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pears that such is not the case. The *Starmount* case involved a restrictive covenant which was placed in a deed to a portion of the same tract of land purchased by the defendant. Thus it would seem that this case merely followed the majority view. The *Brevard* case involved an easement and a covenant not to sue, placed in a deed by a common grantor to another tract of land. The subsequent purchaser contended that a deed could not be record notice if it were to a parcel of land other than the one bought. Although it was held to be record notice, the court there said, "This position might be well taken if we were dealing with restrictive covenants rather than an easement."[17]

Then turning to other authorities, the court relied on a statement by Tiffany,[18] and an annotation in the *American Law Report*.[19] These authorities lend support to the view adopted by the court and to its assertion that this is the majority view. However, the statement by Mr. Tiffany was written before 1920 and the annotation was written in 1922. Since that time, it seems that the weight of authority has shifted.[20]

Hence, it would appear that the decision as to the enforcement of restrictions absent a uniform plan is in line with the weight of authority, while the decision as to what constitutes record notice is in accord with the present minority view.

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Taxation—Effect of North Carolina Inheritance Tax on a Will Compromise Agreement

Testatrix devised several tracts of land located in North Carolina to *A, B,* and *C,* a niece and two nephews, in fee simple. *D,* another niece who was specifically excluded from the will, threatened to file caveat to the probate of the will. In return for the promises of *A, B,* and *C* to convey one-fourth of the property to *D,* she did not file caveat and the will was admitted to probate. The executor paid the inheritance tax on the basis that there were four beneficiaries in accordance with the compromise agreement. The North Carolina Commissioner of Revenue filed a tax judgment against the beneficiaries for an additional assessment computed on the basis of the will with three beneficiaries instead of four. A partition sale of one parcel of the land was made by a court-appointed commissioner and the additional assessment was paid. *A, B,* and *C* then brought suit against *E,* a purchaser from *D* of the parcel of land which was sold, to compel payment of a proportionate share of the inheritance tax. It was held that the liability for the tax is on those who are in-

[17] 233 N.C. at 30.
[18] 2 TIFFANY, *op. cit. supra* note 14, at 2188.
[19] Annot., 16 A.L.R. 1013 (1922).
[20] See cases cited note 12 *supra;* Philbrick, *supra* note 12, at 173 & n.155.

tended to take the property by the terms of the will and that a purchaser from a party who takes part of the estate by a compromise agreement with the devisees cannot be required to reimburse them for a portion of the tax paid in the absence of an agreement to do so.[1]

There is a conflict of authority[2] on the question of whether an inheritance tax should be computed by the terms of the will or by the terms of the compromise agreement. The majority[3] of jurisdictions which have decided the question have held that the tax should be levied by the terms of the will, without regard to the compromise agreement. The reason given for this position is that a person who takes property by compromise takes by contract with the beneficiaries named in the will and not by inheritance.[4] The will takes effect as of the date of the death of the testator[5] and the rights and obligations of all the parties in regard to payment of the inheritance tax are fixed at that time.[6] Any subsequent agreement among parties to a will contest should have no effect on the tax.

The minority view is that the inheritance tax should be levied on those who actually take the property by the compromise agreement,[7] disregarding entirely the terms of the will.[8] The reason given for this position is that the fundamental principle of an inheritance tax law is to exact a tax upon the value of property transferred from the estate of the decedent to the beneficiaries.[9] Proponents of this view say that to tax those who take by will when they do not get all the property is to

[1] Pulliam v. Thrash, 245 N.C. 636, 97 S.E.2d 253 (1957).

[2] 28 AM. JUR., *Inheritance, Estate, and Gift Taxation* §§ 219, 220 (1940); Annot., 36 A.L.R.2d 917 (1954); 29 COLUM. L. REV. 1164 (1929); 85 C.J.S., *Taxation* § 1143 (1954); PINKERTON AND MILLSAPS, INHERITANCE AND ESTATE TAXES §§ 70, 71 (1926).

[3] Mackenzie v. Wright, 31 Ariz. 272, 252 Pac. 521 (1927); *In re* Cress' Estate, 335 Mich. 551, 56 N.W.2d 380 (1953); Lynchburg Trust & Savings Bank v. Commonwealth, 162 Va. 73, 173 S.E. 548 (1934); *In re* Jorgensen's Estate, 267 Wis. 1, 64 N.W.2d 430 (1954).

[4] Cochran's Ex'r v. Commonwealth, 241 Ky. 656, 44 S.W.2d 603 (1931).

[5] N.C. GEN. STAT. § 31-41 (1950); *In re* Newton's Estate, 35 Cal.2d 830, 221 P.2d 952 (1950); *In re* Chevalier's Estate, 167 Kan. 67, 204 P.2d 748 (1949); Butler v. Dobbins, 142 Me. 383, 53 A.2d 270 (1947); Lee v. Foley, 224 Miss. 684, 80 So. 2d 765 (1955); Wachovia Bank & Trust Co. v. Green, 239 N.C. 612, 80 S.E.2d 771 (1954).

[6] Succession of Popp, 146 La. 464, 83 So. 765 (1919); McDonald v. State Tax Commission, 158 Miss. 331, 130 So. 473 (1930); 28 AM. JUR., *Inheritance, Estate, and Gift Taxation* § 218 (1940).

[7] Taylor v. State, 40 Ga. App. 295, 149 S.E. 321 (1929); Hart v. Mercantile Trust Co., 180 Md. 218, 23 A.2d 682 (1942); *In re* Gartside's Estate, 357 Mo. 181, 207 S.W.2d 273 (1947).

[8] Several early Pennsylvania cases treated payments made by beneficiaries under a will in compromise of caveator's claims against the estate as expenses of administration and therefore not subject to the inheritance tax. Hawley's Estate, 214 Pa. 525, 63 Atl. 1021 (1906); Kerr's Estate, 159 Pa. 512, 28 Atl. 354 (1894); Pepper's Estate, 159 Pa. 508, 28 Atl. 353 (1894). This view was discarded in a later case and Pennsylvania now follows the minority view. Taber's Estate, 257 Pa. 81, 101 Atl. 311 (1917); 16 MINN. L. REV. 722 (1931).

[9] *In re* Gartside's Estate, 367 Mo. 181, 207 S.W.2d 273 (1947); State *ex rel.* Hilton v. Probate Court, 143 Minn. 77, 172 N.W. 902 (1919).

impose a tax out of proportion to the property actually received.[10] Another reason given is that if a devise or legacy in a will is re-renounced,[11] no tax is due from the person who renounces.[12] The person who actually takes the property must pay the tax. The compromise,[13] therefore, is termed a partial renunciation[14] and those taking by the agreement are required to pay the tax. Courts following the minority view have also stated that policy is in favor of the tax-by-the-compromise rule since it will encourage settlement of litigation by offering a legatee or devisee a reduction in taxes.[15]

The result of the principal case appears unfortunate at first glance, since the three devisees are made to bear the entire burden[16] of the tax

[10] Pepper's Estate, 159 Pa. 508, 28 Atl. 353 (1894).

[11] The general rule is that a legatee or devisee may escape inheritance tax by renunciation within a reasonable time. People v. Flanagin, 331 Ill. 203, 162 N.W. 848 (1928); *In re* Estate of Stone, 132 Iowa 136, 109 N.W. 455 (1906); *In re* Bute's Estate, 355 Pa. 170, 49 A.2d 339 (1946); Annot., 60 A.L.R. 312 (1929).

[12] A renunciation of a share of a decedent's estate may have unsatisfactory consequences for the tax payer under the federal gift tax. In Hardenberg v. Commissioner, 198 F.2d 63 (8th Cir. 1952), *cert. denied*, 344 U.S. 836 (1952), when two heirs renounced their shares of the estate of the decedent to which they succeeded under the intestacy laws in favor of a third heir, they incurred a gift tax on the shares transferred. The court said that the property vested in the heirs at the date of the decedent's death and that any subsequent transfer by them even by renunciation was subject to the gift tax. See also Maxwell v. Commissioner, 17 T.C. 1589 (1952). *But see* Brown v. Routzahn, 63 F.2d 914 (6th Cir. 1933), *cert. denied*, 290 U.S. 641 (1933), involving a renunciation of a gift by will, where the court stated that the devisee has a right to reject the bequest up to the time of distribution without incurring gift tax liability. The North Carolina authority appears to be in accord with the above-cited decisions. Perkins v. Isley, 224 N.C. 793, 798, 32 S.E.2d 588, 591 (1945); Opinion of the Attorney General, CCH INH., EST. & GIFT TAX REP. (7th ed.) ¶ 18262 (N.C. September 10, 1954). *But cf. A Survey of Statutory Changes in North Carolina in 1953*, 31 N.C.L. REV. 375, 376 (1953). See 3 AMERICAN LAW OF PROPERTY § 14-15 (Casner ed. 1952). The rule of the Hardenberg Case is criticized in ALI FED. INCOME, ESTATE AND GIFT TAX STAT., Tentative Draft No. 10, 113-15 (1955); ATKINSON, WILLS § 139 (1953).

[13] Transfers pursuant to a compromise of a will contest are not treated as taxable gifts if bona fide and made at arm's length. Maud Hadden Farrell, P-H 1954 T.C. Mem. Dec. ¶ 54085; *Cf.* Housman v. Commissioner, 105 F.2d 973 (2d Cir. 1939), *cert. denied*, 309 U.S. 656 (1940).

[14] Partial renunciation is generally permitted unless an intent is indicated on the part of the testator for the beneficiaries to take all or nothing. Foulkes v. Foulkes, 173 Ark. 188, 293 S.W. 1 (1927); State Banking Co. v. Hinton, 178 Ga. 68, 172 S.E. 42 (1933); ATKINSON, WILLS § 139 (1953).

[15] State *ex rel.* Hilton v. Probate Court, 143 Minn. 77, 172 N.W. 902 (1919); 80 U. PA. L. REV. 920 (1932).

[16] The application of the majority view will not always mean more revenue for the state. If parties of more distant relation than the devisees or legatees take part of the property by compromise, the state might gain more by taxing those who actually take the property since the more distant the relation the higher the rate of tax. English v. Crenshaw, 120 Tenn. 531, 110 S.W. 210 (1908). Usually, however, the tax-by-the-will rule results in more tax since there will be fewer persons taking the property subject to the tax and therefore fewer personal exemptions to reduce the total amount of the property subject to the tax. State *ex rel* Hilton v. Probate Court, *supra* note 15; Annot., 36 A.L.R.2d 917, 920 (1954). If the devisee or legatee is a charitable institution which is tax exempt and it compromises with some of the heirs of the testator, the state will not be able to

while the party who threatened caveat received an equal share of the property and was not required to pay any of the tax.[17] However, the case seems clearly correct. The history of the North Carolina inheritance tax statute indicates an intent on the part of the legislature to have the property taxed by the terms of the will.[18] Cases involving will compromise agreements also point toward the result reached by the court. The North Carolina court in previous cases has refused to "make a will"[19] for a decedent unless the doctrine of family settlement[20] applies.[21] If the will is found to be valid the property is transferred according to the provisions of the will. If the will is successfully attacked, the property passes by the intestacy laws. Any property received by individuals who are neither devisees or legatees, if the will is admitted to probate, nor heirs or next of kin, if the property is distributed

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levy any tax on the transfer if the majority view is followed. Taylor v. State, 40 Ga. App. 295, 149 S.E. 321 (1929); People v. Kaiser, 306 Ill. 313, 137 N.E. 826 (1922); *In re* Stephani's Estate, 164 Misc. 240, 300 N.Y.S. 813 (Surr. Ct. 1937). Since a charity is a favored entity in the tax law, the courts might overlook the tax-by-the-will rule as a matter of policy and allow an exemption only for property actually received by the charity. See Toeller's Estate v. Commissioner, 6 T.C. 832, *aff'd on other grounds,* 165 F.2d 665 (7th Cir. 1946); U.S. Treas. Reg. 105, § 81.44 (1939).

[17] The result is hardly unfortunate to the individual who is taking by the compromise agreement. While he is deemed a party taking by contract for inheritance tax purposes, he is considered an heir for income tax purposes since his claim is based on inheritance rights and he is not liable for any income tax on the property received. Lyeth v. Hoey, 305 U.S. 196 (1934). *But cf.* White v. Thomas, 116 F.2d 147 (5th Cir. 1940), *cert. denied,* 313 U.S. 581 (1941).

[18] N.C. CODE ANN. § 7880(1) (Michie, 1939) provided in part that an inheritance tax should be levied, "When the transfer is by will or by the intestate laws of this State . . . or when the transfer is by settlement, contract, or agreement, or by any court order or otherwise, to any person or persons, by reason of claim or claims arising by virtue of the intestate laws, in controversies or contests as to the probate or construction of any will or wills . . . ." This clearly indicated an intent on the part of the legislature that a compromise should be followed in computing the taxes. However, this provision was deleted from the Revenue Act in 1941. N.C. SESS. LAWS 1941, c. 50, § 2. The provision was amended to provide that a tax should be levied, "When the transfer is by will or by intestate laws of this state from any person dying, seized or possessed of the property while a resident of this State." This seems to indicate an intention on the part of the legislature to adopt a provision exactly opposite to the deleted provision which would place N.C. in accord with the tax-by-the-will rule. Note, 21 N.C.L. REV. 99, 102 (1942); *A Survey of Statutory Changes in North Carolina in 1941,* 19 N.C.L. REV. 435, 526 (1941); 29 REPT'S ATT'Y GEN. 220 (N.C. 1947). The present statute has retained the same language. N.C. GEN. STAT. § 105-2 (1950).

[19] Bailey v. McLain, 215 N.C. 150, 1 S.E.2d 372 (1939); *In re* Westfeldt, 188 N.C. 702, 125 S.E. 531 (1924).

[20] Rice v. Wachovia Bank & Trust Co., 232 N.C. 222, 59 S.E.2d 803 (1950); Hunter v. Trust Co., 232 N.C. 69, 59 S.E.2d 313 (1950); Reynolds v. Reynolds, 208 N.C. 578, 182 S.E. 341 (1935).

[21] The equity power of the court is extended to situations where, in the interest of family harmony, the provisions of the will should not be carried out. All parties having any interest in the estate of the decedent may enter into a binding agreement under court supervision providing for a distribution of the property in practical disregard of the will. See note 20 *supra. Quaere*: Whether the inheritance tax in this situation should be levied according to the terms of the will or according to the terms of the family settlement agreement.

by the laws of intestacy, is taken by contract and not by inheritance rights.[22]

While the arguments in favor of the minority view are persuasive, the reasoning does not stand up under close analysis.[23] Though the fundamental principle of an inheritance tax is to exact a tax on the transfer from the estate of the decedent to those who actually take the property due to the death of the decedent, the tax is levied[24] on those taking by the will or by inheritance. To hold otherwise is to rewrite the language of the inheritance tax statute. Also, it is true that a legatee or devisee may renounce a part of the will, and this being done, that part of the legacy or devise is not taxable to him. But in a renunciation the laws of wills or of intestacy take the property to the taxable party, not the agreement among the parties. A compromise presupposes a prior confirmation of the will rather than a partial renunciation since the legatee or devisee is exercising his dominion over the property by entering into the compromise.[25] The argument that the tax-by-the-compromise rule will encourage settlement of litigation does not seem to be of much merit[26] because the parties to the agreement can reach the same result among themselves that is reached in jurisdictions following the minority view by merely stipulating who will pay what portion of the tax or by dividing the property in such a way that each will have an equal share after the tax is paid.[27]

Attorneys for the beneficiaries in a will compromise agreement would be well advised to include a provision in the settlement that each party to the agreement will bear a pro rata share of the inheritance tax in order to protect their clients from a result such as was reached in the principal case.

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[22] Bailey v. McClain, 215 N.C. 150, 1 S.E.2d 372 (1939), cites with approval Cochran's Ex'r v. Commonwealth, 241 Ky. 656, 659, 44 S.W.2d 603, 604 (1931), which states, "Although his right to maintain the contest of the will is derived from his relationship to the testator, his title to the money came from the contract with the legatees."

[23] Warren, *The Progress of the Law*, 33 HARV. L. REV. 556, 574 (1920); 29 COLUM. L. REV. 1164 (1929); 16 MINN. L. REV. 722 (1932); 80 U. PA. L. REV. 920 (1932).

[24] N.C. GEN. STAT. § 105-2 (1950) provides in part: "A tax shall be and is hereby imposed upon the transfer of any property, real or personal . . . .

"First. When the transfer is by will or by the intestate laws of this State from any person dying, seized or possessed of the property while a resident of the State."

[25] See note 23 *supra*.

[26] Some courts have indicated that the tax-by-the-compromise rule might lead to sham agreements by an individual subject to a high rate of tax with an individual subject to a lower rate in order to avoid the tax. People v. Union Trust Co., 255 Ill. 168, 99 N.E. 377 (1912); *In re* Pepper's Estate, 159 Pa. 508, 28 Atl. 353 (1894).

[27] Brown v. McLoughlin, 287 Mass. 15, 190 N.E. 795 (1934).