

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

HIGGINS AND OTHERS APPELLANTS ; H. L. (E.)

AND

DAWSON AND OTHERS RESPONDENTS. 1901
Nov. 28.

Will—Construction—Bequest of Pecuniary Legacies—Bequest of “Residue and Remainder” of Specific Mortgage Debts—Intestacy—Undisposed of Personal Estate acquired between Dates of Will and Death—Administration—Legacies, Specific or Demonstrative—Fund applicable for Payment—Ambiguity—Intention—Extrinsic Evidence, Admissibility of—Evidence dehors the Will.

A testator, after directing payment of his debts and funeral and testamentary expenses, bequeathed a number of pecuniary legacies, and then gave “all the residue and remainder” of two specified mortgage debts then due to him, after payment of his debts and funeral and testamentary expenses (but not adding “and legacies”), to three persons named. At the date of the will the testator’s personal estate consisted of the two mortgage debts, which were just sufficient for payment of the legacies (if payable thereout), debts, and funeral and testamentary expenses. Subsequently to the date of his will the testator became possessed of further personal estate, but as the will contained no general residuary gift this remained undisposed of. The total personal estate, exclusive of the two

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mortgage debts, was not sufficient for payment of the debts, funeral and testamentary expenses and legacies.

On an originating summons to ascertain in what order the assets should be applied :—

Held, that “the residue and remainder” of the two mortgage debts meant what was left after payment thereof of the debts, funeral and testamentary expenses only, and that the undisposed of personalty could alone be resorted to for the general pecuniary legacies.

The decision of the Court of Appeal, [1900] 2 Ch. 756, reversed for the reasons there given by Rigby L.J.

JOHN GRAINGER by will made in 1895 directed and bequeathed property as stated in the head-note. The property of which he was possessed then and at the time of his death in 1898 is also there mentioned. Evidence of the property acquired between those dates was given by affidavit, and allowed to be read, though objected to as inadmissible. Details not necessary for the present report are set out in the report of the case below. (1) Upon an originating summons Stirling J. held that according to the true construction of the will and in the events which had happened “the residue and remainder” of the two mortgage debts meant what was left after payment thereof of the debts, funeral and testamentary expenses only, and that the undisposed of personalty could alone be resorted to for the general pecuniary legacies.

The Court of Appeal (Lord Alverstone M.R. and Collins L.J., Rigby L.J. dissenting) reversed this decision, and held that though the will did not contain the words “and legacies” in the description of “the residue and remainder,” the testator intended the legacies to be paid out of the two mortgage debts, and that the will must be so construed.

The legatees of the two mortgage debts appealed.

Nov. 26. *Jenkins, K.C.*, and *Cann*, for the appellants, contended that the decision of the Court of Appeal was based upon a forced and unnatural construction and ought to be reversed.

Ingpen, K.C. (*Northcote* with him), for the respondent Dawson.

Theobald, K.C. (*Fischer Williams* with him), for the respondent.

(1) *In re Grainger, Dawson v. Higgins*, [1900] 2 Ch. 756.

ents Grainger and Ramage, who represented the next of kin and the pecuniary legatees, contended that that decision was right, and, besides the cases there referred to cited, upon the question of the admissibility of extrinsic evidence, *Fonnereau v. Poyntz* (1) ; *Colpoys v. Colpoys* (2) ; *Boys v. Williams*. (3)

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Nov. 28. EARL OF HALSBURY L.C. My Lords, I think your Lordships are very much indebted to Mr. Theobald and his learned junior for the very able and learned exposition of the principles upon which a will is to be construed in this country ; but I confess that I have not been able to entertain the smallest doubt as to what is the true solution of the question propounded for your Lordships' determination.

Stated very narrowly—and I think the more narrowly stated the better—the question for determination on this particular will turns upon two phrases, or, even more compendiously stated, upon one phrase of the will : “All the residue and remainder of the sum of nine thousand one hundred and eighty-seven pounds, lent on mortgage to Sir John Lawson, the deeds being in the keeping of Messrs. Blount, Lynch & Petre, of Fitzalan House, Arundel Street, Strand, and of the sum of four thousand pounds, lent on mortgage to Mrs. Alicia Kirk, of the Park, Gorey, Ireland, the deeds being in the keeping of the same firm, after payment of my just debts and funeral expenses, and the expense of proving this my will.”

Those are the words which your Lordships have to construe ; and I confess that it is to my mind absolutely amazing that any one can entertain the smallest doubt as to what those words mean. I have read the words by themselves because, in my view of the meaning of this instrument, they are by themselves. One does not doubt that, where you are construing either a will or any other instrument, it is perfectly legitimate to look at the whole instrument—and, indeed, you must look at the whole instrument—to see the meaning of the whole instrument, and you cannot rely upon one particular passage in it to the exclusion of what is relevant to the

(1) (1785) 1 Bro. C. C. 472.

(2) (1822) Jac. 451 ; 53 R. R. 42.

(3) (1831) 2 Russ. & My. 639 ; 34 R. R. 178.

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 1901 That is perfectly true as a general proposition ; but I ask myself
 HIGGINS here what other words—what part of the will, what provision
 c. other than the one I am construing, reflects any light on, or
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 Earl of Halsbury I am called upon to expound. If I am right in saying that
 L.C. there is no other part of the will that cuts down, qualifies, or
 in any degree alters the sense of the words I have read (and
 Collins L.J. himself says : “ Read by itself and cut off from its
 context it is, I agree, capable of one meaning only ”), then I
 ask myself what it is in the other part of the instrument to
 which the Lord Justice refers, by which he says the natural
 and ordinary and plain meaning of the words can be cut down
 and expounded into something different from that which he
 has himself said is their ordinary and natural meaning.

My Lords, in the course of the very learned and exhaustive
 argument, I have not heard one word quoted from any other
 part of the will which affects that question. What has been
 done (with the utmost respect I say it) by the then Master of
 the Rolls and the Lord Justice is to cut a sentence into two
 and to read the words “ residue and remainder ” as if they
 stood by themselves. Now, it has been said, and said very truly,
 that “ residue and remainder ” are relative terms ; you cannot
 tell what they mean until you have found out in relation to
 what they are used. If, as Collins L.J. says, these words had
 been left by themselves and without an exposition of what
 they were to be read in relation to, there would have been
 considerable justice in the suggestion that you might read
 them as applicable to the residue of the whole estate after pay-
 ment of its natural and just burthens. But that is not true ;
 and all through the argument, in spite of repeated questions
 by me to the learned counsel, I found that in no one case
 would they read the words as they stand in the will, but they
 would read the words “ residue and remainder ” by themselves,
 and said, and said truly, that those are relative words. But
 when I come to look at the will itself, I must construe them
 as they stand in the context, and in their grammatical meaning,
 and with reference to what is there said ; and then it seems

to me that the problem is solved without the smallest difficulty. The testator says, "all the residue and remainder" (now there the argument has stopped throughout over and over again, but that is not the way to read any sentence)—"all the residue and remainder of the sum of 9187*l*."—and he repeats the same with reference to the second mortgage debt—"and of the sum of 4000*l*," and so on. How is it possible to say that that language is susceptible of doubt?

The observations of very learned judges have been quoted to shew that you must read all the words in every instrument with reference to the circumstances under which they are uttered or written. In one sense that is quite true. It is quite true that, where you are finding out persons or things—who are the persons designated by the will, what are the things left by the will—you may find either the person or the thing by proper external evidence of what is referred to. In the case cited, *Fonnereau's Case* (1), nothing could be more intelligible than this: a man leaves an annuity of so much; it has to be ascertained what he meant by it; the word "annuity" by itself means an annual sum, which, of course, might be a very large sum indeed; or you may find out that the testator possessed a thing which was called an "annuity," because it was the designation of it on the Stock Exchange; you may find out by external evidence what it was that he was referring to. Whatever the subject-matter of it is, you may, of course, find out by external evidence to what he refers. And here the odd thing is that the supposed ambiguous words which you are to construe are the words "residue and remainder," and yet, from first to last, the learned counsel have refused to refer to the words "residue and remainder" as they are used in the will. It is not "residue and remainder" absolutely; and that is the fallacy of the whole argument that has been addressed to your Lordships. It is residue and remainder of a particular thing, and you cannot cut the phrase in two and pretend that it becomes ambiguous because you cut the language in two and take one part of a phrase which is admittedly relative and treat it as if you could read it apart from the context in which

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(1) 1 Bro. C. C. 472.

H. L. (E.) it is, and the thing of which it purports to be the residue.

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And that is really the key to the whole of this matter.

My Lords, I have often said that to treat language with that violence and to say that you have arrived at the conclusion from external circumstances that the testator would have made a different disposition from what he has done if he had had the whole subject-matter in his mind, and, therefore, to construe his language differently, is not to construe or to interpret the language which the testator himself has used, but to make a will for him which you think he ought to have made if he had had the whole circumstances present to his mind.

Now, if I were to concede—what I certainly do not in this case, for I know nothing about it—that it is more probable that the testator would have treated the residue as being the residue of his whole estate and not of this particular sum of which it is stated to be the residue if he had had the facts and circumstances of his property before him—if I were to concede that, it would not help the present respondents, because, in the view I take, if you were to construe it with reference to any such question, it would be making a new will for him, and not construing the will which he has made.

In the case quoted here the day before yesterday—*Hunter v. Attorney-General* (1)—I find myself saying: “The plain fact remains in this will that the testator has not declared the trust that the Court of Appeal have imagined for him, and no apt words have been found to fit or give effect to his supposed intention; and I think your Lordships are not justified in taking such a liberty of interpretation. That certainly would be a strange mode of construing a will, that because you cannot find what else he must have intended to be done with his money except something of that nature, although it is admitted that there are no words in the will to convey the intention which it is suggested he had in his mind, you can invent provisions and impose conditions which the testator himself has not introduced.” I find that my noble and learned friend, Lord Davey, in the same case said: “I can only say, with unfeigned respect for the opinion of that learned judge”—

(1) [1899] A. C. 317.

referring to the Master of the Rolls—"that he seems to me to be making a will for the testator, and not interpreting the words he has used." "The words are directly and plainly applicable to the second purpose, and, in my opinion, to that only." I say here—to paraphrase those words—the words are plainly applicable to the residue of the sums of money to which they are applied as a residue, and to that only. The language, therefore, is to my mind absolutely unambiguous.

My Lords, I confess I am confirmed in the view which I entertain of the true construction by the 24th section of the Wills Act. With whatever purpose, or in respect of whatever supposed defect in the law that section was enacted, I can only say that the language there seems to me plain and unambiguous—that I am to construe this will as if the condition of things to which it refers was that immediately before the testator's death. I do not believe that, for any such purpose as is now contended, you have any right to go into the history of the testator's property and see when he came into possession of it. My Lords, I say that by way of protest against the construction proposed to be placed upon that section of the Wills Act; but, for the purposes of this case, it is enough to say that I think that, in this particular will, the language is plain and unambiguous, and that for no such purpose as has been suggested to your Lordships could you go into external circumstances.

I am very clearly of opinion that the judgment of the Court of Appeal ought to be reversed, and I move your Lordships accordingly.

LORD SHAND. My Lords, I entirely concur with what has fallen from his Lordship on the Woolsack on the subject of the alleged ambiguity in this will. It appears to me, with great deference to those who have thought differently, that the will is unambiguous in itself. It is only ambiguous in this sense, that it has admitted of much argument on two different views of the construction of its terms, and not only of argument, but of very strong difference of opinion on the part of the learned judges in the Court of Appeal. But although that has been so,

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H. L. (E.) I agree with his Lordship in thinking that, in reference to the so-called ambiguity, the meaning of the testator, on a sound construction of his will, is that the deductions to be made from the residue therein described are only the debts, funeral expenses, and the expense of proving his will. He has, in my opinion, expressly stated that these are to be the only deductions from the residue. I agree with my noble and learned friend on the Woolsack that the "residue" to which the testator there refers, according to the plain language of the instrument, is the residue and remainder of the sums then lent upon mortgages, and of those sums only.

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It appears to me, my Lords, that it is a violent construction of this will to treat the word "residue" as referring to the residue of the testator's general estate, or because of the order in which the clauses occur to hold that the residue of the mortgages is to be taken after deduction of the legacies, which are not mentioned as deductions to be made in the clause which specifies what the deductions are to be. I agree with Stirling L.J. that what is really proposed is to read in the word "legacies" in the clause specifying deductions. I can find no warrant for this, or anything to suggest that legacies were to form a deduction from the residue of the mortgage debts.

My Lords, I must further say that I have very great difficulty indeed as to whether any such proof as has been allowed and has been so much referred to in the argument is admissible in this case. The case is not one in which either the property dealt with by the testator or the legatees or persons to be benefited by the will are at all doubtful. In the class of cases in which you cannot tell exactly what is given, or to whom it is given, because of obscure and doubtful expressions of the testator's will in regard to the particular conditions of his property, you must have recourse to extrinsic evidence in order to ascertain his meaning. But here, in the first place, the will is, in its expressions and language, as I think, unambiguous, and, that being so, no proof in reference to the amount of the testator's estate at the date of the will can affect its construction. It appears to me that the purpose, or the effect, at all



events, of the proposal to lead evidence in this case, is to supply a basis for inferring the intention of the testator, and to take one away from the true construction of the will as shewing that the testator intended something different from what he has said. I agree with his Lordship in thinking that even if it could be shewn that the intention of the testator was something different from the language of the will, that intention would not prevail, but that the language of the will must settle the rights of parties. The object of shewing that there was a deficiency in the assets dealt with by the will as a whole is really to affect this question of intention, and I would observe that if, in order to place the Court entirely in the position of the testator when he made his will, it is competent to lead evidence as to the amount of his estate at that date, it must, I think, be equally competent to lead counter evidence in order to shew that, although his estate was of that amount, he had great expectations that his estate would be considerably larger in the course of a few days or a few years during which he expected to live. The one class of evidence must be admitted as a counterpoise to the other. But the importance of such evidence and its real effect can be of very little consequence, if any, because of the provision in the Wills Act to which his Lordship has just referred, to the effect that under the statute the will speaks as at the date of the death, and the amount and nature of the estate must be regarded as at that date, and not at a date three or four years before, when the estate might have been different altogether. On these grounds I am entirely of opinion with the Lord Chancellor that the judgment ought to be as his Lordship has proposed.

LORD DAVEY. My Lords, notwithstanding Mr. Theobald's very able argument, I cannot bring myself to feel any doubt as to the construction of this will, nor do I think that any case has been made by the respondents for the admission of extrinsic evidence for the purpose of enabling us to construe it. On both those points I am quite satisfied with the judgment delivered by Rigby L.J. in the Court of Appeal, and I adopt the reasons which he has given. I need not, therefore, make

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any lengthened observations upon the case; but I wish in particular to call attention to two passages in the judgment of that learned Lord Justice. He says this (1): "The first point which I think it convenient to notice is the fundamental distinction between evidence simply explanatory of the words (of the will) themselves, and evidence sought to be applied to prove intention itself as an independent fact (Wigram, 3rd ed. pl. 10). This distinction must never be lost sight of. The great majority of the cases of explanatory evidence consisted of the ascertainment of persons and things insufficiently explained by the will itself. When I say that it has never been contended that a will bearing a definite construction can have another and different construction imposed upon it by extrinsic evidence, I by no means undertake to assert that in point of fact this has never been done. Before the publication of Sir James Wigram's treatise, there probably were, and subsequently there possibly may have been, instances of the kind: all such instances, however, must be attributable to the result of an unconscious, though illegitimate, yielding to almost necessary bias in favour of a particular intention, indicated or suggested by extrinsic facts, as distinguished from the explanatory effect of such facts on the words of the will under discussion." The learned Lord Justice adds in a later passage: "It must be borne in mind that a will is not ambiguous by reason only that it is difficult of construction. If it is finally held to bear a particular construction, that must govern its legal meaning, notwithstanding any difficulty that the Courts may have felt in arriving judicially at the construction; it is only ambiguous when, after full consideration, it is determined judicially that no interpretation can be given to it"—I will add what is apparently the meaning of the Lord Justice—without some explanation of the expressions used in it which are descriptive of the subjects of the bequests or of the persons to whom the bequests are made.

My Lords, like Rigby L.J., I will not undertake to say that no case is to be found (I do not pretend to have made an exhaustive search, but I am not aware of any case) in which extrinsic evidence has been admitted to enable the Courts to

(1) [1900] 2 Ch. 763, 764.

construe a difficult will where the words themselves require no interpretation, but the difficulty is only in the construction of the sentence in which the words occur. The cases cited by Mr. Theobald do not appear to me to bear a contrary character. They were all cases where the question was as to the meaning of an indefinite or uncertain description of persons or things.

And, my Lords, to admit such evidence as has been tendered in this case would, in my opinion, be contrary to s. 24 of the Wills Act, which bids us construe a will as if it were made immediately before the testator's death. Not only would it be contrary to that section, but in my opinion it would also be contrary to the general principles which guide the Courts in the construction of wills and of other instruments as well.

My Lords, I have already said that the gift in this will does not, in my opinion, present any difficulty of construction. No doubt the word "residue" is in itself a relative term; but in this case the testator has himself told us the meaning in which he uses the word "residue," and the subject-matter with reference to which the word "residue" is used, namely, it is to be the residue of the mortgage debts, after the payment of debts and funeral and testamentary expenses. Am I to change my opinion of the meaning of those words, which I think very plain, because I know that at the time when he made his will the mortgage debts formed the bulk of his property? I think not. Nor do I think I ought to admit that consideration to influence my opinion merely because other persons as well qualified, or better qualified than myself, have attached a different meaning to those words. It may be that the testator may have been imperfectly acquainted with the use of legal language; he may not have understood the legal effect of making a specific gift or what a specific gift was, and he may have used language the legal interpretation of which does not carry out the intentions that he had in his mind. I do not know whether that is so or not. But, whether that be so or not, of this I am quite clear, that that fact should not induce the Court to put a meaning on his words different from that which the Court judicially determines to be the meaning which they bear.

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My Lords, the difficulty which arises from departing from this plain, simple and well-founded rule of construction is illustrated by this very case. The consequence of holding that the words “residue after payment of” “debts and funeral” and testamentary expenses mean something different from what the testator has said has led to this extraordinary result—that the Court has felt itself constrained, having put that unnatural meaning upon the words which the testator has used, to determine that legacies which are *primâ facie* mere pecuniary legacies of 100*l.* or more—there are several pecuniary legacies of 100*l.*, 150*l.*, 1000*l.*, 750*l.*, and so forth—that those legacies, which are expressed in language as to the meaning of which no lawyer could possibly have any doubt, are to be held to be specific—that is, to be not what they say, a gift of 100*l.*, but a gift of an aliquot portion of a mortgage debt. My Lords, that is only an illustration of the danger of departing from what has been sometimes called the golden rule of construing every instrument according to the natural meaning which the words bear in the instrument in which you find them.

I am, therefore, of opinion with your Lordships that the judgment of the Court of Appeal should be reversed and the judgment of Stirling J. restored.

LORD BRAMPTON. My Lords, I so thoroughly concur in every word that was said by the Lord Chancellor in giving judgment just now, that I do not feel that I could usefully add one single word. His reasons for the judgment at which the House has arrived seem to me to be not only sound law, but extremely good sense. Therefore, I satisfy myself by concurring with that judgment. I think the judgment of Stirling J. ought to be restored and the judgment of the Court of Appeal reversed.

LORD ROBERTSON. My Lords, I understand and respectfully appreciate the view taken of this will in the Court of Appeal and ably supported by the learned counsel for the respondents. But I am entirely unable to see ambiguity in this will, for I find the subject of the gift to the canons to be expressly defined

in the words of the gift. I can see no relation in the word "residue" to the prior legacies. I see a direct relation to the debts, funeral expenses, and the expense of proving the will.

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*Order of the Court of Appeal reversed save in so far as it affirmed the order of Stirling J. ; Declared, that upon the true construction of the testator's will his undisposed of personal estate was liable for the payment of his debts and funeral and testamentary expenses, and the pecuniary legacies and annuity bequeathed by his will in exoneration of the specifically bequeathed mortgage debts : And it appearing that the undisposed of personal estate was insufficient for the payment of the testator's funeral and testamentary expenses and debts, and the pecuniary legacies and annuity, and the appellants agreeing that such deficiency should be made good out of the specifically bequeathed mortgage debts : And disclaiming all right to be recouped out of the specifically devised real estate ; Ordered, that the costs of all parties in the Chancery Division and in the Court of Appeal (including the costs directed by the order of the Court of Appeal to be paid by the appellants), and also the costs of all parties incurred in respect of the appeal to this House, be paid out of the undisposed of personal estate : Cause remitted to the Chancery Division.*

*Lords' Journals, November 28, 1901.*

Solicitors : *Withalls & Belton ; Blount, Lynch & Petre ; Collyer & Davis.*