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Wills-Classes of Legacies

WILLS—CLASSES OF LEGACIES—The testator died leaving a will with the following clause: "I bequeath to my daughter, Mabel L. Waters, Salt Lake City, Utah, or to her heirs, if she shall die before me, five thousand (5000) dollars cash out of the Burbank estate, Pittsburgh, Pa." The widow, step-

son and daughter were made parties to the suit by the plaintiff, as administrator, who asks for a judgment of the construction of the will. The widow contends there is a specific legacy wholly payable from the assets of the Burbank estate alone and the daughter says she is entitled to the whole amount as it was a demonstrative legacy. The court found that there had been instructions given in the execution of the will that the daughter should receive the sum of $5000 *to be paid out of the money derived from the Burbank estate,* and in pursuance to the instruction the item had been drawn up. The court then found that this was a specific gift and the daughter was entitled only to the returns of the estate regardless of the amount in deficiency. The daughter appeals and the judgment was affirmed. *Waters v. Selleck,* Supreme Court of Indiana, Feb. 6, 1930, 170 N. E. 20.

There are three kinds or classes of legacies: specific, general and demonstrative. The first class is a gift of a definite thing or a particular portion of the estate, which is described to distinguish it. A general legacy is one payable from the assets of the whole estate. The third class is a fusion of the first two whereby the legacy is payable out of the general assets in case of failure of the particular fund. *Words and Phrases,* p. 1980; *In re Wilson,* (Pa.) 103 Atl. 880; *Kramer v. Kramer,* 201 Fed. 248. The question whether a legacy is in a particular class is primarily one of the intention of the testator. *Thayer v. Paulding,* (Mass.) 85 N. E. 868. The particular characteristics are to be attached to each because they are construed to have been so intended in the first instance. *Page on Wills* (2nd Ed.), Sec. 1225.

Courts, in order to protect the legatee, have generally been very liberal in construing wills; and where there is insufficient language to call a gift specific, they have called it demonstrative. *Ives v. Canby,* 48 Fed. 718. The main reason for being wary of specific gifts is that in case the testator disposes of the particular thing during his life-time, the gift is considered to be adeemed. *New Albany Trust Co. v. Powell,* 29 Ind. App. 494, 64 N. E. 640. If there has been an unquestioned ademption of the legacy then there is no question of general or specific legacy. The courts have invoked one rule of construction that has proved helpful in avoiding specific gifts in favor of demonstrative legacies. There is a presumption that the testator intended to make a sensible and equitable disposition and if the relation of the legatee is such that the ademption could not be anticipated, then the bequest is general. *Johnston v. Conover,* (N. J.) 35 Atl. 291. The weight given to the presumption differs in various jurisdictions from a very strong one in Pennsylvania to the converse where a slight indication that the gift is specific will determine the intent in Rhode Island. *Wilson's Estate,* (Pa.) 103 Atl. 880; *Sherman v. Riley,* (R. I.) 100 Atl. 629. The fact that the legatee was the natural bounty of the testator has been considered in determining the intention. The fact that the legacy is primary and the fund from which it is payable is secondary leads the courts in some states to call it demonstrative.

The apparent conflict between the Supreme Court and Appellate Court upon the intention of the testator and in arriving at a different result in the same case may be explained upon one basis. (See *Waters v. Selleck,* App. Court of Ind., Oct. 11, 1928, 163 N. E. 233; 4 Ind. Law Journal, p. 278.) The Supreme Court sees a clear intention in the finding of fact

that the testator had given directions to the scrivener to the effect that the daughter should receive $5,000 in cash "to be paid out of the money derived from the Burbank estate" and that in consequence the item was drawn up. This finding of fact apparently was not questioned. The direction to the scrivener unquestionably tends to show an intent on the part of the testator to make the gift specific, but it was not referred to in the Appellate Court's decision holding the gift demonstrative. There is authority in point with the Supreme Court on very similar facts but that is of very little value when the intent of the testator is in question. *In re Tillinghast*, (R. I.) 49 Atl. 634; *Gelbrach v. Shively*, (Md.) 10 Atl. The Appellate Court, in its decision on the face of the will alone, and without considering the direction of the testator, seems to have reached a decision in line with modern trend of cases; whereas, the Supreme Court, in the light of this finding of fact, was justified in affirming the judgment of the lower court on the ground that the actual intent of the testator was revealed. R. R. D.