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Edmond Borgia Butler

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VESTED OR CONTINGENT REMAINDERS "THE PERENNIAL ENIGMA"¹

EDMOND BORGIA BUTLER†

THE above quotation is from the opening sentence of an opinion of Surrogate Wingate in the case of *Matter of Montgomery*.² In that particular instance, he was referring to the question of the lapsing of a remainder by the death of the remaindermen before the time for the happening of the contingency. But whatever the occasion for a consideration of the question of whether a remainder is vested or contingent, and as a matter of fact, whether it is a remainder or a reversion, the courts have not always contributed to the clarification of this question.

THE CONFLICT IN DECISIONS

In *Whittemore v. Equitable Trust Co.*,³ the Court of Appeals stated in a unanimous opinion written by the present presiding judge, that an estate granted in default of appointment

<i>Vested</i>	
<i>or</i>	
<i>Contingent</i>	

"... to such person or persons, and in such shares, interests and proportions, as the same would have been distributable if such deceased Settlor had been the owner thereof at the time of his or her death and had died intestate"

created a *vested* remainder subject to being divested.

In *Schoellkopf v. Marine Trust Co.*,⁴ the Court of Appeals unanimously held that an estate granted in default of appointment "to the heirs of the party of the first part (the settlor) *per stirpes*, and not *per capita* ..." created a *contingent* remainder.

"Here those who are described as 'heirs' receive a contingent remainder

† Professor of Law, Fordham University, School of Law.

1. Scope of the article. It is impossible within the confines of an article in a law review, adequately to discuss the varying phases of this problem. I shall attempt to discuss the difficulties confronting courts, lawyers and litigants in the interpretation of wills and trust instruments, in so far as they may appear to create either a reversion or a remainder, and in so far as they present the question of whether a future estate is vested or contingent. I intend to discuss the question of vesting simply as it affects *remainders*, and primarily with the idea of limiting the use of the word "vested" in so far as the rule against remoteness of vesting is concerned. It is my hope that an examination of these authorities may result in the clarification of the law by the decision of the Court of Appeals rather than by legislation. It is offered with this in mind and with the distinct realization that while criticizing courts and authors for inaccurate expressions, there probably are many similar inaccuracies contained herein. I shall be pleased to be apprised of my mistakes.

2. 166 Misc. 347, 2 N. Y. S. (2d) 406 (Surr. Ct. 1938).

3. 250 N. Y. 298, 301, 165 N. E. 454, 455 (1929).

4. 267 N. Y. 358, 196 N. E. 288 (1935).

created by the trust indenture. They take as purchasers through a beneficial right derived from the trust instrument, and all who have a share in that right and who may, by survival or other event, become members of the class entitled to the remainder have a beneficial interest in the trust which cannot be destroyed without their consent. (*Whittemore v. Equitable Trust Co.*, 250 N. Y. 298)."

Referring back to an old case, the Court of Appeals in *Moore v. Littel*,⁵ stated that a remainder after the death of the life tenant granted "to his heirs and their assigns forever", constituted a *vested* remainder.

In *Matter of Wilcox*,⁶ it was held that a remainder limited to the brother and sister of the life beneficiary "in case my said daughter, Frances D. Wilcox [the life beneficiary], shall die, leaving no issue born to her, which shall attain the age of 21 years . . ." was a *contingent* remainder which would not vest necessarily within the permitted period.

In *Matter of Johnson*,⁷ the court held that a remainder limited after the death of the life beneficiary "without leaving issue, or the death of said issue during minority, then the said principal sum of \$18,000 to go to my sons Lewis M. and William S. in equal shares" was valid as a *contingent* remainder and was *vested* so as not to lapse. The court held first that there were two alternative provisions. Julia Durgy had died without leaving issue. This was valid under the rule against remoteness of vesting. The other alternative provision was void because it was the same as the provision in *Matter of Wilcox* and since the contingency upon which the remainder was limited validly had happened, the estate had been properly created under the rule against remoteness of vesting. Having thus determined that it was a valid contingent remainder, the Appellate Division unanimously held that it did not lapse. They then proceeded to argue:

"It would seem more probable that a testator would give his sons fully alienable and indefeasible rights rather than interests terminable at their respective deaths. These circumstances lead us to the conclusion that the right of Lewis and William was a vested right to a contingent interest not dependent on their surviving their sister Julia, but was alienable and constituted assets of their respective estates. (*Hennessy v. Patterson*, 85 N. Y. 91; *Roosa v. Harrington*, 171 id. 341; *Matter of Banker*, 223 App. Div. 496; *aff'd.*, 248 N. Y. 596; *Matter of Bump*, 234 id. 60.)"

To add to the confusion, we have the contribution of the 'divide and pay-over rule'. In *Matter of Pulis*,⁸ the direction was

5. 41 N. Y. 66 (1869).

6. 194 N. Y. 288, 87 N. E. 497 (1909).

7. 233 App. Div. 587, 253 N. Y. Supp. 241 (4th Dep't 1931).

8. 220 N. Y. 196, 115 N. E. 516 (1917).

*The "Divide
And Pay
Over" Rule*

"I further direct, authorize and empower my executors within two years after the decease of my two children, Abraham and Sarah, to sell my house for the largest amount that can be obtained for it, and divide the net proceeds of said sale, one-half the amount between the children of my son, Abraham Pulis, and the other half thereof between the children of my daughter, Sarah Powles."

The court held that the remainder was not vested, saying:

"There was no vesting of title or interest in the children of the testator's son Abraham or daughter Sarah prior to that time, certainly not except upon the contingency of survivorship. Where final division and distribution is to be made among a class, the benefits of the will must be confined to those persons who come within the appropriate category at the date when the distribution or division is directed to be made. (Matter of Crane, 164 N. Y. 71, and cases cited; Matter of Baer, 147 N. Y. 348, 354, and cases cited; Delaney v. McCormack, 88 N. Y. 174, 183; Robinson v. Martin, 200 N. Y. 159; Dickerson v. Sheehy, 209 N. Y. 592; Fulton Trust Co. v. Phillips, 218 N. Y. 573, 583.)"

"There is no language in the will that is susceptible of a construction that will avoid the 'divide and pay over' rule as is pointed out in the cases mentioned in the dissenting opinion in *Dickerson v. Sheehy* (*supra*)."

The effect of this decision was to disinherit the widow and two children of a deceased child of the testator. The decision was by a four to three vote, the then Chief Judge Cardozo and Associate Judges Pound and Hogan dissenting.

In *Wright v. Wright*,⁹ the court held that a gift to the Washington Heights Library in the City of New York did not vest in the library because of the 'divide and pay over' rule. Since the library had gone out of existence by consolidation into the New York Public Library prior to the time for the trustees to pay and deliver the property to the library, and since its estate was contingent, it lapsed.

"Under these circumstances we have the simple case, free from complications, where there is no gift but by direction to trustees to pay at a future time, and in such a case it is perfectly well settled that the legacy will not vest in the beneficiary until the time for payment arrives." (Warner v. Durant, 76 N. Y. 133; Smith v. Edwards, 88 N. Y. 92, 109; Delafield v. Shipman, 103 N. Y. 463; Shipman v. Rollins, 98 N. Y. 311; Rudd v. Cornell, 171 N. Y. 114.)"

In *Fulton Trust Co. v. Phillips*,¹⁰ the Court of Appeals refused to apply the rule stating:

9. 225 N. Y. 329, 122 N. E. 213 (1919).

10. 218 N. Y. 573, 583, 113 N. E. 558, 560 (1916).

"The so-called 'divide and pay over rule' is a canon of construction rather than a rule of property, and like other rules, which are applicable in the interpretation of wills, it is always applied in subordination to the intention of the testator which is expressed in the will. It is not a hard and fast rule which must of necessity be applied whenever a certain form of words is used without regard to the expressed intention of the testator. The 'divide and pay over rule' like all other rules which courts utilize to aid in the interpretation of wills is available to facilitate them in ascertaining the real intention of the testator. In searching for the intention of the testator, where there is nothing in the will which bespeaks a contrary purpose, the 'divide and pay over rule' may furnish valuable aid. Notwithstanding the criticism to which the rule has been subjected (*Dickerson v. Sheehy, supra*), we recognize the force of the rule and have not hesitated to give it effect when to do so aids in the discovery of the intention of the testator. It is a rule which courts will never apply, where to do so would nullify the expressed intention of the testator."

A few additional illustrations are appropriate on the question of reversion or remainder, before we begin to try to find our way through the maze of conflicting decisions:—At the common law it was unquestionably true that a man could not convey a remainder to his own heirs. The word "heirs" was a word of art which was necessarily used in the creation of a fee simple. With the statutory changes in the Law of New York made in the Revision of 1830 and subsequent thereto, many of the rules of the common law were changed, notably the rule in *Shelley's case*.¹¹ However, in *Doctor v. Hughes*,¹² the Court of Appeals held that the ancient common law rule which prevented one from limiting a remainder to his own heirs, was not to be confused with the rule in *Shelley's case* and survived "at least as a rule of construction, if not as one of property."¹³

"But at least the ancient rule survives to this extent, that to transform into a remainder what would ordinarily be a reversion, the intention to work the transformation must be clearly expressed. Here there is no clear expression of such a purpose."

"There is no adequate disclosure of a purpose in the mind of this grantor to vest his presumptive heirs¹⁴ with rights which it would be beyond his power to defeat. No one is heir to the living; and seldom do the living mean to forego the power of disposition during life by the direction that upon death there shall be a transfer to their heirs."

11. N. Y. REAL PROP. LAW (1936) § 54.

12. 225 N. Y. 305, 122 N. E. 221 (1919).

13. See *id.* at 311, 122 N. E. at 222.

14. The living persons who would be the heirs if the ancestor were to die today are

In *Doctor v. Hughes* the grant of real property was to a trustee in trust to pay to the settlor from the rents and profits \$1500 a year and such additional amounts as the trustee in his discretion might distribute. The trustee was directed to make certain additional payments during his lifetime for his benefit. The trustee was empowered to sell and:

*Doctor
v. Hughes*

"Upon the death of the grantor, he was to 'convey the said premises (if not sold) to the heirs at law of the party of the first part.' In case of a sale, he was to pay to the heirs at law 'the balance of the avails of sale remaining unexpended.' He was authorized at any time, if he so desired, to reconvey the premises to the grantor, and thus terminate the trust."

The plaintiff sought as a judgment creditor to sell the interest of one of the two daughters of the grantor. If she had any interest in the land, it could be sold to satisfy the judgment. The court held that she had none since a reversion was created.

In *Whittemore v. Equitable Trust Co.*,¹⁵ the settlors, children of the life beneficiaries, conveyed personal property to the trustee in trust, to collect and pay the income to the mother of the settlors for her life and on her death to their father for his life. Upon the death of the life beneficiaries, the principal was to be paid over to the settlors in equal shares. In the event of the death of one of the settlors before the life beneficiaries, that settlor's interest was disposed of by the trust instrument as follows:¹⁶

*The "Second"
Whittemore
Case*

"Provided, however, that if any of them be then dead, the part of the net principal of the Trust Estate which would have been paid over and delivered to him or her if he or she had survived shall be paid over and delivered to such person or persons, and in such shares, interests and proportions, as such deceased Settlor, by his or her last will and testament, shall have appointed, *or, in default of such appointment, to such person or persons, and in such shares, interests and proportions, as the same would have been distributable if such*

properly described as heirs apparent, if they are the closest possible relatives today, and as heirs presumptive, if they are now the closest relatives but may lose their rights by the contingency of some nearer relative being born. Not only is this the law of property, but is also the law of succession to a crown. The elder daughter of the reigning King of England is today the heir presumptive because she is the eldest living child, there being no male children born. If a son is born to the present King of England, he will become the heir apparent. For the purpose of this article, there is no value to these distinctions between heirs apparent and heirs presumptive. In either event there are no *heirs* of a living ancestor.

15. 250 N. Y. 298, 165 N. E. 454 (1929).

16. See *id.* at 301, 165 N. E. at 455.

deceased Settlor had been the owner thereof at the time of his or her death and had died intestate."¹⁷

The court held that a remainder and not a reversion had been created.

In *Berlenbach v. Chemical Bank & Trust Company*,¹⁸ the plaintiff, the settlor, granted personal property to his trustee, the defendant, in trust to collect the income and pay it to the plaintiff "during his life but not exceeding a period of twenty years . . ." At the end of twenty years the principal was to be paid to the plaintiff, if he be then living. If he died before the end of the twenty year period, the trustee was directed to

*The Berlenbach
Case*

" . . . pay over the principal of the trust estate to such person or persons as the grantor may, by his last will and testament, appoint, or in default of such appointment, to the persons entitled under his will to his residuary estate, or if he die intestate, to the persons entitled to receive his personal property in case of intestacy."

The court held that a reversion and not a remainder was created, citing *Doctor v. Hughes* and saying: "No person other than plaintiff is specifically mentioned as beneficiary; the income is made payable to plaintiff for a period of twenty years, at the expiration of which the principal is to be transferred to him."

The court pointed out that the next of kin had an expectancy, but no estate, and that the case was governed by its decisions as to revocability in *Stella v. New York Trust Co.*,¹⁹ and *Franklin v. Chatham Phenix National Bank & Trust Co.*²⁰

In *City Bank Farmers Trust Co. v. Miller*,²¹ the settlor created a trust in personal property with direction to pay to her the sum of \$500 weekly from income and principal until the principal fund remaining should be reduced to \$5000 or less, when the trust should cease, and the remaining principal was to be paid to the settlor. If she died before the termination of the trust as above provided, the trustee was to dispose of any remaining principal as she shall by her last will and testament appoint, "or in default of such appointment, to the parties who would be her distributees under the laws of the State of New York." The court held that a reversion and not a remainder was created.

*City Bank
Farmers
Trust Co.
v. Miller*

17. Italics mine.

18. 235 App. Div. 170, 256 N. Y. Supp. 563 (1st Dep't 1932), *aff'd* 260 N. Y. 539, 184 N. E. 83 (1932).

19. 224 App. Div. 50, 229 N. Y. Supp. 166 (1st Dep't 1928).

20. 234 App. Div. 369, 255 N. Y. Supp. 115 (1st Dep't 1932).

21. 278 N. Y. 134, 15 N. E. (2d) 553 (1938).

"The intent as expressed in the trust agreement was that the property was to be returned to the donor if she lived long enough. If not, then it should go to her legatees or next of kin. In either event it would go as her property. In case of intestacy, those who would take would take as next of kin and not by purchase. In such case no remainder was created but a reversion only. (*Doctor v. Hughes*, 225 N. Y. 305; *Berlenbach v. Chemical Bank & Trust Co.*, 235 App. Div. 170; *aff'd.*, 260 N. Y. 539)."

The court pointed out that the case was distinguishable from the *Schoellkopf* case²² because in the *Schoellkopf* case the direction to pay to the heirs was not to his heirs at his death but

*The
Schoellkopf
Case*

"... at the time of distribution, upon the expiration of the lives of the two grandchildren whose lives he employed to measure the duration of the trust. If these grandchildren had lived until the time of the expiration of the two lives which were employed to measure the trust, they would have taken under the definition of the word 'heirs' as it was used in the *Schoellkopf* trust."

"In the case at bar the settlor provided for distribution at her death according to the laws of her domicile, and did not intend to vary the ordinary line of intestate succession. (*Doctor v. Hughes* and *Whittemore v. Equitable Trust Co.*, *supra.*) The direction to the trustee to dispose of any remaining principal or income on the death of the settlor in one of two ways only, namely, in accordance with her will or the laws of intestacy, was merely a superficial expression of a duty imposed upon the trustee by law. The same disposition would have occurred had not those directions been contained in the trust agreement."

"It follows that the trust agreement gave rise to a reversion and not a remainder subject to a power of appointment."

In *Engel v. Guaranty Trust Co. of New York*,²³ it was held that a reversion was created under the following circumstances. The plaintiff executed a trust agreement with the defendant, Guaranty Trust Co., under the terms of which the trustee was directed to pay to the plaintiff the net income so long as he lived. It then provided:

*Engel v.
Guaranty
Trust Co.
Of New York

In The
Appellate
Division*

"Upon the death of the Grantor, the trust shall terminate and the principal thereof shall be paid to Margaret V. Engel, wife of the Grantor, provided she survive the Grantor. In the event that the said Margaret V. Engel shall not survive the Grantor, then upon the death of the Grantor the principal of said trust shall be paid over and delivered to such person or persons and in such amount or amounts as may be validly provided by the Grantor in such Last Will and Testa-

22. 267 N. Y. 358, 196 N. E. 288 (1935).

23. 254 App. Div. 117, 3 N. Y. S. (2d) 1000 (1st Dep't 1938).

ment of his as may be duly admitted to probate, but if the Grantor shall die without making valid provision for the distribution thereof by duly probated Last Will and Testament, then the principal of said trust shall be paid over and delivered to such person or persons, and in such shares, interests and proportions as the same would have been distributable if the Grantor had been the owner thereof at the time of his death and had died intestate."

The Court said:

"It has been repeatedly held that a trust to pay the income thereof to the grantor, and the principal upon his death to his next of kin or to those who would take in intestacy, unless otherwise appointed by the grantor's will, effects merely a reversion in the grantor and the next of kin acquire no remainder. (*Berlenbach v. Chemical Bank & Trust Co.*, 235 App. Div. 170; *aff'd.*, 260 N. Y. 539; *Whittemore v. Equitable Trust Co.*, 162 App. Div. 607; *Davies v. City Bank Farmers Trust Co.*, 248 id. 380; *Cagliardi v. Bank of N. Y. & Trust Co.*, 230 id. 192; *Stella v. New York Trust Co.*, 224 id. 50; *Cruger v. Union Trust Co.*, 173 id. 797.)"

The appellate division distinguished the *Engel* case from the *Whittemore* case pointing out that in that case the life income was to be paid to beneficiaries other than the settlors themselves. Upon the death of one of the settlors, before the life beneficiaries, the life beneficiaries would continue to receive the income until their death and even beyond the lives of all of the settlors. The court italicized the following extract from the opinion in *Whittemore v. Equitable Trust Co.* as follows:

"If the trust deed had said that upon the death of the life beneficiary the net principal of the trust estate was to be paid over and delivered to the settlor or his next of kin in equal shares, the addition in this place of the words 'next of kin,' would not have been sufficient in all probability to create a remainder. Rather it would indicate that the settlor intended all above a life interest to remain with him as a reversion to be disposed of in any way he pleased. The words would indicate a limitation, not a gift. (Whittemore v. Equitable Trust Co., 162 App. Div. 607; Doctor v. Hughes, 225 N. Y. 305.)"

The court then pointed out that this language indicated that the Court of Appeals would call the estate a reversion if at the death of the life beneficiary it was payable to the settlor or his next of kin.

"Generally, a direction to the trustee of a trust fund to deliver the principal at the termination of the life estate to the appointees or heirs of a life beneficiary *other than to the settlor* has been held to indicate an intention on the part of the settlor to create a remainder. (*Hussey v. City Bank Farmers Trust Co.*, 236 App. Div. 117; *aff'd.*, 261 N. Y. 533; *Corbett v. Bank of New York & Trust Co.*, 229 App. Div. 570.)"

As a result of its deliberations, the court held that a reversion and not a remainder was created. This decision of the Appellate Division was reversed in the Court of Appeals,²⁴ Judges Finch and Rippey dissenting, Judge Finch writing an opinion. *In The Court of Appeals* The majority opinion relied upon *Whittemore v. Equitable Trust Company*, holding that the only reservation of control over the fund which the settlors made in the Whittemore case was by testamentary disposition thereof.

"The instrument now before us likewise fails to provide for an assignment of the trust principal by the grantor. Its terms, moreover, admit of exercise of the reserved power of testamentary appointment only in the event of the grantor's survivorship of the remainderman, Margaret V. Engel. Significant, too, is the omission of any provision for return of the trust principal to this grantor beyond the \$15,000. which he expressly retained the right to draw down. In this last aspect (though the total value of the *corpus* does not appear), the purpose of the grantor fully to divest himself of any other reversionary interest in this trust is clearer to a degree than was the like intent of the settlors which the court found in the Whittemore case—for there the settlors were to have the principal again on their survival of both life beneficiaries."

The court held that the ancient rule "that a reservation to the heirs of the grantor is equivalent to the reservation of a reversion to the grantor himself"

"... is with us no more than a *prima facie* precept of construction which may serve to point the intent of the author, when the interpretation of a writing like this trust agreement is not otherwise plain. Inasmuch as for us that rule has now no other effect, it must give place to a sufficient expression by a grantor of his purpose to make a gift of a remainder to those who will be his distributees. We find in the present instance an adequate disclosure by the trust agreement of a purpose in the mind of this grantor to *vest*²⁵ his presumptive heirs with rights which it would be beyond his power to defeat, except by testamentary provision." (*Italics mine.*)

Judge Finch in his dissenting opinion pointed out the following:

"The trust instrument, as pointed out by the Appellate Division in an opinion carefully written, plainly shows that the settlor established a life trust for himself, a remainder to Margaret, if she survives him, and a reversion in

24. 280 N. Y. 43, — N. E. (2d) — (1939).

25. Note the misuse of the word "vest". In the Schoellkopf case, the Court of Appeals correctly determined this to be a contingent remainder. On the next page, the opinion, after having used the word "vest" makes this statement: "This whole group (those related by blood) has a contingent remainder created by this trust indenture."

himself should Margaret predecease him. Beyond this plaintiff made no disposition of his estate. Outside of his former wife Margaret who consents, the settlor alone has the power to dispose of the property by will or if he dies without so doing, it goes to his next of kin. In either event it would go as his property. (*City Bank Farmers Trust Co. v. Miller, supra.*) A further indication that the grantor intended to retain a reversion in the principal subject only to the remainder interest of Margaret is the provision in the agreement giving the grantor the right to withdraw from the principal a sum not exceeding \$15,000."

He therefore held that a reversion and not a remainder had been created.²⁶

26. Since the Court of Appeals has constantly referred to the case of *Whittemore v. Equitable Trust Co.* as its controlling decision, a comparison of the estates created in that case with the other cases hereinbefore discussed will be of assistance in arriving at some definite conclusions in respect to the problem involved. The following cases will be compared with the *Whittemore* case: (1) *Hussey v. City Bank Farmers Trust Co.*, 236 App. Div. 117, 258 N. Y. Supp. 396 (1st Dep't, 1932), *aff'd without op.*, 261 N. Y. 533 (1933); (2) *Mayer v. The Chase National Bank of New York*, 143 Misc. 714, 257 N. Y. Supp. 161 (Sup. Ct. 1932), *aff'd without op.*, 240 App. Div. 877, 267 N. Y. Supp. 939 (1st Dep't, 1933); (3) *Schoellkopf v. Marine Trust Co.*, 267 N. Y. 353, 196 N. E. 288 (1935); (4) *City Bank Farmers Trust Co. v. Miller*, 278 N. Y. 134, 15 N. E. (2d) 553 (1938); and (5) *Engel v. Guaranty Trust Co. of N. Y.*, 280 N. Y. 43, — N. E. (2d) — (1939).

In *Whittemore v. Equitable Trust Co.*, 250 N. Y. 298, 165 N. E. 454 (1929), the three settlors transferred personal property to trustees to pay the income to their mother for life and on her death to their father for life and on the death of both of them, if the settlors be then living, the principal was to be paid over to the settlors.

"But if one of the settlors has died before the life beneficiary, then that settlor's interest is disposed of as follows:

"Provided, however, that if any of them be then dead, the part of the net principal of the trust estate which would have been paid over and delivered to him or her if he or she had survived shall be paid over and delivered to such person or persons, and in such shares, interests and proportions, as such deceased settlor, by his or her last will and testament, shall have appointed, or *in default of such appointment, to such person or persons, and in such shares, interests and proportions as the same would have been distributable if such deceased settlor had been the owner thereof at the time of his or her death and had died intestate.*"

(1) In *Hussey v. City Bank Farmers Trust Co.*, 236 App. Div. 117, 258 N. Y. Supp. 396 (1st Dep't 1932) *aff'd without op.*, 261 N. Y. 533 (1933), the settlor transferred certain personal property to the trustee in trust to pay the income to his wife for life and on her death the principal was to be distributed as she directed by will.

"In the event that she left no will disposing of the principal of the trust, it was to be paid over to the creator of the trust, John U. Hussey, if living; *if not living, it was to be paid to his next of kin according to the laws of the State in which he resided at the time of his death.*"

Note that in both the *Whittemore* case and the *Hussey* case life estates were created in persons other than the settlor. In the *Hussey* case, the power of appointment was granted to the life beneficiary to dispose of the principal by will.

(2) In *Mayer v. The Chase National Bank of New York*, 143 Misc. 714, 257 N. Y. Supp. 161 (Sup. Ct. 1932), *aff'd. without op.*, 240 App. Div. 877, 267 N. Y. Supp. 939

Two additional cases will serve to show how confusion can arise in the interpretation of language as to whether or not a reversion or a

(1st Dep't 1933), the settlor gave a life estate to his daughter with provision for payment of the principal during her life and a direction to the trustees that if she should die after the settlor and before the date for final payment of the principal during her life, the trustees were to pay the then remaining principal to such persons as she should appoint by Will, "*and if or to the extent that she shall have failed validly to exercise such power of appointment, to such person or persons and in such shares and proportions as the Settlor's administrator would have been required to pay the same pursuant to the statutes of the State of New York had the settlor died the absolute owner of the principal of the trust estate immediately after the death of the said Eugenie Marion Grimes.*"

"In case of the death of the said Eugenie Marion Grimes before the death of the settlor, the Trustee shall pay over the principal of the trust estate as the same shall then exist to the Settlor." (*Italics mine.*)

Here, also, in both the *Whittemore* case and the *Mayer* case the life estate was granted to somebody other than the settlor, and in the *Mayer* case the power of appointment was granted to the life beneficiary and the return of the property to the settlor would appear to be an after-thought.

(3) In *Schoellkopf v. Marine Trust Co.*, 267 N. Y. 358, 196 N. E. 288 (1935), the settlor transferred personal property to his trustees in trust during the life of two named infant grandchildren, to pay the income to his son Herman for his life and upon his death to his son Ernst for his life. He provided that the principal should be paid over upon the termination of the trust—the death of the two grandchildren—to the person or persons who at that time were receiving the income, so that the provision for income is the one which determines the way in which the remainder will go. He gave to the survivor of Herman and Ernst the power to designate the person to whom the income should be paid after his death but if the survivor died without designating the person to receive the income, the income was to be paid

"*to the heirs of the party of the first part (the settlor) per stirpes, and not per capita, until the termination of this trust.*"

In the *Schoellkopf* case, as in the *Whittemore* case, life estates in trust were granted to persons other than the settlor. In the *Schoellkopf* case, the power of appointment was granted to the life beneficiaries.

(4) In *City Bank Farmers Trust Co. v. Miller*, 278 N. Y. 134, 15 N. E. (2d) 553 (1938), the settlor gave personal property to the trustee in trust to pay the sum of \$500. weekly so long as the net income and principal should provide funds for the purpose and leave over in the hands of the trustee the sum of at least \$5000. The trust was to terminate when the principal was reduced to \$5000. or less. The balance was then to be paid to the settlor. If she died during the continuance of the trust the trustee was to dispose of the remaining principal as she shall by her last will and testament appoint or in default of such appointment to the parties who would be her distributees under the laws of the State of New York.

In *City Bank Farmers Trust Co. v. Miller*, no one other than the settlor was given any interest in the property prior to the gift over in default of appointment to her distributees; and therefore a reversion and not a remainder was created.

(5) In *Engel v. Guaranty Trust Co. of N. Y.*, 280 N. Y. 43 (1939), the settlor transferred personal property in trust to pay the net income to the settlor during his life, granting a power to the trustee to make payments to him from principal of not more than \$15,000. Upon his death the principal was disposed of as follows:

" . . . the principal thereof shall be paid to Margaret V. Engel, wife of the Grantor,

remainder arises. The first of these cases is *Beam v. Central Hanover Bank & Trust Co.*,²⁷ decided May 29, 1936. The second of these cases is *Davies v. City Bank Farmers Trust Co.*,²⁸ decided May 29, 1936.

In the first of these cases the majority opinion determines that a remainder was created:

*The Beam
Case*

"The pertinent provisions of the deed of trust are as follows: 1. The Trustee shall hold and administer the trust estate, and shall receive and collect the income

therefrom, and shall pay over the annual net income received to the Grantor in each year during his life, in equal quarterly instalments. Upon the death of the Grantor, the Trustee shall transfer, assign and pay over the principal of the trust estate to such persons and upon such estates, in trust or otherwise, as the Grantor may by last will and testament validly limit and appoint, or to the extent that the Grantor shall have failed to make valid testamentary appointment of the whole or any part of the trust estate, the Trustee shall transfer, assign and pay over the same to the heirs at law of the Grantor."

This, as I have said, was held by the majority to create a remainder. One of the justices concurred in the result holding that a reversion and not a remainder was created. Another justice dissented upon the ground that a remainder was created but the trust was irrevocable because of the impossibility of determining the persons who would eventually fulfill the description of "heirs".

In the other case, *Davies v. City Bank Farmers Trust Co.*, the major-

*The Davies
Case*

ity opinion held a reversion was created.

In describing the trust the court said:

"Under the terms of the agreement the income from the trust was to be paid to the plaintiff during her lifetime. Upon her death the principal was to go 'to such person or persons as may be specifically appointed to receive

provided she survive the Grantor. In the event that the said Margaret V. Engel shall not survive the Grantor, then upon the death of the Grantor the principal of said trust shall be paid over and delivered to such person or persons and in such amount or amounts as may be validly provided by the Grantor in such Last Will and Testament of his as may be duly admitted to probate, *but if the Grantor shall die without making valid provision for the distribution thereof by duly probated Last Will and Testament, then the principal of said trust shall be paid over and delivered to such person or persons, and in such shares, interests and proportions as the same would have been distributable if the Grantor had been the owner thereof at the time of his death and had died intestate.*" (Italics mine)

In the *Engel* case, it is true that the settlor reserved a life estate which differed from the *Whittemore* case but he provided upon his death for payment of the remainder to his wife "provided she survived" him. Thus a gift in remainder was made to someone other than his heirs and the gift to his heirs was made only if she died before him. The case therefore falls into the category of the *Whittemore* case.

27. 248 App. Div. 182, 288 N. Y. Supp. 403 (1st Dep't 1936).

28. 248 App. Div. 380, 288 N. Y. Supp. 398 (1st Dep't 1936).

the same by last will and testament of the Settlor, duly executed by her and subsequently duly admitted to probate, or if, no such specific appointment be so made, to the residuary legatee or legatees named by such Last Will and Testament of the Settlor, and in default of such specific appointment, or residuary disposition, to the person or persons who would have been entitled to take the same if the Settlor had then died, owning and possessed of the Trust Property, a resident of the State of New York and intestate, in the same proportions, if to several persons, in which such property, in that case, would have been received by and distributed among them'."

The same justice dissented from this opinion holding that it was a remainder and irrevocable for the reasons above indicated in the *Beam* case.

Obviously, the two estates were identical.²⁹ The two cases were decided on the same day and four of the judges sat in each case. It would seem from the foregoing that it was hoped that eventually a decision would be given by the Court of Appeals which would finally determine the question, first, as to the distinction between a reversion and a remainder, and secondly, as to whether or not unborn persons are beneficially interested so that in the absence of their consents, a trust is irrevocable. The latter question the Court of Appeals has, up to now, avoided deciding. In the *Engel* case the court said:³⁰

"It is unnecessary to say whether there is any significance in the possibility that among that class may also be persons who are yet unborn."

29. A comparison of the language shows the similarity of the cases. In the *Beam* case, the settlor transferred personal property to his trustee to pay the income to him during his life. "Upon the death of the Grantor, the Trustee shall transfer, assign and pay over the principal of the trust estate to such persons and upon such estates, in trust or otherwise, as the Grantor may by last will and testament validly limit and appoint, or to the extent that the Grantor shall have failed to make valid testamentary appointment of the whole or any part of the trust estate, the Trustee shall transfer, assign and pay over the same to the heirs at law of the Grantor."

In the *Davies* case, the settlor transferred certain personal property to her trustees in trust to pay the income to the Settlor during her life. Upon her death the principal to go to "such person or persons as may be specifically appointed to receive the same by last will and testament of the Settlor, duly executed by her and subsequently duly admitted to probate, or if, no such specific appointment be so made, to the residuary legatee or legatees named by such Last Will and Testament of the Settlor and in default of such specific appointment, or residuary disposition, to the person or persons who would have been entitled to take the same if the Settlor had then died, owning and possessed of the Trust Property, a resident of the State of New York and intestate, in the same proportions, if to several persons, in which such property, in that case, would have been received by and distributed among them." No one other than the Settlor received any gift prior to the gift in default of appointment to the Settlor's distributees. Thus the case is identical with the *Berlenbach* case, 235 App. Div. 170, 256 N. Y. Supp. 563 (1st Dep't 1932), *aff'd.*, 260 N. Y. 539, 184 N. E. 83 (1932).

30. 280 N. Y. 43, 48, — N. E. (2d) — (1939).

The Court of Appeals similarly refused to answer this question when it was specifically certified in *Guaranty Trust Co. v. Harris*,³¹ and also in *Schoellkopf v. Marine Trust Co.*³²

AN AUTHORITATIVE PRONOUNCEMENT ESSENTIAL

This analysis clearly demonstrates the necessity of formulating some principles to guide us in determining whether an estate granted by a settlor to his own heirs constitutes a reversion or a remainder. It is also necessary to classify varying uses of the word "vested" and to find some method of determining whether an estate is vested or contingent and what results flow therefrom.

A great deal has been written in the past about the difficulties of the so-called rule against perpetuities. The title of the rule which is generally said to be the "Rule against Perpetuities" is a misnomer. At the common law it arose out of the *Duke of Norfolk's* case,³³ which held that the estate in question was valid, not *tending* to a perpetuity, pointing out that the contingency must necessarily occur within one life in being.

In New York we have adopted the terminology of the common law days and discuss a "rule against perpetuities" when, as has been finally and definitely established by the Court of Appeals of this state in *Matter of Wilcox*,³⁴ the so-called rule against perpetuities consists of two sep-

31. 267 N. Y. 1, 195 N. E. 529 (1935).

32. 267 N. Y. 358, 196 N. E. 288 (1935).

33. [1682] 3 Ch. Cases 1, 22 Eng. Reprints 931.

34. 194 N. Y. 288, 87 N. E. 497 (1909). In this case we are told that the contingent remainder of Maria E. Sanders and Charles McCoy was not valid within the except clause in the second sentence of Section 42 of the Real Property Law. The court said:

"But if the fund should be treated as real estate it would not affect the question before us, for, as already said, the gift over is not of the share of any of the issue of Frances upon its death before reaching majority, but on Frances not leaving any issue that might attain full age. The gift, therefore, would not fall within section 16, p. 723, of the Revised Statutes, that of a single minority."

This exception was placed in the Revised Statutes in Section 16 of Title 2, Article 1st. The section read as follows:

"Sec. 16. A contingent remainder in fee, may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited, shall die under the age of twenty-one years, or upon any other contingency, by which the estate of such persons may be determined before they attain their full age."

The Revisers referred to this section in their notes as follows:

"It may be useful to illustrate by examples, the effect of Section 16 as its meaning may not be immediately obvious. Suppose an estate devised to A for life and upon his death, to his issue then living; but in case such issue shall die under the age of twenty-one years, or in case such issue shall die under the age of twenty-one years and without lawful issue, then to B in fee. Here in both cases, the remainder to B would be valid as expressed by the terms of the section. . . ."

The Court of Appeals held otherwise holding that only one minority may be added to

arate rules:—the rule against the unlawful suspension of the power of alienation and the rule against remoteness of vesting.

Much has been written about the difficulties of lawyers and litigants with the rule against the unlawful suspension of the power of alienation but excepting in so far as lawyers attempt to measure the suspension of the power of alienation by lives not in being at the creation of the estate, practically no difficulties have been noted in this connection.

*The Rule
Against The
Unlawful
Suspension
of The
Power Of
Alienation
Is Not The
Problem*

Dean Alden, counsel to the Commission to Investigate Defects in the Law of Estates, reporting to the Commission, called attention to the fact that there were but thirty cases in the Court of Appeals from 1914 through 1929, an average of less than two cases per year, involving both of these rules, and that in the period from February 1930 to February 1931, only one case occurred. As a conclusion he states:³⁵

"The law is plain and our bench and bar know it. The old criticism of Professor Gray, even if it then had any ground of justification, has no present standing. To quote the Committee on State Legislation of the Association of the Bar of the City of New York, 'careful draftsmen of wills find no difficulty in meeting particular situations with confidence, certainty and satisfaction.'"

In the communication of the Law Revision Commission to the Legislature "Relating to the Rule against Perpetuities and Related Matters"³⁶ the Law Revision Commission stated the following:

"Recently an investigator working under the direction of the Commission has made a count of cases in all of the New York Reports for the years 1904, 1914, 1924 and 1934, dealing with the measurement of trusts in relation to suspension of the power of alienation, including the various constructional devices used by the courts in mitigating the rigors of the two-lives rule, and cases dealing with vesting, contingencies, acceleration and remote interests. .

*Number of
Cases In
Courts On
Vesting and
Remainders
Indicates
Acuteness
Of Problem*

The results follow:

the two lives in the permissible period in respect to remoteness then applicable to real estate. For the notes of the original revisers, see the REP. OF DEC. ESTATE COMM. 99, where Dean Alden has appended to his report the Revisers' Notes. In the reprint they are found beginning at p. 563.

35. REP. OF DEC. ESTATE COMM. (original combined reports) 39. In the reprint of this report, the above quotation will be found on page 503.

36. REP. OF LAW REV. COMM. (1936) 477.

Year	Number of cases dealing with measurement of trusts	Number of cases dealing with vesting, remoteness, etc.
1904	6	34
1914	10	45
1924	12	30
1934	19	45

A further count made by the same investigator, covering 22 consecutive volumes dealing with the measurement of trusts in relation to suspension of the power of alienation and the various constructional devices by which the courts avoid the strict application of the two-lives rule. In the same volumes 275 cases were found dealing with vesting, remoteness, contingencies in relation thereto and acceleration."

An examination of volumes 273 to 275, inclusive, of the Court of Appeals, 249 Appellate Division to 253 Appellate Division, inclusive, 160 to 167 Miscellaneous, inclusive, and 300 New York Supplement to 4 New York Supplement, Second Series, inclusive, discloses sixty-eight cases in which problems affecting vesting and lapsing of remainders and related matters, suspension of the power of alienation and accumulations were involved. Of these, forty-eight dealt with the question of vesting or lapsing of remainders and related matters, sixteen involved questions of the suspension of the power of alienation—four of which also involved questions of vesting—and four dealt with accumulations. There was no case involving the suspension of the power of alienation in an Appellate Court. It would appear, therefore, that our problem is not with the suspension of the power of alienation. We cannot prevent litigation over questions of suspension in the Surrogate's Court or in the Supreme Court at Special Term, but its discussion in an Appellate Court has become a

*Vested Or
Contingent,
Remainder Or
Reversion,
Are The
"Enigmas"*

rarity. However, the prevalence of the litigation involving some form of vesting and involving also the distinction between remainder and reversion must, of necessity, compel careful examination to see what, if any, legislation is necessary and whether the difficul-

ties could not be removed by a decision of the Court of Appeals.

REVERSION OR REMAINDER

The question of remainders and reversions is perplexing because of the similarity of language used in the various cases. It would appear from an examination of the decisions of the Court of Appeals, which decisions have most frequently occurred in an attempted revocation of a trust under Section 23 of the Personal Property Law, that if a settlor

*If Settlor
Alone
Benefits
A Reversion*

in the creation of a trust, gives nothing to anyone other than himself except what would appear in language to be a remainder limited to his heirs, a reversion and not a remainder is created. (*Doctor*

v. Hughes,³⁷ *Berlenbach v. Chemical Bank & Trust Co.*,³⁸ *City Bank Farmers Trust Co. v. Miller*.³⁹)

Where, however, an estate of some kind is granted to someone other

*If A Grant
Is Made
To Anyone
Other Than
Settlor Prior
To The Estate
In Question
It Is A
Remainder*

than the settlor, which precedes the estate limited in terms to his heirs, a remainder is created. (*Whittemore v. Equitable Trust Co.*,⁴⁰ *Hussey v. City Bank Farmers Trust Co.*,⁴¹ *Schoellkopf v. Marine Trust Co.*,⁴² *Engel v. Guaranty Trust Co.*⁴³)

In addition to this, *Doctor v. Hughes*⁴⁴ is certainly authority for the fact that an attempted grant to heirs or next of kin in an estate, other than that which they would take by virtue of intestacy, creates a remainder and not a reversion. This factor was present in *Schoellkopf v. Marine Trust Co.*,⁴⁵ for there

*If The
Estate In
Question
Is Not The
Same As
The Result
Of Intestacy,
A Remainder
And Not A
Remainder*

the estate was granted in default of appointment to those persons who would have been his heirs if the settlor owned the property at the termination of the trust and died intestate. The period of time fixed was not at the *death* of the settlor but at the time of distribution, which would either be at the death of his two sons, Herman and Ernst, or at the death of the two grandchildren whose lives

measured the continuance of the trust.

Very little further need be said on this subject. If it is desirable to have legislation, it could validly apply only to estates created after its effective date, and it would seem that it is unnecessary. While the Court of Appeals has steadfastly refused to formulate rules of law generally without reference to the particular case before it, and while this is a salutary attitude in most instances, it would seem that here

37. 225 N. Y. 305, 122 N. E. 221 (1919).

38. 235 App. Div. 170, 256 N. Y. Supp. 563 (1st Dep't 1932), *affd.*, 260 N. Y. 539, 184 N. E. 83.

39. 278 N. Y. 134, 15 N. E. (2d) 553 (1938).

40. 250 N. Y. 298, 165 N. E. 454 (1929).

41. 236 App. Div. 117, 258 N. Y. Supp. 396 (1st Dep't 1932), *affd. without op.*, 261 N. Y. 533, 185 N. E. 726 (1933).

42. 267 N. Y. 358, 196 N. E. 288 (1935).

43. 280 N. Y. 43, — N. E. (2d) — (1939).

44. 225 N. Y. 305, 122 N. E. 221 (1919).

45. 267 N. Y. 358, 196 N. E. 288 (1935).

the court could very properly determine the limits of its own previous decisions and lay down some definite rule similar to the analysis above suggested, which would guide lawyers and judges not only in the problems of litigation itself, but also in the preparation of trust instruments and wills.

VESTED OR CONTINGENT

An approach to any authoritative solution of the other problem of the distinction between vested and contingent future estates must be made with fear and trepidation, for anyone who has delved into the plethora of opinions of courts and textwriters, must emerge from that examination with his mental equilibrium as disturbed as his physical would be if he emulated the activities of a whirling dervish.

Therefore, it is necessary to approach the problem by analyzing the ways in which the word "vested" is used or "abused." There are certain

*Different
Rules Give
Rise To
Different
Uses of The
Term "Vested"*

rules of law which bring before the courts a problem of determining whether an estate is vested or contingent. These rules have their origin in different principles of law and, therefore, it is perfectly natural that in applying one rule of law, a meaning

will be given to the word "vested" which is wholly different from the meaning which is given to the word "vested" in applying a different rule of law. Among these rules are, first, the rule against the remoteness of vesting, and secondly, the rule which holds that a contingent remainder lapses unless the remainderman lives until the happening of the contingency.

The first rule has been declared part of the public policy of this state for in *Church v. Wilson*,⁴⁶ and in *Matter of Horner*⁴⁷ and in *Carrier v.*

*The Rule
Against
Remoteness
Of Vesting
Dictated By
Public Policy*

Carrier,⁴⁸ it was determined that the statutory enactments of the revisers in respect to the rules against the unlawful suspension of the power of alienation and remoteness of vesting, were part of the public policy of the State. They were designed for the

purpose of limiting the period of time during which property might be withdrawn from free alienability, either by restraints upon it or by practical difficulties arising out of the existence of contingent future estates. As the Court of Appeals said in *Walker v. Marcellus*,⁴⁹ the design

46. 152 App. Div. 844, 137 N. Y. Supp. 1002 (4th Dep't 1912), *affid. on the opinion of the court below*, 209 N. Y. 553, 103 N. E. 1122 (1913).

47. 237 N. Y. 489, 143 N. E. 655 (1924).

48. 226 N. Y. 114, 123, 123 N. E. 135, 138 (1919).

49. 226 N. Y. 347, 123 N. E. 736 (1919).

of the revisers "was to simplify, not to complicate, the transfer of real estate—to restrict, not to extend, the limitations which a grantor might impose upon it."

I fail to see what public policy of the State of New York is involved in a rule which requires that a contingent remainderman shall live until

*Public
Policy Does
Not Require
Lapsing of
A Contingent
Remainder*

the happening of the contingency. It is perfectly obvious that the origin of this rule was the same as the origin of the rule which resulted in the destruction of a contingent remainder if the preceding estate were to terminate before the happening of

the contingency, which rule has been abrogated by Section 58 of the Real Property Law. At the common law possession was a sign of title far more than it is today, for there were originally no recording acts and the transfer of title to real property was made by livery of seizin either on the land or in sight of it. There had to be, as it were, a manual handing over of seizin from the holder of the estate at the termination of his estate, to the one whose estate next succeeded. If there was any break in this handing over of seizin, then the estate which failed to receive it was disqualified. The reason for these rules no longer exists and yet most of the confusion in the law in respect to the vesting of future estates, owes its origin to the desire of the court to follow out a canon of construction, "The Law Favors the Vesting of Future Estates" and to prevent the distributees of a contingent remainderman from being deprived of the estate which they normally would have inherited but which might lapse by reason of the death of their ancestor before the happening of the contingency. Because the law favors the vesting of future estates, words of survivorship attached to a gift in a will are held to refer to the time of the death of a testator (*In re Weaver's Estate*⁵⁰). It was for these reasons, obviously, that in *Matter of Johnson*,⁵¹ the Appellate Division in the Fourth Department, after having held that the contingent remainder did not violate the rule against remoteness of vesting, declared that the remainder did not lapse because it was vested.

From the standpoint of the rule against remoteness of vesting, we have very little real difficulty. We must realize here that the rule is designed

*The Rule
Against
Remoteness*

to prevent restrictions being placed by a testator or grantor which would put off into the too remote future the determination of the person or persons

from whom the property may properly be bought, and the existence of a contingent remainder, while not working a legal restraint on alienation,

50. 253 App. Div. 24, 1 N. Y. S. (2d) 167 (3d Dep't 1937).

51. 233 App. Div. 587, 253 N. Y. Supp. 241 (4th Dep't 1931).

as long as the remainderman is in being, does in fact work a practical restraint on alienation. Suppose a legal life estate is given to A and remainder in fee to B, if at the death of A, B has been admitted to the bar, and, if not, remainder in fee to C. The life tenant and the alternative remainderman are alive, and *sui juris*. Technically from them might be bought a fee simple absolute in possession. In order to buy A's interest we are assisted in determining its value by a reference to the mortality tables, but when we come to purchase the remainder from B and C, B naturally will insist that, at the death of A, he is going to be admitted to the bar and, therefore, he should receive the full value of the remainder. C will naturally cast aspersions on the intelligence and character of B and say he never could pass the bar examination and if he did he never would be admitted to the bar and, therefore, he, C, is the one who should receive the full value of the remainder; as a result of which the prospective purchaser will go elsewhere to buy real property because life is too short for him to wait until B and C decide the value of their respective interests in the estate. The law permits these actual restraints upon alienation but it has fixed a point beyond which these restraints may not exist.

Before we begin to divide the classes of estates in so far as the rule against remoteness of vesting is concerned, we must note a clear distinction. Possession has nothing whatsoever to do with the vesting of a future estate. True, we speak of an estate as vested in possession but if an estate is vested in possession, it is a present estate and we are not concerned with problems of the existence of a present estate but rather as to the vesting of a future estate.

The next thing to realize is that conditions which are attached to the beginning of an estate—conditions precedent—of necessity make an estate contingent by whatever name a court chooses to call it and a condition attached which operates after the commencement of the estate, to terminate it—a condition subsequent—results in the situation where in its beginning the estate is not within the rule against remoteness of vesting because it is finally vested, or as it is sometimes put, it is indefeasibly vested in its origin.

There are but two types of future estates which may be created which are not within the operation of the rule against remoteness of vesting.

*Only Two
Estates Not
Within The
Rule*

These are: (1) An estate which is finally or indefeasibly vested, that is, the estate in its beginning has no condition attached to it and there is no condition subsequent which may operate at a time

in the future to terminate the estate, either before it becomes an estate in possession or after. Such estate is truly a vested estate for there is certainty as to the person who will take. Enjoyment is postponed but the remainderman will enjoy it if he lives long enough. Enjoyment—possession—we have stated, has nothing whatsoever to do with the vesting of a future estate. If an estate for a thousand years is granted to A and remainder to B, the estate in B would be vested even though he would never live to enjoy it. This class of finally vested estates includes such estates as, to A for life, remainder in fee to B.

(2) The word "vested" describes another type of estate which is not within the operation of the rule against remoteness of vesting. That is, an estate which is limited to a person so that there is a certainty as to the person who will take, considering this estate from its beginning, but there is attached a condition subsequent which will operate to terminate that estate. This estate has been described as an estate which is vested subject to being divested. I prefer to say that that estate is a finally vested estate subject to being divested. Nothing further is necessary to be done to vest the estate in the individual. The only thing which stands between him and the enjoyment of that estate is the running of time, and death of prior holders is nothing but the running of time. No survivorship is attached to the commencement of the estate, for survivorship, that is, death in a particular order, is not the running of time but always works a contingency when it is attached to the commencement of the estate. An estate of this kind is—To A for life, remainder in fee to B, but if B dies under the age of 21 years, remainder in fee to C.

These two remainders—one, finally vested with no condition subsequent attached; the other, finally vested subject to being divested by the happening of a true condition subsequent—are the only future estates which are not within the operation of the rule against remoteness of vesting because they are the only estates where it is presently known in whom the estate will begin on the termination of the preceding estates. They are the only estates in which it may be said that the persons to whom they are limited will take the estates if they live long enough.

*All Other
Remainders
Are Within
The Rule*

Our problem with respect to the vesting of future estates and the rule against remoteness of vesting comes when we attempt to use Section 40 of the Real Property Law as a test of whether or not an estate is vested or contingent within the operation of this rule. Section 40 of the Real Property Law reads as follows:

*Section 40
R.P.L.*

"Sec. 40. When future estates are vested; when contingent.

A future estate is either vested or contingent. It is vested, when there is a person in being, who would have an immediate right to the possession of the property, on the determination of all the intermediate or precedent estates. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain."

It is in the definition of a vested future estate that the trouble arises. The remainder is "vested" when there is a person in being who would have an immediate right to the possession of the property on the determination of all the intermediate or precedent estates.

I recall listening to a lecture some years ago in which this was referred to as the "now rule". This is probably the explanation of all the confusion arising in this matter because it was explained

*The "Now"
Fallacy*

that a remainder is vested if there is a person in being *now* who, if the preceding estates were to terminate *now*, would be entitled to immediate possession. Suppose that an estate is granted to A for life, remainder in fee to B provided that at the death of A, B is a resident of the State of New York; if not, remainder in fee to C. If B is now a resident of the State of New York, he is "a person in being who would have an immediate right to the possession of the property, on the determination of all the intermediate precedent estates"—if the test is "now"—because if A were to die now, B would be a resident of the State of New York and entitled to immediate possession. Applying the "now test", it is said that this remainder is "vested" subject to being divested, yet in fact it is a truly contingent remainder within the operation of the rule against remoteness of vesting, because a true condition precedent must be complied with at a future time in order that B may take the estate.

That such an estate is within the operation of the rule is demonstrated by the decision of *Matter of Wilcox*.⁵² When the estate was created by the death of Bethuel McCoy, Frances Wilcox had no issue. In fact she died leaving no issue. Therefore, in its creation it was so limited that if the preceding estate were to terminate, there was from its creation, always a person in being who would be entitled to immediate possession—Charles McCoy—and yet the court held the remainder void. A remainder of this type can be said to be vested only within the language of Section 40 of the Real Property Law, perhaps for purposes of determining whether or not the estate should lapse by reason of the death of the remaindermen before the happening of the contingency.

The difficulty with the language of Section 40 of the Real Property Law is that it attempts in its first sentence to make a complete division

52. 194 N. Y. 288, 87 N. E. 497 (1909).

of future estates into two categories—"vested" and "contingent". The trouble is that its definitions of "vested" and "contingent" do not exhaust the possibilities and, therefore, they leave in so far as the language is concerned, an insufficiency in the enumeration of the possible types of future estates. The estate described in the discussion immediately foregoing, is "vested" and "contingent" under the definitions contained in Section 40 where, as a matter of fact, it is always contingent under the rule against remoteness of vesting.

The word "vested" has been applied to a remainder limited to the heirs of a living person. (*Moore v. Littell*,⁵³ *Whittemore v. Equitable Trust Company*.⁵⁴) In neither of these cases was the decision that the remainder was vested in the heirs apparent or presumptive necessary to the decision. In *Moore v. Littell*,⁵⁵ all that the case was required to hold was that the interest in the heirs apparent or presumptive was alienable. Where the matter is in issue, the Court of Appeals has held that a remainder limited to the heirs of a living person is a contingent

Remainder
To "Heirs"
Of A Living
Person Is
Contingent

remainder in those persons now living who would be the heirs of the ancestor if he were to die now. (*Schoellkopf v. Marine Trust Co.*,⁵⁶ *Engel v. Guaranty Trust Company*.⁵⁷)

It is important to note that all of the persons who today would be the heirs of a living ancestor may never inherit because they may all predecease their ancestor and another group of persons—collaterals—may actually be his heirs at his death for an heir is one who *has survived* his ancestor and inherits his real property. (*Cushman v. Horton*⁵⁸). The only way that an heir apparent or presumptive can be sure of his inheritance is to shoot his ancestor and then he would lose it by the imposition of a constructive trust in favor of the other "heirs" of the ancestor (*Ellerson v. Wescott*⁵⁹). Therefore, it cannot properly be said, under any interpretation of the language of Section 40 of the Real Property Law, that an estate limited to heirs,

53. 41 N. Y. 66 (1869).

54. 250 N. Y. 298, 165 N. E. 454 (1929).

55. 41 N. Y. 66 (1869).

56. 267 N. Y. 358, 196 N. E. 288 (1935).

57. 280 N. Y. 43, — N. E. (2d) — (1939).

58. 59 N. Y. 149 (1874). The word "heirs" has a secondary meaning rarely used. In this sense it is interpreted as children. An example of this is found in the case of *Spicer v. Connor*, 148 App. Div. 334, 132 N. Y. Supp. 877 (4th Dep't 1911), where the remainder was given "to the heirs which my daughter . . . now has and which she may hereafter have . . ." Obviously, the word "heirs" is not used in its primary meaning because by the very definition of "heirs," while she lives she cannot have "heirs now living." It must therefore refer to her children and so it was interpreted.

59. 148 N. Y. 149, 42 N. E. 540 (1896).

next of kin or distributees, is a "vested remainder subject to being divested". This question has finally been determined in the cases of *Schoellkopf v. Marine Trust Co.*⁶⁰ and *Engel v. Guaranty Trust Co.*⁶¹ This time-honored doctrine found in the quotation in *Doctor v. Hughes*—"no man is heir to the living"—may be found in Blackstone.⁶²

These last types of "vested" remainders are, of course, truly contingent remainders and within the operation of the rule. There is another class of remainder which comes within the operation of the rule and that is a remainder which is vested subject to open and let in after born children;—to A for life, remainder in fee to the children of B. If at the time of the creation of this remainder B has a child, C, the estate is vested in that child subject to the cutting down of C's share in the remainder by the birth of other children to B. While it is vested in C subject to open, this estate is within the rule against remoteness of vesting (*Haug v. Schumacher*⁶³).

Textwriters have done their share in confusing the issue. Reeves gives four types of vested estates.⁶⁴

- "a. Those indefeasibly vested;
- b. Those vested subject to be divested simply;
- c. Those vested subject to be partly divested by the coming in of other members of the class."
- d. Those vested subject to be divested wholly or partly and also to let in other members of the class."

He gives the following examples of the first:—A for life, remainder in fee to B.

60. 267 N. Y. 358, 196 N. E. 288 (1935)

61. 280 N. Y. 43, — N. E. (2d) — (1939).

62. 2 BL. COMM. 208.

63. 166 N. Y. 506, 60 N. E. 245 (1901). GRAY, *THE RULE AGAINST PERPETUITIES*, (3d ed. 1915) 88, points out that such an estate may be entirely void because of violating the rule. He says:

"Interests which are truly and in all respects vested, never come within the Rule, but when there is a gift in remainder to a class which has become vested in a living person, if the number of persons who will finally constitute the class may not be determined until a remote period the remainder is void. For instance, suppose a devise to A for life, remainder to his eldest son (unborn) for life, remainder to the grandchildren of B. B is living and has had one grandchild, C, born to him. C is said to have a vested remainder, but as the number of the grandchildren in whom the remainder is ultimately to vest in possession, and consequently the size of the shares, cannot be determined till too remote a period, the whole devise to the grandchildren is invalid as too remote. This is apparently an exception to the rule that vested interests are never too remote, but in truth remainders of this sort, although called vested, are not really so; at a certain point, and on the point which the Rule against Perpetuities touches, they are, in fact contingent."

64. 2 REEVES, *REAL PROPERTY* (1909) 1161 *et seq.*

—Of the second:—A for life, remainder to B and his heirs provided that if B marries C he is not to have it.

—Of the third:—A remainder limited to children of the life beneficiary.

—Of the fourth:—Devise to A, remainder to his children; but, if any child dies before A his share to be divided equally among those who survive A.

Under this last type of remainder Reeves makes a mistake in his statement of the case of *House v. Jackson*.⁶⁵ He says that the remainder was limited to the *children* of John Jackson. As was pointed out in *Moore v. Littel*,⁶⁶ the remainder was to the *heirs* of John Jackson. In his note on page 1163, he says that this type of remainder is not a contingent remainder but rather "a remainder vested subject to being divested and also to open and let in other members". It is statements of this kind which have resulted in considerable confusion. The remainder was contingent.

In 1936, the Law Revision Commission filed a communication with the Legislature.⁶⁷ After criticizing both rules—the rule against the

*Recommendations
Of The Law
Revision
Commission*

unlawful suspension of the power of alienation and the rule against remoteness of vesting—the revisers suggested among other things, the clarification of the law as to vested and contingent future estates

under Section 40 of the Real Property Law, by substituting therefore four classes of future estates:

- (a) Estates indefeasibly vested.
- (b) Estates subject to open.
- (c) Estates subject to complete defeasance.
- (d) Estates subject to a condition precedent.

On page 6 of their report they give examples of these as follows:

"a. 'Indefeasibly vested'—e.g., to my son William for life, remainder to my son John in fee.

"b. 'Vested subject to open'—e.g., to my son William for life, remainder to his children in fee (there being one child, A, *in esse*, but other children may be born and come in, not to oust A, but to lessen his share).

"c. 'Vested subject to complete defeasance'—e.g., to my son William for life, remainder to my son John in fee, but if William leaves issue him surviving then to such issue.

"d. 'Subject to a condition precedent'—e.g., to William for life and after

65. 50 N. Y. 161 (1872).

66. 41 N. Y. 66 (1869).

67. LEGIS. DOC. (1936) No. 65 (H) which is found in the 1936 edition of the Report of the Law Revision Commission.

his death to his issue reaching twenty-one, but if he leaves no such issue, then to John in fee (William is living at the time of testator's death but at that time has no issue; the remainder to the issue of William is contingent as to person, and that to John is contingent as to event)."

In the Appendix beginning on page 11, there is a draft of the bill which has been changed somewhat in the subsequent years, having been submitted in 1937 and 1938 but not this year. They had no intention of removing the estates classed as (b)—Vested subject to open and (d) Subject to a condition precedent—from the operation of the rule against remoteness of vesting which they would call a rule against the "unlawful fettering of alienability" by inserting a new section to read as follows:

*The Proposed
Amendments
Affecting
Vesting*

"Remote future estates fettering alienability; when unlawful. A future estate unlawfully fetters alienability and is void in its creation when: 1. such estate may by any possibility remain either subject to a condition precedent or vested subject to open for longer than the permissible period defined in section forty-seven of this article; or

2. such estate, limited as either a springing or a shifting interest after a prior estate in fee simple, is not certain to become possessory, if ever, at or before the expiration of the permissible period defined in section forty-seven of this article."

It is in connection with this and other matters that I wish to register a protest against the idea of amending the law using entirely new terms in the statute. It is true that the word "fettering" is found in the revisers' notes. They say:⁶⁸

"It will be seen by those, who are familiar with the difficult learning on this subject, that the change which the Revisers recommend, is effected, not so much by the introduction of new principles, as by the extension of rules, already admitted, but partial in their application, to all classes of expectant estates, created by the act of the party. The interests of society require that the power of the owner to *fetter the alienation* and suspend the ownership of an estate by future limitations, should be confined within certain limits; but where these limits are not exceeded, it would seem reasonable that the intentions of the party should always be carried into effect, whether declared by deed or devise, by a feoffment at common law, or a conveyance operating under the statute of uses." (*Italics mine.*)

However, the statute drafted by the revisors did not refer to the "fettering of alienability" and after more than a century of interpretation of language, it would seem futile to adopt amendments which would bring

68. REP. OF DEC. ESTATE COMM. (original combined reports) 103, Reprint, at 572.

into the law new terminology which would have to be interpreted anew. By means of judicial interpretation, the Court of Appeals of this state has rendered appeals to the Appellate Division and to the Court of Appeals on matters affecting the suspension of the power of alienation practically non-existent. It is my contention that the Court of Appeals can and should do the same thing in respect to the rule against remoteness of vesting and also in respect to the lapsing of future contingent estates by the death of the contingent remainder before the happening of the contingency. Clarity and simplicity of expression in the opinions of the court and in the writings of authorities on the subject is essential. The Court of Appeals has in the past occasionally formulated rules with respect to matters not then before the court. It has, for example, felt necessary in *Seaver v. Ransom*⁶⁹ to issue certain rules which were helpful in determining the right of a beneficiary of a contract to sue.

In *Matter of Horner*⁷⁰ the Court of Appeals laid down rules which, when properly understood, terminated the litigation over severability of trusts and made it practically impossible for a settlor to create a void trust by reason of measuring the continuance of the suspension for more than two lives in being. The opinion of the late lamented Judge Cardozo is an example of what can be done to clarify the rules in respect to the vesting of future estates and the distinctions between remainders and reversions, but with the greatest respect for a distinguished jurist and scholar, may I say that the opinion was not written in a style that "he who runs may read". Not only are lawyers confused from time to time by opinions written in that style but even appellate courts are puzzled by the meaning of decisions of the court of last resort.

I recall very distinctly being in the Appellate Division in the Second Department upon the argument of a case involving severability of trusts shortly after the decision of the Court of Appeals in *Matter of Buttner*,⁷¹ (wherein the Court of Appeals had reversed the Appellate Division in the Second Department when they thought they were following *Matter of Horner*⁷²) and hearing the late Presiding Justice Kelly say to counsel who had just cited *Matter of Horner*:—"Don't cite that case to us, counsellor; we thought we knew what it meant but after the decision of the Court of Appeals in *Matter of Buttner*,⁷³ we are completely at a loss to understand it."

The Court of Appeals should unquestionably, by its decisions, formu-

69. 224 N. Y. 233, 120 N. E. 639 (1918).

70. 237 N. Y. 489, 143 N. E. 655 (1924).

71. 243 N. Y. 1, 152 N. E. 447 (1926).

72. 237 N. Y. 489, 143 N. E. 655 (1924).

73. 243 N. Y. 1, 152 N. E. 447 (1926).

late the rules to guide the courts in determining whether an estate lapses by reason of the death of the remainderman prior to the happening of the contingency. Surrogate Wingate in a comparatively recent case decried the condition of the law in this respect. In *Matter of Montgomery*,⁷⁴ he was confronted with the problem of what should be done in the following situation.

"The residue of the estate was erected into a trust for the life benefit of the widow with the following succeeding direction; 'and upon her death then the said Trust is to cease and terminate and my Trustee shall thereupon, as soon as is reasonably convenient, sell and dispose of all said property in its possession, both real and personal and from the said proceeds pay to my grandson, John Renwick Montgomery the sum of One Thousand Dollars (\$1,000.00) and to my grand-daughter Lulu H. Patterson the sum of One Thousand Dollars (\$1,000.00) and the remainder shall be equally divided and paid over to my sons Harry C. Montgomery, Robert Walker Montgomery and John Renwick Montgomery, *or their survivors*. Provided, however, that should either my grandson John Renwick Montgomery, or my granddaughter Lulu H. Patterson die before me then I give and bequeath their portion above mentioned, namely \$1,000.00 each, to their issue, if any,—otherwise the bequest is to lapse and be added to the portion to be received by my sons.'" (Italics are those of the Surrogate)

When the testator died he left three sons, Harry, Robert and John; Robert and John were unmarried. Harry was married and the two grandchildren named in the will are his children. All of these survived the testator, but Harry C. Montgomery died before the life beneficiary. The question is whether the gift to Harry "vested" in him as of the date of death of the testator "in a manner which will effect its devolution pursuant to the terms of his will upon the death of the life beneficiary of the trust." After a lecture to counsel on "the utter futility and useless waste of paper involved in the practice of citing precedents interpreting the language employed by other testators in different wills, and urging their results as persuasive in the present instance", and on quoting facts *dehors* the record, the learned Surrogate proceeds with a lament on the condition of the law, using one after another, different canons of construction.⁷⁵ He says:

74. 166 Misc. 347, 2 N. Y. S. (2d) 406 (Surr. Ct., 1938).

75. The canons to which he refers are as follows: (1) "where there is a devise to one person in fee, and in case of his death to another, the contingency referred to is the death of the first named devisee during the lifetime of the testator, and that if such devisee survives the testator, he takes an absolute fee." . . . Words of survivorship and gifts over on the death of the primary beneficiary are construed, unless a contrary intention appears, as relating to the death of the testator. . . ." (350) He adds that the danger signal is "the tendency is to lay hold of slight circumstances in the will to vary the construction.

"It might well be, however, that with pen poised for writing 'finis' to a decision to this effect, the harassed *nisi prius* court would suddenly recollect the frequent statements by his judicial superiors that 'The law favors the vesting of estates and a construction which will prevent the disinheritance of the issue of a remainderman who may die during the existence of the precedent estate. . . .

"While still perplexed by the diverse results attainable through the media of these differing criteria of decision, the language of the Court of Appeals in *Doughterty v. Thompson* (167 N. Y. 472, 483), which is paraphrased and applied in *Whitman v. Terry* (196 App. Div. 282, 287), comes to mind. It is there said: 'It is true that the law favors the vesting of legacies as early as possible, but it does so to avoid perpetuities, intestacy, illegal suspension of the power of alienation, and to effect an intent which might otherwise be defeated. . . .

"The meaning of the last clause of this statement is elusive. The primary

. . . ." He points out this canon is limited by a provision that "where the disposition of the property which is devised over in case of death is preceded by a prior estate for life or years, then the general rule is, that the time of death refers to that which occurs during the period of the intervening estate. . . ." (351)

The next canon is (2) "The law favors the vesting of estates and a construction which will prevent the disinheritance of the issue of a remainderman who may die during the existence of the precedent estate." (351, 352) He points out that this is limited by another rule which is: "It is true that the law favors the vesting of legacies as early as possible, but it does so to avoid perpetuities, intestacy, illegal suspension of the power of alienation, and to effect an intent which might otherwise be defeated." In referring to this last statement the learned Surrogate says: "The meaning of the last clause of this statement is elusive." He also points out that all of these canons must yield to the testamentary intent expressed in the instrument.

The next rule or canon he refers to is the "divide and pay over rule" "where the only gift is in the direction to pay or distribute at a future time, the case is not to be ranked with those in which the payment or distribution only is deferred, but is one in which time is of the essence of the gift. . . . In such cases, until the happening of the future event, it must necessarily remain uncertain whether a gift would exist at all, and that could not be said to have vested which was not certainly given." He points out two exceptions to the "divide and pay over rule":—(1) "If the postponement of the payment is for the purpose of letting in an intermediate estate, then the interest shall be deemed vested at the death of the testator and the class of legatees is to be determined as of that date, for futurity is not annexed to the substance of the gift". (2) "Where there are words importing a gift in addition to the direction to executors or trustees to pay over, divide or distribute; in such a case the general rule of construction does not govern because the language employed, outside of the direction to divide or distribute, imports a gift."

He presents an additional canon which is "where a will is capable of two interpretations, that one should be adopted which prefers those of the blood of the testator to strangers" and, finally: "It is a general rule with respect to the construction of wills that if a will is susceptible of two constructions, one of which will tend to inequality in the distribution of the estate between the children of the testator, and the other will tend to produce equality, the latter construction is favored."

No wonder we have the above comments of the learned Surrogate. Using these as the guides to determine what the testator meant, one finds one's self at a crossroad with sign posts pointing in four directions to his destination.

principle of testamentary interpretation is the validization of the testamentary intent, which, if clear, will neither be defeated by any canon of construction, nor does it require any such canon for support. These principles are axiomatic."

After passing over the divide and pay over rule with the statement:

"In this situation, this canon sheds but a feeble light by which the footsteps of the court may be guided,"

he refers to the canon of construction that "where a will is capable of two interpretations, that one should be adopted which prefers those of the blood of the testator to strangers." He then says:

"Here, at least, there is, obviously, a sounder basis for a rule of imputed intention than is discernible in those hereinbefore considered whose reason is founded only on policy of law or the choice of phraseology by the particular scrivener, since there is a natural inference from customary human conduct that a person will desire to confer a benefit upon those most closely related to him rather than upon strangers.

"It must be apparent from this review, unfortunate as such a conclusion may be, that the art of testamentary interpretation is very far from an exact science and that the particular result attained in a given case will largely be determined by the individual predilections or prejudices of the particular perplexed judicial officer who may be called upon to pass judgment on the question. This, in turn, like other human expressions of opinion will, no doubt, be influenced on occasion by his immediately preceding post-prandial activities and his matutinal repast.

"It is even conceivable that in some minds a suspicion may arise, unjust as this might be, that the vaunted canons of construction are, in some instances at least, rather apologetics for a determination already reached than *rationes decidendi* for one in process of attainment.

"In last analysis, therefore, there would seem to be no alternative for a court faced by the necessity of interpreting the terms of a will than to attempt to place himself in the arm chair of the testator in question, (citing cases) and, with the background of the disclosed facts respecting his situation, to attempt to determine what he, himself, if in a like situation, would have desired to effect by the language used in the will."

After examining the exhaustive analysis of Surrogate Wingate, one is compelled to agree with him, that the problems affecting the "harassed nisi prius court" in the determination of whether such an estate lapses or not, have reached the stage where the search for the intention of the testator has received too much and too varied assistance from the court of last resort. Certainly, it should be possible for the Court of Appeals to lay down certain canons of construction and their priority. If it be said against this that the intention of a testator might be defeated, I say without question of contradiction, that the intentions of testators

have in the past and are presently being defeated by "harassed nisi prius courts" sitting in the arm chairs of testators struggling to find out what the Court of Appeals has meant by its decisions in the past, and I further state that in my judgment, what they are interpreting is not the intention of the testator but the words which some lawyer has put in the mouth of the testator. Rarely, if ever, does the court interpret the intention of the testator from his own words. I have yet to read a Will wherein any of these questions have arisen, the language of which I could state definitely was understood by the testator at the time he signed his Will. Whatever may be the propriety to the practice, unquestionably, lawyers in drawing Wills, translate a testator's intent into their own legal terminology. Certainly it would be far better for a testator to be assured of definiteness of meaning of the words used than to realize that, no matter how hard his attorney strove, if infants are involved, the case would undoubtedly arrive in the Court of Appeals, because of the fact that in order to search for the intention of the testator, there is no better guide than that suggested by Surrogate Wingate, namely, the placing of the judge in the arm chair of the testator. Legislation, I repeat, will be of little benefit because it will only apply to estates created after its effective date and thus we have a rule of law applicable to persons who die after a certain date and a different rule applicable in a case of those who die before it. In some instances this has been necessary, as for example, in connection with the doctrine of the "true residue" set out in the cases of *Matter of Benson*,⁷⁶ and *Matter of Lord*⁷⁷ which was corrected by the recommendation of the Decedent Estate Commission by Section 17-b of the Personal Property Law, and the rule with respect to apportionment of stock dividends which has been changed by Section 17-a of the Personal Property Law.

The latter section does not apply to trusts created prior to its effective date. (*City Bank Farmers Trust Co. v. Wylie*⁷⁸). The act became effective May 17, 1926. Prior thereto, however, the law had been amended by the enactment of this section by Chapter 452, Subdivision 2 of the Laws of 1922 effective April 3, 1922, so that now we have the situation where, if a trust was created prior to April 3, 1922, stock dividends must be apportioned in the complicated procedure outlined in *Matter of Stevens*;⁷⁹ *Matter of Osborne*,⁸⁰ *Bourne v. Bourne*,⁸¹ and *Pratt v. Ladd*.⁸²

76. 96 N. Y. 499 (1884).

77. 134 Misc. 198, 236 N. Y. Supp. 136 (Surr. Ct. 1929).

78. 273 N. Y. 304, 7 N. E. (2d) 241 (1937).

79. 187 N. Y. 471, 80 N. E. 358 (1907).

80. 209 N. Y. 450, 103 N. E. 723 (1913).

81. 240 N. Y. 172, 148 N. E. 180 (1925).

82. 253 N. Y. 213, 170 N. E. 895 (1930).

If the trust was created between April 3, 1922 and May 17, 1926, then, unless the testator otherwise provided, stock dividends were to be treated as income by inference since the section conferred upon the testator the right to declare that it should be principal of the trust, and if he died after May 17, 1926, unless he provided otherwise, stock dividends are to be treated as principal. However, there is a definiteness about each rule which is non-existent in our problem at the present time. In other words we have no definite rule at the present time with reference to the lapsing of these estates and therefore a statute would be of little benefit. What is needed is clarification of the law as it is, not a statement of what it should be in the future.

CONCLUSION

From the foregoing discussion it would seem that the Court of Appeals might properly rule:

(1) That a remainder is created if any interest is granted to one other than the Settlor; a reversion if the only estates created are granted to the Settlor or his heirs.

(2) The rule against remoteness of vesting applies to every future estate other than

(a) a finally vested remainder (or other future estate) which is subject neither to a condition precedent nor to a condition subsequent.

(b) a remainder finally vested in its creation but subject to being divested by the operation of a true condition subsequent.

(3) All other future estates must finally vest within the period permitted by statute and, for the purpose of this rule, are regarded as contingent.

(4) A contingent future estate—one that is not finally vested—will not lapse by reason of the death of the remainderman before the happening of the contingency upon which it is limited, if the contingency is not as to the person who will take but rather as to the future event upon which the person will take.

The foregoing suggested determinations of the Court of Appeals will not by any means eliminate all of the problems confronting us at the present time. There are other rules indicated in the various canons of construction which need re-examination in the light of the circumstances which have developed since the original statements were made by the Court of Appeals and which, by repetition, have become canons of construction. Perhaps at some future time it may be possible for us further to consider these problems and make recommendations as to the elimination of other perplexing inconsistencies. Certainly students of the

law, particularly those who are at the threshold of their professional career, would welcome definite statements as above indicated.

Necessarily the foregoing article has been critical of opinions of courts and of textwriters. It is not done in the spirit of criticism either of the learning or the industry or the integrity of the judges and authors whose opinions have been discussed. It is presented in the spirit of analysis; seeking some solution for a problem which confronts us all. It is written with all humility by one who fears the damage he may have done in the last sixteen years in an attempt to teach this subject to law students in this community. Thousands of them are now practicing law. Perhaps this may help them to forget some of the heresy they may have learned from me.