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CONSTRUCTION OF PRIVATE INSTRUMENTS WHERE ADOPTED CHILDREN ARE CONCERNED: II*

J. Wesley Oler †

B. Context: Construction of Instrument as a Whole

Thus far in the discussion the attempt has been to consider a number of common terms of general designation, such as "children," "issue," and "heirs," detached from other language with which they may be found and disassociated from the circumstances under which they may be used, with a view to estimating their intrinsic significance in resolving questions as to the effect of adoption upon the identification of persons designated by them. The examination from this point of view could lead to the deduction that in themselves the particular terms of designation furnished varying degrees of assistance to the interpreter of the instrument. It was not meant to suggest, however, that the particular words were in fact to be considered alone. True, courts now and then have ascribed an inherent finality to the meaning of one or more of these terms, in so far as they bear on the subject, but in the great percentage of instances it has been otherwise. The backdrop of circumstance has been recognized. So has the context afforded by the rest of the instrument. As sometimes explicitly stated, the intention is to be gathered from the instrument as a whole. 176

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176 Middletown Trust Co. v. Gaffey, 96 Conn. 61, 112 A. 689 (1921); Comer v. Comer, 195 Ga. 79, 23 S.E. (2d) 420 (1942); Mooney v. Tolles, 111 Conn. 1, 149 A. 515 (1930); Pierce v. Farmers State Bank, (Ind. 1943) 51 N.E. (2d) 480; Ward v. Overman, 155 Iowa 1, 135 N.W. 649 (1912); Woods v. Crump, 283 Ky. 675, 142 S.W. (2d) 680 (1940); Uitz v. Upham, 177 Mich. 351, 143 N.W. 66 (1913); In re Holden, 207 Minn. 211, 291 N.W. 104 (1940); Reinders v. Koppelman, 94 Mo. 338, 7 S.W. 288 (1887); St. Louis Union Trust Co. v. Hill, 336 Mo. 17, 76 S.W. (2d) 685 (1934); Leeper v. Leeper, 347 Mo. 442, 147 S.W. (2d) 660 (1941); Graves v. Graves, 349 Mo. 722, 163 S.W. (2d) 544 (1942); Melek v. Curators of Univ. of Missouri, 213 Mo. App. 572, 250 S.W. 614 (1923); In re Clarke's Estate, 125 Neb. 625, 251 N.W. 279 (1933); Adrian v. Koch, 83 N.J. Eq. 484, 91 A. 123 (1914), affirmed 84 N.J. Eq. 195, 93 A. 1083 (1915); In re McEwan, 128 N.J. Eq. 140, 15 A. (2d) 340 (1940); Tankersley v. Davis, 195 N.C. 542, 142 S.E. 765 (1928); Stevenson's Estate, 47 Pa. Dist. & Co. 215 (1943); Smith v. Bradford, 51 R.I. 289, 154 A. 272 (1931); Hassell v. Frey, 131 Tex. 578, 117 S.W. (2d) 413 (1938); Mitchell's Will, 157 Wis. 327, 147 N.W. 332 (1914).
One must, of course, be circumspect about such a bromide. In itself it may be verbiage; what it produces may be camouflage. Since the context is of importance, however, it should not be disregarded, and merit may lie in considering some of the connected language upon which courts have at least professed to rely in determining whether an adoptee, for example, was included within the reference of a will or other private instrument to a person's "children," "issue," "heirs," or other relatives.

The item of context seized upon may be but another word or expression. Thus the instrument maker's inclination to employ indiscriminately two or more different terms of general designation to identify the same persons or similarly situated persons has sometimes furnished the court with a reason for construing one of the terms as having as fully intrinsic exclusionary force, with respect to adoptees, as the most exclusionary of the terms used. In a deed's reference to any child or children whom the life tenant might have "born" to her, the quoted word supplied evidence of a probable intention to exclude from the designation a child adopted by the life tenant. A similar result was reached under a devise to the testator's daughter if she "have" heirs (otherwise over to others at her death), the word "have" being suggestive of "born to." And a will which directed payment of the principal of separate trusts to the respective lawful issue of each of the life tenants except one, and which, as to the principal of the trust for him, provided

\[177\] In the following cases, for example, the word "heirs," which is probably the least exclusionary of the terms considered, drew meaning from its apparently indiscriminate co-use with "issue," "children," "grandchildren," or "issue of the body:" Hall v. Crandall, (Del. Ch. 1941) 20 A. (2d) 545; Everitt v. LaSpeyre, 195 Ga. 377, 24 S.E. (2d) 381 (1943); Smith v. Thomas, 317 Ill. 150, 147 N.E. 788 (1925); Cook v. Underwood, 209 Iowa 641, 228 N.W. 629 (1930); In re Clarke's Estate, 125 Neb. 625, 251 N.W. 279 (1933). Other illustrations of the general point are afforded by Miller v. Wick, 311 Ill. 269, 142 N.E. 490 (1924); Moffet v. Cash, 346 Ill. 287, 178 N.E. 658 (1931), dissenting opinion 346 Ill. 311, 179 N.E. 186 (1931); Blaker v. Blaker, 131 Kan. 833, 293 P. 517 (1930); Graves v. Graves, 349 Mo. 722, 163 S.W., (2d) 544 (1942); Dulfon v. Keasbey, 111 N.J. Eq. 223, 162 A. 102 (1932); Rodgers v. Miller, 43 Ohio App. 198, 182 N.E. 654 (1932). It will be noted that the argument can be reversed, so that a designation having an ordinarily strong exclusionary operation may be weakened by its apposition with a less exclusionary word. See in this connection Middletown Trust Co. v. Gaffey, 96 Conn. 61, 112 A. 689 (1921) and Ansonia Nat. Bank v. Kunkel, 105 Conn. 744, 136 A. 588 (1927).

\[178\] Tankersley v. Davis, 195 N.C. 542, 142 S.E. 765 (1928). In Blaker v. Blaker, 131 Kan. 833, 293 P. 517 (1930), the testator spoke of his son's "issue, born in lawful wedlock, of the body." The expression was viewed as manifestly excluding the son's adoptee. To similar effect is Union Trust Co. v. Campi, 51 R.I. 76, 151 A. 131 (1930).

\[179\] Nickerson v. Hoover, 70 Ind. App. 343, 115 N.E. 588 (1917).
that it should be paid to his lawful issue, "if he should have any," was said thereby to show, when viewed in connection with the fact that this beneficiary had an adopted child when the will was executed, an intention to refer only to issue who might be born to the beneficiary.  

Express reference to relations by "blood" naturally points to exclusion of one related by adoption only.  

Allusion to a person's "heirs," in plural form, has given courts evidence of an intent to exclude an adoptee who, if he qualified at all, would be the sole taker.  

In a conveyance of a farm to the grantor's daughter for life, then to her heirs, a recital that the consideration was "natural" love and affection and a mutual division of property among the heirs and children of the grantors helped to induce the conclusion that a child adopted by the grantor's daughter did not take the remainder.  

In another case, where payment of the principal of a trust was to be made to the life beneficiary when he should have a child, his lawful issue, who should "attain unto the age of three years," the quoted words suggested to the court a requirement by the testator that a child, born to the beneficiary, should live through the perilous period in child life, and indicated that an adoption would not satisfy the will.  

A provision of manifest disinheritzation, giving the testator's adopted daughter five dollars, went far in signifying that she did not take under a gift of the residuary estate in remainder to the testator's heirs at law.  

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180 Matter of Hoyt's Estate, 120 Misc. 188, 197 N.Y.S. 828 (1923).

181 Matter of Eilis's Estate, 178 Misc. 491, 34 N.Y.S. (2d) 884 (1942), affirmed 264 App. Div. 846, 36 N.Y.S. (2d) 187 (1942) (adoptee excluded from designation of children of testator's first cousins, where he elsewhere defined his first cousins to include those only who were related to him "by blood"); Stewardson's Estate, 16 Pa. Dist. & Co. 195 (1931) (dictum); Trustees, Executors & Agency Co., Ltd. v. Rowley, [1939] N.Z.L.R. (S.C.) 146 (designation of all the nephews and nieces of the testatrix "of the blood").

182 Warden v. Overman, 155 Iowa 1, 135 N.W. 649 (1912); Morrison v. Sessions, 70 Mich. 297, 38 N.W. 249 (1888). Compare Matter of Levy's Estate, 138 Misc. 670, 245 N.Y.S. 710 (1927), holding that the use of the plural form of designation in a gift to the "grandchildren" of the testatrix evinced an intention to include an adoptee of a daughter of the testatrix, where the testatrix had only one blood grandchild when she executed the will. In Yates's Estate, 281 Pa. 178, 126 A. 254 (1924), the plural form "children" was treated as indicating a belief that the adopter might have a natural child or children in addition to the child she had adopted.


184 Miller v. Wick, 311 Ill. 269, 142 N.E. 490 (1924).

185 Hassell v. Frey, 131 Tex. 578, 117 S.W. (2d) 413 (1938). To the same effect is Union Trust Co. v. Campi, 51 R.I. 76, 151 A. 131 (1930). Compare Public Trustee v. Pilkington, 31 N.Z.L.R. (C.A.) 770 (1912), in which it was held that the description of the recipient of a pecuniary legacy as "my adopted daughter" was
So, too, a will's reference to an adoptee in a particular way at one point may imply that the adoptee is not within another term elsewhere employed in the instrument; as where a testatrix, after making some special bequests, including one to her adopted daughter, whom she described as "my young friend," left the rest of her estate to her lawful heirs; or where the testator, who had adopted his own grandchild, made a bequest of money to him as his "grandchild," and then created a trust of the residuary estate for the benefit of his "children." Similarly, when taken in connection with the gift of half of the corpus of a testamentary trust to one whom the testator and his wife had adopted, a gift of the other half to the nearest and lawful kin of the testator and his wife did not include the adoptee. And in still another instance an intention to exclude an adopted child of a daughter of the testatrix from a gift of trust principal to the daughter's lawful issue was discovered in the failure of the testatrix to refer to the adoptee by name, when elsewhere in the will she had referred by name to her ten natural grandchildren.

Not infrequently the general scheme or purpose of a particular will has been said to shed light on the subject at hand. Thus the inclusion of an adopted child of a son of the testatrix within the benefit of trusts in favor of "children" and "issue" of her sons was deemed to have been inferable from the general purpose of the testatrix, disclosed by the will as a whole, to relieve her sons of the burden of supporting their children. A like result followed in part from a testator's indicated not strong enough to eliminate her as the beneficiary of a trust of the residuary estate for the testator's "children."

186 Warden v. Overman, 155 Iowa 1, 135 N.W. 649 (1912). In Matter of Hoyt's Estate, 120 Misc. 188, 197 N.Y.S. 828 (1923), a devise of real estate to a husband and wife for life, remainder "to their adopted daughter," was said to disclose the manner in which the testatrix thought of the adoptee and thus to suggest the exclusion of the adoptee from "lawful issue" of the adopter, as that term was used in a gift of the corpus of a trust created out of part of the residuary estate. Union Trust Co. v. Campi, 51 R.I. 76, 151 A. 272 (1931), is of similar effect. Compare Public Trustee v. Pilkington, 31 N.Z.L.R. (C.A.) 770 (1912), in which it was held that the description of the recipient of a pecuniary legacy as "my adopted daughter" was not strong enough to eliminate her as the beneficiary of a trust of the residuary estate for the testator's "children."


188 Reinders v. Koppelman, 94 Mo. 338, 7 S.W. 288 (1887).


190 Mooney v. Tolles, 111 Conn. 1, 149 A. 515 (1930).
purpose to effect equality among several lines of descent, where exclusion of an adoptee from the term "issue" would have defeated that objective.  

On the other hand, restrictions placed by the testator on the power to dispose of the subject matter of a benefit, as through the insertion of a spendthrift clause, a prohibition against sale, a provision confining the first taker’s interest to a fee defeasible on his death without issue, or a direction against control of the property by the husband of the life beneficiary, have been regarded in some instances as supplying evidence of an intention that the first takers also shall not have power in effect to pass the property by adoption to a stranger to the blood. And a similar conclusion has been drawn from the testator’s studied effort to make his will an instrument of benefit to those of his blood or those for whom he has special concern, by gifts of the rest of his property to them, or by an ultimate limitation in their favor in a described event, such as a failure of the first taker to have children.

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191 Ansonia Nat. Bank v. Kunkel, 105 Conn. 744, 136 A. 588 (1927). The same reasoning is employed in Mooney v. Tolles, 111 Conn. 1, 149 A. 515 (1930). Conversely, if the effect of a construction that an adoptee is included in a general designation will be to give him a greater share of the estate than persons related to the testator naturally at the same level of descent, this tends to support a holding which excludes the adoptee from the designation. See Trowbridge v. Trowbridge, 127 Conn. 469, 17 A. (2d) 517 (1941); Adrian v. Koch, 83 N.J. Eq. 484, 91 A. 123 (1914), affirmed 84 N.J. Eq. 195, 93 A. 1083 (1915); N.Y. Life Ins. & T. Co. v. Viele, 161 N.Y. 11, 55 N.E. 311 (1899); Einstein v. Michaelson, 107 Misc. 661, 177 N.Y.S. 474 (1919); Matter of Cotheal’s Estate, 121 Misc. 665, 202 N.Y.S. 268 (1923).

192 Middletown Trust Co. v. Gaffey, 96 Conn. 61, 112 A. 689 (1921); Blaker v. Blaker, 131 Kan. 833, 293 P. 517 (1930).


194 Wildman’s Appeal, 111 Conn. 683, 151 A. 265 (1930). But see Bray v. Miles, 23 Ind. App. 432, 54 N.E. 446, 55 N.E. 510 (1899).

195 Wildman’s Appeal, 111 Conn. 683, 151 A. 265 (1930).


197 Middletown Trust Co. v. Gaffey, 96 Conn. 61, 112 A. 689 (1921); Casper v. Helvie, 83 Ind. App. 166, 146 N.E. 123 (1925); Cook v. Underwood, 209 Iowa 641, 228 N.W. 629 (1930); Blaker v. Blaker, 131 Kan. 833, 293 P. 517 (1930); Morton v. American Security & T. Co., 251 App. Div. 31, 295 N.Y.S. 556 (1937), affirmed 276 N.Y. 475, 12 N.E. (2d) 164 (1937); Lichter v. Thiers, 139 Wis. 481, 121 N.W. 153 (1909); Mitchell’s Will, 157 Wis. 327, 147 N.W. 332 (1914). In Tirrell v. Bacon, (C.C. Mass. 1880) 3 F. 62, the weight of this factor of context was insufficient to exclude an adoptee of the testator’s son from a gift in remainder to the son’s “children” or “issue.”
C. Surrounding Circumstances

1. In general

Whether in his use of a term of general description, such as "children," "issue" or "heirs," the maker of a will, deed or other private instrument is to be deemed to have intended the inclusion or exclusion of an adoptee or a person related by adoption is determined not alone by considering the individual significance of the particular term of designation employed and the other provisions with which it is found, but also, as a usual rule, by reading the language in the light of the circumstances surrounding its formulation. Recognizing that the meaning of language may vary according to the conditions under which it is used, the interpreter looks to the circumstances of its use in an effort to accommodate his view to that of the instrument-maker.

If a period of time intervenes between the execution of a will and the death of the testator, it may also be proper to consider events which occur in the interval as a further aid in determining the meaning of the language. In most of the cases within the scope of the present sub-

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198 This principle was recognized at least sub silentio in virtually all the cases considered herein. More direct statement of it will be found in the following: Middletown Trust Co. v. Gaffey, 96 Conn. 61, 112 A. 689 (1921); Mooney v. Tolles, 111 Conn. 1, 149 A. 515 (1930); Wildman's Appeal, 111 Conn. 683, 151 A. 265 (1930); Trowbridge v. Trowbridge, 127 Conn. 469, 17 A. (2d) 517 (1941); O'Brien v. Walker, 35 Haw. 104 (1939), affirmed (C.C.A. 9th, 1940) 115 F. (2d) 956, cert. denied 312 U.S. 707, 61 S. Ct. 829 (1941); Smith v. Thomas, 317 Ill. 150, 147 N.E. 788 (1925); Hale v. Hale, 237 Ill. App. 410 (1925); Pierce v. Farmers State Bank, (Ind. 1943) 51 N.E. (2d) 480; Nickerson v. Hoover, 70 Ind. App. 343, 115 N.E. 588 (1917); Warden v. Overman, 155 Iowa 1, 135 N.W. 649 (1912); Cook v. Underwood, 209 Iowa 641, 228 N.W. 629 (1930); Woods v. Crump, 283 Ky. 675, 142 S.W. (2d) 680 (1940); Martin v. Aetna L. Ins. Co., 73 Me. 25 (1881); Virgin v. Marwick, 97 Me. 578, 55 A. 520 (1903); Wilder v. Butler, 116 Me. 389, 102 A. 110 (1917); In re Holden, 207 Minn. 211, 291 N.W. 104 (1940); Reinders v. Koppelman, 94 Mo. 338, 7 S.W. 288 (1887); Leeper v. Leeper, 347 Mo. 442, 147 S.W. (2d) 660 (1941); Melek v. Curators of Univ. of Missouri, 213 Mo. App. 572, 250 S.W. 614 (1923); In re Clarke's Estate, 125 Neb. 625, 251 N.W. 279 (1933); Fidelity Union Trust Co. v. Hall, 125 N.J. Eq. 419, 6 A. (2d) 124 (1939); Morton v. American Security & T. Co., 231 App. 103, 295 N.Y.S. 556 (1937), affirmed 276 N.Y. 475, 12 N.E. (2d) 164 (1937); Smith v. Bradford, 51 R.I. 289, 154 A. 272 (1931); Hassell v. Frey, 131 Tex. 578, 117 S.W. (2d) 413 (1938); Mitchell's Will, 157 Wis. 327, 147 N.W. 332 (1914).

199 Rules as to the extent to which events occurring between the execution and effective date of a will may properly be considered in construing the language in the will are suggested in 3 Property Restatement, §§ 244, 245 (1940). Compare the broader statement in Moffet v. Cash, 346 Ill. 287 at 291, 178 N.E. 658 (1931), dissenting opinion 346 Ill. 311, 179 N.E. 186 (1931), that the intention of the testator is to be determined from the language in the will considered in the light of the circumstances existing at the time of its execution "and at the death of the testator."
ject the factual situation did not change materially between the date
the will was executed and the time it became effective. In a number of
instances, however, such a change did occur, and where this was so the
later events were sometimes considered in ascertaining the sense of the
language employed.

Although a consideration of the circumstances surrounding the use
of the language in the instrument is quite generally allowed in the
United States, it should be observed that in some states resort to cir-
cumstances is at least nominally conditioned upon the language being
ambiguous. By focusing its attention narrowly upon the words used
and ascribing to them an asserted plain meaning, a court can thus elim-
inate the opportunity to examine the characterizing environment, as
well as other extrinsic evidence bearing on the meaning of the language
used. In its application to the present subject this attitude is exempli-
ied in its more objectionable form by several decisions from Pennsyl-
vania and Indiana. Our interest here, however, is not so much with

200 In the following cases there was an adoption between the execution of the
will and the death of the testator: Russell v. Russell, 84 Ala. 48, 3 S. 900 (1887);
Mooney v. Tolles, 111 Conn. 1, 149 A. 515 (1930); Trowbridge v. Trowbridge, 127
Conn. 469, 17 A. (2d) 517 (1941); Bray v. Miles, 23 Ind. App. 432, 54 N.E. 446,
55 N.E. 510 (1899); Beck v. Dickinson, 99 Ind. App. 463, 192 N.E. 899 (1934);
631, 216 N.W. 428 (1927); Dulfon v. Keasbey, 111 N.J. Eq. 223, 162 A. 102
(1932); Fidelity Union Trust Co. v. Hall, 125 N.J. Eq. 419, 6 A. (2d) 124 (1939);
Matter of Hopkins, 102 App. Div. 458, 92 N.Y.S. 463 (1905); Einstein v. Michael-
son, 107 Misc. 661, 177 N.Y.S. 474 (1919); Matter of Wait's Estate, (N.Y. Surr.
1943) 42 N.Y.S. (2d) 735; Smyth v. McKissick, 222 N.C. 644, 24 S.E. (2d) 621
(1943); In re Beatty, Beatty v. Beatty, [1939] N.Z.L.R. (S.C.) 954. For a case in-
volving a material change in the statutory law as to adoption between the execution
of the will and the death of the testator, see Kohler's Estate, 199 Pa. 455, 49 A. 286
(1901).

201 Mooney v. Tolles, 111 Conn. 1, 149 A. 515 (1930); Trowbridge v. Trow-
bridge, 127 Conn. 469, 17 A. (2d) 517 (1941); Bray v. Miles, 23 Ind. App. 432, 54
N.E. 446, 55 N.E. 510 (1899); Smyth v. McKissick, 222 N.C. 644, 24 S.E. (2d)
621 (1943). Only in Dulfon v. Keasbey, 111 N.J. Eq. 223, 162 A. 102 (1932) did
the court definitely refuse to consider the interim adoption in determining the testator's
intention.

202 Among cases within the scope of the present subject which pay lip-service to
this limitation, see Hall v. Crandall, (Del. Ch. 1941) 20 A. (2d) 545, and Wallace

203 See in this connection 9 WIGMORE, EVIDENCE, §§ 2470-2472 (1940).

204 In Yates's Estate, 281 Pa. 178, 126 A. 254 (1924), where the will created
a trust of part of the residuary estate for the testator's sister for life and directed that at
her death the principal should be paid to her then surviving child or children and the
issue of any deceased child or children, with gift over in default thereof to the sur-
vivors of named nieces and a nephew of the testator, the court held an intention on the
part of the testator to include an adoptee of his sister within the term "child or chil-
incidentally applicable rules of evidence and formality as with the significance attached to particular surrounding circumstances which have in fact been considered by the courts.

2. Adopter’s age; prospects of having natural children

A basis of support for the conclusion that an adopted child was within a testator’s contemplation has occasionally been found in the circumstance that at the date of the execution of the will, which referred to another’s children or issue, it was evident that the person mentioned had little prospect of having natural children. Conversely, "children" could not be established extrinsically by evidence that the adoption had taken place long before execution of the will, that the testator knew of it and spoke of the adoptee as his sister’s daughter, and that the adoptee was treated by the testator and the rest of the family as a daughter of the sister. Refusal to consider the evidence was based on the asserted plain meaning of the words of designation. In Corr’s Estate, 338 Pa. 337, 12 A. (2d) 76 (1940), the allegedly plain meaning of a gift to the “children” of the testator’s daughter resulted in the rejection of proof that an adopted child of the daughter was included in the testator’s household and that affection existed between the testator and the adoptee, as shown by preferred letters and testimony. The Yates case was mainly relied on in Pierce v. Farmers State Bank, (Ind. 1943) 51 N.E. (2d) 480, in which the court held that, to prove the testator meant to include an adoptee in a gift in remainder to his son’s “child or children,” evidence was not admissible that a month before he executed his will the testator had urged his son to marry and, in view of the latter’s professed sterility, to adopt the person in question. For a criticism of the attitude of Indiana courts as to the admission of extrinsic evidence, see Powell, “Construction of Written Instruments,” 14 Ind. L. J. 199 at 222-234 (1939).
where the probabilities at the execution of the instrument seemed to favor the birth of children to one whose children or issue were designated, this sometimes furnished a reason for holding that adoptees were not to be included. 208

3. Knowledge of and reaction to adoption; adoption before instrument becomes irrevocable

It is also usual to attach considerable weight to the circumstance that the maker of the instrument knew of the adoption when the instrument was executed or before it became irrevocable. His attitude toward the adoption may be a particularly important circumstance.

Thus, if the adoption occurred before the execution of an instrument, such as a will or deed of trust, which made provision for the adopter’s children or issue, and the testator or settlor knew of the adoption, and particularly if he approved of it, the adoptee has usually been deemed to be within the designation. 207 Where he has not been so re-templated further adoptions by the life beneficiary. Beck v. Dickinson, supra, was disapproved in Pierce v. Farmers State Bank, (Ind. 1943) 51 N.E. (2d) 480, wherein the court held that evidence was not admissible to show, inter alia, that before executing his will, which gave the corpus of a trust to his son’s child or children at the son’s death, the testator discussed with the son the latter’s sterility and urged him to marry the appellant’s mother and adopt the appellant.

206 Cook v. Underwood, 209 Iowa 641, 228 N.W. 629 (1930) (the testator’s daughter, on whose death without children a gift over was conditioned, was enceinte when the will was executed); Morton v. American Security & T. Co., 251 App. Div. 31, 295 N.Y.S. 556 (1937), affirmed 276 N.Y. 475, 12 N.E. (2d) 164 (1937) [when the will was executed the circumstances suggested that, as her sisters had done, the testator’s daughter would marry and have children, who would qualify under a gift in remainder to her issue or, in default of issue, to her heirs at law and next of kin (meaning lineal descendants), per stirpes]; Lichter v. Thiers, 139 Wis. 481, 121 N.W. 153 (1909) (testator’s granddaughter, to whose children living at her death he devised land in remainder, was an unmarried girl when the will was made and the testator died). As tending to support the same proposition, see also Wilder v. Butler, 116 Me. 389, 102 A. 110 (1917); Melek v. Curators of Univ. of Missouri, 213 Mo. App. 572, 250 S.W. 614 (1923); Mitchell’s Will, 157 Wis. 327, 147 N.W. 332 (1914).

207 Ansonia Nat. Bank v. Kunkel, 105 Conn. 744, 136 A. 588 (1927) (adoption by the testator’s sister antedated execution of the will by twenty-four years; the testator knew and approved of the adoption and acted as sponsor and godfather for the adoptee, with whom he was on very affectionate terms); Munie v. Gruenwald, 289 Ill. 468, 124 N.E. 605 (1919) (adoption by the testator’s daughter antedated execution of the will by seven years; the testator knew of the adoption, always treated the adoptee in the manner he treated his natural grandchildren, and knew that she was recognized everywhere as his daughter’s child); Beck v. Dickinson, 99 Ind. App. 463, 192 N.E. 899 (1934) (one adoption by the testator’s nephew antedated execution of the will by four months and was effected at the suggestion of the testator; but see Pierce v. Farmers State Bank, (Ind. 1943) 51 N.E. (2d) 480, which disapproves this decision, at least
garded, notwithstanding his adoption before execution of the instrument, it has appeared that the adoption was in effect regretted, or that the maker of the instrument did not know of it, or that evidence as to knowledge or approval was lacking or that such evidence was re-

as regards consideration of the evidence); Martin v. Aetna L. Ins. Co., 73 Me. 25 (1881) (adoption by insured and his wife was prior to issuance of policy of insurance on his life, payable to the wife or, if she died before him, to their children; insured and his wife made every effort to indicate that the adoptee was their own and to conceal from him all information to the contrary); In re McEwan, 128 N.J. Eq. 140, 15 A. (2d) 340 (1940) (adoption of two children by testator’s son occurred about a month before the will was executed, and the testator was fully aware of it); Von Beck v. Thomsen, 44 App. Div. 373, 60 N.Y.S. 1094 (1899), affirmed 167 N.Y. 601, 60 N.E. 1121 (1901) (will giving pecuniary legacy to the child or children, by representation, of each of the brothers and sisters of the testator’s wife who predeceased her was executed fourteen years after the death of a sister who, to the testator’s knowledge, had adopted and predeceased a child); In re Truman, 27 R.I. 209, 61 A. 598 (1905) (adoption by brother of testatrix antedated execution of the will by thirty-nine years; testatrix knew of the adoption, referred to the adoptee as her niece, and always treated the adoptee as one of her brother’s children). See also Matter of Levy’s Estate, 138 Misc. 670, 245 N.Y.S. 710 (1927); Public Trustee v. Pilkington, 31 N.Z.L.R. (C.A.) 770 (1912). Much the same result may be accomplished by statute, such as was involved in Hill’s Estate, 30 Pa. Dist. 477 (1921). In Stevenson’s Estate, 47 Pa. Dist. & Co. 215 (1943) the court said it could be assumed that the testatrix knew her niece had adopted a child in due form, where the will was executed almost two years after the adoption. In Comer v. Comer, 195 Ga. 79, 23 S.E. (2d) 420 (1942), the court specifically left open the question of the effect of an adoption occurring before execution of a will. Adoption prior to the execution of the instrument was involved in several cases in which the adoptee was held to be within a reference to a person’s heirs, next of kin or statutory distributees, but the point under consideration was not discussed. Rauch v. Metz, (Mo. 1919) 212 S.W. 357; Dodin v. Dodin, 16 App. Div. 42, 44 N.Y.S. 800 (1897), affirmed 162 N.Y. 635, 57 N.E. 1108 (1900); U.S. Trust Co. v. Hoyt 150 App. Div. 621, 135 N.Y.S. 849 (1912); U.S. Trust Co. v. Hoyt, 115 Misc. 663, 190 N.Y.S. 166 (1915), affirmed 173 App. Div. 930, 158 N.Y.S. 1133 (1916), affirmed 223 N.Y. 616, 119 N.E. 1083 (1918); Re McGillivray, Purcell v. Hendricks, [1925] 3 Dom. L. R. (C.A. Br. Col.) 854.

Warden v. Overman, 155 Iowa 1, 135 N.W. 649 (1912) (adoption by testatrix was treated by the parties as ineffective, although friendly relations between her and the adoptee were continued); Morrison v. Sessions, 70 Mich. 297, 38 N.W. 249 (1888) (family relationship between testator and adoptee lasted only a few months; testator understood adoption had been revoked); Union Trust Co. v. Campi, 51 R.I. 76, 151 A. 131 (1930) (testator disinherited his adoptee by leaving her a dollar in his will); Hassell v. Frey, 131 Tex. 578, 117 S.W. (2d) 413 (1938) (testator’s adopted child left him soon after the adoption, and testator disinherited the adoptee in his will).


Woodcock’s Appeal, 103 Me. 214, 68 A. 821 (1907); Graves v. Graves, 349 Mo. 722, 163 S.W. (2d) 544 (1942); Re Donald, Baldwin v. Mooney, [1929] 2 Dom. L. R. (S.C. Can.) 244. In Matter of Dudley’s Estate, 168 Misc. 695, 6 N.Y.S. (2d) 489 (1938), it was said that the fact that the testator was “not on unfriendly terms” with the children adopted by his niece fell far short of the demonstration re-
124 construction of Instruments

jected, 211 or that the context dictated the decision. 212 In a New Jersey case the point was put this way:

"... Where a testator knows that his son has taken into his home an infant and adopted him and given him his name, and the testator, by a will thereafter executed, makes a class gift to the children or issue of his son, it should be presumed in the absence of contrary indications, that he meant to include the adopted child within the class. The testator accepts the situation and relationship which the adopting parents have created." 213

So, too, a testator's knowledge of an adoption occurring between the execution of the will and an appreciable length of time before his death, 214 particularly if coupled with his approbation of the adoption, has sometimes been regarded as sufficient to bring the adoptee within a benefit conferred by the will upon the adopter's children or issue. 215 The stated reason for this is that the testator is presumed to know the legal effect of the adoption, and his failure to change his will, which speaks only from his death, so as to exclude the adoptee expressly, is not required to establish an affirmative desire to include them in a gift over to the niece's "descendants," contrary to the technical meaning of the term as used by the testator, a lawyer.


213 In re McEwan, 128 N.J. Eq. 140 at 147, 15 A. (2d) 340 (1940).

214 In Mooney v. Tolles, 111 Conn. 1, 149 A. 515 (1930), the court intimated that a "considerable" length of time between the adoption and the death of the testator would be required.

215 Mooney v. Tolles, 111 Conn. 1, 149 A. 515 (1930) (testatrix knew and approved of adoption by her son); Bray v. Miles, 23 Ind. App. 432, 54 N.E. 446, 54 N.E. 510 (1899) (adoption by testator's daughter, about eighteen months before he died, was with his knowledge); Beck v. Dickinson, 99 Ind. App. 463, 192 N.E. 899 (1934) (adoptions by testator's nephew, both before and after execution of the will, were with the testator's knowledge and at his suggestion; but this case was disapproved in Pierce v. Farmers State Bank, (Ind. 1943) 51 N.E. (2d) 480, at least in so far as consideration of the extrinsic evidence is concerned); Smyth v. McKissick, 222 N.C. 644, 24 S.E. (2d) 621 (1943) (testator knew and approved of the adoption by his grandchild, occurring four years before the testator's death, and treated the adoptee as he did his other great grandchildren). See also dictum in In re Clarke's Estate, 125 Neb. 625, 251 N.W. 279 (1933).
without significance. Conversely, the testator’s unfavorable attitude toward an intervening adoption has led to the exclusion of the adoptee from the designation of the adopter’s children or issue, where accompanied by the understanding on the testator’s part that the adoptee would not take under the will. And where the adoption occurred between the making of the will and the testator’s death, but not until after he had become permanently incompetent, inclusion of the adoptee within a provision of the will in favor of the adopter’s children could not be predicated on knowledge and approval of the adoption.

Technically a court’s consideration of such intervening events is difficult to support, and there is authority directly opposed to it. A ready sort of equity undoubtedly results, however, from heeding the testator’s reaction to an adoption which takes place to his knowledge before his death, even though after he has executed the will.

4. Ignorance of the adoption; adoption after instrument becomes irrevocable

The preceding subdivision noted the significance, as a matter of surrounding circumstance, of the instrument-maker’s knowledge and approval or disapproval of an adoption occurring prior to the execution or effective date of the instrument. In the nature of things, however,

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216 Mooney v. Tolles, 111 Conn. 1, 149 A. 515 (1930); Bray v. Miles, 23 Ind. App. 432, 54 N.E. 446, 55 N.E. 510 (1899); Smyth v. McKissick, 222 N.C. 644, 24 S.E. (2d) 621 (1943).

217 Trowbridge v. Trowbridge, 127 Conn. 469, 17 A. (2d) 517 (1941) (evidence admitted to show that although the testator liked the adopted child of his son, he did not know that the adoption had actually taken place; that he disapproved the proposal of it; that from a lawyer’s advice he believed an adoptee would not take under his will; and that he contemplated making a new will which would expressly exclude adoptees as takers thereunder).


219 Perhaps a technical justification can rest on the class character of the gift and the fluctuation in the class membership presumably contemplated at the execution of the will. See 3 Property Restatement § 244, comments e and f (1940).

220 Dulfon v. Keasbey, 111 N.J. Eq. 223, 162 A. 102 (1932). And see Matter of Hopkins, 102 App. Div. 458, 92 N.Y.S. 463 (1905), and Matter of Wait’s Estate, (N.Y. Surr. 1943) 42 N.Y.S. (2d) 735, for intimation that an adoption between execution of the will and the testator’s death should not be considered in determining the meaning of the will. In several instances the significance, if any, of the circumstances that the adoption intervened between the making of the will and the testator’s death was not discussed. Russell v. Russell, 84 Ala. 48, 3 S. 900 (1887); Young v. Stearns, 234 Mass. 540, 125 N.E. 697 (1920); Fidelity Union Trust Co. v. Hall, 125 N.J. Eq. 419, 6 A. (2d) 124 (1939); Einstein v. Michaelson, 107 Misc. 661, 177 N.Y.S. 474 (1919). The matter may be controlled expressly by statute, as in In re Beatty, Beatty v. Beatty, [1939] N.Z.L.R. (S.C.) 954.
neither an adoption nor knowledge of and reaction to it on the part of the maker of the instrument can be a characterizing circumstance, shedding light on the meaning of the language employed, if the instrument has become operative before the adoption.

Thus, where a deed of trust, effective in 1914, provided that in event of the death of a child of the settlor the child or children of the deceased child should receive a stated share of the income, the fact that a son of the settlor adopted a child in 1923 and another in 1925, and that the settlor recognized the adoptees as his grandchildren and approved of them as such, even to the extent of making provision for them in his will, could not affect the interpretation of the deed of trust and bring them within its reference.\(^2^2^1\)

It will be seen readily that to discuss an event, such as an adoption, which does not occur until after an instrument has become effective, is to stress what is not itself significant but merely suggestive, in a circumlocutory way, of that which may be significant; namely, the absence of knowledge or anticipation of the adoption when the instrument was executed or when it became effective. Read with this in mind, cases which emphasize that the adoption occurred after the operative date of the instrument are somewhat more intelligible than if they are taken to imply that the subsequent event of adoption is itself meaningful as a guide to interpretation.

If the instrument in question be a will, as is usually true, it is readily apparent also that in order for the adoption to be subsequent in point of time to the effective date of the instrument its author cannot himself be the adopter. This is a point which is of interest in connection with rules of construction which depend in their application upon whether or not the maker of the instrument is also the adopter.\(^2^2^2\)

Reverting to the conclusion that the only constructional significance which properly can be attached to a subsequent adoption lies in its tendency to suggest that when the instrument was executed or became effective its maker did not have the adoption or adoptee specifically in mind, we face directly the fundamental question whether to a negative circumstance of this character as much weight should be attached as in fact is attached to it by most courts. It is very easy to slip into the false assumption that because affirmative knowledge of the adoption and approval or disapproval of it is an active circumstance, pointing to the meaning of the language of the instrument, the negative situation in-


\(^{2^2^2}\) See infra, III, B, 2.
volved in the absence of anticipation of an adoption is equally significant. It is believed that the mere absence of anticipation of adoption is essentially a neutral element, to which no particular importance can be attached.\footnote{223} It should be remembered that most of the troublesome designations encountered are in the class form, contemplating the introduction of unknown persons into the group. In an opinion, therefore, holding that one adopted by the testator’s son after the testator’s death is not within a provision of the will in favor of the son’s children, determinable as of the son’s death, there is no relevancy to a remark by the court, such as is commonly encountered, that when the will was executed and the testator died the adoptee was wholly unknown to him and, in fact, had not yet been born.\footnote{224} As much pertinence would lie in a similar remark made to support a decision that a child born to the son after the testator’s death should be deemed excluded from the designated class.

Theoretical objections aside, it must be acknowledged that a long line of decisions, all incidentally involving the situation where the instrument-maker was a stranger to the adoption, can be cited for the view that the fact that an adoption occurs after the instrument has become effective (or, according to some opinions, after the instrument was executed) strongly indicates that an adoptee was not within the intent of a designation of the adopter’s children, issue or like relatives,\footnote{225}

\footnote{223}{In re Holden, 207 Minn. 211, 291 N.W. 104 (1940).}

\footnote{224}{See, for example, observation that the adoptee had not been born when the will was made or the testator died, in Smith v. Thomas, 317 Ill. 150, 147 N.E. 788 (1925); Moffet v. Cash, 346 Ill. 287, 178 N.E. 658 (1931), dissenting opinion 346 Ill. 311, 179 N.E. 186 (1931); Nickerson v. Hoover, 70 Ind. App. 343, 115 N.E. 588 (1917); Hutchins v. Browne, 253 Mass. 55, 147 N.E. 899 (1925); Thorp’s Estate, 90 Pitts. (Pa.) L.J. 493 (1942); In re Smith’s Will, 95 Vt. 97, 112 A. 897 (1921).}

\footnote{225}{Unless otherwise noted, the parenthetical references after the citations refer to the approximate length of time between the effective date of the instrument and the adoption: Middletown Trust Co. v. Gaffey, 95 Conn. 61, 112 A. 689 (1921) (twelve years); Mooney v. Tolles, 111 Conn. 1, 149 A. 515 (1930) (seven years; dictum); Wildman’s Appeal, 111 Conn. 683, 151 A. 265 (1930) (fourteen years); Hall v. Crandall, (Del. Ch. 1941) 20 A. (2d) 545 (one year); Huxley v. Security Trust Co., (Del. Ch. 1943) 33 A. (2d) 679 (six years); Comer v. Comer, 195 Ga. 79, 23 S.E. (2d) 420 (1942) (fourteen years); Everitt v. LaSpeyre, 195 Ga. 377, 24 S.E. (2d) 381 (1943) (seven years); Smith v. Thomas, 317 Ill. 150, 147 N.E. 788 (1925) (five years); Moffet v. Cash, 346 Ill. 287, 178 N.E. 658 (1931), dissenting opinion 346 Ill. 311, 179 N.E. 186 (1931) (twenty-seven years); Hale v. Hale, 237 Ill. App. 410 (1925) (five years); Nickerson v. Hoover, 70 Ind. App. 343, 115 N.E. 588 (1917) (forty-eight years); Casper v. Helvie, 83 Ind. App. 166, 146 N.E. 123 (1925) (fourteen years); Woods v. Crump, 283 Ky. 675, 142 S.W. (2d) 680 (1940) (forty years); Wilder v. Butler, 116 Me. 389, 102 A. 110 (1917) (sixteen years);
although it is otherwise if the reference is to his statutory heirs or next of kin. The fact of the posterior date of the adoption has been described.

Russell v. Musson, 240 Mich. 631, 216 N.W. 428 (1927) (seven years after will was made; two years after testator became incompetent); Reinders v. Koppelman, 94 Mo. 338, 7 S.W. 288 (1887) (thirteen years); In re Clarke's Estate, 125 Neb. 625, 251 N.W. 279 (1933) (three years); Jenkins v. Jenkins, 64 N.J. 407, 14 A. 557 (1887) (forty-seven years); Ahlmeyer v. Miller, 102 N.J. L. 54, 131 A. 54 (1925), affirmed 103 N.J. L. 517, 137 A. 543 (1927) (three years); Dulfon v. Keasbey, 111 N.J. Eq. 223, 162 A. 102 (1932) (nine months after execution of will); Fidelity Union Trust Co. v. Hall, 125 N.J. Eq. 419, 6 A. (2d) 124 (1939) (three years after execution of will; two years after execution of trust deed); In re Fisler, 131 N.J. Eq. 310, 25 A. (2d) 265 (1942), affirmed 133 N.J. Eq. 421, 30 A. (2d) 894 (1943) (thirty-six years); Matter of Marsh's Will, 143 Misc. 609, 257 N.Y. S. 514 (1932) (twenty-three years); Matter of Nelson's Estate, 143 Misc. 843, 258 N.Y.S. 667 (1932) (two years; dictum); Matter of Conant's Estate, 144 Misc. 743, 259 N.Y.S. 885 (1932) (one year); Matter of Wait's Estate, (N.Y. Surr. 1943) 42 N.Y.S. (2d) 42 (adopted at undisclosed time after execution of will; Tankersley v. Davis, 195 N.C. 542, 142 S.E. 765 (1928) (three years); Smyth v. McKissick, 222 N.C. 644, 24 S.E. (2d) 621 (1943) (two and six years); Puterbaugh's Estate, 261 Pa. 235, 104 A. 601 (1918) (four years); Bealor's Estate, 23 Pa. Dist. 1117 (1914) (adoption at undisclosed length of time after testator died); Thorp's Estate, 90 Pitts. (Pa.) L.J. 493 (1942) (eleven years); In re Smith's Will, 95 Vt. 97, 112 A. 897 (1921) (thirty-five years).

The fact that the adoption occurred after the effective date of the instrument may also have helped the court conclude in the following cases that the adoptee was not within a reference to the adopter's children, issue, etc.: Wallace v. Noland, 246 Ill. 535, 92 N.E. 956 (1910) (twenty-three years); Miller v. Wick, 311 Ill. 269, 142 N.E. 490 (1924) (five years); Pierce v. Farmers State Bank, (Ind. 1943) 51 N.E. (2d) 480 (three years); Adams v. Merrill, 45 Ind. App. 315, 85 N.E. 114, 87 N.E. 36 (1908) (nine years); Cook v. Underwood, 209 Iowa 641, 228 N.W. 629 (1930) (one year); Savells v. Brown, 187 Ky. 134, 218 S.W. 462 (1920) (thirteen years); Sanders v. Adams, 278 Ky. 24, 128 S.W. (2d) 223 (1939) (ten years); Clarkson v. Hatton, 143 Mo. 47, 44 S.W. 761 (1898) (twenty-nine years); Leeper v. Leeper, 347 Mo. 442, 147 S.W. (2d) 660 (1941) (thirty-four years); Melek v. Curators of Univ. of Missouri, 213 Mo. App. 572, 250 S.W. 614 (1923) (nine years); Parker v. Carpenter, 77 N.H. 453, 92 A. 955 (1915) (three years); Matter of Leask, 197 N.Y. 193, 90 N.E. 652 (1910) (three years); In re Cuddeback's Will, 174 Misc. 322, 20 N.Y.S. (2d) 862 (1940) (length of time not shown); Trowbridge v. Trowbridge, (N.Y. Sup. Ct. 1944) 48 N.Y.S. (2d) 180 (thirteen years); Reinhard v. Reinhard, 23 Ohio L. Abs. 306 (1936) (twenty years); Schafer v. Eneu, 54 Pa. 304 (1867) (ten years); Corr's Estate, 338 Pa. 337, 12 A. (2d) 76 (1940) (eighteen years); Freeman's Estate (No. 1), 40 Pa. Super. 31 (1909) (seventeen years); Ashhurst's Estate, 153 Pa. Super. 526, 5 A. (2d) 218 (1938) (thirty-seven years); Smith v. Bradford, 51 R.I. 289, 154 A. 272 (1931) (three years); Balch v. Johnson, 106 Tenn. 249, 61 S.W. 280 (1901) (length of time not shown); Cochran v. Cochran, 43 Tex. Civ. App. 259, 95 S.W. 731 (1906) (one year); Lichter v. Thiers, 139 Wis. 481, 121 N.W. 153 (1907) (nine years); Mitchell's Will, 157 Wis. 327, 147 N.W. 332 (1914) (five years).

Adoptees have been held quite uniformly to be within an instrument’s reference to the adopter’s statutory heirs or next of kin, even though the adoption occurred after the instrument became effective. Butterfield v. Sawyer, 187 Ill. 598, 58 N.E. 602 (1900); Ultz v. Upham, 177 Mich. 351, 143 N.W. 66 (1913); St. Louis Union Trust Co. v. Hill, 336 Mo. 17, 76 S.W. (2d) 685 (1934); Brock v. Dorman,
as "a circumstance of controlling importance," and as "a controlling circumstance." A writer has referred to it as raising "a grave presumption against an intention to include such adopted child."

The authorities, however, are not completely unilateral on this point. A few cases recognize that the fact that the adoption does not occur until after the instrument becomes effective has little or no significance as a guide to the intention of the testator or conveyor, whether he be the adopter or a stranger to the adoption.

In *Smyth v. McKissick* the Supreme Court of North Carolina demonstrated in a striking fashion the remarkable results which can be produced by attaching to adoption after the effective date of an instrument—that is, to the negative factual situation existing when the instrument became effective—the same degree of significance as is attributed

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227 Middletown Trust Co. v. Gaffey, 96 Conn. 61 at 70, 112 A. 689 (1921); Wildman's Appeal, 111 Conn. 683 at 688, 151 A. 265 (1930).

228 Hall v. Crandall, (Del. Ch. 1941) 20 A. (2d) 545 at 548.

229 70 A.L.R. 621 at 626 (1931), quoted with approval on this point in *In re Clarke's Estate*, 125 Neb. 625 at 632, 251 N.W. 279 (1933).

230 Virgin v. Marwick, 97 Me. 578, 55 A. 520 (1903) (adoption occurred about eight years after the adopter took out policies of insurance on his life, payable in an event to his children surviving him); Sewall v. Roberts, 115 Mass. 262 (1874) (adoption occurred forty years after adopter effected the creation of a trust, the corpus of which was to be paid at his death for the benefit of his child or children).

231 Tirrell v. Bacon, (C.C. Mass. 1880) 3 F. 62; *In re Holden*, 207 Minn. 211, 201 N.W. 104 (1920); Haver v. Herder, 96 N.J. Eq. 554, 126 A. 661 (1924); Hartwell v. Teft, 10 R.I. 644, 35 A. 882 (1896); *In re Truman*, 27 R.I. 209, 61 A. 598 (1905). In *Wyeth v. Merchant*, (D.C. Mo. 1940) 34 F. Supp. 785, affirmed (C.C.A. 8th, 1941) 120 F. (2d) 242, the fact that the adoption was after the testator's death also appears to be treated as quantitatively neutral; and in *O'Brien v. Walker*, 35 Haw. 104 (1939), affirmed (C.C.A. 9th, 1940) 115 F. (2d) 956, cert. denied 312 U.S. 707, 61 S.Ct. 829 (1941), it is referred to as having negative significance, with less effect than a positive circumstance. See also cases cited in footnote 226, supra, for the generally accepted view that an adoptee is to be deemed one of the adopter's statutory heirs or next of kin within the meaning of a private instrument, even though the adoption occurs after the effective date of the instrument.

232 222 N.C. 644, 24 S.E. (2d) 621 (1943).
to an affirmative surrounding circumstance, such as the instrument maker's knowledge and approval of the adoption before the instrument became operative. It appeared that by irrevocable trust deeds executed in 1932 and 1936 and a will executed in 1934, each worded as the others except as to the property covered, B created trusts of large sums of money to continue until the death of the survivor of the life beneficiaries, his three daughters and his deceased son's widow (whose remarriage was to be equivalent to her death for the purposes of the trusts). A share of the income from each trust was to be paid for life to each daughter and at her death to her children. Another share was to be divided in a prescribed way among the widow and children of B's deceased son, until the widow died or remarried, when the children were to take all of the share. The "child or children" of any deceased child of B's daughters and deceased son were to take the share of the parent. In event of a complete failure within any class, the other classes were to take the defaulted share. At the termination of the trusts the corpus was to be similarly distributed. A child of B's deceased son, being married but having had no children, adopted A in 1938 and died in 1941, survived by A but by no blood children. B, who knew and approved of the adoption and treated A as he did his natural great-grandchildren, died in 1942. In a suit for construction of the will and trust instruments the question was whether A came within the designation of "child or children" of B's deceased grandson. As to the deeds of trust, effective before the adoption, A was deemed to be excluded from the term; as to the will, effective after the adoption and B's knowledge and approval thereof, A was held to be included in the designation.

And through a process of reasoning essentially similar to that pursued in the McKissick case, the Supreme Court of Errors of Connecticut, in Mooney v. Tolles, in effect determined that although A, adopted by a son of the testatrix with her knowledge and approval between the making of the will and her death, qualified under other parts of the will as the child and lawful issue of the son, A was not his lawful issue within the meaning of another clause of the will whereby the testatrix exercised a power of appointment over certain property, in its nature ancestral, coming to her under the will of her mother, who had died before the adoption and by her own testament had empowered her daughter to appoint the property generally by will, with gift over, in default of appointment, to the sons of the daughter or their lawful issue.

288 111 Conn. 1, 149 A. 515 (1940).
5. Statutory setting

In connection with the discussion of the normal or technical meaning of particular words of designation, such as "children," "issue" and "heirs," and their individual significance with respect to the general subject of this article, occasion was taken to examine the status-conferring provisions of the adoption statutes, with a view to noting whether they elevated the adoptee to the status suggested by the term of designation. It was seen that in this respect the adoption statute might have either an exclusionary or inclusionary force of its own, in so far as the adoptee and his equivalence were concerned. For the purposes of the discussion it was more or less tacitly assumed that the adoption statute constituted one of the circumstances surrounding the formulation of the language of the instrument, and was to be considered as such. This was in harmony with the announced attitude of most courts which have taken the trouble of referring to the point at all. Otherwise stated, it is presumed that the instrument was executed in the light of knowledge of the then existing adoption law. A few courts only would disregard the adoption statute entirely or openly belittle its position among the surrounding circumstances. There is more common and proper reluctance to attach to the statute, in its relation to the construction of a private instrument, a presumptively controlling significance in the face of other circumstances which may be felt to be of importance also.

234 See supra, II, A.
235 Middletown Trust Co. v. Gaffey, 96 Conn. 61, 112 A. 689 (1921); Mooney v. Tolles, 111 Conn. 1, 149 A. 515 (1930); Wildman's Appeal, 111 Conn. 683, 151 A. 265 (1930); Hall v. Crandall, (Del. Ch. 1941) 20 A. (2d) 545; Wallace v. Noland, 246 Ill. 535, 92 N.E. 956 (1910); Munie v. Gruenwald, 289 Ill. 468, 214 N.E. 605 (1919); In re McEwan, 128 N.J. Eq. 140, 15 A. (2d) 340 (1940); Lichter v. Thiers, 179 Wis. 481, 121 N.W. 153 (1909).
238 Miller v. Wick, 311 Ill. 269, 142 N.E. 490 (1924); Wilder v. Butler, 116 Me. 380, 102 A. 110 (1917).
239 Middletown Trust Co. v. Gaffey, 96 Conn. 61, 112 A. 689 (1921); Wildman's Appeal, 111 Conn. 683, 151 A. 265 (1930); Dulfon v. Keesby, 111 N.J. Eq.
Change in the statutory setting.—When the instrument is executed or becomes effective the statutory setting, so far as adoption is concerned, may be a complete void or be otherwise materially different from the statutory situation which prevails at a later date when identification of persons designated by the instrument is to be made. If this is the case three distinct problems may arise.

First, there may be a question whether, as a matter of statutory construction, the new law was intended by the legislature to apply with respect to instruments previously executed or effective. The answer is sometimes expressly given by the statute itself.\(^{240}\)

Second, if the changed law is in fact applicable as to the anterior instrument, the statute may be unconstitutional as disturbing interests which have already sprung up under the instrument. Thus, where a will, executed and probated at a time when adoption was unknown to the jurisprudence of the state, left the residuary assets to the testator’s son, but provided that if the son should die leaving no issue the property should pass to another son, it was said that if a subsequently enacted adoption statute were construed to have the effect of qualifying a child, adopted thereunder by the first son, as “issue” within the meaning of the will, the statute would be unconstitutional as violating a provision of the bill of rights declaring retrospective laws to be oppressive and unjust.\(^{241}\) On the other hand, the absence of vested interests under the instrument may eliminate constitutional obstacles to retrospective laws.\(^{242}\)

Third, a problem as to the construction of the instrument itself is suggested: Does the negative statutory situation prevailing when an instrument was executed or became effective dictate that a term of designation therein employed, which then would not have embraced an adoptee, shall be deemed to exclude him still at a subsequent date of distribution, where a statute enacted in the meantime has elevated an adoptee to the status of one answering the description of the term of designation?

If the instrument-maker deliberately or with indifference cast the

\(^{223}\) 162 A. 102 (1932); Smith v. Bradford 51 R.I. 289, 154 A. 272 (1931); Lichter v. Thiers, 139 Wis. 481, 121 N.W. 153 (1909).

\(^{240}\) See, for example, the statute affecting adoption involved in In re Burns, 15 Pa. Dist. & Co. 615 (1931).


determination of the takers upon the law as it might stand at the later date, it seems clear that the circumstance of the original statutory setting should not be treated as significant. Thus, the courts are agreed that reference in an instrument to a person’s heirs or next of kin, expressly or impliedly to be ascertained according to the law at the date of the person’s future death, embraces one whom he adopts pursuant to a subsequent statute making an adoptee an heir or distributee of the adopter. And by the same token, it has been held that under a provision in favor of a person’s next of kin, in a deed of trust effective before the enactment of a statute withdrawing from an adoptee the right to inherit from his natural relatives, a sister of the person mentioned could not take as his next of kin, where she was adopted before his death by a stranger, even though the adoption occurred before the change in the law.

The weight of authority is to the effect, however, that if the instrument reveals no such inclination to let the law take its course, but employs a term of description such as “children” or “issue,” which at the time the instrument is executed and becomes effective has a meaning exclusive of adoptees, the fact that by subsequent statute an adoptee is elevated to the status of a child or issue of the adopter will not alter the exclusionary force of the designation as it was used in the instrument. The soundness of giving this much weight to the original negative situation has been doubted for the reason that, whether the designation be “heirs” or “children” or “issue,” the reference is usually to a class whose membership is left to future determination. And a few decisions, either stressing the absence of constitutional objections


244 In re Burns, 15 Pa. Dist & Co. 615 (1931).


in the particular case, or without discussing the matter at all, in effect have treated as insignificant the fact that no adoption statute existed at the execution and effective date of an instrument which conferred benefits upon a person’s children or issue, determinable at a future time. The argument in favor of looking to the adoption laws at the time of distribution rather than at an earlier date appears to rest on the hypothesis that the testator or conveyor had no specific intent in the matter, but did have a general intent that all qualifying as members of the class at the time of distribution should be regarded as included. There is some tendency in this, however, to overlook the definitional aspects of the description employed. These might reasonably be conceived as fixed as of the execution of the instrument or as of its effective date. The maker of the instrument may have anticipated changes in the number of units constituting the whole, but not have contemplated changes in the nature of the units themselves.

III.
Resort to Policy, Particular Rules of Construction and Express Statutory Presumptions

A. In General

So far the discussion has centered largely around surface manifestations of the instrument-maker’s “intention”—the particular terms of designation he employed, the accompanying language, and the surrounding circumstances. These are factors, however, which may not and often do not furnish any adequate answer to the inquiry. It could hardly be otherwise, since the inquiry for which answer is sought is ordinarily with reference to a matter the testator or his counterpart did not foresee; namely, an adoption after execution of the instrument. It then becomes necessary for the court to resort to other sources for its conclusion. A fundamental source is public policy, as that may be

247 Tirrell v. Bacon, (C.C. Mass. 1880) 3 F. 62 (will was executed before, but testator died after enactment of statute, under which his son adopted a child); Sewall v. Roberts, 115 Mass. 262 (1874) (trust indenture became effective before adoption statute was enacted under which settlor adopted a child); Von Beck v. Thomsen, 44 App. Div. 373, 60 N.Y.S. 1094 (1899), affirmed 167 N.Y. 601, 60 N.E. 1121 (1901) (policies of insurance were issued before adoption statute was enacted under which insured adopted a child, but insured died after enactment of statute). In Hartwell v. Tefft, 19 R.I. 644, 35 A. 882 (1896), no adoption statute existed when the will was executed, but codicils were added and the will was republished after enactment of the adoption law.

conceived by the court. The policy may not be announced in direct terms, however; as it appears in the opinion of a court it may take the form of one or more of the so-called “rules of construction.” Rules of construction are often mutually conflicting and thus reflect the underlying struggle of elements more basic. When a conclusion has been reached, consciously or unconsciously, on the basis of policy, there is generally no difficulty in locating a rule of construction to support the decision, even though the rule itself may be mere window-dressing and not necessarily expressive of the controlling policy. Of course, once a rule of construction has been announced for a particular type of case, courts may later resort to it automatically as a basis of decision in itself. This saves the court’s time. It abbreviates the judicial process. In a word, it is a convenience.

Policy in favor of probable intent.—While professing not to remake instruments, there can be no question but that courts constantly pursue a policy of filling gaps left by the instrument-maker in accordance with what they deem would have been his probable intention if he had thought about the omitted matter. A guide to what his intention probably would have been is logically to be found in the usual intention entertained by other persons in a similar situation. Unfortunately there is no infallible means of laying hold of this yardstick. A court may have to do a lot of guessing with respect to it.

Where the question is whether a person related to another by adoption only is within an instrument’s designation of the latter’s children, issue or like relatives, and the problem cannot be resolved successfully by resort to the language and surrounding circumstances, the guess of the court may be that the usual intention of persons similarly situated would be to exclude the adoptee. This assumption may then be stated in the form of a rule of construction that in cases of doubt the presumption of law is in favor of those in the line of ancestral blood, or that blood relationship is always recognized as a potent factor in testacy.

250 3 Property Restatement, § 243 (1940).
251 Middletown Trust Co. v. Gaffey, 96 Conn. 61, 112 A. 689 (1921); Grundmann v. Wilde, 346 Mo. 327, 141 S.W. (2d) 778 (1940); N.Y. Life Ins. & T. Co. v. Viele, 161 N.Y. 11, 55 N.E. 311 (1899); Matter of Haight, 63 Misc. 624, 118 N.Y.S. 745 (1909). See also dissenting opinions in Mooney v. Tolles, 11 Conn. 1, 149 A. 515 (1930), and Bray v. Miles, 23 Ind. App. 432, 54 N.E. 446, 55 N.E. 510 (1899).
252 Hall v. Crandall, (Del. Ch. 1941) 20 A. (2d) 545; Woodcock’s Appeal, 103 Me. 214, 68 A. 821 (1907); Wilder v. Butler, 116 Me. 389, 102 A. 110 (1917); Dulfon v. Keasbey, 111 N.J. Eq. 223, 162 A. 102 (1932).
or that there is a presumption in favor of keeping the property in the channel of natural descent.\textsuperscript{253}

If the court conceives that the desires of the usual testator are for equality among persons of corresponding position, a reason for excluding an adoptee from a particular designation may lie in the fact that if he were included he would obtain a greater share than others,\textsuperscript{254} as might be the case where, having been adopted by one of his natural grandparents, he claimed under the latter's will both as a child and a grandchild.\textsuperscript{255} The constructional preference in favor of equality of distribution might conceivably be extended in the opposite direction to furnish reason for holding that an adoptee should be deemed a child or other representative of the adopter and his line, where there is no other representative and the result of failure of the line will be to add to the shares of others. This, however, was precisely the situation in most of the cases examined, but in none of them was the preference for equality of distribution mentioned as a factor to be considered in the adoptee's favor.\textsuperscript{256} Slightly more helpful to him has been the concept that most testators mean to dispose of all their property and avoid a partial intestacy, so that where such an intestacy would have resulted if the adoptee had not been included within a designation, he has sometimes been deemed within it.\textsuperscript{257}

\textit{Policy of public interest.}—No one can read the cases on this subject without soon becoming aware of what for the most part is an unexpressed but nonetheless perceptible attitude of fear on the part of the courts that, unless they guard well against it, the institution of adopt-

\textsuperscript{253} Comer v. Comer, 195 Ga. 79, 23 S.E. (2d) 420 (1942); Everitt v. LaSpeyre, 195 Ga. 377, 24 S.E. (2d) 381 (1943); In re Clarke's Estate, 125 Neb. 625, 251 N.W. 279 (1933).


\textsuperscript{256} In Mooney v. Tolles, 111 Conn. 1, 149 A. 515 (1930), the equality of distribution argument in favor of the adoptee was based more on the context than on an abstract rule of construction. See also Ansonia Nat. Bank v. Kunkel, 105 Conn. 744, 136 A. 588 (1927).

\textsuperscript{257} Ansonia Nat. Bank v. Kunkel, 105 Conn. 744, 136 A. 588 (1927); Munie v. Gruenwald, 289 Ill. 468, 124 N.E. 605 (1919). But compare, for example, Huxley v. Security Trust Co., (Del. Ch. 1943) 33 A. (2d) 679, where the adoptee was excluded as a "child" or "issue" of the testator's daughter, although this resulted in a partial intestacy.
tion may be an implement of self-advancement, fraud or spite in the hands of adopters seeking to use it deliberately to meet requirements of an instrument, such as a will, that the adopters have children. There has been some basis for this fear in the facts of a few of the cases.

The danger to which reference has just been made is doubtless most real where the adopter himself, as distinguished from the adoptee, will benefit if the conditions with respect to his having children can be met by him. It is thought there is significance in the fact, therefore, that in no instance where an instrument gave to a person a restricted estate, which would ripen into a larger one if he should have children, did the court permit the increase in his interest and the defeat of the gift over to be accomplished through an adoption. So where a testator’s nephew was to receive a third of the income from a trust for life or until he should have a child that should attain the age of three years, and in the latter event he was to receive a third of the principal, the court held that, having no natural children, he did not qualify for the corpus share, although he and his wife took a child of about six months into their household approximately a year after the testator died, and adopted the child three years later. And there is authority that one given a fee simple estate, defeasible in event of his death without children or issue, could not by subsequent adoption acquire an absolute estate and avoid the executory limitation. The possibility of the use of adoption for ulterior purposes in such a case is illustrated by Nickerson v. Hoover. There the testator had devised real estate to his daughter, “provided she have [children],” and if she did not, the property was to pass at her death to her husband for life and then be sold and the proceeds distributed among the testator’s children and grandchildren. When the will was executed the testator’s daughter was only thirty years old, although she had been married for nine years without having had children. Forty-eight years after the testator’s death his daughter, then eighty-two years old, adopted an adult married woman as her child and heir. The court had no hesitancy in holding that the adoption did not ripen the daughter’s estate into an absolute fee and defeat the gift over conditioned on her death without children.

If, as is the usual case, the adopter has a life estate only, but his

258 Miller v. Wick, 311 Ill. 269, 142 N.E. 490 (1924).
260 70 Ind. App. 343, 115 N.E. 588 (1917).
children, issue or other relatives are to take the remainder, with gift over to others if he die without children, etc., then the chances of direct personal gain to the adopter are not great, even if adopted children should qualify as takers within the meaning of the will. In this situation, however, courts seem moved by a fear that if they should recognize adoptees as qualifying under the will to take the remainder, the life tenant might adopt a child simply to defeat the gift over to others. Hence it has sometimes been denied that by the process of adoption a life tenant, having no power to convey the fee, could in effect exercise a power of appointment over it and thereby defeat the ulterior limitation. Commenting on the facts involved in cases it sought to distinguish, one court observed that the adoption involved in them had often taken place under circumstances savoring of an attempt to create an heir for purposes of defeating a gift over. In New Zealand the Supreme Court said that in the absence of a proviso in the adoption statute rendering adoptions ineffective as to instruments previously executed, "It would not be difficult to imagine a case where an adoption might be proceeded with for the sole purpose of altering the destination of property already affected by deed, will or other instrument." The situation is especially suspect if the adoption occurs a short time before the adopter dies, or if the adoptee is an adult.

261 Middletown Trust Co. v. Gaffey, 96 Conn. 61, 112 A. 689 (1921); Woods v. Crump, 283 Ky. 675, 142 S.W. (2d) 680 (1940); Reinders v. Koppelman, 94 Mo. 338, 7 S.W. 288 (1887); Clarkson v. Hatton, 143 Mo. 47, 44 S.W. 761 (1898); Melek v. Curators of Univ. of Missouri, 273 Mo. App. 572, 250 S.W. 614 (1923); In re Clarke’s Estate, 125 Neb. 625, 251 N.W. 279 (1933); Matter of Leask, 197 N.Y. 193, 90 N.E. 652 (1910). But compare Brock v. Dorman, 339 Mo. 611, 98 S.W. (2d) 672 (1936). In Corr’s Estate, 338 Pa. 337, 12 A. (2d) 76 (1940), and Freeman’s Estate (No. 1), 40 Pa. Super. 31 (1900), a life tenant having power to appoint the remainder among his or her children (Corr case) or kin (Freeman case) was held to be without power to appoint the fee to his or her adult adoptee.

262 Mooney v. Tilles, 111 Conn. 1, 149 A. 515 (1930).

263 In re Beaty, Beaty v. Beaty, [1939] N.Z.L.R. (S.C.) 954 at 955. In Ashhurst’s Estate, 32 Pa. Dist. & Co. 547 at 548 (1938), affirmed 133 Pa. Super. 526, 3 A. (2d) 218, the court said: “It is easy to see the abuses which might arise if childless persons unable to have children could, by adopting children, defeat the rights of others and in effect divert the estate of the testator to persons who were strangers to his intention.”

264 Middletown Trust Co. v. Gaffey, 96 Conn. 61, 112 A. 689 (1921) (fact that the adoption was a few days before adopter’s death was said by the court to be of controlling significance); Tinkerley v. Davis, 195 N.C. 542, 142 S.E. 765 (1928) (the court said it was perhaps significant that the adoption by the life tenant had taken place only eight days before her death). See also Schafer v. Eneu, 54 Pa. 304 (1867), in which it appeared that the last of three children adopted by the life tenant was adopted one day before she died.

265 See Woods v. Crump, 283 Ky. 675, 142 S.W. (2d) 680 (1940); Corr’s
The possibility of the use of adoption for avaricious or spiteful purposes cannot be denied. The probability of its employment for those ends is believed, however, to be slight under modern adoption statutes contemplating a thorough investigation into such matters as the motives of the prospective adopter. It should be time enough to speculate upon possible fraudulent use of adoption when the fraud is found. And in considering policies involving the public interest, a court ought not overlook any which may be manifested by the legislature in placing adopted children on a level with natural children "to all intents and purposes."

B. Special Rules of Construction or Presumption

   1. Express statutory presumptions

In the United States the legislatures have exerted little effort to provide a direct answer to the question whether one related to another by adoption is to be deemed the equivalent of a natural relative within the intendment of a private instrument. In the British Empire greater strides in this direction have been made. One of the advantages of an explicit statutory guide lies in the circumstance that it can be made to fit into broader legislative policy with respect to adoption generally. Since, however, any rule which might be laid down by statute in the present connection would be desirable only in the form of a rebuttable presumption, lest rigidity be introduced into a matter in which flexibility is demanded, the statute would have to leave the question to some extent in the lap of the courts, where for the most part it already is.

Such express statutory provisions as do exist vary greatly from each other. At least five distinct approaches to the problem are found, sometimes in partial combination. A statute may undertake (a) to prevent the defeat, through adoption, of a limitation over to others conditioned upon the adopter's dying without children; (b) to eliminate adoption as a factor in the interpretation of instruments executed before the adoption; (c) to declare an adoptee to be equivalent to a child of the adopter within the meaning of an instrument, irrespective of who its maker was; (d) to declare an adoptee not to be equivalent to a child of the adopter within the meaning of an instrument, irrespective of who its maker was; and (e) to declare an adoptee to be equivalent or not

Estate, 338 Pa. 337, 12 A. (2d) 76 (1940); Freeman's Estate (No. 1), 40 Pa. Super. 31 (1909).

266 As to the possibility that the status-conferring provisions of the adoption statutes impliedly raise a rule of presumption, see supra, II, A, 2.
equivalent to a child of the adopter within the meaning of an instrument, depending upon whether it was the adopter or another person who executed the instrument.

(a) A statute of the first type, preventing the defeat of a limitation over conditioned on the adopter’s dying without children, is found in New York, where it is provided:

“As respects the passing and limitation over of real or personal property dependent under the provisions of any instrument on the foster parent dying without heirs, the foster child is not deemed the child of the foster parent so as to defeat the rights of remaindermen.”

It will be seen that while this provision covers any instrument, its sole purpose is to prevent the defeat of the rights of “remaindermen.” Accordingly, it has no application to a case of a substitutionary gift, in event of the foster parent dying without “heirs,” which does not involve futurity but takes effect, if at all, immediately upon the death of a testator. Moreover, there must be an actual gift over in default of such “heirs.” Consequently, the provision does not apply to a conveyance for the benefit of one for life, then to her heirs at law. The gift over to other remaindermen need not be expressed, however, if it can be fairly implied. And such remaindermen may be those entitled to the residuary estate. The reference to the foster parent’s death without “heirs,” being unintelligible if taken literally, has been treated as meaning death without children or, possibly, issue or descend-

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267 N.Y. Domestic Relations Law (McKinney, 1941) § 115.
268 As originally enacted the provision referred only to deeds, conveyances, wills, devises and trusts. N.Y. Laws, 1887, c. 703. Accordingly, in Von Beck v. Thomsen, 44 App. Div. 373, 60 N.Y.S. 1094 (1899), affirmed 167 N.Y. 601, 60 N.E. 1121 (1901), the court held that the provision had no application to policies of life insurance, the proceeds of which were payable at the insured’s death to his wife or, if she died before him, to their children.
269 In Matter of Nelson’s Estate, 143 Misc. 843, 258 N.Y.S. 667 (1932), the court said that in the absence of this provision, where the passing of property by limitation over might be dependent upon the parent dying without children, it would be easy for a person having no children to adopt one and thus cut off the contingent remainder. The provision in question is aimed at that possibility.
275 See N.Y. Life Ins. & T. Co. v. Viele, 161 N.Y. 11, 55 N.E. 311 (1899);
It is not clear whether, in directing that the adoptee shall not be deemed to be a child of the foster parent so as to defeat a limitation over to remaindermen, the statute is to be interpreted as excluding him also from taking under the limitation over itself, as where it is to the foster parent's heirs or next of kin according to New York intestacy laws.\textsuperscript{(b)}

Although the New York statutory provision, supra, does not state expressly that it is to have presumptive effect only, no reason is apparent for believing that the rule which it prescribes could not be overcome by adequate evidence of an intention in conflict with it.

(b) Statutory provisions of the second type, presumptively eliminating adoption as a factor in the interpretation of instruments executed prior to the adoption, have been enacted in Pennsylvania\textsuperscript{(b)} and parts of the British Empire.\textsuperscript{pa}

In New South Wales the statute declares:

\textsuperscript{pa} Pa. Stat. Ann. (Purdon, 1938) tit. 20, § 228. This provision applies only to wills executed by persons other than the adopter, and it is stated in the converse form; that is, an adoptee is to be deemed within a reference to the adopter's unnamed child or children in a will of another than the adopter, if the adoptee was adopted before the date of the will. In a note to the section of the statute by the commission to revise and codify the law of decedents' estates it is said that an extension of the provisions of the section to include children adopted after the date of the will by one other than the testator would tend to defeat the testator's intention. The section applies only to wills and not, for example, to a trust deed. Thorp's Estate, 90 Pitts. (Pa.) L.J. 493 (1942).

It has been suggested that it would not apply where the term of designation in the will was "issue" rather than "children." Ashhurst's Estate, 133 Pa. Super. 526, 3 A. (2d) 218 (1938).
“Provided always that such adopted child shall not by such adoption... acquire any right, title, or interest in any property under any deed, will, or instrument whatsoever made or executed prior to the date of such order of adoption unless it is expressly so stated in such deed, will, or instrument.”

(c) Statutory provisions of the third type, declaring an adoptee to be equivalent to a child of the adopter within the meaning of an instrument, and making no distinction between a case where the instrument was executed by the adopter and where it was executed by a stranger to the adoption, are found in Alberta, Prince Edward Island, Quebec, and Saskatchewan, the statute of the latter jurisdiction providing:

“The word ‘child’ or its equivalent in any instrument shall include an adopted child unless the contrary plainly appears by the terms of the instrument.”

The Washington statute is possibly subject to classification within this group also, as far as wills are concerned. And in North Dakota a portion of the Civil Code relating to definitions and general provisions states that the term “children” includes children by birth and by adoption. This may have reference, however, only to the meaning of the quoted word as employed in statutes.

of such order of adoption” has been construed to refer to an instrument executed prior to the adoption. In re a Dead of Trust, Peddle v. Beattie, [1933] N.Z.L.R. (S.C.) 696 (dictum); In re Horiana Kingi, Thompson v. Eruiti Tamahau Kingi, [1937] N.Z.L.R. (S.C.) 1025 (dictum); In re Beatty, Beatty v. Beatty, [1939] N.Z.L.R. (S.C.) 954. If the adoption is after the execution of the will, even though before execution of a codicil and confirmation of the will in the codicil, the adoptee is excluded as a taker, where the codicil in no way refers to the dispositive provisions of the will under which the adoptee claims. In re Jackson, Holmes v. Public Trustee, [1942] N.Z.L.R. (S.C. & C.A.) 682. For a criticism of this holding, see 19 N.Z.L.J. 152-153 (1943).

280 N.S. Wales Stat., 1939, p. 257.
282 P.E.I. Stat., 1940, c. 12, § 126.
283 In Quebec it is provided that the word “child” or its equivalent in a deed shall include also an adopted child unless the contrary clearly appears; except that “it shall not include the adopted child when it relates to a substitution in which the adopter’s own children are the institutes or substitutes.” Que. Rev. Stat. (1941) c. 324, § 21.
285 Wash. Rev. Stat. Ann. (Supp. 1943) § 1699-13. This section declares in part that by the decree of adoption the adoptee shall be, to all intents and purposes, and for all legal incidents, the child, legal heir, and lawful issue of the adopter, and entitled to all the rights and privileges, including “the right to take under testamentary disposition,” of a child of the adopter begotten in lawful wedlock.
286 N.D. Comp. Laws Ann. (1913) § 7284.
(d) Statutory provisions of the fourth type, in effect declaring an adoptee not to be equivalent to a child of the adopter within the meaning of an instrument, irrespective of whether the maker of the instrument was the adopter or a stranger to the adoption, have been enacted for England and Wales and Scotland. The Adoption of Children Act, 1926, applicable to England and Wales, provides in part:

"... and the expressions 'child,' 'children' and 'issue' where used in any disposition, whether made before or after the making of the adoption order, shall not, unless the contrary intention appears, include an adopted child ... or the issue of an adopted child."

"For the purposes of this section 'disposition' means an assurance of any interest in property by any instrument whether inter vivos or by will including codicil."

(e) Statutory provisions of the fifth type, declaring an adoptee to be equivalent or not equivalent to a child of the adopter within the meaning of an instrument, depending respectively upon whether it was executed by the adopter or a stranger to the adoption, are found, sometimes in conjunction with a provision which distinguishes between the cases of adoption before and after the execution of the instrument, in Maryland, Massachusetts, Pennsylvania, and parts of the British Empire. The prototype legislation in Massachusetts provides:

287 16 & 17 Geo. 5, c. 29, § 5 (2) (Adoption of Children Act, 1926).
288 20 & 21 Geo. 5, c. 37, § 5 (3) (Adoption of Children Act), (Scotland).
289 16 & 17 Geo. 5, c. 29, § 5(2) (3) (1926).
290 Md. Ann. Code (Flack, 1939) art. 16, § 83. This section provides that the term "child" or its equivalent in a deed, grant, will or other instrument shall be held to include any child adopted "by the person executing the same," unless the contrary plainly appears by the terms thereof, whether such instrument be executed before or after the adoption. The implication would seem to be that the converse presumption applies where the instrument was executed by one other than the adopter. See, as apparently to this effect, Eureka Life Ins. Co. v. Geis, 121 Md. 196, 88 A. 158 (1913).
292 Pa. Stat. Ann. (Purdon, 1938) tit. 20, §§ 227, 228. These sections refer to wills only. Section 227 declares that whenever in a will a bequest or devise shall be made to the child or children of the testator, without naming such child or children, such bequest or devise shall be construed to include any adopted child or children of the testator, unless a contrary intention shall appear by the will. Section 228 is a similar provision with respect to the case where the will is executed by one other than the testator, but the presumption of inclusion of the adopted child in such a case is stated to apply only as to adoptions occurring before the date of the will.
293 Br. Col. Rev. Stat. (1936) c. 6, § 12 (word "child" or "issue" or its equivalent, in a will, grant, or settlement is to include a child adopted "by the testator, grantor, or settlor," unless the contrary plainly appears by the terms of the instrument); Ont. Rev. Stat. (1937) c. 218, § 6 (expressions "child," "children" and "issue" in an instrument "made after the making of the adoption order by the adopting parent" are to include an adoptee, but not in any other case); Nova Scotia Rev. Stat. (1923)
“The word ‘child,’ or its equivalent, in a grant, trust settlement, entail, devise or bequest shall include a child adopted by the settlor, grantor or testator, unless the contrary plainly appears by the terms of the instrument; but if the settlor, grantor or testator is not himself the adopting parent, the child by adoption shall not have, under such instrument, the rights of a child born in lawful wedlock to the adopting parent, unless it plainly appears to have been the intention of the settlor, grantor or testator to include an adopted child.”

This provision was said to have been passed as a probable consequence of the decision in Sewall v. Roberts, which held an adoptee to be a child and issue of the adopter within the meaning of a trust agreement effected by the adopter through the agency of his father’s administrators. There being no precise equivalent for the word “child,” the statutory presumption in question has been construed to mean that if by a settlement, deed or will property is given by terms which embrace a child born in lawful wedlock, and which, in their application to existing facts, have the same effect and mean the same thing as child or children, such as the terms “issue,” “descendant” or “heir at law,” the statutory provision is applicable to exclude a person’s adoptee as a taker within such terms under an instrument executed by a stranger to the adoption.

Other statutory rules.—The statutory provision found in some jurisdictions, to the effect that an adopted child shall not be capable of taking property expressly limited to the heirs of the body of the adopter, has been discussed at an earlier point, where the conclusion was reached that logically such a provision relates only to inheritance or to the acquisition of certain statutory interests created in lieu of estates tail.

In this connection it may be observed that by amendment the Ohio adoption statute, after its declaration with respect to the incapacity of an adopted child, c. 139, § 8 (expression “child” or its equivalent in a grant, trust, settlement, entail, devise, or bequest is to include an adopted child of the settlor, grantor or testator, unless the contrary plainly appears by the terms of the instrument; but the opposite is to be true where the settlor, grantor or testator is not the adopter); Queens. Pub. Acts (Reprint, 1936) vol. 1, p. 726 (adoptive not to have any right to property under any disposition made by a person other than the adopter, unless the contrary appears to have been the intention of the person making the disposition.)

297 See supra, II, A, 5.
adoptee to “inherit” property expressly limited to the heirs of the body of the adopter, provides that the adoptee shall, however, be capable of “inheriting” property expressly limited by will or by operation of law to the child or children, heir or heirs at law, or next of kin, of the adopting parent or parents, or to a class including any of the foregoing. 298

Also encountered occasionally is an adoption statute which declares that its enactment is not to affect dispositions by an instrument effective before a stated date. 299 Such provisions, however, are in the nature of saving clauses and throw no particular light on the problems under consideration.

It will have been observed that all of the express statutory presumptions which have been discussed relate to the equivalence of an adoptee as a child or similar relative of the adopter. Only one statute has been found which explicitly provides a presumption with respect to whether a child, after his adoption by a stranger, is still to be deemed a child or issue of the natural parents within the meaning of an instrument. A Queensland law declares that he shall continue so to be deemed, notwithstanding his adoption by another person, unless a contrary intention on the part of the maker of the instrument appears. 300

2. Judicial presumptions depending upon who executes instrument

A previously discussed type of express statutory presumption, which makes an adoptee’s equivalence or nonequivalence to a child within the intendment of an instrument depend upon whether the maker of the instrument was the adopter or another person, has its analogue in rules of construction developed by courts themselves. One of these is that where a person makes provision for his own “child or children,” by that designation, he will be deemed to have intended that a child adopted by him should be included, unless a contrary intention is established by appropriate evidence. 301 There is no dispute over this rule, nor does it

299 See, for example, N.Y. Domestic Relations Law (Supp. 1943) § 110.
301 For various expression of this rule of construction see Middletown Trust Co. v. Gaffey, 96 Conn. 61, 112 A. 689 (1921); Mooney v. Tolles, 111 Conn. 1, 149 A. 515 (1930); Wildman’s Appeal, 111 Conn. 683, 151 A. 265 (1930); Casper v. Helvie, 83 Ind. App. 166, 146 N.E. 123 (1925); Beck v. Dickinson, 99 Ind. App. 463, 192 N.E. 899 (1934); Woodcock’s Appeal, 103 Me. 214, 68 A. 821 (1907); Wilder v. Butler, 116 Me. 389, 102 A. 110 (1917); Dulfon v. Kessbey, 111 N.J. Eq. 223, 162 A. 102 (1932); In re McEwan, 128 N.J. Eq. 140, 15 A. (2d) 340 (1940); Albright v. Albright, 116 Ohio St. 668, 157 N.E. 760 (1927); Rodgers v. Miller, 43 Ohio App. 198, 182 N.E. 654 (1932); Lichter v. Thiers, 139 Wis. 481, 121 N.W. 153 (1909). For instances where the presumption, if its existence was considered at all, was overthrown by the context or circumstances, see Warden v. Overman, 155 Iowa 1, 135 N.W. 649 (1912); Morrison v. Sessions, 70 Mich. 297, 38 N.W. 249 (1888);
appear that there should be any. Suggestions, however, that its basis is a moral obligation owed by the adopter to the adoptee are rather superficial.\footnote{802} A simpler and sounder basis would appear to be that most persons who would have enough affection for a child to adopt it as their own would probably intend that it should be included in a reference to their children.\footnote{808} The observation may also be made that a construction which includes the adopted child, where the adopter is the testator and the adoption occurs after execution of the will, tends to make the instrument legally more effective than the opposite construction, if it is the law of the jurisdiction that an adoption by the testator after execution of a will nullifies the will to the same extent as the subsequent birth of a child would.\footnote{804}

The other and complementary rule of construction announced by some courts is to the effect that if the maker of the instrument is not the adopter, it is to be presumed that a reference in the instrument to the adopter's child or children does not include his adoptee.\footnote{805} This


\footnote{802} Woodcock's Appeal, 103 Me. 214, 68 A. 821 (1907); Wilder v. Butler, 116 Me. 389, 102 A. 110 (1917); Dulfon v. Keasbey, 111 N.J. Eq. 223, 162 A. 102 (1932); In re McEwan, 128 N.J. Eq. 140, 15 A. (2d) 340 (1940); Albright v. Albright, 116 Ohio St. 668, 157 N.E. 760 (1927). In Virgin v. Marwick, 97 Me. 578 at 583, 55 A. 520 (1903), the court said it would be "a reflection upon the sense of justice" of the adopter to hold that he did not intend to include, within the designation of his children as beneficiaries of life insurance policies, a child whom he adopted after the policies were issued.

\footnote{808} This may have been in the mind of the court in Wildman's Appeal, 111 Conn. 683 at 687, 151 A. 265 (1930), when it was said that where the testator is the adopting parent it is "reasonable" to presume that the word "child" or its equivalent in the will was intended to include his adoptee.

\footnote{804} See, for example, Ariz. Code Ann. (1939) § 41-107. And see annotations, 98 A.L.R. 190 at 194 (1935); 105 A.L.R. 1176 (1936).

\footnote{805} For various statements of the rule see Huxley v. Security Trust Co., (Del. Ch. 1943) 33 A. (2d) 579; Smith v. Thomas, 317 Ill. 150, 147 N.E. 788 (1925); Pierce v. Farmers State Bank, (Ind. 1943) 51 N.E. (2d) 480; Casper v. Helvie, 83 Ind. App. 166, 146 N.E. 123 (1925); Beck v. Dickinson, 99 Ind. App. 463, 192 N.E. 899 (1934); Savells v. Brown, 187 Ky. 134, 218 S.W. 462 (1920); Woodcock's Appeal, 103 Me. 214, 68 A. 821 (1907); Wilder v. Butler, 116 Me. 389, 102 A. 110 (1917); Russell v. Musson, 240 Mich. 631, 216 N.W. 428 (1927); Ahlmeyer v. Miller, 102 N.J. L. 54, 131 A. 54 (1927), affirmed 103 N.J. L. 617, 137 A. 453 (1927); Dulfon v. Keasbey, 111 N.J. Eq. 223, 162 A. 102 (1932); Trenton Union Trust Co. v. Gane, 125 N.J. Eq. 389, 6 A. (2d) 112 (1939), affirmed 126 N.J. Eq. 273, 8 A. (2d) 708 (1939); In re McEwan, 128 N.J. Eq. 140, 15 A. (2d) 340 (1940); In re Fisler, 131 N.J. Eq. 310, 25 A. (2d) 265 (1942), affirmed 133 N.J. Eq. 421, 30 A. (2d) 894 (1943); Matter of Leask, 197 N.Y. 193, 90 N.E. 652 (1910); Matter of Wait's Estate, (N.Y. Surr. 1943) 42 N.Y.S. (2d) 735; Smyth v. McKissick, 222 N.C. 644, 24 S.E. (2d) 621 (1943); Albright v. Albright, 116 Ohio St. 668, 157 N.E. 760 (1927); Rodgers v. Miller, 43 Ohio App. 198, 182 N.E. 654 (1932);
rule had its origin with the Supreme Judicial Court of Maine in Woodcock's Appeal,\(^{308}\) where it was said:

“When in a will provision is made for ‘a child or children’ of some other person than the testator, an adopted child is not included unless other language in the will makes it clear that he was intended to be included...”\(^{307}\)

A number of observations, both factual and critical, may be made with respect to this rule.

It will be noticed first that according to its terms the rule is confined to the situation where the designating words are “child” or “children.” Although courts finding merit in the rule will doubtless apply it as well to another designation, such as “issue,”\(^{308}\) or even “heirs,”\(^{309}\) when used as a synonym for “children,” the rule is not applied if the reference is to the general heirs or the statutory next of kin of the adopter.\(^{310}\) In this respect the rule does not have the extensiveness of its statutory counterpart in Massachusetts, where the presumption prescribed by the law has been held to apply even to a designation of the adopter’s heirs at law.\(^{311}\)

Then, too, according to its original statement in Woodcock's Appeal,\(^{312}\) the rule in terms applied only to wills. There being no basis for such a restriction, it was never heeded, and the rule has been invoked as to inter vivos instruments as well as wills.\(^{313}\)

In its original form the rule seemingly permits rebuttal of the presumption only by other language in the instrument itself.\(^{314}\) Convinced

Lichter v. Thiers, 139 Wis. 481, 121 N.W. 153 (1909). See also Leeper v. Leeper, 347 Mo. 442, 147 S.W. (2d) 660 (1941). And see 3 Property Restatement, § 287 (1940).

\(^{308}\) 103 Me. 214, 68 A. 821 (1907).

\(^{307}\) 103 Me. 214 at 217, 68 A. 821 (1907).

\(^{309}\) In re Fisler, 131 N.J. Eq. 310, 25 A. (2d) 265 (1942), affirmed 133 N.J. Eq. 421, 30 A. (2d) 894 (1943). See also Middletown Trust Co. v. Gaffey, 96 Conn. 61, 112 A. 689 (1921); Wildman’s Appeal, 111 Conn. 683, 151 A. 265 (1930); Huxley v. Security Trust Co., (Del. Ch. 1943) 33 A. (2d) 679; Dulfon v. Keesbey, 111 N.J. Eq. 223, 162 A. 102 (1932); Rodgers v. Miller, 43 Ohio App. 198, 182 N.E. 654 (1932).

\(^{310}\) Trenton Union Trust Co. v. Gane, 125 N.J. Eq. 389, 6 A. (2d) 112 (1939), affirmed 126 N.J. Eq. 273, 8 A. (2d) 708 (1939). And see supra, II, A, 6.

\(^{311}\) Wyeth v. Stone, 144 Mass. 441, 11 N.E. 729 (1887).

\(^{312}\) 103 Me. 214, 68 A. 821 (1907).


\(^{314}\) Woodcock’s Appeal, 103 Me. 214, 68 A. 821 (1907).
that the statement of the rule in this manner in one of its earlier opinions improperly prevented consideration of the surrounding circumstances, the Indiana Appellate Court modified the rule so as to permit the presumption to be overthrown by extraneous circumstances. And the more reasonable statement of the rule elsewhere permits rebuttal of the presumption by the attendant circumstances as well as by the language of the instrument as a whole.

What is the rationale of this rule? As it stands it has no satisfactory one. In Woodcock's Appeal the statement of the rule is followed immediately by the remark that the testatrix there, who was the mother of the adopter, "was under no sort of obligation, moral or family, to make provision for the adoptee." It is hardly conceivable, however, that the absence of an obligation owing from the maker of the instrument to the adoptee is the reason for the rule. If B devises property to his friend C for life, remainder to C's children, B is under no more obligation to C's natural children than to his adopted ones.

Preference for blood is also unsatisfactory as an explanation of the rule. There is nothing in the form of the rule which prevents its application to a case where the maker of the instrument is wholly unrelated to the adopter or related to him other than by blood. Moreover, any attempt to predicate the rule on preference for blood encounters the objection that the rule does not apply if the maker of the instrument is the adopter himself, whose connections by blood to his natural children are even more immediate and binding than those between his natural children and another person. Attention is directed to the fact, however, that in Woodcock's Appeal, where the rule was first an-

816 Beck v. Dickinson, 99 Ind. App. 463, 192 N.E. 899 (1934). Although this decision was disapproved in Pierce v. Farmers State Bank, (Ind. 1943) 51 N.E. (2d) 480, the court in the latter case nevertheless stated the rule of construction in the form of its modification in the Beck case.
817 Smith v. Thomas, 317 Ill. 150, 147 N.E. 788 (1925); Matter of Wait's Estate, (N.Y. Surr. 1943) 42 N.Y.S. (2d) 735; Smyth v. McKissick, 222 N.C. 644, 24 S.E. (2d) 621 (1943). See also Wilder v. Butler, 116 Me. 389 at 384, 102 A. 110 (1917), where the court speaks of the presumption as controlling unless "in other ways" the grantor's intention to the contrary appears.
818 103 Me. 214 at 217, 68 A. 821 (1907). The idea of an absence of obligation, where the instrument-maker is not the adopter, is also cited to justify the rule in Wilder v. Butler, 116 Me. 389, 102 A. 110 (1917); and In re McEwan, 128 N.J. Eq. 140, 15 A. (2d) 340 (1940).
819 In the case of In re Holden, 207 Minn. 211, 291 N.W. 104 (1940), aside from the court's objections to the rule in any event, the fact that the testatrix was not related to the adopter by blood constituted particular reason for not applying the rule there.
820 103 Me. 214, 68 A. 821 (1907).
nounced, the court stressed the normal preference of a testator for his own blood and stated another rule of construction, narrower in form, to the effect that in the making of a devise over from his own children to their "child or children," a testator is presumed to have intended "child or children" of his own blood, and not to have intended his estate to pass to a stranger to his blood. If an identity between the two rules was meant, it has long since been destroyed.

The rule has other disquieting aspects. For one thing, it did not exist from the beginning of the subject. In cases like Tirrell v. Bacon,\(^{321}\) and Hartwell v. Tefft,\(^{322}\) which antedated Woodcock's Appeal,\(^{323}\) there was no intimation of the rule, and adopted children were held to be within the bounty of testator's gifts to the children or issue of another; and this, even though the adoption took place after the testator's death. The fact that express legislation was deemed necessary in Massachusetts to effect a result similar to the presumption later announced by the Maine court would also appear to be significant.

Furthermore, authorities cited by courts invoking the rule are often distinguishable on fundamental grounds. For example, in Woodcock's Appeal,\(^{324}\) origin of the rule, the sole authority cited to support it was (1) Russell v. Russell,\(^{325}\) holding that the testator's own adopted child was excluded from a gift in the will to his children because the narrowly worded Alabama statute raised an adoptee to the status of an heir only and not of a child of the adopter; and (2) Schafer v. Eneu,\(^{326}\) in which it appeared that the Pennsylvania statute had not been enacted until after the testator died and in any event was also narrowly worded. The Illinois case of Smith v. Thomas\(^{327}\) also illustrates the irrelevance of the authority which is often cited in support of the rule. The only cases the court there cited in behalf of the rule were (1) Woodcock's Appeal,\(^{328}\) which, as just seen, had relied on decisions involving other material considerations; (2) Matter of Leask,\(^{329}\) which ultimately turned on an express statutory provision to the effect that an adoptee should not be deemed a child of the adopter so as to defeat a limitation over to remaindermen conditioned on the adopter's dying without chil-

\(^{321}\) (C.C. Mass. 1880) 3 F. 62.
\(^{322}\) 19 R.I. 644, 35 A. 882 (1896).
\(^{323}\) 103 Me. 214, 68 A. 821 (1907).
\(^{324}\) Id.
\(^{325}\) 84 Ala. 48, 3 S. 900 (1887).
\(^{326}\) 54 Pa. 304 (1867).
\(^{327}\) 317 Ill. 150, 147 N.E. 788 (1925).
\(^{328}\) 103 Me. 214, 68 A. 821 (1907).
\(^{329}\) 197 N.Y. 193, 90 N.E. 652 (1910).
dren; (3) Blodgett v. Stowell,\textsuperscript{380} which was decided under the express Massachusetts statutory provision against an adoptee being deemed a child of the adopter within the meaning of an instrument executed by another; and (4) Eureka Life Ins. Co. v. Geis,\textsuperscript{381} which turned on a Maryland statute similar in effect to the Massachusetts one.

It is also of interest that almost every case which has invoked the rule as a basis of decision has involved the further factor that the instrument was executed or became effective before the adoption, so that the result could as well have rested on the posterior date of the adoption and the implication of an absence of anticipation of the adoption when the instrument was executed or became effective.\textsuperscript{382} In this connection it was pointed out in Mooney v. Tolles:\textsuperscript{383}

"... It is significant, however, that in practically all of the cases where this distinction [with respect to instruments executed by the adopter and those executed by third persons] has been given effect, it appears ... that the adoption took place long after the testator's death,... It is fairly to be inferred from the authorities that, in determining whether the adopted child was in contemplation of a testator other than the adopting parent, the weighty consideration was the fact that the adoption, being subsequent to the testator's death, was not known to him, together with the effect of it upon the distribution of the estate, rather than that the testator was not the adopting parent and might be presumed to be likely to intend to favor his own blood as against a stranger thereto."

The reason for the rule has been described as "not apparent."\textsuperscript{384} The rule itself has been characterized as "rather arbitrary,"\textsuperscript{385} and "as

\textsuperscript{380} 189 Mass. 142, 75 N.E. 138 (1905).
\textsuperscript{381} 121 Md. 196, 88 A. 158 (1913).
\textsuperscript{382} The single exception is Woodcock's Appeal, 103 Me. 214, 68 A. 821 (1907), where the adoption occurred eight years before the will was executed and nine years before the death of the testatrix. It does not appear whether she knew or approved of the adoption. In several cases where the rule was invoked the court stressed the fact that the adoption took place after the execution or effective date of the instrument. Huxley v. Security Trust Co., (Del. Ch. 1943) 33 A. (2d) 679; Casper v. Helvie, 83 Ind. App. 166, 146 N.E. 123 (1925); Ahlmeyer v. Miller, 102 N.J.L. 54, 131 A. 54 (1925), affirmed 103 N.J. L. 617, 137 A. 543 (1927); In re Fisler, 131 N.J. Eq. 310, 25 A. (2d) 265 (1942), affirmed 133 N.J. Eq. 421, 30 A. (2d) 894 (1943); Matter of Wair's Estate, (N.Y. Surr. 1943) 42 N.Y.S. (2d) 735; Smyth v. McKissick, 222 N.C. 644, 24 S.E. (2d) 62 (1943). See also Middletown Trust Co. v. Gaffey, 96 Conn. 61, 112 A. 689 (1921); Wildman's Appeal, 111 Conn. 683, 15 A. 265 (1930); In re McEwan, 128 N.J. Eq. 140, 15 A. (2d) 140, 15 A. (2d) 340 (1940).
\textsuperscript{383} I11 Conn. 1 at 9-10, 149 A. 515 (1930).
\textsuperscript{384} 1 Page, Wills, 2d ed., § 900 (1926).
\textsuperscript{385} Lichter v. Thiers, 139 Wis. 481 at 490, 121 N.W. 153 (1909).
the sort of thing that makes for the despair of all who are interested in the application of legal principles in the construction of written instruments, especially deeds and wills." It is believed that actually the rule is just a screen behind which lurks, whether the court realizes it or not, the real reason for many of the decisions against inclusion of the adoptee—the fear that adoption might be used as an instrument of self-interest or spite.

IV

Conclusion

In the drafting of wills and other private instruments, where terms of general designation are employed, as in a devise or bequest to a person's "children," "issue," or "heirs," it is desirable that the instrument state explicitly whether one who may be related by adoption to the person mentioned is within the intendment of the expression used, and also whether the particular term of designation is to include one related by blood to the person mentioned, but adopted by a stranger. To supply a prima facie answer to these questions, if the maker of the instrument neglects to provide one himself, statutory presumptions in harmony with broader legislative policy as to adoption generally have considerable merit.

Unfortunately those who draft private instruments usually do not consider the effect which adoption, and particularly future adoption, will have upon the construction of such instruments. And in the United States express statutory presumptions in this regard are not yet common. Resolution of the construction problems is thus thrust upon the courts, which are forced to speculate upon what would or should have been the intention of the instrument-maker if he had thought about the matter. For the most part the conclusions reached by the courts have not been favorable to the position of the adoptee other than as an heir or next of kin of the adopter. The decisions against the adoptee's equivalence to one related correspondingly by blood are often predicated nominally upon arbitrary definitions, irrelevant circumstances and rules of construction having no substantial basis in reason. Sometimes overlooked, moreover, is the distinction between statutes which are narrowly worded with respect to the status which they confer upon an adoptee and those which are broadly phrased. Rarely voiced, but unquestionably influencing the courts, is the apprehension that if adoption were accorded the same legal significance as lawful natural birth it might be employed for purposes of financial gain or as a spite device. It is believed, however, that under modern adoption statutes, with their highly developed procedural safeguards, this fear is not well grounded.