a time is prescribed within which actions on judgments must be brought, neither a new promise nor part payment will toll the bar of the Statute of Limitations.

It is submitted that the decision in the principal case, in accord with the weight of authority, is wholly sound. Since the 20-year period has passed, suit on the judgment no longer lies. Part payment does not revive the judgment or toll the Statute.[9]

Wills—Distribution of Gift Over to "Issue".—Decedent's will contained a gift to *A* for life, remainder to *A's* "lawful issue . . . in equal parts share and share alike, and if any of such issue be then deceased, leaving lawful issue, such issue to take their parent's share." At the time of the execution of the will, *A* had one child, *B*. At the time of *A's* death, she left her surviving *C*, an adopted child of *B*, *D*, a child born subsequent to the execution of the will, and four grandchildren, the children of *D*. On appeal from a decree of distribution made by the Orphan's Court, *held*, *inter alia*, that *D* and his four children are entitled to share equally as the "lawful issue" of *A*. *In re Fisler*, 131 N.J. Eq. 310, 25 A. 2d 265, (Prerog. 1942).

In decreeing distribution of a gift over to "issue" on a capital rather than a stirpital basis, the court in the instant case perpetuates unnecessarily "a stubborn rule of law"[1] required "to apologize for its existence."[2]

Assuming that the established technical meaning of the word "issue" includes remote descendants as well as children,[3] it does not follow, as

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9. In accord: Garabedian v. Avedesian, 42 R.I. 78, 105 A. 516 (1919); McCaskill v. McKinnon, 121 N.C. 192, 28 S.E. 265 (1897); Olson v. Dahl, 99 Minn. 433, 109 N.W. 1001 (1906).

1. Cardozo, J., in New York Life Insurance & Trust Co. v. Winthrop, 237 N.Y. 93, 142 N.E. 431 (Ct. of App. 1923).

2. Chancellor Wolcott in Wilmington Trust Co. v. Chapman, 171 A. 222 Del. Ct. of Ch. 1934).

3. *e.g.*, Price v. Sisson, 13 N.J.Eq. 168 (Ch. 1860); *aff'd*, Weehawken Ferry Co. v. Sisson, 17 N.J.Eq. 475 (E. & A. 1864).

the court in the instant case apparently thought necessary,[4] that the descendants take per capita.[5]

An early preference for capital distribution in the case of a gift to "issue" was forced upon the courts by the decision of Lord Chancellor Loughborough in *Freeman v. Parsley*.[6] Faced with a supposed difficulty in finding a middle ground between the total exclusion of grandchildren and the admission of them to share with their parents, and finding no such medium available, the Lord Chancellor held that grandchildren are entitled to share in a gift to "issue" even though their parents are living at the time of distribution. But the choice was one of evils and was made with admitted hesitation and doubt.[7] Judge Holmes in *Dexter v. Inches*[8] lightly dismissed the dilemma which confronted the Lord Chancellor and the answer has been held to have been supplied by the scheme of the statutes of descent and distribution, which are based on the principle of stocks.[9]

The influence of *Freeman v. Parsley,* dictated the conclusions in several early American decisions,[10] but the courts soon expressed a will-

4. *In re* Fesler, 131 N.J.Eq. 310, 314: "Applying the rule (that the word "issue," in its ordinary meaning embraces remote descendants as well as children) to the instant case would result in a conclusion that Charles Wesley Keeler should share with his children in any final distribution of the trust estate."

5. Wilmington Trust Co. v. Chapman, *supra,* note 2.

6. 3 Ves. Jr. 421 (Ct. of Ch. 1797).

7. *Id.*: "I very strongly suspect that . . . I am not acting according to the intention (of the testator). . . When you put the question, whether he meant all these grandchildren should take with their parents, I think he would say he did not; yet if he was asked the other way, if it should go to the survivor, while there was a (grandchild), I am equally clear, he would not have given it to the survivor."

8. 147 Mass. 324, 17 N.E. 551, 554 (1888): "The difficulty which was felt by Lord Loughborough . . . does not strike us as inseperable. . . Nor do we think that a difficulty in stating a conclusion justifies a construction which the language used, as well as the probabilities, show to be contrary to what the testator could have meant."

9. Wilmington Trust Co. v. Chapman, *supra,* note 2. See Petry v. Petry, 186 App. Div. 738, 175 N.Y.S. 30 (S. Ct. App. Div., First Dept., 1919).

10. See, *e.g.*, Soper v. Brown, 136 N.Y. 244, 32 N.E. 768 (1892); Westar v. Scott, 105 Pa. 200 (1884); Pearce v. Rickard, 18 R.I. 142, 26 A. 38 (1893). *Cf.* Price v. Sisson, 13 N.J.Eq. 168 (Ch. 1860).

ingness to depart from the orthodox view if they were permitted "a faint glimpse of intent" disclosed by the testator that his estate was to be distributed stirpitally. Thus, such qualifications as "to be divided equally between them,"[11] "in equal portions,"[12] or "share and share alike"[13] have been held sufficient indications of intention to support stirpital distribution.[14] One judge commented that the exception to the rule of *Freeman v. Parsley* seems to have a more general application than the rule itself.[15]

In the instant case, the gift over was to issue "in equal parts share and share alike." This alone would have justified distribution per stirpes. The further direction that "if any such issue be then deceased, leaving lawful issue, such issue to take their parents' share" seems to compel the conclusion that the testator intended the grandchildren of the life tenant to take only in the event that their parent was deceased at the time of distribution. The decision appears to ignore this positive manifestation of intent.

Many jurisdictions have flatly repudiated the rule of *Freeman v. Parsley*[17] and hold that the word "issue" imports a distribution per

11. Emmet v. Emmet, 67 App. Div. 183, 73 N.Y.S. 614 (S. Ct. App. Div., Second Dept., 1901); Matter of Durant, 231 N.Y. 41, 131 N.E. 562 (Ct. of App., 1921).

12. Matter of Union Trust Co., 170 App. Div. 176, 156 N.Y.S. 32 (S. Ct. App. Div., First Dept., 1915).

13. New York Life Insurance & Trust Co. v. Winthrop, 237 N.Y. 93, 142 N.E. 431 (Ct. of App. 1923); *In re* Cotheal's Estate, 121 N.Y. Misc. 665, 202 N.Y.S. 268 (Surr. Ct. N. Y. Co., 1923); Matter of Laurence, 238 N.Y. 116, 144 N.E. 361 (Ct. of App. 1924); *In re* Mortimer's Estate, 147 N.Y.Misc. 543, 264 N.Y.S. 229 (Surr. Ct., N. Y. Co., 1933).

14. See, Farmers Loan & Trust Co., 213 N.Y. 168, 107 N.E. 340 (Ct. of App. 1914).

15. McKinney, J., in Lea v. Lea, 145 Tenn. 693, 237 S.W. 59 (S. Ct. 1922).

16. See, generally, Kales, *Meaning of Word Issue in Gifts to Issue*, (1911) 6 ILL. L. REV. 217; Brooks, *Meaning of the Word Issue in Gifts to Issue—Another View*, (1911) 6 ILL. L. REV. 230; Schnebly, *Testamentary Gifts to Issue* (1926), 35 YALE L. J. 571.

17. Jackson v. Jackson, 153 Mass. 374, 26 N.E. 1112 (1891); Wyeth v. Crane, 342 Ill. 545, 174 N.E. 871 (1931); Kidwell v. Ketler, 146 Cal. 12, 79 P. 514 (1905); Stamford Trust Co. v. Lockwood, 98 Conn. 337, 119 A. 21 (1922); Dolbeare v. Dolbeare, 124 Conn. 286, 199 A. 555

stirpes, on the ground that such a construction is consistent with the natural and probable intent of the testator. It is to be regretted that the opportunity to join the "growing majority"[18] of "modern authority"[19] was dissipated in the instant case. Although New Jersey is considered bound to the rule of *Freeman v. Parsley*,[20] a careful reading of the reported decisions dealing with the problem demonstrates that a repudiation of the rule would have caused no violent disruption of precedent.[21]

(1938); *In re* Thompson, 279 N.W. 574 (1938); *In re* Morawetz, 214 Wisc. 595, 254 N.W. 345 (1934); Ernst v. Rivers, 233 Mass. 9, 123 N.E. 93 (1919); Rhode Island Hospital Trust Co. v. Budgham, 42 R.I. 161, 106 A. 149 (1919); Newport Trust Co. v. Newton, 49 R.I. 93, 139 A. 793 (1928); Union Safe Deposit & Trust Co. v. Dudley, 104 Me. 297, 72 A. 166 (1903); *In re* Mayhew's Estate, 307 Pa. 84, 106 A. 724 (1932); Wilmington Trust Co. v. Chapman, 171 A. 222 (1934). See also, 4 KENT'S COMMENTARIES 278; 2 REDFIELD ON WILLS (3rd ed.), c. 1, sec. 428; 3 PAGE ON WILLS (life ed., 1941), c. 26, sec. 1079.

18. *In re* Mayhews Estate, 307 Pa. 84, 106 A. 724 (1932).

19. Wilmington Trust Co. v. Chapman, 171 A. 222 (1934).

20. 3 PAGE ON WILLS (life ed., 1941), sec. 1079, p. 283, n. 7, citing Skinner v. Boyd, 98 N.J.Eq. 55 (Ch. 1925).

21. Price v. Sisson, 13 N.J.Eq. 168 (Ch. 1860), *aff'd sub nom.* Weehawken Ferry Co. v. Sisson, 17 N.J.Eq. 475 (E. & A. 1864), appears to support a capital distribution, but an assumption without discussion that capital distribution necessarily follows from a holding that "issue" includes remote descendants and the presence of a prior decree of the Court of Chancery weaken the force of the decision. The peculiar facts in Inglis v. McCook, 68 N.J.Eq. 27 (Ch. 1904), from which a capital intent may be inferred limit its application. In spite of language to the contrary in Security Trust Co. v. Lovett, 78 N.J.Eq. 445 (Ch. 1911), the actual distribution ordered therein by Vice Chancellor Leaming was on a *per stirpes* basis. Chancellor Walker's statement in Tantum v. Campbell, 83 N.J.Eq. 361 (Ch. 1914) that descendants "take per capita and not per stirpes" is a *dictum*. The same is true of Vice Chancellor Backes' discussion in Skinner v. Boyd, 98 N.J.Eq. 55 (Ch. 1925), for therein by the terms of the limitation it was held that living children exclude their descendants. Hackensack Trust Co. v. Denniston, 127 N.J. Eq. 523 (Ch. 1940) is consistent with a rule favoring stirpital distribution. There is nothing in *In re* Hampson, 4 N.J.Misc. 642 (Orph. Ct. 1926) to indicate that any children of living participants were included in the distribution.

In Coyle v. Coyle, 73 N.J.Eq. 528 (Ch. 1907), the will divided the residue among three children and provided that "if any of my said

children shall have died, leaving lawful issue, such issue shall take the share their parent would have taken if living." It was held that the grandchildren of a deceased child were not entitled to share in the estate.

In Pierson v. Jones, 108 N.J.Eq. 453 (Ch. 1931), the will created a limitation in favor of "the issue surviving of deceased brothers and sisters in equal shares" and further provide that the issue take "only the parent's share." Vice Chancellor Berry decreed "distribution amongst the children of deceased brothers and sisters . . . and distribution should be per stirpes."

The following language of Vice Chancellor Egan in Central Hanover Bank & Trust Co. v. Helme, 121 N.J.Eq. 406, 417 (Ch. 1937), is significant: "In this state, the cases indicate that the courts have restricted the word 'issue' to issue per stirpes, rather than to issue per capita. In case of doubt about the distribution to be made, either per capita or per stirpes, the courts award to issue per stirpes."