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WILLS - INCORPORATION OF DEED BY REFERENCE - CONSTRUCTION

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WILLS — INCORPORATION OF DEED BY REFERENCE — CONSTRUCTION — The sixth clause of testator's duly executed will was as follows: "I have already deeded to my niece, Alta J. Pullman, the southeast quarter (SE¼) of section eight (8), township twenty-four (24), north, range four (4), east of the 6th P. M. in Cuming county, Nebraska, and for that reason I do not devise any real estate to her in this Will." About thirteen months prior to the execution of this will, testator and his wife executed a deed conveying this tract of land to Alta J. Pullman. The deed was never delivered, and was not executed in accordance with the requirements for the execution of wills. In the court below it was admitted to probate, as a part of testator's will, on the ground that it had been incorporated in the will by reference. It appeared that testator's only heirs were two sisters and certain nephews and nieces; that Alta J. Pullman, a niece of the testator's wife, had been brought up in testator's home from the age of three years as his child, and was regarded by him as a favored object of his bounty. Evidence was also introduced showing the testator's constant purpose in the later years of his life to make a gift of the real estate in question to her, and also indicating that he had no clear understanding of the appropriate legal devices to be used to accomplish this end. Thus, at one time testator sought to manifest the gift by giving Alta J. Pullman the key to the door of the house on the premises; and at a later time he told a friend that he

were named with the share each was to take, followed by a lapsed residuary share, and subsequent court distribution of the lapsed share to the remaining residuary legatees as a class, on the basis that these cases show that the named legatees formed a natural class of brothers and sisters. In re Ives' Estate, 182 Mich. 699, 148 N. W. 727 (1914); In re Hunter's Estate, 212 Mich. 380, 180 N. W. 364 (1920).

[13] "What Constitutes a Gift to a Class," 49 HARV. L. REV. 903 (1936).

[14] The conveyor must have been "group minded," 3 PROPERTY RESTATEMENT, § 279 et seq. (1940). A similar definition has been evolved by a writer in 75 A. L. R. 773 at 779 (1931): "a testamentary gift is one to a class where the aggregate property given to the group, or the several items assigned to the members, may, according to the intent of the testator, be taken by such of the persons indicated as are in being at the time of the testator's decease, or at such time subsequent to the date of the will as the membership of the class is to be effectually ascertained."

Other discussions of class gifts include: Casner, "Class Gifts—Definitional Aspects," 41 COL. L. REV. 1 (1941); Casner, "Construction of Gifts 'to A and his Children,'" 7 UNIV. CHI. L. REV. 438 (1940); Casner, "Class Gifts to Others than to 'Heirs' or 'Next of Kin'—Increase in the Class Membership," 51 HARV. L. REV. 254 (1937); Casner, "Construction of Gifts to 'Heirs' and the Like," 53 HARV. L. REV. 207 (1939); Leach, "The Rule against Perpetuities and Gifts to Classes," 51 HARV. L. REV. 1329 (1938).

had willed the land to her. On appeal from the order admitting the two instruments to probate, the decision of the court below was affirmed, on the ground that the intent to incorporate the deed in the will sufficiently appeared. Three judges dissented. *In re Dimmitt's Estate,* (Neb. 1942) 3 N.W. (2d) 752 (1942) rehearing denied, November 14, 1942.

If one were to take the language of the testator literally, without any reference to extrinsic circumstances, he would be forced to disagree with the majority of the court. For the testator has said "I do not devise any real estate to her in this will." But evidence of circumstances surrounding the execution of the will was undoubtedly admissible to put the court in the position of the testator in construing the instrument.[1] This evidence indicated that the testator must not have clearly understood the difference between a deed and a will and probably did not entirely comprehend the precise nature of either. Whether he said "deeded" or "willed" would seem to have meant little to him. Hence, the court could very properly have concluded that the words used in the will meant nothing more than this: "I believe that I have already given this land to my niece, but whether I have done so or not I want her to have it." Or if the doctrine of incorporation by reference is to be used, the testator's language might be paraphrased thus: "I have drawn a deed giving the land to my niece; I still approve of that instrument as a part of the disposition of my property declared in this will." That a will which, if taken literally, declares that a piece of land is deeded and not devised may be held under all circumstances to show an intent to incorporate a deed of the land is adequately supported by authority.[2] Thus deeds were held to be incorporated where a will provided "By reason of having recently deeded Azotus and Wylie farms I do not mention them in the above bequests" [3] and where another will provided "As my property now stands, I have deeded my farm to my daughter and my village property to my son, deeds being held in trust and not to be recorded until my death." [4] On the other hand, there are other cases,[5] such for example as *Noble v. Tipton,*[6] where the opposite conclusion has been reached. The real issue would appear to be whether or not the will means "I still desire to give the land to *X*, and the means to be used are unimportant" or "I have given the land to *X* only if a deed already executed is valid." That the former is the intent of the testator in the principal case can scarcely be doubted. The decision of the majority is believed to be one

[1] As to the extent to which extrinsic evidence may be used in the interpretation of wills, see Warren, "Interpretation of Wills—Recent Developments," 49 HARV. L. REV. 689 (1936); 9 WIGMORE, EVIDENCE, 3d ed., §§ 2458-2472 (1940); 94 A. L. R. 26 (1935).

[2] Arrington v. Brown, 235 Ala. 196, 178 So. 218 (1938); White v. Reading, 293 Mo. 347, 239 S. W. 90 (1922), and cases cited in notes 3 and 4, infra. In general as to the effect of a reference in a will to deeds, see 1 PAGE, WILLS, 3d ed., § 263 (1941); 110 A. L. R. 261 (1937).

[3] Hogue's Estate, 135 Pa. Super. 543 at 545, 6 A. (2d) 108 (1939).

[4] Jennings v. Reeson, 200 Mich. 559 at 561, 166 N. W. 931 (1918).

[5] Zimmerman v. Hafer, 81 Md. 347, 32 A. 316 (1895); Allenbach v. Ridenour, 51 Nev. 437, 279 P. 32 (1929); Witham v. Witham, 156 Ore. 59, 66 P. (2d) 281 (1937); In re Witham's Estate, 160 Ore. 686, 87 P. (2d) 651 (1939).

[6] 219 Ill. 182, 76 N. E. 151 (1905).

more instance where a court refused to press legal formulas to "a drily logical extreme" [7] and reached a conclusion in accordance with substantial justice in the particular case.

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[7] The phrase originates with Holmes, J., in Noble State Bank v. Haskell, 219 U. S. 104 at 110, 31 S. Ct. 186 (1910), and is quoted by Cardozo, J., in two opinions involving questions of incorporation by reference. Matter of Fowles, 222 N. Y. 222 at 223, 118 N. E. 611 (1918), and Matter of Rausch, 258 N. Y. 327 at 331, 179 N. E. 755 (1932).