ANGUILLA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 1 OF 1997

BETWEEN:

KATHERINE GUMBS

Appellant

and

JAMES T. ROGERS
[As Personal Representative in the estate of George Henworth Gumbs, Deceased]

Respondent

Before:

The Hon. Mr. C. M. Dennis Byron	Chief Justice [Ag.]
The Hon. Mr. Satrohan Singh	Justice of Appeal
The Hon. Mr. Albert N. J. Matthew	Justice of Appeal [Ag.]

Appearances:

Miss. J. Kentish for the Appellant
Mr. S. Froomkin Q.C., Mr. K. Lake and
Miss Y. Wallace for the Respondent

1998: May 20;
June 2.

Law of Succession – Interpretation of the will of an illiterate testator – Construction of certain devises of the will – According to one construction deceased will be held to have died intestate as to a portion of certain devised land, after a specific devise to appellant – Whether the devise is void for uncertainty – Question of whether some of the lands devised in the will were in fact beneficially owned by testator or whether he only held on trust – Application of the rule of construction "falsa demonstratio non nocet cum de corpore constat" – Whether extrinsic evidence should be admitted to explain the intent of the testator – **Hardwicke v Hardwicke** [1873] LR 16 E.Q. 168; **Travers v Blundell** [1877] 6 Ch 436 referred to – Presumption against intestacy – **Re Harrison, Turner v Hellard** [1885] 30 Ch 373 applied – Application of the maxim "id certum est quod certum reddi potest". Appeal dismissed.

JUDGMENT

MATTHEW J. A. [AG.]

The testator, George Henworth Gumbs was illiterate. With the assistance of a "bush" lawyer, Thomas Theophilus Rogers, he made a Will on August 4, 1973 consisting of eight devises. This case concerns the interpretation of two devises of the Will, namely the fourth devise which was a gift of his bush land to the testator's three children and the eighth devise which was a specific gift to the testator's granddaughter, Katherine Gumbs, the Appellant, of a piece of bush land. The Will is not very long and it is convenient to set it out in full. This is how the Will reads:

"Little Dicks
Anguilla
August 4th 1973

In the name of God Amen
I George Henwood Gumbs Labourer
Native Born of the above address and
at present Residing in the said
address and is of sound mind do
hereby revoke all wills and testament
I has ever made before this date.
I request that
after my funeral expenses and all just
debts is paid and satisfied
I bequeath my dwellinghouse with the land
around it into two equal shares to my two
daughters Elsie Gumbs and Edna
Armantrading
The Land on which my son, Bernel
house is I request that to be own by
him

The small lot of land south of Bernel
own I request that to be own by my
grand son Luther Gumbs.
All my bush land which is into two
division which is also situated in Little
Dicks I request for these two pieces of land
I request for them to be divide into
three equal shares between my three
children Elsie Gumbs Edna Armantrad-
ing and Bernel Gumbs.
I request that one half acre of Bottom

land situated in Little Dicks up in
the Upper Bottom to be own my grand daughter
Kathrine Gumbs I also request that my
daughter Elsie own a half acre which is
adjoining that of Katherine Gumbs own
I also request that my son Bernel Gumbs
own one quarter acre of land which is
also adjoining the acre which is for Elsie
and Kathrine in the said Bottom
I also request a piece of bush land
situated by my land to be own by my grand
daughter Kathrine Gumbs the said
piece of land is situated between my
land Bounding East with my land and
West with my brother Godwin land on
the North with my land and on the
South with my land.
I request that my three children Elsie
Edna and Bernel bear my funeral
expenses equally and that my body
be decently buried
I appoint James T. Rogers of Stony Ground
To be my Legal executor.

Sign by the Testator	)	his
In the presence of us	)	George Henwood X Gumbs
both at the same time	)	mark
who also in his	)	
presence and in that	)	
of each other have	)	
subscribed our names	)	
as witnesses	)	

sgd. James Rogers
sgd. Thomas M. Petty”

The testator died on December 21 1973. On September 20, 1988 the Appellant through her solicitor wrote to the Respondent who is the Executor of the Will asking him to take the necessary steps to administer the estate and vest her entitlement to her. Later the Appellant got other solicitors to act for her. In a letter written to the Executor by the new solicitors they recognized that the Executor had engaged Mr. Cecil Niles, land surveyor/planner, to partition the

estate and they were objecting to the portion of land identified by Mr. Niles as the Appellant's share. The solicitors suggested a meeting to resolve the issues amicably.

The evidence before the learned trial Judge revealed that the Parties got together in an attempt to resolve their differences but this failed. The Appellant then filed a suit against the Executor.

According to Cecil Niles' sketch the Appellant would be entitled to approximately 4 acres of land coming from the eighth devise. The Appellant's case according to her pleading is that the total area of land contained in Registration Section North Block 59017 B Parcel 1 would be approximately 60 acres. She says that on a proper construction of the eighth devise the Appellant was the only named beneficiary to receive an interest in the land contained in parcel 1, and so the Decedent died intestate as to the remainder of the lands contained in parcel 1 after the specific devise to the Appellant is taken.

The Appellant disagrees with the calculation of Cecil Niles and states that on a proper construction of the second specific devise [i.e. the eighth devise] the Appellant is entitled to approximately 20 acres of land. It follows mathematically that the testator would not have disposed of some 40 acres. But that is not all. The Appellant by paragraph 9 of her claim alleges that upon the intestacy she becomes entitled to a one-fourth share of the remainder of the lands.

The case for the Respondent denies that the Appellant is the only named beneficiary to receive interest in parcel 1 and he alleges that the testator's three children were specifically devised the remainder of land in parcel 1. As regards the Appellant's claim to the second specific devise the Respondent first alleges that the gift fails for uncertainty and in the alternative the second specific devise was an attempt to bequeath to the Appellant lands in which her father had a beneficial interest prior to his death.

The learned trial Judge made some useful observations on the Will which it is necessary to reiterate for a better understanding of the issues. I shall refer to three of them very briefly. The first is that some of the lands that were devised in the Will were not beneficially owned by the testator and that he held these lands on trust. After hearing Counsel on either side it seems to me that I can safely say that the lands in the first three devises and the lands in the fifth, sixth and seventh devises were not beneficially owned by the testator.

The land in the first three devises came out of parcel 27 which was registered in the name of Mary Gumbs, the testator's mother and the land in the fifth, sixth and seventh devises came out of parcel 19 which the testator also did not own.

The second observation relates to the types of land devised. The Will speaks of bush land and bottom land. The undisputed evidence was that bush land referred to lands which were rocky and unsuitable for cultivation while bottom land referred to the lands with a deep, fertile soil.

The last observation is that the testator's lands were not all contiguous. They were in different locations. Some of the land fell squarely in Little Dicks and that is perhaps the case in the first seven devises. The learned Judge found and I think it has been agreed by all that the testator had lands in Shoal Bay, and the eighth devise relates to land in Shoal Bay. Little Dicks and Shoal Bay are two different villages in Anguilla in close proximity. The learned trial Judge made a finding that the two villages lie side by side and they are separated only by a small incline called Nuncie Hill. In his judgment delivered on December 10, 1996 the learned trial Judge after hearing the Parties and upon examination of all the evidence found that in the fourth devise the testator intended to give to his three living children all of his bush lands and that the same referred to the lands comprised in lot 1 and block 1.

As regards the eighth devise the learned Judge found that the only credible interpretation of the gift to the Appellant is that she should receive the portion of land which was delineated on a sketch done by Mr. Cecil Niles and which portion of land was thereby shown to be comprised of approximately four acres.

The Appellant was not satisfied with the judgment and on January 31, 1997 she filed her notice of appeal alleging several grounds of appeal, no less than seven in all.

Before I go on to deal with the grounds of appeal I think I should advert to a passage of the judgment which throws some light on the different parcel or block numbers with which this case is concerned. The learned trial Judge said that the Plaintiff's case was that at the time of his death her grandfather had five different pieces of land; four pieces in Little Dicks and one piece in Shoal Bay. He found that the piece in Shoal Bay is registered as Block 1 of Parcel 59017B and the four pieces in Little Dicks are lots numbers 27, 30, 19 and 1 of parcel 59016B.

I am not able to discern the acreage of lot 27 as the land register for this parcel indicates that the acreage has not been determined but when one looks at the first three devises it cannot be imagined that the amount of land involved could be significant. The land register shows parcel 59016B 30 to consist of 1½ acres, parcel 59016B 19 to consist of 1¼ acres; and parcel 59016B 1 to consist of 7½ acres. Evidence was led that lot 19 represented bottom land.

I return to the Appellant's grounds of Appeal. The first two grounds can be taken together and they seem to be the main grounds of appeal. In short the first ground is that the learned trial Judge misdirected himself when he failed to give effect to the fourth devise as a devise of bush land in lot 30 and lot 1 and instead found that the said fourth devise was intended to be a disposal of land comprised in lot 1 and block 1 and in the process erred in law when

he applied the rule of construction " falsa demonstratio non nocet cum de corpore constat."

The second ground is that the learned Judge erred in law when he failed to give effect to every devise in the testator's Will and to give meaning and effect to all the words contained therein.

Learned Counsel for the Appellant submitted that the learned Judge found that the testator made devises of lots 30 and 1, that both were bush land and both were in Little Dicks and therefore he was under compulsion to construe the fourth devise as a disposition of lots 30 and 1 to his three children and extrinsic evidence was inadmissible to explain the intent of the testator.

The Respondent contends that by the fourth devise the testator intended to give all his bush land to his three children and that these bush lands were situated in two locations, one location in Little Dicks and the other location in Shoal Bay. They allege that there was a falsa demonstratio.

It has already been stated above that the first, second, third, fifth, sixth and seventh devises are in respect of lands which were not beneficially owned by the testator but they were lands of which he was trustee. Learned Counsel for the Respondent has pointed out that in respect of these lands the testator never said they were "my land"; and that he only refers to "my bush land" and "my land" in the fourth and eighth devises respectively when he is referring to land beneficially owned by himself. Learned Counsel submits that lot 30 is not the testator's land and cannot fit into the description of the fourth devise as being the testator's bush land.

The land register for parcel 59016B 30 indicates that when the register was first opened on June 29, 1976 Heirs of Mary Gumbs was the registered proprietor and since January 29, 1992 the registered proprietor has been Elsie Gumbs as Personal Representative of Mary Gumbs, deceased.

What is more crucial is that the cadastral survey for the entire island was done in or about 1975 long after the testator made his

Will. Block and parcel numbers can only have significance since the cadastral survey and the testator could not have anticipated that his two divisions of bush land would be comprehended by different lot numbers. We were shown a map of the area in Court. Block 1 in Shoal Bay was to the North and quite apart from lots 1 and lot 30 which were further South in Little Dicks.

It follows that the fourth devise when construed to give effect to the intention of the testator is not as clear as may be thought. The testator certainly has bush land which he owns in Little Dicks comprising 7½ acres. And he has bush land in Shoal Bay comprising 60 acres approximately. They are in two localities.

It is significant that no where in the Will does the testator mention the words "Shoal Bay" and this is a village close to where the testator lived and presumably known in his time. The Appellant's witness, a land surveyor, Johnny Rogers, admits that Shoal Bay is separate and different from Little Dicks. He says the land in Shoal Bay with which this case is concerned is pretty close to Little Dicks, somewhere near the border but he goes on to say there is no real border.

The land in block 1 in Shoal Bay has a large portion of bush land with an extent of about 60 acres and is by far the largest piece of land owned by the testator. It is the largest piece of land dealt with by the testator. This land is related to the eighth devise. The other portions of land mentioned in the devises apart from lot 1 which is 7½ acres are relatively small.

It seems unlikely that the testator who set about making a Will would intend to let at least 40 acres fall under intestacy. I am here adopting the view of James L. J. in Hardwicke v Hardwicke mentioned below. And Halsbury's Laws of England, Fourth Edition, Vol. 50, paragraph 440 speaks of the presumption against intestacy where the construction of a Will is doubtful as in this case.

The Appellant in order to avoid the uncertainty alleged by the Respondent in the pleadings and to perfect her bequest asks the

Court to insert the words “in Shoal Bay” in the eighth devise. That means the testator would need to have had in contemplation the devise of land in Shoal Bay to her but she states he ought not to have in contemplation a bequest of 40 acres of bush land in Shoal Bay to his three children.

In Re Harrison, TURNER V HELLARD 1885 30 Ch. 373 Lord Esher M.R. said.

> “There is one rule of construction, which to my mind is a golden rule, viz; that when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce – that he did not intend to die intestate when he has gone through the form of making a will. You ought, if, possible to read the will so as to lead to a testacy, not an intestacy. This is a golden rule.”

Applying the golden rule to the testator’s Will Saunders J found that in the fourth devise the testator intended to give his three living children all of his bush lands and that referred to the lands comprised in lot 1 and block 1.

The learned Judge by implication applied the rule of construction “falsa demonstratio non nocet cum de corpore constat”. In HARDWICKE V HARDWICKE 1873 L.R. 16 E.Q. 168 the testator devised “all that my share and interest in the lands known by the name of D, situate in the parish of K, now in the occupation of E”. The lands known as D included two small closes in the parish of L, but only accessible from the parish of K; also one close formerly in the same occupation as the other land, but at the date of the will and the death of the testatrix occupied by M. There was no residuary devise:-

Held, that these three closes passed under the devise. Lord Selborne, L.C. slated at page 175 -

> “It is perfectly certain that if all the terms of description fit some particular property, you cannot enlarge them by extrinsic evidence so as to exclude anything which any part of those terms does not accurately fit. On the other hand, I apprehend that if the words of description when examined do not fit with accuracy, and if there must be some modification

of some part of them in order to place a sensible construction on the will, then the whole thing must be looked at fairly in order to see what are the leading words of description, and what is the subordinate matter, and for this purpose evidence of extrinsic facts may be regarded."

And at page 177 –

"Therefore, although this case is one of more than ordinary difficulty, especially as you have in the subordinate part two inexact descriptions conjoined instead of only one, I think I am bound to hold that the principal subject described by the leading words is, all her interest in that estate which was called by the name of the *Dyffrydd* and the *Little Dyffrydd,* and that the error of description lies in the accessory words, namely, the words descriptive of situation, and the words descriptive of occupation, and that the whole passed."

Again in TRAVERS V BLUNDELL 1877 6 Ch. 436 there was a falsa demonstratio. In that case -

"A testator gave all that part of *Rigby's* estate purchased by him consisting of closes A., B., C., D., E., and F., with the timber and coal mines, to trustees in trust for his son J. O. for life, with remainder to the use of J. O.'s children as he should by deed or will appoint, and in default of appointment to the use of J. O.'s right heirs. J. O., by his will, after reciting the devise in his father's will (but without enumerating the closes), appointed all that part of the property devised by his father's will and therein described as that part of *Rigby's* estate purchased by his said father consisting of A., C., B., and F., with the timber, but not including the mines, to his two sons T. and J.; and he appointed the mines under the land which he had appointed to T. and J. to his four other children. The two omitted closes, D. and E., lay between the other four.

A special case having been filed to obtain the opinion of the court whether the two closes D. and E. passed under the appointment to T. and J.: -

Held (affirming the decision of the Master of the Rolls), that the corpus of the estate devised by the father was sufficiently designated in the son's will, that the enumeration of the four closes instead of the six was a *falsa demonstratio* which might be rejected; and that the whole of the six closes passed under the appointment."

The Master of the Rolls was of opinion that the two omitted closes did, notwithstanding such omission, pass the devise. Hence the appeal. James L. J. who delivered the judgment of the Court thought it was in the highest degree improbable that the testator should have intended to die without making an appointment of the two centre closes in his property.

The Executor stated in evidence that he understood the lands in the fourth devise to be the small rectangular portion in the South-West as well as the large portion to the North being 7½ acres and approximately 60 acres respectively. He was supported to some extent by Bernel Gumbs. The learned Judge was not impressed with the Appellant and her witnesses as much as he was with the witnesses for the Respondent.

The interpretation of the fourth devise which was accepted by the learned trial Judge does no injustice to the Appellant's interest in the eighth devise. The portion of land designated to her there has no specific measurement and is identifiable by reference to other lands of the testator to the East, North and South and land of the testator's brother Godwin to the West.

As regards the eighth devise the learned Judge said that the only credible interpretation of the gift to the Appellant is that she should receive the portion of lands which were delineated on a sketch done by Mr. Cecil Niles and which portion of land was shown to comprise of approximately four acres.

It is enough here to state that I do not agree with the contentions advanced by learned Counsel for the Appellant under grounds 1 and 2 of the appeal. I think the learned trial Judge came to the right conclusions.

The third ground states that the learned trial Judge failed properly to apply the maxim "id certum est quod certum reddi potest". The Appellant's case was that she was entitled to approximately 20 acres of land out of the 60 acres which comprised block 1 located in Shoal Bay. Although the Respondent at the

pleading stage of the case had alleged that the gift should fail for uncertainty, that was an alternative pleading and in any case the learned Judge found the Appellant was entitled to approximately 4 acres. There was nothing certain about the acreage in the Will. The Appellant had engaged a land surveyor who had been licensed for 7 years to carry out an assignment on her behalf. He used Cecil Niles' sketch to establish certain things and somebody else went to do the measurement. It is little wonder that the learned trial Judge said the evidence of Johnny Rogers was of marginal significance to the real points in issue. Further he was one of the Appellant's witnesses who did not impress the learned trial Judge as did the Respondent's witnesses.

There is nothing which was capable of being made certain which was not made certain. This ground of appeal fails.

The Appellant next complained about the learned trial Judge's finding that –

> " (i) None of the parties could speak with certainty as to how the testator acquired the lands he purported to give away by his will;

(ii) The parties had little or no documentary evidence to support their stories, falls against the weight of the evidence as it relates to the Plaintiff's claim in relation to block 1."

When the Appellant gave evidence she stated that she had seen a deed that her great grand father had purchased land at Shoal Bay. This deed was dated January 26, 1914. The acreage given was 12 acres more or less. She stated that she had also seen a document dated July 30, 1930 where her grand father had purchased lands at Shoal Bay from Edwin Harrigan measuring about 4 acres. From her cross-examination it appeared that she left Anguilla in 1964 when she was about 18 or 19 years old. That means the Appellant was born in 1945 or 1946.

When the Executor was cross-examined he stated that the Plaintiff's lawyer had shown him a receipt which indicated that the testator had bought some lands from Harrigan and he said that he had heard that fact but had not seen any documents before that day.

In his judgment the learned Judge wrote –

"The Plaintiff and the Defendant gave a great deal of evidence as to how the testator became owner or occupier of the lands which he purported to give away by his Will. The evidence on this point, on both sides, was confusing and tedious. What is clear from hearing all of it is that none of the parties could speak with certainty as to how the testator acquired these lands and which portions were personally owned by him and which pieces he held merely as trustee. The witnesses on both sides, had little, or no documentary evidence to support their stories and they relied on their memory of events which occurred many years ago".

This ground of appeal is a bit vague. Nothing is really said about the first finding. As regards the second finding the Appellant is probably contending that she had documents to support her story

as it relates to her claim in relation to block 1. Be that as it may I do not see how that takes the Appellant's case further.

The last ground of appeal that I would address is the one that the learned trial Judge misconstrued the submission of Counsel for the Plaintiff made on the pleading point and accordingly, misdirected himself when he failed properly to evaluate the evidence and so determine the area of land which the testator held as trustee for his deceased son Leon as pleaded in paragraph 7 of the defence. In his judgment the learned trial Judge stated that all the contentions of the Appellant in her amended reply appeared to be in order but that Counsel for the Appellant fell into error by assuming that the land referred to in paragraph 7 of the defence comprised all of block 1. He said he did not interpret paragraph 7 of the defence as stating or in any manner suggesting that all of block 1 was being held by the testator for his son, Leon Gumbs.

I do not see anything in paragraph 7 of the defence which could give one the impression that anything else but the land comprising the second devise to the Appellant is the matter for concern. Neither do I see anything in the reply and I refer specifically to paragraph 1.B which could widen the scope of inquiry.

But even though it could be said the learned trial Judge misconstrued the submission this had no bearing on the determination of the area of land falling to the Appellant under the eighth devise.

I would therefore dismiss the appeal with costs to the Respondent to be taxed, if not agreed.

A.N. J. MATTHEW
Justice of Appeal [Ag.]

I Concur.

C. M. D. BYRON
Chief Justice [Ag.]

I Concur.

SATROHAN SINGH
Justice of Appeal