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Wills

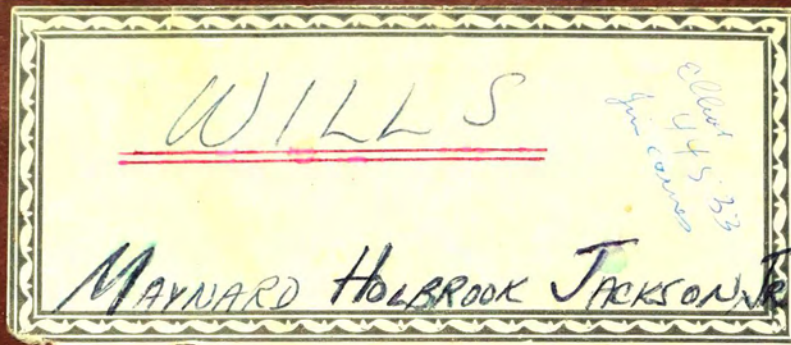
Maynard Jackson

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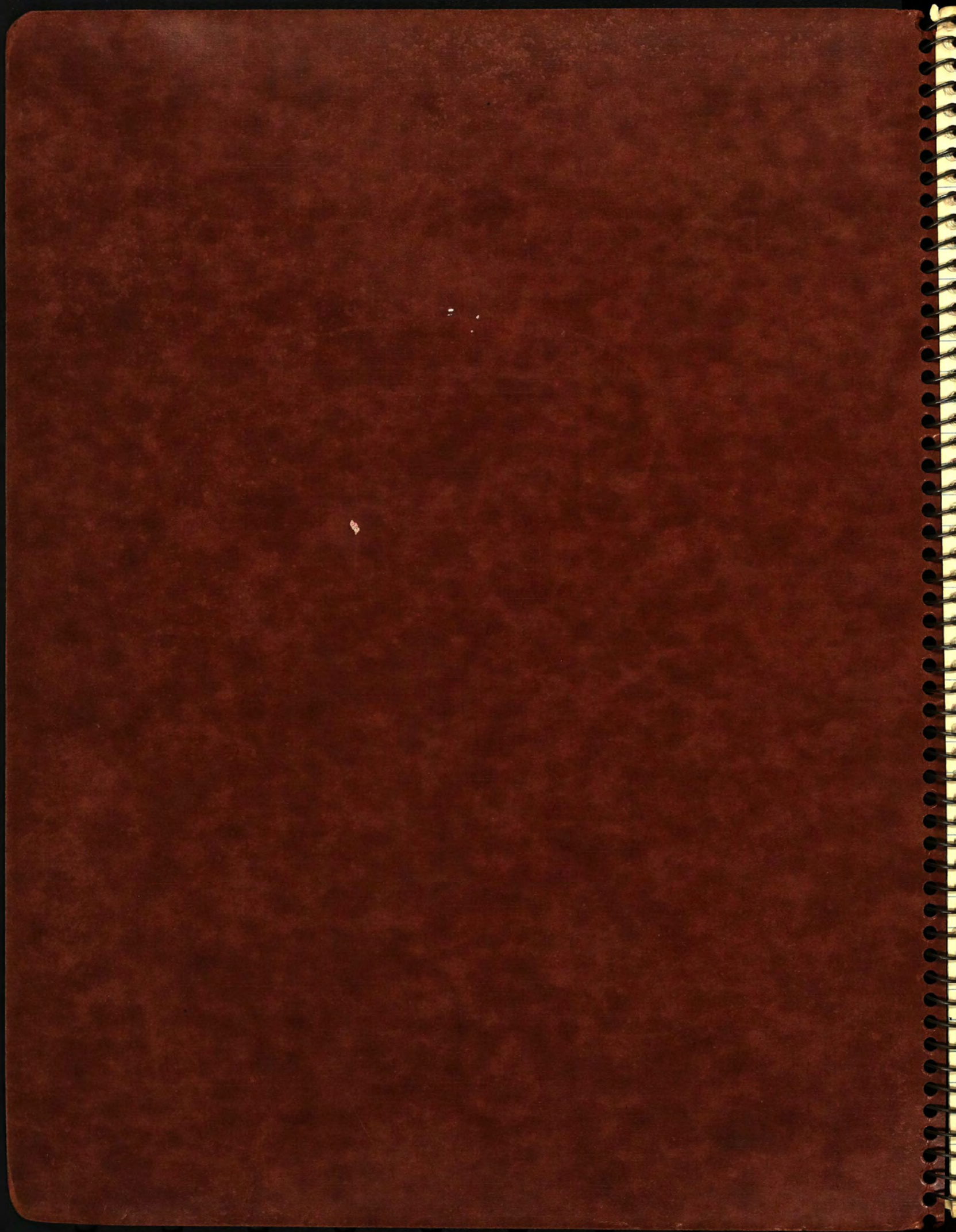
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LAW RECORD

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"ANOTHER MAPLE LEAF PRODUCT"



9-17-59

PROF. RELYEA

Omissions:

- (1) Social + Econ. Bases of Succession
- (2) Cases from 31 & 42
- (3) 65, 66, 67, 75, 86
- (4) Chap. 3.

HORNBOOKS:

ATKINSON, Wills, (2nd ed. 1953)

Page, Wills (5 vols., 1941)

[I.] NONTESTAMENTARY SUCCESSION

[A.] Rights of the Surviving Spouse

Are you interested in protecting the W? If so, how do you?

- (1) Community Property - W already owns $\frac{1}{2}$ of the prop., so there is no succession problem here. Only a few states recog. this. Each H & W own an undivided $\frac{1}{2}$ share.

- (2) Dower - each of them (i.e., the survivor) got $\frac{1}{3}$. Can be waived.

- (3) Curtsey - H got all provided issue were born during the marriage.

Neither dower nor curtesy are particularly effective in all cases.

- (4) Stat. forced share - when H dies intestate. (In Mass., too)

- (5) Also, in Mass. (and about $\frac{1}{3}$ to $\frac{1}{2}$ is receivable) a W can waive the will & take forced share. Called an indefeasible share. However, applies only to prop. held

INDEFEASIBLE
SHARE

by H at death.

There are generally provisions to the effect that a W can get a cash pymt. pending the settlement of the estate, keep the furniture, et al.

Stats. in many juris. reverse this presumption

United States Bank of Portland v. Daniels (1947) (p. 27)

C.L. presump. - devises and bequests in addition to dower. - Gen. Rule - surviving spouse must elect between provisions in the will for her and dower or not. If the testator intends that she get both, it must be so expressed in the will. There was a forced share when it was in - stat. here, and the C.L. could not take hold.

C.L. VIEW RE
ELECTION

The C.L. view is that unless expressed to the contrary, W will get the dower and the testamentary designation.

ASSIGNMENT:

Read thru In re Martin's Est., p. 51. (remember omissions).

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Pringle v. Pringle (p. 34)

A H's power to give away his A H can give away what he wants per. prop. (at C.L.) inter vivos is during his lifetime despite the absolute. Under the Married Women's Act (1848), a H cannot by will do the W would have gotten her prime W of the share of per. prop. share by Dower. However, the to wh. she is entitled under the inter vivos conveyance must intestate laws. = As to H's be valid. extent of her dower against any transfer. Lands & tenements his W is protected to the (or disposition by her H by act inter vivos or last will & testament, w/o her consent.

Newman v. Dore (p. 35)

The int. of author. is that the intent to defeat a claim, which otherwise ^{via inter vivos} W might have, is not enough to defeat the deed.

The only sound test of the validity of a challenged trans-
fer is whether it is real

or illusory. (The N.Y. & Mass. views). i.e., Was the trust here merely illusory or was it real? Has H in good faith divested himself of ownership of his prop. or has he made an illusory transfer? The ct. said here it was illusory because H re-
tained power to revoke & modify the trust and even control the trustee re details of the admin. of the trust. Thus, this was an unlawful invasion of the expectant interest of the W.

The minority rule holds that the intent of H at time of trans-
fer will be decisive. i.e., If H's intent in making the transfer inter vivos was solely to defeat W's expectant interest, her interest would not be defeated. However, it seems to also hold

Objective Test
(Majority)

The "good faith" goes not to an intent to defeat W, but to the validity of the intent of H to divest him-SELF of the assets.

Subjective Test
(Min. View)

Stat. of Distribution (1670) - (Survivor could not be deprived of dower or curtesy by will. Gen. Rule.) widow = $\frac{1}{2}$ of personality if intestate left descendants; $\frac{1}{2}$ if not. Her intestate share could be defeated by will ⁱⁿ favor of others. - Today, changed by Stats. of personality

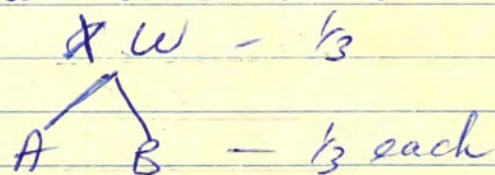
that an absolute transfer of ^{his} ~~all~~ prop. by a married man during his life, if made w/ other purpose & intent than to cut off an unloved wife, is valid even tho' its effect is to deprive the w of any share in the prop. to wh. she would have been entitled at his death.

SHARES OF OTHERS THAN SPOUSE

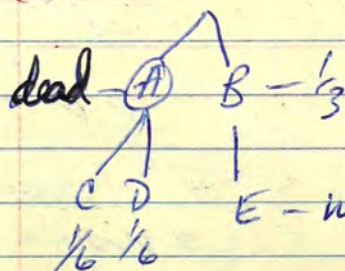
The rules re descent of land are different from those re personality.

The Stat. of Distribution (1670) applied only to personal prop. It outlined the line of succession:

(1) Assume X dies -



(2) X W - $\frac{1}{3}$



E - nothing (B is still alive and cuts off E since E would take by rep. only in the case of a predeceased B.)

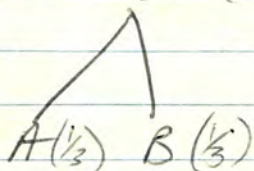
$\frac{2}{3}$
 $\frac{1}{6}$
 $\frac{1}{6}$

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Assignment: Chap 4, sec. 1 - take only the 1st case
 sec. 2 - only cases on 120 & 122
 sec. 3 - all cases to be read.

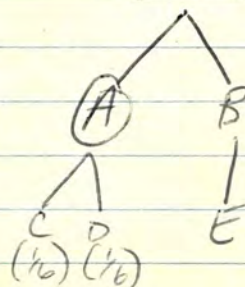
A living parent will ex-
clude his children. Thus:

X W ($\frac{1}{2}$)



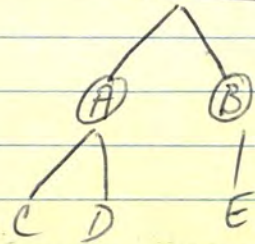
However, on a parent is
deceased, the children take
by rep. Thus:

X W ($\frac{1}{2}$)



Also:

X W ($\frac{1}{2}$)



If per capita:
 C, D & E each get
 $\frac{2}{9}$ (i.e., $\frac{1}{3}$ of $\frac{2}{3}$).
 If per stirpes,
 C & D = $\frac{1}{6}$ each.
 E = $\frac{1}{3}$

If per capita, the heirs are
 taking in their own right
 and share equally.
 If per stirpes, the heirs as-
 sume the share of their
 predeceased ancestor thru
 whom they are claiming,
 and equally
 divide their respective
 shares.

Lockyer v. Vade (p. 50)

In collateral successions, reps. take per
 capita, not per stirpes. There shall be no
 Representations admitted among collaterals
 after brothers and sisters & children.

Rationale behind Representation: to exclude those in a remote degree of relationship.

In Re Martin's Estate

(p. 51)

Here, y are 3 grandchildren and all of intestate's children were dead. Thus, appellant contended that the 3 took via rep. + that the distribution must be per stirpes and not per capita. The Ct. held that rep. applies only on y are lineal heirs in different or unequal degrees.

REPRESENTATION

Thus, on Rep. is proper, the reps. take per stirpes.

On the lineal heirs were related to intestate in equal degrees, they take per capita and directly.

METHODS OF COUNTING

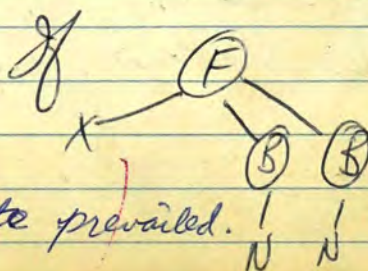
- Same {
- (1) Common Law
 - (2) Canon Law
 - (3) CIVIL LAW

Civil Law method = ascertain closest common ancestor of intestate and claimant. Then count the steps from intestate to the common ancestor and also the steps from the common ancestor to the claimant. The sum of the two figures = degree of relationship between the claimant & the intestate. ∴, The claimant who stood in smallest numerical degree of relationship to intestate prevailed.

To deter. which are the next of kindred & whether they are of equal or unequal degree, the Civil Law Method of counting is used almost universally in U.S.A. You count up from the contestant to the ~~intestate~~ ^{ancestors} that is common to both himself & the other contestant and then back down, & add it up & that will be the degree of removal. Then, y is the Canon Law method of counting.

Lloyd v. Touch

p. 54



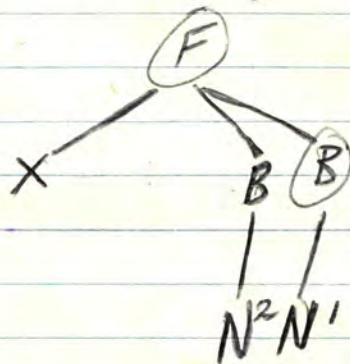
No rep. Since both nephews would still be equal to each other.

Canon Law Method - the steps from the common ancestor to each of the persons involved were counted as in the case of the civil law. But, instead of taking the sum of the two figures, only the larger is taken. This = degree of relationship. (See back page.)

Assignment:

Omit cases beginning on pp.
31, 42, 65, 66, 67, 86, 90, 93,
96, 102, 104, 106, 110, 114, 116, 118,
160, 181, 187, 189, 198, 204.

However, if



then N^1 would take by rep. and N^2 would be allowed to raise him - self to become equal w/ N^1 .

29 SEPT. 59

Prob. of adopted kids. Q. primarily stat. Adoption stats. set apart from reg. stats. on succession. Adopted children may inherit from the adoptive parents; may also inherit from natural parents unless stat. holds otherwise. W More difficult situation on adopted child tries to inherit from parents of adoptive parents or other collaterals. Some cts. hold that he may; public policy favors encouraging the status of adopted child to be as any natural child.

Conflicting policy holds that child may not inherit from collaterals because prop. would go outside blood lines

Simultaneous death of H & W: reason for problem is that part of the estate of one goes to the other who has died last.

MATTER OF HORST

(p. 50)

Stat. provides share for kids ~~who~~ (pretermitted children) who are born after making of will who are not provided for or mentioned in will.

Purpose of stat. is to cover unintentional omissions.

HYPOTHESIS: Man has estate of \$30,000. Wife & two sons.

$W = \$12,000$

$1^{st} S = \$12,000$

$2^{nd} S = 0$

Res. = \$6,000

Result, when son comes in: Widow elects forced share:

$W = \$8,000$

$1^{st} S = \$8,000$

$2^{nd} S = \$10,000$

Res. = \$4,000

$W = \$10,000$

$1^{st} Son = \$6,667$

Res. = \$3,333

$2^{nd} S = \$10,000$

Problem has been worked out in some countries by letting judge determine how much omitted son should get.

Omitted son's share is absolute because stat. provides that he will get what he would have rec'd. had H died intestate.

The after-born child need not survive in order to share in the distribution of the estate by representation.

(1) The way to avoid this problem is to mention all children in the will. (2) Has been argued that any man who would not mention child in will lacked testamentary capacity. (3) Always revise will when new child is born.

ESTATE OF DAVIDSON

(p. 72)

Limitations on gifts to charities (1) no more than $\frac{1}{3}$ (2) if made ⁱⁿ within 30 days of death may be challenged by any heirs. Policy seems to be to prevent people from giving to a charity what almost belongs to others.

Net estate here = \$72,000

Left to charity = \$60,000 (exceeded $\frac{1}{3}$ limit by \$36,000)

Son (by will) = \$12,000

Son = \$6,000 + 12,000 = \$18,000

Charity = \$54,000

Stat. provided that Son could ~~not~~ challenge the excess over the stat. limit only to the extent provided for by the will. Since son was left only $\frac{1}{6}$ by terms of the will, he could get only $\frac{1}{6}$ of the excess, or \$6,000.

T got around stat. by a substitutional bequest to non-relatives.

Advancement - a complete gift wh donor intends to be the donee's share in the estate. Applies only to intestacy. Presump. of advancement. e.g. \$6,000 estate at death.

A = \$5,000 advancement

B = \$2,000 advancement

C = —

\$13,000 = total estate.

Thus, each should get \$4 $\frac{1}{3}$,000⁰⁰. Basic assumption here is that T intended to treat all children equally.

A would probably choose not to go into ~~the~~ ^{hodgepodge} here because he already has more already than he would receive if he got $\frac{1}{3}$ of the total estate.

1 Oct. 59

(Note - p. 78) - ADVANCEMENTS

The doctrine has no application where the ancestor dies wholly testate, nor, in most juris., to cases of partial intestacy.

If the parent intends to make a gift which was to be deducted from the child's distributive share, advancement; otherwise not. Loans

Intent at the time of the transaction is the crucial thing and decides whether it is to be counted as an advancement or not.

A's \$5000 would ant. to more than his share. So, give B \$2000 + the more + give C the remaining \$4000. (\$5000 is more than $\frac{1}{3}$ of \$13,000). Since A already had more than his share of the total \$13,000, A will be left out of the computation. Thus, $\$6000 + \$2000 = \$8000$

$\frac{\$8000}{2} = \4000 each for B & C.

A loan is not an advancement, it is an asset of the estate which would be computed in the total of the estate's assets less the \$1k has run on the ~~debt~~ debt.

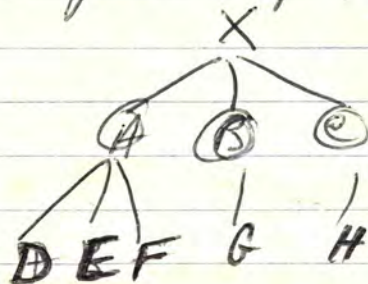
Always consider the intent of the transferor at the time of the transfer to deter. whether it was an advancement. The intent will have to be deter. by overt means. Of intent at the time of transfer.

Person's Appeal (p. 79)

If you are children living, the ~~advancement~~ advancement thereto will be counted against ~~the~~ the shares of the grandchildren.

Should the distribution here

be per stirpes or per capita?



Since all grand-children are of equal degree + all of X's children are dead, per capita would be used, and rep. would not apply due to their equality. Each would take an equal share in his own right.

Per Stirpes v. Per Capita
re Advancements

If the distribution is per capita, the advancements are not counted. If the distribution is per stirpes, the advancements are ~~not~~ counted.

Assignment of
an Expectancy

It can be an assignment of an expectancy, but it is risky in that the one expecting may predecease the testator, or may be disinherited.

[Part II]: Section I *Testamentary Capacity*

The Burden is on proponent to prove que la testatrix, at the time of the execution of her will, had such mind as would enable a person to transmit common + simple kinds of biz w/ that intelligence wh belongs to the weakest class of sound minds, together w/ in a memory sufi to recall the gen.

It is not advisable for an atty. to help anyone of obviously lacking capacity in that this could be interpreted as an attempt to perpetrate a fraud on the ct. that the document will be presented to the ct.

nature, cond. + extent of her prop. and her relations to those to whom she gave + also to those from whom she excluded her bounty. Macbeagh, Appellant (p. 101)

Undue Influence

6 Oct. 59

In Re Hopper (p. 122)

The influence wh the law denominates "undue" must be such as to destroy the free agency of the testator and amt. to moral or phy. coercion.

(Re B/P, see p. 122 chk.)

If a friend wants to leave you (atly.) ~~to~~ something, get another atly. to draft the will other than yourself. Otherwise, the ct. will find the will suspect. The same might hold true re a relative.

* Mistake and Fraud *

Y are 2 fundamental probs:

- (1) Parol evid. - To what extent will ct. look past will to find or not find mistake or fraud or deter true intent of testator?? = How trustworthy is the parol evid?? = Will it violate express provisions of will?? =
- (2) Remedy - is y one?? On (what ct.) can it be enforced?? = Ct. of probate (Surrogate, etc.)

(1) When y is a document, it must be decided by a ct. of probate whether it is a valid will. (2) Then, it must be construed: what does it mean?? =

Matter of Arnold (p. 126)

Re mistake in the inducement, i.e., some collateral matter which might affect validity of

Ct. held: a will is entitled to probate despite the fact that its author was mistaken concerning extraneous facts which might otherwise have caused him to make a different disposition of his prop. The mistake must appear on the face of the will, & it must also appear what would have been the will of the testatrix but for the mistake.

holding

The will. e.g., "To my beloved & faithful wife" - to actually hates H & has been unfaithful. - This is mis-taken in the inducement. Here, sister objected to the probate of the will so that there would be no will & she, being the only living relative, would (w/o will) get all of testator's prop. However, the Ct. refused the request: invalidation of wills on ground of collateral mistakes would open the doors to many spurious claims & destroy reliance on wills. Also, matter of proof would be T.D. in that it would be on sister to prove contrary intent from that expressed or implied, and she could not do so.

Mistake in the Inducement, the effect thereof:

Generally, if there is a mistake in the inducement, the will ~~will~~ ^{usually} be allowed. However, on the reason for the mistake or the true intent appear on the face of the will, it may be relief.

Probate Ct. will never add words to a will.

Leonard v. Stanton (p. 128)

Re ~~the~~ ^a mistake in effect, i.e., mistake in re the effect (actual) of the words.

i.e., Ct. will probate will. ←

Ord. on a bequest or devise

is made to a named bene.

who is, additionally, ~~re-~~

ferred to as "my H," the

quoted words are con-

sidered to be mere words

of description and the bene

takes, even tho' at the time

of the death of the testator

he was not, in fact, her H.

And, the same

result follows in spite

of the fact that the par-

ties were never legally

married, provided that

y is no showing of

fraudulent concealment

of the prior marriage.

Generally, no ~~disallowance~~ refusal of will on this ground due to difficulty of proof otherwise than that wh appears. So, no relief, here either.

Also, here y was misrep., but did it make any difference?

You must prove that the

mistake was induced in order to

show misrep. If y is innocent

misrep., still no relief. i.e., the

will will not be refused probate.

Quaere: Could P have remedy against

atly. who faultily drafts will

wh results in P losing

what P would have gotten

had it been well drawn? =

One case ~~was~~ allowed P re-

covery against Notary Public

who forgot to have will

witnessed. However, normally y

is no recovery allowed.

A. Mistake:

(1) In inducement

(2) In effect

B. Fraud:

(1) In inducement

(2) In effect

Always consider the question of causation. —

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In Re Carson's Estate

Fraud/induce. will vitiate a will. But, on only certain parts of the will were fraudulently induced, and those parts are separable from the unaffected portions, the whole will will not have to fail, but only those portions were fraudulently induced. Quaere: Why do the cts. allow relief for fraud/in. but not for mistake in the in.?? Why relief for fraud/eff. but not for innocent mistake or mistake/eff. — Policy. The cts. will not allow a fraudulently acting party to get away w/ his wrongful acts. However, on y is mistake, no one can be blamed but the testator himself, + proof is more difficult.

If the fraud alleged + proved had no rel. to the motivation or reason for the bequest, the fraud would be immaterial here.

Lippard v. Humphrey (p. 136)

Partial Invalidation

The presumption that a party signing a will by mark, or otherwise, knows its contents, is not a conclusive presumption, but it must prevail in the absence of proof of fraud, undue influence, or want of testamentary capacity attending the execution of the will.

A Ct. will not kill the whole will on the fraud does not affect the whole instrument but only a part. That part will be deleted.

Here, testatrix did not even know what was in the document; thus, y could not have been any testamentary intent. The will was allowed.

This got into the Sup. Ct. ^{only} because it arose in D. of C. + they only have fed. cts.

Morrell v. Morrell (p. 140)

Here, y were parts stricken but the problem here was whether

Re constructive trusts by a ct. of eq., see Pope v. Garrett, (Ch. 144). (However, no relief is available in either eq. or in tort at law, or relief may be had in the probate court.

Rules
of
Law

the Probate Ct. changed the meaning of the will by the deletion.

* The general rule is that a probate ct. can never change words (or add) where they will change the meaning of the words.

Dye v. Parker

(p. 141)

A clear case of fraud. Since the probate ct. cannot change the will, i.e., cannot reform a will, even tho' y may have been fraud y can only be an interpretation of the existing will.

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* Ch. 5, Sec. 2 :

(Call Dean at S.U. re

Debating)

Ga. requires two attesting witnesses.

Omissions :

pp. 212, 214, 217, 219 + 221 + 262

Execution of Attested Wills *

Always do the max. requirements to be on the safe side.

Y are only a few New Eng. states wh require 3 witnesses, the

max. no. in any Amer. states.

(See Atkinson, Wills, p. 348.)

Lamagne v. Stanley

(p. 155)

A leading case in the law of Wills. How does this case

vary from the Barbour Case?

Here, the ct. said that so long as the testator intended the document to be

his last will and testament

(Mass. in accord), and so long as

y is his signature on the document, it

will be taken as his signature.

In the Barbour Case, the ct. said that the signing must be at the bottom of the document for it to be a valid signature. This case required it to be a signature + an intent that it be a signature.

Statute
of
Frauds

Under the S/F, it makes no diff. where the signature is made on the document.

Statute
of
Wills

Under the S/Wills, it must be signed at the end or the bottom. What does "end" mean? Does it mean the phy. end of the document, or the end of the dispositive paragraphs?

In Re Goods of Birt

On was the end? The ct.

The testator clearly intended that the words he introduced on he made the first mark, & so the ct. held, even tho' as written, they followed the signature. Otherwise, no signature under the acts shall be operative to give effect to any disposition or direction wh is underneath, or wh follows it.

Said that the end was after the portion set off by the asterisk (*). Under U.S. the general attitude has been "that if the thing is not signed at the end, it is not a will. Further, if it is material material" following a signature, it is void (the portion after the signature).

* If is a probate will wh will allow a will in the testator's own hand — the Holograph Will.

* Publication of the contents is not required

If the writing following except on required by statute.

T's subscription has any ~~effect~~ direct rel. to the dis-

position of his estate, in addition will be

held to void the entire instrument. Matter

of Tyner, (Chk. 166.)

One can even give an oral will so long as he makes it clear that it is his last will & testament in the presence of a ~~few~~ certain no. of witnesses.

Matter of Kasse (p. 171)

Whether or not the local statute requires publication, it is every-

where essential that it should in some way

evide. to the witnesses his intent to utter the

instr. as his own, & to have them attest it as

such.

This said that it is not necessary that the witnesses see the affixing of the signature so long as testator, in their presence, acknowledges the genuineness of the signature. The witnesses, under the Statute, must see the signature.

16 OCT. 59

This case was under a stat. like the Stat/Wills. I were two witnesses. But, the question arose as to whether the 2nd witness actually saw the testator's signature. Under the statute, all witnesses must be able to see the signature of the testator, altho' they need not actually see the ~~signature~~ provisional will. It must be out in the open capable of being seen.

Betty v. Lomas (p. 174)

Quaere: Who should sign first, the testator or the witness? Here, since

Will attestation
v.
Signature attestation

The witnesses are attesting to the will, they need not see the signature. So, this differs from the signature attestation on the testator must sign before (in point of time) the witnesses. On all signatures are w/in a very short period of time, generally this will be suffi.

hypoi: Testator says, "X, will you sign this please as a witness?" X does, believing it to be a lease whereas actually it's a will.

There must be an awareness of some legal significance.

- This would prob. be suffi so long as the witness was aware of some legal significance of signing the document.

hypoi: "Could I have your autograph?" - Not suffi. No awareness of legality.

(PRESENCE) Rule of Law

"Conscious Presence Rule"

the T need not actually view the act of signing by the witnesses but that these elements must be present: (1) the witnesses

must sign w/in T's hearing, (2) the T must know what is being done, and (3) the signing by the witnesses and the T must be

one continuous transaction.

The witnesses must attest w/in the presence of the testator. What const. "presence?" See Jones v. Tuck and Estate of Tracy.

[Note: a witness does not have to be shown the will's provisions.]

Blind man - have him use all of his other faculties as possible to make it

const. one continuous transaction. Estate of Tracy (p. 180)

w/in his "presence!"

Quaere: What about requiring ^{that} witnesses sign w/in the presence of each other? Must be done.

Suggested Solution

The best way to solve all of these problems is to gather all parties together in one room and have all signatures affixed there & there.

In R.I., the testator must sign w/in presence of all witnesses, but the witnesses need not then sign w/in each other's presence.

{ Krumpe & Wife v. Coors (p. 183)
In Re Holt's Will (p. 191)

ISSUE

Credibility and Competency

In Krumpe, the question arose as to whether a devisee under a will could be called a "credible" witness w/in the meaning of the Statute/wills of England. — Credible was from the beginning interpreted to mean competent, i.e., competent enough to attest. Competency must exist at that time ^(of signing) and need not later be present in the witness.

Stat/wills is substan. law & a change in procedural law will not affect the Stat/wills. The word

"competency" means not only mental capability but also the witnesses qual. for testifying in ct., and an interested party's testimony would be discounted as incompetent due to the vested interest.

Quaere:

Husband and Wife

What about H signing a will of X and the will provides for H's W to receive \$10,000. — Under the statute/wills (p.187 ctk.), H's signature would be invalid since H + W were one at C.L. — If W signed + H was to benefit under the will, void under stat. at p.187 ctk.

20 OCT. 59

* INTEGRATION OF WILLS *

Cole v. Webb — Q. here is whether 2 pages of instr. should be admitted to probate (i.e., what papers of T make up will?)

(See: 49 Harv. L.R. 689.)

— A problem of integration.

Evid. offered was parol. Decided that parol could be intro. Most important evid. was that the pieces of paper alleged to be will were all present at the time of execution. May not be in bank or in other place. Witnesses testified that all papers were present.

METHODS OF ASSURING INTEGRATION:

- (1.) Physical Attachment
- (2.) Numbered pages
- (3.) Carry sentences from page to page (coherent attachment)
- (4.) Not necessary to execute each page, but have T sign each page and have witnesses initial each page.

(5.) In testimonium clause, can mention number of pages in the will & say that T has signed each.

Quaere: In Cole case, would it have made a diff. whether State had stat. requiring signature to be "at end" of will? — State w/ "at end" rule will be stricter re integration since it puts less reliance on coherent attachment.

Kinnear v. Langley ² whether provisions of H's will could be read into W's will? — Contestant (adopted daughter) contended she was pretermitted child, & since she was not mentioned in W's will, she should get entire estate. (Pope's Digest).

Could not say that H's will was integrated w/ W's will because it was in no way present when W's will was executed by W. — Held, however, that mention of D in H's will was incorp. by refer. into W's will if instr. had to be (1.) in exist. at time other document was executed, and (2.) executed in same manner as will to be incorp. by refer.

Document need not be "formally" executed, by gen. rule, to be incorp. into will. Then, some states (N.Y.) do not allow for this sort of incorp.

Effect of incorp. by refer. is to read the entire contents of the document referred to into body of will.

Codicil — document wh is executed in same form as will but is a modification ~~or~~ amend. of the will.

Ct. said: if D had been mentioned in will & clause mentioning her had later been revoked or deleted by the codicil clause mentioning her, she was still mentioned.

If W had executed a completely new will instead of adding codicil, the effect would be same (clause deleted), but it probably would have found in this case that there had been no in-

corp. by refer.
Requirements for Incorp. by Reference;

- (1) Document must be in exist. at time of making of will.
- (2) Clearly identified by will.
- (3) Clear intent to incorp. provisions of the other document.
- (4) Some cts. - will itself must ^{make} refer. to the extraneous writing as being in existence.

Bemis v. Fletcher (Mass.)

H makes will. Then W makes will saying she wanted her prop. to be distributed by the ~~terms~~ ^{terms} of the provisions of H's will.

Assume que after 1st will, H makes a second will. Problem here is that latter was not in exist. when W's will was drawn.

Mass. ct. in above case held that W intended to incorp. provisions ~~of~~ ^{since} it was in exist. & properly identified then it could be incorp.

Most states permit incorp. by refer.
Others do not - refuse to do so on basis of S/F + fact that S/F requires writing & witnesses, etc.

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Taft v. Stearns (p. 228)

Rule of
Law

The making of a codicil is a re-assertion of the will, and if the codicil was free of undue influence and fraud even tho' the will was not, the codicil negates the fraud & undue influence re the will.

The confirmation of the orig. will by the codicil becomes operative as of the date of the codicil.

It is better to say that the codicil republishes the will when the will was valid, and not when the will was invalid as here.

Incorporation
by
Reference

Another theory used by ats. is that the codicil incorps. by refer. The will on y is a refer.

hypo: "I direct that 8/10 of my est. be given to those persons named in a letter wh will be found w/ my will. This is my last will & testament." Then letter was written. Both were found together. To what extent was the letter incorporated into the will? In order for the letter to be incorporated, it must have

existed as of the date of the will.

Hyppi: Codicil found w/ letter & will, and codicil changes administrators (not T.D.). — The ct. will construe the date to be the date of the execution of the codicil. Thus, the codicil would be deemed a republication, & the letter could be incorp.

Regland, Admin. v. Wagner (p. 231)

Testator tried to reserve a right to change his will at any time he wished. The spw estab. a manner of drawing a will and a manner of revoking the will. Generally, the will must be revoked in the same manner as drawn.

(*) here contended that the clause was invalid as against the spw, and that ~~it~~ it should be struck from the will. (Advancements used only in intestacy.)

Quaere: Suppose the deed had been found here, what signif. would the deed have? — If it's merely placed in the deposit box, it would not be effective as a testament due to no delivery. Otherwise, it can be only an expression of the testator's intent.

Test for validity of subsequent identification: the means so provided should not be any act whose sole or chief purpose is that of complementing the will. It should have the force & effect of an independent legal transaction.

Gaff v. Cornwallis (p. 233)

The prop. here was suffi de-Quere: "I bequeath all contents of my described in addition to a de-Deposit box." Since the contents description of the location. may change from time to time, is this a reservation by the

A document referred to in the will for further directions as to the disposition of the estate must (1) be in existence when the will is made, & (2) must be made a part thereof by a suffi identify-ing description contained therein. A T cannot reserve to himself the power to modify a will by a written instrn. subsequently prepared & not executed per stat/wills. See 2 Col. L.R. 148, "Incorp. By Reference", Chaplin.

hypo: "I G to X, but if I give that aut. to him during my lifetime, this is to be invalid."

Matter of Walker (p. 236)

It was uncertain as to who would be in the employ of the co. when I die. The motivation for the will was to provide incentive for the Es to remain in the employ of the Es; will no good. It must be a valid testamentary intent.

27 Oct. 59

Power of Appointment

Given to another to dispose of the prop. per the extent of the power given. The appointee is **NOT** the owner, but " has some int. in the prop. His exer. of that power does not have to be in accordance w/ any particular formality other than that provided by T.

A power of revocation may be reserved, and this may be via the terms. Eg. "If X doesn't dispose of prop. by 12-1-59, then his power shall lapse."

Matter of Rauech

(p. 239)

Trust in 1922. Will in 1927. How can this type of disposition be justified? **? =**

Re an irrevocable trust wh. can't be even altered under the terms of the trust.

In N.Y., a document incorp. by reference must be an attested document. However, Cardozo, J. said that where, as here, γ is a formal, executed document like a trust, we need not carry out the gen. rule to its full finality since γ is little need to worry about fraud.

Quaere: However, can a trust be amended on it state that γ shall be no amend. to it?

No. It's an irrevocable trust.

So, a man may dispose of his prop. via an instr. wh. is not executed as formally as a will, but wh. has some formal execution.

It could be argued that the trust was ~~non~~ non-testamentary, independently significant, and, therefore, was okay, esp. on it could not be amended. So, this would be taken in as by incorporation.

The Fowles Case - (NOTE, p. 240)

~~This power was held ^{implied} by the lower Ct. as being actually lapsed upon the death of the wife; que W's death did ~~not~~ cause a lapse because the clause, ^{did not} avoid the consequences of a lapse. Thus, it ~~could~~ be held to be a gift to the legatees of the w. H's will was dependent upon w's will, a formally executed outside document. So, as far as that is concerned, y. has been compliance w/ the Stat. of Wills. — ~~Condy~~ (Maynard, strike the above discussion of Fowles as erroneous.) — This was valid since y. was compliance w/ the s/w. y. was here no opportunity for fraud or mistake, so the usual rule did not require strict adherence.~~

Re Jones Will Trusts

(p. 244)

Here, trust could be amended at any time. Re a refer. to an existing ascertainable document or to a document which may in the future be substituted therefor.

Some cts. say that T is trying to reserve power of revocation of will not in accord w/ S/W.

No trust was existing at the time of the drafting of the will. It was only explained as to how it was to be estab. upon his death. ∴ No indep. signif.

Some cts. will recog. this to be an act of indep. signif.

Assignment:

After finishing Chap. 6, read Chap. 8, omitting the following cases:

317	353
318	359
320	360
327	364
334	366
349	368
350	375

29 Oct. 59

Rule of Law

If the T's will is not adequately stated in the testamentary document itself, + cannot as a whole be ascertained by admissible evd., then effect cannot be given to parts only of it.

Rule of Law

On evd. is not admissible to make clear the whole testamentary intention, it is not admissible to make clear part of it.

Or, after the making of the will, the trust is amended, it is like the making of a post-will codicil no problem since the later intent is manifested and amounts to a republishing of the will as of the date of amendment.

Holding
(On Re Jones')

{ 1945 - Trust
1950 - Will
1955 - Amend. }

Since here the T has expressed his intention in two alternative forms, & evid. is not admissible to ascertain the second alternative, the gift as a whole must fail for uncertainty.

The mere fact that a pre-will trust is amendable will not allow an amend. thereof by the will, unless y is a post-amend. codicil & then maybe incorp. by refer.

* Some cts. have held that a trust can be incorp. by refer. & ~~the trust~~ that is ~~amendable~~ after execution of will will also be incorp.

* Some cts. say that only the pre-will trust ~~can~~ be incorp. by refer., not the amend.

* Some cts. say that the trust and amend cannot be incorp. by refer. (or y is an amend.).

(re-read this case).

If a codicil is executed in 1959,
everything before is incorp.
(on y is refer. thereto in
either the will or in the
codicil) since the codicil is
a complete republication and
reassertion of the terms of
the will.

* Interpretation of Wills *

Quaere: How do we resolve ambiguities
and how do we construe
words of a will?

We already know que on
there is an addition by
mistake, the Probate Ct. may
strike that addition.

Omissions

But, on y is an omission,
y can be no addition there-
to. However, the meaning
can be construed, w/ the eye
kept on the requirement of l
s/w that the will must
be written and that the
writing will be strictly
followed.

Hunt v. Hort

(p. 246)

"Lady _____" was in will. Ct.
refused to allow parol evid. to
show that Lady Hort was
intended because I simply
failed to write (per s/w) enuf.

Kell v. Charmer

(cbk. 247)

Interpretation of Symbols

Ct. allowed ascertainable sym-
bols to be interpreted by extrin-
sic evid.

3 Nov. 59

A good deal of eq. work is construction of wills.

Hypoi: Bequest to "Mrs. B" or "to her." Will goes on to say that the interpretation of the words will be found on a piece of paper along w/ the will. ~~Can~~ ^{Can} that document be incorporated? = It was not properly executed, and, having theory of incorp. by refer., it would not be looked at. The T has failed to supi express his intent.

Castledon v. Turner

(cbk. 248)

Direct Stmts. of T: What about direct stmts. of what T intended? e.g., "Don't worry, wife, you'll be well taken care of in my will."
- This is the most difficult evid. to use: easy fraud.
So, reference to direct stmts. of T are rejected.

Sichorn v. Morat, 175 Ky. 80, 193 S.W. 1013 (1917) -

Evid. re custom of German wives in referring to their H's as "he." The will was written in German. See note on p. 249.

Parol evid. may be supplied to clarify an ambiguity, but not to supply info. for an absolute omission. Extrinsic proof may be used in the former situation.

Cavert: be careful of the way the
cts. variously use the phrase
"parol evid." In some cases
the ct. means no parol evid.
of any type. In some cases,
may mean just direct ^{oral} stmts.

Nicholl J. Berquer (cbk. 250)

Ambiguities

Patent ambig. - appears on the
face of the will. May be
cured only by looking at
the provisions of the will.
Latent ambig. - does not appear
on the face of the will.
Appears only from extrin-
sic evid., and extrin. evid.
may be used to cure the
ambiguity.

Here, y was a L.A. - "Edward
Berquer." y were two (2) Edward
Berquers. Which one did I mean?

GENERAL RULE AND EXCEPTION

When interpreting will, the assump-
tion is that you can use any
evid. except direct stmts. of
intention of T. An exception to
that general rule is on y
is a L.A., and then y can be
used even direct stmts. of T.

Quere: What is an equivocation? - completely
accurate as to two people, but
does not specify wh one was
intended.

RULE
OF
LAW

If, upon the face of the devise, it had been uncertain whether the devisor had selected a particular object of his bounty, no evid. would have been admissible to prove that he intended a gift to a certain individual.

hypo: "To my grandchild." - T has 5 grandchildren. - Latent ambig. because you have to look off of the face of the will to see what I were other grandchildren. —

Hypo: Suppose T had 50 grandchildren. Ct. would probably equate this w/ a blank and disallow the extrinsic evid.

All latent ambigs. are not curable, and ^{some} are so vague that the T can be said to have not written the will sufficiently.

Hypo: "To John, the oldest son of X." Older son = W^m. Younger son = John. — What do we do here w/ this type of equivocation or if is not an equal description of the two contestants? =

Farrell v. Sullivan

(p. 253)

The Ct. merely ignored the names of the legatees and accepted the the description of the legatees as

being sufi, to identify the one intended,

A misnomer of a legatee or devisee is immaterial if the person intended can be identified by the description in the will.

5 Nov. 59

Quaere: Is the misdescription superfluous to the will or is it important to the will?

* Note on cdk. 254 -

(A.) Struck "East India" because the £700 capital stock was sufi as that was the only £700 capital stock ~~was~~ that he had.

(A-1.) Horse + dog. If horse were struck out, leaving only black (or y is a black dog), not sufi on y is no horse. However, on y is a white horse only, + "black horse" appears in the will, the word "black" can be struck, leaving "horse" and his only horse would pass.

The Doctrine of falsa demonstratio will not allow all of the meaningful words to be struck. At that point the doctrine is not applied.

In Farrell Case, was this a latent ambig. wh would allow extrinsic evd. to be used? = This was not the type of equivocation as would fit the Nicholl Case because here y are not two people to whom it equally applies. In Farrell, the description was not in refer. to anyone knowing that direct stmts. could not be used.

Kurtz v. Hibner

(Ct. 255)

PLAIN MEANING RULE

The Plain Meaning Rule - the second exception to the gen. rule that any & all evd. may be used.

Rule of
Law:
P.M. Rule

Out y is nothing in the will to indicate that I was using the words in other than ~~their~~ usual sense, & if the words used are sensible & meaningful w/ respect to extrinsic circum., extrin. evd. will not be allowed to vary the plain meaning of the words.

However, the argument could be made that due to a history of misdescription of the particular land, the land described in the will was not that actually intended.

e.g., O'Leary is a chain of title referring to "tract 31" on it is known & previously shown that "tract 33" was meant. Thus, on "tract 31" appeared in the will (y actually being tracts 31 & 33), it could be argued that "tract 33" was intended. See e.g., Patch v. White, (note, cbk. 257).

In Farrell Case, strategy of atty. was to convince ct. that his client was the person obviously intended by the description; whereas, in Kurtz Case, atty. met ct. opposition because he tried to show that y was a mistake & that the will should be reformed. It usually is easier to get the ct. to use falsa demonstratio in the former situation of strategy.

Pierce v. Farmers State Bank (cbk. 258)

Plain Meaning Rule applied particularly strictly on only words of relationship are used. (e.g., Son, grandson, daughter, child.) Presumption is that "child" means that, to the exclusion of the adopted child, if any.

The cases in the note demonstrate departures from the general rule: on a will is

Rule of Law

unambiguous, extraneous circumstances and extrinsic evidence will not be allowed to vary the terms.

10 Nov. 59

hypo:

"To my grandchildren." 9 are 10. Evid. intro. to show that fewer than 10 were intended. ~~Will~~ Will the evid. be allowed? A hurdle would be the plain meaning rule. The term "grandchildren" was pretty clear. This would probably prohibit evid. to the contrary. But, assume that you can get by the P.M. rule.

The ambiguity must arise before the intro. of evid. intended to show the ambiguity.

* REVOCATION OF WILLS * (Chap. 8)

Methods:

- (1) Burning, cancellation, tearing or obliterating are called acts of rev. on the instr.
- (2) Rev. may be by a separate document.

Method #1 of Rev. is informal and allowed because it is customary by thought by laymen to be effective and the law has permitted same so as to give effect to ~~the~~ what is thought to be effective. (huh?)

(1) Rev. by Operation of Law

Pascucci v. Alsop

(p. 309)

Rev. by Change of
Circumstances
(or, Implied Rev.)

This is a presump. based on an assumption that testators would not intend their wills to be carried out in view of the circumstances.

A subsequent marriage & birth of a child amount to an implied revocation of a previously made will.

All changes of circumstances do not warrant that presump.

(Called Implied Rev. or Rev. by change of circumstances)

(NOTE: Clients should be advised to bring their wills in periodically to see if any changes of circumstance would warrant revision of the will.)

A will in favor of a wife is not revoked by the birth of a child.

— Consult your state statute.

Robertson v. Jones

(p. 313)

Prior alienation of prop. specifically devised operates as an implied "revocation" by operation of law. But, actually it is a failure of the subject of the devise & not a revocation.

"Beloved wife" was used at the time of the making of the will and that language was merely descriptive of what T deemed to be his wife.

The word "wife" was merely descriptive and did not imply any continuing condition or import a cond. that the bene. should remain T's wife and that the devise would lapse if she is not his wife at the time of death.

(Holding)
Maj. of states say that divorce alone is insufficient to revoke a devise. To effect a revocation, divorce must be accompanied by a prop. settlement (will happen on stats. don't prohibit same, as here). This is true even in those states wh. by stat. have provided for implied revocation.

Ct. held that a Rev. by operation of law would not be effected by divorce or property settlement.

Y must be an intent to rev.
in addition to the acts of
rev.

* (2) Rev. by Acts Done to the Instrument *

Thompson v. Royall (p. 323)

To effect rev. of a duly executed will, in any of the methods prescribed by stat., two things are necessary: (1) The doing of one of the acts specified, (2) accompanied by the intent to revoke - the animus revocandi. Proof of either w/o proof of the other, is insuffi.

Here, it ~~will~~ attempt to rev. ineffective because if you are going to write out a rev., the lines of the writing did not touch the lines and/or words of the will as required for such cancellation - Attyl could have simply had 2 witnesses (Va. law) attest the revocation.

If written words are used for the purpose of rev., they must be placed so as to physically affect the written portion of the will, not merely on blank parts of the paper on which the will is written.

If someone other than T is told by T to revoke will, rev. must be in T's presence.

12 Nov. 59

If the writing intended to be the act of cancelling, does not mutilate, or erase, or deface, or otherwise phy. come in contact w/ any part of written words of the will, Y will not be cancellation suffi to const. revocation.

On T is actually prevented from revoking by the active fraud of another theory of const. trust might be applied. e.g. Blind T tells wife to burn will & she doesn't, tho' she tells him she has.

Attempted ratification of accidental destruction - house burns + will is in desk drawer. T says, "I'm glad because I wanted it destroyed anyway." Would this be an effective rev.? No. The de-

struction must be born of the intent and must be related.

Phinney v. Alexander (p. 331)

On a T, who has executed this will in duplicate, cancels or destroys one of the duplicates, the ~~will~~ presumption is that he meant thereby to revoke the will, whether the other duplicate is deposited w/ some other person or is in T's poss., altho' in the latter case the presumption has been said to be weaker; & it has even been held that on a T, having both dupts. in his poss., altering one of them, & then destroying it, a slight presumption of revocation of the will arises. The presumption of intention to revoke may, however, be rebutted, and it does not arise on the circumstances indicate that no revocation was intended.

When a will is affected by some revocatory act, it must be accompanied by a revocatory intent that the will be revoked as a result of the act.

When you have to interpret something, parol evid. will flow freely. Not so necessarily on the interpretation is not in question.

Duplicate wills are dangerous but it's desirable to have and keep a copy (not fully executed per S/W) who has all of the provisions.

Best to keep the wills in a safe place (e.g. safety dep. box, w/ Atty. or will can be filed w/ the Probate Ct. if the State so allocos. - Mass. does).

If there are duplicate copies, they can be rev. by destruction of one. - The intent must be to revoke both.

Dixon v. Solicitor to the Treasury (p. 336)

Jury found that T cut his signature off the will w/ the intention that the will should be revoked conditionally on his executing a fresh will. - Dependent Relative Revocation.

Doctrine of Dependent Relative Revocation

Solicitor involved here due to possibility of escheat.

The destruction of the 1st will was

On the intention to revoke So closely tied up w/ the execution of
is conditional & on the 2nd will, it could be said the
cond. is not fulfilled, they were related insofar as the
the revocation is not second will would not take
effective. -- Doctrine of effect until the first was
Dependent Relative Revocation. revoked.

17 Nov. 59

Matter of Macomber (p. 338)

See note, ch. 341 for
TEST of D. R. R.

The mere act of cancelling alone
is w/o signif. unless an in-
tent to revoke accompanies the
act; and when corrections are
ineffectual for lack of formality
required by law, an intent
to destroy the previous devise
will not be found.

"The doctrine of D. R. R. is func-
tionally a rule of interpretation
of intention. ... The rule seeks to
avoid intestacy on a will has
once been duly executed and
the acts of the T in rel. to
its revocation seem cond. or
equivocal."

It held that the can-
cellation or obliteration of a will
by the T himself must be w/
an intent to revoke. The cond. nature
of the cancellation here negatives an
intent to revoke, dependent as it
is on other and unfulfilled conds.

D. R. R. is mistake in the inducement

in that the hearing of will #1 was induced by the belief that #2 will is valid or that Y will be a second will executed.

{ * You can most validly deter. what the court may do by deter. what the T would have done if he had known the truth.

* Partial Revocation *

Bigelow v. Gillett

(p. 341)

T erased 2 clauses. Ct. said the prop. would go to the residuary legatee.

The power to revoke a will includes the power to revoke any part thereof.

Ct. held that "the only fair inference is that he intended give the prop. covered by those clauses & which by his revocation became undisposed of by the other clauses of the will, should fall w/in the residuary clause."

You cannot increase the int. given to anyone under the will except the residuary legatee. e.g. "\$500 to X & Y."

This would increase the devise to Y by \$250⁰⁰. — No good say the few Cts. who have dealt w/ this.

19 Nov. 59

Assignment: CHAP. 10 -

Read 409, 410, 411, 413, 414,
418 + 428, 30, 32, 35, 36, 38,
55, 64 + 71 & 75.

Woff v. Bollinger (p. 346)

B's name was crossed out but still legible, and the crossing out was based on the insertion of P's name. However, the Ct. said that since P's name - insertion was not properly executed per s/w, it was ineffective; and since the crossing out was dependent upon the insertion, the crossing out was ineffective, too, on the basis of D.R.R. T made a mistake and the Ct. tried to deter. T's intent. Ct. said that the subsequent disposition to P was conditioned upon a mistake and that, therefore, the intent of T should not be considered. - Not satis. result from point of view of T.

* Revocation by Instrument *

Derr v. Derr (p. 371)

If a later properly executed instr. makes a disposition of prop. inconsistent w/le (Methods → terms of a will, or uses language from wh it is clear that the intention of le T was that such will should no longer continue to be a valid will, its necessary effect is to revoke such will, even tho' the word "revoke" is not used.

When you revoke by instr., the rev. can be either express or by the estab. of a completely different scheme of disposition even w/o an express rev. On a new scheme which is not completely inconsistent w/ the scheme of the will, the two must be resolved by the Ct. The subsequent instr. must

the properly executed.

"I revoke my first will." - on y is nothing more, it could be argued that since this rev. does not itself dispose of any prop., it is ineffective. However, the counter-argument is that by the rev., the prop. will descend per intestate scheme of descent.

What about revival by instr. of a previously "lapsed" will?

* Rev. as affected by the fact that the subsequent instr. is wholly or partially inoperative. *

In Re Gould's Will (p. 376)

T had one will. T made a second, thereby revoking 1st. Then, T cancelled the second will.

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Issue

Holding

The issue is whether the rev. of a subsequent will ipso facto revives a former one expressly or impliedly revoked by the latter? Held, on a second will is destroyed, w/ intent to revive an earlier one, it should, w/o question, be allowed so to operate. The revival depends upon the intention of T at the time of the destruction of the revoking will. The intent can be deter. on basis of the circumstances.

Estate of Callahan

(p. 381)

Suppose T believed that the destruction of the second will would revive the first will, but she is mistaken?? = Ct. here talked of D.R.R. on (per Relyea) as was only a question of mistake. Ct. should have tried first to deter. T's intent.

* Campbell v. French

(p. 383)

Clear case of mistake even shown on face of will. Rev. by a formal instr. here. This is a leading case.

Rule of Law

There is no rev. on the motivation for the rev. is based on a mistake.

Hypo. 1st will - all to A

2nd " - Rev. 1st will - all to B.

2^d will not properly executed.

Rule of Law

1st will will remain effective because unless a rev. is properly executed, it is ineffective + is void.

- (1) Suppose same situation, but B is a devisee w/ incapacity to take + 2^d will is validly executed. (2) Suppose it is not express rev. but only "all to B." Assume B has incapacity to take. Here, D.R.R. could be well argued in favor of A.

CAVEAT: Remember to distinguish between

rev. by instr. (on these problems arise) and revocation by other means.

1 DEC. 59

Linkins v. Protestant Epis. Cathedral Foundation (p. 398)

Issue: Whether a testamentary gift to a religious institution w/in 30 days of death, wh repeats an earlier disposition, is made w/in 30 days of death w/in the meaning of the stat? =

D.R.R. applies most frequently to cases of mistake.

- Per Relyea, this was a mistake of law.

If the stat. here does avoid the latest disposition, can D.R.R. apply under the statute? = i.e., can we say under the stat. that T intended the orig. will to remain effective if the later will turned out to be void? =

Quaere: Whether will #1 is revoked by will #2 on #2 contains an express clause of rev. but wh #2 will is inoperative due to some fact outside of the will (e.g., incapacity of devisee to take)? = Cts. are divided.

Quaere: Suppose y was no express rev. but implied by inconsistent terms? = Cts. are divided.

CHAP X. * ADEMPATION, INCREASE AND SATISFACTION *

There are two classes of devisees or legacies:

- (1) Specific - T intends to give a definite, certain thing.
- (2) General - some sort of general, measured benefit (to come from estate).

If devise is a specific devise and the thing does not exist at T's death, the thing is said to be adeemed (ademption). If the gift were gen., no prob. of ademption!

Abatement - not enough in estate to cover all the bequests. On this happens, the specific devisees are favored.

Executor will use estate in the following way:

- (1) Intestate prop. - first used
- (2) Residuary Clause prop. - next used.
- (3) General legacies - next
- (4) Specific legacies

ADEMPATION

Ademption always has been used in refer. to personal prop. This was thought of as a means of rev. Ademption not used re real estate. When real est. was involved,

Real Estate

"after-acquired" = acquired after making of will.

conveyance of realty, ^{before death} operated as a revocation. If the land is reacquired, devisee still would not get it because a will does not bar on after-acquired

prop.
In Re Sikes

(p. 409)

When making the bequest of "my piano", the T referred to a particular thing & T meant whatever she had at death. intended to give the particular piano then in her poss. and no other. Const. a contrary intention suff to prevent the piano she poss. at her death from passing under the bequest of "my piano."

3 DEC. 59

In gen. bequest of \$1,000, the only question is whether it is \$1,000 anywhere or in the estate or ^{anything} of worth that in the estate

In interpreting a will, only and all matters can be looked to by the court.

A will is deemed not to take effect until the death of T.

Chapman v. Hest

(p. 411)

Devise of T's prop. on board the ship Warwick was removed by T to another ship when "he had quit the Warwick." Q. Was this action of T a manifestation of contrary intent? = Ct. held No. "As the removal of these goods etc." (see p. 412).

Humphreys v. Humphreys (p. 413)

Representative of the more modern interpretation of T's intent being interpreted. Today, we look to T's intent as at the time of execution of the will.

hypo: "1/3 of the money held by me on deposit at X bank." Would this take effect if X removed the money? = Would the removal = ademption of the bequest?

In Humphreys Case, A, B, C share \$3000, but A and B had to bear the loss. A specific bequest had been made to C of \$500. — Gen. Rule is that a residuary legatee bears a loss and a specific legatee is preferred. — So the ct. was saying that the \$500 would not be included in the residuary so that then \$3000 (\$2500 + 500) would be divided three ways instead of A + B dividing \$2500 two ways.

9 Dec. 59

Robinson v. Addison (p. 414)

Gift of 15 1/2 shares. T had 15 1/2 shares, and the problem arose. Is this a spec. legacy? — If so, the son

+ daughter take nothing since T did not have the shares at the time of death. Ct. held that the legatee would not take the shares.

In Re Mandell's Estate (p. 418)

Ct. held this to be a specific legacy. In question were 1200 shares of stock. T had to his name 6000 shares.

MAJORITY RULE

In Robinson, Ct. held that the mere fact that the T did own some other shares ^{at death} suff. to satisfy the bequest did not mean that he intended the shares to pass. The T used the word "my" shares. - This is the more common interpretation.

Minority Rule

In In Re Mandell's Estate, Ct. said even the use of the word "my" did not mean that T did not intend shares to pass, because even tho' he had disposed of the specific shares before death, he had 1200 others, and Ct. held that 1200 shares would pass. - Min. rule - the legacy would not be adeemed.

RULE of LAW

If the specific legacy merely changes in form (e.g., stock increases in value) rather than in substance, no ademption.

T merely said "500 shares of Parke, Davis & Co., par value, of the capital stock." Did T mean that she wanted 500 of her shares ~~then~~ held at death to pass (specific), or that 500 share of such should be given to the legatee even if the estate must buy them out of the estate (a general bequest). This is the real problem here.

Gen. v. Specific Bequests

If a gift is specific, and has been admeasured, the specific legatee gets nothing. If it were a general gift (i.e., bequest), the general legatee will still get the legacy from the estate.

INCREASE - INTEREST AND DIVIDENDS

If it is a specific gift of stock, or the like, the specific legatee gets the dividends and the interest ^{immediately} payments after the death of T. - Increase.

If general, ^(NORMALLY) the interest pymts. & dividends don't accrue to legatee until some time after death - usually a year.

Matter of Ireland (p. 428)

T made bequest of B/A. then became incapacitated. ~~Guardian~~ ^{Guardian} had to sell B/A before T's death to help support T. - Ct. held that

[since T did not have B/P at death, it did not pass: a specific bequest, and was adeemed.

First Nat. Bank v. Perkins Inst. (p. 430)

NOTE: whenever drawing a will T make bequest of stock. Be w/ specific bequests, be exact for T died, the stock was call- and check it periodically during ed; and w/ the redemption T's lifetime to make sure that money therefrom, T bought the subject matter is still held or bonds. Bonds were y when owned by T. T died. The stock was pre-

Held: if the T subsequently parted w/ the prop, even if he exchanges it for other prop. or purchases other prop. w/ the proceeds, the legatee has no ferred stock Q/W as the bequest adeemed?? = Yes.

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Koziah Hoppel's Estate (p. 435)
Demonstrative legacy - T intended to give a gen. bequest but has directed that that bequest be taken out of a particular fund if fund is y; but, if fund is no longer y, the gift is NOT adeemed.

Demon. legacy - bequest of certain sum of money. ^{payable out of certain fund} If the fund fails, it will not be adeemed, but will come on the est. as a gen. legacy. However, for adatement purposes, it's treated as a specific legacy.

A legacy given, payable "out of" a debt due, will not fail (be adeemed, i.e.) by reason of the failure of the modus appointed for payment.

Bowen v. Dorrance (p. 436)

legatee got \$1000.

hypo: Suppose bank paid \$50 on the dollar? = Or, \$.25 on the dollar from the bank to general legatee? What would Sophia get?

in that hypo?

If the fund is not $\frac{1}{2}$, the $\frac{1}{6}$ can be taken out of the gen. estate. If the fund is not $\frac{1}{2}$ but is inadequate or deficient, gift will be treated specifically and abatement will not take effect to hurt the spec. legatee. ~~\$1,500 on the dollar~~ ~~\$5,000~~ but the rest of her legacy would have to be taken pro rata w/ the gen. legatee and would get ~~only \$1,250 on the dollar~~

The legacy must be paid out of the designated fund if suff., resort being had to the gen. fund only for the deficiency, if any.

So, legatee would take whatever is in the bank, and the difference between that and the gift amt. would be gotten from the estate as tho' she were a gen. legatee for that purpose. See p. 437.

Grogan v. Ashe (p. 438)

When the legatee and T stood in loco parentis, a gift before death for a specific purpose raises the presumption that, prima facie, such pymts. are ~~a~~ a complete satis. or a satis. pro tanto. But, if the T does not stand in loco parentis, such pymts. equal to or less than the legacy does not, prima facie, have any rel. to the prior legacy. "Hands off."

Satis - any legatee
Advancement - children or lineal
descendants

A spec. legacy is held to be ad-
elected when the T has collected the
debt (if the legacy consisted of
specific notes) or has disposed of
the devised chattels or stocks
in his lifetime, whatever may
have been his purpose in doing
ing.

But, when a general legacy is
given of a sum of money w/o
regard to any special fund
set apart to pay it, the intention
of the T is of the very essence
of ademption.

Where a T ^{wills} ~~is given~~ a legacy for
a particular purpose, and
afterwards gives the legatee
the same sum for the
same purpose this is of
itself an ademption of the
legacy, nothing else appearing.

* ABATEMENT AND LAPSE *

Merchandise Trust Co. v. Schloss (p. 455)

Two devices here:

- 1.) Acceleration
- 2.) Sequestration

When a widow takes her
share not under the will
but via statute, and other
legatees can't take their share
"until widow dies" for the
purpose of the will, the widow
is deemed dead (upon taking of
the stat. forced share) and the
other legatees can take their
share right away.

15 Dec. 59

Assignment: Read

488 522 570

494 535 576

507 536 579

512 542 572

548 578

560

566

Read also on 484.

If you suspect that your wife may take against the will and take the stat. forced share, provide for that. e.g., "If my wife (so chooses), then I bequeath"

An antenuptial K to release dower rights ~~is~~ is valid so long as y has been full disclosure, esp. by H.

When W takes against the will, the remainder of the will will be valid, unless the W's choice so drastically upsets the will that it does not even approximate T's testamentary intent.

This case dealt specifically w/ a life estate. Suppose the same facts, but W has no life estate left to her, but ^{has instead} a bequest of \$10,000. If W chose her stat. share, that amt. would be taken from the estate per the scheme of allotment. However, this might be inequitable because the stat. share may be more than \$106. So, the better way may be a pro rata withdrawal from the estate.

hypo: T devises "To the wife of X." W dies before T, and X remarries before T dies. Will W-2 of X get the gift under the will? ^(True inheritance) Remember that the crucial testamentary intent is at the time the will is drawn. It could be argued either

way; but if T's intent was to provide for whomever the gift is because of T's love for X, then it could be argued that W-2 would take.

If a codicil is made, the Doctrine of Republication would operate; and the time of the codicil would be decisive.

* LAPSE *

Anti-lapse Statutes

If are stats. wh will not allow lapse on certain relatives are involved, the descendants of those rels. taking on the relative precedences the T.

Kimball v. Story

(p. 464)

On a gift in the residuary clause lapses and y is no place else for it to go, the ~~will~~ gift lapses ^{altogether} and it descends by intestacy.

Partial Lapse: Residuary Clause

Even on y are 3 legates named, and the legacy as to one lapses, that 1/3 (in the residuary clause) will go by intestacy.

17 DEC. 59

Dowling v. Nicholson

(p. 475)

Class gifts "10¢ to the children of Mary Smith, & c." The class may vary, and when that happens, the question of T's intent is a problem. The gift was not spelled out. HYPOT suppose that at time of will,

Must first deter. whether the gift is a class gift or a specific gift.

A, B & C are the children of Mary Smith. A predeceases T. D is born after execution of will & before T dies. — A is out, not because the gift lapses but because A is no longer a member of the group. D is included because he is a member of the class designated. In this case, A's part would be divided among B, C & D.

If T had said "to A, B & C," and ~~D~~, the gift to A would lapse and that part would descend via intestate scheme to T's descendants. D would be out because the gift was not ~~not~~ a class gift, ~~but~~ but was specific.

If it is a class gift, the portion of A would not lapse, but the presump. would be that A was not intended to be included.

Quaere: Was the T group-minded?

Quaere: Or, was he thinking in terms of indivs.? = It must be found that T intended to designate a group which is capable of changing in number. So, if it is "to the children of Mary Smith," T's intent must be deter. first before it can be deter. who gets what!

TEST:

A gift "to A, B + C" is always interpreted as being a gift to indivs. (under the extreme interpretation.)

Q. Suppose A, B + C are all children of X, having the same characteristics? Q. Suppose it is made "to A, B + C, the children of X"? These are problems of interpretation. ~~the~~

LAPSE OF SPECIFIC LEGACIES

On the gift is to individuals, and one of them predeceases T, that individual's gift lapses absent an anti-lapse statute.

Gift to "the children of X"

On "the children of X" are the words of the gift, it is an almost universal construction that the intent was that of ~~a~~ a class gift, and the presumption is in that favor, unless y be a manifestation of contrary intent.

Q. Suppose y is a lapse statute? How would you interpret T's intent in view of such a stat.? The majority view is that a lapse stat. applies even on y is a class ~~stat.~~ gift. Downing Case. The statute is another aid in deter. T's intent.

On a gift is to a class, of which are many members, it is reasonable to suppose that the T had in mind only those of that class who were living at the time T made his will.

The lapse stat. applies only to a change of situation after the will is made.

On A died before the will was made, it is a void gift, not a lapsed gift.

If a gift to A is made specifically and A is dead, but T does not know A is dead, most Ct's say that T would have intended the children of A to take. But, on T knew of A being dead, most Ct's say T had the lapse stat. in mind and made the gift pursuant thereto, and therefore the gift would be deemed to lapse rather than being deemed to be void.

There is no practical difference between the consequences of a void gift and a lapsed gift.

* CHAP. 7 Testamentary Character and Intent *

Sec. 1 Instruments Not Offered as Wills

Inter Vivos
Disposition

[4 are methods of disposing of prop. inter vivos (dead, etc.)
The test is: did any interest pass before death?

Y must be some sort of testamentary ~~intent~~ disposition.
So, the problem arises on the instrn. can be interpreted either way.

5 JAN. 60

Butler v. Sherwood (p. 266)

Suppose we have a deed ^{"to} A from and after my death."
- An effective conveyance of the prop. (like the creation of a springing use). See note p. 268.

More often than not, a reservation of a power to re-voke ~~will~~ ^{instrument} be interpreted as making the instrn. testamentary.

Here, H ended up sharing equally w/ son, and it does not seem to carry out the intent of T. Ct held deed to be ineffective on the grounds that the prop. was not to pass until death of T, not merely that the H's enjoyment of the prop. was delayed.

Nashua Trust Co. v. Mosgovian
~~Trust Co. v. Mosgovian~~ (p. 277)

Re joint account's survivorship. - Ct. held This was not a gift during the life of T. Y was no delivery because Harry did not sign the joint acct. signature card.

Absent statute, you will have to justify an inter vivos attempt to transfer on a traditional theory; e.g., gift.

TEST

The cts. constantly ask, "Did any interest pass?" If so, it is other than a testamentary gift. If not, assuming test. intent, y is a testamentary gift.

The 3rd party bene. K theory is one of the inter vivos methods of conveyance.

K.C. Life Ins. Co. v. Rainey (p. 284)

The life ins. K is non-testamentary and is a third party bene. K.

McCarthy v. Pieret (p. 287)

Ct. found testamentary intent.

TEST OF Ks

The test is whether Pres'd. any sort of right when the K was made.

Eaton v. Brown (p. 299)

Conditional will. The basic problem is one of construction.

by some
Construed, to mean that this
is the effective will of T
only if T does not return
from the trip. Or, as
Holmes said, it could be con-
strued ~~the~~ to be the will of
T and the cond. is men-
tioned only as the moti-
vation ^{or inducement} for making the will.

Rule [If the cond. does not appear
on face of will, will can't
be attached as cond.

Rule [If will is found to be
cond., it will not be
probated.

If she had died, it would
have definitely been her
will.

7 JAN. 60

(CHAP IX.) * Contracts to will *

Harris v. Harris (p. 394)

Divorce from first wife, and K
then made to provide prop. for
her upon his death. H remarries
and wants to provide for W2 (P).
How can he? Suppose he wants
to educate his children?

If you wanted to protect W1,
you could provide that H can

spend only as much as he would normally have spent. Or, create a life estate in H in the prop.

Q. Suppose the K was unwritten? - If agreement deals w/ realty or realty and personally, under S/F ~~it~~ must be in writing. If dealing only w/ personally, not w/in S/F, other things being equal. - On the agreement deals w/ realty and personally, the cts. will not divide, but will still require writing as w/in S/F.

Suppose Just (H) promised to make will but did not do so during his life. What could W-1 do? She could not require Equity to compel H to make will because it would be deemed a futile act: H could comply, make a will, and could revoke it the next day.

Eg. will not act in vain.

Suppose Just had executed a will wch did not comply w/ the agreement, and no action ~~could~~ was taken during his lifetime. What could W-1 do? K cannot be taken into probate ~~ct.~~ to change the will. The probate ct. can do nothing. A will can only be changed by the execution of another will. But, W-1 could sue admr. of H's estate for damages. Or.

services were rendered upon promise to provide for the server in ~~the~~ T's will, action in quantum meruit for value of services rendered will lie.

The consid. need only be suff. to support an ord. K.

Q. What about the kids in Harris v. Harris? = They would be third party beneficiaries and could enforce their rights except in states wh don't recog. third party bene. Ks. e.g., Mass. and maybe N.Y.

Stone v. Hoskins

(p. 401)

Mutual
Reciprocal
Wills

Two wills wh are reciprocal (H to W, and W to H. Or, H to W for life then to kids, and vice versa.)

If γ is only one will, it is a joint will or mutual will, and a will is mutual if γ is an agreement not to revoke. γ can be a joint mutual will (Rastetter v. Hoenninger).

* Suppose γ are two mutual wills wh are reciprocal. = even on γ is an agreement not to revoke, revocation can

be made during the lifetimes of both so long as γ is notice to the other party of revocation. No one is hurt.

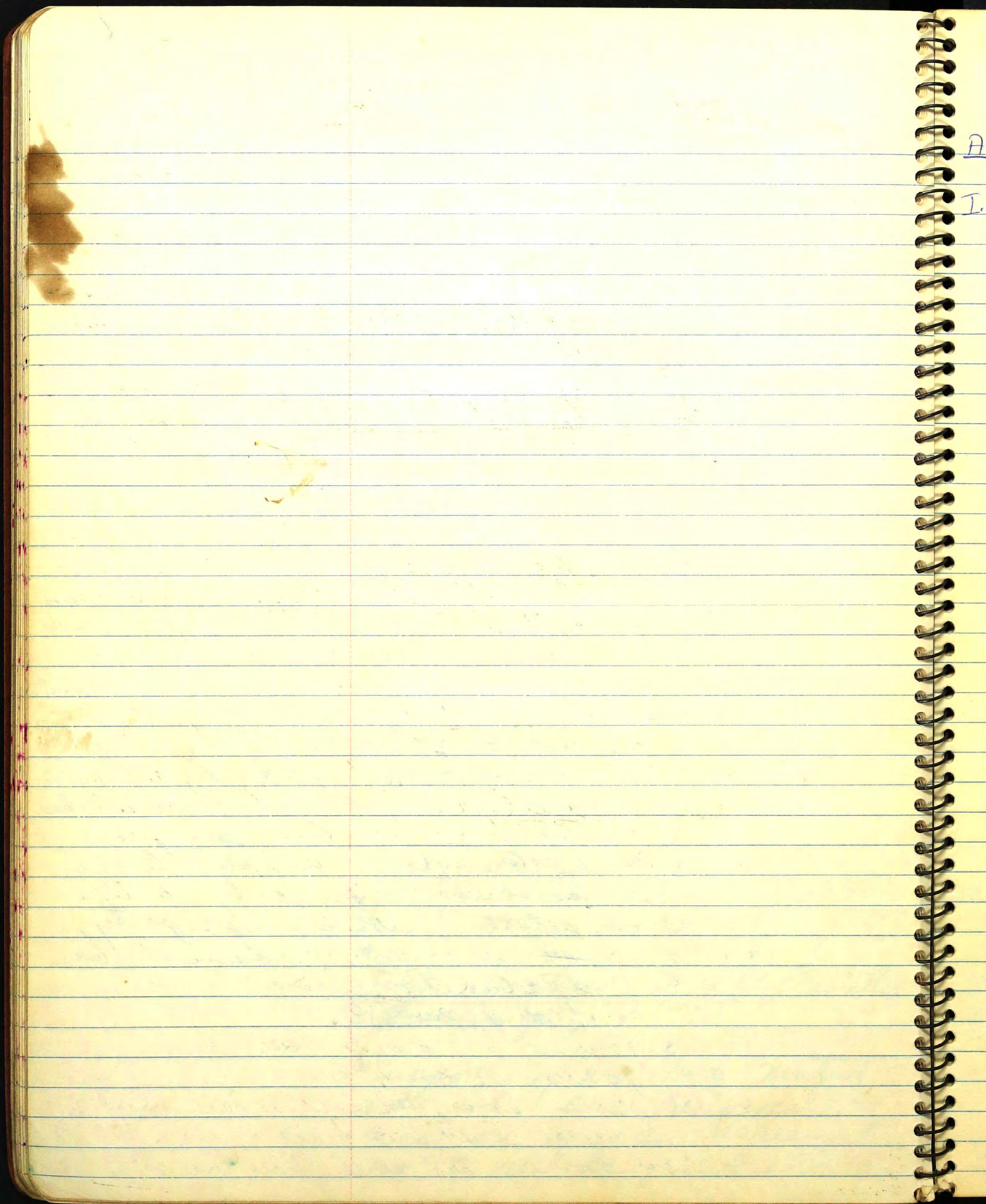
Q. If W dies and has complied w/ her agreement, could H then revoke? = Yes, because since W has already died γ is no obligation to leave his prop. to W.

Rastetter v. Hoenninger

(p. 403)

Here, γ was an additional agreement (in addition to mutual reciprocal wills) that the survivor would leave his prop. to a certain child. — As to H's prop. rec'd. from W due to her death, H must comply w/ agreement. As to his own orig. agreement, it depends on the construction of the K, and normally can do what he wishes. But, as to his ~~own~~ prop. gotten from W, due to the existence of only a life estate in H's property, ~~and~~ the kids cannot be excluded.

Read 479 - 488.



OUTLINE OF WILLS

I. Testamentary Capacity and InducementA. Testamentary Capacity

1. Status and Age

a. The C.L. test. disability of married women has now completely disappeared, and, except for minor exceptions in a few juris., is no longer disability on account of conviction of crime or alienage.

b. Testamentary Age is now fixed by statute in all states; the most usual age is 21, tho' a no. of juris. deviate from this figure, either generally, or on the basis of sex, marital status, or nature of the prop. involved. The age requirement must be met at time of execution.

2. Mental Capacity - Gen. Requirements

a. To make a valid will, one must be of sound mind tho' he need not possess superior or even average mentality. One is of sound mind for test. purposes only when he can understand + carry in his mind in a gen. way:

- (1) The nature + extent of his prop.,
- (2) The persons who are the natural objects of his bounty, and
- (3) The disposition wh he is making of his prop.

b. He must also be capable of:

- (4) Appreciating these elements in relation to each other, and
- (5) Forming an orderly desire as to the disposition of his prop.

c. As shown above, test. cap. is deter. according to one's mental ability to make a will; one may have test. cap. tho' he is under guardianship or

lacks the ability to make a K or transact other business.

3. Insane Delusions (i.e., Monomania)

a. An insane delusion is a false belief which is the product of a diseased mind and to which one adheres against evid. and reason. However, an insane del. does not invalidate the will unless it affects the disposition.

b. Mere eccentricities, prejudices or unusual religious beliefs do not, by themselves, const. insane delusions altho' these and other similar factors are of evidentiary value in deter. whether test. cap. exists.

4. Moral, Educational and Physical Factors

a. Moral depravity, illiteracy, extreme old age, great weakness and severe illness do not disqualify T, tho' the latter 3 elements sometimes prevent one from having the necessary mental cap. to make a will.

b. While a person is not disqual. from making a will by reason of being deaf, dumb, or blind, or ^{even} all three, one so afflicted from birth may lack test. capacity because his mind has not developed to suff. understanding. Moreover, these afflictions, as well as other phy. weakness or illiteracy, may call for special precautions in the execution of the will and increase the difficulty of proof thereof.

B. Undue Influence, Fraud and Mistake

1. Sources and Relationship of Rules

a. Rules re U.I., Fraud and mistake have their basis

almost entirely in the decisions rather than in stats.
b. While each of these elements may be theoretically distinct from the others and from lack of mental cap., there is a factual relationship between them.

2. Undue Influence

a. A will is invalid if it is obtained ^{and caused by} thru an influence wh destroys the free agency of the T and substitutes another's volition for his. Influence may be undue altho' it does not amt. to phy. coercion, but mere advice, persuasion or kindness does not const. U.I.

(1) In order to invalidate the will, the influence must be that of some other person, not by the workings of the T's own mind.

(2) The U.I. must cause the disposition.

(3) When the bene. sustains confidential rels. and drafts the will or controls its drafting, it is generally held that a rebuttable presump. — bordering on an inference of fact — of U.I. arises.

3. Fraud

a. A will is invalid if the T has been willfully deceived by the bene. as to the character ~~of~~ or contents of the instrument, or as to extrinsic facts wh are material to the disposition and in fact caused it. The elements of fraud are essentially those necessary to estab. a deceit; hence, innocent misrep. does not invalidate a will unless relief would be given on acct. of a simple mistake by T to the same facts.

b. Remedies for Fraud & Duress

- (1) Heirs at law, or devisees under a former will, can obtain relief against fraud or duress in the execution of a will only by contest of the will. However, one who was unlawfully prevented from making a ~~test~~ will, the intended beneficiaries obtain their redress by the imposition of a constr. trust or by a damage action against the wrongdoer.
- (2) When a devisee, or heir at law in case of intestacy, promises the owner to convey to or hold on trust for another and fails to perform, a trust will be imposed for the intended beneficiary although there was no actual fraud.

4. Mistake

a. As to the Document Signed, Contents, and Legal Effect

- (1) Probate will be denied when the testator made a mistake executed the wrong document as his will.
- (2) No relief can be obtained on acct. of provisions omitted from a will by mistake. A will may be denied probate if the testator was ignorant as to its contents, but there is a strong presumption that an able-bodied person knew the contents of his will. Provisions inserted by mistake may be omitted from probate, but the Amer. Cts. do not reject words from probate so as to change the meaning of the remaining words.

(3.) No relief at probate will be granted for the T's mistake as to the legal effect of the language used. True even if incorrect legal advice.

b. In Inducement

(1) In absence of statute, relief will not be given for mistakes in the inducement of the will except possibly in the rare case on the mistake and what the T would have done but for the mistake both appear on the face of the instr.

c. In Description of Bene. or Property

(1) Upon constr. of a will, the ct. may reject erroneous parts of the description of the bene. or the prop. when the part which remains suff. describes the person or thing that T must have intended.

(2) When a description in a will applies accurately to a given person or thing, it cannot be shown that the T intended some other person or thing which does not fit the description unless it can be proved that the T customarily described the latter by the terms ~~it~~ used in the will.

(3) When a description applies in part to one and in part to another person or object, it may be shown by the surrounding circumstances, and according to the better view by the T's express declarations, which was intended by him.

(4) When a description in a will applies equally to 2 or more persons or things, it is per-

missible to show wh of them was intended by the T. Here it is clear que T's intention can be shown by his express declarations.

5. Partial Invalidity of a Will

- a. By the majority and better doctrine, when only a part of a will is affected by U.I., fraud, mistake or insane del., the remainder will be enforced unless the two portions are so interrelated that to give effect to one w/o the other would probably do violence to T's intention in wh case the entire will should be denied probate.

II. Execution of Ord. Wills

A. Statutory Sources of the Rules

1. The formalities required for execution of wills are governed by stat. while some cts. have held that the stats. in force at the time of execution govern and others that those at the time of T's death control, the best view is that a will is valid if it meets the stat. requirements at either time. The cts. insist upon at least substantial compliance w/ every stat. requisite but no additional formalities are necessary.

B. Writing

1. Ord. wills must be in writing but may be in any language and inscribed w/ any material or device on any substance wh results in a readable & fairly permanent record.

c. T's Signature

1. Will must be signed by T, but he need not write his full or correct name, and even a mark or stamp is suffi if that was the complete act of wh T intended to authenticate the instr.
2. Most stats. permit T to sign by proxy; +, if so, the T's name written by another at his direction and in his presence is suffi signature.
3. Most states do not require that the will be signed at the end, so that the writing of the T's name anywhere on the instr. is suffi if he intended it to operate as his signature.
4. The stats. in a no. of juris. require that the will be signed at the end or subscribed by the T. In such case if any dispositive portion of the will is below or after the signature at any time of execution, the entire will is invalid.

d. Witnesses - No. and Competency

1. Most stats. require only two attesting wits., but in a few states 3 are necessary. Ga = 2 witnesses in presence of T.
2. The wits. to a will must be competent to testify at the time of execution in a proceeding for the probate of the will. One who is then competent is a qualified attester regardless of later events and one incompetent at the time of execution cannot usually become a proper wit. by any change of his situation.

3. In most juris., the stat. provides that a bene. under the will is a proper at-tester but that he is not permitted to take under the will unless he is also an heir at law, in which case he may take up to his intestate share. Ga. in accord.

E. Making or Acknowledging Signature Before Wits.

1. A few states require signing by the T in the presence of the wits., but most juris. also permit an acknowledgment to them of his signature as an alternative. In states whose legis. follows the modern English Wills Act, there are no other alternatives, and in case of an acknowledgment, the T's signature must be visible to the wits. In most other juris. authentication by the T may also be effected by acknowledgment of the instr. as a will, regardless of whether the wits. see the T's signature.

F. T's Request to Wits.

1. Stats. in some states expressly require that the T request the wits. to act as such. Even in absence of such provision the cts. make a similar requirement. However, a request is readily implied from T's acquiescence in the signing by the wits.

G. Publication -

1. Publication, or the signification by the T to the wits. that the instr. is his will, is not usually required in absence of express statutory provision. Only a minority requires publication and in no state is it

necessary for the wits. to know the contents of will.
H. Animus Attestandi

1. The wits. must sign w/ the intention of giving validity to the instru. as the act of the T.

J. Wits' Signatures

1. The will must be signed by the wits. tho' they need not sign their correct or full names. May be by mark or entirely by proxy.
2. In all cases, wits. must sign upon some paper attached to the will, tho' generally it need not be on any particular part thereof. Some stats., however, require the wits' signatures to be at the end of the will.

J. Order of Signing

1. T should sign before wits. subscribe, tho' it's usually held that the reverse order is permissible if all sign as part of a single transaction.

K. "In the presence of..."

1. The statutes almost universally require that the wits. should sign the will in the presence of T but it's not necessary that T actually see the wits. sign. The stricter sts. insist that the T should be in a position to see the wits. in the act of signing, and also able to see the will w/o material movement of the body. The more liberal view is to uphold the will tho' the signing was not w/in the range of T's vision if it was

close at hand + w/in his general cognizance.
2. Stats. in some states provide that the wits. must sign in the presence of each other, while other stats. require that the T must sign or acknowledge in the presence of wits. present at the same time. However, in most juris. neither of these is required.

1. Attestation Clause

1. Tho' not required for will's validity, it's a valuable and desirable aid in the proof of the facts of execution.

III. Execution of Holographic and Other Special Types of Wills

A. Holographic Wills

1. By statute in 19 juris., holographic wills, or those written and signed in T's hand, are valid w/o formal attestation.
2. Some of these states require that the will should also be dated in the T's hand, and in one state must be found among T's valuable papers. (N.C.)

B. Nuncupative Wills

1. The statutes of most states recog. the validity of oral wills of personalty ^(and realty: Ga.) subject to some or all of the following restrictions:
 - a. That the will was made during T's last sickness,
 - b. at the home of T or in the house in which he died,
 - c. that the T asked one or more of the

- no. of.
required wits. to bear wit. to the will, (3 required in Ga.)
(d) provided that the testimony is reduced to writing within a designated no. of days (6) (30 in Ga.)
e. and the will is offered for probate (Ga. - in solemn form) within a certain period, typically 6 mos. (Ga. - 6 mos. from death).
f. usually the amt. of prop. wh may pass by test will is ltd.

IV. Integration of Wills

- A. A will may be written on several sheets of paper, provided that all are intended to operate as the will and are present at the time of execution. These facts may be presumed from physical connection of the sheets or coherence of the provisions, and can also be estab. in other manners.
B. The problem of integration, or what may be regarded as the will so as to operate by force of a single act of execution, must be distinguished from problems of revocation and construction when there are several test. instruments; each of wh is validly executed.

C. Incorporation by Reference

1. If a will, executed as required by stat., incorporated by reference any document or paper not so executed, whether the paper referred to be in the form of a will, codicil, deed, note or mere list or memorandum, the paper so referred to, if it was

in existence at the time of the execution of the will, is referred to as being in existence, and is identified by satis. proof as the paper referred to, take effect as part of the will in most juris.

D. Reference to Acts

1. The will may provide for designation of the bene. or of the thing or amt. given, by refer. to an act of the T, the bene., or a 3rd person, or any of these in combination, provided that the act is one wh. has ordinarily independ. significance. If the act referred to is palpably specified for the purpose of allowing subsequent control thru unattested act, and has no other real significance, the gift is invalid.

E. Conditional Devises and Bequests

1. A cond. devise or bequest is one wh. takes effect, or continues in effect, according to the happening of some future event.
2. A condition precedent is one that must be fulfilled before the interest vests, while a cond. subsequent is one in wh. the nonhappening or breach will defeat ~~that~~ an estate already vested. The Ct's prefer to construe doubtful test. language as creating a cond. subsequent rather than precedent.
3. A cond. to a legacy or devise is invalid if it encourages conduct wh. is deemed contrary to public pol.; but otherwise a gift may be

subject to any definite cond. Thus, it is usually held that conds. in total restraint of a first marriage of the bene. or dependent upon his obtaining a divorce are invalid, while restraints upon the remarriage of T's spouse or reas. partial restraints upon marriage are valid.

4. A test. cond. that a gift shall be void in case the bene. shall contest the will is valid, at least as to contests w/o prob. cause.

5. If a cond. subsequent is illegal or perform. thereof is impossible, the gift becomes absolute and the cond. is disregarded. Some decisions have taken the same position in case of conds. precedent, altho' here the traditional view is to declare that devises upon illegal or impossible conds. are entirely void, and likewise if the cond. to a bequest is malum in se.

F. Conditional Wills

1. By its terms, the entire will may operate as a will only if the stated event actually occurred. However, as far as possible, the ct. should construe doubtful expressions as mere stmts. of the inducement in making the will, so that it becomes effective upon T's death regardless of the occurrence

of the event referred to.

V. Revocation and Revival

A. Revocation - Concept and Methods in General

1. Rev. is the termination of the potential capacity of the will to operate at T's death, either by the latter's act or by operation of law.
2. A will can be revoked at the pleasure of the T, even if he has declined not to do so, tho' in the latter case appropriate remedy may be had against the estate upon a quant basis.
3. The exclusive methods are:
 - a. Certain well-defined changes in the cir-
cums. of the T from wh a rev. will be implied by law.
 - b. Phy. acts done to the will as pre-
scribed by statute.
 - c. A subsequent writing, in the form
fixed by stat., either expressly or
impliedly revoking the will.

B. Rev. By Operation of Law

1. At C.L., a woman's will was res.
by her subsequent marriage; that
of a man, by marriage and
birth of issue. Neither of these
events, alone, affected a ~~man's~~ man's will.
2. In many juris. the above rules
have been materially alter-
ed modified by express stat. provisions
or by legis. altering the rules of descent
and distribution, and the giving to
married women the capacity to
control and make test. disposition of y prop.

3. In absence of express stat., divorce alone does not revoke a will, but when coupled w/ a settlement of prop. rights between the parties, it is often deemed to revoke ~~the~~ prior devises & bequests in favor of the divorced spouse.

4. At C.L., the alienation of the subj. matter of a devise or bequest was said to revoke same, and some Ct's. continue to so regard the matter though this problem should now be considered solely from the standpoint of ademption, or failure of the devise because the subj. matter is not owned by T at death.

c. Revocation By Phys. Act to the Will

1. Rev. may be accomplished by some designated act of destruction done either by T or by another in his presence and at his direction. The will need not be entirely destroyed, and the slightest burning or tearing of the instr. or the cancellation of any material part of the will is usually sufficient to work a revocation if the T so intended.

2. * Most states permit revocation of a part or clause of a will leaving the remainder unaffected. * By the prevailing view, however, partial rev. is not recog. w/o stat. authorization.

3. While the mutilation of one copy of duplicate wills works a rev., phy. acts done to a codicil cannot revoke a will and, per Wetterview, the act of destroying or mutilating a will does not revoke separate codicils.

D. Revocation By Subsequent Instrument

1. A will may be revoked in whole or part by a later will or codicil, in most juris. by a subsequent instr. executed w/ the formalities required for a will, tho' it does not itself make disposition of T's prop.
2. An express clause of rev. in a duly attested instr. which declares a present intent to revoke is ord. conclusive ~~as~~ as to the rev. of an earlier will and its codicils, but the mere designation of a subsequent will as the last is not regarded as an express rev.
3. Even tho' there is no express rev., a subsequent will of necessity revokes an earlier one to the extent that the respective provisions are entirely inconsistent. It may be possibly implied rev. if the later will indicates a different plan of disposition altho' the later will is not absolutely inconsistent w/ the first. When the later instr. is a codicil, it is ord. rev. only to the extent that the codicil is absolutely inconsistent w/ the will.

E. Dependent Relative Revocation

1. If the terms of a rev. are expressly conditional, the will is rev. if, & only if, the cond. is fulfilled.
2. When a T purports to revoke his will while laboring under a mistake of law or fact in connection therewith, the cts. often declare that rev. is dependent upon the exist. of the situation as believed by T and accordingly hold that the will is not rev. Instead of this fiction of cond. rev., it is more realistic to treat the problem as one of mistake, holding the rev. absolute or void in accordance w/ wh position the indiv. T would probably have preferred.

F. Re-execution

1. Under modern stats., in the absence of a subsequent instr., an effective republication of an invalid or rev. will cannot be made except by re-execution of the will in the manner required for orig. execution of wills.

G. Republishing By Subsequent Instrument

1. A revoked will, wh was once validly executed and never phy. destroyed, may be republished by subsequent will, codicil or other instr. executed w/ the formalities required for wills. The same is ~~to~~ said to be true of wills never duly

executed, then here the doctrine of in-
corp. by refer. must be applied to
sustain the instr.

H. Consequences of Republication by Codicil

1. The intention to republish is general-
ly inferred from a mere refer. in the
codicil or second will to the 1st
instr., and this republication ex-
tends to prior codicils supplemen-
tary to the first, altho' not to
instrus. wh. revoke it.
2. When a will is repub. by codicil,
this has the effect of making the
will speak as of the date of the
codicil, tho' according to the modern
view ('better'), this doctrine should
be applied only in cases on a
reas. result in accordance w/
the T's probable intention is
reached thereby.

I. Revival By Rev. of Revoking Will

1. In the Eng. C.L. etc., the rev. of a
second instr. wh. revoked a prior
will revived the first will, while
in the *ecclesiastical tribunals the
prior will's revival depended upon
the T's intention to do so.
2. In absence of stat., some Amer. etc.
have adopted the C.L. rule, others
the ecclesiastical ~~rule~~ Ct. doctrine,
while still others declare y is no
revival of the first by rev. of
the second, at least if the second
will expressly revokes the first.

ADVANCEMENT - applies only to intestacy and T's children or presumptive heirs.

VI. Operation of Legacies & Devises as Affected by Subsequent Events

1. Ademption

a. A test. gift of T's specific real or personal prop. is ademed, or fails completely, when the thing given does not exist as part of his estate at the time of his death. The doctrine now generally applies regardless of the intention of the T, tho' if the change in the prop. is not substantial, it is no ademption.

2. Increase

a. Specific legacies of debts or obligations ord. carry w/ them unpaid accrued interest, but requests of stock do not pass cash or usually even stock dividends declared in T's lifetime. A spec. legatee or devisee is entitled to all accessions and accretions occurring after T's death.

3. Satisfaction

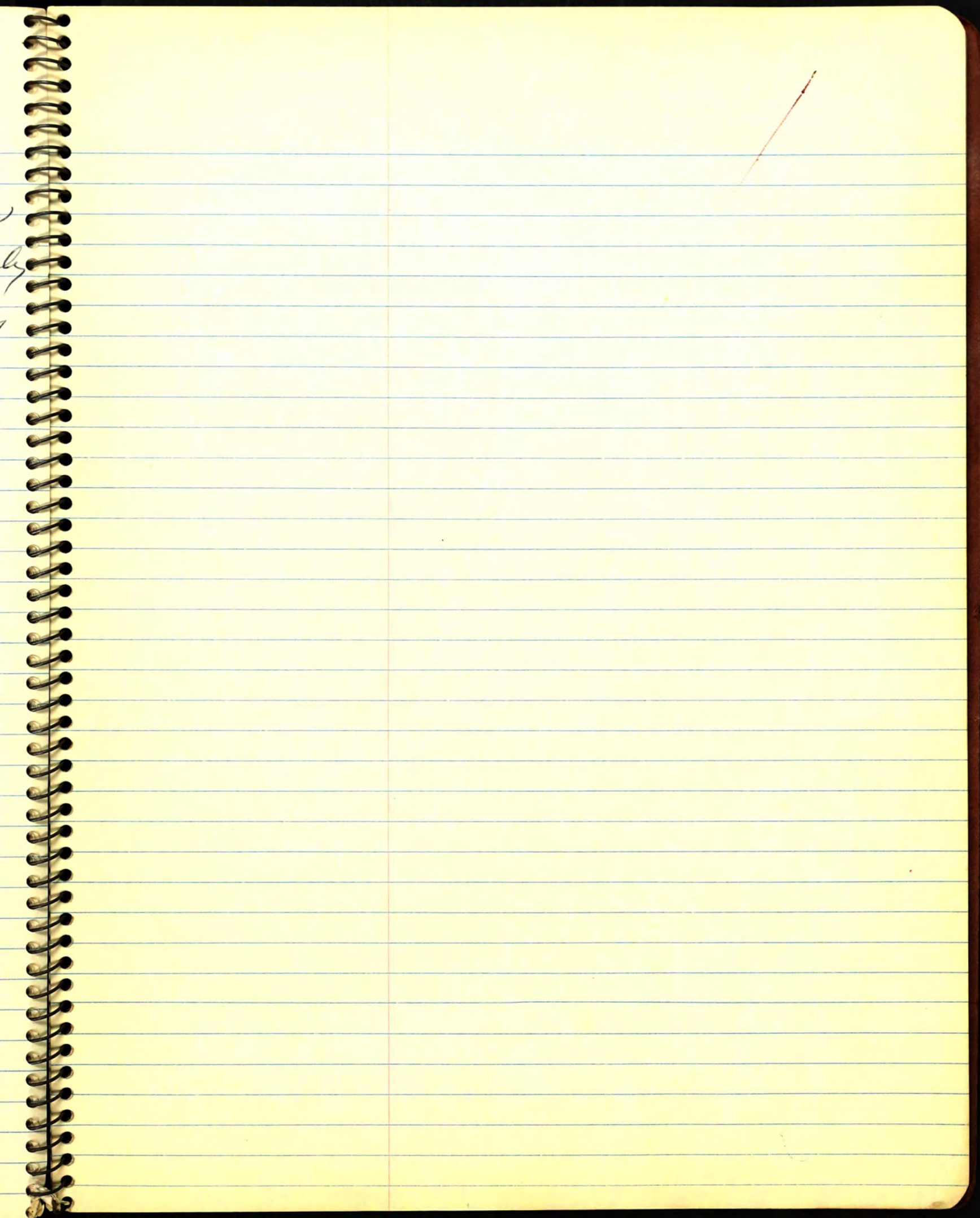
a. A general or residuary legacy may be satis. in whole or in part by T's inter vivos gift to the legatee after the exec. of the will, if T so intends, when the T stands in loco parentis to the legatee, his gift is presumed to be intended as satis. of the legacy. By the prevailing view, the doctrine of satis. does not apply to devises of land.

VII. Contracts to Will

A. A K to make a will is not required to be executed w/ the formalities of a will.

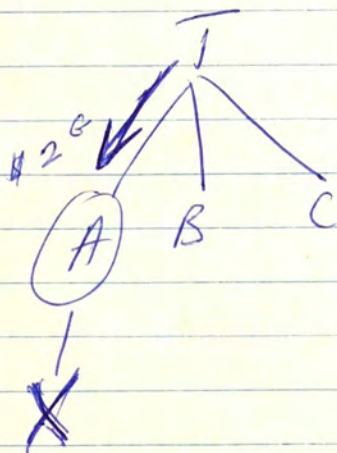
Its essential and formal validity is deter. by the law of Ks. Even if such an agreement is witnessed, it cannot be probated as a will for lack of test. Character of duty estab., it may be enforced in law or eq. against the promisor's estate.

1. S/L begins to run at death.



hypo
15,000 - estate

X - \$2,000 - three kids

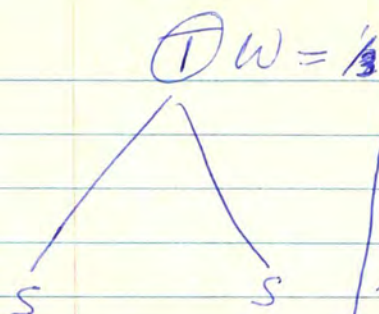


REPRESENTATION

①

$$W = \frac{1}{3}$$

$$\frac{S+S = \frac{2}{3}}{2}$$

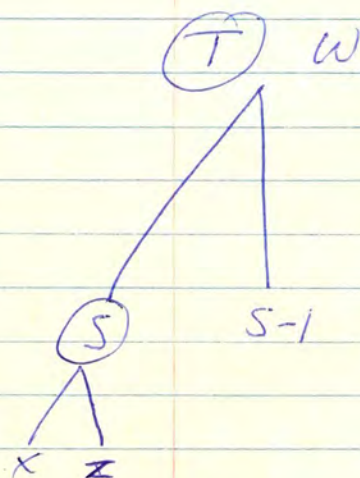


②

$$W = \frac{1}{3}$$

$$S-1 = \frac{1}{3}$$

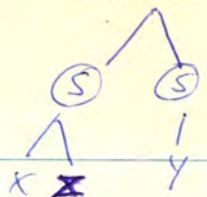
$$\frac{X+Z = \frac{1}{3}}{2} = \frac{1}{6} \text{ each}$$



③
(a)

T W

$$W = \frac{1}{3}$$



If per stripes = $Y = \frac{1}{3}$

$$X+Z = \frac{1}{6} \text{ each}$$

i.e., Same distribution as tho' S+S had not died.

(b) If per capita

$$W = \frac{1}{3}$$

$$Y, X+Z = \frac{\frac{2}{3}}{3} = \frac{2}{9} \text{ each.}$$

Held: ~~the~~ X, Y+Z would take by representation per stripes. i.e., 3 (a.)

Representation: the closest living descendants of a predeceased child are, in effect, moved up into the latter's position and take what would have been the latter's share.

1. Must be the closest in degree to predecessor.
2. Statute -

a. Definite - provision that when those entitled are related to the intestate in equal degree of kindred, they will share equally. Thus, estate would be equally divided.

b. Indefinite - also favor equality of shares as between collaterals equally related to the intestate.

PROBLEMS:

1. Descent of personalty v. descent of Realty.

2. Devise v. Bequeath

a. Devise = disposition of real prop.

b. Legacy = money passing under a will.

c. Bequest = any form of personalty passing under a will.

ADVANCEMENTS

X — \$6,000
Y — 1,000
Z — 0

Estate = 2000

3 \$19000
3000

X = 6000

Y = \$1,500

Z = 1500

Doctrine: if an intestate trans. land or a substan. amt. of personalty to one child, this will be presumed to be an advancement, and the value of the prop. so given will be deducted from the child's share upon distribution of the est. in order to equalize the shares of the other children or their descendants.

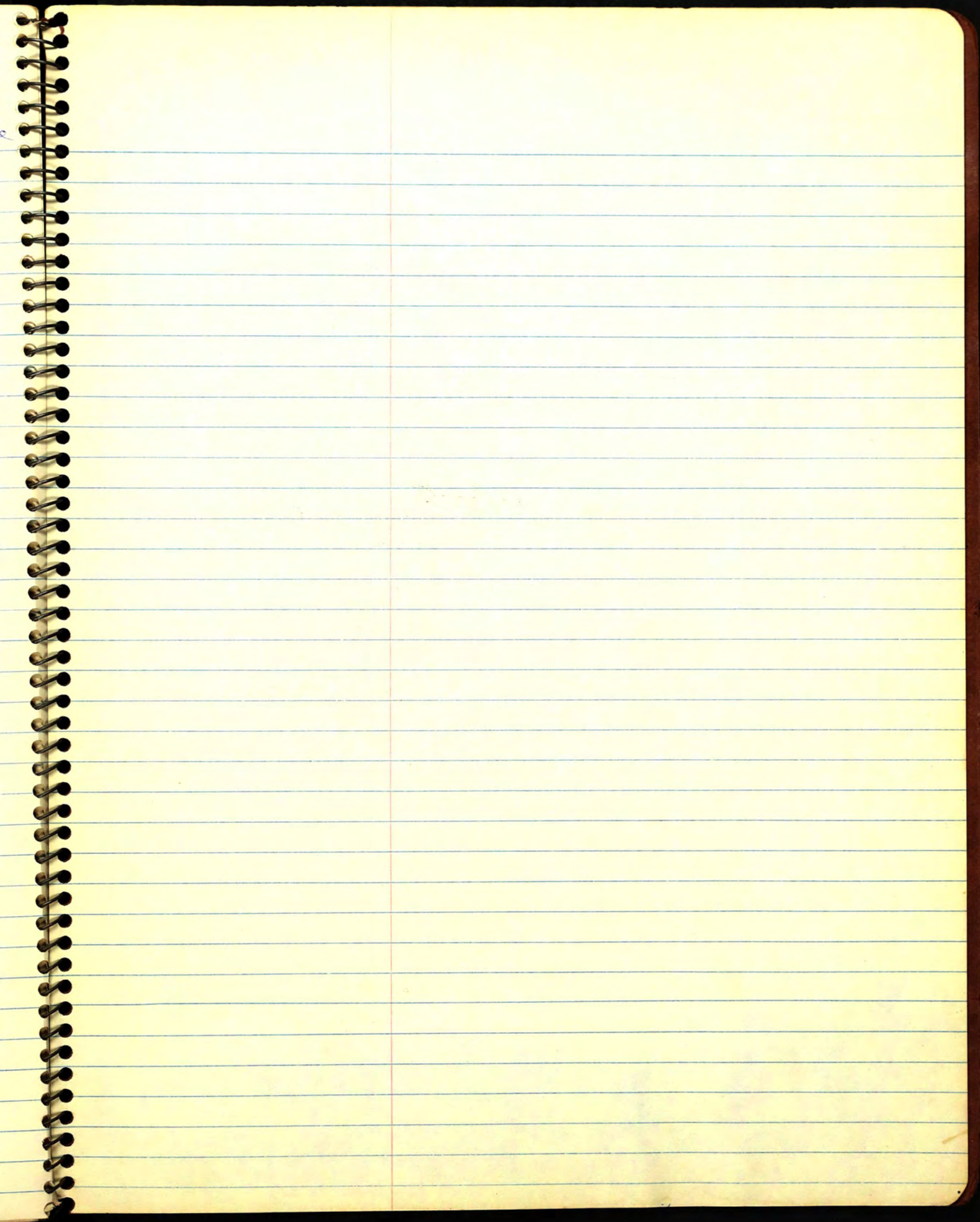
Caveat: the same transaction could amount to an absolute gift, a sale, or a loan.

1. Gift — will not be reckoned against the child's share of the parent's intestate estate.

2. Sale — weak, but may be found on phy. prop. has been trans. to the child.

3. Loan — like the advancement, it may be deducted from the child's share of the estate before pymt. of the latter to him, but unlike the advancement, the heir can be obliged to repay the loan to the estate, if it exceeds his distributive share. Also, S/L runs against a loan but not against an advancement. In some states, a distributee's barred debts cannot be deducted from his distributive share.

For purpose of valuation, an advancement is deemed to be made at the time ~~of~~ the donee obtains poss. & enjoyment.



{ Roman figure = civil law (majority) method of counting.
{ Arabic figure = Canon law method (few states.)

Hypo: Uncle of decedent (decedent's father's brother) v.
brother of decedent. J/brother.

GREAT UNCLE
IV (3)

GRANDFATHER II (2)

(uncle &
decedent)

UNCLE III (2)

FATHER I (1)

BROTHER II (1)

DECEDENT

NEPHEW III (2)

GRANDNEPHEW IV (3)

