Chapter 2: Trusts and Estates

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CHAPTER 2

Trusts and Estates

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§2.1. Execution of wills: Attestation of witnesses. A witness to a will must not only execute the mechanical act of subscription but he must also perform the mental act of attestation. It has been observed that he is under a duty to bear witness to those things which the statute requires for a writing to be a valid will. In addition to a recital of the physical and ceremonial prerequisites for a will the Massachusetts wills act provides that the maker of the will must be of full age and sound mind. Whether on the occasion of signing a will an attesting witness has to form an opinion that a testator had the mental capacity to make a will was in issue before the Supreme Judicial Court in the case of Genovese v. Genovese. This case concerned itself with the sole question of due execution of an instrument in a proceeding for its allowance as a will, there having been a prior jury determination in the Superior Court that the will might be probated although two of the three subscribing witnesses had formed no opinion on the soundness of the testator's mind. The Court thought that a different result "would be at variance with a common sense view of the practical affairs of life . . ." Witnesses to wills are very seldom qualified to give a professional opinion as to the mental competence of the testator. Although they should be able to testify that they observed the testator's mental capacity, it would be naive to overlook the fact that witnesses who are not lawyers may sometimes fail to recognize this part of their duty.

Genovese appears to give sanction to the custom and practice of generations of Massachusetts lawyers who have supervised will-executing ceremonies. The execution usually takes place in the lawyer's office.

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2 G.L., c. 191, §1: "Every person of full age and sound mind may by his last will in writing, signed by him or by a person in his presence and by his express direction, and attested and subscribed in his presence by three or more competent witnesses, dispose of his property . . . ."
4 338 Mass. at 53, 153 N.E.2d at 663.
where the witnesses more often than not meet the testator for the first time. The conversation of the testator is usually no more than perfunctory, and the short time that the witnesses have to observe him would make any opinion of the testator's capacity that the witnesses form superficial at best. It has not been the practice to have lawyers lecture the witnesses as to their obligations as attesters.

The testimony of attesting witnesses as to the presence or absence of those things that the statute requires for a writing to be a will is always material and usually given great weight. However, it has been pointed out that witnesses need not testify affirmatively to every fact required for the due execution of a will, and that they need not know that the paper in question is a will. It has even been indicated that a will may be probated although all of the attesting witnesses testify that the maker of the will was not of sound mind.

It would seem that the testator who sees to it that all the mechanical requirements of the wills act were complied with should not have his dispositive scheme nullified because of inattentiveness or forgetfulness of witnesses or because of their inability or failure to form opinions as to the age or soundness of mind of the one who makes the will.

§2.2. Revocation of wills: Revocation of decrees. In Agricultural National Bank of Pittsfield v. Bernard the sole heir at law and next of kin of a decedent petitioned to revoke a decree of the Probate Court allowing a will and codicil of the decedent. The petition alleged that the petitioner "has recently been informed" that the testatrix duly executed another will subsequent to the dates of execution of the will and codicil previously allowed; and that, although the original of the later will had never been found, it contained a clause that revoked all prior wills. The Supreme Judicial Court reversed the lower court's decree sustaining a demurrer and dismissing the petition to revoke the decree of allowance of the will and codicil, holding that the proof of the existence of a duly executed will with a revoking clause establishes the revocation of prior wills although the rest of the contents of the will are unknown because of its loss or destruction.

The Court apparently thought it insignificant that the later will with the revocation clause could not be found. There is a presumption that a will missing after a testator's death was destroyed by the testator with the intent to revoke. This presumption, however, would not have aided the respondent since the revocation of the prior will was effec-

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7 Hammill v. Weeks, 225 Mass. 245, 114 N.E. 203 (1916), where one witness to a will did not remember anything except that he signed, and the Court observed: "The contention of the appellants in substance is that each attesting witness must testify categorically and affirmatively to every fact required for the due execution of the will. Clearly such a contention is not sound." 225 Mass. at 246, 114 N.E. at 203.


9 Crowninshield v. Crowninshield, 2 Gray 524 (Mass. 1854).
tuated as soon as the later will containing the revoking clause was executed according to the requirements of the wills act. The revocation clause unlike the dispositive provisions was not ambulatory in nature but had immediate effect. The revocation of a revoking will does not automatically revive a revoked will without proof of testator's specific desire to so revive the revoked will. No evidence of an intent to revive appears in the case.

Despite the recognized policy favoring finality of decrees in probate and equity proceedings, the Court found justification for sustaining the petition to vacate the decree allowing the prior will and codicil. The probate and equity courts have the power to vacate a decree by a bill of review or a petition to vacate because of fraud, mistake or want of jurisdiction, or for new evidence which first became known to the party seeking relief after the decree. Waters v. Stickney permitted a Probate Court to probate a codicil which was discovered after a decree allowing a will, and Crocker v. Crocker indicated that the Probate Court had jurisdiction to revoke its decree and enter a new one "if a will is discovered after the appointment of an administrator, or if a later will is discovered after the probate of an earlier one." On the other hand there have been cases denying petitions to vacate decrees on the ground of evidence newly discovered by the petitioner after the decree was entered. Zeitlin v. Zeitlin, Renwick v. Macomber, and Stephens v. Lampron are illustrative. These cases involved attempts to set aside decrees because of newly discovered evidence concerning fraudulent suppression of material facts, misrepresentation and perjury in the actions that resulted in decrees allowing wills in contested hearings. The Court in all these cases refused to upset the decrees for incorrect findings of fact as to matters in issue at the hearing. The parties had their day in court on the issues involved. The Bernard case would have been more like these cases if the question of the revocation of the earlier will by a later instrument had been in issue in the original probate proceeding that resulted in a decree.

In Perry v. Perry the Court upheld the dismissal of a petition to reopen trustees' accounts. Two of the three trustees were also directors of a closely held corporation, the stock of which was held in trust,

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3 Pickens v. Davis, 134 Mass. 252 (1883).
4 Ibid.
8 12 Allen 1 (Mass. 1866).
9 198 Mass. 401, 84 N.E. 476 (1908).
10 198 Mass. at 406, 84 N.E. at 478.
13 308 Mass. 50, 30 N.E.2d 858 (1941).
and the internal management of the corporation was not referred to in the accounts. In refusing to revoke the decrees of allowance of the accounts the Court concluded that the failure to disclose the internal management of the business in the accounts allowed did not show manifest error in the decree or fraud of the kind that may be the basis of revocation.\textsuperscript{15}. The beneficiaries of the trust or their guardians were aware of the dual positions of the trustees and they had an opportunity to make further inquiry into corporate affairs.

\section{Wills: Ademption of specific bequest.}

One of the essential characteristics of a specific bequest is that unlike a general or demonstrative gift it is subject to ademption by extinction. The great weight of modern authority is committed to the so-called "identity" theory of ademption according to which the specific bequest takes effect only if there is property among the testator's probate assets answering the description of the bequest.\textsuperscript{1} It would be immaterial that the testator did not have the intent to adeem. It seems quite clear that this is the Massachusetts view.\textsuperscript{2}

During the 1959 Survey year the Supreme Judicial Court engrafted an exception onto the "identity" theory of ademption in a case of first impression in this jurisdiction. \textit{Walsh v. Gillespie}\textsuperscript{8} involved a will in which the testatrix gave two persons "all Du Pont Stock that I may have at the time of my death, in equal shares, share and share alike." Some years after execution of the will a conservator of her property was appointed and sold fifty of the one hundred shares of du Pont stock owned by the testatrix. The testatrix died a short time after this sale and only a small portion of the proceeds was expended for her support and maintenance.

The Supreme Judicial Court held that the balance of the unexpended proceeds was to be divided equally between the two legatees of the du Pont stock and that the legacy was adeemed pro tanto only to the extent of the expenditures by the conservator for the benefit of the testatrix. In so deciding the Court adopted the prevailing attitude in other jurisdictions,\textsuperscript{4} observing that the application of the identity theory to a situation such as this would be unjust.\textsuperscript{5} It was admitted


\section{14 Page, Wills §1527 (Lifetime ed.); Atkinson, The Law of Wills §134 (2d ed. 1958).}

\textsuperscript{8} Moffatt v. Heon, 242 Mass. 201, 136 N.E. 123 (1922); Richards v. Humphreys, 15 Pick. 133, 135 (Mass. 1833).

\textsuperscript{4} Page, Wills §1530 (Lifetime ed.); Note, 45 Harv. L. Rev. 710 (1932); Annotations, 51 A.L.R.2d 770 (1957), 61 id. 449, 468 (1958).

\textsuperscript{5} If the subject matter of the testamentary gift were realty, G.L., c. 204, §9 would have been applicable. This statute provides: "In every sale of the real estate of a deceased person or a ward by an executor, administrator, guardian or conservator, the surplus of the proceeds remaining on the final settlement of the accounts shall be considered as real estate, and shall be disposed of to the same persons and in the same proportions to whom and in which the real estate if not sold would have descended or have been disposed of by law."

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that there are many situations in which specific legacies should be adeemed by extinction when the subject matter is destroyed by an act of God or other circumstances wholly beyond the control of the testator. But the distinguishing feature in this case was thought to be the fact that the testatrix, being under conservatorship, was incapable of correcting the result by changing her will because of her lack of competency.

There should be little doubt that the legacy of the du Pont stock was specific. It was not a gift of one hundred shares of du Pont stock but “all du Pont stock that I may own at my death.” It appears that there was an intent to dispose of only those shares of stock that were owned by the testatrix at the time of her death. It may well be that she anticipated the possibility that she might own fewer shares at the time of her death than at the time of the execution of her will and for that reason drafted the limitation as it read. The construction adopted treats the provision of the will as though the donor gave du Pont stock “now owned by me.”

This particular problem was not discussed except for a remark that “[t]he parties agree — and rightly — that the bequest of the du Pont stock is specific.” Tomlinson v. Bury was cited. The limitation in question in that case was substantially similar to the one in Walsh v. Gillespie, but the question there was whether the legacy was specific so that the legatee could get contribution from other specific legatees when the asset was used to satisfy a widow's statutory forced share. From the wording of the will in Walsh v. Gillespie, it is arguable that “the bequest is one the subject-matter of which can only be ascertained at the death of the testatrix . . . Strictly speaking, no case of ademption arises.”

On the other hand, if there were an ademption of the legacy to the extent of fifty shares of du Pont stock, the apparent dispositive scheme of the testatrix would have been upset. The stock was the largest asset in the estate and it was bequeathed to the principal objects of the donor's bounty. If there had been an ademption, nearly one half of the estate's largest asset would have been distributed to individuals who were not intended to be preferred over the specific legatees. In view of the conservatorship at the time the fifty shares were converted to cash, the testatrix was probably incapacitated to create a new estate plan which would have dealt with these changed circumstances.

§2.4. Wills: Waiver; Election. It is possible for a testator to place a legatee in such a position that an acceptance of the legacy will amount to a forfeiture of another property interest which is not part of the

6 If this were the form of the bequest, the executor would be obliged to purchase a hundred shares of the stock for the legatee if the estate could not supply them and if there were general assets available to make such a purchase. First National Bank of Boston v. Charlton, 281 Mass. 72, 185 N.E. 250 (1932); Slade v. Talbot, 182 Mass. 256, 65 N.E. 374 (1902).


8 145 Mass. 346, 14 N.E. 157 (1887).

9 In re Palmer, [1945] 1 Ch. 8, 13.
probate estate and which would have accrued to the benefit of the legatee but for the acceptance of the benefits under the will. The retention of any beneficial interest under a will constitutes an election and a ratification of the will in its entirety. Thus, in Thurlow v. Thurlow\(^1\) a testator bequeathed certain shares of stock which stood in the joint names of himself and his wife, with right of survivorship, to a trustee for his wife for life. After the testator's death his widow accepted all of the provisions in the will made for her benefit. The Court held that the natural effect of her conduct made for an election to accept the benefits under the will rather than to assert full title to the stock. If she did not accept any interest under the will, she would have become sole owner of the stock by right of survivorship.

During the 1959 Survey year the Supreme Judicial Court had the occasion to refuse to apply this doctrine of election in the case of Miller v. Miller.\(^2\) The testator's will bequeathed all his property to his brother, and recited: “I have not expressly mentioned my beloved wife, Helen L. Miller, as I have otherwise provided for her welfare.” The testator had made his wife the beneficiary of several life insurance policies and of a death benefit under an employees' retirement plan. A duly appointed guardian of Helen, who was mentally incompetent, received these benefits as well as some from the Veterans Administration. Helen's guardian then waived the will and claimed a statutory forced share for her.\(^3\)

The Court rejected the contention of the testator's brother that Helen, having received the insurance, retirement and veteran's benefits, was precluded from claiming any part of the estate of her husband and could not waive the will. Thurlow v. Thurlow was distinguished since the benefits provided for Helen were not mentioned or incorporated in the will.

§2.5. Insolvent estates: License to sell realty. A personal representative's failure to represent an estate as insolvent permitted a decedent's creditor to obtain satisfaction of his claim despite the estate's insolvency at the date of the debtor's death in Campbell v. Anusbigian.\(^4\) A creditor of a testate decedent began an action against the estate and caused notice of the claim and the action to be filed in the registry of probate within a year of the approval of the executrix' bond. The creditor recovered judgment and execution issued for damages against the goods or estate of the decedent. The inventory of the executrix showed no personal property but there was real estate subject to mortgages. There was no equity in the realty at the date of death of the testator. A “first and final” account of the executrix was allowed,

\(^{3}\) 3 The waiver filed by the guardian was approved by the Probate Court. See G.L., c. 201, §45.

showing in Schedule “A” no personal estate according to inventory but an amount advanced by decedent’s wife to pay claims. Schedule “B” showed payments of general expenses in the amount advanced by the wife.

Some twelve years after the testator’s death his executrix and principal devisee died and the testator’s creditor was appointed an administrator de bonis non with the will annexed. His inventory values of equity of the real estate of the testator were substantial, this increase from the time of the filing of the executrix’ inventory being caused by amortizations of the mortgage debts by the devisee. When the Probate Court denied the creditor’s petition as administrator d.b.n.c.t.a. to sell the real estate to satisfy his claim and administration expenses, he appealed.

The Supreme Judicial Court reversed the lower court, rejecting the contentions that the petition should be denied because the petitioner’s claim was dubious at the time of testator’s death; that he did not proceed with remedies then available; that he was guilty of laches and should not benefit from the financial contributions of the devisee. It was pointed out that the creditor preserved his rights by bringing his action and filing his notice within a year of the approval of the personal representative’s bond. He had statutory authority to have the real estate sold after the year expired even though there might have been an absolute conveyance or a mortgage for value in good faith. The Court thought that the statutory policy outweighed the assertion of laches, stating: “He had a judgment good until barred by the statute of limitations applicable thereto, and good against the assets of the estate. The executrix was on notice, and the subject real estate was no less assets of the estate because the executrix chose to enhance its value by paying the mortgage debt with her funds.”

It was considered insignificant that the executrix’ “final account” was allowed. Its allowance could not discharge the estate in respect of the creditor’s judgment which was not included in the account.

In view of the creditor’s actions to preserve his claim against the estate, it seems that the representative’s only remedy to terminate claims against the insolvent estate would have been to represent the estate as insolvent. If an adjudication of insolvency had been made by the Probate Court and an order of distribution made thereunder, claims of creditors would have been barred.

§2.6. Trusts: Accounting methods. *Hutchinson v. King,*1 decided during the 1959 Survey year, considered the question of the flexibility

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2 G.L., c. 197, §9.
3 Id., c. 202, §20.

The Court observed that this statute made no specific requirements as to the manner in which particular transactions should be reported and stated that it should be construed flexibly and reasonably.

We see nothing in the language of §2 which would require us to treat as improper any reasonable and orderly statement of the account in a manner consistent with the facts . . . with applicable substantive rules of law, and with accounting principles and methods from time to time currently employed by competent and reputable fiduciaries, so long as they fairly and intelligibly reflect the transactions reported. . . . Accordingly, it is appropriate under the statute (a) to require no more complication . . . in the keeping of accounts than is essential to reflect the fiduciary’s transactions and (b) to permit accounts to be furnished in any reasonable form consistent with §2. If a trustee wishes to use a more complicated or refined method of accounting than the minimum required, the statute does not forbid his doing so . . . Permitting trustees to use flexibly all appropriate, convenient, and reasonable accounting methods is especially important in a day when the varying requirements of State and Federal tax and regulatory authorities and of probate accounting present serious bookkeeping problems and when accounting machinery offers opportunities for greater accuracy as well as for operating economies.

The trustees had sold rights to subscribe to certain securities and noted the sale in Schedule A where the proceeds were included as an addition to principal cash. No entry was made in Schedule A of any addition or gain, or in Schedule B of any change or loss, by reason of the sale. Schedule C showed a decrease in the book value of the securities corresponding to the increase in principal cash that resulted from the sale of these rights. The Court concluded that the trustees’ accounting method was entirely proper even though that espoused by the guardian ad litem would also have been acceptable.

2 "Accounts rendered to the probate court by [a] . . . trustee . . . shall be for a period distinctly stated therein, and consist of three schedules, of which the first shall show the amount of personal property according to the inventory, or, instead thereof, the amount of the balance of the next prior account, . . . and all income and other property received and gains from the sale of any property or otherwise; the second shall show payments, changes, losses and distributions; the third shall show the investment of the balance of such account, if any, and changes of investment. A trustee shall state in his accounts the receipts of principal and income separately and also the payments and charges on account of such principal and income separately."


"The guardian ad litem contended that the trustees should have shown in Schedule A the receipt of the rights as an addition to principal at zero, leaving the original shares of stock in respect of which the rights were issued unchanged at their appraised value. The Court thought that the guardian’s method might be less accurate than that of the trustees since it left the book value of the original shares unreduced by any amount to account for the diminution in value of the original shares caused by the issuance of the rights."
§2.7. Trustee's duty to consult others. The 1959 Survey year brought forth two cases regarding the extent to which a trustee is under a duty to abide by the desires and advice of other persons where the trust terms provide for the expression of such desires and advice. Hillman v. Second Bank-State Street Trust Co. considered a trust which provided that the trustee pay to the settlor's daughter so much of the income as the trustee should deem for her best interest. There was a provision that in making these payments the trustee "may apply" to a friend of the settlor "for advice and shall be protected in acting upon such advice." Another article stipulated that the trustee "shall" furnish an account annually to the friend during the daughter's lifetime.

The Court was of the opinion that the trustee had no duty to consult the friend. The word "may" in the provision that the trustee "may apply" to the friend for advice was permissive only and not mandatory. The observation was made that the settlor knew how to distinguish between a mandatory direction and a grant of permissive authority. When he imposed on the trustee a duty to account, the word "shall" was used instead of "may."

In Keith v. Worcester County Trust Co. the testator's will created a residuary trust which in part provided: "To pay the net income therefrom semi-annually or oftener in the discretion of my said trustees to or for the use, benefit, comfort, support, and enjoyment of my wife. . . . I authorize and empower my said trustees to make utilization of the principal for the foregoing purposes at such times and to such extent as my said wife . . . desires." The wife of the testator claimed that she was entitled to receive from the principal such amounts as she should desire in good faith for the purposes stated. The Court, however, found that payments out of corpus were entirely within the discretion of the trustees. The words "authorize and empower" import permission and imply discretion. It was observed that the phrase "at such times and to such extent as my said wife . . . desires" showed no inconsistency; it indicated that an expression of the wife's desire called for the exercise of the trustees' judgment.

The Court also ruled that it was proper for the lower court to refuse to consider a prior will as relevant evidence. This will was revoked by the probated will in question and it authorized the trustee to make payments of principal to the wife in its sole discretion and as it might deem wise and expedient. It was argued that the prior will and its revocation were concomitant circumstances which were admissible to show the meaning of the words in the probated will. But the Court

3 Ibid.
stated that since there was no ambiguity in the will in question, the
prior will and its revocation could not be considered. Extraneous
matters should not be used to raise an ambiguity not otherwise mani-
fest in a document before a court for interpretation.

§2.8. Transmissibility of contingent remainders: Right of donee’s
personal representative to property passing by exercise of a general
testamentary power. In Boston Safe Deposit and Trust Co. v. Alfred
University\(^1\) a Thomas Prince established by will a trust for the benefit
of his son for life with a gift over to several named persons, including
a William Ames, upon the death of the son without issue. Ames sur-
vived Thomas Prince; Ames and his widow predeceased Prince’s son,
who died without issue. Ames bequeathed the residue of his estate to
a Massachusetts trustee to pay the income to his wife for life and she
was also given a general testamentary power of appointment. The
widow of Ames specifically exercised her power by her will in favor of
Alfred University. The corpus of the Prince trust was turned over to
the trustee under the will of Ames who sought instructions as to the
disposition of this fund.

The Supreme Judicial Court decided that the Prince trust fund
should be paid to the personal representative of Ames’s widow for dis-
tribution to Alfred University, subject, however, to claims of her credi-
tors, if any. When Ames died, the contingent interest created by the
Prince trust became a part of the corpus of his testamentary trust.
This contingent remainder in turn devolved to Alfred University as
the appointee under the will of the widow of Ames.

Under Massachusetts law many types of contingent interests are
transmissible.\(^2\) If the only contingency is that a remainderman must
survive a life tenant in order to take, the remainder is alienable inter
vivos.\(^3\) A remainder limited in favor of a definite person and subject
to a contingency having no reference to his life has been transmissible
under common law and by statute.\(^4\) The equitable future interest
created in favor of Ames by the Prince trust was contingent only as to
whether Prince’s son would die without leaving issue surviving him
and not as to the person to take. The interest passed by the Ames will
and later by the exercise of Ames’s widow’s power of appointment.\(^5\)

\(^3\) Whiteside v. Merchants National Bank, 284 Mass. 165, 187 N.E. 706 (1933);
Clarke v. Fay, 205 Mass. 228, 91 N.E. 928 (1910); Putnam v. Story, 132 Mass. 205
(1882). However, survival of two or more events by the holder of a future interest
before he is entitled to enjoy the estate may render the interest unassignable. Hall
v. Farmer, 229 Mass. 103, 118 N.E. 351 (1918); Clarke v. Fay, 205 Mass. 228, 91
N.E. 928 (1910).
\(^4\) Whiteside v. Merchants National Bank, 284 Mass. 165, 174, 187 N.E. 706, 709
(1933); Nickerson v. Harding, 267 Mass. 203, 166 N.E. 703 (1929); G.L., c. 184, §2.
\(^5\) The contingent remainder of Ames was transmitted by the will of Ames and
by the testamentary power exercised by Ames’s widow. The Massachusetts courts
have indicated that contingent interests, such as powers of termination and possi-
bilities of reverter, which were inalienable inter vivos, were devisable. See Austin
When Mrs. Ames exercised her power of appointment by her will, the property subject to the power did not bypass her estate. The Court instructed that it be paid to her personal representatives so that it would be available for the satisfaction of claims of her creditors, if any. The power was general and its subject matter could have been reached by her creditors had her individual estate been insolvent. Only after the claims against the estate were satisfied would a transfer to the appointee be proper.

The jurisdiction of a Massachusetts court to instruct the trustee was questioned because Ames and Mrs. Ames were domiciled in Florida at their deaths. It was decided, however, that it was appropriate for the local court to give instructions. Ames apparently intended that the trust be administered in Massachusetts since he appointed a Massachusetts trust company as his trustee. This trustee was subject to the jurisdiction of a Massachusetts court.

§2.9. Exercise of power of appointment: Renunciation. There is a well-settled rule of construction in Massachusetts that a general bequest of an estate or a general residuary clause will operate as an exercise of a general testamentary power of appointment unless a contrary intent appears in the will. In *Boston Safe Deposit and Trust Co. v. Painter* it was said that the “inquiry is not whether the will shows affirmatively an intention to exercise the power . . . [but] whether the will shows affirmatively an intention not to exercise the power.” This view was given further sanction by *Second Bank-State Street Trust Co. v. Yale University Alumni Fund*.

In the *Yale* case a trust indenture provided that the trustee pay the income to the settlor for life and upon his death to his brother Frank, for life. On Frank’s death the trust fund was to be paid to Yale University Alumni Fund. The settlor reserved a power of revocation and a general testamentary power of appointment.

The settlor died leaving a will devising and bequeathing his entire estate to his brother Frank, who was also appointed executor. After the settlor’s death the trustee continued to administer the trust fund.


3 322 Mass. at 366, 77 N.E.2d at 411.

and pay the income to Frank until he died. Frank, as executor of his brother's will, indicated in a federal estate tax return that his brother did not exercise a general power of appointment. There was other evidence showing that Frank did not think that his brother executed the power. Frank then died and the legatees under his will and the Yale University Alumni Fund claimed the trust fund.

The Court, relying upon the Painter case, decided the power was executed since the will itself did not manifest an intent not to exercise it.\(^5\) It was concluded also that there was no renunciation by Frank of the gift of the trust fund. His conduct implied that he mistakenly believed that the power was not exercised and failed to show that he intended to disclaim or renounce.

Even if there were evidence that would have warranted a finding that Frank did renounce the gift of the trust property, it would appear that the Yale University Alumni Fund would still not have been entitled to take as a taker in default of appointment. The settlor "blended" the power with the rest of his estate in his general devise of his estate to his brother, manifesting an intent to "capture" the trust res out of the trust indenture.\(^6\)

\(\text{§2.10. Construction: Meaning of "wife" and "widow." If a donor makes a gift to A for life with a remainder to the wife or widow of A there is an apparent ambiguity. Does the donor desire to benefit the woman who is married to A at the date of gift or does he intend to give to the woman who answers the description of wife or widow of A as of the date of A's death? Hill v. Aldrich}\(^1\) set forth a rule of construction to the effect that a "gift to the widow of another is presumptively at least a gift only to that other's wife who was known to the testator." \(^2\) Since the rule is not one of law, it must give way to a donor's manifestation of a contrary intent.

The question of the meaning of the words "wife" and "widow" was considered by the Court in Stryker v. Kennard.\(^3\) There, an inter vivos trust provided that income be paid to one Waldo Kennard for life and on his death the income was to be paid

\[ \ldots \text{to his wife as long as she remains his widow, and on the death of said Waldo and on the death or remarriage of his wife to divide said income equally among the children then living of said Waldo Kennard by his present wife Irma Evelyn or by any suc-} \]

\(^5\) Compare Boston Safe Deposit and Trust Co. v. Prindle, 290 Mass. 577, 195 N.E. 798 (1935), where the donee's will contained two residuary clauses, one disposing of real estate and the other disposing of personality. The residuary clause devising realty specifically referred to the donee's power but the residuary clause bequeathing personality made no mention of the power. It was held that the power of appointment was not exercised with respect to the personal estate.


\(\text{§2.10.} 1\) 326 Mass. 630, 96 N.E.2d 147 (1951).
\(2\) 326 Mass. at 633, 96 N.E.2d at 149.
ceeding wife, the issue of a deceased child to take the parent's share by right of representation, until twenty years after the death of the last survivor of said Waldo Kennard and his present wife Irma Evelyn, or until the youngest of his said children attains the age of twenty-five years, whichever event shall first occur, and then to divide the principal equally among the then surviving children of said Waldo by his wife Irma Evelyn or any succeeding wife, the issue of any deceased child to take the parent's share by right of representation.4

In case there were no such issue living at the date of termination of the trust then the principal was to be paid to the settlor's heirs.

Waldo Kennard had been married three times. His first marriage was terminated by divorce before the trust was created. At the time the trust was created he was married to Irma and there were marital difficulties between them. This marriage also ended in divorce and Waldo's third wife survived him as he had survived Irma.

The Supreme Judicial Court upheld the instruction of the Probate Court to the trustee to pay the income of the trust to Waldo Kennard's third wife so long as she was alive and remained unmarried. The rule of construction of the Aldrich case yielded to the donor's expression of an intention to make a gift of income to the woman married to Waldo at the time of his death. This intent was found to exist from the settlor's description of the income beneficiary as "wife" and "widow," but when the remainders were given to the children they were referred to as children by Waldo's present wife, Irma, or by a succeeding wife; from the donor's mention of Irma by name three times but not when the income beneficiary was described; from the settlor's knowledge of the marital difficulties between Waldo and Irma, and Waldo's prior divorce. It would have been an unrealistic dispositive scheme to benefit children of any subsequent marriage and not benefit a subsequent wife.

It was argued that the word "wife" should not have been construed to include a subsequent wife since this would have resulted in the remainders being void under the rule against perpetuities; that where there are two reasonable interpretations, one of which will invalidate interests under the rule and the other does not, that interpretation upholding the validity of the limitation should be adopted. The Court, however, concluded that, since it is customary for courts to refuse to give instructions to fiduciaries as to possible future duties, the time was not appropriate to pass upon the validity of the remainder interests. It found that the intention to benefit a succeeding wife was clear. Even with this interpretation the remainder interests appear to be valid because the trust had to terminate or at least the remainders had to vest no later than twenty years after the death of the survivor of Waldo and Irma whose lives were in being at the date of the creation of the trust.

It was decided that Waldo's wife at the date of his death was to receive income for life or until she remarried without any discussion of that part of the trust instrument that called for a termination of the trust twenty years after the death of the survivor of Waldo and Irma or when the youngest child reached the age of twenty-five years. If the donor intended to benefit a wife other than Irma, there would be an apparent inconsistency. He expressed a desire that such wife receive income until she died or remarried and he also set out a termination date for the trust that might occur before the wife died or remarried. It may be that the Court felt that there was no inconsistency by refusing to adopt a literal interpretation of the provision for termination and distribution of principal, and construing it to be indicative of the time when the remainder interests were to vest.

§2.11. Construction: Meaning of the word “funds.” The word “funds” used to describe the subject matter of a testamentary gift is obviously pregnant with ambiguity. The Supreme Judicial Court in the case of Salter v. Salter, construing a will drafted by a layman, stated that “ordinarily [the term “funds”] is used to describe an accumulation of money or collection of securities set apart and held for a definite purpose.” At any rate the Court observed that the word should not encompass real estate in the absence of special circumstances.

In this case a testatrix made a specific devise of realty to a favorite nephew in the first clause of her will. Clause two provided: “any funds remaining after the settlement of my estate, to be divided as equitably as may be among my grandnieces and grandnephews.” Clause three gave her books to the nephew named in clause one. The fourth clause disposed of articles of personalty among the families of her three nephews and provided that if they did not wish to retain any of these articles they were to be sold by the executor and the proceeds were to be distributed as indicated in clause two.

Before the testatrix died, she adeemed the specific devise by selling the subject matter and acquired a different parcel of land. The Court held that this land descended as intestate property to her two brothers and a nephew, who was not the preferred one mentioned in the first and third clauses.

It was observed that, although the second clause, disposing of any funds remaining after the settlement of the estate, was residual, it did not dispose of realty. This clause immediately followed the devise of real property and appeared to refer only to personalty.

It is arguable that the testatrix had the desire to preclude her own brothers from sharing her estate since they were not mentioned as beneficiaries and since her will disposed of her entire estate, as constituted at the date of its execution, to others. The Court, however, remarked: “Her general intent, as evidenced by the will, to benefit [the legatees named in clause two] to the exclusion of her heirs at law ought
not to induce a construction of the term in question in a sense which in all probability she did not intend." 3

Chapter 191, §19 of the General Laws 4 should be of no avail to those who claimed under the second clause of the will. The purpose behind its enactment was to change the common law rule that after-acquired realty could not be devised. It is not designed to formulate a rule of construction.

§2.12. Construction: Gift to residuary legatees. If a testator makes a gift to a person for life with a remainder to those who are to be identified in the residuary clause, it may be important to determine whether the remainder passes to the intended takers as residuary legatees. In the order of abatement of legacies a residuary legacy will abate before general, demonstrative or specific bequests. If the remaindermen take qua residuary beneficiaries, the probate estate must satisfy all other gifts before they can share. On the other hand, if they take a general bequest, their interests will not abate until the residuary estate is first exhausted.

A remainder interest given "to my residuary legatees" has been treated as a residuary gift. 1 The question to be answered is whether the donor desired that those named in the residuary clause take in their capacity as residuary legatees or whether he referred to the persons named in the residuary clause as a means of identifying the legatees. 2

In First Safe Deposit National Bank of New Bedford v. Comstock 3 a testatrix gave legacies of stated amounts to several charitable organizations in article 17 of her will. Article 20 gave the residue to these same organizations. A codicil to the will left property in trust and provided that upon the death of a beneficiary the corpus was to be distributed "among the legatees named in the Seventeenth Article of my last will in equal shares." The assets of the estate were insufficient to pay all of the legacies in full so that each of the legatees suffered a reduction of their bequests.

The Court rejected the contention that the corpus of the trust be distributed among all the legatees to make up deficiencies. The testatrix merely referred to article 17 as a means of identifying the remaindermen. It was not necessary to make reference to article 20 in any way, and it was insignificant that the residuary legatees in article 20 were identical to those who were to take sums of money under article 17.

3 338 Mass. at 394, 155 N.E.2d at 432. See also Frost v. Courtis, 167 Mass. 251, 45 N.E. 687 (1897).
4 "An estate, right or interest in land acquired by a testator after the making of his will shall pass thereby in like manner as if possessed by him at the time when he made his will, unless a different intention manifestly and clearly appears by the will."