

SUCCESSION

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I

LEGISLATION

ALTHOUGH New York's Estates, Powers and Trusts Law¹ was the only major statutory revision to become effective during the period under review, the trend toward legislative revision and codification of probate and succession law has not yet run its course. Completion of the new Uniform Probate Code by the joint American Bar Association and National Conference of Commissioners on Uniform State Laws committees will undoubtedly spur additional legislative action.²

Codification of succession law requires review and drafting procedures which inevitably produce new provisions designed to clarify or change existing statutory or case law. Comparable amendments to probate, administrative, and intestate succession statutes are not infrequent in those states which have not undertaken systematic codification. Not surprisingly, some of these amendments have generated litigation.

A 1953 New Jersey enactment,³ recently litigated, provided that adopted children should no longer be entitled to inherit from their natural parents. A proviso was added to prevent the new statute from affecting "any adoption granted or any right or duty vested or established under any law heretofore in effect."⁴ The New Jersey Supreme Court held that a child adopted prior to 1953 could inherit her natural mother's intestate estate even though the mother died in 1964.⁵ The court relied heavily on the saving clause as a manifestation of legislative intent that the 1953 amendment should not be applicable to prior adoptions, even though the natural parent's death might occur subsequently.⁶ Other decisions construing stat-

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1. The N.Y. EPTL, effective September 1, 1967, is the subject of a symposium in 33 *Bklyn. L. Rev.* 405-573 (1967).

2. At this writing, the project is scheduled for completion in 1969.

3. N.J. Stat. Ann. § 9:3-30 (1960).

4. N.J. Stat. Ann. § 9:3-34 (1960).

5. *Nickell v. Gall*, 49 N.J. 186, 229 A.2d 511 (1967).

6. The court did not hold that the adopted child acquired a "vested right" to inherit from her natural mother at the time of adoption. Rather, it held that the legislature, in enacting the saving clause, did not intend a technical interpretation to attach to its usage of "right or duty vested or established." 49 N.J. at 190, 229 A.2d at 513. The court also pointed to the fact that the original adoption decree had expressly excepted

utes changing the status of adopted or illegitimate children, while reaffirming the ineffectiveness of amendments which occur after a testator's death,⁷ have nevertheless emphasized the more liberal trend motivating and underlying legislation in this field.⁸

In 1956, Virginia repealed its statute providing that subsequent marriage of the maker revokes his will. A testatrix executed her will in 1936, married in 1937, and died in 1965. The Supreme Court of Virginia held that the will was revoked upon her marriage and not revived by the repeal of the statute.⁹

Perhaps the most remarkable decision concerning change of law was *Fullam v. Brock*.¹⁰ An earlier decision,¹¹ in 1962, had held unconstitutional a statute¹² purporting to grant husbands the right to dissent from the wills of their wives. In 1964, the North Carolina Constitution¹³ was amended so as to grant the legislature the power to enact such a statute.¹⁴ In 1965, the original statute was re-enacted.¹⁵ The testatrix died, however, 3 months

the "right of inheritance" from a statement of general dissolution of the parent-child relationship. It felt that this justified inclusion of a make-weight argument that the natural mother "may have relied" on this exception in "omitting a will." 49 N.J. at 191, 229 A.2d at 514. Perhaps even more significant, though not commented upon in the opinion, is the fact that the claimant was the decedent's only child; the next of kin were three sisters and a brother.

7. In re Estate of Graham, 150 N.W.2d 816 (Mich. 1967). A testamentary trust bequeathed the remainder after a life estate to issue of the body of the life tenant. Thirty-one years after the settlor's death, but 6 years before the death of the life tenant, the adoption law was amended to include adopted children as issue. Mich. Stat. Ann. § 27.3178 (1962). See In re Estate of Miner, 359 Mich. 579, 103 N.W.2d 498 (1960). In Graham, the Supreme Court of Michigan states that: "It was not competent for the legislature to change [the testator's] will in that respect by statutory amendment adopted after his death." 150 N.W.2d at 818.

8. In In re Will of Van Nostrand, 53 Misc. 2d 835, 279 N.Y.S.2d 806 (Sur. Ct. 1967), the court rejected an argument that the enactment in 1965 of N.Y. Deced. Est. Law § 83-a (now N.Y. EPTL § 4-1.2), providing for legitimation by order of filiation, changed or revoked the prior provisions of N.Y. Dom. Rel. Law § 24 to the extent that marriage of the parents effected legitimation. The court limited the applicability of the new statute to cases where the illegitimate's parents had *not* subsequently married.

9. *Wilson v. Francis*, 208 Va. 83, 155 S.E.2d 49 (1967).

10. 271 N.C. 145, 155 S.E.2d 737 (1967).

11. *Dudley v. Staton*, 257 N.C. 572, 126 S.E.2d 590 (1962).

12. Ch. 959, § 1 [1961] N.C. Sess. Laws 1260-61.

13. N.C. Const. art. X, § 6 (1868) provided that the property of a female "may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried." *Dudley v. Staton* held that the clause "as if she were unmarried" modified the verbs "devised and bequeathed" as well as "conveyed," 257 N.C. at 580-81, 126 S.E.2d at 596-97. As so construed, the provision invalidated any legislative attempt to restrict the power of testation of a married woman by provisions to which a single testatrix would not be subject.

14. The words "as if she were unmarried" were deleted, and in their place the words "subject to such regulations and limitations as the General Assembly may prescribe" were substituted. N.C. Const. art. X, § 6.

15. N.C. Gen. Stat. § 30-1 (1967).

before the effective date of the re-enactment; the question presented was whether or not her husband had the right to dissent from her will. The court held that the adoption of the constitutional amendment "restored" the husband's right of dissent,¹⁶ and supported its reasoning by citing inapposite decisions¹⁷ validating statutes whose effectiveness was expressly conditioned upon the subsequent passage of a constitutional amendment; it ignored prevailing concepts as to the effect of a declaration of unconstitutionality¹⁸ and the fact that the constitutional amendment utilized prospective terminology in its grant of legislative power.¹⁹

II

CHOICE OF LAW

Choice-of-law problems can arise with respect to the estate of any decedent owning property located in a jurisdiction other than his domicile, or whose spouse is domiciled in another jurisdiction, or who has made an inter vivos transfer to a nondomiciliary transferee as a "testamentary substitute."²⁰ Related problems such as jurisdiction and full faith and credit are also often raised. While extended discussion of the topic should be deferred to authorities in the field of conflict of laws, it may be appropriate, nevertheless, to present a sample of the choice-of-law problems in succession that have been litigated during the *Survey* year.

Several cases have drawn sharp distinctions between real and per-

16. 271 N.C. at 151, 155 S.E.2d at 741. The legislature had expressly provided that its re-enactment of the statute should not be construed as a determination of the invalidity of the statute in the interim. *Id.*

17. *E.g.*, *Druggan v. Anderson*, 269 U.S. 36 (1925). There, Congress specified that a particular enactment should not become effective until 1 year after ratification of the eighteenth amendment. It was passed in contemplation of subsequent ratification, and could not become effective without ratification. These considerations did not obtain with respect to the original adoption of N.C. Gen. Stat. § 30-1 (1967).

18. An unbroken line of North Carolina cases had followed the lead of the U.S. Supreme Court and established the proposition that an unconstitutional law is no law. See *e.g.*, *Board of Managers of James Walker Memorial Hosp. v. City of Wilmington*, 237 N.C. 179, 74 S.E.2d 749 (1953); *Sessions v. Columbus County*, 214 N.C. 634, 200 S.E. 418 (1939); *State v. Williams*, 146 N.C. 618, 61 S.E. 61 (1908). In *Roberson v. Penland*, 260 N.C. 502, 133 S.E.2d 206 (1963), the court held that a compromise agreement executed in reliance on the validity of N.C. Gen. Stat. § 30-1 would remain in force despite the subsequent declaration of the statute's invalidity in the *Dudley* case. This holding in no way affected the status of the statute; it was a determination that the agreement is valid *despite* the statute's invalidity.

19. See notes 13-14 *supra*.

20. New York employs this terminology in EPTL § 5-1.1(b), in subjecting various inter vivos transfers to the surviving spouse's right of election.

sonal property in connection with choice of law. The holographic will of a Florida domiciliary, invalid in Florida, was held admissible to probate in Virginia; as so probated, it controlled the disposition of testator's Virginia real estate.²¹ A New Jersey widow, who had no right to elect against her husband's will in New Jersey (where he died domiciled), could nevertheless elect against it and take a dower interest in Ohio realty owned by the decedent at his death.²² A Texas decedent's son was entitled, under the New Mexico pretermitted heir statute, to an interest in real property located in New Mexico, even though he was not so entitled under the Texas pretermitted child statute.²³ A Czechoslovakian domiciliary, residuary beneficiary of the estate of another Czech, died prior to distribution of her share of his estate. Her share included real estate located in New York, which was sold by the executor (under a discretionary power of sale) prior to her death. The proceeds were available to satisfy her legacy, but if they were characterized as realty, they would pass to her niece and grand-niece under New York law; if personalty, they would be *bona vacantia* under Czech law. A New York surrogate held that the proceeds could not lose their character as realty until actually distributed by the executor, and ordered the decedent's share paid to her niece and grand-niece.²⁴

The most interesting case of the *Survey* year turned on a different issue than characterization of assets. The bulk of a Virginia decedent's assets were located in New York, and his will provided that as to such assets, New York law should govern.²⁵ Under New York law, the testamentary provisions for the spouse were sufficient to bar her election of a forced share. Under Virginia law, however, she had an absolute right to elect against the will.²⁶ New York's appellate division held that she could assert this right of election against the New York assets.²⁷ The court conceded that "where the law of her domicile gives a widow no right to take against the will, she gains none from the fact that the property and administration are in a jurisdiction where there is such a right,"²⁸ but held that the decedent's domiciliary state can validly limit his right to dispose of his property by will.

21. *French v. Short*, 207 Va. 548, 151 S.E.2d 354 (1966).

22. *Pfau v. Moseley*, 9 Ohio St. 2d 13, 222 N.E.2d 639 (1966).

23. *Price v. Johnson*, 78 N.M. 123, 428 P.2d 978 (1967).

24. *In re Matous' Estate*, 53 Misc. 2d 255, 278 N.Y.S.2d 70 (Sur. Ct. 1967). The issue was apparently one of first impression in New York. For a similar ruling, see *Succession of King*, 201 So. 2d 335 (La. App. 1967).

25. The applicable section was N.Y. Deced. Est. Law § 17 [now EPTL § 3-5.1(h)].

26. Va. Code Ann. §§ 64-13, 64-16 (1950).

27. *In re Clark's Will*, 28 App. Div. 2d 55, 281 N.Y.S.2d 180 (1st Dep't 1967).

28. *Id.* at 57, 281 N.Y.S.2d at 183. This dictum is squarely contrary to *Pfau v. Moseley*, 9 Ohio St. 2d 13, 222 N.E.2d 354 (1966) discussed in the text accompanying note 22 *supra*.

Two leading decisions suggesting a contrary result²⁹ were distinguished on the ground that the surviving spouse in each case had agreed to or adopted the decedent's election of New York law as to assets located in New York. The issue would have been more complex had the surviving spouse been a resident of a third state, under whose law she would not be entitled to a right of election.

III

NONTESTAMENTARY SUCCESSION

Surviving Spouse.—Appellate courts in Maryland and Tennessee struggled with the effect of inter vivos transfers and arrangements on the surviving spouse's forced share. In the Tennessee case,³⁰ the decedent irrevocably transferred personal property aggregating more than one-third of his estate to two sisters as trustees for himself for life, with principal to be distributed at his death to five brothers and sisters. At his death, the widow claimed a distributive share of this property under a fraudulent conveyance statute.³¹ In upholding her claim, the court pointed to factors³² which suggested an application of the old New York illusory transfer test.³³ In the Maryland case,³⁴ the decedent established two savings account trusts for the benefit of his nieces and nephews more than 10 years prior to his death. Although modest at first, the balances grew with additional deposits and the accumulated dividends and constituted almost half of his total estate at the time of his death. The court concluded that the decedent's purpose in establishing the accounts "was to divide his belongings equally between his widow and the children of his sister,"³⁵ but nevertheless found no fraud on the widow's marital rights. The inconsistent results reached in these similar cases suggest the need for more specific guidelines in the determining of fraudulent or colorable inter vivos transfers.³⁶

The question of whether assets subject to a valid contract to bequeath may be reached by a surviving spouse raises serious and complex policy

29. *Wyatt v Fulrath*, 16 N.Y.2d 169, 211 N.E.2d 637, 264 N.Y.S.2d 233 (1965); *In re Smith's Estate*, 182 Misc. 711, 48 N.Y.S.2d 631 (Sur. Ct. 1944).

30. *Sherrill v. Mallicote*, 417 S.W.2d 798 (Tenn. App. 1967).

31. Tenn. Code Ann. § 31-612 (1955).

32. I.e., absence of consideration for the inter vivos transfer, retention of a life estate, no actual management by the trustees during settlor's lifetime, and size of trust in relation to total estate. 417 S.W.2d at 801-02.

33. See *Newman v. Dore*, 275 N.Y. 371, 9 N.E.2d 966 (1937). See generally W. MacDonald, *Fraud on the Widow's Share* (1960).

34. *Klosiewski v. Slovan Bldg. & Loan Ass'n*, 230 A.2d 285 (Md. Ct. App. 1967).

35. *Id.* at 288.

36. N.Y. EPTL § 5-1.1(b) specifies that certain inter vivos transfers are subject to the surviving spouse's forced share regardless of intent.

issues as to each jurisdiction's statutory provisions for surviving spouses. If specific assets are transferred to a promisor, solely in consideration of his promise to bequeath them to a beneficiary of the transferor's choosing, the protective policy underlying forced shares statutes would not be seriously impaired by a holding that the spouse cannot share in such assets. If, however, the promisor contracts to bequeath assets which he has himself acquired, retaining full power to transfer or consume them during his lifetime, the underlying policy of the forced share statute may be seriously impaired by such a decision. And if the decedent obligates himself to bequeath his *entire* estate, such a holding would nullify the statute, completely frustrating its objectives. Since the forced share concept is designed to operate irrespective of the decedent's intent, or even in spite of a contrary intent, it should be unnecessary for the spouse to prove that the contract was entered into with specific intent to deprive him or her of a distributive share.

An intermediate California court recently held that the beneficiary of a contract to devise specifically described property takes it to the exclusion of the surviving spouse.³⁷ If the court's interpretation of the applicable statute³⁸ is correct, California residents can retain possession of and control over their separate property during their lifetimes, passing it on at death free of a surviving spouse's claim. The legislature should take notice that this is the precise contingency against which a surviving spouse most needs and deserves protection.

The potential for frustration of this policy has increased in New York after *Rubenstein v. Mueller*.³⁹ The contract, between the decedent and his first wife, was embodied in a joint and mutual will bequeathing the estate of the first decedent to the survivor; "the estate of the second decedent" was then bequeathed to several named beneficiaries. Decedent survived his first wife and remarried. After his death, his second wife unsuccessfully claimed a statutory share in property which he had acquired during his first marriage and had held jointly with his first wife during her lifetime. Since the decedent retained possession, ownership, and control over this property until his death, the result is as disturbing as that discussed above with respect to California.⁴⁰

Surviving spouses, claiming a forced share in the decedent's estate despite an antenuptial agreement releasing such claims, were unsuccessful

37. In re Estate of Stewart, 63 Cal. Rptr. 548 (Cal. App. 1967).

38. Cal. Prob. Code § 70.

39. 19 N.Y.2d 228, 225 N.E.2d 540, 278 N.Y.S.2d 845 (1967).

40. In both cases, a long and apparently harmonious first marriage was followed by a short one that was terminated by the husband's death. The courts were, in effect, preferring relatives of the first wife over the second wife. But there is no indication that the rule established in each case will be limited to similar fact situations.

this *Survey* year in upsetting the agreement where they could show only a failure by the decedent to disclose the full extent of his wealth.⁴¹ One spouse who did succeed was able to prove actual misrepresentation of assets.⁴² It is significant that each court commented upon the education and business acumen of the complainant. Disparities between the claimant and the decedent in these respects were discovered only in the case where the spouse was successful.

Creditors.—The year's most interesting fraudulent transfer case arose in New York.⁴³ By separation agreement with his first wife, the decedent promised: (1) to bequeath one-half of his estate to his son; (2) to make the son beneficiary of several life insurance policies; and (3) if he should make any inter vivos transfers, to pay his son a sum equal to one-half of the amounts so transferred. In violation of the agreement, the decedent changed beneficiaries of some of the policies, established revocable inter vivos trusts and joint mutual fund accounts giving a right of survivorship to his second wife, and bequeathed his entire estate to her.

The son asserted that the trusts and mutual fund accounts were transfers in fraud on his rights as a creditor of the decedent. Although he prevailed as to the trusts, because of their revocability,⁴⁴ the mutual fund accounts proved more troublesome.⁴⁵ The parties stipulated that these transfers did not render the father "insolvent."⁴⁶ Thus the second wife acquired a moiety of one-half of each account, which a creditor could not reach. As to the remaining half, the decedent retained a power to withdraw the funds during his lifetime and thereby defeat his spouse's expectancy of taking them by survival. The court equated this power with a retained power to revoke trusts, thus subjecting one-half of the mutual fund accounts to payment of claims against the estate. By focusing on the classification of the survivor's interest as an expectancy, the court subjected the transferor's retained interest in such transfers to payment of claims without inquiry as to the transferor's state of mind.

As to the surviving spouse's half of the joint accounts, the decision appears questionable. Even though the transfer could not be set aside as fraudulent because it did not render the transferor's estate insolvent, might it not be considered a violation of the transferor's contractual obligation

41. In re Estate of Strickland, 181 Neb. 478, 149 N.W.2d 344 (1967); In re Estate of Davis, 20 N.Y.2d 70, 228 N.E.2d 763, 281 N.Y.S.2d 767 (1967).

42. In re Estate of Gelb, 425 Pa. 117, 228 A.2d 367 (1967).

43. In re Granwell, 20 N.Y.2d 91, 228 N.E.2d 779, 281 N.Y.S.2d 783 (1967).

44. See *City Bank Farmers Trust Co. v. Cannon*, 291 N.Y. 125, 51 N.E.2d 674, 45 N.Y.S.2d LXIX (1943).

45. The appellate division had dismissed the son's claim on the ground that no evidence of "actual intent to defraud" had been presented. 25 App. Div. 2d 824, 270 N.Y.S.2d 372 (1st Dep't 1966).

46. A requirement established by N.Y. Debt. & Cred. Law § 273.

under the separation agreement? And might not the promisee recover from a gratuitous transferee any property so transferred?

Pretermitted Heir.—Two cases presented a conflict between the right to disinherit by express testamentary provision and the operation of anti-lapse statutes. In one,⁴⁷ the testator expressly excluded “the issue of my marriage,” and bequeathed his estate to three named individuals and three charities. Since the individual legatees predeceased him, a son claimed their legacies as decedent’s next of kin. The charitable legatees claimed that the exclusion of the son had the effect of constituting them substitute legatees, thus preventing the lapse from occurring. This ingenious but ill-founded argument was rejected.⁴⁸ In the other case,⁴⁹ testatrix bequeathed property to a sister, expressly excluding the sister’s son. The sister predeceased the testatrix, and the son took her legacy by operation of the anti-lapse statute,⁵⁰ since the testatrix manifested no intention to exclude the nephew from ever enjoying her property; but rather, she omitted him because she felt certain he would be amply provided for in his mother’s will—including, naturally, assets which the sister would have received under testatrix’ will. This same result has been reached in other lapsed legacy cases, despite a clear manifestation of intent for complete exclusion.⁵¹

The California confusion⁵² over the effect of boiler plate clauses as manifestations of intention to exclude children continues.⁵³ Even with the admission of extrinsic evidence to show decedent’s “*lack* of intent to omit from his will any provision for” children,⁵⁴ the cases are difficult to reconcile. In the most recent,⁵⁵ testator’s son introduced evidence that he had visited his father on numerous occasions during the period when the will was executed, although his parents were separated; that his father kept a picture of him in his residence; and that his father had given him the purchase price of an automobile as a high school graduation present. The

47. *In re Estate of Levy*, 196 So. 2d 225 (Fla. Dist. Ct. App.), cert. denied, 201 So. 2d 550 (Fla. 1967).

48. “The intent of the testator not to include his son and heir among the legatees, as recited in the will, was not accompanied by any language for substitution of another in the place of a named legatee whose testamentary disposition might lapse. As is often the case, the testator did not anticipate lapsed legacies, and made no provision respecting them.” 196 So. 2d at 230.

49. *In re Estate of Jovanopoulos*, 51 Misc. 2d 995, 274 N.Y.S.2d 249 (Sur. Ct. 1966).

50. N.Y. Deced. Est. Law § 29 (now EPTL § 3-3.3).

51. E.g., *In re Estate of Darmstadter*, 53 Misc. 2d 1003, 280 N.Y.S.2d 223 (Sur. Ct. 1967).

52. See Pyle, *How to Beat the Pretermitted Heir Statute*, 18 *Hastings L.J.* 333 (1967).

53. This year’s contribution is *In re Estate of Bank*, 248 Cal. App. 2d 429, 56 Cal. Rptr. 559 (1967).

54. See *Estate of Torregano*, 54 Cal. 2d 234, 243, 352 P.2d 505, 510, 5 Cal. Rptr. 137, 142 (1960).

55. *In re Estate of Bank*, 248 Cal. App. 2d 429, 56 Cal. Rptr. 559 (1967).

decision went against the son, in favor of brothers and sisters of the decedent, because of a no-contest clause in the will bequeathing \$1 to all persons who could establish any claim against the estate as an "heir at law." Since the decedent was a lawyer, reasoned the appellate court, he must have been aware that "heirs" included his children.⁵⁶ In the opinion of one recent commentator,⁵⁷ artificial reasoning of this sort undermines the statutory policy requiring specific intent to exclude. Rhode Island, on the other hand, has the presumption that an omission of the testator's children from his will is unintentional.⁵⁸

The confusion in California over application of the pretermitted heir statute was further compounded by another intermediate court decision.⁵⁹ The testatrix bequeathed her estate to a daughter, with the request that such portions be distributed to another daughter as the legatee should deem reasonable and necessary. The court held these words created no trust, and hence the second daughter took nothing under the will. Her claim as a pretermitted heir was also rejected, on the "reasoning" that: (1) she was named in the will; (2) she received nothing under the will; therefore (3) the omission to provide for her was intentional. By this tortured construction, an *ineffective attempt* to provide for the daughter was converted into an *intentional omission* of provision for her.

Iron Curtain Statutes.—Since *Matter of Tybus*⁶⁰ was decided in 1961, Polish nationals have received funds subject to administration in New York under that state's "benefit" statute.⁶¹ New York's Attorney General is now contending, and a surrogate's court has held in *Matter of Kina*,⁶² that under present conditions Polish beneficiaries are not permitted the requisite use, benefit, and control of funds transmitted to them. Two courts, refusing to stay proceedings pending determination of the *Kina* appeals, have ordered transmission of funds to Poland in reliance on *Matter of Tybus*.⁶³ Other holdings have authorized transmission of funds to residents of the Soviet Union.⁶⁴ Payment of impounded funds of a Soviet national to a judgment

56. *Id.* at 434, 56 Cal. Rptr. at 563.

57. "The court should thus scrutinize the will to see how clearly and strongly the testator indicated that he had his children in mind, *not* how clearly and strongly he indicated an intent to disinherit a general class which could include his children." Pyle, *supra* note 52, at 340.

58. *Vance v. Rood*, 226 A.2d 143 (R.I. 1967).

59. *In re Estate of Moore*, 61 Cal. Rptr. 722 (Ct. App. 1967).

60. 28 Misc. 2d 278, 217 N.Y.S.2d 913 (Sur. Ct. 1961).

61. N.Y. Sur. Ct. Act § 269-a.

62. 49 Misc. 2d 593, 268 N.Y.S.2d 131 (Sur. Ct. 1966). Appeal pending in Appellate Division.

63. *In re Estate of Krasowski*, 28 App. Div. 2d 180, 283 N.Y.S.2d 960 (3d Dep't 1967); *In re Sikorski's Estate*, 54 Misc. 2d 883, 283 N.Y.S.2d 794 (Sur. Ct. 1967).

64. *E.g.*, *In re Estate of Podworski*, 53 Misc. 2d 1043, 281 N.Y.S.2d 276 (Sur. Ct. 1967).

creditor in New York was ordered,⁶⁵ over a vigorous dissent which noted that the claimant was the brother of the Soviet citizen and his claim evidenced only by a letter from her acknowledging the debt. The dissenter characterized the claim as a "devious stratagem" in conflict with the policy of the statute. In a California decision,⁶⁶ the right of Californians to bequeath property to citizens of Rumania under California's "reciprocity" statute was affirmed.⁶⁷

After these pages were written, the Supreme Court dealt a death blow to iron curtain statutes as currently administered.⁶⁸

IV

TESTAMENTARY SUCCESSION

Testamentary Capacity and Undue Influence.—While the obstacles confronting a caveator may render accomplishment of his objective "equally as formidable as shooting an elephant,"⁶⁹ the probate jungle exhibits no shortage of aspiring marksmen. The most popular weapon is lack of testamentary capacity; during the period under review, however, it proved rather ineffective.

In a Wyoming case,⁷⁰ a guardian had been appointed for the decedent within 6 months after the date of execution of the will. The guardianship petition and order indicated that the proceedings were necessitated because the decedent, then a man of 85, had become unable to manage his property. Evidence was admitted in the caveat proceeding tending to show that decedent had "slipped" considerably, both physically and mentally, during the year prior to the execution of the will. Nevertheless, a directed verdict for propounders was affirmed on appeal.⁷¹ Another decision held that a probate judge erred in taking judicial notice, in a caveat proceeding, of

65. *In re Estate of Leikind*, 28 App. Div. 2d 884, 282 N.Y.S.2d 47 (2d Dep't 1967).

66. *In re Estate of Chichernea*, 424 P.2d 687, 57 Cal. Rptr. 135 (Sup. Ct. 1967).

67. Cal. Prob. Code § 259. For a recent criticism of Iron Curtain statutes, see Note, 1967 *U. Ill. L.F.* 141 (1967).

68. *Zschernig v. Miller*, 88 S. Ct. 664 (1968).

69. *In re Will of Simone*, 53 Misc. 2d 314, 315, 278 N.Y.S.2d 928, 929 (Sur. Ct. 1967).

70. *In re Estate of Morton*, 428 P.2d 725 (Wyo. 1967).

71. Perhaps the most significant factors were these: (1) The offered will was very similar to an earlier one, except for the deletion of a bequest to the caveators, decedent's nephews; (2) A church was the residuary legatee of both wills; (3) The scrivener testified that the decedent told him that the caveators "had enough and he wasn't going to leave them any more". 428 P.2d at 732. An attempted caveat of an inconsistent second will failed, however, in *In re Will of Villani*, 28 App. Div. 2d 76, 281 N.Y.S.2d 1019 (1st Dep't 1967).

orders he had entered with respect to testatrix' mental competency before and after the execution of the will, since these proceedings were not made part of the record.⁷² A third case upheld the trial court's refusal to permit lay opinion testimony about decedent's testamentary capacity because the qualifying testimony had not established facts sufficient to justify an opinion.⁷³

In two cases, caveators succeeded in establishing undue influence on the part of a sister of one testatrix⁷⁴ and the recently-hired practical nurse of another.⁷⁵ A most professionally embarrassing case arose in Rhode Island,⁷⁶ where a clerk of probate court was held to have procured the execution of a will naming himself as beneficiary through abuse of a confidential relationship with the testatrix.⁷⁷

Execution.—A recent review of the wills statutes regarding formalities of execution concludes with a proposal that would authorize the probate of signed, but otherwise ineffectively executed, instruments where the trier of fact is convinced beyond a reasonable doubt that the proffered document "represents in whole or in part said testator's bona fide attempt to prescribe the devolution of his property at his death."⁷⁸ Such a curative act would prove useful in cases where there is little doubt that a defectively executed instrument was intended to operate as a will; it could, perhaps, have saved the instrument in at least three cases decided during the period under review.⁷⁹

72. In re Estate of Simpkins, 195 So. 2d 590 (Fla. Dist. Ct. App. 1967).

73. Sachs v. Little, 245 Md. 343, 226 A.2d 283 (1967).

74. Pearce v. Cross, 414 S.W.2d 457 (Tex. 1967).

75. Belcher v. Somerville, 413 S.W.2d 620 (Ky. App. 1967).

76. Appollonio v. Kenyon, 225 A.2d 778 (R.I. 1967).

77. A jury verdict that the testatrix lacked testamentary capacity was also affirmed.

78. Comment, An Analysis of the History and Present Status of American Wills Statutes, 28 *Ohio St. L.J.* 293, 322 (1967).

79. In In re Estate of Hazelwood, 57 Cal. Rptr. 332 (Ct. App. 1967), a holographic will failed for lack of a complete date: the year "1965" appeared, but not the month and day. Although the court concluded that "there is no doubt that the document written by [testatrix] was executed with testamentary intent," it was obligated to reverse the order admitting the document to probate. In Seab v. Seab, 203 So. 2d 478 (Miss. 1967), a married couple signed an instrument purporting to be their last will and testament, acknowledged it as such before a member of the County Board of Supervisors, and filed it for record in the county will books; the wills statute requires two witnesses.

The effect of the proposed statute on Land v. Succession of Newsom, 193 So. 2d 411 (La. 1967) is less certain. There, the statute required that each sheet constituting the will be signed; testatrix signed only the latter of two sheets which were stapled together. Whether such an instrument was "signed by the testator," as required by the proposed statute, is problematical.

The statute might also avert malpractice litigation. See text accompanying notes 82-89 *infra*.

In an unusual case, an unsigned copy of a will was admitted to probate in Pennsylvania.⁸⁰ The signed and executed original, although known to have been in decedent's possession 9 years before her death, was not found among her effects. The copy was found, however, in an envelope containing her apartment lease and an unsigned copy of her deceased husband's will. Over a strong dissent, the Pennsylvania Supreme Court affirmed an order admitting the copy to probate. The presumption that the will was destroyed *animo revocandi* was rebutted, according to the majority, by evidence of testatrix' poor eyesight, carelessness, and moving of residence; the dissenters contended that this evidence was too equivocal to meet the "positive, clear, and satisfactory" requirement⁸¹ for overcoming the presumption.

North Carolina adopted the majority rule that probate of a validly executed will cannot be set aside upon evidence that it failed to effectuate the testator's intent due to a draftsman's error.⁸² Such errors are likely to become more costly after *Price v. Holmes*.⁸³ There the administrator of a disappointed legatee sued the lay draftsman of a will⁸⁴ for negligence and breach of warranty after probate of the purported will was denied because of irregularities in execution and attestation.⁸⁵ The legatee had survived the decedent, dying a few days before decedent's will was declared inadmissible to probate. The legatee's administrator sought to recover the amount she would have received had the will been valid, plus punitive damages. Defendant successfully contended that the cause of action in tort did not accrue until the will was declared invalid; since the legatee was dead at that time, the cause of action did not survive. Against the claimed breach of warranty, defendant asserted a 3-year statute of limitations. The action had been filed within 3 years of the judgment nullifying the will, but more than 3 years from the date of execution and the decedent's death. The Kansas Supreme Court reversed the trial court's summary judgment for the defendant and held that the cause of action had accrued more than 3 years

80. In re Estate of Ervien, 427 Pa. 64, 233 A.2d 887 (1967).

81. See In re Murray's Estate, 404 Pa. 120, 129, 171 A.2d 171, 176 (1961); In re Dalbey's Estate, 326 Pa. 285, 288, 192 A. 129, 130 (1937).

82. In re Will of Cobb, 271 N.C. 307, 156 S.E.2d 285 (1967). A recent survey and analysis of American law relating to fraud and mistake in wills is Henderson, Mistake and Fraud in Wills—Part I: A Comparative Analysis of Existing Law, 47 *B.U.L. Rev.* 303 (1967). Proposals for change appear in Henderson, Mistake and Fraud in Wills—Part II: A Suggested Statutory Departure, 47 *B.U.L. Rev.* 461 (1967).

83. 198 Kan. 100, 422 P.2d 976 (1967).

84. The draftsman was a banker, who prepared the will at the request of the decedent. The opinion does not disclose whether or not he received any compensation for his "services."

85. See In re Estate of Weber, 192 Kan. 258, 387 P.2d 165 (1963).

previously;⁸⁶ that it survived the legatee's death,⁸⁷ but that the statute of limitations was tolled while the proceedings to determine the validity of the will were in progress.⁸⁸ As to the alleged breach of warranty, plaintiff was entitled to a day in court.

The decision may have an inhibitory effect on unauthorized legal practice; it may also signal greater exposure to liability on the part of the legal profession itself. Unlike the rule against perpetuities,⁸⁹ laws relating to formalities of execution of wills are generally sufficiently clear and straightforward so that failure of compliance by a licensed attorney would seem to be clearly actionable. *Price v. Holmes* should receive thoughtful consideration by every member of the probate bar.

Joint and Mutual Wills.—"The extensive litigation concerning joint and mutual wills should be a caveat that such wills should be avoided or the parties' intent be manifested in clear and unambiguous language to indicate whether or not the parties wish to be bound."⁹⁰

The soundness of this statement, which itself echoes earlier warnings,⁹¹ cannot be doubted; yet the *Survey* year produced decisions by appellate courts of no fewer than five jurisdictions: Florida,⁹² Iowa,⁹³ Missouri,⁹⁴ New York,⁹⁵ and Wisconsin.⁹⁶ These cases are must reading for any practitioner who persists in the use of joint and mutual wills and no attempt will be made to summarize their holdings.

86. The court found it unnecessary to specify whether the cause of action arose at the time of execution or at the testator's death, since both events occurred more than 3 years prior to the commencement of the action.

87. Kansas law provides for survival of causes of action for breach of contract. Kan. Gen. Stat. Ann. § 60-1801 (1964); *Cory v. Troth*, 170 Kan. 50, 223 P.2d 1008 (1950).

88. "Before she could proceed against [defendant] for damages, we believe it would be incumbent on [the legatee], or some other interested party, to attempt, at least, the probate of [decedent's] will and only when such endeavor failed would [legatee] have been able, under any theory, to recover from [defendant]." 422 P.2d 976, 982 (1967). Since plaintiff was prevented from suing defendant until the probate proceeding had been finally determined, the statute was tolled during its pendency. In re Estate of Brasfield, 168 Kan. 376, 214 P.2d 305 (1950).

89. In *Lucas v. Hamm*, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), it was held that an action could be maintained by disappointed legatees against a licensed attorney who drafted a will containing a bequest which violated the rule against perpetuities. Defendant escaped liability, however, because the court held that his error was of the sort that any attorney of ordinary skill might make. It constituted neither negligence nor breach of contract.

90. In re Aquilino's Will, 53 Misc. 2d 811, 813, 280 N.Y.S.2d 85, 87 (Sur. Ct. 1967).

91. E.g., B. Sparks, *Contracts to Make Wills* 192 (1956).

92. *Laragione v. Hagan*, 195 So. 2d 246 (Fla. Dist. Ct. App. 1967).

93. *Floerchinger v. Williams*, 148 N.W.2d 410 (Iowa 1967).

94. *Wimp v. Collett*, 414 S.W.2d 65 (Mo. 1967).

95. *Rubenstein v. Mueller*, 19 N.Y.2d 228, 225 N.E.2d 540, 278 N.Y.S.2d 845 (1967).

See text accompanying notes 39-40 *supra*.

96. In re Estate of Hoepfner, 32 Wis. 2d 447, 145 N.W.2d 754 (1966). See also *Pederson v. First Nat'l Bank*, 31 Wis. 2d 649, 143 N.W.2d 425 (1966).

Lapse.—An Indiana intermediate court, in a case of first impression, rejected the common law distinction between lapsed and void legacies, and held an antilapse statute applicable although the legatees were deceased when the will was made.⁹⁷

Ademption.—Recent decisions manifest a judicial preference for the “intent” theory of ademption over the “presence” test. California is one of the leaders in this regard: in one case, no ademption occurred where specifically bequeathed property was sold by the decedent and the proceeds deposited in a savings account;⁹⁸ in another, where specifically devised realty was taken in condemnation proceedings and the proceeds used to buy other realty, the devisee was entitled to the second parcel;⁹⁹ and in a third, no ademption occurred when specifically devised realty was later transferred to a wholly-owned corporation.¹⁰⁰ Two additional jurisdictions have held that sale of specifically bequeathed assets by guardians of incompetents does not adeem the bequests.¹⁰¹ However, Kansas continues to follow the “presence” test and has recently held that a contract of sale adeems a specific devise.¹⁰²

When a stock split or dividend intervenes between the execution of a will bequeathing corporate shares and the testator’s death, the question arises as to whether the increment is added to the original bequest. The majority view holds that it is, if the bequest is specific, but not if the bequest is general or demonstrative.¹⁰³ Rhode Island has rejected this classification,¹⁰⁴ finding support in a Pennsylvania decision¹⁰⁵ for its holding that the increment follows the original shares in the absence of the manifestation of contrary intention. This is a special rule, applicable to stock splits only; in other cases, the classification test will still be employed.

Charitable Bequests.—An Ohio intermediate court refused to apply

97. *McAvoy v. Sammons*, 224 N.E.2d 323 (Ind. App. 1967).

98. *In re Estate of Newsome*, 248 Cal. App. 2d 861, 56 Cal. Rptr. 874 (1967).

99. *In re Estate of Shubin*, 252 Cal. App. 2d 640, 60 Cal. Rptr. 678 (1967).

100. *In re Estate of Creed*, 255 Cal. App. 2d 100, 63 Cal. Rptr. 80 (1967). Since the specifically devised realty was the corporation’s only asset, the court held that the stock became the property of the devisee.

101. *Our Lady of Lourdes v. Vanator*, 422 P.2d 74 (Idaho 1967); *Grant v. Banks*, 270 N.C. 473, 155 S.E.2d 87 (1967).

102. *In re Estate of Snyder*, 199 Kan. 487, 430 P.2d 212 (1967).

103. 6 Page, *Wills* § 48.6 (Bowe-Parker rev. 1962).

104. *Egavian v. Egavian*, 232 A.2d 789 (R.I. 1967).

105. *In re McFerrer’s Estate*, 365 Pa. 490, 76 A.2d 759 (1950), although it was conceded that the bequest of stock was a general legacy, the court held that the increment of shares representing a stock split should be awarded to the legatee. The reasoning was that the testatrix would not have intended a mere change in form to reduce the value of the legacy. The Rhode Island court converted this reasoning into a presumption of general application. Presumably, the presumption extends to stock dividends, which also do not alter in any way the “substance of the testator’s total interest or rights in the corporation.” 232 A.2d at 793.

that state's mortmain statute¹⁰⁶ although the codicil containing the charitable bequest was executed less than 2 months before the testator's death. Had the bequest been invalidated, the assets would have funded a trust for the testator's grandchildren established under an earlier will. Testator was survived by his children. The court reasoned that the statute was designed to protect those who would take by intestacy, and that since the grandchildren were not of the protected class, they could not invoke the statute against the charitable legatee.¹⁰⁷ If this decision is followed, the Ohio mortmain statute may be nullified by an estate planner who need only provide a substitutional gift to some noncharitable legatee other than those who will take by intestate succession.

New York's mortmain statute¹⁰⁸ limits bequests for "any benevolent, charitable, literary, scientific, religious or missionary society, association, corporation or purpose" to one-half of the testator's estate. When, in a recent case, a testatrix left her entire estate to the City of New York, her next of kin attempted to invoke the "conduit theory" to show that over one-half of New York expenditures are directed toward the purposes named in the statute. The surrogate, however, adopted the "entity theory," holding that social welfare programs are legitimate governmental functions; hence, New York is not a charitable corporation.¹⁰⁹ This reasoning ignores the words "or purpose" in the statute, as well as the argument that a purpose is no less charitable or benevolent merely because government is engaged in furthering it. This case raises an issue of sufficient importance to warrant more serious consideration and closer analysis.

Construction.—Attempts to persuade courts to read new provisions into wills, or rewrite existing provisions, met with mixed success. One court refused to correct an inadvertent (and costly) exercise of a power of appointment;¹¹⁰ another refused to fill a dispositive gap in order to avoid partial intestacy.¹¹¹ In a third case, however, an apparent bequest of a one-half undivided interest in an estate was converted into a class gift to avoid partial intestacy.¹¹²

The eligibility of adopted children to share in class gifts continues to be a much-litigated issue. Where the adoption occurs after the testator's death, the "stranger to the adoption" presumption is still likely to exclude

106. Ohio Rev. Code § 2107.06 (1954) invalidated charitable bequests where the testator was survived by lineal descendants and the will was executed less than one year prior to his death. The statute was substantially modified in 1965. Ohio Rev. Code § 2107.06 (Supp. 1966).

107. *Central Nat'l Bank v. Morris*, 10 Ohio App. 2d 225, 227 N.E.2d 418 (1967).

108. N.Y. EPTL § 5-3.3.

109. *In re Klitenik's Estate*, 53 Misc. 2d 955, 230 N.Y.S.2d 488 (Sur. Ct. 1967).

110. *In re Estate of Jaekel*, 424 Pa. 433, 227 A.2d 851 (1967).

111. *Wright v. Bentinaen*, 226 N.E.2d 194 (Mass. 1967).

112. *In re Estate of Devin*, 230 A.2d 735 (N.H. 1967).

the adopted child from sharing in a class gift,¹¹³ although in a recent case where the testator was himself the adopting parent, a converse presumption was applied despite the use of technical terminology such as "issue" in describing the class.¹¹⁴

113. See *Minary v. Citizens Fidelity Bank & Trust Co.*, 419 S.W.2d 340 (Ky. 1967); *Hein v. Hein*, 431 P.2d 316 (Okla. 1967); *Security Nat'l Bank & Trust Co. v. Willim*, 153 S.E.2d 114 (W.Va. 1967).

114. *In re Nicol's Trust*, 19 N.Y.2d 207, 225 N.E.2d 530, 278 N.Y.S.2d 830 (1967).