

SOME OBSERVATIONS ON WILLS UNDER THE INDIANA
PROBATE CODE OF 1953

MAX RHEINSTEIN†

A will is an instrument looking to the future. It is meant to take effect at the time of the death of the testator, but some of its provisions may not become operative until a still later moment, for instance, the death of a life tenant. A great deal may happen in the interval between the making of the will and the time or times when its various provisions will become effective, and many of those events may materially affect or upset the scheme of distribution which the testator has established.

If the testator is assisted by a skilled draftsman, the various contingencies will have been considered, and, if the circumstances call for some special provision, appropriate clauses will have been inserted in the instrument. Being advised, for example, of the possibility that his aunt to whom he has left \$10,000 may die before him, the testator may provide that in such case the money shall go to her daughter or be split between the testator's nephews. If the testator is made aware of the fact that the apportionment of the estate tax may constitute a problem, he may feel it advisable to provide expressly that it shall be prorated among all, or certain, beneficiaries of his will, borne completely by the residuary legatee, or apportioned in some other way.

If the testator fails to provide for such possibilities, the question arises as to what the executor is to do. The assets must be distributed, and the contingency dealt with in some way. Fortunately, the case of the particular testator will not be the first for which such a question arises. As a matter of fact, the situations stated are typical, and the law, through the courts and the legislatures, has developed definite rules to meet them. If the testator has not stated who should have the \$10,000 meant for one who predeceases him, the law steps in to fill the gap; a common law rule of venerable age provides that the recipient is the residuary legatee. If the assets of the estate turn out insufficient for payment of all the legacies, another rule of stop-gap law tells us that, while as a general rule all legacies abate upon an equal footing, some kinds of legacy, for instance, one given to a creditor in lieu of payment of his debt, or to the widow in lieu of dower, or to a dependent relative, is to have priority over ordinary legacies.

If these rules of law are formulated to correspond to intentions of the individual testator, they need not be spelled out in the will. The testator, whose intentions coincide with the rules of law, can keep his testa-

† Max Pam Professor of Comparative Law, University of Chicago Law School.

mentary instrument brief. Wills, generally, can be simpler and shorter where the rules are not out of tune with the notions of the ordinary citizen. If the law undertakes, as it should, to serve the interests of the bulk of testators the rules should, as far as possible, be drawn to coincide with those intentions which experience indicates to be generally held by testators. A person whose ideas are not those of the average must, of course, be free to establish, by express provision, his own scheme.

That will-making should be as simple as possible is a postulate of particular importance where owners of modest amounts of property are numerous and where a considerable number of property owners believe that they do not need a lawyer to make a will. Yet, in the United States the homemade will is fraught with dangers, and lawyer-made wills tend to be lengthy and complicated instruments couched in language which a layman is rarely able to understand. One reason for this state of affairs is the obsolete character of many of the rules of the common law. The bulk of these were developed by courts of England in the eighteenth century, that is, in a place and time of habits vastly different from those of present-day America. In the process of *stare decisis* these rules have been preserved, unless replaced by laws more consistent with contemporary American attitudes.

The rules which the English courts worked out as corresponding to the presumed intention of a testator were characterized by two policies: First, the heir at law was preferred over all others; and, second, the average testator was believed to be anxious to preserve the real estate for his family in general and for their heir in particular.

These policies were, indeed, likely to coincide with the ideas of that testator whom the judges of the courts of eighteenth century England had before their minds. He was typically a man the bulk of whose fortune was invested in land, and who was anxious to preserve this financial basis of the family's standing and influence undivided in the hand of his eldest son. Hence, at that time, it was proper to assume that the average testator would rather have legacies go unpaid than have the real estate used for this purpose; that for the payment of debts he would not want the real estate touched until the personal estate was completely exhausted; that he would want any debt secured by a mortgage on a parcel of real estate to be paid out of the personal estate; that he would wish the subject matter of a lapsed devise to descend to the heir rather than to the residuary devisee; and that he would have land not yet owned by the testator at the execution of the will descend to the heir.

Do such rules still correspond to the intentions of an average testator in a midwestern state of the United States in the middle of the twentieth

century? The question appears sufficiently answered by its statement. There has thus arisen for American legislatures the task of reforming these rules of law so that they will correspond with the ideas ordinarily entertained by the average, present-day American rather than with those of the typical English testator of the days of Lords Kenyon or Stowell. The enactment of a new probate code would seem to present a unique opportunity to perform this task. The Indiana General Assembly has recently enacted such a code. How has it approached the problem?¹

The section of the Code dealing with lapse poses several problems. Under the traditional stop-gap rules, if the beneficiary of a testamentary gift predeceased the testator, the legacy or devise² would lapse. In the case of a legacy the benefit would accrue to the residuary legatee or, if none, to the next of kin, while the subject matter of a devise would descend to the heir unless the testator indicated that the residuary devisee was to benefit. This obsolete distinction has long ago ceased to be observed in Indiana,³ and the Code continues this modern approach in Section 6-601(g)(1).⁴ From the general rule that a devise will not take effect, unless the devisee survives the testator, this section establishes an exception where a devise is made to a descendant of the testator. Improving upon the older anti-lapse statute,⁵ the new section sensibly provides that the devise shall be treated as if made in favor of the descendants of the devisee in question, not only if that devisee died in the period between the execution of the will and the death of the testator, but also if he was already dead at the time of the execution of the will. The careful way in which it is stated that the term "descendant" is to include persons related to the original beneficiary by adoption or illegitimacy constitutes another improvement.

In other respects, however, the wording of the anti-lapse statute gives rise to doubts. Under Section 6-601(g)(2) the "property . . . devised"

1. The Indiana Probate Code is to a considerable extent based upon the Model Probate Code, prepared for the Probate Law Division of the Section of Real Property, Probate and Trust Law of the American Bar Association, by its Model Probate Code Committee in cooperation with the Research Staff of the University of Michigan Law School. Much of what is said will also apply to that Code, certain aspects of which have already been discussed in the writer's article on *The Model Probate Code: A Critique*, 48 COL. L. REV. 534 (1948).

2. In the Code the term "devise" is defined to mean both devise and legacy of traditional terminology, and throughout the Code the term is, with few exceptions, used in this sense. IND. ANN. STAT. § 6-103 (Burns 1953). In the following, the same terminology will be used unless the context requires, as in the passage of the text above, that legacy and devise be distinguished from each other.

3. *Holbrook v. McCleary*, 79 Ind. 167 (1881).

4. The allusions in text to a section without further explanation are to IND. ANN. STAT. (Burns 1953).

5. IND. ANN. STAT. § 7-709 (Burns 1933).

to a descendant who fails to survive the testator is to "vest" in the surviving issue of the original devisee. It is proper to speak of the "vesting" of property in the case of a specific devise, especially since, in contrast to the previous situation in Indiana, under the new Code title to the assets of the personal estate, like the title to those of the real estate, no longer passes to the executor, but directly "to the person to whom it is devised. . . ."⁶ What property, however, is to "vest" in a *general* legatee? This provision apparently means no more than that the claim for the payment of their legacy is acquired by the issue of the original legatee in the same way as if they had been named in the will.

The provision attracts attention, however, to a more general problem, namely that of determining from whom a general legatee can claim the payment of his legacy. It can hardly be assumed that the draftsmen of the Code intended to change the traditional rule under which general legacies are payable by the personal representative in the course of the administration. However, if the Code is to be applied literally, it seems as if the personal representative is not entitled to make such payment. Pursuant to Section 7-123, the persons to whom the property of the decedent is devised acquire it "chargeable with the expenses of administering the estate, the payment of other claims and allowances." "Claims" are defined so as not to include general legacies.⁷ It may then be asked out of what assets the executor is to pay these legacies. The draftsmen had either lost sight of general legacies or they entertained a vague, but incorrect, view that upon the death of the decedent the general legatees would acquire a property interest in the assets of the estate. They would acquire such an interest if they were beneficiaries of a trust; however, it is generally accepted that as general legatees they do not acquire such a position,⁸ and it is improbable that the draftsmen of the Code wished to give it to them. Unfortunately they failed to include general legacies among the claims with which the assets of the estate are charged when title to them passes from the decedent to the special and residuary legatees.

The wording of the anti-lapse provision is apt to create another problem. Quite properly the draftsmen were anxious to include within

6. Section 7-123. In the face of this seemingly clear provision, the Commission Comment to § 7-701 asserts that the personal representative "takes title to the personal property but not to the real estate, the same as under the present law." As to this surprising contradiction, see Note, *Possession and Control of Estate Property During Administration: Indiana Probate Code Section 1301*, 29 IND. L.J. 251, 260 (1954).

7. "'Claims' include liabilities of the decedent which survive, whether arising in contract or in tort or otherwise, funeral expenses, the expense of the tombstone, expenses of administration and all estate and inheritance taxes." IND. ANN. STAT. § 6-103 (Burns 1953).

8. *Contra*: Chase National Bank of New York City v. Sayles, 11 F.2d 948, 48 A.L.R. 207 (1st Cir. 1926). But see BOGERT, TRUSTS § 12 (3d ed. 1952).

the benefit of the anti-lapse statute not only natural descendants of the testator but also persons who have entered the family by adoption.⁹ For understandable reasons the draftsmen did not wish, however, to extend this benefit to one who has been adopted as an adult. Adoptions of adults are infrequent, but still possible under the laws of some American states and of several foreign countries. The Code provides that, in order to benefit from the anti-lapse statute, the adopted person must be one who was adopted "during his minority." Assume that a testator has given a legacy to his son, that the son has predeceased him and he is survived by an adoptive daughter whom the son adopted when she was nineteen years of age. Assume further that at the time of the adoption the son was a resident of Indiana and the child a resident of Illinois. Under the law of the latter state a female person ceases to be a minor when she completes her eighteenth year of age,¹⁰ while in Indiana the age of majority seems to be twenty-one for both male and female.¹¹ May the daughter benefit from the Indiana anti-lapse statute? If the text had used a certain age, such as eighteen or twenty-one years, rather than a legal concept, which has no meaning except within the context of a particular legal system and which must be determined in the frequently cumbersome process of the law of conflict of laws, troublesome litigation might have been prevented.

By its own provision the lapse statute, Section 6-601(g)(1), does not apply to a residuary gift. It is left to speculation, in a situation where several beneficiaries are named in the residuary clause and one fails to take, whether his share should accrue to the benefit of the others or pass intestate.¹² The cause for litigation could have been removed if this much debated question¹³ had been answered in the new Code.

The Code has also left undecided another famous controversy which has arisen in connection with anti-lapse statutes. When a devise to a debtor of the testator who has predeceased him is declared by the statute not to lapse but to accrue to the benefit of a descendant of the beneficiary

9. As to the former law, compare *Peirce v. Farmers State Bank of Valparaiso*, 222 Ind. 116, 51 N.E.2d 480 (1943), with *Beck v. Dickinson*, 99 Ind. App. 463, 192 N.E. 899 (1934).

10. ILL. ANN. STAT. c. 110, § 380 (1940).

11. In § 8-101 the Probate Code defines as an "incompetent," among others "any person who is . . . [u]nder the age of majority, . . ." What the age of majority is, however, is not stated in the Code. In the law on civil procedure it is stated that "[t]he phrase 'under legal disabilities' includes persons within the age of twenty-one [21] years. . . ." IND. ANN. STAT. § 2-4701 (Burns 1946 Repl.). No other statutory provision is referred to in the index to Burns Annotated Indiana Statutes.

12. Formerly Indiana held that a lapsed residuary devise fell into the residue. *West v. West*, 89 Ind. 529 (1883); *Holbrook v. McCleary*, 79 Ind. 167 (1881); *Gray v. Bailey*, 42 Ind. 349 (1873); and *Hedges v. Payne*, 85 Ind. App. 394, 154 N.E. 393 (1926).

13. See *George Washington University v. Riggs National Bank*, 88 F.2d 771 (D.C. Cir. 1936); *In re Gray's Estate* 147 Pa. 67, 23 Atl. 205 (1892).

named, the question then is does the descendant take the devise subject to, or free from, the debt?¹⁴ A statutory answer would have been desirable.

In the matter of the order in which assets of the estate are to be used for payment of claims, the Code radically breaks with the ancient rule which required that all personalty be exhausted before the realty could be touched.¹⁵ Section 7-1103 establishes a simple order of application of assets in which both kinds of property are treated equally.¹⁶ Indirectly, this Section also establishes the order in which devises are to abate, wisely leaving room to priorities for such special kinds of devises as those to the surviving spouse, to a dependent relative, or those meant to provide for the payment of the testator's debts, for the erection of a monument, or for the maintenance of his grave.¹⁷ In all this the Code would seem to correspond to the notions generally held by the average testator in present-day America. By expressly stating that no preference as between real and personal property shall be made in the matter of payment of legacies, the Code has also done away with the obsolete and obnoxious rule which prevented the use of real property for the payment of legacies unless the testator had expressly or by implication ordered it in his will.¹⁸

It is provided in Section 7-1104—and wisely so—that in all cases in which assets of the estate have been sold or taken for the payment of claims, general legacies, the family allowance, the shares of pretermitted heirs, or the indefeasible share of a surviving spouse, "other legatees and devisees"¹⁹ shall contribute according to their respective interests to the legatee or devisee "whose legacy or devise has been sold or taken,"²⁰ so as to accomplish an abatement in accordance with the provisions of Section 7-1103.

Since the residuary devise would thus abate first, the provision of Section 7-1104 seems to bolster the contention that the claim of the Federal Government for estate tax is to be paid out of the residue rather than ratably apportioned among all the beneficiaries. The majority of the state courts has adopted the former rule, but the rule of apportion-

14. See Mechem, *Some Problems Arising Under Anti-lapse Statutes*, 19 IOWA L. REV. 1, 20 (1933).

15. IND. ANN. STAT. § 6-1107 (Burns 1933).

16. The provision literally corresponds to § 184 of the MODEL PROBATE CODE.

17. See the Comment to the corresponding § 184 of the MODEL PROBATE CODE.

18. Warlick v. Boone, 120 Kan. 148, 242 Pac. 135 (1926); Comment, 36 MICH. L. REV. 297, 308 (1937); NEW YORK LAW REVISION COMMISSION, 1937 REPORT 971.

19. Here the Code strays from its uniform terminology under which "devisee" includes "legatee"; see note 2 *supra*.

20. This wording of the Code is not entirely accurate; what is sold or taken is, of course, not the legacy or devise but the asset bequeathed or devised.

ment has been established by statute in an increasing number of states²¹ and has even been applied without the help of a statute.²² The question is whether the testator who has not included any specific instructions on the apportionment of the estate tax is more likely to assume that it will be borne entirely by the residuary beneficiary or that it will be ratably apportioned among all beneficiaries. The answer is not easy. In 1930 New York's Decedent Estate Commission believed that proration was the method most generally intended by testators.²³ Under a scheme widely followed by draftsmen in this country, it is, indeed, customary to provide for the surviving spouse and the immediate family by way of residuary devise, and it may well be argued that a testator is unlikely to intend that the burden of estate tax be fully borne by his chief beneficiaries. But can it be said generally that he would want the legacies given other relatives to abate for tax payment purposes? Furthermore, what is the testator's intention where he provides for his wife and family by particular devises and gives to charity whatever may be left of his net estate?

Regulation of the problem by express provision of statute would seem to have been specially desirable in Indiana, where the law is not clear. In a decision of the Orphans' Court of Philadelphia County, Pennsylvania, the state of Indiana seems to have been regarded as one following the rule of non-apportionment.²⁴ However, in the only reported Indiana decision which touches upon the problem,²⁵ the court emphatically stated that the problem of determining the burden of estate taxes ought to be answered "equitably" and that "equality is equity."²⁶ On this basis the court ordered the apportionment of the tax burden among an intestate decedent's heirs and the person who had been his joint tenant of real estate and other assets. The joint tenant had obtained the sole title to these assets through the death of the decedent, and, for the purpose of computing the taxable estate, the value of their acquisition was to be added under the federal estate tax law to the assets left by the decedent. This opinion would seem to raise sufficient doubt as to which of the two competing rules of law applies in Indiana. The absence of a statutory

21. Karch, *The Apportionment of Death Taxes*, 54 HARV. L. REV. 10 (1940); Reidy, *Apportionment of Estate Taxes*, 88 TRUSTS AND ESTATES 623 (1949); Reidy, *Problems of Apportionment of Estate Taxes Under State Statutes*, (A.B.A. Section of Real Property, Probate and Trust Law) 1949 PROCEEDINGS 23; Note, *Apportionment of Federal Estate Taxes: Which Funds Bear the Burden*, 40 COL. L. REV. 690 (1940); Note, *Statutory Apportionment of Federal Estate Taxes*, 62 HARV. L. REV. 1022 (1949).

22. *Hampton's Administrators v. Hampton*, 188 Ky. 199, 221 S.W. 496 (1920).

23. See the Commission Note following N.Y. DECEDENT ESTATE LAW § 124.

24. *Ely's Estate*, 28 Pa. D. & C. 663 (1937).

25. *Pearcy v. Citizens Bank & Trust Co. of Bloomington*, 121 Ind. App. 136, 96 N.E.2d 918 (1951).

26. *Id.* at 155, 96 N.E.2d at 927.

provision renders it advisable for the draftsman to insert in every will a clause indicating the distribution of the tax burden whenever the estate is large enough to be subject to estate tax.

If a piece of land is charged with a mortgage or similar encumbrance, under the common law the heir or devisee was entitled to have the mortgagee's claim paid out of the personal estate so that the land would be exonerated.²⁷ Like so many others, this rule, too, expresses that policy of eighteenth century English law which sought to favor recipients of realty over those of personalty. In its home country the rule of exoneration was considered obsolete and abolished by statute as early as 1854.²⁸

In Indiana, the problem was previously dealt with in a statutory provision which seemed to follow the traditional rule²⁹ but which, by its language, created many doubts³⁰ that appear never to have been resolved by any reported decision. Fortunately these doubts have now been laid to rest by Section 7-1109 of the new Code, which is a special application of the general policy of abolishing the ancient preference for takers of real estate.³¹ The new provision is based upon Section 189 of the Model

27. See Note, *Exoneration of Specific Property from Incumbrances Existing at the Death of the Testator or Ancestor*, 40 HARV. L. REV. 630 (1927).

28. Real Estate Charges Act, 1854 (Locke King's Act), 17 & 18 VICT. c. 113; 40 & 41 VICT. c. 34 (1877) and see also Stat. 30 & 31 VICT. c. 69 (1867).

29. IND. ANN. STAT. § 6-1137 (Burns 1933) provided: "Whenever any person shall have devised his estate, or any part thereof, and any of his real estate subject to a mortgage executed by such testator shall descend to an heir or pass to a devisee, and no specific direction is given in the will for the payment of such mortgage, the same shall be discharged as follows:

First. If such testator shall have charged any particular part of his estate, real or personal, with the payment of his debts, such mortgage shall be considered a part of such debts.

Second. If the will contains no direction as to what part of his estate shall be taken for the payment of his debts, and any part of his personal estate shall be unbequeathed or undisposed of by his will, such mortgage shall be included among his debts to be discharged out of such estate unbequeathed or undisposed of."

30. By its text, § 6-1137 was to apply only to "a mortgage executed by the testator." See note 28 *supra*. What was to be done in the case of a mortgage which had been placed upon the land before its acquisition by the testator but for which he had assumed personal liability? Was exoneration excluded unless, as the old English cases expressed it, "the testator had made the debt his own"? *Woods v. Huntingford*, 3 Ves. Jun. 128, 30 Eng. Rep. 930 (Rolls Ct. 1796); *Duke of Ancaster v. Mayer*, 1 Bro. C. C. 454, 28 Eng. Rep. 1237 (Ch. 1785). What did this cryptic phrase mean? The cases are anything but clear. See *Pleasants v. Flood*, 89 Va. 96, 15 S.E. 504 (1892); *Townshend v. Mostyn*, 26 Beav. 72, 53 Eng. Rep. 823 (Rolls Ct. 1858); *Barham v. Earl of Thanet*, 3 My. & K. 607, 40 Eng. Rep. 231 (Ch. 1834); *Shafto v. Shafto*, 1 Cox 207, 29 Eng. Rep. 1131. (Ch. 1786).

In the second alternative of the statute, see note 28 *supra*, could exoneration be claimed out of that part of the personal property which, while not bequeathed specifically, was needed for the payment of general legacies, or which was to pass to the residuary legatee? Or could exoneration be claimed only out of personal property passing by partial intestacy?

31. IND. ANN. STAT. § 7-901 (Burns 1953).

Probate Code, and, in accordance with it, makes it clear that the legatee of a specific *chattel* which is encumbered with a security interest shall not be entitled to reimbursement out of the general assets.

Going beyond the text of the Model Code, the draftsmen have added the following sentence in Section 7-1109: "If a mortgagee receives payment on a claim based upon the obligation secured by such mortgage, the devise which was subject to such mortgage shall be charged with the reimbursement to the estate of the amount of such payment for the benefit of the distributees entitled thereto." The policy expressed in this sentence appears to be well founded,³² but the wording falls short of legal accuracy, since it is not the devise but the piece of land, the chattel, or the chose in action, which is actually subject to the mortgage. It may further be questioned whether the "devise" is really to be charged with the reimbursement of the estate. If, for example, the devisee has sold the asset to a third party, one may ask whether the executor is entitled to proceed against the purchaser who has acquired the "devise" or whether he is limited to a personal claim against the devisee.³³

One of the Code's striking innovations is its provision for the disposition of that income which accrues during the time required for the administration of the estate. At common law title to realty specifically devised passes to the devisee immediately upon the testator's death. At the same moment he becomes entitled to possession and, consequently, to all profits and rents which become collectible after the testator's death. But title to specifically bequeathed personalty does not pass directly to the legatee but to the personal representative. Unless the asset is sold to satisfy claims against the estate, the legatee will receive it upon distribu-

32. The possibility of payment to the mortgagee out of the general assets of the estate is expressly provided for in IND. ANN. STAT. § 7-820 (Burns 1953), but the personal representative is not supposed to make any such payment without prior authorization or subsequent approval by the court.

33. The sentence which gives rise to this problem cannot be traced to Section 20 of the NEW YORK DECEDENT ESTATE LAW as is stated in the report following the section. See the Comments following IND. ANN. STAT. § 7-1109 (Burns 1953). Section 20 of the New York law is concerned exclusively with the problem of exoneration of assets of personal property specifically bequeathed. N.Y. DECEDENT ESTATE LAW § 20. The corresponding provisions on the exoneration of real estate are contained in the real property law. N.Y. REAL PROP. LAW § 250.

The wording of § 20, the second sentence of which elegantly solves a problem left open in the Indiana Code, is:

"Where personal property subject to any lien, mortgage or pledge is specifically bequeathed by will, the legatee must satisfy the lien, mortgage or pledge out of his own property without resorting to the executors of his testator unless there be in the will of such testator a direction, expressly or by necessary implication, that such mortgage, lien or pledge be otherwise paid. Where such personal property specifically bequeathed has been made subject to any lien, mortgage or pledge with other personal property, the specifically bequeathed property shall bear its proportionate share of the total lien, mortgage or pledge." N.Y. DECEDENT ESTATE LAW § 20.

tion. Who is entitled, in the absence of specific direction in the will, to the increments, fruits, and profits produced during administration by an asset specifically bequeathed? The traditional answer has been that they belong to the legatee.³⁴

The rule is based upon the assumption that such a result corresponds to the intentions of the average testator. When the testator by his last will and testament specifically bequeaths his livestock, his bonds, or his shares of corporate stock, he means to dispose of them as of his death, and it can safely be assumed that he intends and expects that the legatees enjoy the profits not later than the devisee of the farm is to enjoy the crops. The testator may have some vague notion that his estate will have to go through a process of administration which may take time, but it is unlikely that he intends that rents, profits, and increments produced during the period of administration shall go to the residuary legatee, the next of kin, or the heir. If the testator for some reason wants a person other than the legatee or devisee to take the interim gain on assets specifically bequeathed or devised he can achieve that result by establishing a life estate or some other estate of limited duration. It will be a rare case, however, in which a testator intends to give to his residuary devisee or legatee an estate limited to the period of administration in all assets specifically devised or bequeathed to others. This, however, is exactly what the new Probate Code does when it provides in Section 7-1107 that "[u]nless the decedent's will provides otherwise, all income received by the personal representative during the administration of the estate shall constitute an asset of the estate the same as any other asset and the personal representative shall disburse, distribute, account for and administer said income as a part of the corpus of the estate." In other words, the produce of specific legacies bequeathed, as well as the crops, rents, and other profits of land specifically devised belong, if they are received by the personal representative during the administration of the estate, not to the particular beneficiary but to the residuary legatee.

In attempted justification for this innovation, the draftsmen of the Code urge the need of a rule uniform throughout the State; they suggest that in certain counties the rule advocated by them has already been observed, and they intimate, as of controlling importance, the desirability of avoiding calls for contributions by putting this income into the corpus of the estate.³⁵ Unquestionably it is true that the more cash there is available in the general assets of the estate the easier it will be to pay the claims

34. ATKINSON, WILLS § 135 (2d ed. 1953); 2 PAGE, WILLS § 1597 (3d ed. 1941); see Note, 116 A.L.R. 1129 (1938).

35. See the Comments following IND. ANN. STAT. § 7-1107 (Burns 1953).

which are to be satisfied from those assets. It may be asked, however, whether such cash should be raised from income produced by things which have been otherwise specifically bequeathed or devised. In its provision as to the order of application of assets the Code recognizes that the average testator would not want assets which he specifically bequeathed or devised to be used to pay claims as long as general assets are available.³⁶ To give to the residuary legatee the income produced by assets which have been so bequeathed or devised is to apply a different presumption as to the average testator's intention.

With respect to pre-Code practice in Indiana it is impossible for one, not an Indiana lawyer, to confirm or contradict the Commission's observation. It would seem improbable, however, that there should have been a single county in Indiana in which the crops, the rents, and the other profits, which have been produced by land specifically devised and which have not been particularly charged by the will with the payment of debts, should ever have been regarded as belonging to the legatee of the residue of the personal estate.

Another strange result seems to be produced by the way Section 7-1107 is phrased. The residuary legatee is to have that income which is ". . . received by the personal representative during the administration of the estate. . . ."³⁷ How long the income produced by a piece of land or other asset is to enure to the benefit of the residuary and when it will begin to accrue to the specific devisee or legatee depends, thus, upon the length of the period of administration; the longer it lasts, the better for the residuary devisee. Furthermore, what is the meaning of the word "received" in the above phrase? What happens to income which is not "received" by the personal representative, for instance, rents which the personal representative has failed to collect during the period of administration, or dividends from shares of stock which he has distributed to the specific legatee in a "partial distribution" pursuant to Section 7-1101?³⁸ Shall the allocation of income between specific and residuary legatee really depend upon such accidental circumstances or, even worse, upon the personal discretion of the executor? In these respects the Section simply cannot have the meaning which a literal reading of its text conveys, but what else it may mean will not be determined until the Supreme Court of Indiana has spoken.

36. IND. ANN. STAT. § 7-1103 (Burns 1953).

37. Emphasis added.

38. On the problem of whether, under the Code, the legal representative is under a duty to collect the income from the assets of the estate, see Note, *Possession and Control of Estate Property During Administration: Indiana Probate Code Section 1301*, 29 IND. L.J. 251, 256, 262 (1954).

All these complications can be avoided, of course, if the decedent expressly provides in his will that the income produced during the period of administration from any asset shall accrue to the benefit of the specific legatee or devisee. Such a clause would have been unnecessary under the old law because the appropriate rule corresponded more nearly to the intention of the average testator. The same intentions would seem to prevail today.³⁹ Unless a distribution of income which can safely be presumed contrary to the wishes of the overwhelming majority of testators is to take place, it will now be necessary for many Indiana wills to be lengthened by an income allocation clause.⁴⁰

In line with the rule that the income produced during administration is to accrue to the general assets of the estate, the Code provides, in Section 7-1108, that "[g]eneral legacies shall not bear interest, unless a contrary intent is indicated by the will." Again it seems that this new rule is at variance with the intention of the average testator.

Under the traditional approach the estate has not been held subject to a duty to pay interest to general legatees during that period which is necessary, under normal conditions, for the executor to settle the estate. In the English ecclesiastical courts this period was fixed at a maximum of one year after death. In this country changes were made in many states by postponing the beginning of "the executor's year" to the date of the issuance of letters testamentary, or by shortening the "normal" period of administration to ten, nine, or even fewer months. Upon the expiration of the executor's year, or the statutory period substituted for it, interest began to be payable to general legatees.⁴¹ A special rule was developed as to a general legacy given to a person whom the testator had supported and whom he apparently desired to support after his death by means of a general legacy large enough to produce income. In accordance with this presumed intention of the testator, interest on such legacies was held to run from the moment of the testator's death.⁴² While

39. Indiana is not the only state where the traditional rules on the allocation of income from assets specifically devised or bequeathed have been changed. The statutes are discussed and classified in Comment, *Probate and Administration: Disposition of Rents and Profits of Realty*, 2 MONT. L. REV. 148 (1941), a summary of which is given in Note, 29 IND. L.J. 251, 263, n. 55 (1954).

40. For certain problems which may arise under more or less specific provisions of a will, see *id.* at 265.

41. See *Brown v. Bernhamer*, 159 Ind. 538, 65 N.E. 580 (1902); *Clark v. Helm*, 130 Ind. 117, 29 N.E. 568, see Note, 14 L.R.A. 716 (1891); *Case v. Case*, 51 Ind. 277 (1875); *Roberts v. Malin*, 5 Ind. 18 (1854); *Evans, The Payment of Legacies*, 2 INDHO L.J. 163 (1932).

42. See *Alig v. Levey*, 219 Ind. 618, 39 N.E.2d 137 (1942); *Stimson v. Rountree*, 51 Ind. App. 207, 99 N.E. 439 (1912); *Lewis, When Does Interest Begin to Run on Legacies?*, 16 MINN. L. REV. 226 (1932); 39 YALE L.J. 590 (1930).

the new statute leaves open the possibility that a testator's special intention be honored where it is "indicated in the will," the wise draftsman will now find it advisable expressly to spell out such an intention. Again, we see, that wills drafting has been made more complicated.

Testators in their wills may not only fail to tell what should be done in the case of certain contingencies, such as the prior death of a legatee or the inadequacy of the assets for payment of legacies, but may also frequently use words or phrases which are ambiguous. If a testator has given a legacy "to the children of X," whom did he mean to include if X, in addition to two children born in lawful wedlock, has a third child who was born illegitimate but legitimated by subsequent marriage, a fourth child who was born and has remained illegitimate, and a fifth child who has entered the family by adoption? There are other possibilities⁴³ and every one of these individuals might be called a child of X. Which ones the testator intended to include in his testamentary gift is open to conjecture.

The testator may also have given a life estate in certain assets to his son, with remainder over to his son's wife. The son may have had one wife at the time the will was executed and another at the death of the testator. Was it the deceased's intention to benefit that individual woman whom he knew as his daughter-in-law, or whatever woman, possibly unknown to him, who might survive his son as a widow?⁴⁴

Suppose the will includes a legacy to Z of what the testator describes as "all my money," while the residue is given to the Society for the Prevention of Cruelty to Animals. The decedent's estate consists of a small amount of cash, a checking account of several hundred dollars, a savings account of \$1,500, stocks and bonds amounting to some \$50,000, and real estate worth some \$15,000.⁴⁵ In some sense every combination of these assets of the testator can be called his "money."⁴⁶

In all such cases an attempt may be made to find out what the testator really meant when, at a certain day and place, he used the ambiguous term. But, under the prevailing limits on admissible evidence, we shall rarely succeed, and even if we do we may discover no more than that the testator used the ambiguous word or phrase without any clearly defined intent.

43. For further illustrative fact situations see, *e.g.*, *Peirce v. Farmers State Bank of Valparaiso*, 222 Ind. 116, 51 N.E.2d 480 (1943); *Beck v. Dickinson*, 99 Ind. App. 463, 192 N.E. 899 (1934); *Casper v. Helvie*, 83 Ind. App. 166, 146 N.E. 123 (1925); *Nickerson v. Hoover*, 70 Ind. App. 343, 115 N.E. 588 (1919); *Haddon v. Crawford*, 49 Ind. App. 551, 97 N.E. 811 (1912); *Harness v. Harness*, 50 Ind. App. 364, 98 N.E. 357 (1912).

44. *Cf. In re Drew* [1899] 1 Ch. 336.

45. For another possible situation see *Hall v. Bledsoe*, 83 Ind. App. 622, 149 N.E. 448 (1925).

46. *Cf. Perrin v. Morgan* [1943] A.C. 399.

If no showing of actual intent is made, the court will ascribe to the vague term that meaning which is indicated by what may be called the rule of authoritative explanation.⁴⁷ These rules, obviously, should lead the court to give the ambiguous term that meaning which it is most likely to have when used by an average testator.

Are the existing rules of authoritative explanation adequate? The problem is analogous to that which exists with respect to the rules of stop-gap law, and the practice of following precedent is apt to produce the same result, that is, the preservation of rules after the reasons for them have disappeared. In England a highly technical meaning of the term "my money," which may well have corresponded to the eighteenth century notions was carried over into the twentieth century until it was at long last discarded by the House of Lords.⁴⁸ The rule designed to explain the meaning of the word "children" was established at a time when adoption was rare or unknown, but by most courts of this country it has been continued into a period in which adoption has come to be commonplace. A decision by which a testator's intention was shockingly frustrated in this way was rendered in Indiana as late as 1943.⁴⁹

Perhaps in the light of this case, the draftsmen of the new Code have modernized the rule explaining the term "children" so as to include adoptive children⁵⁰ and, indeed, have introduced a rule which generally provides that whenever a devise is made ". . . to a person or persons described by relationship to the testator or to another, any person adopted during minority before the death of the testator shall be considered the child of his adopting parent or parents and not the child of his natural or previous adopting parents. . . ."⁵¹

In the frequent cases of a provision for the benefit of "the relatives," "the family," "the heirs," or "the next of kin" of himself or some other person, the testator's intent is again not expressed with sufficient clarity.⁵² In the *Restatement of Property* the rule of authoritative explanation is stated to the effect that "[w]hen a limitation is in favor of the 'family' of a designated person, then, unless a contrary intent of the conveyer is found from additional language or circumstances, the possible takers thereunder include the spouse and the issue of the designated person, and

47. RHEINSTEIN, *CASES ON DECEDENTS' ESTATES* 731 (1947).

48. *Perrin v. Morgan* [1943] A.C. 399.

49. *Peirce v. Farmers State Bank of Valparaiso*, 222 Ind. 116, 51 N.E.2d 480 (1943).

50. IND. ANN. STAT. § 6-103 (Burns 1953).

51. IND. ANN. STAT. § 6-601(d) (Burns 1953). On the doubts which may arise in connection with the concept of "adopted during minority," see p. 156 *supra*.

52. See Casner, *Construction of Gifts to "Heirs" and the Like*, 53 HARV. L. REV. 207 (1939).

no other person.”⁵³ “Relatives” is presented in the *Restatement* as having the same meaning as “next of kin,”⁵⁴ who are defined as “those who under the applicable local law would succeed to the personal property of the designated ancestor if such ancestor died intestate at the time when the group is to be ascertained” and the time at which the group is to be ascertained is set at the time “of the death of the designated ancestor, unless an intent of the conveyor to have the statute applied as of some other date is found from additional language or circumstances.”⁵⁵ The term “heir” is similarly defined, except that reference is made to the “. . . local law . . . [applicable] to property of the type which is the subject matter of the . . .” devise.⁵⁶

The draftsmen of the Indiana Probate Code have included rules explaining the terms presently under discussion, but, rather than adopting the rules of *Restatement*, they based theirs upon the text of Section 14(4) of the Pennsylvania Wills Act of 1947,⁵⁷ which is less precise and less apt to prevent confusion.

The four terms “family,” “relatives,” “heirs,” and “next of kin” are together defined in Section 6-601(c) in that sense which is traditionally applied to “heirs” and “next of kin,” namely, the totality of the intestate successors of the person in question. Remote relatives may thus be included in the class, though there might be a question as to whether the testator meant them when he described the class as the “family” of a certain person. Although the point is doubtful, it would seem to correspond more closely to the common understanding to limit, as the *Restatement* does, the term “family” to the spouse and issue, that is, persons, who are not only related to each other, but live together in a common household. The Code is certainly in accordance with common American usage when, contrary to older views, it includes the spouse in the circle of the family and the relatives.

In determining a person’s intestate successor it is necessary to refer to the statute of a particular jurisdiction; the Indiana Code provides that this reference be made as if the “. . . person were to die intestate at the time when such class is to be ascertained, domiciled in this state, and owning the estate so devised.”⁵⁸ This solution may generally be appropriate, but the courts should apply it cautiously. Where the testator at the time of the execution of his will was a resident of another jurisdiction, he

53. RESTATEMENT, PROPERTY § 293 (1940).

54. *Id.* § 307.

55. *Id.* § 308.

56. *Id.* § 305.

57. PA. STAT. ANN. tit. 20, § 180.14(4) (1950).

58. IND. ANN. STAT. § 6-601(c) (Burns 1953).

may have had before his mind the intestacy rules of that place as they stood at that time. Of course, it is also possible that he used the term "my heirs," or some equivalent phrase, without caring which particular individuals would be included in the class. In the latter case it is irrelevant, as far as the testator's intentions are concerned, which state's statute is used to determine the class of his heirs. In the former, however, his intention would be upset if the court should look to a statute other than the one which he actually had in mind.⁵⁹ Where such an intention can be found it ought to be honored.

In the case of devises to "the heirs," "the family," "the relatives," or "next of kin" of a third person, Section 6-601(c) makes a distinction between those which take effect at the testator's death and those where the devisees' enjoyment is postponed. In the former case the intestate successors of the third person are to be determined by those laws which would apply if the third person were to die intestate at the time of the testator's death, and as if he had been domiciled in Indiana. If T has given a legacy to the "heirs" of his brother, B, who is a resident of California or Ireland at the times of both the execution of T's will and of T's death, the class of takers is thus to be determined by the law of Indiana and as if B had died simultaneously with T. This solution might upset T's intention if he had used the phrase after inquiry into, and with implied reference to, the intestacy rules of California, Ireland, or whatever other jurisdiction he would have found to have been the residence of the third person whose heirs he intended to benefit.⁶⁰

In the case where the devise is not to take effect at the time of the testator's death it is not clearly spelled out in Section 6-601(c) of the Code what jurisdiction's laws are to be used to determine the intestate successors of a third person. After providing for the devise which takes effect at the testator's death, the text continues: "With respect to a devise which does not take effect at the testator's death, the time when such class is to be ascertained shall be the time when the devise is to take effect in enjoyment."

59. Under § 14(4) of the Pennsylvania Wills Act of 1947, PA. STAT. ANN. tit. 20, § 180.14(4) (1950), which has been the model of § 6-601(c) of the Indiana Code, it was said that in a devise to the testatrix' heirs the class of takers was to be determined under the statute which was in effect at the time of the execution of the will rather than under the statute which was in effect at the time of the testatrix' death, where it could be found that such was the testatrix' intent. *Farmers Trust Co. v. Wilson*, 361 Pa. 43, 63 A.2d 14 (1949).

60. See *Houghton v. Hughes*, 108 Me. 233, 79 Atl. 909, 1913A Ann. Cas. 1287, 1290 (1911); *In re Fergusson's Will* [1902] 1 Ch. 483, 71 L.J. Ch. 360 (1902). See Notes, 15 FLA. L.J. 195 (1941), 38 ILL. L. REV. 336 (1944), 42 MICH. L. REV. 1135 (1944), 19 N.Y.U.L.Q. REV. 216 (1942).

As it stands, this seems to modify the preceding sentence only with respect to the *time* as of which the class of intestate successors is to be determined, and would seem to call for application of Indiana law again. On the other hand it could be that no rule is given as to the applicable law at all and that the actual intention of the testator in these cases must be determined without aid of such a rule.

With respect to the time at which the intestate successors of the third party are to be ascertained in the case of "a devise which does not take effect at the testator's death," we are referred, as we have seen, to "the time when the devise is to take effect in enjoyment." An attempt at literal application of this rule suggests difficulties. Assume T has made a devise in trust to X, as trustee, for the benefit of A for life, remainder to the heirs of A, none of the heirs to be entitled to possession until he reaches the age of twenty-one, and the income from his share to be accumulated until such time. The class of A's intestate heirs is to be determined at the different times at which each of them reaches the age of twenty-one. If, when A dies, she is a widow having three children, aged three, ten, and thirteen years respectively, who are her heirs? For all purposes except that of determining the remainderman after her life estate, the question of whether any one of the children takes will be left in suspense until at least one reaches the age of twenty-one. If all three die before they reach the age of twenty-one, the heirs of A then may be two young nephews. The picture may be further complicated if they both die before reaching twenty-one. The reader can spin forth this example, for what has been said should indicate that the second sentence of Section 6-601(c) cannot be applied as written. Most probably the phrase, "time when the devise is to take effect in enjoyment," means the time when the interest devised is to vest.⁶¹

The most potent factor causing American wills to be instruments of such formidable length and awesome complication lies in the unsatisfactory way in which the powers of personal representatives and trustees are regulated by those rules of law which apply when the testator has not established his own scheme of management. An English executor has extensive discretionary powers which he can exercise freely.⁶² In this

61. In the Comments following the section it is stated that § 6-601(c) is based upon Section 14(4) of the Pennsylvania Wills Act of 1947. In the Commission's Comment by which that Act is accompanied it is stated that in all cases of the kind treated in the Sub-section in question ". . . it is desirable to have the class determined as of the time the remainder falls in, unless the testator directs otherwise." PA. STAT. ANN. tit. 20, § 180.14(4) (1950). This rule is certainly desirable. But has it found expression in the language of the statute?

62. Administration of Estates Act, 1925, 15 & 16 Geo. 5, c. 23. See WILLIAMS, THE LAW OF EXECUTORS AND ADMINISTRATORS, especially c. 35 (13th ed. Parry, 1953).

country the trend of legislation has been to pile one restriction of the executor's power upon another until he is unable to take any step of importance without permission of the court. The extreme of this solicitousness has been reached in the Uniform Probate Code,⁶³ which has been accepted as the general model of the Indiana Probate Code.⁶⁴ Under the Indiana Code permission of the court must be obtained by the executor if he wishes to do any one of the following:

(1) compromise "or in any manner modify the terms of any obligation owing to the estate. . . . [or] in lieu of foreclosure, accept a conveyance or transfer of. . . ." an asset mortgaged, pledged, or constituting a lien for securing an obligation owing to the estate,⁶⁵

(2) compromise a claim made against the estate,⁶⁶ or convey or transfer in satisfaction of a lien an asset of the estate mortgaged, pledged, or constituting a lien for securing an obligation owed by the estate,⁶⁷

(3) sell, mortgage, lease, or exchange any asset of the estate⁶⁸ except "[p]erishable property and other personal property which will depreciate in value if not disposed of promptly, or which will incur loss or expense by being kept and," except, furthermore, "so much other personal property as may be necessary to provide allowance to the surviving spouse and children pending the receipt of other sufficient funds. . . ."⁶⁹

(4) make a conveyance or lease for the purpose of performing an executory contract of the decedent.⁷⁰

The compromise of claims of, or against, the estate is declared not to be binding upon the estate unless it is made with prior authorization or receives subsequent approval by the court.⁷¹ The sanction of nullity is not expressly provided in the case of a sale, lease, mortgage or exchange of an asset made without authorization of the court, but the sections dealing with such transactions are so phrased as to lead to the conclusion that a disposition made without decree of court is invalid. In view of the provisions of the Code it is difficult to imagine a purchaser who would deal with an executor who would not be armed with such a court decree.

63. Rheinstein, *supra* note 1, at 538-539.

64. See Simes, *The Indiana Probate Code and the Model Probate Code: A Comparison*, 29 IND. L.J. 341 (1954).

65. IND. ANN. STAT. § 7-705 (Burns 1953).

66. IND. ANN. STAT. § 7-818 (Burns 1953).

67. IND. ANN. STAT. § 7-820 (Burns 1953).

68. IND. ANN. STAT. §§ 7-903, 7-908, 7-911 (Burns 1953).

69. IND. ANN. STAT. § 7-909 (Burns 1953).

70. IND. ANN. STAT. § 7-712(a) (Burns 1953). A court order, however, is unnecessary in the event that the personal representative has been empowered by the will to execute the conveyance or lease. *Id.* § 7-712(b).

71. Ind. Ann. Stat. § 7-818 (Burns 1953). "In the absence of prior authorization or subsequent approval by the court, no compromise shall bind the estate." *Ibid.*

The provisions of Section 7-909 protect the purchaser to a limited extent by allowing an executor to make certain sales without the court's express authorization.⁷² A prospective purchaser would have little assurance, however, that a particular sale is one which falls within the privileged category.

Although the nullity sanction is not stated expressly with respect to a conveyance or mortgage made without judicial decree for the purpose of performing an executory contract of the decedent,⁷³ the cautious transferee will insist upon the presentation of a decree by the executor.⁷⁴

In every one of the following additional situations the executor is directed to obtain the court's express approval: (1) abandonment of valueless property,⁷⁵ (2) continuation of the business of the decedent,⁷⁶ (3) investment of funds of the estate,⁷⁷ (4) payment of a mortgage, lien, or pledge encumbering an asset of the estate, or renewal or extension of any obligation secured by such an encumbrance,⁷⁸ (5) allowance of claims not yet due against the estate,⁷⁹ (6) extension of credit on sales of assets,⁸⁰ (7) platting of land,⁸¹ (8) exchange of assets,⁸² (9) use of the estate's funds for the purpose of performing an executory contract of the decedent,⁸³ and (10) making of distributions.⁸⁴

Only the following transactions are expressly permitted without court approval: (1) voting stock and giving proxy,⁸⁵ (2) maintaining an action for the recovery of assets and trying title,⁸⁶ and (3) performing executory contracts of the decedent insofar as neither the conveyance or mortgage of an asset nor the incurring of expense to the estate becomes necessary.⁸⁷ It is hard to imagine what executory contract could be performed in this way.

72. See note 66 *supra* and accompanying text.

73. IND. ANN. STAT. § 7-712(a) (Burns 1953).

74. Unless the circumstances of paragraph (b), see note 67 *supra*, of this section are fulfilled, in which event it would seem that the words of the paragraph offer a fair measure of assurance.

75. IND. ANN. STAT. § 7-708 (Burns 1953).

76. IND. ANN. STAT. § 7-711 (Burns 1953).

77. IND. ANN. STAT. § 7-714 (Burns 1953).

78. IND. ANN. STAT. § 7-820 (Burns 1953); see note 64 *supra* and accompanying text.

79. IND. ANN. STAT. § 7-803 (Burns 1953).

80. IND. ANN. STAT. § 7-905 (Burns 1953).

81. IND. ANN. STAT. § 7-922 (Burns 1953).

82. IND. ANN. STAT. § 9-923 (Burns 1953).

83. IND. ANN. STAT. § 7-713 (Burns 1953).

84. IND. ANN. STAT. §§ 7-1101 *et seq.* (Burns 1953).

85. IND. ANN. STAT. § 7-412 (Burns 1953).

86. IND. ANN. STAT. §§ 7-701, 7-703 (Burns 1953).

87. IND. ANN. STAT. § 7-713 (Burns 1953).

Under the system of the Code, the executor is not a free agent entrusted with the execution of a decedent's last will and testament, but an officer of the probate court, which is alone responsible for practically every step in the course of the administration. This result is surely not intended by the usual testator.

There are doubtless situations in which it is necessary that responsibility for the administration of an estate, or for certain phases of it, be assumed by the probate court. Such a situation exists if an estate is insolvent, or when distributees are in serious disagreement as to whether, and, if so, upon what terms, a piece of land or other important asset should be sold. A certain measure of judicial supervision may also be indicated where the estate is wound up not by the person chosen by the decedent himself but by an administrator with the will annexed, an administrator de bonis non, or an administrator to collect.

The English method of allowing the powers outlined above to be exercised freely by the executor seems more desirable. Also to be considered is the procedure in the countries of the Civil Law where the only task which must normally be performed by a judicial or quasi-judicial agency is the determination of the person or persons entitled to deal with the assets of the estate and the issuance to them of an official certificate of identification. The person or persons so identified are responsible for the proper settlement and distribution of the estate, and no court will be involved with the matter unless the estate is insolvent, the creditors are otherwise endangered, or some dispute arises among the interested parties.⁸⁸ The system of every decedent's estate being administered under the close control of a court seems to exist only in two western legal systems, the American and the Austrian. In Austria this system is the product of the benevolent paternalism of the bureaucracy of the Hapsburgs. The reasons for its existence in the United States can only be imagined; this ever-increasing governmental solicitude is, indeed, a development which would seem anomalous among the general American attitudes. Perhaps it was more difficult at one time to find persons who could safely be entrusted with the management and settlement of a decedent's estates. Under frontier conditions it may have been justified to assume that persons likely to have property to leave, or persons likely to be appointed as executors, would be illiterate or at least lacking in experience.⁸⁹ If this

88. See Rheinstein, *European Methods for the Liquidation of the Debts of Deceased Persons*, 20 IOWA L. REV. 431 (1935).

89. Perhaps, the presumption of illiteracy is responsible for another institution peculiar to the United States, namely, the solicitude shown by the Post Office Department, which does not allow a customer to fill in the form of a postal money order as he is allowed to do everywhere outside of the United States.

should have been the reason, it is no longer valid.

This development, however, has not been uniform. Texas has preserved the institution of "independent administration" ever since it appeared there for the first time in 1848.⁹⁰ By simply stating that his executor shall be independent or that the will shall be of the nonintervention type, a Texas testator can free his executor from all court supervision and all requirements to obtain judicial permission for any transaction, at least so long as no complications arise which would require judicial intervention. The institution has worked well; it is said to be widely used⁹¹ and has been adopted in Arizona, Idaho, and Washington.⁹²

The striking feature of the system prevailing in the majority of American states is that it is designed not for the normal but the abnormal case. This tendency has shown a marked increase. It has decisively influenced the Model Probate Code and, through it, the Indiana Code. The latter has even gone beyond its model. In an earlier part of this article we discussed the code provisions which allocate the income from assets specifically devised to the general assets of the estate and deprive general legatees of their traditional right to receive interest.⁹³ As indicated, these innovations are justified in the commission comments upon the ground that "[b]y making the income a part of the corpus the sale of assets to pay obligations and also . . . a call for contributions will frequently be avoided."⁹⁴ The Commission obviously had in mind the estate which does not have sufficient liquid assets to pay the claims. Of course, not every estate will have sufficient cash, but often enough the checking and saving accounts together with life insurance proceeds will suffice. If major debts or taxes are payable, easily saleable securities may yield the necessary cash. It is not necessary for the statutory scheme for all cases of administration to be patterned on one which is required only in certain abnormal cases and which, in the normal case, will simply create unnecessary delay, formality, and expense. The testator who has confidence in his executor, individual or corporate, will be well advised by appropriate

90. PROBATE ACT of 1848, §110. TEX. ACTS 2d. Leg., R.S. 1848, c. 157, p. 275. The provision as it now exists reads:

"Any person capable of making a will may so provide in his will that no other action shall be had in the county court in relation to the settlement of his estate than the probating and re-recording of his will, and the return of an inventory, appraisement and lists of claims of his estate." TEX. REV. CIV. STAT. ANN. art. 3436 (1948).

91. RICHEY, HISTORY AND COMMENTARY ON TITLE 54—ESTATES OF DECEDENTS (1952). 9A TEX. REV. CIV. STAT. ANN. 223, 236 (1952); see also SIMKINS, ADMINISTRATION OF ESTATES IN TEXAS 102 (1908).

92. ARIZ. CODE ANN. § 38-1902 (1939); IDAHO CODE ANN. §§ 15-237, 15-238 (1947); WASH. REV. CODE §§ 11.68.010—11.68.040 (1951).

93. See pp. 160-162 *supra*.

94. See the comments following IND. ANN. STAT. § 7-1107 (Burns 1953).

provisions in his will to eliminate these superfluous formalities. The will of the informed testator to be well drafted must become a formidable instrument. The Indiana Probate Code of 1953 has failed to facilitate the job of the draftsmen.