

ROYAL COURT  
(Samedi Division)

24.

31st January, 1996.

Before: The Deputy Bailiff, and Jurats  
Gruchy and Orchard.

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Representation of Brenda Young,  
widow of Bryan Michael Hewett

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Advocate M. J. O'Connell for Mrs. B. Young.  
Advocate P. Matthews for the Crown.

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JUDGMENT.

**THE DEPUTY BAILIFF:** On Friday, 26th January, a representation was made before the Samedi Court for the registration of a will of real estate in unusual circumstances.

5 On 22nd December, 1995, when the matter first came before Court as an *ex parte* representation, this Court ordered that the Attorney General be convened as *amicus curiae*.

10 We have made the Order requested but we now set out our reasons for so doing.

15 The unusual circumstances came about because a will of real estate made by the testator, Bryan Michael Hewett, on 15th November, 1978, has been lost. The terms of the will are in every respect unexceptional. The testator devised all his realty to his wife or if she should not survive him, then to his adopted daughter.

20 The will was witnessed in due form by Advocate B.A.C. Yandell and by his secretary. Sadly, of course, Advocate Yandell has died and the will apparently came into the hands of Bailhache Labesse and Advocate Lang of that firm.

On 4th August, 1994, Advocate Lang, by letter, acknowledged receipt of the will, having in or around July, 1994, received instructions from a professional contact, on behalf of the widow of the deceased, to register it.

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We have carefully considered the affidavit of Advocate Lang and it is quite clear that the most thorough searches for the original will have failed completely to discover it. Advocate Lang's affidavit leaves us in no doubt that the photocopy which has been forwarded to us is an authentic and accurate copy of the last will. The affidavit of Advocate Lang was accompanied by two affidavits. One is made by Tracey Louise Hewett, the adopted daughter of the deceased. Paragraph 3 of Miss Hewett's affidavit is illuminating. It reads:-

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*"I have been told that I might wish to take independent legal advice in connection with this matter but I have decided against doing so because it seems perfectly clear to me what my father's intentions were and I have absolutely no wish to interfere with these, even if I thought I had a basis to do so, which I do not".*

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We also have an affidavit from the deceased's widow, Mrs. Brenda Hewett, saying that she, too, has carried out extensive searches to attempt to discover the original will without success and stating that she is confident that the photocopy is a photocopy of the original.

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Advocate Matthews, for the Crown, prepared some observations, which we are happy to adopt.

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Article 12 of the "Loi (1851) sur les testaments d'immeubles" (the Loi) provides, *inter alia*, that:

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*"L'Enregistreur des Contrats enregistrera les Testaments contenant des legs d'immeubles, et les décisions judiciaires qui auront prononcé sur leur validité, dans les livres du Registre Public".*

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Article 14 of the Loi provides:-

*"Tout Testament d'immeubles, avant d'être exécuté, sera présenté à la Cour Royale, qui en ordonnera l'enregistrement.*

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*Si le Testament contient aussi des legs de biens-meubles, une copie, dûment certifiée par le Greffier Judiciaire, sera présentée à la Cour Royale qui en ordonnera l'enregistrement comme ci-dessus.*

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*Dans le premier cas, le Testament restera à la garde de l'Enregistreur des Contrats".*

5 It is quite clear that the law intends the original of the will to be presented to the Court for registration unless there be a mixed will of movables and immovables which allows for a copy to be provided which has been duly certified by the Judicial Greffier.

10 In the case of Thatcher v. Thatcher et Au (1926) 233 Ex 547, the first named Defendant was a legatee under two mixed wills of movables and immovables executed by her deceased mother in the months of January and July, 1924. The July will had been executed within the forty days immediately preceding the death of the testatrix, and, at the Plaintiff's behest, was annulled by the Court on the basis of Article 10 of the Loi. The original of the  
15 January will could not be produced to the Court and so the Plaintiff sought permission to register "*le brouillon ou copie certifiée dudit brouillon*". The "*brouillon*" of the January Will had been registered in the Ecclesiastical Court. The application to register the will in the Royal Court was contested by the  
20 Plaintiff, the eldest son of the testatrix who had been excluded from both wills. The Court rejected the Defendant's application and gave *inter alia* the following reason as grounds for its decision:-

25 "*Que, .....nul pièce autre que le testament même d'immeubles en original et en due forme, ne peut être acceptée en Justice comme l'acte dispositif donnant titre réel ou apparent au prétendu ayant droit à des immeubles situés en cette Ile, et n'est susceptible d'être*  
30 *enregistrée au Registre Public de cette Ile .....*".

The Act of Court records that the Defendant was permitted to appeal to the Superior Number. There is no record in the "Tables des Décisions" of an appeal being determined.

35 We were asked to note (and we did) that both the 1851 law and the Thatcher case pre-date modern photocopying methods. In the Thatcher case, there was only a "*brouillon*" of the will available and it did not contain the signatures of the testatrix or of the  
40 attesting parties. In this case, we have no doubt that we hold a photocopy of the original will in its final condition, attended by all the necessary solemnities and formalities required by the 1851 Law.

45 Although not precisely in point, we draw consolation from the fact that this Court, sitting as the Probate Division, has in recent years ordered the photocopy of a will to be admitted to Probate where the original had been lost. The cases cited to us by  
50 Advocate Matthews in support were as follows:

Estate Saw (unsigned and unattested carbon copy of deceased's will which was supported by three duly executed codicils thereto, each of which in terms confirmed the said will) 1st October, 1988;

Estate A'Court (photocopy of signed will) 28th February, 1992;

Estate Beamer (photocopy of signed will) 5th November, 1993;

Estate Roberts (photocopy of signed will) 6th August, 1993;

Estate Shepherd (carbon copy of the will with facsimile signatures) 13th January, 1995;

Estate Bois (photocopy of signed will).

There is, of course, no affidavit sworn by Advocate Yandell's secretary or clerk, C.B.Perkins, but certainly under English law the attestation clause would be sufficient (Sugden v. Lord St. Leonards (1876) 1 P.D. 154).

In this case, there is apparently no evidence that the testator revoked the will (or attempted to revoke the will) prior to his death. The will is straightforward. The application is made by the widow and is supported by their adopted child. There is nothing in the papers which indicates that an earlier will might revive under the doctrine of dependent relative revocation in the event that the 1978 will is ineffective.

This Court has assumed an inherent jurisdiction in the Probate Division which was, of course, created by statute under the Probate (Jersey) Law, 1949. Against that is the fact that the Royal Court declined to register Mrs. Thatcher's January will. We have to recall that in the Thatcher case, the principal heir had been excluded from the will and the apparent weakness of the plaintiff's case may well have influenced the Court in reaching the decision that it did. In our view, the decision of the Court in the Thatcher case was probably based on matters of form rather than substance. According to the *amicus curiae* there are no grounds other than the Thatcher case why the Court should not register the photocopy will. We suggested to Advocate O'Connell on Friday afternoon that a solution might well be for the widow and the child to enter into a *contrat de transaction* on the basis that Mr. Hewett died intestate. We take the view that this would add unnecessary cost and suffering to a case which is as clear as any is likely to be.

In the circumstances, we have ordered the photocopy of the will to be registered in the Public Registry and we have asked the Greffier to mark the photocopy which will be registered accordingly.

We are most grateful to Advocate Matthews for his assistance in this matter.

Authorities

Loi (1857) sur les testaments d'immeubles.

Thatcher -v- Thatcher et Au (1926) 233 Ex 547.

Sugden -v- Lord St. Leonards (1876) 1 PD 154.