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Recent Decisions

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RECENT DECISIONS

TAXATION—TRANSFER OF PROPERTY BY WILL PURSUANT TO VALID CONTRACT ENTERED INTO BY TESTATOR NOT SUBJECT TO STATE INHERITANCE TAX IF TESTATOR RECEIVED FULL CONSIDERATION IN MONEY'S WORTH FOR THE PROMISED BEQUEST. — After a period of marital discord, Tranquilla Vai filed an action for separate maintenance against her husband John. In March 1953, they entered into a property settlement agreement by which Tranquilla was to receive less than half the community property. John, on his part, agreed to support their mentally incompetent daughter during his lifetime; to hold his wife harmless for their daughter's support; and also to provide in his will that an amount of property, sufficient to support his daughter as long as she lived, be left in a trust. Pursuant to this agreement, John executed a will in which, after certain specific bequests, he left the residue of his estate in trust for his daughter's support. Shortly after John's death in 1957, his wife brought an action to rescind the property settlement agreement on the ground that he had fraudulently concealed community assets from her. Although the California Supreme Court adjudged Tranquilla entitled to rescind,[1] she chose to enter into a stipulation with the executors under which she received $500,000 in return for waiving all rights under the property settlement, with the exception of her deceased husband's promise to support their daughter. In evaluating John Vai's estate for tax purposes, the state inheritance tax appraiser imposed a tax on the entire residue, including the amount necessary for the daughter's support. The executors objected to this imposition claiming that $515,341.56, the amount at which the fund necessary for the daughter's support was capitalized, should be allowed as a deduction in determining the inheritance tax due. The probate court overruled this objection, and the executors appealed. The Supreme Court of California, Chief Justice Traynor dissenting, reversed and *held:* when a testator leaves property by will pursuant to a valid contract entered into during his lifetime, the bequest is not subject to an inheritance tax if the testator has received for the promised bequest full consideration in money or money's worth, within the meaning of the California inheritance tax law. *In re Vai's Estate,* 417 P.2d 161, 52 Cal. Rptr. 705 (Cal. 1966).

The decision in *Vai* is based on a new construction which the California Supreme Court gave to section 13601 of the California Revenue and Taxation Code. That section provides, without apparent exception, that "a transfer by will or the laws of succession of this State . . . is a transfer subject to this part."[2] For many years, the inheritance tax provision concerning transfers by will, which is presently section 13601, was construed to make "everything in the nature of a change of ownership effected through a will"[3] taxable regardless of the reason for such transfer. Prior to *Vai,* the only statutory exceptions to the taxability of transfers for full consideration in money's worth were made in the case of

1 Vai v. Bank of America, 56 Cal. 2d 329, 364 P.2d 247, 15 Cal. Rptr. 71 (1961).
2 CAL. REV. & TAX. CODE § 13601.
3 *In re* Grogan's Estate, 63 Cal. App. 536, 219 Pac. 87, 89-90 (1923).

inter vivos transfers.[4] By its decision in *Vai,* that a transfer of property by will pursuant to a valid contract entered into by a testator during his lifetime for which he received full consideration in money's worth was not subject to an inheritance tax, the California Supreme Court, in effect, grafted an exception onto "the apparently plain language"[5] of the inheritance tax law where none had previously existed.

A majority of jurisdictions, considering the taxability of transfers by will for consideration, have reached a result contrary to *Vai.*[6] Most state inheritance tax statutes expressly except from taxation inter vivos transfers either in contemplation of death or intended to take effect in possession or enjoyment at death, provided they are made for a valuable or money's worth consideration.[7] However, courts generally have held that no such exception applies to transfers made by will.[8] Their rationale, as stated by the New Hampshire Supreme Court, is simple.

> If the legislature had intended to limit the imposition of the tax to property passing gratuitously, it could easily have said so; but by providing that all property passing by will should be subject to the tax, it manifested an intention not to so limit it.[9]

In *In re Gould's Estate,*[10] the New York Court of Appeals suggested a legislative purpose in taxing all transfers made by will might well have been "to prevent parties from avoiding payment of the tax by changing intended beneficiaries into testamentary creditors."[11] Thus, it was feared that a less than unequivocal rule would invite easy tax avoidance schemes.

Until *Vai,* California had remained in line with the majority and refused to exempt from an inheritance tax transfers of testator's property by will pursuant to a valid contract for valuable consideration. The leading case for this

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4 Before being disapproved by the California Supreme Court in *Vai,* the state controller's regulations, working rules for state officials in administering the inheritance tax law, CAL. ADMINISTRATIVE CODE tit. 18, §§ 13601-13603(a) provided:

> A transfer by will is subject to the Inheritance Tax Law even though made pursuant to an agreement between the transferee and the decedent for an adequate and full consideration in money or money's worth which was received by the decedent. In such case, the transferee takes from the decedent under the will and not by virtue of the agreement.

In re Vai's Estate, 417 P.2d 161, 167, 52 Cal. Rptr. 705, 711 (1966).

5 *In re* Grogan's Estate, 63 Cal. App. 536, 219 Pac. 87, 89 (1923).

6 See *e.g.,* Rooney v. Inheritance Tax Comm'n, 143 Kan. 143, 53 P.2d 500 (1936); 234 Mass. 403, 126 N.E. 44 (1920); *In re* Bernay's Estate, 344 Mo. 135, 126 S.W.2d 209 (1939); Krug v. Douglas County, 114 Neb. 517, 208 N.W. 665 (1926); Carter v. Craig, 77 N.H. 200, 90 Atl. 598 (1914); *In re* Howell's Estate, 255 N.Y. 211, 174 N.E. 457 (1931); Sheppard v. Desmond, 169 S.W.2d 788 (Tex. Civ. App. 1943); *In re* Jones' Will, 206 Wis. 482, 240 N.W. 186 (1932).

7 *E.g.,* CAL. REV. & TAX. Code § 13641; KAN. GEN. STAT. ANN. § 79-1501 (1964); MASS. ANN. LAWS ch. 65, § 1 (1964); N.J. STAT. ANN. § 54:34-1(c) (1960); N.Y. TAX LAW § 220(2); OHIO REV. CODE ANN. § 5731.02(C) (Page Supp. 1966); PA. STAT. ANN. tit. 72 § 2301(c) (1964); TEX. TAX-GEN. ANN. art. 14.01 (1960).

8 *E.g., In re* Howell's Estate, 255 N.Y. 211, 174 N.E. 457 (1931); Sheppard v. Desmond, 169 S.W.2d 788 (Tex. Civ. App. 1943). For other cases to similar effect, see Annot., 157 A.L.R. 964, 973-76 (1945).

9 Carter v. Craig, 77 N.H. 200, 201, 90 Atl. 598 (1914).

10 156 N.Y. 423, 51 N.E. 287 (1898).

11 *Id.* at 428, 51 N.E. at 288.

proposition was *In re Grogan's Estate.*[12] In *Grogan,* a husband and wife entered into a property settlement agreement which provided the wife would receive $3,000 a year during her husband's life. The agreement further provided that she would continue to receive income, after his death, from a trust fund created by his will. The husband made a will in conformity with this agreement. When the state inheritance tax appraiser imposed a tax on the value of the trust created in the will, the wife claimed (as did the executors in *Vai*[13]) that the will merely fulfilled the husband's obligation under the prior agreement and did not constitute a taxable "transfer by will" within the meaning of the inheritance tax law. The court rejected this contention, finding that "everything in the nature of a change of ownership effected through a will"[14] is taxable. As the court viewed it, the tax was

> upon the *vehicle* carrying the right [of succession], rather than a tax upon the right itself. It [the inheritance tax act] is in effect a declaration of law that when a will is used as a means of conveyance of property a tax must be paid for that privilege.[15] (Emphasis added.)

In *Vai,* the California Supreme Court, rather than follow *Grogan,* chose to adopt the rationale of *In re Belknap's Estate,*[16] a California district court of appeals decision which had earlier questioned the *Grogan* rule.[17] In *Belknap,* a property settlement agreement provided that a wife would receive a stipulated monthly sum during her husband's life and that the purchase of an annuity would be authorized for her in his will. The court held that the transfer of the annuity was effected by virtue of the property settlement rather than by the will, and thus its value was not subject to inheritance tax. Viewed in this light, the wife's beneficial interest in the annuities vested under the agreement,[18] and nothing remained to be transferred by the will. The court stated that the will merely served as a "conduit" by which the testator fulfilled his obligation under an agreement enforceable by the wife without regard to the will.[19]

The *Vai* majority thought the rationale of *Belknap* was "apposite" to the situation before them.[20] Vai's daughter had a right to receive the trust benefits. This right vested at the time the property settlement agreement was made. Thus, she could have enforced her right to support, independent of the will, by maintaining she was a third party beneficiary under the property settlement agreement.[21] The *Vai* majority believed that merely because the testator satisfied his obligation by a provision in his will, that interest was not ipso facto taxable.[22]

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12 63 Cal. App. 536, 219 Pac. 87 (1923).
13 *In re* Vai's Estate, 417 P.2d 161, 164, 52 Cal. Rptr. 705, 708 (1966).
14 *In re* Grogan's Estate, 63 Cal. App. 536, 219 Pac. 87, 89-90 (1923).
15 219 Pac. at 90.
16 66 Cal. App. 2d 644, 152 P.2d 657 (1944).
17 152 P.2d at 661-62.
18 *Id.* at 661.
19 *Id.* at 659.
20 *In re* Vai's Estate, 417 P.2d 161, 164, 52 Cal. Rptr. 705, 708 (1966).
21 *Ibid.* See Brown v. Superior Court, 34 Cal. 2d 559, 212 P.2d 878 (1949).
22 *In re* Vai's Estate, 417 P.2d 161, 165, 52 Cal. Rptr. 705, 709 (1966).

The California Supreme Court's adoption of the *Belknap* rationale was presaged by language in certain of its earlier decisions.[23] In *In re Rath's Estate,*[24] the court found that it was the intent of the inheritance tax act, gleaned from the act as a whole, that the imposition of tax should be measured by beneficial succession.[25] The court believed that agreements extrinsic to the will should be considered to determine whether beneficial succession had passed by those agreements rather than by the will. If beneficial succession passed by the agreement, the will was viewed as a mere "conduit of title,"[26] and the transfer would not be taxable as a transfer by will. *Rath* distinguished *Grogan* and *In re Gould*[27] (a New York case to the same effect) on their facts.[28] Though the *Vai* majority noted that *Rath* distinguished rather than overruled *Grogan,*[29] it is submitted that the two theories of taxation upon which the latter two cases were decided are inconsistent. *Rath* based the imposition of the tax on the *substance* of the transfer, i.e., on whether a beneficial succession was effected. *Grogan,* however, based the test of taxability solely on the form of the transfer.[30] The demise of the *Grogan* rule was clearly foreordained by *Rath.*

In *Vai,* the majority went beyond the strict words of the inheritance tax act to speculate as to legislative intent.[31] Adherence to the *Grogan* rule, the court said, would lead to such "anomalous" results that the legislature could not have intended such an unequivocal rule. In explicitly disapproving *Grogan,* Justice Mosk, speaking for the *Vai* majority, stated:

> The anomalous result of this [the Grogan] rule is that a tax must be levied whenever a testator provides in his will that a creditor is to receive a stated sum in payment of a debt owed by the testator, whereas the tax would be avoided by the mere failure of the testator to specify that the debt be paid, requiring the creditor to receive payment by means of filing a claim against the estate. The Legislature could not have intended to make the imposition of the tax depend upon such fortuitous considerations.[32]

The "anomalous result" referred to by the majority, however, must be qualified to some extent. Under the *Grogan* rule, the mere fact that a testator *provides* in his will for payment of a debt would not, of itself, force his creditor

23 See *In re* Barter's Estate, 30 Cal. 2d 549, 184 P.2d 305, 309 (1947); *In re* Rath's Estate, 10 Cal. 2d 399, 75 P.2d 509 (1937). Both cases admittedly are factually distinguishable from the *Grogan-Vai* situations. However, they are two previous instances in which the court did not regard a technical transfer by the vehicle of a will as determinative of taxation.

24 10 Cal. 2d 399, 75 P.2d 509 (1937).

25 75 P.2d at 511-12. The *Rath* court, however, admitted that no express provision of the California Inheritance Tax Law provides that *beneficial* succession, rather than mere *succession* is to be the measure of tax.

26 *Id.* at 513.

27 156 N.Y. 423, 51 N.E. 287 (1898).

28 75 P.2d at 513. In *Grogan* and *Gould,* the testator disposed of his own property, whereas in *Rath* the testator devised property which he held in trust for others.

29 *In re* Vai's Estate, 417 P.2d 161, 167 n.6, 52 Cal. Rptr. 705, 711 n.6 (Cal. 1966).

30 *Compare In re* Rath's Estate, 10 Cal. 2d 399, 75 P.2d 509, 511-12 (1937), *with In re* Grogan's Estate, 63 Cal. App. 536, 219 Pac. 87, 90 (1923).

31 *In re* Vai's Estate, 417 P.2d 161, 166, 52 Cal. Rptr. 705, 710 (Cal. 1966).

32 *Ibid.*

to pay an inheritance tax. As Chief Justice Traynor pointed out in his dissent, a tax would be imposed only if the creditor *accepted* the bequest in payment of the debt.[33] The creditor, however, can elect to renounce the legacy[34] and file a claim on the debt against the testator's estate. In the latter case, since the creditor's claim would be based on the contract rather than on the will, he could receive the sum owed him undiminished by any inheritance tax.[35]

The court also felt that basing the imposition of an inheritance tax solely on the testator's use of the will as a vehicle for transfer would place a premium on violating contracts to bequeath.[36] If a testator fulfilled his contract by executing a will, the transfer would be taxable. However, if he breached his agreement and failed to make a promised bequest, the disappointed beneficiary could recover the value of the bequest tax free in an action for damages against the estate.[37]

In his dissent, Chief Justice Traynor took the position that adherence to the *Grogan* rule would not attach a premium to contract violation, and that the beneficiary's interest would be taxable "whether or not the decedent performs his contract . . . ."[38] This conclusion assumes that the remedy for a breach of a contract to make a specified bequest is necessarily an equitable action for specific performance.[39] Other remedies, however, are available to the beneficiary and different tax consequences follow depending upon which remedy is used.[40] In an equitable suit for specific performance,[41] the plaintiff would, as nearly as possible, be placed in the "position he would have occupied had the contract been performed — *i.e.,* that of legatee or devisee."[42] The court would then

33 *Id.* at 174, 52 Cal. Rptr. at 718 (dissenting opinion).

34 See Albright v. State Tax Comm'n, 233 Iowa 1303, 11 N.W.2d 578 (1943); *In re* Gould, 156 N.Y. 423, 51 N.E. 287 (1898).

35 Even granted this qualification, however, the consequence that a creditor could not accept payment of a debt (to which he had an enforceable claim) by legacy without incurring an inheritance tax, would be nonetheless "anomalous."

36 *In re* Vai's Estate, 417 P.2d 161, 166, 52 Cal. Rptr. 705, 710 (1966).

37 *Ibid.* See Bente v. Bugbee, 103 N.J.L. 608, 137 Atl. 552 (Ct. Err. & App. 1927). See also Note, *The Contractual Will and Some Consequences of its Breach,* 34 VA. L. REV. 590 (1948).

38 *In re* Vai's Estate, 417 P.2d 161, 174, 52 Cal. Rptr. 705, 718 (1966) (dissenting opinion).

39 *Ibid.* Justice Traynor supported his contention with the illustration of a suit for equitable relief in *In re* Kidd's Estate, 188 N.Y. 274, 80 N.E. 924 (1907). That case involved an antenuptial agreement by which a husband promised to devise property to his stepdaughter in return for $40,000 from his wife. When the testator failed to make the specified devise, the stepdaughter sued on the contract for equitable relief. The New York Court of Appeals decided the recovery was taxable. The court reasoned that had decedent performed his contract, the transfer by will would have been taxed. In enforcing the contract, equity converts those who take under the will into "trustees for the beneficiary under the original agreement. . . . Therefore the devolution of the property has in fact taken place under the will, and such devolution is subject to the transfer tax." *Id.* at 280, 80 N.E. at 925.

40 *Compare* Bente v. Bugbee, 103 N.J.L. 608, 137 Atl. 552 (Ct. Err. & App. 1927), *with* Daum v. Inheritance Tax Comm'n, 135 Kan. 210, 9 P.2d 992 (1932). For an analysis of the different tax consequences of recovery in an action for damages, see Comment, *Applicability of Inheritance Taxation to Contracts to Devise or Bequeath,* 37 YALE L.J. 108 (1927).

41 Though some courts have granted relief for breach of contract to devise under the term "specific performance," the term is a misnomer. Aside from the possibility of anticipatory breach during his lifetime, the promisor cannot breach until death. Specific performance, as such, is obviously impossible. Thus, courts sometimes use the terms "quasi-specific performance" or "constructive trust" to describe the remedy. Hirsch, *Contracts to Devise and Bequeath,* 9 WIS. L. REV. 388, 396 (1934).

42 Note, *supra* note 37, at 596.

impose a trust on the property passing to decedent's heirs or next of kin in favor of the plaintiff.[43] Since the property would devolve under the will, the devolution would be subject to a transfer tax.[44]

In an action at law for damages, however, a different result would follow.[45] The plaintiff in a damage action would occupy a position analogous to a judgment creditor of the decedent's estate.[46] The claim would be paid by the executor before the will was probated. Although recovery would be practically the same under either remedy, since recovery in a damage suit is based on contract, it would not be subject to an inheritance tax.[47] Thus, breach of contract would be encouraged as providing a simple means of tax avoidance. *Vai,* however, based the imposition of inheritance tax on beneficial succession, thus removing the tax avoidance incentive from violation of contracts to bequeath.

Another possible avenue for tax avoidance was also foreclosed by *Vai. A,* simply by exchanging his promise to devise property to *B* in return for consideration sufficient to bind the contract,[48] could confer testamentary benefits on *B* not subject to inheritance tax. The consideration *B* gave in that situation need not necessarily be of equivalent monetary value to the bequest. To prevent this device, *Vai* borrowed the more stringent consideration requirement set out in section 13641 of the inheritance tax act, dealing with inter vivos transfers.[49] This section states that " 'valuable and adequate consideration' is a consideration equal in money or in money's worth to the full value of the property transferred."[50] Thus, in order to exempt from taxation a transfer of property by will made pursuant to a valid contract, *B* would have to give *A* an equivalent in money's worth for the promised bequest. As no actual benefit would accrue to *B* from this *quid pro quo,* the purpose of the inheritance tax act would not be defeated.

Though the rule adopted by the majority in *Vai* is more logical and efficient than its predecessor, the logic of Chief Justice Traynor's dissent is compelling. Traynor maintained that in arriving at its holding the majority violated some basic canons of tax statute construction.[51] One of these well-known pre-

43 *In re* Kidd's Estate, 188 N.Y. 274, 280, 80 N.E. 924, 925 (1907).

44 *Ibid.*

45 *E.g.,* Bente v. Bugbee, 103 N.J.L. 608, 137 Atl. 552 (Ct. Err. & App. 1927).

46 Note, *supra* note 37, at 596. See generally 1 PAGE, WILLS § 10.27-.28 (Bowe & Parker ed. 1960).

47 Bente v. Bugbee, 103 N.J.L. 608, 613, 137 Atl. 552, 554 (Ct. Err. & App. 1927).

48 It should be noted that in *Vai* the consideration John received for his promise to leave money in his will to support his incompetent daughter was sufficient consideration to support the property settlement agreement. However, since this consideration was not measurable in money or money's worth, within the definition of the inheritance tax act, it was not adequate consideration for exempting the transfer from taxation under the new rule. The court, instead, found that when Tranquilla Vai accepted $500,000 in the stipulation with the executors of her husband's estate rather than completely rescind the agreement for fraud this constituted money's worth consideration. Had Tranquilla rescinded the agreement, as she was entitled to, her share of the community property probably would have been considerably more than the amount she actually received. This difference, the court determined, was the measure of consideration John Vai received in return for his promise to bequeath property for his daughter's support. *In re* Vai's Estate, 417 P.2d 161, 169, 52 Cal. Rptr. 705, 713 (1966).

49 CAL. REV. & TAX. CODE § 13641.

50 *Ibid.*

51 *In re* Vai's Estate, 417 P.2d 161, 172, 52 Cal. Rptr. 705, 716 (1966) (dissenting opinion). See 1 COOLEY, TAXATION 450-52 (3d ed. 1903).

cepts is that "beyond the words employed [by the statute], if the meaning is plain and intelligible, neither officer nor court is to go in search of the legislative intent . . . ."[52] As Justice Traynor read the language of section 13601, it was clear and admitted of no exceptions whatever.

> Nothing in the present statute or its predecessors suggests that a transfer by will pursuant to an enforceable contract is excepted from the normal operation of the tax. In all the years since the Legislature first selected succession as a subject of tax [citing statute] it has never so much as intimated in any provision . . . that it meant to exclude from "transfer by will" a transfer by will pursuant to a contract.[53]

Even if there is some ambiguity as to the meaning of a tax provision, a literal or strict construction is favored "because presumptively the legislature has given in plain terms all the power it has intended should be exercised."[54] The *Vai* majority incorporated an exception into the inheritance tax law in violation of what the court itself previously conceived to be its proper function,[55] i.e., that of only construing and applying, rather than adding to or detracting from, the words the legislature had written.

Despite its questionable statutory foundations, the *Vai* decision has obvious merit. Its rule provides a consistent basis for the imposition of inheritance tax whether the transfer is contractual or testamentary in character. It also prevents the seemingly unfair result of a beneficiary being taxed for a bequest that was, in a sense, "bought and paid for." The rule has the further practical merit of removing a tax restriction which inhibits the contract to bequeath from being used as an estate planning device.[56] It is to the California Supreme Court's credit that it accomplished these results in *Vai* without opening any avenue for tax avoidance.

John Scripp

WILLS — LAPSED RESIDUARY LEGACIES BECOME PART OF THE RESIDUE RATHER THAN PASS BY INTESTATE SUCCESSION. — The testator, John T. Slack, was predeceased by a residuary legatee who died without issue. On distribution of the testator's estate, the Probate Court of Windsor County, Vermont, decreed that the deceased residuary legatee's share should pass as part of the residue of the estate to the surviving residuary legatees. The estate of the testator's widow and certain other heirs challenged this distribution asserting that the lapsed residuary legacy should pass as intestate property. The Supreme Court of Vermont affirmed the Probate Court and *held:* lapsed residuary legacies become part of the residue and pass with the balance of it unless a

52 1 COOLEY, *op. cit. supra* note 51, at 450.
53 *In re* Vai's Estate, 417 P.2d 161, 170, 52 Cal. Rptr. 705, 714 (Cal. 1966) (dissenting opinion).
54 1 COOLEY, *op. cit. supra* note 51, at 453.
55 See Kirkwood v. Bank of America, 43 Cal. 2d 333, 273 P.2d 532, 536 (1954); *In re* Miller, 31 Cal. 2d 191, 187 P.2d 722, 727 (1947).
56 For a comprehensive treatment of the contract to devise as an estate planning tool, see Sparks, *Contract to Devise or Bequeath as an Estate Planning Device,* 20 MO. L. REV. 1 (1955).

contrary disposition is demonstrably applicable. *In re Slack Trust,* 220 A.2d 472 (Vt. 1966).

By its decision in *Slack,* the Vermont Supreme Court rejected the common law rule, followed by a majority of the states, concerning distribution of lapsed residuary estates. The common law rule holds that a lapsed part of the residue does not pass into the remainder of the residue, but rather passes to the testator's next of kin as intestate property.[1] At the time this rule was developed in England, it was designed to keep property within the family estate by favoring the next of kin over residuary legatees.[2] As the original purpose for the rule lost its importance, however, other rationales were advanced to support it. Some courts justified the common law rule on the basis that there could be "no residue of a residue."[3] Other courts advanced the reasoning that it was the testator's presumable intention that no residuary legatee should receive a greater proportion of the residue than that given him by the will.[4] However, most courts in applying the common law rule did so blindly, without reference to its underlying rationale.[5]

It is interesting to note that later English cases have severely criticized the common law rule and have greatly restricted its application.[6] In fact, at least one commentator has even suggested that the rule has been implicitly abandoned in England.[7] Nevertheless, this rule favoring partial intestacy in the case of lapsed residuary legacies was incorporated into the American legal system as a part of the English common law. Once again, most American courts simply invoked the rule without investigating its underlying rationale.[8] However, in many cases where the rule has been considered on its merits, it has received scathing criticism. As the Pennsylvania Supreme Court so aptly stated:

> The rule thus established does not commend itself to sound reasoning, and is a sacrifice of the settled presumption that a testator does not mean to

1 6 PAGE, WILLS § 50.18 (Bowe-Parker rev. 1962) at 97. A more comprehensive statement of this rule is found in Commerce Nat'l Bank v. Browning, 158 Ohio St. 54, 59, 107 N.E.2d 120, 123 (1952):

> That rule of law, which was adopted from the English common law, is that a portion of a residuary legacy or devise, which is not to a class and which lapses or is otherwise ineffective, does not inure to the benefit of the other residuary devisees or legatees unless the testator has specifically provided that it shall pass to them, but instead it passes as intestate property to the heirs or next of kin of the testator.

2 *In re* Gray's Estate, 147 Pa. 67, 23 Atl. 205 (1892).

3 "But where a legacy lapses which is part of the residue, it cannot, according to our decisions, fall into the residue because it is itself a part of the residue, and it must pass as intestate estate." Lyman v. Coolidge, 176 Mass. 7, 9, 56 N.E. 831, 832 (1900). *Accord,* Dresel v. King, 198 Mass. 546, 85 N.E 77 (1908); ATKINSON, WILLS § 140 (2d ed. 1953) at 784.

4 *E.g., In re* Moloney's Estate, 15 N.J. Super. 583, 83 A.2d 837 (Hudson County Ct. P. Div. 1951), criticizing rule as "too myopic in scope to be considered either sound, satisfactory or convincing"; Oliver v. Wells, 254 N.Y. 451, 173 N.E. 676 (1930); Wright v. Wright, 225 N.Y. 329, 122 N.E. 213 (1919); Skrymsher v. Northcote, 1 Swans. 566, 36 Eng. Rep. 507 (1818); Page v. Page, 2 P. Wms. 489, 24 Eng. Rep. 828 (1728); Bagwell v. Dry, 1 P. Wms. 700, 24 Eng. Rep. 577 (1721); 6 PAGE, *op. cit. supra* note 1, at 98.

5 6 PAGE, *op. cit supra* note 1, at 98.

6 *In re* Dunster, [1909] 1 Ch. 103; *In re* Parker, [1901] 1 Ch. 408; *In re* Palmer, [1893] 3 Ch. 369.

7 2 JARMAN, WILLS 1031 n.(f) (8th ed. 1951).

8 6 PAGE, *op. cit. supra* note 1, at 98.

> die intestate as to any portion of his estate, and also of his plain actual intent, shown in the appointment of general residuary legatees, that his next of kin shall not participate in the distribution at all.[9]

The common law rule has also been criticized on the ground that its effect "is to defeat the testator's intention in almost every case in which it is applied . . . ."[10] In *Slack,* the Vermont court cited with approval an excerpt from *Corbett v. Skaggs,*[11] pointing out that

> the statement sometimes made in support of the latter practice — that the share of the deceased residuary legatee cannot fall into the residue because it is itself a part of the residue — appears rather to play upon words than to point out any real difficulty.[12]

These telling criticisms prompted the Vermont court to conclude: "Other than its large numerical following, this [common law] rule admittedly has little to recommend it."[13]

Even more expressive of the deep-seated dislike for the common law rule is the number of devices that courts have employed to circumvent its application. Justice Cardozo characterized this practice in the following language:

> There is indeed a technical rule, *reluctantly enforced by courts when tokens are not at hand to suggest an opposite intention,* that a gift of "a residue of a residue" is not to be augmented by the lapse of another gift out of the general residuum . . . .[14] (Emphasis added.)

Thus, in many cases, courts strain to interpret the particular terminology of a will as creating a class gift, a joint tenancy, or a gift over.[15] There is also noticeable in a number of decisions a conscious effort to interpret a will as manifesting an intent by the testator that lapsed residuary shares should pass to the surviving residuary legatees.[16] Such subterfuge provoked the Vermont court in *Slack* to observe that "it seems far sounder to operate under a rule which is acceptable according to its terms, rather than its exceptions."[17]

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9 *In re* Gray's Estate, 147 Pa. 67, 74, 23 Atl. 205, 206 (1892).

10 *In re* Dunster, [1909] 1 Ch. 103, 106.

11 111 Kan. 380, 207 Pac. 819, 28 A.L.R. 1230, (1922), commented on with approval in 36 HARV. L. REV. 230 (1922), 21 MICH. L. REV. 485 (1923).

12 *Id.* at 386, 207 Pac. at 822.

13 *In re* Slack Trust, 220 A.2d 472 (Vt. 1966).

14 Oliver v. Wells, 254 N.Y. 451, 457, 173 N.E. 676, 678 (1930).

15 *In re* Randall's Will, 185 Kan. 92, 340 P.2d 885 (1959) (class gift); *In re* Ives' Estate, 182 Mich. 699, 148 N.W. 727 (1914) (class gift); Roberts v. Tamworth, 96 N.H. 223, 73 A.2d 119 (1950) (class gift); Shearin v. Allen, 137 N.J. Eq. 276, 44 A.2d 210 (Ct. Err. & App. 1945) (joint tenancy); *In re* Long's Estate, 121 N.Y.S.2d 183 (Surr. Ct. 1953) (class gift); *In re* Hoermann's Estate, 234 Wis. 130, 290 N.W. 608, 128 A.L.R. 89 (1940) (substitution in effect a gift over); *In re* Dunster, [1909] 1 Ch. 103 (class gift); *In re* Parker, [1901] 1 Ch. 408 (gift over).

16 Attebery v. Prentice, 158 Neb. 795, 65 N.W.2d 138 (1954); *In re* Zimmermann's Estate, 122 Neb. 812, 241 N.W. 553 (1932); *In re* Moloney's Estate, 15 N.J. Super. 583, 83 A.2d 837 (Hudson County Ct. P. Div. 1951); Aitken v. Sharp, 93 N.J. Eq. 336, 115 Atl. 912 (1922), 31 YALE L. J. 782 (approvingly); *In re* Dammann's Estate, 12 N.Y.2d 500, 191 N.E.2d 452, 240 N.Y.S.2d 968 (1963), 9 N.Y.L.F. 404 (1963) (approvingly), 32 FORDHAM L. REV. 604 (1964) (approvingly); *In re* Nielsen's Will, 256 Wis. 521, 41 N.W.2d 369 (1950).

17 *In re* Slack Trust, 220 A.2d 472, 473-74 (Vt. 1966).

In adopting the minority rule, the Vermont Supreme Court was greatly influenced by the Kansas Supreme Court's decision in *Corbett v. Skaggs,*[18] the leading case for the progressive, minority view.[19] Instead of circumventing the question, *Corbett* was the first case expressly to overturn the common law rule by judicial decision after a consideration of the rule on its merits.[20] In *Corbett,* the Kansas court felt compelled to adopt the minority rule because of the rule of construction which gives predominance to the testator's intent. The court stated:

> We regard the rule that lapsed shares of deceased residuary legatees shall be treated as intestate property as in direct conflict with the one to which this court is definitely committed — that the actual purpose of the testator, so far as it can be ascertained, must be given effect.[21]

Consistent with this argument, the court in *Slack* cautioned that

> this is a rule of construction only, adopted because it appears to comport most closely with the presumed intent of the testator in the usual case. It is at all times subject to contrary expressions of intent in the instrument by the testator.[22]

As is evident from the preceding discussion, the importance of the Vermont court's decision in *Slack* stems not so much from the uniqueness of its holding, but rather from its timing. *Corbett* was decided in 1922. Other courts, however, failed to follow its example in judicially repudiating the common law rule until Ohio did so in 1952[23] and Illinois in 1956.[24] Prior to *Corbett,* Indiana was the only state adhering to the minority rule through court decision.[25] Indiana, however, appears to have adopted the minority position in 1873 without any consideration of the common law rule.[26]

This latest step in the advancement of the minority view through judicial activism is encouraging, but it could very well be the last advancement by such means. The Vermont court was fortunate because it decided *Slack* as a case of first impression.[27] It was not burdened, as are courts in almost all the other

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18 111 Kan. 380, 207 Pac. 819 (1922).

19 "This is the approach well stated in Corbett v. Skaggs . . . and we adopt the rule of that case." *In re* Slack Trust, 220 A.2d 472, 474 (Vt. 1966).

20 We might now avoid deciding that question by holding — as we think the facts justify — that in any event there are special features of the will under consideration which would require a decision in favor of the surviving residuary legatees. . . . We prefer to rest our decision upon the general principle rather than upon exceptional features of the particular case. Corbett v. Skaggs, 111 Kan. 380, 385-86, 207 Pac. 819, 821-22 (1922).

21 *Id.* at 386, 207 Pac. at 822. *Accord, In re* Sowder's Estate, 185 Kan. 74, 340 P.2d 907 (1959). *Contra, In re* McCoy's Estate, 193 Or. 1, 236 P.2d 311 (1951).

22 *In re* Slack Trust 220 A.2d 472, 474 (Vt. 1966).

23 Commerce Nat'l Bank v. Browning, 158 Ohio St. 54, 107 N.E.2d 120 (1952).

24 Schroeder v. Benz, 9 Ill. 2d 589, 138 N.E.2d 496 (1956), 55 MICH. L. REV. 1202 (1957).

25 Carey v. White, 126 Ind. App. 418, 126 N.E.2d 255 (1955); Hedges v. Payne, 85 Ind. App. 394, 154 N.E. 293 (1926); West v. West, 89 Ind. 529 (1883); Holbrook v. McCleary, 79 Ind. 167 (1881).

26 Gray v. Bailey, 42 Ind. 349 (1873).

27 *In re* Slack Trust, 220 A.2d 472, 474 (Vt. 1966).

states, by a series of precedents adhering to the common law rule.[28] Many courts, though highly critical of the common law rule, yield to the great weight of *stare decisis* and reluctantly apply it.[29] As the New York Court of Appeals stated in *Wright v. Wright*,[30] "[W]e . . . are forced to realize that as the result of inheritance and frequent repetition the rule has become too firmly established to be disregarded."[31]

While judges are hesitant to alter by court decision a rule so firmly established in our legal system, they are not nearly so reluctant to call upon legislatures to make such changes.[32] It is submitted that such an attitude on the part of the Bench constitutes a forfeiture of its responsibility for the orderly growth and development of the common law.[33] The warning enunciated by Chief Justice Vanderbilt of New Jersey in *Fox v. Snow*[34] (although it concerns a different matter) is highly relevant to the present situation.

> To hold, as the majority opinion implies, that the only way to overcome the unfortunate rule of law that plagues us here is by legislation, is to put the common law in a self-imposed straitjacket. Such a theory, if followed consistently, would inevitably lead to the ultimate codification of all of our law for sheer lack of capacity in the courts to adapt the law to the needs of the living present. The doctrine of *stare decisis* neither renders the courts impotent to correct their past errors nor requires them to adhere blindly to the rules that have lost their reason for being. The common law would be sapped of its life blood if *stare decisis* were to become a god instead of a guide.[35]

In the face of judicial refusal to act on the matter, a number of state legislatures have responded to the call. As a result, the common law rule that a lapsed residuary legacy should pass as intestate property has been completely overturned by statutory enactments in at least five states.[36]

Since the common law rule concerning the distribution of lapsed residuary estates is so firmly established by judicial decision in almost all the remaining states, it appears that any major shift to the minority rule most likely will be achieved through legislative change rather than judicial activism. While this development has taken place in a limited number of states, the rate of change

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28 A comprehensive listing of the cases accepting and rejecting the common law rule is given in Annots. at 28 A.L.R. 1237 (1924), 139 A.L.R. 868 (1942) and 36 A.L.R.2d 1117 (1954).

29 *E.g., In re* Waln's Estate, 156 Pa. 194, 27 Atl. 59 (1893); *In re* Gray's Estate, 147 Pa. 67, 23 Atl. 205 (1892).

30 225 N.Y. 329, 122 N.E. 213 (1919).

31 *Id.* at 341, 122 N.E. at 217.

32 *In re* Bogardus' Will, 5 Misc. 2d 607, 164 N.Y.S.2d 485 (Surr. Ct. 1957).

33 For an interesting discussion of the role played by judicial precedents in the interpretation of wills, see Halbach, *Stare Decisis and Rules of Construction in Wills and Trusts*, 52 CALIF. L. REV. 921 (1964). "The straightforward overruling of unsuitable precedent represents less of a threat to the rule of law, simplicity and impersonality in adjudication, and reasonable predictability than does the retention of unsound rules, hedged by their characteristic weakness." Halbach, *supra* at 955.

34 6 N.J. 12, 76 A.2d 877 (1950).

35 *Id.* at 23, 76 A.2d at 882-83 (dissenting opinion).

36 ILL. ANN. STAT. ch. 3, § 49 (Smith-Hurd 1961); N.J. STAT. ANN. § 3A:3-14 (1953); OHIO REV. CODE ANN. § 2107.52 (Page 1954); PA. STAT. ANN. tit. 20, § 180.14(10) (1950); R.I. GEN. LAWS ANN. § 33-6-20 (1956).

has been far slower than one would expect in view of the virulent criticisms leveled at the majority rule.[37] Taking into account both the ingrained conservatism of the Bench and the slow-moving machinery of state legislatures, there appears to be little hope for a significant movement to the minority rule in the near future.

It is submitted that while *Slack* may not lead courts in states presently following the common law rule to reject that rule, it may influence them to give a more liberal interpretation to the testator's intention in creating a residuary clause in his will. In this manner, courts may achieve many of the minority rule's beneficial results, while still professing their respect for, and adherence to, the precedents arising under the common law. Regardless of the effect of *Slack* on other states, the Supreme Court of Vermont should be commended for allowing the principles of reason to triumph over the dictates of judicial precedent in an area of law greatly in need of such a reassociation with reality.

William H. Seall

FEDERAL PROCEDURE — INTERPLEADER — TWO CIRCUITS DISAGREE ON INSURANCE COMPANIES' USE OF INTERPLEADER WHEN MULTIPLE TORT CLAIMS AGAINST THEIR INSURED ARE IN EXCESS OF POLICY COVERAGE AND HAVE NOT YET BEEN REDUCED TO JUDGMENT. — Plaintiffs, Underwriters at Lloyd's and other British insurance companies, had issued liability insurance policies to Roy H. Sheffield, Jr., d/b/a Dixie Flyers. These policies purported to indemnify Sheffield up to the sum of $20,000 for liability which he might incur as a result of his crop spraying operations. Defendant cotton farmers contended that Sheffield, while carrying on his crop spraying operations, caused more than $50,000 damage to their cotton crops. The insurance companies sought a bill in the nature of interpleader under Federal Rule of Civil Procedure 22[1] to determine their liability under the potential claims arising from the damage. The United States District Court for the Eastern District of Arkansas dismissed the complaint for lack of jurisdiction over the subject matter.[2] The United States Court of Appeals for the Eighth Circuit reversed and *held:* a bill in the nature of interpleader is available to insurance companies under Federal Rule

37 *E.g.*, 6 PAGE *op. cit. supra* note 1, § 50.18, at 98-99; ATKINSON, *op. cit. supra* note 3, § 140, at 785; 36 HARV. L. REV. 230 (1922); 21 MICH. L. REV. 485 (1923); 55 MICH. L. REV. 1202 (1957); 31 YALE L. REV. 782 (1922). See also text accompanying notes 9-10, 12-14 *supra.*

1 FED. R. CIV. P. 22 provides:

(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U. S. C., §§ 1335, 1397, and 2361. Actions under those provisions shall be conducted in accordance with these rules.

2 Underwriters at Lloyd's v. Nichols, 250 F. Supp. 837 (E.D. Ark. 1966).

22 even though the claims against the insured party had not been reduced to judgment and the injured parties could not yet assert their claims directly against the insurance company. *Underwriters at Lloyd's v. Nichols,* 363 F.2d 357 (8th Cir. 1966).

Plaintiff, State Farm Fire and Casualty Company, had issued an automobile liability insurance policy with a maximum coverage of $20,000 per accident to Ellis Clark. While this policy was in effect, Clark was involved in a serious accident with a Greyhound bus. As a result of this accident, at least four suits were filed in California state courts against Clark and others, seeking recovery of damages in excess of $1,000,000. Additional suits were anticipated. State Farm sought a bill in the nature of interpleader under the Federal Interpleader Act[3] and also under Federal Rule 22 to determine its liability under the potential claims arising out of the accident. The United States District Court for the District of Oregon allowed the bill. The United States Court of Appeals for the Ninth Circuit reversed and *held:* the injured parties cannot be considered "claimants" within the jurisdictional requirements of the Federal Interpleader Act nor "persons having claims against the plaintiff" within Federal Rule 22 since, in the absence of a direct action statute, they have no right to institute suits directly against the insurance company without first prevailing in their suits against the insured party. Therefore, the action in the nature of interpleader must be dismissed for lack of jurisdiction over the subject matter. *Tashire v. State Farm Fire & Cas. Co.,* 363 F.2d 7 (9th Cir.) *cert. granted,* 87 Sup. Ct. 90 (1966).

Interpleader is by no means a new remedy in the law. It was common practice for English courts of equity, when there were conflicting claims to a sum of money, to relieve disinterested stakeholders of the disputed sum and determine the rights of all the various claimants. The necessity for interpleader arises from the fact that a stakeholder runs the risk of double liability if he does not turn the sum over to the rightful party.[4] The stakeholder does not always

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3 28 U.S.C. § 1335 (1964) provides:

(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if

(2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.

4 Chafee, *Modernizing Interpleader,* 30 YALE L.J. 814, 815 (1921).

discharge his duty to turn the sum over to the correct claimant by turning it over to a claimant who is in his judgment the correct one. The strict requirements for a bill of interpleader[5] have been largely eliminated.[6] Indeed, a bill in the nature of interpleader is now available even when the stakeholder himself asserts a claim to the money in question.[7]

The interpleader remedy was, and still is, a popular one. It has proven especially advantageous to insurance companies which are frequently faced with conflicting claims to proceeds of insurance policies. The original Federal Interpleader Act,[8] adopted in 1917, made this remedy more available to insurance companies by enlarging the jurisdiction of the federal district courts. These courts were permitted to make nationwide service of process upon claimants.[9] Since that time, the act has been refined on a number of occasions. In 1925, insurance associations were added to the coverage of the act.[10] The statutory remedy was extended in 1926 to include casualty and surety companies.[11] The statute was further extended in 1936 to include "any person, firm, corporation, association, or society."[12] The act was amended once again in 1948. Among other changes, the term claimant was extended to include not only those who "are claiming" but also those who "may claim" to be entitled to the fund in question.[13]

In 1938, the Federal Rules of Civil Procedure were promulgated. Rule 22, dealing with interpleader, recognized that the common law interpleader remedy had not been limited by the passage of the Federal Interpleader Act.[14] This rule, which explicitly eliminated some of the old, strict requirements for interpleader, was said to be "the most modern and liberal method of obtaining interpleader to be found."[15]

Both *Nichols* and *Tashire* raise the question of who can be considered a

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5 First, the same thing, debt or duty must be claimed by both or all the parties against whom the relief is demanded; second, all their adverse titles or claims must be dependent on or be derived from a common source; third, the person asking the relief — the plaintiff — must not have or claim any interest in the subject matter; fourth, he must have incurred no independent liability to either of the claimants, — that is, he must stand perfectly indifferent between them, in the position, merely, of a stakeholder [quoting 3 POMEROY, EQUITY JURISPRUDENCE § 1332]. Platte Valley State Bank v. National Live Stock Bank, 155 Ill. 250, 257, 40 N.E. 621, 623 (1895).

6 3 MOORE, FEDERAL PRACTICE ¶ 22.04 (2d ed. 1964).

7 Texas v. Florida, 306 U.S. 398 (1939); Standard Sur. & Cas. Co. v. Baker, 105 F.2d 578 (8th Cir. 1939); Pan American Fire & Cas. Co. v. Revere, 188 F. Supp. 474 (E.D. La. 1960); John Hancock Mut. Life Ins. Co. v. Kegan, 22 F. Supp. 326 (D. Md. 1938); 3 MOORE, *op. cit. supra* note 6, ¶ 22.03; Keeton, *Preferential Settlement of Liability-Insurance Claims*, 70 HARV. L. REV. 27, 40 (1956).

8 39 Stat. 929 (1917).

9 3 MOORE, *op. cit. supra* note 6, ¶ 22.06.

10 43 Stat. 976 (1925).

11 44 Stat. 416 (1926).

12 49 Stat. 1096 (1936). For an excellent account and analysis of the development of statutory interpleader, see Chafee, *Modernizing Interpleader*, 30 YALE L.J. 814 (1921); Chafee, *Interstate Interpleader*, 33 YALE L.J. 685 (1924); Chafee, *Interpleader in the United States Courts*, 41 YALE L.J. 1134 (1932); Chafee, *The Federal Interpleader Act of 1936*, 45 YALE L.J. 963, 1161 (1936); Chafee, *Federal Interpleader Since the Act of 1936*, 49 YALE L.J. 377 (1940); Chafee, *Broadening the Second Stage of Interpleader*, 56 HARV. L. REV. 541, 929 (1943).

13 28 U.S.C. § 1335 (1964). See note 3 *supra*.

14 Chafee, *The Federal Interpleader Act of 1936: II*, 45 YALE L.J. 1161, 1167-69 (1936).

15 3 MOORE, *op. cit. supra* note 6, ¶ 22.04, at 3007.

"claimant" under either statutory or rule interpleader. The statute provides that the remedy is available when "two or more adverse claimants . . . are claiming or *may claim* to be entitled to such money or property, or to any . . . benefits arising by virtue of any . . . policy or other instrument . . . ."[16] (Emphasis added.) The rule similarly provides that "persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or *may be* exposed to double or multiple liability."[17] (Emphasis added.)

In both cases, the injured parties contended that they could not be considered "claimants" or as "having claims" against the insurance companies in the absence of a direct action statute, which would have allowed them to proceed directly against the companies. Since they had not secured a final judgment against the insured, the injured parties contended that they could not be deemed as having claims against the insurance companies for the purpose of interpleader jurisdiction. The insurance companies, on the other hand, argued that the mere possibility defendants might be successful in their suits against the insured parties meant that they were claimants within the meaning of both statutory and rule interpleader. They contended that since defendants "may claim" against the companies, they fell within the statute. Likewise, since the companies "may be exposed" to double or multiple liability, they felt the injured parties should be treated as claimants within the meaning of the rule.

Whether the word "claimant" includes someone who may have a claim *in the future* had presented considerable difficulty to insurance companies seeking statutory interpleader in the past. In *Klaber v. Maryland Cas. Co.*,[18] the Eighth Circuit held that such contingent liability would not entitle an insurance company to file a bill in the nature of interpleader until all potential claims against the insured party had been adjudged. The *Klaber* case was brought under the 1926 Federal Interpleader Statute which allowed the remedy when "two or more adverse claimants . . . are claiming to be entitled to such money or property . . . ."[19] Significantly, the "may claim" provision found in the present act was missing from the 1926 statute.[20] Had it been there, *Klaber* might well have been decided differently.[21] Since the 1948 act restored the "may claim" clause, *Klaber*'s value as precedent is doubtful.[22]

In *Pan American Fire & Cas. Co. v. Revere*,[23] the United States District

16 28 U.S.C. § 1335 (1964). See note 3 *supra*.
17 FED. R. CIV. P. 22. See note 1 *supra*.
18 69 F.2d 934 (8th Cir. 1934).
19 44 Stat. 416 (1926).
20 The "may claim" clause in the original interpleader act was omitted from the 1926 Act in order to secure its passage. Klaber v. Maryland Cas. Co., 69 F.2d 934, 939 (8th Cir. 1934).
21 This is suggested by certain language in *Klaber:*
> No insurer should be denied the benefits which were intended to be conferred by the act [1926], but, on the other hand, since the courts have no legislative powers, they have no right to extend the unusual authority granted by the act to cases which do not fairly fall within its provisions liberally construed. Klaber v. Maryland Cas. Co., *supra* note 20, at 939.

22 A/S Krediit Pank v. Chase Manhattan Bank, 155 F. Supp. 30 (S.D.N.Y. 1957); 3 MOORE, *op. cit. supra* note 6, ¶ 22.08[2]; Chafee, *Federal Interpleader Since the Act of 1936*, 49 YALE L.J. 377, 420 (1940).
23 188 F. Supp. 474 (E.D. La. 1960).

Court for the Eastern District of Louisiana allowed a bill in the nature of interpleader in order to bring all persons injured in an automobile accident into court to present their claims against the insurance company in one action. Judge J. Skelly Wright, in a scholarly opinion, suggested that "under the 'may be exposed' clause of Rule 22 and the 'may claim' clause of the [1948] Interpleader Act, it would not seem to matter how remote the danger [of claims against the insurance company] might be."[24] *Pan American* differed from *Klaber,* however, since Louisiana has a statute[25] allowing injured parties to bring a direct action against the liability insurer, whereas there was no such statute in *Klaber.*

The absence of a direct action statute, however, did not prevent a federal district court in Indiana from allowing a bill in the nature of interpleader in a recent case involving multiple claims against insured parties. In *Commercial Union Ins. Co. v. Adams,*[26] numerous claims resulted when an explosion in the Coliseum at the Indiana State Fairgrounds killed more than seventy persons and injured more than three hundred. The court, unimpressed by the absence of a direct action statute, pointed out that one of the major advantages to be gained by the use of interpleader is the equitable distribution of insurance policy proceeds when it is apparent that the actual and potential claims will far exceed the policy coverage.[27] Shortly after *Commercial Union* was decided, however, a federal district court in Ohio held in *National Cas. Co. v. Insurance Co. of North America*[28] that the absence of a direct action statute would prevent an insurance company from using Rule 22 interpleader when the claims against the insured had not yet been reduced to judgment.

The utter confusion in the case law on this subject can best be attributed to the basic ambiguity in the language of both the Federal Interpleader Act and Federal Rule 22. This ambiguity has provided courts with freedom to weigh the advantages to be gained by the use of interpleader in multiple tort claims situations against the potential disadvantages its use might entail.[29] Liability insurers seek to use the interpleader device in multiple claim situations since they fear that unless all claims against their insured are disposed of in one action, they might be required, after exhausting the fund under the policy in paying some judgments, to pay additional sums to other claimants on the theory that the fund should have been prorated. It is apparent that the dangers to insurance companies of a multiplicity of suits and possible excess liability are significant reasons for allowing interpleader to be used in multiple tort claims situations.[30] Indeed, this rationale forms the very basis for interpleader.

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24 *Id.* at 482.

25 LA. REV. STAT. § 22:655 (1959).

26 231 F. Supp. 860 (S.D. Ind. 1964).

27 *Id.* at 867. In the *Commercial Union* case, the insurance coverage amounted to approximately $1,000,000. As of the date of the hearing, 129 suits involving claims arising out of the explosion had been filed against one of the insured parties. The total prayers of these suits exceeded $11,107,500. *Id.* at 862-63.

28 230 F. Supp. 617 (N.D. Ohio 1964).

29 For an excellent discussion of this whole problem, see Pan American Fire & Cas. Co. v. Revere, 188 F. Supp. 474 (E.D. La. 1960).

30 Commercial Union Ins. Co. v. Adams, 231 F. Supp. 860 (S.D. Ind. 1964); Pan American Fire & Cas. Co. v. Revere, *supra* note 29; 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, § 551 (Wright ed. 1961); Keeton, *supra* note 7, at 40-46. See Texas v.

Furthermore, courts must consider the advantages to be gained by the equitable distribution of the insurance proceeds when it is apparent that the claims will be far in excess of policy coverage and the tortfeasor will be unable to satisfy them.[31] In *Tashire,* the insurance company alleged that the claims arising out of the accident would exceed $1,000,000. The $20,000 insurance coverage could thus be depleted by the first or second successful claimant. In *Nichols,* it was alleged that the claims totaled more than $50,000, whereas the insurance coverage amounted to only $20,000. In both these cases, the unavailability of interpleader would encourage an unseemly race to the courthouse by injured parties attempting to lay first claim to the insurance money. Of course, since there is always the possibility of delay in reaching actual judgment against the tortfeasor, the race might not of itself determine who shall ultimately capture the prize.[32] As one noted commentator has observed:

> Instead of a haphazard looting of a fund by the first comers, a bill in the nature of interpleader filed before numerous judgments have ripened assures a fair share of the insurance money to each victim and conforms to the principle, "Equity is equality."[33]

It should be noted, however, that this argument in favor of interpleader, based on the equitable distribution of the funds, assumes that the tortfeasor is either insolvent or would be unable to satisfy out of his own resources all claims that might be adjudged against him. In both *Nichols* and *Tashire,* it was doubtful that the insured parties could have paid all possible judgments. However, in multiple tort claim situations where it is apparent that the insured tortfeasor can satisfy all the claims which might be urged against him, the insurance company's use of interpleader could result in serious hardships upon individual claimants. In such a case, since the tortfeasor would be able to satisfy claims in excess of policy coverage, the disposition of the insurance proceeds would be of little importance to the ultimate satisfaction of the claims. Nevertheless, the insurance company, in an attempt to minimize litigation costs by joining all injured parties in a single action, would still seek interpleader where it would be of no benefit to the claimants. In this situation, the individual claimants would be forced to bring their suits en masse in a court which may be far removed from their homes. Interpleader would result in a further disadvantage to claimants if one considers the possible adverse psychological effect the presentation of multiple claims might have on a jury. This factor is significant in cases where the claims represent considerable sums of money. A jury might tend to be less generous when presented with multiple claims against one tortfeasor than it would have been if it had only one claim to consider. Of course, having one jury determine all claims tends to insure a more equitable distribution of the policy proceeds since the jury will presumably award damages in a consistent manner.

Florida, 306 U.S. 398 (1939); New York Life Ins. Co. v. Welch, 297 F.2d 787 (D.C. Cir. 1961); John Hancock Mut. Life Ins. Co. v. Kegan, 22 F. Supp. 326 (D. Md. 1938).

31 Commercial Union Ins. Co. v. Adams, 231 F. Supp. 860, 867 (S.D. Ind. 1964).

32 Maryland Cas. Co. v. Glassell-Taylor & Robinson, 156 F.2d 519, 523 (5th Cir. 1946).

33 Chafee, *supra* note 14, at 1166.

Provision might also be made to allow the use of different juries for each claim. Viewed in this light, *Tashire* may well reflect an unarticulated judicial reluctance to deprive injured parties of the right to bring action against the tortfeasor in the federal district court of their own choice as well as to accord claimants the full benefits of trial by jury.

In *Nichols* and *Tashire,* which were decided on the same day, two federal appellate courts reached diametrically opposed conclusions on the same basic fact-situation. Even though the problem presented in these cases is a commonly recurring one, this area of the law remains uncertain. The United States Supreme Court has granted certiorari in *Tashire.*[34] It is to be hoped that the Court will resolve the present uncertainty by deciding that the advantages to be gained by the equitable distribution of insurance proceeds to all successful claimants warrants the use of interpleader in a situation where the claimants could not otherwise obtain satisfaction of their judgments against the tortfeasor. This was the result reached by the Eighth Circuit in *Nichols.* It is submitted that such a result is preferable to that arrived at by the Ninth Circuit in *Tashire.*

Dennis M. Kelly

RELEASE — GENERAL RELEASE OF ALL CLAIMS CONSTRUED AS BARRING RELEASOR'S SUBSEQUENT CLAIM FOR CONTRIBUTION. — An automobile driven by Wortha Benjamin collided with an automobile operated by Charles Norton, in which Norton's wife was a passenger. Approximately one month later, Benjamin signed a general release in standard printed form. The essential clause of this release stated that the signer does

> hereby release, acquit and discharge said party or parties from all claims and demands, actions and causes of action, damages, cost, loss of service, expenses and compensation on account of, or in any way growing out of personal injuries, whether known or unknown to me at the present time, and property damage resulting or to result . . . .

When the Nortons brought an action for personal injuries, Benjamin filed an answer which included a cross-claim against plaintiff-husband for indemnity or contribution of the amount of any damages recovered by plaintiff-wife. The husband pleaded the general release executed by defendant as a bar to defendant's cross-claim. The Supreme Judicial Court of Maine, on a question certified to it by the United States District Court for the District of Maine, *held:* the release was clearly designed to adjust, settle and terminate all claims and demands which the releasor might have against the plaintiff-husband, including any claim for contribution. *Norton v. Benjamin,* 220 A.2d 248 (Me. 1966).

The precise question presented by *Norton* was whether a general release of *all claims* arising from an accident included a claim for contribution, although

34 Tashire v. State Farm Fire & Cas. Co., 363 F.2d 7 (9th Cir.), *cert. granted,* 87 Sup. Ct. 90 (1966).

such a claim was not specifically referred to in the language of the release. In jurisdictions which recognize a right of contribution among tortfeasors,[1] this question has been both a recurring and troublesome one. Aside from variations in the relationship between the driver and passenger or passengers in the one car and the damage suffered by the driver of the other, the situation in *Norton* is typical. There is a collision between two vehicles. The driver and passenger of one car are injured while the other driver suffers damage to his vehicle. The latter driver negotiates with the former's insurer for his property damage. In consideration of a nominal amount of money,[2] he signs a general release, thinking he is only releasing claims for any injuries and property damage *to himself*. Later, he discovers that he has also released his claim for contribution against the other driver. This claim for contribution, which may be worth many thousands of dollars,[3] is a claim which the releasor did not contemplate[4] and probably never understood at the time of negotiation. It is obvious that the releasor never intended to release such a valuable right. Yet, a literal reading of the release leads courts to conclude that the releasor did intend to release his claim for contribution. Determining the scope of a release, therefore, depends upon whether or not courts will permit extrinsic evidence to be introduced to clarify the parties' intent as manifested in the instrument.

Since a release is a type of contract,[5] it is subject to all the rules governing the interpretation of contracts, including the parol evidence rule. This rule states that in the absence of fraud, duress, or mutual mistake, extrinsic evidence of preceding or accompanying negotiations will not be admitted to vary or contradict the terms of a written instrument which is definite and clear on its face.[6] Courts will, however, admit extrinsic evidence to interpret a contract where there is some ambiguity in the language of the release.[7] Whether a court will find an ambiguity in a release, such as that which confronted the Maine court in *Norton,* depends upon the court's initial response to such a release and its attitude toward the admissibility of extrinsic evidence to clarify the parties' intention.[8]

A substantial majority of courts which have passed on the question raised in *Norton* have given full effect to the general language of the release and have been unwilling to admit extrinsic evidence to prove that the right of contribu-

1 "[C]ontribution among tortfeasors is now in effect, in one form or another, in about half of the states . . . ." Commissioners' Prefatory Note, UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT (1955 Rev. Act).

2 In *Norton,* defendant submitted an itemized bill to plaintiff-husband's claims adjuster for $1,011.16. Defendant subsequently settled this claim for $876.16. Norton v. Benjamin, 220 A.2d 248, 250 (Me. 1966).

3 The plaintiff-wife in *Norton* claimed personal injuries in the amount of $50,000 plus interest and costs. Complaint, p. 3, Norton v. Benjamin, Civil No. 8-133, D. Me., March 11, 1965.

4 Counsel for both sides in *Norton* stipulated that no discussion of contribution or indemnity took place between the adjuster and the defendant. Norton v. Benjamin, 220 A.2d 248, 250 (Me. 1966).

5 Little Rock Packing Co. v. Massachusetts Bonding & Ins. Co., 262 F.2d 327 (8th Cir. 1959); Westfall v. Motors Ins. Corp., 140 Mont. 564, 374 P.2d 96 (1962).

6 4 WILLISTON, CONTRACTS § 631 (3d ed. 1961).

7 *Id.* § 627.

8 Havighurst, *Principles of Construction and the Parol Evidence Rule as Applied to Releases,* 60 NW. U.L. REV. 599, 612-13 (1965).

tion was not within the contemplation of the parties at the time of settlement.[9] In the leading case of *Killian v. Catanese*,[10] the Supreme Court of Pennsylvania, faced with a release similar to the one in *Norton*, held that since there was no attempt made to limit its scope, the instrument indicated a clear intention to release the additional defendant from all liability, including liability for contribution.[11]

What support there is for the opposite conclusion is based on the proposition that at the time of settlement, a right of contribution is a right subsequently maturing. It is believed that such a future right cannot be released unless it is specifically referred to or falls within the fair meaning of the language in the instrument.[12] In *Leitner v. Hawkins*,[13] the Court of Appeals of Kentucky was faced with a release similar in its inclusive language to that in *Norton*, especially as to the release of all claims "known and unknown."[14] Despite this all-inclusive reference, the court held:

> At the time the release above was signed, obviously no demand for contribution could have been made. This right subsequently matured, and it is the general law that demands subsequently maturing are not as a rule discharged by the release unless expressly provided for or falling within the fair import of the terms of the release . . . . The release purports no such meaning or intent, and we would be going far afield so to declare.[15]

In rejecting the reasoning of the *Leitner* decision, the Supreme Judicial Court of Maine retorted that "as to this we say only that in our view the right to contribution was *inchoate* and releasable and was embraced within the fair meaning and intent of certain of the inclusive phrases in the release in the instant case."[16] (Emphasis added.) Thus, the differences in result, as previously suggested, can be attributed to the initial judicial response to a release. While the court in *Norton* found that the claim for contribution was "within the fair

9 *Id.* at 613. See *e.g.*, Berman v. Plotkin, 172 F. Supp. 214 (E.D. Pa. 1959); Brown v. Eakin, 50 Del. 574, 137 A.2d 385 (Super. Ct. 1957); McNair v. Goodwin, 262 N.C. 1, 136 S.E.2d 218 (1964); Polley v. Atlantic Ref. Co., 417 Pa. 549, 207 A.2d 900 (1965); Mayer v. Knopf, 396 Pa. 312, 152 A.2d 482 (1959); Killian v. Catanese, 375 Pa. 593, 101 A.2d 379 (1954).

10 375 Pa. 593, 101 A.2d 379 (1954).

11 *Id.* at 595-96, 101 A.2d at 380.

12 Edester v. Heady, 364 S.W.2d 811 (Ky. Ct. App. 1963); Leitner v. Hawkins, 311 Ky. 300, 223 S.W.2d 988 (Ct. App. 1949); Public Serv. Elec. & Gas Co. v. Waldroup, 38 N.J. Super. 419, 119 A.2d 172 (1955).

13 311 Ky. 300, 223 S.W.2d 988 (Ct. App. 1949).

14 *Id.* at 302, 223 S.W.2d at 989.

15 *Id.* at 303-04, 223 S.W.2d at 990.

16 Benjamin v. Norton, 220 A.2d 248, 253. *Contra,* Havighurst, *supra* note 8, at 611:

> Although many rights which are thus inchoate at the time of the release might appear to fall within the literal coverage, it may be said that when a release is pleaded as a defense against claims which were not matured at the time of its execution, inquiry concerning purpose becomes relevant, and extrinsic evidence should be admitted.

For cases lending support to Havighurst's statement, see Rotberg v. Dodwell & Co., 152 F.2d 100 (2d Cir. 1945); Schine v. Schine, 250 F. Supp. 822 (S.D.N.Y. 1966); Kershaw v. Kershaw Mfg. Co., 209 F. Supp. 447 (M.D. Ala. 1962); United Elec., Radio & Mach. Workers v. General Elec. Co., 208 F. Supp. 870, 872 (S.D.N.Y. 1962); Hutton v. La France, 198 Cal. App. 2d 19, 17 Cal. Rptr. 628 (Dist. Ct. App. 1961); MacFarland's Case, 330 Mass. 573, 115 N.E.2d 925 (1953).

meaning and intent" of the release,[17] the Kentucky court in *Leitner* looked at the circumstances and held that "the release purports no such meaning or intent."[18]

Having taken note of these contrary views, the court in *Norton* concluded:

> on the balance we are persuaded that the Pennsylvania rule better accords with the familiar and accepted application of the parol evidence rule and will in the long run better serve the policy of fostering and encouraging the settlement of claims.[19]

While it is conceded that "society gains most from the certainty and finality of such settlements,"[20] it is submitted that when a general release in standard printed form makes no specific reference to claims for contribution, an ambiguity arises and extrinsic evidence should be admitted to clarify a party's intention to release such a right.[21]

This is not to say that the general release has no proper place in the realm of settlement. Rather, it is to say that the general all-inclusive release, in standard printed form, is too often used by insurance companies to deprive a party of claims which he did not contemplate when he signed the release. What has resulted, is the widespread use of printed forms, such as that in *Norton,* containing blanks for the parties' names, the place of accident and the consideration for the release. These releases generally contain a compilation of form book phrases, and are usually drafted by the insurance company seeking the release.[22] All too often, a party who has signed such a release intending only to discharge claims for personal injuries and property damage done to himself, subsequently learns that he has discharged a valuable claim for contribution against a joint tortfeasor.

In this context, the Maine court's answer to the *Leitner* decision, that the right to contribution is inchoate, releasable, and embraced within the fair meaning of certain phrases within the release, is more a rationalization of its position than a recognition of the real problem. This is likewise true of the court's further statement that "one who purports to release *all* claims should clearly specify any that he intends and desires to reserve . . . ."[23] It is submitted that the *Leitner* decision is more in accord with reality. While *Leitner* recognizes that the right to contribution may be released before it matures, it requires an express provision or some other clear expression that a given right was intended to be released. Whether the term inchoate, or future maturing right, is used, the

17 220 A.2d at 253.
18 Leitner v. Hawkins, 311 Ky. 300, 304, 223 S.W.2d 988, 990.
19 220 A.2d at 253.
20 *Id.* at 251.
21 This view is substantiated by the negative implications of certain language in Oxford Commercial Corp. v. Landau, 12 N.Y.2d 362, 366, 190 N.E.2d 230, 231-32, 239 N.Y.S.2d 865, 867 (1963):

> In sum, the plaintiff corporation's promise, *contained in an integrated agreement reached after lawyer-guided negotiations and containing provisions quite unlike the stereotyped verbiage found in the usual standard general release,* permits no conclusion other than that the plaintiff intended to release everyone who participated . . . . (Emphasis added.)

22 Havighurst, *supra* note 8, at 606.
23 Norton v. Benjamin, 220 A.2d 248, 253 (Me. 1966).

ordinary layman, when negotiating the satisfaction of his particular claims, is concerned with his immediate damages. He neither contemplates nor understands any right to contribution. To require this layman, who signs the general release prepared by the insurance company, to expressly reserve a right which he does not comprehend is grossly inequitable. Yet judicial decisions such as *Norton* encourage insurance companies to use general all-inclusive releases as a means of depriving uninformed parties of a subsequently maturing claim for contribution.

The general release is used in a variety of contexts other than the situation in *Norton*. A number of courts which have been called upon to interpret a general release have allowed the instrument to be limited on the basis of the circumstances surrounding its execution.[24] These cases stand for the proposition that a person who executes a general release does not relinquish claims of which he has no knowledge and that the intention of the parties as shown by extrinsic evidence at the time the release was executed may be used to interpret an all-inclusive release. An examination of the circumstances in *Norton* would have made it clear that the defendant Benjamin did not intend to release his right to contribution. The view favoring the admissibility of extrinsic evidence is a more modern one and would have resulted in a more equitable solution in *Norton*.[25]

The court's reasoning in *Norton* is somewhat anomalous. By finding no ambiguity in the printed release, it applied the parol evidence rule. The court believed that such a determination would serve the cause of certainty and finality in the law. The question remains: for whom is the law certain and final? Insurance companies, having many of these releases in their possession, can be certain that their interests are protected since they will not be called upon to defend a suit for contribution. However, it is just as certain that the average layman will continue to sign such all-inclusive releases, thinking he is only releasing claims for his own injuries and property damage. A possible reason for the court's refusal to allow extrinsic evidence to be used in *Norton* may have been the court's desire to protect the great number of outstanding releases similar to the one at bar.[26] It is submitted, however, that a ruling by the Supreme Judicial Court of Maine that it would refuse to interpret any such release

24 *E.g.*, United States v. Ramstad Constr. Co., 194 F. Supp. 379 (D. Alaska 1961) (subcontractor's release); Graham v. Taller & Cooper, Inc., 91 F. Supp. 419 (E.D.N.Y. 1950) (recital on check for vacation pay); Cahill v. Regan, 5 N.Y.2d 292, 157 N.E.2d 505 (1959); Simon v. Simon, 274 App. Div. 447, 84 N.Y.S.2d 307 (1948) (divorce settlement); Meil v. Syracuse Constructors, Inc., 42 Misc. 2d 39, 247 N.Y.S.2d 541 (Sup. Ct. 1964) (automobile accident).

25 Four states have enacted statutes which would allow this result. CAL. CIV. CODE § 1542 (1954); REV. CODES MONT. § 58-510 (1947); 1 N.D. ANN. CODE § 9-13-02 (1959); 3 S.D. CODE § 47-0241 (1939). CAL. CIV. CODE § 1542 provides:

> A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

For a thorough analysis of this statute's application to the general release and the protection of the releasee in the absence of a statute, see Casey v. Proctor, 59 Cal. 2d 97, 378 P.2d 579, 28 Cal. Rptr. 307 (1963). See also Heath v. Utah Home Fire Ins. Co., 89 Idaho 490, 406 P.2d 341 (1965) and Sloan v. Standard Oil Co., 177 Ohio St. 149, 203 N.E.2d 237 (1964), which follow *Casey*.

obtained in the *future* as including a right to contribution unless it was specifically referred to in the instrument would better serve the ends of justice. It would be no hardship for insurance companies to include such a reference in a printed release to protect their interests. On the other hand, the layman confronted with such a phrase as *release of all future rights of contribution,* although he might not understand the terminology, would at least be put on notice to inquire.

Robert R. Rossi

26 One of the reasons plaintiff gave for seeking certification of the question of law to the Supreme Judicial Court of Maine was its:

> great importance to the insurance industry, especially as it relates to the settlement negotiations and trial of pending and future actions, as there are vast numbers of so-called general releases which might be affected, and which make no specific mention of actions for contribution or indemnity. Plaintiff's Exhibit "A," Norton v. Benjamin, Civil No. 8-133, D. Me., March 11, 1965.