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Chapter 5: Trusts and Estates

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CHAPTER 5

Trusts and Estates

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§5.1. Fiduciary accounting: Amortization payments charged to principal: Depreciation reserve. Whenever a trust provides for successive beneficial interests, the trustee is often faced with the question of the proper allocation, as between income and principal, of the various expenses incurred during the administration of the trust. From the trustee's standpoint, the question is of serious concern because of the legal duty imposed on him to act impartially toward each beneficiary of the trust.[1] From the beneficiary's standpoint, the question is important because every allocation of trust expenses seriously affects the value of the beneficial interest.

In *New England Merchants National Bank v. Koufman,*[2] decided during the Survey year, the Supreme Judicial Court was presented with the question of whether amortization of mortgage principal should be charged against the income or corpus of the trust. The Court held that the payments were chargeable to corpus even though the trust res consisted solely of real estate and there was no cash in the principal account from which to make the payments.[3]

In *Koufman,* the testator had been involved in the real estate construction and development business. When the testator executed his will, his wife was almost entirely dependent on him for her support. By Article Second of his will, the testator devised certain real estate "subject, however, to any mortgage or mortgages . . . which may exist thereon at the time of my death . . . " to his trustees and directed them to pay to his wife for her life "the net income" up to a stated annual maximum and further directed them to distribute the excess annual income, if any, in equal shares to his daughter and grandson.[4]

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§5.1. [1] Kingsley v. Spofford, 298 Mass. 469, 477, 11 N.E.2d 487, 492 (1937); Restatement (Second) of Trusts § 232, at 555 (1959); 3 A. Scott, Trusts § 232, at 1894 (3d ed. 1967).

[2] 1973 Mass. Adv. Sh. 623, 295 N.E.2d 388.

[3] Id. at 626-29, 295 N.E.2d at 391-92.

[4] Id. at 624, 295 N.E.2d at 389.

On the wife's death, the trustees were directed to distribute the principal of the trust to a named charity.[5]

The trust corpus consisted solely of interests in two parcels of real estate, both of which had been encumbered with mortgages since the testator's death in 1965.[6] From the inception of the trust, there had never been any cash in the principal account and the trustees had been charging all expenses, including payments on the mortgages, against current rent receipts. Because the income beneficiaries questioned the trustees' method of accounting for the mortgage payments, the trustees filed a petition for instructions on the proper method of computing the "net income" of the trust.[7]

Following a hearing, the probate judge decreed that the income beneficiaries were the primary objects of the testator's donative intent and ordered the trustees not to charge the income of the trust with the principal payments on the mortgages. The judge also ordered that if the cash flow of the trust was insufficient to permit a current distribution of the entire net income, the undistributed net income was to be distributed as soon as funds became available and was to be charged against the principal of the trust together with four per cent interest from the date on which the distribution should have been made.[8] Finally, the decree authorized the trustees to borrow money

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[5] Article Second in its entirety read:

All right, title, and interest which I may own at the time of my death in any real estate wherever located, except the real estate at 161 Cabot Street, Brookline, Massachusetts, subject, however, to any mortgage or mortgages, or other encumbrances, or any lien or liens, which may exist thereon at the time of my death, in fee simple absolute to the TRUSTEE under this my Will, IN TRUST NEVERTHELESS, for the following trust purposes and to be known as 'Trust B'; and also to the co-trustee;

(a) To pay to or apply for the benefit of my wife, JEANNE O. KOUFMAN, as long as she shall live, the net income in monthly installments up to ten thousand dollars ($10,000.00) for each twelve month period.

(b) To pay the net income in excess of ten thousand dollars ($10,000.00) if any, for the rest of such period of twelve months by equal monthly installments in equal shares during the period of the following twelve months to BEVERLY TUTTLE and my grandson, JAMES A. KOUFMAN, or to apply the same for their benefit in the same manner, or to be the survivor of them.

(c) Upon the death of my said wife, Jeanne O. Koufman, to pay and transfer the principal of this trust to the CHILDREN'S CANCER RESEARCH FOUNDATION commonly known as "Jimmy Fund" and located in Boston, Massachusetts, for its unrestricted use consistent with its charitable purposes.

Id at 624, 295 N.E.2d at 389.

[6] At the testator's death, the real estate was valued at $795,000 and the outstanding balance on the mortgages was $547,164.01, leaving an equity in the property at that time of $247,844.98. By July 1971, the mortgage balance had been reduced to $463,494.88. Id. at 624-25, 295 N.E.2d at 389-90.

[7] Id. at 625, 295 N.E.2d at 390.

[8] Id. at 626, 295 N.E.2d at 390. The decree provided, however, that if the accrued interest charges would reduce the corpus below the value of the equity at the time of the testator's death, then the charges should be abated so as to preserve the original value. Id. at 626 n.1, 295 N.E.2d at 390 n.1.

on the trust corpus in order to effectuate the testator's intent to provide for the income beneficiaries.[9]

In affirming the decree of the probate court, the Supreme Judicial Court firmly settled the question of who, as between the income beneficiaries and the remainderman, should bear the economic burden created by a mortgage on trust property. In addition, the facts of the case presented the Court with a situation not usually present in cases dealing with the allocation of trust administration expenses, namely, the practical problem of providing a method for payment where no principal cash is available. In fact, the very existence of the latter problem was relied upon by the remainderman in arguing that the testator must have intended the amortization payments to be charged against income. Otherwise, the remainderman argued, this trust, created by a "shrewd real estate investor," would have been unworkable.[10]

Notwithstanding the remainderman's argument that the lack of any cash in the principal account furnished a basis for discerning the testator's intent, the Court relied on the widely accepted rule that, absent any indication in the instrument to the contrary, amortization payments on mortgages on trust property are always to be treated as a charge against the corpus of the trust.[11] In the circumstances presented to the Court in *Koufman,* a construction of the words "net income" to mean income available after charging principal expenses thereto would have had the effect of shifting the beneficial interests of the trust in a manner not intended by the testator. On this basis alone, the Court held that the payments should be charged against corpus. "[T]he value of this rule [charging mortgage amortization to corpus] is not simply precedential; its compelling justification is that charging principal amortization to income essentially shifts the beneficial interest to the remainderman from income beneficiaries, presumably in alteration of the balance envisioned by the decedent."[12]

The *Koufman* decision is sound from a legal as well as a practical standpoint. Clearly, principal amortization payments are not in the nature of ordinary current expenses such as interest on mortgages and other indebtedness, regularly recurring taxes, insurance premiums and ordinary repairs, all of which traditionally have been charged against income.[13] Rather, they are in the nature of perma-

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[9] Id. at 626, 295 N.E.2d at 390.

[10] Id. at 627, 295 N.E.2d at 391.

[11] Ellis v. King, 336 Ill. App. 298, 83 N.E.2d 367 (1949); In re Marshall's Will, 21 Misc.2d 154, 191 N.Y.S.2d 299 (Sur. Ct. 1959); Holmes v. Hrobon, 93 Ohio App. 1, 103 N.E.2d 845 (1951); G. Bogert, Trusts and Trustees §§ 603, 808, at 172, 397 (2d ed. 1960); 3 A. Scott, Trusts § 233, at 1897 (3d ed. 1967); Revised Uniform Principal and Income Act § 13(c)(2).

[12] 1973 Mass. Adv. Sh. at 628, 295 N.E.2d at 391-92.

[13] Kingsley v. Spofford, 298 Mass. 469, 11 N.E.2d 487 (1937) (fire insurance); Parkhurst v. Ginn, 228 Mass. 159, 117 N.E. 202 (1917) (taxes); Bridge v. Bridge, 146 Mass. 373, 15 N.E. 899 (1888) (interest on mortgage, repairs, taxes, water rates, insurance); Root v. Yeomans, 32 Mass. (15 Pick.) 488 (1834) (ordinary repairs).

nent improvements to the trust property which are of maximum benefit to the remainderman and, as such, have always been considered a charge against trust corpus.[14] To have required in *Koufman* that the principal payments be charged against income would have had the effect of enriching the remainderman at the expense of the income beneficiaries who, according to the probate judge's findings, were the primary objects of the testator's donative intent.

From a practical point of view, the lack of any cash in the principal account presents no serious obstacle to charging the amortization payments against corpus. One possibility, of course, is for the remainderman to satisfy the mortgages.[15] Another alternative, authorized by the decree, is for the trustees to borrow money on the trust res in order to make the payments. In view of the language in Article Eighth of the will authorizing the trustees to mortgage, sell, exchange or otherwise dispose of the trust property,[16] the authorization to borrow is consistent with the testator's intent. Finally, the provision for interest incorporated into the decree insures the income beneficiaries against any diminution in the value of their income interest on account of a delay in payment while preserving the value of the remainder as it existed at the time of the testator's death.

Anticipating that the Court would follow the general rule regarding principal amortization payments, the remainderman argued in the alternative that a reserve for depreciation of the real estate should be established and charged against the income of the trust.[17] Aside from the fact, however, that the weight of authority is against establishing such a reserve where the trust corpus consists of commercial or rental property,[18] the facts presented in *Koufman* did not suggest that such a reserve was warranted.

Generally, a reserve is set aside to assure the remainderman that the value of the corpus of the trust will not be diminished by depreciation or obsolescence. In the usual case, a reserve is established where the trust property consists of assets which gradually decline in value either because they are of inherently limited life or because their use causes them to diminish in value. Clear examples of such assets, sometimes referred to as "wasting assets," include leaseholds,

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[14] Little v. Little, 161 Mass. 188, 36 N.E. 795 (1894); Plympton v. Boston Dispensary, 106 Mass. 544 (1871); G. Bogert, Trusts and Trustees § 805, at 150 (2d ed. 1960). 3 A. Scott, Trusts § 233.3, at 1909 (3d ed. 1967).

[15] This approach was suggested by the probate judge when he stated that "the gift to the remainderman of the equity in the real estate at the time of the decedent's death, *to the extent that the remainderman does not elect to satisfy any mortgage or mortgages*, is subject to the prior rights of the income beneficiaries to the net income." 1973 Mass. Adv. Sh. at 625, 295 N.E.2d at 390 (emphasis added).

[16] Id. at 628, 295 N.E.2d at 391.

[17] Id. at 629-31, 295 N.E.2d at 392-93.

[18] Matter of Siegel, 29 App. Div. 2d 502, 288 N.Y.S.2d 944 (App. Div. 1968); Matter of Crimmins, 159 Misc. 499, 288 N.Y.S. 552 (Sur. Ct. 1936); Welch v. Welch, 235 Wis. 282, 290 N.W. 758 (1940); G. Bogert, Trusts and Trustees § 829, at 458 (2d ed. 1960); 3 A. Scott, Trusts § 239.4, at 2048 (3d ed. 1967).

royalties from books or inventions, and interests in mines, wells, forests, and quarries.[19]

In *Koufman,* the trust consisted solely of interests in two parcels of commercial real estate. Not only was there no evidence of physical depreciation, but the parties agreed that the properties had actually appreciated in value since the testator's death. In these circumstances, the Court was clearly correct in refusing to order the trustees to establish a reserve. In the absence of any direction in the will regarding a reserve for depreciation, it is unlikely that the testator would have favored deductions against the income of the trust in order to protect the remainderman against a possible diminution in value of the real estate. In fact, given the probate judge's finding that the income beneficiaries were the primary objects of the testator's donative intent, it is more probable that the testator intended depreciation and obsolescence to be risks borne by the remainderman in exchange for the very real possibility that the property would, as it did, appreciate in value.

§5.2. Fiduciaries: Reopening prior accounts: Fraud: Self-dealing: Negligence. The purpose of the fiduciary's duty to account periodically for the property entrusted to him is two-fold.[1] On the one hand, by providing a means of complete and accurate disclosure, it is intended to insure that the beneficiaries of an estate, trust, or other fiduciary relationship receive the benefits to which they are entitled.[2] On the other hand, it provides a method by which the fiduciary is discharged from responsibility for his handling of the property during the period covered by the account.[3] The latter purpose is actually a part of the more general statutory policy of expediting the administration of estates and trusts by imposing a degree of finality on the allowance of all fiduciary accounts. During the Survey year, the Supreme Judicial Court in *O'Brien v. Dwight*[4] reviewed at length the obligations imposed on a fiduciary in rendering his account and the standard of conduct governing his activity as a fiduciary.

Chapter 206, section 24 of the General Laws specifically provides that "[a]fter final decree has been entered on any . . . account it shall

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[19] G. Bogert, Trusts and Trustees § 829, at 458 (2d ed. 1960); 3 A. Scott, Trusts § 239.4, at 2048 (3d ed. 1967); Restatement (Second) of Trusts § 239 at 591 (1959), comment h.

§5.2. [1] G.L. c. 206, § 1, provides in part:

> An executor, administrator, guardian or conservator, or a trustee required by law to give bond to a judge of probate, shall render an account relative to the estate in his hands at least once a year and at such other times as shall be required by the court . . . .

[2] G.L. c. 206, § 2; Restatement (Second) of Trusts §§ 172, 173, at 376 (1959).

[3] See Holyoke Nat'l Bank v. Wilson, 350 Mass. 223, 214 N.E.2d 42 (1966); Restatement (Second) of Trusts § 220, at 514 (1959); 2 G. Newhall, Settlement of Estates and Fiduciary Law in Massachusetts § 287, at 241 (4th ed. 1958); 3 A. Scott, Trusts § 220, at 1765 (3d ed. 1967).

[4] 1973 Mass. Adv. Sh. 409, 294 N.E.2d 363.

not be impeached except for fraud or manifest error."[5] This section was amended in 1938 to make clear that interim as well as final fiduciary accounts are to be afforded the same degree of finality as decrees entered in other proceedings before the probate court.[6] Section 24 is obviously founded on the long-established public policy that once a matter has been properly heard and determined by a court of competent jurisdiction, it should not be reopened. In line with that policy, the Supreme Judicial Court on a number of occasions has held that a matter would not be relitigated where a claim is made that certain testimony was false or that material evidence was either suppressed or concealed.[7]

Despite the desirability of achieving finality in all court proceedings, there are numerous cases in which the Court has acted to reopen a prior probate court decree where the interests of justice required such action. For the most part, these cases have relied on the "fraud or manifest error" language contained in section 24. It has been held, for example, that a decree will be reopened where an affected person was not given notice of a proceeding or afforded an opportunity to litigate an issue claimed to have been adjudicated by the decree.[8] In some cases, the failure to notify or otherwise afford an interested party an opportunity to be heard has been the result of an accident or mistake.[9] In others, where the failure was intentional, the Court has had no difficulty finding fraud within the meaning of section 24.[10]

An infrequent but nonetheless clear example of the fraud necessary to set aside an earlier account is the situation where the fiduciary has engaged in self-dealing and has disguised it by filing an inaccurate or incomplete account. In this situation, the Court has been quick to grant relief. In a leading case, *Jose v. Lyman,*[11] one of several co-executors had purchased from the estate, at private sale, some securities of a closely-held corporation which the testator had pledged

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[5] G.L. c. 206, § 24.

[6] Acts of 1938, c. 154, § 1.

[7] Stephens v. Lampron, 308 Mass. 50, 53, 30 N.E.2d 838, 839 (1941) (decree of probate procured through fraud of principal beneficiary who secreted potential witness against the will not revoked); Renwick v. Macomber, 233 Mass. 530, 533-34, 124 N.E. 670, 671 (1919) (decree of probate procured by fraud of sole legatee through suppression of facts showing testamentary incapacity held not open to revocation after time for appeal had passed); Zeitlin v. Zeitlin, 202 Mass. 205, 207, 88 N.E. 762 (1909) (a libel to set aside a decree of divorce on the ground that it was obtained by false testimony, fraudulently procured, cannot be maintained).

[8] E.g., Jose v. Lyman, 316 Mass. 271, 55 N.E.2d 433 (1944); O'Sullivan v. Palmer, 312 Mass. 240, 44 N.E.2d 958 (1942); Lovell v. Lovell, 276 Mass. 10, 176 N.E. 210 (1931); Sullivan v. Sullivan, 266 Mass. 228, 165 N.E. 89 (1929); Child v. Clark, 231 Mass. 3, 120 N.E. 77 (1918).

[9] E.g., Lovell v. Lovell, 276 Mass. 10, 176 N.E. 210 (1931); Sullivan v. Sullivan, 266 Mass. 228, 165 N.E. 89 (1929).

[10] E.g., O'Sullivan v. Palmer, 312 Mass. 240, 44 N.E.2d 958 (1942); Child v. Clark, 231 Mass. 3, 120 N.E. 77 (1918).

[11] 316 Mass. 271, 55 N.E.2d 433 (1944).

to the co-executor as security for a loan. To protect the value of the securities, the co-executor had entered into an agreement with another large holder of securities in the same company that neither one would sell them for eighteen months. The legatees under the will and the beneficiaries of a testamentary trust were not informed of the details of the stock transaction. The executors' account, assented to by all persons, merely indicated that the shares had been sold and that the proceeds had been paid to one of the executors in satisfaction of the testator's obligation to him. The account did not, however, indicate that the executor was the purchaser of the shares. Four years after a decree allowing the executors' account was entered, one of the heirs filed a petition to revoke the decree alleging that fraud and manifest error within the meaning of section 24 had been committed.[12] In reversing the probate court's dismissal of the petition, the Supreme Judicial Court held that the allowance of the account had been procured by fraud in law, stating:

> [The executor] could not derive any personal advantage at the expense of the trust, and could not put himself in a position antagonistic to the interests of those whom he represented, even if the price was adequate . . . . If a trustee deals fairly, openly and in good faith, a transaction in which he is personally interested will not be avoided. . . . But no advantage could be taken of the parties beneficially interested, by misrepresentation or concealment of any important fact, and they must be in a position to understand the nature and effect of the [transaction]."
> . . . By virtue of the failure of the executors to disclose the facts and the misleading wording of the items in the account concerning the transaction in question, it is proper to conclude that the petitioners were in effect denied an opportunity to face the real situation and to dispute the action of [the co-executor] . . . .[13]

In *O'Brien v. Dwight,*[14] the Supreme Judicial Court was asked to reconsider its holding in the *Jose* case. Justice Quirico, speaking for an unanimous Court, reaffirmed the principles set forth in the *Jose* case, stating:

> The holding of [the *Jose*] case is an important step in maintaining a reasonable balance between the obligations undertaken by the fiduciary when he accepts the position and the right of the beneficiaries of an estate, trust or other fiduciary relationship to receive the benefits due them from the proper discharge of fiduciary's duties. The rules applied and the results reached in the *Jose* case . . . impose no new or additional risk, burden or liability on any fiduciary whose conduct complies with the long established

[12] Id. at 272, 55 N.E.2d at 434.
[13] Id. at 278, 281-82, 55 N.E.2d at 437, 439.
[14] 1973 Mass. Adv. Sh. 409, 294 N.E.2d 363.

basic principles governing the conduct of fiduciaries in their dealings with trust property.[15]

In *O'Brien,* the testator owned substantially all of the stock in Holyoke Transcript, Inc., a family corporation engaged in the newspaper publishing business. His will, allowed on April 23, 1930, gave all of his property to his wife for her life and provided that upon her death, the corporation's stock was to be distributed to his son William, his two daughters, and to a trustee for the benefit of his son Henry.[16] Mrs. Dwight died on July 31, 1957. Prior to her death, she had been the executrix of her husband's estate as well as a principal officer with her brother and son William of Holyoke Transcript, Inc.

Shortly after the testator's death, Mrs. Dwight, along with her brother and William, formed another Massachusetts corporation under the name of Holyoke-Transcript-Telegram Publishing Co., Inc. Mrs. Dwight became the owner of substantially all of the stock in the new corporation, whose corporate purposes were almost identical to those of the earlier family corporation. In 1934, while Mrs. Dwight, her brother, and William were in control of both corporations, Holyoke Transcript, Inc.[17] leased its entire physical plant to the new corporation and gave the latter a license to publish a newspaper under the same name as that published by the earlier corporation. In effect, the entire newspaper publishing business of Holyoke Transcript, Inc. was transferred to the new corporation.[18]

Mrs. Dwight died in 1957. By means of gifts made prior to her death and by her will, Mrs. Dwight transferred ownership of the new corporation to William and her two daughters. The testator's son Henry, who was to receive a one-sixth interest in Holyoke Transcript, Inc. under his father's will, received no interest in the new corporation under his step-mother's will or otherwise despite the fact that the new corporation had, in effect, succeeded to the entire business of Holyoke Transcript, Inc. Instead, the trustee of the trust for the benefit of Henry received a distribution of one-sixth of the shares of Holyoke Transcript, Inc., a corporation which by that time had been

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[15] Id. at 438, 294 N.E.2d at 382-83.

[16] The testator died leaving a widow who was his second wife, a son Henry by his first wife, and a son William and two daughters by his second wife. Id. at 411, 294 N.E.2d at 367.

[17] Id. at 412-13, 294 N.E.2d at 368-69.

[18] At the time that the vote was taken to transfer the newspaper publishing business to the new corporation, the board of directors of Holyoke Transcript, Inc. consisted solely of Mrs. Dwight and her son William. The vote provided in part:

> the assistant treasurer and the clerk . . . are, authorized . . . to lease the real estate, presses and other property of the Holyoke Transcript, Inc., . . . in whole or in part, to a new corporation . . . for such consideration . . . and on such terms as they deem best . . . and voted further that said new corporation be accorded the privilege of using . . . the name of the newspaper now published in Holyoke, Massachusetts, by Holyoke Transcript, Inc. . . .

Id. at 414 n.6, 294 N.E.2d at 369 n.6.

transformed into what was essentially a real estate holding and property leasing company. Subsequently, the trustee sold the shares in Holyoke Transcript, Inc. to William at their then appraised value and invested the proceeds in diversified securities and bank deposits.[19]

During the period from the allowance of the testator's will on April 23, 1930 until the filing by the trustee of the trust for the benefit of Henry of its first account on October 1, 1958, only three probate accounts were filed. Mrs. Dwight, as executrix, filed her first account on December 31, 1956, covering a period of almost twenty-seven years.[20] That account included substantially all of the stock of Holyoke Transcript, Inc. at its original inventory value of $333.53 per share. In 1957, William succeeded his mother as administrator and filed for her the second and final account for his father's estate. This account contained substantially the same information as the executrix's first account and showed a complete distribution to William as administrator. William's inventory as administrator included the shares of Holyoke Transcript, Inc. at the original inventory value of $333.53 per share. A first and final account filed by William as administrator on February 28, 1958, indicated a complete distribution of all of the personal property in the estate, including a distribution of 132 shares of stock in Holyoke Transcript, Inc. to the trustee for the benefit of Henry. The only remaining account filed prior to the commencement of the litigation was the trustee's first account showing that the shares of stock in Holyoke Transcript, Inc. had been sold and the proceeds used to purchase other investments.[21]

In the four accounts which had been filed in connection with the testator's estate, there was no reference to the fact that in 1934 Holyoke Transcript, Inc. had transferred its newspaper publishing business to a new corporation, nor was there any reference to any of the shares of stock of the new corporation or the income therefrom. Furthermore, the appraisers appointed by the probate court to appraise the stock of Holyoke Transcript, Inc. for purposes of the trustee's inventory did not have access to any of the financial information relating to the new corporation. With the exception of the

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[19] The 132 shares of stock in Holyoke Transcript, Inc. distributed to the trustee were valued at $760 per share by three appraisers appointed by the probate court. When the shares were distributed by William as administrator, he informed the trustee that it was the policy of Holyoke Transcript, Inc. management to build up earned surplus and therefore not pay dividends. Subsequently, William offered to purchase shares from the trustee at the appraised value, 100 of the shares to be purchased by Holyoke Transcript, Inc. and 32 shares by another corporation controlled by him. The trustee, which was a bank, accepted William's offer and at the same time voted to make collateral loans to Holyoke Transcript, Inc. and the other corporation in amounts necessary to enable the latter corporations to make the stock purchases. Id. at 420-21, 294 N.E.2d at 372-73.

[20] Although the issue was not before the Court, the failure of the executrix to file periodic accounts appears to have violated G.L. c. 206, § 1, which requires that an executor file an account "at least once a year . . . until his trust is fulfilled . . . ."

[21] 1973 Mass. Adv. Sh. at 421, 294 N.E.2d at 373.

trustee's first account, all of the parties, including in one instance a guardian ad litem appointed to represent the interests of various named minors and unborn and unascertained persons, assented to the allowance of the accounts.[22]

The first objection to any account was filed by a guardian ad litem appointed in connection with the allowance of the first account of the testamentary trustee. In fact, after a thorough investigation of the facts, the guardian filed not only an objection to the trustee's account but also filed petitions to revoke the decrees allowing the earlier accounts and filed a petition in equity seeking to compel the other beneficiaries of the estate to surrender to the trust its proportionate share of the stock in the new corporation and to pay the trust the income and profits realized on the stock.

After receiving the findings of a master-auditor on the liability aspects of the case, the probate judge reserved and reported some twenty questions to the Supreme Judicial Court for decision. The most significant questions reported raised the issue of whether the facts as found by the master-auditor were sufficient to vacate the decrees allowing the prior accounts.[23] The Court held that the decrees should be vacated on the ground that fraud within the meaning of section 24 had been committed by Mrs. Dwight and her son William. The Court further held that the trustee of the testamentary trust was entitled to a one-sixth share of the ownership of the new corporation as well as a proportionate part of all dividends declared by the new corporation after Mrs. Dwight's death.[24] Relying on its earlier decision in the *Jose* case, the Court stated that "[t]he case now before us is certainly one of 'self-dealing' by fiduciaries and also a 'failure to disclose' such self-dealing by their accounts."[25]

The self-dealing by the fiduciaries in *O'Brien* was clear. What they had done, in effect, was to divert the entire newspaper publishing business of Holyoke Transcript, Inc. to a corporation owned and controlled by them. That business, the master-auditor found, was a valuable asset and a profitable business venture and the transfer to the new corporation without any real consideration[26] represented a substantial loss to Holyoke Transcript, Inc. and seriously diminished the value of its stock. In these circumstances, the long-established prohibi-

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[22] A guardian ad litem was appointed "to represent the interests of various named minors and of 'unborn and unascertained persons [who] may be interested' in the allowance of the [first] account" of the executrix. Id. at 418-19, 294 N.E.2d at 372. William's first and final account as administrator was also assented to by the trustee of the testamentary trust. Id. at 419, 294 N.E.2d 372.

[23] Id. at 424-25, 294 N.E.2d at 375.

[24] Id. at 438, 294 N.E.2d at 383.

[25] Id. at 437, 294 N.E.2d at 382.

[26] While the original lease provided for an annual rental of $75,000 to be paid to Holyoke Transcript, Inc., the rent actually paid fluctuated substantially over the years, being determined more by the financial needs of the new corporation than by the actual rental value of the property. Id. at 415, 294 N.E.2d at 369-70.

tion against self-dealing applies: "Whatever form the transaction may assume, the salutary rule must be enforced which forbids [fiduciaries] from reaping a personal profit from the method which they adopt of investing or managing the trust estate."[27]

Having determined that the fiduciaries had engaged in self-dealing, the Court was clearly correct in holding that they were guilty of fraud within the meaning of section 24 since their failure to disclose the details of the inter-corporate transactions deprived the beneficiaries of an opportunity to challenge the propriety of those transactions.

On a related issue, the guardian ad litem contended that the testamentary trustee was negligent in not gathering into the trust all of the assets to which it was entitled. Specifically, the guardian alleged that the trustee was negligent in assenting to the allowance of the second and final account of Mrs. Dwight as executrix and to the first and final account of William as administrator, in failing to take action against Mrs. Dwight and her son to recover assets of the trust, and in relying on the appraisal of the persons appointed by the probate court without having another appraisal made.[28] The Court, in holding that the trustee was not negligent although it might have acted differently under the circumstances, reiterated the general rule regarding the conduct of trustees: "[A trustee] is required to act in good faith, with reasonable prudence and sound judgment, guided by a due and rational appreciation of the fiduciary obligation and actuated by an honest, intelligent and diligent effort to discharge fully the responsibility which it had voluntarily accepted."[29]

In holding that the trustee was not negligent,[30] the Court discussed the guardian ad litem's specific allegations. With regard to the trustee's assent to the allowance of some of the earlier accounts, the Court stated that the trustee had the right to rely on the original inventory showing 798 shares of stock in Holyoke Transcript, Inc. and the subsequent accounts which showed the disposition of those shares.[31] The trustee was not required to make an audit of the books and records of the company to determine whether it still owned at the time of distribution of the shares all of the assets which it owned at the time of the testator's death.[32] Regarding the allegation that the trustee was negligent in not taking any action to recover assets from

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[27] Bowen v. Richardson, 133 Mass. 293, 296 (1882). Accord, Boston Safe Deposit & Trust Co. v. Lewis, 317 Mass. 137, 140, 57 N.E.2d 638, 640 (1944); Restatement (Second) of Trusts § 170, at 364 (1959); 2 A. Scott, Trusts § 170, at 1297 (3d ed. 1967).

[28] Id. at 442-46, 294 N.E.2d at 385-87.

[29] Id. at 443, 294 N.E.2d at 385-86, quoting Berry v. Kyes, 304 Mass. 56, 58-59, 22 N.E.2d 622, 624 (1939). Accord, McInnes v. Whitman, 313 Mass. 19, 30, 46 N.E.2d 527, 532 (1943); Gardiner v. Rogers, 267 Mass. 274, 278, 166 N.E. 763, 764 (1929); Taft v. Smith, 186 Mass. 31, 32, 70 N.E. 1031, 1032 (1904); Harvard College v. Amory, 26 Mass. (9 Pick.) 446, 461, 465 (1830).

[30] 1973 Mass. Adv. Sh. at 442, 294 N.E.2d at 385.

[31] Id. at 444, 294 N.E.2d at 386.

[32] Id.

the respondents, the Court simply held that there was not enough evidence to support such a finding.[33] On the issue of the trustee's failure to have another appraisal of the stock made, the Court held that there was no negligence because the evidence did not support a finding that the trustee acted in bad faith or failed to exercise reasonable skill in relying on the probate court appraisal.[34] The Court did state, however, that given the trustee's business relationships with the Dwight corporations, it might have been desirable to have had the bank resign as trustee in favor of one who was totally disinterested and to have had an appraisal of the shares made by some third person.[35]

§5.3. Trusts: Modification: Partial termination. In *New England Merchants National Bank v. Kann,*[1] the Supreme Judicial Court was presented with the important question of whether, over the objection of the sole surviving annuitant, a testamentary trust could be partially terminated in favor of the remaindermen where sufficient trust property would be set aside to preserve the income interest of the annuitant. Unfortunately, the Court failed to reach that question and dismissed the remaindermen's claim on the basis of the equitable doctrine of unclean hands. The Court held that because the remaindermen had not agreed to an increase in the amount of the annuity it would not permit a partial termination of the trust in their favor.[2]

The trust in question comprised the residue of the estate of Annie F. Selfridge, whose will was allowed on July 11, 1935. The residue, valued at approximately $450,000, was left in trust to pay the net income to the testatrix's nephew and, after his death, to pay from the net income $5,000 annually to a grandnephew and $5,000 annually to Josephine Stanley Kann for their lives. The will directed the

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[33] Id. at 445, 294 N.E.2d at 386.
[34] Id. at 445-46, 294 N.E.2d at 387.
[35] Id. at 445, 294 N.E.2d at 387.

§5.3. [1] 1973 Mass. Adv. Sh. 591, 294 N.E.2d 390.

[2] Id. at 593-94, 294 N.E.2d at 393. The remaindermen filed a request for reconsideration which was denied by the Court. In its request, the remaindermen stated, among other things:

> The basic issue because of which this case was reported to the Court was the judicial *power* to order partial termination of the trust in the circumstances presented. If the existence of such power were affirmed, the case would then be returned to the Probate Court to pass on the discretionary aspects of the case. The Supreme Judicial Court, however, acted on those discretionary aspects instead, and did so without a proper record to enable it to do so. It is difficult to see how a more appropriate case for resolving the judicial power could be presented, since it will not be raised where the parties have reached an agreement. A primary reason for the position taken by the charities in the present case was precisely to bring this issue to this court for the sake of a permanent and clear rule for other cases.

Letter from Mark A. Michelson, Attorney for Respondent to Honorable G. Joseph Tauro, Chief Justice, Supreme Judicial Court, April 4, 1973, on file at the Offices of the Annual Survey of Massachusetts Law.

" '[t]rustees to add all income not required for the above payments to the principal of the trust . . . .' "[3] Upon the death of the last surviving annuitant, the trustees were directed to " 'pay over the principal of said fund, together with any accumulated income thereon, free and discharged of all trusts' equally to the three named charities".[4]

At the time the trustee filed its petition for modification, Josephine Kann was the only surviving annuitant under the trust. The value of the trust corpus had increased to approximately $1,870,000, from which an annual net income of approximately $48,000 was being added to principal. In its petition, the trustee sought to modify the trust by increasing the annual stipend to the surviving annuitant from $5,000 to approximately $14,000,[5] and by seeking authorization to distribute the remaining annual income to the charities. In their answer, the charities not only opposed the modification suggested by the trustee but also sought a partial termination of the trust so as to permit an immediate transfer to them of so much of the principal of the trust as was not necessary to make the annual payments of $5,000 to the surviving annuitant. The Attorney General filed an answer in which he took the position that no part of the principal of the trust should be paid to the charities until the death of the annuitant. The probate judge reserved and reported the case without decision to the Supreme Judicial Court.[6]

Since all parties were not in agreement on the question of increasing the annuity, the Court correctly ruled that it had no power to modify the trust in that regard. By the great weight of authority, a fixed-dollar testamentary annuity cannot be altered to take into account changed circumstances such as an increase in the cost of living or a decrease in the value of the dollar absent the consent of all interested parties or appropriate language in the will.[7] A court is simply

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[3] 1973 Mass. Adv. Sh. at 592, 294 N.E.2d at 392.

[4] Id. at 593, 294 N.E.2d at 392.

[5] The increase in the annuity was requested:

"so that she will receive annually that amount which is the present economical equivalent of an annuity of $5,000.00 per annum at the date of the allowance of the testatrix's will increased in accordance with the Consumer Price Index published by United States Department of Labor adjusted for the difference in federal income taxes, namely, the amount of $14,034.25 per annum."

Id. at 591 n.1, 294 N.E.2d at 392 n.1.

[6] Id. at 591, 294 N.E.2d at 391.

[7] Rogers v. English, 130 Conn. 332, 33 A.2d 540 (1943); In re Trusteeship under Will of Whelan, 263 Minn. 476, 116 N.W.2d 811 (1962); Matter of Kilmer, 11 Misc. 2d 157, 171 N.Y.S.2d 639 (Sur. Ct. 1958). Cf. Springfield Safe Deposit & Trust Co. v. Stoop, 326 Mass. 363, 366, 95 N.E.2d 161, 163 (1950). See Restatement (Second) of Trusts § 167, at 351 (1959); G. Bogert, Trusts and Trustees §§ 562, 815, at 141, 281 (2d ed. 1960); 2 A. Scott, Trusts § 167, at 1268 (3d ed. 1967). See also Haskell, Justifying the Principle of Distributive Deviation in the Law of Trusts, 18 Hastings L.J. 267 (1967); Comm. on Modification, Revocation and Termination of Trusts, Report, Modification of Terms Regarding Amount or Time of Payments to Income Beneficiaries, 4 Real Prop., Prob. & Trust J. 359 (1969); Note, Variation of Private Trusts in Response to Unforeseen Needs of Beneficiaries: Proposals for Reform, 47 B.U.L. Rev. 567 (1967).

without power to reform or supplement the terms of a testamentary instrument in light of developments arising after the death of the testator in the absence of language in the will evincing such an intent.[8] This principle applies in the case of a fixed-dollar annuity even where it is presumed that the testator may have had a general intent to maintain a beneficiary at a given standard of living.[9] Although a court can properly authorize or direct the acceleration of enjoyment of a gift of income or principal by a sole beneficiary, no such power exists where the effect of the acceleration would be to deprive another beneficiary, without his consent, of an interest in the trust property.[10]

With the question of its power to order an increase in the annuity removed from the case, the Court directed its attention to that part of the remaindermen's answer which sought a partial termination of the trust. The Court assumed without deciding that it had the power to partially terminate the trust but refused to exercise that power, holding that by reason of their refusal to agree to an increase in the annuity, the remaindermen were barred from relief under the equitable doctrine of unclean hands.[11]

By declining to act on the remaindermen's counterclaim, the Court let pass a rare opportunity to settle an important question in the law of trusts: whether, over the objection of an annuitant, there exists judicial power to order a partial termination of a testamentary trust

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[8] Sanderson v. Norcross, 242 Mass. 43, 46, 136 N.E. 170, 172 (1922); Anderson v. Bean, 220 Mass. 360, 363, 107 N.E. 964, 965 (1915).

[9] See generally Restatement (Second) of Trusts § 167, at 351 (1959); 2 A. Scott, Trusts §§ 164.1, 167, at 1257, 1268 (3d ed. 1967).

[10] 2 A. Scott, Trusts § 168, at 1288 (3d ed. 1967). A leading case cited for this principle is Rogers v. English, 130 Conn. 332, 33 A.2d 540 (1943), which involved a situation very much like the one presented in *Kann*. In *Rogers*, a testamentary trust provided for payments to the testator's children not to exceed $4,000 a year. Several of the children sought larger payments on the ground that economic changes since the death of the testator in 1914, including the imposition of the federal income tax and the 1934 devaluation of the dollar, justified an increase in the annuities. The court held that it could not properly modify the trust terms, giving weight to the fact that:

> An increase in the amounts of annuities . . . would necessarily decrease the amount to be distributed at the termination of the trust, and to that extent would be contrary to the will of the testator that [the remaindermen] should receive all the fund which had not been previously expended under specific directions he had given.

Id. at 340, 33 A.2d at 543-44.

[11] The Court stated:

> The charities in their counterclaim are seeking equitable relief from this court yet they have refused to act equitably. In view of the particular circumstances of this case, we think that no persuasive and convincing reason has been presented by the charities for opposing an equitable increase in the stipend to the annuitant. In the circumstances of this case we believe the adjustment sought is fair and reasonable, especially in view of the fact that the annuitant is the last living survivor of the income beneficiaries of the trust. It is difficult to conceive on the record before us of any rational argument that such an adjustment would be contrary to the wishes of the testatrix. Moreover its effect on the charities who oppose the adjustment would be relatively insignificant. For these reasons, we decline to act favorably on the counterclaim for equitable relief by the charities. He who seeks equity must do equity.

1973 Mass. Adv. Sh. at 593-94, 294 N.E.2d at 393.

where the annuity is payable solely out of income and provision is made for setting aside sufficient trust property to preserve the annuity during the period set forth in the will. Obviously, a resolution of the question is important from an estate planner's point of view since a clear pronouncement on the issue would better enable him to carry out his client's wishes with respect to, among other things, the disposition of unused excess income and the partial termination of the trust in favor of remaindermen. More significant, however, is the effect which a resolution of the issue would have on the rights of charitable remaindermen. As written, the Court's decision may be interpreted as endorsing the rule that testamentary dispositions can be altered only if all beneficiaries agree.[12] In the context of charitable remainder gifts, the Court's decision may be interpreted as permitting an acceleration of the remainder only in the situation where the life beneficiary assents. His assent will, of course, be conditioned to a substantial degree on his ability to exact a favorable concession from the remaindermen. With that possibility in mind, it would have been preferable for the Court to have acknowledged the existence of a power of partial termination in the appropriate case, even if it decided that on the facts of the particular case before it an exercise of the power was not warranted. Had the Court so acted, further proceedings in the probate court could have established the terms and conditions of any partial termination. The latter approach would have permitted the parties to explore a number of alternatives, including the purchase of a commercial annuity, the payment of a lump sum out of income, or the periodic payment of a percentage of income.

Notwithstanding the Court's refusal to rule on the question in the context of the *Kann* case, earlier decisional law in Massachusetts and elsewhere indicates that a court does have the authority to direct a partial termination of a trust in circumstances such as those presented in *Kann*.[13] The general rule, of course, is that a trust will not be partially terminated so long as any "material purpose" of the trust remains to be carried out.[14] And the rule applies even where all parties approve of the termination. In Massachusetts, the rule is:

> [W]here the testator has fixed the time for the termination of the trust, and where it is active and its purposes and objects have not been fully accomplished and its termination would not best accomplish the testator's intent, the trust cannot be terminated even with the approval of all parties in interest.[15]

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[12] Budin v. Levy, 343 Mass. 644, 180 N.E.2d 74 (1962); Bowditch v. Andrew, 90 Mass. (8 Allen) 339 (1864).

[13] Ames v. Hall, 313 Mass. 33, 37, 46 N.E.2d 403, 405 (1943); Springfield Safe Deposit & Trust Co. v. Friele, 304 Mass. 224, 227, 23 N.E.2d 138, 140 (1939); Weeks v. Pierce, 279 Mass. 108, 116, 181 N.E. 231, 233 (1932).

[14] Restatement (Second) of Trusts § 337, at 158 (1959); 4 A. Scott, Trusts § 337, at 2655 (3d ed. 1967).

[15] Whitney v. Whitney, 317 Mass. 253, 257, 57 N.E.2d 913, 915 (1944). Accord, Gordon v. Gordon, 332 Mass. 197, 124 N.E.2d 228 (1955); Rowland v. June, 327 Mass. 455, 99 N.E.2d 283 (1951); Damon v. Damon, 312 Mass. 268, 44 N.E.2d 657 (1942).

The "material purpose" rule has been applied in numerous cases where the interest of the beneficiary seeking termination was postponed for a period of years or for a period measured by the duration of a preceding beneficial interest.[16] In the early cases dealing with these situations, the Court's principal emphasis was on the testator's power to postpone a gift in part while still giving the same beneficiary some present interest with protection from creditors.[17] In the leading case applying the rule, *Claflin v. Claflin,*[18] the trust simply provided that the beneficiary was entitled to partial distributions from the trust at ages twenty-one and twenty-five and a final distribution at age thirty. Prior to reaching his twenty-fifth birthday, the beneficiary sought a termination of the trust. While the Court recognized that the beneficiary's interest was absolute and vested, it held against termination stating:

> [W]e are unable to see that the directions of the testator to the trustees, to pay the money [at the stated ages] and not before, are against public policy . . . . It cannot be said that these restrictions upon the plaintiff's possession and control of the property are altogether useless, for there is not the same danger that he will spend the property while it is in the hands of the trustees as there would be if it were in his own.[19]

More recently, the Court has had occasion to apply the "material purpose" rule in situations where the remainderman sought partial termination of that portion of a trust allegedly not needed to support the preceding beneficial interest. For example, in *Taylor v. Albree,*[20] the Court was faced with a trust which directed the trustees to pay certain annuities to twelve named persons and " '[u]pon the decease of all of the annuitants' " to distribute the trust property to the testator's heirs at law.[21] Following the death of eleven of the annuitants, the remaindermen petitioned for a partial termination of the trust. The Court declined to order the termination, stating that "[t]he trustees still have active duties to perform" under the will.[22] Likewise, in *Springfield Safe Deposit & Trust Co. v. Friele,*[23] the charitable remaindermen were unsuccessful in their efforts to compel a distribution of surplus income as earned where three of the original four annuitants were living and resisted the distribution. While the Court stated that it

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[16] Ryan v. McManus, 323 Mass. 221, 80 N.E. 2d 737 (1948); Allen v. First Nat'l Bank & Trust Co., 319 Mass. 693, 67 N.E.2d 472 (1946). See Hoffman v. New England Trust Co., 187 Mass. 205, 72 N.E. 952 (1905).

[17] See Dunn v. Dobson, 198 Mass. 142, 84 N.E. 327 (1908); Hoffman v. New England Trust Co., 187 Mass. 205, 72 N.E. 952 (1905); Schaffer v. Wadsworth, 106 Mass. 19 (1870).

[18] 149 Mass. 19, 20 N.E. 454 (1889).

[19] Id. at 23, 20 N.E. at 456.

[20] 309 Mass. 248, 34 N.E.2d 601 (1941).

[21] Id. at 251-52, 34 N.E.2d at 603.

[22] Id. at 258-59, 34 N.E.2d at 606.

[23] 304 Mass. 224, 23 N.E.2d 138 (1939).

was following the general rule of carrying out the testator's intent in refusing to order a current distribution of the surplus income, it was no doubt influenced by the fact that the annuities were payable out of principal, if necessary.[24]

Notwithstanding the *Claflin* decision and those that have followed it, the Court has indicated that where no material purpose would be served by continuing the whole or a part of the trust and where the testator has not indicated a contrary intent, the trust can be terminated, in whole or in part, even where there is still outstanding a prior beneficial interest.[25] For example, in *Ames v. Hall,*[26] a testamentary trust provided life income to Mrs. Hall of a share of the trust fund, a limited power of appointment by her with gifts in default thereof, and a further power to appoint an "annuity" of one-third of her share of the income to her surviving husband. She exercised only the latter power, and the question was whether the default gifts of the remaining two-thirds of her share of the trust fund had to await her husband's death.[27] The Court affirmed a decree of the probate court ordering immediate distribution of the remaining two-thirds of the principal, holding that such distribution should be made "among those who are to be the main objects of the testator's bounty after the death of [the annuitant]. No good reason appears why they should be compelled to wait an indefinite period for the death of . . ." the annuitant.[28] The Court stated:

> [It has] not hesitated to order termination in whole or in part in proper instances. The only safe generalization is that termination in whole or in part has been ordered where such termination would best accomplish the testator's intent . . . and has been denied where it would tend to defeat that intent . . . . In the present case the decree fully protects the surviving husband, and a present distribution of so much of the fund as is not required for his protection will be in accordance with the testator's general purpose . . . .[29]

The result reached in *Ames* is consistent with the weight of authority elsewhere.[30]

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[24] Id. at 224-25, 23 N.E.2d at 138-39.

[25] See, e.g., Welch v. Trustees of Episcopal Theological School, 189 Mass. 108, 75 N.E. 139 (1905) (two-thirds of the trust res terminated for the benefit of the charitable remainderman where life beneficiary entitled only to one-third income interest); Williams v. Thacher, 186 Mass. 293, 71 N.E. 567 (1904) (trust terminated as to all property except that required to maintain a house and pay taxes for the one beneficiary whose interest was to survive distribution of the balance of the principal).

[26] 313 Mass. 33, 46 N.E.2d 403 (1943).

[27] Id. at 33-35, 46 N.E.2d at 403-04.

[28] Id. at 37, 46 N.E.2d at 405.

[29] Id.

[30] Whittingham v. California, 214 Cal. 128, 4 P.2d 142 (1931); Wayman v. Follansbee, 253 Ill. 602, 98 N.E. 21 (1912); In re Central Home Trust Co., 61 N.J. Super. 109, 160 A.2d 186 (1960). See 4 A. Scott, Trusts § 340.2, at 2717 (3d ed. 1967); Restatement

It seems, therefore, that although the Court refused in the context of the *Kann* case to commit itself on the question of its power to partially terminate a trust over the objection of one of the beneficiaries, such a power exists where there is nothing in the will expressly to the contrary and no material purpose would be served by continuing the trust as originally written. Indeed, absent the issue of unclean hands, the *Kann* case seems to have been an appropriate case for the exercise of the power. Clearly, no interests under the will would have been harmed by a partial termination. Nor would partial termination have violated any intent expressed by the testatrix in her will. Obviously, her primary intent was to give the income from the trust to her nephew for life and the principal thereafter to the charitable remaindermen. As a subsidiary element, she provided for the two children of her nephew by giving them fixed-dollar annuities which may never have come into effect or which were likely to be long postponed, as in fact they were. This factual pattern is, although more simplified, closely similar to that involved in *Ames v. Hall,* in which the Court held that effectuation of the "main scheme" of distribution of principal on the death of the life tenant should be interfered with as little as possible by a subsequent smaller gift of income, and ordered "a present distribution" of the bulk of the principal as being "in accordance with the testator's general purpose."[31]

In view of the importance of the issue raised in *Kann* to not only the parties involved but to the bar and public in general, it is unfortunate that the Court did not resolve it. The public policy considerations implicit in every situation involving charitable gifts deserve a clear pronouncement from the Court on the judicial power of partial termination. Had the Court acknowledged the existence of the power, it could have remanded the case to the probate court for further proceedings consistent with its opinion. By that method, the probate court would then have been authorized to direct a partial termination if, but only if, the charitable remaindermen "did equity" and consented to what the parties and the court considered to be an appropriate increase in the amount of the annuity.

§5.4. Wills: Bequests of corporate stock: Stock splits: Ademption. In Massachusetts, the question of whether a bequest of stock includes additional shares resulting from a stock split occurring between the date of the execution of the will and the testator's death traditionally has been determined by classifying the bequest as general or specific and then applying the rule that a general bequest includes only the number of shares specified in the will while a specific bequest passes

(Second) of Trusts § 340 (2) at 173 (1959), wherein the rule is formulated as follows:

> Although one or more of the beneficiaries of a trust do not consent to its termination or are under an incapacity, the court may decree a partial termination of the trust if the interest of the beneficiaries who do not consent or are under an incapacity are not prejudiced thereby and if the continuance of the trust is not necessary to carry out a material purpose of the trust.

[31] 313 Mass. at 37, 46 N.E.2d at 405.

the specified number of shares as well as all accretions created by the stock split.[1] The determination of whether a bequest is general or specific is made by ascertaining whether the testator intended to bequeath "particular property" in making the bequest.[2] In *Bostwick v. Hurstel,*[3] the Supreme Judicial Court rejected the general versus specific classification approach, noting that "the problems created by the use of the distinction . . . in the stock split situation far outweigh any advantages it might have."[4] The Court adopted instead the simple rule followed in a majority of other jurisdictions that "in the absence of anything manifesting a contrary intent, a legatee of a bequest of stock is entitled to the additional shares received by a testator as a result of a stock split occurring in the interval between the execution of his will and his death."[5]

The Court's reasons for rejecting the use of the general versus specific classification in the stock split situation were well founded. That approach narrowly limited the Court's inquiry into the nature of the original bequest and failed to give any real consideration to what may have been the testator's intent with specific reference to the disposition of the additional shares created by the stock split. Since the ultimate disposition of the additional shares was determined solely by reference to those factors which indicated whether the original bequest was specific or general, the Court was often preoccupied with overcoming the presumption that bequests of stock are general[6] by finding, for example, that the original bequest was of an odd number of shares or that the shares originally bequeathed were all that the testator owned at the time that his will was executed. Furthermore, the general versus specific classification approach ignored, in most instances, the basic nature of a stock split as being merely a change in form, not a change in the stockholder's proportionate interest in the corporation.[7]

In *Igoe v. Darby*,[8] a leading Massachusetts case on the pre-*Bostwick* approach to stock splits, the testatrix owned seventy-six shares of American Telephone & Telegraph when she executed her will. A subsequent stock split increased the number of shares to 228 at the time of her death. In holding that the original bequests were specific, thus passing the additional shares proportionally to the legatees, the Court emphasized that the number of shares bequeathed corresponded ex-

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§5.4. [1] Lavin v. LeRoe, 349 Mass. 773, 211 N.E.2d 340 (1965); McGuinness v. Bates, 345 Mass. 632, 189 N.E.2d 212 (1963); Igoe v. Darby, 343 Mass. 145, 177 N.E.2d 676 (1961); First Nat'l Bank v. Union Hosp., 281 Mass. 64, 183 N.E. 247 (1932); First Nat'l Bank v. Charlton, 281 Mass. 72, 183 N.E.250 (1932).

[2] E.g., First Nat'l Bank v. Union Hosp., 281 Mass. 64, 68, 183 N.E. 247, 248 (1932).

[3] 1973 Mass. Adv. Sh. 1431, 304 N.E.2d 186.

[4] Id. at 1435, 304 N.E.2d at 189.

[5] Id. at 1441, 304 N.E.2d at 192.

[6] E.g., Desoe v. Desoe, 304 Mass. 231, 234, 23 N.E.2d 82, 83 (1939).

[7] 1973 Mass. Adv. Sh. at 1435, 304 N.E.2d at 189.

[8] 343 Mass. 145, 177 N.E.2d 676 (1961).

actly with the number of shares owned by the testatrix at the time her will was executed and that the shares originally bequeathed were of an "odd amount."[9] A similar result was reached in *Lavin v. LeRoe*,[10] in which the testator owned an odd number of shares and bequeathed all of those shares in definite unequal numbers to several persons in eight specific paragraphs of his will. In *McGuinness v. Bates*,[11] on the other hand, although the testator made several bequests of stock in definite unequal amounts, the Court ruled that the additional shares created by the stock split did not pass to the legatees because the original bequests were general. The Court relied on the fact that the number of shares bequeathed was substantially less than the number owned by the testator at the time his will was executed.[12]

In the *Bostwick* case, the bequest involved was of " 'twenty-five (25) shares of stock in . . . American Telephone & Telegraph and also all household furniture and furnishings owned by me at the time of my death.' "[13] A later clause bequeathed " 'all remaining shares of stock in . . . [A.T. & T.], which I may own at the time of my decease and which is not hereinbefore bequeathed . . . .' "[14] Finally, there was a provision in the will setting forth an order of abatement in the event that the general assets of the estate were insufficient to pay the debts, taxes and expenses of administration. The latter provision empowered the executors to sell some of the shares of A.T. & T. with the proviso that " 'such sale of stock shall not affect the specific legacy [of the twenty-five shares]'."[15]

The will was executed on April 13, 1957. At that time, the testatrix owned 412 shares of A.T. & T. In September 1957, she acquired forty-five additional shares. Between September and October 1957, she sold all 457 shares. Subsequently, a conservator was appointed for her, and in May 1958 he repurchased 320 shares. A three-for-one split occurred on April 24, 1959, increasing the number of A.T. & T. shares held by the conservator to 960. In March 1962, the conservator died and a successor was appointed. Between December 1962, and September 1963, the successor conservator sold 105 shares, thereby reducing the holding to 835 shares. In June 1964, a two-for-one split occurred, resulting in an additional 835 shares. During 1964 and 1965, the successor conservator sold 385 shares, leaving 1,285 shares at the time of the testatrix's death in November 1965. By reason of the two stock splits, the legatee of the original twenty-five shares, who was also the executor, distributed to himself 150 shares of A.T. & T. The legatee of the remaining stock objected and the probate court

[9] Id. at 148, 177 N.E.2d at 677.
[10] 349 Mass. 773, 211 N.E.2d 340 (1965).
[11] 345 Mass. 632, 189 N.E.2d 212 (1963).
[12] Id. at 634, 189 N.E.2d at 213.
[13] 1973 Mass. Adv. Sh. at 1431, 304 N.E.2d at 187.
[14] Id. at 1431-32, 304 N.E.2d at 187.
[15] Id. at 1432, 304 N.E.2d at 187.

disallowed the distribution, ruling that the original bequest was general rather than specific and that the legatee was therefore not entitled to the additional shares.[16]

On appeal, the Supreme Judicial Court discarded its earlier approach to stock split situations in favor of the majority rule followed elsewhere that, absent anything in the will manifesting a contrary intent, a legatee of a bequest of stock is entitled to the additional shares created by the split.[17] The Court was persuaded that the new rule was a more realistic approach to the problem created by the stock splits in three respects. First, the new rule recognized the nature of a stock split as a "change in form, with the stockholder's proportionate interest or ownership in the corporation, his rights to dividends and rights upon dissolution remaining the same."[18] Also, the new rule acknowledged the testator's intent, whereas the use of the general versus specific classification may very well have resulted in frustrating rather than effectuating a testator's intent.[19] Finally, the new rule would reduce the protracted litigation involved in determining whether a particular bequest of stock is specific or general.[20]

The facts of the *Bostwick* case presented the Court with an ideal situation for abandoning the old approach to the stock split situation for several reasons. First, there was no indication in the will that the testator would not have wanted the legatee to share in the additional shares created by the stock split. Indeed, the provision in the will relating to the order of abatement indicated that the testator wanted the legatee to enjoy the full value of the shares originally bequeathed. To have deprived the legatee of the additional shares would have substantially reduced the value of the original bequest.[21] Secondly, at the

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[16] Id. at 1431, 304 N.E.2d at 186.

[17] See, e.g., Estate of Helfman, 193 Cal. App. 2d 652, 14 Cal. Rptr. 482 (1961), In re Vail's Estate, 67 So.2d 665 (Fla. 1953); Allen v. National Bank, 19 Ill. App. 2d 149, 153 N.E.2d 260 (1958); In re Doonan Estate, 110 N.H. 157, 262 A.2d 281 (1970); Egavian v. Egavian, 102 R.I. 740, 232 A.2d 789 (1967); Warner v. Baylor, 204 Va. 867, 134 S.E.2d 263 (1964); Estate of Barslow, 128 Vt. 192, 260 A.2d 374 (1969).

[18] 1973 Mass. Adv. Sh. at 1440, 304 N.E.2d at 191.

[19] [F]or example, in a situation where a testator executes a will leaving 100 shares of a certain stock to a named legatee and the stock splits two for one . . ., if the court denies the legatee's right to receive the additional 100 shares, his legacy will be thereby reduced to only half of the corporate interest which the testator originally intended to bequeath. Furthermore, this result will ordinarily be due to a corporate decision over which the testator had little or no control. It is highly doubtful that this is the ultimate result the testator intended, although the unquestioned rule of construction in this jurisdiction is to give effect to the testator's intent where possible.

Id. at 1436, 304 N.E.2d at 189.

[20] Id. at 1441, 304 N.E.2d at 191.

[21] The two stock splits involved resulted in sextupling the number of shares held by the testatrix. Regarding the impact which the splits had on the value of the stock, the Court took judicial notice of the fact that each split was immediately followed by a corresponding fractional drop in the stock's sales price; rises in the price thereafter occurred only over a period of years. Id. at 1443 n.3, 304 N.E.2d at 192-93 n.3.

time that the stock splits occurred, the testatrix was under conservatorship because of her advanced age and mental weakness and presumably was neither aware of the stock splits nor of their potential effect on the provisions of her will. Finally, the Court noted that since the testatrix was under conservatorship, it was possible that she may not have been able to execute a new will even if she had so desired.[22]

The Court was faced in *Bostwick* with the additional problem that the original shares bequeathed by the testatrix had been sold prior to the appointment of a conservator. Under Massachusetts law, such a sale ordinarily would have resulted in an ademption of the legacy.[23] However, the shares in *Bostwick* had been repurchased by the conservator and were part of the testator's estate at the time of her death. Since the doctrine of ademption is based on "the actual existence or nonexistence" of the bequeathed property at the time of the testator's death and "not on the intent of the testator with respect to it," the Court reasoned that the presence of the stock in the testator's estate precluded an ademption "despite the testatrix's lack of continuous ownership."[24]

Finally, although the Court rejected the use of the general versus specific classification in the stock split situation, it was careful to point out that it was expressing no opinion on the continuing validity of the classification for other purposes.[25] Specifically, the Court's holding in *Bostwick* does not disturb the existing rule that the classification of the gift determines questions of ademption of legacies or questions regarding the proper order of distribution when the estate is inadequate to satisfy all bequests.[26] Also, the Court expressed no opinion on the proper distribution of stock dividends occurring after execution of the will except to state that it has been held by courts in other jurisdictions that stock dividends do not pass to the named legatee under the original bequest.[27]

§5.5. New legislation: Purchase of real property from trustees: Protection. As long as a trustee is acting within the powers con-

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[22] Id. at 1444, 304 N.E.2d at 193.

[23] [A bequest of specific property] can only be satisfied by the thing bequeathed; if that has no existence, when the bequest would otherwise become operative, the legacy has no effect. If the testator subsequently parts with the property, even if he exchanges it for other property or purchases other property with the proceeds, the legatee has no claim on the estate for the value of his legacy. The legacy is adeemed by the act of the testator.

Tomlinson v. Bury, 145 Mass. 346, 347-48, 14 N.E. 137, 140 (1887). Accord, Keegan v. Norton, 322 Mass. 158, 76 N.E.2d 1 (1947); First Nat'l Bank v. Perkins Inst. for the Blind, 275 Mass. 498, 176 N.E. 532 (1931); Moffatt v. Heon, 242 Mass. 201, 136 N.E. 123 (1922). However, the legacy is not adeemed where the sale occurs while the testator is under conservatorship. Walsh v. Gillespie, 338 Mass. 278, 154 N.E.2d 906 (1959).

[24] 1973 Mass. Adv. Sh. at 1445, 304 N.E.2d at 194.

[25] Id. at 1441, 304 N.E.2d at 192.

[26] Igoe v. Darby, 343 Mass. 145, 177 N.E.2d 676 (1961); Moffatt v. Heon, 242 Mass. 201, 136 N.E. 123 (1922).

[27] See Note, 36 Albany L. Rev. 182, 188-92 (1971); Annot., 46 A.L.R.3d 7 (1972).

ferred on him in making a transfer of trust property, it is immaterial whether the purchaser has notice of the existence of the trust or knows of the extent of the trustee's powers under the instrument creating the trust.[1] Where the transfer is a breach of trust, however, the question always arises as to the rights of the transferee vis-a-vis the beneficiaries of the trust relative to the property transferred. Generally speaking, the transferee is entitled to prevail if he is a so-called bona fide purchaser, *i.e.,* a purchaser for value who is without notice of the existence of the trust or its terms.[2] In the case of transfers of real property, of course, the transferee is charged with notice of what is on record at the registry of deeds for the county in which the property is situated;[3] presumably all instruments creating trusts of real property have been properly recorded. Nevertheless, a title examiner for a purchaser from a trustee may encounter difficulty in reconstructing matters affecting the trust which occurred subsequent to the recording of the original trust instrument. To increase the protection of one purchasing real property from a trustee of an inter vivos trust, the legislature has enacted a new statute which imposes additional recording burdens on the trustee which are intended to facilitate and insure the accuracy of the title search.

Chapter 199 of the Acts of 1973[4] provides that any recordable instrument purporting to affect an interest in real estate which is executed by any person or persons who, according to the registry records, "are or appear to be the trustees of a trust" is binding on the trust in favor of "a purchaser or other person relying in good faith on such instrument" notwithstanding "(a) inconsistent provisions in the trust . . . (b) any amendment, revocation, removal or resignation of trustee, appointment of additional trustee, or other matter affecting the trust . . . or (c) any inadequacy in the consideration recited."[5] In the case of subsection (a), the purchaser is not protected if the trust instrument is recorded in the appropriate registry and the place of recording is referred to in some instrument in the chain of title. In the case of subsection (b), the protection is not available if the items referred to therein are recorded in the appropriate registry and noted on the margin of the original recorded instrument.

§5.6. New legislation: Regulation of fiduciaries engaged in trust business. Chapter 652 of the Acts of 1973 amends Chapter 203 of the General Laws by adding two sections, 4A and 4B, which regulate the business of certain fiduciaries engaged in the administration of estates or trusts.[1] In section 4A, the statute defines the term "fiduciary"

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§5.5. [1] 4 A. Scott, Trusts § 283, at 2342 (3d ed. 1967).

[2] Smith v. Knapp, 297 Mass. 466, 9 N.E.2d 399 (1937). G.L. c. 203, § 3 provides that purchasers for value and without notice take free and clear of all trusts.

[3] E.g., Peck v. Conway, 119 Mass. 546 (1876).

[4] Acts of 1973, c. 199, adding G.L. c. 184, § 34.

[5] Id.

§5.6. [1] Acts of 1973, c. 652, amending G.L. c. 203, §§ 4A, 4B.

as any corporation, bank, trust company or individual who engages in "trust business" and whose gross annual income from such business is in excess of twenty-five thousand dollars for three successive years. "Trust business" is defined as any activity conducted by an executor of a will, an administrator, or a trustee under a testamentary or inter vivos trust while acting in such fiduciary capacity. "Customer" is defined as any resident of the Commonwealth who engages in trust business with or enters into discussions or correspondence creating a trust business relationship with a fiduciary.[2]

Section 4B requires every fiduciary, prior to the execution of any document creating a fiduciary relationship and provided that he is on notice of the customer's intent to execute such a document, to furnish the customer with a statement in writing containing certain information. Among other things, the statement must state in clear and understandable terms that, unless the fiduciary is himself an attorney, the customer should obtain and pay for the services of an attorney of his own selection to represent his interest and draft the necessary documents; that the interests of the customer, his estate, and the beneficiaries thereof may at times be in conflict with the interests of the fiduciary; and that officers and employees of a trust company may not engage in the practice of law and may not appear for the customer or his estate before the probate court. In addition, with respect to fees and charges, the statement must include a schedule of all charges, currently applicable, which the fiduciary makes for such services; state that such charges are subject to change in the future; itemize "in reasonable detail" what services will be rendered for the particular fee; and state that legal expenses, whether performed by an independent attorney or the fiduciary, are payable in addition to the compensation of the fiduciary. Finally, the statute requires that if it is contemplated that any part of the customer's estate will be invested in any common or pooled fund operated by the fiduciary, the fiduciary must furnish the customer with detailed financial information regarding the fund, including a copy of its most recent audited published report.[3]

§5.7. New legislation: Charitable trust: Deviation from terms: Cy Pres. Where the particular purpose of a charitable trust has been rendered impractical or impossible of fulfillment, the Court has the power under the doctrine of cy pres to devote the trust property to similar charitable purposes if the donor manifested a more general charitable objective.[1] In most, if not all, of the cases dealing with the application of the doctrine, the Court's attention has been focused exclusively on the question of whether the donor manifested the more

[2] Id., amending G.L. c. 203, § 4A.
[3] Id., amending G.L. c. 203, § 4B.

§5.7. [1] Restatement (Second) of Trusts § 399, at 297 (1959); 4 A. Scott, Trusts § 399, at 3084 (3d ed. 1967).

general charitable objective.[2] Additionally, in actions seeking the application of the doctrine, those persons who would take upon a failure of the charitable gift have traditionally been joined as parties.

Chapter 562 of the Acts of 1974 amends Chapters 12 and 214 of the General Laws, making significant changes not only in the application of the doctrine of cy pres itself but also in the procedure governing actions commenced for the purpose of applying the doctrine.[3] Chapter 12 was amended by the addition of a new section, 8K, which provides that a gift made for a public charitable purpose "shall be deemed to have been made with a general intention to devote the property to public charitable purposes, unless otherwise provided in a written instrument of gift."[4] Chapter 214 was amended by adding a new section, 10B, which does away with the necessity in cy pres actions of joining as parties those persons who would be entitled to take upon the failure of any charitable gift. However, in such actions, notice of the proceeding must be given to such persons unless the new section 8K is applicable or, if not applicable, unless the action is commenced more than twenty years after the death of the donor and the court expressly finds that the donor by written instrument manifested a general intention to devote the property to public charitable purposes. In the case of an action to permit "reasonable deviation from any of the subordinate terms of a charitable gift of a donor who has died," neither joinder of nor notification to the persons entitled to take upon failure of the gift is necessary.[5]

§5.8. Other legislation. When a minor is entitled to a distribution of funds from an estate, chapter 232 of the Acts of 1974 permits the probate court, upon application of an administrator or executor, to authorize a distribution of the funds to the parent of the minor where the sum involved is less than two hundred dollars.[1]

Chapter 91 of the Acts of 1974 amends section 27 of chapter 168 of the General Laws to provide that bank deposits standing in the sole name of a decedent shall be paid to his legal representative. However, if the deposit does not exceed two thousand dollars and no demand for payment or notice of proposed withdrawal has been received by the bank from a duly appointed executor or administrator within sixty days from the date of death, payment may be made directly to the surviving spouse or next of kin of the decedent upon presentation of

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[2] E.g., Rogers v. Attorney General, 347 Mass. 126, 196 N.E.2d 855 (1964); Anna Jacques Hosp. v. Attorney General, 341 Mass. 179, 167 N.E.2d 875 (1960); Restatement (Second) of Trusts § 399, comment i, at 302 (1959); 4 A. Scott, Trusts § 399.2, at 3094 (3d ed. 1967).

[3] Acts of 1974, c. 562, §§ 1,2, adding G.L. c. 12, § 8K and G.L. c. 214, § 10B.

[4] Id. § 1, adding G.L. c. 12, § 8K.

[5] Id. § 2, adding G.L. c. 214, § 10B.

§5.8. [1] Acts of 1974, c. 232, adding G.L. c. 215, § 41A.

a copy of the death certificate and surrender of the passbook.[2] Section 19 of the General Laws chapter 170, dealing with shares or accounts in a co-operative bank standing in the sole name of the decedent, was similarly amended by chapter 91.[3]

Chapter 234 of the Acts of 1974 amends section 9A of chapter 197 of the General Laws by increasing the time within which actions may be brought against executors and administrators for personal injury and death from two to three years.[4]

Chapter 473 of the Acts of 1973 amends chapter 215 of the General Laws by adding a new section 9A which permits fiduciaries to act prior to the expiration of the appeal period. The new section provides that the acts of all fiduciaries performed after the entry of a decree appointing them as such or authorizing them to sell, mortgage or lease real or personal property and prior to the expiration of the appeal period "shall be valid to the same extent as if said appeal period had expired without any appeal" in all instances where no appearance was entered against the appointment, sale, mortgage or lease prior to the entry of the decree or where an appearance was entered but subsequently withdrawn prior to the entry of the decree.[5]

Chapter 669 of the Acts of 1973 rewrote sections 2, 5 and 6 of chapter 206 of the General Laws to require that real property be included in the accounts of trustees, guardians and conservators.[6]

Chapter 487 of the Acts of 1973 further increases the homestead exemption from $10,000 to $20,000.[7]

Chapter 495 of the Acts of 1973 increases the value of estates subject to disposition by a public administrator from less than one hundred dollars to less than five hundred dollars.[8]

Chapter 728 of the Acts of 1973 amends chapter 215 of the General Laws by inserting a new section 41 which authorizes the probate court, upon application of any interested person, to permit the temporary deposit of funds of an unsettled estate in a notice account provided that the interest payable on the notice account is at a rate higher than that of accounts requiring no prior notice of withdrawal.[9]

Chapter 677 of the Acts of 1973 added to chapter 202 of the General Laws a new section 37 which provides that a decree of the probate court upon a petition for leave to sell real or personal property shall be sufficient to authorize any action requiring a license from the probate court.[10]

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[2] Acts of 1974, c. 91, § 1, amending G.L. c. 168, § 27.
[3] G.L. c. 170 § 19, as amended by Acts of 1974, c. 91, §2.
[4] Acts of 1974, c. 234, amending G.L. c. 197, § 9A.
[5] Acts of 1973, c. 473, adding G.L. c. 215, § 9A.
[6] Acts of 1973, c. 669, amending G.L. c. 206, §§ 2, 5, 6.
[7] Acts of 1973, c. 487, amending G.L. c. 188, §§ 1, 9; G.L. c. 209, § 21; G.L. c. 236, § 18.
[8] Acts of 1973, c. 495, amending G.L. c. 194, § 17.
[9] Acts of 1973, c. 728, adding G.L. c. 215, § 41.
[10] Acts of 1973, c. 677, adding G.L. c. 202, § 37.