

## Disposition of Void and Otherwise Failing Devises in Maryland

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# Comments and Casenotes

## DISPOSITION OF VOID AND OTHERWISE FAILING DEVISES IN MARYLAND

The Maryland, minority rule to the effect that a lapsed or void devise will pass to the heir and not to the residuary devisee,<sup>1</sup> raises some speculation as to whether or not the rule carries over to devises which fail for other reasons. A determination of this question necessitates a discussion of the rule itself, and also a differentiation between absolute devises and devises in trust.

The case which originally stated the doctrine in question was *Lingan v. Carroll*.<sup>2</sup> In that case the testator had devised certain land in trust for educational purposes. The defendant, testator's heir-at-law, entered upon the land on the supposition that, the devise in trust being void, the land passed to him rather than to the residuary devisee. The residuary devisee brought a bill against the executor of the heir, he having died, to compel an account of the profits of the real estate into which the heir had entered. On demurrer the bill was dismissed, and the Court of Appeals, without opinion, affirmed the lower court.

The residuary devise in this case was in the following terms: "rest and residue of my real estate, not herein before disposed of." Despite this broad language the Court held that, since the testator had *de facto* devised the land, it would not pass, though in fact there was no effectual disposition. The Court said:

"... he intended to dispose fully of the land in question . . . ; and the law being settled, that in case of a lapsed devise, the land shall pass to the heir and not to the residuary devisee, and there being no solid dis-

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<sup>1</sup> See Miller, *Construction of Wills*, Secs. 58, 93, 159; notes 44 L. R. A. (N. S.) 793; 10 A. L. R. 1526; 103 A. L. R. 476; *Lingan v. Carroll*, 3 H. & McH. 333 (1793). But this rule does not apply to personality. See *Cox v. Harris*, 17 Md. 23 (1861); *Deford v. Deford*, 36 Md. 163 (1872); *Orrick v. Boehm*, 49 Md. 72 (1878); *Rizer v. Perry*, 58 Md. 112 (1881); *Dulaney v. Middleton*, 72 Md. 67, 19 Atl. 146 (1899); *Prettyman v. Baker*, 91 Md. 539, 46 Atl. 1020 (1900). While the Maryland lapse statute, Md. Code, Art. 93, Sec. 335, and Md. Code Supp., Art. 93, Sec. 335A, now prevents the possibility of lapse, the problem herein discussed includes this possibility both because the cases are based upon lapse cases and because the discussion may be of interest in states either having no lapse statute or a statute not so broad as the Maryland one.

<sup>2</sup> 3 H. & McH. 333 (1793).

inction between the case of a lapsed devise and the case of a devise void by the rules of law, it being manifest in both cases that the testator did not intend the land de facto devised to go to the residuary devisees," (the heir will take).<sup>3</sup>

The problem did not again arise until nearly seventy years later, at which time the Court of Appeals, in the case of *Tongue's Lessee v. Nutwell*,<sup>4</sup> recognized that the Maryland rule was against the preponderance of authority elsewhere, but held that, since it had been followed and acquiesced in by the legal profession as sound Maryland law for such a long period of time, and since there was no distinction between a lapsed devise and one void by the rules of law, therefore the rule would be upheld. The rule has thus become firmly embodied in the common law of Maryland and has withstood many attempts to dislodge it.

Most outstanding among these attempts is that made in the case of *Rizer v. Perry*.<sup>5</sup> There it was contended that the rule had been superseded by the statute<sup>6</sup> which provided that wills speak as of the time of the death of the testator rather than as of the date of execution. The Court, however, concluded that, since a desire that the residuary devisee was to take the void devise did not appear in the will, and since a different intention was naturally inferable from the attempt to dispose of it otherwise, the Court could not, by force of the statute alone, hold that the void devise passed to the residuary devisee.

The rationale of these cases is that since the testator intended to dispose of the land in question, he has shown an intention not to give the property to the residuary devisee, and, while he has also shown an intention by the attempted devise not to give the property to the heir-at-law, yet, the devise being void or having lapsed, should go, as between the heir-at-law and the residuary devisee, to the former because "the heir is not to be excluded in favor of . . . the residuary devisee by mere implication or intendment. Nothing less than clear, substantive and undeniable intent on the part of the testator will exclude him . . ." This being so, can it not be said that any reversion which is

<sup>3</sup> *Ibid.*, 334.

<sup>4</sup> 13 Md. 415 (1859).

<sup>5</sup> 58 Md. 112 (1882). And see also *Cox v. Harris*, 17 Md. 23, 31 (1861); *Barnum v. Barnum*, 26 Md. 119, 174 (1866); *Rea v. Twilley*, 35 Md. 409 (1872); *Orrick v. Boehm*, 49 Md. 72, 105 (1878); *Chilcoat v. Reid*, 154 Md. 378, 140 Atl. 100 (1927).

<sup>6</sup> Md. Code, Art. 93, Sec. 309, Acts 1849, Ch. 229.

<sup>7</sup> 58 Md. 112, 119.

left in the testator as a result of a failure to attempt disposition will pass by the residuary clause, provided of course that that clause is broad enough to include property of the type involved in any one particular case?

That this is so has been recognized by the Maryland Court of Appeals in the case of *Fulton v. Harman*,<sup>8</sup> where, the testator having devised land to his wife for life, and having devised all the rest of his property by a general residuary clause to his son, the Court held that the fee passed under the residuary clause. While the language used was broader than called for by the circumstances of the case, the principle stated has been upheld by other decisions of the court.<sup>9</sup>

The conclusion thus far is that while devises which are void or which lapse go to the heir-at-law, yet any undisposed of interest will pass by a residuary devise, if that be in terms broad enough. This, however, raises an inquiry as to when there is an undisposed of reversion in the testator. It is elementary that where a devise is absolute in terms, any interest not devised is a reversionary interest in the testator; but what of a devise to trustees in fee? In such a case do the trustees take the complete fee even though it may not be necessary to carry out the trust?

One of the leading Maryland text-writers on the subject<sup>10</sup> has stated the rule as follows:

“Whether an estate given to trustees in any particular case is a fee simple estate, or any other estate, does not depend upon whether the testator has used words of limitation or expressions adequate to carry an estate of inheritance, but whether the exigencies of the trust as they appear on the face of the will, without reference to events subsequent to the testator's death, demand the fee simple, or can be satisfied by any and what less estate, the trustees take exactly the quantity of interest which the purposes of the trust require.”<sup>11</sup>

<sup>8</sup> 44 Md. 251 (1875). See particularly page 262, where the Court said:

“The devise or bequest of all of the testator's property, real, personal, and mixed, included *all reversionary interests however remote*, which were undisposed of by the previous provisions of the will.” (Italics ours.)

<sup>9</sup> *Barnum v. Barnum*, 42 Md. 312 (1874); *Reid v. Walbach, et al.*, 75 Md. 205, 23 Atl. 472 (1892); and as to personalty *Holmes v. Mackenzie*, 118 Md. 210, 84 Atl. 340 (1912).

<sup>10</sup> *Miller Construction of Wills*, Sec. 203.

<sup>11</sup> *Restatement of Trusts*, Sec. 88 (semble). But the rule as to personalty is the reverse, see *Restatement of Trusts*, Sec. 88 and *Price v. Price*, 162 Md. 656, 161 Atl. 2 (1932).

Do the Maryland cases bear out this rule? The case most clearly stating the rule is *Brown v. Reeder*.<sup>12</sup> There the settlor deeded property to trustees for herself for life and after her death for the use and benefit of her son and his heirs forever. It was contended that a perpetuity was thereby created, but the Court held that on the death of the survivor of the settlor and her son, the whole equitable estate would vest in the heirs of the son, and they would then be entitled to a conveyance of the legal title. The principle upon which the decision was based was that the extent of the legal interest of a trustee in an estate given to him in trust is measured, not by words of inheritance or equivalent terms but by the object and extent of the trust upon which the estate is given.<sup>13</sup> Most of the cases to be found deal with the interest of the beneficiary in remainder and do not concern themselves with the question here presented.

There is authority, however, in the case of *Warner, et al., v. Sprigg, et al.*,<sup>14</sup> for the proposition that where testator does not make complete disposition by his devise in trust, the remainder will be in the testator (and under the rule of *Fulton v. Harman*, will go to the residuary devisee). In that case the testator had devised certain property in trust for one W. (The Court held legal title to be in W, the trust being passive.) W conveyed to a trustee to hold on certain trusts, which did not exhaust the whole of the property. In this situation the Court held that all the interests which the grantor (W) did not convey necessarily remained in him, and consequently the reversion was vested in him. Thus, if testator devises to trustees in fee, but the purposes of the trust do not dispose of the entire fee, there will remain in the testator a reversionary interest which will pass by the residuary clause.

Is the rule true as to void or lapsed devises? Certainly if a devise to trustees is void, then unless the trustee holds by way of resulting trust, the exigencies of the trust as apparent "on the face of the will" (the face of the will showing the devise to be void) will not require the full fee, and there will be a reversion in the testator which will pass to the residuary devisee. The devise in *Lingan v. Carroll* was to trustees and was held void, and yet the heir and not the

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<sup>12</sup> 108 Md. 653, 71 A. 417 (1908).

<sup>13</sup> See generally on the problem *Long v. Long*, 62 Md. 65 (1883); *Numsen v. Lyon*, 87 Md. 31, 39 Atl. 533 (1897); *Brillhart v. Mish*, 99 Md. 447, 58 Atl. 23 (1904); *Lyon v. Safe Deposit*, 120 Md. 514, 87 Atl. 1039 (1913); *Schmidt v. Hinkly*, 115 Md. 330, 80 Atl. 971 (1911).

<sup>14</sup> *Warner, et al., v. Sprigg, et al.*, 62 Md. 14 (1883).

residuary devisee was held to take. The devise to trustees there was of the full interest, however, and thus may be regarded as coming within the rule concerning absolute devises. If this distinction is a valid one, and in the view of the present writer it is, then the question of what rule the court will follow in case of a devise to trustees complete on its face, which fails in part because void or lapsed, still remains open. The better rule would seem to be that the trustee will hold by way of resulting trust for the heirs-at-law whenever the devise to trustees fails in part because void or lapsed,<sup>15</sup> and that when the devise to trustees is in itself incomplete, in that it fails to dispose of the entire interest, there will be a reversion in the testator which will pass by the residuary devise.

The conclusion, therefore, is that whether the devise be absolute or in trust, if a part of the fee simple interest remains undisposed of the residuary devise takes, but if the full fee is disposed of, though partially in an ineffectual manner, the heir-at-law will take either by way of resulting trust or under the rule of intention stated in *Lingan v. Carroll*.

<sup>15</sup> The effect of which is merely to carry over the intention rule of *Lingan v. Carroll* to the trust situation.