2536.

APPROVAL, BONDS OF HENRY COUNTY, OHIO—$39,796.30.

COLUMBUS, OHIO, November 15, 1930.

Industrial Commission of Ohio, Columbus, Ohio.

2537.

CONSTRUCTION OF WILL—TESTATOR DEVISES AND BEQUEATHS RESIDUE OF BOTH REAL AND PERSONAL PROPERTY TO HIS WIFE—WHAT ESTATE WIFE TAKES WHEN NO EXPRESS WORDS OF LIMITATION ARE USED TO INDICATE THE QUANTUM OF HER INTEREST.

SYLLABUS:

Where the residuary clause of a will devises and bequeaths to the testator's wife all the residue of his estate both real and personal without using any express words of limitation to indicate the quantum of her interest, and a subsequent clause then states, "It is my desire and wish that after the death of my beloved wife, (naming her), and providing there remains sufficient property, to pay the following amounts hereafter specified; and if not sufficient that they be paid proportionately", following which certain parties are named and definite sums of money written after their names, the wife takes a fee simple estate in the realty and an absolute interest in the personalty, and the attempted limitations over are void.

COLUMBUS, OHIO, November 15, 1930.

Tax Commission of Ohio, Wyandotte Building, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your request for the construction of a certain will in order to determine, for the purpose of assessing the inheritance taxes, whether the widow named therein takes a fee simple estate, or merely a limited estate with remainder over. Said will, after providing, in the first item, for the payment of testator's debts, and, in the second and third items, for the payment of certain pecuniary legacies, further provides in so far as is pertinent:

> "4th. I hereby give, devise and bequeath to my beloved wife, A. R. M., all the residue of my estate both real and personal.
>
> 5th. It is my desire and wish that after the death of my beloved wife, A. R. M., and providing there remains sufficient property, to pay the following amounts hereafter specified; and if not sufficient that they be paid proportionately.
>
> R. M. M., the sum of fifty thousand ($50,000.00) dollars, L. M. S. the sum of twenty-five thousand ($25,000.00) dollars, R. M. M., Jr., the sum of twenty-five thousand ($25,000.00) dollars, W. C. M., the sum of twenty-five thousand ($25,000.00) dollars, C. M., the sum of twenty-five thousand ($25,000.00) dollars, G. M., the sum of twenty-five thousand ($25,000.00) dollars. ---------- Church, the sum of fifty thousand ($50,000.00) dollars,

> The Home _____, the sum of twenty-five thousand ($25,000.00) dollars, _____ Gallery of Fine Arts, the sum of twenty-five thousand ($25,000.00) dollars, and the _____ Association the sum of twenty-five thousand ($25,000.00) dollars."

The purpose of construing a will is to ascertain and effectuate the intention of the testator as it is expressed by the words used in the instrument. *Anderson* vs. *State,* 116 O. S. 684, 689; *Brasher* vs. *Marsh,* 15 O. S. 103, 108; *Shaw and Campbell* vs. *Hoard,* 18 O. S. 227, 232. This intention must be gathered, not from an isolated consideration of one or even a few integrant provisions, but from the whole will and all its component parts as they bear upon each other. *Carter* vs. *Reddish,* 32 O. S. 1, 12-13; *Edwards* vs. *Rainier's Ex'rs.,* 17 O. S. 597, 604; *Starling's Ex'r.,* vs. *Price,* 16 O. S. 29, 31; *O'Malley* vs. *O'Malley, Jr.,* 20 O. A. R. 279, 280.

That a remainder cannot be engrafted upon a fee simple estate is irrefragable. *Baxter* vs. *Bowyer,* 19 O. S. 490, 497-498; *Hull* vs. *Chisholm,* 7 O. A. R. 346 (syllabus); *Persinger* vs. *Britton,* 10 O. A. R. 164, 168; *O'Malley* vs. *O'Malley, Jr.,* 20 O. A. R. 279, 281; *Stophlet* vs. *Stophlet,* 22 O. A. R. 327, 328; *Trumbull* vs. *Stentz,* 30 O. A. R. 34, 35; *Martin* vs. *Martin,* 27 O. L. R. 127, 129 (Ct. of Appeals). However, the description of an estate in general language which, if standing alone, would be sufficient to create a fee simple title, may, by subsequent provisions, be cut down to a lesser estate. *Widows' Home* vs. *Lippardt,* 70 O. S. 261, 284. Hence, before a limitation over can be declared void as engrafting a fee, it must first appear that a fee simple estate is actually created. It may be that the limitation does not graft upon a fee, but that it precludes a fee from being created at all. *Robbins* vs. *Smith,* 72 O. S. 1, 15, 16 and 17. In *Baxter* vs. *Bowyer,* 19 O. S. 490, 497-498, the court states:

> "It is true that a remainder cannot be engrafted upon a fee. The true reason of this rule, however, is not because the law will not permit it, but because the thing is impossible. I cannot give the whole of my estate to one, and a part of it to another. I cannot give the absolute fee to my wife, and the remainder to the church, for the same reason that I cannot give a square circle or give nothing, because it involves an absurdity. But before this rule can be applied, it must first be well ascertained that the will in question does, when construed fairly, and in the light of all its provisions and surroundings, give an estate in fee."

But subsequent words cannot operate to limit what otherwise would be a fee simple estate unless they are "as clear and decisive as the words of the clause giving the interest or estate". *Collins* vs. *Collins,* 40 O. S. 353, 364-365; *Persinger* vs. *Britton.* 10 O. A. R. 164, 167; *Watkins* vs. *Price,* 16 O. A. R. 27, 28; *Martin* vs. *Martin,* 27 O. L. R. 127, 130 (Ct. of Appeals); Page on Wills (1926 Ed.), Section 981, Pages 1636-1637; Alexander's Commentaries on Wills (1918 Ed.), Sections 932 and 934.

The fourth clause of the will in question, standing alone, gives to the widow, in clear and decisive words, a fee simple in the residue of the estate. *Watkins* vs. *Price,* 16 O. A. R. 27; *Martin* vs. *Martin,* 27 O. L. R. 127, 129 (Ct. of Appeals); *Findlay Brewing Co.* vs. *Dick,* 1 N. P. N. S. 592, 593 (affirmed by Circuit Court without report, see footnote, p. 592). Not only are words of inheritance unnecessary to pass an estate in fee by will at common law in Ohio (*Widows' Home* vs. *Lippardt,* 70 O. S. 261, 291) but Section 10580 of the General Code expressly provides:

> "Every devise in a will of lands, tenements, or hereditaments, shall convey *all* the estate of the devisor therein, which he could lawfully devise, unless it *clearly* appears by the will that the devisor intended to convey a less estate." (Italics the writer's.)

The crux of your inquiry is encountered when it is sought to determine the effect of item No. 5 upon the disposition made by item No. 4 of the will. The former item provides:

> "5th. It is my desire and wish that after the death of my beloved wife, A. R. M., and providing that there remains sufficient property, to pay the following amounts hereafter specified; and if not sufficient that they be paid proportionately. * * * "

First, it is to be noted that in so far as the present remnant of the property which once constituted the residue of testator's estate exceeds the sum of the amounts specifically named in the second paragraph of item 5 ($300,000.00), it belonged to the widow in fee simple. The testator did not attempt to limit the widow's right in, or further to dispose of, such excess in any way. The testator, in item 5, attempted to make further disposition as to the property dealt with in item 4 only in so far as the amount of it remaining at his wife's death was equal to or less than $300,000.00. Hence, the provisions of item 4 stamp conclusively upon such excess, if any, the character of an absolute or fee simple estate.

More difficult of solution is the determination of the effect of item 5 upon the disposition made in item 4 in so far as the residue of testator's estate was equivalent to or less than $300,000.00. Item 4, standing alone, gives the widow an absolute title to this portion of the estate, inherent in which is the right to use or to dispose of it inter vivos in whole or in part in any lawful manner she saw fit; and the right upon her death to direct its disposition by will, or to have it descend according to the statutes of intestate succession.

Item 5 places no curtailment upon the widow's use of this property; neither does it abridge her absolute right to dispose of it inter vivos. She could have disposed of the entire estate while she lived had she so desired; there is nothing showing any intention of placing a restriction or limitation upon such disposal in any manner or for any purpose.

The only attempted limitation is upon the manner of disposition of this property at the death of the widow. But even this limitation was placed only upon such property (up to the amount of $300,000.00) as might have happened to remain at that time. There are no mandatory provisions requiring her to leave property to the extent of $300,000.00, or any property. If none remained, that was to be all right. Item 5 clearly contemplates that no property might remain. It is made optional with the testator's wife how much of the property she shall use or dispose, and how much (and indeed whether any at all) shall be left at her death for the parties named in the second paragraph of item 5.

It may be contended that the total effect of items 4 and 5 is to give the widow a life estate. But there are no express words so limiting her interest; and had the testator intended a mere life estate, that would have been the most certain way for him to have created it, for not even a power of disposal added where a life estate is given expressly can enlarge it into a fee simple. *Widows' Home* vs. *Lippardt,* 70 O. S. 261, 282; *Fetter* vs. *Rettig,* 98 O. S. 428, 430. Neither are there any words from which a life estate can be reasonably implicated. Certainly this cannot be done where one clause of a will provides in clear language for an estate in fee simple, and a subsequent clause merely provides for the payment of certain sums in case the first taker leaves enough or anything to pay them. Furthermore, if a life estate were created, what kind would it be? As much skill in conjecture would be required to determine whether such a life estate would or would not carry a power to consume the corpus for support, as it would to conclude that a life estate were created at all. It may likewise be argued that had the testator intended to create a fee simple estate, he would

have used express words of inheritance. However, in view of Section 10580, General Code, above quoted, and of Ohio's law dispensing, even prior to the enactment of said Section, with the necessity of words of inheritance, it seems more reasonable to say that, had the testator intended his wife to take only a life estate, he would have inserted the express term "for life". Because of the equivocation which pervades the provisions which must be relied upon to imply a life estate, they do not bring themselves within the rule, already referred to, which requires that subsequent words, in order to limit what otherwise would be a fee simple estate, must be as clear and decisive as the clause giving the estate.

The mere fact that the testator attempts to make some kind of a limitation over is not of itself an infallible indicium that a life estate is created. If that were decisive then all of the numerous cases which have held void attempts to engraft remainders upon fee simple estates would be erroneous. The proper consideration which must be accorded an attempted limitation over is stated correctly in *Fernandez* vs. *Martin,* 189 Ky. 438, at page 441:

> "The fact that the testator went to the trouble to make a devise over in the second clause may or may not be of importance in construing the first clause, depending upon whether or not his intention as expressed therein is clear."

Although there are no cases presenting facts exactly identical to ours, yet there are some which do furnish guidance. A distinction has been recognized between the situation where the subject matter of a limitation over is the entire property which the first taker received (thus creating a true remainder) and where the subject matter is only such part of the property as the first taker chooses to leave. Thus, in *Baxter* vs. *Bowyer,* 19 O. S. 490, at page 499, the court says:

> "Most of the authorities cited by counsel, where an apparently contrary doctrine has been held, are distinguishable from the present case by a single peculiarity. In most of them the subject-matter of the limitation over was, not the remainder of the estate, but such part of the estate as the first devisee or legatee chose to leave. Thus, in the leading case of *Att'y-Gen.* vs. *Hall, Fitzgibbon,* 314, the subject-matter of the limitation over was, 'so much as he should be possessed of at his death'. In *Ide* vs. *Ide,* 5 Mass. 500, it was 'the estate he shall leave'. In *Jackson* vs. *Bull,* 10 J. R., it was 'the property he died possessed of'. In *Jackson* vs. *Robbins,* 16 J. R., 537, it was 'such estate as should remain unsold, undevised, or unbequeathed'. These and the like cases are clearly distinguishable from the present one. They are cases where the testator gives to the first devisee full dominion and control over the estate, and then, under the form of a limitation over, undertakes to make, as it were, a will for the first devisee, to take effect in case the first devisee should fail to make one for himself, or therwise to dispose of the property. This the testator cannot do. Every one has the right to dispose of his own property. To make one the absolute owner of my property, and at the same time retain any power in my own hands to control or dispose of it, is simply impossible. In the cases referred to, where the limitation was held to be void, the repugnancy was total and irreconcilable. The language of the will left no escape, in those cases, from the conclusion, that the testator intended to give the first devisee absolute dominion and control over the property. There was no escape, because the limitation itself, as well as the previous devise, necessarily implied such absolute power and dominion, by making the thing limited over, its existence or non-existence, to depend upon the pleasure of the first de-

visee. Such a limitation cannot be sustained, because it is only a limitation in words, and not a limitation in fact, or in law."

To the same effect are: *Clark* vs. *Seminary*, 3 O. C. C. 152, 172; and *Findlay Brewing Co.* vs. *Dick*, 1 N. P. N. S. 592, 598-599.

In *Steuer* vs. *Steuer*, 8 C. C. N. S. 71, the testator's will provided:

"I give, devise and bequeath to my beloved wife, Anna Marie Steuer, my real estate and personal property of every description. It is my will that whatever is left of my estate after my wife's decease, shall be equally divided amongst all my children."

The court held that the widow took an estate in fee simple and that the attempted limitation over was void for repugnancy.

In *Watkins* vs. *Price*, 16 O. A. R. 27, the will provided:

"Item Second. I give, devise and bequeath to my beloved husband, Benjamin Watkins, all my property, be it real, personal or mixed.

In case there is any property left at the death of my husband, Benjamin Watkins, it is my desire that it shall go to my sister * * * ."

The court held that the husband took a title in fee simple to the real estate, and full title to the personal property, saying: (p. 28)

"The first part of the second item, if standing alone, devises a fee simple title in the real estate, and bequeaths all personalty to Benjamin Watkins. The language is clear and unequivocal. The second portion of that item does not, in as clear terms, take away or limit the devise and bequest to Benjamin Watkins."

And while words which express a desire or wish (as those do in item 5) may have the effect of creating a valid disposition, yet it would seem that the use of that type of expression is a factor to be taken into consideration. In the Watkins case, supra, the court said further:

"Our view of the language used in this will is that the term, 'it is my desire', is merely precatory. No limitation is placed upon the devise and bequest already made."

See also, 11 R. C. L. 477-478, Section 16.

In *Trumbull* vs. *Stentz*, 30 O. A. R. 34, the will provided:

"I give, devise and bequeath to my beloved wife, Almira Harsen, all my real and personal property belonging to me. It is my request that the property left at the decease of my beloved wife be equally divided between David P. Trumbull and Maud M. Stentz."

The court decided that the widow took a fee simple title, saying: (p. 35)

"It has many times been held in Ohio that where a last will and testament in its terms bequeaths or devises property to one person absolutely and in fee simple, and then by a subsequent provision in the will attempts to ingraft a

remainder upon the fee, the so-called remainder is void and of no effect, and the first taker will take the property absolutely and in fee simple."

Likewise, in the Anonymous Case, 7 O. N. P. 574, the will provided:

"I give and bequeath to my beloved wife all my property, both real and personal, to do with as she pleases. And at her death, what should remain, it is my will, should go to my beloved niece * * *."

The court determined that the widow took a fee simple estate.

Deibel's Ohio Probate Code, Section 581 (11) states:

"Any condition repugnant to a fee simple cannot be imposed. Thus 'I give to my wife all my property of every description * * * . It is my will that whatever is left * * * after my wife's decease shall be equally divided among my children' grants a fee."

A few of the cases from other states which are identical to the Ohio authorities just reviewed are: *Plaggenborg* vs. *Molendyk's Admr.*, 187 Ky. 509; *Linder* vs. *Llewellyn's Admr.*, 190 Ky. 388; *Snyder* vs. *Snyder*, 202 Ky. 321; *Clements, Appellant*, 122 Me. 164; *Holloway* vs. *Atherton*, 205 Mich. 129; *In re Fort's Estate*, 211 N. Y. S. 772. See also Alexander's Commentaries on Wills, Sections 930, 931, 932, 933 and 934.

Other Ohio cases which arrive at the same conclusion, but which are a little less conclusive on our situation because they either give to the first taker unlimited power of disposition or append some word of limitation to the estate of the first taker, such as "heirs", "fee simple" or "forever", are: *Tracy* vs. *Blee*, 22 C. C. N. S. 33; *Hull* vs. *Chisholm*, 7 O. A. R. 346; *Brooks* vs. *Iler*, 28 O. D. 624; *Pealer* vs. *Cruit*, 3 O. L. Abs. 325 (Ct. of Appeals); *Robraham* vs. *Gregg*, 2 O. A. R. 108; *Persinger* vs. *Britton*, 10 O. A. R. 164; *Stophlet* vs. *Stophlet*, 22 O. A. R. 327.

But not only does the implication of a life estate fail because of the quandary permeating the provisions upon which such an estate could alone be predicated, but I am of opinion that the real intention of the testator cannot be effected because it would be contrary to law, creating a new kind of estate which the law does not tolerate. The real intention of the testator, as expressed in his will, was to give to his wife an estate which possessed all of the qualities of an estate in fee simple with the exception that if any of the property happened to remain unexpended or undisposed by her at her death, she could not direct its disposition by will or permit its descension according to the laws of intestacy. His intention was undoubtedly the same as that of the testator in *Weller* vs. *Dinwiddie*, 198 Ky. 360, a somewhat similar case, about which the court remarked at page 365:

"He may have thought that he could give absolute title to property to his widow and son and still have the right to say if anything remained or was left after they had used or consumed as much as they wished, it should go to his relatives. It was the human thing for an aged man to hope, to wish for, but it may not be. There can be no limitation upon a fee once granted."

In Alexander's Commentaries on Wills (1918 Ed.), Section 936, it is stated:

"The testator cannot create by will such an estate as by the rules of the common law he could not in his lifetime create by deed. He cannot create an estate or inheritance unknown to the law."

In *King* vs. *Beck*, 15 Ohio 559, the court said, at page 561:

> "In the construction of wills, the intention of the testator must govern, if it be not unlawful or inconsistent with the rules of law. The control over intention, by the rules of law, applies not to the construction of words, but the nature of the estate. A testator may use such words as he may please, to convey his intention; and such intention, if clearly manifested, will be carried into effect, if it be not unlawful, and does not create an estate forbidden by law. A testator has the perfect right to choose his own language, but not to create an estate which the law does not permit. He would have no right to create a perpetuity, or in any sense to break down or violate the fixed principles of property."

To the same effect are: *Starling's Ex'r.* vs. *Price,* 16 O. S. 29, 31; *Carter* vs. *Reddish,* 32 O. S. 1, 12-13.

Though this principle of law may, in certain cases, seem to impinge relentlessly upon the intention of a testator, its reason for existence is, nevertheless, obviously sound. Were a property owner permitted to create any type of estate which he desired, the ownership of land would become so intricate and doubtful as to jeopardize titles and relegate their certainty beyond the realm of practicability. Thus if the gamut were thrown wide open, an eccentric landowner might transfer his property to John Doe and his heirs who had red hair, or who never munched in between meals, or who skipped the seventh grade. Though these examples are extreme, they serve to demonstrate the soundness of the rule which aims to retain practicable and simple the number and kinds of lawful estates.

That the arrangement directed by the testator was an attempt to create a new kind of estate, is substantiated by the erudite author of Page on Wills. It is stated in Section 1001 (1926 Ed.).

> "Where the testator's intention to give a fee clearly appears upon the will, his attempt to direct the course of descent upon the death of the first taker is repugnant to the nature of the estate, or it is an attempt to create a new kind of estate, without power of disposition by will, and descending in some manner other than that fixed by statute.. Whichever explanation is adopted, the gift over is void."

See also Sections 954, 971 and 1021.

The right to alienate a fee simple estate inter vivos cannot be taken away. *Minor* vs. *Shippley,* 21 O. A. R. 236. Likewise, it would seem that the right to dispose of it by will or according to the laws of descent, upon the fee holder's death, is indestructible.

I am thoroughly cognizant of the rule of construction which requires that all the clauses of a will should, wherever possible, be given effect in determining the testator's intent. However, this rule does not apply where the clause sought to be given effect is fully repugnant or where its provisions are contrary to law. *Baxter* vs. *Bowyer,* 19 O. S. 490, 497; *Robbins* vs. *Smith,* 72 O. S. 1, 16-17; *Tax Commission* vs. *Oswald,* 109 O. S. 36, 49; *King* vs. *Beck,* 15 Ohio 559, 561; *Carter* vs. *Reddish,* 32 O. S. 1, 12-13; 4 Kent's Com. (13th Ed.) *535. In *Linder* vs. *Llewellyn's Admr.,* 190 Ky. 388, the court states at page 391:

> "It may be said that to construe the will as giving to the widow a fee in the devised property, will defeat the intention of the testator. * * * this would be true in all cases where a testator undertakes to do that which the law does not permit."

It must be remembered that the right to make a will is not one of the inalienable rights. It was a nonentity to the ancient common law. It is a creature of the Legislature entirely and one can make a testamental disposal only if he conforms to the manner provided by law.

This opinion necessitates, for the purpose of distinction, a consideration of another group of Ohio cases, most of which are differentiated from the cases already perused in that the first taker in these wills is expressly given some limited power of disposal or enjoyment, and this feature is seized upon as indicating that it was not the testator's intention to grant a fee simple estate since a fee simple included those rights without express enumeration.

In *Baxter* vs. *Bowyer,* 19 O. S. 490, the testament provided:

> "Item 1.—I give and devise all of my property to my beloved wife, Deborah Baxter, both real and personal, of every description, with full power to collect, by law or otherwise, all debts due me, and to adjust and pay all expenses resulting from my last sickness and demise, and all other just claims whatsoever. I also expressly desire that she shall have unlimited power in the possession of all property, real and personal, thus bequeathed to her; to sell, at public or private sale, on such terms as she may think best, or use in any manner she may deem proper, any or all of the property, real or personal; and deeds to purchasers to execute, acknowledge, and deliver in fee simple.
>
> Item 2.—I hereby devise, that, at the death of my beloved wife, the sum of $200.00 be placed in the hands of the Treasurer of 'Union Cemetery' as a perpetual fund, to be by him placed at interest, the interest to be annually collected and expended in taking care of our graves.
>
> Item 3.—I do hereby devise and bequeath, at the death of my beloved wife, after all expenses resulting from her last sickness and demise, and the expenses of tombstones and item 2nd shall have been adjusted, all the property then remaining to the presbytery of Cincinnati."

The court determined that the widow took a "life estate and life maintenance, with an unrestricted right as to the manner of enjoying the property, and with power to change the property into money, by sale, for the benefit of the estate". The tribunal accentuates the fact that its decision is influenced by the express gift to the wife of additional powers, saying: (p. 498)

> "He gives his 'property' to his wife, with the unrestricted right to 'possess' and 'use' it, and with a power of 'sale', to be exercised publicly or privately. The provisions as to the 'possession' and 'use' of the property add nothing to the word property, and certainly do not import an absolute estate. Indeed, their introduction at all, after the clause devising the 'property' would seem to negative the idea that the testator supposed he had already vested the property absolutely in his wife. If he supposed he had already made her the absolute owner, why make any provision as to the manner of her using or possessing it. She would, as a matter of course, use and possess her own property as she pleased. The same may be said of the power to sell. The absolute owner of property can sell it when and where he pleases. But the tenant for life cannot sell without a power granted for that purpose. When so granted, prima facie, it is in the nature of an executorial power, or power to change the property into money for the benefit of the estate, or for its better enjoyment. That such is the nature of the power intended here, is also to

be argued from the fact that a similar power is given to the wife to collect and pay the debts of the estate."

The court said that the phrase "all the property then remaining" did not there mean only such property as the first taker chose to leave, but referred to the property remaining after the deduction of the expenses concomitant to the widow's last sickness and death, of the sums required for tombstones and care of graves, and of the widow's life interest. It is to be noted that our situation is distinguishable in that no express power of use or disposal was granted to the widow, as was done in the Baxter will, from which a life estate can be implied.

The case of *Johnson* vs. *Johnson,* 51 O. S. 446, expressly decided on the authority of *Baxter* vs. *Bowyer,* concerned a will whose residuary clause provided:

> "I give and devise to my beloved wife, Marry Ann Johnson, and her assigns all the remainder of my property, both real and personal * * * with full power to bargain, sell, convey, exchange or dispose of the same as she may think proper, but, if at the time of her decease, any of my said property shall remain unconsumed, my will is that the same shall be equally divided between my brothers and sisters and their children, if deceased, the children to have the same amount the parent would be entitled to if living."

The court stated at page 458:

> "The fact that, after using words which in themselves would give a fee, full power to bargain, sell, convey, exchange or dispose of the estate as she may think proper, is expressly given to her by the testator, at once creates a slight inference that something less than a fee was intended, because a fee of its own force carries with it, and confers upon her the power, without express words from him to that effect, to bargain, sell, exchange, or dispose of the property as she may think proper."

The opinion then declared that the insertion of this power taken in connection with the subsequent disposal of property which should "remain unconsumed" indicated that:

> "The plain intention of the testator as shown by the whole will, is, that the property is given to the widow to be by her used and consumed, and that while so using and consuming the same she is empowered to bargain, sell, convey, exchange, or dispose of the same as she may think proper, limited, however in the exercise of such power, to the purpose for which the property is given to her, that is for her consumption."

Thus, much weight was given to the use of the phrase "remained unconsumed". These distinguishing characteristics place the Johnson case, along with the Baxter case, in a different category from the facts in your interrogatory.

In *Enyart* vs. *Keever,* 32 Bull, 401, 52 O. S. 631; *Greene* vs. *Greene,* 38 Bull, 205, 57 O. S. 628; *Campbell* vs. *Greenawalt,* 67 O. S. 520; and *Raymond* vs. *Williams,* 100 O. S. 544, the Ohio Supreme Court rendered decisions, without report, alone upon the precedent of *Johnson* vs. *Johnson* and *Baxter* vs. *Bowyer.* The wills in the former cases fall within the same category as those in the latter and their provisions are set out in detail in the case of *Tax Commission* vs. *Oswald,* 109 O. S. 36, at pages 43 and 44.

In *Min Young* vs. *Min Young,* 47 O. S. 501, a life interest and support in the first taker were predicated upon the clause—"She shall use for her own comfort

and convenience, all that in her judgment is necessary". A subsequent clause of the will provided that "what remains at the time of her decease shall be divided" among the children. In *Murphy* vs. *Widows' Home,* 21 O. A. R. 174, and *Murphy* vs. *Riker,* 25 N. P. N. S. 393, the giving of property to the first taker "for her own use and benefit" coupled with the power to sell, etc., was adjudged to vest in her a life estate with authority to sell or dispose of it for her own use and benefit. Here also a subsequent clause provided that "At her death, should there anything remain of my estate, I bequeath it to the Old People's Home in Cincinnati". In *Robbins* vs. *Smith,* 72 O. S. 1, the will directed the property to be apportioned among the first takers, but added that it "shall not be turned over to them, but shall be safely invested for their behoof; and the annual income arising to each child shall be subject to her control". However, each child was given authority to will her portion of the inheritance, in default of which her portion, at her death, was to go to others. The court held that life estates were created with power to finally dispose of the corpus by will. *In Tax Commission* vs. *Oswald,* 109 O. S. 36, testator's wife was given his property in general terms, "She to have full power to sell, deed and transfer, any or all of it, as she may deem best to better her condition. * * * After the death of my wife whatever property remains of my estate I will and bequeath as follows: etc." It was held that a life estate was created, coupled with a limited power to invade the principal in whole or in part and consume the same, if necessary, "as she may deem best to better her condition". The decision was based upon *Baxter* vs. *Bowyer, Johnson* vs. *Johnson* and the above mentioned group of cases which has been grounded upon them. It is to be noted that in the type of will represented by that in *Tax Commission* vs. *Oswald,* the provision relating to the further disposition after the widow's death of "whatever property remains of my estate", does not contemplate, as is contemplated by the will about which you inquire, that the widow may leave only what property she chooses; but it refers to the amount of the principal that may remain after the widow has used of it what may be necessary for her life support. This would necessarily represent an indefinite sum, depending upon the widow's longevity, her station in life, etc. The facts of the two wills are dissimilar because the Oswald will contains unequivocal language (other than the language of the attempted limitation over) from which a life interest can be implied; while the will in your inquiry does not.

In *Shannon* vs. *Shannon,* 13 N. P. N. S. 193, affirmed without opinion in 85 O. S. 456, the will read:

> "I give and bequeath to my wife, Rebecca A. Shannon, all my estate both real and personal to be used and disposed of by her according to her best judgment, and at her death to be divided equally between our five children, * * * ."

On the authority of *Baxter* vs. *Bowyer,* the lower court stated that the widow "took only a life estate with the right to convey or dispose of for her support or consumption". Here the intention to create a life estate is shown, not only by the express grant to the widow of powers of use and disposal, but by the fact that the property to be divided among the children is "all my estate", the same property (the corpus) which is the subject of the grant to the widow.

O'Hara, Adm'r. vs. *Peirano,* 8 N. P. N. S. 581, involved a will providing:

> "Second. I give, devise and bequeath all the rest, residue and remainder of my estate, real personal and mixed, to my wife, Mary Podesta, absolutely and in fee simple.
>
> Third. In case my wife should die leaving said estate unconsumed I desire that the same shall be distributed as follows: To Caroline Peirona,

$6,000.00," and then follow many other like legacies varying in amounts, to different persons.

The court declared:

> " * * * the intention of the testator was to give to his said wife, Mary Podesta, a life estate in his estate for her own life, with the right to consume the whole or a part of the estate during her life; and that if she left any part of the estate unconsumed at her death, it should be devoted to the payment of the several money legacies."

It must be remembered that this was merely a Common Pleas Court case. If by the quoted declaration, the court meant to give to the word "unconsumed" (which word does not appear in the will in your inquiry) the same construction as was given to it by the Supreme Court in *Johnson* vs. *Johnson* (i. e.—to signify such right of consumption in the widow as to give her a life estate and support) then it is unobjectionable. But if the Common Pleas Court meant that the widow could use or dispose the corpus for any purpose during her life, in the same manner as if she had a fee simple, and that that portion of the property which happened to remain at her death could be limited over, then it is contrary to the decisions of the Ohio Courts of Appeals and Circuit Court in *Steuer* vs. *Steuer; Watkins* vs. *Price; Trumbull* vs. *Stentz;* the nisi prius decision in the Anonymous Case and all of the other authorities considered in the first part of this opinion which determine that such new type of estate cannot be legally fabricated.

In *White* vs. *Freeman,* 18 C. C. N. S., a printed blank was used in making the will. The first item, which was entirely in print, directed the payment of debts and funeral expenses. Items 3 and 4 which were in writing read:

> "Third. All the rest of my property and estate I give and devise and bequeath to my beloved wife, Frances S. White, giving her full right and power to adjust and settle all claims due me at my death.
>
> Fourth. At the death of my said wife, Frances S. White, I will that all the property and estate remaining after settling all the claims due, such as expenses of last sickness, and funeral expenses, and all that remains of my estate, to be divided equally between * * * ."

The court held that the widow took a life estate with power to charge the same with the expenses of her last sickness and funeral. The opinion recognized the principle established in *Steuer* vs. *Steuer* (p. 563), but it said that the situation before it was different since item one (in print) provided for payment of testator's debts and funeral expenses, and since item four attempted to dispose of, at the widow's death, "all property and estate *remaining after settling claims due, such as expenses of last sickness and funeral expenses*". From this situation the court concluded that the words just italicized were not intended simply as a repetition of item one, otherwise item four would in effect be bequeathing the same property a second time—first to the widow and second to those named in the latter part of the fourth item; and that the testator plainly intended that out of the property named in the third item, the expenses of the widow's last sickness and funeral should be paid, and that what should remain of the property named in the third item, after such payment, should go to the parties named as takers after the widow's death.

The Ohio cases which relate to our problem are numerous and varied; but that the line of cleavage between the type of cases represented by *Steuer* vs. *Steuer* and the

type of which *Baxter* vs. *Bowyer* is a representative, is well established, may not only be ascertained from the opinions themselves, but great credibility accrues to its certainty from the fact that for over a period of thirty years these two types of cases have appeared in the official reports of Ohio cases, and no court in making a decision in one type of case, has ever overruled the line of cases representing the other principle. The cases represented by *Steuer* vs. *Steuer* sprang into existence in 1900 (Anonymous Case) and are found as late as 1928 (Trumbull Case). The other line of cases originated in 1869 (Baxter Case) and continue down through the Oswald Case (1923) and Murphy Cases (1925). The Supreme Court in none of its opinions overrules the cases of which *Steuer* vs. *Steuer* is exponential; this savors of tacit recognition. The will on which you request an opinion belongs to that class. I direct your attention to the classification of cases found in the Steuer Case.

It would be unwise to extend the scope of the *Baxter* vs. *Bowyer* principle to cover our situation and thereby discredit the principle of *Steuer* vs. *Steuer,* inasmuch as the Ohio Supreme Court has itself cast doubt upon the correctness of the conclusion of *Baxter* vs. *Bowyer* because of its relying too much on *Smith* vs. *Bell,* 6 Pet. 68, a case which has been declared "contrary to authorities generally", and whose "authority * * * is somewhat impaired by the circumstance that no counsel was heard on behalf of the party against whom it was made, and the attention of the court does not seem to have been drawn to the authorities in favor of the opposite conclusion". *Widows' Home* vs. *Lippardt,* 70 O.S. 261, 286, 287, 288; *Clark* vs. *Seminary,* 3 O. C. C. 152, 174.

Specifically answering your question, I am of the opinion that where the residuary clause of a will devises and bequeaths to the testator's wife all the residue of his estate both real and personal without using any express words of limitation to indicate the quantuum of her interest, and a subsequent clause then states, "It is my desire and wish that after the death of my beloved wife, (naming her), and providing there remains sufficient property, to pay the following amounts hereafter specified; and if not sufficient that they be paid proportionately", following which certain parties are named and definite sums of money written after their names, the wife takes a fee simple estate in the realty and an absolute interest in the personalty, and the attempted limitations over are void.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2538.

CIVIL SERVICE—EMPLOYES OF TOLEDO CITY SCHOOL DISTRICT COME UNDER JURISDICTION OF MUNICIPAL CIVIL SERVICE COMMISSION—POWER SPECIFICALLY RESERVED BY CHARTER OF CITY.

SYLLABUS:

1. *The charter of the city of Toledo specifically reserves to the Civil Service Commission of said city, created by said charter, the powers and duties conferred and imposed upon municipal civil service commissions by the general laws of the state.*

2. *The Civil Service Commission of the city of Toledo, as created by the Toledo*