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Interpretation is one of the most difficult tasks confronting the lawyer or judge. Future interest cases present challenging and recurring problems of interpretation. The author here discusses the elements, methods, and problems of interpretation. Although the discussion is set in the context of future interests cases, many of the author's remarks are applicable to interpretation in general.

I. A Glance at Objectives

A. *The Human Quest for Understanding*

Man's quest for an absolute, for a definition of "good," for the meaning of "justice," carries us back to the beginnings of philosophy. And although these concepts are as elusive as the Questing Beast pursued by King Pellinore in T. H. White's delightful book, *The Once and Future King*, the history of mankind indicates that the curiosity of thoughtful persons is insatiable and that the search will not end. It continues daily before our eyes—in mathematics, astronomy, medicine, psychology, sociology, economics, philosophy, and other disciplines not the least of which is law. Even Holmes, the supposed skeptic, who rejected absolutes[1] and who denied the intermixture of law and morals,[2] repeatedly affirmed the significance of intellectual achievement[3] and thought it "not improbable that man,

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1. Holmes, *Ideals and Doubts*, 10 Ill. L. Rev. 1, 2 (1915). "With absolute truth I leave absolute ideals of conduct equally on one side."

2. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 464 (1897). "For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law." Others have of course disagreed. See, *e.g.*, Gray, The Nature and Sources of the Law § 310 (1909). "But on the definition of 'Jurisprudence,' which appears the sounder one, the true grounds of morality seem a proper subject of contemplation." Cardozo, The Nature of the Judicial Process 133-34 (1921). "What really matters is this, that the judge is under a duty, within the limits of his power of innovation, to maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience." Despite his unwillingness to relate law and morals, Holmes far from rejected idealism. Holmes, *Law in Science and Science in Law*, 12 Harv. L. Rev. 443, 462 (1899). "But it is an ideal, and without ideals what is life worth?"

3. See, *e.g.*, Holmes, *The Profession of the Law*, in Collected Legal Papers 29, 32 (1886); Holmes, *The Path of the Law*, *supra* note 2, at 478. "Read the works of the great German jurists, and see how much more the world is governed by Kant than by Bonaparte."

like the grub that prepares a chamber for the winged thing it has never seen but is to be—that man may have cosmic destinies that he does not understand."[4]

Whether or not it is given to us to "catch an echo of the infinite,"[5] and though we may be denied the barest glimpse of the unknown, it seems a true observation that the cumulative effect of unveiling tiny parts of the inscrutable whole have at last put us on a course toward the stars. By the same token we may hope, though of course we cannot be sure, that persistent efforts at improving small segments of the vast structure of the law—the human attempt more closely to approach justice—may lead toward the ultimate goal, though it may never be precisely envisioned. Thus, for reviewing once again problems not solved by giants of times gone by, no apology is tendered.

B. *"Certainty Generally is Illusion, and Repose Is Not the Destiny of Man."*[6]

In one sense the quest for the absolute may be said to be an expression of the human longing for certainty. It is not strange, therefore, that periods of extreme formalism have characterized the development of the law or that great expositors of the law should have insisted that the judges did not make law but were in effect merely discoverers of fundamental truths.[7] The same is no doubt true of the doctrine of stare decisis which may well be founded in substantial part upon the desire for repose. Whatever the case, the high degree of rigidity and resistance to sudden change which has marked the history of the law of future interests and imparted to it a higher degree of certainty than is elsewhere discernible[8] may well account for the almost passionate interest lavished upon it by those who have become its devotees. Accept the premises even for a moment, and the illusion of certainty is very apt to seize you.

Yet, despite its painful growth, even the law of future interests has not been immune to revolutionary change. The Statute of Uses[9] (1535) opened great new and almost surely unanticipated vistas in the law of property and *Pells v. Brown*,[10] which in 1620 established

4. HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 291, 296 (1913).
5. Holmes, *The Path of the Law*, *supra* note 2, at 478.
6. *Id.* at 465.
7. See the discussion in GRAY, *op. cit. supra* note 2, §§ 465-79.
8. Less than 50 years ago, Professor Gray said as to questions of remoteness that, "there is for them a definite recognized rule: if a decision agrees with it, it is right; if it does not agree with it, it is wrong." GRAY, THE RULE AGAINST PERPETUITIES ix (3d ed. 1915).
9. 1535, 27 Henry VIII, c. 10.
10. Cro. Jac. 590, 79 Eng. Rep. 504 (1620). "Millions upon millions, probably billions upon billions, of property have gone to persons to whom they would not have gone, if two of the judges of the majority had agreed with their brother. . . ." GRAY, *op. cit. supra* note 2, § 509.

the indestructible character of the executory interest, was almost certainly the major antecedent of the Rule Against Perpetuities, and in all probability was also the progenitor of the rule first laid down in 1670 that a future interest capable of taking effect as a contingent remainder shall never be construed as an executory devise.[11] By 1833 the Rule Against Perpetuities was crystallized.[12] Today perpetuity reform is on the march,[13] the rule of destructibility of contingent remainders has been abolished in most states[14] and the Rule in Shelley's Case has likewise all but vanished.[15] In addition, a number of statutes affecting the title clogging habits of possibilities of reverter and rights of entry are in force and marketable title acts are becoming respectable.[16] Thus, it cannot be said that there has been repose even in the law of future interests. Indeed, a great deal of what some might call the "substantive" law of future interests is either no longer with us or is nearing departure, and one may venture to suggest that the law of future interests is at least veering toward the point predicted in a more general way by Holmes,[17] "when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them."

C. *And What of the Future?*

It may be expected that with the diminution of formalism in the law generally, and in particular in the law of future interests through the elimination or modification of rules of property designed to defeat intention, greater attention will be given by courts and by the profession to achieving what are conceived to be basic objectives—of which, no matter how significant its past, the preservation of form for its own sake is no longer one. This could constitute a return to

11. This facet of the rule of destructibility of contingent remainders apparently originated in Purefoy v. Rogers, 2 Wms. Saund. 380, 85 Eng. Rep. 1181 (1670). See GRAY, *op. cit. supra* note 8, § 920. The other facet of the rule of destructibility was of course the requirement that a contingent remainder must take effect, if at all, *eo instanti* at the ending of the supporting estate of freehold.

12. Cadell v. Palmer, 1 Cl. & F. 372, 6 Eng. Rep. 956 (1833).

13. See, summarizing the literature and statutes concerning reform of the common law rule, ABA SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW, PERPETUITY LEGISLATION HANDBOOK (2d ed. 1962).

14. For a summary of state statutes, see SIMES & SMITH, THE LAW OF FUTURE INTERESTS § 207 (2d ed. 1956).

15. *Id.* § 1563.

16. See LEACH & LOGAN, CASES ON FUTURE INTERESTS AND ESTATE PLANNING 68-78 (1961), where some of the legislation is summarized and where the important literature concerning these subjects is cited. See also BASYE, CLEARING LAND TITLES (1953); SIMES & TAYLOR, THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION (1960).

17. Holmes, *The Path of the Law*, *supra* note 2, at 474.

pursuit of the Questing Beast, but it need not, since the quarry is somewhat nearer at hand at least for the future which most of us are willing to foresee.[18] For as long as we recognize the institution of property and its concomitants, the rights to transmit property gratuitously during lifetime and at death and to create future interests in it, the basic stated objective of the law is likely to be what it has for some time said to have been—to give effect to "intention." To state the objective in this orthodox fashion is simple enough, but as a guide to methods of interpretation the statement is useless because "intention" is a fugitive very nearly as elusive as the Questing Beast himself. Since actual intention is never absolutely ascertainable, and is often not reasonably inferable, it would be more correct to say that the objective to be sought in the law of future interests is to attach to the words and facts at hand a meaning which emerges from the appropriate admixture of all of the ingredients of the interpretive process.

II. ELEMENTS OF THE INTERPRETIVE PROCESS

A. *Language*

Although, as we have seen, the law of future interests is gradually losing its appeal of absolutism through the rejection of unbending rules of property, it has another appeal of which it is unlikely to be deprived—the allure of language. This magnetic force must be watched and contained, since words can become as despotic as substantive dogma. Indeed, those who find fascination in the law of future interests should be wary of being entrapped by the illusion that words are an end in themselves. This is a notion not difficult to entertain if one reasons that language, together with man's intellect, have long been supposed to distinguish the human species, at least anthropologically, from the "lesser inhabitants" of the earth;[19] that the most significant use of language from the point of view of man's destiny apparently lies in the expression and conservation of ideas; and that the special essence of drafting and interpreting documents creating future interests is the statement and preservation of conceptual thought. The reasoning is of course fallacious because much if not all of the law is a matter of words[20] and the law of

18. For a vigorous and by no means altogether obsolete defense of the right of bequest from a sociological point of view, see SUMNER, *The Challenge of Facts*, in THE CHALLENGE OF FACTS AND OTHER ESSAYS 17, 42-44 (1914). Communists, obviously, do not agree. And Holmes, essentially conservative in his personal views, could envision with no great alarm a society in which the institution of property was greatly modified. Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41 (1918). Yet, absent what sociologists call "survival value," it is doubtful that "trusts" and "future interests" could have persisted as long as they have.

19. HOOTON, UP FROM THE APE 157, 164-74 (1931).

20. *Cf.* Commissioner v. City Bank Farmers' Trust Co., 74 F.2d 242, 247 (2d Cir.

future interests has no monopoly on the use of language as one of its most important tools. Moreover, language, though highly important, is only one element of the interpretive process and it is a fallible one at that.

Words, like numbers, are symbols and, as such, if precisely and expertly used, may be nearly perfectly descriptive of things or ideas or combinations of both. But, as Mr. Vaughn Hawkins pointed out in a farsighted paper delivered more than one hundred years ago, words, as one of the signs or marks of intention, have their own inherent limitations:

> The failure of language adequately to convey the intention may take place from three causes: first, the imperfection of language in itself, considered as a code of signals, its want of definite signification, and its inadequacy to the expression of every phase of thought; secondly, from the improper and unskillful use of language by the writer; thirdly, from the limited nature of the human mind, incapable of foreseeing all contingencies to which the expression of its intent may require to be adapted, especially if the interpretation of the writing take place at a period long after that at which it was composed. . . . The usages of the same words at different times, in different places, by different writers, vary greatly. No words but technical words have their connotation or denotation precisely determined by authority; the classification and fixing of meanings belongs to a very important but little studied subject which may be called the theory of dictionaries; but, were that theory far more perfect than it is, language would be and would always continue inadequate to meet the perpetually increasing complexities of human circumstances and human thought.[21]

It is indeed true that the range of human ideas and intentions exceeds man's vocabulary, it is therefore little wonder that an instrument of gift often fails to express the maker's whole intent.[22]

Considering language, as Mr. Hawkins does and as we all must, as one set of marks or signs of intention, it is also apparent that no group of words, in and of itself, can ever express intention; words unrelated to some standard and to some identifying reference are meaningless.[23] As Dean Wigmore put it:

1934). "I am quite aware that this is all largely [a] matter of words, but so is much of the law of property. . . ." (Learned Hand, J.)

21. Hawkins, *On the Principles of Legal Interpretation, With Reference Especially to the Interpretation of Wills*, 2 JUR. SOC. PAPERS 298, 307 (1860).

22. *Cf.* Schuyler, *Future Interests in Illinois: Current Maturities and Some Futures*, 50 NW. U.L. REV. 457, 535 (1955). But see 2 SIMES, THE LAW OF FUTURE INTERESTS § 308 (1st ed. 1936). "It is almost inconceivable that a testator should desire to make a lawful disposition of his property which would be beyond the capacity of the English language to express."

23. "In every case the words used must be translated into things and facts by parol evidence." Doherty v. Hill, 144 Mass. 465, 468, 11 N.E. 581, 583 (1887). Per Holmes, J., who, however, was not very liberally inclined toward allowing deviations from the normal meaning of language: "[T]he testator . . . is required

> Instead of the fallacious notion that "there should be interpretation only when it is needed," the fact is that there must always be interpretation. Perhaps the range of search need not be extensive, and perhaps the application of the document will be apparent at the first view; but there must always be a traveling out of the document, a comparison of its words with people and things. The deed must be applied "physically to the ground."[24]

Although we may argue about whether we are seeking to discover "intention," or "sense," or the "inducement" to the words,[25] the fact will remain that, whatever label we use, we shall discover nothing if there is nothing to which we can relate the words. A very simple example would be an outright bequest "to my son." The testator's "intention," indeed even his "meaning," cannot be determined with any assurance uuless we know whether he has a son and who he is. A more rollicking example is quoted in one of Dean Wigmore's little gems: " 'My duty, sir, to find out his meaning!' exclaimed Lord Alvanley. 'Suppose the will had contained only these words, "Fustum funnidos tantaraboo"; am I to find out the meaning of his gibberish?' "[26]

This brings us to the question of what standards are available to impart meaning to the words used by the maker of a gift and to facilitate discovery of the "sense" in which they are used. As used here, the term "standard" refers to some standard of interpretation of the sense in which the language in an instrument of gift is employed. Dean Wigmore suggests three which may be applicable in the interpretation of wills: (1) that of the normal users of the language of the forum, the community at large, represented by the ordinary meaning of words, (2) the standard of a special class of persons within the community (*e.g.*, lawyers) who use certain words

. . . to express his commands in writing, and that means that his words must be sufficient for the purpose when taken in the sense in which they would be used by the normal speaker of English under his circumstances." Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 420 (1899). And see SIMES, *op. cit. supra* note 22, § 306.

24. 9 WIGMORE, EVIDENCE § 2470 (3d ed. 1940).

25. The old theory was that we sought "meaning" as distinguished from "intent." See 9 WIGMORE, *op. cit. supra* note 24, § 2459; Hawkins, *supra* note 21, at 303. Dean Wigmore says that we should distinguish between "Will" and "Sense." He urges that "Will," to utter a given word, can seldom be considered for juristic purposes, but "Sense" can usually be given full effect if it can be ascertained. 9 WIGMORE, *op. cit. supra*, § 2459. Hawkins points out that, "the intent, which is the ultimate object of inquiry, can never be the subject of immediate knowledge, but must . . . be inferred . . . with a greater or less degree of probability." Hawkins, *supra* note 21, at 310. Simes seems to agree when he says that, "when we say we are determining the testator's intent, we mean his probable intent." 2 SIMES, *op. cit. supra* note 22, § 307. Kales speaks, obscurely, of the "inducement" to the testator's "legal act of using certain words according to some standard." KALES, ESTATES, FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS ch. VII (2d ed. 1920).

26. 9 WIGMORE, *op. cit. supra* note 24, § 2461 n.10.

in a sense common to the entire class, but different from that of the community at large, and (3) the individual standard of the maker of the will (*e.g.*, a manner of expression peculiar to the testator).[27] The relative significance of these standards and what evidence may be admissible to determine which one or more may be employed are fully discussed by Mr. Wigmore[28] and there is no need to repeat or summarize his discussion since we are here only incidentally concerned with rules of evidence. It is enough to reiterate that the language of the instrument is incapable of interpretation unless a standard of interpretation is adopted. The standard may simply be the normal use of language, but standard there must be.

It has been suggested above that there must be not only a standard of interpretation of language, but also that words are not meaningful absent some "identifying reference." That term may overlap the term "standard," but as used here it also has a distinct meaning, *i.e.*, there must be some way, from the language of the instrument being construed or from admissible extrinsic evidence, of identifying what objects, persons, ideas, or concepts are being described. If the identifying reference is not to be found in or inferred from the instrument, the interpreter will be quite unable to interpret unless admissible extrinsic evidence, combined with the language of the instrument, reveals the sense or probable intention sought to be conveyed. Here, then, is another circumscription of the competency of language, or, perhaps more accurately put, an instance of "the improper and unskillful use of language" mentioned by Mr. Hawkins. This type of foible is especially likely to occur in future interests cases where the very creation of a future interest involves (as is frequently the case) an idea or concept, rather than a person or thing. A single example will suffice. Suppose a deed to the donor's son, *A*, for life, remainder to *A*'s children, and if none survives him to his sisters.[29] *A* never has any children and all his sisters predecease him. The question is whether the future interests pass as a part of the sisters' estates. The concept is transmissibility; the marks or signs afforded by the language above are inadequate; there is no effective identifying reference. Had the maker of the gift, instead of referring to *A*'s "sisters," identified them as "such of my daughters as may be living at *A*'s death," or as "my daughters, now born or born before *A*'s death, they to take a transmissible interest," the identifying reference would have been far more effective. It would not have been perfect because it might or might not identify illegitimates or daughters by adoption.

27. *Id.* § 2458.

28. *Id.* §§ 2460-67. Holmes apparently would not ordinarily have permitted resort to any standard but the *normal* meaning of language. See the quotation, *supra* note 23.

29. *Cf.* Hofing v. Willis, 31 Ill.2d 365, 201 N.E.2d 852 (Sept. 1964).

Enough has been said to indicate that language, though it may be highly effective, is never quite enough to make the art of interpretation exact. However, the more precise the wording, the smaller the margin for error.

B. *Rules of Construction*

Although it is repeatedly asserted that intent is the polestar in construction cases, that no will has a twin brother and that one man's nonsense is not to be construed by another man's nonsense, the fact remains that there has been developed over the years a vast body of authority to which resort is often had in the interpretive process.[30] Frequent consistent judicial construction of similar expressions tends to infuse them with a definite and fixed meaning. When this has clearly occurred it is not difficult to select as a standard of interpretation Wigmore's second suggestion, *i.e.*, the standard of a special class of persons within the community, though it must be admitted that in future interests cases it is no easy matter to determine whether a given "rule of construction" has acquired an integrity of its own. However, this is true in other areas of the law and, even in connection with rules of construction, "There are many principles or rules or concepts so specific that the play of discretion in applying them is greatly reduced, though seldom absent altogether."[31]

Eminent writers have differed in their appraisal of the utility of rules of construction. Mr. Hawkins expressed some doubt as to the expediency of rules of construction as contrasted with principles of construction.[32] Professor Gray referred to the "unsatisfactory character of many of the rules for the interpretation of wills. . . ."[33] Professor Kales thought that "authorities are of first importance in determining what shall be taken as the primary meaning of words and phrases," but that authorities "cited for . . . general propositions are obviously of the least value in controlling the ultimate conclusion in the case."[34] He further suggested that "the only cases that can be regarded as controlling are those where a single phrase or word in a regular form has been ruled upon or ruled upon repeatedly."[35] Professor Simes regards rules of construction "like the laws of intestacy" which take care of a situation for which a decedent "failed to make

30. See, *e.g.*, HAWKINS, WILLS (3d ed. 1925); JARMAN, WILLS (8th ed. 1951). General rules of construction are set out in chapter LVII of the third volume of Mr. Jarman's work and in chapter I of Mr. Hawkins' work.

31. Cardozo, *Jurisprudence*, 55 REPORT OF N.Y. STATE BAR ASS'N 263, 281 (1932).

32. Hawkins, *supra* note 21, at 330.

33. GRAY, *op. cit. supra* note 2, § 705.

34. KALES, *op. cit. supra* note 25, at 152, 153. *Cf.* Schaefer, *Intent of the Testator*, in ABA PROCEEDINGS OF PROBATE AND TRUST LAW DIVISIONS, SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW, 5, 7 (1953).

35. KALES, *op. cit. supra* note 25, at 154.

adequate testamentary provision. . . ."[36] He regards many such rules as means of effectuating policy and sometimes as fulfilling the lowly role of "a mere arbitrary method of deciding the case, of somewhat more dignified and judicial character than tossing a coin or rolling dice."[37]

It certainly is true that many rules of construction, *e.g.*, at least several of those relating to the esoteric concept of vesting,[38] are of little if any use except as rationalizations of results already assured. It likewise seems true that most rules of construction shed almost no light on intention except where they have been relied upon in the draftsmanship of an instrument. But where a case can go one way or the other, and where a rule of construction which through long usage has acquired a hard core may tip the scale, perhaps rules of construction should be accorded "such an element of certainty that . . . prediction ceases to be hazardous for the trained and expert judgment."[39] Mr. Hawkins has said it another way:

> By the combined result of the decisions of a succession of judges, each bringing his mind to bear on the views of those who preceded him, a system of interpretation is built up, which is likely to secure a much nearer approach to perfect justice than if each interpreter were left to set up his own standard of how far it was right to go in supplying the defective expression, or of what amounted to a conviction of the intent as distinguished from mere speculative conjecture.[40]

C. *Inference and Extrinsic Evidence*

Interpretation, in its ordinary sense, must be based on inference even when the intention of the maker of a gift appears to be absolutely unambiguously stated. On the other hand, interpretation stops in the absence of any marks or signs from which intent can be inferred. Interpretation (again in its ordinary sense) "can be carried only so far as the intent can be collected with sufficient probability."[41] Of course there are many cases where courts purport to interpret intent when the testator's mind has never worked upon the problem at hand. In such instances the word "interpretation" must be considered as comprehending the formation of a judgment for the testator since he could have had no intention concerning something that never

36. 2 SIMES, *op. cit. supra* note 22, at § 309.

37. *Id.* at 19-20. *Cf.* LLEWELLYN, THE COMMON LAW TRADITION 189 (1960). "[*T*]*he rules of law*, alone, do not, because they cannot, decide any appealed case *which has been worth both an appeal and a response.*"

38. Schuyler, *Should the Rule Against Perpetuities Discard Its Vest?*, 56 MICH. L. REV. 683, 887, 896-917 (1958).

39. Cardozo, *supra* note 31.

40. Hawkins, *supra* note 21, at 329. And see GRAY, *op. cit. supra* note 2, § 705; KALES, *op. cit. supra* note 25, at 154.

41. Hawkins, *supra* note 21, at 313.

occurred to him. For the moment, however, we are concerned with inferences in the interpretative process—inferences to be drawn from the instrument being construed itself and from extrinsic evidence.

At one end of the spectrum the probability of correctness of inferences may be overwhelming. Suppose, for example, the case where a testator has given "to my son *A* for life, remainder to my heirs at law technically determined at the date of my death, intending hereby to include *A* as a remainderman." At the testator's death he has three heirs at law, *A*, *B*, and *C*. The question is whether, at *A*'s death, one-third of the property passes as a part of *A*'s estate. The conclusion that it does is nearly assured. We say the instrument is unambiguous; what we are doing is inferring at least (1) a standard of interpretation, (2) that the will was in all probability drawn by a lawyer, and (3) that the testator meant what he said when he specifically expressed his intention. Even if the last phrase—the declaration of intention—were omitted, and though extrinsic evidence showed that *A* was the testator's sole heir, the property would probably pass as a part of *A*'s estate; the competing inference that *A* was not to take any part of the fee would be unlikely to prevail over the very strong inference to be drawn from the language itself.

Between the two ends of the spectrum fall more difficult cases where the inference from language is less compelling, but where inferences to be drawn from extrinsic evidence, combined with the language of the gift, tend toward reasonable probability of correct results. Here might fall a case where the testator gives to "my son *A*, and when he dies title shall shift to Memorial Hospital." Extrinsic evidence shows that *A* was a bachelor fifty years old and a spendthrift and that although the testator knew of *A*'s profligacy he was fond of him. Extrinsic evidence also shows that the testator had founded Memorial Hospital, that he was very active in its affairs and that he had been President of its Board of Trustees when he made the will and at his death. There is a statute which dispenses with the need for words of inheritance in devising a fee and the jurisdiction where this will is construed inflexibly follows the rule that a fee cannot be given over after a fee on an event certain to occur. Therefore, if *A* gets the fee, the Hospital can take nothing; if he has only a life estate, the gift over to the Hospital is valid. From the *language* we can infer that (1) the will was ineptly drafted, (2) the testator meant for the property to go to the Hospital when *A* died, and (3) the phraseology of the gift over seems to presuppose a prior fee and not a life estate in *A*. From the extrinsic evidence we can strongly infer that (1) the testator did not want *A* to have an absolute estate, and (2) Memorial Hospital was a preferred object of the testator's

bounty. On balance, the combination of inferences would indicate to many that despite the statute and the rule of repugnancy, *A* should be held to take a life estate. Of course, a judge rigidly imbued with the sanctity of rules of property could reach an opposite result on the basis of the will alone.

At the far end of the spectrum fall those cases where probable intention cannot be collected from language and extrinsic evidence or either. An event has happened which the testator did not anticipate. Such a case is the example earlier given where the grantor's son is given a life estate and if he dies without children then to the son's sisters. The only extrinsic evidence shows that *A* died without children after the grantor and that all of *A*'s sisters predeceased him. No "intention" as to the transmissibility of the sisters' interests is ascertainable nor is a probable intention even inferable. "[A]ny solution is bound to be verbal and indeed formal."[42] And it is nearly certain to be influenced by one or more of the intangible forces later discussed which form so important a part in the interpretive process viewed, as it must be, as an art.

The subject of inference and extrinsic evidence should not be dropped without brief comment on the function of extrinsic evidence in construction cases. We have already seen that interpretation is dependent in all cases on extrinsic evidence in greater or lesser degree. Its admissibility has been enormously liberalized over the years because of recognition of the principle that the "words of a document are never anything but indices to extrinsic things, and that therefore *all the circumstances must be considered which go to make clear the sense of the words*,—that is their associations with things."[43] True, limitations on the admissibility of extrinsic evidence have not been altogether eliminated; the rule against "disturbing a clear meaning" persists to some extent[44] and the rule prohibiting in most instances the admission of direct declarations of intention is not likely soon to be eliminated.[45] Yet many of the thoughtful views expounded more than a century ago by Mr. Francis Morgan Nichols[46] are gaining acceptance.

Most discussions concerning the role of extrinsic evidence in interpreting wills concern themselves with descriptions of things and people. It must never be overlooked that in interpreting dispositions of future interests we are as much interested in ideas and concepts

42. Boal v. Metropolitan Museum of Art, 292 Fed. 303, 304 (S.D.N.Y. 1923) (Learned Hand, J.).

43. 9 WIGMORE, *op. cit. supra* note 24, § 2470.

44. *Id.* §§ 2461-63.

45. *Id.* §§ 2471-75.

46. Nichols, *On the Rules Which Ought to Govern the Admission of Extrinsic Evidence in the Interpretation of Wills*, 2 JUR. SOC. PAPERS 351 (1860).

as we are in things and persons. For this reason, in future interests cases, extrinsic evidence may play an even more important role. Facts have a way of shedding light on ideas that are not or cannot be exactly described by words and we can discern a healthy recognition of this in the steady erosion of ancient shibboleths. However, care should be taken to keep evidence in construction suits within appropriate bounds of relevance, practically and reasonableness. And, despite the limits of language, few would argue that extrinsic evidence should, except in rare instances, influence results to the point where the words used will not bear the meaning attached to them by the interpreter.[47]

D. *Judgment*

The all-important element in the interpretive process in difficult cases is of course judgment. Judgment is a composite of many intangibles. Judgment is mastery of technique or at all events the capacity and diligence to master it. Judgment is an enlightened recognition of the importance of history and tradition. Judgment is precedent and the ability logically to apply it where it should be applied. Judgment is the impact of facts and the expertise, within limits, to recognize and apply techniques which will produce the result called for when the facts are not neutral. Judgment is wisdom, patience, and foresight. Judgment is, imagination, courage, and integrity. Judgment is firmness tempered by compassion, sensitivity and understanding. Judgment is the mores and sometimes mere custom. Judgment is philosophy, training, and background. Judgment is sociology, economics, psychology—perhaps a blend of all the social sciences. Judgment is flexibility and adaptability to change when change is indicated. Judgment is morality, equity, and justice as best we can approximate these. Judgment is experience.

The advocate who is called upon to predict a result in a particular case must take account of these abstract components and he must also evaluate the possibility of the partial or total absence of some, and the presence of the antithesis of others. For judgment may be (though it not often is) lack of intellectual capacity, ignorance, indolence, petulance, prejudice, idiosyncrasy, and lack of imagination or some one or more of these. Fortunately, although the title "Judge" is not synonomous with "justice," very few of our judges are afflicted with

47. See Hawkins, *supra* note 21, at 326: "[T]he meaning of the words cannot be added to or corrected beyond a certain point, or the words cease to be capable of bearing the interpretation put upon them; and, though the intent be known [strongly inferable?], there is no expression in which it can clothe itself. . . . [L]egal interpretation is not a mere ascertaining of the intent; it acts only by putting a meaning, consistent with the [probable?] intent, upon the words." *Cf.* KALES, *op. cit. supra* note 25, § 151.

these baser qualities. Indeed, many years of experience at the bar leads to the belief that most judges strive, with or without direct consciousness of their striving, toward Cardozo's "definition" of judgment:

> So also the duty of a judge becomes itself a question of degree, and he is a useful jndge or a poor one as he estimates the measure accurately or loosely. He must balance all his ingredients, his philosophy, his logic, his analogies, his history, his customs, his sense of right, and all the rest, and adding a little here and taking out a little there, must determine, as wisely as he can, which weight shall tip the scales. If this seems a weak and inconclusive summary, I am not sure that the fault is mine. I know he is a wise pharmacist who from a recipe so general can compound a fitting remedy. But the like criticism may be made of most attempts to formulate the principles which regulate the practice of an art. . . . After the wearisome process of analysis has been finished, there must be for every judge a new synthesis which he will have to make for himself. The most that he can hope for is that with long thought and study, with years of practice at the bar or on the bench, and with the aid of that inward grace which comes now and again to the elect of any calling, the analysis may help a little to make the synthesis a true one.[48]

III. Classification for Interpretive Purposes

A. *Limitations and Utility*

No student of future interests could be foolish enough to suppose that all cases involving interpretation could or should be minutely classified. This would lead to a return to rigid formalism. However, some broad classifications clearly assert themselves and these have the merit of narrowing the areas in which the interpretive process must rest on a highly complex mixture of intangibles. To the extent that those areas can be limited, certainty and repose are fostered and litigation, fruitless for one side or the other unless compromised,[49] is discouraged. Hence, with full awareness of their limitations and of inevitable overlapping between and among them, some broad classifications are suggested in the belief that they may be of aid to the interpreter in assessing the relative importance of the factors involved in the interpretive process.

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48. Cardozo, *op. cit. supra* note 2, at 161-63.

49. For a suggestion that courts should perhaps have the power to compromise cases by resort to multi-part rules, see Coons, *Approaches to Court Imposed Compromise*, 58 Nw. U.L. Rev. 750 (1964). Professor Noonan suggests that a discretionary power to impose compromises may have a special value in will construction cases. *A Symposium on Philosophy from Law: Compromise and Decision Making in the Resolution of Controversies*, 58 Nw. U.L. Rev. 795, 800-01 (1964). The present writer has strong reservations, especially if the compromise is to be allowed any force as a precedent. *Id.* at 802.

B. *Cases Where "Intention" Is Stated Clearly*

Though intention is a state of mind and must therefore always be inferred, there are cases where, recognizing this, it is only a harmless distortion to say that intention has been clearly stated. When an instrument (1) is phrased in precise language which is or should be understandable in terms of a readily ascertainable standard by those charged with administering it and those who benefit by it, (2) contains identifying references which, considered in the light of extrinsic evidence, are unmistakable, and (3) anticipates by its terms the happening of the event which has precipitated disagreement and provides what is then to happen, the instrument may fairly be said to be unambiguous and the maker's intention is ascertainable in the ordinary sense in which those terms are used.

Suppose (1) a gift to *A* for life, remainder to such of his children as are living at his death and the then living descendants per stirpes of such of *A*'s children as are not living at *A*'s death, (2) *A* has three children two of whom die before *A*, each leaving a child who survives *A*, and (3) *A*'s third child also predeceases *A* leaving no children, but a spouse who survives *A*. The language and the facts will make it very difficult indeed for anyone to say that the spouse of the third child should take anything upon the events that have happened. The spouse may be avaricious, in dire need or represented by incompetent counsel, or all three, but whatever lures her into the courthouse, she should be abruptly treated. So it should be in any similarly clearcut case, unless it is no longer clearcut because time may have altered or obscured the symbolism of the words.

C. *Cases Where Resort to Rules of Construction Is Appropriate*

Somewhat more difficult are cases involving the use of terms or types of gifts which are themselves ambiguous but which have acquired a settled meaning through usage. Suppose the gift in remainder in the example discussed in the preceding paragraph had been to *A*'s children and if any shall die leaving children then to such children and if any shall die without children then to the surviving children. On the same set of facts the spouse, as the heir or devisee of the child last to die, may or may not have a good claim to one-third of the property depending upon whether the taking effect of the gift over is or is not regarded as a part of the divesting contingency.[50] The testator has either not thought about the matter or if he has

50. The apparent conflict on this question between Blomfield v. Eyre, 5 C.B. 713, 136 Eng. Rep. 1058 (1848), and Jackson v. Noble, 2 Keen 590, 48 Eng. Rep. 755 (1838), evoked much discussion. The *Blomfield* case found favor, sub silentio, in the famous case of O'Mahoney v. Burdett, 7 Eng. & Ir. App. Cas. 388 (1874). The point arises

there is nothing in the will nor any extrinsic evidence from which probable intent may be inferred. Adherence to a rule of construction, if one is established when the matter arises, will resolve the dilemma.

Many similarly soluble questions may arise with even greater frequency. Where there is an immediate gift, or a gift of a future interest in fee, followed by a gift over on the "death" or "death without issue" of the first taker, the word "death" requires interpretation because it is not expressly related to any point of time. Where there is a gift to a class, those to be comprehended within its terms must be determined unless the time for closing the class is specified. A gift, without more, to a group of persons "or to the survivors or survivor" of them demands that the court decide who must survive whom or who must survive what point of time in order to qualify as a taker. Property given to the descendants of several persons or even to the descendants of one person must be distributed either per stirpes or per capita and, if per stirpes, the court may also have to determine at what generation the stirps or roots begin.

It is plain, if only from the volume of decisions, that dispositions of the kinds mentioned here, as well as numerous other kinds, fall into patterns and continue to be drafted without requisite accuracy. Each time this occurs, intent (which may or may not be lacking) is unascertainable. In such cases, if what we might call a mature rule of construction is established, its application, in the absence of compelling extrinsic evidence to the contrary, will bid as fair to produce a result which the testator would have wanted as will the pure guess of the court. Adherence to the rule, unless it is deemed bad from a policy standpoint, or unless it has outworn its utility,[51] will assist the profession in advising would-be litigants and should help to curtail litigation. Vacillation will have the opposite effect.[52]

It will be noted that adherence to rules of construction in certain situations may impart a sufficient degree of certainty into otherwise ambiguous phraseology to enable some dispositions, not otherwise eligible, to be classified in a sense as cases where "intent" is stated clearly. Especially would this be true if there were grounds for

often enough to warrant a strong rule one way or the other. See, for example, McGlothlin v. McElvain, 407 Ill. 142, 95 N.E.2d 68 (1950), commented on, 30 CHI.-KENT L. REV. 1, 80 (1951); 39 ILL. B.J. 388 (1951); 46 ILL. REV. 776 (1951); Dusenberry v. Johnson, 59 N.J. Eq. 336, 45 Atl. 103 (ch. 1899).

51. *Cf.* discussion of the venerable rule that "the law favors the early vesting of estates." Schuyler, *Drafting, Tax, and Other Consequences of the Rule of Early Vesting*, 46 ILL. L. REV. 407 (1951).

52. See GRAY, *op. cit. supra* note 2, at 317. "[W]hat many judges are setting up against the rules of construction is, not their opinion of what testators really intended, but their guess as to what the testators would have intended if they had thought about the point in question, which they did not, a guess resting often upon the most trifling balance of considerations."

inferring that a particular expression had been used in reliance on a rule of construction. This would be but one instance of overlapping between classifications, but it is enough to show that these groupings are at most aids in and not elements of the process of interpretation.

D. *Cases Where Intention, Unstated, May Be Inferred With a Greater or Lesser Degree of Probability*

Cases which may fall within this group are as diverse as those which the first group may embrace. Here, as in instances where rules of construction are applied, we are dealing with situations which the testator did not contemplate, or cannot be said to have contemplated. We are in a way deciding what a dead man would have done if he had thought about something that he didn't think about, but we have grounds for supposing our conclusion to be correct as to what he would have done, *i.e.*, what his probable intent was or what his intent would have been.

Suppose, for example, that a testator gives property to his wife for life, and at her death to his children, or their issue, and if any of the children die leaving no issue, then to the "surviving" children, or their issue. All three children predecease the widow, the first two leaving issue who survive the widow, the last to die leaving no issue. The issue of the children who died first could claim all of the property if their parents had happened to be "surviving" children, but in the event which has occurred they will get at most an intestate portion of the "share" of the child who died last unless "surviving" does not really mean "surviving" and is read "other." The inference is very strong that no rational testator would, under the circumstances, want his grandchildren's share to depend upon the accident of a parent surviving his brother or sister;[53] the probability is very great that the testator "would have wanted" the word "other" to be substituted for "surviving," especially if there were an ultimate gift over if all of the children died without issue.

In acceleration cases, where the testator has not stated what should happen if his spouse renounces, what he probably would have wanted is often inferable. *Trustees of Kenyon College v. Cleveland Trust Co.*,[54] is a good example. The will gave the testatrix's husband a life interest in an estate of approximately 600,000 dollars, and upon his death 300,000 dollars was to go in specified amounts to certain persons. The balance was to go to Kenyon College. Testatrix's husband renounced the life estate and elected to take one-half of the estate. If the money gifts were accelerated the takers would have the benefit of their gifts immediately and the college would get nothing. The

53. *Cf.* Wake v. Varah, 2 Ch. D. 348, 354 (1876).
54. 130 Ohio St. 107, 196 N.E. 784 (1935).

income from the one-half of the estate left after renunciation was directed to be sequestered and accumulated for the benefit of the college during the renouncing husband's lifetime. The inference that the testatrix would have preferred this to immediate payment of the money gifts and complete exclusion of the college, almost surely a preferred object of her bounty, is nearly irrefutable. Other equitable solutions could be found and they might be as good or better, but it is as nearly certain as anything can be that "probable intention under the circumstances" was better served by the method adopted than if the money gifts had been accelerated because they were "vested."

Many other examples of the reasonable inference of what a testator would have wanted had he considered an event for which he did not provide might be suggested. Of these a large proportion would be far less common than the examples given and quite a few might be unique or almost so. In the solutions discussed, the treatment of "survivor" as "other," and resort to sequestration in aid of a disappointed taker, the techniques approach the application of a rule of construction, so those cases to some extent overlap the "rule of construction" classification of cases. As inferences of probable "intent" become less clear, and as more unfamiliar ground appears in the situation presented for decision, the intangibles of judgment assume greater and greater importance.

E. *Cases Where No Probable Intention Can Be Inferred and Where No Rule of Construction Presents a Solution*

Professor Gray said that,

> When the judges say they are interpreting the intention of a testator, what they are doing, ninety-nine times out of a hundred, is deciding what shall be done with his property on contingencies which he did not have in contemplation. . . . What the judges have to do is, in truth, to say what shall be done where the testator has had no real intention. . . .[55]

Of course there are far more cases than one in every hundred (the reference was no doubt a figure of speech) which do not involve matters which the testator has not thought about at all. Indeed in the many cases reaching a conclusion as to probable intention (using the term in the sense of "intention inferable with a reasonable degree of probability even though not clearly expressed or clearly inferable"), the very process of inferring the probable intention presupposes some prior consideration by the testator of the matter in issue, because there can be no intention, actual or probable, concerning something on which the mind has not worked. But there are many cases, as we have already seen, including many of those where it has been deemed

55. GRAY, *op. cit. supra* note 2, at 316.

appropriate to invoke rules of construction, where no intention at all can be inferred. This may be the result of hopeless ambiguity or it may be the result of sheer failure to anticipate an event. It is to that group of cases, exclusive of those inviting the application of rules of construction, that attention is at this point focused.

This is the greyest area of interpretation. It may involve cases where the will is drawn in ambiguous and unfamiliar terms unsusceptible of the application of any known standard. It may involve situations where the will is "home-made" or drawn by an incompetent lawyer. It may involve cases where completely unanticipated events have occurred and where it is impossible with any degree of probability to infer what the testator would have wanted. In this area the courts are faced with their most difficult problems of interpretation; indeed they are not "interpreting" in any true sense, for "the process of interpretation must stop for want of materials . . . ."[56] But reach a decision they must or partially abdicate their function and allow the law of intestacy to take its course—a result of desperation not often permitted, quite possibly because in many instances the one thing that can be clearly inferred is the testator's aversion to intestacy.

These cases force the element of judgment to its very verge, since so many of the intangibles comprised by that term must be balanced in achieving results. Under these circumstances widespread agreement on whether a ruling is correct is not to be expected. Straightforward recognition of this and of the virtual necessity of forming a judgment for the testator, as distinguished from feigned discovery of an intention that never existed, would gain far more respect for the interpretive process (and for the judicial process) in this type of case.[57] Frustrating as it may be, even the magic of the law stops where there is nothing over which its wand may be waved.

IV. INTERPRETATION AS AN ART

The volume of future interests cases which reaches the appellate level is formidable but it should not be forgotten that in all likelihood "a majority . . . could not, with semblance of reason, be decided any way but one."[58] Nor should it be overlooked that there must be

56. See Hawkins, *supra* note 21, at 313.

57. *Cf.* Matter of Lummis, 101 Misc. 258, 273, 166 N.Y. Supp. 936, 946 (1917). "An admission that the testator had no real intention upon the question which the court is resolving by construction is only a frank avowal of what is plainly manifest in too many cases on wills."

58. CARDOZO, *op. cit. supra* note 2, at 164. *Cf.* LLEWELLYN, *op. cit. supra* note 37, at 189. "Substantially, the more bare rules of law do today manage alone to decide that obnoxious but persistent body of appeals in which in fact the applicable rules are both firmly and reasonably settled—often enough reexamined, retested, restated, and reaffirmed within the past few years—and in which the facts of the case fall so obviously inside the core of the rule that reasonable judges do not have to ponder."

numberless relatively uncomplicated future interests cases which are finally decided at the nisi prius level and many more which are settled without trial. And while statistics are not available it would be surprising indeed if it were not so that countless trusts are administered in this country from inception to termination without resort to judicial interpretation during the entire period of administration. This vast group of cases, like millions of transactions daily conducted in the commercial world, constitute the great underlying portion of the iceberg. So if you look for certainty in the interpretive process, there it is—a vast invisible mass in which those to whom repose is all important may find solace. This great body of cases requires no interpretation practised as an art. It is in the difficult and novel cases that the elements of the interpretive process which we have discussed come into play—the cases that plague the advocates on both sides, the judges who must decide them, and the students who must seek to understand them when they find their way, as they have a habit of doing, into casebooks on the law of future interests.

Let us review briefly what confronts the interpreter in the case which is not run of the mill. He must look for a standard or standards of interpretation applicable to the instrument before him. There may be one or more and differing standards and these may apply to different portions of the instrument. He must seek identifying references and he must determine whether and to what extent these are adequate to define the things, persons, and ideas which must be defined. He must determine whether the instrument is one to which one or more rules of construction might properly be applied. If so, he must decide whether the rule or rules which might be invoked are "hard core" rules or merely rules which will help to fortify a result once reached. He must conclude what extrinsic evidence is allowable, consider its relevance and its weight. Then he must apply the processes of logic to discern inferences that may properly be drawn from the language and extrinsic evidence before him. He must evaluate the strength of these inferences and, if there are competing inferences, as there almost surely will be, he must balance these to see which way the scales shall be tipped. Finally, he must call upon all of the resources which go to constitute his judgment and come forward with a conclusion. If he is a judge of a court of review he will be called upon to give reasons for his ultimate decision and will of necessity have to exercise caution not to ignore the past nor to create some obscure crevasse in which future litigants may be entrapped. If he is a lawyer acting as counsellor or advocate, his task, though perhaps less delicate, will be no less difficult; he has his reputation, his client's chances of success, and above all his integrity to consider and he can no more afford to be wrong than the judge. At every step of the way

the interpreter is confronted with conscious or subconscious choices; the end is a synthesis of hopefully correct selections and there is no formula for the decision ultimately extracted from the mixture. Can anyone say that his calling is not based upon learning, experience, and every other factor affecting that very real intangible—judgment? Can anyone say that his calling is not the practise of an art?

It would be impossible adequately to describe an artistic future interests decision. But, if one were called upon to do so, the specifications would not differ greatly from those which would apply to any other artistic legal judgment. Apart from taking account of all that is suggested in the preceding paragraph, the artistic judgment will never be mechanical;[59] it will display a link between the past and the present;[60] it will recognize relevant social changes; in some instances it will foreshadow a relatively near-term future; and, in the rare situations where full play for the art is allowed,[61] it will offer a fleeting glimpse of a far-away future—perhaps long ago pre-ordained—unbelievable to most, revelationary to some, and inspirational to the few who grasp its import.

Hand me the antiphlogiston, alchemist, and I shall mix a proper potion!

59. Hawkins, *supra* note 21, at 330. "[Interpretation is] a process of reasoning from probabilities, a process of remedying, by a sort of equitable jurisdiction, the imperfections of human language and powers of using language, a process whose limits are necessarily indefinite and yet continually requiring to be practically determined—and not, as it is not, a mere operation requiring the use of grammars and dictionaries, a mere inquiry into the *meaning of words.*" *Cf.* Stone, *Man and Machine in the Search for Justice,* 16 STAN. L. REV. 515, 556-57 (1964). "Men in their search to do justice seem always to be transcending the drive, methods, and limits of mere intellect. Insofar as we delegate this particular search to machines, even by inadvertence, we shall risk its emasculation to the extent of the incapacity of machines to do what cannot be intellectualized. . . . The quality of justice done finally depends . . . on the will exercised and the choice made by the man in the judgment seat."

60. "The goal which we seek is a blend which takes into account in due proportion the wisdom of the past and the needs of the present." SCHAEFER, PRECEDENT AND POLICY 21 (1955).

61. But see LLEWELLYN, *op. cit. supra* note 37, at 190. "I hope, and hope hard, that the present material may make permanently untenable any notion that creativeness —choice or creation of effective policy by appellate judges—is limited to the crucial case, the unusual case, the borderline case, the queer case, the tough and exhausting case, the case that calls for lasting conscious worry. My material aims to put beyond challenge that such creativeness is instead everyday stuff, almost every-case stuff, and need not be conscious at all."