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PROBLEMS OF CONSTRUCTION ARISING IN THE LAW OF PROPERTY—PARTICULARLY IN THE LAW OF FUTURE INTERESTS

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INTRODUCTION

The object of this series of studies is, not to produce an elaborate treatise on the various topics to be discussed, but to call to the attention of the profession certain problems of construction arising in the Law of Property—particularly, in the Law of Future Interests. A discussion of the Pennsylvania decisions in the light of those in other jurisdictions, and particularly the common law, seems to the writer to demonstrate that in some of these situations the Pennsylvania courts have taken an erroneous view; it is his hope that, as a result of attention being called to them, the legislature or the courts will find a way to clear up the difficulties and to place the law on this subject on a more rational basis.

A. Value of rules of construction

While the problems to be discussed are in many respects entirely independent of each other, they seem to the writer to have a marked family resemblance. There are in approaching them two radically different methods of treatment. The first is to treat each case as a distinct problem in itself, and to ignore largely or

entirely the prior decisions in similar cases; this method is attractively described as "Looking at the four corners of the will for the testator's intention", and its adherents refuse to be bound by any rules which might hamper such effort. The second method is based upon two principles: The first is that it is the duty of the court "To ascertain not what the testator actually intended, as distinguished from what his words express, but what is the meaning of the words he used". Next, in order to ascertain what that meaning is, we have the *dictum* laid down by Lord Redesdale in *Jesson v. Wright*,¹ that "technical words shall have their legal effect unless from subsequent inconsistent words it is very clear that the testator meant otherwise". Concretely, these two principles mean: "Have your rules of construction and abide by them wherever possible".

The fundamental question, on the answer to which depends the correctness of these conflicting methods of approach, is whether or not in cases of this character the testator has in his mind a definite intention. If so, it is the duty of the court to ascertain it and carry it out; if not, it is a waste of time (or worse) for the court to try to ascertain it. It is submitted that, contrary to a very general assumption of certain courts in dealing with problems of this character, it is a mistake to assume that a testator who uses expressions of the kind to be considered, himself attaches an exact meaning to the words that he has used. This statement requires some elucidation. It must, of course, be admitted that the ordinary testator has a fairly definite picture in his mind of the property that he possesses and the persons whom he desires to benefit. But if, for example, he owns a particular piece of real estate which he desires to give to *A*, with, however, a *proviso* that in a certain contingency it shall go to *B*, he expresses to the draftsman of his will his general wish, and leaves to such draftsman, especially if he be a lawyer, the expression of that intent in legal form. He may, for example, tell his counsel that he wants to leave Whiteacre to *A*, but if *A* die without children, then Whiteacre is to go to *B*. When his counsel prepares a draft of the will, the testator finds some such words as these: "I give

¹ 2 Bligh 1 (1820).

and devise Whiteacre to *A* and his heirs"; he inquires of his counsel what the words "and his heirs" mean, perhaps adding that he does not intend to benefit *A's* heirs, but only *A*, and his counsel replies that by the words used he is only benefiting *A*, because the additional words "and his heirs", although they appear to the lay mind to give an interest of some kind to *A's* heirs, really give them no interest whatever, but that this is the technical way of giving *A* an estate in fee simple, and that counsel assumes that it was this kind of an estate or interest, being the greatest known to the law, that the testator desired to confer upon *A*. The testator acquiesces, but with a distinct impression that the phraseology of the law is very confusing, and that he must rely on his counsel to see that the proper phraseology is used to carry out his wishes. In the draft submitted to him, he next observes that following the gift of Whiteacre to *A* and his heirs, occur these words: "provided, however, that if *A* die without issue, Whiteacre shall pass to *B* and his heirs". At this point he may either ask counsel what he means by the expression "die without issue", and be told by his counsel (perhaps erroneously) that this is the legal way of expressing his wish that "if *A* die without children", Whiteacre shall pass to *B*; or possibly, having learned by this time that the phraseology of the law is beyond his ken, he may simply take for granted that his counsel has expressed in legal phraseology his wish that "if *A* die without children", Whiteacre shall pass to *B*, and let it go at that. To vary the illustration—in thousands of cases, land or personalty has been devised or bequeathed by a testator "To *A* for life, remainder to his heirs". It seems certain that no testator who makes such a gift has an accurate picture in his mind as to what is to happen at *A's* death; if he were asked, after executing his will, whether at *A's* death he wanted the property to pass to *A's* heirs indefinitely, or whether on the other hand he wanted the property to pass at *A's* death to *A's* heirs, so to speak, in their own right, and after their death to *their* heirs whoever they might be, he would, if accurate and truthful, doubtless reply that he knew nothing of such alternatives, and had, therefore, no preference with regard to the matter.

If these illustrations represent the real truth with regard to the intention (or lack of intention) on the part of the ordinary testator in such cases, it seems to follow that the courts in dealing with these problems of construction are mistaken in emphasizing their desire to ascertain and carry out the testator's intention; their real function in cases of this character would seem to be, not to search the four corners of the will to ascertain an intention that is not (or may not be) there, but rather to interpret the meaning of the words he actually used. As stated by Baron Parke in *Doe v. Gwilliam*:² "In expounding a will the court is to ascertain not what the testator actually intended, as contra-distinguished from what his words express, but what is the meaning of the words he used". Or again, as stated by Lord Denman in *Rickman v. Carstairs*:³ "The question . . . is not what was the intention of the parties, but what is the meaning of the words they have used". Finally, as stated by Mr. Justice Holmes in *Eaton v. Brown*:⁴ "The English courts are especially and wisely careful not to substitute a lively imagination of what a testator would have said if his attention had been directed to a particular point, for what he has said in fact".

This principle has recently been recognized by the Supreme Court of Pennsylvania in *Packer's Estate*, (No. 2) ⁵ where, quoting from *Joyce's Estate*,⁶ the court said: "It must be steadily borne in mind that it is not the province of the court to consider what the testator possibly intended, but only what intention is expressed in the language used". Professor Gray expressed this thought in his usually convincing way in his work on "Nature and Sources of the Law"; in Section 702 he said:

"When a testator has a real intention, it is not once in a hundred times that he fails to make his meaning clear . . . When the judges say they are interpreting the intention of a testator, what they are doing ninety-nine times out of a hundred is deciding what shall be done with his property on contingencies that he did not have in contemplation.

² 5 B. & Ad. 122, at 129 (1833).

³ 5 *Ibid.* 651, at 663.

⁴ 193 U. S. 411, at 413, 24 Sup. Ct. 487 (1903).

⁵ 291 Pa. 198, 139 Atl. 868 (1927).

⁶ 273 Pa. 404, at 407, 117 Atl. 90, at 91 (1922).

Now for cases in which a testator has not provided, it may be well that there should be fixed rules as there are for descent in cases of intestacy”.

The writer believes strongly in the desirability of such rules of construction—partly for the reasons above pointed out, and partly also for the reason that they tend to definiteness in the law, whereas on the other hand, if what a court is seeking for is some unexpressed intent of the testator, the decision as to that question, not being based upon any rules of construction, necessarily depends on the idiosyncracies of the particular judge who decides the case, and quite obviously forms no basis for a judgment as to how another court (or even the same court) might decide a substantially similar case in the future; indeed the courts which seek the testator’s intention, realizing that the decision reached is often not in line with decisions reached in similar cases, not infrequently use some such expression as: “This is an unusual case and must not be treated as a precedent”—thus tacitly recognizing the justice of the criticism that logically the case should have been decided differently. True it is that the rules of construction which are evolved by the courts have in many instances proved to be unsatisfactory and have either been overruled by the courts or changed by the legislatures; even so, it seems better that there should be rules as to which counsel may advise, and on the faith of which counsel may construe a will with considerable confidence as to the decision of the court, rather than to have the unsatisfactory alternative of counsel being obliged to inform his client that, there being no rules of construction applicable, the decision as to the meaning of a will must necessarily depend upon the unascertainable view that an individual judge or a particular court may take of the question. The importance of having such definite rules of construction will be illustrated many times in the course of these studies. The writer further believes that it is possible by following rules of construction to arrive at definite answers to all, or almost all, of the problems of construction to be here discussed; in other words, just as Professor Gray in his “Rule against Perpetuities” has demonstrated that that rule may be stated in almost mathematical terms, so that the application of

it is not difficult, so in the problems of construction to be discussed, the writer submits that, if proper rules of construction are followed, it is not simply a question of opinion which of two conflicting views is correct, but it is fairly susceptible of demonstration that one is correct and the other is erroneous.

B. Significance of contemporary legal conceptions as affecting rules of construction

One other factor should be mentioned at the outset as of large importance in dealing with problems of this kind, and that is the views of the day with respect to legal conceptions. In common law times, for example, when estates tail were both familiar and popular, it was inevitable that the construction given by the court to the phrase "if *A* shall die without issue" should tend to be different from the construction given to the same words at the present day when estates tail have been universally abolished; the cutting down of a fee simple previously created by the testator to a fee tail, by the use of the words "if *A* die without issue", while to the layman or even the lawyer of the present day it seems to be a far-fetched and improbable construction of such phrase, yet to the lawyer (and probably to the layman) of two or three hundred years ago, this construction must have seemed not only natural, but desirable. Or again, in the case of a gift of land to *A* for life, remainder to his heirs, the so-called rule in *Shelley's Case*,⁷ which declared that the testator has by the use of such words given *A* a fee simple, must have represented the popular verdict as to the proper construction of these words in the fifteenth and sixteenth centuries when land was seldom conveyed, and hardly even capable of being devised; obviously, under such economic conditions the testator who had given property to *A* for life with remainder to his heirs would normally have assumed that the property would pass on through *A's* heirs, and the correct legal way to accomplish this result was to give *A* a fee simple. If some courts and legislatures have shrunk from this conclusion today, and have either by judicial decision or

⁷ 1 Coke Rep. 93 b (1591).

legislative enactment done away with the rule in *Shelley's Case*, it is primarily because at the present day economic conditions have so changed that when, as the result of the rule in *Shelley's Case*, *A* is under such circumstances given a fee simple, the common understanding is that either because of his conveying it in his lifetime, or devising it by his will, the chances are small that the estate thus given to *A* will ever subsequently benefit his heirs. It is submitted that economic and social considerations of the kind suggested have a natural and proper weight in determining the proper rules of construction, and that as such economic and social factors change, the original rules of construction may be found unsatisfactory, and in that event should be changed. But there is a marked difference, of course, between changing rules of construction when circumstances require it, and having no rules of construction, or, as it is sometimes expressed, having rules of construction which are of little weight as against the supposed insight on the part of the court into the testator's mind and intention.

DYING WITHOUT ISSUE (AND SUNDRY COROLLARIES)⁸

It is proposed to start this series of studies of problems of construction relating to future interests in property with a study of what is perhaps the most familiar problem of construction known to the Law of Property. In literally thousands of cases a testator has devised or bequeathed property to *A* and his heirs with a *proviso* that if *A* "die without issue", the property shall pass to *B* and his heirs. Perhaps it may assist in the subsequent study of this problem to summarize some of the principal variations which the problem may take. There are four familiar cases:

⁸ When this study was almost completed, there appeared in (1930) 79 U. OF PA. L. REV. 15, an interesting article by Philip Werner Amram of the University of Pennsylvania Law School entitled *Pennsylvania Rules for Construction of the Words "die without issue"*. Obviously that article covers somewhat the same ground as the the present article, but the general object sought to be accomplished by this article, namely, the remedy of certain defects in the law, has rendered the treatment sufficiently different to justify the REVIEW in publishing both articles.

- (1) Gift to *A* for life, remainder to his issue.
- (2) Gift to *A* for life, remainder to his issue or children, and if he die without issue or children, then to *B* and his heirs.
- (3) Gift to *A* for life, and if he die without issue, then to *B* and his heirs.
- (4) Gift to *A* and his heirs, and if he die without issue, then to *B* and his heirs.

(There are other less important variations of the same general theme, for example, dying "without leaving any lawful issue", which was held in *Eichelberger v. Barnitz*,⁹ to be equivalent to "dying without issue".)

For the purposes of the following discussion, two other variations should be borne in mind. The first is the nature of the property; in some cases the subject matter is realty, in some cases personalty, and in some cases both. Again, in a number of cases which will be considered, the word "children" is used instead of the word "issue".

The correct construction of such expressions has caused an immense amount of litigation, and the decisions have, in the opinion of the writer, in many such cases been such that the testators, if they were aware of them, would doubtless be astounded at the results.

A. Several meanings of the word "issue"

We first proceed to an examination of several of the possible ambiguities that may arise in connection with the phrase "if *A* die without issue". The first ambiguity obviously has to do with the meaning of the word "issue" itself. This word has had a long legal history, and it is proposed to review this history briefly, not limiting the review entirely to cases of "dying without issue". Jarman in his well-known work¹⁰ starts with the proposition that:

"The word 'issue' embraces descendants of every degree whensoever existent, and unless restricted by context

⁹ 9 Watts 447 (Pa. 1840).

¹⁰ 2 JARMAN, WILLS (6th Am. ed. 1893) *1257 (p. 403).

cannot be satisfied by being applied to descendants at a given period. The only mode by which a devise to the issue can be made to run through the whole line of objects comprised in the term is by considering it as a word of limitation synonymous with 'heirs of the body'; by which means an ancestor takes an estate tail; an estate capable of comprising in its devolution, though not simultaneously, all the objects embraced by the word 'issue' in its largest sense";

he adds, however, that :

"If there be on the face of the will sufficient to show that the word was intended to have a less extensive meaning and to be applied only to children or to descendants of a particular class or at a particular time, it is to be construed as a word of purchase and not of limitation".¹¹

The quotation from Jarman emphasizes two familiar facts: first, that the word "issue" has two possible meanings, either "heirs of the body" or "children", and secondly, that according to the common law its *prima facie* meaning was the more extensive one, *i. e.*, "heirs of the body". It follows, therefore, as Jarman points out,¹² that a "devise to a person and his issue, confers an estate tail; and it may be observed that such a devise is not (as is a devise to a person and his children) dependent on, or, it seems, in the least degree influenced by, the fact of there being or not being issue of the devisee living at the date of the will (or at any other period)". It is further pointed out:

"... that a devise to A *and his issue living at his death* creates an estate tail in A. In such a case it is clear that the issue cannot take as joint tenants with him since the objects are not ascertainable until the death of the parent. It is only through him that they can become entitled, and the case falls, therefore, within the principle of the Rule in Wild's Case, namely that the parent must take an estate tail in order to let in the other objects".¹³

Rule in Wild's case: In passing, an interesting analogous problem grows out of the not uncommon devise or conveyance "to A

¹¹ *Ibid.* n. 1.

¹² *Ibid.* *1258 (p. 404).

¹³ *Ibid.* *1259 (p. 405).

and his childdren", and a short study of it may throw some light on the main problem under consideration. It is, of course, well settled that a devise or conveyance to *A* and his heirs, or to *A* and the heirs of his body, gives nothing to the heirs or the heirs of the body; these words are treated as merely descriptive of the estate given to *A*, who in the first instance takes an estate in fee simple and in the second an estate in fee tail. This familiar thought is commonly expressed by saying that in these expressions the words "heirs" or "heirs of the body" are not words of purchase, but are words of limitation, meaning, of course, that they limit or define the *quantum* of the estate in *A*. The authorities above cited¹⁴ show that the same result follows where the conveyance or devise is "to *A* and his issue"; at least if there be no context which requires the word "issue" to be otherwise construed, it is treated as equivalent to "heirs of the body" (which is, of course, its *prima facie* meaning); the word "issue", therefore, becomes a word of limitation and *A* takes an estate in fee tail precisely as if the conveyance or devise had been to *A* and the heirs of his body.

The primary problem in the case of a conveyance or devise to *A* and his children may, therefore, be stated to be "Is the word 'children', like the word 'heirs' or 'heirs of the body' or 'issue', to be treated as a word of limitation, defining the extent of *A*'s estate, or is it *per contra* to be treated as a word of purchase, giving some interest to *A*'s children?" The common law gave a double answer to this question. In *Wild's Case*,¹⁵ this distinction is taken:

"(1) If *A* devises land to *B* and to his children or issue, and he hath not any issue at the time of the devise, the case is an estate tail, for the intent is manifest and certain that his children or issue should take, and as immediate devisees they cannot take because they are not *in rerum natura*, and by way of remainder they cannot take, for that was not his intent for the gift is immediate; therefore, then such words shall be taken as words of limitation.

(2) But if a man devises land to *A* and his children or issue and he then has issue, his express intent may take effect according to the rule of Common Law, and no manifest and

¹⁴ *Supra* notes 10, *et seq.*

¹⁵ 6 Coke 16 b (41 Eliz.).

certain intent appears to the contrary, and therefore in such case they shall have a joint estate for life".

The following comments may be made on the above statement: (1) That evidently in the foregoing statement the word "issue" or "issues" means "issue" or "issues" only when the context shows that "issue" meant "children" and not "heirs of the body"; in other words, the rule does not apply to a simple gift to *A* and his issue. (2) That the first resolution above quoted is another illustration of the common law preference for an estate tail; certainly for centuries there has been no reason why children cannot take by way of remainder, and it is somewhat evading the question to say that "that was not his (the testator's) intent for the gift is immediate". At least in certain courts doubt has been raised as to whether the gift is "immediate". (3) The second resolution in effect declares that if there are children, the word "children" is not to be treated as a word of limitation, but on the contrary *A* and the existing children shall take a joint estate for life; it is the first judicial step in the direction of recognizing that the word "children" may not be a word of limitation; assuming this, and remembering that at common law *A* in such a case only took a life interest, it was a not unnatural inference of the common law that *A* and his children shall take some kind of a life interest together, and the favored form of holding together according to common law conceptions was the joint estate. An effort will now be made to trace the further development of this so-called rule in *Wild's Case*, both in the English decisions and in the various courts of this country.

Examining first the second resolution in *Wild's Case* (dealing with the situation where *A* has children) the weight of modern authority both in England and in this country favors the view that, as stated in *Wild's Case*, the parent and the children take concurrently; true, as stated by Lord Cranworth in *Byng v. Byng*,¹⁶ this is only a *prima facie* rule of construction, but as a matter of fact in most cases there is little or nothing to alter the *prima facie* meaning of the words. Numerous cases supporting this *prima facie* meaning may be found in the reports not only of the English

¹⁶ 10 H. L. Cas. 171, at 178 (1862).

courts, but of many states including Alabama, Massachusetts, New Jersey, New York, North Carolina, Virginia, etc. Doubtless under modern rules as to the extent of estates created by will, *A* and his children may take a joint estate in fee instead of a joint estate for life, and doubtless also in different jurisdictions where the preference for joint estates has disappeared, the estate of *A* and his children may be a tenancy in common instead of a joint estate. However, in the main in most jurisdictions the second resolution in *Wild's Case* is, subject to the above-mentioned qualifications, still in force. Creeping through these decisions has, however, been the thought that it may not take much additional light from the context to produce the quite different result of giving *A* a life interest followed by a remainder to his children. In *Wills v. Foltz*,¹⁷ after a life interest to one *X*, the testator bequeathed the balance of his property "To *A*, *B* and *C* and their children"; *A*, *B* and *C* were the illegitimate children of the testator by *X*. At the time of the testator's death *A* had three children, *B* had five children and *C* had four children with one more born after the testator's death. *A* was the only one who was married *at the date of the will*, and at that time she had two children. The lower court held that the three daughters and their children took a joint estate in fee *per capita* and *A* appealed. The decree was affirmed by the Supreme Court which followed the resolutions in *Wild's Case* and held that under the modern statute the concurrent estate taken by the three daughters and their children was a fee simple. The judge who rendered the opinion admits that this may not have been the testator's intention: "he thought it either would confer on his daughters a fee or life estate".¹⁸ But, he held that under the weight of authority he could not reach any other conclusion.

A quite different conclusion has, however, been reached in at least the two states of Kentucky and Pennsylvania. In the leading case of *Rice v. Klette*,¹⁹ it is said: "Under the more recent decisions of this court where there is nothing in a deed or will to show a contrary purpose, the rule is to hold an estate deeded or devised

¹⁷ 61 W. Va. 262, 56 S. E. 473 (1907).

¹⁸ *Ibid.*

¹⁹ 149 Ky. 787, at 791, 149 S. W. 1019, at 1021 (1912).

to a man and his children or to a woman and her children as a life estate to the first taker with remainder to the children". In these cases it is urged that especially where *A* is a son or daughter or wife of the testator, there is a strong presumption arising from this relationship that the testator's intention was to give the parent an estate for life only—with the added argument in the case of the wife that it is improbable that the testator wanted her to have the right to pass her share to some stranger in blood.²⁰

In Pennsylvania in *Graham v. Flower*,²¹ the two resolutions in *Wild's Case* were cited with approval, and both in that case and in *Shirlock v. Shirlock*,²² the second resolution, namely, the concurrent gift to the parent and child (when there were children in existence), was followed. The court in *Graham v. Flower* flatly declined to uphold the opposing contention (that *A* took a life estate) saying: "This is a conjecture which possibly may be right, but no such intent is expressed. On the contrary there is a plain, direct and immediate devise of one-sixth to each niece and her children, their heirs and assigns."²³ In *Coursey v. Davis*,²⁴ however, it was decided that a grant *by deed* to a woman and her children (there being children in existence at the time) vested in her a life estate with a remainder in fee to the children as a class, and in *Hague v. Hague*,²⁵ a gift by will to *A* and her children was held to create a life estate in *A* with remainder in fee to her children, *Shirlock v. Shirlock* being in terms overruled. In the leading case of *Chambers v. Union Trust Co.*,²⁶ the devise was to a nephew, *A*, and his children—with a further provision in case he should die without issue, which is immaterial to the question under consideration. The Supreme Court discussed in terms whether the first resolution in *Wild's Case* still applied, (there having in fact never been any children born to *A*, who despite this fact claimed [under the first resolution in *Wild's Case*] a fee tail, con-

²⁰ See *Hood v. Dawson*, 98 Ky. 285, 33 S. W. 75 (1895).

²¹ 13 S. & R. 439 (Pa. 1826).

²² 5 Pa. 367 (1847).

²³ *Supra* note 21, at 440.

²⁴ 46 Pa. 25 (1863).

²⁵ 161 Pa. 643, 29 Atl. 261 (1894).

²⁶ 235 Pa. 610, 84 Atl. 512 (1912).

verted by the Act of 1855²⁷ into a fee simple). The Supreme Court in terms held that the first resolution in *Wild's Case* was not the law in Pennsylvania:

"For the reason upon which it rests fails because of the different interpretation which we place upon a devise to a parent and his children . . . The theory [of the first resolution] was that if there were no children in existence at the time of the devise, the provision in their favor would fail altogether unless the parent were given a fee tail; hence and for that reason alone the first resolution. But with us, where the children take in remainder, it is immaterial whether they are or are not in existence at the time of the devise or at the time of the death of the testator. . . . Therefore, it is not necessary to give an artificial meaning to the devise in order to care for the interests of the children, and there is no apparent reason for adhering to the first resolution in *Wild's case*".²⁸

The net result, therefore, is that under the law of Pennsylvania today, if an estate is given to *A* and his children, *A* takes a life estate with remainder to his children, regardless of whether there are any children in existence at the date of the testator's death or not.

The question arises whether in this recent departure by the courts of Kentucky and Pennsylvania, the law has really come closer to carrying out the testator's intention. The recent development has been referred to with approval in a few English cases such as *In re Jones*.²⁹ The objection to applying at least the first resolution (where *A* has no issue) to gifts of personalty seems formidable, namely, that the effect of the application of the rule is to give *A*, the parent, an absolute interest. While in the earlier English cases like *Stokes v. Heron*³⁰ it was taken for granted that the resolution did apply to gifts of personalty, in more recent cases like *In re Wilmot*³¹ and *In re Jones*,³² it seems to be taken for

²⁷ P. L. 368.

²⁸ *Supra* note 26, at 615, 84 Atl. at 514.

²⁹ [1910] 1 Ch. 167. See also HAWKINS, WILLS (1st ed. 1863) Appendix 2 ii, 316.

³⁰ 12 Clark & F. 161, at 183 (1845).

³¹ 103 L. T. R. 37 (1897).

³² *Supra* note 29.

granted that it does not. Restricting the rule, therefore, to gifts of real estate, the question may be summarized in this simple way. Has the court the right to assume from the fact of a gift being made to *A* and his children that the testator intends that *A* should have a life estate only, and that the children should have the ultimate remainder? No one can deny that the use of the phrase is so vague that it is *possible* that the testator may have had such meaning; on the other hand, it may be said with a good deal of force that if he had, it is only the most ignorant of lawyers or conveyancers who would have failed in drawing the instrument to make this intent clear. The case seems to the writer to be an admirable illustration of the wisdom of the rule which declares that the duty of a court is simply to construe the language used, and not to consider some possible intention not expressed by the testator. If this principle is sound, and the writer earnestly believes that it is, it would be wiser for the courts to follow the resolutions in *Wild's Case* (of course adapting them to modern conditions with respect to the quality of the estate in *A* and the children, and also whether there should be a life estate or fee simple) rather than to jump at a conclusion, which, however possible, is certainly not in terms stated by the testator, namely, that *A* is only to have a life estate.

The courts are doubtless right in scrutinizing the will to see whether there are other circumstances from which an inference of life estates and remainders may possibly be drawn, but in the absence of such other circumstances, the essential principle of the resolutions in *Wild's Case* seems to be sound and should be followed by the courts today. According to this view, *Chambers v. Union Trust Co.*³³ was wrongly decided; the nephew should have been held to take a fee tail, (enlarged by the Act of 1855 into a fee simple); this being the correct meaning under the rule in *Wild's Case* of the gift to the nephew and his children, manifestly the further provision "in case he should die without issue" did not affect the decision. If under the rule in *Wild's Case* the gift "to the nephew and his children" should be construed as

³³ *Supra* note 26.

meaning a gift "to the nephew and his issue"—in other words, if "children" is, under the rule in *Wild's Case*, equivalent to "issue", it is manifestly absurd for the further expression "if he die without issue" to be construed to mean a definite failure of issue; on the contrary, "children" in the former clause of the will having been construed as a word of limitation, "issue" in this later clause must equally be so construed—with the net effect, therefore, that the nephew got a fee tail (now enlarged into a fee simple) free from any divesting contingency.

The following statute would accomplish the result of restoring the Pennsylvania Law to its earliest form, incorporating, however, the principle of the Act of 1855 assimilating estates tail with estates in fee simple:

"That in any deed or will executed after the date of this Act, an estate given to *A* and his children shall be held to create an estate in fee simple in *A*, regardless of whether *A* had children or not at the date of the instrument, or at the date of the testator's death, unless it appears from other language in the deed or will that the grantor or testator intended to create some different estate or estates."

Several meanings of the word "issue" (continued): Still another familiar case illustrating the *prima facie* meaning of the word "issue" is the case of a devise to *A* for life with remainder to his issue; it is, of course, quite clear that *prima facie* under the rule in *Shelley's Case*, *A* takes an estate tail, and for precisely the same reason, namely in order that the estate may pass on from *A* to his descendants—which it could not do if the rule in *Shelley's Case* did not give *A* an estate tail.

The application of this *prima facie* meaning of the word "issue" in the case of gifts of personalty should be briefly noted. In case of gifts of personalty as well as in the case of gifts of realty to *A* and his issue, "issue" *prima facie* means "heirs of the body", and therefore the same estate is given to *A* and the heirs of his body. Inasmuch, however, as in the case of personalty the law does not recognize estates tail, and inasmuch, therefore, as words which in the case of realty would have conferred an estate tail upon *A*, in the case of personalty confer an estate in fee simple

(or absolute estate) upon him, it follows that a gift of personalty to *A* and his issue gives *A* an absolute interest in the personalty;³⁴ but it is important to note that this result is not reached by treating the word "issue" as any less a word of limitation than in the case of a gift of realty, but simply, as above pointed out, because of the fact that the Law of Property never recognized the possibility of an estate tail so far as personalty is concerned.

The *prima facie* meaning of the word "issue", however, will readily yield if the testator so desires. As Jarman says:³⁵

"If the testator annexed to the gift to the issue, words of explanation indicating that he uses the term 'issue' in a special and limited sense, it is, of course, restricted to that sense", citing cases in which by context "issue" is explained to mean "children", and other cases in which by the context "children" is held to mean "issue".

It is not deemed necessary to elaborate this familiar thought.

B. Meaning of the word "issue" in Pennsylvania

As stated by a recent writer: "The same conditions which impelled the English Courts to make this rule existed in Pennsylvania, and the courts here adopted it",³⁶ citing numerous cases including the leading case of *Eichelberger v. Barnitz*.³⁷ In other words, under the common law of Pennsylvania as under the common law of England, the word "issue" *prima facie* means "heirs of the body" and not "children", though the opposite meaning will, of course, be given to it if the language of the will shows that the testator used the words in such restricted sense; the practical consequence, therefore, is that where the word "issue" is given its *prima facie* meaning, many cases in Pennsylvania held that in the case of a gift to *A* and his issue, the first taker got an estate tail; numerous illustrations also could be cited where this consequence followed from a devise to *A* and if he die without issue to *B*,³⁸ and also from a devise to *A* for

³⁴ 2 JARMAN, *op. cit. supra* note 10, *1371 (p. 508).

³⁵ *Ibid.*

³⁶ Madden, *Death Without Issue* (1930) 3 PENNA. B. ASSOC. Q. 28, at 29.

³⁷ *Supra* note 9.

³⁸ *Sharp v. Thompson*, 1 Whart. 139 (Pa. 1836).

life with remainder to his issue,³⁹ and others not necessary to enumerate.

C. Meaning of "dying without issue (or children)"

The word "issue" is not the only ambiguous word in the expression "dying without issue". Considerable ambiguities may arise with respect to the meaning of the word "without", especially when used in such expressions as dying "without children" or "without issue". Of course, the testator may so define the word as to leave no room for difficulty. He may, for example, make a gift to *A* with a gift over "if *A* die without ever having had children (or issue)", or again "without children (or issue) surviving him". There is no difficulty in interpreting either of these expressions, but suppose he says simply "If *A* die without issue (or children)"; what does that mean? There are four possible meanings:

- (1) Without ever having had issue (or children).
- (2) Without issue (or children) surviving him (definite failure).
- (3) When (in the case of issue only) all the issue of all generations have expired (indefinite failure).
- (4) Without issue (or children) in the lifetime of the testator only (substitutionary theory).

We now inquire which of these possible meanings of the expression "dying without issue (or children)" the law has given to the four similar forms of this problem as set forth earlier in this article.⁴⁰

1. The first of these was a gift to *A* for life, remainder to his issue. This requires no further discussion. As above pointed out,⁴¹ in such case in the absence of any explanatory language, where the word "issue" is construed as equivalent to "heirs of the body" the rule in *Shelley's Case* applies with the result that *A* takes a fee tail—remembering, of course, that in many juris-

³⁹ *Haldeman v. Haldeman*, 40 Pa. 29 (1861).

⁴⁰ *Supra* p. 392.

⁴¹ *Supra* p. 392 *et seq.*

dictions in the United States, fees tail have been abolished, and that under such statutes *A* would take a fee simple instead of a fee tail (as in Pennsylvania), or *A* would take a life estate with some kind of remainder, whether vested or contingent, in his children or issue (as in Illinois and many other states). Obviously, therefore, whatever complications may follow in the case of the three remaining forms of the problems which contain the words "if *A* die without issue", no such complications follow in the case of the first form of the problem where there is a simple gift to *A* for life, remainder to his issue.

2. The second of these three was a gift to *A* for life, remainder to his issue (*or children*), and if he die without issue (*or children*), then to *B* and his heirs. In this case, if the remainder be to children, (or if issue be construed as equivalent to children), the problem that arises in the third and fourth with respect to *the quantum of the estate of A* does not exist; *A* has a life estate only.⁴²

Indeed, it may be said that in such cases the only real problem is the correct construction in the case before the court of the words "children" or "issue". Of course, these two words *prima facie* have quite distinct meanings, "children" *prima facie* meaning only the descendants of the first generation, and "issue", as above pointed out, *prima facie* including descendants of all subsequent generations. The gift to *A* for life, remainder to his children, therefore, creates a life estate in *A* with a remainder that will vest in the children when born, whereas a gift to *A* for life, remainder to his issue, if issue be construed as including all descendants, gives *A* an estate tail in order that his descendants

⁴² This was decided in *Beckley v. Reigert*, 212 Pa. 91, 61 Atl. 641 (1905), where the remainder was to the issue; *West v. Vernon*, 215 Pa. 545, 64 Atl. 686 (1906), where the remainder was to "her children should she have any living, and in case she died without leaving issue, then" over; *Lewis v. Link Belt Co.*, 222 Pa. 139, 70 Atl. 967 (1908), where the devise was to a husband for life and thereafter to a stepson (and daughter) for life: "But in the event of his (or her) death leaving issue, said real estate shall go to said issue absolutely and in fee, but in the event of the death of (the beneficiaries) without issue", then over. In all of these cases it was contended on behalf of the first takers that their life estates were enlarged by the clause "in the event of their death without issue" into a fee tail (enlarged again by the Act of 1855 to a fee simple), but in all of them the Supreme Court held to the contrary.

for all generations may participate. Pursuing the illustration a step further, a gift to *A* for life, remainder to his children, and if he shall die without children to *B* and his heirs, creates two alternative remainders to take effect at *A*'s death, one in favor of his children if he have any, and the other in favor of *B*. If the devise is to *A* for life remainder to his issue, and if he die without issue then to *B* and his heirs, if issue be construed as including all descendants, *A* takes a fee tail and *B* (at common law) a remainder after a fee tail. Quite often the two words are both loosely used, as for instance in cases like *West v. Vernon*⁴³ where there was an original remainder to children with a subsequent gift over in case *A* die without issue, and on the so-called referential theory it was held that the testator doubtless meant to designate the same class when he created the remainder in favor of the children. To put the case quite simply, in a case of a gift to *A* for life remainder to his children, there is no question but what the rule in *Shelley's Case* does not apply, and that *A* gets a life estate with remainder to his children, nor is *A*'s estate enlarged by the further clause "if *A* die without children then to *B* and his heirs". On the other hand, in the case of a gift to *A* for life remainder to his issue, the rule in *Shelley's Case* does apply, and *A* takes an estate tail, and the further clause "if *A* die without issue" does not affect the prior estate tail to *A*, but simply gives *B* a remainder after an estate tail.

The critical factor in case No. 2⁴⁴ is *the gift to the children* (or issue construed as meaning children). Wherever there is such direct gift to the children (or issue) vested in them either at birth or on some other contingency, there is a distinct tendency in the decisions (in the interest of such children or issue) to interpret the subsequent clause "if *A* die without children (or issue)" as meaning "without ever having had such children or issue"—with the result, therefore, that the interest which had originally vested in the children or issue is not divested by the subsequent death of the life tenant, even if at the time of his death he leaves no children or issue surviving him. Indeed, in

⁴³ *Supra* note 42.

⁴⁴ *Supra* p. 392.

*Treharne v. Layton*⁴⁵ even the phrase "dying without *leaving* children or issue" was construed to mean "dying without ever having had children or issue" in the interest of such children or issue.⁴⁶

Attention also perhaps should be called at this point to the fact that where the so-called substitutionary interpretation of the expression "dying without issue" prevails, (a matter shortly to be discussed), such construction, if adopted in a particular jurisdiction, may apply even to the case now under consideration. For example, in *Hogg's Estate*,⁴⁷ a testator bequeathed a part interest in his farm to a granddaughter, and "In case of the death of the granddaughter without an heir", to third persons. The question being whether the granddaughter took more than a life interest, the Superior Court held that she took a fee. They held that the word "heir" in the expression "dying without an heir" must mean "heirs of the body" or "issue", and after holding that if the testator intended to provide for an indefinite failure of issue, the daughter of course, took an estate in fee simple at the present time, said that even if it were a definite failure of issue (under the substitutionary view) such expression as "if he (the first taker) die without children," or the like, must be construed as referring to that event occurring in the lifetime of the testator only—with the result that in that event also the granddaughter took a fee simple.

3. The third case⁴⁸ was a gift to *A* for life, and if he die without issue, then to *B* and his heirs. The preliminary inquiry is whether "issue" is used in the sense of "descendants" or in the sense of "children"; this question is to be discussed and decided in the light of the principles heretofore laid down.⁴⁹ Assuming that in a particular case it be decided in favor of the meaning "children", it is obvious that if *A* dies without children, the prop-

⁴⁵ L. R. 10 Q. B. 549 (1875).

⁴⁶ See KALES, FUTURE INTERESTS (1920) 630-632; THEOBALD, WILLS (8th ed. 1927) 790-791.

⁴⁷ 27 Pa. Super. 429 (1905).

⁴⁸ *Supra* p. 392.

⁴⁹ *Supra* p. 392 *et seq.*

erty passes to *B*; the testator, however, has not specified what shall happen if *A* dies leaving children. There are two possible constructions. The first is that the testator not having made any express gift to the children, the children take nothing and the estate passes at *A*'s death leaving children under the residuary clause or to the testator's heirs. The common law is quite clear that this is the correct conclusion.⁵⁰

Many American courts, however, hold to the contrary, on the ground that though there is no express gift to the children, a gift to the children must be implied, as otherwise the purpose of the testator to make a further provision only if there were no children would be meaningless.

In Pennsylvania, it is frequently stated that a gift to the issue will be implied. In *Beilstein v. Beilstein*,⁵¹ a testator left a piece of real estate to his daughter "as long as she lives, but should she die without leaving a family", then over. She died unmarried and without issue, leaving a will by which she devised the property to the defendant, who was her mother. In an action of ejectment by the devisees over, the Supreme Court affirmed a judgment below for the defendant, saying: "The devise over in case Gertie should die without leaving a family is an implied devise to her family if she should leave one. It is only if she does not that the devise over is to take effect, and there is the necessary implication that in the other unexpressed contingency of her leaving a family, the estate is to go to them".⁵² Although, apparently, under this statement the estate would have gone to her children or descendants if she had left any, the Supreme Court nevertheless construed the word "family" as equivalent to descendants, and held that the daughter, therefore, took a fee tail which under the Act of 1855 was enlarged to a fee simple. The apparent contradiction should be noted that whereas in the passage quoted from the opinion it is stated in terms that there was "an implied

⁵⁰ I JARMAN, *op. cit. supra* note 10, at *674 (p. 697).

⁵¹ 194 Pa. 152, 45 Atl. 73 (1899).

⁵² *Ibid.* at 154, 45 Atl. at 74.

devise to her family", yet the ultimate conclusion reached is not (as one would expect) that, there being no family, the estate passed to the devisees over, but quite to the contrary that the daughter's original life estate was enlarged to a fee tail by virtue of what the court has previously described as an implied gift to the family. Apparently, the learned court fell into an error; if, as the decisions seem to hold, the word "family" in the case in question is construed as equivalent to descendants, it of course was properly held that the daughter took a fee tail enlarged by the Act of 1855 to a fee simple, but it seems hardly accurate in such case to speak of an implied gift in favor of the family or descendants. However, the Court has several times since then reiterated that in such cases there is an implied gift in favor of the issue or family.⁵³

The writer's comment on the two conflicting views as to whether a gift to the issue or children should be implied or not in such cases will be reserved for a later paper in which he will discuss the propriety of implying estates from a broader viewpoint.

Assume, however, that in case No. 3⁵⁴ the expression "if *A* die without issue" be construed as meaning "when his descendants shall expire". Manifestly, in such case, in spite of the informality of the language employed, *A*'s life estate is enlarged

⁵³ For instance, in *English's Estate*, 270 Pa. 1, 112 Atl. 913 (1921), where, however, there was a direct gift after the daughter's death to her issue the Court says at page 6, 112 Atl. at 915, by way of *dictum* only: "In a will when the average person says that he gives an estate to *A* for life and if *A* shall die without issue, then the estate shall go to *B*, most often the intention is that at *A*'s death if he has any children then living, they shall take the estate in fee, and if not, *B* shall have it"; this is a very direct statement that a gift shall be implied in favor of the children, with no suggestion that the indirect effect of so implying it is to create an estate tail in the life tenant, and thereby cut out the children (as was the result in *Beilstein v. Beilstein*, *supra* note 51). Finally, in the recent case of *Martin v. Grinage*, 289 Pa. 473, 137 Atl. 676 (1927) the Court says, on page 489, 137 Atl. at 682: "Where a devisee is given merely a life estate with a provision that on his death at a definite time without heirs or issue or children, as the case may be, the property is to go over to others, the dying without issue provision is usually read as implying a remainder in the life tenant's issue, heirs or children if he leaves any"—another plain statement in support of the implication of an estate in favor of the issue or children, as the case may be.

⁵⁴ *Supra* p. 392.

unto a fee tail, and *B*'s estate instead of being an executory devise contingent on *A*'s dying without children, becomes an ordinary remainder after a fee tail.

As above pointed out, this was the view that the Supreme Court took in *Beilstein v. Beilstein*; ⁵⁵ the decision was that the daughter took an estate in fee tail enlarged by the Act of 1855 into a fee simple—which was correct if the expression “should she die without leaving a family” is equivalent to “should she die without issue”. The only difference, in case the subject matter is personalty, is that though in the eyes of the common law the testator's purpose was the same, yet as the common law did not permit an estate tail in the case of personalty, *A* took a fee simple or absolute estate (precisely as he would if the personalty had been bequeathed to *A* absolutely), and the attempted remainder to *B* after the absolute estate to *A* failed, precisely as if a testator gave real estate to *A* and his heirs, remainder to *B* and his heirs, the remainder to *B* would fail because, having given the fee simple to *A*, there was in the eyes of the common law nothing left to give to *B*.

4. There remains for consideration the most familiar type of cases of this general character, namely No. 4, the gift to *A* and his heirs, and if he die without issue, then to *B* and his heirs. Here again the whole problem is substantially solved when the court has arrived at the proper construction of the word “issue”. If (and this, of course, is its *prima facie* meaning) the word “issue” be construed as equivalent to “heirs of the body”, it is quite settled that *A* takes a fee tail (enlarged by the Act of 1855 into a fee simple), and *B* takes a vested remainder after a fee tail (rendered of no value by the same Act of 1855 because after a fee simple in *A* there is nothing left for *B*). If, on the other hand, the word “issue” be construed as equivalent to children, *A*, of course, takes a fee simple with an executory devise over in favor of *B*, if *A* dies without children. This very brief statement will be fully elaborated in the study which follows of estates tail in Pennsylvania.

⁵⁵ *Supra* note 51.

D. Estates tail in Pennsylvania

It is, of course, familiar to Pennsylvania lawyers that estates tail were introduced into this country in general, and in particular to the state of Pennsylvania, along with the other estates known to the common law. Not only estates tail themselves, but some of the more remarkable qualities pertaining to estates tail were so introduced, particularly the possibility of barring remainders following estates tail by the familiar proceedings known as fines and common recoveries. Many cases may be found in the early Pennsylvania reports in which such remainders after estates tail were barred and the estates tail thereby converted into estates in fee simple.⁵⁶

The essential idea of an estate tail, namely, an estate which would pass from *A* down through his descendants indefinitely is, however, of doubtful value under modern social and economic conditions. However appropriate in a country like England where the oldest son inherits to the exclusion of younger sons and daughters, it is of doubtful value in a country like the United States where all sons and daughters inherit equally.⁵⁷ Again, the conception of an estate tail was more practical in the fifteenth century when a man's property was not liable for his debts, than it is in the twentieth century when the opposite principle is taken for granted. Changing notions both with respect to the laws of inheritance and also with respect to seizure of property for the debts of either a living or deceased owner have naturally served to cast doubt upon the desirability of the old estate tail, and in most of the states of this country statutes have been passed, the effect of which is to do away with estates tail after the passage of the statute. The earliest statute of this character was in the state of New York.⁵⁸ In New York, and many states which followed its lead, the effect of such statutes is that "the estate tail is changed into a fee which will become a fee simple absolute if the first taker

⁵⁶ *Dunwoodie v. Reed*, 3 S. & R. 435 (Pa. 1817); *Lyle v. Richards*, 9 S. & R. 322 (Pa. 1823); *Carter v. McMichael*, 10 S. & R. 429 (Pa. 1823).

⁵⁷ Although in Pennsylvania estates tail (where they still exist) pass as at common law, and not according to the statutory rules of inheritance: *Reinhart v. Lantz*, 37 Pa. 488 (1860).

⁵⁸ Laws of 1782, c. 2; Laws of 1786, c. 12.

is survived by issue, but if he dies without issue, his estate in fee ends and goes over to the person named as remainderman".⁵⁹ In other states again: "The estate tail is changed into a life estate in the first taker with the remainder in fee simple to his child or children".⁶⁰ In other states again: "Every estate given in fee tail shall be an absolute estate in fee simple to the issue of the first donee in tail, the estate tail in the donee being changed into an estate in fee simple in the issue of such donee on his death".⁶¹ In Pennsylvania the Act of April 27, 1855,⁶² provides in effect that all gifts, conveyances or devises made thereafter which would theretofore have created estates tail should thereafter create fees simple. In Pennsylvania, since 1855, therefore, it is quite clear that if an estate be devised to *A* and the heirs of his body, or to *A* and his issue, or to *A* for life with remainder to his issue, by force of the statute *A* takes a fee simple, and of course any attempted remainders following such fee simple are simply null and void. There is, however, a class of cases in which this statute has been applied where the result does not seem to be satisfactory. Take, for example, the familiar gift to *A* and his heirs, and if he die without issue then to *B* and his heirs; prior to the Act of 1855, as above pointed out, it was quite well settled in Pennsylvania (as elsewhere) that the effect of the words "if *A* die without issue" was to reduce the fee simple previously conferred upon *A* to a fee tail, and to give to *B* a remainder following the expiration of the estate tail in *A*.⁶³ After the Act of 1855, as a result of the same reasoning, the Court held that *A* had a fee tail which by the Act of 1855 was changed to a fee simple, and that therefore *B*'s remainder after *A*'s fee tail was null and void.⁶⁴

⁵⁹ WALSH, REAL PROPERTY (2d ed. 1927) 153.

⁶⁰ *Ibid.* citing the New Jersey statute and decisions.

⁶¹ *Ibid.* citing Connecticut and Ohio statutes.

⁶² *Supra* note 27.

⁶³ Sharp v. Thompson, 1 Whart. 139 (Pa. 1836).

⁶⁴ Hackney v. Tracy, 137 Pa. 53, 56, 20 Atl. 560 (1890), where counsel argued: "We must still determine what estate the devisee would take independent of the act [of 1855], and if that estate be a fee tail, the Act converts it into a fee simple"—which argument was tacitly adopted by the Court though the Act itself was not mentioned in the opinion; Jones v. Gulf Refining Co., 295 Pa. 92, 144 Atl. 895 (1929).

E. Act of July 9, 1897, P. L. 213

It is submitted that these cases were wrongly decided; the framers of the Act of 1855, while they intended to abolish estates tail that were created in terms, could hardly have intended to apply the statute to cases where the estate tail was not a direct creation of the testator, but an indirect deduction from the language employed by him; it is believed that to apply the Act of 1855 to the case of a gift to *A* and his heirs and if he die without issue to *B* and his heirs (*thus entirely nullifying the intended gift to B and his heirs*) is highly undesirable—whatever the correct construction of the expression “if he die without issue” before the Act of 1855, it should certainly, after the passage of that Act, have been construed to mean a definite failure of issue at *A*’s death. The injury to *B*’s interest which resulted from applying the Act of 1855 to this case was so serious that by the Act of July 9, 1897⁶⁵ (restricted to wills by the Act of June 17, 1917)⁶⁶ words in a will thereafter executed relating to death without issue “or any other words which may import either a want or failure of issue of any person in his lifetime, or at 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 an indefinite failure of his issue, unless a contrary intention shall appear by the will in which such devise or bequest is made”. This act was applied to a gift to *A* and his heirs, but if “he should die without lawful issue”, to *B* and his heirs in *Smith v. Piper*,⁶⁷ with the result that instead of *A* receiving a fee simple absolute (as in *Hackney v. Tracy*⁶⁸) it was held that the limitation over to *B* was valid by way of executory devise, and that *A* could not convey a fee simple so long as she was without issue.

In passing, the language of the Act of 1897 (as modified by the Act of 1917) is taken *verbatim* from the English Wills Act.⁶⁹ It is an interesting speculation why such an obviously necessary

⁶⁵ P. L. 213.

⁶⁶ P. L. 403, § 14.

⁶⁷ 231 Pa. 378, 80 Atl. 877 (1911).

⁶⁸ *Supra* note 64.

⁶⁹ 7 WM. IV & 1 VICT. c. 26, § 29 (1837)

change (which was made in England as early as 1837) should have failed to be followed in Pennsylvania until sixty years later, especially as the Act of 1855, as above pointed out, much aggravated the difficulties which the common law rules of construction, preferring an indefinite to a definite failure of issue, had caused.

The "equity" of the Act was successfully invoked in *English's Estate*,⁷⁰ where, citing it, the Court held that in the case of a gift to *A* for life, remainder to her issue, (with a gift over if there were no issue) *A* had only a life estate (though prior to the Act of 1897, under the rule in *Shelley's Case*, *A* would probably have had an estate tail).

A further interesting question with respect to the construction of the Act of 1897 arose in *Hays's Estate*,⁷¹ the same will had previously been passed upon by the Supreme Court in *Dilworth v. Schuylkill Improvement Land Co.*⁷² By the will, which became operative in 1902, land, *inter alia*, was devised to an unmarried daughter "with the power to appoint among her children or their issue, if any she have, and in default of issue" to others. In the *Dilworth* case the daughter having married, joined with her husband Dilworth in an agreement to sell certain property, claiming that by virtue of the words of her father's will she had a fee simple, but the Court held that under the Act of 1897 she had only a life estate. Later, her husband having died, she married a Mr. Craig and a son was born; she then entered upon a new agreement of sale of the property, contending that she became absolute owner of the estate when a child was born to her. The Supreme Court, in the *Hays's* case, stated the position of her counsel as follows: "The conclusion is drawn that the rule of construction fixed by the Act [of 1897] becomes inoperative if there be any children born during life";⁷³ the Supreme Court, however, declined to admit that the birth of issue enlarged the estate of the daughter and said:

"The word 'or' as used in the clause 'in the lifetime or at the death' appearing in the Act of 1897 and relied upon

⁷⁰ *Supra* note 53.

⁷¹ 286 Pa. 520, 134 Atl. 402 (1926).

⁷² 219 Pa. 527, 69 Atl. 47 (1908).

⁷³ 286 Pa. at 526, 134 Atl. at 403.

by appellant is evidently intended as a conjunctive and the failure of issue is to be determined as of the date when the first taker dies. The statutory rule is applicable and the daughter took an interest for life only as heretofore held, though a child had been born to her.”⁷⁴

The result obviously might have been different if the original gift had been to the daughter in fee simple with a *proviso* that in default of issue it was to go over; manifestly in such case, when issue was born, the possibility of default of issue had vanished, and the daughter could have conveyed a fee simple free from any chance of being divested.

What appears to be a confusion of ideas in connection with this act is found in *Hannon v. Flidner*.⁷⁵ The testator, who died in 1879, left certain properties after the decease of his wife and sister-in-law to a daughter, Mary Kirker, in fee. “But in case of the decease of my said daughter Mary Kirker without lawful issue surviving her, then and in such case I give, devise and bequeath all my property and estate of every description, real, personal and mixed to my son-in-law Dr. John Kirker, his heirs and assigns forever.” Dr. and Mrs. Kirker had one son, Robert S. Kirker, who died in 1902 unmarried, intestate and without issue. Dr. Kirker was divorced from his wife in 1888 and died in 1897 leaving to survive him a widow, a daughter by his first wife (who is the plaintiff herein), the son Robert S. Kirker by his second wife Mary (the testator’s daughter), and a daughter Rose by his third wife. Mary, the testator’s daughter, died in 1905. The plaintiff, Mrs. Hannon, claimed as the heir of Dr. Kirker a one-half interest in the land in question and sold the same to defendant; this case stated was agreed on to determine whether she had an interest in the property. Quoting *Mickley’s Appeal*,⁷⁶ the lower court said:

“We find no evidence in the will of Mr. Stewart of any intention to cut down the estate of Mrs. Kirker by giving to the words ‘without lawful issue surviving her’ any other than

⁷⁴ *Ibid.*

⁷⁵ 216 Pa. 470, 65 Atl. 944 (1907).

⁷⁶ 92 Pa. 514 (1880).

their well established meaning. In the absence of evidence indicating such intention, it seems clear to us testator created what would have been an estate tail prior to the Act of Apr. 27, 1855, but which that Act and the line of cases referred to converted into a fee simple estate. Mrs. Kirker, having survived her father and under his will taken an estate in fee simple in the property described in this case, it follows that plaintiffs have no interest therein".

The judgment for defendant was affirmed by the Supreme Court on the opinion of the court below. It would seem as if the substitutionary doctrine laid down in *Mickley's Appeal* would either prior or subsequent to 1897, have been applicable, as it is clearly applicable to a case where the court finds that the testator intends a definite as opposed to an indefinite failure of issue: But assuming this to be so, it is difficult to see why the lower court says that the "testator created what would have been an estate tail prior to the Act of Apr. 27, 1855, but which that Act and the line of cases converted into a fee simple estate". There is an apparent contradiction in terms in the opinion of the lower court in first holding that the case falls within the ruling of *Mickley's Appeal* which, as we shall see, is limited to gifts over on a definite failure of issue, and yet a few lines later in its opinion say that the testator intended to create an estate tail (which, of course, presupposes that the testator was contemplating an indefinite failure of issue). The result prior to the Act of 1897 was the same in both cases, *i. e.* the first taker under the substitutionary doctrine takes a fee because the divesting contingency has not occurred in the testator's lifetime, and on the indefinite failure of issue theory he equally takes an estate in fee because the estate tail which he would have taken at common law was enlarged by the Act of 1855 into a fee simple.

F. The barring of contingent remainders in Pennsylvania

It is, of course, familiar to students of the Law of Property that as a result of a series of judicial decisions and statutes in England, it was possible for the holder of a life estate to destroy contingent remainders by either a deliberate forfeiture of the life

estate or by a merger of the life estate with an ultimate vested remainder in fee or reversion. It is not so generally known that this system of barring contingent remainders was adopted into the law of Pennsylvania.⁷⁷ Of course, however, this doctrine was based wholly upon the theory of seisin, with the necessity of having always a tenant in possession ready to perform legal duties. There is, therefore, much to be said in favor of the view that when the doctrine of seisin has been abandoned, the law should no longer permit the destruction of remainders by forfeiture or merger, and this change has been accomplished by statutes in England, and in a number of states including New York, Alabama, Arizona, Georgia, Indiana, Iowa, Kentucky, Maine, Massachusetts, Michigan, Montana, North Dakota, South Dakota, Virginia, West Virginia, Wisconsin, with partially covering statutes in South Carolina and Texas. In most of these jurisdictions the statutes extend even further, and (contrary to the rule of the common law) uphold a contingent remainder where the life estate ends *naturally* before the contingency on which the remainder depends has happened.

It is an interesting question whether contingent remainders may still be barred in states which follow the common law where no statutes have been passed to the contrary. There were many such states where the destruction of contingent remainders had been adopted as part of their property system, including Mississippi, South Carolina, Illinois, and Iowa, while courts of others, like Kentucky, have used *dicta* to the same effect. In Illinois, comparatively recently, in the case of *Bond v. Moore*,⁷⁸ the Supreme Court without question upheld the effort on the part of a life tenant to bar a contingent remainder by means of an application of the doctrine of merger.⁷⁹ Whether the Supreme Court of Pennsylvania would at the present time uphold the destruction of contingent remainders either by forfeiture or by merger may

⁷⁷ *Bennett v. Morris*, 5 Rawle 8 (Pa. 1835), followed in many later cases.

⁷⁸ 236 Ill. 576, 86 N. E. 386 (1908).

⁷⁹ But see Act of July 2, 1921, page 470, ILL. REV. STAT. (Cahill, 1925) c. 148, § 24: "No future interest shall fail or be defeated by the determination of any precedent estate or interest prior to the happening of the event or contingency on which the future interest is limited to take effect".

be seriously questioned. In *Harris v. McElroy*,⁸⁰ though the question was not directly involved, the court quoted the dissenting opinion of Chief Justice Gibson in *Lyle v. Richards*,⁸¹ and the subsequent English Act⁸² barring contingent remainders by forfeiture, and thus refers to a suggestion that the trustee in the case before the court might be directed to convey property to the plaintiff in order to enable her to destroy the contingent interests of her children and grandchildren: "This court will never give its aid to produce such a destruction of the interest of persons whom the appellant was bound to protect." On the other hand, in *Stewart v. Neely*,⁸³ a case where a party tried to bar contingent remainders by invoking the doctrine of merger, though the judge in the lower court criticized the whole doctrine of barring contingent remainders, the Supreme Court in affirming said: "The authorities cited on behalf of the appellants were not necessary to sustain the familiar rule of the common law that a contingent remainder must have an estate of freehold to support it."⁸⁴ In other words, the Supreme Court seemed tacitly to uphold the barring of contingent remainders in a proper case, but held that it did not apply to the case at bar, partly because the life estate was merged not with a vested remainder or reversion, but only with a contingent remainder, and partly because the contingent remainder had been conveyed by deed and not by will. Despite this, which is the most recent *dictum* of the Supreme Court of Pennsylvania on the subject, it seems probable that that Court would not at the present day uphold the deliberate destruction of a contingent remainder either by forfeiture or by merger, and yet there is a doubt on the subject, which it seems desirable to remove. Further, even though the Supreme Court might refuse to uphold the destruction of contingent remainders by deliberate act, there is nothing to indicate that it would, if the case now arose, reverse the case of *Stehman v. Stehman*,⁸⁵ which has never been overruled, or even adversely commented on.

⁸⁰ 45 Pa. 216 (1863).

⁸¹ 9 S. & R. 322, 343 (Pa. 1823).

⁸² 8 & 9 Vict. c. 106 (1845).

⁸³ 139 Pa. 309, 20 Atl. 1002 (1891).

⁸⁴ *Ibid.* at 315, 20 Atl. at 1002.

⁸⁵ 1 Watts 466 (Pa. 1833).

This case laid down for Pennsylvania the same strict rule that had been laid down in England in *Festing v. Allen*.⁸⁶ In that case land had been devised to trustees for the use of the testator's wife for her life or widowhood "then to a granddaughter Martha Hannah Johnson for life" with remainder to "all and every the child or children of her the said Martha Hannah Johnson who shall attain the age of 21 years." Martha Hannah Johnson survived the widow and died leaving three infant children, and the main question was whether the children took any interest in the devised premises. It was held that they did not, but that " . . . as no child had attained 21 when the particular estate determined by her death, the remainder (to her children) was necessarily defeated."⁸⁷ Similarly in *Stehman v. Stehman* there was a devise to the testator's widow for life and after her death "to the male heirs of Tobias if any he gets in fee" and "for want of male heirs of Tobias, to the male heirs of his son John in fee". At the death of the widow Tobias was single, but he afterwards married and had children. It was held that the limitations over at the death of the widow were contingent remainders, and for want of male heirs of Tobias at her death, vested in the male heirs of John. To the argument that the testator evidently contemplated that the male heirs of Tobias who might come into existence at any time were to take, Judge Gibson said:

" . . . the inflexible rule which demands that no limitation be deemed an executory devise if it may by any practical construction be sustained as a contingent remainder, overbears all implications of an intention inconsistent with it and is decisive of the question. This too, for the all sufficient reason that these executory devises being inconsistent with the policy of the Common Law, which, on account of its abhorrence of estates commencing in futuro, requires all the precedent parts of the fee to pass out of the grantor at the same instant, are barely tolerated and only in favor of the explicit declaration of one who may have been compelled to dispose of his estate when unassisted by counsel".⁸⁸

⁸⁶ 12 M. & W. 279 (1843).

⁸⁷ *Ibid.* at 299.

⁸⁸ 1 Watts, at 475.

Festing v. Allen was followed in a long line of cases in England, though not without protest.⁸⁹ It was, however, found so unsatisfactory that by statute ⁹⁰ it was enacted:

"That every contingent remainder created by any instrument executed after the passing of this Act or by any will or codicil revived or republished by any will or codicil executed after this date in tenure or hereditament of any tenure which could have been valid as springing or shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent remainder, shall in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation."

Of this Vaizey says⁹¹:

"Yet even this statute appears to have left one case unprovided for, and in which it may still be necessary to insert limitations to trustees to preserve. If a remainder is limited to such children as shall attain a certain age and when the last particular estate determines some only of those children have attained that age, the remainder will vest in them. Consequently, the Act will not operate and the younger children will be excluded."

In some, at any rate, of the states in this country the courts have found the rule of *Festing v. Allen* unsatisfactory. In *Henry v. Spaulding*,⁹² after an interest to his wife during her life or widowhood, the testator bequeathed "all the property in her hands and possession at the time of the happening of either event in equal shares to the children of my two sons, Charles A. Spaulding and Albert M. Spaulding, and their heirs forever". These two sons were the testator's only descendants. Charles died in his mother's lifetime leaving a widow but no children. At the

⁸⁹ *Astley v. Micklethwait*, 15 Ch. D. 59 (1880); *Dean v. Dean*, [1891] 3 Ch. 150; *White v. Summers*, [1908] 2 Ch. 256.

⁹⁰ 40 & 41 VICT. c. 33 (1877).

⁹¹ VAIZEY, *LAW OF SETTLEMENTS*, 1164.

⁹² 75 N. H. 92, 71 Atl. 219 (1908).

time of this litigation Albert was a bachelor about fifty years of age. This was a petition filed by the administrator of the decedent for advice of the court, after the widow's death. Recognizing that the original gift to the children of the two sons was "to a dubious or uncertain person"; recognizing further that in certain jurisdictions (having doubtless in mind *Festing v. Allen*) this gift could not be construed as an executory devise, the court said:⁹³

"The testator intended that his real estate, as well as personal property, should go to the children of his two sons. The gift was one he had power to make. The fact that his wife survived him or that no child was born in the lifetime of the widow is not a sufficient reason for breaking his will".

In other words, the court held that if Albert should marry and have children after his mother's death, they would be entitled.⁹⁴

Gray, in the third edition of his "Rule against Perpetuities", after reviewing the rule of *Festing v. Allen*, reached the conclusion that it "had its origin in the dislike of uses which is so forcibly expressed in the preamble of the Statute of Uses"; he urges in Section 928: "When a positive rule of law has become obnoxious to the courts, they may deal with it in three ways:

"First, they may follow it and leave it to the Legislature to alter it;

"Second, they may say it is unsuited to modern conceptions and may disregard it;

"Third, they may change it from a positive rule of law to a rule of construction".

He contends in Section 930 that his third method, which is the one adopted in the cases that dissent from *Festing v. Allen*, seems the least desirable for "regarded as a rule of construction, there is no reason or sense in it; it is purely arbitrary", calling attention to the similar confusion that grows out of trying to treat the rule in *Shelley's Case* as a rule based on intent.

⁹³ *Ibid.* at 94, 71 Atl. at 221.

⁹⁴ See also to the same effect *Simonds v. Simonds*, 199 Mass. 552, 85 Atl. 860 (1908).

Following Gray's suggestion of a statutory change, it seems desirable so to phrase the statute that it will apply even to the case mentioned by Vaizey, and also to make it quite clear that contingent remainders can no longer be barred in this state, and the following act (which in so far as it accomplishes the first purpose is more comprehensive than the recent Illinois statute above referred to) is suggested for this purpose:

"No remainder or other interest shall be defeated by the determination of the precedent estate or interest prior to the happening of the event or contingency on which the remainder or expectant interest is limited to take effect, and any rule which requires a future interest which by possibility may take effect as a remainder to do so or fail entirely is hereby abolished."

Needless to add, such a statute would not affect the barring of remainders after estates tail in those cases in which, owing to the estates having been created prior to the Act of 1855, estates tail still exist in Pennsylvania. Even prior to the Act of 1855 (which in effect prohibited the creation of estates tail thereafter in Pennsylvania), it was well settled that remainders after estates tail, whether vested or contingent, could be barred either by fines or common recoveries, or by a disentailing conveyance under the Act of January 16, 1799.⁹⁵ There is every reason in modern times why the power of the tenant in tail to bar remainders after the estate tail, in other words the power to convert his fee tail into a fee simple, should be sustained, and no doubt is entertained that the courts would uphold such right if the question were now raised.

Of course, however, in the case of a gift to *A* and his heirs, and if he die without issue then to *B* and his heirs, the court may find from the context or from the nature of the subject matter that the expression "if he die without issue" does not have its normal meaning of "when his issue shall have expired", but does mean "if he die without children"; naturally, there is no room for any doubt if the testator has himself used the language "if he

⁹⁵ 3 SMITH'S LAWS (1810) 338, § 1.

die without children". But in many cases, of which *Snyder's Appeal*⁹⁶ is an example, the courts have found that the phrase "if he die without issue" really means "if he die without children". Under that construction a further problem arises, namely, whether the clause "if he die without issue" means "if he die without ever having had issue", or whether it means "without issue surviving him". There is not much authority upon this point, but what authority there is distinctly favors the latter views. Several possible meanings are referred to in the opinion in *Snyder's Appeal*,⁹⁷ but the court was not obliged by the facts of that case to decide the point.

The later view was definitely taken in *Hugher v. Sayer*,⁹⁸ and in *Pinbury v. Elkin*.⁹⁹ The cases in this country in which the question seems to have been squarely raised and decided are *Morgan v. Morgan*,¹⁰⁰ and *Parish v. Ferris*.¹⁰¹ In *Morgan v. Morgan*, after making gifts to several children testator provided "that if my sons should either of them die without children, his brother shall have his part in equal proportion". One son John took possession of the property devised to him, was married and had one son who died two years before John's death. When the son John died, he therefore had no children. The question was whether the land in question was a part of the estate of the son John and therefore liable to his creditors, or whether it had passed by virtue of the gift over to another son Edward who was the defendant in this case. In holding that it passed to the other son, the court said:

"In the mind of the testator, had he foreseen the event of the birth and death of a grandson without having had children before the death of his father, the same reason would have existed for designating the person or persons to succeed to the estate as would be on the death of either son without children living at the time of the son's death. There-

⁹⁶ 95 Pa. 174 (1884).

⁹⁷ *Ibid.* at 178.

⁹⁸ 1 P. Wms. 534 (1718).

⁹⁹ *Ibid.* 563 (1719).

¹⁰⁰ 5 Day 517 (Conn. 1813).

¹⁰¹ 6 Ohio St. 563 (1856).

fore, to adopt the construction contended for would defeat an important provision manifestly intended by the testator, by adding the last clause of the will, viz.—the disposition of either son's part in case of death without children then living.”¹⁰²

In other words, while it would be theoretically possible for the testator so to provide that the gift over should not take effect if the first taker had had a son who died in his lifetime, yet it would be such an absurd provision with so little reason to support it that the courts would be extremely unlikely so to hold; substantially the same reasoning led to the same result in *Parish v. Ferris*.

G. Summary

The result so far may be summarized as follows: The words “dying without issue”, if there were an independent gift to the issue, meant “without ever having had” issue—(this in the interest of such issue when born); on the other hand, if there were no independent gift to the issue (which is the common case), the words in the case of real estate were not construed either as meaning “without ever having had issue” on the one hand, or “without issuing surviving” (definite failure of issue) on the other; both of these constructions (which were familiar in the case of a gift over if *A* die without children) were dismissed, and the presumption in favor of estates tail resulted in such expression being construed as an indefinite failure of issue. A devise of land to *A* and his heirs and if he die without issue to *B* and his heirs, therefore meant at common law, on the indefinite failure of issue view, that *A* took an estate tail; as between the definite and indefinite failure of issue possibilities, the common law chose the indefinite failure of issue, and therefore it was not necessary to consider other questions that might have arisen on the other theory—such as whether dying without issue meant without having had issue, or without leaving issue surviving; nor on the other hand was it necessary to discuss as of what date *A* must die

¹⁰² *Supra* note 100, at 524.

without issue in order for the gift over to become effective. It is perhaps, however, proper to add that prior to the nineteenth century, in spite of a great number of cases in which the question whether such words contemplated a definite or indefinite failure of issue was discussed, it was never questioned that if they were to be construed as contemplating a definite failure of issue (as they were in the case of personalty), the gift over to *B* would take effect if *at the time of A's death* he had no issue, and no one up to that time had even suggested that the gift over to *B* was to take effect only if *A* died without issue *in the testator's lifetime*.

This naturally leads to a consideration of the quite recent substitutionary construction of such phrases as "if *A* die without issue", which will be discussed in the second installment of this article.

(*Editor's Note:* The concluding installment of this article will appear in the March issue of the REVIEW.)