H. Substitutionary construction of "Dying Without Issue"

The common law, as above pointed out, had its own perplexities. "Issue" might mean "heirs of the body"—presumptively did mean "heirs of the body" in the case of land. On the other hand, it might mean "children" and presumptively did mean "children" in the case of personalty. "Without issue", on the other hand, might in different contexts either mean without ever having had children, or without children surviving, or even when all descendants shall have expired. For centuries the courts wrestled with such problems of construction, reaching certain conclusions, some of which, having in time proved unsatisfactory, were repealed or modified by statute. The curious fact must now be referred to that after centuries of such discussion, and after the formulation of well-defined rules on the subject, many of the courts in this country suddenly discovered a totally new meaning for the expression "if A die without issue". Instead of meaning "if A die without leaving issue", or "if A die without ever having had issue", or "when A's issue or descendants shall all have expired", the fertile imagination of the courts referred to discovered in these words this quite new and startling meaning "if A dies without issue in the testator's lifetime only"; this is called the substitutionary construction of the words in question, because manifestly, where adopted, it means that if A survives the testator he takes outright and free from any contingency whatever, whereas, on the other hand, if he dies in the testator's lifetime, and only in that event, B, the devisee over, is to take in his place. It is, to say the least, startling that this new interpretation should have been discovered after centuries of discussion about this familiar phrase,
and it is proposed to investigate the origin of this substitutionary doctrine in Pennsylvania and some of the sister states.

Mickley's Appeal is often referred to as the foundation of this doctrine in Pennsylvania. An examination of the authorities, however, seems to show a distinctly earlier origin, perhaps the earliest case being Biddle's Estate. In that case the testatrix gave "... to my daughter Anne E. Biddle everything of which I die possessed. In the event of my daughter's death without children", she gave sundry bequests, including a gift of the residue to a niece and nephew, followed by the clause "In the event of the death of these", a gift over to five individuals. On the filing of the executor's account, the daughter, Anne, claimed that she was absolutely entitled to this personalty; the other parties named in the will claimed that she must give security to protect the interest of those who might be entitled at her death. The lower court took the latter view, but its decree was reversed by the Supreme Court in a short opinion by Lowrie, J., who said:

"The first clause plainly gives the daughter an absolute estate. ... Very naturally the testator's next thought is to make other disposition 'in the event of her daughter's death without children.' But death when? There is not a word to inform us. The intention is therefore ambiguous. Another clause has the same ambiguity. The residue given to Grace and Richard Biddle is to go over 'in the event of their death'.

"How are we to deal with this ambiguity? Consider that the devise to Anne is absolute, with no word directly tending to show an intention to reduce it to a life estate or to a conditional fee; and it is perfectly consistent with this to suppose that the subsequent dispositions were intended to take effect if Anne should die before her mother. ... And this supposition derives support from the residuary clause alluded to; for it would make the shares of Grace and Richard Biddle absolute, if ever they should vest in possession, and without it they would not be so."
Without continuing the quotation, the court, without citing any Pennsylvania authorities except *Caldwell v. Skilton*, reached the conclusion that the gift over was inoperative, because only intended to take effect if the daughter died in her mother's lifetime—which, of course, she had not done. In such casual way, this important change in the law of Pennsylvania was made. But we can go further and, if we do not find a justification, can at least find some explanation of the decision in the case cited, namely, *Caldwell v. Skilton*. In that case the gift was to A and his heirs, but if he die then to his children, but if he have no children, then to X. There were two reasons why in that case the gift over to X was held to be effective only if A died in the testator's lifetime. The first and perhaps principal reason was that the phrase “if A die” obviously denotes a contingency of some kind; as death is a certainty, the testator who uses such a phrase must have meant death within a limited time, and in a case like *Caldwell v. Skilton*, the only possible limit of time is the testator's own lifetime; some such words must in the nature of things be written into such a will or otherwise the expression “if he die” is meaningless. This rule is universally recognized even in jurisdictions where the courts have declined to carry the so-called substitutionary theory any further.

The second reason for the decision in *Caldwell v. Skilton* was somewhat similar; the gift over “if A die” was either to his children, or if he had no children, to X. As he manifestly must die either with or without children, the “if” clause again would have no meaning unless restricted to death within a particular time. This added reason for the decision was emphasized by the court, and indeed leaves no doubt as to the propriety of the conclusion of the court, even if there were otherwise any doubt (which there was not). *Caldwell v. Skilton*, however, is manifestly a very insufficient foundation for the decision in *Biddle's Estate*, and *Biddle's Estate* must perhaps be added to the list of cases in which Chief Justice Lowrie has been responsible for guiding the Supreme Court of Pennsylvania into somewhat uncertain and devious ways.

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6 13 Pa. 152 (1850).
6 Ibid. at 153.
7 Chesebrow v. Palmer, 68 Conn. 207, 36 Atl. 42 (1896); Steinhart v. Wolf, Palmer, 68 Conn. 207, 36 Atl. 42 (1896).
In *Biddle's Estate*, the matter was apparently not given very serious consideration, but *Mickley's Appeal* presented substantially the same question, and the report shows that the opposing argument was very fully presented by counsel. In this case the testator divided the residue of his estate into sixths and gave one-sixth to each of several children including two sons, John and Joseph. Following the gift was this provision: "I direct that if either of my sons should die without leaving issue at the time of his death, the share given to such son shall pass to and be divided among such of my children as may be then living, and to the issue of such as may be dead, such issue, however, taking only the share of their parent", with a further provision that in such case the portions going to a daughter shall be held in trust like the original shares given the daughters. The Orphans' Court decreed that the executor pay the distributive shares to the sons in their own right absolutely. On appeal by the trustee, counsel for the appellant stated the principles very clearly:

"In order to a clear understanding of the law applicable to this bequest, we must carefully distinguish between the case of a bequest to A., and if he should die, to B., and the case of a bequest to A., and if he should die 'without issue', or 'without children', or 'without leaving issue living at the time of his death'. In the first class of cases, that of a bequest to A., absolutely or indefinitely, and if he should die, to B., the rule of construction applicable, and the reason for such rule, are most clearly set out in the opinion of Sir John Romilly, M.R., in the case of Edwards *v.* Edwards, 15 Beav. 357 (year 1852), as follows: 'As the testator speaks of death—the most certain of all things—as a contingency, it can only be made contingent by reference to its taking place before a particular period, and as no period of time is mentioned in the will, it is necessarily presumed that the period of time, to which the testator refers, is the period of possession or enjoyment; that is, his own death, when the legacy to A. will take effect; and the subsequent limitation is introduced to prevent a lapse of the legacy in case A. did not survive the testator. In such cases, therefore, the rule may be considered settled, that the bequest must be read somewhat to this effect, that is to say, a

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*Supra* note 1.
bequest to A., but if A. shall die before the bequest becomes vested in him, then to B., and the consequence is this, if A. survives the testator, he takes an absolute vested interest.

"The law applicable to the second class of cases, and in which class the bequest now under consideration falls, is likewise in the same case clearly set out, and a distinction drawn between the two classes of cases. In the second of the supposed cases, there is a manifest distinction. There the event spoken of on which the legacy is to go over is not a certain, but a contingent event. It is not in the case of the death of A., but in the case of his death without issue, or without leaving a child; and here it would be importing a meaning and adding words to the will, if it were to be construed as a condition to entitle B. to take upon the death of A. without issue, if it was to happen at some particular period. In these cases it has always been held, if at any time, whether before or after the death of the testator, A. died without leaving a child, the gift over takes effect, and the legacy vests in B.; this is best established by the case of Farthing v. Allen, reported only in 2 Jarman on Wills 688. All those cases are, of course, liable to be varied by the force of the particular expressions which the testator may have made use of in his will, importing a different intention; but they do not affect the rule—on the contrary, they must be held tacitly to admit the application of it, inasmuch as they are treated as exceptions to an existing rule."

Mr. John G. Johnson, counsel for appellees, relied principally on Caldwell v. Skilton and Biddle's Estate. In affirming the decree of the lower court, Chief Justice Sharswood admitted that English cases such as O'Mahoney v. Burdett supported appellant's contention, but continued:

"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."

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9 Ibid. at 515.
10 L. R. 7 H. L. 388, 395 (1874).
11 Supra note 1, at 517 (Italics ours).
This was an inaccurate statement of the English law so far as the case of "death without issue" is concerned, though Biddle's Estate partially justifies the correctness of the statement so far as Pennsylvania law is concerned. This is substantially the whole ground of the decision except for the fact that the court, in further support of its decision, says that:

"Thus, while according to the construction contended for, [but not adopted by the court], the original share of the son would be held subject to the executory bequest over, the accrued share would be held absolutely, while the accrued shares of the daughters would be held exactly as the original shares." 12

Without pursuing the discussion further, in spite of a carefully reasoned argument to the contrary, Chief Justice Sharswood adopted the so-called substitutionary rule of construction—possibly without realizing that, in so doing, he was flying in the face of probably hundreds of cases both in this state and in other jurisdictions in which the words "if either of my sons should die without leaving issue living at the time of his death" had been held without question to cover the case of death without leaving issue living, either during the testator's lifetime, or after his decease.

There is a long line of Pennsylvania cases in which the same principle is adopted and somewhat expanded. In Coles v. Ayres,13 there was a gift of the residue of the testator's estate to his children in equal shares: "If both my children should die intestate and without lawful heirs", then over. The words "and without lawful heirs" were held equivalent to "dying without issue", and it was held that the children on surviving their parent's death, therefore, took an absolute estate free from any contingency. In McAlpin's Estate,14 a testator had by will bequeathed one-third of his estate to trustees, in trust to pay the income to a daughter for life, and then "in case all her children shall depart this life without issue, the part or share in this my last will and testament devised to the said children of my daughter Mary shall revert to and be equally

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12 Ibid. at 518.
13 156 Pa. 197, 27 Atl. 375 (1893).
14 211 Pa. 26, 60 Atl. 321 (1905).
divided among my surviving heirs”. It was held that the testator’s children, having survived the daughter, took an absolute estate free from any condition. Judge Penrose, in his opinion in the lower court, while pointing out that “The doctrine of Mickley’s Appeal is not in accordance with the English decisions as to immediate gifts, if the limitation over is ‘in case of death without issue’”, nevertheless adds: “but where these words are annexed to a gift in remainder, even the English cases hold that they are referable to a death without issue before the time of distribution”, and McAlpin’s Estate may, therefore, be classed with Jessup v. Smuck and others, as being correctly decided, apart from any doubt that may exist as to the propriety of Mickley’s Appeal. Seewald’s Estate points out that the rule in Mickley’s Appeal has been “established by numerous decisions both before and since this legislation”; it was there held that “the words ‘die without issue’ . . . followed by the clause ‘living at the time of his death’ . . . are not sufficient to show testator contemplated the residuary gift taking effect, if at all, at the death of the son rather than at his own death”.

The substitutionary theory, however, although very deeply embedded in the law of Pennsylvania, has not entirely superseded the so-called successive theory with which it largely conflicts. Even before Biddle’s Estate, in Jessup v. Smuck, an unsuccessful effort was made to establish the substitutionary rule. In that case the testator had devised certain lands to his son Samuel in fee “he or they [the heirs] paying thereout and therefor certain legacies”, and by a subsequent provision he stipulated “in case my said son Samuel should die before he marries”, then all his share to go to a son Joel. Samuel, upon his father’s death, took possession, paid the legacies and later died intestate and without having married. The plaintiffs, who were devisees of his brother Joel, claimed the

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16 Ibid. at 29, 60 Atl. at 322.
16 16 Pa. 327 (1851).
17 281 Pa. 483, 127 Atl. 63 (1924).
18 Ibid. at 486, 127 Atl. at 64 (referring to Act of July 9, 1897, P. L. 213).
19 Ibid. at 487, 127 Atl. at 64, citing Morrison v. Truby, 145 Pa. 540, 22 Atl. 972 (1891).
20 Supra note 3.
21 16 Pa. 327 (1851).
land in controversy in this action of ejectment. Fully sustaining the substitutionary viewpoint, the lower court entered judgment for the defendant, saying, "The devise to Joel, we think, was only intended as a substitution in case of the death of Samuel unmarried before the death of the testator". As pointed out by the Supreme Court, the case was "prepared with great industry and research by the counsel on both sides who have argued it with much learning and ability". Counsel for the defendants-in-error thus stated the substitutionary doctrine:

"We submit, therefore, that the rule is too firmly established to be shaken, that where the devise is immediate and absolute, a devise to another, in case of the death of the first-named devisee, although connected with some collateral circumstance, is substitutionary only, and refers to the death of the first devisee in the lifetime of the testator. There cannot be any difference whether the collateral circumstance be the having issue, having children, or the marriage of the first devisee. The conjunction of the circumstance with the event of the devisee's death might be thought to import a contingency in the one case as much as in the other. But the conjunction of such personal circumstances with the event of death does not, under the rule, determine the contingency which the testator contemplated; and to effectuate his intention, and not destroy the estate he has given, it becomes necessary to refer the happening of the event to the period of the testator's death." 

The Supreme Court, however, declined to take the substitutionary view, reversed the judgment and entered judgment for the plaintiffs, saying:

"The testator was providing for the disposition of his estate after his decease, and must be supposed to refer to events, and their occurrence in time subsequent to his death. . . . The provisions in terms of this will are strong to show that the testator contemplated and provided for the death of Samuel, without marriage, at any period of his life, as the

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22 Ibid. at 330.
23 Ibid. at 338.
24 Ibid. at 337.
time and event on which the property in controversy was to pass over to Joel.”

After stating the substitutionary rule, the court said:

“... 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 objects of his bounty.”

The court points out that “none of the cases referred to and relied on for the defendants, connect marriage with the event of death”, and points to other clauses in the will to show that, in this will, the testator was contemplating things to be done after his death.

Again, in *Matlack v. Roberts*, a testator devised his real estate to two sons, adding this clause, “And in case of the death of either of my children unmarried or without issue, then I do order that the share of said child or children so dying, may be divided equally among my surviving daughters or their heirs”. Testator left two sons and four daughters, including one, Martha Matlack, the mother of the plaintiff. After the testator’s death, the real estate was sold by the sheriff on a judgment obtained against the testator in his lifetime. After paying the judgment and other claims, there was a balance due a son, John, of $5800, which was paid to him. He subsequently died, unmarried and without issue, having by will given all his estate to his nephew, Edwin Roberts. In this action of assumpsit by Albert Matlack, the son of Martha, against Edwin Roberts, as executor of John Roberts, deceased, the plaintiff contended that the devise to John was in fee tail, and that as devisee of the land he received the balance of the proceeds on the same terms, and that, therefore, on the death of John unmarried and without issue, the plaintiff as the heir of one of the daughters was entitled to share in the $5800. The lower court entered judgment for the defendant which was affirmed by the Supreme Court, which held, following *Vaughan v. Dickes*, that “dying be-

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25 Ibid. at 339.
26 Ibid. at 340, citing 2 Powell, Devises (1827) 763.
27 54 Pa. 148 (1867).
28 20 Pa. 509 (1853).
fore marriage indicated nothing definite in the period when the failure of issue should take place,” that, therefore, John took an estate tail, (though for other reasons plaintiff was not entitled to recover). The importance of the decision for our purposes is that the Supreme Court declined to hold that the expression “in case of the death of either of my children unmarried or without issue” meant a definite failure of issue, either in the testator’s lifetime (the substitutionary theory), or at any time in the devisee’s lifetime (the successive theory); on the contrary, they held that the words meant an indefinite failure of issue and, therefore, gave the sons an estate tail. They distinguished Jessup v. Smuck and other cases: “For in each of these cases special expressions are found which lead to the conclusion a failure of issue within a definite period was intended”.

In both Jessup v. Smuck and Matlack v. Roberts, the Supreme Court declined to accept the substitutionary interpretation urged upon them; though not very consistently, they in the former case held (correctly as it seems) that the clause “if Samuel should die before he marries”, meant the death of Samuel at any time, whereas (with some hesitation, but in view of Vaughan v. Dickes) in Matlack v. Roberts, they held that the word “unmarried” must be entirely disregarded, and therefore treated the words “without issue” as meaning an indefinite failure of issue.

Again, in Ralston v. Truesdell, after a life estate in his wife, the testator devised certain lands to a granddaughter and the heirs of her body, “but if she should die and leave no child or children, then in such a case the said property shall be sold to the best advantage, and equally divided among my other legatees and their heirs”. After the widow’s death, the granddaughter, Nancy, executed and delivered to one Brownson a deed in fee in which it was recited that the deed was executed for the purpose of destroying remainders after Nancy’s estate tail. Brownson thereupon reconveyed to Nancy who later died leaving a will upon which letters of administration c. t. a. were issued to Ralston, the plaintiff in this

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29 Supra note 27.
30 Supra note 21.
31 Supra note 27, at 150.
32 178 Pa. 429, 35 Atl. 813 (1896).
case. He brought ejectment for this land against the defendants who were the "other legatees" of the testator. It was argued for the defendants that the words "but if she should die and leave no child or children" modified the previous gift to Nancy and to the heirs of her body, and that, Nancy having died without leaving children, there was a gift over to the defendants. The lower court, in an opinion which was affirmed by the Supreme Court, held that both expressions, namely, "heirs of her body" and "child or children", were used in their technical legal sense; that Nancy took an estate tail subject to an executory devise over in favor of the other legatees; and that her deed barred the entail and the devise over. The significance of the case for the purpose of the present discussion is that it was contended for the defendant that, on the authority of King v. Frick,33 that "the testator intended the devise over 'to his other legatees and their heirs' only in the event of the death of the first taker, Nancy Ramsey, without children during his life". The court, however, thought that the fact that the gift to Nancy was only to take effect at the death of the testator's wife showed that the testator "in making the devise to Nancy Ramsey referred to an event that would take place subsequent to his death, to wit, the death of his wife".34 In passing, it may be noted that the court did not even consider the argument which has been made in certain cases, that where there is a remainder gift to a devisee (as in the case of Nancy) followed by a gift over in a certain contingency, such contingency must be presumed to be intended to happen only during the lifetime of the life tenant.

Finally, in Stoner v. Wunderlich,35 testator bequeathed certain real estate to his son Frederick and provided "if the said Frederick die without issue, and his wife survives him, she shall have the use of the said lot No. 2 with the appurtenances during her life, and at her death the said property shall revert to my surviving heirs". The question was whether Frederick took a fee simple which he could convey to the defendant. The lower court held that he could, but the Supreme Court now reverses, saying, "But when did the

33 135 Pa. 575, 19 Atl. 951 (1899).
34 Supra note 32, at 434, 35 Atl. 815.
35 198 Pa. 158, 47 Atl. 945 (1901).
testator contemplate that such an event [Frederick's death without children] would occur? In a definite or indefinite period? Before or after his own demise?" 36 It holds that the gift over means a definite and not an indefinite failure of issue as is shown by the gift over of the life estate to Frederick's wife. The Court then faces the question whether the testator contemplated "that his son's death would occur prior to his own death, and was the limitation over made with that contemplation in view"; it holds that the will as a whole clearly showed that this testator was contemplating things that might happen after his death. While on its facts the case may be distinguished from the substitutionary line of cases, nevertheless it is to be noted that the Supreme Court cited Powell on "Devises" 37 (as it had done years before in Jessup v. Smuck) as correctly stating that "this construction [the substitutionary 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 objects of his bounty." Stoner v. Underlich was cited and followed in Kirkpatrick's Estate. 38

An interesting side light on the history of the substitutionary theory in Pennsylvania is thrown by the cases of Mitchell v. Pittsburgh Railway Co. 39 and Barber v. Pittsburgh Railway Co. 40 Both these cases hinged upon the proper construction of the same will. The testator had devised certain lots to one Amanda Stephens stated in the will to be "now five years old", and provided "In the event of Amanda dying unmarried, or, if married, dying without offspring by her husband, then these lots are to be sold and the proceeds to be divided equally amongst the heirs of John

36 Ibid. at 161, 47 Atl. at 946.
37 Citing specifically page 763.
38 280 Pa. 366, 124 Atl. 474 (1924). See also Daniels's Estate, 27 Pa. Super. 358 (1905), where, recognizing the force of the substitutionary rule in Pennsylvania, the court construed sundry clauses in the will, such as, for instance, a clause with respect to a guardian for the first taker, as indicating that the will might take effect before the beneficiary had obtained her majority, and hence held that the testator, by the language, "if my said daughter, Mary B. Daniels, shall die before or after attaining the age of twenty-one years without issue," meant a gift over if she die without issue at any time.
40 166 U. S. 83, 17 Sup. Ct. 488 (1897).
Barber". After the testator's death Amanda married and had five children, one of whom married, but all of whom died before their mother without leaving offspring. In her life Amanda had joined in a deed which, if the will created an estate tail in her, barred the entail, and by sundry conveyances her title free from the entail became vested in the defendants. In the action of ejectment in Mitchell v. Pittsburgh Railway Co. which was brought by the administrator c. t a. of decedent, the lower court entered judgment for the defendants, which was affirmed by the Supreme Court, which, after holding that Amanda took a fee simple by the original words of the will, said:

"There are no words used in the second paragraph of the will, containing the devise to Amanda, which indicate any intent to limit her estate. Had the will stopped there, the devise would unquestionably have been absolute. The following paragraph was not intended to operate by way of limitation, but was manifestly substitutionary in its character . . . The devise is then in the first instance to Amanda; and in the event of her dying without issue over to alternative beneficiaries. Dying without issue was thus made the contingency upon which the substituted beneficiaries could take: Coles v. Ayres, 156 Pa. 197. But death when? Where, as here, there is nothing to indicate an adverse intent, additional limitations dependent on no other contingency than is implied from the language, 'if any of them die', or 'in case of death', or the like, cannot be referred to the event whenever it may happen,—for that would be to give a forced construction to the words,—but must be construed as referring to death in association with some additional circumstance which makes it actually contingent. That circumstance is said to be naturally in regard to the time of happening, and that time, where, as here, the gift is immediate, is necessarily the death of the testator, there being no other period to which the death can refer: Caldwell v. Skilton, 13 Pa. 152." 41

The court felt fortified by the argument that "the power of sale was intended to be exercised at a near, rather than a remote, period after testator's death", and also that the gift over was to the "heirs" of John Barber; this in the opinion of the court meant

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41 Supra note 39, at 650, 31 Atl. at 68.
“the children of John Barber who were living”. The Court also thought that Amanda’s extreme youth did not argue against the substitutionary construction, especially as “No presumption could arise from the fact of making a will that testator expected to die before she should attain a marriageable age”. The case is a more or less logical deduction from Coles v. Ayres,42 where the language used was “if both my children should die intestate and without lawful heirs”, and it was held on the substitutionary theory that the children surviving the testator took an absolute estate.

In Barber v. Pittsburgh Railway Co. some of the children of John Barber, being dissatisfied with the decision in Mitchell v. Pittsburgh Railway Co., and being advised by counsel that that decision was not conclusive, brought an independent action of ejectment on precisely the same cause of action in the United States Circuit Court for the Western District of Pennsylvania. A judgment for the defendants having been entered in the lower court, the plaintiffs appealed to the Circuit Court of Appeals which certified to the Supreme Court that it desired the instruction of that court on the following question: “First. Is the decision of the Supreme Court of Pennsylvania, before referred to, conclusive? If not, then, Second. What estate did Amanda Stephens take under the devise?” The case was elaborately argued by counsel for the defendant Railway Company who maintained (1) that “The proper construction of this will, under the law of Pennsylvania, has been decided by the highest court of the State in the case of Mitchell v. Pittsburgh Railway Co.,43 165 Pa. 645”, and (2) that “If the question as to the nature and extent of the title which Amanda Stephens took under the will of Mr. Stevenson is open in the Federal Courts for original investigation, then we assert that she took a fee simple absolute”, either because having taken a fee tail she had barred the remainders by her deed, or because “If the devise be construed a fee with limitation over, the fee became absolute, because (a) the event upon which the limitation must happen was under the rule of property in Pennsylvania restricted in time to the lifetime of the testator, and admittedly it

42 156 Pa. 197, 27 Atl. 375 (1893).
43 Supra note 39.
did not so happen. (b) The conditions, upon the non-performance of which the estate was to go over, were performed by Amanda. She did not die unmarried—she married and had offspring by her husband— and therefore the estate did not go to John Barber’s heirs”. The Supreme Court certified that Amanda had an estate tail. As to whether the opinion in the prior case was “conclusive evidence of the law of Pennsylvania in a court of the United States, depends upon the further question whether the opinion is declaratory of the settled law of Pennsylvania as to the effect of such devises, or is a decision upon the construction of this particular devise”. Admitting the line of cases in Pennsylvania “in which a devise over, after a devise in fee, has been held to be substitutionary, when expressed by such words as if the first taker ‘die without children’; . . . or ‘without leaving issue at the time of his death’; . . . or “intestate and without issue’”, the Supreme Court of the United States thought that “In none of these cases, however, was the devise so expressed that it could be construed as creating an estate tail”, and finally held that:

“A careful examination of the adjudged cases in Pennsylvania irresistibly compels us to the conclusion that there is no settled rule of property in that State, by which the words of the devise to Amanda Stephens, ‘and in the event of Amanda dying unmarried, or, if married, dying without offspring by her husband’ should be construed as restricted to her death in the testator’s lifetime, making the devise over substitutionary, and to take effect only upon her death within that time.”

On this somewhat delicate question, therefore, the Supreme Court of the United States decided that the prior decision of the Supreme Court of Pennsylvania was not “declaratory of the settled law of Pennsylvania as to the effect of such devises”, and therefore that it was the duty of the Supreme Court of the United States, (of course trying to construe the law of Pennsylvania), to decide “What estate did Amanda Stephens take under the devise”. Citing a line of cases beginning with *Eichelberger v. Barnitz*, the Su-

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44 *Supra* note 40, at 103, 17 Sup. Ct. at 493.
45 9 Watts 447 (Pa. 1840).
preme Court held that a devise over upon failure of issue imported in Pennsylvania an indefinite failure of issue; that the word "unmarried" should be disregarded under *Vaughan v. Dickes*; that therefore Amanda took an estate tail. The court thought also that this meaning of the expression "in the event of Amanda dying unmarried, or, if married, dying without offspring by her husband" was not affected by either the power of sale, or the gift over "to the heirs of John Barber"; also that there was no occasion to look beyond the language of the will to such extrinsic facts as "the testator's state of health or to his length of life afterwards".

To summarize the decisions in these cases, it is interesting to note the following: (1) Judge Ewing in the Court of Common Pleas of Allegheny County in the first opinion in the *Mitchell* case, held that Amanda took under the will an estate tail which had been duly barred. On appeal in the same case, the Supreme Court of Pennsylvania held that the language used by the testator created not an indefinite, but a definite failure of issue of Amanda; inasmuch, however, as definite failure was, as construed by the Supreme Court of Pennsylvania, to take effect in the testator's lifetime only, Amanda took an absolute estate and the judgment for the defendant was, therefore, affirmed. When the case reached the federal courts in *Barber v. Pittsburgh Railway Co.*, the Circuit Court in an opinion by Acheson, J., said:

"If we were to hold that the devise to Amanda Stephens did not pass to her an estate in fee simple, this conclusion would not help the plaintiffs, for we cannot agree with them in their contention that Amanda took only a defeasible fee. In our view of this will, if Amanda did not take a fee simple, she took at least an estate tail." 47

In other words, the lower federal court held for the defendant either on the ground that if the ruling of the Pennsylvania Supreme Court in the *Mitchell* case prevailed, defendants were entitled, or if the opinion of Judge Ewing in the lower court that Amanda took a fee tail prevailed, the defendants were likewise entitled. Finally, the Supreme Court of the United States in terms refused

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46 *Supra* note 28.

to take the substitutional view adopted by the Pennsylvania Supreme Court and placed its decision flatly upon the ground that Amanda took a fee tail. (The Circuit Court of Appeals, upon receiving this opinion, affirmed the judgment of the lower court.) The net result, therefore, was a striking division of opinion between the Pennsylvania Supreme Court adopting the substitutionary view, on the one hand, and the Federal Supreme Court, adopting the indefinite failure of issue view on the other. No one of the three decisions which adopted the theory of an indefinite failure of issue, however, is instructive on the question whether, if the correct construction were a definite failure of issue, that failure of issue should be restricted to the testator's lifetime or not; on the other hand, the opinion of the Pennsylvania Supreme Court in the Mitchell case is a flat refusal to adopt the indefinite failure of issue view,—with the assumption that, the indefinite failure of issue theory being inadmissible, the question was just when the definite failure of issue must occur. The case in its several stages presents very clearly the various views which might be taken, although it should be added that since the Act of 1897 in Pennsylvania doing away with the indefinite failure of issue theory, the federal courts would, if the same question now confronted them, be obliged to decide between the successive and substitutional views, whereas the Pennsylvania Supreme Court is clearly committed not only by its decision in the Mitchell case, but in many others, to the substitutional view.

The weight of authority in this country favors the substitutionary view. One authority says:

"It has been held that where there is an immediate gift to a person and the gift over on the death of the beneficiary without issue, the latter gift in the absence of words indicating a contrary intention takes effect upon the death without issue happening at any time, as well after as before the death of the testator. (Citing a number of cases chiefly English and Canadian); but as a general rule in such cases the gift over refers to death occurring during the lifetime of the testator, unless it appears from the context of the will and the surrounding circumstances that the testator intended the gift to
take effect upon the death of the person named at any time, as well after as before the testator's death.” (Citing cases from sixteen of the American States.)

Many of these later cases have been examined, but the examination has not disclosed a single weighty argument in support of the decision reached. Such cases, for example, are *Bronson v. Wallingford*, *Wright v. Charley*, *Collins v. Collins*. The state in which the doctrine has been most strongly supported is New York; *Washbon v. Cope* being, perhaps, the leading case. Even in New York, however, the arguments used in support of the decisions do not seem very formidable, and, as in other jurisdictions, there seems to be a tendency to avoid a too harsh application of the rule by finding in the will other indications which enable the court to reach the conclusion that the gift over was intended to take effect in the case of death without issue at any time.

**History of the Substitutionary Rule in England**

It is not deemed necessary to refer to cases prior to *Edwards v. Edwards*. In that case a testator devised certain real estate to trustees upon trust to pay the rents to his wife during widowhood, and subject to this life interest of his wife, he devised certain properties to several children. He then states, “Further, my will and meaning is, that if one of my three children shall die and leaving no children born in wedlock, his or her share shall be equally divided between the other two and for their heirs forever; And if two of my children shall die, and leaving no children born in wedlock, their share shall go to the surviving one and his or her heirs forever.” The widow survived the testator a few years and died without having married. Later John, the eldest son, married and died without issue, having devised his estates by a will; his brother

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49 Cyc. 1504.
50 54 Conn. 511, 9 Atl. 392 (1887).
51 129 Ind. 257, 28 N. E. 706 (1891).
52 116 Iowa 703, 88 N. W. 1097 (1902).
53 144 N. Y. 287, 39 N. E. 388 (1895).
55 15 Beav. 357 (1852).
and sister claimed the estates devised to John by their father by virtue of the conditions contained in their father’s will. Sir John Romilly decided against the claim of the brother and sister. In so doing he made the following analysis of the cases of this general character:

“There are four classes of cases in which questions of this description arise, and it will be necessary for me shortly to refer to each, in order to make my decision in the present case clear and intelligible. The first case is, that of a simple gift to A., and if he shall die, then to B. The second case is, that of a gift to A., and, if he shall die without leaving a child, then to B. The third and fourth classes of cases are where these gifts to A. and B. are preceded by a life-estate, or some other interest of partial duration, and may be described thus: a gift to one for life, and, after his decease, to A., and if A. shall die, then to B.; and fourthly, a gift to one for life, and after his decease, to A., and if A. shall die without leaving a child, then to B.”

After holding that in accordance with the weight of authority in the first case, “the words applying to the gift over must . . . be confined to the death of the testator”; that in the second case that “it has always been held that if at any time, whether before or after the death of the testator, A. should die without leaving a child, the gift over takes effect, and the legacy vests in B”; that in the third case, “if A. die before the period of possession or payment, i. e. before the death of the tenant for life of the legacy, the legacy goes to B”; he decides that in the fourth case (which was the case before him) “the rule is that these words indicating death, without leaving a child, as the event on the occurrence of which the gift over is to take effect, must be construed to refer to the occurring of that event before the period of distribution”. In other words, admitting (in the second case) that ordinarily in the case of a gift to A. and if he shall die without leaving a child to B, the gift over takes effect “If at any time, whether before or after the death of the testator, A. should die without leaving a child”; he distinguishes the case before him where the gift to A. was sub-

\[\textit{Ibid. at 361.}\]
ject to a prior life interest, and holds that the prior life interest alters the situation so that the gift over is effective only if A die without leaving a child before the period of distribution. His position does not even suggest the substitutional theory except in the rather special case of the gift to A following a prior life interest to someone else.

Just why such prior life interest should affect the construction of the otherwise similar language used in cases two and four of Lord Romilly is not apparent, and the case was flatly overruled by the House of Lords in O'Mahoney v. Burdett. In that case a testator had bequeathed to his sister certain stock for life, and after her death to her daughter and also said, "If my said niece should die unmarried or without children, the £1000 I here will to revert to my nephew". The sister died in the lifetime of the testator; Grace, her daughter, survived the testatrix and died without leaving children. Her husband, the appellant in this case, relying on Edwards v. Edwards, contended that by the expression "If my said niece should die unmarried or without children", it is to be understood the death of the niece unmarried or without children not at any time whatsoever, but only during the lifetime of the tenant for life. The House of Lords, however, refused to take this view, finding no difference "according to the ordinary and literal meaning of the words" between "A bequest to A and if he shall die unmarried or without children to B", and "a bequest to X for life with remainder to A and if A die unmarried or without children to B". After commenting on the cases cited by Lord Romilly, the Chancellor says, "I am unable to find in any case prior to Edwards v. Edwards any authority that the words introducing a gift over in case of the death unmarried or without children of a previous taker do not indicate, according to their natural and proper meaning, death unmarried or without children occurring at any time". The result, therefore, is that assuming, as had Lord Romilly in Edwards v. Edwards, that in the case of a gift to A for life and if he shall die without children, the gift over takes

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57 Supra note 10.
58 Supra note 55.
59 Supra note 57, at 398.
effect "in case of A's death without children at any time", the House of Lords definitely holds that this, as it seems to them, obvious and undisputed proposition, applies equally even though, as in the case before them, the gift to A had been preceded by a life interest to X. And the cases are numerous in which the doctrine of O'Mahoney v. Burdett has been recognized in more recent decisions in England. This construction has also been adopted in Canada.80

CASES IN WHICH THE ENGLISH RULE HAS BEEN FOLLOWED

In the case of Naylor v. Godman,61 a testator directed that the residue of his estate should be invested in land for the benefit of six children of his daughter, each to have the enjoyment for life with remainder to his or her children in fee; by a later provision he stipulated that "It is my will that if one or more of my said grandchildren shall die without issue, the share of the one or more so dying shall vest in and become the property of the surviving brothers and sisters of deceased equally". One of the six died after the testator's death without issue. It was held that his share passed to his surviving brothers and sisters, the court saying, "Contention is, however, made that where the words in the will refer to the death of the devisee, where such gift is immediate, that is to take effect in possession, such words are always construed to mean death of the devisee before the death of the testator. But this is stating the doctrine too broadly." (Citing 3 Jarman on Wills 611—"this construction is only made ex necessitate rei, from the absence of any other period to which the words can be referred.")62

In a District of Columbia case63 a testator had bequeathed a fraction of his estate to his grandson George N. Herrell with a proviso that "if my grandson should die without issue", then his share to a daughter and another son. The court held that these words meant in case of George's death at any time without issue, and said, "While it is true that similar words have been held to

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61 109 Mo. 543, 19 S. W. 56 (1891).
62 Ibid. at 551, 19 S. W. at 58.
refer to death in the lifetime of the testator, where no contrary intention was manifest (citing cases) we deem it unnecessary to consider those decisions because the Supreme Court of the United States in *Britton v. Thornton*, 112 U. S. 527, 5 Sup. Ct. 271, laid down the rule that, under a devise to one person in fee and in case he should die under age and without issue to another in fee, the devise over takes effect upon the death at any time of the first devisee under age and without children." 64

In Connecticut, 65 a testator had bequeathed certain property to a niece, Sara. He later provided, "It is my will that in case either of them (Sara or another) should die without leaving children or issue at the time of their respective deaths", then to the children of his brother Horace. Sara died without leaving issue after the testator's death. It was held that the administrators of the estates of Horace's children were entitled, disapproving a former decision. 66

In *Britton v. Thornton*, 67 a case that arose in Pennsylvania, a testator bequeathed certain lands to one Eliza Thornton "Provided, that should the said Eliza Ann die in her minority, and without lawful issue then living", then over to the residue. The Supreme Court of the United States held that the gift over was operative whether she died in her minority and without lawful issue then living in the testator's lifetime, or after the testator's death, following *O'Mahoney v. Burdett*. 68 This case was followed in *First National Bank v. De Pauw*, 69 where the testator had devised certain lands to two grandchildren, "If either of them should depart this life without leaving issue", then over to the survivor. The court said:

"The whole question, then, is whether the words 'if either of them should depart this life without leaving issue', refer to the event of death before that of the testator, . . . or after the testator's death. If the former is the true mean-

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64 Ibid. at 32.
65 Butler v. Flint, 91 Conn. 630, 101 Atl. 19 (1917).
66 Lawlor v. Hallohan, 70 Conn. 87, 38 Atl. 903 (1897).
68 Supra note 10.
69 75 Fed. 775 (C. C. D. Ind. 1896).
ing, the gift over to the survivor is substitutionary merely, depending on the contingency of the death of either of the primary devisees in the lifetime of the testator, and designed to prevent a lapse; and upon that construction, both of the grandsons having survived the testator, the contingency upon which the survivor was to take has gone, and each took an absolute estate in fee. If, on the other hand, the words refer to a death at any time, under the circumstances mentioned, then, on the death of the testator, the grandsons took a base or determinable fee, coupled with a contingent interest in favor of each in the estate devised to the other, by way of executory devise.” 70

The court recognizes that in many cases in this country the substitutionary rule has been adopted, but says:

“It is a rule resting rather upon authority and precedent than upon reason, for it is by no means certain that it was not the intention of the testator to control the ultimate devolution of the title, after it had been enjoyed during life by the first taker, in case he die without issue. Such a construction seems to harmonize better with the popular use of the words, and to give a natural, rather than an artificial, effect to the language employed.” 71

The court thought that there was sufficient in the will in question to give the broader meaning to the clause, and cites Britton v. Thornton 72 in support of its conclusion.

This same view had previously been taken in Crane v. Cowell. 73 There by will testator had devised certain real estate to his grandchildren and added, “if any of my grandchildren should die, leaving no surviving issue, then I give and devise all the estate both real and personal herein given, to such grandchild, unto the survivor or survivors of such as shall die as aforesaid, and unto their heirs and assigns forever.” Judge Curtis, after citing the substitutionary rule applicable to the case of a gift to $A$ and in case of his death to $B$, says:

70 Ibid. at 777.
71 Ibid. at 779.
72 Supra note 67.
73 2 Curt. 178 (U. S. C. C. 1854).
"But it is manifest, that the whole basis of this reasoning fails, if the will gives the property over, not simply if the legatee die, but if his death is connected with some collateral event, such as dying without issue, which is contingent. In such case, there is no necessity to seek for a contingency, or for ingrafting on the language of the testator, a limitation of time, during which the event is to happen, to render it contingent. For the testator has himself in terms announced an event which may or may not happen after his decease, as the contingency upon which the property is to go over."  

He concludes:

"Though I do not intend to intimate any doubt of the soundness of the rule of construction, which introduces into a will such a limitation of time, in cases where it is necessary to make a contingency, I feel no disposition to do it when is not absolutely necessary. Indeed, the hypothesis that a testator, in making a testamentary provision, to take effect only upon and after his decease, really intended to provide for events in his lifetime, is somewhat unnatural and improbable and has been more than once admitted to be so. . . . In this case the basis of this rule of construction failing, and the words of the testator fairly importing a dying at any time without surviving issue, I do not feel at liberty to introduce into the will the words 'in my lifetime', and thus make the testatrix mean what she certainly has not said, and what I cannot find cause to declare she must have meant."  

He adds the following significant words, "Moreover, if the case at bar came within the rules of construction contended for by the complainant, the question between a definite or indefinite failure of issue, which has so often arisen and has given rise to such diversity of opinion, could in many cases have been avoided by considering that death, and failure of issue, and survivorship, were all to be referred to the lifetime of the testator." The court cited Anderson v. Jackson, and added this comment: "The construction of this will was thus repeatedly examined with the aid of the most eminent counsel in the country, and I am not aware that it was ever suggested, that the dying without issue, and the survivorship

74 Ibid. at 184.
75 Ibid. at 185.
76 16 Johns. 382 (N. Y. 1819).
therein provided for, were events to occur before the decease of the testator.” This is a very forceful statement of the thought that the courts that have adopted the substitutional view in recent years have apparently not considered its effect upon many cases previously decided which would have been decided otherwise if the substitutionary theory had been adopted by the courts.

The entire question has been considered with more than usual care in Drager v. McIntosh. In that case a testator had devised all the residue of his property to seven children in equal shares: “In case of the death of any of my said children leaving heirs of their body alive, then the interest of such deceased child shall go to his or her children in equal proportions, but in case any of my said children shall die leaving no child or children or descendants of deceased child or children,” then over to the other children or their descendants. After the testator’s death the children attempted to convey the title to certain lands in fee simple, and this suit was brought to decide whether they could pass a title free from any contingency. Declining to adopt the substitutionary doctrine, which was contended for by the appellee, the court said:

“This is directly contrary to the well established rule of construction which has been announced in numerous cases in which this court has construed similar clauses in wills, that when a devise is made to a person in fee, and in case of his death to another in fee, the absurdity of treating as contingent or uncertain the one event which is sure to occur to all living, requires an interpretation of the devise over as referring only to death in the testator’s lifetime, but when the death of the first taker is coupled with other circumstances which may occur or which may never occur, as death under age or without issue, the devise over takes effect, unless controlled by other provisions of the will, according to the ordinary and literal meaning of the words, upon death under the circumstances indicated whether before or after the death of the testator.”

The decision is the more important in view of the fact that Farmer, J., specially concurred only on the express ground that the gift

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7316 Ill. 460, 147 N. E. 433 (1925).
74 Ibid. at 464, 147 N. E. at 435.
over was only to take effect if the event occurred in the testator's lifetime. The significant fact, therefore, is that despite a number of earlier cases which pointed towards the adoption of the substitutionary doctrine in that state, the Supreme Court of Illinois expressly repudiated that doctrine in *Drager v. McIntosh*, and planted itself firmly on the same ground as the House of Lords in *O'Mahoney v. Burdett*, and the Supreme Court of the United States in *Brinton v. Thornton*, both of these cases being cited in the opinion of the court. This case was followed and approved in *Liesman v. Liesman*, where *Fifer v. Allen* is quoted as follows:

“The rule established in the case of O'Mahoney v. Burdett has since been followed in England, and it has been considered that there is a manifest distinction between a devise over, not in the case of the death of the first devisee, which is inevitable, but upon the happening of a contingent event, such as the death of the first devisee, without issue. In case of a devise simpliciter to one person and if he should die, to another, the courts of England and this country have construed the will upon the theory that the testator must have had some contingency in view, and inasmuch as the death of the first devisee is a certain and not a contingent event, the testator must have contemplated death within some particular period of time, and to prevent a lapse and in favor of vested rather than contingent interests, they have considered the life of the testator to be that period. In the case of *Crane v. Cowell*, 2 Curtis 178, the court, referring to the rule of construction just stated, said: ‘But it is manifest that the whole basis of this reasoning fails if the will gives the property over, not simply if the legatee dies, but if his death is connected with some collateral event, such as dying without issue, which is contingent. In such case there is no necessity to seek for a contingency or for engrafting on the language of the testator a limit of time during which the event is to happen to render it contingent, for the testator himself, in terms, announced an event which may or may not happen after his decease, as a contingency upon which the property is to go over’. In accordance with this rule, the death of any of the testator's children mentioned in section 4 of the will must refer to death at any time, whether before or after that of the testator.”

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79 331 Ill. 287, 293, 162 N. E. 855, 858 (1928).
80 228 Ill. 507, 81 N. E. 1105 (1907).
PROBLEMS ARISING IN THE LAW OF PROPERTY

The net result of the discussion seems to be as follows: First, on principle, in case of a gift to A and his heirs and if he shall die without issue then to B and his heirs, there seems to the writer to be no question whatever but what the testator intended the gift over to take effect if A died at any time without issue. It is true that the cases are numerous in which it has been properly held that such words cover the case of the death of A without issue in the testator's lifetime, on the ground that the testator may easily have had in mind the happening of the event in his own lifetime as well as after his death, and may have intended in the former contingency to have provided a substitutional gift to B. That, however, is a very different thing from holding that by the use of such words the testator meant to provide only for the case of A dying without issue in his lifetime. The writer has tested out his theory as to the popular construction of such clause by putting the question of the proper meaning of these words to his classes in Property over a period of many years, and has found that only a negligibly small proportion of the class take the view that the testator intended his gift over to take effect in the case of the death of the first taker in his own lifetime only. Secondly, the study of the cases has developed the fact that while the substitutionary theory prevails in many jurisdictions in this country, the opinions in which it has been adopted, have seldom, if ever, given the matter very careful consideration. The case of "a gift to A and his heirs and if he die without issue to B" has been treated as analogous to "a gift to A and his heirs and if he die to B"; quite overlooking the fact that the reason for holding that the gift is substitutionary in the second case, to wit, that the words "if he die" would otherwise be meaningless, has no application whatever to the first case where there is nothing in the nature of the case to require such a limited meaning. On the other hand, in England what seems to the writer to be the correct view has always been upheld, and the slip that was made by Lord Romilly in Edwards v. Edwards was promptly remedied by the House of Lords in O'Mahoney v. Burdett, so that the law is settled in England in favor of the wider

*a Supra note 55.
*b Supra note 10.
meaning, namely, if $A$ die without issue at any time, regardless of whether there be a prior life estate to $X$ or not. This view, as above pointed out, has received some support in this country, i.e. in Missouri and the District of Columbia, and particularly the United States Supreme Court in Britton v. Thornton, where O'Mahoney v. Burdett was followed in terms. The contrary rule is thus properly described in the opinion in First National Bank v. De Pauw, where the court said:

"It is a rule resting rather upon authority and precedent than upon reason, for it is by no means certain that it was not the intention of the testator to control the ultimate devolution of the title, after it had been enjoyed during life by the first taker, in case he die without issue. Such a construction seems to harmonize better with the popular use of the words, and to give a natural, rather than an artificial, effect to the language employed."

There are various applications of the rule of Mickley's Appeal which are of interest. They are considered at length in the article by Mr. Amram above referred to. For example, he subdivides the cases in which the question as to the application of this rule has arisen into three classes: (1) A gift to $A$ in fee and if he die without issue then to $X$; (2) A gift to $A$ for life remainder to $B$ in fee, and if $B$ die without issue then to $X$; (3) A gift to $A$ for life, remainder in fee to $B$, but if $A$ die without issue then to $X$. He contends that with certain qualifications the rule in Mickley's Appeal applies to cases in Group 1; that as to cases in Group 2 it applies in a modified form, i.e. that $B$ takes an absolute fee without reference to his possible subsequent death without issue if he survives $A$; that in cases in Group 3 it does not apply, for the obvious reason that $A$ is only given a life estate which there is no reason for the court to increase to a fee regardless of whether he dies without issue or not.

It would lead the writer too far afield from his main object to enter upon a careful consideration of these problems. His main

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63 Supra note 69.
64 Supra note 1.
object without emphasizing too much the possible variations of the problem has been to inquire just how the rule in *Mickley's Appeal* arose in Pennsylvania and other jurisdictions, and secondly, whether it really carries out the intention of the testator where it is applied. He is himself convinced that the rule had its origin in the confusion between the two quite different cases. First, is a gift to *A* and *if he die*, to *B*; manifestly in such case, as *A* must die some time, the phrase "if he die" must relate to some point of time, and the only point of time that suggests itself is in the testator's lifetime. It is almost inevitable in such case that the phrase should be treated as if the testator had said, "if *A* die in my lifetime", and construe the will accordingly. The second case is a gift to *A* "and if he die without issue to *B". Here, manifestly *A* may die without issue either in the testator's lifetime or afterward. There is no necessity, therefore, for the court construing the clause, as they did in *Mickley's Appeal*, to mean only if *A* dies without issue in my lifetime. Not only is there no necessity, but it is submitted that it is very much more likely that the testator is meaning to cover the case of *A*'s dying without issue at any time, and that therefore it should be immaterial whether *A* dies without issue in the testator's lifetime or after his death. It is rather interesting to note that in all cases which have adopted this rule, at least in this state, the provision has been substantially "death without children or death without issue"—sometimes accompanied by such additional thoughts as "death unmarried". But it is perfectly easy to suggest other contingencies which could hardly by any construction be held to relate simply to the testator's lifetime. Suppose, for instance, the provision was "a gift to *A* and his heirs and if he die under the age of 50 to *B* and his heirs", could it be contended with any prospect of success that such clause meant "if he die under the age of 50 in the testator's lifetime only"? It is submitted that probably no courts have gone this far and yet it seems a manifest contradiction to hold that the expression "if he die without issue", means only "if he die without issue in the testator's lifetime"; whereas, on the other hand, "if he die before he reach the age of 50" means "if he die before the age of 50 at any time".
If, as the author believes, the substitutionary view is incorrect, the undeniable result is that in most of the jurisdictions in our country where the substitutionary doctrine is maintained, the wishes of the testator in many cases have been ruthlessly over-turned. We have, therefore, a situation quite similar to that noted above (i.e., the situation where, quite apart from the question here involved, the common law had construed the words "if A die without issue", as meaning an indefinite failure of issue). When it once became plain that by giving such meaning the courts were denying to a testator the right to dispose of the property as he really wished, the common law rule of construction was repealed by the passage of appropriate statutes. Following the principle of such statutes, it is suggested that in Pennsylvania and other states adopting the so-called substitutionary rule, a statute should be passed as follows:

"That in all deeds, wills or other instruments bearing date after the passage of this Act, words which may import either a want or failure of issue of any person in the testator's lifetime, or at any time, shall be construed to mean a want or failure of issue at any time, unless a contrary intention shall appear by the instrument in which such devise or gift is made."

Such statute would be a natural supplement to the Act of July 9, 1897, P. L. 213; that Act provided in effect that words which might import either a definite or indefinite failure of issue should be construed to mean a definite failure of issue unless a contrary intention appeared by the instrument in which such gift was made. The proposed statute would go a step further and raise a presumption in favor of a definite failure of issue of the first taker at any time, rather than the presumption in favor of a failure of issue in the testator's lifetime, which is enforced by jurisdictions where the substitutionary theory prevails.