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PAROL TESTIMONY IN THE CONSTRUCTION OF WILLS.

I HAVE perused with some care and much interest the report of the case of *Kurtz* v. *Hibner et al.*, ante, p. 93, and the editorial note appended, in which the learned editor feels compelled to dissent from the conclusions of the court, as announced in the opinion of Mr. Justice THORNTON. The principle involved is of the highest importance, and is worthy of the most careful consideration of the profession.

From the best consideration which I have been able to give the subject, I am constrained to the conclusion that the decision of the court is right, and that the editor has fallen into an error. The great learning and deservedly high reputation of the editor who wrote that note, and the profound respect I have ever entertained for him as an eminent jurist, whose labors have done so much to advance the science of the law, have caused me to hesitate long before allowing myself to disagree with him.

The fundamental error of the editor, in my apprehension, consists in his assuming that necessarily the testator designed to devise land to which he had a present existing title. To maintain this assumption we must find that the court, as a matter of law, must declare that it was impossible for the testator to intend to devise property to which he had not a present title, when

there is no expression in the will intimating such a purpose. I have met with no case, and certainly none has been cited in the editorial note, in which such a doctrine is intimated.

While in the particular case we may admit that this is most probably true, we must also admit that it is not necessarily so, and the court had no warrant for saying, as matter of law, or as a necessary legal conclusion, that such was the case; and hence it had no right to act upon such conclusion. We may suppose a thousand cases in which a testator would devise a particular piece of land to which he at the time had no title. It is sufficient to suggest the case of an honest mistake as to the ownership, or of a contemplated purchase. At any rate, he had a right to do so, and so it has no doubt been done by ten thousand before him through misapprehension or even caprice. The devise in this will is of "the west half of the south-west quarter, section 32, township 35, range 10, containing 80 acres, more or less." Here then we have the range, the township, the section, the quarter section, and the half-quarter section set down, and *nothing more.* The description is complete and definite, but we find nowhere a single word of additional description. We find no attempt to duplicate the description as "my" land, or "in the possession of A. B.," or "on which is the Big Spring," or "my land on the Bluff," nor any other single word on which the court may seize to enable it, with the aid of parol proof, to say that *thirty-two* was a false description, and so reject it, and still determine from the words of the will that section thirty-three was in truth meant. Strike the word "thirty-two" from this description and the whole is left entirely unintelligible, for there is nothing else in the will to supply its place.

I entirely agree with the learned editor, in his definition of the maxim *falsa demonstratio non nocet.* He says, "The ractical meaning of this maxim is, that however many errors there may be in the description, either of the legatee or of the subject-matter of the devise, it will not avoid the bequest, PROVIDED *enough remains to show, with reasonable certainty, what was intended.*" I have emphasized the latter part of this definition because I think it an important, nay, an indispensable part of it, and which, in its application to the principal case, was quite overlooked in the note. If we reject the false description, which is in the number of the

section, and so leave that a blank, as the editor in fact does, leaving only a specified eighty-acre tract in an unspecified section in a given township, we have a description which applies alike to no less than 36 different lots, so far as the description goes, and nothing "remains in the will to show with reasonable certainty" which of the 36 tracts was intended. If there be a case in which the court has rejected one description as false, and substituted another in its place without a single word in any part of the will, pointing in the most remote degree to the description substituted as the true one, it has not been referred to in the note appended to the principal case, nor have I met with it elsewhere. In all the cases there have been two or more descriptions, so that when one was rejected, enough was left to enable the court, upon being informed by parol proof of all of the facts in the view of the testator when he made the will, to determine with reasonable certainty what the testator did really intend by the *remaining* words when he used them. According to my understanding of the rule, the meaning of the description must at last be found in the words which are inserted in the will.

No doubt words may be supplied by implication in reading a will or an ordinary conveyance, and so it is in reading any composition in any known language. No author ever writes down all the words which must be understood by the reader to get his full meaning. When words are thus to be supplied as understood, it must always be done from consideration of the context. Generally such words are omitted intentionally by the author for the sake of brevity or euphony, but it sometimes occurs from mistake. In the last case, it is generally more difficult to supply the omitted words than in the first. So, too, words are sometimes inserted by mistake, when it is the office of construction to omit them, as it was in the former case to supply the omitted words. The office of construction is to expound the meaning which the author intended to convey by the writing, and this must be done by the consideration of the words written. Whenever the court can reach the meaning, by omitting a redundant word, which it is manifest from the whole text was not designed to be inserted, or by supplying one clearly to be understood, it will do so. In doing this, courts apply their own knowledge of affairs to the composition before them, and declare the meaning accord-

ing to their convictions. So it was that the court expunged the redundant word *not* from the note of hand. Their knowledge of affairs told them that no honest man ever gave a note intentionally in which he promised *not* to pay, &c. In the same way the court, in *Wilbur* v. *Smith*, 5 Allen 194, the case referred to by the editor, was enabled to declare from the words of the will that the testator designed to bequeath the *residue* of his estate. It sometimes happens that the words used in an instrument are incapable of conveying any definite meaning, and then it is held to be void for uncertainty.

I agree with the editor in another of his propositions which, upon its first statement, would seem to be at war with the general rule, that a patent ambiguity cannot be explained by parol, while a latent ambiguity, which is made to appear by parol proof, may be explained by the same class of evidence. He says "that no case is ever tried where the force, operation, and construction of a written instrument are concerned, that oral evidence is not received in aid of its construction." When understood as no doubt intended, I say I cordially assent to this proposition, though I would prefer to substitute the term *extrinsic facts* in place of "oral evidence," for in most cases the courts in ascertaining the meaning of written instruments ask no questions of others, but apply their own knowledge of things derived from their own observation; and it is only where such knowledge of the subject-matter, or of the particular terms, is inadequate to make clear the meaning of the words which the parties have used, that resort is had to the knowledge of others better informed on the particular subject.

The gradations between patent and latent ambiguities are almost infinite, by which courts have been often perplexed in applying the general rule already stated, although ordinarily it is of easy application; but in either case, and in all cases, the construction must be of the words there found, and it must be consistent with the words in view of the facts tending to throw light upon the sense in which they were used. Perhaps no better case can be found to illustrate the principle I have stated than that of *Fish* v. *Hubbard*, 21 Wend. 651. There Hubbard had agreed to furnish Fish with water out of *the* mill-dam sufficient to run *the* fulling-mill and carding-machine. To the court here

was a patent ambiguity, yet no doubt to the parties a definite meaning was expressed. Parol proof was admitted to show that Hubbard had a mill-dam on a certain stream, and that Fish had a fulling-mill and carding-machine just below it. In the light of these facts, the meaning which the parties intended to express by the words used was obvious. As I do not know that I could now express my understanding of the law on this subject any better than I did nearly thirty years ago in the case of *Doyle* v. *Teas*, 4 Scam. 256, I will take the liberty of quoting from the opinion: "But the true rule, clearly deducible from the cases, I think, is where the language is of such a character as to show that the parties had a fixed and definite meaning which they intended to express, and used language adequate to convey that idea to persons possessed of all the facts which they had in view at the time they used the language; it then becomes the duty of the court to learn those facts, if need be, by parol proof, and thus, as far as possible, by occupying the place of the parties using the expressions, ascertain the sense in which they were intended to be used. But if the language itself shows that the parties had no fixed and definite idea which they intended to convey, then bringing the language in contact with no state of extraneous facts could enable the words themselves to convey a clear and definite idea, because, after all, it must be the language used in view of the circumstances that conveys the meaning of the parties."

If in this case the word *my* had been used instead of *the* in connection with, or rather in duplication of the description, then indeed there would have been something *in the will* to construe, and by the aid of parol proof the court might ascertain what the testator meant when he used it—then there would have been an additional description by which the court might have determined the subject of the devise, after having eliminated *thirty-two*. I repeat, without some sort of additional description in the will, the court had no right to destroy the description, which is clear, precise, and single, and insert an additional description of its own, and then go on and construe it. It is impossible to say that there is a false description where there is but one description which, as in this case, is plain and perfect, without an additional reference or word by which the court might be enabled to determine what land was in the mind of the testator when he

wrote or dictated the description proposed to be eliminated from the will. The central idea on which this doctrine of *falsa*, &c., turns is, that there must be two descriptions of some sort, which facts *aliunde*, if need be, show are inconsistent with each other, and enable the court to say satisfactorily which is the true and which is the false description, when it will discard the false and give effect to the true, as if the false description had never been written. As this is the pivot on which this and all similar cases must turn, at the risk of tautology I must repeat, if no expression be left in the will which can supply the place of the discarded part—if the testator had left out what the court is asked to omit, the devise would have been held void for want of a description of the subject, then the maxim cannot apply. If the learned editor will search the cases for additional words of description of the subject of the devise, I think he will always find them wherever the maxim has been applied. Nothing of the kind is found in this case.

It is admitted that parol evidence was not admissible to show that the testator meant one tract of land when he only described another through mistake, and yet that is the principal case, pure and simple; and ingeniously turn it as we will, it must come back to that at last, for the only effect of the parol proof was to show that the testator wrote section 32 instead of section 33, without a word of additional description.

Undoubtedly the law does not treat wills and contracts precisely alike. A will is the emanation of one mind, while contracts are the result of negotiations, where conflicting interests are more likely to scrutinize and adjust the language.

Hence it is, that the courts are more liberal in the construction of wills, in order to effectuate the intention of the testator, especially in the description of the subject, or the object of a bequest or devise, than they are in construing contracts. But, in another respect, the law regards a will as of a more sacred character than a contract, in this, that it absolutely forbids the courts to reform or correct a mistake in a will, no matter how clearly it may be proved by parol that the testator or the scrivener did commit a mistake, while it is the every-day practice of the courts of chancery to reform contracts by substituting one set of words for another, so as to effectuate the real intent of the parties. No court has ever ventured thus to change a will. It must ever

remain in the precise language of the testator, and the only province of the court is to construe *that language* so as to give effect to the real intention of the testator by the aid of all the facts which can enlighten it as to that intent.

Had the court in the principal case done what the editor thinks it should have done, it would have gone to the utmost limit to which the Court of Chancery has ever gone in reforming contracts. Indeed, it would have made a new will for the testator, after destroying the one which he had made and published according to all the forms of the law, and should such tampering with wills become an accepted doctrine, wills would cease to be what testators make them, but would become plastic things in the hands of the courts, liable to be shaped and moulded to any and every form under the influence of parol testimony, and made to read the very reverse of the language employed by the testator. It will be a disastrous day when the courts shall assume to make wills for those who no longer remain to protest against the desecration.

We all know of the unscrupulous energy of disappointed expectants in contesting wills, and the courts cannot be too careful in opening a new door for the admission of perjury, to tamper with bequests and devises. In this particular case it may be that a mistake was actually made, and that by reforming the will the real purposes of the testator would be carried out; but in doing so a principle would be asserted which would more frequently defeat than promote the purposes of testators.

The law has its imperfections, as well as all other human institutions, and so long as it attempts to maintain general principles, necessarily justice must suffer in particular cases.

The legal acumen for which the editor, with whom I feel compelled though reluctantly to disagree, is so justly celebrated, will, I am satisfied, upon more mature reflection, convince him that he has for once, at least, fallen into an error; and his well-known candor, I am sure, must make him anxious, that if such be the case, it should be pointed out in a courteous and proper way.

I have extended this discussion much beyond the limits designed, but the importance of the subject magnifies itself the more I reflect upon it, and so I think I will strike out nothing that I have said.

J. D. CATON.

Ottawa, Ill., April 10th 1871.