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WILLS-CONSTRUCTION-"PERSONAL PROPERTY" AS INCLUDING REAL ESTATE

WILLS—CONSTRUCTION—"PERSONAL PROPERTY" AS INCLUDING REAL ESTATE—Testatrix, a German woman, not particularly familiar with the English language, drew a holographic will making certain specific bequests of money and bonds and concluding by giving all her "personal property" to three named beneficiaries. Testatrix died leaving both realty and personalty. *Held*, both realty and personalty passed under the term "all my personal property." "My personal property" was construed to mean "my own property." *In re Olsen's Estate*, (Cal. App. 1935) 50 P. (2d) 70.

In the interpretation of the language of a will the court seeks, whenever not in conflict with some rule of law, to carry out what it thinks is the probable intent of the testator.[1] This intent must be expressed in the language of the will,[2] and, unless the context indicates a contrary intention, technical words are to be taken in their technical sense.[3] Yet, words uninterpreted are meaningless,[4] and the court quite properly considered the lack of skill of the testatrix and the general circumstances surrounding the execution of the will.[5] Words intrinsically applicable to personal estate only may, by force of the context of the will, include realty.[6] A gift of "the rest of my money" [7] has been held to include realty, and the California court does not stand alone in extending a gift of "all my personal property" to include realty.[8] But where there is nothing in the context from which it is apparent that testator used the words other than in their strict and primary meaning and when his words so interpreted are sensible with reference to extrinsic circumstances, words properly descriptive of personalty only have not been extended to include realty.[9] In the principal case, aided by the presumption against intestacy, the court relied solely on the ignorance of the testatrix to support the conclusion reached. Confining personal property to its legal meaning, it cannot be said that there is either ambiguity or mistake. Yet the court's conclusion is quite reasonable and it is probable that the intent of the testatrix was effectuated. On the other hand, it is quite possible that testatrix

[1] ROOD, WILLS, 2d ed., 252 (1926). The early cases on the intention of the testator in the construction of the will are collected and annotated in 8 L. R. A. 740 (1890).

[2] GARDNER, WILLS, 2d ed., 323 (1916).

[3] Polsey v. Newton, 199 Mass. 450, 85 N. E. 574 (1908); Marquette v. Marquette's Exrs., 190 Ky. 182, 227 S. W. 157 (1921); cases collected in ROOD, WILLS, 2d ed., 370 (1926).

[4] 2 SIMES, FUTURE INTERESTS 13, § 306 (1936).

[5] Hewitt v. Green, 77 N. J. Eq. 345, 77 A. 25 (1910); Cross v. Hoch, 149 Mo. 325, 50 S. W. 786 (1899); 9 COL. L. REV. 51 (1909); 28 YALE L. J. 33 (1918).

[6] 2 JARMAN, WILLS, 7th ed., 974 (1930).

[7] In re Estate of Miller, 48 Cal. 165 (1874), cited with approval in principal case. McCabe v. Cary's Exr., 135 Va. 428, 116 S. E. 485 (1923); Talbot v. Anderson, 292 Pa. 454, 141 A. 256 (1928). But see Sweet v. Burnett, 136 N. Y. 204, 32 N. E. 628 (1892); and extensive collection of cases in 93 A. L. R. 514 (1934). And see discussion on meaning of "money" in a will in 44 L. Q. REV. 280 (1928) and 46 L. Q. REV. 8 (1930).

[8] In West v. West, 215 App Div. 285, 213 N. Y. S. 480 (1926), in addition to a conflict between the use of the word "seized" and the term "personal property," there was a grant of an unrestricted power to sell all property. In Swentzell's Estate, 294 Pa. 261, 144 A. 129 (1928), there was a disposition of "all the rest and residue of my personal estate, whatsoever and wheresoever, not hereinbefore given." The personal estate was not enough to pay debts of testator and there had been no personal property bequeathed in prior clauses. *Held*, realty passed. But in Webb v. Webb, 111 Ark. 54, 163 S. W. 1167 (1914), the court construed "whatever both property I may have" to pass only personalty. See also In re Kavanagh's Will, 133 Misc. 399, 232 N. Y. S. 308 (1928).

[9] White v. Crawford, 87 Mo. App. 262 (1901). Spurrier v. Hobbs, 68 W. Va. 729, 70 S. E. 760 (1911), held gift of "all my estate personal and mixed" did not pass realty.

intended to dispose of only her chattel property to certain beneficiaries. The problem becomes quantitative. Is the ignorance of the testatrix and the presumption against intestacy [10] enough per se to overcome the ordinary meaning of words? The California court's answer was yes. Under such a construction the intent of the unskilled testator who misuses technical terms may be effectuated while the intent of the unskilled testator who advisedly uses technical terms may be defeated. Without questioning the soundness of the decision in the principal case, it must be conceded that it goes rather far in permitting mere probabilities as to the testatrix's intention to overcome the ordinary legal meaning of the words used in the will.

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[10] McCabe v. Cary's Executor, 135 Va. 428, 116 S. E. 485 (1923); GARDNER, WILLS, 2d ed., 326 (1916). Should the court have desired the opposite result, there might have been a greater reliance on Jarman's fifth rule, "that the heir is not to be disinherited without an express devise, or by necessary implication." 3 JARMAN, WILLS, 7th ed., 2144 (1930). Simes suggests that, "Rules of this sort not uncommonly exist in pairs. If one result is desired, one rule is used; if the opposite result, we use the other." 2 SIMES, FUTURE INTERESTS 20, § 310 (1936).