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## DEVELOPMENT OF DESCENT IN INDIANA

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A study of the law of descent in Indiana offers as wide a field of inquiry to the political scientist as to the lawyer. Revisions in the treatment of the next of kin, spouses, and children other than the issue of a legal marriage brought about by the Probate Code<sup>1</sup> can be attributed to changes in legal thinking wrought principally by a hundred years of economic development that transformed Indiana from a rural economy in the 1850's to the industrial state of today.

Two major tenets of public policy may be discerned in the 1953 Probate Code. The first is that the state has progressed conceptually to the point where it is now becoming a living idea, the object of the affections of individual citizens, although not to the full measure of the role that it plays in the minds of citizens in a totalitarian system. Second is the recognition that in a highly developed economy the fostering of trade is a leading principle of public policy. This entails the fullest possible protection of credit. It is manifest that the interests of the individual, as well as of the state, will best be served by freeing his credit from any shackles that may be imposed upon it after, as well as before, his death. Thus, creditors must have the same power to satisfy their claims from the deceased's assets after his death as exists during his lifetime—even though in isolated cases hardship might result to those persons who might be considered the normal objects of his affections. Successors to the deceased's property should have no greater rights, as against his creditors, than did the deceased during his lifetime.<sup>2</sup> These twin pillars of policy have sub-

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1. Ind. Acts 1953, c. 112. IND. ANN. STAT. §§ 6-101—8-219 (Burns Repl. 1953)—herein cited: *e.g.*, Probate Code § 6-101.

2. This feature of the Probate Code is no doubt largely a result of the fact that the Probate Commission was composed principally of lawyers and bankers.

The Statutes of Merchant, Acton-Burnell de Mercationibus, 11 Edw. 1 (1283); 13 Edw. 1, Stat. 3 (1285), and the Statute of Staples, 27 Edw. 3, Stat. 2 (1353), to-

stantially changed the law of descent in Indiana under the Probate Code.

In terms of realty, at least three basic theories of ownership of property have developed among the peoples of the globe: (1) centralization of the incidence of ownership (at least to the extent it had been recognized) in the clan or in the old man of the clan, particularly prominent among pastoral and other nomadic peoples;<sup>3</sup> (2) of very early, and also quite recent, development is the thought that ownership of all realty is by the state;<sup>4</sup> and (3) concentration of most property rights in the hands of individuals, the extent of the concentration depending upon the political philosophy of the times.<sup>5</sup>

It is maintained by Pollock and Maitland that in coming to England the Germans did not bring with them the clan theory of ownership.<sup>6</sup>

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gether with the writ of *elegit*, Statute of Westminster II, 13 Edw. 1, c. 18 (1285), seem to be the first recorded stirrings of the great driving force in favor of protecting credit. These acts enabled the creditor to seize lands of the debtor and hold as a tenant by statute Merchant, Staple, and *elegit*, which was an estate of freehold capable of descent but defeasible upon payment of the debt. Co. Litt. 289b. It has had a curious survival in the Indiana practice of first offering at execution sales the rents, issues, and profits for seven years. IND. ANN. STAT. §2-3906 (Burns 1933).

3. Thus, the reference to the flocks of Abraham in Genesis 26:35. See BAIKIE, *THE LIFE OF THE ANCIENT EAST* 197 (1923); JOHNS, *BABYLONIAN AND ASSYRIAN LAWS, CONTRACTS AND LETTERS* (1904).

Cæsar and Tacitus (6 DEBELLO GALICO 22) would lead one to the belief that the tribes residing east of the Rhine were of seminomadic habits, with quasi-communal concepts of ownership. This conclusion has been questioned, however, by DECAULONGES, *ORIGINS OF PROPERTY IN LAND* 4-11 (1899).

On this continent, Indians in the Midwest seem to have had the tribal concept. Treaties were made with the "chiefs and head warriors" rather than each individual. For example, see the Fort Wayne Treaty of 1803 in 2 INDIAN AFFAIRS, LAWS AND TREATIES 64 (1904).

4. See BREASTED, *HISTORY OF EGYPT* c. V (1909); MASPERO, *DAWN OF CIVILIZATION* 299 (1922). The authorities are agreed that following the battle of Hastings in 1066, the Northumbrian Rebellion in 1072, and finally the convocation on Salisbury plain in 1085 after the abortive Danish invasion, title to all land in England except allodial holdings in certain channel isles was vested in the King. "*Z tenet terram illam de . . . dominico Rege.*" 1 POLLOCK & MAITLAND, *HISTORY OF ENGLISH LAW* 232. See BL. COMM. \*49, \*105; DIGBY, *HISTORY OF THE LAW OF REAL PROPERTY*, c. I, § 2 (1897).

The most obvious modern example is the communistic system with the "collective farm." But see also the English Agricultural Act of 1947, 10 & 11 GEO. 6, c. 48, § 16, and the development of the "production for use" idea, which permits legal divestment of an owner's title for failure to put land to such proper use as the state may prescribe. See also IND. ANN. STAT. §§ 15-1801-1807 (Burns Repl. 1950), permitting the control of land use for conservation purposes; and from the same trunk stems municipal, *id.* § 53-703 *et seq.*, and county, *id.* § 53-711 *et seq.*, land planning and zoning authority. Bd. of Zoning Appeals v. Wheaton, 118 Ind. App. 38, 76 N.E.2d 597 (1947).

5. Ownership concepts seem to have been shaped more by economic and political factors than by the degree of civilization. SEEBÖHM, *THE ENGLISH VILLAGE COMMUNITY* c. VI (1915). Even extremely primitive peoples have developed extensive ideas of individual ownership. See MOCHTON, *TAMING NEW GUINEA* (1921).

6. 2 POLLOCK & MAITLAND, *HISTORY OF ENGLISH LAW* c. VI, § 1, contending that spindeship was at least as strong as spearship and that, therefore, the presence of descent to cognates prevented the existence of a clan concept.

Yet there is strong reason to believe that much of the Anglo-Saxon holdings were "folkland," *i.e.*, owned by the family, in contrast with "bookland" which was probably the subject of individual ownership.<sup>7</sup> But whether the doctrine of family ownership was of Anglo-Saxon origin or of later development, it is clear that many of the English laws of descent were shaped by a struggle for mastery between the concepts of individual and clan ownership that developed after the Norman conquest.

Nor is this struggle only of historical significance. The theories of ownership in the state, individual, or family continue to shape probate law. Creating indefeasible rights in the members of one's family constitute limitations on individual ownership; granting protection to creditors after the debtor has died represents an extension of the individual, and a limitation on the family, ownership concepts; early escheat to the state is a further limitation on the theory of family ownership. To a great extent, therefore, modern probate law represents a compromise between these concepts of title.

## I

Presumably, the earliest feuds, being granted by the crown primarily for military services, were personal to the feoffee and terminated with his death.<sup>8</sup> Early there appeared, however, a *forma doni*, which by addition of the words *et haeres* indicated the feoffor's consent that the right of possession and use of the fief could be enjoyed by the feoffee's legal heirs.<sup>9</sup> Initially, *et haeres* seems to have had three legal effects: (a) it created an estate that passed to the feoffee's heirs on his death rather than reverted to the feoffor; (b) it gave an interest of some sort immediately to the body of the feoffee's heirs so that the feoffee could not subinfeudate or transfer the fief without consent of the heirs;<sup>10</sup> and (c) it created a type of determinable fee with a possibility of reverter to the feoffor when the blood line of the feoffee ran out.<sup>11</sup> The latter was corrected by the addition of the words

7. 2 HOLDSWORTH, HISTORY OF THE COMMON LAW 67-68.

8. 2 BL. COMM. \*108; LITTLETON, TENURES, Book I, c. 1, § 1. But the Anglo-Saxon concept permitted property to descend to successors *ad infinitum*. DIGBY, *op. cit. supra* note 4, at c. I, § 1. The descent of lands was firmly established in 1267 when the Statute of Mort d'Ancestor, 52 HEN. 3, c. 16, permitted a deceased's heirs to avail themselves of writs of novel disseisin against third party intruders and thus recapture the estate of which their ancestor was in possession.

9. Until *Quia Emptores*, at least, all feuds were gifts by way of subinfeudation with the donor retaining a reversionary right.

10. GLANVILLE, Book VIII, c. 1.

11. BRACON, NOTE BOOK 17; 3 HOLDSWORTH, HISTORY OF THE COMMON LAW 116; 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 14.

*et assignees*, which permitted the donee by transfer to avoid the possibility of reverter to the feoffor. And the Statute of Quia Emptores Terrarum,<sup>12</sup> in 1278, by succeeding subinfeudation with substitution, seems to have had the same effect of terminating the possibility of reverter although the words *et assignees* were not used. Relics of the feudal concept remained, however, or perhaps were revived by the doctrine that an enfeoffment without consideration created a resulting use in the feoffor—for the common law had developed the doctrine that if one enfeoffed another without consideration, on the death of the feoffee leaving no lineal descendants, the property reverted to the feoffor.<sup>13</sup> This antique, which presumably remained the common law in Indiana, was confirmed by Statute in 1852<sup>14</sup> and continued as Indiana law until its repeal by the Probate Code.<sup>15</sup>

The clan concept of an immediate interest of the prospective heirs in the estate of their living ancestor gradually died out although sufficient residue persisted until the fourteenth century to give trouble to Bracton.<sup>16</sup> This concept was superseded by the juristic approach that the words *et haeres* merely designated the type of estate which was given, *i.e.*, a fee capable of descending to the owner's heirs, instead of a life estate. The words *et haeres* were construed to limit the type of estate given—a fee—and hence were “words of limitation” rather than “words of purchase” denoting persons to whom something was given; for *nemo est haeres viventis*.<sup>17</sup> From this it followed by the logical

12. 18 EDW. 1. (1290).

13. HALE, HISTORY OF THE COMMON LAW 229 (1713). Glanville felt differently if the donor was the father and the donee had remote heirs since the property could not ascend. GLANVILLE, Book VII, c. 1.

14. 1 Ind. Rev. Stat. 1852, c. 27, § 7.

15. Probate Code § 6-201 and Commission Comments thereto.

16. BRACTON, NOTE BOOK 224, 1685. Blackstone believed that this dying out was accomplished by the grantor warranting himself and his heirs to defend the title. 2 BL. COMM. \*301. “*Ego et haeredes mei warrantizabimus et imperpetuum defendemus.*” LITTLETON, TENURES § 733. Before Quia Emptores, a warranty bound only the grantor for his lifetime. CO. LITT. 348a. Unless the grantee was to hold of the grantor, in which case the warranty was presumed upon homage so as to bind the grantor's heirs, after Quia Emptores special covenants of warranty were necessary.

17. The temporary setback of the family interests resulting from construction of the words *et haeres* as words of limitation was avoided by restricting the class of heirs through use of the words *et haeres corporeum*. Temporarily, this created a fee in which the family was the unit of ownership. However, ingenious property lawyers soon determined that this effected a fee conditional until heirs of the body were born, at which time it became a fee simple absolute. LITTLETON, TENURES, Book I, c. 2. This time the landed gentry had resort to Parliamentary relief. In 1285, as a part of the great Parliament of II Westminster, the Statute De Donis Conditionalibus, 13 Edw. 1, was enacted. This reinstated the clan ownership concept by converting the conditional fee, created by an enfeoffment to X and the heirs of his body, into a fee tail, an estate that continued in the family line as long as there were lineal descendants of the feoffee with a reversion to the feoffor and his heir when the feoffee's family line was extinguished.

processes of judicial reasoning that unless such words of limitation were used the feoffee took only a life estate.<sup>18</sup> This continued as a part of the common law in Indiana until 1852, when the Legislature abolished the necessity for words of limitation in creating a fee in a conveyance.<sup>19</sup> This statute did not, however, affect wills, and the rule of the necessity of using words of limitation to create a fee continued in the law of wills.<sup>20</sup> A Statute of 1852, however, contained a section to the effect that a provision in a will denoting the testator's intent to devise his entire interest in realty or personalty should pass all of his estate.<sup>21</sup> This was supplemented by an Act of 1929, providing that unless the testator was shown to have a different intent, a

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The fee tail remained intact for approximately 375 years. However, its real effectiveness was destroyed by Taltarum's Case, Y.B. 12 Edw. 4, 19 (1465), which by legal chicanery permitted a barring of the entail as against both the heirs and reversioner. 2 BL. COMM. \*117. The Statute of Fines, 1540, 32 HEN. 8, c. 36, barred the entail but not the reversion.

Indiana, in 1831, took the course now followed in all states except Maryland of abolishing the fee tail by converting the estate into a fee simple. Ind. Rev. Stat. 1831, c. 29, § 11. However, Ind. Rev. Stat. 1838, c. 29, § 11, preserved the estate for the first generation. The language of the present Indiana Statute is somewhat ambiguous: "Estates tail are abolished; and any estate which, according to common law, would be adjudged a fee tail, shall hereafter, be adjudged a fee simple; and if no valid remainder shall be limited thereon, shall be a fee simple absolute." IND. ANN. STAT. § 56-138 (Burns Repl. 1951).

The preservation of the remainder after the estate tail was permitted by Ind. Rev. Stat. 1846, c. 28, §§ 56, 57. The remainder was valid as a contingent limitation on a fee, which would vest in possession at the death of the first taker without leaving issue. Remainders over after fee tails, however, operated by way of purchase from the grantor and not by descent from the tenant. Thus, the remainderman takes free of the debts of the tenant and free from dower. Since the remainder is taken by way of purchase, it should be subject to the rule against remoteness of vesting. IND. ANN. STAT. § 51-105 (Burns 1933).

18. For these words made the estate of inheritance, LITTLETON, TENURES § 1.

19. IND. ANN. STAT. § 56-105 (Burns Repl. 1951).

20. 2 BL. COMM. \*108. The severity of the common law did not apply to wills, however, and words of limitation seem to have been used as a guide to intent, a life estate being implied unless words of perpetuity were used.

21. Ind. Acts 1852, c. 11, § 2. The problem of determining whether language that once constituted "words of purchase" is now mere surplusage or is to be treated as words of purchase is complicated by § 6-601(c) of the Probate Code: "A devise of real or personal estate, whether directly or in trust, to the testator's or another designated person's 'heirs' or 'next of kin' or 'relatives,' or 'family,' or to 'the persons thereunto entitled under the intestate laws' or to persons described by words of similar import, shall mean those persons, including the spouse, who would take under the intestate laws if the testator or other designated 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. 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."

While this Subsection, which was taken from the Pennsylvania Wills Act of 1947, PA. STAT. ANN. tit. 20, § 180.14 (4) (1950), where it was designed to fill the gap created by the abolition of the rule in *Shelley's Case*, was not originally designed to cover the "words of limitation" problem, it may have that effect.

devisee should take an interest in fee simple.<sup>22</sup> But, except as rules of intent governed the situation, the common law requirement of the necessity of using words of limitation in wills to create a fee interest remained until abolished by the Probate Code.<sup>23</sup> Since it is the Indiana rule that wills must be construed as of the date of the testator's death,<sup>24</sup> another ancient doctrine has fallen. However, where language that would have been necessary to create a fee at common law is used in an instrument (and such language will probably continue to be used for years to come), it must be determined whether such phraseology is now to be construed as words of purchase, so as to create a present interest in the beneficiary's heirs, or to be disregarded as surplusage.<sup>25</sup>

While *Quia Emptores* unfolded the concept of alienability *inter vivos*, leaving only its method of execution to be perfected by development of the "use," the requirements of livery of seisen prevented post-mortem alienations of land.<sup>26</sup> Consequently, real estate owned at the decedent's death still passed to his heirs subject to dower and curtesy. The heir took by descent, however, and not by way of purchase; his enforced taking was due simply to lack of legal means to accomplish a post-mortem transfer by the ancestors rather than to any interest the heir had in the realty during the ancestor's lifetime. Nor did the ancestor's creditors have any remedy of recovery against the realty after the ancestor's death, although again the difficulty was procedural and not substantive.

The growth of the use, by dispensing with the necessity of livery of seisen, or perhaps concepts of policy tending towards broadening alienation powers permitted a disposition of the equitable interests by way of an appointment to use. The practice had become so established in the law of uses that when the Statutes of Uses,<sup>27</sup> perhaps inadvertently, destroyed the equitable will, the scheme of post-mortem transfers

22. Ind. Acts 1929, c. 175, § 1.

23. Probate Code, § 6-601.

24. *Hayes v. Martz*, 173 Ind. 279, 89 N.E. 303, 90 N.E. 309 (1909); *Doe ex rel. Lafontaine v. Avaline*, 8 Ind. 6 (1856).

25. The ancient doctrine, *nemo est haeres viventis*, that a limitation to the general heirs of a living person was void, is no longer the law in Indiana. Probate Code § 6-601 (c). Hence, a limitation to A and his heirs could, under the rule of *Ridgeway v. Lanphear*, 99 Ind. 251 (1884), be construed to create a devise to A and his children. See also *Haddock v. Gray*, 104 Ind. 251 (1885). This in turn could give rise to application of the rule in *Wild's Case*, which has been the law in Indiana, *King v. Rea*, 56 Ind. 1 (1877), unless Section 6-601 (c) of the Probate Code has the effect of abrogating this rule.

26. "Only God, not man, can make an heir," said GLANVILLE, Book VII, c. 1. Maitland felt that the public policy against Mortmain, rather than feudal doctrines, prevented post obit gifts of land. 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW § 3.

27. 27 HEN. 8, c. 10. (1535).

was legitimized five years later by the Statute of Wills.<sup>28</sup> The force of the common law doctrine of guided descent to the heirs survived the Statute of Wills, however, and has continued to play a role in shaping Indiana probate law. This survival is important in several respects. First, it has led to a doctrine of strict construction of the execution of wills. Under the theory of prevention of fraud, the antique safeguards with which a reluctant Parliament circumscribed the execution of a will have been preserved in all their ancient majesty although under modern rules of evidence they are more likely to lead to the perpetration rather than prevention of fraud. Actually, the rules surrounding the execution of a will are as much designed to defeat the testator's intention as the rules governing construction are calculated to preserve it. Their real purpose is to help preserve the solidarity of the family unit by limiting the power of the ancestor to disinherit the natural objects of his affections. Indiana has always been among the more conservative states in requiring close attention to the statutory requirements of execution of wills, and the Probate Code, although designed to simplify administration of estates, actually intensifies the legal prejudice in favor of the heir by adding to the formal requirements of a will the necessity of publication and of witnesses signing in the presence of each other.<sup>29</sup> In addition, while Indiana has never followed the natural right of inheritance theory of Wisconsin,<sup>30</sup> there is a presumption against a testator's intent to disinherit,<sup>31</sup> and a disposition of property which disregards the natural objects of the testator's bounty is a material element in determining testamentary capacity.<sup>32</sup>

## II

In a like vein, the family unit has been protected in Indiana by limitations on testamentary power through establishment of the concepts of the pretermitted heir, the forced heir, and the designated heir and marital interests taken by way of purchase.<sup>33</sup> All of these, to-

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28. 32 HEN. 8, c. 1 (1540).

29. Probate Code § 6-501.

30. Parents have no obligation to leave property to their children in Indiana. *Nesbitt v. Trindle*, 64 Ind. 183 (1878).

31. This is somewhat counterbalanced, however, by a presumption that a testator does not desire to die intestate; it is also offset by an Indiana rule, *Garrison v. Day*, 36 Ind. App. 543, 76 N. E. 188 (1905), now confirmed by statute, Probate Code § 6-601, that lapsed, void, or revoked gifts pass through the residuary clause and not by intestacy. *Quaere*: Are renounced gifts to be included in this category?

32. *Jarret v. Ellis*, 193 Ind. 687, 141 N.E. 627 (1923).

33. As used in this article, a "forced heir" is one who has merely an expectancy in his ancestor's estate. The ancestor can destroy the expectancy by voluntary or involun-



gether with certain statutory future interests unknown because unnecessary to the common law, have developed since the Statute of Wills and are designed to correct situations where public policy has determined that the line of descent to the heir should not in peculiar circumstances be interrupted by an ancestor's post-mortem transfer. Only in the case of the statutory future interest, however, is there interference with the power of inter vivos alienation by the holder of the immediate estate or with rights of his creditors after his death.<sup>34</sup>

The English law built up the doctrine that marriage of the testator and birth of issue after execution of the will brought about a revocation. The judges were not agreed, however, as to whether this was based on the presumed intent of the testator and therefore subject to refutation by parol evidence or whether its reason was that of public policy in favor of protection of the children so as to reject collateral evidences of intent not to revoke.<sup>35</sup> But Indiana, from the Northwest Territory Ordinance until 1831,<sup>36</sup> laid no statutory restrictions upon the power of a testator to designate his beneficiaries provided his will was validly executed.

In 1843, following the English trend, the Indiana legislature provided that birth of a child after the making of a will revoked it in toto unless provision for the issue had been made in that instrument.<sup>37</sup> The 1852 Code also caused the birth of the child to revoke

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tary conveyance inter vivos, and on the ancestor's death the interest can be subjected to payment of the ancestor's debts. If, however, the ancestor dies owning the particular property which is subject to the forced heir concept, then such heir takes the property by descent notwithstanding contrary terms in the testator's will.

The "designated heir" also has a mere expectancy defeasible by inter vivos alienation by the testator and subject to payment of the testator's debts. The designated heir is not entitled to inherit any *specific* property despite the will, but he cannot be deprived of a designated share of the ancestor's net estate by the will.

The "pretermitted heir" is one who would be entitled to take by descent if the testator died testate, but who is born after the ancestor executes his will.

34. 1 Ind. Rev. Stat. 1852, c. 27, § 27, prevented the husband from destroying the wife's statutory interest in realty by an inter vivos transfer. Similar protection was later given against involuntary conversions of realty at judicial sales. Ind. Acts 1875, c. 123, § 1. By a judicial interpretation of the Act of 1891, c. 185, § 1, this protection was extended to inter vivos dispositions of personalty. *Crawfordsville Trust Co. v. Ramsey*, 55 Ind. App. 40, 100 N.E. 1049, 102 N.E. 282 (1913).

The realty restriction is preserved in the Probate Code § 6-203, but the restriction on the sale of personalty has been abandoned. Also omitted from the Probate Code is the phrase of the 1852 Code (1 Ind. Rev. Stat. 1852, c. 27, § 22) which permitted the husband to take his statutory share in his wife's estate free of her debts contracted after marriage.

35. Intent of the testator is the basis for the revocation, *Lugg v. Lugg*, 2 Salk. 593, 91 Eng. Rep. 497 (1793). Intent is unimportant, *Marston v. Fox*, 8 Ad. & E. 14, 112 Eng. Rep. 742 (1838).

36. The pretermitted heir provision first appeared in Ind. Rev. Stat. 1831, c. 41, § 20.

37. Ind. Rev. Stat. 1843, c. 30, §§ 10-14. Curiously, this statute anticipated the

the will but somewhat inconsistently retained the 1843 provisions as to death of the afterborn child before the testator. In this statute, there was a severe and, at the same time, mild restraint on the testator. It was severe in that it did not (as do most similar statutes<sup>38</sup>) make the statutory protection for the pretermitted heir dependent upon the testator's intention. Most statutes of this sort are designed merely to correct oversights on the part of the testator, thus permitting the testator in his will to indicate his desire not to make the afterborn child a beneficiary or make other provision for him by way of insurance or otherwise.<sup>39</sup> The Indiana Statute, however, required that to avoid revocation the testator must make a specific bequest in the will providing for the afterborn child.<sup>40</sup> On the other hand, the 1852 Code did not protect children adopted after the will was made,<sup>41</sup> illegitimate children born and acknowledged after execution of the will,<sup>42</sup> or, apparently, children legitimated after the will.

The Probate Code returns Indiana to what seems the better doctrine<sup>43</sup> that the will should not be regarded as revoked by an afterborn child; such child should take by inheritance regardless of the will unless the testator has made some provision therein for afterborn children, the omission appears to have been intentional, or the will was executed when the testator had children alive and his estate was left to the surviving spouse.<sup>44</sup> Children adopted after execution of the will are classed with those born afterwards, but the status of illegitimate children born and acknowledged afterwards or born before and acknowledged afterwards is not clear.<sup>45</sup> Since the Probate Code

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Probate Code by providing that if no provision was made by devise or settlement for such afterborn child and he survived the testator or died leaving issue, then his share was received by way of intestacy. Subsequently, in 1852, the rule was changed, and birth of a pretermitted heir caused the will to be revoked. 2 Ind. Rev. Stat. 1852, c. 11, §§ 3-4. The Probate Code § 6-308 returns to the 1843 procedure.

38. See Bordwell, *Statute Law of Wills*, 14 IOWA L. REV. 283 (1928).

39. *E.g.*, MASS. ANN. LAWS c. 191, § 20 (1933); *Petition of Minot*, 164 Mass. 38, 41 N.E. 63 (1895).

40. See *Morse v. Morse*, 42 Ind. 365 (1873); *Hughes v. Hughes*, 37 Ind. 183 (1871).

41. *Bray v. Miles*, 23 Ind. App. 433, 54 N.E. 446 (1899); *Markover v. Krauss*, 132 Ind. 294, 31 N.E. 1047 (1892); *Daves v. Fogle*, 124 Ind. 41, 23 N.E. 860 (1889).

42. *Eckart v. Eckart*, 95 Ind. App. 148, 163 N.E. 288 (1932).

43. See Bordwell, *supra* note 38; Matthews, *Pretermitted Heirs, An Analysis of Statutes*, 29 COL. L. REV. 748 (1929).

44. Probate Code § 6-308.

45. Acknowledged illegitimate children are, under the Probate Code § 6-103, considered as "children" only for purposes of descent under § 6-205. This would seem to literally exclude them from consideration under § 6-308. But a liberally minded court could construe § 6-308 to indicate that the acknowledged illegitimate child would have inherited had the testator died intestate and should, therefore, deserve consideration under § 6-308.

limits revocation of wills by operation of law to those cases specified in the statute,<sup>46</sup> it would seem that Indiana has abrogated the common law rule that marriage plus birth of a child revoked the will.<sup>47</sup>

Adoption of the Probate Code, however, leaves two more snags in its wake in the case of afterborn children. First: Did the Acts of 1852 have the effect of revoking the will *instantly* the unprovided for child was born, or did the revocation operate only if the afterborn child survived the testator? The use of the words "who shall survive him" in Section 3 of the Act of 1852 would indicate the latter viewpoint is correct. However, Section 4 of the same Act provided: "But in case such child dies without issue, and the wife of such testator be living, the estate of the testator, except the wife's interest therein, shall descend according to the terms of the will; and in case of the death of the wife, and also of the child, without issue, the whole of such estate shall descend as directed in the will, unless such child have a wife living at his death, in which case, such wife shall hold such estate to her use so long as she remains unmarried." Read literally, this meant that the will of the testator was immediately revoked upon birth of a child. If the child survived or died leaving issue who survived the testator, the will remained revoked. But if the child died before and the widow of the testator survived the testator, then the will was revived. If the wife of the testator and the child both predeceased the testator and the child left only a widow, then the widow took a life interest in the estate which the child would have taken by inheritance had the testator died intestate, and the will was revived as to the remainder. "Such estate" is presumed under this Section to refer to the child's share rather than to the entire estate of the testator.<sup>48</sup>

There still remains the second problem of wills that were revoked by the birth of a child before January 1, 1954. It would appear that

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46. Probate Code § 6-508.

47. Under a similar statute it was so held in Appeal of Mendoza, 141 Me. 299, 43 A.2d 816 (1945).

The New York Code permits the testator to make a "settlement" for a child born after execution of the will. N. Y. DECEDENT ESTATE LAW § 26. Under this act it is sufficient if the afterborn child is made a beneficiary in a life insurance policy in substantially the amount that would have been received had the testator died intestate.

However, the court deciding *In re Faber's Estate*, 305 N.Y. 200, 111 N.E.2d 883 (1953), in construing a statute similar to the Indiana law, determined that the provision for the afterborn child must appear in the will and that a collateral settlement would not suffice. This is unfortunate since it requires the will to be changed each time a child is born. It should be noted, however, that the testator can provide for the afterborn or adopted child by codicil, which is a will under the act.

Indiana has never extended the pretermitted heir rule to others than children of the testator. See 2 Ind. Rev. Stat. 1852, c. 11, § 1. See also Matthews, *supra* note 43.

48. *Morse v. Morse*, 42 Ind. 365 (1873), lends strength to this theory.

an afterborn child did not take, under Section 4, an absolute fee interest, which was defeasible on his death without issue. If this is true, then as to testators who had executed a will before January 1, 1954, and had a child born after the will who was not provided for therein, such child's determinable interest was not increased by the Probate Code but shall still determine on his death without issue after January 1, 1954.

In 1881 the forced heir concept was clearly established in Indiana by the case of *Utterbach v. Terhume*.<sup>49</sup> Until this case was decided, the courts had construed the childless second wife statute<sup>50</sup> as creating a life estate in the widow with remainder to the children by the first marriage.<sup>51</sup> *Utterbach v. Terhume* determined that the wife took a fee but with a restraint on alienation so long as the children by the first marriage remained alive.<sup>52</sup> The children by the first marriage became forced heirs of the widow, having a bare expectancy that could not be conveyed.<sup>53</sup> However, the original life estate-remainder concept was restored in 1899.<sup>54</sup> Since 1947, children by a first husband have also taken a remainder, and the childless second husband received a life estate as he does today.<sup>55</sup> Before that time, a childless second husband took an unrestrained fee.

Another forced heir situation arose when, under the Act of 1875, a husband's real estate was sold to pay his debts. After the sale was consummated, the wife's one-third, one-fourth, or one-fifth statutory interest was a maximum value of \$20,000 became absolute.<sup>56</sup> In such event the husband became her forced heir<sup>57</sup> and took the interest she had acquired if he survived her,<sup>58</sup> provided she then owned the property<sup>59</sup> and he had not been guilty of such misconduct as barred his

49. 75 Ind. 363 (1881).

50. 2 Ind. Rev. Stat. 1852, c. 27, § 24. The change in 1852 from a life estate by way of dower to a fee in the widow was actually intended to benefit the children as well as the widow. So the children by the first marriage took their remainder after the second childless widow's life estate free of creditors of the deceased father—husband.

51. *Martindale v. Martindale*, 10 Ind. 566 (1858).

52. See *Byrum v. Henderson*, 151 Ind. 102, 51 N.E. 94 (1898); *Gwaltney v. Gwaltney*, 119 Ind. 144, 21 N.E. 552 (1889); *Bryan v. Uland*, 101 Ind. 477 (1884); *Flenner v. Benson*, 89 Ind. 108 (1883).

53. *Johnson v. Johnson*, 153 Ind. 60, 54 N.E. 124 (1899).

54. Ind. Acts 1899, c. 99, § 2; see also Ind. Acts 1901, c. 240, § 2; Ind. Acts 1947, c. 256, § 1.

55. Ind. Acts 1947, c. 256, § 1.

56. Ind. Acts 1875, c. 123, § 1.

57. *Elliott v. Cale*, 113 Ind. 383, 14 N.E. 708, 16 N.E. 309 (1887); *Currier v. Elliott*, 141 Ind. 394, 39 N.E. 554 (1895).

58. Ind. Acts 1875, c. 128, § 3.

59. *Hurst v. Mann*, 51 Ind. App. 466, 99 N.E. 828 (1912); *Herrick v. Flinn*, 146 Ind. 258, 45 N.E. 187 (1896); *Summit v. Ellett*, 88 Ind. 227 (1882); *Haggerty v. Byrne*, 75 Ind. 499 (1881).

marital rights.<sup>60</sup> The statute treated the widow's interest as though she had inherited it from her husband to the extent that if she remarried and died during the second coverture, it passed to the children by the first marriage, she being barred from alienating it during such second coverture. The children were also substituted for the first husband as the wife's forced heirs if the first marriage had terminated by divorce and not death of the husband.

The wife also took under the 1852 Statute a one-twelfth or one-fifteenth interest in her husband's realty<sup>61</sup> of a nature that was partly by way of purchase and partly as a forced heir, in that the husband could not dispose of this share during his lifetime without her consent, but it was subject to claims of creditors during the husband's lifetime or after his death.<sup>62</sup> The husband also held an interest in his wife's realty that was partly by purchase and partly resembled a taking by descent as a forced heir. This interest was free of his wife's debts incurred after marriage if she owned it when she died but was subject to sale during her lifetime to pay her debts even though incurred after marriage.<sup>63</sup> Furthermore, she could not defeat this interest by will.<sup>64</sup>

These forced heir concepts have all been swept away by the Probate Code although to a certain extent the marital rights have been retained. Since they were mere expectancies or, in the case of the marital rights, merely inchoate interests, the Code operated to cut them off on January 1, 1954, unless they had vested before that time.

Husbands and wives also took as designated heirs in their deceased spouse's personalty. That is, a deceased spouse could not divest his mate of the designated interest by will,<sup>65</sup> but it was subject to claims of the deceased spouse's creditors both before and after his death<sup>66</sup>—although an element of the purchase concept has been injected by the courts.<sup>67</sup> With the exception of these marital relationships, Indiana has never developed the designated heir concept as some other jurisdictions have done.<sup>68</sup> And even these designated marital rights have

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60. *Bradley v. Thixton*, 117 Ind. 255, 19 N.E. 335 (1888).

61. Ind. Acts 1875, c. 123, § 2. That is the difference between the one-third which the wife could take despite the will and the one-fourth or one-fifth to which she was limited as against creditors.

62. 1 Ind. Rev. Stat. 1852, c. 27, §§ 17, 22; Ind. Acts 1891, c. 58, § 1.

63. *Noble v. Noble*, 19 Ind. 431 (1862).

64. *Turner v. Heinberg*, 30 Ind. App. 615, 65 N.E. 294 (1902).

65. Ind. Acts 1853, c. 38, § 1; Ind. Acts 1891, c. 185, § 1; c. 58, § 2; Ind. Acts 1901, c. 78, § 1.

66. Ind. Acts 1891, c. 185, § 1.

67. *Crawfordsville Trust Company v. Ramsey*, 55 Ind. App. 40, 100 N.E. 1049, 102 N.E. 282 (1913).

68. New York, for example, limits the amount a testator can give to charity if he

been greatly changed by the Probate Code.<sup>69</sup> Since they were mere expectancies, such change affected all such rights except where the spouse had died before January 1, 1954.

The doctrine of legitime never crept into Indiana law.<sup>70</sup> Some jurisdictions have preserved this principle by preventing the ancestor from disinheriting his child by will although in no state is he prevented from disposing of his property to other than his children by *inter vivos* gifts. There are also jurisdictions which prevent more than a certain percentage of the estate from being devised to charity or which void gifts to charity if the testator dies soon after making the will.<sup>71</sup> Indiana, however, finds no objection to an unnatural disposition of the testator's property, and the owner can give all his property away during his lifetime or devise it by will with the effect of pauperizing his descendants.<sup>72</sup> No public policy has ever been developed in Indiana which requires that one support his children after his death. The problem of the unnatural disposition of property by a parent has been approached elsewhere, indirectly, by permitting support of the children to be treated as a claim against the decedent's estate,<sup>73</sup> but Indiana has denied this theory<sup>74</sup> except in the case of illegitimate children.<sup>75</sup> Even though it is a criminal offense for a parent not to support his children during his lifetime,<sup>76</sup> still they have no lien or claim against the parent's estate after he dies. A small measure of correction of this injustice is accomplished by the Probate Code in permitting the court to grant a minimum family allowance to the widow and minor children

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has issue. N.Y. DECEDENT'S ESTATES LAW § 17; *In re Upjohn's Will*, 304 N.Y. 366, 107 N.E.2d 492 (1952).

69. See Probate Code §§ 6-301 to 6-308.

70. Legitime refers to that portion of an estate of which a parent cannot disinherit a child without legal cause. See 2 BL. COMM. \*491; 2 POLLOCK AND MAITLAND 346.

Protection similar to legitime has been given to spouses in Indiana. The Code of 1852, in blending the law of realty and personalty, ignored the principle of legitime as had all earlier acts. Curiously enough, however, the amendment of 1853, by providing that on the death of the wife before the husband her personalty should descend in the same manner as her realty, in effect made the husband her designated heir as to one-third of her personalty although there was no similar rule as to the personalty of the deceased husband. See Ind. Acts 1853, c. 38, § 5. In 1891, however, the statute was amended to provide that one-third of the personalty of a man dying testate descended to his wife. Ind. Acts 1891, c. 185, § 1.

71. See Bordwell, *supra* note 38.

72. *Nesbit v. Trimble*, 64 Ind. 183 (1878).

73. *In re Straight's Estate*, 329 Mich. 319, 45 N.W.2d 300 (1951); *In re Kozlowski's Estate*, 43 Berks Cty. L.J. (Pa) 17 (1950). See also *Elliott v. Elliott*, 235 N.C. 153, 69 S.E.2d 224 (1952); *Byrne v. Byrne*, 112 N.Y.S.2d 569 (Sup. Ct. 1952).

74. *Sorin v. Olinger*, 12 Ind. 29 (1859).

75. IND. ANN. STAT. § 3-629 (Burns Repl. 1946).

76. IND. ANN. STAT. § 10-1402 *et seq.* (Burns 1933).

regardless of any terms in the will but only as long as administration of the estate is pending.<sup>77</sup> This unfortunate attitude of the probate law is only slightly corrected by the position taken by the courts in will contests that an unnatural testamentary disposition may be considered as a factual element in determining the mental capacity of the testator. Perhaps the rarity of the occurrence is responsible for the paucity of the remedy.

### III

Presumably, Blackstone's seven canons of descent of realty became the law of Indiana along with the balance of the common law.<sup>78</sup> The initial part of the first canon, to the effect that the decedent's stock of descendants shall take *ad infinitum*, has always been the Indiana law both as to realty and personalty. The fourth canon, that taking should be by representation, was the rule in Indiana until changed by the Code of 1852,<sup>79</sup> which provided that if only grandchildren were alive, they took *per capita*; but if there were unequal degrees of kinship, the taking was *per stirpes* as at common law.<sup>80</sup> Under the Probate Code, the issue take *per capita* if all are of equal degree; otherwise, the taking is *per stirpes*.<sup>81</sup> This taking by representation is not from, but rather through, the expectant heir. The heir who predeceases his ancestor has no interest that he can devise nor do his heirs inherit any of the ancestor's property from him.

The second phase of the first canon, that property never ascended, whatever may have been the reason therefor,<sup>82</sup> was initially changed in Indiana in 1817.<sup>83</sup> The extent to which the parents can take has varied from time to time; but since 1852, the parent or parents have taken one-fourth of the net estate if the decedent left no issue but there was a surviving spouse, one-half if there were brothers and sisters but no issue or spouse, and all if no brothers, sisters, issue, or

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77. Probate Code § 6-403. However, the family allowance provides only a stop gap against starvation until the machinery of organized charity commences its movement.

78. The common law prior to James IV was adopted in Indiana by the Act of July 14, 1795.

79. See Ind. Rev. Stat. 1846, c. 28, § 109.

80. 1 Ind. Rev. Stat. 1852, c. 27, § 2; *Moran v. Holliday*, 39 Ind. App. 201, 77 N.E. 837 (1906); *Brown v. Taylor*, 62 Ind. 295 (1878); *Cox v. Cox*, 44 Ind. 368 (1873).

81. Probate Code § 6-201.

82. See the extended discussion of the origin of this doctrine in 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW c. V, § 2.

83. Ind. Acts 1817, c. 21, § 2.

spouse.<sup>84</sup> Under the 1852 law, the parents took as joint tenants, whereas under the Probate Code they take realty as tenants by the entireties.<sup>85</sup>

Neither the second canon, that males shall inherit ahead of females, nor the third canon, that where there are two or more males of equal degree the eldest inherits, has been the law of Indiana since it became a state.

The law has also varied in Indiana from time to time as to whether Blackstone's fourth canon, that lineal descendants shall take by representation, should be extended to collateral heirs. The 1846 Act applied the doctrine of representation to all collaterals,<sup>86</sup> and in 1852 the rule was applied as far as first cousins and their descendants.<sup>87</sup> Under the Probate Code the taking is per capita if all are of equal degree of relationship; otherwise it is by representation, and hence per stirpes, through nephews and nieces.<sup>88</sup> But beyond this degree, *i.e.*, that of uncles and their descendants, the taking is per capita at the nearest degree of kinship.

The fifth canon, that to inherit one must be of the blood of the ancestor who was first seized of the property, has survived in a modified form until the Probate Code. The Code of 1852 followed the statutes up to that time in providing: "If there be no person entitled to take the inheritance according to the preceding rules, it shall descend in the following order:

*"First.* If the inheritance came to the intestate by gift, devise, or descent, from the paternal line, it shall go to the paternal grandfather and grandmother, as joint tenants, and to the survivor of them; if neither of them be living, it shall go to the uncles and aunts in the paternal line, and their descendants, if any of them be dead, and if no such relatives be living, it shall go to the next of kin in equal degree of consanguinity, among the paternal kindred; and if there be none of the paternal kindred entitled to take the inheritance as above prescribed, it shall go to the maternal kindred in the same order.

*"Second.* If the inheritance came to the intestate by gift, devise, or descent, from the maternal line, it shall go to the maternal kindred in the same order; and if there be none of the maternal kindred entitled to take the inheritance, it shall go to the paternal kindred in the same order.

84. 1 Ind. Rev. Stat. 1852, c. 27, §§ 3-4, 25; Probate Code § 6-201 (c) (2) (3).

85. Probate Code § 6-201 (c) (7).

86. Ind. Rev. Stat. 1846, c. 28, § 114.

87. 1 Ind. Rev. Stat. 1852, c. 27, §§ 4-5.

88. Probate Code § 6-201 (c) (1).



"*Third.* If the estate came to the intestate otherwise than by gift, devise, or descent, it shall be divided into two equal parts, one of which shall go to the paternal, and the other to the maternal kindred, in the order above described; and on the failure of either line, the other shall take the whole."<sup>89</sup> This legal anachronism which had its origin in the *feudum novum* concept of seisen has been swept away by the Probate Code.

Both the sixth canon which preferred the whole blood over the half-blood and the seventh canon which preferred male over female collaterals have long been abolished in Indiana.<sup>90</sup>

The scheme of descent to collaterals in Indiana will remain somewhat vague until clarified by judicial decision. All the ancient authorities were agreed that personal property went to those persons in the nearest degree of consanguinity to the deceased. There were, however, two methods of determining these degrees. The common law counted up from the deceased to the nearest common ancestor and then down to the next of kin; the longest of these two counts determined the degree of consanguinity. The civil law, however, counted up from the decedent to the nearest common ancestor and then down to the supposed heir, the degree being the total of the two counts.

The common law canons of descent of real estate, however, followed the parental system. That is, one counted up to the first ancestor who was seised, and all descendants of such ancestor, however remote, claimed through him by representation ahead of nearer issue of a more remote ancestor.

Indiana, since 1817, has followed the civil law rule of descent except that under the 1852 law brothers and sisters were in class one as well as parents, thus making uncles and nephews class two. The Probate Code purports to follow the civil rule except that it interpolates descendants of brothers and sisters ahead of descendants of grandparents or others more remote.

Neither the common law nor the civil law as applied to personalty in England limited the circle of heirs except by the ancestral property doctrine.<sup>91</sup> This was consonant with the trend of that time that an

89. 1 Ind. Rev. Stat. 1852, c. 28, § 5; *Gray v. Swerer*, 37 Ind. App. 384, 94 N.E. 725 (1911). If the form of the property had changed, however, this ancestral doctrine was lost. *Ibid.*

90. Ind. Rev. Stat. 1846, c. 28, § 14; *Anderson v. Bell*, 140 Ind. 375, 39 N.E. 735 (1894).

91. Although the common law did not place a general limitation on the circle of heirs requiring that an heir be of a certain degree of consanguinity to the deceased, restrictions were placed upon the right of particular classes of persons to inherit. Aliens, felons, usurers, bastards, and, later, Roman Catholics were denied inheritance.

individual's primary loyalty was to, and dependence was upon, the family line. It is not surprising that the family responsibility concept flourished in early America since protection through legal procedure left something to be desired. Particularly was this true of an agricultural economy such as that of Indiana in the 1850's. But the average city dweller of today is apt to look upon his cousins, particularly his wife's cousins, merely as those whose visits send him to the sofa as a sleeping couch. He no longer regards his relatives as the principal source of reliance for civil protection and financial aid as did his great-grandfather. Instead, his ear is now attuned to the state as his protector and the dispenser of largess in time of need.

The language of Section 201(c)(6) of the Probate Code, as the Probate Code Commission intended it, is illustrative of the remarkable change in social thinking that has accompanied the change in economic society in Indiana since 1852. The fact that the Probate Commission has attempted to put into legal terms the concept of the state as an object of an individual's affection, ahead of his family connections, is revealing evidence of how far society has come to regard the state as the controlling factor in modern living.

In 1925 an English statute circumscribed the circle of heirs to first cousins and their descendants.<sup>92</sup> A similar doctrine was unsuccess-

Co. LITT. 8a. (HALE, *op. cit. supra* note 12, at 251, asserts that in early Wales bastard children inherited equally with legitimates. *Contra*, SEEBOHM, *op. cit. supra* note 5, at 191.) A deflowered virgin was also prohibited from inheriting—presumably because her value as a marriage partner was destroyed or seriously impaired. Co. LITT. 32a.

In addition, a wife's breach of marital obligations destroyed her right to dower. Thus, dower was lost if the wife eloped and abided with an adulterer unless the husband, without ecclesiastical coercion, be reconciled unto her. The tenant in curtesy did not, however, lose his right to inherit by adultery nor did the fact that adultery was mutual save the wife's dower. Co. LITT. 32a. The Probate Code has preserved the early Indiana concept that prevented one living in adultery at the time of the spouse's death from sharing in the estate. Probate Code § 6-214. See also *Bradley v. Thixton*, 117 Ind. 255, 19 N.E. 383 (1888); *Wiseman v. Wiseman*, 73 Ind. 112 (1880); *Shaffer v. Richardson*, 27 Ind. 122 (1876). However, inheritance is not barred by casual acts of infidelity, *Spade v. Hawkins*, 60 Ind. App. 388, 110 N.E. 1010 (1916); *Gaylor v. McHenry*, 15 Ind. 383 (1860). The Probate Code also denies the right of a husband who has abandoned his wife without justification and with intent to effect a permanent separation to share in his wife's estate, marking a further shift from the common law concept of the dominance of the male. Probate Code § 6-125; *Morehouse v. Koble*, 80 Ind. App. 418, 141 N.E. 254 (1923); *Hill v. Taylor*, 186 Ind. 680, 117 N.E. 930 (1917). However, the Probate Code takes no notice of the heartless parent who has abandoned his child before the latter's death. Such parent will inherit equally with the loyal, devoted spouse. This represents a reluctance of the law to change an ancient concept to meet contemporary social policy. Since the common law did not permit ascendants to inherit, there was no reason to punish the parent for neglect. Perhaps, however, the legal duty of a parent to support a child could be used as an offset against the deserting parent's claim to share in the child's estate. See Probate Code § 7-1106, providing for retainer against an heir for debts owing to the deceased.

92. Administration of Estates Act, 1925, 15 Geo. 5, c. 23, § 46 (v).

cessfully proposed for the California Code in 1931.<sup>93</sup> But no state except Maryland has heretofore actually delimited the circle of recognized heirs with the result of making the state a recipient of the deceased's property.<sup>94</sup>

The theory was adopted by the Model Probate Code and by the Indiana Probate Code Commission.<sup>95</sup> Whether it was accepted by the Legislature involves a difficult problem of statutory construction. "If there is no surviving issue, or parent, or issue of a parent, or grandparent of the intestate, then to the issue of deceased grandparents in the nearest degree of kinship to the intestate per capita without representation. The degree of kinship shall be computed according to the rules of the civil law; that is, by counting upward from the intestate to the nearest grandparent and then downward to the relative, the degree of kinship being the sum of these two [2] counts."<sup>96</sup> The first sentence of this paragraph would indicate that only first cousins could inherit the property of a deceased intestate lacking nearer kin.<sup>97</sup> This presumes that "grandparent" is used in the specific sense of the father or mother of the parents of the deceased and not in the generic sense of all ancestors in the ascending line. In earlier laws, however, the term "grandparents" was used in probate descent sections in the generic rather than specific sense. The 1817 Statute provided: "The real and personal estate of persons dying without issue having no father or mother, brothers or sisters, shall be divided into two equal parts, one of which shall go to the parental, the other to the maternal kindred in the following order: first to the grandfather if there be any, if not, to the grandmother, and if there be neither grandfather nor grandmother, to uncles and aunts on each side and their descendants. . . ."<sup>98</sup> Similar language was used in the 1838 Statute: "When there is no issue of the intestate, nor father or mother, brothers or

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93. See Evans, *Comments on the California Probate Code*, 19 CALIF. L. REV. 602 (1931). The author here suggests the philosophy that the average individual would rather have the state as the object of his bounty than his remote heirs.

94. MD. ANN. CODE GEN. LAWS art. 93, § 146 (1951), limiting descent to the fifth degree. Perhaps descent under teutonic law ended with six cousins. See 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW c. VI, § 2. The ancient Welsh limited descent to the second cousin level, the escheat being back to the old man of the clan. SEEBORN, *op. cit. supra* note 5, at 194.

95. Probate Code § 6-201 and Commission Comments thereto.

96. Probate Code § 6-201 (c)(6). The Model Probate Code prescribed: "The degree of kinship shall be computed . . . by counting upwards to the *nearest common ancestor*." (italics added) SIMES AND BAYSE, PROBLEMS IN PROBATE LAW INCLUDING A MODEL PROBATE CODE § 22 (1946)—hereafter cited: Model Probate Code.

97. A child of a first cousin is a first cousin once removed, not a second cousin. *Weaver v. Liberty Trust Co.*, 170 Md. 212, 183 Atl. 544 (1936).

98. Ind. Acts 1817, c. 21, § 5.

sisters, nor their descendants, grandfathers or grandmothers, uncles or aunts in the paternal line or their descendants, great-grandparents and great-uncles and aunts and their descendants, then that part of the estate . . . shall escheat. . . ."<sup>99</sup> In each instance it was presumed that "grandparents" was used in the generic sense to include all those in the ascending line. And the second sentence of 201(c)(6) would indicate an intention to similarly use the term; otherwise, how could there be a "nearest" grandparent?

Part II of the Report of the Probate Study Commission, as redrafted after the passage of the Code, stated: "Sec. 201(c)(6) changes present law by eliminating the possibility of inheritance by persons related to an intestate more remotely than through the intestate's grandparent." Unfortunately, this language was not in the report as submitted to either the 1951 or 1953 Legislature but rather was contained in a redraft of the Commission's Report after the Probate Code was passed. The Code provides: "The report of the probate code study commission made pursuant to the provisions of chapter 302 of the acts of the 86th Session and chapter 347 of the acts of the 87th Session of the General Assembly of the state of Indiana may be consulted by the courts to determine the underlying reasons, purposes and policies of this act, and may be used as a guide in its construction and application."<sup>100</sup> And the Commission as to this Section said: "This is a new section, the purpose of which is to point out new matter, changes made by the new Code, reasons for the change, source of substantive contents, etc. It is intended to be used as a well of information by lawyers and judges in interpreting the intention and meaning of the different sections of the Code proper. It is intended by the Commission that it will have the same standing among lawyers and judges when called upon to construe a section of the Code as a Legislative Journal."<sup>101</sup> But it is a new doctrine of statutory construction if the comments of the Code Commission, weighty as they may be, can be used as a guide to a construction of a statute for which the comments were not available to the Legislature at the time of the adoption of the statute. Whether the courts will see fit to change the long-established law as to the body of heirs in the absence of clear evidence of legislative intent remains to be determined.

Certainly the concept of limiting the body of persons who can qualify as heirs so as to avoid practical litigation over remote cousins

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99. Ind. Rev. Stat. 1838, c. 29, § 6.

100. Probate Code § 6-104.

101. Commission Comments, *Ibid.*

is one that is deserving of careful consideration.<sup>102</sup> Nor can there be any doubt as to the power of the sovereign to so limit the number of heirs. In fact, the whole body of the law of descent as well as of wills is a result of statutory creation; descent could be altogether abolished without violating any rights which have constitutional protection.

As the circle of heirs shrinks, so the importance of escheat expands. Prior to *Quia Emptores*, escheat was synonymous with reversion. When the tenant died without heirs, the property returned to the grantor. After the statute, however, the land returned to the lord of whom it was held, not the grantor, because escheat was based upon tenure whereas a reversion is an estate in land. Escheat arose either *propter delictum tenentis* or *propter defectum sanguinis*.<sup>103</sup> The first, corruption of blood for treason or for felonies that were approaching treason, has disappeared as being an attainder of the blood although, in a similar vein, statutes are sometimes enacted limiting inheritance to or from felons. The second type of escheat, that which came into play when the blood line ran out and one died intestate without lawful heirs, has remained except that the state is substituted for the lord.

Since 1817, Indiana has provided that the estate of one dying intestate without lawful heirs should escheat to the state for the benefit of the common school fund.<sup>104</sup> Such provisions were also contained in the Code of 1852.<sup>105</sup> Later acts provided for the sale of escheated land,<sup>106</sup> as well as for the escheat of land acquired by nonresident aliens,<sup>107</sup> and placed a duty upon the Attorney General to prosecute the state's claims to escheated property.

102. It should be remembered that the collateral heirs of a deceased heir have no rights of inheritance through the deceased heir. To inherit through an ancestor by representation, one must be a lineal heir.

103. Co. Lrrr. 13b.

104. Ind. Acts 1817, c. 21, § 6.

105. 1 Ind. Rev. Stat. 1852, c. 27, § 11; *Donaldson v. State ex rel. Honan*, 182 Ind. 615, 101 N.E. 485 (1914).

106. Ind. Acts 1883, c. 77, § 2.

107. Indiana early repudiated the common law rule that aliens could not take property by inheritance. Co. Lrrr. 7b. Initially, however, the right to inherit or pass property by descent was limited to aliens who had taken out their first papers. Ind. Rev. Stat. 1843, c. 28, §§ 4-12. In 1852, the right of nonresident aliens to hold lands was limited to the amount of 320 acres. All property in excess of this amount escheats to the state five years after the time such excess is acquired. IND. ANN. STAT. §§ 56-501 *et seq.* (Burns Repl. 1951); *Baldwin v. Witz*, 87 Ind. 190 (1882).

Under the Probate Code there are no express provisions permitting an alien to inherit. Where, however, the United States has a reciprocal treaty concerning inheritance with another country, such treaty should give aliens who are citizens of that country the right to inherit in Indiana. Lacking such treaties, the common law rule prohibiting

It seems established that in such escheat cases the state takes as the ultimate heir of the deceased and not as the holder of an estate in reversion as did the feoffor of a fee simple before *Quia Emptores* or the grant of a fee tail after *De Donis*. Nor should the principles of escheat *propter delictum tenentis* for treason apply where the escheat has been *propter defectum sanguinis*. Therefore, the common school fund should take all the property so escheating as an heir and subject to all liens and encumbrances thereon, including succession taxes.

Care must be taken to distinguish between instances of escheat and *bona vacantia*. In the case of escheat, the state, as noted, takes in its own right as an heir because there are no other persons who can legally inherit. However, in event of *bona vacantia* the state merely becomes the custodian of the property of missing persons.<sup>108</sup> The Decedent's Estate Act of 1881 set up a procedure for taking possession of real estate where on death of the ancestor the heirs did not appear and for selling it if no heirs had yet appeared at final closing of the estate.<sup>109</sup> The proceeds were paid to the State Treasurer (not to the common school fund) and held by him until the heirs appeared and claimed them. This Act of 1881 also contemplated that, if at the time of distribution no proof of heirship had been made to any portion of the surplus, within two years after final settlement it should be paid to the County Treasurer who should transfer it to the State Treasurer to be entered on the books to the credit of the unknown heirs. Within one year the court was permitted to give notice to the heirs of the amount awaiting them, but there was no provision by which title to this money ever finally vested in the state.

In 1907 an Act provided for the transfer of unclaimed estate monies from the state treasury to the common school fund and required the Attorney General to prosecute escheat actions on behalf of the State of Indiana in the Marion County Superior Court against the unknown owners of monies in the unclaimed estates' account in the state treasury which had rested there for five years. The Act further provided that after five years all future funds which are not claimed from the State Treasurer should escheat and the rights of the heirs be barred. A single listing of decedents' names and amounts of un-

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inheritance may be revived—particularly as to personalty. *Quaere*, whether the words "any person," found in the Probate Code § 6-501, permit an alien to make a will of property which is not the subject of the exclusions in IND. ANN. STAT. §§ 56-501 *et seq.* Dicta in *Parent v. Walmsly*, 20 Ind. 82 (1862), indicate to the contrary.

108. By statute, in England, escheat is now abolished and all property is treated as *bona vacantia*. Administration of Estates Act, 1925, 15 GEO. 5, c. 23, § 46 (vi).

109. Ind. Acts 1881, c. 45, §§ 185-192.

claimed monies was required to be posted by the auditor once a year in an Indianapolis newspaper.<sup>110</sup>

A 1913 Statute, apparently replacing some provisions of the Act of 1881, contemplated payment by the administrator to the clerk of surplus, to which no proof of heirship had been made, on order of court within thirty days after final settlement. The clerk then paid the money to the Attorney General who entered the amount on his books to the credit of the heirs of the decedent and paid it over to the Treasurer for the benefit of the common school fund. Therefore, these monies belonging to unknown heirs were actually treated as *bona vacantia*, as distinguished from the concept of the state taking property as an ultimate heir.<sup>111</sup>

The Probate Code substitutes Sections 6-201 and 7-1112 for the foregoing provisions except that the Section of the Act of 1907 transferring all such monies to the common school fund is retained. The new Statute is not, however, entirely clear. Subsection (a) of 7-1112, standing alone, could be construed to signify that under Section 6-201 the State still occupies the status of the ultimate heir of the deceased. Therefore, upon the order of final distribution, the estate of one dying without heirs would pass immediately and unconditionally to the common school fund subject to the final order being set aside within one year for "mistake."<sup>112</sup> Section 7-1112 read as a whole would indicate, however, that despite Section 6-201(c)(8) the State is not the ultimate heir of the deceased under escheat; but, like the English law, the entire problem is one of *bona vacantia*. As a result, the State cannot acquire title less than seven years after payment is made to the Treasurer. *Quaere*, is this a statute of limitations so that the rights of persons under a disability are not affected by the seven-year limitation, or is it a nonclaim statute affecting all alike?

While the Probate Code raises many problems relating to the law of descent, most of those discussed in this article seem capable of solution without further statutory amendments. The two basic factors of public policy herein noted that have motivated passage of the Probate Code will assist the courts in reconciling seeming ambiguities as well as resolving points of conflict with earlier statutes. Until these matters are cleared, however, the lot of a title examiner in Indiana will not be a happy one.

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110. Ind. Acts 1907, c. 43. Question may arise as to the sufficiency of the notice. See *In re Estate of Apostolopoulos*, 68 Utah 344, 250 Pac. 469 (1926).

111. Ind. Acts 1913, c. 18, § 1.

112. Probate Code § 6-121.