GIFTS OVER ON DEATH WITHOUT ISSUE

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HISTORICAL INTRODUCTION

Prior to the Statute of Uses,¹ if a gift of Blackacre was made "to A and his heirs, but if A died without heirs of his body (or issue), to B and his heirs," the gift to B and his heirs, taking effect by way of shifting use and not by way of remainder, was void.² It was natural, therefore, for a court which wished to save the gift to B to construe it as a remainder. This could best be done by implying an estate tail in A, with a gift over upon its expiration to B.³ After the passage of the Statute of Uses and the Statute of Wills,⁴ shifting and springing gifts, which of course took effect other than by way of remainder, were held valid.⁵ At this time, if there was a feoffment or a devise of Blackacre "to A and his heirs, but if A died without issue, to B and his heirs," it was not necessary to interpret B's gift as a remainder in order to save it. Yet it was so construed, the old law prevailing. If a chattel real were so limited, its gift over to B was held void as an attempt to entail a term.⁶ No case of such a limitation of chattels personal has been found at this period.

In 1620, *Pells v. Brown*⁷ held executory devises to be indestructible. This decision necessitated the Rule against Perpetuities, initiated by Lord Nottingham in 1682.⁸ Thereafter, if

¹ 27 HEN. VIII, c. 10 (1535).

² KALES, ESTATES AND FUTURE INTERESTS (2d ed. 1920) § 26.

³ An early instance of such an interpretation took place in the 35th year of Edward III (1361). There was a gift of land to B, to him and his heirs, to have and to hold, to B and his heirs forever, if B had issue of his body, and if he died without heir of his body, the land was to revert to the donor and his heirs. B had issue, and that issue died without heir of his body. The suit was between the collateral heirs of B and the donor. It was adjudged that B had only a fee tail and that, because B had died without heir of his body, the donor recover. Lib. Assis. 35 Edw. III pl. 14 (1361); BROOKE'S ABRIDGMENT, ESTATE (1576) 36, Taile 20; FITZHERBERT'S ABRIDGMENT (1577) Taile 17. Such was the English law down to the Wills Act of 1838. THEOBALD ON WILLS (8th ed. 1927) 208.

⁴ 32 & 34 HEN. VIII, c. 1 (1540).

⁵ GRAY, RULE AGAINST PERPETUITIES (3d ed. 1915) § 135.

⁶ See *Child v. Baylie*, 3 Cro. Jac. 459, 460 (1618); GRAY, *op. cit. supra* note 5, §§ 155-158.

⁷ 3 Cro. Jac. 590 (1620).

⁸ *Duke of Norfolk's Case*, 3 Cas. Ch. 1 (1682); GRAY, *op. cit. supra* note 5, §§ 169-170.

there was a devise of Blackacre "to A and his heirs, but if A died without heirs of his body (or issue), to B and his heirs," in order to save B's gift under the new rule against the creation of remote interests, it was necessary either to construe B's gift as taking effect at some definite near period, such as if A died without heirs of his body (or issue) surviving A, or to give B by interpretation a remainder after an estate tail.⁹ To the medieval judge the choice was clear, and the old method persisted. This meant, of course, that A's death without heirs of his body (or issue) signified a period whenever A's line ran out, no matter when. After future interests in chattels real and personal were permitted in the 17th and 18th centuries, difficulties at once arose as to the remoteness of the gift to B and his executors when the devise of chattels personal or real ran "to A and his executors, and if A died without issue, to B and his executors."

Another related circumstance naturally led to the legal view that A's death without heirs of his body or without issue meant when A's line ran out, no matter when, and not when it was extinct at A's death or at some other definite future time. For centuries it has been the custom of solicitors in England in the settlement of large landed estates to limit one or more estates tail with remainders thereafter.¹⁰ The common form of such an estate tail was "A and the heirs of his body," and the customary way to introduce the remainder after such an estate was to adopt a form similar to one of the following:

If A die without heirs of his body.
For want of such heirs of A's body.
In default of such issue of A.
In default of issue of A.¹¹

While the word "such" generally appears, some of the forms do not employ the word.¹² Indeed, in the form given in Key and Elphinstone's *Conveyancing*,¹³ both "in default of such issue," and "if there should be a failure of issue" are used.¹⁴ It seems, therefore, that it was a matter of indifference whether or not the

⁹ See *supra* note 3.

¹⁰ The best description of English family settlements is to be found in WILLIAMS, *SETTLEMENTS OF REAL ESTATE* (1879) c. 15. It is not within the scope of this paper to describe them in detail.

¹¹ The forms appear in MADOX, *FORMULARE ANGLICANUM* (1702) 93, 398-415, especially forms Nos. 170, 725-728, 745-749, which cover settlements in the reigns of Edward I, II, III, Richard II, Henry IV, V, VI, VII, and VIII. Also in BRIDGMAN, *CONVEYANCES* (1st ed.) 7, 63, 332; 7 BYTHEWOOD, *PRECEDENTS* (1834) 363; 2 KEY AND ELPHINSTONE, *CONVEYANCING* (8th ed. 1904) 599; *White v. Summers*, [1908] 2 Ch. 256, 271-72.

¹² MADOX, *op. cit. supra* note 11, forms Nos. 725, 728.

¹³ *Loc. cit. supra* note 11.

¹⁴ See also *White v. Summers*, *supra* note 11, at 272.

referential word "such" was employed. Of course A's estate tail would run out and the next interest take effect if A's line at any time was exhausted. Thus, the remainder would become an estate in possession when A died without descendants him surviving, or if A's line ran out at any time after A's death, as when A's great, great grandson died a bachelor.

Nothing could be more natural, therefore, to the English lawyer of the last 600 years than to attribute to the words "die without heirs of the body," or "die without issue," a meaning totally at variance with the layman's idea of the expression.

Normally, when the testator gives an interest to a person and his heirs, with a gift over if that person dies without issue, the testator means that the devisee shall lose the estate only if on his death he leaves no heirs of his body him surviving. But to the mediæval, and even to the modern, lawyer, a man died "without issue" whenever his line ran out. This was the legal interpretation prior to the Wills' Act of 1838. As is stated in Jarman on *Wills*:

"Words referring to the death of a person without issue, whether the terms be, 'if he die without issue,' 'if he have no issue,' or 'if he die before he has any issue,' or 'for want' or 'in default of issue,' unexplained by the context, and whether applied to real or to personal estate, (notwithstanding the distinction taken between these two species of property in some of the early cases) are construed to import a general indefinite failure of issue, *i.e.*, a failure or extinction of issue at any period."¹⁵

In almost every case calling for a differentiation of construction of this expression "dying without issue" the court was presented with the alternative of construing it as a failure of issue at any time (an indefinite failure of issue), or a failure of issue at the death of the first taker (definite failure of issue). Theoretically definite "failure of issue" means a failure at some specified time. By far the most common point of time found in practice is the death of the first taker. As Jarman expresses it, however, the event specified might be "collateral to the devisee," as in a devise to A and his heirs with a devise over in case he should die without issue in the lifetime of B. Suppose during the lifetime of B, A dies leaving a child who in turn dies before B; has the event happened upon which the gift is to go over? *Crowder v. Stone*¹⁶ seems to be the only case involving this question. Lord Lyndhurst held that the gift over took effect.¹⁷ A possible construction even here might be, that, inasmuch as the testator could not have meant a failure of issue at any time,

¹⁵ JARMAN ON WILLS (1st ed. 1844) 418.

¹⁶ 3 Russ. 217 (1827).

¹⁷ But *cf.* *Nichols v. Hooper*, 1 P. W. 198 (1790).

he must have meant that other failure of issue which is more commonly referred to in wills, *i.e.*, failure of issue at the death of the first taker.

As has been pointed out, if there was a devise of land to A and his heirs, followed by a gift over if A died without heirs of his body (or without issue), A's estate was cut down to an estate tail and the gift over became a remainder immediately following.¹⁸ And, likewise, if there was a devise to A for life, followed by a gift over on default of A's issue, A took an estate tail by construction.¹⁹ As an estate tail in possession could be barred, turned into a fee simple absolute, and all interests thereafter destroyed at the will of the owner, A was able at once to acquire the whole fee simple entirely contrary to the intent of the testator.²⁰ On the other hand, if the subject matter of the gift was personalty, in which there could be no estate tail, the gift over, arising, as it was said, on a general failure of issue, was void for remoteness.²¹ It resulted from this difference between the two classes of property that the judges were more prone in personalty than in realty to find on the face of the instrument a special context limiting the gift over upon failure of issue to the death of the first taker. And this remained true, in spite of the well known principle that the rule against perpetuities should not be employed for the purpose of construction.

It is necessary to consider what expressions have been commonly construed sufficient in England to cut down the generality of the meaning of "dying without issue" from an indefinite to a definite failure thereof.

(1) Where the failure of issue is stated to take place during the life of some living person. Thus, where there was a devise "to A and his heirs, but if A died without issue living B over," it was held that A did not take an estate tail.²² *A fortiori*, if the subject matter of the gift be personalty, a definite failure of issue would result.²³ It would seem that the same reasoning would apply where the gift over is to a person alive at the time of the testator's death and designed to be living at the time that he is to take. Thus, if the gift over is to survivors of persons alive at the testator's death, the event upon which it is conditioned should be held to be upon a definite failure of issue. This result is reached if the subject matter of the bequest is personalty.²⁴ But, if the will be one of land, *Chadock v. Cowley*²⁵

¹⁸ THEOBALD, *op. cit.* *supra* note 3, at 819.

¹⁹ *Ibid.*

²⁰ WILLIAMS, REAL PROPERTY (23d ed. 1920) 272.

²¹ 2 JARMAN, *op. cit.* *supra* note 15, at 427.

²² Pells v. Brown, *supra* note 7, at 695.

²³ *Cf.* Crowder v. Stone, *supra* note 16.

²⁴ Hughes v. Sayer, 1 P. Wms. 534 (1790).

²⁵ 3 Cro. Jac. 695 (1625).

decided without sufficient reason that the common law construction prevails. On the other hand, if the gift over is to some one for life and there is no further devise of the property, *Rowe v. Jeffrey*²⁶ has held in the case of land that a definite failure of issue is meant.

(2) If the expression used is "dying without leaving issue," a definite failure of issue is intended in a bequest of personalty, but an indefinite failure of issue in a devise of realty. It was so held in *Forth v. Chapman*.²⁷ Very little, however, is necessary to bring the devise of land into line with the bequest of chattels in this respect. Thus, the expression "leaving no issue behind him" was sufficient to accomplish this purpose.²⁸

(3) Finally, it would seem, both as to realty and personalty, if the expression "after his death," or the like, be coupled with "dying without issue," a definite failure of issue is intended.²⁹

Unless there is some special language appearing on the face of the instrument creating it, such, for instance, as an estate tail in the first taker, a gift over on A's death without issue should be interpreted as a gift over on A's death without issue him surviving. This result was finally reached in England by the enactment of the Wills Act of 1838,³⁰ which provides:

" . . . that in any devise or bequest of real or personal estate, the words 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being (without any implication arising from such words) a limitation of an estate tail to such person or issue; or otherwise; provided, that this act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age, or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue."

AMERICAN STATUTES

In the 17th and early 18th centuries, estates tail were favored in Virginia. Indeed, in 1710 estates tail were protected from

²⁶ 7 T. R. 589 (1798).

²⁷ 1 P. Wms. 663 (1790).

²⁸ *Porter v. Bradley*, 3 T. R. 143 (1789).

²⁹ *Trotter v. Oswald*, 1 Cox 317 (1787); *Ex parte Davies*, 2 Sim. (N. S.) 114 (1854).

³⁰ 1 VICT. c. 26, § 29 (1837).

destruction by fine and recovery. In 1727 slaves were subjected to the limitations in tail by being annexed to lands in tail to pass with the land itself. In 1734 there might be the docking of a fee tail under certain conditions. However, at the first session after the Declaration of Independence, the legislature declared that tenants in tail of land or of slaves should hold them in fee simple.³¹

Since that time many American jurisdictions have abolished by statute estates tail. In twenty-three jurisdictions the statute enacts that a limitation formerly sufficient to create an estate tail now creates either a fee simple absolute, or a fee simple with an executory limitation taking effect only if the first taker dies without issue him surviving. In eight states an estate tail now becomes a life estate in the first taker with a remainder in fee simple absolute in the next taker. In three states it becomes an estate tail for the life of the first taker only, and then a fee simple absolute in those who take by inheritance from him. In only six states are we certain that estates tail exist today.³²

Virginia took the lead; not only of all the American states but of England, in abolishing by statute the *prima facie* meaning to the common law of England of "dying without issue." In 1819 it passed a statute which reversed the common law presumption, and adopted the *prima facie* presumption that failure of issue at the death of the person is meant, unless "the intention of such limitation be otherwise expressly and plainly de-

³¹ 2 BLACKSTONE, COMMENTARIES (Tucker's 1st Am. Ed. 1803) 116, n. 119; see 4 DANE'S ABRIDGMENT (1824) 621.

Thomas Jefferson was responsible for this enactment. On Oct. 12, 1776, "He obtained leave to bring in a bill to enable tenants in tail to convey entailed property in fee simple. Two days later he reported a bill doing away with the whole system of entail. It was an audacious move. From generation to generation lands and slaves—almost the only valuable kind of property in Virginia—had been handed down protected against creditors, even against the very extravagance of spendthrift owners; and it was largely by this means that the quasi-nobility of the colony had succeeded in establishing and maintaining itself. A great groan seemed to go up from all respectable society at the terrible suggestion of Jefferson, a suggestion daringly cast before an Assembly thickly sprinkled with influential delegates strongly bound by family ties and self-interest to defend the present system. Records of the times fail to explain the sudden and surprising success of a reform, which there was every reason to suppose could be carried through only very slowly and by desperate contests; we know little more than the strange fact that the whole system of entail in Virginia crashed to pieces almost literally in a day, carrying with it an aristocracy somewhat brummagen, but the only one which has ever existed in the territory now of the United States." MORSE, THOMAS JEFFERSON (1883) 43; see 1 FISKE, OLD VIRGINIA (1901) 40.

³² The jurisdictions are classified down to January 1, 1928, in LAW OF PROPERTY RESTATEMENT (Am. L. Inst. 1928) Draft 16, pp. 7-11.

clared on the face of the deed or will creating it."³³ The modern West Virginia statute has, of course, its origin in the same act, and it has also been followed more or less literally in Mississippi,³⁴ North Carolina,³⁵ New Jersey,³⁶ Tennessee,³⁷ Kentucky,³⁸ District of Columbia,³⁹ Maryland,⁴⁰ Massachusetts,⁴¹ Rhode Island,⁴² and Pennsylvania.⁴³

In accordance with the English common law, New York early held that "dying without issue" meant an "indefinite failure of issue."⁴⁴ This had been assumed in earlier cases, which held, however, that a definite failure of issue was meant, because of the gift over to a certain person as "survivor."⁴⁵ Chancellor Kent seemed perfectly clear in his own mind that the common law rule was the law of New York. Indeed, he thought that the common law rule was based upon the intent of most testators.⁴⁶ In 1782 New York had abolished fees tail by turning them into fees simple.⁴⁷ The Revised Statutes of 1830 contained the following provisions:

"Where a remainder in fee shall be limited upon any estate,

³³ VA. REV. CODE (1819) c. 99, § 26: "Every contingent limitation in any such deed or will made to depend upon the dying of any person without heirs or heirs of the body or without issue, or issue of the body, or without children, or offspring, or descendant, or other relative, shall be held and interpreted a limitation to take effect when such person shall die, not having such heir or issue, or child, or offspring, or descendant, or other relative, as the case may be, living at the time of his death, or born to him within ten months thereafter, unless the intention of such limitation be otherwise expressly and plainly declared on the face of the deed or will creating it."

³⁴ HUTCHINSON, DIGEST (1822) 610.

³⁵ N. C. Acts 1827-28, c. 7.

³⁶ N. J. Acts 1851, p. 218.

³⁷ Tenn. Laws 1851-52, c. 41, p. 113, § 3.

³⁸ KY. REV. STAT. (1852) c. 80, § 9.

³⁹ D. C. REV. CODE (1857) tit. 1, c. 48, § 45.

⁴⁰ Md. Laws 1862, c. 161; Md. Laws 1866, c. 236.

⁴¹ Mass. Acts 1888, c. 273.

⁴² R. I. GEN. LAWS (1896) c. 202, § 24.

⁴³ Pa. Act. July 9, 1897, P. L. 213 (1897) Act 172.

⁴⁴ Jackson v. Bellinger, 18 Johns. 368 (N. Y. 1820); Lion v. Burtiss, 20 Johns. 483 (N. Y. 1823); Wilkes v. Lyon, 2 Cow. 333 (N. Y. 1823).

⁴⁵ Fosdick v. Cornell, 1 Johns. 440 (N. Y. 1806); Jackson v. Blanshan, 3 Johns. 289 (N. Y. 1808); Moffat v. Strong, 10 Johns. 12 (N. Y. 1813); Anderson v. Jackson, 16 Johns. 382 (N. Y. 1819).

⁴⁶ "I am inclined to think that in 19 cases out of 20 the testator really means a general or indefinite failure of issue." Anderson v. Jackson, *supra* note 45, at 401. He repeated the same opinion in 4 KENT, COMMENTARIES *274. In Anderson v. Jackson, Kent had dissented and had reversed his concurrence in the opinion of Fosdick v. Cornell, *supra* note 45, which held that the word "survivor" had the effect of restricting the common law meaning of "dying without issue."

⁴⁷ N. Y. Laws, Sess. 6, c. 2; Sess. 9, c. 12.

which would be adjudged a fee tail, according to the law of this state, as it existed previous to the time mentioned in the last section, such remainder shall be valid as a contingent limitation upon a fee, and shall vest in possession, on the death of the first taker, without issue living at the time of such death."⁴⁸

And Section 22 read:

"Where a remainder shall be limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, the words 'heirs' or 'issue' shall be construed to mean heirs or issue, living at the death of the person named as ancestor."⁴⁹

The revisers in their report to the legislature commented acutely on the expression "dying without issue." They noted the common law meaning of it and Chancellor Kent's approval thereof, and said:

"In most cases, it is expressed that the limitation over shall take effect on the event of the first taker's 'dying with out issue, or without leaving issue'; and in these cases, it is believed that the meaning which the law affixes to the terms, namely, a failure of issue, at any period however remote, even after the death of the first taker, is very opposite to that of the party by whom they are employed."⁵⁰

Referring to the New York cases in Johnson's reports cited above, they said:

"The tendency of the sections that we have proposed to prevent litigation may be fairly stated, as an additional argument in favor of their adoption. Nearly every case that has arisen in our own courts in relation to executory devises and other contingent limitations has turned on the question, whether the first taker took an estate tail, or in other words, whether the remainder were dependent on an indefinite failure of issue. (1 Johns. R. 440; 10 Johns. R. 12, 19; 11 Johns. R. 337; 16 Johns. R. 382; 18 Johns. R. 368; 20 Johns. R. 483). In all of these cases, the struggle of the judges to support the limitation over, by confining the failure of issue to the death of the first taker, is very manifest."

Section 22 of the New York Revised Laws of 1830 has been substantially copied in Missouri,⁵¹ Michigan,⁵² Wisconsin,⁵³ Minnesota,⁵⁴ New Mexico,⁵⁵ Alabama,⁵⁶ South Carolina,⁵⁷ Georgia,⁵⁸

⁴⁸ N. Y. REV. STAT. (1830) pt. 2, tit. 2, § 4.

⁴⁹ *Ibid.* § 22.

⁵⁰ 3 ANALYSIS OF REVISED STATUTES (1828) pt. 2, c. 1, tit. 2, art. 1, p. 12.

⁵¹ Mo. Acts 1845, c. 32, § 6.

⁵² MICH. REV. STAT. (1846) pt. 1, tit. 14, c. 62, § 22.

⁵³ WIS. REV. STAT. (1849) pt. 2, tit. 15, c. 56, § 22.

⁵⁴ MINN. REV. STAT. (1851) c. 43, § 22.

⁵⁵ N. M. Laws 1851-52, pp. 377, 381, § 25.

⁵⁶ ALA. CODE (1852) § 1302.

⁵⁷ S. C. STAT. AT LARGE (1853) 298.

⁵⁸ Ga. Laws 1853-54, p. 72, No. 62.

California,⁵⁹ Nevada,⁶⁰ Idaho,⁶¹ Montana,⁶² North and South Dakota,⁶³ and Arizona.⁶⁴

Between the Virginia Act and the New York Act there is this difference in form: the Virginia statute provides that the presumption of definite failure of issue can be rebutted by a contrary intent appearing in the will, while the New York statute contains no such provision and says, apparently peremptorily, that the words "shall be construed" to mean heirs or issue living at the death of the person named as ancestor. Does this strict language used in the New York Act preclude the possibility of rebutting the new meaning? Chancellor Kent has some language in his *Commentaries* suggesting that the rule in New York is a hard and fast one and un rebuttable.⁶⁵ But no case has been found in New York, or in any other jurisdiction, which raises this question. It is extremely unlikely that any such case should occur in a country hostile to estates tail and where the rule against perpetuities prevents remote limitations on indefinite failure of issue. Nor has any analogy been found with respect to any other statute laying down in absolute terms a rule of construction for wills. It is submitted that just as the common law rule was rebuttable by appropriate language on the face of the will,⁶⁶ so the New York statutory rule was not intended to be any more stringent in its application. If any testator were rash enough in other parts of his will to say that he meant the expression "dying without issue" to have the old common law meaning, it is believed that the New York courts would consider the statutory rule inapplicable.

The writer believes that the form embodied in the Wills Act in England and the Virginia act in the United States is the better, and suggests the form prepared by Professor Ernest Freund,⁶⁷ with the addition of the proviso contained in both statutes just referred to, so as to read as follows:

"In any gift, grant, or devise hereinafter taking effect, a limitation of an executory interest contingent upon the event of a prior taker 'having no issue' or 'dying without issue' or 'dying without leaving issue' (or using words of similar import), shall not be held to refer to an indefinite failure of issue, but shall be deemed to refer to the want or failure of issue at the time of

⁵⁹ Cal. Acts April 27, 1855, p. 171.

⁶⁰ Nev. Terr. Laws 1861, c. 9, § 43, p. 17.

⁶¹ Idaho Laws 1863-64, p. 535, § 44.

⁶² Mont. Terr. Laws 1864, p. 479.

⁶³ DAK. CIVIL CODE (1864-65) art. 4, § 477.

⁶⁴ ARIZ. REV. STAT. (Civil Code 1913) § 4687.

⁶⁵ 4 KENT, *op. cit.* *supra* note 46, at *281, note a.

⁶⁶ See *supra* note 45.

⁶⁷ This appears in KALES, *CASES ON FUTURE INTERESTS* (1917) 535.

the death of the person named as ancestor, unless a contrary intention shall appear from the instrument creating it."

A classification of the statutes appears in a note.⁶⁸

AMERICAN LAW APART FROM STATUTE

In a country so hostile to entails, it is surprising that the expression "dying without issue" should be employed in wills to the extent that our litigation shows. The reckless use of the phrase is probably due to custom and to the fascination which the elusive word "issue" has had for the layman and for the lawyer little versed in conveyancing.

⁶⁸ (1) States in which the statute applies to all situations:

Alabama	New York (see 5 <i>infra</i>)
District of Columbia	North Carolina
Georgia	Rhode Island
Maryland	South Carolina
Massachusetts	Tennessee
Mississippi	Virginia

(2) States in which the statute applies to wills only:

New Jersey	Pennsylvania
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(3) States in which the statute applies to deeds only:

California	New Mexico (?)
Idaho (?)	North Dakota (?)
Montana (?)	South Dakota (?)
Nevada (?)	

(4) States where the statute applies to real property only:

Arizona	North Dakota
Kentucky	South Dakota
Michigan	West Virginia (?)
Minnesota	Wisconsin

(5) States where the statute in terms applies only to remainders:

Alabama	Missouri
Arizona	Montana
California	Nevada
Idaho	New York
Michigan	Wisconsin
Minnesota	

In these states (No. 5) the New York definition of "remainder" would probably be applied so as to give the statute a broad application to all future interests. The New York statute is as follows: "Where a future estate is dependent on a precedent estate, it may be termed a 'remainder,' and may be created and transferred by that name." N. Y. REV. STAT. (1830) pt. 2, tit. 2, art. 1, § 11.

In compiling the above table there has been used a degree of dogmatism which may not be justified by the future development of these statutes by the courts. Where the act is apparently limited with respect to land or personalty or to a certain type of conveyance, the judges may strain to extend its application by interpretation. And if that is impossible, the step taken by the legislature may encourage the courts to repeal the common law to which the act has failed to extend. This is a familiar process. See (1921) 34 HARV. L. REV. 526.

It is perhaps more astonishing that the phrase should have here received so widely its absurd common law interpretation. Many of such decisions, however, were made before the middle of the nineteenth century. Furthermore, a goodly proportion of those handed down thereafter involved wills of much earlier date. Something is also due to the early legal education of our judges who, like Chancellor Kent,⁶⁹ were brought up under the influence of the eighteenth century English decisions and who felt unable to break away from them even under a different state of society.

A great majority of our judges have required legislation, or some context upon the face of the will, to hold the gift over to be on a definite failure of issue. Kentucky, Connecticut and Ohio alone have been bold enough to accomplish this without either of these aids.⁷⁰ The Kentucky and Connecticut decisions would seem to include both land and personalty, but the subject matter of the dispute in the Ohio case was land.⁷¹ But the great weight of American authority, both as to land⁷²

⁶⁹ 4 KENT, *op. cit. supra* note 46, at *274.

⁷⁰ *Northcut v. Whipp*, 12 B. Mon. 65 (Ky. 1851); *Moore v. Moore*, 12 B. Mon. 651 (Ky. 1851); *Hudson v. Wadsworth*, 8 Conn. 347 (1831); *St. John v. Dann*, 66 Conn. 401, 407 (1895) (land and personalty); *Parish v. Ferris*, 6 Ohio St. 563 (1856); *Niles v. Gray*, 12 Ohio St. 320 (1861), approved in *Anderson v. Realty Co.*, 79 Ohio St. 23 (1908); *cf. Harris v. Smith*, 16 Ga. 545 (1855) *semble*; *Summers v. Smith*, 127 Ill. 645 (1889) *semble*; *McAllister v. Elliott*, 14 Atl. 208, 711 (N. H. 1928) *semble*.

⁷¹ *Parish v. Ferris*, *supra* note 70.

The hostility in Kentucky to English precedents has been noted in GRAY, *THE NATURE AND SOURCES OF THE LAW* (2d ed. 1921) 245 n. 1. See CLEVELAND, HEWITT AND CLARK, *PROBATE LAW AND PRACTICE IN CONNECTICUT* (1915) 921.

⁷² An indefinite failure of issue was held to be meant in the following cases involving land:

Arkansas: *Mercantile Trust Co. v. Adams*, 95 Ark. 333, 129 S. W. 1101 (1910).

Georgia: *Wiley, Parish & Co. v. Smith*, 3 Ga. 551 (1847); *Hertz v. Abrahams*, 110 Ga. 707, 36 S. E. 409 (1900).

Indiana: *Huxford v. Milligan*, 50 Ind. 542 (1875).

Kansas: *Klingman v. Gilbert*, 90 Kan. 545, 135 Pac. 682 (1913) *semble*.

Maine: *Fisk v. Keene*, 35 Me. 349 (1853); *Richardson v. Richardson*, 80 Me. 585 (1888); *Skolfield v. Litchfield*, 116 Me. 440, 102 Atl. 240 (1917).

Maryland: *Laidler v. Young*, 2 H. & J. 69 (1807); *Newton v. Griffith*, 1 H. & G. 111 (1827); *Pennington v. Pennington*, 70 Md. 418 (1889); *Comegys v. Jones*, 65 Md. 317 (1886).

Massachusetts: *Hawley v. Northampton*, 8 Mass. 3 (1811); *Hurlburt v. Emerson*, 16 Mass. 241 (1819); *Parkman v. Bowdoin*, 1 Sumn. 349 (C. C. D. Mass. 1833); *Nightingale v. Burrell*, 15 Pick. 104 (1833); *Parker v. Parker*, 5 Metc. 134 (1842); *Malcolm v. Malcolm*, 3 Cush. 472 (1849); *Wheatland v. Dodge*, 10 Metc. 502 (1845); *Terry v. Briggs*, 12 Metc. 17 (1845); *Hall v. Priest*, 6 Gray 18 (1856); *Brown v. Addison Hospital*, 155 Mass. 323, 29 N. E. 625 (1892); *Allen v. Trustees*, 102 Mass. 262

and personalty,⁷³ is in favor of the common law pre-

(1869); *Hayward v. Howe*, 12 Gray 49 (1858); *Gilkie v. Marsh*, 186 Mass. 336, 71 N. E. 703 (1904).

New Hampshire: *Hall v. Chafee*, 14 N. H. 215 (1843) *semble*; *Merrill v. Baptist Union*, 73 N. H. 414 (1905).

New Jersey: *Secquil v. Moore*, 1 Cox 386 (N. J. L. 1795); *Morehouse v. Cotheal*, 2 Zab. 430 (1850) (reversed on collateral point); *Chetwood v. Winston*, 40 N. J. L. 337 (1878); *More v. Rake*, 2 Dutc. 574 (1857) *semble*.

New York: *Wilkes v. Lion*, 2 Cow. 333 (1823).

North Carolina: *Moore v. Bradley*, 2 Hayw. 142 (1801).

Pennsylvania: *Haines v. Witmer*, 2 Yeates 400 (1798); *Hope v. Rusha*, 88 Pa. 127 (1878); *Caskey v. Brewer*, 17 S. & R. 441 (1828); *Clark v. Baker*, 3 S. & R. 470 (1817) *semble*; *Burkart v. Bucher*, 2 Binn. 455 (1810); *Wall v. McGuire*, 22 Pa. 248 (1855); *Doyle v. Mullady*, 33 Pa. 264 (1859); *Rancel v. Creswell*, 30 Pa. 158 (1858) *semble*; *Sharp v. Thompson*, 1 Whart. 139 (1836); *Braden v. Cannon*, 24 Pa. 168 (1854); *Reinoehl v. Shirk*, 119 Pa. 108 (1888); *Duer v. Boyd*, 1 S. & R. 202 (1814); *Moody v. Snell*, 81 Pa. 359 (1876); *Pierce v. Hakes*, 23 Pa. 231 (1854); *Wynn v. Story*, 38 Pa. 166 (1861); *Criley v. Chamberlain*, 30 Pa. 161 (1858); *Covert v. Robinson*, 46 Pa. 274 (1863); *Ray v. Alexander*, 146 Pa. 242 (1891); *Robinson's Estate*, 149 Pa. 418 (1892); *Eichelberger v. Barnitz*, 9 Watts 447 (1840); *Lawrence v. Lawrence*, 105 Pa. 335 (1884); *Vaughan v. Dickes*, 20 Pa. 509 (1853); *Arnold v. Muhlenberg College*, 227 Pa. 321, 76 Atl. 30 (1910); *Beilstein v. Beilstein*, 194 Pa. 152, 45 Atl. 73 (1899); *Graham v. Abbott*, 208 Pa. 68, 57 Atl. 178 (1904); *Amelong v. Dorney*, 16 S. & R. 322 (1827); *Irwin v. Dunwoody*, 17 S. & R. 60 (1827); *Hansell v. Hubbell*, 24 Pa. 244 (1855); *Horton v. McCall*, 233 Pa. 405, 82 Atl. 472 (1912); *Hackney v. Tracy*, 137 Pa. 53 (1890); *Heffner v. Knepper*, 6 Watts 18 (1837).

Rhode Island: *Whitford v. Armstrong*, 9 R. I. 394 (1870); *Holden v. Wells*, 18 R. I. 802 (1895); *Osborne v. Shrieve*, 3 Mas. 391 (C. C. D. R. I. 1824).

South Carolina: *Clifton v. Haig*, 4 Des. Eq. 330 (1812) *semble*; *Mazyck v. Vanderhorst*, 1 Bailey Eq. 48 (1828); *Graham v. Moore*, 13 S. C. 115 (1879) *semble*; *Mangum v. Piester*, 16 S. C. 316 (1881).

Tennessee: *Hamner v. Hamner*, 3 Head 398 (1859); *Chester v. Greer*, 5 Humph. 26 (1844).

Virginia: *Callava v. Pope*, 3 Leigh. 103 (1831); *Bells v. Gillespie*, 5 Rand 273 (1827); *Broadbudd v. Turner*, 5 Rand 308 (1827); *Wright v. Cohoon*, 12 Leigh. 370 (1841); *Hill v. Burrow*, 3 Call 297 (1803); *Tate v. Tally*, 3 Call 307 (1803); *Carter v. Tyler*, 1 Call 165 (1797); *Jiggetts v. Davis*, 1 Leigh. 368 (1829); *Tinsley v. Jones*, 13 Gratt. 289 (1856); *See v. Craigen*, 8 Leigh. 449 (1836); *Roy v. Garnett*, 2 Wash. 11 (Va. 1794).

⁷³ An indefinite failure of issue was held to be meant in the following cases involving personalty:

Moody v. Walker, 3 Ark. 147 (1840) *semble*; *Watkins v. Quarles*, 23 Ark. 179 (1861); *Gray v. Gray*, 20 Ga. 804 (1856); *Huxford v. Milligan*, 50 Ind. 542 (1875); *Allender v. Sussan*, 33 Md. 11 (1870) *semble*; *Albee v. Carpenter*, 12 Cush. 382 (Mass. 1853); *Hall v. Priest*, 6 Gray 18 (Mass. 1856) *semble*; *Vaughn v. Guy*, 17 Mo. 429 (1853); *Chism's Adm'r v. Williams*, 29 Mo. 288 (1860); *Davies v. Steele*, 38 N. J. Eq. 168 (1884); *Paterson v. Ellis*, 11 Wend. 259 (N. Y. 1833) *semble*; *Moffat v. Strong*, 10 Johns. 12, 16 (N. Y. 1813) *semble*; *Norris v. Beyea*, 13 N. Y. 273, 280 (1855); *Hoff's Estate*, 147 Pa. 636 (1892); *Clifton v. Haig*, *supra* note 72 (S. C.); *Postell v. Postell*, 1 Bailey Eq. 390 (S. C. 1831); *Randolph v.*

sumption.⁷⁴

The expressions upon the face of the will which have been urged to cut down the common law meaning are the same as those noted above in connection with the English law.

(1) If the gift over is to a person designated as "then living" or "surviving," the weight of authority in the case of land, contrary to *Chadock v. Cowley*,⁷⁵ is in favor of holding that the popular meaning is meant.⁷⁶ There is a substantial minority of

Wendel, 4 Sneed 646 (Tenn. 1857); *Bowman v. Tucker*, 3 Humph. 648 (Tenn. 1842); *Chester v. Greer*, *supra* note 72 (Tenn.); *Nixon v. Rose*, 12 Gratt. 425 (Va. 1855); *Deane v. Hansford*, 9 Leigh. 253 (Va. 1838); *Williamson v. Ledbetter*, 2 Munf. 521 (Va. 1811); *Callava v. Pope*, 3 Leigh. 103 (Va. 1831).

⁷⁴ The minority view is represented by the following cases:

Land: *Clarke v. Turry*, 34 Conn. 176 (1867); *Harris v. Smith*, 16 Ga. 545 (1855); *Summers v. Smith*, 127 Ill. 645 (1889) *semble*; *Moore v. Moore*, 12 B. Mon. 651 (Ky. 1851); *Northcut v. Whipp*, 12 B. Mon. 65 (Ky. 1851); *Black v. Cartmell*, 10 B. Mon. 188 (Ky. 1849) *semble*; *McAllister v. Elliot*, 140 Atl. 708, 711 (N. H. 1928) *semble*; *Parrish v. Ferris*, 6 Ohio St. 563 (1856).

Personalty: *Clarke v. Turry*, *supra*; *Harris v. Smith*, 16 Ga. 545 (1855) *semble*; *Moore v. Moore*; *Black v. Cartmell*, both *supra*.

⁷⁵ *Supra* note 25.

⁷⁶ "Survivor"—Land—Definite Failure Intended: *Jackson d. St. John v. Chew*, 12 Wheat. 153 (U. S. 1827); *Morgan v. Morgan*, 5 Day 517 (Conn. 1813) *semble*; *Couch v. Gorham*, 1 Conn. 36 (1814); *Blanchard v. Maynard*, 103 Ill. 60 (1882) *semble*; *Carpenter v. Sangamon Trust Co.*, 229 Ill. 486, 82 N. E. 418 (1907) *semble*; *Summers v. Smith*, 127 Ill. 645, 21 N. E. 191 (1889) *semble*; *Deboe v. Lowen*, 8 B. Mon. 616 (Ky. 1848); *Abbott v. Essex Co.*, 18 How. 202 (U. S. 1855) *semble*; *Lyons v. Cotharin*, 205 Mich. 476, 171 N. W. 406 (1919) *semble*; *Gannon v. Pauk*, 200 Mo. 75, 98 S. W. 471 (1906) *semble*; *Gannon v. Albright*, 183 Mo. 238, 81 S. W. 1162 (1904) *semble*; *Pinkham v. Blair*, 57 N. H. 226 (1876) *semble*; *Van Middlesworth v. Schenk*, 3 Hals. 29 (N. J. L. 1824) *semble*; *Kennedy v. Kennedy*, 5 Kutch. 185 (N. J. L. 1861) *semble*; *Wardell v. Allaire*, 1 Spenc. 6 (N. J. L. 1842) *semble*; *Seddel v. Wills*, 1 Spenc. 223 (N. J. L. 1843) *semble*; *Howell v. Howell*, 1 Spenc. 411 (N. J. L. 1845); *Groves v. Cox*, 40 N. J. L. 40 (1878).

Fosdick v. Cornell, 1 Johns. 440 (N. Y. 1806) *semble*; *Jackson v. Blanshan*, 3 Johns. 292 (N. Y. 1808); *Anderson v. Jackson*, 16 Johns. 382 (N. Y. 1819); *Pond v. Bergh*, 10 Paige Ch. 140 (N. Y. 1843); *Cutter v. Doughty*, 23 Wend. 513 (N. Y. 1840); *Dumond v. Stringham*, 26 Bart. 104 (N. Y. 1857); *Langley v. Heald*, 7 W. & S. 96 (N. Y. 1844) *semble*; *Rapp v. Rapp*, 6 Pa. 45 (1847) *semble*; *Johnson v. Currin*, 10 Pa. 498 (1849); *Nicholson v. Bettle*, 57 Pa. 384 (1868); *Ingersoll's Appeal*, 86 Pa. 240 (1878); *Stoner v. Wunderlich*, 198 Pa. 158, 165, 47 Atl. 945, 949 (1901) (realty) *semble*; *Mebus' Estate*, 273 Pa. 505, 516, 117 Atl. 340, 345 (1922) (realty to be sold) *semble*; *DeTreville v. Ellis*, 1 Bailey Eq. 40 (1827); *Selman v. Robertson*, 46 S. C. 262 (1895); *Lewis v. Claiborne*, 5 Yerg. 369 (Tenn. 1821); *Brown v. Hunt*, 12 Heisk. 404 (Tenn. 1873).

If there is a gift over to one for life after the gift on death without issue of the first taker, the gift is conditioned on a definite failure of issue. *Ide v. Ide*, 5 Mass. 500, 502 (1809) (land) *semble*; *Stoner v. Wunderlich*; *Mebus' Estate*, both *supra*; *Higgenbotham v. Rucker*, 2 Call. 265 (Va.

jurisdictions where the courts have held the other way.⁷⁷ But if the subject matter be personalty, this minority is very small.⁷⁸

(2) If the gift over be upon the first taker's "dying without leaving issue," the common law meaning still obtains in a bare majority of jurisdictions.⁷⁹ If the subject matter is personalty, the restricted sense has been unanimously accepted.⁸⁰

1800) (personalty) *semble*. *Contra*: Newton v. Griffith, 1 Har. & G. 111 (Md. 1827) (land).

If the gift over for life is followed by a remainder in fee, there is no presumption that a definite failure of issue is meant. Pennington v. Pennington, 70 Md. 418 (1889) (land). *Contra*: Stone v. Bradlee, 183 Mass. 165, 170, 66 N. E. 708, 710 (1903) (land and personalty) *semble*; Todd v. Armstrong, 213 Pa. 570, 62 Atl. 1114 (1906) (real estate).

⁷⁷ Caulk v. Caulk, 3 Pennew. 528, 52 Atl. 340 (Del. 1902); Huxford v. Milligan, 50 Ind. 542 (1875); Newton v. Griffith, 1 Har. & G. 111 (Md. 1827); Farrar v. Christy, 24 Mo. 453 (1857) *semble*; Hoxton v. Archer, 3 G. & J. 199 (Md. 1831); Sequil v. Moore, 1 Cox 386 (N. J. L. 1795); Haines v. Witmer, 2 Yeates 400 (Pa. 1798); Duer v. Boyd, 1 S. & R. 203 (Pa. 1814); Caskey v. Brewer, 17 S. & R. 441 (Pa. 1828); Clark v. Baker, 3 S. & R. 470 (Pa. 1817) *semble*; Burkart v. Bucher, 2 Binn. 455 (Pa. 1810) *semble*; Sharp v. Thompson, 1 Whart. 139 (Pa. 1836); Heffner v. Knepper, 6 Watts 18 (Pa. 1837); Braden v. Cannon, 24 Pa. 168 (1854); Wall v. Maguire, 24 Pa. 248 (1855); Rancel v. Creswell, 30 Pa. 158 (1858) *semble*; Doyle v. Mullady, 33 Pa. 264 (1859); Moody v. Snell, 81 Pa. 359 (1876); Hope v. Rusha, 88 Pa. 127 (1878); Reinoehl v. Shirk, 119 Pa. 108, 12 Atl. 806 (1888); Borrough v. Foster, 6 R. I. 534 (1860); Brownell v. Brownell, 10 R. I. 509 (1873); Bells v. Gillespie, 5 Rand 273 (Va. 1827); Broadus v. Turner, 5 Rand 308 (Va. 1827).

⁷⁸ Gray v. Gray, 20 Ga. 804 (1856); Huxford v. Milligan, 50 Ind. 542 (1875); Nowlin v. Winfree, 8 Gratt. 346 (Va. 1852). *Contra*: Williams v. Graves, 17 Ala. 62 (1849); Russ v. Russ, 9 Fla. 105, 113 (1860) *semble*; Pinkham v. Blair, 57 N. H. 226 (1876) *semble*; Kimball v. Penhallow, 60 N. H. 448 (1881) *semble*; Moffat v. Strong, 10 Johns. 12 (N. Y. 1813); Norris v. Beyea, 13 N. Y. 273, 280 (1855) *semble*; Moreland v. Majors, 1 Murph. 48 (N. C. 1805) *semble*; DeTreville v. Ellis, 1 Bailey Eq. 40 (S. C. 1827); Stevens v. Patterson, 1 Bailey Eq. 42 (S. C. 1829); Brown v. Hunt, 12 Heisk. 404 (Tenn. 1873).

⁷⁹ Ide v. Ide, 5 Mass. 500 (1809) *semble*; Hawley v. Northampton, 8 Mass. 3 (1811); Hurlburt v. Emerson, 16 Mass. 241 (1819); Nightingale v. Burrell, 15 Pick. 104 (Mass. 1833); Malcolm v. Malcolm, 3 Cush. 472 (Mass. 1849); Farrar v. Christy, 24 Mo. 453 (1857); Osborne v. Shrieve, 3 Mas. 391 (C. C. D. R. I. 1824); Burfoot v. Burfoots, 2 Leigh. 119, 132 (Va. 1830) *semble*; Paterson v. Ellis, 11 Wend. 259, 279 (N. Y. 1833) *semble*; Chetwood v. Winston, 40 N. J. L. 337 (1878); Bibb v. Bibb, 79 Ala. 437 (1885) *semble*; Caulk v. Caulk, 3 Pennew. 528, 52 Atl. 340 (Del. 1902) *semble*; Scofield v. Litchfield, 116 Me. 440, 102 Atl. 240 (1917); McCarthy v. Walsh, 123 Me. 157, 122 Atl. 406 (1923).

Contra: Beresford v. Elliott, 1 Des. Eq. 183 (S. C. 1790); Robeson v. Cochran, 255 Ill. 355, 358, 99 N. E. 649 (1912) *semble*; Morehouse v. Cothel, 2 Zab. 430, 440 note (N. J. L. 1850); Daniel v. Thomson, 14 B. Mon. 663 (Ky. 1854); Smith v. Kimbell, 153 Ill. 368, 38 N. E. 1029 (1894).

⁸⁰ Beresford v. Elliott, 1 Des. Eq. 183 (S. C. 1790); Dunn v. Bray, 1 Call 294 (Va. 1798); Atwell's Executors v. Barney, 1 Dud. 207 (Ga. 1831) *semble*; Clapp v. Fogleman, 1 D. & B. Eq. 466 (N. C. 1836); Robards v.

(3) If the gift over upon death without issue is expressed to take effect "after his decease" or "at his death," the weight of authority holds both as to land and personalty that the common law presumption is rebutted.⁸¹

It is to be regretted that all the American judges have not been able to anticipate the legislatures in holding that our social structure justifies a departure from the common law of England, and a holding that in all these categories there is a presumption of a definite failure of issue.

A number of American cases without sufficient reason confine a gift over on death without issue to such death prior to that of the testator who created the limitations. These decisions cut across the authorities hitherto discussed without paying any attention to them. Before analyzing this anomalous line of authority, it is necessary to consider the English law.

(1) If there is an immediate gift to A absolutely and a gift over "in case of his death," or "if he die," such gift over will only be effective if A dies before the testator.⁸²

(2) If there is a gift to X for life and then to A absolutely, a gift over "in case of A's death," or "if he die," will take effect only if A die prior to the vesting in possession of his interest.⁸³

(3) If there is a gift to A absolutely with a gift over "if A die without issue him surviving" (or unmarried, or without children, etc.), the gift is not confined to the death of A before that of the testator.⁸⁴

(4) Likewise, if, in the preceding case, there be a prior life estate to X, the gift over takes effect upon the death of A without issue him surviving at any time, whether before or after the death of the testator or of the life tenant.⁸⁵

(5) If in the last two preceding cases there are gifts over, first, "if A die without issue him surviving," and second, "if A die with issue him surviving," all possibilities after A's death are

Jones, 4 Ired. L. 53 (N. C. 1843); Ladd v. Harvey, 21 N. H. 514 (1850); Robert v. West, 15 Ga. 122 (1854) *semble*; Woodward v. Woodward, 1 Green 83 (N. J. Eq. 1863); Allender v. Sussan, 33 Md. 11 (1870).

⁸¹ Atwell's Executors v. Barney, Dud. 207 (Ga. 1831) (personalty); Snickson v. Snitcher, 2 Green 53 (N. J. L. 1833) (land); Downing v. Wher-rin, 19 N. H. 9 (1848) (land); Whitford v. Armstrong, 9 R. I. 394 (1870); Swinburne, Petitioner, 16 R. I. 208 (1888) (realty and personalty); Wilson v. Wilson, 46 N. J. Eq. 323 (1890) (land); Parkhurst v. Harrower, 142 Pa. 432 (1891) (land) *semble*; Hall v. Brownlee, 164 Ind. 238, 72 N. E. 131 (1904) (personalty); Ide v. Ide, 5 Mass. 500, 502 (1809) (land) *semble*. But see Tinsley v. Jones, 13 Gratt. 289, 293 (1856) (land).

⁸² THEOBALD, *op. cit. supra* note 3, at 742.

⁸³ *Ibid.* 744.

⁸⁴ *Ibid.* 745.

⁸⁵ *Ibid.* 746. The leading case is O'Mahoney v. Burdett, L. R. 7 H. L. 388 (1875).

taken care of, and, therefore, the gifts over are construed to take effect if A die before his interest vests in possession.⁸⁶

It is with reference to the situations described in paragraphs 3, 4, and 5 that there are a number of American decisions⁸⁷ the conclusions of which are not only at variance with the correct results in England indicated above, but which also confuse the facts in paragraphs 3, 4, and 5 with those in paragraphs 1 and 2. The problem has frequently been presented in this country in the case of a gift over simply upon A's "death without issue." Suppose, for instance, the view is taken that in a gift over "on A (the first taker) dying with issue," "dying without issue" means dying without issue prior to the testator, the question still remains to be decided whether, if A dies before the testator, and leaves a child who dies childless before the testator, the contingency has in fact happened. Yet many of our courts have dealt with this situation as if it had no relation whatever to the question as to whether the gift over was upon definite or indefinite failure of issue in the sense discussed in the early part of this article. Almost invariably no mention is made of this aspect of the case.

ALABAMA

Prior to the enactment of Section 1302 of the Alabama Code of 1852, which construed a gift over on "failure of issue" as a gift conditioned on such failure at the death of the first taker, the phrase imported an indefinite failure of issue.⁸⁸ If the gift over was to some one described as "surviving," a definite failure was meant.⁸⁹ But a gift over without leaving issue, at least as to land, did not, in and of itself, limit the generality of the phrase.⁹⁰

In *Smith v. Smith*,⁹¹ there was a gift over on death without children surviving the first takers, and the court held, upon the authority of the Indiana and Pennsylvania decisions, that the contingency was confined to the death of the testator. In *Burleson v. Mays*,⁹² where the gift over was on death "without leaving any lawful heir," the court held that "heir" meant "children"

⁸⁶ THEOBALD, *op. cit. supra* note 3, at 748; KALES, *op. cit. supra* note 2, § 532; Updegraff, *Some Effects of the District Code Provisions Dispensing With Words of Inheritance* (1914) 14 GEO. L. REV. 253-256.

⁸⁷ See Note (1909) 25 L. R. A. (N. S.) 1045.

⁸⁸ *Darden's v. Burns*, 6 Ala. 363 (1844) (personalty); *Simmons v. Augustin*, 3 Port. 69, 103 (Ala. 1836) (land) *semble*; *McGraw v. Davenport*, 6 Port. 319 (Ala. 1837) (personalty) *semble*.

⁸⁹ *Williams v. Graves*, 17 Ala. 62 (1849) (personalty).

⁹⁰ *Bibb v. Bibb*, 79 Ala. 437 (1885) (land—involved the construction of a will drawn in 1839).

⁹¹ 139 Ala. 406, 36 So. 619 (1903).

⁹² 189 Ala. 107, 66 So. 36 (1914).

or "issue," and it followed *Smith v. Smith*.⁹³ If there is a life estate preceding the gift cut short by the conditional gift over, such condition is confined to the life of the life tenant.⁹⁴

CONNECTICUT

A few early Connecticut cases on estates tail by implication from a gift over on failure of issue would seem to indicate that the common law rule was to be followed, and a general failure of issue was *prima facie* intended. But the significance of these cases is greatly weakened by the extraordinary and unprecedented holding in *Hudson v. Wadsworth*⁹⁵ that an estate tail by implication may arise although the gift over is on definite failure of issue.⁹⁶ And against the inference in favor of the common law doctrine, a number of cases justify the conclusion that "where the phrase 'dying without issue' is held not to refer particularly to death before the testator, the phrase will be held to refer to the taker's own death, and not to an indefinite failure of issue in the future."⁹⁷

In *Holmes v. Williams*,⁹⁸ there was a devise of land to Williams and his heirs on condition that he pay Holmes £200 when he arrives at full age, but if Williams die without issue, then to Holmes and six others. It was held that the gift over was on Williams' death without issue prior to full age.⁹⁹ In *Morgan v. Morgan*,¹⁰⁰ where the gift over upon death without issue was to the brothers of the first taker, and there was no condition that they survive him, the court seemed to think that a personal provision for them was meant, and it therefore restricted the condition to a definite failure of issue. The attitude of the court, however, was against the general common law meaning.¹⁰¹ And in

⁹³ Cf. *O'Connell v. O'Connell*, 196 Ala. 224, 72 So. 81 (1916) *semble*, where almost all contingencies were provided for, but such fact was not made the basis for the opinion.

A similar point was directly passed upon, with the same result, in *Spira v. Frankel*, 210 Ala. 27, 97 So. 104 (1923), where there was a gift over if the first taker "should die leaving no issue."

⁹⁴ Cf. *Boshell v. Boshell*, 218 Ala. 320, 118 So. 553 (1928) (the condition held, upon a special context, to be effective no matter when it occurred); *Reynolds v. Reynolds*, 208 Ala. 674, 95 So. 183 (1923) (the condition was if he "die childless.")

⁹⁵ 8 Conn. 348 (1831).

⁹⁶ See *Turrill v. Northrop*, 51 Conn. 33, 38 (1883); *Mahoney v. Mahoney*, 98 Conn. 525, 536, 120 Atl. 342, 347 (1923).

⁹⁷ CLEAVELAND, HEWITT AND CLARK, *op. cit.* *supra* note 71, at 529. The writer has relied upon the full collection of cases and their accurate statement in this work. *Ibid.* 528-529, and Supplement (1929) 203, 213.

⁹⁸ 1 Root 332 (Conn. 1791).

⁹⁹ *Accord*: *Williams v. Dickerson*, 2 Root 191 (Conn. 1795) (land).

¹⁰⁰ 5 Day 517 (Conn. 1813).

¹⁰¹ *Ibid.* 521, 522.

the following year the court rejected *Chadock v. Cowley*,¹⁰² and held that, where there was a devise of land after failure of issue to "surviving brethren," a definite failure of issue was intended.¹⁰³ Later, *Bullock v. Seymour*¹⁰⁴ and *Clarke v. Terry*¹⁰⁵ settled the law in favor of the restricted construction.¹⁰⁶

The first decision cited for fettering to the death of the testator a gift over on such a condition is *Phelps v. Robbins*.¹⁰⁷ But this case turned entirely upon the special context of the will in question.¹⁰⁸ Of more significance is *White v. White*.¹⁰⁹ In restricting the generality of the phrase to the death of the testator, the court relied upon gifts over upon the death of the first taker,¹¹⁰ which are not in point, and also upon the special context. There were dicta to a similar effect in *Phelps v. Phelps*¹¹¹ and in *Stone v. McEckron*.¹¹² *Johnes v. Beers*¹¹³ went upon a special context in the will in question. The leading case, however, is *Lawlor v. Holohan*.¹¹⁴ This seems to be a solid decision to the restrictive effect, but, as it relies upon the cases above cited, which by no means settle the law for Connecticut, its force is weakened. Indeed, *Chesebro v. Palmer*,¹¹⁵ relying upon *Turrill v. Northrop*,¹¹⁶ went the other way. *Lawlor v. Holohan* was accordingly doubted in *Butler v. Flint*.¹¹⁷ Nevertheless it must now be considered law.¹¹⁸

No case has been found in Connecticut where there is a gift to A for life, and then to B and his heirs, but if B die without

¹⁰² *Supra* note 25.

¹⁰³ *Couch v. Gorham*, 1 Conn. 36 (1814).

¹⁰⁴ 33 Conn. 289 (1866).

¹⁰⁵ 34 Conn. 176 (1867).

¹⁰⁶ May this result not be due to the fact that Connecticut "jurisprudence was affected by the English law, more because the Colonists had imbibed its spirit where it was good and suited to their needs, than because they directly copied or considered as in force any particular portion of it?" CLEAVELAND, HEWITT, AND CLARK, *op. cit. supra* note 71, at 921.

¹⁰⁷ 40 Conn. 250 (1873).

¹⁰⁸ *Ibid.* 270.

¹⁰⁹ 52 Conn. 518 (1885).

¹¹⁰ *Ibid.* 521.

¹¹¹ 55 Conn. 359 (1887).

¹¹² 57 Conn. 194 (1889).

¹¹³ 57 Conn. 295 (1889).

¹¹⁴ 70 Conn. 87 (1897).

¹¹⁵ 68 Conn. 207 (1896).

¹¹⁶ 51 Conn. 33 (1883).

¹¹⁷ 91 Conn. 630, 101 Atl. 19 (1917).

¹¹⁸ *Walsh v. McCutcheon*, 71 Conn. 283, 41 Atl. 813 (1898); *Hull v. Holmes*, 78 Conn. 362, 62 Atl. 708 (1905); *Rudlein v. Rand*, 88 Conn. 292, 91 Atl. 198 (1914); *Hull v. Hull*, 101 Conn. 481, 126 Atl. 699 (1924); *Burnham v. Burnham*, 101 Conn. 529, 126 Atl. 704 (1924); see CLEAVELAND, HEWITT AND CLARK, *op. cit. supra* note 71, at 528 and Supplement (1929) 203.

issue, to C and his heirs, and where the question of fettering the condition to the death of A has been clearly involved. Probably such an event would not be chosen by the court in preference to the death of the testator.¹¹⁹

GEORGIA

The early Georgia cases interpreted "dying without issue" as referring to an indefinite failure of issue.¹²⁰ In *Harris v. Smith*,¹²¹ it was stated that the court, on slight evidence, would find a definite failure of issue. But the court not long after suggested in a case which apparently involved real and personal property that a gift over to persons "surviving" had no such effect.¹²² Nevertheless, if the gift over is "at the death" of the first taker, a definite failure of issue was held to exist in *Atwell v. Barney*.¹²³ And there is a dictum that a death on "not leaving issue" has the same effect as to personalty.¹²⁴ A statute similar to the New York act restricted the generality of the earlier decisions to a definite failure of issue.¹²⁵

Cases on the question of whether the contingency of "dying without issue" should be confined to the period of distribution are in conflict. The weight of authority, however, seems to be in favor of such restriction. The early case of *Bailey v. Ross*¹²⁶ favors the period of distribution, although the court relied on the special context. And *Sumpter v. Carter*¹²⁷ confines the condition to the death of the life tenant. *Starnes v. Sanders*¹²⁸ is to the same effect. *Moore v. Cook*¹²⁹ suggests that, where there is no life estate, words of survivorship are to be referred to the death of the testator, unless the contrary appears. Two other cases tend to hold that the condition refers to the death of the first taker at any time.¹³⁰ No distinction seems to be taken between real and personal property.

¹¹⁹ See *Scanlin v. Peterson*, 105 Conn. 308, 313-314, 135 Atl. 394, 397 (1926); *Keeley v. Imindok*, 105 Conn. 742, 136 Atl. 560 (1927); cf. *Meriden Trust Co. v. Squire*, 92 Conn. 440, 103 Atl. 269 (1918) (the court confined the gift over to the first taker's death before twenty-one).

¹²⁰ *Wiley v. Smith*, 3 Ga. 551 (1847); *Gray v. Gray*, 20 Ga. 804 (1856); *Brown v. Weaver*, 28 Ga. 377 (1859); *Hertz v. Abrahams*, 110 Ga. 707, 36 S. E. 409 (1900) (will probated in 1847).

¹²¹ 16 Ga. 545 (1855).

¹²² *Brown v. Weaver*, *supra* note 120.

¹²³ 3 Dud. 207 (Ga. 1831).

¹²⁴ *Roberts v. West*, 15 Ga. 122 (1854).

¹²⁵ Ga. Acts 1853-54, p. 72, No. 62.

¹²⁶ 66 Ga. 354 (1881).

¹²⁷ 115 Ga. 893, 42 S. E. 324 (1902).

¹²⁸ 151 Ga. 632, 107 S. E. 863 (1921).

¹²⁹ 153 Ga. 840, 113 S. E. 526 (1922).

¹³⁰ *Kinard v. Hale*, 128 Ga. 485, 57 S. E. 761 (1907); *Curles v. Wade*,

ILLINOIS

The Supreme Court of Illinois has held that, if there was a provision that the first taker die "without leaving issue," a definite failure of issue was meant.¹³¹ So also in the case of real estate if the gift over was to the survivor "of two devisees."¹³² Apart from interests subject to an estate tail, the court has never held a future interest limited to take effect upon an indefinite failure of issue. In *Lunt v. Lunt*¹³³ and in *Strain v. Sweeny*¹³⁴ it has strained language to find a definite failure of issue. There are two dicta to the effect that the rule of the English Wills Act is in force.¹³⁵ In two recent cases¹³⁶ the court appears to have held that "die without issue" might be treated as meaning primarily "die without ever having had issue," even where the first taker had a fee and there was no independent gift to the issue or children of the first taker.¹³⁷

Later Illinois cases, where there have been gifts over upon "death without issue" or "death without children," must now be considered from the point of view as to whether the contingency was on the death of the testator or preceding the death of the life tenant. Mr. Kales has considered these conditions, and we adopt his conclusion.¹³⁸ Where the limitations are by will to A, simply with a gift or gifts over on A's death and one or more collateral contingencies, Mr. Kales says:

"If it be determined that A takes only a life estate, then clearly 'die' refers to the death of the life tenant whenever that may occur. *King v. King*, 215 Ill. 100 (1905); *Branson v. Bailey*, 246 Ill. 490 (1910). Even where it is determined that A takes a fee or an absolute interest the settled rule now is that

151 Ga. 142, 106 S. E. 1 (1920); *cf.* *Hill v. Terrell*, 123 Ga. 49, 51 S. E. 81 (1905).

¹³¹ *Smith v. Kimbell*, 153 Ill. 368, 38 N. E. 1029 (1894); *Hinricksen v. Hinricksen*, 172 Ill. 462, 50 N. E. 135 (1898); *Metzen v. Schopp*, 202 Ill. 275, 67 N. E. 36 (1903); *Robeson v. Cochran*, 255 Ill. 355, 99 N. E. 649 (1912); *Morris v. Phillips*, 287 Ill. 633, 122 N. E. 831 (1919); see KALES, *op. cit. supra* note 2, § 545, n. 65.

¹³² *Waldo v. Cummings*, 45 Ill. 421 (1867); *Summers v. Smith*, 127 Ill. 645, 21 N. E. 191 (1889); *Hinricksen v. Hinricksen*, *supra* note 131; *Arnold v. Alden*, 173 Ill. 229, 50 N. E. 704 (1898); *cf.* *Johnson v. Johnson*, 98 Ill. 564 (1881); *Silva v. Hopkinson*, 158 Ill. 386, 41 N. E. 1013 (1895).

¹³³ 108 Ill. 307 (1891).

¹³⁴ 163 Ill. 603, 45 N. E. 201 (1896).

¹³⁵ *Summers v. Smith*, *supra* note 132, at 650-651, 21 N. E. at 192; *Smith v. Kimbell*, *supra* note 131, at 376, 38 N. E. at 1031.

¹³⁶ *Stafford v. Read*, 244 Ill. 138, 91 N. E. 91 (1910); *Kendall v. Taylor*, 245 Ill. 617, 91 N. E. 644 (1910).

¹³⁷ *Cf.* *Field v. Peoples*, 180 Ill. 376, 54 N. E. 304 (1890); *Morris v. Phillips*, *supra* note 131, at 640, 122 N. E. at 834.

¹³⁸ KALES, *op. cit. supra* note 2, §§ 531-534.

prima facie 'death' refers to death at any time either before or after the testator's death. *Blackstone v. Althouse*, 278 Ill. 481 (1917); *Ashby v. McKinlock*, 271 Ill. 254 (1916); *Wilson v. Wilson*, 261 Ill. 174 (1913); *Brenock v. Brenock*, 230 Ill. 519 (1907); *Crocker v. Van Vliissingen*, 230 Ill. 225 (1907); *Carpenter v. Sangamon Trust Co.*, 229 Ill. 486 (1907); *Fifer v. Allen*, 228 Ill. 507 (1907); *Bradsby v. Wallace*, 202 Ill. 239 (1903); *Thomas v. Miller*, 161 Ill. 60 (1896); *Smith v. Kimbell*, 153 Ill. 368 (1894); *Summers v. Smith*, 127 Ill. 645 (1889)."¹³⁹

*Clark v. Leavitt*¹⁴⁰ is to the same effect.

Where there is a gift to X for life, and then to Y absolutely, with a gift over on Y's death and one or more collateral contingencies, the effect is doubtful. In *Lachenmyer v. Gehlbach*,¹⁴¹ where the limitation was to Y and the gifts exhausted all possibilities, the court restricted the contingencies to the death of the life tenant.¹⁴² Where there was a single gift over, death at any time was meant.¹⁴³ But *Sheley v. Sheley*¹⁴⁴ misunderstood *Lachenmyer v. Gehlbach* and held that, where there was only one contingency, the result should be the same as in that case. *Sheley v. Sheley* seems to have been approved in *Ames v. Smith*;¹⁴⁵ *Fulwiler v. McClun*;¹⁴⁶ *Morris v. Phillips*;¹⁴⁷ and *Risser v. Ayres*;¹⁴⁸ and there was a dictum to the same effect in *Drager v. McIntosh*.¹⁴⁹

INDIANA

In Indiana, until a comparatively recent date, the old common law was strictly adhered to. Indeed, the court went a little beyond the English judges, for an indefinite failure of issue was held to be meant, with respect to real and personal property, even where the expression "death without issue" was coupled with a gift over to what was substantially "survivors" of living persons.¹⁵⁰ But if the gift over was expressed to be after the death of the first taker, then a definite failure of issue was held

¹³⁹ *Ibid.* § 531.

¹⁴⁰ 330 Ill. 350, 161 N. E. 751 (1928).

¹⁴¹ 266 Ill. 11, 107 N. E. 202 (1914).

¹⁴² *Welch v. Crowe*, 278 Ill. 244, 115 N. E. 859 (1917) and *Kleinhaus v. Kleinhaus*, 253 Ill. 620, 97 N. E. 1077 (1912) seem inconsistent with this holding.

¹⁴³ *Garvin v. Carroll*, 276 Ill. 478, 114 N. E. 927 (1917).

¹⁴⁴ 272 Ill. 95, 111 N. E. 59 (1916).

¹⁴⁵ 284 Ill. 63, 119 N. E. 969 (1918).

¹⁴⁶ 285 Ill. 174, 120 N. E. 458 (1918).

¹⁴⁷ *Supra* note 131.

¹⁴⁸ 306 Ill. 293, 137 N. E. 851 (1923).

¹⁴⁹ 316 Ill. 460, 466, 147 N. E. 433, 436 (1925).

¹⁵⁰ *Huxford v. Milligan*, 50 Md. 542 (1875).

to be intended, even though the gift over was not to "survivors."¹⁵¹

Before long, however, a gift over on death without issue was interpreted in *Wright v. Charley*¹⁵² as such death before the testator. This change seems to have been based upon New York and Pennsylvania cases holding that conditional gifts over upon the death of the first taker were confined to such death before the testator, and upon a failure to consider the distinctions taken in *O'Mahoney v. Burdett*.¹⁵³ But *Wright v. Charley* has been followed.¹⁵⁴ Indeed, the Indiana court confines the death without issue to the life of the testator even though there is a life estate prior to the gift of the ancestor.¹⁵⁵ Had not Indiana followed New York and Pennsylvania in this broad application of the restricted construction, it would seem that the law of Indiana would have been that an indefinite failure of issue at any time was meant.¹⁵⁶

IOWA

In *Collins v. Collins*,¹⁵⁷ the Iowa court held that, where there was a devise in fee, the devisee to take on the death of the testator, coupled with a gift over in case the donee died without issue, the words referred to such death during the lifetime of the testator, and that if the devisee survived, he should take an absolute estate in fee simple, and that this rule applied to real and personal property.¹⁵⁸ This rule was approved in *Tarbell v. Smith*¹⁵⁹ and in *Blain v. Dean*.¹⁶⁰ In *Tarbell v. Smith* one of the reasons given was that the gift over was void for repugnancy under the rule of *Meyer v. Weiler*.¹⁶¹ In both these cases the gift

¹⁵¹ *Hall v. Brownlee*, 164 Ind. 238, 72 N. E. 131 (1905).

¹⁵² 129 Ind. 257, 28 N. E. 706 (1891).

¹⁵³ *Supra* note 85; *cf.* *Harris v. Carpenter*, 109 Ind. 540, 10 N. E. 422 (1887); *Heilman v. Heilman*, 129 Ind. 59, 28 N. E. 310 (1891).

¹⁵⁴ *Antioch College v. Branson*, 145 Ind. 312, 44 N. E. 314 (1896); *Teal v. Richardson*, 160 Ind. 119, 66 N. E. 435 (1903); *Clark v. Thieme*, 181 Ind. 163, 103 N. E. 1068 (1914); *Quilliam v. Union Trust Co.*, 194 Ind. 521, 142 N. E. 214 (1924); *cf.* *Morgan v. Robbins*, 152 Ind. 362, 53 N. E. 283 (1899); *First Nat. Bank v. DePauw*, 86 Fed. 722 (C. C. A. 7th, 1898); *Fowler v. Duhme*, 143 Ind. 248, 42 N. E. 623 (1896).

¹⁵⁵ *Borgner v. Brown*, 133 Ind. 391, 33 N. E. 92 (1893); *cf.* *Moores v. Hare*, 144 Ind. 573, 43 N. E. 870 (1896); *Hoover v. Hoover*, 116 Ind. 498, 19 N. E. 468 (1889).

¹⁵⁶ See *Quilliam v. Union Trust Co.*, *supra* note 154, at 534, 142 N. E. at 218.

¹⁵⁷ 116 Iowa 703, 88 N. W. 1097 (1902).

¹⁵⁸ The court cited *Fowler v. Duhme*, *supra* note 154.

¹⁵⁹ 125 Iowa 388, 101 N. W. 118 (1904).

¹⁶⁰ 160 Iowa 708, 142 N. W. 418 (1913).

¹⁶¹ 121 Iowa 51, 95 N. W. 254 (1903).

over was of only such real and personal property as was left by the prior devisee. *Talbot v. Snodgrass*,¹⁶² relying upon *Meyer v. Weiler*, decided that a gift over was void for repugnancy. In *Tarbell v. Smith*, on the other hand, the gift over was not of what was left, and, therefore, the decision is of no value.

Tarbell v. Smith contained a dictum that the contingency of "dying without issue" should be confined to the testator's death even though there was a preceding life estate. But in *Dowd v. Scally*¹⁶³ the court intimated that the condition would be allowed to operate when it occurred after the death of the testator and before the life tenant. In that case all contingencies after the death of the life tenant were provided for.¹⁶⁴

KENTUCKY

Kentucky is one of the few jurisdictions which abandoned the common law presumption and adopted, about the middle of the nineteenth century, a presumption of definite failure of issue both as to real and personal property.¹⁶⁵ This may have been due to the hostility shown in Kentucky to the English common law.¹⁶⁶

In *Harvey v. Bell*,¹⁶⁷ the testator devised his property in trust to his four grandchildren. He further provided that if any of them should "die without issue of his or her body living, the property devised to the one so dying should be equally divided between the remaining ones or their issue." A question arose as to the title to some of the land, which in turn depended upon the construction of the above quoted expression in the will. The court held that death without issue at any time was meant and not such death before the testator. It laid down four rules:

"1st. Where an estate is devised to one for life, with remainder to another, and, if the remainderman die without children or issue, then to a third person, the rule is that the words 'dying without children or issue' are restricted to the death of the remainderman before the termination of the particular estate.

"2d. Where property is devised to one or more infants, and is to be held by their trustees or guardians until they are twenty-one years old, and then be turned over to them, or divided be-

¹⁶² 124 Iowa 681, 100 N. W. 500 (1904).

¹⁶³ 184 N. W. 340 (Iowa 1921).

¹⁶⁴ Cf. *Atchison v. Francis*, 182 Iowa 37, 165 N. W. 587 (1917); *Caslavka v. Caslavka*, 194 Iowa 52, 188 N. W. 4 (1922); *In re Clifton's Estate*, 205 Iowa 913, 218 N. W. 926 (1928).

¹⁶⁵ *Black v. Cartmell*, 10 B. Mon. 188 (Ky. 1849) *semble*; *Northcut v. Whipp*, 12 B. Mon. 65 (Ky. 1851); *Moore v. Moore*, 12 B. Mon. 651 (Ky. 1851).

¹⁶⁶ GRAY, *THE NATURE AND SOURCES OF THE LAW* (2d ed. 1921) 245n. See KY. REV. STAT. (1852) c. 80, § 9, which enacts this presumption as to real estate.

¹⁶⁷ 118 Ky. 512, 81 S. W. 671 (1904).

tween them, with the proviso that, if they die without issue, it shall go to the survivors, or, if all die, to a third person, it has been held that the limitation as to dying without issue is to be limited to a death in infancy before the period of distribution.

"3d. Where, by the will, the devise is to a class, and the period of division is postponed, even where the devisees are not infants, it has been held that the limitation as to dying without issue must be confined to a death without issue before the period of division fixed by the will.

"4th. On the other hand, where there is no intervening estate, and no other period to which the words 'dying without issue' can be reasonably referred, they are held, in the absence of something in the will evidencing a contrary intent, to create a defeasible fee which is defeated by the death of the devisee at any time without issue then living."¹⁶⁸

The first rule had its origin in *Birney v. Richardson*,¹⁶⁹ where there was a bequest of real and personal property to the testator's wife during widowhood, and if she married the whole estate was to be equally divided among the testator's children, and if any of the children "should die without a lawful heir begotten of their body, then his or her part of the estate would be equally divided among my surviving children." In an action for some of the personal property the construction of the will was drawn in question. The court held that the testator intended a dying without issue prior to the wife's marriage. It has been pointed out that this result is entirely sound.¹⁷⁰ The Kentucky case was based on the earlier English case of *Galland v. Leonard*,¹⁷¹ where the facts were substantially the same. Both cases may well stand upon the intention of the testator disclosed upon the face of the will to confine the contingency to the period of division, which is evidenced by his direction to divide the corpus.¹⁷² Indeed it has been made clear in England that in a gift to *A* for life and then to *B*, and if *B* dies without issue, over, the gift over will take effect upon the death of *B* at any time without issue.¹⁷³ Rule 1 therefore, is based upon a misapprehension, and indeed is in principle inconsistent with the 4th rule mentioned therein, where, in the absence of a life estate, there is no fettering condition to the period of division.¹⁷⁴ But the rules in *Harvey v. Bell* are apparently still law in Kentucky.¹⁷⁵

¹⁶⁸ *Ibid.* 521-524, 81 S. W. at 674-675.

¹⁶⁹ 5 Dana 424 (Ky. 1837).

¹⁷⁰ Note (1924) 24 Col. L. Rev. 512, 514.

¹⁷¹ 1 Swans. 161 (1818).

¹⁷² *Accord*: *Boynton v. Boynton*, 165 N. E. 489 (Mass. 1929).

¹⁷³ *O'Mahoney v. Burdett*, *supra* note 85; *THEOBALD, op. cit. supra* note 3, at 486.

¹⁷⁴ See *O'Mahoney v. Burdett*, *supra* note 85; *THEOBALD, op. cit. supra* note 3, at 486. The first rule has been ably criticized in Note (1924) 24 Col. L. Rev. 512, 514-518.

¹⁷⁵ *1st Rule*: *Ferguson v. Thomasson*, 87 Ky. 519, 9 S. W. 714 (1888);

MARYLAND

The doctrine of the Maryland cases involving wills and deeds prior to 1862 was as strict, if not stricter, than the common law. The phrase "dying without issue" was interpreted to mean an indefinite failure of issue.¹⁷⁶ If the gift over is to "survivors" of living persons, then *Chadock v. Cowley*¹⁷⁷ is followed as to land.¹⁷⁸ Although no decision is directly in point there seems to be a disposition to follow *Roe v. Jeffrey*.¹⁷⁹

By Acts of 1862, c. 161, the expression "dying without issue" in a will was restricted to a definite failure of issue; and in Laws of 1866, c. 236, the same provision was extended to gifts *inter vivos*.

Forsythe v. Lansing, 109 Ky. 518, 59 S. W. 854 (1900); *Bradshaw v. Williams*, 140 Ky. 160, 130 S. W. 985 (1910); *Jewell v. White*, 166 Ky. 325, 179 S. W. 212 (1915); *White v. White*, 168 Ky. 752, 182 S. W. 942 (1916) *semble*; *Baker v. Thomas*, 172 Ky. 334, 189 S. W. 215 (1916); *Bonner v. Wedekind*, 193 Ky. 743, 237 S. W. 394 (1922); *Ensminger v. Grimes*, 201 Ky. 494, 257 S. W. 19 (1923); *Linton v. Hail*, 201 Ky. 698, 702, 258 S. W. 111 (1924) *semble*; *Wilson v. Morrill*, 205 Ky. 257, 265 S. W. 774 (1924); *McWilliams v. Havely*, 214 Ky. 320, 283 S. W. 103 (1926); *Rankin v. Rankin*, 227 Ky. 169, 12 S. W. (2d) 319 (1928).

2d Rule: *Jones v. Moore*, 96 Ky. 273, 28 S. W. 659 (1894); *Linton v. Hail*, 201 Ky. 698-702, 258 S. W. 111 (1924) *semble*; *Howard v. Howard*, 212 Ky. 847, 280 S. W. 156 (1926).

3d Rule: *Linton v. Hail*, 201 Ky. 698-702, 258 S. W. 111 (1924) *semble*.

4th Rule: The court said, by way of dictum, that this rule only applied to a case of real property, and that if the subject matter were personal, the condition would be confined to the case of the testator. *Harvey v. Bell*, *supra* note 167, at 526. On the whole this distinction seems to have been preserved in the rest of the cases. *Calloway v. Calloway*, 171 Ky. 366, 188 S. W. 410 (1916) (real and personal property confined to death of testator); *Prewitt v. Prewitt*, 178 Ky. 346, 198 S. W. 924 (1917) (real and personal property confined to death of testator); *Ruhe v. Lisle*, 200 Ky. 520, 255 S. W. 133 (1923) (realty confined to death of testator).

In *Atkinson v. Kern*, 210 Ky. 824, 276 S. W. 977 (1925) which was a case of real property, the court disapproved the cases just cited and followed the 4th rule in *Harvey v. Bell*. Other cases involving land approving the 4th rule are: *Simpson v. Adams*, 127 Ky. 790, 106 S. W. 819 (1908); *Craig v. Williams*, 179 Ky. 329, 200 S. W. 481 (1918); *Linton v. Hail*, 201 Ky. 698-702, 258 S. W. 111 (1924) *semble*; *Ireland v. Cooper*, 211 Ky. 323, 277 S. W. 483 (1925); *Laughlin v. Neeley*, 223 Ky. 656, 4 S. W. (2d) 690 (1928). But in spite of the fact that *Calloway v. Calloway*, *supra*, was disapproved, it would seem that the distinction made in *Harvey v. Bell* between real and personal property still persists. See *Ireland v. Cooper*, 211 Ky. 323, 326, 277 S. W. 483, 484 (1925).

¹⁷⁶ *Laidler v. Young*, 2 H. & J. 69 (Md. 1807); *Tongue's Lessee v. Nutwell*, 13 Md. 415 (1858); *Comegys v. Jones*, 65 Md. 317, 4 Atl. 567 (1886).

¹⁷⁷ *Supra* note 25.

¹⁷⁸ *Newton v. Griffith*, 1 Har. & G. 111 (Md. 1827); *Hoxton v. Archer*, 3 G. & J. 199 (Md. 1831).

¹⁷⁹ *Supra* note 26. See *Newton v. Griffith*, *supra* note 178, at 123, 124; *Pennington v. Pennington*, 70 Md. 418, 17 Atl. 329 (1889).

In *Fairfax v. Brown*,¹⁸⁰ a gift over on failure of issue living at death of first taker was confined to such death before the termination of the preceding estate to a life tenant. It should be noticed, however, that the gift over exhausted all the possibilities. In other words, there was a gift to issue, if there was issue, and a gift over if there was no issue left at the death of the first taker. In *Hutchins v. Pearce*,¹⁸¹ the condition was held to apply to the death of the first taker at any time, and *Fairfax v. Brown* was said to go upon a special context. In *Bentz v. Maryland Bible Society*¹⁸² and in *Gerting v. Wells*¹⁸³ the gift was confined to the period of distribution, which was at the end of a period of years from the death of the testator. These two cases seem to be based upon *Hammett v. Hammett*.¹⁸⁴ In that case there was a devise of real and personal property to the widow during life or marriage, then a gift to the children and a further bequest upon the death of the children. The court held that the condition was confined to the period of the life estate. The gift, however, was "on death" and not "on death without issue." In *Lumpkin v. Lumpkin*,¹⁸⁵ there was a gift to the testator's children to take effect at his death, but in case any of them died without leaving lawful issue, then to the testator's wife and his surviving children. The arguments by counsel were full and able. The court held that the condition was confined to the testator's death and that if any child survived the testator that child took absolutely. That was said to be the law in Maryland.¹⁸⁶ It is submitted, however, that the case is not of great value in that it relied upon *Hammett v. Hammett*¹⁸⁷ and upon New York decisions. In *Duering v. Brill*,¹⁸⁸ the same result was reached on the authority of *Lumpkin v. Lumpkin*.¹⁸⁹ But in *Duering v. Brill* the gift exhausted all possibilities. *Godwin v. Kemp*¹⁹⁰ went upon a special context of the will in question.

Where a life estate precedes the devise, which is divested upon the death of the taker without issue, such condition in Maryland seems to be confined to the duration of the lives of the testator and the life tenant.¹⁹¹

¹⁸⁰ 60 Md. 50 (1882).

¹⁸¹ 80 Md. 434, 31 Atl. 501 (1895).

¹⁸² 86 Md. 102, 37 Atl. 708 (1897).

¹⁸³ 100 Md. 93, 59 Atl. 177 (1904).

¹⁸⁴ 43 Md. 307 (1875).

¹⁸⁵ 108 Md. 470, 70 Atl. 238 (1908).

¹⁸⁶ *Ibid.* 498-499, 70 Atl. at 244.

¹⁸⁷ *Supra* note 184.

¹⁸⁸ 127 Md. 104, 96 Atl. 269 (1915).

¹⁸⁹ *Supra* note 185.

¹⁹⁰ 129 Md. 159, 98 Atl. 495 (1916).

¹⁹¹ *Booth v. Eberly*, 124 Md. 22, 91 Atl. 767 (1914).

MISSOURI

Prior to 1845,¹⁹² a gift over on failure of issue meant an indefinite failure of descendants.¹⁹³ An early dictum indicates that it is immaterial that the gift over is expressed to some one "surviving" the first taker.¹⁹⁴ But later dicta are the other way.¹⁹⁵

In *Yocum v. Siler*,¹⁹⁶ land was devised to Y with a gift over if he died "without issue." Y survived the testator and had legal issue living at his death. It was held that Y took absolutely. It was assumed in the opinion that the gift over would have been effective irrespective of when the condition happened. But it was not necessary to the decision to pass upon this question.¹⁹⁷ *Gannon v. Pauk*¹⁹⁸ has a dictum to the same effect. *Naylor v. Godman*;¹⁹⁹ *Union Trust Co. v. Curby*;²⁰⁰ and *Hartnett v. Langan*²⁰¹ go upon special language in the will showing a period of division to which death without issue should be referred.²⁰²

The earliest case confining death without issue to the death of the testator is *Henderson v. Calhoun*,²⁰³ which relies solely on cases holding a presumption in general of early vesting of all kinds of future interests. *Huntington Real Estate Co. v. Megaree*²⁰⁴ involved a gift over on death with children, which was held upon the authority of *Henderson v. Calhoun* to become absolute upon the testator's death. The leading case is *Owens v. Men and Millions Movement*,²⁰⁵ where a gift over upon death "without leaving any issue" was confined to such death before the testator. No Missouri cases were relied upon, but the court cited and followed decisions from Illinois, Pennsylvania, Kentucky, Iowa, Maryland, Indiana and New York. The court cited the Statute of 1845,²⁰⁶ which presumed a definite failure of issue, and held it inapplicable.²⁰⁷ This case was followed in *Ewart v.*

¹⁹² MO. REV. STAT. (1845) c. 32, § 6 presumed a definite failure of issue.

¹⁹³ *Vaughn v. Guy*, 17 Mo. 429 (1853); *Farrar v. Christy's*, 24 Mo. 453 (1857); *Chism's v. Williams*, 29 Mo. 288 (1860); see *Hudson, Estates Tail in Missouri* (1915) 1 U. OF MO. BULL. L. SER. no. 1, p. 9.

¹⁹⁴ *Farrar v. Christy's*, *supra* note 193.

¹⁹⁵ *Gannon v. Albright*, 183 Mo. 238, 81 S. W. 1162 (1904) (land); *Gannon v. Pauk*, 200 Mo. 75, 98 S. W. 471 (1906).

¹⁹⁶ 160 Mo. 281, 61 S. W. 208 (1901).

¹⁹⁷ *Cf. Yocum v. Parker*, 134 Fed. 205 (C. C. A. 8th, 1904).

¹⁹⁸ *Supra* note 195.

¹⁹⁹ 109 Mo. 543, 19 S. W. 56 (1891).

²⁰⁰ 255 Mo. 393, 164 S. W. 485 (1914).

²⁰¹ 282 Mo. 471, 222 S. W. 403 (1920).

²⁰² See also *Welch v. Wagner*, 232 S. W. 146 (Mo. 1921).

²⁰³ 183 S. W. 584 (Mo. 1916).

²⁰⁴ 280 Mo. 41, 217 S. W. 301 (1919).

²⁰⁵ 296 Mo. 110, 246 S. W. 172 (1922).

²⁰⁶ *Supra* note 192.

²⁰⁷ *Owens v. Men and Millions Movement*, *supra* note 205, at 121, 246 S. W. at 175.

Dalby,²⁰⁸ where it was also suggested, without being decided, that, if there had been a preceding life estate, the contingency would have been fettered to a happening before the death of the life tenant.²⁰⁹ The court relied for its decision not only upon *Owens v. Men and Millions Movement*, but also upon *Northcutt v. McAllister*,²¹⁰ where the gift over was on death only, upon *Huntington Real Estate Co. v. Megarce*,²¹¹ and upon *Henderson v. Calhoun*.²¹² It thought furthermore that there was a suggestion in *Naylor v. Godman*²¹³ in the same direction.

NEW JERSEY

In an early case in 1795, an estate tail was said to be created by a devise to the testator's three sons and their heirs with the proviso that "if either of my sons above named die without issue the premises given to him or them dying as aforesaid, shall go to him or them that survive."²¹⁴ Later cases, however, have clearly held that in a devise of land a gift over to persons described as "surviving" results in a definite failure of issue.²¹⁵ It was likewise held, with regard to personalty and realty, that the word "living" added to a gift over upon death without issue had the same effect.²¹⁶ And in the case of land it was also held that a definite failure was meant by the phrase "if he shall die without issue, that then at his decease."²¹⁷

In 1851 by statute New Jersey confined the presumption to a definite failure of issue.²¹⁸ Meanwhile a long list of decisions was forming which restricted such a condition to the death of the testator²¹⁹ or to the death of the life tenant.²²⁰

²⁰⁸ 319 Mo. 108, 5 S. W. (2d) 428 (1928).

²⁰⁹ *Ibid.* 120, 5 S. W. (2d) at 432.

²¹⁰ 297 Mo. 475, 249 S. W. 398 (1922).

²¹¹ *Supra* note 204.

²¹² *Supra* note 203.

²¹³ 109 Mo. 543, 551, 19 S. W. 56, 58 (1892).

²¹⁴ *Secquil v. Moore*, 1 Cox 386 (N. J. L. 1795).

²¹⁵ *Van Middlesworth v. Schenk*, 3 Halst. 29 (N. J. L. 1824); *Wardell v. Allaire*, 1 Spenc. 6 (N. J. L. 1842); *Seddel v. Wills*, 1 Spenc. 223 (N. J. L. 1843); *Howell v. Howell*, 1 Spenc. 411 (N. J. L. 1845); *Kennedy v. Kennedy*, 5 Dutch. 185 (N. J. L. 1861); *Ackerman v. Vreeland*, 1 McCart. 23 (N. J. Eq. 1861).

²¹⁶ *Wallington v. Taylor*, Sax. 314 (N. J. Eq. 1831) (land); *Woodward v. Woodward*, 1 Green Ch. 83 (N. J. Eq. 1863) (personalty).

²¹⁷ *Sinnickson v. Snitcher*, 2 Green 53, 59 (N. J. L. 1833) (land).

²¹⁸ N. J. Laws 1851, March 12, p. 218.

²¹⁹ *Yawger v. Yawger*, 37 N. J. Eq. 216 (1883); *Denise v. Denise*, 37 N. J. Eq. 163 (1883); *Barrell v. Barrell*, 38 N. J. Eq. 60, 39 N. J. Eq. 603 (1884); *Baldwin v. Taylor*, 37 N. J. Eq. 78, 38 N. J. Eq. 637 (1884) *semble*; *Burdge v. Walling*, 45 N. J. Eq. 10, 16 Atl. 51 (1888); *Snyder v. Taylor*, 88 N. J. Eq. 513, 103 Atl. 396 (1918); *cf. Wilson v. Wilson*, 46 N. J. Eq. 321, 19 Atl. 132 (1890); *Steinhart v. Wolf*, 95 N. J. Eq. 132,

In *Wurts v. Page*,²²¹ there was a devise of shares to daughters to be paid on marriage, and to some sons at 21 and to the other sons at 22, and "in case of the decease of any of my said children without issue," then over. The court held that as to the daughters there was a gift over at their death, and as to the sons a gift over before the shares were payable.

In *Pennington v. Van Houten*,²²² the testator devised all of his real and personal estate to his son, but ordered his executors to put the proceeds at interest and support the son until he attained 21; "but if my son Abraham should die having no children, then" over. The court held that the contingency upon which the gift over was limited was confined to the son's death under 21.

In *Patterson v. Madden*,²²³ there was a gift of land to the testator's sons. He provided, however, that none of the land should be sold during the life of his wife. He further provided that if any of his sons "should die without leaving issue and leaving a widow," then over. The court held that *Pennington v. Van Houten* governed and that the condition upon which the gift over was limited was confined to the death of the sons before the testator's wife. It laid down two rules:

"First. If land be devised to A in fee and a subsequent clause in the will limits such land over to designated persons in case A dies without issue, and A so dies, and the substituted devisees are *in esse* at his death, and there is no other event expressed in the will to which the limitation over can fairly be referred, then A takes a vested fee which becomes divested at his death and vests in those to whom the estate is limited over.

"Second. Where there is an event indicated in the will other than the death of the devisee to which the limitation over is referable (for instance, the distribution of the testator's estate or the postponement of the enjoyment of the property devised until the devisee reaches the age of twenty-one or until the exhaustion of a prior life estate), such limitation over will be construed to

122 Atl. 886 (1923). But see *Hampton v. Newkirk*, 93 N. J. Eq. 270, 115 Atl. 656 (1921); *Patterson v. Madden*, 54 N. J. Eq. 714, 723, 36 Atl. 273 (1896); *Ackerman v. Vreeland*, *supra* note 215, at 24; *Wurts v. Page*, 19 N. J. Eq. 365 (1869).

²²⁰ *Wurts v. Page*; *Yawger v. Yawger*, both *supra* note 219; *Williamson v. Chamberlain*, 10 N. J. Eq. 373 (1855); *McDowell v. Stiger*, 58 N. J. Eq. 125, 42 Atl. 575 (1899); *Shimer v. Shimer*, 50 N. J. Eq. 300, 24 Atl. 385 (1892); *Keepers v. Fidelity Co.*, 56 N. J. L. 302, 28 Atl. 585 (1894); *Patterson v. Madden*, *supra* note 219; *Dilts v. Clayhaunce*, 70 N. J. Eq. 10, 62 Atl. 672 (1906); *Michael v. Minchin*, 90 N. J. L. 603, 101 Atl. 283 (1917) *semble*; *Freund v. Freund*, 91 N. J. Eq. 80, 110 Atl. 449 (1919); *Davis v. Scharf*, 99 N. J. Eq. 88, 133 Atl. 197 (1926); *Schreve v. Wilkins*, 82 N. J. Eq. 18, 87 Atl. 642 (1913) (following what is said to be the first rule in *Patterson v. Madden*).

²²¹ *Supra* note 219.

²²² 4 Halst. Ch. 745 (N. J. Eq. 1852).

²²³ *Supra* note 220.

refer to the happening of such event or to the death of the devisee, according as the court may determine from the context of the will and the other provisions thereof that the limitation clause is set in apposition to the event specified or is connected with the devise itself."²²⁴

The court found the first rule followed in *Ackerman v. Vreeland*,²²⁵ and in the decision on one of the devises in *Wurts v. Page*,²²⁶ and the second rule followed in *Williamson v. Chamberlain*,²²⁷ and in the decision on another of the devises in *Wurts v. Page*.

It is to be noticed that the second rule above quoted does not indicate any prima facie presumption as to whether the condition is to be confined to the death of the life tenant or the death of the devisee at any time. In three later cases it is indicated that the former presumption is to be adopted and that in the absence of a special context the condition is confined to the death of the life tenant.²²⁸ And a similar result has been reached where there is a period of distribution in the future.²²⁹ But on the other hand, such condition has been interpreted as operating on the death of the first taker at any time, where there was only a slight special context to justify the result.²³⁰

The first rule in *Patterson v. Madden* is affirmed in *Snyder v. Taylor*.²³¹ There seems to be no distinction made by the courts between real and personal property in all these cases.

NEW YORK

The early New York decisions on definite and indefinite failure of issue are discussed above in connection with the New York legislation.²³²

The law of New York on confining gifts over on failure of issue to the death of the testator or of a life tenant has been exhaustively reviewed elsewhere by Professor Updegraff,²³³ and will therefore not be considered here.

²²⁴ *Ibid.* 723.

²²⁵ *Supra* note 215.

²²⁶ *Supra* note 219.

²²⁷ *Supra* note 220.

²²⁸ *Michael v. Minchin*, *supra* note 220; *Freund v. Freund*, 91 N. J. Eq. 80, 110 Atl. 449 (1919); *Davis v. Scharf*, 99 N. J. Eq. 88, 133 Atl. 197 (1926).

²²⁹ *McDowell v. Stiger*, 58 N. J. Eq. 125, 42 Atl. 575 (1899); *Keepers v. Fidelity Deposit Co.*, 56 N. J. L. 302, 28 Atl. 585 (1894).

²³⁰ *Hampton v. Newkirk*, 93 N. J. Eq. 270, 115 Atl. 656 (1921); *Ambruster v. "Own Your Own Home" Ass'n*, 97 N. J. Eq. 69, 127 Atl. 167 (1925).

²³¹ 88 N. J. Eq. 513, 103 Atl. 396 (1918).

²³² *Supra* at 338-339.

²³³ Updegraff, *op. cit. supra* note 86, at 249-256.

NORTH CAROLINA

The cases in North Carolina on wills and conveyances taking effect prior to the Act of 1827-28 show that whether the subject matter was real or personal property the common law rule of indefinite failure of issue was followed.²³⁴

In *Hilliard v. Kearney*,²³⁵ the case turned upon the construction of a will made in 1775 by which negroes were bequeathed to the testator's wife for life and after her death to be equally divided "among my five daughters, Mary, Sarah, Elizabeth, Drucilla and Nancy, and if either of them die without an heir, her part to be equally divided among her other sisters." The testator's wife and five daughters survived him. His wife died, then Mary died, and the negroes were divided between the four surviving daughters. Afterwards Sarah and Nancy died, leaving children. Then Elizabeth died without a child. The court, relying upon English cases, decided that as Elizabeth had survived the testator and the life tenant, her share had become absolute. It pointed out that where there was no prior gift to that which was to go over upon death without issue the contingency was to be confined to the life of the testator; but, "if there be an intermediate period between the death of the testator and the death of the legatee, at which the estate may fairly be considered absolute," that time will be adopted. In this case the children had survived both the testator and the life tenant, and it was unnecessary to decide as to whether the condition should be confined to the death of the testator or the death of the life tenant. But the court went on to discuss this question and found sufficient evidence upon the face of the will to fetter the condition to the period before the testator's death.

This doctrine in North Carolina, as elsewhere, seems an unconscious departure from the prior cases. Only a few years before, in *Garland v. Watt*,²³⁶ the court had taken such a condition generally. Nevertheless, where there was no life estate or period of division otherwise fixed, the rule of *Hilliard v. Kearney* was followed.²³⁷ Where the gift to the first taker was postponed until

²³⁴ *Realty*: *Brown v. Brown*, 3 Ired. L. 134 (N. C. 1842); *Brantley v. Whitaker*, 5 Ired. L. 225 (N. C. 1844); *Cox v. Marks*, 5 Ired. L. 361 (N. C. 1845); *Hollowell v. Kornegay*, 7 Ired. L. 261 (N. C. 1847); *Weatherly v. Armfield*, 8 Ired. L. 25 (N. C. 1847).

Personalty: *Bryson v. Davidson*, 1 Murph. 143 (N. C. 1806); *Davidson v. Davidson*, 1 Hawks. 163 (N. C. 1820); *Rice v. Satterwhite*, 1 D. & B. Eq. 69 (N. C. 1835); *Ferrand v. Howard*, 3 Ired. Eq. 381 (N. C. 1844); *Porter v. Ross*, 2 Jon. Eq. 196 (N. C. 1855).

²³⁵ Busb. Eq. 221 (N. C. 1853).

²³⁶ 4 Ired. L. 287 (N. C. 1844).

²³⁷ *Vass v. Freeman*, 3 Jon. Eq. 221 (N. C. 1857); *Garrison v. Eborn*, 3 Jon. Eq. 228 (N. C. 1857); *Jenkins v. Hall*, 4 Jon. Eq. 334 (N. C. 1858).

he became of age, it was held, in accordance with the rule quoted above from *Hilliard v. Kearney*, that death before his arrival at the age of 21 was meant.²³⁸

Meanwhile, however, there was a strong line of authority greatly limiting the application of *Hilliard v. Kearney*. In *Buchanan v. Buchanan*,²³⁹ the testator gave all of his estate not otherwise disposed of by his will dated 1843 to his son, and provided that, "should Richmond die without a bodily heir, it is my will and desire that my son Andrew should have it all." The court held that the gift over was in operation after the death of the testator. The court considered that *Hilliard v. Kearney* was confined to a gift to a class where there was a gift over to the survivors if any member died without issue.²⁴⁰ It further said that the Statute of 1827, which was enacted after the date of the will of *Hilliard v. Kearney*, and which changed the common law presumption from an indefinite failure of issue to a definite failure of issue at the death of the first taker, prevented any further restriction upon the generality of the condition and compelled the construction that the death without issue of the first taker should mean such death at any time. The court was obliged to admit that several of the cases following *Hilliard v. Kearney* could not be justified upon the principle suggested in *Theobald on Wills*. The rule of *Buchanan v. Buchanan* has been followed and the condition held to mean death at any time, even though there was a prior life estate.²⁴¹ In view of this interesting construction of the Statute of 1827, it is odd to find the same judge a few months later, in *Fields v. Whitfield*,²⁴² following *Price v. Johnson* and confining the condition to the period before the first taker reached the given age.

Buchanan v. Buchanan received a fresh impetus from *Patter-*

semble; *Davis v. Parker*, 69 N. C. 271 (1873); *Burton v. Conigland*, 82 N. C. 99 (1880).

²³⁸ *Burton v. Conigland*, *supra* note 237.

Accord: *Fields v. Whitfield*, 101 N. C. 305, 7 S. E. 780 (1888); *Price v. Johnson*, 90 N. C. 592 (1884) *semble*.

²³⁹ 99 N. C. 308, 5 S. E. 430 (1888).

²⁴⁰ "Possibly, where there is a gift over, if any members of a class die without issue, to the survivors, the gift over must take effect, if at all, before the time when the survivors are to be ascertained." *THEOBALD, op. cit. supra* note 3, at 746.

²⁴¹ *Dunning v. Burden*, 114 N. C. 34, 18 S. E. 969 (1894); *Trull v. Railroad*, 151 N. C. 545, 66 S. E. 586 (1909); *Perrett v. Bird*, 152 N. C. 220, 67 S. E. 507 (1910); *Elkins v. Seigler*, 154 N. C. 374, 70 S. E. 636 (1911); *Hobgood v. Hobgood*, 169 N. C. 485, 86 S. E. 189 (1915); *Kirkman v. Smith*, 175 N. C. 579, 96 S. E. 51 (1918).

Rees v. Williams, 164 N. C. 128, 80 S. E. 247 (1913); 165 N. C. 201, 81 S. E. 286 (1914), is to the same effect, although in that case there was no prior life estate.

²⁴² 101 N. C. 305, 7 S. E. 780 (1888).

son v. McCormick,²⁴³ where an action to recover land turned upon the construction of a will which took effect in 1870. Therein the testator devised the land to his mother for life and after her death to his "nephews John D. and Clem Jowers to be divided equally between them. In case they, or either of them die without issue, it is my will that the property herein bequeathed shall go to the heirs of Archibald and Gilbert Patterson and to the surviving brother John D. or Clem Jowers, as the case may be, to be equally divided between them." The mother died in 1877; John D. died in 1904 without leaving any issue surviving him. It was held that as to John D.'s interest the gift over took effect. The opinion contains an exhaustive and able discussion of all the authorities. The case of *Hilliard v. Kearney* was placed solely upon the ground that the will there involved took effect prior to the Act of 1827. The opinion in *Patterson v. McCormick* leaves nothing of the doctrine of *Hilliard v. Kearney* alive at the present time.²⁴⁴ Furthermore, it is hard to see how those cases which restricted the condition to a period of division fixed by the attainment of the first taker of a given age can still be law, although they are not expressly overruled.²⁴⁵

It should be noted that when the gift over is not upon the condition of the first taker's dying without issue or children, but upon some other event not coming within the Statute of 1827, such as death *with* children surviving, two recent cases held that such condition is to be confined to the lifetime of the testator.²⁴⁶

PENNSYLVANIA

A leading case in Pennsylvania is *Mickley's Appeal*.²⁴⁷ By will proved in 1878, J. J. Mickley ordered his real estate to be sold and the proceeds to be added to the remainder of his personal property, which was then to be divided into equal shares. He gave one part thereof to each of his sons and daughters. A gift to a son read "to my son, Henry J. Mickley, or his heirs." The clause which gave rise to the present controversy was as follows:

²⁴³ 177 N. C. 448, 99 S. E. 401 (1919).

²⁴⁴ *Patterson v. McCormick* has been approved in *Love v. Love*, 179 N. C. 115, 101 S. E. 562 (1919); *Hines v. Reynolds*, 181 N. C. 343, 107 S. E. 144 (1921); *Alexander v. Fleming*, 190 N. C. 815, 130 S. E. 867 (1925); *American Yarn Co. v. Dewstoe*, 192 N. C. 121, 133 S. E. 407 (1926). In all of these cases there was a prior life estate.

²⁴⁵ *Burton v. Conigland*; *Fields v. Whitfield*; *Price v. Johnson*, all *supra* note 238.

²⁴⁶ *Goode v. Hearne*, 180 N. C. 475, 105 S. E. 5 (1920); *Dupree v. Daught-ridge*, 188 N. C. 193, 124 S. E. 148 (1924).

²⁴⁷ 92 Pa. 514 (1880).

"Fourth. I direct that if either of my sons should die without leaving issue living at the time of his death, the share given to such son shall pass to and be divided among such of my children as may be then living, and to the issue of such as may be dead, such issue, however, taking only the share of their parent. In the event of the death of either of my said children without issue living at the time of his or her death, I direct that in the distribution of the share of such child as aforesaid, the portion thereof allotted to each of my daughters shall be held in trust in the same manner as directed in the provision hereinbefore made for them."²⁴⁸

The testator left surviving him three sons and three daughters, all of whom were living at the time of the litigation. The auditing judge held that the sons took each a life interest. Upon appeal the judgment was remanded to the Orphans' Court. That court decreed that the sons took absolute interests. An appeal was taken to the Supreme Court, where the decree of the Orphans' Court was affirmed. Chief Justice Sharswood said:

"It is very clearly settled, both in England and in this state, that if a bequest be made to a person absolute in the first instance, and it is provided that in the event of death, or death without issue, another legatee or legatees shall be substituted to the share or legacy thus given, it shall be construed to mean death or death without issue before the testator. The first taker is always the first object of the testator's bounty, and his absolute estate is not to be cut down to an estate for life, or what is practically the same thing, to be subjected to an executory gift over upon the occurrence of the contingency of death or death without issue at any future period within the rule against perpetuities without clear evidence of such an intent: *Caldwell v. Skilton*, 1 Harris 152; *Estate of Mary Biddle*, 4 Casey 59; *Karker's Appeal*, 10 P. F. Smith 141; *Fahrney v. Holsinger*, 15 P. F. Smith, 388; *McCullough v. Fenton*, Id. 418. . . . In the English cases a distinction is made between devises of realty and bequests of personalty, which has not been recognized in this state."²⁴⁹

In *Caldwell v. Skilton*,²⁵⁰ one of the cases cited by the court, there was a devise of land to the testator's wife for life, and then to the children and their heirs in equal shares, and in case of the death of any of the children its share was to go to its children, or if a child should die without issue, then to the surviving children and their heirs. The wife died before the testator. The defendant agreed to purchase the share of one of the children but refused to take a conveyance because a clear title could not be conveyed. It should be noted that the gifts over were in every event. This in substance reduces A's estate in fee to a life estate. In order to avoid an incongruity it was necessary to

²⁴⁸ *Ibid.* 515.

²⁴⁹ *Ibid.* 517-518.

²⁵⁰ 13 Pa. 152 (1850).

fetter the condition to the death of the testator.²⁵¹ And the court, resting its decision on this ground, held that the grantor under the deed having survived the testator and the wife took an absolute interest and could convey a clear title.

In the second case cited, *Estate of Biddle*,²⁵² a will gave property, apparently both real and personal, to Anne E. Biddle, the testatrix's daughter, and in the event of her daughter's "death without 'children,'" over to named persons. The question was whether Anne took an absolute estate or a life estate. The court held that she took an absolute estate, relying on *Caldwell v. Skilton*, and upon the special context. It is to be noted that the gift over did not include every event and therefore the case proceeded upon a mistaken idea of that case. Moreover, it was a dictum only.

In *Karker's Appeal*,²⁵³ land was devised to A and his heirs, but if he should happen to die intestate and without issue, then over. It was held that A took an absolute interest and the gift over was void as a gift over on intestacy. The case is obviously no authority for *Mickley's Appeal*. Finally, *Fahrney v. Holsinger*²⁵⁴ went on the special context of the will.

Mickley's Appeal was not cited by the United States Supreme Court in a case from Pennsylvania, *Britton v. Thornton*,²⁵⁵ where after a devise to one E. A. Thornton there was a gift over if he died under age and without issue, and the Court held that the condition operated after the death of the testator.

*Barber v. Pittsburgh Railway Co.*²⁵⁶ was also a case from Pennsylvania decided by the United States Supreme Court. The question was whether A took an estate tail under a will effective in 1831, prior to the Act of 1883 making a fee presumptive, the Act of 1855 converting estates tail into estates in fee simple, and the Act of July 9, 1897, which presumed a definite failure from a gift over on death without issue. There was a devise to Amanda and "in the event of Amanda dying unmarried, and if married without offspring by her husband," then among the heirs of J. B. The Supreme Court of Pennsylvania in a prior ejectment action had given Amanda a fee, on the ground that the gift over was substitutionary.²⁵⁷ The Supreme Court of the United States, Mr. Justice Gray writing the opinion, held that it was not bound to follow the Supreme Court of Pennsylvania, for the reason that there was in Pennsylvania no settled rule

²⁵¹ See Updegraff, *op. cit. supra* note 86, at 251.

²⁵² 28 Pa. 59 (1857).

²⁵³ 60 Pa. 141 (1869).

²⁵⁴ 65 Pa. 388 (1870).

²⁵⁵ 112 U. S. 526, 5 Sup. Ct. 291 (1884).

²⁵⁶ 166 U. S. 83, 17 Sup. Ct. 488 (1897).

²⁵⁷ *Mitchell v. Pittsburg Ry.*, 165 Pa. 645, 31 Atl. 67 (1895).

that "dying without issue" meant such death in the life of the testator only; and held that an indefinite failure of issue was meant. Mr. Justice Gray said:

"There is, indeed, a line of cases in that court, in which a devise over, after a devise in fee, has been held to be substitutionary, when expressed by such words as if the first taker die "without children"; (Biddle's Estate, (1857) 28 Penn. St. 59; McCormick v. McElligott, (1889) 127 Penn. St. 230;) or "without leaving issue living at the time of his death," (Mickley's Appeal, (1880) 92 Penn. St. 514; Stevenson v. Fox, (1889) 125 Penn. St. 568; King v. Frick, (1890) 135 Penn. St. 575; Morrison v. Truby, (1891) 145 Penn. St. 540;) or "intestate and without issue," (Karker's Appeal, (1869) 60 Penn. St. 141; Coles v. Ayres, (1893) 156 Penn. St. 197.) In none of these cases, however, was the devise so expressed that it could be construed as creating an estate tail."²⁵⁸

Mr. Justice Gray further pointed out²⁵⁹ that in *Schoonmaker v. Stockton*,²⁶⁰ and in *Shutt v. Rambo*,²⁶¹ where the expressions were respectively "die without heirs" and "die in the lifetime of the testator," a special context limited the gift over. In addition to the cases cited by Mr. Justice Gray, there were three cases where a definite failure of issue was intended and nothing was said about fettering the condition to the testator's death.²⁶²

In *Fitzwater's Appeal*,²⁶³ the testator bequeathed personalty to his nephew for life, and after the nephew's death, to his son Frank, and "should said Frank Fitzwater son of my nephew, Jacob Fitzwater, die without issue," then over to other relatives. The court held that the son, upon surviving his father, took an absolute interest. It is to be noted that, as the case was one of personalty, no question of estate tail was involved. In *Robinson's Estate*,²⁶⁴ where the gift over was upon death without issue to "the surviving child," the condition was confined to the death of the testator in a case involving land and personalty.

Since *Barber v. Pittsburgh Railway Company*,²⁶⁵ there has been one case in which an estate tail by implication has been created by the gift over.²⁶⁶ In two cases²⁶⁷ involving controversies

²⁵⁸ *Barber v. Pittsburgh*, *supra* note 256, at 102, 17 Sup. Ct. at 492.

²⁵⁹ *Ibid.* 103, 17 Sup. Ct. at 492.

²⁶⁰ 37 Pa. 461 (1860).

²⁶¹ 57 Pa. 149 (1868).

²⁶² *Snyder's Appeal*, 95 Pa. 174 (1880) ("shall at any time die without issue"); *Parkhurst v. Harrower*, 142 Pa. 432, 21 Atl. 826 (1891) ("at time of his son's death"); *Estate of Miller*, 145 Pa. 561, 22 Atl. 1044 (1891) ("die before he had any heirs").

²⁶³ 94 Pa. 141 (1880).

²⁶⁴ 149 Pa. 418, 24 Atl. 297 (1892).

²⁶⁵ *Supra* note 256.

²⁶⁶ *Hannon v. Fliedner*, 216 Pa. 470, 65 Atl. 944 (1907); *cf. Dilworth v. Schuykill Co.*, 219 Pa. 527, 69 Atl. 47 (1908).

²⁶⁷ *Todd v. Armstrong*, 213 Pa. 570, 62 Atl. 1114 (1906); *Waldron v. Wahl*, 286 Pa. 237, 133 Atl. 252 (1926).

over land, a definite failure of issue was found, and the result in *Mickley's Appeal*²⁶⁸ was not followed. In *Mebus's Estate*,²⁶⁹ the court said that a special context made the death of the first testator the time intended for the happening of the condition. And in *Shearer v. Miller*²⁷⁰ and *Sharpless' Estate*,²⁷¹ in both of which land was involved, a special context confined the condition to the death of a life tenant whose estate preceded the one in question.

Mickley's Appeal was followed in cases involving land where the conditions were respectively "die unmarried and without issue";²⁷² and "living at death."²⁷³ In *Flick v. Oil Co.*,²⁷⁴ involving a will of land, there was a gift over, if the first taker "depart this life without issue," to an other for life and then to six named persons, and *Mickley's Appeal* was again followed.

The same result was reached in two cases of personal property, in one of which the words "leaving" and "survivors" were used,²⁷⁵ and in the other of which the words were "the shares of any deceasing child leaving no lawful issue to increase the shares of the survivors."²⁷⁶

RHODE ISLAND

Prior to the Rhode Island Statute of 1896²⁷⁷ the law of Rhode Island was the common law rule of indefinite failure of issue.²⁷⁸ It made no difference that the gift over was to survivors, at least so far as land was concerned.²⁷⁹ *Forth v. Chapman*²⁸⁰ was also followed in regard to land where the gift over was upon "leaving no issue."²⁸¹ The expression "after his death," however, probably had a qualifying effect, both as to real and personal

²⁶⁸ *Supra* note 247.

²⁶⁹ 273 Pa. 505, 117 Atl. 340 (1922).

²⁷⁰ 185 Pa. 149, 39 Atl. 846 (1898).

²⁷¹ 209 Pa. 409, 58 Atl. 806 (1904).

²⁷² *Cooper v. Leaman*, 212 Pa. 564, 61 Atl. 1106 (1905); *Ault v. Karch*, 220 Pa. 366, 69 Atl. 857 (1908).

²⁷³ *Neubert v. Colwell*, 219 Pa. 248, 68 Atl. 673 (1908); *Stark's Estate*, 264 Pa. 232, 107 Atl. 699 (1919).

²⁷⁴ 188 Pa. 317, 41 Atl. 535 (1898).

²⁷⁵ *Moorhead's Estate*, 180 Pa. 119, 36 Atl. 647 (1897).

²⁷⁶ *Freeman's Estate*, 281 Pa. 190, 126 Atl. 270 (1924).

²⁷⁷ R. I. GEN. LAWS (1896) 202, § 24.

²⁷⁸ *Osborne v. Shrieve*, 3 Mas. 391 (C. C. D. R. I. 1824); *Arnold v. Brown*, 7 R. I. 188 (1862); *Sutton v. Miles*, 10 R. I. 348 (1872); *Brownell v. Brownell*, 10 R. I. 509 (1873).

²⁷⁹ *Burrough v. Foster*, 6 R. I. 534 (1860).

²⁸⁰ *Supra* note 27.

²⁸¹ *Osborne v. Shrieve*, *supra* note 278; *Holden v. Wells*, 18 R. I. 802, 31 Atl. 265 (1895).

property.²⁸² It is to be noted that an earlier case involving land held that there was an indefinite failure of issue, although the gift over was conditioned upon the words, "if he has no lawful issue after him."²⁸³

Although Rhode Island maintained the orthodox rule until late in its legal history, in 1894 *Harris v. Dyer*²⁸⁴ confined the condition to the death of the testator. The testator, by a will of 1887, divided his realty among his children in equal shares and provided that "in case of the death of any of the six named heirs to the residue of my estate, without leaving lawful issue, the survivors will inherit the portion of the deceased party but in the case of any one of the six parties named leaving lawful issue, then they are to inherit the parents' portion." The question in the case was whether the devisee, who survived the testator, could convey a good title to the land. The court held that he could, upon the ground that the gifts over were conditioned upon events which were intended to happen before the death of the testator. The opinion relied upon English, Pennsylvania, New Jersey, and North Carolina cases, and to a slight extent upon the special context. It is to be noted that the gifts over embraced all contingencies, but this was not relied upon by the court. It is hard to reconcile this case with the opinion less than a year later in *Holden v. Wells*,²⁸⁵ where an indefinite failure of issue was held to exist with reference to a devise of land, and no question was raised in regard to confining the condition to the testator's death. *Harris v. Dyer* was followed by *In re Johnson*,²⁸⁶ and approved in *Newport Trust Co. v. Chappell*.²⁸⁷

SOUTH CAROLINA

Prior to the Statute of 1853²⁸⁸ the gift over on death without issue imported a definite failure of issue.²⁸⁹ Slight changes appearing on the face of the will, however, resulted in the narrow

²⁸² *Swinburne*, Petitioner, 16 R. I. 208, 14 Atl. 850 (1888) (personalty); *Wells v. Fairbanks*, 6 R. I. 474 (1860) (realty).

²⁸³ *Whitford v. Armstrong*, 9 R. I. 394 (1870); cf. *Lippett v. Hopkins*, 1 Gall. 454 (C. C. D. R. I. 1813).

The writer of the opinion in *Swinburne*, Petitioner, *supra* note 282, *Durfee*, C. J., was a member of the court which decided *Whitford v. Armstrong*, *supra*.

²⁸⁴ 18 R. I. 540, 28 Atl. 971 (1894).

²⁸⁵ 18 R. I. 802, 31 Atl. 265 (1895).

²⁸⁶ 23 R. I. 111, 49 Atl. 695 (1901) (land).

²⁸⁷ 40 R. I. 383, 101 Atl. 323 (1917) (personalty).

²⁸⁸ S. C. STAT. (1853) 298.

²⁸⁹ *Graham v. Moore*, 13 S. C. 115 (1879); *Mangum v. Piester*, 16 S. C. 316 (1881) (both dealing with wills prior to 1853).

construction of definite failure at the death of the first taker.²⁹⁰ *Forth v. Chapman*²⁹¹ was followed as to realty and personalty.²⁹² A gift over to "surviving" persons limited the gift, both real and personal property, to a definite failure of issue.²⁹³

During the first half of the nineteenth century there seemed no tendency in the South Carolina cases to confine the contingency of a gift over on failure of issue to the testator's death. In *Yates v. Mitchell*,²⁹⁴ where the contingency was "without leaving lawful begotten issue living at the time of his, her, or their death," such condition was taken generally. The cases of *Vidal v. Verdier*²⁹⁵ and *Dehay v. Porcher*²⁹⁶ clearly go upon the special context of the particular wills involved. *Presley v. Davis*,²⁹⁷ however, confined the following contingency to the death of the testator: "if any should die or make their exit without lawful issue, then their portions are to be equally divided among the remainder of the aforesaid children," and decided that such condition should not be operative after the testator's death. The court relied upon *Schoppert v. Gillam*,²⁹⁸ where a gift over after a life estate to surviving children of a third person was held to mean children surviving the life tenant, on the authority of *Cripps v. Wolcott*.²⁹⁹ *Blum v. Evans*³⁰⁰ held that a gift over on death without issue should be confined to the life of the testator's wife who took a prior life estate. But in *Owings v. Wood*,³⁰¹ such a gift over was taken generally, although the court's attention was not particularly called to the point.³⁰²

²⁹⁰ *Clifton v. Haig*, 4 Des. Eq. 330 (S. C. 1812).

²⁹¹ *Supra* note 27.

²⁹² *Mazyck v. Vanderhorst*, 1 Bailey Eq. 48, 52 (S. C. 1828). This case was followed as to land. *Adams v. Chaplin*, 1 Hill Ch. 265, 268 (S. C. 1830); *Edwards v. Edwards*, 2 Strob. Eq. 101 (S. C. 1847); *Hay v. Hay*, 3 Rich. Eq. 384 (S. C. 1851); cf. *Gregg v. Harlee*, Dud. Eq. 42 (S. C. 1837).

So far as *Beresford v. Elliott*, 1 Des. Eq. 183 (S. C. 1790) holds the contrary as to land, it must be considered overruled.

²⁹³ *DeTreville v. Ellis*, 1 Bailey Eq. 40 (S. C. 1827); *Stevens v. Patterson*, Bailey Eq. 42 (S. C. 1829); *Selman v. Robertson*, 46 S. C. 262 (1895).

²⁹⁴ 1 Rich. Eq. 265 (S. C. 1844).

²⁹⁵ *Spear* Eq. 402 (S. C. 1844) (all the contingencies were provided for).

²⁹⁶ 1 Rich. Eq. 266 (S. C. 1845).

²⁹⁷ 7 Rich. Eq. 105 (S. C. 1854).

²⁹⁸ 6 Rich. Eq. 83 (S. C. 1853).

²⁹⁹ 4 Madd. 11 (1819).

³⁰⁰ 10 S. C. 56 (1877). The case was elaborately argued. The court relied on *Vidal v. Verdier*, *supra* note 295, and earlier English cases. The opinion has been properly criticized. See Note (1924) 24 Col. L. Rev. 512, 515, n. 14.

³⁰¹ 105 S. C. 177, 89 S. E. 667 (1916).

³⁰² *Chaplin v. Turner*, 2 Rich. Eq. 136 (S. C. 1846); *Durant v. Nash*, 30 S. C. 184, 9 S. E. 19 (1888); *Marshall v. Marshall*, 42 S. C. 436, 20 S. E. 298 (1894).

TENNESSEE

In Tennessee prior to 1852³⁰³ the common law rule of indefinite failure of issue was adopted both as to realty and personalty.³⁰⁴ Little, however, was necessary to cut down the gift over to a failure of issue at the death of the first taker. If the limitation over was to persons "surviving" the first taker, such a result was reached both as to realty and personalty.³⁰⁵ And a definite failure was also found upon special context in several cases.³⁰⁶

*Armstrong v. Douglass*³⁰⁷ arose under the last clause of the statute of 1852 which provides that there shall be an *indefinite* failure of issue if the intention "of such limitation be otherwise expressly and plainly declared in the face of the deed or will created." The court found as to the 15th clause in the will under consideration an indefinite failure of issue expressed on the face of the will. This is the only case that the writer has found involving a similar statutory clause in the United States.

More recent cases, however, show a tendency to confine a gift over on death without issue to the lifetime of the testator. In *Vaughn v. Cator*,³⁰⁸ such a gift over of personalty was confined to the testator's lifetime upon the authority of *Montagu v. Nuccella*,³⁰⁹ where, however, the gifts over exhausted all contingencies. In *Meacham v. Graham*,³¹⁰ the gift over was "without living children." This contingency was cut down to the testator's death on the authority of *Vaughn v. Cator* and New York cases. Both these cases were approved in *Katzenberger v. Weaver*,³¹¹ where there was a gift to the first taker's children if he died leaving children.

Meek v. Trotter,³¹² where there was a preceding life estate,

³⁰³ Tenn. Laws 1851-2, c. 91, p. 113, § 3.

³⁰⁴ *Randolph v. Wendel*, 4 Sneed. 646 (Tenn. 1857); *Kirk v. Furgerson*, 6 Coldw. 479 (Tenn. 1869) (realty); *Bowman v. Tucker*, 3 Humph. 648 (Tenn. 1842); *Chester v. Greer*, 5 Humph. 26 (Tenn. 1844) (realty and personalty); *Hamner v. Hamner*, 3 Head. 398 (Tenn. 1859) (realty and personalty).

³⁰⁵ *Lewis v. Claiborne*, 5 Yerg. 369 (Tenn. 1829); *Brown v. Hunt*, 12 Heisk. 404 (Tenn. 1873); see *Booker v. Booker*, 5 Humph. 505, 510 (Tenn. 1844).

³⁰⁶ *Williams v. Turner*, 10 Yerg. 287 (Tenn. 1837); *Bramlet v. Bates*, 1 Sneed. 554 (Tenn. 1853) (presented same facts and reached same result as *Pells v. Brown*, *supra* note 7); *Gray v. Bridgeforth*, 33 Miss. 312 (1857).

³⁰⁷ 89 Tenn. 219, 14 S. W. 604 (1890).

³⁰⁸ 85 Tenn. 302, 2 S. W. 262 (1886).

³⁰⁹ 1 Russ. 165 (1826).

³¹⁰ 98 Tenn. 190, 29 S. W. 12 (1897).

³¹¹ 110 Tenn. 620, 75 S. W. 937 (1903); *cf.* *Stones v. Maney*, 3 Tenn. Ch. 731 (1878) (gift over on death without issue was confined on the special context to death before the first taker reached 35).

³¹² 133 Tenn. 145, 180 S. W. 176 (1915).

contained a dictum that the gift over should be confined to the life of the life tenant. The earlier cases were approved and would have been followed had there been no intervening estate.

*Anderson v. Lucas*³¹³ involved a devise of land made in 1843 in which there was a gift if the first taker died without lawful issue. The court followed the earlier Tennessee cases which represented the law at that date and found that an indefinite failure of issue was intended.

VERMONT

In *Chaplin v. Doty*,³¹⁴ a gift over upon the first taker's death "without leaving lawful issue" was construed to mean "without having *had* lawful issue," so that when the legatee survived the testator and begat a child, the gift to the former was held to be absolute. It was assumed that the condition applied after, as well as before, the testator's death. In *Dwight v. Eastman*,³¹⁵ there was a devise of land to the testator's son and daughter in equal shares. The testator provided that each share should descend to the issue of each of the testator's children, and if no issue to the issue of the other. It was held that the condition operated after the death of the testator. Nothing was said about the exhaustion of all contingencies.

*In re Wells's Estate*³¹⁶ involved a devise of land to the testator's widow for life, and then to the testator's daughter for life, and then to the heirs of his daughter's body. The will then provided that "should my beloved daughter, Lucia R. Ward, die leaving no heirs of her body, or shall I, at any future time fail to have heirs of my body, then to a religious society." The deed was held void for remoteness because the testator intended that it should vest on the death of the daughter without heirs of her body then surviving. But in *In Re Thayer's Estate*³¹⁷ it was said extra-judicially: "True, the rule must not be overlooked that words of survivorship are presumed to relate to the death of the testator, if fairly capable of such construction."

WISCONSIN

Wisconsin follows New York where there is no preceding life estate in confining the contingency to the life of the testator.³¹⁸

³¹³ 140 Tenn. 336, 204 S. W. 989 (1918).

³¹⁴ 60 Vt. 712, 15 Atl. 362 (1888).

³¹⁵ 62 Vt. 398, 20 Atl. 594 (1890).

³¹⁶ 69 Vt. 388, 38 Atl. 83 (1897).

³¹⁷ 99 Vt. 204, 206, 130 Atl. 683-684; cf. *Shepard's Heirs v. Shepard's Estate*, 60 Vt. 109, 14 Atl. 536 (1888).

³¹⁸ *Lovass v. Olson*, 92 Wis. 616, 67 N. W. 605 (1896); *Patton v. Lud-*

In *Chesterfield v. Hoskin*,³¹⁹ there was a gift to the testator's son for life and, in case of his death without issue and leaving a widow surviving, then to the widow; but if he leave issue, the issue to take. The court held that this meant death after the testator.

In *Korn v. Friz*,³²⁰ there was a preceding life estate, and the court took the condition generally upon slight special context. That *Korn v. Friz* went upon the construction of the will is pointed out in *Hohnbach v. Hohnbach*,³²¹ where there was a preceding life estate without special context, and the court confined the contingency to the death of the life tenant.

SUMMARY

The unfortunate rule fettering a gift over on death without issue to the period of distribution exists in Alabama, Connecticut, Indiana, Iowa, Maryland, Pennsylvania, Rhode Island, Tennessee and Wisconsin. It probably exists also in New York and South Carolina. It appears in part in Kentucky and New Jersey. Georgia, Illinois and Vermont may be classified as doubtful states.

The statute presuming a definite failure of issue at the death of the first taker has hardly ever been discussed in these authorities. Even if the condition is to be confined to the death of the testator, or of a prior life tenant, the question might well still be open whether A's death without issue is intended to be upon A's indefinite failure of issue before the testator or the life tenant.

Perhaps the most sensible suggestion is made in *Buchanan v. Buchanan*,³²² that the statute itself precludes reference to any other period than the death of the first taker. The effect of this construction would be to do away entirely, in those states having such an act, with the anomalous body of authority just considered at length.³²³

ington, 103 Wis. 629, 79 N. W. 1073 (1899); *Owens' Will*, 164 Wis. 260, 159 N. W. 906 (1916); *Will of O'Brien*, 173 Wis. 41, 180 N. W. 141 (1920).

³¹⁹ 133 Wis. 268, 113 N. W. 647 (1907).

³²⁰ 128 Wis. 428, 107 N. W. 659 (1906).

³²¹ 151 Wis. 487, 139 N. W. 731 (1913).

³²² *Supra* note 239.

³²³ *Cf. Siegwarth's Estate*, 33 Pa. Super. Ct. 622 (1907) with *Buchanan v. Buchanan*, *supra* note 239. The cases seem to conflict. See Updegraff, *op. cit. supra* note 86, at 255-256.

In *Dowd v. Scally*, 184 N. W. 340 (Iowa 1921), after a gift to the testator's wife for life there was a remainder to his children: but should any of his children die without issue before his wife, then to the survivors of them on her death: and should any die without leaving issue, the issue on his wife's death were to take their parent's share. One of the testator's children died after his death and before his wife, leaving two children who died unmarried before the life tenant. It was held that the testator's child had died with issue and the heir of that child's deceased issue took under the gift to them in the will.