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WILLS—CONSTRUCTION—LAPSE—“HEIRS” AS SUBSTITUTIONARY—Testator in his will bequeathed one half of his estate “share and share alike” to his three brothers, naming them, “being to each a one-third part thereof, to them and their heirs forever.” Two of the brothers were to testator’s knowledge dead at the time he made his will, and the third brother predeceased the testator. In proceedings brought for a construction of the will, *held*, that the residuary legacies to the brothers did not lapse, but the legacies vested in the respective heirs of deceased brothers. *In re Britt’s Estate*, (Wis. 1946) 23 N.W. (2d) 498.

At common law a legacy or devise lapses if the legatee or devisee dies during the lifetime of the testator, and the property passes into the residue or descends to the testator’s heirs under the rules of intestate distribution.¹ Lapse statutes have been passed in most states which change the common law doctrine in respect to certain beneficiaries.² In the absence of an applicable statute, however, the testator may prevent a lapse by manifesting an intention in his will to make a gift in substitution.³ This is in accord with the universally accepted doctrine that when the intention of the testator can be ascertained, the court will enforce that intention unless forbidden by some positive rule of law.⁴ As in the principal case, when the testator uses traditional words of limitation such as “to A, his heirs and assigns,” or “to A and his heirs forever,” the court must determine what is sufficient manifestation of the testator’s intention to avoid a lapse. In this determination, the courts are guided by certain definite criteria. It is generally held that the use of the conjunction “or” in the phrase “or his heirs,” following a devise or legacy to a named beneficiary, furnishes an alternative or substitutionary provision, and the heirs will take under the will when the legatee or devisee predeceases the testator.⁵ However, a devise or legacy to A “and his heirs” or to A “his heirs and assigns” will lapse upon the death of the beneficiary during the testator’s lifetime,⁶ unless the context of the will indicates an intent to effect a substitutionary gift.⁷ The reason consistently advanced for this canon of construction is that the words “heirs, assigns, etc.,” although no longer required under statutes to pass a fee simple estate, are words of limita-

¹ ROOD, WILLS, 2d ed., § 666 (1926); *Brett v. Rigden*, 1 Plowd. 340, 75 Eng. Rep. 516 (1568); *Camden Trust Co. v. Wolfe*, 131 N.J. Eq. 437, 25 A. (2d) 915 (1942).

² 4 PAGE, WILLS, lifetime ed., § 1422 (1941).

³ *Palmer v. French*, 326 Mo. 710, 32 S.W. (2d) 591 (1930); *Brill v. Green*, 316 Ill. 583, 147 N.E. 446 (1925). Testator’s intention must be to appoint a substitutional beneficiary who is living at the testator’s death.

⁴ *Jones v. Holloway*, 183 Md. 40, 36 A. (2d) 551 (1944); *Magill v. Magill*, 317 Mass. 89, 56 N.E. (2d) 892 (1944).

⁵ 128 A.L.R. 94 at 101 (1940). See note in 16 TEX. L. REV. 607 (1938), where it is said that the rule is well established that courts may construe “and” as “or,” or “or” as “and” to give effect to testator’s intentions.

⁶ 78 A.L.R. 992 (1932); *Camden Trust Co. v. Wolfe*, 131 N.J. Eq. 437, 25 A. (2d) 915 (1942); *In re Spier’s Estate*, 224 Mich. 658, 195 N.W. 430 (1923); *Lawrence Nat. Bank v. Smoot*, 145 Kan. 189, 64 P. (2d) 22 (1937).

⁷ See footnotes 10-12, *infra*.

tion indicating the nature of the estate which is given and not the person to whom it is given.⁸ The correlation of the word "assigns" with "heirs" is usually held to add emphasis to a finding that the phrase "to them, their heirs and assigns" is a phrase of limitation and not of purchase.⁹ Some courts have found that by his use of the word "heirs" the testator intended to make a substitutional gift when the will manifests a plan of equal distribution of testator's estate among family groups,¹⁰ when at the time of executing the instrument or adding a codicil thereto the testator knew that a devisee or legatee was dead,¹¹ or when "heirs" is used in another part of the will as descriptive of the beneficiaries and not of the estate given.¹² The Wisconsin court was led to a sub-

⁸ 128 A.L.R. 94 (1940); 3 WOERNER, AMERICAN LAW OF ADMINISTRATION, 3d ed., § 434 (1923); *Fidelity Union Trust Co. v. Halsey*, 136 N.J. Eq. 119, 40 A. (2d) 645 (1945).

⁹ The use of the word "assigns" with "heirs" assumes that the legatee will survive, for otherwise it would be impossible for him to assign his legacy. In *re Minor's Estate*, 59 Cal. App. 616, 211 P. 807 (1922); In *re Witte's Estate*, 102 Pa. Super. 535, 157 A. 328 (1931).

¹⁰ In *Dent v. Dent*, 113 S.C. 416, 102 S.E. 715 (1919), the will divided residue of testator's estate into three equal parts, and gave a share to each of testator's two brothers, and children of a deceased brother "share and share alike."

In *Plummer v. Shepherd*, 94 Md. 466, 51 A. 173 (1902), the testator devised realty to named brothers and their heirs, and to the heirs of certain deceased brothers, "share and share alike."

In *re Estate of Hoermann*, 234 Wis. 130, 290 N.W. 608 (1940), testator bequeathed his residuary estate to five daughters and four sons, by name, "to have and to hold the same, unto them, share and share alike, and to their respective heirs and assigns forever."

In *Bond's Appeal*, 31 Conn. 183 (1862), the will gave to the testator's children "and their heirs respectively" to be divided in equal shares among them his estate remaining upon decease or marriage of his widow.

That courts find no substitutionary intention in these words, see In *re Minor's Estate*, 59 Cal. App. 616, 211 P. 807 (1922), "their heirs and assigns respectively"; *Daboll v. Field*, 9 R.I. 266 (1869), "equally between them, share and share alike, and to their respective heirs, executors, administrators, and assigns"; In *re Gosden's Will*, 158 Misc. 99, 285 N.Y.S. 309 (1936), "in equal shares [to three nephews of testator], their heirs and assigns."

¹¹ Testator devised land to his son, William Davis, "to him and his heirs forever." William died and testator added a codicil to his will in which he stated the death of William, who had been appointed his executor, and appointed another son as executor, "to above mentioned will"; held, the heirs of William take under the will lands devised to William. *Davis's Heirs v. Taul*, 6 Dana (36 Ky.) 51 (1837).

Testator, knowing that two of his three sisters were dead at the time of making his will, made a bequest to his "brothers and sisters and their heirs"; held, that the heirs of predeceased sisters took shares respectively bequeathed to them. *Huntress v. Place*, 137 Mass. 409 (1884). But see *Adams v. Jones*, 176 Mass. 185, 57 N.E. 362 (1900).

¹² In *Hawn v. Banks*, Edw. Ch. (N.Y.) 664 (1846), a clause in the will stated: "I give and bequeath to my niece Mary Phelan and to her heirs the sum of \$6000." A previous clause had said: "I give to my sister and to her heirs (excepting her

stitutionary construction of the words "to them and their heirs forever" because of the presence in the will of: the distributive phrase "share and share alike"; the scheme unfolded of an equal division of the testator's residuary estate between his own relatives and relatives of his wife; the fact that two of the residuary legatees were to testator's knowledge dead at the time he executed the will, and the presumption of the law against an intended intestacy of one who executes a testamentary instrument. It is well-known that the rules of lapse frequently operate to thwart the testator's desires in the distribution of his estate.¹⁸ In view of the ambiguous character of the word "heirs" in conjunction with named legatees, and the court's desire to effectuate the intention of the testator whenever it is possible by reasonable interpretation of the entire instrument, the decision in the principal case appears to be both justifiable and commendable.

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daughter Mary Jane Wilcox and descendents of said daughter) the sum of \$7000." When Mary Phelan predeceased testatrix, the court held that the children of Mary Phelan took her legacy under the will.

Testator devised to his niece "and her heirs" the residuum of his estate. A previous portion of the will read, "To my brother Thomas's heirs at law I bequeath one hundred dollars." The court held that when testator's niece predeceased him, the niece's children took under the will. *Wettach v. Horn*, 201 Pa. 201, 50 A. 1001 (1902).

In *Barnwell's Estate*, 29 Pa. Dist. R. 317 [affirmed in 269 Pa. 443, 112 A. 535 (1921)] a gift to legatee "and to her heirs and assigns" was held to be substitutionary, because in a later gift, the testator declared that it was "not to her [legatee's] heirs and assigns."

¹⁸ 4 PAGE, WILLS, lifetime ed., § 1430 (1941).