

California Law Review

VOL. 52

DECEMBER 1964

No. 5

Stare Decisis and Rules of Construction in Wills and Trusts

*Edward C. Halbach, Jr.**

CERTAIN TRADITIONAL NOTIONS about the role of precedent in property law have obstructed the development of workable rules for construing donative instruments. The law of future interests undoubtedly suffers most, but the consequences of these attitudes are reflected throughout American property law.¹ Even advocates of a flexible approach to precedent in other areas of the law frequently acknowledge that their comments are not meant to apply to property and commercial law.² The thesis of this Article is that such a concession is neither necessary nor justifiable.

The case for judicial correction of unsound precedents is particularly forceful in the construction of wills, trusts, and other donative instruments. General legislative disinterest in these matters is one factor to be considered,³ but more important is that rules of construction characteristically yield to findings of contrary intention, thereby providing a "backdoor" that courts understandably use as a means of avoiding disfavored presumptions of intent. The result is that realization of the objectives of stare decisis depends on the soundness of precedent. Stability, reasonable certainty, simplicity, and impersonality in adjudication, and other expected advantages of adhering to precedent are impaired by frequent resort to the constructional backdoor of "dis-

* B.A., 1953, J. D., 1958, State University of Iowa; LL.M., 1959, Harvard University; Professor of Law, University of California, Berkeley.

¹ "[O]n the whole, the face of the law is profoundly changed in every century, and certainly within a brief period measured by national history. It is often said that our common law is what Coke said, and that it especially includes his errors. That is true of some doctrines applied to real property, but in almost everything else, Coke would scarcely have recognized the law we apply as something with which he ever had any concern." Radin, *The Trail of the Calf*, 32 CORNELL L.Q. 137, 150 (1946).

² See, e.g., Davis, *The Future of Judge-Made Public Law in England: A Problem of Practical Jurisprudence*, 61 COLUM. L. REV. 201, 213 (1961). See also Collopy v. Newark Eye & Ear Infirmary, 27 N.J. 29, 42, 141 A.2d 276, 283 (1958).

³ "[T]he legislature is slow in dealing with defects in law governing the relations of man and man and has been increasingly disinclined to trouble itself with what is called 'lawyer's law.'" Pound, *What of Stare Decisis?* 10 FORDHAM L. REV. 1, 12 (1941).

covered intention." At the same time, absence of predictability under unsound rules minimizes the reliance factor as an obstacle to overruling.

This Article is concerned with the judicial method appropriate in dealing with rules of construction, as distinguished from procedural rules, such as those for determining when and to what extent courts may receive extrinsic evidence, which govern the process of interpretation. Although it has become fashionable in the property fields not to distinguish between construction and interpretation,⁴ for present purposes the distinction is significant. To distinguish the two processes, but without suggesting that they can be separated, it may be said that interpretation seeks essentially to reconstruct the transferor's circumstances and state of mind and to discover his actual intention through examination of extrinsic evidence, and that rules of construction operate when interpretation fails to produce an answer. Furthermore, this discussion relates specifically to rules for construing dispositive provisions, rather than attempting directly to deal with various so-called rules of property closely associated with construction but applicable despite a transferor's clearly contrary intention, such as the Rule in Shelley's Case, or with rules of administration, such as those governing questions of principal and in-

⁴ *E.g.*, 3 RESTATEMENT, PROPERTY § 241, comment *e* (1940). The distinction, abandoned in the third edition of *Page on Wills*, has been restored in the recent revision. See 4 BOWE-PARKER, PAGE ON WILLS § 30.3 (Rev. ed. 1961).

Compare RHEINSTEIN, CASES ON DECEDENTS' ESTATES 387-89 (2d ed. 1955):

This indiscriminate use [of "construction" and "interpretation"] is not necessarily the result of confusion; the distinction may rather be regarded as useless or as being impossible of application. So acute a thinker as Richard R. Powell, for instance, has expressed himself as follows:

"... I have found no necessity for, or helpfulness in, the making of a distinction between 'interpretation' and 'construction.' Either word can properly be used to denote the two-step process of first deriving the separate ideas sought to be communicated by the draftsman of the instrument, and second, of grinding and burnishing these component parts so that they become units in a coherent entity." [Powell, *Construction of Written Instruments*, 14 IND. L.J. 199, 201-03 (1939).]

With the gist of this statement we cannot quarrel. Clearly, when we search for the testator's actual meaning, we must not take up singly every word, phrase or sentence used by him, but we must read his instrument as a—supposedly—coherent whole. A distinction between "interpreting" words and "construing" a total instrument would, indeed, be fatuous. But the distinction between *clarification* of the testator's actual intentions, and legal or judicial *supplementation* of his dispositions is of a different kind and is not refuted by Professor Powell's argument.

The historical reason why the distinction here made has not only been obfuscated but actually resented seems to us to consist in the reluctance of courts to concede that, in dealing with wills, contracts, deeds and other private transactions, they are ever doing anything but carrying out the intentions of the private parties concerned. This judicial reluctance has deep-seated reasons which are the same as those by which courts have so generally been motivated to hide their considerations of policy and expediency behind a screen of apparently cogent derivation of practical conclusions from theoretical concepts.

come, even though those rules involve significant constructional ingredients in that the properly discoverable intention of the transferor generally controls. Even if what is said here has some relevance to judicial method in these related areas, basic differences in the character of these rules and the problems they deal with introduce different considerations.⁵ Finally, references to rules of construction are to *specific* rules prescribing particular results for particular recurring situations, as distinguished from the general principles or "constructional preferences" from which specific rules are developed. The assertion that constructional rules are often found in opposing pairs,⁶ supporting whichever result a court chooses to reach, properly relates to these constructional preferences rather than to specific rules of construction. That assertion is really little more than recognition of what is true of legal problems generally: their solutions involve a weighing of competing considerations, sometimes striking an uneasy balance. This should not produce the type of unpredictability of result suggested by charges that these opposed "rules" are but post-decisional rationalizations. Viewed as the ingredients of specific rules, constructional preferences are a basis for developing sound specific rules of construction which do not—or at least should not—run in opposed pairs.

The principal contentions of this Article may be summarized briefly. The first is that many recurring types of construction cases should be resolved by resort to rule, rather than by a particularistic, case-by-case approach which falsely claims to discover actual intention. This position is based only in part on the belief that decision by rule minimizes costly and fruitless litigation. It is primarily based on the conviction that in many situations the most likely route to appropriate results in individual cases is through the consistent application of sound rules of construction. This is because a particular, recurring problem of construction so often involves policy factors and strong probabilities of intention which coincide sufficiently to make one construction, in terms of the results it tends to produce, distinctly preferable to other permissible constructions.

Second, especially because of the peculiar constructional backdoor of "discovered" contrary intention, adherence to unsound constructional

⁵ While any attempt to review these differences briefly would be more misleading than helpful, an example is the greater likelihood of reliance on a "rule of property law" than on a rule of construction. See, e.g., *Rubenser v. Felice*, 58 Wash. 2d 862, 872, 365 P.2d 320, 325-26 (1961) (the dealings in the property are described in the dissenting opinion), involving the Rule in *Shelley's Case*.

⁶ See, e.g., Simes, Knouff, and Leonard, *The Meaning of "Heirs" in Wills—A Suggestion in Legal Method*, 31 MICH. L. REV. 356, 358 (1933). Compare "Thrust and Parry" in Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401-06 (1950).

precedent cannot be justified in the name of stare decisis. In fact, to stand on unsound rules of construction is to forfeit the expected advantages of a practice of adhering to precedent. When a presumption conflicts with common sense, adherence to the rule becomes largely nominal; litigation is invited, and results contrary to the rule are frequent and based on unpersuasive details of particular cases. This produces a pattern of actual decision that is irregular and unpredictable. In fact, it is the hallmark of an unsound rule that it yields to faint indications of contrary intention. Actual decision by rule and fulfilment of the objectives of stare decisis thus depend on the existence of reasonably sound rules which courts can accept.

Finally, despite the usual assumption that reliance is an obstacle to overruling in areas regarded as involving property law, it follows from the preceding conclusion that reliance upon precedents which are demonstrably unsound—and thus ripe for overruling—is peculiarly *unlikely* in the case of rules of construction applicable to wills and trusts. This is not to dismiss reliance altogether as a factor in construction cases. It is simply to urge that a court, instead of assuming the reliance factor, at least consider whether realistic possibilities of reliance actually exist with respect to the type of constructional problem before it.

In large measure these contentions conflict with several widespread notions about the role of precedent in construction. Although these notions will subsequently be dealt with more fully, some mention of them is useful at the outset. One is that precedents have little value in determining the meaning of individual wills or trust instruments since each is unique—often expressed in terms of not construing one man's nonsense by another's.⁷ This attitude is sometimes valid, as in misdescription cases, where the problem is essentially confined to "interpretation" and for which there is no serious temptation to rely on rules of construction. It is not valid, however, in those recurring situation-types within which the cases are similar in language and context and where the transferor apparently formed no actual intention, as in the typical future interest case.⁸ Nor is the value of precedent undetermined by the underlying argument that there are endless variations of intention and objectives, for

⁷ "It has been said, particularly in relation to testamentary interpretation, that authorities can be of no service; that to cite cases is to construe one man's nonsense by another man's nonsense; that the mode of dealing with one man's blunder is no guide to the mode of dealing with another man's blunder; that all courts have to do is look to the intention of the testator as the Polar star and give it effect. . . . The truth is that in matters of interpretation authorities are sometimes valuable and sometimes not." KALES, *ESTATES, FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS* § 152, at 151 (2d ed. 1920). See also Elphinstone, *On the Limits of Rules of Construction*, 1 L.Q. REV. 466, 469 (1885), quoted in note 82 *infra*.

⁸ See generally RHEINSTEIN, *CASES ON DECEDENTS' ESTATES* 381-89 (2d ed. 1955).

the refusal of courts to "rewrite" wills limits the issue to selecting one of several recognized constructions. A second notion is that, when a particular type of constructional question must be settled, a rule is needed, and that one rule is about as good as another. While a few situations are sufficiently "neutral" to permit such an approach,⁹ it must not be assumed that this is true of others. The cases falling within a given situation-type frequently involve common considerations of policy and intention, a weighing of which will reveal that one construction is distinctly better than others. A third notion, that stare decisis is particularly sacred in property law, has been mentioned previously. Again, the notion has some validity, especially where a reasonable degree of certainty exists and where worthy reliance interests are likely. But the reliance factor is neither peculiar to property law nor necessarily weighty in all of the so-called property areas, and when carried over into construction it should not receive more emphasis than it deserves. The destructive force of these traditional notions thus stems from the tendency to generalize without considering their applicability to construction in general and to specific constructional situations in particular.

Courts should attempt to resolve recurring types of cases, where no actual intent appears, by weighing the relevant, competing constructional preferences. Whenever possible, specific rules of construction should be developed for guidance in instances of potential dispute involving like circumstances. If an existing presumption, being out of harmony with the relevant policies and the inclinations of transferors, makes little sense as an original proposition, and produces observable resistance at the stage of application, the rule should be forthrightly overruled unless this is precluded by considerations of reliance. The experience with long-endured, unsound presumptions of intent demonstrates that it is not enough merely to try to settle a constructional question one way or the other.¹⁰ A view of stare decisis that prefers certainty to improved doctrine in this area of the law is predicated on the fallacy that stability can exist under an unsound presumption. Only through reasonably sound rules—that is, where at least there is no strong conviction that the presumption violates popular attitudes or otherwise disregards relevant policies—can a constructional question be deemed settled in any meaningful sense. Thus, to urge the overruling of unsound constructional prece-

⁹ Undoubtedly there are situations for which this is true—situations in which no solution appears distinctly better than others as a general proposition and in which the quest for an answer in the repeatedly unconvincing particulars of each case is wasteful. See, e.g., discussion note 62 *infra*. "Judicially made choices . . . can minimize future controversy by providing a rule for cases in which either rule might be satisfactory but a rule is needed to end controversy." 2 POWELL, REAL PROPERTY ¶ 316, at 665 (1950).

¹⁰ See text accompanying notes 16-31 *infra*. See also notes 32-37 *infra*.

dent is not to suggest that stability is unimportant. On the contrary, the case for overruling is reinforced by the great value of stability in this area of the law. Stability, however, should be measured by consistency of actual decision, rather than lip-service to a rule. The development of a workable body of doctrine for handling the enormous volume of constructional litigation therefore requires a willingness on the part of courts to reexamine unsatisfactory earlier decisions.

I

A CASE STUDY: THE NEW YORK EXPERIENCE WITH THE PRESUMPTION THAT ISSUE TAKE PER CAPITA

A revealing case history is provided by the New York experience with the unfortunate presumption that in a gift to a person's "issue," the descendants of that person take per capita rather than per stirpes. This experience illustrates the major points that are developed in this Article. The particular constructional situation admittedly presents an easy case for this purpose in that the original rule of construction was obviously unsound and the case material is unusually abundant, but in the history of this single problem one can identify and readily observe the significant elements that are typical of other constructional situations,¹¹ although not so readily apparent in harder types of cases.

The constructional situation involves provisions directing distribution of property to someone's issue without specifying the manner of distribution among them. For example, the case may involve a residuary bequest "to the issue of *A*" or a transfer in trust for *A* for life with remainder "to *A*'s issue who survive him." Assume that the word "issue" is given its usual meaning, referring to descendants of all degrees, and that at the relevant time *A*'s issue consist of two living children, *B* and *C*, and five grandchildren, *X*, *Y*, and *Z* (the children of *B*) and *Q* and *R* (the children of *A*'s deceased child, *D*). A per capita distribution would require that *B*, *C*, *X*, *Y*, *Z*, *Q*, and *R* each receive one-seventh of the property; under a per stirpes distribution *B* would take one-third, *C* would take one-third, and *Q* and *R* would divide one-third by right of representation, as the children of *D*.¹²

¹¹ See, e.g., notes 32-37 *infra*.

¹² Properly, there are at least three possible rules for determining the shares of issue: per capita; strictly per stirpes; and the manner in which issue take under the local law of intestate succession, if that is not strictly per stirpes. As long as there is a claimant who is of the first generation of descendants, the latter two methods produce identical results under intestacy statutes providing for representation. For present purposes it is sufficient to refer to the drastically different alternatives simply as per capita and per stirpes, as the New York courts have done in using the latter term to mean distribution according

In 1892, in *Soper v. Brown*,¹³ the New York Court of Appeals, after deciding that "issue" referred not to children but to descendants of all degrees, stated the rule governing distribution to issue as follows:

It is settled that under a gift to "issue," where the word is used without any terms in the context to qualify its meaning, the children of the ancestor, and the issue of such children, although the parent is living, as well as the issue of deceased children, take in equal shares *per capita*, and not *per stirpes*, as primary objects of the disposition. It might well be doubted whether a testator actually contemplated that the children of a living parent would take an equal interest with the parent under the word "issue," or that the issue of a deceased child should not take, by representation, the share of its parent. Lord LOUGHBOROUGH referred to this in *Freeman v. Parsley*, [30 Eng. Rep. 1085] *supra*, and, while he held that all were entitled equally *per capita*, said that he expected that it was contrary to the intention, and regretted that there was no medium between the total exclusion of the grandchildren and admitting them to share with their parents.¹⁴

The per capita rule was applied and confirmed in 1909 in *Schmidt v. Jewett*.¹⁵

It was recognized at the outset, of course, that the presumption favoring per capita distribution would yield where a per stirpes distribution was intended.¹⁶ The understandable reluctance of courts to apply the per capita rule soon led to open recognition that it would yield to "a very faint glimpse of a different intention" or to "slight indications of another meaning."¹⁷ The result was that "issue" cases regularly required litigation in order to know how distribution was to be made, and, of course, the cases went both ways.¹⁸ The per stirpes results

to the statute of intestate succession. *Petry v. Petry*, 186 App. Div. 738, 747, 175 N.Y. Supp. 30, 36 (1919).

¹³ 136 N.Y. 244, 32 N.E. 768 (1892).

¹⁴ *Id.* at 250-51, 32 N.E. at 770.

¹⁵ 195 N.Y. 486, 88 N.E. 1110 (1909). This case permitted all of the life beneficiary's children and grandchildren alive at her death to share equally in the corpus, over the contention of one of the children that distribution should be made only among the living children and the descendants of deceased children, the latter taking by right of representation. Language in the instrument to the effect that the issue were "to take in equal portions" would seem to reinforce the per capita presumption, but the court did not say so and other cases have found the per capita presumption rebutted where such language was used. See *Matter of Durant's Will*, 231 N.Y. 41, 131 N.E. 562 (1921); *Matter of Union Trust Co.*, 170 App. Div. 176, 156 N.Y. Supp. 32 (1915), *modified*, 219 N.Y. 537, 114 N.E. 1048 (1916).

¹⁶ See *Kernochan v. Whitney*, 125 App. Div. 371, 109 N.Y. Supp. 721 (1908), in addition to the dictum of *Soper v. Brown*, quoted in text accompanying note 14 *supra*.

¹⁷ *Matter of Farmers' Loan & Trust Co.*, 213 N.Y. 168, 174, 177, 107 N.E. 340, 342, 343 (1914).

¹⁸ *E.g.*, compare *Rasquin v. Hamersley*, 152 App. Div. 522, 137 N.Y. Supp. 578 (1912), and *Matter of Milnor's Estate*, 87 Misc. 528, 149 N.Y. Supp. 1064 (Surr. Ct. 1914), with *Matter of Van Cleef*, 92 Misc. 689, 157 N.Y. Supp. 549 (Surr. Ct. 1915), and *Matter of*

were reached on the basis of unpredictable and unconvincing "indications" of intention and, in truth, reflected the strong feelings of judges that the per capita presumption tended to frustrate the probable desires of transferors. The conviction was obvious that the rule itself was unsound, not just occasionally inappropriate to a particular case.¹⁹

In a 1919 case,²⁰ the appellate division observed that it was "generally admitted by judges who have felt compelled to enforce this rule of construction that by doing so they have done violence to the real intention of the testator."²¹ The court further recognized that the apparent reason for the per capita rule's adoption in England "does not obtain in the laws of this state" and that it is shown to be "a fallacious rule" because its exceptions "seem to have a more general application than the rule."²² Rather than construe the instrument as requiring a per stirpes result by an artificial finding of contrary intent, however, the court held the per capita presumption applicable because it felt compelled to follow the decisions of the court of appeals. The court expressed its hope that the court of appeals would change its construction of the word "issue,"²³ but the court of appeals rejected this plea without opinion and affirmed.²⁴ The court refused to reexamine the previous decisions despite the doubts it had earlier expressed about the rule,²⁵ even though the possibilities of reliance upon the rule were negligible in light of its history of "faint glimpses" and irregular application.²⁶

Cromwell, 80 Misc. 606, 142 N.Y. Supp. 553 (Surr. Ct. 1913). See also note 15 *supra*, containing cases reaching diverse results even under language calling for equality of distribution.

¹⁹ See, e.g., *Matter of Union Trust Co.*, 170 App. Div. 176, 156 N.Y. Supp. 32 (1915), refusing in a routine set of facts to distribute per capita among eight children and twelve grandchildren, despite express language that distribution was to be "in equal portions among her then surviving issue." The court construed this language as meaning "not equality of all descendants, but equality in the branches into which the person's family are naturally divided," admitting that "it may be that in this construction of the will an intention to confine this distribution per stirpes rather than per capita has gone beyond any reported case, but after an examination of a great many wills I am clearly of the opinion that to give to the word 'issue' a construction that would include all descendants, whether their parents were living or not, has resulted in a distribution of estates which has really been contrary to the testator's intention, and which has really involved great injustice among a testator's descendants." *Id.* at 183, 156 N.Y. Supp. at 37.

²⁰ *Petry v. Petry*, 186 App. Div. 738, 175 N.Y. Supp. 30 (1919).

²¹ *Id.* at 741, 175 N.Y. Supp. at 32.

²² *Id.* at 744, 175 N.Y. Supp. at 34-35.

²³ *Id.* at 747, 175 N.Y. Supp. at 36-37.

²⁴ *Petry v. Langan*, 227 N.Y. 621, 125 N.E. 924 (1919).

²⁵ See quotation in text accompanying note 14 *supra*.

²⁶ The per capita rule has been overruled by the courts of some other states. E.g., *In re Mayhew's Estate*, 307 Pa. 84, 160 Atl. 724 (1932). See also *Rhode Island Hosp. Trust Co. v. Bridgham*, 42 R.I. 161, 106 Atl. 149 (1919) (relying upon closely analogous new statute as justification); *Clarke v. Clarke*, 222 Md. 153, 159 A.2d 362 (1960) ("distinguishing" its prior decisions). It is ironic that a refusal to overrule this presumption, when so little

In 1921 the legislature responded by enacting Section 47(a) of the Decedent Estate Law, which provides: "If a person dying after this section takes effect shall devise or bequeath any present or future interest in real or personal property to the 'issue' of himself or another, such issue shall, if in the same degree of consanguinity to their common ancestor, take per capita, but if in unequal degree, per stirpes, unless a contrary intent is expressed in the will." As might be expected, when the rule was changed to reinforce rather than contradict natural impressions of what a testator would have intended, the need to litigate the per capita or per stirpes question disappeared with respect to dispositions to "issue" in post-1921 wills. In a routine set of facts the method of distribution is now obvious. Having a sound rule of construction has fostered predictability and other values sought through a practice of following precedent—advantages lacking under the old rule. To be sure, construction has been required in a few cases because of the inclusion of confusing additional language, such as that the issue are to take "in equal shares,"²⁷ but the general picture with respect to post-1921 instruments is that of a problem solved.²⁸ Unfortunately, the comment in a 1921 opinion to the effect that hereafter "courts will be relieved of the necessity of searching for 'faint glimpses' or 'slight traces' in order to give effect to what they believe to be the testator's intent"²⁹ was premature because of the continued problem of pre-1921 instruments.

Because the statute operated prospectively only, wills which became effective prior to 1921 continued subject to the weak per capita presumption. There has been and still is an enormous amount of litigation involving future interests to "issue" in pre-1921 instruments. The results of cases searching for the required glimpse of other intention are varied, of course, just as before the statute.³⁰ This situation almost certainly

reason for restraint existed, should come from the New York Court of Appeals, noted for its repeated pronouncements recognizing a duty as well as a right to overrule. See *Rumsey v. New York & N.E.R.R.*, 133 N.Y. 79, 85-86, 30 N.E. 654, 655 (1892); *Klein v. Maravelas*, 219 N.Y. 383, 114 N.E. 809 *passim* (1916). "Our court said, long ago, that it had not only the right, but the duty to re-examine a question where justice demands it . . . [W]e abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule." *Woods v. Lancet*, 303 N.Y. 349, 354-55, 102 N.E.2d 691, 694 (1951).

²⁷ *Matter of Carpenter's Estate*, 33 Misc. 2d 444, 224 N.Y.S.2d 289 (Surr. Ct. 1961); *Matter of McCoon's Estate*, 3 Misc. 2d 634, 153 N.Y.S.2d 123 (Surr. Ct. 1956).

²⁸ This is not to suggest that further improvements cannot be made, especially in some closely related cases. See *Pinkham, Frustrari Per Stirpes*, 18 RECORD OF N.Y.C.B.A. 138 (1963).

²⁹ *Whitehead v. Ginsburg*, 197 App. Div. 266, 270, 188 N.Y. Supp. 739, 742 (1921).

³⁰ *E.g.*, compare *Matter of Good's Will*, 304 N.Y. 110, 106 N.E.2d 36 (1952); *Matter of Ward's Estate*, 20 Misc. 2d 608, 194 N.Y.S.2d 96 (Surr. Ct. 1959); *Matter of Hawley's Will*, 6 Misc. 2d 927, 163 N.Y.S.2d 701 (Surr. Ct. 1957); *Matter of Jones' Estate*, 123 N.Y.S.2d 367 (Surr. Ct. 1953); *with City Bank Farmers Trust Co. v. Massimo*, 88 N.Y.S.2d

would have been avoided if the per capita rule had been corrected by judicial decision. Thus, even in the relatively rare case in which it is reasonable to expect legislative correction of a bad rule of construction, if future interests are frequently involved in the rule's applications, the desirability of retroactive operation should not be overlooked in deciding whether the task should be left to the legislature. The New York experience with the two rules operating side by side provides, however, an opportunity to contrast the failure of an unsound rule of construction with the success of a sound rule as a means of quieting litigation and uncertainty, while at the same time searching for acceptable results.³¹

Other problem areas could serve to demonstrate various aspects of the case for overruling unsound constructional precedent.³² For example, the still troublesome "Tennessee Class Doctrine," changed prospectively by the Tennessee legislature in 1927, offers an excellent case study for

308 (Sup. Ct. 1949). The overwhelming majority of cases find the "faint glimpse" necessary to permit distribution per stirpes.

³¹ Another interesting aspect of the post-1921 history of the "issue" problem in New York concerns the applicability of the statute to related cases. If the will of a testator who died after 1921 provided that the remainder of a testamentary trust or the residue of his estate was to go to the "descendants" of a named person, does the old per capita rule or the statutory rule apply? The answer should be obvious, and to several courts it has been. *Matter of Schoellkopf*, 21 Misc. 2d 564, 197 N.Y.S.2d 640 (Surr. Ct. 1960); *Matter of Russell's Estate*, 133 N.Y.S.2d 52 (Surr. Ct. 1954). See also *Matter of Libbey's Estate*, 206 Misc. 723, 134 N.Y.S.2d 839 (Sup. Ct. 1954). But the notion that statutes in derogation of the common law are to be narrowly construed has so afflicted the thinking of courts in a few cases that they have treated these cases as governed by the old rule rather than by the statute; after all, the statute only says "issue." *Matter of Gardiner's Will*, 20 Misc. 2d 722, 191 N.Y.S.2d 520 (Surr. Ct. 1959) (per capita result); *Matter of Walbridge's Estate*, 192 Misc. 746, 80 N.Y.S.2d 676 (Surr. Ct. 1948) (per capita presumption rebutted). Certainly this problem would not have arisen had the change in the presumption been made by a decision of the court of appeals. While this particular level of absurdity is not to be expected with any frequency, the experience suggests that unfortunate results may follow from the frequently unsympathetic attitude of courts toward apparent legislative purpose and the problems of the legislature. Cf. Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 407 (1908) (concluding: "The public cannot be relied upon permanently to tolerate judicial obstruction or nullification of the social policies to which more and more it is compelled to be committed"). The likelihood of courts refusing to apply a particular statute by analogy is to be contrasted with the readiness with which judicial precedents are used in related cases as departure points in the reasoning of courts. The impact of possible differences in judicial method in subsequently dealing with legislative rather than judicial change in the law may be significant in connection with the objective of putting a segment of the law in order once it has received a bad start.

³² In addition to the examples in the text and in notes 33-37 *infra*, see Powell, *Construction of Written Instruments*, 14 IND. L.J. 199, 218-22 (1939) (discussing the Indiana experience with the repugnancy doctrine operating as a rule of construction); Oler, *Construction of Private Instruments Where Adopted Children Are Concerned*, 43 MICH. L. REV. 705, 901 (1945); 2 SIMES & SMITH, *FUTURE INTERESTS* §§ 734-35 (2d ed. 1956) (reviewing the incessant litigation involving the time as of which the "heirs" are to be determined under a remainder to "heirs" where a preceding estate was in one or more of the actual heirs).

these purposes,³³ as do several other objectionable survivorship doctrines of more widespread acceptance involving future interests.³⁴ A pattern of resistance, comparable to the uncertainty and abnormal litigation caused by the per capita rule in New York, can also be observed in connection with the much-criticized rule that, where the local antilapse statute does not apply, the share of a deceased residuary legatee lapses instead of passing to the surviving residuary legatees when the gift is to a group of individuals, rather than in the form of a class gift.³⁵ Another example is the so-called inter vivos branch of the Doctrine of Worthier Title, in states in which the prohibition against a remainder in the grantor's heirs has been reduced to a rule of construction. A revealing "case history" on this matter can be found in a recent study leading

³³ See Comment, *The Tennessee Class Doctrine: A Spectre at the Bar*, 22 TENN. L. REV. 943 (1953); Chambers, *History of the Class Doctrine in Tennessee*, 12 TENN. L. REV. 115 (1934); 1 SIMES & SMITH, FUTURE INTERESTS § 146 (2d ed. 1956). Under the "Class Doctrine" a requirement of survivorship is implied in connection with future interests in class gift form, tending to cut off some lines of descendants or other natural objects of the testator's bounty. Concerning continued litigation and uncertainty with respect to instruments which became effective before 1927, see *Burdick v. Gilpin*, 205 Tenn. 94, 325 S.W.2d 547 (1959); *Jennings v. Jennings*, 165 Tenn. 295, 54 S.W.2d 961 (1932). The disadvantage of confused and unduly restrictive application of statutory language which "intrudes" upon court-made doctrines can be seen in *Denison v. Jowers*, 192 Tenn. 356, 241 S.W.2d 427 (1951). See also *Wilson v. Smith*, 47 Tenn. App. 194, 337 S.W.2d 456 (1960).

³⁴ One example is the "divide and pay over rule," of which one judge has said: "[The rule] has been productive of more litigation than any other rule as to the construction of wills. That nearly all laymen and very many lawyers are wholly ignorant of it, there can be no question. Despite that fact, if it had become a rule of property, it should be respected whether good or bad, but instead of being a rule of property, it is a rule which unsettles title to property, and the condition of the decisions is such that in almost every case counsel is justified in insisting, if not actually required to insist, that his client shall obtain the decision of the court of last resort on the question." *Cammann v. Bailey*, 210 N.Y. 19, 33, 103 N.E. 824, 828 (1913) (concurring opinion) (but which followed by suggesting that "entire relief" may require legislative action). See also *Gluck, The "Divide and Pay Over" Rule in New York*, 24 COLUM. L. REV. 8 (1924) (which, at p. 35, concluded by saying that perhaps "the subject is too complex to be solved merely by the legislature" and "seems one requiring study by such a body as the American Law Institute"); *Berick, The "Divide and Pay Over Rule" in Ohio*, 14 U. CINN. L. REV. 391 (1940).

Another example is the artificial and troublesome doctrine which distinguishes a gift to a person "at" or "when he reaches" a specified age from one to a person "to be paid" or "payable" at that age. See 5 AMERICAN LAW OF PROPERTY §§ 21.17-20 (Casner ed. 1952).

³⁵ See Note, 32 FORDHAM L. REV. 604, 610 (1964) (criticizing a court for circumventing instead of overruling this "admittedly undesirable" rule); Legislation, 26 FORDHAM L. REV. 372, 377-80 (1957); 5 AMERICAN LAW OF PROPERTY § 22.6 (Casner ed. 1952). See also Note, 31 YALE L.J. 782 (1922).

This rule is "reluctantly enforced by courts when tokens are not at hand to suggest an opposite intention." *Oliver v. Wells*, 254 N.Y. 451, 457, 173 N.E. 676, 678 (1930). See also *Lichter v. Bletcher*, 123 N.W.2d 612 (Minn. 1963), simply finding the rule inapplicable without finding persuasive indications of intention one way or the other.

to legislation abolishing worthier title *retroactively*.³⁶ The data and conclusions of that study of a particular problem support the generalized contentions of this article.³⁷

II

THE VALUE OF RULES OF CONSTRUCTION: THE AFFIRMATIVE CASE FOR OVERRULING UNSOUND PRECEDENT

A. *The Function and General Content of Rules of Construction*

The function of a rule of construction is to supply a result where no actual intention is discoverable. Unlike cases involving contracts, which are concerned with meanings reasonably to be understood from objective criteria,³⁸ cases dealing with donative instruments are concerned with the "ascertainment of what may be termed [the conveyor's] subjective intent, insofar as he had one."³⁹ In many cases, however, courts are confronted with questions not contemplated by the transferor, or which at least must be so treated for want of admissible evidence of an actual intention. Rules of construction thus supply an "intent" that is to be attributed to the transferor where apparently none existed in fact. Because of this, rules of construction fulfill a function comparable to the laws of intestate succession.⁴⁰ They supply a disposition under circumstances for which a transferor has not expressly provided, and

³⁶ CALIFORNIA LAW REVISION COMMISSION RECOMMENDATION AND STUDY RELATING TO THE DOCTRINE OF WORTHIER TITLE (1959). See CAL. CIV. CODE § 1073, which is to "be applied in all cases in which final judgment has not been entered on its effective date."

³⁷ Worthier title, as the per capita rule, proves to be a litigation breeder and a source of uncertainty. Even if one accepts the objectives stated in modern attempts to justify the doctrine, these objectives can hardly be fulfilled by a mere rule of construction which, as a disfavored *presumption*, is more often rebutted than applied. See Verrall, *The Doctrine of Worthier Title: A Questionable Rule of Construction*, 6 U.C.L.A.L. REV. 371, 374-75 (1959). If the settlor who has not thought seriously about the implications of conferring a remainder upon his heirs is to be allowed to regain the property later during his lifetime, instead of preserving a rule of construction which often fails to perform this function anyway because of "discovered" intent contrary to that presumed, there should be a special rule or presumption dealing with revocability, but not one susceptible of surprise application if the settlor dies without having sought to recover the "remainder" from his heirs. See N.Y. REAL PROP. LAW § 118; N.Y. PERS. PROP. LAW § 23; Scott, *Revoking a Trust: Recent Legislative Simplification*, 65 HARV. L. REV. 617 (1952). See also N.C. GEN. STAT. § 39-6 (1949), under which a grantor may revoke a future interest gratuitously created in favor of persons not *in esse*, unless it is expressly provided otherwise.

³⁸ See generally 3 CORBIN, CONTRACTS § 532 (1960).

³⁹ RESTATEMENT, PROPERTY § 241, comment c (1940).

⁴⁰ Cf. GRAY, THE NATURE AND SOURCES OF THE LAW 175 (2d ed. 1921): "Now for cases in which a testator has not provided, it may be well that there should be fixed rules, as there are for descent in case of intestacy." See also Elphinstone, *On the Limits of Rules of Construction*, 1 L.Q. REV. 466, 469 (1885), quoted in note 82 *infra*.

they should be formulated with this role in mind. Courts can and should apply sound rules with a firmness reflecting this role, rather than grasping, in each case, for the faintest suggestion of a supposed intent when almost certainly none existed. Viewing construction as operating upon matters for which the transferor has not provided, but within a given scheme of disposition, serves to emphasize the importance of not becoming too preoccupied with word manipulation and unnecessary refinements. In supplying a construction a court should keep in mind that it is participating in the distribution of a person's property. It is deciding, within limits, the disposition the transferor should be deemed to have made.

The concept of a legally attributed intent cannot properly be described as "what the transferor probably would have intended" had the question occurred to him. It is more than this, for it involves other factors of social policy.⁴¹ But it is important to see also that it is less than this, if the function of rules of construction is to be understood. Out of respect for the limits of adjudication,⁴² construction does not search for the transferor's intention as an open question but as a very limited one. Constructional litigation, whether eventually resolved by rule or by "the particular facts of the case," is concerned with which of several permissible meanings is to be assigned to the provision in dispute. The "intent" element relates merely to the choice the transferor would have made between certain recognized alternatives had he been confronted with this limited choice when he executed the instrument. Thus, the court does not purport to decide the disposition the transferor would have made if he had considered the matter as an open proposition at the time, because of the endless variations in individual desires and the obvious impossibility of accomplishing such a "re-writing" of the instrument.

The "intent" element, understood in this fashion, is the main ingredient of the law's solution of constructional problems. Consequently, a specific rule of construction should realistically reflect the desires of transferors in the situation to which it relates. When applied to dispositions falling within its ambit, the rule should *tend* to produce results consistent with the natural tendencies of individuals, within the limits imposed by the terms and revealed purposes of particular dispositions. In individual cases, of course, a presumed construction can only approximate the wishes of the particular transferor.

Beyond this, social "policy" is a proper ingredient of specific rules

⁴¹ See 1 SIMES & SMITH, *FUTURE INTERESTS* § 465 (2d ed. 1956).

⁴² Cf. Fuller, *Adjudication and the Rule of Law*, 54 AM. SOC. INT. L. (PROC.) 1, 3-5 (1960), discussing the concept of the "polycentric" problem.

of construction. This should be recognized openly and without apology, for difficulty in the operation of some rules appears to stem from the presence of policy influences that are overly subtle. Even the legitimacy of some of these influences is subject to question, in that the process of construction is asked to compensate for inadequacies in related rules of property law.⁴³ By stating explicitly the policy factors influencing specific presumptions, courts would make rules of construction more readily acceptable and more intelligible for purposes of application, and would incidentally facilitate judicial and legislative reexamination of both the constructional rules and the related property law doctrines.

Of course, the particular policies and transferor inclinations from which each rule should be developed necessarily depend upon the nature of the particular recurring situation in question. Recent efforts of treatise writers have gone far in enumerating the general principles and constructional preferences which result from the interaction of probable wishes of transferors and considerations of social policy.⁴⁴ Without at-

⁴³ Rules applicable to remainders to "heirs" furnish two ready examples: (1) the inter vivos branch of the doctrine of worthier title; and (2) rules governing the date as of which a person's heirs are determined when possession is postponed beyond that person's death.

If legislation were enacted permitting limitations to the heirs of a settlor to be disregarded for purposes of trust termination during the settlor's lifetime (see citations and discussion in note 37 *supra*), such arguments as are still made for worthier title would be virtually eliminated, and *both* the constructional process and the objectives now sought through the doctrine would be advanced. This is not to suggest, however, that rejection of worthier title should await such a legislative change.

Also, implying powers in the legal life tenant to sell and manage the subject matter, with a duty to substitute the proceeds, would facilitate replacing the rule of early determination of heirs (*i.e.*, giving "heirs" its technical meaning) with a presumption under which an artificial class of heirs is to be determined at the date of distribution (the probable expectation of one using "heirs" in its typical future interest context). See latter rule in PA. STAT. ANN. title 20, §§ 180.14(4), 301.14 (Purdon 1950); *Abbott v. Continental Nat'l Bank*, 169 Neb. 147, 98 N.W.2d 804 (1959). The usual rule presumes the *technical* meaning was intended, RESTATEMENT, PROPERTY § 308 (1940), but natural impressions of the transferor's admittedly vague expectations have led both to explicitly recognized exceptions and to inconsistent applications supposedly based on contrary intention under the particular facts. *In re Latimer's Will*, 266 Wis. 158, 63 N.W.2d 65 (1954), relied in part upon a recognized exception and in part upon a doubtful one, but the practical difficulties (tracing vested remainders through the heirs' estates) which the court saw in the usually presumed result are shortcomings inherent in that rule itself. Also compare *Gilman v. Congregational Home Missionary Soc.*, 276 Mass. 580, 177 N.E. 621 (1931), with the unsatisfactorily explained, inconsistent result of *Boston Safe Dep. & Trust Co. v. Waite*, 278 Mass. 244, 179 N.E. 624 (1932). Although, without legislative activity, overruling the basic rule seems inadvisable once it has become well established, courts should attempt to develop clear-cut rules for deciding cases in the yet gray areas involving possible exceptions. Opinions such as *In re Easter's Estate*, 24 Cal. 2d 191, 148 P.2d 601 (1944), based upon unpersuasive "particular facts" where a well-defined specific exception would have been appropriate, are most unfortunate.

⁴⁴ 5 AMERICAN LAW OF PROPERTY § 21.3 (Casner ed. 1952); 2 POWELL, REAL PROPERTY ¶ 318 (1950); RESTATEMENT, PROPERTY § 243 (1940).

tempting a complete statement of these preferences, for present purposes they may be illustrated by the following: the preferences for complete and valid dispositions; the preference for results consistent with prevailing attitudes in the community, particularly reflecting policies manifested in the statutes of descent and distribution; the preference for similar treatment of persons of equal relationship to the transferor, especially avoiding disinheritance of lines of descendants; and the preference for results conducive to the free alienability of property. Obviously these are more than simply observed preferences of transferors. They are also normative, embodying notions about how persons "should" dispose of their property.

Frequently the preferences relevant to a given type of constructional situation coincide sufficiently to justify a forceful rule of construction. In some recurring situations, of course, they are seriously in conflict, requiring a difficult choice among possible alternatives. In practice, the strength of a particular presumption normally bears a direct relationship to the force with which the relevant policies and the probable inclinations of transferors coincide. Nevertheless, some difficult choices can be given effect through forceful rules, where this is deemed necessary in order to get a question settled, so long as the presumption is not patently *unsound*. In any event, sound specific rules of construction are developed by weighing accepted preferences and, when the particular language and dispositional context of a recurring situation suggest a highly probable meaning to the average person, by giving weight to this meaning. When a recognized rule is grossly inconsistent with the rule such a procedure would produce, the existing rule will not perform the functions we are entitled to expect of it. These functions are essentially: (1) to suggest good results in individual cases; and (2) to provide the stability and other benefits that are expected from a practice of actually—not nominally—adhering to precedent.

B. Rules as a Means to Better Results in Individual Cases

Frequently it is asserted that precedent is of little value in determining the meaning of particular instruments because each case turns upon the particular facts and language involved and because of the endless variations in individual intentions. This is sometimes true, of course, as in cases involving unique combinations of language and circumstance, typified by the misdescription cases. These cases generally involved actual intentions inadequately expressed and present such restricted sets of facts as to deprive different cases of the common considerations that permit common solution through precedent. Rules of construction, however, properly deal with recurring situations, unanticipated by the draftsman,

within each of which the material facts and recognized alternatives are sufficiently similar to involve common considerations. The language patterns and dispositional contexts of cases falling within each class, for which a specific rule is designed, are closely related.⁴⁵ In addition, the endless variations of intention are in a sense ignored, inasmuch as the litigation is concerned with selecting one of several recognized alternatives. Even in these cases, it sometimes appears that precedent has little value and that each case turns on its own facts. Particular archaic and senseless rules sometimes compel courts to resort repeatedly to "particular facts" as a means of preventing what appear to be unjust results under the rules,⁴⁶ but this experience with unsound rules does not justify a disparaging view of constructional precedent in general.

A technique of rule-based decisions must be appraised in light of the limited questions presented in constructional litigation. Typically the issue is confined to choosing one of but two or three permissible constructions, each of which tends to produce a pattern of results quite different from the results another would tend to produce. If the available choices were thus restricted at the planning stage, despite the diversity of transferor intentions, there would be general agreement among transferors regarding their preferences on many of the matters which now arise

⁴⁵ See RHEINSTEIN, *CASES ON DECEDENTS' ESTATES* 385 (2d ed. 1955):

[In certain cases] it is incorrect to speak of a search for the intention of the testator. We know that he did not have one. Somehow the problem must be answered, but all we can do is try to handle it in that way in which the testator is likely to have intended it to be handled if he had considered it. What we carry out is not, as in the cases of successful clarification of ambiguities, the testator's real intention but rather his hypothetical intention, the intention which he is likely to have had if he had his mind applied to the problem. This hypothetical intention of the testator may or may not coincide with his real one. . . . The testator's own intentions are neither found nor carried out, but they are *supplemented* by those of the law or the judge.

Professor Rheinstein also describes what he terms "rules of stop gap law" and "rules of authoritative explanation," and distinguishes these rules from efforts to ascertain actual intention. *Id.* at 382-83.

⁴⁶ Cf. GRAY, *THE NATURE AND SOURCES OF THE LAW* 174-5 (2d ed. 1921):

[Rules of construction] in the Common Law . . . were often pushed into such refinement that they lost their practical value, and, what is more, they sometimes attributed to a testator the very opposite of the intention which he was likely to have had. . . . Against this disposition there has of late years been a decided reaction on the part of the courts. Judges . . . have said that each will is to be determined according to the intention of the testator, and that the judicial mind should apply itself to that problem, and not trouble itself with rules of construction.

. . . In modern practice the reasoning is often of the most inconclusive character, but the judges have got to decide the cases somehow, and having turned their backs upon rules of construction, have to catch at the slightest straw with which to frame a guess.

repeatedly as problems of construction. Thus, in constructional litigation involving these same matters, the results of one construction will tend to *approximate* different intentions within the usual range of individual intentions, while the results of another will not. Where this is so, the value of sound precedent and the costs of unsound doctrine are evident. For example, one could hardly say that each instrument, hence each case, is so different from others as to render precedent valueless in the "issue" cases involving the per capita or per stirpes problem. It is true that if transferors were asked how they wanted their property distributed among their issue, they would give varied answers. But, if offered only the alternatives recognized by the New York cases, for instance, there would be general agreement among transferors. Neither would precedent be of little value to courts in deciding whether or not under ordinary circumstances a bequest or remainder to a person's issue includes adoptees, *if* the usual and constantly resisted rule presuming their exclusion were abandoned.⁴⁷

The present point can adequately be illustrated by other recurring situations. For example, consider the common problem of survivorship involving remaindermen designated as an inflexible class, such as "children" or "brothers and sisters," rather than as an adaptable class, such as "issue" or "descendants." Assume *H* left his estate in trust for his wife, *W*, for life, remainder "to my children." Assume further that one of *H*'s children, *C*, who was alive at *H*'s death, predeceased *W*. The question now is not what *H* would have wanted to do with *C*'s share. This question, which *H*'s lawyer should have raised, could and would evoke an almost unlimited variety of answers from different individuals. Instead, the courts have treated a remainder "to my children" as admitting of two interpretations: either the children are required to survive and *C*'s interest fails, or there is no implied requirement of survival and *C*'s interest, being indefeasibly vested, passes as an asset of his estate. Upon being fully advised of the probable consequences of these limited alternatives, and without the opportunity of waiting to see what *C*'s actual family situation would be or what disposition *C* would eventually make of

⁴⁷ With the usual rule (and its operating problems) reviewed in Oler, *Construction of Private Instruments Where Adopted Children are Concerned*, 43 MICH. L. REV. 705, 901 (1945), contrast the approach taken in *In re Coe's Estate*, 42 N.J. 485, 201 A.2d 571 (1964). Furthermore, a judicial change in the presumption preserves flexibility for dealing with exceptional cases, flexibility that is likely to be lost if the usual rule has to be countered by legislation or provision in the instrument. Consider, for example, the problem of an adult being adopted to defeat a gift over, and contrast the suggestion in *In re Coe's Estate*, *supra* at 492, 201 A.2d at 576, with New York's legislative difficulties in the area. See Pasley, 1963 *Survey of New York Law: Future Interests*, 15 SYRACUSE L. REV. 306, 310-12 (1964).

his share, *H* would probably have chosen the latter construction in order not to risk cutting off one of his lines of descent. Courts have been in nearly complete agreement in presuming this result, and those courts which have had to live with the other presumption have resisted, avoided, and apologized for their rules.⁴⁸ Thus, that testators would prove to have widely different intentions, if allowed to re-write their wills on this matter, does not prevent general agreement upon the preferred constructional solution.

It is only when one of the recognized constructions for a given situation-type is grossly inconsistent, in terms of the results it tends to produce, with the usual tendencies of persons in disposing of their property that a rule presuming that construction is properly labeled "unsound," or is likely to produce a pattern of resistance at the stage of application. Where each of two possible constructions would tend to produce results reasonably consistent with transferor inclinations, a rule supporting either could be acceptable. In such a situation, either rule can be referred to as sound and the value of decision by rule depends on other considerations to be discussed later. Our concern in discussing the overruling of precedent relates to cases in which a rule can fairly be labeled "unsound."

After weighing the probable objectives of transferors and other relevant policies, if one rule is distinctly preferable, the recognition of a contrary rule, coupled with a practice of looking to the particulars of each case, destroys the opportunity of reaching appropriate results with relative ease in the bulk of the individual cases involved. A method is patently unrealistic which purports to decide a constructional question on the basis of unconvincing "evidences of intent" tortured from the details of the particular litigation. What could be more artificial and wasteful than to purport in each case to make a choice between two constructions based on the transferor's intention when almost certainly he formed no intention at all on the matter, especially since the particular case in which an unexpressed intent did exist could not be identified? Anyone who has studied a substantial number of constructional decisions must be distressed by the speculative conclusions supposedly drawn from particular facts, when virtually any case will yield up some distinctive

⁴⁸ With 1 SIMES & SMITH, *FUTURE INTERESTS* § 146 (2d ed. 1956), contrast the "Tennessee Class Doctrine" and the "divide and pay over rule," discussed in notes 33 & 34 *supra*.

A solution analogous to that of an anti-lapse statute would have considerable merit in these cases. Although not recognized by courts as a permissible construction in the absence of statute, the solution has been introduced by one legislature. TENN. CODE ANN. § 32-305 (1955) (modifying the "Class Doctrine" as to post-1927 instruments).

facts upon which an argument can be made for any desired result.⁴⁹ Similarly distressing is the Freudian significance so often attached to fortuitous selections of particular forms of expressions.⁵⁰ There is no justification for deciding a case upon a tedious study of the details of wording when it is evident from the very question presented and the uncertainty of the transferor's language that he placed no such significance and exercised no such care in his choice of particular words. If a transferor has actually taken up a matter with his lawyer or has otherwise formed an intention on the matter, we can expect it to be expressly covered in the instrument. Once the transferor has failed to form an intention, or at least to manifest that intention with reasonable clarity, peculiar facts and the details of ambiguous language can rarely lead to a conclusion that is anything but judicial guesswork. Of course, if the language in context or the admissible extrinsic evidence and circumstances do provide reasonably persuasive guides to intention in a particular case, it should be decided accordingly. Even a forceful presumption will not discourage the claimant whose case is persuasive for the opposite result.

It is not only for reasons of certainty, then, that the development of sound, forceful rules is important. It is because, in many types of cases in which no clear intent appears, better results can be reached through appropriate rules than through even the most conscientious inquiry into usually meaningless details of circumstance and wording. When it is evident that one presumed construction is distinctly more ap-

⁴⁹ See, e.g., the lengthy opinion and lengthier dissenting opinion in *Estate of Stanford*, 49 Cal. 2d 120, 315 P.2d 681 (1957). See also *Safe Deposit & Trust Co. v. Waite*, 278 Mass. 244, 179 N.E. 624 (1932); *Lichter v. Bletcher*, 123 N.W.2d 612 (Minn. 1963).

⁵⁰ For example, distinctions between a bequest to A "at" or "when he reaches" age 21 and one to A "to be paid" or "payable" to him at age 21, and the exceptions to this distinction, were articulated long ago in *Clobberie's Case*, 2 Vent. 342 (1677), and continue to the present day as a source of difficulty. See *In re Sessions' Estate*, 217 Ore. 340, 341 P.2d 512 (1959); 5 AMERICAN LAW OF PROPERTY §§ 21.17-20 (Casner ed. 1952); 2 Simes & Smith, *FUTURE INTERESTS* § 586 (2d ed. 1956). Another example is the "divide and pay over" rule. *Matter of Crane*, 164 N.Y. 71, 58 N.E. 47 (1900). See also note 34 *supra*.

"[I]t is the court's duty to find out the legal effect of documents and to construe the language of the testator, without regard to his unexpressed intent. . . . I have to do with a situation quite outside of anything which the testator had in contemplation, and it is therefore obvious that any solution is bound to be verbal and indeed formal." (Emphasis added.) *Boal v. Metropolitan Museum of Art*, 292 Fed. 303, 304 (S.D.N.Y. 1923). The objection to this widely quoted dictum by Judge Learned Hand is that it does not follow, even if evidence outside the will is inadmissible or if admitted not helpful, that the solution must be verbal and formal. The same opinion continues by recognizing: "courts have always permitted themselves, within limits, to impute to testators an intent which they could not foresee." *Ibid.* In attributing this intention to the testator, however, the solution need not and should not be purely formal and verbal in situations for which transferor inclinations or policy considerations offer useful guides to appropriate results.

propriate than its alternatives,⁵¹ a practice of requiring individual lower court judges to seek answers in the unconvincing details of each case is particularly destructive. For such cases, a forceful presumption established by a state's highest court is readily justifiable. In some of these situations there are strong, natural tendencies of transferors by which courts should be guided.⁵² In other situations a particular construction may be preferable either because it represents a more probable meaning to be attached to certain language⁵³ or forms of disposition⁵⁴ in a recurring context, or because it is consistent with some notion of social policy and of what is "right," particularly where the probabilities of intent are unpersuasive.⁵⁵

⁵¹ This writer is hard pressed to imagine an area of the law in which Professor Llewellyn's concept of "situation sense," LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960), has greater validity than in the construction of donative instruments. Objections that have been raised against this concept, as in Rohan, *The Common Law Tradition: Situation Sense, Subjectivism or "Just-Result Jurisprudence,"* 32 *FORDHAM L. REV.* 51, 57-66 (1963), are less persuasive as applied to its use as a basis for deciding to overrule in constructional situations than as applied to its application in other types of cases. For example, the difficulty of recognizing sound and unsound answers is often removed by a glance at the experience (*i.e.*, the pattern of resistance) under the existing rule, and the possession of situation sense is not limited to specialists, for specialized knowledge of customs and practices is not required in cases involving the donative distribution of property among the objects of one's bounty.

⁵² This is true, for example, of the *per capita* and *per stirpes* cases. This is also true of the most frequent source of future interest litigation, the survivorship cases. These cases and the principles affecting their solution are reviewed in Halbach, *Future Interests: Express and Implied Conditions of Survival*, 49 *CALIF. L. REV.* 297, 431 (1961).

Recognized tendencies of transferors, similar to those which have influenced the virtually universal enactment of pretermitted-heir and anti-lapse statutes in this country, should be deemed relevant in analogous areas of construction for which legislation is less common. Courts should also consider the trend of intestacy statutes, as reflecting popular tendencies and norms, in deciding constructional questions involving the rights of adopted children. A commendable approach is found in *Estate of Heard*, 49 *Cal. 2d* 514, 319 *P.2d* 637 (1957), and in *In re Coe's Estate*, 42 *N.J.* 485, 201 *A.2d* 571 (1964).

⁵³ See *American Christian Mission Soc'y. v. Tate*, 198 *Ky.* 621, 250 *S.W.* 483 (1923).

Despite the interesting arguments that may be forwarded in support of the doctrine of worthier title today as a rule of construction, the resistance to the doctrine stems from the fact that a rule to the effect that "my heirs" means "me" and not "my heirs" is difficult to apply as a presumption of intent. See note 37 *supra*.

⁵⁴ See criticism of the rule that the share of a deceased residuary legatee lapses (assuming the local anti-lapse statute is inapplicable) because the residuary gift is to a group of named individuals, rather than in the form of a class gift, in Legislation, 26 *FORDHAM L. REV.* 372, 377-80 (1957); 5 *AMERICAN LAW OF PROPERTY* § 22.6 (Casner ed. 1952). See also Note, 31 *YALE L.J.* 782 (1922).

⁵⁵ See, *e.g.*, the "rule of convenience" relating to the closing, or maximum membership, of a class. Casner, *Class Gifts to Others than to "Heirs" or "Next of Kin": Increase in Class Membership*, 51 *HARV. L. REV.* 254 (1937). An interesting recent case suggesting the strength of the rule and the justification for it is *Re Wernher's Settlement Trusts*, 1 *All Eng. Rep.* 184 (1961), noted 1961 *CAMB. L.J.* 177.

Consider also the relationship between community policy and the rights of adoptives

Because of the differences in individual objectives and circumstances it is inevitable, in dealing with matters of intention, that some transferors would have chosen a construction other than that obtained through the application of any rule. Necessarily we cannot know of which transferors this is true, unless actual intent can be shown so that the case is not appropriate for application of a constructional rule anyway. Thus, we can only ask that rules produce "right" results—*i.e.*, results approximating a transferor's intention—in the greater number of cases. Unfortunately, in some difficult types of cases the competing considerations appear so nearly in balance that we can have no assurance that "right" results will outnumber "wrong" ones under any of the available rules.⁵⁶ In many recurring constructional situations, however, a rule properly arrived at will promise results which are "right," as contrasted with the results under other available constructions, in an overwhelming majority of the cases to which it relates. Therefore, once it is concluded that a rule is distinctly preferable to its alternatives, the rule should be applied forcefully and with confidence. Socially preferred and "natural" results should be protected in this fashion unless a different intention is manifested with reasonable clarity. A general case-by-case approach is unnecessary and does not offer the desired protection. It makes little sense for courts to be neutral, much less favorable, toward per capita distributions to issue, the exclusion of adoptees, and the cutting off of lines of descent.

*C. Predictability, Impersonality, Judge's Workload, and the Like—
The Problem of Swimming Upstream*

In addition to the need for sound rules as guides to appropriate results in individual cases, there is another particularly significant reason for developing sound rules and, if necessary, overruling bad precedent. Rules should provide a means of promoting predictability and other valuable objectives of the doctrine of stare decisis. In the construction of wills and trusts, however, an examination of the fundamental reasons underlying the doctrine reveals that its objectives are attainable only through sound presumptions and that these objectives are in fact defeated by preserving unsound rules. This is largely because of two characteristics of the problem of construing donative instruments: (1) rules of construction are overcome if contrary intention is found; and (2) unsound rules look transparently foolish to all concerned. When the natural demands of judges, lawyers, and potential litigants for acceptable results

under class gifts. See note 52 *supra*. See also Merrill, *Toward Uniformity in Adoption Law*, 40 IOWA L. REV. 299, 317-22 (1955).

⁵⁶ See text accompanying note 62 *infra* for discussion of the function and forcefulness of rules in such situations.

are forced to operate against the current of an unrealistic presumption of intent, the supposed advantages of adhering to precedent are lost. In contrasting the advantages of sound rules of construction with the failure of unsound rules, it also becomes evident that overruling can take place without damage to the values inherent in stare decisis. This being so, it follows that the doctrine is no justification for standing blindly on constructional precedent that common sense and experience prove unsound.

The nature of constructional questions is such that the probabilities of intent are usually apparent to lawyers and laymen alike. Thus the Llewellyn concept of "situation sense" seems particularly appropriate in this area.⁵⁷ When common expectations and the sympathies of a court can be expected to conflict with the law's presumed result, litigation is invited as a means of circumventing the rule. Evidence of this is found in the number of cases in which attempts are made to overcome disfavored rules on the basis of unpersuasive "particular facts."⁵⁸ The record of success in these cases, though not consistent enough to remove the rule as a factor in any given case, is an inducement for others to respond to the temptation. Since judges understandably will not decide cases with any consistency by application of rules that are contrary to common notions of probable intention, a disfavored rule results in a doctrinal no-man's land, heavily posted with warnings that the "rule" yields to the slightest suggestion of other intent. Unlikely presumptions of intent thus make it unnecessarily difficult to predict the result of even an ordinary set of facts in which there is no real indication of actual intention on the part of the transferor—cases that properly should be resolved by rule. On the other hand, a situation covered by a sensible specific rule of construction can readily be resolved by that rule. The appropriate result is likely to be self-evident and to be reached without serious question, since litigation to avoid the rule becomes a bad investment. Consequently, a presumption that reasonably reflects the tendencies of transferors and satisfies a court's sense of justice will be respected by courts and potential litigants alike. This permits the rule to operate without the resistance that is created at the stage of application by rules which conflict with natural expectations. Thus, in addition to the serious risk of bad results

⁵⁷ See note 51 *supra*.

⁵⁸ In addition to the previous discussion of the New York experience with the per capita rule, text accompanying notes 16-24 and 30 *supra*, see Verrall, *The Doctrine of Worthier Title: A Questionable Rule of Construction*, 6 U.C.L.A.L. REV. 371, 374-75 (1959), and Legislation, 26 FORDHAM L. REV. 372, 377-80 (1957) (lapse of share of one of several residuary legatees). See also Brown, *Problems of Construction Arising in the Law of Property—Particularly in the Law of Future Interests*, 79 U. PA. L. REV. 385, 571 (1931).

when the presumption is not overcome, the consequence of forced resort to unpersuasive evidence in the face of an unsound rule is an unnecessary degree of uncertainty.

Predictability is valuable for a number of overlapping reasons. Counseling and private resolution of potential disputes requires not only that lawyers know the relevant rules but also that they have some reasonable basis for predicting ultimate results. Chances of compromise are diminished by different evaluations of a case by opposing counsel. Because of expectations artificially created by an unrealistic presumption, together with this uncertainty, the likelihood of uncontested settlement of estates is displaced by dissipation of estate assets, delay in administration, and family animosities engendered, or at least accentuated, by litigation. Then, case preparation and meaningful participation in the adjudicative process depend upon an understanding of the true factors that will influence the result. Again, however, the process of relating expected grounds of decision to established doctrine, which should be furthered by *stare decisis*, is severely impaired by retention of weak, disfavored presumptions. This is inevitable when a body of cases reveals a frequent but irregular practice of drawing unrealistic conclusions from details of fact and language in order to avoid a rule, coupled with a disparity between the supposedly relevant specific rule and the preponderance of general principle. In short, when actual results are in disorderly conflict, however persistent the lip service to a rule, the process of construction is deprived of the predictability necessary for advising clients, evaluating cases, and preparing for litigation.

Adherence to precedent also relates to the workload of the judiciary. Were each aspect of every case to be examined anew, the demands upon a judicial system would be intolerable.⁵⁹ It is unreasonable to ask judges to understand and to appraise the policy considerations affecting each point of law in every case. The value of sound, specific rules of construction in this respect is obvious. So long as a presumed result coincides with common sense, there is little temptation to reexamine the rule or to seek in its alleged reasons and history a basis for excluding individual cases from its application. Nor, more significantly, is there the need for courts to examine tediously the particulars of each individual case in hope of finding supposed evidence of contrary intention. The volume and character of litigation undertaken to avoid unsound rules of construction are evidence of their impact on the workload of judges.

Stare decisis is also valued as a means of achieving reasonably consistent and impersonal judicial decisions and for its role in maintaining

⁵⁹ See CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921).

popular confidence in the adjudicative process. These values are not furthered by mere formal adherence to precedents that are out of harmony with reasonable expectations. Personalized choice in judicial decision-making is relatively unlikely under sound rules of construction. Where there is temptation to decide independently of a bad rule by finding contrary intention, however, the results of construction cases reveal neither consistency nor freedom from the personal discretion of judges.⁶⁰ Beyond this the nature of construction problems is often such that observers can readily comprehend the probabilities of intent to which the law purports to give effect. Consequently, a single instance of express overruling, where justification is apparent, is no occasion for loss of public or professional confidence. On the other hand, whether a bad rule is litigated and applied in the name of stare decisis or is paid lip service and eventually circumvented for unpersuasive reasons, there is justification for Bentham's stinging criticism:

The refusal to put upon the words used by a man in penning a deed or will, the meaning which it is all the while acknowledged he put upon it himself, is an enormity, an act of barefaced injustice, unknown every where but in English jurisprudence. It is, in fact, making for a man a will that he never made; a practice exactly upon a par (impunity excepted) with forgery.⁶¹

Some attention should be given to the role of precedent in those constructional situations in which no single presumption of intent appears distinctly preferable. Occasionally the inclinations of transferors and the impact of other policy objectives will be unclear or, when weighed together, will be virtually in balance.⁶² For want of conviction and sense of urgency, cases of this type are not likely to present serious questions of overruling; the significant problem of method here has to do with the

⁶⁰ For examples of opinions pointing out that the rule of construction yields to contrary intent and then holding the rule overcome but without suggesting any facts, language, or circumstances from which the contrary intent is discovered except, of course, the hardships inherent in the rule itself, see *United States v. 654.8 Acres of Land*, 102 F. Supp. 937 (E.D. Tenn. 1952); *Lichter v. Bletcher*, 123 N.W.2d 612 (Minn. 1963); *Matter of Hawley's Will*, 163 N.Y.S.2d 701 (Surr. Ct. 1957). In other cases, the facts from which contrary intent is found can hardly be called persuasive. *E.g.*, *Estate of Easter*, 24 Cal. 2d 191, 148 P.2d 601 (1944), *noted*, 32 CALIF. L. REV. 320 (1944); *Safe Deposit & Trust Co. v. Waite*, 278 Mass. 244, 179 N.E. 624 (1932); *Aitken v. Sharp*, 93 N.J. Eq. 336, 115 Atl. 912 (1922), *noted*, 31 YALE L.J. 782 (1922). How are cases selected for such treatment, when other cases are governed by the relevant specific rule?

⁶¹ 5 BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 590 (1827).

⁶² An example, which is an increasingly common source of trust litigation, is the question of whether a trustee's power to make distributions pursuant to a support standard is to be exercised after taking account of the beneficiary's other resources or whether the trust distributions alone are to provide the support. The cases are reviewed in Halbach, *Problems of Discretion in Discretionary Trusts*, 61 COLUM. L. REV. 1425, 1441-51 (1961).

appropriate force to be given precedent in these cases in the interests of certainty. Even where it cannot be asserted with confidence that one rule would tend to produce better results than another in individual cases, much can be said for resolving constructional questions by reference to specific rules rather than on a case-by-case basis. In addition to consistent, impersonal treatment of claimants in apparently similar cases, decision by rule provides a basis for counseling beneficiaries, fiduciaries, and potential litigants and for granting instructions. This would also reduce litigation of a type that typically involves family conflict and heavy drain on estate funds without uncovering persuasive indications of actual intention. The objectives of stare decisis seem not to require a rule that is clearly better than any other, so long as there is no conviction that the rule is unsound.

Professor Simes has suggested that the outcome of construction cases can be best predicted by analyzing and weighing underlying policies, rather than on the basis of rules of construction.⁶³ This approach to prediction may be necessary, as the best technique available, when a case falls within the ambit of an unsound presumption. The relevant policies, of course, reveal the weakness of the rule and something of the real factors likely to influence a court's eventual decision, but the rule remains. It continues as an obstacle to the result one would otherwise predict and constitutes an unreliable factor in the picture, inasmuch as the court may seize upon it to decide any given case. This destroys the predictability that might be founded on the underlying policies standing alone. From a longer range view, nothing is really gained by asking each lawyer and each judge to weigh for himself the competing preferences applicable to each case. It is not until the probabilities of intent and other relevant policies are weighed by an appellate court, and a specific rule of construction is enunciated for future guidance, that a reliable basis for counseling will exist.⁶⁴

III

RETROACTIVITY AND THE MYTH OF RELIANCE

If the experience with an established rule of construction and the court's own evaluation of the rule reveal a need for change, the court must consider whether it should refrain from overruling for fear of up-

⁶³ 1 SIMES & SMITH, *FUTURE INTERESTS* § 469 (2d ed. 1956); Simes, Knouff, and Leonard, *The Meaning of "Heirs" in Wills—A Suggestion in Legal Method*, 31 MICH. L. REV. 356 (1933).

⁶⁴ For example, the peace and quiet that have followed the admirable opinion in *Corbett v. Skaggs*, 111 Kan. 380, 207 Pac. 819 (1922), can be contrasted with the litigation and uncertainty in other states on the same question. See 6 BOWE-PARKER, *PAGE ON WILLS* § 50.18 (rev. ed. 1961). See also note 54 *supra*.

setting worthy reliance interests. Most of the possible evils that must be weighed against the expected advantages of overturning precedent⁶⁵ have, in effect, been analyzed earlier as an aspect of the affirmative case for overruling. In essence, the conclusion was that the objectives of *stare decisis* are threatened less by openly rejecting bad precedent on the occasion of overruling than by repeatedly disregarding it because of "discovered" contrary intent—and that overruling may be necessary if the doctrine is to be meaningful as a practical matter. We now turn to the possible evil so often stressed as the main obstacle to overruling in areas of so-called property law: the factor of past reliance.

This deterrent, as it applies to construction of donative instruments, should be reduced to realistic proportions. Instead of assuming that reliance is a factor in these cases, actual inquiry should be made concerning the possibilities of reliance upon the rule in question. If such an inquiry is made, the likelihood of finding a serious reliance problem is materially less than might be expected, especially if the rule of construction in question is one that is ripe for overruling.

Let us assume that a court is contemplating changing its rule from a presumption of construction *A* to a presumption of construction *B*. The court has already concluded that construction *B* offers a better result in the particular case before it. It also believes construction *B* better reflects what transferors generally would want done with their property under circumstances of the type for which the existing rule is designed. The court's belief is supported by the performance record of the old rule and by observable resistance to it in past decisions. Are there reliance factors in such a case which preclude overruling? Is it likely that a retroactive substitution of result *B* for result *A* in the presumption will injure persons who have changed their positions on the basis of the earlier decisions? Was there really a reliance obstacle in the "issue" cases, for example, to prevent the New York Court of Appeals from changing the presumption of per capita distribution to one of per stirpes?

⁶⁵ "The doctrine of *stare decisis* tends to produce certainty in our Law, but it is important to realize that certainty *per se* is but a means to an end, and not an end in itself. Certainty is desirable only insofar as it operates to produce the maximum good and the minimum harm and thereby to advance justice. The courts have been reluctant to overthrow established rules when property rights are involved for the simple reason that persons in arranging their affairs have relied upon the rules as established, though outmoded or erroneous, and so to abandon them would result sometimes in greater harm than to observe them. The question whether the doctrine of *stare decisis* should be adhered to in such cases is always a choice between relative evils. When it appears that the evil resulting from a continuation of the accepted rule must be productive of greater mischief to the community than can possibly ensue from disregarding the previous adjudications on the subject, courts have frequently and wisely departed from precedent." Dissenting opinion by the late Chief Justice Vanderbilt in *Fox v. Snow*, 6 N.J. 12, 25, 76 A.2d 877, 883-84 (1950).

Courts cannot, of course, know with precision the degree to which reliance is a factor with respect to a given rule of construction. Nevertheless, courts should not too readily shed their roles in the law's development by assuming to decide that a matter should be left to the legislature. Even without a legislature's capacity to investigate, a court may well be able to satisfy itself, particularly where doubtful rules of construction are concerned, that a rule it wishes to change is not of a type that makes justifiable reliance even reasonably likely.⁶⁶ When a court is requested to overrule a particular presumption, the court should first attempt to identify just how a situation could arise in which a person might have occasion to rely upon the rule of construction in question; it should then consider the likelihood of a person in that situation consciously deciding to act in reliance upon that rule. The court might well conclude that the reliance problem is not serious enough to justify refusing to deal with the issue of overruling on its merits.⁶⁷

The first and least likely form of reliance interest is the supposed reliance of transferors and their lawyers in drafting instruments. This suggestion falls as readily as any could into the category of what Justice Cardozo called "a figment of excited brains."⁶⁸ Rules of construction deal mainly with cases the transferor failed to anticipate, or at least that were not in his mind at a time when he might consciously have decided to rely on a presumption. If a question concerning the disposition of property under certain conditions occurs to a lawyer while drafting a non-negotiated, unilateral instrument, *even if he knows* the relevant rule, he does not deliberately omit covering the point in reliance upon a presumption of intent, especially one that is overcome by faint—or imagined—glimpses of contrary intent. And certainly the transferor himself will not rely on constructional precedents; he would not, for example, even suspect the law of reading "my heirs" as meaning "myself."⁶⁹ Whatever other arguments may be advanced in support of the doctrine of worthier title, its continued existence as a rule of construction cannot be based on conscious reliance by transferors and their lawyers. The insubstantiality of this type of supposed reliance becomes evident once it

⁶⁶ The absence of likely reliance upon the Doctrine of Worthier Title, which permitted retroactive legislation in California, could have been recognized by a court. See notes 36 & 37 *supra*.

⁶⁷ Cf. *Alferitz v. Borgwardt*, 126 Cal. 201, 208, 58 Pac. 460, 462 (1899): "A lawyer who would have advised a client to rely upon the Berson Case *in making* a loan would show his incapacity."

⁶⁸ "The picture of the bewildered litigant lured into a course of action by the false light of a decision, only to meet ruin when the light is extinguished and the decision is overruled, is for the most part a figment of excited brains." CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 122 (1921).

⁶⁹ On the Doctrine of Worthier Title, see note 37 *supra*.

is considered in the context of any rule of construction that is ripe for overruling. Retroactive substitution of sound rules for unsound rules serves, then, to carry out transferor "expectations," not to upset them.

Conceivably of more substance is the possibility of someone other than the transferor changing position in reliance upon a rule of construction. Of particular concern are the interests of fiduciaries and purchasers who may have distributed property or accepted titles pursuant to advice of counsel, whose opinion was based on a rule of construction. Again, however, the likelihood of this reliance should be examined in relation to any particular rule of construction, in order to determine its substantiality. Since the impact of retroactive change in the law is limited by the principle of *res judicata* and by effective private settlement, an assessment of the danger a particular overruling poses to fiduciary and purchaser reliance must take into account the extent to which it is unrealistic to think of persons changing position purely on the basis of the rule in question.

One factor in this assessment is the likelihood that legal counsel would advise making a distribution or accepting a title without first having the constructional question adjudicated or otherwise settled. This assumption of legal advice is appropriate since without such advice the rule of construction would not be known and there would be no question of reliance. Consequently, the question is whether one who knows the particular rule would conclude that it could be relied upon as a sufficient basis for taking action or whether he would insist upon further assurance, typically by insisting that the beneficial interests or the state of the title be judicially established. Once this question is asked, the answer will usually be obvious with reference to rules that need overruling. The pattern of prior decisions under such a rule will reveal that, despite the presumption, the decisions in fact go both ways without predictable lines of distinction. A person does not consciously rely on a rule he knows is readily overcome by faint, unpersuasive glimpses of contrary intention. Had the New York Court of Appeals wished in 1919 to overrule the per capita presumption in the "issue" cases,⁷⁰ there would have been no serious danger of an executor having previously distributed the residue under a will, or a trustee the remainder under a trust, on a per capita basis relying on the recognized rule of construction. A fiduciary would insist on judicial construction of the instrument in such cases, at least if wholly adequate protection were not available through private settlement. Similarly, a court should consider whether, if serious doubt existed as to the construction of an instrument creating legal present and future interests in land, any one

⁷⁰ *Petry v. Langan*, 227 N.Y. 621, 125 N.E. 924 (1919), is discussed in text accompanying at note 24 *supra*.

would purchase the land⁷¹ or would be compelled to accept title, under a contract calling for marketable title,⁷² from the holders of the various interests as determined by a doubtful, inconsistently applied presumption. For example, assume *A* conveyed to *B* for life, remainder to *C* if then living and otherwise remainder to the heirs of *A*. Without the state of the title having been judicially established, would a deed from *A*, *B*, and *C* be acceptable to a purchaser or constitute a marketable title because the doctrine of worthier title creates a presumption, though often held inapplicable, that there was a reversion in *A* rather than a remainder to his heirs? In light of the aftermath of *Doctor v. Hughes*,⁷³ at least assuming no local title standard specifically declaring such a title marketable, one would readily expect a negative answer wherever worthier title is merely a rule of construction.⁷⁴

Even assuming a reasonable possibility of justifiable reliance, before the importance of the reliance factor can be evaluated realistically the court must also inquire how a situation might arise that would so much as present an opportunity for someone to rely on the rule. Only then can the frequency of possible reliance and the outer limits of danger from overruling be seen in realistic proportions. For example, where a constructional problem involves equitable interests under a trust, a purchaser of the subject matter would normally not be affected by the constructional problems. His dealings would be with the trustee on the basis of the latter's expressed power of sale. Purchaser reliance problems are essentially confined to transactions involving the subject matter of successive legal estates. This area of potential problems is further narrowed, almost to insignificance, by the frequency with which legal life tenants are also granted powers of sale, and particularly by the fact that, in the

⁷¹ "[W]hen a reasonable doubt exists as to the construction which the courts would make, the title is unmarketable and should not be accepted until the point has been judicially determined." 1 PATTON, TITLES § 201 (2d ed. 1957). The liberality with which wills are construed, individually rather than on the basis of precedents, in order to effectuate the testator's intention "constitutes an especial reason . . . for refusing to approve as a muniment of title any devise which may be fairly considered as ambiguous or uncertain until all parties who could raise a question . . . have been barred by decree, limitation, or release." 2 *Id.* § 527.

⁷² For example, title was held not marketable and specific performance was denied because the rule of construction relied on by plaintiffs would yield to a finding of contrary intention, and thus reasonable doubts concerning the title existed until the construction of the instrument was judicially determined with the appropriate parties before the court, in *Fisher v. Eggert*, 64 Atl. 957 (N.J. 1906). See generally *Williams v. Bricker*, 83 Kan. 53, 109 Pac. 998 (1910); 3 AMERICAN LAW OF PROPERTY § 11.49 (Casner ed. 1952).

⁷³ 225 N.Y. 305, 122 N.E. 221 (1919). See Verrall, *The Doctrine of Worthier Title: A Questionable Rule of Construction*, 6 U.C.L.A.L. REV. 371, 374-75 (1959).

⁷⁴ See notes 71 & 72 *supra*. In fact, the danger exists that "an examiner might easily overlook it [worthier title] and give an erroneous opinion" on the assumption that the instrument meant what it said. 1 PATTON, TITLES § 223 (2d ed. 1957).

absence of such a power, sale of the subject matter is rarely possible anyway since some interests will usually have been created in unborn and unascertainable persons. By way of illustration, consider again the worthier title example in the preceding paragraph. *B*'s life estate would typically not be followed by a contingent remainder in a named person, such as *C* in the example; instead there would more likely be a primary remainder to an undetermined class, such as "*B*'s issue who survive him," followed by the purported disposition to "*A*'s heirs," to take effect if *B* leaves no issue. Thus, purchase from the owners of all the legal interests would be clearly precluded without ever confronting the constructional question of whether the purported remainder to the grantor's heirs is a reversion in the grantor. Similarly, even if we make the unlikely assumption that upon demand of all beneficiaries, determined according to the doctrine of worthier title, a trustee would be willing to terminate a trust without court order,⁷⁵ joinder of all potential beneficiaries in such a demand would rarely occur for the reasons just stated: it is an unusual trust today that does not create potential interests in unborn or unascertainable persons.

In attempting to appraise the dangers of retroactivity to fiduciaries and purchasers, the risks should be appropriately discounted whenever the problem under consideration is one which, under local procedures, would be settled as a matter of course by a decree of distribution at the termination of estate proceedings. Even though a matter is not one routinely covered by probate or comparable decree, in many states the dangers of reliance are to be appraised in light of modern procedures under which construction proceedings or instructions are expeditiously and inexpensively available to personal representatives and testamentary trustees.

Thus, in considering whether to overrule a particular constructional doctrine, a court should attempt to evaluate the reliance factor realistically. It should do this in terms of actual situations in which there *could* have been reliance on the rule and then in terms of whether, if such a situation had occurred, the particular rule is one upon which it is reasonable to suppose a person would have been willing, or compelled, to rely. The court should also have in mind local procedures that would have been available as alternatives. The differences in various rules of construction and in the circumstances in various states make broad generalizations inadvisable. Nevertheless, it is fair to assert that reliance

⁷⁵ In such a case, in addition to the constructional problem, the trustee would have additional cause to hesitate, since he would usually require a determination that termination would not upset a material purpose of the settlor, under the *Claflin* doctrine. *Claflin v. Claflin*, 149 Mass. 19, 20 N.E. 454 (1889); RESTATEMENT, TRUSTS 2d § 337(2) (1959).

dangers have generally been exaggerated. Rather than to assume either that reliance is an insurmountable obstacle simply because property law is involved or that the court is not equipped to evaluate the reliance factor, a court should examine this factor as it affects any given question of overruling. The character of unsound rules of construction is such that a realistic look at the possibilities of reliance may well reveal that legislative investigation of the reliance factor is not needed before undertaking a job which badly needs to be done—and which may have to be done by a court if it is to be done at all.⁷⁶

Finally, mention should also be made of the special type of reliance interests that relate to counseling and to the settlement and prosecution of litigation. Essentially, in this area our concern is for *reliability* rather than for past acts of reliance that might be upset by retroactive change in the law. We have already seen, in connection with the affirmative case for overruling, that reliability does not exist under unsound rules of construction but depends upon the willingness of courts to provide sound rules. As far as past acts of reliance as restraints upon overruling are concerned, the consequences of retroactivity are limited by res judicata and effective private settlements. Where the rights of parties are thus determined, retroactivity is no threat, and, of course, the parties are no worse off or better off than if the overruling had not occurred. In cases which may still be affected, where a lawyer's advice has been relied on in rejecting settlement, we must distinguish the lawyer's embarrassment from the client's loss. Beyond his investment in the litigation itself, the client's loss is the settlement opportunity given up in order to pursue litigation under the old rule, litigation which will now presumably be lost. How much concern there should be for that lost opportunity, which now appears to have depended upon an erroneous construction of the transferor's intention and which had somewhat the character of a windfall, is a matter to be weighed against the saving to the person the law now concludes was intended to receive the property. The loss, of course, is one which might have been sustained under the old rule anyway via the often-used backdoor of "discovered" contrary intent—a substantial risk that is assumed in refusing settlement and one that is hard to evaluate so long as an unsound rule prevails.

Before accepting retroactivity as something wholly undesirable that must be endured if a better rule is to be established by a court, account should be taken of the *advantages* of retroactivity. In fact, in the con-

⁷⁶ See Chief Justice Vanderbilt dissenting in *Fox v. Snow*, 6 N.J. 12, 24, 76 A.2d 877, 883 (1950): "Particularly in the realm of testamentary construction should courts feel free to depart from precedent when the dictates of justice and reason demand it." This view is held even in the House of Lords in England. See *Perrin v. Morgan*, [1943] 1 All Eng. Rep. 187, 194.

struction of donative instruments, one advantage of judicial action over legislative action, in their usual forms, is the retroactive effect of the former. This is largely because so many constructional problems involve future interests. Consequently, problems tend to arise long after the creative instrument has become effective and thus immune to prospective changes in the law. At least one legislature decided that the advantages outweighed the dangers to supposed reliance interests and explicitly made an enactment changing a rule of construction retrospective, despite some feelings of uncertainty about the constitutionality of so doing.⁷⁷ Just as the workings of such traditional villains of future interest law as the Rule in Shelley's Case have continued long beyond their abolition,⁷⁸ bad rules of construction applicable to future interests will also remain for decades unless retroactively purged from the law. This was observed earlier in the review of the New York experience with the per capita and per stirpes problems in the "issue" cases.⁷⁹

This discussion of retroactivity would not be complete without some mention of prospective overruling, in which there appears to be a growing interest, principally as a means of safeguarding reliance interests.⁸⁰ Several points concerning prospective overruling are relevant. First, the improbability of significant reliance interests, together with the value of retroactivity in reducing litigation and in effectuating the approved purposes of past transferors, suggests that there is no need for exemption from the usual retroactive application of decisional law. Furthermore, and of broader implication, there is a danger that a practice of prospective overruling, assuming a new rule would not be applied even to the

⁷⁷ CALIFORNIA LAW REVISION COMMISSION RECOMMENDATION AND STUDY RELATING TO THE DOCTRINE OF WORTHIER TITLE 6 (1959), discussed in Recent Legislation, 47 CALIF. L. REV. 740, 745-46 (1959). Compare N.Y. PERS. PROP. LAW § 17-c, considered in *Matter of West's Estate*, 289 N.Y. 423, 46 N.E.2d 501 (1943); SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND 130-248 (1943). Also compare REVISED UNIFORM PRINCIPAL AND INCOME ACT § 14.

⁷⁸ E.g., *Burnham v. Baltimore Gas & Elec. Co.*, 217 Md. 507, 144 A.2d 80 (1958).

⁷⁹ See notes 27-30 *supra*. See also note 33 *supra*, discussing the "Tennessee Class Doctrine," and *Neissl v. Hartman*, 196 N.E.2d 528, 44 Ill. App. Ct. Rpts. 2d 412 (1963), concerning the rights of adoptees.

⁸⁰ See, e.g., LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 117 (1962) (in ch. 6, "Impressions of the Conference on Precedent"): "And the emergence into judicial respectability was noted, of the procedure of safeguarding those who had relied on prior clear rules, even while the Court made clear a new rule for the future—a procedure which has been under discussion for twenty years, whose constitutionality was the subject of one of Justice Cardozo's finest opinions, and which had been advocated by him while he was still holding office in New York." (The reference is to Justice Cardozo's opinion in *Great Northern Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932)). See also Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1 (1960); Freeman, *The Protection Afforded Against the Retroactive Operation of an Overruling Decision*, 18 COLUM. L. REV. 230 (1918).

case announcing it, would diminish the incentive of private litigants to seek change in the law and thereby impair the common law's capacity for self-improvement.⁸¹ This latter should strike a sensitive chord among property lawyers generally, for many aspects of property law have already suffered more than their share from judicial "hands-offism." In fact, only rarely are courts requested to reconsider an outmoded doctrine of property law. Instead of producing reconsideration and simplification, resistance to property rules is reflected in excessive refinement and highly technical exceptions—and in construction, of course, in ready findings of contrary intention.

CONCLUSION

The personal and financial costs of litigation to ascertain the meaning of wills and trusts represent an enormous waste in the devolution of property. The blame for much of this waste falls upon the law. A certain amount of human oversight by transferors and their lawyers being inevitable, the law must compensate by the development of workable rules of construction. Where actual intention is not discoverable, decision by rule has much to recommend it, both as a means of reaching good results in individual cases and as an aid to peaceful settlement of estates. Admittedly little can be done in this regard with cases in which the individuality of language and context makes attempted resort to precedent futile. Rules of construction can be useful, however, in those recurring situations within which the individual cases and their solutions involve common considerations.

The boundaries of each constructional situation, and thus the cases to which each specific rule relates, must be defined by relevant similarities of language and dispositional context;⁸² the intention the rule

⁸¹ For a variation avoiding this defect, but raising problems of its own, see *Molitor v. Kaneland Community Unit*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 968 (1959) (prospective except for the litigants in the case then before the court). The dissenting opinion referred to this technique as "an aborted offspring of the Sunburst theory." *Id.* at 41, 163 N.E.2d at 104. See also related case of *Molitor v. Kaneland Community Unit*, 24 Ill. 2d 467, 182 N.E.2d 145 (1962). Compare *Jones v. Woodstock Iron Co.*, 95 Ala. 551, 563, 10 So. 635, 638 (1891), which, in overruling a prior decision, stated that persons acquiring title in reliance upon a prior case would be protected in accordance with the prior law; this dictum was applied in *Ashford v. Prewitt*, 102 Ala. 264, 14 So. 663 (1894).

⁸² "At first sight it may seem that cases of this nature fall under no rules, that you cannot construe one man's blunder by another man's blunder, we find however that there is a startling uniformity in error; the same words are omitted, the same superfluous words are inserted, and the same word is substituted for another, over and over again. . . .

"It may be objected that the blunder may occur in an instrument where the circumstances of the parties are different from those in the reported cases, and that the context of the instrument under consideration may differ from those that have received judicial construction. This objection does not affect the validity of the rule, it only alters

attributes to a transferor in that situation must then reflect socially approved, natural inclinations of persons in disposing of their property. Where this is not the case, the potentialities of precedent in resolving constructional questions will not be realized. In such instances, if overruling is otherwise appropriate, a realistic assessment of the dangers to reliance interests will probably reveal no need to preserve a rule that judges would feel compelled to circumvent repeatedly by strained findings of contrary intention.

A practice of relying on "particular facts" in cases encompassed by a bad rule is not really a search for actual intention, for such a search is essentially a waste of effort. It is a cover for what is an obvious though understandable attempt to circumvent unsound rules in the interest of decent results, which are recognized before the search for justification is undertaken. The rules are in truth being *rejected*, not *rebutted*, but this occurs on an inconsistent, case-by-case basis. Some litigants receive the benefit of the practice while others similarly situated do not. Thus we often find a court openly apologizing for its own decision, based on a bad rule, and openly admitting that another rule would be preferable.⁸³ Such a practice of relying on supposed particular facts to achieve acceptable results is no answer to precedent which badly needs overruling. It represents, in fact, the concession by which rules are allowed to survive long after experience proves them unsound. The ability to rely on rules in counseling and in settling and litigating cases is surrendered by this practice. The price is litigation that is costly to estates, to courts, and to family harmony. Cases which would raise no serious issue at all under a suitable rule are placed in doubt by unlikely presumptions of intent. On the other hand, if a presumed result makes good sense as a reflection of constructional objectives, the rule can be readily accepted as the answer to a case, for litigation to overcome it is a bad risk. Consequently, if an

the manner of expressing it. A rule of this nature may be expressed as follows: 'Where a phrase *A* occurring in an instrument of a certain nature may mean *B* or *C*, and the phrase *D* occurs in the same instrument, *A* must be taken to mean *B*, unless the circumstances of the parties or the context of the instrument render that meaning impossible.'"

Elphinstone, *On the Limits of Rules of Construction*, 1 L.Q. REV. 466, 469 (1885).

⁸³ Illustrative is the language of *In re Gray's Estate*, 147 Pa. 67, 74-75, 23 Atl. 205, 206 (1892): "The rule thus established does not commend itself to sound reasoning, and is a sacrifice of the settled presumption that a testator does not mean to die intestate as to any portion of his estate, and also of his plain actual intent. . . . If the question were new in this state, speaking for myself I should not hesitate to reject the English rule as wrong in principle and subversive of the great canon of construction,—the carrying out of the intent of the testator."

See also *Petry v. Petry*, 186 App. Div. 738, 175 N.Y. Supp. 30 (1919) (discussed in text accompanying notes 20-23 *supra*), *aff'd*, 227 N.Y. 621, 125 N.E. 924 (1919); *Wright v. Wright*, 225 N.Y. 329, 340-41, 122 N.E. 213, 217 (1919); *In re Freer*, 22 Ch. D. 622, 628 (1881).

existing rule of construction is contrary to good sense, it should be forthrightly overruled and replaced by a sound rule, unless precluded by realistic—not assumed—considerations of reliance upon prior decisions.

To urge overruling in this fashion is not to urge the individuals presently constituting a court to substitute their views freely for those of their predecessors. Those constructional rules that are most in need of overruling have proven in experience to be unsuitable. The indictment of a rule will not be predicated simply on the judges' subjective evaluations of popular inclinations and social policies, or even on the rule's failure to conform to already recognized preferences. The success or failure of a rule of construction is observable in the amount and character of litigation it produces. Ultimately, the quality of any presumption is tested at the stage of application. Recurrent dissatisfaction with the rule at this stage, on the part of judges who have to live with it, is evidence that the rule is bad. This proof through experience is epitomized by the admission that the rule yields to the slightest indication of contrary intent.

Rather than suggesting a freeing of judges from precedent, the suggested method contemplates a more forceful use of precedent in construction generally. It recognizes the application of rules as a workable method of achieving both good results in individual cases and values normally associated with a practice of following precedent, but it recognizes also that only reasonably sound rules can become forceful rules in an area of the law where rules are rebutted if other intention is found. Through the suggested method the following of precedent can be real and meaningful, rather than nominal—honored frequently, yet not consistently, in the breach. The straightforward overruling of unsuitable precedent represents less of a threat to rule of law, simplicity and impersonality in adjudication, and reasonable predictability than does the retention of unsound rules, hedged by their characteristic weakness. These objectives are attainable only through presumptions which tend to produce results reasonably consistent with a transferor's probable desires and with other constructional preferences. In many situations for which rules of construction are appropriate, it can fairly be said that one construction is distinctly better than its alternatives in this respect. Where this is the case, much will be gained by establishing that rule and applying it forcefully. Adherence to an unsound rule cannot be justified on the basis of reasons underlying the doctrine of *stare decisis*—absent realistic, not imagined or assumed, considerations of reliance—for the basic objectives of the doctrine are forfeited by unsound presumptions. Instead the doctrine should be seen as requiring a willingness on the part of courts to correct bad rules of construction.