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## Falling in Love

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## FALLING IN LOVE

JUDITH T. YOUNGER\*

### INTRODUCTION

If you were to browse through law school catalogs or websites in the United States today, you would repeatedly see a course called, “Trusts and Estates,”<sup>1</sup> or something akin to it.<sup>2</sup> If you read on a little further, you would discover that the course is about the transmission of property from one generation to the next. Its component parts are: wills,<sup>3</sup> intestate succession,<sup>4</sup> nonprobate transfers,<sup>5</sup> and trusts.<sup>6</sup> When I began law school, I knew nothing

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1. This is what it is called at Harvard Law School. *Harvard Law School Course Catalog*, HARVARD LAW SCHOOL, <https://helios.law.harvard.edu/CourseCatalogs/hls-course-catalog-2013-2014.pdf> (last visited Dec. 23, 2013).

2. Some examples are: “Wills and Trusts,” *Courses 2013–14*, UNIVERSITY OF MINNESOTA LAW SCHOOL, <http://www.law.umn.edu/uploads/e0/fa/e0faefaa15cbcffe9e0d80c1703d6c87/CourseAreaOfferings13-14rev-11.14.13.pdf> (last visited Dec. 23, 2013); “Wills and Trusts,” *All Courses*, UCLA SCHOOL OF LAW, <https://curriculum.law.ucla.edu/Guide/AllCourses/> (last visited Dec. 23, 2013); and “Wills and Estates,” *Law School Catalog 2012–14*, UNIVERSITY OF TEXAS LAW SCHOOL, [http://registrar.utexas.edu/docs/catalogs/law/ut\\_catalog\\_law12-14.pdf](http://registrar.utexas.edu/docs/catalogs/law/ut_catalog_law12-14.pdf) (last visited Dec. 23, 2013).

3. Wills are written documents that dispose of one’s property when he or she dies. They have to comply with the formalities required by state legislatures and be proven in court through a process called “probate.”

4. This is the court-supervised process of distributing a dead person’s property when he or she has left no will. It is called “administration” and follows a plan laid out by the state legislature.

5. These are devices like insurance policies, joint accounts, payable on death designations, and retirement accounts. They are asset specific and pass the property named in them on death of the owner to a designated successor. They do not require court supervision and thus avoid the probate or administration process. They are frequently called “will substitutes.”

6. This is the lawyer’s invention of which the great historian, Frederick W. Maitland, extravagantly said, “Of all the exploits of Equity the largest and the most important is the invention and development of the Trust.” FREDERICK W. MAITLAND, *EQUITY: A COURSE OF LECTURES* 23 (A. H. Chaytor & W. J. Whittaker eds., 2d ed. 1936). The distinguishing feature of this device is that it enables separation of legal title and equitable title. Thus, if I give property to a trustee and direct him or her to pay income to John for John’s life and to pay the remainder to Mary on John’s death, the trustee has legal title to the trust property (which is the kind of title a

about any of these subjects and I am sorry to say that I knew nothing more when I graduated. Trusts and Wills were taught as separate courses then. Both were required at my law school, and I took them in my second year. Dean Russell D. Niles<sup>7</sup> taught “Trusts,” and Professor Thomas E. Atkinson<sup>8</sup> taught “Wills.” I remember them as exceptionally handsome men who naturally taught “in sage on stage” mode.<sup>9</sup> The teacher holds forth and the students merely listen and watch. I did not listen and hardly watched; I let their performances float by me. Thus, not one shred of substance entered my head. I emerged from law school unenlightened about the delights to come. I certainly did not foresee that Wills, Trusts, and I would hit it off—become matches, so to speak—or that we would mature into loving partners in my future teaching career.

My love affair with the subjects began with a series of small serendipities. I was in my second job out of law school and working as an associate in the litigation department of a Wall Street firm.<sup>10</sup> My boss, Charles Pickett,<sup>11</sup> lent my services to the head of the Estates Department for a day. “Estates is short-handed,” he explained, “they’re having an emergency. Go over there and help them out.” I went across the hall to where the Estates Department began. The partner in charge, Charles B. Lauren,<sup>12</sup> was in his office with the client. Mr.

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law court would recognize before 1536), and Mary and John have equitable title to the trust property (which is the kind of title the Chancellor of England, head of equity, so to speak, would recognize then). The trust has a life outside the Trusts and Estates course. *See, e.g.*, John H. Langbein, *The Secret Life of the Trust: The Trust As an Instrument of Commerce*, 107 YALE L.J. 165 (1997).

7. Dean Niles was appointed to the deanship in 1948 and became chancellor of the University in 1963. He also served as president of the Association of the Bar of the City of New York. *See* Lee A. Daniels, *Russell Niles, 90, Ex-Chancellor; Of N.Y.U. and Law School Dean*, N.Y. TIMES, Sept. 17, 1992, <http://www.nytimes.com/1992/09/17/us/russell-niles-90-ex-chancellor-of-nyu-and-law-school-dean.html?scp=2&sq=russell%20d.%20niles&st=cse>.

8. He was the author of, among other works, a very useful hornbook on Wills. *See* THOMAS E. ATKINSON, *HANDBOOK OF THE LAW OF WILLS AND OTHER PRINCIPLES OF SUCCESSION INCLUDING INTESTACY AND ADMINISTRATION OF DECEDENTS’ ESTATES* (2d ed. 1988).

9. *See, e.g.*, *What is Your Teaching Style?*, COLORADO STATE UNIVERSITY, <http://www.biz.colostate.edu/mti/tips/pages/WhatIsYourTeachingStyle.aspx> (last visited Dec. 23, 2013) (categorizing teaching styles).

10. Chadbourne, Parke, Whiteside and Wolff, now Chadbourne & Parke, LLP.

11. Pickett was the firm’s chief litigator and had extensive experience in the field. He was frequently in court. *See* *Feder v. Martin Marietta Corp.*, 406 F.2d 260, 261 (2d Cir. 1969); *First Nat’l City Bank of N.Y. v. Aristeguieta*, 287 F.2d 219, 220 (2d Cir. 1960); *Trans World Airlines, Inc. v. Civil Aeronautics Bd.*, 184 F.2d 66, 67 (2d Cir. 1950); *Am. Tobacco Co. v. Riggio Tobacco Corp.*, 192 N.Y.S.2d 541, 542 (N.Y. Sup. Ct. 1959). He was not a patient man, but he was the best teacher I have ever had. He would return a draft memo I prepared for him with all the unnecessary words scissored out. Such vivid, rough lessons, one never forgets.

12. Lauren was head of the firm’s Estates Department. He was, unlike Pickett, an extremely patient man. I learned from him, too, but his teaching method was a stark contrast to Pickett’s. He

Lauren told me that the client was one of the beneficiaries of a large testamentary trust. The trustee was directed to pay trust income to others for a time and, later, to pay the principal of the trust to our client, the remainderman. The trust assets included some royalty contracts and some parcels of land in upstate New York. The contracts produced income but would be completely used up as time went on. They were thus “wasting” assets. The land did not produce much income. It was therefore an “unproductive” asset. The trust was silent about how to treat receipts from these assets, posing a difficult problem for the trustee. “He,” Mr. Lauren said, “must tread a prudent path between the successive interests in the trust. For the income beneficiary he must make the trust property produce income; for the remainderman he must preserve the principal of the trust. When the assets he administers include either unproductive or wasting assets, these duties conflict.”

The client was upset because he thought the trustee was favoring the income beneficiaries over him in apportioning receipts from the contracts and the land. In some states, there was a fixed rule that would dictate the division.<sup>13</sup> “Unfortunately, the law in New York is muddled,” Mr. Lauren told me. However, he thought the client was clearly right about the trustee’s results: they were skewed to favor the income beneficiaries to our client’s disadvantage. “Find a better way,” said Lauren to me, “and justify it.” I went to work immediately, and by afternoon I had learned just enough to write a memo that satisfied him. That same evening, at home, I showed it to my husband.<sup>14</sup> “You could make a nice little law review article out of that—with charts,” he said. I took his advice, and the nice little law review article (with only one chart) was published in the New York University Law Review sometime later.<sup>15</sup> Dean Niles saw it there. He called me and told me it made him proud. “Judith,” he said, “would you like to teach a section of Trusts at the Law School?” “Yes,” I replied; and so my teaching career began.

The unlucky students who were in that first class knew a great deal more about the subject than I did. They were actuaries, insurance agents, bankers, and trustees. The class was technically part of the school’s evening division for people who maintained full-time jobs while going to law school. It met from 6:00 PM to 8:00 PM, twice a week. The students came with bags of sandwiches in-hand. They sensed my insecurity and lack of knowledge on

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would give long, gentle explanations of arcane subjects in a quiet voice. He did not mind repeating himself for a novice like me and did so cheerfully until he was sure I had gotten the point.

13. See Judith T. Younger, *Apportioning Receipts From Wasting and Unproductive Assets: A Comment on the New Principal and Income Act*, 40 N.Y.U. L. REV. 1118, 1124 (1965).

14. The late Irving Younger. See A.B.A., *THE IRVING YOUNGER COLLECTION: WISDOM AND WIT FROM THE MASTER OF TRIAL ADVOCACY* (2010).

15. Younger, *supra* note 13, at 1118.

everything except apportionment rules. Instead of mocking me, however, they were kind, taking over when they felt I needed help. For the next few years, I taught, as an adjunct, whatever courses I was asked to teach; unfortunately it was never the same course twice. Thus, I did not return to teaching Trusts until many years later when I joined the full-time faculty at Cornell Law School. By then, law school curricula had changed. The course I was asked to teach was an integrated one; it included wills, intestate succession, nonprobate transfers, and trusts. At Cornell it was officially called “Processes of Property Transmission.”<sup>16</sup> The students called it “PPT.” The first time I taught it, I was, as I had been at NYU, on shaky ground. I knew I needed help and was lucky to get some expert advice from Professors Stanley M. Johanson<sup>17</sup> at Texas and Robert S. Pasley<sup>18</sup> at Cornell. Today, I am still in their debt. At Cornell, I had the luxury of teaching PPT at least once every year. Eventually, the balance shifted between the students and me. I came to know more than they did and regretted only that I had not paid attention when I had the opportunity to learn it all in law school.

There are many things about this course that attach me to it.<sup>19</sup> Here, I will confine myself to one: the course’s potential to show students the stark difference between competent and incompetent representation. It teaches that, for clients, choosing a lawyer is as important as choosing a mate. It teaches that incompetent representation can wreak havoc on a decedent’s estate. It teaches, as well, what good lawyers can do. They have invented the course’s main actors—the will, the trust, and the nonprobate transfer—and nursed them from infant rebel upstarts through childhood and adolescence to respectable adulthood. The three are now grownups, standing ready to shoulder the burdens of passing property from one generation to the next. Of course, lawyers could not have accomplished this transformation alone. It required

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16. More recently, it has become “Trusts and Estates.” *2013–14 Course Offerings and Descriptions*, CORNELL LAW SCHOOL, [http://support.law.cornell.edu/students/forms/current\\_Course\\_Descriptions.pdf](http://support.law.cornell.edu/students/forms/current_Course_Descriptions.pdf) (last visited Dec. 23, 2013).

17. Professor Johanson is the James A. Elkins Centennial Chair in Law; University Distinguished Teaching Professor at the University of Texas-Austin. He was the author, with the late Jesse Dukeminier, of a highly regarded Wills and Trusts casebook. *JESSE DUKEMINIER & STANLEY M. JOHANSON, FAMILY WEALTH TRANSACTIONS: WILLS, TRUSTS, AND ESTATES* (2d ed. 1972).

18. Professor Pasley was on the faculty of Cornell Law School when I arrived there. In addition to giving me his copy of the Johanson casebook, he provided a constant source of kindness and good advice.

19. I use “attach” in the same sense that it is used in modern psychology. A baby uses “attachment behavior” to make adults love him. Attachment theory explains that an infant needs to develop a relationship with at least one primary caregiver for social and emotional development to occur normally. In the same way, I have to be “attached” to a course to teach it well. See JOHN BOWLBY, *A SECURE BASE: PARENT-CHILD ATTACHMENT AND HEALTHY HUMAN DEVELOPMENT* (1988).

needy clients and cooperation from the courts, and sometimes legislatures. When presented to students in the light of their history, the will, the trust, and the nonprobate transfer take on the glamour of old Hollywood.<sup>20</sup> Students are surprised and pleased to find such excitement in the classroom; they can revel in the heady past and speculate from it about the future.

### I. THE BAD LAWYERS

When a client consults a lawyer about an estate plan, the client is thinking about death; the client knows that he or she, like everyone else, will have one day “joined the feathered choir.”<sup>21</sup> The client will not be able to take his or her property with him or her; the client has come to a lawyer’s office to try to control its destination after he or she dies. The client is about to execute a document or documents that may be the “most important” of his or her lifetime.<sup>22</sup> What the client needs most for this crucial job is a skilled draftsman; someone who can put his or her intent into words that will stand up under attack. However, there is no way the client can tell if the lawyer he or she has chosen *is* such a person. The client cannot test out the lawyer’s drafting skills in advance. The best that the client can do is consult, get the estate plan on paper, pay the bill, and hope for the best. Only after the client is dead does the lawyer’s product reveal its true worth. The students in the Trusts and Estates class and I are in attendance at the epilogue; the client, of course, is not. We get to see the effects of the representation, decide whether the client got value for the money he or she spent, whether his or her intent was effectuated, and whether the representation was a triumph or disaster. My favorite illustration of the effect of bad representation is the *Rothko* will case.<sup>23</sup>

Mark Rothko was a painter.<sup>24</sup> In his mature style, he arranged two or three color rectangles, one above another on the canvas—his admirers would say the rectangles were luminous, floating within a radiant color field.<sup>25</sup> His critics

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20. See CONNIE BRUCK, *WHEN HOLLYWOOD HAD A KING* (2003).

21. Noël Coward’s euphemism for dying coined in “*In a Bar on the Piccola Marina*.” Hear soprano Felicia Lott sing it at *Lott—A bar on the Piccola Marina (Noël Coward)*, YOUTUBE, <http://www.youtube.com/watch?v=c0kasR5d8gg> (last visited Dec. 23, 2013). Read the lyrics at *A Bar on the Piccola Marina (Noël Coward)*, INTERNATIONAL LYRICS PLAYGROUND, <http://lyricsplayground.com/alpha/songs/a/abaronthepiccolamarina.shtml> (last visited Dec. 23, 2013).

22. Leon Jaworski, *The Will Contest*, 10 BAYLOR L. REV. 87, 88 (1958).

23. *In re Estate of Rothko v. Reis*, 372 N.E.2d 291 (N.Y. 1977); Cf. LUCY A. MARSH, *DRAFTING WILLS AND TRUSTS* 11 n.4 (2009) (telling us that the court papers for the *Rothko* will case filled twelve filing cabinets).

24. *In re Estate of Rothko*, 372 N.E.2d at 293.

25. See *Mark Rothko and his Paintings*, MARK ROTHKO, [www.markrothko.org](http://www.markrothko.org) (last visited Dec. 23, 2013).

would say they looked like a patch of half-stripped wallpaper instead.<sup>26</sup> Rothko achieved a measure of success with his rectangles in his lifetime, but the success did not make him happy. He committed suicide in 1970, leaving his estranged wife, Mary Alice, and two minor children, Kate and Christopher, surviving.<sup>27</sup> His estate consisted largely of paintings.<sup>28</sup> Several hung, or were stacked, in the family's brownstone in Manhattan, and 798 others were stored in the warehouse where Rothko was living at his death.<sup>29</sup> Rothko had chosen Bernard J. Reis, a "close personal friend," who "advised [him] in all business matters,"<sup>30</sup> to draft his will. An accountant by profession, Reis had completed law school at NYU<sup>31</sup> in the same part-time program in which I first taught Trusts. He had never been admitted to the bar, however.<sup>32</sup> Rothko is supposed to have said to Reis, "Bernie, you know I hate attorneys, I hate going up in elevators. . . . Will you prepare something for me?"<sup>33</sup> Reis, of course, should have said, "No," but he did not. Instead he drafted a two-page will for Rothko, thus engaging in the unauthorized practice of law.<sup>34</sup> The will, duly executed under Reis's supervision and admitted to probate,<sup>35</sup> provides us with a fine example of what bad representation can do to an estate and the decedent's intended postmortem plan.

Rothko gave five paintings<sup>36</sup> to the Tate Museum in London.<sup>37</sup> He left "the real estate owned by [him] at 118 East 95th Street, New York" and "all of the contents thereof," as well as \$250,000, to his "wife, Mary Alice."<sup>38</sup> The "real estate" was not probate property; Mary Alice and Rothko held it as tenants by

26. Rachel Campbell-Johnston, *Don't worry if you don't get Rothko. Go to this magnificent show and just stand in awe*, THE TIMES, Sept. 24, 2008, [http://www.thetimes.co.uk/tto/arts/visual\\_arts/article2422968.ece](http://www.thetimes.co.uk/tto/arts/visual_arts/article2422968.ece).

27. *See In re Estate of Rothko*, 372 N.E.2d at 291.

28. *Id.* at 293.

29. *See id.*

30. JAMES E. B. BRESLIN, *MARK ROTHKO: A BIOGRAPHY* 441 (1993) (quoting Reis).

31. *Id.* at 182.

32. Reis became certified as a public accountant and passed the New York bar exam in the same year. He had to support his parents and was thus not able to do the one-year of clerkship then required for bar admission. Instead, he started his own accounting firm. *Id.*

33. LAURIE ADAMS, *ART ON TRIAL: FROM WHISTLER TO ROTHKO* 182 (1976) (quoting Reis).

34. *See id.*

35. A copy appears in MARSH, *supra* note 23, at 269–70.

36. These were to be selected by the museum from those Rothko produced for the Four Seasons Restaurant in the Seagram Building in Manhattan. *See Mark Rothko: The Seagram Mural Project*, TATE, <http://www.tate.org.uk/whats-on/tate-liverpool/exhibition/mark-rothko-seagram-mural-project> (last visited Dec. 23, 2013). Rothko originally accepted the commission but later changed his mind. *Id.*

37. *In re Estate of Rothko*, 352 N.Y.S.2d 574, 576 (N.Y. Surr. Ct. 1974) [hereafter called "the contents case"].

38. *Id.* at 575–76.

the entirety.<sup>39</sup> Thus, the will had no effect on it.<sup>40</sup> Apparently Reis did not know that, but this particular mistake was harmless. Probate property or not, the house and land would go to Mary Alice.<sup>41</sup> The “all of the contents thereof” language *was* harmful, however. It triggered a separate construction proceeding to determine whether Rothko intended the “forty-odd works” of his in the house to be included in “contents.”<sup>42</sup> There were seven separate law firms involved in the contents case.<sup>43</sup> They took three different positions on the paintings. Two executors and the residuary beneficiary, The Mark Rothko Foundation, argued that all the paintings in the house should go to the foundation.<sup>44</sup> One executor argued that all but the paintings on the fourth floor of the house should go to Mary Alice and the rest to the foundation.<sup>45</sup> Mary Alice argued that all the paintings in the house should go to her, and the Surrogate agreed.<sup>46</sup> The attorneys’ fees attributable to this proceeding ultimately came out of the estate.<sup>47</sup>

Rothko left the residue of his estate, 798 paintings, to The Mark Rothko Foundation.<sup>48</sup> It was minimally described in the will as “a non-profit organization, incorporated under the laws of the State of New York.”<sup>49</sup> The will named five directors of the foundation, three of whom, including Reis, were to be executors of Rothko’s estate.<sup>50</sup> The foundation had been incorporated in 1969, probably for tax purposes, to control the disposition of Rothko’s work, and to enhance his reputation.<sup>51</sup> Its certificate of incorporation was vague; it said nothing about the foundation’s purpose except that it was to “spend its funds ‘exclusively for charitable, scientific and/or educational

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39. The Surrogate in the contents case recognized this, as well as the fact that Reis was not a lawyer. (“The East 95th Street real estate as a matter of fact was held as tenants by the entirety so it really does not pass under the will. The language of this will is not strictly that of a lawyer. It was drafted by one of the executors, Reis, an accountant.”) *Id.* at 577.

40. This tenancy is like a joint tenancy with right of survivorship but can exist only between married people. *See* JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, WILLS, TRUSTS, AND ESTATES 447 (8th ed. 2009). The surviving member of the couple takes the whole on the other’s death. *Id.* It was a nonprobate transfer; a will substitute.

41. *See id.*

42. *In re Estate of Rothko*, 352 N.Y.S.2d at 579.

43. This count includes the Office of the Attorney General of the State of New York. *Id.* at 575.

44. *Id.* at 576.

45. *Id.*

46. *Id.*

47. *Estate of Rothko*, 414 N.Y.S.2d 444, 452 (N.Y. Surr. Ct. 1979).

48. *See* MARSH, *supra* note 23, at 269.

49. *Id.*

50. *Id.*

51. BRESLIN, *supra* note 30, at 540.



purposes.”<sup>52</sup> It, too, was a Reis product. Reis said later that he kept the foundation’s powers vague to give its directors greater flexibility.<sup>53</sup> After Rothko’s death, the directors amended the certificate, stating the foundation’s sole purpose was “to provide financial assistance to mature creative artists, musicians, composers and writers.”<sup>54</sup>

The drafting of this residuary gift to the foundation was Reis’s great mistake. When Rothko executed his will in 1968, and when he died in 1970, New York had a so-called “mortmain statute.”<sup>55</sup> The statute allowed issue or parents of a decedent to challenge charitable gifts of more than half the estate, but only if they would receive a pecuniary benefit if the charitable gift failed.<sup>56</sup> Others had no standing. Rothko’s residuary gift to the foundation did exceed half his estate,<sup>57</sup> but any challenge to it could easily have been avoided by skillful drafting. When Mary Alice invoked the statute on behalf of the two minor children,<sup>58</sup> the court ruling on it explained how easy it would have been to circumvent it:

[I]ssue can still be disinherited in favor of charity by a skilled will draftsman, because an issue or parent may only contest a charitable bequest if he will receive a pecuniary benefit from a successful challenge, either as a legatee or distributee. Thus an issue is deprived of standing to make an election against a charity if the testator makes a gift over of a failed gift to charity to some unrelated person.<sup>59</sup>

52. *Id.*

53. *Id.*

54. *Id.* at 541.

55. Mortmain statutes were originally designed to keep land out of the hands of the church. A transfer of land to the church deprived the King and his lords of feudal revenues. As Holdsworth explained it, “If a man gave land to a religious corporation, i.e. made an alienation in mortmain, the lord got a tenant who never died, who was never under age, who could never marry, who could never commit a felony. The religious corporation suffered none of those incidents in the life of the natural man which were profitable to the lord . . .” 2 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 848–49 (3d ed. 1923). More recently, in the law of wills, mortmain statutes restricted the power of a testator to make gifts to charities but typically protected only the immediate family of a decedent from disinheritance. The New York mortmain statute, applicable to the Rothko case, N.Y. ESTATES, POWERS AND TRUSTS LAW § 5-3.3(a)(1) (Consol. 1979), was typical. It has since been repealed.

56. *Id.* at § 5-3.3(a).

57. The estate’s value was said to be \$5,000,000 by the Surrogate in the contents case. *In re Estate of Rothko*, 352 N.Y.S.2d 574, 579 (N.Y. Surr. Ct. 1974).

58. Mary Alice could have made her own challenge to the will as Rothko’s widow because he left her less than her statutory share. She could also have challenged his mental capacity to make the will, but she did neither. She is supposed to have said that she had enough money and did not want to tarnish Rothko’s reputation. *See* LEE SELDES, THE LEGACY OF MARK ROTHKO 118 (1996). Mary Alice died at age forty-eight, surviving Rothko by only six months. *Id.* at 120.

59. *Estate of Rothko*, 335 N.Y.S.2d 666, 670 (N.Y. Surr. Ct. 1972) (citation omitted).

It was standard drafting practice in circumstances like Rothko's to make the charitable gift and to add a clause providing that if it was void in whole or part, the property should go to someone other than the testator's parent or issue. All it would have taken was a single sentence: "If any gift to a charity under this will shall be ineffective, such bequest shall go instead to my friend A." Another method of getting around the statute would have been to include a negative bequest stating that issue and parents were completely disinherited.<sup>60</sup> Apparently Reis did not know about the statute or the ways to avoid it. Thus, the will was completely unprotected from the children, who acquired standing as distributees under the laws of intestacy if the charitable gift failed.<sup>61</sup> Not only were they thus able to set aside half the gift to the foundation but they were in a position to challenge the executors' conduct just as if they had been intended beneficiaries of the estate.<sup>62</sup>

The ensuing litigation drew in the Attorney General of the State of New York on behalf of the ultimate charitable beneficiaries of the foundation, as well as Frank Lloyd, head of Marlborough Galleries.<sup>63</sup> Lloyd was Rothko's dealer and had done much to make the market for Rothko's work.<sup>64</sup> As a result of the children's challenge, Rothko's will was completely "broken."<sup>65</sup> The children received about half of the paintings in Rothko's estate, including those the Surrogate awarded to Mary Alice in the contents litigation.<sup>66</sup> The three executors Rothko named to act for him were vilified, denied commissions, surcharged, and removed.<sup>67</sup> Ironically, they were replaced by Kate Rothko as administrator with the will annexed.<sup>68</sup> The more than \$9,000,000 in damages

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60. See, e.g., *In re Estate of Eckart v. Eckart*, 348 N.E.2d 905, 906 (N.Y. 1976).

61. See *Estate of Rothko*, 335 N.Y.S.2d at 668.

62. See *id.*

63. *Estate of Rothko*, 379 N.Y.S.2d 923, 931–32 (N.Y. Surr. Ct. 1975).

64. Even Surrogate Midonick recognized this, saying of Marlborough's efforts: "[I]t must be recognized that [these] efforts enhanced the sales values of the paintings and accomplished sales at prices in excess of those obtainable in the artist's lifetime. . . . [B]ut it cannot be gainsaid that the promotional efforts of Marlborough had a major effect in publicizing Rothko works and in creating a market for his product at higher prices, far higher than date of death values." *Id.* at 955. Judge Nunez's partial dissent in the Appellate Division also bears mention. He agreed with Midonick's statement above and added, "Marlborough deserves much credit for creating a market for Rothko paintings during the artist's lifetime." *Will of Rothko*, 392 N.Y.S.2d 870, 877 (N.Y. App. Div. 1977) (Nunez, J., dissenting in part).

65. For the notion that contesting a will is tantamount to attempting to "break" it and winning the contest leaves a "broken" will, see LAWRENCE M. FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW* 82 (2009).

66. They inherited them from their mother Mary Alice who survived Rothko by only six months. See SELDES, *supra* note 58, at 120.

67. See *In re Estate of Rothko v. Reis*, 372 N.E.2d 291, 294 (N.Y. 1977).

68. Edith Evans Asbury, *Rothko's Daughter Gains Control of Artist's Estate*, N.Y. TIMES, Jan. 17, 1976, at 1.

assessed<sup>69</sup> against the executors was the equivalent of the appreciated value of the paintings at the date of the decree less the original sales price to Marlborough.<sup>70</sup> At most, damages should have been the difference between the sales price to Marlborough and what the executors would have received from a prudent sale then.<sup>71</sup> The foundation was reorganized so that it gave away its share of the paintings to various museums, most to the National Gallery in Washington, D.C.<sup>72</sup>

In a separate criminal proceeding, Rothko's dealer, Frank Lloyd, who paid the ultimate judgment against the executors, was convicted of forgery and tampering with the evidence in the children's case.<sup>73</sup> I met Frank Lloyd after the main litigation just before his own trial. Lloyd invited his lawyers and their families to his home on Paradise Island in the Bahamas for a weekend. The lawyers, including my late husband who tried the case,<sup>74</sup> and Lloyd prepared for the upcoming trial while their families enjoyed the island. Lloyd was a marvelous host. The experience did not impair my objectivity; it only enhanced my enthusiasm for *Rothko* as a teaching case.

The rightness of the *Rothko* decision is certainly a matter of dispute.<sup>75</sup> Essentially, the children argued that Rothko's executors were guilty of selling the estate paintings to Marlborough Galleries, in which two of them were interested, at prices lower than they should have received.<sup>76</sup> They argued a conspiracy of disloyal executors with Lloyd and Marlborough to gain control of the estate paintings that the children considered their entitlement.<sup>77</sup> The courts treated the executors as trustees throughout.<sup>78</sup> They and the media closed their eyes to all mitigating factors: Rothko himself had made similar sales to the gallery when he was alive, he expected his executors to continue to deal with Marlborough and Frank Lloyd, he knew of the two executors' interest in the gallery, and he never intended his children to get half the paintings in his estate. Had the courts been open-minded and the defendants' lawyers better, the result might have been quite different. Professor Maitland

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69. *In re Estate of Rothko*, 372 N.E.2d at 295; John Langbein called them "draconian." John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 665 (1995).

70. *See In re Estate of Rothko*, 372 N.E.2d at 298.

71. *See* Richard V. Wellman, *Punitive Surcharges Against Disloyal Fiduciaries—Is Rothko Right?*, 77 MICH. L. REV. 95, 112 (1978) (arguing for the rejection of Surrogate Midonick's reasoning).

72. SELDES, *supra* note 58, at 350.

73. Despite the conviction, Lloyd avoided any jail time and his Marlborough Galleries continued to flourish. He was represented in the criminal case by my late husband, Irving Younger. *See id.* at 343–49 (describing the trial and the outcome).

74. *See id.* at 344.

75. Wellman, *supra* note 71, at 117–18.

76. *Estate of Rothko*, 379 N.Y.S.2d. 923, 945–46 (N.Y. Surr. Ct. 1975).

77. *See id.* at 946.

78. *See id.* at 943; *In re Estate of Rothko v. Reis*, 372 N.E.2d 291, 296 (N.Y. 1977).

has pointed out the contractual aspect of trusts.<sup>79</sup> Professor Langbein has elaborated on the subject<sup>80</sup> and applied this view of the trust directly to the *Rothko* case. Through that lens, he found that the New York Court of Appeals ignored a number of crucial questions that it should have asked and the significance of the answers:

What was the logic of the parties' deal? Did the two executors provoke a disloyal conflict, or did they pursue a course of action that Rothko tacitly authorized when he selected fiduciaries who came with an embedded conflict? At this distance from the litigation, these questions that the court did not ventilate are hard to answer. If, however, the contractarian basis of the trust deal (in this case, an estate deal) were understood, questions of this sort would be properly posed and investigated. Family and personal trustees often have interests adverse to the trust. The settlor's determination to ask these conflicted persons to serve bears materially on the standard of fiduciary duty that the trust deal embodies.<sup>81</sup>

Whatever side students choose on the merits of the *Rothko* case, they never dispute the fact that, if his will had been prepared by a skilled draftsman, there could have been no challenge from the children and none of this would have happened. Sometimes they question the validity of judging the quality of legal representation by the performance of a nonlawyer like Reis. It is then that I remind them of *Kaufmann*,<sup>82</sup> an undue influence case that we deal with earlier in the term. In *Kaufmann*, three prominent members of the New York bar earned the "bad lawyer label" for their shameful failure to fulfill their obligations.

Two of them, partners in a prestigious law firm, represented the decedent, Robert Kaufmann, in making his estate plan.<sup>83</sup> They knew of his homosexual relationship with Walter Weiss, his primary beneficiary and proponent of his will.<sup>84</sup> They knew, too, that there was likely to be a contest from disinherited family members.<sup>85</sup> Nevertheless, they did no advance planning to prevent a contest from succeeding.<sup>86</sup> The third lawyer was a skilled litigator who

79. Professor Maitland also pointed out the fact that, in the fourteenth century, uses did not develop as contracts because the common law had not yet begun to enforce the simple contract. MAITLAND, *supra* note 6, at 28–30.

80. See Langbein, *supra* note 69, at 625.

81. *Id.* at 666.

82. *In re Kaufmann's Will*, 221 N.Y.S.2d 601 (N.Y. App. Div. 1961) (reversing a jury verdict of undue influence and ordering a new trial); *In re Will of Kaufmann*, 247 N.Y.S.2d 664 (N.Y. App. Div. 1964) (upholding a second jury verdict of undue influence), *aff'd*, 205 N.E.2d 864 (N.Y. 1965).

83. *In re Will of Kaufmann*, 247 N.Y.S.2d at 674–75.

84. *Id.* at 674–75.

85. *Id.*

86. See Jaworski, *supra* note 22, at 91.

represented the proponent.<sup>87</sup> He, too, had all the relevant information but did not adequately prepare the proponent for his examination before trial and the inevitable questions the family's lawyers would ask about proponent's relationship with the decedent and his participation in the preparation of the will.<sup>88</sup> Walter Weiss lied about both, denying that he had a homosexual relationship with the decedent or that he had participated in the planning for his death.<sup>89</sup> There was ample evidence that he was lying.<sup>90</sup> It thus became virtually impossible for Walter to testify at the trials without being impeached. In fact, he testified at neither trial and thus lost the opportunity to convince the jury that he and Robert had a true love relationship and that his influence was not undue.<sup>91</sup> The net result was, as in the *Rothko* case, another "broken" will and unmistakable evidence that "genuine" lawyers can be as incompetent as those who are "false."

## II. THE GOOD LAWYERS

It is much easier to talk about bad lawyers than good ones. Professional incompetence usually generates litigation, litigation generates court decisions, and court decisions are fodder for casebooks. Law students, including those in Wills and Trusts, thus see plenty of examples of bad lawyering. The work of the good lawyer, on the other hand, rarely comes to court or to the casebooks as such. It may turn up when a lawyer does some heroic and surprising work for his client<sup>92</sup> or when the lawyer's work is a new product, an invention, so to

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87. *In re Will of Kaufmann*, 247 N.Y.S.2d at 665.

88. *See id.* at 684 (noting that Weiss's pretrial testimony was "deliberately false").

89. *Id.* at 672, 684.

90. The facts are all laid out in Justice McNally's dissenting opinion when the Appellate Division reversed the jury finding of undue influence at the first trial as well as in his majority opinion upholding the second jury finding of undue influence. *See, e.g., In re Kaufmann's Will*, 221 N.Y.S.2d 601, 605-06 (N.Y. App. Div. 1961) (McNally, J., dissenting).

91. Of course, sodomy was still a felony in New York then, so there was some risk to Walter in taking the witness stand. He should have had the choice, however. His actions after Robert's death, if he had been able to tell about them, show their relationship in a different light from what the jury accepted. Later, Weiss published a beautiful memorial volume to Robert as a poet and an artist. WALTER A. WEISS, *THE WORK OF ROBERT KAUFMANN 1913—1959* (1961). A copy of this hard-to-find book is available at the Fine Arts Library of Cornell University. I bought a copy from the Minneapolis Public Library and use it in class.

92. *See Estate of Dvorak*, No. 2012P001514 (Ill. Cir. Ct. Prob. Div. Apr. 2, 2012). Jeffrey Waller of Spain, Spain & Varnet argued successfully that a testator's will, insofar as it ordered the destruction of her surviving black cat, should be voided, and that the estate and his client, the executor, Third Fifth Bank, should be allowed to share the cost of maintaining the animal for its natural life. *See also* Jocelyn Heaney, *Chicago Bankers, Lawyers Save Orphaned Cat from Death Row*, TAKE PART (Apr. 6, 2012), <http://www.takepart.com/2012/04/05/chicago-cat-saved-death-row-chicago-bankers>.

speak, and the invention is in court to be tested.<sup>93</sup> In fact, all the major players in the Wills and Trusts course owe much to lawyers' inventiveness. The trust, the will, and the nonprobate transfer are the product of three things over the ages: clients' needs, good lawyers' efforts to fill those needs, and the sympathy and support of the courts.<sup>94</sup>

If we set out to test the veracity of this statement, we should start in the 1300s, with the "use." It was then a vehicle for avoiding the feudal prohibition on wills of land,<sup>95</sup> and the precursor of the modern trust. To create a use that would operate like a will, the owner of land would convey it to someone else.<sup>96</sup> The conveyee was not meant to enjoy it but merely to hold it for the use of the owner for his life and then to the use of those named in the owner's will; the conveyee promised that he would do so.<sup>97</sup> This looks like the arrangement we know today as a trust; there is a settlor, a trustee, a life beneficiary (who, in this case, is the same person as the settlor) and a remainderman. The promisor has no active duties. The benefit of using the use was to give the person or persons who had it—the original owner during his life and those named in his will after his death—the advantages of full ownership of the property, while relieving them of some of its burdens—in this case, the prohibition against willing land, and feudal incidents as well.<sup>98</sup> Usually the promisors were faithful. If, by chance, they were not, the common law courts saw them as the owners, ignoring the person or persons who had the use. Even before the Chancellor got around to enforcing uses, Parliament saw their potential for abuse and acted to prevent their employment to defraud creditors or to convey land to the Church.<sup>99</sup> Until the fifteenth century, there was no remedy against a faithless promisor. Urged to act by those who benefited from uses and their lawyers and deploring injustice, the Chancellor then began to enforce them.<sup>100</sup> The use thus became a popular device for evading or avoiding unpopular laws.<sup>101</sup> It is generally credited with the following subversive activities: undermining the feudal system in England, revolutionizing the law of conveyancing, enabling

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93. See *Farkas v. Williams*, 125 N.E.2d 600 (Ill. 1955).

94. Legislatures sometimes helped but also hindered.

95. See William F. Fratcher, *Uses of Uses*, 34 MO. L. REV. 39, 45 (1969). Primogeniture dictated that the land went automatically to the eldest son or to the nearest male heir on the owner's death. Apparently, it still lives. See Sarah Lyall, *Son and Heir? In Britain, Daughters Cry No Fair*, N.Y. TIMES, June 23, 2013, at A1.

96. Fratcher, *supra* note 95, at 51.

97. *Id.*

98. See *id.*

99. See Austin W. Scott, *The Trust as an Instrument of Law Reform*, 31 YALE L.J. 457, 458–59 (1922).

100. Sometimes with the cooperation of the common law judges who he called in to advise him. See Fratcher, *supra* note 95, at 53–54.

101. Professor Scott described the use's activities as evasion. Scott, *supra* note 99, at 458. Professor Fratcher described them as avoidance. Fratcher, *supra* note 95, at 54.

married women to achieve economic independence, allowing daughters and younger sons to participate in the family wealth (land), giving some “corporate” protections to business enterprises, enabling gifts of large sums of money to charitable enterprises, and inspiring the courts to invent the “constructive trust” to relieve against fraudulent schemes of all sorts.<sup>102</sup>

Henry VIII, King of England,<sup>103</sup> sat atop the feudal pyramid and found himself losing revenues as a result of the widespread employment of the use.<sup>104</sup> He managed to forge an alliance with the common lawyers in Parliament who were similarly losing revenues to those who practiced in the Chancellor’s courts.<sup>105</sup> Together they planned to snuff out the troublesome use. The vehicle Parliament chose was the Statute of Uses.<sup>106</sup> Passed in 1536, it operated by converting the use into legal title recognized, and dealt with thereafter, by the law courts instead of the Chancellor.<sup>107</sup> The use was thus “executed.” Henry soon faced a rebellion, euphemistically called the Pilgrimage of Grace.<sup>108</sup> One of its causes was the Statute of Uses. The powerful landed gentry, outraged because they could no longer make wills of land, sided with the rebels.<sup>109</sup> Parliament was forced to capitulate and, accordingly, passed the Statute of Wills in 1540.<sup>110</sup> The good lawyers’ invention, the will of land via the use, previously illegal, crossed the border into legitimacy. What happened to the use then? It should have been dead. It should no longer have been possible to separate legal and equitable titles after 1536. Professor Scott tells us that for about 100 years after the Statute of Uses, uses lay dormant; Professor Maitland confirms this.<sup>111</sup> However “imaginative lawyers” were working to convince both the common law and chancery courts that the statute did not apply to all uses. The courts, construing the statute strictly, agreed with them and the use, now in trust’s clothing, revived in the seventeenth century.<sup>112</sup> On its operation thereafter, Scott quotes Lord Mansfield explaining that trusts now operated cleanly within the law:<sup>113</sup> “[They] are made to answer the exigencies of

102. Scott, *supra* note 99, at 457.

103. Henry VIII was King of England from 1509–47. *Henry VIII (r1509–1547)*, THE BRITISH MONARCHY, <http://www.royal.gov.uk/historyofthemonarchy/kingsandqueensofengland/thedors/henryviii.aspx> (last visited Dec. 25, 2013).

104. 4 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 450 (1924).

105. *See id.* at 453.

106. *Id.* at 455.

107. *See id.* at 461–63.

108. *Id.* at 464.

109. 4 HOLDSWORTH, *supra* note 104, at 464–65.

110. *Id.* at 465.

111. MAITLAND, *supra* note 6, at 41.

112. *See* Scott, *supra* note 99, at 464.

113. *Id.* Lord Mansfield was Chief Justice of the Court of King’s Bench from 1756–88. Whether we view him as a reformer or a revolutionary, he certainly had a great impact on English law.

families and all purposes, without producing one inconvenience, fraud, or private mischief, which the statute Hen. 8 meant to avoid.”<sup>114</sup> And so another of the players in the Trusts and Estates course survived an attempt on its life, shed its outlaw status, and went “straight,” joining the will of land.

In the next few hundred years, we watch as the will begins to age. Its formal requirements<sup>115</sup> are strictly enforced and proving it by probate has become a cumbersome, expensive, and, in most cases, unnecessary court process. Like the executors in the *Rothko* case, the will and the probate bar are attacked and accused of, among other things, imposing a private tax and collecting it from the public. Like the *Rothko* executors, they find themselves unable to mount an effective defense. Ironically, leading the enemy army is a nonlawyer, who, like Reis, seems to have been engaged in the unauthorized practice of law.<sup>116</sup> Norman Dacey, a mutual fund salesman, turned author and wrote a book titled *How to Avoid Probate*.<sup>117</sup> It captured the public imagination, made the best-seller lists, sold millions of copies, and went through five editions.<sup>118</sup> It generated wide publicity and much litigation.<sup>119</sup> Dacey’s cure for the evils of probate was a nonprobate lifetime transfer of assets to a revocable inter vivos trust.<sup>120</sup> He told his readers they did not need lawyers; they could use the ready-made forms that were contained in his book.<sup>121</sup> Another revolt followed. It is the twentieth century and this revolt is aptly described as “the nonprobate revolution.”<sup>122</sup> Less formal methods of passing property down the generations, so-called nonprobate transfers or will substitutes, proliferated.<sup>123</sup> Here again the inventors were good lawyers working for their clients, insurance companies, banks, and other financial institutions who were profiting from the revolution at the expense of the

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114. *Id.*

115. A writing, a signature, and witnesses. *See, e.g.*, UNIF. PROBATE CODE § 2-502 (amended 2010).

116. In Connecticut, he was held to be doing just that. *See* Grievance Comm. of Bar of Fairfield Cnty. v. Dacey, 222 A.2d 339, 352 (Conn. 1966). In New York, the Court of Appeals exonerated him. *See* N.Y. Cnty. Lawyers’ Ass’n v. Dacey, 234 N.E.2d 459, 459 (N.Y. 1967) (overruling both the trial court and a divided intermediate court). Dacey went on the offensive, accusing the New York County Lawyers Association of depriving him of free speech. That failed but added to the publicity surrounding him and his book. *See* Dacey v. N.Y. Cnty. Lawyers’ Ass’n, 423 F.2d 188, 195 (2d Cir. 1969), *cert. denied*, 398 U.S. 929 (1970).

117. NORMAN F. DACEY, *HOW TO AVOID PROBATE* (1965).

118. *See* Richard D. Lyons, *Norman Dacey, 85; Advised His Readers To Avoid Probate*, N.Y. TIMES, Mar. 19, 1994, at 52.

119. *Id.*

120. *See* DACEY, *supra* note 117, at 10.

121. *See id.* at 331.

122. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108 (1984).

123. *See id.* at 1109.



probate bar. Unlike wills, these will substitutes, except for the inter vivos revocable trust, are “asset specific.” They apply to only one asset at a time. They require a writing and a signature, as do wills, but they do not need witnesses or probate.<sup>124</sup> As with a will, the property owner keeps complete control of his or her assets during life and can freely change his or her mind about their disposition before death. These nonprobate devices include insurance contracts, P.O.D.<sup>125</sup> designations, retirement accounts, bank, brokerage, and mutual fund accounts, as well as Dacey’s revocable inter vivos trust.<sup>126</sup> Even after probate had been simplified in many jurisdictions in response to public dissatisfaction, and strict compliance requirements eased by curative doctrines like substantial compliance and harmless error,<sup>127</sup> nonprobate transfers remained fashionable and the public continued to be entranced by them.

The big question, of course, was whether they would hold up when tested in court. Early judicial reaction was somewhat like Parliament’s thirteenth century view of the “use.” They seemed like attempts to evade the law of wills. They looked like wills and operated like wills, but they did not comply with the wills statutes or go through the probate process. They must therefore be invalid. When some courts reluctantly let them take effect, they did so only behind the fiction that something had been given to the beneficiary during the property owner’s lifetime—but what?<sup>128</sup> In jurisdictions where the courts remained reluctant to validate them, the legislatures stepped in to do so.<sup>129</sup> The fiction of lifetime transfers was slowly abandoned and, like the other inventions of good lawyers before them, these so-called will substitutes crossed the border to legitimacy and became accepted for what they are: wills that do not require witnesses or probate.

#### CONCLUSION

Our cast of lawyer inventions is now complete. The client with death on his or her mind, if he or she consults a good lawyer, is usually offered a combination solution: a package including the revocable, inter vivos, trust, the will, and nonprobate transfers. The revocable inter vivos trust acts as the vessel for linking and holding probate assets and nonprobate assets together. The lawyer drafts an inter vivos revocable trust for the client, reflecting the client’s

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124. *See id.* at 1125.

125. The acronym for payable on death.

126. This is a trust that the settlor sets up in his lifetime and which he retains the power to revoke. *See* BLACK’S LAW DICTIONARY 949 (rev. 4th ed. 1968).

127. *See* UNIF. PROBATE CODE § 2-503 (amended 2010).

128. *See, e.g.,* Farkas v. Williams, 125 N.E.2d 600 (Ill. 1955).

129. UNIF. PROBATE CODE § 6-201 (1969) authorized them in a variety of documents and was widely adopted in the states.

dispositive wishes. The lawyer supervises the transfer to the trust of the client's assets while the client is still alive. Any forgotten or after-acquired assets the client owns at his death are caught by a separate will<sup>130</sup> that carries them into the trust. Any nonprobate assets are made payable to the trust, and the terms of the trust govern distribution of the estate. Here are all three major players linked in peaceful symbiosis, their turbulent births and rebellious childhoods behind them. We thus have a happy resolution but not an ending. There will be changes: new clients, new lawyers, new inventions. I, however, will remain constant. "No matter what the future brings,"<sup>131</sup> I will be firmly attached to this course for "the heart has its reasons, which reason knows nothing of."<sup>132</sup>

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130. Another lawyer invention called a "pour-over will." See W.S. McClanahan, *The Pour-Over Device Comes of Age*, 39 S. CAL. L. REV. 163, 163 (1966).

131. *As Time Goes By*, by Herman Hupfeld from the movie *Casablanca*. Hear it as it was sung in the movie: "*As Time Goes By*"—*Casablanca—The Original Sam (Dooley Wilson) Song*, YOUTUBE, <http://www.youtube.com/watch?v=zaAqze81y4Y> (last visited Dec. 26, 2013).

132. "Le coeur a ses raisons, que la raison ne connaît point." BLAISE PASCAL, *PENSÉES* 114 (Dominique Descotes ed., Flammarion 2008) (1669).

