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CONCLUSION

Although *Commissioner v. LoBue* solved one problem of the Commissioner by eliminating proprietary stock options, it left him with another when the Court passed up the opportunity to stifle its own dictum in the *Smith* case. In the light of this new dictum in the *LoBue* case and the Court's apparent approval of the *McNamara* decision, the Commissioner may have to modify his position concerning the treatment of the option as compensation. Although valuation problems may prevent the treatment of the option as compensation by employees of small corporations, there appears a good chance for such treatment by employees of larger corporations.

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[42] Burnet v. Logan, *supra* note 41.

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in the *LoBue* case seemed to be emphasizing this very point when it referred to a "readily ascertainable market value." Rather than put a highly conjectural valuation on the stock, the courts might prefer to defer any taxable amount to the time the option is exercised.[42] In many cases this rule might prevent the small corporation employee's use of the lower tax rates as regards nonrestricted stock options.

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sought to introduce extrinsic evidence to aid in the construction of the will, which evidence was refused by the lower court. On appeal, the North Carolina Supreme Court reversed the lower court, holding that there was a patent ambiguity and that evidence of the surrounding circumstances at the time of the testator's death should be admitted.

Thus, it is often the case that an otherwise valid will presents difficult problems of construction because of ambiguities in the language employed. The question then presents itself: Under what circumstances is it possible to introduce extrinsic evidence to aid in the construction of the will?

The justification for admission of extrinsic evidence is the necessity of the sitaution; that is, an ambiguity in the will itself, and unless an ambguity exists, the testator's intention must be found only within the "four corners of the will."[2]

The courts have classified ambiguities into two categories, "latent" and "patent." A patent ambiguity arises when the will is ambiguous on its face; *i.e.,* from the very reading of the words of the will it is not clear what they mean or what the testator intended.[3] Thus, a will which read: "I give to my four daughters the plantations on which I now live. If any of my daughters die without issue, their portion is to be equally divided among the three survivors & co.,"[4] was held by our court to be a patent ambiguity because from the reading of the will the meaning of the phrase, "& co.," was not clear. Also, if a testator leaves one tract of land to two different people in the same will,[5] the ambiguity is apparent on the face of the instrument and is therefore patent.

The admissibility of extrinsic evidence to explain or resolve a patent ambiguity, has long been the subject of conflict among the courts. The broad rule laid down in such cases is that extrinsic evidence is not admissible in the case of a patent ambiguity, because the document was void upon its face due to the uncertainty, and no interpretation could be given to the words as there was nothing to interpret.[6] This rule is much too broad, however, when one considers the number of cases

[2] Wachovia Bank and Trust Co. v. Green, 239 N. C. 612, 80 S. E. 2d 771 (1954); R. J. Reynolds v. Safe Deposit and Trust Co., 201 N. C. 267, 159 S. E. 416 (1931); Kidder v. Bailey, 187 N. C. 505, 122 S. E. 22 (1924); Wooten v. Hobbs, 170 N. C. 211, 86 S. E. 811 (1915); 4 PAGE, WILLS § 1627 (3rd ed. 1941).

[3] Taylor v. Maris, 90 N. C. 619 (1884); Institute v. Norwood, 45 N. C. 65 (1853); 4 PAGE, WILLS § 1623 (3rd ed. 1941); 20 AM. JUR., *Evidence* § 1156 (1939).

[4] Taylor v. Maris, *supra* note 3.

[5] Bank of Manhatten v. Gray, 53 R. I. 377, 166 Atl. 817 (1933); 4 PAGE, WILLS § 1623 (3rd ed. 1941).

[6] Taylor v. Maris, 90 N. C. 619 (1884); Bailey v. Bailey, 52 N. C. 44 (1859); Barnes v. Simms, 40 N. C. 392 (1848); Bridges v. Pleasants, 39 N. C. 26 (1845); Field v. Eaton, 16 N. C. 483 (1829).

which admit some extrinsic evidence where the ambiguity was patent.[7]

The North Carolina Court has become more liberal in its attitude toward allowing extrinsic evidence to aid in the construction of a will where there is a patent ambiguity provided such extrinsic evidence is limited to what it calls "circumstances attendant."[8] Our court on numerous occasions has said that in the construction of a will the cardinal purpose is to ascertian and give effect to the intention of the testator as expressed in the words he has used, and, that to ascertain such intention, all the provisions may be examined in the light of the surrounding circumstances. These circumstances include the state of the testator's family at his death, the condition and nature of his property, and the relationship of the testator to his family and to beneficiaries named in the will.[9] For instance, in *Wooten v. Hobbs*[10] the court said, "The writing in which the will must be expressed, contains the only testamentary intention that the law will effectuate. This intention must be found within the instrument or nowhere. Hence, extrinsic evidence is inadmissible to show an intent not contained in the document itself. But when the will is such as to call for construction, the court, with a view to securing a proper construction, puts itself, so far as may be, in the position of the testator, that it may see things from his view point. To this end, evidence regarding all relevant facts and circumstances surrounding the testator at the time of executing the will is admissible." In other words, the court, in the case of a patent *ambiguity,* can hear evidence concerning the "circumstances attendant" to the making of a will so as nearly as possible to place itself in the position of the testator at the time he wrote the will in order to ascertain his intent. This evidence is to be considered by the court without the use of a jury.[11] The court may, however, in its discretion, submit questions of fact to a jury for determination.[12] It should be noted, however, that the evidence admitted is limited to the circumstances surrounding the making of the will, and declarations by the testator of his intention whether made before or after the execution of the will are inadmissible to show his intent.[13]

[7] Hubbard v. Wiggins, 240 N. C. 197, 81 S. E. 2d 174 (1954); *In re* Will of Johnson, 233 N. C. 570, 65 S. E. 2d 12 (1951); Cannon v. Cannon, 225 N. C. 611, 36 S. E. 2d 17 (1945); Heyer v. Bullock, 210 N. C. 321, 186 S. E. 356 (1936); Scales v. Barringer, 192 N. C. 94, 133 S. E. 410 (1926); Snow v. Boylston, 185 N. C. 321, 117 S. E. 14 (1923); 4 PAGE, WILLS § 1624 (3rd ed. 1941); 57 AM. JUR., *Wills* § 1043 (1948).

[8] *Ibid.*

[9] *Ibid.*

[10] 170 N. C. 211, 86 S. E. 811 (1915).

[11] Cecil v. Cecil, 173 N. C. 410, 92 S. E. 158 (1917).

[12] *In re* Housing Authority, 235 N. C. 463, 70 S. E. 2d 500; N. C. GEN. STAT. § 1-172 (1953).

[13] Holmes v. York, 203 N. C. 709, 166 S. E. 889 (1933); R. J. Reynolds v. Safe Deposit and Trust Co., 201 N. C. 267, 159 S. E. 416 (1931); Raines v. Osborne, 184 N. C. 599, 114 S. E. 849 (1922).

The true rule seems to be that if the ambiguity is patent and the intention of the testator cannot be discovered by a consideration of the facts and circumstances surrounding the testator at the time of execution, then the devise must fail since other evidence may not be introduced to show the testator's intention.[14]

The other type of ambiguity, which is designated as latent, does not appear on the face of the instrument, but becomes apparent when other evidence is introduced. The instrument seems unambiguous but it becomes ambiguous when an attempt is made to apply the words to existing facts.[15] It is generally stated that parol evidence can be admitted to explain a latent ambiguity.[16] If there is a latent ambiguity, the declarations of the testator as to his intentions, in contrast to the case of patent ambiguities, will be admitted to prove the testator's intention whether the declaration was made before or after the will.[17]

Latent ambiguities fall into three main groups: (1) Unambiguous and certain description of a person, but two persons answer the description equally well: Thus, in *Tilley v. Ellis*,[18] where the testator devised certain property to the "Methodist Episcopal Church" and the evidence disclosed that there were two branches thereof under similar names, the court said this was a latent ambiguity; or where the testator leaves certain property to Mary Jones and there is more than one Mary Jones, this is a latent ambiguity and extrinsic evidence may be admitted to show the intention of testator as to which Mary Jones was meant.[19] (2) Unambiguous and certain description of property but two properties answer the description equally well. So, when a testator devised what was called the "Linebarger Plantation" and it could not be determined from the will what specific piece of property was devised by this description, the court held this to be a latent ambiguity and admitted extrinsic evidence to explain it.[20] (3) Unambiguous and certain description of property or person, but the identity or location of the particular property or person needs to be determined: Thus, where the testator was ac-

[14] *Ibid.*

[15] Raines v. Osborne, *supra* note 13; 4 JONES, EVIDENCE § 1548 (2d ed. 1926); 4 PAGE, WILLS § 1623 (3rd ed. 1941).

[16] Ladies Benevolent Society v. Orrell, 195 N. C. 405, 142 S. E. 493 (1928); Raines v. Osborne, 184 N. C. 603, 114 S. E. 846 (1922); McLeod v. Jones, 159 N. C. 74, 74 S. E. 733 (1912); Institute v. Norwood 45 N. C. 65 (1853); 9 WIGMORE, EVIDENCE §§ 2470-2472 (3rd ed. 1940).

[17] *In re* Will of Southerland, 188 N. C. 325, 124 S. E. 632 (1924); 9 WIGMORE, EVIDENCE § 2472 (3rd ed. 1940).

[18] 119 N. C. 233, 26 S. E. 29 (1896); See also: Ladies Benevolent Society v. Orrell, 195 N. C. 405, 142 S. E. 493 (1928); Institute v. Norwood, 45 N. C. 65 (1853).

[19] McDaniel v. King, 90 N. C. 597, 603 (1883) (dictum); 57 AM. JUR., *Wills* § 1067 (1948).

[20] Kincaid v. Lowe, 62 N. C. 41 (1864); McDaniel v. King, *supra* note 19; 57 AM. JUR., *Wills* § 1087 (1948).

customed to call *X* by a nickname and the testator intended *X* to have the property devised, even though the name used in the will was the nickname, the court held this a latent ambiguity and extrinsic evidence was admitted to show the intention of the testator.[21]

At first blush, it would seem that the *Wolfe* case,[22] involved a latent ambiguity, since a mere reading of the will indicates the personal property is to go to Mrs. Wolfe, and the balance to the Red Cross. The ambiguity becomes apparent only when it is discovered that the testator possessed no real property and therefore, the "balance" to the Red Cross could only be comprised of what is generally known as personal property. Since this case does not fall into one of the three categories previously mentioned in which a latent ambiguity must fall, the court was correct in holding that there was no latent ambiguity. On the other hand, it does not seem to be a true patent ambiguity since it is not apparent on the face of the will that there is an ambiguity. However, in determining that the will contained a patent ambiguity, the court evidently reasoned that the phrase, "personal property," is in itself capable of two meanings,[23] the broader including everything which is the subject of ownership except land and interest in land, while the more restricted embraces only goods and chattels;[24] and thus, since it could not be determined which was meant by the testatrix, there was a patent ambiguity.

Although the North Carolina court's conclusions seem quite defensible, the difficulty experienced by the trial court with the distinctions between latent and patent ambiguities with the resulting questions of admissibility of extrinsic evidence serves to emphasize the nicety of the distinctions required.

It is the contention of the writer that our court should abandon these old rules and follow the more practical appoach now being adopted by many jurisdictions. This approach is to do away with the distinction between latent and patent ambiguities.[25] Under this theory extrinsic evidence may be admitted in cases involving patent ambiguities as in those involving latent ambiguities to show the intent of the testator.

[21] Moseley v. Goodman, 138 Tenn. 1, 195 S. W. 590 (1917).

[22] 243 N. C. 469, 91 S. E. 2d 246 (1956).

[23] In holding that the phrase, "personal property," in this will is a patent ambiguity, the court implies the phrase is ambiguous in itself. *Quaere:* If a testator owns stocks, bonds, and real property and leaves the personal property to A and the real property to B, does the will contain a patent abiguity?

[24] Blakeman v. Harwell, 198 Ga. 165, 31 S. E. 2d 50 (1944); Ward v. Curry, 297 Ky. 420, 180 S. W. 2d 305 (1944); 3 PAGE, WILLS § 964, 983 (3rd ed. 1941). For a discussion of what passes under the words, personal property, in a will see 137 A. L. R. 212 (1942), an 162 A. L. R. 1134 (1946).

[25] *In re* Brodersen's Estate, 102 Cal. App. 2d 122, 229 P. 2d 38 (1951); Sater v. Sater, 329 Mich. 706, 46 N. W. 2d 433 (1951); Moore v. Parrish, 38 Wash. 2d 642, 228 P. 2d 142 (1951); Fay v. Strader, 234 Minn. 444, 48 N. W. 2d 657 (1951); 4 PAGE, WILLS § 1623 (3rd ed. 1941); 57 AM. JUR., *Wills* § 1043 (1948).

The court would only determine if there was an ambiguity; if so, extrinsic evidence could be introduced allowing the jury to clear it up. Such a rule would seem to permit greater freedom in determining the testator's intent. In *Armistead v. Armistead*,[26] the court stated: "The distinction between latent and patent ambiguities, when examined, is wholly unphilosophical, and founded upon a scholastic quibble of Lord Bacon."

Another court has said: "The distinction between 'latent' and 'patent' ambiguities is now practically ignored and disregarded. The courts without regard to the distinction, endeavor to arrive by the most direct way at what the testator meant when he wrote the will."[27]

One of the chief arguments against changing to the new rule is that it would encourage interested persons to perjure themselves.[28] This type of reasoning seems to rest on the assumption that more people will be untruthful than will be truthful. While admitting that in a very few cases a witness might perjure himself, it would seem that in the far greater number of cases justice would be done by finding out the intention of the testator so that the property could be disposed of as he wished. The North Carolina Court has approached this position by admitting the "circumstances attendant" in the case of a patent ambiguity. It is submitted that the court should abandon altogether the distinction between "latent" and "patent" ambiguities and, in all cases where there is an ambiguity, admit the evidence necessary to establish the intent of the testator.

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[26] 32 Ga. 597 (1861).
[27] Haupt v. Michaelis, Tex. Com. App., 231 S. W. 706 (1921).
[28] 4 PAGE, WILLS § 1623 (3rd ed. 1941).