

THE CANADIAN BAR REVIEW

VOL. VII.

TORONTO, NOVEMBER, 1929.

No. 9

MISDESCRIPTIONS IN WILLS.

A PLEA FOR A CHANGE IN THE LAW.

It would probably prove a serious shock to the ordinary layman were one to say that the judge does not sit on the Bench to administer justice. A favourite notion of the general public naturally is that it is the judge's duty to do justice—which is of course true within bounds, but if by justice is meant what is commonly referred to as "natural justice" (for it must be borne in mind that there is a broad distinction between natural justice, and what is generally termed law), the notion must be materially qualified. On the contrary it is very frequently the judge's bounden duty to deliver judgments which he himself believes at the time to be directly opposed to natural justice. It is believed that the common idea of the ordinary layman is that the judge takes as his ideal the wisdom of Solomon, and endeavours to approximate his judgments as nearly as possible to those of that learned pundit. Fortunately for the stability of our system of jurisprudence such is not the case.

A moment's thought should suffice to convince one that had we no more stable touchstone for the accuracy of our law than the idea in the mind of an individual judge, of what would constitute natural justice in any given case—our whole system of jurisprudence would at no distant date come toppling about our ears.

In point of fact we conceive the duty of the judge is not to mold his judgment on what he conceives to be natural justice, but to frame it in accordance with what he feels assured is the law upon the subject as established by the cases and precedents—in many instances a widely different proposition.

Not only would it not be correct to say that the judge does not worship natural justice as his beau ideal, but one might even

go a step further and say that in many cases it is his honour's bounden duty to deliver a judgment which he feels in his own mind to be diametrically opposed to that illusory beacon; and that he would do very wrong were he to attempt to proceed otherwise.

The truth of the above observations will, the writer ventures to think, be aptly illustrated by the remarks that follow.

The object of the present article is to put forward a plea that the present law on the aspect of the law of wills herein dealt with may be so changed as to bring about a coincidence of the law in this instance with the canons of natural justice upon the point. At present the two are at opposite poles. By reason of the present condition of the law upon the subject thousands and thousands of dollars of futile costs have been wasted upon the matter for many long years past, and grievous injustice has been inflicted upon countless unoffending members of the public, and it is quite certain that countless similar inflictions of fruitless costs, and grievous injustice, on the same point, will continue to harry the public until the evil is rectified.

This may seem a bold statement, but the writer ventures to believe that it is not one whit overdrawn, but that every reader of this article, whether lay or legal, who has the patience to pursue it to the end, will cordially endorse the views expressed by the writer.

The point under discussion is as follows:

Under the present state of our law, if a testator in drawing his will makes a mistake in the description of the subject of a devise or bequest, the mistake cannot, in a large number of cases, be corrected by the Court—for instance suppose (a very common case) a father desires to leave his farm to his eldest son—let us say his farm is the north half of lot six in the first concession of the township of —by mistake he describes it as the south half of lot six, in the same concession and township. Let us suppose further that the north half of the said lot is the only land the father owns—It will be said by the ordinary layman: "no great harm is done there! the Court on being shown that the land in question is the only land the testator owned, will, no doubt, promptly correct the mistake, and injustice is avoided."

Just so—that is what the writer contends, ought to be the law, but unfortunately it is not—What happens in the given case is that the unfortunate eldest son, by reason of this simple error, loses his devise, and there is an intestacy as to the land in question.

Now we proceed one step further in this branch of the law. If the testator, when making his will had used words indicating that

he was *dealing with property which he owned at the time*, then there would be no difficulty in having the mistake corrected. Evidence would, in that case, be admissible to show what land the testator did own at the time; and, on it being made to appear that the land in question was the only land he owned, the Court would at once see that that land must necessarily be the parcel intended in the devise, and would correct the mistake accordingly.

The obstacle to the correction of the mistake in the first instance is that no foundation is laid for the introduction of evidence as to what land the testator owned, but, once you have his own statement in the will that he is dealing with land which is already his, that obstacle disappears—you may then show by extrinsic evidence what land he owns in order to deduce therefrom what land it must have been that he was dealing with by his will.

We will now elucidate the position more fully by reference to certain cases decided in our own Courts.

Before doing so we might say that the writer, many years ago, wrote an article on this subject for the *Canadian Law Times*¹ in which he discussed the cases more fully than need be done here.

For our present purposes it will be sufficient to cite the following extracts from the article, pages 203 and 204:—

The following propositions upon the subject may, we think, be taken to be settled law:—

1. (a) If A., owning a definite portion of a lot, say the north-east quarter (and no other land) leave a will devising a different portion, say the north-west quarter of that lot, without more, the devise falls to the ground, and there is an intestacy as to the land owned by the testator.

(b) In such a case extrinsic evidence is not admissible to show that the testator owned the north-east quarter, and no other land, for the purpose of establishing a mistake in the description.

2. If A., instead of making a bald devise as in the case above supposed, use words indicating an intention to dispose of land owned by himself, extrinsic evidence would then be admissible, and the Court would, in the light of it, if a proper case were made out, correct the mistake and uphold the devise. . . . In this connection, the words of the late Chief Justice Robinson in *Doe d. Lowry v. Grant*² are in point: 'There would be no room for doubt in this case if the power of this Court were unlimited for giving effect to what they see upon the face of a will was the real intention of the testator; for it is plain that the intention here was to devise all the land which he owned in the Township of Huntley to his sons Edward and Samuel. The only question is whether we are authorised to say so by the rules of construction which the Court have adopted.' Also the expression of the

¹ 17 C.L.T. p. 201.

² 7 U.C.R. 127.

present learned Chief Justice of Ontario in *Doyle v. Nagle*³: 'There can be very little doubt that what the testator intended to devise was lot 12; but if there was nothing further in the case than the facts I have just stated, there is a clear and well defined rule of law which stands inexorably in the way of receiving evidence that that lot was intended.'

The case of *Re Shaver*⁴ is typical of that class of cases where the mistake cannot be corrected by the Court⁵:—

In that case the devise was as follows:

'I devise the south-west quarter of lot 5, concession 2, of the Township of Westminster, containing 50 acres more or less, to H. P. S.' It was a bald devise unassisted by any preliminary declaration, such as was found in *Doe d. Lowry v. Grant* (*supra*), indicating an intention on the part of the testator of disposing of property which he owned at the time of making the will. The facts of the case were that the testator owned the south-east quarter of the lot in question, but not the south-west quarter which he assumed to deal with, nor any other portion of that lot. The learned Chancellor (Boyd, C.), before whom the case came received evidence of the surrounding circumstances above mentioned, and corrected and upheld the devise. His reasoning was as follows: 'The authorities show that you may reject any erroneous part of the description if you have enough left to identify the subject matter devised (numerous cases cited). It is evident that the testator intended to devise the quarter of the lot to his son, but he calls it by mistake the south-west instead of the south-east quarter. Omit the words south-west quarter and you have a sufficient description of what was meant. It would then read, 'I devise to my son 50 acres of lot 5 in the second concession of Westminster.' Extrinsic evidence may be given to show what 50 acres he owned of that lot, so as to localize and ascertain the quarter devised.'

The learned Chancellor remarks that the case is widely distinguishable from *Summers v. Summers*,⁶ and characterises the testator's act as 'an obvious blunder.'

We think one would hazard little in expressing the opinion that to anyone other than a lawyer the above decision would appear to be a most righteous one, and yet, from the lawyer's standpoint, it would seem to be incapable of support on the approved line of authorities. One need have the less hesitation in expressing that view, inasmuch as the learned Chancellor, on being again confronted by the same point in a contested case, (*Re Shaver* was an *ex parte* application) which we are about to mention, himself expressed a doubt whether *Re Shaver* (*supra*) was supportable on the cases.

In illustration of the rigid doctrine, the case of *Hickey v. Stover*,⁷ naturally comes to be considered. In that case the circumstances were to all

³ 24 A.R. 165.

⁴ 6 O.R. 312.

⁵ 17 C.L.T. 209-213.

⁶ *Bleakley v. Smith*, 11 Sim. 150; *Shardlow v. Cotterell*, L.R. 20 Ch. D. 9; *Kean v. Drope*, 35 U.C.R. 421; *Wigram on Wills*, pp. 68, 367; *Re Callaghan*, 8 P.R. 415.

⁷ 5 O.R. 110.

⁸ 11 O.R. 106.

intents and purposes the same as in *Re Shaver* (*supra*), while the decision was diametrically opposite. The testatrix devised the south quarter of lot 20, Con. 9, Township of R., to T. L., and the east quarter to her two daughters. It was sought to show that she had at the time of her death no other land than the south half of lot 20, Con. 8, of R., and to make the will operate to pass that to T. L.: 'Held, that the devise being in its terms free from ambiguity, the Judge below was right in rejecting evidence of extrinsic facts, and that even if it might have been shown that lot 20 in Con. 8 was the only land which the testatrix owned the will could not operate to pass it.' This case came in the first instance before the learned Judge who tried the case commented on in this article, (Ferguson, J.) who has perhaps done more to elucidate and settle the law on this subject than any other single Judge upon our Bench (numerous cases cited). It was afterwards reviewed and affirmed by the Divisional Court (Boyd, C., and Proudfoot, J.). The following citations from the judgment of Boyd, C., will serve to show the line of argument and the reasons of the decision. After quoting the words of the devise the learned Chancellor says, p. 112: 'The devise is in its terms free from all ambiguity; it is not inherently absurd or insensible; it is not inconsistent with any context. The maxim pertinent to such a case is *quoties in verbis nulla est ambiguitas ibi nulla expositio contra verbis expressa fienda est*.⁹ There is one single specific description of a particular lot of land, whether owned by the testatrix or not now appears to me to be a fact immaterial.' The learned Chancellor then refers to the rule exemplified in *Doe Lowry v. Grant* (*supra*) and points out that neither that rule nor the one laid down in *Hardwick v. Hardwick*¹⁰ can aid in the present case, and proceeds, 'There is no conflict upon different parts of the description of what is devised; the description is single, and relates to a defined lot without any modifying or qualifying or assisting words to ascertain what is meant. Assume that oral testimony would disclose that the lot described in the will was not owned by the testatrix, but that a lot of the same number in an adjoining concession was owned by her, what result properly follows? If you may delete the erroneous concession, and if you have a sufficient description left, the will may pass the land; the description left (after rejecting the concession) would be a devise of the south quarter of lot 20 in the Township of Raleigh to the son, and the east quarter of the same lot to the daughters. Is that a sufficiently precise description of the lot? Is there any right to reject the concession stated in the will? My difficulties begin with the first step. What right is there to reject the concession stated in the will? It is not enough to say that she owned no land in that place. Such variance between the lot she owns and the lot she names in the will is not an instance of latent ambiguity or equivocation; she owns one thing; she devises another thing; evidence is not admissible to show that these are identical, or that the one means the other for the purposes of the will. The only such case in which extrinsic evidence is to be received is when the description, in all its parts, is equally applicable to two things: Cairns, L.C., in *Charter v. Charter*.¹¹ Difficulties

⁹ Co. Litt., M7a.

¹⁰ L.R. 16 Eq. p. 175.

¹¹ L.R. 7 H.L. at p. 377.

appear to multiply with the next step. If by the effect of extrinsic evidence we render uncertain that which on the face of the will is certain, then we create an unnecessary ambiguity, and to remedy this we need further evidence to clear up the uncertainty. Having eliminated the concession as erroneous, we have to determine which lot is the one devised. There are, I suppose, a dozen or more lots numbered twenty in the Township of Raleigh: which is it to be? From the language in the will, if that is to be alone regarded, you cannot determine. If, going outside the will, you introduce the assumption that the testatrix meant to devise her own land, then you can arrive at certainty on the principle, *id certum est*, etc. It is clear that no evidence of the testatrix's intention, or of circumstances to indicate intention, can be given to explain the will, when it embodies no latent ambiguity. If not, I do not see how any assumption can be legitimately made that this testatrix intended to devise the land she lived on or owned. She may have thought that she had an interest in the lot actually named in the will, or she may have intended to procure that lot and devised it in anticipation of such acquisition. All evidence on these heads is shut out, so that as a general rule, it would be unsafe to conjecture what she meant. The rule must be *non quod voluit sed quod dixit*. It does not necessarily or infallibly follow that having but one lot, she intended to devise that one. The conjecture that she so intended may be so strong as to fall little short of certainty; but that little involves a doubt which cannot be solved by judicial inference.²² If the testatrix had said: I devise my lot, being No. 20 in the 9th Concession of Raleigh, then there would be something in the will itself to correct by. There would then practically be two descriptions, i.e., her Lot No. 20 in Raleigh, and her lot in the 9th Concession. You could then prove *ab extra* that the 9th Concession was an erroneous designation, and one that did not square with the rest of the description; *Welby v. Welby*.²³ This would be a case of *falsa demonstratio*, for enough would be left to render the will operative as to the particular land intended and defined.' The learned Chancellor then adds 'I am inclined to think that I went too far in *Re Shaver* (*supra*) but sitting here in Divisional Court I am not bound by it.'

We think it unnecessary to pursue the cases further. It seems quite clear from what we have said that the learned Chancellor felt convinced that the judgment rendered by him in *Re Shaver* (*supra*) was absolutely demanded by natural justice, and yet as seen above

²² It has been conceded by the Bench time and again that this presumption, though clearly not admissible, would assuredly be an extremely reasonable one. Mr. Justice Ferguson, for instance, in *Re Bain and Leslie*, 24 O.R. 136, says: "It is beyond question the intention of every or almost every testator to dispose of his wordly property." The late Chief Justice Robinson too, in *Doe d. Lowry v. Grant* (*supra*) says: "The testator merely announces in the beginning of his will an intention to bequeath all his real property, not an intention to give it to anyone in particular, but that general intention to leave nothing undisposed of which is usually expressed by way of introduction, and which he may suppose actuates every testator when he sits down to make his will." In the Courts both in England and the United States, it is recognized as a natural and reasonable assumption, that when a testator makes a will he does not intend to die intestate as to any part of his property.

²³ 2 V. & B. 191.

he condemns it unsparingly in the subsequent case which comes before him on the same point.

We think, therefore, from what has been said that without referring to further cases we may take it as proved that our opening remarks are fully established, viz., that a learned judge will deem it his bounden duty to ignore and immolate natural justice if the rules of law and equity require him, as they frequently do, so to do.

It will be observed that the learned Chancellor in his reasons for judgment in the *Hickey v. Stover* case (*supra*) uses the expression "If the testatrix had said 'I devise my lot, being No. 20 in the 9th Concession of Raleigh' then there would be something in the will itself to correct by." This touches the very nub of the whole discussion. The plea that the writer is putting forward is simply that by a slight amendment to the Wills Act, the situation be reduced to exactly that which the learned Chancellor here indicates.

The result would be that the immense waste of costs which is now going on and the grievous injustice which the public is now and has for a long period of years been, suffering would forthwith cease, and the Court would be enabled to administer natural justice by correcting the obvious mistake in every instance.

Only two remarks we think need be added to what has been already said—the first that the measure of relief hereby bespoken is almost entirely in the interest of the farmers; we mean that the realty which is described in the peculiar manner hereinbefore referred to, viz., Lot in the concession of the Township 7—or some particular part of that lot—as the N.W. $\frac{1}{4}$ is in nine cases out of ten in the possession of a farmer—The realty of a merchant, or business man rarely bears that description.

The hardship entailed by the present state of the law falls therefore in nine cases out of ten on the shoulders of the farmer.

The second remark is that the recurrence in cases before the Courts of the injustice referred to, had, prior to the writer's articles above referred to, had been alarmingly frequent,¹⁴ and since that date an almost equally numerous list has been futilely contested.

The plea is now put forward that this fruitless waste of expense and nugatory infliction of injustice now cease once for all.

The writer finds that in the article in question he touched on the form which any remedial legislation, if adopted, might best assume, and he ventures to repeat here the suggestion there made, which is as follows:

¹⁴ To show how frequent, we find that the number of Ontario cases alone upon the subject, cited in the article, is not less than thirty-three.

From what has been said, it will appear that the difficulty in dealing with cases of this kind lies in the fact that, although the legal rules governing the interpretation of wills are entirely rational, intelligible and well settled, the hands of the Judges in applying them to individual cases are either fettered or free, according to the caprice of the testator in wording his will. Can any remedy be proposed that will free the hands of the Judges in granting relief, without at the same time exercising a disturbing influence on the present well understood rules of interpretation? Probably most lawyers will agree with us that nothing is much more objectionable than statutory tinkering with established law: so that if any remedy can be suggested, it will, it seems to us, be the more acceptable if it leave the present rules of construction unimpaired. There would no doubt be different ways of effecting the end in view. We shall not presume to do more than offer a suggestion. To us it seems that if the legislative authorities felt disposed to deal with the matter, the preferable method of procedure would be to abstain from interfering in any way with the law or authorities as they at present stand, and direct attention solely to the wills themselves. We think a short enactment to the following effect would answer the purposes, viz.: Unless an intention to the contrary therein appears, all wills shall be construed as though the subject of every devise or bequest therein contained were immediately preceded by the words, "my property, being", or words to like effect.

A provision of this kind, preceded by an appropriate preamble indicating the evil to be removed, would, we think, cover the whole ground, and effect a very radical improvement in the law in its application to this subject. The adoption of this would seem to us to be attended by the advantage that each individual case would rest upon its own circumstances, and it would remain with the Court to determine whether it was or was not a proper case for affording the relief asked.

F. P. BETTS.

London, Ont.