90465-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

(Court of Appeals No. 69929-6)

In re the Testamentary Trust of Giuseppe Desimone,

DALE COLLINS, a married man, Appellant

v.

BNY MELLON, N.A., JOSEPH R. DESIMONE and RICHARD L. DESIMONE, JR., in their capacities as the co-Trustees of the TESTAMENTARY TRUST OF GUISEPPE DESIMONE,

Respondents

VESTED BENEFICIARYS ANSWER TO PETITION FOR REVIEW

CATHERINE ROSS, Appearing Pro Se

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I. IDENTITY OF RESPONDING PARTY

This answer to the petition for review is filed by Catherine Ross, Pro Se, a Vested Income beneficiary of the Testamentary Trust of Giuseppe Desimone (herein after the " Vested beneficiary"). In the Court of Appeals, the Vested beneficiary filed a Brief on August 19, 2013, and joined in the Co-Trustees and Danieli Parties' cross appeals. Also, Vested beneficiary filed a timely motion to publish on April 18, 2014, which was subsequently denied by the Division One Court of Appeals on May 5, 2014. (See: Order in Petitioner's Appendix B).

II. RESTATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the Court of Appeals erred in its decision, concluding that the testamentary intent of Giuseppe Desimone did not mean to include Dale Collins or any non-marital issue as beneficiaries under his trust?

Whether the Division One Court of Appeal's Opinion conflicted with two other divisional Court of Appeal cases; thus, triggering a "substantial" public interest that this Court should review?

III. RESTATEMENT OF THE CASE

Introduction, Procedural History of the Case:

Because the trial court, in its Order of January 11, 2013, granted motions for summary judgments to the Co-trustees and the Danieli parties

and dismissed all claims by Dale Collins against the Giuseppe Desimone Trust, with prejudice; and further denied Dale's motion for summary judgment, Dale Collins appealed to the Division One Court of Appeal. (CP 359-363-- No 69929-6) The Court of Appeal three- judge panel, after thoroughly reviewing the filed briefs from all the parties and hearing oral arguments, then unanimously affirmed the trial court's decision by issuing an unpublished 19-page Opinion on March 31, 2014. The Court of Appeal denied attorney fees to all parties. Petitioner Dale Collins now seeks a review of that decision.

The Court of Appeal, in its ruling, first, pointed out that the paramount duty of a court called upon to interpret a will is to ascertain the intent of the testator. (cf: RCW 11.12.230)

Next it said, if possible, the testator's intent should be *"derived from the four corners of the will and the will must be considered in its entirety."* Finally, the Court of Appeal explained, *"the testator's intentions, as viewed through the surrounding circumstances and language, are determined as of the time of the execution of the will."*[1]

[1] Both quotes, Quoting the Supreme Court case In re Estate of Mell, 105 Wn 2d, 518 (1986)

Opposing parties in this case argued that the testator's intent was unambiguous as to the testator's use of the word "issue", but each had different reasons. (CP 11-29; 121-133; 134-141; 170-176; 284-304) Whether or not Dale Collins is a non-marital descendant of Giuseppe Desimone is immaterial to this case, as it was not a genuine issue of material fact before either the trial court or the court of appeal.

*And contrary to Dale's misleading statement in his Petition For Review, i.e., that both courts recognized his "grandson" status and that these "assertions create issues of fact" "that must be taken as **true**", upon this Court's review, the courts did not have before them the issue of Dale's parentage or grand-parentage. (See Petitioner's Statement of Fact @ 3 & 4) This case involved a will interpretation matter, deciding only testator's intent. The Court of Appeal's ruling contradicts with Dale's above-mentioned alleged factual statement. (See Opinion @ 3 & 4)

(my emphasis)

Analogously, the Division One Appeals Court stated , in pertinent part, in *Estate of Wright, 147 Wn. App. 674 (2008)*; review denied:

> "The parties disagree about whether or not we must presume that Patterson is Myron Wright's child. This disagreement need not be resolved, as it has little relevance to Josephine Wright's intent as testatrix, the actual issue presented herein". (See: Wright court @ FN4)

A. Facts of this Case and alleged Facts of this Case:

1.) Facts:

The Co-trustees of the Testamentary Trust of Giuseppe Desimone are: BNY Mellon, Joseph Desimone & Richard Desimone. Giuseppe Desimone executed his Will on November 18, 1943, with the assistance of a competent attorney. (CP 142-169). Giuseppe Desimone died on January 4, 1946. (CP 134-141). Giuseppe and his wife owned the Pike Place Market and other real estate in King County. The current lawful income beneficiaries are: Suzanne Hittman, Joseph Desimone, Richard Desimone Jr. (grandchildren); Karen Danieli, Shelley Caturegli, Catherine Ross, Denise Peterman, Liza Taylor, Maria Danieli (great-grandchildren).

In his Will, Giuseppe named his five children and provided, regarding any income distributions, that they would share in a testamentary trust; and upon their deaths their issue (Giuseppe's grandchildren) would take the share they would have been entitled to if alive, on the basis of one share to each male issue and one half to each female issue. If any of Giuseppe's children died leaving no issue, then the share of that deceased child would go and be divided among his surviving children and the issue of any deceased child. And the issue of any deceased child receiving the share that the deceased child would have

taken if alive are to divide it among themselves on "said" basis of one portion for each male child and one half to each female child.

In the event that any grandchildren die leaving issue (great-grandchildren), then the same plan as described above with the grandchildren is to be followed. Finally, in the event Giuseppe's great-grandchildren shall die leaving issue, *while they are each entitled to any part of the Trust,* the share which each great-grandchild would have taken if alive is to go and be divided among the surviving issue of the grandchild through whom such great-grandchild was taking, on the basis mentioned above, i.e., one share to each male child; one half to each female child). (CP 142-169) (my emphasis)

At the Testamentary Trust's termination point, which is twenty-one years after the death of the last to die of Giuseppe Desimone's named children and those grandchildren born at the time of testator's death, Giuseppe Desimone says that the corpus of the trust shall be divided among and paid to the "issue" of his children, "per stirpes" PROVIDED" that the male issue of Giuseppe's children receive a full share and the "female issue a half-share only." (emphasis: Giuseppe's Will; CP 142-169).

When the corpus of the trust is to be distributed and there shall be no direct issue of any one of his children living, then such share is to go

and be divided among the direct descendants of his other children, per stirpes, on the basis of one share for each male descendant and one-half share for each female descendant. (my emphasis) (CP 142-169).

Mondo Desimone was married to his wife (Louetta) from 1948 until his death in 1996. Jacqueline Danieli is his only acknowledged child. (CP 11-29) Jacqueline Danieli died in July of 2012 and is now survived by her six daughters, who are the lawful great-grandchildren of Giuseppe Desimone. (CP 121-133; 134-141) Since Mondo Desimone is dead, he cannot now come back from the grave to defend his reputation against Dale Collins' stale and baseless claim. (CP 289-304 @ 12; CP 134-141 @ 8)

2.) Alleged Facts by Petitioner:

Over 60 years after the death of Giuseppe Desimone, Dale Collins makes a claim in a TEDRA proceeding that he is a beneficiary of Giuseppe's Testamentary Trust because he is the natural son of Mondo Desimone (Giuseppe Desimone's son). But, he is also acknowledging that he is the result of an affair between a "*tall...*" man and his mother, Josephine E. Collins/Daniels, while his mother was married to Dale's presumptive father, Orville Collins. At the time of Dale's birth, Orville Collins is listed on his birth certificate as his father. (CP 134-141). Dale

Collins believes he is due sixteen years of retroactive income from the Giuseppe Desimone Trust, among other things, (CP 1-10; 11-29). Dale Collins claims to have known that Mondo Desimone was his natural father in 2008. (Petition @ 3)

(a). *Additional inconsistencies, and misleading recitations, in Dale's Statement of Fact section: (See: Petition For Review @ 3 & 4)

1.) Dale Collins asserts that no Descent statute is referenced in Giuseppe's Will. Dale is incorrect, for the Will on pages 2 & 3 mentions (although not by specific code name) the community property Descent statute (RRS 1342). (See Petition @ 3) (Giuseppe's Will @ CP 142-161)

2). Petitioner recites another contradiction in his statement of the facts. Although Collins now says his mother worked in the Desimone flower shop at the Pike Place Market (Petition @ 3), previously he stated something else to the lower courts. At the ex-parte and trial court levels, Dale said his mother worked weekends at a fruit stall at the Market in the summer of 1948 and never alleged at any time that she worked within any close proximity of Mondo Desimone or any other Desimone in a flower shop owed by the Desimones. (CP 11-20 @ 4, lines 16-19 & Dale's Affidavit, CP 30-62).

3.) Also, Dale Collins attempts to purposely mislead this Court regarding when the controlling statutory "issue" definition dropped "lawful" out of the "lineal descendants" phrase. Dale impliedly recites that it was done in 1976, twenty years before Mondo Desimone's death in 1996. (Petition @ 4)

But here Mr. Collins is misapplying the "issue" statute (RCW 11.02.005) by applying instead the formerly-named "illegitimate child, rights of" statute. (now RCW 11.04.081) (See Petition @ 4).

Then from there, the Petitioner leaps to the illogical conclusion based upon this misapplied premise that his "*date of ascertainment*" to determine his beneficiary status should apply in 1996, because by that time Dale Collins says "lawful" was dropped from the Descent "issue" definition. This simply is not true.

The fact is that while the "illegitimate rights" statute was drastically changed in 1976, the pertinent part of the "issue" statute was not changed until 2005. (See: Session Laws of 2005, Ch. 97)

Ironically, then, the Petitioner's entire line of reasoning regarding this matter miserably fails like a poorly-built sinking ship.

IV. Argument against Review

Summary Introduction:

Inasmuch as the Division One Court of Appeals correctly ruled in a forthright manner regarding a simple will interpretation matter, about a Will that was executed in 1943, and correctly applied standard principles of will construction, this Court does not need to review this case. At the court of appeal level, Dale Collins' summary judgment denial was affirmed; the Co-trustees and Daniel parties' grants of summary judgments were affirmed; all Dale Collins' claims against the Testamentary Trust of Giuseppe's were dismissed, with prejudice, affirmed. One hundred years of case law, statutory law, secondary-law sources, which the Division One Court of Appeals considered, straightforwardly show Dale Collins cannot be a beneficiary under the trust created under Giuseppe's Will of 1943. The Respondents should not have to suffer through more court time over this stale and baseless claim; incurring still-more attorney fees. Since there are no material conflicts between this recent Division One Court of Appeal ruling and other court of appeal courts, contrary to Petitioner's statements, this petition for review should be denied. And furthermore, since the Petitioner presented no novel or unique arguments (but instead, a host of arguments that often misapplied interpretation of Giuseppe's Will, the laws, and other authority sources) his petition for review should be denied because there is no "substantial" public interest issue for this Court to decide.

A. The Division One Court of Appeal's decision does not conflict with Division Three's *Matter of Sollid, 32 Wn. App. 349 (1982)* for many reasons; so this Court need not review under RAP 13.4 (b) (2) & (4).

Petitioner's arguments regarding the *Sollid* adoption case are not relevant for many reasons; most importantly, because the Petitioner cannot cite any WA case law that has merged "adoption rights" of persons with "illegitimate rights" of persons. Further, when the Will was executed in 1943, the already long-standing "illegitimate rights" statute (RRS 1345)

had been in place as written for nearly 70 years with the applicable portion of this statute remaining untouched for another three decades. Pointedly, this statute has never been applied retroactively in WA case law.

First, a concise summary of *Sollid* case: In the *Matter of Sollid*, the Division Three court had to consider whether adopted children were income beneficiaries for their adoptive grandparents' trust. In 1947, R.K. and Maria Sollid created an irrevocable trust, naming their three children... At the same time, an executed will created a testamentary trust with Maria Sollid the life income beneficiary and trustee. When Maria Sollid would pass, the 1947 trust instrument would become the operative instrument. Pertinent parts of the irrevocable trust provided:

> "Upon the death of last of the three named beneficiaries (children), then the corpus of the trust shall be delivered and paid to the then surviving (grandchildren), including lineal descendants of three beneficiaries, per stirpes" If there be no surviving issue or descendants, then the Trustees shall distribute, deliver and pay the trust property to the **heirs at law** of the respective Donors **according to the law of descent**."[2]

Next, the Court of Appeals recites about what The Division Three court then decided:

> "The court concluded 'issue', under the current law, included 'all the lawful lineal descendants of the ancestor and all lawfully adopted children.' Accordingly, the court applied the then current statute and concluded that the adopted children were 'issue'". (See Division One's Opinion @ 14)

[2] In re Sollid, 32 Wash. App. 349, 647 P.2d, 1033 (1982)

The Division Three *Sollid* court gave many reasons why they did this, among which was:

"Although possibly not squarely on point, nevertheless, recourse is had toward laws of inheritance by adopted children as bearing in the settlor's/testator's intent."[3]

Then this Division Three court tells how the adoptions laws had changed in 1943 (five years before the *Sollid* trust was executed) to allow adopted kindred of adoptee to inherit from the adoptee. This court then concluded:

"It would seem fair that if the adoptive grandparent could inherit from the adoptees, the converse should be true"[4]

Finally, the court concluded that a part of *Sollid's* trust instrument indicated settlors' intent, although not "specifically." Quoting from the trust this court recites:

"(T)he said term shall include their **heirs** or successors in interest as provided in this trust agreement as and when such heirs or successors in interest may acquire the rights of either or any of said beneficiaries."[5] (my emphasis)

And the Court of Appeal's Opinion discusses that this Division Three court's other reason was as follows:

"The settlor was presumed to understand that a statute fixing the rights of an adopted child would be subject to change; thus, statute requiring adopted children be treated as trust beneficiaries was retroactively applied" (See Opinion @ 14).

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[3] Id. @ 352
[4] id. @ 353
[5] Id. @ 358

This Division One Court rightly declined to accept Dale's argument to apply the *Sollid ruling* to this instant case, as this case deals with an entirely different subject matter. It says:

> "Dale argues that we should retroactively apply the liberalized statutes regarding grandchildren born of wedlock"... "Generally, statutes are presumed to have prospective application only. Dale fails to cite any case where RCW 11.04.081 was held to have any retroactive application. Additionally, Sollid and the cases it relies on involved adopted children. Dale is not an adopted child" (See Court of Appeal's Opinion @ 14, 15)

Also, in response to Dale Collins' Petition (@ 9), citing *Sollid* and *Annan v. Wilmington Trust Co, 559 A.2d 1289,* it is instructive for this Court to note the following:

Because the "illegitimate child, rights" statute (RRS 1345) had not changed in over 80 years by the time Giuseppe executed his Will in 1943, it is not reasonable to conclude that either Giuseppe or his lawyer presumed this pertinent probate statute would be changing anytime in the future since no science existed at the time to conclusively prove father's paternity. (CP 289-304 @ 8 &9)

Back in the 40s, this particular statute required for any non-marital person to take from his alleged father's *kindred's* estate, that he needed: 1) father's written acknowledgement, witnessed; 2) his parents to intermarry and adopt him. None of these proofs of paternity exist for Dale Collins; this is undisputed. So, unlike the adoption statues which were being

revised, as the *Sollid* court noted, the Descent intestate statute *(RRS 1345) remained the same in 1943 when Giuseppe executed his Will.

Thus, this Court need not review, per Discretionary rules 13.4 (b) (2) (4), as there exists no conflict between the Division One *Desimone* Court of Appeal decision and the Division Three *Sollid* Court of Appeal decision.

*(See: Danieli parties' Response Brief's appendix to trace the statutory history of RRS 1345)

B. Dale Collins' rebuttal to Court of Appeal's Opinion regarding "illegitimate rights" statute (RCW 11.04.081), relative to the Division II Cook case, is not in point; as no conflict between these court of appeal cases exist. For this reason, this Court does not need, under RAP 13.4 (b) (2) & (4), to review this case.

Contrary to Dale Collins assertions about how the Division One Court of Appeal is incorrect, relative to how the Division Two Court of Appeal applied "illegitimate rights" statute (RCW 11.04.081), the Cook case *Estate of Cook, 40 Wn. App. 326, 698 P 2d. 1076 (1985)* is not in point for the argument proposed by Dale Collins in his *Petition For Review.* (See: Petition @ 12; first paragraph).

There are no material conflicts between the Division One Court of Appeal's decision and the Division Two *Court* of Appeal's decision; as the former ruling concerned finding testator's intent by applying standard

rules of will construction, while the latter one concerned finding which set of "heirs-at-law" would take in an intestate estate, as required by state law. [Giuseppe's Will nowhere indicates that he wants "heirs –at-law" to partake of his bounty.]

In the *Cook* case, the decedent, Julia Cook, born illegitimate in Ohio in 1909, died intestate in 1980 with a Washington estate, leaving no spouse and no lineal descendants. First at issue: would the decedent's estate descend, per the requirement in the intestate statute (RCW 11.04.015), in 1980, to the paternal heirs or the material heirs? The paternal heirs were closer in kinship than the material heirs. So the case then turned on determining decedent's paternity. The material heirs brought forth a witness to say Ms. Cook's mother did not meet the alleged father until after Ms. Cook was born. The paternal heirs produced a delayed birth certificate to prove who the father was. The material heirs conceded that if the paternal heirs could prove paternity, they would lose.

The *Cook* court next applied the "illegitimate rights" statute (RCW 11.04.081) *prospectively* to determine the correct standard for proof of paternity. At no time did the *Cook* court say it was applying retroactively the statutory requirement for determining a paternity issue; whereas, the *Sollid court* expressly stated they were, regarding an adoption matter. And, of course, because of *Sollid,* Dale Collins has consistently argued

that the courts should apply the descent statutes retroactively in this specific case. (CP 11-29 @ 18)

For a hundred years in WA case law this "*illegitimate child, rights of*" statute (formerly RRS 1345) has been applied prospectively, not retroactively.

[CP: 354-358 @ pg 1, citing: *Supreme Court's In re Rohrer's Estate, 22Wash. 2d 135 (1900); Supreme Court's Wasmund v Wasmund, 90 Wash. 274 (1916); Supreme Court's In re Baker's Estate, 49 Wash. 2d 609 (1956); Supreme Court's In re Estate of H.A. Gand, 61 Wash 2d 135 (1962); Supreme Court's Pitzer v Union Bank of California, 141 Wn. 2d 539 (2000].*

So these two divisional court of appeal cases are not at all in conflict. This Court, then, should not review the Division One Court of Appeal's decision because the Discretionary rules (13.4(b) (2) (4) do not apply.

C. Response to: Petitioner's continuing assertions that the *Bowles v Denny* case holds for the proposition that the common law "issue" term has a more inclusive meaning (one that included out of wedlock "issue") than the statutory definition that was in place in the same *era* that Giuseppe's Will was executed.

Petitioner Dale Collins, by relying on the Supreme Court Bowles case (*Bowles v Denny, 155 Wash 535, 285 Pac. 422 (1930)* attempts to mislead this Court by asserting that there was a more inclusive meaning to the term "issue" in common law, i.e., that illegitimates were included within its meaning. (See Petition @ 2, 3 & 11).

However, when the Bowles court, quoting another jurisdiction, said "*in its general sense, unconfined by any indication to the contrary, this word includes in its meaning all descendants*", it meant this in a completely different context, as the Court of Appeals rightly noted. (See Opinion @ 9).

But Dale Collins ignores directly addressing any rebuttal to the Court of Appeal's take on this, and plows through again with his misleading assertions in his Petition.

Authority sources from this era say otherwise:

In Black's Law Dictionary (3rd edition, 1933) it says, in pertinent part, regarding "issue" definition:

"Descendants: All persons who have descended from a common ancestor...the word is commonly held to include only legitimate issue..." (my emphasis) (Black's Law: See Appendix A).

In Words and Phrases (1904 edition) it says, under "Illegitimate child" section:

"A devise to 'issue' means, prima facie, legitimate issue and an intention to include illegitimate issue must be deduced from the language itself, without resort to extrinsic evidence" ... See appendix B @ 3789 **[Note: Words and Phrases, 1904 edition, lst, 2nd, 3rd series was mentioned in Editor's note within *Bowles v Denney case (1930)]***

In Page's Law Treaties on Wills (edition 1941) says:

"Issue is a word whose primary meaning, in absent anything to show a contrary intent, is that of legitimate lineal descendants indefinitely". (See Appendix C, Section 1027 @ 152) (See also: Vested Beneficiary's Brief @ 11&13)

D. The Court of Appeals did not err in its decision, citing WA supreme court cases (and one squarely on point out- of- state case) when it used applicable existing statutes at the time of the 1943 Will's execution, rather than consider applying statutes retroactively. And no exception to this general rule exists for this instant case. *Sollid* and out-of-state *Delaware* cases are not relevant.

First, although the Court of Appeal's Opinion cited more than a few WA state supreme court cases for its proposition that applicable statutes should be applied at the time of any will's execution, it also cited one squarely on point out-of-state supreme court case *(Powers v Wilkenson, 399 Mass. 650, 653-54 (1987)*. In seeking relief on review, Petitioner Collins cites no WA Supreme Court cases under the Discretionary rule (See 13.4(b) (1). In fact, Dale Collins ignores trying to counter any of the Division One's salient points about these Supreme Court cases. (See Petition @ 5 & 8)

Second, Petitioner Dale Collins' arguments about how applicable statutes should be applied as of the "*date of ascertainment*" of when a beneficiary would step-in at a future date, rather than as of the "*date of execution*" of a will, are incorrect. (See: Petition @ 9-11) These lines of arguments by Collins are incorrect because they ironically fail to discuss the obvious fact that Giuseppe's intent nowhere indicates in his Will of 1943 that he wishes his **"heir at law**" or" **"heirs"** to take of his bounty

and have the laws of descent apply at a time in the future, in order to ascertain a pool of beneficiaries. For Giuseppe Desimone's Will (unlike what is found of the wills of the *Sollids'* and some of the *Delaware* parties), at his trust termination point, does not contain a substitution provision. He instead wishes his bounty go to his children's **issue,** per stirpes; and then if any of his children's' lines are gone, to his other children's "**direct descendants**". (See: Giuseppe Desimone's Will, @ Article 5) (my emphasis). The strong inference to be drawn from this is that Giuseppe had faith his direct descendants lines would not fail; and he did not wish any heirs- at-law to take and any applicable descent laws to apply at a future "date of ascertainment." So then, it would be purely speculative to presume that Giuseppe Desimone thought about how the pertinent Descent statutes would change in the future when nowhere does he say this thought, impliedly or expressly in his 1943 Will. *(See: Court of Appeal's Opinion @ 16). (See also: Vested Beneficiary's Brief @ 23-25)*

Thus, Petitioner Dale Collins retort that the Court of Appeal's Opinion is merely "divining" Giuseppe's intent is meritless. Sound reasoning was applied by the Division One court to determine testator's intent in this instant case. In fact, contrary to what Petitioner Dale Collins further argues @ 11, the Division One Court of Appeal did not just rely

upon "surrounding circumstances" to determine testator's intent. Yes, this Division One did rely on "other authorities" and the Massachusetts Supreme Court *Powers v Wilkenson* case; but it also relied on the language in the Will itself.

Regarding this latter point, the Division One court took cognizance of the fact the Giuseppe used the technical term "**issue**" (RRS 1354) no less than twenty times in his Will and that he had the aid of an attorney. So Giuseppe was presumed to know the laws at the time the Will was executed and how they would affect it. (See: Court of Appeal's Opinion @ 7 & 10) And since Giuseppe's Will mentions one Descent statute (the community property one, RRS 1342), it is logical to assume he knew of the other probate Descent statutes and how they would affect his Will. (Vested Beneficiary's Br @ 19)

E. Petitioner should not be allowed any attorney fees.

Inasmuch as Dale Collins did not prevail at the Division One Court of Appeal level, he cannot under RAP 18.1 (j) get his attorney fees.

V. Conclusion:

This Court should *not* accept review, or reverse the Division One's decision of March 31, 2014, as requested by Petitioner Dale Collins for relief. Nor should this court remand for trial the issue of Collins' paternity, as was also requested by Mr. Collins. None of Dale Collins' arguments have merit; nor do they meet any of the criteria needed for Discretionary review, under RAP 13.4 (b).

Dated this 14th day of July 2014

Catherine Ross

Catherine Ross, pro se

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the state of Washington, that the following is true and correct:

That on July 4th, 2014, I arrange for service of the foregoing Answer to the Petition For Review, to the court and to the following parties:

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DATED at Soap Lake, Washington this 4th day of July, 2014.

Catherine Ross

Catherine Ross

APPENDICES

Appendix A

Black's Law Dictionary

BLACK'S LAW DICTIONARY

CONTAINING

DEFINITIONS OF THE TERMS AND PHRASES OF AMERICAN AND ENGLISH JURISPRUDENCE, ANCIENT AND MODERN

AND INCLUDING

THE PRINCIPAL TERMS OF INTERNATIONAL, CONSTITUTIONAL, ECCLESIASTICAL AND COMMERCIAL LAW, AND MEDICAL JURISPRUDENCE, WITH A COLLECTION OF LEGAL MAXIMS, NUMEROUS SELECT TITLES FROM THE ROMAN, MODERN CIVIL, SCOTCH, FRENCH, SPANISH, AND MEXICAN LAW, AND OTHER FOREIGN SYSTEMS, AND A TABLE OF ABBREVIATIONS

BY

HENRY CAMPBELL BLACK, M.A.

AUTHOR OF TREATISES ON JUDGMENTS, TAX TITLES, INTOXICATING LIQUORS, BANKRUPTCY, MORTGAGES, CONSTITUTIONAL LAW, INTERPRETATION OF LAWS, RESCISSION AND CANCELLATION OF CONTRACTS, ETC.

THIRD EDITION

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ISSUE, *v.* To send forth; to emit; to promulgate; as, an officer *issues* orders, process *issues* from a court. To put into circulation; as, the treasury *issues* notes. To send out, to send out officially; to deliver, for use, or authoritatively; to go forth as authoritative or binding. Stokes v. Paschall (Tex. Civ. App.) 243 S. W. 611, 614.

A writ is "issued" when it is delivered to an officer, with the intent to have it served; Wilkins v. Worthen, 62 Ark. 401, 36 S. W. 21; Michigan Ins. Bk. v. Eldred, 130 U. S. 693, 9 Sup. Ct. 690, 32 L. Ed. 1080; Webster v. Sharpe, 116 N. C. 468, 21 S. E. 912; Ferguson v. Estes & Alexander (Tex. Civ. App.) 214 S. W. 465, 466.

When used with reference to a writ of error, State v. Brown, 169 N. J. Law, 519, 138 A. 370; a writ of scire facias, In re Johns' Estate, 253 Pa. 532, 98 A. 719, 720; a writ of attachment, McMaster v. Ruby, 80 Or. 476, 157 P. 783, 784; corporate stock, Cattlemen's Trust Co. of Fort Worth v. Turner (Tex. Civ. App.) 182 S. W. 438, 441; a bond, Klutts v. Jones, 20 N. M. 230, 148 P. 494, 499; Travis v. First Nat. Bank, 210 Ala. 620, 98 So. 890, 891; Steinbruck v. Milford Tp., 100 Kan. 93, 163 P. 647; State v. School Board of Tecumseh Rural High School Dist. No. 4, 110 Kan. 779, 204 P. 742, 744; a deed, Wyman v. Hageman, 318 Ill. 54, 148 N. E. 853, 855; a note, Foster v. Security Bank & Trust Co. (Tex. Com. App.) 288 S. W. 438, 440; an insurance policy, Coleman v. New England Mut. Life Ins. Co., 236 Mass. 552, 129 N. E. 288, 289; National Liberty Ins. Co. v. Norman (C. C. A.) 11 F.(2d) 59, 61; and the like, the term is ordinarily construed as importing delivery to the proper person, or to the proper officer for service, etc. But it does not invariably have such a meaning. Estabrook & Co. v. Consolidated Gas, Electric Light & Power Co. of Baltimore, 122 Md. 643, 90 A. 823, 824.

In financial parlance the term "issue" seems to have two phases of meaning. "Date of issue" when applied to notes, bonds, etc., of a series, usually means the arbitrary date fixed as the beginning of the term for which they run, without reference to the precise time when convenience or the state of the market may permit of their sale or delivery. When the bonds are delivered to the purchaser, they will be "issued" to him, which is the other meaning of the term. Turner v. Roseberry Irr. Dist., 33 Idaho, 746, 198 P. 465, 467. See, also, Anderson v. Mutual Life Ins. Co. of New York, 164 Cal. 712, 130 P. 726, 727, Ann. Cas. 1914B, 903.

ISSUE, *n.* The act of issuing, sending forth, emitting or promulgating; the giving a thing its first inception; as the issue of an order or a writ.

In Pleading

A single, certain, and material point, deduced by the pleadings of the parties, which is affirmed on the one side and denied on the other. Whitney v. Borough of Jersey Shore, 266 Pa. 537, 109 A. 767, 769; Village of Oak Park v. Eldred, 265 Ill. 605, 107 N. E. 145, 146. A single certain and material point arising out of the allegations of the parties, and it should generally be made up of an affirmative and a negative. Cowen Co. v. Houck Mfg. Co. (C. C. A.) 249 F. 285, 287; Simmons v. Hagner, 140 Md. 248, 117 A. 759, 760. A fact put in controversy by the pleadings. Shea v. Hillsborough Mills, 78 N. H. 57, 96 A. 293, 294. The disputed point or question to which the parties in an action have narrowed their several allegations, and upon which they are desirous of obtaining the decision of the proper tribunal. When the plaintiff and defendant have arrived at some specific point or matter affirmed on the one side, and denied on the other, they are said to be at issue. See Knaggs v. Cleveland-Cliffs Iron Co. (C. C. A.) 287 F. 314, 316; First Nat. Bank v. District Court of Hardin County, 193 Iowa, 561, 187 N. W. 457, 458. (But as used in a rule of court, a case is not "at issue" where nothing but a demurrer has been filed, presenting no issue except a question of law as to the sufficiency of the complaint. Arnett v. Hardwick, 27 Ariz. 179, 231 P. 922, 923.) The question so set apart is called the "issue," and is designated, according to its nature, as an "issue in fact" or an "issue in law." Brown; Martin v. City of Columbus, 101 Ohio St. 1, 127 N. E. 411, 413.

Issues arise upon the pleadings, when a fact or conclusion of law is maintained by the one party and controverted by the other. They are of two kinds: (1) Of law; and (2) of fact. Rev. Code Iowa 1880, § 2727 (Code 1931, § 11426); Code Civ. Proc. Cal. § 588; Comp. St. Wyo. 1910, § 4451 (Rev. St. 1931, § 89-1202); Bergiar v. University City (Mo. App.) 190 S. W. 620, 622; General Electric Co. v. Sapulpa & I. Ry. Co., 49 Okl. 376, 153 P. 189, 193.

The entry of the pleadings. 1 Chitty, Pl. 630.

Issues are classified and distinguished as follows:

General and *special.* The former is a plea which traverses and denies, briefly and in general and summary terms, the whole declaration, indictment, or complaint, without tendering new or special matter. See Steph. Pl. 155; Tilden v. E. A. Stevenson & Co. (Del. Super.) 132 A. 739, 740; McAllister v. State, 94 Md. 290, 50 A. 1046; Standard Loan & Acc. Ins. Co. v. Thornton, 97 Tenn. 1, 40 S. W. 136. Examples of the general issue are "not guilty," "*non assumpsit*," "*nil debet*," "*non est factum.*" The latter is formed when the defendant chooses one single material point, which he traverses, and rests his whole case upon its determination.

Material and *immaterial.* They are so described according as they do or do not bring up some material point or question which, when determined by the verdict, will dispose of the whole merits of the case, and leave no uncertainty as to the judgment. Pearson v. Pearson, 104 Misc. 675, 173 N. Y. S. 563, 565.

Formal and *informal.* The former species of issue is one framed in strict accordance with the technical rules of pleading. The latter arises when the material allegations of the declaration are traversed, but in an inartificial or untechnical mode. In the latter case, the defect is cured by verdict, by the statute 32 Hen. VIII. c. 30.

A *collateral* issue is an issue taken upon

matter *aside* from the intrinsic merits of the action, as upon a plea in abatement; or *aside* from the direct and regular order of the pleadings, as on a demurrer. 2 Archb. Pr. K. B. 1, 6, bk. 2, pts. 1, 2; Strickland v. Maddox, 4 Ga. 394. The term "collateral" is also applied in England to an issue raised upon a plea of diversity of person, pleaded by a criminal who has been tried and convicted, in bar of execution, viz., that he is not the same person who was attainted, and the like. 4 Bl. Comm. 396. Matters collateral to the main issue are those which do not constitute an essential element of the offense embraced within the charge. State v. English, 308 Mo. 695, 274 S. W. 470, 474.

Real or *feigned.* A real or actual issue is one formed in a regular manner in a regular suit for the purpose of determining an actual controversy. A feigned issue is one made up by direction of the court, upon a supposed case, for the purpose of obtaining the verdict of a jury upon some question of fact collaterally involved in the cause. Such issues are generally ordered by a court of equity, to ascertain the truth of a disputed fact. They are also used in courts of law, by the consent of the parties, to determine some disputed rights without the formality of pleading; and by this practice much time and expense are saved in the decision of a cause. 3 Bla. Comm. 452. The name is a misnomer, inasmuch as the *issue* itself is upon a real, material point in question between the parties, and the circumstances only are fictitious.

Common issue is the name given to the issue raised by the plea of *non est factum* to an action for breach of covenant.

This is so called because it denies the deed only, and not the breach, and does not put the whole declaration in issue, and because there is no general issue to this form of action. 1 Chitty, Pl. 483; Gould, Pl. c. 6, pt. 1, § 7.

In Real Law

Descendants. All persons who have descended from a common ancestor. Edmundson v. Leigh, 189 N. C. 196, 126 S. E. 497, 499. Offspring; progeny; descent; lineage; lineal descendants. Gardner v. Anderson, 114 Kan. 778, 227 P. 743, 747; In re Schuster's Will, 181 N. Y. S. 500, 503, 111 Misc. 534; Wilkins v. Rowan, 107 Neb. 180, 185 N. W. 437, 439; Manning v. Manning, 229 Mass. 527, 118 N. E. 676, 678; Beaty v. Calliss, 294 Ill. 424, 128 N. E. 547, 549; Security Trust & Safe Deposit Co. v. Lockwood, 13 Del. Ch. 274, 118 A. 225, 226; Connertin v. Concannon, 122 Or. 387, 259 P. 290, 291; Allen v. Reed, 17 F.(2d) 666, 667, 57 App. D. C. 78; Rhode Island Hospital Trust Co. v. Bridgham, 42 R. I. 161, 106 A. 149, 153, 5 A. L. R. 185; Hoadley v. Beardsley, 89 Conn. 270, 93 A. 535, 538; Turner v. Monteiro, 127 Va. 537, 103 S. E. 572, 575, 13 A. L. R. 383; In re Book's Will, 89 N. J. Eq. 500, 105 A. 878, 879; 8 Ves. 257; 17 Ves. 481; 19 Ves. 547; 1 Rop. Leg. 90.

In this sense, the word includes not only a child or children, but all other descendants in whatever degree; and it is so construed generally in deeds. But, when used in wills, it is, of course, subject to the rule of construction that the intention of the testator, as ascertained from the will, is to have effect, rather than the technical meaning of the language used by him; and hence issue may, in such a connection, be restricted to children, or to descendants living at the death of the testator, where such an intention clearly appears. Abbott; Sibley v. Perry, 7 Ves. Jun. 523, 529; Ralph v. Carrick, 11 Ch. D. 873, 883; Barmore v. Darragh (Tex. Civ. App.) 231 S. W. 472, 479; Daskam v. Lockwood, 103 Conn. 54, 130 A. 92, 94; Tantum v. Campbell, 83 N. J. Eq. 361, 91 A. 120, 122; Davenport v. Hickson (C. C. A.) 251 F. 983, 985; Deacon v. St. Louis Union Trust Co., 271 Mo. 669, 197 S. W. 251, 256; Carlisle v. Carlisle, 243 Pa. 116, 89 A. 873, 874; Etheridge v. Eagles-House Realty Co., 179 N. C. 407, 102 S. E. 609; Newcomb v. Newcomb, 197 Ky. 801, 248 S. W. 198, 200; Horner v. Haase, 177 Iowa, 115, 158 N. W. 548, 549; In re Rynear's Estate, 224 N. Y. S. 606, 607, 130 Misc. 804.

The word "issue" in a will is generally a word of limitation; In re Packer's Estate, 246 Pa. 116, 92 A. 70, 74; Baxter v. Early, 131 S. C. 374, 127 S. E. 607; Bonnycastle v. Lilly, 153 Ky. 824, 156 S. W. 874, L. R. A. 1916B, 1078; and when so used, is sometimes said to be equivalent to "heirs of the body"; Rhode Island Hospital Trust Co. v. Bridgham, 42 R. I. 161, 106 A. 149, 152; 5 A. L. R. 185; Parrish v. Hodges, 178 N. C. 133, 100 S. E. 256; Middletown Trust Co. v. Gaffey, 96 Conn. 61, 112 A. 689, 690. But it has been pointed out in other cases that this word is not as strong a word of limitation as the words "heirs of the body," Adams v. Verner, 102 S. C. 7, 86 S. E. 211, 214; City Nat. Bank v. Slocum (C. C. A.) 272 F. 11, 18; and yields readily to a context indicating its use as a word of purchase, Stout v. Good, 245 Pa. 333, 91 A. 613, 615; Eversmeyer v. McCollum, 171 Ark. 127, 283 S. W. 379, 382; Ford v. McBrayer, 171 N. C. 420, 88 S. E. 736, 737; Yarrington v. Freeman, 201 Ky. 135, 255 S. W. 1034.

The word is commonly held to include only legitimate issue. Page v. Roddie, 92 Okl. 226, 218 P. 1092, 1095; King v. Thissell, 222 Mass. 140, 109 N. E. 880; Hardesty v. Mitchell, 302 Ill. 363, 134 N. E. 745, 746, 24 A. L. R. 556; Love v. Love, 179 N. C. 115, 101 S. E. 563, 563; *contra:* Eaton v. Eaton, 88 Conn. 238, 91 A. 196, 198.

In Business Law

A class or series of bonds, debentures, etc., comprising all that are emitted at one and the same time.

ISSUE IN FACT. In pleading. An issue taken upon or consisting of matter of *fact*, the fact only, and not the law, being disputed, and which is to be tried by a jury. 3 Bl. Comm. 314, 315; Co. Litt. 126*a*; 3 Steph. Comm. 572. An issue which arises upon a denial in the answer of a material allegation of the complaint or in the reply of a material allegation in the answer. Rev. Codes, Mont. § 6793 (Rev. Code 1921, § 9395). See, also, Code Civ. Proc. Cal. § 590; Comp. St. Wyo. 1910, § 4452 (Rev. St. 1931, § 89-1203). The "issues of fact" which, if presented by the pleadings and supported by evidence, must be

Appendix B

Definitions of Words and Phrases, 1904 edition

JUDICIAL AND STATUTORY

DEFINITIONS

OF

WORDS AND PHRASES

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By Members of the
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VOLUME 4

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rahams, 36 S. E. 409, 411, 110 Ga. 707, 50 L. R. A. 361.

The word "issue," in its natural signification and common use, includes all the offspring or descendants of a person, whether heirs or not, and includes "heirs of the body," though it is not identical with that term. Black v. Cartmell, 49 Ky. (10 B. Mon.) 188, 193.

"Issue," when used as a word of limitation, is equivalent to "heirs of the body," but where "issue" is not used as a word of limitation, its natural and primary meaning, without explanation, is descendants in every degree, whether heirs or not. Beckham v. De Saussure (S. C.) 9 Rich. Law, 531, 546.

The word "issue," according to all decisions in England and the United States, means heirs of the body or children, according to the intention of the testator, deduced from expressions contained in the will. Chelton v. Henderson (Md.) 9 Gill, 432, 436.

The word "issue," in a devise, is regarded primarily as a word of limitation, and as synonymous with the technical words "heirs of the body;" and, as used in a will devising lands to M. and her heirs forever, and providing that, in case there shall be issue of M. by any other marriage, they shall not be entitled to inherit, the word "issue" is used as synonymous with "heirs." Allen v. Craft, 9 N. E. 919, 922, 109 Ind. 476, 58 Am. Rep. 425.

"Issue," in a will, prima facie means heirs of the body. In a devise to the testator's son, and, in case the son should die without leaving issue, the bequest to him should go to others, the son took a defeasible estate, which terminated at his death without issue. Middleswarth's Adm'r v. Blackmore, 74 Pa. (24 P. F. Smith) 414, 419.

Illegitimate child.

A devise to "issue" means, prima facie, legitimate issue, and an intention to include illegitimate issue must be deduced from the language itself, without resort to extrinsic evidence. Flora v. Anderson (U. S.) 67 Fed. 182, 185.

Under Ky. St. § 4841, providing that the issue of a devisee dying before the testator shall take the share which the devisee would otherwise have taken, a bastard child of a daughter of testator, who died before the testator, took the share which the mother would have taken as devisee, if she would have survived the testator, as Id. § 463, providing that "the word 'issue' as applied to the descent of real estate shall be construed to include all the lawful lineal descendants of the ancestor," was intended to embrace in the word "issue" all persons who might lawfully inherit the estate. Cherry v. Mitchell, 55 S. W. 680, 690, 108 Ky. 1.

The word "issue," as used in a will bequeathing property with a trust to the issue of a certain person, means legitimate children only. A trust to illegitimate children thereafter to be born is void as against good morals. Kingsley v. Broward, 19 Fla. 722.

As issue living at death of ancestor.

When a remainder is limited to take effect on the death of any person without heirs or heirs of his body, or without issue, the words "heirs" or "issue" mean heirs or issue living at the death of the person named as ancestor. Gen. St. Minn. 1894, § 4383; Rev. St. Wis. 1898, § 2046.

"Issue," as used by a testator in devising a lot to his two daughters during their life and the life of the survivor, and, after the decease of the survivor, the same "unto the male issue then living of my son Richard," meant such male issue as were alive at the death of the survivor of the two daughters. Wistar v. Scott, 105 Pa. 200, 42 Leg. Int. 48, 51 Am. Rep. 197.

In the bequest of personalty to one for life, after his death to his issue, and in default of issue then to another, the term "issue" primarily signifies children or their issue living at the first taker's death, and should not be construed "as of the body," so as to enlarge the interest of the life tenant. In re Pennock's Estate (Pa.) 11 Phila. 623, 626.

The first section of an act relative to the descent of real estate provided that if any child of a person dying seised of lands and intestate shall have died before the intestate, leaving issue, the share of the land which the child so dying would have been entitled to if she or he had survived the intestate shall descend to and be inherited by such issue. The second section provided that when any person shall die seised of land without will, and without leaving lawful issue, leaving a brother or sister, the inheritance shall descend to the brother or sister. It was held that the word "issue," in the phrase "without leaving lawful issue," in the second section, included the issue of a child who died before the intestate, since otherwise a brother or sister would take before a child of a deceased child, as provided by the first section. Haring v. Van Buskirk, 8 N. J. Eq. (4 Halst. Ch.) 545, 548; Moseby's Adm'r v. Corbin's Adm'r, 10 Ky. (3 A. K. Marsh.) 289, 291.

Where a testator devised lands to a son for life, without power to dispose of or render the same liable for his debts, and after his decease to such persons as he by will should direct, and on the son dying intestate, leaving issue surviving him, then to the issue in fee, and on failure of the issue then to the sister for life, the word "issue" meant only children of the son who should

Appendix C

Page's: A Treatise on the Law of Wills

A TREATISE ON THE LAW OF WILLS

BY

WILLIAM HERBERT PAGE

Professor of Law, University of Wisconsin
Author of Page on the Law of Contracts

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tended to include an illegitimate grandchild.[5] Extrinsic evidence may be considered for the purpose of determining whether or not testator intended that a gift to "grandchildren" should include an illegitimate grandchild.[6]

Sec. 1027. Issue and offspring.

Issue is a word whose primary meaning, in the absence of anything to show a contrary intent, is that of legitimate lineal descendants indefinitely.[1]

[5] Groves' Estate v. Groves, ... W.Va. ..., 198 S.E. 142; annotated, 45 West Virginia Law Quarterly 179 (testator in his will referred to his son A; A was illegitimate; held that such reference showed that a gift to testator's grandchildren included A's legitimate children).

[6] In re Estate of Ellis, 225 Ia. 1279, 282 N.W. 758; annotated, 24 Iowa Law Review 629, 87 University of Pennsylvania Law Review 752, and 25 Virginia Law Review 634.

[1] *England.* Weldon v. Hoyland, 4 De G. F. & J. 564; In re Sutcliffe, [1934] Ch. 219.

Alabama. Wright v. City of Tuscaloosa, 236 Ala. 374, 182 So. 72.

Connecticut. Union & New Haven Trust Co. v. Sherwood, 110 Conn. 150, 147 Atl. 562 (the context, such as "then living issue" may show that the class is to be fixed within the time determined by the statute against perpetuities); Mooney v. Tolles, 111 Conn. 1, 70 A.L.R. 608, 149 Atl. 515; Dolbeare v. Dolbeare, 124 Conn. 286, 117 A.L.R. 687, 199 Atl. 556; annotated, 37 Michigan Law Review 630; Warren v. Duval, 124 Conn. 448, 200 Atl. 804 (the class of "issue" may be fixed after the time determined by the statute against perpetuities; and accordingly the gift may fail; Congregational Home Missionery Society v. Thames Bank & Trust Co., ... Conn. ..., 14 Atl.(2d) 626.

District of Columbia. Allen v. Reed, 57 App.D.C. 78, 17 Fed.(2d) 666; Jewell v. Graham, 57 App.D.C. 391, 24 Fed.(2d) 257.

Kansas. Gardner v. Anderson, 116 Kan. 431, 227 Pac. 743.

Kentucky. Hodge v. Lovell's Trustee, 262 Ky. 509, 90 S.W.(2d) 683.

Massachusetts. Bigelow v. Morong, 103 Mass. 287; Hall v. Hall, 140 Mass. 267, 2 N.E. 700; Hills v. Barnard, 152 Mass. 67, 9 L.R.A. 211, 25 N.E. 96; Jackson v. Jackson, 153 Mass. 374, 11 L.R.A. 305, 26 N.E. 1112; Manning v. Manning, 229 Mass. 527, 118 N.E. 676; Boston Safe Deposit & Trust Co. v. Park, ... Mass. ..., 29 N.E.(2d) 977.

New Jersey. Weehawken Ferry Co. v. Sisson, 17 N.J.Eq. 475; Skinner v. Boyd, 98 N.J.Eq. 55, 130 Atl. 22; (affirmed, 100 N.J.Eq. 355, 134 Atl. 919); Pierson v. Jones, 108 N.J. Eq. 453, 155 Atl. 541 (affirmed, 111 N.J.Eq. 357, 162 Atl. 580); Hackensack Trust Co. v. Denniston, ... N.J. Eq. ..., 14 Atl.(2d) 773.

New York. Drake v. Drake, 134 N.Y. 220, 32 N.E. 114; Matter of Farmers' Loan & Trust Co., 213 N.Y. 168, 2 A.L.R. 910, 107 N.E. 340.

Ohio. Moon v. Hepford, 2 Ohio N.P. 365, 3 Ohio Dec. 508.

Oklahoma. McCoy v. Lewis, 166 Okla. 245, 27 Pac.(2d) 350.

Oregon. Connertin v. Concannon, 122 Or. 387, 259 Pac. 290.

Pennsylvania. Robins v. Quinliven, 79 Pa. 333; Lockhart's Estate, 306 Pa. 394, 159 Atl. 874.

Rhode Island. Pearce v. Rickard, 18 R.I. 142, 19 L.R.A. 472, 26 Atl. 38; Rhode Island Hospital Trust Co. v. Bridgham, 42 R.I. 161, 5 A.L.R. 185, 106 Atl. 149; Newport Trust Co. v. Newton, 49 R.I. 93, 139 Atl. 793.

South Carolina. Thomson v. Russell, 131 S.Car. 527, 128 S.E. 421; Lucas v. Shumpert, 192 S.Car. 208, 6 S.E.(2d) 17 (a word of limitation).

Vermont. In re Beach's Estate, 103 Vt. 70, 151 Atl. 654.

Washington. Bowles v. Denny, 155 Wash. 535, 285 Pac. 422 (the use of "then living" may prevent a great-great-grandchild from taking).

Since "issue" are determined from birth, while "heirs" are determined at the death of the ancestor, cases upon the legal effect of "heirs" are not authority on the question of the legal effect of "issue." Bartlett v. Mutual Benefit Life Insurance Co., 358 Ill. 452, 193 N.E. 501.

If "issue" has been defined by statute, it will be assumed that testator used the word with the statutory meaning. In re Beach's Estate, 103 Vt. 70, 151 Atl. 654.

On the other hand, a statutory definition of "issue" in case of intestacy is not applied in construing a will. In re Thompson's Estate, 202 Minn. 648, 279 N.W. 574.

See, Meaning of the Word "Issue" in Gifts to "Issue," by Albert M. Kales, 6 Illinois Law Review 217; Meaning of the Word "Issue" in Gifts to "Issue"—Another View, by Willard Brooks, 6 Illinois Law Review 230, and Testamentary Gifts to "Issue," by Merrill I. Schnebly, 35 Yale Law Journal 571.

See note, 117 A.L.R. 691.

[2] Mooney v. Tolles, 111 Conn. 1, 70 A.L.R. 608, 149 Atl. 515; Jewell v. Graham, 57 App.D.C. 391, 24 Fed.(2d) 257; Thomas v. Levering, 73 Md. 451, 21 Atl. 367, 23 Atl. 3 (a devise was made to devisee's "issue, children or descendants," per capita, and not per stirpes; and the living children and the descendants of the deceased children were held to take to the exclusion of the children of the living children).

See, also, Thompson v. Russell, 131 S.Car. 527, 128 S.E. 421, where a gift to testator's children and their issue share and share alike included their children but not their grandchildren.

[3] *Alabama.* Wright v. City of Tuscaloosa, 236 Ala. 374, 182 So. 72.

Connecticut. Daskam v. Lockwood, 103 Conn. 54, 130 Atl. 92; Greenwich Trust Co. v. Shively, 110 Conn. 117, 147 Atl. 367; Warren v. Duval, 124 Conn. 448, 200 Atl. 804.

Kansas. Gardner v. Anderson, 116 Kan. 431, 227 Pac. 743.

Maryland. Elliott v. Van Elss, 147 Md. 407, 128 Atl. 132.

New Jersey. Skinner v. Boyd, 98 N.J.Eq. 55, 130 Atl. 22 (affirmed, 100 N.J.Eq. 355, 134 Atl. 919).

New York. Chwatal v. Schreiner,

This primary meaning of "issue" has, however, been questioned. "'Issue,' in its primary signification, imports 'children.' . . . It is a secondary meaning by which it has been held to include the issue of issue in an indefinite descending line."[2]

The original rule has been said to be that "issue" in its primary sense, and in the absence of any indication of a contrary intention, includes descendants generally,[3] of whatever degree. Whether they take per stirpes or per capita is discussed else-

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