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## WILLS--CONSTRUCTION-TESTAMENTARY INTENT

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WILLS—CONSTRUCTION—TESTAMENTARY INTENT—In a will drawn for her by a layman, testatrix inserted in her own words a clause reading, "It is my belief that 120 acres . . . owned by my deceased husband, John Cagley, subject to a life estate willed to me, be distributed to his four nieces and nephews. . . ." In fact, her husband's will had not specifically disposed of the remainder, and testatrix had in addition to the life estate, taken the remainder as residuary devisee. *Held*, The clause was a valid devise of the property to the four named beneficiaries. *Layton v. Tucker*, (Iowa, 1946) 23 N.W. (2d) 297.

The court's decision rests on its construction of the words, "It is my belief." It concludes that the phrase had reference to testatrix' mistaken impression that the fee to the land had passed to her on her daughter's death, thus rejecting a more literal and grammatical interpretation which would have had the phrase read either, "It is my belief that 120 acres . . . should be distributed to his four nieces and nephews,"<sup>1</sup> or ". . . was distributed to his four nieces and nephews."<sup>2</sup> It is submitted that on the recorded facts an interpretation linking the phrase, "It is my belief," to the dispositive part of the clause would have been more accurate. It would seem that testatrix' choice of words indicated confusion in her own mind as to the exact status of the title to the land but showed her desire that the land be divided among the nieces and nephews irrespective of the doubtful condition of the title. In reaching its conclusion the

the church and premises be kept in repair, etc., held a trust); similarly, *Episcopal City Mission v. Appleton*, 117 Mass. 326 (1875); *Stanley v. Colt*, 5 Wall. (72 U.S.) 119 (1866); *Petition of Tuttle*, 80 N.H. 36, 112 A. 397 (1921). Cases in which transfers were held to create covenants or trusts are collected in 7 L.R.A. (n.s.) 1119 (1907), 3 L.R.A. (n.s.) 741 (1906), 9 L.R.A. (n.s.) 758 (1907).

<sup>1</sup> If testatrix in the clause expressed a desire as to the future disposition of property which she doubted to be her own, it is questionable whether the court would have given it effect as a devise. *T*, suspecting that property belongs to *X*, leaves a will in which he requests that the property be given to *A*. If the property actually belongs to *X*, *T*'s attempted disposition is ineffective whether stated as a request or an order. *Snyder v. Snider*, 202 Ky. 321, 259 S.W. 700 (1924); *Prince v. Prince*, 64 Wash. 552, 117 P. 255 (1911). But if in fact the property belongs to *T*, on principle there would seem to be no reason why his formally executed wishes as to the disposition of his property should not be respected. It is clear that but for the mistake of fact, *T* would have devised the property to *A*. The situation is substantially different from that in which the testator includes words bearing on the future use of property which he devises in fee. See note 4, *infra*. However, the clause might be declared invalid as lacking the necessary testamentary intent at the time the will was executed. The question turns on whether it is a requirement of testamentary "intent" that the testator believe he owns the interest he attempts to bequeath or devise.

<sup>2</sup> The contestants apparently argued that testatrix meant the clause only as a recital of a distribution which had already been made, and that therefore no property was devised. The court rejected the argument on the ground that there was no evidence testatrix had any reason for assuming such a distribution. It is possible, however, that even if the court had found an attempted but ineffective disposition, the clause could have been interpreted as accomplishing the testatrix' main purpose. The court might have read the testatrix' intent from the clause as being, "I believe that the property has already been distributed to the four nieces and nephews, but if not, it is my will this property be given to them." See *In re Dimmitt's Estate*, 141 Neb. 413, 3 N.W. (2d) 752 (1942), 41 MICH. L. REV. 751 (1943).

court went on the assumption that it was interpreting a will and laid down as its cardinal purpose the determination of the testatrix' intent,<sup>3</sup> overlooking perhaps a more fundamental problem. In regard to this clause, it is not so much a question of construing a will as determining whether a will exists; whether, in short, the clause displays the necessary *animus testandi* to make it a valid testamentary disposition of property.<sup>4</sup> The court assumes, without deciding, that the rejected alternatives, if followed, would have rendered the clause totally ineffective as a devise; and its choice of alternatives can thus be justified by the general rule of construction that where there is more than one possible interpretation of an instrument, an interpretation which renders it valid is to be favored. By the construction it adopts, the court avoids the difficult problems which would have arisen had it concluded that the clause was an attempt to make a devise of property testatrix did not believe to be her own. Once granted that the clause is testamentary, the conclusion reached becomes inevitable since there can be no doubt as to whom she intended to be the beneficiaries. The only remaining problem is to give effect to that desire. While the courts deny themselves the right to rewrite a will, they have gone far in remoulding and recasting the testator's words in order to give effect to his intent.<sup>5</sup> All that was required in the principal case was to say as the court did that the word, "belief," was used by testatrix to indicate her understanding as to the manner in which she had acquired title to the property, thus making the clause part of an irrelevant mistake of fact. The court, without attempting to explain the grammar of a sentence which was imperfect at best, merely states that the dispositive part of the clause stands alone as a valid devise, unqualified by the ambiguous first half of the sentence.

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<sup>3</sup> This is perhaps the most frequently encountered rule of construction. Cf. *Hardenbergh v. Ray*, 151 U.S. 112, 14 S. Ct. 305 (1894); *Perrin v. Blake*, *HARGRAVES LAW TRACTS* 489 (1787); *Upham v. Plankington*, 152 Wis. 275, 140 N.W. 5 (1913); *Johnson v. Bowen*, 85 N.J. Eq. 76, 95 A. 370 (1915). The statement, however, is oftentimes misleading. See 2 *SIMES, FUTURE INTERESTS* 11 (1936); *ATKINSON, WILLS* 757 (1937).

<sup>4</sup> Generally the question of testamentary intent is raised in connection with the probate of an instrument, but it may also be encountered in connection with the interpretation of a clause in a probated will. In the latter case, the problem is whether the testator meant to make a devise of property or was rather including non-testamentary observations in an otherwise valid will. One prime example of this may be found in the handling of the so-called "precatory trusts." Compare *Matter of Hayes*, 263 N.Y. 219, 188 N.E. 716 (1934), with *Williams v. Williams Committee*, 253 Ky. 30, 68 S.W. (2d) 395 (1933).

<sup>5</sup> For example, courts have transposed words, phrases, and sentences, *In re will of Richter*, 212 Iowa 38, 234 N.W. 285 (1931); substituted words, *Barrett v. Barrett*, 134 N. J. Eq. 138, 34 A. (2d) 579 (1943); read phrases in a sense not ordinarily attributed to them, *Wilkison v. Wilkison*, 130 Kan. 424, 286 P. 282 (1930); supplied omitted words, *In re Bien's Will*, 42 N.Y.S. (2d) 138 (1943); rejected superfluous or repugnant words, *Crawford v. Crawford*, 290 Ky. 542, 162 S.W. (2d) 4 (1942); and corrected grammar and punctuation, *Herbert v. Central Hanover Bank and Trust Co.*, 131 N.J. Eq. 330, 25 A. (2d) 7 (1942).