

1959

Tracy-Collins Trust Co. and Vilate P. Devine v.  
Marguerite Gessford Pierpont and Ella P. Meyer :  
Brief of Respondent

Utah Supreme Court

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Morgan and Payne; Attorneys for Respondent;

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## In the Supreme Court of the State of Utah

IN THE MATTER OF THE ESTATE OF  
THOMAS FAIRCLOUGH PIERPONT, De-  
ceased

TRACY-COLLINS TRUST COMPANY and  
VILATE P. DEVINE,

Appellants,

vs.

MARGUERITE GESSFORD PIERPONT  
and ELLA P. MEYER,

Respondents.

CASE  
NO. 9022

FILED  
OCT 19 1959  
Clerk, Supreme Court, Utah

### Brief of Respondent, Marguerite Gessford Pierpont

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IN THE MATTER OF THE ESTATE OF  
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TRACY-COLLINS TRUST COMPANY and  
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Appellants,

vs.

MARGUERITE GESSFORD PIERPONT,  
and ELLA P. MEYER,

Respondents.

**CASE  
NO. 9022**

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## **Brief of Respondent, Marguerite Gessford Pierpont**

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### **STATEMENT OF CASE**

In lieu of unnecessarily repeating, the Statement of Case contained in Appellant's Brief at Pages 1 to 5 is incorporated herein and hereby referred to in particularity.

## STATEMENT OF FACT

Also, to prevent repetition, the Statement of Facts contained in Appellant's Brief at Pages 5 to 9 is incorporated herein and referred to as being essentially correct together with the following changes and additions.

That the testator, Thomas Fairclough Pierpont, had been ill, requiring major operations making him so he could not speak and an invalid for a considerable time before he made his Will on February 15, 1954, and finally died on September 14, 1954 (R. 98). That during this time, the testator was left to the sole care of his widow, Marguerite Gessford Pierpont, who constantly nursed and attended him day and night and she, continuing as the private secretary ( for many years past) of testator, assisted him with his many and troubled business affairs (R. 369 to 371). That testator intended to leave his widow financially independent, as is clearly manifested by the Will itself, in appreciation for her kind and faithful services and because his said widow is not related to any of the other legatees or heirs of testator.

On October 7, 1954, the widow elected not to take the monetary bequest of \$20,000.00 provided by Paragraph Eighth of the Will in lieu of the bequests and benefits of Paragraphs Second and Seventh of said Will (R. 203, 214, 236-237, 333). The testator's Will was duly admitted to probate October 22, 1954 (R. 23-29).

The Executor petitioned for a family allowance (R. 73) of \$250.00 per month to reasonably maintain said widow and her home in a proper manner and this petition was approved without any objections December 17, 1954, even

though apparently there were no "liquid" assets available for such payment." (R. 95-96)

On December 23, 1954, the widow renounced her statutory share of her husband's estate and elected to take under the Will (R. 92).

The gross estate of decedent testate approximates one-third million dollars valuation, and the net estate after payment of all debts, taxes and expenses of administration and all specific bequests and legacies other than to respondents herein was \$158,339.22. There has been no showing at any time of any inability herein by the Executor-Trustee, Tracy-Collins Trust Company, to pay the annuities and payments specified by the Will. On the contrary, the said residue now consists of liquid assets and the Executor-Trustee has been able to collect accounts due and to borrow large sums of money (\$70,000.00) at four to five percent interest unsecured on the assets of said estate and has never been in danger of having to sell or liquidate at a sacrifice any of the property of testator (R. 208-213, 297-305, 336).

That the Executor-Trustee has without right withheld payments of the annuities to the widow, Marguerite Gessford Pierpont, and to the sister of testator, Ella P. Meyer, and has caused the accrual of interest thereon without fault of the annuitants even though the Court first interpreted the Will as to the payment of said annuities as early as October 25, 1957, in favor of respondents herein (R. 319).



**STATEMENT OF POINTS****POINT 1**

THAT IF THE COURT FINDS THE WILL AMBIGUOUS OR UNCERTAIN IN ITS TERMS OR MEANING, EVIDENCE SHOULD BE ADDUCED TO SHOW THE INTENTION OF TESTATOR.

**POINT II**

THE WILL SHOWS AN INTENTION THAT PAYMENTS UNDER SUBPARAGRAPH SEVENTH (i) SHOULD COMMENCE FROM THE DATE OF DEATH OF TESTATOR.

**POINT III**

THE WILL SHOWS THAT THE TESTATOR DID NOT INTEND TO POSTPONE THE PAYMENTS PROVIDED UNDER SUBPARAGRAPH SEVENTH (i) UNTIL THE ESTATE WAS DISTRIBUTED TO THE TRUSTEE.

**POINT IV**

THE PAYMENTS UNDER SUBPARAGRAPH SEVENTH (i) OF THE WILL ARE ANNUITIES AND ARE CONTROLLED BY SECTION 74-3-14, UTAH CODE ANNOTATED 1953.

**POINT V**

THE COURT DID NOT ERR IN HOLDING THAT INTEREST BE PAID TO RESPONDENTS ON THE AMOUNTS DECREED TO BE DUE THEM.

## ARGUMENT

The whole problem in this case is typified by the meaning of the words "during her lifetime" in paragraph 7 (i) referring to respondents, Marguerite Gessford Pierpont and Ella P. Meyer. According to appellants, these words "during her lifetime" do not speak as of date of death of testator but rather are indicative to the trustee only to pay such payments after the estate assets are physically delivered to the trustee. Not only this artifice is maintained, but the trustee also claims that the testator only "desired" certain payments be made to his widow and sister during their lifetimes and that therefore the trustee is not required to make such payments if it should be against the discretion of trustee to make such payments or to make up such payments if suspended. It should be remembered that the Executor and Trustee herein are identical and that the claim of inability to pay payments from the trust assets until received by the trustee is a sham. The trustee is maintaining in behalf of certain of the residuary legatees against the specific annuitants receiving about three years of monthly payments in the face of the obvious wording and intent of the testator even though there are ample funds available. If the trustee is correct, then the annuitants (respondents) could have been deprived of their payments for 5, 10, or more years merely by the device of failing to settle the estate and refusing indefinitely to transfer on their books the assets from the Executor to the Trustee and insisting that the trust and Trustee were not yet in existence. Certainly the widow, who had the elections to not take under the Will or to take \$20,000.00 cash in lieu of other benefits, would not have been so anxious to

make her election to take under the Will and the trust if she had known the contrary intent and arbitrary powers of "discretion" claimed by the Trustee herein in not making the payments or in not making up suspended payments even when adequate funds are available and especially when there is no showing by the Trustee of inability to get funds to make such payments under paragraph 7(i) of the Will and without "sacrificing" the estate as warned by the testator in paragraph 7 (k).

The Will of testator manifestly provides first and foremost for the security and well-being of the widow. To favor residuary legatees now as against the clear intent of testator to give the widow \$250.00 per month during her lifetime is unconscionable, especially where the estate is ample and should earn sufficient income on approximately \$150,000.00 principal to more than pay the annuities provided for the widow and sister of testator. The decedent knew the extent of his holdings and property and the extent of the charges to be made under his Will. He also knew that his sister was aged and in poor health (R. 363) and would not probably live much longer than the testator himself. The widow would be cut off from her annuity if she should re-marry and therefore receive her support elsewhere or if she should take the \$20,000.00 cash under Paragraph Eighth. It is significant that paragraph 7 (i) instructs that the Trustee **shall** make disbursements "From the income of the Trust Estate and, if insufficient, from the principal thereof," indicating the full extent to which the testator was willing to go to see that these monthly payments would be made. To adequately provide for the widow and sister for their dependent lifetimes was reasonably uppermost in his mind.

Paragraph 7 (k) is interesting for analysis. It provides that if income is insufficient and principal funds are not available that the Trustee "may" reduce and if necessary "may suspend" further payments until funds become available through income or through orderly sale of all or part of the principal assets, but in the event any payments specified to be made by Trustee shall be so reduced or suspended, when funds become available, any so resulting deficiencies shall be made up. Also, the subparagraph provides that the Trustee shall not sacrifice the assets for sale "to meet the payments specified in this Will" but the Trustee is informed that principal assets should be liquified to enable the Trustee "to make the payments specified hereunder." (Boldface ours.) Now any reasonable man would know that monthly payments cannot be made if "income is insufficient" and "principal funds are not available." But how Trustee interprets this section to mean that just because the assets should not be sacrificed by Trustee gives him the discretion not to make up the payments is incomprehensible when more than adequate funds have become available for making up such deficiencies. Can it be said from the wording of this subparagraph that the testator intended that any so resulting deficiencies should not be made up when funds became available? Certainly not. The only purpose of the paragraph is to prevent a sacrificing of assets. There is no language of absolute direction in subparagraph 7 (k) except to possibly avoid sacrificing of assets. Nobody would want his estate sacrificed anyway, but this surely does not make the other statements of the subparagraph discretionary with the Trustee contrary to the voiced intention and desire of testator to make up deficiencies when funds become available! In re

Pittocks Will, 102 Ore. 159, 199 Pac. 633, cited by appellants, was a case of directly contrasting language of a direction followed by a desire (the desire being ruled not mandatory) where in Pierpont's Will subparagraph 7 (k) we have permissions to reduce or suspend payments in emergencies and a desire to make up deficiencies followed by a direction not to sacrifice the estate. It is not the same! Besides, in the Oregon case, the two instructions, one directory and the other requesting, were in conflict and detrimental to interests of the trustees as directors of the Oregonian Publishing Company and would thus become contrary to intention of testator. There is no conflict in 7 (k) of Pierpont's Will neither is there any detriment suffered when the clear intention of testator is to make specified monthly payments to respondents and to make up any emergency deficiencies when funds become available.

Some point has been made that the widow is getting her family allowance in addition to the claimed annuity during her lifetime. It should be pointed out that a family allowance to a widow during administration is an absolute right—even where a portion of the estate has been set aside as her share of the estate. See *In re Pugsley*, 27 Utah 489, 76 Pac. 560. See 74-3-3, U. C. A. 1953, which treats a family allowance as a debt of administration and a charge on the property of estate on a priority basis. Also see 75-8-1, U. C. A. 1953, stating that a surviving wife is entitled to such allowance out of the estate as may be necessary or reasonable for support which may date from death of decedent and is a preference to all other debts except the last illness, funeral expense and expense of administration. The Pierpont Will sets out the amount of the fam-

ily allowance that is reasonable but it is a debt of administration and not a legacy or bequest as is the monthly annuity "during her lifetime." See also 74-2-6, U. C. A. 1953, which states that a clear bequest cannot be changed by inference or argument from another part of the will.

It should also be noticed that Paragraph Eighth of said Will provides after the trust paragraph Seventh that Marguerite Gessford Pierpont has the election to take a cash bequest of \$20,000.00 in lieu of any benefits under paragraphs Second and Seventh and thus recognizes the right of the widow to the family allowance of \$250.00 per month during administration provided in Paragraph Sixth. Thus, the widow would have collected \$20,000.00 cash and her family allowance of \$250.00 per month for three years of administration in lieu of furniture, car and lifetime annuity. (She already got the home on Shakespeare Avenue by survivorship of a joint tenancy with deceased (R. 172). The widow would have been entitled to her family allowance if she had elected not to take under the Will at all, but she elected to take under the Will after her family allowance was ordered and she had to make her election in this instance and under the Will provisions before distribution to the Trustee of the residue. Where is there anything in the Will to indicate that testator intended the widow **not** to have her annuity in addition to the family allowance? The widow is entitled to family allowance by statute regardless of provisions of the Will, and she would have been entitled to a widow's allowance even if the Will had provided for none.

The sister, Ella P. Meyer, under paragraph 7 (i) is to receive \$100.00 per month during her lifetime the same



as the widow is to receive from income and principal, if necessary, during her lifetime \$250.00 per month. The wording is the same for both and should mean the same for both. Where wording occurs more than once in a Will it is presumed to have been used in the same sense and this rule applies with double force where the wording is found in two sentences in immediate succession. In *re* Murphy's Estate, 99 Montana 114, 43 Pac. 2nd. 233. The widow and sister should be treated alike in both receiving their annuities from testator's death date as it is obvious the testator intended the sister to have the monthly income for the short time she might survive him and she is not provided any family allowance. It is interesting also to note that testator provided that the monthly payment would cease upon re-marriage of the widow. How could such payments cease upon re-marriage during administration if it were not intended that such payments should commence before distribution to the Trustee, namely, upon testator's date of death?

Also it is interesting to note precatory language (and the rule in *re* Pittock's Will cited above by appellants) of subparagraphs 7 (i) and 7 (j) where 7 (i) and 7 (j) are similar in stating "from income or principal" my Trustee, "subject to the provisions of subparagraph (k) of this Paragraph Seventh," and are dissimilar in 7 (i) stating "shall" made disbursements (of annuities) and 7 (j) saying "may" make disbursements for emergency needs of certain heirs. Applying the rule of Pittock's Will, paragraph 7 (i) is mandatory and 7 (j) is permissive or advisory.

Even allowing the interpretation of the wording of the Will as presented by appellants, the application of the

legal principles cited in the cases will not allow any practical outcome of this case different from the ruling of the lower court, as will be shown in the law cited in the following Points.

#### POINT 1

THAT IF THE COURT FINDS THE WILL AMBIGUOUS OR UNCERTAIN IN ITS TERMS OR MEANING, EVIDENCE SHOULD BE ADDUCED TO SHOW THE INTENTION OF TESTATOR.

The Findings of Fact and Conclusions of Law and the Judgment and Decree interpreting said Will herein (R. 460-472) are based upon the ruling in effect that evidence as to testamentary intent would be admissible if at all only if the Will was ambiguous and no ambiguity was found (R. 462, 469). If on this appeal it is determined that there is ambiguity in the Will, the cause should be remanded for the taking of evidence as to testamentary intent as offered by respondents (R. 369-371) and Transcript of Proceedings on June 30, 1958.

The respondent, Marguerite Gessford Pierpont, feels that the Will is clear and unambiguous and that the intention of testator was to provide a monthly annuity from the date of testator's death. *Mitchell v. Reeves*, 196 A. 785 (Conn), 115 ALR 1114, holds: What a testator meant by what he said, and not what he meant to say, is the question involved in interpreting a will. To the same effect of construing a will according to legal effect of words used is the case of *In re Beal's Estate*, 117 Utah 189, 214 Pac. 2nd 525.

When resort is had to written instrument alone, the



interpretation of the trial court, if reasonable, will be accepted by the appellate Court, or if that interpretation is one of two reasonable views, it will be followed. In *re Platt's Estate*, 21 Cal. 2nd. 343, 131 Pac. 2nd 825; In *re Northcutt's Estate*, 16 Cal. 2nd 683, 107 Pac. 2nd 607.

## POINT II

THE WILL SHOWS AN INTENTION THAT PAYMENTS UNDER SUBPARAGRAPH SEVENTH (I) SHOULD COMMENCE FROM THE DATE OF DEATH OF TESTATOR.

The judgment appealed from awarded the \$250.00 monthly installments of annuity to the widow, Marguerite Gessford Pierpont, together with interest thereon until paid for the period from September 14, 1954, when testator died, to October 18, 1957, when the residue of the estate was distributed to the Trustee (R. 471) and said judgment awarded the sister, Ella P. Meyer, a similar judgment for her said \$100.00 monthly payments for said period of administration.

There is nothing difficult about this problem of when the trust vests, especially when the Will contains the period denoted for the payments to be paid "during her lifetime." Sec. 74-2-25, U. C. A. 1953, says: "Testamentary dispositions, including devises and bequests to a person on attaining majority, are presumed to vest at the testator's death." The statute answers the question. A Utah case on this statute also destroys in Utah the fiction of the separation between Executor and Trustee as to their powers and duties—In *re Lowe's Estate*, 68 Utah 49, 249 Pac. 128. This case holds that a beneficiary with power to

change trustee under Will is entitled to make such change before distribution of the property to the Trustee from the Executors. The appellant Trustee contended since it did not have possession from distribution of the trust property, the testator could not have intended for the beneficiary to have the power to substitute Trustee and require transfer of trust property to new Trustee until distribution of the property from such Executors to the testamentary Trustee.

The court also held in the Lowe case that since under the statute (74-2-25 U.C.A. 1953) **all** testamentary dispositions are presumed to vest at the testator's death and there was nothing in the Will to indicate an intention on the part of testatrix that the vesting of the bequests and devises made therein should be postponed beyond her death, that the Trustee should divest itself of the title to the **trust property which testatrix knew would vest in her Trustee at the moment of her death.** And this was true even though no distribution had been made from Executor to Trustee and the wording of Will was that the testamentary Trustee should transfer and convey all of such **property at the time in its hands and possession** to such other trust company as her said daughter might designate in writing.

Title under a testamentary trust vests as of the date of death of testator and Trustee's title and that of the beneficiary vest as of that date, and a life tenant is therefore entitled to income from date of death of testator as an incident of that title. In re Hyland's Estate, 58 Cal. App. 2nd 556, 137 Pac. 2nd 73, 75.

Where will created trust which gave income to beneficiaries for life, beneficiaries were entitled to income from the date of testator's death, notwithstanding fact that trustees of such trust had not received the corpus from the

executor till some time thereafter. In *re Schiffman's Estate*, 86 Cal. App. 2nd 638, 195 Pac. 2nd 484, 488.

In the absence of a provision in the will otherwise, the legatee of a monthly annuity was entitled to payments from the date of death of the testator together with interest on all unpaid amounts from the date accrued. In *re Luckel's Estate*, 151 Cal. App. 2nd 481, 312 Pac. 2nd 24, 31.

See also Section 234, comments a, b, e, f, and g, Restatement of Trusts, 2nd, where beneficiary is entitled to income from date of death of testator and this rule is applicable to trusts created by residuary bequest and it is immaterial whether the same person is designated as executor and trustee.

In *Pierpont's Will*, not only is income given to the life annuitants for disbursement thereof, but if income is insufficient to complete the payments, the corpus or principal shall be used when funds become available without sacrificing said estate assets. **A fortiori** the payments provided in *Pierpont's Will* are payable from date of death of testator. This is the only consistent viewpoint with the use by testator of the phrases "during her lifetime."

In *re Platt's Estate*, cited *supra*, deals with nearly all of the problems concerned in this *Pierpont Will* and appeal and this case follows the rule of the Restatement, Section 234, Trusts, also cited above. Platt holds that the trust vests at testator's death. See also *Estate of Hill*, 149 Cal. App. 2nd 779, 309 Pac. 2nd 39; and *Estate of Dare*, 196 Cal. 29, 35, 235 Pac. 725, where the allocation of income is to be made by the trustee, not the executor, even though they may be the same person. And see *Will of S. C. Leitsch*, (Wisc.) 201 N. W. 284, 37 A. L. R. 547, which states the

great weight of authority that a bequest of a life estate in a residuary fund, or some aliquot part thereof, if no time is prescribed in the will for the commencement of the interest or the enjoyment of the use or income of the residue, the legatee for life is entitled to the interest or income . . . . . from the death of testator.

State Bank of Chicago vs. Gross, 344 Ill. 512, 176 NE 739, 75 ALR 172, while holding payments are due from date of death of testator also holds that the executor may pay these amounts directly to the beneficiaries without waiting to transfer the residue or specific fund to the trustee and that for trustee to withhold payments until distribution of residue to trustee "would be to enrich the residuary legatee by income from the trust fund which would not properly belong to the residuum of the estate." Also, the creation of the trust is not "fixed by the time the executors actually delivered the trust funds to the trustee, or, if executors and trustees were one, the time when they segregated the trust funds or made appropriate entries on their books."

### POINT III

THE WILL SHOWS THAT THE TESTATOR DID NOT INTEND TO POSTPONE THE PAYMENTS PROVIDED UNDER SUBPARAGRAPH SEVENTH (I) UNTIL THE ESTATE WAS DISTRIBUTED TO THE TRUSTEE.

The argument against paying the annuity to the widow because she already got a family allowance has been argued hereinabove. How about the sister who got nothing on her annuity for over three years? The trustee's position is not fair and it is trying to act as sole judge as

to who is entitled to what payments under the Will and is selfishly withholding from the chief beneficiaries the residue for its own interests as Trustee and in favor of remaindermen all contrary to the explicit wishes and intentions of testator. In *re Ferrall's Estate*, (Cal.) 248 Pac. 2nd 108, 112, holds that if there is any doubt or uncertainty about the intention of the settlor in a trust, it will be construed, if possible, in favor of the beneficiary and against the trustee. This was a case where trustee did not invade principal of trust for beneficiary where income was insufficient for her needs even where she had adequate outside income and trustee had discretion to invade principal or not. "The mere fact that the trustee is given discretion does not authorize him to act beyond the bounds of a reasonable judgment." "Whenever exercise of a trustee's discretion, absolute or otherwise, is challenged, the basic inquiry is whether trustee acted in state of mind contemplated by the settlor."

The way the appellants balloon the figures as to the share of the widow and sister over a period of future years (Appellants Brief Pg. 23 and 40) you would think they resent these payments because it may deplete the estate 8.91% plus. Futurity means nothing for the sake of argument. The widow may re-marry or the widow and sister may die. It is manifest, however that if Trustee has its unchecked "discretion" the widow would have been far better off to take her \$20,000.00 and her widow's allowance rather than the annuity. The Trustee should not escape responsibility for withholding the annuity payments and the accruing interest owing thereon. This situation has been largely created by the Trustee and litigious heirs, not the respondents herein. If a large unpaid sum builds

up which may go to the heirs and representatives of annuitant, that is the fault of the Trustee for not paying the sums to the widow and sister monthly as needed for their maintainance and as intended by the testator.

109 A.L.R. 717 et seq. states that where a monthly or yearly installment is given to a beneficiary, it is payable out of principal even without a specific instruction to that effect. When it is allowed specifically out of the principal, it is in the nature of an annuity and is not a fluctuating income from trust property and it will take precedence over a residuary grant and must be paid even to the exhaustion of the trust fund.

A life tenant's right to annuity bequeathed to her under testamentary trust was cumulative even in years during which income from trust was insufficient to meet annuity in view of the fact that it was expressly provided in will that any deficiency in trust income should be made up out of principal. *Caughy vs. State Deposit and Trust Co.*, 196 Md. 252, 76 A. 2nd 323.

There is just nothing in the Will or in the law which provides for a postponement of these monthly payments to annuitants. All that is asked is the unpaid amounts due during probate as ordered and adjudged due to respondents herein (R. 471). The income of the estate will more than adequately carry these payments in the future and the whole trust corpus and more will eventually be distributed to the remaindermen.

## POINT IV

THE PAYMENTS UNDER SUBPARAGRAPH SEVENTH (i) OF THE WILL ARE ANNUITIES AND ARE CONTROLLED BY SECTION 74-3-14, UTAH CODE ANNOTATED 1953.

This is a rewarding subject to discuss but it is ridiculous for appellants to define annuities as they do using the life insurance definition of annuity from Section 31-11-2, U.C.A. 1953.

Our Utah Code classifies legacies in Section 74-3-1 and in sub (3) thereof defines an annuity as a bequest of certain specified sums periodically. Certainly the periodic sums specified by Pierpont in his own words to be paid respondents during their lifetimes fit the Utah definition of annuities.

Section 74-3-14, U.C.A. 1953, provides: "Legacies are due and deliverable at the expiration of one year after the testator's decease. Annuities commence at the testator's decease."

Section 74-3-14, U.C.A. 1953, refers back to 74-3-1, wherein all the kinds of legacies are defined and including a legacy of annuity. Annuities then, commence at the testator's death but all other legacies are due and deliverable at the expiration of one year after the testator's decease. This is absolutely compatible and explanatory of the phrase employed by Testator "during her lifetime" with regard to the payments to respondents in 7 (i) of the Will. The position of the widow and sister then is in complete harmony with Utah statute law. (Even if appellants are correct that these are not annuities, the payments would then

be general legacies due one year after death of decedent and therefore two years before distribution of residue to Trustee where the Will does not state a contrary time for commencement!!)

In re Sears Estate, 18 Utah 193, 55 Pac. 83, holds that payments reserved for a surviving wife are annuities even though the amount is discretionary with the Trustee. The Court made an issue of the fact that it was not discretionary for Trustee to pay only a little to widow and as much as possible to other beneficiaries as the Testator had provided for his wife first and foremost. (That is really the objection to the Pierpont Will—that the testator provided for his wife first and foremost!)

Black's Law Dictionary says an annuity is a legacy payable by installments. 96 C.J.S. 547, Section 1014 on Wills states that an installment charge is an annuity, unless it consists merely of income from a fund.

Section 902 on Wills, 96 C.J.S. 351-352, states that a gift of an annuity constitutes a legacy or bequest and that it may be subject to such limitations as the testator may impose.

Let us again remember that the testator said the payments were to be disbursed **monthly** during the lifetime of the widow and during the lifetime of the sister. He did not say **commencing** three years after my decease or when the Executor gets around to transferring the trust assets to the Trustee or when the books are brought up to date and changed from Executor to Trustee.

On Page 36 of Appellants' Brief this "sound discretion of the Trustee" to make up suspended payments has already been argued against, but it is indicative of the extreme to which the Trustee resorts to have its own way and rob



present annuitants to favor remaindermen for selfish purposes, even when testator explicitly states they "shall be made up". The Respondents have had to go to the Supreme Court to defend their rights and have not brought any suits against Trustee to force a sale of principal assets in payment of annuities. This is unnecessary now because ample funds are available to make up "such deficiencies" created by an over-reaching, capricious and arbitrary Trustee. It is such elementary law that personal representatives of Respondents would succeed to large unpaid sums due them under the Will that it will not even be discussed except to repeat that the Trustee caused such a situation against the wishes of both Testator and Respondents. The Trustee was amply protected by two rulings of the lower Court on this lawsuit but still persists in taxing and battling the heirs and estate.

#### POINT V

THE COURT DID NOT ERR IN HOLDING THAT INTEREST BE PAID TO RESPONDENTS ON THE AMOUNTS DECREED TO BE DUE THEM.

The assets of the estate herein are substantial and the desires of testator in paying of amounts due with interest thereon can be carried out without harming the estate.

Again using statutory definitions, Section 74-3-15, U. C.A. 1953 provides: "Legacies bear interest from the time when they are due and payable, except that legacies for maintenance, or to the testator's widow, bear interest from the testator's decease." This statute refers to previous sections 74-3-1 (classifying all legacies including annuities) and 74-3-14 (stating commencing and due dates for legacies including annuities.) Annuities are due and payable

commencing with testator's decease and therefore bear interest from testator's death date or when subsequently falling due. Also in this instance the monthly payments are for maintenance and to the widow and bear interest from the testator's decease.

Interest is a part of or an accretion to the legacy itself. In re Platt's Estate; In re Luckel's Estate, supra.

Where have a testamentary trust to pay income to successive beneficiaries, the former beneficiary is entitled to income from date of death of testator and interest at the legal rate thereon regardless whether delay is due to fault of Executor or not and whether or not same person is Executor and Trustee. Restatement of Trusts 2nd, Section 234, comment e.

Matter of Bird's Will, 241 NY 184, 149 NE 827, holds that interest is payable on legacy of income even where legatee delays settlement by instituting suit contesting the Will. A direction in the Will addressed to Trustee to pay income of trust to legatee does not exonerate Executor from paying income and interest thereon to the beneficiary.

## CONCLUSION

That the Will of testator herein is clear and unambiguous showing an intent to provide annuities to respondents from date of death of testator and the respondents are entitled to interest thereon from date of accrual thereof as provided in the Findings and Judgment of lower Court (R. 460-472).

That this Court should find that the Trustee has no "sound discretion" to not make up such payments and has exceeded its authority and breached the trust favoring the

respondents pursuant to testator's Will. The great majority of the cases and law writers are against the position of appellants.

Respectfully submitted,  
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