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CLASS GIFTS IN NORTH CAROLINA

ROBERT E. LONG*

INTRODUCTION

It is a part of the lawyer's duty in writing wills^{1*} to foresee the situations in which each proposed gift may have to be construed and the constructions which may be put upon it. Not only must he search out the ambiguities of everyday language, but he must know beforehand the exact consequences of any technical terms he uses. Clear statement and a due regard for precedent are especially important when he is designating beneficiaries in groups.

First of all, the words he has in mind may not designate a group at all. Such a term as "to *A* and his heirs," for example, is not a group designation for the simple reason that it is the customary formula for an outright gift to *A*. The words "and his heirs" take effect merely as words of inheritance indicating that *A* is to have a fee simple estate if the gift is land, or an outright interest if the gift is personalty. Because they describe or "limit" the interest given to *A*, they are also known as "words of limitation." Words which, by contrast, describe the beneficiaries rather than the interest given are known as "words of purchase," and the beneficiaries as "purchasers." Only if the words used in the will are construed as words of purchase will the court have to face the other problems with which this paper is concerned.

The order in which these problems will be discussed may be illustrated by supposing that we have a gift "to *A* and his children" under such conditions that the children are held to take as purchasers.^{2*} Let us assume also that they are held to take a remainder after a life estate in *A*, though we shall see that there is some difficulty involved in reaching such a result.³ In spite of the solution of these two problems, the gift is still thoroughly ambiguous.

There is first the problem of defining "children." Does it include adopted children, illegitimates, stepchildren, and grandchildren? What matters may be considered in determining what definition the testator would have given the words which he employed? And if certain types of persons are held to be children under this particular will, there remains an even more important question: does the word "children"

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^{1*} This paper will deal primarily with testamentary gifts. Where the construction of *inter vivos* gifts is known to be different, that fact will be indicated.

^{2*} See the discussion of *Wild's Case*, *post*, p. 299.

³ *Ibid.*

necessarily designate all the children who were living at the date of the will and no others or does it allow some fluctuation? In the language of the courts, is this a gift to individuals or to a class? This question becomes important if any additional children are born after the date of the will, or if any child dies between the date of the will and the death of the testator. In order to select the persons to whom the gift shall go, we must be able to forecast the disposition of the share of any member who dies before the time set for the distribution of the shares.

Finally, there is the problem of dividing the property among the various beneficiaries. If the gift is to "*A* and the children of *B*," *A* may think himself entitled to more than a child's share. In some instances it is settled that one member of a class should be more favored than another; we shall suggest other instances in which a like inequality would seem to be desirable.

This is what we propose to do:

1. Discuss, with reference to the North Carolina cases, the methods employed to determine whether a phrase which appears to describe a group of beneficiaries really names any persons as purchasers or serves only to describe the nature of an interest given to someone else.

2. Examine some fairly common group designations, in order to determine what definition the court has given them—noting especially such terms as "heirs" and "next of kin."

3. Point out the circumstances under which the beneficiaries are held to take as a class rather than as individuals, and the consequences of such a holding.

4. Determine the length of time within which a class may increase its membership after the execution of the will.

5. Investigate the consequences of a decrease in the membership of the class before and after the death of the testator.

6. State the conditions which must be satisfied in order to entitle any member of the class to more than a *per capita* share in the gift.

I

DESIGNATION AS PURCHASERS

Any discussion of class gift problems will be foreclosed if the words which appear to designate beneficiaries are held instead to be words of limitation describing an estate given to someone else, as they commonly are in gifts to *A* and his heirs or to *A* and the heirs of his body. Since "*A* and his heirs" is the historically proper^{4*} method for describing a fee simple in *A*, and since "*A* and the heirs of his body" is the cor-

^{4*}It is no longer necessary to use words of inheritance, even in deeds. N. C. CODE ANN. (Michie, 1939) §991.

responding formula for a fee tail in *A*, it is to be expected that "heirs" in such a gift will be considered a word of limitation. An arbitrary rule of law⁵ which causes certain other possible class designations to be construed as words of limitation is the Rule in *Shelley's Case*.^{6*} For, the unwary testator it sets a well-concealed trap, which cannot be avoided merely by the expression of an intent to avoid it. But no attempt will be made here either to formulate the Rule or to define the limits of its application in North Carolina.^{7*}

Apart from the cases involving gifts to *A* and his heirs and those under the Rule in *Shelley's Case*, our court has had occasion to construe possible class designations as words of limitation only in gifts to "*A* and his children." This is a common type of gift, yet one in which it is peculiarly difficult to tell what was intended. Is it merely a different way of saying "to *A* and his heirs," or does it give some interest to *A*'s children as purchasers? That, according to the common law, must depend upon the situation of *A*.^{8*} The two resolutions in *Wild's Case*⁹ have long provided a rule of thumb for such a gift:

"... this difference was resolved for good law, that if *A* devises his lands to *B* and to his children or issues, and he hath not any issue at the time of the devise,^{10*} that the same is an estate tail; for the intent of the devisor is manifest and certain that his children or issues should take,^{11*} and as immediate devisees they cannot take, because they are not *in rerum natura*, and by way of remainder they cannot take, for that was not his intent, for the gift is immediate, therefore such words shall be taken as words of limitation... but if a man devises land to *A* and to his children or issue, and they then have issue of their bodies, there his express intent may take effect, according to the rule of the common law, and no manifest and certain intent appears in the will to the contrary. And therefore in such a case, they shall have but a joint estate for life."^{12*}

⁵ *Crisp v. Briggs*, 176 N. C. 1, 96 S. E. 662 (1918).

^{6*} All that can be said for the rule appears to be very well stated in *Starnes v. Hill*, 112 N. C. 1, 16 S. E. 1011 (1893), and to be contradicted in *Hooker v. Montague*, 123 N. C. 154, 31 S. E. 705 (1898).

^{7*} For that purpose see Block, *The Rule in Shelley's Case in North Carolina* (1941) 20 N. C. L. REV. 49; NOTE (1922) 1 N. C. L. REV. 110. For proposal for the abolition of the Rule see NOTE (1930) 9 N. C. L. REV. 51.

^{8*} Whether the court looks to the situation of *A* at the time the will was executed or at the moment of the testator's death has given rise to some contrariety of opinion in the courts. North Carolina determined the question as of the time of the testator's death in *Silliman v. Whitaker*, 119 N. C. 89, 25 S. E. 742 (1896). The question is fully presented in Casner, *Construction of Gifts "to A and His Children"* (1940) 7 UNIV. OF CHI. L. REV. 428, which adopts the time of the testator's death as the majority view.

⁹ 6 Co. Rep. 16b, 17a, (K. B. 1599).

^{10*} For the time of the devise, see note 8, *supra*.

^{11*} In North Carolina the slender protection afforded the children by the entailment is taken away by N. C. CODE ANN. (Michie, 1939) §1734, which, since 1784, has converted every fee tail estate into a fee simple.

^{12*} Joint, because co-tenancy was presumed to be joint; life estates, because no words of inheritance were used. The presumption of joint tenancy, so far as

Both these resolutions have been followed in North Carolina^{13*} and extended so as to apply to limitations of future interests,¹⁴ to *inter vivos* transfers,¹⁵ and to personalty.^{16*} Thus any gift to "A and his children" will pass the entire interest to A if he is childless, but will require him to share it with his children if he has any.

Occasionally something turns up to indicate that the testator would have intended nothing of the sort, as in *Bridges v. Wilkins*¹⁷ where the testator bequeathed to his six sisters, "and their lawful issue." Only one of the sisters, William Annie, had any children at the time the will took effect. Strict application of the Rule would mean that William Annie would have to divide her share with her children, while the other sisters would take their shares outright.^{18*} This seemed wrong, not only because the testator would probably have wanted William Annie

estates of inheritance were concerned, was abolished in North Carolina in 1789. N. C. CODE ANN. (Michie, 1939) §1735. The necessity of using words of inheritance in a will was abolished in 1784. N. C. CODE ANN. (Michie, 1939) §4162. Such words became unnecessary in *inter vivos* conveyances made after 1879. N. C. CODE ANN. (Michie, 1939) §991.

^{13*} *First Resolution applied*: *Boyd v. Campbell*, 192 N. C. 398, 135 S. E. 121 (1929); *Ziegler v. Love*, 185 N. C. 40, 115 S. E. 887 (1923); *Masters v. Randolph*, 183 N. C. 3, 110 S. E. 598 (1922); *Cole v. Thornton*, 180 N. C. 90, 104 S. E. 74 (1920); *Silliman v. Whitaker*, 119 N. C. 89, 25 S. E. 742 (1896); *Jenkins v. Hall*, 57 N. C. 334 (1858).

In *Boyd v. Campbell*, *supra*, the grantor declared in the premises, grant, and habendum, respectively, that the deed was to (a) P.C., his children, their heirs, and then to his grandchildren; (b) P.C., his children, and then to his grandchildren forever, heirs and assigns; (c) P.C., to him and his children, their lives, heirs and assigns, and then to his grandchildren forever, only use and behoof forever.

P.C. had no children at the time of the deed. It was held that he took a fee tail, converted into a fee simple by the statute. The idea of an executory interest to the grandchildren was excluded by the failure to state a contingency upon which it should arise.

Second Resolution applied: *Buckner v. Maynard*, 198 N. C. 802, 153 S. E. 458 (1930); *Snowden v. Snowden*, 187 N. C. 539, 122 S. E. 300 (1924); *Benbury v. Butts*, 184 N. C. 23, 113 S. E. 499 (1922) ("To A and her children and her children's children," held to give A and her two children a fee simple as tenants in common.); *Cullens v. Cullens*, 161 N. C. 344, 77 S. E. 228 (1913); *Lewis v. Stancil*, 154 N. C. 326, 70 S. E. 621 (1911); *Whitehead v. Weaver*, 153 N. C. 88, 68 S. E. 1059 (1910); *King v. Stokes*, 125 N. C. 514, 34 S. E. 641 (1899); *Helms v. Austin*, 116 N. C. 751, 21 S. E. 556 (1895); *Hampton v. Wheeler*, 99 N. C. 222, 6 S. E. 236 (1888); *Hunt v. Satterwhite*, 85 N. C. 73 (1881); *Pruden v. Paxton*, 79 N. C. 446 (1878); *Moore v. Leach*, 50 N. C. 88 (1857).

¹⁴ *Ziegler v. Love*, 185 N. C. 40, 115 S. E. 887 (1923); *Cole v. Thornton*, 180 N. C. 90, 104 S. E. 74 (1920).

¹⁵ *Buckner v. Maynard*, 198 N. C. 802, 153 S. E. 458 (1930); *Cunningham v. Worthington*, 196 N. C. 778, 147 S. E. 294 (1929).

^{16*} There is no fee tail estate in personalty, but since there is none in realty since the statute of 1789, the result reached in either case is the same. The court has treated the rule as applicable: "This limitation gives her an absolute interest in the use of the slaves, according to the rule laid down in *Wild's Case*. . . ." *Jenkins v. Hall*, 57 N. C. 334, 338 (1858); *Daggett v. Moseley*, 52 N. C. 587 (1860); *Davis v. Cain's Exrs.*, 36 N. C. 304 (1840).

¹⁷ 56 N. C. 342 (1857).

^{18*} At least one court would find that William Annie was entitled to a share outright because her sisters were. *Knight v. O'Brien*, 202 Ala. 440, 80 So. 824 (1919).

to have as much as her sisters but also because the entire gift was "in the form of a single phrase." The rule was therefore thrown out altogether and a life interest was given to each of the six sisters, followed by a contingent remainder to her children. The court pointed out that it was thus protecting the interests of the future children of all six. Neither resolution in *Wild's Case* would have protected any future children.

In another case¹⁹ the Second Resolution was rejected on the ground that the interest given to *A* was too small. The Court thought it improbable that the settler would have desired a construction which, by making the children tenants in common with his wife, "would enable them when they came of age, to demand a partition, and thus leave their mother destitute in her old age." This consideration would seem to be applicable in many cases under the second resolution. However little the testator's widow may have to fear from the disloyalty of her children, she should not be put at the mercy of their creditors.

These holdings and others like them^{20*} indicate that wherever counsel are astute in pointing out the disadvantages of the rule, its application becomes uncertain. Judicial repudiation of so venerable a doctrine is perhaps not to be expected, in spite of the hostility with which it is currently received.^{21*} Legislative repudiation, however, seems highly desirable. Not only would it make a provision more in accord with the intentions of the average testator, but it would have the merit, stressed elsewhere in this paper, of replacing a weak presumption by a strong one.

The Uniform Property Act points the way for the future in providing that any conveyance to *A* and his children, whether immediate or postponed, shall be construed to give *A* an estate for life followed by a remainder.²² Until our legislature shall see fit to adopt that course, litigation may be expected to continue. But it will at least be confined to home-made wills. A gift simply "to *A* and his children" is so

¹⁹ *Chestnut v. Meares*, 56 N. C. 416 (1857).

^{20*} Where the gift is "to *A* as a loan for her and her children," rather than "to *A* and her children," a life estate vests in *A* and a remainder in the children. *Coakley v. Daniel*, 57 N. C. 89 (1858).

The same result was reached in construing a deed "to *A* to have and to hold to *A* and her children forever." The Court relied partly on the technical ground that the children were named only in the habendum and must therefore take by way of remainder if they were to take at all. The common law requirement of words of inheritance for the conveyance of a fee prevented the children from taking more than a life estate. *Blair v. Osborne*, 84 N. C. 417 (1881).

^{21*} 2 SIMES, FUTURE INTERESTS (1936) §412.

This rule has been repudiated by the courts in Kentucky and Pennsylvania. *Harrington v. Layton*, 200 Ky. 630, 255 S. W. 271 (1923); *Burns v. Moseley*, 162 Ky. 199, 172 S. W. 521 (1915); *Elliott v. Diamond Coal & Coke Co.*, 230 Pa. 423, 79 Atl. 708 (1911); *Crawford v. Forest Oil Co.*, 208 Pa. 5, 57 Atl. 47 (1904).

²² NOTE (1939) 52 HARV. L. REV. 993, 999.

notoriously ambiguous that the trained draftsman avoids it. If he intends that *A* shall have the property outright he says so; or if he intends that *A*'s children shall take some interest he specifies what children and what interest.

II

PARTICULAR CLASS DESIGNATIONS

The determination that the "children of *A*" are to take as purchasers is only a beginning. The next problem is one of definition. What persons, under the circumstances of the individual case, are to be considered *A*'s children, or his next of kin, or his "heirs"?

Perhaps "under the circumstances of the particular case" should be underscored, for the search here is nearly always for the meaning of the word as it appeared to a particular testator. But if no special circumstances are shown, the court believes that it comes nearer to the true intent of the testator by looking to see what a man of ordinary preferences would desire, than by looking solely to the possible scope of his words in popular speech. It has held that "children" do not include grandchildren²³ or illegitimates^{24*} for that reason, and "heirs lawfully begotten" does not include persons illegitimate at birth, in spite of later statutory legitimation.²⁵ "Nephews and nieces" apparently do not include a brother's grandchildren, but do include the children of a half-brother.^{26*} No ruling has been given as to whether a gift to children includes adopted children or step-children. Such cases are likely to depend on special facts.^{27*}

Of more general interest are gifts which suggest that some preliminary assumption be made before the class is determined, or which present a problem of representation. A gift to *T*'s next of kin after the death of *W*, for example, raises both questions. Are they to be

²³ *Thompson v. Batts*, 168 N. C. 530, 84 S. E. 858 (1915); *Lee v. Baird*, 132 N. C. 755, 44 S. E. 605 (1903), *rehearing denied*, 134 N. C. 410, 46 S. E. 955 (1904); *Mordecai v. Boylan*, 59 N. C. 365 (1863); *Ward's Exrs. v. Sutton*, 40 N. C. 421 (1848); *Denny v. Classe*, 39 N. C. 102 (1845).

^{24*} Even an illegitimate alive at execution of the will was not within a gift to his mother's "issue." *Daggett v. Moseley*, 52 N. C. 587 (1860); *Thompson v. McDonald*, 22 N. C. 463 (1839).

But where the testator appears to have known all the facts, a gift to the heirs of his living sister [construed to mean children in *Jourdan v. Green*, 16 N. C. 218 (1829)] will go to her four illegitimate children. *Howell v. Tyler*, 91 N. C. 207 (1884). Contrast the severity of the English court: *In re Paine*, 1 Ch. 46 (1940).

²⁵ *Love v. Love*, 179 N. C. 115, 101 S. E. 562 (1919).

^{26*} "For if they are not nephews and nieces what are they?" *Shull v. Johnson*, 52 N. C. 202, 204 (1855).

^{27*} For a compilation of the authorities, see *NOTES* (1910) 27 L. R. A. (N. S.) 1158, L. R. A. 1918B, 123; *PAGE, WILLS* (2d ed. 1926) §900. Cases on other special group designations are well classified in 1 *PAGE, WILLS* (2d ed. 1926) §883, *et seq.*

determined as of the time of *T*'s death, or on the assumption that *T* died at the same time as *W*? And if they include two children of *T*, do they also include the children of a deceased child? The answers to these particular questions may as well be given now, for the construction of gifts to "next of kin" is well settled. They have consistently been held to include only the nearest set of relatives—brothers and sisters to the exclusion of children of a deceased brother, and living children to the exclusion of the families of deceased children.^{28*} And they are determined as of the death of the person whose next of kin they are unless some ground for a contrary holding appears.²⁹

Gifts to heirs are quite another matter, for the "heirs" may vary with the nature of the property subject to the gift. If it is real estate, they are the persons who would have taken real estate under the rules of descent if there had been an intestacy. The widow cannot be included if there are any blood kin.^{30*} But if it is personalty, the heirs are the persons, including the widow, who would have taken personalty under intestacy.³¹ This abandonment of the common law notion of heirs as "real heirs"—that is, persons who inherited land from a person of the same blood—is explained on the ground that "heirs" is not a proper word to describe persons to whom personalty is given.^{32*} This is difficult to follow. It is true enough that the "heirs," in the proper sense, would not have taken the personalty if the testator had died intestate; neither would the "nephews" or the "second cousins." But that fact should not prevent them from taking it under a bequest. The real justification for following the statutory scheme seems to lie in the fact that most testators, when they come to make the final gifts to heirs, have no particular persons in mind as beneficiaries and are

^{28*} *Knox v. Knox*, 208 N. C. 141, 179 S. E. 610 (1935); *Wallace v. Wallace*, 181 N. C. 158, 106 S. E. 501 (1921); *Redmond v. Burroughs*, 63 N. C. 242 (1869); *Harrison v. Ward*, 58 N. C. 236 (1859); *Simmons v. Gooding*, 40 N. C. 382 (1848).

The effect of a specific reference to the intestate laws is uncertain. In *Croom v. Herring*, 11 N. C. 393, 400 (1826), the Court approved an English case in which such a reference had been held not to require representation. "The words, as if I had died intestate, did not point to the persons who were to take, but to the manner, and they could not enlarge by mere implication the known and definite meaning of the words next of kin." But in *Simmons v. Gooding*, 40 N. C. 382 (1848), it was said that representation would not be allowed if the gift were to next of kin "as in case of intestacy."

"Nearest heirs" means heirs, not next of kin. *Cox v. Heath*, 198 N. C. 503, 152 S. E. 388 (1930).

²⁹ *Jones v. Oliver*, 38 N. C. 369 (1844).

^{30*} N. C. CODE ANN. (Michie, 1939) §1654, Rule 8, makes an exception where the deceased person leaves "none who can claim as heir." See note 45, *post*.

³¹ *Everett v. Griffin*, 174 N. C. 106, 93 S. E. 474 (1917); *Nelson v. Blue*, 63 N. C. 659 (1867); *Freeman v. Knight*, 37 N. C. 72 (1841); *McCabe v. Spruill*, 16 N. C. 189 (1828); *Croom v. Herring*, 11 N. C. 393 (1826).

^{32*} *Corbett v. Corbett*, 54 N. C. 114, 117 (1853): "The word 'heirs' is not appropriate to the disposition of personal property; and when used in reference to it means those who take by law or under the statute of distributions."

content that the law of intestacy shall take its course.^{33*} Since there is no common word to describe the persons to whom the law gives personality under intestacy,^{34*} it is reasonable to infer that the testator used "heirs" to describe them.

Gifts of residue are likely to contain both real and personal property. In such a case the court does not require that the personality be sorted from the realty and given to a different set of beneficiaries. Rather, it gives all the property to the persons who would have taken the real estate. The form of the gift, it is said, shows an intention that it should all go together; and the takers of real estate are chosen "because of the force of the word 'heirs' in its appropriate and technical sense."^{35*}

This "appropriate and technical sense" not only limits the class to the testator's blood kin under the canons of descent, but it also requires that they be ascertained at the time of his death.³⁶ Here, too, the court has had to make occasional departures. Consider a gift to the widow for life, then to the heirs of the testator. If the widow is to be considered an heir, as she must be in a gift of personality, and if the heirs are to be determined as of the death of the testator, we must conclude that the testator has given the widow an interest for life followed by a share, at least, in the remainder. This view has been taken in some jurisdictions,³⁷ but North Carolina, by determining the testator's heirs as if he had outlived the widow, has limited her to a life interest in two cases. In one the determination was postponed because the remainder was to the testator's heirs "whoever they may be," an ambiguous phrase which might just as well refer to his own death as to that of the widow.³⁸ In the second, it was said that the widow could not claim as an heir since she would be the testator's only heir and take the entire remainder; while if he had wanted her to have both the

^{33*} For a development of this approach see Casner, *Construction of Gifts to "Heirs" and the Like* (1939) 53 HARV. L. REV. 207.

^{34*} "Distributees," though accurate, is little favored by the courts and unknown to the general public. The court will not infer that the testator has used "next of kin" to describe them. See note 28, *supra*.

^{35*} *Hackney v. Griffin*, 59 N. C. 381 (1863); *Rogers v. Brickhouse*, 58 N. C. 301 (1860). It should be kept in mind that all these gifts are to the heirs of the testator or of some other deceased person. Gifts to the heirs of a living person were once held to be void for uncertainty on account of the proposition: *Nemo est haeres viventis*. *Timberlake v. Harris*, 42 N. C. 180 (1851). To avoid such a construction it was provided by statute that they should be construed as gifts to children. N. C. CODE ANN. (Michie, 1939) §1739.

³⁶ *Wachovia Bank & Trust Co. v. Lindsey*, 210 N. C. 652, 188 S. E. 94 (1936); *Dixon v. Pender*, 188 N. C. 792, 125 S. E. 623 (1924); *Witty v. Witty*, 184 N. C. 375, 114 S. E. 482 (1922).

³⁷ *Gilman v. Congregational Home Missionary Society*, 276 Mass. 580, 177 N. E. 621 (1931); *Holloway v. Holloway*, 5 Ves. Jr. 399 (Chancery, 1800); cf. *Boston Safe Deposit Co. v. Waite*, 278 Mass. 244, 179 N. E. 624 (1932).

³⁸ *Jenkins v. Lambeth*, 172 N. C. 466, 90 S. E. 513 (1916).

life estate and the remainder, he would have given her the property outright.³⁹

This case, *Grantham v. Jinnette*, is interesting on other grounds. It shows the snares which have been set for a testator who happens to be illegitimate, and who makes the mistake of describing the objects of his bounty as his "heirs." The testator here devised to his wife for life, with a direction that the land should then be sold and the proceeds divided among his heirs; and the court's reasoning was something like this:

1. The wife was not meant to take the gift to heirs because her interest was limited to an estate for life. In order to exclude her, the heirs must be determined at her death.

2. There were no children of the testator, and his mother was dead. Non-recognition of more remote kin of an illegitimate prevents his mother's nephew from coming within the terms of a gift to heirs.

3. Though the testator may have intended to benefit his mother's family, with whom he lived, that cannot be shown because parol evidence is inadmissible to vary the meaning of such a plain word as "heirs."

4. The University, being the ultimate heir through its right of escheat,^{40*} is the designated beneficiary.

The dissenting judge argued that even though the testator probably did not have the widow in mind as an "heir," he certainly did not have the University in mind. He therefore favored the persons claiming through the widow. If the heirs of the testator were to be determined at his death, there could be no doubt that the widow was an heir, whether the gift was considered to be land or personalty.^{41*} And the fact that the testator did not think of her as such would appear to be immaterial under *Baugham v. Trust Co.*⁴² There the devise was to the testator's children, but if any of them should die without heirs, his share to go to the survivors. If they all died without heirs, the property was to go to "my heirs at law." The gifts to the "survivors" and to the testator's heirs were assumed to be executory devises rather than substantial gifts. Then it was held that the "heirs" of the testator were to be determined at his death rather than at the death of the last of the children without heirs. The result was that the children took not only the fee but the devise limited upon it as well. The gift to

³⁹ *Grantham v. Jinnette*, 177 N. C. 229, 98 S. E. 724 (1919).

^{40*} The common law distinction between the right of escheat and the state's right of *bona vacantia* appears to have had no bearing on the case. The Court's discussion was in terms of escheat.

^{41*} Since the direction to sell was mandatory, the gift to heirs must be considered personalty. *Everett v. Griffin*, 174 N. C. 106, 93 S. E. 474 (1917).

⁴² 181 N. C. 406, 107 S. E. 431 (1921). See also *Zeigler v. Love*, 185 N. C. 40, 115 S. E. 887 (1923).

"heirs" became as ineffective to limit the *quantum* of the prior estate as the remainder to heirs would have been in *Grantham v. Jinnette* if the court had determined the heirs at the death of the testator so as to include the wife.

In one respect the decision in *Grantham v. Jinnette* seems to be more sensible than the *Baugham* Case. It is a little artificial to hold that the testator intended the same person to take both the life estate and the remainder, though it might be justified in order to prevent escheat.^{43*} The real trouble with the case is not that the testator's wife was excluded but that his mother's nephew was. It is the court's insistence upon one of the technical meanings of the word "heirs" to accomplish a result which was never within the testator's contemplation. Why could it not look to see what meaning the testator would have given the word? It is almost unthinkable that such an inquiry would not have revealed that he thought of his mother's family as his heirs, in spite of his illegitimacy.^{44*} As a last resort, if we must have technical definitions, it might have been held that "my heirs," when used in wills by persons leaving heirs, is not broad enough to include the University of North Carolina. It was pointed out by the dissenting judge that there is no other case on record anywhere in which a man has died testate, and leaving heirs, only to have his property escheat to the state.^{45*}

It is impossible to lay down any rules for defining all the different words which a testator may use to describe the objects of his bounty. In each case we can say that what the word appears most likely to

^{43*} A possible construction would be to require that the heirs be ascertained at the death of the testator (where he is the named ancestor), but on the assumption that the holder of the prior estate is dead. 2 SIMES, FUTURE INTERESTS (1936) 422. That however would not prevent escheat in *Grantham v. Jinnette*. For a gift expressly requiring that the class be determined upon the assumption that one of the members is dead, see *Wachovia Bank & Trust Co. v. Lindsey*, 210 N. C. 652, 188 S. E. 94 (1936).

^{44*} "But a more general and fundamental rule, underlying all others, is to look at the whole instrument in the light of the surrounding circumstances when it was made, and see, if we can, in what sense the testator used the word, for his intent must prevail over any legal mode of construing it where there is an antagonism. . . . Could he have intended a present benefit to persons who did not then exist and who might never come into being?" *Howell v. Tyler*, 91 N. C. 207, 212 (1884).

^{45*} The University was held, in the *Jinnette* Case, to take by virtue of the gift and because of the postponement of the determination of the heirs. It was not suggested that the widow would not have been an heir if the "heirs" had been determined at the testator's death. It is therefore impossible to support the statement (see NOTE (1926) 4 N. C. L. REV. 15) that the decision is "codified by the insertion, in 1925, of the word 'intestate' in the eighth rule of descent: 'when any person dies intestate leaving none who can claim as heir to such deceased person, but leaving a surviving widow or husband, such widow or husband shall be deemed as heir and as such shall inherit his estate.'" N. C. CODE ANN. (Michie, 1939) §1654, Rule 8. The real purpose of the insertion would seem to be to prevent a widow from "inheriting" property which her husband has devised or bequeathed to other persons.

have meant to a person in the testator's position is the only meaning worth considering. Whether that meaning is the technical meaning or some other must then be left to the common sense of the court to determine.

III

GROUP IDENTITY

Once the words used by the testator have been defined, it remains to determine their effect. The term "children of A," to continue our previous example, may have been the testator's way of describing the three children he knew at the time he made the will; he may have intended that each of them should take one third of the gift and no more, even though one of the shares should lapse by the death of a child before his own death. Ordinarily, however, the court will not infer that he was so minded unless he has named them individually. Where he names only a group, it seems more likely that he preferred, or would have preferred, if he had thought about it, to have the entire property go to some members of that group than to have any part of it lapse. Thus, in the case put, the death of one of the children of A before the death of the testator will cause the share of that child to go to the other children rather than to be segregated for the benefit of the residuary legatees or the takers under intestacy. No part of the gift will go to anyone outside the group if any member lives long enough to prevent a total lapse.

It is important to note that if there is any possibility of fluctuation in the number of takers of a constant aggregate of property they are said to be described as a class.⁴⁶ Determining whether or not there is any possibility of fluctuation will be largely a matter of guessing the state of the testator's mind. Was the idea of a group of persons taking a fixed amount of property foremost, or the idea of certain persons taking certain portions of his estate?

Ordinarily the phrasing⁴⁷ of the will, casual as it may have been, will be the only clue. If the testator uses some class designation such as "children," "nephews," or "servants" he gives some indication that he is group-minded; if he names the takers individually he gives some indication that he is not. If nothing appears to show the contrary, these indications will control the disposition of the gift.

It is very difficult to convince any court that a testator was group-minded where he has named the takers individually; in North Carolina

⁴⁶ Cooley, *What Constitutes a Gift to a Class* (1937) 49 HARV. L. REV. 903.

⁴⁷ Numerous examples are collected in NOTES (1936) 105 A. L. R. 1394 and (1931) 75 A. L. R. 814.

it has not been done.^{48*} Cases in other states, however, show circumstances under which it seems eminently reasonable to suppose that the testator would have made a provision for survivorship among the persons named if he had thought about it. In such cases the failure to use a class designation should not be fatal. Suppose, for example, that the testator gives all his property to *A* and *B*, to the total exclusion of his heirs. *A* then dies before him, and the heirs claim half of the property. Should they get it? The Connecticut court thought it more reasonable under such circumstances to treat the gift as one to a class, since the will displayed an attitude which was more consistent with the idea of a right of survivorship in *B* than with the idea of a lapse in favor of the heirs.⁴⁹ *B* was therefore allowed to take the entire gift.

Suppose the gift, rather than being to named individuals, is to an individual and a class, such as to "*A* and the children of *B*." If *A* dies before the testator, should the children of *B* take his share? That may depend to some extent upon what the size of *A*'s share is.^{50*} If the children are to take only one half of the gift, they stand collectively in the same position as *B*. There is no more reason for giving them a right of survivorship in *A*'s share than there would have been in giving *B* such a right.^{51*} But if the distribution is to be *per capita*, so that *A* has in effect a right of survivorship in the shares of the children, there is some ground for saying that they should have a corresponding right in his share.^{52*} This will avoid the anomaly of a class gift in which there is survivorship in every share but one.^{53*}

The nature of the property subject to the gift may be of importance in determining the group-mindedness of the testator, though no case appears to have turned on that. In such a hybrid designation as "*A*'s three children" the court may very well consider the difference between securities which can be easily divided and a dwelling house which the

^{48*} "Had the will given the property to the children of Frances McAden, deceased, without naming them, then they could have taken as a class only . . . but by naming them they became legatees individually, and the death of one in the lifetime of the testatrix must be attended by the usual result of a lapse." *Mebane v. Womack*, 55 N. C. 293, 301 (1855). See *Wooten v. Hobbs*, 170 N. C. 211, 86 S. E. 811 (1915); *Todd v. Trott*, 64 N. C. 280 (1870).

⁴⁹ *Bolles v. Smith*, 39 Conn. 217 (1872); *Hunter's Estate*, 212 Mich. 380, 180 N. W. 364 (1920).

^{50*} The distribution of such a gift is discussed in Section VI of this article.

^{51*} The effect of such a holding would be to create a class (the children of *B*) within a class (*A* and the children of *B*). *A* is more commonly given his half as an individual. *Palmer v. Jones*, 299 Ill. 263, 132 N. E. 567 (1922).

^{52*} "In my opinion it is correct to say that a gift by will to a class properly so called and a named individual such as *A* equally, so that the testator contemplates *A* taking the same share that each member of the class will take, is prima facie a gift to a class." (Italics ours.) *Romer, L. J., in In re Moss*, 2 Ch. 314, 317 (1899).

^{53*} Such an anomaly, nevertheless, is sometimes upheld. *Estate of Pierce*, 177 Wis. 104, 188 N. W. 78 (1922). See the amusing footnote in LEACH, CASES AND MATERIALS ON FUTURE INTERESTS (2d ed. 1940) 364.

testator has expected A's family to occupy. The lapse of a share in the securities is considerably more plausible than the lapse of a share in the dwelling house.

Fortunately the court has made no attempt to generalize further the circumstances under which a gift is to be construed as one to a class rather than one to individuals. It is therefore free to consider the general state of mind revealed in the will and the circumstances under which it was written, and thereby to ascertain the intent of the testator. That it is only a fictitious intent with regard to a question which never crossed his mind is of no moment, for the question must be decided one way or the other. But because the testator probably never heard of a class gift construction it is not enough to ask whether he "intended" one; when the problem is expressed only in that way the court is likely to rely too heavily upon the phrasing of the gift. The real question is whether the testator would have preferred the *results* obtained by calling his gift a class gift, or those to be had by calling it a gift to individuals. Only when we know what he would have thought of those results can we know what he "intended."

IV

INCREASE IN THE CLASS MEMBERSHIP

In some cases it is thought that the testator, besides intending to create a class which would be flexible for survivorship purposes, also wished to permit the class to increase. Indeed, this is so commonly the case that one court seems to have assumed that a group which was not capable of increase could not be a class at all.⁵⁴ Problems of increase and decrease, however, are not as closely related as that, and are better considered separately.

If it is to increase, not only must the class be described by words which are broad enough to include some persons whose birth or other qualification for membership occurs after the execution of the will, but it also must not appear that the testator would have limited it to its original membership. The presumption in favor of including at least all eligible persons born between the execution of the will and the death of the testator, however, is so strong that this limitation has not always been fully realized. A comparison of two cases, *Matchwick v. Cock*⁵⁵ and *Meares v. Meares' Executors*,⁵⁶ will illustrate the point. The first follows the probable intent of the testator. The second, unfortunately, follows only the result reached in the first.

The English Chancery decided the *Matchwick* Case in 1798, on very simple facts. The testator had left property to his son and two daugh-

⁵⁴ *Blackstone v. Althouse*, 278 Ill. 481, 116 N. E. 154 (1917).

⁵⁵ 3 Ves. 609 (1798).

⁵⁶ 26 N. C. 192 (1843).

ters after the death of his wife, the income meanwhile to be applied to the maintenance of his "children." It would seem to be a reasonable assumption that if he had had future children in mind when he made the gift of income, he would also have given them a share in the principal. The Master of the Rolls went so far as to admit that this was the reasonable construction of the will, but decided to make the most of the ambiguity in order to give the two sons born after the making of the will some share in their father's estate. He was bound, he said, to construe it every way, if possible, to apply the words to after-born children. . . . "I almost wonder the law of England allows a man to disinherit his child and leave it upon the parish." The after-born sons were therefore held to be entitled to a share in the income.

In 1808 the legislature of North Carolina became alive to the misfortunes of the after-born child, and provided that if the parent should die without making any provision^{57*} for him, the child should take an intestate share of the parent's estate.⁵⁸ After this it was no longer necessary to put a strained construction upon a will in order to give the after-born child a crust from his father's bounty. If the will plainly showed that it had been made without any consideration of the needs of future children the court was free to recognize that fact. The danger that such children would be left destitute unless the court should "construe it every way, if possible, to apply the words to after-born children" no longer existed.

Yet our court continued to hand out the crust, and must do so in the future unless the decision in *Meares v. Meares' Executors*⁵⁹ is overruled. There the testator made his will in 1838, at which time he had eight sons and no daughters. He provided that the income from his residuary estate should be used for the support and education of his children until 1844. The principal was then to be divided into as many shares as there should be children then living, plus a share which was to be given to the widow; and four of the shares should go to the first four sons, *A, B, C, and D*. The income from what was left was then to be applied to the education of the other "children" until 1851, when the four youngest sons, *E, F, G, and H*, were to receive shares equal to those which their brothers had received in 1844; any excess was to be divided among all the "children."

The only reasonable inference here would seem to be that the testator used the word "children" simply to avoid the necessity of

^{57*} Apparently provision for the child does not necessarily mean provision for the support of the child. A provision which expressly excludes the child from a share in the estate is a provision within the meaning of the statute, since it was not the legislature's intent to force the testator to leave anything to such child. *Thomason v. Julian*, 133 N. C. 309, 45 S. E. 636 (1903).

⁵⁸ N. C. CODE ANN. (Michie, 1939) §4169.

⁵⁹ 26 N. C. 192 (1843).

writing out the names of the eight sons more than once, and that he had in mind no more persons as recipients of income than as recipients of principal. If he had anticipated the birth of a ninth child, it is reasonable to suppose that he would have given that child a share of the principal, or at least have explained his failure to do so.

The unexpected ninth child, a daughter, was born in 1839, one year after the execution of the will and one year before the death of the testator. Why he failed to change his will in her favor does not appear, but it is not unlikely that he expected to have more time in which to do it; it is certainly possible that he expected the statute of 1808 to take care of the situation.

The Court held, however, that the statute did not apply, since a "provision" for the daughter appeared in the will; it was to be found in the requirement that the income from the property be used for the education of the "children" until 1851. "Children," said the Court, included after-born children for the reason that the English court had expressly said so. Moreover, "courts are always anxious to effectuate the intention of testators, when there is a gift to a class of persons, as to children, by including in it as many persons, answering the description, as possible."⁶⁰ The daughter was therefore entitled to decent support and education until she was twelve years old,^{61*} and could claim nothing under the statute.

This decision seems thoroughly objectionable both as to method and as to result. The focus is solely upon the word "children" rather than on the will as a whole, and the enforcement of a fictitious intent deduced from the use of that word is made to accomplish the practical disinheritation of the beneficiary, a result which the testator would not normally intend. In a case with similar facts the New York Court held that the naming of the existing children in the gift of principal showed that the testator had only them in mind, and that the gift of income to "my children" did not enure to the benefit of later born children so as to deprive them of the benefit of the statute.⁶²

"It is not a canon of construction, but only a concise way of putting a principle of common sense, to say that when a testator has made a

⁶⁰ *Id.* at 196.

^{61*} If she is to be considered one of the children throughout the will she will be entitled to have the estate divided into ten shares (including one for the widow) in 1844. Five full shares thus became available for the payment to the four younger brothers in 1851 of sums equal to those received by the older brothers, and should be more than enough. If there is an excess the daughter will have a share in it; but, for purposes of discussion, this interest is probably negligible. The Court took no notice of it.

⁶² *Mulqueen v. Mulqueen*, 211 N. Y. Supp. 228, 213 App. Div. 637 (1925), *Aff'd* 241 N. Y. 58, 150 N. E. 564 (1925). This decision reversed *In re Mulqueen's Will*, 208 N. Y. Supp. 518 (1925).

dictionary for himself, we must look at that to see in what sense he has used the words in his will."⁶³

The New York Court did not hold, nor would we suggest, that the "children" did not constitute a class for the purposes of decrease and survivorship, but only that the special circumstances of the case rendered it undesirable that the class should be allowed to increase beyond its membership at the time of the execution of the will. Where no such special circumstances exist, increase is generally allowed, on the assumption that it was the intention of the testator to benefit as many persons answering the class description as a prompt settlement of the estate would allow. Members born before the death of the testator have been included even where language used inadvertently in the will appeared to exclude them.⁶⁴

The problem, therefore, is not generally whether increase shall be allowed or shall not be allowed, but to what extent it shall be allowed. From the date of the will to the death of the testator it is generally taken for granted,⁶⁵ the great bulk of the litigation has to do with additions after his death.

Persons born^{66*} after the death of the testator are generally not allowed to participate in an immediate gift, since to keep the class open waiting for them to be born would delay the division of the property.⁶⁷ But where the division of the property is going to be delayed anyway, the Court is usually inclined to allow the class to increase during the period of the delay. Thus where the gift is to *A* for life, then the children of *B*, the class is permitted to increase until the death of *A*; all children born before that time become members when born.^{68*} The testator's language is broad enough to cover them, and the need for certainty in the title to the property is not urgent enough to exclude them so long as no one of the existing members of the class is able to demand a delivery of his share.

There have been only two deviations from this principle. In *Wise v. Leonhardt*,⁶⁹ where there was a devise to the children of *A* to be

⁶³ *Matter of Birks*, 69 L. J. Ch. (N. S.) 124, 81 L. T. (N. S.) 742 (1900), quoted in *Mulqueen v. Mulqueen*, 211 N. Y. Supp. 228, 232 (1925).

⁶⁴ *Carver v. Oakley*, 57 N. C. 85 (1858).

⁶⁵ *Robinson v. McDiarmid*, 87 N. C. 455 (1882).

^{66*} A child *en ventre*, if later born alive, is considered as already born. N. C. CODE ANN. (Michie, 1939) §1738.

⁶⁷ *Britton v. Miller*, 63 N. C. 268 (1869); *Gay v. Baker*, 58 N. C. 344 (1860). See the discussion of the Rule of Convenience, *post*, p. 314.

^{68*} *Walker v. Johnston*, 70 N. C. 576 (1874); *Simpkins v. Spence*, 58 N. C. 208 (1859); *Hawkins v. Everett*, 58 N. C. 42 (1859); *Sanderling v. Deford*, 47 N. C. 74 (1854); *Jourdan v. Green*, 16 N. C. 218 (1829).

Children born after the death of the testator have been allowed to share in such a gift to the children of *A* despite the presence in the same will of another gift to the children of *A* in which they could not share. *Britton v. Miller*, 63 N. C. 268 (1869).

⁶⁹ 128 N. C. 289, 38 S. E. 892 (1901).

divided among them after the death of *A*, it was apparent that there could be no division of the property during *A*'s life.^{70*} Yet the three children of *A* living at the death of the testator were allowed to take the property to the exclusion of the eight children born thereafter. It is hard to see why these eight children should be excluded. Certainly the Court's statement that the title had to be in someone, that it "could not be in the clouds," affords no justification for such a holding. If the title cannot be in the clouds or in *A*^{71*} it may nevertheless be vested in the three children subject to partial divestment in favor of those later born;^{72*} the fact that the three children must have the title need not mean that they are to have it indefeasibly. And once this difficulty has been overcome it would seem just as reasonable to admit children born after the death of the testator where there is an express direction for the postponement of the division of the property as to admit them where the intervention of a life estate causes a postponement.

The second deviation from the rule, we submit, was just as erroneous as the first. It grew out of the unhappy choice of words made by Pearson, C. J., when he said that

"A legacy given to a class subject to a life estate vests in the persons composing the class at the death of the testator; but not absolutely, for it is subject to open so as to make room for all persons composing the class not only at the death of the testator but also at the falling in of the intervening estate."⁷³

The effect of this, if construed literally, is to open the class momentarily at the death of the life tenant rather than to keep it open throughout the life estate; and in *Waller v. Brown*⁷⁴ the Court construed it literally.^{75*} In a gift to *A* "during his life and then to his children" it held that, although children living at the date of the gift need not survive *A*, a later child who failed to do so would not be included in the class. Those who answered the roll call at the date of the gift were

^{70*} If the takers are limited to persons living at the testator's death there may be a division by mutual consent, but that is true in the case of a life estate and remainder. In either case no individual is able to demand a division. See *Satterfield v. Steward*, 212 N. C. 743, 194 S. E. 459 (1937); *Sides v. Sides*, 178 N. C. 554, 101 S. E. 100 (1919).

^{71*} It seems likely that a life estate was intended for *A*, but probably no court would go so far as to imply it. *Ralph v. Carrick*, 11 Ch. 873 (1879).

^{72*} The younger children would take by the operation of shifting executory interests, which may cut down a fee as readily as a vested remainder. See *In re Lechmere & Lloyd*, 18 Ch. Div. 524 (1881).

⁷³ *Mason v. White*, 53 N. C. 421, 422 (1862).

⁷⁴ 197 N. C. 508, 149 S. E. 687 (1929).

^{75*} The Court relied partly on *Powell v. Powell*, 168 N. C. 561, 84 S. E. 860 (1915), which, however, was authority for admitting children born after the death of the testator whether they survived the life tenant or not. The Court there had said in effect that the remainder would vest in the children already born, but subject to be opened up at the birth of each succeeding child.

in, and those who could answer it at the death of the life tenant, but no others.

In view of the known reluctance of the Court to change its doctrines in property matters⁷⁶ it is probably sufficient to state that this case is squarely in conflict with four previous holdings,⁷⁷ none of which is even mentioned. It discriminates between the older and younger children for no reason which can be discovered and with no basis in precedent. Although the latest holding on the point, it seems almost certain that in future litigation it will be abandoned in favor of the view that all children born during the life estate should be admitted to the class. Then as class members they may be excluded for failure to survive the life tenant if that is a condition upon which the class may decrease,^{78*} but at least they will receive equal treatment.

We may thus feel fairly sure of being able to ignore both of the deviations from the rule that the class may increase until the time at which some member may demand a distribution of the property. One of them was based upon a misapprehension of the metaphysics of title, the other upon sheer inadvertence. But although the class may include all persons born before the date of distribution it may not, as a general rule, increase any further. The so-called Rule of Convenience⁷⁹ excludes persons born after the time when some member becomes entitled to call for a distribution,^{80*} for the reason that it would be inconvenient to keep the class open any longer. This is neither arbitrarily frustrating the testator's intent nor irresponsibly making a new will for him; it is only a way out, a sensible solution of the problem created by the imperfect expression of two mutually inconsistent desires:

1. The desire that all persons described shall be able to claim some of the property.
2. The desire that the property shall be available for distribution at a time which happens to occur before all such persons are born.

More often than not, when the time for distribution comes, it is altogether uncertain whether the class is going to increase any more if it is kept open. Meanwhile the members as of that time are likely

⁷⁶ See McCall, *Destructibility of Contingent Remainders in North Carolina* (1937) 16 N. C. L. Rev. 87.

⁷⁷ *Allen v. Perker*, 187 N. C. 376, 121 S. E. 665 (1924); *Chambers v. Payne*, 59 N. C. 278 (1862); *Sanderlin v. Deford*, 47 N. C. 74 (1854); *Knight v. Wall*, 19 N. C. 125 (1836).

^{78*} See the section on Decrease in Class Membership, *post*, p. 316. The requirement that after born children survive the life tenant might have been treated under that heading, but we have preferred to deal with it here because of the court's treatment of it as a condition precedent to membership in the class.

⁷⁹ 2 SIMES, *FUTURE INTERESTS* (1936) §370, *et seq.*

^{80*} *Britton v. Miller*, 63 N. C. 268 (1869); *Gay v. Baker*, 58 N. C. 344 (1860); *Knight v. Knight*, 56 N. C. 167 (1857). To *A* for life, then to the children of *B*. *Held*: Children born after the death of *A* are excluded. Where the gift is immediate, children born after the death of the testator are excluded.

to wish their shares paid to them and the estate wound up. To deny them this would mean either an indefinite postponement of the distribution or requirement that bonds be given to protect future children, and either of these alternatives might keep the property unnecessarily, restricted for many years.^{81*} Such an undesirable result is always to be avoided unless the will plainly requires it.

But if the testator wishes to include children born after the period of distribution there is nothing in the Rule of Convenience to prevent him from doing so. The rule is only a formulation of the result which the Court thinks the testator would have desired if he had thought about it, not a rule of law defeating intent. His language need not be completely free from ambiguity for the Court to find that he meant to include all persons who should ever be able to bring themselves within the class description. If it does find such an intent, then whether the distribution is to be at the death of the testator or at some later time it can be no more than a qualified one so long as increase in the class is still possible. Thus if the gift is to the children of *A* "whenever born," no child of *A* may call for a share in the gift without giving a bond to protect the interests of future children^{82*} so long as *A* is thought to be capable of having more children.^{83*}

A case which has not yet arisen in North Carolina is that of a gift simply to the children of *A* where the time of distribution arrives before *A* has had any children. Here again the Rule of Convenience may well give way, for it no longer states the probable intent of the testator. "Whenever he intended or expected such distribution to be made, he did not intend the distribution should be made before any of the class to whom he gave his estate came into existence."⁸⁴ Nor is it likely that he intended that the first child thereafter born should take the entire gift. It is therefore held that all children of *A* are included, no matter when they are born.^{85*}

Subject to these limitations, the Rule of Convenience seems to be a

^{81*} This objection is not so serious in the case of realty, since the existing members of the class may take a deed to the land which will show on its face the possibility of partial defeasance in favor of the later members. No bond would be necessary. This distinction has not been drawn in cases, but neither have any gifts of land been litigated which involve the point.

^{82*} *Pickett v. Southerland*, 60 N. C. 615 (1864); *Roper v. Roper*, 58 N. C. 16 (1859); ("Children that she now has or hereafter may have."); *Shinn v. Motley*, 56 N. C. 490 (1857) (Children "that now or hereafter may be."); *Shull v. Johnson*, 55 N. C. 202 (1855).

^{83*} *Jee v. Audley*, 1 Cox Eq. Cas. 324 (1787), established a conclusive presumption of a life long ability to bear children, and in *Smith v. Moore*, 178 N. C. 370, 100 S. E. 702 (1919) it was said that "the law presumes that the possibility of issue is not extinct." For the opposite view see *Leach, The Rule Against Perpetuities and Gifts to Classes* (1938) 51 HARV. L. REV. 1329, 1338.

⁸⁴ *Hayward v. Spaulding*, 75 N. H. 92, 95, 71 Atl. 219, 221 (1908).

^{85*} For a discussion of the authorities in other jurisdictions, see *Warren, Devises to Children* (1926) 35 YALE L. J. 785, treated as problem No. 1.

sensible rule for determining the maximum membership of a class where the testator has set no limits upon it; but it should be reëmphasized that it is not a rule for every case. A careful draftsman will not depend upon it, nor will he allow his client's purposes to be defeated by it. Instead, he will so clearly and definitely specify the limits within which the named class may increase that no question as to the testator's intention will ever be raised.⁸⁶

V

DECREASE IN THE CLASS MEMBERSHIP

Not every class is capable of increase. The testator may give to the children of a person already dead or to his companions in a battle already fought. In such a case it is the possibility of a fluctuation downward, of a decrease in the number of persons taking the entire gift, which is important. A recent writer has said that "the very function of a class is, in effect, to provide survivorship among members of a group when the testator has failed to do so but would probably be pleased with that distribution."^{87*} The question here is the extent of the survivorship which that implies. When does the interest of a member become fixed, or "vested," so as to be transmissible to his heirs or devisees rather than subject to the rights of the members who survive him?

Survivorship at least until the death of the testator is characteristic of every testamentary gift to a class.^{88*} If the members are *A*, *B*, and *C*, and *A* dies before the testator, *A*'s share will go to *B* and *C*, unless the lapse statute causes a different disposition.^{89*} *A* cannot take a share because he died before the will took effect; his children cannot take without the aid of a statute because they are not named in the will. The other members of the class are named, and named with reference to this property. It is reasonable that the share of *A*^{90*} should go to them.

⁸⁶ See, generally, Casner, *Class Gifts to Others Than "Heirs" or "Next of Kin"* — *Increase in the Class Membership* (1937) 51 HARV. L. REV. 254.

^{87*} Cooley, *What Constitutes a Gift to a Class* (1937) 49 HARV. L. REV. 903, 912. A gift of \$100 to each of the children who shall reach twenty-one does not create any survivorship, although the persons to take are determined under ordinary class gift principles. Whether they should be called a class or not is probably no more than an academic question. To avoid unnecessary complications we shall proceed on that assumption.

^{88*} In a gift by deed there may be no survivorship: the interests of the members living at the time of the conveyance may be vested subject only to rights of future members. In such a case it is the possibility of increase which makes the group a class.

^{89*} See the discussion of the effect of the lapse statute on class gifts, *post*, p. 318.

^{90*} It will facilitate discussion to speak of the membership of a class at any particular time as including the persons who would take the gift if it should become vested at that time. This will avoid some of the confusion resulting

If the gift to the class is immediate it is not necessary that the members do more than outlive the testator. *A*'s executor or heirs may claim his share even if he dies the day after the testator. But if some future time is mentioned the long-lived members of the class may contend that there is survivorship until that time, so that if *A* dies before it, although after the death of the testator, his share should go to them.

Here the common law made a distinction between two types of cases. In one the testator directed his executor to make a gift at a future time. In the other he made the gift presently but directed the executor to pay it at a future time. The future gift was thought to be made only to persons who should be living when it should take effect. Thus a gift to the children of *A* at the end of ten years was a gift only to children who should be alive at the end of the ten years;⁹¹ one "to be divided between all my children at the time my daughter reaches fifteen" would exclude children who died before the daughter reached fifteen. So it was held in *Anderson v. Felton*,⁹² but with considerable reluctance. "With every disposition to the contrary," said Chief Justice Ruffin, "we find ourselves compelled to hold the legacies in the will not to have vested. There are no words of gift of the personalty except by inference from the direction to divide. And as to the period of division, *and consequently of gift*, the will uses terms of strict condition: 'at the time my daughter Sarah arrives to fifteen,' and 'when he or she shall receive, etc.'" (Italics ours.)

In spite of the petty quibble raised here, later courts do not appear to have been disturbed by the lack of any present words of gift. The Court which decided *Mason v. White*⁹³ allowed children who died before the date of distribution to share in the gift, although the clause under which they claimed was "to *A* during her natural life and at her death to be equally divided among her children." No repetition of the holding in *Anderson v. Felton* has occurred, perhaps because of the rarity of future interests in which the period of the delay is other than the duration of a life estate given to someone else. If the postponement is made for the purpose of letting in an intervening estate, it is said in other jurisdictions that it was probably not the testator's purpose to require that the class member outlast that estate.⁹⁴ This takes care of most of the cases, since the postponement is most often made

from the cases which treat an actual right of enjoyment as a condition precedent to membership. Instead of saying that the class at the time of execution of the will consisted of such persons answering the class description as should survive the testator we shall say that it consisted of *A*, *B*, and *C*.

⁹¹ *Smell v. Dee*, 2 Salk 415 (Chancery 1707).

⁹² 36 N. C. 55, 56 (1840).

⁹³ 53 N. C. 421 (1862).

⁹⁴ *Matter of Crane*, 164 N. Y. 71, 58 N. E. 47 (1900). See Gluck, *The Divide and Pay Over Rule in New York* (1924) 24 COL. L. REV. 8.

for the purpose of letting in an intervening life estate to some member of the testator's immediate family.

But our Court, far from saying that any such intervening estate would be necessary, has generally ignored the fact that the language in such cases appeared to make the gift a future one.^{95*} This affords ground for hope that the old distinction between present and future gifts may be modified, so that if there is no need for the class members to survive the time of payment in a gift to a class "at the death of" a life tenant, there will be none in a similar gift "at the time my youngest daughter reaches fifteen." It is hard to see any ground for construing the two gifts differently, and in view of the preference for vested interests which the Court has repeatedly professed^{96*} it will come as a surprise if in the future they are construed differently. It seems more likely that nothing short of a positive rule of law will compel the Court to hold an interest contingent when it has "every disposition to the contrary."

Before leaving the subject of decrease in the class membership it may be well to add a word on the effect of the lapse statute on class gifts. The problem is simply this: if the testator makes a gift to his "children" and one of them dies before he does, will the children of the deceased child be entitled to a share under the lapse statute⁹⁷ or will the entire property go to the other children of the testator? Some courts have gone so far as to hold that because they never share in the gift, children who predecease the testator are never included in the group designation: the "children" of the testator are only those children who survive him.^{98*} In view of the purpose of the lapse statute to permit representation where the testator has failed to foresee the need for it, it would seem better to say that all the children living at or after the execution of the will^{99*} are included in the class designation;

^{95*} In one case of a remainder to a class the Court did observe that the words "after" or "upon" the death of A "do not take a contingency but merely denote the commencement of the remainder in point of enjoyment." *Rives v. Frizzle*, 43 N. C. 237, 239 (1851).

^{96*} *Satterfield v. Steward*, 212 N. C. 743, 194 S. E. 459 (1937); *Witty v. Witty*, 184 N. C. 375, 114 S. E. 482 (1922).

In *Taylor v. Taylor*, 174 N. C. 537, 94 S. E. 7 (1917), there was a devise to W for life, "and at the expiration of my wife's interest in land and property, divide it equally among my living children." It was held that the remainder vested in the children living at the testator's death.

⁹⁷ N. C. CODE ANN. (Michie, 1939) §§4166, 4168.

^{98*} *Campbell v. Clark*, 64 N. H. 328, 10 Atl. 702 (1887). The same view has been taken in England, Canada, Georgia, and New Jersey. *POWELL, CASES ON FUTURE INTERESTS* (1937) 422, n. 13. But the weight of authority seems to be in favor of applying the statutes. *Rudolph v. Rudolph*, 207 Ill. 766, 69 N. E. 834 (1904); 5 THOMPSON, WILLS (2d ed. 1936) §309; *Cooley, Lapse Statutes* (1936) 22 VA. L. REV. 373. No North Carolina case has been found.

^{99*} Devises to children who have died before the will was executed cannot be subject to the operation of the lapse statute. They are void all together. *Lindsey v. Pleasants*, 39 N. C. 320 (1846).

that the common law passed their shares to the survivors rather than allow a lapse, and that the statute, by giving the shares to certain representatives, simply provides a solution which the legislature has thought to be more in conformity with the desires of the ordinary testator.

VI

WHAT IS THE PLAN OF DISTRIBUTION?

After the Court has decided what persons shall participate in the gift, it may still have to decide what the share of each of those persons is to be. In many cases there will be a controversy between those who stand to benefit by a *per capita* distribution and those who prefer some other scheme.

During the first years of our Court it became fairly clear that gifts to classes were to be divided *per capita* unless a contrary intent appeared in the will.^{100*} This was true even where the class consisted of two sub-classes¹⁰¹ or of an individual and a sub-class,¹⁰² unless some means could be found for overcoming the presumption.

A. Gifts to heirs.

*Croom v. Herring*¹⁰³ decided that a stirpital distribution was intended in a gift to be divided "among all my heirs, agreeable to the statute of distributing of intestate's estates." The statute, said the Court, was called upon not only to designate the members of the class but also "to point out the manner of division of that property." *Freeman v. Knight*¹⁰⁴ indicated that North Carolina would also follow the statute even without a reference to it, where the gift was to heirs *simpliciter*.^{105*} But in that case the gift was not to heirs *simpliciter*. It was to be "equally divided among my legal heirs." Justice Gaston explored the English authorities on the meaning of the word "equally," and concluded that the distribution must be *per capita*. Equal division among the families represented was not "equal" distribution among "heirs." "Whatever might be thought of these distinctions were the matter a new one, to disregard them would be *quieta movere*." This reproach was sufficient to command obedience from later judges whose attention was called to it. A will, which was before the Court the next year, provided that if the life tenant should die leaving heirs the prop-

^{100*} *Patterson v. McMasters*, 56 N. C. 208 (1857); *Bryant v. Scott*, 21 N. C. 155 (1835).

A gift to the testator's grandchildren is divided *per capita*, even though their parents survive the testator. *Cheeves v. Bell*, 54 N. C. 234 (1854); *Hill v. Spruill*, 39 N. C. 244 (1846).

¹⁰¹ *Hobbs v. Craige*, 23 N. C. 332 (1840).

¹⁰² *Ward v. Stow*, 17 N. C. 509 (1834).

¹⁰³ 11 N. C. 393 (1826). ¹⁰⁴ 37 N. C. 72 (1841).

^{105*} *Empie v. Empie*, 198 N. C. 562, 152 S. E. 625 (1930), so followed the statute.

erty should be "equally divided between them."¹⁰⁶ They were held to take *per capita*.^{107*} So were the heirs of a woman to whom slaves were given for life "and at her death to be equally divided among the heirs of her body."¹⁰⁸ *Freeman v. Knight* seemed to be law.

Then came two opinions by Justice Battle which ignored it completely. In *Rogers v. Brickhouse*¹⁰⁹ the residue was to be sold and the proceeds "equally divided among my heirs at law." By this provision, said the Court, distribution *per stirpes* was "clearly indicated." The same was true of a gift "to be equally divided amongst my heirs, except John Burgin." "... the rules of descent must be resorted to for the purpose of ascertaining who are the testator's heirs . . . and the rule in relation to the right of representation must be observed as well as any other."¹¹⁰

Battle's decisions, however, were soon forgotten. No mention was made of them when the next gift of residue "to be equally divided between all my heirs" came before the Court.¹¹¹ Chief Justice Pearson held that the heirs took *per capita*, on the authority of *Freeman v. Knight*. It is difficult to say why Battle failed to dissent, for he apparently continued to regard his opinion in *Rogers v. Brickhouse* as good law.^{112*} At any rate, the fear that to undervalue the significance of the word "equally", would be *quieta movere* has since prevailed.¹¹³ It affords a pitfall for draftsmen, especially the amateur one who harbors no suspicion of the difference between a gift to be divided among his heirs and a gift to be equally divided among his heirs.^{114*}

B. Gifts to an individual and a class and to two sub-classes:

It was established by 1834 that a gift to *A* and the children of *B*, or even to *A* and the "heirs" of *B*, nothing more appearing in the will, would be divided *per capita*. *A* could claim only the share of one

¹⁰⁶ Swain v. Roscoe, 25 N. C. 200 (1842).

^{107*} They therefore took as purchasers rather than by descent under the Rule in *Shelley's Case*. If any words are added to the limitation which will carry the estate to any other persons, in a manner or in any other quality that the canons of descent provide, will take the case out of the operation of the Rule. *May v. Lewis*, 132 N. C. 115, 43 S. E. 550 (1903).

¹⁰⁸ Evans v. Lea, 40 N. C. 169 (1848).

¹⁰⁹ 58 N. C. 301 (1860).

¹¹⁰ Burgin v. Patton, 58 N. C. 425, 427 (1860).

¹¹¹ Hackney v. Griffin, 59 N. C. 381 (1863).

^{112*} *Grandy v. Sawyer*, 62 N. C. 8 (1866). Residue to wife for life, then "to be equally divided between the heirs of my beloved wife and my heirs at law." Held: one half of the residue goes to the testator's heirs *per stirpes*. This holding is consistent with *Freeman v. Knight* if "equally" is to refer only to the manner of distribution between the two sub-classes. But *Mills v. Thorne*, 95 N. C. 362 (1886), on substantially similar facts, refused to recognize such a restriction.

¹¹³ *Mills v. Thorne*, 95 N. C. 362 (1886); *Tuttle v. Puitt*, 68 N. C. 543 (1873).

^{114*} No North Carolina cases involving the plan of distribution in gifts to "issue" or "descendants" have been found.

child, or of one heir of *B*.^{115*} If the result seemed difficult to justify at times, it was the fault of the English authorities, which had settled the matter. The Court did not stop to consider the relative strength of the claims which *A* and *B* might have had to the testator's bounty. It was content to rest on the *per capita* presumption so long as nothing appeared to rebut it in the language of the will.

But it was clear from the first that anything which appeared on the face of the will to indicate that the testator intended stirpital distribution would be given effect. Other gifts to the same persons afforded the finest type of clue. It was plain that if *T* gave \$1000 to *A* and \$1000 to the children of *B*, he intended *A* to receive half of the *residue* given to "*A* and the children of *B*."¹¹⁶ Conversely, the scheme of distribution indicated in the residuary gift might govern the division of a specific bequest.¹¹⁷ Still dependent upon the language of the will, the Court went on to hold in 1857 that any separate gift to the children of *B* would cause them to take only a half in a gift to *A* and the children of *B*, whether the separate gifts were equal or not.¹¹⁸ Once the children had been named as a class, it was said, they remained a class.

This argument is only moderately persuasive. A testator may very well give Blackacre to the "children of *B*" without giving any indication as to the distribution of another gift to *A* and the children of *B*. But the decision is justifiable apart from the will, since *A* and *B* bore the same relation to *T*. Such extraneous circumstances the earlier courts had appeared to disregard; but Justice Battle only two years before

^{115*} *Ward v. Stow*, 17 N. C. 509 (1834). This decision was the culmination of years of litigation, during which the Supreme Court twice reversed itself. It overrules the very plausible holding of *Ricks v. Williams*, 16 N. C. 3 (1826), that "heirs, as to others, are a unit, and make but one person." All the cases on the point use some such term as "equally to be divided," but the decisions do not appear to have turned on that. They have rested rather on the absence of anything to rebut the *per capita* presumption.

The *per capita* presumption in gifts to two sub-classes has an odd effect when applied in conjunction with the presumption that life estates are held jointly. Thus a gift to *A* and *B* for life, remainder to their children, gives *A* and *B* joint life estates, and at the death of the survivor the remainder goes to all the children *per capita*. *Lamm v. Mayo*, 217 N. C. 261, 7 S. E. (2d) 501 (1940); *Burton v. Cahill*, 192 N. C. 505, 135 S. E. 332 (1926); *Leggett v. Simpson* 176 N. C. 3, 96 S. E. 638 (1918).

In the recent case of *Tillman v. O'Brian*, 220 N. C. 714, 18 S. E. (2d) 131 (1941), our Court held that where realty was directed to be sold "and the proceeds divided equally" between the children (seven in number) of the deceased daughter, the only child of another deceased daughter by name, and another who was treated as a foster son, the division of the proceeds should be *per capita* and not *per stirpes*, no contrary intention having appeared in the will. See *Walsh v. Friedman*, 219 N. C. 151, 13 S. E. (2d) 250 (1941) where the Court held that a gift to the testator's grandchildren *per stirpes* was construed as a gift to a class.

¹¹⁶ *Gilliam v. Underwood*, 56 N. C. 100 (1857); *Barringer v. Cowan*, 55 N. C. 436 (1856); *Pardue v. Givens*, 54 N. C. 306 (1854); *Martin v. Gould*, 17 N. C. 305 (1832).

¹¹⁷ *Henderson v. Womack*, 41 N. C. 437 (1849).

¹¹⁸ *Lockhart v. Lockhart*, 56 N. C. 205 (1857).

had broadened the scope of the court's inquiry. In *Bivens v. Phifer*¹¹⁹ he had dealt with a gift to the heirs of *A*, the heirs of *B*, the heirs of *C*, *D*, the heirs of *E*, and the heirs of *F*. There were no separate gifts to any of these groups. Battle found that the testator intended stirpital distribution, since the opposite result would give *D* only one twenty-third of the property, too small a share for a man with a family to support and no great wealth with which to do it. If there were no English precedents for his solution,¹²⁰ there was at least authority for his technique: "You are at liberty to prove the circumstances of the testator, so far as to enable the Court to place itself in the situation of the testator at the time of making his will, but you are not at liberty to prove either his motives or intentions."¹²¹ Justice Battle placed himself in the position of the testator, and found the experience rewarding. But, although he assumed that each of *T*'s children had equal claims upon him, he did not expressly follow a statute of distributions.

In *Mitchell v. Parks*¹²² there was a gift to the heirs of *A* and the heirs of *B*, followed by separate gifts of half the residue to the heirs of *A* and half to the heirs of *B*. The equal distribution of the residue between classes rather than among individuals was sufficient to control the distribution of the specific property.¹²³ That might well have ended the discussion. But the Court went on to cite out-of-state authority for deducing a stirpital intent wherever the word *heirs* was used. This is reminiscent of Justice Henderson's holding that "heirs, as to others, are an unit, and make but one person."¹²⁴ Apparently unaware of the fate to which that doctrine was consigned in later gifts to heirs and individuals,¹²⁵ the Court held that such gifts required special treatment. "And this," said Judge Walker, "distinguishes the case at bar from those relied on by the counsel in his learned argument before us where the expression was 'to children' or 'to children to be equally divided between them' or 'to children naming them.'"¹²⁶

The case would be stronger if Judge Walker had expressly discountenanced the earlier holdings. His failure to mention them, and the existence of a strong alternative ground for decision may lead some future court to revert to the ancient dogma that where heirs take as purchasers they also take as individuals, and not collectively.^{127*} It is

¹¹⁹ 47 N. C. 436 (1855).

¹²⁰ None were cited.

¹²¹ Lord Langdale in *Martin v. Drinkwater*, 2 Bevan 215, 217 (1840).

¹²² 180 N. C. 634, 105 S. E. 398 (1920).

¹²³ Note 117, *supra*.

¹²⁴ *Ricks v. Williams*, 16 N. C. 3 (1826).

¹²⁵ *Feimster v. Tucker*, 58 N. C. 69 (1854); *Hobbs v. Craige*, 23 N. C. 332 (1840); *Ward v. Stow*, 17 N. C. 509 (1834).

¹²⁶ *Mitchell v. Parks*, 180 N. C. 634, 635, 105 S. E. 398, 399 (1920).

^{127*} *Ward v. Stow*, 17 N. C. 509 (1834). Justice Battle, in *Grandy v. Sawyer*, 62 N. C. 8 (1866), explained this case on the ground that the "heirs" actually

submitted that such a holding has little to recommend it, and that the presumption should be strongly the other way.

It is believed also that there should be a strong presumption in favor of the Statute of Distributions.¹²⁸ Other courts have held not only that the "heirs" of *B* should take a single share collectively, but also that the "children" of *B* should do so whenever that would have been the result under intestacy. This analogical use of the statute was expressly rejected in an early case,^{129*} but with no reasons given other than the general statement that the statute must be kept in its place. It might properly furnish a rule as to the object of the bequest, whereby we are enabled to ascertain who shall take under the designations used in the testaments; but the proportion in which they shall take must necessarily be established from a just construction of the will.^{130*}

Why "necessarily"? And why did the Court think that it came nearer to a "just construction" of an ambiguous will by applying one presumption rather than another? Without the aid of some presumption, based on custom or policy, surely no amount of judicial effort will suffice to isolate a single meaning from language which has two meanings.^{131*} In such a case the Georgia court looks to see what sort of distribtuion would have been made under intestacy:

"The Statute of Distribution sets forth the settled policy of the law as to where the estate of a decedent shall go. While the testator is allowed to ignore, either in part or altogether, the rules laid down in that statute, it will not be presumed that it was the intention of the testator to disregard the law as it is contained in the statute in any part unless the terms of the will are such as to make this intention manifest."¹³²

Michigan has taken the same view. If a testator there wishes the children of his deceased child *B* to have a larger share than child *A*, he must have made that intention perfectly clear.¹³³ Otherwise *A* will be entitled to as much as all the children of *B* together, just as he would have been if his father had died intestate.

included only children named. Where other persons were included, he said, the heirs must take as a unit and *per stirpes*.

¹²⁸ N. C. CODE ANN. (Michie, 1939) § 137.

^{129*} *Whitehurst v. Pritchard*, 5 N. C. 383 (1810). Justice Lowrie dissented because of the failure to apply the analogy of the Statute of Distributions. The case was disapproved in *Ricks v. Williams*, 16 N. C. 3 (1826); but Justice Henderson there relied entirely on his own decision in *Collier v. Poe*, 16 N. C. 57 (1826), which was reversed in *Ward v. Stow*, 17 N. C. 509 (1834).

^{130*} Compare the refusal to follow the Statute in determining what is equal distribution to the heirs of the testator. *Freeman v. Knight*, discussed *supra*, p. 319.

^{131*} It is assumed that the ambiguity is not resolved by a consideration of the circumstances under which the will was written.

¹³² *McLean v. Williams*, 116 Ga. 257, 259, 42 S. E. 485, 486 (1902); *Dollander v. Dhaemers*, 297 Ill. 274, 130 N. E. 705 (1921).

¹³³ *Eyer v. Beck*, 70 Mich. 179, 38 N. W. 20 (1888).

By such resort to the Statute the Court may hope to avoid many of the quibbles over language which are bound to arise under a *per capita* presumption capable of being upset by "a faint glimpse of an intention to the contrary."^{134*} It is not too late for the Court to establish a presumption in favor of the Statute. Not only will it have at least as good a chance of accomplishing the testator's purpose as the *per capita* presumption but, being stronger, it will enable many more estates to be settled without resort to the ruinous litigation which a weak presumption can only serve to encourage.

CONCLUSION

It has not been our intention to attempt a comprehensive summary of the law of class gifts: the problems are too diverse to be covered in a paper of this length. Nevertheless the nature of some of the problems has been indicated, together with the respects in which the North Carolina law is peculiar.

In the footnotes to these pages appears the record of a large amount of costly litigation. No part of it would have been necessary if the draftsmen of the wills which came before the Court had taken time to write out in detail exactly what was to be done with the property. Only the Rule in *Shelley's Case* can upset the clearly expressed intention of a testator so long as there is no contravention of the public policy of the state.^{135*} Some imagination and some skill in the use of words should enable any draftsman to make an unambiguous statement of that intention.

^{134*} 2 JARMAN, WILLS (6th Am. ed. 1893) 206. Note the distinction drawn between a gift to the children of *A* and *B* and a gift to the children of *A* and the children of *B*. *Howell v. Tyler*, 91 N. C. 207, 213 (1884).

^{135*} Violations of the Rule Against Perpetuities have been extremely rare in North Carolina litigation, but it has been decided in accord with the authorities elsewhere that if the interest of one member of a class is bad under the Rule, the entire gift is bad. *Moore v. Moore*, 59 N. C. 132 (1860). Leach, *The Rule Against Perpetuities and Gifts to Classes* (1938) 51 HARV. L. REV. 1329 expresses a contrary view.