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IS TIFFT v. PORTER MODIFIED, OR ARE BEQUESTS OF CLOSELY HELD STOCK AN EXCEPTION TO IT?

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In the past decade there has been an interesting sequence of decisions in the lower courts of New York which have held that a bequest of stock of a family or closely held corporation, which stock is shown to have been held by the testator at the date of his will and retained by him until his death, is a specific bequest, although the testator in his will did not refer to "my stock," nor otherwise similarly identify it. These cases warrant consideration because of the dearth of authority elsewhere concerning bequests of stocks of family corporations,¹ which today have become so common. Consideration of these cases is necessary, moreover, because they have given rise to the question whether Tifft v. Porter,² long a leading and influential case in this state and throughout the country, has, or has not, been overruled. Surrogates have differed on the question. And one Department of the Appellate Division, in an obiter dicta, three years ago, took the indefinite position that the authority of Tifft v. Porter "is seriously impaired, if not destroyed, by In re Security Trust Company of Rochester."³ In construing stock bequests it is a matter of some importance to know whether the authority of Tifft v. Porter has been destroyed; and, if not, whether it has been impaired; and, if it has, to what extent? What does Tifft v. Porter stand for today? Do the courts correctly appraise what Tift v. Porter stood for originally? Is Tifft v. Porter modified, or are bequests of closely held stock an exception to it?

In Tifft v. Porter the testator left 240 shares of the stock of the Cayuga County Bank to his wife, and 120 shares of the stock of the same bank to another legatee. According to the statement of facts, the testator owned just 360 shares of this stock at his death; and, as the court in its opinion discusses exclusively possession by testator of this stock at date of his will, they evidently inferred or assumed this second fact from proof of the first.⁴ Nevertheless, these legacies were held to

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1. But three reported cases on the point have been found outside of New York. New Albany Trust Co. v. Powell, 29 Ind. App. 494, 64 N. E. 640 (1902) is in accord with the New York cases, and is quoted below, p. 000, n. 30. Cumming's Estate, 12 Pa. Co. Rep. 45 (1892); Yerkes Estate, 8 Pa. Dist. Rep. 83 (1894) are both contra; and are criticized infra, note 70. In Burnett v. Heinrichs, 95 N. J. Eq. 112, 122 Atl. 681 (1923) testator held all the stock, apparently, and the bequests were held specific; but upon general principles, indicated note 15, infra.
2. 8 N. Y. 516 (1853).
4. It seems curiously to have been generally overlooked, that, according to the statement.
be general, and these legatees were denied income on the stock after testator's death. The crux of the case appears in this language from the opinion:

"A legacy is general, when it is so given as not to amount to a bequest of a particular thing or money of the testator distinguished from all others of the same kind. It is specific, when it is a bequest of a specified part of the testator's personal estate which is so distinguished."

"In those cases in which legacies of stocks or shares in public funds have been held to be specific, some expression has been found from which an intention to make the bequest of the particular shares of stock could be inferred. Where, for instance, the testator has used such language as, 'my shares,' or any other equivalent designation, it has been held sufficient. But the mere possession by the testator at the date of the will (sic) of stock of equal, or larger amount than the legacy, will not of itself make the bequest specific."

Thus the court embraced "the arbitrary and iron-clad English rule," and in time that case of *Tift v. Porter* became the fountain head of the same rule elsewhere in this country. But while those paragraphs state the gist of the opinion, embodying the rule governing the decision, what other courts have most often quoted is the following classic expression, stating what has been deemed "the reason" for the rule:

"The inclination of the courts to hold legacies to be general, rather than specific, and on which the rule is based that to make a legacy specific, its terms must clearly require such a construction, rests upon solid grounds. The presumption is stronger that a testator intends some benefit to a legatee, than that he intends a benefit only upon the collateral condition that he shall remain, till death, owner of the property bequeathed. The motives which ordinarily determine men in selecting legatees, are their feelings of regard, and the presumption of course is that their feelings continue and they are looked upon as likely to continue. An intention of benefit being once expressed, to make its taking

of facts in *Tift v. Porter*, 8 N. Y. 516 (1853), decedent's possession of the stock in that case was shown only as of his death, while the opinion there, by contrast, discusses exclusively possession as of the date of his will, adding "Davis v. Cain, 1 Iredell Eq. R. 309 and Robinson v. Addison, 2 Beav. 515 are directly in point." Thus in *Tift v. Porter*, the court inferred or assumed possession at date of will from proof of possession at date of death. And so, in *Matter of Freeman*, 139 Misc. 301, 302, 248 N. Y. Supp. 422 (Surf. Ct. 1921), the surrogate says: "In *Tift v. Porter*, the testator, at the time of the execution of his will and also at the time of his death, was the owner of 360 shares of stock of the Cayuga County Bank." In *Vogel v. Saunders*, 92 F. (2d) 984 (App. D. C. 1937), the majority likewise inferred possession at date of will from proof of possession at death.

5. See 8 N. Y. 516, 518 (1853).
8. *Tift v. Porter* is relied on in the leading cases on this point in several states, see notes 101 to 105, *infra*. 
effect turn upon the contingency of the condition of the testator's property being unchanged, instead of upon the continuance of the same feelings which in the first instance prompted the selection of the legatee, requires, as it ought, clear language to convey that intention.\textsuperscript{9}

In the case before it, the testator had given 240 shares out of the 360 shares he owned to his wife, who claimed the bequest as his widow. Had the court been writing that opinion in these days of divorce, perhaps the court would have been somewhat less emphatic about the per- durance of the testator's regard for a legatee. Surely in these days a stock bequest to a friend, a servant, or other employee is not necessarily evidence of an enduring bond of affection. However, the language thus used by the court was adopted by the Supreme Court of the United States,\textsuperscript{10} and is still being quoted.\textsuperscript{11} \textit{Tiff v. Porter} became, and is today a leading case, a landmark. And while its influence thus extended beyond New York, within the State it remained unimpaired as late as 1915, when Surrogate Schultz held a bequest of certain stock, "which shares were in his (testator's) possession both at the time of the execution of his will and at his death" to be general and not specific, citing \textit{Tiff v. Porter}, and further saying: "The question is not a new one and I believe is no longer debatable."\textsuperscript{12}

Two years later, in 1917, the Court of Appeals decided \textit{Matter of Security Trust Company of Rochester}.\textsuperscript{13} This case seems to have attracted no attention at the time, and, as will appear, its force was apparently not appreciated for ten years; and its full significance is not generally known and recognized even today. The testator, who had been an original incorporator of Kee Lox Mfg. Co., owned, both at the date of his will and at the date of his death, 2024 shares (together, he and two others owned 4150 shares) of the 5000 shares issued by that company. To a sister he bequeathed "$5000 also 200 shares of stock of the Kee Lox Mfg. Co.;" to a second sister he bequeathed the same, and the balance of said stock was bequeathed among eighteen other legatees in various amounts. Although the bequests to the sisters were thus of cash and stock,\textsuperscript{14} this was not noted by the court in its opinion. However,

\textsuperscript{9} See 8 N. Y. 516, 521 (1853).
\textsuperscript{10} See Kenaday v. Sinnott, 179 U. S. 606, 608 (1900).
\textsuperscript{11} The most recent quotation is in the majority opinion in Vogel v. Saunders, 92 F. (2d) 984 (App. D. C. 1937).
\textsuperscript{14} Combining bequests of cash and of stock to the same legatee has been held enough to show an intent to make the stock bequest specific. Kermode v. Macdonald, L. R. 3 Ch. 584 (1868); Douglas v. Douglas, 13 App. D. C. 21, 26 W. L. R. 331 (1898); Metcalf v. First Parish, 128 Mass. 370 (1880); \textit{contra}: Estate of McGaw, 85 Pa. Super. Ct. 545
bequest of the balance of the stock, after the gifts to the sisters, might have been relied upon to make their respective legacies specific; and there is an oblique reference to this rule. But there were still other indications in the will that sufficiently showed "an intention to give to the legatees named the specific stock which the testator held in the Kee Lox Mfg. Co. at the date of his will and at the time of his death."

Here, then, was ample basis for the court to decide that the legacies involved in the case before them for decision were specific legacies, without remotely infringing upon the holding in Tifft v. Porter. Moreover, the court might readily have done, in terms, what later surrogate opinions have held was done anyway, namely, the court might have distinguished the case before it as concerning stock of a privately owned corporation, whereas Tifft v. Porter involved "stocks or shares in public funds."

Though the court said nothing inconsistent with this theory, and in fact supported it by implication, (by the discussion and emphasis of the above facts as to testator's relationship to the close corporation), still, they did not directly adopt it.

And certainly they did not directly impair or challenge Tifft v. Porter. They do say that Tifft v. Porter "goes no further than to hold that a gift of stock is a general legacy when there is nothing in the will to indicate that it is a gift of the testator's stock;" they proceed to quote the second paragraph quoted above from Tifft v. Porter; and then they add:

"The law is not so unscholarly as to insist upon the use of the word 'my'

(1925). And in Douglas v. Douglas, supra, there were additional words which materially aided the court in construing the bequest as specific, and adecme.

15. Unitarian Society v. Tufts, 151 Mass. 76, 23 N. E. 1005 (1890), is cited and briefly stated with the comment that the Massachusetts court found nothing in Tifft v. Porter inconsistent with their holding, in applying said rule. But the rule there followed is not stressed, nor does the court in the Security Company case seem to rely on it, except-colaterally or cumulatively. See also, Millard v. Bailey, L. R. 1 Eq. 373 (1856). Compare In re Willcocks, 2 Ch. 327 (1921).


For paying debts testator directed that cash be used and, if insufficient, "any stocks or bonds which I may hold in corporations other than the Key Lox Mfg. Co. and Crown Ribbon & Carbon Mfg. Co. shall be sold and the proceeds applied upon said debts." By another clause he bequeathed "all my stock and interest in the Crown Ribbon & Carbon Mfg. Co."


18. Neither does the court point out that, in the case before it, possession of the stock: was shown both as of "the date of the will" and the date of death, and thus distinguish Tifft v. Porter, upon the facts. See note 4, supra; and note 63, infra.

19. See 221 N. Y. 213, 219, 116 N. E. 1005, 1007 (1917). This authoritative interpretation of Tifft v. Porter, does not mention the "presumption" so much emphasized in that case. See quotation, p. 000, supra. It also leaves the way open for evidence of attendant circumstances, respecting the stock, in construing the will.
when other words may clearly indicate the intention of the testator to give shares then in his ownership.\(^\text{20}\)  

The crux of \textit{Tifft v. Porter} is retained: There still must be "words" to indicate the testator’s intention. But the fact of possession, the fact that shares corresponding to the bequest are "then in his ownership" is given weight, consideration, and importance quite inconsistent (on that single point) with the entire opinion in the early precedent. This is made quite clear (and the court points the way which the lower courts later followed) in the further content of the opinion in \textit{Matter of Security Trust Company}, in which the Court of Appeals goes outside its own cases, to find the principles upon which to base its decision.

Thus, for instance, the Court of Appeals quotes from \textit{Matter of Largue}:\(^\text{21}\) "Many of the courts of last resort have broken away from the arbitrary and iron-clad English rule" and construe legacies of stock specific "without the use of 'my' or any similar expression, when the will upon its face fairly discloses the intention of the testator to make a specific bequest." And from \textit{Ferreck's Estate}\(^\text{22}\) the court quotes, "the fact that the testator had the number of shares so given, though not controlling, is significant." They quote also from \textit{Thayer v. Paulding},\(^\text{23}\) "a very slight indication of an intention to give shares then in his ownership is enough to make the legacy specific in a case like this." The court even indulged in the whimsy of discussing a hypothetical case,\(^\text{24}\) namely, what would have happened if the testator had owned a less number of shares of this stock at death? They answer: "In \textit{Drake, Adm'r v. True}, 72 N. H. 322, such a situation was met by dividing the stock left by the testatrix proportionately among the legatees.\(^\text{25}\)

These citations by the New York Court of Appeals represented a substantial roll call from the states which have never been in entire accord with \textit{Tifft v. Porter}.\(^\text{26}\) This endorsement of the language and the thought of the other courts (in support of the decision then being made in the Security Trust Company case) constituted a peculiar yet devastating attack upon \textit{Tifft v. Porter}.\(^\text{27}\) While the holding or ruling in the

\(^{20}\) See 221 N. Y. 213, 220, 116 N. E. 1006, 1008 (1917).
\(^{21}\) 267 Mo. 104, 114, 183 S. W. 608, 610 (1916).
\(^{22}\) 241 Pa. 340, 88 Atl. 505 (1913).
\(^{23}\) 200 Mass. 98, 85 N. E. 868 (1908).
\(^{24}\) Similar tactics by the majority in \textit{Vogel v. Saunders}, 92 F. (2d) 984 (App. D. C. 1937), met sharp criticism from the minority.
\(^{25}\) 221 N. Y. 213, 221, 116 N. E. 1006, 1008 (1917).
\(^{26}\) In \textit{Martin, Petitioner}, 25 R. I. 1, 16, 54 Atl. 589, 595 (1903), the court held a stock bequest specific without "my" and in the opinion said: "Undoubtedly the fact of the testatrix having an odd number of shares of the Ashland Cotton Company at the date of her death, exactly corresponding with the number given away, was a circumstance to be taken into account. . . ."
\(^{27}\) \textit{Nichols v. Eaton}, 91 U. S. 713 (1875) presents an interesting parallel. There, like-
case is not impugned, the broad scope of the opinion in *Tifft v. Porter* is definitely circumscribed; the rule that courts favor general legacies, the "presumption" that legacies are general, and "the reason" for the said presumption, enunciated and elaborated in *Tifft v. Porter*, are curtailed and limited in application. The manner in which this was done, however, has caused doubt and confusion in the lower courts. Some of them have relied upon *Matter of Security Trust Company* as discrediting *Tifft v. Porter*.

The first of these decisions came in *In re Strasenburgh's Will*. The testator bequeathed 400 shares of the capital stock of a corporation founded and controlled by him, to each of two business associates, and 4000 shares of the same corporation to a son. He "at all times" had stock in excess of this, one certificate being for 400 shares, but none for 4000 shares, except by combining three certificates. Upon an issue as to whether dividends declared during the year of administration should go to these legatees or to the residuary legatee, Surrogate Feeley held the bequests to be specific. He gives an entirely sufficient reason for his holding, in this paragraph:

"In the will he does not say 'my' shares. ... Yet any testator, if he mentions a particular thing generally, means to give what he then has of that kind; and if it be ascertained that at his death he had on hand the exact amount of stock shares which he gave by such legacies, this fact alone, 'though not controlling, is significant.' Being shares in his own business, run by him down until about the date of the will, almost as a one-man company, these shares were not offered to the public, but were closely held, by him and his wife ... and the rest being in the hands of his trusted business associates, mentioned in the will, and some small lots held by employees, it is not likely he referred in the will to shares thereafter to be acquired either by him or by his executor; but intended those he then had and later kept.... In this regard the observation of an Indiana court is pertinent: 'If it appears that the testator knew that he alone owned a sufficient amount of stock to satisfy a legacy, when stock is devised, such legacy will be regarded as specific, because the will must necessarily have referred to the shares owned by the testator.' *New Albany Trust Co. v. Powell*, 29 Ind. App. 494, 500.*

This last thought had first been expressed in an earlier and more

wise, after showing a complete and adequate basis for its decision in recognized precedents, the court went on to discuss additional reasons (*contra* to the English precedents) which the court treated as a concomitant and independently sufficient basis of its decision. Scathing criticism of this latter "dictum" was published by Professor John Chipman Gray and obtained wide circulation. Yet the courts followed the "dictum"; and it thus became "the greatest single factor in the establishment of spendthrift trusts" in the United States. See *Griswold, Spendthrift Trusts* (1937) 25, reviewed, (1937) 25 Geo. L. J. 512.

30. See *id.*, 96, 97, 242 N. Y. Supp. at 460, 461.
celebrated opinion in the Surrogate’s own state. In *Matter of Hastings* the testator had bequeathed among five legatees in unequal amounts a total of 45 shares of capital stock of a certain association; so much was found among his assets, and, it appearing that testator knew he alone possessed enough shares of this stock to satisfy these bequests, they were held specific, the court saying:

“If a bequest of stock ‘standing in my name’ or of ‘my’ stock is specific, how can it fairly be claimed that a bequest of stock which is only procurable, as the testator knows, by a resort to his assets, lacks the specific quality?”

But in the *Strasenburgh* case, the Surrogate did not rely upon this reasoning alone. He undertook further to distinguish the early landmark, saying:

“*Tift v. Porter*, 8 N. Y. 516, by a majority of one vote, laid down the rule that a gift of stock is a general legacy when there is nothing *in the will* to indicate that it is a gift of testator’s stock. . . . Today no one doubts the right of the court to go outside the will to resolve a doubt about a legacy being specific” etc.

The Surrogate met and rejected other objections, also, saying:

“In such a case replevin ceases to be a universal test of a legacy being specific, because until allotment in certificate, the legatee could not identify, by the language of the will, any particular shares as his own bequest. Ademption also, in such cases, ceases to be a complete test, in itself, of the specific nature of

31. (a) 6 Dem. Surr. 307 (N. Y. 1887). This is a noteworthy opinion. It considers both the authority contra, and the preliminary question of evidence, as to whether the facts respecting the corporation and its stock may be shown. (b) In Ashton v. Ashton, Cas. tem. Tal. 152, 25 Eng. Rep. 712 (1735) the court said that if it were proven that stock of the kind bequeathed was not purchasable, that would be “a very strong circumstance for saying that the testator intended to give that which he then had.” (c) See Robinson v. Addison, 2 Beav. 515, 520 (1840) where the decision was contra, involved stock of a corporation having 2600 shares which “though not frequently sold are nevertheless occasionally bought and sold and may be had for money.” Both these observations were noted in Matter of Hastings, 6 Dem. Surr. 307 (N. Y. 1887). (d) In Evans v. Hunter, 86 Iowa 413, 53 N. W. 277 (1892) which involved government bonds and which followed Tift v. Porter, the court said: “The question to be determined is whether the requirements of the will can be satisfied only by delivering to the legatees the bonds which the testator owned at death.” (e) Kunkel v. Macgill, 56 Md. 120 (1880).


the legacy, where the ademption is partial only, and the units in the mass are uniform and of equal value.\textsuperscript{34}

He conceded that it would be impossible, if only part of this stock had been disposed of by the testator, to say whose shares were adeemed, and added:

“For all that, there can, apparently, be a gift of a particular fraction of a particular thing, such as corporate shares, without any implied substitution in cash if enough be not on hand at death to meet the call of the will.”\textsuperscript{35}

Thereafter the Court of Appeals decided \textit{Matter of Will of Catherine Martin}.\textsuperscript{30} On June 11, 1924, she owned and exchanged forty shares preferred stock of the Niagara Falls Power Company, par $100 per share, for one hundred and sixty shares, par $25 per share. Later, in September, 1925, she executed her will, giving her sister “the interest on 40 shares of stock of the Niagara Falls Power Co. while she lives,” then over to a hospital. She mentioned the par value of the stock as $100 per share; she also bequeathed some cash to her sister; and she gave the residue “including all Power Company stock not mentioned above” to the Salvation Army. She died still owning the stock received in the above exchange. The Surrogate held the sister took (for life) one hundred and sixty shares of the par $25 stock as a general legacy; the Appellate Division held that she took (for life) forty shares of the par $25 stock, as a specific legacy. The Court of Appeals decided that she took (for life) one hundred and sixty shares of the part $25 stock, as a specific legacy. As noted above, the joining of a bequest of cash with a bequest of stock to the same legatee is sometimes supposed to evidence sufficiently an intent to make the stock bequest specific;\textsuperscript{37} and, secondly, the gift of the residue of a named stock is often deemed enough to make

\textsuperscript{34} See \textit{In re Strasenburgh’s Will}, 136 Misc. 91, 93, 242 N. Y. Supp. 453, 462 (Surr. Ct. 1928). Considering a bequest of the contents of a safe deposit box, in \textit{In re Low}, 103 N. J. Eq. 435, 442, 143 Atl. 222, 225 (1923), the court said: “In Parrott v. Worford, 1 Jac. & W. 594, it was said that the liability to ademption was an unfailing test of the character of the legacy... the inevitable consequence of ademption had this box been found empty at testator’s death, compels the conclusion that the legacy is specific.” Compare: \textit{Matter of Fisher}, 93 App. Div. 186, 37 N. Y. Supp. 567 (1st Dep’t 1904), where contents of such box were bequeathed to several legatees in specified proportions. See (1914) 14 Col. L. Rev. 74, 75, note 11.


\textsuperscript{36} 225 App. Div. 724, 231 N. Y. Supp. 813 (1st Dep’t 1928); 252 N. Y. 532, 170 N. E. 151 (1929).

\textsuperscript{37} See note 14, \textit{supra}.
a preceding bequest of stock of the same company specific. But these considerations were not relied upon in *Matter of Security Trust Company*; nor in this case. Although the reference to par value, in the will of testatrix, did not conform to, and hence did not accurately describe the stock she owned, the memorandum opinion and decision in *Matter of Martin's Will* has been construed, in subsequent Surrogate decisions, as dependent solely upon the fact that testatrix owned the stock which was held to pass under her bequest, both at the time of her will and at the date of her death.

Thus interpreted, *Matter of Martin's Will* would overrule the holding in *Tifft v. Porter*. This seems far-fetched. What the Court of Appeals did not do in the *Security Trust Company* case, they surely would not do in a memorandum opinion later in *Matter of Martin*. But *Matter of Martin* exhibits the reach of the *Security Trust Company* opinion. *Matter of Martin* emphasizes pointedly the new importance of possession of the stock, and the relative unimportance of the "words" necessary to make the bequest specific. In *Matter of Martin*, as also in *Security Trust Company* case, there was a gift of a balance of the stock, following gifts of shares of stock of the same kind; the words of these bequests would serve to satisfy the requirement that there be "words" to evidence an intent to make specific a bequest of stock owned by testator.

This may appear more obvious upon consideration of a recent decision in the District of Columbia, wherein *Tifft v. Porter* was quoted and distinguished by the majority, and was relied upon in the dissent. Testatrix bequeathed 14 shares of American Telegraph & Telephone Company stock, without using "my" or any equivalent designation, to a woman to whom she referred as "my dear friend and companion" and to whom she made other bequests. At her death testatrix owned no stock other than ten shares of the stock of that company. To satisfy creditors it became necessary either to sell this stock, or to sell realty passing under the residuary clause. The legatee opposed sale of the stock, contending it was specifically bequeathed, and she was sustained by the court. The majority opinion quotes and adopts the reason assigned in

38. Note 15, *supra*.
40. Whether a specific legacy of stock is adeemed by a change in the subject matter between the date of the will and testator's death, depends on whether the change is substantial or merely formal. *Matter of Brann*, 219 N. Y. 263, 114 N. E. 404 (1916); First Nat. Bank v. Union Hospital, 281 Mass. 64, 183 N. E. 247 (1932). This rule was inapplicable in *Matter of Martin's Will*, since the exchange was made prior to the execution of the will, but a similar attitude towards the legacy was displayed by the Surrogate and by the Court of Appeals.
41. See *Matter of Tyler*.
**IS TIFFT v. PORTER MODIFIED?**

_Tiff v. Porter_ for the rule that "courts are generally averse to construing legacies to be specific." But they then proceed to say: "The reason for applying the rule is absent in this instance." Further they say that, if testatrix had left no shares of stock of this company,—"In that case the courts would be loathe to construe the legacy as specific, and hold that it had been adeemed. But that situation does not exist here." In short, the continued possession of the stock by testatrix is a vital factor in deciding whether the bequest is specific or not. In such case, the reason stated in _Tiff v. Porter_ for the rule adopted there, does not apply.

The holding in _Tiff v. Porter_ is not thus evaded, nor violated. Possession solely is still not enough. Some expression must be found, in the four corners of the will, to make the bequest specific. But, when the stock has been retained (and the legatee need not be saved the consequence of ademption) then any words whatsoever should suffice to avoid the judicial inference favoring equality among legatees, and to make the bequest specific. Most of the New York cases, beginning with _Matter of Security Trust Company_, and including _Matter of Martin_, are in harmony with this theory of _Vogel v. Saunders_. This will appear, by contrast, later, when discussing the cases which are not in accord.

Eleven years had elapsed between the _Security Trust Company_ case in 1917 and the _Strasenburgh_ case in 1928, which was the first decision construing the _Security Trust Company_ case as establishing a departure from _Tiff v. Porter_. But after the Court of Appeals had again spoken in _Matter of Martin's Will_, in 1929, there were—just two years later—three opinions, by different Surrogates, almost simultaneously, dealing with like problems. The first of these to be considered is _In re Mitchell's Estate_. "Life" was founded by John A. Mitchell, testator, and Andrew Mill, in 1882. In 1892 it was incorporated, testator receiving 750 shares, and Miller the other 250 shares, which each retained until testator's death, when the business was worth a million dollars. Mitchell bequeathed 180 shares outright among his sister, his cousin and three business associates. The remaining 570 shares he gave in trust to his widow for life, then to several associates, including the above three. In referring to these 570 shares, he authorized the trustees "to retain all of my said 570 shares." The executors considered this gift specific, and the gift of 180 shares general. As to the 180 shares, testator provided that the children of a predeceased legatee would take the parent's

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43. See S N. Y. 516, 521 (1853).
45. Ibid.
portion, "or if any of such legatees should leave no children surviving me, then, I give and bequeath the same to his or her next of kin in equal shares, per stirpes and not per capita." Disposition of the income on the stock during the period of administration (a dividend of $100 per share) was the only matter in issue. Testator's use of the word "my" (above) was seized upon in aid of the construction that the legacies in the 180 share group were specific as well as those in the 570 share group. Yet the case exhibits the spirit of Matter of Security Trust Company, to which the Surrogate compares it, and from which he quotes copiously:

"The indications of intent in this will are just as strong as those in Matter of Security Trust Co. The stock of the Life Publishing Co. was not publicly dealt in. The corporation here was even a closer one, with but two stockholders. . . . Mr. Mitchell must have known that his executors would not be able to replace the stock bequeathed by him in case he disposed of it, in whole or part, during his lifetime. His will disposes of the exact number of shares owned by him at the time it was executed. At his death he possessed the same amount of stock. The legatees here were favored relatives and business associates who apparently had helped to make the business successful. His intention was plainly to give them an immediate interest. Moreover, he provided for a complete disposition of the stock to the children or next of kin of the legatees, in case anyone pre-deceased him. . . . For these reasons the legatees are entitled to the specific shares, and to a pro rata distribution of the dividend of $18,000., but without interest."47

The holding in Tift v. Porter is to be followed in a clear case, however. When the stock bequeathed is not that of a close corporation, the fact of ownership of the stock by testator at the time of making his will does not alone make the gift specific. And, if the stock has not been retained, the legatee will be spared the consequence of ademption, by requiring clear words to show an intent to make the bequest specific.

Thus, in Freeman's Will,48 the testator had made a bequest of 38 shares of stock in various corporations, which he owned at the date of his will; but during his life, he had disposed of shares of like description and amount. The executor relied upon the Security Trust Co. case to obtain a construction that this bequest was specific and so adeemed. But Surrogate Wingate, held the bequest general, which saved the bequest for the legatee. The decision is amply supported by authority.49 But the opinion is quite interesting. The Surrogate harkens back to Matter of Werle's Will, with its expression that "The question . . . is no longer debatable." He insists "that the general rule stated in Tift

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47. See id., 372, 374, 186 N. Y. Supp. at 667, 668 (Surr. Ct. 1921).
v. Porter is firmly established in the jurisprudence of this state."50 Yet he takes cognizance of the schism, and eloquently supports it so far as it concerns bequests of closely held stock. Referring to Tift v. Porter, he says:

"The ruling is by express terms limited to 'legacies in stocks or shares in public funds' which in modern parlance is the equivalent of stocks or bonds dealt in by the general public. The decisions in the Security Trust Company, Strasenburgh, Mitchell, and similar cases all concerned shares in closely held concerns. "The securities in enterprises commonly purchased and sold by the general public frequently differ in no essential particular from currency. This is especially common with such securities as Liberty bonds. On the other hand, where the stocks bequeathed represent complete or partial control of a personal, closely held, private enterprise, it is obvious that different considerations prevail. In such a case, a gift of the controlling shares amounts virtually to a gift of the business. If, therefore, the testator has in his lifetime disposed of such indicia of ownership a determination that the executors in such a case should be required to go out and repurchase them, or the business which they represent, would be a palpable absurdity, placing the estate at the absolute mercy of the individual who, at the moment, possessed control. Such absurdities will not be indulged by the courts, but their refusal so to do in no wise invalidates the rule of Tift v. Porter, which does not purport to cover such circumstances."51

Thus by dictum the Surrogate interprets the Security Trust Company case as an "exception" to Tift v. Porter, and as concerning merely cases on bequests of closely held stock.52 But the Court of Appeals did not confine themselves to that ratio decedendi. That simple basis for the decision in Security Trust Company, would leave the memorandum opinion in Matter of Martin without support; whereas, it must depend upon Matter of Security Trust Company.

Freeman's Will was rightly decided. It fell within the holding in Tift v. Porter. Sufficient support for this holding, however, lies in the fact that courts favor general legacies: primarily, to save the legatee the

50. See p. 366, supra.
52. The Surrogate says, also, "While the Court of Appeals in the Security Trust Company case reaches a result differing from that in Tift v. Porter as a consequence of the essentially unlike circumstances, there is nothing therein decided or implied which impairs its authority. This fact is further emphasized by its express adherence thereto in Matter of Lendle, 250 N. Y. 502. It is simply a case of differing legal principles being applicable to diverse states of fact." (p. 305). But the court in the Security Trust case did not rest its decision upon any diverse state of facts! See notes 9-17, supra. And Lendle's Estate involved no question of specific legacy. The nature of that case, and its only reference to Tift v. Porter, are indicated in this quotation: "The bequests were of German marks which are to be regarded, not as a measure of value, but as a commodity. They are like a general bequest of stock or bonds, to be satisfied in kind. Tift v. Porter, 3 N. Y. 516; Evans v. Hunter, 86 Iowa 413, 53 N. W. 277. . . ."
consequences of ademption, when that is necessary; and, secondarily, to preserve equality among legatees, when the first object is unnecessary. The first object works in the legatee’s favor; the second work to his detriment; yet both objects are intended to conform to a presumed intent of all testators. When the court in Tifft v. Porter went beyond this arbitrary basis of judicial presumption, and undertook to assign a “reason” for the presumption, and to base it upon actual inference, (philosophizing about testator’s affection for the legatee outlasting his tenure of the stock) they could not have intended to do more than put a foundation under the presumption. They were not expanding, nor enlarging, the presumption. Hence the “reason” for the presumption should not be used to tag a legacy as general, whenever there is no occasion for the presumption itself. Such was the decision of the majority in Vogel v. Saunders. Consider also the next case in this regard.

In the case of Matter of Liell’s Will, Henderson, Surrogate, also had noted that a departure had been made from Tifft v. Porter, and, in a decision less easily justified, he refused to consider the record before him as coming within that departure. The testator had bequeathed thirteen bonds of Schieffelin & Company, which he owned when his will was executed and thereafter until his death, among seven legatees. The question was whether income during the period of administration went to them, or to the residuary legatees. Holding these stock bequests to be general, the Surrogate said:

“If this be a specific legacy, the executrix (legatee of eight shares) would not benefit unless the decedent died possessed of the bonds mentioned in paragraph ‘Third’ of the will. Was it his desire that she receive a benefit from his estate in any event or only if the bonds remained his until his death? . . . Mere possession of the bonds at the date of the execution of the will and at the date of the testator’s death is not sufficient to make a legacy specific. A specific legacy is a part of the decedent’s estate which is distinguishable from all others of the same kind. (Tifft v. Porter, 8 N. Y. 516; Matter of Delaney, 133 App. Div. 309). The testator divided the Schieffelin & Co. bonds unequally among seven legatees but there was no attempt by the testator to point out any particular Schieffiln bond for any legatee. A specific legacy is a gift of a particular thing. If the testator had disposed of one of these bonds in his lifetime, it would be impossible to determine which of the seven legatees had lost his legacy or part of his legacy etc. etc.
In Matter of Strasenburgh, 139 Misc. 91, where the language of the will, is somewhat similar to the instant case and the legacies were held to be specific, the testator owned a majority of the stock in the company, the shares of which he bequeathed in his will. It was his corporation and he alone owned a sufficient amount of stock to satisfy the legacies. It is not urged that this condition exists here. In that case, and in all others that have been called to my attention and that bear upon the present question, either the legacy was given to one person, or the court found an intention upon the part of the testator to make specific gifts.\footnote{58}

Purporting to recognize but not extend the departure from Tift v. Porter, this case actually, in spirit, more closely resembles Tift v. Porter than any New York case since Matter of Security Trust Company.\footnote{59}

The decision might be considered satisfactory, if it were frankly grounded upon an arbitrary judicial presumption in favor of equality among legatees, when the primary judicial presumption intended to avoid ademption is inapplicable. But the court goes back to the “reason” supplied in Tift v. Porter; and this case is another instance\footnote{60} in which that “reason” is utterly inapplicable.

In the first place, the court is not called upon to decide whether testator intended to make a “specific bequest” of stock, whenever it is

\footnote{58} See id., at 389, 247 N. Y. Supp. at 386.

\footnote{59} (a) Compare Drake Adm’r. v. True, approved in Security Trust Co., at p. 200 supra. Compare also In re Strasenburgh’s Will, quotation above.

(b) In Davie v. Crandal, 101 N. Y. 311, 4 N. E. 721 (1886) a gift to a son of testator of the sum of $243.92 a portion of the debt due me from the said Jas. Davis, secured by his notes was followed by a similar gift to a second son. At the date of the will and at date of death, testator held a note by Davis for the amount of the two sums thus bequeathed; and the legacy was held a specific legacy of one-half the note. See also Estate of Daly, 202 Cal. 284, 260 Pac. 296 (1927); Bost v. Morris, 202 N. C. 34, 161 S. E. 710 (1931). Compare, Jones v. Virginia Trust Co., 142 Va. 229, 128 S. E. 34 (1925); Miller v. Weber, 126 Md. 658, 95 Atl. 962 (1915).

(c) The legacy must be distinguishable from testator’s other kinds of stock. In re Bonesteel, 265 N. Y. 455, 193 N. E. 268 (1934). Accord, Boston Safe Deposit v. Reed, 229 Mass. 267, 118 N. E. 333 (1918).

(d) But the legacy need not be distinguishable from testator’s other stock of the same kind. An excellent case note in (1914) 14 Col. L. Rev. 74, 75 has this statement:—“The legacy may be specific although the identification of the particular shares is insufficient to separate them from the entire number of the same description in the testator’s estate.” Eckfeldt’s Estate, 13 Phil. 202, (Pa. 1879) contra. Mahoney v. Holt, 19 R. I. 669, 36 Atl. 1 (1896); compare, Meyers Executor v. Meyers, 33 Ala. 85 (1858) and although the property is acquired after the date of the will, Stephenson v. Dowson, 3 Beav. 342, (1840) and therefore, if to be ascertained at the testator’s death would not be subject to ademption. See, Bothamley v. Sherbon (1875) L. R. 20 Eq. 302. Compare Wood’s Estate, 267 Pa. 462, 110 Atl. 90 (1920); Bost v. Morris, 202 N. C. 34, 161 S. E. 710, (1931). Mahoney v. Holt, supra, is criticized in (1897) 10 Harv. L. Rev. 454, citing Williams, Executors (9th ed.) 1027, 1028. See, also, (1905) 10 Ann. Cas. 490, 497.

clear that he did intend to bequeath specific stock.\textsuperscript{61} Furthermore, the \textit{Strasenburgh} case said that "any testator, if he mentions a particular thing generally, means to give what he then has of that kind."\textsuperscript{62} The 


\textsuperscript{62} (a) See note 30, \textit{supra}, and text p. 000.

(b) Ownership of stock at the execution of the will equivalent in kind and amount to the stock bequest was alone held enough to make the bequest specific, on the idea that the testator must have intended to give the stock he had: Joffreys v. Joffreys, 3 Atl. 120 (1743); White v. Winchester, 6 Pick. 48 (Mass. 1827); Cuthbert v. Cuthbert, 3 Yeates 486 (Pa. 1803); New Albany Trust Co. v. Powell, 29 Ind. App. 494, 64 N. E. 640 (1902); Matter of Hastings, 6 Dem. Sur. 307, 15 N. Y. St. Rep. 420 (1887). See notes 19-20, \textit{supra}. See also, Avelyn v. Ward, 1 Ves. Sr. 419, 27 Eng. Rep. 1117 (1749).

(c) \textit{Contra}: Johnson v. Goss, 128 Mass. 433 (1880). \textit{Cf.} Palmer v. Palmer, 106 Me. 25, 75 Atl. 130 (1909). Also cases following in this note, and in note 63 (b).

(d) In Davis v. Kane, 1 Iredell 304 (N. C. 1840), the court said that testator, by a bequest of 25 shares of bank stock, had not expressed an intent to give the shares he then owned, and that a conjecture, however plausible, that he intended the stock that he then held would not render the gift specific.

Lord Eldon, in Sibley v. Perry, 7 Ves. Sr. 523, 528, 32 Eng. Rep. 211, 213 (1802) said: "I have no doubt in private that directing a transfer of stock he means to give what he has: but there is no case deciding it is specific, without marking the specific thing, the very corpus . . . (and) unless I can say that his intention was that the legacy should fall if the stock was parted with, I cannot say he meant the one or the other because he happened to have so much stock at the date of the will, for otherwise there is no legal ground for that construction."

And, \textit{In re:} Willcocks, 2 Ch. 327, 329 (1921), testatrix bequeathed an odd amount in pounds, shilling and pence of a named stock to her father, and the same to her mother, and "all the remainder of my real and personal estate" to her husband. She owned these stocks and no others at the date of her will, but sold them thereafter. The court said, "In Hawkins on Wills, the learned author points out that the possession of the particular sum may be the motive of fixing the amount of the bequest, but yet the testator may intend to give it in the form of a general legacy." And, upon that reasoning, the bequest is held
Security Trust Company case and In re Martin's Estate indicate that this idea is strengthened whenever the testator retains those very shares until his death. And, when he does so, it is idle for the court to conjecture whether it was testator's desire that the legatee "receive a benefit from his estate in any event, or only if the bonds remained his until his death." When the stocks are retained, consideration of any other situation is "sheer speculation from a hypothetical case." For the will speaks from death. At death the testator intends to give the stock he then still has.

(e) By contrast, Rigby, L. J. said in In re Nottage, 1895, 2 Ch. 657, 664: "You have got a long way towards a specific gift if you come to the conclusion that he is trying to describe something which he has."

And, in New Albany Trust Co., supra, the court said: "At the time the decedent executed his will he owned 259 shares of the capital stock of the Madison Gaslight Company, and it is to be presumed he had that particular stock in mind. While a person might make a devise of some article of personal property which he did not possess at the time, for he might make provision for its procurement after his death,—yet it would be an unusual thing to do, and out of the ordinary."

63. (a) That ownership of stock at the execution of the will and at date of testator's death of the kind and amount bequeathed, makes the gift specific: Matter of Martin's Will, supra, Jewell v. Appolonio, 75 N. H. 317, 74 Atl. 250 (1909); Waters v. Hatch, 161 Mo. 262, 288, 79 S. W. 916, 923 (1904); Martin, Petitioner, 25 R. I. 1, 54 Atl. 559 (1903); Lewis v. Sedgwick, 223 Ill. 213, 79 N. E. 14 (1906). See also, Metcalf v. FRamingham Parish, 128 Mass. 370, 373 (1850); Mandelle's Estate, 252 Mich. 375, 233 N. W. 230 (1950); Calnane's Estate, 28 S. W. (2nd) 420, 422 (Mo. App. 1930); Griffith v. Adams, 106 Conn. 19, 137 Atl. 20 (1927); Wood's Estate, 267 Pa. 462, 110 Atl. 90 (1920); Sherman v. Riley, 43 R. I. 202, 110 Atl. 629 (1920); Smith v. Smith, 192 N. C. 637, 135 S. E. 855 (1926).

(b) Contra: Robinson v. Addison, 2 Beav. 515 (1840); Tifft v. Porter, 8 N. Y. 516 (1853); Dryden v. Owings, 49 Md. 356 (1878); Gilmer v. Gilmer, 42 Ala. 9 (1869); Corbin v. Mills, 19 Grat. 478 (Va. 1869); Sponsler's Appeal, 107 Pa. 95 (1884); Yearles Estate, 8 Pa. Dist. Rep. 63 (1894); Cummings Estate, 12 Pa. Co. Rep. 45 (1892); Bond v. Evans, 92 Colo. 1, 17 P. (2d) 311 (1932); Gannabrant v. Callaway, 110 N. J. Eq. 83, 158 Atl. 830 (1932).

Collections of these cases, with comment critical of the former, and endorsing this latter group of cases will be found in 11 W. & T. L. C. Eq. 605, 646, 676; (1903) 10 Ann. Cas. 490-499; and (1908) 11 L. R. A. (n.s.) 87.

64. Taken from the above quotation from In re Liell's Will, first paragraph thereof, line 4. This is the language, also, of the "reason" quoted from Tifft v. Porter, supra.

65. In Vogel v. Saunders, 92 F. (2d) 984 (App. D. C. 1937) note 11, supra, the majority observed that, if testatrix bequeathed stock, and died owning none, "the courts would be loathe to construe the legacy as specific, and hold that it had been adeemed. But that situation does not exist here." Earlier in the same paragraph, referring to the rule stated in Tifft v. Porter, the majority said: "The reason for applying the rule is absent in this instance."

66. (a) "In practically all of these United States various statutes are now in force, the effect of which, with the decisions under them, is that all wills are to be construed, both as to real and personal property, as if made immediately before the death of the
The notion that a testator's regard for the legatee must be presumed to continue until death (expounded in *Tifft v. Porter*, but ignored in *Matter of Security Trust Company*) is not thus infringed; for the testator himself proves that regard by holding the stock, available to satisfy his legacy. Judicial concern to save the legatee the consequence of possible ademption is then superfluous: the testator has prevented ademption.6

Insistence upon this presumption, this judicial inference 'favorable' to the legatee, in *Liell's Will*, deprived the legatee of income.67 In *Vogel v. Saunders*, that inference 'in her favor' would have deprived the legatee of her stock—if the minority had prevailed.68 As the primary testator, unless a contrary intention appear in the will. 1 ALEXANDER, COMMENTARIES ON WILLS 283, referring not to persons or beneficiaries, but to subject matter. See also, 3 WOERNER ADMINISTRATION 1396. Compare, (from ALEXANDER's footnote) Smith v. Edlington, 8 Cranch 66 (1814); Thorndike v. Reynolds, 22 Gratt. 21, 32 (Va. 1872). *Contra* as to specific bequests, Bradley's Estate, 119 Misc. 2, 194 N. Y. Supp. 888 (Surr. Ct. 1922), citing Delaney's Will, 133 App. Div. 409, 117 N. Y. Supp. 838 (2d Dept 1909), aff'd, 196 N. Y. 530, 89 N. E. 1098 (1909).

(b) "It is immaterial whether the property given is described as being part of the testator's estate at the time of the making of the will, but to be a specific legacy it is essential that the property be owned by the testator at the time of his death, and that it be so described that it can be distinguished from the rest of his estate." Baker v. Baker, 319 Ill. 320, 150 N. E. 284 (1915), quoted in *Vogel v. Saunders*. See, to like effect, Griffith v. Adams, 106 Conn. 19, 137 Atl. 20 (1927); Wood Estate, 267 Pa. 462, 110 Atl. 90 (1920); compare, Smith v. Smith, 192 N. C. 687, 135 S. E. 855 (1926).


67. "He actually owned thirty-three $1,000 Fourth Liberty Loan bonds at the time of the execution of his will, and retained them in his possession to the time of his death, thus negativing the idea that he entertained the intention to adeem any portion of the bonds." Calnane's Estate, 28 S. W. (2d) 420, 422 (Mo. App. 1930). And see, *In re Black*, 223 Pa. 382, 72 Atl. 631 (1909).

68. See note 34, supra. The court in *Liell's case* might have reached a right conclusion by adopting the theory that such stock bequest is a demonstrative legacy, where testator owned stock of the kind and amount bequeathed at date of will. This does conflict with the holding in *Tifft v. Porter*, but not with the quotable reasoning for which that case is principally noted. Possession of the stock at date of will, under this theory, warrants an inference that the testator expected that stock "which he then had would remain in his possession until he died, and then serve to carry out his will, still it does not follow that he invalidate the bequest. . . . Such a bequest is consequently demonstrative, not specific." 2 W. & T. L. C. Eq. 647. Cf., id., 610. *Vogel v. Saunders* might be considered as in accord with this theory.

69. 92 F. (2d) 984 (App. D. C. 1937). The minority say: "Because the testatrix thus
reason for said presumption is absent whenever the stocks bequeathed are retained by the testator until his death, the presumption should not arise, in such case, to plague the legatee it was invented to aid! 70

Instead, in such case, the court should extend itself to find in the four corners of the will “some expression” of an intent to bequeath these specific shares, sufficient to conform to the holding in Tifft v. Porter. Otherwise, the legatee should be told that her bequest is a general bequest—not upon any speculation about whether testator desired her to have the bonds in any event, or only if they remained in his possession,—but upon the frank position that, the testator’s intention being unknown, and it being unnecessary to save the legatee from the consequence of the legal doctrine of ademption, the court will, nevertheless, hold the bequest to be general, because of a judicial preference to maintain quality among legatees, in accord with a (gratuitously) presumed intent of all testators to that effect. This, if somewhat arbitrary, is yet forthright and understandable. It would be justified only in the utter absence of any “words” indicating a contrary intent.

Notwithstanding Freeman’s Will and Liell’s Will, further recognition of a change in what had once been considered the scope and purport of Tifft v. Porter came later in the same year in In re Hebbard’s Will. 71 Testator’s wife, who predeceased him, had bequeathed certain securities to her grandniece if her husband (testator) failed to survive her by six

fled especially generous towards this legatee the rule intended to increase the chance of benefit under a will is held not to apply. An exactly opposite result would be more sensible.”

70. (a) The other considerations which cause the courts to favor a construction that a legacy is general having to do with income, abatement, and equality among legatees, are well recognized to be secondary considerations. Johnson v. Conover, 54 N. J. Eq. 333, 35 Atl. 291 (1896); see Mandelle’s Estate, 252 Mich. 375, 378, 233 N. W. 230, 231 (1930); Burnett v. Heinrichs, 95 N. J. Eq. 112, 116, 122 Atl. 651, 653 (1923).

(b) (1) Of the three reported cases found involving the question whether bequests of closely held stock are, per se, specific, two are contra to New York cases. Opinions in both cases are considered weak. In Yerkes Estate, note 1, supra, the court stressed the above secondary considerations leading courts to favor tagging a legacy as general. The court said: “For these reasons, and because of the presumption in favor of equality, a gift will be regarded as general unless all the requisites of a specific legacy are manifest. A legacy of stock, even though the number of shares is an odd one corresponding exactly to the number owned by the testator, and though the stock itself is not generally found in the market is not specific. Hawkins on Wills *301.” 8 Pa. Dist. Rep. 84. No other authority is cited; and the Hawkins test shows he had reference to ownership by testator only at date of will; and that he admits that Jeffreys v. Jeffreys, 3 Ath. 120 (1743) is contra.

(2) In Cummings Estate, 12 Pa. Ct. Rep. 45 (1890) the court said: “Moreover, the existing ownership must be shown by the will itself, either expressly by the use of my, mine, etc., or, impliedly, by a direction to transfer, etc., the will cannot be supplemented by extrinsic evidence.”

The six months would have expired September 3, 1930, and on August 28, 1930, testator made a codicil (modifying a will which gave all his estate to his relatives) giving to said granddaughter of his deceased wife, "the securities described below: 30 shares, American Telegraph & Telephone Company", etc. He then listed, similarly, by number of shares and name of the company, the securities he was bequeathing. These securities were not otherwise identified, but were identical in amount and description with those bequeathed by his wife, as above. Testator died January 2, 1931; and his said bequest of stock was held to be specific. The granddaughter otherwise would have lost the securities. Slater, Surrogate, wrote:

"The executors depend upon *Tifft v. Porter*, 8 N. Y. 516, to support their contention that the legacies are general... The authority of *Tifft v. Porter* appears to be challenged by the decision of the same court in *Matter of Martin's Will*, 252 N. Y. 582, although followed in *Matter of Freeman's Estate*, 139 Misc. Rep. 301."

Continuing, Surrogate Slater says that *Matter of Martin's Will*,

"has been followed by Surrogate Foley in *Matter of Tyler*, New York Law Journal, August 2, 1930, where the gift was of 38 shares of stock of the Corn Exchange Bank. At the time of the death of the decedent, in the *Tyler* Case, he owned 40 shares of bank stock. The surrogate held that the bequest was specific as to the 38 shares of stock, citing *Matter of Martin's Will*, supra."

Six days after *In re Hebbard's Will*, just above, decision was rendered in *In re Malone's Estate*. By her will, the testatrix bequeathed one share of American Telegraph and Telephone Company stock to a hospital, one share to a church, one share to her aunt, and then provided that three shares are to be sold and divided evenly between named children. She then added,

"I would suggest that the executor hold this American Telephone and Telegraph Company stock until after the next stock issue (if there should be one this year) and take advantage of the rights which will be issued, that is, sell them, and add the money to the above amount to be given to the children."

The testatrix sold this stock in her lifetime. The gift however was saved to the legatees by the finding of the surrogate that the legacy was

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72. Compare the curiously similar facts upon which a contrary decision was given in *Skipwith v. Cabell*, 19 Gratt. 758, 791 (Va. 1870), relying upon *Tifft v. Porter*, and *Davis v. Cain*, 1 Iredell 304 (N. C. 1840).
74. See id., at 42, 253 N. Y. Supp. at 522.
76. See id. at 658, 257 N. Y. Supp. at 838. (Italics supplied.)
general. No notice is taken of the words italicized above. Tifft v. Porter is cited, quoted and blithely followed:

"While the authority of that case has been challenged, the general rule stated therein is firmly established in the jurisprudence of this state. Matter of Freeman's Estate."78

As to the bequests to the hospital, to the church, and to the aunt, the Surrogate says that,

"the testatrix has simply made a general bequest of stocks, to be satisfied in kind. ... . The gift of the remaining three shares must be regarded as a general legacy, and in the event of insufficiency of assets, all the legacies must abate pro rata."79

Again the gift was saved for the legatees upon the authority of Tifft v. Porter. But this decision is not supported by the holding in that case. Moreover, this surrogate overlooked the fact that the rule applied in Tifft v. Porter was very much curtailed in scope by the Security Trust Company case. For there the Court of Appeals quoted, with approval:

"the fact that the testator had the number of shares so given, though not controlling, is significant," and "a very slight indication of an intention to give shares then in his ownership is enough to make the legacy specific in a case like this." From the words of her will, quoted above, it is clear that this testatrix anticipated that death might overtake her within a year; that she owned stock which she was bequeathing, with direction that her executor "hold this ... stock until after the next stock issue (if there should be one this year)" etc. Even the holding in Tifft v. Porter that, in addition to possession at date of will, there must be "some expression" indicating an intent to give the stocks then held, was here fully satisfied. In re Liell's Will was an arbitrary decision in favor of equality of legatees.80 In re Malone's Estate was an even more arbitrary decision to save the legatees the consequence of ademption.81


(b) See cases note 15, supra, that a bequest of a balance of stock made prior bequests of the same stock specific.


79. See id.

80. See text at page 376, note 56.

81. (a) Thus we have correlative examples of the extent to which the courts go in denominating a legacy as general under the influence of the opinion in Tifft v. Porter: Holding a bequest general (to avoid ademption) when the stock has been disposed of, as in Malone's Estate, 143 Misc. 657, 257 N. Y. Supp. 837 (Surr. Ct. 1931), and holding a
When the next case arose two years later, the proposition that testamentary gifts of stock owned by testator, of a closely held corporation, are specific bequests, was recognized as established. And Tifft v. Porter is not mentioned. The facts must be pieced together from two reports of the case. Testator owned forty-six of the entire fifty shares of the capital stock of a trucking company. By paragraph three of his will, he bequeathed one share of the stock of said corporation, each, to four employees, without using "my" or any equivalent expression. He also provided for sale of forty-two shares of said stock to named legatees at $75,000. Sale to them at a lower figure was first approved. Subsequently, the court held, as to the four employees:

"The legacies of the stock provided for in paragraph third are specific. The fact that the testator owned practically all of the capital stock of the corporation, coupled with its non-public character, brings the gift within the rule laid down in Matter of Security Trust Company... and Matter of Mitchell's Estate."83

Likewise, later, in a decision under which realty devised by the residuary clause of testator's will became liable for payment of his general legacies, another surrogate followed the same rule. Louis Comfort Tiffany owned 890 shares of non par stock of Tiffany and Company when his will was executed June 17, 1921, and thereafter until his death. He bequeathed four hundred shares, without using "my" or any equivalent adjective, and the balance of the said stock passed with his residuary estate to his children for life, remainder to their issue. He provided by codicil, "I wish all my specific and general legatees to receive their legacies free and clear of all... taxes." Taxes were directed to be paid "out of my residuary estate."85

Surrogate Howell points out that this reference to specific legacies

bequest general (to maintain equality among legatees) when the stock has been retained, as in Liell's Will, note 56, supra. Often, as in these cases, the words of the will are supplanted by the will of the court in effectuating an intent not evidenced by the will, nor warranted by the facts, but gratuitously presumed. Blair v. Scribner, et al., 67 N. J. Eq. 583, 60 Atl. 211 (1905).

(b) Curiously, Vogel v. Saunders, note 11, supra, saved the legacy to the legatee (where stock had been retained, in part, but was endangered by creditor's claims) by holding the bequest to be specific. They distinguish the "reason" of the rule of Tifft v. Porter as inapplicable. Actually, they distinguished the letter of that reason and followed its spirit! And the facts justified them in so doing. Compare note 53, supra.

85. See id., at 889, 285 N. Y. Supp. at 989. A similar provision was deemed decisive to make the bequest specific in Cramer v. Cramer, 35 Misc. 17, 71 N. Y. Supp. 60 (Sup. Ct. 1901).
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could mean only the bequest of Tiffany and Company stock, and he points out also that, under the will, except for a bequest to a nurse of the income for life on fifty shares thereof, all said stock went to testator's family, or to a foundation he had created, the trustees of which were forbidden to sell the stock until it had first been offered to the directors of Tiffany and Company. In addition, following the tenor of Matter of Security Trust Company, he then says:

"The Tiffany & Company stock was never listed on any stock exchange, never had any 'over the counter' market, and was never procurable in any general market. It was always a closely held family stock, and at testator's death about one-third of it was owned by the Tiffany family and the balance by two other families. . . . I find that testator intended to bequeath the stock in Tiffany & Company that he owned and that consequently the legacies are specific. It follows that the specific legatees of that stock are entitled to be paid in full, and that they likewise are entitled to receive the dividends."

Finally the attitude of the Appellate Division is shown in the case of Filor's Estate. Testator gave "the proceeds of my life insurance policy of $25,000" to his mother, or if she predeceased him to his brothers and sisters. He also gave an annuity of $1,000 to his mother, residue to his wife and children. Thereafter he changed the beneficiary of the insurance policy from his estate to his wife. Later, by codicil, he gave additional bequests of $5,000 each to his four brothers and sisters, and otherwise specifically confirmed his will. He left a net estate of $500,000. Sherwood, Surrogate, (following the spirit of the reasoning in Tifft v. Porter) held the mother "entitled to receive" $25,000 from the estate, and quoted the Tifft case.

This decision was reversed by the Appellate Division May 10, 1935. They held the bequest to be "a specific legacy and not a demonstrative legacy" and, in an opinion written per curiam, they added:

"The case of Tifft v. Porter is not to the contrary, and the authority of that case is seriously impaired, if not destroyed by In re Security Trust Company of Rochester, 221 N. Y. 313, 320, 116 N. E. 1006."

Thus we find that the decisions in Lill's Will and in Malone's Estate, and the opinion in Freeman's Will, deny that Tifft v. Porter has been impaired. Matter of Hastings, Strasenburgh's Will, Mitchell's Estate, Beecroft's Estate and Tiffany's Estate each and all involved closely held stock. The decisions in Hebbard's Will and in Matter of Tyler are

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86. See 157 Misc. 873, 876, 285 N. Y. Supp. 971, 975; and id., at 891, 285 N. Y. Supp. at 991.


grounded upon the proposition, as stated by the dicta of the Appellate Division in Filor’s Estate, that the authority of Tifft v. Porter has been “seriously impaired if not destroyed.” What conclusions follow?

The precise holding in Tifft v. Porter, that possession by the testator at the date of his will, and at the date of his death,80 of “stocks or shares in public funds” of equal or larger amount than his legacy will not of itself make the bequest specific, and that there must be, in addition, “some expression” of intent to give those stocks,—remains, unimpaired.

But the rule followed in Tifft v. Porter that legacies are to be presumed to be general, has been materially confined and restricted in application. The weight to be given to the fact of continued possession of the stock has been increased. The requisite further showing in “words” of an intent to give those stocks (and thus create a specific legacy) has been diminished,—almost to the vanishing point! This was done first by the action of the Court of Appeals in the Security Trust Company case in going to the opinions of courts which have held more “liberal” views, to find and adopt new principles for its guidance; and, second, by the construction, in that case, that Tifft v. Porter “goes no further than to hold that a gift of stock is a general legacy when there is nothing in the will to indicate that it is a gift of the testator’s stock.” The force of this construction has been both elucidated and emphasized by the memorandum opinion in Matter of Will of Martin. The extent to which this construction may lead, is illustrated by the recent decision, in another jurisdiction, in Vogel v. Saunders. There the stock was retained in part and the bequest was held specific on the ground that the “reason” of the rule favoring general legacies did not apply when the stock was retained. The court did also rely upon “words” in the will which referred to the legatee, but which had no reference to the stock.

Regardless of the presumption favoring general legacies, bequests of stock of a closely held corporation should be held to be specific, without “my” or an equivalent expression, whenever the testator holds a majority of said stock at the date of the execution of his will, and retains it until his death. Probably such legacies should be held specific, even when the testator’s holding is less than a controlling interest, provided the stock is in fact closely held, as distinguished from stocks obtainable on the market. In either case, disposing of part during testator’s lifetime should cause an abatement pro tanto among these specific legacies.90 And when the holder of a block of stock not replaceable on the market (and therefore unique through scarcity) bequeathes it, and later disposes

89. See note 4, supra.
of it, voluntarily or involuntarily, the bequest should be held adeemed, as it would be absurd to consider that the testator expected his executor to go out and buy stock which the testator well knew could not be bought, in any ordinary way.\textsuperscript{91}

\textit{Tifft v. Porter} though not overruled, has been modified. But the bequests of stock of family, or otherwise closely held, corporations, do not depend for decision upon this modification. They stand upon the distinct ground that they involve unique subject-matter; and, therefore, they are entirely outside the scope of the \textit{Tifft} case, and constitute an exception to it. Thus the alternate questions stated in the above title cannot be satisfied by a single answer. Each must be answered in the affirmative.

This modification of the principles announced in the opinion in \textit{Tifft v. Porter} places New York more nearly in accord with those jurisdictions, including Massachusetts,\textsuperscript{92} New Hampshire,\textsuperscript{63} Rhode Island,\textsuperscript{64} Indiana,\textsuperscript{65} Illinois,\textsuperscript{66} Missouri,\textsuperscript{67} and Pennsylvania,\textsuperscript{68} where, as to stock legacies, previously there had been a break from the "iron-clad rule of 'my'" as that rule is followed in England, and, in America, in New Jersey\textsuperscript{60} and in Colorado.\textsuperscript{100} More recently, as noted, that rule was avoided by distinguishing and thus limiting its application, in a noteworthy case in the District of Columbia. And the corroding force of distinction and limitation, applied to \textit{Tifft v. Porter} in New York, weakens to that extent the keystone of the arch upon which "the 'my' rule" is built in Alabama,\textsuperscript{101} in California,\textsuperscript{102} in Iowa,\textsuperscript{103} in Virginia,\textsuperscript{104} and in Wisconsin.\textsuperscript{105} That other jurisdictions may refer to these developments and

\begin{footnotes}
\item[91.] Quotations: from Matter of Hastings, New Albany Trust Company v. Powell, and Freeman's Will, in text at p. 000, notes 30 and 32, supra.
\item[93.] See note 90, supra.
\item[94.] See note 26, supra.
\item[95.] New Albany Trust Company v. Powell, 29 Ind. App. 494, 64 N. E. 640 (1902).
\item[97.] Matter of Largue, note 21, supra.
\item[98.] Ferreeck's Estate, note 22, supra.
\item[99.] Blair v. Scribner, 67 N. J. Eq. 583, 60 Atl. 211 (1905); Whitlock v. Blavenberg, 2 N. J. Misc. 419 (1924); Garrabant v. Callaway, 110 N. J. Eq. 88, 91, 158 Atl. 830, 831 (1932).
\item[100.] Bond v. Evans, 92 Colo. 17 P. (2d) 311 (1932).
\item[101.] Gilmer v. Gilmer, 42 Ala. 9 (1868).
\item[102.] Matter of Bernal, 165 Cal. 223, 132 Pac. 375, 379 (1913).
\item[103.] Evans v. Hunter, 86 Iowa 413, 53 N. W. 277 (1892).
\item[104.] Skipwith v. Cabell, 19 Gratt. 758, 791 (Va. 1870).
\item[105.] \textit{In re} Blomdahl's Will, 216 Wis. 590, 257 N. W. 152 (1934) which relies upon Evans v. Hunter, note 103, supra, and upon Liell's Will, note 56, supra, both of which are bottomed on \textit{Tifft v. Porter}.
\end{footnotes}
similarly modify their own position, eventually, is indicated by the misgivings with which the "iron-clad" English rule was adopted by them.\footnote{106. In Dryden v. Owings, 49 Md. 356 (1878), another leading American case, in which a stock legacy was held general because the testator had not used "my" and although he owned stock of the kind and amount bequeathed, both at the date of his will and at the time of his death, Robinson, J. said: "Were this a case of first impression ... I should not hesitate to say he meant to give the legatee these identical bonds." The court relied chiefly upon Robinson v. Addison, 2 Beav. 515. In Kunkel v. MacGill, 56 Md. 120 (1881) the court held similar bequests to be specific, where some clauses of the will contained the word "my" and testator died very soon after executing the will. Again the court's opinion was written by Robinson, J. This time he wrote: "I was inclined to the opinion that the legacy was specific in that case (Dryden v. Owings) and the doubts then entertained have not been weakened by the further consideration of the subject."}
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