

*GIFTS OVER WITH FLOATING SUBJECT-
MATTER: ESTATES, POWERS, REPUGNANCY
(AND THE INTENTION OF THE TESTATOR)*

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I

Once upon a time, a few leagues from the great city, there lived a kindly farmer. He had no children, but he loved his wife dearly. He did not love the legal profession, and he rarely indulged his generosity in their direction. When he pondered the wise disposition of his worldly wealth (seldom and modest respectively), he took it for granted that his wife must be provided for after he had gone to that greater Manitoba in the sky. As he had no close relations, and all hers were dead, well established in life or lawyers, he thought of his only nephew, who was not a lawyer, but quite handy around the farm all the same, as a worthy recipient of some ultimate reward. The good old farmer did not read the law reports; and worse: he thought he knew what he wanted to do. In the twilight of his life, one calm evening when the television programmes were not enthralling, being composed in his mind, he penned his will. And this is what he wrote: "This is my last will and testament. When my dearly beloved wife dies, I want any of my property she still has to go to my only nephew, absolutely and in fee simple. In the first place, when I die, I want my dearly beloved wife to be the owner of my farm and stock and all my other property. She will not want, because I know she is too level-headed to run through it quickly. My wife and my nephew are to be my executors." The will was duly executed, the witnesses did not include the nephew or the wife, nor did the testator neglect to die.

Years went by. They were not pleasant times for the testator's relict, for she had loved her husband dearly. In her declining years she toyed with the idea of moving to Australia, to live with her widowed sister. She made efforts to sell the farm where she had spent her contented marriage — the farm her husband had owned in fee simple. That fee was still vested in the widow and nephew as executors, so when a prospective purchaser made

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some inquiries the nephew got wind of the transaction. He learned that the widow intended to use the proceeds of sale for her fare to distant parts, to build an extension to a house in the land of her adoption and on general living expenses, and that if anything were left she intended to bequeath it to him. The nephew made a journey to the great city to ask a lawyer whether, if the farm were sold, which he did not object to, the widow could spend the proceeds as she proposed, which he did object to. The lawyer consulted a few precedents and friends over lunch and asked his newest articed clerk to prepare him a note. And this is what the impertinent articed clerk wrote.

II

The Clerk's Tale

First, it is necessary to find the testator's intention. That is done partly by construing the will and partly from considering the surrounding circumstances. The purpose of finding the intention is either to effectuate it or to frustrate it, according to which precedents you follow. If it is difficult or impossible to tell what the testator's intention was, the will can be held void for uncertainty, but many judges prefer to guess, make one up, or employ a rule of construction or law which produces a result whether that was the testator's intention or not.

Secondly, the kindly farmer's intention was clearly to give some property to his widow and to give some property to his nephew on her death. The testator's reference to the widow running through it (i.e. presumably, the property) and the confining of the nephew's bequest and devise to property she still had (when she died) suggest that the widow might have been intended to have rights over the fee (and the corpus of the personal property). The terms of the gift to the nephew rule out the possibility of the widow being intended to have any power of disposition by will of anything her husband had owned.

Thirdly, the court will come to at least one of the following conclusions, which ought to be considered in the light of all the authorities.

- (a) Because the widow is to enjoy the property during her lifetime, and is to have power to appropriate capital to her own use, and the nephew is to take anything left over at her death, the will gives the widow a life interest in all the estate and a general power of appointment *inter vivos* over the corpus of the personalty and the fee, and gives the nephew on her death the corpus and the fee to

- the extent that the widow did not exercise the power.
- (b) As a variant of (a), the widow's power of appointment inter vivos is not general but, because of the reference to her want and level-headedness, is confined to what she decides to use for her maintenance and does not extend to giving property away.
 - (c) As a variant of (b), since "want" refers to actual need, the widow's power is confined to what is necessary for her maintenance, having regard, for example, to any resources she may have apart from her husband's estate.
 - (d) Because the power given to the widow to appropriate capital is very extensive, she is put in the position of an owner of it, and the testator had two conflicting intentions: to make the widow the owner absolutely and in fee simple, and later, to make the nephew the owner absolutely and in fee simple. It is impossible to effectuate both intentions, because you cannot have a remainder after a fee simple or after an absolute interest in personal property. Put another way, if the widow is to own the fee and the absolute interest in the personalty, that variety of ownership includes power of testamentary disposition and, on the death of the owner intestate, succession by her next of kin. If the gifts to the wife and the nephew are inconsistent, one must be void for repugnancy to the other. It is therefore necessary to find the testator's dominant intention.
 - (e) His dominant intention was to give the property to his wife because that came after the other disposition¹ and because the purported gift over to the nephew of what she still had when she died exhibited uncertainty of subject-matter (particularly with regard to personal property, in respect of which it would be difficult to separate what came from the testator's estate and what the widow acquired elsewhere) and because the testator loved his wife dearly and must naturally have wanted to provide for her and he expressed concern that she should not want and because he used no words of limitation when he referred to her owning the farm.
 - (f) The testator's dominant intention was to give his property absolutely and in fee simple to his nephew because that was the first thing the testator said by way of

1. See *Re Maltman* [1927] 1 D.L.R. 417, 419 (*per Fullerton J.A.* in the Manitoba Court of Appeal); *Re Dinsmore's Will* (1936) 11 M.P.R. 196 (New Brunswick).

disposition in his will. As he directed his mind first to what was to happen on his wife's death he meant to give her only a life estate in the land and a life interest in the personal property. He thought she would not want because he thought she could live on the income from the farm. What he regarded her as not likely to run through too quickly was the income and any consumable stock or things that would wear out because he considered her sensible enough to husband her resources carefully by not breaking too much crockery, being hard on the linen or neglecting routine maintenance and repairs. The only reason the gift over was confined to what she still had when she died was that he envisaged that, even with her care and good sense, some things were bound to be used up or worn out. He did not want to preclude her from making use of such things.

III

When the lawyer read his clerk's note he was troubled. He had himself spent a while reading the discussion and criticism by Kennedy,² and he knew there were cases reported after that article was written. He recognised the validity of the clerk's uncertainty as to what a court would decide. He considered that a review of the authorities might indicate some principles on the basis of which he could offer definite advice to the nephew. His client having authorised him to do so, the lawyer sought from counsel more learned than himself an opinion as to the possibility of a tenancy for life with a remainder subject to a power. And this is how the opinion began.

IV

Express Tenant for Life with Express or Implied Power of Appointment Overriding Remainders

While it is impossible to have a remainder after a fee simple or after an absolute interest in personalty, it is possible to create a life estate or interest with a remainder over which is only to take effect subject to a special or general power of appointment given to the tenant for life.

The will in *Re Tuck's Estate*³ left the testator's land to his wife "for and during her natural life" and his personal property "to be for her use and behoof during her natural life . . . And . . . all

2. "Gift by Will to W: At Her Death 'What Remains' to the Children" (1950) 28 *Canadian Bar Review* 839.

3. (1905) 10 O.L.R. 309.

the personal property . . . that may be in possession of my . . . wife at her decease, and not otherwise disposed of shall . . . be sold . . . and the proceeds . . . equally divided among my daughters . . . ” On those words, it looks as though the testator meant to give his widow: (i) a life estate in the land; (ii) a life interest in the personal property; (iii) the right to use any of the personal property, including that which would be consumed or worn out by use, such as cash not in a state of investment at his death; (iv) the right to dispose of the absolute interest in any item of personal property inter vivos; (v) the right to appropriate to her own use any money she raised by sale or on security of personal property. There seems to be a gift over of the personal property of the testator, in the possession of the widow at her death, to his daughters equally, but there is some difficulty in understanding the import of the words: “and not otherwise disposed of . . . ” The testator’s gift over to his daughters is unlikely to have been meant to be one of the proceeds of sale of personal property that was in the widow’s possession at her death and not otherwise disposed of *by her will*; for if she had the use of it during her life, and the unfettered power of disposition inter vivos or by will, she looked very much like the legatee of an absolute interest after which there could be no gift over. It is possible that the testator meant to give her a life interest, a general power of appointment inter vivos of the absolute interest and a power of testamentary appointment otherwise than by general or residuary bequest, and to establish a trust for sale of items in her possession at her death and of which she had not made an appointment inter vivos or by will. Another way of looking at it is that the testator meant to exclude from the trust for sale any personal property in the widow’s possession at her death which she had disposed of inter vivos but had not delivered (e.g., something she had contracted to sell). Yet again, the words, “and not otherwise disposed of” may have been for emphasis, to make clear that the widow’s use and behoof included a power of disposition inter vivos. Britton J. formed the “opinion that the widow . . . took absolutely all of the personal property which she appropriated to her own use and used up, during her life, and that there was a gift over of only so much of the personal property of [the testator] as was in the possession of the widow at time of her death.”⁴ “ . . . the widow had by implication the unqualified right of disposing of the personal property.”⁵

In *Re Tuck’s Estate* there was a specific reference to the life

4. 10 O.L.R. 311.

5. 10 O.L.R. 312.

of the first donee, coupled with an implication that she was to have some power, not indicated with precision as to its extent, to take items for her own benefit out of the property otherwise destined for remaindermen. Such a power to invade the capital is sometimes given to the tenant for life expressly, using the word "encroach" — a word also often used by judges even when not employed by the testator. In *Re Hand*⁶ the will gave the residue of the testator's estate "unto my sister . . . for her lifetime with power in her unfettered discretion to encroach upon the corpus of such residue . . . it being my will and intent that during her lifetime my . . . sister shall have the full use of the said residue . . . as if it were entirely her own property and upon her death the remainder if any, to be paid to the Hamilton Naturalist Club . . ." That is a clear way of indicating that the sister is to be

6. (1975) 60 D.L.R. (3d) 402. See also *Re Davey* (1910) 17 O.W.R. 1034, where Teetzel J. held that a gift by will of all the testator's property "to my wife for her use and benefit so long as she lives, with full power to use and enjoy the same and such corpus of the estate as she may require or desire to use for her own benefit during her life, and should any part of my estate remain unused at her death then such part so remaining is to be divided equally among my brothers and sisters, and my wife is not to be required to account for my estate or any part thereof" entitled the widow to a life estate, with a right to use such of the corpus as she might desire for her own enjoyment and, as to a farm included in the estate, not to the mere use of it in specie but a power to sell it and use the proceeds, whatever remaining unused going at her death to the brothers and sisters; *Creighton v. Creighton* (1919) 17 O.W.N. 278, where Masten J. held that a gift of the testator's residuary estate to his wife for her own use during her life with power to her absolutely to sell or mortgage any of the real estate she might deem advisable and absolutely to appropriate to her own use any of the personal estate and proceeds of sale of real estate as to her might seem proper and in all ways to deal with the estate as if it were her own absolutely, with a gift over to his daughter and sons, on the death of his wife, of the estate "which shall then remain unused by my wife", entitled the widow to a life interest, with a power of disposition during her lifetime, but no power of disposition by will, the residue remaining at her death going to the sons and daughter; *Re Levy* (1924) 26 O.W.N. 300, a decision by Riddell J. on a will of rather similar import; *Re Stonehouse* (1925) 29 O.W.N. 156, a decision by Grant J. on a power given to the tenant for life to take "part of the principal which she may consider necessary for her proper maintenance and comfort"; *Re McCaffrey* (1927) 32 O.W.N. 97 (Rose J.); *Palmer v. Graham* (1930) 39 O.W.N. 322, where Wright J. held that the wife had a general power of appointment inter vivos over the corpus of the estate, the testator having left all his property to his wife for life, with his children to take equally after her death, the will containing the following provision: ". . . if my . . . wife consider that the income or yearly proceeds arising from my estate do not prove sufficient for her suitable and proper support maintenance and benefit then she may and is hereby entitled to encroach upon and use the principal to any extent she may choose or require . . ."; *Agnew v. Canada Permanent Trust Co.* [1933] O.W.N. 80, where Rose C.J.H.C. held that a gift by will of all the testator's property to his wife for life, with a gift over to his nephew and nieces, followed by a codicil stating, "I hereby empower my . . . wife to draw from the corpus of my estate whatever sums of money she may desire for her own use", gave the widow a life interest, with a power to draw from the corpus of the estate whatever sums of money she desired to use, i.e. when she desired to spend it, but not to draw it for the purpose of reinvesting it in her own name, the gift over being valid as written; *Re Luke* [1939] O.W.N. 25, a decision of Roach J. on a will in similar terms (see n. 49, post) to that in *Re Stonehouse*. *English cases*: In *Surman v. Surman* (1820) 5 Madd. 123 Leach V. -C. held that the wife had been given a life interest with a power to appropriate capital, subject to which there was a gift over, where the will gave the property to the wife for life, gave her "power . . . to use, apply, employ and appropriate the same as she thinks proper, for her own benefit and the proper maintenance of my . . . nephew and daughter-in-law during their respective minorities" and made a gift over of what remained at her death (or remarriage). In *Scott v. Josselyn* (1859) 26 Beav. 174 Romilly M.R. came to a similar conclusion, holding the wife's power to be a general one inter vivos (she was given a power of appointment by will as well), where the will gave the property to the wife for life, directed the trustees to permit her to apply to her own use and benefit so much and such parts of the capital thereof as she should think proper, and made a gift over of what remained at her death. In *Pennock v. Pennock* (1871) L.R. 13 Eq. 144 Malins V. -C. held that the husband had

tenant for life of the residue, that she is to have a general power of appointment inter vivos over the capital, and that there is a gift of the unappointed capital (if any) to the club on the sister's death. Pennell J. so held.

Most of the problems have arisen out of inartistically drawn wills. There are quite a few reported cases, more like *Re Tuck's Estate*, where a power of appointment was indicated but not set out with such decisiveness as in *Re Hand*. An interesting example is *Re Hartle*.⁷ The will in that case stated that his wife was to have the use and benefit of the testator's property "to whatever extent she may require for her use and comfort during her lifetime." The testator directed that, on his wife's death, all the residue of his personal property and whatever remained of

been given a life interest with a general power of appointment over the capital, subject to which there was a gift over, where his wife's will gave the property to him for life, gave him "power to take and apply the whole or any part of the capital . . . for his own benefit" and made a gift over subject to the power. In *Re Fox* (1890) 62 L.T. 762 Stirling J. had before him a testamentary trust for the testator's wife for her maintenance during her lifetime. The will said the wife might "during her lifetime . . . sell, lease, mortgage, or otherwise absolutely dispose of all or any part of the said estate for her maintenance, but not by way of testamentary disposition." Then the testator made a gift over of what remained at his wife's death. The learned judge held that the wife took a life interest with power to resort to the capital for her maintenance. In *Re Richards* (1901) 71 L.J. Ch. 66 Farwell J. held that the wife had a general power of appointment over the corpus (exercisable inter vivos — he declined to decide whether it was also exercisable by will), as well as her life interest, where the testator gave her all his property for life and provided: "in case such income shall not be sufficient she is to use such portion of my . . . estate as she may deem expedient." (Then there was a gift over of what remained at her death.) That decision was followed by Warrington J. in *Re Ryder* [1914] 1 Ch. 865, though he thought the general power of appointment was exercisable only inter vivos, where a testatrix gave property to her husband for life and continued:

"I authorise my husband so long as he is entitled to the income of . . . my estate to apply such portion of the corpus of my estate as he shall think fit for his own use and benefit" (with a gift over, subject thereto, to charity). In *Re Shuker's Estate* [1937] 3 All E.R. 25 Simonds J. held that the wife had a life interest, and (against his inclination) a general power of appointment over the capital (which she exercised inter vivos as to the whole of it), where the testator left property for her "to retain the income thereof for her own use and benefit absolutely with power to convert to her own use from time to time such part or parts as she may think fit of the capital . . ." with a gift over subject thereto. *Scottish cases*: In *Barr's Trustees v. Barr's Trustees* (1891) 18 F. 541 the will gave the wife property for life, and power to dispose of it, and made a gift over of what remained at the wife's death. It was held by the Inner House that she took a life interest but no power to dispose of the property by will, so that the gift over took effect on her death (the Lord Ordinary, Lord Kyllachy, having thought she had a power to dispose of the capital inter vivos). See also *Forsyth v. Forsyth* (1905) 12 S.L.T. 778. *New Zealand cases*: In *Public Trustee v. Wilson* [1916] N.Z.L.R. 798 the testatrix bequeathed one-third each of her estate to her son, her daughter and her father "to be used . . . for their sole benefit during each of their lifetimes or until such moneys or interests are expended." The will provided for a gift over on the death of each legatee of the balance of his share to the survivors or survivor and, on the death of the last survivor, for the balance to go to the testatrix's brother. Stringer J. regarded as material facts and circumstances, in construing the will, that at the time of making her will the testatrix was a widow with two children aged eight and nine respectively, that her father lived with her and her children, and that she was possessed of an estate consisting entirely of personalty worth about £1,780. The learned judge held that each primary legatee took a life interest in his share, with a general power of appointment inter vivos over the capital, and that the gifts over took effect in default of appointment. In *Nicholson v. Muggeridge* [1931] G.L.R. 241 the will left all the testator's property on trust for sale and investment of the proceeds and "to pay to my wife . . . the income and such portion or portions of the principal as she shall or may from time to time apply to my . . . Trustee for and from and after her decease as to such portion or portions of the . . . income and principal as my . . . wife shall not then have received . . . upon trust for all my children in equal shares . . ." Reed J. held that the wife had a life interest and an unrestricted power to call for the capital, subject to which the gift over took effect. [In fact, six of the eight children probably had a deficit after getting their share and paying the Supreme Court costs.] There was no repugnancy to the life interest in the gift over of the income, as the children only got what the mother did not receive (cf. *Henderson v. Cross* (1861) 29 Beav. 216). Capital applied for by the wife but not received by her went under the gift over.

7. (1922) 22 O.W.N. 526. See also *Re Best* (1960) 23 D.L.R. (2d) 480, 485, per Patterson J. (n. 179, post). Cf. *Re Luke* [1939] O.W.N. 25 (n. 49, post); *Re King* [1940] O.W.N. 57 (n. 50, post).

his real estate was to be sold and the proceeds were to be distributed equally among his niece and nephews. The executors were desired to take such steps as might be necessary to administer to the needs and requirements of the wife. In fact, during her widowhood, the executors only managed to pay the wife \$192.74 (the report does not disclose why: an affidavit stated that the personal estate amounted to \$551: perhaps the \$192.74 was ready cash and income; but later the report declares that the personalty had been exhausted), and she used \$440 of her own money (portion of a sum of \$854 deposited in a bank by her husband to the joint credit of himself and his wife) to maintain herself. After her death, the widow's next of kin tried and failed to get \$440 from the testator's estate. Middleton J. held that the widow had a life interest, and therefore her next of kin had no rights. The learned judge said:⁸ "Nor was it at all plain that even in her lifetime she could have complained if the executors had refused to sell, so long as she had money of her own available for her maintenance, particularly as that money was derived from her husband." The executors had, in the judge's opinion, no duty to maintain the widow but only a duty to permit her to resort to the corpus of the fund for her needs and requirements.

In *Thompson v. Thompson*⁹ the testator declared by his will: "I appoint my wife . . . executrix and to have full control of all my property so long as she may live and at her death the property to be equally divided among my living children . . ." Raney J. held that the widow took a life estate with power to encroach on the corpus; that she was accountable to no one as to what she did inter vivos but that the remainder over meant she had no power to dispose of the property by will. In *Re Mayer Estate*,¹⁰ an Alberta case, the will of the testatrix gave all her property "unto my . . . husband . . . to have and to hold . . . so long as he shall live, and upon his death, should any portion of my estate remain, I direct that it be divided equally among my three children . . . Nevertheless, it is my intention that my husband shall be unhampered in the control of my estate so long as he shall live, and I hereby authorize . . . him to . . . deal . . . with . . . the same as though said property were his own . . . , it being my intention that he shall use said estate as he shall see fit during his lifetime." Ford J. interpreted those words¹¹ "as giving a life estate or interest in the property of the testatrix with power to encroach on the corpus as the beneficiary 'shall see fit during his lifetime'

8. 22 O.W.N. 528.

9. (1930) 38 O.W.N. 453. See also *McLaren v. Coombs* (1869) 16 Gr. 602.

10. [1950] 2 W.W.R. 858.

11. [1950] 2 W.W.R. 861.

— to quote the last words of the clause.” In *Re McFarland*¹² the testator gave his entire estate to his wife “to be used by her during her lifetime, she to have the right, during her lifetime to expend or otherwise consume my entire estate or any portion thereof. Upon the death of my . . . wife any portion of my . . . estate then remaining I give” to the testator’s nephew. Grant J. held that the wife took a life interest in the estate with a right to encroach upon the capital to such extent as might be necessary to provide properly for her maintenance and support. The learned judge thought the words “expend” and “consume” implied a recurring spending for her own benefit and were inconsistent with the widow having any power to make gifts of capital. In *Re Thorpe Estate*¹³ in Newfoundland, the testator gave all his property to his wife “Absolutely to have and to hold in her own name while she lives or as long as she lives She can sell or dispose of any Part or Portion of my Property houses or land at aney time she like to. and to aney one she wish. at aney time During her lifetime or at aney time untill her Death. After my Wifes Death my only son . . . Will become Hier and Possessor and Owner of what remains unsold at the time of my Wifes Death . . .” Higgins J. held that the widow took a life interest with power to encroach on the principal. The language of the testator was more restrained in *Re Leslie*,¹⁴ but the decision was similar. The will gave the testator’s widow a life interest in the property “with the privilege of sale of any of the assets of my estate, . . . subject to the approval of my executors and trustees . . .” with a gift over to charities of “what may be left at her death”. Greene J. held that the tenant for life had power to encroach upon the corpus for purposes of maintenance.

Some wills using milder expressions than those in the cases in the preceding paragraph have been held to give the tenant for life a power of appointment over the capital. They are expressions which, in another context, could have been regarded as merely emphasizing the generosity of giving a life interest, as indicating that no charges are imposed by the will upon the life interest, that the life interest is not determinable or liable to defeasance, that property is to be enjoyed for life in specie (even in the case of personal property consumed or worn out by use — an exclusion of the rule in *Howe v. Lord Dartmouth*¹⁵ in the case of residuary personalty) or something else short of a power of appointment over the capital. They are regarded as having a

12. [1963] 1 O.R. 273.

13. (1974) 6 Nfld. & P.E.I.R. 419.

14. [1940] O.W.N. 345.

15. (1802) 7 Ves. 137.

more extensive import by virtue of the terms of the gift over, those terms being taken to imply a power of disposition of capital conferred on the tenant for life.

In *Re McDonald's Estate*¹⁶ the testator left his residuary estate to his wife, "for her own use during her life time" after which he made a gift over of the house and contents and another gift over of "any money and securities which may remain after the death of my wife . . ." The Appellate Division held, in the words of Ritchie J.:¹⁷ "The disposal of any of the property which may remain over at the death of the wife . . . shews that it was intended to give the wife . . . the disposition of the principal during her life." In *Matte v. Matte*¹⁸ Meredith C.J.C.P. held that the widow had a life estate with power to expend the corpus in any necessary or reasonable manner, when the will said the property was "for her sole use during her lifetime" and made a gift over of what remained after payment of her debts and funeral expenses. The learned Chief Justice said:¹⁹ ". . . the right to expend the principal does not include the right to give it away or to expend it for the purpose of depriving those who may be entitled to the remainder, of any share in the testator's bounty." In *Re Gouinlock*²⁰ the testatrix gave her husband her residuary estate, "to have and to hold for his sole use and benefit in such manner as he considers best during his lifetime and after his death any of my estate then remaining shall be divided between my children . . ." Middleton J. held that gave the husband a life estate with power to encroach upon the corpus. In the Saskatchewan case of *Re Goodnough Estate*²¹ the testator left all his property to his wife, "for her use and benefit during her lifetime and at her decease anything remaining to be divided share and share alike among my children . . ." Elwood J. held she had a life interest with power to encroach on the capital for the purposes of maintenance. In *Re Knutson Estate*,²² another Saskatchewan case, the will left all the testator's property to his wife, "for her sole use and benefit for the term of her natural life and after her death the residue remaining to be divided equally between my son . . . and my daughter . . ." Brown C.J.K.B. held that the widow took a life interest with power "to encroach upon the corpus of the estate to any extent necessary for her maintenance and support." In *Re Richardson*²³ the testator's will ran: "Mrs.

16. (1903) 35 N.S.R. 500. See also *Re Achterberg* (1914) 5 O.W.N. 755.

17. 35 N.S.R. 504.

18. (1915) 8 O.W.N. 605.

19. 8 O.W.N. 606.

20. (1915) 8 O.W.N. 561.

21. (1916) 27 D.L.R. 790.

22. [1925] 2 W.W.R. 126.

23. (1928) 35 O.W.N. 81.

Melissa H. Richardson to have the use of the balance of my estate until her death and what is left to be given to Home & Foreign Missions equally divided." Wright J. held that Melissa took a life estate in the residue with power to encroach upon the corpus for her unrestricted use. In *Stadder v. Canadian Bank of Commerce*²⁴ the will gave the whole of the testator's estate to his wife, "for her sole use as long as she may live and at her death I desire that what shall then remain of my estate shall be equally divided between" a nephew and two nieces. That disposition was considered by five judges in the Ontario Appellate Division and they all thought it gave the widow a life interest with power to encroach on the capital. Riddell J.A. said:²⁵ "Reading this in the light of all the circumstances, placing ourselves in the arm-chair of the testator, as the saying is, I can read this in no other sense than as giving to the widow this property so far as she should care to use it; and providing that if she should not care to use any of it the remaining portion should go to the three persons named in the will. Such a provision is wholly valid, and it should now be carried out." In *Re Duncan*²⁶ the testator gave his wife "the use of all my estate . . . as long as she may live. At the decease of my . . . wife I direct that my estate as it may then be is to be divided equally between my two sons . . ." Sedgewick J. held that the widow took a life interest with power to spend the moneys of the estate and the proceeds of securities when realized according to her need, without being liable to account to the estate for such moneys; but no power, apparently, to touch the capital of land, although the total value of the estate was only \$5,000 and the widow was elderly. In *Lister v. Gilbert*²⁷ the will left all the testator's property to his wife, "The same to be used during her lifetime as she may require it and at her death whatever remains to be divided equally between our four daughters . . ." Baxter C.J., in the New Brunswick Supreme Court, held that the widow took a life interest with a power of appointment over the capital which she could competently exercise in favour of herself. The headnote summarises lucidly and accurately: "Where a testator leaves his property to his wife and disposes of what remains at her death, the question is whether the testator intended to dispose of the property that had become his widow's, or whether he intended to give his widow a limited estate with a power of appointment in her lifetime, reserving the right to dispose of the remainder." In *Re Kraft*

24. [1929] 3 D.L.R. 651.

25. [1929] 3 D.L.R. 654.

26. (1932) 41 O.W.N. 175.

27. [1938] 2 D.L.R. 783.

*Estate*²⁸ the testator said in his will: "... I give ... a life interest in all [my] estate ... unto my wife ... with power to use such part of same as she sees fit during her lifetime ... Upon the death of my ... wife, I give ... the residue of my estate ... upon the following trusts ... " (which were then detailed). Ford J.A., giving the judgment of the Appellate Division of the Alberta Supreme Court, said²⁹ that the widow was entitled to a life interest in all the testator's property with power to encroach on the capital for the purpose of her maintenance.

In *Re Hodgkins*³⁰ the testator gave the residue of his estate to his sister "during her lifetime and any balance at her death to be divided equally between her two youngest daughters. ... My real estate to be sold ... and the proceeds ... and personal property to be paid over to my sister ... with the request that any balance at her decease she is to divide equally between her two youngest daughters." Lennox J. held that the testator's sister had a life interest in his residuary estate, with the right to enjoy in specie the property comprised in it (including the proceeds of sale of the real estate), with remainder to the two youngest daughters, the sister having "a possible right to encroach upon the corpus." (The testator's direction and request to his sister to divide the property at her death were interpreted as a remainder.) In *Re Van de Bogart*³¹ the testator left his property "in trust to dispose of and pay over or convey ... to ... my wife ... all my estate ... during her life, and at her death any residue of my estate then remaining shall go to my brother ..." Grant J. held that the will gave a life estate to the widow with power to encroach on the corpus for her maintenance.

In *Re King*³² the will gave all the testator's property to his wife, "absolutely for her natural life ... After her death all that remains is to go to my son ..." Hogg J. held that the widow had a life interest with the right to draw on the capital as necessary for her maintenance and support. In *Montreal Trust Co. v. Tutty*³³ the testatrix left her residuary property to her husband, "to have and to own ... until his death and then to pass whatever is left of my estate to my nephew ... or his heirs." The Nova Scotia Supreme Court in banco held that the husband took a life interest with power to encroach upon the principal. Hall J. said:³⁴ "When

28. (1952) 6 W.W.R. (N.S.) 124.

29. 6 W.W.R. (N.S.) 127.

30. (1918) 14 O.W.N. 105.

31. (1927) 32 O.W.N. 182.

32. [1940] O.W.N. 57.

33. (1950) 25 M.P.R. 121.

34. 25 M.P.R. 130.

[the testatrix] made her will it was impossible for her to foresee that her husband would survive her only by three years. I think the words 'to have and to own this residue of my estate until his death' convey her intention that her husband should have and possess the residue as the owner thereof during his lifetime, to use as he deemed necessary. He might live three years or twenty years. Probably the longer he lived, the greater the encroachment. She provided for either contingency, but made it clear that she retained power of appointment over 'whatever is left' at his death and the balance, if any, should pass to her nephew or his heirs." (Presumably that meant it passed to the nephew's estate if he predeceased the husband. Presumably the statement that the widower was to pass it was treated as a gift over.) MacQuarrie and Parker, JJ. simply concurred in that eccentric³⁵ way of putting it, and MacDonald J. agreed with the quite orthodox result. In *Re Cadieux*³⁶ the will provided (in what was flatteringly called "an English translation") for all the testator's property to "go back to my . . . wife . . . she shall be able to enjoy them as she will wish during her lasting life, after the death of my . . . wife what will remain of my estate will be shared as follows: between our children . . ." Kelly J., in the Manitoba King's Bench, held that the widow took a life interest with power to encroach on the capital.

There are yet other cases where no words of use, transfer, depredation or anything like that are added to the terms of the grant of the life interest, but a power of appointment over capital is considered to have been granted to the tenant for life solely by implication from the terms of the gift over, that being expressed not to give the whole corpus to the remainderman, but only what is left at the death of the tenant for life. Such a case is *Re Johnson*.³⁷ The will disposed of all the testator's property to his wife "for the term of her natural life . . . In the event of her . . . death then the following legacies shall be paid forthwith if there is sufficient funds to pay the same . . ." Then followed a list of legacies and a gift over of the remaining assets. Boyd C., giving the judgment of the Divisional Court, said³⁸ the widow "... has a life estate and interest in all the property, with an implied contingent power to encroach on the capital for the purposes of maintenance. . . . it is a fair and reasonable conclusion to be drawn from the language of the will, construed in the light of the

35. Reserving by her will to herself a power of appointment?

36. [1951] 2 D.L.R. 782 (n. 200, post).

37. (1912) 27 O.L.R. 472. See also *Re Wallace* (1926) 30 O.W.N. 264 (Appellate Division); *Re Bloomfield* (1929) 36 O.W.N. 148; *Re Ketcheson* (1929) 37 O.W.N. 60 (Appellate Division).

38. 27 O.L.R. 475-476.

surrounding facts known to the testator when he made his will and at the time of his death. He knew that his wife would need support and maintenance,³⁹ and he left her all his property for that purpose. He also knew that the income of the estate, while enough perhaps for a woman able to fend for herself, would be insufficient for one blind and infirm . . . ” In *Roche v. Roche*⁴⁰ the will gave all the testator’s property to his wife “for and during the term of her natural life, and after her death I give . . . such of said property as may remain undisposed of to my children share and share alike.” The Nova Scotia Supreme Court held unanimously that the widow took a life interest with (apparently unlimited) power to encroach on the corpus. In *Re Bangs Estate*,⁴¹ in the Manitoba Queen’s Bench, Monnin J.A. held the wife took a life interest, with an absolute power of encroachment on the capital, where the will gave: “To my wife . . . the balance of my Estate monies, furniture and effects during her lifetime, in the event of her death my Son . . . and Daughter . . . to share equally in the remaining balance of the estate at that time.”

The extent of the power

When the tenant for life is held to have a power to encroach on the corpus (or of appointment over the capital or over the fee simple), the court is not always called upon to determine the extent of the power. Courts which have decided, or offered observations on, how far the tenant for life’s power goes, have differentiated three main degrees of it.

The first is a general power of appointment (inter vivos, usually, but sometimes by will as well), or unrestricted power to encroach on the corpus.⁴²

The second is a power to use capital for the maintenance or

39. The testator left, as well as his widow, grown-up children married and doing for themselves. His wife was, at the date of the will, weak and with failing eyesight. At the date of the judgment she was old, infirm and stone-blind. (27 O.L.R. 475, *per* Boyd C.)

40. [1930] 4 D.L.R. 310.

41. (1962) 39 W.W.R. 623 (n. 198, *post*).

42. *Re Tuck’s Estate* (1905) 10 O.L.R. 309 (n.3, *ante*); *Re Davey* (1910) 17 O.W.R. 1034 (n.6, *ante*); *Creighton v. Creighton* (1919) 17 O.W.N. 278 (n. 6, *ante*); *Stadler v. Canadian Bank of Commerce* [1929] 3 D.L.R. 651 (n. 24, *ante*) (“so far as she should care to use it” — did that include giving it away or appointing it to herself and then leaving it by will?); *Roche v. Roche* [1930] 4 D.L.R. 310 (n. 40, *ante*) (apparently an unlimited power); *Thompson v. Thompson* (1930) 38 O.W.N. 453 (n. 9, *ante*); *Palmer v. Graham* (1930) 39 O.W.N. 322 (n. 6, *ante*); *Re Duncan* (1932) 41 O.W.N. 175 (n. 44, *post*); *Lister v. Gilbert* [1938] 2 D.L.R. 783 (n. 27, *ante*); *Re Mayer Estate* [1950] 2 W.W.R. 858 (n. 10, *ante*); *Montreal Trust Co. v. Tutty* (1950) 25 M.P.R. 121 (n. 33, *ante*); *Re Bangs Estate* (1962) 39 W.W.R. 623 (n. 41, *ante*); *Re Hand* (1975) 60 D.L.R. (3d) 402 (n. 6, *ante*). See also *British and Foreign Bible Soc. v. Shapton* (1915) 7 O.W.N. 658 (n. 157, *post*); *Re Clinton* (1919) 16 O.W.N. 267; *Re Chafe Estate* [1923] 1 W.W.R. 65 (n. 164, *post*). *English cases*: *Scott v. Josselyn* (1859) 26 Beav. 174 (n. 6, *ante*); *Pennock v. Pennock* (1871) L.R. 13 Eq. 144 (n. 6, *ante*); *Re Stringer’s Estate* (1877) 6 Ch. D. 1 (n. 157, *post*); *Re Pounder* (1886) 56 L.J. Ch. 113 (n. 115, *post*); *Re Richards* (1901) 71 L.J. Ch. 66 (n. 6, *ante*); *Re Willatts* [1905] 2 Ch. 135 (n. 157, *post*); *Re Ryder* [1914] 1 Ch. 865 (n. 6, *ante*); *Re Shuker’s Estate* [1937] 3 All E.R. 25 (n. 6, *ante*). *Australian cases*: *Re Comstock’s Will* [1918] V.L.R. 398 (n. 157, *post*). *New Zealand cases*: *Public Trustee v. Wilson* [1916] N.Z.L.R. 798 (n.6, *ante*); *Nicholson v. Muggerridge* [1931] G.L.R. 241 (n. 6, *ante*).

support of herself (the tenant for life).⁴³ Such a power would not entitle the tenant for life to make gifts or so to appoint to herself that the capital would pass under her will or intestacy.

The third is a power to use capital only so far as it is necessary to do so for the maintenance of herself (the tenant for life).⁴⁴

The distinction between the second and third types of power is generally that the second, but not the third, embraces what is reasonably generous having regard to the tenant for life's station in life and what she is used to in the way of maintenance, even if not strictly necessary, as well as items of support which are not maintenance, e.g., holidays. There is, however, another distinction amounting to a sub-classification of the third type of power. If the tenant for life has funds available for her maintenance apart from her late husband's estate, she must sometimes exhaust those before the third type of power can be exercised, but that is not always the case. That distinction is illustrated by *Re Luke*⁴⁵ and *Re King*⁴⁶ on the one hand and *Re Hartle*⁴⁷ on the other hand. The view of Middleton J. in *Re Hartle*⁴⁸ that the widow might not be able to claim on her husband's estate so long as she had money of her own available for her maintenance was obiter dictum. In *Re Luke*⁴⁹ Roach J. held that a power given to the tenant for life of the testator's estate "to use . . . so much of the corpus thereof as she may have need of for her comfort, maintenance and support during her lifetime" entitled her "to use . . . as much of the corpus as she may have been found in need of for her comfort, maintenance and support during her lifetime, apart from funds that she may have held in her own right" (i.e., she did not have to exhaust the latter

43. *Re Johnson* (1912) 27 O.L.R. 472 (n. 37, ante); *Matte v. Matte* (1915) 8 O.W.N. 605 (n. 18, ante); *Re Goodnough Estate* (1916) 27 D.L.R. 790 (n. 21, ante); *Re Stonehouse* (1925) 29 O.W.N. 156 (n. 6, ante); *Re Van de Bogart* (1927) 32 O.W.N. 182 (n. 31, ante); *Re Richardson* (1928) 35 O.W.N. 81 (n. 23, ante) (this may have been a wider power: the report is not very forthcoming); *Agnew v. Canada Permanent Trust Co.* [1933] O.W.N. 80 (n. 6, ante); *Re Leslie* [1940] O.W.N. 345 (n. 14, ante); *Re Kraft Estate* (1952) 6 W.W.R. (N.S.) 124 (n. 28, ante); *Re McFarland* [1963] 1 O.R. 273 (n. 12, ante). See also *Re Reid* [1946] 3 D.L.R. 410 (n. 168, post); *Re Plant* [1946] 3 D.L.R. 847 (n. 174, post); *Re Shamas* (1967) 63 D.L.R. (2d) 300 (n. 180, post). In *Re Achterberg* (1914) 5 O.W.N. 755, where Middleton J. held the tenant for life had a power to encroach on the corpus for maintenance, the learned judge, at the request of the parties, fixed the amount and decided upon \$450 a year. See also *Re Cutter* (1916) 31 D.L.R. 382, 389, per Boyd C. (n. 163, post); *Re Reid* [1946] 3 D.L.R. 410, 415, per Ford J. (n. 173, post). English cases: *Re Pedrotti's Will* (1859) 27 Beav. 583, distinguished in *Re Richards* (1901) 71 L.J. Ch. 66 (n. 6, ante); *Re Fox* (1890) 62 L.T. 762 (n. 6, ante).

44. *Re Hartle* (1922) 22 O.W.N. 526 (n. 7, ante); *Re Knutson Estate* [1925] 2 W.W.R. 126 (n. 22, ante); *Re Duncan* (1932) 41 O.W.N. 175 (n. 28, ante) (power to spend according to her need, without being liable to account — was that an unlimited power?); *Re Luke* [1939] O.W.N. 25 (n. 49, post); *Re King* [1940] O.W.N. 57 (n. 32, ante). See also *Re Cutter* (1916) 31 D.L.R. 382 (n. 162, post); *Re Green* (1916) 10 O.W.N. 146; *Re Parsons* (1926) 31 O.W.N. 192 (n. 167, post).

45. [1939] O.W.N. 25.

46. [1940] O.W.N. 57.

47. (1922) 22 O.W.N. 526 (n. 7, ante).

48. 22 O.W.N. 526 (n. 8, ante).

49. [1939] O.W.N. 25, 29.

first). In *Re King*⁵⁰ Hogg J. said: "Assuming that the fact is that [the tenant for life] has property or income from her own resources, this fact does not qualify nor take away her right to look to the testator's estate for funds sufficient for her maintenance and support to the same extent were she without means or property of her own. It was the intention of the testator, to be gathered from his will, that his widow should have the right to some portion of her husband's estate, and the fact of the widow having means of her own would not, in the circumstances of the case, be an element in ascertaining the husband's intention."

V

At this point in the preparation of his opinion, learned counsel had to spend a day on other work. He gave what he had written so far to his newest assistant for comment. The newest assistant read it through carefully and made a memorandum of two comments.

VI

The Newest Assistant's First Comment

The words of the wills have not been correlated with the type of power the judges thought they created. Doing so shows there is no telling what interpretation to expect except in obvious cases. The wills may conveniently be classified as containing: (a) words of control of the property; (b) words of discretion; (c) words as to use or benefit attached to the life interest or the power; (d) words indicating that the power relates to maintenance or support; (e) no words relevant to the extent of the power.

- (a) *Words of control of the property.* Apart from cases where the words clearly indicate a general power of appointment,⁵¹ the words in the wills are as follows.

"To have full control" — *held*, there was *no duty to account* for the exercise of the power *inter vivos*.⁵²

"To pay over or convey to the tenant for life" — *held*, a power for the purpose of *maintenance*.⁵³

"Power absolutely to appropriate to her own use and in all ways deal as if it were her own abso-

50. [1940] O.W.N. 57, 59 (n. 32, *ante*).

51. *Re Clinton* (1919) 16 O.W.N. 267; *Re Hand* (1975) 60 D.L.R. (3d) 402; *Re Stringer's Estate* (1877) 6 Ch.D. 1.

52. *Thompson v. Thompson* (1930) 38 O.W.N. 453.

53. *Re Van de Bogart* (1927) 32 O.W.N. 182.

lutely" — held, a general power inter vivos.⁵⁴
"Full power of use and disposal and application of the proceeds" — held, a general power inter vivos.⁵⁵
"Right to expend or otherwise consume" — held, a right to such extent as might be necessary to provide properly for maintenance and support.⁵⁶
"Power to sell" — held, a general power inter vivos.⁵⁷
"Privilege of sale subject to the approval of my trustees" — held, a power for the purpose of maintenance.⁵⁸
"To have and to own" — held, a power to use up the property as the donee deemed necessary.⁵⁹

(b) *Words giving a discretion.*

"As she should think proper" — held, a general power inter vivos.⁶⁰
"As he shall think fit" — held, a general power, probably exercisable only inter vivos.⁶¹
"As she may think fit" — held (reluctantly), a general power (which was exhausted inter vivos, thus obviating the question of whether it could have been exercised by will).⁶²
"As she sees fit" — held, a power for the purpose of maintenance.⁶³
"As she desires" — held, a power to take what was necessary for comfortable maintenance.⁶⁴
"As she may require or desire" — held, a general power inter vivos.⁶⁵
"As she may require" — held, a general power inter vivos.⁶⁶
"To any extent she may choose or require" — held, a general power inter vivos.⁶⁷
"To whatever extent she may require" — held, a

54. *Creighton v. Creighton* (1919) 17 O.W.N. 278.

55. *Re Comstock's Will* [1918] V.L.R. 398.

56. *Re McFarland* [1963] 1 O.R. 273.

57. *Re Willatts* [1905] 2 Ch. 135.

58. *Re Leslie* [1940] O.W.N. 345.

59. *Montreal Trust Co. v. Tutty* (1950) 25 M.P.R. 121.

60. *Scott v. Josselyn* (1859) 26 Beav. 174.

61. *Re Ryder* [1914] 1 Ch. 865.

62. *Re Shuker's Estate* [1937] 3 All E.R. 25.

63. *Re Kraft Estate* (1952) 6 W.W.R. (N.S.) 124.

64. *Re Parsons* (1926) 31 O.W.N. 192.

65. *Re Davey* (1910) 17 O.W.R. 1034.

66. *Lister v. Gilbert* [1938] 2 D.L.R. 783.

67. *Palmer v. Graham* (1930) 39 O.W.N. 322.

power to meet needs and requirements (possibly only after other funds available for the purpose had been exhausted).⁶⁸

“As she may apply to my trustee for” — held, a general power *inter vivos*.⁶⁹

(c) *Words of use or benefit.*

“To have the use of” — held, an unrestricted power to use *up*.⁷⁰

“The use of” — held, (i) a power for the purpose of maintenance;⁷¹ (ii) a power to spend the moneys according to need, without being liable to account (confined to moneys although the words were, “the use of all my estate”).⁷²

“For her sole use” — held, (i) an unrestricted power to use *up*;⁷³ (ii) a power to expend in any reasonable or necessary manner, but not to give away or expend for the purpose of depriving remaindermen.⁷⁴

“Benefit and use of” — held, a power for the purpose of maintenance.⁷⁵

“For his own benefit” — held, a general power.⁷⁶

“For their sole benefit” — held, a general power *inter vivos*.⁷⁷

“For her sole use and benefit” — held, a power exercisable for her necessary maintenance and support.⁷⁸

(d) *Words of maintenance or support.* The will sometimes relates the power expressly to maintenance.⁷⁹ There are also two examples of possible implication from a condition precedent.

“If she consider that the income or yearly proceeds do not provide sufficient for her suitable and proper support maintenance and benefit” she has power to use capital “to any extent she may choose or

68. *Re Hartle* (1922) 22 O.W.N. 528.

69. *Nicholson v. Muggerridge* [1931] G.L.R. 241.

70. *Re Richardson* (1928) 35 O.W.N. 81.

71. *Re Reid* [1946] 3 D.L.R. 410.

72. *Re Duncan* (1932) 41 O.W.N. 175.

73. *Stadder v. Canadian Bank of Commerce* [1929] 3 D.L.R. 651.

74. *Matte v. Matte* (1915) 8 O.W.N. 605.

75. *Re Achterberg* (1914) 5 O.W.N. 755.

76. *Pennock v. Pennock* (1871) L.R. 13 Eq. 144.

77. *Public Trustee v. Wilson* [1916] N.Z.L.R. 798.

78. *Re Knutson Estate* [1925] 2 W.W.R. 126.

79. *Re Stonehouse* (1925) 29 O.W.N. 156; *Re Luke* [1939] O.W.N. 25; *Re Plant* [1946] 3 D.L.R. 847; *Re Fox* (1890) 62 L.T. 762.

require" — *held*, a *general* power inter vivos.⁸⁰

"In case anything should occur that her income is not sufficient, she shall be at liberty to go to the principal" — *held*, a power for the purpose of *maintenance* suitable to her station in life.⁸¹

- (e) *No relevant words.* This category consists of wills mentioning no express power to touch capital and, except in one case, *Re King*,⁸² where the property was given to the testator's widow "absolutely for her natural life," with no descriptive words attached to the life interest given to the donee of the power over capital. That power therefore exists solely by implication from the gift over being confined to what is left at the death of the tenant for life. The implied power in such cases has been *held* to be: (i) *general*;⁸³ (ii) for the purpose of *maintenance*;⁸⁴ (iii) exercisable *so far as required for comfortable maintenance* suitable to the donee's station in life;⁸⁵ (iv) to draw *as necessary for maintenance and support* (but not having to exhaust other funds first).⁸⁶

VII

The Newest Assistant's Second Comment

The cases seem to establish a general principle that where property is left by will to a person for life, with a gift over of what is left at the death of the tenant for life, the gift over is valid and is subject to a power, of variable extent, exercisable by the tenant for life, to appropriate capital so as to diminish the fund that will pass under the gift over.

VIII

When learned counsel returned to the preparation of his opinion, he responded to his newest assistant's second comment in this way.

The cases only establish a general principle that that can be

80. *Palmer v. Graham* (1930) 39 O.W.N. 322.

81. *Re Pedrotti's Will* (1859) 27 Beav. 583.

82. [1940] O.W.N. 57.

83. *British and Foreign Bible Soc. v. Shapton* (1915) 7 O.W.N. 658 (the terms of the will not being stated in the report, there may have been some relevant words); *Re Chafe Estate* [1923] 1 W.W.R. 65; *Roche v. Roche* [1930] 4 D.L.R. 310 (apparently); *Re Bangs Estate* (1962) 39 W.W.R. 623.

84. *Re Johnson* (1912) 27 O.L.R. 472 (in the circumstances: see n. 39, *ante*). See also *Re Shamas* (1967) 63 D.L.R. (2d) 300 (n.180, *post*).

85. *Re Cutter* (1916) 31 D.L.R. 382.

86. *Re King* [1940] O.W.N. 57.

so. The thought that they establish it is so is too hasty. Sometimes the courts have found no such power over the capital to have been intended.

IX

Express Tenant for Life with No Power of Appointment

In *Re Elliott*,⁸⁷ a Nova Scotia case, the will gave all the testator's property to his wife, "for her own use during the term of her natural life and from and after her decease I give . . . the residue of my said estate as left unused by my . . . wife unto my children . . ." Owen J. held that the widow took a life estate, with no power to touch the corpus (though no doubt her use might wear some of it out).

In *Re Richer*⁸⁸ the testator gave his wife "the free use of all my estate both real and personal for her lifetime. After my . . . wife's decease the balance of my . . . estate that will remain unspent, if any, I give . . . to my four children to be divided among them in equal shares." Meredith C.J.C.P. said, refreshingly:⁸⁹ "It has always been impossible for me to understand why the Court should not permit such a will to take effect; what very good reason there could be for considering a gift, which those concerned might find no difficulty in understanding, or giving effect to, void for uncertainty; and, in such a case as this, if what

87. (1909) 7 E.L.R. 308. *English cases*: In *Re Thomson's Estate* (1880) 14 Ch. D. 263 the testator gave property to his wife for life, with power to dispose of the property for her own use and benefit, followed by a gift over of what remained at her death. The Court of Appeal held that she took a life interest and that the gift over was valid. In the circumstances it was not necessary to decide whether the wife had any power of disposing of the capital inter vivos. In *Re Holden* (1888) 57 L.J. Ch. 648 the gift was to the wife "for her own use and benefit as long as she may live" and there was a gift over of what remained at her death. Kay J. held that the gift over was meant to be of what remained after paying the testator's debts, not after capital disposals by the wife, so the wife had the right to use the property in specie but no power of appointment. Accordingly there was a bare life interest followed by a gift over of the fund intact. See also *Re Dixon* (1912) 56 S.J. 445, where Neville J. made a similar interpretation of a will with somewhat different wording. *Australian case*: In *Re McNeight's Will* [1916] V.L.R. 292 the testator made a gift for the sole use of his wife and another gift of cash for her support during her life. (The limitation "during her life" may have been meant to apply to both gifts.) After the wife's death there were to be some pecuniary legacies out of what was given to her and there was a gift over of the balance. Beckett J. held the wife took only a life interest. *New Zealand cases*: In *McLean v. McMorran* (1892) 11 N.Z.L.R. 1 the testator left property to his wife absolutely, subject to reduction to a life interest on remarriage, followed by a gift over in these terms: "After her death the money remaining to be divided between my sons . . ." The Court of Appeal held that the wife would have no power to encroach on the capital once her interest in the property had been reduced to a life interest. The "money remaining" meant the whole fund, i.e., the residue after specific devises and bequests, pecuniary bequests and payment of debts and funeral testamentary expenses. In *Re Elder* (1886) 14 N.Z.L.R. 565 the will left all the testator's property to his wife for life, followed by a gift over of the "residue of said estate, if any" and Williams J. held that the wife took only a life interest. The words "If any" might have envisaged the entire estate going on debts and funeral and testamentary expenses. See also *Pringle v. Stevenson* (1899) 18 N.Z.L.R. 317. In *Yates v. Yates* (1905) 25 N.Z.L.R. 263 the testator left all his property on trust "to allow my . . . wife . . . the free use and enjoyment thereof for . . . her life she using and enjoying the same as if she was the absolute owner thereof" followed by a gift over of what remained on the wife's death. Denniston J. held that the wife took only a life interest and that the gift over extended to all property not consumed or worn out by the wife's use and enjoyment in specie. See also *Re Bennett* [1956] N.Z.L.R. 304.

88. (1919) 50 D.L.R. 614.

89. 50 D.L.R. 615.

the widow is to take, in addition to a life-estate, is too uncertain, why it, not the gift over at her death, should not fail." But there was no holding of voidness here. The learned Chief Justice referred to the fuller setting out of his views in *British and Foreign Bible Soc. v. Shapton*,⁹⁰ where he held that the widow had an unrestricted power of appointment of the capital. Riddell J. was for applying to the personalty the decision in *Re Johnson*,⁹¹ where the Divisional Court held that the tenant for life had contingent power to encroach on the capital for the purposes of maintenance. Middleton J., in a short judgment, thought the widow could have the money, and if need be spend it, and Latchford J. agreed with him. The Ontario Appellate Division ended up by holding that the *Richer* tenant for life could spend the money and use the other property, but not sell or mortgage any property to raise money to spend. Such was the potency of "unspent" and the small range of things to which the judges were able to apply it. Such was the impotence of "if any."

In *Re Ridd Estate*⁹² the will left all the testator's property to his wife, "for the support of herself and my children as may be necessary . . . My wife . . . to have full use of my Estate as long as she lives, and at her death, providing the youngest child is twenty one years of age, . . . the remainder of my Estate shall be divided equally between my then surviving children . . ." Williams C.J., in the Manitoba King's Bench, held that all the widow took was a life interest. She had no power to touch the capital, despite the remainder being only of the remainder. Yet the learned Chief Justice said:⁹³ "As I study this wording it seems to me that the intention of the testator was plainly this: That his wife should take only a life estate, but with power to encroach on capital . . ." Where did the power to encroach go? Was it uncertain or impossible? No, it seems to have slipped quietly from the pages of the *Western Weekly Reports* while the compositor had his back turned. The only clue is on page 375, where Williams C.J. said: "But I feel that this will comes within the first class referred to by Middleton J.A." (in *Re Scott*:⁹⁴ a simple life interest unembellished by any power to encroach on the corpus by however light a step). Where did that certain feeling come from? The mystery deepens.

In the Nova Scotia case of *Re Cameron*⁹⁵ the testator gave

90. (1915) 7 O.W.N. 658 (n. 157, post).

91. (1912) 27 O.L.R. 472 (n. 37, ante).

92. [1947] 2 W.W.R. 369 (n. 199, post). See also *Doe d. Keeler v. Collins* (1849) 7 U.C.Q.B. 519; *Re King* (1925) 57 O.L.R. 144, 151, per Hodgins J.A.; *Re Florent* [1927] 3 D.L.R. 946.

93. [1947] 2 W.W.R. 373.

94. [1926] 1 D.L.R. 151, 152.

95. (1967) 62 D.L.R. (2d) 389.

his residuary estate to his wife "for life and at her death the balance of said residue remaining shall be divided equally among" her brothers and sisters. Cowan C.J.T.D. held that the wife had only a life interest, with no power over the capital. The learned judge said:⁹⁶ "There is nothing in [the will] which would give rise to the implication of such right of disposition, except the words 'balance . . . remaining' . . . It seems to me . . . that the words can and do refer to the residue remaining at the death of the life tenant . . . after consumption or destruction by use of certain portions of the residue which would consist of consumable goods and household furniture or other articles of a perishable nature."

X

It may be thought that those are unusual cases, but that a testator who gives a tenant for life personal property, and remainder over of what is left, *may intend*, and in those cases *may have intended*, to permit diminution of the corpus of what the remainderman is to take only by consumption or wear during the tenancy for life, and not by disposal by the life tenant; and that the choice lies between that less usual conclusion and the commoner one that the testator meant to give the tenant for life some power of appointment over the capital. In fact, there is another choice available. Sometimes the courts have decided that a person who appears to be a tenant for life is really the absolute owner or owner in fee simple.

XI

When is a Tenant for Life Not a Tenant for Life?

In *Re Turner*⁹⁷ the testator directed that his personal estate be sold and held on trust "for the sole use benefit and behoof of my . . . daughter . . . and to be at her sole disposal both as to principal and interest during the term of her natural life . . . and that her sole receipts . . . shall be . . . good and sufficient discharges to my . . . trustee . . ." Then followed a provision that if, on the daughter's death, "all or any of the . . . trust funds remain unappropriated by her," they should be divided equally between her children. The trustee handed the proceeds of sale to the daughter. Middleton J. came to the conclusion⁹⁸ "that there

96. 62 D.L.R. (2d) 416.

97. (1916) 10 O.W.N. 155. See also *Re Hill* (1923) 24 O.W.N. 158.

98. 10 O.W.N. 156.

was an absolute gift to the daughter — bearing in mind that she had taken over the whole property and discharged the trustee.” There is probably something wrong with the abbreviated report. The learned judge could not really have interpreted the testator’s intention by reference to what his trustee and his daughter did after he died. It is clear that the testator gave his daughter a life interest and a general power of appointment inter vivos over the capital, and that she had exercised the power in her own favour as to the whole fund. That seems to be what Middleton J. had in mind when he said: “The children would be entitled only to any portion of the trust fund unappropriated by [the daughter], remaining at her death. When she demanded and received the trust fund, she appropriated it, so that nothing remained as a trust fund at the time of her decease.”

In *Dobson v. Dobson*⁹⁹ the testator left his wife “all my personal property and have the use of same at her discretion till her demise at which time all such property left to be divided share and share alike between my sons . . .” McNiven J., in the Saskatchewan King’s Bench, held that made the widow absolute owner of the personalty. It requires considerable effort to discern that that was the testator’s intention. He used, of the gift to her, the words “till her demise.” He made a gift over of what was left. He might have intended his widow to take a life interest and a power of appointment inter vivos over the corpus of the fund, with remainder, in default of appointment, to his sons. He might have meant his widow to take a life interest without any power of appointment, the reference in the gift over to what was “left” indicating only that the widow, who was empowered to “use” the property, was not to be liable for use amounting to consumption or wearing out and could, quite properly, as a heavy-handed widow, smash things accidentally. If there are no inconsistencies in the will, there is no need to decide whether any part of it is dominant. Nevertheless, the learned judge thought it was obvious that the dominant intention of the testator was to provide for his widow. McNiven J.’s conclusion involves reading the will like this: (1) “I leave my wife all my personal property” [she takes absolutely because there is nothing to indicate the contrary]; (2) “she can use it till she dies” [no harm in stating the obvious: an owner can use her property — that nobody can deny — but not when she is dead, because then it is too late for physiological reasons]; (3) “when she dies, what she still has of the personal property she takes under my will is to go to my sons equally” [that is void: it is repugnant to an

99. [1947] 1 W.W.R. 483. See also *Walker v. Walker* [1947] 4 D.L.R. 624 (Sask. K.B.).

absolute interest to have a gift over: it is an abortive attempt by the husband to invade the wife's power of testamentary disposition: the brute.]

In *Re Rankin Estate*¹⁰⁰ the will left the testator's residuary property to his sister, "to be used by her and at her death if any of the money is left, I wish it to go to the University of St. Francis Xavier Antigonish N.S." Thompson J., in the Saskatchewan King's Bench, held that the sister took absolutely, there being either: (i) an attempted gift over which was void as being repugnant to the sister's unfettered right to use up the capital; or (ii) no attempt to make a gift over on her death, the testator having used only precatory words not creating a trust. But: (i) the gift over was not repugnant to anything if the sister's rights were confined to dealings inter vivos and if the gift over was only of what she chose not to use up; (ii) the words are not precatory unless they are construed as addressed to the sister, for which construction there is no warrant. The learned judge said:¹⁰¹ "It will be noted that the testator did not say that his sister was to have the use of his property for her life only." [There is harm, apparently, in not stating the obvious. When on earth — or perhaps elsewhere — did Thomson J. think she might use it if not when she was alive?]

In *Yarmie v. Panchyshyn*¹⁰² the will gave all the testator's property to his "wife Dora Yarmie for her own use and benefit absolutely and for ever for the rest of her life and until her death. And at the time of Dora Yarmie's death she will by appointment direct the properties and all personal goods to my Executors Peter Panticheson of the Post Office of Whittome in the Province of Saskatchewan for his sole use and benefit." It would be fanciful to proceed on the basis that the testator made clear what he meant. His wife could not take an interest in his property both "absolutely and for ever" and "for the rest of her life and until her death." Had there been a clear-cut gift over, the interpreter might have been influenced by it in favour of a life interest for Dora, but the terms of the benevolence towards Peter suggest that Dora was meant to have some power of testamentary disposal, which power she was ordered to exercise in Peter's favour, or of which the testator forecast that she would so exercise it. The Saskatchewan Court of Appeal did treat those terms as a gift over but did not regard the widow as a tenant for life. Martin C.J., giving the judgment of the court, said:¹⁰³ "This

100. (1951) 2 W.W.R. (N.S.) 562 (appeal dismissed: 3 W.W.R. (N.S.) 433).

101. 2 W.W.R. (N.S.) 563.

102. [1952] 3 D.L.R. 693.

103. [1952] 3 D.L.R. 697.

is an absolute gift and concluding words 'for the rest of her life and until her death' cannot cut down the absolute gift. . . . The absolute gift must prevail and the attempted gift over must be declared repugnant and void."

That recipe is not a speciality of the house to experience which it is necessary to visit Saskatchewan. In *Re MacInnis and Townshend*¹⁰⁴ the testatrix willed to her sister all her property, "to be used and disposed of as she wishes during her lifetime and that any that is left at her death it shall go to my niece . . ." The uninitiated might believe, impiously, that a testatrix could not construct a clearer example of a life interest with a general power of appointment inter vivos over the corpus and a gift over in default of appointment. The Prince Edward Island Supreme Court in banco held that the sister took all the interest of the testatrix in the property. They read "during her lifetime" as governing only the use and disposal and not as evincing an intention, in terms of the Wills Act, contrary to the presumption that a will passes the testator's whole interest in the property left to the legatee or devisee. On that footing the sister had full powers of disposal inter vivos and by will by virtue of ownership, and any attempt to remove her testamentary power expressly or by implication (e.g., by making a gift in remainder on her death) was void.

The Ontario Divisional Court stood on that footing in *Re McElwain and Demartini*.¹⁰⁵ There, the will gave the residue of the testator's estate to his wife, "for her use during the term of her natural life, with power to use the principal as well as the income therefrom in any way that she may see fit. On the death of my . . . wife, I give . . . all that remains in my estate to my daughter . . ." It was held that the will left the residuary estate to the wife absolutely. Keith J., giving the judgment of the court, said:¹⁰⁶ "The attempt to dictate what was to be done with any portion of his estate remaining at her death is wholly repugnant to the fundamental concept of the will which was that the widow was to enjoy the property without any sort of restriction . . ." In addition to wondering at the equation of power to use and ownership, it is permissible to wonder how some concepts of a will come to be more fundamental than others, especially when there is no inconsistency between them.

Some judges have wondered. In *Re Mayer Estate*¹⁰⁷ Ford J.

104. (1973) 35 D.L.R. (3d) 459.

105. (1974) 46 D.L.R. (3d) 525.

106. 46 D.L.R. (3d) 528.

107. [1950] 2 W.W.R. 858, 861 (n. 10. ante).

said of words similar to those of the will in *Re McElwain and Demartini*: "I cannot find in the words of the will any dominant intention to make an absolute gift followed by a subordinate intention that would reduce it to a life estate to which effect could not be given." In the Manitoba Court of Appeal, in *Re Schumacher*,¹⁰⁸ Dickson J.A. (with whom Freedman C.J.M. agreed, though Guy J.A. dissented) said: "I confess to some difficulty in understanding the rationale behind the apparent reluctance sometimes displayed by the Courts in giving effect to the express wishes of a testator." And later:¹⁰⁹ "The legal concept of repugnancy can be carried too far. Clearly, if two bequests are in conflict and irreconcilable, one or other must give way. *Re Walker*¹¹⁰ was such a case. It affords a good example of repugnancy." Again:¹¹¹ "It seems to me that unless there is an obvious and clear conflict created by two provisions of a will the Court should not be alert to frustrate the expressed intention of a testator by seeing repugnancy where none truly exists." In *Re Hand*,¹¹² where the testator's sister, the tenant for life, was given full powers inter vivos over the corpus of the residue, Pennell J. said: "In this will I find no attempt to deal with that which remains undisposed of by the sister in a manner repugnant to the gift to her."

XII

Our fictitious testator, about whom this fairy tale is woven, made no explicit reference in his will to the lifetime of his widow. He referred to her death, but not in the sentence willing property to her. That differentiates his will from those in the cases discussed so far. Learned counsel naturally did not overlook that, and so his opinion continued.

XIII

Absolute Gifts and Repugnancy

There is undoubtedly a rule that, if a grant of property be made, there can be no valid terms of the grant inconsistent with the nature of the proprietary interest granted. There cannot be a remainder after a beneficial fee simple (or after an absolute

108. (1971) 20 D.L.R. (3d) 487, 490. See also the remarks of Meredith C.J.C.P. in *British and Foreign Bible Soc. v. Shapton* (1915) 7 O.W.N. 658 (n. 157, post) and *Re Richer* (1919) 50 D.L.R. 614, 615 (n. 89, ante).

109. 20 D.L.R. (3d) 491.

110. (1925) 56 O.L.R. 517 (n. 120, post). Later it is submitted that *Re Walker* was a bad example of repugnancy.

111. 20 D.L.R. (3d) 494.

112. (1975) 60 D.L.R. (3d) 402 (n. 6, ante).

beneficial interest in personal property). There can be an executory limitation over, but not on the owner of the fee simple alienating it. Since a will has to be construed as a whole, it does not follow from use by the testator of the word "absolutely" or of some equivalent that he intends to pass a fee simple or absolute interest. Other words in the will may make the contrary clear (as may surrounding circumstances, for the words are not everything). One can, after all, be the absolute owner of a life estate or interest, as opposed, for example, to owning a determinable life interest under a protective trust, or to a widow's life interest determinable on her remarriage. If the will makes clear that an inalienable beneficial interest in property is given to one person, and yet purports to make a gift over of all or part of the same property to another person on the first one's death, the gift over is void for repugnancy to the absolute interest.¹¹³ To put it another way, the gift over is ineffective to interfere with the will of the donee of the inalienable beneficial interest or with the rights of his next of kin or with his power of alienation inter vivos. Generally, though, an argument can be raised that the very presence in the will of the words of gift over indicates that the testator did not intend to give an inalienable beneficial interest to the prior donee, but merely a beneficial interest for his life (with or without a power of appointment over the fee or capital).

Such an argument met with no success in *Re Hulett Estate*,¹¹⁴ an Alberta case. The will there gave all the testator's property to his wife, "to and for her sole use and benefit absolutely . . . I further direct that upon the death of my wife . . . that the following division shall be made in my estate . . ." Macdonald J.A. held the gift to the wife absolute and the gift over void as repugnant to it. That does seem a strained interpretation. It is unlikely that the testator envisaged granting property outright to his wife and then interfering with her outright ownership. It is more probable that he meant, by his gift over, to indicate that his wife was to take his property for life. The words

113. *Henderson v. Cross* (1861) 29 Beav. 216; *Perry v. Merritt* (1874) L.R. 18 Eq. 152.

114. [1945] 1 W.W.R. 387. See also *Re Cathcart* (1915) 8 O.W.N. 572, where Sutherland J. was faced with the conundrum of a primary gift expressed to be for life and in fee simple: *Re Wigle* (1924) 27 O.W.N. 357; *Yarmie v. Panchyshyn* [1952] 3 D.L.R. 693 (n. 102, ante). In *Re Burke* (1959) 20 D.L.R. (2d) 396 (Ontario Court of Appeal) the will left the testator's residuary estate to trustees on trust "... to pay and transfer the same to my wife ... for her own use absolutely ... and ... upon her decease, in respect to any balance of my estate which may remain, I give the same as follows ...". Laidlaw J.A., with whom Morden J.A. agreed, held the "balance" meant what the trustees had not yet transferred to the widow when she died a month after her husband, as to which the gift over took effect. LeBel J.A., dissenting, thought the wife became the absolute owner of the residue. *English case*: In *Re Jones* [1898] 1 Ch. 438 the gift was to the testator's wife "for her absolute use and benefit so that during her lifetime for the purpose of her maintenance and support she will have the fullest power to sell and dispose of my estate absolutely" with a gift over of what remained after paying the wife's funeral expenses. Byrne J. held that the wife took absolutely and that the gift over was void for repugnancy to her interest.

“to and for her sole use and benefit absolutely” could be regarded as characterising her life interest at least as easily as the gift over could be ignored in deciding what interest he meant to give her.¹¹⁵

XIV

The will which occasions the writing of the opinion does not actually use the word “absolute” or an obvious equivalent. It says the testator wants his wife “to be the owner of” his property. The quoted words could be the equivalent of “absolutely” or “in fee simple;” but, in view of the testator’s desire that what she still has at her death should pass to his nephew, here using the words “absolutely and in fee simple,” it could be argued that the widow is meant to have a beneficial life interest, with a power of appointment inter vivos, followed by a gift over to the nephew in default of appointment. There are, in fact, many cases decided by the courts on gifts not expressed to be either for life or inheritable, with a gift over on the death of the first donee of what is left then.

XV

Gift of Unstated Duration, Followed by Gift Over of What is Left on Death

The first gift is often held to be absolute or in fee simple and the gift over void as repugnant to it. By and large, the holding that the first gift is of the full interest of the testator in the property is based on the assumption that it must be because it is not said not to be. There are many degrees of self-expression

115. As to the position in Quebec, see *Shearer v. Hogg* (1912) 46 S.C.R. 492. *English cases*: In *Re Pounder* (1886) 56 L.J. Ch. 113 there was a gift to the wife “for her own absolute use and benefit and disposal” followed by a gift over of what remained after paying the wife’s debts and funeral expenses. Bearing in mind that those dispositions were in a codicil revoking an undoubtedly absolute gift to the wife, Kay J. held that she got a life interest and a general power of appointment inter vivos and that the gift over took effect in default of appointment. In *Bibbens v. Potter* (1879) 10 Ch.D. 733 Hall V.-C. held that the testator’s sister took only a life interest under a gift to her “absolutely” followed by a gift over of what remained at death. See also *Re Dixon* (1912) 56 S.J. 445. *New Zealand case*: In *Re Cate* [1923] N.Z.L.R. 419 the testator left all his property to his wife “absolutely, but on the following conditions namely that in the event of her marrying again, or at her death, whatsoever there is left that I have left to her shall be equally divided between my children . . .” Hosking J. said (p. 422) it was plain from the conditions that the testator did not use the word “absolutely” for the purpose of conveying an absolutely unqualified interest. The wife took a life interest determinable on remarriage, and the gift over was effective. The wife had no power of appointment, the learned judge saying (p. 424): “In the present case the testator was a farmer, as he emphatically declares. The contingency of farm stock, whether live or dead, perishing or being worn out before it is realized, especially where the first taker is suffered to continue in actual possession and to have the use of the subject-matter, would amply justify and account for words of the kind in question [‘whatsoever there is left’]. The testator no doubt lived in happy unconsciousness of the rule in *Howe v. Dartmouth*, and died unsuspectingly believing that under his will his wife would be entitled during her life to enjoy in specie the property he was leaving behind him, of which parts were bound to perish or become worn out if his wife survived him for any length of time.”

between "absolutely" or "in fee simple" and "for life." There may be a simple primary gift, such as: "I leave all my property to my wife and on her death any of my property that remains is to go to my son." There may be additional words which can be regarded as assisting either side in the contest as to whether the primary donee takes everything (in which case the gift over is void) or the gift over is effective (in which case the primary donee takes a life interest). Those words may be annexed to the primary gift, as: "I leave all my property to my wife with full power of disposition" followed by a gift over on her death. The full power of disposition can be prayed in aid of the absoluteness of the gift (by giving the wife an important attribute of ownership which is absolute or in fee simple the testator indicated that that was the type of ownership she was to have) and consequent repugnancy (or uncertainty of subject-matter) of the gift over; or in aid of the view that the gift to the wife is for life (by giving the wife an express power of disposal the testator implied that she would not otherwise — i.e., as owner of the whole interest in the property — have had it) and hence that the gift over is a valid one as to property unappointed by the wife under her power. Equally, words may be annexed to the gift over, as: "I leave all my property to my wife and after her death I want everything she has not given away or sold to go" to someone else. The words relating to sale and gift may be regarded as giving the wife a power, to which the gift over is subject, or as showing that the interest given to the wife is absolute or in fee simple, after which the gift over is void.

Cases where the gift over was held void

In *Re Miller*¹¹⁶ the testatrix gave the residue of her estate to her brother, "with power to sell and dispose of as full as I could do now my real estate . . . and it is my will and intent that my . . . brother . . . shall use so much of the proceeds of my property as shall be necessary to provide a comfortable maintenance for him during his lifetime and that if any of my property or the proceeds thereof shall not be necessary for the comfortable maintenance of my . . . brother and shall remain at his death then such part so remaining shall be divided equally between my niece . . . and my nephew . . ." Middleton J. said:¹¹⁷ "The choice is

116. (1914) 6 O.W.N. 665. Cf. *British and Foreign Bible Soc. v. Shapton* (1915) 7 O.W.N.: 658, 661, per Meredith C.J.C.P. (n. 160, post). In *Re Story* (1909) 1 O.W.N. 141 the testator provided: "I . . . will that my wife . . . do have the benefit of all my real and personal property particular all monies . . . and in the event of her having any of my money at the time of her death, the same shall be divided amongst my children or their heirs equally." Riddell J. held that the wife took the real property in fee simple and had the right to use up personal property (e.g., spend money). No question was raised as to the validity or effect of the gift over of personalty.

117. 6 O.W.N. 666.

between an absolute gift and a life estate. There does not seem to be any middle ground. If the beneficiary has the right to deal with the corpus, then the gift of any balance that may remain is repugnant and void, for the property is vested in the first taker absolutely, and the attempt to give what remains at the death of that first taker is an attempt to do something not permitted by law." Having noted that the brother was paralytic and evidently the main object of the beneficence of the testatrix, the learned judge held he was the absolute owner of the residuary estate. That is wrong and the reasoning is terrible. The question was whether the brother was meant to be the absolute owner or not. One cannot answer that question by saying he was and holding a contrary intention repugnant. If the gift over was repugnant to the idea of the brother having an absolute interest, the latter cannot have been the idea of the testatrix. The gift over to the niece and the nephew was consistent only with the brother having a life interest. The brother was also intended to help himself to the capital when *necessary to provide a comfortable maintenance for him*. That meant a limited power of appointment inter vivos to which the gift over was subject. That interpretation would have conferred on the brother the status of main object of the beneficence of the testatrix, without giving him more than she intended him to have, without denying him comfortable maintenance during his unfortunate paralysis and without denying the niece and nephew.¹¹⁸

In *Re Brenner*¹¹⁹ the testator left his residuary estate, after two pecuniary legacies, to his wife, "and I empower her to sell or dispose of all or any of the . . . estate . . ." and then he provided for the distribution of the property among his children and grandchildren when his wife died. In Sutherland J.'s opinion, there

118. See also *Re Freedman* [1974] 1 W.W.R. 577, 579-580 (n. 153, *post*). *Scottish case*: in *Cochrane's Executrix v. Cochrane* 1947 S.C. 134 the will gave all the testator's property to his sister and declared: "Anything she may desire to dispose of or realise after my decease, such as library and stamp collection, may be done. On her decease everything of mine to be sold and the proceeds divided" amongst certain charities. All seven judges decided that the sister took the fee. The majority took the view, as expressed in the joint judgment of Lord Justice-Clerk Cooper and Lord Jamieson (p. 141): "Reading the whole provisions together, we find in them a sufficient expression of the testator's intention that the charities should take in succession to the sister whatever on her death might remain of his estate . . . In other words our preference is for the view that the testator intended that the charities should take in succession to the sister as substitutes or quasi-substitutes . . ." They were not called upon to decide, and offered no opinion, whether the intended substitution was effective. *Australian case*: in *Ritchie v. Magree* [1964] A.L.R. 649 the will gave the testator's residuary estate to his wife, with liberty to dispose of any portion, and a gift over of what remained at his wife's death to his daughter. The High Court, on appeal from New South Wales, held that the wife took the residue absolutely and that the gift over was void for repugnancy. *New Zealand cases*: In *Jacob v. Jacob* (1897) 16 N.Z.L.R. 52 the will gave all the testator's property to his wife and son as joint tenants, stated that they were "empowered to sell, lease, or dispose of in any way they may think best of my property" and made a gift over of what remained on the death of the survivor. Williams J. held that the wife and son took absolutely and that the gift over was void for repugnancy. In *Shepherd v. Hunt* (1900) 3 G.L.R. 113 the will gave all the testator's property to his wife, "to use and dispose of the same as she may deem fit" and made a gift over of what remained at her death. Conolly J. held that the wife took absolutely and that the gift over was void for uncertainty and repugnancy.

119. (1920) 18 O.W.N. 406.

was an absolute gift to the wife, and nothing was found in the will to cut that down to a life interest. Yet there were two indications of a life interest which, presumably, the learned judge found but did not recognize: (i) the express power of sale or disposal; (ii) the gift over. The decision is wrong. It amounts to saying that the gift to the wife was absolute because it was not expressed to be for life, and the rest of the disposition of the residue, being inconsistent with anything but a life interest (probably coupled with a power of appointment over capital), must be rejected for repugnancy to that absolute interest. That is question-begging in a circle.

The first reported occasion upon which a case of this kind came before an appellate court in Canada is *Re Walker*.¹²⁰ That testator said in his will: "I give and devise unto my . . . wife all my . . . property [except a gold watch and chain and jewellery specifically bequeathed to nephews] and also should any portion of my estate still remain in the hands of my . . . wife at the time of her decease undisposed of by her such remainder shall be divided as follows . . ." The Ontario Appellate Division held that the wife took the residuary estate absolutely. Middleton J.A. stated a principle which is correct but irrelevant:¹²¹ "When a testator gives property to one, intending him to have all the rights incident to ownership, and adds to this a gift over of that which remains in specie at his death or at the death of that person, he is endeavouring to do that which is impossible. His

120. (1925) 56 O.L.R. 517. See also *Re Burgar* (1909) 14 O.W.R. 772; *Re Sexton* (1920) 19 O.W.N. 139, where Middleton J.'s propositions of law relate to a will whose terms are not fully set out in the report. Cf. *Re Cotterill* (1911) 2 O.W.N. 745 (n. 154, post); *British and Foreign Bible Soc. v. Shapton* (1915) 7 O.W.N. 658 (n. 157, post); *Re Cutter* (1916) 31 D.L.R. 382 (n. 162, post); *Re Chafe Estate* [1923] 1 W.W.R. 65 (n. 164, post); *Re Moren* [1953] 4 D.L.R. 138 (Nova Scotia). English case: in *Bowes v. Goslett* (1857) 27 L.J. Ch. 249 Stuart V.-C. held that the wife took an absolute interest, and that a purported gift over was void for repugnancy to that interest, where a testator left his wife all his leasehold property "for her sole use and benefit" and provided for a further gift on her death of "all my leasehold property not already disposed of by her. . . ." Irish cases: In *Re Jenkins' Trusts* (1889) 23 L.R. Ir. 162 Porter M.R. held, where a testatrix left all her property to her sister and stipulated a gift over of what remained undisposed of at her sister's death, that an absolute gift to the sister was meant; as her sister predeceased the testatrix, the testatrix died intestate as to all her property, since the attempted gift over on the sister's death was repugnant to her (lapsed) absolute interest (There are few more unjust decisions in the reports.) In *Re Walker* [1898] 1 I.R.5 the testatrix made a gift on trust for her sister M. and provided that the balance on M's death should be held on trust for the testatrix's niece's children then living. She made another gift on trust for her sister E. and provided that the balance on E's death should go, as to £40, to the trustee, and as to the rest, as the balance of the gift to her sister M. Those provisions were contained in a long will and codicil, which created some express life interests. Porter M.R. held that M and E took absolutely. In his opinion the testatrix meant them to have the whole property but thought the settlor of a fund on trust for another person had power to dispose of the unspent part of it after the death of the cestui que trust. He thought that to hold that the sisters took life interests would defeat the intention of the testatrix. (Was there an Irish-Canadian family of Walkers who held strong beliefs about how wills should be drafted?) Australian cases: In *Wright v. Wright* [1913] V.L.R. 358 a Beckett J. held that the wife took absolutely, and that the purported gift over was void, where the testator left all his property to his wife with a gift over of what remained at her death. Similar decisions were made by Harvey C.J. in Eq. in *Mowsar v. Birrell* (1929) 29 S.R. (N.S.W.) 506 and by Adam J. in *Re Ferguson* [1957] V.R. 635. New Zealand case: in *Rodger v. Rodger* (1893) 12 N.Z.L.R. 392 the testator gave his residuary estate to his wife "for the benefit of my family" and the will provided for a gift over of what remained at the wife's death. Denniston J. held that the wife took an absolute interest and that the gift over was void for repugnancy to that.

121. 56 O.L.R. 522.

intention is plain but it cannot be given effect to." Indeed his intention was plain, but it was not to give his widow all the rights incident to ownership. It was to allow her to decide whether to appropriate to herself all the rights incident to ownership. That was meant to be a general power of appointment. He did not intend her to have power of disposition by will unless she had previously exercised the general power of appointment in her own favour. The power was meant to be exercisable *inter vivos* only. He did intend the remainder of the property to be divided in accordance with his will if any portion of it had not been taken out of his will by his widow's exercise of her power. That was meant to be a gift over in default of appointment. He intended his widow in any event to enjoy the property while she lived. That was meant to be a life interest. It is all clear and it was all possible. Riddell J. had found it possible but the Appellate Division reversed his decision. Middleton J.A. found in the will a conflict not put there by the testator. So he thought the court had "to endeavour to give such effect to the wishes of the testator as is legally possible, by ascertaining which part of the testamentary intention predominates and by giving effect to it, rejecting the subordinate intention as being repugnant to the dominant intention." That meant ascertaining whether the widow took a life interest or one of unlimited duration. "Subject to an apparent exception to be mentioned, there is no middle course . . ." The apparent exception comprises cases in which "the life-tenant is given a power of sale . . ." ¹²² Without saying why, the learned judge concluded abruptly for the voidness of the gift over on the ground of repugnancy to an absolute interest. Latchford and Orde J.J.A. agreed with Middleton J.A. without any fuss, and Magee J.A. did so in a few opaque words of his own. It follows from such a decision that if the first donee refrains from making a will because she expects the residue of what she took from the testator to go as provided in his will, the intention of both donor and donee will be defeated in favour of the donee's next of kin without effectuating any policy superior to that of carrying out testators' intentions. The presumption in the Wills Act that all the interest of the testator passes to a legatee or devisee *unless there is a contrary intention* becomes a rule that a legacy or devise is of the testator's whole interest in the property *unless there are words of limitation*.

Re Walker was followed by Rose J. in *Re Moore*. ¹²³ There the

122. 56 O.L.R. 523.

123. (1925) 57 O.L.R. 530. Cf. *Re Parsons* (1926) 31 O.W.N. 192 (n. 167, post); *Re Reid* [1946] 3 D.L.R. 410 (n. 168, post); *Re Best* (1960) 23 D.L.R. (2d) 480 (n. 178, post).

testator gave his residuary estate to his wife, "for her use and benefit and it is my will that my wife at her decease leave the balance of my estate if any for the benefit of the Home Mission Fund of the Presbyterian Church of Canada." There was more justification for holding the widow absolutely entitled than there had been in *Re Walker*: Moore had expressly given his wife a life interest in other property; and the desire that his widow "leave" the balance suggests that he thought he was giving her something that would form part of her estate when she died.

Re Walker was followed again and applied, this time in the Ontario Appellate Division, in *Re Scott*,¹²⁴ though Riddell J.A. thought he might have decided otherwise but for authority. In that case, the will was muddled, but appeared to give the testator's wife his residuary estate, "to have and to hold with full power to control the same" and it provided that the testator's sister "at the time of the death of [my wife] inherit whatever property remains in her hands at the time of her death." Middleton J.A., with whom Riddell and Masten J.J.A. and Grant J. concurred, said:¹²⁵ "I can find nothing in the will to justify the view that all that was given to the widow was a life-estate, or a life-estate with power to encroach upon the corpus. The expression to have and to hold with full power to control the same does not, to my mind, indicate any intention to cut down the ownership, but rather a desire to emphasize the absolute nature of the gift to her. . . . It is plain to me that what the testator intended was to give absolutely to his wife and to control, upon her death, the destiny of that which he had already given, something which can be done under the civil law, but which cannot be done under the common law." Middleton J.A. thought the question presented indistinguishable from that considered in *Re Walker*; but the fact remains that there were no words in the *Walker* will like "to have and to hold with full power to control the same."

In *Re Sigman*¹²⁶ the testator, by clause (1) of his will, made a gift of all his property "To my wife" and later said: "(3) I . . . devise . . . to my wife . . . all my real estate which I may possess during her lifetime & after she has deceased what property is left to be sold & divided equi shares among the following heirs . . ." Wright J. decided that the gift over to the heirs was void. He said:¹²⁷ "The provisions of clause 3, instead of cutting down the absolute estate given by clause 1 to the widow, recognise that she is to take an absolute estate, because the testator directs that

124. [1926] 1 D.L.R. 151.

125. [1926] 1 D.L.R. 152.

126. (1926) 30 O.W.N. 280.

127. 30 O.W.N. 281.

what property is left is to be sold, indicating that the widow is entitled to something more than a life-estate. No reference is made to any power of sale, and it must be assumed that she was given an absolute estate in the first instance." That is very hard to follow or swallow. The question being whether an estate in fee simple is given by the will as a whole, it cannot be answered by reference to what would happen if clause (1) stood alone. As to the direction that the real property which was left was to be sold on the widow's death: that is no more an indication that the widow was entitled to something longer than a life estate than it was an indication that Wright J. was about to set to sea in a sieve. In fact, it seems to be a direction as to the manner of a gift over in default of exercise of a power of appointment; and one would certainly face a repugnancy if the testator had added a power of sale to his trust for sale.

Re Walker was applied outside Ontario when adopted by the Manitoba Court of Appeal in *Re Robinson*.¹²⁸ There the testatrix stated: "I give my entire estate to my brother" (with the exception of some gifts to other people). And: "Upon the death of my . . . brother . . . , the residue of my estate then remaining is to become the property of" her niece. The court held by a majority of three to two that (as expressed in the judgment of Trueman J.A.,¹²⁹ with whom Fullerton J.A. agreed) the intention was clear, and that it was to give an absolute estate to the brother (which was valid) and to make a gift over (which was invalid). Although he agreed with that result, Prendergast C.J.M. thought¹³⁰ that a life interest in the brother with power to draw upon the corpus for maintenance under the direction of the court was the possibility that would most nearly carry out the intention expressed by the will; an untrammelled power being intended but impossible. The learned Chief Justice agreed that the brother took all only because none of the other judges shared his view as to what was the nearest the court could get to the intention. In law, a life interest with a general power of appointment inter vivos of the capital is quite possible. Dennistoun J.A., with whom Robson J.A. agreed, thought the brother took the property for life, without any power to encroach on the capital, because: (i) a trustee was interposed, and that must have been for the purpose of protecting the capital; and (ii) the testatrix was under no moral duty to support her brother, who was well provided for by the income, and who was not dependent on his

128. [1931] 1 D.L.R. 289 (n. 192. post).

129. [1931] 1 D.L.R. 297-298.

130. [1931] 1 D.L.R. 291.

sister's estate anyway. It is amazing how aversion to irrelevances and spurious doctrines enabled all five judges to come to a wrong conclusion. (The use of an express trust and the absence of a moral duty could help to clarify an unclear will, but the testatrix must have intended her brother to have some power over the capital when she confined her gift over to what was "then remaining." In the converse case, the absence of an express trust cannot abrogate an intention to safeguard capital: if that is the intention it must be effectuated by the appropriate machinery, which could include an implied or constructive trust.)

The Nova Scotia Supreme Court unanimously applied *Re Walker in Nova Scotia Trust Co. v. Smith*,¹³¹ where the testator said: "I devise and bequeath [all the residue of my estate] to my wife . . . ; provided however, that what remains of said residue at her death shall be divided" between two adopted children. It was held that the wife took the residue absolutely. The court treated the case as one of a void gift over, though it looks more like a case of a void condition subsequent or a valid gift over.

In *Re Kane*¹³² the Manitoba Court of Appeal followed their own previous decision in *Re Robinson*. The testator gave all his property "unto my wife . . . After the death of my wife, my estate is to go to my grandchildren equally, if there is any left." Prendergast C.J.M., with whom Trueman and Richards J.J.A. concurred, held that the wife took the property absolutely. The learned Chief Justice asserted:¹³³ "The general rule in cases of this class seems to be, that where a gift, made in terms that would make it absolute if it stood alone, is followed by a gift over of what may remain at the death of the first legatee, the second legacy is void. It is not a matter, in such a case, of making out the testator's intention, for it is quite plain that he intends that there should be a gift over. The point is that the two gifts are considered to be incompatible and as one of them must give way, the first and main one is maintained and the other held a nullity." In view of the way that is put, and of his opinions expressed in other cases, it seems that the learned Chief Justice was stressing the enormity of the doctrine rather than explaining it. In practice, the "general rule" is not applied with a high degree of generality. Dennistoun J.A. also agreed with Prendergast C.J.M. and explained his different view from that which he had taken of the *Robinson* will on the ground that the *Kane*

131. [1933] 2 D.L.R. 272.

132. [1934] 3 D.L.R. 637 (n. 193, *post*).

133. [1934] 3 D.L.R. 638.

will appointed no trustee and that the testator intended to give his wife a free hand in the management of a cooperage business which was the principal asset of his estate. The testator cannot have intended her to write her will with a free hand, and the free hand she was meant to have inter vivos could have been articulated by a general power of appointment. Robson J.A. dissented, as in *Re Robinson*, again thinking the widow had a life interest (whether with or without power to encroach on the corpus not being in question).

The same court came to a similar conclusion, again with dissent, in *Re Bradshaw*.¹³⁴ Mrs. Bradshaw made the following direction as to property by her will: "Kindly have all turned to Mr. B. [her husband] not to be drawn out unless for his personal use, if needed, if he passes away to be left in trust for ten years." The majority of the Manitoba Court of Appeal (Dennistoun, Trueman, Robson and Richards J.J.A.) held that Mr. B. took the property absolutely: what (if anything) he did not take under the will he took as his wife's successor on intestacy. Trueman J.A. specifically held that Mr. B. did not take the corpus under the will, but only a wide and possibly uncontrollable discretion to encroach on it. It was the turn of Prendergast C.J.M. to dissent. The learned Chief Justice held that the husband took nothing but what the will gave him, that being a life interest together with a power to encroach on the corpus for his support; and that the gift over was to the husband's children and grandchildren. He said¹³⁵ that the rule "that a testator, after making an absolute gift, cannot put a string on it" in his view was "absolute only when the two discordant provisions are separate and distinct and not when the sense of the phrase indissolubly joins them."

In British Columbia *Re Walker* was followed in *Re Scott Estate*.¹³⁶ The will there ran: "I devise and bequeath to my wife . . . all my real estate of every kind and all my personal estate and effects whatsoever to her sole use and benefit, subject to the following restrictions: one-half of the whole of my said estate both real and personal which shall remain at the time of the death or remarriage of my . . . wife shall go to my . . . wife or such person or persons as she shall appoint, and the remainder of my . . . estate shall be divided in the following manner . . ." Manson J.'s holding that the widow took all the property absolutely, and that the "restrictions" amounted to no more than an expression

134. [1935] 1 D.L.R. 167 (n. 194, post). Cf. *Re Plant* [1946] 3 D.L.R. 847 (n. 174, post).

135. [1935] 1 D.L.R. 168.

136. (1937) 52 B.C.R. 278. Cf. *Re Parsons* (1926) 31 O.W.N. 192 (n. 167, post); *Re Reid* [1946] 3 D.L.R. 410 (n. 168, post); *Re Best* (1960) 23 D.L.R. (2d) 480 (n. 178, post).

of a desire on the part of the deceased, was in flagrant violation of an obvious intention that the widow was to take: (i) a life interest terminable on remarriage; (ii) the remainder in half on remarriage; (iii) a power of appointment by will of that same half if she died without having remarried; (iv) a general power of appointment inter vivos of any capital in which, at the time of exercise of the power, she had a life interest.

Re Walker was followed in Alberta in *Re Foss*.¹³⁷ The testator in that case stated: "I give, devise and bequeath my property, both real and personal to my wife . . . to have and to hold to her my . . . wife and to her heirs and assigns forever. After my wife's death, the property shall be divided between they heirs on following conditions . . ." It looks as though the testor had "heirs" in mind as a word of purchase and not of limitation, but it was a muddled will and he may not have been completely clear as to the distinction between a remainderman and a successor in title. Howson J. held that the wife took absolutely on the ground that there was an absolute gift in the first sentence and that the second sentence did not cut it down because it amounted "to no more than an expression of desire on the part of the deceased . . ." ¹³⁸

The doctrine commended itself to the British Columbia Court of Appeal in *Wilson v. Wilson*,¹³⁹ where the testator left "to my . . . wife . . . all my property . . . for her sole use and benefit forever. . . I direct that upon the decease of my . . . wife . . . that the residue of my estate shall be equally divided between my sons . . . or their direct issue, share and share alike." It was held that "residue" meant anything left at the wife's death, and that the gift over was void for repugnancy to her absolute interest. That can only be justified by the word "forever" which, as it stands, cannot indicate conclusively that the wife was meant to take more than a life interest (with a power of some kind over capital), because it is the wife's sole use and benefit that was to be forever, and those could not go on when she died.

In *Re Hornell*¹⁴⁰ the will of David Hornell provided: "I give and bequeath to my wife Margaret Hornell all my personal property, monies, real estate and mortgages, to have and to hold after she pays all legal claims against my estate. On the death of my wife, what remains of my estate is to go to my daughter Jean

137. [1940] 4 D.L.R. 791.

138. [1940] 4 D.L.R. 793.

139. [1944] 2 D.L.R. 729. Cf. *Re Parsons* (1926) 31 O.W.N. 192 (n. 167, post); *Re Reid* [1946] 3 D.L.R. 410 (n. 168, post); *Re Best* (1960) 23 D.L.R. (2d) 480 (n. 178, post).

140. [1945] 1 D.L.R. 440.

Winnifred Hornell." The Ontario Court of Appeal held that the wife took the whole estate absolutely. McRuer J.A., with whom Henderson J.A. agreed, said:¹⁴¹ "My view is that the intention of the testator gathered from the language used, is that he wished his wife Margaret Hornell to have all his property absolutely, but if anything remained of the property given to her at the time of her death, it should go to his daughter Jean Winnifred Hornell. . . . I feel that I am bound to hold, on the authorities, that the words used by the testator showed a dominant intention in favour of Margaret Hornell, and that the last sentence of the clause is inoperative to cut down the absolute nature of the gift to Margaret Hornell." The learned judge's view, necessitating some repugnancy, is strange but possible. His feeling was impossible: no authorities could bind him to hold what David Hornell's dominant intention was. McRuer J.A. concluded:¹⁴² "I am of the opinion that if the Court restricted the interest of the wife in this case to a life estate, it would have to read into the will a limitation on the estate of the wife that is not warranted by the language used." Laidlaw J.A., dissenting, drew attention¹⁴³ to the fact that the testator, when he made his will a little over six months before his death, was seventy-three years old, and that his wife, who lived another four years to the day, was then about seventy-six. They had three children, a son who was a salesman living in Ottawa, a married daughter living in Minden, and Jean Winnifred, who had lived at home all her life and looked after the family home for many years prior to the death of her parents. He said: "I come to the irresistible conclusion that the testator intended by the words used in his will to benefit both his wife and his daughter Jean Winnifred." Turning to those words, the learned judge said:¹⁴⁴ ". . . when the whole will is read, and not the first sentence only, it is my firm conviction that the testator did contemplate that part of his property would be available on the death of his wife. He did not contemplate that during her lifetime she would dispose of all of it by sale, gift, or other means so as to completely deprive his daughter Jean Winnifred of all interest and benefit whatsoever. Likewise from the language used he did not expect his wife to make a will and thereby dispose of the estate given to her. So, what he was contemplating was that at the time of the death of his widow there would be in existence a part of his property unused by her and which he plainly indicated 'is to go to my daughter Jean Winnifred Hornell.'" He

141. [1945] 1 D.L.R. 445.

142. [1945] 1 D.L.R. 446.

143. [1945] 1 D.L.R. 441.

144. [1945] 1 D.L.R. 442.

also expressed the opinion:¹⁴⁵ “Any other construction, I think, defeats or impairs the real intention of the testator by the application of technical rules unknown and unsuspected by him or the author of the will” (his clergyman). Laidlaw J.A.’s dissent concluded:¹⁴⁶ “it . . . ought to be declared that Margaret Hornell took a life estate with power for the purpose of her maintenance, to encroach on the capital of the property of the late David Hornell and upon her death Jean Winnifred Hornell took an estate in fee simple in the part of the property then remaining.” The opinion of Laidlaw J.A. was closer to the intention of the testator than was the decision of the court, but the learned dissenting judge did not demonstrate whence he derived the limitation of the widow’s power over the capital to the purpose of her maintenance.

In *Re Troup*¹⁴⁷ the testatrix left “all my worldly goods & Money to my husband . . . And at his demise all goods property & Money shall be divided between our family. Winnifred to take half and Dorothy I quater. And 1 quater to our son Forbes Robinson.” Dysart J., in the Manitoba King’s Bench, held that the husband took all the real and personal property of the testatrix absolutely. As to personalty, he decided that there could be nothing but an absolute legacy unless the will set out a proper trust. As to land, he decided that there had been an absolute gift in fee simple followed by a repugnant gift over. The case was disputed as between the whole interest and a life interest to the husband, no question being raised as to the possibility that the husband was meant to take a life interest with power to encroach on the capital. The learned judge’s decision as to the personalty seems to treat the will as something other than an executory document, which is wrong, and his decision as to the realty treats the express words of the gift over as repugnant to some intention which was expressed nowhere, which is also wrong.

In *Nowee v. Iverson*,¹⁴⁸ a British Columbia case, the testator left all his property to his wife, “for her sole use until my son . . . shall attain the age of twenty-one . . .” When that occurred, his executrix (his wife) was directed to divide the estate into two equal parts, one part to go to herself, “for her sole use during her lifetime, and upon her death the remainder or residue of said share shall pass unto my . . . son . . .; the other share of my . . .

145. [1945] 1 D.L.R. 443.

146. [1945] 1 D.L.R. 444.

147. [1945] 2 D.L.R. 450 (nn. 195 and 197, post).

148. (1956) 5 D.L.R. (2d) 558. Cf. *Re Scheuerman* [1946] 1 D.L.R. 153 (n. 155, post); *Re Parsons* (1926) 31 O.W.N. 192 (n. 167, post); *Re Reid* [1946] 3 D.L.R. 410 (n. 168, post); *Re Best* (1960) 23 D.L.R. (2d) 480 (n. 178), post.

estate I hereby devise and bequeath until my . . . son . . . when he attains the age of twenty-one . . . In the event that my . . . wife shall predecease my . . . son attaining his majority, I hereby direct all residue of my . . . estate shall pass unto my . . . son . . . It is my wish and desire that my wife shall maintain, support, and educate my son from the proceeds of my . . . estate until he shall have attained his majority." Whittaker J. first held that the last sentence did not create a trust, as the words were precatory. Then he said¹⁴⁹ that the words giving the sole use of the property to the testator's wife until his son reached the age of twenty-one "are words which clearly give to the wife the right to use the whole or any part of the estate. If the testator had intended the wife to have the income only, such intention could have been expressed in simple words known to every layman. The net estate is approximately \$13,000 and no doubt the testator realized that the income from this sum would not be sufficient to maintain his wife and son. The gift of one-half to the son and one-half to the wife on the son attaining his majority was, I think, an attempted disposition of that part of the estate, if any, which might remain unexpended at that time." The learned judge was confirmed in his belief¹⁵⁰ "that the testator intended an absolute gift to his wife" by the wording of the gift to her of a half-share when the son reached twenty-one, as, notwithstanding the words "during her lifetime" it was made clear by the terms of the gift over ("the remainder or residue of said share") that she was to have the use of the capital. The gift to the son should the wife die before his twenty-first birthday also, by referring to "residue," indicated that the capital might have been diminished by the wife. The learned judge concluded that the only effect of the will was to give the whole estate absolutely to the wife. Why her rights over capital had to be as owner and not as donee of a power is nowhere stated. Nor is any acknowledgment made of the peculiarity — it is not suggested that it is impropriety — of interpreting the intention of a testator from the words he used in attempting to make a gift over in such a way as to hold the gift over void.

The testator in *Re White*¹⁵¹ left all his property "to my wife . . . and whatever the residue of the Estate she may die possessed of or entitled to, I give . . . it to my niece . . ." Kelly J., in the Ontario High Court, held, partly because she was his executrix, and partly because "the residue" might include things not derived

149. 5 D.L.R. (2d) 559-560.

150. 5 D.L.R. (2d) 560.

151. (1962) 33 D.L.R. (2d) 185.

from her husband's estate, as well as on the other wording of the will, that the testator's wife took his estate absolutely and that the gift to the niece, being repugnant to the absolute interest, was void. Thus was another obvious testamentary intention set at naught. The testator probably meant the residue that was to go to the niece to consist only of what was left of his estate; if he meant to include his wife's other property, there seems to be a case for an election. The relevance of the wife's position as executrix to the extent of her beneficial interest is nowhere divulged.

The latest case reported so far in this unhappy line is the decision of Nitikman J. in the Manitoba Queen's Bench in *Re Freedman*.¹⁵² The will directed the testator's trustees "to give" all the testator's property "to my . . . wife . . . Upon the death of my . . . wife, . . . the capital of the estate is to be divided as follows: Fifty per cent of the balance . . . amongst my family . . . fifty percent to my [wife's] family . . ." The learned judge held that the testator had made his wife an absolute gift to which the gifts over were repugnant. The judgment consists largely of quotations from Maxwell Freedman's will and from judgments dealing with other wills. Here are some of Nitikman J.'s own words:¹⁵³ "It is readily apparent from a reading of the will that the expressed intention does not reflect what the testator meant to do. Undoubtedly he meant to confer a benefit on the persons he described as 'my family' and 'my wife's family', such benefits to take effect on his wife's death. The courts seek, wherever possible, not to frustrate the testator's wishes, but if those wishes are contrary and repugnant to his expressed intention, that expressed intention must prevail. It is a well-established rule of law that if the words of a bequest, read in their natural, ordinary and grammatical sense, convey a clearly defined conveyance then in such case the expressed intention of the testator governs and must be given effect to even if it conflicts with what the testator meant to do." Whence did the learned judge receive his information as to what the testator meant to do, or as to his wishes? From reading the will? If so, how did the testator's meaning and wishes differ from his expressed intention? If the testator was serious about the remaindermen, he must have meant his wife to take a life interest. It is a well-established rule of law that a will must be read as a whole.

Unfortunately courts do not seek, wherever possible, to

152. [1974] 1 W.W.R. 577, commented on: 1 *Estates and Trusts Quarterly* 117. Cf. *Re Plant* [1946] 3 D.L.R. 847 (n. 174, post).

153. [1974] 1 W.W.R. 579-580.

avoid frustrating the testator's wishes.

Cases where the gift over was held valid

First, there are cases where the primary donee was held to have a life estate or interest and nothing more.

In *Re Cotterill*¹⁵⁴ the testator provided that property was to go to his wife and "upon the death of my wife my son . . . shall receive 15 per cent., and the balance to be equally divided among my daughters." Middleton J. held that the wife had a life interest. Regarding "the balance" as meaning the whole capital less the son's fifteen per cent, there is no implication that the wife was to have any power over the corpus (except as to personalty consumed by use).

In *Re Scheurman*,¹⁵⁵ an Alberta case, the testator left all his property to a trustee on trust to convey his farm to his wife, "for her sole use and benefit. She is to use and administer all my property as she sees fit to use, and upon her death the said

154. (1911) 2 O.W.N. 745. Cf. *Re Walker* (1925) 56 O.L.R. 517 (n. 120, ante); *Re Sigman* (1926) 30 O.W.N. 280 (n. 126, ante); *Re Robinson* [1931] 1 D.L.R. 289 (n. 128, ante); *Nova Scotia Trust Co. v. Smith* [1933] 2 D.L.R. 272 (n. 131, ante); *Re Kane* [1934] 3 D.L.R. 637 (n. 132, ante); *Re Troup* [1945] 2 D.L.R. 450 (n. 147, ante); *Re White* (1962) 33 D.L.R. (2d) 185 (n. 151, ante); *British and Foreign Bible Soc. v. Shapton* (1915) 7 O.W.N. 658 (n. 157, post); *Re Cutter* (1916) 31 D.L.R. 382 (n. 182, post); *Re Chafe Estate* [1923] 1 W.W.R. 65 (n. 164, post).

155. [1946] 1 D.L.R. 153. Cf. *Nowee v. Iverson* (1956) 5 D.L.R. (2d) 558 (n. 148, ante); *Re Parsons* (1926) 31 O.W.N. 192 (n. 167, post); *Re Reid* [1946] 3 D.L.R. 410 (n. 168, post); *Re Best* (1960) 23 D.L.R. (2d) 480 (n. 178, post). *English cases: Constable v. Bull* (1849) 3 De G. & Sm. 539, where a gift to the testator's wife, followed by a gift over of what remained at her death, was held by Knight Bruce V.-C. to give the wife only a life interest; *Re Brooks' Will* (1865) 2 Dr. & Sm. 362, where Kindersley V.-C. held the primary donee, the testator's wife, to have only a life interest where she was given property, with a reference to her use and expending, followed by a gift over; *Re Sheldon and Kemble* (1885) 53 L.T. 527, where Kay J. came to a conclusion similar to that in *Constable v. Bull*; *Re Last* [1958] P. 137, where the testator left property to his brother and provided for a gift over of what remained at the brother's death; Karminski J. held that the brother took a life interest and that the gift over was valid, nothing being said about the question of whether the brother had any power of appointment. *Irish case: in Philson v. Stevenson* (1903) 37 I.L.T.R. 225 the testator made a gift to his wife and made gifts over of £50 to his sister "and if any balance to go to my brother . . ." The Court of Appeal held that the wife took a life interest and that the gifts over were valid. The ultimate gift to the brother was of the balance after paying the testator's debts and the legacy to his sister, not after capital disposals by the widow. *Australian cases: In Brown v. Brown* (1886) 20 S.A.L.R. 98 the will gave all the testator's property to his wife, with a gift over of what remained at her death. The Full Court held that the wife took only a life interest. In *Re Ridgway* (1900) 26 V.L.R. 254 the testator left all his property to his wife for her sole use and benefit, with a gift over of what remained at her death. a'Beckett J. held that the wife took only a life interest. In *Re Carlless* (1911) 11 S.R. (N.S.W.) 388 the will gave all the testator's property to his wife, with a gift over of what remained, and Simpson C.J. in Eq. held that the wife took only a life interest, regarding the gift over as being of what remained after paying the testator's debts, not after capital disposals by the widow. In *Re Ross's Will* [1917] V.L.R. 318 Hodges J. reached a similar conclusion to that in *Brown v. Brown* (the property in *Re Ross's Will* being given to the wife for her own use). In *Public Trustee v. Roberts* [1966] S.A.S.R. 269 the testator left all his property to his wife and provided for a gift over to charities of what remained at her death. Holding that the wife took only a life interest, Mitchell J. said, as the sole explanation of why she had no power over the capital (p. 272): "It seems to me that the gift to the widow is either a gift of a life estate in the whole of the deceased's estate or an absolute gift of the whole. There appears to be no room for an interpretation whereby the widow would have a life estate together with a general power of appointment which she might exercise in her own favour, or what appears to be referred to in Canada as a 'power of encroachment.'" Yet the will said: "Any of this property remaining after her decease" was to be sold and the proceeds divided among the charities, the quoted words seeming unapt to refer simply to residue after paying the testator's debts and funeral and testamentary expenses. *New Zealand case: in Smith v. Public Trustee* (1897) 16 N.Z.L.R. 475 Denniston J. held that the wife took only a life interest where her husband's will left her property "for her sole use and at her absolute disposal" and made gifts over on her death.

property is to become that of my children. All the rest and residue of my Estate I devise and bequeath to" [blank]. Ford J. first held that there was "an absolute gift of the farm" (presumably meaning a gift in fee simple of the farm) to the wife, so that "all my property" must be interpreted to mean "all my personal property." The learned judge concluded:¹⁵⁶ "Farming as he was, and owning stock and implements for farming, the testator contemplated that his widow would continue to farm, and intended her to use his personal property for this purpose and to rear his children, three of whom are still infants. In order to enable her to do so he gave her full discretion in the use of this property. It is my opinion that his predominant intention to be gathered from the circumstances and language of the will, to which effect must be given, was that she should have possession of the personal property and use it as she should see fit in the business of farming, which may involve sales and replacements from time to time. I would hold that the living expenses of the family residing on the farm may be paid from the proceeds of the farming operations. It is only what is left of the personal property on her death that goes to the children. If the value of the personal estate at the time of her death is less than on the date of the testator's death, her estate should not be required to account. I think that the discretion allowed her, if exercised in good faith, must lead to that result. On the other hand, should she cease to carry on farming operations, the executor ought to turn the personal property into money or securities. She would then be entitled to the income on it, but, if there should be at the time of such conversion any increase in value over that at the death of the testator, the accretion would belong to her." Three minor comments seem called for. First, it would seem that her estate would be required to account for a shortage of assets, but only to the extent of any shortage resulting otherwise than from the widow's exercise of her discretion in good faith. Secondly, the reference to the "executor" is presumably because the trustee, whose duty it would be to convert personal property and invest the proceeds in authorized securities, was, in the first instance, the same person. Finally, the widow's entitlement to increased value on sale might not be followed as to an increase in monetary value due solely to inflation.

Then there are cases where the primary donee was held to have a life estate or interest and a power of some kind over the capital.

156. [1946] 1 D.L.R. 156-157.

In *British and Foreign Bible Soc. v. Shapton*¹⁵⁷ the testator left property to his wife, and what remained unexpended at her death, to the plaintiff charity. Meredith C.J.C.P. thought the testator's intention clear:¹⁵⁸ "Nor can I very much doubt that if [the testator] or [the widow] had been told, or if any ordinary layman were now told, that there is doubt about the meaning of the will, the answer would have been, and would be: 'Well, if there is, it would take a Philadelphia lawyer to find it:' and, being obliged to confess a want of qualification, once so commonly ascribed to that keen-witted, but somewhat mythical, personage, find myself among the doubters of any such doubt." The learned Chief Justice continued: "The will seems to me to be simple and plain. The wife was to have the personal estate as long as she lived, with power to spend as much as she saw fit; and all that remained of it, 'unexpended,' at her death, was to go to the charity, for the benefit of the souls of the heathen, as well, doubtless, as that of the giver." He then introduced the theme, which can be discerned in some of his other judgments, of giving effect to the testator's intention:¹⁵⁹ "Thus, and thus only, can effect be given to all that the testator willed: thus, and thus only, can all the objects of his bounty receive benefactions; and receive all of that which he intended each of them should have: thus, and thus only, can there be any hope of the souls' benefits

157. (1915) 7 O.W.N. 658. See also *Re McLaughlin* (1915) 8 O.W.N. 277. Cf. *Re Cotterill* (1911) 2 O.W.N. 745 (n. 154, ante) and cases referred to in n. 154, ante. *English cases*: In *Re Stringer's Estate* (1877) 6 Ch. D. 1 the testator left property to his brother, said he was to have power to dispose of the property in any way or quantity inter vivos or by will and made a gift over of any property not disposed of by his brother. The Court of Appeal held that the brother, who predeceased the testator, would have had a life interest and a general power of appointment, subject to the exercise of which the gift over took effect (which it did). In *Re Sanford* [1901] 1 Ch. 939 the testator left property to his wife "so that [she] may have full possession of it and entire power and control of it, to deal with it or to act with regard to it as she may think proper." He made a gift over of any of the property not "devised or appointed" by his wife. Joyce J. held that the wife had a life interest and a power of appointment, subject to the exercise of which the gift over took effect. In *Re Willatts* [1905] 2 Ch. 135 the testator gave his wife power to sell his property and specified that anything left at her death was to go to his daughters. The Court of Appeal held that the wife had a life interest and a general power of appointment inter vivos, subject to the exercise of which the gift over took effect. In *Roberts v. Thorp* (1911) 56 S.J. 13 the testator left property to his wife to use for the benefit of herself and her infant children, said that if she deemed it advisable to do so she might dispose of any of the property at her will and made a gift over of what remained at her death. Warrington J. held that the wife had a life interest and a power of appointment inter vivos, subject to the exercise of which the gift over took effect. *Australian cases*: In *Re Comstock's Will* [1918] V.L.R. 398 the testator left all his property to his wife with full power of use and disposal and application of the proceeds, and made gifts over of what was undisposed of at the wife's death. Irvine C.J. held that the wife had a life interest and a general power of appointment inter vivos, subject to the exercise of which the gift over took effect. In *Re McIntosh* [1929] S.A.S.R. 21 the testator left property to his wife, said that she was to have "power to do what she likes with" it and made a gift over of what remained at her death. Napier J. held that the wife took a life interest which was followed by a valid gift over. As the wife had died leaving the corpus intact, there was no need to decide whether she had had any power of appointment, but the learned judge found that she had had a general power of appointment. *New Zealand case*: in *Rosenberg v. Scraggs* (1900) 19 N.Z.L.R. 196 the testator left all his personal property on trust "to allow my . . . wife . . . to have complete control and disposal of same during her lifetime for her own use and benefit without having in any way to account . . . and so much thereof as she shall not have disposed of at the time of her death" on trust by way of gift over. Stout C.J. held that the widow had a life interest and a "power of disposition of the capital during her life" subject to the exercise of which the gift over took effect.

158. 7 O.W.N. 659.

159. 7 O.W.N. 660.

intended: and thus, and thus only, can that, to me, abomination, a court-made, or a court-mutilated, will, be avoided. So it seems to me." He concluded that the wife had been given a life estate with power to encroach on the corpus as she saw fit, and said¹⁶⁰ that if *Re Miller*¹⁶¹ decided that it was impossible to hold the *Shapton* will valid as written, it was not binding.

Boyd C. came to a similar conclusion in *Re Cutter*,¹⁶² yet another Ontario case, where the testator provided: "To my sister . . . I leave all the residue of my estate. On the decease of my sister . . . the unused or unexpended balance shall revert to the Odd Fellows Home of Toronto." That was held, after a full examination of the precedents, to give the sister a life interest with power to encroach on the corpus. The learned Chancellor said:¹⁶³ "I think the whole residue may be employed so far as required for her comfortable maintenance suitable to her state in life. In other words, if necessary the capital may and should be encroached upon for the purpose of her proper maintenance, but for no other purposes." And later he added: "If any difficulty arises, there will be a reference to ascertain to what she is entitled as a yearly allowance for maintenance, payable monthly or quarterly, as she may wish."

The testator in *Re Chafe Estate*¹⁶⁴ left real and personal property to his "wife . . . and on the death of my wife, . . . all that remains must be divided among my children." Chambers J., in the Manitoba King's Bench, regarding it as necessary to construe the devise and bequest as a whole,¹⁶⁵ held that the wife took a life interest, with a general power inter vivos over the corpus. The learned judge said:¹⁶⁶ ". . . the widow takes the full use of the property . . . for her life with power to spend or dispose of the capital during her lifetime in any manner she chooses, except by will, and . . . upon her death whatever, if any, of the capital may then remain unspent or undisposed of shall go to the children of the testator . . . in equal shares."

A slight contrast is provided by the decision of Lennox J. in *Re Parsons*.¹⁶⁷ There the testator left all his property to his wife, "the same to be hers to use as she desires and at her death . . . I

160. 7 O.W.N. 661.

161. (1914) 6 O.W.N. 665 (n. 116, ante).

162. (1916) 31 D.L.R. 382.

163. 31 D.L.R. 389.

164. [1923] 1 W.W.R. 65 (see n. 188, post).

165. [1923] 1 W.W.R. 66.

166. [1923] 1 W.W.R. 67.

167. (1926) 31 O.W.N. 192. Cf. *Re Moore* (1925) 57 O.L.R. 530 (n. 123, ante); *Re Scott Estate* (1937) 52 B.C.R. 278 (n. 136, ante); *Wilson v. Wilson* [1944] 2 D.L.R. 729 (n. 139, ante); *Nowee v. Iverson* (1956) 5 D.L.R. (2d) 558 (n. 148, ante); *Re Scheuerman* [1946] 1 D.L.R. 153 (n. 155, ante).

desire and will that the remainder of the property left be equally divided between my six children . . ." The learned judge held, without the report disclosing why he thought the widow's power so limited, that she was entitled to a life interest, with the further right to encroach upon the corpus or capital in so far, and in so far only, as might be necessary for her comfortable maintenance; and that, subject to the power of the widow, the gift over took effect on her death as to all the testator's property.

In the Alberta case of *Re Reid*¹⁶⁸ the will provided: "I direct that the use of my homestead property, including land, buildings, furniture, fixtures, personal wearing effects and household effects . . . be given to my wife and upon her death the remaining property fall into the residue of my estate." Ford J. said:¹⁶⁹ "I do not construe the gift to her as an absolute one. She is given the use only, and in the same sentence, the remaining property is to fall into the residue of the estate. She could not have it conveyed or transferred to her by the executors." Later the learned judge considered the intention and circumstances:¹⁷⁰ ". . . the dominant intention of the testator was that his widow should have the right to use the property, both real and personal, so as to provide herself with the means of living for the rest of her life. If not so, he could easily have said that the said property would fall into the residue of his estate on her death. Instead of this he said 'the remaining property'. Contemplating as he did her need, due to her advanced age at the time he made his will and her physical and mental ability at that date to use this property so as to provide for her needs for the rest of her life, there is special significance to be attached to the words 'the remaining property'." The only remark that need be made is that what the learned judge was seeking was the testator's unadjectival intention: questions of predominance do not arise unless there is a conflict in which something has to yield in the end. He decided:¹⁷¹ "She has the right, if she needs it for her maintenance over and above what she may receive under other provisions of the will, to have the homestead property sold and, if I may borrow the words of Boyd C. in *Re Johnson*,¹⁷² . . . to encroach on the capital for the purposes of her maintenance." Finally, Ford J. said:¹⁷³ "If the residuary legatees will not approve of a measurable portion of the [proceeds of sale] being

168. [1946] 3 D.L.R. 410.

169. [1946] 3 D.L.R. 414.

170. [1946] 3 D.L.R. 414-415.

171. [1946] 3 D.L.R. 415.

172. (1912) 27 O.L.R. 472 (n. 37, ante).

173. [1946] 3 D.L.R. 415.

used by the executors for the widow's maintenance from time to time, the executors may apply to have the amount fixed."

Ford J.'s reference in *Re Reid* to the widow not being able to have the property conveyed or transferred to her finds a poignant echo in *Re Plant*,¹⁷⁴ where the words of the will provided for just that but also contained provisions making it unwise and going some way towards retracting the direction. There, the testatrix said: "My Government Bonds & money in Bank & money out in note etc. I wish put in my Mothers name but taken care of on condition described herein. Money to be left in Bonds & not sold. Unless such time should come that all other principal is used up & it should be necessary to get more principal. She may then sell same. Should my executor have safe & better means of secure more interest than leaving some in bank. He may use money in bank to invest according to his own good judgment. My Mother may have a drawing account up to \$30.00 per month, but if it is not necessary for her to use that much she may draw as little as she wishes. . . . At the death of my Mother. I wish all money & Bonds left to go to my friend Andrew E. Ross." The Ontario Court of Appeal, undaunted by the kind-hearted muddle-headedness of the testatrix, found her intention plain, at least in part, and held that her mother took a life interest, with power to encroach on the corpus. Hogg J., giving the judgment of the court, said:¹⁷⁵ "The plain intention of the testatrix to be gathered from the language of the will is that the beneficiary is not to have an absolute interest in the property left to her. The principle which seems to me is to be followed is that stated by Chancellor Boyd in *Re Johnson* . . ."¹⁷⁶ The court concluded¹⁷⁷ that the ". . . mother in addition to having the income from the estate, might also, if she found the income not sufficient for her maintenance, and it was necessary to do so, encroach upon the capital up to an amount of \$30 each month, and use that amount if necessary."

In *Re Best*,¹⁷⁸ in Nova Scotia, the testatrix said in her will: "I desire my husband . . . to have the use . . . of my estate . . . and also such part of the principal as he requires. After the death of . . . my husband I would desire if any part of my estate is unexpended," certain gifts over to take effect. Patterson J. held that the husband had a life interest with power to encroach on the

174. [1946] 3 D.L.R. 847. Cf. *Re Bradshaw* [1935] 1 D.L.R. 167 (n. 134. ante); *Re Freedman* [1974] 1 W.W.R. 577 (n. 152. ante).

175. [1946] 3 D.L.R. 849.

176. (1912) 27 O.L.R. 472 (n. 37. ante).

177. [1946] 3 D.L.R. 850.

178. (1960) 23 D.L.R. (2d) 480.

principal and also that the gifts over were valid. A question arose as to paying the husband's funeral expenses out of the capital of the fund, on which the learned judge said:¹⁷⁹ "It seems that [the husband] died insolvent and that though he had power to dispose of both the real and personal property of the estate as he required for his own use, he had not done so. No authority has been shown that the Nova Scotia Trust Co. to whom his executorship has been transmitted is legally obligated to pay his funeral expenses or other accounts that he incurred whether for his proper maintenance or not. [The husband] not having exercised this power to encroach upon the estate, I do not think that this power which was a personal one, and being for his own use, could so devolve to his executor that it can legally pay any bills that had been incurred by [the husband] in his lifetime for his own support or otherwise or for his funeral expenses."

The Ontario Court of Appeal has provided the latest reported contribution to the collection of cases of this kind: *Re Shamas*.¹⁸⁰ The words of the testator were: "I give all I belong to my wife. I want her to . . . raise the family. All will belong to my wife until the last one comes to the age of 21 years old. If my wife [does not marry again] she will keep the whole thing and see that every child gets his share when she dies." The testator died in July 1932 and by June 1967 his widow had not remarried. MacKay J.A., giving the judgment of the court, after referring to the principle stated in *Re Walker*,¹⁸¹ said:¹⁸² Professor Kennedy points out,¹⁸³ as did the Nova Scotia Court sitting *en banc*, in *Re McGarry*,¹⁸⁴ . . . that in *Re Walker*, the Court had applied the common law rules of repugnancy applicable to property law, to construction of the will. In the case of deeds, it is the form of the grant that establishes the interest conveyed. In construing wills, the entire document and the relevant surrounding circumstances are looked at to determine the interest intended to be granted, so that while one passage in a will taken by itself would appear to grant an absolute interest, other passages may indicate that this was not the testator's intention, so that the question of repugnancy does not arise." The learned judge then referred¹⁸⁵ to the principles applicable in construing wills, and

179. 23 D.L.R. (2d) 485.

180. (1967) 63 D.L.R. (2d) 300.

181. (1925) 56 O.L.R. 517 (n. 120, *ante*).

182. 63 D.L.R. (2d) 302-303.

183. 28 *Can. Bar Rev.* 839.

184. [1950] 1 D.L.R. 715, 25 M.P.R. 121 [aff'd. [1950] 4 D.L.R. 523 *sub nom. Montreal Trust Co. v. Tutty*, M.P.R. *loc. cit.*] (n. 33, *ante*).

185. He referred to and quoted from *Halsbury's Laws of England*, vol. 39, 3rd ed., pp. 973-975, paras. 1474 and 1475, *Lucas-Tooth v. Lucas-Tooth* [1921] 1 A.C. 594, 601, *Re Fleury* (1964) 44 D.L.R. (2d) 393, 399, and *Perrin v. Morgan* [1943] A.C. 399, 420-421.

concluded:¹⁸⁶ "I am of the opinion that a reading of the will in question as a whole expresses the intention of the testator . . . that his estate vest in his children in equal shares subject to a life interest therein to his widow (subject to that interest being divested on her remarriage . . .) with the right to postpone realization of the assets of the estate, to carry on the business as she saw fit and to encroach, in her discretion, upon the capital of the estate for the support and maintenance of herself and the children, until the youngest child should reach the age of 21 years. When the will is considered in the light of the circumstances existing at the time it was made, I also think it sufficiently clearly expresses the intention that the widow should also have the right to encroach on the capital if necessary, for her maintenance and support from the time the youngest child attained the age of 21 years until her death or remarriage. The circumstances which I refer to are these. The testator had a wife and eight young children. The value of the estate at that time was such that if the estate were realized and invested the widow could not hope to live and raise her family on the income from the estate. The only way in which proper provision could be made for his wife and family would be to make a disposition that would enable his wife to carry on the business which he and she had, up until that time, jointly carried on, and if necessary, to encroach on the capital for the maintenance of herself and the maintenance and education of the children."

XVI

Learned counsel having completed his review of the authorities, he handed the typescript to his newest assistant, together with a copy of the kindly farmer's will and the letter of instructions from the nephew's lawyer, and asked him for a draft of advice as to the interest the widow took in the farm under the will. After long and immature consideration, the newest assistant presented a draft to his learned senior.

Tackling the words of the will and considering the circumstances known to the testator in the light of the reported cases, the newest assistant changed his mind so many times in the course of preparing his draft that it turned out more like the list of possibilities catalogued in the clerk's tale¹⁸⁷ than advice on which the parties could act. For that reason it is not given in full

186. 63 D.L.R. (2d) 304-305.

187. Section II, *ante*.

here. He did, however, make some observations on the law which his learned senior thought interesting, and the relevant abstract from his draft is this.

XVII

The Newest Assistant Abstracted

The plethora of cases from many jurisdictions presenting a pretty conflict, a statement of the rationes decidendi of the decisions of our own Province cited in the opinion seemed worth making.

Manitoba cases

- (1) Where there is a gift to A, without words of limitation, and a gift over to B of what remains on A's death, all in a single paragraph of the will, the paragraph must be read as a whole and, if possible, both gifts must be given effect to: *Re Chafe Estate*,¹⁸⁸ a decision of first instance.
- (2) A gift over to B of "what remains" on A's death, after a life interest given to A, implies that A has power, inter vivos but not by will, to take away from the corpus so as to stop what is so taken away going to B: *Re Chafe Estate*; *Re Cadieux*;¹⁸⁹ *Re Bangs Estate*,¹⁹⁰ (all decisions of first instance).
- (3) If A has a life interest and power to encroach upon the corpus, the inference is that A may exercise the power as to the whole of the corpus if the will does not indicate a limitation on the power: *Re Chafe Estate*.
- (4) Where there is a gift to A, without words of limitation, and a gift over to B on A's death in a later paragraph of the will, the effect of the gift over to B is that A takes a life interest: *Re Maltman*,¹⁹¹ a unanimous decision of

188. [1923] 1 W.W.R. 65 (n. 164, ante). The terms of the gift were: "I give, devise and bequeath unto: — My wife, Mrs. Adelaide Chafe. 869, Bannatyne Ave., Winnipeg, Manitoba, all my property consisting of house and lot, 869 Bannatyne Ave., Winnipeg, Manitoba. Horses and wagons and all their belongings. All cash deposited in the Bank and on the death of my wife, Mrs. Adelaide Chafe, Winnipeg, Man., all that remains must be divided among my children."

189. [1951] 2 D.L.R. 782 (nn. 36, ante, and 200, post).

190. (1962) 39 W.W.R. 623 (nn. 41, ante, and 198, post).

191. [1927] 1 D.L.R. 417. The relevant part of the will was: "I bequeath all my real and personal property to my wife Annie Louisa Maltman except my gold watch which goes to David Henry Maltman son of Robert Maltman, Forest River, N. Dakota. "My personal property along with my Winnipeg Real Estate is to be sold at my death and the proceeds used to pay my lawful debts and the mortgage that is now on my farm and if there is any money cash over it shall belong to my wife. At the expiration of her death my property shall go to my brother Robert Maltman and his family who is now living at Forest River North Dakota and he shall distribute it as he thinks fit."
Fullerton, Dennistoun, Prendergast and Trueman J.J.A. dismissed an appeal from Dysart J., who had held ([1926] 3 D.L.R. 27, 29) that "the wife took only a life interest in the farm, and that upon her death Robert Maltman and his family became entitled to the fee simple."

the Court of Appeal.

- (5) Where there is a gift to A of the testator's entire residuary estate, or of all his property, without words of limitation, and a gift over to B of the residue remaining, or of what is left of all the property, or of the balance, at the death of A in a later paragraph of the will, A takes an interest of unlimited duration and B takes nothing: *Re Robinson*;¹⁹² *Re Kane*;¹⁹³ *Re Bradshaw*;¹⁹⁴ (all majority

192. [1931] 1 D.L.R. 289 (n. 128, ante). The relevant part of the will of the testatrix was:
 "I give my entire estate to my brother, W.J. Robinson, of the City of Winnipeg, in the Province of Manitoba, with the exception of \$1,000 (or a mortgage in good standing to that amount) which I give to my niece, E.M. Sutherland, wife of W.R.R. Sutherland, for her sole and personal use; I also leave to her all my clothes, furniture, pictures, china, etc.
 "Any jewellery, diamonds, etc., which I possess are to become the property of D.M. Ross, daughter of D. Ross, 2915-44th Avenue West, Vancouver, B.C.
 "Upon the death of my said brother, W.J. Robinson, the residue of my estate then remaining is to become the property of the above mentioned D.M. Ross.
 "I give \$1,000 (or a mortgage in good standing to that amount) to my sister, I.A. Ross, wife of the said D. Ross before mentioned."
 Macdonald C.J.K.B. held ([1930] 3 D.L.R. 820, 824) that W.J. Robinson took a life interest in the residuary estate and that the gift over to D.M. Ross was valid. Apparently (see [1931] 1 D.L.R. 289, per Prendergast C.J.M., 292, 296, per Dennistoun J.A., 297, per Trueman J.A.) Macdonald C.J.K.B. also held that W.J. Robinson had power "to encroach on the corpus of the said estate if necessary for his maintenance during the term of his natural life, as this Court may from time to time direct."
 Dennistoun J.A., who dissented in the Court of Appeal, agreed with Macdonald C.J.K.B. except as to W.J. Robinson's power to encroach on the corpus. Robson J.A. agreed with Dennistoun J.A.
 Prendergast C.J.M. agreed with Macdonald C.J.K.B. but concurred with Trueman J.A. in allowing the appeal. Fullerton J.A. agreed with Trueman J.A. Trueman J.A., who was thus one of the only two judges (of the six who sat on the case) who actually held the opinion that became the decision, said (pp. 297-298): "I look upon the words in the will as plain in their sense and intention. The words 'I give my entire estate to my brother,' it seems to me, convey an absolute interest. The gift over on his death of the 'residue to my estate then remaining,' instead of qualifying, confirms and points out the absolute nature of the gift to him. It being in his power to determine whether there shall be any residue or not, I do not see how it can be said that he has not an absolute estate. The Court is nevertheless invited to say that there is a problem of construction — that the words 'upon the death of my said brother, the residue of my estate then remaining is to become the property of D.M. Ross, show that, instead of the gift to Robinson being an absolute one, it is limited to a life estate, and that what the will really amounts to is a declaration of trust, vesting the estate in Mr. Polson, appointed 'executor and trustee,' who is to pay the income, and something out of the corpus, if need be, to Robinson for his maintenance. Of course this is not construction at all, but loose speculation as to what may have been in the testatrix's mind, or as to what she may have intended, but which she has clearly not said. The will can be read in its natural, ordinary and grammatical sense. I see no reason why it should not be. The intention to give to the niece what of the estate remains on the brother's death is also equally clear. It does not, however, follow that because in law this later gift is void since repugnant to the first, the will should be remade or remoulded by the Court by nullifying the testatrix's words by which an absolute estate is given to the brother."
193. [1934] 3 D.L.R. 637 (n. 132, ante). The relevant part of the will was:
 "I give, devise and bequeath all my real and personal estate of which I may die possessed of in the following manner, that is to say: unto my wife Nellie Kane.
 "And I nominate and appoint Nellie Kane to be executrix of this my last Will and Testament.
 "After the death of my wife, my estate is to go to my grandchildren equally, if there is any left."
 Montague J., at first instance, held that the will vested the testator's whole estate in his widow absolutely. The majority of the Court of Appeal (Prendergast C.J.M. and Dennistoun, Trueman and Richards J.J.A.) dismissed the appeal. Robson J.A., dissenting, thought the widow took a life interest.
194. [1935] 1 D.L.R. 167 (n. 134, ante). The holograph will of the testatrix was in the form of a letter written to a friend on 19th January 1934, three days before she died. The letter ran:
 "I am very ill, & if I pass away please go with him to the Post Office, the Bank of Montreal, main branch, also B. Commerce, River & Osborne St.
 "Kindly have all turned over to Mr. B. not to be drawn out unless for his personal use, if needed, if he passes away to be left in trust for ten years.
 "My mind is very clear. Kindly oblige . . ."
 Adamson J. held that the husband took a life interest in such of his wife's property as was referred to in her will, with power to encroach upon the corpus for his personal use. The Court of Appeal (Dennistoun, Trueman, Robson and Richards J.J.A., Prendergast C.J.M. dissenting) allowed the appeal and held that he took the property absolutely.

decisions of the Court of Appeal); *Re Troup*;¹⁹⁵ *Re Freedman*;¹⁹⁶ (both decisions of first instance).

- (6) Where there is a gift to A of personal property, without words of limitation, and a gift over to B on A's death, A takes an absolute interest, and B takes nothing, because the only way to settle personal property is by means of an imperative trust for investment: *Re Troup*,¹⁹⁷ a decision of first instance.
- (7) Effect will be given to a bequest of personal property to A for life, with a gift over to B on A's death: *Re Bangs Estate*,¹⁹⁸ a decision of first instance.
- (8) Where there is a gift to A of all the testator's property, and a gift over to B of the remainder of the estate on A's death, the following factors indicate that A is intended to have a life interest:
 - (a) the appointment of C as co-executor with A "for all purposes in carrying out" the testator's wishes as

195. [1945] 2 D.L.R. 450 (n. 147, ante). The relevant part of the will of the testatrix was:
 "I Elizabeth Ede Troup of the City of Winnipeg in the Province of Manitoba, Herewith bequeath all my worldly goods & Money to my husband Forbes Paterson Troup.
 "And at his demise all goods property & Money shall be divided between our family.
 "Winnifred to take half and Dorothy 1 quarter. And 1 quarter to our son Forbes Robinson."
 Dysart J. held that the gift to the husband included personally and realty and that the husband took both absolutely. As to the considerations affecting the realty, he said (p. 452): "Real property may be limited in its estate, and it is possible to confer upon one person an estate for life, with a remainder to others. But the actual words of the bequest in this case appear without any such limitation. They amount to a devise of the entire land estate absolutely in fee simple. Those operative words are then followed by words purporting to limit the estate to one for life. The two bequests are repugnant to each other and cannot be brought into harmony. They cannot both stand; one or the other must give way. Authorities agree that in such circumstances the chief words of a bequest must prevail over the subsidiary words; that the whole estate so conferred must pass without the limitation."
196. [1974] 1 W.W.R. 577 (n. 152, ante).
197. [1945] 2 D.L.R. 450 (nn. 147 and 195, ante). Dysart J. quoting (p. 452) Williams on *Personal Property*, 18th ed., pp. 438-439, and ignoring pp. 440-441: "The strict and ancient doctrine of the indivisibility of a chattel, though retained by the Courts of law, had no place in the modern Court of Chancery, which, in administering equity, carried out to the utmost the intentions of the parties." (Monnin J.A. quoted more to the same effect from Williams on *Personal Property*, 18th ed., pp. 439, 440, in *Re Bangs Estate* (1962) 39 W.W.R. 623, 627, n. 198, post.)
198. (1962) 39 W.W.R. 623 (n. 41, ante). The relevant parts of the will were:
 "I nominate and appoint Peter Julian Bangs, Student, Toronto, Ontario and the survivor of them to be the Executors and Trustees of this my will.
 "I give, devise and bequeath all the Real and Personal estate of which I shall die possessed or entitled to unto my said Executors and Trustees hereinbefore named, in Trust for the purposes following:
 "Firstly, to pay my just debts, funeral and testamentary expenses, And thereafter in trust to pay over or convey the following bequests to the persons or corporations hereafter named, namely:
 [Five pecuniary bequests.] "To my wife Estelle Bangs, Winnipeg, Man., the balance of my Estate monies, furniture and effects during her lifetime, in the event of her death my Son Peter and Daughter Louise to share equally in the remaining balance of the estate at that time.
 "All the rest and residue of my estate both Real and Personal I give, devise and bequeath unto Estelle Bangs, my Wife, of the City of Winnipeg, Province of Manitoba, absolutely.
 "With full power and authority to my Executors and Trustees to sell and dispose of all or any part of my Real or Personal estate, where necessary for the carrying out of the purposes of this my will, and to execute any and all Documents that may be necessary for so doing."
 Monnin J.A. held: (a) the first gift to the wife was of personality only; (b) there could be a life interest in personality and a gift over (pp. 627-629), quoting Williams on *Personal Property*, 18th ed., pp. 439, 440, *Halsbury's Laws of England*, 3rd ed., vol. 29, pp. 372-373, paras. 738-739, Jarman on *Wills*, 8th ed., vol. 2, pp. 1181, 1183, and Holdsworth, *History of English Law*, vol. 7, pp. 446-479; (c) the wife took a life interest in the personality; (d) because the gift over of the personality on the wife's death was of "the remaining balance. . . at that time" the wife had a power to encroach on the corpus; (e) the wife took the realty absolutely under the residuary gift.

- expressed in" his will;
- (b) a statement in the will that the executors "shall have full power to dispose of any and all assets included in my Estate as to them may seem fit";
 - (c) that the will states that the gift to A is "for the support of herself and my children as may be necessary" and that A is "to have full use of my Estate as long as she lives" and makes a gift over on A's death:

Re Ridd Estate,¹⁹⁹ a decision of first instance. See also *Re Cadieux*,²⁰⁰ another decision of first instance.

- (9) Effect should be given to the express wishes of a testator if possible, and the doctrine of repugnancy should not be carried too far: *Re Schumacher*,²⁰¹ in the Court of Appeal.

Chattels, life interests and floating trusts

The problem of the kindly testator's widow and nephew relates to sale of the farm, presumably including stock, and the destiny of the proceeds of sale.

The suggestion has been made that, in the case of goods, a gift, followed by a gift over on the death of the first donee of what is left then, is liable to occasion inconvenience if valid as a life interest with a power to encroach on the corpus because, when the primary donee dies, it may be difficult to tell what goods then in her custody came from the donor and what from other sources. It has also been suggested that a power of the first donee to

199. [1947] 2 W.W.R. 369 (n. 92. ante). The relevant part of the will was:

"I hereby devise and bequeath all my property Real and Personal of every kind and nature wheresoever situated to my wife Prudence Ridd after payment of all my lawful debts which shall include medical attendance, hospital and funeral expenses, for the support of herself and my children as may be necessary, and

"I hereby appoint my wife the said Prudence Ridd and my son-in-law, Alexander Smith, sole executors for all purposes in carrying out my wishes as herein expressed. That they shall have full power to dispose of any and all assets included in my Estate as to them may seem fit. And

"My wife, Prudence Ridd to have full use of my Estate as long as she lives, and at her death, providing the youngest child is twenty one years of age, and after all debts are paid, the remainder of my Estate shall be divided equally between my then surviving children, share and share alike." Williams C.J.K.B. said (p. 372): "It will be observed that the first three clauses end with the word 'and,' so that the will reads as one long sentence." The learned Chief Justice held that the wife took only a life interest and that the capital passed intact to the surviving children on her death. Presumably he thought the reference in the gift over to "the remainder of my Estate" must be treated as denoting the remainder after payment of the testator's debts and funeral expenses, not after exercise by the wife of some power over capital.

200. [1951] 2 D.L.R. 782 (n. 36. ante). The relevant clause of the will, as translated, was:

"All that I shall leave at my death: Movables, immovables, Money in Bank or in my possession, Victory Bonds and all that could come back to me, will go back to my dear wife Arsilia Cadieux (Nee Des Rosiers) she shall be able to enjoy them as she will wish during her lasting life, after the death of my said wife what will remain of my estate will be shared as follows: between our children: One third to our daughters and the two thirds to our sons."

Kelly J. held that the reference to the wife's enjoyment during her life, and the gift over, indicated that the wife took a life interest; and that the reference to her enjoyment being "as she will wish" and the gift over being of "what will remain" indicated that the wife had a power to encroach upon the capital.

201. (1971) 20 D.L.R. (3d) 487, 490, 491, 494, per Dickson J.A. (with whom Freedman C.J.M. agreed), Guy J.A. dissenting (nn. 108-111, ante).

dispose of items, and thus stop the remainderman getting them, indicates that the first donee is the absolute owner and that therefore there is no valid gift over but merely an invalid attempt to interfere with the first donee's right to make a will.

The donor's personal representatives could make an inventory; and the tenant for life can be required, by action quia timet if necessary,²⁰² to give security for the ultimate delivery to the remainderman of everything she had not disposed of validly under the power.

There is no difficulty in principle in a settlement of any kind of personal property for life with remainder over. There is not even any objection in principle to a gift over of items unascertained until the death of the tenant for life, e.g., what she still has then. There are many cases where a bequest of a life interest, with a power to encroach on the corpus and a gift over of what remains at the death of the tenant for life, has been upheld. The power of appointment with a gift over of unappointed property is widely used. Where there are mutual wills, the surviving testatrix often becomes a tenant for life of her own property (i.e., what she has apart from the estate of the first testator to die), or of some of it, but with no fetter on her power of disposal of the corpus inter vivos except that she must not use her power for the sole purpose of defeating the remainderman.²⁰³ That kind of floating trust is valid, notwithstanding that the items of property that will be caught by it cannot be determined until the survivor of the parties to the contract dies. There is no reason why matters should be different when only one testator is involved.

If T bequeaths property "To A absolutely on condition that A leave it in his will to B" the condition is valid. There is no conceivable policy against it: no trustee can make a will, so as to affect the beneficial interests under the trust, even if he is the absolute owner at law. There is a policy in favour: it is unconscionable to take the benefit of a gift and then try to evade the burden. If A does not comply with the condition, and gets away with that, someone is unjustly enriched at the expense of B.²⁰⁴ In the example, if A does not bequeath the property to B, A's personal representatives should hold it on an implied or constructive trust for B (as the property of the surviving testator, where there are mutual wills, is held on trust if he revokes the

202. *Johnson v. Mills* (1749) 1 Ves. Sen. 282; *Fisher v. Hughes* (1820) Coop. t. Cott. 329.

203. *Birmingham v. Renfrew* (1937) 57 C.L.R. 668, especially pp. 675-676, per Latham C.J., and p. 689, per Dixon J.

204. For a case where there was no fraud or contract, but "unjust enrichment" was prevented by the Nova Scotia Appeal Division, see *Re Spears and Levy* (1974) 52 D.L.R. (3d) 146.

will made in accordance with the contract with the other testator).

If T bequeaths property "To A absolutely," and there is an arrangement between T and A dehors the will that A will bequeath the property to B, B can enforce the secret trust against A's personal representative if A does not bequeath the property to B. If, instead of agreeing to bequeath "the property" to B, A had agreed to bequeath to B "what A still has at his death," Brightman J. was prepared in *Ottoway v. Norman*²⁰⁵ to countenance the proposition that the secret trust was still valid (though it failed in that case otherwise than on account of its floating nature). It should not be different if the requirement as to A's testamentary conduct is stipulated in the text of T's will.

Those are not cases of repugnancy, as a trust is not a case of repugnancy because the beneficial interest does not go with the legal rights. If T bequeaths property "To A absolutely on condition that A leave what he still has of it when he dies to B," A may take the legal title absolutely, but, if he does, he holds it on trust for himself for life, with remainder on trust for B absolutely, and has a power of appointment (of greater or less extent, depending on the true construction of the whole will in the light of T's knowledge of relevant circumstances when he made his will) which, validly exercised, will override the trust for B. That is how equity usually works.

Realty and the phantom of a remainder after a fee simple

It seems necessary, in view of some of the judgments, to recall that, while a transfer of real property inter vivos is construed fairly strictly, a will is an executory document.

The rule that there can never be another estate limited to take effect after a fee simple is a rule of common law. It does not apply to equitable interests, to conveyances operating to pass legal estates by virtue of the Statute of Uses or to devises.

A grant (not by conveyance to uses) by the owner of the fee simple "To A in fee simple, but if B play in a team that wins the Canada Cup, then to B in fee simple" transfers a fee simple absolute to A and nothing to B; but an identical grant in a will takes effect as written.

A grant (whether in a conveyance to uses or not) inter vivos by the owner of the fee simple "To A in fee simple and on A's death to B in fee simple" likewise transfers a fee simple absolute

to A and nothing to B. An identical grant in a will raises problems of interpretation, to answer which it is necessary to read the whole will (whose layout may be relevant but is, at most, of trifling importance) and to consider all significant circumstances known to the testator. Only if, after doing that, it is concluded that the testator's intention was to vest a beneficial fee simple absolute in A, and to provide that B should have it when A dies, is there a genuine case of repugnancy, necessitating the rejection as subordinate of one of the elements repugnant to each other. It is plainly wrong in law to hold that the testator's intention is clear, but cannot be carried out, if his clear intention is to put real property at the absolute disposal of A, and that B is to take it if A does not dispose of it inter vivos, or that B is to take such of it as A does not dispose of inter vivos.

- (i) A devise "To A for life, A to have a general power of appointment over the fee simple, with remainder to B in fee simple of any part of the land A does not appoint inter vivos or by will" is valid as written.
- (ii) A devise "To A, and on A's death, such of the land as A has not disposed of is to go to B" may mean exactly the same. If it does, and A takes the legal fee simple (though there seems no reason why he should take more than a life estate), A will hold it on trust for himself for life and, subject thereto and to the exercise of his power, for B in fee simple. It is not possible (unless there is something to that effect in another part of the will or in the relevant circumstances known to the testator) to construe the devise as being of a beneficial fee simple absolute to A with an inconsistent gift over to B.
A fortiori if A is not intended to have a power to appoint by will.
- (iii) A devise "To A for life, A to have a general power of appointment inter vivos over the fee simple, with remainder to B in fee simple of any part of the land unappointed by A" is valid as written.
- (iv) A devise "To A absolutely, and on A's death, such of the land as A has then is to go to B" may mean exactly the same. If the devise must be construed as carrying the legal fee simple absolute to A, there is a trust of it to give effect to the testator's intention. There being no express trust, there is a constructive trust to prevent B being defrauded by A or his successors in title.

To base a judgment on the lack of clarity of the testator's intention may sometimes be inescapable, but to base it on a clear intention involving repugnancy is possible only if he intends the primary donee to have a beneficial fee simple absolute and someone else to take a gift over; or if he intends the primary donee to have a fee simple absolute subject to such a restraint on alienation as offends *Quia Emptores* or public policy. If there is anything that can be done by contract or by secret trust, it can be done by overt devise.

- (v) T, the fee-simple owner, devises land "To A in fee simple." A agrees orally with T that A will hold the land beneficially for life, with power to sell such parts of it as A may think fit to sell, and to appropriate the proceeds of sale for his personal expenditure, and that on A's death B is to take the land, or such of it as A still has title to. There is a valid secret trust (whether or not evidenced in writing) and B will take the land not sold by A, as well as any proceeds of sale, or property into which they can be traced, owned by A at his death.
- (vi) H and W contract that each will leave all the property he owns at death to the survivor absolutely, and that the survivor will leave all the property he owns at death to A; and H and W both make wills accordingly. W dies, and her estate vests in H (absolutely at law). H is a trustee. He has power to dispose of any of his property inter vivos, except for the sole purpose of defeating the interests of A; but he has no substantial testamentary capacity. If he revokes his earlier will and makes a new one leaving everything to B, the revocation is effective, and the earlier will will not be admitted to probate, but the trust is still there, and the personal representatives who prove W's last will will hold his net estate on trust for A.

Repugnancy unmasked

For a true case of repugnancy in a will there must be a gift of property beneficially to A and a gift of the same property beneficially to B. A gift of real property "to A to enjoy during his life" and another gift of the same real property "to B to enjoy during the life of A" is an example of repugnancy. A will containing a gift of Blackacre "to A absolutely" and another gift

of Blackacre" to B absolutely on the death of A" presents no repugnancy unless the whole will and circumstances show that A was meant to take a beneficial fee simple absolute. If they do not show that, on the face of it the gift to B establishes that A's absolute interest is for life. A and B have not been given the same real property: A has been given a life estate or interest and B a fee simple in remainder. A devise of Blackacre "to A beneficially in fee simple but he must not dispose of it except by gift to B" comprises repugnancy. A devise of Blackacre "to A in fee simple and, to the extent that he does not dispose of it, remainder to B in fee simple on A's death" presents no repugnancy. On the face of it, the only fee simple (if any) that vests in A is the legal estate, held on trust for B subject to A's interest for life and power of appointment over the fee.

XVIII

The prospective purchaser of the farm may get tired of waiting. The widow may despair of reaching Australia. The nephew may become disenchanted with lawyers. The kindly farmer cannot live happily ever after. There is no happy ending to this fairy tale. In fact, there is no ending at all. But learned counsel will soon complete his opinion.