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Gifts to "Heirs" in California

"T\text{ake}, for instance, the word 'heirs', so often, indeed almost always, put into a will to fill out the final limitations. There are jurisdictions where no counsel dares to advise on what is to be done with property that is bequeathed to 'heirs'."\(^1\)

It is improbable that California was one of the jurisdictions which the late John Chipman Gray had in mind in 1909 or earlier when these words were written. It is true that at that time there had been few decisions in this state which would furnish any guide as to the meaning of the word "heirs" in a will or other document. The learned author and teacher of property law was not referring, however, to the absence of judicial decisions on the question in any particular jurisdiction but to the fact that many courts were inclined to judge each will by itself, and that for this reason there could be little precedent to aid in the problems of construction.\(^2\) Since 1909 the California cases dealing with the meaning of the word "heirs" have become more numerous. Nevertheless no little uncertainty still exists as to the meaning of the term in various situations—whether for the reason to which Professor Gray referred or for other causes.

\(^1\) \text{GRAY, THE NATURE AND SOURCES OF THE LAW (2nd ed. 1921) 176.}

\(^2\) "Judges . . . have declared that the mode of dealing with one man's blunder is no guide as to the mode of dealing with another man's blunder, and especially have said that each will is to be determined according to the intention of the testator, and that the judicial mind should apply itself directly to that problem, and not trouble itself with rules of construction." Gray, \textit{op. cit. supra} note 1, at 174; see Note (1917) \textit{30 HARV. L. REV.} 372; \textit{cf.} Lord Shaw of Dunfermline's statement in Lucas-Tooth v. Lucas-Tooth [1921] A. C. 594, 613-614 (a case in which it was held the "heir" was there to be determined as of the time of distribution): "To treat categories which arise as generalizations in one case as necessarily applicable to and inclusive of all cases, and then further to treat the words as falling within the categories according to a pre-allotted meaning, may be destructive of true interpretation. Words themselves change in meaning; even punctuation, or the order in which things are set down, may have its significance; and the nuances of expression have an infinite variety. Out of these categories or generalizations, you may no doubt construct a machine which would stamp ordinary words with a meaning which their author would promptly disavow. The generalization becomes a category, the category becomes a rule, and the rule becomes a bed of Procrustes, upon which words and expressions must be stretched, but which, as one is unhappily conscious, they can only be made to match by torture or by mutilation. The meaning of the testator is not thus reached; truth is therefore sacrificed, and misinterpretation results."
In a gift to "heirs," do they take in the proportions provided for by the statutes on intestate succession or do they always share equally? When does an ultimate limitation to "heirs" exclude by implication a particular heir to whom a prior gift has been made? As of what date are the heirs to be determined,—the death of the ancestor (when the latter and the testator are different persons), the death of the testator, or the date of their acquisition of possession or enjoyment? What qualification of the words "my heirs" is necessary to prevent the application of Probate Code sections 228 and 229, which in certain situations make the relatives of a predeceased spouse, rather than the relatives of the decedent, the latter's heirs? A consideration of these and other problems will reveal that considerable uncertainty as to the meaning of the word "heirs" in California law still exists.

IN WHAT PROPORTIONS DO HEIRS TAKE?

A decedent leaves as his heirs one child and two grandchildren, children of a deceased child. Under section 222 of the Probate Code, the grandchildren inherit by right of representation, or _per stirpes_, so that the child will receive one-half of the property and each of the grandchildren one-fourth. Suppose, however, that property of one dying intestate is not involved but that the question is as to the division of property given by will or deed "to the heirs of A." Will the child take one-half and each of the grandchildren one-fourth, in accordance with the provisions of section 222 of the Probate Code, or will the three share equally? The state of the California law requires that the problem be considered in three different situations: (1) where by will property is given to the heirs of A; (2) where by will property is given to A for life, remainder to the heirs of A; and (3) where by deed or contract property is given to the heirs of A.

3 E.g., when does an apparent remainder in a deed to the grantor's "heirs" amount simply to a reversion in the grantor; and, likewise, when is an apparent devise to a person who is the testator's heir nugatory because he is regarded as acquiring the property by descent—the so-called doctrine of "the worthier title"? See Sines, THE LAW OF FUTURE INTERESTS (1935) §§144-148; Tiffany, REAL PROPERTY (2d ed. 1920) 1893; Harper and Heckel, The Doctrine of Worthier Title (1930) 24 ILL. L. REV. 627; Note (1935) 48 HARV. L. REV. 1202. These questions have apparently not been raised in any reported California case. The present article does not purport to do more than suggest the problems. In Gray v. Union Trust Co. (1915) 171 Cal. 637, 154 Pac. 306 (where no mention is made of the doctrine) the particular wording of the remainder, which was to the "heirs at law [of the trustor] according to the laws of succession of the State of California as such laws now exist" (italics ours) was sufficient to prevent the application of the first mentioned doctrine even though it may be in force in California. As the court pointed out, by a change in the laws of succession those entitled under the deed of trust might be entirely different persons from those who would be the trustor's heirs at the time of her death. The "heirs," therefore, took by the deed of trust a remainder which was not subject to the trustor's control, as a reversion would have been.
Section 108 of the Probate Code (formerly sections 1334-5 of the Civil Code) provides that "a testamentary disposition to 'heirs' . . . of any person, without other words of qualification, and when the terms are used as words of donation, and not of limitation, vests the property in those who would be entitled to succeed to the property of such person according to the provisions of division II of this code." 4 In the case of Dickey v. Wairond the supreme court very properly held that in a situation where this section applies, the provisions of the code on intestate succession are applicable "not only for the designation and description of the takers, but also for the purpose of fixing the proportions in which each shall take." 5 By its own terms, however, section 108 applies only to testamentary dispositions. The strong implication, if not the dictum, of the opinion in the Dickey case is that where the property is given to the heirs by deed they take equally, regardless of the provisions of the code on intestate succession. The opinion seems also to hold by way of dictum that in the case (whether by will or by deed) of a gift to A for life, remainder to the heirs of A, although the rule in Shelley's case has been abolished by section 779 of the Civil Code, the word "heirs" is nevertheless one of limitation within the meaning of section 108 of the Probate Code, and, therefore, the heirs do not take in the proportions provided for by the descent statutes but constitute a class which shares equally.

The abolition of the common law rules of descent which made it of importance whether the decedent had acquired the land by descent or by purchase has rendered inapplicable certain important consequences of the so-called "worthier title" doctrine in connection with wills. Nevertheless opportunity for its application in California remains. For instance, suppose a testator specifically devised Blackacre to his mother, who would have been his sole heir under section 225 of the Probate Code had she survived him, and gave the residue of his property to a friend, X. The mother predeceased the testator, leaving another son, the testator's brother, who survived him. If Probate Code section 92 (the anti-lapse statute) applies, the devise to the mother will not lapse but will pass to the testator's brother as a lineal descendant of the original devisee, the mother. But if the doctrine of "the worthier title" applies, section 92 would seem to be inapplicable. Had she lived, the mother would have taken by descent, since the devise to her would have been nugatory; and, therefore, when she predeceased the testator, the property would fall into the residue. See In re Warren's Estate (1931) 211 Iowa 940, 234 N. W. 835.

4 Note the omission of the words "issue" and "descendants" when Civil Code sections 1334-5 were made 108 of the Probate Code. These two words are obviously more restrictive in meaning than "heirs," "relations," "family," or any of the other similar terms which appear in that section. A literal application of the provision of section 1334 would have meant that a testamentary disposition to "issue" or "descendants" vested the property in collateral relatives of the decedent in certain cases where he left no lineal descendants. Nevertheless the omission of these two words from section 108 may give rise to certain problems as to per capita or per stirpes construction in testamentary gifts to "issue" or "descendants." See 2 Page, Wills (2d ed. 1928) §927.

5 (1927) 200 Cal. 335, 339, 253 Pac. 706, 707.
The fallacy of the conclusion that, since the abolition of the rule in *Shelley's* case, the word "heirs" in a remainder to the heirs of a life tenant is a word of limitation, has been pointed out by an able commentator. "It is admitting in one breath that the rule in *Shelley's* case has been abolished, and in the next breath saying that Probate Code section 108 will be applied as if the rule in *Shelley's* case still existed in California." Perhaps the use of the word "limited" in Civil Code section 779, in referring to a remainder being limited to the heirs of the life tenant, led the court to the erroneous conclusion that in such a situation the word "heirs" was a word of limitation. The statement in section 1335 of the Civil Code that the word "heirs" is used as a word "of donation and not of limitation when the property is given to the person so designated directly, and not as a qualification of an estate given to the ancestor of such person" may also have contributed to the error. In the superseded opinion of the district court of appeal in the *Dickey* case the court seems to have taken the view that in a remainder to the heirs of a life tenant the property is not given directly to the heirs within the meaning of section 1335, and accordingly to have arrived at the startling conclusion that a devise to the heirs of a life tenant is "both a donation and a limitation and therefore Civil Code section 1334 does not apply."

The implication in *Dickey v. Walrond* that in the case of a gift to heirs by deed or other instrument operating *inter vivos*, the descent statutes are not determinative as to the share which each will take, as in the case of a gift to heirs by will, introduces an equally undesirable distinction. From every practical standpoint there would seem to be no justification for a different rule in the two situations. Why should the shares which heirs receive be different under identically worded gifts to them by that description by deed, on the one hand, and by will on the other? Distinctions of this character bring the law into disrepute. If, in the absence of any statute, the rule were well settled that a gift to "heirs" constitutes an ordinary gift to a class in which all members share equally, the responsibility for having limited the provisions of Civil Code section 1334 and Probate Code section 108 to wills might rest with the legislature. But by the overwhelming weight of authority, without the aid of any statute, a gift to "heirs" is interpreted as a gift to them in the pro-

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7 Cal. Civ. Code §779. "When a remainder is limited to the heirs, or heirs of the body, of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the successors or heirs of the body of the owner for life, are entitled to take by virtue of the remainder so limited to them, and not as mere successors of the owner for life."

portions provided for by the rules or statutes on intestate succession. The fact that most of the cases so holding have been will cases is no indication that the rule is restricted to testamentary gifts. Apparently no reason is ever advanced in support of the rule which is not equally applicable to gifts to heirs by instruments operating inter vivos.

Three previous California cases are probably largely responsible for the intimation in Dickey v. Walrond that where the gift to heirs is not by will they take equally, regardless of the provisions of the statutes on intestate succession. The first of these was a decision by the district court of appeal in litigation over the proceeds of a benefit certificate in a fraternal organization payable on the death of the member to “his legal heirs related to said member in the relationship of heirs.” The heirs of the deceased were his widow and nine brothers, sisters, nephews and nieces. The trial court held that the widow was entitled to one-half of the proceeds but on appeal its decision was reversed and the widow given one-tenth, only. The court held that the descent statutes were to be looked to to ascertain the names of the heirs but when once they were ascertained, the case was just as if the names of the heirs had been written in the contract, so that they would take equally. In support of this conclusion the court relied principally upon Niblack on Accident Insurance and Benefit Societies, second edition, a quotation from which it included in its opinion. The quotation from Niblack precisely supports the opinion. A closer examination of the text shows that the author admits that in a gift by will to “heirs,” the descent statutes designate both the persons to take and the proportions in which they shall take. He contends, however, that in the case of an insurance contract, although the statutes designate the persons, they do not control as to the proportions. The only asserted reason which he gives in support of this distinction is that “when a member has made his certificate payable to his heirs, they do not take the fund by descent, but by contract.”


10 Burke v. Modern Woodmen of America (1906) 2 Cal. App. 611, 84 Pac. 275.


12 But in a gift to “heirs” by will, the heirs do not always take by descent; frequently they take by purchase, i.e. through the will. The heirs of a person other than the testator take by purchase when he makes a gift to them by that description in his will. Furthermore, though because of the so-called doctrine of the “worthier title” (see supra note 3) the testator’s heirs frequently do take by descent when he so describes them in a gift in his will, the reason why they are considered as taking by descent is that the will gives them nothing which they would not take as heirs in the absence of such a gift.
Indiana case is the only one of the six which Niblack cites in support of his contention which in any wise sustains it. Of the five other cases, four involved instruments in which the word "heirs" was not used but in which the benefit was to accrue to the "wife and children," and in the fifth case the question of apportionment among the heirs was neither involved nor mentioned. At the same time the author cites three cases which he admits are against the view for which he contends. In each of these cases the insurance was in favor of "heirs" and the court in each case apportioned the proceeds among them according to the rules of intestate succession. Several other decisions involving insurance policies or benefit certificates reach the same conclusion as to apportionment, so that the weight of authority in the insurance cases is decidedly against Niblack's position.

The other two California cases concerned Federal land patents in which the patentees were described as "heirs" of a specified deceased person. In the first of these cases, Cooper v. Wilder, the original entryman had died leaving a widow and son as his heirs but having made the widow the sole beneficiary under his will in which he expressly excluded the son from any share of his estate. The action was by the son to quiet title against the defendant who claimed through the foreclosure of a mortgage given by the widow. As the successor in interest of the widow, the defendant claimed the entire property. The court very properly held that the land was no part of the estate of the decedent and was not devisable by him or affected by the decree of distribution, and, therefore, that it vested in the two heirs equally. The additional statement in the opinion that the heirs would take equally "regardless of the proportions in which they would have taken under the laws of succession" was unnecessary to the decision. The other land patent case, Wittenbrock v. Wheadon, while not referred to by the court in its opinion in the Dickey case, was cited and relied upon by counsel in the briefs. In that case the

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13 Wilburn v. Wilburn (1882) 83 Ind. 55.
18 (1896) 111 Cal. 191, 43 Pac. 591, 52 Am. St. Rep. 163.
19 (1900) 128 Cal. 159, 60 Pac. 664. Cf. Powell v. Powell (1912) 22 Idaho 531, 536, 126 Pac. 1058, 1060, in which the Idaho Supreme Court disagreed with the views expressed in these two California cases and held that "the title should and does pass
deceased entryman left a widow and three children. Citing the *Cooper* case, the court held that the widow and children each took an undivided one-quarter interest in the land. The court also rested its decision upon the provisions of section 2269 of the Federal Revised Statutes (not applicable to the patent in the *Cooper* case) which specifically stated that the issuance of the patent to the heirs, as therein provided for, should "cause the title to inure to such heirs as if their names had been specially mentioned." This statutory provision would seem clearly to require a per capita division. The intimation in *Dickey v. Walrond*, therefore, that where the gift to "heirs" is made in some instrument other than a will, their shares will not be determined by the descent statutes, rests on the shaky support of a district court of appeal decision in an insurance case which is against the great weight of authority, the dictum in another case, and a third case in which the meaning of the word "heirs" was fixed by the provision of a particular Federal statute. It should not be difficult for the supreme court, when the question is squarely presented for its decision, to disregard the intimation to the contrary in the *Dickey* case and hold that the provisions of the descent statutes are equally applicable whether the heirs take by will or by other instrument.

**EXCLUSION OF PARTICULAR HEIR BY IMPLICATION**

When does an ultimate limitation to the testator's heirs exclude by implication an heir to whom a gift of a particular estate in the same property has been made? This problem is also connected with the additional one as to the proper time for the determination of the "heirs,"—is it the death of the testator or the death of the life tenant or other date when the limitation to the "heirs" takes effect in possession or enjoyment? The exclusion of the heir to whom the particular estate is given may be effected simply by excluding him from the group of persons from whom the "heirs" are to be selected, or, in other words, by ascertaining who would have been the heirs had this particular heir predeceased the testator. In that event no departure from the rule that heirs are to be determined as of the date of the testator's death is necessary. On the other hand, the exclusion of the particular individual may also be accomplished by departing from this rule and interpreting the limitation in question as one in favor of those persons who would have been the testator's heirs had he survived until the time when the limitation to "heirs" is to take effect in possession.

The problem may perhaps be more clearly presented in the light of the facts of the leading California case of *Estate of Wilson*. After de-
vising property to a son for life, and on his death to his then living children, the will provided "and if he leave no issue, then upon his death, all such real property shall be distributed among my heirs, as provided by the laws of the State of California, the same as if I had died intestate." When the will was executed, the testatrix was a widow and the son was her only child. He was married but without issue until after the execution of the will, when a son was born to him. The son and his wife and the grandson all survived the testatrix. Numerous nephews and nieces (children of deceased brothers and sisters) also survived her. The grandson subsequently predeceased the son, and the latter died leaving his wife as his sole heir at law and his sole devisee and legatee. The nephews and nieces, on the one hand, and the son's wife, as successor in interest of her husband, on the other, both claimed the property by reason of the gift over to the testatrix's "heirs" upon the death of the son without leaving issue. If, in providing that the property was to go to her "heirs" on the death of her son without leaving issue, the testatrix used the word "heirs" in its ordinary sense, her son would be the one to whom the description applied and, as his successor in interest, his wife was entitled to the property. If, however, the testatrix intended by the word "heirs" to designate her next of kin, other than her son, as those who should take the property in the event of his death without issue, the nephews and nieces were entitled to it. The trial court decided in favor of the wife and the supreme court in favor of the nephews and nieces. The supreme court concluded that, whether the heirs were to be determined as of the date of the testatrix's death or of the date of the death of the life tenant, the language of the will indicated a clear intent on the part of the testatrix to have the son excluded. In addition to the fact that he was the sole heir and that a life estate in the same property had already been given him, the court seemed principally influenced by the phrase "distributed among my heirs," which it pointed out, necessarily referred to a gift to more than two heirs, and, therefore, indicated that the testatrix had in mind her next of kin other than her son.

The result reached in the Wilson case seems in accord with the probable intention of the testatrix. One may be puzzled, however, to determine the extent to which the decision actually turned upon the presence in the will of the phrase "distributed among my heirs." In spite of the emphasis upon this and other particular phraseology, it is by no means clear that without it the court would not have reached the same conclusion, namely, that by the ultimate limitation to "heirs" the testatrix intended to refer to her next of kin, other than her son, her sole heir apparent. The prevailing view both in England and this country, however, seems to be that the fact that the life tenant is the testator's sole
heir is not by itself such an incongruity as to prevent the ultimate limitation to heirs being accorded its primary and usual meaning and thus referring to the person entitled to succeed to the property on his death intestate. It is also to be noted that much the same phraseology as was present in the will in the Wilson case—"to and amongst my heirs-at-law, share and share alike"—was not deemed sufficient by an English court to prevent the testator's only child and sole heir, who was also the beneficiary for life, from receiving the property. One may agree with the result reached in the Wilson case and nevertheless come somewhat regretfully to the conclusion that this decision seems to place California in Gray's category of jurisdictions where at least a fair degree of predictability has been sacrificed to the desire to carry out the probable wishes of the testator in the particular case.

One can readily appreciate the difficulty with which a judge was confronted in a case which was tried before him shortly after the supreme court had decided the Wilson case. In Estate of Newman the will left the property in trust for the testator's wife and all but one of seven other collateral heirs. It then provided that on the death of the survivor of the beneficiaries of the trust the trustee should convey, deliver, pay and transfer "to my heirs at law, wherever and whoever they may be, according to the laws of succession of the state of California, all of said trust estate." The testator's heirs were his wife, a brother and five sisters, and a niece, the daughter of a predeceased brother. All except the niece were beneficiaries under the trust. A step-daughter of the testator was also a beneficiary. It was argued that by this reference in the will to his heirs "the testator meant to describe and refer to the persons who would be his heirs at law at the time of the death of the last survivor of the beneficiaries of the income of the trust set forth in the will," and evidently influenced by the Wilson case the trial court so held. The district court


22 Ware v. Rowland, supra note 21.

23 (1924) 69 Cal. App. 420, 229 Pac. 898.

24 See In re Bump's Will (1922) 234 N. Y. 60, 136 N. E. 295, where, due to the particular wording of the will, three possibilities were presented as to the proper
of appeal, however, decided that there was nothing in the will to warrant the court in according to the word "heirs" other than its technical and usual meaning or in construing it to describe an artificial class of "heirs" to be ascertained as if the testator had died at the time of the termination of the trust. It distinguished Estate of Wilson on the ground that there the life tenant was the sole heir and that the ultimate limitation on the termination of the life estate was a distribution "among my heirs," thus showing that the word "heirs" was not used in its strict technical sense.

The decision in Estate of Newman undoubtedly is in accord with the prevailing view elsewhere. Furthermore, the distinction pointed out by the district court of appeal between that case and Estate of Wilson is not without validity. It is not clear, however, that had the supreme court passed upon the Newman case it might not have reached the same conclusion as in Estate of Wilson. The testator's qualification of "my heirs at law" by the phrase "wherever and whoever they may be," although conceivably indicating the possibility of change in the group of his nearest relatives merely between the date of the will and that of his death, seems more probably intended to include the period after his death during which the trust was to last.

It may be that a statute such as Pennsylvania has had for some years will preserve the same degree of certainty or predictability which exists time for the determination of the testator's "heirs," to whom the ultimate limitation was made: (1) the death of the testator, (2) the death of the widow, to whom he gave a life interest with a power to consume, and (3) the death of his sisters, to whom he gave a life interest after the death of the widow, in the event of his daughter's dying without leaving issue. If the first alternative were selected, the property ultimately went to his daughter; if the second, to his sister; and if the third, to such aunts and cousins as should survive his sister. The Court of Appeal said: "The surrogate chose the second alternative; the Appellate Division the third. We select the first." (This gave the primary and natural meaning to the term "heirs"). Cf. Union & New Haven Trust Co. v. Ackerman (1932) 114 Conn. 152, 158 Atl. 224, where it was held that because of the particular provisions of the will, the "heirs" should be determined as of the termination of the life estate; Bridgeport City Trust Co. v. Shaw (1932) 115 Conn. 269, 161 Atl. 341, where it was held that there was nothing in the will to indicate an intent that the heirs should be determined at other than the usual time, i.e. at the death of the testator; New Britain Nat. Bank v. Parsons (1934) 118 Conn. 167, 171 Atl. 1, where by a three to two decision the court held that, insofar as the question as to the proper time for the determination of the testator's heirs was concerned, the will there involved was of the same character as that in the Bridgeport City Trust Co. case rather than the Union & New Haven Trust Co. case. Cf. also Gilman v. Congregational Home Missionary Society (1931) 276 Mass. 880, 177 N. E. 621, where the court reversed the trial court because the former could find no words in the will indicating that the words "heirs at law" should have other than their primary meaning; Boston Safe Deposit & Trust Co. v. Waite (1932) 278 Mass. 244, 179 N. E. 624, where the court also reversed the trial court because it had accorded the words "heirs at law" that meaning when, in the view of the Supreme Court, the wording of the will indicated a different meaning. See (1932) 45 Harv. L. Rev. 1121 for comment on both cases.
in the jurisdictions which insist upon "heirs" being given its natural and primary meaning in the absence of very clear indication that it was not intended to have that meaning, and at the same time will permit of results which more nearly accord with the probable intention of the testator in the average case. Since 1923 Pennsylvania has had a statute which provides that in the absence of provision to the contrary, either expressly or by necessary implication, the "heirs" or "next of kin" . . . "shall be construed as meaning the person or persons thereunto entitled at the time of the termination of the estate . . . for life . . ." and "shall not be construed as meaning the person or persons who were the heirs or next of kin of the donor at the time the grant or donation was made or at the time the testator died."25

TIME AT WHICH "HEIRS" ARE TO BE DETERMINED26

Determination of the testator's "heirs" as of the date of the termination of the life estate has already been mentioned as an indirect method of exclusion of a particular heir or heirs. In most of the cases throughout the country where the question has been raised as to whether the "heirs" should not be artificially determined as of that date, the ultimate controversy seems to have been over the exclusion of the particular heir or heirs who were already entitled to a life interest. The ascertainment of this artificial class of "heirs," however, has other consequences than simply the elimination of a particular heir or heirs. It frequently results in the exclusion of other heirs who survive the testator but die during the continuance of the life estate and in the substitution of others in their place. Instead of the gift to heirs being vested on the testator's death, vesting is here postponed until this artificial class of "heirs" can be determined—which is not until the termination of the life estate.

In no California case, apparently, has particular attention being paid to this aspect of the problem. In its opinion in Estate of Wilson, however, although the court pointed out that in view of its conclusion that the life tenant was to be excluded in the determination of the testator's heirs, it was immaterial to the respondent (who claimed through the life tenant) whether the heirs were to be ascertained as of the date of the testator's death or of the termination of the life estate, nevertheless it went on to say that it thought "it clear that the intention was that they should be determined as of the date of termination of the life estate." Apparently, however, the question was not argued in the case or in subsequent litiga-

tion in the same estate which resulted in another appeal over a different question.\textsuperscript{27} Nineteen nephews and nieces were entitled to the bulk of the property, regardless of which date was used for the ascertainment of the heirs. Another niece, however, had survived the testator but died before the termination of the life estate, leaving her husband and two children as her heirs. The dictum in the opinion precluded both the husband and children from sharing in the estate. Obviously the niece's husband could not qualify as an heir of the testator. The absence of any living brother or sister of the testator excluded the children, who were his grandnephews or grandnieces, from sharing along with the nineteen nephews and nieces, under the rule of \textit{Estate of Nigro}\textsuperscript{28} which obtained at that time. Thus it was very material from the standpoint of the niece's surviving husband and children whether the heirs were determined as of the one time or the other. No mention is made in the court's opinion of any reasons which induced it to conclude that the heirs should not be determined as of the time of testator's death. Determining them as of that date would both have been more in accord with the natural and primary meaning of the word "heirs" and would have resulted in the interests vesting at the earliest possible date. Furthermore, certain justifications sometimes found for using the termination of the life estate as the date as of which they should be ascertained were not present in the \textit{Wilson} case. There were no words clearly indicative of that intent, such as "those who shall \textit{then} be my heirs,"\textsuperscript{29} nor was there uncertainty as to the amount of the property which the heirs would take, as where the life tenant is given a power to consume.\textsuperscript{30} The will in

\textsuperscript{27} \textit{Estate of Wilson} (1924) 65 Cal. App. 680, 225 Pac. 283. See \textit{infra}, pp. 432-4 for a discussion of the question presented on this second appeal. The statements above referred to from the opinion of the supreme court on the first appeal appeared in the last paragraph of its opinion as originally rendered. As the result of a petition for a modification of the opinion by a relative of the predeceased husband of testatrix who was not a party to the action but who claimed to be entitled as her heir (and who participated in the subsequent litigation reviewed by the district court of appeal) the supreme court changed the wording of this paragraph. In the opinion as modified, however, the court reiterated its view that the heirs were to be determined as of the termination of the life estate.

\textsuperscript{28} (1916) 172 Cal. 474, 156 Pac. 1019. See Schapiro, \textit{Descendants of Deceased Brothers and Sisters of Decedent as Heirs at Law in California} (1925) 13 CALIF. L. REV. 113. The rule of Estate of Nigro was changed in 1931 by the substitution of "issue" (of the decedent's parents) for "brothers and sisters of decedent and to the children of deceased brothers and sisters" in Probate Code section 223 (formerly subdivision 2 of section 1386 of the Civil Code) and the insertion of the phrase "nor descendant of a deceased brother or sister" in Probate Code section 226 (formerly subdivision 5 of section 1386 of the Civil Code.)


\textsuperscript{30} In Craig v. McFadden (Tex. 1917) 191 S. W. 203, the life tenant's power to consume the entire property was considered to be one circumstance tending to show
the Wilson case, however, contained no direct words of gift to the heirs but only the provision for distribution to them; and this has occasionally been relied on in decisions in other jurisdictions as affording some (though not conclusive) indication of an intent that the interest should not vest until the time of distribution and that the heirs, therefore, should be determined as of the termination of the life estate.31

It is also possible that the court in the Wilson case favored the determination of the heirs as of the later date because it considered that by so doing the exclusion of the life-tenant son from the class of "heirs" could be the more readily justified. It is perhaps arguable that where the life tenant is the testator's sole heir, to exclude him, but nevertheless determine the "heirs" as of the testator's death, would be to leave no one to take the future interest. This seems to be the view expressed by Mr. Simes in his recent work32 and one which also has the support of the House of Lords in a case involving a gift to the testator's right heirs with the express exception of his son, who was his sole heir.33 The present writer agrees with Jarman's characterization of this decision of the House of Lords as an extraordinary one and with his view that "high as is the authority of the Court by which it was ultimately decided, its soundness may be questioned." While it is difficult to follow Jarman's conclusion that the will contained "a positive and express disposition in favor of the person who would be next in the line of descent, if the son were out of the way,"34 the only reasonable implication would seem to be that a gift to such person was intended.35 Sir Frederick Pollock's contention, in attempted justification of the decision, that "heir" is a word of art, and that "if the testator meant 'right heir' to be read as 'the person who, if...' etc., he should have said so explicitly,"36 may be

an intention that no title should vest until the termination of the life estate and that the "heirs" should, therefore, be determined as of that time. In several other cases, however, the life tenant's power to consume has not prevented the court from holding that the "heirs" should be determined at the time of the testator's death. Gilman v. Congregational Home Missionary Soc., supra note 21; Abbott v. Danforth (Me. 1937) 192 Atl. 544; In re Bump's Will, supra note 24. Cf. the almost universally accepted rule that a power of appointment, the exercise of which will defeat a remainder, does not turn what would otherwise have been a vested remainder into a contingent one. Simes, op. cit. supra note 3, §80; Cal. Civ. Code §781.


33 Pugh v. Goodtitle (1787) 3 Bro. P. C. 454.


35 Lord Mansfield so held when the case was before him. See Fearne, Contingent Remainders (3d Am. ed. 1826) Appendix, 573.

36 (1933) 49 L. Q. Rev. 464.
salutary counsel for draftsmen but is too rigid a rule for application by courts. At least three American jurisdictions see no incongruity in a life tenant who is the testator's sole heir being excluded by implication and the "heirs" nevertheless determined as of the date of the testator's death.\(^7\) The judge in a recent English case\(^8\) also admitted that his personal view was opposed to the House of Lords decision, which he felt compelled to follow.

"HEIRS THEN LIVING" AND SIMILAR PHRASES

Attempts by the testator to be more specific in the gift to his "heirs" upon the termination of the life estate have not always resulted in the elimination of uncertainty as to the time as of which the "heirs" are to be determined. Occasionally the word "heirs" is qualified by the phrase "then living" or "then surviving." Here, the vesting of the gift is clearly postponed until the termination of the life estate. But is the gift made to those who are the testator's heirs at his death and who survive the life tenant, or is it in favor of an artificial class of "heirs" to be determined as of the termination of the life estate? Other reasons may, of course, justify the conclusion that the testator intended an artificial class of "heirs" to be determined as of the later date. The prevailing view, however, seems to be that the mere qualification of "heirs" as those "then living" does not require any departure from the primary and natural meaning of the term.\(^9\) In a Massachusetts case the opposite conclusion was reached and the "heirs" were ascertained as of the termination of the life estate.\(^40\) The testator had left all his property in trust for his wife for life and on her death to his "heirs at law then living." The wife survived him for more than forty years and in the meantime his brother and sisters, who, in addition to the wife, were his heirs, had all died. Consequently, on the death of the wife, none of his heirs, in the primary sense, were still alive. On the other hand, numerous nephews and nieces would have been his heirs had he died at the same time as his wife. Undoubtedly influenced strongly by this circumstance and by a desire to avoid any intestacy, the court held that the testator here intended to have his "heirs" ascertained as of the termination of the life estate. The language of the opinion seems sufficiently broad to imply that the qualifying phrase "then living" should generally produce that result. While the literal meaning of the phrase "heirs then living"

\(^{37}\) Nicoll v. Irby (1910) 83 Conn. 530, 77 Atl. 957; In re Miller's Estate (1922) 275 Pa. 30, 118 Atl. 549; In re Carter's Will (1926) 99 Vt. 480, 134 Atl. 381.

\(^{38}\) In re Smith (1933) 210 N. E. 647.

\(^{39}\) In re Winn (1910) 1 Ch. 278; Beardsley v. Fairchild (1913) 87 Conn. 359, 87 Atl. 737; Cushman v. Goodwin (1901) 95 Me. 355, 50 Atl. 50.

or "then surviving" would seem to support the majority view, the Massachusetts interpretation may be more in accord with the intention of the testator. Since it is probable that the question of construction will usually be raised shortly after the testator's death and prior to the termination of the life interest, there will be simply the possibility (instead of the certainty as in the Massachusetts case) of the life interest extending over a long period during which all of the original heirs may die. Thus there is always the possibility of the same result, i.e., a failure of the gift, which would have been the outcome in the Massachusetts case but for the court's interpretation of the phrase "then living" as referring not to those of the heirs, in the primary sense, who survived the life tenant, but to an artificial class of heirs determined as of the termination of the life estate.

In no California case, apparently, has the court been required to pass upon this problem raised by a gift "to my heirs then living." The phrase was involved, however, in two recent cases in neither of which the particular problem here under discussion was then in issue. In *Estate of Layton*\(^{41}\) the testator had left the residue of his estate in trust, the net income from which was to be paid to his wife during her life or until her remarriage. On her death or remarriage, the property was to be distributed to a certain church, but it was further provided that if the gift to the church should be held invalid in whole or in part, the invalid portion should go "to my then living heirs-at-law, excluding my daughter." A brother and sisters of the decedent appealed from the order settling the executor's account and distributing the estate, and the question was raised whether they were "interested" in the estate, inasmuch as they were not specifically named as beneficiaries in the will and were not "heirs" of the testator in the primary sense of that term. The court held, however, that they were included in the gift "to my then living heirs-at-law, excluding my daughter." It concluded that the testator did not intend that on the termination of the trust in favor of his wife, any invalid portion of the remainder "should go to his wife alone, and that in using the words 'then living heirs' he did so intending to designate thereby those persons, excluding his daughter, who should be alive at the time of the termination of the trust and who might at that time come within the term 'heirs.'” Although the precise question was not involved in the case and the somewhat indefinite language above quoted does not even constitute an unequivocal dictum, it does seem to contain an intimation that the "heirs" should be determined as of the date of termination of the trust and not simply be the survivors of those who were the heirs at the testator's death.

\(^{41}\) (1933) 217 Cal. 451, 19 P. (2d) 793, (1934) 91 A.L.R. 480.
The phrase "to my heirs then living" was also considered by the district court of appeal in *Estate of Hoover*. The testator had left the residue of his property in trust for his daughter for life, and had provided that after her death it should all go "to my heirs then living, in accordance with the present law of succession of the State of California." The daughter, who was the testator's sole heir-at-law, claimed the remainder after the termination of the trust, and also claimed that the trust estate was merged with the remainder so that she was entitled to have the property distributed to her free of the trust. The court properly ruled against this contention, holding that the words "heirs then living" clearly excluded the daughter. The question was not involved, and the opinion contains no intimation, as to whether the "heirs" ultimately entitled should be the survivors of those who (excluding the daughter) would have been the heirs at the testator's death, or those who would have been his heirs had he died at the termination of the life estate.

Even a definite statement by the testator that the "heirs" to whom he wishes his property to go after the termination of the life estate are to be determined as of that date does not always eliminate a problem as to the proper time for their ascertainment. The desirability of even further qualification of the word "heirs" is suggested by the result reached in a recent English case. After having provided that in the event she survived his mother, his wife should enjoy the income from all his property during her life, the testator gave the corpus to "such person or persons as at the decease of my said wife shall be my heir or heirs at law absolutely." The wife predeceased the testator and the question arose as to whether the provision that the heirs were to be determined as of the date of her death still applied. A majority of the Court of Appeal held the provision still applicable, with the result that the "heirs" were determined as of a date when the testator was still alive. This, of course, was the literal meaning of the language of the will, and to limit it by implication to the situation where the wife survived the testator, would result in intestacy. Nevertheless this would seem clearly what the testator intended, and the trial judge and one of the judges of the Court of Appeal so held. A Maryland decision is in accord with the dissent in the English case.

**Gifts to Heirs of Persons Other Than Testator**

When the gift is not to the testator's heirs but to the heirs of another person, additional problems as to the time as of which the heirs are to be ascertained frequently arise. Here another alternative is presented,
i.e., that the heirs may be determined at the date of the death of their ancestor rather than either at the testator’s death or at the time of distribution. The situation is further complicated by the fact that the gift may be one to the heirs of a living person. In such a case the children or other heirs apparent may be the intended beneficiaries; and if there is no postponement of possession or enjoyment, the “heirs” of such living person will be determined as of the date of the testator’s death.45 Again, where the gift is that of a remainder to the heirs of a living person immediately following a life estate to such person himself, the heirs will usually be ascertained at the death of the ancestor.46 This is so because at the testator’s death there are no “heirs” (in the primary sense) of the living life tenant; and the date of their ascertainment at the latter’s death coincides with the date when they are entitled to possession. Where the two dates do not coincide, however, are the heirs to be determined as of their ancestor’s death or as of the time of distribution? No California case has apparently presented the precise problem. In a Massachusetts case it was held that the heirs should be determined at the ancestor’s death, although the possession was postponed until the termination of an intermediate life estate. The result accords with the primary meaning of the term and the particular situation seems to have called for no departure from that meaning. The same conclusion was reached in a recent decision by the New York Court of Appeals.48 In a prior New York case, however, also decided by the Court of Appeals, the heirs (or next of kin) were determined not at the death of the ancestor but as of the time of distribution. In its opinion in the subsequent case, the court distinguished this case on the basis of the particular “circumstances then present” including the fact that “there was no direct gift, but only ‘one through the medium of a mandate to deliver and convey’.”

45 Healy v. Healy (1898) 70 Conn. 467, 39 Atl. 793; Harris v. Ingalls (1907) 74 N. H. 339, 68 Atl. 34; Heath v. Hewitt (1891) 127 N. Y. 166, 27 N. E. 959, 13 L. R. A. 46. When possession is postponed, as, e.g., by a prior life estate to a third person, and the “ancestor” is still alive at the termination of the life estate, the “heirs” (i.e., children) will include both those answering the description at the testator’s death and those coming within the description before the termination of the life estate.


50 Chalmers v. Chalmers, supra note 31 at 246, 190 N. E. at 478.
The fact in the case where the heirs were determined as of the time of distribution that the gift to them was substitutional, whereas it was not substitutional in the case where the heirs were determined at the ancestor's death, may also have been a distinguishing element in the two cases.51

Where the gift is to the heirs of a person who is dead when the will takes effect and the gift is immediate, with no postponement of possession or enjoyment, are the heirs to be determined at the ancestor's death (subject to the condition of their surviving the testator) or are they to be ascertained as of the death of the testator? The beneficiaries will frequently, though not always, be different, depending upon which date for the determination of the heirs is taken. The weight of authority,52 as well as the California view,53 seems to be in favor of their ascertainment as of the time of the testator's death. This necessitates a departure from the primary meaning of the term "heirs" but has the advantage of preventing a complete failure of the gift which would result under the opposite rule when all the heirs (in the strict sense) die between the time of their ancestor's death and the death of the testator.54

Where an estate for life or years precedes the gift to the heirs of the deceased person, should the "heirs" be determined as of the death of the testator or as of the period of distribution? Not to ascertain them until the latter date would result in a postponement of vesting, and could not be justified, as in the case previously mentioned, on the ground of the prevention of the complete failure of the gift. If the heirs are to be ascertained at any time other than the death of their ancestor, therefore, the death of the testator would ordinarily seem preferable to the time of distribution.

EFFECT OF SECTIONS 228 AND 229 OF PROBATE CODE

In an earlier article55 the writer has endeavored to point out the extraordinary and, to a large extent, undesirable consequences of the

51 "Distinctions are also drawn, how effectively we need not say, between a gift to next of kin in substitution for another class, and a gift to next of kin as primary donees." Cardozo, J., in New York Life Ins. Co. v. Winthrop, supra note 49 at 103, 142 N. E. at 432.
52 Ruggles v. Ruggles (1897) 70 Conn. 44, 38 Atl. 885; Mockbee v. Grovins (1923) 300 Mo. 446, 254 S. W. 170; Trenton etc. Co. v. Donnelly (1903) 65 N. J. Eq. 119, 55 Atl. 92. Contra: Lancaster v. Lancaster (1900) 187 Ill. 540, 58 N. E. 462, 79 Am. St. Rep. 234; see also In re Ruggles Estate (1908) 104 Me. 333, 71 Atl. 933, which does not make it clear as of which date the heirs are to be determined.
53 Estate of Page (1919) 181 Cal. 537, 185 Pac. 333.
54 Cf. the majority interpretation of the phrase "my heirs then living," which may result in complete failure of the gift due to the death of all the heirs in the interval between the testator's death and the time of distribution. Ante pp. 426-7 and notes 39 and 40.
rules of descent embodied in Probate Code sections 228 and 229 (formerly subdivision 8 of section 1386 of the Civil Code). In addition to being responsible for numerous anomalies and injustices in the law of intestate succession, they represent an extreme and complex application of the old doctrine of descent of ancestral property, which is a waning one. At common law and in most jurisdictions where that doctrine has existed, it applied only to the identical property acquired by descent. A sale or exchange of the property extinguished its ancestral character, so that the proceeds or the property acquired with the proceeds was not regarded as ancestral for the purpose of descent. Moreover, in most jurisdictions the doctrine is not applicable at all to personal property. In Estate of Brady, however, the California Supreme Court held these particular code provisions applicable to property for which the original property had been exchanged or in which the proceeds of the sale of the original property had been invested, and to the interest, rents and profits therefrom.

In Estate of Watts the testatrix left a will in which she gave the residue of her property to her heirs. The estate had formerly been community property of the testatrix and her husband. Upon his death intestate three-fourths of the community property had been inherited by the testatrix and one-fourth by the husband's relatives. The testatrix's brothers and sisters and children of deceased brothers and sisters claimed the entire residue of her estate as her heirs. Persons bearing a similar relationship to the predeceased husband, however, contended that they were entitled to one-half the residue under subdivision 8 of section 1386 of the Civil Code (now section 228 of the Probate Code). The trial court awarded the entire residue to the testatrix's relatives but the supreme court reversed the decision and held that the husband's relatives were also her heirs and were entitled to half of the property. In a subsequent appeal in the case, the supreme court held that oral declarations of the testatrix were inadmissible to show that by the word "heirs" she intended to refer to her own relatives only. The conclusions reached by the supreme court seem practically unescapable in view of the provisions of subdivision 8 of section 1386 and of section 1334 of the Civil

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56 Co. Litt. 12b; Martin v. Martin (1911) 98 Ark. 93, 135 S. W. 348; Armitage v. Armitage (1867) 28 Ind. 74; Holmes v. Shinn (1901) 62 N. J. Eq. 1, 49 Atl. 151; McCammon v. Cooper (1904) 69 Ohio St. 366, 69 N. E. 658; (1912) 12 Cor L. Rev. 1905.

57 WOERNER, THE AMERICAN LAW OF ADMINISTRATION (3d ed. 1923) §73.

58 (1915) 171 Cal. 1, 151 Pac. 275. See also Simonton v. Los Angeles etc. Bank (1928) 205 Cal. 252, 270 Pac. 672; Estate of Putnam (1933) 219 Cal. 608, 28 P. (2d) 27, 22 CALIF. L. Rev. 450.

59 (1918) 179 Cal. 20, 175 Pac. 415.

60 (1921) 186 Cal. 102, 198 Pac. 1036.
Code (now section 108 of the Probate Code) that "a testamentary disposition to 'heirs'... of any person, without other words of qualification, ... vests the property in those who would be entitled to succeed to the property of such person" according to provisions of the code on intestate succession. Common law precedent, furthermore, tends to support the same result. Where a man seised of land by descent *a parte materna* made a feoffment with the remainder to his right heirs, it was held that the heirs *a parte materna*, and not the heirs *a parte paterna*, should have the land.\(^1\) In other words, one individual may be the heir as to one piece of property and an entirely different individual be the heir of the same person as to another piece of property.

Subdivision 8 of section 1386 of the Civil Code was held inapplicable in the determination of the testatrix's heirs in the second appeal in the *Estate of Wilson*.\(^2\) The case involved a situation in which it would have been particularly unfair to have held that the "heirs" of the testatrix, to whom she had left her property, were the relatives of her predeceased husband rather than her own blood relatives. Nevertheless the reasoning by which the court sought to justify a very desirable result seems far from convincing. The bulk of the testatrix's estate consisted of property which had been the separate property of her predeceased husband and which she had inherited from him on his death intestate over forty years before. Her will, in which she left all her real property to her "heirs" in the event of the death of her son without leaving issue, was made in 1896. She died in 1907. When she made the will there was nothing in the descent statutes of this state that even remotely suggested that if she left relatives of her own, her heirs could be her deceased husband's relatives. As the law then stood, the only opportunity which the husband's relatives had of succeeding to her property on her death intestate, was in the event that she should have no relatives of her own, in which case the husband's relatives would have been entitled, instead of the property escheating to the state. Nine years after she made the will, however, and less than two years before her death, subdivision 8 of section 1386 of the Civil Code was amended to give for the first time to the relatives of the predeceased husband the priority over the relatives of the decedent which they now have under section 229 of the Probate Code.\(^3\) The lower court awarded the property to the relatives of the

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\(^1\) Godbold v. Freestone (1695) 3 Lev. 406. Cf. the rule that "heir" means heir at common law, so that in a devise to the "heir" or "heirs," although the land was gavelkind or borough English, the eldest son was nevertheless entitled. Garland v. Beverley (1878) 9 Ch. D. 213; *In re Smith*, supra note 38.

\(^2\) *Supra* note 27.

\(^3\) For history of these provisions of the code see Ferrier, *op. cit. supra* note 55, at 261-263.
predeceased husband, holding that the testatrix had willed it to them under the designation of her "heirs," in view of the provisions of section 1334 and of subdivision 8 of section 1386 of the Civil Code.64 The district court of appeal, struggling valiantly, in spite of these provisions of the code, to avoid a result so contrary to the undoubted intention of the testatrix, found what seemed to it a sufficient justification in the language of the will immediately following the words "then upon his death, all such real property shall be distributed among my heirs," namely, "as provided by the laws of the state of California, the same as if I had died intestate." That language, the court held, made it "clear that the laws she intended to refer to and apply were the laws existing at the time she made the will, 'the same as if I had died intestate'."5 The opinion also seems to indicate that it was the view of the court that even though the will had not contained the quoted language following the words "my heirs," the latter should still be determined according to the law of descent in force when the will was written. A few decisions can be found in support of such a view,66 but the weight of authority is contra.67 Since, according to the primary and natural meaning of the term, "The 'heirs' of a person are those whom the law appoints to succeed to his

64 Although by its own terms subdivision 8 of section 1386 of the Civil Code (now sections 228 and 229 of the Probate Code) is applicable only if the decedent "leaves no issue," and the testatrix in this case left a son, the supreme court in the first appeal (supra note 20 and text pp. 419-21) held that the testatrix had used the word "heirs" in her will as exclusive of her son and that her "heirs" were to be determined as of the date of the son's death—the termination of the life estate. Therefore, insofar as the meaning of "heirs" was concerned, the case would seem to be the same as if she had left no issue.

65 Supra note 27, at 695, 225 Pac. at 290.

66 Houghton v. Hughes (1911) 108 Me. 233, 79 Atl. 909, Ann. Cas. 1913A, 1287 (holding on point in question not necessary to decision); In re Swenson's Estate (1893) 55 Minn. 300, 56 N. W. 1115 (distinguished in In re Fretherin's Estate (1923) 156 Minn. 366, 194 N. W. 766 so as to be inapplicable or virtually overruled as to question here discussed).


In the majority of the foregoing cases, the "heirs" were not those of the testator but of the life tenant. The opinion in the Wilson case attempted to distinguish such cases from those in which the gift was to the testator's own heirs. Insofar as concerns the question whether the law in force when the will was executed should govern the determination of "heirs," it is difficult to see any difference between the two situations, and apparently nowhere except in the Wilson case is such a distinc-
estate in case he dies without disposing of it by will," it is inconsistent with that meaning not to apply the law in force at the person’s death. Furthermore, to hold that “heirs” means, prima facie, those entitled under the law at the date of the execution of the will, rather than at the date of death, leads to an additional undesirable result. It keeps the term “heirs” from reflecting the improvements which are from time to time being made in the descent statutes. Situations like that in the Wilson case, where the change in the statute after the will was made was both of doubtful expediency and beyond any reasonable contemplation on the part of the testatrix, are exceptional. The court would probably have hesitated to hold that the meaning of “heirs” was determined by the law in force at the time the will was executed, if the only result of that interpretation had been to render applicable an obviously unfair rule of descent such as that in Estate of Nigro, which the legislature had subsequently abrogated.68

For the purpose of making the provisions of subdivision 8 of section 1386 of the Civil Code applicable and thus avoiding an inequitable result, a somewhat strained interpretation of one of the other words listed along with “heirs” in section 1334 of the Civil Code and used in the will in question was also made by the district court of appeal in Estate of McCrum. The testatrix’s will left the remainder of her property, after numerous bequests to her own relatives and to charities, to “my husband’s family,” pursuant to a promise made to him. The property had been community property of the husband and the testatrix and had come to her on his death. At the date of the execution of the will and at the date of the testatrix’s death, her husband’s relatives consisted of six nephews and nieces, and two grandnephews and one grandniece. The nephews and nieces claimed the property as next of kin under subdivision 5 of section 1386 of the Civil Code, to the exclusion of the grandnephews and grandniece who were of a more remote degree of relationship to the husband. If this subdivision applied, the grandnephews and grandniece were not entitled to any shares as descendants of deceased brothers or sisters, under the holding in Estate of Nigro.72

68 Hochstein v. Berghauser (1899) 123 Cal. 681, 687, 56 Pac. 547, 549.
69 Supra note 28.
70 This was the reverse of usual situation, of which the second appeal in Estate of Wilson is an example. The application of the provisions of these ancestral descent statutes in ascertaining the meaning of “heirs” and other similar terms in a will, is more often the cause of, than the means of avoiding, an inequitable result.
71 (1929) 97 Cal. App. 576, 275 Pac. 971.
72 Supra note 28.
Under subdivision 8, however, all descendants of deceased brothers and sisters took by right of representation. If the testatrix had died intestate, subdivision 8 would clearly have been applicable; i.e., her heirs would have been her husband’s relatives as well as her own relatives. But subdivision 8 did not purport to define who were the predeceased husband’s heirs. Nevertheless the district court of appeal, (reversing the trial court), held that in willing the property to her husband’s “heirs” or “family” the testatrix “must be presumed to have had in mind the law under which relatives of a predeceased spouse succeed to the estate left by the other spouse as outlined in that subdivision and to have used the term in that sense.” Under the provisions of the Probate Code the rule of descent of Estate of Nigro no longer exists and the problem presented in Estate of McCrum would not arise.

A clear qualification of the word “heirs” (or, more exactly, “family”) occurred in the will in Estate of Marshall and prevented the relatives of the predeceased husband of the testatrix from taking any share in her property. In that case the will provided that “All that is left of my estate, after my just debts are paid, I leave to my own family who I think are all in Mexico.” As in the Watts estate, the property had been community property of the testatrix and her predeceased husband, and relatives of the latter claimed a share under section 1334 of the Civil Code which includes “family” along with “heirs” and other similar terms in providing that a testamentary gift to persons thus designated vests the property in those who would be entitled according to the provisions of the code on intestate succession. The court held, however, that only the testatrix’s own blood relatives were entitled. This was both because they were residents of Mexico, while the husband’s relatives were not, and because the testatrix had qualified the word “family” by the words “my own.” The court stated that in its opinion the latter words were sufficient by themselves to prevent the husband’s relatives from sharing in the property according to the provisions of the code on descent.

It is to be regretted that the court did not take the same point of view in the subsequent case of Estate of Page. There the testatrix’s will provided that in the event her husband should predecease her she gave “one fourth of the rest, residue and remainder of my estate to his lawful heirs and the balance, after deducting said one-fourth, to be equally divided among my lawful heirs.” Part of her estate had formerly been community property of the testatrix and her predeceased husband and

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73 Estate of Ross (1921) 187 Cal. 454, 202 Pac. 641.
74 Supra note 71 at 582, 275 Pac. at 973.
75 Supra note 28.
76 (1917) 176 Cal. 784, 169 Pac. 672.
77 (1919) 181 Cal. 537, 185 Pac. 383.
another part had formerly been the husband's separate property. Reversing the decision of the trial court, the supreme court held that the husband's relatives were entitled not only to the one-fourth of all the property but, as to the community property, to half of the other three-fourths as well, and as to the separate property, to all of the other three-fourths. Restriction of the husband's relatives to one-quarter of all the property would seem to have been clearly justifiable on the ground that the gift to the husband's "heirs" of one-quarter constituted a "qualification" within the meaning of section 1334 of the Civil Code of "my heirs" to whom the testatrix gave the remaining three-quarters.

Not only to prevent such questionable decisions as Estate of Page but also to avoid the results in technically justifiable ones such as Estate of Watts, and to obviate the necessity of resorting to unconvincing reasoning to support a commendable result as in the second appeal in Estate of Wilson, there should be an amendment of section 108 of the Probate Code (formerly sections 1334-5 of the Civil Code). The amendment should provide that unless it affirmatively appears on the face of the will, either expressly or by necessary implication, that the testator had the particular rules of descent of sections 228 and 229 of the Probate Code in mind when he used the word "heirs" (or other similar term), these sections shall be excluded in determining the persons who are entitled to the property.

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