

1940

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Comments, 5 MO. L. REV. (1940)

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Comments

THE USE OF DEADLY FORCE IN THE ARREST OF MISDEMEANANTS

The privilege of using deadly force to prevent crime and to capture criminals has been increasingly restricted by the courts, though at one time it was comparatively broad. Some of the reasons for the broader privilege have disappeared. Since most felons formerly were punished by the death penalty, deadly force was allowed, both to prevent the commission of felonies and to capture felons. The death penalty has been abandoned as punishment for all but a few felonies so this reason no longer exists. Since misdemeanants were never punished more seriously than by the imposition of a fine or a short imprisonment, one was not allowed to kill either to prevent the occurrence of misdemeanors or to capture fleeing misdemeanants. Then, too, under English common law a felon's property reverted to the crown, so there was a special interest in apprehending and capturing felons; whereas, a misdemeanant was punished only by the imposition of a fine, so that his capture was not permitted by this drastic method. In the United States, a criminal's property is not forfeited to the state.

Our reports display no end of cases disallowing the privilege of using deadly force to prevent the commission of certain crimes which were felonies, both at common law and by statute.¹ While Lord Coke once remarked that deadly force could be used to prevent the commission of a felony even though the same result could be accomplished by other milder means,² today no American court recognizes a privilege of killing to prevent the commission of a crime, unless there is no other reasonable method of prevention. The authorities seem to be well in accord in holding that one may kill to prevent the commission of certain felonies, those most violent and offensive.³ Similarly, there appears to be no doubt that one may kill to capture resisting or fleeing felons.⁴ It is clear that one may not kill to prevent the escape of a misdemeanant,⁵ but the question of whether deadly force

1. *Rex v. Scully*, 1 C. & P. 319 (1824) (stealing chickens); *Regina v. Murphy*, 1 Craw. & D. 20 (1839) (stolen timber); *Storey v. State*, 71 Ala. 329 (1882) (horse stealing); *Carmouche v. Bouis*, 6 La. Ann. 95 (1851) (theft of sugar cane in field); *McClelland v. Kay*, 14 B. Mon. 103 (Ky. 1853) (owner of slave killed while stealing chickens entitled to recover slave's value).

2. 3 Co. INST. *56.

3. *Osborne v. State*, 140 Ala. 84, 37 So. 105 (1903) (murder); *People v. Grimes*, 132 Cal. 30, 64 Pac. 101 (1901) (murder); *Ragland v. State*, 111 Ga. 211, 36 S. E. 682 (1900) (allows deadly force to be used to prevent the commission of any felony attempted to be committed on the person of the defendant); *State v. Turlington*, 102 Mo. 642, 15 S. W. 141 (1890) (deceased presented pistol in an attempt to escape from jail); *Litchfield v. State*, 8 Okl. Cr. 164, 126 Pac. 707 (1912) (rape); *Moore v. State*, 237 S. W. 931 (Tex. Cr. 1922) (statutory rape).

4. *Richards v. Burgin*, 159 Ala. 282, 49 So. 294 (1909); *Jackson v. State*, 66 Miss. 89, 5 So. 690 (1888).

5. *Thomas v. Kinkead*, 55 Ark. 502, 18 S. W. 854 (1892); *Head v. Martin*, 85 Ky. 480, 3 S. W. 622 (1887); *People v. Klein*, 305 Ill. 141, 137 N. E. 145 (1922);

may be employed to effect the arrest of a misdemeanor who is resisting but not fleeing presents a problem about which there is some apparent difference of opinion. It will be assumed that the arrest is lawful; that the officer was either proceeding under a valid warrant or under the accepted privilege of arrest without a warrant. We are not concerned with the problems arising when the officer, in killing, did not intend to kill or to inflict serious bodily harm, or where his conduct in killing was negligent. Similarly, we shall not dwell upon the situation where the misdemeanor becomes a felon, too, by virtue of any action he may have taken in resisting the arrest, which would make the felony rules applicable.⁶

In any case, an officer in making an arrest has the ordinary privilege of self-defense, and in all jurisdictions he is entitled to an instruction by the court according him this defense. As it will later be seen, some courts feel that this is an incommensurate protection to one entrusted with the dangerous duty of enforcing our laws, and being at a loss for a better method of handling this illusive concept, give a separate instruction on the officer's right to use force greater than that allowed by the privilege of self-defense. This results in two instructions, because seldom does a case arise in which the elements of self-defense are entirely missing.

Nearly all the authorities admit that an officer can use all reasonable force to effect the arrest of the misdemeanor.⁷ The problem becomes more complex when one attempts to construe this seemingly simple rule. What acts will be allowed as reasonable? Could this question be accurately and definitely answered, no further efforts would be required. One thing can be said with some assurance: an officer is not permitted to use force in excess of that necessary to accomplish the arrest,⁸ though seldom is he required to gauge nicely the amount to be used.⁹

It is urged on the one hand that a misdemeanor's life is more valuable to society than is his arrest or punishment, and since in any case the punishment he would receive, if apprehended, is a fine or short imprisonment, the officer should not be permitted to take his life in effecting the arrest.¹⁰ On the other hand, it is said that the officer should not be placed in the predicament thus arising: that he is confronted on the one side with his duty to move forward to effect the arrest, and on the other by the restriction that he refrain from killing or inflicting

Brown v. Weaver, 76 Miss. 7, 23 So. 388 (1898); State to Use of Johnson v. Cunningham, 107 Miss. 140, 65 So. 115 (1914); State v. Sigman, 106 N. C. 728, 11 S. E. 520 (1890); Reneau v. State, 2 Lea (Tenn.) 720 (1879).

6. As illustrated in Cornett v. Commonwealth, 198 Ky. 236, 248 S. W. 540 (1923).

7. AMERICAN LAW INSTITUTE, CODE OF CRIMINAL PROCEDURE, § 19-2.

8. People of State of Colorado v. Hutchinson, 9 F. (2d) 275 (C. C. A. 8th, 1925); Tarwater v. State, 16 Ala. App. 140, 75 So. 816 (1917); Lentine v. McAvoy, 105 Conn. 528, 136 Atl. 76 (1926); Commonwealth v. Bollinger, 198 Ky. 646, 249 S. W. 786 (1923); Caperton v. Commonwealth, 189 Ky. 652, 225 S. W. 481 (1920); State v. Jenkins, 195 N. C. 747, 143 S. E. 538 (1928); Harper v. State, 84 Tex. Cr. 345, 207 S. W. 96 (1918).

9. People of Colo. v. Hutchinson, 9 F. (2d) 275 (C. C. A. 8, 1925); Barrett v. United States, 64 F. (2d) 148 (App. D. C. 1933); Union Indemnity Co. v. Webster, 218 Ala. 468, 118 So. 794 (1928); Dixon v. State, 101 Fla. 840, 132 So. 684 (1931).

10. Bohlen & Shulman, *Arrest With and Without a Warrant* (1927) 75 U. OF PA. L. REV. 485; Pearson, *The Right to Kill in Making Arrests* (1930) 28 MICH. L. REV. 957; Note (1936) 25 KY. L. J. 64; Note (1937) 25 KY. L. J. 172.

serious bodily harm. One writer suggests that a restriction on an officer's performance of duty to make arrests will encourage crime.¹¹

Of all the writers on the subject, Bishop seems to be the foremost proponent of the officer's right to use deadly force to effect the arrest,¹² although others can also be found to substantiate his position.¹³ Of these, the ones giving reasons to support their conclusions recite the duty of the officer to go forward to secure the arrest as requiring that no barrier be placed in his way. Although nearly all of the older writers favor this view, the majority of courts in the United States hold the officer not to be privileged in killing to overcome the resistance of the misdemeanor.¹⁴

At least two American jurisdictions have rejected this majority view—Missouri and North Carolina. Although the Missouri court, in *State v. McNally*,¹⁵ held the officer not privileged to use deadly force, Sherwood, J., in a vigorous dissent says that police officers are under the special protection of the law, and if they are acting under a proper and lawful privilege of arrest for a misdemeanor or breach of the peace and are resisted, they may repel force with force and need not retreat, and if the offender be killed in the struggle, the killing will be justified. Three years later the majority opinion in this case was overruled in *State v. Dierberger*,¹⁶ adopting the position of Sherwood, J., and citing *State v. Fuller*.¹⁷ The doctrine of *State v. Dierberger* was followed in eight cases.¹⁸ Three cases,¹⁹ beginning in 1925, seem again to reject this view, reverting to the

11. (1931) 17 A. B. A. J. 675 (restricted to felonies).

12. 2 BISHOP, CRIMINAL LAW (9th ed. 1923) 493: "But in misdemeanors and breaches of the peace, as well as in cases of felony, if the officer meet with resistance, and the offender is killed in the struggle, the killing will be justified." But see 1 BISHOP, CRIMINAL PROCEDURE (4th ed. 1895) 90.

13. 2 HALE, P. C. 117 (1736); 1 EAST, P. C. 295, 302, 303 (1806); 1 RUSSELL, CRIMES (9th Am. ed. 1877) 892: "So that in all cases, whether civil or criminal, where persons having authority to arrest or imprison, and using the proper means for that purpose, are resisted in so doing, they may repel force with force, and need not give back; and if the party making resistance is unavoidably killed in the struggle, this homicide is justifiable." WHARTON, HOMICIDE (3d ed. 1907) 739: "And though the arrest is for a misdemeanor, the officer and his assistants are not only authorized, but bound, to use such force as is necessary to execute the warrant; and if they kill the accused they are entitled to acquittal on the ground that the homicide is justifiable, if no unnecessary force was used." 1 WHARTON, CRIMINAL LAW (11th ed. 1912) § 429; 4 BL. COMM. 179.

14. *Smith v. State*, 59 Ark. 132, 26 S. W. 712 (1894); *State v. Phillips*, 119 Iowa, 652, 94 N. W. 229 (1903); *Whitford v. State*, 35 Okl. Cr. 22, 247 Pac. 424 (1926); *Reneau v. State*, 2 Lea (Tenn.) 720 (1879); *State ex rel. Morris v. National Sur. Co. & Bragg*, 162 Tenn. 547, 39 S. W. (2d) 581 (1930); *Commonwealth v. Rhoads*, 23 Pa. Sup. Ct. 512 (1903).

15. 87 Mo. 644 (1885).

16. 96 Mo. 666, 10 S. W. 168 (1888).

17. 96 Mo. 165, 168, 9 S. W. 583 (1888): "His duty is to overcome all resistance and bring the party to be arrested under physical restraint, and the means he may use must be co-extensive with the duty."

18. *State v. Fuller*, 96 Mo. 165, 9 S. W. 583 (1888); *State v. Clayton*, 100 Mo. 516, 13 S. W. 819 (1890); *State v. Turlington*, 102 Mo. 642, 15 S. W. 141 (1890); *State v. Bateswell*, 105 Mo. 609, 16 S. W. 953 (1891); *State v. Rose*, 142 Mo. 418, 44 S. W. 329 (1897); *State v. Lane*, 158 Mo. 572, 59 S. W. 965 (1900); *State v. Coleman*, 186 Mo. 151, 84 S. W. 978 (1904); *State v. Montgomery*, 230 Mo. 660, 132 S. W. 232 (1910).

19. *State v. McGehee*, 308 Mo. 560, 274 S. W. 70 (1925); *State ex rel. Kaercher v. Roth*, 330 Mo. 105, 49 S. W. (2d) 109 (1932); *State v. Salts*, 331 Mo. 665, 66 S. W. (2d) 1013 (1933).

majority opinion in *State v. McNally*. Again in 1939 the Missouri court in *State v. Ford*,²⁰ expressly overrules these three decisions and declares the law in Missouri to be as expounded in *State v. Dierberger*, although the court admits that the weight of American authority is against this view. It might be mentioned, however, that this doctrine has been aided in part by statute which provides: "If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all necessary means to effect the arrest."²¹

In North Carolina, the view taken appears to be substantially the same as the Missouri view. The leading case of *State v. Dunning*²² has been consistently followed in that state.²³ The court in that case laid down the rule that the officer "may use the force necessary to overcome resistance, and to the extent of taking life, if that is required for the proper and efficient performance of his duty." However, this can hardly be said to be a square holding, since at the time of the killing the arrestee was advancing upon the defendant with a knife, so the right of self-defense was equally available. Moreover, the facts do not justify the conclusion that the officer may kill, because the arrestee in that case was not killed. Even though the problem was discussed only in *dicta*, the rule has been cited so often by the North Carolina court that it can safely be said to be the law in that state.

Other scattered decisions can be found to uphold this proposition. In *Clements v. State*,²⁴ the Alabama court said that under a lawful and proper arrest in which resistance is met, force may be used to repel force, and if the resisting party is killed in the struggle, the killing will be justified. This again is not a square holding, as the defendant clearly could avail himself of the privilege of self-defense since deceased when killed was presenting a pistol to be used against the defendant. The later case of *Holland v. State*²⁵ seems to reverse this by holding: "When an attempted arrest is for an ordinary misdemeanor or in a civil action, life can only be taken by the officer where the person arrested resists by force, and so endangers the life or person of the officer as to make such killing necessary in self-defense." In *Terrell v. Commonwealth*,²⁶ the Kentucky court seems to favor this view in *dictum*, but the earlier cases of that state hold directly to the contrary.²⁷

Statutes are to be found in many of the states which attempt to define the amount of force that an officer may use in making the arrest.²⁸ Some of these statutes seem to adopt a definite test. For example, the Kansas statute provides: "Homicide shall be deemed justifiable . . . when necessarily committed in

20. 130 S. W. (2d) 635 (Mo. App. 1939).

21. MO. REV. STAT. (1929) § 3571.

22. 177 N. C. 559, 98 S. E. 530 (1919).

23. *Holloway v. Moser*, 193 N. C. 185, 136 S. E. 375 (1927); *State v. Miller*, 197 N. C. 445, 149 S. E. 590 (1929).

24. 50 Ala. 117 (1874).

25. 162 Ala. 5, 50 So. 215 (1909).

26. 194 Ky. 608, 240 S. W. 81 (1922).

27. *Dilger v. Commonwealth*, 88 Ky. 550, 11 S. W. 651 (1889); *Stephens v. Commonwealth*, 20 Ky. L. 544, 47 S. W. 229 (1898); *Donehy & Prather v. Commonwealth*, 170 Ky. 474, 186 S. W. 161 (1916).

28. IDAHO CODE ANN. (1932) § 19-610; IOWA CODE (1931) § 13472; MO. REV. STAT. (1929) § 3571; MONT. REV. CODES ANN. (Anderson & McFarland, 1935) § 11750; OKLA. STAT. (Harlow, 1931) § 2777; S. D. REV. CODE (1919) § 4550.

attempting, by lawful ways and means, to apprehend any person for a felony committed, or in lawfully suppressing any riot or insurrection, or in lawfully keeping or preserving peace."²⁹ In California, the statute provides that in the case of an arrest under a warrant, after notice of the intention to arrest is given, the killing of the arrestee will be justified when necessary to effect the arrest, in the case of an execution of a legal process, and in the case of an escaped, fleeing or resisting felon.³⁰ Most statutes say that all necessary force may be used,³¹ and they have been construed not to allow deadly force to be used.³² In Texas, an officer making an arrest may kill only if his life is endangered or if he is threatened by serious bodily harm,³³ thus enacting by statute the rule of the majority courts. As a whole, these statutes have not played an important part in the actual rule as administered by the courts.

The argument for the present Missouri view is most forcefully stated by Sherwood, J., who declares that if given only the ordinary right of self-defense while arresting misdemeanants, "a peace officer 'would be of all men the most miserable,' compelled by his duty to press forward and make arrests . . . with the consciousness that though the law imperatively demands at his hands the arrest of the law breaker, yet it . . . placed him on the same plane as an ordinary individual when engaged in a private quarrel, and invoking the doctrine of self-defence. The bare statement of such a proposition constitutes its own ample refutation. The law never requires an impossibility, and having made it the duty of peace officers to make arrests, to quell disturbances and breaches of the peace, it is not so unreasonable as to deny the means to compass the end commanded."³⁴

However, a careful consideration of the ramifications of this problem would suggest that, after all, the courts are concerned only with the inadequacy of the protection afforded the officer by allowing him only the ordinary privilege of self-defense, and that they are not attempting to find a separate and distinct theory upon which an officer may be declared justified in killing his arrestee. Instead, a broader and more liberal privilege of self-defense is being made available to the officer which will encompass the situation where, in the absence of his duty to arrest and thus move forward, he would otherwise be an aggressor, thus losing any ordinary self-defense privileges available. The position of the minority courts that two separate theories exist by which the officer may be acquitted—the one of ordinary self-defense, and the other of the defendant's privilege while acting under his authority as an officer—seems to imply that even though the

29. KAN. GEN. STAT. ANN. (Corrick, 1935) § 21-404.

30. CAL. PEN. CODE (Chase, 3d ed. 1935) § 196.

31. CAL. PEN. CODE (Chase, 3d ed. 1935) § 843; IDAHO CODE ANN. (1932) § 19-610; IOWA CODE (1931) § 13472; MO. REV. STAT. (1929) § 3571; MONT. REV. CODES ANN. (Anderson & McFarland, 1935) § 11760; OKLA. STAT. (Harlow, 1931) § 2777; S. D. REV. CODE (1919) § 4550.

32. *State v. Wilson*, 41 Idaho 616, 243 Pac. 359 (1925); *State v. Phillips*, 119 Iowa 652, 94 N. W. 229 (1903); cf. *People v. Lathrop*, 49 Cal. App. 63, 192 Pac. 722 (1920); *State v. Ford*, 130 S. W. (2d) 635 (Mo. 1939).

33. TEX. STAT. (Vernon, 1936) art. 1212, § 8.

34. Sherwood, J., in *State v. McNally*, 87 Mo. 644, 653 (1885).

officer's person was in no way threatened, he might kill the arrestee if necessary to overcome his resistance. Would even the Missouri and North Carolina courts allow a diminutive sheriff, who is attempting to arrest a huge and powerful misdemeanant and who is not threatened by loss of life or serious bodily harm, but who is contemptuously but gently repulsed, the right to kill to effect the arrest? It is quite unlikely that even those courts intend to justify such a homicide. Although these courts appear to reach a correct conclusion in the ordinary case, in allowing the officer to kill, it seems that a most confusing method of presenting the problem to the jury is adopted. Since the circumstances upon which these cases are predicated nearly always involve some element or elements of self-defense, and since the effect of the conclusion reached by these courts is to adopt a broader privilege of self-defense to be made especially available to an arresting officer, much confusion would be eliminated by formulating one instruction to cover both of these elements, including the ordinary narrower privilege of self-defense, and extending to cover the situation of the arresting officer.

EDWARD E. MANSUR, JR.

WILLS—CONSTRUCTION OF "CHILDREN" TO INCLUDE ILLEGITIMATES

The common law concept of the status of the illegitimate child was that he was *filius nullius*, the child of nobody.¹ Consequently he could not inherit from his natural parents, he had no right to support, nor even the privilege of using his father's name. Nor could he have heirs except of his own body. The harshness of the common law, according to some writers, was "supposed to be founded partly in policy, to discourage illicit commerce between the sexes."² It is hard to see the logic of this attitude, because it is not the offenders against society who are being punished, but rather their innocent progeny. An explanation might be found in the hatred of the Christian Church for any sort of extra-marital relations, and in the prevalent attitude of the Church to condemn anything which it did not understand or with which it could not cope. Certainly the influence of the Church upon the law was not inconsiderable.

"The fact that it is the child who suffers because of the varying strength of the disapproval put upon his parents' acts is of course nothing new in the history of moral ideas. Whatever the basis of the concept of vicarious expiation,—the Greek one of divine retribution, the Hebrew one of an entail of punishment from generation to generation, or the primitive concept of sin as a contagious matter which may be transmitted from parent to child,—it certainly became a well established one in Christian morality."³

1. 2 POLLOCK AND MAITLAND, *HISTORY OF ENGLISH LAW* (2d ed. 1905) 396; Robbins & Deák, *The Familial Property Rights of Illegitimate Children: A Comparative Study* (1930) 30 COL. L. REV. 308, 316.

2. 2 KENT, *COMMENTARIES* (1884) 212.

3. Robbins & Deák, *supra* note 1, at 312. See also *Bennett v. Toler*, 15 Gratt. 588, 632 (Va. 1860) where it is said that the rule springs "perhaps originally out of the maxims of a fulfilled dispensation, which visited upon the children, to the third and fourth generation, the sins of the parent."

It is to be noted, however, that the common law did not go to the extent of limiting the amount or forbidding the testator to will anything at all to illegitimate offspring, although two states today limit the amount by statute which a testator may leave by will to his illegitimates.⁴

The status of the bastard with regard to inheritance being what it was, we could guess without examining the cases that when a testator at common law made a devise "to my children" or "to the children of A" he was thought to include only legitimate children. Whenever the generic term "children" was used in deeds, wills, or other conveyances it was as though the testator or grantor had used the words "legitimate children."⁵ There was early thought to be no basis for finding the testator to have had a different intention, and parol evidence was not admissible for the purpose of showing that a testator may have thought he was including illegitimates.⁶ The explanation for this rigid rule may be found in the social ideas of the times. There was the deeply engrained moral idea that it was not respectable to have illegitimate children; hence they were never mentioned in polite society; nor would a testator even in his will be thought to have mentioned them unless he did so clearly and unequivocally. There is less of facetiousness than of truth in the remark of the bachelor who, when questioned about the number of his children, replied that he had none "to speak of." The universal approach to the problem of the illegitimate child was (perhaps the use of the past tense is not strictly accurate) not to "speak of" him. Little wonder then that a testator was taken not to have spoken of him when he referred to "children" in his will.

The rule was early relaxed to allow the bastard child to take under a devise to "children" if it was impossible for a legitimate child to take.⁷ So where there were no legitimate children answering the description in the will, evidence *dehors* the will could be resorted to for the purpose of finding whether there were any who had acquired the reputation of children; and illegitimates could acquire such reputation.⁸ The argument was that the testator, knowing there were no

4. S. C. CODE (1932) §§ 8695, 8927; LA. CIV. CODE ANN. (Dart, 1932) Arts. 1486, 1487, 1488.

5. ". . . a gift to children, sons, daughters, or issue, imports *prima facie* legitimate children or issue. . . ." 3 JARMAN, WILLS (7th ed. 1930) 1725. See also, Smith v. Garber, 286 Ill. 67, 121 N. E. 173 (1918). The English law has gone further and held that the illegitimate was a "stranger in blood" to his natural parents. Atkinson v. Anderson, 21 Ch. D. 100 (1882).

6. Marquette v. Marquette's Ex'rs, 190 Ky. 182, 227 S. W. 157 (1921) contains a recent exposition of the common law idea, holding that when testator makes a devise to "children" there is no ambiguity which opens the door to extrinsic evidence—the testator is conclusively presumed to have intended only legitimate children. To the same effect are Heater v. Van Auken and Hockerbery, 14 N. J. Eq. 159 (Ch. 1861), and Tuttle v. Woolworth, 74 N. J. Eq. 316, 77 Atl. 684 (Ch. 1908).

7. Gardner v. Heyer, 2 Paige 11 (N. Y. 1829); Lord Woodhouselee v. Dalrymple, 2 Mer. 419 (1817); *In re Eve*, [1909] 1 Ch. 796; Hill v. Crook, L. R. 6 H. L. 265 (1873).

8. Lord Woodhouselee v. Dalrymple, 2 Mer. 419 (1817); cf. *In re Jackson*, [1933] 1 Ch. 237, where the devise was "to my nephew Arthur Murphy" and the testatrix had three nephews by that name, two being legitimate and the other illegitimate. Held, that the ambiguity regarding the testatrix' intention with

legitimate children who could take, must necessarily have meant to designate illegitimates by the term. This relaxation no doubt went a long way toward finding the intention of the testator but it could never be extended to cover the situation where there were both legitimate and illegitimate children.⁹

Some of the English cases suggest that the above exception should be limited to the case where there is no possibility of legitimate children, i.e., where the parent of the illegitimate to be benefited is dead or past the age of child-bearing.¹⁰ However, the majority of the courts in this country probably follow the exception, and in the absence of legitimates it may be shown by parol that there are illegitimate even though there may be a possibility of legitimate children.¹¹ The same rule of necessity has been followed to allow both a legitimate and an illegitimate child to take where such a construction is necessary to satisfy the plurality of the term "children."¹²

The *prima facie* interpretation of the word "children" was departed from in a second class of cases. As laid down in the leading English case:¹³ "The other class of cases is of this kind. Where there is upon the face of the will itself, and upon a just and proper construction and interpretation of the words used in it, an expression of the intention of the testator to use the term 'children' not merely according to its *prima facie* meaning of legitimate children, but according to a meaning which will apply to, and which will include, illegitimate children." Differently stated, it has often been said that the testator may "make his own dictionary," and where in one portion of the will he speaks of the illegitimate as his child, or the child of some other person, then a devise to his children or to that others' children will be construed to include the illegitimate child.¹⁴ This class of cases resolves more difficulties than does the class of cases first mentioned, but neither exception will be successful in arriving at the intention of the testator in every case. The status of the bastard remained the same, at common law,

regard to the legitimate nephews entitled the court to consider extrinsic evidence to determine testatrix' true intention. The illegitimate nephew was then permitted to take when the circumstances showed he was intended. *Cf. In re Fish*, [1894] 2 Ch. 83, where the devise was to testator's wife for life and then to his "niece Eliza Waterhouse during her life." Testator had no niece named Eliza Waterhouse but his wife had a legitimate grandniece and an illegitimate grandniece both of that name. Held, the legitimate grandniece took and evidence that testator intended the illegitimate grandniece was properly excluded. (These two cases are distinguished in a note in (1933) 49 L. Q. Rev. 313.)

9. *Collins v. Hoxie*, 9 Paige 81 (N. Y. 1841); *Heater v. Van Auken and Hockenbery*, 14 N. J. Eq. 159 (1861). Note, however, the cases compared under note 8, *supra*.

10. *Dorin v. Dorin*, L. R. 7 H. L. 568 (1875); *In re Eve*, [1909] 1 Ch. 796.

11. *Tuttle v. Woolworth*, 74 N. J. Eq. 310, 77 Atl. 684 (Ch. 1908); *Marquette v. Marquette's Ex'rs*, 190 Ky. 182, 227 S. W. 157 (1921).

12. *Gill v. Shelley*, 2 Russ. & M. 336 (1831); *cf. Mahoney v. Grainger*, 283 Mass. 189, 186 N. E. 86 (1933), holding that the plurality of the term "heirs" will not preclude an aunt, the sole heir, from taking to the exclusion of first cousins.

13. *Hill v. Crook*, L. R. 6 H. L. 265, 283 (1873).

14. The cases which have followed this reasoning are so numerous that it is impossible to note all of them here. A selection of them follows. *Worts v. Cubitt*, 19 Beav. 421 (1854); *In re Bryon*, 30 Ch. D. 110 (1885); *Dickison v. Dickison*, 36 Ill. App. 503 (1890), affirmed in 138 Ill. 541, 28 N. E. 792 (1891).

in the situation where there were legitimates who answered the description in the will, and where a fair construction of the whole will failed to show an intention to include the illegitimate child.

The modern decisions are beginning, however, to ameliorate the harshness of the common law in two additional ways. The first of these has come about through an interpretation of the modern statutes legitimating or providing for inheritance by illegitimates. The scope of this comment is not broad enough to permit a survey of the whole field of legislation in this respect, but the legitimacy statutes in the main have attempted to give the after-legitimated child all of the rights of a child born legitimate. The usual method of legitimation is the marriage of the parents after the child is born, and the courts have generally held such subsequent legitimation to be sufficient to permit a bastard child to take under a devise to "children."¹⁵

Most American jurisdictions today give the bastard a right of support and a limited right of inheritance.¹⁶ Some courts have been able to declare that illegitimates come within the term "children" in the light of these statutes.¹⁷ This construction indicates an attempt to keep the position of the bastard child under the will abreast of that which he enjoys under the modern inheritance laws. Other courts have refused to do this,¹⁸ and the reasoning of these courts seems more logical. After all, the illegitimate must take under the will by purchase, if he takes at all, and whether or not he takes by purchase depends upon whether he is within the class designated in the limitation. The inheritance statutes, de-

15. *Gates v. Seibert*, 157 Mo. 254, 57 S. W. 1065 (1900); *In re Morton's Estate v. Morton*, 62 Neb. 420, 87 N. W. 182 (1901); *Harness v. Harness*, 50 Ind. App. 364, 98 N. E. 357 (1912); *In re Hoagland's Estate*, 125 Misc. 376, 211 N. Y. Supp. 629 (1925); *In re Sheffer's Estate*, 139 Misc. 519, 249 N. Y. Supp. 102 (1931). This was held to be true in *Miller's Appeal*, 52 Pa. 113 (1866) even though the legitimation statute was passed after testator's death where the statute was a special one and provided that the child be made "capable in law to inherit and transmit any estate whatsoever, as fully and completely and to all intents and purposes as if she had been born in lawful wedlock." To the same effect, see *Sleigh v. Strider*, 5 Call 439 (Va. 1805); *McGunnigle v. McKee*, 77 Pa. 81 (1874); *Smith v. Lansing*, 24 Misc. 566, 53 N. Y. Supp. 633 (1898); *Hewitt v. Farmers' Loan & Trust Co.*, 245 N. Y. 622, 157 N. E. 833 (1927).

16. For a collection of these statutes, see Freund, *Illegitimacy Laws of the United States*, United States Dept. of Labor, Children's Bureau Bulletins, Leg. Ser. No. 2, Pub. No. 42, at 28, 75. Many statutes give a right of inheritance from the mother. *Id.* at 19, 23. Connecticut has gone further even without legislation and declared that a bastard is the heir of its mother and comes under the designation of "child" or "issue." *Eaton v. Eaton*, 88 Conn. 269, 91 Atl. 191 (1914); *Eaton v. Eaton*, 88 Conn. 286, 91 Atl. 196 (1914).

17. *Bennett v. Toler*, 15 Gratt. 588 (Va. 1860). In this case it is ingeniously argued that by the statute giving the bastard a right of inheritance from his mother he is no longer *filius nullius* as to her, but is placed in *all respects* on the same footing as a lawfully begotten child, i.e., as to her he has become legitimate. Consequently, in a devise "to A for life, then to her children," an illegitimate child can take. The paradox results—as to his mother he is legitimate, but as to his father he is still a bastard. See also *Rhode Island Hospital Trust Co. v. Hodgkin*, 48 R. I. 459, 137 Atl. 381 (1927).

18. *Flora v. Anderson*, 75 Fed. 217 (C. C. S. D. Ohio 1896); *Johnstone v. Taliiferro*, 107 Ga. 6, 32 S. E. 931 (1899); *Brisbin v. Huntington*, 128 Iowa 166, 103 N. W. 144 (1905); *Lyon v. Lyon*, 88 Me. 395, 34 Atl. 180 (1896); *In re Will of Scholl*, 100 Wis. 650, 76 N. W. 616 (1898).

termining that in certain cases where there has been no will the illegitimate shall take by descent, have no bearing upon the construction of a limitation in a will to include or exclude illegitimate children.

The attempt to better the position of the illegitimate child has met with more success in the second class of modern cases. As we have seen, at early common law there was thought to be no need for determining the testator's intention when he used the word "children," because, since the child born out of wedlock was *filius nullius*, he could only have meant his legitimate children.¹⁹ It followed that parol evidence was not admissible to show testator's intention; his intention was conclusively presumed. The inquiry first arose as to whether this was a valid presumption. It was easily seen that it was not always true that the testator intended only his legitimate children and the cardinal rule of will construction, the intention of the testator, was meeting with constant infraction.

The idea of the newer cases is best expressed in the following: "The true rule should be that 'children' is a neutral word, taking its color from the surrounding circumstances. If it be regarded as such, no difficulty will be experienced with the rule that parol evidence as to the testator's intention is inadmissible, as the existence of natural children known to the testator will necessarily create the ambiguity which opens the door to such evidence."²⁰

The case of *In re Ellis' Estate*²¹ contains the latest pronouncement of this rule. There the testatrix devised property to the "children and grandchildren" of her brother-in-law in equal shares. It was held that extrinsic evidence was admissible to show that testatrix knew of and recognized the illegitimate grandson of her brother-in-law and he was allowed to take under the devise to "grandchildren." The court said: "In the light of our statutes and decisions we conclude that we are not bound by the common law rule and declare that where such terms as children, grandchildren, or nephews are used in a will or deed and there are both legitimates and illegitimates and the testator has full knowledge of such fact and the intention of the testator is not clearly expressed in the will, the use of such words creates no presumption but the word is a neutral one and an ambiguity exists, and the intention of the testator or grantor must be determined not only from the provisions of the will but also in the light of the circumstances surrounding the execution of the will and parol evidence is admissible to prove the intent of the testator or grantor."²²

Under this view of the law the illegitimate child is no longer the child of nobody, and will not be precluded from sharing under a designation "to children" whenever there can be shown to have been a manifestation of intention by the testator that he should so share. This approach would seem to be more in consonance with reason as well as with natural justice. The oft-repeated cardinal

19. See note 5, *supra*.

20. 8 B. R. C. 303. *Quaere*. Are declarations of the testator admissible? See 5 WIGMORE, EVIDENCE (2d ed. 1923) §§ 2471, 2472.

21. 225 Ia. 1279, 282 N. W. 758 (1938), (1939) 24 IOWA L. REV. 629, (1939) 87 U. OF PA. L. REV. 752, (1939) 25 VA. L. REV. 634.

22. *Id.* at 1290, 282 N. W. at 763.

rule of will construction would seem to be better served if the word "children" in a will is regarded as a neutral one, and the existence of both legitimate and natural children is allowed to open the way to an inquiry regarding intention. The majority of the courts today probably do not follow this liberal rule,²³ although a substantial minority have been following it for some time, some of them professing at the same time to adhere to the rigid common law rule of testamentary interpretation.²⁴

GERALD B. ROWAN

23. *Appel v. Byers*, 98 Pa. 479 (1881); *Hicks v. Smith*, 94 Ga. 809, 22 S. E. 153 (1894); *In re Will of Scholl*, 100 Wis. 650, 76 N. W. 616 (1898); *Marquette v. Marquette's Ex'rs*, 190 Ky. 182, 227 S. W. 157 (1921). See also the annotation in (1935) 94 A. L. R. 116.

24. *Sullivan v. Parker*, 113 N. C. 301, 18 S. E. 347 (1893); *Harrell v. Hagan*, 147 N. C. 111, 60 S. E. 909 (1908); *Harness v. Harness*, 50 Ind. App. 364, 98 N. E. 357 (1912); *Smith v. Garber*, 286 Ill. 67, 121 N. E. 173 (1918); *New Jersey Title Guarantee & Trust Co. v. Elsworth*, 108 N. J. Eq. 229, 154 Atl. 602 (1931); *cf. Heater v. Van Auken and Hockenbery*, 14 N. J. Eq. 159 (Ch. 1861), cited note 9, *supra*; *In re Ellis*, 282 N. W. 758 (Iowa 1938). As early as 1894 in *Howell v. Tyler*, 91 N. C. 207, 211, it was suggested that the rule "seems to ignore to some extent the inquiry as to what the testator intended in using the word. . . ." The court there went on to say at 212: ". . . a more general and fundamental rule, underlying all others, is to look at the whole instrument in the light of the surrounding circumstances when it was made, and see, if we can, in what sense the testator used the word, for his intent must prevail over any legal mode of construing it when there is antagonism." The doctrine was carried to its logical result in *Elliott v. Elliott*, 117 Ind. 380, 20 N. E. 264 (1889) and where property was devised to a wife "to use and dispose of as she may think best for herself and my children," the word "children" was held to mean testator's illegitimate children by the devisee, to the exclusion of legitimate children by a former wife, when the circumstances indicated this to be the testator's intention.