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Advancements: II

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VI

REQUISITES OF ADVANCEMENTS

A VOLUNTARY inter vivos transfer by a parent to a child is not an advancement so long as the transferor lives. The purpose of the doctrine is to equalize an intestate's property among his children. It is auxiliary to the distribution of his estate that the question of advancement is raised.[220] The death of the transferor is not enough to give rise to the doctrine. The person seeking to charge the intestate's heirs with an advancement must prove several additional facts. The legislation of each state determines what must be proved in order to charge the transferee with an advancement.

A. *Intent of the Advancor*

A parent or grandparent may transfer property during his lifetime to a child or grandchild. On his death intestate the courts are often called upon to determine whether the transaction was a gift, a resulting trust or an advancement. In all states except Kentucky and South Carolina, the rule is that the intent of the advancor at the time of the transaction is the determining factor in ascertaining whether a transfer is or is not an advancement.[221]

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220 Harper v. Harris, (8th Cir. 1923) 294 F. 44.

221 Booth v. Foster, 111 Ala. 312, 20 S. 356 (1895); Fennell v. Henry, 70 Ala. 484 (1881); Holland v. Bonner, 142 Ark. 214, 218 S.W. 665 (1920); In re Guardianship of Hudelson, (Cal. App. 1941) 109 P. (2d) 964; Page v. Elwell, 81 Colo. 73, 253 P. 1059 (1927); Barron v. Barron, 181 Ga. 505, 182 S.E. 851 (1935); Parker v. Parker, 147 Ga. 432, 94 S.E. 543 (1917); Andrews v. Halliday, 63 Ga. 263 (1879). In that case the intestate thought that he had advanced each of his children an equal amount, but in fact some had received more than others. The court ruled that the mere fact he thought he had advanced his children equal amounts did not relieve them from accounting for advancements. The court said, at 269-270: "If the advancements were really unequal, that the intestate was under a misapprehension as to their equality would not make the least difference. Why should it? The scheme of the law is for each distributee to account for what he actually got by way of advancement, not for what the ancestor may have supposed he got. And this does not interfere with the right of the latter to put a valuation upon property where he has undertaken to do so. The two questions are altogether different." Johnson v. Belden, 20 Conn. 322 (1850); Meeker v. Meeker, 16 Conn. 383 (1844); Culp v. Wilson, 133 Ind. 294, 32 N.E. 928 (1893); Dille v. Webb, 61 Ind. 85 (1878); Duling v. Johnson, 32 Ind. 155 (1869); In re Sell's Estate, 197 Iowa 696, 197 N.W. 922 (1924);

In England, since passage of the Administration of Estates Act of 1925, the intent of the advancor is determinative.[222] However, an analysis of the English cases decided prior to that date casts a great deal of doubt on the role that the intent of the advancor played in determining whether or not a voluntary inter vivos transfer of property was an advancement. In no English case was the court called upon to determine the intent of the advancor. The cases never speak of his intent nor of the intent of the advancee. However, opinions by well known English jurists tend to indicate that the intent of the advancor was regarded as immaterial. In *Edwards v. Freeman,*[223] Lord Chief Justice Raymond, in commenting on the advancement provision of the statute of distributions, said:

> "But then the act takes it into consideration, that there may be some of the children who have received a portion or advancement before, but not so much as to make up their full share; in that case such child so advanced but in part, shall have so much more out of the intestate's personal estate as will suffice to make his share equal to that of the other children. The statute takes nothing away that has been given to any of the children, however unequal they may have been, how much soever that may exceed

Ellis v. Newell, 120 Iowa 71, 94 N.W. 463 (1903); Bash v. Bash, 182 Iowa 55, 165 N.W. 399 (1917); McCabe v. Broeme, 107 Md. 490, 69 A. 259 (1908); Clark v. Willson, 27 Md. 693 (1867); Parks v. Parks, 19 Md. 323 (1863); Garrett v. Colvin, 77 Miss. 408, 26 S. 963 (1899); Schlicher v. Keeler, (N.J. Ch. 1905) 62 A. 4; Wolfe v. Galloway, 211 N.C. 361, 190 S.E. 213 (1937); Nobles v. Davenport, 185 S.C. 162, 116 S.E. 407 (1923); Thompson v. Smith, 160 N.C. 256, 75 S.E. 1010 (1911); Kiger v. Terry, 119 N.C. 456, 26 S.E. 38 (1896); O'Connor v. Flick, 271 Pa. 249, 114 A. 636 (1921); In re Brahm's Estate, 269 Pa. 82, 112 A. 21 (1920); Johnson v. Patterson, 81 Tenn. (13 Lea) 626 (1884); Morris v. Morris, 56 Tenn. (9 Heisk.) (1872). In that case the court said, at 816: "The provision in Section 2431 of the Code, that 'Absolute equality shall be observed in the division of estates of deceased persons, except where a will has been made and its provisions render equality impossible,' is a mere announcement of a rule of law of effective existence without the Statute; and was expressed by the Legislature with a view to the estate owned by the deceased at the moment of his death, and upon the idea that no advancements had been made by him in his lifetime. It was not intended to restrict or enlarge the general rule upon the subject of advancements. . . ." Rowe v. Rowe, 144 Va. 816, 130 S.E. 771 (1925); McClanahan v. McClanahan, 36 W.Va. 34, 14 S.E. 419 (1892). Since the doctrine depends on the intent of the intestate, the courts hold that an insane person is incapable of making an advancement. In re Guardianship of Hudelson, supra this note; In re Fleming's Estate, 173 Misc. 851, 19 N.Y.S. (2d) 234 (1940). In that case sisters of an incompetent petitioned the probate court for an allowance of support out of his estate. The court made them an allowance and decreed that the amount so received should be charged as an advancement. Insofar as the technical doctrine of advancements is concerned that decision is clearly erroneous. The doctrine is not applicable where the parties concerned are brothers and sisters. In addition, the advancor was incapable of exercising the required intent. Perhaps the decision can be justified as an advance.

[222] 15 Geo. V, c. 23, §47(I)(iii) (1925).
[223] 2 P. Wms. 436, 24 Eng. Rep. 803 at 806 (1727).

the remainder of the personal estate left by the intestate at his death, the child may, if he pleases, keep it all; if he be not contented, but would have more, then he must bring into hotchpot what he has before received; this manifestly seems to be the intention of the act, grounded upon the most just rule of equity, *equality.*"

In *Edwards v. Freeman,* Lord Chief Justice Raymond also said:

"... the statute of distribution does not break into any settlement that has been made by the father; it only meddles with what is left undisposed of by him, and of that only makes such a will for the intestate, as a father, free from the partiality of affections, would himself make; and this I may call a *parliamentary will.*"

In *Blockley v. Blockley,*[224] Judge Pearson said:

"I think the intention of the statute was not to disturb anything which had been done by the intestate in his lifetime, but that that which had been done should be taken into account in estimating his children's shares of his estate. That makes the whole of such a transaction between father and son fair. If the father makes a will, saying that he wishes the son to have what he has given him in his lifetime over and above what he has given him by his will, the son will take it. But if the father dies intestate, the law says, the right rule between children is equality, and, so far as is possible, there should be equality among the children."

Because either there was doubt as to whether the intent of the advancor determined the nature of a voluntary inter vivos transfer or because the consensus among English lawyers was that the intent of the advancor was immaterial, Parliament decided that a clarification or change of law was necessary and consequently enacted as a part of the Administration of Estates Act of 1925 the following provision:

"... then any money or property which, by way of advancement or on marriage of a child of the intestate, has been paid to such child by the intestate or settled by the intestate for the benefit of such child (including any life or less interest and including property covenanted to be paid or settled) shall, subject to any contrary intention expressed or appearing from the circumstances of the case, be taken as being so paid or settled in or towards satisfaction of the share of such child or the share which such child would have taken if living at the death of the intestate. . . ."[225]

[224] 29 Ch. Div. 250 at 253 (1885). Cf. Taylor v. Taylor, L.R. 20 Eq. 155 (1875).
[225] 15 Geo. V., c. 23, §471(iii) (1925).

Although the English statute of distributions is the prototype of most American statutes, American courts had no difficulty in determining that the intent of the advancor determines whether a voluntary inter vivos transfer is an advancement. South Carolina is the only state in which an American court, construing an advancement statute similar to the statute of distributions, held that the intent of the advancor was immaterial.[226] A perusal of the American decisions indicates that some courts do not correctly interpret the English cases. For instance, the Kentucky court in *Barber v. Taylor's Heirs*,[227] cites *Edwards v. Freeman* as authority for the rule that the intent of the advancor controls. In *Graves v. Spedden*,[228] the Maryland court, without citing any English authority, stated that in Maryland, as in England, the intention of the intestate determines whether or not a gift of property is an advancement. In *Mitchell's Distributees v. Mitchell's Admrs.*,[229] the Alabama court stated that the law of advancements was based on the custom of London. The court pointed out that under the custom the intent of the advancor controlled. Since it is doubtful whether the English statute of distributions is based on the custom, the decision of the Alabama court seems unsound.[230]

Most cases do not rely on any authority but merely assume that an advancement depends on the intent of the advancor. Some decisions reach the same conclusions on the theory that a person has the absolute right to dispose of his property as he pleases, and therefore, the intent of the transferor determines the nature of the transaction.[231] This proposition was well expressed by the North Carolina court in the case of *James v. James*[232] as follows:

> " 'A man has a right to do with his own property as he chooses,' is a proposition agreed to on all hands. The restriction is, he shall not interfere with the rights of other persons which are recognized either at law or in equity; hence he is not at liberty either by sale or gift to dispose of property to which another person is entitled by mortgage or deed or trust, nor is he at liberty to dispose of his property by gift in respect to his creditors unless he retains property amply sufficient to pay his debts.
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> "A child is not a creditor of his father and has no right to

[226] Heyward v. Middleton, 65 S.C. 493, 43 S.E. 956 (1903); Rees v. Rees, 11 Rich. Eq. (S.C.) 86 (1859); M'Caw v. Blewit, 2 McCord Eq. (S.C.) 90 (1827).

[227] 39 Ky. (9 Dana) 84 (1839).

[228] 46 Md. 527 (1877).

[229] 8 Ala. 414 (1845).

[230] See first instalment of this article, 51 MICH. L. REV. 665 at 672-673 (1953).

[231] Holland v. Bonner, 142 Ark. 214, 218 S.W. 665 (1920).

[232] 76 N.C. 331 at 332 (1887).

object, either in law or in equity, to the father's right of disposition. The child has a mere 'expectancy.' "

In a few cases the courts have reached the same result by referring to the advancement statute. For example, in *Kiger v. Terry*,[233] the North Carolina court pointed out that in a few states the intent of the parent was excluded by statute and in those states all transfers by him are advancements. The court then pointed out that their statute did not expressly exclude the parent's intent. Using these statements as a basis for its decision, the court said that the statute left in force the evident rule ". . . that the owner of property may dispose of it according to his own desire. . . ."

In Indiana, the statutes read in part as follows: "Advancements in real or personal property shall be charged against the child to whom the advancement is made . . . but if the advancement exceed the equal proportion of the child advanced, the excess shall not be refunded."[234]

"The maintaining, or educating or giving money to a child, without a view toward a portion or settlement in life, shall not be deemed an advancement."[235] In construing that statute, the Indiana court ruled that the question of whether a transfer of property is an advancement or gift depends on the intent of the advancor or donor. As a basis for this decision the court pointed out that the first part of the statute does not define advancement, and the latter provision merely declares what is not an advancement. Therefore, since intent determines what is not an advancement under some circumstances, all advancements must depend on the intent of the advancor.[236]

Some courts have reached the conclusion that an advancement depends on the intent of the advancor by relying on cases where the question to be determined was whether the transfer was a gift or resulting trust.[237] In *Jackson v. Matsdorf*,[238] a parent transferred title to property to his daughter in order to avoid claims of creditors. Later, he sought to compel her to reconvey the property on the theory that the transfer was a resulting trust. The court ruled that the parent's intent at the time of the transfer determined whether the transfer was

[233] 119 N.C. 456, 26 S.E. 38 (1896).
[234] Ind. Stat. Ann. (Burns, 1933) §6-2354.
[235] Ind. Stat. Ann. (Burns, 1933) §1504.
[236] Woolery v. Woolery, 29 Ind. 249 (1868).
[237] Culp v. Price, 107 Iowa 133, 77 N.W. 848 (1899); Herbert v. Alvord, 75 N.J. Eq. 428, 72 A. 946 (1909); Jackson v. Matsdorf, 11 Johns. (N.Y.) 91 (1814); Burbeck v. Spollen, 6 Ohio Dec. 1118, 10 Am. Law Rec. 491 (1882).
[238] 11 Johns. (N.Y.) 91 (1814).

an advancement or resulting trust. Of course, the use of the word "advancement" was inaccurate because a transfer is never an advancement until after the death of the advancor. In *Burbeck v. Spollen*,[239] the Ohio court, when called upon to determine whether a transfer was a gift or advancement, erroneously relied on the case of *Jackson v. Matsdorf* for authority for the proposition that advancement depends on the intent of the advancor.

In some states, by statute, a gift or grant of property is not an advancement unless it is expressed in the grant to be so made or charged in writing by the intestate or acknowledged in writing as such by the child. Courts, in interpreting that legislation, state that the statute does not change the rule that the intent of the advancor determines whether a transaction is a gift or advancement. Such a rule merely prescribes the manner by which the intention shall be proved.[240]

1. *The Kentucky Rule.* The previous Kentucky statute on advancements reads in part as follows: ". . . where any children of the intestate . . . shall have received from the intestate in his lifetime any real estate by way of advancement, . . . such advancement shall be brought into hotchpot with the estate descended."[241] Under that statute the Kentucky court held that the intent of the advancor or donor determined whether the transaction was an advancement or gift.[242] The present Kentucky statute reads in part as follows: "Any real or personal property or money, given or devised by a parent or grandparent to a descendant, shall be charged to the descendant.[243] An analysis of this statute shows that the intent of the advancor is immaterial.[244] The statute also provides that "the maintaining, or educating or the giving of money to a child or grandchild without any view to a portion or settlement in life, shall not be deemed an advancement." Under that proviso of the statute, the intent of the advancor or donor is determinative.[245]

[239] 6 Ohio Dec. 1118, 10 Am. Law Rec. 491 (1882).

[240] Elliott v. Western Coal and Mining Co., 243 Ill. 614, 90 N.E. 1104 (1910); Comer v. Comer, 119 Ill. 170, 8 N.E. 796 (1886). In that case the court pointed out that prior to the act requiring advancements to be charged in writing all substantial gifts were presumed to be advancements. Since the enactment of the statute, there is no such presumption unless the evidence of the advancement is written. Fellows v. Little, 46 N.H. 27 (1865).

[241] Ky. Stat. (1792-1834) tit. 61, §15 and tit. 75, §28.

[242] Barber v. Taylor's Heirs, 39 Ky. (9 Dana) 84 (1839).

[243] Ky. Rev. Stat. (1948) §391.140.

[244] Gossage v. Gossage's Admr., 281 Ky. 575, 136 S.W. (2d) 775 (1940); Ecton v. Flynn, 229 Ky. 476, 17 S.W. (2d) 407 (1929); Boblett v. Barlow, 26 Ky. L. Rep. 1076, 83 S.W. 145 (1904); Bowles v. Winchester, 76 Ky. (13 Bush.) 1 (1877).

[245] Crain v. Mallone, 130 Ky. 125, 113 S.W. 67 (1908); Hill's Guardian v. Hill, 122 Ky. 681, 92 S.W. 924 (1906).

In that state, a person who has made a gift of property to a descendant and does not want it charged as an advancement can defeat the statute in three ways: (1) by disposing of all his property by will, (2) by giving all his property away before his death, or (3) by advancements to a descendant which exceed his share of the estate.[246] In all other states he can defeat the statute in these ways and, with the exception of South Carolina, by declaring that the transfer is an absolute gift. In South Carolina, since the intent of the transferor is regarded as immaterial, he cannot defeat the statute by declaring that a voluntary inter vivos transfer of property is an absolute gift. In all states, except those that hold the doctrine of advancements applicable to cases of partial intestacy, a person can defeat the doctrine if he dies intestate as to part of his property.

B. *Acceptance*

Most courts which hold that the intent of the advancor determines whether a voluntary inter vivos transfer of property from a parent to a child is an advancement, hold that the intent of the advancee or transferee is immaterial. These same states also hold that a voluntary inter vivos transfer by a parent to a child is prima facie an advancement. Likewise, they hold that an instruction which reads " . . . advancements must not only have been intended by the parent as an advancement, but must also have been accepted by the child as an advancement," is erroneous. It is not necessary for the parent to say to the child: "Now I give you this as an advancement," and the child to respond: "I accept it as such." All that is required to show acceptance is for the child to receive the money or property and in that sense accept it.[247] Such a rule, although consistent with the rule that an

[246] Cleaver v. Kirk's Heirs, 60 Ky. (3 Metc.) 270 (1860). Cf. Sullivan v. Sullivan, 29 Ky. L. Rep. 239 (1906).

[247] Ireland v. Dyer, 133 Ga. 851, 67 S.E. 195 (1910); Holliday v. Wingfield, 59 Ga. 206 (1877). Cf. Sherwood v. Smith, 23 Conn. *516 (1855). In that case the court said at 521: "A son might be willing to receive property as a gift, which he would prefer not to take, as a part of his portion in his father's estate. He might be willing to receive a collegiate education, if the expenses were borne as a gift, when, if they were to be charged to him as an advancement, he might prefer having the amount in a different form." Cf. Davis v. Garrett, 91 Tenn. (7 Pickle) 147, 18 S.W. 113 (1892). In that case a father conveyed a slave to his seven-year-old daughter. He registered the title as required by law. It was held that the transaction was an advancement. Since the conveyance was beneficial to the daughter, the court presumed that she accepted it. Rains v. Hays, 74 Tenn. (6 Lea) 303 (1880). To constitute a valid advancement, the property must be delivered to the advancee in the advancor's lifetime. City National Bank v. Morrissey, 97 Conn. 480, 117 A. 493 (1922); Mason and Holman's Admrs. v. Holman, 78 Tenn. (10 Lea) 315 (1882); West v. Jones, 85 Va. 616, 8 S.E. 468 (1889). Cf. Davis v. Garrett, supra this note.

advancement depends on the intent of the advancor, can lead to disastrous results. A child may be willing to receive property as a gift, which he might prefer not to take as part of his portion in his father's estate. If his father does not inform him that the transfer is an advancement, he may think that it is an absolute gift. The only justification for the rule laid down by the courts is that the child is charged with knowledge of the law and if he accepts the property without first ascertaining his father's intention, he is deemed to have accepted the property as a part portion.

In *Hartwell v. Rice*,[248] a father-in-law gave money to his son-in-law for support of his insane daughter. The son-in-law acknowledged in writing that this was an advancement to the daughter. The Massachusetts court held that the money so received should be charged as an advancement. In that case the court did not hold that an advancee need not be of sound mind at the time of the transfer. The decision was based on the fact that prior to the married woman's act a wife's personal property was vested in her husband. Therefore, the acknowledgement by the husband was sufficient to charge it as part of his wife's share in her father's estate.

That case suggests an interesting problem. If the transferee of property is insane at the time of transfer, a person might argue that his lack of mental capacity prevents the amount received by him from being charged as an advancement. However, the law presumes the acceptance of a beneficial gift by one who, because of his feebleness of mind, is incapable of accepting it.[249] Since the intent of the advancee is generally regarded as immaterial and an advancement is said to be a gift, most courts would hold that the advancee need not be of sound mind at the time he accepted the property.

C. *Time When Title Must Pass*

Many cases state that it is necessary to the existence of an advancement that irrevocable title to the property pass to the advancee in the lifetime of the advancor.[250] These same cases often define an advancement as "a perfect and irrevocable gift." Most cases make such

[248] 67 Mass. (1 Gray) 587 (1854).

[249] Pohl v. Fulton, 86 Kan. 14, 119 P. 716 (1911); Malone's Committee v. Lebus, 116 Ky. 975, 77 S.W. 180 (1903).

[250] McClellan v. McCauley, 158 Miss. 456, 130 S. 145 (1930); Greene v. Greene, 145 Miss. 87, 110 S. 218 (1926); Nobles v. Davenport, 183 N.C. 207, 111 S.E. 180 (1922). Cf. Batton v. Allen, 5 N.J. Eq. (1 Halst.) 99 (1845). In that case a parent, after his son's death, satisfied a judgment held against him. On the parent's death, his administrators sought to deduct the amount of the judgment from the grandchild's distributive share. Held, that the transfer must occur in the lifetime of the advancee.

statements by way of dicta.[251] However, in the recent case of *Albers v. Young*,[252] the Colorado court held that an advancement must be an irrevocable gift in the lifetime of the advancor. In that case an intestate opened a joint bank account in his name and that of his daughter. Only two deposits were made, both by him, and solely from his funds. By statute, a joint bank account in Colorado may be paid to anyone of the joint depositors, whether the other is living or not. The court held that the money in the account was not an advancement to the daughter.

Although that case seems in accord with conventional advancement concepts, other cases have reached a different result. In *Thompson v. Latimer*,[253] the same definitions were relied on in an effort to convince the Kentucky court that a life insurance policy in which the insured reserved the right to change the beneficiary was not an advancement. The court rejected that contention and held that the policies should be charged to the child as a part portion. Other cases are to the same effect.[254]

In *Hughey v. Eichelberger*,[255] the South Carolina court held that land conveyed by an intestate to a trustee for the benefit of his daughter was an advancement, even though he reserved the right to revoke the trust.

D. *Intestacy of the Advancor*

A parent or other person to whom the doctrine of advancements applies, may make a gift to one of his children, and on his death leave a will disposing of all his property. Under such circumstances, all courts hold that the doctrine of advancements is inapplicable. The courts reach this result by holding that the foundation of the doctrine is to effectuate the presumed intent of a parent that his children should share equally in his estate, but where he disposes of his entire estate by will his directions are given. Therefore, if one child receives more than another, he did not intend for them to share equally.[256]

[251] Fennell v. Henry, 70 Ala. 484 (1881); Stacy v. Stacy, 175 Ark. 763, 300 S.W. 437 (1927); Page v. Elwell, 81 Colo. 73, 253 P. 1059 (1927); Grattan v. Grattan, 18 Ill. (8 Peck) 167 (1856).

[252] 119 Colo. 37, 199 P. (2d) 890 (1948).

[253] 209 Ky. 491, 273 S.W. 65 (1925).

[254] Culberhouse v. Culberhouse, 68 Ark. 405, 59 S.W. 38 (1900); Justice v. Mead, 220 Ky. 638, 295 S.W. 976 (1927); Rickenbacker v. Zimmerman, 10 S.C. 110 (1878).

[255] 11 S.C. 36 (1878).

[256] Harper v. Harris, (8th Cir. 1923) 294 F. 44; Alward v. Woodward, 315 Ill. 150, 146 N.E. 154 (1925); In re Morgan's Estate, 226 Iowa 68, 281 N.W. 346 (1938); Pole v. Simmons, 45 Md. 246 (1876); Domzalski v. Domzalski, 303 Mich. 103, 5 N.W. (2d) 672 (1942); In re Staples' Estate, 214 Minn. 337, 8 N.W. (2d) 45 (1943); In re Beier's Estate, 205 Minn. 43, 284 N.W. 833 (1939); Kuhne v. Gau, 138 Minn. 34, 163 N.W. 962 (1917); Kragnes v. Kragnes, 125 Minn. 115, 145 N.W. 785 (1914); Graham v. Karr,

Also, most advancement statutes read: "If any estate, real or personal, has been given by an intestate. . . ." The words of such a statute require it to be construed as applying only to persons dying wholly intestate.[257] In *In re Bush's Estate*,[258] a parent made advancements to a son. In 1931, he executed a will naming this son as a residuary legatee. Between 1931 and 1939 when he died, he made several more advancements to him. The advancements were evidenced by non-interest-bearing notes which provided that the amount therein stated should be deducted from the son's share of the estate. The Kansas court required the son to account for advancements made after the execution of the will. That case is contrary to the overwhelming weight of authority which holds that a testator is conclusively presumed to have intended all voluntary transfers of property, whether made prior or subsequent to the will, to be absolute gifts. The underlying theory of these decisions is that a will speaks from the date of the testator's death.[259] The only justification for the decision in *In re Bush's Estate*, supra, is to hold that the doctrines of ademption or satisfaction of a legacy apply to a residuary legatee.[260]

Often a child borrows money from a parent and executes a note which provides that it shall be regarded as an advancement if the parent dies before the payment is made. On the parent's death testate, the child may claim that he cannot be charged with the sum so received. Most courts hold that the sum so received can be charged as a part of the child's share of the estate.[261] The Massachusetts court holds that the child cannot be compelled to account.[262] The view of the Massachusetts court is preferable. In an agreement of this type

331 Mo. 1157, 55 S.W. (2d) 995 (1935); Wickliffe v. Wickliffe, 206 Mo. App. 42, 226 S.W. 1035 (1920); In re Lear's Estate, 146 Mo. App. 642, 124 S.W. 592 (1910); In re Wantz's Estate, 137 Neb. 307, 289 N.W. 363 (1939); In re Willis' Estate, 158 Misc. 534, 287 N.Y.S. 165 (1936); In re Bernhard's Estate, 151 Misc. 480, 273 N.Y.S. 250 (1934); Prevette v. Prevette, 203 N.C. 89, 164 S.E. 623 (1928); Dodson v. Fulk, 147 N.C. 530, 61 S.E. 383 (1908); In re Loesch's Estate, 322 Pa. 105, 185 A. 191 (1936); O'Connor v. Flick, 271 Pa. 249, 114 A. 636 (1921); McQuiddy Printing Co. v. Hirsig, 23 Tenn. A. 434, 134 S.W. 197 (1939); Bailey v. Bailey, (Tex. Civ. App. 1948) 212 S.W. (2d) 189; In re Sipchen's Estate, 180 Wis. 504, 193 N.W. 385 (1923).

[257] Linell's Admr. v. Linell, 21 N.J. Eq. 81 (1870).

[258] 155 Kan. 556, 127 P. (2d) 455 (1942). Cf. Toomer v. Toomer, 5 N.C. (1 Murph.) 93 (1805).

[259] Wickliffe v. Wickliffe, 206 Mo. App. 42, 226 S.W. 1035 (1920); In re Pardee's Estate, 240 Wis. 19, 1 N.W. (2d) 803 (1942).

[260] Hayes v. Welling, 38 R.I. 553, 96 A. 843 (1916).

[261] In re Esmond's Estate, 154 Ill. App. 357 (1910); Kinney v. Newbold, 115 Iowa 145, 88 N.W. 328 (1901); City National Bank of San Saba v. Penn, (Tex. Civ. App. 1936) 92 S.W. (2d) 532. Cf. Robinson v. Ramsey, 161 Ga. 1, 129 S.E. 837 (1925).

[262] Old Colony Trust Co. v. Underwood, 297 Mass. 320, 8 N.E. (2d) 792 (1937); In re Pardee's Estate, 240 Wis. 19, 1 N.W. (2d) 803 (1942). Cf. In re Lake's Estate, 214 Wis. 474, 253 N.W. 174 (1934). In that case a testatrix left surviving only brothers and

there is no enforceable obligation. If the parent were to sue the child, the latter would contend that he had the right to elect how payment should be effected and that he elected to have it charged as part of his inheritance. In such a suit the child would win. The transaction is at most an advancement with a right in the advancee to elect whether he will let it be charged as a part of his inheritance or change the character of the transaction to a loan by paying the advancor.[263]

In some cases, a testator provides that his estate should descend as if no will had been made. For instance, in *Trammel v. Trammel*,[264] a testator provided that realty should descend the same as if no will had been made. The court ruled that the testator intended for advancements to be taken into account in the division of his estate. In *DeCourmant v. Beyert*,[265] a testator bequeathed his property ". . . as provided by the laws of the State of New York in cases of intestacy." The court held that advancements need not be accounted for. These cases appear to be in direct conflict. The only possible reconciliation is that both cases involve the construction of a will and the court was simply ascertaining the intent of the testator. On that basis and on no other can they be distinguished.[265a]

Many times a parent makes an advancement and then decides to make a will. If he revokes or cancels the will, the doctrine of advancements is applicable. As a justification for this rule, the courts state

sisters. One of her brothers gave her a certificate which stated that testatrix had advanced him $1000, to be repaid with interest at some future time "or amount taken from my share or share of my heirs from estate." Held, that the $1000 was to be deducted from the brother's share of the estate. Since the parties were brothers and sisters, the doctrine of advancements was inapplicable.

[263] Cf. Leask v. McCarthy, 147 App. Div. 796, 132 N.Y.S. 92 (1911).

[264] 148 Ind. 487, 47 N.E. 925 (1897).

[265] 36 Hun (N.Y.) 382 (1885); LeCoulteux de Caumont Exr. v. Morgan, affd. 104 N.Y. 74, 9 N.E. 861 (1887). On appeal the New York Court of Appeals affirmed because the transfers were not intended as advancements. The court indicated that the doctrine of advancements was applicable to such a case.

[265a] Harris v. Allen, 18 Ga. 177 (1855). In that case a testator directed that his property should be distributed according to the statute of distributions. Both the court and the parties litigant assumed that the doctrine was applicable. Croom v. Herring, 11 N.C. 393 (1826). In that case testator devised his property ". . . to be divided among all my heirs agreeable to the statute of distribution of intestates' estates." Held, that advancements need not be accounted for. Brown v. Brown, 37 N.C. (2 Ired. L.) 309 (1842); Raiford v. Raiford, 41 N.C. (6 Ired. Eq.) 490 (1849). In that case a deed of trust provided that after the death of the grantor the property should be equally divided "among all the rest of my heirs and distributees . . . in the same manner, and according to the rules of descent and distribution in intestate estates. . . ." Held, that advancements must be accounted for. The court distinguished the case of Croom v. Herring, supra this note, in the following language at 499: "At all events, that decision has no application to the point now under consideration. There, the word 'heirs' was used in reference to personal property. Here, the word 'heirs' is used in reference to land, and the word 'distributees' in reference to personal property—both words of definite legal meaning. . . ."

that if the making of a will indicates an intent to extinguish an advancement, then revoking or cancelling the will indicates a change of purpose.[266] Likewise, if the will is wholly invalid or inoperative the doctrine of advancements is applicable.[267]

1. *Partial Intestacy.* A testator may make advancements to some of his children during his lifetime and his will may be drawn in such a way that he dies intestate as to part of his property. Under such circumstances, the courts in most jurisdictions hold that advancements cannot be charged to the children.[268] The English cases reach this conclusion on the technical rule that, since there is a will, the testator did not die intestate within the meaning of the statute.[269] In England, since the passage of the Administration of Estates Act of 1925, the doctrine of advancements is applicable to cases of partial intestacy.[270] The American decisions are based in part on the language of the statute and also on the presumed intent of the testator to create an inequality which would be defeated if children were compelled to account for advancements.[271]

The California statute uses the word "decedent" rather than the word "intestate." In that state the courts hold that the doctrine is applicable where a person dies intestate as to part of his property.[272]

In Ohio, although the statute reads: "If any estate, real or personal, has been given by an intestate . . . ,"[273] the court tends to consider the advancement concept applicable to cases of partial intestacy.[274]

[266] Hartwell v. Rice, 67 Mass. (1 Gray) 587 (1854).

[267] In re Ford, [1902] 2 Ch. 605. Cf. Prichard v. Prichard, 91 W.Va. 398, 113 S.E. 256 (1922).

[268] Blankes v. Clark, 68 Ark. 98, 56 S.W. 1063 (1900); Gilmore v. Jenkins, 129 Iowa 686, 106 N.W. 193 (1906); Hayden v. Burch, 9 Gill (Md.) 79 (1850); Stewart v. Pattison, 8 Gill (Md.) 46 (1849); In re Finck's Estate, 120 Misc. 428, 198 N.Y.S. 670 (1923); In re Ogden's Estate, 211 Pa. 247, 60 A. 785 (1905). Cf. Leffler v. Leffler, 151 Fla. 455, 10 S. (2d) 799 (1942).

[269] Cowper v. Scott, 3 P. Wms. 119, 24 Eng. Rep. 993 (1731); Walton v. Walton, 14 Ves. Jr. 318, 33 Eng. Rep. 543 (1807).

[270] 15 Geo. V., c. 23, §49 (1925).

[271] Gilmore v. Jenkins, 129 Iowa 686, 106 N.W. 193 (1906); Hayden v. Burch, 9 Gill (Md.) 46 (1849); Linell's Admr. v. Linell, 21 N.J. Eq. 81 (1870).

[272] In re Rawnsley's Estate, (Cal. App. 1949) 210 P. (2d) 888; In re Hayne's Estate, 165 Cal. 568, 133 P. 277 (1913). In that case the court said at 573: "It is suggested by the respondent that the statutory provisions regarding advancements do not apply, except in cases where the decedent dies wholly intestate. Some of the decisions so declare because the statute under consideration was believed to contain such a limitation. *Kent v. Hopkins*, 86 Hun 611, . . . where the statute began with the words 'If any child of an *intestate*,' is an example. Our code contains no words which imply a similar limitation."

[273] Ohio Code Ann. (Baldwin, 1940) §10503-19.

[274] Dittoes Admr. v. Cluney's Exr., 22 Ohio St. 436 (1872); Wright v. Merchant, 2 Ohio Dec. 742 (1862).

The courts of that state hold that the doctrine is not applicable where the will shows that the testator thought he had disposed of his entire estate.[275]

The Tennessee statute reads: "Absolute equality shall be observed in the division of the estates of deceased persons, except where a will has been made, and its provisions make equality impossible."[276] In construing this statute the courts of that state hold that the doctrine of advancements applies to partial intestacy and that persons claiming a share of the undevised estate must account for advancements.[277]

The Kentucky,[278] Virginia,[279] and West Virginia[280] advancement statutes are, by their very language, applicable where the will does not dispose of all the testator's property. The Kentucky statute requires a devisee to account for the value of the property devised to him before he can share in the part of the estate not disposed of by the testator's will.[281] In Virginia, the courts, in construing the advancement statute, have reached a like result.[282] Since the West Virginia statute is almost identical with the Virginia legislation, the courts of that state will undoubtedly follow the Virginia rule.

2. *Applicability of the Doctrine of Advancements to a Pretermitted Child.* Many states have statutes which provide that a child not named or provided for in his parent's will shall receive a share of the estate as in the case of intestacy, unless such child shall have been provided for by the testator in his lifetime or unless it appears that the omission was intentional, and not occasioned by accident or mistake. A parent may have made advancements to his children and later die testate, leaving as an heir a child not provided for in his will. In *Sanford v. Sanford,*[283] the New York court, without much discussion of the problem, held that such a child could compel the other children to account for advancements. However, in *Gibson v. Johnson,*[284] the Missouri court held that the doctrine of advancements was inapplicable.

[275] Needles v. Needles, 7 Ohio St. 432 (1857).
[276] Tenn. Code Ann. (Michie, 1938) §8402.
[277] Pearce v. Gleaves, 10 Yerg. (Tenn.) 359 (1837).
[278] Ky. Rev. Stat. (1948) §391.140.
[279] Va. Code Ann. (1950) §64.17.
[280] W.Va. Code Ann. (1949) §4094.
[281] Nolan's Exrs. v. Nolan, 220 Ky. 613, 295 S.W. 893 (1927); Stiff's Exr. v. Stiff, 217 Ky. 716, 290 S.W. 718 (1927); Brewer's Admr. v. Brewer, 181 Ky. 400, 205 S.W. 393 (1918); Farley v. Stacey, 177 Ky. 109, 197 S.W. 636 (1917); Gulley v. Lillard's Exr., 145 Ky. 746, 141 S.W. 58 (1911).
[282] Poff v. Poff, 128 Va. 62, 104 S.E. 719 (1920); Payne v. Payne, 128 Va. 33, 104 S.E. 712 (1920).
[283] 61 Barb. (N.Y.) 293 (1872).
[284] 331 Mo. 1198, 56 S.W. (2d) 783 (1932); Wilson v. Miller, (Va. Spec. Ct. App. 1855) 1 Pat. and H. 353. See In re Rawnsley's Estate, (Cal. App. 1949) 210 P. (2d) 888.

The court based its conclusion on the language of the statute which requires a person who has received an advancement to elect to "come into partition with the other parceners." The court pointed out that the title to an estate by coparceny is always by descent; that the persons who had received advancements took title by devise as distinguished from descent, and that the advancement statute did not apply to devisees. The court distinguished *Sanford v. Sanford* on the ground that the language of the New York advancement statute was different.

3. *Applicability of the Doctrine if a Widow Elects to Take Against Her Husband's Will.* Under our laws of descent and distribution, a husband must leave a certain part of his estate to his wife. If he leaves her less than the amount he is required to leave her, she may elect to take against his will as if he died intestate.

In North Carolina, one of the few states in which a widow can compel children to account for advancements, a widow, if she elects to take against her husband's will, can compel her children to account for advancements.[285] That decision seems erroneous in that the supreme court of that state has held in other cases that the doctrine of advancements is not applicable to cases of partial intestacy.[286] In Indiana, a widow cannot compel her children to account for advancements. However, the supreme court of that state in the case of *Banner v. Allen,*[287] by way of dictum, stated that a widow's election to inherit as if her husband died intestate did not entitle her to compel her children to account for advancements. The court pointed out that her husband had not died totally intestate.

The dictum of the Indiana court is preferable to the North Carolina decision. The customary statutory words, "her share is to be ascertained as if the husband died intestate," are not to be used for the purpose of allowing the widow to take advantage of advancements, but are used to indicate that the wife of the testator is entitled to a specified share of his estate. If, by his will, she inherited the amount she would be entitled to as if he died intestate, she could not take advantage of advancements. By analogy, she should not be permitted to take advantage of advancements if she elects to take against his will.

E. *Necessity of a Writing Charging a Gift as an Advancement*

In California, Illinois, Maine, Nevada and Oregon, a child cannot be charged with an advancement in the distribution of his father's

[285] Credle v. Credle, 44 N.C. (1 Busbee L.) 225 (1853).
[286] Jerkins v. Mitchell, 57 N.C. (4 Jones Eq.) 207 (1858).
[287] Banner v. Allen, 25 Ind. 222 (1865).

estate unless it is (1) charged as such in the gift or grant or (2) charged in writing by the intestate or (3) acknowledged in writing as such by the person to whom the gift or grant was made.[288]

In several other states the advancement statutes have a provision which reads substantially as follows: "All gifts and grants shall be deemed to have been made as an advancement if they are expressed in the gift or grant to be so made or if charged in writing by the intestate as an advancement or acknowledged in writing as such by the child or descendant."[289]

The courts, in construing the above statute, uniformly hold that a gift is not an advancement unless charged in writing in one of the ways enumerated in the statute. The basis for this holding is that the legislature, by implication, intended to exclude all other ways of proving advancements.[290]

288 Cal. Probe Code (Deering, 1941) §1050. That section reads as follows: "A gift before death shall be considered as an ademption of a bequest or devise of the property given; but such gift shall not be taken as an advancement to an heir or as an ademption of a general legacy unless such intention is expressed by the testator in the grant or otherwise in writing, or unless the donee acknowledges it in writing to be such." In re Rawnsley's Estate, (Cal. App. 1949) 210 P. (2d) 888; Ill. Stat. Ann. (1947) c. 3, §166; Wallace v. Reddick, 119 Ill. 151, 8 N.E. 801 (1886). In that case an intestate conveyed property to his sons prior to 1872, and died in 1874. In 1872 Illinois passed a statute requiring a writing before a transfer of property shall be an advancement. Since the intestate did not charge the transfers in writing as an advancement, the court ruled that they could not be so considered. The court said at 158: "This whole matter of descent of property is within legislative control. Heirs apparent and prospective distributees, during the ancestor's lifetime, have no vested rights in his estate, nor in the laws of descent. Accordingly, it is held the application of a statute changing the rules of descent of property impairs no vested rights. This statute is not in terms made prospective in its operation. It seems to have been intended to apply to all advancements. . . ." Elliott v. Western Coal and Mining Co., 243 Ill. 614, 90 N.E. 1104 (1910); Young v. Young, 204 Ill. 430, 68 N.E. 532 (1903); Bartmess v. Fuller, 170 Ill. 193, 48 N.E. 452 (1897); Meppen v. Meppen, 392 Ill. 30, 63 N.E. (2d) 755 (1945); Me. Rev. Stat. (1944) c. 156, §4; Porter v. Porter, 51 Me. 376 (1862); Nev. Comp. Laws Ann. (Supp. 1941) §9882.303; Ore. Comp. Laws Ann. (1940) §16-304.

289 Idaho Code Ann. (1932) §14-109; Mass. Gen. Laws (1932) c. 196, §5; Mich. Stat. Ann. (1937) §27.3178 (160); Minn. Stat. Ann. (1946) §525.53; Mont. Rev. Code Ann. (1947) §91.414; Neb. Rev. Stat. (1943) §30-115; N.D. Rev. Code (1943) §30-2114; Okla. Stat. (1941) tit. 84, §225; S.D. Code (1939) §56.0116; Utah Code Ann. (1943) §101-4-20; Wash. Rev. Stat. Ann. (1932) §1351; Wis. Stat. (1947) §318.27.

290 Barton v. Rice, 39 Mass. (22 Pick.) 508 (1839); Bullard v. Bullard, 22 Mass. (5 Pick.) 527 (1827); Bulkeley v. Noble, 19 Mass. (2 Pick.) 337 (1824); Olney v. Brown, 163 Mich. 125, 128 N.W. 241 (1910); Lodge v. Fitch, 72 Neb. 652, 101 N.W. 338 (1904); Baden v. Mier, 71 Neb. 191, 98 N.W. 761 (1904); Courtney v. Daniel, 124 Okla. 46, 253 P. 990 (1927); In re Yates' Estate, 88 Okla. 259, 213 P. 87 (1923); Mowry Admr. v. Smith, 5 R.I. 255 (1858); Petition of Atkinson, 16 R.I. 413, 16 A. 712 (1889); Adams' Heirs v. Adams, 22 Vt. 50 (1849); Newell v. Newell, 13 Vt. 24 (1841); Schmidt v. Schmidt's Estate, 123 Wis. 295, 101 N.W. 678 (1904); Pomeroy v. Pomeroy, 93 Wis. 262, 67 N.W. 430 (1896). Cf. Hornstra v. Avon State Bank, 55 S.D. 513, 226 N.W. 740 (1929). In that case a parent gave one of his children a sum of money. They agreed that if the child did not pay the money it was to be charged as a part of her inheritance. In South Dakota a writing is required to charge a child with an advancement. On the father's

In Georgia, the statute reads: " . . . a memorandum of advancements in the handwriting of the parent or subscribed by him, shall be evidence of the fact of advancement."[291] The Georgia court was called upon to construe this statute in the case of *Bransford v. Crawford.*[292] In that case, oral declarations of an intestate that notes held by him were advancements to his sons were held admissible to prove advancements. The court stated that the legislature did not, by the enactment of the statute, intend to require a writing to prove advancements. The legislative intention was to set forth one way by which advancements may be proved.

In Vermont, an advancement in real estate must be proved in the following ways: (1) where in the gift or grant it is expressed to be an advancement, or (2) where the conveyance is for the recited consideration of love and affection, or (3) where the conveyance is acknowledged as such in writing by the advancee. Before a child may be charged with personal property as an advancement, the proof must show that the property was delivered to the child expressly as an advancement in the presence of two witnesses.[293]

In New Hampshire, real estate given by a parent to a child is not an advancement unless (1) the deed recites that the consideration is love and affection or (2) it is proved to be an advancement by some acknowledgment signed by the party receiving it.[294] Personal property cannot be charged as an advancement unless (1) proved to be such by an acknowledgment in writing, signed by the party receiving it, (2) by some charge or memorandum thereof in writing, made by the deceased or by his order, or (3) unless delivered expressly as an advancement in the presence of two witnesses who are requested to take notice thereof.[295]

In Rhode Island, real estate conveyed by deed or gift is an advancement. Personal property delivered to a child or grandchild may be charged as an advancement only if (1) charged as such in writing by

death intestate the court ruled that the sum could be charged to the son's share of the estate. The court pointed out that the money could not be charged as an advancement, but based its conclusion on the right of retainer doctrine.

[291] Ga. Code Ann. (Parks, 1937) §113-1014.
[292] 51 Ga. 20 (1874).
[293] Vt. Stat. (1947) §3067.
[294] N.H. Rev. Laws (1942) c. 360, §15.
[295] N.H. Rev. Laws (1942) c. 360, §16.

the intestate or his order or (2) delivered expressly for that purpose in the presence of two witnesses who are requested to take notice thereof.[296]

If the statute requires a writing before a gift may be charged as an advancement, the writing need not use that word, for it is sufficient if a reading of the instrument shows that such was the writer's intention.[297] A parent cannot meet the requirements of the statute by making a charge against a child in his regular book of accounts.[298] If the charges against the children are kept in a regular book of accounts but are kept separate and apart from charges against third persons, there is a sufficient compliance with the statute.[299]

Since statutes of the type under discussion require advancements to be proved by written instruments, no material or essential part of the proof can be supplied by parol.[300] If an intestate makes an ambiguous written charge against a child, the acts and declarations of the intestate accompanying the making of the charge may be shown for the purpose of ascertaining his intention.[301]

The writing required by a statute of this type, must be executed contemporaneously with the transfer of the property. A writing made after the transaction cannot be used as proof of an advancement because it is in the nature of hearsay evidence. The courts reach this result partly by analogy to the rule which requires an entry in a book of

[296] R.I. Gen. Laws (1938) c. 567, §23; Mowry Admr. v. Smith, 5 R.I. 255 (1858). In that case an intestate during his lifetime, transferred a real estate mortgage to three of his grandchildren in consideration of love and affection. In Rhode Island a mortgage of real estate is personal property. Held, that this could not be charged as an advancement. The reasons were (1) that it was not charged as such by a memorandum in writing and (2) that the evidence did not show that it was delivered as an advancement in the presence of witnesses who were requested to take notice thereof.

[297] Young v. Young, 204 Ill. 430, 68 N.E. 532 (1903); Bulkeley v. Noble, 19 Mass. (2 Pick.) 337 (1824); In re Yates Estate, 88 Okla. 259, 213 P. 87 (1923); Appeal of Ashley, 21 Mass. (4 Pick.) 21 (1826). Cf. Biglow v. Poole, 76 Mass. (10 Gray) 104 (1857). In that case the intestate's account book contained the following statement on the title page: "Small book referred to in my last will and testament, dated Aug. 2d 1843, showing the moneys I have advanced to my children, severally, and to which I shall give credit to any or each of them, as they may pay me from time to time. . . ." Held, that the charges in the book were intended to be debts and not advancements.

[298] Fellows v. Little, 46 N.H. 27 (1865); Brown v. Brown, 16 Vt. 197 (1844). Cf. Weatherhead v. Field, 26 Vt. 665 (1854).

[299] Young v. Young, 204 Ill. 430, 68 N.E. 532 (1903).

[300] Fellows v. Little, 46 N.H. 27 (1865); Law v. Smith, 2 R.I. 244 (1852); Weatherhead v. Field, 26 Vt. 665 (1854).

[301] Elliott v. Western Coal and Mining Co., 243 Ill. 614, 90 N.E. 1104 (1910); Liesse v. Fontaine, 181 Wis. 407, 195 N.W. 393 (1923); Arthur v. Arthur, 143 Wis. 126, 126 N.W. 550 (1910). Cf. In re Hessler's Estate, 79 Neb. 691, 113 N.W. 147 (1907).

accounts to be made at the time of the transaction, and partly by analogy to the rule that the intent of the advancor at the time of the transfer controls. Relying on these reasons, the courts hold that where an advancement is charged in the manner required by statute, subsequent oral declarations of the intestate are not admissible to prove that an absolute gift was intended.[302]

If a parent charges a child with an advancement as required by statute and subsequently destroys the writing, his act changes the advancement to an absolute gift.[303] Likewise, if the writing making the charge was always in the advancor's possession, and is not found in his papers at his death, the writing is presumed to have been destroyed by him and the child cannot be charged with an advancement.[304]

In *Hartwell v. Rice*,[305] a father charged an advancement to his daughter in the manner required by statute. Subsequently, he executed a will in which he converted the advancement to an absolute gift. Later he revoked the will and died intestate. It was held that the will, since it never took effect, did not extinguish the advancement. The court also pointed out that if the making of the will showed a desire to extinguish the advancement, the cancelling of the will indicated a change of that purpose.

The Massachusetts statute, like several others, provides that a child may be charged with an advancement where it is acknowledged as such by him. In *Fitts v. Morse*,[306] the court of that state was called upon to construe that part of the statute. In that case, the children of an intestate agreed, during his lifetime, that money owed by some of them to him should be treated as advancements in the settlement of his estate. The intestate did not approve of the agreement. It was held that this was not an acknowledgment of an advancement as required by statute.

VII

PRESUMPTIONS

A. *The Majority Rule*

In an earlier part of this monograph, we saw that the intent of the transferor determines whether a conveyance is an advancement or a

[302] Bulkeley v. Noble, 19 Mass. (2 Pick.) 337 (1824); Fellows v. Little, 46 N.H. 27 (1865); Weatherhead v. Field, 26 Vt. 665 (1854).

[303] Marshall v. Coleman, 89 Ill. App. 41 (1899), modified 187 Ill. 556, 58 N.E. 628 (1900).

[304] Ibid.

[305] 67 Mass. (1 Gray) 587 (1854).

[306] 103 Mass. 164 (1869). See also In re Sipchen's Estate, 180 Wis. 504, 193 N.W. 385 (1923).

gift.[307] Often property is transferred by a parent to a child without any outward manifestations of intent on the part of the former. Since the advancement statutes have not created a statutory presumption to enable the courts to determine the intent of the advancor, they have made their own presumption.[308] That presumption is that all substantial voluntary transfers are prima facie advancements.[309]

The basis of the rule is that the natural affection of a parent is as strong for one child as for another. Therefore, in the distribution of his property he will treat all of his children equally and fairly so that all of them will share equally in his estate, not only in what remains at his death, but equally in all that comes from him.[310]

The Supreme Court of Iowa has demonstrated the reason for the rule under discussion by use of the following example. Suppose one child has married and his father gives him eighty acres of land. Later, when the second son also weds, a similar gift is made. However, the father may die before all of his children have received such a gift. Under such circumstances he undoubtedly intended for all of them to share equally. If the conveyances made by him in his lifetime are not charged as advancements, the older children who received the property inherit more than the younger ones. Therefore, by presuming that he intended to charge the children with advancements, a just result is reached.[311]

An analysis of that example shows that the court was merely doing

[307] Supra p. 231.

[308] Johnson v. Belden, 20 Conn. 322 (1850); Packard v. Packard, 95 Kan. 644, 149 P. 404 (1915).

[309] Watt v. Lee, 238 Ala. 451, 191 S. 628 (1939); Dent v. Foy, 206 Ala. 454, 90 S. 317 (1921), 210 Ala. 475, 98 S. 390 (1923); Clements Admr. v. Hood, 57 Ala. 459 (1876); Rumbly v. Stainton, 24 Ala. 712 (1854); Smith's Guardian v. Smith's Admrs., 21 Ala. 761 (1852); Goodwin v. Parnell, 69 Ark. 629, 65 S.W. 427 (1901); Sewell v. Everett, 57 Fla. 529, 49 S. 187 (1910); Neal v. Neal, 153 Ga. 44, 111 S.E. 387 (1922); Howard v. Howard, 101 Ga. 224, 28 S.E. 648 (1897); Wenbert v. Lincoln Nat. Bank and Trust Co., 116 Ind. App. 31, 61 N.E. (2d) 466 (1945); Culp v. Wilson, 133 Ind. 294, 32 N.E. 928 (1893); Ruch Admr. v. Biery, 110 Ind. 444, 11 N.E. 312 (1887); In re Wiese's Estate, 222 Iowa 935, 270 N.W. 380 (1936); Fell v. Bradshaw, 205 Iowa 100, 215 N.W. 595 (1927); In re Sell's Estate, 197 Iowa 696, 197 N.W. 922 (1924); O'Connell v. O'Connell, 73 Iowa 733, 36 N.W. 764 (1887); Burns v. Burns, 87 Kan. 19, 123 P. 720 (1912); Pilkington v. Wheat, 330 Mo. 767, 51 S.W. (2d) 42 (1932); Pitts v. Metzger, 195 Mo. App. 677, 187 S.W. 610 (1916); Ray v. Loper, 65 Mo. 470 (1877); Gordon v. Barkelew, 6 N.J. Eq. (2 Halst.) 94 (1874); Kintz v. Friday, 4 Dem. Sur. (N.Y.) 540 (1886); Thompson v. Smith, 160 N.C. 256, 75 S.E. 1010 (1912); Ex Parte Griffin, 142 N.C. 116, 54 S.E. 1007 (1906); Storey's Appeal, 83 Pa. 89 (1887); Johnson's Admr. v. Patterson, 81 Tenn. (13 Lea) 626 (1884); Morris v. Morris, 56 Tenn. (9 Heisk.) 814 (1872); Poff v. Poff, 128 Va. 62, 104 S.E. 719 (1920); Johnson v. Mundy, 123 Va. 730, 97 S.E. 564 (1918).

[310] Goodwin v. Parnell, 69 Ark. 629, 65 S.W. 427 (1901); Plowman v. Nicholson, 81 Kan. 215, 105 P. 692 (1909).

[311] Bash v. Bash, 182 Iowa 55, 165 N.W. 399 (1917).

what it thought the intestate would have done had he considered the problem. The statute of distributions makes a will for a person who dies intestate. Like the statute of distributions, the courts, in creating the presumption, are doing what they believe the intestate would have done if he had executed a will on the day of his death. The scope and operation of that prima facie presumption is to cast upon the party against whom it operates, the duty of introducing sufficient evidence to rebut it. However, the authors of the *Model Probate Code* take a different view of the problem. They have reversed the presumption so that "every gratuitous inter vivos transfer is deemed to be an absolute gift and not an advancement unless shown to be an advancement."[312] Their view is shared by the Texas court and by the Connecticut court where the transfer is of personal property.

B. *The Texas Rule*

Since Texas is a community property state, the writer was inclined to believe that its courts would hold that a transfer by a parent to a child would, on the former's death, be presumed to be an advancement. However, the courts of that state hold that the presumption is one of absolute gift. They merely place the burden of proof on the party alleging that a voluntary transfer is an advancement. The theory of those decisions is that if the parent intended his children to share equally in his separate estate, he would attach conditions to the gift so it would be an advancement, or that failing so to provide, he certainly would have taken care of the matter by will. Therefore, if he elects not to follow either of the above methods, the only reasonable assumption is that he did not intend for his children to share equally in his estate at his death.[313] The Texas decisions do not require that

[312] SIMES AND BASYE, PROBLEMS IN PROBATE LAW 65-68 (1946).

[313] Andrews v. Brown, (Tex. Civ. App. 1926) 283 S.W. 288, affd. (Tex. Civ. App. 1928) 10 S.W. (2d) 707; Rutherford v. Deaver, (Tex. Comm. App. 1921) 235 S.W. 853, reversing Rutherford v. Deaver, (Tex. Civ. App. 1920) 218 S.W. 31. In that case the court of appeals held that a deed from a parent to a child in consideration of love and affection is on the former's death deemed an advancement. The court did not rely on other Texas advancement decisions, but on a quotation from *Corpus Juris* and the Texas cases of Landrum v. Landrum, 62 Tex. Civ. App. 43, 130 S.W. 907 (1910), and Lott v. Kaiser, 61 Tex. 665 (1884). Those cases did not involve the doctrine in its technical sense. In both cases the question to be determined was whether the purchase of property by a parent in his child's name was a resulting trust. On appeal, the Court of Commission Appeals reversed because the decision of the court was not in accord with Texas law. Smart v. Panther, 42 Tex. Civ. App. 262, 95 S.W. 679 (1906); Sparks v. Spence, 40 Tex. 694 (1874). In that case the court held that property conveyed by a father to a child after the death of the former's wife is presumed to be an advancement. That decision is based on the Texas law of community property.

the advancement be expressed in writing before it can be charged as such but merely place the burden of proof on the party claiming that a gift from a parent to a child is an advancement.[314]

C. *The Connecticut Rule*

In Connecticut, the relationship of parent and child is not sufficient to give rise to the presumption that the delivery of a chattel or money by the one to the other is an advancement. The court feels that a parent may be liberal with a child without placing him under future accountability to his estate and that he may discriminate in his favor if he chooses. If he intended to charge the personal property as an advancement, he must evidence that intention by some method beyond the unexplained act of delivering the property to the child. If the intestate explicitly declares that a voluntary inter vivos transfer of personal property is an advancement, the Connecticut court would hold that the child must account for it.[315] In that state, a gift of real estate by a parent to a child is prima facie an advancement.[316]

D. *The Kentucky and South Carolina Rule*

In Kentucky, by statute, and in South Carolina, by judicial decision, the intent of the advancor is disregarded and all substantial gifts are advancements.[317] In both jurisdictions, the person claiming that a child has received an advancement has the burden of proving that the transfer was a gift rather than a loan, debt or resulting trust. If he proves that the transfer was a gift, the courts hold that it is an advance-

[314] Andrews v. Brown, supra note 313. Cf. Lindley v. Lindley, (Tex. Civ. App. 1915) 178 S.W. 782. In that case a father deeded land to his daughter. The deed recited a consideration of $1000 which was to be credited against her share of the estate. Held, that she should be charged with the sum of $1000 as an advancement.

[315] Johnson v. Belden, 20 Conn. 322 (1850); Kemp v. Turman, 104 Miss. 501, 61 S. 548 (1913). In that case the Supreme Court of Mississippi said that a gift of personal property, unless it is money to be used to purchase real estate, is prima facie a gift. That statement was dictum because the court held that the evidence was sufficient to rebut the presumption of advancement. The court based this dictum on its inability to find a case holding that such a transfer was prima facie an advancement. However, in Whitfield v. Whitfield, 40 Miss. 352 (1856), the court had held that a voluntary inter vivos transfer of personal property was an advancement. In view of that decision the Mississippi court in all probability will not follow the dictum of Kemp v. Turman, supra this note.

[316] Hatch v. Straight, 3 Conn. 31 (1819).

[317] Supra pp. 234, 236. That rule is subject to an exception in both jurisdictions. Ky. Rev. Stat. (1948) §391.140 reads in part as follows: "The maintaining, or educating or giving of money, to a child or grandchild, without any view toward a portion or settlement in life, shall not be deemed an advancement." In White v. Moore, 23 S.C. 456 (1885), the Supreme Court of South Carolina held that money expended for a medical education was not an advancement.

ment.[318] For instance, in *White v. Moore,*[319] a parent loaned his son money and took a note for the amount due. On the father's death intestate, because the note was barred by limitations, the other children claimed that the amount loaned was an advancement. The court ruled that the children claiming that the transaction was an advancement had the burden of proof.

In *Farmer's Exchange Bank of Millersburg v. Moffett,*[320] a parent loaned his son money and took a note for the amount due. On the father's death, a creditor attached the son's interest in the estate and the son claimed that he had agreed with his father that the note should be treated as an advancement.[321] The court held that the burden of proving that the transfer was an advancement was on the son.

E. *The Louisiana Rule*

Louisiana follows the civil law doctrine of collation. Under that doctrine, collation must take place if the advancor has formally ordered it, or if he has remained silent on the subject.[322] When the advancor formally expresses his will that what he gave the advancee was intended as an advantage or extra part, collation does not take place, unless the value of the article given exceeds the disposable portion, in which case the excess must be accounted for.[323]

The declaration that the gift or legacy is made as an extra portion may be made (1) in the instrument making the disposition or (2) afterwards by an instrument executed before a notary public and two witnesses [324] or by the advancor's will.[325]

VIII

TRANSFERS OF PROPERTY GIVING RISE TO THE PRESUMPTION OF ADVANCEMENT

In a leading English case, Sir G. Jessel said that ". . . nothing could be more productive of misery in families than . . . to hold that

318 Proctor v. Proctor, 282 Ky. 20, 137 S.W. (2d) 354 (1940); Farmer's Exchange Bank of Millersburg v. Moffett, 256 Ky. 160, 75 S.W. (2d) 1063 (1934); White v. Moore, 23 S.C. 456 (1885).

319 23 S.C. 456 (1885).

320 256 Ky. 160, 75 S.W. (2d) 1063 (1934).

321 In that case it was to the son's advantage if the transaction were an advancement. Otherwise, he would owe the estate nine hundred dollars. The case was reversed because the son was permitted to testify in violation of the Kentucky Dead Man's Statute.

322 La. Civ. Code Ann. (1945) art. 1230.

323 Id., §1231.

324 Id., §1232.

325 Id., §1233; Darby v. Darby, 118 La. 328, 42 S. 953 (1907).

every member of the family must account strictly for every sum received from a parent."[326] Accordingly, the courts hold that all voluntary inter vivos transfers are not necessarily advancements. In determining whether a transaction is an advancement, the courts consider many factors. At this point, it is advisable to consider the various types of transfers giving rise to the presumption.

A. *Money or Property Given to a Child to Start Him in Business*

If a parent gives a child money for the purpose of establishing or enlarging a business, the courts hold that the money is given for the purpose of establishing the child in life and is therefore presumed to be an advancement.[327]

A gift of property of little value may be charged as an advancement if given for establishing a child in life. For instance, in *Ison v. Ison,*[328] a parent transferred a stallion to his son to be used to beget foals. When the father died intestate the other heirs sought to charge this as an advancement. The purported advancee claimed that this was a mere present, so trifling in nature that it should not be charged as a part portion. The court held that the value of the stallion, since it was bestowed on the child with a view toward settlement in life, should be charged to him on the distribution of his father's estate.

However, a gift of substantial value given to establish a child in business is not necessarily an advancement. In *Dent v. Foy,* [329] a very wealthy parent made several voluntary inter vivos transfers to all of his children, some of which were given to establish the child in business. The court held that the sums so received were not advancements because they were not intended as such by the intestate. From this example we see that the intent of the advancor or donor governs, even though the property was given to establish the children in business, and if he intended an absolute gift, the courts will follow his wishes. Of course, in those jurisdictions where the intent of the advancor is regarded as immaterial, all voluntary inter vivos transfers of money or property given to establish a child in life are advancements.

[326] Taylor v. Taylor, L.R. 20 Eq. 155 at 158 (1875).

[327] Mitchell's Distributees v. Mitchell's Admr., 8 Ala. 414 (1845); Page v. Elwell, 81 Colo. 73, 253 P. 1059 (1927); McDonald v. McDonald, 86 Mo. App. 122 (1900); Shiver v. Brock, 55 N.C. (2 Jones Eq.) 137 (1855); Ison v. Ison, 5 Rich Eq. (S.C.) 15 (1852).

[328] 5 Rich Eq. (S.C.) 15 (1852). Cf. Shiver v. Brock, 55 N.C. (2 Jones Eq.) 137 (1855). In that case a horse, some cows and hogs, a bed, some chairs, a table, some broomcorn and lard amounting in value to $299 given by a parent to a daughter, was held chargeable as an advancement.

[329] 206 Ala. 454, 90 S. 317 (1921), 210 Ala. 475, 98 S. 390 (1923).

B. *Marriage Portion*

On a daughter's marriage, her father may give her a wedding present. Usually such gifts are substantial and the other children, on the parent's death intestate, seek to charge the property so given as an advancement. The courts view such a transfer as being made for the purpose of establishing her in life and hold that it should be charged to her as an advancement.[330] However, the presumption is rebuttable, and if the parent intended to make an absolute gift, his wishes will be followed.[331] In those jurisdictions where the intent of the advancor is regarded as immaterial, all substantial voluntary inter vivos transfers by a father to a daughter on the latter's marriage are advancements.

C. *Property of Trifling Value*

Should a child be charged with an advancement where the property transferred by the parent to him is of small or trifling value? The answer to this question must be in the negative.[332] The reason that a mere trifling sum is not sufficient to give rise to the presumption of advancement is that the inconsequence of the matter on its face rebuts the presumption.[333] However, whether or not a trifling present or gift is to be charged as an advancement depends largely on circumstances. For instance, a horse and rig, given by a parent to a child for the latter's pleasure, has been held not to be an advancement.[334] However, in another case, a stallion given by a parent to a child for the purpose of agriculture has been held to be an advancement.[335]

330 Wenbert v. Lincoln Nat. Bank and Trust Co., 116 Ind. App. 31, 61 N.E. (2d) 466 (1945). In that case an intestate gave his daughter common stock as a wedding present. Held, that the gift was an advancement. Hollister Admr. v. Attmore, 58 N.C. (5 Jones Eq.) 373 (1860). In that case household furniture given a daughter as a wedding present was charged as an advancement. Carter's Exr. v. Rutland, 2 N.C. (1 Hayw.) 97 (1794). In that case the court said: "When a man sends property with his daughter upon her marriage, or to his son-in-law and daughter any short time after the marriage, it is to be presumed *prima facie,* that the property is given absolutely in advancement to his daughter. . . ." Cf. Johnson v. Belden, 20 Conn. 322 (1850). In that case the court held that household property valued at more than $500 given by a father to his daughter was not an advancement. The decision was based on the Connecticut rule that gifts of personal property are never prima facie advancements.

331 King's Estate, 6 Whart. (Pa.) 370 (1841). In that case a very wealthy father gave his daughter furniture worth $1132 as a wedding present. Held, that the wealth of the father showed that he did not intend to make an advancement.

332 Griggs v. Love, 13 Ky. L. Rep. 175 (1891). In that case a diamond ring given by a parent to a child was held to be a gift. Meadows v. Meadows, 33 N.C. (11 Ired.) 148 (1850); M'Caw v. Blewit, 2 McCord Eq. (S.C.) 90 (1827); Mitchell's Distributees v. Mitchell, 8 Ala. 414 (1845); McDonald v. McDonald, 86 Mo. App. 122 (1900).

333 McDonald v. McDonald, 86 Mo. App. 122 (1900).

334 M'Caw v. Blewit, 2 McCord Eq. (S.C.) 90 (1827).

335 McDonald v. McDonald, supra note 333; Ison v. Ison, 5 Rich. Eq. (S.C.) 15 (1852); M'Caw v. Blewit, supra note 334.

The distinction in the cases is that one was given for the mere gratification of the child, whereas the other was given for the purpose of establishing the child in life.

In determining whether a small gift should be charged as an advancement the wealth of the parent must also be considered. The gift of a horse or a cow by an opulent person is not as persuasive evidence of an advancement as if he were poor.[336]

In South Carolina and Kentucky, where the intent of the advancor is immaterial, a gift of small or trifling value is not considered an advancement.[337]

D. *When a Parent Sells Property to a Child*

A child may approach his father and ask him to sell certain property to him. If the parties agree on a price that is fair and adequate and the amount agreed on is actually paid, the transaction is a sale. Therefore, on the parent's death intestate, the value of the property cannot be charged to the child as an advancement.[338] Many times the problem is not that easy to solve. For instance, the agreed price may be less than the actual value of the property or the deed may recite consideration that has not, in fact, been paid. In both of these situations, if the parent dies intestate, the doctrine of advancements plays a very important role.

1. *When the Consideration Paid Is Not Equal to the Value of the Property Conveyed.* Often a parent conveys real estate to a child for love and affection and a nominal consideration, i.e., one to twenty-five dollars. Under such circumstances, courts are not warranted in finding that the transfer was a sale and accordingly the presumption is one of advancement.[339]

If a parent conveys property worth $5000 to a child for a consideration of $2000, should the difference in value be charged to the child as an advancement? The vast majority of cases hold that it should be charged as such because to hold otherwise would defeat the

[336] McDonald v. McDonald, supra note 333; M'Caw v. Blewit, supra note 334.

[337] Griggs v. Lane, supra note 332.

[338] Holland v. Bonner, 142 Ark. 214, 218 S.W. 665 (1920); Stauffer v. Martin, 43 Ind. App. 675, 88 N.E. 363 (1909); Ex parte Barefoot, 201 N.C. 393, 160 S.E. 365 (1931); Nobles v. Davenport, 183 N.C. 207, 111 S.E. 180 (1922); Kiger v. Terry, 119 N.C. 456, 26 S.E. 38 (1896); Osborne v. Richmond, 131 Va. 261, 108 S.E. 560 (1921); Edwards v. Freeman, 2 P. Wms. 436, 24 Eng. Rep. 803 (1727). In that case the court said at 808: ". . . if the child had been a purchaser, or creditor of the father, it could not be intended, that what was the child's purchase or debt should be brought into hotchpot."

[339] Parks v. Parks, 19 Md. 323 (1863). In that case the consideration was love and affection and $25. See Harrelson v. Gooden, 229 N.C. 654, 50 S.E. (2d) 901 (1948).

very equality in the distribution of a parent's estate among his children that the statute is designed to protect.[340] However, where the consideration paid is nearly equal in value to the property conveyed, the courts hold the transaction to be a sale.[341]

In Tennessee, the court holds that a sale by a father to a son is not an advancement in part merely because the consideration is inadequate.[342] The reason for those decisions is that a court will not weigh in "golden scales" the dealings between parent and child or declare what both parties intended as a sale to be an advancement upon proof merely of inadequacy of consideration.[343]

2. *When a Deed Recites a Consideration That Has Not Been Paid.* Often a parent, in deeding property to a child, instructs the person drawing the deed to insert a specified sum as the consideration paid. The parties do not intend for the sum to be paid and it is not paid. On the parent's death intestate, the other children, seeking to show advancements, may have to prove that the recited consideration was not paid. If the deed is in consideration of love and affection and a nominal consideration, no difficulty is presented, the presumption being one of advancement.[344] However, if the consideration recited is substantial, the child receiving the property will claim that to permit a showing that it was not in fact paid is violative of the parol evidence rule.

In all states but Vermont,[345] the courts hold that to permit a showing that the consideration was not paid for the purpose of proving an

[340] Mossestad v. Gunderson, 140 Iowa 290, 118 N.W. 374 (1908); Gossage v. Gossage's Admr., 281 Ky. 575, 136 S.W. (2d) 775 (1940); Powell's Heirs v. Powell's Heirs, 35 Ky. (5 Dana) 168 (1837); Stewart v. State, 2 Har. and G. (Md.) 114 (1828). In that case the court pointed out that there is no presumption that the price paid for the property was inadequate. Mumford v. Mumford, (Mo. App. 1917) 194 S.W. 898; Ex parte Barefoot, 201 N.C. 393, 160 S.E. 365 (1931); In re O'Hara's Estate, 204 Iowa 1331, 217 N.W. 245 (1928). In that case the consideration for the conveyance was $12,000 and the child's agreement to support his father for life. The father died very shortly thereafter. Held, that the transaction was a sale.

[341] Kiger v. Terry, 119 N.C. 456, 26 S.E. 38 (1896).

[342] Merriman Admr. v. Lacefield, 51 Tenn. (4 Heisk.) 209 (1871).

[343] Ibid.

[344] Hatch v. Straight, 3 Conn. 31 (1819); Parks v. Parks, 19 Md. 323 (1863); Scott v. Scott, 1 Mass. 527 (1805); Ex parte Griffin, 142 N.C. 116, 54 S.E. 1007 (1906); Sayles v. Baker, 5 R.I. 457 (1858). In that case the court held that a conveyance for love and affection was conclusively an advancement. The court pointed out that if the recited consideration is love and affection and a nominal sum the presumption is one of advancement.

[345] Adams v. Adams, 22 Vt. 50 (1849). Also in accord with this case is the Missouri case of Yates v. Burt, 161 Mo. App. 267, 143 S.W. 73 (1912). That case was overruled by implication in the following Missouri cases: Pilkington v. Wheat, 330 Mo. 767, 51 S.W. (2d) 610 (1916); Gobel v. Kitchen, 217 Mo. App. 354, 266 S.W. 992 (1924); Lynch v. Culver, 260 Mo. 495, 168 S.W. 1138 (1914).

advancement does not violate the parol evidence rule.[346] The reason for such holdings is that the heirs seeking to charge the transfer as an advancement are not seeking to impeach or defeat the title transferred by the conveyance, but merely to prove that an advancement was intended.

The recital of consideration places the burden of proving that an advancement was intended on the party alleging such to be the case.[350] If the grantee in the deed admits that the consideration was not paid, the presumption is one of advancement.[351]

Earlier in this monograph we saw that in some states a transfer of property cannot be charged as an advancement unless evidenced by a writing. In those jurisdictions, proof that the consideration was not paid does not aid the party claiming advancement because there is no writing charging the transfer as such.[352]

E. *When a Parent Purchases Property in the Name of a Child*

When a person pays the purchase money for real property, but takes title in the name of a stranger, the courts hold that the party taking the legal title holds it in trust for the one who paid the purchase price.[353] However, where a parent purchases real estate and takes title in the name of a child, the transaction is presumed to be an advancement or gift rather than a resulting trust.[354] The basis of the rule is that the parent makes the conveyance in consideration of some legal or moral obligation to his family.[355]

Most cases on this point do not involve the doctrine of advancements. In these cases a parent purchased the property in a child's name and, after a dispute with the latter, sought to recover the prop-

[346] Meeker v. Meeker, 16 Conn. 383 (1844); Finch v. Garrett, 102 Iowa 381, 71 N.W. 429 (1897); Burton v. Baldwin, 61 Iowa 283, 16 N.W. 110 (1883); McCray v. Corn, 168 Ky. 457, 182 S.W. 640 (1916); Crafton v. Inge, 124 Ky. 89, 98 S.W. 325 (1906); Gordon's Heirs v. Gordon, 58 Ky. (1 Metc.) 285 (1858); Parks v. Parks, 19 Md. 323 (1863); Pilkington v. Wheat, supra note 345; Gobel v. Kitchen, supra note 345; Lynch v. Culver, supra note 345; Speer v. Speer, 14 N.J. Eq. 240 (1862); Bruce v. Slemp, 82 Va. 352, 4 S.E. 692 (1886).

[347-349] omitted.—Ed.

[350] Day v. Grubbs, 235 Ky. 741, 32 S.W. (2d) 327 (1930); Pilkington v. Wheat, supra note 345.

[351] Lynch v. Culver, supra note 345; Gobel v. Kitchen, supra note 345.

[352] Supra pp. 244-248.

[353] McCafferty v. Flinn, 14 Del. Ch. 307, 125 A. 675 (1924); Hall v. Hall, 107 Mo. 101, 17 S.W. 811 (1891).

[354] Bogy v. Roberts, 48 Ark. 17, 2 S.W. 186 (1886); Robinson v. Robinson, 45 Ark. 481 (1885); Brown v. Burke, 22 Ga. 574 (1857); Hall v. Hall, supra note 353; Page v. Page, 8 N.H. 187 (1836); Mott v. Iossa, 119 N.J. Eq. 185, 181 A. 689 (1935); Landrum v. Landrum, 62 Tex. Civ. App. 43, 130 S.W. 907 (1910).

[355] McCafferty v. Flinn, supra note 353; Hall v. Hall, supra note 353.

erty on the theory that a resulting trust was intended.[356] The courts are very reluctant to permit a parent to recover in such a case. For that reason they hold that a resulting trust must be established by strong, unequivocal and convincing evidence.[357]

These cases are of some value in determining whether the purchase of property in the name of a child is an advancement. If the parent cannot recover the property and later dies intestate, the courts are called upon to determine whether the transaction is an advancement or gift. Under such circumstances they hold that the presumption is one of advancement.[358]

The property purchased in the child's name may constitute a large portion of the parent's estate. For that reason, other heirs will claim that the transfer was a resulting trust. In the jurisdictions that have been called upon to pass on this problem, the courts hold that the presumption is one of advancement.[359]

[356] Stacy v. Stacy, 175 Ark. 763, 300 S.W. 437 (1927); Bogy v. Roberts, supra note 354; Cotton v. Citizen's Bank, 97 Ark. 568, 135 S.W. 340 (1911); Robinson v. Robinson, supra note 354; Faylor v. Faylor, 136 Cal. 92, 68 P. 482 (1902); McCafferty v. Flinn, supra note 353; Mott v. Iossa, supra note 354; Hall v. Hall, supra note 353; Page v. Page, supra note 354; Creed v. Lancaster Bank, 1 Ohio St. 1 (1852); Dudley v. Bosworth, 29 Tenn. (10 Humph.) 9 (1848); Thompson's Heirs v. Thompson's Devisees, 9 Tenn. (1 Yerg.) 97 (1826); Hamilton v. Bradley, 6 Tenn. (5 Hayw.) 127 (1818).

[357] Bogy v. Roberts, 48 Ark. 17, 2 S.W. 186 (1886); Brown v. Burke, 22 Ga. 574 (1857); Brennaman v. Schell, 212 Ill. 356, 72 N.E. 412 (1904); Bay v. Cook, 31 Ill. 336 (1863). In that case a creditor claimed that a transfer by a parent to a son was a resulting trust. The court found that the conveyance was made to avoid a prospective liability and held that a resulting trust was created. Taylor v. Taylor, 9 Ill. (4 Gilman) 303 (1847); Culp v. Price, 107 Iowa 133, 77 N.W. 848 (1899); Hunnell v. Zinn, (Mo. Supp. 1916) 184 S.W. 1154. In that case the court held that the fact that the parent received part of the rents and was consulted as to the making of improvements was not sufficient to rebut the presumption of advancement. Jackson v. Matsdorf, 11 Johns. (N.Y.) 91 (1814); Catoe v. Catoe, 32 S.C. 595, 10 S.E. 1078 (1890); Dudley v. Bosworth, 29 Tenn. (10 Humph.) 9 (1848). Cases holding that the evidence was insufficient to rebut the presumption of advancement: Bogy v. Roberts, supra this note. In that case a parent purchased property in the name of a child. The parent took possession, made improvements and received the rents and profits. Held, that this evidence was not sufficient to rebut the presumption of advancement. Eastham v. Powell, 51 Ark. 530, 11 S.W. 823 (1889); McCafferty v. Flinn, 14 Del. Ch. 307, 125 A. 675 (1924); Mott v. Iossa, 119 N.J. Eq. 185, 181 A. 689 (1935). In that case a stepfather purchased real estate in the name of a stepson. Subsequently, he discovered that his marriage to the child's mother was void. Held, that this evidence was insufficient to show that a resulting trust was intended. Astreen v. Flanagan, 3 Ed. Ch. (N.Y.) 279 (1839).

[358] Taylor v. Taylor, 9 Ill. (4 Gilman) 303 (1847); Scott v. Harris, 127 Ind. 520, 27 N.E. 150 (1891); Barth v. Severson, 191 Iowa 770, 183 N.W. 617 (1921); Ellis v. Newell, 120 Iowa 71, 94 N.W. 463 (1910); Hunnell v. Zinn, (Mo. Supp. 1916) 184 S.W. 1154.

[359] Barth v. Severson, supra note 358; Hunnell v. Zinn, supra note 358.

F. *When a Child Purchases Property In His Name with His Parent's Money*

Suppose a parent gives a child money to purchase real estate with the understanding that title is to be taken in the parent's name. If the child, in violation of this agreement, takes title to the property in his own name, the other heirs, on the parent's death, may claim the transaction was a resulting trust rather than an advancement. The only cases involving this problem are not advancement cases. In those cases the parent discovered what had taken place and sued the child to establish a resulting trust. In these cases, the court held that the child holds the property as trustee for his father.[360] If the parent discovers that the child has purchased the property in his own name and if he does not object, the courts hold that he intended to make a gift to the child and on his death intestate, the value of the property is deemed an advancement to the child.[361] If the parent did not discover the facts prior to his death, the courts would undoubtedly hold that the property was held by the child as trustee for his parent.

G. *When a Parent Pays a Note He Has Signed as Surety for a Child*

Many times an adult person borrows money and in doing so he is required to have a surety on his note. If a parent is financially acceptable he often signs as surety and, on his son's default, is compelled to pay the debt. If he dies intestate and does not collect the money so paid, the other children may seek to charge the amount he paid to discharge his suretyship obligation as an advancement. At the same time, the child receiving the money may want it treated as a debt because the indebtedness is barred by limitations. The authorities are divided. Some courts treat the transaction as one where the father has voluntarily paid the debt of the son and presume that it is an advancement.[362] Other courts have recognized the fallacy of this

[360] Moore v. Scruggs, 131 Iowa 692, 109 N.W. 205 (1906); Peer v. Peer, 11 N.J. Eq. (3 Stockton) 432 (1857).

[361] Douglass v. Brice, 4 Rich Eq. (S.C.) 322 (1852); Gregory v. Winston's Admr., 23 Grat. (Va.) 102 (1873).

[362] Wood v. Knotts, 196 Iowa 544, 194 N.W. 953 (1923); Reynolds Admrs. v. Reynolds, 92 Ky. 556, 18 S.W. 517 (1892); Haglar v. McCombs, 66 N.C. 345 (1872); Huffman v. Ramey, 157 Tenn. 183, 15 S.W. (2d) 746 (1928); Steele Admr. v. Friarson, 85 Tenn. 430, 3 S.W. 649 (1887); Johnson v. Hoyle, 40 Tenn. 56 (1859).

line of reasoning and hold that it is a debt.[363] The theory of these decisions is that the parent, in his lifetime, did not give up the right to sue the child for indemnity and that the debt, therefore, never became an advancement.[364] If the father, at the time of payment, indicates that he intends to treat the transaction as an advancement, the courts respect that desire.[365] But if he attempts to change the transaction from a debt to an advancement at a later date in order to prevent his claim from being barred by limitations, the courts refuse to follow his intention unless he expressed that desire in the presence of the child and the latter did not object to the change.[366]

The cases adhering to the view that if a father as surety pays a debt of a son, the transaction is an advancement, are, in the opinion of the writer, unsound. It is obvious that the requirement of a gift is not present since the father could sue the son at once on the theory of indemnity. Until he relinquishes that right, the transaction should be treated as a debt.

H. *When a Parent Takes a Note or Security for Money Paid a Child*

A child may ask his parent for a substantial sum of money and give him a note or mortgage or both. On the parent's death intestate, the other heirs, if the note or mortgage is barred by limitations, will claim that the transaction is an advancement. The child, in order to save interest, may claim that it was a part portion or he may, if the parent died testate, claim that an advancement was intended. The courts hold that the presumption is one of debt.[367] In the event of litigation, one of the parties always contends that parol evidence is not admissible to prove that the transaction was an advancement.[368] However, the rule is well settled that parol evidence is admissible to prove

[363] In re Hutman's Estate, 30 Pittsbg. (Pa.) Leg. J. 385 (1883); In re Buchanan's Estate, 2 Chest. Co. (Pa.) Rep. 74 (1883); Levering v. Rittenhouse, 4 Whart. (Pa.) 130 (1839).

[364] Note 360 supra.

[365] Treadwell v. Everett, 185 Ga. 454, 195 S.E. 762 (1938); In re Buchanan's Estate, supra note 363; McDearman v. Hodnett, 83 Va. 281, 2 S.E. 643 (1887). Cf. Wood v. Knotts, 196 Iowa 544, 194 N.W. 953 (1923).

[366] Note 363 supra.

[367] Haines v. Christie, 28 Colo. 502, 66 P. 883 (1901); Barron v. Barron, 181 Ga. 505, 182 S.E. 851 (1935); Russell v. Smith, 115 Iowa 261, 88 N.W. 361 (1901); Guarantee Title and Trust Co. v. Siedhoff, 144 Kan. 13, 58 P. (2d) 66 (1936); Bowman's Admrs. v. Bowman's Exr., 301 Ky. 694, 192 S.W. (2d) 955 (1946); Sprague v. Moore, 130 Mich. 92, 89 N.W. 712 (1902); Overholser v. Wright, 17 Ohio St. 157 (1866); In re Morris' Estate, 356 Pa. 497, 52 A. (2d) 172 (1947); In re Jones' Estate, 29 Pittsb. (Pa.) Leg. Jr. 89 (1881); High's Appeal, 21 Pa. (9 Harris) 283 (1853); House v. Woodard, 45 Tenn. (5 Cold.) 196 (1867); Vaden Admr. v. Hance, 38 Tenn. (1 Head) 300 (1858).

[368] Grey's Heirs v. Grey's Admrs., 22 Ala. 233 (1853); Cutliff v. Boyd, 72 Ga. 302 (1884); Sadler v. Huffhines, 11 Ky. L. Rep. 670, 12 S.W. 715 (1889).

that an advancement was intended.[369] Before the court will hold that an advancement was intended, the evidence must be clear and convincing.[370]

In jurisdictions which require all advancements to be evidenced by a charge in writing, parol evidence is not admissible to show that a note or mortgage is an advancement.[371]

I. *When a Parent Refers to the Transaction as a Gift*

A parent may give property to a child and refer to it as a gift. In *Rowe v. Rowe,*[372] a son stated that his parent, at the time he transferred property to him, said that it was given "without strings tied to it" and the gift was made to relieve the father of taxes as he wanted the son "to enjoy the property in his lifetime." The son claimed that the father's declarations were sufficient to rebut the presumption of advancement. The court held that the language was as consistent with an advancement as with a gift and that therefore the language was not sufficient to rebut the presumption of advancement. All other cases are in accord with that decision.[373]

A child may accept a gift when he would refuse an advancement. If the parent refers to the transaction as a gift he probably intended it as such. If he intended an advancement he would have used appropriate language. People who are not trained in law do not know the technical legal meaning of these words. To charge them with the legal meaning of the words might run counter to their intention. Although, from a technical point of view, the decisions of the courts may be correct, logical public policy dictates that the rule should be different. To a layman a gift is not an advancement and an advancement is not a gift. Therefore, if the parent calls the transaction a gift and the child accepts it as such, he should not be charged with an advancement.

[369] Buscher v. Knapp, 107 Ind. 340, 8 N.E. 263 (1886); Stovall v. Stovall's Admr., 14 Ky. L. Rep. 668 (1893); Comer v. Grazens, 14 Ky. L. Rep. 668 (1893). Cf. Porter v. Porter, 51 Me. 376 (1862).

[370] Fennell v. Henry, 70 Ala. 484 (1881); Hindshaw v. Security Trust Co., 48 Ind. App. 351, 93 N.E. 567 (1911); Willetts v. Willetts, 19 Ind. 22 (1862); Harley v. Harley, 57 Md. 340 (1882); Sadler v. Huffhines, 11 Ky. L. Rep. 670, 12 S.W. 715 (1889); Doty v. Doty, 155 Pa. St. 285, 26 A. 548 (1893); Merkel's Appeal, 89 Pa. 340 (1879); Jennings v. Jennings, 49 Tenn. (2 Heisk.) 283 (1871).

[371] Meppen v. Meppen, 392 Ill. 30, 63 N.E. (2d) 755 (1946); Porter v. Porter, 51 Me. 376 (1862); Lodge v. Fitch, 72 Neb. 652, 101 N.W. 338 (1904); Schmidt v. Schmidt's Estate, 123 Wis. 295, 101 N.W. 678 (1904).

[372] 144 Va. 816, 130 S.E. 771 (1925).

[373] In re Sell's Estate, 197 Iowa 696, 197 N.W. 922 (1924); Lynch v. Culver, 260 Mo. 495, 168 S.W. 1138 (1914); Dutch's Appeal, 57 Pa. (7 P. F. Smith) 461 (1868). See Laman v. Craig, 30 Tenn. App. 353, 206 S.W. (2d) 309 (1947).

J. *When a Father-in-Law Transfers Property to a Son-in-Law*

A father-in-law may give money to, or pay bills owed by, a son-in-law. On his death, the question may arise as to whether amounts so paid should be charged as advancements to his daughter. Three possibilities must be considered in solving this problem: (1) the advancor tells his son-in-law that the gift is intended as an advancement in his daughter's presence; (2) the father-in-law states it is an advancement and his daughter is not present; and (3) at the time of the transaction nothing is said about it being charged as an advancement.

The first possibility presents no difficulty since the transaction took place in the daughter's presence. She is deemed to have consented to having it charged to her as an advancement.[374] The second and third possibilities, however, present a more complicated problem. Prior to the enactment of the married women's act, the courts held that a gift of personalty was an advancement but a gift of realty was not.[375] The North Carolina court, in *Banks v. Shannonhouse*,[376] expressed the reasons for the rule in the following quotation:

> "In our opinion there is a very essential difference. If personal property be given to a wife, it instantly, *jure mariti*, belongs to the husband; so it is immaterial whether the gift be made to the wife or to the husband. But if land be given to the wife it remains hers, and the husband can only become entitled to a life estate as tenant by the curtesy; whereas, if it be conveyed to the husband, the wife takes nothing, save a collateral right to have dower in case she survives; so it cannot be said in any sense that she has received of her father any land by way of advancement."

However, after enactment of the statute permitting married women to own and dispose of their property, the courts changed the rule and held that a voluntary inter vivos transfer of property, whether it is real or personal property or both, by a father-in-law to a son-in-law is an advancement to the daughter even though she was not present at the time of the transaction and the father-in-law did not state it was an advancement.[377]

[374] Dicta, Rains v. Hays, 74 Tenn. (6 Lea) 303 (1880).

[375] Hagler v. McCombs, 66 N.C. 345 (1872); Banks v. Shannonhouse, 61 N.C. 284 (1867); Dixon v. Coward, 57 N.C. (4 Jones Eq.) 354 (1859); Harrington Admr. v. Moore, 48 N.C. (3 Jones L.) 56 (1855). Cf. Hinton v. Hinton, 21 N.C. (1 Dev. and B. Eq.) 587 (1837).

[376] 671 N.C. 284 at 287 (1867).

[377] Rumbly v. Stainton, 24 Ala. 712 (1854); Burnett v. Branch Bank of Mobile, 22 Ala. 642 (1853); Wilson's Heirs v. Wilson's Admr., 18 Ala. 176 (1850); James v. James, 41 Ark. 301 (1883); Lindsay v. Platt, 9 Fla. 150 (1860); Ireland v. Dyer, 133 Ga. 851, 67 S.E. 195 (1910); Dilley v. Love, 61 Md. 603 (1883); McDearman v. Hodnett, 83 Va. 281, 2 S.E. 643 (1887); Bruce v. Slemp, 82 Va. 352, 4 S.E. 692 (1887).

Although the courts changed the law dealing with advancements by a father-in-law to a son-in-law, they claim that the married women's act had no effect on the law regarding advancements. To demonstrate the fallacy of that rule, quotations from two cases will be noted. In *McDearman v. Hodnett*,[378] the Virginia court said:

> "The argument is that the act changed the relation of a husband towards his wife as respects her property, which is no longer subject to his disposal, or to the payment of his debts, but is to be possessed and controlled by her, as though she were a *feme sole*. This may be true, but we do not perceive that it affects the question before us. The object of the act is to secure to married women the enjoyment and control of their property, but not to interfere with the dominion over and right of disposal of one's property, or with the general law as respects the dealings between parents and their children, or the distribution of decedent's estates. The question of advancements . . . is not touched or in any way influenced by the act; nor was it designed to have any such influence."

In *Ireland v. Dyer*,[379] the Georgia court said:

> "It is well settled by the authorities that the donor's intention is the controlling principle in the application of the doctrine of advancements, and that whatever the donor intended as an advancement should be so considered without regard to the mode of making it or of securing the actual enjoyment of it. According to this principle it has many times been held that a gift to a son-in-law during the life of the donee's wife constitutes an advancement to the wife, and it is immaterial that the daughter does not know of the advancement to the son-in-law, or that by reason of improper investments or otherwise the daughter does not in fact derive any benefit from the advancement. Thus the payment by the father of his son-in-law's debts may constitute an advancement to the daughter. . . . It has been held that the married women's property act securing to them their separate property did not prevent an advancement to the son-in-law from being deemed an advancement to the daughter."

The quotation from *McDearman v. Hodnett* is based on the assumption that the married women's act was not intended to change the law regarding advancements. That assumption is undoubtedly correct. However, the act destroyed the reason back of the rule. As shown previously, prior to the enactment of the married women's act, the courts held that a transfer of personal property by a father-in-law

[378] 83 Va. 281 at 285, 2 S.E. 643 (1887).

[379] 133 Ga. 851 at 854, 67 S.E. 195 (1910), quoting from 2 AM. & ENG. ENC. LAW 326-327.

to a son-in-law was an advancement to the daughter but that a transfer of real property was not.[380] The reason for the rule was that the husband had control over the personal estate of his wife.[381] When the married women's act was adopted that reason was destroyed. Consequently, the courts should now hold that a transfer of property from a father-in-law to a son-in-law is not an advancement unless consented to by the daughter.

The quotation from *Ireland v. Dyer* is based on the assumption that the intent of the intestate determines the parties to whom the concept of advancements applies. However, that assumption is incorrect. The intention of the intestate is material only in determining whether a voluntary inter vivos transfer is an advancement or a gift. It cannot be used to give an intestate the power to extend the doctrine to parties not included in the statute. If the statement from *Ireland v. Dyer* is carried to its logical conclusion, a parent could make a gift to anyone he desires and charge it to one of his children as an advancement. Such a rule would defeat the very equality that the doctrine is intended to preserve.

The cases decided subsequent to the married women's act rely on the Florida case of *Lindsay v. Platt*[382] as authority for the proposition that a voluntary inter vivos transfer from a father-in-law to a son-in-law is an advancement to his daughter. In that case the transfer was made prior to the enactment of the married women's act, but the act was passed prior to the intestate's death. The gift was of personal property. Therefore the court was warranted in holding that the transaction was an advancement. However, that case is not authority for the proposition that a voluntary inter vivos transfer of real or personal property by a father-in-law to a son-in-law subsequent to the married women's act is an advancement to the daughter.

A gift from a father-in-law to a daughter-in-law should be charged as an advancement if a gift from a father-in-law to a son-in-law is one. However, the courts hold that a transfer to a daughter-in-law is not an advancement unless the son consents to the transaction.[383]

[To be concluded.]

380 Wilson's Heirs v. Wilson's Admr., 18 Ala. 176 (1850); Wentz v. DeHaven, 1 S. and R. (Pa.) 312 (1815).

381 Cf. Burnett v. Branch Bank of Mobile, 22 Ala. 642 (1853); Rumbly v. Stainton, 24 Ala. 712 (1854).

382 9 Fla. 150 (1860).

383 Zerega v. Zerega, 78 Misc. 466, 138 N.Y.S. 580 (1912). Cf. Palmer v. Culbertson, 65 Hun 625, 20 N.Y.S. 391 (1892), affd. 143 N.Y. 213, 38 N.E. 199 (1894).