Montana Law Review

Volume 14
Issue 1 *Spring 1953*

Article 7

January 1953

Relationship between Lapse and Pretermission in the Law of Wills

Norman Robb

come Tax Problems of Farmers and Ranchers'' were discussed by Mr. Williams, Chairman of the Committee on Tax Problems of Farmers, H. Gene Emery, of Indianapolis, and T. M. Ingersoll, of Cedar Rapids, Iowa.

Herbert W. Lark was moderator of a popular Trial Tactics Panel. Panel members were Philip S. Van Cise, of Denver, A. L. Merrill, of Pocatello, William Meyer, of Butte, Brigham E. Roberts, of Salt Lake City, and John Ilsley, of Gillette, Wyoming.

Judge Alfred P. Murrah, of Oklahoma City, presided at the sessions of the Section of Judicial Administration, which included the evening assembly at which Judge Hickman was the speaker, and an afternoon session when Judge James Alger Fee, of Portland, led a discussion on ''Procedures Before Trial.''

One of the highlights of the meeting was a sparking performance of Gilbert & Sullivan's Trial by Jury by students of the Montana State University School of Music under the direction of Professor John Lester, sponsored by the Montana Bar Association. The same group also presented a variety show. Other entertainment features included a reception following the opening session sponsored by the Montana Bar Association and lawyers of Bozeman and Livingston, Montana; a reception for members of the Junior Bar; a ladies' luncheon at Old Faithful Inn, sponsored by the lawyers of Billings; and an illustrated lecture on ''Geyser Land,'' by David Condon, Chief Naturalist of Yellowstone National Park.

Principal credit for the success of the Regional Meeting is due the General Chairman, Mr. William J. Jameson, of Billings.

The Executive Committee of the Montana Bar Association has awarded the 1953 convention to the city of Great Falls. The convention will be held on August 13, 14 and 15. Your attendance at the convention is invited.

RELATIONSHIP BETWEEN LAPSE AND PRETERMISSION IN THE LAW OF WILLS

I.

INTRODUCTORY.

When the California Supreme Court decided the case of *In re Mathews' Estate*[1] they passed on a rather intricate problem involving two highly technical aspects of the law of wills; namely, the law of lapse and the application of anti-lapse statutes, and, secondly, the effect and application of the statutory law of pre-

[1]176 Cal. 576, 169 P. 233 (1917).

termitted heirs. The case concerned a will that had been republished, almost verbatim, by a codicil, after the daughter-legatee of the testatrix had died. This legatee was survived by her son, the testatrix's grandson, who was neither mentioned nor provided for in the original will or the republished will, nor by any prior advancement or settlement. The son claimed as a pretermitted heir when the testatrix's will was presented for probate, and the beneficiaries contended that he took only his mother's share under the statute preventing lapse. Both the lower court and the Supreme Court held that the boy took as a pretermitted heir.

II.

LAPSE STATUTES AND VOID GIFTS

The common law doctrine of lapse in the law of wills has been greatly altered by legislation, beginning with the English Statute of Wills.[3] Section 33 of that Act provides:

> "* * * where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

The purpose of this section was to give effect to the testator's "presumed intention," for it was postulated on the theory that the testator would have preferred that the gift go to the issue of the deceased beneficiary rather that to the residuary beneficiary or as intestate property, had he known of the inability of the beneficiary to take the gift.

This section of the Statute of Wills has been the basis for similar legislation in all but four[8] of the United States. The American statutes vary as to the classes of devisees and legatees they apply to. In one state[4] the class is restricted to children and in two states[5] to children or grandchildren. In six states[6] the classes are the same as that of the English statute, e.g. "child or

[3] 7 Wm. IV & 1 Vict. c.26.
[8] Florida, Wyoming, Louisiana, New Mexico. See Bordwell, *The Statute Law of Wills*, 14 IA. L. REV. 428, (1929).
[4] South Carolina. See Bordwell, *supra*, note 3.
[5] Colo. and Conn. See Bordwell, *supra*, note 3.
[6] Ala., Ariz., Ark., Ind., Miss., and Texas. See Bordwell, *supra*, note 3.

other issue of the testator." In twenty[7] states any relation or relative is included; and in nine states[8] any devisee or legatee; and in the remaining five states[9] the classes are more complicated. In practically all states the person who takes in place of the deceased beneficiary must be a lineal descendant of said beneficiary.

Anti-lapse statutes do not operate if the testator provides for a gift over to take effect in the event the first beneficiary predeceases him, nor do they operate if it can be found from the will itself that the testator did not intend the property to pass by the anti-lapse statute in case the beneficiary predeceased him.[10]

"The Montana statute preventing lapse is as follows:

> When any estate is devised or bequeathed to any child, or other relation of the testator, and the devisee or legatee dies before the testator, leaving lineal descendants, such descendants take the estate so given by the will, in the same manner as the devisee or legatee would have done had he survived the testator."[11]

Prior to 1947 the Montana statute applied only to a devise of realty,[12] but in that year it was amended to read as above quoted.[13] The few cases[14] in Montana immediately concerned with the application of this statute were all decided prior to the 1947 amendment, and they uniformly held that the statute, as it was then, did not apply to gifts of personalty, and that a legacy lapsed when the beneficiary predeceased the testator.

The result reached in these Montana cases was the same as the California courts reached under their former statute,[15] which

[7]Calif., Idaho, Kan., Me., Mass., Mich., Minn., Mont., Mo., Neb., Nev., N.D., Ohio, Okla., Ore., S. D., Utah, Vt., Wash., Wis. See Bordwell, *supra*, note 3.

[8]Ga., Iowa, Ky., Maryland, N. H., R. I., Tenn., Va., W. Va. See Bordwell, *supra*, note 3.

[9]Delaware, Penn., N. Y., N. J., Ill. See Bordwell, *supra*, note 3.

[10]In re Todd's Estate, 17 Cal. (2d) 270, 109 P(2d) 913 (1941), prior opinion 99 P(2d) 690.

[11]R.C.M. 1947, § 91-139; R.C.M. 1935, § 7012.

[12]R.C.M. 1935, § 7012. Prior to the 1947 amendment this statute read as follows: "Lineal descendants take estate upon death of devisee before testator. When any estate is *devised* to any child, or other relation of the testator, and the devisee dies before testator, leaving lineal descendants, such descendants take the estate so given as the devisee would have done had he survived the testator."

[13]Ch. 58, § 7012, LAWS OF MONTANA 1947.

[14]In re Fatt's Estate, 60 Mont. 526, 199 P 711 (1920); In re Estate of Hash, 64 Mont. 118, 208 P 537 (1921); Convers v. Byars, 112 Mont. 372, 118 P (2d) 144 (1941).

[15]Section 1310, Cal. Civil Code (1920). Section 1310 prior to 1905 was identical with Section 7012 of the Montana Codes prior to its 1947

was identical with our statute prior to the 1947 amendment. However, the amendment clearly overrules the decisions of the *Fratt, Hash* and *Byars* cases, for the statute now expressly applies to *legacies* as well as devises. Montana is now in line with the weight of authority on this point.

Anti-lapse statutes also play a part in cases where the beneficiary was dead at the time the will was executed. At common law such a gift was held void on the ground that the provision never could have taken effect even though the testator had died immediately after the will was executed. However, most modern authorities hold that anti-lapse statutes are also applicable in cases of this type,[16] thus allocating the gift to the lineal descendants of the beneficiary.

In the case of *In re Estate of Hash*[17] Montana took the common law and minority view by holding a gift to a dead person void and of no effect. Again in the case of *In re Doyle's Estate*[18] our court said:

> "It is generally held, in the absence of a statute to the contrary, that where a legacy or devise is left to a person who is already dead at the time the will in question is executed, the gift lapses even though the fact of such death is known to the testator."

In the *Doyle* case the court found support for its decision in Section 91-104, R.C.M. 1947,[19] which declares that a testamentary disposition may be made to any person capable of taking the property. The court held that a dead person was not capable of taking property, and that the gift must therefore fail completely.

Prior to 1921, California had also cast its lot with the minority on this matter,[20] but in that year it amended its anti-lapse statute to expressly include gifts to persons dead at the time the will was executed, as well as beneficiaries who died after the

amendment. In 1905 Calif. amended Section 1310 to read identically with what is now Montana's present statute, Section 91-139. See: In re Foss, 140 Cal. 212, 73 P 976 (1903).

[16]3 A.L.R. 1682 (Annotation).

[17]*Supra*, note 14.

[18]107 Mont. 64, 80 P(2d) 374 (1938). (Holding that in the absence of a statute to the contra, that where a gift or devise is left to a person who is already dead at the time the will in question is executed, the gift lapses even though the fact of such death is known to the testator.) See also: Gardner v. Anderson, 114 Kan. 778, 227 P 743 (1923). *Contra*: Winsor v. Brown, 48 R. I. 200, 136 A. 434 (1927).

[19]Formerly R.C.M. 1935, § 6977.

[20]In re Glass' Estate, 164 Cal. 765, 130 P 868 (1913); In re Mathews Estate, 176 Cal. 576, 169 P 233 (1917).

execution of the will, but prior to testator's death. This fact will be come important at a later point in this paper.

III.

PRETERMITTED HEIR STATUTES.

In most of the American states which follow the common law principle of testamentary freedom, whereby a testator may disinherit all his relatives, even his dependent children,[21] there are certain restrictions imposed by law thereon. The outstanding example of these restriction is the "pretermitted heir" statutes, which can be roughly divided into two types: the "omission" statutes and "after-born-children" type. This paper will discuss them in that order.

A. The "Omission" Statutes.

In twenty-six[22] states, Montana included, there are statutes which, in general, provide that when a testator fails to provide in his will for any of his children, or the issue of a deceased child, then such omitted child or issue takes the share of the testator's estate that he would have taken had the testator died intestate.[23]

The Montana Statute[24] reads:

> "When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child or the issue of such child, must have the same share in the estate of the testator as if he had died intestate."[25]

[21]ATKINSON ON WILLS (1st Ed. 1937) p. 91. In re Carroll's Estate, 59 Mont. 403, 196 P 996 (1921); In re Benolken's, ...Mont....., 205 P(2d) 1141 (1949). See also In re Eatley's Will, 82 N.J.Eq. 591, 89 A. 776 (1913).

[22]Ark., Calif., Ga., Idaho, Kan., Ky., Me., Mass., Mich., Minn., Mo., Mont., Neb., Nev., N.H., N.M., N.D., Ohio, Okla., Ore., R.I., S.D., Utah, Vt., Wash., Wis., Alaska, Canal Zone, P.I., P.R., V.I. See Bordwell, Statute Law of Wills, 14 IA. L. REV. 174. (1929).

[23]In re Brainard's Estate, 76 Cal. App. (2d) 850, 174 P(2d) 702 (1946).

[24]R.C.M. 1947, § 91-136, R.C.M. 1935, § 7009.

[25]Our statute is identical with § 1307 of the Calif. Civil Code (1920). In 1931 California amended her statutes on omitted children and after-born children and combined them into one section, reading as follows: "Section 90 Cal. Probate Code. Rights of children and grandchildren. When a testator omits to provide in his will for any of his children, or for the issue of any deceased child, whether born before or after the making of the will or before or after the death of the testator, and such child or issue are unprovided for by any settlement, and have not had an equal proportion of the testator's property bestowed on them by way of advancement, unless it appears from the will that such omission was intentional, such child or such issue succeeds to the same share in the estate of the testator as if he had died intestate."

The theory of legislation of this type is that the child should take his intestate share when he has been forgotten by the testator or omitted through accident.[26] The courts base this theory upon the presumption that the testator would have made some provision for the child if the omission had been called to his attention in time.[27] However, it should be noted that these statutes are not a mandatory limitation upon testamentary power regardless of initention,[28] for if the court finds the omission was intentional, or not due to accident or mistake, then the statute does not operate and the child is precluded entirely. It is, of course, fundamental that the testator may expressly disinherit a child or grandchild in his will.[29]

In Montana, and states with substantionally the same statute, some provision[30] in the will for the child prevents the operation of the statute. In some states the provision need not be in the will, a prior or subsequent settlement upon the child being sufficient. More-over, mere mention of the child in the will is all the statute requires in order to preclude the child.[31]

When dealing with these statutes, Montana and the weight of authority[32] permit the introduction of extrinsic evidence to aid

[26]ATKINSON ON WILLS (1st Ed. 1937) p. 94.

[27]1 Page, Wills (Lifetime Ed.) § 526, p. 966. In re Benoklen's Estate .....Mont....., 205 P(2d) 1141 (1949). (The legislative purpose in enacting Section 7009, R.C.M. 1935, was not to restrict testatrix or to dictate to her what provisions she should make. It is not to control her intention, but to provide for her children and issue of any deceased child in the event of her forgetfulness or oversight upon the presumption that if she had thought of them she would have intended that they should have some share in her estate and that share the law of succession would fix.)

[28]In re Barter, 86 Cal. 441, 25 P 15 (1890) ; In re Carter's Estate, 49 Cal. App. (2d) 251, 121 P(2d) 540 (1942) ; In re Todd's Estate, 17 Cal. (2d) 270, 109 P(2d) 913 (1941).

[29]In re Benolken's Estate .....Mont....., 205 P(2d) 1141 (1949). (The fourth provision of the will read: "I intentionally omit any bequest to my sons Leo and George." The court thought that no natural sympathy for the two sons can be allowed to defeat the clearly expressed intention of the testatrix.)

[30]In re Benolken's Estate, *supra*, note 29. (Where court said any testamentary provision which affords evidence that testator's child or issue of any deceased child has not been forgotten by the testator, is sufficient to prevent the application of the statute. The court in this case held that a proviso in a will giving one dollar to each of testator's heirs-at-law not elsewhere mentioned or provided for in the will was sufficient to prevent the children of a dead child from being pretermitted heirs.)

[31]Yeates v. Yeats, 179 Ark. 543, 16 S.W. (2d) 966, 65 A.L.R. 466 (1929). (Intention to disinherit children, or issue of deceased children, can be shown by naming them in the will without providing for them.)

[32]Maine, Mass., Mich., Minn., Neb., R.I., Vt., Wis., Mont., N.D., S.D., Utah, Tenn., Nev. See the excellent annotations in 94 A.L.R. 209 and 170 A.L.R. 1379. In re Estate of Peterson, 49 Mont. 96, 140 P. 237 (1914). (Wherein the Montana court held evidence dehors the will admissible.)

in determining whether or not the omission was intentional. Strangely enough, California, from whom we borrowed our statute, in the 1868 decision of *In re Garraud*[33] held extrinsic evidence inadmissible in cases under this statute.[34] Although this decision has been severely criticized, even by the Supreme Court of the United States,[35] the California courts have uniformly followed it.[36]

In states where the question has been considered, it is unanimously held that statutes for the benefit of pretermitted children raise a rebuttable presumption that the testator did not intentionally omit the child.[37] This shifts the burden of proof onto the beneficiaries, requiring them to prove by a preponderance of the evidence that the omission was intentional. In states which refuse to allow the use of extrinsic evidence, this can become an almost impossible burden.

B. The "After-born Children" Statutes.

All but three states[38] have legislation which provides that a child born to the testator after the execution of the will takes as on intestacy unless provided for or mentioned in the will. These enactments, known as "after-born children" statutes, can be classified into two main categories; namely, those which provide that the birth of a child revokes a prior will entirely and gives such child his intestate share,[39] and those which give the after-born child his intestate share, but allow the will to otherwise stand.[40]

In Montana our statute puts us into the weight of authority and gives the child his intestate share without revoking the will entirely. Our statute, typical of legislation on this subject, reads as follows:

> "Whenever a testator has a child born after the making of his will, whether in his lifetime or after his death,

[33]35 Cal. 336 (1868).
[34]The minority view is supported mostly by those states whose statutes declare the omitted child takes as in intestacy unless the child is named or referred to in the will. Ark., Calif., Mo., N.H., Ore., Wash.
[35]Coulam v. Doull, 133 U.S. 216, 33 L.Ed. 596, 10 S.Ct. 253 (1890).
[36]In re Prices' Estate, 56 Cal. App. (2d) 335, 132 P(2d) 485 (1942); In re Dixon's Estate, 28 Cal. App(2d) 598, 83 P(2d) 98 (1938); In re Lombard's Estate, 16 Cal. App(2d) 526, 60 P(2d) 1000 (1936).
[37]170 A.L.R. 1387. (Annotations).
[38]Florida, Maryland, Wyoming.
[39]Ga., Ind., Iowa, La., N.J., Ohio, Penn.
[40]Ala., Ariz., Ark., Calif., Colo., Conn., Idaho, Ill., Kan., Ky., Me., Mass., Mich., Minn., Miss., Mo., Mont., Neb., Nev., N.H., N.M., N.Y., N.C., N.D., Okla., Ore., S.C., S.D., Tenn., Texas, Utah, R.I., Vt., Va., Wash., W.Va., Wis. See Bordwell, The Statutory Law of Wills, 14 IA. L. REV. 290 (1929).

> and dies leaving such child unprovided for by any settlement, and neither provided for nor in any way mentioned in his will, the child succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate."[41]

It will be noted that our statute provides for posthumous as well as lifetime after-born children. This is the usual method,[42] although a few jurisdiction have statutes relating to each.

In most states the "after-born" statutes apply irrespective of the testator's intention, or else require the intention not to provide to be found within the will itself without the use of extrinsic evidence.[43] While the Montana court has never ruled on the admissibility of extrinsic evidence as applicable to our "after-born" statute, it would seem that in view of the *Peterson* case[44] a good argument could be made for its admissibility. However, should Montana permit such evidence in this regard, it would be taking the position of a very small minority.[45]

In thirty states,[46] Montana included, provision for the after-born child other than by the will is sufficient to preclude his taking as in intestacy or revoking the will.[47] It will be noted that our statute expressly covers this point in the following language; "* * * *leaving such child unprovided for by any settlement* and neither provided for nor in any way mentioned in his will * * *." Of course, it must be remembered that the testator may still disinherit such children by a suitable provision to that effect in the will.[48]

[41]R.C.M. 1947. § 91-135; R.C.M. 1935, § 7008. Montana's statute is identical with Section 1306 Calif. Civil Code (1920). California has since amended their statute and combined it with their "omission" statute. See supra, note 25 for Calif. Probate Code, (1937), Section 90.

[42]Bordwell, The Statute Law of Wills, 14 IA. L. REV. 290 et seq. (1929).

[43]ATKINSON ON WILLS (1st Ed. 1937) p. 96. Bordwell, The Statute Law of Wills, 14 IA. L. REV. 290 (at 295 & 6) (1929).

[44]See *supra*, note 32.

[45]Only four states allow extrinxic evidence. Maine, Mass., Minn., and R.I. See Bordwell, *supra*, note 43, at page 296.

[46]Ariz., Ark., Calif., Del., Idaho, Ia., Kan., Ky., Me., Mass., Minn., Miss., Mo., Mont., Nev., N.J., N.Y., N.C., N.D., Ohio, Ore., Okla., R.I., S.D., Tenn., Tex., Utah, Va., Wash., W.Va. See Bordwell, *supra*, note 43, at page 294.

[47]In re Brant, 121 Misc. 102, 201 N.Y., Supp. 60 (1923). (Testator had taken out several insurance policies for the benefit of his son, and the son was not mentioned in the will, nor provided for therein. Held: The insurance policies were such "settlement" as contemplated by the statute, so that it would have no application on account of the omission of the son, born after the making of the will.)

[48]Flanner v. Flanner, 160 N.C. 126, 75 S.E. 936 (1912). The same is true as to posthumous children. See Burns v. Allen, 93 Tenn. 149, 23 S.W. 711 (1893).

IV.

LAW OF WILLS: HEREIN OF THE INTERPLAY BETWEEN LAPSE AND PRETERMISSION.

In the case of *In re Mathews' Estate*[49] the Supreme Court of California held that the son of a "daughter-legatee," who had predeceased the testatrix, took as a pretermitted heir rather than under the then existing anti-lapse statute.[50] The facts of the case were that in 1902 the testatrix made her will, wherein she provided a legacy of ten dollars for her daughter, Mary. The will contained no mention or provision for Mary's son, Howard. Nor had Howard received any prior or subsequent settlement from the testatrix. In 1907 Mary predeceased the testatrix, who in 1908 executed a codicil in which she referred to and ratified her prior will in every respect, save as to a slight increase in another legacy. The codicil contained no mention or provision for the grandson. After the testatrix's death, the grandson, Howard, claimed that he took from testatrix as a pretermitted heir under Section 1307,[51] the then existing pretermitted heir statute, rather than under Section 1310, the anti-lapse statute. Both the Probate Court and the Supreme Court sustained his contention. In reaching this result the court held that Section 1310 was not applicable on the ground that the will had been republished by the execution of the codicil, and, therefore, the legacy to the boy's mother was void as being an attempted gift by will to a dead person. The Court held that Section 1310 applied only to cases where the original legatee predeceased the testator after the will was made, and not to cases where the beneficiary was dead when the will was executed. In refusing the contention of the other beneficiaries, that the boy was entitled only to the legacy given his mother, the Court said:

> "The principal fault with this reasoning is that Section 1310 of the Civil Code relates to the time of the death of the testatrix, and not to the time of the decease of the original legatee. It is a statute of distribution, and has reference to the conditions existing at the time of the death of the maker of the will if the provisions of that instrument remain unchanged. The death of his mother did not have the effect of erasing her name from the testament and writing that of Howard Leonard in its place, because, of course, he could take the legacy intended for his mother in any case only in the event of

[49]See *supra*, note 1.
[50]Section 1310, Cal. Civil Code (1920). See *supra*, note 15.
[51]See *supra*, note 25.

> his surviving his grandmother. It seems clear, therefore, that when the will was republished by the execution of the codicil, the legacy to Mrs. Leonard was void as being an attempted gift by will to a dead person, and that the failure to mention Howard Leonard in the republication made him a pretermitted heir."

So the case holds the execution of a new will, or the republication of a prior will, after the death of a beneficiary *who is the child of the testator,* without providing for nor mentioning the issue of such child-beneficiary, allows such issue to take as a pretermitted heir rather than under the anti-lapse statute. This result is contrary to that reached by the weight of authority[52] which holds anti-lapse statutes applicable both where the beneficiary is dead at the time the will is made, or republished, as well as where the beneficiary predeceases the testator after the execution of the instrument.

The *Mathews'* case is no longer the law in California. In 1931, Section 1310 was amended to specifically include instances where the beneficiary was dead when the will was made.[53]

The weight of authority and present California view would seem to be preferable, for it not only avoids results such as reached in the *Mathews'* case, but it also protects the omitted or forgotten issue of a "child-beneficiary" who was dead at the time the will was executed by allowing such issue to take the parent's share through the anti-lapse statute. To illustrate, suppose, under the state of the law as applied in the *Mathews'* case, that a testator is survived by his parents, the issue of a child who was dead when the will was made, and two sisters. The will provides for the parents, the sisters and the dead child, but no mention or provision is made for the grandchildren, nor are they provided for by any settlement. It does not appear that the omission was intentional. Under the *Mathews'* case, the gift to the child is void, and, therefore, the grandchildren take, as pretermitted heirs, their intestate share. By the statute of intestate succession this share is the share their parent would have taken in intestatcy. The share the parent would have taken by intestacy would be the entire estate, for the example states that the

[52]See Part II of this paper at page 3. See *supra*, note 16.

[53]Cal. Probate Code, 1937, § 92. "Death of devisee. If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to his fails, unless an intention appears to substitute another in his place; except that when any estate is devised or bequeathed to any kindred of the testator, leaving lineal discendants, *or is dead at the time the will is executed,* but leaves lineal descendants surviving the testator, such descendants take the estate so given by the will in the same manner as the devisee or legatee would have done had he survived the testator."

only lineal descendants surviving the testator were the issue of the deceased child. This would defeat the entire will. Although such a case may be a rarity, from it can be seen cases where the share to be taken, although not the entire estate, would be sufficiently large to seriously impede the effect of the will. Under the majority view this result need not be worried about, for the grandchild takes the devise or bequest given to his parent through the anti-lapse statute.

V.

CONCLUSION.

In Montana the *Mathews'* case still probably represents the law. Although our Court has never been faced with the problem of construing both our pretermitted heir statute and the anti-lapse statute in the same case and under similar facts, the case could be cited as authority in this state for two reasons; namely, first, our statutes on these two subjects are identical[54] with those in force in California at the time the *Mathews'* case was decided; Secondly, the fact that our Supreme Court has expressly held a testamentary gift to a dead person void.[55] These two elements combine to form the necessary ingredients, along with the *Mathews'* case as a corner-stone, to reach the conclusion arrived at by the California court and later rejected by the California legislature. The result of the *Mathews'* case is one to be avoided, if possible, because, to this writer it does not truly represent the testator's intentions. It would hardly seem that a man would want his most solemn declarations cast aside, and those for whom he has expressly provided to suffer a loss in order that one for whom no provision was made may recover the full share allowed him by law, especially in view of the fact that the omitted grandchild's parent was provided for. This is not to say that pretermission statutes are completely unworthy, for they do serve a very useful purpose when properly applied. But they were not designed to operate in cases where provision was made for a man's children. If a man does provide in his will for a child already dead, he is either ignorant of the fact of the death, or he intends to provide for the beneficiary's dependents. If he is ignorant of the death, it is much more logical to hold that he would prefer the deceased's issue to take the testamentary provision, rather than the deceased's intestate share and thus perhaps defeat the will to a great extent if not entirely. This is especially so in view of the fact that a man usually knows the beneficiary's de-

[54] *Supra*, notes 15 and 25.
[55] See Part II of this paper at page 3. Also *supra*, note 17.

pendents will also benefit from the gift. The writer's contention is based on the ground that if the law can find justification for anti-lapse statutes where the beneficiary dies after the will is executed, but before the demise of testator, then there is no reason for not doing the same where the beneficiary died prior to the execution of the will, or its republication. This contention is the result reached by the weight of authority[56] under statutes such as California's present Act, as well as statutes such as Montana's.

Montana, of course is not bound to follow the *Mathews'* case, but to refuse to do so would require the overruling of the *Doyle* and *Hash* cases,[57] wherein the claim that our anti-lapse statute should also apply to a person dead at the time of the execution of the will was made and rejected. Courts do overrule prior decisions to be sure, but until they do we are bound by the law of those cases. It is on this premise that the contention is made that the *Mathews'* case represents what the law in Montana would be in similar circumstances.

There is one weapon in Montana which might be used to combat the application of the *Mathews'* rule, and which was not available to the California Court. This is the rule of the *Peterson* case[58] allowing the use of evidence aliunde to help ascertain whether or not the pretermitted child was intentionally omitted. However, this is at best only a rule of evidence applicable to each particular set of facts. What is needed is legislation to correct the evil, for the *Peterson* case does not prevent the omitted grandchild from taking as a pretermitted heir should the court find the omission was not intentional.

The object of this paper is not to advocate the repeal of our pretermission statutes, rather it is to point out how they can be misapplied, with the best of intentions, to situations where they really have no bearing. The surest and quickest solution to this problem is legislation making our anti-lapse statute applicable to cases where the devisee or legatee is dead at the time the will is executed.

Brief notice should be given to the sections of Professor Simes' Model Probate Code[59] applicable to lapse[60] and preter-

[56]See Part II of this paper at page 3. Also *supra*, note 16.
[57]*Supra*, notes 14 and 18.
[58]*Supra*, note 32.
[59]MODEL PROBATE CODE (1st ed. 1946) by L. M. Simes.
[60]Section 57, Model Probate Code. "Failure of Testamentary Provision by Lapse or Otherwise.
(a) * * *
(b) Avoidance or Failure of Devise when Devisee Dies before Testator. Unless a contrary intent is indicated by the will, when any

mitted heirs.[61] Section 57 refers only to a beneficiary alive when the will was made, but who predeceases the testator. Thus it would seem that Professor Simes took the common law and minority view that a gift to a dead person is void and therefore lapses. Under the facts as they existed in the *Mathews'* case, this would inject the case into Section 41 and give the issue of such child-beneficiary their intestate share. Why Professor Simes did not go the whole way and include gifts to beneficiaries already dead within the purview of Section 57 can only be left to conjecture. But this omission becomes only more puzzling in view of the fact that Section 57 does provide solutions for two other equally troublesome problems. It expressly includes adopted children and it gives a definite formula for solving problems arising under gifts to a class where one of the members of that class predeceases the testator.[62]

Before closing it should again be pointed out that this paper deals only with the situation where the beneficiary of the will is issue of the testator. It has absolutely no bearing on cases where

adopted child of the testator or blood relative within the fourth degree
(1) Is designated as a devises, or
(2) Would have been a devisee under the terms of a class gift, had he survived the testator, and such adopted child or blood relative dies after the making of the will and before the testator leaving issue surviving the testator and the fact of his death is unknown to the testator, then such issue as represent the deceased devisee shall be deemed substituted for him so as to take the interest under the will which their deceased ancestor would have taken had he survived."

[61]Section 41, Model Probate Code. "Pretermitted Children. (a) Children Born or Adopted After Will Made. When a testator fails to provide in his will for any of his children born or adopted after the making of his last will, such child, whether born before or after the testator's death, shall receive a share in the estate of the testator equal in value to that which he would have received if the testator had died intestate, unless it appears from the will that such omission was intentional, or unless when the will was executed the testator had one or more children known to him to be living and devised substantially all his estate to his surviving spouse.
(b) Children Believed to Be Dead When Will Made. If, at the time of the making of his will, the testator believes any of his children to be dead, and fails to provide for such child in his will, the child shall receive a share in the estate of the testator equal in value to that which he would have received if the testator had died intestate, unless it appears from the will or from other evidence that the testator would not have devised anything to such child had he known that the child was alive."

[62]The application of anti-lapse statutes to class gifts is a difficult and troublesome proposition for the courts under present legislation. This paper intentionally omits any discussion of the problem arising under the application of existing anti-lapse statutes to class gifts because that alone is another and separate topic which merits the full attention of a paper.

the beneficiary is any other relation to the testator, or is a stranger to him. The reason for this is obvious; it is only the parent-child issue relation that falls under both the pretermission and anti-lapse statutes.

NORMAN ROBB

ADOPTION: THE NEED IN MONTANA FOR A STATUTE EXPRESSLY DEFINING THE INHERITANCE RIGHTS OF ADOPTED CHILDREN

Although the adoption of children was a thing unknown to the common law, it was a familiar practice under the Roman or civil law, and for this reason our modern statutes of adoption are taken from the latter. These statutes, then, modify the common law rules as to the succession of property whenever a question of adoption arises.[1] Since the statutes conferring adoption are not always clearly defined as to the inheritance rights of the adopted child, the result is that similar statutes are often interpreted differently.[2] In looking to decisions in states having similar statutes to Montana's concerning the inheritance rights of adopted children, the problems which arise under such statutes will be examined under the headings of inheritance *to, through,* and *from* the adopted child.

I. Inheritance to the Adopted Child

It is generally held that an adopted child will succeed by inheritance to the estate of the adopting parent in the same manner as a natural child.[3] In one Montana case which was a proceeding by a collateral relative of the testator to contest his will wherein the testator gave his estate to his adopted daughter, the court said that even if there were not a will, Elizabeth Meyer, being the adopted daughter of Simon Pepin, would succeed to all of his estate under the Statute as against the petitioner or any other collateral heirs.[4] The Statutes which the Court referred to are now R. C. M. 1947, Section 61-134, on the effect of adoption, and R. C. M. 1947, Section 91-403, on the succession to and distribution of estates. Neither of these Statutes define the inheritance

[1]Butterfield v. Sawyer, 187 Ill. 598, 58 N.E. 602 (1900).
[2]ATKINSON, WILLS, § 31, p. 6 (1937).
[3]In re Newman's Estate, 75 Cal. 213, 16 P. 887 (1888); 2 C. J. S. *Adoption* § 63; 1 Am. Jur. *Adoption of Children* § 59; 1 R. C. L. *Adoption of Children* § 29.
[4]In re Pepin's Estate, 53 Mont. 240; 163 P. 104 (1917).