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PATCHELL V. GROOM REVISITED: DISTRIBUTIONS AMONG DESCENDANTS PER STIRPES

By FREDERICK J. SINGLEY, JR.*

In its opinion in the case of *Patchell v. Groom*,[1] decided in 1945, a majority of the Maryland Court unequivocally adopted the reasoning of a series of English cases dealing with stirpital distributions. The rule of these cases, and of *Patchell v. Groom*, was that the *stirpes* for purposes of such distributions were to be found among the first takers and not among the ancestors or other individuals who took no absolute estate, even although designated by name.

Patchell v. Groom[2] aroused interest in Maryland and elsewhere,[3] but was not cited by the Court of Appeals for nearly ten years. In 1954, a substantially similar question was considered by the Court in *Ballenger v. McMillan*,[4] where a result was reached which was not only at sharp variance from that in *Patchell v. Groom*, but narrows the area within which the *Patchell* case may be regarded as controlling authority.

It should be emphasized that these cases were not concerned with a gift to "my descendants equally"; a gift to "the descendants of A"; or a gift to "my descendants", without a direction or an implication that a stirpital distribution was intended. In these examples, the rule is that all take *per capita*, in the absence of contrary intention.[5]

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[1] 185 Md. 10, 43 A. 2d 32 (1945).

[2] *Ibid.*

[3] 13 A. L. R. 2d 1023, 1076.

[4] ... Md. ..., 106 A. 2d 109 (1954).

[5] Judik v. Travers, 184 Md. 215, 40 A. 2d 306 (1944); Levering v. Orrick, 97 Md. 139, 54 A. 620 (1903); Requardt v. Safe Deposit Co., 143 Md. 431, 122 A. 526 (1923).

Nor were these cases concerned with an *immediate* gift to "my descendants, *per stirpes* and *not per capita*"; or with a gift to "*A and his descendants per stirpes*". These are the classical examples of distributions *per stirpes,* when the heir cannot share with a living ancestor.

> "It is not conceivable how any property can be divided among persons and their issue *per stirpes*. . . . A *stirps* is a root of inheritance; it designates the ancestor from whom the heir derives title; and it necessarily presupposes the death of the ancestor. When *issue* are said to take *per stirpes,* it is meant that the descendants of a deceased person take the property to which he was entitled, or would have been entitled if living."[6]

Both *Patchell v. Groom* and *Ballenger v. McMillan* dealt with situations where the individuals who might otherwise have been the *stirpes* were not the first takers. In *Patchell,* the Grindall will provided:

> "At the death of the last survivor of my children . . . I do hereby devise and direct that all my estate . . . shall be divided equally among all of my descendants then living per stirpes and not per capita, . . ."[7]

In the *Ballenger* case, the Gorman deed of trust provided:

> " 'the trust is to continue during the lives of all the children of the said William H. Gorman, and upon the death of the last surviving child of the said William H. Gorman the trust shall terminate *and the principal of the trust estate shall go to all the descendants of William H. Gorman then living, to be divided among them per stirpes and not per capita'.*"[8]

These are the narrow limits of the problem which has been troubling the Courts here and in England for nearly a century: If a gift is made by A to "my children B, C and D for life, and on the death of the survivor of them to my

[6] Rotmanskey v. Heiss, 86 Md. 633, 634, 39 A. 415 (1898).
[7] *Supra,* n. 1, 13.
[8] *Supra,* n. 4, 110.

descendants, per stirpes", are the *stirpes* or stocks to be found among A's children, B, C and D or among the children of B, C and D? *Patchell* held that the children of B, C and D were the stocks; *Ballenger,* that B, C and D were themselves the *stirpes* for purposes of distribution.

A further problem exists with respect to limitations in favor of the descendants of persons other than the testator or settlor. Assume that A makes a gift to "the descendants of my brothers X and Y, per stirpes". Do the brothers constitute the *stirpes,* or are the stocks to be found in their children? The *Patchell* case takes the latter view, and may still remain authority for this proposition.

The problem of these cases was apparently first considered by the House of Lords in 1863 in the case of *Robinson v. Shepherd.*[9] In that case, the testator died in 1862, leaving his estate:

> " 'to the persons, being such descendants as next hereinafter mentioned, *in equal shares,* among and to the lawful descendants living at the time of his (the testator's) death, of such of the brothers and sisters of his late grandfather, Henry Pearson, deceased, as had died leaving lawful descendants, such descendants, respectively, to be entitled to share the same moneys in a course of distribution *per stirpes and not per capita'.*"[10]

Two of the sisters of testator's grandfather had died leaving descendants. Sir John Romilly, then Master of the Rolls, held that the estate was initially divisible into two shares, one for the descendants of each sister, who would then share *per capita:*

> "How can I give the fund *'per stirpes and not per capita'*, and at the same time give it *'in equal shares'*. I am of opinion . . . that there are two roots, that the fund must be divided into two parts, and then that one of them must be divided equally amongst the descendants of one daughter, and the other moiety amongst those of the other daughter, living at the death of the testator. If one left eleven and the other five descend-

[9] 32 Beavan 665, 55 Eng. Rep. 261 (1863), rev'd., 4 De G. J. & S. 129, 46 Eng. Rep. 865 (1863).
[10] *Ibid.*

ants, it would have to be divided into two equal shares, and one such share would then be divided in elevenths and the other in fifths."[11]

Lord Westbury, then the Lord Chancellor, reversed the Master of the Rolls, holding[12] that *per stirpes* referred to the descendants of brothers and sisters, and not to the brothers and sisters themselves. Lord Westbury concluded that:

> ". . . descendants . . . are to be classified *secundum stirpes* or according to their families, and that the property in question is to be divided into as many shares as there are stirpes or families, each stirps or family taking an equal share."

In 1866, the problem was again presented to the English Courts in *Gibson v. Fisher.*[13] In this case, the will provided:

> " 'And pay all the rest, residue, and remainder of the moneys equally amongst the descendants of the brothers and sisters of the whole and half blood of my late father, *John Fisher,* who may be living at the time of my decease; such descendants of the brothers and sisters of my father to take severally as tenants in common, *per stirpes* and not *per capita'.*"

The testator's father had 4 brothers and sisters, all of whom were dead, leaving 9 children who survived the testator. The Master of the Rolls who had decided *Robinson v. Shepherd,* now Lord Romilly, concluded that the fund was initially divisible into four and not into nine parts. He regarded the case as *res integra* and declined to follow *Robinson v. Shepherd,* which he felt was contrary to established authority:

> "I am of opinion it must be ascertained how many brothers and sisters of the whole and half blood of the testator's father, *John Fisher,* had descendants who were living at the time of the testator's decease, and that the whole fund must be divided into as many portions as there were families descended from such brothers and sisters then living."[14]

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[11] *Ibid,* 262.
[12] *Ibid,* 133, 867.
[13] L. R. 5 Eq. 51, 37 L. J. (N. S.) 67 (1867).
[14] *Ibid,* 58.

Lord Westbury, who had reversed Lord Romilly in *Robinson v. Shepherd* had resigned in 1865, and Romilly apparently held some hope that *Robinson v. Shepherd* might yet be overruled if an appeal were taken in *Gibson v. Fisher.* Quoting again from Romilly's opinion in *Gibson v. Fisher:*

> "I have looked very carefully at the Lord Chancellor's decree in *Robinson v. Shepherd.* Probably neither the Lord Chancellor nor I ever saw the decrees after they were drawn up and before they were passed and entered; but it is very difficult to say that either of them can be right as they stand. The result has been that, on the whole, I have thought, considering that there may be an appeal from my decision by which the whole matter may be reviewed before a Court of competent jurisdiction, that it would be better that I regard the case as if it were *res integra* without any previous decision in the case of *Robinson v. Shepherd,* . . ."[15]

No appeal was taken from Lord Romilly's decree in *Gibson v. Fisher* and it was not until 1883 that the question arose again, in the Chancery Division in *In Re Wilson.*[16] Thomas Wilson had died in 1848, and had left his estate to Trustees to pay the income to his wife for life; then to his children; and in default of children to his cousins, the children living at the termination of the trust of four aunts and two uncles:

> ". . . according to the stocks, and not to the number of individuals."[17]

At the death of the widow, without leaving children, there were surviving one cousin and the children and descendants of 15 deceased cousins. The question presented was whether the fund was initially divisible into six parts (uncles and aunts) or 16 parts (cousins). The Court (North, J.), said:

> "The question is, where am I to look for 'the stocks'?"[18]

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[15] *Ibid.*
[16] In Re Wilson (Parker v. Winder), 24 Ch. D. 664, 53 L. J. Ch. (N. S.) 130 (1883).
[17] *Ibid,* 665.
[18] *Ibid,* 667.

Quoting *Robinson v. Shepherd:*

> ". . . the words *'per stirpes'* refer to the descendants."[19]

Then the Court distinguished *Gibson v. Fisher* and said:

> "If, however, those two cases were authorities exactly applicable to the present case, and I had to choose between them, I would follow *Robinson v. Shepherd* in preference to *Gibson v. Fisher.*"[20]

In 1911, the same question came before the Chancery Division in *In Re Dering.*[21] The Court (Warrington, J.), preferred *Robinson v. Shepherd* and *In Re Wilson* to *Gibson v. Fisher,* and found that the provision,

> "In trust for such of the issue of my deceased aunts, Charlotte Elizabeth Haslewood and Harriet Mary Majendie who shall be living at my decease, such issue to take *per stirpes* and not *per capita.*"[22]

required an initial division into 13 shares, one for each of the children of the aunts and not into two shares represented by the aunts themselves.

Finally, in 1918, the case of *In Re Alexander,*[23] was decided by the Chancery Division.

Here, Alexander had died in 1887, leaving £20,000 in trust, income to his three sisters and the survivor of them, remainder on the death of the survivor of them,

> ". . . for such of my nephews and nieces" (as may be living at death of survivor of the sisters) "and for the issue then living of any such nephews and nieces of mine who may have previously died . . . as tenants in equal shares per stirpes."[24]

The survivor of the three sisters, none of whom had children, died. Four brothers of the testator had left 14 nephews and nieces surviving at the time of the termination of the trust. In addition, there were descendants of five deceased nephews and nieces surviving.

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[19] *Ibid.*
[20] *Ibid,* 668.
[21] In Re Dering (Neall v. Beale), 105 L. T. 404.
[22] *Ibid.*
[23] In Re Alexander (Alexander v. Alexander) (1919), 1 Ch. 371.
[24] *Ibid,* 372.

The Court determined that the fund should be initially divided into 19, and not into four parts. Admitting a preference for *Gibson v. Fisher,* Sargant, J., felt bound by *Robinson v. Shepherd,* and held that the stirpital division began with the first class of takers, the nephews and nieces.

In 1927, when the problem was first presented to the Maryland Court of Appeals in the case of *Lycett v. Thomas,*[25] the Court of Appeals found five English cases: four holding that the stocks, or *stirpes* must be found in the first takers; and only one adhering to the view that the *stirpes* are to be found among the named individuals or the designated class without reference to whether or not they take a beneficial interest absolutely. Moreover, in 1913, New York had adopted the view of the English cases in *In Re Title Guarantee and Trust Co.*[26] Elsewhere in the United States, the authorities were in sharp conflict.[27]

In *Lycett v. Thomas,* the Court of Appeals was called upon to construe a deed executed by Isaac M. Cate, by which property had been conveyed to a Trustee. Income from the fund was to be divided into five equal parts. One part was to be paid to each of three daughters; one part to a son; and one part to the children of a deceased daughter. There was a provision that if the son died without descendants, his share of the income was to be divided,

> "among his nephews and nieces then living and the descendants then living of any deceased nephews or nieces, *per stirpes.*"[28]

The question presented was whether the son's share of income was to be initially divided into four parts (*i.e.,* among the stocks represented by his sisters) or whether it was to be equally divided among nephews and nieces. The Court took the latter view, and in an opinion by Judge Adkins, held that:

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[25] 153 Md. 443, 138 A. 225 (1927), cited in 78 A. L. R. 1385, 1387.

[26] 159 App. Div. 803, 144 N. Y. S. 889 (1913), affirmed without opinion, 212 N. Y. S. 551, 106 N. E. 1043 (1914).

[27] The cases are collected and analysed in a series of notes: 16 A. L. R. 15, 150, 31 A. L. R. 799, and, after Lycett v. Thomas, 78 A. L. R. 1385, 126 A. L. R. 157, 13 A. L. R. 2d 1023.

[28] *Supra,* n. 25, 445.

> "The words *'per stirpes'* are naturally applied to descendants, and mean according to stock or by representation. . . .
>
> " 'When issue are said to take *per stirpes,* it is meant that the descendants of a deceased person take the property to which he was entitled, or would have been entitled if living'."[29]

While the English cases were cited in the opinion in *Lycett v. Thomas,* the Court did not appear to have felt them necessarily controlling, but primarily rested its conclusion on the substitutional character of a stirpital distribution:

> "A stirps is a root of inheritance; it designates the ancestor from whom the heir derives title; and it necessarily presupposes the death of the ancestor."[30]

Eighteen years later, in 1945, however, a majority of the Maryland Court unequivocally adopted the rule of the English cases in *Patchell v. Groom.*[31]

Particularly noteworthy are two circumstances: first, that the applicability of the principle had not been recognized by counsel for any of the parties, but was apparently invoked by the Court; and second, that the application of the rule was not necessary to the result of the case, since the fractional shares remained unchanged whether or not the first takers constituted true stocks.

The *Patchell* case dealt with the Will of John T. Grindall, who died in 1885, survived by five children. A portion of his estate was left in trust and the trust terminated on July 25, 1943, on the death of his surviving child. The will provided:

> " 'At the death of the last survivor of my children . . . it is my will that the trust hereinbefore mentioned shall cease and determine, and thereupon I do hereby devise and direct that all my estate and property real, personal and mixed shall be divided equally

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[29] *Ibid,* 448.

[30] MILLER, CONSTRUCTION OF WILLS (1927), Sec. 97, quoting Judge Bryan's opinion in Rotmanskey v. Heiss, *supra,* n. 6.

[31] 185 Md. 10, 43 A. 2d 32 (1945), cited in 13 A. L. R. 2d 1023, 1076.

> among all of my descendants then living per stirpes and not per capita, to them, their heirs, personal representatives and assigns absolutely'."[32]

Upon the death of the last survivor of the children, there were four grandchildren surviving; two were the children of the testator's son Albert; two, the children of his daughter, Mary Eliza.

The question presented to the Court on appeal was the proper construction of the phrase,

> ". . . divided equally among all of my descendants then living per stirpes and not per capita."[33]

The appellants, the guardians *ad litem* of the great-grandchildren of the testator, had contended that while distribution was *per stirpes* to the point of dividing the estate between the two branches represented by the two children of the testator who had left children surviving, beyond this point distribution was to be made *per capita,* with grandchildren in each branch sharing equally with more remote descendants.

Judge Marbury, speaking for a majority of the Court, consisting of Judges Delaplaine, Grason and Melvin, cited the familiar rule:

> "Where bequests are made to descendants equally, or to all the descendants of any person, or to the descendants simply, the rule is that all take per capita, unless a contrary intention appears."[34]

and found the expression of contrary intention in the use of the phrase "per stirpes and not per capita".

The opinion then referred to the substitutional concept of stirpital distribution adopted in *Rotmanskey v. Heiss* and then reviewed the line of English cases in detail. Continuing its opinion, the Court said:

> "But in a case where, not by accident but by design, the first takers are not the children, but the grandchildren, it follows, just as clearly, that the grand-

[32] *Ibid,* 13.
[33] *Ibid.*
[34] *Ibid,* 14.

children must be the stocks, and not their parents who do not take at all. That is the theory of the English decisions which have been approved by this Court. . . .

"The doctrine of these cases is that a descendant cannot take by substitution the share of a deceased ancestor unless that ancestor would have taken that share had he been living at the appointed time. If the ancestor is not entitled to take by the provisions of the will, then he has no share which his descendant can take, and if his descendant is the first person entitled to take, then that descendant does not take by substitution, but is the primary taker in his own right."[35]

Then the Court pointed out that under the facts of the *Patchell* case, the decision did not affect the result:

"In the instant case it happens to make no practical difference whether we determine that the children are the stocks or whether we determine that the grandchildren are the *stirpes*. That is so because there were two children leaving descendants and each of these two children had two children. *But we think the question should be clarified.*"[36]

It seems clear that this is the rationale of the *Patchell* case, and having had the attention of the judicial mind, cannot be minimized as *obiter dicta*.[37]

There was a spirited minority opinion[38] filed by Judge Henderson, in which Judges Collins and Markell joined. Their disagreement with the view taken by the majority was based on Section 303 of the Restatement of Property, which adopts the rule that a distribution to the descendants of a designated individual follows the statutory distribution in intestacy, in the absence of an expression of contrary intent. The English cases were distinguished.

"*Lycett v. Thomas, supra,* and the English cases therein cited, belong to a narrow class of gifts to 'the

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[35] *Ibid,* 23.
[36] *Ibid,* 23-24. Emphasis supplied.
[37] Alexander v. Worthington, 5 Md. 471 (1854); U. Rwys. & E. Co. v. M. & C. C. of Balto., 121 Md. 552, 88 A. 617 (1913); McGraw v. Merryman, 133 Md. 247, 104 A. 540 (1918).
[38] *Supra,* n. 31, *sep. op.* 26.

> descendants of A and B, *per stirpes', i.e.,* independent gifts to the descendants of any one of two or more persons, unconnected with previous gifts of income to the same descendants or the specified ancestors. In such cases, the question arises as to the intended point of reference, a question that cannot arise where the testator speaks of his own descendants, who necessarily begin with his children."[39]

When *Patchell v. Groom* was decided in 1945, the Court of Appeals did not have before it the opinion in *Sidey v. Perpetual Trustees Estate and Agency Co. of New Zealand,*[40] decided by the Privy Council. The Sidey will provided:

> "And from and after the death of the last survivor of my said four children as aforesaid I give devise and bequeath the whole of my residuary estate real and personal to and amongst my then surviving descendants in such manner that the same shall be divisible *per stirpes* among the children grandchildren and remoter issue of such of my children as shall have left issue."[41]

Upon the death of the last surviving of the testator's children, there were nine grandchildren living, the descendants of three children. If the grandchildren were the stocks, the estate would be initially divided into nine shares; if the children, into three shares.

In the lower Court, the grandchildren were held to be the stocks. On appeal to the Privy Council, this was reversed. Lord Simonds, the Lord Chancellor, said in his opinion:

> "They (their Lordships) cannot accept the suggestion made in the argument of this appeal that there is any rule of construction which requires a stirpital division to begin at one generation rather than another. In every case the result must depend upon the language that is used and the context in which it is used."[42]

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[39] *Ibid,* 31.
[40] (1944) 2 All E. R. 225, (1944) A. C. 194.
[41] *Ibid,* 226.
[42] *Ibid,* 227.

There followed a discussion of the testator's intent as found in the Sidey will, and a review of the English cases. Finally, Lord Simonds concluded:

> "Their Lordships do not think it necessary to question the correctness of any of the decisions to which reference has been made, but they cannot elevate the reasoning which led to such decisions into a rule of construction. There appears to them on principle to be no reason why in the construction of a gift *per stirpes* the stocks should be found among the takers and not among their ancestors."[43]

In mid-1954, *Ballenger v. McMillan*,[44] came before the Court of Appeals of Maryland. The 1945 Court which had decided *Patchell v. Groom* had consisted of seven judges; the 1954 Court, of five. Of those who had joined in the majority opinion, only Judge Delaplaine remained. Judge Henderson, who had written the minority opinion, was still a member of the Court, as was Judge Collins who had been a member of the minority.

Moreover, the publication of the English Reports, delayed by World War II, had been resumed, and Lord Simonds' opinion in the Sidey case was readily available.

Ballenger v. McMillan involved the construction of a deed of trust executed in 1912 by William H. Gorman. The pertinent provision of the deed was as follows:

> " '. . . the trust is to continue during the lives of all the children of the said William H. Gorman, and upon the death of the last surviving child of the said William H. Gorman the trust shall terminate *and the principal of the trust estate shall go to all the descendants of the said William H. Gorman then living, to be divided among them per stirpes and not per capita.*' . . ."[45]

William H. Gorman had four children: Douglas, who had five children; Elizabeth, who had four children; Albert, who had three children; and Nora, who had two children. Thus, on the death of the last survivor of William's children, the question was presented, did the children con-

[43] *Ibid*, 228.
[44] . . . Md. . . ., 106 A. 2d 109 (1954).
[45] *Ibid*, 110.

stitute the stocks for an initial division of the trust estate into four parts, or did the grandchildren constitute the stocks, for an initial division of the trust estate into fourteen parts.

The lower Court followed the rule of *Patchell v. Groom* and of the English cases holding that the stocks were to be found in the grandchildren and that the trust was initially divisible into fourteen parts. On appeal, this was unanimously reversed by the Court of Appeals, which filed an opinion written by Judge Collins.

The Court again reviewed the English cases, and pointed out that *Patchell v. Groom* had been decided at a time when the opinion of *Sidey v. Perpetual Trustees Estate and Agency Co. of New Zealand*[46] was not before it. As an additional reason for declining to follow the holding in the *Patchell* case, the Court placed reliance on the absence of the word "equally" from the dispositive provisions of the Gorman deed of trust.

There follows in the opinion a long quotation from the minority opinion of Judge Henderson in the *Patchell* case, in which reliance was placed on Section 303 of the Restatement of Property, which provides in part as follows:

> "(1) When a conveyance creates a class gift by a limitation in favor of a group described as the 'issue of B', or as the 'descendants of B', and the membership in such class has been ascertained in accordance with the rules stated in Secs. 292 and 294-299, then, unless a contrary intent of the conveyor is found from additional language or circumstances, distribution is made to such members of the class as would take, and in such shares as they would receive, under the applicable law of intestate succession if B had died intestate on the date of the final ascertainment of the membership in the class, owning the subject matter of the class gift."
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> . . . . . .

Comment f says:

> *"Operation of the stated rule — Effect of all descendants of one generation being dead.* When a limitation is made to the 'issue of B', . . . and all of B's

[46] *Supra*, n. 40.

> children are dead, but grandchildren of B are alive, a problem arises as to whether these grandchildren of B take equal shares or take as representatives of their respective parents. This is determined in any state in the same manner as the similar problem of intestate succession is determined in that same state. Commonly existent statutes provide that remote issue of the intestate, when all of the same degree, take per capita. Where such a statute exists, the distribution of a class gift of the sort described in this Comment would be regulated thereby unless a 'contrary intention of the conveyor is found from additional language or circumstances'."

Judge Henderson had also pointed out that the Maryland Statute of Distributions[47] and the English Statute of Distributions, both of which are based on Roman Law, provide for a stirpital distribution among grandchildren, the children of the intestate constituting the stocks or stirpes. The rule is to the contrary in most American jurisdictions, which accounts for the variant in the Restatement, Section 303(f).

It would seem that our Court of Appeals, in *Ballenger v. McMillan*,[48] has turned its back on the artificialities of the rule followed in *Patchell v. Groom*,[49] *Robinson v. Shepherd*,[50] and in the English cases, and has adopted the more realistic view of *Sidey v. Perpetual Trustees*.[51]

Two limitations should be stated, however:

(1) Intention may be a controlling factor in any construction case.

> "I do not enter into an examination of the cases: when I see an intention clearly expressed in a will, and find no rule of law opposed to giving effect to it, I disregard previous cases."[52]

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[47] Md. Code (1951), Art. 93, Secs. 129, *et seq.*

[48] *Supra*, n. 44.

[49] 185 Md. 10, 43 A. 2d 32 (1945).

[50] 32 Beavan 665, 55 Eng. Rep. 261 (1863), rev'd. 4 De G. J. & S. 129, 46 Eng. Rep. 865 (1863).

[51] (1944) 2 All E. R. 255, (1944) A. C. 194.

[52] Lindley, L. J., in Baker v. Stone, L. R. (1895), 2 Ch. 196, quoted with approval by Judge Henderson in Judik v. Travers, 184 Md. 215, 222, 40 A. 2d 306 (1944). To the same effect, see opinions of Judge Pearce in Poultney v. Tiffany, 112 Md. 630, 77 A. 117 (1910), and Judge Bryan in Cox v. Handy, 78 Md. 108, 27 A. 227, 501 (1893).

(2) The rule of *Ballenger v. McMillan* applies only to dispositions in favor of the settlor's or testator's *own* descendants.

> "*Lycett v. Thomas, supra,* and the English cases therein cited, belong to a narrow class of gifts to 'the descendants of A and B *per stirpes*', *i.e.,* independent gifts to the descendants of any one of two or more persons, unconnected with previous gifts of income to the same descendants or the specified ancestors. In such cases, the question arises as to the intended point of reference, . . ."[53]

Subject only to these limitations, a " 'distribution among my descendants then living *per stirpes,* would seem to establish my children as the stocks and to fix the proportions in which my surviving grandchildren take'."[54]

[53] Judge Henderson's opinion, in Patchell v. Groom, *supra,* n. 49, 31.
[54] Judge Collins' opinion in Ballenger v. McMillan, *supra,* n. 44, 115, quoting Judge Henderson's opinion in Patchell v. Groom, *ibid.*