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THE EFFECT ON FUTURE INTERESTS OF A WIDOW'S ELECTION AGAINST THE WILL

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Colorado law provides that no person can devise or bequeath away from his surviving spouse more than half of his estate without invoking his spouse's right to take a statutory share of one-half of the estate.[1] This is an enlargement on the common law dower and curtesy and undoubtedly creates a greater incentive for renunciation of the will. The incentive is heightened when the will creates for the surviving widow an estate for life or other interest of restricted alienability and duration. Since a life estate is not considered by the courts to be equivalent to a one-half interest in the whole estate,[2] there is going to be the problem of what effects will follow if the widow should elect to take against the will.

Let us take two examples which have arisen in cases before the Colorado Supreme Court. The first is pertinent to the problem even though a surviving widow is not involved.

(1) The settlor created a living trust whereby he left a substantial portion of his property to different members of his family. Part of the income was to be paid to his son H for life and upon his death to the son's wife L for her life on the condition that she and her husband had not separated during the son's lifetime. After the wife's death the income was to be paid *per stirpes* to the lawful issue of H, but if there be no such issue living (or if living, extinction should occur before the termination of the trust), then the income was to be paid to A, B, and C. Before H died he and his wife were divorced. H died leaving L and their children. L disclaimed any interest in the life estate. The question was whether the income should be paid to the children immediately or be held in suspense until the death of L. The court held that even though the only provision in the trust for paying the income to the children was on L's death, the children's interest would be accelerated and the income paid to them immediately. They declared that the prior estate failed because of the disclaimer and because L did not survive H as his widow. This is the only Colorado decision[3] recognizing acceleration of future interests.

(2) Testator left one-half of his estate to his wife for life and remainder to his brother and sister and the three children of a former marriage. The residue of the estate he gave to A. The widow elected to take a statutory one-half. It was apparently assumed by all parties that the remainders were accelerated since no issue was made of the matter. The question was whether A's interest should be abated one-half to provide for the widow's forced share. The court held that the abatement should effect all legacies

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1 Colo. Rev. Stat. § 152-5-5 (1953).
2 *E.g.*, Wolfe v. Mueller, 46 Colo. 335, 104 Pac. 437 (1909).
3 Brunton v. International Trust Co., 114 Colo. 298, 164 P. 2d 472 (1945).

proportionately and that A's interest would be reduced by fifty percent.[4] *Query*: Did this result in equal abatement? The testator gave the remaindermen less than a half interest since their interests were preceded by a life estate. Upon renunciation of the preceding interest their interests were greatly magnified before they were abated one-half. Other states, under such circumstances, have ordered the life estate to be seized by a court-appointed trustee or receiver and sequestered for the benefit of all disappointed legatees.[5] Other cases in the Colorado reports appear to present similar opportunities for sequestration and yet the legatees never brought that remedy to the court's attention.[6] As will be shown later, not only is sequestration recognized as a common law remedy in other jurisdictions, but Colorado has always had a statute which undoubtedly gives such relief.[7] Its use has been confined to questions of contribution between legacies,[8] and, as in the above case, it has been overlooked as a means of providing more equitable relief for disappointed legatees when a widow[9] renounces her life interest in favor of a statutory share.

Acceleration and sequestration arise in situations other than when a widow elects against a will, but this is by far the more common situation.[10] This article will attempt to predict how the Colorado courts will treat various types of future interests when the testator's plans have been frustrated by his widow's renunciation of a carefully drawn will. The basic questions to be kept in mind are (1) whether the interest is one which is traditionally accelerated upon the disclaimer of the preceding life estate, and (2) if it does appear to be of that type, do the circumstances warrant the equitable relief of sequestration for the disappointed legatees?

ACCELERATION: THEORETICAL ASPECTS

Although it is true that the term "acceleration" is often used by the courts when the life tenant dies before the testator, there is no problem in this type of situation because the will itself provides that the "remainder" shall become possessory upon the death of the life tenant. Actually there never was a remainder for the

4 Binkley v. Switzer, 69 Colo. 176, 192 Pac. 500 (1920).

5 Dean v. Hart, 62 Ala. 308 (1878); Bank of Statesboro v. Futch, 164 Ga. 181, 138 S.E. 60 (1927); Campbell v. Campbell, 380 Ill. 22, 42 N.E. 2d 547 (1942). Timberlake v. Parish's Ex'r, 35 Ky. (5 Dana) 345 (1837); Adams v. Legroo, 111 Me. 302, 89 Atl. 63 (1913); Hinkley v. House of Refuge, 17 Am. Rep. 617, 40 Md. 461 (1874); Firth v. Denny, 84 Mass. (2 Allen) 468 (1861); Sellick v. Sellick, 207 Mich. 194, 173 N.W. 609 (1919); Cotton v. Fletcher, 81 N.H. 243, 123 Atl. 889 (1924); Holdren v. Holdren, 78 Ohio St. 276, 85 N.E. 537 (1908); In re Lonegran's Estate, 303 Pa. 142, 154 Atl. 387 (1931); Meek v. Trotter, 133 Tenn. 145, 180 S.W. 176 (1915); Jones v. Knappen, 63 Vt. 391, 22 Atl. 630 (1891); McReynolds v. Counts, 50 Va. (9 Grat.) 242 (1852). *Contra*, Capron v. Capron, 6 Mackey 340 (D.C. 1888); Union Trust Co. v. Rossi, 180 Ark. 552, 22 S.W.2d 370 (1929); Sherman v. Baker, 20 R.I. 446, 40 Atl. 11 (1898).

6 Logan v. Logan, 11 Colo. 44, 17 Pac. 99 (1887); Brinkley v. Switzer, 69 Colo. 176, 192 Pac. 500 (1920); Peterson v. Stitzer, 103 Colo. 529, 87 P.2d 745 (1939).

7 Colo. Rev. Stat. § 152-14-10 (1953), provides: "In all cases where a surviving spouse shall renounce all benefits under the will and the legacies and bequests therein contained to other persons shall in consequence thereof become increased or diminished in amount, quantity, or value, it shall be the duty of the court upon the settlement of such estate to abate from or add to such legacies and bequests in such manner as to equalize the loss sustained or advantage derived thereby in a corresponding ratio to the several amounts of such legacies and bequests according to the intrinsic value of each."

8 Hart v. Hart, 95 Colo. 471, 37 P.2d 754 (1934); Binkley v. Switzer, 69 Colo. 176, 192 Pac. 500 (1920); Wolf v. Mueller, 46 Colo. 335, 104 Pac. 487 (1909); Logan v. Logan, 11 Colo. 44, 17 Pac. 99 (1887).

9 The term "widow" will be used throughout this article. The statutes equally apply to a widower.

10 For full treatment of acceleration and sequestration in all their aspects, see 2 Simes & Smith, Future Interests, ch. 25 (2nd ed. 1956); Restatement, Property §§ 231-236 (1944); and the Appendix to the Restatement of Property: "Aspects of the Law of Acceleration and Sequestration" written by Professor Richard R. Powell, Reporter of the American Law Institute for the Restatement of Property.

reason that what appears to be a remainder upon reading the will, was never preceded by a freehold estate which took effect. Acceleration also occurred at common law in England and some American states when the life tenant forfeited his interest[11] (by treason, felony, or tortious conveyance) or merged his estate with the next succeeding vested interest.[12] These two situations—forfeiture and merger—have a different effect than other types of failure of the life estate. The law has always regarded a merger or forfeiture to occur *after* the life estate had been conveyed or devised. If the remainder is a vested remainder, it will immediately become possessory since it was ready to take seisin "whenever and however the preceding freehold estates determine."[13] On the other hand, if it was a contingent remainder in land the law at one time held that it must fail and be destroyed forever.[14] This was because the contingent remainder could not become possessory until the condition precedent had occurred. If it had not occurred[15] and if there was no other future interest to fill the gap in seisin, the land necessarily reverted to the grantor or his successor in interest, and it would require a new conveyance to take it away from him.

In contrast to this, when a life estate failed for any other reason, such as disclaimer or renunciation, the harshness of the rule was avoided by the fiction of "relation back" whereby the court looked upon the renunciation as having occurred at the moment of the testator's death.[16] The effect is just the same as if the life tenant had died before the testator. The will was construed as though the life estate had never existed[17] and, thus, the remainder interest is treated as a present interest. It has been held in Colorado that a renunciation of a life estate does not take with it the remainder which is limited thereon.[18]

11 Archer's Case, 1 Co. Rep. 66b, 76 Eng. Rep. 146 (1598).

12 Craig v. Warner, 5 Mackey 460 (D.C. 1887); Blocker v. Blocker, 103 Fla. 285, 137 So. 249 (1931). These cases and Archer's Case, *supra* 11, involve reversionary interests which were accelerated to present possession.

13 This is the classic definition of a vested remainder. Gray, Rule Against Perpetuities § 9 (4th ed. 1942).

14 Blocker v. Blocker, 103 Fla. 285, 137 So. 249 (1931); Archer's Case, 1 Co. Rep. 66b, 76 Eng. Rep. 146 (1598).

15 If it had occurred, then it would no longer be a contingent remainder, but a vested remainder.

16 Of course, equitable contingent remainders were never subject to the rule of destructibility, so there was never any reason for the fiction of "relation back" for them. Nevertheless the courts have applied the fiction to them also. See, e.g., Mayhew v. Atkinson, 93 F. Supp. 754 (D.C.D.C. 1950).

17 Dean v. Hart, 62 Ala. 308 (1878); Union Trust Co. v. Rossi, 180 Ark. 552, 22 S.W.2d 370 (1929); Wallace v. Wallace, 118 Fla. 844, 160 So. 377 (1935); Rench v. Rench, 184 Iowa 1372, 169 N.W. 667 (1918); Citizens-Union Bank & Trust Co. v. Palumbo, 290 S.W.2d 489 (Ky. 1956); Wood's Adm'r v. Wood's Devisees, 58 Ky. (1 Metc.) 512 (1859); Cockey v. Cockey, 141 Md. 373, 118 Atl. 850 (1922); Rose v. Rose, 126 Miss. 114, 88 So. 513 (1921); McCollum v. McCollum, 108 Neb. 82, 187 N.W. 783 (1922); Davidson v. Savings & Trust Co., 129 Ohio St. 418, 195 N.E. 845 (1935).

18 Binkley v. Switzer, 69 Colo. 176, 192 Pac. 500 (1920).

Although acceleration has been defined by one authority as a "hastening of the owner of the future interest toward a status of present possession,"[19] this is technically an inaccurate picture when applied to cases of renunciation. Under the doctrine of "relation back" the interest was a present interest the moment the testator died. For all practical purposes, though, it is helpful to look at it as it happened in reality, that is, there was a future interest until the life estate was renounced. Therefore when it is said that a vested remainder is accelerated, what is meant is that what would have been a vested remainder, had not the life estate been disclaimed, is now a present interest. If the interest is what would ordinarily be called a contingent remainder and the court does not accelerate it for some reason, it is properly called an executory interest.[20]

The majority of decisions justify acceleration on the theory that it best carries out the testator's intention, or at least his probable intention.[21] In this respect it resembles the doctrine of dependent relative revocation which has developed in the law of wills. "If the testator had known that the new will would be ineffective, would he have intended to revoke the old one?" is not much different than "if the testator had known the life estate would be ineffective would he have intended to use the language he did?" The law of acceleration involves so many varying circumstances, just as the circumstances surrounding the revocation of a will, that the answer depends on how the court thinks the testator would change his will if he were alive. The courts will go to great lengths to reconstruct the probable intent of the testator. In one case acceleration was allowed upon the widow's renunciation even though the will said "It is my desire that no part of my real estate be disposed of until after the death of my wife."[22]

Under this theory of probable intent, most vested remainders will be accelerated and even many contingent remainders will be accelerated. The usual case is one in which a life estate is given to the wife "and upon her death the estate shall go to my children." Although there is a technical condition precedent attached to the vesting of the remainder—the death of the widow—the courts will either interpret this to be a vested remainder and the words "upon her death" as superfluous,[23] or they will look at it as a contingent remainder with the implied condition precedent "upon her death or other termination of the life estate."[24] Since the condition precedent has been fulfilled, the remainder becomes a present estate. Of course this is really the same thing as a vested remainder since a condition precedent "whenever the prior estate terminates" fulfills the definition of a vested remainder. Even when the remainder

19 2 Simes & Smith, Future Interests at 263 (2nd ed. 1956).

20 Wakefield v. Wakefield, 256 In. 296, 100 N.E. 275 (1912). In Grossan v. Grossan, 303 Mo. 572, 580, 262 S.W. 701, 705 (1924) the court said: "It is suggested that the devise . . . was a contingent remainder, and that the nullification of the particular estate destroyed the remainder. That is true. It destroyed the remainder, as such. It did not destroy the devise to the daughters as such."

21 See, e.g., Cotten v. Fletcher, 81 N.H. 243, 123 Atl. 889 (1924).

22 Union Trust Co. v. Rossi, 180 Ark. 552, 22 S.W.2d 370 (1929).

23 Doe v. Considine, 73 U.S. (6 Wall.) 458 (1867); Minnig v. Batdorff, 5 Pa. 503 (1887); American Trust Co. v. Johnson, 236 N.C. 594, 73 S.E.2d 468 (1952).

24 Union Trust Co. v. Rossi, 180 Ark. 552, 22 S.W.2d 370 (1929); Vance's Estate, 141 Pa. 261, 21 Atl. 643 (1891). But cf. Lovell v. Town of Charlestown, 66 N.H. 584, 32 Atl. 160 (1891) where the court refused to accelerate a vested remainder because "upon my wife's death" seemed to the court to mean that the remainderman was not to take until her death.

is clearly contingent — *e.g.*, to A for life and upon his death to B if he then be living — the courts will often accelerate B's remainder even though there is no assurance that he will survive A.[25] Thus the principle of acceleration is not merely an operation of law that affects only vested remainders. Rather it is a way of reconstructing the testator's will, the scheme of which has been upset by the widow's election. In some areas of the law, the distinction between vested remainders and contingent remainders is important, but in view of the fact that the courts accelerate remainders according to the particular circumstances of each case the distinction is not important.[26] Nevertheless, for the purpose of analysis it is convenient to classify the situations into five groups.

REMAINDER VESTED INDEFEASIBLY

By the great weight of authority, vested remainders that are not subject to divestment will be accelerated upon renunciation of the life estate.[27] When there are unusual circumstances the courts have refused to accelerate a vested remainder. Thus where a renounced life estate was an equitable interest under a trust and there were other life estates concurrent with the renounced interest, courts have refused to accelerate part of the remainders to fill in the gap left by the renounced interest. To work an acceleration, the particular estate as a whole must terminate.[28]

CONTINGENT REMAINDERS

When the future interest is subject to a condition precedent the courts have encountered some difficulty in establishing a set rule as to what kind shall be accelerated and what kind shall not. The *Restatement* takes the view that no acceleration should take place "so long as a condition precedent to such succeeding interest continues unfulfilled."[29] However, it recognizes that as a rule of construction, language which would ordinarily be construed as creating a condition precedent should be reconstrued in light of the renunciation.[30] With this in mind a court may come to the conclusion that the testator's intention would best be aided by accelerating the interest. Thus a description of the persons to take after the life estate as the "surviving children" or "those children as are living upon my wife's death" has often been interpreted by the courts to refer to those that will survive the termination of the life estate no matter how it ends and not necessarily the termination of the widow's life. In *Scotten v. Moore*[31] the testator gave all his estate to his wife for life and after her death to "my

25 Mayhew v. Atkinson, 93 F. Supp. 753 (D.C.D.C. 1950); Northern Trust Co. v. Wheaton, 249 Ill. 606, 94 N.E. 980 (1911); Citizens-Union Bank & Trust Co. v. Palumbo, 290 S.W.2d 489 (Ky. 1956).

26 Scotten v. Moore, 28 Del. 545, 93 Atl. 373 (1914); Nelson v. Meade, 129 Me. 61, 149 Atl. 626 (1930); American National Bank v. Chaplin, 130 Va. 1, 107 S.E. 636 (1921). *Contra*, Sueske v. Schofield, 376 Ill. 431, 34 N.E.2d 399 (1941); Schaffenacker v. Beil, 320 Ill. 31, 150 N.E. 333 (1925).

27 Mayhew v. Atkinson, 93 F. Supp. 753 (D.C.D.C. 1950) (one remainder was vested, the other contingent. Both were accelerated.); Bank of Statesboro v. Futch, 164 Ga. 181, 138 S.E. 60 (1927); Allen v. Hannum, 15 Kan. 625 (1875); Adams v. Legroo, 111 Me. 302, 89 Atl. 63 (1913); Sherman v. Baker, 20 R.I. 446, 40 Atl. 11 (1898); In re Borchert's Will, 259 Wis. 361, 48 N.W.2d 496 (1951).

28 Toombs v. Spratlin, 127 Ga. 766, 97 Atl. 1044 (1907); Windsor v. Barnett, 201 Iowa 1226, 207 N.W. 362 (1926); United States Trust Co. of New York v. Douglass, 143 Me. 150, 56 A.2d 633 (1948); Plympton v. Plympton, 88 Mass. (6 Allen) 178 (1863); Roe's Executors v. Roe, 21 N.J. Eq. 253 (1871); In re Reighard's Estate, 253 Pa. 43, 97 Atl. 1044 (1916). *But cf.* Loew's Estate, 291 Pa. 22, 139 Atl. 582 (1927). Where the remaindermen are also the holders of the concurrent life estates, no harm will result upon acceleration. Randall v. Randall, 85 Md. 430, 37 Atl. 209 (1897); Wyllner's Estate, 65 Pa. Super. Ct. 396 (1917).

29 Restatement, Property § 233 (1944).

30 *Id.* comment c.

31 28 Del. 545, 93 Atl. 373 (1914).

then living children (or in case of their death to their legal representatives) share and share alike." The court held that the principle of acceleration is based on the presumed intention of the testator, and that there need be no distinction made between vested and contingent remainders. The court reasoned that when it appears that possession by the remainderman is postponed solely for the benefit of the widow, it is presumably the intention of the testator that her renunciation is equivalent to her death.[32]

When the condition precedent is of a nature that something more than the mere termination of the life estate is required, there will be no acceleration. Thus when T gave property to his wife for life and the remainder to his daughters, provided they shall tenderly care for the widow for the rest of her life, there was no acceleration upon the widow's renunciation since the testator intended the postponement of the remainders to depend on their taking care of his wife.[33]

REMAINDERS VESTED SUBJECT TO COMPLETE DEFEASANCE

Most of the cases of this classification are construed in the same way that contingent remainders are construed. There is not much difference between "to A for life and then to B if living; if not living then to C" and "to A for life and then to B; but if B does not survive A, then to C." In the first example the remainder to B is contingent; in the second example the remainder is vested subject to complete defeasance. It would seem that a remainder of this type should be accelerated since it is highly probable that the testator made alternative dispositions which were dependent on B's being alive at the termination of the life estate so he could personally be benefited. Since the life estate has been removed, B should be able to take possession. There is substantial authority that such a limitation should be accelerated and become indefeasible.[34] Some courts have taken a middle road and have accelerated the remainders but subjected them to divestment should the remainderman not survive the life tenant.[35] Colorado apparently

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32 See also Mayhew v. Atkinson, 93 F. Supp. 753 (D.C.D.C. 1950) (step children who may be living); Dean v. Hart, 62 Ala. 308 (1878) (gift to wife and daughter jointly for life, survivor to take the whole. On death of both, remainder to heirs of the daughter. Held, daughter took whole of life estate even though not yet the "survivor."); Equitable Trust Co. v. Proctor, 27 Del. Ch. 151, 32 A.2d 422 (1943); Tomb v. Bardo, 153 Kan. 766, 114 P.2d 320 (1941) (nieces and nephews then living); O'Rear v. Bogie, 157 Ky. 666, 163 S.W. 1107 (1914) (to descendants of life tenant as in intestacy); Eastern Trust & Banking Co. v. Edmunds, 133 Me. 450, 179 Atl. 716 (1935) (grandson if living). *Contra*, Suesko v. Schofield, 276 Ill. 43, 34 N.E.2d 399 (1941) (upon death of widow to her descendants if any); Schaffenacker v. Beil, 320 Ill. 31, 150 N.E. 333 (1925) (brothers and sisters of testator if they be living at death of wife); Cassidy v. Padgett, 99 Ind. App. 239 (1934); Stevens' Ex'r v. Stevens, 121 Ohio St. 490, 169 N.E. 570 (1929) (to A and B should they be living at widow's death).

33 Crossan v. Crossan, 303 Mo. 572, 262 S.W. 701 (1924). See also Wood's Adm'r v. Wood's Devisees, 58 Ky. (1 Metc.) 512 (1859) (at death of widow to J. provided he be living and has arrived at the age of twenty-five); Brandenburg v. Thorndike, 139 Mass. 102, 28 N.E. 575 (1885) (at expiration of three years from the death of wife to be distributed in equal shares to A and B); Key's Estate, 16 Pa. Co. Ct. 216 (1895) (remainder to "heirs" of life tenant).

34 Capron v. Capron, 6 Mackey 340 (D.C. 1888); Decker v. Decker, 251 Ala. 278, 37 So.2d 204 (1948); Union Trust Co. v. Rossi, 180 Ark. 552, 22 S.W.2d 370 (1929); Rench v. Rench, 184 Iowa 1372, 169 N.W. 667 (1918); Keen v. Brooks, 186 Md. 543, 47 A.2d 67 (1946); Young v. Eagan, 131 N.J.Eq. 574, 26 A.2d 180 (1942); Petition of Chemical Bank and Trust Co., 198 Misc. 536, 99 N.Y.S.2d 368 (1950); American Trust Co. v. Johnson, 236 N.C. 594, 73 S.E.2d 468 (1952) (court calls the remainder a vested interest subject to divestment, but it appears to be alternative contingent remainders); In re Disston's Estate, 257 Pa. 537, 101 Atl. 804 (1917); Albright v. Albright, 192 Tenn. 326, 241 S.W.2d 415 (1951). See also Restatement, Property § 231, comment h (1944). *Contra*, In re Roger's Estate, 97 Md. 674, 55 Atl. 679 (1903); Sawyer v. Freeman, 161 Mass. 543, 37 N.E. 942 (1894); In re Atkinson's Will, 81 N.Y.S.2d 631 (Surr. 1949).

35 Hasameier v. Welke, 309 Ill. 460, 141 N.E. 176 (1923); Parker v. Ross, 69 N.H. 213, 45 Atl. 576 (1897).

followed this rule in a case where the interests were equitable and the trust was to continue.[36]

CLASS GIFTS

The cases involving remainders to a class are very similar to situations where the remainder is vested subject to complete defeasance. The only added question is, when does the class close if the remainder is accelerated? It should be kept in mind that some class gifts are contingent remainders (*e.g.*, to A for life, and then to his *surviving* children) and there may be the added problem of construing words of condition precedent. Some courts have held that merely because the remainder is accelerated does not require the class to close before the death of the life tenant.[37] But there are problems in this solution unless the gift is land, since the trustee or personal representative must retain enough of the corpus in case the class should increase in size. Consequently, as a matter of convenience, the majority of the courts have held that acceleration should be accompanied with the closing of the class.[38] The question has not been decided in Colorado.[39] The *Restatement* is in accord with the majority view but recognizes that manifestation of a contrary intent will keep the class open.[40] Also, of course, manifestation of a contrary intention may keep the remainder from being accelerated in the first place.

EXECUTORY INTERESTS

As we have seen in the section on vested remainders subject to complete defeasance, when an executory interest is limited upon a vested remainder, there is the probability that acceleration of the remainder will destroy the executory interest.[41] A good example of this is found in *Albright v. Albright*.[42] In that case the testator left his wife most of his estate. Some of the property, however, was given in the form of a life estate to his wife with remainder

36 Brunton v. International Trust Co., 114 Colo. 298, 164 P.2d 472 (1945). See note 3 *supra*, and the accompanying text. After the remainder was accelerated the trust continued. Althouugh the court did not expressly so hold, it was implied in their decision that the interests were still subject to divestment.

37 Askey v. Askey, 141 Neb. 406, 196 N.W. 891 (1923); Yeaton v. Roberts, 28 N.H. 459 (1854); Neill v. Bach, 231 N.C. 391, 57 S.E.2d 385 (1949).

38 Tomb v. Bardo, 153 Kan. 766, 114 P.2d 320 (1941); Allen v. Hannum, 15 Kan. 625 (1875); Sherman v. Baker, 20 R.I. 446, 40 Atl. 11 (1898); American Nat. Bank v. Chapin, 130 Va. 1, 107 S.E. 636 (1921).

39 In Brunton v. International Trust Co., *supra* note 36, the remainder was to the issue (*per stirpes*) of the settlor's son. Upon renunciation of the preceding life estate the remainder accelerated. The class closed of necessity since the settlor's son was dead. The class would have closed even if there were no acceleration.

40 Restatement, Property § 231 comment i (1944).

41 See cases collected in note 34, *supra*.

42 192 Tenn. 326, 241 S.W.2d 415 (1951).

to two daughters, but if either die before their mother then their children were to take in their place. In order to free the property of these restrictions the widow disclaimed her life estate and agreed with her daughters to a settlement by which they would divide the property so that each would get a fee simple in her share. The widow did not take her statutory share. The court held that the disclaimer accelerated the remainders to possessory status. The gifts over to the grandchildren were destroyed since the court thought that the testator would not want to divest his daughters of their interests once they had become possessory. Professor Simes suggests that where an executory interest is of the type that divests only a possessory interest, there should not be acceleration.[43] Thus where land is devised to A in fee simple, but if A die without issue, then to B in fee simple absolute, B's interest should not be accelerated upon A's renunciation, but would be converted from a shifting executory interest into a springing executory interest.

GENERAL EXCEPTIONS

As will be discussed in the next section, even though there would be ample reason to accelerate a future interest, a court may choose to halt the acceleration and sequester the life estate on the theory that the testator's plan would be better accomplished by compensating those legatees who lose more than others by the widow taking her statutory share. This exception to acceleration applies to all types of future interests.

All the foregoing discussion has been on the assumption that the proper theory of acceleration is that it is based on a reconstruction of the will; that courts should not follow historically-fixed rules of property if they can discern a contrary intention in the spirit of the will, even though a strict interpretation of the written language would not suggest it. They also justify their decisions on the ground that the testator is presumed to know of his wife's right to a statutory share (or dower as the case may be) and therefore must have contemplated the possibility that the remainders would be accelerated. There are a few decisions that take the more realistic view that the testator's intentions have been frustrated and the court is merely trying to patch up remnants of the will rather than have the testator's desires be completely frustrated by having the whole estate pass by intestacy.[44]

There is a third theory that a few courts seem to go on. It is based on a strict common law principle that wills must be construed literally and should not be "reconstrued" in light of subsequent frustration. This view favors the explicit meaning of words over judicial mind-reading. Under this theory vested remainders are automatically accelerated where there is no preceding freehold that ever came into existence. Contingent remainders become springing executory interests since to accelerate them would pass over the condition precedent as required by the language of the will.[45] This

43 2 Simes & Smith, Future Interests at 289 (2nd ed. 1956).

44 Woodburn's Estate, 151 Pa.St. 586, 25 Atl. 145 (1892); In re McIlhattan's Will, 194 Wis. 113, 216 N.W. 130 (1927). In rare circumstances the courts will declare the whole will invalid because of the devastating effect of the widow's election. Fennell v. Fennell, 80 Kan. 730, 106 Pac. 1038 (1909); In re Estate of Hunter, 129 Neb. 529, 262 N.W. 41 (1935).

45 Sawyer v. Freeman, 161 Mass. 543, 37 N.E. 942 (1894) in which the testator left his estate in trust for his wife for life and at her death to be paid to her daughter, but if the daughter be not living at her death, then to the issue of such daughter. The court, in an opinion by Holmes, J., held that the words "at her death" prevented acceleration. See also Stevenson v. Stevenson, 205 Ill. App. 15 (1917); Stevens v. Stevens, 121 Ohio St. 490, 169 N.E. 570 (1929); Compton v. Rixey's Executor, 124 Va. 548, 98 S.E. 651 (1919).

view tends to penalize testators who fail to provide alternative dispositions in case their wives elect against the will (assuming they would have wished acceleration to take place).

SEQUESTRATION

Since every time there is an acceleration of a future interest there is a corresponding increase in its value, it usually occurs that some other legatee or devisee loses a larger part of his gift than he would otherwise. In most states this occurs most often to a residuary legatee since the personal representatives will take his share to pay all claims before other gifts are abated.[46] This rule of abatement is changed in Colorado because of section 152-14-10 of the 1953 Colorado Revised Statutes.[47] This statute has been interpreted to mean proportionate abatement regardless of whether the different legacies are specific, general, or residual.[48] The words "legacies and bequests" should be taken to include devises of real property.[49] The statute is of little effect, however, if after the proper abatement, a remainder is increased in value by its acceleration, thus decreasing the percentage of its share of the abatement. This would be proper if the testator intended such a result, but many testators would probably have meant for the other legatees to receive more than they would get if acceleration is allowed. There are situations, of course, where acceleration would not deprive anyone of his just proportion. Thus where the entire estate is given to the wife for life with the remainder over, acceleration will not distort the testatmentary scheme no matter how many persons have an interest in the remainder. Also when the remaindermen are the beneficiaries of all the other gifts other than the wife's, there will be no distortion.

Where substantial distortion can occur is given by the following hypothetical situation: Testator having an estate worth $100,000 leaves $50,000 to his child A by a former marriage and the residue he leaves to his present wife for life with the remainder to her daughter B, the testator's stepchild. The wife's life estate is present-

46 See, e.g., Pace v. Pace, 271 Ill. 114, 110 N.E. 878 (1915).
47 *Supra* note 7.
48 This interpretation has often been repeated, but always is *dictum*. See Hart v. Hart, 95 Colo. 471, 37 P.2d 754 (1934) where all gifts were specific legacies, but the language used by the court was broader; Binkley v. Switzer, 69 Colo. 176, 192 Pac. 500 (1920) where all gifts abated *pro rata*, but all were of same class; Logan v. Logan, 11 Colo. 44, 17 Pac. 99 (1887) where gifts were of same class, but the court said: ". . . all legacies and bequests (which words include devises of real estate) are to be equalized under the statutory provisions." at 50, 192 Pac. at 102.
49 Logan v. Logan, *supra* note 47.

ly worth, let us say, $20,000 and the remainder, $30,000. If the wife renounces and takes her $50,000 statutory share, then both the pecuniary gift to A and the remainder to B will abate one-half. A is entitled to $25,000 at this point and B will get $15,000. There is still the life estate to be disposed of. If the remainder is accelerated then B will receive $25,000 which represents a net reduction of only 16 2/3%. The other child's gift remains at a reduction of 50%. If instead of acceleration, the widow's life estate is sequestered for the benefit of disappointed legatees (in this case both A and B, since in Colorado all legacies are abated equally) the estate would be more equitably distributed. The doctrine of sequestration is widely recognized in this type of situation.[50] The courts will appoint a trustee to receive the income from the life estate and pay it to the legatees in proportion to their interests. Thus, in this case, A would get five-eighths of the income and B would get three-eighths. When the widow dies, her daughter or her daughter's successor in interest will receive the property in fee simple absolute.

The same result should follow if B's interest was a contingent remainder that would not normally accelerate, for instance "to my wife for life and then to my daughter on the condition that they take care of my wife for the rest of her natural life." Since there would be no aceleration, the renounced life estate should be sequestered in the same manner. In this case sequestration is not used to alleviate distortion between legacies, but simply to compensate disappointed legatees. Otherwise the life estate would pass into the residuary fund or go by intestacy.

It would seem from the language of section 152-14-10 that the common law doctrine of sequestration should be used whenever a widow's election deprives a beneficiary of part or all of his gift if it can be made up to him by using the renounced interest. If the widow renounced a legacy of property in fee simple, the other legatees would share in the property to compensate for the reduction in the whole estate. The same result should follow if what is renounced is a life estate. The statute expressly orders the court to *equalize* the losses (and not merely abate) acording to the value of the legacies.

A few courts have invented an alternative remedy that reaches the same result that sequestration does. In *Tomb v. Bardo*[51] the court accelerated the remainder and placed a charge on the real property to compensate disappointed legatees. It should be noted that this proceeds on a different theory than where a court, after paying the widow her share, distributes the residuary property with a charge placed on it in favor of other legatees or claimants. That is but a method of distributing the estate, the courts going to great lengths to find language in the will implying such a charge, and usually (at least in states other than Colorado) the residuary legatee has to bear the burden of paying off the claims including the widow's share. Since section 152-14-10 changed the common law as to abatement, the principle used in *Tomb v. Bardo* would be applicable as well as sequestration.

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50 See cases collected in note 5 *supra*.

51 153 Kan. 766, 114 P.2d 320 (1941). Simes states that this is the only case where this remedy has been used. 2 Simes & Smith, Future Interests at 297 (2nd ed. 1956). He overlooks the early cases of Allen v. Hannum, 15 Kan. 625 (1875); Sarles v. Sarles, 19 Abb. N.Cas. 322 (N.Y. Sup. Ct. 1887); Meek v. Trotter, 133 Tenn. 145, 180 S.W. 176 (1915).

The *Restatement* originally favored only sequestration, but after the above case was decided it was amended to read: "Whether sequestration or charge is used for the minimizing of distortion depends upon the judicial choice as to which remedy is more efficient."[52] Although sequestration is the more common relief given, it is submitted that it has several weaknesses. (1) The costs of having a court-appointed trustee or receiver to manage the life estate is high, thus limiting the use to cases where there is great distortion between legacies. (2) Litigation might arise should the widow outlive her expected lifespan, since that would mean that the remanderman's interest was overvaluated and the other disappointed legatees would demand that they should have a greater proportion of the distributed income. (3) It is possible that the widow might live so long that the income from her life estate would fully compensate the abated legacies. The question would then arise as to who should get this income. These problems are eliminated if *Tomb v. Bardo* is followed and the remainders are accelerated subject to an equitable charge. Thus: testator devises Blackacre (worth $100,000) to his wife for life and remainder to his daughter A, and the residue of his property (worth $30,000) to son B. If the wife elects to take her statutory one-half, the two gifts abate proportionately and she would get one-half to Blackacre and $15,000. The remainder in the other half of Blackacre is accelerated and charged with an amount to satisfy the disappointed legatees. At this point it is important to recognize that both A and B are disappointed legatees. Thus the charge on Blackacre should be just enough to give B a proper share of the increased value given to the remainder by acceleration. This increased value must be calculated according to the widow's life expectancy, *i.e.*, what the life estate would be worth had she not renounced it. If this were calculated to be worth $30,000 then the remainder would be worth about $70,000. Out of every dollar increase due to acceleration, 30% should go to B and 70% to A, because such is the ratio of the intrinsic value[53] of the orginal gifts, *i.e.*, a $70,000 remainder to A and a legacy of $30,000 to B. A charge of $9000 (30% of the value of the life estate) should be placed on A's half of Blackacre to be paid to B. This device avoids the expense of having the court administer the life estate and settles the question of the ratio

52 Restatement Property § 234, comment aa (1949 amendment to 1944 ed.).

53 ". . . it shall be the duty of the court . . . to abate from or add to such legacies . . . to equalize the loss sustained . . . in a corresponding ratio to the several amounts of such legacies and bequests according to the intrinsic value of each." Colo. Rev. Stat. 152-14-10 (1953).

of distribution once and for all by the use of mortality tables in estimating the value of the life estate.

Although there is no Colorado decision on the subject of sequestration, there is persuasive authority in favor of such relief by virtue of the fact that section 152-14-10 was taken[54] directly from an Illinois statute that has been construed several times by the courts of that state. (These Illinois decisions were written after the Colorado statute was enacted, but the Colorado Supreme Court has strongly relied on subsequent decisions of Illinois courts in construing this same statute in relation to another question.)[55] The Illinois courts have interpreted the statute to require sequestration of a renounced life estate for the benefit of disappointed legatees. In *Wakefield v. Wakefield*[56] the testator bequeathed pecuniary gifts to a number of individuals. He gave his wife a life estate in all the rest of his property and provided that at the death of the wife, $2000 was to be paid to A if he was then living. All the rest went to the children of B and the children of C in equal shares. The widow elected to take her statutory share. The court held that the statute required the life estate to be sequestered to equalize the disappointed legatees. Since the remainder was contingent there might not have been an acceleration even in the absence of sequestration, but in *Conant v. Elgin City Banking Co.*[57] the court expressly held that a vested remainder would not be accelerated if sequestration was required to equalize the losses. In other cases the Illinois courts have held that where the remainder is subject to a condition precedent other than the termination of the life estate, sequestration is in order.[58]

Iowa is the only other state which has a statute controlling abatement on a widow's renunciation.[59] Although the Iowa statute is not identical in wording to the Colorado and Illinois statutes, it provides that the amount of any claim that must be satisfied in opposition to or in disregard of the provisions of the will must be taken ratably from the interests of the heirs, devisees, and legatees. This has been construed to provide for sequestration of a life estate when a widow elects against the will. The leading case is *Bening v. Eischeid*[60] in which the testator left his estate in trust with income up to $600 per year to be paid to his wife for life; any additional income to be paid to A and B. Upon the widow's death the trust was to terminate and the property to pass in the following ratio: one-third to C and two-thirds to A and B. The widow renounced her life

54 Logan v. Logan, 11 Colo. 44, 17 Pac. 99 (1887).

55 *Id.* at 49, 17 Pac. at 101. The question was whether the entire will was destroyed by the renunciation of the widow. The court said: "Were this a new question, as counsel suggests, we would not only deem the foregoing interpretation duly authorized by the reasons and considerations given, but consider it the duty of the court to accept it as the more reasonable construction. It is, however, not a new question . . . . Since the appropriation of that section by our legislature . . . the supreme court of Illinois has decided that a will is not destroyed . . . by the renunciation of the widow, but that all legacies and bequests (which words are construed to include devises of real estate) are to be equalized under this statutory provision. Marvin v. Ledwith, 111 Ill. 144." The identical Illinois statute was Hurd's Rev. St. 1921, ch. 3, § 78. In 1939 the wording of the statute was changed but the Illinois court held that it did not alter the effect whatsoever. In re Reighard's Estate, 402 Ill. 364, 84 N.E. 2d 345 (1949). The present Illinois act can be found in Ill. Rev. Stat. 1959, ch. 3, § 202.

56 256 Ill. 296, 100 N.E. 275 (1912).

57 232 Ill. App. 156 (1924). See also Pillsbury v. Early, 252 Ill. App. 620 (1929).

58 Campbell v. Campbell, 380 Ill. 22, 42 N.E.2d 547 (1942); Sueske v. Schofield, 376 Ill. 431, 34 N.E.2d 399 (1941); Foreman Trust & Savings Bank v. Seelenfreund, 329 Ill. 546, 161 N.E. 88 (1928); Schaffenacker v. Beil, 320 Ill. 31, 150 N.E. 333 (1926); Blatchford v. Newberry, 99 Ill. 11 (1880). All these decisions based their result on the Illinois statute which is identical to the Colorado statute.

59 Section 633.14, Code of Iowa, 1954.

60 240 Iowa 1294, 39 N.W.2d 299 (1949). Cf. McGuire v. Luckey, 129 Iowa 559, 105 N.W. 1004 (1946); Shedenhelm v. Cafferty, 174 Iowa 195, 256 N.W. 340 (1916).

estate and took a statutory third of the whole estate. The trust fund was reduced from $71,500 to $46,000. The drop in income to be paid A and B was 33 1/3%. But if they were allowed to receive the $600 yearly income that the widow relinguished (by the terms of the trust they were to take all residue income, and at the same time they owned part of the remainder interest which conceivably might be accelerated) the net drop would only be 18%. The court held that the $600 income could be sequestered and distributed to equalize the losses suffered because of the widow's taking one-third of the estate.[61]

It would seem that under the authority of these cases and the unambiguous language of section 152-14-10, Colorado would probably apply the sequestration doctrine whenever disappointed legatees were astute enough to apply to the courts for that relief. Even when there is no distortion between legacies, as where no acceleration occurs, the life estate should be sequested to compensate all legatees for the depletion of their gifts.

61 Sequestration was in order, but the court, rather than appoint a trustee, changed the value of the remainder interest in favor of C and awarded the income of the trust to A and B. The parties had already stipulated as to the value of the life estate in the widow by utilizing the mortality tables. This method of handling the distribution is similar to the method used in Tomb v. Bardo, *supra* at note 50.