NOTES

Deluded Testators and Re Bohrmann Estate

Re Bohrmann Estate [1] is probably the only English or Canadian decision that invalidates a legacy affected by a specific delusion about the legatee but grants probate of the rest of the will.[2]

Dr. Cecil Wright has recorded his conviction that the course taken was wrong.[3] He would have held the whole will bad. Macdonell & Sheard's *Probate Practice* [4] has adopted his view and cites *Fulton* v. *Andrew* [5] as confirming it. This article will however contend that *Re Bohrmann* was right on the point questioned, though also that the decision was wrong on another point not raised by Dr. Wright or the text-writers.

Re Bohrmann is inadequately reported, the only statement of facts being that made in Langton, J.'s reasons, which are vague on material points. The judge seems to indicate that Clause 6 of Bohrmann's will left the residue to "charities in England"; [6] the fourth codicil stated that Clause 6 of the will should be construed as if the word "England" was deleted and replaced by "United States of America".[7] It seems a necessary inference that no charities were named, but the executors were empowered to select them. An action to prove in solemn form was contested by the next of kin, who claimed there was lack of testamentary capacity, so that an intestacy resulted.

At the trial there was much evidence of the testator's eccentricities. The court held that he had general testamentary capacity,

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[1] [1938] 1 All E.R. 271, 158 L.T. 180, 82 Sol. Jo. 176.

[2] Two other cases of partial probate may be noticed. In *Billinghurst* v. *Vickers*, (1810), Phillimore 187, the first part of a will written by the testator was probated, but a later part added by a legatee was rejected because the court was not satisfied the testator knew and approved of the contents. In *Wood* v. *Wood*, (1811), Phillimore 357, the court in probating a will struck out an addition to the will made after death.

[3] Commentary, (1938), 16 Can. Bar Rev. 405, at p. 409.

[4] (Carswell, 1953), at p. 23.

[5] (1875), L.R. 7 H.L. 448.

[6] [1938] 1 All E.R. 271, at p. 281.

[7] *Ibid.*

yet that he had an insane delusion against the London County Council which caused the substitution made in the fourth codicil. In the result, the court ruled that the change was void, but that the rest of the codicil and the will should stand, with Clause 6 in its original form. Dr. Wright disagreed because he claimed that the deletion was put on the ground of "testamentary incapacity",[8] which should have invalidated the whole will.

Since Langton, J. had expressly negatived general incapacity, Dr. Wright's reasoning seems to revert to the view expressed in two early cases, of which Cockburn, C.J. said in *Banks* v. *Goodfellow*: [9]

> It is true that in the case of *Waring* v. *Waring*[10] the Judicial Committee of the Privy Council, and in the recent case of *Smith* v *Tebbitt*[11] Lord Penzance in the Court of Probate, have laid down a doctrine according to which any degree of mental unsoundness, however slight, and however unconnected with the testamentary disposition in question, have been held fatal to the testamentary capacity of the testator.

Cockburn, C.J. added that those pronouncements were *obiter;* they were declared to be bad law, not only in *Banks* v. *Goodfellow*[12] and *Smee* v. *Smee,*[13] but also in such Canadian cases as *McIntee* v. *McIntee,*[14] *Skinner* v. *Farquharson*[15] and *Paré* v. *Cusson.*[16] So far as Bohrmann's will was invalidated, the ground was not incapacity, but specific delusion, which is quite compatible with general capacity.

It may be questioned whether specific delusion involves incapacity, even *ad hoc;* but assuming *ad argumentum* that it does, there is no reason for making a particular bad disposition invalidate any other in the will not the product of delusion. Dr. Wright's conclusion that even dispositions not caused by delusion must also fall does not follow at all. Of course, in many cases proof of delusion results in the court being prepared to hold that a person who was the subject of the testator's delusion must have suffered from it,[17]

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[8] (1938), 16 Can. Bar Rev. 405, at p. 409.
[9] (1870), L.R. 5 Q.B. 549, at p. 556.
[10] (1848), 6 Moo. P. C. 341.
[11] (1867), L.R. 1 P. & M. 398.
[12] (1870), L.R. 5 Q.B. 549, at p. 559.
[13] (1879), 5 P.D. 84, at pp. 90, 91.
[14] (1910), 22 O.L.R. 241.
[15] (1902), 32 S.C.R. 58, at p. 85.
[16] [1921] 2 W.W.R. 11 (Man. C.A.).
[17] It seems unnecessary to discuss the conflict between two lines of authority, one holding that delusion concerning the subject of a disposition only invali-

though it cannot be said how much he suffered, as where he had strong claims upon the testator's bounty, but the will left him nothing or an inadequate benefit. Then, since the court cannot improve matters by deletion from the will, it perforce sets aside the whole,[18] so that the complainant profits under intestacy or a revoked will. But when deletion of that part of a will affected by delusion can give adequate remedy, then the court deletes, and it cannot justify setting aside the will.

Dr. Wright seems to have been misled by fixing his attention on wills of the first type, where he should have looked to the second. Bohrmann's will seems clearly to fall into the second category. Deletion gave complete relief and the whole will could not have been rationally annuled.[19]

As has been said, Macdonell & Sheard invoke *Fulton* v. *Andrew*[20] as supporting Dr. Wright's view, which they adopt. But that decision does not really support them or Dr. Wright. There the will propounded was attacked on two grounds. First, lack of testamentary capacity due to drunkenness and brain disease; and, secondly, that the testator did not know and approve of the residuary clause. A special verdict found that the testator had general capacity, but that he did not know and approve of the residuary clause.[21] The House of Lords, reversing the probate court, held that probate should issue, but excluding the residuary clause, so that there was resulting intestacy as to the residue.

Macdonell & Sheard argue that *Fulton* v. *Andrew* held it absurd

> ... that when the dispositions in question are all contained in the same document, incapacity could invalidate some of them, but leave the others unaffected.

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dates when it is proved that the delusion actually produces that disposition, the other holding that the delusion invalidates the disposition when it appears to have been calculated to affect the disposition and its influence is not disproved.

[18] There are many instances of which one may find examples in *Battan Singh* v. *Amirchand*, [1948] A.C. 161; *Smee* v. *Smee*, (1879), 5 P.D. 84; *Ouderkirk* v. *Ouderkirk*, [1936] S.C.R. 58; *Timbury* v. *Coffee*, (1941), 66 C.L.R. 277.

[19] One may well wonder whether Dr. Wright's general attitude toward will-making was not unorthodox. Thus he asks [(1938), 16 Can. Bar Rev. 405, at p. 407]:

> Why should the courts lend their assistance to supporting dispositions of persons devoid of social instincts?

Not many of the legal profession would concur in the attitude that reveals.

[20] (1875), L.R. 7 H.L. 448.

[21] *Ibid.*, at p. 454.

They comment:

> That view it is submitted is the correct one, and *Re Bohrmann* must be regarded as wrongly decided.[22]

Fulton v. *Andrew* actually held that part of the will (the residuary clause) was invalidated, yet the other parts were unaffected. Moreover, the effect of the decision is not what is suggested. It did not turn on incapacity, which was expressly negatived, but on the testator's not knowing or approving of the clause invalidated. *Re Bohrmann* is perfectly consistent with that decision.

(i)

Though the objections to *Re Bohrmann* considered above seem to have been unfounded, it is submitted that the decision was otherwise wrong in that:

(1) it gave effect to objections of delusion that were never in issue in the action;

(2) the objections given effect to were objections that no one had a *locus standi* to raise.

As has been said, Bohrmann's will was contested, not by English charities, whose identities were still unascertained, but only by a next of kin. He complained, not of Clause 6, nor of the change in Clause 6 by codicil, but of the whole will. He set up not a delusion that Langton, J., found, but that the testator had no testamentary capacity. He claimed there was an intestacy.

Langton, J., found for the testator's capacity, which was the only issue raised, but held part of the fourth codicil to be bad for delusion, which had not been pleaded. There was actually no one before the court who had any interest in pleading the delusion. Seemingly no English charities could get before the court, since none had been given a status by the executors having selected them. Probably the situation could only have been met regularly by the Attorney-General's intervening on behalf of unascertained charities and raising objections to the will. The actual situation however was that the only parties before the court were the executors and the next of kin, and no issue had been raised except general testamentary incapacity.

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[22] Macdonell & Sheard, *op. cit.*, n. 4, at p. 23.

Practice in probate suits requires opponents of a will to specify particular instances of delusion.[23] Earlier, though instances did not need to be specified,[24] delusion still had to be pleaded; and there seems to be no ground on which a probate court could justify invalidating a will for delusions not pleaded, much less for delusion that no party sets up even informally, but which is merely revealed incidentally in the evidence.

(ii)

The second objection to *Re Bohrmann* is that not only was delusion never in issue, but that there was no one who could have put it in issue. No one had any *locus standi.* And that was not only because no charities had been identified. There is little direct authority on who can set up delusion of a testator, other than general lunacy. But it will be submitted that a *locus standi* to put delusion in issue requires that:

(1) the delusion must be one about the complainant; and

(2) the complainant must be someone to whom the testator owed a testamentary duty.

(iii)

The books say little on what subject a delusion must relate to before it can be made ground for attacking a will. But principle seems to require that the delusion must have been one about the complainant, as an example will show.

Suppose X and Y are the next of kin of Z. Z has an insane delusion about Y but none about X. Z's will leaves nothing to either X or Y. Y refuses to attack the will, but X, wishing to establish an intestacy, sues to invalidate the will because of the delusion, Y declining to join as a party. Y could have set aside

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[23] See *Re Shrewsbury, McLeod* v. *Shrewsbury,* [1922] P. 112, a decision on the former English 0.19 R. 25A, which has been adopted in some provinces. The English rule is now 0.18 R.12 (I) (b), which requires particulars of "disorder or disability of mind".

[24] The decisions in *Salisbury* v. *Nugent,* (1883), 9 P.D. 23 and *Hankinson* v. *Birmingham,* (1883), 9 P.D. 62, upon an earlier rule, though they held that particular acts, relied on to prove pleas of undue influence or incapacity need not be specified, never questioned that those pleas themselves must be expressly raised. 0.19 R.25A, which dealt with delusion, expressly called for giving specific instances.

the whole will, and then X would have benefited as to half the estate. But it seems unarguable that X can capitalize on a wrong to Y, which Y will not complain of. That wrong is none of X's business, and his action should fail.

Re Bohrmann seems somewhat analogous. The delusion was not set up by any party. Those who were given relief against it were unascertained English charities. Langton, J., treated the delusion as one about them, though his reasoning was vague; actually, the delusion was directed against the London County Council. The only ground that existed for identifying Council and charities was that the Council were expropriating Bohrmann's land to build a hospital. Thus, particularly in view of the charities' being unidentified, their connection with the Council was about as tenuous as possible, and Mr. Justice Langton's ruling against the fourth codicil for the benefit of the charities seems questionable on several counts.

(iv)

Locus standi to attack a will for delusion, while requiring the delusion to have been one about the complainant, appears to invoke other more complicated factors too. One problem is this: are all persons on the same footing for attacking a will who have deprived of benefits by the testator's delusions about them? If not, what distinctions should be drawn? Inherent in that problem is the question: what in law constitutes a deprivation? The answer seems inevitable that something in the nature of a "right" must be taken away.

There are authoritative rulings that the persons who would take upon an intestacy can only be deprived by a valid will.[25] They can contest any will that they can show to be legally objectionable. But can any person not a next of kin complain about being deprived by a deluded testator, even one deluded about him? One not a next of kin can only hope to benefit through a will. If there is only one will, he cannot benefit by having it set aside. And since he cannot benefit, attack by him on the will can only be vexatious, and the Court should hold that he has no *locus standi.* Where a complainant about delusion had a valid first will giving him a legacy, but a second will or a codicil tainted by delusion

[25] *Houston* v. *Burns,* [1918] A.C. 337, at p. 342; *A.-G.* v. *National Provincial Bank,* [1924] A.C. 262, at p. 268.

about him revoked the legacy, then his claim of unlawful deprivation becomes more plausible, though he may be a stranger in blood. But if unlawful deprivation involves the taking away of some right, does this stranger in blood lose any "right"? Is he in the same position as a next of kin who loses a legacy in the same way?

It is submitted that there exists a basic difference: When someone like a son is given benefits under a wholly-sane testator's will, but those benefits are later revoked through insane delusion about the son, does not the son's right to attack the revocation arise because he is a son, rather than because of the earlier legacy? The mere will of a living testator gives a legatee no vested rights.

The right to complain of dispositions caused by delusion has been several times judicially said to be measured by the extent of the testamentary duty.[26] That is, the disposition is vulnerable if the testator thereby infringed a duty to benefit the complainant. But it is another matter where a legacy revoked was a mere matter of generosity in the first place. There the testator should be as free to take away as to give, and the legatee should have no status to complain, even of specific delusion.

That principle makes sense, but how far will it extend? There are statutes that indirectly restrict the disinheriting of spouses and children,[27] but they do not directly invalidate wills. They permit Courts as a matter of discretion to vary wills within narrow limits. But apart from such a statute, testators are not bound to leave anything to anybody; [28] the testamentary duty that exists is moral only.

Ordinarily the Court does not try to measure moral duties; [29] but where it acts upon them, it must perforce give some precision

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[26] *Banks* v. *Goodfellow*, (1870), L.R. 5 Q.B. 549, at p. 565: "claims to which he ought to give effect"; and p. 569: "claims upon his regard and bounty"; *Battan Singh* v. *Amirchand*, [1948] A.C. 161, at p. 170; *Harwood* v. *Baker*, (1840), 3 Moo. P.C. 282. *Re Bohrmann* seems to be inconsistent with the principle of those decisions.

[27] These are variations on the original New Zealand *Testator's Family Maintenance Act, 1911*; e.g., the British Columbia Act of that name, R.S.B.C. 1960, c. 378; the Ontario *Dependants Relief Act*, R.S.O. 1960, c. 104; the English *Inheritance (Family Provision) Act, 1938*, I & II Geo. 6, c. 45.

[28] *Banks* v. *Goodfellow*, (1870), L.R. 5 Q.B. 549, at pp. 563, 564; *Boughton* v. *Knight*, (1873), L.R. 3 P. & D. 64, at p. 66.

[29] A sane testator may not only disinherit all relatives, but do so from the unworthiest motives: *Boughton* v. *Knight*, (1873), L.R. 3 P. & D. 64, at p. 66; *Hart* v. *Tulk*, (1852), 2 D.M. & G. 300, at p. 313; in *Beal* v. *Henri*, [1950] O.R. 780 (C.A.), the Court upheld a will which left all the estate to a mistress and an ex-mistress, because the wife and children were ignored owing to estrangement, not to delusion.

to the concept. In practice the Courts have not gone beyond recognizing a testamentary duty to "near relatives",[30] and probably there is no precedent that recognizes a duty to relatives more remote than nephews and nieces.[31] There can undoubtedly be cases where a stranger in blood would have stronger moral claims to a testator's bounty than any relative. The stranger may have reared the testator from childhood when all relatives neglected him. The testator may have been a physical wreck who owed everything to the stranger and nothing to relatives. Some *dicta* in *Banks* v. *Goodfellow*,[32] *Smee* v. *Smee*[33] and *Burdett* v. *Thompson*[34] hint obliquely that a stranger in blood might have a moral claim that could invalidate a will that ignored him owing to delusion. But all those hints are *obiter*, and there seems to be no real authority for the proposition that others than relatives (or spouses) can have a legal complaint that a testator's delusion deprived them of benefits.

(v)

There remains the question how far the Courts will inquire whether a testator's leaving little or nothing to a near relative is due to delusion. There is a strong decision that a testator has no testamentary duty toward a son from whom he has been long estranged. They are in effect strangers, and he need not leave the son anything.[35] Absence of duty implies that it should make no difference if the testator had an insane delusion about such a son.[36]

But this seems to be a field in which there is a dearth of authority on how far a testator's delusion is relevant. Suppose a

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[30] See cases cited in footnote one. The term "relatives" of course includes spouses, who are statutory next of kin. The duty has no operation as against wholly sane testators.

[31] *Battan Singh* v. *Amirchand*, [1948] A.C. 161, at p. 170; and *Harwood* v. *Baker*, (1840), 3 Moo. P.C. 282, at pp. 304, 313.

[32] (1870), L.R. 5 Q.B. 549, at p. 564.

[33] (1829), 5 P.D. 84, at p. 92: "those who by personal relationship or otherwise had claims upon him".

[34] (1873), L.R. 3 P. & D. 64, at p. 73: "persons who by nature or through other circumstances, may be supposed to have claims on the testator's bounty".

[35] *Pontifical Society for the Propagation of the Faith* v. *Scales*, (1962), 109 C.L.R. 9. The main judgment was given by Dixon, C.J., whose reputation as a lawyer stood high, without, as well as within, Australia.

[36] Delusion was not set up in the *Pontifical* case, though as the report shows, the testator went to some length to publicize his belief that the son was illegitimate, though the Court found that allegation to be unfounded.

son has always had a bad record, and is even in gaol at the time his father makes a will that leaves him nothing. Can the son attack the will and claim an intestacy because the father is shown to have had a delusion which imputed to the son imaginary misdeeds over and above those actually committed? If not, how bad must his record be to make the delusion immaterial? If the son can set up the delusion in spite of his own bad record, is the extent of his turpitude wholly irrelevant? Should the Courts inquire whether the son's record would justify a wholly sane father in disinheriting him? Or should they consider that a proved delusion must always invalidate every will? If the Courts try to discover whether the son's record or the testator's delusion is the real cause of the disinheritance, how far are they to go? Are they to rely on the testator's declarations as to what factors entered into his will? Cases could easily arise where the testator's motives were undiscoverable; where would the onus be then? The decisions to date seem to furnish no answers.

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