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* May 7.
* June 6.

J. LEWIS & SONS, LIMITED (PLAINTIFF) ..... } APPELLANT;

AND

STANLEY E. DAWSON AND FRED. W. DAWSON (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Will—Construction—Description of devised property—Falsa demonstratio.

A testator's real estate consisted of a farm at Cape John upon which he and his family resided and a wood lot about 50 miles therefrom. He had a wife and four children. By his will he gave his wife the third part of his real estate and personal property for her life; then, by clause 2 (the construction of which was in question) he gave to his younger son, W., "all my real estate consisting of the farm on which I now reside, situated at Cape John and also all my personal property subject to his mother's claim and also to" arrangements for building a house and for carrying on the work of the farm for the maintenance of the family until W. reached 21 years of age, but "in the event of his dying before he comes to that age, then all my real estate and personal property shall go to my oldest son L., he at the same time assuming all the responsibilities and liabilities involved in these arrangements." By the subsequent clauses the testator gave to his son L. and to his daughter M. each a sum to be paid by W. "after he comes into possession of the property" and to the testator's daughter N. a sum to be paid by W. after N. reached the age of 21.

Held: The words in clause 2 giving to W. "all my real estate consisting of the farm on which I now reside, situated at Cape John" should, in view of their context and the other provisions of the will, be construed as a gift of all the testator's real estate, including the wood lot as well as the farm; the words "consisting of the farm," etc., being rejected as a mere *falsa demonstratio.*

Slingsby v. *Grainger,* 7 H.L. Cas. 273, discussed and distinguished.

Judgment of the Supreme Court of Nova Scotia *en banc,* 7 M.P.R. 255, affirmed.

APPEAL by the plaintiff from the judgment of the Supreme Court of Nova Scotia *en banc* (1) reversing (Hall J. dissenting) the judgment of Graham J. (2).

The question was one of title to land, the parties respectively claiming through deeds from different grantors, and the rights of these grantors depended upon the proper

* PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Hughes JJ.

(1) 7 M.P.R. 255; [1934] 2 D.L.R. 153.

(2) 7 M.P.R., at 256-259.

construction of a will. The material facts of the case, the provisions of the will in question, and the question for determination, are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

J. L. Ralston K.C. for the appellant.

G. F. Henderson K.C and *D. K. MacTavish* for the respondents.

The judgment of the Court was delivered by

CROCKET J.—This action was brought against the two appellants and one, Edwin A. Rice, for partition of a lot of woodland containing 400 or 500 acres, situate at Middle Stewiacke, Colchester Co., Nova Scotia.

The appellant claimed that it owned in fee simple a nine-twelfths undivided interest in this wood lot, having acquired title thereto by a series of deeds from the oldest son and two daughters of one, Alfred Archibald, who died in the year 1875. The respondents claimed that they were the owners of the entire lot under a succession of deeds from the only other child of Alfred Archibald, his youngest son, to whom they alleged his father devised it by his last will and testament executed on August 24, 1875.

It is admitted that Alfred Archibald was seized in fee of the lot at the time of the execution of his will and at the time of his death. The whole question involved in the appeal is as to whether, upon the construction of the will, the wood lot was devised to the testator's youngest son, or whether there was an intestacy with respect to it.

The testator owned in addition to the wood lot in question a farm at Cape John, Pictou Co., upon which he and his family resided, which with the wood lot, distant, the trial Judge states, about 50 miles from the farm, comprised the whole of his real estate. The testator left surviving him his widow, two sons and two daughters, the name of the oldest son being Leander Gordon, and the name of the youngest Walter Henry.

The learned trial Judge held that there was an intestacy in respect of the wood lot and that as a result the plaintiff by its deeds acquired a nine-twelfths undivided interest in it, while the defendants through their deeds

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from the youngest son acquired an undivided interest in the remaining three-twelfths. The trial judgment was reversed on appeal to the Supreme Court *en banc* per Ross and Carroll, JJ., who held that all the testator's real estate was devised to the youngest son, Walter Henry. Hall, J., agreed with the learned trial Judge, Graham, J., that the devise to Walter Henry did not cover the wood lot.

By para. 1 of his will the testator gave and bequeathed to his wife the third part of his real estate and personal property during the period of her natural life. Para. 2 with which the dispute is principally concerned reads as follows:

> I give and bequeath to my youngest son Walter Henry all my real estate consisting of the farm on which I now reside, situated at Cape John and also all my personal property subject to his mother's claim and also to the following arrangements, viz: That a house is to be built as soon as convenient, part of the material of which is already prepared, and the work of the farm is to be carried on as before for the maintenance of the family until the said Walter Henry shall arrive at the age of twenty-one. But in the event of his dying before he comes to that age, then all my real estate and personal property shall go to my oldest son Leander Gordon, he at the same time assuming all the responsibilities and liabilities involved in these arrangements.

Para. 3 gives and bequeaths to the testator's oldest son, Leander Gordon, the sum of $500 "to be paid to him by his brother Walter Henry after he comes into possession of the property." Para. 4 gives and bequeaths to the testator's oldest daughter, Margaret, the sum of $200 which was also " to be paid to her by her brother Walter Henry after he comes into possession of the property." Para 5 gives and bequeaths to the testator's youngest daughter, Nettie, the like sum of $200 which was "to be paid to her by her brother Walter Henry after she arrives at the age of twenty-one." A codicil executed a few weeks later, merely changed the amounts of the legacies to the daughters from $200 to $100 each.

The words which create the difficulty are the words by which the testator described the land devised to Walter Henry, viz: " all my real estate consisting of the farm on which I now reside, situated at Cape John." This phrase, standing by itself, is capable of two different meanings: first, that the subject of the devise was all the testator's real estate and that this consisted only of the farm on

which he then resided situated at Cape John; and, second, that the subject of the devise was only that portion of his real estate which consisted of the farm. If the first be adopted as the intended meaning, the general words "all my real estate" would obviously be the governing words of the devise and the subsequent words, in that view, might be disregarded as a mere *falsa demonstratio* in the light of the admitted fact that the testator at the time was seized in fee, not only of the farm at Cape John, but of the wood lot at Middle Stewiacke. If, on the other hand, the phrase be read in the suggested alternative sense, no question of *falsa demonstratio* arises, for in this view there is no repugnance or inconsistency between the two expressions "all my real estate" and "consisting of the farm on which I now reside," etc.

In support of the latter construction the learned counsel for the appellant primarily relies upon the language of the phrase itself. He argues that the word "all" is applicable to the whole phrase and not merely to the words "my real estate," and that the words "consisting of the farm," etc., consequently form a necessary part of the description of the intended devise and limit the meaning of the whole description to the farm. Secondarily, he contends that there is nothing in any of the other provisions of the will which in any way modifies or alters the meaning of the phrase as indicated upon its face.

If the phrase alone be considered, dissociated from its context and all other provisions of the will and having regard only to the admitted fact that the farm did not in truth comprise all the testator's real estate, we should not have hesitated to accede to the argument that it ought to be construed in a sense which does not import a false or erroneous description rather than in a sense which does. The decisive question, however, is: what was the testator's real intention respecting this devise, as indicated, not by the quoted phrase itself, but as indicated by its context and the terms of the will as a whole? It may be that, looking at the phrase itself, it should be treated *prima facie* as embodying but one complete description limiting to the farm only the land intended to be given, seeing that such a construction eliminates all repugnance and inconsistency

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between the general words "all my real estate" and the qualifying words "consisting of the farm," etc., and yet that, when its immediate context and the other provisions of the will as a whole are considered, such a construction of the isolated phrase may be found to be entirely out of accord with other provisions of the will upon which it bears and which bear upon it, and out of accord with the testator's true intention as evidenced by the entire will.

When the immediate context and the other provisions of the will are examined, it is seen that the gift to Walter Henry comprises not only "all my real estate consisting of the farm," etc., but also "all my personal property"; that the whole is subject to the antecedent gift to his mother, viz: "the third part of my real estate and personal property" for the term of her natural life, and to the specified stipulations as to the building of a house and the continuation of the work on the farm as before for the maintenance of the family until Walter Henry attains the age of 21; that the subject-matter of the gift-over to Leander Gordon, which is only to take effect in the event of Walter Henry not attaining the age of 21 and is also described as "all my real estate and personal property," is subject to his assumption of "all the responsibilities and liabilities involved in these arrangements"; and that the two legacies to Leander Gordon and Margaret (the oldest daughter) for $500 and $200 respectively are to be paid by Walter Henry "after he comes into possession of the property" and the other $200 legacy to Nettie (the youngest daughter) "after she arrives at the age of twenty-one."

These provisions, we think, make it perfectly clear, not only that the will was intended to make complete provision for the testator's wife and all his children, but to dispose of his entire estate—real estate and personal property alike—for that purpose, regardless of whether the farm constituted all the testator's real estate or not. The description of the subject-matter of the gift to the testator's wife is unmistakably incapable of any other meaning on its face than that it embraces one-third of *all* the testator's real estate and personal property of whatever it consisted. Similarly, the description of the subject-matter of the gift-over to Leander Gordon is incapable of any other meaning

on its face than that it embraces *all* the testator's real estate and personal property, of whatever it consisted, subject, of course, to the antecedent gift to his mother and his assumption of the responsibilities and liabilities attached to the principal gift to Walter Henry. To construe the particular words "consisting of the farm," etc., as denuding the general words "all my real estate" of the comprehensive sense which they undoubtedly bear in respect of both the gift to the testator's wife and the gift-over to Leander Gordon and read them as a cutting down of the description of the subject-matter of the principal gift to Walter Henry out of which the gift-over to Leander Gordon entirely proceeds, rather than as a mere declaration as to what all his real estate did consist of, seems to me to be repugnant, not only to the grammatical and obvious meaning of the words "all my real estate" themselves, but repugnant to the real intention of the testator as evidenced by the terms of the whole will.

The significant linking together of the three gifts in para. 2 itself points directly to the conclusion that the words "all my real estate" are to be understood in the same sense in regard to each. The provisions for the payment by Walter Henry of the three legacies afford additional evidence to the same effect, for it is impossible to believe that the testator could have intended that his youngest son, who was clearly charged with the responsibility for carrying on the work of the farm as before for the maintenance of the entire family until he should attain the age of 21, and with the payment of the three legacies provided as a further bounty to the oldest son and the two daughters after he should come into possession of the property, should take less from the principal gift to him than the older son would take from the gift-over in the event of the former's death before attaining his majority. Such a construction obviously entails an intestacy as to all real estate, other than the farm, in the one case and not in the other—a construction which can only be justified by clear and unambiguous language.

We think, therefore, that the majority judgment of the Court of Appeal correctly construes the words "all my real estate" as the leading words of the phrase in ques-

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tion, affording a complete description of what the testator really had in his mind as the subject-matter of the devise to Walter Henry, and that the addition of the particular words relied upon by the appellant are not in truth a necessary part of that description but an independent and erroneous declaration that all the testator's real estate consisted of the farm on which he resided. In other words, that the expression "all my real estate" is to be read in its natural grammatical sense and not as "all *that portion of* my real estate consisting of the farm," etc.

In *Slingsby* v. *Grainger* (1), upon which the appellant's counsel so strongly relied, there was no such collocation of language as that contained in the will in the case at bar, though there was a gift and a gift-over which related one to the other. In that case both gifts were entirely of personal property, which was composed of consols, reduced annuities and bank stock. The testatrix by her will, which she wrote herself, left to her brother

> everything I may be possessed of at my decease for his life; and should he marry, and have children of his own, to those children after; but should he die a bachelor, I leave the whole of my fortune now standing in the Funds to E.S.

The question, not dissimilar to the question now involved, was whether E.S. took the whole fortune of the testatrix or only that part of it which was then standing in the funds. The case was considered by Lord Chancellor Chelmsford and Lords Cranworth, Wensleydale and Kingsdown. Lords Cranworth and Wensleydale agreed with the Judges of the Court of Appeal that the words "now standing in the Funds" excluded the bank stock and limited the bequest only to that portion of the fortune of the testatrix which answered the description of "now standing in the Funds." The Lord Chancellor and Lord Kingsdown expressed great doubt upon the point but stated that, in view of the fact that Lords Cranworth and Wensleydale agreed with the view of the Appeal Court, they would not dissent. The headnote of the case enters them, however, as *dubitante*. Lord Cranworth in his reasons himself stated that the portion of the argument which had had most weight with him was that founded on the principle of *falsa demonstratio,* and in this connection said:

(1) (1859) 7 H.L. Cas. 273.

I certainly should have entirely acceded to that at once if the expression, "my fortune," had not been so connected with "now standing in the Funds" as to make the latter a part of the description of the former. If it had been, I wish to dispose of the whole of my fortune to my niece, which fortune is now standing in the Funds, that I should have taken to be a mere *falsa demonstratio* that would not have affected the generality of the first gift.

He also discussed the argument that the subject-matter of the gift and the gift-over must be the same, and in this connection said:

Now, I do not think that is a fair argument, more particularly when I observe that the testatrix has used different words: instead of saying, "'I leave everything that I may be possessed of at my death" the expression [in the gift-over] is, "I leave my fortune now standing in the Funds." It would seem, therefore, that she meant something different because she has expressed it differently. At all events, I do not think it is a necessary conclusion that she meant her god-daughter to have everything that she clearly intended her brother to have if he married and had children.

Lord Wensleydale said:

If we may speculate on what the testatrix may probably have intended to say, we should possibly be right in conjecturing that she meant the whole of her fortune (with the exception of the small legacies specifically mentioned), to be enjoyed by the appellant in the event of the testatrix's brother dying a bachelor. But she has not said so. She has left to him everything she may be possessed of at her decease for his life, and should he die a bachelor, then not the whole she shall be possessed of, but "the whole of my fortune now standing in the Funds," making a distinction between that and the whole of her property.

I think it impossible to construe this bequest of "all my fortune," and the addition "now in the Funds," as a *falsa demonstratio,* as it would probably have been a bequest of all my fortune distinctly, with an addition such as this, "and that fortune is now in the Funds."

It will be noticed that in the case cited the words relied upon as words of restriction or limitation were used in relation to the subsequent gift-over and not in relation to the antecedent principal gift upon which it entirely depended, while in the case now under consideration the critical phrase occurs in the description, not of the subsequent gift-over, which comprises all the real estate and personal property of the testator, but of the prior gift, upon which the gift-over depends, and that the qualifying words were added to a descriptive expression which was not identical with that used in describing the antecedent gift, while in the present case precisely the same words are used in relation to both the prior gift and the subsequent gift-over, apart from the alleged qualifying words themselves.

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Neither the case of *West* v. *Lawday* (1), nor *In re Brockett* (2), nor any of the other cases referred to by the appellant's counsel, presents any such significant features as those pointed out in the will which we are now called upon to interpret.

We have, therefore, concluded that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *F. H. Patterson.*

Solicitor for the respondent: *G. H. Vernon.*