1944

GORDON HAYMAN, ADMINISTRATOR OF THE ESTATE OF INA F. SUTHERLAND, DECEASED (DEFENDANT) ..... APPELLANT; *April 27, 28 *June 22.

AND

FOSTER NICOLL, ON BEHALF OF THE RESIDUARY LEGATEES OF LYDIA A. NICOLL, DECEASED (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Will—Construction—Trust—Bequest of money "in full confidence" that legatee "will dispose of the same in accordance with the wishes which I have expressed to her"—Whether trust established.

The testatrix died in January, 1937, having made her will and four codicils thereto. By the fourth codicil she bequeathed the amount of money which she might have on deposit in a named bank at her death to her daughter S. "in full confidence that she will dispose of the same in accordance with the wishes which I have expressed to her". S. received said amount from the executor of the testatrix and treated it as her own, and died intestate in June, 1940, without having disclosed any "wishes" of the testatrix mentioned in the codicil. An action was brought on behalf of the residuary legatees of the testatrix against the administrator of the estate of S., claiming that the bequest to S. was a trust which S. failed to carry out and, in the absence of evidence showing the nature of the trust, the money should go to the residuary legatees.

Held: The action failed. The words of the fourth codicil, taken by themselves or read with other provisions of the will and codicils, did not establish a trust; nor did the evidence establish that a trust was created. (Rules as to precatory trusts and secret trusts discussed.) (Judgment of the Supreme Court of Nova Scotia *in banco*, [1944] 2 D.L.R. 4, reversed.)

APPEAL by the defendant from the judgment of the Supreme Court of Nova Scotia *in banco* (1) reversing (Doull J. dissenting) the judgment of Archibald J.

Lydia A. Nicoll, late of Clyde River, Nova Scotia, died on or about January 18, 1937. She had made a will and four codicils thereto, all of which were admitted to probate. Her fourth codicil, made in 1936, contained the bequest which gave rise to the present controversy. It read as follows:

I give and bequeath the amount of money which I may have on deposit with the Canadian Bank of Commerce at Barrington, Nova

*PRESENT:—Rinfret C.J. and Kerwin, Hudson, Taschereau and Rand JJ.

(1) [1944] 2 D.L.R. 4.

1944

HAYMAN v. NICOLL.

Scotia, at the time of my death to my daughter, Ina F. Sutherland, in full confidence that she will dispose of the same in accordance with the wishes which I have expressed to her.

At the time of the death of the testatrix there was in the said bank the sum of $2,572.05, which sum was, on the closing of the estate (after the passing of the final accounts) paid by the executor to Mrs. Sutherland. Mrs. Sutherland died intestate on or about June 25, 1940, and administration of her estate was granted to Mr. Hayman, who is the defendant in this action and the present appellant.

The action was brought (by the present respondent and another plaintiff who since died) on behalf of the residuary legatees under the will of Lydia A. Nicoll against the administrator of the estate of Mrs. Sutherland, for payment of the said sum to the said residuary legatees, claiming that a trust was imposed upon Mrs. Sutherland in respect of the said sum, that Mrs. Sutherland had refused or neglected to exercise the provisions of the trust and refused to disclose such provisions to the residuary legatees, that Mrs. Sutherland could not take the money for herself, and, in the absence of evidence showing the nature of the trust (it was admitted on behalf of the respondent that the plaintiffs had not succeeded in establishing what were the "wishes" mentioned in the codicil), the money fell into the residue of the estate of the testatrix. The defendant (appellant) denied that there was any trust imposed upon Mrs. Sutherland.

Archibald J. dismissed the action. His judgment was reversed by the Court *in banco* which held (Doull J. dissenting) that the said sum should go to the residuary legatees. The defendant appealed.

E. F. Newcombe K.C. for the appellant.

C. B. Smith K.C. for the respondent.

The judgment of the Chief Justice and Kerwin J. was delivered by

KERWIN J.—This is an appeal by Gordon Hayman, the administrator of the estate of Ina S. Sutherland, from a decision of the Supreme Court of Nova Scotia *in banco*, reversing a judgment of Archibald J. The appellant is

the defendant in an action brought by Foster Nicoll and Hallet Nicoll on behalf of the residuary legatees of Mrs. Lydia A. Nicoll. Hallet Nicoll died after judgment was given by the trial judge but proceedings were continued by Foster Nicoll in the same representative capacity, and he is now the respondent. The claim is to recover a sum of money on deposit at the Barrington branch of the Canadian Bank of Commerce to the credit of Lydia A. Nicoll at the date of her death.

Mrs. Nicoll died on or about January 18th, 1937, having previously made her last will and testament and four codicils thereto, probate of which will and codicils was duly granted to the Royal Trust Company, the executor named in the will. The fourth codicil is in these terms:

> I give and bequeath the amount of money which I may have on deposit with the Canadian Bank of Commerce at Barrington, Nova Scotia, at the time of my death to my daughter, Ina F. Sutherland, in full confidence that she will dispose of the same in accordance with the wishes which I have expressed to her.

The amount in the bank to the credit of Mrs. Nicoll at the time of her death was $2,572.05. The Royal Trust Company passed its accounts as executor on October 14th, 1937, and on that date handed to Mrs. Sutherland a cheque for the amount of the deposit. Mrs. Sutherland treated the money as her own, using a part thereof to purchase an automobile and investing the balance in securities. She died intestate June 25th, 1940, and letters of administration of her estate were granted to the appellant.

On behalf of the respondent, Mr. Smith first contended that there was a resulting trust established with reference to the bank account. His argument was that the wording of the fourth codicil shows, at the very least, that Mrs. Nicoll considered that she had disclosed to Mrs. Sutherland the "wishes" which she desired Mrs. Sutherland to follow in disposing of the money; that, Mrs. Sutherland having refused or neglected to disclose the terms of the communication to her, it should be assumed against her that she acquiesced in the terms of the wishes so expressed to her; and that, it being impossible now to ascertain the wishes of Mrs. Nicoll, there was a resulting trust in favour of the latter's residuary legatees. The second point made is that, on the construction of the codicil itself,

1944

HAYMAN v. NICOLL.

Kerwin J.

Mrs. Sutherland became a trustee of the money and that, the terms of the trust not being available, the same result follows.

As to the second contention, I am of opinion that the terms of the codicil, taken by themselves, do not establish a trust. It is now recognized that the old rule as to precatory trusts no longer prevails and that a gift to A "in full confidence" that he will do certain things will not, as a general rule, establish a trust. It does not appear useful to list the many cases that have been cited on this branch of the case since, considering the tendency of the courts in modern times, I have concluded that in this particular case no trust was imposed upon Mrs. Sutherland by the fourth codicil of Mrs. Nicoll's will. This is made clearer when one looks at the second codicil wherein the testatrix, when intending to establish a trust, does so in unmistakable language:

> I give and bequeath to my son Frank Foster Nicoll the sum of three hundred dollars ($300) in trust for the benefit of St. Matthew's Church, Clyde River.

As to the first contention, it is undoubted that in certain circumstances a testator may bequeath a sum of money to an individual upon trust for purposes not appearing in the testamentary document but disclosed by him to the trustee and acquiesced in by the latter either expressedly or tacitly, and that parol evidence is admissible to establish the trust. *Blackwell* v. *Blackwell* (1). This statement, however, begs the question, as it must first be established that there was such a trust and that it was agreed to. It is admitted on behalf of the respondent that the evidence led by him does not show the terms of the alleged trust but it is contended that it shows that Mrs. Sutherland considered she was not herself entitled to the money. Upon that point I agree with the trial judge, as I am not impressed by the evidence in that regard,—given by interested parties and as to which the Trust Company's representative, who was present upon one occasion referred to, was not asked any questions. I also agree that in any event the provisions of section 37 of the Nova Scotia *Evidence Act*, R.S.N.S. 1923, chapter 225, apply and that there is no corroboration of the evidence.

(1) [1929] A.C. 318.

Assuming that as against the construction to be placed upon the words of the fourth codicil, the terms of Mrs. Nicoll's wishes, if known, might create a trust, those terms might, on the other hand, as in *McCormick* v. *Grogan* (1), disclose that no trust was created. A sufficient time elapsed between the death of Mrs. Nicoll, January 18th, 1937, and the death of Mrs. Sutherland, June 25th, 1940, to bring matters to a head and, even if those on whose behalf this action is brought were, as they suggest, lulled for a time into a sense of false security by expressions used by Mrs. Sutherland, they were quickly disabused. The cheque for the money on deposit was handed to Mrs. Sutherland on October 14th, 1937, and this action was not commenced until after her death. The onus is upon the respondent, and, in the absence of evidence that a trust was imposed upon Mrs. Sutherland, the basis of the first contention fails.

The appeal should be allowed and the judgment at the trial restored, with costs throughout.

HUDSON J.—By a codicil to the will of the late Lydia A. Nicoll it was provided:

> I give and bequeath the amount of money which I may have on deposit with the Canadian Bank of Commerce at Barrington, Nova Scotia, at the time of my death to my daughter, Ina F. Sutherland, in full confidence that she will dispose of the same in accordance with the wishes which I have expressed to her.

Under the authority of this provision the executors of the will paid to the late Mrs. Sutherland the sum of $2,572.05 which she used in part for her own purposes during her life time. The remainder is held by the appellant as part of her estate.

The plaintiffs in this action claim on behalf of the residuary legatees under the will of Mrs. Nicoll that the bequest to Mrs. Sutherland was a trust, that she during her life time failed to carry out such trust or to disclose its nature and that, consequently, they are entitled to the money.

At the trial an attempt was made to establish by evidence that the money bequeathed to Mrs. Sutherland was in a trust to pay the debts of the testatrix and, after pay-

(1) (1869) L.R. 4 H.L. 92.

1944

HAYMAN v. NICOLL.

Hudson J.

ment of some money to a man who had at one time lived at the Nicoll home, to divide what remained among the residuary legatees.

The evidence failed to establish any such purpose and counsel for the plaintiffs at the trial very properly abandoned this ground. It was then contended that there was at least sufficient evidence to establish that the bequest was a trust, the nature of which could not now be ascertained, and that, in the absence of objects, the residuary legatees were entitled to the fund.

In support of this argument it was alleged, firstly, that the words of the codicil, read in conjunction with the will and prior codicils, imposed a trust, and secondly, that Mrs. Sutherland had in her life time admitted that the money was given to her in trust and not for her own benefit.

In respect of the first ground, the learned trial Judge was of the opinion that neither the language of the codicil read by itself, nor read with the other provisions of the will and codicils, gave support to the plaintiffs' position. On the second question, he found that the evidence offered on behalf of plaintiffs was not trustworthy and that it was vague, uncertain and conflicting and did not establish any statement by Mrs. Sutherland that there was any definite obligation imposed upon her.

On appeal, this decision was reversed by a majority, Chief Justice Chisholm and Mr. Justice Smiley forming the majority and Mr. Justice Doull dissenting.

I agree with the views expressed by Mr. Justice Archibald at the trial and Mr. Justice Doull at the Court of Appeal. The word "confidence", as stated by Lord Davey in *Comiskey* v. *Bowring-Hanbury* (1), is a neutral word. If the will as a whole indicates an intention to create a trust, the court will so construe the will; otherwise it will not.

The other testamentary dispositions of the testatrix do not lend support to the contention of the respondent. By the will itself, made in 1930, certain real property was devised to one Jack F. Nicoll. By the first codicil, in 1933, the above devise was revoked and all real property of the testatrix devised to the plaintiff F. Foster Nicoll, one of the respondents.

(1) [1905] A.C. 84, at 89.

By the will $300 was bequeathed to a church and by a second codicil in 1935 this bequest was altered so that it conveyed to F. Foster Nicoll the sum in question in trust for the church, a trust being definitely defined.

By the original will there was no particular disposition of personal property other than a bequest of $2,200 to Jack F. Nicoll, a small sum for a cemetery, and the bequest to the church already mentioned. In 1933 a third codicil was made by which all the deceased's furniture, household effects, etc., were bequeathed to Mrs. Sutherland, upon trust that she should divide the same among the deceased's surviving children in such way as Mrs. Sutherland might wish or decide expressly. In 1936 the fourth codicil containing the provision in question was made.

It will be observed through the progress of these dispositions that the testatrix did not have in mind any absolute equality in benefits for her children. On the contrary, she made a specific devise of all of her real property to the respondent F. Foster Nicoll, and it is shown by the preceding codicils that when a trust was intended it was so stated in definite language.

The argument most pressed and relied on on behalf of the respondent is that, notwithstanding the language of the codicil, Mrs. Sutherland during her life time neglected and refused to disclose what her mother had said to her. Under some circumstances, such reticence might give rise to an inference that a trust was intended, but the evidence put forward here by the plaintiffs in their abortive attempt to prove a trust for specific purposes suggests to me that Mrs. Sutherland may have had quite good and honest reasons for not disclosing her mother's wishes. In any event, the respondents had ample time to take action during the life time of Mrs. Sutherland to compel disclosure, if they so desired. If the oral evidence of the plaintiff is to be given any credence whatever, it leads me to think that whatever was said by the testatrix to Mrs. Sutherland was vague and indefinite as to objects, and this in itself supplies a reason why the words of the will should not be construed as obligatory.

Two old cases are of interest on this point. In the case of *Harland* v. *Trigg* (1), the Lord Chancellor said:

(1) (1782) 1 Br. Ch. Cas. 142.

1944

HAYMAN v. NICOLL.

Hudson J.

I have no doubt but a requisition made with a clear object will amount to a trust. In the case of the Duchess of *Buckingham's* will, the words were very gentle, but had a distinct object. But where the words are not clear, as to their object, they cannot raise a trust. Where this testator had a leasehold estate, which he meant should go to the family, he has used apt words; therefore, where he has not used such words, he had a different intent.

And again in the case of *Wynne* v. *Hawkins* (1) in the same volume, the Lord Chancellor said at page 180:

If a bill had been filed in the lifetime of the wife, could I have ordered this money to be laid out, and that she should receive the interest for her life, and then it should go over? These are equivocal words, the intent of which is to be gathered from the context. If the intention is clear, what was to be given, and to whom, I should think the words not doubting would be strong enough. But where, in point of context, it is uncertain what property was to be given, and to whom, the words are not sufficient, because it is doubtful what is the confidence which the testator has reposed; and, where that does not appear, the scale leans to the presumption that he meant to give the whole to the first taker.

In the case of *Briggs* v. *Penny* (2), it was said by Lord Truro at p. 556:

It is most important to observe that vagueness in the object will unquestionably furnish reason for holding that no trust was intended, yet this may be countervailed by other considerations which shew that a trust was intended.

The words of Lord Bowen in *In re Diggles; Gregory* v. *Edmondson* (3), might be appropriately quoted:

But just as uncertainty of the property and object are reasons for not construing the will as creating a trust, so also the fact that a trust would cause embarrassment and difficulty is a reason for coming to the same conclusion.

With reference to the numerous authorities discussed in the court below, I am content to accept the views of Mr. Justice Archibald and Mr. Justice Doull. I would allow the appeal and restore the judgment at the trial.

The judgment of Taschereau and Rand JJ. was delivered by

RAND J.—This appeal raises the question of the interpretation of a codicil to the will of Lydia A. Nicoll, which reads as follows:

I give and bequeath the amount of money which I may have on deposit with the Canadian Bank of Commerce at Barrington, Nova

(1) (1782) 1 Br. Ch. Cas. 179. (2) (1851) 3 MacN. & G. 546.
(3) (1888) 39 Ch. D. 253, at 257.

Scotia, at the time of my death to my daughter, Ina F. Sutherland, in full confidence that she will dispose of the same in accordance with the wishes which I have expressed to her.

The will, subject to three specific dispositions, had left the residue to the children of the deceased. By earlier codicils the testatrix had converted a direct legacy to a church into one in trust for the same church, and had given certain personal effects then in the residue to the daughter Ina in trust for distribution among the residuary legatees and another, in her absolute discretion; and by the last codicil withdrew likewise from the residue the sum of approximateley $2,500, the amount standing to the credit of the testatrix at her death. The entire estate was in the neighbourhood of $17,000.

The testatrix died in January, 1937. Her will was proved shortly thereafter and the order passing accounts and ordering distribution made in October of that year. The daughter Ina died on June 25th, 1940, and the appellant is the administrator of her estate.

On behalf of the respondents it is claimed there is, on the face of the will, an absolute trust, the objects of which have failed, and consequently the benefits result to the residuary legatees: but that, on the other hand, if the words of the codicil are precatory merely, a secret trust has resulted from the communication by the testatrix to the daughter of her wishes and the undertaking by the latter to carry them out, a failure or refusal on her part to do so, and a resulting trust to the residue.

What the wishes of the testatrix, mentioned in the codicil, were is unknown. Archibald J., who tried the issue, came to the conclusion that there was no evidence on which he could make a finding on them or on the fact of any communication of them to the daughter Ina, whether before or after the making of the codicil. In September, 1938, the respondents, by letter, requested the daughter to disclose them but, so far as appears, without result. It is evident that feelings had been aroused and with at least one of her brothers Ina was not on speaking terms.

Mr. Smith for the respondents argued that the first enquiry should be whether the daughter Ina had in fact so undertaken with the testatrix, and that it was only when

1944

HAYMAN v. NICOLL.

Rand J.

that question was decided that the construction of the codicil might become necessary. But so far as it may be considered material, I am unable to agree with him. What is first presented to the court is the testamentary document and any enquiry regarding transactions *dehors* that instrument must, I should say, follow the conclusions relating to it.

Do the words of the codicil, then, create a trust or are they merely precatory, expressive of the wish of the testatrix but not intended to impose upon the legatee an imperative direction? During the past fifty years a marked change has taken place in the attitude of the courts toward dispositions of this character. The earlier tendency was to treat such expressions as placing a bond upon the person taking, the performance of which courts of equity would enforce. But this has given way to an opposite leaning and the present rule is that confirmed in the case of *In re Atkinson* (1): to give effect to the real intention of the testator, as that is to be gathered from the testamentary instrument as a whole, regardless of any particular words used or of any rule related to them. So construed, I agree with Archibald and Doull JJ., that the words in question were not intended to do more than to indicate the desire rather than to impose the will of the testatrix.

There remains the contention that by a communication to the daughter a secret trust arose. The rules of law dealing with this class of transactions are clearly settled. If, on the face of the will, the legal interest is, *simpliciter*, in the legatee, it can be shown that an agreement outside of the will was made by which the legatee undertook as an absolute obligation the carrying out of wishes of the testator. If, on the other hand, the will expressly creates the fiduciary obligation, then the oral communication must be made either before or at the time of the making of the will. If it is not, the beneficial interest is deemed not to be distributed and a resulting trust at once arises. The present case is intermediate. Although the words are precatory, they look to an oral or a written communication to the legatee for their completion. Where a trust arises outside the will, the transaction may take place at any time during the life of the testator for the reason that the

(1) (1911) 80 L.J. Ch. 370.

continuance of the legacy is on the footing of the legatee's undertaking. But the rule does not oblige us to say that the mere communication, in such a case as this, of the wishes of the testatrix, would *ipso facto* create an obligatory trust. If the language of the will, following which the communication is made, is precatory, why should a communication be considered as going beyond its mere fulfilment, and as not being intended to have the same effect as if it had been set out in full in the testamentary document? It would be necessary to show clearly not only the communication but that it was made in circumstances in which such an obligation was imposed upon and accepted by the legatee: *In re Falkiner: Mead* v. *Smith* (1); *Sullivan* v. *Sullivan* (2); *Reid* v. *Atkinson* (3). That proof here, having as its object the establishment of a claim against an estate, would in addition require corroboration.

A further difficulty would arise in respect of the question of performance. It is alleged as part of the claim that the daughter Ina had died "without exercising the provisions of the said trust". The respondents are suing not as *cestuis que trust* but as resulting beneficiaries upon a failure of performance and that essential fact is part of their case. The daughter could, if alive, answer it by proving performance and the question is whether we are to presume that the trust must have been incompatible with the conduct of the daughter evidenced to the court.

These difficulties are obviated by the findings below that there is no sufficient evidence either of the fact of the communication of the wishes or of what they were; *a fortiori* there is no evidence of the acceptance by the daughter of an obligation to carry them out; and no ground has been suggested on which a presumption of any of these matters could now be raised against the estate.

I would, therefore, allow the appeal and restore the judgment at the trial, with costs both in this Court and in the Court of Appeal.

Appeal allowed with costs.

Solicitor for the appellant: *Donald McInnes.*

Solicitor for the respondent: *R. Clifford Levy.*

(1) [1924] 1 Ch. 88. (2) Ir. R. [1903] 1 Ch. 193.
(3) (1871) Ir. R. 5 Eq. 373.