Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of McLeod v. *McNab and others, from the Supreme Court of Nova Scotia in the Dominion of Canada; delivered July 17th,* 1891.

Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD HANNEN.
SIR RICHARD COUCH.

[*Delivered by Lord Hannen.*]

THEIR Lordships do not think it necessary to trouble the Counsel for the Respondents.

The facts of this case, so far as it is necessary to state them by way of introduction to the judgment of this Board, are these :—The testator, Mr. Alexander McLeod, made his will on the 17th July 1880. That will contained a residuary bequest to Dalhousie College. The Appellant is the executor of Archibald McLeod deceased, who was the only surviving brother and heir-at-law of the testator, and would be entitled to any estate not disposed of by the testator. He says that the residuary bequest to Dalhousie College was revoked by a codicil of the 17th June 1882. For the present purpose their Lordships assume that this codicil did contain a revocation of the residuary bequest; although undoubtedly, as pointed out by the learned Judges in the Court below, the terms of that revocation are unknown, and it does not appear whether it was by express words of revocation, or by the substitution of some other gift in its place. Assuming there was such a revocation, the testator, on the 21st July 1882, made another

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codicil, expressed to be a codicil to his will of the 17th of July 1880. By that codicil he confirms the will of the 17th July 1880 in every other particular than as altered by that codicil. The question is whether that has the effect of reviving the residuary bequest which was contained in the original will of 1880.

Now the language of the statute which regulates these matters in the Colony as well as in this country, so far as it is necessary in this case to state it, is this :—" No will or codicil shall be " revived otherwise than by a codicil executed in " manner herein-before required, and showing an " intention to revive the same." It has been decided in many cases that the intention must be found in the instrument itself; and it may be taken that the recent decisions have established that a mere reference to the document intended to be dealt with, whether will or codicil, by its date, is not sufficient in itself. The date is an important element in the consideration, but it is not to be taken by itself; it becomes necessary to look to the context, and to anything else in the document which may explain whether the intention of the testator was to confine the action of the testamentary disposition under consideration to the document of that date, or to extend it to something more.

Their Lordships are of opinion that when the codicil of the 21st July 1882 is examined, with the assistance of those circumstances in which the testator was placed at the time, which they are entitled to consider, it does appear that this is not merely a reference to the document of the 17th July 1880 by its date, but by other words, which appear clearly to indicate that it was that document by itself which was in the contemplation of the testator. According to the exposition of the law by Sir James Wilde in the case of *In the goods of Steele* (1 L.R.P. & D.

575), which has been acted upon ever since, " 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. This is a doctrine " constantly acted upon at common law in " relation to written documents, and notably in " cases of written guarantee." Among the pertinent circumstances that may be looked to must be included the known contents of the codicil of the 17th June 1882. We have these from the evidence of Mr. Shannon. By the will of the 17th July 1880 Mr. Thompson was appointed executor, but, by the codicil of the 17th June 1882, the appointment of Mr. Thompson was cancelled, and Mr. McNab was appointed in his place. When therefore in the codicil of the 21st July 1882 the testator says, " Whereas " I have in my said will nominated and appointed " Philip Thompson, of the city of Halifax, " assistant city treasurer, to be one of my " executors, now I do hereby cancel the said " appointment, and I do hereby appoint in lieu " of the said Philip Thompson my friend John " McNab, of the said city of Halifax, merchant, " as one of my executors, who with my friends " Thomas Bayne and James McDonald in the " said will named, are to be the executors of my " said will, and of this my codicil thereto," it is obvious that he could not be referring to the will, which it is contended on behalf of the Appellant was then in existence, consisting not only of the document of the 17th June 1880, but of the codicil of the 17th June 1882; because looking at the will so constituted it was not the fact that the testator had appointed Mr. Thompson, but he had appointed Mr. McNab. This appears to their Lordships to lead inevitably to the conclusion that when the testator in that

part of the codicil of the 21st July 1882 is speaking of his will, he is referring only to the document of the 17th July 1880; and that therefore, in the language of Sir James Wilde in the case above referred to, their Lordships do find in the instrument under consideration "expressions "conveying to the mind of the Court, with "reasonable certainty, the existence of the "intention in question," namely, to deal with the will of 1880, not in combination with, but as distinct from, the codicil of the 17th June 1882. There are other minor points contained in the codicil of the 21st July 1882, in connection with the codicil of the 17th June 1882, which it is not necessary in their Lordships' view to say more of than this, that they all point in the same direction.

An argument has been addressed to their Lordships that the mere statement that the testator confirms the will of 1880 is not sufficient, without any express statement that the testator revokes the revocation of the residuary bequest. Their Lordships are of opinion that if the meaning be, as they consider it is, that he confirms the will of the 17th July 1880 in its terms, that is in itself a restoration of the residuary bequest contained in it; and their Lordships are also of opinion that the word "confirm" is an apt word, and expresses the meaning, and has the operation of the word "revive," which is used in the Statute.

For these reasons their Lordships will humbly advise Her Majesty to approve the judgment of the Supreme Court and dismiss the Appeal. The Appellant must pay the costs of the Appeal.