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WILLS—LATENT AMBIGUITY—INTENTION OF TESTATOR—One W. R. Meredith died leaving a will setting out the following items: "The balance of my property of every kind, character, and description, real and personal, I will and bequeath in fee simple to my first and my second cousins living at my death. . . ." There are 15 first cousins and 136 second cousins and according to ancestry they were divided into five groups. The plaintiff, in a suit to partition the property, attacked the will, contending that the testator meant only the first and second cousins of the Meredith group. The lower court heard testimony concerning the testator's intention but held against plaintiff because there was no ambiguity on the face of the will. *Held*, affirmed. There were parties fulfilling the description of the beneficiaries both at the time of making and death; and there is no ambiguity in the will. Parol evidence to vary the express language of a will is inadmissible. *Rodarmel v. Gwinnup.* Appellate Court of Indiana, 1930, 173 N. E. 327.

On the principal point the decision is easily sustained. There was no ambiguity, either latent or patent. The words used had a clear and definite meaning, and actually referred to individuals who could be identified with-

out trouble from the language used. What is really involved here is the parol evidence rule. The statute on wills requires that a testamentary disposition of property be made only in a written instrument, executed with certain formalities. Burns 3452 (1926). To allow a disposition of the property in a manner contrary to the expressed intention of the testator as evidenced by his written will, is to give effect to an oral testamentary disposition of property. This, the statute of wills and the parol evidence rule prohibit. *Vestal v. Garret,* 197 Ill. 398, 64 N. E. 345; *Patė v. Bushong,* 161 Ind. 533, 69 N. E. 291; *Grimes' Executors v. Harmon,* 35 Ind. 198, 254; *Judy v. Gilbert,* 77 Ind. 96, 98; *Sturgis v. Work,* 122 Ind. 134; *McAlister v. Butterfield,* 31 Ind. 25, 28; Cf. *Johnson v. Johnson,* 128 Ind. 93; and *Pate v. Bushong,* 161 Ind. 532, 69 N. E. 291, where the wills were held to be ambiguous and subject to parol evidence.

It will be noticed that in this case the will was attacked in an action for the partition of the property. It is suggested that it might have been successfully attacked in an action to contest the will. The contention of the plaintiffs here really was that a part of the will was induced or executed by mistake and not that the language used was ambiguous. The distinction is between inadequately expressing an intention, and in not intending what was plainly expressed. If it is the latter, and the reason inducing the use of the language was some mistake on the part of the testator, then the fact of mistake may become immaterial. That is, mistake if it is material goes to the *animus testandi,* just as does fraud or undue influence. The result is that the part of the will induced or executed by mistake is not an expression of a testamentary intention by the testator. In other words, the intention to make a will must be one which is uninfluenced by fraud, undue influence, or mistake. Originally courts refused to recognize the fact of mistake in the inducement as going to the *animus testandi; Iddings v. Iddings,* (Penn.) 7 Serg. & R., III; *Mitchell v. Gard,* 3 Sev. & Tr. 75; *Shadbolt v. Waugh,* 3 Hagg, 573; *Barker v. Somins,* 110 Mass. 477. 488, 489, although it was always the law that a mistake in the execution destroyed the *animus testandi. In Re Meyers' Estate,* Pro. Div. (1908) 353; *In Re Goods of Hunt,* L. R. 3 P. & D. 250 (1875); *Nelson v. McDonald,* 61 Hun. 406, 16 N. Y. S. 273; *Hildreth v. Marshall,* 51 N. J. Eq. 241, 27 Atl. 465.

In more recent years a mistake which actually induces a testamentary disposition of the property has been held to destroy the *animus testandi.* Earlier English cases allowed evidence of mistake in the inducement only if it was proved that the testator had not read the will; and then only if the mistake could be corrected by striking out a part of the will. *Harter v. Harter* (1873) L. R., 3 P. D. 11; *In Re Goods of Boehm,* Pro. Div. (1897) 247; *In Re Goods of Bushel,* 13 P. & D. 7 (1887).

But the first requirement has now been abandoned in England, and evidence of mistake may be received even though the testator has read the will. *Morrel v. Morrel,* Pro. Div. 7 P. & D. 68, (1882). In this country the courts have usually not made that distinction as is shown by the leading case of *Patch v. White,* 117 U. S. 210, 6 Sup. Ct. 617, 20 L. Ed. 860. And apparently they have not limited the doctrine to the remedy of striking out. *Bohler v. Hicks,* 120 Ga. 800, 48 S. E. 306, *Grimes Exec. v. Harmon,* 35 Ind. 198, 254. The law of mistake in the inducement of a will is in some confusion, but the tendency seems to be to give it the same latitude as is given

in the law of contracts. The remedy, of course, is different. A contract may be reformed for mistake; but a court of equity can not reform a will. *Dennis v. Holsapple*, 148 Ind. 207, 47 N. E. 631; *Sherwood v. Sherwood*, 45 Wisc. 357; *Barnes v. Bartlett*, 47 Ind. 98. But a will may be contested on the grounds of mistake. Section 3485 Burns, 1926. From the rule of interpretation stated in *Kenworth v. Williams*, 5 Ind. 375, mistake comes within the contemplation of the statute.

In the instant case the question could not be raised in the partition suit. The will had been probated, and until set aside in whole or in part by an action to contest, it stood as the testamentary disposition of the testator's property, and the decree admitting the will to probate would be *res judicata* on the point. *Jones v. Rhodes*, 74 Ind. 510; *Stocky v. Watkins*, 112 Ga. 268; *Winslow v. Donnely*, 119 Ind. 565, 22 N. E. 13; *Van Savingham v. Hartman*, 77 Ind. App. 474, 130 N. E. 138; *In Re Pearson's Estate*, 196 Cal. 294, 237 Pac. 744. *In Re Davis' Estate*, 151 Cal. 319, 86 Pac. 183, 90 Pac. 711, is a case squarely in point as to the facts and the holding upon the point above raised. But an action to contest would be a direct attack. Whether it would have been effective in the instant case, would depend on the exact contention of the Plaintiff, and as to how far the courts in Indiana are going to go in the matter of mistake. If for example the contention had been that "second cousins" had been included by mistake, and that the testator intended only the first cousins to take, although there is apparently no Indiana case directly deciding the point, there is abundant authority in other jurisdictions for a successful contest of the will as to the phrase "second cousins" for the purpose of striking it out.

If the contention were that the testator really intended that only certain groups of his second cousins should take, and that by mistake he included all, the situation is more difficult. It has been met, however, by striking out the word "second," and then allowing parol evidence to explain the resulting ambiguity of "——— Cousins." *Patch v. White, supra*, is followed by most jurisdictions upon this point. The explanation of the ambiguity could be made in a subsequent partition suit, and certainly could be made in an action brought for a construction of the will. In fact, however, the Indiana Court has on at least one occasion reached this result by calling a description ambiguous which was not ambiguous. See, *Pate v. Bushong*, 161 Ind. 532, 69 N. E. 291.

J. B. E.