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WHEN LEGACIES SHOULD BEGIN TO DRAW INTEREST IN ILLINOIS

JAMES R. HEMINGWAY

IN the Ecclesiastical Courts of England were developed the rules governing administration of estates which are largely followed by our probate and county courts; most of those concerning legacies were developed in the English Chancery Courts with the aid of some of the rules laid down by the former courts. The courts of England and, with few exceptions, the courts of the states, have followed these early established rules. Unless they are contrary to the policy of the law in Illinois—and there is no reason to believe they are—these rules likely would be followed here.

A well-established rule in England and in this country is that legacies carry interest from the time they are payable. In general, unless some other time for payment is set by the will, a legacy is deemed payable one year after the testator’s death. This rule was developed to accord with that reputed to have been adopted by the Ecclesiastical Courts from the civil law which allowed the executor one year in which to ascertain the extent of the testator’s assets and to pay his debts. That a legacy is not payable for a year does not conflict with the law of the vesting of legacies. A legacy given without condition and without reference to time may be vested as of the testator’s death, but the executor cannot be compelled by a legatee to make payment within a year, even though the testator so directs, unless the

1 LL.B. Fellow at Chicago-Kent College of Law.
2 Holdsworth’s History of English Law, VI, pp. 652, 654; Pearson v. Pearson, 1 Sch. & Lef. 10; Beckford v. Tobin, 1 Ves. Sr. 308.
executor chooses to do so. So, to prevent uncertainty in the law, the courts generally have established as an arbitrary rule that, unless otherwise directed by the will, a legacy is payable for the purpose of drawing interest, one year after the testator's death, and that this rule will be applied without reference to special circumstances delaying the time when the legacy is actually paid. Thus, the rule has not been altered by the fact that no probate was had until some time lapsed after the testator’s death, that the assets from which the legacy was to be paid could not be collected within one year from the testator’s death, that the testator by his will allowed more than a year in which to settle his estate, that the statute provided the executor should have one year from probate to pay legacies, and even that the legatees themselves participated in a contest delaying distribution. It was early held that if the estate were productive, interest would be due on a general pecuniary legacy from the date of the testator’s death; but the fact that the estate was productive was disregarded in later cases, and no exception was made even under such circumstances. Some of the states have come to the conclusion that where the statute or the practice of the probate court allows the executor at least one year from the date of issuance of letters testamentary to wind up the affairs of the testator, legacies are to be deemed payable at that time rather than one year from the date of the testator’s death. It was some time before this rule was

4 Benson v. Maude, Mad. & Geld. 15; Couch v. Eastman, 29 W. Va. 784. Unless refunding bond is given, Cahill's Ill. Rev. St. (1929) Ch. 3, par. 119.
5 Ogden v. Pattee, 149 Mass. 82.
6 Koon's and Wright's Appeal, 113 Pa. St. 621; Vermont State Baptist Convention v. Ladd, 58 Vt. 95.
7 Warwick v. Ely, 59 N. J. Eq. 44; In re Spencer, 16 R. I. 25; Chambers' Guardian v. Chambers' Executors, 87 Ky. 144.
10 Maxwell v. Wetherhall, 2 P. Wms. 25.
definitely settled in New York, where the Surrogate Courts persisted in applying the general rule regardless of the statute. ¹³

Upon the full consideration of the reasoning of the courts on the question of whether or not interest should be payable from one year from the date of death or one year from the date of issuance of letters, the former appears far the more logical. One year from the testator's death is a fixed and definite time; one year from the date of letters is not, which fact would lead to more disadvantages than advantages. In adhering to the rule of paying interest from one year after the testator's death in spite of a statute giving the executor one year from issuance of letters in which to settle the estate, the Supreme Court of Vermont said:

The rule has certain advantages which we consider sufficient to overcome all objections. It bases the allowance of interest upon an initial point that cannot be moved by the various accidents of settlement, and thus enables a testator to give certainty to his bequests without the use of special provisions. It accords substantially with what may properly be considered the intention of a testator whose will is silent as to interest; for it is doubtless true that wills are ordinarily made in expectation of the usual course of settlement. But, if the probating of the will or the granting of letters is made the controlling factor, the value of a bequest may be lessened by a postponement of payment without interest, on the happening of a great variety of contingencies which the testator cannot be supposed to have in contemplation. When this takes place, the scheme of the ordinary will is reversed and the more favorable bequests are lessened in value to increase the remainder. ¹⁴

Thus, if the estate is productive, the residuary legatees, to whom will go the accumulated earnings, including the earnings on so much of the estate as will eventually be used to pay the general legacies, could, by delaying the probate of the will or issuance of letters through a

¹³ Carr v. Bennett, 3 Dem. Sur. 433; In re Wallace's Estate, 24 N. Y. St. 405.
¹⁴ Woodward's Estate v. Kolton et al., 78 Vt. 254.
contest, enrich themselves at the expense of the general legatees.

No statute exists in Illinois which gives the executor a definite, minimum period in which to settle the estate. From a reference to the statute providing that the executor file an annual account until the estate is closed, it would seem perhaps, that he has an indefinite time if the nature of the estate reasonably requires it. If he unjustly refuses to close the estate after two and one-half years, he may become personally liable to pay interest at the rate of ten per cent on the funds he withholds. This provision, however, appears not so much to set a usual time for closing an estate as to penalize the executor for neglect and bad faith, for, if the estate reasonably requires to be kept open after that time the executor is not liable under the statute. That portion of our statutes which most nearly fixes a time for closing an estate is that section which bars the claims of creditors after a period of one year from the issuance of letters. Legacies are not customarily paid before that time since the executor wishes to feel secure in the fact that all enforceable claims are filed before he undertakes to make distribution. It can hardly be said, however, that the executor must distribute the estate at that time. Considering, therefore, that the rule that legacies shall draw interest (to be paid by the estate, not the executor personally) to start one year from the testator’s death tends more strictly to carry out the presumed intention of the testator in the greater number of cases, and that there exists no statute inconsistent with this rule in Illinois, it seems to be a proper one to follow in this state.

While, as a general proposition, it is quite uniformly held that no interest is payable until one year from the testator’s death (or in certain states, one year from the date of letters or the conventional time of closing the estate), certain recognized exceptions arise from the

15 Cahill’s Ill. Rev. St. (1929), Ch. 3, par. 114.
16 Cahill’s Ill. Rev. St. (1929), Ch. 3, par. 116.
17 Cahill’s Ill. Rev. St. (1929), Ch. 3, par. 71.
nature of the legacy or of the legatee where interest is construed to be payable from the date of the testator’s death. These exceptions have not been created at the mere whim of the courts but are based on reason and justice. The exceptions that have come to be recognized generally are in cases such as the following: legacies to a child of the testator or one to whom he stood in loco parentis, a legacy to the testator’s widow where it is given in lieu of dower, a legacy given in satisfaction of a debt, specific legacies, gifts of the residue of the estate or an aliquot part thereof, and annuities.

Legacies to the testator’s child or one to whom he stood in loco parentis, in the absence of any contrary intention in the will, bear interest from the date of the testator’s death whether or not the testator has postponed the enjoyment (but not the vesting) of the corpus of the gift. The rule is not based on a theory of legal obligation but on the presumed intention of the testator to provide for the maintenance of the infants that he voluntarily undertook to support during his lifetime. But before this rule—or exception to the rule—can apply, it must appear that the child is a minor and without other provision for his support prior to the time when he would receive the corpus of the legacy or prior to the time when he would be entitled to receive the interest on his legacy, if the gift be one of interest. While the rule operates in favor of a child of the testator, it will not apply to any other minor to whom the testator did not stand in loco parentis. Thus, it will not benefit a grandchild, a niece, nor a natural child.

Cases such as these should not be confused with those where the testator has expressed the intention that the legacy be used for maintenance and support, for some states hold that in such cases the clear intent of the testator must control whether the legatee is a minor or an adult and whether or not he stood in the relation of a child to the testator.  

Although there is in these decisions nothing which would apparently conflict with the policy of the law in Illinois, it is doubtful if occasion would ever arise to apply the rule in a case where the child would be entitled to either the corpus or interest of his legacy from the usual time—one year from the testator's death—since provision is now made for the children of the testator in the statutes by way of an award for maintenance during the year of probate.  

No reason appears, however, why the rule should not apply where the time of payment is postponed, as in the case of a gift of a sum to the testator's son at twenty-one.

Where a legacy is given to the testator's widow and is expressed to be in lieu of dower, no other provision having been made for her support, the courts have sometimes been inclined to allow the widow interest on her legacy from the date of the testator's death. There is much controversy on this point, however, and while many decisions have listed this as one of the exceptions to the general rule it has, in most instances, been dictum. No English cases are found including this as an exception. Although they are well settled that a widow is not included in the same class as a minor child of the testator who is entitled to interest from the date of his death under the presumption of his intention to provide maintenance for the child, they do not seem to raise

25 Cahill's Ill. Rev. St. (1929), Ch. 3, pars. 75, 78.
26 Williamson v. Williamson, 6 Paige 298; Towe v. Swasey, 106 Mass. 100. But not if there is no estate of which the widow is dowable, Gill's Appeal, 2 Pa. St. 221.
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the point of dower at all or recognize any exception in favor of the widow.\textsuperscript{28} An early New York decision gave a widow interest on her legacy from the date of the testator’s death, the legacy being in lieu of dower, but the legacy was a part of the residuum of the estate and that alone would have been sufficient to entitle her to interest from the death of the testator.\textsuperscript{29}

Massachusetts is strongly in favor of the exception. There, in spite of a statute providing that the widow loses her right to dower if she does not waive the provisions of the will within six months, it was held that “The widow’s title to dower is paramount; if she accepts the provisions of the will as a substitute for this legal right, she takes not strictly as a beneficiary but as a purchaser for a valuable consideration,” and interest was allowed her from the testator’s death.\textsuperscript{30}

New Jersey and Pennsylvania are quite positive that no exception should be made for the widow even though the legacy is in lieu of dower.\textsuperscript{31} A legacy given in satisfaction of a debt is recognized as bearing interest from the date of the testator’s death,\textsuperscript{32} and it is sometimes attempted to put the reason for interest on legacies in lieu of dower on the same basis. In criticism of this tendency the Supreme Court of Pennsylvania said:

The reason given in \textit{Clark v. Sewell} for excepting the case of a creditor, is that because the debt is extinguisable presently, the legacy, to extinguish it, must also be payable presently; for which cause it is, and not for any inherent virtue or desert in his claim, that a creditor’s case is an exception to the general rule that a legacy is not demandable within the year. It is made so to effectuate the manifest intention of the testator. In addition, it is obvious that if the debt were not extinguished till the expiration of a year, it would bear interest in the mean-

\textsuperscript{29} Williamson \textit{v.} Williamson, 6 Paige 298.
\textsuperscript{30} Towle \textit{v.} Swasey, 106 Mass. 100.
\textsuperscript{31} Howard \textit{v.} Francis, 30 N. J. Eq. 444 (although such legacies do not abate with general legacies); Gill’s Appeal, 2 Pa. St. 221.
\textsuperscript{32} Clark \textit{v.} Sewell, 3 Atk. 98.
time; and it is consequently immaterial whether the interest be paid on the debt or the legacy. A widow’s dower, however, is extinguished, not by present payment of her legacy, but by her election to take it in satisfaction; and as it does not bear interest in the meantime, there is no occasion to allow interest on the substitute. Should the widow not think the legacy, without interest, a fair equivalent for her dower, she is not bound to take it.

By statute in Illinois, the widow is presumed to take under the will unless within one year from issuance of letters she elects to take dower. In other words, she has no dower at any time after the testator’s death unless she chooses to assert her right to it within the time prescribed. Accordingly, no reason exists for payment of interest on a legacy in lieu of dower, for it is not by the will but by the statute that the dower is barred, and by statute there is no dower to draw interest before renunciation of the provisions of the will. Furthermore, since it is held that the presumed intention of the testator to provide maintenance for his minor child does not extend to adults, the widow would be entitled to no interest for the year succeeding the testator’s death on that theory. But granting that such a theory might be recognized in Illinois, if interest is given only where the widow is otherwise unprovided for, there is, in Illinois, no reason for allowing interest, because the widow is entitled to a widow’s award for maintenance during the period of administration.

Interest on specific legacies apparently has always been allowed from the date of the testator’s death. Specific legacies are deemed to be severed from the rest of the testator’s estate from the time of his death—identified as belonging to the beneficiary from that time. Since such legacies do not abate with general legacies

33 Gill’s Appeal, 2 Pa. St. 221.
34 Cahill’s Ill. Rev. St. (1929), Ch. 41, pars. 10, 11; Warren v. Warren, 148 Ill. 641. Contrast this with Mass. St. 1861, c. 184, where if the widow does not waive the provisions of the will within six months, she loses her right to dower.
35 Cahill’s Ill. Rev. St. (1929), Ch. 3, par. 75.
in the payment of the testator’s debts, they may be paid at once if there is no likelihood that the balance of the estate will be exhausted. Any increase of the specific property bequeathed, such as interest, rent, hire or other form of profit, would therefore go with the gift. The same rule has been held to apply to demonstrative legacies. The characteristics of these legacies are recognized in Illinois, and there appears no reason why an exception to the general rule in their case should not be made here as in other states.

Much the same reason applies to the exception made in the case of legacies of the residuum or an aliquot part thereof. Where the residuum is given outright, no one claims interest thereon other than the legatee himself; so no question is involved. But a question does arise where one legatee is given the income of the residue for life with remainder over to another. Should the income produced during the year following the testator’s death be added to the principal, giving the beneficiary for life the income on the augmented fund starting from a year after the testator’s death, or should the income beneficiary be entitled to the earnings of the fund from the testator’s death? Seldom has the question not been decided in favor of the beneficiary for life. The exception in this case “does not rest on the presumption that the life interest was given for support, but on the equity which seeks to give to each (the life tenant and the remainderman) his due.” It is the intention of the testator that the beneficiary for life receive the income

37 McWilliams v. Falcon, 59 N. C. 235.
38 Dauel v. Arnold, 261 Ill. 570.
during the remainder of his entire life—not one year less than the remainder—and, if it is not impracticable, his intention should be carried out. When the decedent's personal estate comes to the hands of the executor a large portion of it no doubt consists of income-producing investments selected by the testator in his lifetime. It is not difficult for him to keep the income separate from the corpus of the estate and use only principal in payment of debts and expenses of administration. In fact, this is what most corporate executors in Illinois do. The entire earnings, less any expenses during the year of administration properly chargeable to income, would then be paid to the income beneficiary at the end of the year.

The rule in England is that the first payment of an annuity should be made one year from the date of the testator's death, "but if a legacy is given for life, with remainder over, no interest is due till the end of two years." The exception with respect to annuities accruing from the testator's death arises from its unique character.

"An annuity", as defined by our own Supreme Court, "technically is a certain yearly sum granted to a person in fee or for life or for years, chargeable only on the person of the grantor. It is used in a broader sense to designate a fixed sum payable periodically, subject to such limitations as the grantor may impose, and it may be charged on the real estate as well as on the person." It is generally agreed in this country that the first payment of an annuity is due at the end of one year from the testator's death, or if it is payable in more frequent periods, such as semi- or quarter-annually, the first payment would be due at the end of the first period. If a fixed sum, it apparently would have to be paid at all

41 Gibson v. Bott, 7 Ves. Jr. 89.
events, that is, whether there were sufficient income produced or not, and in the event of a failure of income it would have to be paid from principal. If it were all as simple as this no difficulty would arise, but it has been held that the language of the will may restrict the annuity to income generally, or to a specific fund. In Craig v. Craig, where there was a direction to invest a sum of money enough to produce in legal interest at least five hundred dollars, it was held to be an annuity.

Pennsylvania has gone so far as to say there is no distinction between a gift of income, that is, a gift of all the income produced by a certain fund, and an annuity. Therefore, in Pennsylvania, where the testator bequeathed ten thousand dollars to his executors, in trust, to put out at interest and to pay and apply the interest and income thereof to the testator's sister, it was held that the sister was entitled to interest accruing during the year following the testator's death.

New York was early influenced by the Pennsylvania rule, and while the case of Cooke v. Meeker could have been decided on other grounds, it was there broadly stated that 'the authorities would seem abundant therefore, to sustain the doctrine that when a sum is left in trust, with a direction that the interest and income should be applied to the use of a person, such person is entitled to the interest thereof from the date of the testator's death.' Even after the decision in Cooke v. Meeker the Surrogate Courts refused to apply this doctrine in cases of non-residuary legacies, but maintained that the decision in that case turned upon the fact that the legatee was a minor, thereby bringing the case within one of

44 Additon v. Smith, 83 Me. 551; Stamper v. Pickering, 9 Sim. 176; but see Graves v. Hicks, 9 Sim. 536, where the court refuses to order real estate to be sold to pay annuity.
45 Einbecker v. Einbecker, 162 Ill. 267; In re Pierce, 56 Wis. 560; Morgan et al. v. Pope et al., 47 Tenn. 541; Homer et al. v. Landis et al., 95 Md. 320.
46 3 Barb. Ch. 76.
47 Eyre v. Golding, 5 Binney 472; Spangler's Estate, 9 Watts & Serg. 135.
48 Hilyard's Estate, 5 Watts & Serg. 30.
49 36 N. Y. 15.
the exceptions, and that consequently the broad proposition there quoted was dictum. But the Court of Appeals finally passed upon the question directly, supporting the dictum in *Cook v. Meeker*,\(^{50}\) and New York now follows Pennsylvania; although in New York for purposes of taxation the distinction between an annuity and a gift of income is well recognized.\(^{51}\)

On the other hand, in many states there is a sharp line of demarcation between an annuity and a gift of the income of a particular fund for life. Such states recognize that an annuity accrues\(^{52}\) from the date of the testator's death, but the interest from a general fund of a specific amount does not accrue until a year from the testator's death.\(^{53}\) This distinction has also been recognized in England.\(^{54}\)

Judging by strict legal principles, a doctrine which recognizes this distinction appears more sound than one which does not. If an annuity is a fixed sum payable annually, the annual payment will not vary in amount, regardless of the fact that the fund from which it is paid may earn more in one year than another, and where the fund earns less the payments go on until the corpus of the fund is exhausted. Of course, if the testator limits the fund for payment of an annuity to the income of a particular fund or of real estate, as he may do,\(^{55}\) and

\(^{50}\) In re Stanfield's Estate, 135 N. Y. 292, holding that if the estate is productive interest from a non-residuary trust would be payable from the date of death. See also In re O'Hara's Executors, 44 N. Y. Supp. 222.

\(^{51}\) Whitson et al. v. Whitson, 53 N. Y. 479. See also In re Dewey's Estate, 153 N. Y. 63, where a widow was given the income from $12,000 annually for life, but the net estate was less than $12,000, and the court held that the provision was meant as a gift of income and not as an annuity, so that the widow could not have the deficiency in annual payments made up from the corpus of the estate.

\(^{52}\) By this, it is not meant to convey the idea that the annuity is apportionable.


\(^{55}\) Einbecker v. Einbecker, 162 Ill. 267; In re Pierce, 56 Wis. 560; Morgan et al. v. Pope et al., 47 Tenn. 541.
the income in any one year should be less than the annuity, the annuity would abate proportionately. But, if the fund produced more than enough to cover the annuity, the annuity would not thereby be increased. Since an annuity is, then, of a fixed sum, and generally not dependent upon the earnings of a fund unascertained until a year after the testator’s death, there is no objection to its accruing from the testator’s death.

However, if the interest of a specific sum is to be paid to a beneficiary for life with remainder in the fund to another, the fund is not required to be set up by the executor until a year from the testator’s death, for the fund would abate with other general legacies, and hence the executor would have a year in which to determine whether it will be called upon to pay debts. As the New Jersey court so aptly phrased it,

A bequest of a specific sum of money is one gift, one legacy, the benefit of which the testator has apportioned between the donee for life and the remainderman. To the life tenant he has given the interest or produce of the fund during life, and the capital sum to the remainderman after the death of the former. Such a legacy is, therefore, subject to the rule that general legacies are to take effect and be payable at the expiration of one year from the testator’s death. The executor is not bound to set apart the legacy for investment before the end of the year, and until that be done, there is no fund to produce the interest that is payable to the life tenant.56

This was the reasoning applied in Carr v. Bennett,57 where the will directed the executor to “invest the sum of four thousand dollars in bonds and mortgages,” and provided that “the interest thereof, after paying said executor a suitable fee for looking after said fund, shall be paid annually to said Jennette Carr, and at the death of said Jennette Carr the whole of the above bequest shall be equally divided between the children of said

56 Welsh v. Brown, 43 N. J. L. 44.
57 3 Dem. Sur. 433.
Jennette.” Here, the beneficiary for life asked interest on the four thousand dollars from the date of the testator’s death, but the court held that this was a general legacy, not falling within any of the exceptions to the general rule, and that interest began to run only at the expiration of a year from the testator’s death. In Bartlett v. Slater et al. the testator bequeathed one million dollars to his son-in-law in trust to pay the income arising therefrom to the testator’s granddaughter, and the court held that notwithstanding the executors were, by the will, permitted to pay the legacy to the trustee within one year after the testator’s death, the granddaughter was entitled to no interest during the first year, the executors not having made payment to the trustee.

On what principle of law is the Pennsylvania rule based? The first case of importance on this point in that state was Eyre v. Golding. The court held that a bequest of the interest of four hundred pounds to be paid annually to the testator’s daughter during her natural life was the same as an annuity and gave the daughter interest for the year following the testator’s death. In his opinion, Tilghman, C. J., said, “There is a difference between a legacy of a sum of money to one for a term of life and a bequest of a sum to be paid annually for life.” This is undoubtedly true if by the latter he meant a fixed sum to be paid annually and not merely the income from a sum of money. But the case before him certainly was not one of a fixed sum, for clearly the interest on four hundred pounds could vary materially from year to year and the beneficiary would receive as much or as little as the fund produced. Does it make a difference that no trustee was named to put the fund out at interest? No principle of law is more fundamental than that a trust will not fail for want of a trustee, and certainly one would be appointed if it were only the executor himself. Does it make a difference that no remainderman was named? Where the will names no remainderman,
the principal would either fall into the residuum $^{60}$ or, in Illinois, would pass as intestate property under the statute. $^{61}$ In its essential characteristics, therefore, the provision in *Eyre v. Golding* is no different from that in *Welsh v. Brown*, above quoted, where the testatrix gave her niece the interest of twenty-five hundred dollars, to be paid to her annually by the executor, and upon the death of the niece to divide the principal sum among her children. To support his proposition that the income was payable from the date of the testator's death, Justice Tilghman cited *Angerstein v. Martin* and *Hewitt v. Morris*. $^{62}$ Both of these cases, however, had to do with interest on the residue of estates and for that reason were not in point. The Justice also cited Roper on Legacies, which discussed no case in accord with his proposition. The later decisions in Pennsylvania were controlled by *Eyre v. Golding* and did not make a careful study of the true differences between gifts of income and annuities. $^{63}$

Since, New York also was started in its doctrine by a decision which made no apparent distinction between the various exceptions to the general rule, the New Jersey, Connecticut, and California cases stand out as supporting by far the sounder proposition of law.

Certain Massachusetts cases have been cited as supporting the same rule that Pennsylvania does, but an examination of the case in Massachusetts reveals that the decisions are there controlled by statute. Thus, where a testator willed to his brother the sum of one hundred thousand dollars in trust to have all the income during his life with power and authority to use so much of the principal sum for his own use as he should find

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$^{60}$ Caldwell National Bank v. Rickard et al., 143 Atl. 745 (N. J. Ch. 1928); Dunn v. Kearney, 288 Ill. 49.

$^{61}$ Cahill's Ill. Rev. St., Ch. 39, sec. 12. That these omissions were not considered determining factors in the establishment of the Pennsylvania rule is apparent in the later cases of Hilyard's Estate, 5 Watts & Serg. 30, and Spangler's Estate, 9 Watts and Serg. 195, where there is a trustee and a remainderman.

$^{62}$ 1 Turn. & Russ. 232 and 1 Turn. & Russ. 241.

$^{63}$ Rhode Island was also influenced by Eyre v. Golding in Trott v. Wheaton, 5 R. I. 353.
occasion for and elect to use and expend, it was held that under the statute the brother was entitled to interest from the date of the testator’s death. The same statute was in existence when the earlier case of Sargent v. Sargent, also sometimes cited, was decided. If the reasoning of the Pennsylvania court had been recognized in Massachusetts, why should the latter state have passed a statute to settle the question? This point is even more clearly made in California. In that state the code provides that “in the case of a bequest of the interest or income of a certain sum or fund, the income accrues from the testator’s death,” and yet the decision in In re Brown’s Estate was that this provision would not apply where the fund was directed by the will to be paid to trustees, by them to be invested and the income to be paid to a life beneficiary, because the trustees could not begin payment until they received the fund and invested it so as to produce an income. That the code might not change the rule even where the income is to be paid by the executor is inferable from the decision in Mackey v. Mackey et al. And it is certain that where there is no such statute it can make no difference that the executor is given the fund in trust rather than a trustee, because the executor would not take the fund as a trustee until it is separated from his funds held as executor.

However, whether or not the general rule is changed by statute, the intention of the testator, as expressed in the language of the will, is always controlling as to the time from which interest is payable. But a difficulty often arises in determining what language is sufficient to alter the general rule. No method can be established to standardize the interpretation of the words used by

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64 Mass. Gen. Sts., c. 978, sec. 23, which declares that “when, by a will, an annuity, or the rent, use, income, or interest of any property, or the income of any fund, is given to, or in trust for the benefit of, a person for life, he shall be entitled to receive the same from and after the decease of the testator.”


66 103 Mass. 297.

67 In re Brown’s Estate, 143 Cal. 450.

68 107 Cal. 303.

69 Wylie v. Bushnell, 277 Ill. 484.
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testators. Each case must stand by itself. Thus, a
direction to pay a legacy "as soon as convenient" or
"within one year after my death at the convenience of
my executor" or "as soon as practicable" have been
held insufficient to change the general rule.\(^70\)

On the other hand, in Tennessee, where the general
rule that pecuniary legacies draw interest from the end
of the first year is recognized, it was held that where a
will declared, "I do set apart out of my estate in the
hand of my executor, the sum of four thousand dollars,
to be held by my executor subject to the following trust,"
interest should be allowed from the date of death because
the intention was shown by the will that the legacy should
be paid at that time.\(^71\) A provision that a six thousand
dollar bequest should be paid by any six one thousand
dollar five per cent bonds that the trustee might choose,
indicated the intention of the testatrix that the bene-
iciary should receive the income from the selected bonds
from the date of the testatrix's death.\(^72\) In order to
evoke the construction that interest was intended from
the date of death, the testator's intention as indicated
by his will should be, in some way, to separate from the
estate as a whole the particular legacy on which interest
is claimed. The testator's intention, of course, could
postpone as well as hasten the time of payment and if a
legacy is expressly declared to be payable at a future
date, the legatee would not be entitled either to his legacy
or interest thereon until that time arrived.\(^73\)

When interest is deemed to be payable on a legacy
other than on a specific or residuary legacy, it is cus-
tomary to pay simple interest at the legal rate.\(^74\) From
the nature of specific and residuary legacies the same
rule cannot apply. The specific legacy is at once iden-
tified and segregated so that the legatee receives the

\(^70\) Griggs v. Veghte, 47 N. J. Eq. 179; Bartlett v. Slater et al., 53
Conn. 102; Vernet v. Williams, 3 Dem. Sur. 348.
\(^71\) Harrison v. Henderson et al., 54 Tenn. 315, 347.
\(^72\) Bridgeport Trust Co. v. Fowler et al., 102 Conn. 318.
\(^73\) Wheeler v. Ruthven et al., 74 N. Y. 428.
\(^74\) Welch v. Adams, 152 Mass. 74 and other cases there cited; Callo-
increase and profits arising therefrom, whether or not the specific property is actually delivered to him. Under the circumstances he would not be entitled to any additional interest, even if what was earned by the specific property were less than the legal rate. Interest is given because the use of the legacy is withheld, but in the case of a specific legacy no more would be earned by that property after delivery than before. On a residuary legacy the net earnings of the estate during the year of administration is the measure of interest allowed whether this is more or less than the legal rate. No benefit would be derived by paying more, for, as the residuary estate is the fund from which interest is paid, the legatee would be merely paying himself interest.

The question may be asked, "How do we know that any interest at all would be given on legacies in Illinois, since the Supreme Court has not definitely passed upon the point?" A very strong argument in answer to this question was made by Albert M. Kales in his article entitled, Do Legacies Bear Interest in Illinois? And, while it may have no authoritative value, an early county-court decision recognized not only the fact that interest is paid, but that on general legacies it is paid from a year after the testator's death. The Appellate Court in one case gave interest at five per cent, the legal rate in Illinois, to start from the date of the final account but did not discuss the time when interest should start to run. It merely decided that under the circumstances of that case the allowance of interest to the legatees was proper.

One case arose in this state which was exactly in point and would have settled all further argument if the court had not sidestepped the question here considered. The testator had made, among other bequests, two of six

75 2 Ill. Law Rev. 440.
76 Etchhold v. Greenebaum, 1 Chicago Legal News 210, (County Court of Cook County, 1869). This case also held that the court may compel the executor to put money out at interest and also pay part or all of a legacy before the estate is closed upon the furnishing of a refunding bond.
77 Fraser v. Fraser, 149 Ill. App. 186.
thousand dollars and one of four thousand dollars to be held in trust by his executor for the life of the beneficiaries with remainder over at their death. The will also gave the executor five years from his letters testamentary in which to "complete all collections and sales and distributions (moneys in trust not included)." Another provision was that "all the proceeds of my estate, including cash on hand and what may be realized as above and from all other sources, shall be divided, paid out and distributed as follows and as promptly as he [the executor] may find practicable." The executor refused to pay the legatees the income from their legacies, maintaining that they were not entitled to receive any income until after the final settlement of the estate, which might be five years from the date of his letters. But it was held:

The legacies are not payable to the complainants and they are entitled only to the income, but it appears that the income actually produced was at least equal to the legal rate of interest claimed by the bill, which is all that was asked for.

A rule which is perhaps somewhat arbitrary, but which has been generally adopted where no time has been fixed by the will for payment of a general legacy, is that it is payable at the expiration of one year from the testator's death and draws interest from that time. The question whether that rule ought to be adopted by this court in case of such a legacy is not involved in this case and is not decided, but it is quite clear that its application, under the facts of the case, would be entirely just and fair to the remaindermen. 78

The court also pointed out that where one person is acting in the capacity of executor and trustee his duties are separate and distinct and he does not take the fund as trustee until it is separated from the general funds in his hands as executor. This indicates that no distinction should be made between a fund held by the executor as trustee and a fund to be paid to another as trustee with respect to the time the fund begins to draw interest.

78 Fenton v. Hall, 235 Ill. 553.
In conclusion, then, the rules which have been established in other jurisdictions and which might, consistently with our laws, be followed in Illinois are the following:

1. Pecuniary legacies draw interest from the time when they are payable.

2. When no time for payment is indicated by the will, general pecuniary legacies may, for convenience and justice, be deemed payable one year from the testator’s death, and they will draw interest from that time.

3. Where a legacy is given to minor child of the testator or a minor to whom he stood *in loco parentis* and the child has no other means of support, it may have interest on its legacy from the testator’s death.

4. A legacy expressly given, or construed to be given, in payment of a debt will draw interest from the testator’s death.

5. A legatee who is given a specific legacy is entitled to all the increase, income, interest, dividends, rent, or other form of profit derived from the specific property from the testator’s death.

6. The beneficiary of a residuary trust (composed of all or part of the residuum) is entitled to the net earnings of the estate, or his share of the residuum, from the date of the testator’s death.

7. An annuitant is entitled to receive the first payment on his annuity at the end of the first interval, according to the frequency of payments fixed by the will, and if no interval is fixed by the will, at the end of one year from the testator’s death.

8. A beneficiary who is given the use or income of a designated sum of money for life or years is entitled to interest to be figured at the legal rate starting from one year after the testator’s death, to be paid at the end of the first interval elapsing after the one year, to continue, of course, only until the principal sum is paid to the trustee.