In Nebraska the buyer probably would not be able to rescind the contract of sale with Saks because he did obtain the thing for which he contracted, and could not show pecuniary damage, an essential element when the misrepresentation concerns an extraneous fact about something other than the article to be sold.

The holding in the instant case that no showing of pecuniary damage is necessary to rescind a transaction for fraudulent misrepresentation is in accord with the majority of American decisions. However, it is possible that neither the majority nor minority view ought to be applied uncritically in all cases. There are a great many policy considerations, not yet well defined by the courts, which should be extremely influential in helping the courts decide to allow or deny rescission. In the present case the donor was completely innocent, intentionally defrauded, and induced by the fraudulent misrepresentations to make a gift. In allowing the defrauded donor to rescind, the court was perhaps strongly influenced by the bad faith of Saks, a store with supposedly high integrity. Stronger and more definite policy considerations might govern other cases.[24]

RONALD CUPPLES

REAL PROPERTY—"TO MY WIFE SO LONG AS SHE MAY REMAIN MY WIDOW"—DETERMINABLE FEE OR LIFE ESTATE?

Plaintiff's father devised to his wife his ". . . entire estate both real and personal . . . to have as long as she may remain my widow, in case my widow should remarry it is my will that she receive her lawful portion the same as if this will had never been written." The widow died testate without having remarried. She bequeathed the sum of $100 to plaintiff and the residue of her estate to her other children, defendants, equally. Plaintiff

party merely wants to be relieved of his contractual obligations and should not be denied relief because he has not incurred damages.

24. For example, in Brett v. Cooney, 75 Conn. 338, 53 Atl. 729 (1902), plaintiff, who had sold his land to defendant as the result of fraudulent misrepresentations that the sale was to another person, was allowed to rescind. The defendant proposed to operate a boarding house, and the plaintiff had an understanding with his neighbors that none of them would sell for this purpose. Here the property of the plaintiff's neighbors might have been depreciated, leaving them without a right to sue anyone, and the plaintiff might at the same time have suffered in their esteem, although he had actually done his best to observe their agreement. It is submitted that the policy considerations in favor of allowing relief in this case are far stronger than they are in the principal case.

contended that the language of her father's will gave her mother a life estate only, determinable upon her remarriage, and that, therefore, plaintiff was entitled to a share of her father's estate as one of his heirs. Defendants contended that their mother took a determinable fee simple, and that since she had not remarried, the property could be devised to them in fee simple absolute.[1]

In holding that the language created a fee simple determinable, the court stated that the words of the will, when considered as a whole, evinced an intent to pass the maximum possible estate consistent with the special limitation; and that if the testator had intended to give his widow less than a fee simple, he should have expressly limited the estate to her for life. In reasoning that more express language was necessary to restrict the estate to one for the widow's life, the court paraphased the Kentucky statute[2] which reverses the common law presumption that a fee is not intended unless expressly so limited by the conveyance or devise. The court further relied on the rule of construction that execution of a will creates a presumption that the testator intended to die wholly testate, and that the court should effectuate that intention whenever possible.[3]

The sole issue presented by the case is whether the words "so long as she remains my widow" create a determinable fee or a determinable life estate. Courts in various jurisdictions have had to consider and weigh several factors in solving this problem.[4] Ordinarily, no single factor is of sufficient importance to control the decision. Usually some combination of several elements provides the basis for a particular result. It is clearly impossible to evaluate the factors individually in terms of their relative weight. Their importance will vary from case to case with the presence or absence of other determinants. It may be generalized, however, that when the number of factors on each side is ap-

1. Taylor v. Farrow, 239 S.W.2d 73 (Ky. 1951).

2. (1) Unless a different purpose appears by express words or [by] necessary inference, every estate in land created by deed or will, without words of inheritance, shall be deemed as fee simple or such other estate as the grantor or testator has power to dispose of. KY. REV. STAT. § 381.060 (1948).

3. This position is often taken by the courts in Kentucky and other jurisdictions. Pumroy v. Jenkins, 151 Kan. 466, 99 P.2d 752 (1940); Cuddy v. McIntyre, 312 Ky. 606, 229 S.W.2d 315 (1950); Hopson's Trustee v. Hopson, 282 Ky. 181, 138 S.W.2d 365 (1940); Hinkle v. Hinkle, 168 Ky. 286, 181 S.W. 1116 (1916); Redding v. Rice, 171 Pa. 301, 33 Atl. 330 (1895).

4. See Note, 122 A.L.R. 75-92 (1939), wherein the various factors are further illustrated, and cases containing one or more factors are presented.

proximately the same, the predictability of decision is slight, but as the number of factors on one side increases, particularly with a corresponding decrease in the number of those on the other side, the accuracy of prediction increases.

Although these factors do not usually occur singly, it is nevertheless necessary to discuss them individually in the interest of clarity.

The following factors are conducive to a finding that a determinable fee simple was created:

1. *The fact that a contrary holding would result in the widow's getting an estate of less value than she would have received had she waived her rights under the will and taken her statutory distributive share.*[5]

This is based on an inference that the testator intended to benefit his wife by providing for her in his will, and in order to do this he must have intended that she receive more under the will than she would have gotten had he devised no property to her. This inference seems correct when the will has been drawn by a lawyer, since he, in all probability, advised the testator of the intestacy statutes; but whether the inference remains valid when the deceased executes his own will is less certain.

2. *The fact that the wife has been given part of the same property in fee upon her remarriage.*[6]

Representative of cases where this factor is found is *Redding*

5. Pumroy v. Jenkins, 151 Kan. 466, 99 P.2d 752 (1940); Vaughn v. Vaughn, 97 Va. 322, 33 S.E. 603 (1899). The court in the principal case reasons that the deceased testator intended to pass whatever estate he had (an absolute fee) but qualified or limited only in case his widow might remarry.

6. Cummings v. Lohr, 246 Ill. 577, 92 N.E. 970 (1910); Staack v. Detterding, 182 Iowa 582, 161 N.W. 44 (1917); Pumroy v. Jenkins, 151 Kan. 446, 99 P.2d 752 (1940); Hutter v. Crawford, 225 Ky. 215, 7 S.W. 2d 315 (1950); Davis v. Bennett's Executor, 272 Ky. 674, 114 S.W.2d 1150 (1938); Mann v. Frese, 203 Ky. 739, 263 S.W. 21 (1924); Hinkle v. Hinkle, 168 Ky. 286, 181 S.W. 1116 (1916); *In re* Biles' Will, 88 Misc. 452, 151 N.Y. Supp. 1097 (Surr. Ct. 1914); Weiss v. City of Mt. Vernon, 157 App. Div. 383, 142 N.Y. Supp. 250 (2nd Dept. 1913); Anderson v. Anderson, 150 Ore. 476, 46 P.2d 98 (1935); Redding v. Rice, 171 Pa. 301, 33 Atl. 330 (1895); *In re* Baird's Will, 171 Wis. 215, 177 N.W. 23 (1920). In *Anderson v. Anderson, supra*, the testator devised "to my wife all my estate so long as she shall remain my widow, relying upon her to properly rear . . . our two children. In case she remarries it is my will that she then take for her sole use and benefit, ½ of all the property then remaining. . . ." Deciding that the widow's estate was a fee, determinable on her remarriage, the Oregon Supreme Court said that the better reasoned and more recent authorities incline to the view that in instances in which the devise is to the widow conditionally and there is no disposal of the remainder upon her death un-

v. Rice,[7] in which the will gave to the wife all of the testator's real and personal property so long as she remained his widow, ". . . and if she should get married, then she shall be only entitled to the one-third in said property, the balance . . . to my youngest daughter. . . ." In holding that the wife took a fee simple determinable in two-thirds of the property and a fee simple absolute in the other one-third, the court advanced among other reasons[8] that since the testator must have intended his widow to have more if she did not remarry, the devise must have created a determinable fee rather than a determinable life estate in the two-thirds.

3. *The fact that there is neither a gift over nor a residuary clause.*[9]

The absence of both a gift over and residuary clause would result in partial intestacy should the court find that only a determinable life estate was created. The presumption against partial intestacy influences courts to hold that a determinable fee is created under such circumstances.[10]

---

married, the widow takes a determinable fee simple estate. The court also cited with approval and in support *In re* Baird's Will, *supra;* Glass v. Johnson, 297 Ill. 149, 130 N.E. 413 (1921); Squier v. Harvey, 16 R.I. 226, 14 Atl. 862 (1888); Staack v. Detterding, *supra.* The *Squier* case, *supra,* is extremely liberal in its approach and would probably be limited to its facts by the more conservative courts.

The early English case of Gay v. Deveron, 12 Sim. 200, 59 Eng. Rep. 1108 (1841) involved a novel situation. The testator devised his property to his wife for life but if she should remarry to his daughter for life; he also made his wife residuary devisee provided she did not remarry. Thus the widow in addition to presently enjoying a determinable life estate took a determinable fee simple by remainder, with a possibility of merger taking place should she alienate her entire interest.

7. 171 Pa. 301, 33 Atl. 330 (1895).

8. Among these other factors was the existence of a statute similar in content and purpose to the Kentucky act in the principal case.

9. Glass v. Johnson, 297 Ill. 149, 130 N.E. 473 (1920); Cummings v. Lohr, 246 Ill. 577, 92 N.E 970 (1910); Beatty v. Irwin, 35 Ind. App. 238, 73 N.E. 926 (1905); Staack v. Detterding, 182 Iowa 582, 161 N.W. 44 (1917); Pumroy v. Jenkins, 151 Kan. 466, 99 P.2d 752 (1940); Cuddy v. McIntyre, 312 Ky. 606, 229 S.W.2d 315 (1950); Hopson's Trustee v. Hopson, 282 Ky. 181, 138 S.W.2d 365 (1940); Walton v. Jones, 216 Ky. 289, 287 S.W. 710 (1926); Gaven v. Allen, 100 Mo. 293, 13 S.W. 501 (1890); Anderson v. Anderson, 119 Neb. 381, 229 N.W. 124 (1930); Weiss v. City of Mt. Vernon, 157 App. Div. 383, 142 N.Y. Supp. 250 (2nd Dept. 1913); Hults v. Holzbach, 233 Pa. 367, 82 Atl. 469 (1912); Redding v. Rice, 171 Pa. 301, 33 Atl. 330 (1895); Squier v. Harvey, 16 R.I. 226, 14 Atl. 862 (1888); Haring v. Shelton, 103 Tex. 10, 122 S.W. 13 (1909); Foote v. Foote, 76 S.W.2d 194 (Tex. Civ. App. 1934).

10. Of course partial intestacy cannot be entirely avoided since the possibility of reverter after the fee will remain undevised. However, there

4. *The existence of a statute abrogating the common law requirement that words of inheritance be used in order to create a fee simple and stating that every estate in land created by deed or will shall be deemed a fee simple or such other estate as the grantor or testator had the power to dispose of in the absence of express words to the contrary.*[11]

While the courts have not felt that such a statute is absolutely determinative that a fee simple determinable results under the circumstances considered here, nevertheless, the existence of such a statute has been accorded great weight in finding a determinable fee to have been created. In fact no case has been found involving such a statute in which the court held that a determinable life estate was created, unless there were express words so limiting the interest.

In addition to these factors, there are certain considerations of policy which have influenced different courts in varying degrees to find that a determinable fee has been created. Among them are (1) the fact that the widow is often charged with the responsibility of raising the family after the husband's death, (2) the fact that circumstances may change so that it is highly desirable that the property be sold in order to accomplish that purpose, in which case it is desirable to have as marketable an

---

is nothing the courts can do about disposing of this ordinarily rather insignificant interest.

11. Cummings v. Lohr, 246 Ill. 577, 92 N.E. 970 (1910); Pumroy v. Jenkins, 151 Kan. 466, 99 P.2d 752; Cuddy v. McIntyre, 312 Ky. 606, 229 S.W.2d 315 (1950); Hopson's Trustee v. Hopson, 282 Ky. 181, 138 S.W.2d 365 (1940); Hutter v. Crawford, 225 Ky. 215, 7 S.W.2d 1043 (1928); Walton v. Jones, 216 Ky. 289, 287 S.W. 710 (1926); Mann v. Frese, 203 Ky. 739, 263 S.W. 21 (1924); Prindible v. Prindible, 186 Ky. 280, 216 S.W. 583 (1919); Anderson v. Anderson, 119 Neb. 381, 229 N.W. 124 (1930); Weiss v. City of Mt. Vernon, 157 App. Div. 383, 142 N.Y. Supp. 250 (2nd Dept. 1913); Hults v. Holzbach, 233 Pa. 367, 82 Atl., 469 (1912); Redding v. Rice, 171 Pa. 301, 33 Atl. 330 (1895); *In re* Baird's Will, 171 Wis. 215, 177 N.W. 23 (1920). *Anderson v. Anderson, supra,* is a typical case. There the testator devised ". . . to my wife as long as she shall remain my widow . . . and if she should remarry, my property is to go to my children then living except as to her dower, over which I have no control." The court reasoned that the widow took a determinable fee in accordance with the provisions of the Nebraska statute, one similar to that in *Taylor v. Farrow.* By way of dicta, it was said that had the widow sold her estate to a third party, that party would take title subject to the defeasance upon the widow's remarriage. Most jurisdictions agree with this limitation on the purchaser's title; but, in Gaven v. Allen, 100 Mo. 293, 13 S.W. 501 (1890), the widow was able to pass an absolute fee to the purchaser. She had also been given a power of sale over the devised realty, and the court said it was the testator's intent to give his widow power to pass the full fee, even though her own estate was only a determinable fee.

interest in the property as possible, (3) the overall desirability of dividing estates "duration-wise" as little as possible. Although these considerations of policy are seldom made explicit in the opinions, it is reasonably certain that they underlie many decisions.

On the other hand, the following factors are conducive to a finding that a determinable life estate was created:[12]

1. *The fact that the executor has been given a power of sale over the testator's realty.*[13]

In this situation a holding that the widow took a determinable fee would for all practical purposes nullify the power of sale in the executor, since at most there would be a possibility of reverter left to sell. If the possibility of reverter is not accompanied by a reversion (as is the case where it follows a determinable fee rather than a determinable life estate) it cannot be alienated inter vivos in some jurisdictions, and, even in those jurisdictions where it is alienable, under circumstances such as these it would not be a readily marketable interest.

2. *The fact that words of inheritance are used in other parts of the will to create fee simple interests and are not used in connection with the gift to the widow until remarriage.*[14]

In this situation the words of the will itself make it clear that

12. Of course where the will contains a gift over or residuary devise to take effect either in the event of death or remarriage it is clear that the testator intended to restrict his widow's estate to her life. In each of the cases cited below the court found the testator intended that the remainderman or residuary devisee take in any event no later than the death of the widow, thus giving her a determinable life estate. Brunk v. Brunk, 157 Iowa 51, 137 N.W. 1065 (1912); Koonz v. Hempy, 142 Iowa 337, 120 N.W. 976 (1909); Mouser v. Srygler, 295 Ky. 490, 174 S.W.2d 756 (1943); Napier v. Davis, 7 J.J. Marsh 283 (Ky. 1832); Peck v. Griffis, 148 Mich. 682, 112 N.W. 722 (1907); Place v. Burlingame, 75 Hun 432, 27 N.Y. Supp. 674 (1894); *affd.* 149 N.Y. 617, 44 N.E. 1128 (1896).

13. Long v. Hill, 29 Pa. Super. 606 (1905). But what would a court decide if, as is so often the case, the widow is also the sole executrix? If the widow were also given the fee estate, her having a sterile power of sale should be no problem.

14. Schaeffer v. Messersmith, 10 Penn Co. Ct. Rep. 366 (1890). Such distinctions, however, have been dropped by most modern courts since they prefer to look to the content of the whole will instead of picking phrases out of their context to pounce upon as being indicative of any special intent (or lack thereof) in the testator. It has been held that the fact that personalty has been bequeathed absolutely to the widow in the same will which devises the realty conditionally indicates an intent to give a "fee" interest in the personalty, but only a life estate in the realty. Peck v. Griffis, 148 Mich. 682, 112 N.W. 722 (1907). Such reasoning is not persuasive in the least, for there is no correlation between the quantum of estate granted and the fact that it is conditional.

the testator was aware of the technicalities involved in creating a fee simple interest, and his failure to use the same words in connection with the gift during widowhood is some indication of an intention to create an estate of less duration than those he gave elsewhere in the will.

An analysis of the principal case in terms of the foregoing factors leads to the conclusion that it was correctly decided.[15] Neither of the factors which would suggest that only a determinable life estate was intended were present. On the other hand a holding that only a determinable life estate was created would have resulted in the wife's taking less than her statutory distributive share; she had been given part of the same property in fee upon her remarriage; there was neither a gift over in the case of remarriage nor a residuary clause; and finally the Kentucky statute almost demands this decision.

It is submitted that in the absence of express language limiting the estate created to one for life, statutes such as the Kentucky act leave little room for the application of the other factors suggested above. The only problem for determination under such a statute is whether *express* words to the contrary are present. It is certainly true that words of limitation such as "until remarriage" or "so long as she remains unmarried" are not *express* words to the contrary within the meaning of those terms in the statute. Such words should not be regarded as words measuring the quantum of the estate, but rather as words relating only to

15. In holding that the widow took a determinable fee rather than a mere determinable life estate, the Kentucky Court of Appeals had ample support for its position in the five Kentucky cases cited by the defendants, namely: Cuddy v. McIntyre, 312 Ky. 606, 229 SW.2d 315 (1950); Hopson's Trustee v. Hopson, 282 Ky. 181, 138 S.W.2d 365 (1940); Hutter v. Crawford, 225 Ky. 215, 7 S.W.2d 1043 (1928); Mann v. Frese, 203 Ky. 739, 263 S.W. 21 (1924); Prindible v. Prindible, 186 Ky. 280, 216 S.W. 583 (1919). However, in so finding for the defendants, the court was forced to distinguish (and even too a certain extent overrule) several Kentucky cases submitted by the plaintiff, namely: Thomas v. Stafford, 305 Ky. 559, 204 S.W.2d 940 (1947); Mouser v. Srygler, 295 Ky. 490, 174 S.W.2d 756 (1943); Morgan v. Christian, 142 Ky. 14, 133 S.W. 982 (1911); Napier v. Davis, 7 J.J. Marsh 283 (Ky. 1832). In *Mouser v. Srygler, supra,* the novel situation of a father's devise to his daughter so long as she remained a widow was presented. The devise expressly limited the estate to the daughter's life by using the disjunctive "or" between the terms "remain a widow" and "she remarried," thus showing that the estate was to determine in either of two ways, by her death ending widowhood, or by remarriage ending widowhood. Therefore, the court said it was the testator's intent not to give the fee to the daughter. The other cases mentioned were distinguished on similar factual differences between them and the principal case.

the happening of a particular contingency, *i.e.*, remarriage of the widow.

In addition the suggested solution is desirable in view of the policy considerations mentioned above. In normal circumstances the duty of raising a family falls upon the widow, and the task is often a difficult one. In many cases the necessity for selling the property arises, perhaps because it is not a good income-producing property in its present condition, and no money is available to improve the property. Selling a life estate is a difficult thing at best, and more often than not results in the seller's getting relatively little for her interest. Finally, it has as a general proposition been considered desirable to place as much of the total quantum of possible estates in one person so as to increase marketability, and thus advance the overall objective of free alienability.

IRA FLEISCHMANN

PERSONAL PROPERTY—PARTIES TO A MARRIAGE WHICH NEVER MATERIALIZES HELD TENANTS IN COMMON OF THE WEDDING GIFTS.

Plaintiff and defendant received wedding gifts at three parties given in honor of their engagement. Each gift was accompanied by a card reading, "To Janet and Seymour," plaintiff and defendant respectively. When the couple subsequently ended their engagement by mutual consent, plaintiff demanded the gifts, which defendant had been storing at his home for safekeeping. Upon defendant's refusal to surrender them, plaintiff instituted a replevin action. At no time did any of the donors express a desire for the return of the gifts, nor did either of the litigants make such a tender.[1]

Refusing to take judicial notice of the social custom contended for by plaintiff, namely that the intended bride is entitled to the wedding gifts, the court found that plaintiff and defendant owned the gifts as tenants in common. Once that determination had been made, plaintiff's action necessarily failed. One tenant in common is deemed to hold for the benefit of his co-owners, and hence another co-tenant has no grounds for demanding that the person already in possession relinquish the goods.[2]

1. Mandelbaum v. Weiss, 11 N.J. Super. 27, 77 A.2d 493 (App. Div. 1950).
2. Garrett v. McAtee, 195 Ark. 1123, 115 S.W.2d 1092 (1938); Kleinfeld v. General Auto Sales Co., 118 N.J.L. 67, 191 Atl. 460 (1937).