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NOTE

ANALYSIS OF LARE WILL, 352 PA. 323 (1945), 42A. 2ND. 801†

by

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In this case the decedent's husband was the proponent of an alleged will naming him sole beneficiary. The husband had probated the will and the matter came into court on appeal by collateral relatives from the decree of probate. The alleged will was written on the face of a blank bank check. The contestants alleged forgery, first by questioning the genuiness of Mrs. Lare's signature, and then by contending that, if the signature was genuine, yet her husband had gotten possession of the blank bank check already bearing that signature and had fraudulently typed the body of the will on that check.

The hearing to determine whether or not an issue devisavit vel non should be allowed was held before Judge Milholland of the Allegheny County court, who found and ruled that the will was a forgery and for that reason declined to award an issue. In this he was sustained by the Orphans' Court in banc. The appeal to the Supreme Court then was taken by Mr. Lare, the husband. The appellate court reversed, but not unanimously.

On the appeal the majority opinion was written by Justice Patterson; Justices Linn, Stern and Jones were of the majority; Justice Stearne wrote a concurring opinion; Chief Justice Maxey and Justice Drew each wrote a strong dissent. Because four opinions, two in vigorous dissent, were filed, the case has attracted considerable attention and has led many lawyers to assume that the majority decision has disregarded and upset many precedents.

It seems to the writer that the majority opinion has established no new rule, but that all that has happened is that the Supreme Court majority concluded that under the peculiar facts of this *Lare* case it was not a proper exercise of discretion by the local judges to refuse an issue. That no change in or departure from settled

† See discussion of case in "Judicial Function in Will Cases—An Epochal Decision" by A. J. White Hutton in Dickinson Law Review, Vol. L., No. 3, page 104.

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law principles was intended is demonstrated in the concluding remarks in Justice Stearne's concurring opinion that he joins with the majority (at 338), ". . . we should continue to follow, and not depart from, our declared law and practice." That the question on appeal turned on whether or not there was a proper application of discretion by the hearing judge and the court in banc is evidenced by Justice Patterson's remark (at 330), "In determining whether there has been such an abuse of discretion by the court below we have considered all the evidence." The court reporter gathered that such was the purport of Justice Patterson's opinion, because in the syllabus he said:

> "7. Upon appeal, the decision of the chancellor will be reversed where there appears to have been an abuse of discretion."

Justice Drew commences his vigorous dissent by saying, "The learned chancellor, Judge Mulholland, did not abuse his judicial discretion."

While the majority opinion does not make a complete catalog or schedule of the facts in support of the will and those opposed, mention is made therein of many of the facts, some pro and some con, so as to indicate the nature of the dispute and that it was sufficiently substantial to call for an issue and trial before a chancellor with a jury. All of the facts are not referred to in Justice Patterson's opinion, as we find additional facts referred to in the three additional opinions.

After mentioning favorable and unfavorable elements, Justice Patterson stated that the function of a hearing judge is, ". . . to determine whether there is a substantial dispute upon a material matter of fact"; that if there is such a dispute an issue must be awarded; that there was such a dispute in the *Lare* case arising out of the evidence; and that, therefore, it was an abuse of discretion then to rule finally that the will was a forgery, instead of which the question should be investigated anew on the trial of an issue by a trial judge or chancellor sitting with a jury.

Justice Stearne in his concurring opinion concisely states what the divergence was between the five justices who prevailed and the two who dissented, his language being (at 331):

> "The majority have decided that the exclusive function of such hearing judge is to determine whether there exists a substantial dispute of fact. The minority view is that the hearing judge may conclude, despite the testimony, that he would not support a verdict of a jury and therefore no substantial dispute exists."

He said that misleading expressions appeared in many cases, particularly in those wherein the Orphans' Court had to decide whether or not a dispute was *substantial* and in cases where the courts had to define the functions of a trial judge when alone passing on issues of fact. Justice Stearne, agreeing with language previously used by Justice Stern, stated that the hearing judge is not a jury acting as an "ultimate fact-finding tribunal"; instead he is to decide only "whether there is a substantial dispute upon a material matter of fact," *so that a jury's verdict either way would not have to be set aside as against the weight of the evidence.*

Justice Stearne said that the mistake made in the court below consisted in Judge Mulholland's first making a finding of fact, notwithstanding substantial conflict in the evidence, that the Lare will was a forgery in two particulars, and then in concluding as a matter of law that because of such finding of fact he could not uphold a verdict sustaining the will; that consequently no substantial dispute was presented. He also stated (at 333) that " the dispute must be *substantial* and not a mere conflict in the testimony," and illustrated such statement of the law by mentioning a hypothetical factual situation, in which connection he probably had in mind cases like *Berg's Est., 173 Pa. 647,* and *Malunny's Est., 208 Pa. 21* where there were disputes as to the genuineness of the signatures, but the evidence in support of them so outweighed that which denied them that there were no *substantial* disputes justifying issues.

Justice Stearne continuing, and, for the purpose of distinguishing between the functions of a hearing judge and a trial judge, stated (at 334):

> "The trial judge, who sits to determine an issue devisavit vel non, acts as a chancellor. He is not bound by a verdict when it is against the manifest weight of the evidence, which is addressed to him quite as much as to the jury. If his professional and official conscience is not satisfied that it is sufficient to sustain a verdict against the will, either because it lacks probative force or inadequacy, it becomes his duty to set the verdict aside: . . ."

According to Justice Stearne, and the cases abundantly support him in that, the hearing judge may either grant the issue, refuse it and uphold the will, or refuse it and strike down the will, depending on whether or not there is a substantial dispute on a material fact.

Continuing, he said (at 336), ". . . the hearing judge must weigh the evidence in order to ascertain whether the dispute is *substantial.* Beyond this he may not go." He points out that the county judge found as a fact that there was a double forgery, although there was no direct evidence thereon produced by either side, the only evidence being either circumstantial or opinion.

After reviewing some of the facts Justice Stearne says that he cannot agree with the minority contention that no verdict sustaining the Lare will could be permitted to stand, so that there should be no jury trial, but that if on jury trial the facts then should justify the rejection of the will the trial judge or the appellate court can do so even if the jury's verdict should sustain it.

What seems to have controlled with the Supreme Court majority, including Justice Stearne, appears in remarks of the latter justice (at 336). The hearing judge made the strange finding of fact that Lare first had forged his wife's signature and then had written the body of the will over that forged signature! Even if the whole instrument, body and signature, should be a forgery, it would be difficult to believe that the forged signature was written before the body was typed. But the evidence was quite persuasive that Mrs. Lare's signature was genuine. If it

was so genuine, then, as the hearing judge said and Justice Stearne repeated, no witness had direct knowledge of the forgery and the only additional evidence was circumstantial and opinion, of which additional evidence some supported and some impugned the will. Thus in support of the will there was the signature quite likely genuine, plus circumstances and opinions of probative force, and opposed to genuineness there were only circumstances and opinions of like force, so because thereof, Justice Stearne said, the hearing judge should not have rejected the will.

Chief Justice Maxey commences his dissent by stating that all the justices agree that the law is settled that the Orphans' Court has the right to decide in a will case whether or not an issue to determine the validity of an alleged will should be awarded. Obviously the right which the justice thus refers to is not an absolute right, but one limited by a sound judicial discretion. He then repeats the well known principle that before an issue is awarded there must be a substantial dispute upon a material matter of fact, that is, that the party who succeeds in getting an issue awarded must have more than a mere technical prima facie case.

The Chief Justice, mentioning the rule that an issue is to be awarded only where the judicial conscience could sustain a verdict either way, proceeds by forceful, factual argument to show why he could not sustain a verdict in favor of the Lare will. He discusses twelve different circumstances tending to show, and completely persuading him, that Mrs. Lare did not write or authorize the body of the will. He says (at 338) that there are further circumstances in support of the same showing and that equally conclusive evidence was present to indicate that it was Mr. Lare who wrote the body of the will. In his argument on the facts the Chief Justice looks upon Mrs. Lare's signature as genuine. However, he did not discuss any of the circumstantial evidence that tended to support the will, much of which supporting evidence is briefly mentioned in the majority opinion.

At page 349 the Chief Justice purports to quote from the majority opinion, but his quotation is not correct. The majority opinion says (at 330):

> "If a jury were to believe the evidence of" Mr. Lare, "a verdict upholding the instrument as the will of Mrs. Lare *could be sustained* (italics mine)."

For the language which here has been italicized the Chief Justice substitutes the expression "would have to be sustained." His reference to such quoted language of the majority, plus what Justice Stearne has said, lights up the whole case and shows us that there has been no departure from settled principles, instead of which the Justices differed on the factual effect of the evidence. According to the majority, Justice Stearne included, the evidence was such that the judicial conscience could sustain a verdict upholding the will as valid, wherefore it was not a proper exercise of discretion for the hearing judge to render a verdict or finding of fact pronouncing the will a forgery and then entering judgment thereon declaring the will invalid.

The Chief Justice complains that when the issue should get to be tried before a jury the testimony would be just about the same as that which was given before the hearing judge. That cannot be said with so much confidence. Very likely both sides on the trial before a jury, and especially since they have had the benefit of the Justices' factual arguments, will produce further testimony bolstering their respective contentions and detracting from those of the adversary.

Justice Drew commences his dissent by declaring that the lower court did not abuse its judicial discretion, and that same assertion is repeated several times in the Drew dissent. Such reception serves to confirm the notion of the writer that the reversal was entered and an issue awarded by the Supreme Court majority because five justices felt that under the peculiarities of the Lare case a verdict either way could be sustained by the judicial conscience, wherefore it was a lack of discretion to refuse an issue and declare the will invalid.

According to Justice Drew (at 353), in a will contest before a hearing judge the first thing to be determined is what issues of fact have been created, and then to ascertain the extent to which the evidence produced has made those issues "the subject of any real dispute."

Justice Drew discussed the evidence and the inferences which he made therefrom in opposition to the will, but in his dissent he paid no attention to evidence in support of the will.

This dissent is based on and would apply to the *Lare* case the well known principle that usually the findings of fact of a judge trying a case without a jury have the effect of a jury's verdict if there be credible evidence to support such findings.

Justice Drew (at 363) speaks of the presumption in favor of validity which exists where the attack is based on undue influence or lack of testamentary capacity, and states that that presumption does not apply where the charge is forgery. The writer can agree that where the charge is that of a forged signature no presumption favors the proponent, but he questions whether there might not be some presumption in favor of validity where the genuineness of the signature is not in real dispute, but it is alleged that the body of the will was written fraudulently above such genuine signature. Where the paper is in proper testamentry form and the signature is genuine, why should there be a heavier burden on the proponent where fraud or forgery is charged than where the attack is based on lack of testamentary capacity or undue influence? Undue influence is a species of fraud.

Justice Drew concludes his dissent by saying (at 370):

> " . . . the manifest weight of the evidence clearly shows that the purported will is a forgery and the Chancellor properly so found. No judicial mind, in my judgment, could have reached any other conclusion. His findings are overwhelmingly supported by the evidence and therefore should be binding on this Court.

> "There is nothing in our cases which cast any doubt upon the two rules of law I have defined and illustrated; first, that a Chancellor is required to grant an issue d.v.n. only if after a conscientious study of the evidence as a whole he is not certain of the truth of matters in controversy; and that he can and should refuse an issue and decide the case, if the evidence, considered as a whole, has convinced him that one side of the case is right and the other wrong; and, secondly, the rule that this Court will not, in such a case this, overrule or reject any finding or conclusion of fact, or reverse any decree, which has been based by an Orphans' Court Judge upon a conscionable, lawful appraisal of the competent evidence."

Nothing appears in the report of the *Lare* case which to the writer's mind evidences any purpose on the part of the Supreme Court majority to depart from well trodden paths and adopt new doctrines. The majority passed on the *Lare* case with all of its unusual features and passed on that case alone. There was no intention to reject and the majority did not reject the doctrine announced in our many reported cases as to the duties and powers of a hearing judge and the finality of his conclusions, but did determine and declare that in the *Lare* case, with almost certainly a genuine signature and with all the rest of the evidence circumstantial or opinion, *a verdict in favor of the will could have the approval of the judicial mind, wherefore the lower court did not exercise discretion when it refused a jury trial and rejected the will.* The Justices were not in disagreement on principles of law, substantive or adjective, but their division arose solely from divergent views on factual aspects of the *Lare* case.