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WILLS-CONSTRUCTION-MEANING OF WORD 'WIDOW" WHEN USED BY TESTATOR

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WILLS—CONSTRUCTION—MEANING OF WORD "WIDOW" WHEN USED BY TESTATOR—Testatrix set up a testamentary trust which was to continue "until the death of the last survivor of such of my children, grandchildren and any widow of my son, surviving him as shall be living at my decease." Upon the death of any child the trustee was directed to pay to "the husband or widow" of such child a part of the principal or an annuity from the income of the trust. Testatrix' son remarried after her death and on his death the trustee brought this action to determine whether the second wife who was living at testatrix' death, was entitled to the annuity. On appeal from a decree of the probate court instructing that no annuity was payable, *held,* affirmed. A testamentary gift to the widow of another is presumptively a gift only to that other's wife who was known to the testator. *Hill v. Aldrich,* (Mass. 1951) 96 N.E. (2d) 147.

Where a testamentary gift is made to a beneficiary who is described only by his relation either to the testator or to another, and there is an existing person answering the description, such words are ordinarily held to refer to the date of the will and not to the time that the gift is to take effect in possession.[1] For example, where there is a testamentary gift to the testator's "wife," or to the "wife" of another, the courts usually find that the will refers to the existing wife.[2] Where there is a gift to the testator's "widow," or to the "widow" of another, however, most of the cases seem to indicate that the wife known to the testator was not necessarily the intended object of the gift.[3] This distinction is subject to a possible explanation. Where the word "wife" is used, the relation is already created and an existing fact is being referred to, only one person presently satisfying the designation. Where the word "widow" is employed while the beneficiary's husband is still alive, however, to neither an existing fact nor a fact which will necessarily come into existence has there been a reference.[4] In the principal case, the court failed to recognize this distinction. But the application by a court of rules of construction is simply permissive rather than mandatory. The primary aim of the court in such a situation is to ascertain the testator's intention as expressed in the will. This, of course, requires a full and complete consideration of the entire will, read in the light of the circumstances.[5] The intention of the testator being the touchstone of interpretation, when such intention is clear, the ordinary rules of construction, which are

[1] 1 JARMAN, WILLS, 7th ed., 372 (1930); 69 C.J. §1221 (1934); Anshutz v. Miller, 81 Pa. 212 (1876).

[2] Van Syckel v. Van Syckel, 51 N.J. Eq. 194, 26 A. 156 (1893); Williams v. Fundingsland, 74 Colo. 315, 221 P. 1084 (1924) (dictum), 63 A.L.R. 77 at 81. *Contra,* American National Bank of Camden v. Morgenweck, 114 N.J. Eq. 286, 168 A. 598, affd. 118 N.J. Eq. 269, 178 A. 727 (1933).

[3] Swallow v. Swallow's Admr., 27 N.J. Eq. 278 (1876); Meeker v. Draffen, 201 N.Y. 205, 94 N.E. 626 (1911); Wallace v. Cutsinger, 66 Ind. App. 185, 115 N.E. 789 (1917).

[4] Swallow v. Swallow's Admr., supra note 3. Cf. 3 PAGE, WILLS, 3d ed., §1008 (1941).

[5] Gannett v. Shepley, 351 Mo. 286, 172 S.W. (2d) 857 (1943). For a general discussion of the problem of interpretation, see Kales, "Considerations Preliminary to the Practice of the Art of Interpreting Writings—More Especially Wills," 28 YALE L.J. 33 (1918).

available in more difficult cases, are wholly inapplicable.[6] Moreover, even in cases where the court may properly resort to such rules, an arbitrary application thereof is wholly unwarranted.[7] As one court, dealing with a problem of interpretation, stated, "The analogies afforded by precedents are helpful servants, but dangerous masters."[8] Nevertheless, there would seem to have been no such reason to depart from the normal rule in the principal case. The court here argued that the requirement of survivorship by the widow, in order to be one of the measuring lives, also applied to the widow as beneficiary and identified a particular individual.[9] But the requirement might also be explained as a mere redundancy occasioned by the failure of the drafter to realize that a widow must necessarily survive her husband to be a widow. Moreover, the deliberate insertion of the word "any" would seem to be entitled to great weight, since such a modification of "widow" would be meaningless if a particular individual were intended. It may be supposed that the definite article "the" or even the indefinite article "a" would have been used before the word "widow" in the will if the testatrix had really intended to restrict the beneficiary to the existing wife of her son.[10] Thus, it is submitted, the better interpretation in the principal case would seem to be that testatrix intended to provide for her son's widow, whoever she might be, simply because she was his widow, and on his death would probably be without support.

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[6] Brasher v. Marsh, 15 Ohio St. 103 (1864); Trowbridge v. Trowbridge, 127 Conn. 469, 17 A. (2d) 517 (1941).

[7] Gannett v. Shepley, supra note 5. Since a valid interpretation is always preferred to an invalid one, the normal rule might be rejected if the resultant gift were invalid under some rule of law. See In re Friend's Estate, 168 Misc. 607, 6 N.Y.S. (2d) 205 (1938), affd. In re Friend's Will, 257 App. Div. 924, 12 N.Y.S. (2d) 1008 (1939), modified 283 N.Y. 200, 28 N.E. (2d) 377 (1940) (gift to widow would have been invalid under New York rule against suspension of power of alienation if ordinary rule of interpretation applied). The problem is further considered in Chaplin, "Future Trusts for a 'Husband,' 'Wife,' or 'Widow,'" 36 YALE L.J. 336 (1927).

[8] Wentworth v. Fernald, 92 Me. 282 at 288 (1898).

[9] Principal case at 149. Cf. Wallace v. Cutsinger, supra note 3.

[10] See Van Brunt v. Van Brunt, 111 N.Y. 178, 19 N.E. 60 (1888); Willis v. Hendry, 127 Conn. 653 at 672, 20 A. (2d) 375 (1941).