C. M. HENDERSON.....APPELLANT. 1922 *Nov. 9. *Nov. 27.

AND

M. E. FRASER AND E. G. HENDERSON..RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Will—Codicil—Legacies in both to same persons—Whether additional or substitutional.

By his will, J. N. Henderson gave, amongst other legacies, to the respondent Fraser $20,000 and to the respondent Henderson $10,000. The testator later made a codicil. The first clause was as follows: "I hereby ratify and confirm the said will in every respect save in so far as any part is inconsistent with this codicil." In the two other clauses, he bequeathed to each of the respondents a sum of $25,000.

Per Idington, Duff and Anglin JJ.—The two bequests in the codicil are additional to, and not substitutional for, the gifts made to the same legatees by the will. Davies C.J. and Brodeur and Mignault JJ. *contra.*

Judgment of the Court of Appeal affirmed on equal division of this court.

APPEAL from the judgment of the Court of Appeal for British Columbia, reversing the judgment of Hunter C.J. at the trial.

The Montreal Trust Company, trustee under the will, made application to the Supreme Court of British Columbia for the determination of the following question arising out of the construction of the last will and codicil of the late J. N. Henderson, namely: "Whether the legacies mentioned in the codicil were cumulative or whether they were in substitution of the legacies mentioned in the will."

Hunter C.J. held that the legacies given by the codicil were substituted for those in the will. The Court of Appeal, *per* Macdonald C.J.A. and Martin J.A., reversed this judgment, McPhillips J.A. dissenting.

The present appellant is a party to the proceedings, both in his own interest as residuary legatee and as representative of all other legatees, by virtue of an order made in these proceedings.

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

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Tilley K.C. for the appellant: Upon the evidence and under the circumstances in this case, the intention of the testator was to make the legacies in the codicil substitutional.

If any presumption of law arises in this case, it is rebutted by the following circumstances as stated in the factum:

(*a*) The use of the words "I hereby ratify and confirm the said will in every respect save in so far as any part is inconsistent with this codicil", as the first clause in the said codicil, instead of the usual ratification clause, together with the fact that no change was made by the codicil in the provisions of the will, except in the legacies to the respondents;

(*b*) The total estate being sufficient to pay legacies in full and leave a certain amount in the residuary fund if the legacies in the codicil be taken as substitutional, whereas a large deficiency will be occasioned if the legacies are held to be cumulative;

(*c*) The respondents not being treated alike in the will, but being given an equal amount in the codicil.

In re A. F. Bryan (1); *Russel* v. *Dickson* (2); *Hooley* v. *Hatton* (3); *Moggridge* v. *Thackwell* (4); *Allen* v. *Callow* (5); *Barclay* v. *Wainwright* (6); *Bell* v. *Park* (7).

Lafleur K.C. for the respondent. *Prima facie* the gift in the codicil is a new gift not substitutional for or revocatory of the gift in the first.

This presumption is strengthened when the codicil contains no words of revocation.

A clear gift ought not to be taken away except by expressions so clear as to leave no reasonable doubt. *Wilson* v. *O'Leary* (8); *Russell* v. *Dickson* (2); *Suisse* v. *Lowther* (9); *Watson* v. *Reed* (10); *Sawrey* v. *Rumney* (11).

THE CHIEF JUSTICE.—This appeal has given rise to much difference of judicial opinion upon the proper construction to be given to a will and codicil, and as to whether certain bequests of money to two of the nieces of the testator in the codicil should be held to be cumulative or substitutionary to those given to the same nieces in the will.

(1) [1907] P. 125.
(2) 4 H.L. Cases 293.
(3) [1772] 1 Bro. C.C. 390N.
(4) [1792] 1 Ves. 465.
(5) [1796] 3 Ves. 290.
(6) [1797] 3 Ves. 462.
(7) [1914] 1 I.R. 158.
(8) [1892] 7 Ch. App. 448.
(9) [1843] 2 Hare 424.
(10) [1832] 5 Sim. 431.
(11) [1852] 5 DeG. & S. 698.

The deceased testator was a bachelor and died at Victoria, B.C., on the 10th August, 1920, leaving a will dated 16th of May, 1919, by which he devised and bequeathed all his real and personal property to the Montreal Trust Company upon trust to sell and convert the same into money and out of the proceeds to pay his debts, funeral and testamentary expenses and a large number of legacies. Amongst these were, one to his niece Muriel Edna Henderson, wife of Donald G. Munro Fraser, of the sum of $20,000, and another to his niece Evelyn G. Henderson, of the sum of $10,000. There were a number of other legacies and bequests and a residuary devise to his nephew, the present appellant.

The question to be determined is whether the bequests to those two nieces in the codicil were cumulative to those given in the will or were substitutional therefor. That question must be determined by deciding what the intention of the testator was. That intention must be gathered from the language of the will and codicil, and from the conditions surrounding the testator when he made them. It is not without weight in so determining to find, as is admitted here, that if the cumulative rule sought to be followed is adopted the result will be that all of the testator's pecuniary legacies to his other beneficiaries will be cut down 15 per cent, whereas if the codicil bequests are found to be substitutional, there will be no such abatement.

Now turning to the codicil and endeavouring to find the controlling factor from it, namely the intention of the testator, we find that the codicil was made at Long Beach, California, and that he had not his will with him at the time. We can presume this because in the opening paragraph of the codicil he says he cannot remember the exact date of his will.

Then follows the first clause, viz.:

> First: I hereby ratify and confirm the said will in every respect save in so far as any part is inconsistent with this codicil.

Clauses 2 and 3 containing the bequests to each of the two nieces of $25,000 then follow.

Now it is to my mind absolutely clear that he is thereby confirming his will in every respect *except in regard to the*

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two legacies to his two nieces given by the will which by his codicil he increased, one from $20,000 to $25,000 and the other from $10,000 to $25,000, thus putting both nieces on an equal footing.

I construe the words

save in so far as any part is inconsistent with this codicil

to mean "not consistent" or "at variance with." Now "any part" includes the amount of their respective legacies under the will and he expressly fails to confirm those, evidently to my mind showing a clear intention on his part not to confirm those two previous legacies given in his will. In every other respect he intends to confirm and does so, but with regard to these two legacies of $20,000 and $10,000 respectively he does not confirm the will. On the contrary, as I think, he substitutes for them the sums of $25,000 which he bequeaths to his nieces by the codicil.

The cumulative construction seems to me to ignore absolutely, or at any rate to fail to give any effect to the words confirming the will

save in so far as any part is inconsistent with this codicil.

These important words on that construction are left without any meaning and therefore ignore altogether the testator's *intention.* He confirms the will in every respect save in so far as the changes made in his bequests to his two nieces. With regard to them he does not ratify or confirm his will, but, on the contrary, devises increased amounts to each, giving each $25,000.

I have not heard any suggestion as to any meaning to be attached to these words of the codicil confirming his will

save in so far as any part is inconsistent with this codicil,

unless the suggestion is the correct one that his intention was to ratify and confirm his will in every respect except with regard to these two legacies each of which he desired to increase and did increase.

I have read the cases cited below and in argument here but do not find anything in any of them suggesting that the cumulative rule regarding legacies in a will and a

codicil is more than a *prima facie* one, and one which must in all cases of course yield to the paramount rule that the intention of the testator, if it can be found, or determined, must prevail.

In this case, I think the intention clear that the two codicil bequests are substitutionary and not cumulative to those of the will, and that the intention of the testator that they should be so is also clear from the express words in the first paragraph of the codicil which ratifies and confirms the

> will in every respect save in so far as any part is *inconsistent* with this codicil,

or as I construe the words, *not consistent with,* or *at variance with.* The only part of the codicil altering or varying the will is where the two bequests are increased, as I have stated, and so to his mind were inconsistent with the original bequest made in the will.

On this question of the testator's intention, if it can be found, being paramount over the *prima facie* cumulative rule, I quote from the speech of Lord St. Leonards in the case of *Russell* v. *Dickson:*

> I considered myself at liberty, without trenching upon any rule of law, or breaking in upon any decision, to determine this case upon the intention. There is no rule of law that prevents a court from looking to the intention. Every case that you open says: If you find the intention, you are at liberty to act upon it; and the simple question in this case is: Do you or do you not find the intention? Of that I have already spoken. Then there is the difficulty about the rule of law. There is no case exactly like this nor is it likely that such a case should frequently occur. You must depend upon the principle. If you can find within the four corners of the instrument an intention, not that the legacy shall be cumulative, but that it shall be substitutionary, you are at perfect liberty to act upon the intention, you are not only at perfect liberty, but you are bound by law to give effect to it, provided only that it does not contravene any existing rule of law.

IDINGTON J.—I cannot add much, if anything, useful to that which has been said by the learned judges constituting the majority determining the result now in appeal herein.

Counsel for the appellant has fairly presented in his factum the results of the leading cases which I have con-

[1853] 4 H.L.C. Cases, 293, at pp. 310-311.

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sidered but which by no means convince me that the codicil in question was not intended to be cumulative according to the *prima facie* effect to be given thereto.

Undue importance seems to me to be attached to the word "inconsistent".

I may add that seeing an item of $32,097.27 for real estate in value according to those appraising for the imposition of succession duties, suggests the possibility that the testator attached a much higher value thereto and thus the basis for appellant's conjecture is quite unfounded.

I observe he was careful to suggest due care in the disposition thereof and suggested his brother, who was the father of those benefiting most largely by this will, should be consulted as to his family affairs.

That suggests much to me that might explain the view taken by the testator.

At all events I cannot see my way to reverse the *prima facie* rule to be adopted.

I would dismiss the appeal without costs save as to those of the executors or trustees, while theirs between solicitor and client must be paid out of the estate.

DUFF J.—The point for decision on this appeal can be stated in a sentence or two. The testator by his will left to his niece Muriel Edna Henderson a legacy of $20,000 and to his niece Evelyn G. Henderson a legacy of $10,000. By a codicil he gave to each of these nieces a legacy of $25,000. The question upon which we are to pass is whether or not in each case the gift by the codicil is in substitution for the gift by the will or whether on the other hand the gifts by the two instruments take effect cumulatively.

In order to appreciate the argument on behalf of the appellant it is necessary to read the whole of the codicil which is in the following terms:

I, Joseph Newlands Henderson, of the city of Vancouver, British Columbia, in the Dominion of Canada, but temporarily residing at Long Beach, California, United States of America, hereby declare this to be a codicil to my last will and testament which last will and testament I made during the months of May and June, 1919, the date of which I do not remember.

First: I hereby ratify and confirm the said will in every respect save in so far as any part is inconsistent with this codicil.

Second: I hereby give and bequeath to my niece Muriel Edna Henderson, wife of Donald George Munro Fraser, said Muriel Edna Henderson being the daughter of my brother Thomas Morrison Henderson, the sum of twenty-five thousand dollars ($25,000).

Third: I give and bequeath to my niece, Evelyn Gladys Henderson, the daughter of my brother Thomas Morrison Henderson, the sum of twenty-five thousand dollars ($25,000).

In witness whereof I have hereunto set my hand and seal this fifteenth day of January, in the year of our Lord one thousand nine hundred and twenty.

Joseph Newlands Henderson (Seal).

The general rule of construction being that *prima facie* where by a will and a codicil two legacies whether of the same or of different amounts are given to the same persons, the legacy given by the codicil is presumed to be additional to that given by the will; the ground from which Mr. Tilley directs his attack on the judgment of the Court of Appeal is that the introductory clause or rather the first paragraph of the codicil means and overcomes this presumption.

Now although it may be, as argued on behalf of the respondent, that the first paragraph is in a sense otiose because the publication of the codicil is in itself a republication of the will as of the date of the codicil, still it is undeniable that paragraph does contain a solemn declaration by the testator of his intention that the dispositions made by the will shall be undisturbed save in so far as the provisions of the codicil are inconsistent with them. And that by implication does of course sufficiently disclose an intention in fact on the part of the testator that in the case of such inconsistency and to the extent of such inconsistency the dispositions of the codicil are to prevail over the dispositions of the will.

The real question is: How far does this carry us? I am unable to agree that it follows as a consequence from this premise that the legacies given by the codicil are to be substituted for those given by the will. And for this reason, *ex hypothesi,* there is substitution if there is inconsistency and there is no substitution unless there is inconsistency and the question therefore necessarily turns on the point, is there or is there not inconsistency? And touching that point the presumption against substitution rests upon the foundation that there is no incompatibility and no inconsistency involved in the giving considered in

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itself of a pecuniary legacy by codicil to a legatee to whom a legacy has already been given by the will. We need not go into the reasons for the presumption. It seems to be founded in good sense; and such great masters of judicature as Lord Cairns and Lord Justice James gave effect to it without hesitation and without doubt. *Prima facie*, at least, therefore Mr. Tilley is not assisted by the first paragraph. *Prima facie* there is no inconsistency between the provisions of the codicil in relation to the legacies in question and the relevant provisions of the will.

Mr. Tilley meets this by the argument that, conceding this to be the *prima facie* construction of the paragraph, it is not its true construction. You must, he says, read the first paragraph with its context, in other words you must read it as an *addendum* to each of the two remaining paragraphs, the two paragraphs giving the legacies under consideration. And read with its context in this way he contends that the fair meaning, if not the necessary meaning, of it is that the provision made by the codicil for each of the beneficiaries mentioned is the provision, that is to say, the only provision the testator is making for those beneficiaries by way of pecuniary legacy.

There is no doubt weight in the contention that the first paragraph should be read as a part of the whole text of the codicil and I think this is so notwithstanding one's predisposition to look upon it as a stereotyped form. But the argument does not, I think, carry the appellant the whole distance. If it appeared that the paragraph on the construction which has been given to it in the Court of Appeal was without operation, we should have a very different case. It is impossible I think, to contend that because, while there is no inconsistency between the legacies in the codicil and the legacies given to the same legatees in the will, there is inconsistency between the codicil and the disposition of the residue by the will and therefore the first paragraph is not in any view wholly nugatory.

The sum of the matter, as will already have been apparent according to my view, is that the appellant's argument is really an attack, when it is closely analysed, upon the presumption against substitution and as such, I say this of course with the greatest respect for those who

take another view, I cannot help thinking that in its effect it is an appeal to the court to substitute one's impression as to the probable intention of the testator for the conclusion one is driven to as to the result of a faithful adherence to the language the testator has employed. A passage is cited in the respondent's factum from a judgment of Lord Justice James in *Wilson* v. *O'Leary* (1), which I cannot forbear quoting:

> I would only add this that I cannot help feeling that this case has occupied more time than it would have done if I had throughout confined myself strictly to that which is my legitimate duty, that is, if instead of endeavouring to find out what the testator meant I had confined myself to endeavouring to ascertain what was the meaning of the testamentary papers which he left behind him.

The appeal should be dismissed.

ANGLIN J.—There is nothing in the codicil which can be said to give expression to an intention to revoke the legacies given to the two respondents in the will. There is no inherent "inconsistency" between the gifts to them in the will and the gifts to them in the codicil—nothing so incompatible that both may not take effect. On the other hand the residuary bequest in the will would certainly be cut down by the legacies given in the codicil. The confirmation of the will was subject to this modification.

I attach no significance to the fact that under the will the bequests to the two legatees were of unequal amounts, whereas the legacies given to them by the codicil are each of the same amount. We have no clue to the motives that actuated the testator on either occasion. Without some knowledge of them any inference of intent that the new legacies should be substitutional would be unsafe and unwarranted. *Prima facie,* therefore, the gifts under both instruments are to be regarded as cumulative. *Russell* v. *Dickson* (2); *Hurst* v. *Beach* (3).

The only extraneous circumstances relied upon to support the inference of a contrary intention on the part of the testator is the fact, now apparent, that, after debts and succession duties have been satisfied, if the bequests in question are cumulative, all the testator's pecuniary legacies

(1) 7 Ch. App. 448 at p. 456.
(2) 4 H.L. Cas. 293 (3) [1819] 5 Madd. 351, at p. 358.

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must abate 15 per cent, whereas, if the gifts by the codicil are substitutional for those in the will, no abatement will be requisite. No doubt if it were clear that that fact had been present to the mind of the testator its significance might be cogent. Yet, even under such circumstances, I can scarcely conceive of the testator, if he meant that there should be a revocation of the gifts made to the respondents in the will, expressing that intention in his codicil by the clause,

> I hereby ratify and confirm the said will in every respect save in so far as any part is inconsistent with this codicil.

He almost certainly would have employed some such phrase as "instead of (in lieu of, or in substitution for) the gifts made to them in my will, I give and bequeath, etc."

But it is by no means improbable that the deficiency in the estate, now ascertained, was quite unknown to the testator. His assets consisted *inter alia* of several parcels of real estate, the actual worth of which must have been problematical, and of various stocks and shares, many of them highly speculative in character and of very uncertain value. It is quite a usual thing for an owner to be optimistic in respect to the value of his own property. Then again the testator may not have realized that his debts would amount to over $13,000, or that succession and probate duties would deplete his assets by a sum exceeding $26,000. In a word, it must be pure conjecture whether the testator appreciated that the additional bequests of $25,000 apiece to his two nieces would more than exhaust the residue of his estate bequeathed by his will to the appellant. As James L.J. said in *Wilson* v. *O'Leary:*

> Where there is a positive rule of law of construction such as exists in these cases, that is to say, that gifts by two testamentary instruments to the same individual are to be construed cumulatively, the plain rule of law and construction is not to be frittered away by a mere balance of probabilities.

In the case at bar I fail to find even a balance of probabilities in favour of the view urged by the appellant.

In my opinion no case can be made for taking the two bequests in the codicil before us out of the ordinary rule

7 Ch. App. 448, at p. 454.

that they should be regarded as additional to, and not as substitutional for, the gifts made to the same legatees by the will. Jarman on Wills (6th ed.) p. 1123; 28 Halsbury L. of Engl. no. 1432.

BRODEUR J.—We are called upon to decide whether the legacies mentioned in the codicil are cumulative or whether they are in substitution of the legacies of the will.

In his will the testator had made several legacies to his ten nephews and nieces, ranging from $2,000 to $20,000. The two respondents, who are nieces, were legatees to the extent of $10,000 and $20,000 respectively. The will had been made in British Columbia on the 16th of May, 1919. A few months later the testator went to California where he made a codicil on the 15th of January, 1920, and died a short time later. By this codicil he declared at first that he ratified and confirmed his will in every respect "save in so far as any part is inconsistent with this codicil"; and then he gave $25,000 to each of his nieces to whom he had given previously by his will $20,000 and $10,000 respectively.

If the $50,000 disposed of by the codicil is to be considered as an addition to the $30,000 given to these legatees by the will, the estate will not be large enough to pay in full the other legatees. If, on the contrary, the legacies to these two nieces are substitutional, all the legacies could be paid in full.

There is not much in the evidence before us to guide us in the construction of this will. We may fairly assume that the testator knew the value of his fortune; and we could hardly say that his intention was to deprive the other legatees of the amount which he had given them, since he confirms everything he has done in his will and the only inconsistencies and differences which are to be found between his codicil and his will are in the legacies which he gives to his nieces.

I consider that his evident intention was to increase the legacy which he had previously mentioned and to substitute in one case $25,000 for $10,000, and $25,000 for $20,000 in the other.

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For these reasons, the appeal should be allowed, the costs to be paid by the estate.

MIGNAULT J.—The only question here, and it is a question of much nicety, is whether the bequests which the late J. N. Henderson made by his codicil to his two nieces, the respondents, were in substitution for or in addition to the legacies which he had given them by his will. The will was executed before witnesses at Vancouver on May 16th, 1919, and, among a number of legacies to relatives of the testator, he gave to the respondent Muriel Edna Henderson, wife of Donald Fraser, $20,000, and to the respondent, Evelyn G. Henderson, $10,000. The testator was in Long Beach, California, when, on January 15th, 1920, he made a codicil to his will which evidently he did not have in his possession, for he says he does not remember its date. By this codicil, after stating in clause one that he ratifies and confirms his said will in every respect,

save in so far as any part is inconsistent with this codicil,

he bequeaths to each of the respondents, by separate clauses, the sum of $25,000.

The first court held that these last legacies were substitutionary; the Court of Appeal, Mr. Justice McPhillips dissenting, that they were cumulative. The appellant, the residuary legatee—and there will be no residue but a deficiency if the bequests are cumulative—now appeals to this court.

As stated by Lord Cranworth in *Russell* v. *Dickson*,

where a legacy is given to the same party in each of two different instruments, a will and codicil, *prima facie* you must treat them as two gifts. That is an obvious proposition. If the party has twice said he gives, he must be understood to mean to give twice, but of course there may be circumstances to show that the *prima facie* construction is not, in the particular case, the construction to be adopted. What the circumstances are that are sufficient to outweigh the *prima facie* presumption, is extremely difficult to be determined by any rule of *a priori* reasoning. Very small circumstances have sometimes been acted on as sufficient to take the case out of the general rule.

The test is, of course, what the testator really intended, and no case better shows than *Russell* v. *Dickson* (1) that when the intention sufficiently appears to substitute the later legacy for the former, effect will be given to that

(1) 4 H.L. Cas. 293 at p. 304.

intention. As Lord St. Leonards said, in the same case, at p. 310:

> If you can find within the four corners of the instrument an intention, not that the legacy shall be cumulative, but that it shall be substitutionary * * * * you are bound by law to give effect to it.

So in *Russell* v. *Dickson* (1) the testator, in a codicil executed a few days before his death, began by the words:

> Not having time to alter my will and to guard against any risk, * * *

and this language, among other circumstances, was considered as indicating his intention to substitute the legacy contained in the codicil for that made by his will.

Here the testator had in mind that what he was going to do by his codicil would be inconsistent with some parts of his will, which otherwise he wished to ratify and confirm in every respect, and to the extent of such inconsistency he desired to alter his will. There could be no, what I might call intrinsic, inconsistency, by which I mean legacies which cannot be carried out cumulatively, between the will and the codicil, because the bequests in both were of sums of money. Nevertheless the testator, when he said

> save in so far as any part *is* inconsistent with this codicil

was not dealing with a possible, but with an actual, inconsistency assumed by him to exist between the will and the codicil, and in my judgment this is a most important consideration to determine whether the testator intended to add these large legacies to the quite substantial amounts he had already given to his nieces. So the inconsistency contemplated here was one existing in the mind and intention of the testator, as he understood his testamentary provisions, and resulting from something contained in his codicil.

Were the two bequests to these two sisters, the respondents, of $25,000 each, by the codicil, inconsistent with the bequest to them of unequal sums by the will, to wit, $20,000 to Mrs. Fraser, and $10,000 to Miss Henderson? Perhaps not intrinsically, in the sense in which I have used the word, but the real question is whether the testator considered the one inconsistent with the other. And equal treatment of these two legatees in the codicil would

(1) 4 H.L. Cas. 293.

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certainly be inconsistent with unequal treatment towards them in the will. If the intention of the testator in making his codicil, in other words if the scheme of the codicil, was to remove this inequality—and the codicil deals only with these respondents—certainly there would be an inconsistency in his mind between the will and the codicil. Giving effect to the will and codicil cumulatively would leave the inequality; treating the legacies in the codicil as substitutionary for those in the will would remove it.

I have therefore reached the conclusion that in the intention of the testator, which of course must be determined by inspection of the instrument, the legacies made by the codicil were inconsistent with the legacies to the same legatees in the will and that therefore they should not be given cumulative effect.

The appeal should be allowed and the trial judgment restored. Costs out of the estate.

Appeal dismissed.

Solicitors for the appellant: *Bowser, Reid, Wallbridge, Douglas & Gibson.*

Solicitors for the respondents: *O'Brian & McLorg.*