

PENNSYLVANIA RULES FOR CONSTRUCTION OF THE WORDS "DIE WITHOUT ISSUE"*

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There are literally hundreds of cases in the Pennsylvania reports involving the meaning of "die without issue." Many of them are outwardly conflicting, but a careful examination indicates that there are at least general rules of construction applicable to the solution of each phase of the problem. A consideration of individual cases and a criticism of existing rules will not be attempted in this article, which will be limited to an attempt to set out the different aspects of the subject, and to determine what general principles are indicated by the mass of decisions, in order to arrive at practical working rules for the solution of specific problems. Three different and distinct legal problems of construction are created by these words.

1. Is the failure of issue to be definite or indefinite?
2. At what time, in relation to the testator and the other persons named in the instrument, must the death occur?
3. Is it death without issue surviving or death without ever having had issue?

In considering the cases, every effort will be made to reduce each set of facts to its lowest common denominator and no differentiation will be made between the alternative expressions "die without issue," "leave no issue," "have no issue," etc. All raise the same problems; all have the same solution.

I. DEFINITE OR INDEFINITE FAILURE OF ISSUE

A. The Rule as to Real Property

It is impracticable to go into a lengthy exposition of the feudal and historical background, which led to the development of the doctrine of indefinite failure of issue and entailed estates. It will be sufficient to say that at the early common law, the words

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“die without issue” presumptively indicated an indefinite failure of issue and created an entailed estate; that is to say, a failure of the issue no matter at how remote a period in the future it might occur. In the words of Chief Justice Tilghman: ¹

“I take it to be established that the words ‘without leaving issue’ applied to real property, are to be understood issue indefinitely, unless there be some other words showing an intent to restrict them to the time of the death of the first taker.”

In a later case ² in our Supreme Court Mr. Justice Woodward says:

“The series of cases in the English law have been uniform, from the time of the year-books down to the present day, in the recognition of the rule of law, that a devise in fee with a remainder over, if the devisee dies without issue or heirs of the body, is a fee cut down to an estate tail, and the limitation over is void by way of executory devise as being too remote, and founded in an indefinite failure of issue.

“This may not be according to the actual intent of the testator. Doubtless he did not intend to create an estate tail, but when a testator uses words, without explanation or qualification in the context, which, according to a settled rule of law, import an estate tail, the legal meaning of the will is to prevail over the actual intention of the testator. Artificial rules being founded in considerations of public policy, must often frustrate the intentions of testators, and it is well they should, for the law is wiser than any one man.”

It can, therefore, be stated that at our early common law, the use of the words “die without issue” created a presumption that there was an indefinite failure of issue and that an estate tail was created.³ It was, of course, possible to overcome this presumption by additional phraseology indicating a contrary intent, and the

¹ Clark v. Baker, 3 S. & R. 470, 478 (1817).

² Vaughan v. Dickes, 20 Pa. 509 (1853).

³ See also Eichelberger v. Barnitz, 9 Watts 447 (1840); Robinson's Estate, 149 Pa. 418, 24 Atl. 297 (1892); Graham v. Abbott, 208 Pa. 68, 57 Atl. 178 (1904); Benedict v. Zimmerman, 215 Pa. 155, 64 Atl. 333 (1906); Arnold v. Muhlenberg, 227 Pa. 321, 76 Atl. 30 (1910); Horton v. McCall, 233 Pa. 405, 82 Atl. 472 (1912); Kyner v. Hockersmith, 235 Pa. 586, 84 Atl. 506 (1912); Jones v. Gulf Refining Co., 295 Pa. 92, 144 Atl. 895 (1929).

court will seize "with avidity on any circumstance, however trivial, denoting an intention to fix the contingency at the time of the death."⁴ For examples, if the will provides "without issue" at the time of his death,⁵ if the word "issue" can be construed to mean "children";⁶ if the gift over be a life estate to a person in being at the testator's death;⁷ if upon the failure of the issue, an affirmative act is to be done by a person in being at the testator's death;⁸ if the will provides for gifts to a class, and on failure of issue of one of the class, gifts over to the survivors.⁹ The subject is vast and cases can be found to support any desired conclusion. In the words of Mr. Justice Coulter:¹⁰

"Laying aside, then, the multitude of cases as to what words create an estate tail, or cut down a fee simple into a fee tail, or what words mean an indefinite failure of issue, or a failure within a life or lives in being and twenty-one years afterwards, which were cited by the learned counsel from the English Books, and the repetitions of them in the American books, let us go to the fountain-head, the will itself, of David Walker, a substantial Irish farmer, of a good name, and see if we can ascertain what he did mean by his devise of the plantation to his daughter Jean and her heirs."

In 1855 an Act of Assembly was passed¹¹ providing as follows:

"Whenever hereafter by any gift, conveyance or devise, an estate in fee tail would be created according to the existing laws of this State, it shall be taken and construed to be an

⁴ Gibson, C. J., in *Seibert v. Butz*, 9 Watts 490, 494 (1840), cited with approval in *Miller's Estate*, 145 Pa. 561, 22 Atl. 1044 (1891); *Gerhard's Estate*, 160 Pa. 253, 28 Atl. 684 (1894).

⁵ *Beckley v. Riegert*, 212 Pa. 91, 61 Atl. 641 (1905); *Stout v. Good*, 245 Pa. 383, 91 Atl. 613 (1914).

⁶ *Hill v. Hill*, 74 Pa. 173 (1873); *Miller's Estate*, *supra* note 4; *Peirce v. Hubbard*, 152 Pa. 18, 25 Atl. 231 (1892); *O'Rourke v. Sherwin*, 156 Pa. 285, 27 Atl. 43 (1893).

⁷ *Stoner v. Wunderlich*, 198 Pa. 158, 47 Atl. 945 (1901); *Mebus's Estate*, 273 Pa. 505, 117 Atl. 340 (1922). See also *Marshall v. Clause*, 230 Pa. 344, 79 Atl. 511 (1911), where the gift was to A in fee, and if he have no direct heirs, then only "during his natural life" with a gift over to his widow for life; *Martin v. Grinage*, 289 Pa. 473, 481, 137 Atl. 676, 678 (1927).

⁸ *Taylor v. Taylor*, 63 Pa. 481 (1870); *Fahrney v. Holsinger*, 65 Pa. 388, 392 (1870); *Middleswarth v. Blackmore*, 74 Pa. 414 (1873).

⁹ *Johnson v. Currin*, 10 Pa. 498 (1849).

¹⁰ *Ibid.* 502.

¹¹ Act of 1855, P. L. 368, § 1.

estate in fee simple and as such shall be inheritable and freely alienable."

Since this Act in terms abolished entailed estates, and created only fees simple, the logical result would have been the abolition of the old rule.

Under the old rule, the fee tail was created for the purpose of benefit to the issue of the first taker, since the court felt that the use of the words "die without issue" indicated an intention on the part of the testator to benefit the issue under the will and, by the creation of a fee tail, the issue did receive an indefinite benefit. The Act of 1855 created a fee simple out of such a gift, and therefore, if the courts continued to construe the gift as a fee tail, it became a fee simple absolute and the issue received absolutely no protection since the first taker obtained a fee simple. It would logically follow that after the Act of 1855, the court would eliminate the doctrine of indefinite failure of issue and would hold that where there was a gift over on failure of issue, it meant a definite failure because it was only by making the failure definite that the issue could receive any benefit whatsoever under the will. But no such result followed. The Act had absolutely no effect on the existing law as to indefinite failures of issue, and the courts continued to hold that the presumption existed that the testator intended an indefinite failure, that this created a fee tail, which was converted by the Act into a fee simple.¹²

How flagrantly this disregards the real intent of the testator is best illustrated by the very recent case of *Jones v. Gulf Refining Co.*, decided only last year.¹³ In that case the testator gave all his property to *A* for life, with a remainder to *B* in fee, "if she shall die leaving lawful issue," and "if she shall die without leaving lawful issue" then to *X*. Note that the gift to *B* was a fee simple conditional; no full title was to vest unless *B* died leaving lawful issue. Yet the court held that the failure of issue was presumptively indefinite, that *B* therefore acquired a fee tail, enlarged by the Act of 1855 into a fee simple, and thereby not only removed

¹² See *Jones v. Gulf Refining Co.*; *Arnold v. Muhlenberg*; *Benedict v. Zimmerman*; *Graham v. Abbott*; *Robinson's Est.*, all *supra* note 3.

¹³ *Supra* note 3.

the condition attached to the original gift to *B*, but completely destroyed the testator's intention, and gave to *B* an absolute fee simple which the testator had expressly negated in the will.¹⁴

These difficult questions of construction are now in a great measure removed by the Act of 1897,¹⁵ which provides:

"In any gift, grant, 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 death of such person, and not indefinite failure of his issue, unless a contrary intention shall appear by the deed, will or other instrument in which such gift, grant, devise or bequest is made or contained,"

and which applies to all instruments executed after July 1, 1897.

The effect of this Act is clear and precise. It entirely changes the presumption which formerly was in favor of an indefinite failure of issue and substitutes a statutory presumption that, in the absence of words indicating a contrary intent, a definite failure is to be presumed.¹⁶

To quote the words of our present Chief Justice in *English's Estate*:¹⁷

"The Act of 1897, as construed by this Court, when it controls, sweeps away much old law and gives a plain guide for the future.

"The Act of 1897 does not provide simply an additional canon of construction, but, as we have seen, it changes an obsolete guide, substituting therefor one which is intended to, and, as against the old rule, unquestionably will, assist in ascertaining the actual meaning of testators; this, represent-

¹⁴ Note also that in this case the gift over after failure of issue was to definite named persons in being at the time of the testator's death. The decision cannot be reconciled with *Stoner v. Wunderlich and Mebus's Estate*, *supra* note 7. See also *Marshall v. Clause*, *supra* note 7.

¹⁵ Act of 1897, P. L. 213. Repealed as to wills and re-enacted without change in the Wills Act of 1917, P. L. 403, § 14. Held constitutional in *Dilworth v. Schuylkill Improvement Co.*, 219 Pa. 527, 69 Atl. 47 (1908).

¹⁶ Mitchell, C. J., in *Lewis v. Link Belt Co.*, 222 Pa. 139, 141, 70 Atl. 967 (1908).

¹⁷ 270 Pa. 1, 7, 112 Atl. 913, 915 (1921).

ing, most fortunately, the modern tendency of the law,—to find and enforce the ‘actual intent’ in each case,—should be taken advantage of and given the broadest opportunity for success by the judiciary.”

B. *The Rule as to Personal Property*

In spite of some misgivings on the part of the judges in the early cases,¹⁸ it was definitely settled long prior to the Act of 1897 that the presumption of indefinite failure did not apply to gifts of personalty;¹⁹ and that such gifts were gifts on definite failure of issue only. We therefore have no substantial problem as to personal estate.

II. AT WHAT TIME IN RELATION TO THE DEATH OF THE TESTATOR AND OF OTHER PERSONS NAMED IN THE WILL MUST THE DEATH OCCUR?

This problem is entirely unconnected with the questions so far discussed. Assuming that it is decided that the failure of issue is definite and that the gift over is valid, to what period, in relation to the scheme set up by the testator, does the death refer? It is the cases in this class that present the greatest confusion and which are apparently least reconcilable. The reason for this is the refusal of the courts to subscribe to the doctrine of “rules of construction.” There can always be found in decisions of will cases a conflict between the “rule of construction” theory and the “intent of the testator” theory. This accounts for the numerous repetitions of the phrases: “Precedents are of little importance in will cases”; “The real intent of the testator is to govern”; “The will is to be read within the four corners of the instruments.”

But in spite of such protestations, our courts have developed distinct, and often arbitrary rules of construction, and there are few better examples than the rules now to be considered. The easiest approach is the discussion of a specific problem.

¹⁸ For example: Gibson, C. J., in *Seibert v. Butz*, *supra* note 4, at 494.

¹⁹ *Eachus's Appeal*, 91 Pa. 105 (1879); *Snyder's Appeal*, 95 Pa. 174 (1880); *Moorhead's Estate*, 180 Pa. 119, 36 Atl. 647 (1897); *Nices' Estate*, 227 Pa. 75, 75 Atl. 1025 (1910).

Suppose a testator leaves his property to *A* in fee and if he die without issue, then to *X*. There are obviously two possibilities: *X* will take only if *A* dies without issue before the testator, or *X* will take if *A* dies without issue at any time.

Then suppose a testator leaves his property to *A* for life, with remainder to *B* in fee, and if *B* die without issue, then to *X*. There are three possibilities here: *X* will take only if *B* dies without issue before the testator, or *X* will take only if *B* dies without issue before the life tenant *A*, or *X* will take if *B* dies without issue at any time.

Then suppose a testator leaves his property to *A* for life and if *A* die without issue, then to *X*. Here there are again two possibilities: *X* will take only if *A* dies without issue before the testator, or *X* will take if *A* dies without issue at any time.

All possible cases can be placed in one of these three groups. As to each, an examination of the cases discloses a distinct rule and by a proper classification of the cases and a recognition of the rule applicable, all the decisions can be reconciled.

A. A Gift to A in Fee and if He Die Without Issue Then to X

The rule applicable to this class of case is known as the "Rule of Mickley's Appeal," a decision of Mr. Chief Justice Sharswood in 1880.²⁰ The rule derives its name from this case by reason of the eminence of the great judge who wrote the opinion and because it is there first set down as a definite rule of law, although it had been recognized and applied many years before.²¹

"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

²⁰ 92 Pa. 514 (1880).

²¹ *Caldwell v. Skilton*, 13 Pa. 152 (1850); *Biddle's Estate*, 28 Pa. 59 (1857); *Shutt v. Rambo*, 57 Pa. 149 (1868); *Fahrney v. Holsinger*, *supra* note 8.

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.”²²

Our courts have always been chary of restraints on alienation and the reasoning behind Justice Sharswood's opinion is that the fee simple in *A*, direct from the testator, should not be reduced in alienability by directing that a contingent gift over should exist during the entirety of *A*'s life. Were this the rule, a purchaser of the property from *A* would take title subject to the right of *X* to claim a fee simple in the event that *A* should die without leaving issue surviving him. This is logical and perhaps proper, but is it what the testator intended? In this case, the testator gives his property to *A* and expressly provides that if *A* die without leaving issue *surviving him*, *X* should have the property. If it is to be argued that the testator intends that *A* must die during the testator's lifetime, he could easily say so. He could add the words "if *A* predeceases me, without leaving issue him surviving." It does not seem sufficient for the court to say that this is a restraint on alienation, for on the contrary the testator has expressly stated that he desires a restraint on alienation and it is admittedly a lawful restraint since it is within the time allotted by the rule against perpetuities. It is true that in *Mickley's Appeal*, the court was able to find other words in the will which assisted it in thus arriving at what they held to be the testator's intent, but the rule above quoted is the important part of the decision and has been followed innumerable times²³—the last case being *Freeman's Estate*²⁴ in 1924, where the court says:

²² *Supra* note 20, at 517.

²³ *Morrison v. Truby*, 145 Pa. 540, 22 Atl. 972 (1891); *Sugden v. McKenna*, 147 Pa. 55, 23 Atl. 439 (1892); *Coles v. Ayres*, 156 Pa. 197, 27 Atl. 375 (1893) (in which it was held that the rule applies to a will in which a fee is presumed by statute as well as to cases where the fee is given by apt language in the will); *Mitchell v. Pittsburgh Ry., etc.*, 165 Pa. 645, 31 Atl. 67 (1895) (in which "offspring" was held to mean "issue," and in which it was also held that the mere fact that the first taker was only five years at the time of the making of the will did not change the rule that the testator meant death without issue during his lifetime); *Engel's Estate*, 180 Pa. 215, 36 Atl. 727 (1897); *Flick v. Oil Co.*, 188 Pa. 317, 41 Atl. 535 (1898); *Richards v. Bentz*, 212 Pa. 93, 61 Atl. 613 (1905); *Cooper v. Leaman*, 212 Pa. 564, 61 Atl. 1106 (1905); *Neubert v.*

"It is a rule of law that if a bequest be made to a person absolute in the first instance and it is provided in the event of death or death without issue another legatee or legatees shall be substituted for the share or legacy so given, it shall be construed to mean 'death or death without issue before the testator'."

The practical effect of the decision is that the gift over is invalidated if *A* survive the testator, the cases being uniform in holding that if *A* survives the testator, his estate ripens into a fee simple absolute and as such is freely alienable. The rule applies equally to realty and personalty.²⁵

It is worthy of note that after the passage of the Act of 1897, it was argued that this Act created a new statutory rule abrogating the rule of *Mickley's Appeal* and referring all such deaths to the date of the death of the person to whose issue reference was made. This argument was based on the language in the Act declaring that "die without issue . . ." (shall be construed to mean) ". . . want or failure of issue *in the lifetime or at the death of such person.*" But the courts properly held that the Act bore no reference to this question at all. All it prescribed was a statutory presumption that failures of issue were definite and not indefinite. As to dates of dying with relation to persons other than the person

Colwell, 219 Pa. 248, 68 Atl. 673 (1908); *Ault v. Karch*, 220 Pa. 366, 69 Atl. 857 (1908); *Robinson v. Jones*, 222 Pa. 56, 70 Atl. 948 (1908); *Edwards' Estate*, 227 Pa. 299, 76 Atl. 28 (1910) (in which there was a gift to *A* in fee but if *A* "should not be living at the time of my decease or die without lawful issue" then to *X* and in which it was held that "or" means "and" and that the rule of *Mickley's Appeal* applied); *Bell v. Ricketson*, 230 Pa. 246, 79 Atl. 548 (1911); *Benedict v. Bonebrake*, 253 Pa. 348, 98 Atl. 574 (1916); *Naugle v. Irvin*, 259 Pa. 214, 102 Atl. 815 (1917) (where the gift was to *A* in fee and if he die during minority without issue then to *X*; held, if *A* survives the testator and reaches 21 he receives an indefeasible estate); *Shornhorst v. Jacob*, 272 Pa. 223, 116 Atl. 157 (1922); *Williamson v. Improvement Company*, 278 Pa. 358, 123 Atl. 307 (1924); *Hogg's Estate*, 27 Pa. Super. 428 (1905) (in which "heir" was held to mean "issue"); *Siegwarth's Estate*, 33 Pa. Super. 622 (1907) (but note that in this case, the income was given to *A* for five years and then the fee was given to *A* and if he died without issue, then to *X*; although the first gift is not absolute, it is to the same person who subsequently receives the absolute estate and therefore the rule of *Mickley's Appeal* will be applicable); *Throckmorton v. Thompson*, 34 Pa. Super. 214 (1907); *Little's Estate*, 91 Pa. Super. 245 (1927).

²⁴ 281 Pa. 190, 126 Atl. 270 (1924).

²⁵ See 92 Pa. 514 at 516 and cases cited *supra* note 23.

whose issue were referred to, the Act is silent. This was flatly decided by the Superior Court in *Siegwarth's Estate* in 1907.²⁶

Many of our judges have been critical of the rule and, as is said in *Ralston v. Truesdale*:²⁷

"This construction is only made *ex necessitate rei* from the absence of any other period to which the words may be referred, as a testator is not supposed to contemplate the event of himself surviving the object of his bounty."

The rule is not to be applied where the will clearly indicates an adverse intent, and the intention of the testator is to be gathered from all the provisions of the will.²⁸

For this reason, several distinct exceptions to the rule have been engrafted on it, which may be classified as follows:

1. *Where the gift is not absolute in the first instance*²⁹

This is an obvious exception. The justification of the rule in *Mickley's Appeal* is the effort of the court to avoid a postponement of the date of the ultimate distribution of the estate, and to avoid the reduction of absolute estates to estates for life or subject to contingencies.

For example, in *Smith v. Piper*³⁰ the gift was to *A* in fee provided that *A's* estate shall "become absolute" when *A* "has married and has issue born," but if *A* die without issue, then to *X*. The court held that *A* had only a conditional fee and that therefore the rule could not apply to give *A* a fee simple upon surviving the testator.

2. *Where there is a gift to the issue of the first taker*

It is sometimes stated as a second exception that the rule of *Mickley's Appeal* does not apply where there is a gift over, either expressly or impliedly, to the issue of the first taker.

²⁶ *Supra* note 23, at 625, 626; *Deeter's Estate*, 280 Pa. 135, 141, 124 Atl. 416, 418 (1924).

²⁷ 178 Pa. 429, 434, 35 Atl. 813, 814 (1896). See also *Francis's Estate*, 4 Pa. D. R. 694 (1895).

²⁸ *Daniels's Estate*, 27 Pa. Super. 358, 361 (1905); *Grubb's Estate*, 5 Pa. D. R. 422 (1906).

²⁹ See Paragraph II (B) *infra*.

³⁰ 231 Pa. 378, 80 Atl. 877 (1911).

It is argued that if there be a gift to *A*, and on his death to his issue, with a gift over on death without issue, it cannot be said that the testator intended a final distribution of his estate on the date of his death and could not have contemplated the failure of *A*'s issue after the testator's death.³¹

But the case of *Galbraith v. Swisher*³² does not support the exception. The case is very sketchily reported, but it appears that the gift was to *A* in fee, provided that if *A* die, then a remainder to his issue, or failing issue, then to *X*. The opinion recites the rule of *Mickle's Appeal*, states that it is applicable and decides that *A* takes a fee simple absolute on surviving the testator.

In *Sunderland's Estate*³³ the testator directed his property sold and divided among his children, except *A*'s part, and "Should she (*A*) not have issue, her part is to be divided to the other parts. Should she have issue, her part goes to that issue." The court decided that *A* took a life estate in her part and thus arrived at a result contrary to *Galbraith v. Swisher*, by reducing the original gift to a life estate. There are not many cases in which this exception to the rule is stated. It seems preferable to discard it and place all the cases in the first exception; that is, gifts not absolute in the first instance. In every case purporting to set up this exception, the gift to the first taker was, as a matter of fact, not absolute, except in *Galbraith v. Swisher*, and in that case the court did not recognize the existence of the exception where the gift to the first taker was absolute.

3. *Where a contrary intent appears in the will*

This exception obviously attaches to a rule which is adopted "from necessity, in aid of what was considered the general intent of the testator."³⁴

The rule cannot apply if the first taker is referred to or treated as living at a period subsequent to the death of the testator.

³¹ *Noble's Estate*, 182 Pa. 188, 193, 194, 37 Atl. 852, 853 (1897); *Francis's Estate*, *supra* note 27; *Boyd's Estate*, 17 Pa. D. R. 393 (1908). See also *Nice's Estate*, *supra* note 19, at 78, 75 Atl. at 1026, although this case dealt primarily with definite or indefinite failure of issue.

³² 19 Pa. Super. 143 (1902).

³³ 203 Pa. 155, 52 Atl. 167 (1902). See also *Mebus's Estate*, *supra* note 7.

³⁴ *Jessup v. Smuck*, 16 Pa. 327, 341 (1851).

In *Stoner v. Wunderlich*,³⁵ the gift was to *A* in fee, *A* to pay the testator's widow \$60.00 per annum; if *A* die without issue and his wife survive him, then the wife to have the property for life and remainder to *X*. The court says, in holding that the rule of *Mickley's Appeal* cannot apply:

"The devise is coupled with a direction that the devisee shall pay \$60.00 per annum to his mother, who was then living, during her natural life. The testator evidently expected his wife to survive him, because in the event she did not, the granting of the annuity to her would have been useless. He therefore anticipated the payment of the annuity to his wife at the only time when it could be paid, to wit: after his death. This fact we think conclusively shows that the testator contemplated that his son would survive him and that the event of his dying without issue would occur after the death of the testator."

In *Middleswarth's Adm'r. v. Blackmore*³⁶ the gift was to *A* in fee, out of which *A* was to pay \$50.00 a year to the testator's widow for ten years; with a proviso that if *A* died without issue, then the real estate was to be sold, and after paying the sums charged against it, the testator's executors were to distribute the balance to named remaindermen.

The court held that by reason of the creation of the annuity, the testator contemplated *A's* death during the lifetime of his executors, *i. e.* after his own death, and decided that *A* took a defeasible estate, and not a fee simple.

In *Daniels's Estate*,³⁷ the gift was to *A*, a minor, in fee. The testator then directed that *A* select *Z* as her guardian. The will then provided that if *A* die without issue, either before or after reaching the age of 21, remainder to *X*.

The court said, in deciding that *A* had only a defeasible estate:

"In immediate connection with the bequest of the personal property to the appellant he expresses a desire and

³⁵ *Supra* note 7, at 164, 47 Atl. at 947. See also *Hoover v. Krick*, 1 Walker 117 (1879); *Kirkpatrick's Estate*, 280 Pa. 306, 124 Atl. 474 (1924).

³⁶ 74 Pa. 414 (1873).

³⁷ 27 Pa. Super. 358, 361 (1905).

request that she 'select and have appointed as her guardian Cassius Duffield'. This clearly indicates that it was the expectation, or that it at least was in the contemplation of the testator that the will might take effect before the appellant had attained her majority. Immediately following this comes the limitation over to other legatees, 'if my said daughter shall die before or after attaining the age of twenty-one years without issue'. Having suggested to his daughter the person whom he desires that she shall select as her guardian, during her minority, he directly in connection with that request incorporates in his will the provision that the property shall go to others in the event of his daughter dying without issue, whether during her minority or after she shall attain full age. The provisions and terms of this will clearly indicate that the testator contemplated and provided for the death of his daughter without issue, at any period of her life, whenever that event might happen, as the time and event on which the property in controversy was to pass to other legatees."

These cases indicate the general type of will in which it is held that the testator has indicated clearly an intention that the death of the first taker without issue may occur subsequent to the death of the testator, even though the original gift to the first taker was absolute.

B. A Gift to A for Life, Remainder to B in Fee, and if B Die Without Issue, Then to X

If the decision of *Mickley's Appeal* is based on the

" . . . very clear indication of the intention of the testator that the distribution of his estate to the persons entitled, should take place at the period of his own death and not be postponed to a subsequent time",³⁸

and if we recognize the exception in the case of a non-absolute gift to the first taker, the rule clearly will not apply to a case where there is an intervening life estate, because the testator clearly intends a postponement of the final distribution of his estate beyond the time of his own death, and because the gift to the first taker is clearly non-absolute. The logical conclusion from the reasoning

³⁸ *Supra* note 20, at 517.

in *Mickley's Appeal* would require that *B* die without issue before the death of *A*, the life tenant, and if *B* survives the testator and the life tenant *A*, *B* will take an absolute estate and the gift over to *X* will disappear.

This rule is stated in *McAlpin's Estate*³⁹ as follows:

"If a bequest be made to a person absolute in the first instance and it is provided that in the event of death without issue another legatee or legatees shall be substituted to the share or legacy so given, it shall be construed to mean death or death without issue *before the testator if the gift is immediate* or death or death without issue *during the continuance of the prior estate* where the limitation is by way of remainder."

In *Morrison v. Truby*,⁴⁰ the court states the principle:

"Where the gift is immediate, that is to say, to take effect immediately upon the testator's death, it is determined by the first-named event; but, where there is an intermediate estate, or where a time is fixed for the enjoyment of the devise, time may be given for the happening of the possibility during the running of the precedent interest, or until the period of enjoyment arrives. Thus, the actual contingency may happen in the lifetime of the testator, or of the first taker, or before distribution or the period of enjoyment,

³⁹ 211 Pa. 26, 60 Atl. 321 (1905).

⁴⁰ *Supra* note 23, at 549, 22 Atl. at 974. *Accord*: *Fitzwater's Appeal*, 94 Pa. 141 (1880); *McCormick v. McElligott*, 127 Pa. 230, 17 Atl. 896 (1889); *Ralston v. Truesdale*, *supra* note 27; *Shearer v. Miller*, 185 Pa. 149, 39 Atl. 846 (1898) where the Court says at 153, 39 Atl. at 850: "Jeremiah's death (the life tenant) is the important epoch in the testator's entire scheme. The point of time to which he refers the ultimate disposition of his estate, and it seems most reasonable to assume that this is the period which was in his mind when he provided for the event of Weaver's death (the remainderman) without issue"; *Souder's Estate*, 203 Pa. 293, 52 Atl. 177 (1902); *Sharpless' Estate*, 209 Pa. 409, 58 Atl. 806 (1904); *Mayer v. Walker*, 214 Pa. 440, 63 Atl. 1011 (1906); *Church v. Baer*, 236 Pa. 605, 84 Atl. 1099 (1912); *Nicholson v. Brown*, 238 Pa. 356, 86 Atl. 192 (1913); *Cross v. Dye*, 259 Pa. 207, 102 Atl. 816 (1917) *semble*; *Patterson v. Reed*, 260 Pa. 319, 103 Atl. 735 (1918); *Stark's Estate*, 264 Pa. 232, 107 Atl. 699 (1919); *Swank's Estate*, 270 Pa. 395, 113 Atl. 679 (1921); *Roop's Estate*, 274 Pa. 117, 117 Atl. 787 (1922) (held, that the remainderman's estate is contingent and does not vest unless he survives the life tenant); *Seewald's Estate*, 281 Pa. 483, 127 Atl. 63 (1924); *Hoffeditz v. Bosserman*, 282 Pa. 570, 128 Atl. 509 (1925); *Seeley v. Munger*, 297 Pa. 283, 146 Atl. 892 (1929); *Brown v. Geissler*, 25 Pa. Super. 258 (1904); *McKee v. Trust Company*, 64 Pa. Super. 199 (1916); *Stille's Estate*, 69 Pa. Super. 56 (1918); *Wildemore's Estate*, 9 Pa. D. & C. 809 (1927).

according to the intent of the testator as disclosed in the provisions of his will.”

The most recent restatement of this rule is found in the case of *Seeley v. Munger*, decided in 1929.⁴¹ It is in the cases in this group that the greatest confusion arises. The courts have not clearly differentiated these cases from the ordinary case to which *Mickley's Appeal* applies and there is an apparent conflict which, on analysis, is not at all real.

In *King v. Frick*⁴² the gift was to *A* for life, remainder to *B* and if *B* die “without children, grandchildren or wife living,” then to *X*. The court took for granted that the rule of *Mickley's Appeal* applied and decided *B* had a fee simple by reason of the fact that he had survived the testator. This decision is flatly contradictory to the cases just quoted, but it should be noticed that as a matter of fact *B*, at the time of the suit, had survived both the testator and the preceding life tenant *A*, and was entitled to a fee simple under the rule as set forth in *McAlpin's Estate*. On the facts, the case is properly decided.

Exactly the same situation arose in the case of *Palethorp v. Palethorp*,⁴³ where the facts were substantially identical and the court's decision, although correct in fact, is inconsistent in reasoning with the decision in *McAlpin's Estate*.

In *Schnebly's Estate*,⁴⁴ where the gift was to *A* for life, remainder to *B* in fee and if *B* die without issue, then to *X*, it was very properly held that the rule of *Mickley's Appeal* did not apply and that the death of *A* was the controlling factor so that if *B* survived the testator and the life tenant *A*, he would take an indefeasible estate. But the opinion of the lower court, which was affirmed in a memorandum opinion by Mr. Chief Justice Brown, arrives at this conclusion by a process of involved reasoning, apparently not recognizing the general rule applicable to such a state of facts.

⁴¹ *Supra* note 40.

⁴² 135 Pa. 575, 19 Atl. 951 (1890).

⁴³ 194 Pa. 408, 45 Atl. 322 (1900).

⁴⁴ 249 Pa. 211, 94 Atl. 825 (1915).

Attention should also be called to the case of *Hannon v. Fleidner*.⁴⁵ In this case the gift was to *A* and *B* for life, with remainder to *C* in fee and if *C* die "without lawful issue surviving," then to *X*. The important point in the case was whether the failure of issue was definite or indefinite, the will having been executed prior to the Act of 1897. It was decided that the failure was indefinite and that *C* had a fee tail in remainder, converted by the Act of 1855 into a fee simple. As an additional reason for its decision, the court states that the rule of *Mickley's Appeal* applies and that *C* would have a fee absolute if she survived the testator. The report in the Supreme Court gives no clear statement of the facts, but an examination of the paper books indicates that the testator died in 1879; that *A*, one of the life tenants, died in 1882; that *B*, the other life tenant, died in 1904, leaving *C*, the remainderman, surviving, and that the title which was in dispute in the case arose out of a deed executed by *C* to the defendant in 1905, after the death of both life tenants. The case, therefore, is properly decided, since *C* survived both the testator and the life tenants and therefore was entitled to a fee simple under the rules of *McAlpin's Estate*.

This rule, being a rule of construction, will be discarded if a contrary intention appears in the will.

In *Williams' Estate*,⁴⁶ the gift was to *A* for life, remainder to *B*, but in case *B* "shall die childless either before or after the decease" of *A* then to *X*. The court refers to the general rule applicable to such a situation, but decides that, since the testator provided for the death of *B* either before or after the death of *A*, the life tenant, the death without issue referred to the date of the death of *B*, so that *B* did not take an indefeasible estate by surviving the testator and the life tenant *A*.

In *Wettengel's Estate*⁴⁷ the gift was to *A* for life, with remainder to *B* in fee and if *B* die "either before or after my (testator's) death, without leaving issue," then to *X*. The court said:

⁴⁵ 216 Pa. 470, 65 Atl. 944 (1907).

⁴⁶ 216 Pa. 318, 65 Atl. 757 (1907).

⁴⁷ 278 Pa. 571, 574, 123 Atl. 488, 489 (1924).

“In other words, the rule of construction whereby, under some circumstances, we conclude that the testator must be taken to mean death of the legatee in his, the testator’s, own lifetime or during a life estate preceding a remainder, can have no application here, because this testator has clearly indicated by plain words that he contemplated the death of the legatees at any time, either before or after his own death, thus excluding the idea, contended for by appellant, that he meant only to provide for what should happen in the event of the death of one or more of the legatees during the continuance of the precedent life estate.”

These decisions not only carry out the testator’s intention but are the logical conclusion of the rule stated.

C. A Gift to A for Life, Remainder in Fee to B, but if A Die Without Issue, Then to X

Under this set of facts, the rule of *Mickley’s Appeal* cannot apply, since the gift to *A* is a life estate and the testator clearly intends the death without issue to take place at the period after his own death. In fact, he places it at the expiration of a life-estate, created in the will, which cannot commence until after his own death.

The logical construction of such a clause would refer the death without issue to the date of the death of *A*, the life tenant, so that the gift over to either *B* or *X* would become fixed at that time. Here no situation could arise where a gift over would be destroyed by a remainderman surviving the testator or surviving the life tenant; the testator’s intention would be strictly carried out: *A* would have a life-estate; upon the death of *A*, the person entitled to the gift over would be definitely determined, depending on whether or not *A* had issue surviving on the day of his death.

In *West v. Vernon*⁴⁸ the gift was to *A* for life, and at her death, to *B*, but if she should die “without living issue” then to *X*. It was held that *A* had only a life estate, with a definite failure of issue, and that *A* did not take a fee simple on surviving the testator.

⁴⁸ 215 Pa. 545, 64 Atl. 686 (1906).

In *Hays' Estate*⁴⁹ the gift was to *A* with power of appointment among her issue, and if she die without issue, then to *X*. *A* survived the testator and it was contended that the birth of a child gave her a fee. The court repudiated this construction and held that *A* had a simple life estate.

III. DO THE WORDS MEAN DEATH WITHOUT ISSUE SURVIVING OR DEATH WITHOUT EVER HAVING HAD ISSUE?

There is one additional problem in connection with the words "die without issue"; do these words mean death without issue living at the time of the decease of the person whose issue are mentioned or do they mean death without ever having had issue? That is, if *B* had issue who die during *B's* lifetime so that at the time of *B's* death, *B* has no issue living but at one time he had issue, has the condition been fulfilled, under which the gift over will become operative? This point is touched on in the opinion of Mr. Justice Green in *Snyder's Appeal*,⁵⁰ where he quotes the Lord Chancellor in *Pinbury v. Elkin*⁵¹ as follows:

"Secondly—another sense of dying without issue was if the party died without ever having had issue."

The point, however, was not involved in that case and there are apparently no decisions in Pennsylvania directly on the question prior to the Act of 1897.

In the recent case of *Hays' Estate*,⁵² where the gift was to *A* for life, with power of appointment among issue, and in default of issue to *X*, an analogous question was raised. A child was born to *A* and it was argued that this automatically served to change *A's* life estate into a fee.

In the language of the court:

"The argument of appellant rests on the interpretation of certain words used in that statute. In part it provides, if

⁴⁹ 286 Pa. 520, 134 Atl. 402 (1926). Accord: *Carlisle v. Carlisle*, 243 Pa. 116, 89 Atl. 873 (1914); *Mebus's Estate*, *supra* note 7; *Deeter's Estate*, *supra* note 26; *Waldron v. Wahl*, 286 Pa. 237, 133 Atl. 252 (1926); *Mayhew's Estate*, 80 Pa. Super. 404 (1923).

⁵⁰ 95 Pa. 174, 177 (1880).

⁵¹ 1 P. Wms. 563 (1790).

⁵² *Supra* note 49, at 525, 526, 134 Atl. at 403. See also *Edwards' Estate*, *supra* note 23, where the Court construes the word "or" as a conjunctive.

the will uses the words 'have no issue, or any other words which may import a failure or want of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, (these words) shall be construed to mean a want or failure of his issue in the lifetime or at the death of such person.' The conclusion is drawn that the rule of construction fixed by the act becomes inoperative if there be any children born during life. . . .

"The word 'or' as used in the clause 'in the lifetime or at the death' . . . is evidently intended as a conjunctive, and the failure of issue is to be determined as of the date when the first taker dies."

This decision would seem effectually to prevent any conflict in this branch of the problem and it may be confidently said that "die without issue" means death without leaving issue living on the day of the death of the person whose issue are concerned.

* * * * *

There is one incidental matter arising out of the use of the words "die without issue" which, although not strictly relevant to the problem we have been discussing, deserves mention.

If there is a gift to *A* for life, and if he die without issue, then to *X*, and if the testator fails to provide for any remainder after the life estate other than the gift without issue, the courts will imply a remainder to the issue and will modify the testator's will to read: "to *A* for life, and if he die without issue, then to *X*, but if he die leaving issue, then to the issue." An example of this is the recent case of *List's Estate*,⁵³ where the court states the principle as follows:

"When the income of an estate is given to one person, for a period which must certainly end, and there is no gift of the estate in remainder, save in the event of the first taker dying without issue before the expiration of the particular estate, and in fact he survives that time, or if the particular estate is for his own life and he dies leaving issue him surviving, then a gift of the estate in remainder will be implied in favor of him or his issue, as the case may be."

⁵³ 283 Pa. 255, 129 Atl. 64 (1925). See also *Beilstein v. Beilstein*, 194 Pa. 152, 45 Atl. 73 (1899).

SUMMARY

1. In bequests of personalty, the words mean a definite failure of issue.
2. In devises of realty, under wills dated prior to July 1, 1897, the words presume indefinite failure of issue and the creation of an estate tail.
3. In devises of realty, under wills dated subsequent to July 1, 1897, the words presume a definite failure of issue.
4. If there is a gift to *A* in fee, with a gift over on failure of issue, the presumed intent of the testator is a death without issue in his own lifetime, so that if *A* survives the testator, he takes a fee simple absolute. This is called the rule of *Mickley's Appeal*, and will not apply,
 - (a) if the original gift to *A* is not absolute,
 - (b) if a contrary intent can be found in the will.
5. If there is a gift to *A* for life, with a remainder to *B* in fee, and a gift over on failure of issue, the presumed intent of the testator is a death without issue prior to the death of the life tenant, so that if *B* survives the testator and the life tenant, *A*, he takes a fee simple absolute. This is called the rule of *McAlpin's Estate* and will not apply if a contrary intent can be found in the will.
6. If there is a gift to *A* for life, and a gift over on failure of issue, *A* has only a life estate and surviving the testator and having issue will not give *A* a fee.
7. "Die without issue" means death without issue surviving and not death without ever having had issue.

The future course of the construction of these words is impossible to chart. The rules now applicable seem to be fairly well defined, but it must never be forgotten that every will case offers the opportunity for our courts to adopt either the language of our present Chief Justice:

"The modern tendency of the law (is) to find and enforce the 'actual intent' in each case."

or the language of Mr. Justice Woodward:

"Artificial rules, being founded in consideration of public policy, must often frustrate the intentions of testators and it is well they should, for the law is wiser than any one man."