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NOTES

THE WYOMING TESTATOR AND HIS AFTER-ACQUIRED PROPERTY

Wyoming's statute in relation to property acquired after the will was made[1] has not, as yet, been passed on by the State Supreme Court. This paper will attempt to show the probable construction that will be placed on this statute when it is placed in issue.

The problem as to the disposition of after-acquired property generally occurs when a testator makes only general or specific devises or legacies, making no mention as to disposition of the residue of his personal or real property. However, the problem does arise even when a residuary clause is present. In this situation, the courts have found it necessary to dig further beneath the surfaces of both the statute and the will in question to discover the intention of the legislators as well as of the testator.

At common law, real property acquired after the making of a will could pass only if the will were revoked and a new one made which

1. Sec. 6-303, Wyoming Compiled Statutes, 1945. Any property acquired by the testator, after making of his will, shall pass thereby in like manner as if possessed at the time of making the will, if such shall manifestly appear by the will to have been the intention of the testator.

included such property.[2] After-acquired personalty, however, was allowed to pass by the will.[3] Wyoming's after-acquired property statute changes the common law rule in respect to real property: "Any property acquired by the testator after making his will, shall pass thereby. . . ." When the word "property" is used in a statute without qualification or limitation, it embraces both real and personal property.[4] Therefore, since after-acquired personal property was allowed to pass under the will at common law, the rule with respect to it was not changed by the statute but was simply re-enacted.[5] "Property," as used here, also includes any right or chose in action which is capable of legal ownership.[6] The second clause of the statute, ". . . shall pass thereby in like manner as if possessed at the time of making the will . . . ," has been construed by courts having a similar statute to be simply a restatement of the common law rule of construction in regard to personal property—which now also embraces real property—that a will speaks as of the death of the testator.[7]

The concluding clause of our statute is the one that presents the greatest problem: ". . . if such shall manifestly appear by the will to have been the intention of the testator." The question, then, is what does the testator intend in regard to certain situations that might arise?

There have been rather broad rules laid down as to what the testator desires when certain types of clauses are used in the will—i.e., specific, general, or residue. Although the will is said to speak as of the death of the testator, this is only a presumption which may be rebutted in the case of specific legacies, when the testator uses language indicating that the bequest is to speak as of the time the will is made.[8] The Delaware court has gone even further by saying that such a statute does not apply to specific devises.[9] At any rate it is doubtful if a confessedly specific devise could come within the statute, because there would be no words in the devise to which the after-acquired property could attach.

The situations that might arise may be roughly divided into three categories: (1) subsequently acquiring a greater interest in the same property, (2) subsequently acquiring adjoining property or otherwise enlarging the original holding and (3) subsequently acquiring property entirely unconnected with that previously held.

The first problem arises when a simple devise has been made. The question is whether the after-acquired interest will pass under the devise or under the residuary clause; or, if the will contains no residuary clause,

2. United States Security Trust Co. v. Petrillo, 129 Misc. 15, 220 N.Y.Supp. 635 (1927).
3. United States Security Trust Co. v. Petrillo, 129 Misc. 15, 220 N.Y.Supp. 635 (1927); Fitzgerald v. Bell, 340 O.L.Abs. 631, 39 N.E.2d 186 (1941).
4. Briggs v. Briggs, 69 Ia. 617, 29 N.W. 632 (1886).
5. Briggs v. Briggs, 69 Ia. 617, 29 N.W. 632 (1886).
6. Appeal of Beach, 76 Conn. 118, 55 Atl. 596 (1903).
7. Fitzgerald v. Bell, 340 O.L.Abs. 631, 39 N.E.2d 186 (1941); In re Ide's Will, 120 N.Y.S.2d 650 (1953).
8. In re Ide's Will, 120 N.Y.S.2d 650 (1953).
9. Sussex Trust Co. v. Polite, 12 Del.Ch. 64, 106 Atl. 54 (1919).

whether it will pass as intestate property. If the devise is specific, such property will not pass; if the devise is general, it can pass the property. If the will states unequivocally that only a certain interest in the property is to pass by the devise, then the devise is a specific rather than a general one and, of course, will not pass the after-acquired interest.[10] If the will states that the testator's "interest" in the property is to pass by the devise, then the court must look to relevant evidence in the particular case to discover whether the testator intended the devise to be general or specific; for example, whether the testator had seemingly provided for all situations in which he intended his property to pass, or possibly if the testator had made equal devises to all his heirs. There are, of course, many things which might be considered by the court as relevant evidence here.

The second problem—enlarging the property which is the subject of the devise—occurs most frequently when the testator enlarges his farm, residence, or place of business. The usual difficulty occurs here, also, in deciding whether the general or residuary devisee or legatee is to take (or whether it is to pass as intestate property if the will contains no residuary clause). The general rule is that if the devise or legacy is sufficiently shown to be general rather than specific and if its wording is sufficiently broad to include such after-acquired property, the property will pass by it.[11] The courts, on the whole, have been very liberal in their interpretation of what is a general legacy or devise.[12] Ordinarily, even when the clause continues by describing the property, it is held to be general if the will does not otherwise have provisions under which the property could reasonably be held to pass; for instance when a testator devises Blackacre followed by the legal description, then later buys an adjoining 80 acre field—the will containing no residuary clause.[13] This view is sustained on two theories: (1) that the will shall be construed so as to prevent intestacy as to any portion of the estate if that could reasonably be done, and (2) that the words describing the property are words of description rather than words of limitation. Whether the wording is sufficiently broad to include this property again depends upon the courts interpretation of the relevant evidence.

The situations and arguments growing out of the first two problems apply equally well to the third except that here the spotlight is focused

10. A testator made specific devises of all the real estate which he owned at the time he made his will and a residuary clause for personal property. One devisee was to be given the testator's two-thirds undivided interest in a city block. The testator later acquired the additional one-third interest. The court held that the additional interest could not pass under the specific devise, but must pass as intestate property. Spear v. Stanley, 129 Me. 55, 149 Atl. 603 (1930).
11. Sussex Trust Co. v. Polite, 12 Del.Ch. 64, 106 Atl. 54 (1919).
12. The testator, in his will, followed a devise of property by the words ". . . where I now reside." The court held that the word "now" was not a limitation, but an item of description—therefore, it was not a specific devise and not excluded from the operation of the after-acquired property statute. Sussex Trust Co. v. Polite, 12 Del.Ch. 64, 106 Atl. 54 (1919).
13. Sussex Trust Co. v. Polite, 12 Del.Ch. 64, 106 Atl. 54 (1919); Halderman v. Halderman, 342 Ill. 550, 174 N.E. 890 (1931); In re Little Joe, 165 Wash. 628, 5 P.2d 995 (1931).

on whether there is sufficient evidence to show that the property should be construed to have been included in the will at all.[14] In *Silverman v. Larson*,[15] the court of Kansas dealt with this problem: T had made a will leaving specific devises to each of his six children with a residuary clause leaving the remainder to his children, share and share alike. His daughter Amelia, plaintiff, became estranged from her father, the testator, after the birth of an illegitimate son to her. T then made a new will, exactly like his former will, but substituted Amelia's illegitimate son in her place. Three of the children died before the testator and Amelia attempted to establish that the property devised by the deceased children to the testator should pass as intestate property upon the death of T. The court held that such a will which declares a purpose to dispose of all T's property, leaves no doubt as to T's intention—he intended all the residue to pass to the residuary devisees still living.

Each of these problems could easily be solved if the answer to one question were known: What evidence is relevant? Our statute says ". . . if such shall *manifestly* appear *by the will* to have been the intention of the testator." The word "manifestly" is an indefinite and vague term, and therefore can hardly have a well-defined or precise effect on the construction of wills.[16] It undoubtedly requires that the intention be fairly inferable from the will, but does not require an express declaration. In a fairly representative case before the Washington court,[17] a statute similar to ours was dealt with. An Indian, Little Joe, had left a will purporting to leave all property, both real and personal, to his wife. A description of the real property he then owned was made. The court, in holding that after-acquired land passed by this will, said in effect that the will showed his intention to endow his wife with all the property possessed at the time of his death; whether he contemplated the acquisition of land in the future need not have appeared specifically in the will.

In the construction of a will, the courts will always try to find the intention of the testator and abide by it whenever possible.[18] The prime consideration, however, in the construction of all wills is that the testator intended not to die intestate as to any property, real or personal, which he owned at the time of his death.[19] Therefore, courts will construe wills with this consideration in mind and avoid a decision of intestacy, if at all possible.[20] Another assumption that courts will make is that if the

14. Silverman v. Larson, 124 Kan. 267, 259 Pac. 707 (1927); Wingard v. Harrison, 337 Ill. 387, 169 N.E. 232 (1929).
15. Silverman v. Larson, 124 Kan. 267, 259 Pac. 707 (1927).
16. Durboraw v. Durboraw, 67 Kan. 139, 72 Pac. 566 (1903); Briggs v. Briggs, 69 Ia. 617, 29 N.W. 632 (1886).
17. In re Little Joe, 165 Wash. 628, 5 P.2d 995 (1931).
18. Gorham v. Chadwick, 135 Me. 479, 200 Atl. 500, 117 A.L.R. 805 (1938); In re Winsby's Estate, 108 Cal.App. 614, 291 Pac. 851 (1930); Halderman v. Halderman, 342 Ill. 550, 174 N.E. 890 (1931).
19. In re Coleman's Estate, 218 A.D. 732, 257 N.Y.Supp. 831 (1932); In re Little Joe, 165 Wash. 628, 5 P.2d 995 (1931).
20. Rhode Island, however, provides by statute for intestacy whenever after-acquired property is involved. General Laws R. I. Chap. 567, Sec. 18.

will contains a residuary clause, any property acquired by the testator after publication of his will shall pass by it.[21] Florida has even gone so far as to specifically provide for this by statute.[22] However strongly these presumptions may influence the thinking of the courts, they are still mere presumptions and do not authorize the triers to make a new will or to include in a will something that was not intended.[23]

Although it is rather well settled that as to after-acquired real property, something must affirmatively appear in the will itself in order that it shall pass,[24] it is not so well settled as to after-acquired personal property. There was a common law rule that after-acquired personal property passed *unless a contrary intention appeared.*[25] This would seem on first glance to be contrary to our statute, but the Ohio court in the leading case of *Fitzgerald v. Bell*[26] did not so view it. In interpreting "intention" as used in the statute (similar to ours), the court allowed itself to draw upon this common law rule, since it is a rule of construction applicable to "intention." Therefore, if a contrary intention does not appear, a fairly inferable intention to include such property must, by hypothesis, appear.

Although a testator is fortunate in being allowed to assume that his will covers all property acquired by him after the execution of the instrument, he should never assume this to be automatic and self-operating without some affirmative action on his part. His intention in this respect should always be made clear in order that it cannot become the subject of manipulation by courts at a time when he is no longer able to set down the thoughts that could resolve the difficulty. If he wishes his after-acquired property to pass by his will, he need only state in the specific legacy or device itself to whom and under what conditions it shall pass; if he wishes all his after-acquired property to pass by the residuary clause he should spell out such an intention positively. Since testators ordinarily have not considered the probabality of having after-acquired property which should be dealt with in his will, it should be the duty of every draftsman of wills to bring this to the attention of his client.

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21. Gleason v. Norton, 173 App. Div. 1002, 159 N.Y.Supp. 1115 (1916), affirmed 123 N.E. 866 (1919).
22. . . . Every will containing a residuary clause shall transmit after-acquired property unless the testator expressly states in his will that such is not his intention. Sec. 731.05 (2) F.S. 1949.
23. Spear v. Stanley, 129 Me. 55, 149 Atl. 603 (1930).
24. Durboraw v. Durboraw, 67 Kan. 139, 72 Pac. 566 (1903).
25. Fitzgerald v. Bell, 340 O.L.Abs. 631, 39 N.E.2d 186 (1941).
26. Fitzgerald v. Bell, 340 O.L.Abs. 631, 39 N.E.2d 186 (1941).