

Present: Pereira J. and Ennis J.

1914.

JAYAWARDENE v. JAYASINGHE.

99—D. C. Colombo, 4,654.

Patent ambiguity—Extraneous evidence—Language of last will not strictly grammatical—Intention of testator.

Extraneous evidence is not admissible to explain a patent ambiguity in the words of a will. Where the language of a will is not strictly grammatical, the meaning to be given to it should be consonant with what the context shows the testator intended. And so where in one clause of a will it was provided that the executor should sell all the movable and immovable property of the testator and call in and collect all "outstanding moneys," and later in the will the testator made reference to the estate being (present tense) worth a certain sum,—

Held, that the reference was to the whole estate that the executor would have to sell and call in and collect, that is to say, to the estate as at the date of the death of the testator, and not to the estate as at the date of the will.

THE following portions of the last will are material to this report:—

3. It is my will and desire that my executors hereinbefore named shall cause all my movable and immovable property, whatsoever and wheresoever the same may be, whether in expectancy, reversionary, or otherwise, to be well advertised in the local papers for at least a month and then sold by a good and reliable auctioneer by public sale.

4. All my outstanding moneys shall be called in and collected. It is my desire that the moneys so realized from the sale of my immovable property as well as from the sale of my movable property, together with the moneys collected, shall, subject to the payment of all my just and lawful debts and testamentary expenses, be divided in the following manner, to wit:—

5. The sum of Rs. 15,000 is my approximate value of my estate, inclusive of jewellery and other articles belonging to me. In case my estate is worth more, then the legacies above mentioned shall be proportionately increased, and in case it is less, the legacies shall be proportionately decreased.

Bawa, K.C., and F. H. B. Koch, for appellant.

A. St. V. Jayewardene, for legatees.

Samarawickreme, for executors, respondents.

Cur. adv. vult.

November 7, 1914. PEREIRA J.—

In this case the question is whether the last will of John Cornelius Jayasinghe is to be deemed to apply to the property that belonged

1914.
 FERREIRA J.
 Jayawardene
 v.
 Jayasinghe

to the testator at the date of the will, or to the property that belonged to him at the time of his death. As a general rule, a will speaks as at the date of the death of the testator, but it is said that in the present case there is sufficient in the words used in the will to indicate that in paragraph 4 at least (I have numbered the paragraphs in red pencil for convenience of reference) the word "estate" is used to imply the estate of the testator at the date of the making of the will. The District Judge has allowed extrinsic evidence to be led to explain the meaning of paragraph 4, but in my opinion that course was altogether unnecessary, and, indeed, not justified by law. If there is at all an ambiguity, in the clause, it is not a latent but a patent ambiguity, and as regards the latter, the rule of law is *ambiguitas verborum patens nulla verificatione excluditur*. The subject is treated of in sections 93 to 97 of our Evidence Ordinance. The difficulty in the interpretation of clause 4 of the will really lies in its bad grammar—bad in view of the intention of the testator to be gathered from the context—rather than in the ambiguity of any expression used, and as observed by De Villiers C.J. in the case of *De Jager v. De Jager*¹ "where the language in a will is not strictly grammatical, one should attach that meaning to it which it is quite clear from the context that the testator attached to it." Let us examine the context. Clause 3 of the will provides that the executors shall cause "all the movable and immovable property of the testator, wheresoever the same may be whether in expectancy, reversionary, or otherwise, to be advertised and sold," and that all "outstanding moneys shall be called in and collected"; and then the testator proceeds to say that he desires that the "moneys so realized" should be divided among certain named devisees. It is manifest that by the expression "moneys so realized," he meant the moneys realized in the manner provided in paragraph 3, in other words, moneys realized by the sale of the whole estate that he would die possessed of. This much was not contested by the respondent's counsel. The total amount of the so-called legacies was Rs. 150,000. That being so, when, in clause 4, the testator valued his estate at the same sum, and provided for the contingency of the estate being worth more or less, it is clear that the "estate" that he there referred to was the selfsame estate that he dealt with by paragraph 3. The word "is" in the sentence "in case my estate is worth more" is a grammatical error (common enough in the country) for "be," meaning "shall be" or "should be," and it should not be allowed to defeat the intention of the testator to be gathered from the context.

For these reasons I would allow the appeal with costs.

ENNIS J.—I agree.

Appeal allowed.

¹ 1 A. C. R. South Africa 449.