THE RIGHT REVEREND ALEXANDER MACDONELL AND OTHERS (DEFENDANTS)..... APPELLANTS ; 1893 *Oct. 24, 25, 26, 27, 28, 30, 31.

AND

MICHAEL PURCELL AND OTHERS (PLAINTIFFS AND DEFENDANTS)..... RESPONDENTS. 1894 *Feb. 20.

THE RIGHT REVEREND JAMES VINCENT CLEARY AND OTHERS (DEFENDANTS)..... APPELLANTS ;

AND

MICHAEL PURCELL AND OTHERS (PLAINTIFFS AND DEFENDANTS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Will—Revocation—Revival—Codicil—Intention to revive—Reference to date—Removal of Executor—Statute of Mortmain—Will executed under mistake—Ontario Wills Act R. S. O. (1887) *c.* 109—9 *Geo.* 2 *c.* 36 (*Imp.*)

A will which has been revoked cannot, since the passing of the Ontario Wills Act (R. S. O. [1887] c. 109) be revived by a codicil unless the intention to revive it appears on the face of the codicil either by express words referring to the will as revoked and importing such intention, or by a disposition of the testator's property inconsistent with any other intention, or by other expressions conveying to the mind of the court, with reasonable certainty, the existence of the intention in question. A reference in the codicil to a date of the revoked will, and the removal of an executor named therein and substitution of another in his place, will not revive it.

Held, per King J. dissenting, that a codicil referring to the revoked will by date and removing an executor named therein is sufficient indication of an intention to revive such will more especially when the several instruments are executed under circumstances showing such intention.

Held, per Gwynne and Sedgewick JJ., that the Imperial Statute, 9 Geo. 2 c. 36 (the Mortmain Act) is in force in the province of

*PRESENT :—Fournier, Taschereau, Gwynne, Sedgewick and King JJ.

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Ontario, the courts of that province having so held (*Doe d. Anderson* v. *Todd*, 2 U. C. Q. B. 82 ; *Corporation of Whitby* v. *Liscombe* 23 Gr. 1), and the legislature having recognized it as in force by excluding its operation from acts authorizing corporations to hold lands.

Held, per Gwynne J., that a will is not invalid because it was executed in pursuance of a solicitor's opinion on a matter of law which proved to be unsound.

APPEAL and cross-appeal from a decision of the Court of Appeal for Ontario (1) affirming, but varying, the judgment at the trial which held the will of Patrick Purcell made in May, 1890, and revoked by another will in January, 1891, to be revived by a subsequent codicil.

In May, 1890, Purcell made a will by which he devised a large portion of his property to religious corporations to be used for charitable purposes. Some time afterwards he consulted a solicitor who advised him that the Imperial statute 9 Geo. 2, ch. 36, the statute of mortmain, was in force in Ontario and by reason of its provisions these bequests might fail and a great deal of his property be left undevised. After receiving this advice Purcell executed a new will disposing of his property in a different manner and after doing so he took other advice as to the statute of mortmain being in force and its effect upon the first will, which was expressly revoked by the later instrument, and in March, 1891, he executed the following codicil prepared by another solicitor who knew nothing of the will of January, 1891, or the revocation of that of May, 1890.

I will and devise that the following be taken as a codicil to my will of the 14th day of May, 1890, A.D.:

I hereby revoke the appointment of Jas. A. Stuart, my late bookkeeper, to be one of the executors of this my will, and in his place and stead I appoint John Bergin, of the town of Cornwall, barrister-at-law, with all the powers and duties heretofore conferred upon the said Jas. A. Stuart, as in my said will declared.

(1) 20 Ont. App. R. 536 sub. nom. *Purcell* v. *Bergin*.

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In witness whereof, I have hereunto set my hand this 16th day of March, 1891, A.D.

P. PURCELL.

Signed, sealed and published and delivered by Patrick Purcell as a codicil to his last will and testament, who in his presence, at his request, and in the presence of each other, have hereunto affixed our names as witnesses.

GEORGE MILDEN,
R. FLANNIGAN,

Not long after executing this codicil Purcell died and proceedings were taken to have it declared that the will of May, 1890, was revived by said codicil and was the last will of the testator. The court of first instance held that it was so revived and should take effect from its date. On appeal to the Court of Appeal, that court affirmed the decision but varied it by declaring that the revived will only took effect from the date of the codicil. From that decision an appeal was taken to this court by the religious corporations affected by the decision as to the date from which the revived will would operate, such date being less than six months before the testator's death which would cause the devises to lapse under the Mortmain Act. The next of kin took a cross appeal from that part of the decision which held the will of May, 1890, revived.

The facts of the case are set out more fully in the judgments of Mr. Justice Gwynne and Mr. Justice Sedgewick in this court.

The argument proceeded as if there had been but one appeal before the court.

S. H. Blake Q.C. and *Anglin* for the appellants on the main appeal, the religious corporations affected by the date as to which the revived will took effect. The argument on that point is omitted as it was not dealt with by the court in giving judgment. The learned

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counsel then argued the question raised by the cross-appeal.

The codicil sufficiently indicated the intention of the testator to revive the will of May, 1890. *In the Goods of Turner* (1); *In the Goods of Reynolds* (2); *McLeod* v. *McNab* (3).

A will may be revived by implication; *Newton* v. *Newton* (4); *In the Goods of Atkinson* (5).

The statute of Mortmain is not in force in Ontario; *Ray* v. *Annual Conference of New Brunswick* (6); *In re Robson* (7). The doctrine of *stare decisis* will not prevent this court from holding it not in force, notwithstanding the decisions of the Ontario courts to the contrary. *Hart* v. *Frame* (8); *In re Nathan* (9).

Latchford for the respondent, the St. Patrick's Orphan Asylum, and *MacTavish* Q.C. for the respondents, the Good Shepherd Nuns, argued that the will of May, 1890, was revived by the codicil.

Robinson Q.C. and *Moss* Q.C. for the testator's next of kin, respondents in the main appeal and appellants in the cross-appeal. It cannot be well contended that the will of January, 1891, was void for having been executed on erroneous advice on matters of law. To effect such a result the error must appear on the face of the will. Jarman on Wills (10); *Newton* v. *Newton* (4); *Attorney General* v. *Lloyd* (11).

Since the passing of The Wills Act a revoked will cannot be revived by a codicil in this form. *In the Goods of Steele* (12); *McLeod* v. *McNab* (3); *Marsh* v. *Marsh* (13).

(1) 64 L. T. 805.
(2) 3 P. & D. 35.
(3) [1891] A. C. 471.
(4) 12 Ir. Ch. 127.
(5) 8 P.D. 165.
(6) 6 Can. S.C.R. 308.
(7) 19 Ch. D. 156.
(8) 6 Cl. & F. 199.
(9) 12 Q.B.D. 475.
(10) 5 ed. vol. 1 p. 147.
(11) 3 Atk. 551.
(12) 1 P. & D. 578.
(13) 1 Sw. & Tr. 533.

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Leitch Q.C. for the executors of John Purcell one of the next of kin, referred to *Dudley* v. *Champion* (1); *Brown* v. *McNab* (2).

Blake Q.C. and *Anglin* were heard in reply.

FOURNIER J.—I am of opinion that the appeal should be dismissed and the cross-appeal allowed.

TASCHEREAU J.—I would allow cross-appeal and dismiss principal appeal. I adopt Chief Justice Hagarty's view, and the reasons given by his lordship, that the will of January, 1891, is Purcell's last will, and that the will of 1890 was not revived by the codicil.

GWYNNE J.—The question before us is, which of two instruments, the one bearing date the 14th day of May, 1890, and the other the 10th day of January, 1891, was the true last will and testament of Patrick Purcell, deceased, and as such entitled to be admitted to probate. In determining this question the rule to be applied is, that the court should proceed upon such evidence of the surrounding circumstances as, by placing it in the position of the testator, will the better enable it to read the true sense of the words used in a codicil bearing date the 16th day of March, 1891, and to determine whether the testator has upon it shown his intention to be to revoke the instrument of January, 1891, and to revive that of May, 1890, which had been absolutely and expressly revoked by that of January, 1891; accordingly evidence of these surrounding circumstances was largely entered into and some evidence was also received by the court below which, as I think, was not admissible.

Upon the 14th May, 1890, Patrick Purcell, since deceased, made his last will and testament in writing

(1) [1893] 1 Ch. 101. (2) 20 Gr. 179.

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and thereby appointed Alexander Leclair, Angus McDonald and James Stuart the executors of the said will. To them he devised all his property, real and personal, of every nature and kind whatsoever and wherever of which he should die possessed or entitled unto upon certain trusts therein declared. It may be here said that the personalty consisted of about one-tenth in value of the realty, the whole consisting in round numbers of about $600,000. He then, in clauses numbered from 1 to 39 inclusive, made devises in favour of his family and near relations and friends. To a few only is it necessary to refer. The first three clauses contained devises in favour of his wife. By the fourth he also devised to her five thousand dollars in cash. By the tenth he devised to his niece, Catherine Forrestal, wife of Alexander Leclair, two thousand dollars, if alive at his death, and if not the same to go to her children then alive, share and share alike. By the eleventh to his niece Isabella Forrestal, five thousand dollars. By the thirteenth to his sister Bridget McDonald, two thousand dollars. By the fourteenth to Miss Ada Fisette, two thousand dollars. By the eighteenth he devised that his executors should have power, should they deem it advisable, to expend the sum of one thousand dollars in ornamenting his family burying ground at Flanagan Point, and also the sum of one thousand dollars for a monument over his grave unless he should have done so himself before his death.

By the twenty-first clause he devised to Emily Nash, wife of Donald A. Cameron, of the township of Charlottenburgh, for her own separate use and benefit, the mortgage money which her husband might owe the testator at the time of his death.

By the twenty-eighth clause he devised to his niece, Mary Forrestal, the sum of one thousand dollars.

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By the thirty-second clause he devised to his adopted child, A. P. Tully, the sum of two hundred dollars.

By the thirty-eighth clause he devised to Miss Victoria McVicar, of Port Arthur, the sum of two hundred dollars.

He then devised to his executors, for their travelling expenses and in lieu of all commissions for administering his estate, the sum of five hundred dollars each.

He then devised and directed that all the residue of all his property, of every nature and kind whatsoever, should be divided by his executors into twenty-seven parts, which they should dispose of as follows:—

By the forty-first clause he devised and directed that six of the said twenty-seven parts of the said residue should be paid to the Roman Catholic Bishop of the diocese of Alexandria, in the province of Ontario, at the time of his death, for distribution among the deserving poor of all denominations in the county of Glengarry, and the education of boys belonging to the said county as he might decide, according to his own discretion, and not otherwise; and in the event of there being no bishop of the diocese at the time of his death, then that the said six parts should be paid to the next bishop of the said diocese appointed after his death.

By the forty-second clause he devised three other parts of the said residue to be paid in equal shares to the superioresses of the convents in the said county of Glengarry, to be expended by them in the education, support and clothing of poor children, and the support and clothing of indigent men and women in the said county of Glengarry.

By the forty-third clause he devised to the said Roman Catholic Bishop of the diocese of Alexandria four other parts of the said residue for distribution amongst the deserving poor of the town of Cornwall and county of

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Stormont, and for the education and clothing of boys belonging to the said town and county, as he might decide and according to his own discretion, and not otherwise; and in the event of there being no bishop of the said diocese alive at the time of his death, then that the said four parts should be paid to the next bishop of the said diocese appointed after his death.

By the forty-fourth clause he devised two other parts of the said residue to be paid in equal shares to the superioresses of the convents in the town of Cornwall and county of Stormont, to be expended by them in the education, support and clothing of indigent men and women in the said town of Cornwall and county of Stormont as they might respectively decide.

By the forty-fifth clause he devised that four other parts of the said residue should be paid to the Roman Catholic Archbishop of the archdiocese of Kingston, in the province of Ontario, at the time of his death, for distribution amongst the deserving poor of the said archdiocese, and the education and clothing of boys belonging to the said archdiocese, as he might decide according to his own discretion; and in the event of there being no archbishop of the said archdiocese alive at the time of his death, then that the said four parts should be paid to the next archbishop of the said archdiocese, to be expended as aforesaid.

By the forty-sixth clause he devised two other parts of the residue to be paid in equal shares amongst the superioresses of the convents in the said archdiocese of Kingston to be expended by them in the education, support and clothing of poor children and the support and clothing of indigent men and women in the said diocese as they might respectively decide.

By the forty-seventh clause he devised four other parts of the said residue to be paid to the Roman Catholic Archbishop of the archdiocese of Ottawa at the time of

his death for distribution among the deserving poor of the said archdiocese as he might decide according to his own discretion, and in the event of there being no archbishop of the said archdiocese alive at the time of his death, then that the said four parts should be paid to the next archbishop to be appointed for the said archdiocese to be expended as aforesaid.

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By the forty-eighth clause he devised one other part of the said residue to the trustees of St. Patrick's Orphan Asylum at Ottawa for the benefit of that institution, and he devised one other part of the said residue to be paid to the Good Shepherd Nuns of the city of Ottawa.

He then revoked all former wills by him theretofore made.

Upon this will being executed the testator deposited it for safe keeping in the surrogate court in the town of Cornwall and he kept a copy of it in his own possession.

Prior to and in the month of November, 1890, he evidently contemplated making considerable alterations in the bequests devised by the will, for he had in his own handwriting entered upon the copy retained by him certain alterations, as follows:—

1. Instead of the five thousand dollars in cash devised to his wife by clause four he inserted two thousand.

2. Instead of the two thousand dollars devised to his niece Catherine Forrestal by clause ten he inserted one thousand.

3. Instead of the five thousand dollars devised to his niece Isabella Forrestal by clause eleven he inserted one thousand.

4. Instead of the two thousand dollars devised to his sister Bridget McDonald by clause thirteen he inserted one thousand.

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5. He erased from clause eighteen the devise of one thousand dollars which his executors were empowered to expend in ornamenting his family burying ground at Flannigan Point.

6. Instead of the devise to Emily Nash in the twenty-first clause of the mortgage monies which might be due to testator at the time of his death by her husband, he inserted the sum of five hundred dollars.

7. Instead of the devise in the twenty-eighth clause to his niece Mary Forrestal of one thousand dollars he inserted five hundred.

8. Instead of the devise of two hundred dollars to A. P. Tully in the thirty-second clause he inserted "his choice of the horses;" this was inserted in the handwriting of Weldon the testator's clerk by the testator's directions and was the only alteration not made in testator's own handwriting.

9. Instead of the six of the twenty-seven parts of residue devised to the Roman Catholic bishop of the diocese of Alexandria for distribution amongst the deserving poor of all denominations, he inserted the words "two thousand for deserving poor of all denominations."

10. Instead of the devise of three parts of said residue to the superioresses of the convents in the county of Glengarry he inserted the words one thousand. And instead of the devise of other four parts of the said residue to the Roman Catholic bishop of the diocese of Alexandria he inserted the figures "1,500." Here he appears by the evidence to have stopped; although crosses in red pencil are drawn across the subsequent clauses of the will it does not appear when they were so drawn.

Sometime in the month of November, 1890, the testator went into the office of Mr. D. B. Maclennan, a solicitor of thirty years, standing practising in Cornwall, and asked him if he would have any objection to

act as executor under his will to which Mr. Maclennan having assented he left the office. Then we find that the testator gave to his confidential clerk the copy of the will in which he had made the alterations aforesaid, and directed him to copy it out clean as altered up to the end of the thirty-ninth clause. In the copy so handed to the clerk to copy the name of James Stuart was erased and in his stead were inserted the words D. B. Maclennan, Barrister, Cornwall; and at the end of the clauses devising five hundred dollars to each of his executors, were added the words "and to D. B. Maclennan in full for his professional and law expenses $1,000 extra," and this additional clause which was not in the will of May, 1890.

"I devise to James Meagher the most southerly house and lot situate in Gladstone, East Cornwall, lately owned by D. H. McKenzie, and on his death to my adopted son A. P. Tully, absolutely forever should he be alive at the time of his death." The testator's clerk having copied out clean the copy of will as so altered, the copy so prepared up to the devise of the residence, that is to say, to the end of the thirty-ninth clause, remained in the testator's possession until the 10th day of January, 1891, when the testator having been ill for some days caused the following letter to be written by his clerk and sent to Mr. Maclennan.

"SUMMERSTOWN, JANUARY 10, 1891.

"D. B. MACLENNAN, Esq., Cornwall.

"DEAR SIR,—I wish you to come here immediately and bring my will, now in the Probate Court in Cornwall, with you. This will be your authority for getting said instrument.

"P. PURCELL.

"Wire me if they do not give you my will.

"P. P."

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Upon receipt of this letter Mr. Maclennan went to the Surrogate Court, got the will he was directed to get and taking it with him went to Mr. Purcell's house. He there, in Mr. Purcell's presence and at his request, opened the sealed packet in which the will was and read it. After having read it Mr. Purcell asked him what he thought of the provisions made in it for the bishops and other charitable bequests; thereupon Mr. Maclennan informed him that in his opinion the bequests would fail or prevail according to the proportion which his personal estate should bear to his lands and mortgages, and that under a will, drawn as it was, if he was correct in his opinion about the charitable bequests, a large portion of his estate would pass as undevised to his widow and next of kin. About this time the clean copy made by Mr. Purcell himself up to clause forty of the will of 1890 was produced, and Mr. Purcell asked Mr. Maclennan to write down what he wished to be done in regard to the charitable bequests in order to have the will so begun completed. Mr. Maclennan accordingly took down Mr. Purcell's instructions and therefrom made a draft will from clause forty to the last clause inclusive which is as follows :—

> I direct that the bequests made in the five next preceding paragraphs of this my will be paid out of my personal estate, other than such as may be secured by mortgage on real estate, and I hereby revoke and annul all former wills made by me.

He thereupon procured the clauses so drafted to be added by Mr. Purcell's clerk to that which had already been written over by him up to clause forty, which being done the will so prepared was on the same 10th day of January duly executed by Mr. Purcell as and for his last will and testament. When Mr. Maclennan, in taking instructions for drafting the clauses from clause forty inclusive, had reached the end of the charitable bequests he asked the testator what he wished

to do with the residue, to which he replied, "I will do nothing with it."

I have dealt at large with this evidence for the purpose of showing that this will was executed after the greatest deliberation on the part of the testator, and that the will of May, 1890, was in the most express terms revoked and annulled by it. A couple of days afterwards, viz., on the 12th January, 1891, Mr. Purcell's clerk by Mr. Purcell's direction addressed and sent to Mr. Maclennan a letter saying:

> Mr. Purcell wishes you to change the bequest to Bishop Macdonell of Alexandria from ten thousand to five thousand dollars and to insert a clause that upon his demise his will shall be inserted in the leading local newspapers. You know how to act in regard to this clause.
>
> Yours truly,
>
> GEORGE MELDEN,
>
> For P. P.

Upon receipt of this letter Mr. Maclennan had a new will written out with this alteration made in it and sent it enclosed addressed to Mr. Purcell. It does not however appear to have been ever executed by Mr. Purcell.

Now here we have been asked to say, first, that the will of May, 1890, was only revoked in consequence of the advice of Mr. Maclennan (and indeed of others also) which was to the effect that the provisions of the Imperial statute, 9 Geo. 2, c. 36, were in force in Ontario; secondly, that such advice was erroneous; thirdly, that being erroneous the will of the 10th January, 1891, should be held to have been executed under mistake; and fourthly, that it should therefore be regarded as never having had any effect. For this contention there does not seem to be any foundation in law or in fact. In answer to it however, it may be said: first, the suggestion that the testator proceeded solely upon the advice given him as to the provisions of the statute of Geo. 2 being in force in Ontario, is altogether an assumption

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which we are not warranted in making; secondly, that the testator acted upon the belief that the advice given him was sound may be admitted, but there is no authority for holding that the advice upon which the testator proceeded turning out to be unsound would avoid the will executed upon that advice.

Thirdly, the judgment in *Doe Anderson* v. *Todd* (1), delivered in 1845, which held that the provisions of the statute of 9 Geo. 2 were in force in Upper Canada, was followed by several decisions in the courts of Upper Canada and Ontario until 1875, when *Ferguson* v. *Gibson* (2), and *Whitby* v. *Liscombe* (3), were decided. This latter case having been carried to the Court of Appeal the law as laid down in *Doe Anderson* v. *Todd* (1) was there affirmed. That judgment has ever since been not only undoubtingly followed by the courts of Ontario, but may be said to have been recognized by the legislature as sound law by the insertion, in acts authorizing corporations to hold lands, of the *non-obstante* clause used in 3 & 4 Wm. 4 ch. 78, referred to in *Doe Anderson* v. *Todd* (1), and *Whitby* v. *Liscombe* (3):—

> The acts of Parliament commonly called the statutes of mortmain or other acts, laws or usages to the contrary notwithstanding.

The act of the Ontario Legislature, 55 Vic. ch. 20, although passed after the decease of the testator, shows clearly that the provisions of 9 Geo. 2, ch. 36 were regarded by the legislature as having been always in force in that province as they had been held by the courts to be. That act is entitled, "An Act to amend the law relating to mortmain and charitable uses,' and by the 8th section it is enacted that:—

> Money charged or secured on land or other personal estate arising from or in connection with land, shall not be deemed to be subject to the provisions of the statutes known as "the statutes of mortmain or

(1) 2 U. C. Q. B. 82. (2) 22 Gr. 36.
(3) 22 Gr. 203.

charitable uses," as respects the will of a person dying after the passing of this act.

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If, therefore, it had been relevant to the question before us, and I think it is not, to inquire whether the advice given by Mr. Maclennan was sound or not, it could not, I think, be doubted that it was quite sound.

Then evidence was given of a conversation which his medical attendant, Dr. Bergin, had with the testator on the 12th January, 1891, and the following day, and of what Dr. Bergin had done in consequence of such conversations, under which John Bergin, Dr. Bergin's brother, came to be employed to draw the codicil of the 16th March, 1891. This evidence was tendered with the view of establishing that from the 12th or 13th January, 1891, the testator entertained the intention of appointing Mr. John Bergin, who drew the codicil, to be an executor of his will.

All that that evidence appears to me to show, and this it shows very clearly, is that for some reason or other the testator kept Dr. Bergin in ignorance of the fact of his having executed the will of January, 1891. Except in so far as showing the circumstances attending the preparation of the codicil by John Bergin the evidence has no bearing upon the question before us, which is, simply: Does or does not the codicil so prepared, and which was executed by the testator, show by its terms that the testator's intention was to revoke the will of January, 1891, and to revive in its place that of May, 1890? In so far as a case like the present, wherein a question arises the determination of which must be arrived at by the light of the surrounding circumstances, can be governed by a judgment in a case where a like question arises to be determined also by the light of its surrounding circumstances, I think that the judgments in the cases of *In the Goods of Steele*

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(1), and *In the Goods of Turner* (2), the latter being decided in 1891, are the nearest to the present case, and which we should follow.

Placing ourselves then in the position in which the testator was when he executed the codicil in question it is to my mind inconceivable that the testator could have contemplated by that codicil and the language used therein that he was expressing an intention to revoke the will of Jan. 7th 1891, which he had had prepared with so much deliberation, and revive in the stead that of May 1890, which with like deliberation he had expressly revoked and annulled; utterly inconceivable, if his intention had been to revoke the one and revive the other, that no words expressing such intention should have been inserted. John Bergin who drew the codicil had no knowledge of the existence of the will of January 1891, or of any will but that of May 1890. He had no instructions to prepare a codicil which should have the effect of revoking the will of Jan. 7th 1891, and of reviving that of May 1890. When he drew the codicil he believed, although erroneously, the will of May, 1890, to be in full force and effect as the testator's last will and testament and that Stuart was still one of the executors of such will. He, therefore, when preparing the codicil never intended to prepare one which should have the effect of reviving a will which he believed to be in full force and effect in law and in fact. The language which he used in the codicil is, therefore, naturally quite in accord with his belief as to then continuing and existing validity in law and in fact of the will to which he was preparing a codicil. The only thing which the language used by him in the codicil professes to do is to revoke what he believed to be an existing valid appointment then n force of Stuart as one of the executors of an instru-

(1) 1 P. & D. 575. (2) 64 L. T. 805.

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ment then existing in full force and effect as the last will and testament of the testator, and if that belief had been well founded the codicil would have had its intended and expressed effect. The language used is: "I hereby revoke the appointment of James A. Stuart, "&c., to be one of the executors of this my will and in "his place and stead I appoint John Bergin, &c., &c."

Now the appointment of Stuart as an executor of that will had already been revoked and annulled by the will of January 1891, so that the codicil so worded could have no effect as it could not revoke an appointment which had already been revoked; failing to have the effect intended, namely, of revoking a valid instrument in full force and effect as the testator's will, I cannot see upon what principle the language so used, which was perfectly applicable if the will of May 1890, had then been in full force and effect as the person using the language believed it to be, can be construed as showing an intention to revoke the will of January, 1891, by which Stuart's appointment as an executor should be annulled and that of John Bergin substituted in his place; it would be necessary to construe it as first revoking the will of January 1891, which is not expressed in it and thereby of reviving in its integrity the will of 1890, including the appointment of Stuart and then revoking the appointment of Stuart as an executor of such revived will. In other words the will of May, 1890, must be revived before the codicil revoking the appointment thereof can take effect.

In the judgment of Sir J. P. Wilde, in *In the Goods of Steele* (1), he says:—

I therefore infer that the legislature meant that the intention of which it speaks should appear on the face of the codicil either by express words referring to a will as revoked and importing an intention to revive the same or by a disposition of the testator's property inconsistent with any other intention or by some other expressions convey-

(1) 1 P. & D. 575.

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ing to the mind of the court with reasonable certainty the existence of the intention in question. In other words I conceive that it was designed by the statute to do away with the revival of wills by mere implication.

And he refers to the judgment of Sir C. Creswell, in *Marsh* v. *Marsh* (1), wherein that learned judge expresses himself of opinion that the intention of the legislature was to put an end equally to implied revocations and implied revivals.

Placing myself, therefore, in view of the surrounding circumstances, as well as I can in the position of the testator when, upon the 16th March, 1891, he executed the codicil of that date, it fails by its language to convey to my mind with any degree of certainty, or indeed I may say at all, that there existed in the mind of the testator the intention of revoking thereby the will of January, 1891, which he had executed after the utmost apparent deliberation, or of reviving the will of May, 1890, which with like deliberation he had revoked and annulled by the will of January, 1891. The only intention shown by the codicil is an intention to revoke an appointment assumed to be still valid and subsisting in a will also assumed to be then in full force as the last will of the testator, and as the will to which the codicil is professed to be made a codicil and the appointment professed to be revoked had then no such existence the codicil fails to have any effect. I am of opinion, therefore, that the will of January, 1891, was not revoked thereby, and that upon the decease of the testator that instrument constituted his sole last will and as such is entitled to be admitted to probate. It would serve no useful purpose to attempt to offer any affirmative explanation of what the testator's real object in executing that codicil may have been any more than of his object in designedly, as it would seem, keeping

(1) 1 Sw. and Tr. 534 ; 6 Jur. N. S. 380.

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his medical attendant, Dr. Bergin, in ignorance of the fact of his having executed the will of January, 1891.

It is sufficient to say that the codicil does not upon its face show an intention to revoke the will of January, 1891, and to revive that of May, 1890.

The appeal of the plaintiff below will be allowed and that of all the other parties disallowed and an order will go to the effect that the will of January, 1891, is alone entitled to be admitted to probate. The costs of the plaintiffs' appeal to be allowed to them out of the estate. The other appeals to be dismissed without costs.

SEDGEWICK J.—In this appeal there are three testamentary instruments to be considered, the will of the 14th May, 1890 (the O'Gara will), the will of the 10th of January, 1891 (the Maclennan will), and the codicil of the 16th of March, 1891; and the main question is whether that codicil, purporting to be a codicil to the O'Gara will, revives that will, and, as a consequence, revokes the Maclennan will. The answer to this question depends largely upon the effect that is to be given to the 24th section of the act respecting Wills (1), which is as follows:—

> No will or codicil, or any part thereof, which has been in any measure revoked, shall be revived otherwise than by the re-execution thereof or by a codicil executed in the manner hereinbefore required, and showing an intention to revive the same, etc.

this section being an exact transcript of the corresponding section in the Imperial Wills Act (2). The Maclennan will had revoked the O'Gara will, and the subsequent codicil is in the words following:—

> I will and devise that the following be taken as a codicil to my will of the 14th day of May, 1890, A.D:—
>
> I hereby revoke the appointment of Jas. A. Stuart, my late bookkeeper, to be one of the executors of this my will, and in his place and stead I appoint John Bergin, of the town of Cornwall, barrister-at-law,

(1) R.S.O. ch. 109. (2) 1 Vic. c. 26, s. 22.

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with all the powers and duties heretofore conferred upon the said Jas. A. Stuart, as in my said will declared.

In witness whereof, I have hereunto set my hand this 16th day of March, 1891, A.D.

P. PURCELL.

Signed, sealed and published and delivered by Patrick Purcell as a codicil to his last will and testament, in the presence of us who in his presence, at his request, and in the presence of each other, have hereunto affixed our names as witnesses.

GEORGE MILDEN,
R. FLANNAGAN.

The Ontario Court of Appeal has held (Hagarty C.J. dissenting) that the effect of this codicil, read in connection with the surrounding circumstances, is to revive the revoked will to which it expressly refers, and also to revoke the Maclennan will, the revival to take effect, however, only from the date of the codicil.

Prior to the passing of the English Wills Act, above referred to, the law was that if a testator made a codicil to a revoked will (it being perfectly clear that the codicil related to that will), the revoked will was thereby revived, and the revoking instrument thereby revoked.

The object of the statute was to do away with the revival of wills by mere implication, and to make it clear that in the codicil itself there must be some unequivocal expression of an intent on the testator's part to restore to life the revoked instrument.

It has been decided, over and over again (1), that a reference in a codicil to a revoked will, by its date only, is not of itself a sufficient indication of an intent to revive that will, and these decisions have been, in effect, approved of by the Privy Council in *McLeod* v. *McNab* (2).

All we have in the present case is a codicil referring to a revoked will by its date, and changing one of the

(1) *In re Steele* 1 P. & D. 575, (2) [1891] A.C. 471.
and cases there cited.

three executors and trustees therein named, nothing more. And the question comes down to this: Does such a codicil, within the meaning of the statute, show an intention to revive the will to which it purports to relate? Or, in other words, does a codicil which merely changes the name of one of three exccutors named in a revoked will revive it?

Now a codicil to a will whether in force or revoked must make some change in its dispositions It must do something. Leave out of the present codicil the appointment of Mr. Bergin in place of Stuart and it would be a mere piece of useless paper. The law is, as I have said, that the reference by date to the O'Gara will does not, of itself, show an intention to revive it. Does the substitution of one executor for another, and nothing more, show that intention? If it does, then I can conceive of no codicil to a revoked will which would not show that intention. A codicil must make some alteration in the testament to which it relates. If that alteration, by reason of its being an alteration, shows the reviving intention then the statute is meaningless. No change in the old law has been effected by it.

It seems to me (I say it with deference) that in the courts below the distinction has been lost sight of between an intention to make a codicil to a revoked will and an intention to revive a revoked will. I think it probably clear from the evidence that in the present case there was an intention to make a codicil to the revoked will. The document on its face so purports. The evidence does not lead to the conclusion that the testator made a mistake as to the particular will he was dealing with, but if he intended to revive that will and to revoke the later instrument the statute required that he should say so, either in express terms, or in words that would convey to ordinary minds with

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reasonable certainty the existence of both intentions, the one as well as the other. The expression of the reviving intention, as distinguished from the other intention, was as necessary as the performance of any other statutory requirement; its execution in the presence of two witnesses, for example, and the absence of such expression, it seems to me, brings the codicil within the statute and prevents it from having the effect contended for.

To return, however, to the particular terms of the codicil. One cannot well pass judgment upon the relative importance of the different provisions which a testator may make by his will, but it seems to me that in ordinary cases the change by codicil of one of three executors named in a will is a matter of little account. At law an executor takes nothing beneficially under a will. He is a mere machine. His duty, his sole duty, is to realize the estate and distribute it as by the will provided. Apart from recent statutes as executor he received no pay. He is an officer of the court only, strictly accountable for the discharge of duty but entitled to no emoluments; even if he is sole executor it is a barren honour, but when he is but one of three it amounts to less. I should say that, in ordinary cases, a bequest or devise is a matter of much more importance than the appointment to an executorship. A beneficiary gets something. And suppose that in the present case the only provision was that out of the residue of the estate one John Smith was to be paid by the executors ten shillings. Would that indicate an intention to revive the will? Observe how far reaching is the bequest. It is a recognition of the executors as named in the will. It is a direction to them to alter the original distribution of the estate. It is a taking away from the residuary beneficiaries of perhaps to them a large sum of money, and it might with equal

force, it seems to me, be contended that such codicil showed upon its face an intention to revive. If that be so then any codicil must show a like intention, and the statute is words and nothing more.

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In this view, so far, I understand that three of the four learned judges of the appeal court agree with me; but Mr. Justice Maclennan, (and with him Mr. Justice Osler,) have come to a different conclusion, having reference to "the surrounding circumstances." Let us look at these "circumstances." The O'Gara will had been executed on the 14th of May, 1890, and had been deposited on file with the registrar of the Surrogate Court at Cornwall. It was a most elaborate document containing more than forty gifts and devises of different kinds, and purported to dispose of all the property of the testator, about nine tenths (speaking roughly) being set apart for what may be called charitable purposes. Out of the three executors therein named was one James Stuart. During the year 1890 the testator for some reason (not clear from the evidence) had lost confidence in Stuart, and in the month of November he called upon Mr. D. B. Maclennan, a solicitor practising in Cornwall, and one of the leading members of the Ontario bar, and obtained his consent to act as one of the executors of his will. In the mean time he (the testator) had before him a copy of the O'Gara will. There was a question in his mind as to the possible legality of the charitable dispositions therein contained, the money for the purpose of satisfying them having to be raised from the proceeds of the sale of impure personalty as well as real estate, and we find that he went carefully over all the provisions of this will with his own hand, striking out this provision and changing that, with a view of executing a new will based upon his changed intentions. On the 10th of January following his man of business by his directions, and in his

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name, wrote to Mr. Maclennan requesting him to get the O'Gara will from the court and come to him. Mr. Maclennan on the same day went to him with the O'Gara will and under his instructions prepared and had executed another will substantially of the purport which the testator had in his own hand made out upon the copy of the O'Gara will, previously in his possession. By this will the O'Gara will was revoked. Mr. Maclennan was substituted as an executor instead of Stuart, the charitable bequests were enormously reduced and the residue was intentionally left undisposed of. It is admitted on all sides that this will was perfectly valid as a testamentary instrument, it being claimed however that having been executed as alleged under mistaken advice as to the effect of the mortmain acts (to which I will refer hereafter), the O'Gara will which it purported to revoke was not in law revoked and that they both should be admitted to probate.

This will (the Maclennan will) was taken by the solicitor to Cornwall to be placed on file and the revoked O'Gara will was left with Mr. Purcell.

All this happened on the 10th of January. On the following day,(the 11th), Dr. Bergin visited the testator. Dr. Bergin,who is member of Parliament for the County of Stormont and a man of eminence in his profession, had for years been Purcell's medical adviser. Purcell had likewise been in the habit of conversing with him on business matters and he (Dr. Bergin) was more or less conversant with his affairs, knowing of the existence and contents of the O'Gara will. In fact, shortly prior to the execution of the Maclennan will a conversation had taken place between them respecting the validity of the charitable bequests in the first will. At this visit on the 11th Dr. Bergin saw the O'Gara will left the day before by Mr. Maclennan, and Purcell and he began conversing about it. Several

things are certain in regard to what happened at this conversation. First Purcell asked the Doctor to take this will to his brother Mr. John Bergin, a practising barrister and solicitor at Cornwall, and get a written opinion from him as to the validity of the charitable bequests therein made. Secondly, Dr. Bergin called the testator's attention to the fact that Stuart was one of the executors and suggested a change to which he agreed. There was a suggestion (it is not absolutely certain that it was the Dr.'s suggestion) that John Bergin should be appointed in his place and (according to Dr. Bergin's account of Purcell's statement) he, Dr. Bergin, was instructed to get his brother, John Bergin, to draw up a codicil appointing John Bergin executor in lieu of Stuart. Thirdly, Purcell concealed from the Doctor the facts that the day before he had executed the Maclennan will, that Stuart was no longer an executor and that the O'Gara will had been revoked. There is, I think, only one explanation for this concealment, for it is impossible that on this matter Purcell's memory was in fault. He was then in a very weak state physically, trying to recover from an illness brought on by excess in the matter of stimulants to the inordinate use of which he was addicted. He was afraid to tell the Doctor of the contents of the Maclennan will and particularly of the fact that Mr. Maclennan had been made an executor. He foolishly imagined that his Doctor, the medical man on whose skill and attention he relied for the prolongation of his life, would be annoyed were he to know that his own brother had been overlooked and another solicitor in the same town appointed, and he deliberately resolved to deceive him as to the exact condition of affairs, which resolve he kept, for neither the Doctor nor his brother ever knew of the existence of the Maclennan will until after Purcell's death, several months afterwards. He

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knew too that the O'Gara will then before them had been revoked, that it was a mere piece of waste paper, and he thought that the appointment of John Bergin as an executor of that instrument would have no valid effect, the will of the day before being the only testament then in force.

It seems to me absolutely out of the question to suppose that, by this time at least, his request as to the drafting of a codicil for the simple purpose of changing an executor indicated an intention to absolutely revoke and nullify the solemn instrument of the previous day and to restore all the numerous bequests in the O'Gara will which the later instrument had either reduced or eliminated altogether.

It was perfectly reasonable and natural that he should be concerned about his charities and should be anxious for legal certitude as to the extent to which he might go in that direction, for the Maclennan will, as stated, had not disposed of the residue. There was perhaps half a million of dollars to be dealt with and it is extremely probable that he did contemplate either the making of a fresh testamentary disposition in respect to that or the spending of it in his life time in the erection and endowment of a hospital at Cornwall. At all events he is still uncertain. He is seeking light. There is no manifestation of any wish in the meantime to undo the work of yesterday.

We come now to the following day, the 12th of January. Purcell is still thinking over his affairs. The Maclennan will had given $10,000 to the Bishop of Alexandria, and the O'Gara will had contained a clause that it should be published in the local newspapers, which clause had been left out of the later will. Purcell now desires to reduce this bequest to $5,000 and to restore the provision as to publication, and his man of business, upon his instructions, writes to Mr. Maclennan the following letter:—

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SUMMERSTOWN, January 12th 1891.

D. B. MACLENNAN, Esq., Cornwall.

In *re* will.

DEAR SIR,—Mr. Purcell wishes you to change the bequest to bishop Macdonell of Alexandria from ten thousand to five thousand dollars, and to insert a clause that upon his demise his will shall be inserted in the leading newspapers. You know how to act in regard to this clause.

Your truly,

GEO. MILDEN,

for P. P.

This codicil was prepared and sent to Purcell but it would seem that he died without his attention being again called to it.

Does not this letter, however, afford conclusive evidence that up to this time at least he had no intention of revoking the existing will, his instructions of the previous day in respect to Stuart and John Bergin, to the contrary, notwithstanding?

It does not seem clear that when Dr. Bergin returned home from his visit of the 11th that he asked his brother to draw the codicil then referred to. He did, however, leave with him the O'Gara will and obtained from him a few days afterwards a written opinion as to the validity of the charitable bequests. This opinion the doctor handed to Purcell at the same time giving him a message that he should get the best legal advice that he could get in the province. Finally it was arranged that Dr. Bergin should take the will with him to Toronto with a view of obtaining the opinion of S. H. Blake Q.C. upon it. Dr. Bergin had a consultation with Mr. Blake on the 7th of March and on the 9th and 10th of March he communicated the advice then given to Purcell.

The following is the evidence of Dr. Bergin as to what then followed. The same Mr. Blake is examining him:—

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Q. What passed between you and Purcell at that meeting?—A. I told Mr. Purcell that you had said to me that you could not look into the cases at such short notice and give an opinion, but that you would look into it, and your opinion was that he ought to do what he proposed to do or as much of it as he could at once in regard to these charitable bequests; I think I told you that his intention was, so far as this part of the country was concerned, to build a hospital and home for aged and indigent men and women, and I urged upon him to do that, and that was his idea I believe, and as I think there can be no doubt about it, but he had important interests in Nova Scotia connected with a contract, and very much against my will he went there.

Q. He went to Nova Scotia, and at what date was it he went to Nova Scotia?—A. He went to Nova Scotia about the 12th or 13th of April.

Q. What had taken place in the meantime between this 8th or 9th March, when you returned from Toronto, in regard to will or codicil?—A. He sent for me. He was taken ill with a sore hand. He had injured his hand, been upset, and we were very much alarmed about blood poisoning, and this was why I did not wish him to go away. On one of these visits, the 14th or 15th, he said to me: "You have not brought the codicil yet which I instructed you to have prepared long ago."

Q. That was the 14th or 15th March he said to you, you haven't brought me the codicil which he had instructed you to get?—A. Yes.

Q. What did you say to him, doctor, upon that?—A. Yes, it must have been the 15th, because I said I would bring it down to-morrow morning when I came.

Q. What was this codicil he referred to as being the codicil he had spoken to you about?—A. It was the codicil to this will of May, 1890, that was made in Ottawa, the O'Gara will it was called.

Q. And when was it he had spoken to you about the codicil to this will?—A. After I came back from Toronto and told him you thought, under the circumstances, that he ought to provide for keeping that will alive.

Q. Then how long after that did you see Mr. John Bergin and instruct him about the codicil?—A. That same day.

Q. And was the codicil prepared?—A. He gave it to me that night.

Q. And you, having gotten it, what did you do with it?—A. Well, I kept possession of it till I went down there.

The doctor went down on the 16th, on which day the codicil was signed in his presence. At this time the original O'Gara will was in John Bergin's posses-

sion, and upon the execution of the codicil the testator requested the doctor to give it to his brother and to instruct him to attach it to his will (the O'Gara will), which he subsequently did.

The testator died on the 1st of May following.

It is as well to insert here the further evidence of Dr. Bergin as to the drawing of the codicil.

MR. BLAKE.—Q. Was there, or was there not, anything said subsequent to the 16th March, anything in the way of recalling that codicil of that date or interfering with it in these conversations you had?—A. Yes; he asked me whether my brother had sent the will and codicil to me again, and whether you had approved of it, and I told him I didn't know; I felt satisfied.

Q. That is not what I am asking you. I am asking whether anything was said as to recalling this codicil of the 16th March, 1891, anything that expressed dissatisfaction with it, or the desire to have it cancelled, or any matter of that kind? A. No. The only conversations I had with him afterwards were more professional than any other, but they were on almost every occasion coupled with his views as to the hospital, and the kind of hospital he would build when he returned from Nova Scotia.

Q. Then there is this allegation that I want you to speak to his lordship upon in the plaintiff's statement of claim. "The plaintiff charges that the codicil of the 16th March, 1890, (this is clause 8), was executed at the instance of the testator's legal adviser, etc." (reads clause). Is that a fact, did you suggest, or did your brother John suggest, the execution of this codicil?—A. The first my brother knew of it was the instructions I brought him from Mr. Purcell, and the first conversation that occurred between Mr. Purcell and me on the question of this codicil was on the 12th January, 1890, after having read the will and finding that Stuart's name was still on it. I asked Mr. Purcell when I went down there the next day whether it was wise for him to retain Stuart as one of his executors, and he said, "No, I intended to relieve him"; and he said, "Who am I to put in his place?" I said, "You ought to have a good man, a business man, a man who knows something of managing estates, a prudent man and a man who will see that his brother executors do not fritter away the estate and divert it from the purposes for which you intend it."

Q. And so it came from Patrick Purcell?—A. Whether he suggested or I suggested that John Bergin should be the executor, I am not positive, because he repeated it over and over again, he is a proper man, and afterwards when I told him that John would accept it he said that

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he was delighted. Then no further conversation occurred between us after that in regard to the codicil until he gave me the instructions, I think on the 15th or 14th to have that codicil prepared; he said to me, "You haven't brought that codicil as I instructed."

Now I do not gather from all or any of these facts as detailed by Dr. Bergin the slightest evidence of an actual intention to revive the O'Gara will or revoke the Maclennan will. It was on the 14th or 15th March that Purcell said to the Doctor "You have not brought the codicil yet which I instructed you to prepare long ago." And these instructions must have been given on the 11th or 12th of January, long before he had been advised by Mr. Blake that the O'Gara will should be "kept alive." Besides there is no evidence that after that advice Purcell ever asked or suggested that a codicil should be drawn of that character or having that effect. "It may, I think, be doubted," said Lord Penzance in *Re Steele*, "whether any testator, who bore in mind that he had revoked his will and substituted another for it, ever really sat down with the purpose of revoking his last will and reviving the former one and set about the execution of that purpose by simply making a codicil referring by date to the first will, without more. Would any lawyer advise such a course, or would any unskilled testator imagine he could achieve the end by such a method? The leading idea of revoking the one and reviving the other in its place would surely find expression by some form of words in a paper designed mainly for that object" (1).

And so I say in the present case that if Purcell wanted to revoke the second and revive the first will he would have said so. He would have used some form of words having that effect. The fact is that instead of intending to give effect to the charitable dis-

(1) 1 P. & D. 575.

positions of the first will his intentions had altogether changed. He proposed to reduce still further his bounty to the Bishop of Alexandria, and "to build a hospital and home for aged and indigent men and women" at Cornwall. How, in view of all these facts, can it be contended that the surrounding circumstances show the intention claimed? There may have been, and I think there was, an idea in his mind of making, at some future time, some further testamentary disposition of the undisposed residue of his estate. There was, however, no idea that, by the mere execution of the codicil, he was restoring the first will and destroying the second. In referring to the acts and words of the testator subsequent to the execution of the Maclennan will I am not to be considered as holding that all such evidence was admissible—that these were such surrounding circumstances as might be considered in construing the different instruments. The evidence was brought out, however, by those supporting the O'Gara will and on that ground I have referred to it.

I had intended dealing with Mr. Blake's argument as to the alleged mistake of the testator to which I have referred, but I find that so ably dealt with in Mr. Justice Gwynne's judgment that I find it unnecessary to add anything in respect to it.

If my view be correct it ends the case, and it should be declared that the will of the 10th January, 1891, is the only instrument entitled to probate.

KING J.—I agree with the learned judges of the Ontario Court of Appeal who have found that the will of May, 1890, was revived by the codicil of May, 1891, while appreciating the weight of the judgment to the contrary of the learned Chief Justice of Ontario.

If express words of revivor are required to revive a revoked will by a codicil the codicil in question here

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fails of that effect. But no particular form of words is necessary. All that is required is that the codicil upon its face, and giving to the words the sense in which the testator is to be taken to have used them, shall show the intention to revive. This may be shown "either by express words referring to a will as revoked, and imputing an intention to revive the same, or by a disposition of the testator's property inconsistent with any other intention, or by expressions conveying to the mind of the court with reasonable certainty the existence of the intention in question" (1). In so construing the language of the codicil "the court ought always to receive such evidence of the surrounding circumstances as, by placing it in the position of the testator, will the better enable it to read the true sense of the words he has used" (1). One can see how a codicil referring to a previously revoked will by date might contain in its substantive provisions nothing that would be any more consistent with the revival of that will than with the confirmation of the revoking will. In such case it might well be a question whether the testator had not mistaken the dates, and really had in mind the real last will. An instance of this might be where the codicil referring to a will of the date of the revoked will simply made a bequest to a person not named in either will, or of an additional sum to a person named in both, as, for instance, if the testator here had by the codicil given a further sum to his wife. Such a provision would not add anything to the weight to be given to the mere date as indicative of an intention to revive the revoked will, for it would be as consistent with one view as the other. But the codicil here goes beyond that. First it purports to be a codicil to the will of May 14, 1890; it then makes a testamentary provision for the more effectual carrying out

(1) *In re* goods of Steele, 1 P. & D. 575.

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of that will by the revoking of so much of it as appointed Stuart as executor, and by the appointment in his place of Bergin, conferring upon him in terms all the powers and duties conferred and imposed upon Stuart as in the said will declared; and, as pointed out by Mr. Justice Maclennan, declares that the will in which he is making this change is "this, my will." There can be no question as to which will is meant. Upon the face of the codicil it is rendered certain by the reference to the date of the first will, and by the reference to a person who was an executor of the first will and not of the second. "Among pertinent circumstances that may be looked to" [as Lord Hannen says in *McLeod* v. *McNab* (1),] in order to get the true sense of the words the testator has used, must be included the known contents of the revoking will of January 10, 1891. Similar circumstances as to the change of an executor named in the first instrument, but not in the second, were there held to lead inevitably to the conclusion that the first instrument was the one referred to. Here independent surrounding circumstances, not necessary to be detailed, justify the like conclusion.

The will of May 14th, 1890, being indisputably intended and being known to be a revoked will (unless the revocation were per incuriam) what is the proper conclusion to be drawn from a codicil calling it "this my will" and cancelling the appointment of one of the executors named in it and appointing another in his place, with the powers and duties conferred by it? How could Bergin become an executor of such revoked will unless it were intended thereby to be revived? How could he have the same powers and duties as were conferred upon Stuart by that will unless it were to be a living will? I think that some sensible mean-

(1) [1891] A. C. 473.

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ing is to be given to a deliberate and authentic act, and agree with the learned judges Burton, Osler, Maclennan and Robertson, that the expressions used in the codicil show with reasonable certainty the existence of an intention to revive. It is said that no unskilled testator would imagine he could thus revive a will; but, before the present act, testators, skilled and unskilled, were accustomed to do it by much less—by simply making it plain that the codicil referred to the previously revoked will.

It is not possible to explain all of Purcell's conduct. It presents difficulties to any view, the least, perhaps, if we could think that the revocatory clause was executed per incuriam. I think, however, that he ought to be credited with some sense and some honesty. The making of a will was a serious thing with him, and his main concern lay in making provision out of his large means for various charities. By his first will the great bulk of his property was so devoted. It was only upon his being told that these charitable gifts might largely fail that he conceived the idea of recasting certain devises and bequests, and making such provision for charity as might be conveniently made out of his personal estate, other than such as might be secured by mortgage on real estate. This latter scheme he gave effect to by his will of January 10th, 1891, upon an off-hand opinion received from Mr. Maclennan in a brief interview. This will dealt with only about one-tenth of his property. If Mr. Maclennan's opinion had been otherwise there is no reason for supposing that the charitable bequests, and indeed the whole will, would not have substantially remained as they were. The day after making the second will he continued the inquiry into the validity of the charitable bequests, introducing the subject to Dr. Bergin (whom he had telegraphed to two days before, desiring to see him on

business), showing to Dr. Bergin the first will, and asking him to get the opinion of his brother (a solicitor) upon it. The next day he suggested to Mr. Maclennan alterations in the second will, a fact which shows, perhaps, merely that he was still acting on the advice that he had received from Mr. Maclennan.

He did not tell Dr. Bergin of the tentative will that he had made following upon Mr. Maclennan's advice. Seeking further advice he perhaps concluded to keep to himself the fact of having asked other advice. But whatever the reason he did not tell Dr. Bergin. Dr. Bergin advised the taking of the opinion of Mr. S. Blake Q.C., formerly a vice-chancellor of Ontario, and Dr. Bergin was authorized to consult Mr. Blake. Dr. Bergin says that Purcell said to him: "Take that to Mr. Blake and if he thinks it requires a new will let him make it, or do whatever he thinks necessary, and after that bring it back." Purcell was informed that Mr. Blake said that the will ought to be kept alive, which, as explained, meant that in Purcell's then state of health a new will might not turn out to be executed long enough before the testator's death to make good charitable devises or bequests payable out of moneys charged on lands. Purcell then requested that a codicil providing for the appointment of Mr. John Bergin as executor instead of Stuart, which had been spoken of before, should be sent to him for execution and it was so sent and is the codicil in question. Stuart had been book-keeper for Purcell, but in the autumn previous differences had arisen between them and Stuart then ceased to be Purcell's book-keeper and went to the United States. John Bergin was substituted for him as an executor of the original will and was clothed with all the powers and duties by such will conferred on Stuart.

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I cannot believe that (as suggested) this was all a contrivance to mislead the Bergins. There is no assignable motive for such a piece of duplicity. The reasonable view is that his mind had got back to its first state and that he desired to revive the first will as his will, and to provide effectually for the carrying of it out.

Having the misfortune to differ upon this point from my learned brethren it is not at all useful to express an opinion upon the numerous and weighty matters that have been so very ably discussed by the several learned counsel.

Appeal dismissed and cross-appeal allowed with costs.

Solicitors for appellant: *J. A. Macdonell, Anglin & Minty.*

Solicitors for appellants Archishop of Kingston and others: *O'Sullivan & Anglin.*

Solicitors for respondents, next of kin: *Maclennan, Liddell & Cline.*

Solicitors for respondents Bergin and others: *Leitch, Pringle & Hackness.*

Solicitors for respondents, St. Patrick's Asylum: *Latchford & Murphy.*

Solicitors for respondents, Good Shepherd Nuns: *O'Gara, MacTavish & Gemmill.*

Solicitor for respondent, Tully: *John Bergin.*

Solicitors for respondents McVicar: *Creasor, Smith & Notter.*

Solicitor for respondent Isabella Stuart: *R. Smith.*

Guardian of Infant defendants: *John Hoskin.*