Chapter 8: Trusts and Estates

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§8.1. Fiduciary accounting: Allowance, book values. A trustee is required to keep and render records with respect to the administration of a trust. His accounts must accurately show in detail the nature and amount of the res as well as the mode of its administration.\(^1\) Although statutes and court-approved forms may set forth the general framework of an account, it has been held that variations and additional details which fairly and intelligibly reflect the trustee's activity may be sanctioned.\(^2\)

Fiduciary accounting practice in Massachusetts, consistent with the minimum broad requirements of a statute,\(^3\) may fall substantially short of reflecting the true value of the trust property at accounting dates. Original inventory values may be carried over to a series of interim accounts for a period of several years without adjustments representing marked fluctuations in market values.\(^4\) Carrying securities at their book value was found to be in accordance with the traditional practice of the careful and prudent trustee and could not be the basis for revoking decrees of allowance of accounts.\(^5\) Beneficiaries lacking knowledge of accounting technicalities and the habitual use of book values may easily be misled as to the true state of the trust res as they assent to the allow-

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\(^1\) Restatement (Second) of Trusts §172 (1959).


\(^3\) G.L., c. 206, §2 provides: “Accounts rendered to the probate court by 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, charges, 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.”


ance of accounts. Nonetheless, decrees of allowance based on such assents will not be upset.6

Continued use of book value of trust property in renewal successive accounts despite a significant decrease in market value was again upheld with some misgivings and suggestions for future reform in Taylor v. Worcester County National Bank.7 There, the asset held in a testamentary trust was commercial real estate which was appraised and inventoried by the executors at a value of $335,000. It was mortgaged by the executors for $200,000 in order to pay taxes and administration expenses. A trust company as trustee carried the property on its books at the inventory value subject to the mortgage. Eleven accounts were filed and allowed, the remaindermen having received copies of all accounts as they were filed. Schedule “C” of the first eight accounts reported the difference between the inventory value and the principal balance of the mortgage as “equity” (the later accounts used the term “book value” in place of “equity”). Although the original book value of the trust property remained the same, the successive accounts showed an increase in the value of the equity as the principal on the mortgage was paid.

A trust remainderman objected to the allowance of the trustees final account, petitioned to revoke prior decrees allowing the interim accounts, and sought to surcharge the trustee for the loss to the trust estate on the ground that the successive accounts “did not even remotely reflect the true condition of the trust estate and were a gross distortion of the trust equity in the res.” Evidence was introduced showing that the market value of the commercial property had greatly diminished below the original inventory value and that the trustee had known of the reduction in value as the result of several appraisals made by it during the term of the trust.

The Supreme Judicial Court, relying on its prior approval of the practice to account with book values in Old Colony Trust Co. v. Mabbett,8 ruled in favor of the trustee. Since the interim accounts had been allowed after due notice, the items appearing therein cannot be impeached except for fraud or manifest error.9 Listing assets at book value according to traditional fiduciary practice was neither fraudulent nor manifestly erroneous. In Mabbett the trust assets in question consisted of railroad bonds the market value of which were readily ascertainable by the beneficiaries on their own initiative. The actual value of the commercial real estate of Taylor (like the market value of the stock of a closely-held corporation) could not be easily determined by a person who lacked expertise in appraising such property. It would be expected, therefore, that a beneficiary would be inclined to rely on

6 Id.
accounting values of the trustee especially if the accounts do not make it clear that they are based solely on "book value."

Trustees, in addition to their duty to account for the trust property clearly and accurately, owe the beneficiaries a high duty of loyalty. Their dealings with the cestuis are not treated as being between negotiating parties with conflicting interests. They must be eminently fair and communicate all material facts. In the principal case, as a result of its own several appraisals, the trustee knew that its book values were substantially in excess of market values and a fair reporting of the true status of the trust property might require at least a caveat that the accounting values might not represent those of the open market.

Balanced against the duty of a trustee to make a clean and accurate accounting is the statutory policy expediting the efficient administration of estates by impressing a degree of finality to the allowance of fiduciary accounts. Massachusetts General Laws, Chapter 206, Section 24 specifically provides that decrees of allowance of accounts may not be impeached except for fraud or manifest error. Accounting in the usual and accepted manner on the form supplied by the Probate Court following the framework of a statute could not be considered to be erroneous although another method utilizing actual values would be more appropriate under the circumstances.

The kind of fraud needed to impeach on allowance of an account has been described as "fraud which induced the court to take jurisdiction which it did not have" or which deprived 'an interested party of his day in court.' An accounting fiduciary's concealment of a material transaction or misstatement of yield of an asset have been found to be

10 Restatement (Second) of Trusts, §170 (1959).

11 In the Taylor case the Court observed in a footnote that the trustee itself wisely abandoned its use of the confusing term "equity" in describing the excess of the book value of the land over the balance due on the mortgage. 1971 Mass. Adv. Sh. at 1907 n.1, 277 N.E.2d at 490 n.1.

It also said: "In recent years some corporate and other trustees have taken pains to point out in their accounts (by footnote or otherwise) that book values of trust assets have been employed, which bear no necessary relation to market values. Some trustees also have stated the aggregate market value, as of a specific date, during or following the accounting period, of securities having a readily ascertainable market or over-the-counter value. This, of course, without an appraisal, is not easily possible with respect to land or to securities and other classes of property closely held or seldom sold." 1971 Mass. Adv. Sh. at 1907, 277 N.E.2d at 490.

12 See footnote 3 supra.


15 Jose v. Lyman, 316 Mass. 271, 55 N.E.2d 433 (1944) (failure to disclose self-dealing by trustee). Compare Perry v. Perry, 339 Mass. 470, 160 N.E.2d 97 (1959) where the beneficiaries had knowledge of the dual positions of trustees and had the opportunity to make further inquiry in a hearing on the allowance of the account.

sufficient fraud to reopen accounts. In *Taylor*, despite the trustee's cognizance of the dealing value of the commercial property, the Court felt that nothing had been concealed. A perusal of the accounts, more particularly, the last two interim accounts that were allowed, would give notice to the remaindermen that the trustee was using a book or inventory method of accounting. The remainderman's objection to the retention of the asset by the trustee could have been raised at a hearing on its propriety as an item of the account.\(^{17}\)

Recognizing that the probate accounting practice it was again approving might be confusing or misleading to persons not familiar with it, the Court went on to state:

We cannot refrain from the observation that it would be appropriate for the Probate Court, after consultation with bar groups and organized bodies of corporate and other professional fiduciaries, to consider, for use in the future, some revisions of probate accounting practices, and to seek to put them into effect either by court rule or by proposing legislation. Such revisions may be possible without imposing any undue additional burden on trustees. In particular, there might be considered appropriate methods of reflecting in an account, by note or otherwise, a persistent and perceptible diminution (beyond a mere temporary fluctuation) in the value of a trust asset. Analogous or comparable fields of accounting may provide helpful precedents.\(^{18}\)

§8.2. Fiduciary accounting's allowance: Future interests: Tax clause. In *Old Colony Trust Co. v. Bravo*\(^1\) the application of a standard tax clause in a will was the basis of a controversy. It provided: "I direct that all legacy, succession, estate or other inheritance taxes imposed upon or in respect of any of my property shall be paid from the residue of my estate."\(^{12}\) As with all boiler plate provisions which may be desirable for most situations this standard clause may fall short of attaining the specific objectives of a donor.

The merit of such a provision is, of course, to pass to the general and specific legatees the full amounts given to them undiminished by death taxes which would otherwise be attributable to them.\(^3\) If a substantial portion of the donor's wealth subject to death taxes is transferred by way of nonprobate transfers, the clause may prove to be inappropriate in that it may significantly reduce the net worth of the gift to the residuary


3 See G.L., c. 65 §§1, 6 and 17.
legatees who may have been the prime objects of the donor's beneficence. Special problems may arise if the residuary bequest is designed to take advantage of the estate tax marital deduction. If the will containing the standard tax provision also creates future estates additional administrative complexities may develop. The amount of inheritance tax attributable to a future interest does not become due until the interest becomes possessory and the amount of the anticipated tax may be highly speculative at the time of the formation of the residue. The taxes on future interests may be compromised and prepaid under a statutory procedure but the commissioner of taxation may decline such prepayment.

The executor could provide for the taxes due on future interests by making distribution to the residuary legatees who have present interests against indemnity receipts; otherwise he would have to retain a reserve fund out of the residue. This fund would perhaps have to equal the maximum possible tax which could be assessed and which in the ordinary case would be difficult if not impossible to ascertain. At any rate, whether indemnity receipts or reserve funds be utilized, the net result would be to deprive the residuary legatees of present enjoyment of a substantial part of their shares in a manner probably contrary to what would have been the wishes of the testator had he thought about the alternatives.

The will in Bravo left the residue of the testator's estate in trust for the benefit of his wife for life. Upon her death, after the satisfaction of certain bequests, the principal was to be used to establish three new trusts of certain amounts and the remaining principal was to be paid "free of all trusts in equal shares to my residuary legatees." Article Two of the will designated five charities as "residuary legatees." A separate article contained the above-quoted standard tax clause.

When the testator's wife died in 1933 three new trusts were created as required by the will, one of which was for the benefit of Hilton L. Bravo for life with the remainder to the contestant, Robert B. Bravo. The trustee filed its eighth account in 1934 showing equal distributions from principal to the five charities and a payment of a sum of money to the Commonwealth for legacy and succession taxes then due. This tax payment was made from funds which otherwise would have passed to the five charities, the "residuary legatees." The eighth account also showed a balance in the principal and income of the trust for the testator's wife, but this balance, after having been reduced by payment of various

5 Id. at 818; Boston Safe Deposit and Trust Co. v. Commissioner, 345 F.2d 625 (1st Cir. 1965).
6 G.L., c. 65, §7.
7 Id. §14. This statute by its terms seems to give only the person entitled to a future interest the right to prepay and compromise. Many wills specifically empower the executor to prepay and compromise death taxes attributable to future interests.
incidental expenses, was chosen to have been finally and equally distributed to the charities in the eleventh and final account of the wife's trust allowed in 1938. The charities gave indemnity receipts for all distributions to them.

Concerning the three successor trusts, the principal of one of them was distributed to the remainderman in 1936 after payment of the succession tax then due. The fourth and final account of that trust, allowed in the same year, showed that the tax was paid from its principal. No taxes were incurred when the principal of the second successor trust was distributed in 1943. When the third, the Hilton L. Bravo trust, later terminated, the trustee filed an account showing a payment from principal of the succession tax then due on the remainder interest. The remainderman Robert B. Bravo, contested the allowance of the account and the Probate Court reserved and reported to the Supreme Judicial Court two questions: first, whether the succession tax was properly paid from the Hilton L. Bravo trust fund, and second, whether the adjudication and allowance of all the previous accounts should prevent the Court from answering the first question.

The Court gave an affirmative answer to the second question since the previous accounts adjudicated and allowed indicated that the succession taxes, as they fell due, were paid from then available funds and that no reserve fund was ever created. Since there had been no "fraud or manifest error," a consideration of the proper source of tax payment on the contestant's future interest was debarred at this time. All beneficiaries of the trusts, themselves or through a guardian ad litem, assented to all previous accounts including the important eighth account. Inasmuch as the propriety of the source of funds to pay taxes could have been questioned in the prior accounting proceedings, the matter is res judicata.

In view of the answer to the second question the Court declined to answer the first question put by the probate judge. Yet, after observing that the tax clause was inadequate for the testamentary disposition in question, it expressed its agreement with the mode of payment of the taxes by the trustee as being "quite the only avenue it might have followed. . . . Indeed, the establishment of such a reserve might well have given rise to various complexities much more difficult to untangle than that which presently confronts the trustee and us." A more sophisticated tax clause for the testator's dispositive scheme would probably have expressly relieved the residue of the burden of succession taxes on future

9 G.L., c. 206, §24. Before 1938 accounts were "determined and adjudicated." For the similarity between an "adjudication" and an "allowance" under the post-1938 version of the statute see Newhall, Settlement of Estates and Fiduciary Law in Massachusetts §§288 et seq. (4th ed. 1958).


§8.3

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interests at least to the extent that they are not compromised and pre-paid under a power given to the executor.

§8.3. Estates: Joint tenancy, simultaneous death. At common law, where two or more persons die in the same catastrophe, there is no presumption of law as to survivorship among them.\(^1\) If devolution of property depends upon proof of the order of death of the persons perishing in a common disaster, the risk of nonpersuasion rests upon the one who claims through the survivor.\(^2\) This state of the law is unsatisfactory because there is often no evidence, direct or circumstantial, as to the time of deaths and property may pass in a manner clearly unintended by the deceased. The rule led to unreasonable results as, for example, to preclude the same legatee of two testators dying in a common disaster from taking under either will.\(^3\)

Various statutory attempts to resolve the difficulty of proof by creating arbitrary and complicated presumptions based upon sex, age, physical condition and the like proved to be unworkable.\(^4\) The Uniform Simultaneous Death Act approaches the problem differently. It provides a course for the distribution of property where there is "no sufficient evidence" of the order of death of persons and creates no presumptions.

A portion of the Massachusetts version of the uniform act provides: "[w]here there is no sufficient evidence that two joint tenants or tenants by the entirety have died otherwise than simultaneously the property so held shall be distributed one half as if one had survived and one half as if the other had survived."\(^5\) The meaning of "sufficient evidence" was in issue in Petition of Smith,\(^6\) where a husband and wife, who owned property as joint tenants and tenants by the entirety, were found dead in their garage, in an automobile with its engine running—death having resulted from carbon monoxide asphyxiation. The person claiming through the husband as the survivor had an expert testify that it was his opinion that the wife died earlier emphasizing her poor physical condition and a state of depression. The only other expert testimony on the matter of survivorship was by the medical examiner who testified that it was his opinion that it was impossible to determine the precise time of death of each or either of them.

After having ruled that "sufficient evidence" meant the usual standard in civil cases—proof by a preponderance of the evidence—the Court found that the claimant failed to sustain his burden of proving that the deaths were otherwise than simultaneous. There was no direct or circumstantial evidence as to survivorship, nor could the claimant get the

\(^{1}\) Wigmore, Evidence §2532 (3rd ed. 1940).
\(^{2}\) Id.
\(^{3}\) Wing v. Angrave, 8 H.L.C. 183 (1860).
benefit of any presumption based on sex or physical condition. In earlier cases, where age, sex and physical conditions were considered to be relevant facts on the question of survivorship, there were additional circumstances of the accident from which inferences could have been drawn.

The claimant further contended that a common disaster clause in the husband's will changed the course of distribution set forth in the statute. He relied on that part of the simultaneous death act which provides:

This chapter shall not apply to a will, living trust or deed wherein provision has been made for distribution different from the distribution under this chapter . . . or where provision is made for a presumption as to survivorship which results in a distribution of property . . . different from that here provided.

The Court rejected this argument on the ground that the common disaster clause in the will had no application to property owned by the testator as a joint tenant or a tenant by the entirety. Right of survivorship is an essential characteristic of both forms of co-ownership and the property, therefore, was not a part of the testator's estate.

The clause by its terms did not refer to the jointly-owned property, but even if it had, the result would have been the same. There are limited circumstances in which a will may affect property settlements which by-pass the probate estate. But, the only way that the survivorship aspect of a joint tenancy and a tenancy by the entirety may be defeated is by a severance or a termination of the estates by the owners before they die.

8 See Robson v. Lyford, 228 Mass. 318, 117 N.E. 621 (1917).
9 This clause provided: "In the event that my wife and I shall die under such circumstances as shall make it doubtful which of us died first, or if, as the result of a common accident my wife shall die at approximately the same time as I do, I direct that this, my will, shall be [construed] and shall take effect for any and all purposes as if my wife shall have predeceased me. The decision of my executor shall be final and conclusive on any question arising under this provision." 1972 Mass. Adv. Sh. at 952 fn. 4, 282 N.E.2d at 415 fn. 4.
11 "The husband only had the power of disposition over properties which he solely owned, and he had no power over property in which his wife possessed an interest," 1972 Mass. Adv. Sh. 952, 282 N.E.2d at 415. See also C. Moynihan, Introduction to the Law of Real Property c. 10, §§3 and 6 (1962).
12 The doctrine of equitable election may compel the surviving joint tenant to give up the jointly-owned property to a devisee of the property if the surviving tenant accepts benefits under the will. Thurlow v. Thurlow, 317 Mass. 126, 56 N.E.2d 902 (1944).

A will may terminate and dispose of a savings bank trust account. Restatement (Second) of Trusts, §58, comment c. (1959).


§8.4. Interpretation of wills: Meaning of “issue:” Adopted child. Before 1876 there was in Massachusetts no express statutory rule of construction on the question whether a transfer of property to a person designated by the term “child” or its equivalent included an adopted child. The original adoption statute enacted in 1851 broadly equated the rights of an adopted child with a child born in lawful wedlock.1 In the earliest Massachusetts case on the point, the statute was interpreted to mean that a child adopted in 1865 by the settlor of an irrevocable trust should take as a “child” or “issue” of the settlor even though the trust was created in 1825.2

In 1876 the Legislature restricted an adopted child’s right to inherit property so as to allow him to inherit directly from the parent but not through his parent from any of his parent’s kindred,3 and it created a new rule of construction concerning the right of an adopted child to take under the term “child” or its equivalent.4 The 1876 statutory rule was codified into General Laws, Chapter 210, Section 8 with minor changes in wording to provide:

The word “child,” or its equivalent, in a . . . devise or bequest shall include a child adopted by the . . . testator, unless the contrary appears by the terms of the instrument, but if the . . . testator is not himself the adopting parent, the child by adoption shall not have, under such instrument, the rights of a child born in lawful wedlock to the adopting parent, unless it plainly appears to have been the intention of the . . . testator to include an adopted child.

From 1876 to 1958 the statute was consistently construed to mean that an adopted child could not take a transfer of property as “child”,5 as “issue”,6 or as “heir”7 where the donor was a stranger to the adoption.

§8.4. 1 “A child so adopted, as aforesaid, shall be deemed, for the purposes of inheritance and succession by such child . . . and all other legal consequences and incidents of the natural relation of parents and children, the same to all intents and purposes as if such child had been born in lawful wedlock of such parents or parent by adoption, saving only that such child shall not be deemed capable of taking property expressly limited to the heirs of the body or bodies. . . .” Acts of 1851, c. 324, §6.


3 “As to the inheritance of property, any person adopted in accordance with the provisions of this act, shall take the same share which he would have taken if born to said adopting parent in lawful wedlock, of any property which such parent could have devised by will. In respect to inheritance also, he shall stand in regard to the legal descendants, but to no other of the kindred of his adopting parent in the same position as if born to him in lawful wedlock.” Acts of 1876, c. 213, §8.

4 St. 1876, c. 213, §9 which also contained the proviso: “. . . that nothing in this act shall be construed to restrict any right to the succession to property which may have vested in any person already adopted in accordance with the laws of this Commonwealth.”


6 See Blodgett v. Stowell, 189 Mass. 142, 144, 75 N.E. 138, 139 (1905);
In harmony with the modern sociological and humanitarian bias for equality between biological and adopted members of the same family and what appear to be present attitudes of donors, the Legislature reversed the policy of the 1876 statute by repealing the stranger to the adoption rule in 1958. As amended, Section 8 of Chapter 210 provided:

The word "child", or its equivalent, in a . . . devise or bequest shall include an adopted child to the same extent as if born to the adopting parent or parents in lawful wedlock unless the contrary plainly appears by the terms of the instrument.

The 1958 Act specifically recited that it "shall be applicable only to . . . devises or bequests executed after the effective date of this act."

In 1962, Perkins v. New England Trust Co. confirmed that the 1958 amendment was prospective only and did not repeal the stranger to the adoption rule with respect to instruments executed before August 26, 1958.

Chapter 27 of the Acts of 1969 further clarified, liberalized and gave some retroactive effect to the rule of construction. Section 2 of this statute provides:

The provisions of . . . [G.L., c. 210, §8], as amended by section one of this act, shall be applicable to all . . . devises or bequests whether the same were executed or effective before or after the effective date of this act provided that said provisions shall not apply to any such . . . devise or bequest which was executed or effective prior to . . . [August 26, 1958] with respect to any interests or right therein which had vested prior to the effective date of this act.


10 Id. §2. The act became effective on August 26, 1958, six months after its approval.


12 A new section was substituted for G.L., c. 210, §8 as amended by St. 1958, c. 121, §1 as follows: "Section 8. The words "child", "grandchild", "issue", "heir" or "heir-at-law", or their respective equivalents, in a . . . devise or bequest, shall include one who is adopted to the same extent as if born to the adopting parent or parents in lawful wedlock, whether the adoption was decreed before or after the date of execution or the effective date of any such . . . devise or bequest, unless the contrary plainly appears by the terms of the instrument."

13 Acts of 1969, c. 27, §3 made the act effective on September 1, 1969.
The viability of the pre-1958 rule involving a pre-1958 will was again a focal issue during the Survey year in Boston Safe Deposit and Trust Co. v. Fleming. The testator, a resident of Massachusetts, died in 1901 leaving a will, executed in 1899, in which he divided the residue of his estate into two equal portions. The first portion was to be held in trust to pay the income to his wife for life and upon her death the principal was to be added to the second portion if his daughter, Grace, was then living. If Grace was not then living, this portion was to be divided equally among six Boston charitable corporations. The second portion was to be held in trust to pay the income to Grace for life and upon her death the principal was to be paid to her "issue" then living, and if she had no "issue" then living the principal was to be divided equally among the same six charities.

Grace, who was twenty-two years old and unmarried at testator’s death, married in 1909, and she and her husband continuously resided in California from 1916 until they died. Grace and her husband adopted a one year old son in 1917 and in 1924 adopted a daughter, then six years old. They raised both adopted children in their household as their children. When the testator’s wife died in 1938 the principal of the trust held for her benefit was, as required by the will, added to the trust held for the benefit of Grace.

Grace died on January 5, 1969, survived by her two adopted children and no biological issue. A decree of the Probate Court ordering distribution of the trust principal to the six charitable corporations in equal shares was upheld by the Supreme Judicial Court by a four to three majority.

An earlier opinion representing the unanimous decision of a quorum of five members of the Supreme Judicial Court was released in April, 1971, and later recalled and replaced by the present opinion. The withdrawn opinion was written by Justice Braucher and in substance took the position of the present dissenting opinion.

Although it recognized the trend of recent legislative policy and public viewpoint to more fully equate adopted children with the natural-born, the majority of the Court felt compelled to decide that the pre-1958 rule was applicable. Since the will was executed and effective before August 26, 1958, the 1958 amendment by its express terms was inoperable.

15 Justice Cutter wrote the opinion of the Court. Justice Braucher wrote the dissent and was joined by Chief Justice Tauro and Justice Spiegel.
17 For other recent Massachusetts legislative developments making adopted children's rights correspond more closely to those of natural-born children see Acts of 1962, c. 273, amending the anti-lapse statute, G.L., c. 191, §22; Acts of 1965, c. 252, amending the intestacy law, G.L., c. 210, §7, so as to allow the adopted child to inherit from or through the adopting parent; Acts of 1967, c. 463, amending G.L., c. 65, §1, relating to tax rates and classes of beneficiaries to ascertain the amount of inheritance tax.
Nor was the 1969 Act to be applied because the trust terminated and the interests "had vested" prior to September 1, 1969, the effective date of the 1969 Act. The opinion cited a long line of cases applying the 1876 rule of construction to support its conclusion and emphasized Perkins v. New England Trust Co., with its refusal to make the post-1958 rule retroactive, as being directly in point.

The Court thought it to be clear that Massachusetts law and not that of California was determinative. The testator was domiciled in Massachusetts and his will made no reference to the law of any other state. The question to be decided was not one of the legal effect of the adoption under the laws of California but of the meaning of testator's Massachusetts will.

The adopted children contended that depriving them of benefits under the will denied them equal protection of the laws under the authority of Levy v. Louisiana and Glona v. American Guarantee and Liability Insurance Co. The Court relegated its answer to the space of a footnote, observing that these cases did not apply to the interpretation of a will and the legal effect of the words used.

The main thrust of the dissent was that the stranger to the adoption rule was created by the 1876 "fossil" statute, entirely out of harmony with the modern legislative policy expressed by the 1958 and 1969 amendments, and should therefore be confined to the fullest extent possible. The opinion pointed out that it would not reverse the many cases that were based on the pre-1958 laws because all of them involved contests between adopted children and blood relatives. Since the Fleming case was the first to arise in the jurisdiction dealing with a contest between charities and adopted children, the outmoded rule should not apply.

Special reliance was placed on a recent case, Moore v. Cannon. There, a pre-1958 will provided for a gift over "to those who would have been entitled to . . . [the] estate . . . had . . . [the adoptive parent] died intestate vested with title thereto." An adopted child was allowed to take on the

18 Many of which are cited in footnotes 5, 6 and 7 supra.
ground that the rule of construction for non-inclusion of an adopted child was rendered inapplicable by the language of the limitation.

The Court distinguished the cases having to do with pre-1958 transfers to “heirs.” The terms of the will in Moore referred specifically to the estate’s devolution under the intestacy law as it would have occurred if the adoptive parent had been vested with the title. This was not the equivalent of a gift to “heirs.” The Court declined to extend the previous cases involving gifts to “heirs” to the present case since “[n]o present policy (in view of the 1958 amendment of c. 210, §8 . . .) requires such an extension.”

In Moore, the intent to include adopted children appeared from the words of the will. The dissent in Fleming discovered a similar intent in the dispositive scheme: that charities rather than blood relatives of the testator would take if the adopted children were excluded.

If the Fleming case is to be distinguished from all the others on this issue solely on the ground that the contest was between adopted children and charities, it should be on the rational basis that the average donor would have different desires depending upon the identity of the alternate takers. Assume that a testator created a residuary trust to pay the income to his daughter for life and upon her death to pay the principal to such of her issue who survive her and if no issue should survive her than to the C charity. It would appear that the charity was to take by way of an end limitation only after the testator’s specific primary wishes to benefit his daughter and her issue have been exhausted. The will, at most, shows a preference for the charity over an intestate distribution. The dispositive scheme of the Fleming case was somewhat different. Under the specific terms of the will the first portion of the residue was to be held for the benefit of testator’s wife for life and upon her death the principal was to be paid to the six charitable corporations as alternative contingent remainderman if Grace failed to survive the testator’s

27 347 Mass. at 599, 199 N.E.2d at 315.

28 Under the terms of G.L., c. 210, §8 before the 1958 amendment a child adopted by the testator took “unless the contrary plainly appears by the terms of the instrument,” but if the testator was not the adopting parent, the adopted child did not take “unless it plainly appears to have been the intention of the . . . testator to include” such child. It may be argued, on the specific wording of the statute, that the “terms of the instrument” are required to rebut the final rule of construction and that any relevant extrinsic evidence may rebut the second rule.

29 There was testimony by the adopted son, subject to exception, that Grace told him on many occasions of numerous statements by the testator that he had no direct knowledge of the charities named in the will, and that they were suggested to him by the will draftsman as being reputable organizations. The judge also ruled inadmissible, as too remote, an offer of proof that the reports of three of the named charitable corporations failed to disclose the name of the testator as a contributor, officer or participant during his life. The dissent made no reference to this part of the record.
widow. The charities would get this portion whether or not biological issue of Grace survived the wife.\textsuperscript{30}

It is difficult to see how any meaningful distinction can be made between an end limitation to charities and one to the donor's heirs. In \textit{Perkins v. New England Trust Co.},\textsuperscript{31} a testator left a part of his residuary estate in trust for the benefit of his children and their issue. There was an ultimate gift over to the testator's "heirs at law" if the children were to die without leaving issue surviving them. The Court, finding no contrary intent, applied the pre-1958 rule, and gave the remainder on death of a child without natural children to testator's heirs instead of to the child's adopted child.

\textit{Perkins} also adopted a rule of construction ascertaining the "heirs" as of the date of the testator's death rather than the date set for distribution of the trust.\textsuperscript{32} One of the stated reasons for this canon of construction is "that such a mode of ascertaining the beneficiary implies that the testator has exhausted his specific wishes by previous limitations, and is content thereafter to let the law take its course."\textsuperscript{33}

The policy of a statute has been used to alter the fixed approach of the common law although the statute by its terms was to operate prospectively.\textsuperscript{34} In \textit{Fleming}, however, the policy of the 1958 and 1969 amendments did not change the common law but changed another statutory rule. These recent statutes expressed the explicit policy of non-retroactivity except to the extent specifically set forth. The dissent would emphasize the broad policy to treat biological and adopted children equally and downgrade the express policy of non-retroactivity. The "policy" of the law consists of legislative as well as judicial determinations.

The dissenting opinion, written by Justice Braucher, was sharply worded. It accused the majority of "perverse literalism" at four different times,\textsuperscript{35} of "linguistic demonstration"\textsuperscript{36} and "excessive devotion . . . to their own linguistic prejudices."\textsuperscript{37} Unlike his withdrawn opinion, which

\textsuperscript{30} The dissenting opinion made no reference to this point, but the withdrawn opinion considered it and dismissed it with the observation that "counsel were unable to suggest any rational explanation for that provision other than inadvertence on the part of the testator or the draftsman." 1971 Mass. Adv. Sh. at 651.

\textsuperscript{31} 344 Mass. 287, 182 N.E.2d 308 (1962).


\textsuperscript{33} Whall v. Converse, 146 Mass. 345, 348-349, 15 N.E. 660, 662 (1888).


\textsuperscript{36} Id. at 327 n.1, 279 N.E.2d at 349 n.1.

\textsuperscript{37} Id. at 332, 279 N.E.2d at 332. The apocryphal wise old lawyer who was reputed to have advised a newly-admitted member of the bar was, perhaps, later appointed to a court of review and gave similar advise to a neophyte judge. The wise old lawyer advised the young lawyer that in trying a case, if the law was
cited and quoted the traditional authorities in the form of cases, statutes and law review articles, Justice Braucher cited and quoted such sources as Wittgenstein, *Philosophical Investigations* (3d ed. 1969); Puffendorf, *Bentham and Carroll via Humpty Dumpty*.

§8.5. Interpretation of wills and trusts: Adopted child, vested rights.

The 1969 statute broadening the rule of construction relating to the inclusion of adopted children under the designation of "child" or its equivalent is, by its terms, to be given retroactive effect.1 This act, however, excepts from its application "any devise or bequest . . . executed or effective prior to . . . [August 26, 1958] with respect to any interests or right therein which had vested prior to the effective date of this act."2 (Emphasis added.) The meaning of "interests or right therein which had vested" is obscure. Use of the word "vest" to describe a property interest may imply a legislative concern with vested estates, present and future, as defined under traditional common law terminology used to classify estates. If this were so, the statute would not apply to vested remainders, but would include such future interests as contingent remainders and executory interests. It might also apply, with some doubt, to a vested remainder subject to complete or partial divestment.

"Classification of a future estate as "vested" or "contingent" may be based largely on the form of the limitation creating the estate with no regard to the substance or value of the property interest involved. A gift to A for life and upon A's death remainder to B if B survives A creates in B a contingent remainder because it is subject to a condition precedent of survivorship. But, if language in the form of a divesting condition subsequent were substituted, the gift over to B would be classified as being vested subject to defeasance. Thus, a transfer to A for life with a remainder to B, but if B should die in the lifetime of A then to C would give B a vested remainder subject to an executory interest in favor of C.3

It is obvious that the beneficial interest created in favor of B in either limitation is the same. It would not be reasonable to infer a legislative purpose to deal with B's interests in the two illustrations differently, and on his side, he should pound the law. But, if the law for his side was weak, he should pound the table. And, if both the law and facts for his side were weak, he should pound the table.

38 "[V]ether it's worth while goin' through so much, to learn so little, as the charity-boy said ven he got to the end of the alphabet, is a matter of taste," Dickens via Weller, *Dickens, The Pickwick Papers* 373 (Inner Sanctum Edition-Fadimore Ed. 1949).

§8.5. 1 G.L., c. 210, §8, amended by Acts of 1969, c. 27. See §8.4 n.12 supra. Section 2 of the act provides that it "shall be applicable to all . . . devises or bequests whether the same were executed or effective before or after the effective date of this act . . . ."

2 Acts of 1969, c. 27, §2. It became effective on September 1, 1969. Id., §3.

3 See C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY, c. 5, § 17C.
it may be significant that the proviso of the 1969 Act makes reference to vested "interests or right" rather than "estates." The substance and value of a future interest is not causally related to its classification under orthodox terminology. Indeed, a contingent remainderman may have a greater potential financial benefit than a vested remainderman.4

"Vest" has at times been used by courts to designate an attribute of a property interest which was the subject of controversy. The Massachusetts Supreme Judicial Court has described a transmissible contingent remainder as a "vested interest in a contingent right."5 In Clarke v. Fay6 the issue before the Court was whether a contingent remainder was assignable. The remainderman in question was to receive a portion of the principal of a trust if he, as a member of a class, survived the life tenant. He was to receive an additional portion if he later survived his aunts who should die without leaving issue surviving them. The Court ruled that so much of the trust fund that would devolve to the remainderman on his survival of the life tenant was alienable by him even though it was a contingent remainder. It pointed out that the remainderman was ascertained as a person who must inevitably take a portion of the principal, provided only that he was alive at the death of the life tenant. The remainderman's interest was said to be "more than a mere possibility, and was a 'vested interest in a contingent' right."7 As to the portion of the trust that might have devolved to the remainderman through an aunt, it was said to be "contingent in every respect" and amounted to "a mere possibility" and therefore inalienable. Unlike the first portion which the beneficiary would enjoy on the fulfillment of the single contingency of surviving the life tenant, the augmented share through the aunt would become possessory only if three contingencies were fulfilled. The terminology of this case used to describe the transmissible beneficial interest is similar to the language of the proviso in the 1969 statute.

The word "vest" may have a constitutional law connotation under the familiar principle that a statute may not abrogate a pre-enactment "vested right." To state that a vested right is protected from the operation of a retroactive law under the due process clause or because there would be an impairment of the obligation of a contract is, of course, simplistic and conclusory. Whether an existing right is beyond the reach of particular legislation depends upon several factors including the nature and strength of the public policy in the statutory goal, the nature of the right and the extent to which the statute in question would modify it.8

4 Id. See also Young v. Tudor, 323 Mass. 508, 511, 83 N.E.2d 1, 3 (1948).
6 205 Mass. 228, 91 N.E. 328 (1910).
7 Id. at 235-36, 91 N.E. at 331.
8 See Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 696-97. See also J. Scurlock, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND 8 (1953).
§8.5 TRUSTS AND ESTATES

To have a statute exclude only "vested rights" from its retroactive application may be the expression of a legislative purpose to include pre-enactment property interests to the full extent permissible under the state and federal constitutions.

The meaning of "vested rights and interests" in the 1969 Act was the major issue in Billings v. Fowler and Boston Safe Deposit and Trust Co. v. Dean. In Billings a testatrix, in a will executed and effective before 1958, created a trust to terminate 21 years after the death of her last surviving child. The income was to be paid to her children (two sons and a daughter) and to the issue of any deceased child by right of representation. If any child died without leaving issue surviving him or her, the deceased child's share of the income was to be paid to the surviving child or children and to the issue of a deceased child by right of representation; and if any child died leaving surviving issue and all such issue died before the date set for termination of the trust, the share of income of the deceased issue was to be paid to the surviving children and to the issue of a deceased child by right of representation. After the expiration of 21 years following the death of the last surviving child the trust principal was to be paid to the surviving children and to the issue of a deceased child by right of representation. Alive on September 1, 1969, the effective date of the statute, were testatrix's two sons and daughter, three children and six grandchildren of one son, a child of the daughter born in lawful wedlock and one adopted child (adopted in 1941 after testatrix's death) of the daughter.

The Court was asked to decide whether the adopted child was a beneficiary of the trust. There being nothing in the will to manifest an intent to include adopted children and since the testatrix was not the adopting parent, the pre-1958 rule of construction would exclude the adopted child. The Court was, therefore, directly confronted with the question whether the provisions for retroactivity in the 1969 statute were rendered inapplicable because "interests or right therein . . . had vested" in persons other than the adopted child before September 1, 1969.

After observing that the proviso of the statute could not fairly be

11 Testatrix's daughter (the adoptive parent) sought decaratory relief under G.L., c. 231A on the ground that controversy had arisen with respect to interests created by the will which had an important bearing upon her "immediate estate planning problems dependent upon whether . . . her adopted daughter is a beneficiary" under the will.

The Court ruled that such relief could be granted although no immediate present interest of a present life beneficiary would be affected—G.L., c. 231A, §9 provides that the chapter be "liberally construed" in order to "afford relief from, uncertainty . . . with respect to rights. . . ." See Old Colony Trust Co. v. Silliman, 352 Mass. 6, 223 N.E.2d 504 (1967); Copp v. Worcester County Nat'l Bank, 347 Mass. 548, 199 N.E.2d 200 (1964).
viewed as adopting the technical terminology of the classification of future interests with all of its subtle and sometimes purely formal distinctions, the Court ruled that at least some of the contingent remainders created by the will had vested within the meaning of the act, namely the interests of each of the biological children and grandchildren of the testatrix living before September 1, 1969. These interests were described as having "vested in right" because they were "substantial" and "have accrued to ... [the living biological children and grandchildren], subject only to total or partial defeat by biological events." Since the rights of the biological issue were vested, the 1969 statute did not operate to include the adopted grandchild as a trust beneficiary or remainderman.

On behalf of the adopted child it was contended that the objective of the 1969 Act was to broaden the post-1958 rule of construction and restrict the operation of the outmoded pre-1958 rule to the full extent it was constitutionally possible—that the "vested interest" beyond the retroactive reach of the statute should be limited to a possessory estate or a presently fixed right to future enjoyment in an ascertained person. Special reliance was placed on a Rhode Island case, *Prince v. Nugent*, involving a similar controversy. A 1956 Rhode Island statute expanding the rule of construction to include an adopted child within a limitation to lawful issue provided that the statute was to apply to any instrument whether executed before or after its enactment "unless the particular estate so limited shall have vested in and as to the person or persons entitled thereto on [May 8, 1956]." (Emphasis added). The Supreme Court of Rhode Island found that the legislative purpose was to affect all pre-enactment interests allowable under constitutional law. It stressed the nature of the statutory rule as one of construction rather than law—that the donor's expressed intent would be implemented. That Court stated that it was of the opinion "that the legislature intended that the word 'vested' be given the technical meaning it has in the law of property" and held that a remainder subject to a condition precedent of survivorship was not beyond the reach of the act.

*Billings* noted the difference in the terminology of the statutes of the two states: Rhode Island excepting an "estate ... [which] shall have vested," Massachusetts excepting "any interests or right therein which had vested"—the language of the Massachusetts statute being more comprehensive.

*Tirrell v. Bacon*, construing an earlier Massachusetts statute, was thought to be closer precedent. In the *Tirrell* case, the testator died in 1857 leaving the residue of his estate in trust to pay the income to his wife for life and upon her death to his children in equal shares. As each

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15 R.I. GEN. LAWS ANN. §15-7-16 (1956).
16 93 R.I. at 162, 172 A.2d at 751.
child died his share of the trust fund was to be distributed to his child or children then living and to the issue then living of any deceased child; and in default of any such child or issue to the heirs of the testator. One of the testator’s children received his share of the trust income until his death in 1879 leaving an adopted child (adopted in 1874) but no natural children surviving him. In 1876 the General Court enacted the statute creating the stranger to the adoption rule with the proviso “that nothing in this act shall be construed to restrict any right to the succession to property which may have vested in any person already adopted in accordance with the laws of this Commonwealth.”

The Federal Circuit Court held that the adopted child’s interest in the trust fund had vested within the meaning of the statute’s proviso and was, therefore, unaffected by the new rule of construction. Having made the observation that the adopted child’s gift was contingent upon his survival of his adoptive parent, the opinion nevertheless identified the interest as a “vested remainder, which opens to let in after-born children.”

The name which we may give to this interest of... [the adopted child] is not important, because, in my opinion, the proviso of the statute preserved all interests. It does not say that vested remainders shall be preserved and contingent remainders shall be destroyed; the word “vested,” in the proviso, qualifies “right” and not “property”... The “vested rights” which it preserves are all existing rights... It is not to be supposed that the law intended to destroy all contingent remainders and executory devises, and to preserve vested remainders alone. Such nicety of construction is not reasonable.

Billings v. Fowler left open the question of whether the legislature could have retroactively affected contingent remainders constitutionally. It found that there was no desire to do so by assuming that one of the reasons for the inclusion of the 1969 proviso “may have been to remove constitutional doubts about the validity of the 1969 amendment without it.” “Constitutional doubts” have arisen in a myriad of situations involving the modification of pre-enactment relationships with respect to property. Only recently was it decided locally that so tenuous an interest as inchoate dower could be abrogated despite strong earlier intimations.

19 3 F. at 64.
20 Id. at 65.
22 Many of these cases were cited by the Court. See 1972 Mass. Adv. Sh. at 389 n.9, 279 N.E.2d at 913. n.9.
The beneficial interests of the living biological issue in *Billings* would appear to be more substantial than the type of interest which is described as being "inchoate" according to common legal parlance.

In deciding that the 1969 act would not affect the interests of the biological children and grandchildren in existence at the date of its enactment, the Court seems to ignore the fine distinction of *Clark v. Fay* conceiving the number of degrees that a beneficiary may be removed from financial enjoyment. As in *Clark*, the grandchildren of the *Billings* trust would be entitled to the enjoyment of income by simply surviving the life tenant with the possibility of acquiring additional income later if further conditions were fulfilled. Nor does the Court take a stand on the question whether the interests of unborn natural issue would be affected by the statute, finding only that "[a]t least as to biological children and grandchildren of the testatrix, living prior to September 1, 1969." If the pre-1958 rule of construction were to be applied to the initial share of income only and to the interests of only those beneficiaries who were living prior to September 1, 1969, the same words—children, grandchildren and issue—would have two different meanings, a result the majority of the Court, in *Boston Safe Deposit and Trust Co. v. Fleming*, thought should be avoided.

The *Dean* case, decided on the same day, was much like *Billings v. Fowler*; and on the authority of *Billings*, the Court ruled that the interests (vested and contingent) of natural born issue, who were beneficiaries of a pre-1958 inter vivos trust and alive on September 1, 1969, were free from the reach of the 1969 statute. *Dean* differed from *Billings* in that biological issue alive at the date of the enactment of the statute were actually receiving trust income, and if an adopted child were to be included, their share of income would have been reduced. Because of this difference, the Court felt that it was an easier case to decide.

§8.6. Reciprocal wills: Contracts. Interrelating contracts with wills may cause conceptual difficulties. A contract is a bilateral transaction which cannot be modified unilaterally; while a will is a unilateral donative disposition which is revocable until death. Failure of some courts to determine the real expectation of parties to a contract to make a will has led to decisions which have imposed upon such contract and the will made in performance of it certain anomalous characteristics.\(^1\)


§8.6 TRUSTS AND ESTATES

A contract to devise property should be analyzed according to contracts principles. The essence of the agreement is the transmission of property on the death of the promisor and the manner of doing so, by will, is merely incidental. If the promisor fails to devise the property in accord with the terms of the contract the promisee should have the same remedies that would be available to the promisee of a contract to sell land in which the death of the promisor is the date set for performance.2 A contract to make a will should not be unilaterally revocable; and a will made pursuant to such contract should not become irrevocable.

Bettencourt v. Bettencourt,3 decided during the Survey year, was concerned with the uncommon situation of a will purporting to set forth the terms of a contract which would impose legal obligations upon the testator to dispose of property during his lifetime. A husband and wife simultaneously executed reciprocal, identical wills. The wife's will, after an exordium provided:

My husband, ... and I own as joint tenants the real estate and personal property described in the paragraphs below. ... We have agreed with one another, in consideration of identical promises of each to the other, that following the death of the first of us to die the survivor will dispose of said jointly owned property in the manner stated in said paragraphs. By this will, and by an identical will made today by my husband, each of us confirms the agreement and provides for the disposition of said property and of our respective interests therein as joint tenants and as a survivor in the manner stated in said paragraphs; and each of us agrees to execute whatever deeds or other instruments may be necessary to accomplish the agreed results.4

This was followed by five paragraphs describing separate parcels of real estate (owned in tenancy by the entirety) and giving such property to the testatrix's children and stepchildren.5

2 See Sparks, note 1 supra at 109-23.
4 Id. at 1072-1073, 284 N.E.2d at 240.
5 Four of the paragraphs referring to different parcels of real estate to go to designated children contained a final sentence like the following: "Promptly after the death of my husband, if I survive him, I will execute any deeds or other instruments necessary to convey the said property in fee to our said son..." Id. at 1073 n.4, 284 N.E.2d at 240 n.4.

The one paragraph of the will which purported to devise property at the death of the wife provided: "If I survive my husband, all the real and personal property which we owned jointly, including any of the properties described ... above the grantees of which shall have predeceased me, shall belong to me absolutely as survivor to do with as I see fit. I ... devise ... such part of said properties as I may still own at the time of my death, and also all other ... property which I may then own ... to our then living children ... the issue of any deceased child to take by right of representation." Id. at 1073 n.5, 284 N.E.2d at 240 n.5.
It appeared that the husband and wife had narrowly escaped several automobile accidents on a previous trip to California and that the reciprocal wills in question were executed the day before they left on another such trip following a decision to provide for the children if they should die on the journey. They separated in California, returned to Massachusetts and the wife commenced divorce proceedings but no decree was ever issued. The wife revoked her will during the proceedings. Later, the husband died and the children brought a bill in equity to compel the wife to convey to them certain parcels of land according to the terms of the agreement she made or confirmed in her will.

The Superior Court judge dismissed the bill. He found that the lawyer who drafted the will for husband and wife had told them they could change the wills at any time an "did not inform . . . [them] that he intended to draw a trust, or an agreement." Thus he concluded that the instruments were wills and, as such, the wife could revoke her will at pleasure.

The decree was reversed by the Supreme Judicial Court mainly for the reason that the lower court judge failed to directly consider the focal issue whether husband and wife had made or intended to make a contract. If so, the wife's obligations regarding disposition of the real estate upon the husband's death could not be extinguished by revocation of her will. The Court observed that the alleged contract was not one to make a will but one to make the inter vivos transfers set forth in the wills, an arrangement more clearly and easily effectuated by a carefully drafted trust instrument rather than a will. The reciprocal wills, however, not only made sufficient references to a contract to satisfy the requirements of the Statute of Frauds but also purported to describe the specific agreement with particularity. The agreement seemed to be fair and natural for a wife to make with a husband with the same family situation and there was nothing to imply that it was subject to a condition that a harmonious marriage continue to exist.

Despite the manifestations of the existence of a binding contract or perhaps an inter vivos trust, the Court felt that the parol testimony raised sufficient doubts as to the real expectation of the parties—

6 Id. at 1072, 284 N.E.2d at 240. This appeared as testimony of the wife without any exception being saved. The wife gave further testimony, also without exception, that she believed that she could change the will at any time and that the "will was made up specifically for our trip to California, with the understanding that I could change or do anything that I wanted to with it at any time if I was able to get back." The lawyer's testimony contradicted this. Id. at 1074, 284 N.E.2d at 240-41.

7 G.L., c. 259, §1 (contract for the sale of land). The Court felt that G.L., c. 259, §5 (contract to make a will) was not applicable because the agreement was not one to make a will.

8 Although the anticipation of death while on the specific journey may have been the reason for the making of the reciprocal wills, the wills should not be treated as being conditional. See Eaton v. Brown, 193 U.S. 411 (1904).

9 Note 6, supra.
references to the agreement in the wills may have reflected "an informal intra-family understanding subject to alteration at the will of the parties." Although the evidence was before it, the Supreme Judicial Court determined that it should not resolve the question since there was contradictory testimony involving the credibility of witnesses. It therefore remanded the case for a new trial so that there could be specific findings on all the critical issues.

The plaintiffs' standing to maintain the suit was also questioned. It was argued that they were attempting to sue on a contract as third party beneficiaries, a procedure prohibited by long-standing Massachusetts precedent. In its discussion of this issue the Court made reference to its recently-expressed doubt as to the soundness of any general rule preventing enforcement of third party beneficiary contracts. It also suggested that the instant case might fall within a recognized exception to the general rule because the plaintiffs were all in an intimate family relationship to the promisor. It made a further observation that the action brought by the plaintiffs was in part a proceeding for declaratory relief under a statute which, by its terms is to be construed broadly, and the plaintiffs might be entitled to a binding declaration of their rights under the agreement despite the lack of the availability of the particular relief sought.

At any rate, the Court stated that it didn't have to resolve the procedural problems in the case before it. One of the plaintiffs was the executor under the will of the husband, who, as such, was a party to the contract reflected in the reciprocal wills. This plaintiff, qua personal representative of the husband's estate, might enforce the wife's (defendant's) obligation under the contract, and the Court expressed its desire that this plaintiff be allowed to amend the bill of complaint so as to become a party plaintiff in his capacity as executor.

§8.7. New Regulation: Short statute of limitations, creditors. Massachusetts General Laws relating to the enforcement of claims of creditors

11 The issues were stated to be "(a) whether the parties intended to make a binding contract; (b) the duration of any such contract (e.g. until changed by mutual assent, or for a reasonable time, or for the period of the then proposed trip); (c) the terms of any such contract, and the extent to which the two wills constituted an integrated expression of such a contract; and (d) whether the parties entered into any such contract because of some mutual mistake." 1972 Mass. Adv. Sh. at 1078-1079 n.13, 284 N.E.2d at 243-44 n.13.
of deceased persons have recently been subject to piecemeal amendments with a lack of concern for their effect on interrelating sections. In 1969 the time within which an executor or administrator may not be answerable to an action by a creditor was reduced from six to three months from the date the bond is given. But, the statutory protection afforded the personal representative in delaying the payment of debts for six months from the date his bond was approved remained intact.

In 1971 the statute of limitations barring claims of creditors of deceased persons was reduced from one year to six months from the time of the filing of the personal representative's bond. Although the goal of the amendment, to expedite the administration of decedents' estates, was laudatory, administrative efficiency was impaired. The personal representative would be reluctant to pay the claims of general creditors within six months unless he was absolutely certain that the estate was solvent and the creditor would be forced to actually institute suit within the six month period in order to preserve his rights. To save creditors from this burden, Chapter 256 of the Acts of 1972 further amended the statute of limitations relating to claims against the deceased by increasing the period of time within which the executor or administrator may be sued from six months to nine months.

Chapter 298 of the Acts of 1972 adds one exception to the short statute of limitations by allowing actions for personal injuries or death to be commenced up to two years after such cause of action occurs; but, if such action is commenced more than six months after the executor or administrator files his bond, any judgment may be satisfied only from the proceeds of an insurance policy or bond and not from the general assets of the estate. Utilization of a six month period seems to be inconsistent with the adoption of the new nine month period in Chapter 256 of the Acts of 1972.

§8.8. New legislation: Real estate, expense of administration. Although title to real estate passes directly to the heir or devisee on the


2 G.L., c. 197, §2 provides: "If an executor or administrator does not within six months after approval of his bond have notice of demands against the estate of the deceased sufficient to warrant him to represent such estate to be insolvent, he may, after the expiration of said six months, pay the debts due from the estate and shall not be personally liable to any creditor in consequence of such payments made before notice of such conditions demand."


4 Note 2, supra.

5 Amending G.L., c. 197, §9.

6 G.L., c. 197, §9 further provides that the "probate court may allow creditors further time for bringing actions, not exceeding one year from the time of the giving of his official bond by such executor or administrator, provided that application for such further time be made before the expiration of six months from the time of the approval of the bond."

7 Amending G.L., c. 197, by adding §9A.
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section of the trust estate.

owner’s death, the land may be sold at any time to satisfy claims against the decedent or his estate. However, where there has been a duly recorded conveyance or mortgage for value and in good faith by an heir or devisee, a Massachusetts statute gives protection to the transferee at the end of one year from the time that the personal representative files his bond. Exempt from the application of this statute are claims for taxes, legacies and administration expenses. Chapter 491 of the Acts of 1972 provides that real estate conveyed or mortgaged by a duly recorded instrument shall not be available for the payment of administration expenses at the end of six years from the time that the personal representative gives his bond.

§8.9. New legislation: Interest on legacies, trust distributions. Interest on a pecuniary legacy begins to run from the time at which the legacy becomes payable. Ordinarily, legacies are deemed to be payable one year from the testator’s death, but if the will provides for a different date for payment, such date controls. Interest accrues from the date the legacy is payable even though the will may not be probated and the personal representative may not qualify for several years after the testator’s death. The only statute relating to interest on legacies does no more than establish the rate of interest in the absence of rules that may be promulgated by the Supreme Judicial Court.

This statute was amended by Chapter 448 of the Acts of 1971, which makes pecuniary distributions under trust instruments as well as legacies subject to the statutory rate of interest unless the wills and trust instruments provide otherwise. The amendment also sets the time at which interest begins to run as being the date of the expiration of the period within which creditors may bring actions against an executor or administrator or six months from the date upon which the distribution is required by the trust department, unless the will or trust instrument provides otherwise.

§8.10. New legislation: Charitable trusts, private foundations. The Tax Reform Act of 1969 imposes upon trustees of “private foundations” new duties with stiff penalties levied upon the trusts and their managers if these duties are violated. There are very strict rules against self-
dealing which may subject the foundation and its manager to a penalty tax. Excess business holdings, investments which jeopardize the charitable purpose, the making of certain taxable expenditures and the failure to make specified distributions each taxable year give rise to a liability for additional excise taxes.

Section 508(e) of the Internal Revenue Code provides that a private foundation shall not be exempt from income taxation unless its governing instrument includes provisions which require or prohibit the above-mentioned acts causing imposition of the additional excise taxes. Under a new regulation a private foundation's governing instrument shall be deemed to have been amended to meet the requirements of section 508(e) if states enact corrective legislation. Such legislation was enacted by Chapter 367 of the Acts of 1971. Chapter 367 expressly refers to the requirements of the Internal Revenue Code which must be met in order to prevent the levy of additional taxes upon a private foundation and imposes a duty on the foundation to meet these requirements. The statute provides that it shall not apply to any trust to the extent that a court of competent jurisdiction shall determine that such application would be contrary to the terms of the instrument governing such trust and that the same may not properly be changed to conform to the requirements of the statute.

§8.11. New legislation: Lapsed legacies: Meaning of "relation," adopted children. The word "relation" in the Massachusetts anti-lapse statute has been construed to mean relation by blood. Recent amendments have included adopted children within the designation of "child"

7 Int. Rev. Code of 1954, §§4943(a), 4944(a), 4945(a), 4942(a).
8 1.508-3(d) (adopted 12/21/72 by T.D. 7232).
9 Adding G.L., c. 68A.
10 Amending G.L., by inserting c. 68A.

§8.11. 1 G.L., c. 191, §22, which provided: "If a devise or a legacy is made to a child or other relation of the testator, who dies before the testator, but leaves issue surviving the testator, such issue shall, unless a different disposition is made or required by the will, take the same estate which the person whose issue they are would have taken if he had survived the testator. The words 'child', and 'issue', as used in this section shall include adopted children.

2 See Worcester Trust Co. v. Turner, 210 Mass. 115, 96 N.E. 132 (1911), holding that testator's sister-in-law was not a relation within the meaning of the statute. See also State Street Trust Co. v. White, 305 Mass. 547, 26 N.E.2d 356 (1940) holding that testatrix's husband was not a relation. He was also a cousin of the testatrix, but the Court found that the testatrix made a gift to her husband as such, and not to him as her cousin.
and "issue." The Acts of 1971, Chapter 411 further amended the statute so as to provide that the words "other relation" shall also include adopted children. It would appear that a bequest to a child adopted by any blood relative of the testator would come within the scope of the amendment.

§8.12 Other legislation. Section 19 of Chapter 197 of the Massachusetts General Laws, authorizing a legatee to recover his legacy by proceedings in equity in the Probate Court, imposes no time limit within which such proceedings may be brought. It does, however, provide that real estate of the testator shall not be liable to be sold for the payment of a legacy as a result of such a proceeding unless the suit is filed in the Probate Court within twenty years from the date of the testator's death. Chapter 750 of the Acts of 1972 amended Section 19 by changing the twenty year period to six years. If the testator died within six years of the effective date of the act, the proceeding must be brought within twenty years from the date of the testator's death or December 31, 1974, whichever date is earlier.

Chapter 711 of the Acts of 1972 removes the requirement of notice for executors or administrators of deceased depositors of special notice accounts.

Chapter 291 of the Acts of 1971 lowers the age at which a person may make a will from twenty-one years to eighteen.

Chapter 405 of the Acts of 1972 increases the total value of an estate, consisting entirely of personal property, that qualifies for informal administration from one thousand to two thousand dollars.

Chapter 269 of the Acts of 1972 authorizes the appointment of a conservator to have charge and management of the property of a person declared missing in action or a prisoner of war while serving in the armed forces of the United States.


§8.12. 1 Amending G.L., c. 167, by inserting §48B.
2 Amending G.L., c. 191, §1.
3 Amending G.L. c. 195, §16.
4 Amending G.L., c. 201 by adding §16A.
5 This amendment satisfied a need. G.L., c. 201, §16 requires "advanced age" or "mental weakness" for the appointment of a conservator.

The "absentee" statute (G.L., c. 200) might have a possible limited application. It authorizes the appointment of a receiver to take possession of property of a person who "has disappeared or absconded" and "it is not known where he is." G.L., c. 200, §1.