it is not an expansion of the issues under a general denial; but if anything, an affirmance of the old exception of "title by adverse possession." Therefore the defense of the statute of limitations in this type of case may still be proper under a general denial or what amounts to the same thing under Illinois practice today.

The better rule would be to require the statute of limitations in all cases to be pleaded expressly. A rule which allows the statute of limitations to be used when not expressly pleaded is weaker on notice than any other defense would be if so allowed. The facts necessary to be proved in order to assert the statute of limitations are usually proved whether the issue is being tried or not. Dates come into proof as a matter of course. To employ a rule which would allow a defendant to spring this defense without specially pleading it could work such a surprise as to cause injustice upon an unsuspecting party. A plaintiff in order to protect himself would have to negate the defense whether the other party is asserting it or not; this is an unnecessary procedure. Another objection to allowing the defense to be used without expressly pleading it is that usually the main disputes between the parties in relation to this defense are not questions of fact for the jury, but are disputes over rules of substantive or procedural law.[14] A procedure eliminating unnecessary trials should be encouraged.

The principal case offers no serious obstacle to holding that the statute of limitations must be specially pleaded in all cases. The language used in relation to the statute of limitations was broad, but was merely dicta and not necessary for the decision of the case. It is hoped that if a proper case arises the court will allow the dicta to remain dicta and propound the view that the statute of limitations must be pleaded expressly in all cases or be deemed waived.

ARTHUR BRANTMAN.

TRUSTS—*Attempted Partial Revocation of Testamentary Trust by Family Settlement Agreement.* (Illinois)

The testator left the bulk of his estate in trust to accumulate the income for the life of the survivor of his wife and two children plus twenty-one years. During the term of the trust, certain annuities were to be paid to the testator's children for life. Upon the death of each child, his or her respective children were to have certain annual payments applied to their support. At the end of the term, the accumulated income

[14] Browning v. De Frees, 196 Calif. 534, 238 Pac. 714 (1925); Brazell v. Hearn, 33 Ga. App. 606, 127 S.E. 479 (1925); Citizen's First Nat'l. Bank v. Whiting, 112 Okla. 221, 240 Pac. 641 (1925); Selles v. Pagan, 8 F.2d 39 (C.C.A. 1st 1925); Murphy v. Murphy, 71 Calif. 389, 235 Pac. 653 (1925).

and the trust property were to vest in the grandchildren per stirpes. The trust instrument declared that it was the testator's desire, "to create and preserve for my grandchildren and their heirs an estate having a steady permanent income." The children ineffectually attempted to set the will aside on the grounds of fraud, undue influence, etc., shortly after the testator's death. Several years later, the trustees filed a bill for construction, and the trust had since been administered on the basis of the construction there given.[1]

In the present suit, a suit for further construction, the children sought to increase their annuities by the use of a family settlement agreement based upon a consideration of their forbearance from prosecuting a further attack upon the validity of the trust. Interests of unborn and minor remaindermen were represented by a guardian and trustee. The circuit court allowed the agreement, and ordered the guardian to execute it. On appeal by the trustees, *held*: Reversed. The court will not allow a family settlement agreement to modify the terms of a testamentary trust merely because its provisions may be harsh with respect to living beneficiaries. The fact that such agreements are favorites of the law does not change the rules applicable to trusts. *Altemeier v. Harris*, 335 Ill. App. 130, 81 N.E.2d 22 (2nd Dist. 1948).

The right of a person to dispose of his property to uses and ends of his own selection upon his death is so well founded in our law that any doctrine which tends to frustrate the exercise of that right should be carefully examined and sparingly applied. If the will makes outright gifts of the testator's property, an agreement among the devisees and the legatees to distribute the estate in a manner which differs from the terms of the will does not present a serious deviation from the intent of the testator.[2] For his intent would appear to be that they take the property as their own to deal with it as they should see fit. But where the intention of the testator is expressed by an active trust, the courts should be most astute to protect and preserve that scheme of distribution or enjoyment, so that the testator's intent will not be defeated by the misapplication of doctrines which would be perfectly valid when properly applied.

There is little doubt that family settlement agreements are favorites of the law, or that their purposes and contemplated results are to be encouraged.[3] It is also the accepted view that decrees affecting the future interests of unborn members of a class may be made binding upon such

[1] Smith v. Thomas, 317 Ill. 150, 147 N.E. 788 (1925).

[2] For a general discussion of such settlements, see 97 A.L.R. 468. Note that trusts are a very widely recognized exception to the general rule. 97 A.L.R. 471.

[3] Hall v. Hall, 125 Ill. 95, 16 N.E. 896 (1888); McDole v. Kingsley, 163 Ill. 433, 45 N.E. 281 (1896); Cole v. Cole, 292 Ill. 154, 126 N.E. 752 (1920); Simpson v. Wrate, 337 Ill. 520, 169 N.E. 324 (1929); Anderson v. Anderson, 380 Ill. 488, 44 N.E.2d 43 (1943).

unborn persons by invoking the doctrine of virtual representation.[4] However, when these postulates are combined to accomplish indirectly that which cannot be done directly—the modification of an apparently valid testamentary trust where there are contingent interests and the main purposes of the trust have not been substantially fulfilled—it is mandatory that the utmost caution be exercised to protect both the settlor's desires and the interests of unborn beneficiaries.[5]

It is not to be taken that the doctrine resulting from the blending of the components heretofore set out is of itself bad law, for there are situations in which its application is highly desirable. The facts in *Jennings v. Hills* [6] present such a situation. Most of the trust property was long term leases. There were at least seven suits or claims involving the estate and its administration. Some of the leases were liable to be sold at a loss to satisfy the claim of the settlor's widow for one third of the personalty to which the court found she was entitled after she had renounced the will. The widow was also suing to recover her dower, and to recover from the executors certain sums of money claimed to have been taken by the testator from a trust fund in her favor. The heirs were seeking to set aside the will on various grounds. None of the annuities provided for in the trust had been paid, and the annuitants feared they might be lost, while other beneficiaries feared the will might be set aside. By such an array of litigation everyone concerned was likely to lose some if not all of his expectancy; the position of the unborn and minor remaindermen's interests was most precarious. A family settlement agreement compromising the various interests was drawn, and a guardian was appointed to execute the instrument in the name of the minor and unborn beneficiaries. In such a situation a family settlement with the unborn class members represented by those sui juris, and also by the guardian ad litem, would not only be proper, but highly desirable. A portion of the testator's intention could be disregarded to the end that his desires would not be completely defeated.[7]

Should this doctrine be applied where there is no serious question as to the validity of the trust—where the only threatened suit is one for

[4] Hale v. Hale, 146 Ill. 227, 33 N.E. 858 (1893); Gavin v. Curtin, 171 Ill. 640, 49 N.E. 523 (1898); Longworth v. Duff, 297 Ill. 479, 130 N.E. 690 (1921); Cary v. Cary, 309 Ill. 330, 141 N.E. 156 (1923); Gunnell v. Palmer, 370 Ill. 206, 18 N.E.2d 202 (1939).

[5] That trusts involving contingent interests may not be terminated: Anderson v. Williams, 262 Ill. 308, 104 N.E. 659 (1914); Johnston v. Gastman, 291 Ill. 516, 126 N.E. 172 (1920); Hubbard v. Buddemeier, 328 Ill. 76, 159 N.E. 229 (1927); Mohler v. Wesner, 382 Ill. 225, 42 N.E.2d 264 (1943); Comment, 32 ILL. BAR J. 136 (1943). That trusts may not be terminated unless their purposes have been substantially accomplished: Guerin v. Guerin, 270 Ill. 239, 110 N.E. 402 (1915); Sheley v. Sheley, 272 Ill. 95, 111 N.E. 591 (1916).

[6] 247 Ill. App. 98 (1st Dist., 1927).

[7] The case is here presented for its factual situation. The family settlement agreement was collaterally involved in the adjudication of another question.

construction, and not such a contest as would seriously jeopardize the remaindermen's interests? In *Wolf v. Uhleman*,[8] the testatrix left the bulk of her property in trust to pay certain annuities to her two children for twenty-one years, on the death of either of them, certain payments to be made to their children, all interests to vest on the death of the survivor of the testatrix's children, but no distribution to be made until the remaindermen should respectively reach the age of forty years. In a suit by the only two grandchildren against their father and aunt, the court allowed a family settlement with a guardian representing the one minor grandchild and the unborn grandchildren, should any later appear. The consideration upon which the agreement was predicated was the compromise of a threatened suit for construction of the will. The grounds of this contemplated suit, if closely examined, do not seem to embrace any serious threat to the trust.[9] In spite of this, the court felt that the interests of the minor and unborn beneficiaries were not only well protected, but were enhanced by the agreement which precluded the suit for construction, and increased the payments to the children and the living grandchildren. It may well be doubted that the unborn grandchildren received any benefit or that their interests were actually asserted to their best advantage. It would appear that any increased payments to the living beneficiaries could not help but decrease most materially the amount of accumulated income to which such contingent remaindermen would become entitled. The result seems to be an exchange of cash-in-hand for benefits of a most ephemeral nature at the expense of the contingent interests. Further, the expressed intention of the settlor is defeated and the trust, in effect, reconstructed according to the court's views of equity without any sufficient justification. Such a decision represents a rather marked departure from the recognized office of the family settlement agreement.

A pattern very similar to that of the *Wolf* case developed in *Altemeier v. Harris*.[10] Because of the two previous suits, any contemplated suit for construction would hardly be a serious threat to the interests of the remaindermen. It would appear that the only consideration which could flow to the remaindermen would be immunity from an apparently frivolous suit. This seems to be a most inequitable exchange for a material depletion in the accumulated income which the remaindermen are to receive in the future. As in the *Wolf* case the testators' heirs were attempting to frustrate his expressed and obvious desires. The court refused to impinge upon either the settlor's intent or the interests of the remainder-

[8] 325 Ill. 165, 156 N.E. 334 (1927).

[9] *Ibid.*, at 184, 341.

[10] In the *Altemeier* case the court sought to distinguish and reconcile the *Wolf* case. The will in the latter case was more complicated than that involved in the former case. This does not, however, impair the contrast between the treatments given the contingent interests and the testator's intent in the two cases.

men. It is submitted that the *Altemeier* decision in refusing to allow the settlement agreement represents the better view.

The doctrine of virtual representation is very useful in preventing useless and expensive delay in the adjudication of rights of parties when they are affected by the interests of persons unborn or unascertained. But such a doctrine is fraught with danger when it is not carefully exercised. If laxity or naivete permit the doctrine to be applied in situations such as the *Altemeier case*, the result can be nothing more than the defeat of the testator's intent, and a depletion of the contingent remainderman's interests under the trust. Unless it can be demonstrated that a serious threat to those interests exists, a family settlement agreement in which they are bound by the doctrine of virtual representation should not be allowed. There should be no deviation from the expressed intent of the testator, unless that deviation can be justified as the only measure which will prevent a substantial defeat of his scheme of distribution.

HILMER C. LANDHOLT.

WILLS— *Revocation of Duplicate Wills.* (Illinois)

In 1941, deceased duly executed two copies of her will—the typewritten original and a carbon copy. Deceased retained the executed carbon. The "original" was delivered to a friend for safekeeping. On her death in 1946, the friend to whom she had entrusted the typewritten original filed the instrument for probate. A few days later, the carbon impression was found in a pocketbook in decedent's home with the word "Void" written across both pages followed by the signature of the decedent. The fact that this word was written by decedent was not in dispute. The probate and circuit courts denied probate to the original impression. On appeal, *held*: Order affirmed. The words "Void" and the name of testatrix across both pages of the duly executed carbon impression were effective to revoke both copies of the will. *In re Holmberg's Estate. Wiersema et al. v. People*, 400 Ill. 366, 81 N.E.2d 188 (1948).

The question of the revocation of one of duplicate wills has not before been considered by the Illinois court, although there are numerous decisions upon the point in other jurisdictions.

The pertinent Illinois statute reads: "A will may be revoked only (a) by burning, cancelling, tearing or obliterating it by the testator himself or by some person in his presence and by his direction and consent . . ." [1] When a will is traced into the possession of the testator and last seen there, and is not forthcoming at his death, there is a prima facie presumption that the testator destroyed the will with the intention of

[1] ILL. REV. STAT., c. 3, § 197 (1947).