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# WILLS-FAILURE OF RESIDUARY CLAUSE TO PASS UNDEVISED PROPERTY

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WILLS—FAILURE OF RESIDUARY CLAUSE TO PASS UNDEVISED PROPERTY —Decedent, in his will, declared that he had, by trust agreement of even date, "disposed of all my intangible personal property, both during the remainder of my lifetime and after my death. Said Trust Agreement does not include within its terms my real estate, my tangible personal property, or any money. . . . This will is, therefore, specifically designed to provide for the distribution of said real estate, tangible personal property, and money." After certain specific gifts decedent directed that, "all the rest and residue of my estate, of every description, real, personal and mixed, and wherever situated," be divided among named charities. Before the date of execution of those instruments decedent had been advised that he might have a claim to the corpus of a certain trust fund. He took no steps to have the matter determined, but after his death it was judicially decided that he had inherited the securities in the trust fund. Decedent's next of kin contended that decedent was intentionally intestate as to that fund. *Held,* contention rejected. *Sheridan v. Perkins,* (Va. 1947) 42 S.E. (2d) 853.

The contention of the next of kin raises the question: under what circumstances will a clause, residuary in form, fail to carry all undevised property? [1]

[1] 3 PAGE, WILLS, 3d ed., 88 (1941).

Undoubtedly a testator may provide expressly for the exclusion of property from the residuary clause.[2] In the principal case, however, the court construed the recital in the will as simply declaratory of testator's motives and not as a limitation on its scope. As an erroneous recital of fact, such a declaration would not, per se, affect the operation of the residuary clause.[3] It is frequently said that "where the words used to show an intention on the part of the testator to exclude from the operation of the residuary clause certain portions of the estate," [4] such intention must not be defeated. It is also said that such exceptions need not be express, but may be gathered from the will as a whole.[5] However, an examination of the cases indicates that the exception to the rule operates only in restricted situations. The residuary clause may itself be so limited as to fail to make the donee thereunder a general residuary legatee.[6] A special instance of the limited residuary clause is the "particular residuary clause," where the clause refers only to some particular fund.[7] But the language of the clause in the principal case is seemingly all inclusive, and less tied to the particular fund than in the cases turning on that doctrine.[8] In some circumstances certain specific property will not be included in the residue to pass under a residuary clause, general in language, because to include it would be inconsistent with other provisions in the will relating to that item, or to the residuary legatee, or to the operation of the clause itself. Typical of such cases is *Holton v. Jones*,[9] in which testator devised property equally to the children of *A* for their lives, without the power of alienation, remainder to *A*'s grandchildren. The general residue was to be sold with the proceeds going to *A*'s children. There were no grandchildren of *A*. It was held that testator was intestate as to the reversionary interest retained by operation of law because it would be inconsistent to give the proceeds of the sale of that interest to the life tenants who did not have the power of alienation.[10] In some cases rever-

[2] Kempson v. Kempson, 89 N.J. Eq. 205, 104 A. 86 (1918). Van Buskirk v. Standard Oil Co., 94 N.J. Eq. 686, 121 A. 450 (1923).

[3] 3 PAGE, WILLS, 3d ed., 89 (1941). In re Bagot, [1893] 3 Ch. Div. 348; Smith v. Dugan, 145 App. Div. 877, 130 N.Y.S. 649 (1911), affd., 205 N.Y. 556, 98 N.E. 1116 (1912). In re Hunt's Will, 207 App. Div. 127, 202 N.Y.S. 224 (1923), affd., 237 N.Y. 613, 143 N.E. 764 (1924).

[4] Tindall's Exrs. v. Tindall, 24 N.J. Eq. 512 at 513 (1873).

[5] 3 PAGE, WILLS, 3d ed., 89 (1941).

[6] See Atty. General v. Johnstone, Amb. 577, 27 Eng. Rep. 373 (1769), in which the language of the residuary clause indicated that the testator expected that only a pittance would be left for the legatee. See also Wolf v. Schaeffner, 51 Wis. 53, 8 N.W. 8 (1881).

[7] Succession of McBurney, 162 La. 758, 111 S. 86 (1926). Oglesbee v. Miller, 111 Ohio St. 426, 145 N.E. 846 (1924). Grise v. Weiss, 213 Ind. 3, 11 N.E. (2d) 146 (1937).

[8] See Blankenbaker v. Early, 132 Va. 408, 112 S.E. 599 (1922), where the relatively less general residuary clause was pointed out as a distinguishing feature.

[9] 133 N.C. 399, 45 S.E. 765 (1903).

[10] See also Johnson v. Stanton, 30 Conn. 297 (1861), reversion did not go to residuary legatee who was also remainderman on condition of surviving the life tenant, and was donee of power of appointment in the alternative. Wetherill v. Lefferts, 254 Pa. 484, 98 A. 1074 (1916), residue to be distributed at once, reversionary interest

sionary interests in property in which particular estates were devised have been held to be excepted from the residue, *ipso facto*.[11] At least that may be done where testator has evidently tried to make final disposition of his entire estate.[12] Courts have gone further in limiting relatively broad residuary clauses under the doctrine of *ejusdem generis*, than under any other theory. In fact in *McChesney v. Bruce*,[13] where testator failed to make any mention of real estate, but made several bequests of personalty and concluded with, "It is my desire that the proceeds of the servants' hire, together with all the residue of my estate," be disposed of as specified, the court held that the generality of the residuary clause was restricted by the antecedent bequests so as to confine it to the residue of personalty. *Bullard v. Goffe*[14] is in accord, but these cases show the influence of a strong preference against deflecting land from the heirs at law. In most cases which rely on *ejusdem generis*, the language used in the clauses in question could be classed as that of particular residuary clauses.[15] Militating in favor of including all undevised property in the residuary gift is the presumption that such a clause is intended to embrace and carry all forgotten, unknown, or otherwise unmentioned property, and all lapsed and invalid gifts.[16]

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which was postponed beyond two valid life estates held not included therein. Copenhaver v. Pendleton, 155 Va. 463, 155 S.E. 802 (1930).

[11] Brinkerhoff v. Butler, 296 Ill. 368, 129 N.E. 742 (1921). Lane v. Patterson, 138 Ga. 710, 76 S.E. 47 (1912). Cf. Matthews v. Andrews, 290 Ill. 103, 124 N.E. 871 (1919).

[12] Walton v. Walton, 73 N.J. Eq. 57, 67 A. 397 (1907).

[13] 1 Md. 344 (1851).

[14] 20 Pick. (37 Mass.) 252 (1838).

[15] Cole v. Ensor, 3 Md. 446 (1853). Minor's Executrix v. Dabney, 3 Rand (24 Va.) 191 (1825).

[16] Floyd v. Carrow, 88 N.Y. 560 at 568 (1882). See also Smith v. Dugan, 145 App. Div. 877, 130 N.Y.S. 649 (1911); In re Ingham's Estate, 315 Pa. 293; 172 A. 662 (1934).