Testamentary Archeology in Late-Victorian Ontario: William Martin's Little, Posthumous Legal System

G. Blaine Baker*

Abstract

This is a 'will-in-context' study of a Toronto bequest of the 1880s that shows how a testator's ideological commitment to freedom of willing and his retention of high-powered legal talent to actualize that commitment were derailed by a hapless or avaricious executor, unpredictable real-estate markets, a lethargic court, and eccentric beneficiaries. It also suggests that self-made private law like contracts, trusts, and wills may be as doctrinally, textually, or administratively contradictory, indeterminate, or unpredictable as state-made public or regulatory law has often been shown to be.

Keywords: legal archeology, legal history, legal pluralism, facilitative law, wills and estates

Résumé

Cette étude d'un « testament-en-contexte » d'un legs à Toronto dans les années 1880 montre comment l'engagement idéologique d'un testateur à l'égard de la liberté de legs a été déraillé, malgé son utilisation des meilleurs avocats pour actualiser cet engagement, par un exécuteur soit impuissant soit avare, par un marché de l'immobilier imprévisible, par des tribunaux complaisants, et par des bénéficiaires excentriques. L'étude permet aussi de conclure que les documents de droit privé faits par le particulier comme les contrats, fiducies et testaments peuvent être aussi contradictoires, indéterminés ou imprévisibles du point de vue doctrinaire, textuel ou administratif, que les documents de droit public ou réglementaire faits par l'État.

Mots clés : archéologie légale, histoire légale, pluralisme légal, loi facilitatrice, testaments et successions

* Faculty of Law (Emeritus), McGill University; Faculty of Law (Visiting), University of Toronto. I am grateful to Rande Kostal, Dick Risk and Mary Stokes, as well as to the 2014 Osgoode Society Legal History Workshop and to this law and society journal's anonymous reviewers, for helpful commentary on an earlier version of this paper. Martin family members Eva Isabella Anderson Martin (1882–1990), Agnes Gray Martin (1895–1948), and Florence Helen Melrose Johnstone (1911–2005) had all prepared unpublished "family stories," and, although none of them directed much attention to patriarch William Martin's will, their notes were generally useful. Uncited references to family fact or lore in this text are based on those stories.

Canadian Journal of Law and Society / Revue Canadienne Droit et Société, 2015, Volume 30, no. 3, pp. 345–363. doi:10.1017/cls.2015.28

https://doi.org/10.1017/cls.2015.28 Published online by Cambridge University Press

Widower William Martin of Mimico, Ontario, made a will in February of 1886 that provided for four bequests.[1] To his sister-in-law, Elizabeth McLean Martin, he gave "one hundred dollars a year … such legacy to be a lien upon all lands of which I die possessed." To his son, James Martin, he gave, first, "all my ready money, securities for money, goods, chattels and personal property." To that same son he gave, second, "the east half of lot number five in the First Concession of the Township of Etobicoke … to have and to hold the same for and during the term of his natural life." He then specified that "after [James's] death I give, devise and bequeath all and every the lands that I shall die possessed of share and share alike unto the children of my said son James."[2]

The "east half of lot number five," the family's pre-Confederation home known as "Chestnut Haven," was by a large margin the most valuable asset in William's 1887 estate, and it was the subject of a princely but problematic 1890 sale by the Martins to a land development syndicate.[3] (Conversion of its sale price would yield approximately $3.5 million by early-twenty-first century standards.)[4] The gift of a life interest to an only child in what was the bulk of a father's patrimony also gives some pause. Moreover, the administration of that life estate and its remainder continued to impinge on family confidence and financial security for a couple of generations.

A first goal of this essay is to treat the "site of legal order" created by William's devise as a legal-archeologist's opportunity.[5] Primarily under the influence of English legal historian Brian Simpson, a number of contextualized treatments of leading Anglo-American judicial decisions have recently been undertaken.[6] There is also a smattering of studies of local law-books in context.[7] It now seems appropriate to expand scholars' view by commencing contextual analysis of other kinds of legal artifacts, especially "facilitative" ones like contracts, trusts, and wills.

---

1 The will was almost certainly prepared by the Toronto law firm of Mulock, Tilt and Miller, since the Martin family used that firm exclusively for legal services between about 1860 and 1920. Because William Mulock was, by 1886, a Liberal Member of Parliament in Ottawa, Nicholas Miller or James Tilt was most likely the draftsman.

2 "William Martin Will," Death Records-Ontario, Etobicoke Township, York County, FHL 1846467, Cert. 021041-1888. That will is one and a half longhand pages in length, in four paragraphs, all of which are reproduced in this portion of the text or infra, text at note 45. Mrs. William Martin's "dower" was irrelevant to those testamentary events, because she died in 1872. Statutory reforms to Ontario's married women's property law were similarly irrelevant to the composition or administration of William's will, or to its beneficiaries, because those changes were complete (on their own terms) by 1878.

3 William's personal property inherited outright by James was said on probate to have been worth $6,200, and all but $900 of that amount had apparently been spent by James by his death in 1896. See "William Martin Probate," 14 October 1887; "James Martin Probate," 4 March 1896.

4 See generally http://gpih.ucdavis.edu/files/Ward-Devereux_P_1872-78.xls.

5 Compare Debora Threedy, "Legal Archeology: Excavating Cases, Reconstructing Context," 80 (2006) *Tulane Law Review*: 1197; Robert Gordon, "Simpson's Leading Cases" *Michigan Law Review* 95 (1997): 2044.

6 See, e.g., A. W. Brian Simpson, *Leading Cases in the Common Law* (Oxford: Oxford University Press, 1995); Eric Tucker, et al., eds., *Property on Trial* (Toronto: Irwin, 2012).

7 See, e.g., Jim Phillips, "A Low-Law Counter-Treatise: Absentees to Wreck in British North America's First Justice of the Peace Manual," in *Law Books in Action*, ed. Angela Fernandez and Marcus Dubber (Oxford: Hart, 2012) 202; Philip Girard, "Themes and Variations in Early-Canadian Legal Culture: Beamish Murdock and his *Epitome of the Laws of Nova Scotia*," *Law and History Review* 11 (1993): 101.

https://doi.org/10.1017/cls.2015.28 Published online by Cambridge University Press

Typical aims of case-in-context scholarship are to reclaim the parties' understandings of the episode in issue, to contrast that vision with the meaning the event acquired in law when sprung loose from its original setting, and to explain the motives of legal casebook, manual, or treatise-writers for that metamorphosis. It is, however, difficult to imagine a "leading" will, contract, or trust instrument, with the result that the kind of archeology required to contextualize expressions of facilitative law will be different from that associated with case-in-context scholarship.[8]

In rare instances, a contract or a trust deed has been a sufficiently important part of litigated facts that a scholar's focus has shifted temporarily from the judicial decision at the center of the study to a non-adjudicative artifact, and those transfers offer provisional models for this testament-based archeology.[9] But those studies address contracts only insofar as bargains' formation, interpretation, or performance gave rise to disputes channeled into litigious form, and they do not cast those regimes as legal systems in their own right. There are, however, several authors whose interest in very modern schemes of facilitative law aligns roughly with this historically-oriented exercise in legal archeology.[10]

There is also a useful handful of studies that focus on the creation of particular Canadian estates or their long-term administration. Bruce Ziff's account of the judicial treatment of discriminatory provisions in Reuben Leonard's educational trusts, Constance and Nancy Backhouse's description of Elizabeth Bethune Campbell's tribulations wresting a legacy from uncooperative establishment lawyers, and Ian Kyer's reconstruction of David Fasken's estate-planning practices warrant special mention.[11]

It bears acknowledgment that William Martin's estate also found itself in court several times. In a first instance, because the will did not name an executor, James sought appointment as the estate's administrator in York County's Surrogate Court. That position was assigned to him in 1887, subject to the apparently uncommon attachment to it of neighbors Donald Hendry, James Kelly,

---

8 See John Hagopian, "The Use of Land Registry Offices for Historical Research," *Ontario History* 87 (1995): 77; Evelyn Kolish, "L'histoire du droit et les archives judiciares," *Cahiers de droit* 34 (1993): 289.

9 See Judith Maute, "*Peevyhouse v Garland Coal and Mining Co.* Revisited," *Northwestern Law Review* 89 (1995): 1341; A. W. Brian Simpson, "Contracts for Cotton to Arrive," *Cardozo Law Review* 12 (1989): 287; W. E. Brett Code, "The Salt Men of Goderich in Ontario's Court of Chancery," *McGill Law Journal* 38 (1993): 519.

10 See generally John Braucher, et al., *Revisiting the Contracts Scholarship of Stewart Macaulay* (Oxford: Hart, 2013); David Campbell, et al., *Changing Concepts of Contracts: Essays in Honor of Ian Macneil* (Basingstoke, UK: Palgrave, Macmillan, 2013); Michel Coutu and Pierre Guibentif, eds., "Legal Pluralism as a Paradigm for Jurisprudence: Reflections on Jean-Guy Belley," *Canadian Journal of Law and Society* 26 (2011): 215–467.

11 See Bruce Ziff, *Unforeseen Legacies: Reuben Wells Leonard and the Leonard Foundation Trusts* (Toronto: University of Toronto Press, 2000); Constance and Nancy Backhouse, *The Heiress and the Establishment* (Vancouver: University of British Columbia Press, 2004); C. Ian Kyer, "The David Fasken Estate," in *Essays in the History of Canadian Law: A Tribute to Peter Oliver* ed. Jim Phillips, et al. (Toronto: University of Toronto Press, 2008) 410, 421–33. See also Gerald Grenon, *Adding Context: Wright v Tatham and the Origin of the Implied Hearsay Rule* (Winnipeg: Manitoba Legal History Project, 1993); Mark M. Orkin, *The Great Stork Derby* (Don Mills: General, 1981).

https://doi.org/10.1017/cls.2015.28 Published online by Cambridge University Press

John Rundle, and Henry Whitlan, who committed $24,000 to the Court as sureties. In a second instance, the putative 1890 purchaser from James of his children's interest in Chestnut Haven sought from Ontario's High Court of Justice (Chancery Division) approval of that fifty-acre sale, which was granted subject to a judicially-declared trust in favor of the children, severance and retention by the Martins of their family home on an acre of the land, and subject to removal by the Court of responsibility for administration of the estate from James. That was plainly the most significant of the estate's trips to court. Finally, on the 1905 death of estate annuitant Elizabeth Martin, James's three elder children and the widower of a fourth obtained the Court's permission to sell the retained residential portion of Chestnut Haven to Elizabeth's family, Elizabeth, Jr. and James Rice.[12] None of those episodes became a leading case and, apart from providing publicly-accessible sources of information about the family, the relevance of that litigation to the will under consideration and to the administration of the estate it created is limited. Indeed, the judgments in those cases are little more than conclusory statements.[13]

The path is therefore more-or-less clear to attempt an archeology of William Martin's will as a legal artifact in its own right. Focusing on an instrument of facilitative law and the "government in miniature" it created will hopefully allow the impact of this species of legal archeology to help redress the limited effect on mainstream legal doctrine and theory of case-in-context studies at-large.[14] Perhaps it will also aid in provoking conversation about why conventional legal academics, some of whom are also historians, are often comfortable reproducing legal doctrine, theory, and skills (all of which are time-and-place contingent) in decontextualized ways.[15]

A second and closely-related goal of this study is to contribute critically to the developing literature on facilitative law. Facilitative frameworks, like that deployed by William Martin to make bequests, are normally said to empower the state's citizens to make private law for themselves. They are, therefore, extensively implicated in the creation of "legally-pluralistic" landscapes, where large and small, formal and informal, legal systems co-exist within one state.[16] Scholars who study associations ranging from cooperatives, to private clubs, to business corporations, to administrative agencies typically also conceive of those entities as "miniature governments" or "micro-sovereignties" that sometimes overlap

[12] See "Elizabeth McLean Martin," *Globe* (Toronto, ON), 23 February 1905; *Martin v Martin,* 22 May 1906 (Ont. H Ct J); Grant # 8558, York County Land Registry Office (hereafter YCLRO), 26 May 1906. See also *Martin v MacNab,* infra note 85.

[13] There are no available court files or bench books for those judgments, or records of action taken under them, perhaps because the courts' involvement in those cases was more often administrative than judicial.

[14] See generally Rande Kostal, "Historicizing the Common Law: Brian Simpson and the Limits of Influence," American Society for Legal History – Annual Meeting, 10 November 2012; James E. Krier, "Facts, Information, and the Newly-Discovered Record in *Pierson v Post*," *Law and History Review* 27 (2009): 189.

[15] That seeming irony animated much of the commentary on this essay by Dick Risk. See "R. C. B. Risk to Blaine Baker," 9 August 2014.

[16] An introduction to facilitative law can be found in David Sugarman and Gerry Rubin, eds., *Law, Economy and Society, 1750–1914* (Abingdon, UK: Professional Books, 1984) 9–12, 67.

https://doi.org/10.1017/cls.2015.28 Published online by Cambridge University Press

with one another and create legally-pluralized subjects.[17] Even scholars who study particular enactments, especially business legislation, might be said to be scrutinizing little legal systems.[18]

Legal pluralists have also provided rich accounts of privately-made, and even informal, sites of legal order.[19] Those studies have sometimes been developed around "access to justice" issues, to expand access inquiries beyond the state's civil courts to a broader range of institutions where law-related things happen.[20] Those law-related things are variously said to include the announcement of regulations by private standards organizations, the issuance of binding arbitral decisions, the enforcement of condominium, shopping-center, or recreation club by-laws, and the management of grievances under collective agreements or in educational institutions. There is, moreover, a sense in which most modern "stateless law" (law that operates across, or without regard to, national borders) is another manifestation of private law-making.[21] Class-action settlements, especially those involving grand gestures of reconciliation, civil litigation that migrates transnationally on the basis of attractive local techniques for financing it, and the judicial enforcement of sweeping choice-of-law clauses are all examples of inchoate stateless law. Other commentators have treated inexplicit and often casual normative regimes as self-contained sites of legal order.[22] Those implicit norms might be as ordinary as generalized rules of etiquette or unspoken canons of social hierarchy, or they might be as complex as the norms that are "custom-made" through slow evolution in special relationships. Still other commentators have focused on the ways in which elite legal language sometimes structures interpersonal relations, discursively.[23]

Opportunities provided by the Anglo-American state for its constituents to make testamentary, trust, and contract provisions for themselves are, however, the common law's most permissive regimes of facilitative law. The bare-bones theory of neo-classical contract law, for example, is that the parties to an exchange make

---

17 See, e.g., John C. Coffee, "The Mandatory/Enabling Balance in Corporation Law," *Columbia Law Review* 89 (1989): 1618; Harry W. Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985).

18 See, e.g., Thomas Telfer, "Ideas, Interests, Institutions and the History of Canadian Bankruptcy Law, 1867–1880" *University of Toronto Law Journal* 60 (2010): 603; Paul Craven, "The Modern Spirit of the Law: Blake, Mowat, and the *Breaches of Contract Act*, 1877," in *Essays in the History of Canadian Law: in Honor of R. C. B. Risk*, ed. G. Blaine Baker and Jim Phillips (Toronto: University of Toronto Press, 1999) 510.

19 See, e.g., Roderick A. Macdonald, "Pour la reconnaissance d'une normativité implicite et inférentielle," *Sociologie et société* 18 (1986): 47; Jean-Guy Belley, *Le contrat entre droit, économie, et société* (Cowansville, PQ: Blais, 1988).

20 See, e.g., Eric S. Knutsen, "Keeping Settlements Secret," *Florida State University Law Review* 37 (2010): 945; Roderick A. Macdonald, *Access to Justice in Canada Today* (Toronto: LSUC, 2005).

21 See e.g., H. Patrick Glenn, *The Cosmopolitan State* (Oxford: Oxford University Press, 2013); Robert Niezen, *Truth and Indignation: Canada's Truth and Reconciliation Commission on Residential Schools* (Toronto: University of Toronto Press, 2013); Cassandra Burke Robertson, "The Impact of Third-Party Financing on Transnational Litigation," *Case Western Reserve Journal of International Law* 44 (2011): 159.

22 See, e.g., Michael Reisman, *Law in Brief Encounters* (New Haven: Yale University Press, 1999); Cass Sunstein, "Social Norms and Social Roles," *Columbia Law Review* 96 (1996): 903.

23 See e.g., Stewart Macaulay, "Images of Law in Everyday Life," *Law and Society Review* 21 (1987): 185; Greg Marquis, "Doing Justice to British Justice," in *Canadian Perspectives on Law and Society*, ed. Wesley W. Pue and Barry Wright (Ottawa: Carleton University Press, 1988) 43.

https://doi.org/10.1017/cls.2015.28 Published online by Cambridge University Press

a transaction-specific legal system, with minimal formation or "constitutional" constraints intended to enable the state to recognize that "polity" and compel adherence to its terms.[24] A contract, trust instrument, or a will is thus a notional blank slate on which private law-makers write law for themselves. The range of prospective human relationships eligible to be channeled with those forms of privately-made rules is vast. The little legal systems that are created by will, trust instrument, or contract therefore have, at least in principle, greater prevalence than the state's private regulatory regimes such as torts or restitution. Overriding factors like freedom from duress, undue influence and unconscionability, the mental capacity to deal, and the requirement of informed consent limit that potential omnipresence, but not radically so.[25] The Anglo-American state's primary roles in respect of self-made normativity are the provision of "default" terms to fill transactional gaps left by private law-makers, and the neutral enforcement of testamentary, trust-based, and contractual norms.[26]

This paper's contextualization of William Martin's will is, in view of its combination of legal archeology with analysis of the stability of that will as a little legal system, necessarily modest. The essay can, however, profitably be read together with a companion account in which genealogical information and the everyday family relations were canvassed at greater length.[27]

The Martin Family

Together with his wife, Mary Scott Martin, and infant son James, "yeoman" William Martin arrived in Canada West from Eastrig, Currie Parrish, Midlothian County, Scotland (near Edinburgh) in 1848. Born in 1816, William was one of twelve children of Ann Brown and "carrier" James Martin. Five of his siblings would soon join him in Mimico, namely Alexander, Andrew, Robert, Anne, and Janet, although only the families of William and Alexander remained in that area.[28] Fifty- and thirty-six-acre market-gardening or muck-farming plots were rented at what is now Mimico Avenue and Royal York Road, and at Lakeshore Boulevard and Royal York.[29] William also made a £550 loan to Thomas Goldthorpe in 1855 on land at what is now Lakeshore and Kipling Avenue, and that mortgagor's 1861 default on the debt enabled William to foreclose on it to move his family

[24] See generally Patrick S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon, 1979) 219–568; A. W. Brian Simpson, "Innovation in Nineteenth-Century Contract Law," *Law Quarterly Review* 91 (1975): 247.

[25] See generally E. D'Agostino, *Contracts of Adhesion* (Cham, UK: Springer, 2015); John P. Dawson, "Economic Duress" *Michigan Law Review* 45 (1946): 1.

[26] See generally Adam J. Hirsch, "Default Rules in Inheritance Law," *Fordham Law Review* 73 (2004): 1031; John H. Langbein, "The Contractual Basis of the Law of Trusts," *Yale Law Review* 105 (1995): 625.

[27] See James D. Martin and G. Blaine Baker, www.newtorontohistorical.com/MartinFamily.html. Without Jim Martin's primary-source research for that earlier paper, the completion of this essay would have been a much greater challenge than it was.

[28] William's other siblings ultimately settled in Toronto, Meaford, and Berkeley, Ontario, Harbor Grace, Newfoundland, and Kankanee, Illinois.

[29] West half of lot 2, concession 1, Etobicoke Township, York County; west half of lot 4, concession 1, Etobicoke Township, York County. See also Miles and Co., *Illustrated Historical Atlas of York County* (Toronto: Wilson, 1878) 6.

https://doi.org/10.1017/cls.2015.28 Published online by Cambridge University Press

into the property's Regency-styled stone house with its extensive ells and outbuildings.[30] Eight years later, William bought from John Burkett's estate for $1,300 a 150-acre farm that the Martins called "Shingle Bay Cottage" on the west shore of Lake Simcoe just south of Orillia, Ontario.[31] That property seems to have been acquired by William as an investment, although James's young family did spend a couple of summers there. It was sold to the province in 1885 for $6,545 (five times its purchase price of fifteen years earlier) and developed as the "Ontario Asylum for Idiots," later named the "Ontario Hospital School" and still later the "Huronia Regional Center." In 2007, it was repurposed as the headquarters of the Ontario Provincial Police.[32] The source of William's financial resources is unknown, although his father's 1868 Scots estate may have figured in the purchase of the Shingle Bay land. James Martin, Sr., did not immigrate to Canada, but church records and family notes show that he visited for events like his children's weddings.[33]

James Martin, Jr., was born in Midlothian County, Scotland in 1848, and family lore has him learning to walk on the trans-Atlantic voyage from Leith, Scotland, to Quebec City, Canada East. He grew up in the fledgling Toronto "suburb" of Mimico, Canada West, with paternal uncles Alexander, Andrew, and Robert in close proximity.[34] Mimico was then a mixed agricultural and residential community, and it would soon become a summer destination for Torontonians with vacation homes on Lake Ontario. Christchurch Anglican appears to have been an important part of the family's life, with four of their marriages occurring there in the 1850s and, later, several interments in the churchyard cemetery.[35] Neighbors included the Wards, Murrays, Melroses, and Allans, all of which names were given to Martin grandchildren or great-grandchildren as Christian names. James apparently attended Etobicoke public schools, where he won several book prizes.[36] He became an accomplished amateur artist, and he is said sometimes to have attracted the curiosity of passers-by while reading by candle-light at home into the early hours of the morning. Family correspondence shows that James hired hands to cultivate his land, look after his livestock, and do his statute-labor on the roads. Notman-Fraser photographs depict him wearing swallow-tailed suits while inspecting his orchards, and his notes to acquaintances reveal that he frequently

30 See Mortgage # 59405, YCLRO, 14 September 1855; *Martin v Goldthorpe* (Vesting Order # 82176, Upper Canada Court of Chancery, 4 April 1861); Miles, supra note 29, at 6.

31 Lot 12, concession 3, South Orillia Township, Simcoe County. See Instrument # 53774, Simcoe County Land Registry Office (hereafter SCLRO), 16 June 1869; Instrument # 53775, SCLRO, 24 June 1869.

32 See Grant # 2021, SCLRO, 19 October 1885.

33 See, e.g., "Samuel Lindley and Anne Martin Marriage Certificate," Christchurch Mimico, 20 December 1853; "Robert Martin Autobiography," currently in the possession of Brian Stephens of Kamloops, British Columbia.

34 See generally M. Jane Fairburn, *Along the Shore: Rediscovering Toronto's Waterfront Heritage* (Toronto: E. C. W. Press, 2013) 305–87; Harvey Currell, *The Mimico Story* (Toronto: Town of Mimico, 1967) 20–59.

35 See generally William J. Keel, *Christchurch, Mimico: 1827–1927* (Toronto: Keel, 1987). The Martins were members of that "high church" congregation for about seventy-five years.

36 See generally Susan Berry, *A History of Education in the Lakeshore Area* (Toronto: Wylie, 1966) 1–4, 19–24. James' book prizes are currently in the possession of Ronald L. Martin of Mississauga, Ontario.

https://doi.org/10.1017/cls.2015.28 Published online by Cambridge University Press

travelled by train to Toronto to mix with city society (the Great Western Railway and the Northern Extension Railway had tracks across the Martin properties in Mimico and Orillia, respectively, that would have facilitated his travel).[37] James lived with his father for all forty years of their overlapping lives, and he had ten children notwithstanding the fact that he was an only child and despite his lifelong lack of employment and income.[38] His obituary reported that he had "ability and culture [that would have] qualified him to hold a public station," but had little to say about his actual achievements.[39]

James married Elizabeth Rundle at York Mills, Ontario, in 1872, and she promptly moved in with her in-laws in Mimico. Mary Elizabeth was born to that couple in 1873, followed by Florence Edna in 1875. Those girls would be enrolled as high-school students in the Ontario Ladies' College at Whitby (now Trafalgar Castle School) and then in a nursing program at the Owen Sound General and Marine Hospital.[40] They would also be the first to "take" under the trust created by their grandfather's will. Born in 1877 and 1878, Walter Scott and William John both died in infancy. Their mother, Elizabeth Rundle Martin, also died in 1878, and William's widowed sister-in-law, Elizabeth, was prevailed on to assume child care and household management for the family.

James married Agnes Adeline Harvie in 1881, and six more children followed in quick succession. The "class" of remainder-people who would inherit under the terms of their grandfather's will was thus rounded out at eight. William, Jr., was born in 1882, Barbara Scott in 1884, John Harvie Allan in 1887, James Ward in 1889, Robert Macmillan (Mac) in 1891, and Agnes Gray in 1895.[41] Perhaps due to the intervening deaths of their grandfather and father, and to the fractured sale of their legacy in Chestnut Haven, those younger children stayed for the most part at home rather than following their older siblings through private schools and post-secondary education.

The Bequests and Their Administration

In 1888, in the midst of that fast-paced child-bearing-and-rearing and following his father's death by one year, James made a two-sentence will with the assistance of the family's regular Mulock, Tilt, and Miller law firm. He gave "all my personal property of every sort to my wife Agnes absolutely … [and appointed] my wife executor of this my will and guardian of my infant children."[42] Probate of that will in 1896 listed assets of $4,939, including a new 100-acre South Orillia Township farm valued at $4,000 that was held in joint tenancy in James's

37 See, e.g., "James Martin to Alexander Keith," 26 March 1895; "Alexander Keith to James Martin," 23 January 1893. Correspondence mentioned in the text, as well as that cited in notes 44 and 47, infra, is currently in the possession of James D. Martin of Brampton, Ontario.

38 See "William Martin Probate," supra note 3.

39 "James Martin," Orillia *Packet* (Orillia, ON), 21 February 1896.

40 See Martin and Baker, supra note 27. See generally Anon., *Ontario Ladies' College* (Whitby: Ontario Ladies' College, 1965) 1–7; David Gagan, *A Necessity Among Us: The Owen Sound General and Marine Hospital* (Toronto: University of Toronto Press, 1990) 28–56.

41 See Martin and Baker, supra note 27. See also Fred W. Harvie, *The Harvies of Orillia* (St. Catharines, ON: Lincoln Graphics, 1977) 145–56.

42 "James Martin Will," 14 July 1888.

https://doi.org/10.1017/cls.2015.28 Published online by Cambridge University Press

and his children's names.[43] Separation from the estate of that real property (which was not and, because of the right of survivorship, could not have been covered by James's will), left about $900 worth of personal property to Agnes. That sparse legacy from her prematurely-deceased husband presumably also led to judicially-approved "draws" that she regularly made, on the basis of need, for her minor children from their grandfather's Court-administered trust following her husband's death.[44]

James was also empowered by his father's will "to, by will or other instrument under seal properly executed by [James], appoint an Executor or Trustee to sell and dispose of all my said lands after the death of the said James Martin and to divide the proceeds thereof between the children of my said son James as hereinbefore provided for."[45] James plainly did not do that by will or, so far as can now be determined, by any other formal instrument. That skipped step became superfluous a couple of years later when, as mentioned, the Chancery Division of Ontario's High Court approved a sale of most of the realty in William's estate to land developers and assumed James's responsibility for running the trust into which the proceeds were paid. Provincial officials also represented the Martin children in their minority on applications for judicial approval of the Chestnut Haven sales.[46]

The waters of William's estate began to get rougher in the winter of 1890, however, when estate administrator and life tenant James contracted by way of a "bargain and sale agreement" to sell all fifty acres of Chestnut Haven in fee simple (his children's inheritance and the security for his aunt's annuity) to the Mimico Real Estate and Security Company (formerly the New Toronto Manufacturers' Company) for $28,000.[47] That purchaser was a conglomerate of Philadelphia and Toronto industrialists, and the purchase price was substantially higher than the 1887 probate-declared value of the property of $6,000.[48] Indeed, the increase was almost a multiple of five (in three years).[49] The purchaser's goal, which was

---

43 That property was the east half of lot 9, concession 1, South Orillia Township, Simcoe County. See also "James Martin Probate," supra note 3. Daughters Mary and Edna, who had reached the age of twenty-one, each conveyed their interest in it to their step-mother for $1 two weeks after their father's death. The other six children did the same in the spring of 1918 (with Mrs. William Martin, Jr. barring her dower), after the youngest of them had reached her majority. See Grant # 4616, SCLRO, 5 March, 1896; Grant # 16211, SCLRO, 14 May 1918.

44 Those requests to the Court were made directly through the Mulock, Tilt, and Miller law firm, or through that firm by way of F. G. Evans at the Orillia law firm of McCarthy, Pepler, Evans, and McCarthy. See, e.g., "Mrs. James Martin in Account with F. G. Evans," 27 December 1902; "Mr. Robt. M. Martin to F. G. Evans," 10 January 1913.

45 "William Martin Will," supra note 2. That clause may have been used obliquely by the Surrogate Court to justify its 1887 appointment of James as the estate's trustee.

46 See, e.g., *Martin v Martin,* supra note 12; Indenture # 8553, YCLRO, 28 May 1906.

47 See "Martin to Keith, et al.," Agreement # 4022, YCLRO, 6 March 1890; "James Martin, et al., to Thomas McDonald, et al. (composing the Mimico Syndicate) Conveyance," 19 December 1891.

48 That inflation may have been due to the fact that the deal was an unsecured transaction, or to the fact that the land was in in a prime location. See generally Richard Harris, *Unplanned Suburbs: Toronto's American Tragedy, 1900 – 1950* (Baltimore: Johns Hopkins, 1996) 21–85; http://en.wikipedia.org/wiki/File:NewTorontoMimicoPlan1890.JPG.

49 "William Martin Probate," supra note 3. Succession duties were not implemented in Ontario until 1892, with the result that limiting them could not have been a motive for James' apparent under-valuation of the property for probate. See *Succession Duty Act,* 55 Vict. (1892), c. 6 (Ont.). Minimizing municipal property taxes, through under-valuation of the land, could, however, have been James' goal.

https://doi.org/10.1017/cls.2015.28 Published online by Cambridge University Press

realized in the early-twentieth century following a series of financial set-backs, was to create the town of New Toronto as a self-contained industrial community on the larger model of Rochester, New York.[50] By the First World War, plants in New Toronto had been constructed by manufacturers like Goodyear Tire, Du Pont Fabrikold, and Canadian Wallpaper. For present purposes, however, the key point is that James purported to sell much more than the life interest that he owned in the Martins' Mimico property. Life tenants, then as now, could use the asset in issue and take earnings or renewable resources from it. But they could not sell, waste, or otherwise prejudice the interests of their remainder-people.[51] William Martin apparently wanted to keep his well-situated, landed wealth intact for a future generation of his family and seemingly did not trust James to use or steward that wealth wisely. Or perhaps William was leery about giving his whole patrimony to his son, fearful that James would leave everything to a surviving second wife who would then, in respect of her estate, "play favorites" with her natural children as against her step-children. William knew that he had pancreatic cancer at least a year before he died, and he also knew that none of his four existing grandchildren had resided for any significant time other than with him in the family home that became the subject of his bequest of a life estate to their father with its remainder to them. How widely life estates were used in those kinds of circumstances is not a question that has been the subject of local scholarly inquiry, and the commitment of several days to sampling period wills in the Public Archives of Ontario did not much advance that inquiry.[52] Students of nineteenth-century British North American law firms have, moreover, yet to find a significant wills or estates practice among those businesses that would show patterns and means of succession.[53] Similarly, the small Victorian corpus of local wills manuals has little to say about the use of life estates.[54] Nor is the nineteenth-century prevalence of life estates a topic that has been widely investigated in the broader Anglo-American world.[55] Moreover the legal-historical literature of Scotland and the Scots diaspora does not have much to say about traditional Celtic preferences for intergenerational wealth-transfers by way of ultimo-geniture (youngest descendent takes all),

[50] See generally http://www.etobicokehistorical.com/new-toronto.html; "Toronto's Growing Suburb – New Toronto," *Globe* (Toronto, ON), 25 October 1890.

[51] See generally Alexander Leith and James F. Smith, *Commentaries on the Laws of England Applicable to Real Property* (Toronto: Rowsell and Hutchison, 1880) 130–36. See also Bruce Ziff, *Principles of Property Law* (Toronto: Carswell, 2010) 175–92.

[52] Cf Bettina Bradbury, *Wife to Widow: Lives, Laws, and Politics in Nineteenth-Century Montreal* (Vancouver: University of British Columbia Press, 2011) 142–170; Trudi Johnson, "Women and Inheritance in Nineteenth-Century Newfoundland," *Journal of the Canadian Historical Association* 13 (2006): 1.

[53] See e.g., C. Ian Kyer, *Lawyers, Families, and Businesses: The Shaping of a Bay Street Law Firm, Faskens, 1863–1963* (Toronto: Irwin, 2013) 13–122; Christopher Moore, *McCarthy, Tetrault: Building Canada's Premier Law Firm, 1855–2005* (Toronto: Douglas and McIntyre, 2005) 13–54.

[54] See e.g., Daniel O'Sullivan, *Manual of Practical Conveyancing* (Toronto: Carswell, 1882); Richard T. Walkem, The *Law Related to the Execution and Revocation of Wills* (Toronto: Willing and Williamson, 1873). See also James Christie, *Concise Precedents of Wills* (London: Maxwell, 1857).

[55] Cf Hendirk Hartog, *Someday all this will be Yours* (Cambridge: Harvard University Press, 2012) 144–205; Lawrence M. Friedman, *Dead Hands: A Social History of Wills, Trusts, and Inheritance Law* (Stanford, CA: Stanford Law Books, 2009) 111–24, 140–70.

https://doi.org/10.1017/cls.2015.28 Published online by Cambridge University Press

of which this bequest is arguably a modified version.[56] It has, therefore, been difficult to determine whether William Martin as testator was behaving defensively, eccentrically, or dynastically or was following common cultural practices. It can, however, be said that no institution or person through whose hands William's will passed treated it as novel.

The first salvo in James's efforts to sell his children's inheritance to Mimico Real Estate came in the form of a two-page "offer to sell you my farm," in James's handwriting and literary style, addressed to the partners of that company.[57] It was a standing offer to make what was then known as a bargain and sale agreement, which was typically an unsecured installment contract to sell land.[58] There is no indication of lawyers' participation in James's mapping of that deal or in the offer's drafting, but the purchasers were represented by novice Toronto commercial solicitor William Norman Tilley. Tilley went on to achieve national prominence in that field and as a long-tenured Treasurer (President) of the Law Society of Upper Canada.[59] James's proposal called for a down payment of $5,000 ($1,000 plus $4,000, a couple of months apart), a payment of $5,000 on 1 November 1890, and five consecutive yearly payments of $3,600 (with five percent interest) on each 1 November during that period. There is mention in that offer of potential take-back mortgage financing, but no details were provided and no mortgage was attached to that version of the transaction.[60]

That deal went ahead in the winter of 1891, following judicial intervention.[61] Ontario's Chancery Division took control of the property as parens patriae of William's grandchildren, and substituted financing by way of a $23,000 mortgage for the bargain and sale arrangement to which the parties had originally agreed and under which a $5,000 down payment had already been made to James. The Court thereby became Mimico Real Estate's effective creditor/mortgagee and would hold payments under the transaction in trust for the Martin grandchildren. It also severed from the deal the acre of land on which the family home was located, and allocated occupancy of it to Elizabeth Martin for her life in lieu of the $100 a year that had been left to her in William's will. Title to a life estate in that severed

---

56 Compare David Walker, *A Legal History of Scotland* (Edinburgh: Green, 2004) vol. 6, 1026–46; Cormac O'Grada, "Primogeniture and Ultimo-geniture in Rural Ireland," *Journal of Interdisciplinary History* 10 (1980): 491.

57 See "Martin to Keith, et al.," supra note 47. The offerees were Alexander Keith, James Fitzsimmons, Jessie Keith, James Morrison, Thomas McDonald, John Sheridan, Joseph Sheridan, Arthur Kitson, Joseph Barrett, and Peter Whitely.

58 See generally Daniel Bilak, "The Law of the Land: Rural Debt and Private Land Transfer in Upper Canada, 1841–1867," (1987), *Histoire sociale/Social History* 20 (1987): 179; David Gagan, "The Security of Land: Mortgaging in Toronto Gore Township, 1835–1895," in *Aspects of Nineteenth-Century Ontario*, ed. Frederick H. Armstrong, et al. (Toronto: University of Toronto Press, 1974) 140.

59 See generally Christopher Moore, *The Law Society of Upper Canada and Ontario's Lawyers* (Toronto: University of Toronto Press, 1997) 204, 217, 240–1.

60 For insightful examination of ways that American testators and courts "skated close to the edge of the ice" making wills and administering estates, see Susannah Blumenthal, "The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth-Century America," *Harvard Law Review* 119 (2006): 959, 1006–32.

61 See Grant # 5009, YCLRO, 12 January 1891. It is unclear whether Mimico Real Estate, or Elizabeth Martin, or the eldest grandchildren (who were then sixteen and eighteen years of age) became uncomfortable with the arrangement and "blew a whistle" loudly enough that the judiciary heard it.

https://doi.org/10.1017/cls.2015.28 Published online by Cambridge University Press

land remained with James, and title to the remainder stayed with his children.[62] Judicially-appointed sureties for James's administration of his father's estate, Hendry, Kelly, Rundle, and Whitlan, were then excused by the Court from the duties they had assumed four years earlier. James appears to have represented himself in that proceeding and, insofar as he had anything left to represent, in the subsequent conveyance.

James stated in his 1887 application for appointment as executor of his father's estate that "during the last five years [he had] transacted most of [his father's] business and [his father] always consulted [him] about any business transactions."[63] Although he acknowledged in passing the legal interest of his children in his offer to sell Chestnut Haven to Mimico Real Estate, the prevailing language of that and related texts is "my land," "my offer," and "my extension of time."[64] James also omitted to appoint by will or other instrument, as he was requested to do in his father's will, a trustee to manage and then divide and distribute among his children the remainder interest that was left to them.[65] He seems to have regarded William's assets as tantamount to his own, notwithstanding the limitations of his status as son and later the limits of his life estate. Indeed James may have reasoned that, so long as he preserved for his children the $6,000 that he declared Chestnut Haven to have been worth on his father's death, he could appropriate to himself as a life tenant any subsequent appreciation in much the same way that he could keep the profits that accrued from growing crops on that property or renting it to tenants.[66] It was likely a rude shock to him when, while approving a modified version of the sale of Chestnut Haven to Mimico Real Estate, the Court removed James from the administration of his father's estate and from the management of his children's trust.

Having lost control of his children's trust assets to the Court, as well as the use of the family's Mimico property to his Aunt Elizabeth and to Mimico Real Estate, James retreated with his immediate family to his new in-laws' "Springbank Farm," again in Simcoe County's South Orillia Township. Although his parents-in-law and two of his maiden aunts-by-marriage continued to reside in the house on that property, James purported to buy the farm from father-in-law and commercial stage-coach operator William Harvie for a $1,250 down-payment and a $3,750 vendor take-back mortgage.[67] The fact that his children were put on title to that land as joint tenants suggests that James used part of their deposit money from the Mimico sale for that purchase. The key point is, however, that a family of ten, along

62 For descriptions of the substantive work of that Court, see generally Dennis R. Klinck, "Doing Complete Justice: Equity in the Ontario Court of Chancery," *Queen's Law Journal* 32 (2006): 45, 48–80; Elizabeth Brown, "Equitable Jurisdiction and the Court of Chancery in Upper Canada," *Osgoode Hall Law Journal* 21 (1983): 275, 299–314.

63 "William Martin Probate," supra note 3.

64 See, e.g., "Martin to Keith, et al.," supra note 47.

65 See "William Martin Will," supra note 2; text at notes 46–47, supra.

66 No pre-1890 reported Canadian case-law on that point has been discovered. And no notice seems to have been taken in those negotiations or judicial proceedings of the *Settled Estates Act*, R. S. O. (1877), 39 & 40 Vict., c. 30, which would presumably have enabled James (with the concurrence of his remainder-people or their guardians) to sell the fee simple in all of Chestnut Haven.

67 See Instrument # 40012, SCLRO, 29 June 1890; Instrument # 40013, SCLRO, 29 June 1890. The mortgage was discharged by Instrument # 2928, SCLRO, 18 July 1908.

https://doi.org/10.1017/cls.2015.28 Published online by Cambridge University Press

with four in-laws and a hired farm-hand, were then co-habiting in a cramped, storey-and-a-half frame farmhouse that must have extruded a very different ambiance from the comparatively privileged surroundings of Chestnut Haven. Proceeds from the sale of the lands surrounding William's Mimico home were, at least for the moment, accumulating beyond the family's reach in the coffers of the Accountant of the Supreme Court of Ontario. But Mimico Real Estate's difficulty making those payments, commencing in the third year of that six-year deal, together with its impending insolvency, would soon disrupt once again the expectations of William's beneficiaries.[68]

Payment Under the Mimico Sale Stalls

Alexander Keith of Mimico Real Estate wrote to James Martin in the winter of 1893 to propose an adjustment to the 1891 transaction under which Keith's syndicate had probably made two installment payments of $3,600, together with delivery of the $1,000 plus $4,000 down payment.[69] He asked for a payment period of longer than six years, smaller installments, and he requested that James instruct his lawyer to stop threatening a court action for "specific performance" of the original deal.[70]

The debt held by the Court on Chestnut Haven as parens patriae of the Martin grandchildren empowered it to "distrain for arrears of interest provided that, in default of the interest hereby secured, the principal hereby secured shall become payable," to "enter on and lease or sell the said lands on default of payment for one month and on giving one month's notice," and to "have quiet possession of the said lands free from all incumbrances on default [by the mortgagor]."[71] It was not a textbook mortgage, but it gave the Court a few remedial options. In any event, James was neither an owner, nor a trustee, nor a mortgagee when default under that transaction began. And, although the High Court was the relevant mortgagee with contractual power to distrain or enter onto the property, it appears to have done little about that default until the spring of 1929.[72] In contra-distinction to the Martins' neighbors, several of whom had taken full-bodied mortgages back from

---

[68] York County's land-registry records for the relevant area of Etobicoke Township show that "Samuel McKnight, Liquidator" took possession of bankrupt Mimico Real Estate's property in 1896–97. He sold most of that land back to the company's original stakeholders in the period leading up to the 1905 reorganization of that group by its initial investors. That restructuring, perhaps unsurprisingly, coincided with the opening of the Grand Trunk Railway Yards in New Toronto. The liquidator apparently did not deal with Chestnut Haven. See, e.g., Grant # 8140, YCLRO, 14 June 1904; Grant # 8209, YCLRO, 27 March 1905; Grant # 8211, YCLRC, 27 March 1905. See also http://www.newtorontohistorical.com/Railway.html.

[69] In other words, Mimico Real Estate was about $15,800, or sixty percent, short of its obligation in respect of Chestnut Haven when its payments stalled.

[70] See "Keith to Martin," supra note 37.

[71] Mortgage # 5010, YCLRO, 22 October 1890. See also Grant # 5009, YCLRO, 12 January, 1890. See generally Alfred T. Hunter, *A Treatise on Power of Sale under Mortgages of Reality* (Toronto: Carswell, 1892).

[72] See "Lot 5, concession 1," *York County – Etobicoke Township Land Registry Abstract Book*, at 2 (17 May 1929). The mortgage was discharged on perfunctory application by the Court and Mimico Real Estate, despite thirty-five years of apparent default. That result might be explained by the expiry of prescription/limitation periods, by the final payment by the Court to the youngest Martin beneficiary thirteen years earlier, by the impending stock-market instability of 1929, or by bureaucratic inertia.

https://doi.org/10.1017/cls.2015.28 Published online by Cambridge University Press

Mimico Real Estate and who did repossess or attempt to repossess their former lands when that company went into default, the Accountant of the Supreme Court may have reasoned that, without local industrial development, Chestnut Haven was actually worth something like the $6,000 at which James had valued it when his father's will was probated in 1887. On that basis, the failed transaction had already yielded approximately $6,500 more than the property's non-industrial value. There was, thus, little incentive to seek repossession or any other extraordinary relief from Mimico Real Estate. And, unlike the neighbors, neither the Court, nor the Martin grandchildren (who were still in their minority), nor James seems to have been interested in re-occupying the land for agricultural, vacation, or residential purposes. Those are large assumptions that are important to this account, but there does not seem to be any way to make them more than assumptions. The kinds of sources that would be required to reconstruct that Court's administrative work do not appear to exist. Indeed, the non-adjudicative dimensions of judicial work have not yet been thoroughly-addressed in histories of Canadian trial courts.[73]

The Beneficiaries' Inheritance

James died at Springbank, in the midst of that Mimico development scramble, on 15 February 1896. He was forty-eight years old, and none of the available sources reveals the cause of his death. James's eight children then ranged in age from one to twenty-three years and, by virtue of his death (which brought about "closure" of the class of beneficiaries created by their grandfather's will) and their ages, the two eldest children became eligible to receive their portions of William's trust fund. The size of those pay-outs cannot be determined precisely, but they were almost certainly larger than the remaining six pay-outs that began seven years later.[74] That is so because James's widow withdrew another undeterminable amount of money from that trust during the next twenty years, with the Court's authorization and following inspections of her household, to provide necessities of life for her minor children. Those withdrawals would necessarily have depleted a fund that was growing through neither new deposits nor aggressive investment.[75]

The speed with which James's probate application was made by his executrix (his widow and sole beneficiary) two weeks after his death, notwithstanding her relatively remote location and the fact of that death's occurrence in mid-February, together with the almost instant and gratuitous transfer to her by the two oldest grandchildren of their interest in the homestead that James's widow and her children occupied, also suggest concern about the financial well-being of the family.[76] The later opposition of the four younger children, who were still at home, to the proposed 1905 "sweetheart" sale of the retained Chestnut Haven house to their

[73] See, e.g., Dale Brawn, *The Court of Queen's Bench of Manitoba, 1870–1950* (Toronto: University of Toronto Press, 2006) 21–203; P. Girard, et al., eds., *The Supreme Court of Nova Scotia, 1754–2004* (Toronto: University of Toronto Press, 2004) 53–203.

[74] See infra, text at note 88.

[75] It is unclear why the Accountant of the Supreme Court, rather than an institutional or private trustee, was the designated manager of the estate.

[76] See Grant # 4616, supra note 43. See also Grant # 16211, supra note 43.

https://doi.org/10.1017/cls.2015.28 Published online by Cambridge University Press

great-aunt Elizabeth Martin's daughter and son-in-law suggests further sensitivity to making monetary ends meet.[77] Despite William's paternalistic sentiments of the 1880s toward his grandchildren, factors like the vicissitudes of his son, a weakly-backed land developer, an unpredictable Toronto real-estate market, a national economic depression, and an apparently sluggish court had merged to effect significant frustration of those sentiments. Their relatively unsuccessful expression or insulation in the little legal system created by his will is a key subject to which this essay will return.[78]

What were the longer-term results of William's 1887 bequest? His son James, who received $6,200 worth of personal property and a life interest in fifty acres of land in Mimico, died nine years after that bequest took effect and left a $900 estate comprised of "household goods, farming implements, horses, horned cattle, farm produce, and cash."[79] William's sister-in-law Elizabeth was paid a $100 annuity for the first four years of the regime created by his will and then occupied his Mimico home (in lieu of that annuity) for the succeeding fourteen years. Although the estate's obligation to her ended with her death in 1905, its other beneficiaries then sold their remainder interest in William's former home to Elizabeth's daughter and son-in-law at a $1,000 price that was significantly below its market value.[80] That son-in-law was a rough-carpenter, rather than a carrier, yeoman, or a gentleman-farmer like the other family members who had lived at Chestnut Haven, which may account for his apparently straightened financial circumstances that led to further sales of parts of that one-acre property (together with the mortgages with which he encumbered it).[81] What remained of it was sold for $9,000 in 1921 by Elizabeth's descendants to William Baycroft, who transformed it into Baycroft's and then Ridley's Funeral Home that has continued on the site at 3080 Lakeshore Boulevard West in New Toronto for the intervening ninety-four years.[82] After that sale, Elizabeth's descendants relocated to Detroit, Michigan.

James's widow, Agnes Harvie Martin, was not a direct beneficiary of William's estate but, owing to transfers from his grandchildren to her in 1896 and 1918, she came to own the family's Springbank Farm in respect of whose purchase her husband had spent (presumably covertly) several thousand dollars of his children's trust money from that estate. Her four unmarried children lived out their lives on that farm, as she bequeathed it to them in equal parts on her death in 1943.[83] Mac Martin, the survivor of that group, then returned Springbank by will on his death in 1976 to the descendants of the married heirs of his grandfather's 1887 trust (Edna's children Helen and Murray, William's children William and Muriel, and Barbara's children Allan, Andrew, and Norma).[84] Following litigation among those descendants, William Anderson Martin acquired the property from Mac's other

77 See *Martin v Martin,* supra note 12; Grant # 8558, supra note 12.
78 See text at notes 90–96, infra.
79 See "James Martin Probate," supra note 3.
80 See Grant # 8558, supra note 12.
81 See, e.g., Grant # 8583, YCLRO, 17 July 1906; Mortgage # 221, YCLRO, 26 March 1914.
82 See Grant # 2202, YCLRO, 18 September 1921; Mortgage # 2202, YCLRO, 18 September 1921.
83 See Will and Probate # 14669, SCLRO, 3 March 1943.
84 See "Robert Macmillan Martin Will."

https://doi.org/10.1017/cls.2015.28 Published online by Cambridge University Press

beneficiaries and transferred about forty acres of conservation easements across it to the Province of Ontario in the 1980s. Those easements were named in honor of several generations of "William Martins," including the family's late-nineteenth-century patriarch.[85] What remained of that property was sold on the open market in 2004.

It bears repetition that calculations of pay-outs to William's grandchildren from the Chestnut Haven funds are difficult to make. A guess would be that no beneficiary received more than about $1,525 in early-twentieth-century dollars (and probably less), as compared with the roughly $4,250 that each of them might reasonably have expected in late-nineteenth-century dollars on the basis of a tally immediately preceding their sale to Mimico Real Estate. A difference in proceeds that approaches 300 percent seems noteworthy. Viewing that issue from the standpoint of what those beneficiaries did with their inheritance does not make matters much clearer. In each case, there seems to have been one "substantial" acquisition of things like a Heintzman piano, a Ford Model T truck, and swamp-land zoned for agricultural use (intended to pre-empt military conscription during World War I). The largest single purchase by any of those beneficiaries was probably the 1909 acquisition from cousin Eric Lafferty Harvie of 160 acres of undeveloped land in the Kitscoty region of Alberta, which was resold in 1917.[86] There is no indication that money was invested in the stock market, or in bonds, or in currency by any of the beneficiaries but, by the same token, neither did most of them have careers or regular employment. The best conclusion is therefore that their diminished inheritances supported subsistence lifestyles for lives that ranged in length following the receipt of their inheritance from twelve to seventy years.

Three of the eight beneficiaries were ultimately married with children. But even the number of great-grandchildren in William's "dynasty" was modest, at seven, so the trust money was probably not allocated in significant measure to things like inter-generational child-rearing, education, or the provision of business start-up funds. The grandchildren who married did so in "acceptable" and sometimes socially-mobile ways. Mary married an American medical doctor, William married the daughter of a local politician, and Barbara married a member of Hamilton, Ontario's, extended Dundurn-MacNab family. Despite the young age of that generation at the time of the life-changes described in this essay, they presumably understood that they were being pulled back and forth between Mimico and Orillia, that they lived in progressively less opulent and more cramped settings, that people who were important parts of their lives like grandfathers, fathers, and great-aunts disappeared one after another, that official personnel visited their widowed mother to ensure their care, and that arguments involving judges sometimes drew them in. Moreover, that generation appears to have tried to compensate among themselves and their immediate descendants for those short-comings almost a century later.[87]

---

85 See *Martin v MacNab* (1980), Supreme Court of Ontario.

86 See Instrument # 972 (1909), Township 50, Range 3, W4, Alberta Land Titles Office. See generally Fred M. Diehl, *A Gentleman from a Fading Age: Eric Lafferty Harvie* (Calgary: Devonian, 1989) 17–30, 65–82.

87 See text at notes 72–75, supra.

https://doi.org/10.1017/cls.2015.28 Published online by Cambridge University Press

The Vulnerabilities of a Little Legal System

What of the "historical significance" of this Martin episode? A starting-point is, arguably, the recognition that ideas about the past's importance are often contingent on subjective matters. Social historians might observe that the Martin vignette is a comparatively-engaging and rarely-accessible one of "middle-class" behavior, set in a period before that label had much Canadian currency. Conversely, institutionally-oriented historians might regard this paper as a partial and perhaps disturbing answer to questions about the effectiveness of the fading Chancery Division of Ontario's High Court at the turn of the twentieth century. That might be enough to say on the issue of historical significance, since there is so little local secondary literature on those themes.[88] In other words, the social significance of this study may lie largely in its subject's ordinariness.[89] But the larger goals of this research were the modest contextualization of a will and the administration of an estate, and reflection on the strategic choices made within the constraints of that unstable government in miniature. Those aims and the themes through which they have been pursued almost necessarily propelled this text onto more expansive theoretical terrain.

This archeology of a late-Victorian Ontario will, like several tangentially-related case-in-context studies, suggests that too much emphasis may conventionally have been placed on the language and concepts of state law, even when the subject of study was self-made law or implicit normativity.[90] A similar conclusion has also emerged from contextualized studies of the norms that structured nineteenth-century Canadian corporate action.[91] Individualistically-oriented William Martin embraced the legislatively-entrenched concept of freedom of willing and apparently hired leading Toronto legal counsel to ensure that his technical deployment of that laissez-faire idea would be as thorough as his ideological engagement with it.[92] But, like many other legal regimes, whether treaty-based, customarily international, domestically legislative, administrative, common law, or privately-mandated, the little testamentary charter that William "enacted" for implementation across three generations of his family was very imperfectly realized. William's plan did prevent James from squandering the whole estate, and it

---

88 But see Brian Young, *Patrician Families and the Making of Quebec: The Taschereaus and McCords* (Montreal: McGill-Queen's, 2014); William H. Graham, *Greenbank: Country Matters in Nineteenth-Century Ontario* (Peterborough, ON: Broadview, 1988).

89 Large-scale, rather than single-case, studies could be undertaken to help flesh out the issue of "ordinariness," as was done provisionally by Philip Girard and Rebecca Vienot, "Married Women's Property Law in Nova Scotia, 1850–1910," in *Separate Spheres: Women's Worlds in the Nineteenth-Century Maritimes*, ed. Janet Guildford and Suzanne Morton (Fredericton: Acadiensis, 1994) 67. But the resources required to do collective or synthetic legal archeology would be very nearly prohibitive.

90 Cf Eric H. Reiter, "From Shaved Horses to Aggressive Churchwardens," in *Essays in the History of Canadian Law: Quebec and the Canadas*, ed. G. Blaine Baker and Donald Fyson (Toronto: University of Toronto Press, 2013) 460; Angela Fernandez, "The Ancient and Honorable Court of Dover," *Australia and New Zealand Law and History e-Journal* (17 January 2011): 194.

91 See, e.g., C. Ian Kyer, "Gooderham and Worts," in Baker and Phillips, supra note 18, at 335; Brian Young, *In Its Corporate Capacity: The Seminary of Montreal as a Business Institution* (Montreal: McGill-Queen's, 1986) 3–37, 108–49.

92 See *Wills Act*, R. S. O. 1887, c. 109. See generally Adam Hirsch, "Freedom of Testation/ Freedom of Contract," *Minnesota Law Review* 95 (2010): 2180.

https://doi.org/10.1017/cls.2015.28 Published online by Cambridge University Press

more or less prevented his second daughter-in-law from inheriting that estate through her husband and excluding her step-children from it. But the estate's diminished quantum did not build or secure any dynasties. The entropy of human relations thus limited the impact in the world of ideologically-grounded and carefully-crafted legal formalism. A hapless, dilettantish, or avaricious son, a widespread commercial recession, a sluggish court, and eccentric beneficiaries significantly compromised elite, private law-making.

Most straight-forwardly, that imperfect realization raises "law in books" (William's will) and "law in action" (the will's attempt to have an impact on social relations) questions. Closely-related issues like the monopoly, authority, and objectivity of formal law (again, William's will) also emerge from this exercise in legal archeology. Expressed otherwise, sub-themes that arose from the will's skewed operation can be catalogued under broad headings like "legal transplantation and rejection," "juristic imperialism and popular rebellion," and "insertion of norms into resistant social space."[93] Privately constructed legal systems thus seem to have many of the textual, doctrinal, and operational vulnerabilities that recent generations of legal realists and critical legal scholars have exposed in respect of full-blown public law or regulatory private law.[94] The indeterminacy, contradiction, and unpredictability of self-made legal systems may turn out to be as pronounced as those features have often been shown to be for larger, state-based legal systems. If so, those disabilities will have to be said to exist despite the widely-hyped capacity of contracting parties, testators, and trust settlors to control comprehensively the creation and management of their little legal systems. Jumping too quickly into a simplified version of the legal realist and critical legal studies parades may not be prudent in this case, but that leap is at least superficially compelling. It probably also bears emphasis that William Martin's posthumous legal system was not a relatively peaceable kingdom of implicit normativity like those which have been documented for passing urban strangers and European gypsies.[95]

Conclusions

There may, finally, be an issue about the representativeness of this Martin story. But the lack of comparable studies means that that issue cannot be addressed in a thoroughgoing fashion. One suspects that, if asked, Brian Simpson would have responded intuitively that this kind of account will turn out to be fully representative of the workings of little, privately-made legal systems. The intent here was,

[93] Literature on legal transplants and imperialism thereby gets drawn into this mix. See, e.g., Yves Dezalay and Bryant Garth, *Asian Legal Revivals: Lawyers in the Shadow of Empire* (Chicago: University of Chicago Press, 2010); David Sugarman, "Who Colonized Whom?" in *Professional Competition and Professional Power*, ed. Yves Dezalay and David Sugarman (London: Routledge, 1995) 222.

[94] See generally John H. Schlegal, *American Legal Realism and Empirical Social Science* (Chapel Hill: University of North Carolina Press, 1995); Alan Hunt, *The Sociological Movement in Law* (Philadelphia: Temple University Press, 1978).

[95] See, e.g., Reisman, supra note 22; Susan G. Drummond, *Mapping Marriage Law in Spanish Gitano Communities* (Vancouver: University of British Columbia Press, 2006); Walter Weyrauch and Maureen Bell, "Autonomous Law-Making: The Case of the Gypsies," *Yale Law Journal* 103 (1993): 323.

https://doi.org/10.1017/cls.2015.28 Published online by Cambridge University Press

moreover, to promote a timely expansion of legal archeology beyond adjudicative and intellectual artifacts to myriad other sites of justice where law is debated, created, found, organized, interpreted, or applied. The excavation of a bequest that was significantly frustrated by entropic human affairs seemed like a promising way to begin and encourage that expansion. It also offered the opportunity to focus on, and peel away, layers of strategy adopted by a range of people and institutions touched by that bequest.

G. Blaine Baker
Faculty of Law (Emeritus)
McGill University
blaine.baker@mcgill.ca

https://doi.org/10.1017/cls.2015.28 Published online by Cambridge University Press