Chapter 2: Wills, Trusts, and Future Interests

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A. WILLS, TRUSTS, AND ADMINISTRATION

§2.1. One-year statute of limitations: Executrix's agreement to sell real estate. In *Reilly v. Whiting*\(^1\) an executrix made an agreement to sell real estate, signing it "as executrix and individually." Suit was brought on the contract more than a year after its breach. The executrix set up as a defense the one-year statute of limitations on actions on contracts made by an executor or administrator.\(^2\) The plaintiff's contention was that since the agreement was signed "as executrix and individually" the defendant was still individually liable, even if the statute of limitations had run on her liability as executrix. The Court, however, took the view that the agreement was made by the defendant in part as executrix and that the statute should apply. The fact that the words "and individually" were added could not, the Court felt, affect the result, since the defendant in any event was liable individually. The Court felt that the statute would be meaningless if it did not protect the defendant personally from acts done by her as executrix.

The conclusion seems logical under the circumstances, since an executor, in most instances, is personally liable for his actions, and the clear intent of the legislature in such cases is that his liability be limited to one year.

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\(^2\) G.L., c. 260, §11.
§2.2. Effect of surviving spouse being declared sole heir. Some rather startling recent decisions have arisen out of the law providing that where a man dies intestate, leaving a widow but no issue and his total estate is less than $10,000, the widow becomes his sole heir. In Green v. Gilmore, decided during the 1954 Survey year, one fourth of a trust fund was held in trust for Edwin Gilmore to be paid to him in 1956. If he died before that date it was to go to his heirs at law. He died in 1952, leaving a widow and a father and mother, but no issue. The Probate Court determined that Edwin's estate, exclusive of the trust, was less than $10,000, which made the widow the sole heir. Later the Probate Court decreed that as sole heir she was entitled to the whole of the trust fund, although it amounted to more than $15,000. On appeal the Supreme Judicial Court affirmed the decree. The Court stated that the will gave the trust fund to the heirs of Edwin, and by the decree of the Probate Court his widow was his sole heir at law. The fact that the trust fund exceeded $15,000 made no difference because the statutory limit on the widow's share applied only to the estate owned by Edwin and taken by descent from him. In its reasoning the Court followed Seavey v. O'Brien, a somewhat similar case.

The inference from the reasoning in this case is that if the $15,000 had been unexpectedly discovered in Edwin's estate the decision would have been different.

A question was also raised as to whether the accumulated income went to Edwin's estate or was part of the principal. The Court called attention to the terms of the will giving the trustees "absolute discretion" in the matter of paying income to Edwin. Accordingly, accumulated income became part of the principal.

§2.3. Contested wills: Jury issues. The 1955 Survey year brought the usual crop of jury issue cases, the most significant of which was Wood v. McDonald. Except for a few small legacies, decedent left the bulk of her estate to her attorney-brother, who had drawn the will and was named its executor. Three sisters and a niece survived the decedent, in addition to the brother. They claimed undue influence and moved for the framing of jury issues. The probate judge denied the motion. On appeal, the Supreme Judicial Court, stressing the fact that the framing of jury issues is discretionary, affirmed the decree. The Court stated that while the circumstances should be considered by the court with jealous scrutiny they were not conclusive on the question of framing issues.

Massachusetts decisions have consistently held that wills which purport to confer substantial benefits on the attorney drafting them are to

§2.2. 1 G.L., c. 190, §1.

be viewed with caution and extreme scrutiny. *Reilly v. McAuliffe,*

discussed in the 1954 *Survey* was an example of this. In that case, a
finding of undue influence by the probate judge was affirmed when the
attorney received a substantial bequest under a codicil executed by
the decedent ten days prior to her death.

The difference between the two cases seems to be the fact that in
*Wood* the attorney was related to the testatrix.

On the other hand, in *Morin v. Morin,* another decision during the
1955 *Survey* year, a finding by a jury of undue influence was upheld
by the full Court in a case where most of the estate was given to one
of the sons and the will was drawn in that son’s office by a lawyer
selected by him and where the testator had no independent advice.

In *Boston Safe Deposit & Trust Co. v. Blaisdell* the Court reversed
the decree of a probate judge allowing a motion to frame jury issues.
The challenge here was directed to the testamentary capacity of the
testatrix, who was seventy-nine years old when the will was executed.
The contestants had offered to prove that the testatrix suffered from
arteriosclerosis of the brain, a gradually developing disease, and that
she had been admitted to a hospital in February, 1950. They also
offered to introduce a “prominent psychiatrist” who would testify, based
on hospital records of the decedent’s last illness and the testimony of
other witnesses, that in his opinion the decedent was not competent to
execute a will on July 7, 1949 (seven months prior to her admission to
the hospital). To all this the Supreme Judicial Court said, “There
is no direct evidence that the brain condition developed before early in
1950. The evidence of peculiarities in behavior on which the contest­
ants rely is hardly sufficient to warrant an inference that she was not
competent to make a will in July, 1949.”

As to the attitude of the Supreme Judicial Court on appeals from
decrees granting or denying motions for jury issues, Justice Williams
said, “It is the duty of this court to examine the statements of counsel
received in lieu of evidence and to decide the case in accordance with
its own judgment, giving due weight to the decision of the judge. . . .
We recognize that weight should be given to the opinion of the trial
judge, but the evidence expected to be offered is of such a character
that in our opinion the order of the Probate Court should be re­
versed.”

The language used in *Blaisdell* seems a sharp contrast to the talk of
the probate judge’s discretion in *Wood v. McDonald.* It seems indica­
tive of a tendency on the part of the Court to examine more carefully

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decisions allowing jury issues while leaving denials to the discretion of the probate judges. It all seems to be part of a general policy of not allowing the disappointed heir to use the courtroom as a forum to air the family's dirty linen, or forcing a settlement in his favor by threats to contest the will.\(^7\)

\(\S 2.4\). Wills — Charitable bequests; Cy pres. In *Mackey v. Bowen*\(^1\) the will gave the residue (about $40,000) to the “Church of the Infant Jesus of Brookline . . . for the purpose of erecting an altar to my memory and that of my wife, my father and mother, brothers and sisters.” The title to the church property was in the Roman Catholic Archbishop of Boston, a corporation sole. The church was a small temporary one, built as an offshoot from another parish, and the intention was to replace it with a larger church, a fact which the testator knew and favored. The executors filed a petition for instructions. The evidence showed that the cost of an altar might be small or large, according to the funds available. The will contained a clause stating that the testator purposely gave nothing to his relatives. The heirs claimed that the case should be remanded to the Probate Court to see if the corporation sole would accept the gift and what the altar would cost, the surplus, if any, over the cost, or the whole if the gift was not accepted, to be distributed among the heirs. The Supreme Judicial Court held that the gift was a valid charitable gift, notwithstanding it was intended as a memorial, and that acceptance of a legacy is presumed until unequivocal renunciation. In this case the answer of the Archbishop showed that it would be accepted. The Court stated that there was no occasion for an order for cy pres at that time. That question would arise if it appeared that all the money was not spent for the altar. However, it would not be difficult to discover a general charitable intent where the testator expressly excluded his relatives.

In this case, the Court said, since it was understood that a new church was to be built and it was uncertain what the altar would cost and when it would be built, the Court should not remake the will by introducing limitations as to amount or time. Further, while executors are entitled to instructions, it is only as to their present duties. In this case, if the legatee accepts they should pay the legacy to it, with no concern as to future contingencies. The proper use of the funds given to a public charity would be a concern of the Attorney General.\(^2\)

In *First Christian Church v. Brownell*\(^3\) certain funds were held in

\(^7\) Fuller v. Sylvia, 240 Mass. 49, 133 N.E. 384 (1921).


\(^2\) See Ames v. Attorney General, 332 Mass. 246, 124 N.E.2d 511 (1955), where a petition for mandamus to compel the Attorney General to allow use of his name in a suit to enforce the terms of a public charitable trust was dismissed for lack of standing to sue on the part of the petitioner. For an examination of the decision, see the discussion at \(\S 18.3\) *infra*.

\(^3\) 332 Mass. 143, 123 N.E.2d 603 (1955).
trust for the church. In 1941 the church voted to close, and appointed a committee to turn over the property to the Massachusetts Congregational Conference, of which it was a part. The proceedings in this case were five different petitions by the church, each asking that a certain fund be applied cy pres. The Attorney General and the heirs, etc., of the various donors or testators were made respondents. As to four of the funds and part of the fifth the judge found that there was no general charitable intent on the part of the donors and therefore the funds should not be applied cy pres, but reverted to the heirs, legatees, etc., of the donors or testators. The Conference appealed, and the real question at issue was its right to appeal. The Court dismissed the appeals on the ground that the Conference was not an aggrieved party and had no right of appeal. An organization which hopes to be the beneficiary of cy pres has no private interest, no interest differing in kind from that of the public generally, which is represented exclusively by the Attorney General. Hence it has no standing to appeal.

§2.5. Residuary clause: Deficiency of assets; Interest on legacies. The case of Sibley v. Livermore1 presented several interesting problems. It was a petition by a testamentary trustee for instructions, and was an aftermath of the earlier case of Smith v. Livermore,2 involving the same will. The will contained 221 clauses. Clause 211 gave $400,000 to trustees to pay the income to the testator's niece Mary for life. On her death the fund was to be "divided in accordance with the residuary clause of this will." Clause 219 provided that if the estate was insufficient to pay the legacies in full, the legacies in trust and those for $5000 or more should be preferred; and that all estate and inheritance taxes should be paid from the residue.

The estate was not sufficient to pay even the preferred legacies in full, and in accordance with the decree in the earlier case the executors paid all the preferred legatees, including the trust at issue in this case, 91 percent of their legacies, less the Massachusetts inheritance taxes on each one. Nothing was paid to either the deferred or the residuary legatees.

After the death of the life tenant in 1954, the trust fund, originally $352,000, was liquidated for $585,000. Out of this were to come the expenses of distribution, income taxes on gains, and Massachusetts inheritance taxes on the amounts to be distributed to legatees. Exclusive of this trust it would take about $168,000 to make up for the 9 percent not paid to the preferred legatees and to reimburse them for the inheritance taxes. The deferred legacies, not paid at all, totaled $124,000.

The residuary legatees argued that they were entitled by the terms of the will to the remainder after Mary's death, but the Court held that the clause in the trust providing for distribution in accordance with

2 298 Mass. 223, 10 N.E.2d 117 (1937).
the residuary clause did not operate to make gifts after the death of the life tenant to the persons named in the residuary clause. What it meant was that the remainder after the life tenant’s death was to be treated as part of the residue. As such it was subject to the payment of deficiencies in the pecuniary legacies, deferred as well as preferred, in priority to payments to the residuary legatees. The use of the word “divided” instead of “distributed” did not show any different intention. In the earlier case the Court had made a similar ruling as to a trust where the life tenant predeceased the testator. The trustee should be instructed to pay over the balance to himself as surviving executor and surviving trustee.

The petition was by the trustee, and the Court held that as executor he could not be given instructions asked for as trustee. As no one objected, however, the Court would give him the instructions on the assumption that he would amend the petition by naming himself as surviving executor and surviving trustee.

On this basis the executor was instructed to pay first the 9 percent deficiency in the preferred legacies, except the deficiency in the $400,000 trust for Mary, less the Massachusetts inheritance taxes and with 4 percent interest from one year after the testator’s death. Next he should pay principal and interest of the deferred legacies, less inheritance taxes. Inheritance taxes were to be paid out of the residue, but could not be paid until the residue was established. Once a residue was established all legatees would be reimbursed for the taxes deducted from their legacies. There was no priority among the legatees as to taxes. If the estate was not sufficient to pay the deferred legacies, with interest, or to reimburse the legatees for the taxes, the amount available should be prorated.

The petitioner also requested instructions as to a deduction to which he was entitled from the tax assessed on the capital gains by virtue of the fact that many of the legatees were nonresidents, but the Court refused on the ground that equity will not interfere to determine the validity of a tax.

§2.6. Bequest to the person named as trustee. The case of Zeltserman v. Woods\(^1\) raised an interesting question, probably new to most attorneys. The will gave the estate to a trustee for the benefit of the testatrix’s mother for life. On her death what remained of the trust fund was bequeathed to Herbert Brigham if then living, and, if not, to Stanley Field. Herbert was named executor and trustee, but if he was unable or did not desire to serve, Stanley was named in his place. The mother predeceased the testatrix, so no trustee was appointed. Both Herbert and Stanley survived the testatrix, but both declined to serve as executors and the petitioners were appointed administrators c.t.a. The probate judge ordered the estate to be distributed to Herbert, and the contesting heirs at law appealed, claiming that it went as


http://lawdigitalcommons.bc.edu/asml/vol1955/iss1/6
intestate property. Their contention was that the bequest to Herbert was intended only as compensation for his services as trustee, and, as he did not serve, the bequest failed and there was an intestacy. This contention was based on the early case of Kirkland v. Narramore,² which held that where bequests are made to individuals in the character of executors and trustees, and not as marks of personal regard only, they are given on the implied condition that the persons serve in the character intended; and that bequests to individuals who are executors are prima facie considered to be given to them in that character, unless the presumption is repelled by the nature of the legacies or other circumstances.

The Court affirmed the decree of the Probate Court giving the estate to Herbert. The reasoning of the Court was that the legacy was given to him by name and not as trustee. Also it was provided that, if he did not desire to serve, Stanley was to serve in his place, but Stanley received no legacy for serving if Herbert was living. It seemed plain that the testatrix had personal reasons for making the bequest. Also it was unlikely that she would have given her entire estate as compensation for what might be only a brief term as trustee. In the Kirkland case the bequest was for a definite amount to the "above trustee" and was followed by other bequests. A will is to be construed so as to effect what is believed to be the testator's intention, and an intestacy is to be avoided if possible. In this case sufficient evidence appeared to show that the testatrix intended Herbert to have the legacy irrespective of any services by him as trustee.

§2.7. Creation of a trust. In Gordon v. Gordon,¹ the Court was called on to construe the will of Yetta Gordon devising her house in the following language: "It is my wish that my home in Attleboro remain intact and that any of my children be allowed to stay there whenever they wish, and for this reason I devise said property and bequeath the entire contents of the house, except for the specific bequests herein mentioned, to my daughter, Minerva Gordon, and my son, Harold B. Gordon. If at any time said Minerva Gordon and Harold B. Gordon shall decide to sell the home and live elsewhere, the home shall be sold and the proceeds divided equally among my children in accordance with the terms of the residuary clause of this will."

At testatrix' death, Minerva and Harold were her only unmarried children and the only ones still living in Attleboro. After her death, the united family she had known divided into two antagonistic factions, and since 1950 none of the children have lived in the house.

2 105 Mass. 31 (1870).

§2.7. ¹ 1955 Mass. Adv. Sh. 49, 124 N.E.2d 226. Another case involving the Gordon family is discussed in §11.4 infra. The case there discussed involves a condition in a will that a legatee forfeit his interest if he marry outside a particular religious faith. The will was upheld. Certiorari to the Supreme Court of the United States was denied.
Minerva and three of her sisters brought a petition for declaratory relief. They contended that Minerva and Harold held the house in trust for all six of the children, that the trust had failed and should be terminated by a sale of the house and a division of the proceeds. The respondent Harold contended that he and Minerva owned the house as tenants in common. The Court held that a trust was created, stating that "although the particular word does not appear, the existence of a trust does not depend upon the terminology used." 2 The Court was not concerned with whether or not the testatrix knew what a trust was or intended one had she fully understood. The pivotal factor was her intent, as gleaned from a reading of the entire will. If carrying out her expressed intent required a trust, a trust would be declared.

However, the family feud which developed after the mother's death made it impractical for the children to live together under the same roof. Accordingly the Court held that the purpose of the trust had failed and ordered the trust to be terminated, the property sold, and the proceeds divided in accordance with the will.

§2.8. Implied trusts: Joint contributions to a bank account. In Tenczar v. Tenczar1 there was a petition by a wife separated from her husband claiming that a bank account standing in his name was the result of their joint efforts and should be shared equally by them. From a decree of the probate judge in the wife's favor the husband appealed. From the judge's finding of facts it appeared that the account was opened by the husband in his own name. Both husband and wife worked and their salaries were turned over to the wife. She paid the household expenses and deposited the balance in this and another account. (The other account had been divided under a decree of the court at the time the husband obtained a decree that he was living apart for justifiable cause.) The judge ruled that the account had been accumulated by their joint efforts and should be equally divided. On appeal the decree was reversed. The mere fact that the wife contributed to an account in the husband's name did not give rise to a trust. When a husband or wife pays money or transfers property to the other, there is no presumption that it is received in trust. If a trust is alleged to exist, it must be proved. In the absence of such proof, it must be deemed that the money, property, or conveyance was received with the intention that it be applied to the use and benefit of either or both at the discretion of the recipient. The same principle would apply where the wife contributes money towards the purchase of real estate in the husband's name. She must show that she contributed a definite sum for the whole or an exact share of the property.

§2.9. Removal of trustee. As an aftermath to the cases involving the Gordon family discussed in Section 2.7, a petition was brought by

the same four sisters for the removal of Harold Gordon as trustee under his father's will. The petition alleged that he "has improperly and wrongfully misused and abused and is continuing to misuse and abuse his position, authority, and power as trustee for his own use and advantage..." Evidence was introduced of an apparently constant switching of funds among Harold Gordon, the Estate of Joseph Gordon, and the Interstate Transit Corporation, the family business. The probate judge found the pleadings unsupported by the evidence and dismissed the petition. The petitioners appealed. The Supreme Judicial Court, speaking through Mr. Justice Wilkins, found it unnecessary to review the evidence. Instead, it took judicial notice of its own prior proceedings and removed Harold as trustee on the sole basis that he is no longer a beneficiary of the trust. "We think," said the Court, "that the testator would not have wanted him to continue as trustee in these circumstances, that it would not be for the best interests of the trust that he remain as trustee." 4

§2.10. Charitable corporations: Qualifying as trustee. American Institute of Architects v. Attorney General 1 was a petition for a declaratory judgment to determine if it was necessary for the petitioner to be appointed trustee and qualify by giving bond in order to receive a legacy. The will gave the residue to the American Institute of Architects, of Washington, D. C., upon certain trusts and conditions, chiefly to provide scholarships and financial assistance to deserving students of architecture, and so forth. The capital was to be kept inviolate as long as the American Institute of Architects should endure, and not be transferred or distributed unless the American Institute of Architects ceased to exist. In that event it should be transferred to some organization most fitted to maintain the fund and carry out the trust. The general purposes of the Institute, as set forth in its charter, were substantially the same as those set forth in the will. The Court held that the Institute did not take upon a technical trust, but upon a quasi trust. Title to the gift vested in it upon a restriction that it be used only in the manner and for the purposes expressed in the will. Accordingly the executor could transfer the securities to the Institute directly and without the necessity that it qualify as trustee.

§2.11. Statutory changes. A 1955 statute 1 recognizes the new so-called "certified mail." Wherever the statutes or rules require that no-

2 Record, p. 1.


tices in probate proceedings be sent by registered mail it is now per-
missible to use "certified mail" instead.

The legislature in 1955 passed a new statute\textsuperscript{2} providing a substan-
tial increase in the fees payable in the Probate Court. The statute
also did away with the free copies of wills, decrees, and the like. In
other words, there is now a fee payable for nearly everything that is
filed or taken away. The most important item in the increase of fees
had to do with probate accounts. There is now a filing fee of $5 for
each year or major portion of a year that the account covers. This
was modified by a later statute\textsuperscript{3} providing that there shall be no filing
fee if the amount covered by the account is less than $1000.

B. FUTURE INTERESTS

\textsection{2.12. Life estates and future interests in personality: Accounting
by executor.} It appears to be well settled that there can be valid gifts
over after life estates in tangible personal property. With some possi-
ble exceptions because of the nature of the subject matter and the
types of estates that may be created in chattels,\textsuperscript{1} most of the American
cases permit the creation of the same kinds of interests in a chattel as
may be created in land.\textsuperscript{2}

In \textit{Old Colony Trust Co. v. Swift}\textsuperscript{3} the testator bequeathed tangible
personal property (under the value of $4000) to his wife "to have, hold
and enjoy during her life." This property was to go to certain rela-
tives if they survive the wife, and, if they did not, it was to pass to
any deceased relative's issue by right of representation. There was a
clause providing that the wife should hold a life estate in the personal
property without liability for waste and without an obligation to in-
sure. The executor delivered the personality to the widow and then
filed a first and final account showing such distribution. The Probate
Court allowed the account as a first account only, apparently on the
ground that the title was in the executor, where it would remain until
the life beneficiary died. On appeal, the Supreme Judicial Court
reversed this decree and ordered the allowance of the account as a first
and final account.

The Court did not find it necessary to concern itself with the techni-
cality of the complete state of the title in the chattels after the executor
delivered them to the widow. The question before it was whether the
executor had fulfilled all his duties with respect to the property when

\textsuperscript{2} Id., c. 418, amending G.L., c. 262, §40.
\textsuperscript{3} Id., c. 744, modifying c. 418, which amended G.L., c. 262, by repealing §40 and
inserting a new one.

\textsection{2.12.} \textsuperscript{1} E.g., estates tail cannot be created in personality, and there cannot be
any life estates and gifts over if the subject matter is consumable.
\textsuperscript{2} See 1 American Law of Property §4.4 (1952).
it was turned over to the wife so as to relieve himself of any further accounting. In concluding that he completed distribution on delivery to the life beneficiary, the Court emphasized that the will gave her full control over the property, without her having to give security. The Court pointed out that since the testator relieved her from liability for waste and failure to insure, his intent must have been to give the remaindermen only that which would be left at the expiration of the life estate. It was noted that there was nothing in the will from which it could be implied that the testator contemplated a duty on the part of his personal representative to take charge of the property when the wife died. The remaindermen would be entitled to the possession of the chattels on the death of the life tenant without the necessity of further action by the executor. It was not considered significant that some of the remaindermen could not be ascertained until the life estate terminated.

§2.13. Construction: Preference for early vesting. During the 1955 year, the Supreme Judicial Court in Old Colony Trust Company v. Clemens relied heavily on the rule that the early vesting of remainders is to be favored. Alfred W. Smith created a trust reserving the unlimited power to alter, amend, and revoke it. The income was made payable after his death to his wife for life. A subsequent paragraph provided:

In the event, however, that my said wife shall not be living at the time of my decease, or if living at my decease, after the death of my said wife, the said trustee shall pay over, free and clear of all trusts, the principal sum of said trust estate to my nieces and nephew in equal portions, share and share alike and to the issue of any deceased niece or nephew by right of representation.

The settlor included his stepniece as a beneficiary of the corpus. The Court was asked to decide whether the recipients of the corpus should be determined as of the date of the creation of the trust, at the death of the settlor, or when the life beneficiary died at which time the principal became distributable. The Court held that the remainder interests vested on the death of the settlor, and the nieces and nephews living at that time were entitled to a share in the corpus even though they might not later survive the period of distribution. It reasoned that, since the settlor reserved the power to revise and revoke the trust, he did not intend that the remainders vest before his death. The Court also could have emphasized that no beneficiary, including his wife, was to benefit until Mr. Smith died. In selecting the date of settlor's death instead of his wife's death as the critical date on which the remainders became indefeasi-
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ble, the preference for the early vesting of remainders was considered decisive. The Court stated that Lyons v. Lyons\(^2\) and Barker v. Monks\(^3\) were controlling, noting that those cases differed in that remaindermen were lineal descendants of the donor\(^4\) but did not think that this difference was significant, since Lyons, Barker and Clemens all involved gifts to blood relatives.

Relative to the question whether the direction to the trustee to pay over the trust principal at the death of the life tenant settled the period at which the vesting was to take place, the Court said that these words are commonly used to give formal authority to distribute trust funds and rarely indicate any further intent. The strict application of the so-called "divide and pay over" rule\(^5\) was rejected in line with earlier cases to the effect that such language by itself is not enough to imply a condition of survivorship.\(^6\)

It seems that one of the most forceful arguments raised in support of the contention that only those who answered the description of nieces and nephews at the time of division of the trust fund were to take was made when it was called to the attention of the Court that treating the gifts as vested on the death of the donor had the effect of passing the trust property to persons who were not his blood relatives. Some of the nephews and nieces died after the settlor and before the wife, and, as a result, their personal representatives were entitled to their property to distribute according to the provisions of a will or under intestacy laws. The Court stated that this was a possibility whenever there was an interval between the times of vesting and distribution, and said: "The contention suggests a reason for doubting the wisdom of the rule for preferring early vesting but not a reason for denying the applicability of the rule in the present case."\(^7\)

If it was the desire of the donor to benefit his blood relatives only, it may be doubted that a broad rule of construction should frustrate such wish. The policy expediting the vesting of future interests did not prevent the Court from finding that the remainders were subject to an implied condition that the holders survive the donor. Apparently, then, a "positive" declaration of intent is not essential to render the rule inapplicable. If the donative scheme appears to prefer relatives to others, the wisdom of the application of the rule to benefit others may be doubted.

\(^3\) 315 Mass. 620, 53 N.E.2d 696 (1944).
\(^4\) "We find nothing in the language of the will that can overcome the preference of the law for vested remainders—a preference that is especially strong where the remainders are to children of the testator." 313 Mass. at 552, 48 N.E.2d at 19.

\(^5\) See In re Crane, 164 N.Y. 71, 58 N.E. 47 (1900); 2 Simes, Law of Future Interests §§393, 394 (1936); 3 Restatement of Property §260.


It has been suggested that the preference for vested interests has
doubtful validity in this day and age.\(^8\) The contingent remainder is
no longer subject to the common law destructibility rule; it is more
freely alienable than earlier and may in certain circumstances be
reached by creditors. It is also probable that the average donor thinks
more in terms of enjoyment and possession of the trust res than in
terms of vesting. Moreover, in view of adverse tax consequences and
administration expense problems that may be present if remainders
are vested,\(^9\) it is believed that most grantors would desire to postpone
vesting until the time for distribution.

\(\S 2.14\).

Construction: Income payable to brothers of testator and in
case of their death to their heirs; Implied condition of survivorship.
A gift to A for the life of B creates in A an estate pur autre vie which
is vested and which will pass to A's personal representative on his
death.\(^1\) On the other hand, a bequest to A for the life of B and if A
dies then to C, would seem to give A an interest which is not devisable
or descendible.

In December, 1954, the Supreme Judicial Court had to interpret a
provision in a will somewhat similar to the above limitation in the
case of Boston Safe Deposit & Trust Co. v. Northey.\(^2\) There T died
testate giving the residue in trust to pay income up to $2500 annually
to A for life. The rest of the income was payable during A's life in
equal shares to T’s three brothers, “and in case of the death of any of
said brothers his share of said income to be paid to his heirs.” B, a
brother of T, survived T, but predeceased A, leaving a will. The trus-
tee sought instructions as to whom B's share of the income must be
paid.

The Court, rejecting the contention that B's interest in the income
was indefeasibly vested, decided that it was payable to his heirs as
long as A lived. The Court announced: “The general rule is that
where the payment of income to a person is not limited in terms to the
life of a beneficiary but is limited to some other lawful period of time,
and before the expiration of that period the beneficiary dies, his per-
sonal representative is entitled to the income for the remainder of the
period.”\(^3\) This rule of construction was thought to be somewhat arbi-
trary, and the Court refused to apply it in this case where the contin-
gency of death could be referred to a time other than the life of the
testator. The bequest of income to B was limited to A's lifetime, and
his death was not certain to occur before A's. The language of contin-

\(^8\) See American Law of Property \(\S 21.3\) (1952).

\(^9\) See Casner, Estate Planning 192, 193 (1953); 5 American Law of Property \(\S 21.3\)
(1952).

\(\S 2.14.\) 1 Hussey v. Hussey, 323 Mass. 533, 535, 83 N.E.2d 159 (1948); Harrison


gency relates more reasonably to the date of expiration of the life estate than the death of the donor. The Court did not permit the policy for early vesting of interests to interfere with this more reasonable interpretation.

§2.15. Construction: Gift to B or his issue; Implied condition of survivorship. Restatement of Property §252 provides: "In a limitation purporting to create a remainder or an executory interest, in . . . B or his issue . . . the alternative form tends to establish as to the interest of B that (a) a requirement of survival to the end of all preceding interests exists; and (b) such survival is a condition precedent of such interest." In the Comment that follows this section of the Restatement it is said:

The use of the disjunctive "or" . . . tends to establish the intent of conveyor that a choice be made at some time between B and the potential takers under the rest of the limitation. The further fact that there are interests prior to the interests created or attempted to be created by the quoted limitation affords, in the duration of such prior interests, a reasonable and convenient postponement of the making of this choice. Survival by B for this period of postponed choice justifies the stated constructional tendency to exclude completely the potential takers under the balance of the limitation.

In Old Colony Trust Co. v. Barker\(^1\) the Supreme Judicial Court observed the rule stated in Section 252 and the Comment thereon in deciding the case. The testator left the residuary estate in trust to pay the income to his wife for life and on her death the principal was to be paid to certain named beneficiaries, including a cousin. The trustee was also directed to pay over to him "or in case of his death to his issue by right of representation, the sum of . . . $10,000." The cousin was also to receive an additional $20,000 in the event the wife did not survive the testator or if they died in a common calamity. The cousin survived the testator but died before the wife, leaving four children. After quoting Section 252 as applicable, the Court held that the $10,000 gift was payable to the children instead of the legal representative of his estate.

This holding was fortified by a look at the $20,000 legacy, which, if the wife had predeceased the testator, would have been payable to the cousin if he survived the donor, and, if he did not, to his children by virtue of the local anti-lapse statute. The language of the $10,000 gift seemingly was designed to bring about a like result.

§2.16. Construction: Life estate or absolute interest. It often happens that a testator desires to give the primary object of his bounty full control over property and what remains unconsumed to pass to another. The effectiveness of such a plan seems to depend on the ques-
tion whether the first taker received a fee simple or absolute interest, or whether he obtained a life estate or a life interest with a power to consume. The source of any difficulty in carrying out the apparent wishes of testators who set up such schemes appears to be the ancient common law tendency to classify estates into rigid invariable types.

In Massachusetts the unfortunate precedent of the early case of Ide v. Ide has on occasion been used to frustrate what appeared to be the obvious wishes of donors. In that case, property was devised to testator's son, Peleg, and to his heirs and assigns forever. The will went on to provide, "and further it is my will, that if my son Peleg shall die, and leave no lawful heirs, what estate he shall have, to be equally divided between my son John Ide, and my guardian Nathaniel Ide, to them and their heirs forever."

It was held that Peleg took a fee simple absolute, and the Court said:

Whenever, therefore, it is the clear intention of the testator that the devisee shall have an absolute property in the estate devised, a limitation over must be void, because it is inconsistent with the absolute property supposed in the first devise. And a right in the first devisee to dispose of the estate devised at his pleasure, and not a mere power of specifying who may take, amounts to an unqualified gift.

Since the first taker was given absolute power over the property devised, the subsequent attempt to derogate from the gift was useless.

This emphasis on formalism conflicts with the apparent intent of the testator. This being so, is there any reason for the continued existence of the rule of Ide v. Ide? In Frost v. Hunter the Supreme Judicial Court stated that the rule is "indispensable to the required certainty and security in establishing titles to property and especially in the disposition of landed estates, and that it is a safer rule than one which, for want of strictures, would be attended in its application with all sorts and shades of doubt and uncertainty." However, in experience, the rule of Ide v. Ide instead of making titles secure has led to much litigation, since it is doubtful that it corresponds with the desires of the ordinary donor.

The Supreme Judicial Court refused to apply the Ide doctrine in Morris v. Smith, saying "... we are not disposed to follow Ide v. Ide..."
§2.17

WILLS, TRUSTS, AND FUTURE INTERESTS

. . . or any other cases . . . in so far as they appear to hold any limitation may be put upon the probate court or of this Court to consider the will as a whole as it is contained in its four corners and the circumstances under which it was executed." The will before the Court in the third paragraph gave testatrix's mother all her real and personal property. The fourth paragraph devised and bequested certain property to named persons "[i]n the event that the death of [testatrix's mother] occurs before my own death, or at the death [of the mother] . . ." The Court thought that the natural import of the language indicated that the mother was intended to get a life estate only especially in light of circumstances attending the execution of the will. It was pointed out that testatrix's mother was eighty-four years old when the will was executed and had acquired property by right of survivorship which with her own would adequately take care of her during her remaining years.

§2.17. Construction: Class gifts; Meaning of the word "wish"; Rule Against Perpetuities. Where there is an immediate gift to a class, the class closes at the date of testator's death. If the enjoyment of the gift is postponed by the intervention of a preceding estate, the class closes at the expiration of the prior estate. These two propositions are particularizations of a general rule of construction, sometimes called a rule of convenience, that class membership is determined at the period of distribution. If a donor manifests a desire to benefit a group of persons at a certain time, only those answering the description of the group at the time of division of the property should share. Otherwise, it would be extremely awkward to benefit the individuals in the class at the time intended and yet keep enough property back for future division among those who could be described as class members in the future.

In Crockett v. Crockett the seventh clause of a will read: "To all of my nieces and nephews, I wish that my estate would provide a four-year college course to any wishing to accept such." This was followed by a clause dividing the residuary estate into equal parts among the testator's mother, wife, and son. A Probate Court decision that the seventh clause created no valid legacies in the nephews and nieces was appealed. The Supreme Judicial Court reversed the decree stating that the legacies to the nieces and nephews were direct and present gifts. There being no preceding estate, there was nothing to indicate that the enjoyment of the legacy of each donee was to increase or diminish by the number of nieces and nephews who survived him. The testator really thought of them as individuals rather than a group.

3 Ibid.

http://lawdigitalcommons.bc.edu/asml/vol1955/iss1/6
It was argued that since the testator had no niece, he must have desired to include a niece who might have been born beyond the period of the Rule Against Perpetuities. If this were his intent the entire gift would fail. However, the Court rejected this contention, declaring that the postponement of payment to nieces and nephews born in the future would be at variance with the donor's testamentary scheme. It would be inconsistent with his desire to educate the beneficiaries who were now in existence; and it would conflict with his apparent intent to benefit his mother, wife, and son, since the residuary gift to them could not be computed until the amount required for the legacies for the purpose of education had first been settled.

The Court gave the word "wish" more than a purely precatory meaning. The will did not name an executor or a trustee. The expression is the equivalent to a command when it is used to declare what disposition is to be made of the decedent's property. It is unlike the situation where there is a bequest to a certain person followed by an expression of donor's wish that the legatee makes some further disposition.5