

2 Coll. 342, and both cases were referred to as authorities by Farwell, J., in *Re Sealy* (1901), 85 L.T.R. 451; and *Hall v. Severne* was held to be rightly decided, by Sullivan, M.R., in *Donnellan v. O'Neill* (1871), Ir. R. 5 Eq. 532, on the ground that the shares of the residue were fixed by the will, and so were the persons to take them, and there was nothing in the codicil to alter this express gift. And, in addition to all this, it was followed as late as 1907, by a Divisional Court, in *Re Miles*, 14 O.L.R. 241—a decision binding upon me.

There is no doubt of the general principle that a codicil forms part of the will or testamentary instrument, but not necessarily to all intents or purposes. As said by Lord Hardwicke, C., in *Fuller v. Hooper* (1750), 2 Ves. Sr. 242, "the testament . . . may be made at different times and different circumstances, and therefore there may be a different intention at making one and the other."

I hold, therefore, that the present plaintiff, being a legatee only by virtue of the codicil signed and made on the 9th September, 1908, is not one of the legatees contemplated in the will made on the 7th February, 1907. This being so, and as the evidence is, that she sues only for herself and in her own behalf, she has no *locus standi* to question the conduct of the executor in paying over the property devised to the two nieces who take under the terms of the will.

This lessens the importance of the main question as to whether these nieces are entitled to take the property. My impression at the trial was, that, upon the facts, there had been a sufficient compliance with the conditions requisite to their success. . . . True it is, that ignorance by the beneficiary of a condition annexed to a gift by will does not protect the devisee from the consequences of not complying therewith; *Astley v. Earl of Essex* (1874), L.R. 18 Eq. 290.

There is a good deal to be said in favour of the view presented by the plaintiff's counsel, that the conduct of the testator, his words and acts in regard to his nieces and in their presence, were so fraught with sexual aberration as to render the requirement of residence with him one *contra bonos mores*, within the meaning of *Brown v. Peck* (1758), 1 Eden 140. This of course does not appear upon the face of the condition, and requires to be established (as it was established) by the evidence. This conduct would absolve them from continuous residence and would justify their having him cared for, as they did, by a married woman and her husband, who were able to control the testator; so that, in equity, the testator himself worked a discharge of the conditions.