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THE RIGHT OF A TESTATOR TO PAUPERIZE HIS HELPLESS DEPENDENTS

HERBERT D. LAUBE*

A parent is under a moral duty to provide for the support and maintenance of his children during the period of their dependence. Does the law permit a parent, at death, to cut off his helpless dependents from the sole source of their support and make them the objects of charity? This problem involves a conflict between the legal right of the parent to dispose of his property by will and the legal duty of the parent to maintain his dependent children and prevent them from becoming public charges. This conflict involves two questions:

I. Has a testator the right to disinherit his helpless children?
II. Is the estate of the testator liable for the support of his helpless dependents?

The answers to these two questions afford a solution of the problem.

I. HAS A TESTATOR THE RIGHT TO DISINHERIT HIS HELPLESS DEPENDENTS?

In 1906, Mr. Justice Lamm said:

"That a testator has the naked legal right to disinherit, say an infant of tender years left at his death a motherless orphan, is so. That is to say, such result necessarily flows from the plenary testamentary power existing in this State under our statutes, and at common law. ... By the same token, a father has the naked legal right to disinherit ... a feebleminded daughter of no earning capacity and leave her, like a falling autumn leaf, the sport of every ill wind that blows. But these general principles must be taken with some grains of salt. They are hard sayings (stumbling blocks), much murmured against."

The purpose of this inquiry is to ascertain the basis and the present validity of these stumbling blocks. A decade ago, the unlimited freedom of testamentary disposition of property, regardless of the claims of family, was denounced as so contrary "to common sense, justice and humanity" that its existence could be reasonably attributed only to inertia. In England, it was said, a man, however wealthy he may be, may leave his family destitute and devise and bequeath his whole estate to a home for lost dogs. In 1877, The Spectator declared

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1Meier v. Buchter, 197 Mo. 68, 86, 94 S. W. 883 (1906).


3The Hall Will Case (1877) 11 IR. L. T. 3.
“It is very difficult to make an average Englishman listen to a word against the liberty of bequest. He holds that such a word impugns his right to do what he likes with his own property, that it threatens his authority over his family. . . . and that it is put forward, in some mysterious way or other, in the interests of French democratic opinion. . . .

“Englishmen ‘make eldest sons’ every day, and leave not only nieces, but younger sons, sisters and mothers dependent upon the charity of the eldest.”

In this discussion, slight reference will be made to English experience. The English problem is peculiar because of the importance of settlements which provide for the children of the marriage. Moreover, the fact that, until 1926, primogeniture was the rule of intestacy controlling real property in England makes the English law inapplicable to the United States. Sir Henry Maine said that the European preference for primogeniture was due, not to the desire to disinherit the bulk of the children in favor of one, but rather to the strength and durability which it gave to kingly authority in the social organization. Justice yielded to political expediency because it was necessary for the fief to descend as an integral whole.

The English law of succession underwent considerable modification in America. The rule of primogeniture was abolished in all the colonies. The legislatures of the various states established fitter schemes of descent and distribution based upon a doctrine of equality. But, said The Spectator, outside of England, no such absolute testamentary power exists except in the United States.

THE RIGHT TO WILL

In 1857, the Indiana court declared that the right to dispose of property by will is now coming to be regarded as a natural right, though Blackstone and Paley do not admit it. As late as 1891, a

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5 Eversley, supra note 4, p. 569.
8 McMurray, Liberty of Testation and Some Modern Limitations Thereon (1919) 14 ILL. L. REV. 96, 117.
10 Supra note 3, p. 3. “This liberty is so wide that even the ratepayer, who during a man’s life is protected from the burden of supporting his wife and young family by the Vagrancy Act, may have to provide for his widow and children if he chooses to leave his fortune to others.” Inalienable Family Rights in Property, supra note 4, p. 105.
11 Noel v. Ewing, 9 Ind. 37, 61 (1857).
New Jersey court rested the right upon the previously exploded theory of social compact. Recently, out in the progressive West, it was discovered that "It is an attribute of property that the owner thereof has the right to dispose of it as he pleases." When the North Carolina court was seeking for light as to the character of the testamentary right, it discovered that only in Wisconsin was it a natural right. In 1906, when Mr. Justice Winslow declared the right to be inherent, Dean Pound observed that his pronouncement was in direct opposition to the steady progress of the law. The concurring opinion in the Wisconsin case, by Mr. Justice Marshall, embodies a philosophy of absolute rights that had been generally rejected in 1906 except in restricted areas of the earth. Yet, nearly ten years later, the same judge declared that "As often, and not too often, said, the testamentary right is one of the most important of the inherent incidents of human existence."

"The right of dominion over property is not a natural one. It is a product of social compact, bestowed as a reward for the virtues or superiorities by which the property was produced or acquired. When man dies, the property which he has accumulated must remain behind him. He possesses no natural right to transmit it to persons of his selection. Under natural law, at his death, it would go to the strong, and those to whom he would give it might never take. Here again the social compact pledges itself to enforce his disposition of it.... His power of disposition is absolute. Possessing capacity he may give to whom he pleases." Smith v. Smith, 48 N. J. Eq. 566, 590 (1891).

In re Moore's Estate, 114 Or. 444, 447, 236 Pac. 265, 266 (1925). Peace v. Edwards, 170 N. C. 64, 65, 86 S. E. 807 (1915). The court said that the right to dispose of property by will is not a natural right. The only case holding to the contrary to be found is Nunnemacher v. State, 129 Wis. 190, 108 N. W. 627 (1906). A note in (1908) 9 Ann. Cas. 726 says: "The doctrine of the reported case (Nunnemacher v. State) that there is a natural right, protected by the constitution, to take property by inheritance, devise, or bequest, is entirely new to the law. The doctrine which has long been regarded as not open to question is that such right is entirely dependent upon, and subject to modification or abridgment by, statutory law."


Pound, Need of Sociological Jurisprudence (1907) 19 GREEN BAG 607, 613.


Ritchie, Natural Rights (1894) Preface. "When I began, some three years ago, to write a paper on 'Natural Rights,'... I had a certain fear that in criticizing that famous theory I might be occupied in slaying the already slain."

Ball v. Boston, 153 Wis. 27, 31, 141 N. W. 8 (1913). Vinogradoff has said, "Attempts... to give the theory of the law of nature a direct bearing on the practice of the Courts have not been successful..." COMMON SENSE IN LAW 239.
It may be true that the testator is a despot within limits. But, as Mr. Justice Holmes has reminded us:

"All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached." 20

The particular application of this philosophy to the problem, which forms the thesis of this discussion, was made by Redfield a generation before the opinions in the Wisconsin case were rendered. He said:

"The right of testamentary disposition of property is, unquestionably, one of the results of cultivated social life, and dependent upon municipal law. But it is, nevertheless, an instinctive sentiment, intimately associated with that love of acquisition, and dominion, which forms the basis of social progress; and which in its normal development, is the sure measure of advancing civilization, and, in its morbid excesses, equally marks the process of declension, and the increase of crime." 21

The murmurings of society against the disinheritance of helpless dependents is not due to the normal exercise of testamentary power. They have been directed against morbid excesses of the testator's dominion, which courts, ill-advisedly, have thought to be absolute. Those morbid excesses are the basis of this study.

Let us examine some of the decisions to disclose the verbal violence in which courts indulge in proclaiming the absolutism of the testator's power of disposition. In a California case, 22 the jury was told that "one has the right to make an unjust will, an unreasonable will, or even a cruel will." The will was denied probate and the judgment was affirmed. In a Pennsylvania case, 23 the court said that a testator can distribute his property as he sees fit, without regard to the prejudices which influence him. In this case, the nearest relatives were first cousins. In Missouri, the Supreme Court declared that "The absolute ownership of property implies the right of arbitrary disposition of it according to loves, hates or caprices of the grantor." 24 The grantor had given all his property to his second wife and the only child by her to the exclusion of his children by the first wife, the youngest of whom was over 35 years of age. The court reversed...

22 In re Willitts' Estate, 175 Calif. 173, 186, 165 Pac. 537, 543 (1917). See also, Estate of Packer, 164 Calif. 525, 129 Pac. 778 (1913).
23 In re Phillips Estate, 244 Pa. 35, 90 Atl. 457 (1914).
24 Hayes v. Hayes, 242 Mo. 155, 169, 145 S. W. 1155 (1911).
the verdict of the jury against the will. In Michigan, it was declared that "Nothing can prevent him (owner) from making either a will or deed as eccentric, as injudicious or as unjust as caprice, frivolity, revenge can dictate." Here the court seems to have exhausted its vocabulary of superlatives. How passionately harsh is the language! It is merely evidence, not of the law, but of injudicious, judicial utterance. The contestant in the case was a brother, whom the deceased had not seen in 40 years. In an Oregon case, it was held that a testatrix could do as she pleased with her property. The testatrix was unmarried and had no lineal descendants. Extravagance in judicial expression is apt to be very intense when the testator has disinherited a daughter who has exasperated her father by not deferring to his wishes in the selection of a husband. In such cases, California, Kansas and Texas cry out that the right of absolute dominion is sacred and inviolable. The law of the land authorizes parents to disinherit their sons and daughters for any cause and without cause. A careful examination of the cases seems to reveal that generally where the language of the court is unrestrained, the testamentary disposition was reasonable or the verdict of the jury made the judicial effusion superfluous. Most of these courts might well be admonished to heed the words of John Marshall and construe the law in the light of the facts of the case under decision. If they obeyed the admonition, these cases would contain less misleading effervescence.

If one wishes to learn that the right to will is neither fundamental nor natural, one needs only to read what the courts have said as to the statutory regulation of the right. In contrast to the language just referred to, in these cases, the courts seem to use a different vocabulary. Perhaps the words of Mr. Justice De Graff are as luminous as any which may be cited. In speaking of the power of the legislature, he said:

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24In re Darst's Will, 34 Or. 58, 54 Pac. 947 (1898).
26Dreisback v. Spring, 93 Kan. 240, 144 Pac. 195 (1914).
28The court said in In re Young's Estate, 90 N. J. Eq. 236, 242, 106 Atl. 425, 428 (1918), that "no court has the power to refuse probate to a will merely because the disposition the testator has made of her property by it appears to the court to be unnatural, unreasonable and unjust." In this case, Madam Nordica cut off her husband, the contestant, with only the unpleasant reminder that she had already advanced him $400,000.
29Cohens v. Virginia, 6 Wheat. 264, 399, 5 L. Ed. 257 (U. S. 1821).
30In re Emerson's Will, 183 Wis. 437, 445, 198 N. W. 441, 443 (1924).
"The right to take property by devise or descent is a statutory
privilege, and not a natural right. Such matters are strictly
within legislative control. . . . The Legislature may restrict
the succession of estates of decedents in any manner, and, if it
pleased, could absolutely repeal the statute of wills and of
descent and distribution. It could in the exercise of sovereignty
take any or all property upon the death of the owner for the
payment of the decedent's debts, and apply the residue to public
uses."

The tenor of all the recent decisions on the validity of inheritance
taxes, excepting those in Wisconsin, is the same. In the light of such
a pronouncement, it becomes difficult to understand why Mr. Justice
Lamm believed that a testator had a right to pauperize his helpless
dependents.

THE UNNATURAL WILL

Courts frequently characterize a will as 'natural' or 'unnatural'.
They are words of uncertain import. Their ambiguity has served
only to becloud the judicial process. In 1922, the Missouri court said
in McNealey v. Murdock:

"While it is the right of every person in this state to make
testamentary disposition of his or her property to whomsoever
they will, and to disinherit any or all their natural heirs if it
pleases them to do so, this right does not abrogate nor destroy
the natural affection of a mother for her children. It is a law of
nature which we cannot repeal, and which is therefore like the
law of gravitation, an evidential fact in every issue involving its
operation . . . The statutory heir is often far removed in
consanguinity . . . so that there would be no evidential force in
the relationship."

The ties of blood are not usually disregarded. Whenever they are,
the act is deemed unnatural. The law recognizes that a man's chil-
dren and their descendants are the natural objects of his bounty. In
North Carolina, it was contended that there was no such thing as an
unnatural will known to the law. Although the court did not fully
approve the instruction which defined an unnatural will, it refused to

33In re Emerson's Estate, 191 Iowa 900, 905, 183 N. W. 327, 329 (1921).
34State v. Guinotte, 275 Mo. 298, 204 S. W. 806 (1918); In re Rogers' Estate, 250
S. W. 576 (Mo. 1923); State v. Walker, 226 Pac. 894 (Mont. 1924); Rhode Island
Hospital & Trust Co. v. Doughton, 187 N. C. 263, 121 S. E. 741 (1924); Moody v.
Hagan, 36 N. D. 471, 162 N. W. 704 (1917); In re Inman's Estate, 101 Or. 182, 199
Pac. 615 (1921); Cornett's Executors v. Commonwealth, 127 Va. 649, 105 S. E. 230
(1920); Sherwood's Estate, 122 Wash. 648, 211 Pac. 734 (1922).
35293 Mo. 16, 26, 239 S. W. 126, 129 (1922).
36In re Monroe's Will, 2 Con. Surr. 395, 20 N. Y. Supp. 82, 84 (1889).
37Bradley v. Onstatt, 180 Ind. 687, 694, 103 N. E. 798 (1914).
It is clear from an examination of these cases that a will which, in its disposition of property to lineal descendants, tends to conform to the provisions of the statute of descent and distribution is natural.

But, it is said, there is nothing "unnatural nor surprising" about a will of a childless widow who disinherited her sister whom she had not seen for 60 years in favor of her husband's nephew and strangers who had cared for her in illness. It is not unnatural for a man to prefer his wife to his brothers and sisters. If a bachelor uncle fails to make provision for his nieces and nephews, his will "is not at variance with natural instincts," because he is under no obligation to provide for them. The will of a childless widower is not unnatural because it disregards poor and needy relatives. But a will which bestows property on the wealthy and overlooks the poor in the same relation is not natural. It suggests a disordered mind. A will which disinherits a son and daughter who are comfortably provided for and bestows all the property on the grandsons is "not a strange and unnatural thing." It is unnatural for a woman, without cause, to fail to provide for an adult daughter for whom she entertained the greatest affection. It is natural for a father to prefer the kind and attentive child to the thankless and ungrateful one. It is natural for him to favor the children who are nearest to him in respect and affection or by reason of intimate social or domestic relations.


40 Petterson v. Imbsen, 46 S. D. 540, 545, 194 N. W. 842, 844 (1923).

41 If a will which, in its disposition of property to lineal descendants, tends to conform to the provisions of the statute of descent and distribution is natural.

42 "It is common knowledge that the blood tie between brother and sister is not as binding as that between parent and child, or the tie between husband and wife..." Burham v. Grant, 24 Colo. App. 131, 137, 134 Pac. 254 (1913). See also, Beyer v. Schlenker, 181 S. W. 69, 72 (Mo. 1915).


44 In re McDevitt, 95 Calif. 17, 31, 30 Pac. 101 (1892).

45 "It was for the testator to select the objects of his bounty.... What nephews or nieces, if any, should enjoy that bounty was for his determination, not for courts or juries." In re Marx's Estate, 201 Mich. 504, 508, 167 N. W. 976 (1918). See also, Stevens v. Leonard, 154 Ind. 67, 70, 56 N. E. 27 (1900).


48 In re Hess's Will, 48 Minn. 504, 51 N. W. 614 (1892).
unnatural if a mother disinherits an adult daughter, who incurred her hostility by siding with her father.\textsuperscript{49} Where the testator had an antipathy for his son’s wife, the disinheritance of her children was not unusual.\textsuperscript{50} It is not unnatural for a father to disinherit an abusive son of 40;\textsuperscript{51} but it would be “an unnatural and heartless act” for a testator to disinherit a child whom he adopted when she was 14 months old in favor of his brother.\textsuperscript{52} The important circumstance is, were those who would naturally be expected to be the objects of bounty provided for.\textsuperscript{53} In these cases, the standard set up by the statute of descent and distribution is disregarded because the relation is too remote from the standpoint of dependence or affection, or both, or is overcome by countervailing factors. The question seems to have been: Was the departure warranted under the circumstances? If it was, it was a natural will. Clearly this is a question of fact which is constantly being discussed as a question of law.

If the objective test of naturalness is applied, then, according to a New York case,\textsuperscript{54} “The question is not, however, whether the gifts are such as, upon a whole, we would have advised under the same circumstances, but whether there is such a violent departure from what we would consider natural, that they cannot fairly be referred to any cause other than a disordered intellect.” This is a matter for the jury to determine. The standard which the statute of descent and distribution sets up as to lineal descendants is a standard of reasonableness for disposition of property. But considerations in particular cases may make other dispositions reasonable. If all the children and their descendants are disinherited, the statutory standard of reasonableness seems to be material. If collateral heirs are disregarded, it is relatively immaterial. Cousins to the second, third and fourth degree of propinquity are not included in the definition of “natural objects of testator’s bounty.”\textsuperscript{55} If one child is preferred to another, then the question of justification enters. It may be a matter of affection or

\textsuperscript{49} In re Journeay’s Will, 15 App. Div. 567, 44 N. Y. Supp. 548 (2d Dept. 1897), aff’d 162 N. Y. 611 and 646, 57 N. E. 1113 (1900). Under the same facts, it has been held that if one “pleases to dispose of it [property] contrary to the dictates of natural or moral obligation, he has a perfect right to do so.” Hoerth v. Zable, 92 Ky. 202, 206, 17 S. W. 360 (1891).

\textsuperscript{50} In re Sturtevant’s Will, 9 Or. 299, 396, 178 Pac. 192, 201 (1919).

\textsuperscript{51} Haight v. Haight, 112 N. Y. Supp. 144, 146 (1908).

\textsuperscript{52} Shields v. Ingram, 5 Redf. Surr. 346, 348 (N. Y. 1882).

\textsuperscript{53} 2 Bl. Comm., supra note 4, at 509, n. 4.

\textsuperscript{54} Peck v. Cary, 27 N. Y. 9, 18 (1863).

\textsuperscript{55} In re Campbell’s Will, 136 N. Y. Supp. 1086, 1097 (1912).
animosity, kindness or ingratitude, wealth or poverty. The natural-ness of the will is a question of fact. As the Alabama court said:

"A will is not necessarily unnatural because of a discrimination between heirs of the same degree, or because of the entire exclusion of part or all of them. The circumstances of the case determine the naturalness of a donation or bequest. It cannot be said, as a matter of law, that the affection for one, though not of kin, raised from infancy by the donor, is unnatural, or that a gift or bequest to such a person is unnatural. It is a question of fact for the jury."56

And, as such, it clearly turns upon the question of whether under the circumstances it was reasonable. In the opinion of the Iowa court the unnaturalness of a will "is not to be deemed self-evident on the face . . . (of the will) as a matter of mathematics. On this question the history of the family is to be considered, and the moral equities and obligations appearing therefrom."57

But, in determining the naturalness of a will, some courts have applied the subjective test. The test of a man's ability to dispose of his property is made to depend upon his conception of his obligations to those who are the objects of his bounty.58 The will is natural if it conforms to the nature and disposition of the person who makes it.59 A dissolute fellow, who passes over his paternal uncle and maternal aunt and gives his patrimony to his illegitimate children and their mother, is merely making a will which is in precise accordance with the tenor of his abnormal life.60 It accords with his natural obligations. If the will was unjust, that was the natural character of the man.61

At any rate, when an unnatural distribution of property is made, the courts scrutinize closely the circumstances under which it is made.62 Indeed, if the natural objects of bounty are excluded, the will is viewed with great suspicion.63 It requires, in Georgia,64 but

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56Henry v. Hall, 106 Ala. 84, 17 So. 187 (1894).
59In re Holman's Estate, 42 Or. 345, 358, 70 Pac. 908 (1902).
60In re Klinzer, 71 Misc. 620, 130 N. Y. Supp. 1059, 1072, 8 Mills 112, 133 (1911).
slight evidence to show such a will is the result of an aberration of intellect. The law adopts the "very rational and common sense principle" that for a man to bequeath his property to the exclusion of wife and children is so unnatural an act, as human experience shows, to require very little more evidence to establish that he is not of sound and disposing mind.63 New York has said that a will may, under all the circumstances, be unnatural in its dispositions, so that its provisions would be evidence of mental defect, obliquity or perversion of mind which would require explanation.64 In Missouri and Vermont, an unnatural will casts the burden on the proponent to show that the testator was a perfectly free agent. But a will cannot be set aside on the mere ground that it is unnatural. Of course, to assume that an unnatural will is ever an isolated transaction is to assume what is generally contrary to human experience. But where "it does violence to the natural instincts of the heart, to the dictates of fatherly affection, to natural justice, to solemn promises, to moral duty, such unexplained inequality and unreasonableness is entitled to great influence in considering the question of testamentary capacity and undue influence."65 An unnatural disposition is evidence tending to throw light on testamentary capacity.66 The weight of

65Weston v. Hanson, 212 Mo. 248, 270, 111 S. W. 44 (1908); McFadin v. Catron, 120 Mo. 252, 272, 25 S. W. 506 (1893); Gay v. Gillian, 92 Mo. 250, 5 S. W. 7 (1887); In re Barney's Will, 70 Vt. 352, 370, 40 Atl. 1027 (1898); 40 Cyc. 1154.
66A natural presumption in the case was, that the donor would give the bulk of her property to her needy relatives rather than a stranger." Here the physician, who attended the testatrix, was beneficiary. Woodbury v. Woodbury, 141 Mass. 329, 334, 5 N. E. 275 (1886).
A father may disinherit his children and the children may not be heard to say that his act in doing so is contrary to natural justice; except in case a child be so helpless because of tender age or mental or physical infirmity that no father, except his mind be perverted, would so far forget parental affection or lose sight of duty, saying nothing about pity, as to send his estate entirely away from such an one. In such case the law still permits the consideration of natural justice." In re Allen's Estate, supra note 39, p. 595.
68In re Martin's Estate, 170 Calif., 657, 663, 151 Pac. 138, 141 (1915); In re Johnson's Estate, 72 Calif. App. 663, 670, 237 Pac. 816, 819 (1925); Lehman v. Lindemayer, 48 Colo. 305, 313, 109 Pac. 956 (1910); Holland v. Bell, 148 Ga. 277,
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evidence depends upon how far the provisions depart from what is natural.\textsuperscript{70}

TESTAMENTARY CAPACITY

In 1865, Chief Justice Denio admonished courts to be careful not to confound perverse opinions and unreasonable prejudices with mental alienation.\textsuperscript{71} Perverse conduct does not amount to insanity. It may be wickedness pure and simple.\textsuperscript{72} Unjust and absurd as the provisions of the will of a relentless, jealous testator may be, they are not necessarily the pure creations of a perverted imagination, without any foundation in reality.\textsuperscript{73} Wills do not depend for their validity upon the justice of the testator's prejudice.\textsuperscript{74} Prejudice against a child invalidates a will only when it is an insane delusion.\textsuperscript{75} It may be evidence of mental derangement.\textsuperscript{76} To be monomania it must be utterly groundless and irrational.\textsuperscript{77} But, in Oregon, if the aversion, spite or prejudice resolves itself into mental perversion, the will is invalid.\textsuperscript{78}

A few cases speak of moral insanity. It is a perversion of the sentiments and affections, manifesting itself in jealousy, anger, hate, or resentment.\textsuperscript{79} However violent or unnatural, it will not defeat a will unless in fact the emanation of a delusion.\textsuperscript{80} Redfield says that the English courts have manifested a reluctance to yield in any sense to the recognition of any morbid affection as moral in-

279, 96 S. E. 419, 420 (1918); Hollenbeck v. Cook, 180 Ill. 65, 70, 54 N. E. 154 (1899); Bradley v. Onstatt, 180 Ind. 697, 694, 103 N. E. 798 (1914); Smith v. James, 72 Iowa 515, 516, 34 N. W. 399 (1887); Gott v. Dennis, 295 Mo. 66, 86, 246 S. W. 218, 223 (1922); \textit{In re} Gunderman's Estate, 102 Neb. 590, 594, 168 N. W. 359, 361 (1918); \textit{In re} King's Will, 172 N. Y. Supp. 869, 873 (1918); Reynolds v. Root, 62 Barb. 250, 252 (N. Y. 1862); \textit{In re} Hinton's Will, 180 N. C. 206, 212, 104 S. E. 341, 344 (1920); Frye v. Frye, 1 Ohio App. 246, 248 (1922); Campbell v. Campbell, 215 S. W. 134, 137 (Tex. Civ. App. 1919); \textit{In re} Martin's Will, 92 Vt. 362, 371, 104 Atl. 100 (1918); Elliott v. Fisk, 162 Wis. 249, 253, 155 N. W. 110 (1916); 40 Cyc. 1160.

\textsuperscript{70} Supra note 46, p. 175, 214 Pac. 501.

\textsuperscript{71} Am. Seamen's Friend Soc. v. Hopper, 33 N. Y. 619, 624 (1865).

\textsuperscript{72} Bohler v. Hicks, 120 Ga. 800, 804, 48 S. E. 306, 308 (1904).

\textsuperscript{73} Potter v. Jones, 20 Or. 239, 249, 25 Pac. 769 (1891).

\textsuperscript{74} (1905) 177 Am. St. Rep. 582 note.

\textsuperscript{75} Huggins v. Drury, 192 Ill. 528, 536, 61 N. E. 652 (1901); Schmidt v. Schmidt 201 Ill. 191, 199, 66 N. E. 371 (1903).

\textsuperscript{76} Sherley v. Sherley's Ex't, 81 Ky. 240, 244 (1883).

\textsuperscript{77} Pelamourges v. Clark, 9 Iowa 1, 23 (1859).

\textsuperscript{78} Hollman's Will, 42 Or. 345, 357, 70 Pac. 908 (1902).

\textsuperscript{79} Taylor v. McClintock, 87 Ark. 243, 112 S. W. 405 (1908).

\textsuperscript{80} McClintock v. Curd, 32 Mo. 411, 421 (1862).
sanity. But, in 1862, Mr. Justice Doe said, in a dissenting opinion:

"The verdict on the issue of sanity should be set aside, because the court instructed the jury that delusion is the test of what is called active insanity; that a moral insanity without delusion does not incapacitate a person to make a will."

The common sense of this able judge, on this point, seems to have met with no judicial approval. Yet, twenty years later, the Illinois court, in sustaining the verdict of the jury against the will said:

"We find it difficult to believe that an egotism which is so extravagant and distorted that it... wholly disregards and ignores the natural claims of a needy child, known to be worthy, and dutiful, and loving, and the affections ordinarily implanted in the heart for such a child, can consist with a mind entirely free from disease causing morbid delusion."

To justify such a statement as a matter of fact would be difficult. The testator left a widow and an only child, a daughter, who was married. He left his daughter the income of $2,000 for life. Most of the balance of his $100,000 estate he left to further religious education. One judge dissented vigorously, proclaiming

"The testator had his eccentricities of character, but taking the whole evidence together, it shows most clearly, in my judgment, that he had full testamentary capacity."

The test of testamentary capacity is generally conceded to include the ability of the testator to comprehend what is the extent of his property and who should be natural objects of his bounty. How shall the ability to comprehend the natural objects of one's bounty be defined? Over a century ago, a New Jersey court declared, in approving an instruction to the jury, that

"a disposing mind and memory is a mind and memory which have the capacity of recollecting, discerning and feeling the relations, connections and obligations of family and blood. And these definitions I take to be accurately true."

In 1908, this notion was repudiated in Arkansas. As a champion of testatorial absolutism, the court declared:

"The test relates, not to the moral quality of the act done, but to the mental capacity of the testator to do what he did. The

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81 REDFIELD, supra note 21, p. 77.
82 Boardman v. Woodman, 47 N. H. 120, 146 (1867).
84 (1889) 3 L. R. A. (N. S.) 172, note; Cordrey v. Cordrey, 1 Houst. 269, 273 (Del. 1850); Hanrahan v. O'Toole, 139 Iowa 229, 233, 117 N. W. 675 (1905); Horn v. Pullman, 72 N. Y. 269, 276 (1873); Chrisman v. Chrisman, 16 Or. 127, 137, 18 Pac. 6 (1888); Harrison v. Rowan, 3 Wash. C. C. 580, 586 (1819).
question is, not whether the testator did actually appreciate the
deserts of and the relation to him of the one excluded, but
whether he had, at the time, the capacity to do so. . . .
"There is a clear distinction between having the capacity to
comprehend deserts and actually comprehending them—the
former the law requires, the latter it does not. . . . Care, there-
fore, should be taken by the courts to see that the distinction
mentioned is observed, for it is precisely the one that public
policy dictates and the law requires in order to preserve the
right and power of testamentary disposition."

What public policy dictates that testators should have the power to
pauperize helpless dependents, the world is not advised. Perhaps,
the court was merely laboring under a jurisprudence of conceptions.
Indeed, one becomes quite convinced of it, when one discovers that
Kentucky courts have adopted the very judicial test that Arkansas
has repudiated. When wills are harsh, cruel and spiteful, the Ken-
tucky court does not have to resort, by way of apology, to that soft,
purring sentiment of ancient vintage that "Reliance can usually be
placed on the affections, independent of the law, which parents
have for their children, to recognize their claim. . . ." to satisfy its
sense of decency.

Let McDonald v. McDonald speak for Kentucky. The testator
was a man of wealth who had a great desire to make and save money.
He was grasping and miserly. He believed if he could take his prop-
erty with him he would die happy. He didn't want his wife and
children to have a "damned dollar" of his estate. He threatened to
leave them his land so burdened with debt that it would take them
30 or 40 years to pay for it. He wanted to leave it so that they
would have to work like dogs to make a living out of it. Here was a
man whose mean, hateful, spiteful disposition of his property would
have justified all the superlatives that any court ever used in sus-
taining any will on the basis of the untrammeled power of a testator
to choose the objects of his bounty. His will was a mirror of the
malice of the man. How tenderly was it dealt with in Kentucky?
The court sustained the verdict of the jury for the contestants, his
children, in these words:

"He unquestionably had the mind to know his estate, and the
nature and value of it. He seems to have had a fixed purpose as to
the disposition of his estate, and that was to give his children as
little interest as possible. . . . It is as necessary, in order to have
testamentary capacity, for one to have such sensibilities as will

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57Potter v. Jones, supra note 73, p. 257.
88120 Ky. 211, 85 S. W. 1084 (1905).
enable him to know the obligations he owes to the natural objects of his bounty, as for him to know the nature and value of his estate, and a fixed purpose to dispose of it." 8

One must know not only the natural objects of his bounty, but he must realize his duty toward them. Both are essential to testamentary capacity. 9 So Kentucky speaks in consonance with common sense. There is promise that this test, which courts can apply without apology, may gain currency. It was approved in Michigan in 1916, 91 not quite 100 years after it was first enunciated. Some other courts use the words "comprehend" and "appreciate" conjunctively in speaking of testamentary capacity. 92 Inasmuch as the words are not used by way of contrast, the language seems to have been unconscious rather than intended.

THE SENSIBLE AND SYMPATHETIC JURY

The jury is instructed that the law is that a testator may "dispose of his property regardless of the ties of nature and relationship, and in defiance of the rules of justice or the dictates of reason; and no sentimental considerations of love and affection that should actuate a man in dealing with his own blood can be decisive." 93 The jury is charged that a will is not to be upset because its provisions may seem "unreasonable, unnatural, foolish or unjust." 94 But, despite the law and the court, Redfield has advised us, the common sense instincts of the jury are likely to lead them right in cases of this character. It is not easy to save an absurd will from a sensible jury. 95 Yet, courts complain that to set aside a will is a serious matter. 96 In 1916, a jury in North Carolina was instructed

"that the dependent condition of the wife of the deceased, and her inability to take care of herself, was competent in corroboration of the evidence as to the mental capacity of the defendant, since he devised the bulk of his property to the Christian Science

89Ibid. at 217.

92Havens v. Mason, 78 Conn. 410, 413, 62 Atl. 615 (1905); Sayre v. Trustees of Princeton Univ., 192 Mo. 95, 128, 90, S. W. 787, 797 (1905); In re Campbell’s Estate, 136 N. Y. Supp. 1086, 1097 (1912); In re Smith’s Estate, 112 Misc. 165, 184 N. Y. Supp. 143, 144 (1920).
94Estate of Higgins, 156 Calif. 257, 265, 104 Pac. 6 (1909).
95REDFIELD, op. cit. supra note 21, p. 77, note.
people, leaving his wife and daughter who supported him for many years practically destitute."

A sensible and sympathetic jury found against the will, much to the disgust of a dissenting judge. He railed at the admission of the incompetent testimony of one witness, who said "that any man who makes such a will must be crazy."

In the Institutes, Justinian tells us that if a child is disinherited by a parent, he may impeach the will "as undutious, under the pretext that the testator was of unsound mind at the time of the execution. This does not mean that he was really insane, but the will, though legally executed, bears no mark of that affection to which a child is entitled." The presumption was a fiction. It was, however, conclusive. Courts in the various states are constantly reminding us that the Roman law doctrine of inofficious wills has no application. Yet, by a similar fiction the same result is often reached. The law in books becomes very different from the law in action.

Nearly 20 years ago, Dean Pound asked to what purpose was the extensive power of the jury recognized. His answer was "Practically the purpose is, in largest part, to keep the letter of the law the same in the books, while allowing the jury free rein to apply different rules or extra-legal considerations in the actual decision of causes—to create new breaches between law in the books and law in action. The occasion is that popular thought and popular action are at variance with many of the doctrines and rules in the books. . . ." Juries merely preserve the appearance of the legality of a rule of law which they disregard. Ehrlich has said that lawyers are inclined to assume that the rule of decision is a faithful expression of how things are actually done. Courts realize that an unjust, unreasonable, cruel will usually involves a question of competency. "Of course juries lean against wills which seem to them unequal and unjust." Vigorously courts declare that a person has a right to dis-

\[57 In re Straub's Will, 172 N. C. 138, 139, 90 S. E. 119, 121 (1916).\]
Other cases in which the question of dependency entered in the will are Davis v. Babb, 190 Ind 173, 125 N. E. 493 (1920); In re Townsend's Estate, 122 Iowa, 246, 97 N. W. 1108 (1904); Convey v. Murphy, 146 Iowa, 154, 124 N. W. 1793 (1910); Rudy v. Ulrich, 69 Pa. 177 (1871); Aylward v. Briggs, 145 Mo. 604, 47 S. W. 410 (1898).
\[58 In re Straub's Will, supra note 97, p. 142. 98:18, pr. (Moyle's 5th ed.).\]
\[99 In re Allen's Estate, 230 Mich. 584, 595, 203 N. W. 479 (1925).\]
\[100 Law in Books and Law in Action (1910) 44 A. L. R. 13, 18. See also, INTERPRETATION OF LEGAL HISTORY (1923) 120.\]
\[101 Freedom of Judicial Decision: Its Principles and Objects, SCIENCE OF LEGAL METHOD (Mod. Leg. Phil. Ser.) 80.\]
\[102 In re McDervitt, supra note 42, p. 33.\]
inherit his relatives and affirm the verdict of the jury in which they found the testator incompetent.104

"The right to dispose of one's property, disinheriting any one or all of his or her children, is not controverted in the least degree, but where the capacity in the testator to dispose of his property to any one is raised by the issue, then the circumstances enumerated are highly useful to the jury in their search for the truth of the matter."105

Mr. Justice Lamm, who declared that a testator had the right to disinherit a helpless dependent, suggested that the unhappy distribution of property made by an unnatural will might be "tempered and toned down" by the trier of facts.106 Where social opinion has not prevented testators from employing a too arbitrary exercise of their power, the verdicts of juries have had some effect in this direction.107 Rood suggests that human nature in courts and juries alike is prone to seek an excuse to deny effect to wills which seem unjust. A finding that the testator was insane serves the purpose.108 Occasionally some court will insipidly suggest

"The justice and righteousness of his final dealings with those who are the natural objects of his bounty and toward whom he has assumed solemn duties and obligations are to be determined by the final judge of all human conduct."109

A jury, which is more concerned with justice here than hereafter, under the influence of such counsel, may very properly prefer to consider

"that as long as kindness is esteemed a virtue by civilized people, their laws can neither be interpreted as essentially unkind nor are they of such sour complexion and so deadly cold in their processes as to eliminate all human warmth of sentiment and all moral duty."110

The jury may well regard the absolute power of the testator over his property merely as law in the abstract, even though some courts denounce them as "wild."111 The very fact that there has been such abundant litigation over capricious and arbitrary wills is the best evidence of the futility of the intemperate exaltation by the courts of the testator's absolute dominion over his property. The judicious

104 In re Carroll's Estate, 59 Mont. 403, 196 Pac. 996 (1921).
106 Supra note 1, p. 88.
107 Supra note 8, p. 116.
108 Rood, WILLs (2d ed. 1926) 93.
110 Supra note 1, p. 87.
"A general right to consider whether a will offends against natural justice, without defining what is meant by the term, releases all brakes and permits the jury to run wild." In re Allen, supra note 39, p. 593.
results obtained by the finders of fact expose the injudicious pro-
nouncements of the court.\textsuperscript{112}

CONCLUSION (1)

It is evident that the rule of law which gives absolute dominion to
the testator over his property is one to which courts still tenaciously
cling. But, it is frequently only an abstract rule of law. In practice,
it so often shocks common decency that the will is denominated an
unnatural will, a term of vague import. The unnatural will is
freighted with the doctrine of presumptions or burden of proof; or
suspicions of mental aberration or undue influence are cast upon it; or
appreciation, in addition to comprehension, is made the test of
testamentary capacity. Finally, the will is submitted to the jury
where it is very apt to receive the fate it deserves, with or without
judicial approval.

II. WHEN A TESTATOR DISINHERITS HIS HELPLESS DEPENDENTS,
IS HIS ESTATE LIABLE FOR THEIR SUPPORT?

In speaking of the right of a parent, Blackstone said:\textsuperscript{113}

"Our law has made no provision to prevent the disinheriting of
children by will: leaving every man's property in his own disposal,
upon a principle of liberty in this as every other action; though
perhaps it had not been amiss if the parent had been bound to
leave to them at least a necessary subsistence."

But Blackstone agreed with Grotius that a natural right obliged every
parent to give the necessary maintenance to children.\textsuperscript{114} According
to Kent,\textsuperscript{115} writers on general law concede the right of parents to dis-
pose of their property as they please, after providing for the necessary
maintenance of their infant children and those adults who are not of
sufficient ability to provide for themselves. But said Kent,

"A father may at his death, devise all his estate to strangers,
and leave his children upon the parish; and the public have no
remedy by way of indemnity against the executor. 'I am sur-
prised,' said Lord Alvaney, 'that should be the law of any
country, but I am afraid that it is the law of England'."

An examination of the case of Rawlins v. Goldfarb\textsuperscript{116} shows that Kent
stated almost verbatim the law to be as it was declared by the Master

\textsuperscript{112}Woerner says: "A fruitful source of litigation is found in the capricious and
arbitrary dispositions often made in wills, to the grievance and unjust deprivation
of heirs at law; the readiness with which juries seize upon slight pretexts, flimsy
proof of 'undue influence', etc., to set aside such unjust wills, is indicative of a deep
seated ethical aversion to the power of arbitrarily diverting the natural channel of

\textsuperscript{113}\textit{Loc. cit. supra} note 4.

\textsuperscript{114}\textit{Ibid.}, p. 448.

\textsuperscript{115}Commentaries (14th ed. 1896) 203. Puffendorf is cited.

\textsuperscript{116}Ves. Jr. 449, 444 (Ch. 1800).
of Rolls. It is to be noted the decision of Lord Alvaney bears the date 1800.

In 1806, when Mr. Justice Lamm declared that a father had the legal right to leave his infant child a pauper, he was merely stating the law as he got it from Blackstone or as Kent got it from Lord Alvaney.

In 1926, a New York court was confronted by the same problem. In *Rice v. Andrews*, an attempt was made to have the cost of maintenance of a minor child declared a lien upon the assets of the estate. It appears that the testator had an estate valued at about $30,000. He left a child of seven the object of charity. The child's sole offence was that he was the issue of an unhappy marital venture. The question was whether the testator had the right to pauperize his infant son. The court, with customary expressions of sympathy, held that if a father has chosen to cut him off, "such a child has no claim against his father's estate for his support and maintenance, but must shift for himself or be dependent upon others for his support."

In defence of the court which sustained the vicious conduct of the testator, one writer suggests that the child's appeal loses much of its force when it is remembered that the majority of children orphaned in infancy have no inheritance. It is difficult to understand how the prevalence of misfortune can ever justify any court in increasing its currency. This case offered an opportunity to the court. It was confronted by the problem of adjusting the law, shaped by the individualism of the past to the ideals of social justice of the twentieth century. The father's act was distinctly anti-social. The interests of society in preventing the pauperization of a seven year old child are greater than are its interests in the protection of the absolute right of a testator to give vent to his malice entailing such social consequences. One writer, in discussing facetiously the *Immoralities of Wills*, suggests that the habit of wreaking posthumous vengeance merely "argues a screw is loose in the testator's moral machinery."

In most cases, where helpless dependents have been pauperized by the testator, the attack has been made upon the will. The competency of the testator has been put in issue. A typical case is found in the *Matter of Gregory* which arose in New York in 1896. The testa-

11Ibid. 827, 530.
11(1927) 30 Law Notes 222, 223.
PAUPERIZING HELPLESS DEPENDENTS

tor had cohabited with a woman in France. He had six illegitimate children by her. He returned to New York and apparently brought with him only one little daughter, whom he adopted. She was then ten years old. Shortly afterward he died leaving a will, which he had made five years before he adopted her. She was left penniless. She attacked the will. Her case was easily disposed of on the ground that the right of inheritance of an adopted child is like that of any other child subject to the testamentary power of the testator. Frequently, it is suggested that such cases of dependency are rare. Rare is a relative word. When the attack is made on a will on the grounds of competency, one cannot always discover from the reports whether there were helpless dependents. To say that they are rare is pure speculation. The reports show that where the testator has encountered marital difficulties on his second matrimonial venture, his helpless minor children are apt to suffer. In a Kentucky case, the testator was sued for divorce by his second wife. Pending the action, he died leaving to a three year old daughter by the second wife $2,000 provided she did not die without children before 21 years of age. The value of the estate exceeded $25,000. The residue was left to his two adult children by his first wife, subject to the right of dower of the second wife. Despite the fact that public dependency of his infant daughter was only a possibility because the mother had a dower interest in lands, the court said that that fact alone was sufficient to show that the testator had ceased to look naturally at things either from disease or other causes.

It may be true that a competent testator can disinherit his son who is a helpless imbecile. The validity of a will cannot be dependent upon the vices or virtues of a testator. The validity of a will is not dependent upon whether a minor child is a dependent and is not provided for by the will. But, the vital question is: Is the testamentary power of a testator limited by social considerations which prevent him from making his helpless dependents the objects of charity?

126Walls v. Walls, 99 S. W. 969 (Ky. 1907).
127In re DeBaun’s Estate, 2 Con. Surr. 304, 9 N. Y. Supp. 807 (1890). The testator left all his property to his second wife. He was her fourth husband. He left penniless an adult son, who was born an imbecile.
THE LIMITS OF TESTAMENTARY POWER

It may be that a man may, by will, indulge his spite and display his vindictive sentiments as much as he pleases, but he cannot defeat his creditors.2 To the prejudice of the rights of a creditor, he cannot direct in his will the payment of a large sum for past services, when no such services were ever rendered.3 Indeed, a Kansas case suggests that no testamentary disposition can interfere with either the rights of creditors or persons dependent upon the testator for support.4 When the question is whether the child may be excused from school for religious exercises, the New York court cries "The child is not the mere creature of the state." When the question is: May a father pauperize his helpless child by will?, the court makes the child a creature of charity and merely expresses its sympathy. Yet, in New York, a minor's estate is properly charged with the expense of saving the mother from a pauper's grave. Otherwise, it would be a scandal upon the law. "How could it be otherwise in a refined system of jurisprudence in a civilized country?" said the New York court.5

Blackstone cast doubt upon the policy of the law which enabled the ancestor, in his dotage and caprice, to disinherit heirs.6 Clearly, the welfare of society demands that the law should limit the power of the dead to control human affairs.7 In the light of the problem under discussion, it is interesting to note the attitude of Mr. Justice Cooley toward the power of testamentary disposition.

"But the right to give property by will is conferred for the very reason that the owner is supposed to make in his particular case, a better distribution of his estate than could be made by any unvarying rule; that he knows who by their needs, their affection, their care and solicitude for his welfare, their kind regard for himself and for those to whom he has been attached, and by the thousand and one circumstances naturally operating upon the mind, should be remembered in his bounty, . . . better than any general legislation can possibly provide."8

Such a characterization of the power assumes that it will not be exer-

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12Hagen v. Yates, 1 Dem. 584, 596 (N. Y. 1883).
13DAVIDS, NEW YORK LAW OF WILLS (1924) 1697. SCHOUER, WILLS EXECUTORS AND ADMINISTRATORS (6th ed. 1923) § 2703.
182 COMM. 373.
19Scott, Control of Property by the Dead (1917) 65 U. PA. L. REV. 527.
20Fraser v. Jennison, 42 Mich. 206, 229, 3 N. W. 882 (1879).
PAUPERIZING HELPLESS DEPENDENTS

cised in an anti-social way. How strangely it contrasts with the bewildering medley of sentiments of the Pennsylvania court!

"The law wisely acquires equality of distribution where a man dies intestate. But the very object of a will is to produce inequality, and to provide for the wants of the testator's family; to protect those who are helpless; to reward those who have been affectionate, and to punish those who have been disobedient. It is doubtless true that narrow prejudice sometimes interferes with the wisdom of such arrangements. This is due to the imperfections of our human nature. It must be remembered that in this country a man's prejudices are a part of his liberty. He has the right to them...."

All private rights have a social setting. They are influenced by social considerations, although they are designed to secure individual interests. To hold that the law guarantees to a man his right to his prejudices to the extent of pauperizing a child of tender years is a folly in which the law does not always indulge itself.

JUDICIAL LIMITATIONS ON RIGHTS

As early as 1767, Lord Mansfield declared that conditions in restraint of marriage are odious. Unqualified restrictions upon it are void. Courts tell us that the basis of the doctrine is discovered in the "common weal and the order of society." The restrictions are void although not express. The law favors marriage as an institution fundamental to society. It appears, at times, to be less interested in the product of marriage.

At other times, the law is highly regardful of the rights of children. One Ham, a citizen of Texas, had three boys, aged 12, 13 and 15 years. He found their care rather irksome, so he emancipated them. But the court found them to be dependent children. In Texas, a man can't evade his responsibility that way. He has to die to do it. In Missouri, a husband divorced one wife and took unto himself a second. He desired to rid himself of the expense of maintaining an infant child.

138Cauffman v. Long, 82 Pa. 72, 77 (1876).
139IHERING, LAW AS A MEANS TO AN END (1913) 54, 97.
140Long v. Dennis, 4 Burr. 2052, 2055 (K. B. 1767).
142Hogan v. Curtin, 88 N. Y. 162, 170 (1882), which is cited with approval in Matter of Seaman, 218 N. Y. 77, 81, 112 N. E. 576 (1915).
143Demogue, Gifts Conditioned on Marrying or Not Marring (1923) 18 ILL. L. REV. 37, 40.
by his first wife, so attempted to give all his property to his second wife. But, in Missouri, one cannot divest himself of his property that way so as "to leave his tender female offspring to the cold regard of public charity."

An antenuptial agreement that seeks to relieve a husband of all his pecuniary marital obligations is void. The fundamental obligation of marriage is that the wife and children shall have support. By an agreement with his wife, a husband cannot throw off the obligation to support his children. As against the children and the public he is liable. The obligation of a father to support his child is a continuing duty, against which the statute of limitations will not run during the time that the child needs support. A father cannot make a valid and irrevocable contract which will relieve him from the obligation to maintain, support and educate his child.

The paramount consideration in determining the validity of a provision in a marriage contract is the welfare of the child. A father cannot divest himself of the right to control his child by giving her away. Nor can a husband and wife make a contract regarding the custody and maintenance of their child which a court is bound to enforce.

But a father can create a continuing debt for the support of his minor children after his death which will constitute a claim against his estate. An agreement by a father to support his children during their minority is binding on his estate after his death. These contracts are not void because there is no reason in public policy to prevent his doing so.

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146White v. White, 180 S. W. 1004, 1005 (Mo. App. 1915).
147Dennison v. Dennison, 52 Misc. 37, 41, 102 N. Y. Supp. 621 (1906).
150Harper v. Tipple, 21 Ariz. 41, 45, 184 Pac. 1005, 1007 (1919); In re Scarlett, 76 Mo. 565, 584 (1882).
152In re Scarlett, supra note 150.
153Edelson v. Edelson, 179 Ky. 300, 313, 200 S. W. 625 (1918).
It is conceded that courts will refuse to enforce contracts which are vicious in themselves.\textsuperscript{157} It is clear that the doctrine that contracts are void if against public policy is one of purely judicial creation.\textsuperscript{158}

What is public policy? In a California case, the court said:

"An exact definition of public policy would be difficult to formulate. One that has been frequently approved is that adopted by Lord Brougham, namely that no one can lawfully do anything which has a tendency to be injurious to public welfare. The application of the principle to a given state of facts is not always easy, though it admits of some degree of latitude. Public policy often changes as the law changes. It is manifest, therefore, that there can be no single or fixed standard governing it... It is primarily the prerogative of the Legislature to declare what contracts and acts shall be unlawful; but courts following the spirit and genius of the law, written and unwritten, of a state, may decree void as against public policy contracts, which, though not in terms specifically forbidden by legislation, are clearly injurious to society."\textsuperscript{159}

If a contract is at war with the interests of society or is in conflict with the morals of the time,\textsuperscript{160} it is void and courts do not hesitate to declare it so. The test is not whether the contract has in fact resulted in injury to the interests of society, but whether its tendency is that such injury will result.\textsuperscript{161} Have the courts been as keenly sensitive to social interests in restricting the right of the testator in disposing of his property?

\textbf{WILLS VOID AS AGAINST PUBLIC POLICY}

It is agreed that a testator may dispose of his property by will subject only to such limitations as sound public policy may dictate.\textsuperscript{162} If capacity, formal execution, and volition appear, the will of the most impious must stand unless there is something, not in the motives which led to the disposition, but in the actual disposition, against

\begin{footnotes}
\item[	extsuperscript{159}]Maryland Casualty Co. v. Fidelity & Casualty Co., 71 Calif. App. 492, 496, 236 Pac. 210, 212 (1925).
\item[	extsuperscript{160}]R. C. L. 712; Fidelity & Deposit Co. v. Moore, 3 Fed. (2d) 652, 653 (1925);
\item[	extsuperscript{161}]Jones v. Am. Home Finding Assn., 191 Iowa 211, 213, 182 N. W. 191 (1921);
\item[	extsuperscript{162}]Liggett v. Shriver, 181 Iowa 260, 265, 164 N. W. 611, 612 (1917); Huber v. Culp,
\item[	extsuperscript{163}]46 Okla. 570, 575, 149 Pac. 216 (1915).
\item[	extsuperscript{165}]Johnson v. Shaver, 41 S. D. 585, 593, 172 N. W. 676, 677 (1919).
\end{footnotes}
good morals and against public policy. An English court doubted whether a provision in a will that the body of the testator, when dead, should be burnt on a pile of wood, was not an unlawful purpose. A provision in a will that the residue of the testator's money and other evidence of credit should be destroyed was held void.

The seventh edition of Swinburne's treatise on wills was published in 1803. He says that a testator cannot command what is wicked, or against justice, piety, equity and honesty. Since then most writers have said that wills subversive of sound policy and good morals are void. Courts have repeated the phrase. There seem to be practically no decisions on the point. The Century and Decennial Digests record one case since the Civil War period. It relates to the validity of the will of a testator who made it while contemplating suicide. Seven other cases have been adjudicated in our history. They related to the emancipation of slaves. Generally, it may be said that there are no pertinent precedents for wills which are void because against public policy, excepting, of course, wills the validity of which are dependent upon questions involving restraint upon alienation.

Why has there been in the law of wills such a dearth of precedent? The explanation may be found in the language of one court, which said "The wishes of the dead are more sacred than the dispositions of the living." When a disposition amounts to the deprivation of the support of the testator's helpless dependent, it is difficult to perceive its sacred quality. It seems that only maudlin sentiment can support it on that ground. At least, upon one occasion, under the mantel of natural rights, the Wisconsin court heartily endorsed the sentiment.

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184 Williams v. Williams, 20 Ch. D. 659 (1881).
185 Bd. of Com. v. Scott, 88 Minn. 386, 93 N. W. 109 (1903).
186 TREATISE, TESTAMENTS AND LAST WILLS (7th ed. 1803) 8.
187 Schoeler, supra note 9, p. 510.
188 Key No., Wills, Nature and Extent of Testamentary Power, Illegality of object or purpose, DECENNIAL § 18, CENTURY § 46.
189 Roche v. Nason, 105 App. Div. 256, 93 N. Y. Supp. 565 (1905), aff'd, 185 N. Y. 128, 77 N. E. 1007 (1906). This is the only case cited by Davids to illustrate wills against public policy. Supra note 129, § 538.
187 Page, supra note 141, §§ 1094 and 1095.
182 In Will of Rice, 150 Wis. 401, 444, 136 N. W. 956 (1912) the court said, "The right to make a will is more sacred than the right to make a contract." See also, Herron v. Stanton, 79 Ind. App. 683, 689, 147 N. E. 305 (1922).
Perhaps, the more acceptable explanation may be found in the caustic comment of Kansas. In De Crow v. Harkness, the court said:

"Amidst all the theories of all the schools of social economics practical people have not yet gone beyond the fundamental theory of the real ownership of property and the right to dispose thereof as the owner sees fit."

This pronouncement was made in 1917. It is evidence of the tenacious adherence of some courts to ancient ideals despite the change in social conditions.

The sublime inconsistency of these staunch defenders of testatorial absolutism is an amazing spectacle. In California, one McNally, bachelor, aged 54, agreed with his niece that if she would care for him he would give her all his property at his death. She performed the service until 1893, when he married. Shortly thereafter he died. She sought specific performance of the contract. California is a state of testatorial liberty, where a man may make a will as cruel and harsh and unjust as he pleases. The court denied relief to the niece, saying:

"If it was within their contemplation, and the contract embraced the taking of the deceased's entire estate to the exclusion of any future wife or child, then we have no hesitation in saying that the contract was void against public policy."

In New York, where a testator may pauperize a seven year old son, a man can't deprive himself by contract of the power to bequeath or devise by will the property of which he is owner at his death to the exclusion of his children. Man's beastliness, his anti-social conduct will not receive judicial approval if it is by way of contract. It must be by will, because the contract is repugnant to public conscience.

In Texas, each and every citizen has the absolute right to dispose of his property by will "regardless of the ties of nature and relationship, and in defiance of the rules of justice or the dictates of reason". But, when a father surrenders the custody of his nine year old son under an agreement that the son was to be made heir to all the testator's property at his death, the contract is void. The court said:

"The law should not encourage the relinquishment by parents of their children and the renunciation of a sacred relation imposed by nature merely for the child's enrichment by placing the seal of validity upon a contract in which a parent in effect barters
his children away for a property return. It is more concerned in fostering and maintaining that relation and guarding its valuable and wholesome influences than the child's financial prosperity. Let it once be held that a parent's contract of this kind is valid and may be enforced, and every parent will be free to transfer his children to any one willing to pay them well for the bargain. We are unwilling to subscribe to such a doctrine. It tends to the destruction of one of the finest relations of human life, to the subversion of the family tie and to the reversal of an ordering of nature which is essential to human happiness and the security of society. It reduces parental duty and the child's welfare to the sordid level of financial profit, and would license the easy surrender of that duty for merely the child's financial advantage."

This is an exalted conception of the parental relation. The policy of the court is in harmony with the emphasis which is now placed upon the welfare of the child in dealing with questions of custody. One commends the significance which is given to parental obligation. But, the world would have denied this tribute if the case before the court had involved the will of the father in which the nine year old son had been cut off, a penniless orphan. The court could have only extended the child its sympathy because the almshouse180 would provoke no such tribute. The law of wills and the law of contracts are different. Judicial disquisitions on parental obligations lie in the field of contracts in Texas.

The Matter of Eddy's Will41 is an excellent illustration of the judicial indifference to the social problem involved. It is an ire-rousing case. Eddy had five minor children at the time that his wife died. Forthwith, he deserted them and went to live with a married woman. Six years later, he died leaving his entire estate to his paramour. His five minor children contested the will. In their behalf, it was urged that it was against public policy to allow a father to deprive these children of support by such a will. The court felt that inasmuch as the father had not provided for the minors at any time during the six years succeeding their mother's death that his parental affection had not been overcome. The court's impression was that however morally desirable it was to prevent a parent making such a will, "the statute does not prohibit such action." The language of this

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180Ibid., p. 131.
180a"The almshouse was the first expression of the charitable impulse of the community—a sort of catchall of victims of general misfortune. It was the public answer of distress." Mothers' Pensions, p. 794 (Bul. No. 212, U. S. Bur. of Labor Statistics, 1917).
4141 Misc. 283, 84 N. Y. Supp. 218 (1903).
New York case contrasts notably with that of a Maine court. The defendant was a man of large estate who, by his misconduct, had broken up his family and seemed disinclined to support his minor children. The court said that the power of disinheritance of minor children should be construed to apply "where the family relations remain intact, and when there is no great danger that such an arbitrary power will be exercised." The New York court, in repudiating the doctrine that public policy required the testator to provide for his minor children, didn't seem to be able to perceive that there was a distinction between the dependency of an adult wife and the dependency of helpless infants.

**THIS DUTY: WAS IT LEGISLATIVE?**

As the court viewed the law, in *Rice v. Andrews*, it was powerless to compel the estate of the father to support the lad or to interfere with the father's power to dispose of the estate as he saw fit. The remedy for the situation, according to the court, rested with the legislature. Dean Pound has again reminded us only recently that the legislature is never able to do more than to define the law in its broad, crude outlines. The duty of the courts is to interpret laws in the light of the legislative principles introduced. To avoid impossible uniformity and rigor, says Professor Cohen, courts should give content to the law which will adapt it to the complicated needs of life. Courts should construe laws as integral parts of a legal system which controls the whole of life. Herein, the court, in *Rice v. Andrews*, failed tragically. It relied entirely upon the statute that gave to the testator the power to dispose of his property, completely oblivious of the fact that it was inconsistent with many modern statutes equally binding upon it, which were limitations upon that power. Repeatedly Dean Pound has pointed out that the entire trend of modern legislation has been to limit the power of the owner to dispose of his

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182 Miller v. Miller, 64 Me. 484 (1874). In this case, the court made a decree for the care, custody and support of the minor children of the parties, binding on the estate of the husband. It said, "To guard against the danger of a resentful disinheritance of his children, should not the court possess the power to make a decree that should be binding on his estate? ... We think that no one will doubt that such ought to be the law. We think that it is the law." p. 488.

183 *Supra* note 181, p. 285.


187 *Supra* note 158, p. 185.

property to secure the interests of those dependent upon him. There may be times when it is the duty of the court not to speculate upon the wisdom of the law but to apply it. That assumes that the law in a particular case is certain. There was no statute in New York which said that a father could by will pauperize his helpless children.

It may be true that the policy of the law is what the statute enacts. Suppose there is no enactment specifically covering the case. Then, it is admitted that the policy of the law will change with the habits, opinions and wants of the people. It will be different at different times. The failure to perceive that fact caused the New York Court of Appeals to blunder and declare unconstitutional the Workmen's Compensation Act. The repellant result reached in Rice v. Andrews was so shocking to the layman that it may well have caused the court to ponder upon the character of law. Is it fixed and rigid? One court reminds us that it is its virtue that it is not, because the

diversity in the facts of all human transactions affords frequent illustration of the beauty and excellency of the common law, in relieving the conscientious court from the objection to submission to precedents, which sometimes do violence to common understandings of both the learned and the unlearned. Mr. Justice Cardozo has said that at times judges march to pitiless conclusions under the prod of a remorseless logic which is supposed to give them no alternative. They sacrifice their victim "to the gods of jurisprudence on the altar of regularity." The jurist's first need is to become conversant with the problems which form the framework of the law. They arise out of the conditions of human existence and must ever be of prime importance, if humanity is to progress. The law involves a "jurisprudence of realities." The method of the modern era of law is to test legal precepts by the results produced in their practical application. It is the purposes of the law which dictate the premises of legal reasoning and fix the limit of the

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189 Supra note 186, p. 189; Pound, Outlines of Jurisprudence (3d ed. 1920) 43; Pound, Limits of Effective Legal Action (1917) 27 Int. Jour. of Ethics 150, 159.
194 Growth of Law (1924) 66.
application of any legal rule.\textsuperscript{197} The positive law of any enlightened age is estimated by the standard of its ideals.\textsuperscript{198} The state exists for the protection of the weak.\textsuperscript{199} The question then is: Was there any other premise which the court might have employed in \textit{Rice v. Andrews}, which would have yielded a result more consistent with the spirit of modern legislative development?

MODERN SOCIAL LEGISLATION

The common law, so far as it related to the claims of the child against the parent, presents a significant contrast to modern law. Nearly a hundred years ago, in America, the law entered upon a policy which extended its protection to the dependents in the family. Within a quarter of a century, the legal recognition of the interests of the child has been so intensified that ancient legal precepts have become obsolete.

1. Statutory Allowances for Provisional Family Support. These statutes, Woerner tells us, are of purely American origin and owe their existence to a humane consideration of the distress and helplessness of widows and orphans.\textsuperscript{200} They are limitations upon the testator's power of disposition. Schouler says that they are designed to keep the dependents of the deceased from becoming public charges.\textsuperscript{201} They have been adopted by most of the states of the Union.\textsuperscript{202} Their very existence presupposes that the testator has made provision for his dependents. They provide a temporary maintenance for dependents until their interest in the estate can be set out. It prevents them from being thrown as paupers upon the community or being left to the "cold charity of relatives."\textsuperscript{203}

This provisional support is not a mere charity.\textsuperscript{204} It is a preferred claim against the estate.\textsuperscript{205} It takes preference to any claim which a

\textsuperscript{197}Dickinson, \textit{Administrative Justice and the Supremacy of the Law} (1927) 338.
\textsuperscript{198}Vinogradoff, \textit{Common Sense in Law} (1914) 247.
\textsuperscript{200}Supra note 129, § 2650. See also, Wilcox v. Hawley, 31 N. Y. 648, 657 (1864); \textit{In re Lavinberg's Estate}, 104 Wash. 515, 517, 177 Pac. 328 (1918).
\textsuperscript{201}(1896) 2 Am. & Eng. Enc. Law 156.
\textsuperscript{202}\textit{In re Williams}, 52 N. Y. Supp. 700, 702 (1898); Woerner, \textit{supra} note 200, p. 235.
\textsuperscript{204}\textit{In re James' Estate}, 38 S. D. 107, 112, 160 N. W. 525 (1916).
creditor, heir, legatee or representative may have against the estate.\textsuperscript{206} It recognizes a higher duty on the part of the deceased than the payment of any personal debt.\textsuperscript{207} Courts will refuse to give such statutes a narrow and rigid construction because they were designed to relieve a helpless condition of the family.\textsuperscript{208} Nor will they approve the attempt to collect a transfer tax on such allowances, because such interpretation is so unreasonable and contrary to the spirit of the law.\textsuperscript{209} But, the exemptions will be allowed even though the estate is insolvent.\textsuperscript{210}

The legislative history of the various states discloses that these provisions have had a progressively liberal development. Although New York may have been behind some of the other states in making its exemptions adequate to the need,\textsuperscript{211} yet such a tendency is revealed by an examination of the six amendments which have been adopted by it since the enactment of the first statute in \textsuperscript{1842}.\textsuperscript{212}

2. Promotion of the Welfare and Hygiene of Infancy. In \textsuperscript{1921}, Congress enacted the Sheppard-Towner Act to promote the hygiene of maternity and infancy.\textsuperscript{213} Under it over a million dollars a year has been made available for distribution among the states. In order to avail itself of this federal aid, the state must appropriate a sum equal to the amount it receives in aid. Due to its tendency in the diminution of infant mortality, this has been called one of the most important social measures ever enacted by Congress. In the years \textsuperscript{1924}, \textsuperscript{1925} and \textsuperscript{1926}, the State of New York appropriated over $240,000 in order to avail itself of the maximum sum available to it as federal aid.\textsuperscript{214} In other words, the Legislature declared by such appropriation that it was vitally concerned in having the children of the State well-born. Indeed, during the first few months of the operation of the law,

\begin{itemize}
  \item \textsuperscript{206}\textsc{Woerner, supra} note 200, p. 235.
  \item \textsuperscript{207}\textit{Ibid.} § 9.
  \item \textsuperscript{208}\textit{In re} Pugsley, 27 Utah 489, 492, 76 Pac. 560 (1904). See also, \textit{In re} Shedd's Estate, 60 Hun, 357, 14 N. Y. Supp. 841, 843 (1891); \textit{In re} Shulenburg's Estate, 114 Misc. 155, 187 N. Y. Supp. 251 (1921); \textit{In re} Estate of Ryan, 174 Mo. App. 202, 156 S. W. 759 (1913); \textit{In re} Drasdo's Estate, 36 Wash. 478, 78 Pac. 1022 (1904).
  \item \textsuperscript{210}\textsc{Estate of Treat}, 162 Calif. 250, 211 Pac. 1003 (1912). A provision of the Code so provided. See \textsc{Johnson v. Corbett}, 11 Paige 265, 276 (N. Y. 1844).
  \item \textsuperscript{211}\textit{Report of the Commission to Investigate Defects in the Laws of Estates} (No. 70, \textsc{Leg. Doc. New York, 1928}) 2.
  \item \textsuperscript{212}\textsc{Bliss' New York Ann. Code} (6th ed. 1912) § 2713.
  \item \textsuperscript{213}\textsc{42 U. S. Stat. 224} (1921), c. 135.
  \item \textsuperscript{214}\textsc{The Promotion of the Welfare and Hygiene of Maternity and Infancy} (Pub. No. 178, Children's Bureau, Dept. of Labor, 1927) 2.
\end{itemize}
42 states accepted the provisions of the act.\textsuperscript{216} After such a declaration of social policy, how can any court of any one of those states, in the absence of a statute that specifically declares the right of a testator to pauperize his minor child, say that infant pauperization by will was the intent of the Legislature? Statistics show that, in certain towns, infant mortality decreased from 147 to 87 and from 127 to 58.\textsuperscript{216} Why should some infants be rescued from death at the expense of society,\textsuperscript{217} while others are pauperized by the will of a well-to-do father under judicial sanction?

3. Compulsory Education and Child Labor Laws. One reads in a bulletin of the United States Department of Labor that "Poverty and ignorance are both the cause and effect of child labor."\textsuperscript{218} In England, in 1819, the first legislation applying to other than pauper apprentices was passed, regulating child labor in factories. It prohibited the employment of children under nine. The working hours of children under 16 were limited to 12. In 1918, a century later, England passed for the first time an act for the regulation of the employment of children in all gainful occupations. It prohibits the employment of all children under 12. Compulsory full-time school attendance is required of all children up to 14 years of age. Compulsory continuation school attendance is required up to 16 years of age, and is to be raised to 18 at the end of seven years from the time the continuation school section becomes effective.\textsuperscript{219}

In United States, prior to 1830, there was no effective regulation of child labor. In 1813, Connecticut passed a law providing for the education of working children by proprietors of manufacturing establishments in which children were employed.\textsuperscript{220} By 1860, four states had enacted similar laws. From decade to decade, the standards of regulation have been gradually raised.\textsuperscript{221} By 1920, every state in the Union had a compulsory education law. In 1910, a decade before, there were seven states without such laws.\textsuperscript{222} During that same decade, 22 states had enacted a new type of legislation, providing for part time education. In that same period, the children en-

\textsuperscript{216}Working of the Federal Maternity and Infancy Act, (1925) 22 School and Society 742; Baker, The First Year of the Sheppard-Towner Act (1924) 52 Survey 89.
\textsuperscript{217}Federal Maternity and Infancy Act (1927); 75 Review of Reviews 98.
\textsuperscript{218}Supreme Court Hearing on Constitutionality of Sheppard-Towner Act (1923) 24 Ind. Ed. M. 356.
\textsuperscript{219}Child Labor (No. 93, U. S. Dept. of Labor, 1923) 19.
\textsuperscript{220}Ibid p. 2
\textsuperscript{221}Ibid p. 4.
\textsuperscript{222}Ibid p. 1.

\textsuperscript{221}Child Labor in the United States (No. 114, U. S. Dept. of Labor, 1926) 14.
gaged in the gainful occupations of the United States had decreased 46%. In New York, the decrease was 23%. In 27 states, compulsory school attendance is required throughout the state up to the age of 16. In 13 states, the upper age limit is 17 or 18 years, in at least some localities. But in most states, the law allows children above the age of 14 to be excused to go to work.

In an early New York case (1868), the court assumed that a boy of 14 who was cut off by his father's will was able to support himself. In *Rice v. Andrews*, the court seeks to justify its decision on the ground that death had deprived the father of his obligation to support the seven year old son because the father could no longer enjoy the services and society of his little son. His estate cannot stand in his shoes in this regard. The consideration which made the father liable for support vanished at his death. It is interesting to note that this same argument was used in Georgia to relieve the insane parent of the obligation to support a minor daughter. Of course, an insane parent cannot enjoy the company and services of a minor dependent. The court held that did not relieve the parent of the obligation to pay for its support. The same ancient argument was used in 1871, in Iowa, when a father asserted that his right to the services of his child was a sufficient excuse for both the child's tardiness at and absence from school. The court thought otherwise.

"The services and society of the child during school hours cannot be at the disposal of the father. If the parent would bestow on his offspring the great benefits of an education, he must forego the little profit of the child's labor and the pleasure of his constant society."

If a father's estate is liable for the support of a minor child during the period of its dependency, it is clear that it is liable only to the extent of its dependency. So far as the earnings of the child may contribute to its own support, it cannot, to that degree, be regarded dependent. When a court is confronted with the problem of pauperizing a seven year old child on the one hand or holding the estate of the father liable on the other, it is incredible that it should absolve the

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223 Supra note 218, see chart on pp. 14 and 15. For an interpretation of these statistics to discover whether the decrease was real or apparent, see supra note 222, p. 12.

224 Supra, note 222, p. 29.


226 Supra note 117, p. 531.


228 Burdick v. Babcock, 31 Iowa 562 (1871).

229 Ibid., p. 568.
estate on the ground that death had made impossible the enjoyment of the society of the infant. It is too obviously an attempt to support a bad decision by a worse argument. Indeed, by virtue of the law of New York, in questions relating to custody, the courts will consider the best interests of the child, regardless of yearning in the parental breast for the society of the child. The court will deprive the parent of the custody of a child whenever the interest of the child and society demand it. So interested is society in the child that an insolvent father can make a gift of the child's services to the child even against the objection of his creditors.

In a state where it is unlawful to employ any child under 14 in any service whatever during the hours when attendance upon instruction is required, it seems clear that by legislative policy, the economic interest of the father in the child is subordinated to the welfare of the child and the interest of society in it. Every law relating to compulsory education and child labor has been in derogation of the father's right of property in the services of the child. That legislation, like child legislation in general, has been primarily for the protection of the child. Why any court should seek to give effect to a principle of law, which was enunciated by Kent and was based upon a decision made by Lord Alvaney in 1800, when that principle is in direct opposition to the legislative policy of nearly a century, taxes the

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209 "The principle rule, as laid down in a long line of cases, and which is established beyond dispute, is that in a controversy under this section for the custody of the child, the court will consider the best interests of the child, and will make such order for its custody as will best promote its physical, moral, mental and financial welfare." 14 McKinney's Cons. Laws of New York Ann., at 184.

In White v. McDowell, 74 Wash. 44, 47, 132 Pac. 734 (1913), the court said, "We cannot recognize charity, however willingly bestowed, as a legal substitute for the natural duty of a parent to maintain his minor child."

"The abuse of parental authority is the subject of judicial cognizance... and when abuse is established the child may be freed from the dominion of the parent, and the duty of support and education enforced." Calif. Civil Code (Kerr, 2d ed. 1920), § 203. See Hutchison v. Hutchison, 124 Calif. 677, 57 Pac. 674 (1899).

"It is not the policy of the law to deprive children of their rights on account of the dissensions of their parents, to which they are not parties; or to enable the father to convert his own misconduct into a shield against parental liability." Leibold v. Leibold, 158 Ind. 60, 61, 62 N. E. 627 (1902).


212The policy of the Legislature of New York to protect children from pauperization and exploitation may be found in EDUCATION LAW, § 626; LABOR LAW, §§ 70, 93, 131, 161, 162, and 220; PENAL LAW, §§ 480, 482 and 485; POOR LAW, § 130.
understanding. Doubtless such a situation would prompt Prof. Dewey to say that an infiltration into the law of a more experimental logic is a social as well as intellectual need.233

4. Workmen's Compensation Laws. One writer, in justifying the disinheritance of minor children without other means of support, suggests234 "When the wage earner dies, poverty comes to his dependents." That may be true, if the wage earner does not die by accident under Workmen's Compensation. Workmen's Compensation is designed to protect the dependent and orphaned children.235 In eighteen states, benefits under Workmen's Compensation are paid to the dependent children of the deceased up to 16 years of age, while in 20 states they are paid up to 18 years of age.236 New York is included among the latter group.237 In New York, then, a ridiculous situation exists. A well-to-do father can die and by will pauperize his child. But, if a father, a wage earner, dies from accident under Workmen's Compensation, his employer has to contribute toward the support of his child until it attains the age of 18 years. Or if it becomes a public charge upon the City of New York, the department of public welfare is authorized to collect the benefits to the extent of reasonable charges, during the period of dependency, until the minor attains the age of 18.238

In a recent Michigan case,239 the court set out the doctrine of reasonable parts as it was explained by Glanvil in the twelfth century. In commenting upon it the court said that, so far as it related to children, it had been obsolete so long that it was but a curiosity in legal annals. The court must have been forgetful of the provisions of the Workmen's Compensation Acts. The doctrine of reasonable parts has been revived by statute. An interesting illustration of it is to be found in a recent New York case.240

5. Mothers' Pensions. In 1910, it was discovered by a judge in Missouri that dependent fatherless children are a matter of concern to the state.241 In 1913, Missouri and Illinois enacted Mothers'

233Dewey, Logical Method and Law (1924) 10 CORNELL LAW QUARTERLY 17, 27.
238Ibid. 16, § 6.
239Supra note 39, p. 594.
241Craiger, Mothers on the Pay Roll in Many States (1915) 52 REVIEW OF REVIEWS 81; Fairbanks, Mothers' Pensions in Missouri (1914) CONF. CHAR. & CORRECTIONS 442.
Pensions Acts. The object was to prevent the pauperization of worthy children. The child, and not the mother, was the real beneficiary. The maximum age of the child for whom a pension is payable is from 14 to 18. This form of relief swept over the country with astonishing rapidity. It was hailed as the most important contribution to the modern social problem. Before four years had elapsed, 17 states had established such relief. By 1923, it existed in 40 states. In New York, Mothers' Pensions became a policy of the law by almost unanimous vote of the Legislature of 1915. The New York law provides for relief for children up to 16 years of age.

In declaring the Mothers' Pensions Act constitutional, the North Dakota court said:

"... the law is a monument of credit to the Legislature which enacted it. Two of the most important, weighty, and far-reaching problems with which the state has to deal are the public health and the elimination of crime. It is a sociological truth that if the environment of childhood is extreme poverty and continual want and penury,..., we may expect such an environment must of necessity waste the energies of childhood and subject it to the inroads of disease, which may be communicated to part of the public. Meantime this continued want and misery must weaken the moral fiber of childhood, at the very period in life when the child's mind and being are most susceptible to impressions, either good or bad."

Indeed, the New York Legislature was advised prior to the enactment of the Mothers' Pensions Act that "The problem of the prevention of poverty is perhaps the most serious that confronts any civilized community." Mothers' Pensions were represented as the necessary corollary to Anti-Child Labor and Compulsory Education Laws and an essential part of the social code requisite to progress. It is, perhaps, a sufficient commentary on the decision in *Rice v. Andrews* that in the very year that court declared a father could pauperize his helpless minor son by will, in seven cities of the State of New York nearly $6,000,000 of public funds were expended in the relief of

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242 The Needy Mother and the Neglected Child (1913) 104 Outlook 280; Shaw, Progressive Law-making in Many States (1913) 48 Review of Reviews 86.
243 Mother's Pensions in New York (1915) 50 Literary Digest 796.
244 Bogne, Ten Years of Mothers' Pensions (1923) 49 Survey 634; Seventeen States Pension Widows (1913) 30 Survey 450.
245 Pensions for Widows in New York (1915) 34 Survey 1.
246 Cass Co. v. Nixon, 35 N. D. 601, 605, 61 N. W. 204, 205 (1917). See also, *In re Walker,* 49 N. D. 682, 193 N. W. 259; State v. Klason, 123 Minn. 382, 143 N. W. 984; *In re Koopman,* 146 Minn. 36, 177 N. W. 777 (1920).
248 Ibid., p. 182.
poverty among children in the form of Mothers’ Pensions. If the Judiciary is to cooperate as a coordinate department of government, the object of its decisions ought not to be to intensify a problem which the Legislature is attempting to solve. For fifteen years the legislative policy of New York with reference to the pauperization of minors has been unmistakably clear. Further legislative declarations would seem superfluous except for the fact that courts still persistently and indefensibly adhere to the vicious theory of absolute rights regardless of its social consequences.

CONCLUSION (2)

The right of a testator to dispose of his property by will should be interpreted, not only with reference to the statute relating to testamentary dispositions, but with reference to every other pertinent statute. To construe the right of the testator in New York in 1926 to be co-extensive with the right which was declared to exist in the days of Kent is to ignore the most significant facts in American legislative history. It is to apply an ancient principle, mechanically and ruthlessly, yielding a grossly absurd result. The supremacy of the law depends upon its application. Any theory that sanctifies the old, widens the gap between social conditions and the law. It breeds disrespect for law. Modern legislation has limited the right of the individual in his anti-social exercise of the rights of ownership. It is said that the greatness of Papinian depended upon his ability to discover the relevancies of humanity in any case. Indeed, President Frank has declared the great lawyer is the one who perceives the law in its constantly changing social setting. The study of modern legislation persuades one that any judicial interpretation that enables a father to pauperize his helpless minor dependents is not only contrary to considerations of humanity and subversive of the social interest, but is hopelessly inconsistent with the clear policy of the law as declared in statutory enactments. Obviously, it is the duty of the Legislature to nullify such ill-advised judicial construction.

24 Table, Annual Expenditure for Mothers’ Aid (Children’s Bureau, Dept. of Labor). It is estimated that in one year $5,830,805 were spent, exclusive of the expense of administration, in Albany, Buffalo, New York, Rochester, Syracuse Utica and Yonkers in the relief of poverty under Mothers’ Pensions.