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In closing testate estates, the courts of this state are confronted in their probate jurisdiction with the construction of wills. Usually this is a simple matter, but sometimes difficulties arise. On at least two occasions in that many years the District Court over which the writer presides has been confronted, in the construction of a will, with the question of a lapsed legacy, in both of which cases those interested in the will believed that no such lapse was intended by the testator. The two wills in question were prepared respectively by a lawyer of long practice and by a real estate broker also of long practice in both selling real estate and drawing wills. Happily, both cases were settled without invoking the judgment of the court.

When by the terms of a will property is bequeathed to A, B, and C, "and their heirs and assigns forever," and before the death of the testator A, B, or C dies, unless from other provisions of the will the court can determine that it was the intention of the testator in such case that the heirs of the deceased legaee should take the share given him by the will, the legacy lapses.[1]

Within the past year a will came up for construction on a petition for final settlement which provided, after a few specific bequests, that the remainder should go to a nephew and two nieces of the testator, naming them, "in equal parts, share and share alike, to the said....., ..., and ....., their heirs and assigns forever." The nephew had died before the death of the testator, leaving a widow and children. The question arose whether the share, a substantial sum, bequeathed to the nephew should go to his widow and children or to the two surviving nieces. The latter, being convinced that the testator would have desired the share bequeathed to the nephew to go to his family, generously agreed that the court might set it over in that manner, and this was done as no real estate was involved. It will be noted that the above will did not use either the word "and" or "or" following the names of the beneficiaries. However, there seems little doubt that both from a legal and grammatical standpoint the word "and" would be understood.[2] That being so, under the general rules of construction, the gift would have elapsed.

Where the word "or" is used following the name or names of the individual legatee, as where the will reads, "to A, B and C *or* to their heirs," the courts usually construe the language to constitute a gift over to the heirs of any named devisee or legatee who predeceases the executor.[3]

The law seems fairly well settled that in cases where the will leaves property to a named person, "or his heirs," on the death of the

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donee before that of the testator, the property bequeathed to the named deceased person goes to his heirs; but where it is left to a named person, "and his heirs," or to a named person, "his heirs and assigns," upon the death of the named donee before that of the testator, the gift lapses. That is to say, the word "or" makes the word "heirs" a word of purchase and not of limitation (remember the rule in Shelley's Case) ; but where the word "and" is used instead of "or", or is understood, the opposite effect is accomplished, the gift lapsing, and the property going to the surviving donees, if any, or elsewhere depending on the terms of the will.

However, though the drawer of the will can usually fix things to the liking of the testator by the use of the words "or" or "and", it is submitted that further steps should be taken so as to leave no room for interpretation. The purpose of the construction of a will is to ascertain the testator's intention so far as possible. So why not use specific language so there can be no question as to the intention? Why not say that if any of the named legatees dies before the death of the testator, the share bequeathed to him shall pass to so-and-so? It is fairly easy to so word a will that a particular gift will not lapse.

One other thought: While, as above pointed out, the use of the words "or" or "and" gives an entirely different aspect to the meaning of a will, some day, if the atomic bomb doesn't get in its work first, some drafter of a will, be he either lawyer or real estate broker, will draw one saying: "I leave $5,000.00 each to my nieces, A, B, and C, and/or their heirs and assigns forever." When this happens there will be laid in the lap of the court the necessity for a new interpretation of both grammer and law.

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1. 69 C.J. 352-3, 4 Page on Wills 170; 78 A.L.R. 992.
2. See cases cited in 78 A.L.R. 992.
3. See note in A.L.R. supra.