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Victor S. Bryant Jr.

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as insurance are involved it will be a rare case indeed where all claimants can be personally served with process within one state. Thus, the only way that the stakeholder can be sure that he is protecting himself is to bring suit in the federal courts under the Interpleader Act, thereby making possible service of process anywhere in the United States.[19] The liberal construction placed by the federal courts upon the diversity requirements of the Act is salutary. It would be tragic indeed if the remedial effect envisaged in reducing the jurisdictional amount, allowing process to run throughout the United States, liberalizing venue provisions, and abolishing the historical requirements that the claims be identical and have a common origin,[20] should be practically annihilated in a narrow construction of the diversity provisions of the Act.

MAX OLIVER COGBURN.

Future Interests—Rule of Convenience in Class Gifts

In a recent North Carolina case[1] the following clause of a will was before the court for interpretation:

> "ITEM V 'I will, devise, and bequeath to my beloved nephews[2] and any other children who may be borne to Robert and Peg Cole, my house and lot at 301 Fayetteville together with the contents, and the lot west of the home on Fayetteville Road.' "

At the time of the execution of the will Robert and Peg had three children and at the testator's death, almost three years after the execution, there was a fourth child *en ventre sa mere*. The court was called upon to decide what children of Robert and Peg should be included in the gift. Should the gift go only to those three *in esse* at the testator's death and to the fourth *en ventre sa mere* or should it include also all children born to Robert and Peg after the testator's death? The court held that the roll was not to be called until the possibility of any further issue was extinct by reason of the death of Robert or Peg.

The general rule for the determination of the members of a class where the gift is immediate[3] is that only those members *in esse* or *en ventre sa mere* at the testator's death may take under the gift and any persons who fit the description of the class but are born after the testator's death are excluded unless the clear intention of the testator is shown to

[19] 28 U. S. C. §2361 (1948).
[20] See note 2 *supra*.

[1] Cole v. Cole, 229 N. C. 757, 51 S. E. 2d 491 (1948).
[2] Robert and Peg Cole were testator's nephew and niece. The court interpreted the word "Nephews" to mean "grand-nephews."
[3] A gift is immediate where the conveyor, having present ownership of the subject matter limits the corpus thereof to designated groups, annexing no condition precedent, interposing no period of time before enjoyment and creating no interest prior to that of the takers. RESTATEMENT, PROPERTY, EXPLANATORY NOTE §294 (1940).

include them.[4] This is known as the rule of convenience[5] and is almost[6] universally accepted. The court in the present case recognizes and accepts this rule but refuses to close the class at the testator's death, holding that a clear intention is shown by the words of the testator to include any and all class members born after his death. The reasons behind this rule of convenience are suggested by its name. If the class is allowed to remain open until all possibility of increase is gone the members of the class *in esse* or *en ventre sa mere* at the testator's death, in most cases, would attain only limited and restricted benefits from the gift for a considerable period of time. By application of the rule, however, the present members may utilize and enjoy the gift immediately without restriction and without having to put up costly bonds to indemnify later born members; the quick settlement of the estate in the interest of public policy is facilitated; and the property is more freely alienable without possibility of cloud or defect in title. Even where the rule is inapplicable North Carolina has now by statute[7] provided for the sale, lease, or mortgage of land where there are unborn interests. The unborn interests are represented by guardians *ad litem,* and the proceeds of the sale, lease, or mortgage are held in trust until the class is closed and then distributed to the class. While this makes the land more freely alienable the other objections to holding the class open are still present in that the devisee's enjoyment of his gift is postponed, and the estate is not brought to an early settlement.

A limitation to the applicability of the rule is the legal principle frequently stated by the courts: that where the intent of the testator is clearly shown such intent must govern the construction of the will.[8] It is due to this desire of giving great weight to the testator's intention that the present case and the majority hold the rule of convenience to be nothing more than a rebuttable presumption,[9] while others indicate that it is an inexorable rule of law[10] and apply the rule regardless of any intention shown. In those jurisdictions holding the rule to be a rebuttable presumption the determination of when an intent of the testator is shown so as to permit the courts to disregard the rule has been

[4] Shinn v. Motley, 56 N. C. 490 (1857); Merrill v. Winchester, 120 Me. 203, 113 Atl. 261 (1921); Hepburn v. Winthrop, 83 F. 2d 566 (D. C. Cir. 1936); 2 SIMES, FUTURE INTERESTS §374 (1936).

[5] Long, *Class Gifts in North Carolina,* 22 N. C. L. REV. 297, 314 (1944).

[6] The rule in Kentucky is different in that if the class members are children of a near relative of the testator the class remains open until all possibility of increase is extinct. Patterson's Executor v. Dean, 241 Ky. 671, 44 S. W. 2d 565 (1931).

[7] N. C. SESS. L. 1949, c. 811. Discussed in 27 N. C. L. REV. 415 (1949).

[8] Rigsbee v. Rigsbee, 215 N. C. 757, 3 S. E. 2d 331 (1939).

[9] Cole v. Cole, 229 N. C. 757, 51 S. E. 2d 491 (1948); Sawyer v. Toxey, 194 N. C. 341, 139 S. E. 692 (1927); Shinn v. Motley, 56 N. C. 490 (1857).

[10] Mason v. White, 53 N. C. 421 (1862); Ringrose v. Bramham, 2 Cox 384, 30 Eng. Rep. 177 (1794).

a subject of much controversy both in the United States and England due to the subjectiveness of the question.

In the early case of *Petaway v. Powell*[11] the North Carolina court, by dictum, in a holding which excluded the members of a class born after the testator's death, said that in accordance with the rule of convenience, if a legacy were given to the children of the testator's daughter "begotten or to be begotten" any children born after the testator's death would be excluded.

But in the later case of *Shinn v. Motley*[12] the North Carolina court held that the words "to all their children which now are or hereafter may be" show a clear intent of the testator to include all those children born before or after his death so the rule was not applied. The court cited as a precedent the North Carolina case of *Shull v. Johnson*[13] but there the words "to my nieces and nephews that might be living at or after my death," as used in the will, without doubt showed the testator's intent to include those nieces and nephews born after his death. It might be argued that the words "or hereafter may be" were intended by the testator to mean those children born between the making of the will and his death[14] and thus the rule would apply to close the class at his death since the intention of the testator to take the case out of the rule must be clearly expressed.[15] In two cases[16] decided soon after the *Shinn* case the court, relying on the *Shinn* case, held that the word "hereafter" was intended by the testator to include all members of the class born before or after his death although the gift in each case was immediate. These cases seem to indicate that the court was departing from the construction as stated in *Petaway v. Powell*[17] although the court did not overrule, distinguish, or even cite the *Petaway* case. However, in the later case of *Sawyer v. Toxey*[18] the court, when confronted

[11] 22 N. C. 308 (1839) (there the words in the will were: "to *A* and his children").

[12] 56 N. C. 490 (1857).

[13] 55 N. C. 202 (1855); The court also cited: Scott v. Earl of Scarborough, 1 Beav. 154, 48 Eng. Rep. 898 (1838) (trust with the proceeds for all and every the child and children of testator's children "now born or who shall hereafter be born during the lifetime of their respective parents." Held: this included all class members born as long as there was possibility of increase. This *expressly* includes all such members.).

[14] Butler v. Lowe, 10 Sim. 317, 59 Eng. Rep. 636 (1839) ("begotten or to be begotten." The court held the words "to be begotten" to mean any members born between the date of execution of the will and the death of the testator.).

[15] Shinn v. Motley, *supra*.

[16] Pickett v. Southerland, 60 N. C. 615 (1864) ("—— to the rest of my nieces that Mary now has or may hereafter have"); Roper v. Roper, 58 N. C. 16 (1859) ("*A's* children that she has now or may hereafter have").

[17] 22 N. C. 308 (1839).

[18] 194 N. C. 341, 139 S. E. 692 (1927) (the court found an intent of the testator to close the class at his death in another clause of the will also but said that the words describing the class are alone sufficient to close the class at his death since no intent to keep it open longer is shown by the words.); in the case of

with a will by which the testator left property to the children of two daughters and four sons "or any other of my children who may have children borned to them after the date of this will," held that only those grandchildren *in esse* at the testator's death were entitled to share in the property. The court there recognized the principle that if the testator's intent were clearly expressed to include later born members of the class the rule would not operate to exclude them, but considered that this was not such a case.

The cases from other jurisdictions are as controversial on this subject as are those from North Carolina. The Maine court in *Merrill v. Winchester*,[19] though recognizing the rule of convenience as merely a rebuttable presumption, refused to take the case out of the general rule where the will provided: '—— and to her children, grandchildren, and, great-grandchildren now living or hereafter born, I give and bequeath the sum of three thousand dollars each, to be paid within two years after this will is admitted to probate to those then living; and to those born afterward, within two years from the date of birth." The court held that "to those born afterwards" referred to any children *en ventre sa mere* at the testator's death, and not to any conceived after his death. There it was said that the language must be clear and unambiguous to take the will out of the general rule, since without such a clear expression it was improbable that the testator should wish to postpone the distribution of his estate so long. Other expressions as: "to all my first cousins,"[20] "my nieces and nephews by blood or marriage,"[21] "to *A* and his family,"[22] have been held not to show an intent of the testator to permit the class to increase beyond his death. And yet in a West Virginia case[23] where the words "to *E* and her child or children" were used in a will the court held that the words "or children" included any who should be born after the testator's death.[24]

In England such words as: "to his children begotten or to be be-

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Wise v. Leonhardt, 128 N. C. 289, 38 S. E. 892 (1901), where the words "to my son Lawrences children——to be equally divided among them after the death of my son Lawrence" were used, the court held that only those children of Lawrence in being at the testator's death could take, the reason being that the title to the land would be *in nibubus* until the class closed if left open for later born members. This reason does not seem to be a proper one since the title might vest in those in being subject to open up and let in after born members.

[19] 120 Me. 203, 113 Atl. 261 (1921).

[20] Howland v. Slade, 155 Mass. 415, 29 N. E. 631 (1892).

[21] *In re* Wright's Estate, 284 Pa. 334, 131 Atl. 188 (1925).

[22] Langmaid v. Hurd, 64 N. H. 526, 15 Atl. 136 (1888).

[23] Bently v. Ash, 59 W. Va. 641, 53 S. E. 636 (1906).

[24] Accord: Dean v. Long, 122 Ill. 447, 14 N. E. 34 (1887) (proceeds of trust to *E* and her children); Kilgore v. Kilgore, 127 Ind. 276, 26 N. E. 56 (1890) (now born or which may hereafter be born); Downes v. Long, 79 Md. 382, 29 Atl. 827 (1894) (to wife and children of my son now living and to any other legitimate child or children which may hereafter be born to him.

gotten,"[25] "to every child he hath,"[26] "to each child that may be born to either of the children of either of my brothers lawfully begotten,"[27] "to each of the children of nephews and nieces begotten or to be begotten"[28] have been held to exclude any class members not *in esse* or *en ventre sa mere*. But, on the other hand, "whether now born or hereafter to be born"[29] has been held to include all those children born after the testator's death.

The rule of convenience applies to deeds as well as to wills. So the words "to *A* and his children" in a deed will convey the land jointly to *A* and any children *in esse* or *en ventre sa mere* at the execution of the deed to the exclusion of any other children born after the execution.[30] But if there is an intent clearly shown in the deed to include children. born after the execution they will be included.[31] Some courts have said that in the case of a deed all the grantees must be *in esse* at the date of execution.[32] This does not seem to be a proper reason for the exclusion of after born members since the title by deed may vest in those in being subject to open up and let in later born members by shifting use.[33]

It appears that some courts are more hesitant to include class members born after the testator's death where there is a specified amount left to each member than where there is a total sum left to the class as a whole, since in the former situation the entire estate frequently must be left open until the amount due the class is determined by the closing of the class, while in the latter situation only that share of the estate left to the class must remain open until the possibility of increase is extinct.[34] Another distinction, that between real and personal property, is made by some courts when confronted by a gift to a class. These courts more readily hold the class open after the testator's death where the gift is of realty on the ground that realty is more easily administered while being held in abeyance awaiting the close of the class than is per-

[25] Sprackling v. Rainier, 1 Dick. Rep. 344, 21 Eng. Rep. 302 (1761) This case was cited as a precedent in the North Carolina case of Petaway v. Powell, *supra*.

[26] Ringrose v. Bramham, 2 Cox 384, 30 Eng. Rep. 177 (1794).

[27] Storrs v. Benbow, 2 My. & K. 46, 39 Eng. Rep. 862 (1833).

[28] Butler v. Lowe, 10 Sim. 317, 59 Eng. Rep. 636 (1839).

[29] Defflis v. Goldschmidt, 1 Mer. 417, 35 Eng. Rep. 727 (1816). This case was decided after the *Sprackling* case, *supra*, note 24, but did not overrule, distinguish, or even cite the *Sprackling* case. It was, however, cited as a precedent in the North Carolina case of Shinn v. Motley, *supra*.

[30] Heath v. Heath, 114 N. C. 547, 19 S. E. 155 (1894); Cullens v. Cullens, 161 N. C. 344, 77 S. E. 228 (1913) (land goes to *A* and his children *in esse* or *en ventre sa mere* at the date of the deed as tenants in common.).

[31] Mellichamp v. Mellichamp, 28 S. C. 125, 5 S. E. 333 (1888) (to *W*. and the children she already has and such children as she may hereafter bear.).

[32] Miller v. McAlister, 197 Ill. 72, 64 N. E. 254 (1902) (to *M* and her children, born and to be born).

[33] KALES, ESTATES, FUTURE INTERESTS, §74 (2d Ed. 1920).

[34] Mann v. Thompson, 69 Eng. Rep. 271 (1854).

sonalty.[35] These, however, do not seem to be proper distinctions since the test of inconvenience to the entire estate as compared with the inconvenience to the members of the class then *in esse,* and the test of ease of administration of realty as against personalty do not change the expression of the testator's intention, if any, as set out in the will.

The desirability of the principle of seeking the testator's intention and attempting to follow it in the construction of a will is recognized, yet, in seeking the intention of the testator, it should be remembered that there are two probable intentions: one to admit as many members as possible into the class, the other to give the members the benefit of the gift immediately upon the testator's death and not force them to wait for unknown periods to enjoy their property.[36] Thus when the courts apply the rule of convenience they are upholding one probable intention while destroying the other probable intention of the testator. Further, the courts and legislatures have not hesitated to defeat the testator's *expressed* intention when applying the Rule in Shelley's Case,[37] and by converting *fees tail* into *fees simple*[38] in order to facilitate administration and to further the enjoyment and convenience of the recipients of devises and grants. Why then should the courts hesitate because of ambiguous and doubtful language in a will to exclude class members born after the testator's death? It is submitted that unless the testator *expressly* provides for any member of a class born after his death the court should avoid inconvenience and confusion and refuse to admit such members.

As Justice Browning of the Virginia court said:[39]

> "The written expression of human language has never reached such a state of precision and exactness as to preclude one of mental capacity and ingenuity from saying that one thing is meant, and another of equal versatility saying that something else is intended. Quite frequently confusion ensues from which comes the troublesome element which we call 'doubt' and at that juncture the law, ever wholesome and remedial, provides the way out by supplying its rule of construction."

VICTOR S. BRYANT, JR.

[35] Cole v. Cole, 229 N. C. 757, 51 S. E. 2d 491 (1948).
[36] LONG, *supra* note 5, at 314.
[37] Nichols v. Gladden, 117 N. C. 497, 22 S. E. 459 (1895) (the court there said the Rule in Shelley's Case is an inexorable rule of law and the intention of the grantor or testator will not be considered).
[38] N. C. GEN. STAT. §41-1 (1943).
[39] American National Bank and Trust Co. of Danville v. Herndon, 181 Va. 17, 19, 23 S. E. 2d 768, 770 (1943).