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LAPSE, ABATEMENT AND ADEMPION

THOMAS H. LEATH*

LAPSE

While the expression "lapse" has been used in various situations, it is generally thought of in the case where the devisee or legatee dies after the will is executed but before the death of the testator. When a legacy or devise is extinguished by reason of the death of the beneficiary before that of the testator, it is said to lapse, and the intended gifts are known as lapsed legacies or devises.¹

It is said that the intention of the testator as to whether there shall be a lapse is controlling and such intent will be ascertained from the four corners of the will.²

The circumstances causing a lapse must be distinguished from the situation where a beneficiary dies before the will is written. If the legatee or devisee should die before the will is written, the legacy or devise would be void and not lapsed.³ A lapsed gift is one which was good at the date of the will but failed because of a subsequent occurrence. A void gift, on the other hand, is ineffective from the date of the will. The antilapse statutes referred to hereafter apply only to lapsed and not to void legacies and devises.⁴

A divorce does not necessarily render a devise or bequest either void or lapsed. At common law in the absence of a contrary intent apparent in the will a gift to one's spouse by name remains valid upon a divorce after the execution of the will. To the contrary, the failure of the testator to change his will after divorce when he had sufficient time and opportunity to do so creates a presumption that his will expressed his wishes and intentions.⁵ However, in North Carolina G.S. § 31-5.4 provides that a divorce impliedly revokes a husband's gift to his wife by a prior will.

In the event the beneficiary of an estate for life predeceases the testator, the gift to the remainderman does not lapse but takes effect immediately.⁶ By the same token if the remainderman predeceases the testator survived by the life tenant, the estate of the life tenant will not be destroyed.⁷

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¹ 2 MORDECAI, LAW LECTURES 1136 (1916). However, lapses occur in numerous other situations. See generally 57 AM. JUR. WILLS § 1424 (1948).

² Wachovia Bank & Trust Co. v. Shelton, 229 N.C. 150, 48 S.E.2d 41 (1948).

³ Scales v. Scales, 59 N.C. 163 (1860).

⁴ Scales v. Scales, *supra* note 3; Lindsay v. Pleasants, 39 N.C. 320 (1846).

⁵ E.g., *In re Estate of Jones*, 211 Pa. 364, 60 Atl. 915 (1905).

⁶ Richmond v. Vanhouk, 38 N.C. 581 (1845).

⁷ See Howell v. Mehegan, 174 N.C. 64, 93 S.E. 438 (1917).

In the case of testamentary gifts to a class, such as "children" or "grandchildren" of a designated individual, the death of one or more of the members of the class after the execution of the will but prior to the death of the testator does not result in a lapse of the share of the deceased member. The share of the surviving members is simply enlarged to embrace the share of the deceased member, for in the absence of a contrary intention indicated in the will a testamentary class gift is considered as including only those members of the class living at the death of the testator.⁸

The gift to a class of persons must be clearly distinguished from a gift to individuals *nominatim*. While a lapse does not occur in the former, it does result in the latter when one or more of the named beneficiaries predeceases the testator. As stated in *Wooten v. Hobbs*,⁹

It has been uniformly held with us that when a legacy or devise is given to certain persons then in being by name, and any of them die before the testator, those living will not take his share, as survivors, but the legacy or devise will lapse, and go, as property undisposed of by the testator, to the latter's next of kin, unless otherwise provided by statute or unless other disposition thereof be made by the will or a codicil, or in the absence of contrary provisions in the will.

The recent case of *Entwistle v. Covington*,¹⁰ is a good illustration of a lapse upon the death of named beneficiaries prior to the death of the testator. The residuary clause of the will was as follows: "The residue of my estate anything and everything of value I will and bequeath to my sisters May S., Faith L. & Elna G. Covington. or to those who reside at our home place, Glenwood. at the time of my death." Each of the sisters was living at the time of the execution of the will but each predeceased the testator. Neither the testator nor his sisters ever married or left issue. The brother of the testator and his wife were allegedly living with the testator at Glenwood at the time of the death of the latter. They contended they were entitled to the residue of the estate because of their residence at Glenwood. Other heirs and next of kin of the testator contended the word "those" as used in the residuary clause referred only to the named sisters and that a lapse resulted. It appeared from the evidence that the chief objects of the testator's bounty were the three named sisters who lived with him at Glenwood and that the dominant desire and purpose of the testator was to so dispose of his property that the residuary estate would go to the three named sisters and to the survivor or survivors

⁸ *Winston v. Webb*, 62 N.C. 1 (1866); Long, *Class Gifts in North Carolina*, 22 N.C.L. REV. 297, 316 (1944).

⁹ 170 N.C. 211, 215, 86 S.E. 811, 813 (1915).

¹⁰ 250 N.C. 315, 108 S.E.2d 603 (1959).

of them so long as they or any of them remained living and residing at Glenwood. The court stated that, if any one of the three sisters named had been living and residing at Glenwood at the time of testator's death, she would have taken the entire residuary estate. Thus it is apparent that, by the addition of the words "or to those who reside at our home place, Glenwood. at the time of death," the testator expressed the intent that there should be no lapse if at least one of the named sisters had been living and residing at Glenwood at the time of his death. The court stated,

It is quite clear under our decisions that if the residuary clause under consideration had bequeathed and devised the residuary estate to the three sisters of the testator by name and had omitted the clause "or to those who reside at our home place, Glenwood, at the time of my death," there would have been no survivorship; and as each one of the sisters died, prior to the death of the testator, the bequest and devise to such deceased sister would have lapsed and her share of the residuary estate would have gone as intestate property.¹¹

The Court concluded that upon the death of the testator, his three named sisters having predeceased him, the bequests and devises made in the residuary clause lapsed, the residuary clause became ineffective, and the "residuary estate thereupon descended by operation of law to his heirs and next of kin."¹²

The question as to whether or not a bequest or devise shall lapse is controlled by the intent of the testator.¹³ A substitution of another beneficiary in case of the death of the original devisee or legatee would be a clear expression of an intent that the original gift should not lapse. Further, the so-called simultaneous death provisions now inserted in many wills by which the testator may establish a presumption that the wife survived have been held to indicate an intention that the gift to the wife should not lapse in the event of their dying in a common disaster.¹⁴

Statutes have been enacted in North Carolina and in many other jurisdictions to prevent in certain instances a strict application of the common law doctrine of lapse. Before the adoption of these statutes, the law was such that if a testator devised or bequeathed property to his child and such child died during the life of the testator leaving issue surviving, the devise or legacy would nevertheless lapse and pass under the residuary clause of the will, if any; or, in the absence of a residuary clause, it would be intestate property and would descend to the heirs

¹¹ *Id.* at 320, 108 S.E.2d at 607.

¹² *Id.* at 321, 108 S.E.2d at 607.

¹³ *Wachovia Bank & Trust Co. v. Shelton*, 229 N.C. 150, 48 S.E.2d 41 (1948).

¹⁴ *In the Matter of Fowles*, 222 N.Y. 222, 118 N.E. 611 (1918).

at law or be distributed among the next of kin of the testator, in accordance with the nature of the property.¹⁵

Prior to 1951 there were two antilapse statutes in North Carolina, G.S. §§ 31-44 and -42.¹⁶ In effect G.S. § 31-44 provided that a devise or bequest to a child or other issue of the testator should not lapse if issue of the devisee or legatee survived the testator. G.S. § 31-42 as it existed prior to 1951 in effect provided that a "devise" which failed for any reason should pass to the residuary devisee but that there should be no lapse if the "devisee or legatee" would have been an heir of the testator and such devisee or legatee left issue surviving the testator. Both of these statutes limited their effect by stating, "unless a contrary intention shall appear by the will." As originally written G.S. § 31-42 provided a lapsed devise should "be included in the residuary devise (if any) contained in such will" but made no mention of lapsed legacies. A proviso was added to make it apply to legacies of personal property as well as to devises of real property. G.S. § 31-44, on the other hand, dealt with lapse of both real and personal property, but made no express provision for passage under the residuary clause (if any) of the will.

In order to overcome the problems arising out of these loosely drawn statutes and to recognize and preserve the distinction between real and personal property for purposes of devolution, the General Assembly in 1951 repealed G.S. § 31-44 and completely revised G.S. § 31-42 so as to embrace all the statutory antilapse provisions in one statute.

The current statute, G.S. § 31-42, is divided into three sections.

¹⁵ *Smith v. Smith*, 58 N.C. 305 (1860).

¹⁶ In view of the fact that these two statutes have been repealed, they are set forth below as a matter of historical interest.

G.S. § 31-44: "When any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be living at the death of the testator, such devise or bequest shall not lapse, but shall take effect and vest a title to such estate in the issue surviving, if there be any, in the same manner, proportions and estates as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

G.S. § 31-42: "Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will: Provided, there shall be no lapse of the devise or legacy by reason of the death of the devisee or legatee during the life of the testator, if such devisee or legatee would have been an heir at law or distributee of such testator had he died intestate, and if such devisee or legatee shall leave issue surviving him; and if there is issue surviving, then the said issue shall have the devise or bequest named in the will."

These two statutes as they existed prior to 1951 were held not to be interrelated. *Beach v. Gladstone*, 207 N.C. 876, 178 S.E. 546 (1935).

The first section deals with a devise to a person who predeceases the testator leaving issue surviving and provides that the devise shall not lapse but shall go to the surviving issue of the devisee where the deceased devisee would have been an heir of the testator had he survived him and had there been no will. The second section deals with legacies in essentially the same manner as the first section deals with devises but preserves the distinction between devises of real property and the bequests of personal property. The third section provides that in the event of a lapse or failure to take effect for any other reason, the devise or bequest shall, absent a contrary intent in the will, pass under the residuary clause of the will, if any; in the absence of an applicable residuary clause, the devise or bequest passes as in case of intestacy.

Good draftsmen in 1951 did an excellent job of clarifying the statutory laws in North Carolina pertaining to lapses. Nevertheless, the new Intestate Succession Act of 1959¹⁷ would seem to demand further revision of this statute to eliminate the distinction between real and personal property for purposes of devolution. The case of *Farnell v. Dongan*¹⁸ is of particular interest in this respect. The testator devised and bequeathed all of his property, both real and personal, to his wife, to be hers absolutely. The wife predeceased the testator survived by two of her children by a former marriage. There were no children of the marriage to the testator. The testator was survived by brothers and sisters and nieces and nephews as heirs at law. The children of the wife by the former marriage contended that as the surviving issue of their mother they were entitled under G.S. § 31-42 to all of the property, both real and personal, which constituted the net estate of the testator. On the other hand, heirs at law and next of kin of the testator contended they were entitled to all of the property, real and personal, and that the provisions of the antilapse statute were not applicable. The court held that since she would not have been an heir of her deceased husband and since she predeceased him, the statute was not applicable as to the real property; therefore, the devise lapsed and the real property descended to the brothers and sisters and nieces and nephews. However, since she would have been a distributee of the estate of the testator had she been living at his death and had he died intestate, and having left issue surviving her, the legacy did not lapse and the personal property must be distributed to the issue of the deceased wife.

G.S. § 29-2 (of the 1959 Intestate Succession Act) defines "heir" as "any person entitled to take real or personal property upon intestacy

¹⁷ N.C. GEN. STAT. ch. 29 (Supp. 1959). See generally McCall, Bolich & Wiggins, *North Carolina's New Intestate Succession Act*, 39 N.C.L. REV. 1 (1961).

¹⁸ 207 N.C. 611, 178 S.E. 77 (1935).

under the provisions of this chapter." G.S. § 29-3(1) provides that in determining those who take upon intestate succession there is no distinction between real and personal property. Thus it would appear that if *Farnell v. Dongan* were decided today the issue of the deceased widow by a former marriage would take both real and personal property to the exclusion of the brothers and sisters and nieces and nephews of the testator, he having left no issue and having failed to express in his will any contrary intent. If this be the case, further statutory revision should be considered.

If there is no indication in the will to the contrary, and even without statutory provision, lapsed legacies and devices pass as a part of the residuum or, in the absence of a residuary clause, the subject matter passes as intestate property.¹⁹ Nevertheless, G.S. § 31-42.2 fixes the devolution of property which fails by reason of lapse or any other cause on account of the prior death of the beneficiary. The intent of the testator as expressed in or determined from his will governs. The general principle that a lapsed or ineffectual gift passes under the residuary clause in the absence of contrary context is applicable even in the situation where the donee is also named as a residuary beneficiary.²⁰

In determining the applicability of the antilapse statute, those who would have been distributees of the estate had the testator died intestate must be determined as of the date of the death of the testator and not as of the date of the execution of the will.²¹

It should be borne in mind that only the *issue* of the beneficiary who predeceased the testator are benefitted by the antilapse statute. Collateral kindred of the deceased beneficiary will not by virtue of the statute take the property from the testator even though such collateral kin would have been the heirs of the testator had the testator died intestate after the death of the named beneficiary.²²

There is a division of authority as to whether antilapse statutes apply to class gifts. In a few states such statutes embrace gifts to a class specifically.²³ Though in some states the general antilapse statutes have been construed as not being applicable to class gifts,²⁴ it is generally held today that antilapse statutes do apply to class gifts.²⁵ Neither

¹⁹ *Stevenson v. Wachovia Bank & Trust Co.*, 202 N.C. 92, 161 S.E. 728 (1932).

²⁰ *Sorrey v. Bright*, 21 N.C. 13 (1835).

²¹ *Wachovia Bank & Trust Co. v. Shelton*, 229 N.C. 150, 48 S.E.2d 41 (1948).

²² *Daniel v. Bass*, 193 N.C. 294, 136 S.E. 733 (1927).

²³ *E.g.*, Ky. Rev. Stat. § 394.410 (1959), which provides that the share of a deceased class-member shall pass to his issue unless he dies without issue, in which case the common law rule applies to prevent a lapse.

²⁴ *E.g.*, *Campbell v. Clark*, 64 N.H. 328, 10 Atl. 702 (1887).

²⁵ *E.g.*, *In re Scheidl's Estate*, 89 Cal. App. 2d 488, 201 P.2d 58 (1948); *Clifford v. Cronin*, 92 Conn. 434, 117 Atl. 489 (1922); Annot., 56 A.L.R.2d 948 (1957).

the current North Carolina antilapse statute nor the earlier ones are made applicable to class gifts specifically.²⁸ On the theory that a gift to a class by definition is not intended by the testator to include any persons answering the class designation who predecease him, it would seem that such statutes should not be made applicable to class gifts either specifically or by construction.

ABATEMENT

The problem of abatement arises when the assets of an estate are insufficient to pay the debts of the decedent, the costs of administration including estate taxes, and all of the legacies and devises. The insufficiency of funds or property may be caused in various ways. However it is caused beneficiaries may not receive anything until such debts and expenses are paid in full. Dean Mordecai in commenting on the principles of abatement said, "A man is required to be just before he is generous, and, therefore, his debts must be paid before his property is turned over to the objects of his bounty."²⁷

The intention of the testator as indicated in his will controls as between the beneficiaries in case abatement becomes necessary. Unfortunately the testator and the draftsman of the will all too often do not provide or even imply what is to be done in case of an insufficiency of assets.

Where the testator fails to express in his will any intention as to the abatement of legacies and devises for the payment of debts, the following rules generally apply:

1. Residuary legacies must first be exhausted.²⁸
2. General and demonstrative legacies will be resorted to for payment of debts before specific legacies may be encroached upon.²⁹
3. In the case of demonstrative legacies where the fund designated for their payment is in existence at the death of the testator, it is sometimes held that they abate ratably with specific legacies.³⁰ On the other hand, where the fund out of which the demonstrative legacy is to be paid is not in existence at the death of the testator, the demonstrative legacies abate with the general legacies.³¹

²⁸ It seems implicit in the case of *Stevenson v. Wachovia Bank & Trust Co.*, 202 N.C. 92, 161 S.E. 728 (1932), that North Carolina adheres to the view that our antilapse statute is inapplicable to class gifts.

²⁷ 2 MORDECAI, LAW LECTURES 1136 (1916).

²⁸ *Smith v. Livermore*, 298 Mass. 223, 10 N.E.2d 117 (1937); *Nickerson v. Bragg*, 21 R.I. 296, 43 Atl. 539 (1899).

²⁹ *Heath v. McLaughlin*, 115 N. C. 398, 20 S.E. 519 (1894); *Annot.*, 101 A.L.R. 704, 712 (1936).

³⁰ *Matthews v. Targarona*, 104 Md. 442, 65 Atl. 60 (1906); *Note*, 10 Ann. Cas. 158 (1908).

³¹ *Gelbach v. Shivley*, 67 Md. 501, 10 Atl. 247 (1887); *O'day v. O'day*, 193 Mo. 62, 91 S.W. 921 (1906) (dictum).

4. As between legacies of the same class, general, demonstrative or specific, abatement is *pro rata*.³²

5. The majority of the modern decisions hold that specific legacies and specific devises abate ratably on the theory there is no reason to presume that a testator, in the absence of expression in his will, intended to favor one class of property over the other.³³ The minority view adheres to the principle that inasmuch as personal property is the primary source for the payment of debts, specific legacies should abate before specific devises.³⁴ In view of G.S. § 28-81 which provides for the sale of realty to pay debts only where the personalty is insufficient, it appears North Carolina will continue to abide by the minority view.³⁵ The only recent change in this statute was to delete that portion relating to dower. North Carolina even goes so far as to hold that the personalty of a decedent must be applied to the payment of his debts to the exoneration of the real property to satisfy a lien on the latter.³⁶

6. The testator may in his will fix the order of abatement as he chooses when the assets are insufficient to pay debts, and his intent will prevail over the general rules of law.³⁷

ADEMPMENT

Although the principle of ademption is firmly imbedded in the law of wills, the term "ademption" is very difficult to define in a thoroughly satisfactory and all inclusive manner, as will be noted from the following attempts:

When a legacy is taken away or revoked by the testator, such act of the testator is said to be an ademption of the legacy.³⁸

The extinction of a specific legacy by the testator's parting with the subject thereof during his life.³⁹

Ademption is the extinction or satisfaction of a legacy by some act of a testator, which is equivalent to a revocation of the bequest or indicates the intention to revoke....

The foregoing definitions may be criticized because they fail to recognize that ademption may occur by the destruction or extinction of the subject matter during the life of the testator without any action

³² *Balinger's Devisees v. Balinger's Adm'r*, 251 Ky. 405, 65 S.W.2d 49 (1933).

³³ *Baker v. Baker*, 319 Ill. 320, 150 N.E. 284 (1925); *O'day v. O'day*, 193 Mo. 62, 91 S.W. 921 (1906).

³⁴ Annot., 42 A.L.R. 1519, 1523 (1926), and cases there cited.

³⁵ *Baptist Female Univ. v. Borden*, 132 N.C. 477, 44 S.E. 47 (1903).

³⁶ *Rouse v. Rouse*, 237 N.C. 492, 75 S.E.2d 300 (1953).

³⁷ *Robards v. Wortham*, 17 N.C. 173 (1831).

³⁸ 2 MORDECAI, LAW LECTURES 1136 (1916).

³⁹ CYCLOPÆDIC LAW DICTIONARY 30 (3d ed. 1940).

⁴⁰ *Burnham v. Comfort*, 108 N.Y. 535, 539, 15 N.E. 710, 711 (1888).

or intent on his part. Further, as is seen, some do not necessarily embrace the ademption of a devise by its alienation during the life of the testator.

The term "ademption" has been held by a New York court not to apply to devises,⁴¹ yet North Carolina and many other jurisdictions apply the term to devises as well.⁴² To express the matter simply, if the subject matter of a particular legacy or devise is not in existence as a part of the testator's assets at the time of his death, it would be adeemed.

An ademption of a devise or legacy may result from various causes and circumstances. Thus in the case of gifts of specific property, an ademption is caused by the nonexistence of the property at testator's death or its consumption, loss, disposal by sale, gift or other alienation, or change in form, during the lifetime of the testator. In the case of general or pecuniary legacies, ademption results from a gift or advance by the testator to a beneficiary mentioned in his will, made either in cash or by the forgiveness of an indebtedness.⁴³ If there is an ademption, the beneficiary is barred from claiming the gift, except such portion thereof as the testator possessed at the time of his death.⁴⁴ A testator cannot give what he does not own at the time of his death.

The question of whether or not the testamentary disposition was adeemed by gift during the lifetime of the testator is a matter of intent.⁴⁵ The court will adjudge the question as a matter of law when the facts are clear. In doubtful cases, however, evidence will be heard to ascertain the intent with which the gift was made.⁴⁶ This principle has been applied in the case of a gift of money.⁴⁷

Some jurisdictions hold that the question of ademption of a legacy or devise by alienation or extinction also depends ultimately on the intention of the testator.⁴⁸ North Carolina holds it to be a rule of law

⁴¹ *Ibid.*

⁴² *E.g.*, *Perry v. Perry*, 175 N.C. 141, 95 S.E. 98 (1918); Annot., 30 A.L.R. 676, 680 (1924).

⁴³ *Grogan v. Ashe*, 156 N.C. 286, 72 S.E. 372 (1911); Annot., 26 A.L.R.2d 9 (1952).

⁴⁴ In the case of general legacies, the earlier view was that any payment to the legatee resulted in total ademption. *Johnson v. McDowell*, 154 Iowa 38, 134 N.W. 419 (1912); *Low v. Low*, 77 Me. 37 (1885). However, where the payment to the legatee was substantially less than the amount of the legacy, the tendency is to hold the ademption pro tanto. *In re Percival's Estate*, 79 Misc. 567, 141 N.Y. Supp. 180 (1913). On the other hand, ademption by alienation or extinguishment is generally conceded to be pro tanto only. *Murphy v. Boling*, 273 Ky. 827, 117 S.W.2d 962 (1938).

⁴⁵ The doctrine of ademption by gift is closely related to the question of advancement under the law relating to intestacy. Generally it would seem that the same intent would be required for either.

⁴⁶ *Grogan v. Ashe*, 156 N.C. 286, 72 S.E. 372 (1918).

⁴⁷ *Ibid.*

⁴⁸ *Wilmerton v. Wilmerton*, 176 Fed. 896 (7th Cir.), *cert. denied*, 217 U.S. 606 (1910); cases discussed in Annot., 30 A.L.R. 676 (1924).

rather than one of particular intent of the testator,⁴⁹ although it also places much emphasis on the intent of the testator.⁵⁰

In considering ademption, it must be borne in mind that the will speaks as of the death of the testator. In harmony with this rule of law it is provided by statute that the conveyance of property after the execution of the will and before the death of the testator will not create an ademption if the testator re-acquired the property prior to his death. Moreover, even without the aid of a statute, where certain notes were bequeathed and the testator before his death accepted new notes in lieu thereof, the North Carolina court held that ademption did not result but that the new notes passed to the legatee.⁵¹

Ademption does not apply to general or demonstrative legacies, for such do not refer to particular property at the testator's death since they are payable from general assets of the estate.

⁴⁹ *Green v. Green*, 231 N.C. 707, 58 S.E.2d 722 (1950). The proposition that the ademption of specific legacies or devises is a rule of law seems to rest on the very practical consideration that either the testator owned the property at his death or he did not.

⁵⁰ *King v. Sellers*, 194 N.C. 533, 140 S.E. 91 (1927).

⁵¹ *Rue v. Connell*, 148 N.C. 302, 62 S.E. 306 (1908).