

12-1-1952

## Property—Real Property—Future Interests

Robert Schaus

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Estates and Trusts Commons](#)

---

### Recommended Citation

Robert Schaus, *Property—Real Property—Future Interests*, 2 Buff. L. Rev. 115 (1952).  
Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol2/iss1/40>

This The Court of Appeals Term is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact [lawscholar@buffalo.edu](mailto:lawscholar@buffalo.edu).

by the party to be charged, and the further problem of whether a court has the power to lift the statute of limitations by a conditional decree.

### *Future Interests*

The institution of adoption is ancient. Yet, anomalous as it may be, the common law provided no method for the legal adoption of children. Consequently, an adopted child had no rights of inheritance where the foster parent died intestate; and where a will was left, the question as to whether the terms "children"; "issue", etc., could be construed to include adopted children was precluded.<sup>23</sup> Fortunately, the common law was changed by statute in New York in 1887.<sup>24</sup> Since then the legislature<sup>25</sup> and the courts<sup>26</sup> have gradually but continuously enlarged and expanded the rights of adopted children to equal those of natural children. But one significant exception stands out: DOMESTIC RELATIONS LAW §115 states: "(A)s respects the passing and limitation over of real or personal property dependent under the provisions of any instrument on the foster parent dying without heir, the foster child is not deemed the child of the foster parent so as to defeat the rights of remaindermen . . . ."

The first adjudication by the Court of Appeals dealing with §115 arose in *Matter of Leask*.<sup>27</sup> There the testator died leaving a life estate in X., and upon X's death leaving children, then to such children; but if no children, then to the residuary estate. During X's life estate he adopted a son. The court declared that the testator, by using the word *leaving*, intended that only natural offspring should take. Consequently, the remainder estate passed to the residuary legatees. The significance of the decision lies in the Court's approach to the problem, an approach based on the intention of the testator.

The same method was followed by the court in *In Re Upjohn's Will*, decided this year.<sup>28</sup> Frederick Upjohn was the testator. His niece, Mrs. Childs, adopted a two month old daughter

---

23. RESTATEMENT, PROPERTY § 287, Comment on Subsection (1) a.

24. L. 1887, c. 703.

25. For the legislative development see N. Y. DOMESTIC RELATIONS LAW §§ 109-118a.

26. The more significant decisions are *Carpenter v. Buffalo General Elec. Co.*, 213 N. Y. 101, 106 N. E. 1026 (1914); *Matter of Walter's Estate*, 270 N. Y. 201, 200 N. E. 786 (1936); *Matter of Guilmartin's Will*, 277 N. Y. 689, 14 N. E. 2d 627 (1938); *Matter of Horn*, 256 N. Y. 294, 200 N. E. 786 (1931).

27. 197 N. Y. 193, 90 N. E. 652 (1910).

28. 304 N. Y. 366, 107 N. E. 2d 492 (1952).

in 1905. The testator knew of the adoption, and with other members of the family joined in keeping it secret. In 1917 he drew his will, creating a trust in favor of numerous relatives, including Mrs. Childs, and in the event that she died before the termination of the trust, then to her "lawful issue or descendants". Upjohn died that same year. Upon Mrs. Child's death in 1950, before the termination of the trust, the trustees petitioned the Surrogate Court to construe the will and determine whether or not the adopted child was the "lawful issue or descendant" of Mrs. Childs. The Surrogate held not, and the Appellate Division affirmed.<sup>29</sup> The Court of Appeals unanimously reversed. Judge Fuld reasoned that the words "issue" and "descendants" could not be construed in vacuo, but that their meaning must be determined in the light of the testator's intention as shown from the surrounding circumstances. Testator knew of the adoption, and treated the child with generosity and affection. He must have realized that Mrs. Childs—over 40 years of age—would not likely have any natural descendants. He was on intimate terms with the Childs family, who frequently were his guests. And he was an active partner in the pledge of secrecy. In the light of these facts, Judge Fuld concluded, the only reasonable inference to be deduced was that the testator in making his will intended that the adopted child be considered the "issue" or "descendant" of Mrs. Childs. Having determined the intention of the testator, Judge Fuld went on to meet the objection raised by reason of §115. He declared that the purpose of §115 was to prevent the perpetration of fraud on the rights of the remaindermen through an adoption for the very purpose of cutting of the remainder. He then reasoned that there was no fraud to the remaindermen if the testator intended the adopted child to limit their taking. It is submitted that approach to §115 is the proper one, and that the decision is in the best tradition of the court.

### *B. Personal Property*

#### *Bailments*

The characterization of the relationship between a depositor and a safe deposit company has produced some difference of opinion in the courts throughout the United States. It has been stated that the legal relation is that of bailor-bailee,<sup>30</sup> of licenser-licensee,<sup>31</sup> of landlord-tenant,<sup>32</sup> and finally, a combination of all

---

29. 279 App. Div. 675, 108 N. Y. S. 2d 336 (2d Dep't 1951).

30. 6 AM. JUR. BAILMENTS, § 407.

31. 11 MINN. L. REV. 440 (1927).

32. VAN ZILE, BAILMENTS AND CARRIERS (2d. ed. 1908) § 196.