

WILLS AND TRUSTS

1. *Nature of testamentary instrument* — In *Kennedy v. Peikoff*¹ a letter was produced which stated that the deceased had made a will by which he left all his property to a friend. The deceased's solicitor proved that he had handled the will and has passed it to the deceased subsequent to its execution; but no copy was produced. Held, on appeal, that the will should be presumed to have been destroyed *animus revocandi*, since the evidence was that it had been in the possession of the testator but it was not forthcoming on his death. The letter could not be treated as testamentary, and referred only to a document which must be presumed to have been revoked.

2. *Application of Chesterfield Rule* — An interesting discussion of the application of the Rule in *Chesterfield* occurs in the case of *Re Guinness*,² an English case which, however, illustrates principles applicable also in Manitoba. By a deed of settlement, a trust fund was settled on wife and children for their joint lives. The fund was to be used for the benefit of the children, but subject to this the income was to go to the settlor's wife, J. The settlor died, leaving J. a life interest in the residue of his estate, including "investments for the time being remaining unconverted" pursuant to a power contained in the will. J. released to the trustees of the will all income payable under the deed, and the effect of this release fell to be considered. Goff J. held that its effect was to produce a resulting trust. The income fell to be disposed of under the will, and for this purpose would be treated as capital, since it came from a source outside the estate. But, until the trustees under the will exercised their discretion as to investment, the Rule in *Re Earl of Chesterfield* would be applied. This seems a sensible approach, and demonstrates once again that the Rule (even if it is losing its right to a capital 'r') is alive and capable of adaptation.

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3. An interesting British Columbia case which straddles the line between wills and trusts merits attention. In *Re McPhee*³ a settlor of unsound mind executed an indenture of trust in which he acknowledged receipt of \$1.00 from the trustee. The indenture was not executed by the trustee, nor was the trust fund delivered to him.

Before his death, and while in hospital, the settlor of this

1. (1966) 56 W.W.R. 381.

2. (1966) 2 All E.R. 497.

3. *Re McPhee; Canadian Permanent Trust Co. v. Stewart; Canadian Permanent Trust Company v. Clare* (1965) 52 D.L.R. 520.

fund also executed a codicil to his will which he had given instructions to his solicitor to prepare.

The interest of the case lies in the difference of approach to the validity of the indenture on the one hand and that of the codicil on the other. The indenture was rejected, the Judge taking the view that the most that could be said for the document was that it amounted to an incompletely executed intention to make a voluntary gift or an uncompleted voluntary trust.

While, however, the principles applied here were those derived from the classic cases on the voluntary trust, in the case of the codicil the existing cases pointed in a different direction. For here the codicil could be held valid despite the state of mind of the testator. Such are the rules which can be deduced from the cases, that all that was necessary was that the testator should have had capacity when he gave the instructions (held, he did), and that he should have known he was signing a codicil (held, he knew). The result is a decision that falls into two unrelated halves.

4. *The case of the disappearing condition* — Whatever may be the view we take of the justice of the case, it is clear from *Re Lysaght*⁴ that Jarman's insistence on the intention of the testator (even his presumed intention) is wearing thin. For in this case a testatrix bequeathed a sum for a medical studentship to the Royal College of Surgeons, but stipulated that no student of the Jewish or Roman Catholic faith should benefit. Buckley J. was able to decide that he should carry the trust into effect without the proviso by arguing that to insist on the stipulation would defeat the general purpose of the gift. This at any rate cuts short the discussion of what is or is not within the condition "of the faith",⁵ though only by ignoring that part of the testatrix's intention which is most closely referable to positive convictions.

5. *Perpetuities and Accumulations* — It is to be regretted that no progress has been made toward proper reform of the perpetuity and accumulation rules. A clear lead, accepted in Ontario, has been given by the New Zealand and English legislation, which grasps some of the nettles firmly. Morris and Leach among others have ably — as always — surveyed the shortcomings of this legislation, and it is to be hoped that some positive steps will be taken here to up-date restrictive provisions. Unfortunately, local discussion has produced no such positive results.

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4. (1966) 1 Ch. 191.

5. As in *Re Selby*, (1965) 3 All E.R. 386.

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