LIMITATIONS OVER ON THE DEATH OF A FIRST TAKER OR ON HIS DEATH WITHOUT ISSUE: ILLINOIS DECISIONS

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I. LIMITATIONS OVER "ON," "AT," OR "AFTER" THE DEATH OF THE FIRST TAKER

WHERE in any conveyance, whether by will or by deed, land is limited to A, with no language expressly descriptive of the size of his estate, and there is a further limitation to B "on," or "at," or "after" the death of A, the conveyance is regularly construed to create a life estate in A, with a vested remainder in fee in B. Since the limitation to B is not qualified with respect to the time or circumstances of A's death, no other construction is reasonably possible. When a future interest has been so limited that it is certain to come into possession upon the death of the prior taker, the latter's estate is naturally considered to be a life estate unless a contrary intent has been clearly expressed. The prime attribute of a life estate is its terminability at the death of the owner thereof; at common law, any estate so terminable was necessarily a life estate.

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1 Hill v. Gianelli, 221 Ill. 286, 77 N.E. 458 (1906); Hurt v. McCartney, 18 Ill. 129 (1856); Bergan v. Cahill, 55 Ill. 160 (1870). The same rule of construction is applied even though the first taker is expressly given a power to consume the corpus of the property, Hamlin v. U.S. Express Co., 107 Ill. 443 (1883); Bradley v. Jenkins, 276 Ill. 161, 114 N.E. 582 (1916).

2 Whether this statement is wholly and completely accurate depends upon the view taken in respect to the estate of a tenant in fee tail special after possibility of issue is extinct. The estate was certain to end with the death of the tenant, who had no power to bar the entail by fine or recovery. He was in the same position as a tenant for life without impeachment for waste. See Challis, Real Property 291-2, 339 (3d ed. 1911). It would seem that he might properly be said to have only a life estate.
simple "if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law." The creation of an estate certain to come into possession at the death of the first taker sufficiently manifests the intent to create in such first taker a life estate only.4

After the operation of the Statute of Uses brought into recognition new legal interests of the executory type, corresponding to springing and shifting uses theretofore valid in equity, it would have been entirely reasonable to admit the possibility of limiting over a fee simple on the death of the owner without regard to the time or circumstances of his death. If the intent has been clearly expressed to create a fee simple with such a limitation over, there is nothing in public policy that requires the expressed intent to be defeated. Seldom, however, would a conveyor actually intend to create a fee simple with a limitation over that is certain to come into possession at the death of the fee simple owner, since, for practical purposes, the distinction between a life estate and a fee simple subject to an executory limitation over "on death" of the first taker is but slight.5 In all cases where the language is not specific, the construction should be that a life estate has been created. It was recognized, however, in Vinson v. Vinson,6 that the concept of a fee simple with an executory limitation over that is certain to take effect in possession at death was possible. That case involved the construction of a deed of a rather common type wherein the grantor provides that the conveyance shall "take effect at my death," or uses language of equivalent meaning. Usually the Illinois courts have construed such a deed to reserve to the grantor a life estate, and to create a remainder in the person named as grantee.7 In the Vinson case, nevertheless, the appellate court gave clear recognition to the possibility of construing such a deed to create an executory interest (a springing use executed by the Statute of Uses) in the grantee, and to leave in the grantor until his death the fee simple title. If a fee simple can be made terminable by a springing executory interest limited in defeasance of the fee in the

5 Two principal differences exist. The owner of a defeasible fee has more extensive privileges of user than a life tenant, Gannon v. Peterson, 193 Ill. 372, 62 N.E. 210 (1902). The widow of the owner of a defeasible fee is entitled to dower; the widow of a life tenant is not so entitled, Aloe v. Lowe, 278 Ill. 233, 115 N.E. 862 (1917).
7 Latimer v. Latimer, 174 Ill. 418, 51 N.E. 548 (1898); Shackelton v. Sebree, 86 Ill. 616 (1877).
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grantor, there is no reason why it may not likewise be made terminable by a shifting executory interest limited on the death of a prior grantee.8

What language is sufficient to create a fee simple with a certain executory limitation over "on death," would seem to be a problem of construction of intent. Where the grant to the first taker contains words of inheritance ("heirs") or their equivalent, and there is no express statement that the first taker shall have a life estate only, the intent to create a fee simple with an executory limitation, rather than a life estate with a remainder, may be thought indicated. The decision of the Illinois Supreme Court in *Askby v. McKinlock,*9 affords some support for this view. The actual issue in that case was whether the plaintiff, who was suing for specific performance of a contract to convey land, had marketable title. The plaintiff derived title under the will of her uncle, the third clause of which read as follows: "I therefore will and bequeath all my estate, both real and personal, to my beloved niece, Martha Isabella Kerr [the plaintiff] ... and do make her my sole heir of all my earthly possessions, without bond or surety." The eighth clause of the will provided: "... if my said niece and heir should marry and leave no issue, then said estate shall go to my brothers and sisters or their children." And the ninth clause: "If my said niece and heir should leave living issue at her death then said estate will go to said issue. . . ." The court denied the prayer for specific performance, declaring that the plaintiff had a fee simple which was subject to an executory devise over (rather than a fee simple absolute); and it further declared most emphatically that the gifts over could not cut down to a life estate the fee simple which the testator had given the plaintiff in clear and sufficient terms. The language of the opinion indicates that the court realized that there were two gifts over—one to the surviving issue of the plaintiff, and the other to the brothers and sisters of the testator or

8 It should be noted that in the situation here discussed there is no valid objection to the limitation over on the ground that it constitutes a restraint upon alienation. The owner of a defeasible fee simple can convey the interest that he has. Every executory limitation over after a fee simple makes the fee defeasible, and for practical purposes makes alienation thereof more difficult. The practical impediment to alienation arising from the creation of a future interest has never been considered objectionable unless the future interest has been limited for the purpose of preventing alienation. A gift over which is a penalty for alienating is void. The common executory limitation over on death of the first taker without issue impairs the marketability of the fee simple to a great extent; and an executory limitation over certain to come into possession on the death of the first taker undoubtedly is an even greater practical deterrent to alienation, but that fact should not render it invalid. See Schnebly, Restraints upon the Alienation of Legal Interests, 44 Yale L. J. 961, at 962–3 (1935). Nor can it reasonably be contended that the executory limitation over is "repugnant" to the fee simple in the first taker, ibid., at 1198 ff.

9 271 Ill. 254, 111 N.E. 101 (1916).
their descendants—and it would seem that the court thought that one or the other of these gifts would vest at the death of the plaintiff. If that was the view taken by the court, then we have an example of a fee simple defeasible on the death of the owner thereof under any circumstances that can possibly exist at the time of his death. It is strange, however, that the court should have repudiated so emphatically the contention that the plaintiff took only a life estate, and yet have failed to indicate any appreciation of the fact that, upon the construction adopted, she had, for practical purposes, but little more than such.

Later decisions of the Illinois Supreme Court have manifested a strong tendency to construe even such language as appeared in the Ashby case to create only a life estate in the first taker. In view of these later cases, there appears to be little likelihood that the court will hereafter give practical effect to the concept of a fee simple certain to be divested at death, which was admitted as a possibility in the Vinson case and seemingly as a possibility in the Ashby case.

Where the estate of the first taker is not expressly delimited, and a future interest is created which is not certain to come into possession on death of the first taker, it would seem that the first taker should have a fee simple subject to an executory limitation over. This is the regular construction where the gift over is conditioned upon the occurrence of such an event as the death of the first taker without issue surviving. By anal-

10 Holding that the first taker has only a life estate despite the fact that words of inheritance were used in the limitation to him, and despite the further fact that his estate was not expressly stated to be a life estate: Drager v. McIntosh, 316 Ill. 460, 147 N.E. 433 (1925); Liesman v. Liesman, 331 Ill. 287, 162 N.E. 855 (1928). In both these cases, the construction adopted made the future interests contingent remainders, destructible in Illinois prior to 1927, when section 40 of chapter 30 of the Illinois Revised Statutes (1939) became effective. In the former case, such destruction had actually been accomplished. Had the court held the devises to create fees simple subject to executory limitations over, the latter would have been indestructible.

Where in a will the testator has devised land to one and "his heirs," and has at the same time expressly declared that such person shall take only a life estate, the Illinois Supreme Court has construed the devise to create a life estate only, Wallace v. Bozarth, 223 Ill. 339, 79 N.E. 57 (1906); Siegwald v. Siegwald, 37 Ill. 430 (1865). Contra: Lambe v. Drayton, 182 Ill. 110, 55 N.E. 183 (1899); cf. Riissman v. Wierth, 220 Ill. 181, 77 N.E. 108 (1906). See Kales, Estates, Future Interests and Illegal Conditions and Restraints in Illinois § 182 (2d ed. 1920).

Similar language in a deed has likewise been construed to create a life estate only, Miller v. Mowers, 227 Ill. 392, 81 N.E. 421 (1907). In this situation, however, the decision may depend upon application of the rules governing conflict between the granting clause of the deed and its habendum. See Roof v. Rule, 348 Ill. 370, 180 N.E. 807 (1932); Nave v. Bailey, 329 Ill. 235, 160 N.E. 605 (1928); Harder v. Matthews, 309 Ill. 548, 141 N.E. 442 (1923); Morton v. Babb, 251 Ill. 488, 66 N.E. 279 (1911).

11 Smith v. Kimbell, 153 Ill. 368, 38 N.E. 1029 (1894); Fifer v. Allen, 228 Ill. 507, 81 N.E. 1105 (1907); Wilson v. Wilson, 261 Ill. 174, 103 N.E. 743 (1913).
ogy, if land should be conveyed to A, and on his death to B if B should survive A, it ought to be held that A takes a fee simple subject to defeasance only in the event that B should survive him. The statute heretofore cited, making every conveyance prima facie one in fee simple, seems to require this result, since there is no express provision for the contingency of B's death before that of A. To hold that A would take but a life estate, with a contingent remainder in B, would result in the leaving of a reversion in the conveyor or his heirs. If the conveyance should be by will, there may be two objections to this construction. Not only does it appear inconsistent with the statute above mentioned, but it also results in a partial intestacy in many instances. The Illinois Supreme Court, however, has shown an inclination to hold that such limitations create a life estate followed by a contingent remainder. While this view seems erroneous, it is not difficult to perceive how the mistake has occurred. A life estate followed by a contingent remainder conditioned upon the remainderman's survival of the life tenant is of common occurrence. It is easy to fall into the error of concluding that every future interest conditioned upon survival by the donee therein of the first taker is a contingent remainder. The conclusion that the first taker has but a life estate then follows naturally.

Where the estate of the first taker is not expressly described, and two or more future interests are created, one or the other of which must certainly vest on the death of the first taker, he should be held to have a life estate only. The situation is essentially the same as where a single future interest which is certain to vest on death of the first taker is limited. An illustration is a limitation to A, and on his death in fee to his surviving children if any; and if he shall leave no children, to B in fee. Such alternative limitations over are frequently spoken of as limitations which "ex-

12 Where the gift over is of the residue of the testator's estate, the construction criticized in the text would produce a possible intestacy; the same is true where the gift is of specific property and the will does not contain a residuary clause. It has frequently been said that courts will adopt any reasonable construction to avoid such an intestacy. "It has been said that the idea of any one deliberately purposing to die testate as to a portion of his estate and intestate as to another portion is so unusual in the history of testamentary dispositions as to justify almost any construction to avoid it," Scofield v. Olcott, 120 Ill. 362, 374, 11 N.E. 351, 354 (1887); see Welch v. Caldwell, 226 Ill. 488, 495, 80 N.E. 1074, 1075 (1907).

13 McClintock v. Meehan, 273 Ill. 434, 113 N.E. 43 (1916). In Bushman v. Fraser, 322 Ill. 579, 153 N.E. 611 (1926), the court stated the same conclusion, although the issues of the case did not necessitate a decision on the problem whether the limitations created a life estate with a contingent remainder or a fee simple subject to an executory devise over. Since the first taker was survived by the donee in the gift over, the result would have been the same on either construction.

14 Healy v. Eastlake, 152 Ill. 424, 39 N.E. 260 (1894).
haust the possible contingencies." Many limitations over which might seem to fall into this category can be shown not to exhaust literally all possible contingencies. For example, there may be a devise to a child of the testator, A, and on his death to his surviving children if any; and if none, to the other surviving children of the testator. Since by the usual rule of construction the other children of the testator must survive A in order to participate in the gift over, there is obviously a possibility not covered in the limitations; for A may die leaving no surviving children, and yet there may be at his death no living children of the testator. While the limitations over do not exhaust the possible contingencies, they may be sufficiently exhaustive in their scope to warrant the conclusion that the testator intended A to have only a life estate.\textsuperscript{6} The testator may well have thought that he had provided completely for disposition of the land at the death of A. In fact, he has made such provisions that it is highly probable that one or the other of the future interests created will actually vest. As an indication of the intent to create a life estate only in A, such provisions may be sufficient.\textsuperscript{7}

\textsuperscript{6} Kales, op. cit. supra note 10, at § 165; Rest., Property § 108, comment c (1936).

\textsuperscript{7} For clear cases of limitations over which do not exhaust all possible contingencies, and which, therefore, are compatible with a fee simple in the first taker, see Stoller v. Doyle, 257 Ill. 369, 100 N.E. 959 (1913); Cutler v. Garber, 289 Ill. 200, 124 N.E. 441 (1919).

In Drager v. McIntosh, 316 Ill. 460, 147 N.E. 433 (1925), the first limitation over was to the heirs of the body of the first taker. The second limitation was in this language: "in case any of my said children shall die leaving no ... children or descendants of ... children, then the interest of such deceased child shall go to the remainder of my said children or to the descendants of such as may be dead...." In construing this second gift over, it may be possible to hold: (a) that the phrase "remainder of my said children" refers to other children of the testator living at his death; (b) that the limitation to such children is not absolutely contingent upon their survival of the first taker; (c) that the descendants of a deceased child are merely substituted for their parent in cases where such child has died in the life of the first taker leaving descendants surviving him; (d) that where a child has died in the life of the first taker without leaving descendants surviving him, his heirs are entitled by descent from him to the share he would have taken if living. If the construction above indicated were adopted, the two limitations taken together would literally exhaust all possible contingencies, since one or the other must vest. The actual decision in the case was that the first taker had only a life estate, but no particular consideration was given to the problem of the precise construction of the second gift over.

Where the first gift over is to the surviving issue of the first taker, and the second gift over is to the "heirs" of the testator in the technical sense of the term, the two limitations may be taken to exhaust all possible contingencies. While it is possible that the testator may leave no "heirs" at his death, this possibility is so remote that he must certainly have thought that he had made a complete disposition of the property at the death of the first taker; he may,
II. LIMITATIONS OVER ON THE DEATH OF THE FIRST TAKER IN LANGUAGE WHICH IMPLIES A CONTINGENCY

Where property is conveyed to A without express description of his estate, and there is a limitation over "if he shall die," or "in event of his death," or "in case of his death," a difficult problem of construction is presented. All the forms of expression quoted suggest a contingency in respect to the death of A, but do not explicitly state the nature of that contingency. There can be nothing contingent about the fact of death, which is certain to occur at one time or another. If there be a contingency implied in the language, it must clearly have reference to either the time or the circumstances of death.

A. LIMITATIONS IN DEEDS

If the conveyance is by deed, the explanation of the implied contingency is especially difficult. In this situation, the only explanation that occurs to one is that the grantor intended the gift over to become operative in possession only if the first taker, A, should die before the donee of the...
gift over. That is, there is an executory limitation over if the donee there-
in should survive A. The court must choose between this construction, and the construction that A takes only a life estate despite the implication of a contingency in respect to his death. If the limitation to A con-
tains words of inheritance or their equivalent, it would seem preferable to construe the limitations of the deed to create a fee simple in A, defeasible on his death before that of B.

In Cover v. James,9 a deed conveyed land to H and W, and contained this provision: "In case of the death of either . . . . the other to have the whole of said property. . . . ." The court construed the deed to create an estate for joint lives in H and W, with a contingent remainder in fee to the survivor. So far as the actual decision was concerned, it was immaterial whether it was put on the ground indicated, or on the ground that H and W each took an undivided half of the land in fee as a tenant in common with the other, and that there was an executory limitation over as to each half in event of the death of the particular cotenant during the life of the other. By either theory, a fair result could be attained, and effect could be given to the implication of contingency in respect to death.20

Where, however, a deed conveys land to A, and in event of his death to B, no cotenancy is created, and the construction adopted in the Cover case is not possible. Either the implication of contingency must be disregard-
ed, and the deed construed to create only a life estate in A; or the deed must be construed to create in A a fee subject to divestiture if he shall die in the lifetime of B. In the absence of words of inheritance or other lan-
guage indicative of a fee simple in the limitation to A, neither construc-
tion can be said to have any great weight of argument in its favor, al-
though it may be suggested that the statutory presumption21 of a fee sim-
ple supports the second construction above stated.

B. LIMITATIONS IN WILLS

I. PRIMA FACIE CONSTRUCTION

If the conveyance be by means of a devise in a will, two possible expla-
inations of the implication of contingency are apparent. First, it is possible

9 217 Ill. 309, 75 N.E. 490 (1905).

20 It can be argued that since one of the two devisees must in normal course of events die be-
fore the other, the death of one in the life of the other is not a contingent event; and, there-
fore, that neither the construction adopted by the court, nor the alternative suggested in the

text above, gives effect to the implication of contingency. It may be answered, that while one
must die first, it is uncertain which one will die first; that as to each cotenant, his survival of
the other is a contingency. This fact may readily explain why the implication of contingency
crept into the language of the will, even though it be admitted that the language does not
easily suggest the true nature of the contingency implied.

that the testator intended the limitation over to vest in possession only in the event that A should die in the life of him, the testator. Secondly, it is possible that the testator intended the limitation over to become effective only if A should die before B, the donee in the gift over, thus making the gift over contingent on B's survival of A. While either of these two constructions would supply the contingent element that the language seems to involve, the former would usually appear preferable.22 A testator may naturally be expected to look forward to the time of his own death, when his will becomes operative, and to think about the death of his first devisee with respect to that event, rather than with respect to an event probable to occur at a more remote point of time. It seems more likely, therefore, when he suggests a contingency in respect to the death of A, that such contingency is the death of A in the life of him, the testator, rather than the death of A before that of B, which would be a more remote event if both A and B should survive the testator.

The authorities, therefore, have quite generally agreed that a devise to A without description of his estate, followed by a limitation over on his death in terms implying a contingency, is to be construed prima facie to mean the death of A in the life of the testator.23 The pressure to adopt this construction would be especially strong if the limitation to A should contain words normally descriptive of a fee simple, such as "heirs," "in fee," etc. These words being entirely inconsistent with the intent to give A only a life estate, a second cogent reason would exist for adopting the construction stated.

The adoption of this construction makes the gift over substitutional, and not successive. If the gift over ever takes effect in possession, it so takes effect at the death of the testator, and creates a present interest. If the first taker survives the testator, he takes an indefeasible fee simple. The limitations over can never operate to divest a fee simple in A after the fee has once come into possession at the death of the testator.

2. EVIDENCE REBUTTING THE PRIMA FACIE CONSTRUCTION

The rule stated in the preceding subdivision is but a rule of construction.24 Wherever, therefore, there is sufficient language in the context of the devise to show that the testator referred to a death of A after his own death, the intent thus manifested must prevail. Since wills exhibit an infinite variety of phraseologies, no very specific criteria can be stated whereby to determine what language sufficiently manifests the intent of the tes-

23 Ibid.; DeHaan v. DeHaan, 309 Ill. 323, 141 N.E. 184 (1923); Evans v. Van Meter, 320 Ill. 195, 150 N.E. 693 (1925); Knight v. Knight, 367 Ill. 646, 12 N.E. (2d) 649 (1938).
24 Tomlin v. Laws, 301 Ill. 616, 619-20, 134 N.E. 24, 25-6 (1922).
tator to make the gift over operative in event of a death after his own. Certain Illinois cases would seem to call for particular comment in this connection.

In *Tomlin v. Laws*, the will before the court made a devise to "my child, as yet unborn," with a gift over "in the advent of the death of my child," to the testator's wife for her life, and then over to his brothers and sisters. At the time the will was executed, the testator was so injured that he must have contemplated death within a short period. He did in fact die about a month after execution of the will, and the child in gestation at his death was born two months later. Under these circumstances, it would appear extremely doubtful whether the testator could have referred to death of the unborn child in his own life. The court, nevertheless, thought that the usual rule should apply, remarking, however, that if he contemplated death of the unborn child after his own death, it was a death of the child at birth that he had in mind. Obviously, either the construction adopted by the court or the alternative suggested by it would reach the same result, since the child was born alive in due course.

In *Knight v. Knight*, the will devised real estate to a son and a daughter, "with the provision that the same not be sold until at least twenty years after my decease, and in the event of the death of either of the two named heirs the real estate is to be the property of the survivor." The court construed these provisions to refer to death in the life of the testator. It may be noted, first, that in *Cover v. James*, similar limitations in a deed were held to create an estate for joint lives, with a contingent remainder to the survivor. There was in that case no period prior to actual operation of the instrument to which the event of death could be referred. In that case, moreover, the limitation was to a husband and wife. In the case of a limitation to a son and a daughter, as in the *Knight* case, it may be doubted whether the father would have intended to create either a joint life estate with remainder to the survivor, or a cotenancy in fee with an executory limitation over as to each undivided interest in event of the death of the owner of such undivided interest before the death of the other cotenant. Either of these two constructions would exclude from all future benefit the children of the cotenant dying first. The second point of comment on this case relates to the fact that there was a prohibition upon sale of the premises for a period of twenty years. Such a prohibition was probably void as a restraint upon aliena-

25 301 Ill. 616, 134 N.E. 24 (1922).
26 367 Ill. 646, 12 N.E. (2d) 649 (1938).
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...tion, but nevertheless, the close association in point of language between this prohibition and the gift over "in the event of" death suggests strongly that what the testator had in mind was the death of one of the two children within the twenty-year period. This suggestion would be the more plausible if it should appear that both children were very young at the time the will was executed. The rule of construction which the court actually applied related the death mentioned in the instrument to the life of the testator. That rule, as we have seen, arose out of the necessity to explain the contingent character of the language. Where there is some event other than the death of the testator to which the death of the devisee can be related with reason, the need for the application of the rule ceases. A testator usually contemplates that his devisees will survive him; when he has any different idea in mind, he is likely to state it explicitly. "Death" of the devisee should not be construed to mean death in the life of the testator unless there is no other construction which will give reasonable effect to the language employed. It may well be thought that in the Knight case the testator intended the gift over in event of death to be operative only if either child should die before expiration of the twenty-year period.

In DeHaan v. DeHaan, the testator devised his real estate in trust for the term of ten years, directing that 34% of the net income therefrom be paid to his wife, and 66% to three children; he further directed that on termination of the trust, the real estate should be divided among the wife and said three children in the proportions above indicated. By another clause of the will, the testator gave his wife 34% of his personalty; and by yet another clause he provided that the interest taken by the wife under the will should go "in case of her death" to a son. The court held that the gift over "in case of her death" referred to a death in the life of the testa-

28 A restraint on the alienation of a fee is void in Illinois, even when limited to a period of years, McNamara v. McNamara, 293 Ill. 54, 127 N.E. 130 (1920); McFadden v. McFadden, 302 Ill. 504, 135 N.E. 31 (1922). Query, however, whether the restraint should necessarily be void where the fee of the first taker is defeasible for the same period by a limitation over on his death within that period. See Schnebly, op. cit. supra note 8, at 991–2.

29 See note 90 infra.

30 Where a devise is to A for life, remainder to B, and "in event of" his death to C, death of B in the life of A is meant, according to the authorities, Tiffany, Real Property 77 (2d ed. 1920); Theobald, Wills 743 (8th ed. 1927). This holding carries out the principle stated in the text above, that death should be referred to a point of time after the death of the testator if that is possible. Where the limitations are to A for life, and "in event of" his death "without issue surviving," to B, it should be noted that the contingency implied in the phrase "in event of" is actually explained in the language following. In such a case, therefore, there is less pressure to construe "death" to mean death in the life of A. Cf. Kleinbahn v. Kleinbahn, 253 Ill. 620, 97 N.E. 1077 (1912). And see the subsequent discussion in the text, Subdivision IV D.

31 309 Ill. 323, 141 N.E. 184 (1923).
tor, and that since the widow had survived the testator, she took 34% of the personalty absolutely, and 34% of the corpus of the realty on termination of the trust. It must be noted that the gift over in this case was applicable to both the realty and the personalty. If the realty alone had been involved, the death referred to might plausibly have been construed to be death after that of the testator, but during the trust period of ten years. In respect to the personalty, however, death during this period could scarcely have been intended: the will evidently contemplated immediate payment over to the widow of her share of the personalty, and there would have been no apparent reason for limiting over her interest therein on the event of her death after she had come into actual possession and enjoyment, but during a ten-year period which had no relationship to the personalty. It is always a dubious construction of language to interpret it to mean one thing in respect to one kind of property, and another thing in respect to a different sort of property; it is highly unlikely that the testator in referring to the death of his wife had more than one point of time in his mind. The decision, therefore, which construed death to mean death in the life of the testator, was probably correct. It may be further remarked, that there was in this case no close association in point of language between the reference to the ten-year period of the trust and the limitation over "in case of her death."

Occasional cases are found in which there has been a devise to A for life, and "in the event of his death," to B. In this situation, the limitation to B is construed to create a remainder;32 it is not a substitutional limitation conditioned on the death of A in the life of the testator. At least two reasons support this conclusion. First, any limitation following an estate which is explicitly described as a life estate would naturally be construed to be a remainder. Secondly, to construe the limitation to B as substitutional, depending for its effect on the death of A in the life of the testator, would cause a partial intestacy in many instances. If A should survive the testator, there would be no express disposition of the property at A's death. If there were no residuary clause in the will, or if the limitations were of the residue of the estate, a partial intestacy would be inevitable. It has seemed to be the better result, therefore, to construe the limitation to B as a vested remainder, to come into possession on the death of A after that of the testator, even though this construction fails to give effect to the implication of contingency in respect to the death of A.

It might be contended that the limitation to B should be construed as a contingent remainder, conditioned on B's surviving A, thus giving effect to

32 Millikin Nat'l Bank v. Wilson, 343 Ill. 55, 174 N.E. 857 (1931); see Kolb v. Landes, 277 Ill. 440, 115 N.E. 539 (1917).
the implication of contingency arising from the language "in event of his death," employed in the gift to A. The writer believes, however, that such implication of contingency in respect to the remainder is not justified. A remainder ought not lightly to be construed as contingent, thus creating a possibility of intestacy as to the reversionary interest, and making possible the destruction of the remainder where the common law rule of destructibility of contingent remainders continues in force. It would seem likely, moreover, in cases of this description that the language of contingency has crept into the will without mature consideration on the part of the testator because of the fact that, in normal course of events, the remainderman, B, cannot take in person unless he survives the life tenant, A. This fact, present to the mind of the testator, may have induced the expression importing contingency when no condition was actually intended.

An interesting variation of the type of case last discussed is *Millikin Nat'l Bank v. Wilson.* In that case, the will made a gift to a son for his life, and "in the event of his death," to his widow; and "in the event of the death of his widow," to the son's children for their lives; and then to certain nephews, etc., "living at that time." It was held that the gifts to the son's widow and to his children were not substitutional, but were successive. While the decision could rest on the simple proposition that a gift "in the event of" the death of the first taker is not substitutional where such first taker is expressly or by clear implication given a life estate only, there were additional factors in this case to support the conclusion. Whenever the limitation over "in the event of" the death of the first taker is for life only, the implication of contingency in respect to the death of the first taker is readily explainable. The remainderman for life can take in possession only if he survives the death of the first taker; this condition is inherent in the nature of the limitation, and its presence in the mind of the testator might easily explain his implication of contingency in reference to the death of A, which must occur in the life of B if the latter is to take. In the case under discussion, the limitation over to the son's widow was not expressly described as a life estate, but the court properly so construed it; the limitation to the son's children was expressly for their lives; it followed that both the limitation to the son's widow and that to his children ought to be construed as successive.

Contingent remainders have been indestructible in Illinois since 1921, Ill. Rev. Stat. (1939) c. 30, § 40. The destructibility doctrine is still of importance, however, in relation to the problem of construction discussed in the text above, since for many years yet to come questions will arise as to the legal consequences of transactions occurring prior to the effective date of the statute.

*33* Cong. 55, 174 N.E. 857 (1931).
III. LIMITATIONS OVER ON THE DEATH OF THE FIRST TAKER
"WITHOUT ISSUE"

A. COMMON LAW CONSTRUCTION—INDEFINITE FAILURE OF ISSUE

The issue of any person includes, when "issue" is used in the broadest sense, all his descendants. An indefinite failure of issue refers to a failure in any generation, however remote from the stock of descent. Thus, if A dies leaving B as his surviving issue, and B dies leaving C as his issue, and D dies leaving E as his issue, and E dies leaving no surviving issue, at that time the issue of A may be said to have failed. In the early history of the law, the phrase "die without issue" was commonly used in limiting a remainder after an estate tail. Land would be devised to "A and the heirs of his body, but if he shall die without issue, to B and his heirs." The intent to create a fee tail was expressly manifested by the use of the words, "heirs of his body." The limitation over to B if A should "die without issue" was naturally interpreted to refer to the termination of the estate tail through a failure of issue whenever that might occur. Thus, the phrase "die without issue" came to be construed prima facie as referring to an indefinite failure because of its association with the expressly defined fee tail, rather than by reason of the natural meaning of the phrase. Indeed, this construction is very difficult to reconcile with the natural meaning of the quoted phrase when the phrase is disassociated from the limitation to "heirs of the body."

To understand the full import of the common law rule of construction of this phrase "die without issue," it is necessary to note two particular situations. First, is the case of a limitation to A and his heirs, and if he shall "die without issue," to B and his heirs. Construing the phrase quoted to refer to an indefinite failure of issue, the courts naturally drew the conclusion that "heirs" in the limitation to A meant "heirs of the body," and in consequence A took a fee tail. Second, is the case of a limitation to A for life, and if he shall "die without issue," to B and heirs. Here again, the quoted phrase, if in a will, was construed to refer to an indefinite failure of issue. The limitation to B, however, if on an indefinite failure, would not


38 It should also be noted that prior to the Statute of Uses (1535), no legal future interest could be created by limiting a fee simple over on a definite failure of issue. At common law, a remainder was the only future interest which could validly be limited to a third person. After the Statute of Uses and after the development of the rule against perpetuities, moreover, a limitation of a fee over on an indefinite failure of issue would have been too remote.
GIFTS OVER ON DEATH OF FIRST TAKER

be valid at common law unless A took a fee tail, so that B’s interest could be a remainder. There was a rather natural inference, moreover that the intent must have been for A’s estate to continue until the limitation over to B could come into possession according to its terms as construed. These considerations resulted in the conclusion that A took a fee tail despite the fact that the limitation to him was for “life.”

The prima facie construction of the phrase “die without issue” which has been stated above, yielded to a contrary intent if clearly manifested. If the language employed made it clear beyond a doubt that the conveyor referred to a definite failure of issue, i.e., to the death of the first taker without issue surviving at his death, then such manifested intent was given effect. In such a case, after the Statute of Uses, the first taker took a fee simple subject to an executory limitation over on his death without surviving issue. In determining what language sufficiently manifested the intent to make the quoted phrase refer to a definite failure of issue, the courts drew an illogical distinction between limitations of real and personal property. In respect to the former, far clearer evidence of intent was required to preclude the prima facie construction. In respect to personal property, a gift over if the first taker “shall die leaving no issue,” was construed to be on a definite failure; and the same was true where there were limitations to two or more persons, with a gift over to the “survivor” or “survivors” if any one should “die without issue.” In regard to real property, however, in neither of these cases was the context considered sufficiently clear to rebut the prima facie inference of an indefinite failure.

B. ILLINOIS DECISIONS FAVORING THE DEFINITE-FAILURE CONSTRUCTION

It is a matter of some importance to determine the results of the Illinois decisions in regard to this problem of construction. The adoption of the indefinite-failure-of-issue construction means that as to land a fee tail is created. By the Illinois Entail Statute, this fee tail is converted into a

41 While illogical as to interpretation of language, the distinction was explainable. A limitation over of personal property on an indefinite failure of issue was void for remoteness, since personal property could not be entailed. The distinction mentioned was the result of an effort to save limitations over of personality.
43 Forth v. Chapman, 1 P. Wms. 663 (Ch. 1720).
44 Hughes v. Sayer, 1 P. Wms. 534 (Ch. 1718).
45 Forth v. Chapman, 1 P. Wms. 663 (Ch. 1720); Chadock v. Cowley, Cro. Jac. 695 (K.B. 1625).
life estate in the first taker with a remainder in fee simple to his issue. If, on the other hand, the definite-failure-of-issue construction be adopted, the first taker has a fee simple which is subject to divestiture only if he shall leave no issue surviving at the time of his death.

Without dwelling at length on the numerous Illinois decisions in which the problem has been discussed, it safely may be asserted that very slight evidence of intent will suffice to induce the court to adopt the construction of definite failure. It has been held, for example, that a gift over of land if the first taker shall die “leaving no issue,” is on a definite failure. And where there is a gift over of land to “survivors” on the death without issue of one of several persons, the same construction has been adopted. Indeed, it would appear that the Illinois courts have approached closely the position that the phrase “die without issue” is to be construed prima facie to refer to a definite failure, thus reversing completely the common law rule. That virtually this stand has been taken is evidenced by the decision in Strain v. Sweeney. In that case, land was devised to the testator’s son, Dennis “and his heirs forever, . . . . but in case he should die without issue of his body, then the same shall go to the heirs of [another son, Nelson].” In holding that the gift over on death without issue referred to a definite failure of issue of Dennis at the time of his death, the court stated the following reasons for this conclusion: (a) that since the specific devises of the will were in favor of children and grandchildren, it was apparent that the testator had his more immediate issue in mind, and not the more remote issue; (b) that the word “then” used in the gift over was an adverb of time, indicating the period at which the gift over was to become effective, and thus indicating that the issue meant were such issue as might be living at that time; (c) that the limitation over to the “heirs” of Nelson meant the children of Nelson, since he was living at the date of execution of the will and then had living children, and that the testator would not have made a limitation to the children of Nelson to come into

47 If the first taker has children living at the date the conveyance becomes operative, the remainder vests at once in such children, subject only to opening to admit later-born children, Stearns v. Curry, 306 Ill. 94, 137 N.E. 471 (1922).

48 As will appear from the later discussion in the text, the limitation over may be construed to become effective only if the death of the first taker without issue should occur within a prescribed period of time. See Subdivisions IV B, C and D infra.

49 Smith v. Kimbell, 153 Ill. 368, 38 N.E. 1029 (1894); Metzen v. Schopp, 202 Ill. 275, 67 N.E. 36 (1903); Hickox v. Klaholt, 291 Ill. 544, 126 N.E. 166 (1920).


51 163 Ill. 603, 45 N.E. 201 (1896).

52 On the significance of the word “then,” compare the decision in Tolley v. Wilson, 371 Ill. 124, 20 N.E. (2d) 68 (1939). See also Jarman, Wills *993 (6th Am. ed. 1893).
possession at a time more remote than the death of Dennis. It is submitted that if factors such as these are sufficient to rebut the prima facie construction of "die without issue" as referring to an indefinite failure, there will be few cases left in which that prima facie construction can be applied. The decision must be taken as a substantial repudiation of the prima facie rule of the common law.\(^5\)

While it seems fairly probable that in any case which may arise the court will be able to find in the context of the instrument sufficient language to satisfy itself that a definite failure of issue was intended, the draftsman of any instrument who has occasion to make a limitation over on death without issue would do well to make his intent so clear that there cannot be room for controversy. No one, of course, at the present time should attempt to make a limitation over on an indefinite failure of issue. He cannot by this means create a common law fee tail in land, for the Entail Statute will nullify his effort. Practically, therefore, he can use only the limitation over on a definite failure. To express his intent beyond a doubt, he should make the limitation read: "and if the said (first taker) shall die without leaving issue living at the time of his death, then (over)."

C. "WITHOUT ISSUE" CONSTRUED TO MEAN "WITHOUT HAVING HAD ISSUE"

While the conclusion that the phrase "die without issue" does not refer to an indefinite failure of issue disposes of any contention that an estate

\(^5\) In Strain v. Sweeney, the court declared: "But the decisions upon this subject are exceedingly arbitrary, and without much foundation in reason or common sense. Hence, courts will seize hold of slight circumstances to give to executory devises a construction which regards the failure of issue as relating to a definite period of time . . . ." 163 Ill. 603, 606-7, 45 N.E. 201, 202 (1896). In O'Hare v. Johnston, 273 Ill. 458, 113 N.E. 127 (1916), the above quotation was approved, although the court was able to evade the actual problem by construing "issue" to mean "children."

Another interesting decision bearing on this problem is Hickox v. Klaholt, 291 Ill. 544, 126 N.E. 166 (1920). A devise was to a daughter "and the heirs of her body," with a further limitation as follows: if the said daughter should die "without leaving heirs of her body," to the "survivors" of her brothers and sisters; and if she should die "leaving children," then to such children. The court held: that the devise created a fee tail in the daughter, which was converted by the Entail Statute into a life estate in said daughter, with a remainder that vested in her children; that the limitation over if she should die "without leaving heirs of her body" was on a definite failure of issue, and took effect as an executory devise. It was true in this case that there were several factors which tended to indicate a definite failure of issue such as the word "leaving," the limitation to the "survivors" of the brothers and sisters, and the limitation to "children" of the daughter. Since, however, the devise was construed as intended to create a fee tail at common law, there was a strong inference that the gift over was intended to be a remainder after the fee tail, and such a remainder would naturally be on an indefinite failure of issue. The decision, therefore, may be considered as significant in rejecting the construction of indefinite failure. A like decision was reached on similar facts in Metzen v. Schopp, 202 Ill. 275, 67 N.E. 36 (1903). See Kales, op. cit. supra note 10, at § 548.
tail has been created, it does not fix definitely the exact meaning of the phrase. It might reasonably be thought that if the reference is not to an indefinite failure of issue, then it must be to a definite failure, that is, to the death of the first taker without issue surviving at the time of his death. The law, however, has not always developed according to the rule of reason. Another possible construction of this phrase must be considered because in Illinois it has the sanction of several decisions.

Can the phrase "die without issue" be construed to refer, not to a failure of issue at the death of the first taker, but to the failure of such first taker to have issue born to him? Interpreted in this latter sense, the phrase "death without issue" is equivalent to "death without having had issue." It is doubtful if any layman would think of attaching this latter significance to the phrase; that interpretation must be credited to the ingenuity of hard-pressed counsel, and of courts who have sought escape from the supposed hardships of a more natural construction or who have misinterpreted certain precedents.

Where property is limited to A in fee, with a gift over on his "death without issue," the writer can think of no plausible reason for construing the gift over to be conditioned on failure of A to have issue born. The testator who limits property over on the death of the first donee without issue naturally expects that if the first donee leaves surviving issue, such issue will succeed to the property by way of descent or devise from the first donee; he desires to shift the property into a different course of devolution only if the situation at the death of the first donee shall be such that this normally expected succession of the issue cannot take place because of the failure of issue at that time. Whether the first donee did or did not have issue born to him during his life would seem clearly of no consequence if no issue survive him to take in the expected manner. Where land is limited to A in fee and over if he shall die without issue, it is rather shocking to the sensibilities of the person untrained in the intricacies and eccentricities of the law to learn that the land may pass on the death of A without surviving issue to his collateral heirs merely because he had a child born who predeceased him.

In one situation, and in only one, is there plausibility and justification for construing the phrase "die without issue" to mean "die without having had issue." This situation is that in which property is limited to A for life, with a remainder to his issue, or to some particular class of issue, and a gift over on A's death "without issue." Perhaps the best illustration is a gift to A for life, remainder to his "children," and a gift over in event of A's "death without issue." Four possible constructions of such a limitation may be considered:
a) “Death without issue” might be taken to refer to an indefinite failure of issue of A. A’s estate would then be enlarged to a fee tail. The limitation to his children must then be held to create either a remainder after the fee tail or life estates preceding the estate tail. Either of these two constructions of the limitation to the children is obviously inconsistent with the manifest intent that A shall have an immediate estate and that all the children shall take in possession at the death of A. At common law, a fee tail created in A would have descended on his death only to his eldest son under the rule of primogeniture. This construction of the phrase “death without issue” was, therefore, not tenable even in the earlier history of the common law, when the fee tail was a common estate. At the present day, since the common law fee tail has been abolished, such a construction would not usually commend itself to the courts, as appears from the prior discussion of the Illinois decisions favoring the definite-failure construction.

b) “Death without issue” might be construed to refer to a definite failure of issue at the death of A. This construction would divest the remainder vested in a child of A if such child should predecease A. Reluctance to divest a vested interest militated against adoption of this interpretation. It seems fairly clear, moreover, that “issue” as here used ought to be taken to describe the particular class of issue previously mentioned, that is, “children.” This interpretation of “issue” would condition the gift over on “death without children.”

c) If “death without issue” is construed to mean “death without children,” and that phrase is in turn construed to mean “without children surviving A,” a cogent objection to the construction arises. A child of A, who by the usual rules of construction would acquire a vested interest at his birth, may die in the life of A leaving issue. The interest of the issue of said child of A would be defeated if A should subsequently die without leaving “children” surviving him. In this case, the objection to divestiture of a vested interest becomes especially forceful.

d) “Death without issue” can be interpreted to refer to a default of takers under the prior limitation. So soon as any interest vests under such prior limitation, the gift over can be held to be defeated, so that it can never effect a divestiture of the previously vested interest. This construction has a degree of plausibility so far as the interpretation of language is concerned. “Die without issue” may be intended by the testator to

54 See text supra, Subdivision III A.


56 Field v. Peeples, 180 Ill. 376, 54 N.E. 304 (1899); Tolley v. Wilson, 371 Ill. 124, 20 N.E. (2d) 68 (1939); Kales, op. cit. supra note 10, at § 308.
refer to a failure of the particular class of issue described to take vested interests by the terms of the prior gift. This construction, moreover, avoids the difficulties suggested in reference to the other conceivable interpretations of the language. Such a construction is often described shortly as an interpretation of the phrase "die without issue" to mean "die without having had issue." The English decisions fully established this construction in the type of case here discussed, that is, where there is a prior gift to the issue.\textsuperscript{57}

Where, however, there is no prior gift to the issue, as in the case of a limitation to A, and if he shall "die without issue," to B, there is no ground for such a construction.\textsuperscript{58} By the common law rule, the limitation over here must be considered to be on a general failure of issue, so that a fee tail is created in A. If this construction be rejected at the present day, and the assumption be made that A is intended to take a fee simple, and not merely a life estate, then the natural construction of the gift over is that it will become effective in possession if A shall die without issue surviving at the time of his death. None of the arguments justifying the construction of "die without issue" to mean "die without having had issue" are applicable here. While the gift over divests a vested interest, the intent that it shall so operate is too clear for dispute, and any possible construction which may be given to the phrase effects such a possible divestiture. To construe "die without issue" to mean "without having had issue" minimizes slightly the chances of a divestiture occurring, but is a forced and arbitrary construction which finds no plausibility in the language, and has no practical merit sufficient to justify it.

A few Illinois decisions\textsuperscript{59} declaring that "death without issue" is to be

\textsuperscript{57} Jarman, Wills \textsuperscript{*1285-1307}, especially at \textsuperscript{*1293, n. (c) (6th Am. ed. 1893). Because of the reluctance to divest an interest once it has vested, particularly an interest vested in children of the life tenant, the English decisions have carried the rule to the extent of holding that even the phrase, "die without leaving children (or issue)," means "without having had children (or issue)," if by a prior limitation an interest is vested in such children or issue, Jarman, Wills \textsuperscript{*1638 (6th Am. ed. 1893); Theobald, Wills 790 (8th ed. 1927); Kales, op. cit. supra note 10, at § 540.}

\textsuperscript{58} Jarman, Wills \textsuperscript{*1324-27 (6th Am. ed. 1893); Theobald, Wills 792 (8th ed. 1927); Kales, op. cit. supra note 10, at § 539.}

\textsuperscript{59} Voris v. Sloan, 68 Ill. 588 (1873); Field v. Pefpes, 180 Ill. 376, 54 N.E. 304 (1899); King v. King, 215 Ill. 100, 74 N.E. 89 (1905). Of the Voris case it may be remarked that the decision was very obscure, it not being at all clear how the court reached the conclusion that a remainder was vested in the issue of the first taker. It is noted in the opinion that the court had received no assistance from the brief of one of the parties. In neither of the other two cases cited does it appear to have been necessary to determine the exact nature of the limitation over on "death without issue"; these latter cases, therefore, are not weighty precedents for even the restricted proposition that "death without issue" means "without having had
construed to mean "without having had issue" can be explained as cases of the type heretofore discussed, where there were prior limitations to the issue, or a particular class thereof, which had become vested. Other Illinois cases, however, have extended the rule far beyond this situation, and have stated a general rule to the effect that "death without issue" means "death without having had issue." The Illinois authorities favoring this broad rule have perhaps been influenced in some measure by the fact that adoption of this rule afforded one means of escape from construing "death without issue" to refer to an indefinite failure of issue creating a fee tail. As has been indicated, however, a simpler method of escape from that conclusion lies in the construction of "death without issue" to mean "death without issue surviving" at the death of the first taker. Probably the Illinois authorities are better explained as erroneous decisions resulting in the first instance from a misunderstanding of the distinctions, heretofore pointed out, in the English cases. Later decisions have followed the earlier ones blindly without any real examination of the bases therefor.

The first of the Illinois decisions stating the broad rule that "death without issue" means "death without having had issue," irrespective of the absence of a prior vested interest in the issue, is *Stafford v. Read,* decided in 1910. The authorities cited in this decision were *Field v. Peeples,* *King v. King,* *Voris v. Sloan,* all cases in which actually there were prior limitations vesting interests in the issue. Apparently the difference in the situations was not noted or not comprehended. The *Stafford

issue," where a prior limitation has vested a remainder in the issue. For a further point of objection to the decision in the *King* case, see Kales, op. cit. supra note 10, at § 540.

In Winchell v. Winchell, 259 Ill. 471, 102 N.E. 823 (1913), land was devised to D for life, and on her death to "her heirs," with a further provision that the land should pass to the heirs of the testator if D should "die without issue." The court held correctly that D took a fee tail by the Rule in *Shelley's Case,* and that the said fee tail was converted by the Entail Statute into a life estate in D with a remainder in fee simple which vested in her child at birth. It was further declared that "die without issue" meant "without having had issue," and that the ultimate limitation over therefore failed on birth of a child to D. The situation here created by the Entail Statute was the same situation which has been discussed in the text supra. If the statutory remainder vested in the issue of the first taker can be viewed as identical with a remainder so vested by the express provisions of the instrument, then this decision on the construction of "die without issue" may be supported.

60 *Stafford v. Read,* 244 Ill. 138, 91 N.E. 91 (1910); *Kendall v. Taylor,* 245 Ill. 617, 92 N.E. 592 (1910); *Noth v. Noth,* 292 Ill. 536, 127 N.E. 113 (1920); *Clark v. Leavitt,* 330 Ill. 350, 161 N.E. 751 (1928).

61 244 Ill. 138, 91 N.E. 91 (1910).

62 180 Ill. 376, 54 N.E. 304 (1899).

63 215 Ill. 100, 74 N.E. 89 (1905).

64 68 Ill. 588 (1873).
case was followed in the same year by Kendall v. Taylor,\(^6\) and by Noth v. Noth in 1920,\(^6\) without further consideration of the problem; and was again approved in Clark v. Leavit\(^6\) in 1928. The last mentioned decision cannot be regarded as weighty, since the first taker had actually died without having had issue so that regardless of the precise construction of the gift over, it had become effective.

Whether the four decisions mentioned can be regarded as establishing in Illinois a general rule that "death without issue" means "death without having had issue," may admit of doubt. Summers v. Smith,\(^6\) decided in 1889, is the first Illinois decision giving serious consideration to the construction of the phrase "die without issue." The court considered but two possible constructions: first, that the gift over was on an indefinite failure of issue, creating a fee tail; secondly, that the gift over was conditioned on death of the first taker without leaving issue surviving him at his death. The decision held in favor of the latter construction, the court declaring in the most explicit terms that the gift over, which was in this case on death of the first taker "without heirs of his body,"\(^6\) became effective in possession on death of the first taker "without leaving such heirs of body as the estate would have vested in, in fee, instantly, upon the death of the first devisee. . . . ." While it is true that in this case the first taker had apparently died without ever having had issue, and that the result would have been the same had the court construed the gift over to be conditioned on his death "without having had issue," it is noteworthy that such construction was not even mentioned. In Strain v. Sweeney, in 1896, the court was called upon to construe a will wherein land was devised over on the death of the first taker "without issue of his body." It was held clearly and expressly that the limitation over would become operative on death of the first taker "without leaving any children when he died."\(^7\) In this case, the issues of the case would seem to have called for a determination of the exact meaning of the quoted phrase. It is again significant that no mention was made of the construction heretofore criticized. In Pitzer v. Morrison\(^7\) and Gavin v. Carroll,\(^7\) in 1916 and 1917 respectively, the issues again called for a decision as to the precise construction of the phrase "die

\(^{6}\) 245 Ill. 617, 92 N.E. 562 (1910).
\(^{66}\) 292 Ill. 536, 127 N.E. 113 (1920).
\(^{67}\) 330 Ill. 350, 161 N.E. 751 (1928).
\(^{68}\) 127 Ill. 645, 21 N.E. 191 (1889).
\(^{69}\) The gift over in these terms, for purposes of the present discussion, may be deemed the equivalent of a gift over on death "without issue."

\(^{70}\) 127 Ill. 645, 651, 21 N.E. 191, 192 (1889).
\(^{71}\) 163 Ill. 603, 610, 45 N.E. 201, 203 (1896).
\(^{72}\) 272 Ill. 291, 111 N.E. 1017 (1916).
\(^{73}\) 276 Ill. 478, 114 N.E. 927 (1917).
without issue." In both cases it was held that it meant without "surviving" issue, no other construction being even argued, so far as appears.74

The most recent Illinois case dealing with the problem is Tolley v. Wilson,75 decided in 1939. In this case, the limitations were to a son, S, for life, remainder "unto the children of my said son [S] that may be born to him," and a gift over "in case my said son shall die without issue," to brothers and sisters of the testator. S died, having had two children, both of whom predeceased him. It was held that the fee vested in the children of S at their births, and on their deaths passed by the laws of descent to their heirs; that in this situation "die without issue" meant "die without having had issue." This decision was a correct one in the light of the English and Illinois precedents. The prior limitation to the children of S required the gift over to be construed as conditioned on failure of S to have children born, as heretofore explained. That the court recognized this to be the proper basis for the decision appears clearly from the language of the opinion. Unfortunately, the court cited, with seeming approval, Stafford v. Read, Kendall v. Taylor, Noth v. Noth, and Clark v. Leavitt, which the writer has previously criticized.76 This seeming approval of these four cases cannot be reconciled with the other language of the opinion, which states the rule to be, "If there is no independent gift to the children of the first taker, 'without' means primarily 'without children surviving' the first taker."77 In view of this explicit recognition of the appropriate rule, and in view of the earlier decisions inconsistent with Stafford v. Read, Kendall v. Taylor, Noth v. Noth, and Clark v. Leavitt, one may perhaps hope that when the problem is again presented to the Illinois Supreme Court, it will definitely overrule these four decisions.

It must be understood that the Illinois precedents which have construed "death without issue" to mean "death without having had issue" are not applicable where the gift over is upon death "without leaving issue,"78 or where equivalent language has been employed manifesting clearly the intent that such gift shall become operative if the first taker shall die without issue surviving at the time of his death. The intent to condition the gift over on death without surviving issue may appear from the nature of the limitations rather than from the form of the phraseology used. Such intent would appear to be expressed where the limitations are

77 371 Ill. 124, 20 N.E. (2d) 68, 71 (1939).
in the general form: to A for life, remainder to his surviving children (or issue); and "if he shall die without children (or issue)," over to B. It seems to be agreed in this type of case that the gift over is conditioned on death of the first taker without issue then surviving. Since the remainder to the issue is in terms contingent upon their survival of the first taker, the remainder to B is naturally construed as an alternative, to take effect in possession if at the death of the first taker there are no issue then surviving. It is certainly impossible in such a case to construe "death without issue" to mean "death without having had issue."

IV. LIMITATIONS OVER ON THE DEATH OF THE FIRST TAKER WITHOUT ISSUE SURVIVING AT HIS DEATH

If the gift over is explicitly conditioned on the death of the first taker "without issue surviving at his death," it would seem clear that the gift over cannot be construed to be on an indefinite failure of issue; no fee tail, therefore, can be created by such a gift over. Nor can the phrase above quoted be construed to mean "without having had issue." The only admissible construction, therefore, is that the future interest created can come into possession only if the first taker at the time of his death leaves no issue surviving him; the gift over is on a definite failure of issue. Further problems, however, remain for solution. These problems are best understood by a consideration of the several different factual situations described in the subtitles which follow.

A. LIMITATIONS IN THE FORM: TO A FOR LIFE; IF HE SHALL DIE WITHOUT SURVIVING ISSUE, TO B

It should be noted that in the situation described in the subtitle there is in express terms no gift to the issue of A. Since A is given in definite terms a life estate only, his issue cannot possibly take from him, either by descent or devise. By the language of the limitation, the lack of surviving issue of A at the time of his death is made simply a condition precedent to the vesting of the gift over, which is a contingent remainder. In such a

79 Healy v. Eastlake, 152 Ill. 424, 39 N.E. 260 (1894); Johnson v. Askey, 190 Ill. 58, 60 N.E. 76 (1901); Blakeley v. Mansfield, 274 Ill. 133, 113 N.E. 38 (1916); Robeson v. Cochran, 255 Ill. 355, 99 N.E. 649 (1912); cf. Spencer v. Spencer, 268 Ill. 332, 109 N.E. 300 (1915); King v. King, 215 Ill. 100, 74 N.E. 89 (1905), commented upon in Kales, op. cit. supra note 10, at § 540.

80 Bond v. Moore, 236 Ill. 576, 86 N.E. 386 (1908). In Dell v. Herman, 365 Ill. 261, 6 N.E. (2d) 159 (1937), land was devised by a testator to a daughter for life, "and after her death (if she should die without issue)," over to her brothers and sisters, etc. At the time the will was executed, the said daughter was fifty-five years old and unmarried. At the time of the suit which required a construction of the will, the daughter was dead without issue. The court held that the remainder was vested at the death of the testator. It is difficult to support this
case, there is a strong suggestion of bad draftsmanship; it would seem likely that the testator actually intended the surviving issue of A to take on termination of the life estate. Several courts have felt justified under these circumstances in drawing from the language of the will the inference of an intent to make a gift to the issue.\(^8\) In Illinois, the court denied the inference in *Bond v. Moore*.\(^8\) That case, however, exhibited this peculiarity, that the life tenant took by descent, as sole heir of the testator, the reversion left by creation of the contingent remainder conditioned on the death of the life tenant without issue surviving him. It was, therefore, within the power of the life tenant to provide for his issue, either by permitting the reversion to descend on his death intestate, or by devising it to his said issue by his will. Considering the uncertain condition of the Illinois authorities in respect to the general problem of gifts by implication,\(^8\) it is possible that the Illinois Supreme Court might be induced to find a gift to the issue by implication in a case where the peculiarity of the *Bond* case is not present.

Where there is a limitation to A for life, remainder to his surviving issue, if any, and if he shall die without leaving issue surviving, over to B, alternative contingent remainders are created, and a reversion is left.\(^4\) In this situation express provision has been made for the surviving issue of A.

The point to be emphasized in the present connection is, that a gift over on death without issue does not constitute a limitation to the issue, but merely states a condition precedent to the vesting of the gift over. The situation which has been discussed above in connection with the *Bond* case is the one situation in which there is ground for the contention that the gift over on death without issue implies a gift to the issue. In _Blakeley v. Mansfield_, 274 Ill. 133, 113 N.E. 38 (1916); _Smith v. Chester_, 272 Ill. 428, 112 N.E. 325 (1916).
the cases dealt with in the following subdivisions of this article, there is no ground for such a contention, as will appear more clearly at a later point.

**B. LIMITATIONS IN THE FORM: TO A IN FEE; IF HE SHALL DIE WITHOUT SURVIVING ISSUE, TO B**

In the type of case here discussed, the limitations are substantially in the form indicated in the subtitle. The language employed is such as to indicate the intent to limit the land over in event of the death of A without issue (or children) surviving him at his death. Such language, it previously has been shown, cannot be construed to refer to an indefinite failure of issue, nor can it be construed to mean "without having had issue." If the limitation over should be on "death without issue," and should the court construe that phrase to be the equivalent in meaning of the phrase "death without issue surviving," then such limitation would also be within the scope of the ensuing discussion.

In the situation here described, it is entirely clear that no gift has been made to the issue of A. No intent to give the issue an interest is expressly stated, nor is there any reasonable ground for inferring such an intent. A takes a fee simple, for the reasons set forth previously in Subdivision I, whether or not the limitation to him includes words of inheritance. If such a fee simple vests in A, it may descend to his issue, or he may devise it to them. There is, therefore, no ground for implying a limitation in favor of the issue, who obviously are intended to take through A if they take at all.

The real problem in this type of case is the meaning of the phrase "die without surviving issue" in respect to the time of such death. Does this phrase refer to the death of A at any time when he may in fact die, or does it refer only to his death during a limited period of time? If the limitations are contained in a deed, it is difficult to perceive more than one possible construction; the death of A which is meant must be his death whenever it may occur. If the limitations are in a will, however, it is possible to contend that the death meant is only a death without surviving issue in the life of the testator.

Since there is no express qualification respecting the time of A's death, it would seem that the language naturally means the death of A whenever it may in fact occur, whether in the life of the testator, or thereafter.  

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85 See text supra, Subdivisions III A and B.  
86 See text supra, Subdivision III C.  
87 See text supra, Subdivision III B.  
88 Stoller v. Doyle, 257 Ill. 369, 100 N.E. 959 (1913).  
89 "Considering the language used by the testator in this case in its natural and primary sense, it must be held to refer to the death of either or both of the grandchildren without issue.
There are two particular reasons for so interpreting the language. First, it is likely that the average testator expects the devisees of his will to survive him; when he has any different idea, he will probably express it affirmatively. Second, every gift over on death without surviving issue naturally contemplates the probability that any surviving issue will benefit indirectly under the gift to the ancestor; a testator will normally make such a gift over only in those situations where the surviving issue can so benefit. Where the first taker, A, dies in the life of the testator, his surviving issue cannot take under the will, since by hypothesis no gift has been made to the issue. They can take only if there is a statute against lapse broad enough in its terms to include the particular case. The Illinois statute against lapse is applicable only where the first taker is a descendant of the testator. If the first taker is not a descendant of the testator, his surviving issue cannot take under the statute. It is difficult to believe that a testator would make a gift over on death of the first taker without issue, intending to refer only to such a death in his own life, if the surviving issue of the first taker could not possibly benefit in any manner from the gift to the first taker. Indeed, even where the lapse statute permits the surviving issue of the first taker to stand in his place, it is doubtful if the testator is aware of that provision and has made the gift over on the supposition that any surviving issue will take in that manner.

On the other hand, if the condition of the gift over is the death of A at any time without surviving issue, then A's interest is practically unmarketable for his whole life, since no purchaser will assume the risk of a divestiture of his title on A's death unless he is able to purchase A's interest at a great sacrifice on the part of the latter. Nor will A be justified in expending considerable sums of money by way of improvement upon the land devised in view of the possible loss of such expenditures on his death at any time, either before or after the death of the testator. Unless something is said in the context which requires such a construction, it would not naturally be understood that the testator intended that the death of either or both of the grandchildren without issue must happen within some particular period or before some other event, Fifer v. Allen, 228 Ill. 507, 512, 81 N.E. 1105, 1106 (1907); see Crocker v. VanVlissingen, 230 Ill. 225, 227-8, 82 N.E. 614, 615 (1907).

"Generally, a testator does not assume that one for whom he is making provision will not survive him, and intends, in the case of death of such person prior to his own, to provide for the new state of affairs by a new will or codicil," Bradsby v. Wallace, 202 Ill. 239, 245, 66 N.E. 1088, 1089 (1903).

without surviving issue. Thus A may be deprived of a large share of the benefit that the testator may conceivably have intended him to have. These last considerations argue strongly for construing the gift over to refer only to a death of A without issue in the life of the testator. That construction has been adopted by many courts. Beneficial as such a construction may be from the viewpoint of A, it is difficult to reconcile with the unqualified nature of the language employed.

In Illinois, it may be taken to be the established rule that “death without surviving issue” refers to death of the first taker at any time when such death may in fact occur, unless other language of the instrument indicates a contrary intent. This rule of prima facie construction is occasionally supported by affirmative evidence of the testator’s intent. There is no room for argument as to construction where the testator has expressly stated that he refers to death of the first taker either before or after his own death. And the relative ages of the testator and the first taker, or the physical condition of the testator at the time of execution of his will, may point strongly toward the conclusion that he must have had in contemplation a death after his own.

This rule of prima facie construction adopted in Illinois yields to any expression of contrary intent which may appear in the instrument con-

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92 See Hilliard v. Kearney, 45 N.C. 221 (1853).
94 Smith v. Kimbell, 153 Ill. 368, 38 N.E. 1029 (1894); Bradsby v. Wallace, 202 Ill. 239, 66 N.E. 1088 (1903); Fifer v. Allen, 228 Ill. 507, 87 N.E. 1105 (1907); Ahlfield v. Curtis, 229 Ill. 139, 82 N.E. 276 (1907); Carpenter v. Sangamon Trust Co., 230 Ill. 486, 82 N.E. 418 (1907); Crocker v. Van Vlissingen, 233 Ill. 478, 82 N.E. 614 (1907); Brennock v. Brennoch, 230 Ill. 519, 82 N.E. 865 (1907); Wilson v. Wilson, 261 Ill. 174, 103 N.E. 743 (1913); Defrees v. Brydon, 275 Ill. 530, 114 N.E. 336 (1916); Lee v. Roberson, 297 Ill. 321, 130 N.E. 774 (1921); see Hartwick v. Heberling, 364 Ill. 523, 530, 4 N.E. (2d) 965, 969 (1936); Brittain v. Farrington, 328 Ill. 574, 149 N.E. 486 (1925).
95 A contrary rule was announced in Kohtz v. Eldred, 208 Ill. 60, 69 N.E. 900 (1904), but the decision, that death within the life of the testator only was meant, could be sustained on the ground that other provisions of the will affirmatively manifested such an intent. See this explanation in Fifer v. Allen, 228 Ill. 507, 87 N.E. 1105 (1907), containing an extensive review of the prior Illinois decisions, and in Carpenter v. Sangamon Trust Co., 230 Ill. 486, 82 N.E. 418 (1907).
96 Defrees v. Brydon, 275 Ill. 530, 114 N.E. 336 (1916); cf. Barnes v. Johnston, 233 Ill. 620, 84 N.E. 610 (1908) (gift over if the first taker should “then” be dead, the quoted word referring to the time for sale and division by the executor).
97 Abrahams v. Sanders, 274 Ill. 452, 113 N.E. 737 (1916); Lee v. Roberson, 297 Ill. 321, 130 N.E. 774 (1921); Clark v. Leavitt, 330 Ill. 350, 161 N.E. 751 (1928); cf. Tomlin v. Laws, 301 Ill. 616, 134 N.E. 24 (1923). The fact that in another gift to the same donee the testator has made no limitation over may also tend to indicate that in the gift in dispute he referred to death of the first taker at some time subsequent to his own death, Crocker v. Van Vlissingen, 230 Ill. 225, 82 N.E. 614 (1907); cf. Ahlfield v. Curtis, 229 Ill. 139, 82 N.E. 276 (1907).
taining the limitations. It is not possible to frame any general rule as to what may be a sufficient manifestation of intent; many factors may be thought to suggest with more or less force that the testator contemplated a death in his own life, and intended to condition the gift over accordingly. In *Williamson v. Carnes*, a testator devised a residue to his children. He further provided that if any child should die before him, leaving children, the share of the deceased child should go to such children; and if any child should die without leaving children, the share of the deceased child should go to the living children of the testator and the children of any deceased child. The close association here of the gift over on death "without leaving children" and the clearly substitutional gift in event of the death of a child in the life of the testator, warranted the conclusion that the former limitation was intended as an alternative to the latter, to operate only in the event of death of a child in the life of the testator. In like manner, where there is a close connection in point of language between the reference to the death of the first taker and a reference to the death of the testator himself, the conclusion may be induced that the testator referred to a death of the first taker in his own lifetime. The fact that payment of legacies to other beneficiaries is charged upon the estate devised to the first taker has in some instances been thought to indicate that the gift over on his death without surviving issue was conditioned only on such a death in the life of the testator; for otherwise the first taker, not having an indefeasible fee, might find it difficult to raise the funds necessary for payment. The fact that a gift over on death of the first taker without surviving issue is applicable to personal property as well as to real property may be thought to suggest that the testator referred to a death in his own lifetime only, since it is doubtful if a testator would normally intend to divest a gift of personalty after it has once come into the actual possession

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97 284 Ill. 511, 520 N.E. 585 (1918).
98 A similar case is *Duryea v. Duryea*, 85 Ill. 41 (1877).
99 *Fishback v. Joesting*, 183 Ill. 463, 56 N.E. 62 (1900). The limitations were: to the "wife and child or children, or their heirs, who may be living at the time of my decease. . . . If it shall happen that myself, my wife, or my child or children shall depart this life without my child or children have no heirs," then over.
A comparable situation exists where on the death of the first taker without surviving issue, the testator has given a larger interest to another beneficiary of the will, "in lieu of the bequest previously given." The quoted language would seem to fix the death of the testator as the time for effective operation of the gift over, and to necessitate the conclusion that the testator referred to a death in his own life, *Kohls v. Eldred*, 208 Ill. 60, 69 N.E. 900 (1904).
and enjoyment of the donee. While it may be conceded that in the construction of these limitations over no distinction has usually been taken upon the last basis here suggested, the point might well be considered in determining the construction to be adopted in an otherwise doubtful case.

The subtleties of construction in relation to cases of the type here discussed are well illustrated in the decision in Brittain v. Farrington. In successive clauses of his will, the testator had devised various tracts of land to his children and a grandchild, the devises being so drafted as to suggest the purpose to equalize the shares of the several devisees. In a subsequent clause, the testator provided, "It is also my will that should any of my children..., die without issue, or should their death precede mine, such share... be divided... between the other heirs surviving." One of the children of the testator survived him, but died thereafter without having had issue. It was held, on construction of the above limitation over, that death in the life of the testator was meant. The court reached this conclusion on the following line of reasoning: The testator must have intended the pronoun "their" preceding the word "death" to refer to "issue," and not to "children," since it was unlikely that he would have intended to exclude from all benefit the issue of a child who might die in his lifetime leaving issue. This construction necessitated the further conclusion that the gift over was conditioned solely on the death in life of the testator of a child who left no issue to survive the testator. Since the child whose share was in dispute had survived the testator, he took an indefeasible fee simple.

C. LIMITATIONS IN THE FORM: TO A; IF HE SHALL DIE LEAVING ISSUE SURVIVING, TO SAID ISSUE; IF HE SHALL DIE WITHOUT LEAVING ISSUE SURVIVING, TO B

Where the limitations over on the death of the first taker are substantially in the form above set forth, they literally exhaust all possible contingencies. One or the other of the stated gifts over must come into possession on the death of the first taker. Whether the estate of the first taker is declared by the instrument to be a life estate, or whether his estate is not expressly described, it must be construed to be a life estate only. The limitations over on his death are then contingent remainders. It should be remembered, however, that while the remainders are each contingent, one or the other must vest.

103 318 Ill. 474, 149 N.E. 486 (1925).
104 See Subdivision I supra.
GIFTS OVER ON DEATH OF FIRST TAKER

In the situation discussed in the foregoing paragraph, there is no pressure to construe the phrase "die without surviving issue" to refer to a death in the life of the testator only. Indeed, it would seem fairly clear from the language that the reference is to death of the first taker at any time. Since the first gift over is to the surviving issue of the first taker, his death is naturally the time for determining the effect of that limitation, regardless of the time of such death. Since the second gift over is obviously an alternative to the first, death at any time is clearly the death referred to in that gift also.

Where, however, the estate of the first taker is expressly described as a fee simple by use of the words "and his heirs," "in fee simple," "absolutely," or some equivalent terms, a difficulty arises. The devise of an express fee simple is inconsistent with limitations over on death of the first taker which necessarily terminate his estate at his death. While it may be theoretically possible to create a fee simple defeasible in any event at the death of the owner thereof, it is not believed that a conveyor would normally attempt to create such an estate. If it is possible to reconcile the apparently inconsistent limitations by a reasonable construction, that construction should be adopted. One possibility of reconciliation is apparent. If the limitations over to the surviving issue, and in default thereof to B, are construed to refer only to a death of the first taker within some limited period of time, they become perfectly consistent with the language indicative of a fee simple in the first taker. In a case where limitations of the sort here considered are contained in a deed, there is no period of time within which the operative effect of the limitations over can be confined. In the case of a will, the gifts over can be construed to refer only to death in the life of the testator, thus conferring upon the first taker an indefeasible fee simple if he should survive the testator.

That such limitations should have proved perplexing to the courts is not surprising. An example of the difficulty that has been felt in dealing with this situation is well illustrated in Ashby v. McKinlock, which has been stated and discussed previously in Subdivision I. In that case, the limitations over on the death of the first taker, with or without surviving issue, appeared literally to exhaust the possible contingencies.

104 Ibid.
105 271 Ill. 254, 111 N.E. 101 (1916).
106 It is easy to fall into the error of concluding that, where one gift over is conditioned on death leaving issue, and the other on death without leaving issue all contingencies have necessarily been covered. Even so excellent a scholar as the late Albert M. Kales would appear on occasion to have made such an assumption. See Kales, op. cit. supra note 10, at §162, n. 40, §163, n. 50. This conclusion, however, assumes that the second gift over is conditioned
been previously stated, the court rejected most emphatically the contention that the first taker had only a life estate, and apparently reached the rather extraordinary conclusion that she had a fee simple, though that fee was certain to be divested at her death. A simpler solution of the case would have been to hold that the language descriptive of a fee in the first taker showed the testator’s intent to condition the gifts over upon the death of such first taker in the life of the testator only. That construction, however, was not mentioned.

Since the decision in the *Ashby* case two other cases\(^7\) have come before the Illinois court, in both of which there was a gift to the first taker “in fee simple absolute,” with limitations over to the surviving issue, if any, and if none, to other persons. The court thought in both cases that the limitations over exhausted all possible contingencies.\(^8\) It adhered rigidly to the rule that a limitation over on death without surviving issue referred to death of the first taker at any time. The necessary consequence of these conclusions was that the first takers had only life estates, and it was so held. The reluctance which was felt in the *Ashby* case to cut down to a life estate what the testator had expressly declared

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\(^7\) Drager v. McIntosh, 316 Ill. 460, 147 N.E. 433 (1925); Liesman v. Liesman, 331 Ill. 287, 162 N.E. 855 (1928).

\(^8\) This point may admit of argument. See comment on Drager v. McIntosh, 316 Ill. 460, 147 N.E. 433 (1925), supra note 17. In Liesman v. Liesman, 331 Ill. 287, 162 N.E. 855 (1928), the second gift over was to “surviving” children of the testator. Since “surviving” would naturally be interpreted to mean surviving at the death of the first taker (Kales, op. cit. supra note 10, § 528, n. 91), one contingency was seemingly not covered—viz., death of the first taker without surviving issue and without surviving children of the testator. If all contingencies were not exhausted, the decision that the first taker had only a life estate is of doubtful propriety since the intent to give the first taker a fee simple was expressed.
to be a fee was evidently not shared by the bench as it was constituted when these later cases were decided. These later decisions must be taken to establish the rule that gifts over on death with and without issue surviving refer to such death at any time, even though an expressly described fee simple is thereby cut down to a mere life estate.

D. LIMITATIONS IN THE FORM: TO A FOR LIFE; REMAINDER TO B; IF B SHALL DIE WITHOUT ISSUE SURVIVING, TO C; (WITH OR WITHOUT THE FURTHER LIMITATION THAT) IF B SHALL DIE LEAVING ISSUE SURVIVING, TO SAID ISSUE

It should be noted that the situation here described differs from the situations discussed under Subdivisions IV B and C in that here a life estate precedes the interest limited to the person in reference to whom the phrase "die without surviving issue" is employed. The presence of this prior life estate limited to A is of particular significance. Whether the limitation be in a deed or a will, the death of the life tenant, A, is a point of time to which the death of B without surviving issue may be referred.

Where the limitations are contained in a will, the objections to construing the quoted phrase to mean a death in the life of the testator have been indicated; also indicated have been the inconveniences which result from construing that phrase to refer to death at any time when it may in fact occur. In the case of a will, there are three points of time to which death of the remainderman without issue may be related: the death of the testator; the death of the life tenant, A; and the death of the remainderman himself, whenever that may occur. The death of the life tenant, A, is a point of time which may be intermediate between the death of the testator on the one extreme, and the death of the remainderman, B, on the other extreme. The death of B without issue which is intended may well be held to be such a death prior to that of the life tenant. The death of the life tenant is the time which marks the beginning of enjoyment in possession for the remainderman; it is, moreover, a point of time probably less remote from the testator's death than the death of the remainderman himself. The gift over on death of the remainderman without surviving issue can plausibly be construed to mean his death before the time for enjoyment in possession has arrived. Thus, a reasonable construction can be given the language employed, with a minimum of disadvantage to the remainderman.

In some instances, the testator has made clear his intent to condition the gift over on death of the remainderman in the life of the life tenant.

109 See Subdivision IV B supra.

110 See Johnson v. Boland, 343 Ill. 552, 557, 175 N.E. 794, 796 (1931).
He may have stated such intent in express terms. Or, he may have manifested such an intent by the very nature of the gift over, as where the property is given over on death of the remainderman without surviving issue to the life tenant.

In the usual instance, the testator has not made his meaning entirely clear, and a prima facie rule of construction for such cases must be adopted. While all the Illinois cases agree that the phrase "death without surviving issue" is not restricted to such a death in the life of the testator, there has been some vacillation on the part of the supreme court in making its choice between the other two possible constructions. In Kleinhans v. Kleinhans, decided in 1912, the court adopted the rule that, prima facie, death at any time without surviving issue was meant, even though this conclusion seemed to necessitate a holding that the remainderman, B, took but a life estate. Two years later, in Lachenmyer v. Gehlback, the court announced the opposite conclusion that, prima facie, death without surviving issue in the life of the life tenant was meant. An ineffectual attempt was made to distinguish the Kleinhans case. The rule of the Lachenmyer case was approved in a dictum and a decision in 1916 and 1917, respectively. Then came the decision in Gavvin v. Carroll, in 1917, which reaffirmed the rule adopted in the Kleinhans case, although that decision was not cited. In the Gavvin case, the court relied upon Fifer v. Allen, obviously not a pertinent authority because in the latter case, no life estate preceded the interest limited over on death without surviving issue. In Welch v. Crowe, also decided in

... People v. Byrd, 253 Ill. 223, 97 N.E. 293 (1912). The court's description of the remainder in this case as "contingent" cannot be justified; the result of the decision would have been the same had the remainder been treated as vested subject to divestiture on death of the remainderman in the life of the life tenant.

Smith v. Dellitt, 249 Ill. 113, 94 N.E. 113 (1912).

Wilson v. Wilson, 261 Ill. 174, 103 N.E. 743 (1913); Abrahams v. Sanders, 274 Ill. 452, 113 N.E. 737 (1916). The point is either expressly stated, or is assumed, in the decisions cited hereinafter.

253 Ill. 620, 97 N.E. 1077 (1912).


It may be doubted whether the gifts over in this case exhausted all possible contingencies, and that doubt was reflected in the opinion. It was held, nevertheless, that the remainderman took only a life estate. See Subdivision I and note 17 supra; also, notes 106 and 108 supra.

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


276 Ill. 478, 114 N.E. 927 (1917).

228 Ill. 507, 81 N.E. 1105 (1907).
1917, the court returned to the rule of the Lachenmyer case and has consistently adhered thereto in the numerous cases decided between that date and the present writing.122 These decisions have so definitely repudiated the holding of the Kleinlians and Gavvin cases that it now may be assumed to be the established rule that a limitation over on death of a remainderman without surviving issue refers to his death in the life of the life tenant only.123 If he survives the life tenant, his fee becomes indefeasible.124

The rule which has thus been established is but a rule of prima facie construction, and yields to any manifestation of a contrary intent which may appear from the instrument as a whole. Occasionally sufficient evidence of intent may be found in the instrument, to indicate that the testator referred to death of the remainderman without surviving issue in the testator's own life. This conclusion was reached in Siddons v. Cockrell.125 In that case, as the court construed the will, the testator had devised all his property to his wife for her life, terminable as to a two thirds part upon her remarriage. He further provided that the wife should have the whole if she should survive all the children, they having died without issue; but if any of the children should survive the wife, they and the descendants of deceased children should have the property. These limitations were extraordinarily confused and ambiguous. After remarking that the remainders limited to the children in respect to the one-third part in which the wife took an absolute life estate, and the two-thirds part in which she took a determinable life estate, ought to vest at the same time, the court decided that the remainders in both parts vested indefeasibly at the death of the testator; that the deaths referred to by him were deaths in his own lifetime. It is submitted that there was nothing in the language employed to justify this conclusion. In Northern Trust Co. v. Wheaton,126 a testator had devised all his property to trustees for the lives of his wife and sister or the survivor, providing that on death

122 Ames v. Smith, 284 Ill. 63, 119 N.E. 969 (1918); Fulwiler v. McClun, 285 Ill. 174, 120 N.E. 458 (1918); Harder v. Matthews, 309 Ill. 548, 141 N.E. 442 (1923); Riser v. Ayres, 306 Ill. 293, 137 N.E. 851 (1923); Smith v. Dugger, 310 Ill. 624, 142 N.E. 243 (1924); Johnson v. Boland, 343 Ill. 552, 175 N.E. 794 (1931); Baird v. Garman, 349 Ill. 597, 182 N.E. 739 (1932); see Morris v. Phillips, 287 Ill. 633, 122 N.E. 831 (1919).

123 Note especially the opinion in Johnson v. Boland, 343 Ill. 552, 175 N.E. 794 (1931).

124 Cases cited in notes 117, 118, 121, 122 supra.

125 131 Ill. 653, 23 N.E. 586 (1890). The construction of the limitations adopted in this case by the court was peculiar in more than one respect. See criticism in Kales, op. cit. supra note 10, at § 347.

126 249 Ill. 606, 94 N.E. 980 (1911).
of said survivor, the trustees should divide the corpus among named persons. He further provided that if any one of the remaindermen should die before his interest should "vest," leaving a child or children surviving at the time when the estate should "vest," then such child or children should take the parent's share. The court held here also that the death of the remainderman to which the testator referred was such death in the testator's own life. If this decision is to be supported, it must be on the ground that the testator had conditioned the gift over on death of a remainderman before his interest should "vest;" that since there was no condition precedent to such vesting, the remainder vested at the death of the testator; it followed, therefore, that death in the life of the testator was meant. This decision, resting upon the assumption that the testator employed the word "vest" with full knowledge of its technical meaning, is at least dubious. It would seem just as likely that by "vest" the testator meant "vest in possession"—a meaning which would have permitted the gift over to be construed as conditioned on death of the remainderman without issue in the life of the life tenant. In Abraiams v. Sanders, the testator devised real estate to his wife for life, and after charging legacies in favor of his daughters on the said real estate, he devised the remainder to his son. In a subsequent clause of the will, he provided that if any child should "die without definite issue . . . before this will takes effect," his share should pass to the surviving children of the testator, etc. It was contended that the testator referred to the death of a child in his own lifetime. The court rejected this construction, putting emphasis on the following facts: that the testator was eighty-two years of age at the time he executed the will, whereas the son was comparatively young and unmarried; that the daughters were provided for only in money legacies; that in another clause, the testator had in express terms provided for the death of his wife in his own lifetime, and had not used such explicit language in relation to the gift over on death of a child. The court thought that the phrase "before this will takes effect" was intended to refer to the division of the estate on death of the wife. This decision appears to be a doubtful one at the opposite extreme from the two cases previously discussed.

The prima facie rule of construction yields also to a manifestation of intent to make the phrase "death without surviving issue" refer to such a death at any time, whether before or after that of the life tenant. Such

127 274 Ill. 452, 113 N.E. 737 (1916).
128 As to the significance of the fact that the limitation over was applicable to personal property, see comment in Subdivision IV B and note 101 supra.
GIFTS OVER ON DEATH OF FIRST TAKER

an intent may be expressly declared,¹²⁹ or it may be inferred. In one instance,¹³⁰ the court inferred such an intent from the fact that the gift over on death of the remainderman was to the “heirs” of the life tenant, the court pointing out that the latter could not have heirs during his own lifetime, and concluding, therefore, that death of the remainderman at any time must have been intended. In another case,¹³¹ the limitations were in the form: to A for life, remainder to B; and if B should die before C and D, then the land to pass to C and D. Apparently it was the view of the court here that the death of B at any time prior to the deaths of C and D was meant, and not merely such a death in the lifetime of A. This conclusion would appear sound considering the nature of the limitations and the unqualified reference to the death of B before the deaths of C and D.¹³²

The decision in *Patterson v. McCay*,¹³³ holding that the death intended was death without surviving children at any time, whether before or after the death of the life tenant, appears to the writer unsound. In that case, a deed conveyed land to A for life, with a provision that on the death of A the title should “vest in fee simple” in her daughter, B, and her “children.” It was further provided, “in case the said [B] should die before the said [A], or should leave no children living at the time of her death,” then the land should vest in fee in C. B had survived A, but had died without children. In adopting the construction above indicated, the court was probably misled by the unusual form of the language. Two separate conditions were apparently stated, in the disjunctive. Since the first of these conditions referred expressly to death in the life of A, and since the second was not expressly so limited, there was a certain plausibility in the view that the second condition must have been intended to refer to death at any time. No notice was taken of the fact that by the usual

¹²⁹ Beaty v. Callis, 294 Ill. 424, 128 N.E. 547 (1920).
¹³⁰ Cutler v. Garber, 289 Ill. 200, 124 N.E. 441 (1919).

¹³² Attention may also be called to the rather unusual situation present in *Aloe v. Lowe*, 278 Ill. 233, 115 N.E. 862 (1917). There the limitations were in substance as follows: to A, B and C for their lives; on the death of any one of the life tenants leaving issue surviving, one-third of the corpus to said issue; on death of any one of the life tenants leaving no issue surviving, one-third of the corpus to the survivor or survivors; and if all the life tenants should die without leaving issue surviving, then to X. It will be observed that the effect of these limitations was to create in respect to each undivided third of the property a life estate, with remainders in the alternative to the issue of the particular life tenant and to the survivors of the life tenants. It was held that a remainder which vested in a surviving life tenant under these limitations was subject to divestiture on his death without surviving issue at any time.

¹³³ 313 Ill. 491, 145 N.E. 87 (1924).
rules of construction, the disjunctive "or" should have been read as "and" in this instance. If "or" should be taken literally, the conditions would be separate and distinct; on the death of B in the life of A, the land would pass over to C, regardless of whether B left children surviving or not. Such a result would clearly be inconsistent with the manifested intent that B and her "children" should have the land at the death of A. Had "or" been read as "and," there would have been a gift over on two concurrent contingencies, both of which must have been satisfied before the gift over could have become effective in possession. Since B had survived A, her fee would have been indefeasible. There was nothing in the language of the instrument in this case to warrant the conclusion that death at any time was meant; the usual rule, that the gift over was conditioned on death of B without children in the life of the life tenant, should have been applied.

There is one type of case in which the Illinois court has applied the usual rule despite the serious doubt that may arise as to the intent of the creator of the limitations. This type of case is illustrated by Smith v. Dugger. A father had conveyed land by deed to his three sons, with a provision that if any one should die "before marriage and legitimate heirs," then the land should "vest" in the other living grantees. Then there followed a second provision, wherein the grantor reserved to himself the enjoyment of the land during his life. All three sons survived the grantor. The condition of their title was the issue in a suit brought by them for specific performance of a contract to convey the land. It was the decision of the court that they had a marketable title. The deed created an executory interest conditioned on the death of any one of the sons in the life of the grantor; since all had survived the death of the grantor, their title had become indefeasible. In a dissenting opinion, Thompson, J., held that this deed should be construed in the same way that a will of the grantor would be construed; that the death intended, therefore, was death at any time. It would appear that there are two factors which support the argument of the dissenting opinion. First, it is probably true that a deed of this kind is viewed by the grantor as the rough equivalent of a will. While such an instrument differs from a will

135 310 Ill. 624, 142 N.E. 243 (1924).
136 See also the dissenting opinion of the same justice in Harder v. Matthews, 309 Ill. 548, 141 N.E. 442 (1923), a case with facts similar to those in Smith v. Dugger, 310 Ill. 624, 142 N.E. 243 (1924), and similarly decided.
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in that it creates immediately upon delivery an irrevocable future interest, it does accomplish the same general objective as a testamentary instrument. This fact probably should be taken into consideration in determining the proper construction of the deed. If the grantor had executed a will containing the same gift over as the deed, that gift would have been conditioned on death of the first taker at any time since there would have been in that situation no preceding life estate in the conveyer. Secondly, some significance may be attached to the fact that the reservation of a life estate to the grantor followed the clause creating the executory interest. In the case of a deed creating a life estate in another person, followed by a remainder with an executory limitation over, the executory limitation naturally appears subsequently to the clause creating the life estate. While it may be unsound reasoning to make a decision hinge solely upon the relative positions of the clauses creating the life estate and the executory interest, still where there are other factors suggesting doubt as to the intent, the relative positions may become important. Where the reservation of the life estate is last, as in the principal case, there is at least less likelihood that the grantor intended the executory limitation to become operative only upon a death in his own lifetime. It appears to the writer that there is a slight preponderance of evidence in this type of case to justify the conclusion that death at any time was meant.

The facts in the case just discussed exhibited one peculiarity not commonly found, which is worth a passing comment. The limitation over was conditioned on death “before marriage and legitimate heirs,” in contrast to the common limitation over on “death without issue,” or “without surviving issue.” In limitations of the common type mentioned, the conveyer has not in express language stated the time of the death to which he refers. It may be suggested that in the Smith case, the condition, if taken at face value, does expressly state the time of death. “Before marriage and legitimate heirs,” construed literally, means before the marriage of the remainderman and before birth of issue to him. On a literal construction, his fee would become indefeasible upon the birth of a child. A gift over on death of the first taker “without having children,” is construed “without having had children.” The fee becomes indefeasible in the first taker on birth of a child, though such child predeceases the first taker, Jarman, Wills *1056 (6th Am. ed. 1893); Theobald, Wills 792 (8th ed. 1927). It is believed that “before marriage and legitimate heirs” is language demanding even more imperatively the indicated construction.

237 A gift over on death of the first taker “without having children,” is construed “without having had children.”
read into the limitation the restriction that the death must occur in the life of the life tenant. If, moreover, it is the actual intent that the remainderman’s fee shall become indefeasible on birth of issue, birth of issue at any time must be meant; it is not reasonable to suppose that the grantor intended that the fee of the remainderman should be divested merely because he had not had a child born in the life of the life tenant. The peculiar nature of the limitation over, therefore, supplied an additional reason for not applying the rule restricting death to death in the life of the life tenant, and an additional ground upon which the decision may be criticized.

The title to the present subdivision indicates that there may be a single gift over on the death of the remainderman without surviving issue, or there may be two gifts over—one to the surviving issue if any, and the other in default of such issue to C. The result is actually the same whether there be the single gift over or the alternative gifts indicated. In either case, the gift or gifts over are conditioned on death of the remainderman in the life of the life tenant. It may be observed, however, that if there be alternative gifts over which exhaust the possibilities, then the remainderman B can take only a life estate if “death without surviving issue” means death at any time. This fact is a further reason for construing the quoted phrase to refer only to death in the life of the life tenant. There is a suggestion of inconsistency between limitations over which limit to a life estate an interest not expressly so described. It is apparent that the courts have on occasion felt the influence of this argument. If the estate of the remainderman should be expressly described as a fee simple, the inconsistency between such description and the limitations over exhausting the contingencies would become patent; and it would then be exceedingly difficult to justify any other construction than that the death referred to is such a death in the life of the life tenant only.

See the dissenting opinion of Thompson, J., 310 Ill. 624, 628, 142 N.E. 243, 245 (1924); cf. Pitzer v. Morrison, 272 Ill. 291, 111 N.E. 1017 (1916) (death of the remainderman “before” C and D held to refer to such death at any time, whether before or after the death of the life tenant).

Cf. Kleinhans v. Kleinhans, 253 Ill. 620, 97 N.E. 1077 (1912). And see the previous discussions of gifts over exhausting all possible contingencies, Subdivision I and note 17 supra; Subdivision IV C and notes 106, 108 supra.

Lachenmyer v. Gehlbach, 266 Ill. 11, 107 N.E. 202 (1914); Johnson v. Boland, 343 Ill. 552, 175 N.E. 794 (1931). While it is doubtful whether the limitations over in these cases did exhaust all possible contingencies, it is apparent that the court thought they did.

Cf. discussion under Subdivision IV C supra.
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E. LIMITATIONS OVER UNDER A TRUST FOR FUTURE DISTRIBUTION
OR IN CONJUNCTION WITH AN ATTEMPTED RESTRAINT UPON
ALIENATION

In the preceding subdivision, the writer has considered the problem presented where the limitations are to A for life, remainder to B, with a gift over on his death without surviving issue. The arguments justifying the rule which relates “death without surviving issue” to the death of the life tenant have been set forth. A similar situation exists where property has been conveyed to a trustee for future distribution among several beneficiaries, with a provision that in event of the death of any beneficiary without surviving issue, his share shall go over. The arguments previously discussed would warrant the conclusion that the settlor here referred to the death of a beneficiary before final division and distribution by the trustee. In *Spencer v. Spencer*, the Illinois Supreme Court so held. It was pointed out in the opinion that the problem had not previously been presented to the Illinois courts, but that such was the rule in other jurisdictions. In its formal statement of the rule adopted, which the court took from Theobald on *Wills*, it inserted a qualifying clause, the importance of which is not wholly clear. The qualification limits the operation of the rule adopted to the case where the donee in the gift over is “contemplated as taking through the medium of the same trustee.” Apparently this means that “death without surviving issue” will not be construed to be limited to such death during the trust period unless the settlor has indicated that he expects the donee in the gift over to take from the hand of the trustee. On the actual facts of the case, the only language in the gift over suggesting such an expectation were the words, “to be distributed in accordance with the provisions of this will.” No discussion of the apparent qualification of the rule is to be found in the opinion. It is doubtful whether the adoption of this qualification would have any other effect than to complicate further a difficult problem of construction.143

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142 268 Ill. 332, 109 N.E. 300 (1915).

143 The court stated the rule as follows: “... if the fund is vested in a trustee who is directed to distribute it at a certain time, so that the trusts then determine, and the legatees who are to take upon the death of prior legatees without issue are contemplated as taking through the medium of the same trustee, the rule then is to restrict the meaning of 'death without issue' to death without issue before the time of distribution,” 268 Ill. 332, 341, 109 N.E. 300, 303 (1915). See Theobald, *Wills* 747 (8th ed. 1927). It may be suggested that the indicated qualification of the rule above discussed is actually inconsistent with that portion of the opinion in which the court apparently indicates its view that once distribution has been made, the distributee takes absolutely. See 268 Ill. 332, 341–2, 109 N.E. 300, 303 (1915).
In Defrees v. Brydon, a testator had devised a residue on trust for "the sole use" of five named children, providing that as to any child, the trust might be terminated by the trustee at any time in his discretion; that when division should be made by the trustee, each child should have a one-fifth part of the corpus, "to him or his heirs forever"; and, further, if any child should die before the testator "or afterwards," without leaving issue, his share should go over. After a division had been effected by the trustee, one of the children died without leaving issue. It was held that her share went over. The court put great weight on the fact that the will expressly provided for death before the testator "or afterwards," taking this to mean death at any time. Considering the whole of the provisions relative to the death of any child, one is left in doubt as to the true meaning of "death without surviving issue" as it was here used. On the one hand, it may be noted that the testator had provided that upon distribution by the trustee, a child should take his share, "to him and his heirs forever." This language suggests strongly that the testator did not contemplate any divestiture of a share once it had come into the possession of a child. On the other hand, two factors suggest that the testator referred to death of a child without issue at any time. He had made not only the gift over above mentioned, but also a gift over if any child should die leaving issue, and such issue should diechildless. And he had further provided that any child should have the power to devise and bequeath his share to any lineal descendant of the testator or his wife. The very nature of these provisions suggests that the testator was looking forward to a time beyond the termination of the trust.

In Beaty v. Callis, land had been devised to a widow for her life, and on her death to a granddaughter, with a provision that if the said granddaughter should be under the age of twenty-one years at the death of the widow, a trustee should be appointed to manage the said property until the majority of the granddaughter. There was a further provision that if the granddaughter should die before the widow "or subsequent thereto," leaving surviving no "children or descendants of such," the land should go over. The granddaughter attained the age of twenty-one and died without leaving issue. It was held that the land went over. The will expressly provided that the land should go over in event of the

\footnote{275 Ill. 533, 114 N.E. 336 (1916).}
\footnote{This gift over would appear void for remoteness, but it may, nevertheless, be significant as an indication of the time of death intended.}
\footnote{294 Ill. 424, 128 N.E. 547 (1920).}
death of the granddaughter without surviving issue "subsequent" to the death of the wife. The court thought that death without surviving issue prior to the granddaughter's attainment of twenty-one could not have been meant because it would have been practically impossible for her to have died under twenty-one leaving "descendants" of her children surviving. This decision appears to be reasonable on the facts.

It not infrequently happens that a testator undertakes to impose a restraint upon the alienation of property by the devisee thereof. Often the restraint is limited to the period preceding the attainment by the devisee of a stipulated age. If the same instrument makes a gift over in event of the death of the devisee without surviving issue, it would seem reasonable to construe that gift over as prima facie conditioned on death without surviving issue during the period of the attempted restraint, especially if there be a close connection in point of language between the provision imposing the restraint and the provision limiting the property over on death without issue surviving. The fact that the restraint itself may be invalid is immaterial in so far as the intent of the testator in reference to the operation of the gift over is concerned. The imposition of a restraint upon alienation limited to a definite period of time, or until the devisee shall have attained a stipulated age, carries a strong implication of intent that at the end of the specified period, or upon the attainment of the designated age, the devisee shall have full power to convey an absolute fee. If, however, his fee is held to be defeasible on his death without surviving issue, whenever that death may occur, he is practically precluded from conveying for his whole lifetime. In Noth v. Noth, the court gave no consideration to the reasoning here suggested, but held that the gift over was operative on death at any time, despite the fact that the gift over was contained in the same clause of the will as the attempted restraint.

In Clark v. Leavitt, the two factors here discussed—a trust for future distribution and an attempted restraint upon alienation—were apparently both present. A testator had devised real estate to a daughter, providing that she should have only the income therefrom until she attained the age of thirty, and that any conveyance by her should be void until she acquired "full power to sell the same." In the succeeding clause of the will, the testator further provided that should the daughter "die

147 See discussion of Knight v. Knight, 367 Ill. 646, 12 N.E. (2d) 649 (1938), supra, Subdivision II C.

148 292 Ill. 536, 127 N.E. 113 (1920).

149 330 Ill. 350, 161 N.E. 751 (1928).
without issue,” the property should be sold and the proceeds divided among brothers and sisters of the testator. On death of the daughter without having had issue, it was held: that “death without issue” meant “without having had issue”; that the clause, “until she shall have full power to sell the same,” meant until she should have attained the age of thirty and should have had issue born to her; and that the death without issue referred to was not restricted to death prior to her attainment of the age of thirty. In the opinion of the writer, this decision was in error on each of the three points stated. The objections to construing “death without issue” to mean “without having had issue” have been previously considered.159 The clause, “until she shall have full power to sell,” must certainly have been intended by the testator to refer to the daughter’s attainment of the age of thirty; it is too much to imagine that he knew how the court would construe the phrase “die without issue,” and that he therefore realized that the daughter could not have “full power” to convey until issue had been born. That the testator should have intended to make the interest of his daughter defeasible for her whole lifetime for the benefit of his brothers and sisters, who would probably die before the daughter, is unlikely; it would seem more probable that he contemplated a trust for management of the property until the daughter should have attained the age of thirty, and that in the gift over he referred to her death before her attainment of that age and before she became entitled to actual possession of the property upon termination of the trust.

159 Subdivision III C supra.