

1937

## EXECUTORS AND ADMINISTRATORS -ABATEMENT OF LEGACIES - INTENTION OF TESTATOR AS DETERMINED FROM NATURE OF LEGACY AND SURROUNDING CIRCUMSTANCES

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### Recommended Citation

Victor P. Kayser, *EXECUTORS AND ADMINISTRATORS -ABATEMENT OF LEGACIES - INTENTION OF TESTATOR AS DETERMINED FROM NATURE OF LEGACY AND SURROUNDING CIRCUMSTANCES*, 36 MICH. L. REV. 297 (1937).

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EXECUTORS AND ADMINISTRATORS — ABATEMENT OF LEGACIES — INTENTION OF TESTATOR AS DETERMINED FROM NATURE OF LEGACY AND SURROUNDING CIRCUMSTANCES — When testator's estate is insufficient to pay all bequests provided for in his will, they normally abate in a definite order. For example, specific and demonstrative<sup>1</sup> legacies are payable in toto before general legacies, which in turn must be paid before residuary gifts of personalty.<sup>2</sup> Specific devises are free from abatement to pay pecuniary bequests;<sup>3</sup> the same has been said of residuary devises.<sup>4</sup> If there are insufficient assets to satisfy any class in full, bequests therein abate pro rata.<sup>5</sup>

But testator may vary the order of abatement, may provide for the prior payment of any bequest he chooses. The most obvious case occurs when he states specifically what legacies shall be preferred, and to what extent.<sup>6</sup> Express statements of intention to prefer do not provide the only basis for departing from the usual order of abate-

<sup>1</sup> Demonstrative legacies are treated as specific only so long as the particular fund out of which they are payable is in existence. After that, the legacy is treated like a general legacy. 3 WOERNER, AMERICAN LAW OF ADMINISTRATION, § 452, p. 1542 (1923).

<sup>2</sup> See 2 PAGE, WILLS, §§ 1312-1315 (1926); 3 WOERNER, AMERICAN LAW OF ADMINISTRATION, § 452 (1923).

<sup>3</sup> 3 WOERNER, AMERICAN LAW OF ADMINISTRATION, § 444, p. 1517, § 452, pp. 1541, 1544 (1923).

<sup>4</sup> See 3 WOERNER, AMERICAN LAW OF ADMINISTRATION, § 444, p. 1517 (1923), for authority to the effect that where after-acquired realty passes under the will a devise of such lands will not be considered to be specific unless the lands are specifically described, and so may be, equally with residuary personalty, charged with payment of pecuniary legacies.

<sup>5</sup> WILLIAMS, EXECUTORS, 11th ed., 1087 (1921); 3 WOERNER, AMERICAN LAW OF ADMINISTRATION 1541-1543 (1923).

<sup>6</sup> See, for example, *Petition of Spencer*, 16 R. I. 25 (1887); *Bright's Appeal*, 100 Pa. 602 (1882). While presenting problems of interpretation, this type of case does not readily lend itself to summarization because each case is necessarily somewhat of a unique problem. Two generalizations may be made. First, no intention to prefer is to be found from the fact that legacies are made payable in a certain order [*Beeston v. Booth*, 4 Madd. 161, 56 Eng. Rep. 667 (1819); *Perrine v. Perrine*, 6 N. J. L. 133 (1822); *Everett v. Carr*, 59 Me. 325 (1871); 34 A. L. R. 1247 at 1255 (1925)]; *contra*: *Succession of Shaffer*, 50 La. Ann. 601 (1898) (where, after giving one legacy, the will stated, "I then will to") unless testator contemplated a possible deficiency (*In re Harris*, [1912] 2 Ch. 241), the statement of an order being construed as intended to simplify the problem of administration [*Titus' Admr. v. Titus*, 26 N. J. Eq. 111 (1875)]. Second, a preference will not be based on a direction that particular legacies be paid within a specified period [*In re Lloyd*, 87 Misc. 503, 149 N. Y. S. 922 (1914)] or as soon as possible or convenient [*Richardson v. Bowen*, 18 R. I. 138 (1893); *In re Meek's Estate*, 113 Misc. 301, 184 N. Y. S. 693 (1920)]; *contra*: *In re Elmore's Estate*, 292 Pa. 571, 141 A. 478 (1928) (such direction a factor); *In re Robitzek's Estate*, 157 Misc. 68, 282 N. Y. S. 885 (1935); *In re Trimbeys Estate*, 152 Misc. 344, 273 N. Y. S. 957 (1934)].

ment. The courts have inferred an intention to prefer certain types of legacies from the nature of the bequest, sometimes looking to extrinsic circumstances to aid in the interpretation, and occasionally finding a further basis in policy. These additional rules of preference have become so fixed and accepted as to be automatically applied, with no serious inquiry as to their basis and validity. This comment purposes not only to classify these preferred bequests but also to examine the bases on which the preferences are founded and determine, if possible, the adequacy of those bases.

The types of bequests to be discussed are, (1) legacies based on valuable consideration; (2) legacies in lieu of dower; (3) legacies based on a moral obligation; (4) legacies for support and maintenance of dependents; (5) legacies for burial plots, charities and memorials; (6) residuary bequests of realty blended with personalty in the residuary clause; (7) residuary devises given when testator anticipated an insufficiency of personalty to pay pecuniary bequests. Except as otherwise indicated, the discussion will concern only abatement between legacies of the same class.

#### I.

When a legacy is given in exchange for valuable consideration the legatee has a preference over those receiving a bequest as a mere bounty, on the ground that he, having given something of value, is a purchaser of the bequest.<sup>7</sup> The will must state the consideration to be given or the right to be surrendered in exchange for the legacy.<sup>8</sup> But the mere recital that the legacy is given for past services or a consideration will not create a preference if no legal,<sup>9</sup> or a mere moral, obligation existed at testator's death.<sup>10</sup> Sufficient consideration may be found in the enforced release of a valid claim against the estate<sup>11</sup>

<sup>7</sup> See cases collected in 34 A. L. R. 1247 at 1285 (1925); 3 WOERNER, AMERICAN LAW OF ADMINISTRATION 1540 (1923).

<sup>8</sup> *Simpson v. Nicol*, 157 Va. 434, 161 S. E. 63 (1931); *In re Smallman's Estate*, 139 Misc. 501, 248 N. Y. S. 716 (1931) (that if no election required, legatee could claim both the legacy and a right against the estate).

<sup>9</sup> *Koontz v. Hubley*, 111 Ohio St. 414, 145 N. E. 590 (1924).

<sup>10</sup> *Matthews v. Targarona*, 104 Md. 442, 65 A. 60 (1906); *Duncan v. Franklin Township*, 43 N. J. Eq. 143, 10 A. 546 (1887); *Towle v. Swasey*, 106 Mass. 100 (1870). But a debt barred by the statute of limitations may be sufficient consideration. *Williamson v. Naylor*, 3 Y. & C. 208, 160 Eng. Rep. 676 (1838); *Matthews v. Targarona*, supra (obiter).

<sup>11</sup> *Henry's Estate*, 20 Pa. Co. Ct. 415 (1898) (legacy for release of interest in lands devised by testator); *Bailey v. Milligan*, 256 Mass. 90, 152 N. E. 75 (1926) (in fulfillment of antenuptial agreement); *Reynolds v. Reynolds*, 27 R. I. 520, 63 A. 804 (1906) (for services rendered); *Cole v. Niles*, 3 Hun (10 N. Y. S. Ct.) 326 (1874), affd. 62 N. Y. 636 (1875) (in satisfaction of a debt); *In re SchAAF's*

or, by the weight of authority, in acts to be performed after testator's death and which are made a condition to the bequest.<sup>12</sup> The consideration given may be of less value than the legacy.<sup>13</sup>

This doctrine of preference, well established in American case law,<sup>14</sup> apparently resulted from the broad language of the early English cases which stated that the priority given the legacy in lieu of dower was based on the fact that the widow surrendering dower had purchased the legacy.<sup>15</sup> Obviously, to call the legatee a purchaser and to protect him as such is merely to allege a legal conclusion. The question is, *should* the legatee be preferred because he has surrendered a claim against the estate anticipating that he will receive more as a legatee than as a creditor?<sup>16</sup> The preference is not usually stated to

Estate, 120 Misc. 292, 199 N. Y. S. 284 (1923) (for legal services); *Wood v. Vandenburg*, 6 Paige (N. Y. Ch.) 277 (1836) (consideration paid by third party).

<sup>12</sup> In *re Harper's Appeal*, 111 Pa. St. 243 (1885) (for services to be rendered as trustee); In *re Dougherty*, 64 Misc. 230, 118 N. Y. S. 1081 (1909) (similar); *Sherman v. Baker*, 20 R. I. 613, 40 A. 765 (1898) (for masses to be said for testator); In *re Sharff's Estate*, 136 Misc. 627, 241 N. Y. S. 661 (1930) (for upkeep of hospital bed); *Estate of Gassman*, 14 Phila. (Pa.) 308 (1881) (for care of testatrix' husband). That the consideration must be existent at testator's death: *Clayton v. Akin*, 38 Ga. 320 (1868). But legacies to executors for their services will not be preferred [cases collected in 34 A. L. R. 1247 at 1272 (1925)], probably because it is felt that he will be fully compensated through the payment of fees. See *Waters v. Collins*, 3 Dem. Surr. (N. Y.) 374 (1885). But in *Duncan v. Watts*, 16 Beav. 204, 51 Eng. Rep. 756 (1852), preference was refused even though it plainly appeared that the legacy was for services for which he would receive no other compensation.

<sup>13</sup> In *re Harper's Appeal*, 111 Pa. 243 (1885). *Contra*: *Matthews v. Targarona*, 104 Md. 442, 65 A. 60 (1906); *Re Rispin*, 35 Ont. L. Rep. 385, 27 Dom. L. Rep. 574 (1914). Although the statement in the text is contrary to the weight of the few cases presented, the writer suggests that such a rule must have been inherent in the other cases where the question was not raised. Further, since the preference is generally alleged to rest on the same basis as that accorded the widow's legacy (which is preferred in toto regardless of the value of the dower right surrendered—see *infra*, note 28), it is not to be readily presumed that there will be a departure at this point.

<sup>14</sup> In England the "purchaser for value" doctrine is not recognized in this situation. In *re Wedmore*, [1907] 2 Ch. 277, the court expressly refusing to prefer a legacy given in satisfaction of a covenant made in a marriage settlement. This case was followed in *In re Whitehead*, [1913] 2 Ch. 56.

<sup>15</sup> *Burridge v. Bradyl*, 1 P. Wms. 127, 24 Eng. Rep. 323 (1710), apparently established the rule giving preference to the legacy in lieu of dower on the ground that she was a purchaser. Although there were no cases exactly in point, all the leading English text writers assumed that the rule was equally applicable to any legacy given for value. 1 *ROPER, LEGACIES* 430 (1848); 2 *WILLIAMS, EXECUTORS*, 9th ed., 669 (1895). But the English courts limited the application of the rule to legacies given in lieu of dower. See note 14, *supra*.

<sup>16</sup> It may reasonably be assumed that the creditor would not claim the legacy unless it were for more than the debt. Although the legatee for value is called a purchaser, his legacy is deferred to the claims of creditors. *Pearson v. Gillenwaters*,

be based on testator's intent;<sup>17</sup> but if any presumption is to be indulged in, it would hardly be reasonable to conclude that testator, were he advised of the situation, would desire to prefer the creditor-legatee over gratuitous legatees, beyond the value of the right surrendered.<sup>18</sup> And it is hard to justify a legal policy which would protect any further. Indeed, it might be argued, though with less assurance, that the creditor-legatee who, desiring to profit by testator's generosity, deliberately surrenders his preferred position as creditor, knowing that the estate may be insufficient to pay all legacies, should be forced to take the risk of loss along with the chance of gain.<sup>19</sup> As to legacies given for acts and services to be performed after testator's death, it could be argued with equal force that the legatee acts recognizing a possibility of deficiency and so should be held to take subject thereto. However, since such a rule would increase the possibility that a legatee might fail to carry out directions which (as might subsequently be determined by the court) involved services benefiting the estate or intended to be performed in any event,<sup>20</sup> it is suggested that the legatee receive a preference to the extent of the value of the services rendered.

## 2.

The widow taking a legacy in lieu of dower is said to be a purchaser and so entitled to have her legacy free from abatement.<sup>21</sup> Likewise when the legacy is in lieu of a statutory share.<sup>22</sup> Since the preference

99 Tenn. 446, 42 S. W. 9 (1897); *Vinton v. Pratt*, 228 Mass. 468, 117 N. E. 919 (1917) (obiter).

<sup>17</sup> But see *Cole v. Niles*, 3 Hun (10 N. Y. S. Ct.) 326 (1874); and 2 PAGE, WILLS, § 1316 (1926).

<sup>18</sup> It would be natural that the testator did not intend that the creditor lose the pre-existing right for which he rendered services, etc., to the testator. But after that why should we presume that the testator would prefer the creditor to his family, friends, or charities?

<sup>19</sup> This reasoning was employed in *In re Wedmore*, [1907] 2 Ch. 277; and see *Clayton v. Akin*, 38 Ga. 320 (1868).

<sup>20</sup> As might be the case when the legatee was to care for the estate for a time after testator's death [*Estate of Wilson*, 15 Phila. (Pa.) 528 (1882)] or was to care for a helpless dependent [see *In re Dougherty*, 64 Misc. 230, 118 N. Y. S. 1081 (1909); *Estate of Gassman*, 14 Phila. (Pa.) 308 (1881)].

<sup>21</sup> *Burridge v. Brady*, 1 P. Wms. 127, 24 Eng. Rep. 323 (1710) (the original case); *Lord v. Lord*, 23 Conn. 326 (1854); *Overton v. Lea*, 108 Tenn. 505, 68 S. W. 250 (1901); *Borden v. Jenks*, 140 Mass. 563 (1886); *Moore v. Alden*, 80 Me. 301 (1888). And see large number of cases collected in 34 A. L. R. 1247 at 1276 (1925). *Contra*: *Mitchener v. Atkinson*, 62 N. C. 23 (1866); *Hooven's Estate*, 15 Montg. Co. L. Rep. (Pa.) 200 (1899) (no discussion). But the testator may specify against a preference. *Tickel v. Quinn*, 1 Dem. Surr. (N. Y.) 425 (1882).

<sup>22</sup> *Farnum v. Bascom*, 122 Mass. 282 (1877) (husband taking legacy in lieu of statutory share); *McDaniel's Estate*, 9 Pa. Co. Ct. 232 (1890); *Overton v. Lea*,

is based on the fact that the widow has surrendered a valuable right, the testator must have owned dowable lands during the marriage<sup>23</sup> or at his death.<sup>24</sup> The legacy must be expressed to be in lieu of dower,<sup>25</sup> or the will must provide for a disposition inconsistent with a recognition of the dower right.<sup>26</sup> But the widow will also be considered a purchaser if a statute forces her to choose between the legacy and dower.<sup>27</sup> The legacy will be preferred in toto, regardless of the value of the dower right surrendered.<sup>28</sup>

The cases generally explain the grant of preference by stating that the widow is a purchaser, but, as previously suggested, this is merely the statement of a conclusion. A number of cases amplify on this position by finding an intention to prefer, suggesting that testator has, by forcing an election, stated the price to be paid for the dower right—has, so to speak, stated the terms at which he will contract for its release.<sup>29</sup> But since the testator presumably was under the impression that *all* legacies would be paid in full<sup>30</sup> and since no intention to

108 Tenn. 505, 68 S. W. 250 (1901) (statutory dower). *Contra*: Clark v. Clark, 126 Miss. 455, 89 So. 4 (1921).

<sup>23</sup> Perrine v. Perrine, 6 N. J. L. 133 (1822); Roper v. Roper, 3 Ch. Div. 714 (1876) (lands non-dowable by virtue of declaration in deed to testator, effective by virtue of statute); Moore v. Alden, 80 Me. 301 (1888); Acey v. Simpson, 5 Beav. 35, 49 Eng. Rep. 489 (1842).

<sup>24</sup> Overton v. Lea, 108 Tenn. 505, 68 S. W. 250 (1901) (held immaterial that dower right attached only to lands of which testator died seized, since there was still a right to be surrendered, though usually of less value than under the common law). *Contra*: Mitchener v. Atkinson, 62 N. C. 23 (1866).

<sup>25</sup> Kinsey v. Woodward, 3 Del. 459 (1842); Hinson v. Ennis, 81 Ky. 363 (1883).

<sup>26</sup> Warren, Exr. v. Morris, 4 Del. Ch. 289 (1871); Lord v. Lord, 23 Conn. 326 (1854).

<sup>27</sup> Overton v. Lea, 108 Tenn. 505, 68 S. W. 250 (1901); Durham v. Rhodes, 23 Md. 233 (1865); Borden v. Jenks, 140 Mass. 563 (1886); Pope v. Pope, 209 Mass. 432, 95 N. E. 864 (1911). *Contra*: Hinson v. Ennis, 81 Ky. 363 (1883); Mitchener v. Atkinson, 62 N. C. 23 (1866).

<sup>28</sup> In re Brooks' Estate, 2 Con. 172, 10 N. Y. S. 20 (Surr. Ct. 1890); Borden v. Jenks, 140 Mass. 563 (1886); In re Smallman's Will, 138 Misc. 889, 247 N. Y. S. 593 (1931) (dictum); Warren v. Morris, 4 Del. Ch. 289 (1871). *Contra*. Mitchener v. Atkinson, 62 N. C. 23 (1866) (dictum); Mayo v. Bland, 4 Md. Ch. 484 (1851); Dugan v. Hollins, 11 Md. 41 (1857), overruled by dictum in Durham v. Rhodes, 23 Md. 233 (1865). In these *contra* cases the legacy was preferred to the extent of the value of the dower.

<sup>29</sup> “. . . the testator is the only and best judge of the price at which he is desirous to become the purchaser of [the dower right].” 1 ROPER, LEGACIES 433 (1848). “The principle is based upon the idea of contract between husband and wife,” Moore v. Alden, 80 Me. 301 at 305, 14 A. 199 (1888); Blower v. Morret, 2 Ves. Sen. 420, 28 Eng. Rep. 268 (1752); Isenthart v. Brown, 1 Edw. (N. Y. Ch.) 411 (1832); Security Co., Admr. v. Bryant, 52 Conn. 311 (1884).

<sup>30</sup> 2 WILLIAMS, EXECUTORS, 11th ed., 1097 (1930).

prefer can be inferred from the relationship,<sup>31</sup> it can hardly be stated with certainty that testator (had he contemplated this situation) would have been willing to pay the whole price to the comparative disadvantage of other legatees. At least, the extent of the preference presumed can be no more than the value of the relinquished dower right.<sup>32</sup> It has also been suggested that the preference was originally based on the court's inability to measure the value of dower,<sup>33</sup> a reason no longer of any force.<sup>34</sup> The real basis probably is to be found in the desire of the courts to protect the widow from the financial disadvantage which might otherwise result from the ill-advised release of dower in exchange for what turned out to be a less valuable legacy.<sup>35</sup> This would serve to explain a continued retention of the rule, especially since her position is made even more undesirable by statutes giving a very limited time in which to renounce the will.<sup>36</sup> But freedom from abatement in excess of the value of the dower right amounts to an exception to the usual rule that the near relationship of testator and legatee is insufficient basis for the grant of preference.<sup>37</sup>

A discussion of the widow's right, as against creditors of the estate, appears in the notes.<sup>38</sup>

<sup>31</sup> See note 47, *infra*.

<sup>32</sup> It would be reasonable to presume that testator would desire that his widow be given a preference to the value of dower released, else the giving of a legacy might well be nothing less than a trap. But as to the remainder of her legacy there is no basis for supposing that testator would regard her in any different light than the other objects of his bounty.

<sup>33</sup> *In re Wedmore*, [1907] 2 Ch. 277; 2 PAGE, WILLS, § 1316 (1926).

<sup>34</sup> The value of the widow's life estate can readily be determined with the aid of annuity tables.

<sup>35</sup> This reasoning appears in *Lord v. Lord*, 23 Conn. 326 (1854); *Matthews v. Targarona*, 104 Md. 442, 65 A. 60 (1906). And see comment of annotation, 34 A. L. R. 1247 at 1278 (1925).

<sup>36</sup> E.g., see 6 Mass. Ann. Laws (1933), c. 191, § 15 (husband or wife given six months in which to renounce the will); Tenn. Code (1932), § 8358 (section 8361 requires that executor or administrator inform the widow of the condition of the estate at any time within the period for election—one year—if she so requests); 3 Mich. Comp. Laws (1929), § 13086 (one year). On the right of the widow to revoke her election to take under the will, see 81 A. L. R. 740 (1932).

<sup>37</sup> See note 45, *infra*.

<sup>38</sup> Normally all legacies are deferred to the payment of the debts of the estate [3 WOERNER, AMERICAN LAW OF ADMINISTRATION, § 451 (1923)], but the law's solicitude for the widow's welfare may have changed the rule in this situation in some states. Although there is some contrary authority [*Isenthart v. Brown*, 1 Edw. (N. Y. Ch.) 411 (1932); 2 PAGE, WILLS, § 1316 p. 2192 (1926)] there are a number of cases holding that the widow's legacy in lieu of dower will be preferred to the claims of creditors to the extent of the value of the dower interest surrendered [*Margaret Hall's Case*, 1 Bland (Md. Ch.) 203 (1827); *Tracy v. Murray*, 44 Mich. 109 (1880); *Green v. Saulsbury*, 6 Del. Ch. 371 (1880) (legacy preferred to creditor's claims unless so disproportionate to dower as to constitute fraud on the creditors)];

## 3.

It is generally stated that a legacy based on a moral obligation will not be accorded a preference.<sup>39</sup> The majority of cases appear to support this position,<sup>40</sup> but there are a few cases in which legacies of this type have been preferred.<sup>41</sup> And the writer questions whether the rule has been properly stated. The question usually arises in cases where the testator has accompanied the grant of the bequest with some mention of exceptional attention or services rendered for him by the legatee,<sup>42</sup> probably included to explain why the legacy was given. An examination will show that the above stated rule has evolved in cases in which the legatee vainly attempted to prove a consideration for the bequest, or relied on the statement in the will to establish it.<sup>43</sup> In other words, the rule merely stands for the proposition that when testator makes mention of an obligation which the law construes as being only "moral," that statement will not be sufficient to make the legatee a "purchaser." But it is essential to distinguish the mere mention in the will of a situation which the *law* construes as creating a moral obligation, from the case in which the *testator* plainly showed that he felt himself morally bound to give the legacy. When such a sense of obligation is definitely expressed, and the testator considers the legacy as more than an evidence of appreciation, the legacy should be preferred because the testator would have so desired.<sup>44</sup> A refusal

Borden v. Jenks, 140 Mass. 563 (1886) (dictum); Clayton v. Akin, 38 Ga. 320 (1868)]. In Tracy v. Murray, *supra*, the court held that the widow was to be treated like any other creditor of the estate. Although these cases constitute a violent departure from the usual order of marshalling of assets, it is a logical extension of the policy which favors the widow so completely over other legatees, and when so restricted as not to be prejudicial to the creditors' interests is not open to any serious objections.

But other legacies given for a valuable consideration are deferred to the claims of creditors. See note 16, *supra*.

<sup>39</sup> Cases collected in 34 A. L. R. 1247 at 1288 (1925).

<sup>40</sup> Buchanan v. Pue, 6 Gill (Md.) 112 (1847); Towle v. Swasey, 106 Mass. 100 (1870); Koontz v. Hubley, 111 Ohio St. 414, 145 N. E. 590 (1924); Duncan v. Inhabitants of Franklin Township, 43 N. J. Eq. 143 (1887); Matthews v. Targarona, 104 Md. 442, 65 A. 60 (1906).

<sup>41</sup> Owens v. Citizens' & So. Nat. Bank, 177 Ga. 289, 170 S. E. 196 (1933). And see McLean v. Robertson, 126 Mass. 537 (1879); Mayer's Estate, 289 Pa. 407, 137 A. 627 (1927) (an extreme case).

<sup>42</sup> As in Koontz v. Hubley, 111 Ohio St. 414 at 420, 145 N. E. 590 (1924) (legacy given "in consideration of [legatee's] long and faithful services").

<sup>43</sup> Koontz v. Hubley, 111 Ohio St. 414, 145 N. E. 590 (1924); Matthews v. Targarona, 104 Md. 442, 65 A. 60 (1906); Duncan v. Inhabitants of Franklin Township, 43 N. J. Eq. 143 (1887).

<sup>44</sup> As in Owens v. Citizens' & So. Nat. Bank, 177 Ga. 289, 170 S. E. 196 (1933) (where testator plainly showed that he felt himself to be morally bound to give the legacy). And see cases in note 41, *supra*. The chief difficulty lies in determin-



to do so would appear to be nothing less than to ignore testator's probable wish, the result of an unwarranted application of the rule governing legacies for value.

## 4.

The fact of near-relationship of testator and legatee is not of itself sufficient to create a preference.<sup>45</sup> But if it can be shown that the legacy is for the maintenance and support of a dependent near relative<sup>46</sup> or member of testator's immediate family,<sup>47</sup> or for the education of a near relative,<sup>48</sup> the legacy will not abate as against other legacies of the same class. It is probably not necessary that the legacy be stated to be for support,<sup>49</sup> nor will it necessarily be preferred though ex-

ing whether the language in the will merely expresses appreciation for acts done and an intent to reward kindness with kindness, or shows that testator felt himself morally bound to grant the legacy. The distinction between these two states of mind is very slight, and may be too attenuated to gain recognition by the courts. Indeed, the Owens case is the only one which would seem to support either the distinction suggested or the proposed rule appearing in the text. It must be apparent that mere formal language of appreciation—such as "for services rendered"—would be insufficient to show a compelling sense of obligation.

<sup>45</sup> *Parsons v. Reel*, 150 Iowa 230, 129 N. W. 955 (1911); *Chemical Bank & Trust Co. v. Barnett*, 114 N. J. Eq. 4, 168 A. 173 (1933). See list of English and American cases collected in 34 A. L. R. 1247 at 1263 (1925). The reason for denying a preference was ably stated in the leading English case of *Miller v. Huddleston*, 3 Mac. & G. 513, 42 Eng. Rep. 358 (1851), where the court suggested that there might be "many cases in which to give priority on the ground of propinquity would be to do what in all probability would be most foreign to the intention of a testator. Take, for example, the common instance of a legacy of a large sum to a child, and another legacy of a smaller sum to an aged relation, or another legacy of a still smaller sum . . . to an old servant. . . ." However, near relationship is frequently a factor in determining a preference. See, for example, *In re Elmore's Estate*, 292 Pa. 571, 141 A. 478 (1928); *McGoldrick v. Bodkin*, 140 App. Div. 196, 125 N. Y. S. 101 (1910); *In re Mold's Will*, 117 Misc. 1, 190 N. Y. S. 439 (1921). And occasionally a case appears in which the court bases a preference on other grounds, but quite obviously has allowed the fact of relationship to influence the decision. *Benton v. Friar*, 171 Miss. 361, 157 So. 356 (1934); *Armentrout v. Armentrout*, 111 Va. 348, 69 S. E. 333 (1910).

<sup>46</sup> *Richardson v. Bowen*, 18 R. I. 138 (1893) (aged brother); *In re Helliesen's Estate*, 149 Misc. 184, 266 N. Y. S. 792 (1933) (dependent sisters); *Chester County Hospital v. Hayden*, 83 Md. 104, 34 A. 877 (1896) (father).

<sup>47</sup> *In re Day's Will*, 150 Misc. 691, 271 N. Y. S. 170 (1934) (husband); *In re Dougherty*, 64 Misc. 230, 118 N. Y. S. 1081 (1909) (stepson); *In re Helliesen's Estate*, 149 Misc. 184, 266 N. Y. S. 792 (1933) (wife and children); *Towle v. Swasey*, 106 Mass. 100 (1870) (adopted son); *In re Neil's Estate*, 238 N. Y. 138, 144 N. E. 481 (1924) (children).

<sup>48</sup> *Petrie v. Petrie*, 7 Lansing (N. Y. S. Ct.) 90 (1872).

<sup>49</sup> See *Harris v. Ross*, 57 N. C. 413 (1859); *Richardson v. Bowen*, 18 R. I. 138 (1893); *In re Robitzek's Estate*, 157 Misc. 68, 282 N. Y. S. 885 (1935). This is a point upon which there may be some doubt. The annotator in 34 A. L. R. 1247 at 1266 (1925) states (citing mostly New York cases) as a requirement for preference that the legacy must be expressed to be for support and maintenance, and from the

pressly given for that purpose.<sup>50</sup> Rather, preference is dependent upon a showing, based on extrinsic evidence as to the legatee's present financial condition, that the bequest is actually necessary for his adequate support.<sup>51</sup> As previously indicated, a preference may be given to a dependent near relative as well as to members of the immediate family. In Massachusetts, however, the grant of preference is limited to those dependent legatees to whom testator owes a "natural obligation" to support;<sup>52</sup> and from the dictum in a recent case<sup>53</sup> it appears that not only is the grant confined to members of the immediate family, but perhaps also to those whom testator would be legally bound to support, were he still living.<sup>54</sup>

Again, the basis for the preference appears to be one of policy. It is frequently alleged that it rests on the presumed intention of the testator to prefer those legatees dependent on him.<sup>55</sup> But an examination

language of Judge Andrews in *In re Neil's Estate*, 238 N. Y. 138, 144 N. E. 481 (1924), the need for such provisions might well be inferred. Although such requirement seems to have existed in the early New York cases, an examination of those more recent indicates that no such requirement exists, and that the alleged intention may be wholly based on external circumstances. In *re Baker's Will*, 157 Misc. 904, 284 N. Y. S. 751 (1935); In *re Robitzek's Estate*, supra; In *re Day's Will*, 150 Misc. 691, 271 N. Y. S. 170 (1934).

<sup>50</sup> *Quinlan v. Fegan*, 267 Mass. 291, 166 N. E. 756 (1929); In *re Wenner*, 125 App. Div. 358, 110 N. Y. S. 694 (1908).

<sup>51</sup> In *re Neil's Estate*, 238 N. Y. 138, 144 N. E. 481 (1924), appearing in the lower courts in 117 Misc. 498, 191 N. Y. S. 362 (1921), and 205 App. Div. 605, 200 N. Y. S. 160 (1923); *Babbidge v. Vittum*, 156 Mass. 38, 30 N. E. 77 (1892); In *re Trimbe's Estate*, 152 Misc. 344, 273 N. Y. S. 957 (1934); In *re Wenner*, 125 App. Div. 358, 110 N. Y. S. 694 (1908); In *re Wait's Estate*, 148 Misc. 920, 266 N. Y. S. 587 (1933). But see dictum in *Chemical Bank & Trust Co. v. Barnett*, 114 N. J. Eq. 4, 168 A. 173 (1933), to the effect that legatee's dependence on testator will not raise a presumption of intent to prefer.

<sup>52</sup> *Towle v. Swasey*, 106 Mass. 100 (1870); *Babbidge v. Vittum*, 156 Mass. 38, 30 N. E. 77 (1892).

<sup>53</sup> *Quinlan v. Fegan*, 267 Mass. 291, 166 N. E. 756 (1929). Cf. In *re Gibson's Will*, 166 App. Div. 1, 151 N. Y. S. 459 (1915), reaching an opposite result on nearly identical facts.

<sup>54</sup> The court in refusing a preference to legacy given for the support and maintenance of testator's grown and able-bodied son and his family said in *Quinlan v. Fegan*, 267 Mass. 291 at 295, 166 N. E. 756 (1929): "The evidence . . . falls far short of showing any natural obligation upon the testator to provide for them. . . . [And] neither dependence upon the testator, if it had existed, nor relationship by blood and connection by marriage with him, which did exist, would raise any implication that he intended that the legacy in question should be given priority. . . ." It may be that the suggestion in the text is a bit extreme, but the writer wished to call attention to the narrowed application of the rule toward which the dictum in this case tends.

<sup>55</sup> Some cases say that the testator is presumed to have intended to prefer. Others say that the presumption is that he would have so intended had he known of the

of the cases will show that the grant of preference depends largely on the court's opinion as to the legatee's financial condition and needs;<sup>56</sup> and that the legacy will abate if the court decides that the legatee has other adequate means of support<sup>57</sup> and will not be accorded a preference, if after abatement, it will still be large enough to provide for legatee's support.<sup>58</sup> Not only may the court prefer so much of the legacy as seems proper,<sup>59</sup> but it has even been held that it may remake the will to the extent of preferring a residuary legacy to testator's dependents, over general legacies.<sup>60</sup> Although such a viewpoint has been emphatically denounced,<sup>61</sup> it would seem to be the more realistic approach to admit frankly as did Justice Holmes in the Massachusetts case of *Babbidge v. Vittum*,<sup>62</sup> that the rule is not based on an expressed or conjectured intent,<sup>63</sup> but on a humane policy of law which seeks, so far as possible, to prevent the shrinkage of testator's estate from jeopardizing the physical well-being and security of his dependents.<sup>64</sup>

## 5.

The cases are in conflict as to whether legacies for the care of a cemetery lot will be preferred.<sup>65</sup> The fact that the legacy is directed

deficiency. Which view is adopted is immaterial, since both have no basis other than conjecture.

<sup>56</sup> In re Porter's Estate, 151 Misc. 179, 271 N. Y. S. 233 (1934) [where, after showing that the widow would be amply provided for even though her legacy were abated, the court said (at p. 181): "In the opinion of the court, the testator herein believed that the necessities of the widow were adequately provided for by him by other means than the general legacy. . . ."]; In re Wait's Estate, 148 Misc. 920, 266 N. Y. S. 587 (1933); In re Lloyd, 87 Misc. 503, 149 N. Y. S. 922 (1914). And see note 51, supra.

<sup>57</sup> See note 56, supra.

<sup>58</sup> *Babbidge v. Vittum*, 156 Mass. 38, 30 N. E. 77 (1892).

<sup>59</sup> *Towle v. Swasey*, 106 Mass. 100 (1870); *Estate of John Barry*, 13 Phila. (Pa.) 310 (1880) (dictum).

<sup>60</sup> In re Clarke's Estate, 158 Misc. 830, 286 N. Y. S. 968 (1936).

<sup>61</sup> In re Neil's Estate, 205 App. Div. 605, 200 N. Y. S. 160 (1923), the court said (at p. 609): "The court is not at liberty to say that because in its judgment such other provision is inadequate, a preference was intended. . . . We are not authorized to make or revise wills either to conform to our judgment or to human conditions . . . . We are to determine his [testator's] intention and effectuate it."

<sup>62</sup> 156 Mass. 38, 30 N. E. 77 (1892).

<sup>63</sup> 156 Mass. 38 at 46, 30 N. E. 77 (1892): "[That priority] does not go on any expressed or conjectured actual intent of the testator, but simply on a presumption, to prevent the failure to discharge a natural obligation."

<sup>64</sup> On this subject see note in 3 Wis. L. REV. 108 (1924).

<sup>65</sup> Legacy not abated: *Meetkirk's Estate*, 118 Pa. Super. 562 (1935); In re Dougherty, 64 Misc. 230, 188 N. Y. S. 1081 (1909); In re McArdle's Will, 147 Misc. 876, 264 N. Y. S. 764 (1933); In re Hinman's Will, 32 Misc. 536, 67 N. Y. S. 459 (1900). And see *Bartlett v. Houdlette*, 147 Mass. 25, 16 N. E. 740

to be applied to the care of graves other than testator's is probably of no consequence either way.<sup>66</sup> None of the cases found contain any adequate discussion of the basis for their grant or refusal of priority. The more recent New York cases uniformly prefer legacies for the care of testator's own grave on the basis of a statute<sup>67</sup> providing for the payment of a reasonable funeral expense.<sup>68</sup> They have included as a "reasonable funeral expense," legacies given for masses or prayers to be said for testator.<sup>69</sup> A legacy for the annual purchase of flowers for testator's grave has also been preferred.<sup>70</sup> The New York decisions, in applying the statute, in effect class the legacy as a claim against the estate rather than as a preferred legacy.

The fact that a legacy is for charitable purposes is insufficient ground for according a preference to it.<sup>71</sup>

There appears to be some slight justification for believing that a court may possibly decline to abate provisions for a memorial for testator or near relatives. Legacies to provide headstones for the graves of near relatives have been allowed a priority.<sup>72</sup> But more significant are two recent cases in which legacies given to provide for hospital beds in memory of testator and wife<sup>73</sup> and testatrix' mother<sup>74</sup> were pre-

(1888). *Contra*: Wolfersberger's Estate, 15 Pa. Co. Ct. 395 (1894); *Ellis v. Aldrich*, 70 N. H. 219, 47 A. 95 (1899); *Petition of Cain*, (N. H. 1935) 179 A. 347.

<sup>66</sup> In all except the Wolfersberger and Ellis cases (see note 65, supra), it plainly appeared that the bequest was for the care of the family burying plot, but that fact was not commented on in the decisions. The writer suggests that the courts might well grant and limit the preference to provisions for the care of testator's own grave and could find an adequate basis for this, either in policy or presumed intention.

<sup>67</sup> N. Y. Surrogate Court Act, § 216, N. Y. Civ. Prac. (Cahill 1931), p. 800.

<sup>68</sup> In *re Delafield's Will*, 142 Misc. 536, 255 N. Y. S. 85 (1932); In *re Collins' Estate*, 156 Misc. 783, 282 N. Y. S. 728 (1935); In *re Baker's Will*, 157 Misc. 904, 284 N. Y. S. 751 (1935). That the court will not examine into the reasonableness of the amount of the legacy: In *re Meek's Estate*, 113 Misc. 301, 184 N. Y. S. 693 (1920). *Contra*: In *re Randolph's Will*, 146 Misc. 879, 262 N. Y. S. 868 (1933).

<sup>69</sup> In *re Sharff's Estate*, 136 Misc. 627, 241 N. Y. S. 661 (1930) (prayers); In *re McArdle's Will*, 147 Misc. 876, 264 N. Y. S. 764 (1933) (masses). *Contra*: In *re Werrick's Estate*, 135 Misc. 876, 239 N. Y. S. 740 (masses).

<sup>70</sup> In *re Trimby's Estate*, 152 Misc. 344, 273 N. Y. S. 957 (1934).

<sup>71</sup> See cases collected in 34 A. L. R. 1247 at 1275 (1925).

<sup>72</sup> *Wood v. Vandeburgh*, 6 Paige (N. Y. Ch.) 277 (1836) (for parents); In *re McArdle's Will*, 147 Misc. 876, 264 N. Y. S. 764 (1933) (for mother); *Masters v. Masters*, 1 P. Wms. 421, 24 Eng. Rep. 454 (1717) (same); but see *Blackshaw v. Rogers*, cited in *Simmons v. Vallance*, 4 Bro. C. C. 346, 29 Eng. Rep. 927 (1793). In *Apreece v. Apreece*, 1 Ves. & B. 364, 35 Eng. Rep. 142 (1813), a legacy for a mourning ring was abated.

<sup>73</sup> In *re Sharff's Estate*, 136 Misc. 627, 241 N. Y. S. 661 (1930). Cf. *Wetmore v. St. Luke's Hospital*, 56 Hun 313, 9 N. Y. S. 753 (1890), and In *re Gan's Will*, 130 App. Div. 454, 114 N. Y. S. 975 (1909).

<sup>74</sup> *Meetkirk's Estate*, 118 Pa. Super. 562 (1935).

ferred because they were for memorials. In *Meekirk's Estate*, the latter case, it was distinctly stated as one ground for priority that the court would presume an intention to prefer such a memorial over legacies to friends and relatives.

## 6.

As previously indicated,<sup>75</sup> pecuniary legacies are, in many situations, not chargeable on residuary realty. But the overwhelming weight of authority is to the effect that if realty and personalty are blended in the residuary clause, the legacies are a charge on the realty.<sup>76</sup> It does not appear that any particular form of language must be used,<sup>77</sup> although the conventional gift of "rest, residue and remainder" appears most frequently. Since most of the cases charge the legacies on the residuary realty without comment, the basis on which the court proceeds often cannot be determined. However, two explanations have appeared or are deducible. First, it is suggested that the testator shows an intention to charge by the use of such words as "residue" or "remainder," it being argued that such language implies a subtraction and that the "residue" or "remainder" cannot be determined until all previous charges have been deducted.<sup>78</sup> The difficulty is that the testator is presumed not to have anticipated an insufficiency of assets<sup>79</sup> and so could hardly be held to have contemplated such subtraction. The more common explanation emphasizes the fact that the realty is given

<sup>75</sup> Notes 3 and 4, supra.

<sup>76</sup> In re Estate of Schwartz, 275 Ill. App. 374 (1934); In re Reel's Estate, 266 Pa. 221, 109 A. 845 (1920); Jackson v. Lane, 213 Ala. 344, 105 So. 223 (1925); Marcy v. Graham, 142 Va. 285, 128 S. E. 550 (1925); Henderson v. Potter's Orphan Home, 99 W. Va. 46, 127 S. E. 725 (1925); Haldeman v. Openheimer, 103 Tex. 275, 126 S. W. 566 (1910); In re Bawden, [1893] 1 Ch. 693. *Contra*: Brill v. Wright, 112 N. Y. 129, 19 N. E. 628 (1889) (leading New York case); In re Parker's Estate, 151 Misc. 394, 273 N. Y. S. 86 (1934); Dey v. Dey's Admr., 19 N. J. Eq. 137 (1868) ("blending" only a factor), but see Corwine v. Corwine, 24 N. J. Eq. 579 (1874), and Shannon v. Ryan, 91 N. J. Eq. 491, 111 A. 155 (1920). Under the New York rule as first laid down in Lupton v. Lupton, 2 Johns. (N. Y. Ch.) 614 (1817), the residuary realty is chargeable with pecuniary legacies if, prior to the residuary clause, there appears a direction that debts and legacies be paid. See also Finch v. Hall, 24 Hun (31 N. Y. S. Ct.) 226 (1881); Shulters v. Johnson, 38 Barb. (N. Y. S. Ct.) 80 (1862).

<sup>77</sup> In re Bawden, [1893] 1 Ch. 693. Here the residuary clause bequeathed "all the real and personal estate . . . not otherwise disposed of."

<sup>78</sup> Corwine v. Corwine, 24 N. J. Eq. 579 (1874); Henderson v. Potter's Orphan Home, 99 W. Va. 46, 127 S. E. 725 (1925); Haldeman v. Openheimer, 103 Tex. 275, 126 S. W. 566 (1910); In re Reel's Estate, 266 Pa. 221, 109 A. 845 (1920); Mirehouse v. Scaife, 2 My. & Cr. 695, 40 Eng. Rep. 805 (1837).

<sup>79</sup> 2 WILLIAMS, EXECUTORS, 11th ed., 1097 (1930).

by the same bequest as the residuary personalty,<sup>80</sup> the courts considering that by placing the two in the same clause, testator manifests an intention that they be "blended" or treated as a unit: since the legacies are chargeable on the personalty,<sup>81</sup> they must be charged on the realty as well. But it is hardly realistic to maintain that testator, in employing this conventional method of avoiding possible partial intestacy, had any "intention" on the subject. The result might better be explained as an extension, by the courts, of the rule charging legacies on residuary personalty.

## 7.

Pecuniary legacies will also be payable out of residuary realty if, at the time the will was made,<sup>82</sup> there was insufficient personalty to pay all such bequests. This deficiency may result from an actual shortage of personalty,<sup>83</sup> from the fact that the general residuary clause appears in the will prior to the clause granting the legacies,<sup>84</sup> or from the grant, in another part of the will, of a power of consumption which may result in a deficiency by the time a deferred legacy becomes payable.<sup>85</sup> The testator must have known of the deficiency, and although such knowledge will be presumed, the courts will indulge in such a presumption only if the deficiency existing at the time was substantial,<sup>86</sup> and there must have been no likelihood that testator would be

<sup>80</sup> *In re Estate of Schwartz*, 275 Ill. App. 374 (1934); *Rinehart v. Rinehart*, 98 W. Va. 93, 126 S. E. 402 (1925); *Wheeler v. Howell*, 3 K. & J. 198, 69 Eng. Rep. 1079 (1857). To the effect that the realty will not be charged if given in separate residuary clause: *Armentrout v. Armentrout*, 111 Va. 348, 69 S. E. 333 (1910); *Brennan v. Adler*, 190 App. Div. 589, 180 N. Y. S. 359 (1920). As to whether residuary realty will be chargeable if there is a specific direction that legacies be paid from personalty, see note in 26 A. L. R. 648 (1923).

<sup>81</sup> See 2 PAGE, WILLS, § 1264 (1926).

<sup>82</sup> *Carley v. Harper*, 219 N. Y. 295, 114 N. E. 351 (1916), suggested that a deficiency arising subsequent to the making of the will might create a charge on the residuary realty. Such was the result in *Scott v. Stebbins*, 91 N. Y. 605 (1883), but overruled by *Morris v. Sickly*, 133 N. Y. 456 (1892); and see also *McGoldrick v. Bodkin*, 140 App. Div. 196, 125 N. Y. S. 101 (1910).

<sup>83</sup> *In re Rodgers' Estate*, 147 Misc. 344, 264 N. Y. S. 624 (1933) (\$3,600 personalty; \$16,000 legacies); *Fecht v. Henze*, 162 Mich. 52, 127 N. W. 26 (1910) (\$1,400 personalty; \$8,000 legacies); *Ellet v. McCord*, (Tex. Civ. App. 1931) 41 S. W. (2d) 110; *Ely v. Ely*, 163 App. Div. 320, 148 N. Y. S. 691 (1914), *affd.* 219 N. Y. 112, 113 N. E. 800 (1916).

<sup>84</sup> *Knepper v. Knepper*, 103 Ohio St. 529, 134 N. E. 476 (1922); *Lee v. Smith*, 84 Va. 289, 4 S. E. 717 (1888); *Parkes v. Aldridge*, (C. C. N. J. 1881) 8 F. 220.

<sup>85</sup> *Smith v. Bush*, 59 Misc. 648, 111 N. Y. S. 428 (1908) (where legacies were made payable at widow's death, and widow had power to consume personalty if necessary for support).

<sup>86</sup> *In re Lang's Estate*, 156 Misc. 688, 282 N. Y. S. 395 (1935) (\$4200 personalty with which to pay debts and \$4000 legacies; held, no intention to charge realty); *In re Dolley's Estate*, 153 Misc. 533, 275 N. Y. S. 463 (1934) (15%

able to remedy the deficiency before his death.<sup>87</sup> There is present an implied assumption that testator, in determining the then value of his estate, took into account the debts for which his estate might be held. The rule is based on the presumed knowledge of the deficiency, it being argued that if testator knew he had insufficient personalty to pay all legacies he must necessarily have intended to charge the realty, else he had provided for legacies which he knew could not be paid; and the court will not conclude that he intended to indulge in such an empty formality or "mockery."<sup>88</sup>

## 8.

Since there is little case material from which to determine to what extent and in what order the various types of preferred legacies will abate among themselves, no attempt will be made to make any statement beyond a summary of the results of the cases. The legacy in lieu of dower appears to be the most favored; for not only has a general legacy of that type been preferred to specific legacies and devises,<sup>89</sup> but also to legacies for support and maintenance.<sup>90</sup> Legacies for consideration have been held chargeable on residuary realty<sup>91</sup> and given the same preference as legacies for support and maintenance and for pious purposes.<sup>92</sup> As to legacies for support, the rights of dependent

deficiency showed no intention to charge, when there was possibility of remedying the shortage); *Briggs v. Carroll*, 117 N. Y. 288 at 292, 22 N. E. 1054 (1889) (dictum: "The deficiency must . . . be so great and obvious as to preclude any possible inference that the testator did not realize it. . . .")

<sup>87</sup> *In re Dolley's Estate*, 153 Misc. 533, 275 N. Y. S. 463 (1934); *Briggs v. Carroll*, 117 N. Y. 288 at 292, 22 N. E. 1054 (1889) (dictum: "If the disparity is . . . such that he might be reasonably expected to repair the deficiency before his death, the ground for inferring an intention to charge the land would disappear").

<sup>88</sup> *McCorn v. McCorn*, 100 N. Y. 511 at 513, 3 N. E. 480 (1885): "the two legacies . . . were mere mockeries unless meant to be a charge upon real estate. The testator must have known that he had no personal estate with which to pay the smallest portion of his bequests and unless he meant to charge them upon the land we must impute to him the deliberate and conscious intention of making bequests . . . which he knew could never be paid." And see *McGoldrick v. Bodkin*, 140 App. Div. 196, 125 N. Y. S. 101 (1910); *Ely v. Megie*, 219 N. Y. 112, 113 N. E. 800 (1910); *Fecht v. Henze*, 162 Mich. 52, 127 N. W. 26 (1910).

<sup>89</sup> *Overton v. Lea*, 108 Tenn. 505, 68 S. W. 250 (1901); *Clayton v. Akin*, 38 Ga. 320 (1868); *Borden v. Jenks*, 140 Mass. 562, 5 N. E. 623 (1886) (preferred over specific legacy). *Contra*: *In re Kiekebusch's Estate*, 244 N. Y. 236, 155 N. E. 110 (1926); *Boykin v. Boykin*, 21 S. C. 513 (1884); *Morse v. Hayden*, 82 Me. 227, 19 A. 443 (1890). In *Snyder v. Warbasse*, 11 N. J. Eq. 463; (1857), the nature of the legacy was held to be only a factor in charging residuary realty.

<sup>90</sup> *In re Smallman's Will*, 138 Misc. 889, 247 N. Y. S. 593 (1931) (dictum). And see *Security Co., Admr. v. Bryant*, 52 Conn. 311 (1885).

<sup>91</sup> *Koontz v. Hubley*, 111 Ohio St. 414, 145 N. E. 590 (1924) (dictum).

<sup>92</sup> *In re Dougherty*, 64 Misc. 230, 118 N. Y. S. 1081 (1909).

near relatives and family members are the same,<sup>93</sup> and have been held equal to legacies for a consideration and for cemetery upkeep.<sup>94</sup> And the fact of the near relation of testator and legatee has been held to be a factor in charging the residuary realty.<sup>95</sup>

The preceding material would seem to demonstrate that these additional rules affecting the order of abatement have not, in the main, been formulated to effectuate the necessarily conjectural intention of the testator, but have instead been developed to carry out a distribution which, in view of the change in circumstances, appears to the courts to be fair and reasonable.

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<sup>93</sup> In re Helliesen's Estate, 149 Misc. 184, 266 N. Y. S. 792 (1933) (legacies for support of wife and children and of aged sisters both preferred).

<sup>94</sup> In re Dougherty, 64 Misc. 230, 118 N. Y. S. 1081 (1909).

<sup>95</sup> Turner v. Gibb, 48 N. J. Eq. 526, 22 A. 580 (1891); Scott v. Stebbins, 91 N. Y. 605 (1883).