Wills—A Residual Bequest to the Widow with the Phrase "Subject to the Foregoing" Will Abate Before Specific Bequests to the Children.—*In re Estate of Kraft* (Iowa 1971).

Fred W. Kraft died testate devising a farm and the homestead to his widow and two additional farms to his children, leaving the residue, "subject to the foregoing," to his widow. The estate was insufficient to pay all debts, charges, and bequests in full, creating a situation where abatement was necessary. The trial court sustained the widow's objections to the executor first abating her residual estate, and the executor and adversely affected children appealed. *Held*, reversed, three justices dissenting. Testamentary provision for payment of debts and charges is prefatorily impressed by law upon every will and in the absence of such provision in the will, a residual estate devised to the widow with the phrase "subject to the foregoing" will stand totally subordinate to the payment of all debts and charges. *In re Estate of Kraft*, 186 N.W.2d 628 (Iowa 1971).

The primary question presented by the decision in *Kraft* is when to apply the ordinary order of abatement in Section 436[1] of the Iowa Probate Code and when to apply the alternative method under Section 437.[2] The regular order of abatement, as well as the alternative method, was adopted by the Iowa legislature from the Model Probate Code.[3] Since few decisions have been rendered interpreting these statutes,[4] an historical analysis of abatement will aid in un-

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[1] Iowa Code § 633.436 (1971) provides:

Except as provided in section 633.211, shares of the distributees shall abate, for the payment of debts and charges, federal and state estate taxes, legacies, the shares of children born or adopted after the making of a will, or the share of the surviving spouse who elects to take against the will, without any preference or priority as between real and personal property, in the following order:

1. Property not disposed of by the will;
2. Property devised to the residuary devisee, except property devised to a surviving spouse who takes under the will;
3. Property disposed of by the will, but not specifically devised and not devised to the residuary devisee, except property devised to a surviving spouse who takes under the will;
4. Property specifically devised, except property devised to a surviving spouse who takes under the will;
5. Property devised to a surviving spouse who takes under the will.

A general devise charged on any specific property or fund shall, for purposes of abatement, be deemed property specifically devised to the extent of the value of the property on which it is charged. Upon the failure or insufficiency of the property on which it is charged, it shall be deemed property not specifically devised to the extent of such failure or insufficiency.

[2] Iowa Code § 633.437 (1971) provides:

If the provisions of the will, the testamentary plan, or the express or the implied purpose of the devise would be defeated by the order of abatement stated in section 633.436, the shares of distributees shall abate in such other manner as may be found necessary to give effect to the intention of the testator.

[3] Model Probate Code § 184 (1946). The comment to Section 184(b), enacted as Section 437 of the Iowa Probate Code, explains its purpose as follows: "Moreover, the general testamentary plan is often important in determining matters of abatement when the surviving spouse elects to take against the will. The same may be true where abatement takes place to provide for the share of a pretermitted heir. The provisions of subsection (b) embrace these and other situations of similar character."

[4] In re Estate of Kraft, 186 N.W.2d 628 (Iowa 1971); In re Estate of Miguet, 185 N.W.2d 508 (Iowa 1971); In re Estate of Twedt, 173 N.W.2d 545 (Iowa 1970);

derstanding the proper case for the application of each statute.

The general order of abatement first stated in Iowa before being statutorily prescribed was: (1) personal estate, except specific bequests or such of it as is not exempt from the payment of debts; (2) the real estate which is appropriated in the will for such payment; (3) the real estate descended; (4) and the real estate specifically devised.[5] It was a general rule that specific legacies did not abate but that general legacies did.[6] Preference, as between bequests of the same class, was given to the widow in England as early as 1710.[7] Iowa adopted the widow's preference reasoning:

> The theory is that a wife cannot without her consent be deprived by her husband's will of her dower or distributive share. Where she accepts the provisions of the will in lieu of dower, the estate receives a valuable consideration by a relinquishment of that right, which in effect makes her a purchaser for value of her legacy. Since the right to dower is superior to all legacies, the bequest in lieu of dower is also to be preferred over all other legacies. This is true even though the so-called gratuitous legacies are specific and the legacy to the widow is general.[8]

The widow is treated as a quasi-creditor having preference to those with no legal claim against the estate.[9]

The court, giving preference to the widow, later ordered abatement of legacies which were mere bounties, not based upon a consideration, as follows: (1) residuary legacies, (2) general legacies, and (3) specific legacies.[10] Realty did not take preference over personalty when both were specifically bequeathed.[11] Later, the preference for the widow was declared to protect a residuary bequest which would have otherwise abated first.[12] The Iowa supreme court explained:

> Nor does it matter we think, that the bequest here is residuary rather than specific or merely general. The residuum of personalty left to her by the terms of the will was as much a part of the consideration passing to her for her release of her right to a distributive share as any other bequests or devises.[13]

The Iowa supreme court, in support of its holding in *Kraft*, relied heavily on a prior decision, *In re Estate of Twedt*, construing Sections 436 and 437 and the meaning given to the words "subject to" which introduced the residuary bequest.[14] The court reasoned that the testator could not have intended the

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Bergren v. Estate of Mason, 163 N.W.2d 374 (Iowa 1968); Zion Lutheran Church v. Lamp Executors, 260 Iowa 363, 149 N.W.2d 137 (1967); In re Estate of Tedford, 258 Iowa 890, 140 N.W.2d 908 (1966).

5 Wilts v. Wilts, 151 Iowa 149, 130 N.W. 906 (1911).
6 Parsons v. Reel, 150 Iowa 230, 129 N.W. 955 (1911).
7 Burridge v. Bradyl, 24 Eng. Rep. 323 (Ch. 1710).
8 In re Hartman's Estate, 233 Iowa 405, 409, 9 N.W.2d 359, 362 (1943).
9 *Id.*
10 In re Van Wechel's Estate, 241 Iowa 513, 41 N.W.2d 694 (1950).
11 Nolte v. Nolte, 247 Iowa 868, 76 N.W.2d 881 (1956).
12 *Id.*
13 *Id.* at 880, 76 N.W.2d at 888.
14 173 N.W.2d 545 (Iowa 1970).

residuary bequest to stand partially subject to the foregoing but must have intended it to stand totally or entirely subordinate. The foregoing paragraphs in testator's will did not contain a testamentary provision for the payment of all debts and charges. However, the court pointed out that the absence of such a testamentary provision was of no particular significance since a provision for the payment of debts and charges is prefatorily impressed by law upon every will.[15]

The problem in *Kraft* was considered similar to that presented to the court in *Twedt*.[16] In that case testator left a sizable estate, including a large amount of joint tenancy property. Testator's will provided for the sale of a farm with the proceeds to be given to eleven named charities. The residue passed to the widow. Under the order of abatement provided by Section 436 of the Iowa Probate Code, the residuary share bequeathed to the widow would abate last and the charitable bequest first. The debts, charges, and taxes upon the estate were greater than the proceeds from the sale of the farm. Consequently, the charitable gift, if abated first, would have been completely defeated. The Supreme Court of Iowa, therefore, held Section 437 of the Probate Code applicable. The court, in recognizing the amount of property passing to the widow by virtue of its joint tenancy status, noted that the regular order of abatement would defeat the testamentary plan in that it would exhaust the only specific devise made by testator.

The similarity between the *Twedt* and *Kraft* cases ceases with the problem involved, *i.e.*, whether to apply Section 436 or 437. The court, in *Twedt*, recognized that to exhaust the charitable bequest would require an interpretation that the testator's bequest was a completely idle act—an interpretation contrary to Iowa law.[17] Abatement in *Twedt* was recognized as presenting an unusual case. In *Kraft*, the specific bequests to the children, if abated first, would be reduced but not nullified, creating the usual situation in abatement. Twedt's widow received abundant assets from joint tenancy property and the residuary, even after the taxes were paid and the charitable gift fulfilled. Kraft's widow received a farm and the residuary, substantially depleted. As is pointed out in the dissenting opinion, *Twedt* "is easily distinguishable on its facts."[18]

The supreme court agreed with the trial court's interpretation of the Kraft will as unambiguous. However, the court stated that the trial court's interpretation given the phrase "subject to" was too restrictive. In reversing the lower court, the court in *Kraft* concluded that the testator manifested a testamentary plan to subordinate the residual estate to the payment of all debts and estate charges, the payment of which testator had not provided for in his will. In essence, the court rewrote testator's will to read "subject to the foregoing

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15 In re estate of Kraft, 186 N.W.2d 628, 632 (Iowa 1971).
16 173 N.W.2d 545 (Iowa 1970).
17 In re Estate of Tedford, 258 Iowa 890, 140 N.W.2d 908 (1966); In re Estate of Logan, 253 Iowa 1211, 115 N.W.2d 701 (1962); In re Estate of Syverson, 239 Iowa 800, 32 N.W.2d 799 (1948).
18 In re Estate of Kraft, 186 N.W.2d 628, 634 (Iowa 1971).

and the payments of my debts and charges." As is often stated, courts cannot make a new will nor substitute one phrase for another.[19] A well-established principle of testamentary construction ignored by the majority in *Kraft,* is that where the language of the will is plain, certain, and unambiguous, the intention of the testator must be ascertained from the will itself and nothing else.[20] The intention should be that manifested by the express language of the will.[21] Where the testator failed to express an intention that his debts and charges be paid other than as provided by Section 436 of the Iowa Probate Code, it is not the court's providence to apply them differently.[22]

The legislative purpose in enacting an order of abatement is evident from the priority given Section 436 over 437. The legislature clearly provided that for the payment of debts and charges Section 436 should govern unless "the provisions of the will, the testamentary plan, or the express or the implied purpose of the devise would [thereby] be defeated."[23] Stated differently, the order of abatement under Section 436 is the rule and under Section 437 the exception.[24] Section 437 of the Probate Code has only been held applicable once before.[25] In that case the Iowa supreme court stated that Section 437 must be applied with caution in order to reconcile it with Section 436 and then only in unusual cases.

A testator is presumed to be cognizant of the law.[26] From this premise the majority reasoned that testator knew he must pay all debts and charges, since a testamentary provision for their payment is impressed by law upon every will. Since the testator is presumed to have known the law, the court reasoned, the residuary bequest he made subject to the foregoing portion of his will, actually was made subject to debts and charges he knew he must pay. If a testator is presumed to know the law, it should also be assumed that he knew the regular order of abatement prescribed by law. Knowing such, testator failed to make the residuary bequest subject to the payment of debts and charges but did not fail to state carefully the provisions to which the residual estate was subject. In ascertaining the testator's intent the majority must have assumed he knew the law but not that part relating to the regular order of abatement.

Where the payment of a testator's debts are made mandatory by statute,[27]

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19 In re Estate of Ritter, 239 Iowa 788, 32 N.W.2d 666 (1948).

20 In re Estate of Thompson, 164 N.W.2d 141 (Iowa 1969); In re Estate of Artz, 254 Iowa 1064, 120 N.W.2d 418 (1963); In re Estate of Syverson, 239 Iowa 800, 32 N.W.2d 799 (1948).

21 In re Estate of Thompson, 164 N.W.2d 141 (Iowa 1969).

22 In re Estate of Miguet, 185 N.W.2d 508 (Iowa 1971); *see* Stake v. Cole, 257 Iowa 594, 133 N.W.2d 714 (1965).

23 IOWA CODE §§ 633.436, 633.437 (1971).

24 In re Estate of Kraft, 186 N.W.2d 628, 633 (Iowa 1971).

25 In re Estate of Twedt, 173 N.W.2d 545 (Iowa 1970).

26 Nolte v. Nolte, 247 Iowa 868, 76 N.W.2d 881 (1956); Benz v. Paulson, 246 Iowa 1005, 70 N.W.2d 570 (1955); Harvey v. Clayton, 206 Iowa 187, 220 N.W. 25 (1928).

27 IOWA CODE §§ 633.433, 633.434 (1971).

a direction in his will to pay them is not necessary.[28] The same applies to charges.[29] This was never disputed nor in issue in *Kraft* when abatement became necessary. Rather the issue, when it was discovered that testator's estate was insufficient to pay all the debts, charges, and bequests in full, was upon whom the burden of the deficiency should fall. The answer hides in the interpretation given to the phrase "subject to the foregoing."

Although the court interpreted "subject to" as meaning subservient or subordinate to,[30] it failed to discuss what testator's intention was in using the word "foregoing." "Foregoing" simply means that which has actually gone before.[31] When the entire phrase is interpreted, testator must have intended to make the residual estate subordinate to that actually mentioned before in his will. In denying any significance to the use of the word "foregoing" while judicially supplying a testamentary provision for the payment of debts and charges, the court leaves itself vulnerable to another member of that group of ghosts of dissatisfied testators who wait to receive the judicial personages who have misconstrued their wills.[32]

The question as to whether the phrase "subject to" in a will would charge a particular devise or bequest with debts has been considered by the Iowa supreme court several times.[33] Interestingly, the court relied upon legal encyclopedia, dictionary, and foreign jurisdictional definitions to arrive at the meaning of "subject to" when our court has previously defined the same in an earlier case.[34] Under facts similar and substantially more advantageous to the conclusion reached in *Kraft*, the court held that the words "subject to" were not words of qualification of the estate granted.[35] Thus it has been held that a bequest to a widow with the phrase "subject to the payments of my debts as above set forth" directly following the testamentary provision for the payment of debts would not constitute unequivocal and imperative testamentary language to subject the bequest to the payment of debts.[36] Recognizing the statutory preference given to homesteads, the Iowa supreme court in another decision refused to abate a homestead bequest notwithstanding the provision in the will providing for the payment of debts and expenses.[37]

The probable result of the majority's decision is to nullify the preference given to bequests to the widow. Despite the majority's statements to the contrary, the widow was deprived of her right to a preference after she elected to take under the will instead of claiming her distributive share. Under the cir-

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28 Luckenhill v. Bates, 220 Iowa 871, 263 N.W. 811 (1935).
29 Iowa Code §§ 633.3(4), 633.433, 633.434 (1971).
30 In re Estate of Kraft, 186 N.W.2d 628, 631, 632 (Iowa 1971).
31 The Random House Dictionary of the English Language 554 (1967).
32 Perrin v. Morgan, [1943] A.C. 399.
33 In re Estate of Ritter, 239 Iowa 788, 32 N.W.2d 666 (1948); In re Estate of Caldwell, 204 Iowa 606, 215 N.W. 615 (1927); In re Estate of Shultz, 192 Iowa 436, 185 N.W. 24 (1921); In re Estate of Guthrie, 183 Iowa 851, 167 N.W. 604 (1918).
34 In re Estate of Ritter, 239 Iowa 788, 32 N.W.2d 666 (1948).
35 *Id.*
36 *Id.*
37 Luckenbill v. Bates, 220 Iowa 871, 263 N.W. 811 (1935).

cumstances she is presumed to take by purchase rather than by gift, and she is entitled to receive that for which she has paid.[38] The court believed its conclusion was accorded more than minimal support by the fact that the widow received both a farm and the homestead in paragraph one of testator's will. The court overlooked the fact that the homestead passed to her by virtue of its joint tenancy status and that she did not receive it in return for the relinquishment of her distributive share. Upon this misconception, the court concluded that the widow was not deprived of any of her rights.

The logical extension of *Kraft* would be to deny the widow's preference, under like circumstances, when her abated share would be less than the share she would receive had she elected against the will. If the court should hold Section 437 of the Iowa Probate Code applicable and deny the widow a share equal or greater than her distributive share, needless litigation would be the offspring. Why would the widow elect to take under the terms of the will whenever abatement appears necessary when she knows she may not be afforded a preference? It has been observed that there will probably be several cases litigating the meaning of Section 437.[39] *Kraft*, unfortunately, added to the confusion as to what is the proper case for amelioration of the regular order of abatement.[40] Since *Kraft* has failed to establish a clear guideline or stand as a clear example of the proper case for the application of Section 437, proposed legislation is being drafted to clarify the order of abatement and the preference given to the widow.[41] What the court has undone, perhaps the legislature can redo. In the interim, a *caveat* to the practitioner is to check his files for bequests to the widow containing the phrase "subject to the foregoing."

WILLIAM R. STILES

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[38] IOWA CODE § 633.268 (1971). *See* Nolte v. Nolte, 247 Iowa 868, 76 N.W.2d 881 (1956); In re Hartman's Estate, 233 Iowa 405, 9 N.W.2d 359 (1943).

[39] Ryman, *Proprietary and Probate Law*, 20 DRAKE L. REV. 303, 328 (1971).

[40] Mr. Chester Hougen, Administrator and Counsel for Inheritance Tax Division of the Iowa State Department of Revenue, acknowledged that several problems have arisen on final inheritance tax returns when abatement was necessary in probating an estate. The decision in *Kraft*, he stated, has failed to establish a clear guideline in applying the abatement statutes, therefore, creating confusion whenever abatement procedures must be administered.

[41] Mr. Shirley A. Webster, chairman of the Special Committee on Probate, Property, and Trust Law of the Iowa State Bar Association, has stated that the committee at its last meeting voted to eliminate the widow's preference in residual estates as well as any distinction between general and specific bequests. It is the committee's intent to make the residue abate before any general or specific bequests. The committee believes such proposals would more nearly meet the express or implied testamentary plan of the great majority of testators and would bring the abatement statute in line with the *Twedt* and *Kraft* cases.