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Passage of Lapsed Share in Residue

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RECENT CASES

PASSAGE OF LAPSED SHARE IN RESIDUE

Testator directed in his will that the residue of his estate was to be divided into one hundred equal parts, and distributed among individual beneficiaries. Five of the shares were to be held in trust for the benefit of a foster son, and upon his death, for his children. The trust created a life state in the foster son with a contingent remainder in his unborn children, leaving a reversion in the testator. All the residuary legatees, including the foster son were alive at the time of the testator's death. Since the foster son left no children at his death, the life estate terminated and the interest reverted to the testator's estate. However, the court treated the reversion as a lapse of the legacy.¹ Held, that the lapsed share shall continue to be a part of the residue, and be distributed among the surviving residuary legatees. *Commerce National Bank v. Browning*, 107 N.E. 2d 120 (Ohio 1952).

The principle that any lapse in the residuary clause does not inure to the benefit of the remaining residuary legatees but passes as if there had been an intestacy has been established by the English courts.² The rule has no application to lapsed residuary legacies where the legatees take as joint tenants or as members of a class. In that situation, the lapsed share remains in the residue and is distributed among the joint tenants who survive.³ Also, a testamentary gift outside the residue which lapses will fall into the residue, and is not subjected to the principle.⁴ A probate court in a state which has an anti-lapse statute may apply such statute to the situation where one of the residuary legatees has predeceased the testator, and would prevent the lapsed residuary share from passing intestate. Instead, the share would pass to the party or parties designated by the anti-lapse statute. The reason for the rule is not clear. Perhaps the English courts felt that the testator desired that the surviving residuary legatees be limited to the original legacy as devised in the will, and therefore the testator's unexpressed intention should be carried out. The English courts applied the principle to the proper situation without hesitation before the turn of the century; but since then some of the courts have shown reluctance in its application.⁶ American courts have generally

1. The term "lapse" indicates that a legatee or devisee died before the testator, and the gift fails to vest. However, the courts have applied the term to other situations, as was done in the instant case. 57 Am. Jur. 954.
2. *Skrymsler v. Northcoate*, 1 Swanst. 566 (1818); *Bagwell v. Dry*, 1 P. Wms. 700, 24 Eng. Rep. 700 (1721).
3. *Hoerman's Estate*, 234 Wis. 130, 290 N. W. 608 (1940); 57 Am. Jur. 978.
4. *In re Quick's Estate*, 33 Wash. 2d 568, 206 P.2d 489 (1949); 57 Am. Jur. 971.
5. *Schneller v. Schneller*, 356 Ill. 89, 190 N.E. 121, 92 A.L.R. 838 (1934); see note, 139 A.L.R. 873.
6. "The arguments by which this rule was arrived at are perfectly intelligent, and one may say, plausible, nevertheless, I think that the effect of it is to defeat the testator's intention in almost every case in which it is applied, but it is a rule by which I am undoubtedly bound." *In re Dunster*, 1 Ch. 103 (1909).

adopted this principle; but the reasons they have used for its application do not appear to be too clear, except that it must be followed as the common law.⁷

A growing minority of American courts do not feel obligated to follow the rule merely because it is the common law.⁸ Several state courts have rejected the rule by judicial decision.⁹ Ohio and Rhode Island have changed the rule by statute.¹⁰ The court in the instant case, in rejecting the rule, brings out the fact that the testator probably intended to dispose of all his property by his will, and even though a lapse has occurred such share should be distributed among the surviving residuary legatees.¹¹ The objections to the rule may be summed up by the statement set forth in the case of *Corbett v. Skaggs*:¹²

"That the share of a deceased residuary legatee cannot fall into the residue because it is itself a part of the residue, appears to be a mere play upon words than to point out of real difficulty."

The problem of a lapse in the residuary clause of a will may have arisen in the probate courts of Wyoming in the past but a search revealed no cases decided by the Wyoming Supreme Court. The common law would probably be followed,¹³ but since there has been much criticism of the rule, which is technical in its nature and of doubtful value, it would seem best to overcome it by legislation or by decision. Judge V. J. Tidball stated in an article¹⁴ that since the Wyoming legislature has not passed an anti-lapse statute, the drawer of a will can overcome the problem of a lapse of a legacy outside the residue by the use of proper language. He stated that:

". . . 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 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' upon the death of the named donee before that of the testator, the gift lapses."

The lawyer in Wyoming who drafts a will can overcome the problem of a lapse in the residue by including a provision to protect such a lapse from passing intestate. A clause in the will to the effect that, "if any

7. In re Boyle, 123 Colo. 448, 231 P.2d 465 (1951).

8. "The rule is in fact a concession to the set policy of English law, nowhere more severely asserted than in chancery to keep the devolution of property in the regular channels, to the heirs and the next of kin, whenever it can be done." Gray's Estate, 147 Pa. 47, 23 A. 205 (1892).

9. *Corbett v. Skaggs*, 111 Kan. 380, 207 Pac. 819 (1922); In re Zimmerman's Estate, 122 Neb. 812, 241 N.W. 553 (1932); Gray et al v. Bailey et al, 42 Ind. 349 (1872); Will of Neilsen, 256 Wis. 54, 41 N.W. 2d 369 (1950).

10. R. I. Gen. Law c. 566, sec. 7 (1938); Ohio General Code Ann. sec. 10504-73 (1938). The Ohio court in the principle case did not apply this statute. An application was not appropriate to the factual situation of that case. The statute is applicable only when an actual lapse in the residue occurs.

11. Commerce National Bank v. Browning, 107 N.E. 120, 125 (Ohio, 1952).

12. *Corbett v. Skaggs*, 111 Kan. 380, 207 Pac. 819 (1922).

13. Wyo. Comp. Stat. 1945, sec. 16-301.

14. 2 Wyo. L. J. 60 (1947).

residuary devise or legacy under this will shall lapse, such devise or legacy shall pass to the surviving devisees or legatees in proportion to their respective interests in such residue" would suffice.

BOB DUNCAN

ROYALTY INTEREST—REAL OR PERSONAL

Lessee was the producer of oil and gas. The lease expressly provided that the lessee was to pay all taxes assessed and levied upon said lands. For a period of several years the lessee deducted from the account with the lessor a proportionate amount of the gross products tax levied by the State on the oil and gas produced. Suit was then brought to recover this deduction, the lessor claiming that the gross products tax was upon realty. *Held*: that the gross products tax is on personalty. *Oregon Basin Oil and Gas Co. v. Ohio Oil Co.*, 248 P.2d 198 (Wyo. 1952).

The Supreme Court states in this case that the question as to whether or not a royalty interest in oil lands is real or personal property, if discussed in general terms, may prove to be more confusing than helpful.¹ The Court chose instead to look at the principles of law applicable in Wyoming which are the result of its own constitutional² and statutory³ construction.⁴

In the case of *State v. Snyder*,⁵ it was held that the royalties should be considered as realty. However, this case dealt with the constitutional provision⁶ that all moneys from the sale or lease of school lands should belong to the perpetual funds for school purposes. The Court said that oil and gas, while in situ, are a part of the realty. If taken and disposed of the effect is clearly a permanent disposition of land.⁷

The Wyoming Constitution provided that there should be a tax on the gross products of mines and mineral claims as may be prescribed by law instead of a tax upon the real estate.⁸ The original statute⁹ provided for taxation of the gross products of, among other things, oil and gas, and for

1. *Oregon Basin Oil and Gas Co. v. Ohio Oil Co.*, 248 P.2d 198 (Wyo. 1952).

2. Wyo. Const. Art 15, Secs. 1 & 3.

3. Wyo. Comp. Stat. 1945, secs. 32-1001 to 1006.

4. See 4 Wyo. L. J. 250 for a discussion of Wyoming's Gross Products Tax.

5. *State v. Snyder*, 29 Wyo. 163, 212 Pac. 758 (1923).

6. Wyo. Const. Art. 7, Sec. 2.

7. *State v. Snyder*, 29 Wyo. 163, 212 Pac. 758 (1923).

8. Wyo. Const., Art. 15, Sec. 3.

9. Wyo. Comp. Stat. 1945, sec. 32-1001 (enacted in 1903): "The gross product of all mines and mining claims from which . . . coal, petroleum, or other crude mineral oil, or natural gas, or other valuable deposit is, or may hereafter be produced, while the same are being worked or operated, but not while the same are simply in the course of development, shall be returned by the owner, owners, lessee, or operator thereof for assessment for taxation, and taxed in the manner provided for in this Article, and such tax shall be in addition to any tax which may be assessed upon the surface improvements of such mines or mining claims, and in lieu of taxes upon the land of such claims while the same are being worked or operated: . . ."