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CONSTRUCTIONAL AND OTHER FACTORS
RELATING TO CLASS GIFTS

Elliot G. Robbins *

If a text should be deemed necessary on which to build what follows hereafter, it might be found in the words of Judge Allen. He once wrote that a "lawyer's mode and manner of expression and exactitude of meaning are not necessarily synonymous." ¹ In fact, when the lawyer attempts to describe a group of beneficiaries, as by some form of collective designation, it is almost inevitable that trouble should loom just beyond the horizon unless the draftsman is thoroughly cognizant of the problems which lie inherent in the creation of a gift to a class. That trouble may be forestalled by an adequate delineation, within the instrument, of all the issues involved in a given form of property disposition. Inadequate thought, on the other hand, will ultimately force some court to rationalize a conclusion as to what was meant, which conclusion will be achieved only at the expense of interested parties and to the possible discredit of the draftsman. Such being the case, an attempt to clarify all of the knotty problems which underlie class gifts would not be unwarranted. It is proposed to consider herein, however, only those which adhere to

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¹ Marvin v. Peirce, 84 N. H. 455 at 460, 152 A. 484 (1930).
one particular type of class gift, that is a gift to one or more named individuals and to a unit of other persons. In its simplest form, such a gift might read "... to A, B, and the children of C." What are the problems wrapped up in that short phrase, and what of their solution?

It might, at first blush, appear that such an investigation would be about as useful as a tertiary gleaning of a harvested field. When it is observed, however, that courts have been singularly unsuccessful in resolving the sundry issues native to what would appear to be a relatively simple limitation, any attempt to bring clarity and light out of chaos, even in such a tiny area of the law, should achieve stature and significance. To the query as to whether it is either necessary or desirable to formulate a conclusion on the point of precisely what it was a particular testator had in mind when he chose to make a gift by words of the type mentioned, it may be answered that there are approximately two hundred decisions in which such a limitation has been at issue and those decisions are anything but consistent. Certainly, the need for stability and predictability in the law of property would seem to make a resolution desirable.

The problems which could arise in connection with a gift by a limitation of this nature will likely be three-fold in character. They are apt to cluster around three points, to-wit: first, what terminology ought to be used to clarify fully the testator's intention; second, if the issues first arise in litigation, what is the

2 There are decisions on various phases of this limitation to be found in the reports of England, Canada, one federal district, and in thirty-three states. These cases are tabulated in an appendix hereto marked Appendix A.

3 It should be observed, at the outset, that this article will discuss the limitation here considered as if it arose by will. The same results should ensue if a similar gift were to appear in a trust indenture.

4 The desire to achieve stability, and thus predictability, in the law of property has sometimes caused courts to heed the complexities of feudal dogma to an extent that it has become inordinately difficult to master the field. Some suggest that the law of property is a mere showcase for the wares of the legal lexicographer, rather than an arena for the exercise of sound jurisprudence: 21 Iowa L. Rev. 160 at 161. Perhaps this is so. Nonetheless, concepts need to be communicated, particularly in a will where more than one generation is interested, and as yet no successful substitute for language has been developed. Even assuming that predictability is important in the ordinary course of property law, it is necessary to issue a caveat against complacency where federal tax law is also an issue: Helvering v. Hallock, 309 U. S. 106 at 118, 60 S. Ct. 444, 84 L. Ed. 604 at 611 (1940).
nature of the interests which have been created; and third, what distribution should a court decree based thereon? These questions will be taken up in that order.

I. Constructional Tendencies

The draftsman's responsibility is one of paramount importance, but the magnitude of that responsibility can hardly be appreciated until one observes the floundering gyrations experienced by courts forced to determine what a testator meant by a gift of the type herein considered. Because such dispositions describe beneficiaries by collective designation, at least in part, a court must need resolve two major issues in respect to the effect a given limitation will have on the devolution of a decedent's estate. In the first place, it must be determined whether or not the gift is a class gift at all. If it is of that character, the second issue will relate to the quantum of the share due each distributee. These considerations would present relatively little difficulty except for one small factor; as yet, courts have been loath to become fully definitive in respect to class gifts.

Probably the most recurrent definition of a class gift to be found in the cases is the one propounded by Jarman. He once said a class gift was "a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal, or in some other definite proportions, the share of each being dependent for its amount on the ultimate number of persons." If ever a purported definition deserves to be dishonored, this is it. Without presently bothering about citation, it is enough to say that there are innumerable cases, in not one but in every jurisdiction concerned, which hold that any one or more of Jarman's requisites may be deemed unnecessary to a class gift. On the other hand, Jarman ignored many of the constructional factors which the courts have, from time to time, found helpful, if not needful, to

6 See Cooley, "What Constitutes a Gift to a Class," 49 Harv. L. Rev. 903 at 925 (1936), for a penetrating critique of this definition.
a successful determination of whether a class gift has, or has not, been created.

No doubt it is impossible to point to any one factor as being decisive on the point of whether a class gift does or does not exist. The fact that a gift is not of "an aggregate sum" will not prevent such gift from being one to a class. The fact that the beneficiaries are a "body of persons," referred to collectively, does not necessarily make the gift one to a class. Conversely, the fact that the takers are named individually does not preclude the class gift idea. Since an ascertained group of persons may constitute a class, it has been held that the fact the group may, or may not, increase or decrease in numbers is not to be deemed controlling. It would, therefore, not be unwarranted to state that an attempt to define a class gift with precision and rigidity would be doomed to failure.

It is not improper, however, for a court to place considerable reliance on constructional factors in order to ascertain whether a class gift has been made. Actually, there would seem to be some tendency to place a decreasing reliance on mere terminology and an increasing concern with intention. That is, if ambiguity exists, and if it can be ascertained from the tenor of the will or, where proper, the surrounding circumstances, that the testator is "group-minded," his interest being to make a gift to the entirety of takers collectively rather than individually, such a gift will be treated as a class gift.

If, then, a bequest is made to one or more individuals by name in conjunction with a group of other persons who are de-

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9 An exhaustive discussion of this point appears in Casner, "Increase in the Class Membership," 51 Harv. L. Rev. 254 (1937).

scribed generally, the question to be faced is (1) are all of these takers members of a single class; (2) members of more than one class; or (3) merely several individuals? It should be obvious that a gift of this nature can hardly be said to fit the definition Jarman has established, so a true issue of construction will arise. Here is fertile ground for a weighing and balancing of conflicting elements in an attempt to resolve the question. Still a place of beginning is needed and, as a basic premise, it has been well established that the bequest to “A, B, and the children of C” is prima facie a gift to a class unless the testator has expressed himself to the contrary in his will. The courts generally assume this presumption as a place for beginning and accept or reject the premise after exploration of the pertinent considerations.

By way of illustration, the English case of Blackler v. Webb is one of the earliest cases to hold that a bequest to “A, B, and the children of C” is, prima facie, a class gift with distribution to be made to all per capita. In that case, one Samuel Bagwell left the residue of his estate to his son James, and to his son Peter’s children, to his daughter Traverse, to his daughter Webb’s children, and to his daughter Man. Peter had predeceased the execution of the will, but Webb survived Samuel. The court thought that since the children of Webb would not have enjoyed any gift if an analogy to the statute of descent controlled, no representative gift was intended, so the testator must have thought of all takers enjoying equally. The court also noted that the testator had made advancements to his children, so there was no indication that the decision would discriminate against the decedent’s nearest relatives by forcing them to share equally with more distant kin. These reasons may be slender reeds, indeed,

11 See cases listed in Appendix B.
13 A critical perusal of the opinion therein will not reveal any actual expression that the gift is one to a class. It is obvious, however, from the result achieved, that the court was thinking in these terms. Furthermore, the case has been construed in this light rather consistently since it first appeared in the reports.
14 The term “advancements” was used loosely for properly an advancement is a term peculiar to the law of intestate succession. The case was one affecting the construction of a testamentary document.
15 It is submitted that the use of aliunde evidence is an undesirable mode of construction. But see cases cited in note 76, post.
upon which to prop a conclusion, even though that conclusion be otherwise correct. It is to be observed, however, that when later English courts re-examined the problem they attained the same conclusion, although on much sounder grounds.¹⁶

Close attention to the doctrine of stare decisis is a subconscious judicial reaction. If it is necessary to preserve certainty and uniformity, as well as stability and symmetry in a system of jurisprudence, adherence to the doctrine of stare decisis is undoubtedly necessary. Along that line, it is a fact that, when a question of property law has been settled in England, the courts of this country habitually adhere to the decision there formulated. In view of the fact that rules of construction are an inevitable consequence of stare decisis, it follows that, in property law at least, a rational application of the doctrine of stare decisis ought to be usual and proper. To adhere blindly to an English decision when no better reason can be assigned than that it was so there decided, to do this without inquiring what influenced the English court to make such a decision, or to do so without ascertaining whether equivalent reasons exist in this country, however, would be the height of folly. It is disappointing, but not surprising, that there should be a number of cases in this country where the court has rested its entire determination on the decision in the Blackler case without further inquiry.¹⁷ The most unfortunate aspect of these cases is the misuse of the doctrine of stare decisis. Rather than making use of the authority of precedent as a canon of caution, it has been permitted to become the master of the situation to the point where slavish subservience to the old rule has numbed the vision and prostituted the intellect. In certain of the cases which insist that the Blackler doctrine is controlling,

¹⁶ See, for example, the masterly opinion of Romer, L. J., in the case of In re Moss, [1899] 2 Ch. 314.

for example, there has been a failure to observe that the case was not precisely in point. It would be better to ignore the persuasive effect of stare decisis entirely and to re-examine the question presented anew than it would be to misapply precedent. If, on the other hand, a prior decision rests on sound and persuasive grounds and concerns clearly analogous facts, it would not only be expedient, but also just and proper, to follow the earlier authority.

The use and abuse of precedent is not confined to those courts which have been content to cite the Blackler case. There are a number of cases which have entirely rejected the class gift concept and have held that where a will makes provision for an individual, or a group of others, and nothing appears from other clauses in the will or extraneous evidence requiring a different construction, the provision is to be construed as one for the benefit of individuals and not for a class. The basis of these holdings is to be found, usually, in the inability of the court to reconcile the bequest with Jarman's definition of a class gift. There are decisions, however, based on no other reason than an enunciated policy that, if possible, gifts to individuals are to be

18 In Pitney v. Brown, 44 Ill. 363 (1867), the conveyance was to "the children of my late Brother" and to a brother-in-law. The court felt bound by authority, but indicated that it would have preferred to find to the contrary. Actually, in the Blackler case, the gift had been to the children of a living daughter. The cases of Courtenay v. Courtenay, 138 Md. 205, 113 A. 717 (1921), and Brittain v. Carson, 46 Md. 186 (1876), also fail to draw an obvious distinction. In other cases the gift was to the "heirs of C", rather than to C's children. See Myres v. Myres, 23 How. Pr. 410 (N. Y. 1862); Harris v. Philpot, 40 N. C. (5 Ire. Eq.) 324 (1843); Stow v. Ward, 10 N. C. (3 Hawks) 694 (1825); Whitehurst v. Pritchard, 5 N. C. (1 Murph.) 383 (1810). It should be noted, however, that the last three cases construed the word "heirs" to mean children. In Lenden v. Blackmore, 10 Sim. 626, 59 Eng. Rep. 759 (1849), Shadwell, V. C., refused even to hear counsel and ruled on the case before him on the basis of the Blackler decision.

19 In re Ranschenplat's Estate, 212 Cal. 33, 297 P. 882 (1931); In re Fiske's Estate, 182 Cal. 238, 187 P. 958 (1920); Estate of Murphy, 157 Cal. 63, 106 P. 230 (1909); In re Morrison's Estate, 138 Cal. 401, 71 P. 453 (1903); Shannon v. Eno, 120 Conn. 77, 179 A. 479 (1935); Kean v. Roe, 103 Del. 179, 1 P. 754 (Del. 1895); Althouse, 278 Ill. 481, 116 N. E. 154 (1917); Blackstone v. Althouse, 278 Ill. 481, 116 N. E. 154 (1917); Kling v. Schnellbecker, 107 Iowa 636, 73 N. W. 673 (1899); Luke v. Marshall, 5 J. J. Marsh 353 (Ky. 1831); In re Paroni's Estate, 56 Nev. 492, 56 P. (2d) 754 (1936); In re Kleeman, 61 Misc. 560, 115 N. Y. S. 982 (1908); Bryant v. Scott, 21 N. C. (1 Dev. & B. Eq.) 155 (1835); Garnier v. Garnier, 265 Pa. 175, 108 A. 595 (1919); Priester's Estate, 22 Pa. Super. 386 (1905); In re Penney's Estate, 139 Pa. 344, 28 A. 255 (1893); Peoples Nat. Bk. of Greenville v. Harrison, 138 S. C. 457, 18 S. E. (2d) 1 (1941); Murchison v. Wallace, 156 Va. 723, 156 S. E. 106 (1931); Perdue v. Starkey's Heirs, 117 Va. 806, 86 S. E. 158 (1915); Whittle v. Whittle, 108 Va. 22, 60 S. E. 748 (1906); McMaster v. McMaster, 10 Gratt. 275 (Va. 1853); Estate of Pierce, 177 Wis. 104, 188 N. W. 75 (1922). See also In re Allen, sub. nom. Wilson v. Atter, 44 L. T. (N. S.) 240 (Eng., 1881); Tomlin v. Hatfield, 12 Sim. 167, 59 Eng. Rep. 1095 (1841).
favored over a construction which would lead to a finding of a class gift.\textsuperscript{20}

In respect to the first of these views, the cases would seem to indicate that if some one of the several factors Jarman thought necessary to establish the existence of a class gift was lacking, the gift could only be one to individuals. Thus, if the bequest is of a specific sum to each of the indicated takers, rather than merely a share in an aggregate sum, that is sure indicia of a gift to individuals rather than to a class.\textsuperscript{21} However, courts have found greater cheer to be derived from other factors. It has been felt to be extremely important to determine whether the group, in the broad sense, was actually a "body of persons." The query is then one as to whether or not all of the indicated beneficiaries possessed characteristics either common to themselves or to the decedent. If the contrary proves to be the case, there is authority that the gift made could not be to a class.\textsuperscript{22} Much has also been made of the fact that if the amalgam of the indicated takers forms a unit capable neither of increase or decrease there could not be a class.\textsuperscript{23} By the same token, the naming of an individual, or individuals, so as to exclude others from the group composed of "A, B, and the children of C," \textsuperscript{24} has been thought to indicate a gift to individuals.\textsuperscript{25} On the other hand, a failure to name the


\textsuperscript{21} Auger v. Tatham, 191 Ill. 296, 61 N. E. 77 (1901). The court took additional solace from the fact that the estate was more than ample to cover the specific sum given each taker. It would be interesting to learn what the result would have been if this had not been true.

\textsuperscript{22} Shannon v. Eno, 120 Conn. 77, 179 A. 479 (1935); Blackstone v. Althouse, 278 Ill. 481, 116 N. E. 154 (1917); Agricultural Nat’l Bk. of Pittsfield v. Miller, 316 Mass. 288, 55 N. E. (2d) 442 (1944); Garnier v. Garnier, 265 Pa. 175, 108 A. 595 (1919); Perdue v. Starkey’s Heirs, 117 Va. 806, 86 S. E. 158 (1915); Whittle v. Whittle, 108 Va. 22, 60 S. E. 748 (1908); Estate of Pierce, 177 Wis. 104, 188 N. W. 78 (1922).

\textsuperscript{23} Blackstone v. Althouse, 278 Ill. 481, 116 N. E. 154 (1917); Perry v. Leslie, 124 Me. 93, 126 A. 340 (1924); Priester’s Estate, 23 Pa. Super. 386 (1908); Estate of Pierce, 177 Wis. 104, 188 N. W. 78 (1922).

\textsuperscript{24} Suppose, for example, the testator has two children named B and D. B has three children, designated as W, X, and Y; D has two children, A and C. If the testator should make a gift to "A and the children of B" he is eliminating the grandchild C from the will.

\textsuperscript{25} Shannon v. Eno, 120 Conn. 77, 179 A. 479 (1935); Hardy v. Roach, 190 Mass. 223, 76 N. E. 720 (1906). The court concerned with the case of In re Rauschenplat’s Estate, 212 Cal. 33, 297 P. 882 (1931), felt that the existence of a “contest” clause
beneficiaries specifically does not preclude the concept of a gift to individuals.  

It is more usual for courts to examine the relevance of certain criteria, other than a mere application of prior precedents or of an established definition, in order to support or deny the premise that a gift to “A, B, and the children of C” is prima facie a gift to a class. The more important of these deserve some consideration. There are, in fact, many considerations which courts are prone to find of significance, perhaps even controlling, in determining the testator’s intention in respect to the limitation herein considered. 

Actually, many of the indicia cast in the balance are no more than apt illustrations of the preoccupation of certain of the judiciary with technicalities and legal technique. They tend to establish only that there is an ability to rationalize an already-arrived-at conclusion. Often the very factors which a court may deem important as having established the meaning or intention of the testator seem like no more than the product of the personal eccentricities or idiomatic expressions of the testator. It seems most unfortunate to rest heavily on the use made by a testator of a word or phrase, in the course of making a bequest or devise, where the word or phrase is not critical to the disposition. As an illustration, the term “equally divided” has been made the object of impressive research. It has been held that these words do not contemplate a division betwixt classes or the designated individuals, but rather “among” the whole group of named takers. In the face of that ambiguous pronouncement, it is not surprising to note that several cases confidently announce that the term in the will, one providing that if a beneficiary contested the will his share was to be divided equally among the others, was significant as being a prime indication that the testator was thinking in terms of the individuals involved, rather than of a group. But see contra, Rohrer v. Burris, 27 Ind. App. 344, 61 N. E. 202 (1901), and Hazard v. Stevens, 36 R. I. 90, 88 A. 980 (1913). In both of these cases it was thought the mere naming of A, in order to eliminate a potential taker from the group, did not detract from the testator’s “group mindedness” nor did it point to individuality in the bequest or devise. 

imports only a gift to a class.\textsuperscript{27} Other courts are just as certain that the phrase can only indicate a gift to individuals.\textsuperscript{28} Then there are cases which hold that “equally divided” is an appropriate term to indicate a division between each of several groups rather than a division among the members of only one group.\textsuperscript{29} Probably the decision contributing most to general unhappiness is that one which holds that the failure of the draftsman to include “equally between” was the determining factor in the case.\textsuperscript{30}

In several cases, “between” has been construed to mean “among,” so as to make the gift distributable “among” the class\textsuperscript{31} or “among” the individuals.\textsuperscript{32} On the other hand, other courts have held the word “between” has literal application only to a connection of two objects. Such being the case, the normal result would be to hold the gift divisible between an individual and a class, or between two or more classes.\textsuperscript{33} Again, courts have run the gamut in delineating the importance of this word. It has been held that a failure to use “between” will be fatal to a scheme of distribution;\textsuperscript{34} that it is a “key” word;\textsuperscript{35} that it has

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\textsuperscript{27} In re Harper, [1914] 1 Ch. 70; Jackson v. Baker, 207 Ala. 519, 93 So. 469 (1922); Martin v. Munroe & Chambless Nat. Bk. of Ocala, 125 Fla. 169, 169 So. 582 (1936); Carlin v. Helm, 331 Ill. 213, 162 N. E. 873 (1928); Brittain v. Carson, 46 Md. 156 (1876); Van Gallow v. Brandt, 165 Mich. 942, 194 N. W. 1018 (1912); Stokes v. Tilly, 9 N. J. Eq. (1 Stockt.) 130 (1852).

\textsuperscript{28} Shannon v. Eno, 190 Conn. 77, 179 A. 479 (1935); Kean v. Roe, 2 Harr. 103 (Del. 1806); Kling v. Schnellbecker, 107 Iowa 636, 78 N. W. 673 (1890); Purnell v. Gurberson, 75 Ky. (12 Bush) 369 (1876); Harris v. Austin, 125 Me. 127, 131 A. 206 (1925); Russell v. Welch, 237 Mass. 261, 129 N. E. 422 (1921); Bryant v. Scott, 21 N. C. (1 Dev. & B. Eq.) 155 (1835).

\textsuperscript{29} In re Walbran, [1906] 1 Ch. 64; Allen v. Durham, 173 Ga. 811, 161 S. E. 608 (1931); Dahmer v. Wensler, 350 Ill. 23, 182 N. E. 799 (1932); In re Ashburner's Estate, 159 Pa. 545, 28 A. 361 (1894).


\textsuperscript{31} In re Alcock, [1945] Ch. 264, 173 L. T. Rep. 4; Almand v. Whitaker, 113 Ga. 889, 39 S. E. 355 (1901); In re May's Estate, 197 Mo. App. 555, 196 S. W. 1039 (1917).

\textsuperscript{32} In re Morrison's Estate, 138 Cal. 401, 71 P. 453 (1903); In re Paroni's Estate, 56 Nev. 492, 56 P. (2d) 754 (1938).

\textsuperscript{33} In re Walbran, [1906] 1 Ch. 64; Henry v. Henry, 378 Ill. 581, 39 N. E. (2d) 18 (1942); Murphy v. Fox, 334 Ill. App. 7, 75 N. E. (2d) 337 (1948); Ward v. Stowe, 17 N. C. (2 Dev. Eq.) 609 (1834); Roelf's Cousins v. White, 75 Ore. 549, 147 P. 753 (1915); Osburn's Appeal, 104 Pa. 637 (1883).

\textsuperscript{34} In re Penney's Estate, 159 Pa. 346, 28 A. 255 (1893).

only slight persuasive value;\textsuperscript{36} and that, today, it carries no weight at all.\textsuperscript{37} There are numerous other words which, from time to time, have been held controlling,\textsuperscript{38} particularly where the preoccupation of a court has been with subjects and not subjectivity.

There is another device, again sounding more in technique and less in reasoning, which has had a certain amount of force and effect. It concerns the operation of the sundry variations on the theme \textit{expressio unius est exclusio alterius}. One phase of this topic presents the theory that if, elsewhere in his will, the decedent shows that he knows how to make a class gift but does not do so clearly in relation to the limitation at issue, it is reasonable to assume he thought of those taking under such limitation as individuals.\textsuperscript{39} Other variants have been spelled out in a number of ways. If, for example, elsewhere in the will, the beneficiaries, who also take under the limitation at issue, have been referred to as individuals, there is no reason to assume they were not intended to take as individuals in this instance too.\textsuperscript{40} If, elsewhere in the will, the same beneficiaries have been clearly indicated to take in an individual capacity, but not so as to the limitation at issue, a class gift must be assumed to have been intended in the particular limitation.\textsuperscript{41} If, on the other hand, elsewhere in the will, the same beneficiaries have always taken as a class, it is

\textsuperscript{36}In re Morrison's Estate, 138 Cal. 401, 71 P. 453 (1903).
\textsuperscript{38}For example, "each" has been held to separate a class into a group of individuals: Auger v. Tatham, 191 Ill. 296, 61 N. E. 77 (1901); In re Turner's Will, 208 N. Y. 231, 101 N. E. 905 (1913); Patterson v. McMasters, 56 N. C. (3 Jones Eq.) 208 (1857); Donohoe's Estate, 282 Pa. 254, 127 A. 625 (1925); In re Penney's Estate, 159 Pa. 346, 28 A. 255 (1893). See also Herman's Estate, 90 Pa. Super. 512 (1927).
\textsuperscript{39}The following indicated words have been held to be pertinent in decisions respecting the limitation here under consideration: "said" in Kean v. Roe, 2 Harr. (Del.) 103 (1835); "legatees" in Randolph v. Bond, 12 Ga. 362 (1852); "above named" in In re Myhill, 149 App. Div. 404, 134 N. Y. S. 467 (1912); "beloved" in Risk's Appeal, sub. nom. Stauffer's Estate, 52 Pa. 269 (1866); and "share and share alike" in the cases of In re Rauschenplat's Estate, 212 Cal. 33, 297 P. 882 (1931); in Harris v. Austin, 125 Me. 127, 131 A. 206 (1925); and In Dubois v. House, 294 S. W. 935 (Tex. Civ. App. 1927). The word "respective" was deemed important in Davis v. Bennet, 2 DeG., F. & J. 327, 45 Eng. Rep. 1209 (1862).
\textsuperscript{40}Auger v. Tatham, 191 Ill. 296, 61 N. E. 77 (1901); Bruce v. Warren, 22 Ohio App. 41, 153 N. E. 273 (1926).
\textsuperscript{41}See Herman's Estate, 90 Pa. Super. 512 (1927).
reasonable to construe the same intention in relation to this limitation. 42 If one of the named individuals has predeceased the testator who, despite knowledge of this fact, has not changed his will, it must be evident that the testator was thinking in terms of a group or class. 43 Again, if the testator has gone to the bother of naming the individuals, but has not specifically referred to those who meet the description of "the children of C," although he was personally acquainted with each of them, the testator must have been thinking of a gift to be divided between the individuals on the one hand and the group, as a unit, on the other. 44

As opposed to these ideas, there are several indicia normally found in wills which courts treat as properly providing a foundation for establishing a testator's intention with respect to any given point. It is only right that these same indicia should aid in the construction of a gift of the type herein considered. In respect to these elements, however, the problem is again not so much that the court should rely on such criteria as an aid to determination, but rather that such criteria are susceptible to various interpretations. Thus, the statement that a will should be construed so as to avoid either full or partial intestacy, where to do so would not contravene law or public policy, seems to be too well established to warrant citation of authority. With this precept in mind, at least three courts, upon finding a gift to "A, B, and the children of C" in the residuary clause of a will, have held that the testator must have been, at least prima facie, thinking in terms of a class gift. 45 The logic of this position is derived from the fact that, if the gift were not such and if any of the benefi-

44 Lyon v. Acker, 33 Conn. 222 (1866); Eyer v. Beck, 70 Mich. 179, 38 N. W. 20 (1888); Cross v. O'Cavanagh, 198 Miss. 137, 21 So. (2d) 473 (1942). But see contra, McKay v. Zilar, 73 Colo. 529, 216 P. 534 (1923). In Dubois v. House, 294 S. W. 935 (Tex. Civ. App. 1927), the court felt that since the testatrix did not know the "children of C" very well she must have been thinking of them as a group, rather than as individuals.
ciaries were to predecease the testator, that taker’s share would lapse into the decedent’s intestate estate.\textsuperscript{46}

In that connection, it is interesting to note, and to compare, the reasoning offered in support of another case where the testator made only specific gifts and his will lacked a residuary clause. In that instance, the court felt that since there was no residuary clause, the testator must have thought that he had made full disposition of his entire estate by the specific bequests and devises; ergo, the specific legacy to “A, B, and the children of C” was one to a class, otherwise there was a potentiality of lapse into intestacy.\textsuperscript{47} It has also been deemed not unfair to believe that, if the testator has failed to indicate any preference among his residuary beneficiaries, they ought to share equally as a class.\textsuperscript{48} The thought is offered, however, that this line of reasoning should merit no more attention than should be given to any other make-weight argument.

The element of survivorship provides another criteria which has sometimes been thought to be of importance. If, for example, all members of a group are required to survive a certain event in order to enjoy the gift, that factor has been treated as strong indicia that the gift is one to a class, and the same thought has been accepted as being true of the limitation here under consideration.\textsuperscript{49} Much the same consideration has been made applicable to a substitutionary gift, i.e. a provision in a will which directs that, in the event an indicated taker fails to outlive a certain event, the gift is to go over to another. While such language would really be no more than a survivorship provision, nevertheless some cases hold that a gift by way of substitution imports a class gift,\textsuperscript{50}

\textsuperscript{46} Page, Wills (3d Ed., 1940), Vol. 4, § 1430.
\textsuperscript{48} Martin v. Munroe & Chambliss Nat. Bk. of Ocala, 125 Fla. 65, 169 So. 582 (1936).
while others hold in a contrary vein. Added to these cases are those decisions which hold that a failure to provide for a substitutionary gift necessarily requires a finding of a class gift.

It is not unreasonable to hold, and it has in fact often been held, that where a gift is made to persons in a representative capacity such persons will take as a class. Thus, where a bequest is made to the "heirs of C," it is thought that C's heirs should enjoy the same share in the decedent's estate which would, ordinarily, have gone to their ancestor C had he lived and, in that regard, that each heir of C should stand equally with each other heir in the decedent's estate. By way of contrast, if a gift is made to the "children of C," there is no thought of a gift in a representative capacity unless C has been indicated to be deceased. Following through with this reasoning, if the limitation is to "A, B, and the heirs of C," the ordinary rule would be that a gift to two individuals and to a class has resulted. Surprisingly enough, however, if the will reads to "A, B, and the children of C," the usual holding will be to the same effect, that is a gift

51 Shannon v. Eno, 120 Conn. 77, 179 A. 479 (1935); Kling v. Schnellbecker, 107 Iowa 636, 78 N. E. 673 (1899); Van Houten v. Hall, 71 N. J. Eq. 626, 64 A. 460 (1906).

52 Carlin v. Helm, 331 Ill. 213, 162 N. E. 873 (1928); Collins v. Feather's Ex'r, 52 W. Va. 107, 43 S. E. 323 (1903).

53 The following cases will serve to illustrate the point, although other cases from the same jurisdictions could be added by way of supplement: Billingslea v. Abercrombie, 3 Ala. (2 Stew. & P.) 24 (1832); Almand v. Whitaker, 113 Ga. 859, 39 S. E. 395 (1901); Henry v. Henry, 375 Ill. 581, 39 N. E. (2d) 18 (1942); Prather v. Watson's Ex'r, 187 Ky. 709, 220 S. W. 532 (1920); Plummer v. Shepherd, 94 Md. 466, 51 A. 173 (1902); Perkins v. Stearns, 163 Mass. 247, 39 N. E. 1016 (1895); Cross v. O'Cavanagh, 185 Miss. 137, 21 So. (2d) 473 (1945); Ex'r's v. Wintemute v. Ex'r's of Snyder, 3 N. J. Eq. (2 H. W. Green) 489 (1836); In re Jewett's Estate, 5 Misc. 557, 25 N. Y. S. 1109 (1893); Bivens v. Phifer, 47 N. C. 436 (1855); In re Ashburner's Estate, 159 Pa. 545, 28 A. 361 (1894); In re Swinburne, 16 R. I. 206, 14 A. 850 (1888); Farley v. Farley, 121 Tenn. 324, 115 S. W. 921 (1908). See also Silsby v. Sawyer, 64 N. H. 580, 15 A. 601 (1886), and Paul v. Ball, 31 Tex. 10 (1868), where the word "family" was construed to have the same effect. Contra: Myres v. Myres, 23 How. Pr. 410 (N. Y. 1862); Johnston v. Knight, 117 N. C. 122, 23 S. E. 92 (1895); In re Cossentine, [1933] Ch. 119, 148 L. T. Rep. 261.

The word "heirs" was construed to mean "children" in McCartney v. Osburn, 118 Ill. 403, 9 N. E. 210 (1886); Harris v. Philpot, 40 N. C. (5 Ire. Eq.) 324 (1848); Whitehurst v. Pritchard, 5 N. C. (1 Murph.) 383 (1810); Priest's Estate, 23 Pa. Super. 386 (1903); and Oulton v. Kidder, 125 A. 674 (R. I. 1925). The question was not examined, or was passed over, in Billings v. Deputy, 85 Ind. App. 248, 146 N. E. 219 (1925); Harris v. Austin, 125 Me. 127, 131 A. 206 (1925); Ward v. Stow, 17 N. C. (2 Dev. Eq.) 509 (1834); and Stowe v. Ward, 10 N. C. (3 Hawks) 604 (1825), by reason of other factors deemed controlling. See also the opposite results obtained in Osburn's Appeal, 104 Pa. 637 (1883), and in McCartney v. Osburn, 118 Ill. 403, 9 N. E. 210 (1886), wherein the same provision was construed by the courts of two different states.
has been made to two individuals and to a class, but there are some cases which hold that no more than a single class gift has been made.⁵⁴

It should be remembered that if the reference to the parent "C" is merely for the purpose of specifically identifying the group of takers,⁵⁵ or if the parent named is alive,⁵⁶ the bequest or devise could not then be made in a representative capacity and would probably result in a gift to individuals, except there be other indications to the contrary. If, for any reason, the bequest to the "children of C" is not to be deemed to be a representative one, the normal rule would regard it as a gift to individuals.⁵⁷

Notice may also be taken of the fact that, in cases concerning the limitation at hand, courts are inclined to place considerable reliance on the degree of relationship which the various takers bear to the decedent, or to each other, in the attempt to ascertain whether or not a class gift has been made. It has been held, therefore, that if a gift is made to beneficiaries who are referred to by the relationship they bear to the testator, and no reference is made to their parents, the testator must have been thinking of them as individuals rather than as a group.⁵⁸ Conversely, where


⁵⁷ Northey v. Strange, 1 P. Wm. 341, 24 Eng. Rep. 416 (1716); Kean v. Roe, 2 Harr. 103 (Del. 1835); In re Kleeman, 61 Misc. 560, 115 N. Y. S. 982 (1908). The gift was to "A, B, and the children and grandchildren of C" in these cases. In Bruce v. Warren, 22 Ohio App. 41, 153 N. E. 273 (1926), the testator had shown his ability elsewhere to make a representative gift but had not done so as to the limitation at issue.

⁵⁸ Kean v. Roe, 2 Harr. 103 (Del. 1835); Martin v. Munroe & Chambliss Nat. Bk. of Ocala, 125 Fla. 65, 169 So. 582 (1936); Murphy v. Fox, 334 Ill. App. 7, 78 N. E. (2d) 337 (1948). In each case, the gift was to "A, B, and my nieces and nephews." See also Van Gallow v. Brandt, 168 Mich. 642, 134 N. W. 1015 (1912), where the gift was to "my nephews A and B and the children of my sister C." The court thought that, since all takers were equally related, they shared as a class.
the decedent refers to a group by the relationship they bear to C, while naming the individual beneficiaries, it has been held that the testator meant the group to take by representation and not in an individual capacity.\textsuperscript{59} Stress has been placed, in support of a class gift, on the fact that A, B, and C were all of an equal degree of relationship to the decedent.\textsuperscript{60} When A and B were not equally related to C, as respects the decedent, it has been assumed that the decedent intended a distribution between individuals and the class;\textsuperscript{61} although there are cases to the contrary, holding the gift to be either a class gift\textsuperscript{62} or one to several individuals.\textsuperscript{63}

The wide variety of indicia, noted herein, to which the courts have looked should serve to convince anyone that there is authority available to sustain the validity of any contention that counsel might care to press insofar as the limitation here under consideration is concerned. For that matter, it should now be readily apparent that judicial attempts to resolve the problem as to the nature of a given limitation amount to no more than a trial-and-error process. The results are indeed haphazard, and this is


\textsuperscript{60} In re Alcock, [1945] Ch. 264, 173 L. T. Rep. 4; Haas v. Atkinson, 20 D. C. Rep. 537 (1892); McKay v. Zilar, 73 Colo. 529, 216 P. 534 (1923); Rohrer v. Burris, 27 Ind. App. 344, 61 N. E. 202 (1901); Justice v. Stringer, 160 Ky. 354, 169 S. W. 836 (1914); Van Gallow v. Brandt, 168 Mich. 642, 134 N. W. 1018 (1912); Clark v. Lynch, 46 Barb. 68 (N. Y. 1866); Ward v. Ottley, 166 Va. 639, 186 S. E. 25 (1936). To the same effect, although A was only related to the testator by marriage, is the case of Neil v. Stuart, 102 Kan. 242, 169 P. 1138 (1918). In Perry v. Leslie, 124 Me. 93, 126 A. 340 (1924), it was thought that this factor indicated a gift to two or more classes. In the case of In re Kleeman, 61 Misc. 500, 115 N. Y. S. 982 (1908), on the other hand, it was thought that this factor indicated a gift to individuals.


\textsuperscript{62} In re Cossentine, [1933] Ch. 119, 148 L. T. Rep. 261; Boston Safe Deposit & Trust Co. v. Doolan, 307 Mass. 233, 29 N. E. (2d) 844 (1940). Both of these cases are interesting in that the named beneficiaries, the A and B in the formula, were charities and were allowed to share per capitâ with the group.

\textsuperscript{63} Garnier v. Garnier, 265 Pa. 175, 108 A. 595 (1919); Perdue v. Starkey's Heirs, 117 Va. 806, 86 S. E. 158 (1916); Whittle v. Whittle, 108 Va. 22, 60 S. E. 748 (1908); McMaster v. McMaster, 10 Gratt. 275 (Va. 1833); Crow v. Crow, 1 Leigh 74 (Va. 1829).
true even among the decisions of a single jurisdiction. It is the 
natural, and to be expected, result of a method based on weighing 
and balancing considerations supposed to lead one to the testator’s 
intent, where the weighing and balancing has to do only with a 
determination of whether sufficient factors are present or not 
present which, when assembled, describe a fact after the manner 
of a rigid, but established, legal definition. It is the product of 
an inquiry as to whether or not all of the elements of Jarman’s 
definition of a class gift are present. If so, the gift is one to a 
class; if not, it is one for the benefit of individuals. There is a 
deceptive simplicity in that thought, but any reference to the 
cases will make it flagrantly apparent that there is nothing simple 
about its application nor anything like accuracy in its eventual 
product.

It is most refreshing, then, to find a plan which rejects this 
formalism in favor of a more reasoned appraisal; viz., the plan 
suggested in the English case of *In re Moss.* That opinion may 
be paraphrased into one short concept about as follows: (1) 
whether it is proper to call the provision a class gift or to call it 
a gift to several persons of whom the testator thought about col-
lectively is merely an idle bandying about of words; for (2) the 
pertinent issue is whether or not the testator wanted the entirety 
of the indicated property to go equally to the persons designated. 
The real determination to be made is not whether a gift to “A, B, 
and the children of C” will fit an established definition of a 
class gift; on the contrary, the real issue is, was the decedent “group-minded.” It is to the latter end that the weighing and 
balancing process ought to be applied. By “group-mindedness,” 
of course, is meant the thought that the decedent wanted all the 
persons indicated to enjoy if they were alive at the time the 
gift vested in interest but, if they were not then all alive, the 
entirety of the gift was to be divided equally among the survivors.

64 [1899] 2 Ch. 314.
Those cases which have adopted this course have, as a consequence, found this type of limitation effective to create a class gift.  

II. DISTRIBUTIVE SHARES

As it shall be established later, there is a need to determine whether a devise or bequest of the nature herein discussed is a gift to a class. That need transcends the rather natural desire of the beneficiaries to learn the quantum of their respective shares. Despite this, courts seem more concerned with distributive shares than with the nature of the gift. If, as has been pointed out, confusion runs rampant in the latter problem, it can only be said that chaos is the order of the day with regard to the former. The decisions run the gamut, beginning with one which states: "It is here to be observed, that the real question is, do they take individually, or as a class? not, whether they take per capita or per stirpes." They proceed through the entire scale to the many which either refuse or neglect to determine the nature of the bequest or devise and are content to rest the decision on the mere determination of the method of distribution, that is, per capita or per stirpes.

In attempting to ascertain a decedent's intention respecting distribution, courts resort to the usual methodology generally applicable to wills but with rather distressing results. As a place for beginning, courts have generally said that prima facie a per capita construction would be correct, barring expression to the contrary. The reasons available for a choice between a per capita or a per stirpes construction are, again, legalisms on the one

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66 Cole v. Creyon, 10 S. C. Eq. (1 Hills Ch.) 311 at 319 (1833).

67 It is interesting to note that out of 197 cases in which this limitation was at issue, 83 of them made no express decision on the nature of the gift, the court merely deciding to distribute per capita or per stirpes. See appendices C and D.

68 See Appendix B.

69 For an extensive and definitive analysis of the meaning and effect of per capita and per stirpital distribution, see annotation in 16 A. L. R. 15.
hand and valid considerations on the other. Much reliance has been placed on the conclusiveness of certain words and phrases. "Share and share alike," for example, has generally been construed to preclude anything but a per capita distribution, but there are decisions which hold the term to import no more than a prima facie basis for a per capita division. By the same token, "equally divided" has usually been thought to call for a division among the various persons composing a group on a per capita basis, yet there is good authority to the effect that this term is effectively used to indicate a basis for division of the whole between two or more groups so as thereafter to require a per stirpes division within the respective classes.

Other reasons have been advanced to help resolve this issue, reasons which tend to illustrate technique rather than critique. There are, of course, the various applications of the doctrine expressio unius est exclusio alterius. It has been held that if, elsewhere in the will, the testator has exhibited his ability to divide property per stirpes, he would have done so as to the particular clause had he wished to do so. There are also analogous instances following the same general approach. It has been said, for example, that if a testator, elsewhere in his will, has expressed


71 Dollander v. Dhaemers, 297 Ill. 274, 131 N. E. 705 (1921); In re Walker's Estate, 39 Misc. 680, 80 N. Y. S. 653 (1903).

72 Jackson v. Baker, 207 Ala. 519, 93 So. 489 (1922); Kean v. Roe, 2 Harr. 103 (Del. 1835); Martin v. Munroe & Chambliss Nat. Bk. of Ocala, 125 Fla. 65, 109 So. 582 (1930); Carlin v. Helm, 331 Ill. 213, 182 N. E. 873 (1928); Kline v. Schneller, 107 Iowa 636, 78 N. W. 673 (1899); Purnell v. Culbertson, 75 Ky. (12 Bush) 369 (1876); Harris v. Austin, 125 Me. 127, 31 A. 206 (1925); Brittain v. Carson, 46 Md. 186 (1876); Russel v. Welch, 237 Mass. 261, 129 N. E. 422 (1921); Bryant v. Scott, 21 N. C. (1 Dev. & B. Eq.) 155 (1844). In the case first mentioned, that of Jackson v. Baker, the mere use of "per capita" was deemed to be conclusive. The case of Harrell v. Davenport, 58 N. C. (5 Jones Eq.) 4 (1859), held that the phrase "to share equally with each" of the children of C could not possibly mean to share with "all" of them.


74 Conn v. Hardin, 215 Ky. 307, 284 S. W. 1077 (1926); Thornton v. Roberts, 30 N. J. Eq. (3 Stew.) 473 (1879); Stokes v. Tilly, 9 N. J. Eq. (1 Stockt.) 130 (1852); In re Kleeman, 61 Misc. 560, 115 N. Y. S. 982 (1908); Cheeves v. Bell, 54 N. C. (1 Jones Eq.) 234 (1854); Bruce v. Warren, 22 Ohio App. 41, 153 N. E. 273 (1926); Crow v. Crow, 1 Leigh 74 (Va. 1829).
a desire to equalize the shares of A or B with that given to the whole group composed of "the children of C," the distribution ought then to be *per stirpes*. By way of contrast, other cases have resorted to evidence outside the will to defeat the normal presumption of *per capita* distribution.

Another rationale, but one quite suspect in character, has been espoused by several cases. It runs to the effect that, wherever the language of a will is ambiguous, it is only reasonable to presume that the testator would want to follow the distributive scheme of the statute of descent. It is no small mystery as to how a court can justify the existence, let alone the use, of this presumption. From the very fact that a person has executed a will it would appear that he has indicated a desire to make distribution of his estate in a manner other than the one provided by the statute of descent. This is particularly true where one or more of the persons involved would not be an heir of the decedent or where the introduction of the statutory scheme into the dispositive provision would cause a most inequitable distribution of the estate.

75 Randolph v. Bond, 12 Ga. 362 (1852); Spivey v. Spivey, 37 N. C. (2 Ire. Eq.) 100 (1841); Martin v. Gould, 17 N. C. (2 Dev. Eq.) 305 (1832).

76 In re Walbran, [1906] 1 Ch. 64; White v. Holland, 92 Ga. 216, 18 S. E. 17 (1893); Perry v. Leslie, 124 Me. 93, 126 A. 340 (1924); Perkins v. Stearns, 163 Mass. 247, 39 N. E. 1016 (1895). See also Collins v. Feather's Ex'rs, 52 W. Va. 107, 43 S. E. 323 (1905), which found for a *per capita* distribution and said extrinsic evidence merited great weight. The court cited Hamlett v. Hamlett, 12 Leigh 350 (Va. 1841), as authority, but that case held for a *per stirpes* distribution although the reasons are not available as the opinion was lost. See also Cross v. O'Cavanagh, 198 Miss. 137, 21 So. (2d) 473 (1945), where the court held for a *per stirpes* distribution because the interested parties had been holding the property in that manner by reason of prior litigation which had arisen in another state. The case of Archer v. Munday, 17 S. C. 84 (1881), achieved the same result because the parties had been holding in that manner for thirty years.

77 Raymond v. Hillhouse, 45 Conn. 457 (1878); Allen v. Durham, 173 Ga. 811, 161 S. E. 608 (1931); Dollander v. Dhaemers, 297 Ill. 274, 130 N. E. 705 (1921); Claude v. Schutt, 211 Iowa 117, 233 N. W. 41 (1930); Lachland's Heirs v. Downing's Ex'rs, 50 Ky. (11 B. Mon.) 32 (1850); Luke v. Marshall, 5 J. J. Marshall 335 (Ky. 1831); Eyer v. Beck, 70 Mich. 179, 38 N. W. 20 (1888); Lockhart v. Lockhart, 56 N. C. (3 Jones Eq.) 205 (1857); Stow v. Ward, 12 N. C. (1 Dev. L.) 67 (1826); Miller's Estate (No. 2), 26 Pa. Super. 453 (1904); Risk's Appeal, sub. nom. Stauffer's Estate, 52 Pa. 269 (1866); Paul v. Ball, 31 Tex. 10 (1868). See also Martin v. Munroe & Chambless Nat. Bk. of Ocala, 125 Fla. 65, 169 So. 582 (1936), and Harris v. Austin, 125 Me. 127, 131 A. 206 (1925), which state the rule but find present a contrary intention. In Auger v. Tatham, 191 Ill. 296, 61 N. E. 77 (1901), the court felt this presumption was inapplicable because the gift was of a specific sum to each taker. The author of a note in 19 Cal. L. Rev. 442 deduced that courts favoring a *per stirpes* distribution were greatly influenced by the intestacy laws, whereas those favoring the *per capita* method believed the testator had drawn his will to avoid the effect of such statutes.
CONSTRUCTION OF CLASS GIFTS

Fortunately, there is some satisfaction to be derived from the knowledge that probably more courts have chosen to repudiate the presumption than to follow it.78

It may also be noted that, while courts are generally able to declare that a particular method of distribution would be proper, the reasons are not always consistent. Those courts holding to the view that the distribution should be on a per capita basis do so because they think the gift was one to a class,79 to individuals,80 or are unsure of the nature of the gift but certain that the testator must have intended all potential takers to take a share which is equal with that of all of the others.81 Those courts which have favored a per stirpital distribution do so because they have determined the gift to be one to several individuals,82 to individuals


80 See, for example, In re Allen, 44 L. T. (N. S.) 240 (1881); In re Chaplin’s Trusts, 33 L. J. (Ch.) 183 (1863); Tomlin v. Hatfield, 12 Sim. 167, 59 Eng. Rep. 1065 (1841); In re Rauschenplat’s Estate, 221 Cal. 33, 297 P. 882 (1931); Shannon v. Eno, 129 Conn. 77, 173 A. 473 (1933); Kean v. Roe, 2 Harr. 103 (Del. 1835); Blackstone v. Althouse, 278 Ill. 481, 116 N. E. 154 (1917); Kling v. Schnellbecker, 107 Iowa 635, 78 N. W. 673 (1899); Purnell v. Culbertson, 75 Ky. (12 Bush) 369 (1876); Agricultural Nat’l Bank of Pittsfield v. Miller, 316 Mass. 288, 55 N. E. (2d) 442 (1944); In re Paroni’s Estate, 56 Nev. 492, 56 P. (2d) 754 (1936); In re Kleeeman, 61 Misc. 560, 115 N. Y. S. 982 (1908); Bryant v. Scott, 21 N. C. (1 Dev. & B. Eq.) 155 (1835); Donohoe’s Estate, 282 Pa. 254, 127 A. 625 (1895); Peoples Nat. Bk. of Greenville v. Harrison, 198 S. C. 457, 18 S. E. (2d) 1 (1941); Murchison v. Wallace, 156 Va. 728, 159 S. E. 106 (1917).

81 A list of the English and American cases so holding appears in Appendix C.

and a class,\textsuperscript{83} to two or more classes,\textsuperscript{84} or because that method seemed to be the correct way to divide the estate.\textsuperscript{85} In those cases where the court has actually determined whether or not the gift was to a class, the determination has controlled the method of distribution. There is authority which suggests that a determination as to the distributive shares would automatically determine the nature of the gift.\textsuperscript{86} If it is acceptable practice to place the cart before the horse, such authority is sound.\textsuperscript{87}

There is, perhaps, some justification for the pessimistic note taken by one writer who has expressed the belief that even to enunciate a rule in this field is merely to compound confusion.\textsuperscript{88} If, however, the method of distribution is not to be determined solely because the limitation is construed to be one to individuals, to a class, or to two or more classes, probably the happiest reason for making a choice would be based on the degree of relationship which the takers bear to the testator. It is not entirely unreasonable to presume that the average testator would not wish to

\textsuperscript{83} In re Walbran, [1906] 1 Ch. 64; Dahmer v. Wensler, 350 Ill. 23, 182 N. E. 799 (1932); Beal v. Higgins, 303 Ill. 370, 135 N. E. 759 (1922); Palmer v. Jones, 299 Ill. 263, 132 N. E. 567 (1921); Dollander v. Dhaemers, 297 Ill. 274, 130 N. E. 705 (1921); Claude v. Schutt, 211 Iowa 117, 233 N. W. 41 (1930); Shackelford v. Kaufman, 263 Ky. 676, 93 S. W. (2d) 15 (1936); Perry v. Leslie, 124 Me. 93, 126 A. 340 (1924); Newlin v. Mercantile Trust Co. of Baltimore, 161 Md. 622, 158 A. 51 (1932); Perkins v. Stearns, 163 Mass. 247, 39 N. E. 1016 (1895); Cross v. O'Cavanagh, 198 Miss. 137, 21 So. (2d) 473 (1945); In re Walker's Estate, 39 Misc. 653 (1903); Lockhart v. Lockhart, 56 N. C. (3 Jones Eq.) 205 (1857); Herman's Estate, 90 Pa. Super. 512 (1927); Connor v. Johnson, 11 S. C. Eq. (2 Hills Ch.) 41 (1934); Farley v. Farley, 121 Tenn. 324, 115 S. W. 921 (1908); Paul v. Ball, 31 Tex. 10 (1868). The foregoing list represents but one case from each of the jurisdictions mentioned. It could be amplified without difficulty.


\textsuperscript{85} These cases are listed in Appendix D.

\textsuperscript{86} Carey, "Per Capita and Stirpital Division in Illinois," 35 Ill. L. Rev. 1 (1941), states: "In this instance as in others the effect of the rule of division is not alone to determine the share to be taken but also the class which is to take . . . A per capita rule would result in the creation of but one class . . . ." To the same effect, see Long, "Class Gifts in North Carolina," 22 N. Car. L. Rev. 297 at 308 (1944).

\textsuperscript{87} The fallacy of the concept lies in the fact that \textit{per capita} distribution is equally proper in gifts to individuals or to a single class; \textit{per stirpes} may be applicable to a single class or among several classes.

\textsuperscript{88} See note in 79 U. of Pa. L. Rev. 372 (1931).
discriminate against his immediate family in favor of persons more distantly related to him. There may, of course, be supervening reasons why the decedent would want strangers to his blood or more distant relatives to share equally with those nearer to him. Assuming that relationship does have an important bearing on the mode of distribution, courts have then considered applied one of several possible canons of construction. If, for example, A, B, and C are equally related to the decedent, the presumption is that the decedent intended a distribution per stirpes between the individuals and the class representing C.

\[89\] See, for example, Billinslea v. Abercrombie, 3 Ala. (2 Stew. & P.) 24 (1832); Raymond v. Hillhouse, 45 Conn. 467 (1878); Randolph v. Bond, 12 Ga. 362 (1852); Dahmer v. Wensler, 10 Ill. 23, 182 N. E. 799 (1932); Dollander v. Dhaemers, 297 Ill. 274, 130 N. E. 705 (1921); Henry v. Thomas, 118 Ind. 23, 20 N. E. 519 (1889); Claude v. Schutt, 211 Iowa 117, 233 N. W. 41 (1930); Shackelford v. Kauffman, 265 Ky. 676, 93 S. W. (2d) 15 (1936); Agricultural Nat'l Bk. of Pittsfield v. Miller, 316 Mass. 288, 55 N. E. (2d) 442 (1942); Eyer v. Beck, 70 Mich. 179, 38 N. W. 20 (1888); Cross v. O'Cavanagh, 198 Miss. 137, 21 So. (2d) 473 (1945); Ferrer v. Pyne, 81 N. Y. 281 (1880); Gilliam v. Underwood, 56 N. C. (3 Jones Eq.) 100 (1856); In re Ashburner's Estate, 159 Pa. 545, 28 A. 361 (1894).

\[90\] In Kling v. Schnellbecker, 107 Iowa 636, 78 N. W. 673 (1899), all takers were related to the testator by marriage. Neil v. Stuart, 102 Kan. 242, 169 P. 1138 (1918), concerned step-nephews who had lived with the testator and were regarded equally in affection with blood nephews. The case of Boston Safe Deposit & Trust Co. v. Doolan, 307 Mass. 238, 29 N. E. (2d) 844 (1940), allowed a charity to share with the children of nieces and nephews. In Smith v. Curtis, 29 N. J. L. (5 Dutcher) 345 (1862), relatives by marriage shared with certain of the decedent's collateral relatives. All of the takers in the case of In re Kleeman, 61 Misc. 560, 115 N. Y. S. 982 (1908), were related to the decedent by marriage. The English case of In re Cossentine, [1933] Ch. 119, 148 L. T. Rep. 261, permitted a charity to share equally with collateral relatives.

\[91\] Special factors appear in Carlin v. Helm, 331 Ill. 213, 162 N. E. 873 (1928); Rohrer v. Burris, 27 Ind. App. 344, 61 N. E. 202 (1901); Kaufman v. Anderson, 31 Ky. L. Rep. 888, 104 S. W. 340 (1907); In re May's Estate, 197 Mo. App. 555, 196 S. W. 1039 (1917); In re Paronil's Estate, 56 Nev. 492, 56 P. (2d) 754 (1938); Stokes v. Tilly, 9 N. D. Eq. (1 Stockt.) 130 (1852); In re Richard's Estate, 150 Misc. 102, 268 N. Y. S. 465 (1934); Hazard v. Stevens, 36 R. I. 90, 88 A. 980 (1913); Peoples Nat. Bk. of Greenville v. Harrison, 198 S. C. 457, 18 S. E. (2d) 1 (1941); Will of Waterbury, 163 Wis. 510, 153 N. W. 340 (1916). See also White v. Holland, 92 Ga. 216, 18 S. E. 17 (1893), and Ward v. Ottley, 166 Va. 639, 186 S. E. 25 (1935), in which the courts digressed from the normal view of their respective jurisdictions to find a per stirpes distribution on the theory that the gifts were made to the "children of C" for the purpose of disinherit C, thereby forcing a conclusion that the gift was by way of representation.

\[92\] Lyon v. Acker, 33 Conn. 222 (1866); Beal v. Higgins, 303 Ill. 370, 135 N. E. 759 (1922); Palmer v. Jones, 299 Ill. 263, 132 N. E. 567 (1921); Dollander v. Dhaemers, 297 Ill. 274, 130 N. E. 705 (1921); Claude v. Schutt, 211 Iowa 117, 233 N. W. 41 (1930); Luchland's Heirs v. Downing's Ex'rs, 50 Ky. (11 B. Mon.) 32 (1850); Perry v. Leslie, 124 Me. 93, 126 A. 340 (1924); Thornton v. Roberts, 30 N. J. Eq. (3 Stew.) 473 (1879); Rushmore v. Rushmore, 59 Hun. 615, 12 N. Y. S. 776 (1891); Ferrer v. Pyne, 81 N. Y. 281 (1880); Clark v. Lynch, 46 Barb. 68 (N. Y. 1866); Roper v. Roper, 58 N. C. (5 Jones Eq.) 16 (1859); Jourdan v. Green, 16 N. C. (1 Dev. Eq.) 270 (1828); Osburn's Appeal, 104 Pa. 637 (1883). Contrary decisions appear in notes 55 and 56, ante, and in note 91.
but it could be presumed that he intended a distribution *per capita.*\(^9\) In case \(C\) is dead, and \(A, B,\) and \(C\)'s children are equally related to the decedent, the customary belief is that the children should take only \(C\)'s share by representation.\(^9\) If the indicated group, in contrast to \(A\) and \(B,\) the named individuals, is delineated by the relationship to \(C,\) the presumption is that they should take in a representative capacity *per stirpes,*\(^5\) but even so, there is considerable confusion in cases of that nature.\(^6\)

### III. VESTING, LAPSE AND ALLIED PROBLEMS

There are other considerations which often arise that go beyond the mere determination of whether or not the gift is one to a class or regarding the quantum of the shares to be enjoyed by the distributees. Not the least of these relates to the problem of when the gift vests in transmissibility, that is whether, if a taker has died before the time for possession in use and enjoyment, the interest passes to his estate. If the gift is to "\(A, B,\) and the children of \(C\)" simperiter, the cases are uniform on the point that, regardless of the nature of the gift or the quantum of the distributive share, the beneficiary need only survive the testator to obtain his interest.\(^7\) The same result will usually


\(^{95}\) Lyon v. Acker, 33 Conn. 222 (1866); Beal v. Higgins, 303 Ill. 370, 135 N. E. 759 (1922); Dollander v. Dhaemers, 297 Ill. 274, 130 N. E. 765 (1921); Claude v. Schutt, 211 Iowa 117, 233 N. W. 41 (1930); Lachland's Heirs v. Downing's Ex'rs, 50 Ky. (11 B. Mon.) 32 (1860); Cross v. O'Cavanagh, 198 Miss. 137, 21 So. (2d) 473 (1945); Clark v. Lynch's 46 Barb. 68 (N. Y. 1866).


ensue if the same limitation succeeds a life estate in favor of some other person. On the other hand, considerable difficulty may arise where the limitation is "to W for life and then to A, B, and the children of C, or the survivor or survivors of them." The outcome will generally be dependent on whether the gift is held to be one to a class or among classes, but there are decisions which rest on the determination of whether the distribution is per stirpes or per capita. If the limitation is to individuals, all potential takers must survive W to enjoy. If the limitation is determined to be one to individuals and to a class, the survivorship requirement is usually deemed to qualify only the portion of the gift relating to the class. If the entire gift is to a class, again all takers must survive W to enjoy.

A somewhat related issue which has, occasionally, been in need of resolution concerns the problem of when the class will close with respect to afterborn members. The cases dealing there-

201, 54 Eng. Rep. 78 (1859); Amson v. Harris, 19 Beav. 210, 52 Eng. Rep. 330 (1854); McKay v. Zilar, 73 Colo. 529, 216 P. 534 (1923); Shannon v. Eno, 120 Conn. 77, 179 A. 479 (1935); Benson v. Wright, 4 Md. Ch. 278 (1848); Perkins v. Stearns, 163 Mass. 247, 39 N. E. 1016 (1885); Eyer v. Beck, 70 Mich. 179, 38 N. E. 20 (1888); In re Paroni's Estate, 56 Nev. 492, 101 N. E. 905 (1913); Henderson v. Womack, 41 N. C. (6 Ire. Eq.) 437 (1849); Paul v. Ball, 31 Tex. 10 (1858); Estate of Pierce, 177 Wis. 104, 188 N. W. 78 (1922); Will of Waterbury, 163 Wis. 510, 158 N. W. 340 (1916).

98 Londen v. Blackmore, 10 Sim. 626, 50 Eng. Rep. 759 (1840); Palmer v. Jones, 299 Ill. 293, 132 N. E. 567 (1921); Blackstone v. Althouse, 278 Ill. 481, 116 N. E. 154 (1917); Luke v. Marshall, 5 J. J. Marsh 353 (Ky. 1831); Perry v. Leslie, 124 Me. 93, 126 A. 340 (1924); Thornton v. Roberts, 30 N. J. Eq. (3 Stew.) 473 (1879); Smith v. Curtis, 29 N. J. L. (5 Dutcher) 345 (1862); Ex'rs of Wintemute v. Ex'rs of Snyder, 3 N. J. Eq. (2 H. W. Green) 489 (1836); In re Richard's Estate, 150 Misc. 102, 268 N. Y. S. 465 (1934); Manier v. Phelps, 15 Abb. N. C. 123 (N. Y. 1884); Risk's Appeal, sub. nom. Stauffer's Estate, 52 Pa. 269 (1866); Oulton v. Kidder, 128 A. 674 (R. I. 1925); Hazard v. Stevens, 36 R. I. 90, 88 A. 80 (1913); Puryear v. Edmondson, 51 Tenn. (4 Helsk.) 45 (1871).


2 Cole v. Creyon, 10 S. C. Eq. (1 Hills Ch.) 311 (1933). There is dictum on the point in Palmer v. Jones, 299 Ill. 263, 132 N. E. 567 (1921). The cases of In re Myhill, 149 App. Div. 404, 134 N. Y. S. 462 (1912), and In re Walker's Estate, 39 Misc. 680, 80 N. Y. S. 653 (1903), extend the survivorship requirements to A and B.

with have consistently chosen to follow the normal rationale of class gifts and have ordered the class closed to afterborn members when the time for the first distribution of principal has been reached. Thus, if the limitation is not dependent on an intervening life estate or other qualification, children of C born after the testator’s death, unless en ventre sa mere, will not share. If, on the other hand, the limitation rests on an intervening life estate or some other contingency, all persons born prior to that time will be entitled to enjoy an interest in the gift.

Naturally, if a beneficiary is required to survive the testator but fails to do so, there is a problem respecting lapse. Barring the effect of an anti-lapse statute, if the person predeceasing the testator is A, the answer to the question of whether or not his share will lapse will be made to depend on whether the gift is one to a class or not. If the entire limitation is treated as one to a class, the failure of A to survive the testator will not produce a lapse for the rest of the beneficiaries will take the entire gift in equal portions. If the disposition is one to two or more classes,
the death of A prior to the death of the donor also does not cause a lapse. On the other hand, where the gift is one to individuals, or to an individual and a class, and A predeceases the decedent, there is a lapse in his share. The same construction will be applicable, of course, to the instances where C dies childless or the child of C dies before the testator. It should be noted, however, that the effect of the local anti-lapse statute may be sufficient to save a beneficiary’s share for his issue.

Additional factors which arise only occasionally are, when in issue, of tremendous importance to the litigants. None of the cases under consideration have raised any issue regarding taxation, but there is no doubt that the tax consequences of a limitation of the kind in question could pose a major problem today. Other difficulties may be noted in respect to the question of whether or not a debtor is truly an actual beneficiary so as to be possessed of a vested interest subject to levy or one which could be made available to an assignee. What, also, of the problems which could arise because of the failure of an intervening supporting estate? Suppose, for example, a widow should renounce the will and thereby terminate her life estate. In one case where that very thing occurred, the court accelerated the

8 In re Myhill, 149 App. Div. 404, 134 N. Y. S. 467 (1912); In re Walker’s Estate, 39 Misc. 660, 80 N. Y. S. 653 (1903).
9 In re Allen, sub. nom. Wilson v. Atter, 44 L. T. (N. S.) 240 (1881); In re Chaplin’s Trusts, 33 L. J. (Ch.) 183 (1863); Garnier v. Garnier, 265 Pa. 175, 106 A. 595 (1919). In Perry v. Leslie, 124 Me. 93, 126 A. 340 (1924), counsel conceded that the surviving children of A were entitled to take A’s share so the court found it unnecessary to discuss the possible lapse of A’s share.
10 Luke v. Marshall, 5 J. J. Marsh 353 (Ky. 1821); Henderson v. Womack, 41 N. C. (6 Ire. Eq.) 437 (1849); Minter’s Appeal, 40 Pa. 111 (1861); Estate of Pierce, 177 Wis. 104, 188 N. W. 78 (1922).
11 Shannon v. Eno, 120 Conn. 77, 179 A. 479 (1935); In re Paroni’s Estate, 56 Nev. 492, 56 P. (2d) 754 (1936); In re Turner’s Will, 208 N. Y. 261, 101 N. E. 305 (1913); Dupont v. Hutchinson, 31 S. C. Eq. (10 Rich.) 1 (1858).
12 In re Paroni’s Estate, 56 Nev. 492, 56 P. (2d) 745 (1936); Henderson v. Womack, 41 N. C. (6 Ire. Eq.) 437 (1849); Minter’s Appeal, 40 Pa. 111 (1861). The court, in Shannon v. Eno, 120 Conn. 77, 179 A. 479 (1935), indicated that had the deceased beneficiary left issue who survived the testator the gift would have been saved for them under the local statute.
13 Puryear v. Edmondson, 51 Tenn. (4 Heisk.) 43 (1871).
14 The assignee of A was successful in Ex’rs of Winternute v. Ex’rs of Snyder, 3 N. J. Eq. (2 H. W. Green) 489 (1836).
remainder and closed the class to any afterborn children of C.15 Naturally, the specter of technical defects has also arisen. In one case, where A served as a witness to the will, although the gift was called one to a class, the will was held inoperative insofar as A’s share was concerned.16 A similar problem has been found to exist in those instances where the testator, by codicil, has eliminated A from any provision in the will. In such a case, if the gift is to individuals, A’s share will lapse;17 but if to a class, it will not.18 This mere enumeration of the sundry problems which have arisen, or could arise, where a bequest or devise of the type at issue is involved goes far to establish the necessity for resolving the true nature of the gift. If it were not so, there could be no adequate explanation for many an arrived-at conclusion.

In all of the decisions, it should be a matter of no small surprise that only once did the rule against perpetuities become an issue. The English case of Porter v. Fox19 involved an estate which was given, by way of remainder after a life estate, “for the benefit of his grandchildren and his nephew, Thomas Owen, and to be distributed as each reached 25, but if any grandchild die under 25 over to the others.” It was first held that the grandchildren constituted a class but the gift to them was void for remoteness. The court then thought that Thomas was not part of that class. It was of the opinion, however, that since the share he would enjoy was made dependent on the size of the class, his gift too was void for remoteness. The decision is in accord with authority on class gifts and should act as a red flag of caution to the draftsman.20

16 Burnet v. Burnet, 30 N. J. Eq. (3 Stew.) 595 (1879).
20 In general, see Leach, “The Rule Against Perpetuities and Gifts to Classes,” 51 Harv. L. Rev. 1329 (1938).
The absence of any clear trend of decision in this area of the law today prompts the making of some suggestions both to counsel and to the courts. For the attention of the former, it might be said that the legal fraternity all too often neglects to recognize that theorization properly lies in the ambit of prevention rather than in the effectuation of a cure. The most significant practical aspect of the law of future interests lies not in litigation to clarify a trust or a will but rather in the accurate draftsmanship of such documents. Persons who study the drafting of wills should have an interest in their subject which transcends the “unwitty diversities” of legal technique. Nevertheless, an intensive and protracted study of legal technique is fully warranted for it is not simple of comprehension nor minor in consequence.

There is some cause for alarm to be derived from the knowledge that, with depressing regularity, drafters of wills either are ignorant of or apt to overlook pitfalls, much to the subsequent chagrin of interested persons. A predictable error is, quite often, later condemned as having arisen out of some unintelligible feudal dogma of the kind to be found in property law, but persons so claiming are inclined to gloss over their own failings with the suggestion that the law of property, and particularly the law of future interests, teems with legal technicalities and verbal distinctions which cannot be justified in logic nor be regarded as predictable in operation. There is no denying that this segment of the law is a highly elaborate field, providing a delightful head start for the experienced tactitioner but affording almost insuperable obstacles to the general practitioner who has occasion to probe into it only rarely. It is imperative, then, that one

21 If there is any trend at all, it would appear to be one in favor of finding a gift to be one to a single class. From that point on, the normal consequences, both with regard to distribution and the other factors mentioned, will be those herein noted as being inherent in a class gift. The cases are listed in Appendix B.

22 If it is solace to the practitioner who has stubbed his toe, it might be noted that even the most eminent jurists sometimes stumble clumsily when plodding through this very esoteric field. See, for example, the opinion of Cardozo, J., in Doctor v. Hughes, 223 N. Y. 305, 122 N. E. 221 (1919). For the classic example of utter confusion, see the opinions in the case of Speigel’s Estate v. Commissioner, 335 U. S. 701, 69 S. Ct. 301, 93 L. Ed. 330 (1948).
about to draft a will of more than simple form should have a sound grounding in the theory and application of the law relating to future interests.

Assuming even an ordinary understanding of the problems confronting him, the nemesis of the ordinary draftsman is apt to rest in imperspicuity. It is proverbial that clarity of expression lies in conciseness; yet, in many instances, simplicity and terseness of phraseology is merely the product of immaturity of concept. A will free of superfluous phraseology, unassailable in tenor, one compact yet comprehensive, is not only a thing of esthetic satisfaction, it is also a monument to the drafter’s ability. It is a matter of no small moment that, even in ordinary usage, language is susceptible to various interpretations. A necessary corollary of this statement is that one who desires to insure that the wording chosen will convey the meaning intended must use words in their ordinary and accepted fashion or else must clarify his personal usage.

Since a will is usually an attempt by one generation to indicate certain desires to a succeeding generation, it is most important that the language used in wills should rise above the personal idiom or local colloquialisms. The competent draftsman, therefore, will so fully and clearly set forth the testator’s intention that, regardless of when or by whom the will is read, the reader will comprehend its full import with ease. On the other hand, the incompetent draftsman who relies on form books and stylized language will almost inevitably misuse both, leaving his reader confused and perplexed. There is, therefore, some justification for the attitude expressed by many that form books generally, or the *stare decisis* application of particular phraseology, are evils much to be eschewed. In that respect, let it here be noted that it would be a poor draftsman, indeed, who would draw a bequest or devise to "A, B, and the children of C," regardless of the fact that such a clause has an established primary meaning in the eyes of courts.

It should then be observed that the suggestions to be made
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respecting the nature and application of the limitation herein discussed have only a negative effect on the drafter’s duties. If the testator indicates a desire to make this sort of bequest or devise, the draftsman, aware of the pitfalls, ought to probe further and ascertain just what gift was in mind. It would be best to make individual gifts to each person in whom the testator has displayed an interest; or, if the testator insists upon a single gift to the whole named group, the gift should be made with adequate provision requiring survivorship and against lapse. It may be that the testator wishes to include, as potential takers, persons who may be born after the execution of the will but prior to the time for distribution of the estate. If this is true, it would be advisable to make individual gifts to A and B, separate and distinct from the one made to the children of C. By so doing, a majority of the problems otherwise present will be eliminated. Particularly would this be true where the testator wants the children of C, as a unit, to take a share equal to that which either A or B is to enjoy. On the other hand, where the intention is that A or B are to take a no larger share than that to which each child of C is to be entitled, and that if A, B, or any such child predeceases the testator the survivors are to enjoy his share pro rata, the drafter ought to fully and clearly state these facts. In short, the bequest or devise should be spelled out in detail so as (1) to indicate whether it was intended to be a class gift or one to individuals; (2) to delineate the survivorship requirements, if any; and (3) to establish the type of distribution, whether per capita or per stirpes, which was intended.

Assuming that inadequate forethought has been given by counsel to the drafting of a will, there yet remains the disposition which a court ought to make of a limitation of the type here under consideration. Certainly, in so far as a court is concerned, there is considerable desirability in establishing a uniform meaning with respect to such gifts, a meaning which could be applied as providing at least a prima facie construction. The establishment of a primary meaning would go far toward easing the burdens of a court as it could be utilized to provide the solution for several
enigmas. It could, for example, determine the takers and the quantum of the share to be distributable to each. It could resolve the vexing problems apt to ensue because of a possible lapse or by reason of the rule against perpetuities. Furthermore, the rights of creditors, assignees, and the taxing authorities would be clarified. There is, however, a proper inquiry which will need resolution prior to any attempt to establish a primary meaning and that is one as to whether or not a limitation of this nature is one susceptible to stabilization under a canon of construction.

Common law jurists had a tendency to weave an elaborate web of theory about their rules of construction with the ultimate result of so over-embellishing a concept that it ceased to possess practical value. In fact, it has not been unknown for a rule of construction to achieve such rigidity that it has been made to override the testator's manifest intent. This, of course, has not happened without protest, and the inevitable reaction. Here is the foundation for the judicial attitude that it is wholly unreasonable to attempt to use one man's blunder as a thesaurus for aid in clarifying another person's nonsense. In the law of wills, therefore, it has become the fashion to disregard those canons of caution referred to as rules of construction to follow the will-o'-the wisp denominated the "testator's intention."

Now it is very delightful for a judge to announce that he will do as much as is necessary, and no more, to carry out the intent of the testator, but often that statement merely introduces an extended circumlocution. It goes almost without saying that, in those instances where the testator has fully expressed a desire, his wish should be carried out so far as it is consistent with public policy and applicable law. If a decedent actually formulated an intention in some respect it is hardly conceivable that he would have failed to give adequate expression to that intention within the body of his will. When, therefore, a judge seeks to ascertain what a testator's intention may have been in some respect, his

23 Bentham, Rationale of Judicial Evidence (1827), 590n, once wrote: "The refusal to put upon the words used by a man in penning a deed or will the meaning which it is all the while acknowledged he put upon them himself, is an enormity, an act of barefaced injustice, unknown everywhere but in English Jurisprudence."
first query should be as to whether that decedent has given actual consideration to the problem and has, in fact, formulated and expressed an opinion thereon. If so, of course, all subsequent exploration of the issue must be confined to that which is contained within the four corners of the document.\textsuperscript{24}

Unfortunately, in a large number of cases where the construction of a will is in issue before the court, the problem to be resolved arises out of a situation not unlike the one considered in this article, to-wit: the occurrence of a contingency which never entered the testator’s contemplation. With the rules of construction held in disrepute, there is nothing for a court to do except hazard a guess at the testator’s intention in the light of the circumstances surrounding the execution of the will. It very often happens that a judge, in the first instance, will form an opinion as to what the decedent ought, in justice, to have done; that is, what the judge himself would have done under the same circumstances. Then the judge endeavors to find reasons to establish that that which the testator “should” have done, he has done.\textsuperscript{25} Surely this is an erroneous process. A court may well inquire what a will says. What a court thinks the will should say, should not possess any bearing whatever.

When a person dies intestate, although he has formulated no express opinion respecting the devolution of his property, the law properly presupposes that the average person, had he given thought to the problem, would have wanted his property to devolve in a manner compatible with the statute of descent. If this were not true, he would have done something to indicate a contrary intent. Why, then, should it not be considered proper, where a

\textsuperscript{24} The right to make use of extrinsic evidence as an aid in the construction of wills is a much mooted issue. It is beyond the scope of this article to discuss the methods of interpretation at length. Exposition of this fascinating subject may be found in Wigmore, Evidence, Vol. 9, § 2458 et seq.; Kales, Estate, Future Interests and Illegal Conditions and Restraints in Illinois, 2d Ed., § 122; Wigram, Extrinsic Evidence in the Interpretation of Wills, Sanger’s 5th Ed., and Hawkins, “On the Principles of Legal Interpretation, With Reference Especially to the Interpretation of Wills,” 2 Jur. Soc. 298, reprinted in Thayer, Preliminary Treatise on Evidence, Appendix C.

\textsuperscript{25} For a rather candid and disarmingly frank admission of this inclination on the part of the judiciary, see the opinion of Carr, J., in Crow v. Crow, 1 Leigh 74 at 76 (Va. 1829).
testator has failed to form an opinion for lack of thought and thus has made no provision for an eventuality which has occurred, to establish flexible, if not statutory, rules in much the same way as has been done in case of the analogous situation concerning intestate devolution?

It is probably a truism that no two persons have identical relations, friends, interests, or assets. The necessary conclusion to be drawn from that fact is that no two testamentary dispositions will be identical. Accepting such premise, courts quite often syllogistically reason that it would be fruitless to attempt to ascertain the nature of one man's error from the light cast by another's confusion. The irrationality of the reasoning lies in the ignorance of what ought to be a more widely recognized fact; namely, that despite actual differences in estates, interests, and so on, there are only a comparatively few provisions, possible or probable, which a person could frame for the disposition of his effects. The wording employed in dispositive provisions of wills or trusts, therefore, will tend to become repetitious when numerous documents of this character are examined. If so, what better place is there for the application of rules of construction than to establish and clarify oft-used expressions?

Assuming that rules of construction are not an evil per se and that they may even prove to be of value in a limited field of inquiry, there still remains the question of whether prior authority should have a controlling effect, for rules of construction themselves are often no more than the direct result of recognizing the authority of precedent. In desperation, precedent is sometimes summarily dismissed by a court to avoid its serious abuse. Like scriptural quotes, precedent, especially when abstracted from context, is equally applicable to the proof of concepts which may be poles apart. It is the indiscriminate use of precedent, or the act of forcing precedent on a court with the allegation that it is of compelling effect, which has helped many courts to peer at
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precedent in particular, and rules of construction generally, with a jaundiced eye. Precedent may prove to be of questionable value in any lawsuit. It would, however, be an intelligent thing to do to ascertain when precedent should be deemed persuasive and when not, and then to use it accordingly.

Where the phraseology at issue is unique, that is it is peculiar to the context of a certain document and is unlikely to appear in another analogous form again, the authority of prior decisions construing the same words which were used in another vein can hardly have any direct bearing on the present interpretive problem. It would be most improper to insist that prior texts should have controlling effect when they bear no relationship to the text under consideration. At the other extreme, is the case involving the use of language of a general nature. Here again, precedent should not be absolutely determinative, but, by way of contrast, the citation of authority would be proper as an indication of the weight which could be given conflicting considerations. It is not intended to convey the implication that the better rule is necessarily to be determined by counting the number of authorities any more than that the weight of evidence is to be established by a counting of the witnesses. Precedent is valuable as an aid to clarification of general terms in the sense that (1) it may be indicative of the manner in which other jurists, skilled in the art of interpretation, have conducted themselves in analogous situations; (2) it provides a guide or standard to the emphasis attributable to relevant factors; and (3), it suggests the sundry considerations and contentions to be disposed of in any given situation.

There is at least one situation where precedent should be of considerable persuasive value in the process of providing construction for general terms used in an instrument. Where certain phrases or words have been ruled on repeatedly and have reap-

20 The court concerned with the case of In re Montgomery's Estate, 2 N. Y. S. (2d) 406 at 418 (1938), after examining the canons of construction at length, noted that several of them supported the decision and then stated: "In frankness it may be added, however, that this interpretation would not have been varied had the contrary been the fact."
peared in similar context repeatedly, then precedent ought to be invaluable as a guide, standard, or counsel of caution for the court. In fact, in such instances, precedent might be looked on as a lexicon delineating a primary meaning for the constantly recurring phrase or word.

Let it be emphasized, however, that the rationale for establishing certainty of meaning respecting a gift to "A, B, and the children of C" is not for the purpose of aiding the draftsman. Quite the contrary, what has been said has been intended as an aid to a court faced with an issue posed by a decedent who, in fact, never contemplated the effect to be given to the words he chose to use. This thought is further buttressed by noting that, in several cases, courts have chosen to rely to a certain extent on the ability, or lack of ability, of the testator in things legal.

In the absence of a clear expression to the contrary, a devise or bequest to "A, B, and the children of C" should be construed to be a gift to a single class with distribution to be made per

27 It has been suggested that the doctrine of stare decisis, which promotes predictability, is unnecessary since the competent draftsman will fully clarify his intent by an adequate expression of the same without relying on established legal meanings. The careless or ignorant draftsman, on the other hand, will no doubt misuse a word or phrase having an established legal meaning. Unfortunately, that logic is hardly an answer for the situation which has arisen where the draftsman's mind has not worked at all. As yet, a majority of persons are skeptical of a court's ability to read a decedent's mind in any event, and would be outraged if a court should purport to find an intention where the decedent's mind has never worked. It would seem, then, that the only orderly way to resolve the dilemma, one relating to the meaning to be given the words used in respect to situations which the draftsman did not anticipate, would be to place a meaning on such terms which a court should accept as prima facie correct unless evidence to the contrary is educed.

28 In Billings v. Deputy, 55 Ind. App. 248, 146 N. E. 219 (1925), the only reason given for the decision was that the obvious ignorance and lack of legal training on the part of the testator forced the conclusion that he could have had no other intention. In Bunner v. Storm, 1 Sandf. Ch. 537 (N. Y. 1844), the court came to a conclusion obviously opposed to the testator's intention because his lack of legal training had caused him to misuse his terms. A similar lack of legal training may be noted in Carlin v. Helm, 331 Ill. 213, 162 N. E. 873 (1928), in Miller's Estate (No. 2), 26 Pa. Super. 453 (1904), and in Oulton v. Kidder, 128 A. 674 (R. I. 1925). Probably the most unforgivable cases in this field are those wherein the court felt impelled to reach a conclusion because the draftsman was said to be a lawyer who knew the law: In re Ritchard's Estate, 150 Misc. 102, 268 N. Y. S. 465 (1934); Peoples Nat. Bk. of Greenville v. Harrison, 198 S. C. 457, 15 S. E. (2d) 1 (1941). The last mentioned case is particularly interesting for the decedent was, at one time, an associate justice of the supreme court of the state who had drafted his own will. The court summarily dispensed with the idea that he could have had any other meaning than the one they chose to find since he had been such an eminent member of the bar. That may be so, but his eternal monument is the decision, running to several pages, explaining an intention he certainly must have had, since he knew the law so well, but which he was incapable of expressing clearly!
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The ease of judicial administration alone would be sufficient reason for adopting such a construction, but other reasons could bear slight mention. In the first instance, it is submitted that those courts which have refused to decree *per stirpes*, upon a suggested analogy to the statute of descent, are correct. The fact that a decedent has drawn a will should alone be sufficient to establish he is uninterested in having his property devolve after the manner of intestacy. Perhaps an even more compelling reason is to be found in the fact that a large number of the decisions considered herein have concerned persons who, ordinarily, would have been unable to enjoy any portion of the decedent’s estate if the laws of intestacy were truly to apply.

Secondly, the fact that A and B were named by their individual names whereas the children of C were not, can hardly be said affirmatively to establish that either A or B was more highly regarded than any one of the children of C. If anything, the presumption ought to be that A and B were regarded no more highly than such children. It seems to be inescapable logic that where several persons have been indicated, in one fashion or another, to share in the same fund, that no one of those persons enjoys greater favor with the donor than any of the others. If the converse were true, it would be difficult to conceive why such a person was not given a gift separate and distinct from the amalgam of the other beneficiaries.

Lastly, it is most improper to assume that merely because there is a distinction between the relationship which A or the children of C bear to the decedent, that the decedent would wish them to enjoy in a direct ratio to such relationship. Aside from the economic fact that a son may be lumped with the children of another son for the reason that, although the testator wishes to remember his son, the son may be financially able to the point

29 In a contrary vein, see Carey, “Per Capita and Stirpital Division in Illinois,” 35 Ill. L. Rev. 1 (1941), and Long, “Class Gifts in North Carolina,” 22 N. Car. L. Rev. 297 (1944).

30 There is a valid distinction to be drawn between the desire to apply the distributive scheme of a statute of descent to a testate disposition, and the validity of applying the same theory, one which gives rise to the necessity for a statute of descent, to the creation of a rule of construction respecting an intestate disposition.
where he would need a lesser amount than would the grandchildren who may have lost their prime source of support, there is the fact that grandchildren may, in fact, be loved equally with children by the grandparent.\textsuperscript{31} If this be true, and who can doubt it, the original premise for a contrary result would bear even less investigation in a case where A and B were no more than friends of the decedent.

At any rate, it should have been made apparent that the reasons for finding a limitation of the type here considered to be one to a class are sound in character without the necessity of placing undue reliance on either words, whims, or wile.

\textbf{APPENDIX A}

For the convenience of the reader, the entire list of cases dealing with class gift problems of the type under consideration is presented at this point in geographic arrangement by jurisdictions with internal reference to the holding in each case. The cases marked with an asterisk (*) represent decisions wherein the court reached a decision contrary to the general trend in the particular jurisdiction because of peculiarities in the will requiring that result rather than because of a desire to reverse the trend. Cases marked "\textit{per stirpes}" include those wherein the gift was held to be to individuals and to a class on a \textit{per stirpital} arrangement. All other cases achieved a \textit{per capita} result unless specially noted.


\textsuperscript{31}This is ancient history. In Gen., 48:5, the patriarch Jacob, speaking to his son Joseph, said: "And now thy two sons, Ephraim and Manesseh, which were born unto thee in the land of Egypt before I came unto thee into Egypt, are mine; as Reuben and Simeon, they shall be mine."

**CANADA:** The single Canadian case, that of *Re Elliott*, 19 Ont. W. N. 168 (1920), involved a gift treated as being *per capita* to a class.

**ALABAMA:** *Billinslea v. Abercrombie*, 3 Ala. (2 Stew. & P.) 24 (1832), *per stirpes*; *Howard v. Howard's Adm'rs*, 30 Ala. 391 (1857), *per capita*; *Smith v. Ashurst*, 34 Ala. 208 (1859), and *Jackson v. Baker*, 207 Ala. 519, 93 So. 469 (1922), *per capita* to a class.

**CALIFORNIA:** All cases treat the gift as one *per capita* among individuals. See *In re Morrison's Estate*, 138 Cal. 401, 71 P. 453 (1903); *Estate of Murphy*, 157 Cal. 63, 106 P. 230 (1909); *In re Fiske's Estate*, 182 Cal. 238, 187 P. 598 (1920), and *In re Rauschenplat's Estate*, 212 Cal. 33, 297 P. 882 (1931).

**COLORADO:** The single case of *McKay v. Zilar*, 73 Colo. 529, 216 P. 534 (1928), found a *per capita* gift to a class.

**CONNECTICUT:** The early cases of *Lyon v. Acker*, 33 Conn. 222 (1866), *Talcott v. Talcott*, 39 Conn. 186 (1872), and *Raymond v. Hillhouse*, 45 Conn. 467 (1878), led to a *per stirpes* result. In *Shannon v. Eno*, 120 Conn. 77, 179 A. 479 (1935), the gift was held to be one *per capita* among individuals.

**DELAWARE:** *Kean v. Roe*, 2 Harr. 103 (Dela. 1835), *per capita* among individuals.

**DISTRICT OF COLUMBIA:** The only case in the District, that of *Haas v. Atkinson*, 20 D. C. Rep. 537 (1892), found a *per stirpes* gift among classes.

**FLORIDA:** *Martin v. Munroe & Chambliss Nat. Bk. of Ocala*, 125 Fla. 65, 169 So. 582 (1930), *per capita* to a class.

**GEORGIA:** *Randolph v. Bond*, 12 Ga. 363 (1853); *Fraser v. Dillon*, 78 Ga. 474, 3 S. E. 695 (1887); *White v. Holland*, 92 Ga. 216, 18 S. E. 17 (1893);


**ILLINOIS:** *Per capita* to a class was found in Pitney v. Brown, 44 Ill. 363 (1867), and McCartney v. Osburn, 118 Ill. 403, 8 N. E. 210 (1866), but in Auger v. Tatham, 191 Ill. 296, 61 N. E. 77 (1901), and Blackstone v. Althouse, 278 Ill. 481, 116 N. E. 154 (1917), the gift was treated as being one *per capita* among individuals. A *per stirpital* division among classes was found proper in Dollander v. Dhaemers, 297 Ill. 274, 130 N. E. 705 (1921); Palmer v. Jones, 299 Ill. 263, 132 N. E. 567 (1921); Beal v. Higgins, 303 Ill. 370, 135 N. E. 759 (1922); Dahmer v. Wensler, 350 Ill. 23, 182 N. E. 799 (1932); Henry v. Henry, 378 Ill. 581, 39 N. E. (2d) 18 (1942); and Murphy v. Fox, 334 Ill. App. 7, 78 N. E. (2d) 337 (1948). The case of *Carlin v. Helm, 331 Ill. 213, 162 N. E. 873 (1928), reached a result of *per capita* to a class for special reasons.

**INDIANA:** Henry v. Thomas, 118 Ind. 23, 20 N. E. 519 (1889), and Billings v. Deputy, 85 Ind. App. 248, 146 N. E. 219 (1925), found a *per stirpes* gift among classes. Rohrer v. Burris, 27 Ind. App. 344, 61 N. E. 202 (1901), treated the gift as *per capita* to a class.

**IOWA:** *Per capita* to individuals, Kling v. Schnellbecker, 107 Iowa 636, 78 N. W. 673 (1899), but *per stirpes* among classes in In re Whittaker’s Estate, 175 Iowa 718, 157 N. W. 135 (1911), and Claude v. Schutt, 211 Iowa 117, 233 N. W. 41 (1930).

**KANSAS:** Neil v. Stuart, 102 Kan. 242, 169 P. 1138 (1918), and Tomb v. Bardo, 153 Kan. 766, 114 P. (2d) 320 (1941) : *per capita* to a class.

**KENTUCKY:** *Per stirpes* among classes was found in Luke v. Marshall, 5 J. J. Marsh 353 (1831); Lachland’s Heirs v. Downing’s Ex’rs, 50 Ky. (11 B. Mon.) 32 (1850); Bethel v. Major, 24 Ky. L. Rep. 398, 68 S. W. 637 (1902); Prather v. Watson’s Ex’rs, 187 Ky. 709, 220 S. W. 532 (1920); and Shackelford v. Kauffman, 263 Ky. 676, 93 S. W. (2d) 15 (1936). *Per capita* results were attained in Purnell v. Culbertson, 75 Ky. (12 Bush) 369 (1876); Armstrong v. Crutchfield’s Ex’rs, 150 Ky. 641, 150 S. W. 835 (1912); and Justice v. Stringer, 160 Ky. 354, 169 S. W. 836 (1914). See also *Kaufman v. Anderson, 31 Ky. L. Rep. 888, 104 S. W. 340 (1907), and *Conn v. Harden, 215 Ky. 307, 284 S. W. 1077 (1926).*

**MAINE:** Although the gift in Perry v. Leslie, 124 Me. 93, 126 A. 340 (1924), was found to be one *per stirpes* among classes, the case of Harris v. Austin, 125 Me. 127, 131 A. 206 (1925), treated a similar gift as one *per capita.*
MARYLAND: Maddox v. State to use of Swann, 4 Har. & J. 436 (Md. 1815); Benson v. Wright, 4 Md. Ch. 278 (1848); Brittain v. Carson, 46 Md. 186 (1876); Courtenay v. Courtenay, 138 Md. 205, 113 A. 717 (1921), \textit{per capita}. Newlin v. Mercantile Trust Co. of Baltimore, 161 Md. 622, 158 A. 51 (1932), treated the gift as one \textit{per capita} among an individual and a class. But see Plummer v. Shepherd, 94 Md. 466, 51 A. 173 (1902), where the gift was held to be one \textit{per stirpes} among classes.


MISSISSIPPI: Nichols v. Denny, 37 Miss. 59 (1859), and Edwards v. Kelley, 83 Miss. 144, 35 So. 418 (1903), \textit{per capita}. But see *Cross v. O'Cavanaugh, 198 Miss. 137, 21 So. (2d) 473 (1945), treating the gift to be one \textit{per stirpes} among classes for special reasons.

MISSOURI: In re May's Estate, 197 Mo. App. 555, 196 S. W. 1039 (1917), \textit{per capita}.

NEVADA: In re Paroni's Estate, 56 Nev. 492, 56 P. (2d) 754 (1936), \textit{per capita} among individuals.

NEW HAMPSHIRE: Silsby v. Sawyer, 64 N. H. 580, 15 A. 601 (1886), \textit{per stirpes}.

NEW JERSEY: Roome and Dodd v. Counter, 6 N. J. L. 111, 10 Ann. Dec. 390 (1822), \textit{per stirpes}. Van Houten v. Hall, 71 N. J. Eq. 626, 64 A. 460 (1906), \textit{per stirpes} among classes. Ex'rs of Winternute v. Ex'rs of Snyder, 3 N. J. Eq. (2 H. W. Green) 489 (1836); Stokes v. Tilly, 9 N. J. Eq. (1 Stockt.) 130 (1852); Bailey v. Orange Memorial Hospital, 102 A. 7 (N. J. 1917), \textit{per capita}. In Smith v. Curtis, 29 N. J. L. (5 Dutcher) 345 (1862); Fisher v. Skillman's Ex'rs, 18 N. J. Eq. (3 C. E. Green) 229 (1867); Thornton v. Roberts, 30 N. J. Eq. (3 Stew.) 473 (1879); and Burnet v. Burnet, 30 N. J. Eq. (3 Stew.) 595 (1879), the gift was one \textit{per capita} to a class.
NEW YORK: *Per capita* gifts were found in Collins v. Hoxie, 9 Paige 81 (N. Y. 1841); Buner v. Storm, 1 Sand. Ch. 357 (1844); Myres v. Myres, 23 How. Pr. 410 (N. Y. 1862). *Per stirpital* results were attained in Clark v. Lynch, 46 Barb. 68 (N. Y. 1866); Ferrer v. Pyne, 81 N. Y. 261 (1880); Rushmore v. Rushmore, 59 Hun. 615, 12 N. Y. S. 776 (1891); In re Jewett’s Estate, 5 Misc. 557, 25 N. Y. S. 1109 (1893); In re Walker’s Estate, 39 Misc. 650, 80 N. Y. S. 653 (1903); In re Scoles’m’s Will, 94 N. Y. S. 588 (1905); In re Myhill, 149 App. Div. 404, 134 N. Y. S. 462 (1912); and in In re Diefenbacher’s Estate, 165 Misc. 86, 300 N. Y. S. 370 (1937). Gifts *per capita* to a class were found in Lee v. Lee, 39 Barb. 172, 16 Abb. Pr. 127 (N. Y. 1863); Manier v. Phelps, 15 Abb. N. C. (N. Y.) 123 (1884); In re Turner’s Will, 208 N. Y. 261, 101 N. E. 905 (1913); In re Moody’s Will, 122 Misc. 541, 204 N. Y. S. 391 (1924); In re Buttners’ Will, 125 Misc. 224, 210 N. Y. S. 729 (1925); and in In re Richard’s Estate, 150 Misc. 102, 268 N. Y. S. 465 (1934). In the case of In re Kleeman, 61 Misc. 560, 115 N. Y. S. 982 (1908), the gift was treated as being one *per capita* among individuals.

NORTH CAROLINA: Whitehurst v. Pritchard, 5 N. C. (1 Murph.) 383 (1810); Stowe v. Ward, 10 N. C. (3 Hawks) 604 (1825); Ward v. Stow, 17 N. C. (2 Dec. Eq.) 509 (1834); Bryant v. Scott, 21 N. C. (1 Dev. & B. Eq.) 155 (1835); Harris v. Philpot, 40 N. C. (5 Ire. Eq.) 324 (1848); Cheeves v. Bell, 54 N. C. (1 Jones Eq.) 234 (1854); Paterson v. McMasters, 56 N. C. (3 Jones Eq.) 208 (1857); Harrel v. Davenport, 58 N. C. (5 Jones Eq.) 4 (1859), were cases in which the gift was treated as being *per capita*. In Waller v. Forsythe, 62 N. C. (Phill. Eq.) 353 (1868); Culp v. Lee, 109 N. C. 675, 14 S. E. 74 (1891); Johnston v. Knight, 117 N. C. 122, 23 S. E. 92 (1895), and in Tillman v. O’Briant, 220 N. C. 714, 18 S. E. (2d) 131 (1942), the gift was deemed to be one *per capita* to a class. Straight *per stirpital* treatment was accorded in Henderson v. Womack, 41 N. C. (6 Ire. Eq.) 437 (1849); Biven v. Phifer, 47 N. C. 436 (1855); Pardue v. Givens, 54 N. C. (1 Jones Eq.) 307 (1854); Gilliam v. Underwood, 56 N. C. (3 Jones Eq.) 100 (1856), and Lockhart v. Lockhart, 56 N. C. (3 Jones Eq.) 205 (1857). Stow v. Ward, 12 N. C. (1 Dev. L.) 67 (1826); Jourdan v. Green, 16 N. C. (1 Dev. Eq.) 270 (1828); Ricks v. Williams, 16 N. C. (1 Dev. Eq.) 10 (1826); Martin v. Gould, 17 N. C. (2 Dev. Eq.) 305 (1832); Spivey v. Spivey, 37 N. C. (2 Ire. Eq.) 100 (1841); and Harper v. Sudderth, 62 N. C. (Phill. Eq.) 279 (1867), treated the gift as being one *per stirpes* among classes. The finding of a gift *per stirpes* among classes in *Roper v. Roper, 58 N. C. (5 Jones Eq.) 16 (1859), was based on special factors.

OREGON: Roelf’s Cousins v. White, 75 Ore. 549, 147 P. 753 (1915), *per stirpes* among classes.

PENNSYLVANIA: Although straight *per stirpital* treatment was given to the gift in In re Ashburner’s Estate, 159 Pa. 545, 28 A. 361 (1894), the cases of Fissel’s Appeal, 77 Pa. 55 (1856); Minter’s Appeal, 40 Pa. St. 111 (1861); Risk’s Appeal, sub nom. Stauffer’s Estate, 52 Pa. St. 269 (1866); Osburn’s Appeal, 104 Pa. St. 637 (1883); In re Green’s Estate, 140 Pa. 253, 21 A. 317 (1891); Miller’s Estate (No. 2), 26 Pa. Super. 453 (1904); Fleck’s Estate, 28 Pa. Super. 466 (1905); Sipe’s Estate, 30 Pa. Super. 145 (1906); and Herman’s Estate, 90 Pa. Super. 512 (1927), found the gift to be one *per stirpes* among classes. A *per capita* gift among individuals was found in In re Penny’s Estate, 159 Pa. 346, 28 A. 255 (1893); Garnier v. Garnier, 265 Pa. 175, 108 A. 595 (1919); and in Donohoe’s Estate, 282 Pa. 254, 127 A. 625 (1925). *Per capita* treatment was given in Priester’s Estate, 23 Pa. Super. 386 (1903).


SOUTH CAROLINA: Cole v. Creyon, 10 S. C. Eq. (1 Hills Ch.) 311 (1933), and Connor v. Johnson, 11 S. C. Eq. (2 Hills Ch.) 41 (1834), *per stirpes* among classes. Archer v. Munday, 17 S. C. 84 (1881), *per stirpes*. In Dupont v. Hutchinson, 31 S. C. Eq. (10 Rich.) 1 (1858), the gift was *per capita*, but in Perdriau v. Wells, 26 S. C. Eq. (5 Rich.) 20 (1851), it was treated as being *per capita* to a class. See also *Peoples Nat. Bk. of Green-ville v. Harrison, 198 S. C. 457, 18 S. E. (2d) 1 (1941).

TENNESSEE: Puryear v. Edmondson, 51 Tenn. (4 Heisk.) 43 (1871), and Kimbro v. Johnston, 83 Tenn. (15 Lea) 78 (1885), *per capita*. The holding in *Farley v. Farley, 121 Tenn. 324, 115 S. W. 921 (1908)*, treating the gift as *per stirpes* among classes, is based on special factors.


VIRGINIA: A *per stirpital* result was obtained in Hamlett v. Hamlett, 12 Leigh 350 (Va. 1841), and so too in *Ward v. Ottley, 166 Va. 639, 186 S. E. 25 (1936)*, on the special facts there involved. The case of *Hoxton v. Griffith, 18 Gratt. 574 (Va. 1868)*, finding the gift to be *per stirpes* among classes, is also of exceptional character. A *per capita* gift among individuals was found in Crow v. Crow, 1 Leigh 74 (Va. 1829); McMaster v. McMaster, 10 Gratt. 275 (Va. 1853); Whittle v. Whittle, 108 Va. 22,
APPENDIX B

The following cases have accepted the premise that a gift to a class is normally to be presumed in the absence of anything to the contrary:


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844 (1940); Leslie v. Wilder, 228 Mass. 343, 117 N. E. 342 (1917); Nichols v. Denny, 37 Miss. 59 (1859); In re May’s Estate, 197 Mo. App. 555, 196 S. W. 1039 (1917); Bailey v. Orange Memorial Hospital, 102 A. 7 (N. J. Eq. 1917); Burnet v. Burnet, 30 N. J. Eq. (3 Stew.) 595 (1879); Thornton v. Roberts, 30 N. J. Eq. (3 Stew.) 473 (1879); Fisher v. Skillman’s Ex’rs, 18 N. J. Eq. (3 C. E. Green) 229 (1867); Smith v. Curtis, 29 N. J. L. (5 Dutch) 345 (1862); In re Richard’s Estate, 150 Misc. 102, 268 N. Y. S. 465 (1934); In re Buttner’s Will, 125 Misc. 224, 210 N. Y. S. 729 (1925), mod. in other respects 215 App. Div. 62, 213 N. Y. S. 268 (1925), and 243 N. Y. 1, 152 N. E. 447 (1926); In re Moody’s Will, 122 Misc. 541, 204 N. Y. S. 391 (1924); In re Turner’s Will, 208 N. Y. 261, 101 N. E. 905 (1913); In re Kleeman, 61 Misc. 560, 115 N. Y. S. 982 (1908); Manier v. Phelps, 15 Abb. N. C. 123 (N. Y. 1884); Lee v. Lee, 39 Barb. 172, 16 Abb. P. R. 127 (N. Y. 1863); Myres v. Myres, 23 How. Pr. 410 (N. Y. 1862); Bunner v. Storm, 1 Sandf. Ch. 357 (N. Y. 1844); Collins v. Hoxie, 9 Paige 81 (N. Y. 1841); Tillman v. O’Briant, 220 N. C. 714, 18 S. E. (2d) 131 (1942); Johnson v. Knight, 117 N. C. 122, 23 S. E. 92 (1895); Culp v. Lee, 109 N. C. 675, 14 S. E. 74 (1891); Waller v. Forsythe, 62 N. C. (Phill. Eq.) 353 (1868); Roper v. Roper, 58 N. C. (5 Jones Eq.) 16 (1859); Harrell v. Davenport, 58 N. C. (5 Jones Eq.) 4 (1859); Patterson v. McMasters, 56 N. C. (3 Jones Eq.) 208 (1857); Cheeves v. Bell, 54 N. C. (1 Jones Eq.) 234 (1854); Harris v. Philpot, 40 N. C. (5 Ire. Eq.) 324 (1848); Spivey v. Spivey, 37 N. C. (2 Ire. Eq.) 100 (1841); Bryant v. Scott, 21 N. C. (1 Dev. & B. Eq.) 155 (1835); Ward v. Stow, 17 N. C. (2 Dev. Eq.) 509 (1834); Martin v. Gould, 17 N. C. (2 Dev. Eq.) 305 (1832); Stowe v. Ward, 10 N. C. (3 Hawks) 604 (1825); Whitehurst v. Pritchard, 5 N. C. (1 Murph.) 383 (1810); Garnier v. Garnier, 265 Pa. 175, 108 A. 593 (1919); In re Ashburner’s Estate, 159 Pa. 545, 28 A. 361 (1894); Osburn’s Appeal, 104 Pa. 637 (1883); Oulton v. Kidder, 128 A. 674 (R. I. 1925); Hazard v. Stevens, 36 R. I. 90, 88 A. 980 (1913); Perry v. Brown, 34 R. I. 203, 83 A. 8 (1912); Guild v. Allen, 28 R. I. 430, 67 A. 855 (1907); Peoples Nat. Bk. of Greenville v. Harrison, 198 S. C. 457, 18 S. E. (2d) 1 (1941); Dupont v. Hutchinson, 31 S. C. Eq. (10 Rich.) 1 (1858); Perdreriau v. Wells, 36 S. C. Eq. (5 Rich.) 20 (1851); Connor v. Johnson, 11 S. C. Eq. (2 Hills Ch.) 41 (1834); Cole v. Creyon, 10 S. C. Eq. (1 Hills Ch.) 311 (1833); Kimbro v. Johnston, 83 Tenn. (15 Lea) 78 (1885); Puryear v. Edmondson, 51 Tenn. (4 Heisk.) 43 (1871); Saunders v. Saunders’ Adm., 109 Va. 191, 63 S. E. 410 (1909); Collins v. Feather’s Ex’rs, 52 W. Va. 107, 43 S. E. 323 (1903); In re Asby’s Will, 232 Wis. 481, 287 N. W. 734 (1939).

Judicial uncertainty as to the precise nature of the gift, displayed in the following cases, was resolved in favor of a per capita method of distribution:


**UNITED STATES:** Jackson v. Baker, 207 Ala. 519, 93 So. 469 (1922); Smith v. Ashurst, 34 Ala. 208 (1859); Howard v. Howard's Adm'rs, 30 Ala. 391 (1857); Almand v. Whitaker, 113 Ga. 889, 39 S. E. 395 (1901); Conn v. Hardin, 215 Ky. 307, 284 S. W. 1077 (1926); Justice v. Stringer, 160 Ky. 354, 169 S. W. 386 (1914); Armstrong v. Crutchfield's Ex'rs, 150 Ky. 641, 150 S. W. 835 (1912); Kaufman v. Anderson, 31 Ky. L. Rep. 888, 104 S. W. 340 (1907); Harris v. Austin, 125 Me. 127, 131 A. 206 (1925); Courtenay v. Courtenay, 138 Md. 204, 113 A. 717 (1921); Brittain v. Carson, 46 Md. 186 (1876); Maddox v. State for use of Swann, 4 Har. & J. 436 (Md. 1815); Spencer v. Adams, 211 Mass. 291, 97 N. E. 453 (1912); Hardy v. Roach, 190 Mass. 223, 76 N. E. 720 (1906); Hill v. Brown, 120 Mass. 135 (1876); Nichols v. Denny, 37 Miss. 59 (1859); Bailey v. Orange Memorial Hospital, 102 A. 7 (N. J. Eq. 1917); Thornton v. Roberts, 30 N. J. Eq. (3 Stew.) 473 (1879); Fisher v. Skillman's Ex'rs, 18 N. J. Eq. (3 C. E. Green) 229 (1867); Stokes v. Tilly, 9 N. J. Eq. (1 Stockt.) 130 (1852); In re Moody's Will, 122 Misc. 541, 204 N. Y. S. 391 (1924); Myres v. Myres, 23 How. Pr. 410 (N. Y. 1862); Collins v. Hoxie, 9 Paige 81 (N. Y. 1841); Johnston v. Knight, 117 N. C. 122, 23 S. E. 92 (1895); Waller v. Forsythe, 62 N. C. (Phll. Eq.) 353 (1868); Harrell v. Davenport, 58 N. C. (5 Jones Eq.) 4 (1859); Patterson v.
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Mcmasters, 56 N. C. (3 Jones Eq.) 208 (1857); Harris v. Philpot, 40 N. C. (5 Ire. Eq.) 324 (1848); Whitehurst v. Pritchard, 5 N. C. (1 Murph.) 383 (1810); Bruce v. Warren, 22 Ohio App. 41, 153 N. E. 273 (1926); Priester's Estate, 23 Pa. Super. 386 (1903); Perry v. Brown, 34 R. I. 203, 83 A. 8 (1912); Guild v. Allen, 28 R. I. 430, 67 A. 855 (1907); Dupont v. Hutchinson, 31 S. C. Eq. (10 Rich.) 1 (1858); Puryear v. Edmondson, 51 Tenn. (4 Heisk.) 43 (1871); Collins v. Feather's Ex'rs, 52 W. Va. 107, 43 S. E. 323 (1903); In re Asby's Will, 232 Wis. 481, 287 N. W. 734 (1939); Will of Waterbury, 163 Wis. 510, 158 N. W. 340 (1916).

APPENDIX D

In the absence of special factors, or a finding directed to that end, the per stirpital method of distribution was selected for application in the following cases:

Billinslea v. Abercrombie, 3 Ala. (2 Stew. & P.) 24 (1832); Raymond v. Hillhouse, 45 Conn. 467 (1878); Talcott v. Talcott, 39 Conn. 186 (1872); Lyon v. Acker, 33 Conn. 222 (1866); Allen v. Durham, 173 Ga. 811, 161 S. W. 608 (1931); White v. Holland, 92 Ga. 216, 18 S. E. 17 (1893); Fraser v. Dillon, 78 Ga. 474, 3 S. E. 695 (1887); Randolph v. Bond, 12 Ga. 362 (1852); Murphy v. Fox, 334 Ill. App. 7, 78 N. E. (2d) 337 (1948); Billings v. Deputy, 85 Ind. App. 248, 146 N. E. 219 (1925); Eyer v. Beck, 70 Mich. 179, 38 N. W. 20 (1888); Silsby v. Sawyer, 64 N. H. 580, 15 A. 601 (1886); Roome and Dodd v. Counter, 6 N. J. L. 111, 10 Ann. Dec. 390 (1822); In re Diefenbacher's Estate, 165 Misc. 86, 300 N. Y. S. 370 (1937); In re Slocum's Will, 94 N. Y. S. 588 (1905); In re Jewett's Estate, 5 Misc. 557, 25 N. Y. S. 1109 (1893); Ferrer v. Pyne, 81 N. Y. 281 (1880); Harper v. Sudderth, 62 N. C. (Phil. Eq.) 279 (1867); Pardue v. Givens, 54 N. C. (1 Jones Eq.) 307 (1854); Bivens v. Phifer, 47 N. C. 436 (1855); Ricks v. Williams, 16 N. C. (1 Dev. Eq.) 10 (1826); Stow v. Ward, 12 N. C. (1 Dev. L.) 67 (1826); In re Green's Estate, 140 Pa. 253, 21 A. 317 (1891); Minter's Appeal, 40 Pa. 111 (1861); In re Swinburne, 16 R. I. 208, 14 A. 850 (1888); Archer v. Munday, 17 S. C. 84 (1881); Ward v. Ottley, 166 Va. 639, 186 S. E. 25 (1936); Hamlett v. Hamlett, 12 Leigh 350 (Va. 1841); Estate of Pierce, 177 Wis. 104, 188 N. W. 78 (1922). See also In re Daniel, 2 All E. R. 101, 173 L. T. Rep. 315 (1945); In re Prosser, [1929] W. N. 85.
NOTES AND COMMENTS

THE PROPOSED ILLINOIS JUDICIAL ARTICLE

At a time when the population of Illinois totalled less than 55,000, the framers of the first state constitution drafted a judicial article which vested the judicial power of the state in a supreme court composed of a chief justice and three associates, which judges were to be selected by the legislature and were to serve during good behavior. The framers left the duty of providing all necessary inferior nisi prius courts to the general assembly which was also directed to appoint a "competent number of justices of the peace" to serve in each county. The judicial department thus fabricated to serve the frontier conditions which then prevailed proved adequate, particularly since the new constitution authorized an increase in the number of reviewing judges whenever conditions should so require. Such local problems as did arise were met, from time to time, by legislative exercise of the reserved power to create inferior tribunals when and where needed.

Within the next thirty years, however, the population of the state increased some sixteen fold. For that matter, the political complexion of both the state and the nation had also changed. Those who drafted the 1848 constitution, therefore, responding to the new conditions, fixed a revised judicial department upon the state which embodied ideas that dominate the political scene today. Broadly speaking, the principal change produced by the second constitution came with the introduction of the concept of popular election for all state as well as for many local officials. Members of the judiciary were to be selected in the same manner and were to serve for stated terms. Other factors operated to produce a reduction in the size of the supreme court. It was limited to three mem-

1 Ill. Const. 1818, Art. IV, §§ 1, 3, and 4.
2 Ibid., §§ 1 and 8.
3 Ibid., § 3.
4 The legislature, for example, created courts of county commissioners by Act of March 22, 1819; established probate courts under Laws 1828, p. 37; created an extra circuit court for the area north of the Illinois River by Laws 1828, p. 38; set up a municipal court for Chicago under Laws 1837, p. 75; a mayor's court for Springfield by Laws 1839, p. 12, § 8; a county court for Cook County, and for other counties, pursuant to Laws 1845, pp. 74 and 275; as well as produced a substantial revision, including an increase in the size of the supreme court, through the medium of Laws 1841, p. 173.
5 Encyclo. Americana, Vol. 14, p. 682, gives the 1820 census as 55,211 and the 1850 census as 851,470.
7 Verlie, op. cit., p. xxiii, cites an early instance of state supreme court packing for political purposes.
bers whose individual salaries were set at $1,200 per year with the proviso that the judges should be ineligible for other public office for the space of one year after their terms had expired.

Actually, the overall size of the judiciary was increased for the 1848 constitution established a series of circuit courts to sit in some nine designated judicial circuits conducting at least two terms each year and empowered to exercise original jurisdiction "in all cases at law and equity" and in cases of "appeals from all inferior courts." These courts were staffed by elected circuit judges chosen for a six-year term and paid the constitutionally limited wage of $1,000 per annum. In addition, county courts were authorized for each county, also to be staffed by elected judges to be chosen locally for a four-year term of office. These courts were to deal with probate matters, such civil jurisdiction as the legislature might prescribe, and to handle those criminal cases which the legislature might designate so long as the punishment was by fine only, and then not to exceed one hundred dollars. Other concepts, such as one calling for the use of the staggered term, another prescribing qualifications for judicial office, and a third setting a date for judicial elections independent of the one used for the election of other state officials were then introduced and still prevail.

Again, the constitutional system so devised could have proved to be an excellent one, at least for the times, but its framers erred in failing to look far enough into the future. Scarcely a decade later, the population had doubled and, with the advent of the Civil War, industrial and social change progressed amazingly. Inflationary trends turned fixed salaries, especially those fixed at a parsimonious level, into a source of extreme hardship. Abortive attempts, in 1862, to secure constitutional revision failed because of partisan influences, but the failure merely served to emphasize the objectionable features of the 1848 system. As the population grew, and the volume of business increased, the flood of litigation swelled to almost overwhelming proportions but the general assembly could, constitutionally, do nothing to increase the number of courts nor add needed members to the staff of the three-man supreme court.

8 Ill. Const. 1848, Art. V, §§ 7 and 8.
9 Ibid., § 10.
10 Ibid., §§ 16, 17 and 18.
11 Ibid., § 4. The section also served to develop the concept that the judge with the oldest commission should act as chief justice of the supreme court.
12 Ibid., § 11.
By 1870, with the adoption of the present constitution, some degree of relief was attained, but the solution then devised amounted to little more than an increase in the number of courts and in the size of the judiciary, for the integral structure of the judicial department, fashioned under the 1848 constitution, remained about the same. True, intermediate appellate courts were authorized; probate courts were to be set up in certain counties; police magistrates were added at the lower level, and Cook County was split off as a single circuit with its own judicial scheme, but this meant little more than an internal parcelling out of the judicial function into smaller units and among more hands without furnishing any true revision. The vice of the elective system was retained under pressure for more, and ever more, popular control of government.

In the years since 1870, there has been little chance to revise the state constitution and only a few amendments have been made to it. Nevertheless, as early as 1893, there was a feeling developing that a thorough re-examination of the judicial articles was especially imperative. When it became apparent that it was hopeless to expect any substantial degree of revision, energy was directed toward the securing of the passage of single changes. The complexity produced by attempting to govern a city as large as Chicago had come to be by the turn of the century generated the "Home Rule" amendment of 1904. It led to the creation of the Municipal Court of Chicago, which in turn became the model for other municipal courts, but beyond this there has been no substantial change in the form of the judicial department of the state since it received its shape over one hundred years ago.

At the present time, the judicial organization is composed of one supreme court staffed by seven men; four appellate courts, one of which is divided internally into three divisions; a series of circuit courts arranged in some seventeen circuits extending throughout the state exclusive of Cook County, presided over by some fifty-five circuit judges; twenty-eight city courts located in as many strategic cities of substantial size; one hundred and two county courts, each staffed by a single judge; thirteen probate courts; and an untold number of justices of the peace and police

16 Ill. Const. 1870, Art. VI, § 11.
17 Ibid., § 20.
18 Ibid., § 21.
19 Ibid., §§ 23 and 26.
20 See Verlie, op. cit., p. xxxi.
21 Ill. Const. 1870, Art. IV, § 34.
22 Ill. Rev. Stat. 1951, Vol. 1, Ch. 37, § 442 et seq., represents an exercise, by the legislature, of the power to create courts "in and for cities and incorporated towns" given by Ill. Const. 1870, Art. VI, § 1.
23 In the meantime, the population has expanded from the 851,470 of the 1850 census to a figure of around 8,750,000 in 1950.
magistrates. In addition, Cook County is served by a circuit court composed of twenty judges and a superior court, possessing concurrent jurisdiction, with a staff of twenty-eight, some of which judges serve in the Criminal Court of Cook County or in the Family Court branch of the Circuit Court. There is also a Municipal Court of Chicago, possessed of thirty-six associate judges and a chief justice, and the nearby suburb of Evanston has its municipal court presided over by two judges.

Naturally, with such a wide distribution of judicial power among so many judges, with an attendant overlapping of jurisdiction in many instances among the trial courts, but with no efficient way of making the parts work in harmony with or supplement one another, the cry has again arisen for a true revision of at least this one aspect of the state constitution. Bar association committees, heretofore working independently, have now been merged into a Joint Committee of the Illinois State and Chicago Bar Associations. That group, after extended executive sessions lasting many days, has now reported its proposed draft of a new judicial article to replace present Article VI of the 1870 Constitution. The draft has received the approval of the managing boards of the two professional associations, is presently being discussed in conferences sponsored by the law schools located within the state, and will probably be submitted for legislative action at the next session of the General Assembly.

Before that time, every lawyer and law student in the state should become familiar with its provisions and formulate his own opinion as to the wisdom and the legality of the proposal. The practicing lawyer has, from his experience at the bar, already formed an impression as to the need and desirability for change. In the interest of wholesome development in the fundamental law of the state, it is planned, in subsequent issues, to provide an explanation of, and appropriate comment on, the sections of the proposed judicial article and its accompanying schedule.

W. F. Zacharias

MODERNIZING THE LAW OF PERPETUITIES

Mastery over the rule against perpetuities as a mathematical proposition represents only a beginning for the draftsman of complicated wills and trusts. The creation of interests which will be absolutely certain not
to violate the mathematical confines of the rule yet which will serve the purposes of his client offers an additional task requiring a general consciousness of perpetuities and their pitfalls.\(^1\) As the rule demands absolute certainty that interests created must vest, if at all, within the stated period,\(^2\) that certainty is actually a theoretical one which must be established at the time the instrument is to take effect. Even though events which transpire do, in actuality, justify an assumption that the unlikely will not occur, \(i. e.\) that the gift will not vest beyond the period of perpetuities, nevertheless, it is an axiom of perpetuities law that probabilities are not to be considered,\(^3\) even in cases where vesting in fact occurs within the time allowed.\(^4\) The policy of the rule, one favoring certainty of title, is not open to challenge, but it deserves re-examination when applied to certain "hard" cases, for the principle of absolute certainty has been rigorously applied in cases where the facts were such that they all but compelled a vesting within the required period.\(^5\)

\(^1\) Carey and Schuyler, Illinois Law of Future Interests (Burdette Smith Co., Chicago, 1941), § 472, pp. 580-1.

\(^2\) Gray, Rule Against Perpetuities (Little, Brown & Co., Boston, 1942), 4th Ed., §§ 201 and 214. The necessity for this certainty is emphasized by Gray's well-known statement of the rule, appearing in § 201, that no "interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."

\(^3\) Gray, op. cit., § 214. For a criticism of the "might-have-been rule," see Leach, "Perpetuities in Perspective," 65 Harv. L. Rev. 721 (1952), particularly pp. 728, 747.

\(^4\) This almost universally applied common law principle was reversed in Pennsylvania by the passage of the Estates Act of 1947, Pa. Laws 1947, Act. No. 39. Section 4 thereof provides, in part, that upon "the expiration of the period allowed by the common law rule against perpetuities as measured by actual rather than possible events, any interest not then vested and any interest in members of a class the membership of which is then subject to increase shall be void . . . ." The committee which sponsored this act commented that the provision in question was "intended to disturb the common law rule as little as possible, but to make actualities at the end of the period, rather than possibilities as of the creation of the interest, govern, and to provide a more equitable disposition of void gifts. By regarding actualities at the end of the period, the unrealistic results based on purely theoretical possibilities are avoided. The possibility test seems peculiarly inappropriate in most Pennsylvania cases because by the time the courts do decide upon the validity of the remainders, possibilities have become actualities. This results because (1) the modern tendency is to uphold valid life estates even though the ultimate remainder seems obviously void, and (2) the court refuses to decide on the validity of future estates until the termination of the valid life estate. See Quigley's Est., 198 A. 85, 329 Pa. 281, on both points." Purdon's Pa. State. Ann., Title 20, § 301.4(b), and comment thereon at p. 475. See also comment in 48 Mich. L. Rev. 1155 (1950), particularly p. 1166.

\(^5\) Thus a gift to such of a woman's children who shall reach the age of twenty-five would be too remote, even though the named woman be then eighty years old. The possibility that she may have more children prevents the use of the lives of existing children as the measuring rod and, although medical science recognizes that birth of more children to such a person would be a physical impossibility, yet the law conclusively presumes that a possibility exists: Jee v. Audley, 1 Cox 324 (Ch. 1787). This principle has been accepted in Illinois: Kane v. Schofield, 332 Ill. App. 503 at 522, 76 N. E. (2d) 218 at 224 (1947). See also Gray, op. cit., § 215, and annotation in 146 A. L. R. 794 (1943).
The principle in question, one proclaiming that a possibility of vesting within the period will not suffice, was nicely illustrated some years ago by the decision of the Illinois Supreme Court in *Johnson v. Preston*. The testator there gave certain lands to his executor, to have and to hold for a term of years "from and after the date of the probate of this will." It was held that the gift to the executor was void for remoteness as it might not vest, i.e., the will might not be probated, within the period of the perpetuities rule. That view was later affirmed in *Ryan v. Beshk* where property was given in remainder to four named persons if living at the time of distribution, but if any should die before that time, the share of the one so dying should go "to his or her executor or administrator to be applied" as if such decedent had owned the property. It was held that, all remainders being contingent, the gifts over to the personal representatives were too remote.

Although these cases may be said to be technically correct, they may be criticized. It is possible that a will may not be probated until a remote time, but violation of the rule is so unlikely that the requirement of prospective certainty will operate harshly in such case. Especially in Illinois will this type of violation be unusual, for the Illinois Probate Act has been framed so as to promote the speedy settlement of decedent's estates. The lack of cases of the type mentioned may indicate that the *Johnson* and *Ryan* decisions have operated to teach the lesson and, until 1948, the avoidance of this particular pitfall does not appear to have caused any undue warping of estate plans.

With the enactment of the Revenue Act of 1948, however, alert lawyers soon pointed out that a bequest or devise in trust to an estate could
be a useful device in qualifying the gift for a "marital deduction" permitted in connection with the federal estate tax. The validity of such a bequest or devise has, therefore, assumed new importance. While the law allows a deduction of that property included in the gross estate which passes to the surviving spouse, at least to the extent of one-half of the "adjusted gross estate," a disposition which passes only a life interest or a "terminable" interest to the spouse will not qualify for the deduction. On the other hand, a gift in trust for the benefit of the surviving spouse for life, with power in the life-tenant beneficiary to appoint to herself, or to her estate, will qualify. If, as has been pointed out, such an appointment would be held to be a nullity under local perpetuities law, the total gift to the spouse would then constitute no more than a life estate or other "terminable" interest, hence would be inadequate for purpose of the deduction. Until recently, then, before a draftsman could qualify such a gift for the marital deduction, it was necessary for him to draft a provision which would comply both with the rule against perpetuities and with the provisions of the federal estate tax law.

The hitherto relatively dormant decisions in the Johnson and Ryan cases have, therefore, suddenly been projected into the limelight, for the doctrine there laid down could affect many a testamentary gift planned by one who wished to give a limited interest to the surviving spouse for life but who also desired to take advantage of the marital deduction. What had, previously, been only an occasional inconvenience, now assumes the proportions of a regular addition to the burdens laid on the draftsman.

Fortunately, for Illinois, the potential size of the problem induced the legislature, at its last session, to enact a bill which is now listed as Section 153a of the Conveyances Act. It declares that the "vesting of any limitation of property, whether created in the exercise of a power of appointment or in any other manner, shall not be regarded as deferred for purposes of the rule against perpetuities merely because the limitation is made to the estate of a person or to a personal representative, or to a trustee under a will, or to take effect on the probate of a will. The provisions of the Act shall apply only to limitations created after the effective

11 26 U. S. C. A., § 812(e) (1) (A), and § 812(e) (1) (H).
12 Ibid., § 812(e) (1) (B).
14 See notes 6 and 7, ante.
It is the gist of the new section that the mere theoretical possibility of too-remote vesting should not serve to invalidate the planned disposition of an estate, but the statute should not be read in too broad a fashion. The words indicating that the vesting should not be regarded as deferred "merely because the limitation is made to the estate of a person," would also support the negative inference that other events could cause the vesting to be regarded as a tardy one. In the absence of such events, however, there is no room for judicial discretion for the statute is expressed in the form of a command.

One relying on the new statute should note that the four kinds of disposition mentioned are really no more than formal variations of the same thing, i.e. a gift to the estate of a person. Being of limited scope, in that it withholds the common law requirement of advance theoretical certainty of vesting in the one specialized case, the statute does not specifically lengthen the period of perpetuities. The language thereof might serve, however, to support the inference that the answer to the question as to whether or not the common law period of perpetuities has been exceeded is to be ascertained retrospectively, as a matter of fact, rather than prospectively as a matter of theory.

It should also be noted that the basic policy of the rule against perpetuities, one designed to prevent the tying up of property for too long a time after the donor’s death, is not seriously compromised, if it is compromised at all. In the case of a grant to "A for life with remainder to such person, including A’s personal representatives, as A shall by will appoint," there is the admitted possibility that the estate might not be settled, nor letters taken out, for more than twenty-one years after A’s death. In such event, an appointment to A’s personal representative would, when read back into the instrument creating the power, admittedly violate the common law rule as applied in the Johnson and Ryan cases. Under the new statute, however, the appointed interest will not be regarded as deferred and void merely because of the form of the limitation. Although title may, under the statute, remain uncertain and unmarketable for the period of perpetuities, since vesting will be contingent upon settlement of A’s estate, nevertheless this delay in vesting is clearly within the policy of the rule. It is further apparent, under Illinois law, that the uncer-

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16 Ill. Rev. Stat. 1951, Vol. 1, Ch. 30, § 153a. The legislation was drafted and proposed by the Committee on Trust Law, Chicago Bar Association, of which Daniel M. Schuyler was chairman.

17 The broader provision to be found in Pennsylvania, note 4 ante, is specific on the point.

18 Constitutional problems relating to retroactive application of statutes concerning property have been avoided by making the Illinois provision apply solely to limitations created after the effective date of the new statute.

19 See note 9, ante
tainty may be readily dispelled by persons interested in the title, for the Probate Act provides that any person may petition to have the will probated. If the statute be construed to permit a limitation which in fact vests at a time more remote than the period of perpetuities, then the policy of the rule is somewhat compromised; but such cases would be extremely rare.

On the whole, it would seem that, except to those who might wish to cling to outworn "landmarks of the law" merely for the sake of perpetuating the lore with which they are familiar, the new statute provides a great convenience for those engaged in the drafting of marital deduction trusts. It offers a convenience, in fact, which, regardless of any subsequent change in the tax law which stimulated its adoption, should continue to be a useful and reasonable provision entirely consistent with the general policy of the law relating to perpetuities.

R. K. Larson

DISCUSSION OF RECENT DECISIONS

CRIMINAL LAW—FORMER JEOPARDY—WHETHER WITHDRAWAL OF THE SUBMISSION AND FURTHER INTERROGATION OF A JUROR AS TO HIS QUALIFICATIONS CONSTITUTES A BAR TO SUBSEQUENT PROSECUTION WHEN THE SAME JUROR IS AGAIN IMpaneLED AND SWORN—In the recent case of Maddox v. State,\(^1\) the Supreme Court of Indiana was asked to adjudicate upon the validity of a plea of former jeopardy filed by the defendant after a juror, who had been re-interrogated as to his competency following a withdrawal of the submission of the cause to the jury, was re-impaneled.

\(^1\)—Ind.—, 102 N. E. (2d) 225 (1951). Draper, J., wrote a dissenting opinion.
and the jury again sworn. It appeared therein that, after the jury had been impaneled and sworn and the prosecuting attorney had begun his opening address, one of the jurors indicated to the court his reluctance to continue by reason of his newly-discovered relationship to one of the defendants. Upon inquiry, counsel for the defense stated he neither waived nor committed himself at that time with regard to the juror’s revelation. However, when the prosecuting attorney, by court instruction, proceeded with his opening statement, counsel for the defense objected that the defendant could not have a fair and impartial trial. The court then, upon the prosecuting attorney’s motion and over the defense objection, allowed the withdrawal of the submission of the cause “for the sole purpose of determining the qualifications of the said juror to serve.”

The juror was then found to be satisfactory to the prosecuting attorney, although no questions were asked of him by either party, and the jury was again sworn. Defendant thereupon filed an affirmative plea of double jeopardy, to which the prosecution filed a reply. The trial proceeded, the jury returned a verdict of guilty, and judgment being entered thereupon, the defendant appealed to the Supreme Court. That court, one judge dissenting, reversed the judgment with instruction to sustain the plea and discharge the defendant from further prosecution. It held that jeopardy attached when the jury was impaneled and sworn, so that if, thereafter, the jury was discharged without the defendant’s consent and in the absence of legal necessity for so doing, the defendant could not again be placed in jeopardy for the same offence. That result was said to be dictated by the fact that the submission had been withdrawn without the defendant’s consent and without legal necessity, for the juror in question was not further examined but was immediately re-accepted without other questioning.

The majority opinion proceeded upon the theory that it was too late, after the jury had been accepted and sworn to try the cause, to examine the jurors further as to their competency, or to peremptorily challenge any of them, unless a motion to set aside the submission was first interposed. As a cause is to be submitted to a jury as a whole, it would obviously be necessary to set the submission aside before re-ex-

2 — Ind. — at —, 102 N. E. (2d) 225 at 227.


4 The general rule, as stated in 22 C. J. S., Criminal Law, § 258, p. 394, is that “. . . if the jury are discharged without accused’s consent for a reason legally insufficient and without an absolute necessity for it, the discharge is equivalent to an acquittal, and may be pleaded as a bar to a subsequent indictment.” See also People v. Simos, 345 Ill. 226, 178 N. E. 188 (1931).

5 Kurtz v. State, 145 Ind. 119, 42 N. E. 1102 (1896).
amining any juror as to his qualifications in order that the jury would be in the same condition it was before being sworn to serve as a jury. The defendant's original objection was, therefore, improper and his failure to request a withdrawal of the submission might well have operated to waive his objection. When it appeared, however, that there was no legal necessity for the discharge of the jury and the discharge was produced over his specific objection, the court reasoned that the defendant had been exposed to jeopardy before the submission was withdrawn, hence was entitled to the benefit of his plea.

In considering any case wherein a jury has been impaneled and sworn and a juror is thereafter withdrawn and another substituted, two classes of cases may be immediately eliminated; those where the incompetence of the juror is such as to render the verdict a nullity, and those cases where, by legislative fiat, the court is allowed to substitute a juror without reference to a withdrawal of the submission of the cause, or where it has been provided that challenges, both for cause and peremptory, may be taken after the jury has been impaneled and sworn.

An investigation of the instant problem discloses that the only extensive treatment thereof has been made by the Supreme Court of Indiana.

6 This would undoubtedly seem to be the rule in Indiana, for failure to use due diligence in urging objections to the competency of a juror, as well as failure of the complaining party to avail himself of such objections at the proper time, after they have come to his knowledge, would create an implied waiver of the error: Adams v. State, 99 Ind. 244 (1884); Maden v. Emmons, 83 Ind. 351 (1882); Kingen v. State, 46 Ind. 132 (1874). But see Tatum v. State, 206 Ga. 171, 56 S. E. (2d) 518 (1949), and Guykowski v. People, 2 Ill. 476 (1838). The better rule would seem to be that a failure to use due diligence in ascertaining a juror's incompetency, while interrogating him on his voir dire, would constitute a waiver or estoppel as to such incompetency, except where the incompetency of the juror would be such as to render the verdict reversible on review: Stone v. People, 3 Ill. 326 (1840). Ill. Rev. Stat. 1951, Vol. 1, Ch. 78, § 2, specifies the qualifications for jury service in Illinois.

7 In Lovato v. New Mexico, 242 U. S. 199, 37 S. Ct. 107, 61 L. Ed. 244 (1916), the Supreme Court of the United States, on an analogous situation, found no violation of due process but only an irregularity brought about by an overzealous regard for the defendant's constitutional rights.

8 In jurisdictions providing for the use of alternate jurors, the problem is not apt to arise: People v. Badenthal, 8 Cal. App. (2d) 404, 48 P. (2d) 82 (1935); State v. Henderson, 182 Ore. 147, 184 P. (2d) 393 (1947), rehearing denied 182 Ore. 147, 186 P. (2d) 519 (1947).

9 The effect of the procedure upon the constitution of the jury, as followed in the trial court, is not determinative in these cases, since procedural error would be considered subservient to the effort of the trial judge to prevent a void verdict from being rendered, it being impossible for either party to waive the juror's incompetency: Stone v. People, 3 Ill. 326 (1840); People v. Barker, 60 Mich. 277, 27 N. E. 539 (1886); Manning v. State, 155 Tenn. 266, 292 S. W. 451 (1927).

10 State v. Hasledahl, 2 N. D. 521, 52 N. W. 315 (1892); State v. Davis, 31 W. Va. 390, 7 S. E. 24 (1888).

That court, in the cases of *Kurtz v. State*¹² and *Gillespie v. State*,¹³ had occasion to lay the foundation for the decision in the instant case. The first of these cases established the rule that it would first be necessary to set aside the submission before further questioning a juror as to his competency. The second merely applied the reasoning so expounded, ruling that the discharge of a juror, upon the peremptory challenge of the prosecuting attorney following a withdrawal of the submission, was such an implied admission that the juror was competent that there could have been no legal necessity for his removal.¹⁴ The Indiana doctrine, then, appears to be that after the jury is impaneled and sworn, a juror whose competency then becomes suspect cannot be interrogated on this subject unless a motion to set aside the submission is first interposed and allowed. If such a motion is granted, however, it is allowed at the peril of the prosecution for, if no legal necessity such as would justify the removal of the juror is thereafter shown, the withdrawal of the submission is the equivalent of an acquittal.¹⁵ This, at first blush, may seem to be logical but the propriety of that view is extremely questionable, for the trial judge is faced with what is, in effect, an almost insurmountable difficulty.

Cases from other jurisdictions are substantially in accord with the reasoning of the Indiana court as to what constitutes legal necessity authorizing the withdrawal and substitution of a juror, but there the similarity of reasoning ceases. In *Deberry v. State*,¹⁶ the Supreme Court of Tennessee, in commenting upon the substitution of a juror, said that the discharge of a juror¹⁷ does not break up the entire panel, but that the other jurors remain a part thereof and are not again subject to challenge nor are they to be resworn. The Supreme Court of Louisiana, in *State v. Duvall*,¹⁸ in sustaining the trial court’s action in overruling the defendant’s motion to reswear the original eleven jurors after a juror had been substituted, said that ‘‘... the motion necessarily implied an acceptance of the eleven jurors, and we agree ... that the reswearing of said jurors would have been idle and useless ceremony.’’¹⁹ The Arkansas

¹² 145 Ind. 119, 42 N. E. 1102 (1896).
¹³ 188 Ind. 298, 80 N. E. 829 (1907).
¹⁴ The reasoning evidently proceeded upon the theory that a peremptory challenge would not have been necessary had the prosecuting attorney been able to show legal cause for removal.
¹⁵ The reasoning, somewhat doubtfully, presupposes that withdrawal of the submission amounts to a discharge of the jury. No other reported case, however, has expressly so held.
¹⁶ 99 Tenn. 207, 42 S. W. 31 (1897).
¹⁷ A plea of double jeopardy has been held good in similar situations: *Tomasson v. State*, 112 Tenn. 596, 79 S. W. 892 (1903); *Ward v. State*, 20 Tenn. (1 Humph.) 253 (1839). See also *O’Brian v. Commonwealth*, 72 Ky. (9 Bush) 333 (1872).
¹⁸ 135 La. 710, 65 So. 904 (1914).
¹⁹ 135 La. 710 at 728, 65 So. 904 at 911.
case of *Martin v. State*\(^{20}\) seems to be in accord with the last mentioned cases for the prosecution was there allowed to challenge a juror for cause,\(^{21}\) after the jury had been impaneled and sworn, and another juror was then substituted.

One of two possible solutions to the problem may be drawn from these cases: either the substitution of the juror was done without the withdrawal from the jury of the submission of the cause, or the submission was withdrawn but it did not operate to effect a discharge of the jury as a whole. If the former is correct, the problem of substitution is substantially minimized. The court will then merely judicially ascertain,\(^{22}\) without interference with the constitution of the jury, whether or not legal necessity for discharge of the juror exists and, if it is found to exist, the juror will merely be removed and another substituted, only the substitute juror then being sworn.\(^{23}\) The latter alternative would seem to be more in accord with sound legalistic reasoning, and represents the course which probably ought to be adopted, for the cause was submitted to the jury as a whole, hence should be withdrawn from it before further re-examination of the juror.\(^{24}\) The mere fact of the withdrawal of the submission of the cause should not, however, be deemed to represent a discharge of the jury, except in those cases where the withdrawal occurs in the absence of legal necessity. Since the discharge of the jury is normally considered a breakdown of its body, impeaching the organized identity thereof,\(^{25}\) it would seem that the events which transpired in the instant case did not constitute a discharge of the jury. In fact, the defendant was tried by the identical jurors whom he had voluntarily accepted and who had been sworn to try the case; the organized identity of that body was not impeached;\(^{26}\) there was not even a separation. At most, an irregularity occurred,\(^{27}\) which was

\(^{20}\) 163 Ark. 103, 259 S. W. 6 (1924).

\(^{21}\) This procedure, however, represents an anomalous situation since, in the absence of a statute to the contrary, the character of juror can scarcely be said to attach while the right to challenge remains. *State v. Hasledahl*, 2 N. D. 521, 52 N. W. 315 (1892); *Nevada v. Pritchard*, 16 Nev. 101 (1881).

\(^{22}\) That the discharge of a juror and substitution of another may not be done upon the *ex parte* order of the court without a judicial hearing at which defendant and his counsel are present, see *Upchurch v. State*, 36 Tex. Cr. Rep. 624, 38 S. W. 296 (1896).

\(^{23}\) The converse would obviously be that, if the discharge of the juror was not from legal necessity, a breakdown of the jury would have occurred, equivalent to an acquittal.

\(^{24}\) *Kurtz v. State*, 145 Ind. 119, 42 N. E. 1102 (1896).

\(^{25}\) *Lewis v. State*, 121 Ala. 1, 25 So. 1017 (1899).

\(^{26}\) In *Lewis v. State*, 121 Ala. 1, 25 So. 1017 (1899), after the jury was impaneled and sworn, the court told one juror to stand aside but afterwards ordered him to resume his place in the box. Held: no double jeopardy, but at most an unprejudicial irregularity.

\(^{27}\) *Lovato v. New Mexico*, 242 U. S. 199, 37 S. Ct. 107, 61 L. Ed. 244 (1916).
brought about by an error which did not prejudice the defendant in the slightest. It would seem, then, that the plea of double jeopardy should have been rejected.

Keeping within the bounds of established legal reasoning, yet with a view to solving a practical problem which could be common to any trial court, and without desiring to violate the defendant’s constitutional right to be placed but once in jeopardy, the solution would seem to be that if, after the jury is impaneled and sworn, there arises some question as to the competency or qualifications of a juror, a preliminary hearing should be held by the court to determine if legal cause exists for the removal of the juror. If such legal cause is found, the court should entertain a motion, if such be made, or should, upon its own motion, withdraw the submission of the cause from the jury, with a view to permitting a challenge of the juror on his renewed voir dire examination. If, upon the granting of the motion to withdraw the submission, a challenge is not forthcoming from either party, the court should, in order to prevent a re-impaneling and re-swallowing of the same juror, discharge the juror and substitute another in his stead on the court’s own motion. In that way, it would be possible to obviate any claim that there was no legal necessity for setting the submission aside. That method would also prevent possible recourse to a plea of double jeopardy for legal cause for the nullification of the first purported trial would then exist.

R. K. Hoffman

Divorce—Alimony, Allowances and Disposition of Property—Whether or Not the Annulment of a Second Marriage Operates to Revive an Earlier Obligation to Pay Alimony—Litigation in the case entitled Sutton v. Leib provided the federal judiciary with an opportunity to determine several important legal questions bearing on the effect to be given to a remarriage and the subsequent annulment thereof on a prior decree directing the payment of alimony. Plaintiff and defendant therein had been lawfully married in Illinois in 1925 but had been divorced in Illinois, in 1939, under a decree which provided for the payment of alimony in monthly installments, to plaintiff by defendant, for “so long as plaintiff shall remain unmarried.” Subsequent to the divorce, plaintiff established a residence in New York but, in 1944, had married one Henzel while in Nevada. That marriage occurred on the same day that Henzel

28 See, for example, Ill. Const. 1870, Art. II, § 10.
1 — U. S. —, 72 S. Ct. 398, 96 L. Ed. (adv.) 352 (1952), reversing 188 F. (2d) 766 (1951), which had affirmed 91 F. Supp. 337 (1950), but on other grounds. Frankfurter, J., wrote a concurring opinion.
had been awarded an uncontested divorce in the last-mentioned state. Henzel and the plaintiff immediately returned to New York and the defendant, plaintiff's first husband, upon learning of the marriage, ceased making payments under the alimony decree. Shortly after plaintiff and Henzel had returned to New York, Henzel's first wife filed a suit against him for separate maintenance and charged that the Nevada divorce he had obtained was null and void. Plaintiff thereupon promptly left Henzel and instituted her annulment action on the ground that, as Henzel's first marriage had remained valid in New York, her marriage to him was void ab initio. The New York court, in due time, treating the Nevada divorce as invalid, granted an annulment of the Nevada marriage of plaintiff and Henzel. Plaintiff then brought action in a federal district court located in Illinois, relying on diversity of citizenship, to recover the allegedly accrued payments of alimony for the period from the date when defendant ceased making regular payments to a date in 1947 when plaintiff had validly married still another person.

The trial court entered a summary judgment for defendant on the basis of a purported settlement and release.\(^2\) On appeal, the United States Court of Appeals for the Seventh Circuit affirmed the result but upon the ground that the validity of the Nevada remarriage turned on the validity, in Nevada, of the antecedent Nevada divorce which Henzel had obtained from his New York wife. It assumed that, in the absence of direct attack thereon, the Nevada decree was valid and binding in the state where it was rendered,\(^3\) hence required recognition of the subsequent marriage under the established rule that a marriage is to be deemed valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place have been complied with.\(^4\) On certiorari, the United States Supreme Court reversed on the basis that the lower courts had failed to accord the proper degree of full faith and credit to the New York annulment decree. It remanded the case so as to give the lower federal court an opportunity to determine the state of the Illinois law as to the effect to be given to an annulment of a purported second marriage upon an earlier decree providing for the payment of alimony as long as the alimony recipient remained unmarried. It is presumed that the case is, therefore, still pending to await a determination of that issue.

The problem so presented should be of interest not only in Illinois

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\(^2\) See 91 F. Supp. 937 (1950). The trial court recognized the possibility of a full faith and credit problem relating to the effect to be given to the Nevada divorce and the New York annulment, but did not deem it necessary to decide the question.

\(^3\) Note, in particular, 188 F. (2d) 766 at 768.

\(^4\) Restatement, Conflict of Laws, § 121.
but also in other states which have, by statute,\(^5\) incorporated the tenor of the instant decree regarding cessation of the obligation to pay alimony upon remarryment into all divorce decrees, at least by implication if not by express language.\(^6\) It would seem to be clear that, in any decree pronounced subsequent to the enactment of such a statute and where there is no question of the validity of the remarriage, the alimony obligation ceases with the remarriage. In fact, Illinois courts have held it to be mandatory that alimony should cease,\(^7\) even though the parties may have contracted otherwise,\(^8\) for the local statute has been said to be no more than a codification of prior cases on the subject.\(^9\) Assuming such to be the case, it would appear that a solution to the problem of the effect to be given to an annulment of a later marriage ought also to be found in prior cases, if any such exist, on the theory that they, too, have been codified into statutory form.

The precise question appears to have been presented to the Illinois Appellate Court for the First District in the case of *Lehmann* v. *Lehmann*.\(^{10}\) In that case, the parties had been divorced in 1915 under an Illinois decree providing that, in the event that plaintiff should remarry, payments of alimony for her support should cease. Three months later, plaintiff contracted a marriage with one Quintard in New Jersey. She cohabited with Quintard for a period of about fifteen months in New York and in Maine and then returned to Illinois where she sued to annul her marriage to Quintard on the ground that it had been contracted in violation of an Illinois statute which then forbade remarriage within one year following a divorce.\(^{11}\) The marriage was duly annulled by the Illinois court. Lehmann, upon learning of the remarriage, had ceased making alimony payments to plaintiff in the belief that her remarriage had brought an end to his obligation. Following the annulment, plaintiff sued to force Lehmann to pay her the regular alimony payments called for by the


\(^6\) Adler v. Adler, 373 Ill. 361, 26 N. E. (2d) 504 (1940), cert. den. 311 U. S. 670, 61 S. Ct. 29, 85 L. Ed. 430 (1941).

\(^7\) Miller v. Miller, 317 Ill. App. 447, 46 N. E. (2d) 102 (1943).

\(^8\) Banck v. Banck, 322 Ill. App. 369 at 376, 54 N. E. (2d) 577 at 581.

\(^9\) 225 Ill. App. 513 (1922).

\(^10\) Laws 1905, p. 194, repealed by Laws 1923, p. 327, provided in substance that in every case in which a divorce had been granted neither party should marry again within one year from the time when the decree was granted, and that if either of the parties did remarry within such one-year period, such marriage should “be held absolutely void.” See note to Ill. Rev. Stat. 1951, Vol. 1, Ch. 40, § 2.
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divorce decree. The trial court found that while the Quintard ceremony may have been valid in New Jersey it was clearly void in Illinois, was actually no marriage, that petitioner had not remarried within the meaning of the terms used in the divorce decree, and that she had not forfeited her right to alimony payments. The Appellate Court, admitting that plaintiff's marriage would not have been valid under Illinois law, treated the marriage as valid in New Jersey, as well as valid in New York and Maine where plaintiff had resided with Quintard, and was a remarriage as contemplated by the words of the divorce decree. It noted that, if plaintiff were to be allowed to recover alimony for the period she had cohabited with Quintard, she could have continued to so cohabit with him while being also entitled to receive the regular periodic alimony payments under the decree. In that regard, it quoted from the Illinois case of Stillman v. Stillman, where it had been said that it was "unreasonable that she should have the equivalent of an obligation of support by way of alimony from a former husband, and an obligation from a present husband for an adequate support at the same time." According to that court, it was "her privilege to abandon the provision the decree of the court made for her support under the sanctions of the law, for another provision for maintenance which she would obtain by a second marriage." When she had done so, however, the law would "require her to abide by her election." The law of Illinois, at that time, seemed to be established on the point that an annulment of a remarriage would not operate to revive the earlier alimony obligation.

Some seven years later, the New York Court of Appeals, in the case of Schleicher v. Schleicher, dealt with much the same type of problem. The parties there had been married in 1908, separated in 1923, and had been divorced under a Nevada proceeding in 1924. The separation agreement had provided that the husband would pay a stated sum to his wife for her support and maintenance until she remarried. She did, in 1924, marry one Hannum, but this later marriage was annulled in New York, in 1927, by reason of Hannum's insanity. Here, also, the former husband had stopped making the stipulated payments of support money, a form of alimony, upon his former wife's remarriage. The plaintiff, following the annulment, contended that her right to payment had been revived when the second marriage was declared void ab initio. The court so held, although it divided over the point of the extent of the former husband's

12 The provisions of the Uniform Marriage Evasion Act, Ill. Rev. Stat. 1951, Vol. 1, Ch. 89, § 19, appeared to have been inapplicable.
13 99 Ill. 196 (1881).
14 99 Ill. 196 at 202.
obligation. Judge Cardozo, writing for the majority, indicated that the particular marriage was voidable, not void, in its inception but that the annulment, when decreed, put an end to the marriage from the beginning. Nevertheless, the majority felt that while the plaintiff should be allowed to recover support for the period after the marriage had been annulled, nothing should be granted for the period during which she had been supported by her second husband. Principal reliance was placed on two English cases. It was the opinion of the minority that since the marriage was void from the beginning, under the doctrine of relation back, classed by the majority as an inapplicable legal fiction, the plaintiff should be entitled to recover for the entire period during which her first husband had failed to pay.

Except for these two cases, there would appear to be nothing in the American reports on the particular question, for the recent Louisiana case of Keeney v. Keeney, based on a similar fact question, turns on the fact that, in that state, alimony is considered more in the nature of a pension than a perpetuation of the husband's duty to support his former wife, hence is to be deemed cut off even though the remarriage should be later annulled. Some uncertainty may have been engendered in the law of Illinois, however, by the later Illinois case of People ex rel. Byrnes v. Retirement Board, also decided by the Appellate Court for the First District, as it seems to have adopted the New York rule. The case arose when a fireman's widow applied to the retirement board to be reinstated on the pension roll following the annulment of her second marriage. The Appellate Court, approving views expressed in the Schleicher case, decided that the annulment put an end to the remarriage from the beginning, rather than from the time of its dissolution, as would be the case in the event of a divorce. Finding that the remarriage had been effaced as if it had never been, the court ordered the widow restored to the pension roll "on the footing of its nullity," but declared that since this was a pension, it had no authority to direct the payment of the pension for the period of time during which the widow had been living with, and had been supported by, her second husband.

It is worthy of note that the court treated the Byrnes case as being one of first impression, for it appears to have approved a contrary foreign decision without knowledge of the fact that there might have been a prior

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17 211 La. 585, 30 So. 549 (1947).
18 272 Ill. App. 59 (1933).
19 272 Ill. App. 59 at 67.
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Illinois case in point. It might, however, be said that the Byrnes case, approving the New York view, is not really controlling on the point here under consideration as it deals with a pension question. If so, anything there decided would be dicta for the purpose of the instant problem, leaving the Lehmann case, never specifically overruled, to stand as the current Illinois view as to alimony matters. Technical distinctions do exist between these two Illinois cases for, in the first, the court ruled on the effect to be given to an annulment of a remarriage in relation to the obligation to pay alimony, a substitute for the husband's legally imposed obligation to support his former wife, while in the second case it passed upon the effect to be given a similar annulment as it related to the granting of a pension to the widow of a civil servant. When it is remembered that such a pension is a "bounty of the government, which it has the right to give, withhold, distribute, or recall at its discretion," the basis for distinction is made more apparent.

Even if no distinction existed, it could be said that the Byrnes case should not be followed for it erroneously rests on a decision which itself is based on error. Judge Cardozo, in the Schleicher case, had expressed the opinion that his views were justified by cases in which bequests of income were to be paid until remarriage. He referred to the English cases of Matter of Wombell's Settlement and In re Garnett. Again, an examination of these two cases would reveal that they are not authority for the position taken. They were, rather, cases in which it was decided that if a father should make a settlement of a sum of money upon his son, or upon his daughter's intended spouse, to be delivered upon the celebration of the marriage, such settlement could be recovered in the event the marriage should subsequently be annulled. The obvious failure of consideration for such a settlement would justify that result, but the instant problem involves no elements of contractual consideration nor the failure thereof.

On the basis of applicable case law alone, then, it would appear that the Illinois Appellate Court decision in the Lehmann case should control the rights of the parties in the Sutton case. If a new, and authoritative, Illinois decision on the point should be necessary, in preference to having

20 Examination of the brief filed by counsel for the retirement board reveals that the case of Lehman v. Lehman, 225 Ill. App. 513 (1922), was not cited, nor was the theory of that case explored. Counsel relied principally on the claim that the right to be restored to the pension rolls had been taken away by statute when the widow remarried and that there was nothing in the statute to authorize a restoration to the pension rolls.


22 [1922] L. R. 2 Ch. 298.

the state of the Illinois law determined by a federal court, a simple method is available to that end.\textsuperscript{24} It would seem, however, that, as stated in the Stillman case, the plaintiff had the "privilege to abandon the provision the decree of the court made for her support under the sanctions of the law for another provision for maintenance which she would obtain by a second marriage."\textsuperscript{25} Having exercised the privilege, she should be required to abide by her election.

The decision of the Supreme Court, however, appears to have opened the door to the creation of still further ambiguities in law. It is well known that "migratory" divorce has proved to be a plague to the courts. There is now added a threatened plague stemming from the "migratory" annulment. If jurisdiction to annul a marriage were limited to the state where the marriage was celebrated, only the courts of one state would be concerned with the problem and, until annulment had occurred there, other courts would be free to act on the basis of the record. It must be admitted that courts have, without giving too much thought to the matter, directly or inferentially, recognized a jurisdiction in the court of domicile to annul a marriage celebrated elsewhere, treating the question as being identical with that involved in a divorce proceeding,\textsuperscript{26} but to be dealt with according to the law of the forum rather than by the \textit{lex loci contractus}.\textsuperscript{27} There has, however, been a respectable dissent on the ground that the analogy is not sound.\textsuperscript{28}

Annulment, like divorce, is designed to operate on a status, hence is a proceeding \textit{in rem} and would require that the court should have jurisdiction over the res. It is conceivable that an aggrieved spouse could, by change of domicile, move the status of marriage, an admittedly valid and

\textsuperscript{24} Justice Frankfurter, in his concurring opinion in the instant case, offered the thought that the Court of Appeals should hold the case in abeyance until the parties requested a declaratory judgment from the Illinois Supreme Court. A second suggested method would be to dismiss the case on the basis that the necessary jurisdictional amount is lacking. Even under the view most favorable to the plaintiff, she would be entitled to back alimony only from September, 1947, the date of the New York annulment, to November, 1947, the date of her marriage to Sutton. The amount thereof would be inadequate in a diversity of citizenship case: Howard v. Jennings, 141 F. (2d) 193 (1944). Suit could then be left to state court action.


\textsuperscript{26} Anonymous v. Anonymous, — Del. —, 85 A. (2d) 706 (1952).

\textsuperscript{27} Goodrich, "Jurisdiction to Annul a Marriage," 32 Harv. L. Rev. 806 (1919), contains an excellent theoretical treatment of the question. See also Dodd, "Annulment of Marriage," 23 Ill. L. Rev. 75 (1928). Walker, J., in his dissent in Roth v. Roth, 104 Ill. 35 (1882), at pp. 49-50, indicated that a foreign court would lack the power "to construe and give authoritative judgment against the validity of contracts made under our laws" and suggested that an Illinois court would "not be bound by the decree of nullity."
existing thing in law, into another state for the purpose of bringing that status before a court sitting there in order to secure its destruction by divorce. It is, likewise, theoretically possible to accomplish the same thing with respect to a voidable marriage for purpose of annulment inasmuch as it could be said that, until annulment has been granted, a "thing" exists, even though in imperfect fashion. Where, however, the charge is made that the purported marriage is void, and has been so from the beginning, one might well ask what "thing" there is to be carried across state lines into the adjoining jurisdiction to be there dealt with? Actually, the only "thing" in existence, the only "thing" to be destroyed, is a purported public record of a marriage and that is to be found at the place of celebration and there only. By analogy to a suit to nullify the effect of a forged but recorded deed to land, the annulment proceeding, in the last mentioned instances at least, should be deemed local rather than transitory in character.29

To compound the confusion, the United States Supreme Court has now declared that when the domiciliary state, possessing no more than control over the parties, has pronounced a decree of annulment relating to an allegedly void marriage occurring in a sister state, which marriage might well have been declared valid at the place of celebration had the annulment proceeding been there instituted, other states must give full faith and credit to the annulment decree. If bound to recognize the uncancelled public record of the one state, yet forced to apply the annulment decree of the other, a third state would stand in much the same position as the proverbial innocent bystander, to-wit: sure to get hurt but unable to do much about it.

A. GELLER

RELEASE—CONSTRUCTION AND OPERATION—WHETHER OR NOT RELEASE, GIVEN TO ONE TORT FEASOR COVERING STATUTORY LIABILITY FOR WRONGFUL DEATH, OPERATES TO RELEASE ANOTHER FROM CAUSE OF ACTION ARISING FROM VIOLATION OF "DRAM SHOP" STATUTE—The Appellate Court for the Fourth District, in the case of McClure v. Lence,1 was faced with the problem as to whether or not a release given to one for a cause of action resting on the Wrongful Death Act2 would operate to bar a subsequent

29 In O'Brien v. Eustice, 298 Ill. App. 510, 19 N. E. (2d) 137 (1939), it was indicated that it would be necessary to add the proper public official as a party defendant if the purpose of the annulment proceeding was to secure nullification of the public record of the purported marriage. The implication of that holding would be that, if such public official were the official of another state, it would be necessary to begin suit at the place of his official residence, otherwise it would be impossible to obtain jurisdiction over him.


2 Ill. Rev. Stat. 1951, Vol. 1, Ch. 70, § 1 et seq.
suit, for the same injury, against another based on the Illinois Liquor Control Act.³ The case was one in which several minors, patrons of the defendant’s tavern, had allegedly there become intoxicated. After leaving the tavern, the car in which they rode, driven by one of the minors, became stalled on a railroad crossing, was struck by an approaching train, and three of the passengers were killed. The legal representatives of the deceased automobile passengers gave full and binding releases to the railroad in question and thereafter sued the tavern keeper for damages arising from a violation of the liquor control law.⁴ The defendant, among other things, pleaded the releases given the railroad as a special defense,⁵ but that defense, on motion, was stricken on the theory that the causes were distinct and arose under different statutes. Judgment was given in favor of the several plaintiffs after trial but, on appeal by defendant, the Appellate Court reversed and remanded the cause with a direction to overrule the motion to strike the special defense relating to the releases.

While the foundations for the proposition that a release given to one joint tort feasor should operate to release the others are in some state of confusion,⁶ the doctrine is, nevertheless, a practically unanimous one in the United States.⁷ There is, however, much confusion over the problem of who should be treated as joint tort feasors for this purpose and the conflict is apparent in the Illinois cases on the subject. The earliest and foundation case in this state would appear to be that of Chapin v. Chicago & Eastern Illinois Railroad Company.⁸ Counsel for the plaintiff therein had contended that a release given to one of the parties did not bar action against the defendant as they were not joint tort feasors. The court, holding for the defendant, stated: “Whether they were joint tort feasors or not, we do not deem it important in the view we take of the case. It is enough if they were both liable for the same injury.”⁹ While the words quoted were probably dicta, since the plaintiff’s injuries had been caused in a collision between two railroad trains and the two carriers would be joint tort feasors under any construction given to the phrase “joint tort feasors,” at least one later Illinois case has followed the reasoning there expressed where the several causes, although arising at different periods

³ Ibid., Ch. 43, § 94 et seq.
⁴ Ibid., Ch. 43, § 135, provides for a civil remedy for damages caused by an intoxicated person.
⁵ Ibid., Vol. 2, Ch. 110, § 167(4), lists a release as being one of the affirmative defenses there mentioned.
⁶ See opinion of Rutledge, J., in McKenna v. Austin, 134 F. (2d) 659 (1943).
⁸ 18 Ill. App. 47 (1885).
⁹ 18 Ill. App. 47 at 50.
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of time, were related and rested on common law principles of negligence so as to be within the classification of a "joint" tort. The doctrine has also been applied by the Appellate Court for the Second District, in *Manthei v. Heimerdinger*, to a case involving a release given to one for a cause resting on common law negligence producing personal injury but deemed to operate as a bar to a suit against a tavern keeper, based on a violation of the liquor control law, for conduct leading up to the injury. The court there cited the Chapin case in support of the idea that it is relatively unimportant whether the parties are technically joint tort feasors so long as they are liable for the same indivisible injury arising out of a single accident.

Another line of Illinois cases, however, beginning with the decision in *Scharfenstein v. Forest City Knitting Company*, would indicate that it is necessary, for the principle of release to operate, that the parties be, in fact, "joint" tort feasors. The plaintiff there had released a railroad from its liability to him predicated on the Federal Employer's Liability Act and had thereafter sued a corporation which had negligently permitted its agents to pile dirt on the railroad tracks. The case may be weakened somewhat by the fact that the instrument was probably no more than a covenant not to sue, but the court did say that, even if it could be construed to be a release, the plaintiff's cause of action, resting on a distinct tort, would not be barred. That view has been followed in other cases, including one in which a covenant not to sue for wrongful death has been treated as inadequate to bar a suit based on the "Dram Shop" statute. In those cases, the court has looked for, and found, a distinct basis for liability as to each of the parties involved.

Faced with these conflicting decisions, the Appellate Court in the instant case chose to follow the first of these views. As the Chapin case has never been overruled, and as those cases which seem to be contrary do not reject the theory thereof but ignore it, the result attained would seem

10 In Guth v. Vaughan, 231 Ill. App. 143 (1923), for example, the plaintiff was injured in an automobile accident but the injuries were aggravated by the malpractice of a physician. A release given to the automobile driver was held to bar an action against the physician. The case of Aiken v. Insull, 122 F. (2d) 746 (1941), certiorari denied 315 U. S. 806, 62 S. Ct. 638, 86 L. Ed. 1205 (1942), states that the Illinois law is that tort feasors are released if "they were both liable for the same injury." It cites Chapin v. C. & E. I. R. R. Co., 18 Ill. App. 47 (1885), as authority.


12 253 Ill. App. 190 (1929).

to be the sounder one. If it is the purpose of the law of torts to assure no
more than compensation to one who has been injured by the acts of others,
then one who has received full compensation from one of the several
wrongdoers, or who has entered into a contract from which it may be
presumed that he has received full compensation, should have no right to
further judicial action for the purpose of the law has been satisfied. The
amount of recovery should not, ordinarily, be made to depend on the
fortuitous circumstance that in one case the bases for the suit rest on
different statutes and in the other on different common law theories of
liability. The fact that a death has ensued should not, alone, be enough to
change the outcome which would have been attained had the victim sur-
vived and given a release of his common law cause of action for personal
injuries. The same should be true as to a release given on a cause resting
on the "Dram Shop" statute for, although the statute creates a separate
and distinct right of action unknown to the common law, the right of
recovery rests on the fact of injury and not merely on the sale of liquor.

If the legislature had intended that the statute should serve to provide
the basis for an additional recovery, even though full compensation has
already been received from another whose acts concurred in producing the
death or injury, it should have expressly so stated. In the absence of such
a statement, a court should not presume that the statute derogates against
the common law doctrine that a person should have but one recovery for a
single injury.

W. J. Moore

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14 Holton v. Daley, 106 Ill. 131 (1883); Crane v. Chicago & Western Indiana
R. R. Co., 233 Ill. 259, 84 N. E. 222 (1908). The reasoning of these cases appears
to have been overlooked in Hyba v. Horneman, Inc., 302 Ill. App. 143, 23 N. E. (2d)
564 (1939), where the two statutory claims grew out of the same wrongful act.
It is true, however, that the case involved only a covenant not to sue, hence there
could be no presumption of full satisfaction.

RECENT ILLINOIS DECISIONS

AUTOMOBILES—INJURIES FROM OPERATION, OR USE OF HIGHWAY—WHETHER OR NOT OWNER OF PARKED AUTOMOBILE WHO LEAVES KEY IN IGNITION IS RESPONSIBLE FOR INJURIES INFLECTED BY THIEF WHO STEALS CAR—The Appellate Court for the Third District of Illinois, in the case of Cockrell v. Sullivan,1 considered whether or not an automobile owner who fails to comply with the Illinois Motor Vehicle Act2 by permitting his car to stand unattended without first stopping the engine, locking the ignition, and removing the key, is civilly liable for injuries inflicted on another by a thief fleeing therein. Plaintiff therein, basing her property damage suit on defendant's violation of the statute mentioned and under pleadings drawn to exploit views expressed in an earlier Illinois case, obtained a verdict and judgment in her favor. On appeal therefrom, the judgment was reversed when the court in question refused to follow the decision of the majority of the Appellate Court for the First District in the case of Ostergard v. Frisch.3

Since the holding in the instant case is directly contrary to the result attained in the Ostergard case, it is desirable to review the bases for the earlier decision. That case had relied on views expressed in the Massachusetts case of Malloy v. Newman4 and a holding of a court of the District of Columbia in Schaff v. R. W. Claxton, Inc.,5 which cases took the view that a violation of a statute of the kind in question was negligence as a matter of law, making it unnecessary to inquire into the element of proximate causation. The first of these cases, however, was overruled not long after the decision in the Ostergard case when the Massachusetts court, in Galbraith v. Levin,6 rejected the concept that a penal violation of a statute regulating motor vehicles was to be deemed negligence per se and the conclusive proximate cause of an injury. The last expression on the point emanating from Massachusetts accords, in substance or effect, with similar holdings in New York,7 Minnesota,8 and Louisiana.9 It would also appear to coincide with the available legislative history relating to the Illinois statute, a history tending to indicate that the underlying legislative purpose

4 310 Mass. 269, 37 N. E. (2d) 1001 (1941).
9 Maggiore v. Laundry and Dry Cleaning Service, 150 So. 394 (La. App. 1933).
was one toward traffic regulation rather than to design an anti-theft measure.\textsuperscript{10}

It is understood that the Appellate Court for the First District will have an opportunity to reconsider the holding in the Ostergard case when it passes on the appeal taken in the case of \textit{Ney v. Yellow Cab Company}.\textsuperscript{11} It may, and probably should, overrule its earlier holding in the light of the instant decision and the changes which have occurred in the precedents previously relied on. If so, the law of Illinois on the point will once again become uniform throughout the state. If it does not, and prefers to reason from the premise that the injured person should be permitted to recover from the most accessible of the persons involved, even though that person's conduct can hardly be said to amount to actionable negligence within customary concepts relating to negligence and proximate cause, there would be every reason to support the issuance of a certificate of importance so as to get the problem before the Illinois Supreme Court for a conclusive settlement of the issue.

\textbf{BURGLARY — OFFENSES AND RESPONSIBILITY THEREFOR — ELEMENTS INVOLVED IN THE CRIMINAL OFFENSE OF POSSESSION OF BURGLAR TOOLS—}

The recent case of \textit{People v. Taylor}\textsuperscript{1} afforded the Illinois Supreme Court with its first opportunity to construe a section of the Illinois Criminal Code enacted over seventy-five years ago. The case was one in which the defendant, found strolling at night in a neighborhood where a series of burglaries had been recently committed, was stopped by police officers for questioning and, upon search, was found to have in his possession certain tools which could have been used to break and enter.\textsuperscript{2} Defendant was thereupon arrested and indicted on a charge of violating a statute making it unlawful to have possession of tools of that character with the felonious intent to break and enter.\textsuperscript{3} Upon trial before a court acting without a jury, defendant admitted that he had been convicted of burglary over seventeen years prior to the trial, had served a term therefor, and had been out of regular employment for the past two years. He explained, however, that he had been using the tools on a temporary job and was returning home

\textsuperscript{10} See Legislative Reference Notes re H. B. No. 474, 1919, p. 623, and re Uniform Traffic Act, 1935. It should be noted that Ill. Rev. Stat. 1951, Vol. 2, Ch. 95\textsuperscript{1/2}, § 189(a), is not identical with the proposed Uniform Act Regulating Traffic on Highways, 11 U. L. A., § 52, p. 50, although it embodies some of the ideas expressed in the uniform statute.

\textsuperscript{11} Case No. 45580, Appellate Court for the First District, now pending on appeal.

\textsuperscript{1} 410 Ill. 489, 102 N. E. (2d) 529 (1951).

\textsuperscript{2} The tools consisted of a screw driver, a pair of pliers with the handles filed down so they could be used as a pry, and a pencil flashlight, the glass lens of which was covered with black tape so that it could throw only a pin-point beam of light.

\textsuperscript{3} Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, § 87.
therefrom at the time of his apprehension. The defendant’s evidence was corroborated by the testimony of other witnesses. The prosecution relied principally on evidence that the tools in question were of the type used by burglars. Upon conviction and sentence for violation of the statute, defendant prosecuted a writ of error to review the judgment and convinced the Supreme Court, as a matter of law, that the judgment should be reversed without remandment.

Noting that the statute had not been considered in any prior proceeding coming before it, the court indicated the necessary elements of the crime in question to be (1) the adaptation and design of the tool or implement for breaking and entering, (2) the possession thereof by one with knowledge of its character, and (3) the intent to use or employ such tool or implement in breaking and entering. The first and second of these elements were said to be apparent from the evidence in the case. The first because it was not necessary that the tools be peculiar to the trade of burglary, for even common and lawful tools, adaptable for legitimate use, would suffice if possessed with an intent to use them unlawfully for the purpose of burglary; the second because the articles were found on the defendant’s person. The difficult point came in relation to the third element, the one dealing with the intent.

In that regard, the court pointed out that an intent to break into a particular building was not necessary as an intent to utilize the tools in any burglarious entry would be sufficient. In the absence of direct evidence on the point, it was said that circumstantial evidence would be admissible, and that no distinction would be made between direct and circumstantial evidence insofar as the weight and effect thereof was concerned. By way of illustrating the types of circumstantial evidence which might be sufficient to support a conviction, the court designated such matters as the fact that the defendant had been a burglar by occupation for many years; had been known to be associated with burglars; had resisted arrest or attempted to flee; or had been apprehended with the tools secreted in his clothing, any of which might tend to establish the

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7 On the point of the use of circumstantial evidence to demonstrate the presence of intent, see People v. Weiss, 367 Ill. 580, 12 N. E. (2d) 652 (1938).
8 People v. Buskievich, 330 Ill. 532, 162 N. E. 196 (1928).
intent element. It found, however, that the defendant in the instant case met none of these tests hence it could not be said, as a matter of law, that he had intended to use the tools in a burglary. The prior conviction for burglary was ruled out on the ground that there had been no showing of any continuation of felonious habits or association with criminals following defendant’s release from the penitentiary. As defendant had not resisted arrest, had carried the tools in normal fashion, and had an appropriate explanation for his presence on the scene, it was held the evidence was insufficient to meet the burden of proof in relation to intent, hence the conviction had to be reversed.

The opinion, by placing stress on the fact that it would usually be necessary to place reliance on circumstantial evidence to support a conviction for violation of the statute in question, appears to have adopted something of the rationale used by the Supreme Court of Michigan in the case of People v. Howard. That court wrote that the intent, “being something entirely within the mind” of a defendant, would typically have to be established without his admission or confession and entirely from circumstances, hence there “should . . . be accorded the people [prosecution] more than usual latitude in the proof looking towards intent.” While this view may be said to be the majority one among those states which have had occasion to construe similar statutes, it would appear to be too liberal in character. Admitted that circumstantial evidence must usually be used in such cases, it is believed that the evidence should point more directly toward a plan to commit a present crime of burglary than could be inferred from such things as the fact that a given defendant had associated with burglars or had previously been convicted of burglary. While the instant case eliminates the right to use the latter form of evidence, particularly when the earlier conviction is remote in point of time, it loses some of its validity by appearing to endorse the first of these forms of proof.

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13 Any inference to be drawn from the possession of a “peep flashlight” was said to be rebutted by defendant’s testimony that it was needed by one, such as himself, when doing close work while afflicted with poor eyesight.

14 73 Mich. 10, 40 N. W. 789 (1888).

15 73 Mich. 10 at 12, 40 N. W. 789 at 791.

1 410 Ill. 596, 102 N. E. (2d) 806 (1952).

the legislature provided that real or personal property may be awarded by the court as alimony to wife or husband. The trial court there had entered a decree granting plaintiff a divorce and awarding her one-half of the defendant’s real property, consisting of a substantial farm, as alimony in gross. Of the total acreage, a major portion had been conveyed to the defendant by his mother but the remainder had been purchased by the defendant with money derived from farming operations. A mortgage on the property had been substantially reduced during the period of ownership but a balance still remained due thereon. The plaintiff’s allegations tended to show that this reduction had been accomplished by the joint efforts of both plaintiff and defendant in farming the realty. The scope of the plaintiff’s assistance in working on the farm, in addition to the usual household duties, included such things as the cultivation of the fields. This fact appears to have influenced the trial court to award the plaintiff one-half of the realty as alimony in gross. On direct appeal to the Supreme Court as a freehold was involved, the defendant relied heavily on the fact that the property had come almost entirely from his mother and upon expert testimony offered at the trial to the effect that the property could not profitably be farmed if divided. The Supreme Court, despite the 1949 amendment, reversed the alimony ruling and remanded the cause with directions to enter a decree awarding the plaintiff such periodic alimony for her support as the chancellor should deem fair and equitable, but it denied the court authority to order a division of the real property.

Before the enactment of the 1949 amendment, courts only ordered a conveyance of realty in divorce actions, from one spouse to the other, where special equities were pleaded and proven by the party seeking such conveyance. The award of realty, in these instances, was made not on the basis of the statutory divorce jurisdiction of the court but rather upon the basis of the court’s inherent equity powers. Language, typical of the decisions prior to the amendment, is to be found in *Anderson v. Anderson* wherein the court, although refusing to order a conveyance, said: “Where, however, the wife has from equitable considerations, other and additional interests in her husband’s property than such as attach to her status as wife . . . for example . . . if the real estate represents joint earning, work, or savings of the parties, the court may properly, when dissolving the marriage relation, decree that the wife shall be vested with title in fee to such real estate.” The case of *Shekerjian v. Shekerjian*, one in which the court awarded a

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3 380 Ill. 435, 44 N. E. (2d) 54 (1942).
4 380 Ill. 435 at 440, 44 N. E. (2d) 54 at 57.
5 346 Ill. 101, 178 N. E. 365 (1931). The wife there had aided the husband’s business constantly and had helped in the accumulation of the estate for a period of over twenty years.
conveyance of realty, applies the theories expressed in the Anderson case and furnishes an excellent illustration of the prior practice on the subject.

It is to be noted that, in no decision before the 1949 amendment, did the courts successfully award realty as alimony in gross, except by agreement of the parties, without finding facts similar to those outlined in the quotation from the Anderson case. In fact, where awards were granted and sustained, they were based upon a showing of an equitable interest in the land not dissimilar to the interest which would be required to move equity to act to order a conveyance in situations other than those involving a dissolution of a marriage. It would seem, therefore, that the legislature, when enacting the 1949 amendment to the Divorce Act, had in mind the thought that the said amendment should give courts the power, in divorce actions, to make an award of realty as alimony, subject to the court's discretion, without the necessity of finding the existence of special equitable interests. The Supreme Court, however, in the instant decision, based its reversal of the trial court award of realty as alimony in gross upon the fact that insufficient equities had been shown to exist on behalf of the plaintiff.

As the language of the court is so completely in accord with the law stated in the Anderson case, one can only be led to the conclusion that the amendment will have no effect whatever, despite the action of the legislature, on the nature of the pleading and proof required to move the court to award a conveyance of realty in a divorce action. The emphasis on what would constitute a proper exercise of judicial discretion in such matters would seem to outweigh the legislative policy in providing for a complete settlement of all matters between the divorced spouses.

HABEAS CORPUS—JURISDICTION, PROCEEDINGS, AND RELIEF—WHETHER THE ILLINOIS SUPREME COURT WILL EXERCISE ORIGINAL JURISDICTION OVER HABEAS CORPUS PROCEEDINGS WHEN THE ORIGINAL PETITION PRESENTS AN ISSUE OF FACT—In the recent case of People ex rel. Jones v. Robinson, the Illinois Supreme Court was confronted with an original petition for

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6 See, for example, Byerly v. Byerly, 363 Ill. 517, 2 N. E. (2d) 898 (1936); Lipe v. Lipe, 327 Ill. 39, 158 N. E. 411 (1927); Walz v. Walz, 325 Ill. 553, 156 N. E. 828 (1927); Meighen v. Meighen, 307 Ill. 306, 138 N. E. 613 (1923).

7 The court in the instant case said: "The record fails to disclose any special circumstances, equities or reasons for splitting up the defendant's farm... The ordinary and better method of awarding alimony is by periodic allowances, payable at such intervals as may best suit the convenience of the husband and meet the demands of his wife." 410 Ill. 596 at 610, 102 N. E. (2d) 806 at 812. Italics added.

8 By way of contrast, see the decision in Glassman v. Glassman, — Ohio App. —, 103 N. E. (2d) 781 (1951), which affirmed a division of real property by way of alimony made pursuant to a statute comparable to the provision referred to in note 2, ante.

1 409 Ill. 553, 101 N. E. (2d) 100 (1951).
The relator, a prisoner in the state penitentiary, after having been released to Tennessee authorities, was subsequently arrested and returned to the Illinois penitentiary at which time he presented an original petition to the Supreme Court seeking liberty on the ground that his prior release, on a warrant of extradition issued upon the demand of the Governor of Tennessee, had operated as a waiver of any further jurisdiction by the Illinois authorities over his person. The allegation relating to the petitioner's release to the Tennessee authorities was expressly denied in respondent's amended return, and the basis for the writ was thus factually put in issue. The Supreme Court, on the record then before it, thereupon dismissed the petition and remanded the relator to the custody of the warden, holding that it would not exercise original jurisdiction where the original petition for habeas corpus and the return created an issue of fact which would have to be decided before the relator's right to release could be determined.

While, on its face, the result might appear to be a reasonable one, considerable difficulty is experienced to find the basis for it as no Illinois precedent can be found, except by way of dictum, and the constitutional provision would tend to indicate that an opposite result should have been reached. In view of the mandatory character of the language of the present constitution, and especially considering the fact that it superseded the permissive language which appeared in the 1848 Constitution, it would seem that the Supreme Court has been denied any discretion in the matter of acceptance or refusal of jurisdiction in any of those cases which the present constitution places within the sphere of the original jurisdiction of that tribunal. Notwithstanding this, the Illinois Supreme Court has consistently maintained that the mandatory "shall have jurisdiction" does not deprive it of a discretion in such matters and that original cases must still conform to certain requirements before it will take jurisdiction in such matters. Along that line, the court has always considered the presence of

2 Ill. Const. 1870, Art. VI, § 2, declares: "The supreme court . . . shall have original jurisdiction in cases relating to . . . habeas corpus, and appellate jurisdiction in all other cases."


4 People v. Loftus, 400 Ill. 432, 81 N. E. (2d) 495 (1948).

5 Ill. Const. 1848, Art. V, § 5.

6 Original jurisdiction in revenue cases is refused unless the controversy involves a public interest, is between a taxing authority and a taxpayer, and involves the collectability of the tax: North Chicago Hebrew Congregation v. Board of Appeals, 358 Ill. 549, 193 N. E. 519 (1934). Original jurisdiction in mandamus is taken only if the public interest is involved: People ex rel. Kocourek v. City of Chicago, 193 Ill. 507, 62 N. E. 179 (1901), and not even then if a fact issue is presented: People ex rel. Damron v. McCormick, 106 Ill. 184 (1883).
a disputed fact question in an original proceeding to be one of those characteristics which will operate to deprive it of its power to determine the case.7

Because the court has failed to elaborate on the point, it can only be supposed that the rule is an arbitrary one designed for the court's convenience alone, especially since the hearing on a petition for a writ of habeas corpus is essentially a summary one, to be conducted by the court without a jury, and there is no likelihood that the court would experience difficulties of the type which probably would be encountered if trial by jury were necessary.8 The court said it was "foreclosed from determining the issue of fact" raised by the case before it.9 That statement is without logical support, other than in the court's own self-imposed limitations, for the court does take testimony and receive other evidence, through the medium of a commissioner, when it hears original proceedings for disbarment or for contempt of court.10 True, there is no express statutory provision for the appointment of a commissioner to take testimony in reference to original petitions for habeas corpus, but the court has the power to appoint commissioners, if needed, under its authority to make and adopt appropriate rules,11 and it has used the services of commissioners in the past.12

There is no doubt that the circuit courts of the state are vested with an equivalent jurisdiction in habeas corpus matters,13 for the original jurisdiction of the Illinois Supreme Court is not exclusive, but any argument based on that fact would fail to sustain the position taken by the court. Under the constitution, it is the relator who is given the right to select the tribunal in which he will institute his proceeding. Considering the nature and the importance of the writ of habeas corpus, it would seem to be the right of the relator to have his case heard, not dismissed, and the arguments offered by the court to sustain its position are weak indeed. If the

7 See cases cited in notes 4 and 6, ante.
9 409 Ill. 553 at 556, 101 N. E. (2d) 100 at 101.
10 See, for example, In re McCallum, 391 Ill. 400, 64 N. E. (2d) 310 (1946), and People ex rel. Illinois State Bar Association v. People's Stock Yards State Bank, 344 Ill. 462, 176 N. E. (2d) 901 (1931).
12 It is true that the authority of the Illinois Supreme Court to utilize the services of commissioners to draft opinions in cases pending before it on review, a practice which existed from 1927 to 1933, was based on Laws 1927, p. 392, and the several renewals thereof. No similar statutory authority exists for the appointment of commissioners in other cases. Denial of the right to trial by jury, and to the utilization of the services of commissioners, in habeas corpus proceedings instituted in federal courts rests on 28 U. S. C. A. § 2243, formerly 28 U. S. C. A. § 461: O'Keith v. Johnston, 129 F. (2d) 859 (1942), cert. den. 317 U. S. 680, 63 S. Ct. 161, 87 L. Ed. 546 (1942).
court believes that it is truly powerless to act in the matter without the aid of enabling legislation, it should exercise its constitutional function by reporting that fact to the Governor so that he might incorporate the necessary recommendation in his message to the legislature.14

LIMITATION OF ACTIONS—LIMITATIONS AS AGAINST STATE, MUNICIPALITY, OR PUBLIC OFFICERS—WHETHER TIME LIMITATION PROVISIONS OF PROBATE ACT RELATING TO FILING OF CLAIMS ARE BINDING ON STATE—In the recent case of In re Bird’s Estate,1 the Illinois Supreme Court was faced with the problem of whether a nunc pro tunc order would be proper where the records of a probate court were entirely silent as to an allegedly lost claim. The decedent there had received public assistance from the Illinois Public Aid Commission pursuant to the Old Age Pension Act.2 After the nine-month period for filing claims against decedent’s estate had expired,3 the commission petitioned for leave to file a claim nunc pro tunc as a lost record. The probate court allowed the petition and it was upheld by the circuit court. On direct appeal to the Supreme Court, by reason of the fact that the public revenue was involved, that court also held the nunc pro tunc order proper.

The power of courts to restore records which have been lost, even though the court docket is silent on the subject, is supported by the case of Hickey v. Hickey.4 If the instant case decided nothing more than that it would be lacking in significance. The more important matter therein relates to the discussion of the question as to whether or not a state agency is bound by the time-limitation provision of the Probate Act. The court treated the issue as one involving the question of whether or not the particular statutory section amounts to a general statute of limitation which would be inapplicable to the state unless expressly declared to be applicable.5 While recognizing an apparent conflict, at least in phraseology, among its former decisions, the court held the case of Durflinger v. Arnold,6 based on an earlier statute, to be controlling. That case had reached the conclusion that the provision was not a general statute of limitation as it did not totally bar claims against a decedent’s estate but did, for example,

2 Ill. Rev. Stat. 1951, Vol. 1, Ch. 23, § 440—1, et seq. Section 440—4 thereof authorizes the filing of a claim to recover the amount expended for old age assistance.
3 Ibid., Vol. 1, Ch. 3, § 204.
4 295 Ill. App. 67, 14 N. E. (2d) 688 (1938).
5 Clare v. Bell, 378 Ill. 128, 37 N. E. (2d) 812 (1941).
6 329 Ill. 93, 160 N. E. 172 (1928).
allow the assertion of claims, after the expiration of the nine-month period, against heirs and distributees or against after-discovered and non-inventoried assets. Such being the case, the court indicated that the time-limitation provision in question was to be deemed no different than other substantive rules of law, applicable alike to the sovereign state and to private individuals. It may be noted, therefore, that the enactment of the present Probate Act has done nothing to change the law on the point.

MASTER AND SERVANT—THE RELATION—WHETHER OR NOT CONDONATION OF EMPLOYEE’S VIOLATION OF DUTY PREVENTS SUBSEQUENT DISCHARGE FOR SAME MISCONDUCT—The question of an employer’s right to discharge an employee for violations of duty, said to have been condoned with the employer waiving his right to discharge for such acts, was before the Appellate Court for the First District in the case of Schaffer v. Park City Bowl, Inc.1 Plaintiff there had been hired for one year to manage a skating rink on a written contract calling for a set wage plus a percentage of the profits. Two months after plaintiff entered upon his duties complaints reached the defendant from the patrons of the rink concerning the alleged wrongful acts. The defendant’s officers thereupon spoke to the plaintiff concerning these acts and plaintiff promised to conduct himself and the business properly thereafter. Plaintiff was allowed to continue in his employment for one month and was then barred from entering the premises and was discharged. On suit for breach of contract, defendant claimed the discharge was justified because of plaintiff’s previous misconduct. On trial without a jury, the lower court found for the defendant but, on appeal from that judgment, the Appellate Court reversed, holding that the retention of the plaintiff for one month after notice of the breach of duty amounted to a condonation and a waiver of the right to discharge for the prior misconduct.

Surprisingly enough, for an industrial and commercial state like Illinois, very few cases of condonation of contractual misconduct in relation to employment matters have arisen.2 The law is, however, well settled throughout the country that an employer may, by retaining an employee after violations of duty, condone the acts complained of and waive the right to discharge for those acts.3 But just what acts amount to condona-

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2 One possible reason may be the fact that, at least in large industries, matters of this character are usually covered by collective bargaining agreements and grievance procedures. Disputes arising thereunder, if not amicably adjusted, are typically resolved by arbitration rather than by litigation.
3 See, for example, Butterick Publishing Company v. Whitcomb, 225 Ill. 605, 80 N. E. 247, 8 L. R. A. (N. S.) 1004 (1907).
tion, or what time period must elapse before the employer can be said to have condoned the act, are situations which the court must face as the cases arise. The defendant claimed that an employer is entitled to overlook breaches of duty on the part of the servant, hoping for reformation, and if disappointed may then terminate the contract. That position had been taken by a New York court in the case of Gray v. Shepard,\textsuperscript{4} upon which the defendant relied, but the Appellate Court in the instant case, while agreeing with that doctrine, pointed out that it applies only when the employee continues, or repeats, the acts originally complained of as constituting a breach of duty. As the defendant in the instant case offered no proof of any additional wrongful acts on the part of the plaintiff from the time he was admonished until the time of his discharge, the rule of that case was held to be inapplicable.

While not laying down any set rule as to when retention will become a condonation and a waiver, the Appellate Court did indicate that a retention for one month after knowledge of the breach of duty was a sufficient time period under the prevailing facts. The case should, therefore, serve as a warning to employers that, although they need not discharge an employee immediately upon knowledge of his breach of duty, they had best not delay too long or they will be apt to find themselves being sued for breach of the employment contract.

\textbf{Workmen's Compensation—Proceedings to Secure Compensation—Whether Period of Limitation is Extended by Payment of Compensation from a Fund to Which Employer and Employee Have Contributed}—In the recent case of \textit{International Harvester Company v. Industrial Commission},\textsuperscript{1} the Supreme Court of Illinois had to decide the question of whether a claim for workmen's compensation had in fact been presented within the statutory period.\textsuperscript{2} The employee there concerned had sustained an injury during the course of his employment. During the period of his disability he applied for, and received, benefits from an employee's benefit association, one primarily established to provide compensation for those employees who might suffer an injury or an illness not covered by the Workmen's Compensation Act and supported by funds contributed by both the employer and its employees. More than a year after the date of

\textsuperscript{1}147 N. Y. 177, 41 N. E. 590 (1895).
\textsuperscript{2}1410 Ill. 543, 103 N. E. (2d) 109 (1951). Schaefer, J., wrote a dissenting opinion concurred in by Bristow and Hersey, JJ.
\textsuperscript{4}Ill. Rev. Stat. 1949, Vol. 1, Ch. 48, § 161, provides that an application for compensation must be made within one year from the date of injury or, where compensation has been paid, within one year from the date of the last payment of compensation. The provision is now embodied in Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 133.6.
his injury, but within one year from the receipt of the last benefit payment, 
the employee filed a claim for workmen’s compensation. The claim was 
allowed by the commission and was confirmed by a judgment of the circuit 
court over the protest of the employer. On writ of error, the Supreme 
Court, divided four to three, reversed the award on the ground that pay-
ment of benefits from an allegedly independent fund to which the employee 
had contributed was not to be regarded as the equivalent of a voluntary 
payment of compensation within the meaning of the Workmen’s Com-
pensation Act so as to extend the statutory period within which to institute 
proceedings.

Payment of wages by the employer, whether in whole or in part, 
especially when not coupled with a denial of liability, has long been held 
in Illinois to be the equivalent of a recognition of a right to compensation 
so as to prevent the tolling of what would generally be deemed to be a 
period of limitation.\(^3\) The precise question involved in the instant case, 
however, has not appeared before an Illinois court prior to this time and 
there still exists a large and undefined area on the subject notwithstanding 
the aforementioned principle. It would appear that payments unrelated 
to the Workmen’s Compensation Act, and inconsistent with any acknowl-
dedgment regarding its application, should not be treated as payments of 
compensation of a type sufficient to negate the limitation provision of the 
statute.\(^4\) It would, then, seem to follow that payments made by a stranger 
would be equally ineffective for the purpose.

In line therewith, the majority of the court stressed the fact that the 
employee was not paid by the employer but by an independent association 
whose purpose it was to compensate those employees whose disabilities were 
not covered by the act. Superficially, at least, there was a distinction in 
law between the employing corporation on the one hand and the benefit 
fund on the other. The dissenting opinion, however, observed the situation 
in a more practical light. It pointed to the fact that both the benefit fund 
and the employee compensation claims were administered by the same 
office and by the same group of employees. It also noted that the claimant 
had made a specific request for compensation and had been told that 
benefits paid by the association would be larger, per week, than compensa-

\(^3\) United Air Lines, Inc. v. Industrial Commission, 364 Ill. 346, 6 N. E. (2d) 487 
(1936); Marshall Field & Co. v. Industrial Commission, 305 Ill. 134, 137 N. E. 121 
(1922). As to the right of the employer to claim credit for payments so made 
against the compensation eventually allowed, see Olney Seed Co. v. Industrial 
Commission, 403 Ill. 587, 88 N. E. (2d) 24 (1949), noted in 28 CHICAGO-KENT LAW 
REVIEW 178.

\(^4\) In Diamond T Motor Car Company v. Industrial Commission, 378 Ill. 203, 37 
N. E. (2d) 782 (1941), for example, the claimant received $11.50, along with an 
express statement denying liability, several years after an injury in which he lost 
the sight of one eye. It was held that the payment was not compensation within 
the meaning of the pertinent section of the Workmen’s Compensation Act.
tion payments. In addition, although fully informed, the corporation had never denied its obligation to provide compensation payments and may, to that extent, have lulled the employee into a false belief as to the nature of his rights. There is, then, much in favor of the minority view. If there is merit to the decision pronounced by the majority, it lies in the fact that it neither upsets nor reverses prevailing principles but serves as an effective guide to define the limits thereof.

5 Evidence showed that the company physician asked the employee if he would “rather draw $18.50 as compensation, or $20 or $22 a week as he was then drawing.” See 410 Ill. 543 at 548-9, 103 N. E. (2d) 109 at 112. Actually, the overall total of workmen's compensation payments due exceeded the sum paid out by the benefit fund.
BOOK REVIEWS


Was John Tyler the President of the United States from 1841 to 1845 following the death of William Henry Harrison? Who would have succeeded Andrew Johnson, in the office of Chief Executive, if he had been successfully impeached? Would that person have been President of the United States or merely one exercising the powers of that high office? If the latter, for how long would he have acted? What would have occurred if Chester A. Arthur had assumed the office of President during the disability of James A. Garfield, or if Thomas R. Marshall had done likewise during the second Wilson administration, and either Garfield or Wilson had been restored to full health? Would the country have possessed two presidents; would Arthur or Marshall have been obliged to step down; or would Garfield or Wilson have ceased to hold the office given them by popular vote? Is the present congressional act relating to presidential succession constitutional? It is sound, if constitutional; does it cover all possible problems?

These are but a few of the matters discussed in this excellently documented study by a member of the Political Science Department of Pennsylvania State College, one which gives detailed analysis to an ambiguous, if not obscure, section of the United States Constitution and to the legislative attempts which have been made, from time to time, to implement it to offset the potential disaster which could flow from a break in the exercise of the executive power. Some answers, here noted, may have been provided by what might be said to be a body of constitutional custom and usage. Others may be worked out, at least in principle, from reference to the writings and oral comments of the founding fathers, whose records have been intensively combed by the author for light on the subject. The balance of these questions remain to be resolved. Law makers and constitutional framers will find ammunition here at hand from which to work out solutions, for all the issues are noted and logical answers have been proposed. In the process, some analogies have been drawn to issues which could arise at the state level, but the prime emphasis is on the office of the Chief Executive of the nation and those who may succeed to it.

Lawyers, even those not actively engaged in the field of patent law, are not unfamiliar with the changes which have been brought about in recent years in what had, at one time, been regarded as the American ideal for the reward of discoverers and inventors.¹ The attack, of course, has not always been from the Marxist standpoint, but it has, too frequently, come from uninformed areas wherein special interests have predominated.

This book, part of a larger study of the economics of the patent system, views the entire problem of the patent system from the standpoint of the economist. As little has been written in recent years from that viewpoint, a large segment of the book is taken up with an historical introduction reviewing the development of patent systems in the several countries where they exist and of the creation of international conventions for the protection of industrial property. Necessarily, in that process, it has been obligatory to review the several theories offered in justification of any sort of patent right and the several methods devised to prevent monopolization arising therefrom. To that point, the book offers invaluable background for an appreciation of the several patent systems.

The controversial areas are entered when the author begins to weigh the economic factors, to balance the costs and gains, accruing from the granting to an inventor of a protection in the fruits of his achievement. Whatever the economic facts may be within any given country, it is the author's belief that, at the international level, the social cost of extending patent protection exceeds the gains to be derived from it. While some of these costs may be reduced by compelling the patentee to work, or forcing him to license others to work, his invention in other areas, there is no doubt that the wide diversity of technological and industrial development throughout the world prevents a full utilization of this idea. The net result, therefore, is that parts of the world must suffer for the benefit of a few protected areas. That suffering, the author indicates should be brought to an end, and will be ended when the complete economic account has been written. That message is driven home without recourse to political arguments, of whatever stripe, and on the basis of cold, well-organized facts.

¹ See, for example, Lutz, "A Proper Public Policy on Patents: Are We Adopting the Soviet View?" 37 A. B. A. J. 905 (1961).

Autobiographical tales of the successful lives of penniless immigrants too frequently follow the Horatio Alger formula, hence provide little more than commentary on the fact that the United States has been a land of opportunity for those who have been energetic or forceful enough to take advantage thereof. After omitting the personal variations on that theme, there would be little occasion to talk about this book if it were not for the fact that it provides local color in the Chicago area, by reason of the author's association with the revered Jane Addams of Hull House, and for its account of the growth of the trade union movement, particularly in New York, Philadelphia and Boston, where the author served as an organizer and counsellor. Woven into the tale is a story of social service revealed in the promotion of settlement houses and institutes for the relief and education of the working masses of the east. Here, then, is the story of a life spent not in amassing wealth but in an effort to carry out the thought of Katharine Lee Bates, expressed in a verse from her poem "America the Beautiful," to "crown thy good with brotherhood from sea to shining sea!" While not a law book, it has a message for every lawyer who may have given more than a passing thought for the under-privileged and the under-paid.


It can only be supposed that, in the course of preparing his earlier book on law and tactics in the trial of jury cases, Mr. Busch had occasion to give consideration to many of the outstanding or noteworthy civil and criminal trials to be found in the realm of Anglo-American jurisprudence. In the preparation of that scholarly work, he no doubt found interest, even enjoyment, in pursuing the details of those cases but doubtless recognized that legal records might make dull reading to all except a skilful trial attorney such as himself. Through these companion volumes, he now


2 The author, an Illinois lawyer for more than fifty years, gained trial experience as attorney for several county offices, as corporation counsel for the City of Chicago, and in private practice in Chicago. He has, during his busy career, also been dean, now dean emeritus, of DePaul University College of Law.
BOOK REVIEWS

offers the public an intimate and highly readable account of eight notable American criminal trials occurring in the twentieth century. Each trial is reported, with careful but unbiased editing and supplementation, so that the reader is furnished with the details relating to the crime, the steps pursued in the investigation thereof, the conduct of the trial, sometimes in synthesis but sometimes in direct quotation from the record with excerpts from the closing arguments, as well as the verdict and judgment attained and the post-trial history, where such exists. In so doing, Mr. Busch has made each account so realistic in character that the reader is made to feel as if he were a "thirteenth juror" in attendance at the hearing.

Few will fail to remember the newspaper furor over cases like the trial of Leopold and Loeb for the murder of Bobbie Franks, of Bruno Hauptmann for the kidnapping murder of the Lindbergh baby, of D. C. Stephenson for the Indiana rape-murder of Madge Oberholtzer, or of Alger Hiss for perjury. The details of other cases, such as the prosecution of Samuel Insull for alleged mail frauds in the formation of his ill-fated utility empire, or of Sacco and Vanzetti for the hold-up killing of the payroll guards, have begun to dissolve into the past. The two remaining trials here considered, those of "Big Bill" Haywood for the dynamite-murder of the ex-governor of Idaho, and of Leo Frank for the murder of his shop-girl employee, may serve to reveal what are, to some, unknown chapters in American criminal law.

The helpful comments of the author as to the conduct of each of these trials should be reason enough to make the student of trial tactics anxious to give close attention to the unfolding narrative. The gripping nature of each account should draw the interest of even the most casual reader, for every criminal trial has within it the seeds of powerful human drama. It takes the skill of an accomplished author, however, to recreate the dramatic effect for the benefit of those who are unable to be firsthand observers. Mr. Busch has demonstrated that he possesses that ability to a high degree, for these are two books of sterling quality.


The difficulty inherent in the efficient use of the symposium as a means of conveying information regarding a particular topic or area of law lies in the expense of bringing a suitable panel of experts to one point where they may address a sufficient number of interested listeners.
who can afford to take the time and make the journey necessary to be at that same place. Even then, the ear is apt to receive a less permanent impression than that conveyed by the eye, hence the spoken discussions are likely to be lacking in the value which may be gleaned from a perusal of the printed word. Preparation of a printed transcript of the proceedings tends to bridge that gap, but any lawyer who has examined such a transcript can vouch for the fact that few persons speak fluently and to the point. Many of these objections may be obviated if the wisdom of the experts on the panel is prepared in formal fashion and presented in print. Then, each reader may sample at his pleasure and re-read for understanding if the first contact fails to accomplish its purpose.

The two works under consideration are of that character, although the first represents a much more thorough and diversified treatment of the hundreds of rules and principles regarding estate planning which have become crystallized in the past few years. In it appears the "know how," the methodology, and the successfully tested formulas of some twenty-two top-flight advisers scattered around the country. The contents range from sound but general advice on trust planning, through detailed forms of powers of appointment to meet certain tax contingencies, to problems as diverse as valuation on the one hand and the tax consequences of divorce and separation on the other. There is much cogent advice on the subject of the preparation of estate tax returns, and plenty of lucid, non-technical illustrations of the varied tax-saving devices. If weakness appears at all, it lies in the fact that certain of the discussions are localized in character, being particularly oriented toward New York law, while other sections, such as the one dealing with the use of the personal foundation, are not entirely adequate in their coverage. The second publication is, by contrast, quite limited in scope, being principally concerned with the use of "buy-out" and similar agreements and the tax problems attendant thereon.

Naturally, with different men working on aspects of a common subject, there is a tendency toward disjointedness as well as some obvious duplication of effort and advice. Careful editing would have produced a reduction of content without loss. More careful typographical spacing would have resulted in fewer pages. Aside from these things, however, the works in question afford the practitioner more for his money, social considerations left aside, than he could have obtained by attendance at a dozen symposia.
BOOK REVIEWS


Technical works on taxation, whether limited to income taxation or of more general scope, too frequently treat with the subject from the standpoint of an assumption that the reader will be familiar with the economic, social, and political factors involved. They, therefore, usually concentrate on the legal aspects of the tax device, the impact thereof on the taxpayer or the property subject to taxation, and the difficulties inherent in tax administration or collection. In many instances the assumption is a valid one, but no full understanding of tax law is possible without some appreciation of these other factors and they are often lost to sight under pressure of the necessity of applying tax law to the preparation and filing of tax returns or to the resistance of tax assessments and the like. The publication of Professor Anderson's book should operate to relieve the student of taxation, and the busy lawyer, against the possibility of oversight in some areas of taxation where knowledge is important to provide background for the evaluation, and correct application, of tax laws.

In his textbook, written at the collegiate level, the author, experienced in both law and economics, has presented a thorough analysis of the several schemes of taxation presently in vogue, both state and federal, extending over general property taxes, income taxation, the taxation of gifts and inheritances, business taxes, consumption and use taxes, even down to poll taxes, with an explanation of the economic bases, the legal problems, and the administrative difficulties appertaining to each. Details relating to tax shifting, tax avoidance, and tax evasion are not omitted. Where profitable, tables, graphs, even cartoons, help out the text. Theories of taxation and the justification thereof are explored and evaluated while the mechanics of tax practices are opened up to investigation. The product represents one of the most clarifying and readable accounts concerning taxation that has appeared to date. It should be made the basis of the student's introduction to tax law.


Lawyers may, from time to time, be called on to advise or to assist in the formation of cooperative enterprises. If so, they may find passing interest in this slender volume as it sketches something of the history of the cooperative development, treats briefly with the relation of the cooperative to labor, discusses its economic background, and dabbles with the
question of its taxation. Obviously written by one with more than a passing interest in the cooperative movement, the book tends in the direction of a tract rather than toward that dispassionate and detailed type of analysis one would expect to receive from the pen of an economics professor. It is, therefore, not something to be recommended, but the bibliographical listings found therein may prove to possess utility.


A person concerned with civil rights, particularly as those matters bear on segregation and discrimination, should be armed with information concerning the extent of state legislation both in favor of or in opposition to the general topic. Heretofore, such a person would have been obliged to devote hours of labor picking through the contents of a seemingly endless number of state constitutions and statute books to find appropriate references. Thanks to the effort of the compiler and the financial assistance afforded by the publishing group, it is now possible to scan all such statutes within the covers of one book.

The law of each state is treated separately, arranged according to convenient rubrics such as education, employment, miscegenation, or transportation, to mention only a few of the topics listed, but it is possible, through an introductory note, to secure a nation-wide view of the subject. In addition, appropriate reference has been made to judicial interpretation, application or rejection of the statutes in question. Several valuable appendices and charts extend the scope of the material to governmental levels as separate and apart as the United Nations on the one hand and municipal councils on the other. Developments relating to discriminatory practices have been made the subject of comment, and several significant briefs and judicial opinions have been reproduced. Not being limited simply to the problems of Negroes, the work provides an excellent summary of all laws, discriminatory or otherwise, operating in the entire field of human relations. It furnishes a systematized basis for comparison with any universal declaration as to human rights.


When a practicing lawyer, particularly one whose lifetime of activity has been devoted to what is euphemistically referred to as "general" practice, sits down to write about law, he is apt to see his subject more nearly in terms of a series of personal experiences than as a comprehensive
system for the administration of justice. It would, therefore, be practically impossible for him to write anything more than a pattern of biographical anecdotes no matter how much he might strive to give them a schematic rather than a chronological arrangement. This book, written by a Maryland lawyer, displays just that type of treatment despite the author’s attempt to make it into a simple account of law and the administration thereof in a style likely to prove of interest to laymen as well as to other lawyers.

There is, in the process of so writing, much that is repetitious, much that is trivial, and not a little that is the product of half-learned or half-forgotten knowledge. A legal scholar would probably be shocked at the “horse” Latin, the apparent acceptance of ancient rumor, the uncritical reiteration of long-since rejected concepts and institutions, and at the overall picture that has been drawn. Some might find it humorous to discover that Robert Louis Stevenson, for example, has been claimed as a “celebrated American writer.” Others might be pleased to know that the author has listened to speeches, some by eminent men, whose words were heard but have since been forgotten. People of that type could have a “field” day with this book. Others might be inclined to check the book off as containing some not unpleasant, in fact occasionally interesting, thoughts of one who felt, and followed, the urge to write whatever came to mind without regard to the relevance thereof. One thing is certain, the heavens will not fall even if justice has not been done to the book in question.


Professor Glueck’s views on the subject of crime and the criminal offender are too well-known to call for much comment. He has long been an advanced worker for reform in the administration of criminal justice, especially in areas dealing with fundamental causes of criminal conduct, with the application of psychiatry to the examination and treatment of offenders, with the establishment of rational systems for parole and probation, and with the need to develop adequate social devices to prevent crime. Except as some of these topics have received treatment in book form, much of the author’s writing has appeared in legal journals or in the proceedings of learned societies. From among these scattered sources, the author has made a selection of the most vital of his papers, dealing with issues yet generally unsolved, and has compiled them in this book. In that way, it has been made possible to survey the entire realm of the administration of criminal law, to focus upon its defects, to recount the reforms which have been urged before, to discuss the piecemeal efforts at reform, and to emphasize what remains to be done.
In the process, much has been said of the importance of developing an adequate body of trained persons in the related fields of biology, psychology, sociology, and penology, to assist the judge in achieving a thorough picture of the offender, his background, his mental and physical traits, and the like, in order that a true understanding of crime and of its correction may be attained. Few would debate the validity of the argument that the proper administration of a system of criminal law is not simply one calling for standardized treatment for all violators, but involves much individualized study and supervision in order that an indicated therapy may be carried out. There is some occasion to question, at least under a constitutional system of government as presently practiced, whether it would be possible to separate the guilt-determining function from the sentencing one, as urged by the author, in order that specially trained personnel might furnish their unique skills toward a more successful outcome of the criminal case. There is no doubt, however, that much which the author has written is possible of formulation into law and should be developed in order that society be made able to cope with the problem of crime and its correction in a more intelligent fashion than is presently the case.

As the effect of crime is not localized, but may be international in scope, there should be no occasion for criticism over the fact that the author has included among these papers one written to analyze, and vindicate, the legal basis for the Nuernberg trials. Certainly, the supporting data goes a long way to show that the argument over the alleged *ex post facto* treatment given the Nazi leaders lacked soundness. One is led to remark, however, over the seeming vindictiveness which underlies the discussion. That fact might not have been too apparent when the paper appeared by itself. It does, now, stand out in sharp contrast to the tone expressed throughout the rest of the work. For the author’s sake, the concluding article could well have been omitted.


The reissue of a well-received publication seldom calls for comment as it is obvious, from the fact of reissue, that the author has done a good job in filling a need. There is occasion, however, in this instance, to remind the prospective reader that this work is still available for the group to which it is primarily addressed, those recently admitted or about to be admitted to the bar, may be unfamiliar with its existence yet are most in

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1 As to the right of an accused person to have the same judge act throughout the case, from trial to sentence, see *Freeman v. United States*, 227 F. 732 (1915), *Durden v. People*, 182 Ill. 493, 61 N. E. 317, 55 L. R. A. 240 (1901), and *Commonwealth v. Claney*, 113 Pa. Super. 439, 178 A. 840 (1934).
need of the information contained within its covers. No matter how excellent the degree of academic training received, facility in the handling of the trial of cases is something acquired by the student principally as the result of experience and of close attention to the actual court-room scene. Theoretical preparation requires concrete application to develop a good trial lawyer, but it is still possible to learn, from the experience of others, some of the things that the young lawyer will be expected to face so that, armed in advance, he may be prepared for most eventualities. The author, from the treasure of a thirty-year career in the court-room, has here indicated many of the hard-earned lessons he has had to face and the solutions, not always developed on the spot, he has devised for the problems which beset the advocate. In some sixty-odd short chapters he has covered every phase of trial strategy and tactics from the grass-root standpoint, not in abstract textual fashion but with a generous seasoning of anecdotes and advice which make the book all the more readable. Except as it is addressed to practice in New York, not always comparable with practice elsewhere, it should be extremely useful to the young lawyer. He would, without doubt, profit from an examination of the contents.


Lawyers and civic groups concerned with the mounting rate of crime, as well as police executives, will find this volume a useful guide to the achievement of high standards of police department performance. That a nineteenth-century police organization cannot be brought up to date by the mere acquisition of radios and automobiles must be recognized. Organizational revamping, with a view to producing forces capable of striking the twentieth-century criminal at the scene of the crime or shortly thereafter, must be achieved so as thereby to exploit to the fullest the special services of detective, traffic, and records divisions. Achievement of this "line power" by effective organization of the police department is the goal toward which the author seeks to lead his professional readers. Many years of study and of experience with police department methods form the basis for Dr. Leonard's presentation of the principles of police department organization, and for his comments thereon.1

Unity of command, with undivided responsibility in the police executive to those elected officials under whom he serves, and by them to the voters, will at once enable formation of a coherent military operation

1The author is chairman, Department of Police Science and Administration, State College of Washington, Pullman, Washington.
against crime, and fix responsibility for failure in suppressing it. Among other problems dealt with are those relating to the selection of an executive with a proper background in administrative as well as in police or military work, the lengthening of the police executive’s tenure of office, the distinction between “line” and “staff” components of the organization, and the matter of personnel selection and the tests which may be used to that end.

Of particular importance to efficient police work would be the use of modern machine records, with their cross-reference and tabulation systems. The immensity of the job of manually searching burglary records for a decade prior to a given date, for example, would prohibit use of the analytic approach to most cases in large cities. Indicative of what may be done, the author cites an illustrative case where the use of machines permitted an extensive analysis to be made promptly. In that case, Los Angeles police officers were baffled because they had no description of the burglar they sought, although they knew his modus operandi. Following twenty-eight burglaries extending over a three-month period, the case was finally turned over to the statistician who promptly solved it with the machine record system. By the mechanical sorting out of all earlier burglary cases, the complete description of the offender was discovered and he was then easily apprehended. The author concludes, at page 220, that crime “in all of its categories can be attacked successfully only upon the basis of painstaking records analysis. Personnel problems, organizational changes, budget requests, design of a new headquarters building, distribution of the force by function, time, and area, are representative of an almost endless succession of problem situations which require analytical attention if they are to be met effectively.”

The day-to-day organizational work of allotting supporting or staff services to line units, the planning of strategy in the application of line forces to the varied emergencies which may arise, are also treated. Using the record system as a basis for forecasting peak loads upon patrols at various times and areas, the police executive is able to deploy his men most effectively.

The author states, at p. 294, that the “policy determining body in local government is the City Council, and the police have no alternative but to function in accordance with policies laid down by this group of elected officials. If prostitution and gambling are rampant in a city, responsible citizens are entitled to the reasonable assumption that members of the City Council have adopted general policies which permit these conditions. Surely, no one is stupid enough to believe that a City Council would tolerate a police administration which failed to carry its policies into execution.”

Quoting from R. Weldon Cooper, Municipal Police Administration in Texas (Bureau of Municipal Research, University of Texas, 1938), p. 94, the author notes that the “short tenure of the American chief of police is disastrous; it averages 2.8 years in cities of 100,000 population and over.”
Chapter Ten, on "Measurement," one of the more valuable inclusions in the text, seeks to enable the police executive to find the answer to the basic problem of the extent to which his department measures up to the accepted professional standards of modern police science. Pointing out that the volume of crime alone does not afford a basis for judging police efficiency, the author sets out criteria by which to measure this efficiency, together with a suggested check list and rating scale for each item on the list.

By presenting the principles involved in straightforward manner, and by relegating much detail, except that which is useful for illustration, to appendices, the author has given his work a clearly visible outline. The readable text is well adapted for use in police schools. The index and the accompanying bibliography render the volume a useful reference work for the student of political science, the lawyer, and the civic group, as well as the police executive.

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5 At p. 359, the author lists (1) internal organization, (2) organization for line power, (3) personnel selection and training, (4) police record controls, (5) patrol system, (6) detective administration, (7) vice control, (8) traffic administration, (9) crime prevention operations, and (10) self analysis.
BOOKS RECEIVED


