E.N3/G-1

1960

IN THE PRIVY COUNCIL No. 9 of 1959

ON APPEAL

FROM THE FEDERAL SUPREME COURT (BARBADOS)

(Appellate Jurisdiction)

(On transfer from the West Indian Court of Appeal)

IN THE MATTER of THE ESTATE OF GERTRUDE CODMAN GILBERT-CARTER, DECEASED

- and -

IN THE MATTER of THE ESTATE AND SUCCESSION DUTIES ACT 1941

B E T W E E N :

THE COMMISSIONER OF ESTATE AND SUCCESSION DUTIES — Appellant

- and -

TREVOR BOWRING — Respondent

RECORD OF PROCEEDINGS

CHARLES RUSSELL & CO.,
37, Norfolk Street,
Strand, W.C.2.

Solicitors for the Appellant.

DURRANT COOPER & HAMBLING,
70, Gracechurch Street,
London, E.C.3.

Solicitors for the Respondent.

IN THE PRIVY COUNCIL No. 9 of 1959

ON APPEAL FROM THE FEDERAL SUPREME COURT

BARBADOS

(APPELLATE JURISDICTION)

(On transfer from the West Indian Court of Appeal)

IN THE MATTER of the ESTATE of GERTRUDE CODMAN GILBERT-CARTER Deceased

and

IN THE MATTER of the ESTATE AND SUCCESSION DUTIES ACT, 1941.

B E T W E E N

THE COMMISSIONER OF ESTATE AND SUCCESSION DUTIES Appellant

- and -

TREVOR BOWRING Respondent

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

E X H I B I T S

LIST OF DOCUMENTS TRANSMITTED

BUT NOT RE-PRODUCED

No.	Description of Document	Date
1	Opening Address by Counsel for Trevor Bowring	21st August 1956
2	Final Address by Counsel for Trevor Bowring	29th and 30th August 1956
3	Final Address by Counsel for Commissioner.	30th August 1956
4	Address in Reply by Counsel for Trevor Bowring	30th August 1956
5	Order extending time to file appeal	21st December 1956
6	Affidavit of Service of Notice of Appeal to West Indian Court of Appeal.	23rd January 1957

No.	Description of Document	Date
7	Petition for leave to appeal to Her Majesty in Council	6th August 1958
8	Security Bond on Appeal	25th October 1958
9	Certificate of compliance with conditions.	1st December 1958

IN THE PRIVY COUNCIL No.9 of 1959

ON APPEAL FROM THE FEDERAL SUPREME COURT

(BARBADOS)

(APPELLATE JURISDICTION)

(ON TRANSFER FROM THE WEST INDIAN COURT OF APPEAL)

IN THE MATTER of the ESTATE of GERTRUDE CODMAN GILBERT-CARTER, Deceased

- and -

IN THE MATTER of the ESTATE AND SUCCESSION DUTIES ACT, 1941.

B E T W E E N

THE COMMISSIONER OF ESTATE AND SUCCESSION DUTIES — APPELLANT

- and -

TREVOR BOWRING — RESPONDENT

RECORD OF PROCEEDINGS

No.1

No.1

Letter Acting Commissioner of Income Tax and Death Duties to Cottle Catford & Co.

22nd November 1954.

LETTER ACTING COMMISSIONER OF INCOME TAX AND DEATH DUTIES to COTTLE CATFORD & CO.

The Income Tax and Death Duties Department
Bridgetown,
Barbados.
22nd November, 1954.

ATTENTION: Mr.E.M.Shilstone
Messrs.Cottle, Catford & Co.,
High Street,
Bridgetown.

Gentlemen :

ESTATE OF GERTRUDE C. GILBERT-CARTER

It is understood that you claim that the

No.1

Letter Acting Commissioner of Income Tax and Death Duties to Cottle Catford & Co.

22nd November 1954.
continued

Executors are only accountable for the Estate & Succession Duties payable on the property stated in Account "A" of the affidavit. The duties payable on that property are computed as follows:

Estate Duty	$ 16,024.59
Succession Duty	1,362.40
Interest to 22/11/54	278.66
	$ 17,665.65

The liability to duty of the Trust Fund in which the late Lady Carter had a life interest is under consideration and meanwhile you may wish to pay the duty stated above so as to stop interest accruing.

I am, Gentlemen,

Your Obedient servant,

N.D. OSBOURNE

Ag. Commissioner of Income Tax and Death Duties.

No.2

Letter Commissioner of Income Tax and Death Duties to Cottle Catford & Co. assessing duty.

27th June, 1955.

No.2

LETTER COMMISSIONER OF INCOME TAX AND DEATH DUTIES TO COTTLE CATFORD & CO, ASSESSING DUTY.

No.D.D.214/54-55.

THE INCOME TAX AND DEATH DUTIES DEPARTMENT

Bridgetown, Barbados,

27th June, 1955.

Messrs.Cottle,Catford & Co.,
High Street,
Bridgetown.

REGISTRATION OFFICE
BARBADOS.
FILED
21 AUG.1956
V.I.deL.CARRINGTON
REGISTRAR (AG.)

Gentlemen,

Further to my letter of 18th June, 1955, the information presented in the affidavit is

sufficient for the estate duty to be ascertained. Succession duty has however had to be computed on an estimated basis as on statement as the dates of birth of Mrs. L.B.Tayleur and Mr.John Gilbert-Carter and estimated average income for the trust are unknown.

To recapitulate:-

Account "A" of the affidavit has been amended as follows :

Total as submitted	$ 85,742.69	
Add diff. in value of other property		
$ 1,278.40 - $ 804.64	473.76	
" rebate of income tax 1954	453.74	
" settled property declared in Account "F"	563,113.32	
Value of assets	$649,783.51	
Less expenses A/c "B"	2,330.25	
Total value for Estate duty purposes	$647,453.26	

	Due Immediately	Total
Estate Duty on above @ 19%	123,016.13	
Succession duty	8,174.08	131,190.21
Succession duty which may be held over		4,646.09
Interest on $ 131,190.21 @ 3% from 13/5/54 to 4/11/54	1,886.98	1,886.98
	$133,077.19	137,723.28

Interest re-commences to run on $131,190.21 @ 3% from 27th June 1955 on which the assessment has been certified.

I am, Gentlemen, Your Obedient servant,

S. J. MARRIOTT,

Commissioner of Income Tax and Death Duties.

13/GAR

No.3

Trevor Bowring's Notice of Dissatisfaction with Assessment.

25th July 1955.

No.3

TREVOR BOWRING'S NOTICE OF DISSATISFACTION WITH ASSESSMENT

REGISTRATION OFFICE
BARBADOS.
FILED
14.9.1955
V.I. deL.CARRINGTON
(AG.) REGISTRAR

IN THE MATTER of the Estate and Succession Duties Act 1941

and

IN THE MATTER of the Estate and Succession Duty on the property passing on the death of Gertrude Codman Lady Gilbert-Carter late of Ilaro Court, St. Michael, Barbados, deceased.

TAKE NOTICE that I, the undersigned, TREVOR BOWRING, an accountable party being dissatisfied with the assessment of the Commissioner of Estate and Succession Duties made on the 27th day of June 1955, of Estate and Succession Duty on the property passing on the death of the said Gertrude Codman Gilbert-Carter intend to appeal against such assessment.

AND FURTHER TAKE NOTICE that the grounds of my appeal are as follows :

(1) The Commissioner of Estate and Succession Duties has held the executors liable to pay tax on property of which the deceased was not competent to dispose of at her death. The property referred to herein is set out in Account "F" of the Estate Duty Affidavit and referred to as :-

Settlement dated the 16th day of June 1936 made by the deceased with Old Colony Trust Company and Charles Kane Cobb, Trustees, valued at B.W.I. $563,113.32.

(2) Further or alternatively the Commissioner of Estate and Succession Duties has assessed the executors as liable to pay duty on property not under their control. Such property is referred to in the Estate Duty Affidavit under Account "F" and referred to as above.

No.3

Trevor Bowring's Notice of Dissatisfaction with Assessment.

25th July 1955 continued.

(3) Further or alternatively the Commissioner of Estate and Succession Duties has held the executors liable for duty in excess of the assets which they have received as such executors.

Dated this twenty-fifth day of July, 1955.

Sgd: T. BOWRING.

To:
The Commissioner for Estate
and Succession Duties for
the Island of Barbados.

No.4

No.4

Commissioner's Notice Maintaining Assessment.

24th August 1955

COMMISSIONER'S NOTICE MAINTAINING ASSESSMENT

IN THE MATTER of the Estate and Succession Duties Act 1941

and

IN THE MATTER of the Estate and Succession Duty on the property passing on the death of Gertrude Codman Lady Gilbert-Carter late of Ilaro Court, St. Michael, Barbados, deceased.

REGISTRATION OFFICE
BARBADOS
FILED
14. 9. 1955
V.I. deL.CARRINGTON
(AG.) REGISTRAR

TAKE NOTICE that I, the undersigned, SIDNEY JAMES MARRIOTT, Commissioner of Income Tax and Death Duties of the Island of Barbados -

(1) have determined to maintain in whole the assessment made by me of duty on the Estate Duty Affidavit and Accounts sworn to on the

No.4

Commissioner's Notice Maintaining Assessment.

24th August 1955 continued

4th day of November, 1954 by G. M. Yard and T. Bowring proposed executors of the deceased Gertrude Codman Lady Gilbert-Carter late of Ilaro Court, St. Michael, and confirmed in my letter to Messrs. Cottle, Catford & Co. dated 27th June, 1955, and

(2) have determined to maintain the claim made by me in respect of the duty so assessed, to the extent of the assets which the said proposed executors shall have received as executors or might but for their own neglect or default have so received.

Dated this twenty-fourth day of August, 1955.

S.J.MARRIOTT

To: TREVOR BOWRING ESQUIRE.

In the Barbados Court of Chancery

No.5

Petition of Trevor Bowring to reduce assessment and annexures

28th September 1955.

No.5

PETITION OF TREVOR BOWRING TO REDUCE ASSESSMENT WITH ANNEXURES.

BARBADOS

REGISTRATION OFFICE
BARBADOS
FILED 28. 9. 1955.
A. W. SYMMONDS
DEPUTY REGISTRAR.

IN THE COURT OF CHANCERY

IN THE MATTER of the Estate of Gertrude Codman Gilbert-Carter, deceased.

and

IN THE MATTER of the Estate and Succession Duties Act, 1941

BETWEEN

TREVOR BOWRING — Petitioner

and

THE COMMISSIONER OF ESTATE AND SUCCESSION DUTIES — Respondent

---

To: The Hon. J.W.B. Chenery,
Acting Vice-Chancellor of the
Court of Chancery.

THE PETITION of TREVOR BOWRING, of Sefton Lodge, Brittons Cross Road, Saint Michael, Barbados,

SHEWETH :

1. Gertrude Codman Gilbert-Carter died in,

Boston, Massachusetts, in the United States of America, on the 18th day of November 1953 leaving a will dated the 15th day of March 1952 by which she appointed Your Petitioner one of her executors.

2. Your Petitioner filed an Estate Duty Affidavit with the Commissioner of Estate and Succession Duties on the 4th day of November 1954.

3. In Account F of the Estate Duty Affidavit, Your Petitioner set out property referred to therein as the Boston Trust. A copy of the Boston Trust together with all alterations and amendments thereto is attached herewith.

4. On the 27th day of June 1955 the Commissioner of Estate and Succession Duties assessed Your Petitioner as executor of the will of the said Gertrude Codman Gilbert-Carter as an accountable party to the extent of $137,723.28.

5. On the 25th day of July 1955 and within one month of the assessment aforesaid Your Petitioner gave notice in writing to the said Commissioner of Estate and Succession Duties that he was dissatisfied with the said assessment and intended to appeal therefrom. A copy of the said notice is filed with this Petition.

6. On the 24th day of August 1955 the said Commissioner of Estate and Succession Duties gave notice in writing to Your Petitioner that he had determined to maintain his said decision.

7. Your Petitioner relies on the grounds of appeal set out in the abovementioned notice.

Your Petitioner therefore humbly prays :

(1) That the said assessment may be reduced from the sum of $137,723.28 to the sum of $17,665.65 or to such other sum as may seem just.

(2) That Your Petitioner be given costs of this appeal.

(3) Such further or other relief may be granted as may seem just.

And Your Petitioner will ever pray etc, etc.

I the undersigned TREVOR BOWRING, the above-

In the Barbados Court of Chancery

No.5

Petition of Trevor Bowring to reduce assessment and annexures.

28th September 1955. continued

named Petitioner MAKE OATH AND SAY that the statements contained in the foregoing Petition are true in substance and in fact to the best of my knowledge information and belief.

SWORN TO by the deponent the said Trevor Bowring at the Town Hall, Bridgetown, this 28th day of September 1955, before me

T. BOWRING

A. W. Symmonds
Deputy Registrar.

Annexure "A" to Petition of Trevor Bowring

28th September 1955.

ANNEXURE "A" - DEED OF TRUST

DEED OF TRUST 103591

GERTRUDE CODMAN GILBERT-CARTER

I, GERTRUDE CODMAN GILBERT-CARTER of Barbados, widow of Sir Gilbert Thomas Gilbert-Carter, K.C.M.G., (hereinafter called "the Donor"), hereby sell transfer and deliver to OLD COLONY TRUST COMPANY, a Massachusetts corporation and CHARLES KANE COBB, of Brookline, Massachusetts, (hereinafter called "the Trustees"), the property described in the schedule hereto annexed, to hold, manage, invest and reinvest the same and any additions that may from time to time be made thereto, in trust for the following purposes :-

1. To pay the net income to the Donor not less often than quarterly as long as she shall live, together with such parts of principal as she may from time to time in writing request.

2. On the death of the Donor to make the following payments :

To the Donor's step-son, HUMPHREY GILBERT-CARTER, the sum of Two Thousand (2,000) Dollars.

To the Donor's step-daughter, LILY BARBARA TAYLEUR, the sum of Two Thousand (2,000) Dollars.

To the Donor's step-daughter, EVELYN LAURA WHITE, the sum of Two Thousand (2,000) Dollars.

To the Donor's god-daughter, RADEGUND GILBERT-CARTER, the sum of Two Hundred (200) Dollars.

To the Donor's god-daughter, ELIZABETH ANNE TAYLEUR, the sum of Two Hundred (200) Dollars.

To FRANCIS MAY MICKLAM of Hyde Abbey Road, Winchester, the sum of One Thousand (1,000) Dollars, as a mark of appreciation of her services as Governess to the Donor's said son.

Should the above gifts amount in the aggregate to more than three per cent (3%) of the then market value of the trust fund, they are to abate proportionately to equal such three per cent.

The Donor's will dated January 22, 1935, directs payments identical with those above, and it is her intention to alter her will so that such payments shall be made from this trust only. Should the Donor die, however, without having so altered her will, then it is not her desire that the above payments shall be duplicated, but that they be made solely under the terms of her will and not by her Trustees hereunder.

The Donor directs that any death duties or any other taxes in connection with her death imposed on account of this trust shall be paid therefrom.

3. After the death of the Donor and after the foregoing payments, the net income together with such parts of principal as he may from time to time in writing request, shall be paid over to the Donor's son, JOHN CODMAN GILBERT-CARTER, during his life, and on the death of the survivor of the Donor and her said son the trust fund with any accrued or accumulated income shall be paid over as her said son may by will have appointed, or failing appointment, to his issue in equal shares by right of representation, or if he neither appoints nor leaves issue, to his executor or administrator to form a part of his estate.

4. The Donor during her life, and her said son

In the Barbados Court of Chancery

Annexure "A" to Petition of Trevor Bowring 28th September 1955 continued

after her death, shall have the right at any time or times to amend or revoke this trust in whole or in part by an instrument in writing, delivered to the Trustees. If the agreement is revoked in its entirety the revocation shall take place upon the delivery of the instrument in writing to the Trustees, but any amendment or any partial revocation shall take effect only when consented to in writing by the Trustees.

5. The interest of any beneficiary hereunder, either as to income or principal, shall not be anticipated, alientated or in any other manner assigned by such beneficiary and shall not be subject to any legal process, bankruptcy proceedings or the interference or control of creditors or others.

6. The Trustees shall each year render an account of their administration of the trust to the person or persons of full age entitled at the time to receive the income thereof. Such person's or persons' written approval of such an account shall as to all matters and transactions stated therein or shown thereby, be final and binding upon all persons (whether in being or not) who are then or may thereafter become entitled to share in either the principal or the income of the trust.

7. The Trustees, in addition to and not in limitation of all common law and statutory authority, shall have power with regard to both real and personal property in the trust fund and any part thereof, to mortgage to lease with or without option to purchase, to sell in whole or in part at public or at private sale without approval of any court and without liability upon any person dealing with the Trustees to see to the application of any money or other property delivered to them; to exchange property for other property; to invest and reinvest in securities or properties although of a kind or in an amount which ordinarily would not be considered suitable for a trust investment, including but without restriction of the generality of the foregoing wasting investments, intending hereby to authorise my Trustees to act in such manner as they shall believe to be for the best interests of the trust fund, regarding it as a whole, even though particular investments might not otherwise be proper,

and to purchase or retain any securities the purchase or retention of which is requested by the Donor; to keep any or all securities or other property in the name of some other person, firm, or corporation or in their own names without disclosing their fiduciary capacity; to determine what shall be charged or credited to income and what to principal notwithstanding any determination by the courts and specifically but without limitation, to make such determination in regard to stock and cash dividends, rights and all other receipts in respect of the ownership of stock and to purchase or retain stocks which pay dividends in whole or in part otherwise than in cash and in their discretion to treat such dividends in whole or in part as income; provided that as to bonds received from the Donor there shall be no deduction from the interest by way of amortization; to determine who are the distributees hereunder and the proportions in which they shall take; to make payments of principal or income direct to and otherwise to deal with minors hereunder as though they were of full age; to make distributions or divisions of principal hereunder in property in kind at values determined by them; to decide whether or not to make deductions from income for depreciation, obsolescence, amortization or waste and, if so, in what amount; to pay, compromise or contest any claim or other matter directly or indirectly affecting this fund; and generally to do all things in relation to the trust fund which the Donor could do if living and this trust had not been executed. All such divisions and decisions made by the Trustees in good faith shall be conclusive on all parties at interest. The Trustees shall receive reasonable compensation for their services hereunder.

8. Any trustee may resign as a Trustee hereunder from the trusts hereby created at any time by giving thirty (30) days' written notice delivered personally or by registered mail to the Donor, or, if the Donor has deceased, to the beneficiaries then entitled to the income. The person or a majority of the persons of full age to whom notice is thus given may appoint a successor Trustee by a writing endorsed hereon or annexed hereto or, if no such appointment is made within the said thirty (30) days, the resigning Trustee itself shall so appoint a successor. Any succeeding Trustee shall have all the powers conferred upon the original Trustees.

In the Barbados Court of Chancery

Annexure "A" to Petition of Trevor Bowring 28th September 1955 continued

This trust is executed in the Common wealth of Massachusetts and shall be governed by the laws thereof.

IN WITNESS WHEREOF the Donor has hereunto set her hand and seal and in token of their acceptance of the trusts hereby created the said CHARLES KANE COBB has hereunto set his hand and seal and OLD COLONY TRUST COMPANY has caused these presents to be executed and its corporate seal to be hereto affixed by its proper officer or officers thereunto duly authorised this 16th day of June, 1936.

A.F.Rippel GERTRUDE C. GILBERT-CARTER (Seal)

CHARLES K. COBB (Seal)

OLD COLONY TRUST COMPANY

By C.B.HUMPHREY (Seal)

Vice President.

Attest:

E. J. PUFFER

Assistant Secretary.

Annexure "B" to Petition of Trevor Bowring 28th September 1955.

ANNEXURE "B" - AMENDMENT TO DEED OF TRUST

AMENDMENT TO DEED OF TRUST 1-3591

DATED JUNE 16, 1936 OF

GERTRUDE CODMAN GILBERT-CARTER

I, GERTRUDE CODMAN GILBERT-CARTER, (hereinafter called the "Donor") pursuant to the power reserved to me in and by paragraph numbered 4 of a certain Deed of Trust from me to Old Colony Trust Company and Charles Kane Cobb, do hereby amend the said Deed of Trust as follows :

(1) By changing the amount payable under paragraph numbered 2 thereof to Frances May Micklam on the death of the Donor from the sum of One Thousand Dollars ($1,000) to the sum of Five Hundred Dollars ($500).

(2) By striking out paragraph numbered 3 and substituting therefor the following:

In the Barbados Court of Chancery

Annexure "B" to Petition of Trevor Bowring 28th September 1955 continued

"3. Upon the death of the Donor, the Trustees, after making the foregoing payments, shall pay over the net income of the trust property then remaining to the Donor's son, John Codman Gilbert-Carter, if and so long as he is living. Upon the death of the survivor of the Donor and her said son, the Trustees shall divide the trust property, together with all accumulated income, into such number of equal shares as will provide one such share for each of the then living children of her said son and for the issue of each such child then deceased, and shall deal with such shares as follows :

(a) The Trustees shall pay over one (1) such share of the trust property to each of the children of the Donor's said son who is then living and over thirty (30) years of age.

(b) The Trustees shall pay over one (1) such share, equally by right of representation, to the issue, if any, of each such child of her said son then deceased.

(c) The Trustees shall retain the remaining shares of the trust property and shall hold and dispose thereof as follows :

(1) They shall pay over the net income of one (1) such share to each of her said son's children who is then living and under thirty (30) years of age until such child shall have reached such age or sooner died. Upon such child's reaching the said age, the Trustees shall pay over to him the principal of said share.

(2) If any such child dies before reaching such age, the Trustees shall pay over the principal of said share, equally by right of representation to his issue, if any. If any such child dies without issue, the Trustees shall pay over the principal of said share to her said son's then living issue equally by right of representation, except that if any share or shares are then held hereunder for the benefit of any of her said son's children, the portion which any such child would so take shall be added to the share or shares so held for their benefit hereunder.

In the Barbados Court of Chancery.

Annexure "B" to Petition of Trevor Bowring 28th September 1955 continued

(d) The Trustees shall have power from time to time to pay to or apply for the benefit of the Donor's said son, and his children, such sums from the principal of the trust property from which they respectively are, at the time of such payment or application, entitled to receive the income, as the Trustees shall in their discretion deem reasonably necessary for their support, maintenance and/or education.

(e) Notwithstanding anything to the contrary hereinbefore contained, the trusts hereof shall end at the expiration of twenty (20) years after the death of the survivor of the Donor and her said son, and the Trustees shall thereupon pay over to each child of the Donor's said son for whom a share is then held in trust hereunder the principal of his or her share, together with all accumulated income, if any, thereon."

(3) By striking out paragraph numbered 4 and substituting therefor the following :

"4. The Donor during her lifetime shall have the right at any time or times to amend or revoke this trust, either in whole or in part, by an instrument in writing, provided, however, that any such amendment or revocation shall be consented to in writing by the Trustees."

IN WITNESS WHEREOF the Donor has hereunto set her hand and seal and in token of their consent to the foregoing amendment the said Charles Kane Cobb has hereunto set his hand and seal, and Old Colony Trust Company has caused these presents to be executed and its corporate seal to be hereto affixed by its proper officer or officers thereunto duly authorised this 4th day of December, 1939.

Executed by GERTRUDE CODMAN GILBERT-CARTER in presence of :

JOHN T. HAYES

GERTRUDE CODMAN GILBERT-CARTER (Seal)

CHARLES K.COBB (Seal)

Executed by CHARLES KANE COBB in presence of:

JOHN T. HAYES

Executed by Old Colony Trust Company in presence of:

JOHN T. HAYES

OLD COLONY TRUST COMPANY

By O. WOLCOTT

A Vice President

Attest:

E.B.DUSTON (Seal)

Secretary.

In the Barbados Court of Chancery.

ANNEXURE "C" - WAIVER OF RIGHTS UNDER DEED OF TRUST.

Annexure "C" to Petition of Trevor Bowring 28th September 1955.

WAIVER OF RIGHTS UNDER DEED OF TRUST DATED JUNE 16TH, 1936 OF GERTRUDE CODMAN GILBERT-CARTER 1-3591

I, GERTRUDE CODMAN GILBERT-CARTER the Donor in a certain Deed of Trust from me to Old Colony Trust Company and Charles Kane Cobb, wherein paragraph marked "1", thereof reads as follows :

"1. To pay the net income to the Donor not less often than quarterly as long as she shall live, together with such parts of principal as she may from time to time in writing request," do now waive and surrender all rights and privileges under said paragraph marked "1", above and beyond such rights and privileges as shall accrue to me if said paragraph read as follows: "1. To pay the net income to the Donor from time to time as long as she shall live."

IN WITNESS WHEREOF the Donor has hereunto set her hand and seal this 28th day of December, 1939.

EXECUTED by Gertrude Codman Gilbert-Carter in presence of:

William Harvey Smith

Gertrude Codman Gilbert-Carter

Received Old Colony Trust Co., Tr. for Self & co-trustee

by O. Wolcott, Vice Pres.

1-3591

ANNEXURE "D" - FURTHER AMENDMENT TO DEED OF TRUST.

Annexure "D" to Petition of Trevor Bowring 28th September 1955.

I, GERTRUDE CODMAN GILBERT-CARTER, pursuant to the power reserved to me in and by paragraph numbered 4 of a certain deed of trust dated June 16, 1936, from me to Charles Kane Cobb and Old

In the Barbados Court of Chancery.

Annexure "D" to Petition of Trevor Bowring 28th September 1955. continued

Colony Trust Company, as Trustees, as amended by an amendment to said deed of trust dated December 4, 1939, do hereby further amend said deed of trust as follows :-

ONE: By striking out the gift to Frances May Micklam contained in paragraph numbered 2 of said deed of trust and as amended by paragraph (1) of said amendment.

TWO: By reducing by one-half (½) all the other gifts contained in said paragraph 2.

IN WITNESS WHEREOF I have hereunto set my hand and seal and in token of their consent to the foregoing amendment the said Charles Kane Cobb has hereunto set his hand and seal and said Old Colony Trust Company has caused these presents to be executed and its corporate seal to be hereto affixed by its proper officer or officers thereunto duly authorized this 14th day of September, 1942.

Executed in duplicate.

GERTRUDE CODMAN GILBERT-CARTER (Seal)

CHARLES KANE COBB (Seal)

Attest:

E.B.DUSTON
Secretary

OLD COLONY TRUST COMPANY

By O. WOLCOTT
A Vice President.

(Seal) Trustees as aforesaid

Annexure "E" to Petition of Trevor Bowring. 28th September 1955.

ANNEXURE "E" - FURTHER AMENDMENT TO DEED OF TRUST. 1-3591

I, GERTRUDE CODMAN GILBERT-CARTER, pursuant to the power reserved to me in and by paragraph 4 as amended by a certain deed of trust dated June 16, 1936, from me to Charles Kane Cobb and Old Colony Trust Company as Trustee, do hereby further amend the paragraph marked "1" to read as follows :-

"1. To pay the net income to the Donor from time to time as long as she shall live, together with such parts of principal as the Trustees in their uncontrolled discretion shall deem advisable for the comfort and support of the Donor."

IN WITNESS WHEREOF I have hereunto set my hand and seal and in token of their consent to the foregoing amendment the said Charles Kane Cobb has hereunto set his hand and seal and said Old Colony Trust Company has caused these presents to be executed and its corporate seal to be hereto affixed by its proper officer or officers thereunto duly authorized this 13th day of June, 1944.

(Seal)

GERTRUDE C. GILBERT-CARTER

(Seal)

CHARLES K.COBB)
OLD COLONY)
TRUST COMPANY) Trustees as aforesaid.
By CHARLES WESTON)
Vice President.

Attest:

E. B. DUSTON

Secretary.

(Seal)

ANNEXURE "F" - FURTHER AMENDMENT TO DEED OF TRUST. 1-3591

I, GERTRUDE CODMAN GILBERT-CARTER, pursuant to the power reserved to me in and by Paragraph 4 as amended of a certain Deed of Trust dated June 16, 1936, from me to Charles Kane Cobb and Old Colony Trust Company as trustees, do hereby further amend the said Deed of Trust as follows:

1. By striking out the gift to the donor's stepdaughter Lily Barbara Tayleur in the paragraph marked 2 contained.

In the Barbados Court of Chancery.

Annexure "F" to Petition of Trevor Bowring 28th September 1955. continued

2. By striking out the parts of paragraph No.3 as amended prior to the part thereof marked (d) and substituting the following -

"Upon the death of the donor the trustees after making the foregoing payments shall pay from the net income the sum of $600 per year to the donor's stepdaughter Lily Barbara Tayleur during her life and the balance or after her death the whole thereof to the donor's son John Codman Gilbert-Carter during his life. Upon the death of the survivor of the Donor and her said son the trustees shall retain and exclude from the following computation and division a sum reasonably adequate in their opinion to continue the payments to the donor's said stepdaughter Lily Barbara Tayleur during her life and shall divide the balance of principal and from a one-half share thereof shall pay the net income to the donor's daughter-in-law Daphne if she is then alive and the wife of the said John until her death or remarriage; the other half share shall be divided into such part of equal shares as will provide one such share for each of the then living children of her said son and one for the issue by right of representation of each such child deceased leaving issue. On the death of the said Lily Barbara Tayleur her share shall be pro rated among the other shares hereunder and on the death or remarriage of the said Daphne her share shall be prorated likewise, in each case to follow the fortunes of such shares whether still held or already distributed. In so far as such shares are still retained by the trustees such segregation need be only by way of computation and the shares may be held invested and accounted for as one fund notwithstanding.

A. The trustees shall pay over one such share of the trust property to each of the children of the donor's said son who is then living and over thirty years of age.

B. The trustees shall pay over one such share equally by right of representation to the issue if any of each such child of her said son then deceased.

C. The trustees shall retain the remaining shares designated for children of the said son of the donor and shall hold and dispose thereof as follows :

(1) They shall pay over the net income of one (1) such share to each of her said son's children who is then living and under thirty (30) years of age until such child shall have reached such age or sooner died. Upon such child's reaching the said age, the trustees shall pay over to him the principal of said share.

(2) If any such child dies before reaching such age, the trustees shall pay over the principal of said share, equally by right of representation to his issue, if any. If any such child dies without issue, the trustees shall pay over the principal of said share to her said son's then living issue equally by right of representation, except that if any share or shares are then held hereunder for the benefit of any of her said son's children, the portion which any such child would so take shall be added to the share or shares so held for their benefit hereunder.

IN WITNESS WHEREOF I have hereunto set my hand and seal and in token of their consent to the foregoing amendment the said Charles Kane Cobb has hereunto set his hand and seal and said Old Colony Trust Company has caused these presents to be executed and its corporate seal to be hereto affixed this first day of November, 1944.

EXECUTED by GERTRUDE CODMAN GILBERT-CARTER in presence of:

Philip A. Scott

GERTRUDE C. GILBERT-CARTER (Seal)

EXECUTED by CHARLES KANE COBB in presence of :

Philip A. Scott

CHARLES KANE COBB (Seal)

EXECUTED by OLD COLONY TRUST COMPANY in presence of :

Philip A. Scott

OLD COLONY TRUST COMPANY (Seal)

By CHARLES WESTON
A Vice President

Attest:
F.C.O'DONNELL
Assistant
Secretary.

In the Barbados Court of Chancery

Annexure "G" to Petition of Trevor Bowring 28th September 1955.

ANNEXURE "G" - FURTHER AMENDMENT TO DEED OF TRUST

I, Gertrude Codman Gilbert-Carter, pursuant to the power reserved to me in and by paragraph 4 as amended of a certain deed of trust dated June 16, 1936, from me to Charles Kane Cobb and Old Colony Trust Company, as Trustees, do hereby further amend said deed of trust as follows :

By striking out subparagraph (e) of paragraph numbered 3 and substituting therefor the following :

> "Notwithstanding anything to the contrary hereinbefore contained, the trusts hereof shall end at the expiration of twenty (20) years after the death of the survivor of the Donor, her said son, her said daughter-in-law, Daphne, and her said stepdaughter, Lily Barbara Tayleur, and the Trustees shall thereupon pay over to each child of the Donor's said son for whom a share is then held or to be held in trust hereunder the principal of his or her share, together with all accumulated income, if any, thereon."

In Witness thereof, I have hereunto set my hand and seal and in token of their consent to the foregoing amendment the said Charles Kane Cobb has hereunto set his hand and seal and said Old Colony Trust Company has caused these presents to be executed and its corporate seal to be hereto affixed by its proper officer or officers thereunto duly authorized this 17th day of October, 1950.

EXECUTED by GERTRUDE CODMAN GILBERT-CARTER in presence of:

Albert W. Evans

GERTRUDE CODMAN GILBERT-CARTER (Seal)

GERTRUDE CODMAN GILBERT-CARTER

EXECUTED by CHARLES KANE COBB in presence of:

Charles Weston

CHARLES KANE COBB (Seal)

CHARLES KANE COBB

EXECUTED by OLD COLONY TRUST COMPANY in presence of:

Albert W. Evans

OLD COLONY TRUST COMPANY

By O. Wolcott V.P.

Attest :
E. B. DUSTON
Assistant Secretary.

In the Barbados Court of Chancery

Annexure "H" to Petition of Trevor Bowring 28th September 1955.

ANNEXURE "H" - FURTHER AMENDMENT TO DEED OF TRUST

I, Gertrude Codman Gilbert-Carter, pursuant to the power reserved to me in and by paragraph 4 of a certain deed of trust dated June 16, 1936, from me to Charles Kane Cobb and Old Colony Trust Company, Trustees, as amended, do hereby further amend said deed of trust as follows :

By striking out paragraph 2 as amended and by eliminating from the first sentence of paragraph 3 as most recently amended the words "after making the foregoing payments".

In Witness Whereof I have hereunto set my hand and seal and in token of their consent to the foregoing amendment the said Charles Kane Cobb has hereunto set his hand and seal and Old Colony Trust Company has caused these presents to be executed and its corporate seal to be hereto affixed by its proper officer or officers thereunto duly authorized this 31st day of August 1951.

EXECUTED by GERTRUDE CODMAN GILBERT-CARTER in presence of :

Sd - - CHASE

(Seal)

Sd GERTRUDE CODMAN GILBERT-CARTER

GERTRUDE CODMAN GILBERT-CARTER

EXECUTED by CHARLES KANE COBB in presence of :

E.B.DUSTON

(Seal)

CHARLES KANE COBB

CHARLES KANE COBB

EXECUTED by OLD COLONY TRUST COMPANY in presence of :

H.S.WARDEN

OLD COLONY TRUST COMPANY

By CHARLES WESTON
Vice President

Attest :
E.D. - -
Secretary

In the Barbados Court of Chancery

Evidence for Trevor Bowring

No.6

John A. Perkins Examination.

No.6

EVIDENCE OF JOHN A. PERKINS

JOHN A. PERKINS S.S.: I am John Allan Perkins of Dedham, Massachusetts, U.S.A. I am practising attorney of that State. I qualified at the Harvard Law School and was admitted to practice by the Court of Massachusetts in the year 1943. I have been legal adviser to Mr. John A. Carter. I am not sure about the initial date.

I know the deed of trust which is being referred to in this case as the Boston Trust, together with the amendments made from time to time. I have a copy of that deed before me. It is correct to say that under Paragraph 4 of the deed as originally drafted the settlor reserved to herself the right to revoke the trust absolutely, but that for any partial revocation the consent of the trustees was required. According to my knowledge of the law of Massachusetts the provision requiring the consent of the trustees for any partial recovation or amendment of the trust is for the purpose of giving some protection to the trustees against either an amendment which would place a burden on them which they would be unwilling to accept, or a partial revocation which might render the trust uneconomic to administer.

I consider that under the law of Massachusetts, the trustees in giving or withholding such consent would have a fiduciary duty to perform. I will explain that further. As I understand the law of Massachusetts, a trustee in the exercise of such power would not be free to act arbitrarily for his own protection, nor would the trustee be free to act in bad faith or from improper motives. The significance of the fact that such a provision is designed for the protection of the trustee is merely that underlying other instances of trust powers generally - the trustee is authorised under such powers to give some consideration to his own interests.

MR.DEAR : Let us turn now to the amendment of the 4th of December, 1939, the one that provides that from thenceforth the consent of the trustees was required for either a total revocation or

partial revocation or amendment. After that amendment and up to the time of Lady Gilbert Carter's death could any valid revocation or amendment of the trust have been effected by the settlor without having obtained the consent of the trustees?

MR.PERKINS: No.

MR.DEAR: In giving or withholding their consent thenceforth, do you consider that the trustees had a fiduciary duty to perform?

MR.PERKINS: Yes, I think they did.

MR.DEAR: In the giving or withholding of that consent would the Courts of Massachusetts have controlled the trustees in the exercise of that discretion?

MR.PERKINS: The Courts would have controlled them to the extent of preventing an abuse of discretion. The Courts would also, of course, control the trustees to prevent action by them which was in bad faith, or which was made out of improper motives. The Courts would also control the trustees in the event that the trustees saw fit to give or withhold their consent without exercising any judgment or discretion conferred upon them.

MR.DEAR: You said that in giving or withholding consent the trustees would have been performing a fiduciary duty. To whom would that duty have been owed?

MR.PERKINS: That duty would have been owed to the settlor, and also to any incumbent beneficiary of the trust, and it would have been owed to the remainder beneficiaries of the trust.

MR.DEAR: Can you give one example of whether the withholding of consent might have been regarded by the Court as unreasonable so that the Court would have made the trustee give consent?

MR.PERKINS: I will cite a very extreme example to support that. If the trustees, for example, had refused to give consent because the settlor's son, who was a remainder beneficiary, agreed to pay them for their refusal, that would clearly be a breach of their fiduciary duty, and the Court would interfere. In such a case, the Court, would,

In the Barbados Court of Chancery

Evidence for Trevor Bowring

No.6

John A.Perkins

Examination continued

I think, compel consent to be given.

As another example not so extreme, let us suppose that Lady Gilbert-Carter had a personal need for a substantial part of the trust assets, and let us suppose that the son had acquired other resources and was not dependent upon his interest in the trust, and that a partial recovation would not prejudice the interest of other beneficiaries; I think that if the trustees in those circumstances failed to recognise the legitimate need of Lady Gilbert-Carter and refused consent to partial revocation, that would be a breach of their fiduciary duty, and the Court would interfere.

MR.DEAR: Can you give an example of where the trustees might have been willing to consent, and the Court would have to interfere to prevent that consent?

MR.PERKINS: To cite another extreme example which parallels the example I cited a few moments ago, if the trustees were willing to consent because of an undertaking by Lady Gilbert-Carter to pay them for their consent, I think that that consent would be a breach of their fiduciary duty, and the Court would interfere.

MR.DEAR: Can you give one again not so extreme?

MR.PERKINS: Yes. Let us suppose that Lady Gilbert-Carter, although dependent on the trust, tried to persuade the trustees to invest the entire trust fund in a foolish venture of some kind, and they refused as trustees to make such an investment, but were willing to consent to a revocation so that Lady Gilbert-Carter could make the investment herself. I think that that consent would be a breach of fiduciary duty, and the Court would interfere.

MR.DEAR: Do you consider that such consent would be regarded under the law of Massachusetts as a purely ministerial act - as an act that they would have had to perform whenever called upon to do so by the settlor?

MR.PERKINS: Under the law of Massachusetts I would not regard the giving of consent by the trustees as a purely ministerial act.

MR.DEAR: Does the law of Massachusetts recognise discretionary trusts?

MR.PERKINS: If by that term you mean where the trustees have discretion, yes it does.

MR.DEAR: Will you tell the Court how such trustees are controlled by the Courts?

MR.PERKINS: Generally, the discretionary powers held by such trustees are subject to well recognised limitations. I think that the elements limiting the trustees' discretion might be briefly put as four. The first is that a trustee must act honestly. The second is that a trustee must act out of proper motives. The third, that a trustee must exercise judgment on the matter that is committed to his discretion. Fourthly, as the Massachusetts Court has stated time and time again, and to use the language of the Court, "a trustee must act with that soundness of judgment which follows from a due appreciation of trust responsibility. Prudence and reasonableness, not caprice or careless good nature furnish the standard of conduct".

I may say that these elements have been applied by the Court of Massachusetts to powers vested in trustees with the broadest discretion, and have even been applied to powers which are expressed in the instrument to be exercisable under the sole, uncontrolled discretion of the trustee.

I will now refer to some cases of which I have photostatic copies.

MR.DEAR: My Lord, I will hand these cases in for your perusal later.

MR.PERKINS: I will first refer to the case of Boyden against Stevens, 285 Mass., 176. Another case that I want to cite is that of Berry against Kyes, 304 Mass. 56. Another case is that of Damon against Damon, 312 Mass. 258.

MR.DEAR: If I may put in a question here, do you know if in a case where the trustee had the power and uncontrolled discretion to pay to the settlor such parts of the principal as they should deem advisable for her comfort and support, these cases would give the Court control over that discretion as well?

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John A.Perkins

Examination continued

MR.PERKINS: You are referring to the power conferred by the amendment of June, 1944. I do consider that the Courts would have to exercise some type of supvervisory control.

There is one other case to which I would like to refer concerning the general status of discretionary powers. That case is Sylvester against Newton, 323 Mass. 416.

I should point out that none of the cases to which I have referred so far concern precisely the power of supervision exercised over a trustee. In most of the cases, the problem with which we are concerned here is not involved. There are two decisions - one by the Massachusetts Supreme Judicial Court and one by the Federal Court of Appeals, first Circuit concerning trusts governed by the Massachusetts Law which I think are of some importance.

The case decided by the Massachusetts Supreme Judicial Court is that of Welch against the Treasurer and Receiver General, 217 Mass. 348. This was a tax case and concerned a trust established in 1897. The case which was decided by the Federal Court of Appeals was the case of Higgins against White, 93 F. 2nd. 357. When this came before the Court of Appeals the second time a portion of the first decision was revoked - the portion concerning the construction of the tax statute involved; but the construction of the instrument and duties of the trustees was not revoked, but was recited again.

MR.DEAR: Are there any cases that you want to cite on this point?

MR.PERKINS: There are. There are authorities that I want to cite which are not decisions of the Court of Massachusetts. The next case I would like to cite is that of Damiani against Lobasco.

At this stage the Court adjourned for luncheon.

MR.PERKINS: When the Court adjourned I was about to cite the case of Damiani against Lobasco, 367 Penn. 1. I do not have a photostatic copy of this case, I have extracts from the case.

Now I would like to quote from the treatise of Professor Scott of Harvard Law School who is one of the leading authorities on the law of trusts in the U.S.A. In Section 185 of his treatise, "Scott on Trusts" he deals with various kinds of power exercisable subject to some kind of consent or control by another. I will quote a portion of that section. "Where a person upon whom the power of Control is conferred is neither a trustee nor a beneficiary but is a free person otherwise unconnected with the administration of the trust the power as ordinarily conferred upon him is fiduciary, and not for his own benefit. In such cases although the person is not a trustee to the estate he owes duties to the beneficiary with respect to the exercise of the power".

In other words, even when the consent is not that of a trustee but of a free person it still has to be given or withheld subject to fiduciary obligations.

In another portion of his treatise Professor Scott says: "If the holder of the power is one of the trustees it is ordinarily clear that he owes duties to the beneficiaries with reference to the exercise of the power."

Another treatise to which I would like to refer is Stephenson's "Drafting of Wills and Trust Agreements". This is a two-volume work, and the volume from which I want to quote is the volume on administrative provisions. On pages 328 to 330 the following language appears - I am not quoting all the material on these pages, just the portion which I regard as material. It says: "In some trust agreements the settlor expressly reserves to himself acting alone and without the consent or approval of anyone else the power to modify his trust. In other instruments he reserves the power without saying anything about the consent or approval of anyone else. In still others he specifies that the trust may be modified by himself, only with the consent or approval of some named person. The persons whose consent or approval is specified include a trustee, a beneficiary, the settlor or an adviser. If the settlor created the trust primarily for his own protection against his own weakness she might specify that the trust may be revoked only with

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John A.Perkins

Examination continued

the consent of the trustee. Except in those rare cases in which the trust is created for the protection of the settlor himself, and in which he feels the need for, and desires the restraining hand of the trustee, why should he put it within the power of the trustee to give or withhold consent to modifying his own trust?"

There is one other authority to which I would like to refer on this subject, and that is the Restatement on the Law of Trusts by the American Law Institute. Perhaps I had better say a word about what restatements of the law means. It is a method by which a group of lawyers from all over the U.S.A. form together into the American Law Institute, and in volumes which are called restatements of the law on different subjects set forth in succint form what is the law on these subjects in the various States. In the case of the restatement of the law on trusts, the work although issued by the American Law Institute, represents the efforts of Professor Scott.

MR.DEAR: Is this regarded as an authority in the State of Massachusetts?

MR.PERKINS: It has been quoted time and time again in the Massachusetts Courts. It applies to all the States. It is an attempt to state the law of all the States of the U.S.A., although where there are differences it sometimes gets you into trouble. In general, however, we have succeeded in stating the laws of the various States.

The Massachusetts Supreme Court has relied on this authority in many instances. In section 330 of the Restatement on Trusts, Comment L, the precise problem with which we are concerned is discussed. I have a photostat which gives the comment and which runs to several pages. I would like merely to state what I regard as the essential principles. As I see it, the matter can be expressed by three principles thus: (1) If there is no standard by which the reasonableness of the trustee's judgment can be tested the Court will control the trustee in the exercise of the power where he acts beyond the bounds of reasonable judgment unless it is otherwise provided by the terms of the trust.

(2) Even where the trust instrument provides

merely that the settlor can revoke the trust with the consent of the trustee and there is no statement or standard for the exercise of the trustee's discretion, standards may be implied.

(3) Even if no standard exists even by implication, the Court will still control the trustee in the exercise of the power where he acts dishonestly or from improper motives.

There is one comment that I would like to add, and that is that the Massachusetts Courts in dealing with the discretionary powers given to a trustee have so consistently held that these powers must be exercised, as the Court said "with that soundess of judgment which follows from due appreciation of trust responsibility", that I am not at all sure in my mind that the Massachusetts Courts would permit powers to be conferred upon a trustee which were not subject to that control by the Court.

MR.DEAR: In relation to the fiduciary duty which is cast upon trustees would you say in this particular case that the trustees would have a duty cast on them not to consent to any amendment which might have adversely affected the rights of beneficiaries under this will?

MR.PERKINS: If I understand you correctly, I would say no. What I mean is that the mere fact that an amendment or revocation might cut down the interests of some of the beneficiaries would not necessarily require a trustee to refuse consent. The trustee's duty would be to consider the interest of the beneficiaries and whether the proposed amendment was a wise or foolish thing.

MR.DEAR: To put it briefly, would it be correct to say that in considering whether or not they should give their consent the trustees would have to consider the rights of the beneficiaries, the rights of those interested in the remainder and the rights of the settlor as well?

MR.PERKINS: That is correct.

MR.DEAR: We are agreeing that there is consent to the amendments. What we are disputing is whether the trustees had a fiduciary duty to exercise in giving or withholding their consent.

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No.6

John A.Perkins

Examination continued

What Mr.Perkins is saying, if I understand him correctly, is that whenever they were called upon for their consent they had to bear in mind the interest of the beneficiaries, the interest of the settlor, the interest of those interested in remainder and the interest of the trust fund. You mentioned earlier about the trustees having to consider whether an investment was a wise or foolish thing. Does that not mean that they would have to consider the preservation of the trust fund?

MR.PERKINS: That would arise on a consideration of a request for amendment or revocation.

MR.DEAR: You would say then the interest of the settlor, the beneficiaries and those interested in remainder.

MR.PERKINS: That is right.

MR.DEAR: Would you consider that the trustees were also entitled to consider their own position in the event of their being saddled with more onerous duties by the administration of an uneconomic trust?

MR.PERKINS: Yes. I should think that if the trustees' consent had been required in the original instrument for that purpose, the inference would be that it would still be an important consideration for the trustees in the later clause.

MR.DEAR: Can you tell us whether from your knowledge of the law of Massachusetts you are aware of any provision which gives to a trustee the power of veto on the exercise of power of amendment or revocation such as the settlor had here, but no fiduciary duty to exercise in the selection of the objects?

MR.PERKINS: I am not aware of such powers. I do not say that such a power may not be presumed from any terms which make it perfectly clear that it was intended; but it certainly is contrary to the creating trust powers. In the event of any expressed provision to that effect I am not sure that that power would be conferred upon a trustee.

MR.DEAR: Do you consider that such a position

may have obtained in the present deed that we are now considering?

MR. PERKINS: No.

MR.DEAR: In many of the cases to which you referred the provision is that the trustees shall have power or shall have discretion or uncontrolled discretion or words of similar import in performing certain acts. The present deed provides that the settlor may do something - that is amend or revoke the trust in whole or in part with the consent of the trustees. Do you regard the giving or withholding of consent by the trustees as a power or discretion similar to those referred to in the cases which you have cited?

MR.PERKINS: Yes. I do. I might add an explanation to that. While I think that the trustees' power or discretion is confirmed by the words which employ the terms power or discretion, I think that the power is one which he has by virtue of his office. His office is a fiduciary one.

MR.DEAR: The next question is one with regard to which I do not want you to go into any great detail. If the other side wants to, they can cross-examine you on it. Do you know whether there was any purpose from the Inheritance Tax point of view for amending the deed as it was amended in 1939?

MR.PERKINS: I have considered that question. Under the Massachusetts Inheritance Tax there could have been no purpose accomplishable by such an amendment.

MR.DEAR: It may be convenient if I put a number of short questions as a summary of the evidence that you have given. Is it your opinion that this deed is governed by the Law of Massachusetts?

MR.PERKINS: Yes.

MR.DEAR: Do you consider that after the 4th December, 1939, the trustees had a fiduciary duty to perform in giving or withholding their consent to any proposed revocation or amendment of the deed of trust?

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No.6

John A.Perkins

Examination continued

MR.PERKINS: I do.

MR.DEAR: Do you consider that such a fiduciary duty was also applicable after the 13th June,1944.

MR.PERKINS: Yes I do.

MR.DEAR: There is one point that has slipped me up to now. If you look at Clause 6 of the deed of trust you will see that it provides that the trustees shall render account each year of their administration of the trust to the person or persons entitled to receive income therefrom. What I would like you to do is to briefly tell His Lordship what is the purpose of such a provision.

MR.PERKINS: I did not draw this up: but this type of provision is often used in trusts in Massachusetts. Under our probate system the trustees under a will are appointed by the Probate Court and have to render to the Court an account. The purpose ordinarily of putting in a provision of this kind into such a trust would be to provide some method of securing for the trustee an easy method of accounting to the Court for the administration of the trust.

MR.DEAR: Do you consider that this clause has any relevance to the discussion about the fiduciary duty of the trustee in giving or withholding consent?

MR.PERKINS: No. In referring earlier to the case of Sylvester against Newton it will have been noted that in that case where the Court applied the usual standards as to the discretion possessed by the trustee there was a broad exculpatory clause designed to give protection to the trustee, not unlike, but somewhat different from the manner in which this clause seeks to do so.

MR.DEAR: My Lord, that is all the evidence I propose leading from Mr.Perkins. Since the Attorney General has asked to postpone cross-examination of Mr.Perkins until tomorrow morning, I will retain the right, if anything strikes me overnight, to put it to him before the Attorney General begins. However, I do not think that it would be likely.

HIS LORDSHIP: We can always recall him.

MR.FIELD: As I intimated to my learned friend, I have not had an opportunity of seeing my expert as much as I would like. He was engaged in another sphere. If there is no objection, I would prefer if we adjourn at this stage.

The Court adjourned until 9.30 a.m. on Wednesday, August 22nd.

Mr.John A.Perkins having taken the stand for cross-examination:

MR.FIELD: Mr.Perkins, towards the end of your evidence yesterday I understood you to say in substance that the Massachusetts Courts have consistently held that powers must be exercised with fiduciary judgment so that you were not at all clear that the Court would permit the granting of power which could not be controlled by the Court.

MR.PERKINS: What I meant to convey was that I was not sure that the Massachusetts Court would permit the giving to a trustee of power exercisable by the trustee and which would not be subject to the control of the Court.

MR.FIELD: Would you include in that statement the power of a trustee to consent to an amendment of the trust.

MR.PERKINS: Yes, I would.

MR.FIELD: And when a trustee has power to consent to an amendment he is under a duty to exercise fiduciary judgment in respect of the proposed amendment?

MR.PERKINS: That is right.

MR.FIELD: Does the Massachusetts law recognise power reserved in a settlor to revoke a trust?

MR.PERKINS: Yes, it does.

MR.FIELD: Let us suppose that a settlor created an inter vivos trust to pay income to himself for life with further provisions for payment of the income and principal after his death, and let us suppose that the trust contained language along these lines: "I reserve the right from time to time to amend this trust or to revoke it in whole

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No.6

John A.Perkins

Cross-examination continued

or in part by written notice to the trustee". Is there any doubt in your mind that the settlor would have under Massachusetts law an absolute power of revocation or amendment?

MR.PERKINS: No.

MR.FIELD: And assuming that the settlor was sui juris or mentally competent would the trustee be bound by any written notice of amendment or revocation.

MR.PERKINS: Certainly the trustee would normally be bound. Whether there may be any circumstance beyond the settlor being sui juris I would not be sure: but certainly the trustee would be normally bound.

MR.FIELD: Assuming that the same trust such as I have just indicated contained a provision for amendment to this effect: "I reserve the right from time to time to amend this trust or to revoke it in whole or in part by written notice to the trustee, provided that no such amendment which shall increase the duties or responsibilities of the trustee or reduce his powers or immunities shall be affected until consented to in writing by the trustee;" would you say that the Massachusetts Court would recognise such a provision and hold that the trustee's consent is necessary as to any amendments indicated in the proviso?

MR.PERKINS: Yes.

MR.FIELD: No amendment could take effect without that consent?

MR.PERKINS: That is so.

MR.FIELD: Would you say therefore that the trustee has the power to veto any such amendment?

MR.PERKINS: He has what I would call the fiduciary power of giving or withholding consent to that type of amendment. As regards the power of veto, as long as he exercises that power in accordance with his duties he has a power of veto.

MR.FIELD: You do admit that it would be a power of veto used in a particular way?

MR.PERKINS: Perhaps I can give a clearer explanation of the point. For the amendment described in the proviso the trustee's consent would be required. However, if the trustee refused to give consent in circumstances which would amount to an abuse of his discretion, then, as I understand it, the Court would compel him to consent.

MR.FIELD: Would a trustee have to act in good faith and from proper motives?

MR.PERKINS: Yes.

MR.FIELD: Is the power which the settlor has subject to some kind of control by the trustee?

MR.PERKINS: Yes.

MR.FIELD: Is that not also true of an ordinary person - not a trustee - with power of appointment?

MR.PERKINS: I take it that the ordinary power of appointment can be exercised by the person who possesses it for any reason that he sees fit.

MR.FIELD: In good faith.

MR.PERKINS: I do not know that the question of good faith is involved.

MR.FIELD: Are you familiar with the case of Pitman and Pitman Mass?

MR.PERKINS: I do not recall that case.

MR.FIELD: Under the original clause 1 of the deed the settlor could call for all of the principal.

MR.PERKINS: That is true.

MR.FIELD: Under the original clause 4 she needed consent to partial revocation or amendment, but not to full revocation.

MR.PERKINS: That is right.

MR.FIELD: As clause 1 originally stood, would you say that there was any fiduciary duty on the part of the trustees in relation to paying parts

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John A.Perkins

Cross-examination continued

of the principal as she might from time to time in writing request?

MR.PERKINS: No. I do not think so.

MR.FIELD: But as to clause 4 prior to the amendment, you say that the trustees had a fiduciary duty to exercise in giving or withholding their consent to partial revocation or amendment.

MR.PERKINS: Yes.

MR.FIELD: How do you reconcile that with the plain provision of clause 1 as originally drafted that the trustees are to pay to the donor such parts of the principal as she may require which required no fiduciary powers?

MR.PERKINS: I do not know that I see the problem.

MR.FIELD: Under clause 1 as originally drafted she could get control of the whole fund without the trustees having to exercise any fiduciary power.

MR.PERKINS: It was under Clause 1 or 4 that she could obtain the entire fund.

MR.FIELD: But if she wanted part of the principal under clause 1 the trustees had no fiduciary duty.

MR.PERKINS: That is right.

MR.FIELD: If under clause 4 she wanted partial revocation so as to get part of the fund why would the trustees have to have a fiduciary duty?

MR.PERKINS: I think there may be an inconsistency between these clauses, but not the inconsistency that you are referring to. Under Clause 4 as I understand it, the trustee would not be permitted to refuse to consent to partial revocation or amendment arbitrarily. There is no inconsistency between that and the absence of requirement to consent. The inconsistency, if there is one, is that the power which the trustee had under clause 4 to protect himself or itself against the trust fund being so reduced as to become uneconomic to adminster is not possessed under Clause 1.

MR.FIELD: Take clause 4 as amended. Is there anything in the language used from which you can import any standard in which the trustee should exercise a fiduciary duty?

MR.PERKINS: Yes.

MR.FIELD: What is that standard? What are the words that indicate the standard?

MR.PERKINS: That consent should be by the trustees. There is an implication as I understand it.

MR.FIELD: You say that it is by implication. You agree that it is not expressed.

MR.PERKINS: That is what I understand to be the meaning of conferring power on a trustee.

MR.FIELD: You mean that by the very nature of his office a trustee has fiduciary power?

MR.PERKINS: That is right.

MR.FIELD: And you infer that there is a standard?

MR.PERKINS: Yes.

MR.FIELD: Suppose the consent was of a person not a trustee, a person who was a complete stranger to the trust?

MR.PERKINS: If the person was a complete stranger to the trust I believe that the power would also be exercised in a fiduciary capacity.

MR.FIELD: Why do you say that?

MR.PERKINS: Let me indicate. Sometimes power is given to an individual who is a beneficiary and who has an interest to protect. Where the person who has power also has some interest there may be the inference that the power is given to him for the protection of that interest. Where the power is given to someone who has no interest, and who is a complete stranger to the trust, the inference is that the power is not given to him for his own benefit, but to be exercised for the benefit of those who have an interest in the trust.

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Evidence for Trevor Bowring

No.6

John A.Perkins

Cross-examination continued

MR.FIELD: In what position do you put a trustee?

MR.PERKINS: I think it is clear that because of the position which he occupies the powers given him are to be exercised in accordance with the duties of that office. If I may, I will elaborate on that a bit. We have a common provision in the Massachusetts Law and may be in the law of other places as well. Sometimes power is given to a trustee to do certain things with the consent of the adviser. Such an adviser is not a trustee in the sense that he holds property as a trustee or anything of that kind; and yet such an adviser may not act selfishly or contrary to the interests of the beneficiaries. I do not think that the Massachusetts Court would tolerate that.

MR.FIELD: You use the word "adviser". The fact that you use that term suggests that it may be for a special reason that he is an adviser. I do not know if you are thinking in terms of a legal adviser in the U.S.A.

MR.PERKINS: I was thinking in terms of an adviser who has been made such because of his knowledge of investments not possessed by the particular trustees in the case, or anything of that kind.

MR.FIELD: I just want to see if I have got this clear. You agree that a trustee must act in good faith and out of proper motives. Do you agree that it is also true that an ordinary person who is not a trustee must also act in good faith and out of proper motives?

MR.PERKINS: You are referring now to the complete stranger to the trust who is given some power?

MR.FIELD: Yes.

MR.PERKINS: That is correct.

MR.FIELD: Did I understand you to say that such a person could act as he saw fit?

MR.PERKINS: No. Such a person has a power to be exercised subject to fiduciary obligations.

Yesterday in my testimony I referred to a paragraph in Scott's treatise on Trusts, paragraph 185, where Scott says: "Where a person upon whom power of control is conferred is neither a trustee, a co-trustee nor a beneficiary, but a third person otherwise unconnected with the administration of the trust, the power as ordinarily conferred upon him is fiduciary and not for his own benefit." That I believe to be the law of Massachusetts.

MR.FIELD: Suppose a person having power exercised it for his sole benefit. Take Clause 4 of the deed we have before us. If the donee of the power exercised it for his sole benefit what is the position of the trustee?

MR.PERKINS: You are putting a case where Lady Gilbert-Carter sought to gain the trust in some way?

MR.FIELD: No. If she wanted to revoke it. For whose benefit would that be?

MR.PERKINS: Presumably for her benefit.

MR.FIELD: Do you mean for her sole benefit, or for the benefit of someone else?

MR.PERKINS: That depends on what she would do with the money after she got it.

MR.FIELD: But what happens to the money if the trust is revoked?

MR.PERKINS: It becomes hers.

MR.FIELD: Would it not then be for her sole benefit?

MR.PERKINS: What I had in mind is that a settlor of a trust may revoke it for the purpose of establishing a new trust, but on different terms.

MR.FIELD: Suppose she revoked it for the purpose of getting the corpus would not that be exercising a power for her sole benefit?

MR.PERKINS: As far as her participation in the revocation is concerned, it may be for her sole

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John A.Perkins

Cross-examination continued

benefit, and she is entitled to act for her sole benefit.

MR.FIELD: In such a case what would be the duty of the trustee?

MR.PERKINS: It would be to consider whether there was a justifiable reason for turning the assets over to her and so extinguishing the interest of the other beneficiaries.

MR.FIELD: Would you not say that the only duty of the trustee in such a case is to ascertain whether the attempted exercise of the power is or is not within the terms of the trust and act accordingly?

MR.PERKINS: That is a hard question to answer; but if by "terms of the trust" you mean the duties which attach to the trustees' exercise of this power I suppose it is a true statement.

MR.FIELD: Yesterday you mentioned the restatement of the law and you said it is regarded as an authority in the Courts of Massachusetts and is quoted time and again.

MR.PERKINS: That is so.

MR.FIELD: You mentioned three principles for which Section 330, Comment L, stands. The first paragraph I take it is general. Paragraphs 1 and 2 deal with where a standard is expressed.

MR.PERKINS: I take it that the question to which you are referring is whether a standard is expressed or implied.

MR.FIELD: Take this part of the section: "On the other hand, a trustee may be authorised to consent to the revocation of the trust when no restriction either in specific words or otherwise is imposed upon him in the exercise of the power. In such a case there is no standard by which the reasonableness of the trustee's judgment may be tested, and the Court will not compel the trustee in the exercise of the power if he acts honestly and does not act from improper motive".

It says "see Paragraph 187" and that says:

"The power of the trustee in such a case to consent to the revocation of the trust is like the power to appoint among several beneficiaries". You say that Mr.Scott's Restatement is recognised and is acted on. Have you any reason to suggest why this particular paragraph should not be acted on?

MR.PERKINS: I think there are two answers to your question. I think that the opening word of that paragraph is to be read in conjunction with the previous paragraph which says that there may be a standard by which the reasonableness of the trustee's judgment can be tested even if there is no standard expressed, or even if the standard is indefinite. Thus it may be provided merely that the settlor can revoke the trust with the consent of the trustee. On the other hand the second may be interpretddto mean that the trustee can properly consent to the revocation of the trust only if he deems it wise in the circumstances to give consent.

MR.FIELD: You say it should be read with that; but it comes after that paragraph which says that there may be a standard. Then Scott says "On the other hand etc."

MR.PERKINS: That brings me to the second answer. Yesterday I said I was not sure that the Massachusetts Court would recognise the right of a settlor to confer a right upon a trustee which was free from the Court's control. As I understand it from the Massachusetts cases, the mere fact that power is conferred upon a trustee as trustee would create the implication of a standard to be employed in the exercise of the power.

MR.FIELD: Do you mean the cases that you cited yesterday like Damon against Damon etc.?

MR.PERKINS: Yes, I do.

MR.FIELD: Has it been necessary for the Courts of Massachusetts to determine powers in relation to taxation statutes? I am thinking of the other line of cases like Saltonstall vs. Treasurer and Receiver General and Boston Safe Deposit & Trust Co. against the Commissioner of Corporations & Taxation. In those latter cases is it not true to say that the Courts used another principle?

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John A.Perkins

Cross-examination continued

MR.PERKINS: No. I do not think that would be true.

MR.FIELD: Does the same broad principle of trust law run through the Damon against Damon case and that line of cases and the taxation cases?

MR.PERKINS: I do not say that. What I say is that in the Saltonstall line of cases the principle as regards trustees' powers was not particularly involved. What was involved was the principles of taxation law.

MR.FIELD: To arrive at the power in those cases you had to apply the principles of Scott's treatise on Trusts?

MR.PERKINS: In effect what these cases are saying is that whatever may be the trust situation involved in the power to revoke or amend, taxation law treats it as subject to the Inheritance Tax. In these cases, with the exception of the Welch Case, the Court did not consider these powers from the point of view of Trust Law. They only considered the question of taxation.

MR.FIELD: Now, Mr.Perkins, you also quoted from Scott on Trusts. I have not got that book here, but I am going to quote from what I have reason to believe is an accurate record. You will probably recognise it. Section 330.9 says: "Where the settlor reserves the right to revoke a trust with the consent of the trustee it depends upon the extent of the discretion conferred upon the trustee whether he is under a duty to the beneficiaries to withhold his consent or is under a duty to the settlor to give his consent, or can properly either give or withhold his consent. The Court will not compel a trustee in the exercise of any discretionary power except to prevent an abuse of his discretion. In determining what constitutes an abuse of discretion it is important to ascertain whether any standard for the exercise of the discretion is fixed by the terms of the trust. If there is such a standard the Court will compel the exercise of the power by the trustee if he acts beyond the bounds of reasonable judgment.

Thus in Skilling and Skilling.....to pay to

her income and such part of the principal as the trustee, might see fit, and on her death to pay the principal to the named beneficiaries. In the instrument it was expressly declared that the trust should be irrevocable. Desiring to make a different disposition, she induced the trustee to reconvey the property to her. Shortly afterwards she died and the beneficiaries brought a suit to recover the property. It was held that they were entitled to it. The Court said that the instrument should be interpreted as authorising the trustee to pay the settlor only so much of the principal as she might need for her comfort and support; and he could not properly pay her the whole of the principal for the purpose of enabling her to make a different disposition of it.

"On the other hand, where there is no provision in the trust instrument expressly or by implication limiting the power of the trustee to consent to revocation of the trust, it would seem that his giving or withholding consent is effective whether he acts reasonably or not, as long as he does not act dishonestly or from an improper motive".

Do you agree, Mr.Perkins, with that statement, particularly the last part beginning "On the other hand etc."?

MR.PERKINS: I agree with it as I understand it. I understand that the question is whether the power is implied in the instrument. My understanding of the law of Massachusetts is that where power is given to a trustee there is a standard implied. As to the possibility that power may be conferred upon a trustee which the trustee is bound to exercise in good faith and from proper motive, but not with that sound judgment which follows from a due appreciation of trust responsibility. I am not at all sure that the Massachusetts Courts would recognise such a power free from that last element.

MR.FIELD: I do not know if I understand you correctly, but as I see it here what Professor Scott is attempting to say in the first part is that there may be a standard, by implication if not expressed.

MR.PERKINS: That is right.

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Cross-examination continued

MR.FIELD: And in the second part that there may never be a standard expressed or implied?

MR.PERKINS: "Never" is a pretty all encompassing word.

MR.FIELD: But that is Scott as I understand it, and you say that he is highly regarded and is acted on from time to time.

MR.PERKINS: There is no doubt about that.

MR.FIELD: Do you recognise that?

MR.PERKINS: If it is a question of the trustee not being required to act "with that soundness of judgment etc." I myself have grave doubts about it.

MR.FIELD: But that brings us back to your "by virtue of his office the trustee's powers is fiduciary". Do I understand you correctly that in this particular case there is no other implication by which any standard may be found?

MR.PERKINS: I think the instrument shows that the settlor desired to provide for her son and at one time for other beneficiaries.

MR.FIELD: You mean in other clauses of the deed.

MR.PERKINS: The instrument as a whole shows an intention to protect other beneficiaries.

MR.FIELD: How does that import a standard into the trustees granting consent?

MR.PERKINS: It imports a duty to regard the interest of other beneficiaries just the same as power is vested in the office of trustee.

MR.FIELD: You mentioned the case of Higgins and White and you stated that when it came before the Court the second time part of the former judgment was reversed - not the part dealing with the duties of trustees.

MR.PERKINS: That is right.

MR.FIELD: We happen to have that case. It is

reported at Federal Reporter, Second Series, Vol. 116, P.314.

MR.PERKINS: I think the page citation would be 312 when the case began.

MR.FIELD: You said that the part dealing with the duties of trustees had not been varied.

MR.FIELD: On page 317 this is what the Court had to say: "Our law of the case.....get the property back." It then cites some cases. Does that not indicate that the Court was throwing considerable doubt on the correctness of the earlier decision?

MR.PERKINS: On the correctness of the decision on the tax matter. If the settlor had a power as trustee to reinvest the corpus in himself with the consent of another trustee or even alone there would be no income tax. The power referred to in the Income Tax statute was the power exercised by the settlor as settlor alone or in conjunction with another person. What the Court is saying is that in so far as the grantor's power is concerned, it is immaterial whether the grantor's power is possessed as grantor or as trustee. The Court was not casting any doubt at all as I see it on the fiduciary capacity and duty which attaches to the exercise of power as a trustee.

I might add that the law has since been established that under the Income Tax statute power possessed by a grantor may be possessed either in his capacity as grantor or in any other capacity.

MR.FIELD: You also referred to Stephenson as another authority. Have you got his book with you?

MR.PERKINS: No.

MR.FIELD: What is the book called?

MR.PERKINS: "Drafting Wills and Trust Instruments."

MR.FIELD: Is Mr.Stephenson the same type of person as Scott?

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John A.Perkins

Cross-examination continued

MR.PERKINS: No, I think not. Mr.Stephenson is a lawyer who has engaged specially in trust matters and is well known as an authority in that field. He is not a professor in a law School nor has he written a general treatise on the law of trusts. At least I am not aware of it. I think he works in Pennsylvania.

MR.FIELD: To revert for a moment to the case of Damon and Damon and that line of cases.

MR.DEAR: My Lord, before the Attorney General proceeds I would like to inform Your Lordship that we are not disputing that Lady Gilbert-Carter was domiciled in Barbados at the relevant time. I mean at the time of her death.

MR.FIELD: Now, Mr.Perkins, do you know of any case in Massachusetts where the grantor of a trust power, that is the donee, reserved the right to revoke or amend the trust with the consent of the trustee, and in which the power of the trustee was directly an issue to be decided, and what was the power or position of the trustee?

MR.PERKINS: The only case I know of - and in that by implication only - is the Welch case which I mentioned yesterday. I am referring to cases in the Massachusetts Supreme Judicial Court.

MR.FIELD: Can you indicate in this case where the settlor reserved the right with the consent of the trustee?

MR.PERKINS: I think you are suffering from the same difficulty which I had yesterday. The power itself is not set forth in the opinion on the case. I am indebted to Mr. Goodale for the exact terms taken from the Court Papers. "I hereby reserve to myself the power by written instrument with the written consent of my said wife for life and both of the then trustees in this instrument from time to time to revoke the trust hereby .... and thereupon in whole or in part reinvest the trust property in myself." There was similar power in similar terms to vary or modify the terms of the trust.

The instrument was executed in 1897. The wife, one of the parties whose consent was required,

died in 1901; the settlor died in 1907; so that from 1901 to 1907 the settlor had the power to revoke with the consent of the two trustees. This was a tax case, one of the early ones, and the Court said; "Almost ten years before... therein."

MR.FIELD: Apart from that case do you know of any other authority?

MR.PERKINS: Not directly.

MR.FIELD: Are you saying that that case actually considered the duty of the trustees?

MR.PERKINS: What I am saying is that there is an implication; because if the consent of the trustee was of a ministerial kind, or a kind which they would not consider it their duty to exercise, then I do not think that the Court would have made the statement that it did as far as the grantor was concerned.

MR.FIELD: Is that inconsistent in any way with the Saltonstall case?

MR.PERKINS: I do not think so. That was a different problem.

MR.FIELD: Would you tell us what is the difference?

MR.PERKINS: I would say that the difference is in the language of the statutes. The Saltonstall case was governed by the 1909 statute which provided that in a trust established prior to 1907 the power to appoint was reserved to the settlor. If the settlor died after 1907 then the property would be taxable to the settlor's estate whether he exercised the power or not. What the Saltonstall case is saying is that within the meaning of that tax statute the power reserved by the settlor involved the consent of one or more of the three trustees, or such power had not been exercised by the settlor.

MR.FIELD: What is the citation of the case you are speaking of?

MR.PERKINS: The Welch case is 217 Mass., 348.

MR.FIELD: Was that before the Saltonstall case?

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Cross-examination continued

MR.PERKINS: I believe so; but I am not sure that I have the citation of the Saltonstall case.

MR.FIELD: It is 256 Mass. 1.

MR.PERKINS: Then it was 1926.

MR.FIELD: What was the date of the Welch case?

MR.PERKINS: 1914.

MR.FIELD: Do you know of any case in Massachusetts in which the Court had to consider a clause similar to Clause 6, that is, containing provisions for accounts to be approved by income beneficiaries?

MR.PERKINS: I do not recall any. I have not attempted to check up. There may have been some.

MR.FIELD: In the line of cases like Boyden and Stevens etc. is it not true that the standard is expressly indicated and that the initiative in these cases was with the trustees and not with the settlor.

MR.PERKINS: As to the standard being expressed, I do not think that that is true in at least some of these cases. As I recall it, the Court was at some pains to point out in some of these cases that no circumstances were specified which would entitle the trustee to act. As to the second point, whether the initiative was with the trustee, those were all cases where the power was exercisable by the trustee and did not involve the problem of power exercisable by someone else.

RE-EXAMINATION BY MR.DEAR

Re-examination

MR.DEAR: Where the settlor of a trust has an unqualified power of revocation or amendment without the consent of the trustees or anyone else does such a settlor have to act under any fiduciary duty or can such a settlor revoke or amend at his own will and pleasure?

MR.PERKINS: At his own will and pleasure.

MR.DEAR: On examination of this deed as a

whole, bearing in mind that the persons who are trustees are not members of Lady Cart's family, and that one is the Massachusetts Trust Corporation, do you consider that that fact would have any bearing on an implication of fiduciary duty?

MR.PERKINS: I think that fiduciary duty would be implied regardless of who the trustees were. The only effect as I see it of one of the trustees being a professional trustee and one a trust company is something that I have not heard expressed. I am perfectly certain that trustees of that calibre would exercise the power concerned only with a conscientious attempt to carry out their duties.

MR.DEAR: That is all, My Lord.

No.7

EVIDENCE OF FRANCIS G. GOODALE.

Mr. Goodale S.S. I am Francis Greenleaf Goodale. I was called to the Bar of Massachusetts in 1906. There is a provision in the United States by which one can be called to the Bar before one actually graduates. I graduated from Harvard Law School in 1907. I read with another Attorney for five years. I opened a law office with a partner from 1912 to 1916. In 1916 I went into the Federal Department of Justice as a special assistant to the U.S. Attorney for the District of Massachusetts, and later I became special assistant to the U.S. Attorney General. In 1924 I became a member of the firm of Hill, Barlow, and Homans, and in 1934 that firm became Hill, Barlow, Goodale and Wiswall. I am now the senior partner in that firm.

MR.DEAR: Will you give the Court some idea of your association with trust law and your knowledge of trust instruments?

MR.GOODALE: Until 1920 I had no more knowledge of trusts than I had gained from the Harvard Law School and from working on one or two cases before the Supreme Court of Massachusetts and the Federal Court of Appeals, First Circuit.

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No.7

Francis G. Goodale.

Examination. continued.

Beginning in 1920, one of the first things that I did on joining the firm of which I am now a member was to work on the Saltonstall case. From then on I have given increasing attention to trust matters both in the giving of opinions and the administration of trusts as a trustee. For the past 20 years a very substantial part of my work has been in that line.

MR.DEAR: One of your partners recently appeared on behalf of the Old Colony Trust Co.?

MR.GOODALE: Yes. It was not connected with this trust in any way. It was an entirely different trust with entirely different issues involved; but I can say that the matter, although it was decided by the Supreme Court of Massachusetts is still pending, technically speaking, because certain formal steps remain to be attended to.

MR.DEAR: You know this Deed of Trust and you have read it?

MR.GOODALE: Yes.

MR.DEAR: If you turn to Clause 4 you will find that the settlor had the power of complete revocation without any consent, but that for partial revocation or amendment the consent of the trustees was required.

MR.GOODALE: Yes.

MR.DEAR: You heard Mr.Perkins' evidence. You heard him say that he regarded that provision as for the protection of the trustees that their duties might not become too onerous or that they might not have to administer an uneconomic trust. Do you regard that as correct?

MR.GOODALE: I think it is a fair inference from the wording of the clause.

MR.DEAR: Do you consider that in giving or withholding their consent to any partial revocation or amendment the trustees would have acted with a fiduciary duty?

MR.GOODALE: I can imagine an extreme case in which there would be no fiduciary duty. If the

amendment, for example, were purely negligible, I think the trustees would not have been allowed to refuse consent for purely negligible reasons. I think, however, that that is an extreme case, too extreme to have significance here.

MR.DEAR: Look at Clause 1. You will notice that Clause 1 as it originally stood the settlor had the right to call for such parts of the principal as she might from time to time in writing request. Would you regard that as inconsistent with the provisions of Clause 4?

MR.GOODALE: I do.

MR.DEAR: You are aware that by the amendment of December, 1939, the consent of the trustees was thenceforth required not only for partial revocation or amendment but also for total revocation?

MR.GOODALE: Yes.

MR.DEAR: In giving or withholding their consent to any proposed amendment or revocation do you consider that the trustees would have had to act with regard to fiduciary duty?

MR.GOODALE: I do.

MR.DEAR: Would they have been bound to give their consent whenever and in whatever circumstances they were asked to do so?

MR.GOODALE: Certainly not.

MR.DEAR: In your opinion would the Courts of Massachusetts control the trustees in the giving or withholding of their consent?

MR.GOODALE: Yes. I think they would. They would control them to the extent of preventing an abuse of power; but they would not substitute the judgment of the Court for the judgment of the trustees as to whether the power should be exercised at all.

MR.DEAR; In the Trust Law of Massachusetts are you aware of a provision by which the consent of the trustees might be required for the exercise of the power they would have and as

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Examination continued

regards the manner and the use for which the power was exercised?

MR.GOODALE: I am not aware of any such provision coming before the Court. I believe in effect that if the trustees were bound in all circumstances to give their consent their capacity would not be that of a trustee at all, but of a mere agency or bailment.

MR.DEAR: Following on from that are you then of the opinion that whenever a trustee has the power to give or withhold consent in circumstances such as this deed the trustee must always do that with due regard to fiduciary duty?

MR.GOODALE: That is my opinion.

MR.DEAR: You said that when you first joined the firm to which you now belong one of the first cases with which you had to deal was the Saltonstall case. You know the line of cases of which Saltonstall is one?

MR.GOODALE: Yes.

MR.DEAR: You know also the line of cases of which the Reinecki Case is one.

MR.GOODALE: One is the case of Reinecki against the Northern Trust Co. and one is Reinecki against Smith.

MR.DEAR: Do you regard those cases as relevant for a determination under Trust Law of the duties and powers of trustees?

MR.GOODALE: Certainly not. All of these cases in my opinion turn upon questions of constitutional law as to taxation power. In the Saltonstall case it was the taxation power of the Legislature of Massachusetts, and in the case of Reinecki against Smith it was a matter of the taxation power of Congress. The fifth amendment of the U.S. Constitution forbids the taking of property without due process of law, and the 14th Amendment provides that no state shall pass any ex post facto law, or law depriving people of their property without due process of law. The Saltonstall case and the cases which follow it turn on the question whether the Massachusetts

Inheritance Tax Statute of 1909 was such a taking away of property without due process of law.

The Inheritance Statute of Massachusetts of 1909 imposed excise not in the form of income tax, not on the privilege of transmitting property by will or instrument to take effect as if it were a will, but on the privilege of succession. The Supreme Court of Massachusetts held, and this was confirmed by the Supreme Court of the U.S.A., that the right of succession continued until the succession actually became a possession and enjoyment; so that although the trust in the Saltonstall case was a trust created in 1905 the privilege of succession to the property continued until actual succession took place.

Peterson Brook created a trust and had a right to revoke it with the consent of any one of the three disinterested trustees. I do know about this case. Two of the trustees were partners of mine. He did not revoke the trust in its entirety at any time. He died, I believe, in 1920, and the Court of Massachusetts and the U.S. Supreme Court said that as long as Peterson Brook lived the right of succession to his property did not become actual, and until it became actual the privilege of succession was subject to taxation by the Commonwealth of Massachusetts, and therefore the 14th Amendment was not violated. That, I think, was the real issue in all the Massachusetts tax cases including the Old Colony Trust Co. case.

I believe that the case of Reinecki against Smith turned on ex post facto obligations of law. One Douglas Smith had a trust which I believe he had power to revoke with the consent of one or more of the trustees. He amended it by eliminating the power of revocation during the year. The question involved was whether income tax should be applied to the income which came in from the trust? The Statute said that if at any time during the year the settlor had the power alone or with the consent of any other person not having a substantial interest - although the statutes were changed from time to time - at one time they said the consent of anyone, at another time they said the consent of anyone not having a substantial interest, he could during the early part of the year amend with the consent of someone else;

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Francis G. Goodale.

Examination continued.

and the Court decided that it was not a violation of the Federal Constitution to subject to tax the income which came to the settlor during the early part of the year.

There is some language in that case which has caused a certain amount of confusion in subsequent cases when the Court said that the trustee owed no fiduciary duty. I think it is a fair interpretation of that case to say that what the Court meant was that the trustees owed no duty to beneficiaries and those interested in remainder who resisted all amendments that might adversely affect the interest of all the beneficiaries. If that statement means anything more than that, it is my opinion that the Federal Court and the Supreme Court of the U.S.A. did not state correctly the law of Massachusetts.

However, as I have said, the issue before the Court was the interpretation of the trust for taxation purposes.

MR.DEAR: You said that the Court held that where a person had the right to amend or revoke with the consent of any trustee who had a substantial interest the tax would apply?

MR.GOODALE: Yes.

MR.DEAR: Would you say that the fact that a trustee had such a substantial interest would affect the interpretation of the trust deed for the purpose of trust law?

MR.GOODALE: Yes. The Courts have said that if the revocation is dependent on obtaining the consent of someone adversely affected by the revocation it is not really a power of revocation at all. I think that that was discussed in the Welch case.

MR.DEAR: Mr.Perkins also said that sometimes power is given for amendment or revocation with the consent of a beneficiary or a number of beneficiaries.

MR.GOODALE: I agree with that.

MR.DEAR: He also said that where the trustees are not beneficially interested in the trust -

like the trustees in this particular case - it is their duty to consider the interest of all the beneficiaries, the interest of the settlor and the interest of those interested in remainder.

MR.GOODALE: I agree with that.

MR.DEAR: One of the points which has been discussed is the standard by which the trustee's duty should be measured. What would be your observation on that point?

MR.GOODALE: If a standard is expressed in a trust instrument it would be the consideration of the Court to make sure that the standard has been complied with in so far as the standard expressed did not cover all possible exercise of discretionary power. Further, a standard would be implied by the Court to cover every situation in the exercise of that power.

MR.DEAR: Let us deal with Clause 4 of the deed as amended. It says that the donor shall during her lifetime have the right at any time or times to amend or revoke the trust in whole or in part by an instrument in writing, provided however, that any such amendment or revocation shall be consented to in writing by the trustees. In your opinion is it possible for a Court to ascertain any standard of reasonableness in the exercise of the trustees consent or withholding of consent?

MR.GOODALE: In my opinion a standard could be outlined not measured. These trustees would have to exercise their discretionary powers in certain ways and within certain limits. Within those limits the Court would not substitute its judgment for the discretion of the trustees; but the limits would include honesty, good faith and proper motive, and secondly an earnest and serious consideration of the problem involved, and the possible effect of any exercise of discretionary power on the interest of everyone concerned. Thirdly, in my opinion, the discretion would have to be exercised prudently and reasonably, I am not aware that the Court has gone further in finding the discretion to be exercised.

MR.DEAR: You will notice that in this deed the settlor herself does not limit the duties of

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the trustees. Do you consider that in spite of the fact that it is not expressly provided the Court of Massacusetts would imply a fiduciary duty?

MR.GOODALE: I do.

MR.DEAR: There is a passage in the Restatement of the Law on Trusts to which you may have heard Mr.Perkins refer in answer to the Attorney General and which says that there may be a standard by which the reasonableness of the trustee's judgment may be tested even though there is no standard expressed is specific words in the terms of the trust and even though the standard is indefinite etc. He gives examples. You are familiar with the passage?

MR.GOODALE: Yes.

MR.DEAR: Do you agree that that would be applied by the Massachusetts Court as principles of law, particularly the part beginning "On the other hand"?

MR.GOODALE: I do not agree with the statement which says that if there is no standard by which the reasonableness of the trustee's judgment can be tested the Court will not control the trustee in the exercise of the power if he acts honestly and does not act from improper motive. In my opinion the Massachusetts Court would go further in at least one respect. In my opinion the Courts would require the trustee at least to give serious consideration to the matter in hand. Suppose, for example, that a settlor sent over to the trustee saying "I hereby revoke the trust; will you please sign to your consent" and the trustee being in a hurry just signed the paper and sent it right back. I feel reasonably certain that the Courts of Massachusetts, although no standards were expressed in the instrument, would say that that was an improper exercise of the trustee's discretion although there was no bad faith or anything which could be called an improper motive.

MR.DEAR: Section 330 of the Restatement says: "The power of the trustee in such cases to consent to a revocation of the trust is like the

power to appoint among several beneficiaries." What do you think of that?

MR.GOODALE: In my opinion that is going further than the Courts of Massachusetts would go. I would not accept that without greater consideration as representing the law of Massachusetts.

MR.DEAR: In America there is a library in which the original papers of cases are kept?

MR.GOODALE: That is true.

MR.DEAR: Before coming to Barbados you looked up the original papers that were filed in the Welch case?

MR.GOODALE: I had a trusted associate of mine to look them up.

MR.DEAR: From those papers were you able to gather the main provisions in the trust deed?

MR.GOODALE: The trust deed and the pleadings were included in this bound volume. Whenever a case is finished a complete set of papers is bound together and is available in this library. It is from that source that I obtained the exact wording of the power of amendment in the Welch case. I will quote the language that was in the trust. "I hereby reserve to myself power by written instrument with the written consent of my said wife for life and of both of the then trustees in this instrument from time to time to revoke the trust hereby created or any part thereof, and thereupon in whole or in part to reinvest the trust property in myself".

The trustees in this case were not interested parties. The settlor's wife died in 1901 and the settlor died in 1907, one month after the change in the Inheritance Tax Law. The question was which statute should be applied. It was argued that this power of revocation was outstanding from the month after the statute went into effect, but the Court held that the property had vested completely in the trustees under the trust instrument way back in 1897, and therefore Section 25 of the new statute applied.

Section 25 said: "This Act shall not apply

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to the estates of persons deceased prior to the date of coming into effect or the property pass by deed, grant, sale or gift prior to the same date." So the real question was whether the property had passed prior to 1907 notwithstanding that there was this possible so called revocation mentioned.

MR.DEAR: In the Trust Law of Massachusetts property which is given to trustees to hold on behalf of certain beneficiaries is legally vested in those trustees?

MR.GOODALE: That is right.

MR.DEAR: You know the case of Higgins against White.

MR.GOODALE: I do.

MR.DEAR: My Lord, I will let Mr.Goodale produce formally the photostats. The first case I am producing is the case of Higgins against White, 93 F2d, 357. The others are: White against Higgins, 116 F 2d, 312. Sylvester against Newton, 321 Mass.416. Damon against Damon, 312 Mass., 268. Berry against Kyes, 304 Mass., 56. Boyden against Stevens, 285 Mass., 176. Restatement of the Law on Trusts, Section 330, Comment L Welch and Truman against the Treasurer and Receiver General, 217 Mass., 348. I would also like Mr.Goodale to put in the relevant abstract from the deed in the Welch case.

Now, Mr.Goodale, turn to Clause 6 of the deed. You will remember that that clause deals with the income beneficiaries giving the trustees a receipt of the accounts. What is the purpose of that clause?

MR.GOODALE: There are several possible purposes. The first may be to give the trustees some means of avoiding criticism of what they have done. The second may be to save them a considerable amount of trouble and expense which would result if a trust like that of Lady Gilbert-Carter was subject to the jurisdiction of the Probate Court.

MR.DEAR: Do you consider that this clause affects in any way the fiduciary duty of the

trustees in giving or withholding consent to amendment or revocation?

MR.GOODALE: No. I do not.

MR.DEAR: Let me just summarise the opinions you have expressed. You say that for any amendment or revocation of the deed of trust to be effected the consent of the trustees would have to be obtained.

MR.GOODALE: Yes.

MR.DEAR: Would you say that whenever they were called upon to give that consent they had to give it?

MR.GOODALE: No.

MR.DEAR: It is your opinion that in giving or withholding consent they had a fiduciary duty to perform.

MR.GOODALE: It is.

MR.DEAR: That is all from me, My Lord.

CROSS EXAMINATION BY MR.FIELD

Cross-examination.

MR.FIELD: You heard Mr.Perkins say that in his opinion the office of trustee as such implies a fiduciary duty.

MR.GOODALE: I did.

MR.FIELD: I take it that in your opinion a trustee in any form of trust has an inherent fiduciary duty.

MR.GOODALE: I think that the word "trustee" is sometimes misapplied to mean a person carrying out duties which are really not those of a trustee.

MR.FIELD: You may explain that later. You heard Mr.Perkins say that. Do you agree with that?

MR.GOODALE: In so far as I understand the statement to mean that where a trustee is in a

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situation where it may be inferred that the common law conception of a trustee is intended there is a definite inference to be drawn that there are certain fiduciary duties.

MR.FIELD: As to all of his duties or to certain of them?

MR.GOODALE: As to certain of his duties.

MR.FIELD: Your attention was drawn to the Restatement of the Law on Trusts, particularly the passage beginning "On the other hand". You said that in your opinion that does not represent the law of Massachusetts and the Courts of Massachusetts would not act in accordance with it.

MR.GOODALE: I did not mean to be understood as saying that the Courts would ignore that paragraph. Certain parts of the paragraph go further than I believe the Court would go.

MR.FIELD: Do you know of any case in which the principle enunciated in that part or any part of the paragraph has been at issue?

MR.DEAR: My Lord, Mr.Goodale mentioned the particular sentence in the paragraph beginning with the words "On the other hand". He did not say the whole paragraph.

MR.FIELD: You mentioned the first part of the paragraph beginning with "On the other hand" down to just before the last sentence of that paragraph.

MR.GOODALE: There are two parts of that paragraph about which I have reservations. The first is the part which says that in case there is no standard by which the reasonableness of the trustee's judgment can be tested the Court will not compel the trustee in the exercise of power if he acts honestly and does not act from improper motive. In my opinion the Courts of Massachusetts would be more strict in holding a trustee up to an implied standard.

MR.FIELD: To a standard higher than that of honesty and proper motive?

MR.GOODALE: Yes.

MR.FIELD: Do you know any cases on that point?

MR.GOODALE: There is a dictum in the case of Boyden against Stevens in which the Court said that the trustee must give serious consideration. I interpret that as meaning that the trustee must in no circumstances be a rubber stamp.

MR.FIELD: That case was one in which the trustee had power to terminate the trust. In our case the donor has that power with the consent of the trustee; but the donor does not have power to revoke in the case cited.

MR.GOODALE: He has no power to initiate revocation.

MR.FIELD: I also understood you to say that you disagree with the second part of the statement which says: "The power of the trustee in such cases to consent to the revocation of the trust is like the power to appoint among several beneficiaries."

MR.GOODALE: That seems to me to be a rather broad statement.

MR.FIELD: Is there any authority or are there any cases on that?

MR.GOODALE: I know of no case in which such a power of revocation is compared to a special power of appointment.

MR.FIELD: Have you a photostatic copy of the case of Reinecki against Smith?

MR.GOODALE: I have not.

MR.FIELD: You heard me put to Mr.Perkins Section 330.9 of Scott on trusts beginning "where the power is reserved to revoke....." and the next part "on the other hand....." Do you disagree with that?

MR.GOODALE: I do.

MR.FIELD: Why?

MR.GOODALE: Because in my opinion a trustee

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Cross-examination continued.

cannot be allowed to act unreasonably in any circumstances unless some expressed power is given.

MR.FIELD: When you said that in your opinion the Courts of Massachusetts would not go as far as the Restatement with which we dealt would you say that no Court in the U.S.A. would go so far, or were you confining it to the Courts of Massachusetts?

MR.GOODALE: I am confining it strictly to the Courts of Massachusetts.

MR.FIELD: Do you mean that the Restatement does not necessarily have the same effect in the Commonwealth of Massachusetts as elsewhere.

MR.GOODALE: It has whatever effect the Courts of Massachusetts see fit to give.

MR.FIELD: But they would not disregard it easily.

MR.GOODALE: No.

MR.FIELD: Lawyers would disregard it, but not the Court necessarily.

MR.GOODALE: I would not say that lawyers would disregard it.

MR.FIELD: You may remember the case which I put to Mr.Perkins today in which the settlor created an inter vivos trust to pay income to himself for life. Then I put a further case of the same trust with the provision to this effect: "I reserve the right from time to time to amend this trust or revoke it in whole or in part by written notice to the trustee provided that no such amendment which shall increase the duties or responsibilities of the trustee or reduce his powers or shall be effective until consented to in writing by the trustee." Would you say that the Massachusetts Court would recognise such a provision?

MR.GOODALE: I would say that the Massachusetts Court would recognise it as a valid trust provision, and the trust could not be amended without the consent of the trustee.

MR.FIELD: Is that not tantamount to a power of veto?

MR.GOODALE: The power of veto within the limits of the power of the trustee. A person cannot be compelled to assume greater burdens than were undertaken when he became a trustee.

MR.FIELD: Would they have a fiduciary duty to exercise such a power in respect of that amendment?

MR.GOODALE: They would have no fiduciary duty, in my opinion, that would prevent them from protecting themselves but I think their capacity might still be said to be fiduciary.

MR.FIELD: You are not trying to draw a distinction between something in the nature of a fiduciary duty and something else? Yours is always the fiduciary duty mentioned.

MR.GOODALE: I think that this power is for the protection of the trustee; but if they exercise it in a manner which is not related to their protection that power of veto cannot be said to be sustaining.

At this stage the Court adjourned until 2 p.m.

MR.FIELD: Mr.Goodale. You have read what purports to be a fairly accurate summation of the case of Reinecki against Smith.

MR.GOODALE: Yes.

MR.FIELD: I understand you to make the point that this case and other cases along these lines turned on a point of constitutionality - as to whether the Commonwealth of Massachusetts had the right to levy a certain tax.

MR.GOODALE: In that case the Federal Congress was spoken of.

MR.FIELD: Anyhow, the real issue was a constitutional question. Therefore you will say that it had nothing to do with Trust Law?

MR.GOODALE: Yes.

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Cross-examination continued.

MR.FIELD: I notice this paragraph in that case: "In approaching a decision on the question before us it has to be borne in mind that the trustee is not a trustee of the power of revocation and owes no duty to the beneficiary to resist an alteration or revocation of the trust. Of course he owes a duty to the beneficiaries.... stranger to the trust." Am I right in saying that by implication that question did come before the Court - may be as a secondary issue and not necessarily as a primary issue - but it did come before the Court inasmuch as they commented on it, whether as obiter or otherwise?

MR.GOODALE: The Court undertook to describe the nature of the power; but that was preliminary to the question of whether the power was of a nature which the Court considered it to be and in respect of which could be applied the kind of taxation included in the Revenue Act of 1924, without violating the due process of the Federal Constitution. The Court had to speak of the absence of fiduciary duty on the part of the trustees to prevent an amendment or revocation which would hurt the beneficiaries and those interested in remainder. I certainly would want my previous opinion to be understood as saying that the trustees are not under any absolute duty to protect the specific rights of those interested in remainder. If their discretionary power, reasonably exercised, is broad enough to permit them to object or consent to a change in the interest of the remainder, I am sure that the Court of Massachusetts would not interfere.

MR.FIELD: If their discretionary powers be broad enough, and are properly exercised. Therefore it must satisfy two tests.

MR.GOODALE: When they are broad enough and are properly exercised, the Court says it will not substitute its judgment for the discretion of the trustee.

MR.FIELD: By what standard would you judge the "broad enough" in a case like the Reinecki case?

MR.GOODALE: If I remember the Reinecki case correctly it was broad enough to permit revocation and amendment by the settlor with the consent of the trustee. I would add this: In my

opinion the language of the Court about fiduciary duty was not necessarily the decision in the case. The Court was very much concerned with the matter from the point of view of taxation. Without violating the due process of law, Congress had the power to do certain things reasonably necessary to prevent tax evasion.

MR.FIELD: You will remember that this morning I put to Mr. Perkins a hypothetical case. I put it to you also, and if I remember correctly, you said that it was by inference that Clause 4 as originally drafted was for the protection of the trustees; but you could imagine an extreme case where the trustees might not be allowed to object and you suggested that the amendment was for negative purposes. Is that a fair statement?

MR.GOODALE: What I meant to say was that if the refusal of the trustees was for a purely frivolous reason and not an honest exercise of their power the Court might call upon them and say that they should not exercise their power of refusal in the particular matter.

MR.FIELD: You also said that apart from that there was no fiduciary duty.

MR.GOODALE: Yes.

MR.FIELD: Would you look at Clause 8 which reads: "Any trustee may re-sign..... then entitled to the income." Would you still say that the Court would make a trustee accept an amendment when by this very clause he would have a right to resign - an absolute right to resign?

MR.GOODALE: Well, in the extreme, perhaps in such circumstances as I mentioned - refusal for a purely frivolous reason - I still think that the Court might ask the trustee to assent notwithstanding this clause; but the trustee even when directed by the Court would still have the right to resign.

MR.FIELD: Are you familiar with the case of Pitman and Pitman?

MR.GOODALE: No.

MR.FIELD: That is all, may it please Your Lordship.

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Re-examination

RE-EXAMINATION

MR.DEAR: Early in your cross-examination you were asked whether the Massachusetts Courts would imply duties by the fact that the trustee was required to give or withhold consent. You said yes; there would be an implication in respect of certain duties. The question I am putting now is whether in this Deed under consideration the Court would imply among these duties the duty to act reasonably and with a due realisation of the duties of the office of trustee.

MR.GOODALE: In my opinion it would.

MR.DEAR: I think that in your examination-in-chief you said that sometimes deeds of this kind are drawn in which amendments are permissible with the consent of the beneficiaries; and that provision is to protect the interest of those beneficiaries whose consent is required.

MR.GOODALE: Yes.

MR.DEAR: But in cases where the beneficiaries' consent is not required are not the trustees entitled to have regard to the interest of the beneficiaries, the settlor and those interested in remainder?

MR.GOODALE: That is my understanding of it.

MR.DEAR: Therefore they may reasonably and with propriety object to an amendment which would adversely affect the interest of the beneficiaries etc.

MR.GOODALE: Yes.

FURTHER QUESTIONS BY MR. FIELD

Further Cross-Examination.

MR.FIELD: My Lord, there was a further question I wanted to put.

MR.DEAR: I have no objection.

MR.FIELD: In your opinion, Mr.Goodale, would the Massachusetts Law recognise in regard to Clause 4 as it stands now the possession of a fiduciary duty by the trustees as to the exercise

of the power of revocation by the donor, but not as to the objects to benefit from any exercise of the power?

MR.GOODALE: I would have to make my answer two-pronged. If you are speaking about the exercise of power which involves no abuse of that power that is one thing but if the exercise of the power so grossly disregarded the interests of the settlor and the beneficiaries as to produce an unreasonable result, then the Court would say that the trustee must be controlled in the exercise of the power.

MR.FIELD: What I was asking particularly is whether as a matter of principle the Court would recognise such a principle. We have been dealing with a lot of general principles. I was putting this to you as a principle of the law of Massachusetts.

MR.GOODALE: The Courts would recognise the fact that the settlor intended the trustees to have some latitude in the exercise of their judgment.

MR.FIELD: Not as regards the objects to be benefited by the exercise of the power?

MR.GOODALE: In the light of all the circumstances.

QUESTION BY MR. DEAR

MR.DEAR: With your permission, My Lord, I would like to ask a further question. When,Mr. Goodale, you say in the light of all the circumstances I take that you do not mean when the Court considers the exercise of the power in vacuo, but the purpose for which the power is to be exercised.

MR.GOODALE: Yes.

MR.DEAR: That, My Lord, is all the evidence which the Petitioner proposes to lead in this matter.

MR.FIELD: At this stage, My Lord, I am not going to make any opening remarks on the case for the Respondent. I think that my remarks might well wait until we come to the general argument. I would like to call Mr.Kane and ask Mr.Malone to do the examination.

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Examination

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EVIDENCE OF JOHN C. KANE

Mr. Kane S.S. I am Mr. John Clarke Kane of the Commonwealth of Massachusetts. I am a practising Attorney at Law. I have been practising in the Commonwealth of Massachusetts since 1936 with the exception of five years military service. That was after my graduation from Harvard Law School in 1936. I am associated with the firm of Powers and Hall, and I am acquainted with the drawing of trust instruments and the management of advisory trust services.

I have seen and studied the Deed of Trust made by Lady Gilbert-Carter on June 16, 1936 and all the amendments made thereto.

MR.MALONE: Is that Deed of Trust governed by the law pertaining to the Commonwealth of Massachusetts?

MR.KANE: Yes.

MR.MALONE: I propose to follow the same pattern of examination as was followed by my learned friend. I will ask you this first: Would you look at Clause 4 of the deed as it was in its original form? It has been pointed out before that power of revocation is effected by the delivery of an instrument in writing to the trustees, whereas partial revocation or amendment is effected by an instrument in writing with the consent in writing of the trustees.

MR.KANE: That is right.

MR.MALONE: With respect to the power to revoke would you say that there was any fiduciary duty which the trustees would have to exercise?

MR.KANE: As regards the amendment to paragraph 4 made in December 1939 I do not believe that the trustees were under any fiduciary duty in connection with giving or withholding consent to partial revocation or amendment.

MR.MALONE: When you say that they were not under any fiduciary duty to give or withhold

consent would their consent be necessary to effect a partial revocation or amendment of the Deed of Trust?

MR.KANE: Let us take that separate. First of all as regards an amendment of the trust, I would definitely say that their consent is necessary before an amendment could be made effective. The words "partial revocation" as they appear in Clause 4 as it was originally drawn present a seeming inconsistency with Clause 1 of the trust as originally drawn which allows the donor to call for such parts of the principal as she may from time to time in writing request. If you construe the words "partial revocation" in Clause 4 to have the meaning of calling back part of the corpus of the trust to her as distinct from a total revocation in taking it all back, it is inconsistent with paragraph 1, and under paragraph 1 I feel that she has the right to call back a part of the principal at any time and the trustees would have no control over it. You might, to avoid that seeming inconsistency, construe the words "partial revocation" to mean a partial striking out like a deletion of part of the terms of the trust which is similar to an amendment, but not in the context of calling back part of the principal. If you so construe the words, then the trustees' consent would be necessary before such partial revocation would be effected.

MR.MALONE: Now with regard to the granting or refusing of the trustees' consent to what extent do you think that the Court would interfere?

MR.KANE: It would be my opinion that under Clause 4 as originally drafted the Court would not at all interfere with the exercise of the trustees' power to give or withhold consent.

MR.MALONE: Are you taking into account the possibility of dishonest or improper motives?

MR.KANE: Where there is power to be exercised I believe that there is a duty to exercise it honestly, but in this case taking Clause 4 or taking the original instrument as it existed in 1936, I feel that the requirement of consent to amendment or partial revocation is there purely and solely for the protection of the trustees, and I do not think that they are accountable to anyone for giving or refusing to give consent.

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Examination continued

MR.MALONE: In December 1939 Clause 4 was amended. It was, I think you will observe, amended prior to the amendment made shortly afterwards to Clause 1.

MR.KANE: That is right.

MR.MALONE: Would you say whether you consider that the amendment made to Clause 4 in December 1939 was made with the object of creating a fiduciary duty on the trustees.

MR.KANE: In my opinion based on the instrument, the amendments and the evidence that I have heard, I do not believe so. I might say that I do not believe that anyone has so far testified as to the purpose of the change. 1

MR.MALONE: Would you say that the duty of the trustees under Clause 4 as amended was the same as the duty of the trustees with respect to partial revocation prior to the amendment to Clause 4?

MR.KANE: There is one definite difference in my opinion. I would say that after Clause 4 was amended the trustees would be under a definite duty to exercise good faith and proper motives in giving or withholding consent to amendment or partial revocation. In other words, I do not believe that the trustees could for example insist on being paid to give their consent nor could they ask for payment for withholding their consent. 2

MR.MALONE: We have heard in this Court explanations as to the position that the American Restatement of the Law on Trusts occupies in a legal sense in the Courts of Massachusetts. Have you anything to add to that, or do you agree with all that has been said? 3

MR.KANE: The Restatement of the Law on Trusts was prepared by a committee of which the head - called the Reporter - was Professor Scott of the Harvard Law School. The members of the Committee were either - I know that comparisons are odious - were either top ranking professors, or good practising lawyers or judges. That committee under the leadership of Professor Scott, sought to prepare what they termed an orderly restatement 4

of the general common law of the U.S.A. on trusts, including not only the law developed solely by judicial decisions, but the law that has grown by application by the Courts to statutes. The Restatement is a synthesis of what the committee thought was the best rules of Trust Law. It has the prestige of the committee and it is widely cited in the Courts. I may say that by an odd coincidence Professor Scott has written a three-volume book on the Law of Trusts which is, in my opinion, the top book on Trusts in the U.S.A., and the same Paragraph 330 is carried over into the Restatement. He wrote the book on the Law of Trusts first and then headed the committee which prepared the Restatement.

MR.MALONE: You have heard read almost ad nauseam Section 330, Comment L of the Restatement. The question I want to ask is whether there is anything in that section which you think is of relevance in determining fiduciary duties of the trustees in this Deed of Trust by Clause 4 as amended.

MR.KANE: Yes.

MR.MALONE: Would you read the passage which you think is to the point?

MR.KANE: I will put it this way. I have found no Massachusetts case directly concerned with the problem of a trustee's fiduciary duty to consent to an amendment for instance to a Deed of Trust, or with any lack of specific ministerial authority, I would say that the whole passage is probably relevant, not necessarily to the facts as we have them this minute, but to the general problem.

MR.MALONE: Looking again at Clause 4 as amended, do you find in that clause any standard by which the Court could judge the right or duty of the trustee to grant or withhold consent to revocation of the trust?

MR.KANE: I have said that the trustee cannot give or withhold his consent for dishonest or improper motives. Are we assuming that the donor who signs to revocation or amendment is mentally competent or sui juris?

MR.MALONE: Yes.

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MR.KANE: I do not find any standard expressed in Clause 4 that would limit the trustees in their giving or withholding consent, provided that they do not act dishonestly or from improper motives.

MR.MALONE: Is it true to say that there is a passage in Scott on Trusts along much the same lines as Section 330, Comment L, of the Restatement?

MR.KANE: There is a paragraph which was discussed with Mr.Goodale on the general subject of the revocation of a trust with the consent of a trustee. I have here a copy of that passage made in our office from the original; but the copy does not have the footnote.

MR.MALONE: The passage says, "In determining what constitutes a discretion it is important to ascertain.....judgment." Then he cites the Skilling case and goes on, "on the other hand when there is no provision in the trust instrument expressly or by implication limiting..... motive."

MR.KANE: I think that I had better expound a little bit here. I believe that the Massachusetts Law has been correctly stated by the others before me, that if there is a standard the Court will control the exercise of the power by the trustee, and if the standard is very broad, or if the trustee's power is very broad the Court will not substitute its judgment for the power of the trustee; but if you take a case like the Skilling case, it was one where by express provision the trustee had the power to pay to the settlor such part of the principal as the trustees saw fit, and at her death to pay what was left to the beneficiaries. The Court held that the trustee would have to pay the settlor what she would need. They would have to consider her needs. This is like some of our Massachusetts cases that have been cited and some have not been cited. In some of the Massachusetts cases that have been cited there was a standard and the trustees were held to have to operate within that standard; but then Scott says: "On the other hand.....motive."

MR.MALONE: You have said that from Clause 4 you can see no standard by which the Court could judge the power of the trustees to give or withhold consent?

MR.KANE: Not on looking at and studying the trust instrument. As I have said, there is no evidence as to the purpose of the insertion of this thing. From what I know by looking at the instrument along with the amendments I do not find a standard. I do not think there was a standard before 1939. I do not think there was any fiduciary duty of any kind before 1939, and the change here, whatever was the reason for it, does not convince me that there is any standard now.

MR.MALONE: I would like to draw to your attention Clause 6 of the Deed. This is a clause which calls for the rendering of accounts to the income beneficiaries as regards the administration of the trust. Does this clause in your view cast any light on this question of standard in Clause 4?

MR.KANE: Yes. I agree with what has previously been said by the other witnesses that this provision was for the convenience or protection of the trustees in settling their accounts. I mean in order that they might avoid the expense and trouble connected with the Probate Court. I would add that what is significant to me is that the accounts are only to be rendered to the income beneficiaries and not to the remaindermen. The only income beneficiary from 1936 until Lady Gilbert-Carter died was the settlor herself and the position is that the "written approval of the income beneficiaries - in this case there was only one during the material time - shall be final and binding upon all persons who are in being or not and who are then or may thereafter to be entitled to share in either the principal or the income of the trust."

Now how does that relate to the question of amendment? Under Clause 1 as amended in 1944 the trustees could pay to her such parts of the principal as the trustees in their uncontrolled discretion should deem advisable for the comfort and support of the donor. I think that there is a standard there. I think they could only pay to her an amount of principal that was related to her comfort and support. As an illustration, that clause could be amended and brought to where it was in the beginning, and then if they paid to her the principal as she called for all of it and there was an account assented to by her, Clause 6 says that it shall be binding on the remaindermen. That is one illustration.

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Examination continued

Collaterally, if she sought to initiate either a partial or a total revocation and they assented and then she assented to the account under Clause 6, that would be binding on the remaindermen whether in existence or not. It seems to me that the fact that she had that right to ask for partial revocation or the right to ask for amendment, and then had the right to protect the trustees against any liability for what might be, if they had any fiduciary duty, a breach of that duty, supports the inference that there was no intention to change the non-fiduciary duty prior to 1939 into a fiduciary duty after 1939.

MR.MALONE: You have heard Mr.Perkins say that a trustee qua trustee because of his office automatically possesses fiduciary duties. Would you agree with that?

MR.KANE: I do not think that every right, or power, or duty of a trustee is of necessity fiduciary just because he is a trustee. If Mr.Perkins said that I will have to disagree with him.

MR.MALONE: You are saying that it is a fiduciary duty to the extent that the trustee acts honestly and from a proper motive.

MR.KANE: I am saying that I have to differ from something which I understood Mr. Perkins to say this morning. He said that a donee of power under a will or trust had a binding duty to exercise it in good faith and from proper motive, and I have to disagree with him on that particular point. I am relying on the case of Pitman and Pitman which we have asked both gentlemen about. I did not know that the question was coming up and they were not prepared either. That was a case where a donee of the power of appointment under a will was having marital troubles with his wife, and he attempted to exercise his power in the partial performance of a contract that he had previously made with his wife which was in contemplation and would take effect in the event of their divorce. The Citation of the case is 314, Mass. 465. The part I will read is at Page 476 to 477. It is not a complete copy of the case. What I am reading is a memorandum I made myself from a reading of the case. I do not have a photostat of it. What I want to say is that if you desire it I can, when I go home get a photostat made of the whole case and show it to Mr. Perkins and it can be sent down here if it is wanted.

MR.KANE: The Court says on Page 476 to 477: "The exercise of the power was not a thing of barter ..... which the donor conferred on him".

I am coming on to that the donor cannot exercise power that is one of the terms of bargain with his wife, and his attempt to do so constitutes an abuse of the power, and renders its exercise ineffectual.

What I was saying is that I think similar standards apply to the trustees here. Mr.Perkins said they would not apply in the case of a simple donee of the power. I feel that the mere fact that the trustees have a standard of good faith and a requirement not to act from improper motives does not change their power of consent or non-consent into fiduciary duty.

MR.MALONE: There is another aspect of this matter. In your opinion is there any distinction between cases where the power of revocation is in the hands of the grantor of the power and cases where the power is conferred on the trustees?

MR.KANE: I should think so. In my opinion yes.

MR.MALONE: You have mentioned Section 330, Comment L of Scott's Restatement. Do you know any other authorities that you can rely on for the suggestion that the Massachusetts Courts would not regard the trustees as having duties to the extent which Mr. Perkins and Mr. Goodale spoke about?

MR.KANE: I believe that the Saltonstall case, generally speaking, indicated by implication that the power of consent on the part of the trustees was not so much a fiduciary power, not so much a taking away from the settlor's power as to keep the settlor's power out of the Inheritance Tax statute. It is, as I said, there by implication. I will say that I have looked as far as I can into the Massachusetts cases, and I do not find any other cases on the subject. As regards the Welch case I was not told until I got here what was in the record in the Law Library. I do not think there are any more. I do not think that Mr. Perkins knows any more.

MR.MALONE: Both the Welch case and the Saltonstall case concerned tax matters.

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Examination continued

MR.KANE: Yes.

MR.MALONE: I cannot recall whether it was in reference to the same statute, but there was a difference of time.

MR.KANE: The Welch case, I think someone said, was in 1914. The Saltonstall case was sometime later - 1926. I have not carefully read the Welch case yet, but as I recall it, they were talking about the same types of statutes.

MR.MALONE: In respect of Clause 4 of the deed as amended, if the donor of the power had revoked the trust to whose benefit would that have inured immediately? I am not talking about if she revoked it and then created another trust. In such an instance can you think of any other person under the trust who would acquire a benefit by the act of revocation?

MR.KANE: Not by the revocation itself.

MR.MALONE: I mentioned that because I would like you to turn to Section 185 of the Restatement. Perhaps you could cast some light on Paragraphs A, D and E.

MR.KANE: I would say that the whole comment is fairly good law. Can you direct me to something specific?

MR.MALONE: I just saw a certain passage which talks about power being in the hands of certain persons. The last line says: "It is of no significance ....." I suppose that is a fairly general section of the Restatement.

MR.KANE: I do not think that it will help with the power to revoke with or without the consent of the trustee. I think that Section 330 is much nearer to the point.

MR.MALONE: Certain cases have been cited and were suggested by the witnesses on the other side as having relevance to this question of the discretion of the trustees under this clause. Others were cited - Boyden and Stevens, Berry and Kyers, Damon and Damon, and Sylvester and Newton. Can you indicate in which one of the last four cases the initiative to act came from the trustee or was granted to the trustee?

MR.KANE: To start with Boyden and Stevens: There the question was the power of the trustee to terminate the trust by paying it over to the. .....Sylvester and Newton was a case where the executor or rather where the will gave the executors and trustees very broad powers to deal with the property of the deceased, and the executor, I think it was, exercised the power under the will and that was the question in the case. The power was exercised by the executor in a fiduciary capacity and the exercise of the power initiated with him. The trustee was to pay over "to or for the benefit of my son Ralph the income of the trust and also to pay over to him such portions of the principal and at such a time as my trustee shall determine?" Here the payment by the trustee was to be the result of the trustee taking affirmative action and not simply the action of a trustee consenting to the request of the settlor.

In the case of Berry and Kyes I believe it was the same type of question. "I authorise my trustee for the time being in his or its discretion to pay to my son....." I think the complaint in this case was as regards abuse of discretion. I feel sure that where there is a standard our Courts will make the trustee act within the standard; but if it is a very broad power the Court will not substitute its judgment for that of the trustees; the Court would not however, let trustees be utterly unreasonable in the exercise of ordinary fiduciary powers like paying principal, handling a sale or terminating a trust. Our Courts would say that the trustees would have to exercise their power within more or less rigid limits; but that is not the type of case we are talking about.

MR.MALONE: So you do not consider that those cases cast any real light on the problem before us.

MR.KANE: If I could find some test of standard in the exercise of this power or giving or withholding consent in the instrument then I might say that the same type of general rule cited by Mr. Perkins and Mr. Goodale would probably apply to this.

MR.MALONE: I have touched on Clauses 1, 4 and 6 of the deed. Is there any clause in it on which you feel you have some comment to make with regard to the issue before the Court?

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MR.KANE: I would respectfully disagree with Mr. Goodale about the effect of the resignation clause. Mr. Goodale said he could imagine a case prior to December 4, 1939, in which our Court would make the trustees accept an amendment to the trust where their reason for refusing to consent was negative. I do not personally feel that our Courts in any jurisdiction in Massachusetts would on the one hand order a trustee to accept an amendment like that where in the instrument it is particularly provided that the trustee can resign and would not have to be bound by the order of the Court. I disagree with him on that.

There is one thing that struck me on looking at the bottom of Paragraph 2 as originally drawn. The donor directs that any death duties or any other tax in connection with her death, imposed on account of this trust shall be paid therefrom. I think Mr. Perkins said that the Estate Tax would apply with certain limitations to this property. If he did not, I am wrong. I do not believe it would apply if the subject of the trust is securities or intangible property. The words "death duties" are not normal language in American law. We say Inheritance Tax or Estate Tax. That never came out until 1951. It is odd. I do not know what to make of it. We regard duty as something that the Customs people take away from you when you come home with good Barbadian rum.

MR.MALONE: That is all, My Lord.

MR.DEAR: My Lord, there is one case which we would like to ask permission to allow Mr.Kane to take away although it is now in the custody of the Court as an exhibit.

HIS LORDSHIP: Very well, Mr.Kane you said that "death duties" is not an ordinary expression.

MR.KANE: Not in Massachusetts law.

At this stage the Court adjourned until 10 a.m. next day.

CROSS-EXAMINATION OF MR.KANE

Cross-examination

MR.MALONE: May it please Your Lordship, I do not propose to ask any more questions. I am

asking that certain documents be put in. They are not photostatic copies. They have been in some cases typed for Mr.Kane. I am suggesting that they be put in now with a view to facilitating the hearing of this case. We are proposing to have photostatic copies of these particular documents made and sent back here to be put in lieu of these.

HIS LORDSHIP: We can go on and deal with these for the purpose of argument, and may be judgment and then put the photostats in. in place of these.

MR.MALONE: There is the case of the Boston Safe Deposit and Trust Co. and the Commissioner of Corporations and Taxation, 294 Mass., 551; Leberett Saltonstall and Others (Trustees) against the Treasurer and Receiver General and Others, 256 Mass., 519; an extract taken from Scott on Trusts, Chapter 10; Termination and Modifications in Sections 330.8 and 330.9

HIS LORDSHIP: There is one matter, Mr. Kane, which I would like some light on. With regard to the reference to the will towards the end of the second clause, would that clause or part of that clause make any difference apart from the amendments to the discretionary giving or withholding of consent by the trustees as to partial or total revocation? We know that there are certain amendments with regard to certain beneficiaries, probably for good reasons.

MR.KANE: I see the point; but I do not believe that it would be necessary for the settlor in this case to amend the trust..... Does not this in itself take care of what will happen if she feels to alter it? If she alters her will she expresses the intention that payment be made out of the trust proper. If she alters her will that intention is carried out and she does not need to amend the trust instrument if she feels that the effect of the second sentence would be a direction to the trustees not to duplicate.

HIS LORDSHIP: The point struck me, and I wondered if it would make any difference to the trustees giving or withholding consent to partial revocation or amendment.

MR.KANE: I do not believe that the fact that there are beneficiaries whose interests may be affected by the amendment is any reason to say

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that the trustees have a fiduciary duty just for that reason alone. This particular clause was amended and eventually struck out in 1951. There were other paragraphs that were changed, and I do not believe that there is a fiduciary duty on the trustees simply because the interest of the beneficiaries might be changed; but I do believe that where there is a standard or where it is clear from the instrument that they are to have a fiduciary duty then they do have it.

MR.DEAR: Do you agree that legally the estate and trust funds were vested in the trustees?

MR.KANE: Yes.

MR.DEAR: Do you agree that the consent of the trustees was necessary for a valid amendment or partial revocation prior to 1939?

MR.KANE: Yes, with the one qualification as to the interpretation of the words "partial revocation" that I discussed yesterday.

MR.DEAR: Before 1939 do you consider that whenever the settlor called for such consent that the trustees would have been bound to give it?

MR.KANE: No.

MR.DEAR: I think you said yesterday that the trustees had no duty prior to 1939 to exercise in a fiduciary capacity in giving or withholding consent.

MR.KANE: That is right.

MR.DEAR: Carrying that to its logical conclusion they could even have acted from dishonest or improper motives?

MR.KANE: I will answer that this way: I said that it was my opinion that the requirement to consent was solely for their protection. If they gave or withheld their consent to an amendment the settlor had the complete power to revoke the trust entirely or call back part of the principal or do what she liked with it; so she would not be affected.

MR.DEAR: I appreciate the argument, but the

question is whether the trustees could be influenced by dishonest or improper motives in giving or withholding consent.

MR.KANE: I would say that they could be influenced by any motives whatever; I do not see where the consent comes into it.

MR.DEAR: I am asking you to assume that. Even if they acted from dishonest or improper motives they would be accountable to no one?

MR.KANE: Are you talking about giving consent or withholding it?

MR.DEAR: I am putting it generally now. The point is if they gave consent from dishonest or improper motives whether they would be accountable to anyone, and alternatively if they withheld consent.

MR.KANE: You are assuming that the settlor being sui juris and mentally competent to amend the trust in some particular or particulars, they gave their consent, and gave it from dishonest or improper motives; and you want to know if they could be accountable to anyone. I cannot see how they could be myself. I cannot think of a case in which they would be. I am assuming that you are saying that it is something which the settlor wants to do, and the initiative comes from her. She is mentally competent to do it, and the trustees say go ahead. Prior to 1939 I do not see how they could be accountable to anyone.

MR.DEAR: I would like to put to you one or two examples of amendments that the settlor may have desired to make. I am assuming all along that she is mentally competent and sui juris. Let us suppose that herself and her son had had a dispute; he had no other resources and she wanted to amend the trust to give his interest to a stranger; and the son went to the trustees and offered to pay them not to give their consent; and the settlor went to the Court of Massachusetts, are you saying that the Court of Massachusetts would refuse to take notice of the fact that the trustees withholding of consent in such a case was due to the fact that they were being paid by a beneficiary?

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Cross-examination continued

MR.KANE: I feel that prior to 1939 she would not have to go to Court to get their consent to total revocation.

MR.DEAR: I agree with that. The point is that what she is seeking is a partial amendment of the trust.

MR.KANE: But even so, if she revoked it and the next day or the same day she made a new trust for the object that she intended she would be at perfect liberty to do that without the intervention of the Court.

MR.DEAR: You are saying that from a practical point of view she could have before December 1939 effected the same object by taking two steps, total revocation and the creation of a new trust; but that is not the point that I am getting at. What I want to know is does the Massachusetts Court abdicate its right to control the trustees if the trustees are dishonest?

MR.KANE: No. I do not say that.

MR.DEAR: It seems that that is what you are saying. Let us assume that the settlor does not want to take the two steps that you mentioned. Let us assume that it is too much trouble and too much expense. If the Massachusetts Court is like the Barbados Court you could quickly by a summons ask the judge to control the trustees in the exercise of their discretion. You are saying that the Court will say we abdicate our right to control dishonest trustees. If you do not like what they do take two steps to achieve your object. Is that what you are saying?

MR.KANE: I do not want to go so far. I want to say what I have said before that trustees always have to act in good faith and from proper motives. It would be silly of me to say that before 1939 the Court would not have frowned upon trustees acting for their own benefit or taking a bribe in the exercise of their power if they had a fiduciary duty to perform. But in this case I still say that the consent of the trustees before 1939 was solely for their protection, and the Court would probably simply say "why don't you start all over?" It seems to me silly to imagine that type of case coming up under this instrument.

MR.DEAR: In your answer you said that the Court might frown upon such an action by a trustee. What I am putting to you is that not only would the Court frown, but would take action to restrain the trustee from taking such action.

MR.KANE: The Court might remove the trustees; but I cannot see the Court forcing them to take action - to give or withhold their consent.

MR.DEAR: You remember the deed of trust has a provision by which a trustee may resign.

MR.KANE: Yes.

MR.DEAR: Do you consider that the Court might compel him to give consent and if for some reason he wanted to get out of the trust he could resign? You said the Court might remove him. Would the Court compel him to give consent and if he did not like it he could resign?

MR.KANE: I do not believe myself that the Court would be likely to compel him.

MR.DEAR: The question is whether they could do it.

MR.KANE: I do not think so.

MR.DEAR: After the amendment of December 1939 for any amendment or partial revocation to be effected the consent of the trustees would be required?

MR.KANE: Yes.

MR.DEAR: Did the trustees have to give their consent if called upon by the settlor?

MR.KANE: No.

MR.DEAR: But in giving or withholding their consent they would have been permitted to act from dishonest or improper motives?

MR.KANE: No.

MR.DEAR: Can you see anything in the trust which creates this distinction between prior to 1939 and after 1939?

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Cross-examination continued

MR.KANE: I come to that conclusion after reading the trust as it was before 1939 and the amendment after 1939.

MR.DEAR: What does your reading of the trust disclose that makes you accept the point of view that after 1939 the trustees had a duty which they did not possess prior to 1939?

MR.KANE: The original paragraph 4 gave the donor the right to revoke the entire trust without requiring the consent of the trustees: and under clause 1 she was given the right to call for as much principal as she wanted from time to time; so that if you use the words "partial revocation" to mean a calling back of corpus of the trust she could at any time before the amendment call it back. I say that the requirement of the trustees to consent was purely for the protection of the trustees at that stage. When the requirement to consent was extended to total revocation, and when the power to draw the principal was given in my opinion it was then that the trustees had a duty as set out in Scott on Trusts in Section 330.9, the duty of exercising their power of giving or withholding their consent in good faith and from proper motives. I do not want to reiterate what I said yesterday.

MR.DEAR: Would it be correct then from the interpretation of that answer to say that you regard the settlor's renunciation of her right to call for principal as a crucial factor in giving the trustees fiduciary duty?

MR.KANE: No: because that came late. In the first place, I do not say that they had a fiduciary duty. They had at least a duty to act in good faith.

MR.DEAR: You say that the renunciation of her right to call for principal was not your reason for coming to that conclusion?

MR.KANE: She gave up her right to revoke the entire trust on the day of December 4, 1939, and on the 28th she renounced her right to call for parts of the principal under Clause 1.

MR.DEAR: Four our purposes between the 4th December 1939 and the 28th December, 1939, she had a right to call for principal as she liked.

MR.KANE: Yes.

MR.DEAR: She could have called for so much as to have emptied the trust except for a nominal figure.

MR.KANE: Yes; but in fairness to the Court and everyone here I feel that the amendment of the 28th should be read with the amendment of the 4th. It seems to me that they are intended to take place simultaneously. I do not attach any significance to the date.

MR.DEAR: Between the 4th and the 28th December whenever she called upon the trustees for their consent they would have had to act from proper motives?

MR.KANE: Yes.

MR.DEAR: Why?

MR.KANE: At that time she had definitely given up her free power to complete revocation, and she had definitely made that subject to the obtaining of the trustees' consent. She having done that, I feel that they had a duty to exercise their power in good faith.

MR.DEAR: That is the standard which you read into the deed?

MR.KANE: That is not the standard which I read into the deed. That is a principle which is applicable to the law of trusts whether or not a standard is in the instrument.

MR.DEAR: You do not regard that principle as having been applicable prior to the 4th December 1939?

MR.KANE: No.

MR.DEAR: You will agree that either a duty exists or does not exist. By that I mean that a duty cannot exist today and not tomorrow in such a deed as this. Do you agree with that?

MR.KANE: Could you be more specific?

MR.DEAR: If a trustee has no duty, he never has to consider an exercise of that duty. If he

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has no duty as he had prior to 1939 and the settlor came to him for consent to an amendment he would not have to ask her what she wanted the amendment for. He would only have to sign his name to the bottom of the deed?

MR.KANE: Yes.

MR.DEAR: His consent would have been the same as a witness who witnesses a will, but the contents of the will are no concern of his?

MR.KANE: No. Because I said it was for the trustees' protection.

MR.DEAR: Once they had satisfied themselves that their own interest would not be adversely affected they would not have to consider at all any amendments that she might want to make?

MR.KANE: Assuming that she is sui juris?

MR.DEAR: Let us keep that permanently assumed.

MR.KANE: I do not think they would have any duty prior to December 4, 1939.

MR.DEAR: After 1939, that is the point I am making, either a duty existed or did not exist. If it existed, every time that she came for consent they would have to go into various considerations. Either that duty existed or did not exist. Do you agree with that?

MR.KANE: Again you have a duty that has various qualifications. All that I am talking about is a duty to act in good faith and from proper motive. I say that that existed after the amendment of December 4, 1939.

MR.DEAR: Would you agree that after December 4, 1939, the provision for consent would no longer protect purely and solely the interests of the trustees?

MR.KANE: Yes.

MR.DEAR: Yesterday afternoon you explained to the Court what you did not think was the purpose of the amendment. If I remember correctly, you said, "I do not believe that the purpose of that

amendment was to give a fiduciary duty to the trustees". I do not think you gave us any idea of what was the purpose of the amendment.

MR.KANE: I cannot tell you what I think was the purpose of the amendment. I can guess, but I do not think that my guess would mean anything to you.

MR.DEAR: On the evidence available you cannot think of any reason for which the amendment could have been inserted?

MR.KANE: You are asking me to guess.

MR.DEAR: I am asking you whether you can think of a reason on the evidence available to this Court.

MR.KANE: I can think of no reason. I have nothing to make it more than a guess or surmise as to the reason.

MR.DEAR: You would not be prepared to guess or surmise that the reason for the amendment was to give fiduciary duty to the trustees?

MR.KANE: No.

HIS LORDSHIP: I do not think, Mr. Dear, that your analogy with a witness to a will was a very good one.

MR.DEAR: I think we have agreed that after 1939 consent was necessary and could be refused, and that any giving or withholding of consent could be unreasonable?

MR.KANE: I believe there could be. I have said that I think there is authority from Professor Scott right on that particular point which I think applies to this trust on the evidence.

MR.DEAR: Would you come forward to 1953, the year the settlor died and after the last of the amendments to a consideration of the deed at or about the time of her death? She no longer had the power to call for any part of the principal. The trustees had an absolute right and an uncontrolled discretion to make advancements for her comfort and support. The June 1944 amendment

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was the last one that took away her right to call for principal. She could only amend or revoke with the consent of the trustees after that.

MR.KANE: She could call for principal in the sense of partial revocation with the consent of the trustees, or she could amend.

MR.DEAR: The position was that their consent could be requested and it could have been granted or refused in certain circumstances. You will remember this example: Lady Gilbert-Carter had need for a big operation, and she therefore needs a substantial portion of these trust funds. Her son her acquired substantial sums of his own, and partial revocation of the son's interests would not affect the other beneficiaries. She goes to the trustees and asks them to consent to a partial revocation which would permit her to acquire a substantial portion of the trust funds for the purpose required. Let us assume for the moment that the trustees were unreasonable, and said they were not giving her their consent. Do you believe that she could go to the Court and ask the Court to make the trustees give their consent?

MR.KANE: If the trustees were acting in good faith and from a proper motive, I do not believe that she could, from what I know and under this trust. Under Clause 1 as amended, I believe that the trustees have a fiduciary duty to exercise in giving her principal for her comfort and support. I think that duty would be enforceable by her; if the amount of principal she sought was for her comfort and support within the terms of Clause 1 I say yes, she could compel them to give her for her comfort and support under that clause.

MR.DEAR: And in this sense the trustees would have been permitted to act unreasonably?

MR.KANE: I would say no.

MR.DEAR: Here is another example. In the U.S.A. there is a pretty strong feeling against Communists. Let us suppose that Lady Gilbert-Carter was sufficiently misguided to get into the clutches of the Communist Party and she desired to make a total revocation of her deed so as to give all her money to the party in the U.S.A. leaving her children destitute. Let us suppose

that the trustees also had been bitten by the Communist bug and wanted to give their consent, do you think that the Court would restrain them from doing so?

MR.KANE: When you say that the trustees had been bitten by the Communist bug are you saying that they would be acting from a proper or improper motive?

MR.DEAR: They would be acting for the benefit of the Communist Party.

HIS LORDSHIP: The Communist Party would say they are acting properly.

MR.DEAR: Do you assume that the Court would say the trustees are acting improperly assuming that the trustees are communists?

MR.KANE: Does the settlor know that they are?

MR.DEAR: We will assume that for the moment; and the principle beneficiary objects.

MR.KANE: On this trust and on this evidence I do not think that the son could successfully maintain an objection.

MR.DEAR: Therefore we have got to the point where the trustees may give or withhold their consent for any whimsical reason.

MR.KANE: I do not honestly know if something is done whimsically if it is done in good faith.

MR.DEAR: We have got to the point where they may act unreasonably.

MR.KANE: I will say that.

MR.DEAR: I will give an extreme example. The trustees see Lady Gilbert-Carter in a red dress. They are allergic to red dresses and they withhold their consent.

MR.KANE: I cannot say that that is acting in good faith.

MR.DEAR: Would they have to consider acting in good faith?

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Cross-examination continued

MR.KANE: I cannot say how far their duty would go. I do not think that I can define that precisely.

MR.DEAR: You will agree that it is a rather important point. These gentlemen are in their office one morning. They have not seen or heard of Lady Gilbert-Carter for several months. She comes in and says she wants their consent to an amendment. They say they are not consenting because they do not know what it is about. In that case there would be no bad or improper motive, and certainly not dishonesty.

MR.KANE: I think they would have to look at it.

MR.DEAR: For guidance or for anything else?

MR.KANE: No. They would have to look at the proposed amendment.

MR.DEAR: And give careful consideration to it?

MR.KANE: Now we are getting into the relative field.

MR.DEAR: And give some consideration to it?

MR.KANE: I think so.

MR.DEAR: And after such consideration they would decide whether or not to give or withhold consent?

MR.KANE: Yes.

MR.DEAR: And in coming to a decision whom or what would they have to bear in mind?

MR.KANE: Are you talking about this trust?

MR.DEAR: Only this trust.

MR.KANE: I do not know what they would have to consider.

MR.DEAR: It is possible that they might have to consider the interest of the settlor?

MR.KANE: It is possible.

MR.DEAR: Is it also probable?

MR.KANE: I think it is inherent.

MR.DEAR: Do you think they would have to consider the interest of the beneficiaries?

MR.KANE: They might.

MR.DEAR: They must always look and see whether the interest of the beneficiaries is being adversely affected?

MR.KANE: I should think so. I should think that that is part of the amendment.

MR.DEAR: I should think so too. They would also consider the interest of those interested in remainder.

MR.KANE: Yes.

MR.DEAR: Having considered all those matters, they would then decide whether to give or withhold consent?

MR.KANE: Yes.

MR.DEAR: Do you consider this consideration of all these various categories of persons as part of the duty that will be cast upon them in giving or withholding their consent?

MR.KANE: If you are talking about a duty that will be specifically enforced I say no.

MR.DEAR: Do you agree that if for some reason they failed to consider the interest of certain people that would be regarded by the Court as an example of bad faith which would invoke the jurisdiction of the Court?

MR.KANE: No. I am speaking of principles. One is the absence of specific cases on the point; the other is the statement in Scott that where there is no standard the trustees do not have to act to a standard of reasonableness, but simply in good faith and from proper motive. I am trying to stand on those principles.

MR. DEAR: In the Restatement there is a

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passage on which I think you rely for your opinion - Section 330, Comment L. I am suggesting that you are relying on the part which reads : "On the other hand ..... among several beneficiaries."

MR.KANE: I rely on that and on my search for cases which I have not found.

MR.DEAR: Would you go back to the beginning of the previous paragraph which says: "There may be a standard ..... though the standard is indefinite". You do not think that this paragraph should be read with paragraph 4?

MR.KANE: Yes.

MR.DEAR: In cases in which no standard is expressed you say that para. 4 is applicable?

MR.KANE: No. The paragraph says that there may be no standard expressed in specific words. In other words there may be an implied standard in some circumstances. I agree with that. I am also saying that from the facts of this particular case there is no enforceable duty under the trust we are considering.

MR.DEAR: Scott quotes the Skilling case. I think you said that was a Maine case. That would not be binding on the Courts of Massachusetts?

MR.KANE: No: but I think they would follow it. That was a different case. That was just an illustration that Scott used.

MR.DEAR: One of the points on which you took issue with Mr. Perkins and Mr. Goodale was the view they expressed that wherever a trustee is the holder of such power as this he is liable to fiduciary duty. Did you understand them to say that?

MR.KANE: I got that impression.

MR.DEAR: Does Massachusetts Law recognise a power of appointment?

MR.KANE: Yes.

MR.DEAR: And it recognises that such powers

may be exercisable in respect of limited classes.

MR.KANE: Yes. To me the power that one exercises in respect of limited classes is a special power.

MR.DEAR: Let us use these terms in the sense that you are using them. Would you say that the Court of Massachusetts recognises fraud upon powers?

MR.KANE: That is the sort of thing set out in the Pitman case.

MR.DEAR: Would you agree that the principle of fraud upon powers only applies to special powers?

MR.KANE: I do not know. I want to qualify that. When you say fraud upon powers are you talking about a specific doctrine of law applicable to powers? If you are, I am not prepared to discuss that.

MR.DEAR: The point that I am putting is that in the Pitman case the donee was donee of special power.

MR.KANE: Yes.

MR.DEAR: Do you know the book called Farwell on Powers?

MR.KANE: I do not know it. I do not even remember that I have heard of it.

MR.DEAR: You would not know whether Farwell refers to fraud upon powers only with respect to special powers?

MR.KANE: I do not know.

MR.DEAR: Under the law of Massachusetts is not general power equivalent to absolute ownership?

MR.KANE: I would not answer that with an unqualified yes. There is certainly a power to dispose of property to everyone. It would seem to me that that is an absolute power of disposition.

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Evidence for Commissioner

No.8

John C. Kane

Cross-examination continued

MR.DEAR: We have no argument with you on the Pitman case. We agree with you on what you say that the Pitman case says: "Where there is a donee of special power ....eventually." We are saying that that is so in the exercise of every special power. What we are putting to you is this: Do you not agree that the holder of general power can act without any approval whatever?

MR.KANE: I should think so. I did not intend to trick Mr. Perkins when he was asked about that yesterday. I did not even bring up this case. It was something I came across in my preparation. I think he was asked a question about special power.

MR.DEAR: I think that what Mr. Perkins was trying to say was that wherever you have a trustee that by the very nature of his office he must act properly and in good faith, with due consideration of the interest of the trust, and not from caprice or careless good nature etc. That, as I understand it, was the point being made by our witnesses. I understand that you do not agree that a trustee, from the very nature of his office must act like that.

MR.KANE: I agree with all the cases they cited, and the applications of the principles they recited. We have spent three days talking about the power of the settlor to revoke or amend the trust with the consent of a trustee, and that is where we differ. I feel that Scott's statement that where there is no standard expressed or implied the trustees must act only in good faith and from proper motive is correct. They do not think it is. I say again that I have found no standard in this case.

MR.DEAR: You have heard the case of Boyden and Stevens etc. You do not consider that there is authority in those cases for the proposition that where the power is conferred on the trustee even if no standard is expressed that power must be exercised (1) in good faith; (2) from proper motives; (3) on the basis of judgment by the trustee on the matter committed to his discretion; (4) with that soundness of judgment which follows from a due appreciation of trust responsibility and not arbitrarily or from caprice or careless goodnature?

MR.KANE: Your question is where no standard

is expressed. If you broaden that to say where no standard is expressed or implied then I will have to differ with the statement.

MR.DEAR: You remember that in the case of Boyden and Stevens the trustees were given power to exercise in their sole and uncontrolled discretion and you implied a standard.

MR.KANE: I think so, but not in an unlimited way; one within the requirement of reasonableness. What it is I do not know.

MR.DEAR: The Court found a standard.

MR.KANE: From its words as such I will say no. I think the Boyden trust was the type of thing from which you could imply a standard.

MR.DEAR: I think that the Court also referred to the case of Sylvester and Newton and held that the four requirements I have mentioned were necessary even though the power stated to be exercised was in the sole and uncontrolled discretion of the trustee and even though, as in the case of Sylvester and Newton there was a broad exculpatory clause to protect the trustee in the exercise of that power.

MR.KANE: I do not quarrel with that in Sylvester and Newton.

MR.DEAR: Do you quarrel with it for being an interpretation of the principle that where a trustee is vested with uncontrolled discretion the Court will still hold that he is subject to control even though he is alleged to be uncontrolled?

MR.KANE: I cannot apply that principle uniformly all the way. I have to say that Scott seems sound to me on the precise point we are talking about that the trustee does not need to give or withhold consent from any standard of reasonableness.

MR.DEAR: We are dealing with general Trust Law. What I want to ask you is if you know of any case in the Courts of Massachusetts which has decided that a trustee can be subject to no control of the Court other than the requirement to act honestly and from proper motives.

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John C. Kane

Cross-Examination continued

MR.KANE: I do not.

MR.DEAR: You know there is a statement in Scott on Trusts which says: "Even when power is conferred.....as fiduciary powers."

MR.KANE: You are talking about Section 185 to which Mr.Perkins referred in his direct testimony. That section is about control of the trustee in carrying out the duties of administration. It does not deal with revocation or anything like that.

MR.DEAR: Do you agree with the statement?

MR.KANE: The powers referred to do not have to be ordinary fiduciary powers.

MR.DEAR: Do you know the contents of the Welch Case?

MR.KANE: Yes, I have it here.

MR.DEAR: Would you agree that in the Welch case the question that arose was whether certain property had passed before the coming into force of the Inheritance Tax Statute?

MR.KANE: I should think that that is so.

MR.DEAR: Would you further agree if you accept Mr. Goodale's note which he made from the record in the law Library that up to the time that the Act came into force that instrument could have been amended or revoked with the consent of the trustees?

MR.KANE: Yes.

MR.DEAR: Would you agree that in that case the Court held that it was property which had passed in effect completely out of the power of the settlor at the time that the original deed was made in 1897 and that the custody of the children had passed to them before the date on which the 1907 statute took effect, notwithstanding the reserved power of revocation which continued to exist until the death of the settlor a month after the statute came into effect? Do you know also that the Court said: "Between the grantor and the trustee conveyance was absolute...

.....no more power to revoke or alter it than he would have had if the so-called power of revocation had not been inserted therein?"

MR.KANE: You read something that was not in the opinion and then you went on to read the sentence beginning "As between the grantor"

MR.DEAR: Do you agree that the judgment was to the effect that the property had passed out of the control of the settlor when the deed was made originally in 1897?

MR.KANE: You may use the word "judgment" in the sense that we use the word "opinion". The opinion constituted what you have just quoted. What the Court really decided was that the Inheritance Tax Statute did not apply.

MR.DEAR: Would you agree that the reason for saying that the statute did not apply was because as between grantor and trustee the conveyance was absolute and that the grantor had no more power to revoke the deed or alter it than he would have had if the so-called power of revocation had never been made.

MR.KANE: I do not agree that it is specific.

MR.DEAR: You will agree that it is a decision of the Court.

MR.KANE: Not in my sense of what a decision is.

MR.DEAR: You know roughly what this case is about. In the final analysis His Lordship will have to decide whether or not this duty has been correctly assessed under the relevant section of our Act. Would you not regard the reasons that compelled him to come to that decision as forming part of the decision - the ratio decidendi? Would you not also agree that in the Welch case the means by which it was determined was the finding by the Court that between the grantor and the trustee the conveyance was absolute etc.?

MR.KANE: I would not quarrel with that because I believe that if a settlor makes a trust and reserves no power of revocation there is none. If the settlor reserves the power of

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Cross-examination continued

revocation with the consent of the trustees and there is a standard which can be enforced I believe that such a trust, with the power of revocation reserved with the consent of the trustees and with a standard, is not as complete a divestment of the settlor's ownership as a trust where no power of revocation is reserved.

MR.DEAR: Would you agree that that was the ratio decidendi of the case?

MR.KANE: No.

MR.DEAR: You know barristers often disagree with ratio decidendi and the judge's decision; but it still remains the law.

MR.KANE: I regard it as an important and interesting dictum, being part of the main opinion; but I do not regard it as being specific Massachusetts Law. I do not think your own witnesses said that it was.

MR.DEAR: I think I have narrowed the area of disagreement between yourself and them considerably. You agree with them that after the amendments, in 1953 the consent of the trustees was required for partial or total revocation and for amendment.

MR.KANE: Yes.

MR.DEAR: You agree with them that the trustees were entitled to withhold that consent.

MR.KANE: Yes.

MR.DEAR: You agree with them that in the giving or withholding of consent the trustees must not act from dishonest or improper motives.

MR.KANE: Yes.

MR.DEAR: You disagree with them that in addition to the duty to act honestly and from proper motives they had the additional duty to act with that soundness of judgment which follows from a due appreciation of trust responsibility and not arbitrarily or out of caprice or careless good nature.

MR.KANE: If the last phrase is intended to be inconsistent with the language of Scott in Section 330 I must disagree with them bearing in mind the evidence I have heard in this case.

MR.DEAR: I am trying to see where you disagree. Professor Scott is an authority on which you base your opinion. Having gone into these authorities, where you differ from Mr. Perkins and Mr. Goodale is that the trustees, in addition to not being permitted to act dishonestly or from improper motives do not have a duty to act with due appreciation of trust responsibility etc.

MR.KANE: What worries me about that is the extent to which that is intended to go. Do you want me to take them separately? I must recognise that that general principle applies to almost every trust power.

MR.DEAR: You agree that they had to consider the interests of the settlor, the beneficiaries and those interested in remainder, whenever a proposed amendment is to be put in.

MR.KANE: That is part of the duty of acting in good faith to that extent.

MR.DEAR: For them to act in good faith they must consider those interests?

MR.KANE: To the extent of finding out what the proposed amendment is about. They are not rubber stamps.

MR.DEAR: You consider that they have some judgment to exercise in giving or withholding consent?

MR.KANE: Again, to the extent that is inherent in acting in good faith and from a proper motive.

MR.DEAR: You consider that they have some judgment to exercise in giving or withholding their consent?

MR.DEAR: Once good faith is established they can be as unreasonable as they like?

MR.KANE: On the evidence that I have heard, I say that they have no duty of reasonableness in giving or withholding consent to amendment or revocation.

MR.DEAR: And therefore they could have been as unreasonable as they liked.

MR.KANE: To the extent that it is not a violation of the duty of acting in good faith.

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John C. Kane

Re-examination

RE-EXAMINATION BY MR. MALONE

MR.MALONE: On the Welch case, do you consider that there was any standard in that case?

MR.KANE: Although the Court did not hold specifically to a standard, I would feel that our Court would say that there was a standard, and I would find one myself in reading the provisions of the trust as set out in the opinion and the summary and those other provisions contained in the opinion of the Court; because, in the first place, the grantor conveyed all of his property to two trustees, firstly to pay his then existing debts - it is an unusual type of trust - and to manage and invest the trust fund and to pay income to him quarterly during his life time. But in lieu of paying income to him they could at their discretion expend the same and the whole or any part of the principal of such funds for the maintenance of himself and his family and the education of his children. So while he was alive they had as a first duty to pay his debts, and secondly, they did not have to pay him income outright; but could at their discretion apply it for his benefit or for his family's benefit.

Payments of income were made directly and this was done by one of the trustees who saw to it that the monies were supplied for the family maintenance, which is an abnormal thing to do. It took them four to five years to pay off his debts. This was a special sort of trust. It sounds as if this fellow had something wrong with him and they set up this trust to pay off his debts and still keep him and his family alive. After that they did not trust him or he did not trust himself enough to take the income outright, and the trustees were given discretion to apply the income to himself and family. I think that that is the type of case where the Court would imply a standard.

MRFIELD: That, My Lord, is all the evidence we have to offer.

No.9

JUDGMENT OF VICE CHANCELLOR COLLYMORE

In the Barbados Court of Chancery

No.9

Judgment of Vice Chancellor Collymore.

16th October 1956.

IN THE COURT OF CHANCERY

BARBADOS

IN THE MATTER of the ESTATE of GERTRUDE CODMAN GILBERT-CARTER, deceased.

and

IN THE MATTER of the ESTATE AND SUCCESSION DUTY ACT 1941

BETWEEN

TREVOR BOWRING Petitioner

and

THE COMMISSIONER OF ESTATE AND SUCCESSION DUTY Respondent

J.S.B.DEAR and H.B.StJOHN instructed by COTTLE CATFORD & CO. for the Petitioner.

F.E.FIELD A.-G. (Acting) and D.E.MALONE Acting Assistant to A-G. instructed by L.E.R. GILL Queen's Solicitor, for the Commissioner.

This is an appeal under the Estate & Succession Duties Act 1941-16, the requisite formalities for which have been duly observed.

The late LADY GERTRUDE CODMAN GILBERT-CARTER died in Boston, Massachusetts on the 12th day of November 1953 leaving a will dated the 15th day of March 1952, by which she appointed the petitioner one of her executors. At the time of her death the late LADY GILBERT-CARTER was domiciled in this Island. An estate duty affidavit was duly filed and with it was exhibited in account "F" property referred to as the Boston Trust. The

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Commissioner of Estate & Succession Duties, (hereinafter referred to as the Commissioner), contends that the petitioner in this appeal is accountable for death duties in respect of the property comprised in the Boston Trust.

Paragraph 4 of the petition reads :-

"On the 27th day of June 1955 the Commissioner of Estate and Succession Duties assessed Your Petitioner as executor of the will of the said Gertrude Codman Gilbert-Carter as an accountable party to the extent of $137,723.28"

The grounds of appeal as set out in the notice of appeal are :-

"(1) The Commissioner of Estate and Succession Duties has held the executors liable to pay tax on property of which the deceased was not competent to dispose of at her death. The property referred to herein is set out in account "F" of the estate duty affidavit and referred to as :-

Settlement dated the 16th day of June 1936 made by the deceased with Old Colony Trust Company and Charles Kane Cobb, Trustees, valued at B.W.I. $563,113.32.

(2) Further or alternatively the Commissioner of Estate and Succession Duties has assessed the executors as liable to pay duty on property not under their control. Such property is referred to in the Estate Duty Affidavit under account "F" and referred to as above.

(3) Further or alternatively the Commissioner of Estate and Succession Duties has held the executors liable for duty in excess of the assets which they have received as such executors".

Relevant sections of the Act 1941-16 are sections 20(1) and 3 (a). The former of these reads:-

"The executor of the deceased shall pay the estate duty in respect of all property of which the deceased was competent to dispose at his death, on delivering the estate duty affidavit to the Commissioner, and may pay in like manner the estate duty in respect of any other property passing

on such death not under his control, if the persons accountable for the duty in respect thereof request him to make such payment; but an executor shall not be liable for any duty in excess of the assets which he has received as executor, or might but for his own neglect or default have received".

Section 3 (a) is to this effect :-

"A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were sui juris, enable him to dispose of the property, including a tenant in tail whether in possession or not; and the expression 'general power' includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument inter vivos or by will, or both, but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself or exercisable as mortgagee".

The main question for decision is whether at the time of her death the late Lady Gilbert-Carter was competent to dispose of the property in the Boston Trust so as to render the petitioner accountable in respect of the death duties thereon.

The deed of Trust was executed in Boston, Massachusetts, U.S.A. on the 16th June, 1936 and the trustees in whom was vested the legal estate were and are Old Colony Trust Company, a Massachusetts Corporation and Charles Kane Cobb of Brookline, Massachusetts. Paragraph 4 of the original deed of trust set out :-

"The Donor during her life, and her said son after her death, shall have the right at any time or times to amend or revoke this trust in whole or in part by an instrument in writing, delivered to the Trustees. If the agreement is revoked in its entirety the revocation shall take place upon the delivery of the instrument in writing to the Trustees, but any amendment or any partial revocation shall take effect only when consented to in writing by the Trustees".

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This paragraph was subsequently amended on the 4th December, 1939 and remains in its amended form :-

"The Donor during her lifetime shall have the right at any time or times to amend or revoke this trust, either in whole or in part, by an instrument in writing, provided, however, that any such amendment or revocation shall be consented to in writing by the Trustees".

It is agreed on both sides that the law applicable to the interpretation and construction of the trust deed and the rights, powers, and duties conferred and imposed by it is the law of the Commonwealth of Massachusetts and that where and if this is lacking the law of England is to be applied. Indeed the trust deed in paragraph 8 states :-

"This trust is executed in the Commonwealth of Massachusetts and shall be governed by the laws thereof".

With regard to this law I have had the advantage of the evidence of three expert witnesses, who testified as to the principles of the trust law of Massachusetts and gave their views as to the law appertaining to this case. On behalf of the petitioner Mr. John Allen Perkins, a graduate of the Harvard Law School and a practising attorney of the State of Massachusetts since 1943 and Mr. Francis Greenleaf Goodale, also a graduate of Harvard Law School, a practising attorney of the Bar of Massachusetts since 1906 with a wide experience in the law of trusts, gave evidence; while for the Commissioner there was heard Mr. John Clark Kane, who is also a graduate of Harvard Law School and a practising attorney of the Bar of Massachusetts since 1936, save for war service, with an acquaintance of "drawing of trust instruments and the management of advisory trust services."

Summarising the effect of their evidence I think that I may fairly say that the experts agree as to the general principles of the law

of Massachusetts governing trusts and the interpretation of trust instruments, but that the divergence comes in respect of the nature and extent of the fiduciary duties reposed in the trustees by the Boston Trust deed and of the power and authority retained by Lady Gilbert-Carter. On the one hand it is said that the trustees were bound to exercise reason and discretion in safeguarding the interests of the beneficiaries and remaindermen when giving or withholding consent to an amendment or revocation, thus restricting the right of disposition of the settlor, while on the other hand it was stated that the Trustees, provided that they acted honestly and from proper motives, had no such fiduciary duties but owed a duty to the settlor to consent.

In this connection the views of the experts differred with regard to two expositions of the law of Massachusetts contained in Scott's law of Trusts and The Restatement of the law of Trusts. One view was that these should not be accepted as sound unless and until confirmed by the Courts of Massachusetts, the other being that they contained the true statement of the law here applicable. The experts agreed generally that these works are regarded as of weight and authority by the Courts of the U.S.A.

I now proceed in an endeavour to find as a fact the relevant law of Massachusetts as I deduce it from the evidence of the experts and the cases and authorities from which they refreshed their memories and by which they supported their opinions.

Before doing this, however, I may be pardoned if I quote an extract from a review of Scott on Trusts by the late Professor Holdsworth, that eminent English Jurist, which appeared in the Law Quarterly Journal of July 1940. He says :-

"Professor Scott prepared for the American Law Institute the Restatement of the law of trusts. This book is an enlarged edition of the Restatement, which relates the history of,

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and explains the reasons for, the rules which are contained in it, and gives the authorities upon which they are based. The book is therefore the outcome of many discussions - discussions which Professor Scott held with his advisers, those which were held at the meetings of the Council to which the drafts of the Restatement were presented, and those which were held at the Annual Meetings of the Institute. But the book itself, though it follows the arrangement of the Restatement, and the numbering of its sections is essentially the work of Professor Scott. It is based on English and American decisions. As Professor Scott says in his Epilogue, there is no such thing as an American Law of trusts, nor even a federal law of trusts, but there is an Anglo-American law of trusts - 'it is the system which had its origin in the English Court of Chancery and which was received, with some hesitation, in the American colonies and was further developed in the American States'. In America the law differs in some points from State to State; but in Professor Scott's opinion it is not the differences but the similarities which are remarkable. And the same remark applies if we compare the American with English law. It is for this reason that the book will be very useful to English practitioners and students. The English rules are there, sometimes in a slightly different setting, and are supported by reasoning which is sometimes similar, but sometimes new and original. There is also another reason why the book will be useful to English practitioners and students. On some points American authority is fuller than English authority and vice versa. For instance most of the authorities cited on the devolution of the trust property, where the beneficiary dies without heirs or next-of-kin, are English (SS142.3). On the other hand, the rules as to the situation created by the reservation of a power of control by a settlor who has created a trust inter vivos (SS185), have been worked on much more fully in America than in England."

In view of the similarity thus expressed between the two systems and for the reasons which appear later in this judgment, at this stage I

would refer only to three of the many English cases cited by counsel. They are:-

Re Dilke, Verey v. Dilke (1921) 1 Ch. 34.

Re Phillips, Lawrence v. Huxtable (1931) 1 Ch. 347.

Re Churston Settled Estates (1954) 1 All E.R. 725.

While it cannot be denied that a power to appoint to whom the donee pleases except a named person, when that named person is someone other than the donee himself is not a general power within the Wills Act, 1937 re Dilke and re Phillips are authority for the proposition that a power exercisable with the consent of trustees or others, where such consent is merely a condition necessary for the validity of the exercise of the power, and does not involve any duty to exercise a discretion in the selection or approval of the appointee, is a general power. The facts and circumstances in the Churston's Settled Estates case were extremely complicated, but the distinction between a general power and a special power runs throughout.

Professor Scott in his treatise under the heading Termination and Modification deals with 'Where method of revocation specified' and continues in sec. 330.9. "Where power reserved to revoke with consent of the trustee:-"

"Where the settlor reserves power to revoke the trust with the consent of the trustee, it depends upon the extent of the discretion conferred upon the trustee whether he is under a duty to the beneficiaries to withhold his consent, or is under a duty to the settlor to give his consent, or can properly either give or withhold his consent. The Court will not control the trustee in the exercise of any discretionary power, except to prevent an abuse of his discretion. In determining what constitutes an abuse of discretion, it is important to ascertain whether any standard for the exercise of the discretion is fixed by the terms of the trust. If there is such a standard, the court will control the exercise of the power by

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the trustee if he acts beyond the bounds of a reasonable judgment. Thus in Skilling v. Skilling a woman transferred property in trust to pay to her the income and such part of the principal as the trustee might see fit and on her death to pay the principal to named beneficiaries. In the instrument it was expressly declared that the trust should be irrevocable. Desiring to make a different disposition she induced the trustee to reconvey the property to her. Shortly afterward she died, and the beneficiaries brought suit to recover the property. It was held that they were entitled to it. The court said that the instrument should be interpreted as authorizing the trustee to pay the settlor only so much of the principal as she might need for her comfort and support, and that he could not properly pay her the whole of the principal for the purpose of enabling her to make a different disposition of it. On the other hand, where there is no provision in the trust instrument expressly or by implication limiting the power of the trustee to consent to a revocation of the trust, it would seem that his giving or withholding consent is effective, whether he acts reasonably or not, as long as he does not act dishonestly or from an improper motive.

"The question of the duty of the trustee with respect to the giving or withholding of consent to the revocation of a trust has been raised in cases involving the liability of the settlor for income taxes. The federal Internal Revenue Act provides that the income of a trust shall be taxable to the settlor when he has the power to revoke the trust either alone or in conjunction with any person not a beneficiary of the trust. If the trust instrument merely provides that the trust may be revoked with the consent of the trustee, it has been held that the provision is applicable and the settlor is subject to liability to pay the income tax.

On the other hand, if the trust is revocable with the consent of the trustee only to the extent necessary for the comfort and support of the settlor, the settlor is not subject to the income tax".

Section 330 1 of the Restatement under the heading "Where power reserved to revoke with consent of the trustee" says :-

"If the Settlor reserves a power to revoke the trust only with the consent of the trustee, he cannot revoke the trust without such consent. Whether the trustee can properly consent to the revocation of the trust and whether he is under a duty to consent to its revocation depend upon the extent of the power conferred upon the trustee by the terms of the trust. To the extent to which discretion is conferred upon the trustee, the exercise of the power is not subject to the control of the court, except to prevent an abuse by the trustee of his discretion (see SS 187).

"If there is a standard by which the reasonableness of the trustee's judgment can be tested, the court will control the trustee in the exercise of the power where he acts beyond the bounds of a reasonable judgment, unless it is otherwise provided by the terms of the trust. Thus, if the trustee is authorized to consent to the revocation of the trust if in his judgment the settlor is in need, he cannot properly consent to the revocation of the trust if it clearly appears that the settlor is not in need. So also, if the trustee is authorized to consent to the revocation of the trust if in his judgment the beneficiaries of the trust are not in need, he cannot properly consent to the revocation of the trust if it clearly appears that the beneficiaries are in need.

"There may be a standard by which the reasonableness of the trustee's judgment can be tested even though there is no standard expressed in specific words in the terms of the trust, and even though the standard is indefinite. Thus, it may be provided merely that the settlor can revoke the trust with the consent of the trustee. Such a provision may be interpreted to mean that the trustee can properly consent to the revocation of the trust only if he deems it wise under the circumstances to give such consent. In such a case the court will control the trustee in the exercise of a power to consent to the revocation of the trust where the circumstances are such that it would clearly be unwise to permit the revocation of the trust; as for example where the beneficiaries are wholly dependent upon the trust for their support, and the settlor desires to terminate the trust for the purpose of dissipating

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the property. So also, the circumstances may be such that it would clearly be unwise not to permit the revocation of the trust, and in such a case the court can compel the trustee to permit the revocation of the trust in whole or in part; as for example where a trust is created to pay the income to the settlor for life and to pay the principal on his death to a third person and it is provided that in the discretion of the trustee a part or the whole of the principal shall be paid to the settlor, and owing to a change of circumstances the income is insufficient for the support of the settlor who has no other resources, and the beneficiary in remainder has acquired large resources.

"On the other hand, the trustee may be authorized to consent to the revocation of the trust with no restriction, either in specific words or otherwise, imposed upon him in the exercise of the power. In such a case there is no standard by which the reasonableness of the trustee's judgment can be tested, and the court will not control the trustee in the exercise of the power if he acts honestly and does not act from an improper motive (see SS 187 and Comments i-k thereon). The power of the trustee in such a case to consent to the revocation of the trust is like a power to appoint among several beneficiaries.

"In determining the extent of the power intended to be conferred upon the trustee to consent or to refuse to consent to the revocation of the trust, the purpose of the settlor in inserting the provision may be important. Thus, where the settlor reserves a power to revoke the trust with the consent of the trustee, it may appear that the requirement that the trustee should consent was inserted by the settlor in order to preclude himself from revoking the trust under circumstances where it would be clearly unwise for him to do so, as, for example, if he should become a drunkard or a spendthrift. On the other hand, where the purpose of requiring the consent of the trustee was to relieve

the settlor or his estate of liability for income or inheritance taxes, and such relief could be obtained or the settlor believed that it could be obtained if, but only if, the trustee had unrestricted power to consent or to refuse to consent to the revocation of the trust, this indicates that the trustee should be free to consent or refuse to consent regardless of any standard or reasonableness."

Now it was admitted by Mr. Dear during his forceful and exhaustive address and conceded by the Attorney General in his careful and lucid argument that, although there are many cases which have some bearing on the problem posed, there is no decided case directly and completely in point.

It is not my intention to make any lengthy dissertation on the points of resemblance or difference in all the cases cited, but I think it is of paramount importance to keep carefully in mind throughout the terms of this particular trust instrument and the circumstances in which it was created.

With regard to the American cases, photostatic copies of the reports of which have been tendered, I have the following comments to make:-

In Boyden (trustee) v. Stevens, 285 Mass. 176 there was a specific discretionary power in the trustee in accordance with which he had to perform his fiduciary duty.

Berry v. Kyes 304 Mass. 56 is concerned with a particular discretionary power in the use of principal. A feature in Damon v. Damon 312 Mass. 268 was that the trustee of a testamentary trust was to pay income and portions of principal to the beneficiary at such times as the trustee should determine.

In the Barbados Court of Chancery

No.9

Judgment of Vice Chancellor Collymore

16th October 1956 continued

In Sylvester v. Newton 321 Mass. 416 the Executor was given broad discretionary powers of sale under a will

In the above and other cases cited I think it is clear that a standard of duty is expressed or implied.

In Higgins et al v. White 93 F. 2d 357 and 116 F 2 d. 312, it is significant that the grantor and another were trustees and besides it does seem that the second case cast some doubt on the previous decision of the Court. It would further appear that in this case there was an implied standard.

The cases of Saltonstall & others, Trustees, v. Treasurer and Receiver General & others 256 Mass. 519 and of Boston Safe Deposit and Trust Company Limited vs. Commissioners of Corporation 267 Mass. 240 contain language which is helpful and go to show that an unexercised power to consent does not prevent property passing for taxation purposes.

After a careful review of the authorities I have come to the conclusion that the law of Massachusetts to be here applied is as stated in the Restatement section 330 1 and in Professor Scott's Law of Trusts section 330.9 including those portions on which the witnesses for the petitioner make definite reservations. I say this with due regard to and great respect for the views expressed by Mr. Goodale and Mr. Perkins and the reasoning advanced by Mr. Dear, with a realization too that some of this law runs counter to certain of the dicta in the English case of Attorney General v. Astor (1922) 2 K.B. 651 and (1923) 2 K.B. 157.

Lady Gilbert-Carter created this trust and

vested property of which she was the sole owner in trustees; she was the sole income beneficiary and as such under paragraph 6 could give a complete discharge to the trustees. She had a power of revocation or amendment with the consent of the trustees which took the place of her original authority to amend or revoke the trust in whole or in part by an instrument in writing, delivered to the Trustees; the trustees were empowered to resign at any time by giving thirty days' written notice.

I can find no standard of duty expressed or implied in the trust instrument and I think that in these circumstances the trustees owed a duty to the settlor to give consent to any revocation or amendment made by her and had no other duty provided they acted in good faith and from proper motives. It seems to me that Lady Gilbert-Carter retained a power of control over the property in the Boston Trust. This is my view of the matter according to the law of Massachusetts and according to it Lady Gilbert-Carter had and retained until her death such a power to revoke or amend as would enable her to dispose of the property in the Boston Trust as she thought fit.

It follows then that the executor is accountable for duty in respect of the property in the Boston Trust under the terms of the Act 1941-16.

I confess that I have come to this conclusion with reluctance and some measure of hesitancy.

The appeal must be dismissed in so far as the main ground is concerned and the prayer of the petitioner is refused to that extent, but the Petitioner can only be accountable to the extent of such assets as may fall into his hands.

Liberty to apply.

E.A.COLLYMORE,
Vice-Chancellor.
16th October,1956.

In the West Indian Court of Appeal.

No.10

Notice of Appeal

18th January 1957.

No.10

NOTICE OF APPEAL

BARBADOS

IN THE WEST INDIAN COURT OF APPEAL.
ON APPEAL FROM THE COURT OF CHANCERY

IN THE MATTER of the ESTATE of GERTRUDE CODMAN GILBERT-CARTER, deceased.

and

IN THE MATTER of the ESTATE AND SUCCESSION DUTIES ACT, 1941

BETWEEN

TREVOR BOWRING Petitioner-Appellant

and

THE COMMISSIONER OF ESTATE AND SUCCESSION DUTIES Respondent

TAKE NOTICE that the West Indian Court of Appeal will be moved on the day and at the hour appointed in that behalf or so soon thereafter as Counsel can be heard by John Stanley Bruce Dear Esquire of Counsel for the Petitioner-Appellant that the judgment of the Honourable Sir Ernest Allan Collymore, Vice Chancellor of this Island, given in this cause on the 16th day of October 1956 whereby the appeal of the said Trevor Bowring from the assessment of the Commissioner of Estate and Succession Duties, made on the 27th day of June 1955, of Estate and Succession Duty on the property passing on the death of the said Gertrude Codman Gilbert-Carter was disallowed may be reversed and set aside and that this Court may Order that the said assessment may be reduced from the sum of $137,723.28 to the sum of $17,665.65 or to such other sum as may seem just and that the Petitioner-Appellant may be awarded the costs of this appeal and of the proceedings in the Court below and that the Petitioner - Appellant may be granted such further or other relief as may seem just.

AND FURTHER TAKE NOTICE that the Petitioner-Appellant appeals against that part of the said judgment whereby the Learned Vice Chancellor held that the said Gertrude Codman Gilbert-Carter was at the time of her death competent to dispose of the property comprised in the Boston Trust within the meaning and intent of section 3 (a) of the Estate and Succession Duties Act 1941.

AND FURTHER TAKE NOTICE that the grounds of appeal are :

1. That the Learned Vice Chancellor erred in finding expressly or impliedly that the law of Massachusetts applicable to the Boston Trust Deed at the time of the death of the said Gertrude Codman Gilbert-Carter was as follows in that there was no evidence to support any or all of such findings, that is to say :

(a) That there was no standard of duty expressed or implied in the trust instrument.

(b) That the Trustees owed a duty to the Settlor to give consent to any revocation or amendment made by her.

(c) That the Trustees had no other duty provided they acted in good faith and from proper motives.

2. Alternatively, that the Learned Vice Chancellor erred in finding expressly or impliedly that the law of the Commonwealth of Massachusetts applicable to the Boston Trust Deed at the time of the death of the said Gertrude Codman Gilbert-Carter was as set out in 1 (a), 1 (b) and 1 (c) hereof in that each and all of such findings were against the weight of evidence.

3. That the decision of the Learned Vice Chancellor dismissing the appeal of the said Trevor Bowring was erroneous in law in that such decision was contrary to the provisions of sections 20 (1) and 3 (a) of the Estate and Succession Duties Act 1941.

AND FURTHER TAKE NOTICE that the Petitioner-

In the West Indian Court of Appeal.

No.10

Notice of Appeal

18th January 1957. continued

Appellant appeals against the decision of the Learned Vice Chancellor which ignored or by implication overruled the following submissions of Counsel on the part of the Petitioner-Appellant.

1. That since in the Boston Trust the Settlor at the time of her death had reserved to herself the right to amend or revoke the settlement with the consent in writing of the Trustees, the Settlor's power was not such a power as came within section 3 (a) of the Estate and Succession Duties Act 1941.

2. That in the determination of 1 hereof it was irrelevant to consider whether the Trustees had a mere power of veto on the exercise of the power by the Settlor or had a duty to exercise in the selection of the objects.

3. That accepting the evidence of Mr. John Clarke Kane and the statement in Professor Scott's Law of Trusts Section 330.9 and in the Restatement Section 330. L that the Settlor's power was not such a power as came within section 3 (a) of the Estate and Succession Duties Act 1941.

Dated this eighteenth day of January 1957.

COTTLE CATFORD & CO.
No.17, High Street,
Bridgetown, Barbados.

To:
The Registrar
of the West Indian Court
of Appeal

And To:
Mr.L. E. R. Gill
Queen's Solicitor for the
Island of Barbados.

And To:

The Commissioner for Estate
and Succession Duties for
the Island of Barbados.

No. 11.

In the Federal Supreme Court.

Appellate Jurisdiction.

No.11.

Order allowing Appeal.

18th July, 1958.

ORDER ALLOWING APPEAL

IN THE FEDERAL SUPREME COURT

APPELLATE JURISDICTION

(On transfer from the West Indian Court of Appeal)

Barbados.

Civil Appeal No. 1 of 1957

Appeal from the Judgment of the Honourable Sir Ernest Allan Collymore, Vice Chancellor of the Island of Barbados dated the 16th day of October, 1956.

TREVOR BOWRING Petitioner-Appellant

- and -

THE COMMISSIONER OF ESTATE AND SUCCESSION DUTIES Respondent

This Appeal coming on for hearing on the 4th, 5th, 6th and 9th days of June and the 18th day of July 1958 before Sir Eric Halliman President, Mr. Justice Rennie and Mr. Justice Archer in the presence of Mr. J.S.B. Dear of Counsel for the Appellant and the Honourable Attorney General of Counsel for the Respondent.

IT IS HEREBY ORDERED that the Appeal be allowed and the Respondent be entitled to recover from the Appellant the sum of $17,386.99 together with interest in accordance with the provisions of the Estate and Succession Duties Act, 1941 And that the Appellant be entitled to costs on the higher scale both in this Court and the Court below.

Given under my hand and Seal of the Court this 18th day of July, 1958.

A.W. SYMMONDS,
Deputy Registrar.
Federal Supreme Court,
Barbados.

In the Federal Supreme Court.

Appellate Jurisdiction.

No.12.

Judgments.

(a) The Chief Justice Hallinan.

18th July, 1958.

No. 12.

JUDGMENTS

(a) The Chief Justice:

Lady Gilbert Carter, settled the property which is the subject-matter of this case by deed of trust dated 16th June, 1936, referred to in this judgment as the Boston Trust. The Trustees under deed of trust were to pay the net income to the donor, Lady Gilbert Carter. Under Clause 4 of the trust, the donor was entitled to revoke or amend the trust in whole or in part by an instrument in writing delivered to the Trustees.

The Respondent seeks to charge Lady Carter's Executor with liability for death duties on the property settled in the Boston Trust. The Respondent does not claim under Section 7 (b) of the Estate & Succession Duties Act, 1941-16 which relates to the life interest of a deceased person, for the person chargeable thereunder is not the Executor but the person to whom the benefit accrues. Owing to the circumstances of this case, the Respondent must endeavour to recover death duties from the Executor who under Section 20 of the Barbados Act of 1941 is only liable in respect of property of which the deceased was competent to dispose at her death.

The question which falls for decision in this case is whether the requirement that Lady Gilbert Carter should obtain the consent of Trustees before revoking or amending the trust constituted such a fetter on her power to dispose of the property that she was not "competent to dispose" within the meaning of that phrase in Section 20 and as defined in Section 3 (a) of the Barbados Act of 1941.

The Commissioner of Estate & Succession Duties (the Respondent) held that Lady Gilbert Carter was competent to dispose within the meaning of the Section, and that death duties are payable on the property settled by the deed of trust. Upon appeal to the Court of Chancery in Barbados the Vice-Chancellor upheld the contention of the Respondent and this appeal has been brought against that decision.

Section 3 of the Barbados Act of 1941 is for all purposes material to these proceedings the same

as Section 22 (2) (a) of the Finance Act, 1894, and the Respondent in this case has therefore relied on the official practice in England under statutes similar to the Barbados Act. The position in England is concisely summarised in Hanson on Death Duties, 10th Edition, paragraph 549.

"A property over which the deceased had general power of disposition jointly with some other person is not within this sub-section /Section 22 (2) (a) of the Finance Act, 1894/. Such power not being "such general power" as would enable "him" to dispose of the property "as he thinks fit". Whether a general power exercisable with the consent of some other person is within the sub-section seems doubtful xxxxxxxxxxxxxxx It seems difficult to say that, where consent of another person is necessary the deceased was competent to dispose of the property "as he thinks fit"; there seems little difference in substance between a power of this kind and a joint power".

Hanson then mentions the case of in re Phillips 1931 1 Ch. 347 and the case in re Watts 1931 2 Ch. 302 (to which I shall later refer in this judgment) and he concludes this paragraph of his book as follows :-

"The official practice is to claim duty in the Phillips type case but not in the Watts type case. In view of the observation of Roxburgh J. in re Churston Settled Estates 1954 1 Ch. at 334, the question seems an open one".

Maugham J. /as he was then/ who decided in re Phillips stated that the earlier case of in Re Dilke 1921 1 Ch. 34 supported his view. Under a deed Dilke had a general power to appoint subject to the consent of his trustees. He, with the trustees' consent, appointed to such persons as he might by will appoint. It was held that the Trustees were not required to approve of the persons who were to benefit under the exercise of the power, and therefore the appointment was good. But I do not think this case is authority for the proposition that, if the Trustees had refused to agree to such an arrangement and withheld their consent, then, the Court would have compelled them to give it.

In re Phillips, Maugham J. went a step further.

In the Federal Supreme Court.

Appellate Jurisdiction.

No.12.

Judgments.

(a) The Chief Justice Hallinan.

18th July, 1958 - continued.

A Testator with a general power of appointment to be exercised with his Trustees' consent made an appointment to his daughter. His creditors sued as in equity they could recover out of the fund so appointed if the power was general and unfettered. Did the consent of the Trustees create such a fetter? Maugham J. held that it did not, because the Trustees could only veto the exercise of the power but were not concerned in the selection of the objects of the power, so that the power was general. The judgment does not say so, but the logical implication of this decision is that where a Trustee has no duty as to the selection of the objects, in this respect he has no powers either. This case, perhaps in order to give effect to the equitable rule in favour of creditors, went beyond Dilkes' case. Phillips' case has been followed in re Joicey (76 S.J. 459). These cases are authority for the view that where a settlement does not indicate that the Trustees are to exercise a discretion in the selection of objects, they have no power to withhold their consent to the objects selected by the donee.

In re Phillips the main question was whether a power was general and unfettered so that a Testator's creditors could benefit. In re Watts (1931 2 Ch. 302) the question was whether this power was or was not general since, if it was general, it would not infringe the rule against perpetuities; whereas if it was, it would. The consent of the mother of the donee of the power was expressly required not only to revoke the trust of the settlement but to declare new trusts, and Bennett J. distinguishing Phillips' case, held that it was a sufficient fetter to make the power not general or as he called it "special". In re Churston Settled Estates /1954, 1 A.E.R. 725/ the application of the rule against perpetuities to a power of appointment was again in issue and Roxburgh J. followed the decision in Watts' case.

As indicated in the passage I have cited from Hanson, the observation of Roxburgh J. in the Churston case has left open to doubt the soundness of the distinction between the powers and duties of Trustees in cases like that of in re Phillips on the one hand, and in re Watts on the other. I share these doubts. I should be slow to adopt this distinction when interpreting the expression "competent to dispose" in a revenue Statute. It seems

to me that the position of a Trustee whose consent is required for the exercise of a power of appointment resembles the position of the donee of a power of appointment to be exercised jointly, rather than that of a special power where the donee can only appoint among a restricted class. In the Attorney General v. Charlton (1877 L.R.A.C. 426) a joint power was held not to be a general power because it required the concurrence of two minds; - I consider that the same may be said of a power requiring the consent of a Trustee. Furthermore, where the ordinary settlor creates a power of appointment subject to a Trustee's consent without specifying anything more he would surely expect his Trustee to veto the selection of objects of the power if the choice of the donee was foolish. That I should have thought was one of the functions of a Trustee. In my view in re Phillips introduces a highly artificial construction in order to turn what should not have been a general power (because it required the concurrence of two minds) into a general power so as to save the equitable right of creditors to share in the fund appointed under the power. Phillips' case did this by deciding that it is not enough for a settlor to say "The Trustees must concur before the donee appoints", he must make it clear that the Trustee is to exercise a discretion in the selection of objects by the donee. The law has been further confused by the decision in Watts' case where a power that is subject to the consent of a Trustee having a discretion to veto the selection of objects is called a special power. The term "special power" hitherto in English law has meant a power of appointment to a limited class, not a power subject to the veto of a Trustee on the selection of objects. This last kind of power is not a general power but it is not a special power either, just as a power to be exercised jointly is not a general power but is not a special power.

Happily the Boston Trust contains a provision that it is to be governed by the laws of Massachusetts so that we need not decide whether the English practice of the Commissioners of Estate & Succession Duties in applying the distinction between the Phillips' type of case and the Watts' type of case is correct; but I think that a consideration of the English authorities serves by contrast to throw into the relief the powers duties and discretion of the Trustees in this case according to the law of Massachusetts.

In the Federal Supreme Court.

Appellate Jurisdiction

No.12.

Judgments.

(a) The Chief Justice Hallinan.

18th July, 1958 - continued.

The learned Vice-Chancellor had before him two treatises by Professor Scott, an eminent authority on the law of trusts in Massachusetts, and these treatises and the application of the law as stated therein to the Boston Trust were expounded by three expert witnesses, all qualified lawyers from America, two being called by the Appellant and one by the Respondent.

The Vice-Chancellor found that the law of Massachusetts to be applied is as stated in Professor Scott's Restatement at Section 330 paragraph 1 and in his Law of Trusts Section 330 paragraph 9, and he extracts from the Restatement Section 330 paragraph 1 a long passage headed "Where power to revoke with the consent of the trustee" and which reads as follows:-

"If the Settlor reserves a power to revoke the trust only with the consent of the trustee, he cannot revoke the trust without such consent. Whether the trustee can properly consent to the revocation of the trust and whether he is under a duty to consent to its revocation depend upon the extent of the power conferred upon the trustee by the terms of the trust. To the extent to which discretion is conferred upon the Trustee, the exercise of the power is not subject to the control of the Court, except to prevent an abuse by the Trustee of his discretion. (See S.187)

"If there is a standard by which the reasonableness of the Trustee's judgment can be tested, the Court will control the Trustee in the exercise of the power where he acts beyond the bounds of a reasonable judgment, unless it is otherwise provided by the terms of the trust".

Then follow instances where the settlement either in express words or by implication limits the discretion of a Trustee in giving or withholding his consent. Professor Scott then continues:

"On the other hand, the Trustee may be authorized to consent to the revocation of the trust with no restriction, either in specific words or otherwise, imposed upon him in the exercise of the power. In such a case there is no standard by which the reasonableness of the Trustee's judgment can be tested, and the Court will not control the Trustee in the exercise of the power if he acts honestly and does not act from an improper motive

(see S. 187 and Comments i-k thereon). The power of the Trustee in such a case to consent to the revocation of the trust is like a power to appoint among several beneficiaries".

The passage from Professor Scott concludes by saying that the purpose of the Settlor in inserting the provision as to the Trustee's consent may be important and instances the case of where a settlor wishes to give an unrestricted power to the Trustee in order to escape liability to tax -- in such cases this discretion would not be controlled by the Court.

The Vice-Chancellor then applied this statement of the law of Massachusetts to the Boston Trust and found as follows:-

"I can find no standard of duty expressed or implied in the trust instrument and I think that in these circumstances the Trustees owed a duty to the Settlor to give consent to any revocation or amendment made by her and had no other duty provided they acted in good faith and from proper motives".

With respect, I think that the learned judge misdirected himself in finding that the Trustees owed any duty to the Settlor to give their consent. I can find nothing in the passage he cited from Professor Scott nor in the evidence of the expert witnesses to support this conclusion.

All these witnesses agreed that under the terms of the Boston Trust the Trustees had a complete discretion to give or withhold their consent provided they acted honestly and from a proper motive. If these witnesses considered that the Trustee owed a duty to the Settlor then they must have said that the Court would control the Trustees by forcing them to comply with the wishes of the Settlor who is also the donee of the power. It was perfectly clear from their evidence that in their view the Courts of Massachusetts would not do so. On a plain reading of the Boston Trust and applying the learning of Professor Scott thereto I do not see how these witnesses could have said otherwise.

The difference between the law of Massachusetts and the English decision in re Phillips and in re Joicey may be put in this way:-

In the Federal Supreme Court.

Appellate Jurisdiction.

No.12.

Judgments.

(a) The Chief Justice Hallinan.

18th July, 1958 - continued.

The powers and duties of Trustees according to the law of Massachusetts are only controlled by the Court if either expressly or by implication the settlement indicates that in given circumstances the Trustees must exercise their discretion within certain limits. If in such circumstances the Trustee exceed those limits, the Court will control them. But where the settlement contains a simple provision that the donee of a power must obtain the consent of a Trustee to its exercise, then the Court will not control the discretion of the Trustees exercised honestly and from proper motives. The English decisions in re Phillips and in re Joicey on the other hand declare that when a settlement contains the simple provision just mentioned which does not either expressly or by implication indicate that the settlor imposes on the Trustee the duty to veto a selection of objects of which they disapproved, then the Court will control the Trustees if they attempt to veto such selection. In short, according to the English decisions, a Trustee is assumed to have no duty (and I suppose therefore no power) to veto the selection of objects unless an intention to impose such duty is expressly or by implication contained in the settlement; whereas according to the law of Massachusetts a Trustee is assumed to have powers of veto (including the power to veto the selection of objects) unless an intention to limit such power is expressly of by implication contained in the settlement.

Since in the present case there is no such intention to be gathered from the Boston Trust, the Trustees have, in my view, such a discretion to give or withhold their consent as constitutes a fetter on the power of the settlor-donee. She was not "competent to dispose" within the meaning of this phrase in Section 3 (a) of the Barbados Act, and therefore I consider that this appeal should be allowed.

The Respondent is only entitled to recover from the Appellant the sum of $17,386.99 together with interest in accordance with Section 23 of the Barbados Act of 1941.

(Sgd.) ERIC HALLINAN
CHIEF JUSTICE.

Dated this 18th day of July, 1958.

(b) Mr. Justice Rennie:-

This appeal is from the judgment of the Vice-Chancellor of Barbados in an appeal under the Estate & Succession Duties Act, 1941-16.

The Appellant is one of the Executors of the Estate of the late Lady Gertrude Codman Gilbert-Carter who at the time of her death was domiciled in Barbados. Included in the estate is property in the U.S.A. which may conveniently be referred to as the Boston Trust. This property is valued at B.W.I. $563,113.32. The Boston Trust was created by Lady Gilbert-Carter by a deed of Trust dated 16th June, 1936. In paragraph 4 of that deed it is provided:-

> "The Donor during her life and her said son after her death shall have the right at any time or times to amend or revoke the trust in whole or in part by an instrument in writing delivered to The Trustees. If the agreement is revoked in its entirety the revocation shall take place upon the delivery of the instrument in writing to the Trustees, but any amendment or any partial revocation shall take effect only when consented to in writing by the Trustees".

This paragraph was subsequently amended on the 4th December 1939 and remains in its amended form:-

> "The Donor during her lifetime shall have the right at any time to amend or revoke this trust either in whole or in part by an instrument in writing provided, however, that any such amendment or revocation shall be consented to in writing by the Trustees".

In paragraph 1 of the trust deed in its original form it is set out:-

> "To pay the net income to the Donor not less often than quarterly as long as she shall live, together with such parts of principal as she may from time to time in writing request".

On the 28th December, 1939 this paragraph was amended to read:-

In the Federal Supreme Court.

Appellate Jurisdiction.

No.12.

Judgments.

(b) Mr.Justice Rennie.

18th July, 1958 - continued.

"To pay the net income to the Donor from time to time as long as she shall live".

On the 13th June, 1944 this paragraph was again amended and in the amended form to read :-

"To pay the net income to the Donor from time to time as long as she shall live together with such parts of principal as the Trustees in their uncontrolled discretion shall deem advisable for the comfort and support of the Donor".

In paragraph 8 of the trust deed it is set out inter alia :-

"This trust is executed in the Commonwealth of Massachusetts and shall be governed by the laws thereof".

At the hearing before the Vice-Chancellor and before this Court it was agreed on both sides that the law applicable to the interpretation and construction of the trust deed and the rights powers and duties conferred and imposed by it is the law of the Commonwealth of Massachusetts.

Relevant sections of the Barbados Estate & Succession Duties Act 1941-16 are Sections 3 (a) and 20 (1). They are as follows :-

"3. For the purposes of this Act --

(a) a person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were sui juris, enable him to dispose of the property, including a tenant in tail whether in possession or not; and the expression "general power" includes every power or authority enabling the Donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument inter vivos or by will, or both, but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself or exercisable as mortgagee :-"

"20. (1) The Executor of the deceased shall pay the estate duty in respect of all property of which the deceased was competent to dispose at his death, on delivering the estate duty affidavit to the Commissioner, and may pay in like manner the estate duty in respect of any other property passing on such death not under his control, if the persons accountable for the duty in respect thereof request him to make such payment; but an executor shall not be liable for any duty in excess of the assets which he has received as executor, or might but for his own neglect or default have received."

As I see it this Court is required to decide whether Lady Gilbert-Carter was competent to dispose of the property comprised in the Boston Trust. The Appellant says she was not because the law of Massachusetts gives the Trustees a wide discretion in consenting or not consenting to the revocation of the trust; alternatively if the Law of Massachusetts is not to be applied in ascertaining the powers and duties of the Trustees then in our law she was not competent to dispose of the property for the reason that the power she possessed was not a general power.

When dealing with the duty of the Trustees under the law of Massachusetts the learned trial Judge said this:-

> "I can find no standard of duty expressed or implied in the trust instrument and I think that in these circumstances the Trustees owed a duty to the settlor to give consent to any revocation or amendment made by her and had no other duty provided they acted in good faith and from proper motives. It seems to me that Lady Gilbert-Carter retained a power of control over the property in the Boston Trust. This is my view of the matter according to the Law of Massachusetts and according to it Lady Gilbert-Carter had and retained until her death such a power to revoke or amend as would enable her to dispose of the property in the Boston Trust as she thought fit".

The Appellant is asking this Court to say that there is no evidence on which the learned

In the Federal Supreme Court.

Appellate Jurisdiction.

No.12.

Judgments.

(b) Mr.Justice Rennie.

18th July, 1958 - continued.

trial Judge could have come to that conclusion. In this it seems to me that the Appellant is right. The burden of the evidence of the two expert witnesses (Perkins and Goodale) called by the Appellant is that the Trustees would not have been bound to give their consent whenever and in whatever circumstances they were asked to do so. They were also in agreement with each other that the Trustees owed a duty to the beneficiaries under the trust. Then there is the evidence of the expert witness Kane who was called by the Respondent and who said that if the Trustees acted in good faith and from a proper motive in refusing to give their consent to the revocation the Court would not order them to give their consent even in circumstances where the consent was unreasonably withheld. Apart from the evidence of the expert witnesses there is also Professor Scott's restatement of the Laws which was put in evidence. That restatement contains the following passage:-

> "On the other hand the Trustee may be authorized to consent to the revocation of the trust with no restriction either in specific words or otherwise, imposed upon him in the exercise of the power. In such a case there is no standard by which the reasonableness of the Trustee's Judgment can be tested and the Court will not control the Trustee in the exercise of the power if he acts honestly and does not act from an improper motive (see ss 187 and comments i - k thereon). The power of the Trustees in such a case to consent to the revocation of the trust is like a power to appoint among several beneficiaries".

The only conclusion one can come to on the totality of that evidence is that the Trustees possessed a wide discretion in relation to their consenting to the revocation of the trust and that the Courts of Massachusetts would not compel them to give their consent unless it could be shown that they acted dishonestly and from an improper motive. That restraining power of the Trustee amounts in my view to a fetter on Lady Carter's right to revoke the trust and is a sufficient fetter to render her not competent to dispose of the property as she thinks fit.

The foregoing reasons seem to me to be sufficient to dispose of this appeal, but I suppose I

should go further and deal with the other arguments that were adduced in this case.

The other argument put forward by the Appellant dealt with the question of whether Lady Carter was competent to dispose of the trust property quite apart from the application of the law of Massachusetts. This argument presupposes an inability in the Court to determine the law of Massachusetts in relation to this matter. That being so the question now turns on the construction to be given to the words "competent to dispose" in the Barbados Act.

In re Parsons (1943) C.D. 12 at p.15 Lord Greene, M.R. said :-

> "The phrase 'competent to dispose' is not a phrase of art, and taken by itself and quite apart from the definition clause in the Act it conveys to my mind the ability to dispose including of course the ability to make a thing your own .....
>
> The matter is set beyond doubt by the definition in Section 22 Sub-section 2(a) of the Finance Act 1894. It is not an exhaustive definition. It leaves the words 'competent to dispose' to bear their ordinary meaning in the English language and merely adds certain types of competence which the legislature thought might be considered not to be included in the natural meaning of the words. So far as is applicable to the present case the definition is: 'A person shall be deemed competent to dispose of property if he has any power or authority enabling him to appoint or dispose of property as he thinks fit'".

Full weight can be given to this passage from the judgment of Lord Greene for Section 3 (a) of the Barbados Act is substantially the same as Section 22 Sub-section 2 (a) of the Finance Act 1894. And the definition he applied to the case he had under consideration seems to me an apt one, for the instant case.

The learned author of Hanson's Death Duties tenth edition at page 212 writes :-

> "It seems difficult to say that where consent of another person was necessary the

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deceased was competent to dispose of the property 'as he thinks fit'; there seems little difference in substance between a power of this kind and a joint power".

The learned author then deals with the cases of in re Phillips (1931) 1 Ch. 347 and in re Watts (1931) 2 Ch. 302 and goes on to say :-

"In view of the observations of Roxburgh, J. in Churston Settled Estates the question seems an open one".

In Phillips' case the head note reads:-

"Under a settlement a fund was given to such persons after the death of A as he should with the consent of the Trustees appoint by deed --

Held that the power was a general power and that the power having been exercised the fund was equitable assets for the payment of A's debts, notwithstanding that the consent of the Trustees to the exercise of the power was necessary.

In that case the Court was concerned with the rights of a creditor as against the claim of a volunteer. The Court was also influenced by the decision in re Dilke (1921) I.C.D. 34. Maugham J. said "The matter is not untouched by authority" and he referred to Dilke's case. In Dilke's case a person of unsound mind not so found by inquisition was given a power of appointment which was to be exercised with the consent and concurrence of Trustees. He recovered and made a deed with the consent and concurrence of Trustees, whereby he appointed the trust funds to such person or persons and purposes as he should by will or codicil appoint. He subsequently made an appointment by codicil and it was held that on the true construction of the power the Trustees were not required to approve of the persons who were to benefit under the exercise of the power or to the extent to which they were to benefit but that the exercise of the power was merely made conditional upon the consent and concurrence therein of the Trustees, and that the deed was a valid exercise of the power. The deed itself showed that Sir Charles Dilke at the date of the original deed was not of

sound mind and it was argued that the real intention of the provision was that the question whether Sir Charles was competent to exercise the power of appointment should be considered by the Trustees and that their consent to the execution of the deed testified by their concurrence in the deed should be obtained before it could be contended that the power had been exercised. The judgment seems to uphold that argument and in effect says that the requirement of the Trustees' consent was a safeguard against the exercise of the power by a person of unsound mind. Once the disability was overcome the need to have the Trustees consent was no longer real. On that basis the judgment would be an authority limited to the very special circumstances of the case.

Phillips' case as I have already pointed out is concerned with the claim of a creditor. In such cases it would seem that the Court have not kept rigidly within the limits of general powers. The learned author of Farwell on Powers third edition at page 8 writes :-

> "A power to appoint to whom the donee pleases except A has been held to be a general power so as to make the appointed fund assets for the payment of debts (Edie v Babington 3 Ir Ch. R. 568) but not to be a general power within Section 27 of the Wills Act (Re Byron Williams v Mitchell (1891) 3 Ch 474)".

It seems to me that better assistance can be had in solving this problem by looking at the cases dealing with the rule against perpetuities. In re Fane (1913) 1 Ch 404 at p. 413 Buckley L.J. said:-

> "General powers are exempt from the restrictions of the rule against perpetuities because the existence of a general power leaves the property in a position which for the present purpose, does not differ from that in which it would stand if there were an absolute owner. There exists by the existence of the power a present immediate and unrestricted alienability and there is no necessity to consider in that case how far a perpetuity may be created any more than it is necessary to consider it in the case of an absolute owner".

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In the case of in re Watts (1931) 2 C.D. 302 a power was given to revoke a settlement with the consent of the donee's mother and to appoint and declare any new or other trust powers and provisions with the consent of the mother - held it would not be right to hold that the donee of the power was in substance the owner of the property and consequently free to deal with it in any way she pleases and that the power was a special power.

Dilke's case and Phillips' case were both considered and distinguished in Watt's case which bears a much closer resemblance to the instant case than either Dilke's or Phillips' case. In Watt's case as in the instant case the power was one to revoke a settlement with the consent of another party.

In Re Churston Settled Estates Freemantle and Another v Churston (Baron) and Others (1954) 1 A.E.R. 725 Roxburgh, J. followed the decision in Watt's case. It is true that he severely criticised some of Bennett, J's reasons but he approved of what he regarded to be the fundamental basis of Bennett J's decision which was that it would not be right to hold that the donee of the power was in substance the owner of the property and consequently free to deal with it in any way she pleased.

The decisions in Watt's case and in Churston's case seem to me to do no more than apply the dictum of Lord Selborne in Charlton v The Attorney General 4 A.C. 426 at 427 :-

> "If however the substance of the first branch of the section is regarded it certainly points to that kind of absolute power which is practically equivalent to property and which may reasonably be treated as property for the purpose of taxation. That is the case with a general power exercisable by a single person in any way which he may think fit. But it is not the case when a power cannot be exercised without the concurrence of two minds the one donee having and the other not having an interest to be displaced by its exercise".

The review of the cases I have made shows Dilke's and Phillips' on the side of the power being a general power and on the side of its being a special power are the dictum in Charlton's, and the decisions in Watt's and Churston's.

Dilke's case in my view was decided on very special circumstances and its authority must necessarily be restricted. Phillip's case concerned the claim of a creditor and it would appear that special considerations are given to such claims. On the other hand Watt's case bears a close resemblance to the instant case and not only was the decision against the power being a general power but Dilke's case and Phillips' case were considered and distinguished. That is sufficient to satisfy me that the power is not a general power but there is the added authority of Churston's case.

In my view the appeal should be allowed.

(Sgd.) A.B. RENNIE,
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Lady Gilbert-Carter, who was domiciled in Barbados, died in the United States of America on the 12th November, 1953, leaving a Will dated the 15th March, 1952, of which the Appellant was named as one of the Executors. She had in 1936 created a settlement of certain property by a trust deed executed in Boston, Massachusetts, in the United States of America, under Clause 4 of which she reserved to herself the right to revoke the entire trust without the necessity of obtaining the consent of the Trustees to such revocation and also the right, but only with their consent in writing, to amend the trust or partially revoke it. Clause 1 of the trust deed specified the purposes of the trust. Under that clause Lady Gilbert-Carter (hereinafter sometimes referred to as "the settlor") became the sole beneficiary during her lifetime and was entitled to the net income of the trust together with such parts of the principal as she might from time to time in writing request. The trust deed was amended on the 4th December, 1939, and the consent of the Trustees to total revocation of the trust was thereby provided for. It was further amended on the 28th December, 1939, when the settlor waived and surrendered her right and privilege to request any part of principal and retained only her right to receive the net income of the trust. On the 13th June, 1944, the trust deed was again amended and the Trustees were given uncontrolled discretion to pay such parts of the

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principal to the settlor as they should deem advisable for her comfort and support. Her right to receive the net income of the trust continued as before and Clause 4 of the trust deed as amended on the 4th December, 1939, remained in its amended form. The settlor died without having revoked the trust and the Respondent called upon the Appellant to pay estate duty on the property comprised therein (hereinafter called "the trust fund") on the footing that the Settlor at her death had been competent to dispose of it.

The Appellant takes the stand that the Settlor was not competent to dispose of the trust fund at her death and that his accountability on which his liability is dependent is limited under Section 20 (1) of the Estate and Succession Duties Act, 1941, to the property described in his estate duty affidavit exclusive of the trust fund. On his behalf it has been submitted that in the discharge of their functions under Clause 4 of the trust deed as it stood at the Settlor's death the Trustees, in giving or withholding consent to amendment or revocation of the trust, were bound to exercise fiduciary discretion and that this fetter on the power of the Settlor to recover the trust fund was sufficient to render her not competent to dispose of it within the meaning of the Estate and Succession Duties Act, 1941. A great deal of the argument has been concerned with the measure of control which the Courts of Massachusetts would in the Settlor's lifetime have been able to exercise over the Trustees' discharge of their functions under Clause 4 of the trust deed and the circumstances in which these Courts would compel them to act, or restrain them from acting, in a certain way. For the Respondent it has been contended that the Trustees had a bare power of veto under Clause 4, that they had no right to interfere with the Settlor's selection of the persons to benefit from the trust fund, and that she was therefore, for the purposes of the Act, competent to dispose of it.

It has not been disputed that the law applicable to the interpretation and construction of the trust deed and to the powers of the Trustees is the law of Massachusetts if it exists and is ascertainable. There has further been an area of agreement between the parties, namely, that the legal estate

in the trust fund vested in the Trustees on the 16th June, 1936, the date of the original trust deed; that from the 4th December, 1939, their consent was necessary to either amendment or revocation of the trust; that they were under no compulsion to give that consent; and that in giving or withholding consent they were bound to act honestly and from proper motives.

Evidence as to the law of Massachusetts on the subject of trusts with particular reference to the nature and extent of the fiduciary duties imposed on the Trustees and to the power and authority reserved to herself by the Settlor was given by three expert witnesses all of whom were familiar with two treatises by Professor Scott entitled "Scott's Law of Trusts" and "The Restatement of the Law of Trusts" both of which, these witnesses averred, were held in high regard by the Courts of Massachusetts. In addition to extracts from the works of Professor Scott, and the expert evidence the Vice-Chancellor had to consider the numerous cases and authorities from which the expert witnesses refreshed their memories. He found as a fact that the relevant law of Massachusetts was as stated in Scott's Restatement, Section 330 paragraph 1, and in his Law of Trusts, Section 330 paragraph 9, including those portions on which the Appellant's expert witnesses made definite reservations. It is to be observed that he did not unreservedly accept the evidence of the Respondent's expert witness. This witness based himself squarely on Professor Scott's works but it may be that his application of the law stated therein to hypothetical cases put to him did not always reflect a perfect understanding of it. Both of the expert witnesses for the Appellant disputed the passage in Scott's work which deals with the absence of a standard by which the reasonableness of a Trustee's judgment can be tested and the inability of a court to control him in the exercise of his power to consent or to refuse to consent to the revocation of a trust and one of these witnesses was prepared to go so far as to challenge the opinion of the Supreme Court of the United States of America if it differed from his own.

In Re Duke of Wellington (1947) 2 A.E.R. 854 Wynn-Parry J. said at p.857:"In a case involving the application of foreign law as it would be expounded in the foreign Court the task of an English

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Judge, who is faced with the duty of finding as a fact what is the relevant foreign law and who is for that purpose notionally sitting in that Court, is frequently a hard one. But it would be difficult to imagine a harder task than that which faces me, namely, of expounding for the first time either in this country or in Spain the relevant law of Spain as it would be expounded by the Supreme Court of Spain which up to the present time has made no pronouncement on the subject, and having to base that exposition on the evidence which satisfies me that on this subject there exists a profound cleavage of legal opinion in Spain, and two conflicting decisions of Courts of inferior jurisdiction". Wynn-Parry, J. had the difficult task of deciding whether or not a certain doctrine was recognised by Spanish law, there being no express provision in the Spanish Civil Code, nor any express decision of the Spanish Supreme Court, on the point, and the expert witnesses being of opposite views. He resolved the difficulty by himself interpreting an article of the Spanish Civil Code in the light of the expert evidence and thus arrived at a conclusion.

There has been no evidence in this case that according to the jurisprudence of Massachusetts the law of Massachusetts until expounded resides in the breast of the judge awaiting exposition. It may be so; it may be that the law of Massachusetts abhors a vacuum: on the other hand, it may equally well be that a particular law comes into existence only when it is first expounded by a competent authority. It is common ground between the parties in the case that the point in dispute between them, namely, how far control of the Trustees by the Courts of Massachusetts extended, is not covered by any express decision of those Courts and therefore awaits exposition. For the reason I have given I feel unable to say with any confidence that the law of Massachusetts on the point can be ascertained but I shall assume for the purposes of this judgment that it can. On that assumption, there was, in my view, evidence upon which the Vice-Chancellor, who had to contend with opposing views which were categorically expressed, could have found that it was as he stated it to be, that is to say, as set out in Scott's works, and I apprehend that I am not concerned to inquire further. I do not trouble to wonder whether Professor Scott would have qualified in any way what he has written if the Appellant had been allowed to supplement the evidence, as he sought to

do, by an affidavit of Professor Scott. I would merely observe that presumably the Courts of Massachusetts in drawing upon the learning of Professor Scott would ordinarily rely upon his written and not his spoken word and in that respect be no safer from liability to error than the Vice-Chancellor.

The question then arises as to whether or not the fetter on the settlor's power to revoke the trust as described by Professor Scott negatived her competency to dispose of the trust fund.

Counsel for the Appellant has submitted that the Vice-Chancellor's finding that the Trustees are not required to conform to any standard of duty, express or implied, when exercising their functions under Clause 4 of the trust deed results in an increase in the size of the fetter upon the Settlor's powers of revocation and amendment and a corresponding diminution in her competency to dispose of the trust fund. He criticised that part of the judgment in which the Vice-Chancellor said: "I can find no standard of duty express or implied in the trust instrument and I think that in these circumstances the trustee owed a duty to the Settlor to give consent to any revocation or amendment made by her and had no other duty provided they acted in good faith and from proper motive". It is by no means clear to me that the Vice-Chancellor was doing more than stating his final conclusion, namely, that the Trustees were not concerned with any change of destination of the trust fund and that for practical purposes their function under Clause 4 consisted in giving consent to amendment or revocation of the trust deed in the course of which they must have acted in good faith and from proper motives.

Counsel for the Respondent relied on the cases In re Dilke (1921) 1 Ch. 34, and In re Phillips (1931) 1 Ch. 347, and contended that whatever the fetter upon the power of the Settlor to revoke or amend the trust deed, it did not operate upon the selection of the beneficiaries of the trust fund and in consequence could not have impaired the Settlor's competency to dispose of the trust fund. Counsel for the Appellant cited numerous authorities for the purpose of showing their inapplicability to ascertainment of the Settlor's powers. In my view,

many of those authorities are in point and cannot be summarily disposed of as Counsel for the Appellant was wont to do. I propose to deal very briefly with some of the cases to which he referred and to record my observations on them.

Re Dilke was a decision on the validity of the exercise of a power; interpretation of the provisions of the law corresponding to the Estate and Succession Duties Act, 1941, was not involved in the decision but it would be quite inaccurate to say that the decision had nothing whatever to do with the question of competency to dispose. As Lord Greene M.R. said in Parsons v. Attorney General (1943) 1 Ch. 12 at page 15: "The phrase 'competent to dispose' is not a phrase of art, and, taken by itself and quite apart from the definition clause in the Act, it conveys to my mind the ability to dispose, including, of course, the ability to make a thing your own". And further on in his judgment he says that the words are wide and, in a sense, popular in meaning. It is, in my judgment, therefore, fallacious to attempt to prescribe Re Dilke and other cases not decided under the Finance Acts or to keep cases decided under particular enactments in watertight compartments for they afford considerable guidance as to the meaning of competency to dispose as contemplated by the Estate and Succession Duties Act, 1941. Sankey, J. in Attorney General v. Astor and Others (1922) 2 K.B. 651 equated "power to dispose" in Section 4 of the Revenue Act of 1845 with "power to appoint or dispose as he sees fit" in Section 22 (a) of the Imperial Finance Act of 1894 which is identical with Section 3 (a) of the Estate and Succession Duties Act, 1941, and it will be seen that Roxburgh, J. in Re Churston Settled Estates (1954) 1 A.E.R. 725 prayed in aid language used by Lord Selbourne in Charlton v. Attorney General (1878) 4 App. Cases, 427 which he interpreted as being of general application although the case dealt with a joint power of appointment and taxation and he was considering the rule against perpetuities.

The validity of the exercise of the power in Re Dilke depended on the construction to be placed upon certain words in a settlement deed under which a general power of appointment which was conferred was to be exercisable with the consent and concurrence of the settlement trustees (not being less than three) or of a majority of three

or four Trustees. It was held both in the Court of first instance and in the Court of Appeal that upon the natural meaning of the words creating the power it was impossible to say that the Trustees had to exercise a discretion as to the persons to be benefitted by the exercise of the power, that their consent was merely to the exercise of the power by the donee of the power and that it had been properly given.

In Re Phillips (1931) 1 Ch. 347 a settlement fund was given to such persons, after the death of the Settlor, as he should, with the consent of the Trustees, appoint by deed. The Settlor appointed to certain persons but died owing a large sum of money to his creditors which his free estate was insufficient to meet. It was held that his power under the settlement was a general power which he had exercised and that the settlement fund was equitable assets for the payment of his debts although the consent of the Trustees to the exercise of the power was necessary, because that consent, while directed to the exercise of the power did not involve the Trustees in the selection of the objects by the donee of the power. The Testator's competence did not depend on the circumstances that the Trustees had consented to the appointment.

These two cases received the attention of Roxburgh, J. in Re Churston Settled Estates. He criticised portions of the judgment of Bennett, J. in Re Watts (1931) 2 Ch. 302 in which Bennett, J. distinguished Re Dilke and Re Phillips but he approved of a passage in the judgment which seemed to him to be the fundamental basis of the decision. That passage reads: "It seems to me that it would not be right to hold that, upon the terms of the powers contained in the marriage settlement which I have to construe ..... (the daughter) was in substance the owner of the property, and consequently free to deal with it in any way she pleased". Re Watts was also a decision on the rule against perpetuities. Under a marriage settlement a wife was empowered to revoke by deed during the life of her mother the trusts declared by the settlement and to appoint and declare (with the consent of her mother) any new or other trusts, powers and provisions concerning the premises to which the revocation should extend. Bennett, J. held that the power was a special power and said that regard

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must be had to the fact of the mother's consent in writing being given both to the exercise of the power of revocation and to the exercise of the power of new appointment. Roxburgh, J. felt unable to appreciate the relevance of this part of the judgment. He said at page 730 of the report: "Again, I cannot appreciate the bearing of that. The two things are different. I, therefore, cannot say that I can see any real ground of distinction on these facts between Re Watts and Re Dilke and Re Phillips. As far as I can make out neither Re Dilke nor Re Phillips really threw any particular light on the question". He then proceeded to discuss two statements in Key and Elphinstone's Precedents in Conveyancing, namely -

(a) "a power to two or more to appoint as they think fit is a general power for the purpose of the rule (against perpetuities)".

(b) "a power to X to appoint generally but with the consent of Y will be general or special for the purpose of the perpetuity rule, according to whether on the true construction Y has merely a bare veto on an appointment or is under a duty to consider the beneficial interests which X proposes to appoint, and the interests of those who take in default of appointment; if he has such duty the power is special".

He rejected the former statement and found the distinction which the latter statement drew to be unsupported by authority. Instead, he deduced from the authorities what he conceived to be the true underlying principle of the distinction, namely, whether upon the terms of the power the donee of the power was in substance the owner of the property, and consequently free to deal with it in any way he or she pleased. He drew comfort from passages in the judgment of James, L.J. in Attorney General v. Charlton (1877) 2 Ex. D. 398 and of Lord Selborne when that case reached the House of Lords.

James, L.J. at page 412 of the report had said: "A joint power of appointment is, in my opinion, an entirely different thing in intention and practical operation from a general and absolute power of appointment in one individual. In the latter case it is really and practically the

equivalent of property - when exercised the property becomes assets. In the other case, it is what purports to be - a form of remoulding a settlement according to the exigencies of the family".

Lord Selborne at page 446 of 4 App. Cas. had said: "If, however, the substance of the first branch of the section (of the Succession Duty Act, 1853) is regarded, it certainly points to that kind of absolute power which is practically equivalent to property, and which may reasonably be treated as property, for the purpose of taxation. That is the case with a general power exercisable by a single person in any way which he may think fit. But it is not the case when a power cannot be exercised without the concurrence of two minds; the one donee having, and the other not having, an interest to be displaced by its exercise. Nothing could well be conceived more unreasonable, in a practical point of view than to treat a joint power like that now in question in a family settlement, as equivalent in substance to joint property in the two donees".

Roxburgh, J. was dealing with joint powers of appointment. The question he had to decide was whether certain limitations affecting the settled estates infringed the rule against perpetuities. Some of his criticisms of Bennett, J's reasoning in Re Dilke appear to me to be sound, but, with due deference to him, I think that Re Dilke and Re Phillips, in particular the latter case, do shed much light on the problem which he had to consider. There is all the difference in the world between consent which is necessary merely to the validity of the exercise of a power and consent to the choice of persons to be objects of the power. That distinction was pointed out in Re Phillips and the fund was held to be equitable assets for division among creditors because the Testator had not been fettered in the selection of the objects of the power he was exercising although the Trustees could have vetoed the exercise of the power. In Re Dilke, the exercise of the power was held to be valid because the Trustees had nothing to do with the choice of beneficiaries. I find nothing in the judgments of James, L.J. and Lord Selborne in conflict with this conception, despite the generality of language which Roxburgh, J. ascribes to

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Lord Selborne. Lord Selborne's concurrence of two minds directed to the selection of objects is far different from the concurrence of two minds directed to the mere exercise of the power.

In Eland v. Baker (1867) E.R. 579, a marriage settlement gave to the parents a power, with the consent of the trustees, to make void the trusts, and of appointing the estate to new uses. This power was exercised for the purpose of mortgaging the estate to one of the trustees for a sum advanced to the father. The estate was afterwards sold under a power of sale contained in the mortgage deed. It was held that a good title could not be made under it. Sir John Romilly, M.R. said: "I do not think I can make the purchaser take this title. I do not dispute the proposition that a person may in a marriage settlement introduce a proviso which shall simply put an end to the deed; for instance, that with the consent of the parties to the deed that there shall be contained in it a power to revoke all the trusts and uses of the settlement, exactly as if the settlement had never been executed, and that such a power may be made perfectly distinct from the deed. But I do not so read the power of revocation here contained. It is a power to the father, the son-in-law and the daughter, with the consent in writing of the Trustees for the time being, "absolutely to revoke and make void all or any of the uses," etc. If it had stopped at the end of the sentence, then it would simply have given the property back to the father, but it goes on to say, "and by the same or any other deed or deeds to be by them duly executed and attested, to limit and declare new and other uses, trusts, powers, provisoes and declarations in lieu of and in substitution for the uses, trusts, powers, provisoes and declarations which shall have been so revoked and made void, anything hereinbefore contained to the contrary notwithstanding". I read this as a power of revocation for the purpose of relimiting the estate, and relimiting the estate of any new trusts and declarations. How must the estate be relimited? To what trusts and with what declarations? The answer is, to trusts for the benefit of the persons who are the cestuis que trust of the instrument, according to the true scope and intention of the deed itself. Here is an agreement upon marriage that certain land of the father of the lady shall be settled to the uses therein contained, that is to say, to the

use of the husband and wife and to the children of the marriage. My impression is that this must mean a resettlement for the benefit of the persons who are the parties to the marriage and that the consent of the trustees must be given for that purpose".

This case is instructive for two reasons. It indicates the form of words appropriate to a power of revocation simpliciter where consent of Trustees is required and also a form of words which binds the Settlor to resettle the property: in the former case the Settlor can resume the proprty as if no settlement had ever been made; in the latter case he is not free to do so and the Trustees can exercise control over him in his treatment of the cestuis que trust.

Counsel for the Appellant placed considerable reliance on Attorney General v. Astor and others (1922) 2 K.B. 651 and on the judgments of the Court of Appeal in the same case reported at (1923) 2 K.B. 157. Despite some obscure language in the judgments the decision can, I think, be supported on grounds consonant with decisions in Re Phillips and Eland v. Baker. Paragraph 2 of the Information by the Attorney General which appears at page 652 of the report at (1922) 2 K.B. refers to Clause 8 of the settlement which was the subject of inquiry but does not set it out verbatim. Counsel for the Appellant in this case contended that the consent of the Trustees was not necessary to new appointments under the Astor settlement but only to revocation of the settlement and trust. I do not so read the paraphrase of Clause 8 of the Settlement. If it is an accurate paraphrase (and I know of no source from which the actual wording of the clause can be obtained) the consent in writing of the Trustees was necessary to new appointments. If the consent of the Trustees had been necessary only to revocation I would have expected paragraph 2 of the Attorney General's Information to read "..... ..... it should be lawful for him to revoke with the consent of the Trustees the settlement and the trust thereby created ..... and to appoint ..... such new and other trusts..... ....." I consider therefore that the Astor case is governed by Eland v. Baker and is similar to Re Watts where although there was power to revoke with consent there had to be appointment

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to new uses and both the daughter and her mother were concerned with the persons to benefit under the settlement.

Roxburgh, J., in Re Churston Settled Estates, after quoting with approval the passage from Bennett, J's. Judgments in Re Dilkes to which I have referred, compared the position of a person having a general power of appointment with an owner and deciding that the doctrine that a person having a common general power is to be treated as though he were for all practical purposes the owner ought not to be applied to a joint power of appointment, or to a power of appointment to which the consent of somebody is required. He then continued: "After all, what is the underlying broad principle of the rule against perpetuities? It is that property should not be tied up beyond a certain period of time. If the property ceases to be tied up, or, in other words, if it vests in a beneficial owner, then the mischief of the rule is avoided". In this case it can, with equal propriety be asked: "What is the underlying broad principle of the Finance Act of 1894 on which the Estate and Succession Duties Act, 1941, is based?"

Lord Macnaughten in Earl Cowley v. Inland Revenue Commissioners (1899) A.C. at page 210 said: "The principle on which the Finance Act, 1894 was founded is that whenever property changes hands on death the State is entitled to step in and take toll of the property as it passes without regard to its destination or to the degree of relationship, if any, that may have subsisted between the deceased and the person or persons succeeding". The Appellant does not, of course, say that no estate duty is payable by anybody on the trust fund, but he is concerned to pay estate duty at the lowest possible rate, and, in this connection, it is difficult to see why the Respondent did not rest his case on the passing of the trust fund and on the Appellant's liability to pay at the higher rate of duty to the extent of the assets in his hands. The case has, however, been argued solely on the footing of competency to dispose and I say no more about passing of the property.

Roxburgh, J. was not, nor was Lord Selborne, dealing with the case of a single donee of a power who can only validly exercise that power if the Trustees consent but who is not subject to dictation or control in the choice of objects of the

power. In my view, his criticism of the second statement which he quoted from Key and Elphinstone's Precedents in Conveyancing and which he assumed to have been based upon Re Dilke did not take account of Eland v. Baker. Lady Gilbert-Carter was the sole owner of the property which she handed over to Trustees in 1936. Only she could initiate revocation of the trust and after revocation she was not obligated to resettle the property. The Trustees had no duty towards beneficiaries nor could any beneficiary resist revocation. There is no evidence as to the reason for amendment of Clause 4 of the trust deed in December, 1939, but whatever the reason, she did not, in my opinion, thereby forfeit her right to retrace her steps. Her competency to dispose of the trust fund is not, in my view, to be determined by reference to the competency of the Trustees to prevent her from disposing of it. Before the settlement she was competent to dispose of it, by the terms of the settlement she took a step that was not irrevocable for under it she could with the consent of the Trustees regain the property. It seems to me that the argument that she was not competent to dispose after December, 1939, involves the proposition that nobody was competent thereafter to dispose in her lifetime for the Trustees had no power to dispose. It was not, as it might have been, that it could not be established that the Settlor at her death had been competent to dispose. Alternatively, the argument must be that "competent to dispose" means competent to transfer in any way and to whom she pleases without the intervention of anybody. I see no justification for qualifying the expression in this way. I think that the criterion should be: "Was there a way in which she could have made the property once more her own?" Not: "Was there a way in which the Trustee could have frustrated her attempt to regain her property?" If she had obtained the consent of the Trustees to a total revocation of the trust, there being no provision for resettlement the revocation would have been unquestionably valid and there could not in that event have been any question as to her competency to dispose. There is no warrant for importing the conception of unreasonable Trustees in the matter: there is equally good, if not sounder, reason for assuming that the Trustees would have been reasonable persons and I do not believe that the determination of the settlor's competency can be made to depend on any such

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hypothesis. The weapon of veto was undoubtedly a fetter upon the settlor's power of revocation but so was it upon the power of appointment in Re Dilke and Re Phillips and yet repeated references to these cases continue to be made in recent decisions. The distinction between the authority of a Trustee to give or withhold consent to the exercise of a power where his consent is necessary to the validity of the exercise of the power and his authority where his discretion as to the selection of objects of the power is called into play seems to me to be well recognised. In my judgment, Lady Gilbert-Carter was competent to dispose because she could have made the trust fund her own as if no settlement had ever been made. I am not concerned with what the Trustees could, still less might, have done. I think that in popular language she was for practical purposes the owner because by revoking the trust she was free to deal with the trust fund in any way she pleased.

I would have dismissed the appeal.

Nothing has been said in the course of the argument about the nature of the property constituting the trust fund. Although the trust deed was printed with the record the Schedule to it was not. Clause 2 of the trust deed refers to "the trust fund" and Clause 7 to "both real and personal property in the trust fund". Having regard to the definition of property in Section 2 of the Estate and Succession Duties Act, 1941, the accountability of the Appellant should be restricted to that portion of the trust fund which consists of personalty and his liability assessed accordingly.

Dated this 18th day of July, 1958.

(Sgd.) C.V.H. ARCHER,

FEDERAL JUSTICE.

In the Federal Supreme Court.

Appellate Jurisdiction.

No.13.

Order granting Conditional Leave to Appeal to Her Majesty in Council.

1st September, 1958.

No. 13.

ORDER GRANTING CONDITIONAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL.

IN THE FEDERAL SUPREME COURT

ON APPEAL FROM THE FEDERAL SUPREME COURT

(Appellate Jurisdiction)

BARBADOS.

Civil Appeal No.2 of 1958

BETWEEN: TREVOR BOWRING Appellant

- and -

THE COMMISSIONERS OF ESTATE AND SUCCESSION DUTIES Respondent

On the 1st day of September, 1958.

Entered the 1st day of September, 1958.

Before Sir Eric Hallinan, Chief Justice.

UPON the Petition of the above-named Respondent dated the 6th day of August, 1958, preferred unto this Court on the 1st day of September, 1958, for leave to appeal to Her Majesty in Her Majesty's Privy Council against the majority judgment of the Court comprising the Honourable Sir Eric Hallinan, C.J., The Honourable Mr. Justice Rennie and The Honourable Mr. Justice Archer made herein on the 18th day of July, 1958.

UPON READING the said petition, the Affidavit of Lindsay Ercil Ryeburn Gill of the 6th day of August, 1958, and upon hearing Counsel for the Appellant and Counsel for the Respondent

THE COURT DOTH ORDER

That subject to the performance by the said Respondent of the conditions hereinafter mentioned and subject also to the Final Order of this Honourable Court upon the due compliance with such conditions leave to appeal to Her Majesty in Her Majesty's Privy Council against the said judgment of their Lordships of the Federal Supreme Court (Appellate Jurisdiction) be and the same is hereby granted to the Respondent

In the Federal Supreme Court.

Appellate Jurisdiction.

No.13.

Order granting Conditional Leave to Appeal to Her Majesty in Council.

1st September, 1958 - continued.

AND THE COURT DOTH FURTHER ORDER

That the Respondent within a period of 3 months from the date of this order enter into good and sufficient security to the satisfaction of the Registrar in the sum of $2,400 in one or more sureties or deposit into Court the said sum of $2,400 for the due prosecution of the said appeal and for the payment of such costs as may become payable to the Appellant in the event of the Respondent not obtaining an order granting him final leave to appeal or of the appeal being dismissed for non-prosecution or for the part of such costs as may be awarded by Her Majesty Her Heirs and Successors or by the Judicial Committee of the Privy Council to the Appellant on such appeal

AND THIS COURT DOTH FURTHER ORDER

That all costs of and occasioned by the said appeal shall abide the event of the said appeal to Her Majesty's Privy Council if the said appeal shall be allowed or dismissed or shall abide the result of the said appeal in case the said appeal shall stand dismissed for want of prosecution.

AND THIS COURT DOTH FURTHER ORDER

That the Respondent do within 4 months from the date of this order in due course take out all appointments that may be necessary for settling the transcript record in such appeal to enable the Registrar of the Supreme Court to certify that the said Transcript record has been settled and that the provisions of this order on the part of the Respondent have been complied with

AND THIS COURT DOTH FURTHER ORDER

That the Respondent be at liberty to apply at any time within 4 months (exclusive of the months of August and September when the Court will be in long vacation) from the date of this order for Final Leave to appeal as aforesaid on the production of a certificate under the hand of the Registrar of the Supreme Court of due compliance on their part with the conditions of this order

AND THIS COURT DOTH FURTHER ORDER

That the Judgment or order of the Vice-

Chancellor of the 16th day of October, 1956, as well as the Judgment or order of the Federal Supreme Court dated the 18th day of July, 1958, be stayed pending the hearing and final determination of the said appeal to Her Majesty in Her Majesty's Privy Council on the following terms :-

(a) That the Respondent gives to the Appellant a Certificate enabling him to procced to a grant of Probate;

(b) That the Appellant enter into good and sufficient security to the satisfaction of the Registrar of the Court in the sum of $50,000 with one surety in a similar sum or 2 sureties in the sum of $25,000 each upon condition that the bond be void if the Appellant pays to the Respondent all the estate coming into the hands of the said Appellant or the proceeds from the sale thereof less such sum as may be allowed on taxation for the reasonable fees and expenses incurred by the said Appellant for the purpose of the proceedings in this case in the event that the appeal to Her Majesty's Privy Council be allowed.

(Sgd.) A.W. SYMMONDS.
Deputy Registrar.

No. 14.

ORDER GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

IN THE FEDERAL SUPREME COURT

CIVIL APPELLATE JURISDICTION

ON TRANSFER FROM THE WEST INDIAN COURT OF APPEAL

ON APPEAL FROM THE COURT OF CHANCERY BARBADOS.

CIVIL APPEAL NO. 2 of 1958

IN THE MATTER OF THE ESTATE OF GERTRUDE COLMAN GILBERT-CARTER, deceased

- and -

IN THE MATTER OF THE ESTATE AND SUCCESSION DUTIES ACT 1941

In the Federal Supreme Court.

Appellate Jurisdiction.

No.14.

Order granting Final Leave to Appeal to Her Majesty in Council.

14th January, 1959.
- continued.

BETWEEN: TREVOR BOWRING Appellant

- and -

THE COMMISSIONER OF ESTATE AND SUCCESSION DUTIES Respondent

On the 14th day of January, 1959,

Entered the 14th day of January, 1959.

Before: The Honourable Mr. Justice A.B. Rennie.

UPON MOTION made unto the Court this day by Counsel for the above-named Respondent for an Order granting the said Respondent final leave to appeal to Her Majesty in Her Privy Council against the judgment of the Federal Supreme Court dated the 18th day of July, 1958, upon reading the notice of motion filed herein the 17th day of December, 1958, the Affidavit of Lindsay Ercil Ryeburn Gill sworn to the 14th day of January, 1959, and filed herein and the certificate of Algernon Washington Symmonds, the Deputy Registrar of the Federal Supreme Court in Barbados, W.I. dated the 1st day of December, 1958, all filed herein and upon hearing Counsel for the Respondent and Counsel for the Appellant.

THE COURT DOTH ORDER

that final leave be and the same is hereby granted to the said Respondent to appeal to Her Majesty in Her Privy Council against the said judgment of the Federal Supreme Court dated the 18th day of July, 1958,

AND THE COURT DOTH FURTHER ORDER

that the costs of this motion be costs in the cause.

V.I. de L. CARRINGTON,

Deputy Registrar,

Federal Supreme Court.

E X H I B I T S

"A". 1 - REPORT OF CASE OF HIGGINS ET AL v. WHITE. 93 FED. REP. 2ND SERIES 357.

Exhibits
"A". 1
Report of Case of Higgins et al v. White. 93 Fed. Rep. 2nd Series 357.

HIGGINS et al. v. WHITE

No.3272.

Circuit Court of Appeals, First Circuit.

Dec. 8, 1937.

1. TRUSTS - 25(3)

In a trust inter vivos a power reserved to grantor must be by express words of reservation.

2. TRUSTS - 112

The intent of creator of trust controls interpretation of trust instrument.

3. INTERNAL REVENUE - 7(35)

Where declaration of trust named grantor and another as trustees, and empowered trustees, if they should deem it wise to do so, to use corpus for benefit of grantor and her issue or to surrender corpus to grantor, trustees were required, as condition precedent to invasion or surrender of corpus, to determine as trustees, in exercise of fiduciary power, whether they deemed invasion or surrender necessary or advisable, and, hence, income of trust was not taxable to grantor on theory that grantor had power to revest in himself title to corpus (Revenue Acts 1924, 1926, § 219 (g, h), 43 Stat. 275, 44 Stat. 32).

Appeal from the District Court of United States for the District of Massachusetts; Elisha H. Brewster, Judge.

Actions by Clara C. Higgins and by John W. Higgins against Thomas W. White, Collector. From a judgment of the District Court (18 F.Supp. 986) sustaining a demurrer to plaintiff's declaration in each case, plaintiffs appeal.

Reversed and remanded, with directions.

Exhibits

"A". 1

Report of Case of Higgins et al v. White. 93 Fed. Rep. 2nd Series 357 - continued.

Charles M. Rogerson, of Boston, Mass. (Roger W. Hardy, of Boston, Mass., on the brief), for appellants.

Joseph M. Jones, Sp. Asst. to the Atty. Gen. (James W. Morris, Asst. Atty. Gen., and Sewall Key and Norman D. Keller, Sp. Assts. to the Atty. Gen., on the brief), for appellee.

Before BINGHAM, WILSON, and MORTON, Circuit Judges.

WILSON, Circuit Judge.

These two income tax cases, in which Clara C. Higgins and John W. Higgins are the respective plaintiffs, involve the same question and are consolidated in one record on appeal to this court. The actions were separately brought in the District Court for the district of Massachusetts to recover taxes claimed to be erroneously assessed. The government demurred to the plaintiff's declaration in each case, which was sustained. Exceptions were allowed. The following assignment of error is sufficient to raise the sole issue in the cases: That the District Court erred in ruling that the income of the trusts described in the plaintiff's declaration was taxable to the grantor of the trusts under section 219 (g) of the Revenue Act of 1924, 43 Stat. 275, which was re-enacted without change in the Revenue Act of 1926, 44 Stat. 32.

The plaintiff Clara C. Higgins, on June 24, 1924, created certain trusts, naming herself and the Boston Safe Deposit & Trust Company as trustees, and her husband, John W. Higgins, at the same time created similar trusts, each trust providing mutatis mutandis that certain policies of life insurance payable to the creator of the trust should be payable to the trustees named, and also assigning to said trustees certain other property, with the right in said trustees to pay the premiums of said policies out of the property so transferred; also, to use any dividends on said policies to reduce premiums thereon, or to allow said dividends to remain with the insurance company at interest, or to have them added to the policies as paid-up insurance, or to surrender such policies and receive the cash surrender value thereof, or to convert such policies into paid-up policies of life insurance.

The provisions of the declarations of trust in which Clara C. Higgins was the grantor, and also in those in which John W. Higgins was the grantor, that

Exhibits
"A". 1
Report of Case of Higgins et al v. White. 93 Fed. Rep. 2nd Series 357 - continued.

give rise to the questions raised on appeal, are contained in paragraph third of the trust indentures, which reads as follows: "Third: Any funds in the hands of the Trustees which the Trustees shall deem not to be needed to pay premiums, together with any other property which may from time to time be received by them, shall, except as hereinafter provided, be held during the lifetime of John W. Higgins, in trust, to add the net income thereof to the principal and accumulate said net income, provided that if at any time during the continuance of this trust and during the lifetime of said John W. Higgins the Trustees shall deem it wise so to do, they may use any of the funds in their hands specifically including the cash surrender value of said policy for the benefit of Clara C. Higgins and the issue of said John W. Higgins and Clara C. Higgins by paying out to her and them, or any one or more of them, such sums or sum out of the principal as they shall deem necessary or advisable for the comfort, maintenance, support, advancement, education or welfare of said Clara C. Higgins and said issue or any one or more of them, or they may surrender and assign said policy and the trust property held hereunder to said Clara C. Higgins, in which case this trust shall cease and determine."

The decision of this case rests in the proper interpretation of the provisions of this paragraph.

If, as the government contends, the last clause is separate and independent of what has gone before, and the grantor and the other trustee under each trust has the absolute and unconditional power to surrender the trust res at any time to the grantor and terminate the trust, then under sub-divisions (g) and (h) of section 219 of the Revenue Acts of 1924 and 1926, the income of the trust is taxable to the grantor; but if, as the plaintiffs contend, before the trust property may be surrendered to the grantor it must be determined first by the trustees as such, whether they deem it advisable to use a part of the principal of the trusts for the comfort, maintenance, and support of Clara C. Higgins, and mutatis mutandis of John W. Higgins, or the education and welfare of the issue of Clara C. Higgins and John W. Higgins, or to surrender the entire trust property to the grantor of the trusts and thus terminate the trusts, then the trusts do not fall within section 219 (g) or (h) of the 1924 and 1926 acts, which read as follows:

Exhibits
"A". 1
Report of Case of Higgins et al v. White. 93 Fed. Rep. 2nd Series 357 - continued.

"(g) Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to re-vest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor.

"(h) Where any part of the income of a trust may, in the discretion of the grantor of the trust, either alone or in conjunction with any person not a beneficiary of the trust, be distributed to the grantor or be held or accumulated for future distribution to him, or where any part of the income of a trust is or may be applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in paragraph (10) of subdivision (a) of section 214), such part of the income of the trust shall be included in computing the net income of the grantor."

/1/ In a trust inter vivos, a power reserved to a grantor must be by express words of reservation. Thorp, Trustee v. Lund et al., 227 Mass. 474, 476, 116 N.E. 946, Ann.Cas.1918B, 1204; Coolidge et al. v. Loring, Trustee et al., 235 Mass. 220, 223, 126 N.E. 276.

/2, 3/ The intent of the creators of the trusts controls in the interpretation of a trust instrument. An examination of the third clause of the trust instruments in each case we think discloses that the power to dispose of the principal of the trust fund or to terminate the trust is not a broad power unconditionally given to the grantor in conjunction with any person not a beneficiary under the trust, but is a power which can only be exercised by the trustees as such. White v. Poor et al., 1 Cir., 75 F. 2d 35; Id.,296 U.S. 98, 56 S. Ct. 66, 80 L.Ed. 80; Lovett, Trustee v. Farnham et al., 169 Mass. 1, 47 N.E. 246; Sands v. Old Colony Trust Company, 195 Mass. 575, 577, 81 N.E. 300, 12 Ann. Cas. 837; Gardiner v. Rogers, 267 Mass. 274, 166 N. E. 763; Boyden v. Stevens, 285 Mass. 176, 188 N.E. 741. In other words, the trustees must make a determination as trustees that they deem it necessary or advisable to use the principal of the trust funds for the comfort, maintenance, and support of Clara C. Higgins or the education or welfare of any issue of said John W. Higgins and said Clara C.

Exhibits
"A". 1
Report of Case of Higgins et al v. White. 93 Fed. Rep. 2nd Series 357 - continued.

Higgins, or to surrender and assign said policies and the trust property to Clara C. Higgins, or mutatis mutandis to John W. Higgins, in which case the trusts shall cease and determine.

There is nothing contrary to this conclusion in the case of Kaplan et al. v. Commissioner, 1 Cir., 66 F.2d 401. In fact, it supports the plaintiffs' contention in this case to the extent that only in so far as Kaplan had absolute control over the income was it held to be taxable to him; but since he was limited as trustee to the provisions in favor of his wife as cestui que trust, to determine the extent of which the case was sent back, was he exempt from the payment of taxes.

The case of White v. Poor et al., supra, though a different section of the statute is involved, in principle, also sustains the plaintiffs' contention in this case. Any action by Mrs. Sargent in that case when appointed as trustee was not that of a grantor, but as one of the trustees who, together with the other trustees, performed a fiduciary duty in case of a termination of the trust.

In this case neither the income of the trust property nor the trust res was within the absolute and unconditional control of the grantor, either alone or in conjunction with the other trustee. Certain conditions were imposed upon them which they must find existed before they could pay out any part of the principal for the purposes specified therein, or surrender the trust property to the grantor. Their power was a trust power, not an absolute one. Kaplan et al. v. Commissioner, supra; Daisy C. Patterson v. Commissioner, 36 B.T.A. 407, decided August 4, 1937. The provisions of section 219(g) or (h), therefore, are not complied with here.

We think the District Court erred in the interpretation of the trust instrument in holding that the power to terminate the trust and revest the title to the trust property in the settlors was not dependent upon the conditions, the existence of which the trustees were under a fiduciary duty to ascertain. The power to revest the title in the settlors was not one which the creator of the trust could have intended might be exercised at any time the trust company could be persuaded by the donor trustee to exercise it without consulting the interests of the beneficiaries, including the issue of

Exhibits

"A". 1

Report of Case of Higgins et al v. White. 93 Fed.Rep. 2nd Series 357 - continued.

Clara C. Higgins and John W. Higgins, especially since the trust did not ipso facto terminate with the death of the grantor. To hold that it was the intent of the creator of these trusts that, under the third paragraph, they might be terminated at any time by the surrender of the trust property to the grantor without a finding by the trustees that it was necessary or advisable so to do, is contrary to the spirit and purposes expressed in the remainder of the instrument.

It does not follow that a grantor, who is also a trustee, may not be taxed under section 219 (g) or (h) if his right to accumulate income payable to himself in the future, or to revoke a trust, is an absolute power reserved in him in conjunction with a trustee who is not a beneficiary, and does not involve on the part of the grantor the exercise of a fiduciary duty as trustee.

The judgment of the District Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion, with costs of this court.

"A". 2

Report of case of White v. Higgins et al. 116 Fed. Rep. 2nd Series 312.

"A". 2 - REPORT OF CASE OF WHITE v. HIGGINS ET AL. 116 FED. REP. 2ND SERIES 312.

WHITE v. HIGGINS et al.

No.3613.

Circuit Court of Appeals, First Circuit.

Dec. 12, 1940.

1. APPEAL AND ERROR - 1097(1)

The doctrine of "law of the case" is not an inexorable command limiting court's power, but merely expresses the practice of courts generally to refuse to reopen what has been decided.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

Exhibits

"A". 2

Report of case of White v. Higgins et al. 116 Fed. Rep. 2nd Series 312 - continued.

2. APPEAL AND ERROR - 1097(1)

Court's power to reopen points of law already decided on a previous appeal will be exercised sparingly and only to prevent a manifest injustice in a clear instance of previous error.

3. COURTS - 406(1 7/8)

Judgment of Circuit Court of Appeals following its decision on an earlier appeal as being the "law of the case" must stand or fall on its merits upon review by the Supreme Court, since the Circuit Court of Appeals' law of the case is not the Supreme Court's law of the case, and hence, if Circuit Court of Appeals on the second appeal believes its earlier decision was erroneous, it should correct it rather than apply "law of the case" doctrine.

4. INTERNAL REVENUE - 1631

Where question as to whether income from particular trusts was taxable to grantors was fully and fairly presented to Circuit Court of Appeals on first appeal, facts were simple and undisputed, there was no intervening contrary decision of Supreme Court between first and second appeals, and the matter was relatively unimportant under subsequent revenue acts under which income from such trusts would clearly be taxable to grantor, Circuit Court of Appeals would adhere to its earlier decision that the income was not taxable to grantor, as being the "law of the case", notwithstanding court doubted the correctness of its earlier decision. Revenue Acts 1924, 1926, § 219 (g, h), 26 U.S.C.A. Int. Rev.Acts, pages 31, 176; Revenue Act 1932, §§ 166, 167, 26 U.S.C.A. Int.Rev. Act, page 543.

5. APPEAL AND ERROR - 171(1), 882(3)

An appellee may urge, or the appellate court on its own motion may consider, any theory, argument or reason in support of a decision of a lower tribunal, regardless of whether such theory, argument or reason was relied upon or even considered or suggested to the lower tribunal.

6. INTERNAL REVENUE - 1703

Where Circuit Court of Appeals merely held that income from particular trusts was not taxable to

Exhibits

"A". 2

Report of case of White v. Higgins et al. 116 Fed. Rep. 2nd Series 312 - continued.

grantors under particular statute and reversed district court's judgment for tax collector in action against collector to recover income taxes paid, overruled collector's demurrers, and remanded case for further proceedings not inconsistent with the opinion, district court was merely precluded from reconsidering the particular statute as a defense upon the second trial, and the defense that income was taxable to grantors under another statute was open to collector on the second trial. Revenue Acts 1924, 1926, §§ 213(a), 219 (g, h), 26 U.S.C.A. Int.Rev.Acts, pages 19, 31, 163, 176.

7. COURTS - 406 ($1^{7}/8$)

Circuit Court of Appeals on a second appeal would not follow its earlier law of the case where a contrary controlling opinion of the Supreme Court had intervened between the two appeals.

8. INTERNAL REVENUE - 855

In determining whether income of trust is taxable to grantor of trust under blanket statutory provision defining "gross income," the basic inquiry is whether the benefits directly or indirectly retained by the grantor blend so imperceptibly with the normal concept of full ownership that the grantor after the trust has been established may still be treated as the owner of the corpus. Revenue Acts 1924, 1926, § 213(a), 26 U.S.C.A. Int.Rev.Acts, pages 19, 163; 26 U.S.C.A. Int.Rev.Code, § 22(a).

9. INTERNAL REVENUE - 856

The mere fact that the grantor of a trust has made himself trustee with broad power in that capacity to manage the trust estate does not warrant treating the trust income as being income of the grantor under blanket statutory provision defining gross income. Revenue Acts 1924, 1926, § 213(a), 26 U.S.C.A. Int.Rev.Acts, pages 19, 163; 26 U.S.C.A. Int.Rev. Code, § 22(a).

10. INTERNAL REVENUE - 855

The mere fact that the grantor of a trust holds legal title to the corpus as trustee does not preclude taxation of the trust income to the grantor, since his powers as trustee, in conjunction with other provisions of trust instrument, may give him a

Exhibits
"A". 2
Report of case of White v. Higgins et al. 116 Fed. Rep. 2nd Series 312 - continued.

dominion over the corpus substantially equivalent to full ownership. Revenue Acts 1924, 1926, § 213(a), 26 U.S.C.A. Int.Rev.Acts, pages 19, 163; 26 U.S.C.A. Int.Rev.Code, § 22(a).

11. INTERNAL REVENUE - 855

Where wife set up trust and made herself the dominant trustee with broad powers of management, and at any time she could pay over part or all of the corpus to herself individually if she as trustee deemed it advisable for her own best interest or welfare, and wife was ultimate beneficiary if living at time of termination of trust, otherwise members of her family as appointed by her will, trust income was taxable to wife under blanket statutory provision defining gross income, on ground wife remained "owner" of the corpus. Revenue Acts 1924, 1926, § 213(a), 26 U.S.C.A. Int.Rev.Acts, pages 19, 163; 26 U.S.C.A. Int.Rev.Code, § 22(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Owner".

12. INTERNAL REVENUE - 2207

In action to recover income taxes paid, where facts were stipulated and basic issue, as to whether grantor of trust remained owner of corpus so as to warrant taxation of trust income to grantor under blanket statutory provision defining gross income, was determinable solely upon terms of trust instrument, Circuit Court of Appeals on appeal from judgment of district court which had not considered taxability under such statutory provision and so had made no findings on such basic issue, would decide the issue itself and would not remand the case to district court for further findings of fact. Revenue Acts 1924, 1926, § 213(a), 26 U.S.C.A. Int.Rev. Acts, pages 19, 163; 26 U.S.C.A. Int.Rev.Code, § 22(a).

Consolidated appeal from the District Court of the United States for the District of Massachusetts; Hugh D. McLellan, Judge.

Actions by Clara Carter Higgins and another against Thomas W. White, Collector of Internal Revenue, to recover income taxes paid. From judgments

Exhibits

"A". 2

Report of case of White v. Higgins et al. 116 Fed. Rep. 2nd Series 312 - continued.

for plaintiffs, 31 F.Supp. 796, defendant appeals. The actions were consolidated on appeal.

Judgments reversed and cases remanded with directions.

Edward First, Sp. Asst. to Atty. Gen. (J. Louis Monarch, Sp. Asst. to Atty. Gen., Samuel O. Clark, Jr. Asst. Atty. Gen., and Edmund J. Brandon and C. Keefe Hurley, both of Boston, Mass., on the brief), for appellant.

Charles M. Rogerson, of Boston, Mass. (Roger W. Hardy, of Boston, Mass., on the brief), for appellees.

Before MAGRUDER and MAHONEY, Circuit Judges, and PETERS, District Judge.

MAGRUDER, Circuit Judge.

These two actions, consolidated on appeal, were brought to recover back certain income taxes paid for the years 1924 to 1927. They involve identical issues - whether the income of certain trusts is taxable to the grantors under the applicable provisions of the Revenue Acts of 1924, 43 Stat. 253, and of 1926, 44 Stat. 9, 26 U.S.C.A. Int.Rev.Acts, pages 1 et seq., and 145 et seq. The litigation was here before. Higgins v. White, 1 Cir., 93 F.2d 357.

At various times during 1924-1926, inclusive, the appellee Clara C. Higgins created ten funded life insurance trusts to which she transferred securities. Each of the trusts so created also received a life insurance policy upon the life of Clara's husband, John W. Higgins, which had theretofore been applied for by him. Two of the policies were assigned by Mr. Higgins directly to the respective trusts, and the others were assigned by him to his wife who in turn assigned them to the respective trusts.

During the same period, 1924-1926, the appellee John W. Higgins created sixteen funded life insurance trusts to which he transferred securities. Each of the trusts so created also received a life insurance policy upon the life of Clara, which had been applied for by her. Three of these policies in which Mr. Higgins was originally named as absolute beneficiary were assigned by him directly to the rexpective

Exhibits

"A". 2

Report of case of White v. Higgins et al. 116 Fed. Rep. 2nd Series 312 - continued.

trusts, and the other thirteen policies in which the estate of Clara C. Higgins was original beneficiary were assigned to their respective trusts by Mrs. Higgins alone, or jointly with her husband.

All twenty-six trusts are identical except for variations in the policies and securities delivered to the trustees and the dates of execution of the trust instruments.

The trustees named in the wife's trusts were Mrs. Higgins and the Boston Safe Deposit & Trust Company. The trustees named in the husband's trusts were Mr. Higgins and the same trust company. However, it was provided in Article Sixth of each of the trusts that the individual trustee by formal instrument "shall have full power and authority to remove any person who may from time to time be a Trustee hereunder, whether the Corporate or the Individual Trustee, and to appoint another person in his, her or its place, to increase the number of the Trustees hereunder and to appoint additional Trustee or Trustees to fill the place or places so created and to reduce the number of Trustees." In Article Fifth it was provided that "Nothing hereinabove set forth shall be construed to require that there must be two Trustees." No trustee is liable for losses "unless such loss shall happen through his own wilful default."

Other provisions of the trust instruments may be summarized from a typical trust set up by Mrs. Higgins, as follows:

First: The trustees are directed, out of both principal and income of the property transferred to them, to pay the premiums upon the policy on the life of John W. Higgins.

Second: The trustees are empowered "in their sole uncontrolled discretion" to surrender the policy and receive the cash surrender value thereof or to convert the policy into a paid-up policy of life insurance.

Third: "Any funds in the hands of the Trustees which the Trustees shall deem not to be needed to pay premiums, together with any other property which may from time to time be received by them, shall, except as hereinafter provided, be held during the lifetime of John W. Higgins, in trust, to add the

Exhibits

"A". 2

Report of case of White v. Higgins et al. 116 Fed. Rep. 2nd Series 312 - continued.

net income thereof to the principal and accumulate said net income, provided that if at any time during the continuance of this trust and during the lifetime of said John W. Higgins the Trustees shall deem it wise so to do they may use any of the funds in their hands specifically including the cash surrender value of said policy for the benefit of Clara C. Higgins and the issue of said John W. Higgins and Clara C. Higgins by paying out to her and them, or any one or more of them, such sums or sum out of the principal as they shall deem necessary or advisable for the comfort, maintenance, support, advancement, education or welfare of said Clara C. Higgins and said issue or any or more of them, or they may surrender and assign said policy and the trust property held hereunder to said Clara C. Higgins, in which case this trust shall cease and determine."

Fourth: Upon the death of John W. Higgins the proceeds of the insurance policy received by the trustees, together with the other trust property, shall be held in trust for the following uses, namely:

"(a) For a period of three (3) years from the date of the death of John W. Higgins the trustees shall add the net income of the trust property to the principal and accumulate it, except as hereinafter provided. Upon the expiration of said period of three (3) years, the Trustees shall pay the entire trust property at that time in their hands to Clara C. Higgins, if she be living * * * ", otherwise, the property is to be distributed to such of her issue, or the husband, wife, widow or widower of such issue, as she should by her last will appoint, and in default of appointment, to the issue of John and Clara living at that time by right of representation.

"(b) Notwithstanding the foregoing paragraph, the Trustees shall within said period of three (3) years, next following the death of said John W. Higgins, have full and absolute power in their own uncontrolled discretion to use the principal and income of the trust property, in whole or in part, in such a way and for such purposes as they shall think will most promote the best interests and welfare of said Clara C. Higgins or her appointees or the issue of said John W. Higgins and Clara C. Higgins or their appointees. Such sums may be paid

directly to said Clara C. Higgins or to her appointees or to such issue or to their appointees or any or more of them, or may be directly paid by the Trustees in their own uncontrolled discretion."

Articles Fifth and Sixth have been referred to previously.

Seventh: The trustees are given broad powers of management, investment and reinvestment of the trust property. Any of the property may be sold, "at public or private sale without the decree of any court."

The trusts created by Mr. Higgins contain the same provisions, except for interchange of the names of the spouses.

The Commissioner ruled that the income of each of the trusts for the years in question was taxable to the respective grantors, appellees herein, and assessed additional income taxes upon them. The amounts so assessed were paid. Timely claims for refund were made and disallowed, and the present suits were brought within the time limited by the statute.

In each case the Collector filed a demurrer to the plaintiff's declaration in the following terms:

"Now comes the defendant in the above-entitled action and demurs to the plaintiff's declaration upon the ground that such declaration and the matter contained therein in the manner and form as therein set forth are not sufficient to constitute a cause of action for that it does not appear from the plaintiff's declaration that the income received by the trustees during the years 1924, 1925, 1926 and 1927 under the insurance trusts referred to in said declaration was not properly included in the plaintiff's gross income for said years under the provisions of Section 219(g) (h) of the Revenue Acts of 1924 and 1926."

The demurrers were sustained by the District Court and judgments rendered for the defendants. On appeal, we reversed the judgments of the District Court, 18 F.Supp. 986, and our mandates remanded the cases to that court "for further proceedings not inconsistent with the opinion passed down this day." Higgins v. White, 1 Cir., 93 F. 2d 357. The only

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question considered by us was that presented and argued, namely, whether the grantors were taxable under Section 219(g) or (h) of the Revenue Acts of 1924 and 1926.[1] We construed Article Third of the trust instrument, above quoted, as not conferring upon the trustees an absolute power to surrender the trust property to the grantor and thus terminate the trust, but rather as vesting in them a fiduciary power requiring a determination by the trustees that they deemed it necessary or advisable to use the principal for the comfort, maintenance, support, advancement, education or welfare of Clara C. Higgins, or of any issue of her and John W. Higgins, or to surrender and assign the trust property to her. Since this was a power not vested in the grantor as grantor but only in herself as trustee, for so long as she remained a trustee, this court considered that the present was not a case "where the grantor * * * has * * * the power to revest [the corpus] in himself," within the meaning of Section 219(g). A similar conclusion was reached as to Section 219(h).

When the cases went back, the Collector filed an amended answer by consent, and the cases were heard by the District Court upon a stipulation of facts, without a jury. The stipulated facts, which have been summarized in this opinion, did not

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[1] "(g) Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor.

"(h) Where any part of the income of a trust may, in the discretion of the grantor of the trust, either alone or in conjunction with any person not a beneficiary of the trust, be distributed to the grantor or be held or accumulated for future distribution to him * * * such part of the income of the trust shall be included in computing the net income of the grantor." 43 Stat. 277, 44 Stat. 34, 26 U.S.C.A. Int.Rev.Acts, pages 31, 176.

(These sections of the two revenue acts were identical.)

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vary in any substantial particular from the facts as presented upon demurrer to the declarations in the previous appeal.

The Collector renewed his contentions under Section 219(g) and (h), but as to this the District Court was of course bound by our previous decision. The Collector also advanced, as a new contention, that the income of the trusts was taxable to the respective grantors under the basic income tax provision of Section 213(a) of the Revenue Acts of 1924 and 1926.[2] The District Court, 31 F.Supp. 796, 798, declined to consider this new theory of defense. It said:

"Notwithstanding the decision in Chase v. United States, 256 U.S. 1, 41 S.Ct. 417, 65 L.Ed. 801, holding as stated in the headnote that 'The court below, upon retrial following a reversal of its first judgment, may (italics added) entertain a defense not made on the first trial,' I think the practicable thing to do in the case at bar is to treat the decision of the Court of Appeals in the demurrers as decisive for the plaintiffs upon all the issues so far as the District Court is concerned."

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[2] "(a) The term 'gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * * " 43 Stat. 267, 44 Stat. 23, 26 U.S.C.A. Int.Rev.Acts, pages 19, 163.

(These sections of the two revenue acts were identical.)

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Accordingly, judgment was given for the plaintiff in each case. From these judgments the Collector now appeals.

[1, 2] The first question to consider is whether we should upon this second appeal reconsider our previous decision on Section 219(g) and (h). The doctrine of "law of the case" is not an inexorable command. It "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." Messinger v. Anderson, 225 U.S. 436, 444, 32 S. Ct. 739, 740, 56 L.Ed. 1152; Cochran v. M & M Transportation Co., 1 Cir., 110 F.2d 519, 521; Johnson v. Cadillac Motor Car Co., 2 Cir., 261 F. 878, 883-886, 8 A.L.R. 1023; Brown v. Gesellschaft Fur Drahtlose Telegraphie, 70 App.D.C. 94, 104 F.2d 227, 228; Luminous Unit Co. v. Freeman-Sweet Co., 7 Cir., 3 F.2d 577, 580. Though the power exists to reopen the points of law already decided, it is a power which will necessarily be exercised sparingly, and only in a clear instance of previous error, to prevent a manifest injustice. The doctrine of law of the case is normally a salutary one in the interest of economy of effort and of narrowing down the issues in successive stages of litigation. In the absence of exceptional circumstances, it would be unfortunate if on second appeal counsel felt free to argue de novo as a matter of course the points decided on previous appeal. See Great Western Telegraph Co. v. Burnham, 162 U.S. 339, 343, 344, 16 S. Ct. 850, 40 L. Ed. 991.

[3] When the doctrine of law of the case is being invoked in an intermediate appellate court, such as the Circuit Court of Appeals, another consideration enters. After we affirm a judgment on the ground that our decision on an earlier appeal has become the law of the case, the Supreme Court is nevertheless free to take the case on certiorari and reverse our judgment. Panama Railroad Co. v. Napier Shipping Co., 166 U.S. 280, 284, 17 S.Ct. 572, 41 L. Ed. 1004. The Supreme Court frequently does so. Western Union Telegraph Co. v. Czizek, 264 U.S. 281, 44 S.Ct. 328, 68 L.Ed. 682, reversing, 9 Cir., 286 F. 478; American Surety Co. v. Greek Catholic Union, 284 U.S. 563, 52 S.Ct. 235, 76 L.Ed. 490, reversing, 3 Cir., 51 F.2d 1050; Illinois Central R.R. Co. v. Crail, 281 U.S. 57, 50 S.Ct. 180, 74 L.Ed. 699, 67 A.L.R. 1423, reversing, 8 Cir., 31 F.2d 111. Sometimes it does so even where

application for certiorari to review our earlier judgment had been applied for and denied. Burnet v. J. Rogers Flannery & Co., 286 U.S. 524, 52 S.Ct. 497, 76 L.Ed. 1268, reversing, 3 Cir., 54 F.2d 365. Our law of the case is not the Supreme Court's law of the case. Our judgment on the second appeal stands or falls on its merits and has no improved standing before the Supreme Court from the fact that it resulted from an application of our law of the case. This being so, it would seem that if on second appeal we thought our earlier opinion was erroneous, we ought sensibly to set ourselves right, rather than to invite reversal above. But mere doubt on our part is not enough to open up the point for full reconsideration. Often when the decision is originally rendered we have doubts enough. We do the best we can, make our decision and pass on to something else.

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In the cases at bar, this court, as presently constituted, does doubt the correctness of our previous construction of Section 219(g). Considering the practical purposes of taxation, the subsection might well be read, not as requiring that the power to revest be in the grantor as grantor, but as being satisfied where the individual who is the grantor has the practical power to restore the corpus to himself. Where that individual has this power in his capacity as trustee, the vague standard in the trust instrument governing his exercise of fiduciary judgment constitutes little hindrance to him if he wants to get the property back. See Cox v. Commissioner, 10 Cir., 110 F.2d 934, 936, certiorari denied, October 14, 1940, 61 S. Ct. 26, 85 L.Ed. - ; Rollins v. Helvering, 8 Cir., 92 F.2d 390, certiorari denied, 302 U.S. 763, 58 S.Ct. 409, 82 L.Ed. 592. Cf. Commissioner v. Morton, 7 Cir., 108 F.2d 1005. If the question comes to us again in a new case we shall feel free to re-examine it.

[47] But the question was fully and fairly presented to this court on the earlier appeal; the facts were simple and not in dispute; we overlooked no controlling authority; and there has been no intervening decision of the Supreme Court ruling the other way. The point is of shrunken importance, from the standpoint of the revenue, because since the enactment of the Revenue Act of 1932 the income of a trust like those in the cases at bar will clearly be taxable to the grantor. Section 166 of the act, 26 U.S.C.A. Int.Rev.Acts,

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page 543, corresponding to old Section 219(g), now provides for taxation to the grantor not only where the power to revest is in the grantor as such, either alone or in conjunction with any person not having a substantial adverse interest, but also where such power is vested "in any person not having a substantial adverse interest" which would, of course, include a trustee. Moreover, the income of a trust like those here involved would clearly be taxable to the grantor today under Section 167, 26 U.S.C.A. Int.Rev.Acts, page 543, as income which is "held or accumulated for future distribution to the grantor." Cf. Sawtell v. Commissioner, 1 Cir., 82 F.2d 221, 223.

Under these circumstances we shall adhere to our earlier decision on Section 219 as the law of the case.

Appellees next press a technical objection to our consideration of Section 213 on the present appeal.

/5/ The earlier appeal was from judgments for the Collector rendered by the District Court on the ground taken in the demurrers to the complaints, namely, that the income was taxable to the grantors under Section 219. While the applicability of Section 213 was not raised below or argued before this court, it is quite true that we could have considered this section of the law in order to see whether the judgments below should be affirmed as correct in result though rested on an erroneous reason. An appellee may urge, or the appellate court on its own motion may consider, any theory, argument or reason in support of a decision of a lower tribunal whether or not such theory, argument or reason was relied upon, or even considered by or suggested to the court below. Le Tulle v. Scofield, 308 U.S. 415, 60 S.Ct. 313, 84 L.Ed. 355; Helvering v. Gowran, 302 U.S. 238, 245, 58 S.Ct. 154, 82 L.Ed. 224; Rhodes v. Commissioner, 4 Cir., 111 F.2d 53, 56; In re Schwartz, 2 Cir., 89 F.2d 172, 173.

/6/ What we might have done is one thing. What we did do is another. Section 213 was not called to our attention, and our opinion did not consider it - which is not surprising, for that was over a year before the decision in Helvering v. Clifford, 309 U.S. 331, 60 S.Ct. 554, 84 L.Ed. 788, opened up new vistas of tax liability. The mandate of this

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court merely remanded the case for further proceedings not inconsistent with our opinion. Thereafter the District Court permitted the Collector to file an answer[3] and the case came on to be heard again, this time on stipulated facts. Subject to our mandate, which merely foreclosed the reconsideration of Section 219 as a defense, the District Court at that stage was obliged to give judgment according to law; and if under Section 213 as applied to the stipulated facts the income of the trust was taxable to the grantors, judgment should have been given for the Collector. See Chase, Jr., v. United States, 256 U.S. 1, 41 S.Ct. 417, 65 L.Ed. 801; Mutual Life Insurance Co. v. Hill, 193 U.S. 551, 553, 554, 24 S.Ct. 538, 48 L.Ed. 788; Davis v. Crane, 8 Cir., 12 F.2d 355; Balch v. Haas, 8 Cir., 73 F.974, 976, 977.

Chase, Jr., v. United States, supra, is particularly in point. The plaintiff instituted suit for a decree allotting to him certain land on an Indian reservation. The United States moved to dismiss the bill on the ground that its allegations were not sufficient to constitute a cause of action. This motion was sustained and the District Court dismissed the bill, upon the ground that the Act of August 7, 1882, 22 Stat. 341, under which the plaintiff claimed, had been repealed by the Act of March 3, 1893, 27 Stat. 612, 630, - the sole contention advanced by the defendant at that time. Upon appeal, the Circuit Court of Appeals, confining itself to this one question, which was the only one argued by counsel, held that the complaint set forth a cause of action, reversed the decree below and remanded the case to the District Court "with instructions to permit the defendant to answer, if so advised." 8 Cir., 238 F.887, 894. Thereafter, the defendant filed an answer which advanced the contention that the Act of May 11, 1912, 37 Stat. 111, repealed the Act of 1882 so far as the right of the plaintiff to an allotment was concerned. After a trial on the merits, a decree dismissing the suit was entered, and the plaintiff appealed. The Circuit Court of Appeals held that this new contention of the defendant, under the Act of 1912, was well taken, and affirmed the decree. 8 Cir.,

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[3] Whether the District Court was obliged to permit the Collector to file an amended pleading is not now in question; the amendment in fact was allowed "by consent."

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261 F. 833. Specifically the court considered that the contention as to the effect of the Act of 1912 was open to the defendant upon retrial of the Case, despite the fact the the Circuit Court of Appeals upon the former appeal might, if it had thought about it, have affirmed the decree of the District Court upon a different ground from that taken below. Its reversal of that earlier decree decided only what the court purported to decide, namely, that the plaintiff's complaint was not bad for anything appearing in the Act of 1893; it did not become the law of the case that the plaintiff's rights under the Act of 1882 were also unaffected by the Act of 1912. This, despite the fact that the motion to dismiss was characterized as a "general demurrer". 261 F. at 839. Nor was the United States estopped from setting up the new defense by the fact that the Department of Justice was fully advised of the Act of 1912 at the time of the first trial and failed to advance any contention with reference thereto. "To hold that, if counsel does not raise all the questions of law on the first appeal; he may not thereafter raise any new questions of law, would be a very severe rule. There may have been a change of counsel, and many other matters which caused the failure to raise all the applicable questions of law. The question now raised is not inconsistent with but simply an additional reason why the act of 1882 could not be relied upon by appellant as giving him an allotment." 261 F. at 840.

Upon appeal to the Supreme Court /256 U.S. 1, 41 S.Ct. 419, 65 L.Ed. 801/, Chase contended again that the United States "having relied at the first trial upon the single proposition that the Act of 1893 repealed the Act of 1882 and thereby cut off the right of these Indian claimants to allotments, and having failed in that defense, cannot, upon the second trial, abandon that defense and insist that the Act of May 11, 1912, repealed the Act of 1882." In affirming the Circuit Court of Appeals the Supreme Court said (256 U.S. at 10, 41 S.Ct. at 419, 65 L.Ed. 801): "The proposition has a relevant and conclusive application when a judgment of a former action is pleaded but limited application when urged in the same suit, it expresses a practice only and useful as such, but not a limitation of power." It is quite true that if Chase had obtained a decree in his favour at the first trial and this decree had been affirmed on appeal, such decree in any subsequent litigation between the same parties would, on

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familiar principles of res judicata, have been conclusive on Chase's right to the allotment, despite the fact that the United States had a good legal defense which it neglected to set up. But that was not what happened.

Cases like Rhodes v. Commissioner, 4 Cir., 111 F.2d 53, and Commissioner v. Richter, 3 Cir., 114 F.2d 452, certiorari granted, November 18, 1940, 61 S.Ct. 172, 85 L.Ed. - , cited by the taxpayer, are clearly distinguishable. They rest on the proposition that an appellate court must not reverse a judgment or decree below upon a ground not presented to the lower court or considered by it. Whether or not this proposition is universally true (cf. Helvering v. Hormel, 8 Cir., 111 F.2d 1, certiorari granted, October 14, 1940, 61 S.Ct. 35, 85 L.Ed. -), it has no application here, for in the cases at bar the contention that appellees were taxable under Section 213 was presented to the court below, and that court, in rendering the judgments now appealed from, erroneously declined, as we think, to consider such contention on its merits.

[7] But the outcome would be the same, even if our mandate on previous appeal may be interpreted as a direction to the District Court to give judgments for the taxpayers provided they establish the facts alleged in their declarations. Such an interpretation would be based on the argument that in holding that the demurrers to the declarations should not have been sustained, we necessarily decided (whether we realized it or not) that the declarations stated good causes of action notwithstanding anything in Section 219, Section 213, or any other section of the Revenue Act. All this comes to is that our previous decision established as the law of the case that Section 213 does not defeat the claims for refund. But the Circuit Court of Appeals on second appeal certainly would not follow its earlier law of the case when there has intervened between the two appeals a controlling opinion of the Supreme Court. Luminous Unit Co. v. Freeman-Sweet Co., 7 Cir., 3 F.2d 577, 580; Maryland Casualty Co. v. City of South Norfolk, 4 Cir., 54 F.2d 1032, 1039.

It seems that we must deal with Section 213, much as we would like to avoid it until the Supreme Court has had occasion in other cases to elaborate the doctrine of Helvering v. Clifford, 309 U.S. 331, 60 S.Ct. 554, 84 L.Ed. 788. When the income of a

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trust is not taxable to the grantor under the specific provisions of Section 219 (Sections 166 and 167 of the present act, 26 U.S.C.A. Int.Rev.Code §§ 166, 167), it must be recognized that there is a considerable margin of uncertainty as to how far the income is taxable to the grantor under the blanket provisions of Section 213 (Section 22(a) of the present act, 26 U.S.C.A. Int.Rev.Code, § 22(a)). This uncertainty can be narrowed only by subsequent decisions of the Supreme Court.

/8/ The terms of the trust instrument in the Clifford case differ widely in detail from those of the instruments now before us. The Higgins trusts are not short-term trusts, which was an important feature of the Clifford case. But Mr. Justice Douglas pointed out in that case that "no one fact is normally decisive." /309 U.S. 331, 60 S.Ct. 557, 84 L.Ed. 788./ The basic inquiry, as he states it, is whether the benefits directly or indirectly retained by the grantor blend so imperceptibly with the normal concepts of full ownership, that the grantor after the trust has been established may still be treated as the owner of the corpus. "Technical considerations, niceties of the law of trusts or conveyances, or the legal paraphernalia which inventive genius may construct as a refuge from surtaxes should not obscure the basic issue." 309 U.S. at page 334, 60 S.Ct. at page 556, 84 L.Ed. 788.

/9, 10/ Examining a typical trust set up by Mrs. Higgins, what is the extent of her dominion over the corpus? She is the dominant trustee under Article Sixth. She has broad powers of management, of investment and reinvestment, of sale of any of the trust property, either at public or private sale, without the necessity of a court decree. She is liable only for such losses in the trust property as happen through her own "wilful default."

This alone is not enough. There is no statutory warrant for treating the income of a trust as that of the grantor "merely because he has made himself trustee with broad power in that capacity to manage the trust estate." Commissioner v. Branch, 114 F.2d 985, 987, decided by this court October 23, 1940. But on the other hand, taxation of the income to the grantor is not excluded by the mere fact that the grantor holds legal title to the corpus as trustee. His powers as trustee, in conjunction with other provisions of the trust instrument, may give

him a dominion over the corpus substantially equivalent to "full ownership." Helvering v. Clifford makes this clear.

[11] In addition to her powers of management as trustee, Mrs. Higgins is applying the income to pay premiums on a policy of insurance on the life of her husband. The proceeds of this policy, and all other accumulations of trust property, under Article Fourth, upon the expiration of three years after the death of her husband, will be paid to Mrs. Higgins, if living, otherwise as she shall appoint by will to members of her family. Under paragraph (b) of Article Fourth she need not even wait these three years; she may at once pay any or all of the principal or income to herself, if she as trustee thinks that this will most promote her "best interests and welfare."

Furthermore, even before the policy matures by the death of Mr. Higgins, Mrs. Higgins has a practical power over the disposition of the corpus. Under Article Second she may at any time as trustee demand the cash surrender value of the policy. Under Article Third, if she as trustee should deem it advisable for her own "comfort, maintenance, support, advancement, education or welfare," she is empowered to pay over to herself individually the whole or any part of the corpus. Granting that these are fiduciary powers, so were the powers of control over investment which the court regarded as significant in the Clifford case. With such a vague criterion of judgment prescribed in the trust instrument, it is highly improbable that anyone could successfully invoke the power of a court of equity to upset a decision by Mrs. Higgins as trustee to terminate the trust by assignment of the trust property to herself individually. It is equally improbable that anyone of the "intimate family group" would ever attempt to do so. In the Clifford case the court said (309 U.S. at page 335, 60 S.Ct. at page 557, 84 L.Ed. 788) that the grantor "has rather complete assurance that the trust will not effect any substantial change in his economic position. It is hard to imagine that respondent felt himself the poorer after this trust had been executed or, if he did, that it had any rational foundation in fact." This quotation seems applicable to the cases at bar. If the emphasis is on economic realities, the reasons for taxing the income to the grantors in the present cases are at least as strong as in the Clifford case.

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/12/ A point of procedure remains. At several places of its opinion, the Supreme Court in the Clifford case seems to regard the basic issue whether the grantor remains in substance the owner of the corpus as a question of fact, calling for appropriate findings by the trier of fact. Since the issue may depend not only upon an analysis of the terms of the trust but also upon "all the circumstances attendant on its creation and operation" (309 U.S. at 335, 60 S.Ct. at 556, 84 L.Ed. 788), there may be cases where questions strictly of fact are presented. However, in the Clifford case, the considerations mentioned by the court as supporting the conclusion that the grantor remained in substance the owner of the corpus, were all derived from the terms of the trust instrument.

In the present cases the District Court has made no finding either way on the issue whether the grantors remained owners of the corpus of the respective estates, because the court did not think that Section 213 could be considered. But on the record before us, it would not be appropriate to remand the cases for further findings of fact. The underlying facts have been stipulated, and there seems to be nothing outside the terms of the trust instruments bearing on the "basic issue." The District Court is in no better position than we are to draw the ultimate conclusion. An examination of the trust instruments, in the light of the Clifford case and its rationale, leads us to the conclusion that as a matter of law the income of the trusts is taxable to the respective grantors. The taxpayers are not entitled to the claimed refunds.

The judgments of the District Court are reversed and the cases remanded to that court with directions to enter judgment in each case for the defendant.

"A". 3 - REPORT OF CASE OF SYLVESTER v. NEWTON. 321 MASS. 416

Exhibits

"A". 3

Report of case of Sylvester v. Newton. 321 Mass. 416.

JOSEPH S. SYLVESTER, JUNIOR, vs. CLARENCE L. NEWTON, EXECUTOR & OTHERS.

Plymouth. April 8, 1947. - June 6, 1947.

Present: FIELD, C.J., QUA, DOLAN, RONAN, & WILKINS, JJ.

Executor and Administrator, Sale of property. Devise and Legacy, Power of sale. Evidence, Competency, Extrinsic affecting writing. Declaratory Judgment. Probate Court, Declaratory relief.

A petition in equity in a Probate Court by a legatee under a will against the executor and other legatees, although entitled a "petition for instructions," was treated by this court as being what it was in essence and substance, namely, a petition in equity for a declaratory judgment and relief concerning the subject matter of the petition.

Upon a petition in equity in a Probate Court for a declaratory judgment and relief, this court refused to disturb an executor's exercise of broad discretionary powers of sale given him under the will, where it did not appear that his exercise of discretion was arbitrary, capricious and not in good faith.

Evidence of statements by a testator respecting the meaning of provisions in his will was inadmissible where the language of the will was clear and unambiguous.

PETITION, filed in the Probate Court for the county of Plymouth on November 21, 1945.

The case was heard by Davis, J.

J.A. Locke, (M.J. Murphy & C.B. Everberg with him,) for the petitioner.

S.C. Rand, (C.L. Newton & R.S. Sylvester with him,) for the respondents.

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Report of case of Sylvester v. Newton. 321 Mass. 416 - continued.

DOLAN, J. This is a petition, described as one for instructions as to the right of the petitioner "with respect to the purchase of the farm lands and appurtenances thereof" devised and bequeathed under the will of Samuel S. Sylvester, late of Hanover. We treat the petition as being what it is in its essence and substance, namely, a petition for a declaratory judgment as to the rights of the petitioner concerning the subject matter of the petition. E.S. Parks Shellac Co. v. Jones, 265 Mass. 108, 110. Universal Adjustment Corp. v. Midland Bank, Ltd. 281 Mass. 303, 328. Essex Trust Co. v. Averill, ante, 68, 70-71. The case comes before us upon the petitioner's appeal from the decree entered by the judge dismissing the petition.

The evidence is reported, and at the request of the petitioner the judge made a report of the material facts found by him. See G.L. (Ter. Ed.) c.215, § 11. Material facts found by the judge as well as other facts disclosed by the evidence may be summed up as follows: The testator died on January 24, 1944, leaving as his heirs two nieces and six nephews. The petitioner is one of the nephews. The other nephews and the nieces are named together with the executor of the will of the testator as respondents in the present case. The will of the testator was allowed on November 13, 1944, but to be executed in accordance with an agreement of compromise approved by the Probate Court on the same day, and letters testamentary were duly issued to Clarence L. Newton, Esquire, the executor named in the will. The agreement of compromise did not affect in any way the terms of the will with which we are here concerned. We sum them up. By the twenty-fifth article of the will the testator authorized the executor of his will to sell and dispose of both real and personal estate forming a part of the estate at public or private sale; and also to determine what land went with or belonged to his home, and what personal property and personal estate went with or belonged to his home as "distinguished from the farm." The farm property and appurtenances are the properties here involved. As to those properties the testator provided as follows: "If my said brother Edmund Q. Sylvester shall predecease me, and if the farm, live stock, farm equipment and other chattels thereon or connected therewith now owned by my said brother and me as joint tenants, shall form part of my estate, I authorize and empower my executor, my substituted

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Report of case of Sylvester v. Newton. 321 Mass. 416

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executors or my administrators with the will annexed as the case may be, and/or my trustee, original or substituted, if said farm, stock, equipment and other chattels above referred to shall form part of my trust estate, to sell the same as a whole or in parcels at public or private sale, and realizing that it may not be convenient or expedient to sell the same without considerable delay I authorize and empower them in their sole and uncontrolled discretion, if they shall deem it expedient, to operate said farm (even though such operation may be at a loss) or to lease or to let the same or to allow the same to lie idle until such time as they shall deem it wise to sell same and I exonerate them from all liability for any and all losses which may accrue or may be caused to my estate or my trust estate because of anything which they shall do or shall fail to do hereunder, except such as may be caused by their own wilful and intentional wrong. I specifically authorize my said executor, my substituted executors or my administrators with the will annexed, as the case may be, and/or my trustee, original or substituted, as a matter or uncontrolled discretion to sell said farm, live stock, farm equipment and other chattels, or any part or parts thereof, to any of my nephews and nieces hereinbefore named who may desire to purchase the same, at any price and upon any terms which such executor, executors, administrators, or trustee, original or substituted, may consider fair and reasonable in view of my desire to give preference to such nephews and nieces, even though a better price and/or more favorable terms might be obtainable from some other purchaser. If more than one of such nephews and nieces shall indicate a desire so to purchase, I suggest that preference be given to the one of them whose offer may be considered most attractive, taking into consideration the price and terms of payment offered, and the financial responsibility of the offeror." On December 12, 1944, the respondent executor (hereinafter referred to as the executor) sent a notice to the nephews and nieces of the testator, stating in substance that pursuant to the desire set forth in the testator's will he was inviting them, if interested, to submit an offer for the farm, indicating whether the offer included the real estate only, or real estate and farm equipment, or real estate, farm equipment and livestock. On January 5, 1945, the petitioner offered to buy the farm, to include the real estate, "all livestock, the farm truck, and all other miscellaneous farm and personal property," and all the outlying parcels of real

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estate used in the direct operation of the farm. The price offered to be paid by the petitioner was "the sum of $2,000, in cash and $10,000; additional cash, payable in two installments, of $5,000 each, the first and second payments to be made by me out of the first and second installments of my distributive share of my Uncle Sam's estate." On January 23, 1945, the respondent Albert L. Sylvester, also a nephew of the testator, made an offer to the executor to purchase "the property known as the 'Stockbridge Farm' including all land, buildings, livestock, and such personal property as was not included in Samuel S. Sylvester's house, and including such assets as had been liquidated for $14,000 cash. In this offer the Stockbridge Farm was specified to include the 40¾ acres adjacent to the house of Edmund Q. Sylvester, the land between Washington Street, Hanover, and Route 3 and the land west of Route 3. This offer also included an offer to pay $9,000, cash for the Edmund Q. Sylvester house and the 40¾ acres of land adjacent to it lying to the east of Washington St., and not including the livestock." A "difference of opinion" having arisen as to what real estate the executor was authorized to sell, the executor on October 25, 1945, sent a memorandum to the nephews and nieces of the testator, reciting that that question had been adjusted, setting out in detail the particular parcels of real estate, the livestock, all the farm machinery and equipment, the produce and all other personal property then belonging to the farm as the properties which the nephews and nieces were invited to make an offer for, and stating the terms as cash, taxes and insurance to be adjusted as of the date of the delivery of the deed. On October 31, 1945, the petitioner wrote to the executor and submitted an offer for the properties and assets listed in the memorandum of $14,000 in cash. On November 15, 1945, the executor, in accordance with an offer in writing, entered into "a purchase and sale agreement with Albert L. Sylvester, nephew of the deceased, whereby the executor agreed to sell and convey to him the 'Stockbridge Farm,' so called for the sum of Twenty Thousand ($20,000) Dollars." At that time Albert intended to sell the premises to one Albert S. Bigelow and at the time of the hearing in the court below had agreed to do so. The evidence does not show that, when the executor entered into the agreement to sell the premises to Albert, he knew that Albert intended to sell them to anyone. But the executor testified that, had he known at that time that Albert did so intend, he would nevertheless

have accepted the larger offer, that there was enough "spread" so that he would have felt that it was his duty to accept the larger offer, and that he would not consider the offer of the petitioner fair and reasonable, with the information he had, other than the offer of Albert, "until and unless ..... /he/ found that no one else would pay substantially more."

It is the contention of the petitioner that the executor "unjustifiably repudiated the intent of the testator in disregarding the offer of" the petitioner. A consideration of the evidence and of the terms of the will does not support that conclusion. The testator in unambiguous language and unusually broad terms confided to the executor power to sell the farm and equipment in question, or in his sole uncontrolled discretion to operate the farm, even at a loss, or to lease it or to let it lie idle, until such time as he should deem it wise to sell, and exonerated him from all liability for any and all losses that might result, or for anything he might do in the administration of the estate except such as might be caused by his own wilful and intentional wrong. See New England Trust Co. v. Paine, 317 Mass. 542, 548-551. The authority confided by the will of the executor to sell the property involved or any part thereof to any of the nephews or nieces of the testator who might desire to purchase at any price or upon terms that the executor might deem fair and reasonable in view of the testator's desire to give them preference, even though a better price or more reasonable terms might be obtainable, was expressed by the testator to rest in the executor's "uncontrolled" discretion. That is true also concerning the suggestion of the testator that, if more than one of his nephews or nieces indicated a desire to purchase, preference be given to the one of them whose offer might be considered most attractive, taking into consideration the price and terms of payment offered and the financial responsibility of the offeror.

A reading of all the provisions of the will concerning the powers conferred upon the executor demonstrates that, in providing that in the matter of the management of property including its sale the executor was to have sole and uncontrolled discretion, the testator meant just that. It has been long established as matter of law that the judgment of this

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court cannot be substituted for the discretion conferred upon fiduciaries fairly, reasonably and honestly exercised. Amory v. Green, 13 Allen, 413, 416. Eldredge v. Heard, 106 Mass. 579, 582. Proctor v. Heyer, 122 Mass. 525, 529. Restatement: Trusts, § 187, comment e. Scott on Trusts, § 187. See Boyden v. Stevens, 285 Mass. 176, 179. The court will substitute its discretion only when that is necessary to prevent an abuse of discretion. Dumaine v. Dumaine, 301 Mass. 214, 222. In the instant case the only question is whether the exercise of discretion by the executor complained of was arbitrary, capricious and not in good faith. Eustace v. Dickey, 240 Mass. 55, 84. We are of opinion that the proper conclusion upon the evidence is that the discretion of the executor as to the subject matter involved was exercised by him fairly, reasonably, honestly, and in good faith within the broad powers conferred upon him by the will, and was not exercised in violation of or contrary to the intent of the testator as expressed in his will. Consequently the exercise of his discretion by the executor to sell the property in question to the respondent Albert L. Sylvester must stand.

There was no error in the exclusion of evidence offered by the petitioner to show that, prior to entering into the agreement to sell the property to Albert, the executor said that he hoped that the petitioner would get the farm; that he told counsel for the petitioner that he considered $12,000 a fair and reasonable price from a nephew under the terms of the will; that the testator made known to the executor his wishes that the farm, livestock and equipment be sold to the nephew or niece who showed the most interest; and to the effect that the petitioner had asked the manager of the farm to run the farm. The statements in question of the executor were only expressions of good will, and had no binding force. His conduct is to be weighed by what he did under the powers conferred upon him by the will and not by what the testator had said to him. The governing terms of the will are clear and unambiguous. The statements of the testator offered to be proved to show his intention were inadmissible. Tucker v. Seaman's Aid Society, 7 Met. 188. Mahoney v. Grainger, 283 Mass. 189, 191. Adams v. Adams, 308 Mass. 584, 590. No question was raised at the hearing concerning the petitioner's intention to operate the farm property if he obtained title to it.

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The decree entered in the court below dismissing the petition is reversed and a final decree is to be entered adjudging that the petitioner is not entitled under the terms of the will of the testator to require the executor thereof to accept his offer for the purchase of the real estate and personal property in question and to convey or transfer the same to him. Costs and expenses of this appeal may be allowed in the discretion of the Probate Court to the respondents who participated therein, other than the executor (see Frost v. Hunter, 312 Mass. 16, 22).

So ordered.

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Report of case of Boyden v. Stevens. 285 Mass. 176.

"A". 6 - REPORT OF CASE OF BOYDEN v. STEVENS. 285 MASS. 176.

ALBERT BOYDEN, trustee, vs. NATHALIE A. STEVENS.

Suffolk. December 6, 1933. - January 23, 1934.

Present: CROSBY, WAIT, FIELD, DONAHUE & LUMMUS, JJ.

Trust, Construction of instrument creating trust, Discretionary power of trustee, Succeeding trustee, Termination. Probate Court, Petition for instructions.

A testator, who left surviving him his wife and a minor daughter who died the next year leaving the wife as her sole heir at law and next of kin, by his will established a trust, the income of which was to be paid to his wife during her life with power in the discretion of the trustee to pay to her, "or to expend for her benefit or for the maintenance and education of my children or any of them, such portion of the principal as he may deem advisable." After the wife's death, the income was to be applied for the benefit of his children, "if any," or their issue, until his youngest child should reach the age of twenty-five years, or until all should have died, "whichever event first occurs . . . Upon the death of my wife, if no issue of mine survive her . . . .

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the trust property shall be distributed as if I had died intestate." The original trustee having died, his successor, twenty-seven years after the death of the testator, sought instructions. The testator's wife had remarried. Held, that

(1) The succeeding trustee succeeded to the discretionary power of the original trustee as to the use of the principal;

(2) The trustee had discretionary right and power to pay to her who had been the testator's wife, or to expend for her benefit, such portion of the principal of the trust fund as he might deem advisable, even if such payment exhausted the fund, but he should not exercise that right to an extent which would terminate the trust unless, after serious and responsible consideration, he should deem its exercise advisable;

(3) She who had been the testator's wife had no absolute right to require payment to her of the entire fund and thus to have the trust terminate during her life.

Although the trustee in the petition above described felt that it would assist him in the exercise of his discretion to be instructed whether the entire remainder interest was, in the circumstances, vested in her who formerly was the testator's wife, this court felt that the ordinary course should be followed, and declined to give instructions which did not relate to the trustee's present duties.

PETITION, filed in the Probate Court for the county of Suffolk on January 20, 1933, by the trustee under the will of Walter H. Edgerly, late of Boston, for instructions.

The petition was heard by Dolan, J. Material facts and a decree entered by his order are described in the opinion. Both the petitioner and Nathalie A. Stevens appeal from the decree.

The case was submitted on briefs.

F.H. Stevens & J.T. Fahey for the respondent.

C.H. Smith, for the petitioner.

R. Homans, for the guardian ad litem.

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LUMMUS, J. Walter H. Edgerly died in 1906, testate, leaving a widow Nathalie A. Edgerly, now Nathalie A. Stevens, and a daughter Madeline who died in 1907, a minor and unmarried. Any interest of Madeline has passed to the widow as her sole heir at law and next of kin.

The will gave the sum of $50,000, and also the residue of the estate, to Roland W. Boyden "in trust, for the benefit of my wife and children, if any, the income to be paid to my wife during her life. My trustee shall at any time have power in his discretion to pay over to my wife, or to expend for her benefit or for the maintenance and education of my children or any of them, such portion of the principal as he may deem advisable. After the death of my wife, so much of the income as my trustee may deem advisable shall be paid over to, or be expended for the maintenance, education and support of my children, if any, or the issue of any child who may have deceased, until my youngest living child shall reach the age of twenty-five (25) years, or until all of my children shall have deceased, whichever event first occurs. The principal of the trust fund shall then be divided equally among my children then living and the issue of any child who may have deceased, such issue to take such child's share by right of representation. Upon the death of my wife, if no issue of mine survive her, or upon subsequent failure of my issue prior to the time above fixed for distribution of the principal, the trust property shall be distributed as if I had died intestate." Another article of the will provided in part, "The interests of all beneficiaries shall not be subject to attachment or execution, and shall not be anticipated by assignment."

On the death of Mr. Boyden in 1931, the petitioner Albert Boyden was appointed trustee in his stead. He asks to be instructed (1) whether as the successor trustee he may exercise the discretionary power to pay over to Nathalie A. Stevens or to expend for her benefit such portion of the principal as he may deem advisable, (2) whether upon the death of Nathalie A. Stevens the direction that the trust property shall be distributed "as if I had died intestate" gives it to the heirs at the death of the testator (in which case Nathalie A. Stevens owns the entire remainder interest) or to the heirs determined as of the time of distribution (in which case the heirs are unascertained), (3) whether the entire

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beneficial interest in the principal of the trust is now vested in Nathalie A. Stevens, and (4) whether he can properly pay over the entire principal of the trust to Nathalie A. Stevens at the present time. A guardian ad litem was appointed for persons unborn or unascertained, and he argues that all these questions should be decided unfavorably to Nathalie A. Stevens. The Probate Court instructed the trustee that he has the power referred to in the first question, and that as to the fourth question "the trustee is not authorized to pay to her the entire trust estate in one payment, and that the only payments of principal which may properly be made to her are such as the trustee may deem advisable in the reasonable and fair exercise of the discretion reposed in him by the will." On the second and third questions the court declined to give instructions at this time. Both Nathalie A. Stevens and the petitioner appealed.

It is not now questioned that the petitioner has succeeded to the discretionary power of the original trustee. In this respect the Probate Court was right. Stanwood v. Stanwood, 179 Mass. 233, 227. Sells v. Delgado, 186 Mass. 25. Shattuck v. Stickney, 211 Mass. 327. The first question upon which the petitioner asks to be instructed should be answered in favor of his power.

What is his discretionary power? In many of the reported cases a power to pay over principal was conditioned upon a determination by the trustee or other donee of the power that certain facts existed. In Corkery v. Dorsey, 223 Mass. 97, for example, the power was to be exercised "when in the judgment of said O'Callaghan /the trustee/ the said Fay is deserving and in need of aid." See also Lovett v. Farnham, 169 Mass. 1; Allen v. Hunt, 213 Mass. 276; Wright v. Blinn, 225 Mass. 146; Lumbert v. Fisher, 245 Mass. 190; Leonard v. Wheeler, 261 Mass. 130. But such a power may be given unconditionally. Taft v. Taft, 130 Mass. 461. Kent v. Morrison, 153 Mass. 137. Burbank v. Sweeney, 161 Mass. 490. Ford v. Ticknor, 169 Mass. 276. Woodbridge v. Jones, 183 Mass. 549. Goodrich v. Henderson, 221 Mass. 234. Homans v. Foster, 232 Mass. 4, 6, 7, and cases cited. Jones v. Old Colony Trust Co. 251 Mass. 309, 313. Merchants Trust Co. v. Russell, 260 Mass. 162. The present will does not make the power conditional upon the actual existence of any tangible facts or the determination by the trustee that any such facts exist.

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All that is necessary is that the trustee "in his discretion" shall "deem advisable" the payment to Nathalie A. Stevens of the "portion of the principal" that may be under consideration. See Sells v. Delgado, 186 Mass. 25. It is true that even so broad a power as that is not an absolute power without limitation. "There is an implication, when even broad powers are conferred, that they are to be exercised with that soundness of judgment which follows from a due appreciation of trust responsibility. Prudence and reasonableness, not caprice or careless good nature, much less a desire on the part of the trustee to be relieved from trouble or from the possibility of making a foolish investment, furnish the standard of conduct." Corkery v. Dorsey, 223 Mass. 97, 101. See also Wilson v. Wilson, 145 Mass. 490, 492.

There is nothing in the will to prevent the trustee, in a proper exercise of the power, from paying over the entire trust fund at once to Nathalie A. Stevens. The use of the word "portion" does not require that some small fragment of the trust property be retained by the trustee or that the result be accomplished by paying different portions at different times until the whole has been paid over. Cooke v. Farrand, 7 Taunt. 122. Rendlesham v. Meux, 14 Sim. 249, 256, 257. Arthur v. Mackinnon, 11 Ch. D. 385. But the trust must continue during the life of Nathalie A. Stevens, except as the exercise of the power may prevent. Even though she owns the entire remainder, which we do not now decide, Nathalie A. Stevens has no absolute right to have the trust terminated during her life. Claflin v. Claflin, 149 Mass. 19. Young v. Snow, 167 Mass. 287. Danahy v. Noonan, 176 Mass. 467. Welch v. Episcopal Theological School, 189 Mass. 108. Forbes v. Snow, 245 Mass. 85, 93. Abbott v. Williams, 268 Mass. 275, 283. The Trustee has the right to accomplish a termination of the trust by the exercise of the power only in case, after serious and responsible consideration, he shall deem that such an exercise of the power is advisable. The fourth question upon which the petitioner asks to be instructed should be answered in the affirmative, with the qualification already stated.

The petitioner desires instructions as to the second and third questions, already stated, upon which the Probate Court declined to instruct him.

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These questions are, in substance, whether the remainder interest is now vested in Nathalie A. Stevens. Ordinarily the court will instruct a trustee only as to questions with regard to which he has a present duty, and will not advise him as to probalems of the past or the future. Hill v. Moors, 224 Mass. 163, 165. Parkhurst v. Ginn, 228 Mass.159. Swift v. Crocker, 262 Mass. 321, 328. Flye v. Jones, 283 Mass. 136. Occasionally special circumstances have been thought to require a relaxation of this rule. Bowditch v. Andrew, 8 Allen, 339. Old Colony Trust Co. v. Sargent, 235 Mass. 298, 303. In the present case, the trustee thinks that it would assist him in the exercise of his discretion if the question whether the remainder interest is now vested in Nathalie A. Stevens should be adjudicated now. But on the whole we are of opinion that the ordinary course should be followed, and that the Probate Court was right in declining to answer the second and third questions.

Because of our modification of the answer to the fourth question, the final decree is reversed, and the trustee is to be instructed upon the first and fourth questions in accordance with this opinion. The matter of costs and expenses is to be in the discretion of the Probate Court.

Ordered accordingly.

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Report of case of Damon v. Damon. 312 Mass. 268.

"A". 4 - REPORT OF CASE OF DAMON v. DAMON. 312 MASS. 268.

RALPH E. DAMON vs. MURRAY C. DAMON, trustee.

Worcester. September 21, 1942 - October 28, 1942.

Present: FIELD, C.J., DONAHUE, DOLAN, COX, & RONAN, JJ.

Trust, Termination. Equity Pleading and Practice, Appeal.

Upon an appeal from a decree of a Probate Court where the record did not include a report of evidence or a statement of material facts found by the judge,

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certain documentary evidence was improperly printed as a part of the record.

The beneficiary of a testamentary trust was not entitled as of right to termination thereof and to immediate possession of the principal where the testator's directions to the trustee were to "pay over to, or for the benefit of" the beneficiary "the income thereof, and also to pay over to" him "such portions of the principal, and at such times, as my said trustee shall determine; with full power to pay over to the" beneficiary "all of said principal whenever in the opinion of said trustee it is desirable so to do."

PETITION, filed in the Probate Court for the county of Worcester on April 22, 1941.

The case was heard by Atwood, J.

I.E. Erb, for the petitioner.

C.D. Bent, (J.W. Healey with him,) for the respondent.

DOLAN, J. This is an appeal from a decree, entered in the Probate Court, dismissing a petition for the termination of a trust created under the will of Mary M. Damon, late of Leominster, deceased. The will is dated November 17, 1920, and was admitted to probate on July 10, 1929.

The petitioner and the respondent are sons of the deceased. Under the first article of the will the testatrix bequeathed and devised one fourth of her estate to her daughter May, and under the second article one fourth to her son Murray, the respondent. By article third of the will the testatrix gave one fourth of her estate to the respondent in trust as follows: "To my son Murray C. Damon one-fourth of all my estate, real and personal, of every kind and description, or to which, at my decease, I may be in any way entitled, in trust, nevertheless, as follows: To invest the same and pay over to, or for the benefit of, my son Ralph E. Damon the income thereof, and also to pay over to said Ralph E. Damon such portions of the principal, and at such times, as my said trustee shall determine; with full power to pay over to the said Ralph all of said principal whenever in the opinion of said trustee it is desirable so to do. I hereby authorize the said Muraay,

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in case he may desire to resign the office of trustee, or in case he declines to accept the office, to nominate a person to act in his place, the said person to have all the powers herein given to the said Murray, upon the appointment by the Probate Court of said person, and said person's qualification as trustee. In creating this trust I wish my son Ralph to understand that I am in no way reflecting upon him or his ability to handle the funds herein left for his benefit, but I am doing this because of certain conditions now existing, which I trust he will understand." Out of the remaining fourth the testatrix provided for certain general legacies outright or in trust, and directed that the residue of her estate be held in trust, the income therefrom to be paid to her daughter May during her life, and that upon her death the amount so held in trust should be paid over to her sons, the petitioner and the respondent here, or the survivor of them, and in the event neither of them was living at the death of May, that "said property" be paid over to her (the testatrix's) grandchildren then living, "to be divided equally among them; free of all trusts."

The evidence is not reported and the judge made no report of material facts found by him. There are printed in the record certain certified copies of records of the Superior Court relating to divorce proceedings in 1920 and 1921 between the petitioner and his then wife. There is nothing in the record to show that the documentary evidence just referred to was all the evidence presented to the judge at the hearing before him. It follows that the copies of the records of the Superior Court are not properly a part of the record on appeal and cannot be considered by us. Romanausky v. Skutulas, 258 Mass. 190, 193, 194. Gallagher v. Phinney, 284 Mass. 255, 257.

It is the contention of the petitioner that the testatrix intended to give him full and complete ownership of the trust fund created for his benefit, that he is the sole and absolute owner of the trust estate, that his interest is in no way limited to his life, and that he is entitled to the immediate possession of the trust fund.

We deem it unnecessary to decide whether the provisions of the trust created for the benefit of the petitioner gave him a vested and absolute estate. Even if that be assumed, without so deciding, it would not follow that the trust must now be terminated at his request. In this respect the case is

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governed by Claflin v. Claflin, 149 Mass. 19, where the testator gave one third of the residue of his personal estate to trustees to pay $10,000 to his son when the latter attained the age of twenty-one years, a like sum when he became twenty-five years of age, and the balance when he reached the age of thirty years. Having attained the age of twenty-one years and having received $10,000, the son brought a bill in equity to compel the trustees to pay to him the remainder of the trust fund. Holding that the son had an absolute vested interest in the trust and that his interest was alienable by him, the court nevertheless held that nothing had happened that the testator did not anticipate and for which he had not made provisions, and that it was plainly the will of the testator that"neither the income nor any part of the principal should now be paid to the plaintiff." (Page 23.) The result reached in that case rested upon the doctrine that a testator has a right to dispose of his own property with such restrictions and limitations not repugnant to law as he sees fit, and that his intentions ought to be carried out unless they contravene some positive rule of law, or are against public policy. So here, under like principles the intention of the testatrix manifested in plain language must be given effect even if the trust be considered as one merely postponing enjoyment.

In the present case, moreover, the powers conferred upon the trustee with relation to the payment of principal to the petitioner are broader than those that were conferred upon the trustees in the Claflin case, where no discretion was conferred upon them and it was their duty to obey the directions of the testator to make payments to the beneficiary at fixed times.

In the present case the provisions for payment of principal to the petitioner are made to rest in the discretion of the trustee. By conferring upon him the power to pay over to the petitioner all of the principal of the trust estate whenever, in the opinion of the trustee, it was desirable to do so, the testatrix in effect conferred upon him discretion to terminate the trust during the life of the petitioner, and it is generally held that, where the trust is a discretionary one, the beneficiary cannot compel the termination of the trust even though he is the sole beneficiary and sui juris. 3 Scott, Trusts, § 337.4 and cases cited. Boyden v. Stevens, 285 Mass.

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176, 180, and cases cited. In the case just cited it is said, in substance, that where, as in the present case, a trustee has discretionary power to pay over any part or the whole of the principal of the trust estate to the beneficiary whenever he deems it advisable, all that is necessary is that the trustee in the exercise of sound judgment, which follows from a due appreciation of trust responsibility, shall deem it advisable to pay over the principal of the trust estate, but that the trust must continue during the life of the beneficiary except as the trustee in the exercise of the power may prevent, and that even though the beneficiary may own the remainder, the beneficiary has no absolute right to have the trust terminated during her life. These principles supported by the authorities cited in the Boyden case apply equally in the case at bar, where the provisions of the trust are not repugnant to law or contrary to public policy and there is nothing to show that the trustee has not been exercising his discretion with "that soundness of judgment which follows from a due appreciation of trust responsibility." Boyden v. Stevens, 285 Mass. 176, 179, 180. See Sears v. Choate, 146 Mass. 395; Spring's Estate, 216 Penn. St. 529.

Decree affirmed.

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Report of case of Berry v. Kyes. 304 Mass. 56.

"A". 5 - REPORT OF CASE OF BERRY v. KYES. 304 MASS. 56.

WALTER J. BERRY, administrator, vs. MATILDA CATHERINE KYES, administratrix.

Suffolk. May 4, 22, 1939 - September 14, 1939.

Present: FIELD, C.J., QUA, DOLAN, COX, & RONNAN, JJ.

Trust, Discretionary powers of trustee, Use of principal, Constructive, Proceedings to enforce trust, Beneficiary, What constitutes. Fruad. Equity Jurisdiction, Suit to enforce trust. Equity Pleading and Practice, Parties. Husband and Wife. Gift.

Evidence respecting payments exhausting the principal of a trust fund, made by the trustee to a life

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beneficiary during seven years, did not require a finding that they were procured through fraudulent representations by the beneficiary to the trustee or were in excess of the trustee's full discretionary power to make such payments.

The administrator of the estate of a beneficiary of a trust had no right to require an accounting in equity by the administrator of the estate of the beneficiary's wife to whom, it was alleged, he had paid principal of the trust which he fraudulently had induced the trustee to pay him, where it appeared that by the provisions of the trust principal unpaid at his death was to be paid to other parties.

The administrator of the estate of a wife who survived her husband was under no duty to account to the administrator of his estate respecting property standing in her name or their joint names after his death and not shown not to have been a gift to her from him.

PETITION IN EQUITY, filed in the Probate Court for the county of Suffolk on February 19, 1938.

After a hearing by Mahoney, J., the petition was dismissed. The petitioner appealed.

S.R. Wrightington, (F.M. Carroll with him,) for the petitioner.

W.F. McDonough, for the respondent, submitted a brief.

RONAN, J. This is a petition for an accounting, brought by the administrator of the estate of Walter M. Berry against the administratrix of the estate of Mary F. Berry, who was the wife of Walter M. Berry. The parties were married on February 18, 1917. Berry had been retired as a police officer in 1907 and had received a pension of $50 a month until his death on August 1, 1933. He had been employed from November, 1920, until July, 1932, as a collector for a furniture company, receiving from $20 to $25 a week, together with an allowance for the use of his automobile. Mrs. Berry at the time of her marriage was engaged in conducting a lodging house. They had no children. Berry was survived by his wife and three children by a former marriage. Mrs. Berry never took out any administration on her husband's estate. She died March 23, 1937.

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The petitioner contended that Walter M. Berry, by means of false representations, induced the trustee under the will of his mother to pay him all the principal of a trust created by her for his benefit; that such payment constituted a breach of the trust; that the wife received these trust funds; that certain savings bank deposits and cooperative bank shares, some in the joint names of the husband and wife and some in her name alone, are the property of the estate of the husband: and that the estate of the wife is liable by reason of her intermeddling with the assets of her husband's estate without having been appointed administratrix of it. The petitioner appealed from the dismissal of the petition by the Probate Court.

We have a full report of the evidence, which is both oral and documentary. The judge made no findings of material facts but his decision dismissing the petition imports a finding of every fact essential to support his conclusion. Durfee v. Durfee, 293 Mass. 472. Klefbeck v. Dous, 302 Mass. 383. A judge who has seen and heard the witnesses is in a better position to determine their credibility than is a court which is confined to the printed record. The situation is different in regard to findings made upon written evidence. In that respect this court stands in the same position as did the trial judge, and reaches its own conclusion unaffected by the findings made by the trial judge. Harvey-Watts Co. v. Worcester Umbrella Co. 193 Mass. 138. Glass v. Glass, 260 Mass. 562. Rodrigues v. Rodrigues, 286 Mass. 77. Hopkins v. Hopkins, 287 Mass. 542. The case, however, is to be decided upon the entire evidence, and findings of fact based wholly or partly upon oral testimony are not to be set aside unless plainly wrong. Edwards v. Cockburn, 264 Mass. 112. Bratt v. Cox, 290 Mass. 553. Malden Trust Co. v. Brooks, 291 Mass. 273.

Berry's mother died on September 30, 1922. Her will left one third of the residue of her estate in trust for her son, Walter M. Berry, who was to have the income during his life, and upon his death the principal was to be paid "to his issue living at his decease by right of representation." A codicil modifying this trust contained the provision: "I authorize my trustee for the time being, in his or its discretion to pay from time to time to my son Walter M. Berry or to apply for his benefit such portions of the principal of the trust fund provided for

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him in my said Will as my trustee for the time being may deem expedient, it being my intention to leave entirely to the discretion of my trustee for the time being the advisability of making such payments, and the times when, and the amounts in which such payments, if any, shall be made." A Boston bank was appointed trustee. Berry's counsel in July, 1924, wrote the trustee requesting it to pay $2,500 in order that Berry could discharge a mortgage of $2,000 on the house in which he lived, and to enable him to pay some debts. This letter, which was also signed by Berry, further stated that Berry had no ready money; that he was dependent upon his pension and what he earned from the furniture company; and that he had been ill and was not in good health. The requested payment was made by the trustee. The mortgage was discharged on July 31, 1924. It was on the house in which Berry and his wife resided. The title stood in the name of the wife but Berry and his wife had signed the mortgage and the note that it secured. Similar letters, some from counsel and some from Berry, followed, making other requests for payments upon the trustee. The trustee, as shown by its accounts filed in the Probate Court, made payments, commencing with July 30, 1924, and ending on June 27, 1931, of the entire trust fund amounting to $7,562.

The trustee was bound to comply with the provisions of the will. It was 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. Kimball v. Whitney, 233 Mass. 321. State Street Trust Co. v. Walker, 259 Mass. 578. Exchange Trust Co. v. Doudera, 270 Mass. 227. Creed v. McAleer, 275 Mass. 353.

One who receives trust property, with notice that its delivery constitutes a breach of trust, holds the property as a constructive trustee for those who are entitled to have it. The transferee of such a person, who takes with such notice or without consideration, has no greater rights, and likewise becomes a constructive trustee liable to reconvey the property or, if unable to do so, to pay the owner the proceeds or to compensate him for its value. Otis v. Otis, 167 Mass. 245. Sargent v. Wood, 196 Mass. 1. Allen v. Stewart, 214 Mass. 109. Locke v. Old Colony

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Trust Co. 289 Mass. 245. Jones v. Jones, 297 Mass. 198. Jones v. Swift, 300 Mass. 177. Am. Law Inst. Restatement: Trusts, §§ 289, 291, 292.

The measure of discretion possessed by the trustee must be determined by the provisions of the will, construed in accordance with the established principles of law. The testatrix left the advisability of making payments of principal as to both amounts and times entirely to the discretion of the trustee. The power was not unlimited and it could not be exercised unreasonably, arbitrarily or capriciously. The authority conferred must be regarded as the means that the testatrix selected and deemed appropriate to effectuate the accomplishment of the general purpose for which the trust was created. She did not, however, expressly condition the exercise of the discretion granted upon the happening of any contingency or upon the existence of any particular facts. Corkery v. Dorsey, 223 Mass. 97. Boyden v. Stevens, 285 Mass. 176, 179. Cronan v. Cronan, 286 Mass. 497. Old Colony Trust Co. v. Rhodes, 299 Mass. 390. If the trustee, possessing the broad powers conferred upon it by her will, in its sound judgment and prudent discretion concluded that it was advisable to make payments of the entire principal, over a course of years, it was authorized to do so. Leverett v. Barnwell, 214 Mass. 105. Boyden v. Stevens, 285 Mass. 176. Dumaine v. Dumaine, 301 Mass. 214. No representative of the corporate trustee testified as to the reasons that prompted it to pay over the principal of the trust. Some of the payments followed letters from Berry and his counsel, while others were made upon the signing by Berry of what appears to have been the usual form of a request furnished by the trustee. The first payment of $2,500 was the largest, and it is evident that $2,000 of that sum was paid for a discharge of a mortgage upon the house in which Berry lived. The balance of the trust fund, amounting to approximately $5,000, was paid to him in the course of the next seven years. The petitioner concedes in his brief that the codicil may have been sufficient authority to the trustee to make these payments to Berry, yet he contends that such payments were induced by the false representations of Berry and constituted, as against the remaindermen, a misappropriation of the trust funds. Whether the representations of Berry were fraudulent and whether they induced the trustee to make these payments were questions of fact for the determination of the judge of probate. The first

payment was made on the same date as the letter. Whether Berry furnished additional information to the trustee, or what knowledge the latter had before it made the payments, is not disclosed by the record. The mere exercise of its admitted power to pay out of the trust funds did not, upon this record, constitute a breach of trust and we cannot say that the judge was wrong in finding, as he must have found in dismissing the petition, that the petitioner had failed to sustain the burden of proving that the payments were actuated by the fraud of Berry. Harvey v. Squire, 217 Mass. 411, 415. Phinney v. Friedman, 224 Mass. 531. Barnett v. Handy, 243 Mass. 446, 447, 448. Butler v. Martin, 247 Mass. 169,173. Willett v. Herrick, 258 Mass. 585, 596, 597. Wiley v. Simons, 259 Mass. 159. Zintz v. Golub, 260 Mass. 178. Hoftye v. Kelley, 262 Mass. 573. Rosenberg v. Rome, 275 Mass. 64, 67. Picard v. Allan, 285 Mass. 15, 17. Forman v. Hamilburg, 300 Mass. 138, 141. Sherburne v. Meade, 303 Mass. 356.

A short answer to the petitioner's contention is that, as administrator of his father's estate, he has no standing to challenge the validity of these payments. The estate has no interest in the administration of the trust or in the restitution of the trust property. The remaindermen and the trustee were the proper parties to assert such claims. Dalton v. Savage, 9 Met. 28. Warner v. Morse, 149 Mass. 400. Moore v. Mansfield, 248 Mass. 210. Tingley v. North Middlesex Savings Bank, 266 Mass. 337. The petitioner as an individual was one of the remaindermen, and all of them testified in support of the petition which was evidently brought for their benefit. We have discussed the matter simply because, after two complete and separate hearings, it is apparent that the respondent cannot be charged as constructive trustee on account of any property received by Berry from the trust established by his mother's will.

The petitioner did not show that his estate has proprietary interest in any of the savings bank accounts or cooperative bank shares which stood in the joint names of his intestate and Mrs. Berry or in the name of the latter alone. Even if some of the money might have come from Berry, his wife was not shown to have acted without his consent in making the deposits or in purchasing the bank shares. And the same is true of the purchase and sale of two lots of telephone stock, which stood in the joint names.

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The profits secured for the sale of the first lot were nearly equal to the loss sustained by a sale of the second lot. The parties were husband and wife, and the evidence was clearly insufficient to overcome the presumption that, whatever money of the husband entered into any of these transactions, it was an advancement, settlement or gift to the wife. Pollock v. Pollock, 223 Mass. 382, 384. Daniels v. Daniels, 240 Mass. 380, 385. Scanzo v. Morano, 284 Mass. 188. Hogan v. Hogan, 286 Mass. 524. Moat v. Moat, 301 Mass. 469, 471.

The petitioner did not show that the wife had received any property in trust for her husband, and therefore the cases upon which he relies enunciating the principle that the burden is upon a trustee to account are inapplicable. Smith v. Smith, 222 Mass. 102, 106. Colburn v. Hodgdon, 241 Mass. 183, 192. Pappathanos v. Coakley, 263 Mass. 401, 408.

There was nothing in the documentary evidence, which consisted principally of the records of the various banks and the telephone company showing the opening and closing of various joint accounts and the acquisition and disposal of bank shares and stock, to warrant a finding that the husband's estate had any interest in the accounts or the securities. The evidence did not show that the husband and wife did not freely and voluntarily enter into an arrangement which included the making of the deposits and the acquisition of the securities. The names in which the accounts and securities stood were not conclusive in determining the rights of the parties. The petitioner did not prove that the property was put in the names of both as a matter of convenience for the husband; or that the wife held as trustee for him; or that he never intended to give her any rights in the property; or that on some other ground she never acquired an interest therein. The case is clearly distinguishable from Bradford v. Eastman, 229 Mass. 499, Battles v. Millbury Savings Bank, 250 Mass. 180, Lukey v. Parks, 279 Mass. 244, Moreau v. Moreau, 250 Mass. 110, Eddy v. Eddy, 281 Mass. 156, and Greeley v. O'Connor, 294 Mass. 527. The various joint transactions in which the husband and wife participated and the use and management of the proceeds while both were alive warranted a finding that he intended to give her a present interest in the property standing in their names which, upon his death, would ripen into full and complete ownership. Holyoke National Bank v.

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Bailey, 273 Mass. 551. Splaine v. Morrissey, 282 Mass. 217. Coolidge v. Brown, 286 Mass. 504. Goldston v. Randolph, 293 Mass. 253. Batal v. Buss, 293 Mass. 329. Gibbons v. Gibbons, 296 Mass. 89. Castle v. Wightman, 303 Mass. 74. Sullivan v. Hudgins, 303 Mass. 442.

There was evidence that Berry in 1932 had $2,000, which he kept in a safe at his home. If the judge considered such testimony as credible, then there was nothing to show what Berry did with this money or that it was in his possession at the time of his death. Malden Trust Co. v. George, 303 Mass. 528.

We cannot say that the conclusion of the judge that no assets of the husband's estate were shown to have been included in the estate of the wife was wrong. The decree dismissing the petition was right.

Decree affirmed with costs.

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"D". 1 - REPORT OF CASE OF SALTONSTALL v. TREASURER & RECEIVER GENERAL. 256 MASS. 519.

LEVERETT SALTONSTALL & OTHERS, trustees, vs. TREASURER AND RECEIVER GENERAL & OTHERS.

Suffolk. January 18, 1926 - June 29, 1926.

Present: RUGG, C.J., PIERCE, CROSBY, WAIT, & SANDERSON, JJ.

Tax, On legacies and successions. Constitutional Law, Taxation. Trust, Taxation of right of succession to interest accruing on death of donor. Words, "Succession."

An owner of property in 1905-1907 transferred it to trustees in trust, in substance to pay him the income during his life, after the death of himself and his wife to pay the income in equal shares to a son and a daughter with spendthrift trust provisions as to each, and after the death of each child to pay income to the surviving issue

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of such child and ultimately to divide the principal, with gifts over in default of issue. It also was provided that the terms and provisions of the trust instrument might be changed and the trusts terminated by writings signed by the donor and by one or more of the trustees. By an amendment, the trustees were given discretionary power to apply the share of the son for his benefit, or to pay it to his guardian, or to accumulate it. The donor died in 1920, having terminated the trust under its provisions only as to a portion of the fund. The trustees sought instructions as to their duty respecting taxes claimed by the Commonwealth. Held, that

(1) The interests of the children of the donor were rights to income which became their absolute property only when paid to them or appropriated for their benefit, and in the case of the son, such payment or application was subject to the discretion of the trustees, who might pay him nothing;

(2) "Succession," as that term is used in Sts. 1909, c.490, Part IV, §§ 1, 25; c.527, § 8; 1914, c.563; 1916, c.268, §§ 1, 4, included as an essential element the entering into possession and enjoyment of property by the beneficiary;

(3) The terms of the trust instrument as to change and termination of the several trusts by concerted action of the donor and one trustee included in substance and effect a power of appointment within the meaning of St. 1909, c.527, § 8, the donor of the trust being himself "donee of such power" within the provisions of the statute;

(4) Such power to change or terminate the trust not having been exercised during the life of the founder of the trust, who was a "donee of such power" under the statute, and not being capable of being exercised after his death, St. 1909, c.527, § 8, authorized an excise upon that part of the commodity of succession which consisted of the vesting of the property in possession and enjoyment in the daughter and son as of the date of the death of their father;

(5) In such excise, there was no taking of property without due process of law nor impairing of the obligations of any contract in contravention

of the Fourteenth Amendment to the Constitution of the United States.

The founder and all of the beneficiaries and the trustees of the trust above described were residents of this Commonwealth, all cash and securities were kept here and the trust always had been managed here; certain shares in real estate trusts in Illinois were found by a single justice to be personalty; part of the securities were shares of stock in foreign corporations; the instrument of trust was a Massachusetts document and one of its provisions was that it "should be construed and take effect in all respects according to the law of Massachusetts and in the same manner as if all real and personal estate comprised in it were situate in Massachusetts and governed by the law of that State." Held, that the element of succession on which the excise was levied took place in this Commonwealth, with respect to property which was made subject to our excise tax upon the commodity of succession, and was within the jurisdiction of this Commonwealth.

BILL IN EQUITY for instructions, filed in the Supreme Judicial Court for the county of Suffolk on January 31, 1923, by trustees under an indenture of trust made by Peter C. Brooks, who died on January 27, 1920.

The suit was heard by Wait, J., who found the facts stated in the opinion and reported the suit to the full court for determination.

A.D. Hill, for the plaintiff trustees, stated the case.

T. Hunt, for the individual defendants.

E.H. Abbot, Jr., for the defendant Treasurer and Receiver General.

RUGG, C.J. This is a suit in equity by trustees holding property under an indenture of trust, asking for instructions as to their duty respecting certain excise taxes claimed by the Commonwealth. In 1905, 1906, and 1907, Peter C. Brooks transferred to the plaintiffs or their predecessors property of cinsiderable value upon enumerated trusts in substance as follows, so far as here material: (1) To pay the income to Brooks during his life or to allow

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it to accumulate at his option. (2) After the death of himself and his wife to pay the income in equal shares to his children, Mrs. Saltonstall and Lawrence Brooks upon spendthrift trust provisions as to each child, (modified by later amendment so as to give to the trustees in addition discretionary power to apply the share of the son for his benefit, or to pay it to guardians, or to accumulate it). (3) After the death of each child, to pay the income to surviving issue of such child and ultimately to divide the principal, with gifts over in default of issue. The terms and provisions of the trust instrument might be changed and the trusts terminated by writings signed by Brooks and by one or more of the trustees. Mr. Brooks died January 27, 1920, having survived his wife and being survived by both his children. The trust instrument was changed as already pointed out with respect to the son. The trust also was terminated as to certain shares of stock and the trustees required to transfer them to the daughter. In 1919 the trust instrument was further amended by providing that during the life of Brooks the entire income should be accumulated and added to the principal.

At the times of the transfers of property to the trustees in 1905, 1906, and 1907, there was no statute imposing an inheritance tax upon property passing to children. The point to be decided is whether the shares of the children of Brooks under the trust are subject to an excise to be assessed as of the date of his death. The interest which the daughter took under the trust instrument was not an absolute right to the designated share of the income with the power of alienating it in advance, but only the right to receive that share of income, which became her absolute property only upon payment to her, and not before. Broadway National Bank v. Adams, 133 Mass. 170, 173. Boston Safe Deposit & Trust Co. v. Collier, 222 Mass. 390. Haskell v. Haskell, 234 Mass. 442. The interest which the son took was more attenuated because, in addition to the spendthrift trust, discretion was validly vested in the trustees to make expenditures themselves for his benefit and withhold the balance of income and add it to the principal. Foster v. Foster, 133 Mass. 179. Brown v. Lumbert, 221 Mass. 419. Wright v. Blinn, 225 Mass. 146.

The governing statutes are as follows: St.1916, c.268, § 1, amending the preexisting general excise

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tax law on successions, St. 1909, c.490, Part IV, § 1, so as to read in its parts material to the case at bar, in these words: "All property within the jurisdiction of the Commonwealth, corporeal or incorporeal, and any interest therein, belonging to inhabitants of the Commonwealth, and all real estate within the Commonwealth, or any interest therein, . . . which shall pass by will, or by the laws regulating intestate succession, or by deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor or donor, . . . shall be subject to a tax . . . " (See now G.L. c.65, § 1.) By § 4 of said c.268 it was provided: "This act shall take effect upon its passage, but it shall apply only to property or interests therein passing or accruing upon the death of persons who die subsequently to the passage hereof." See G.L. c.65, § 36. St. 1914, c.563, amended the preexisting general excise tax law on successions, St.1909, c.490, Part IV, § 25, so as to read: "This part shall not apply to estates of persons deceased prior to the date when chapter five hundred and sixty-three of the acts of the year nineteen hundred and seven took effect, nor to property passing by deed, grant, sale or gift made or intended to take effect in possession or enjoyment after the death of the grantor when such death occurred prior to said date; but said estates shall remain subject to the provisions of law in force prior to the passage of said chapter." See G.L. c.65, § 36. It was provided by St. 1909, c.527, § 8, that "Whenever any person shall exercise a power of appointment derived from any disposition of property made prior to September first, nineteen hundred and seven, such appointment when made shall be deemed to be a disposition of property by the person exercising such power, taxable under the provisions of chapter five hundred and sixty-three of the acts of the year nineteen hundred and seven, and of all acts in amendment thereof and in addition thereto, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by the donee by will; and whenever any person possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a disposition of property taxable under the provisions of chapter five hundred and sixty-three of the acts of the year nineteen hundred and

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seven and all acts in amendment thereof and in addition thereto shall be deemed to take place to the extent of such omission or failure in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission of failure." See G.L. c.65, § 2. The additional taxes provided by Sts. 1918, c.191; 1919, c.342, § 4, are pertinent, but no separate question of law is raised touching them and they need not be considered in detail.

All these statutes are in substance, when not in these exact words, entitled, "Taxation of legacies and successions." Their words make plain the legislative purpose to impose the excise on whatever rightly may be termed a "succession" coming within the specific statutory description. "Succession," as that word is used in the statute, has been said in numerous decisions to include the privilege enjoyed by the beneficiary of succeeding to the possession and enjoyment of property. In Attorney General v. Stone, 209 Mass. 186, at 190, occur these words: "This is an excise tax, imposed not only upon the right of the owner of property to transmit it after his death, but also upon the privilege of his beneficiaries to succeed to the property thus dealt with. Minot v. Winthrop, 162 Mass. 113, 124; Crocker v. Shaw, 174 Mass. 266, 267. The privilege is not fully exercised until the property shall have come into the possession of the beneficiary. This rule underlies the reasoning of Minot v. Treasurer & Receiver General, 207 Mass. 588. And see the cases there cited. Until the full exercise of such privilege and while as yet no tax has been assessed and paid thereon, we see no reason why, by a general rule applicable to all such cases, any pending liability to taxation may not be regulated so as to subject it to a just and uniform method of assessment, even though some change may thereby be made from the method previously adopted." In Burnham v. Treasurer & Receiver General, 212 Mass. 165, at 167, an excise was upheld "as a tax levied upon the privilege exercised by the beneficiaries on their coming into the possession and enjoyment of the property." It is manifest from these decisions that succession includes, or may by the Legislature lawfully be described to include, as an essential element the entering into possession and enjoyment of property

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by the beneficiary. See Pratt v. Dean, 246 Mass. 300. This point is covered, also, by Magee v. Commissioner of Corporations & Taxation, ante, 512, decided this day. The words of St. 1916, c.268, § 1, to the effect that interests passing and "made or intended to take effect in possession or enjoyment after the death of the grantor or donor" shall be subject to the tax, are precisely applicable to the facts disclosed in the case at bar. The words of § 4 of the same chapter, making the tax applicable to property or interests "passing or accruing" upon the death of persons subsequent to the act, confirm what already has been said. "Accruing" in this connection has some antithesis to "passing," and was intended to include the entering into possession or enjoyment" made subject to the tax by § 1.

The terms of the trust instrument as to change and termination of the several trusts by Brooks and one trustee include in substance and effect a power of appointment within the meaning of St. 1909, c.527, § 8. See now G.L. c.65, § 2. Minot v. Paine, 230 Mass. 514, 521, 522. The partial failure by Mr. Brooks, the one named individual whose affirmative action was essential under the trust instrument, to exercise such reserved power, falls within the descriptive words of said § 8 and contributes to, if it does not cause, the coming into possession and enjoyment of the property by the daughter and son as beneficiaries. This power cannot possibly be exercised after the death of Brooks. Hence the property, subject to such power and thus passing to the possession and enjoyment of the daughter and son as beneficiaries, becomes liable to the excise as of the date of the death of Mr. Brooks. Crocker v. Shaw, 174 Mass. 266. Minot v. Treasurer & Receiver General; supra. Burnham v. Treasurer & Receiver General, supra.

It is the plain import of these statutes in their collective force and effect to subject to the excise tax the interests of the daughter and son of Brooks at the time of his death. The interest of the beneficiaries took effect in enjoyment and possession after the death of Brooks, and he as founder of the trust did not prevent that result by exercising the reserved power with the assent of one trustee to change the trust instrument in accordance with its terms.

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A strong argument in behalf of the beneficiaries has been based on the circumstance that their interests to some extent came into being before the enactment of the first succession tax on interests of lineal descendants, and that upon strict and technical analysis subsequent statutes did not include them. Without pausing to examine this argument in detail, the present statutes cannot be rightly interpreted to exclude their interests, such as they are, from the excise.

It is assumed that an excise cannot be levied upon the mere possession or enjoyment of property. Opinion of the Justices, 208 Mass. 616, 618, 619. Opinion of the Justices, 220 Mass. 613. Perkins v. Westwood, 226 Mass. 268. That is not the aim or effect of the statute herein question. It imposes an excise upon succession to property and upon an interest in property accruing at a stated time as part of succession to property. Such succession comprehends as an essential part possession and enjoyment under the circumstances specified. Since the excise may be levied upon the commodity known as succession, it may validly be imposed so long as any part of that commodity remains in existence. Magee v. Commissioner of Corporations & Taxation, supra. The New York decisions like Matter of Pell, 171 N.Y. 48, in re Lansing, 182 N.Y. 238, and Matter of Chapman, 196 N.Y. 561, as was said in 209 Mass. at page 192, "have not commanded assent in this court."

It follows from what has been said respecting the meaning of "commodity," "succession," "passing" and "accruing," as used in the Constitution and laws of Massachusetts, according to their interpretation by decisions of this court, that there is no violation of the Fourteenth Amendment to the Constitution of the United States in the excise here in question. This point seems to us to be settled by several decisions of the United States Supreme Court. Carpenter v. Pennsylvania, 17 How. 456. Cahen v. Brewster, 203 U.S. 543. Chanler v. Kelsey, 205 U.S. 466. Moffitt v. Kelly, 218 U.S. 400. Billings v. United States, 232 U.S. 261. Nickel v. Nevada, 256 U.S. 222. See also, Magee v. Commissioner of Corporations & Taxation, supra, and cases there collected.

We are unable to perceive anything in Schlesinger v. Wisconsin, 270 U.S. 230, inconsistent with

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the result we feel obliged to reach. The facts were different and the succession or gift there sought to be taxed was held to have come to a complete end before the imposition of the tax. The same may be said of Frew v. Bowers, recently decided by the Circuit Court of Appeals of the Second Circuit, 12 Fed. Rep. (2d) 625.

There is nothing in Welch v. Treasurer & Receiver General, 217 Mass. 348, at variance with this conclusion because the controlling statute there was different from the present statutes. By intervening enactments the Legislature has manifested a purpose to extend the sweep of the succession excise.

The nature of the excise here in question being an excise upon that part of the commodity of succession which consists of the vesting of the property in possession and enjoyment in the daughter and son, upon the death of Mr. Brooks, a vesting which arose from his failure or omission to participate in the exercise of the right of appointment reserved to him in the trust instrument to change its beneficiaries, renders inapplicable the argument in behalf of the daughter and son to the effect that the excise is in contravention of the Fourteenth Amendment as a taking of property without due process of law. The same is true of their argument that the excise impairs the obligation of any contract involved in the trust instrument.

The commodity upon which this excise is laid is within the jurisdiction of this Commonwealth. Brooks, Mrs. Brooks, their daughter and son all were residents of Massachusetts. All the cash and securities of the trust have been kept in Massachusetts and the trust always has been managed here. The legal title to all the property is in the trustees. It is the finding of the single justice that it is the law of Illinois, under which the Chicago Real Estate Trust and the Marquette Trust exist, that the interest of a receipt or certificate holder or beneficiary in each of said trusts is personalty. The trustees hold as a part of the trust fund receipts or certificates in each of said trusts. They also hold shares of stock in numerous foreign corporations. The interests of the daughter and son of Brooks under the trust accrued or passed to their actual possession and enjoyment under the protection of the laws of Massachusetts where the founder of

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the trust, the trustees and the beneficiaries had their domicil and hence were subject to an excise here. While it is possible, as found by the single justice, that some of their rights might be enforced under the laws of other States where the domicil of the corporations or trusts may be, this is the only jurisdiction where it is certain that all their rights can be enforced. This is the place of residence of the trustees. To our courts they may be held to respond for the performance of all their duties. The resident beneficiaries of the trust naturally would resort to our courts for the enforcement of their rights. The instrument of trust on its face appears to be a Masschusetts document. Clause 18 of the trust instrument provides that it "shall be construed and take effect in all respects according to the law of Massachusetts and in the same manner as if all real and personal estate comprised in it were situate in Massachusetts and governed by the law of that State." The situs of shares of stock in corporations and other intangible personal property as a general rule is at the domicil of the owner. Hawley v. Malden, 204 Mass. 138, affirmed in 232 U.S. 1. Bellows Falls Power Co. v. Commonwealth, 222 Mass. 51. Maguire v. Tax Commissioner, 230 Mass. 503, affirmed in Maguire v. Trefry, 253 U.S. 12. Keeney v. Comptroller of New York 222 U.S. 525. Bullen v. Wisconsin, 240 U.S. 625. All intangible securities were actually in Massachusetts where their owners were domiciled. The cumulative effect of all these factors is that the element of succession on which the excise is levied took place in this Commonwealth with respect to property which may be made subject to our excise tax upon the commodity of succession.

The trustees have no present duty to perform as to the excise upon the corpus of the fund and hence are not entitled to present instruction on that subject.

Decree is to be entered instructing the trustees that the respective interests of the daughter and son of Brooks as of January 27, 1920, are subject to an excise under the Massachusetts law on their respective values on that date. The details are to be fixed by a single justice.

Ordered accordingly.

"A". 9 - MEMORANDUM ON THE CASE OF WELCH v. TREASURER & RECEIVER GENERAL. 217 MASS. 348.

Exhibits "A". 9 Memorandum on the case of Welch v. Treasurer & Receiver General. 217 Mass. 348.

MEMORANDUM JRF:BL (4) 8/17/56

WELCH v. TREASURER AND RECEIVER-GENERAL
217 Mass. 348.

TERMS OF THE TRUST:

(1) To pay any debts;

(2) To pay income to settlor, or expend it for maintenance and support of the settlor and his family;

(3) To pay income to wife on settlor's death then divide it among his children, principal to his heirs on the death of himself, wife, and three children.

"I hereby reserve to myself power by a written instrument with the written consent of my said wife, if alive, and both of the then trustees under this instrument from time to time to revoke the trusts hereby created or any part thereof and thereupon wholly or in part to revest the trust property in myself . . . . "

Similar clause to "vary or modify" the terms of the trusts.

The two trustees were non-interested parties.

NOTE: Wife died in 1901, settlor in 1907, hence for that period he could revoke without the assent of adverse party.

Exhibits

"A". 8

Report of case of Welch v. Treasurer & Receiver General. 217 Mass. 348.

"A". 8 - REPORT OF CASE OF WELCH v. TREASURER & RECEIVER GENERAL. 217 MASS. 348.

FRANCIS C. WELCH & ANOTHER, trustees, vs. TREASURER AND RECEIVER GENERAL.

Middlesex. January 28, 1914 - March 31, 1914.

Present: RUGG, C.J., LORING, SHELDON, DE COURCY, & CROSBY, JJ.

Tax, On successions. Statute.

In St. 1907, c.563, relating to the taxation of legacies and successions, the provision of § 25, that "this act shall not apply to estates of persons deceased prior to the date when it takes effect, or to property passing by deed, grant, sale, or gift made prior to" the date when the statute took effect, prevents the imposition of a tax under that statute upon a sum which, under the provisions of a trust deed that went into effect in 1897, directing the trustees on the death of the grantor to pay over the trust fund to his children, came into possession of a child of the grantor on the death of the grantor after the statute went into effect.

DE COURCY, J. This is an appeal from a decree of the Probate Court directing the repayment to the petitioners of certain inheritance taxes paid by them under protest. The taxes were assessed under St. 1907, c.563, upon the right of succession of the children of Charles W. Loring, deceased, accruing under a deed that was executed by him in 1897.

By this deed the grantor conveyed all his property to Horace Loring and Francis C. Welch in trust to pay his then existing debts, to manage and invest the trust fund, and to pay the net income to him quarterly during his life. The habendum of the deed then continues as follows: "or at their discretion they may expend the same and the whole or any portion of the principal of said fund for the maintenance and support of myself and family and the education of my children and at my decease to pay the net income thereof to my wife, Harriet F. Loring during her life, and at her decease, or at my decease, if I shall survive her, to pay the net

income thereof in equal shares to my children, Rose, Charles R. and Edward C. Loring and to the survivor and survivors of them, the issue of a deceased child, however, to take its ancestor's share by right of representation, or my trustees from time to time may expend said income for the maintenance and support of my said wife and issue, and the education of my issue, and at the decease of the last survivor of myself, my said wife and my said three children, to pay over, transfer and convey the principal of said fund as it shall then exist to those persons who are at that time my heirs by blood." It appears that in pursuance of this trust the trustees took charge of the property; and after four or five years they were enabled to pay all the debts, and from that time to pay the income to or for the benefit of the grantor until his death in October, 1907. His wife died in May, 1901. With reference to the character of the trust, the single justice* has found "that it was a bona fide trust made by Mr. Loring, in apprehension that he might become insolvent and with the intent to provide for the payment of his debts and the support of himself and his family; that the property was conveyed to the trustees and thereafter held by the trustees in good faith under the trust." A further finding was that while the payments of income were made directly to Mr. Loring, this was done under the supervision of one of the trustees, who saw to it that the moneys were applied to the family maintenance.

St. 1907, c.563, went into effect on the first day of September, 1907, or a little more than a month before the death of Mr. Loring. The principal contention of the petitioners is that the interest which the Treasurer and Receiver General seeks to reach in the present case is one which passed by the deed of 1897, long before this statute took effect. Section 25 of the statute provides as follows: "This act shall not apply to estates of persons deceased prior to the date when it takes effect, or to property passing by deed, grant,

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* The appeal was heard by Loring, J., who reserved it, upon the pleadings, the findings of facts, and the evidence, for determination by this court.

Exhibits

"A". 8

Report of case of Welch v. Treasurer & Receiver General. 217 Mass. 348 - continued.

sale, or gift made prior to said date; but said estates and property shall remain subject to the provisions of the laws in force prior to the passage of this act."

The plain meaning of this language is that property whose title passed before the date when the statute took effect, is not affected by it. For determining whether this or the earlier laws should apply, a definite and practical date was provided, - that of death where the property passes by will or under the intestate succession laws, and that of the deed when the title so passes. This section applies to the case at bar. Almost ten years before the statute became operative Mr.Loring irrevocably and completely conveyed away all his right and title in this property; and at that time, and by the same instrument, the life interest of the petitioners was vested in them, even though it was subject to possible defeasance by the joint act of the trustees, Mr. Loring, and, during her life, Mrs. Loring. As between the grantor and the trustees the conveyance was absolute, as he had no more power to revoke or alter the deed than he would have had if the so called power of revocation had not been inserted therein.

There is no ambiguity in the language of this section to justify a construction at variance with its plain meaning. It may well be, as contended by the Commonwealth, that but for its provisions, as literally construed, the succession of the children of Charles W. Loring would be subject to a tax under § 1 of the statute, as property passing by deed "made or intended to take effect in possession or enjoyment after the death of the grantor." Crocker v. Shaw, 174 Mass. 266. State Street Trust Co. v. Treasurer & Receiver General, 209 Mass. 373. Nevertheless the object aimed at in § 25 was not the creation of exemptions, even though its effect in this case may be to relieve these heirs from liability. The St. of 1907 was enacted to impose inheritance taxes upon direct heirs, who were not within the scope of the earlier laws; and it also was designed to deal with the whole subject of the taxation of successions at that time. Attorney General v. Stone, 209 Mass. 186, 192. The main purpose of § 25 was to establish a definite line between the cases that should be governed by the law and procedure of the new act, and those that would remain subject to the provisions of the laws in force before its passage.

Exhibits

"A". 8

Report of case of Welch v. Treasurer & Receiver General, 217 Mass. 348 - continued.

The Probate Court was right in ordering that the Treasurer and Receiver General should repay to the petitioners the amount of the tax and interest paid by them, amounting to $948.12, with interest thereon from February 11, 1913, the date of said payment. The decree is to be modified by adding interest to this date, and the costs of appeal; and as thus modified is to be affirmed.

So ordered.

A.E. Seagrave, Assistant Attorney General, for the respondent.

B. Corneau, for the petitioners.

"D". 2

Report of case of Boston Safe Deposit & Trust Co. v. Commissioners of Corporations & Taxation. 294 Mass. 551.

"D". 2 - REPORT OF CASE OF BOSTON SAFE DEPOSIT & TRUST CO. v. COMMISSIONERS OF CORPORATIONS & TAXATION. 294 MASS. 551.

BOSTON SAFE DEPOSIT AND TRUST COMPANY, trustee, vs. COMMISSIONER OF CORPORATIONS AND TAXATION.

Dukes County. October 28, 1935. - June 29, 1936.

Present: RUGG, C.J., PIERCE, FIELD, LUMMUS, & QUA, JJ.

Tax, On legacies and successions. Constitutional Law, Taxation. Trust, Inter vivos.

An interest in remainder, passing in 1930 on the death of the wife of the donor of a trust, survivor of herself and him, life beneficiaries, to their children in possession and enjoyment, was then subject to a succession tax under G.L. c.65, § 1, it appearing that, although the trust was created and finally amended at times before 1907 when such interest was not subject to a tax, the trust could be revoked or amended only by agreement of both the donor and his wife and that the power of revocation or amendment did not cease, and the remainder vest in the children, until the death of the donor in 1920: such taxation involved no violation of any constitutional right of the children.

Exhibits

"D". 2

Report of case of Boston Safe Deposit & Trust Co. v. Commissioners of Corporations & Taxation. 294 Mass. 551 - continued.

PETITION, filed in the Probate Court for the county of Dukes County on May 2, 1932.

The petition was reserved and reported by Davis, J., on the pleadings and an agreed statement of facts.

C.M. Rogerson, for the petitioner.

J.J. Roman, Assistant Attorney General, for the respondent.

RUGG, C.J. This is a petition by the trustee under an indenture of trust for determination of the succession tax, if any, due to the Commonwealth on account of the transfer from the petitioner to remaindermen of property held under the trust. G.L. (Ter. Ed.) c.65, § 30. The case was reserved and reported upon the pleadings and an agreed statement of facts for consideration by this court. G.L. (Ter. Ed.) c.215, § 13. The essential facts are these: In 1891, Charles E. Whitney and his wife, Alice Whitney, entered into an agreement in adjustment of disputes between them and particularly in settlement of a petition then pending by the wife for separate maintenance. By that agreement the property of the husband to a large amount, voluntarily and not as a purchase, was placed in trust, provision was made for the disposition of principal and income, and right was reserved to the husband and wife acting together, but not to either acting alone, to alter or revoke the trust. Extensive powers were given to the trustee, but with direction to pay over, after the deaths of both husband and wife, all the estate to their two children. In 1905, the trust indenture was amended; it then contained a clause of this tenor: 'This trust may be revoked at any time after two years from the date hereof on three months' notice to the trustee in writing, signed by both said CHARLES and said ALICE; and may be altered at any time hereafter, on sixty days' notice to the trustee in writing, signed by both said CHARLES and ALICE, but shall not be altered or revoked after the death of either of them." The trust was not revoked and there was no alteration of it subsequently to 1905. Under the trust as amended, the trustee was to pay half of the income to the husband and half to the wife during their respective lives, and each agreed to bear specified family obligations out of such half. If the wife failed to perform her obligations, the

Exhibits
"D". 2
Report of case of Boston Safe Deposit & Trust Co. v. Commissioners of Corporations & Taxation. 294 Mass. 551 - continued.

husband was to receive the entire income, to support the family, and to have the right to dispose of the property by will subject to the legal rights of the wife. If the wife fulfilled her agreements and survived her husband, she was to receive a half and each of the children a quarter of the income. Upon the death of the survivor of the husband or wife, the income was to be paid to the children equally and the principal distributed to them upon their reaching stated ages, so that, when they should become forty years of age, all the principal would be paid over. Suitable provisions were made as to the possibilities of earlier deaths of the children. The events that have come to pass are that the wife did not break her agreements, survived her husband, who died on September 2, 1920, a resident of this Commonwealth, and herself died on December 13, 1930, leaving the two children, both then over forty years of age.

Upon the death of the husband in 1920, an inheritance tax was exacted on the present interest then passing to his two children for the lifetime of his widow. The respondent now demands an inheritance tax on the principal of the trust fund passing to the children upon the death of their mother. The validity of that tax is challenged.

It is conceded that in 1905 when the trust indenture was amended no statute was in force under which a tax could be levied upon the succession to the trust property by the children. The first statute of that nature was enacted in 1907 and was subsequently amended at various times. The form in force at the time of the death of the husband, the founder of the trust, in 1920, was in these words: "All property within the jurisdiction of the commonwealth . . . which shall pass . . . by deed, grant or gift, except in cases of a bona fide purchase . . . made or intended to take effect in possession or enjoyment after the death of the grantor or donor . . . to any person . . . shall be subject to a tax . . . " St.1920, c.396, § 1; c.548, § 1. The same provisions, so far as here pertinent, were in force at the death of the wife of the founder in 1930. G.L. (Ter. Ed.) c.65, § 1.

The petitioner contends that the attempt to apply the taxing statute in the case at bar is in violation of provisions of the Constitution of the

Exhibits

"D". 2

Report of case of Boston Safe Deposit & Trust Co. v. Commissioners of Corporations & Taxation. 294 Mass. 551 - continued.

United States forbidding a State (1) to pass any law impairing the obligation of contracts, (2) to deprive any person of property without due process of law, and (3) to deny to any person the equal protection of the laws.

A decision adverse to these contentions has been rendered on facts almost identical in Saltonstall v. Treasurer & Receiver General, 256 Mass. 519, affirmed sub nomine Saltonstall v. Saltonstall, 276 U.S. 260. The governing principles there declared are controlling in the case at bar. In that case a trust was established by deed, under which the income was payable to the donor for life, or at his option to be accumulated, and upon the deaths of himself and his wife to the children of the donor, with gifts over. The donor retained the right to change or terminate the trust with the concurrence of one trustee. The power of alteration and revocation of the trust reserved by the donor was the equivalent of the reservation of a power of appointment. At the time of the establishment of that trust there was no statute imposing an inheritance or transfer tax on property passing to children, but before the death of the donor a statute similar to the one here assailed was enacted. The tax thus authorized is an excise tax upon succession, which includes the privilege of entering into possession and enjoyment of the property by the beneficiary. The transfer to the ultimate beneficiaries was held taxable as one "made or intended to take effect in possession or enjoyment after the death of the grantor." It was said in Saltonstall v. Saltonstall, 276 U.S. 260, at pages 270-271: "we are here concerned, not with a tax on the privilege of transmission, not with an attempt to tax a donor's estate for an absolute gift made when no tax was thought of . . . but with a tax on the privilege of succession, which also may constitutionally be subjected to a tax by the state whether occasioned by death . . . or effected by deed . . . The present tax is not laid on the donor, but on the beneficiary; the gift taxed is not one long since completed, but one which never passed to the beneficiaries beyond recall until the death of the donor . . . A power of appointment reserved by the donor leaves the transfer, as to him, incomplete and subject to tax. Bullen v. Wisconsin, 240 U.S. 625. The beneficiary's acquisition of the property is equally incomplete whether the power be reserved to the donor or another. And so the property passing to the beneficiaries here was acquired only because of default

in the exercise of the power during the donor's life and thus was on his death subject to the state's power to tax as an inheritance." This authoritative statement of the law demonstrates that the succession tax levied under a statute operative prior to the death of the founder of the trust, although enacted after the execution of the trust instrument, involved no violation of any constitutional rights of the beneficiaries, because the reserved power of revocation or alteration of the trust prevented the trust estate from vesting finally in the children as the ultimate beneficiaries until the death of the founder of the trust had extinguished the possibility of a change in the beneficiaries. Chase National Bank v. United States, 278 U.S. 327, 335-336. The instant case is distinguishable from Coolidge v. Long, 282 U.S. 582, where no power of alteration or revocation was reserved to the donors of the trust and where the original gift was absolute and irrevocable. For the same reason Helvering v. St. Louis Union Trust Co. 296 U.S. 39, and Helvering v. Helmholz, 296 U.S. 93, are not relevant to the facts here disclosed. The case at bar is distinguishable, also, from Welch v. Treasurer & Receiver General, 217 Mass. 348.

The petitioner relies upon the circumstance that the power to revoke or alter the trust was vested in the founder of the trust to be exercised jointly with his wife, as distinguishing the case at bar from Saltonstall v. Saltonstall, where that power was vested in the donor and one of the trustees acting jointly. We think that this fact constitutes no sound distinction and does not require a different result.

The petitioner urges that the case at bar in this particular is controlled by Reinecke v. Northern Trust Co. 278 U.S. 339, where the power of revocation was reserved "to alter, change or modify the trust" to be exercised as to some of the trusts by the settlor and the single beneficiary of each trust acting jointly, and as to another trust by the settlor and a majority of the beneficiaries acting jointly. It was held respecting these trusts, at page 346: "He /the settlor/ could not effect any change in the beneficial interest in the trusts without the consent, in the case of four of the trusts, of the person entitled to that interest, and in the case of one trust without the consent

Exhibits

"D". 2

Report of case of Boston Safe Deposit & Trust Co. v. Commissioners of Corporations & Taxation. 294 Mass. 551 - continued.

of a majority of those so entitled. Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute." That principle is inapplicable to the fact of the case at bar. Manifestly the "beneficial interest" there described is the interest of the remainderman. It relates to the ultimate beneficial interest in the body of the trust. The interest of the wife of the founder of the trust in the case at bar was not of that nature; it was simply a life estate. It had no connection with the remainderman. It bears some resemblance to the interest of the founder of the trust. It is not adverse to revocation or alteration in the disposition of the remainder for the benefit of the children here sought to be taxed. See Reinecke v. Smith, 289 U.S. 172, 174-175. It stands on the same footing as that of the trustee whose exercise of the power of revocation was conjoined with that of the donor in Saltonstall v. Saltonstall, 276 U.S. 260.

Although the present trust was established in 1891 and amended in 1905, the beneficiaries of the remainder received no possession and enjoyment until 1930. The right to succession by them did not become irrevocable until 1920, when the founder of the trust died. It then vested in them finally, subject to be divested if they did not survive their mother. That was long after the enactment of the statute under which the tax was laid. The succession to the possession and enjoyment of that remainder did not pass to them until the termination of the life estates in 1930. There was no division in rights of the children to succeed to the remainder of the trust fund. The entire remainder is subject to the succession tax.

The reserved power of the founder of the trust to revoke or alter the trust, acting jointly with his wife, constituted an interest in the trust property. That power was extinguished by his death in 1920. The resultant right of succession in the beneficiaries of the remainder, to pass into their possession and enjoyment upon the termination of the life estates, was subject to a succession tax without violation of any of the constitutional guaranties invoked by the petitioner.

Exhibits

"D". 2

Report of case of Boston Safe Deposit & Trust Co. v. Commissioners of Corporations & Taxation. 294 Mass. 551 - continued.

The conclusion is that the property here in question is subject to a succession tax. Saltonstall v. Treasurer & Receiver General, 256 Mass. 519, and cases there reviewed. Boston Safe Deposit & Trust Co. v. Commissioner of Corporations & Taxation, 267 Mass. 240, and cases collected. Saltonstall v. Saltonstall, 276 U.S. 260. Chanler v. Kelsey, 205 U.S. 466, 478. See Helvering v. City Bank Farmers Trust Co. 296 U.S. 85. Decree is to be entered ordering the tax to be paid, the details to be settled in the Probate Court.

Ordered accordingly.

"A". 7

Restatement of the Law of Trusts, S.330 L.

"A". 7 - RESTATEMENT OF THE LAW OF TRUSTS, S.330 L.

A L 1 Restatement, Trusts.

Ch. 10 TERMINATION AND MODIFICATION § 330

If the settlor reserves a power to revoke the trust only by a notice in writing delivered to the trustee, he can revoke it only by delivering such a notice to the trustee. It is ordinarily a sufficient delivery, however, if the notice is mailed to the trustee, although it is not received by him until after the settlor's death.

If the settlor reserves power to revoke the trust only to the extent to which he may need the property for his support, he cannot revoke the trust except for that purpose and to that extent.

k. Where power reserved to revoke with consent of a beneficiary. If the settlor reserves a power to revoke the trust only with the consent of one or more of the beneficiaries, he cannot revoke without such consent. As to the termination of the trust with the consent of all the beneficiaries and of the settlor, where the settlor has not reserved a power of revocation, see § 338.

l. Where power reserved to revoke with consent of the trustee. If the settlor reserves a power to revoke the trust only with the consent of the trustee, he cannot revoke the trust without such

Exhibits
"A". 7
Restatement of the Law of Trusts, S.330 L - continued.

consent. Whether the trustee can properly consent to the revocation of the trust and whether he is under a duty to consent to its revocation depend upon the extent to the power conferred upon the trustee by the terms of the trust. To the extent to which discretion is conferred upon the trustee, the exercise of the power is not subject to the control of the court, except to prevent an abuse by the trustee of his discretion (see § 187).

If there is a standard by which the reasonableness of the trustee's judgment can be tested, the court will control the trustee in the exercise of the power where he acts beyond the bounds of a reasonable judgment, unless it is otherwise provided by the terms of the trust. Thus, if the trustee is authorised to consent to the revocation of the trust if in his judgment the settlor is in need, he cannot properly consent to the revocation of the trust if it clearly appears that the settlor is not in need. So also, if the trustee is authorised to consent to the revocation of the trust if in his judgment the beneficiaries of the trust are not in need, he cannot properly consent to the revocation of the trust if it clearly appears that the beneficiaries are in need.

There may be a standard by which the reasonableness of the trustee's judgment can be tested even though there is no standard expressed in specific words in the terms of the trust, and even though the standard is indefinite, Thus, it may be provided merely that the settlor can revoke the trust with the consent of the trustee. Such a provision may be interpreted to mean that the trustee can properly consent to the revocation of the trust only if he deems it wise under the circumstances to give such consent. In such a case the court will control the trustee in the exercise of a power to consent to the revocation of the trust where the circumstances are such that it would clearly be unwise to permit the revocation of the trust; as for example where the beneficiaries are wholly dependent upon the trust for their support and the settlor desires to terminate the trust for the purpose of dissipating the property. So also, the circumstances may be such that it would clearly be unwise not to permit the revocation of the trust, and in such a case the court can compel the trustee to permit the revocation of the trust in whole or in part; as for example where a trust is created to pay the income

Exhibits
"A". 7
Restatement of the Law of Trusts, S.330 L - continued.

to the settlor for life and to pay the principal on his death to a third person and it is provided that in the discretion of the trustee a part or the whole of the principal shall be paid to the settlor, and owing to a change of circumstances the income is insufficient for the support of the settlor who has no other resources, and the beneficiary in remainder has acquired large resources.

On the other hand, the trustee may be authorised to consent to the revocation of the trust with no restriction, either in specific words or otherwise, imposed upon him in the exercise of the power. In such a case there is no standard by which the reasonableness of the trustee's judgment can be tested, and the court will not control the trustee in the exercise of the power if he acts honestly and does not act from an improper motive (see § 187 and Comments i-k thereon). The power of the trustee in such a case to consent to the revocation of the trust is like a power to appoint among several beneficiaries.

In determining the extent of the power intended to be conferred upon the trustee to consent or to refuse to consent to the revocation of the trust, the purpose of the settlor in inserting the provision may be important. Thus, where the settlor reserves a power to revoke the trust with the consent of the trustee, it may appear that the requirement that the trustee should consent was inserted by the settlor in order to preclude himself from revoking the trust under circumstances where it would be clearly unwise for him to do so, as for example, if he should become a drunkard or a spendthrift. On the other hand, where the purpose of requiring the consent of the trustee was to relieve the settlor or his estate of liability for income or inheritance taxes, and such relief could be obtained or the settlor believed that it could be obtained, if, but only if, the trustee had unrestricted power to consent or to refuse to consent to the revocation of the trust, this indicates that the trustee should be free to consent or refuse to consent regardless of any standard or reasonableness.

m. Where power reserved to revoke with consent of third persons. If the settlor reserves a power to revoke the trust only with the consent of a third person, he cannot revoke the trust without such consent.

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"A". 7

Restatement of the Law of Trusts, S.330 L - continued.

Whether the third person can properly consent to the revocation of the trust and whether he is under a duty to consent to its revocation depend upon the extent of the power conferred upon him by the terms of the trust. If there is a standard by which the reasonableness of his judgment can be tested, the court will control him in the exercise of the power where he acts beyond the bounds of a reasonable judgment, unless it is otherwise provided by the terms of the trust. If there is no standard by which the reasonableness of his judgment can be tested, the court will not control him in the exercise of the power if he acts honestly and does not act from an improper motive. Whether there is a standard by which the reasonableness of his judgment can be tested depends upon the terms of the trust, as it does where the power to consent to the revocation of the trust is conferred upon the trustee (see Comment l). It is easier, however, to infer that the settlor intended to confer an unrestricted power to consent to the revocation of the trust upon a third person, than it is where the power is conferred upon the trustee, since the trustee is more clearly in a fiduciary position. (Compare § 185).

n. Partial revocation. By the terms of the trust.

A TRUE COPY

(Sgd) V.I. de L. CARRINGTON, Ag.

Registrar.

"D". 3

Extract from Scott on Trusts, pages 1805 - 1808.

"D". 3 - EXTRACT FROM SCOTT ON TRUSTS, PAGES 1805 - 1808.

§ 330.8. WHERE METHOD OF REVOCATION SPECIFIED. Where the settlor reserves a power to revoke the trust under certain circumstances, he can revoke it only under those circumstances. Thus if he reserves power to revoke the trust only to the extent to which he may need the property for his support, he cannot revoke the trust except to that extent.[1]

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[1] Lovett v. Farnham, 169 Mass. 1, 47 N.E. 246 (1897); McKnight v. Bank of New York & Trust Co., 254 N.Y. 417, 173 N.E. 568 (1930).

Exhibits

"D". 3

Extract from Scott on Trusts, pages 1805 - 1808

- continued.

Where the settlor reserves a power to revoke the trust in a particular manner, he can revoke it only in that manner.[2] Thus if he reserves power to revoke by a notice in writing to the trustee, he cannot revoke without such notice. Unless it is required by the terms of the trust that the notice should be received by the trustee, it is sufficient if it is mailed to the trustee although it is not received by him until after the settlor's death.[3] Where the trust instrument provides that the trust may be terminated by the trustee by written notice to the settlor and delivery to him of the trust property, and such a notice is delivered but by agreement with the settlor the property is retained by the trustee upon a new trust, there is a sufficient termination of the earlier trust.[4] In Croker v. Croker[5] a husband and wife created a trust for themselves with a remainder interest in their children, and reserved power to revoke or modify the trust by an instrument in writing signed and acknowledged by them. It was held that the husband could not revoke the trust after the death of his wife, since the power of revocation could be exercised only by their joint acts. In Brown v. Fidelity Trust Company[6] it was held that where the settlor reserved

[2] In New York it is provided by statute that where the grantor of a power has prescribed the formalities for execution of the power which exceed those required by law to pass the estate, the additional formalities need not be complied with. N.Y. Real Property Law, §§ 170, 171. It has been held that these provisions are applicable to a power to revoke a trust. Matter of Goldowitz, 145 Misc. 300, 259 N.Y. Supp. 900 (1932).

[3] Hackley Union National Bank v. Farmer, 252 Mich. 674, 234 N.W. 135 (1931), noted in 44 Harv. L. Rev. 1148 (1931).

[4] Capron v. Luchars, 110 N.J. Eq. 338, 160 Atl. 83 (1932), aff'd mem. 112 N.J. Eq. 373, 164 Atl. 447 (1933).

[5] 117 Misc. 558, 192 N.Y. Supp. 666 (1921). To the same effect see Solomon's Estate, 2 A. (2d) 825 (Pa., 1938).

Where the trust is revocable by the two settlors jointly, it cannot be revoked by one of them alone while the other is living. Clark v. Freeman, 121 N.J. Eq. 35, 188 Atl. 493 (1936).

[6] 126 Md. 175, 94 Atl. 523 (1915).

Exhibits

"D". 3

Extract from Scott on Trusts, pages 1805.- 1808

- continued.

power to revoke the trust by giving the trustee thirty days' written notice and by executing a sealed instrument attested by the trustee and acknowledged by a notary public and the delivery of a receipt for the trust property to the trustee, a letter written by the settlor to the trustee two years before her death stating the she wished to terminate the trust was insufficient to revoke it. In Reese's Estate[7] it was held that where the settlor reserved power to revoke the trust by giving sixty days' prior notice in writing to the trustee, and the settlor gave such a notice but died before the period of sixty days had expired, the trust was not revoked.

The settlor may reserve a power to revoke the trust only during his lifetime, or he may reserve also a power to revoke it by will. It is a question of interpretation of the instrument whether a provision reserving a power of revocation empowers the trustee to revoke it by will as well as a power to revoke it by a transaction inter vivos.[8] Where he reserves a power to revoke the trust by will, it is a question of interpretation whether the will exercises the power. In Old Colony Trust Co. v. Gardner[9] it was held that the power was not exercised by a will disposing of the residue of the testator's property and all property over which he had any power of testamentary disposition. The will was sufficient to exercise any power of appointment which the testator had, but was not sufficient to exercise a power of revocation. Where it is hold that a revocable trust is created by a deposit

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[7] 317 Pa. 473, 177 Atl. 792 (1935).

[8] In the following cases it was held that the settlor could not revoke the trust by his will: Stone v. Hackett, 12 Gray 227 (Mass., 1858); Kelley v. Snow, 185 Mass. 288, 70 N.E. 89 (1904) (power to revoke on written notice to trustee); Mayer v. Tucker, 102 N.J. Eq. 524, 141, Atl. 799 (1928); Matter of Richardson, 134 Misc. 174, 235 N.Y. Supp. 747 (1929); Dickerson's Appeal, 115 Pa. 198, 8 Atl. 64, 2 Am. St. Rep. 547 (1887). See Broga v. Rome Trust Co., 151 Misc. 641, 272 N.Y. Supp. 101 (1934); 6 Ann. Cas. 189 (1907); 38 A.L.R. 941 (1925).

[9] 264 Mass. 68, 161 N.E. 801 (1928).

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"D". 3

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in a savings account in the name of the depositor as trustee for another, it has been held that the trust can be revoked not only by acts of the depositor during his lifetime but also by his will.[10]

Where it is provided in the trust instrument that the settlor may revoke the trust with the permission of another person, he cannot revoke it without such permission. It is not uncommon to provide for revocation by the settlor with the consent of one or more or all of the beneficiaries. In such a case he cannot revoke without obtaining the required consent. Where the trust instrument contains no such power of revocation, the trust can be terminated with the consent of the settlor and of all the beneficiaries, where none of them is under a disability, and on such termination the property will be distributed in such manner as is agreed between them.[11] It is not uncommon to provide for revocation by the settlor with the consent of the trustee or of a third person. In such a case the trust cannot be revoked without the required consent.[12] In Richardson v. Stephenson[13] it was provided in the trust instrument that the settlor could revoke the trust if all of the trustees then acting should join in the execution and acknowledgment of the instrument of revocation before the settlor's death. An instrument of revocation was signed by the settlor and all but one of the trustees. This trustee was in Europe and the instrument was mailed to him, but he did not sign it until after the death of the settlor. It was held that the trust was not revoked.

§ 330.9. WHERE POWER RESERVED TO REVOKE WITH CONSENT OF THE TRUSTEE. Where the settlor reserves

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[10] See § 58.4.

[11] See § 338.

[12] Downs v. Security Trust Co. 175 Ky. 789, 194 S.W. 1041 (1917); Richardson v. Stephenson, 193 Wis. 89, 213 N.W. 673, 52 A.L.R. 681 (1927).
As to the duty of the trustee or third person with respect to the giving or withholding of such consent, see § 330.9.

[13] 193 Wis. 89, 213 N.W. 673, 52 A.L.R. 681 (1927), criticized in 26 Mich. L. Rev. 586 (1928).

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power to revoke the trust with the consent of the trustee, it depends upon the extent of the discretion conferred upon the trustee whether he is under a duty to the beneficiaries to withhold his consent, or is under a duty to the settlor to give his consent, or can properly either give or withhold his consent. The court will not control the trustee in the exercise of any discretionary power, except to prevent an abuse of his discretion.[1] In determining what constitutes an abuse of discretion, it is important to ascertain whether any standard for the exercise of the discretion is fixed by the terms of the trust. If there is such a standard, the court will control the exercise of the power by the trustee if he acts beyond the bounds of a reasonable judgment. Thus in Skilling v. Skilling[2] a woman transferred property in trust to pay to her the income and such part of the principal as the trustee might see fit and on her death to pay the principal to named beneficiaries. In the instrument it was expressly declared that the trust should be irrevocable. Desiring to make a different disposition she induced the trustee to reconvey the property to her. Shortly afterward she died, and the beneficiaries brought suit to recover the property. It was held that they were entitled to it. The court said that the instrument should be interpreted as authorizing the trustee to pay the settlor only so much of the principal as she might need for her comfort and support, and that he could not properly pay her the whole of the principal for the purpose of enabling her to make a different disposition of it. On the other hand, where there is no provision in the trust instrument expressly or by implication limiting the power of the trustee to consent to a revocation of the trust, it would seem that his giving or withholding consent is effective, whether he acts reasonably or not, as long as he does not act dishonestly or from an improper motive.[3]

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[1] See § 187.

[2] 133 Me. 347, 177 Atl. 706 (1935).
A provision that the trustee shall pay to the settlor as much of the principal as is necessary for his physical well-being does not amount to the reservation of a power of revocation. McKnight v. Bank of New York & Trust Co., 254 N.Y. 417, 173 N.E. 568 (1930).

[3] See § 187.

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- continued.

The question of the duty of the trustee with respect to the giving or withholding of consent to the revocation of a trust has been raised in cases involving the liability of the settlor for income taxes. The federal Internal Revenue Act provides that the income of a trust shall be taxable to the settlor when he has the power to revoke the trust either alone or in conjunction with any person not a beneficiary of the trust. If the trust instrument merely provides that the trust may be revoked with the consent of the trustee, it has been held that the provision is applicable and the settlor is subject to liability to pay the income tax.[4] On the other hand, if the trust is revocable with the consent of the trustee only to the extent necessary for the comfort and support of the settlor, the settlor is not subject to the income tax.[5]

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[4]Reinecke v. Smith, 289 U.S. 172, 53 S. Ct. 570, 77 L. ed. 1109 (1933).

[5]Higgins v. White, 93 F. (2d) 357 (C.C.A. 1st, 1937).