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SUBSTITUTIONAL GIFTS TO CLASSES.—In some recent cases we have fresh reminder of the futility of Sir William Grant's distinction between original and substitutional gifts, a rule over which courts have quarreled and disagreed ever since it was promulgated, and which never was applied to the exclusion of anyone without disappointing the wish of the testator. In speaking of this rule in *Re Hickey*, [1917], 1 Ch. D. 601, 604, Neville, J., says: "The alleged principle seems to be that the meaning of the word 'substitute' involves the idea of replacing one thing by another. One cannot 'substitute' something for nothing. The proposition appears to me axiomatic but not very illuminating. If the testator uses the word its meaning must affect the construction of his will; but where the court uses it, it is merely a mode of expressing a view of the construction already formed."

In view of the endless variety of expression and the hopeless confusion

of decisions, it has been said that the means of distinguishing the original from the substitutional legacy is the length of the chancellor's foot, and the liveliness of his imagination, per Barrows, J., in *Wheeler v. Allan*, (1866), 54 Me. 232, 234.

The case in which the rule was first announced was this: an immediate gift to "each and every the child and children of my brother and sisters which shall be living at the time of my death; but if any child or children of my said brother and sister or any of them shall happen to die in my lifetime and leave any issue, the legacy or legacies hereby intended for such child or children so dying shall be for his, her, or their issue;" which Sir William Grant, M. R. held did not give a right to take to the children of one dead when the will was made, because "the nephews and nieces here are the primary legatees; nothing whatever is given to their issue except by way of substitution; in order to claim, therefore, under the will, these substituted legatees must point out the original legatees in whose place they demand to stand; but of the nephews and nieces of the testator, none could have taken besides those who were living at the date of the will." *Christopherson v. Naylor*, (1816), 1 Meriv. 319.

If we correct his honor's baseless assumption that the legatees are ascertained at the date of the will instead of at the death of the testator, the whole fabric of his argument is destroyed. Moreover, no rule was ever worse applied than this one in the very case in which it originated. Taking his honor's view of the case, the original legatees are "children of my brother and sisters that shall be living at the time of my death", which would exclude children of a brother dying after the date of the will but before the death of the testator, and leave no possibility of anyone being a substituted legatee. Further, to impute to the testator an intention that the right of issue of a nephew or niece to take shall depend on the inconsequential fact that the nephew or niece died the day before or the day after the will was written, is to read into the will an intention so capricious and fantastic, that it is doubtful if ever a testator entertained it. Testators always have in mind the time when their wills will take effect whatever be the form of expression; but here that is the form of expression.

If the testator had said he gave to the nephews living at his death and the issue of those then dead, it is clear that the issue would take as primary donees, and not by way of substitution for anyone. It would be an original gift to a composite class; living nephews and the issue of dead nephews. It is claimed that the meaning is different if the testator says: "I give Blackacre to my nephews, and if any nephew shall die before me, his issue shall take his share." This is about as strong as any of the cases; but who would suspect that the testator intended to make a point of the future tense "shall die"?

In *Morrison's Est.*, (1891), 139 Pa. 306, the words were: "I have a number of nephews and nieces living in different parts of the country, and whose names and places of residence I am not able to state accurately; to each of them I bequeath the sum of \$10,000; if any of them should die before me, the legacy of those so dying to be paid to their children." The

court held children of nephews dead when the will was written were not entitled; yet no one could doubt that the testator intended to include them.

In *Cochran's Est.*, (1913), 10 Del. Ch. 134, 85 Atl. 1070, the court went so far as to impute such an intent to exclude grandchildren of the testator on the words "shall be dead", which certainly is equally and strictly true of those dead at the writing of the will. The words were "unto such of my children as may survive me, and if any of my said children shall be dead leaving a child or children, then to such child or children the share the parent would have taken if living." It is not possible to make children of a child dying before the testator substituted legatees under this will; for the persons in whose place they are supposed to take are "such of my children as may survive me." If the supposed original legatees survive the testator they themselves take. Those who do not survive the testator do not fall within the class at all, and therefore no one can stand in their stead.

A more rational interpretation was made in holding children of a brother who was dead when the will was written to take under the words: "to be divided equally between my brothers and sister of the full and half blood equally, but if any be then deceased such share to go to his or her children equally." *Anderson v. Wilson*, (1912), 155 Iowa 415, in which the decisions English and American are reviewed at considerable length.

Re Hickey, (1917), 1 Ch. D. 601, was a legacy to "the descendants of A or their descendants living at my death"; in which the court held that children of a descendant dead when the will was written were entitled to take.

While *Christopherson v. Naylor*, (1816), 1 Meriv. 319, is now too firmly established in England to be overruled there, and can only be distinguished to avoid its operation (*Musther, in re*, (1890), 43 Ch. D. 569, C. A.); courts here cannot consistently follow it after holding that the statutes declaring that legacies to descendants "who shall die before the testator shall be paid to their issue if any," entitle issue of members of a class dying before the will was made. See *Chenault v. Chenault*, (1888), 88 Ky. 83; *Bray v. Pullen*, (1892), 84 Me. 185; *Jamison v. Hay*, (1870), 46 Mo. 546. J. R. R.