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WILLS-CONSTRUCTION-USE OF EXTRINSIC EVIDENCE

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WILLS—CONSTRUCTION—USE OF EXTRINSIC EVIDENCE—A suit was brought for construction of a will bequeathing a sum of money "To the Home for the Aged located at 2007 N. Capitol Avenue, Indianapolis, Indiana." A home for the aged was conducted at that address by Altenheim of Indianapolis, while Indianapolis Home for the Aged, Inc. was located at 1731 N. Capitol Avenue. The probate court resolved the contest in favor of Altenheim of Indianapolis, holding the bequest to be unambiguous. On appeal, *held,* reversed. Upon attempted application the bequest was ambiguous and extrinsic evidence was admissible to interpret the language employed. One judge dissented on the ground that the will contained no ambiguity. *Indianapolis Home for the Aged, Inc., v. Altenheim of Indianapolis,* (Ind. 1950) 93 N.E. (2d) 203.

In the interpretation of a will the court must place itself in the situation of the testator by means of evidence of the circumstances in order to identify the persons and property referred to in the will.[1] It is also accepted that the cardinal principle in interpretation is to seek the testator's intent as expressed in the will and as aided by extrinsic facts.[2] If the will is contradictory in its description of the legatee or the property, non-essential and erroneous matter in the description will be striken out, and, if what remains is sufficient to identify, it will be given effect.[3] The use of direct statements of the testator's intent is allowable only to explain an equivocation.[4] Since the bequest in the principal case can be termed equivocal,[5] it would seem that any type of extrinsic evidence, including direct statements of the testator's intent, was admissible. The evidence offered[6] was clearly sufficient to show that the testator intended to designate the Indianapolis Home for the Aged, Inc., and the admission clearly justified to determine what in fact was the testator's expressed intent.[7] The dissent, however, adopted the old view, contending that the will contained no ambiguity and therefore the plain meaning could not be disturbed.[8] While courts are far from unanimous on this matter it is believed that the better view is that a plain meaning, if such a thing exists, can be disturbed; for the older contrary view has been found to be too narrow and formalistic.[9] Once extrinsic evidence is admitted in the principal case it becomes clear that the address used by the testator was erroneous and

[1] WIGMORE, EVIDENCE §526 (1935); In re Loewenbach's Will, 222 Wis. 467, 269 N.W. 323 (1936); McCall v. McCall, 25 S.C. Eq. (4 Rich.) 447, 57 Am. Dec. 733 (1852).

[2] Blauvelt v. Citizen's Trust Co., 3 N.J. 545, 71 A. (2d) 184 (1950); Warren, "Interpretation of Wills," 49 HARV. L. REV. 689 (1936); 94 A.L.R. 26 (1935). The old view, that no extrinsic evidence could be used to disturb a plain meaning, has been rejected by modern authorities. WIGMORE, EVIDENCE §524 (1935).

[3] Warren, "Interpretation of Wills," 49 HARV. L. REV. 689 (1936). BROOM'S LEGAL MAXIMS, 10th ed., 426 (1939).

[4] 5 WIGMORE, EVIDENCE §2472 (1923); 2 PAGE, WILLS §1420 (1926); The phrase "latent ambiguity" is termed an "unprofitable subtlety" and the word "equivocation" is preferred in Warren, "Interpretation of Wills," 49 HARV. L. REV. 697, 707 (1936).

[5] WIGMORE, EVIDENCE §529 (1935).

[6] The evidence tended to prove that: The testator was acquainted with and interested in the appellant; the testator was a life member of the appellant; the testator had made a previous gift to the appellant and expressed an intention to do more for it; the testator had talked with the scrivener of the will about this provision and that the scrivener was unaware of any other home for the aged other than the appellant. Principal case at 204.

[7] Holmes, "The Theory of Legal Interpretation," 12 HARV. L. REV. 417 (1899); Peet v. Peet, 229 Ill. 341, 82 N.E. 376 (1907); 5 WIGMORE, EVIDENCE §2470 (1923); 2 PAGE, WILLS §§1418, 1420 (1926).

[8] The leading American case which denied the use of extrinsic evidence when the will was "clear on its face" was Tucker v. Seaman's Aid Society, 48 Mass. 188 (1843). This proposition was repudiated in England but a strong presumption was said to exist in favor of the society named in The National Society for the Prevention of Cruelty to Children v. The Scottish National Society for the Prevention of Cruelty to Children, [1915] A.C. 207.

[9] Moseley v. Goodman, 138 Tenn. 1, 195 S.W. 590 (1917); Northern Trust Co. v. Perry, 105 Vt. 524, 168 A. 710 (1933); 5 WIGMORE, EVIDENCE, §2463, notes 4, 5 (1923); THAYER, PRELIMINARY TREATISE ON EVIDENCE, 422-26, 471-73, 482 (1898).

enough remained upon striking the address to express the testator's intent.[10] Thus, it would seem that the decision is consistent with modern authorities though it would perhaps have been better for the court to have couched the opinion in different terms so as to avoid the unprofitable distinction between patent and latent ambiguities.[11]

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[10] The test for the application of this doctrine is given in Warren, "Interpretation of Wills," 49 HARV. L. REV. 703 (1936) as: The words must be insensible with respect to the facts; the part disregarded must be a mere trimming; and the remaining portion must be substantial.

[11] 2 PAGE, WILLS §1419 (1926). The distinction is unprofitable and even those courts which use it tend in practice to let in evidence of circumstances in all cases, though limiting use of direct statements of the testator's intent to cases of equivocation.