Construction of Wills--Threlkeld's Ex'rs v. Synodical Presbyterian Orphanage of Anchorage

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An interesting problem in the construction of wills is involved in the recent Kentucky case of Threlkeld's Ex'rs v. Synodical Presbyterian Orphanage of Anchorage. In that action, brought by the executors against the residuary legatee for a declaratory judgment construing Threlkeld's will, the Court of Appeals was squarely faced with a novel situation in which a testator attempted to make a specific gift of property which he did not own, either at the time of the execution of the will, or at his death.

The facts were as follows: the testator, who, by the will in question, disposed of an estate approximating $300,000, had executed a codicil shortly before his death which read as follows: "I always expect to keep two automobiles I want E. O. Magruder to have choice, Mrs. Charlotte Callis the other." At the time of his death, the testator did not own an automobile, having previously given the one he did own to Magruder's son. He had, however, placed orders for a Lincoln automobile and for a DeSoto, neither of which had been delivered prior to his death; nor did there exist, between the testator and the automobile dealers with whom the orders were placed, contracts valid under the Statute of Frauds, for the reason that such contracts were oral, involving sums exceeding $500, no part of which had been paid.

The trial court held that the executors were not authorized to perform the oral contracts by accepting and paying for the two automobiles, nor to deliver the same, or their value, to the purported legatees. From this decision, the executors, Magruder, and Mrs. Callis appealed to the Court of Appeals which affirmed the judgment, apparently on the sole ground that the extrinsic evidence showing the placing of the orders for the automobiles by the testator was properly excluded as being "of no assistance in arriving at the testator's intention." The Appellants had contended "that a latent ambiguity in the clause in question arises when the language of the will is applied to the facts of the case, and extrinsic evidence should be admitted to show what the testator meant by what he said." The court expressed the belief, however, that to do so would be to "make a will for the testator, or to improve on the will as found or to give to the language of the testator an intent not deducible from the will itself."
The purpose of this note is to call attention to the novelty of the fact situation—a situation so novel that considerable searching had failed to disclose another case in point in any jurisdiction—and to suggest another line of reasoning by which the court might have arrived at the same result, which result the writer believes unquestionably correct.

At first glance the case appears to present a problem involving the doctrine of ademption, which doctrine was aptly propounded in the case of *Dillender v. Willson*:

"Ademption, where satisfaction by payment during the life of testator is not involved, is the destruction or extinction of a bequest by means of the sale or other disposition of the things specifically bequeathed and it is effected when by some act of the testator the subject-matter has ceased to exist in the form in which it is described in the will, so that on his death there is nothing answering the description to be given to the beneficiary. To effect an ademption, the legacy or bequest should be specific and not general for it can apply only to specific gifts of which predisposition has been made."

It is, therefore, obvious that if the bequest of the automobiles could be said to be specific, the non-existence of the subject at the time of testator's death would necessarily cause an ademption of the legacy. Under accepted definitions, however, it seems impossible to classify as specific the bequest purportedly made by the codicil in the instant case. For example, the following definition has the approval of the Court of Appeals:

"A specific legacy is said to be a bequest of a particular thing, or a specified part of testator's estate, which is so described as to be capable of identification from all others of the same kind. The testator must intend that the legatee have the very thing bequeathed, not merely a corresponding amount in value or like property." (Emphasis writer's)

It will readily be observed that this definition requires such a sufficiency of description as cannot be found in the Threlkeld instrument. There is, in fact, no description at all; so that the possibility of holding the bequest specific appears to be eliminated. There seems little doubt that had the testator acquired the two automobiles before his death, the ownership thereof would have been sufficient to identify them. This would be true because of the fact that a will is

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228 Ky. 758, 16 S.W. 2d 173 (1929).

'Id. at 760, 16 S.W. 2d at 174.

"Howe v. Howe's Ex'x, 287 Ky. 756, 763, 155 S.W. 2d 195, 200 (1941) Ruh's Ex'x v. Ruh, 270 Ky. 792, 303, 110 S.W. 2d 1097, 1103 (1937).
held to speak as of the time of the death of the testator. If, however, Mr. Threlkeld owned no automobile at the time of his death, there is no manner in which to identify the subject of the gift.

Similar difficulty is encountered in an attempt to reconcile the bequest with the accepted definition of a general legacy, which is said to be "one which may be satisfied out of testator's estate generally, by delivering any part of his estate which corresponds with it in value or in general description to the provisions of the will." Obviously from the description included, the value of "two automobiles" is not ascertainable; hence, it may be seriously doubted that the codicil in question could accurately be classified either as general or specific. There exists also grave doubt as to the propriety of speaking in terms of "ademption" where the testator did not own the property when he made his will nor acquire it thereafter. It is therefore concluded that the court properly avoided basing its decision, even in part, upon the doctrine of ademption.

It is also believed that the court was correct in its conclusion that "no ambiguity in the description of this property" existed, and in its refusal, as a result of the first conclusion, to admit extrinsic evidence "to create an ambiguity which did not exist on the face of the will and then proceed to dissolve that ambiguity by accepting additional extrinsic evidence as to the testator's intent." It is submitted, however, that even had such evidence been received without objection, there would exist no ground for permitting the executors to perform the oral contract for the purchase of the automobiles and deliver them to the purported legatees.

It is often quoted as a general rule that a testator can only dispose of property which he owns. This would appear to be true except, perhaps, in the case of a direction to buy. In Corpus Juris it is stated:

"The testator may direct that property be purchased for a beneficiary and such a provision is good where it is possible to ascertain from the will the description of the property to be purchased or the amount which shall be paid for it, although the rule is otherwise where these facts cannot be ascertained." (Emphasis writer's).

Clearly, however, it is impossible to say from the will that the testator directed his personal representative to buy automobiles. Hence,
one is believed justified in concluding that the codicil in question could not possibly be construed as a direction to buy.

In Phillips v. Murphy it was said:

"A will speaks from the death of the testator and it cannot operate to dispose of property, though mentioned in and attempted to be devised by its provisions, of which the testator was not the owner at the time of his death."

It is therefore submitted that, since the evidence of the existence of the unenforceable contracts did not establish ownership, either legal or equitable, of the automobiles in the testator, the purported legacy must fail both as a specific and as a general legacy.

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