

FERGUSON, J.A.

JUNE 21ST, 1917

RE WHITESELL.

Will—Construction—Devise of Lot of Land not Owned by Testatrix—Erroneous Description—Legal Estate and Beneficial Interest of Testatrix as Mortgagee of another Lot Held to Pass by Devise.

Motion by the executor for an order declaring the true construction of the will of Elizabeth Whitesell.

The motion was heard in the Weekly Court at Toronto.

W. C. Mikel, for the executor and Lena Rustin.

F. W. Harcourt, K.C., for Irvine William Rustin, an infant.

FERGUSON, J.A., in a written judgment, said that the will was as follows: "*I give devise and bequeath all my real and personal estate of which I may die possessed in the manner following that is to say . . . I give Lena Rustin a lease of lot 9 in the 8th concession of Huntingdon until Irvine William Rustin her son is twenty-five years old and then I give it to Irvine William Rustin. In case he dies it goes to Lena Rustin. I wish the balance of my estate to be reduced to money and said money invested, the interest to be paid to Lena Rustin until her son William is twenty-five years old when it goes to him. In case he dies before this age the money goes to Lena Rustin except that the stock on the place goes to Lena Rustin and the household goods and chattels go to Lena Rustin. All the residue of my estate not hereinbefore disposed of I give devise and bequeath unto Lena Rustin.*"

The testatrix did not own lot 9 in the 8th concession of the township of Huntingdon, but at the time of making her will and also at the time of her death was mortgagee in possession of lot 7 in the 8th concession of the township of Huntingdon. It was urged that the testatrix intended to devise lot 7, but erroneously described her land as lot 9.

Reference to *Re Clement* (1910), 22 O.L.R. 121; *Smith v. Smith* (1910), 22 O.L.R. 127.

In drawing the will the testatrix here used a printed form, and in the foregoing quotation the printed words are italicised. These were identical with those used in the *Smith* case. The opinion in that case turned upon the effect given to those printed words. The learned Judge was unable to distinguish that case, and felt bound to follow it, and, following it, to find that the