

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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IN THE SUPREME COURT OF THE STATE OF UTAH

FILED

In the Matter of the Estate of THOMAS
FAIRCLOUGH PIERPONT,

Deceased

TRACY-COLLINS TRUST COMPANY,
and VILATE P. DEVINE,

Appellants,

—vs.—

MARGUERITE GESSFORD PIERPONT
and ELLA P. MEYER,

Respondents.

Case No.
9022

BRIEF OF RESPONDENT, ELLA P. MEYER

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Ella P. Meyer*

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Respondents.

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BRIEF OF RESPONDENT, ELLA P. MEYER

STATEMENT OF THE CASE

This is the brief of respondent, Ella P. Meyer only.

She is the sister of the testator. (R. 278) Throughout this entire proceeding, she has refused as best she could to become embroiled in a quarrel between the immediate family of the testator, and the respondent, Marguerite Gessford Pierpont. (R. 347, 364; Tr. 4, 22) Because of the peculiar grouping of paragraphs in her brother's will, Mrs. Meyer is caught in the family controversy. She desires still to remain aloof, and simply state her case for recovery of an annuity provided her by Mr. Pierpont, a brother who clearly had taken care of her in the past, and intended to do so after his death.

Appellants' statement of the case is substantially correct, and we will not burden the court with restatement, except to emphasize that this controversy has its origin in trustee, Tracy Collins Trust Co. petitioning the trial court for construction of the will. (R. 277) Mrs. Meyer appeared throughout the matter thereafter, and asserted her right to receive the annuity, and claimed interest thereon for arrears. (R. 346, 353; Tr. 6, 13, 20)

She was granted judgment against the trustee for the sum of \$3,713.16 down to the date the final decree bears. (R. 471) It is for that amount, plus her costs, and interest down to the date that sum is paid, for which she contends and for none other.

The research of Mrs. Meyer's counsel has not been done in connection with or in any way associated with respondent, Marguerite Gessford Pierpont. The able brief of her counsel represents an independent work. We do not refer to cases there cited. We deem the most important foreign case to be found, cited in both respondents' briefs, to be *In re PLATT'S ESTATE*, 131 P 2d 825. We present our own independent approach and research. We come to the same answer.

STATEMENT OF THE FACTS

Mrs. Meyer does not contest the facts as stated by appellants' brief. They are sufficiently accurate as to guide this court in its review.

This only, as supplementary, must be added: On April 8, 1958, Mrs. Meyer was "78 years of age. Her health is poor. She is in desperate need of the annuity

Thomas Pierpont provided to be paid in his will.” (R. 363) “Mrs. Meyer is old and infirm. She needs the money her brother, the deceased, set up and provided for her. If there is further delay, it can have a bad effect on the health of Mrs. Meyer, and could hasten illness.” (R. 347)

At the hearing on June 30, 1958 before Judge Tuckett, her counsel moved the court to continue the hearing in order to take testimony concerning testamentary intent. There had just come to his attention that morning for the first time eighteen to twenty checks for \$100 each, two for \$200 each, all in monthly payments, made by the testator immediately prior to his death, in her favor. Counsel preserved his record, asking that if the court deemed there was any ambiguity in the will, that the hearing be recessed or resumed to take testimony. (Tr. 6, 20.) The court found there was no ambiguity. (R. 462)

In his Findings, Conclusions and Decree, reference is made to these proffered checks and motion. Their import must not go unnoticed. (R. 462)

Simply stated, Mrs. Meyer’s claim is this: In paragraph Seventh (i) of the will, and from the residuary estate, the testator made the following bequest:

“From the income of the Trust Estate and, if insufficient, from the principal thereof, my Trustee, subject to the provisions of subparagraph (k) of this paragraph SEVENTH, shall make disbursements as follows:

- (2) To my sister ELLA P. MEYER the sum of One Hundred Dollars (\$100.00) per month during her lifetime.”

Sub-paragraph sub- (k) reads:

“(k) If, at any time the income of the Trust Estate is insufficient to meet the payments *required* to be made by my Trustee, and principal funds are not available for such purposes, my Trustee *may* proportionately reduce the respective payments to be made to the extent required by the availability of funds; and if necessary, may suspend further payments until funds become available through income of the Trust Estate or through orderly sale of all or part of the principal assets. In the event any payments specified to be made by my Trustee shall be so reduced or suspended, it is my desire that when funds become available, any so resulting deficiencies in monthly payments *shall* be made up. It is my desire and instruction that my Trustee shall not sell principal assets at a sacrifice in order to obtain funds to meet the payments specified in this will. But it is my desire that when, if and as required, principal assets *shall* be converted into cash or readily salesable securities in order to enable the Trustee to make the payments specified hereunder, provided that sale of principal assets can, in the sole judgment and discretion of the Trustee, be made at a price and in a manner consistent with sound business judgment.”

STATEMENT OF POINTS

POINT I

THE WILL AND THE LAW REQUIRE AFFIRMING THAT AN ANNUITY IN FAVOR OF MRS. MEYER VESTED AS OF THE TIME OF DECEDENT'S DEATH, NOT UPON DISTRIBUTION.

POINT II

THE BEQUEST TO MRS. MEYER WAS IN THE TRUE NATURE OF AN ANNUITY.

POINT III

THE COURT DID NOT ERR IN FINDING INTEREST
SHOULD BE PAID FROM DATE OF DEATH.

ARGUMENT

PRELIMINARY STATEMENT OF STATUTES:

The following statutory provisions are crucial in the disposition of this case. They are all found in Utah Code Annotated 1953:

74-3-1. CLASSIFICATION OF LEGACIES: ANNUITIES:

“Legacies are distinguished and designated, according to their nature as follows:

- (3) An annuity is a bequest of certain specified sums, periodically; if the fund or property out of which they are payable fails, resort may be had to the general assets as in a case of a general legacy.”

74-3-12. WHEN BEQUEST OF INCOME ACCRUES:

“In case of a bequest of the interest or income of a certain sum or fund, the income *accrues from the testator's death.*”

74-3-14. LEGACIES AND ANNUITIES—WHEN DUE:

“Legacies are due and deliverable at the expiration of one year after the testator's decease. *Annuities commence at the testator's decease.*”

74-3-15. INTEREST ON LEGACIES:

“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.”

74-3-16. INTENT GOVERNS FOUR PRECEDING SECTIONS:

“The four preceding sections are in all cases to be controlled by a testator’s express intention.”

74-2-25. DISPOSITIONS. VESTING. PRESUMPTIONS:

“Testamentary dispositions, including devises and bequests to a person on attaining majority, are presumed to *vest at the testator’s death.*”

COMMENT ON APPELLANTS’ BRIEF:

We do not intend to advert to all of the specious arguments in appellants’ brief but will only argue the important points. By not referring to the numerous misstatements and false conclusions, let it not be implied that we agree with their position, for we do not in any degree. Brevity requires we aim for the mark, and supply authority. That they have not done.

POINT I

THE WILL AND THE LAW REQUIRE AFFIRMING THAT AN ANNUITY IN FAVOR OF MRS. MEYER VESTED AS OF THE TIME OF DECEDENT’S DEATH, NOT UPON DISTRIBUTION.

The judgment that should be affirmed found that the trust provisions of the will, paragraph Seventh, (i) “in connection with all other provisions of the will to

be in the nature of annuities, and such, said annuities are to be paid by the trustee commencing at the date of the death of the deceased. . ." (R. 468, 470)

Thus, the crucial issue, as stated by appellants at page 13 of their brief, is a question of the time when the annuitant Mrs. Meyer's legacy took effect. Without citing a single case as authority, counsel argue this time should be upon distribution, not as stated in the Utah statutes, upon death of the testator.

RESTATEMENT OF TRUSTS:

The learned trial judge found his answer in the statute, after finding Mrs. Meyer had been given an annuity under the will. If her bequest is in the nature of an annuity, then 74-3-14 UCA 1953 is controlling, for it says: "Annuities commence at the testator's decease," and it does not say at distribution. The trial judge also predicated his decision on "An examination of the cases and the RESTATEMENT of the Law of TRUSTS," section 234 thereof being applicable. A partial statement there is:

"a. Where a trust is created by will and by the terms of the trust the income is payable to a beneficiary for a designated period, the beneficiary is entitled to income from the date of the death of the testator, unless it is otherwise provided in the will."

The will created a trust to pay Mrs. Meyer \$100 per month "during her life," not for a portion thereof remaining after administration and distribution. She fits the cloth of the Restatement and the statute, exactly.

UTAH STATUTES:

Furthermore, note the additional statutes that bear on this question of time:

1. "An annuity is a bequest of certain specified sums periodically; if the fund or property out of which they are payable fails, resort may be had to the general assets as in case of a general legacy." 74-3-1 (3) Mrs. Meyer fits this definition: the sum is certain. She gets by the will, first from income, but if insufficient, 7 (i) instructs the trustee to invade principal. This comports with the vesting statute quoted. Furthermore, that the testator instructed delay in payments if sacrifice was involved, said payments *shall* be made up as in sub-(k) does not alter the nature of the annuity. There can be no escape from the character of the legacy as being in the full nature of an annuity.

2. 74-3-12 UCA 1953 says: "In case of a bequest of the interest or income of a certain sum or fund, the income accrues from the testator's death." The Testator in 7 (i) said: "From the income of a trust estate . . ." which puts this legacy in a second statutory instruction to pay from the date of death. Ordinarily in the cases, the provision would reach an indeterminate sum that would be earned as income from the corpus of the trust, and in that unspecified amount situation, still the annuity would accrue at testator's death. How much more it should apply in the case of a "specified sum periodically" of \$100 per month during her life!

3. 74-3-15 UCA 1953 says that "Legacies bear in-

terest 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." The Utah Legislature has vested a right in Mrs. Meyer to collect interest from the time section 74-3-14 says the money is due, to wit, "Annuities commence at the testator's death." Also, if that is not enough statutory authority, the same interest statute says if the legacies are for maintenance, and this is just that, interest shall accrue at testator's decease.

CASE LAW :

It is indeed rare that so much statutory authority is found to evaporate appellants' specious argument. He did not cite a pertinent case on the subject. That should show that the statutes of Utah have been so clear that no reason existed for this court to construe such plain, unambiguous requirements.

Counsel, finding no law to support them, argues in brief the intention of the testator. We will stick with the law and show that the cases throughout the land are against appellants' position, and will confirm this court in affirming the lower court.

The closest Utah authority on the subject is *In Re LOWE'S ESTATE*, 68 Utah 49, 249 P 128. Eminent counsel argued, and the court laid down the basic principles that must be applied in this case, or the Lowe case will be materially weakened, changed. In 1926 this court construed the statute now found at 74-2-25 UCA 1953, then saying :

“ . . . section 6371, Compiled Laws 1917, which declares that *all* testamentary dispositions are *presumed to vest at the testator's death*, and from the fact that there is nothing in the will to indicate an intention on the part of the testatrix that the vesting of the bequests and devises made therein should be *postponed beyond her death*. We regard this language as a direction or command from the testatrix to the trustee, whom she had selected, to divest itself of the title to the trust property, which she knew would vest in her trustee at the moment of her death . . . We are therefore of the opinion that Mrs. Hampton had the right and power under this will at any time after the death of her mother, either before or after there had been distribution of the property in the probate proceedings, to remove Bankers' Trust Co. from its trusteeship and to name in its stead Walker Bros. . .” p. 133 (emphasis added)

The case squarely shows that the bequest to Mrs. Meyer vested at the date of death of Mr. Pierpont. If this court promulgates the doctrines asked for by the appellants, it must do so on no other grounds than a reversal of the Lowe's Estate case. The testamentary intent is clear in both cases. At bar, section 7 (i) is mandatory, using the words “shall make disbursement. . . to my sister Ella P. Meyer . . . during her lifetime.” The best appellants can wheedle out is that in the subsequent admonition in 7 (k) there might be a suspension for avoidance of sacrificing values. More on this later.

The prime determination for this court is to find whether or not a bequest “in the nature of an annuity” vests at the time of testator's death, or sometime later, at distribution of the residuary estate. This court said it was bound by the Utah statutes, in the Lowe case, to

find the vesting occurred at death, not at distribution, and the same finding must be made now. All of the other apposite statutes drive to the same result.

We have searched long and hard to find something squarely in point, and have finally discovered a strong decisive case is California by its highest court. We have a right and duty to advert to that state because it was the source of our own statutes on the subject. Please refer to DEERINGS CALIFORNIA CODES, Probate, from pages 315 to 333. The history of that state's enactments will show that all of Utah's enactments pertinent were identical, historically. California has since codified many of its leading decisions, and the same are shown, with history, beginning at page 333 of that citation. Utah follows California statutes that are identical!

In our research for apposite cases, among many, we finally found a District Court of appeal case in California that appellants might have found and used. It determined the issue favorable to appellants that the annuity vested only at distribution, and not at death, the case being *IN RE WATSON'S ESTATE*, 90 P 2d 349. However, Sheppard gave the answer in the subsequent case of *In Re PLATT'S ESTATE*, 131 P 2d 825, 1942 therein expressly disapproving the Watson decision. The Platt decision must be regarded as the leading case in that jurisdiction, and for any state having the same statutory enactments. It cleans out a great deal of indecision and conflict, summarily, on facts very similar to the case at bar.

In the Platt case, testator likewise left personal property to his widow and son; then remainder to a

trustee with directions to pay the widow from the income of corpus \$250 per month until her remarriage. If the income exceeded that amount, the son came in for a monthly annuity, with more facts not important. The son was substantially to get what was left after interim gifts to his mother, the widow. Problems arose in administration as to the time these annuities accrued, the widow contending payment accrued as of date of death of testator, the son arguing the date of distribution was the vesting date. The Trustee, as in the case at bar, asked the court for instructions, and the lower court found as Tracy-Collins and Mrs. Devine contend here. In *Re Watson*, *supra* would be a specious authority for the position taken by the son there and appellants here but for subsequent debasement. The Supreme Court of California decided once and for all, the date of death of the testator vested the rights, not the date of distribution. It reversed the lower courts with an excellent rational and review of the authorities to guide them out of the mire! It cites section 234 of the RESTATEMENT OF TRUSTS with approval, in consonance with the research of Judge Tuckett. Here are some quotations:

“Unquestionably the rule of the restatement is based upon sound reasoning. As title to all testamentary dispositions vests at the testator's death . . . (codes) the title of the trustee Mr. Platt's property (testator) *vested* as of that date even though the trust estate was residuary in character. (many cases) As a necessary corollary, the title of the life tenant (the mother, widow) also dates from the death of the testator.” . . .

“But in California there is a statutory rule

which is determinative of the question raised by the wife's appeal. Section 160 of the Probate Code" (and this is identical with 74-3-12 of the Utah Code) "provides that 'In case of a bequest of the interest or income of a certain sum or fund, the income accrues from the testator's death' although this provision is controlled by a testator's express intention. If, therefore, the income payable to Mrs. Platt is a 'bequest of . . . income of a certain sum of fund' and the testator did not express a contrary intention, her right to income from the trust estate accrued at the date of her husband's death.

"A bequest is 'a gift by will of personal property; a legacy. It is well settled that testamentary gifts of trust income are 'bequests' (cases) . . .

"So as there is no express provision in the will as to the date from which payment of income shall accrue, under section 160 of the Probate Code the rights of both the wife and son to income under the trust accrue from the date of the testator's death."

The language of the court, referring to the confusion in California appears at page 827 of 131 P2 as follows :

"The appellate courts of California have not been consistent in deciding whether payment of income from a testamentary trust accrues from the date of the testator's death or from the date of distribution of the estate to the trustee. In a majority of cases it has been held that, unless the testamentary trust was created for the *support or maintenance* of the beneficiary, the income accrues from the date of distribution." (cases, including *In re Est. Of Watson*, 90 P2d 349.)"

“Apparently the controlling factor in the decision of these cases was the inability of the beneficiary to compel the payment of any income prior to the distribution of the trust property to the trustees. That fact, however, is not determinative of the question for, as has been recently stated, the rule which precludes a beneficiary from suing to recover income during the period of administration relates only to the time at which the trustees may be compelled to make payment, and does not determine the date at which the right to income commences. In *re Estate of Marre*, 114 P2d 586.”

So here we have the whole case in a nut shell, decided in the highest court in California, over-ruling an erroneous line of prior authority, with a rationale that must be followed here because our statutes are the same, and the logic is identical, to say nothing of the precedent of the *Lowe* case decided by this court.

In thinking about the second paragraph above quoted from the *Platt* case, in respect to the right of the annuitant to compel payment ahead of distribution, let us make reference to the case quoted above: In *re Estate of MARRE*, 114 P2d 586, in connection with appellants' argument before and after page 30 of their brief. They there fall into the confusion of the lower California courts. Appellants argue that during probate, and while the Pierpont properties are being judiciously sold, and not at a sacrifice, that respondents could not have compelled payment, “forced a sale of the trust assets.” The *Platt* decision, refers to *In re Marre's*, *supra*, and the latter decision, by the same court, said:

“It is true that during the administration of the estate, and prior to distribution of the trust property to appellatns, the beneficiary could not have brought action to compel against either the trustees or the exectuors of the estate. (cases) The executors were under no duty to make payments and the trustees could not be compelled to make payments prior to the distribution of the trust property to them. The beneficiary’s remedy during that period is confined to asking the probate court to distribute a portion of the trust funds to the trustee to be used for his support. (cases) The rule preventing suit during this period relates to the time at which the trustees may be compelled to make actual payment, however, rather than to the date at which the right to support commenced. This, after the property was distributed to the trustees, payment should have been made for the respondent’s support and maintenance commencing *from the date of testatrix’ death.*” P. 590

We refer this court to the earlier portion of this excellent Marre’s decision, respecting testamentary intent and maintenance, this for the reason that in the record, it is must be remembered that Judge Tuckett had proffered to him 20 checks in favor of Mrs. Meyer, immediately prior to testator’s death, showing he had maintained and supported her. (R. 469, 462, Tr. 20) Keeping that proffer in mind, note the highest court of California at page 589 of 114 P2d.

“The absence of an express direction that the payments were to accrue from the date of her death does not establish conclusively, however, that the testatrix had no such intent. The intention of the testator is the determining factor

(code) and that intent is to be gathered from the instrument as a whole. (code, cases) The terms of the will clearly indicate that this trust was created for the specific purpose of providing maintenance and support for the testatrix' grandson, the beneficiary herein. Indeed, if the will itself did not refer to this bequest as a trust for maintenance and support, the surrounding facts and circumstances would compel that conclusion. (case) The evidence shows that respondent was the grandson of the testatrix, that he had been supported by her, and that she had definite plans for his future education. Respondent was a minor at the date of the execution of the will and at the date of the testatrix' death, and this trust is the only provision made for the respondent in the will. Under like circumstances it has been held that the payments under such a trust for support and maintenance were intended to accrue from the date of testator's death. In *Estate of Dare*, 235 P 725, 729 this court stated the rule which we think governs the present case; 'By both reason and authority we are compelled to the conclusion that the respondent's right to the income to be derived from the trust properties must be held to have relation to the death of the testatrix. As to the reason of the situation, it would seem to follow that if, as we hold, the provision in said will and in the trust clauses thereof were intended by the testatrix to be *in the nature* of bequests for the maintenance of her adopted daughter who, as has been shown—had theretofore been supported and maintained by her adopting parents during their lifetime, such intention ought to have relation to a time from and after the death of the testatrix, since by that means only could continuity of such maintenance be assured!'

Please note the decision in that case follows with a dis-

cussion of when interest on the sum begins. Supported by strong authority in New York and Massachusetts, the California court says interest accrues as of the date of death, and not of distribution. It has been codified in California, as well as in Utah!

It is a little difficult, to say the least, for us to see the pertinence of appellants' reference to *WOODLEY v. WOODLEY*, 117 P2 722. In that case "there is no trust involved, but the rights of the parties rests upon an "equitable charge." That case is in the lower appellate court of California and the problems are not pertinent. It seems amazing that appellants' brief does not come to the issue, in the face of such overwhelming authority. Even this case finds an equitable charge on land passing by will, subject to an obligation to pay \$50 per month during annuitant's lifetime. And it appears the rule was followed that the right to receive accrued as of the date of death! Appellants here do not sight a single authority, Utah or otherwise, to show strength to their unsupportable argument.

The *PLATT* and *MARRE'S* estate cases, *supra*, are a full and complete refutation to the claims of appellants, and fully support Judge Tuckett for affirmation. This court must follow those cases to be consistent with *In re LOWE'S ESTATE*, *supra*, its own decision since 1926, that ought not to be altered without good reason.

These California decisions should be consulted on the argument as to whether or not the bequests are in the nature of annuities. Mr. Pierpont admonished the trustee not to sell assets at a sacrifice. This did not make

precatory the mandatory vesting of the rights of Mrs. Meyer under section 7 (i). (R. 14) But the rights vested, subject to administration, marshalling the fund, with the instruction that if any amounts were reduced or suspended during liquidation, "any so resulting deficiencies in monthly payments shall be made up." (R. 15) Mrs. Meyer is one of those monthly annuitants. She did not object to orderly liquidation, nor avoidance of quick sale to take care of her. She patiently waited as her brother asked that she do. And when the estate, rather large, (R. 201) was in a position to be advantageously distributed, her rights related back by statute, and by the strongest of court decisions, to the date of Mr. Pierpont's death. The failure of appellants to produce a single case to the contrary is revealing of the paucity.

2 Am. Jur. 819, #4 states, as to vesting:

"If by the terms of the will, the sum given is payable in stated installments at definite periods in the future, the postponement of the payment is presumed to be for the benefit of the legatee, and the bequest VESTS immediately upon the death of the testator. Therefor, the death of the legatee at *any time* thereafter will not defeat the right of his administrator to recover the *entire sum* bequeathed.

Also in 2 Am. Jur. 829, #24, that authority states concerning time of accrual of payment:

"Likewise, where an annuity is given by will, it begins to run from the death of the testator; and ordinarily, the first yearly payment is not due until the end of a year from the death, unless there are circumstances or expressions in the will

evidencing a different intention. If the annuity is directed to be paid monthly, the first monthly payment will be payable at the expiration of a month after the testator's death."

In 1913 the California court held in *WESTERN PAC. RY. v. GODFREY*, 36 P. 284:

"That the estate of a decedent vests in his heir or devisees and legatees immediately upon his death cannot be disputed . . .

"Pending the administration the personal representatives of the decedent are entitled to the possession of the estate for the purposes of administration, but the title *vests* in the heirs or devisees and legatees, subject only to the right of possession of the personal representatives of the decedent . . .

"The legatee does not derive title from the decree of distribution, but from the will, which takes effect immediately upon the death of the testator. The decree of distribution does not create the title. It merely declares the title that accrued under by the will."

To the same effect is the California case of *LIGHTBERG v. BURDELL*, 281 P 518 at 525, 1929, quoting and applying the same language.

The theory of appellants in their brief is that title and rights to the monthly allowance to Mrs. Meyer did not vest or accrue until after distribution; that in the interim the property was vested in the executor, free of obligation to Mrs. Meyer. At common law, this might be true; but Utah and California have adopted a different rule. Note the language of an annotation at 150 ALR 91:

“Under the common-law doctrine title to personal property of a testator’s estate generally vests in the executor upon his appointment, and he has the absolute right to dispose of it. In some jurisdiction, however, as for example, California, both real and personal property generally descend directly to the beneficiary, with a qualified right in the personal representative, who holds it for the purposes of administration more like a receiver than like a common-law executor. The title is not in him, nor has he the power of disposal, save by order of the court.”

The annotation then cites *MURPHY v. CROUSE*, 66 P 971, 972. That case enunciates the doctrine quoted, and it is clearly in point here. The appellants in this case held all of the testator’s property, first as executor, and then as residuary legatee in connection with trust powers. It is in the latter that Mrs. Meyer is entitled to take her annuity. In what capacity did Tracy-Collins Trust Co. hold said property: with common-law powers with an “absolute right to dispose of it” or “with a qualified right . . . for the purposes of administration more like a receiver than a common-law executor?” In the *Murphy* case, *supra*, the highest court of California held in 1901 that:

“The rule never prevailed in this state. Here both real and personal property descend directly to the heir, or to the beneficiary named in the will with a qualified right in the personal representative, who holds it for the purposes of administration more like a receiver than like a common-law executor. The title is not in him, nor has he the power of disposal, save by order of the court.

This has been for almost a century the rule in Cali-

for California, and Utah has picked up the basic California practice. The Utah statute disposes of the question entirely if the payments to Mrs. Meyer are in the nature of an annuity. That we will discuss later under an appropriate head. Assuming the payments to be an annuity, and it is, the statute puts Tracy-Collins Trust Co. in exactly the status as the California court declares: that comparable to a receiver, "with a qualified right" to administer. Certainly the long list of duties enumerated by counsel at page 14 of their brief shows the nature of receivership functions. In a large estate such as the testators' these marshalling functions had to be accomplished, as he foresaw, and made provisions for. And by so functioning, the trust company status does not shift. The testator willed that caution be exercised in converting the estate into a condition to make distribution. He provided that no haste be employed in selling, converting. But he showed his clear intention to have the trustee function according to the Utah statute; and if payments to Mrs. Meyer were "reduced or suspended, it is my desire that when funds become available, any so resulting deficiencies in *monthly payments* shall be made up." (R. 15) How could the testator have been more explicit in showing that it was "\$100 per month during her lifetime" that should be paid to Mrs. Meyer? (R. 14) Note there are but two provisions in the long will for monthly payments. Mrs. Meyer gets one of these.

The right of Tracy-Collins to convert the estate into cash so as to meet the annuity payment requirements is kin to receivership. The right to receive \$100 per month during her lifetime vested in Mrs. Meyer at the time of

testator's death, subject only to the orderly instructions not to "sacrifice in order to obtain funds." He even goes further and instructs the trustee to invade principal if income is insufficient to meet the monthly schedule during the lifetime of Mrs. Meyer. (R. 14)

Bouvier's Law Dictionary, Rawle's 3rd Ed. under "Legacy" at page 1905 treats the question of whether and when the legacy vests. Several authorities are cited there, among the old Massachusetts case of *Eldridge v. Eldredge*, 1852, 9 Cushings 516, saying:

"If the time of payment merely be postponed, and it appear to be the intention of the testator that his bounty should immediately attach, the legacy is of the *vested* kind; . . ."

It is clear here that Mrs. Meyer's legacy was to be "during her life time."

This could never be honorably construed to mean on a contingency or at some future time during her life time.
SUSPENSION OF PAYMENT OF MONTHLY SUMS:

It is implicated in the will that the testator instructed the trustee to husband the assets and only sell when no sacrifice of value would deplete the estate. Para. 7(k) of the will. (R. 15) This provision does not divest Mrs. Meyer of her legacy, annuity. It expressly is reserved that if the monthly sum is proportionately reduced or suspended, "it is my desire that when funds become available, any so resulting deficiencies in monthly payments shall be made up." The Massachusetts court construed a complicated publisher's will in *PARK-HURTS v. GINN*, 117 NE 202 at 207 and stated:

“ . . . it is plain that the purpose of the testator was to give to her something to add to her enjoyment of life and not merely to constitute a fund for the benefit of her heirs or legatees . . . The crucial words of gift so far as concerns time is in effect that these legacies shall be payable only after there is an adequate reserve to support the payment of all annuities and gifts of income . . . ”

Apply the same rule of reason to Mr. Pierpont, and it is clear that he intended and provided for one of his two only full sisters “\$100 per month during her lifetime.” She could not enjoy it after she was dead. It would cease. If it were unnecessarily withheld from her during administration, she could not enjoy it or live on it “during her lifetime.” The testator expressly required that the trustee, in so husbanding the assets, to make up any reduced or suspended monthly payment, and not as appellants argue, denude her, expropriate her, or destroy her annuity! What are the crucial words of “time” in Pierpont’s will?

Let it be remembered that there were only two sisters of the testator. Note the way in which he took care of Florence P. Taggart. (Para. 3, sub. (g) page 1) of the will: he gave a specific, cash sum of \$1000 to her, provided that if Mrs. Taggart be not living “on the date of distribution of my estate then in that event said legacy shall lapse and my executor shall disburse the said sum of \$1000 to Alice Taggart, my niece.” (R. 11) The record does not disclose the entire family picture of the sisters, Mrs Taggart, but it is clear that the testator was aware of time to be consumed in administration,

and wanted to be sure that either the sister, Florence P. Taggart, or his favorite niece by her, be taken care of. The treatment of Mrs. Meyer, the only other full sister, must be considered alongside. In her Answer to Petition for rehearing (R. 366) she shows that "She is 78 years of age. Her health is poor. She is in desperate need of the annuity" Also in her Protest respecting rehearing, at page 347 of the record, she states: "Mrs. Meyer is old and infirm. She needs the money her brother, the deceased, set up and provided for her." These allegations were never answered nor disputed on the record, and stands admitted for purpose of this hearing. She is now 79. Obviously her health could not have been improved at her age. That she was provided for by a loving brother in his will, and that the appellants have obstructed her receipt of sums willed to her amounting to over \$3,600.00 for more than five years now, is cause for this court to find that her condition has worsened, and that the delay would further make her ill. The language in *PARKHURST v. GINN* supra quoted is real. The \$3,600.00 should not be so long delayed in coming as to only benefit her estate and children. It was the aged and ailing sister, Mrs. Meyer, that Pierpont clearly wanted to benefit, and that "during her lifetime" and not too long delayed, without making up the deficit! Mr. Pierpont theoretically preferred Mrs. Meyer to her sister, Mrs. Taggart, for Mrs. Meyer would only have to live for 10 months to have the equivalent of the sister, Mrs. Taggart. It does not lie for the appellants, nor this court, to change the

expressed intention of the testator, to take care of Mrs. Meyer during her lifetime.

THE PROFERRED EXTRINSIC EVIDENCE OF INTENT:

The testator took care of her prior to his death. This cannot be disputed. Mrs. Meyer's counsel moved the court at the time of the last hearing as follows:

“I move the court to continue this hearing in order that testimony be taken, respecting testamentary intent . . . I would like the record to show that there has been shown to me this morning for the first time some eighteen or twenty checks, signed by Mr. Thomas Pierpont in favor of Ella Meyer, most of them are a hundred dollars; there are two or three that are two hundred dollars — immediately preceeding his death, and they followed *in monthly sequence*, and will show a testamentary intent . . . I feel that the court ought to have before it any extraneous evidence, outside of the widow, that would point to this. And I would like to have the court take that into account in the disposition of this case. I would be glad to not make any argument until such time as there is a little more evidence before the court. But I think all parties intended to address themselves directly to the matters of law, and I did not understand it was to take testimony. I asked Mr. Gibbons if he would stipulate with me this morning for the introduction of these checks into the record, and he stated he felt he would not be able to so do. So my only recourse is to make the motion which I have made.

THE COURT: Well, unless there is an ambiguity in the Will, can the court receive extrinsic testimony?

MR. LAMOREAUX: I understand, unless there is an ambiguity, can the Court receive extrinsic testimony? Is that your question? I believe that is the fact. I believe that is a correct statement, and I must preserve my right if the matter should go on appeal. If the court deems there is an ambiguity, I want an opportunity to present considerable extrinsic testimony.

Mr. GIBBONS: Your Honor, in that respect, may I inquire whether it is the intention of Mr. Lamoreaux if this Will is ambiguous on its face?

MR. LAMOREAUX: No, I do not believe that. But I think the argument you have made, Mr. Gibbons, introduced an element of ambiguity which I am wholly unprepared to rebut. But I don't leave it exclusively on matter of argument. I am prepared to present evidence if the court believes there is an ambiguity . . .

THE COURT: Well, the Court might say this: If the court determines there is an ambiguity, I assume that the court will permit you to put on testimony.

MR. LAMOREAUX: That will be satisfactory with me, Your Honor." (Tr. 20)

The court took the matter, after long argument, under advisement for the second time under the rehearing. It received authorities. In entering its final Findings of Fact and Conclusions of Law, it referred expressly to the motion of Mr. Lamoreaux, and the proffer of the several checks. (R. 462, 469) The court in effect found there was no ambiguity within the will. It expressly found:

"That the said will became effective as of the date of the death of the testator and that the

trust provisions and the will became effective as of that date. That there is nothing in the will to indicated that the testator intended to postpone the payments provided for in Paragraph Seventh (i) of the will untill the estate was distributed to the trustee." (R. 470)

There was and is no ambiguity as to Mrs. Meyer. The offer of the checks amply saves the record, and this court must take into account that proffered evidence as proving that the testator had practiced the annuity principle with Mrs. Meyer for 18 months prior to his death, and that he intended to so continue it after his death. The checks are excellent extrinsic evidence of a testamentary intent, and certainly confirm the clear interpretation given of the will, so far as Mrs. Meyer is concerned, of Judge Tuckett's finding there was clear intent for the gift to take efefet as ofthe date of death. As Mrs. Meyer's counsel advised the court,

"But if there is any question of testamentary intent, the matter could be set down to hear those things . . . But I still feel that the matter should be handled as a matter of law, and could well be." (Tr. 6)

Mr. Gibbons stated:

" . . . the provisions of Mr. Pierpont's Will are clear and unambiguous, and that his intention, therefore, is to be determined from the Will itself. For that reason, it is not contemplated by us that we will introduce any evidence in this matter." (Tr. 5)

The record was made without extrinsic exidence except such as proffered by Mrs. Meyer's counsel. The argu-

ment and decision was made on the will itself, and that rightly. Only if this court holds there is ambiguity that might be cleared by extrinsic testimony, should the decision of the lower court be disturbed. Appellants at no time suggested they had any extrinsic evidence. The only offer is that of Mrs. Meyer in confirmation of the interpretation given by the court. We do not wish to open the record for further testimony. But if the court has any real doubt that would upset the decision of the lower court, then Mrs. Meyer has adequately preserved her standing to bring extrinsic evidence to bear on testamentary intent, not otherwise.

STATUTORY HISTORY:

The sections of the Utah statute declaring "Legacies are due and deliverable at the expiration of one year after the testator's decease. Annuities commence at the testator's death," were taken verbatim from the California statute. The legislative history of that statute is stated in Deering's California Codes, Probate, page 333 at No. 162. The California legislature changed the old section that read precisely as does the Utah statute, so as to become more explicit as to when annuities are vested. Note how the addition for clarity is added, shown here in italics:

"162 . . . Annuities commence at the testator's death *and are due at the end of the annual, monthly or other specified period.*"

The California statute then goes on in the same paragraph, showing that even though there be a trust created

by will, such as the trust in the case at bar, nevertheless, interest is to accrue on each anniversary of the decedent's death. This demonstrates the fallacy of appellants' argument. California codified the practice and sound policy on which the Utah statute was founded. Here is the language that follows the quoted portion immediately above:

"162 . . . Whenever an annuitant, legatee of a legacy for maintenance or *beneficiary of a trust* may be entitled to periodic payments or *trust income* commencing at the testator's death, he shall be entitled to interest at 4% per annum on the amount of any unpaid accumulations of such payments or income held by the executor or administrator on each anniversary of the decedent's death, computed from the date of such anniversary." (emphasis added)

California like Utah vests the annuity at the time of testator's death. There is no question about that. Counsel in appellant's brief makes the specious, untrue statement at page 18 of their brief: "The trust estate did not come into existence until the testator's residual estate was distributed to the trustee on October 18, 1957." This statement is simply not true. In paragraph Seventh of the will the testator set up the terms of the trust that included all property "in which I may be interested at the time of my death . . . " The trustee was also the executor, possessed of full power over all of the estate, trust or otherwise. Under the terms of the amended, fuller and more explicit California statute above, the trust has nothing to do with fixing the time when the right to the annuity vests. This is codifying of the rule of law that

has been followed through the land and in England, and to postpone such a vesting date would not only violate the Utah statute but it would do violence to the clear testamentary intent of Mr. Pierpont, to say nothing of establishing a rule of law pregnant with possibilities for abuse by executors that could devour an estate before trust by time, expenses, widow's allowance, and other devises.

As it is, the executor took three years to reduce the estate to a form in which it chose to present the trust aspects to the lower court. (R. 273) It is well to examine appellants "Enclosure A" and the arguments at page 23 of the brief. Suppose they had taken rightfully or wrongfully as many as eight years to marshal and convert the estate for distribution, what could and would have happened to the elderly sister of the testator, Mrs. Meyer, during that time? She could have died of starvation, but her loving brother had other ideas. He stated clearly that she should receive \$100.00 per month during her lifetime." True it is that the testator was prudent in instructing the executor to "suspend further payments until funds become available . . . through orderly sale of all or part of the principal assets," but he follows with clear and unambiguous words that meet the test of the California statute as extended, and the Utah statute as it has existed for years, that:

"In the event any payments specified to be made by my Trustee shall be so reduced or suspended, it is my desire that when funds become available, *any so resulting deficiencies in monthly payments shall be made up.*"

Thus the will agrees with the California statute that the right to receive the fixed sum of \$100.00 per month vested on the date of testator's death; that if not paid then, the sum would have to be made up. And note the peculiar language in Seven (k) refers only to "deficiencies in *monthly* payments." (R. 15) How many annuities or legacies called for *monthly payments*? Only two. Mrs. Meyer and the widow. It is clear that the testator had in mind provision for Mrs. Meyer "during her lifetime." To postpone the vesting or accruing of Mrs. Meyer's annuity until such time as the executor saw fit to distribute the estate would be catastrophic to her age. Attaching conditions tending to "destroy estates are not favored in law, and are construed strictly, and generally all doubts are resolved against restrictions on the use of the property of the grantee." GAFFER'S ESTATE 5 NYS 2nd 678. "Conditions of defeasance, never suggested by her brother.

POINT II

THE BEQUEST TO MRS. MEYER WAS IN THE TRUE NATURE OF AN ANNUITY.

Appellants argue in their Point III that the bequest to Mrs. Meyer is not an annuity. The contingencies referred to respecting the widow are not applicable to Mrs. Meyer. Counsel predicate their argument that "respondents do not have an absolute right that they be made up," referring to the reduction or suspension if funds are not readily available in respect to selling assets at a sacrifice. Judge Tuckett heard the theory and was not impressed.

At that argument (R. 14) appellants' counsel referred the court to the Utah case of *In Re SEARS' ESTATE* 55 P 83 which no doubt assisted the trial court in determining that the bequests were in the nature of annuities.. Counsel does not suggest this court now consult its own decision, precedent since 1898, and unchanged. There testator made provision for his wife, sister, the latter to get \$50.00 per month during her life. A nurse was given money "as soon as there shall be sufficient," and by the payment of expenses, and the two annuities, there was insufficient for the nurse. The nurse persuaded the trial court to cut down the sister, but this court reversed, holding:

"Each of the foregoing bequests constitute an annuity, to continue during the life of the legatee . . . The record shows . . . that the estate after payment of the debts, expenses of administration, and a monthly allowance to the widow, which lasted about a year, was well-nigh exhausted . . . that the sister and legatee . . . has received nothing out of the estate, although at the time of making the decree complained of, 12 months had elapsed since the death of testate. It is apparent that all the legacies cannot be paid, and the question is who is entitled to preference under the terms of the will, as between the legatees to this controversy?

"It seems clear that the testator himself indicated whoshould receive preference in such a contingency . . . Next there is a provision for his sister and her children. This is also quite natural, because of the tender and affectionate feelings which usually exist between brother and sister. Then, after those who are entitled to his

first and highest consideration have been provided for . . . bequest to the nurse . . . it cannot be presumed that the testator intended that this bequest to a stranger should, under any contingency, receive preference over those made to his wife and sister. Such a presumption would be opposed to the natural feeling or affection which man has for his wife and next of kin.

“The bequest to his sister was an annuity, which commenced at the testator’s death while the bequest to the nurse was a legacy which was not due until one year after his death. Rev. St. 2815 . . . ”

The will stated that payments would commence with the date of testator’s death. Pierpont’s gift to Mrs. Meyer is silent. But that silence does not dispose of the case as grounds for this court declaring the gift to be an annuity. The laws of Utah at that time (Rev. Stat. Utah No. 2815 was identical to 74-3-14 UCA 1953 and the court found the old statute made out an annuity. The fact that the will itself specified the date of death for payment is immaterial in view of the Utah statutes. In leading California case *In Re PLATT’S ESTATE*, 131 P2d 825 at 828 the will did not specify the time payments were to commence, but that court, along with virtually all others, stated:

“So as there is no express provision in the will as to the date from which payment of income shall accrue, under Section 160 of the Probate Code the rights of both wife and son to income under the trust accrue from the date of the testator’s death.”

In arguing our point number two on annuities, may

we say that implicit in the authorities cited in point one is the law pertaining to annuities. We advert primarily to the arguments of appellants for answer, referring the reader to point one for synthesis of the dual question of vesting and annuities. The two are closely allied in the cases.

The prime statutory definition of annuity is in 74-3-1, UCA 1953:

“ . . . (3) An annuity is a bequest of certain specified sums periodically; if the fund or property out of which they are payable fails, resort may be had to the general assets as in case of a general legacy.”

Counsel refers on page 26 of their brief to the definition of annuity as it pertains to insurance. That is impertinent. We deal only with the probate definition, quoted immediately above, it having but one prime requisite: that is for a certain specified sum, periodically. The will at paragraph 7 (i) is certain. It specifies \$100.00 per month “during her lifetime.” It also goes further than need be, under the Utah statute, and requires the invasion of principle if income is insufficient. Thus the statute of Utah just quoted, as to its final clause, is not even needed to give certainty.

Counsel goes to paragraph Seven (k) to create doubt as to certainty, and even argues on page 30 of their brief that Mrs. Meyer could not sue to force a sale. -Suffice it to say she did not. She did not presume to rifle the estate, not force uneconomic sacrifice. She waited patiently, only to have her waiting rewarded

with a prolonged and costly defense of her absolute rights, once the estate was liquidated and in a position to distribute. It was wise for the testator Pierpont to instruct no haste in marshalling the assets. But the intent is absolute and clear in the will: first, that Mrs. Meyer was to get under 7(i) a sum certain during her lifetime; and second, that if in prudence, monthly payments were reduced or suspended, they *shall* be made up, in 7 (k). It is impossible to mistake the construction. It is clear. It was not drawn by amateur counsel. Had the draftsman intended to postpone payments to Mrs. Meyer, it would have been easy to carve out an exception for the then existing pertinent statute, 74-3-14 UCA 1953, but all that appears is the wisdom of careful liquidation, holding out the instruction that if “payments required to be made” were suspended, they *shall* be made up. Again note that 7 (k) only refers to “monthly payments” and Mrs. Meyer and the widow are the only set up for monthly payments. When the construction given an instrument by a trial court appears to be resonable and consistent with the intent of the party making it, appellate courts will not substitute another interpretation even though it seems tenable. Here, any substitute interpretation would be stretching intent, and would be villainous.

Appellants say Mrs. Meyer would have no remedy had she sued for a more speedy liquidation and payment to her of the annuity. They argue “respondents do not have an absolute right that they (payments) be made up.” (p 30, their brief) It may be only a qualified

right, qualified only by the caution of orderly liquidation. We do not split hairs. Had the trustee or the probate court been slothful in its liquidation, and undertaken to unnecessarily prolong that process, certainly this court under its rules concerning Extraordinary Writs would have the power to step in and discipline; the rights of Mrs. Meyer were qualified only to the extent of waiting for sales, conversion into cash without sacrifice. This is sensible, but is no grounds for appellants arguing the need for an "absolute right" to receive the annuity. This court did not mind finding In Re SEARS' ESTATE, supra, that the sister, who had not been paid anything within a year of the testator's death, still had a vested right to receive the annuity as of the date of testator's death. It has been unfair for the trustee to so long withhold the annuity, since it had the funds. The trustee has yielded to the pressures of the residuary legatees; instead of remaining neutral as a trustee should, it has taken sides with the grand children and others, remote from the testator's sister, whom Mr. Pierpont had maintained, and wanted to continue to help during her old age. As to Mrs. Meyer, there never has been a legitimate controversy

The complete answer to appellant's argument concerning a right to compel payment before distribution is set forth In Re MARRE'S ESTATE, 114 P2d 591 at 590 under 11-13 sub heads, quoted hereinbefore. Space does not allow repetition. (see page 5,.... of this brief)

Appellants' reference to precatory words in paragraph 7(k) is specious. The whole idea of suspension

or reduction of monthly payments is predicated on the precatory use of the word “may” on the fourth line of 7(k). Note that on line 2 thereof, the testator has used the mandatory, unprecatory words “payments *required*.” This proves the stronger intent in paragraph 7 (i) where the strongest word in the law, “shall” is unqualified, as to the intent that his sister *shall* receive \$100 per month during her lifetime. Precatory words may be found in 7(k), but they relate to the discretion of postponement, not the ultimate right of Mrs. Meyer to receive. “. . . resulting deficiencies in monthly payments *shall be made up*,” are anything but precatory — they manifest a determination to maintain those of his loved-ones who had monthly payments, not those that came after! Certainly the trustee had qualified right to postpone payments; but with the qualified right rode the unqualified right to have the deficiencies “made up.” This type of a will is to be encouraged, but certainly it would make bad law for this court to graft into precedent law the hair-splitting and ambiguity implicit in such contention of appellants.

Appellants are confused. The best way to unconfuse them is for this court to follow the California Supreme Court In Re MARRE’S ESTATE, *supra*, 114 P2 586 and since followed widely. We have quoted earlier in this brief from that excellent decision. In that case it was likewise argued that annuities were not created by the will because no date of commencing payments was stated. The court said:

“The absence of an express direction that the payments were to accrue from the date of her

death does not establish conclusively that the testatrix had no such intent The terms of the will clearly indicated that this trust was created for the specific purpose of providing maintenance and support for the testatrix' grandson . . . Indeed, if the will itself did not refer to this bequest as a trust for maintenance and support, the surrounding facts and circumstances would compel that conclusion."

WOODLEY v. WOODLEY 117 P2d 722, cited by appellants at page 29, their brief, relates to an annuity which is a charge on land, and not applicable. Besides it is a lower court decision; it does not help or hurt the respondent's position at bar otherwise than to dignify the argument that annuitants have vested rights that may be vindicated in the courts.

Appellants cite 95 C. J. S. 803 on precatory words. Note the same authority at page 800, keeping in mind that the precatory words, if such they be in 7(k) of the will, are addressed to the trustee, not to the right of Mrs. Meyer to receive monthly payments. Her right is preserved by the words "*payments required to be made*" on the second line thereof. The precatory words refer to the method of liquidation; they are suggestions to the trustee, and in no way unvest Mrs. Meyer. Line 13 of 7(k) illuminates again the intent that the trustee shall meet the payments specified in this will."

Appellants' brief has not completely leveled with the court on page 32, line 3 of its attempt to elucidate the precatory. It is singular that the most important word in the paragraph — "*shall* was ommitted. It is this word that refers to the vested right of the annui-

tants. Possibly counsel did not realize it was there. He assumes that in its place a word like "may" exists. Not so. His argument falls with his failure to find the word! Substitute a precatory word in its place, and the finding this court must affirm is self evident.

In re PITTOCK'S WILL cited at page 33 of appellants' brief is beside the point.

Counsel trifle with the manner of the lower court in finding the bequests are "in the nature of annuities." The learned trial judge used a common manner of speech, writing. Please notice how the California court uses the same expression on line 18 of page 590 In Re MARRE'S ESTATE, 114 P2d 591, supra. Counsel quibbles.

74-2-25 UCA 1953 raises a presumption that Mrs. Meyer had a vested right to receive her annuity as of the time of death. At page 36 of their brief, appellants admit respondent Meyer is supported by a presumption. Appellants have utterly failed to rebut the presumption. The will itself confirms that the presumption is wholly warranted.

The only discretion trustee had, in respect to respondent Mrs. Meyer, was to take precautions in an orderly liquidation. All of their talk on this subject is unworthy. There is no discretion when Mr. Pierpont said "shall be made up," not may.

Finally, appellants' brief adverts on page 37 to the duty of the trustee to pay the annuity to Mrs. Meyer *or to her estate*. Had she died prior to distribution,

counsel did not say her estate could not collect! The authorities treated herein established the vesting as of date of testator's death and preserved the rights that Mrs. Meyer's estate could realize. Mr. Pierpont recognized this by paragraph 9 of the will. That further proves his intent to take care of her during her lifetime. It was and is a vested right that cannot be postponed. Only the manner of making payment is affected by paragraph 7 (k), not the right.

POINT III

THE COURT DID NOT ERR IN FINDING INTEREST SHOULD BE PAID FROM DATE OF DEATH.

Appellants' counsel argue on page 38 of their brief that the court erred in affixing interest on the annuity. In that connection, the clear error of appellants is exhibited. The brief say at page 38:

“In any event, the award is erroneous as to any payments for the period prior to August 29, 1957, since it is within the *discretion* of the trustee as to whether any such payments shall be made up.”

Nothing could be further from the truth.

To get at this question, as a matter of law, which appellants have skirted, citing no authority, let us look at the cases on interest accruing on annuities. The authorities we are concerned with all agree that interest accrues on an annuity of this kind!

The learned trial court required the payment of interest to Mrs. Meyer, and presumably he relied on the Utah statute, and the general law. He was right. What

is the difference between an annuity and a legacy? All legacies are not annuities, but all annuities are legacies! Hence, when the Utah statute expressly reaches out and employs the language of "legacies for maintenance" Mrs. Meyer is clearly within the Utah statute. But we do not rely on the Utah statute alone.

Note what 2 Am Jur. 829 No. 25 has to say about Interest upon arrearages:

"In this country the weight of authority supports the conclusion that interest upon arrearages of annuities is recoverable from the time the installments of the annuity becomes due and payable."

The statute of Utah requires the payment of interest. 74-3-15 says:

"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."

Mrs. Meyer was given a legacy in the nature of an annuity. It was clearly for "maintenance." All inferences point positively in that direction. This court is bound to accept the proffer of proof that for 18 to 20 months before his death, he maintained her with payments of at least \$100 per month. (Tr. 20) Is a legacy, as used in 74-3-15 an annuity? Certainly it is. Bouvier defines a legacy to be "A gift of personal property by last will and testament. A gift or disposition in one's favor by a last will. The term is more commonly applied to a bequest of money or chattels . . . A direction to the executor to support and maintain a person during his life gives

him a legacy." There can be no doubt but that an annuity is within the generic term used in 74-3-15, thus requiring the payment of interest, and from the time they are due and payable, which is in 74-3-14 UCA 1953: "Annuities commence at the testator's decease." The trial court was aware of this and hence made his decree accordingly. This should by all means be affirmed.

Note that the California statute since 1931 has read:

"General pecuniary legacies, if not paid prior to the first anniversary of the testator's death, bear interest thereafter at the rate of 4% per annum. Annuities commence at the testator's death and are due at the end of the annual, monthly or other specified period. Whenever an annuitant, legatee of a legacy for maintenance or beneficiary of a trust may be entitled to periodic payments or trust income commencing at the testator's death, he shall be entitled to interest at 4% per annum on the amount of any unpaid accumulations of such payments or income held by the executor or administrator on each anniversary of the decedent's death, computed from the date of such anniversary." (See legislative history of section.)

Deering's Calif. Codes, Probate, 333 No. 162. California codified its practice in the courts. Utah's statutes are not in conflict, and are in effect to the same effect, without the interest rate stated.

When interest attaches by statute, that of itself proves the vesting of the legacy, annuity.

Please refer to Jarman on Wills, 7th Ed., vol. 2, page 1108 for reference to the English authorities. Lord Harwicke is there quoted as saying that "where the accumu-

lation of arrears has been occasioned by the misconduct of the party bound to pay" that interest should always accrue. In that same work, Jarman at page 1024 specifies the different kinds of legacies, helpful in classification in this case. That eminent authority states, at page 1107 of that work, respecting the date annuities begin to be payable:

"The general rule is that an annuity given by will is to commence from the date of the testator's death; that is to say, if no time for payment is fixed, the first payment is to be made at the expiration of one year from the testator's death, but if the testator directs that the annuity shall be paid, say, monthly, the first payment is to be made at the end of a month after the testator's death."

2 Jarman, Wills, 7th Ed. 1107.

The Utah statute has picked up this old and ancient rule.

That we are dealing with an ancient and established precedent, see the annotation at 10 ANNO. CASES, 339 with this statement, backed up by a host of authorities:

"By the weight of authority, interest upon the arrearages of annuities is recoverable. Thus it has been held that interest is recoverable from the time the installments of the annuity become due and payable . . . Where an annuity has been given for the support and maintenance of the annuitant, interest upon the arrearages must be allowed.

Let it be observed that Mrs. Meyer has always contended for interest, and is not guilty of laches. See her pleadings at pages 347, 367 of the record.

The Supreme Court of California in re HUBBELL'S ESTATE, 1932, 15 P. 2d 503 observed:

“We are inclined to the view that interest is due on a legacy, not as a penalty for nonpayment or default in payment, but as a part of or and accretion to the legacy itself.”

To apply such a rule of reason in this case does no injury to anyone because the trustees has had the corpus of the estate out at interest for the benefit of all of the residuary legatees. To deprive Mrs. Meyer of her just share of that interest would be inequitable, and benefit those whom Mr. Pierpont did not intend to favor, as his sister's loss. His intent to make up any delayed payment is proof.

The Utah Supreme Court in *Re SEAR'S ESTATE*, 55 P 83 found that

“The bequest to his sister was an annuity which commenced at the testator's death. . .”

Thus, under 74-3-15-UCA 1953, interest had to accrue from date of death of Mr. Pierpont.

This court In *Re LOWE'S ESTATE*, 249 P. 128 found that

“. . . all testamentary dispositions are presumed to vest at the testator's death.”

There is no other answer.

In *Re MARRE'S ESTATE*, 114 P2 591 gives a strong treatment on the subject, finding that interest must be paid on “legacies for support and maintenance” such as we have here.

In *re PLATT'S ESTATE*, 131 P2 825 the California court in that classic leading case holds:

“Interest, when payable upon a legacy, is a part of or an accretion to the legacy itself. (cases) Legacies for maintenance or to the testator’s widow bear interest from the testator’s death; all other legacies are due one year after the testator’s death and bear interest from that time. (code & case) Under this rule, the income which accrued to the wife during the period between the date of death and the date of distribution bears interest from the date such income was received by the executors.”

The RESTATEMENT OF TRUSTS, second, revised edition, at topic 234 is illuminative on the question of interest.

The strongest argument in favor of allowing interest is in the will itself. By paragraph 7(i) the testator showed that he did not rely on income alone but of the corpus of his property as grounds for payment to Mrs. Meyer. He stated clearly that if the income was insufficient, then the principle should be invaded so as to get her required payment of \$100 per month during her lifetime. 7(k) wherein payments to be paid up if suspended, shows the clear intent that she should have the sum certain. If this court continues to adhere to its rule that annuities vest as of the time of death of the testator, then the requirement of the trustee to pay the legal rate of 6% interest from date of death must apply. That counsel argues that there was no income for a time in the estate is inapplicable because of the mandate to pay the \$100 from corpus if income was not sufficient. This puts the right to receive interest on the footing of any other obligation in Utah that goes unpaid. We deal here with a legacy in the nature of an annuity, and the probate stat-

utes require payment of interest from the time when they are due. (74-3-15 UCA 1953) There can be no escape.

Appellants predicate their entire argument against interest on their being a discretion to pay the annuity if and when the probate was concluded. This is falacious, as has been argued in the main part of this brief. If the sum provided in the will vested at time of death, interest commences then. The trial court so found and computed. It was right.

CONCLUSION

Mrs. Ella Meyer trusts that this court will affirm the lower court, and make available to her while she is yet alive, the gift with interest, bestowed by her loving brother. She will not be long with us, but her rights are real and vested. May they be vindicated in the name of good law for the books.

Respectfully,

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