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Future Interests

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order of dismissal was actually a trial in which the municipality was in the position of the prosecution and had the burden of proof. The court pointed out, however, that the action was of a civil nature and the municipality was required to sustain its charges by the preponderance of the evidence, not, as in a criminal action, by proof beyond a reasonable doubt.

JOE H. MUNSTER, JR.

FUTURE INTERESTS

DEFECTS IN DRAFTING

One of the simplest forms of future interests is a life estate to the testator's widow with a vested remainder in fee simple absolute to named children. Yet in *Lane v. Lane*¹ the person who drafted the testator's will in 1946 used the following ambiguous language:

All the real estate in my name, which I may own or have the right to dispose of at the time of my decease, I hereby give, bequeath and devise to my said wife, Lillie M. Lane, to be hers only for and during the period of her natural live [*sic*], with all right title and interest in and to the rents, increases and profits therefrom arising, *and upon her death said property and the title thereto shall vest in the name and title of my sons, Nelson W. Lane and Howard H. Lane, to be theirs absolutely and in fee simple.*² (Emphasis added.)

As is often the case with ambiguous documents, this disposition is also verbose.

The testator was survived in 1954 by his widow, Lillie, a son, Howard, who is still living, the child of his son Nelson who had pre-deceased the testator, and two children of a third son who had been missing for sixteen years at the time the will was drafted and who was presumed dead. The testator's widow died in 1959.

Three constructions were urged upon the court. First, the remainder to the two named sons was subject to the condition precedent that each son must survive the life tenant before his undivided interest would vest. Since only Howard so survived, there would be an intestacy as to an undivided half interest. Second, the fee vested as to Nelson's undivided half interest at the death of the life tenant in the heirs of the testator determined as of the life tenant's death. Third, the son who survived the testator received at the testator's death an indefeasibly vested re-

1. *Zink v. Contris*, 116 Ohio App. 95 (1961).

2. *Ricks v. Jackson*, 169 Ohio St. 254, 159 N.E.2d 225 (1959).

3. 172 Ohio St. 536, 179 N.E.2d 70 (1961).

4. *Cupps v. City of Toledo*, 170 Ohio St. 144, 163 N.E.2d 384 (1959).

mainder in fee simple in an undivided half interest of the land and the child of Nelson, under the anti-lapse statute,³ received an indefeasibly vested remainder in fee simple in the other undivided half interest.

The court adopted the third construction. It read together the words "upon her death said property . . . shall vest" and "to be theirs absolutely and in fee simple." As thus read, vesting simply refers to the termination of the life estate. Unfortunately, the word "vest" when used in a deed or will may mean "vest" in interest, "vest" in possession, or "vest" in interest and possession.⁴ Too frequently lawyers have created an ambiguity by referring to the vesting of a remainder at the end of a life estate when they mean only that then the owner of a previously vested remainder has the right to possession.

FEE TAIL

The fee tail estate developed in agricultural England. Consequently, it is not surprising that its current counterpart, a life estate and a contingent remainder to the heirs of the body of the life tenant, is used in Ohio to keep a farm in the family and the family on the farm, though this may be detrimental to the family and the farm. The case of *Merchant v. Adair*⁵ arose from the successful efforts of a father to keep his sons on the farm and his unfulfilled hopes that he would have grandchildren and that they would likewise remain on the family farm. In 1902 the testator who had obtained title to his 356 acre farm from his father devised it to his two sons by name for their respective lives. The testator further provided that upon the death of a son leaving heirs of his body, his share should go to the heirs of his body, but if a son died without heirs of his body, then his share should go to the other son "for life with remainder to heirs of his body." One of the sons died in 1934 survived by a widow but no heirs of his body. The son's widow lived until 1940. However, she had no right to any income from the farm during her life because her deceased husband had only a life estate and also because of the express cross-remainder to the other son for his life. The survivor of the two sons lived until 1957, when he too died survived by a widow and no heirs of his body. This son by will left all his property to his widow. She claimed an undivided half interest in the property because her husband's father, though he died testate, failed to

1. 116 Ohio App. 100, 187 N.E.2d 71 (1961).

2. *Id.* at 101, 187 N.E.2d at 72.

3. OHIO REV. CODE § 2107.52.

4. In addition to vesting in possession and vesting in interest, the word "vest" may mean alienable or transmissible, or it may simply mean that a particular interest, such as a possibility of reverter, is vested under the rule against perpetuities. See LEACH & LOGAN, CASES ON FUTURE INTERESTS AND ESTATE PLANNING 254 (1961).

5. 113 Ohio App. 513, 179 N.E.2d 152 (1960).

devise specifically the reversion and there was no residuary clause in his will. Therefore, she contended that the two sons as heirs of their father inherited the reversion in fee simple subject to defeasance only if one or both died leaving heirs of the body. The court adopted the widow's contention, it being the only reasonable construction.

The persons who contested the claim of the son's widow to an undivided half interest in the farm were the remote descendants of the seven brothers and sisters of the testator, some apparently claiming as little as a 1/728th interest. They argued that because the testator devised only life estates to his sons with contingent remainders to the heirs of their bodies, he intended that his sons should not take a greater interest and that their wives should not take at all. The court properly labelled this claim as one that rested on conjecture. Even if the testator had specifically stated that the sons, who were his heirs, were to take no more than a life estate, it is well established that heirs cannot be totally or partially disinherited by negative words.⁶

Looking back to the specific facts in *Lane v. Lane*,⁷ the devise of only a life estate to the sons seems unwise both from the point of view of the sons and of the community, as the sons certainly had little incentive to improve the farm. As a general rule, if a father wishes to make the best disposition of his property to his children, he should give them the legal fee simple absolute. When this is done, each child can properly provide for the support of any widow and children that he may leave at his death. Furthermore, the property can be freely alienated.

The desire to keep property in the family is not unique to fathers and their natural descendants. In *Kohler v. Ichler*⁸ a mother by a series of five deeds between May 31, 1940, and June 25, 1947, conveyed land to her adopted son for his life "and then to the heirs of his body, *and if he died without heirs of his body*, the remainder to revert to the grantor, if living, and if not living, then remainder to grantor's heirs at law." (All italicized in original.) The italicized words were omitted in three of the five deeds. (It would be interesting to know whether the same person drafted all five deeds.) The court properly assumed that this omission did not change the interests created.

A clue to the motivation for the creation of only a life estate in the adopted son is the grantor's apparent dislike for the son's wife. The trial court struck from one of the pleadings an allegation that the grantor "had an extreme antipathy and animosity and dislike for" the son's wife. If this allegation were true, it is reasonable to assume that when each of the five deeds was executed and delivered, the grantor was assured

6. 4 PAGE, WILLS § 30.17 (Bowe-Parker rev. 1961).

7. 116 Ohio App. 100, 187 N.E.2d 71 (1961).

8. 116 Ohio App. 16, 186 N.E.2d 202 (1961).

that the son's widow, whoever she might be, would not be able to claim any interest in the land upon the son's death. The grantor, if living, would probably be surprised that her daughter-in-law, upon the death of her son leaving no heirs of his body, claimed to be the owner in fee simple absolute of the land conveyed by the five deeds. Fortunately for the draftsman, the grantor died in 1952 and the son in 1959. The son and his wife were married in 1929 and apparently enjoyed thirty years of marital happiness because at his death the son willed all his property to his wife, who was also his sole heir.

The language in the five deeds before the court in *Kohler v. Ichler*⁹ may not appear ambiguous, but it is. The conveyance to the son with remainder to the heirs of his body can be understood only by reference to the Ohio statute which abolishes the Rule in Shelley's Case.¹⁰ As in many conveyances by will or deed, the ambiguity is not in the primary future interest, so that if the son were survived by heirs of his body, they would take the fee simple absolute without question. However, he left no heirs of his body and the grantor predeceased her son. The ambiguous portion of each deed is that which applies when the grantor predeceased her son and the son died without heirs of his body. In that event, according to the deeds, the remainder is "to revert to the grantor, if living, and if not living, then remainder to grantor's heirs at law." (Emphasis added.) Certainly the draftsman should have known that the purported remainder to the grantor's heirs would raise the question of the applicability of the doctrine of worthier title.¹¹ The court stated that the modern rule is to apply the doctrine of worthier title under which the grantor would have a reversion as a rule of construction and not, as at the early common law, as a rule of law. Of course this doctrine in any case applies only when the persons to take as heirs of the grantor are determined as of the time of the grantor's death. The son's wife assumed that after the delivery of the five deeds, the grantor, her mother-in-law, retained a reversion and that this reversion passed to her husband as his mother's sole heir or as devisee under his mother's will. But this fact was not established. The reversion might have been conveyed by deed to others prior to the mother's death or devised to others at the mother's death testate.

The attorney for the son's wife overlooked an important item in his client's case: the passage of the reversion from the mother to the son. This omission enabled the court to avoid construing the deeds to de-

9. *Ibid.*

10. Since the earliest of the five deeds was May 31, 1940, and the Rule in Shelley's Case was not abolished as to deeds until August 21, 1941, the court should have noticed this fact though it would not have changed its final conclusion. See Comment, *The Fee Tail in Ohio*, 17 OHIO ST. L.J. 335, 337 (1956).

11. SIMES & SMITH, FUTURE INTERESTS ch. 46 (2d ed. 1956).

termine whether the heirs of the grantor are to be determined as of the death of the grantor or as of the death of the son, the life tenant. The fact that if the heirs of the grantor are determined as of the death of the grantor, the son, who is also the life tenant, would be the sole heir might be sufficient to convince a court that the heirs of the grantor should be ascertained as of the date of the death of the life tenant.¹² However, this factor was not considered by the court. In any event, would it not have been better for the court to make this determination, even though technically only dictum, to expedite judicial determination of plaintiff's rights, since the question had been presented to it?

LIFE ESTATE AND GIFT OF PRINCIPAL TO ISSUE OF LIFE BENEFICIARY

As a general rule, future interests should be equitable.¹³ Frequently an inter vivos or testamentary trust is in the form of a life estate to a named beneficiary with a gift of the principal to the life beneficiary's issue at his death. In addition to the ambiguity as to the remainder to issue,¹⁴ this type of disposition patently requires an additional provision for the situation when the life beneficiary dies leaving no issue surviving.

In *Central Trust Co. v. Guthrie*¹⁵ an aunt who died in 1924 created a testamentary trust which first provided for an equal division of the net income between a named nephew and niece during their joint lives. Then, in the language of the attorney who drafted her will,

In case either my said nephew (M. Hart Benton) or niece (Ethel Benton Guthrie) should die *without leaving issue*, him or her surviving, then his or her share of said net income, and the share of principal . . . of said trust fund which otherwise would pass to his or her issue, *shall pass to and vest in the survivor of my said nephew or niece and the issue of said survivor, as the case may be, such issue to take by way of representation.* (Emphasis added to last clause.)

The testatrix' niece, Ethel, died in 1936 survived by two children, Helen and James, and by the nephew, M. Hart Benton, the other beneficiary. Certainly at Ethel's death as to her half under the terms of her aunt's will, Ethel's two children, assuming there were no other living or deceased issue of Ethel, had indefeasibly vested interests in fee simple.

12. *Id.* § 735.

13. England up-dated its property laws in 1925 by allowing the creation of only two legal estates: the fee simple absolute in possession and the leasehold or estate for years. All other interests are equitable. CHESHIRE, MODERN REAL PROPERTY 94 (1962); MCGARRY & WADE, REAL PROPERTY 136 (1959). "[Y]ou rarely find legal life estates and remainders except in homemade wills [except when the life tenant is also given a general power of sale] . . . the objections that apply to *legal* life estates in land do not apply to *equitable* life interests under a trust." CASNER & LEACH, CASES ON PROPERTY 281 (1950).

14. Professor Cook will discuss the ambiguities in a gift to issue in a subsequent issue of the Review.

15. 114 Ohio App. 337, 175 N.E.2d 113 (1961).

But, the question before the court related to the disposition of the half of the principal from which M. Hart Benton had received the income until his death in 1958 not survived by any issue. The answer to this question would have been easier if Helen, one of Ethel's children, had not died in 1954, thus predeceasing her uncle M. Hart Benton. Helen's estate claimed half of the portion of the principal from which M. Hart Benton had been receiving the income. James, Ethel's other child, claimed the entire principal because he was the only issue of Ethel that survived to the time of distribution. Helen's personal representative contended that after Ethel's death the only contingency which would prevent Ethel's children or the personal representative of any deceased child from taking at the death of M. Hart Benton would be Benton's death survived by issue. The court of appeals adopted this view and stated in a very brief opinion: "There is no language in the will which suggests that James and Helen must survive M. Hart Benton before they can take his share."¹⁶ From the point of view of the court this statement may be correct in that nothing in the language of the will suggested to the court any requirement of survival or any divestment upon non-survival to the time for distribution. It is also true that merely because a gift of a future interest is subject to a condition precedent, it is not therefore also subject to an implied condition precedent of survivorship.¹⁷ For example, the gift of the future interest to the issue of Ethel was subject to the dual conditions precedent that Ethel must predecease her brother M. Hart Benton and that he must also die unsurvived by issue. However, under the applicable principles with respect to gifts of a future interest to "issue" set forth in the *Restatement of Property*, the failure of Helen to survive until the death of her uncle would prevent her estate from taking.¹⁸

LIFE ESTATE AND GIFT OF PRINCIPAL TO ISSUE OF THIRD PARTY

Suppose in a gift to C for life, then to the issue of D that D predeceases C survived by two children and one of these children also predeceases C but leaves no issue. Is the estate of this deceased child entitled to share in the remainder? The answer of the court in *Central*

16. *Id.* at 339, 175 N.E.2d at 114.

17. POWELL, REAL PROPERTY § 334 (1950); RESTATEMENT, PROPERTY § 261 (1940); SIMES & SMITH, FUTURE INTERESTS § 594 (2d ed. 1956).

18. "When a limitation is in favor of the 'issue of B,' and B dies prior to the time when the subject matter of the class gift becomes distributable, the persons who are 'issue of B' at the death of B are not necessarily those who become distributees at the time when the subject matter of the class gift becomes distributable. The group designation here employed, that is, 'issue,' connotes a requirement of survival to the time of distribution even though such time of distribution is later than the death of B (compare § 249, Comment i)." RESTATEMENT, PROPERTY § 296, comment g (1940).

*Trust Co. v. Guthrie*¹⁹ is clearly "yes," but the answer of the *Restatement of Property* is clearly "no."²⁰ Obviously the case must not have been fully presented to the court for then the opinion would have had to set forth the specific reasons why the court did not adopt the position of the *Restatement of Property*. As between the position of the court and the position of the *Restatement of Property*, the latter has some merit in that it prevents the property from going to the spouses of deceased issue who failed to survive to the time of distribution. If the gift were by will or by deed of trust, the fundamental question is what would the average testator or settlor prefer.²¹ Since one of the children of Ethel survived M. Hart Benton, it is probable that Ethel's aunt, who was the testatrix, would have preferred this child to take all of M. Hart Benton's share, thus preventing the estate of the deceased child from taking. If, therefore, one assumes that the position of the *Restatement of Property* is sound and that in a future gift to the issue of a named person, the issue who take and the shares that each takes are to be determined as though the named ancestor died intestate at the time for distribution and the issue were the heirs, then a draftsman might simply state that all gifts to issue are to be construed as to the persons to take and the share of each in accordance with the principles of the *Restatement of Property*. One objection to this solution is the difficulty the average lawyer has in reading the *Restatement of Property*. The average judge must have the same difficulty. Therefore, another solution must be found. Professors Leach and Logan recommend the inclusion in the will or trust of a definition of the word "issue."²²

There remain a few miscellaneous ambiguities in the portion of the will before the court in *Central Trust Co. v. Guthrie*.²³ If Ethel had been survived not only by two children, but also by six grandchildren who were the immediate descendants of the two children, would the grandchildren have taken per capita with their parents? The specific language of the will is an indirect gift to the issue of Ethel in these words:

19. 114 Ohio App. 337, 175 N.E.2d 113 (1961).

20. RESTATEMENT, PROPERTY § 296, comment g (1940).

21. "[T]he judicial ascertainment of the intent of the conveyor is a process which combines an orderly, but somewhat restricted, search for his subjective intent with supplementing inferences of an intent which the conveyor probably would have had, if he had addressed his mind to those problems which, in fact, have arisen out of his conveyance." RESTATEMENT, PROPERTY § 241, comment c (1940).

22. "Where in this will any gift is made to issue of a person, those children and more remote descendants of such person shall take who would have taken the personal property of such person if he had died at the time said gift becomes possessory, unmarried, intestate, domiciled in . . . under the laws of . . . in force at the time such gift becomes possessory, and the shares and proportions of taking shall be determined by said laws. Where a power is given to appoint among the issue of a person, appointment may be made to any children or more remote issue of such person." LEACH & LOGAN, CASES ON FUTURE INTERESTS AND ESTATE PLANNING 976 (1961).

23. 114 Ohio App. 337, 175 N.E.2d 113 (1961).

In case either my said nephew (M. Hart Benton) or niece (Ethel Benton Guthrie) should die without leaving issue, him or her surviving, then his or her share of said net income, and the share of principal . . . of said trust fund *which otherwise would pass to his or her issue*, shall pass to and vest in the survivor of my said nephew or niece and the issue of said survivor, as the case may be, *such issue to take by way of representation*. (Emphasis added.)

If a gift to issue without any qualifying words is one to all lineal descendants per capita,²⁴ would the two italicized phrases be construed together? Probably not, because the words "such issue" would likely be construed as referring only to the word "issue" which immediately precedes them. The significance of the entire phrase "such issue to take by way of representation" is substantial when construed with the immediately preceding word "issue" under a situation which required a determination whether this word "issue" was a word of limitation or a word of purchase and if a word of purchase, whether the issue take per capita or per stirpes at the common law, or per stirpes under the more modern construction of this phrase. For example, if this phrase as to taking by representation had been omitted, then the will would have stated that on the death of the nephew or niece unsurvived by issue, "then his or her share . . . shall pass to and vest in the survivor of my said nephew or niece *and the issue* of said survivor, as the case may be." Since the draftsman used the word "and" which is more indicative of the use of the word "issue" as a word of limitation than the word "or," and since in a will prior to the abolition of the need for words of inheritance, the word "issue" can be substituted for the words "heirs of the body,"²⁵ then if Ethel had survived her brother and he had died unsurvived by issue, a court might justifiably have held that Ethel received only a fee tail for life²⁶ and thus had no power to defeat any of her issue who survived her. If Ethel received only a fee tail for her life and died unsurvived by issue, there would have been an intestacy unless the aunt disposed of the reversion in some other portion of her will.

SURVIVORSHIP

Another miscellaneous ambiguity which might have been considered by the court in its opinion is the use of the word "survivor" as follows: "shall pass to and vest in the *survivor* of my said nephew or niece and [or?] the issue of said survivor, as the case may be" When Ethel failed to survive her brother, her issue were then in a position to take upon her brother's death unsurvived by issue, but does the word "sur-

24. See Note, 7 W. RES. L. REV. 186 (1956).

25. See *Ford v. Johnson*, 41 Ohio St. 366, 367 (1884). RESTATEMENT, PROPERTY § 59, comment j (1936).

26. OHIO REV. CODE § 2131.08.

vivor" also refer to Ethel's issue? If it does, to what time must they survive?

Assuming that the remainder as to M. Hart Benton's share, upon his death without issue surviving is to go to his sister Ethel or to her issue, the court might have considered another principle of construction. According to the *Restatement of Property*, when a postponed gift is made to alternative takers, there is from this fact an implied requirement of survival only as to the first taker.²⁷ Whether as to the first taker survival to the death of the life beneficiary is a condition precedent or non-survival to that date is a condition subsequent, or neither of these, in any event, survival or non-survival as to the second alternative taker depends upon the word or words used to describe the second taker.²⁸ Regardless of the statement of the rule of construction in the *Restatement of Property*, when there is a postponed gift to alternative takers, some courts have implied a condition precedent not only as to the first taker, but also as to the second taker.²⁹

GIFT TO RELATIONS

Of all the dispositions considered in this survey, the most unwise is that of the testator in *Parrett v. Paul*.³⁰ The testator died testate in 1934 devising a life estate to his widow in certain land, then providing as follows: "all of my full blood and all of the half blood relations shall share alike in the remainder, if any." The testator's widow died in 1961. A gift to relatives or relations is generally not a wise one. The court correctly stated that the general rule is

that the word 'relations,' when used in a will, means relatives or relations who are heirs or next of kin of the testator, who would take under the statutes of descent and distribution in the absence of an intent appearing in the will to the contrary.³¹

Although the court further stated that the statute of descent and distribution in effect at the testator's death is the one which determines who takes the remainder, it did not clearly indicate that these persons should be ascertained as of the testator's death in 1934 and not as of the death of his widow in 1961.³² There is no reference in the opinion to the

27. RESTATEMENT, PROPERTY § 252 (1940).

28. RESTATEMENT, PROPERTY § 252, comment f; § 249, comment i (1940).

29. SIMES & SMITH, FUTURE INTERESTS § 581 (2d ed. 1956).

30. 115 Ohio App. 488, 185 N.E.2d 798 (1962).

31. *Id.* at 489, 185 N.E.2d at 799. See SIMES & SMITH, FUTURE INTERESTS § 725 (2d ed. 1956); RESTATEMENT, PROPERTY §§ 307, 308, 309 (1940).

32. "When a limitation is in favor of the 'heirs,' 'heirs of the body,' 'next of kin' or 'relatives' of a designated person, or in favor of other groups described by words of similar import, and the persons who come within the term employed to describe the conveyees are to be determined by a statute governing the intestate succession of property, then the statute is applied as of the death of the designated ancestor, unless an intent of the conveyor to have the statute

fact that the remainder interests vested in 1934 and, therefore, might have been devised by those remaindermen who died testate between 1934 and 1961. Furthermore, as to any remainderman who died intestate between 1934 and the present, his interest would pass in accordance with the statute of descent and distribution in effect at his death. Thus, as to remaindermen who died after the testator's death in 1934, either testate or intestate, it is reasonable to believe that the spouses of some of them probably took the deceased's interest. To avoid multiple transfers of undivided interests in postponed gifts to heirs, relatives, and the like, of a named person, at least one state by statute provides that the takers are to be ascertained as of the time of distribution.³³

The claimants to the remainder "are the lineal descendants of the deceased grandparents of the testator." For the reasons previously stated it would appear that the court was not applying the statute of descent and distribution in effect at the testator's death in 1934, but as of the death of the life tenant, his widow, in 1961. As to this class of lineal descendants consisting of eighty-four persons, the trial court directed a per capita distributing because of the phrase "shall share alike in the remainder." The court of appeals took into consideration the fact that since the testator was an only child the words "full blood" and "half blood" would have to refer to the children of his grandparents. The testator's paternal grandmother married twice and had children by both her husbands. The testator's father had two full brothers and sisters and two half brothers and sisters. Twenty-one of the claimants were cousins on the testator's maternal side, and eight were cousins on the testator's paternal side. The additional claimants were the respective descendants of nine deceased cousins on the maternal side and of ten deceased cousins on the paternal side. The applicable statute of descent and distribution provided that lineal descendants of grandparents take per stirpes.³⁴ However, under Ohio decisions the phrase per stirpes does not have the original meaning of the common law.³⁵ Therefore, since all the testator's uncles and aunts were deceased, the stirpes or stock would be the testator's

applied as of some other date is found from additional language or circumstances." RESTATEMENT, PROPERTY § 308 (1940). Cf. *id.* at § 309.

33. "A conveyance of real or personal property, whether directly or in trust, to the conveyor's or another designated person's 'heirs', or 'next of kin', or 'relatives' or 'family' or to 'the persons thereunto entitled under the intestate laws', or to persons described by words of similar import, shall mean those persons, including the spouse, who would take under the intestate laws if such conveyor or other designated person were to die intestate at the time when such class is to be ascertained, a resident of the Commonwealth, and owning the property so conveyed: Provided, that the share of a spouse other than the spouse of the conveyor, shall not include the ten thousand dollar allowance under the intestate laws. The time when such class is to be ascertained shall be when the conveyance to the class is to take effect in enjoyment." 20 PA. STAT. Ann. tit. 20 § 301.14(1) (1950).

34. OHIO REV. CODE § 2105.06.

35. *Kraemer v. Hook*, 168 Ohio St. 221, 152 N.E.2d 430 (1958).

living cousins with a share for each deceased cousin who had surviving descendants as of the time of the application of the statute of descent and distribution. Apparently under this method of distribution there would be forty-eight shares to be divided: twenty-nine shares to living cousins and nineteen shares to the respective descendants of deceased cousins. The court of appeals thus construed the phrase "all of my full blood and all of the half blood relations shall share alike in the remainder" as simply meaning that there should be no discrimination as to the persons to take on the basis of full blood or half blood, but not that each one who took should necessarily receive the same share.

The testator in *Parrett v. Paul*³⁶ was apparently the victim of the custom which was fairly prevalent in 1934 of leaving a surviving widow only a life estate with the special limitation that it should terminate upon remarriage.

Viewed from the recognition of the surviving spouse as a preferred heir, a devise of the fee simple absolute would be probable if the testator's will had been written today. The large number of collateral relatives together with the ambiguous devise make the testator's disposition extremely unwise. It is also unfortunate that the opinion of the court of appeals is not clear as to the specific date, the testator's death in 1934 or the death of his widow in 1961, which it considered proper for determining the persons who received the remainder.

CONDITION PRECEDENT

The wisdom of the court may compensate for the ineptness of the draftsman. This was true in *Roenick v. Dollar Sav. & Trust Co.*³⁷ The testator, an attorney, unwisely added to a gift of a substantial sum to his grandson the condition precedent that the grandson must give to named charities the amounts set forth in the testator's will. These amounts totaled \$35,000, which was less than ten per cent of the value of the bequest at the date of the court's opinion. The testator died within a year of the date of the execution of his will. The court properly stated that whether the payment of the stated amounts to the named charities was considered as a condition precedent or a condition subsequent, it was void. However, since the testator's primary interest was in making the gift to his grandson, this gift was valid and unconditional.³⁸

36. 115 Ohio App. 488, 185 N.E.2d 798 (1962).

37. 179 N.E.2d 379 (Ohio Ct. App. 1960).

38. "In such a case, [illegal conditions precedent] the courts must try to ascertain what would probably have been his [testator's] intention with respect to the property if the condition should be held illegal. The answer would seem to depend upon the character of the gift and the nature of the condition, and other relevant circumstances such as the relation between the settlor and the donee and the character of the gift over, if any, on the nonperformance of the condition. Insofar as there is any inference either way, we believe that the in-

EQUITABLE INTEREST OF BENEFICIARY

The equitable interest of a beneficiary of a trust is not identical with the legal title of the trustee. Therefore, in *Moore v. Foresman*³⁹ it was properly held that the Uniform Stock Transfer Act has no application to the assignment of the interest of a beneficiary even though the principal of the trust consists entirely of shares of stock. It would be interesting to know how many beneficiaries of a trust who have either a vested or a contingent interest with no right to any portion of either the income or principal until the occurrence of some event or the passage of time, nevertheless at some financial loss convert a future interest into a present one by simply selling it.

FEE SIMPLE DETERMINABLE

Ohio has followed a line of rather strict construction with respect to the creation of a fee simple determinable.⁴⁰ This policy has been beneficial in that land which would have been burdened by an outstanding possibility of reverter has been freely alienable with no special limitation to restrict its use. Furthermore, when a fee simple determinable has been created at a time when words of inheritance were necessary to create a fee simple estate, the possibility of reverter has lasted only for the life of the grantor when there was no provision for a reverter to the grantor and his heirs.⁴¹ *Clark v. Smith*⁴² followed this line of decisions. Looking back, it is apparent that there is really no need for the estates known as the fee simple determinable and the fee simple subject to a condition subsequent. The recently adopted Ohio Marketable Title Act⁴³ contains a statute of limitation of forty years as to possibilities of reverter and rights of entry unless there is a recording in accordance with the provisions of this statute. The Illinois statute is more severe in that it abolishes all possibilities of reverter which have been in existence for a stated period and restricts the duration of new ones.⁴⁴ From experience, if a donor of land really wishes to help education, religion, or some other

ference is that the settlor would have intended that the gift should be absolute rather than that it should fail altogether." 1 SCOTT, TRUSTS § 65.3 (2d ed. 1956).

39. 172 Ohio St. 559, 179 N.E. 2d 349 (1962).

40. 1 HAUSSER, OHIO PRACTICE § 215 (1952).

41. See Note, 8 OHIO ST. L.J. 218 (1942).

42. 184 N.E.2d 695 (Ohio C.P. 1962).

43. OHIO REV. CODE § 5301.49(A).

44. "Neither possibilities of reverter nor rights of entry or re-entry for breach of condition subsequent, whether heretofore or hereafter created, where the condition has not been broken, shall be valid for a longer period than 40 years from the date of the creation of the condition or possibility of reverter. If such a possibility of reverter or right of entry or re-entry is created to endure for a longer period than 40 years, it shall be valid for 40 years." 30 ILL. ANN. STAT. § 37e (Smith-Hurd Supp. 1962).