Construction of the Phrase "Death Without Issue" and Similar Terms - Zeller v. McGuckian

Malcolm B. Smith

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This was an appeal from a decree construing the will of one Thomas McGuckian, and ordering the distribution of his estate. By the will the testator left all his real and personal estate to his wife “for and during her natural life”. After death of the wife the property was to go to “my son George McGuckian, or in case of his death to his issue, if any. In the event that my son should die without issue I give, devise, and bequeath all the aforesaid property, not having been previously disposed of, to my nephew, George Zender, absolutely”. The court was petitioned to assume jurisdiction of the trust created by the will, which it did, and appointed one of the executors as trustee. The wife subsequently died, and the son petitioned the court to order a termination of the trust and distribution of the corpus.

In affirming the decree ordering distribution, the Court of Appeals construed the will as creating alternative gifts in remainder, and said: “Where two alternative gifts are preceded by a life estate, the alternative words of the gift are applied to the event of death of the first legatee occurring before the period of possession or distribution as fixed by the will. The first legatee, surviving that period, becomes absolutely and indefeasibly entitled; but if he should die before that period, his previous investure of title becomes divested, and those intended to take by the alternative gift become vested with the estate by way of substitution”. Thus the court construed the will to manifest an intent on the part of the testator that if the son survived the life tenant, then he would be entitled to the entire estate absolutely. In case of his death before the death of the life tenant, the property would go to his issue, if any; but if he should die without issue before the life tenant, then the estate would go to Zender. In other words the court construed the reference to “death without issue” merely as

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* Third year student, University of Maryland School of Law.

1 58 A. 2d 123 (1948).

2 Zeller v. McGuckian, supra, 124.
operating to defer the time of absolute vesting only until the death of the life tenant.

The construction of the phrase "death without issue", which is dealt with in this case, suggests consideration of the rules which determine the period to which the happening of the contingency is referred: (1) death of the legatee or devisee without issue at any time, or (2) before the period of distribution, or (3) before the death of the life tenant, or (4) before the death of the testator. The Restatement of Property\(^3\) speaks of the problem as determining the "critical date" to which one looks to discover whether the failure of issue has occurred. As preliminary, for the purpose of determining to what period the happening of the contingency is referred, it generally makes no difference that another word is substituted for the word "issue". Thus alternative remainders or executory devises over upon the contingency of death without "heirs", "descendants", or "children" will be governed essentially by the same rules as applied when the word "issue" is used, the only difference being that when the word "children" is used, it normally denotes only issue of the first generation.\(^4\)

**Definite and Indefinite Failure of Issue Theories**\(^5\)

In the early English law, prior to the Statute of Uses, if a devise was made "to A and his heirs, but if he die without issue, then to B and his heirs", the gift to B, taking effect by way of a shifting use, was void, for the reason that the common law would not allow a remainder after a fee simple estate. But because of a desire on the part of the courts to save the gift to B, such a gift was construed as a remainder after an estate tail, the theory being that the provision for failure of issue created a fee tail by implication as to the first taker, and a remainder over to B upon the expiration of the fee tail in A. After passage of the Statute of Uses, such a construction was no longer necessary, because shifting uses were held valid as a result of that Statute. But the application of the old rule for nearly 200 years made it too well entrenched to be lightly overcome, and the estate tail by implication prevailed. Also after the Rule against Perpetuities became established the medieval judges were reluctant to change. To save B's gift as a

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\(^3\) *Restatement, Property*, Sect. 266, Comm. d.

\(^4\) *Ibid.*, Sect. 267, Comms. c and d.

shifting use from the operation of that Rule it would have been necessary to construe the gift as taking effect at some definite period, such as upon the death of A without heirs (or issue) surviving A. But the old theory was still followed, giving B, by implication, a remainder after an estate tail. Thus the phrase "death without issue" was held to signify a period whenever A's line of descent ran out, no matter when. This became known as the "Indefinite Failure of Issue" theory, and was followed, in England, until the passage of the Wills Act of 1838. This statute provided that unless a contrary intention shall appear in the will, the words shall be construed to be a definite failure of issue, i.e. a failure of issue in the lifetime or at the death of the named person, and not a period whenever the named person's line of descent runs out.

In this country, although the early cases generally followed the indefinite failure theory, at the present time there is at least some form of statute in almost all states covering the situation at least partially. The Restatement of Property follows the definite failure theory both as to deeds inter vivos and wills. The first Maryland statute on the point was passed in 1862, and adopted the definite failure theory where the phrase appears in wills, unless a contrary intention appears in the will; and in 1886 a similar provision was made with respect to deeds. For these reasons the remainder of this discussion deals only with cases following the definite failure theory.

The Edwards Case

The whole question of the period to which the contingency of death without issue is to be referred is elaborately brought out and examined in the early English case of Edwards v. Edwards. There the testator left property in trust for his wife during widowhood, and thereafter to his three children, with the provision that "if any of my children shall die, and leaving no children, his or her share shall be equally divided between the other two". The widow died thereafter leaving the three children surviving her, but subsequently a son died without issue. The Court held that his share did not pass to his brother and sister,

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*1 Vict. ch. 26, Sect. 29 (1837).
* Supra, n. 3, Sect. 266, Comm. b.
* 15 Bear. 361 (1852).
but became absolute in him when he survived his mother, the life tenant, even though he subsequently died without issue.

The Court pointed out four classes of cases in which questions of this description arise. First, a devise “to A, but if he shall die, then to B”. In this class of cases the testator obviously intended to create a contingency, because the word “if” appears. But actually there is no contingency, because A is certain to die—the event which is sought to be made a contingency is certain to happen. There is no contingency about death except as to the time thereof. Therefore, by the use of this phrase it is presumed the testator intended that A should not take if he died before the testator, but that the property should go to B in that event, thus preventing a possible lapse. Rather than cut down the absolute estate in A and make it a life estate with remainder to B, the clause is given this substitutionary construction; i.e., that the property is intended to go to A or to B, but not to both; if A outlives the testator, he takes, if not, B takes.

The second class of cases is where there is a devise “to A, but if he dies without issue, then to B”. Here, a real contingency is expressed without reference to the time of death, and it would seem that the ordinary meaning should be given the words, so that upon A’s death without surviving issue, whenever his death occurs, B should be entitled to take. But although this seems to be the most logical conclusion based on the words used, not all cases have reached that result, as will be shown later.

The third class is similar to the first, in that no real contingency is expressed, but this class has the added factor of an intervening life estate; e.g., “to W for life, remainder to A, but if A dies, then to B”. Since there is no real contingency expressed, it must be assumed that the testator had in mind the time of death when he used the words. Thus it is implied that the testator intended the gift over to take effect on the death of A before the period of possession or distribution; and here, as distinguished from the first class, the period of distribution is at the termination of the life estate, rather than at the death of the testator. Therefore, if A survives the life tenant, the gift to him becomes absolute, and only upon his death before the death of the life tenant can the alternative remainder to B take effect.

The fourth class of cases discussed in this case is where there is a gift “to W for life, remainder to A, but if A die
without issue, then to B". The added factor of the intervening life estate in this case caused the Court to lay down the rule that the words of contingency must be construed to mean the occurrence of the contingent event before the period of distribution, and thus only upon the death of A without issue in the lifetime of the life tenant can the alternative remainder to B operate. If A survives the life tenant, his estate becomes absolute, even though he may subsequently die without issue. The principle was said to be based on the desire of the courts to relieve the suspension of absolute vesting as soon as possible. However, the Court seemed to overlook the fact that in laying down this rule it was making an unnecessary implication. As in the second class of cases, there is a real contingency expressed here, death without issue, and to give the words their ordinary meaning would seem to necessitate construing it as meaning death without issue whenever death of the named person occurs, whether before or after the death of the life tenant. Instead of construing this class of cases similarly to the second class, in which the same contingency was also expressed, the Court compared it to the third class, where no real contingency is expressed. The fourth rule laid down by the Edwards case was later rejected in England, and the rule for both the second and fourth classes is considered to refer the contingency to the death of the named person whenever it occurs, thus giving the words their natural meaning. But probably the majority of American decisions, involving a life estate with a gift over of the remainder upon death of the first taker without issue, have held the contingency to be referable to the period of the life tenancy.

Rule Which Gives Words Their Natural Unrestricted Meaning

Where there is a gift "to A, but if he die without issue, then to B", or similar wording in which the death of the first taker is referred to in connection with some collateral event, a number of cases recognize as the general rule that the words should be given their ordinary and literal meaning, and that the contingency of death without issue will be held to refer to death of the first taker either before or after the death of the testator, unless there is a showing of contrary intent from the context of the will or

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11 O'Mahoney v. Burdett, L. R. 7 H. L. 388 (1874); see also 25 L. R. A., N. S. 1051 n.
12 See text and cases cited under heading "Rule Which Limits the Contingency to Death Before Termination of Antecedent Estate", infra.
the circumstances surrounding the disposition.\textsuperscript{13} It is said in \textit{Ashfield v. Curtis}\textsuperscript{14} that "The rule may be regarded as well established that when the death of the first taker is coupled with circumstances which may or may not take place, as, for instance, death under age or without children, a devise over, unless controlled by other provisions of the will, takes effect according to the ordinary and literal meaning of the words, upon the death under the circumstances indicated, at any time, whether before or after the death of the testator". This is the rule adopted by the Restatement,\textsuperscript{15} and, from this writer's research, it appears to be with the weight of authority. These cases base their reasoning not only upon the fact that such a construction gives the words their ordinary and literal meaning, but also upon the reasoning expressed in the \textit{Edwards} case, that although where there is a gift to one with a limitation over to another upon the death of the first taker, without any other words of contingency, the courts will imply the contingency of death of the first taker in the lifetime of the testator, based on the theory that he must have had such a contingency in mind; yet where there is an actual contingency expressed, such as death before coming of age or without issue, the courts should not import a meaning and add words to the will by construing it to mean death without issue before the testator's death. In the latter case, it is said, a contingency already exists, and it is unnecessary to imply the further contingency of death before the testator's death.

Although some writers imply that the rule in Maryland is \textit{contra} to this rule giving the words their unrestricted meaning,\textsuperscript{16} there are at least ten Maryland cases which have so construed the phrase, even though not expressly saying that they were following any rule of construction when

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\item \textsuperscript{13} Estate of Briggs, 186 Cal. 351, 199 P. 322 (1921); Clark v. Leavitt, 330 Ill. 350, 161 N. E. 751 (1928); Smith v. Ballard, 117 Ky. 179, 77 S. W. 714 (1903); Buchanan v. Buchanan, 99 N. C. 309, 5 S. E. 430 (1888); Britton v. Thorton, 112 U. S. 526 (1884).
\item \textsuperscript{14} 229 Ill. 139, 82 N. E. 276 (1907).
\item \textsuperscript{15} \textit{Supra}, n. 3, Sect. 267 "When property is limited by an otherwise effective conveyance to B and his heirs, but if B dies without issue, then to C", or by other words of similar import, then, unless a contrary intent of the conveyor is found from additional language or circumstances, the interest of C can become a present interest if, but only if, B is unsurvived by issue at the time of his death, whenever that may occur".
\item \textsuperscript{16} Warren, \textit{Gifts Over on Definite Failure of Issue}, \textit{supra}, n. 5; and see 25 L. R. A., N. S. 1054-5 n. where it is said that Maryland and New York tend to treat "in event of death" and "in event of death without issue" as being the same thing, and refer them both to death of the legatee in testator's lifetime.
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doing so. In all of these cases, the Court said that it would construe the will according to the intent of the testator as it could be gathered from the terms of the will; and since there was nothing else in the will to show any other intent, the Court merely gave the words their natural meaning, without making any presumption that the testator intended only to prevent a lapse and thus restrict the contingency to his lifetime, and without declaring that they were following any general rule of construction controlling in the absence of a contrary intent. They merely looked at the will without reference to any rules, and said such is the intent of the testator because that is the natural effect of the words he has used. This writer believes that the later Maryland cases restricting the contingency to the lifetime of the testator were actually based upon the special context of the will involved, and that they do not lay down any rule to be followed in the absence of a contrary intent. These cases will be discussed along with those from other jurisdictions which reach the result of referring the contingency to the testator's lifetime. It is sufficient here to state that although no Maryland case has laid down this rule, giving the words their unrestricted meaning, as a general rule of construction to control in the absence of contrary intent, still there are Maryland cases which have reached such a result, and it is therefore this writer's opinion that the question may still be open in Maryland.

Some of the earlier cases from other jurisdictions have made a distinction, in applying this rule, between bequests of personal property and devises of real estate. It has been said that in bequests of personalty, the contingency of death without issue will be referred to the happening of such event in the lifetime of the testator, because personalty perishes with the using, and the testator cannot be presumed to have looked beyond the distribution which he has directed his executor to make. However, this distinction seems to have been refuted in later cases as being unsound, and those courts which follow the rule as to real estate also follow it now as to personalty.

17 Gambrill v. Forest Lodge, 66 Md. 17 (1886); Devecmon v. Shaw, 70 Md. 219 (1889); Lednum v. Cecil, 76 Md. 149 (1892); Hutchins v. Pierce, 80 Md. 434 (1895); Weybright v. Powell, 86 Md. 573 (1897); Wilson v. Bull, 97 Md. 128 (1903); Stonebraker v. Zollickoffer, 52 Md. 154 (1879); Mason v. Johnson, 47 Md. 437 (1877); Thomas v. Levering, 73 Md. 451 (1891); and by dictum in 163 Md. 136 (1932).
18 Harvey v. Bell, 118 Ky. 512, 81 S. W. 671 (1904).
19 First National Bank v. De Pauw, 75 F. 775 (1896); Carpenter v. Sangamon Loan & T. Co., 229 Ill. 486, 82 N. E. 418 (1907); RESTATEMENT, PROPERTY, Sect. 267, Comm. b.
This general rule for the construction of the phrase is always subordinate to a contrary intention of the testator appearing in the context of the will. Therefore, those courts which declare the general rule to be that the phrase "death without issue", or words of similar import, refers to death whenever it occurs, will refer the clause to the period before the testator's death, or before distribution (when distribution is postponed), or before the termination of an antecedent estate, when the context of the will requires such a construction. Thus where the testator fixes the time for the distribution of the gift at a period subsequent to his death, and it is evident from the context of the will that he must also have had this period in mind when making the dispositions and the contingencies provided for, the contingency of "death without issue" will be referred to that period, rather than to the death of the named legatee at any time. Or where the gift to the first taker is itself contingent, then the limitation over to the second taker upon death of the first taker without issue will be construed to refer to the time of vesting.

Probably the most well-developed exception to the rule, based on a contrary intent, is where there is a gift in absolute terms followed by a limitation over both on the event of death leaving issue and death without issue. In such case, the contingency is restricted to the lifetime of the testator. This exception only applies where the gift to the first taker is in absolute terms, because the argument is based on the reasoning that by providing for all contingencies, either death with or death without issue, the limitation over is in effect made a certainty, and would operate to cut down the absolute gift to a mere life estate if it were not referred to the period before distribution. For example, where a testator left property to his two sons in fee, with the provision that if either son should die leaving children his share should go to those children, but if either son should die without issue his share should go to the surviving son, the Court found that the gift was absolute in terms and since the limitations over collectively provided for the death of the donee under all possible circumstances, that

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20 Wilson v. Bryan, 90 Ky. 482, 14 S. W. 533 (1890); Huff v. Browning, 90 Ill. App. 612 (1901); Claggett v. Bowie, 130 Md. 437 (1917); see also Restatement, Property, Sect. 288. Although this rule is treated here as an exception to the general rule, in most states it seems to be regarded as a separate and distinct rule of construction. See heading "Rule Which Limits the Contingency to Other Intermediate Periods Mentioned in the Will", infra.

to avoid a repugnant construction which would reduce the estate to one for life, the words of contingency must be construed to refer to the happening of the event in the testator's lifetime. The Restatement of Property also supports this exception, but points out that some courts construe the gift to the first taker as being a life estate, and in such cases the "critical date" is still the death of the first taker whenever it occurs, and the limitation over cannot take effect unless the first taker is unsurvived by issue at that time. Thus, with regard to the gift over, the effect is the same as if the general rule discussed here applied.

The last important exception is where there is a gift over to the survivors of a class, in the event that the first taker should die without issue. In such case those courts which ordinarily give the words their natural unrestricted meaning usually say that the words of survivorship evidence a contrary intention on the part of the testator to confine the contingency to the period when the survivorship is to be determined. Little discussion has been given the matter in the decided cases, but the theory is probably based on the dual aspect of the contingency; i.e., first, dying without issue, and second, dying within the period before the ascertainment of the beneficiaries named in the limitation over. When the latter period has arrived, it is obviously then impossible to ascertain the beneficiaries of the gift over unless the contingency is referred to the happening of the event before the period of ascertainment. The courts determine to what period the words of survivorship refer, and then restrict the contingency of death without issue to that period also. For example, where a testator makes an immediate gift of his residuary estate to his three sons, with the provision that if either should die leaving no issue, then the share of such deceased child shall go to the survivors or survivor, then the contingency of death without issue is referred to the period before the death of the testator, because that is considered the period for ascertainment of the survivorship, the gift being a present gift and distribution not postponed. Since the words of survivorship are referred to the death of the testator, the contingency

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22 Barrell v. Barrell, 38 N. J. Eq. 60 (1884); see also Mitchell v. Pittsburgh, Ft. Worth & C. R. Co., 165 Pa. 646, 31 A. 67 (1895); King v. King, 215 Ill. 100, 74 N. E. 89 (1905). This argument could also have been made in certain Maryland cases which restricted the contingency to period before testator's death. cf. Lumpkin v. Lumpkin, 108 Md. 470 (1905), and Godwin v. Kemp, 129 Md. 159 (1916). Thus it is suggested that special context controlled those decisions.

23 Supra, n. 3, Sect. 267, Comm. G.
of death without issue is also referred to that period. The reasoning seems highly technical, and the courts state it as an exception to the general rule without going into the reasoning behind it. Where a life estate precedes the gift to the first taker, then the words of survivorship, and also the contingency of death without issue are usually referred to the period before the death of the life tenant. The problem of an intervening life estate is usually considered to involve a separate rule of construction and will be discussed under a subsequent heading.

**Rule Which Limits the Contingency to Death Without Issue in Testator's Lifetime**

As distinguished from that line of cases giving the words "death without issue" their natural unrestricted meaning, there is a second line of decisions which declare the general rule to be that where there is an absolute devise in fee, followed by a provision for a gift over to another in the event that the first taker dies without issue, then the words are not a curtailment of the prior devise or bequest, but merely make the gift one in the alternative or substitutionary, and to take effect only on the death of the first taker without issue in the lifetime of the testator. Various reasons are given for adopting this construction, causing the court to believe that such was the intent of the testator, some saying his purpose in including the phrase was not to cut down the absolute estate given to the first taker, but merely to make provision for a substituted devisee in case of a lapse. Others say such a construction is adopted in order to avoid repugnancy, and because the law favors early vesting of estates; or that the first taker is always the primary object of the testator's bounty and his absolute estate should not be cut down without a clear showing of such an intent on the part of the testator. The New York courts, although declaring this rule to be the law of that state based on precedent and authority, do not seem to be entirely satis-

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24 Kohtz v. Eldred, 208 Ill. 60, 69 N. E. 900 (1904); Carpenter v. Hazelrigg, 103 Ky. 538, 45 S. W. 666 (1898); Reams v. Spann, 26 S. C. 561, 2 S. E. 412 (1887).
25 Quilliam v. Union Trust Co., 194 Ind. 521, 142 N. E. 214 (1924); Washburn v. Cope, et al., 144 N. Y. 287, 39 N. E. 388 (1893); Frank v. Frank, 120 Tenn. 569, 111 S. W. 1119 (1908); App. v. App., 106 Va. 253, 55 S. E. 672 (1906); Burnham v. Burnham, 101 Conn. 529, 126 Atl. 704 (1924); Steinhilber v. Dreher, 140 Ohio St. 305, 43 N. E. 2d 285 (1942); Collins v. Collins, 116 Iowa 703, 88 N. W. 1097 (1902).
26 Walsh v. McCutcheon, 71 Conn. 283, 41 A. 813 (1898).
27 Tarbell v. Smith, 125 Iowa 388, 101 N. W. 118 (1904).
28 Mickley's Appeal, 92 Pa. 514 (1880).
fied with its soundness, for in one case it is stated: "... It is by no means certain that it was not the intention of the testator to control and provide for the ulterior devolution of the title, after it had been enjoyed during life by the primary devisee, in case he then died without issue, and such a construction would, it would seem, give effect more completely to the language used".

There have been several Maryland cases seemingly applying the general rule under discussion here, and restricting the contingency to the lifetime of the testator, and, as was previously stated, these cases have led some writers to say that such is the law in Maryland. However, careful scrutiny of these cases will show that the Court has never flatly laid down the general rule as such. Probably the strongest case is *Lumpkin v. Lumpkin* where the language used implied the existence of a general rule more than in any other case. But even in that case the Court seemed to rely chiefly on the intent of the testator, and not upon a rule of construction controlling in the absence of intent. In that case there were a number of gifts to children of the testator throughout the will, and certain gifts to the wife, with a provision at the end of the will that if any child should die without leaving issue, then his share was to go to the wife and surviving children. The Court cited numerous cases, particularly from New York, following the rule restricting the contingency to the lifetime of the testator, and also cited certain Maryland cases restricting the operation of the gift over to the testator's lifetime where the limitation over was only upon death, and not "death without issue". The Court said that the same rationale in the latter group applied also to the case before it, and for this reason, it has been said that Maryland and New York treat a limitation over upon "death" the same as one upon "death without issue". But actually the chief ground for the decision in the *Lumpkin* case was the intent of the testator, based on the terms of the will and the circumstances of the disposition. The Court said, "In our opinion Mr. Lumpkin has indicated in his will with reasonable certainty the time . . . prior to which he intended the death of one of his children without issue to occur in order to cause its share to pass over to

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29 Vanderzee v. Slingerland, 103 N. Y. 47, 8 N. E. 247 (1886).
31 Supra, n. 30.
his wife and other children," and then went on to point out that the limitation over being in favor of the wife as well as surviving children, he must have had in mind the death of a child before his own death, because the wife was well on in years and could not be expected to be alive to take the gift over if the limitation were meant to operate whenever the child died, before or after the testator. Further, the word "inheritance" was used to describe the share of the children in the limiting clause, this also indicating that the testator was thinking in terms of his own death. And finally, the Court said, after discussing the rule of construction as laid down in other states, "... but we do not pursue this subject further, as we rely for our conclusion mainly on the will itself read in the light of the circumstances surrounding the testator when he made it." Similarly, all the other cases restricting the contingency to the testator's lifetime have relied not on a rule of construction, but upon what the Court believed to be the actual intent of the testator, the Court saying in Duering v. Brill, "... We do not think this belongs to the class of cases where a fee is first given, and is then made defeasible, if the devisee dies without issue". It is for this reason, and in view of the several cases previously cited, that this writer believes that where there is nothing in the will or surrounding circumstances to change the natural effect of the words, the Maryland courts will give them their unrestricted meaning; and that it is only where the language and circumstances require such a result that the substitutionary construction restricting the contingency to the testator's lifetime will be given the phrase.

With regard to those states adopting this general rule, it should be noted that it is only applied when the gift to the first taker is of an absolute interest. Thus where the estate to the first taker is a life estate, or other estate less than a fee, the rule does not apply, the reason being that, first, the presumption made by the general rule is based on the inconsistency of cutting down an absolute and unrestricted fee, and would thus not apply where the gift is not of an absolute estate, and second, the words "death without issue" in such case do not import a substitutionary gift either to the first taker or the devisee in the

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81 Ibid., n. 30, 496.
82 Ibid., n. 30, 499.
83 Supra, n. 30.
84 Hollister v. Butterworth, 71 Conn. 57, 40 A. 1044 (1898); Fowler v. Ingersoll, 127 N. Y. 472, 28 N. E. 471 (1891); Chesterfield v. Hoskin, 133 Wis. 363, 113 N. W. 647 (1907).
limitation over, but they refer rather to the gift of the remainder; e.g., where there is a gift "to A for life, and if he die without issue then to B and C, but if he die leaving issue then to such issue", the contingency of leaving issue refers to the gift of the remainder, and the rule will not operate to give A an absolute estate in fee merely because he survived the testator.38

While it is stated in all the cases that the rule is always subject to a contrary intent of the testator appearing from the context of the will, the decisions are somewhat conflicting as to how strong the showing of contrary intent must be. Some courts say that the showing must be clear, strong, and decisive in order to cut down a plain devise in fee to a lesser estate.39 Other courts say that slight circumstances evidencing a contrary intent will be laid hold of to take the case out of the rule since the rule presumes an intent and gives an artificial effect to the language rather than its ordinary and popular meaning.40 Thus there has been no establishment of any group of factors which can be called exceptions so as to take the case out of the general rule by evidencing a contrary intent. The question of existence of a contrary intent must be decided in each case solely on its own facts without any substantial aid from established precedent.

Possibly the only factor which might be classed as an exception to the general rule is the case where the gift to the first taker is preceded by a life estate. In such a situation, these courts, which state the general proposition to be to refer the words to the period before the testator's death, will generally take the case out of the general rule and construe the words to refer to the period before the termination of the preceding estate.41 It is probably more accurate to say that these courts are following the rule of construction which so restricts the contingency in the presence of an intervening life estate, rather than to call it an exception to the general rule which these courts follow in the absence of such life estate. The New York cases, however, seem generally to reject such a construction unless there is some other and stronger evidence of a contrary intent, and still restrict the contingency to the testa-

38 Supra, n. 35.
39 Washbon v. Cope, supra, n. 25; Benson v. Corbin, 145 N. Y. 351, 40 N. E. 11 (1895); Meacham v. Graham, 98 Tenn. 190, 39 S. W. 12 (1897).
tor's lifetime regardless of a preceding life estate, and this same result was reached in an Iowa case. This problem will be more fully discussed in the next heading, the purpose here being merely to show what circumstances will take the case out of the general rule followed by these courts.

It may be well to point out that the discussion under this heading has dealt with those cases which lay down, as a general proposition, the rule giving the words a substitutionary construction and restricting the contingency to the lifetime of the testator. Other courts, although not starting out with this general proposition, may still find an intent from the context of the will to so restrict the words.

Rule Which Limits the Contingency to Death Without Issue Before Termination of an Antecedent Estate

There is a third rule of construction, separate and distinct from the first two discussed, which is said to govern where there is a gift of a life estate with remainder to a named person, but a limitation over to another in the event that the remainderman should die without issue. In such case, the presumption is said to be that the words “death without issue” must be taken to refer to death of the remainderman before the death of the life tenant, unless a contrary intent appears from the context of the will. This rule arose from the early English cases around the time of the Edwards case and was based primarily on the desire of the courts for an early vesting of title, while also supposedly giving the phrase a rational application. It has since been rejected in England, but seems to be still adhered to in a majority of the jurisdictions in this country, including those which ordinarily give the words their natural and unrestricted meaning, and also those which

41 Tarbell v. Smith, 125 Iowa 388, 101 N. W. 118 (1904).
43 Supra, n. 11.
44 Harvey v. Bell, 118 Ky. 512, 81 S. W. 671 (1904); 25 L. R. A. N. S. 1067 n.; and see also Warren, Gifts Over on Death Without Issue, 39 Yale Law Journal 332 (1930); and Note, Future Interests: Construction of "Death Without Issue" as Contingency for Gift Over When Prior Beneficiary's Estate is Preceded by Life Estate, 31 Cal. L. Rev. 695, where it is said that, although the majority rule is otherwise, California still gives the words their natural unrestricted meaning, probably on the theory that the words should not have their natural meaning cut down save by a specific limitation, citing Musson v. Fuller, 54 Cal. App. 2d 5, 133 P. 2d 682 (1943).
ordinarily restrict the contingency to the lifetime of the testator, except New York, and possibly Iowa, and Indiana.\textsuperscript{45} The Restatement has also accepted this view in Section 269, where the rule is stated as follows: "When property is limited by an otherwise effective conveyance 'to B for life (or years), remainder to C and his heirs, but if C dies without issue, then to D', or by other words of similar import, then, unless a contrary intent of the conveyor is found from additional language or circumstances, the interest of D can become a present interest if, but only if, C dies at or before the time of the termination of the interest of B in accordance with the terms of the limitation and is unsurvived by issue at the time of his death." The rationale given for the rule, in Comment a., is the reasonableness of the inference that such a construction gives effect to the intent of the conveyor, and the convenience of as early indefeasibility of interests as is consistent with the manifested intent of the testator.

This rule also seems to be well established in Maryland,\textsuperscript{46} and was correctly followed in the principal case, although the case relied on by the Court as authority for the rule did not involve a limitation over upon death of the first taker "without issue", but merely upon the death of the first taker uncoupled with any other contingency, the devise being to the children of a deceased brother of the testator "... or their heirs", from which the Court there implied a contingency of death before the death of a preceding life tenant, and, since that event occurred, allowed the gift to go to the heirs of deceased children.\textsuperscript{47} However, the result in the principal case was good, even though the authority cited is questionable.

Again, it should be emphasized that this rule is always subject to the contrary intent of the testator, some courts requiring a strong showing of contrary intent, and other courts allowing slight circumstances to take the case out

\textsuperscript{45} See supra, N. S. 39, 40, and 41; Taylor v. Stevens, 165 Ind. 200, 74 N. E. 980 (1905), where the contingency was restricted to the lifetime of the testator regardless of intervening life estate.

\textsuperscript{46} Hill v. Hill, 5 G. & J. 87 (1832); Fairfax v. Brown, 60 Md. 50 (1882); Booth v. Eberly, 124 Md. 22 (1914); and see also Godwin v. Kemp, and the Lumpkin case, supra, n. 30, 499-500, where in the latter the court said, "If the limitation over had in terms applied only to the portion of the estate left to the wife for life with remainder to the children, much authority could have been found in the Maryland cases for holding that the children's death without issue meant a death during the life of the widow, as the children were only to come into possession of the remainder at her death. Indeed, it may be conceded that such would have been the weight of authority in that event".

\textsuperscript{47} Reiff v. Strite, 54 Md. 298 (1880).
of the general rule. And it should also be pointed out that there may be cases in which the context of the will, or other circumstances surrounding the disposition of the estate, manifests a clear intent that the contingency should refer to the death of the life tenant, and in such cases even those courts which do not recognize the rule as a rule of construction, will, of course, give effect to the intent and limit the contingency to the period of the life tenancy.

Rule Which Limits the Contingency to Other Intermediate Periods Mentioned in the Will

Similar to the preceding rule which refers the happening of the contingency to the termination of the antecedent estate, the cases have established the presumption that where there is some period mentioned or indicated in the will, between the testator's death and the death of the legatee or devisee, when distribution or full enjoyment of the estate is to take place, then the intention must have been to restrict the happening of the contingency to that interval. Thus where a testator makes an absolute gift to an infant, to be distributed to him upon attaining the age of twenty-one, but if he dies without issue then the property is to go to another, the presumption is that the words "death without issue" refers to the happening of that event before the infant reaches twenty-one, and if he survives that period of distribution, then he takes an indefeasible title regardless of whether he subsequently dies without issue. This rule arose from the early English decisions on the point, and was a result of the tendency of the courts to favor an early vesting of estates, and from the belief that the first taker was the primary object of the

48 Harvey v. Bell, 118 Ky. 512, 81 S. W. 671 (1904); In Re Kelley's Estate, 303 Pa. 391, 154 A. 719 (1931); Horrocks v. Basham, 139 Ark. 116, 213 S. W. 372 (1919); Horton v. Horton, 107 Misc. 685, 177 N. Y. S. 857 (1919); Donnell v. Newburyport Homeopathic Hospital, 179 Mass. 187, 60 N. E. 482 (1901); RESTATEMENT, PROPERTY, Sect. 268, which states the rule as follows: "When property is limited by an otherwise effective conveyance 'to B and his heirs, but if B dies without issue, then to C', or by other language of similar import, and (a) the conveyance further provides that for a described period the interest of B shall be subject to a trust, or to a similar withholding of control, or to a defeasance, and (b) the ending of such described period is likely to occur between the date upon which the conveyance speaks, and the date of B's death, then unless a contrary intent of the conveyor is found from additional language or circumstances, the interest of C shall become a present interest if, but only if, B dies at or before the end of such described period and is unsurvived by issue at the time of his death". And see also note, Wills—Construction—Limitation of Defeasance Clause, 39 Mich. L. Rev. 1053 (1941). This rule is followed in Maryland in Bentz v. Md. Bible Soc., 86 Md. 102 (1897); Gerting v. Wells, 100 Md. 93 (1904); and Clagett v. Bowie, 130 Md. 437 (1917).
testator's bounty and thus that there was a reasonable inference that the rule gave effect to the testator's intent. In England this result is treated as an exception to the general rule giving the words their unrestricted meaning,\(^9\) while in this country some courts treat it as a rule of construction giving rise to a presumption, and others, although not basing the result upon any rule of construction, find an intention on the part of the testator to restrict the contingency to the period of distribution.\(^50\)

It should be pointed out that the rule under discussion here is also separate and distinct from the first two rules discussed, the one giving the words their unrestricted meaning, and the latter restricting the contingency to death in the testator's lifetime. As brought out in discussing the exceptions to those rules, the courts, where the testator has created a period of distribution, may still follow this rule and limit the contingency to the period before distribution, merely following one of the other rules when no such period is created. Also, the courts, whether following one or the other of the first two rules, and not recognizing the rule here as a rule of construction, may yet find that the context of the will and surrounding circumstances evidence sufficient contrary intent to take the case out of the general rule and thus restrict the contingency to the period of distribution.

**Association of the Contingency With Another Event**

In some cases the testator has coupled the contingency of death without issue with another event by use of the conjunctive particle “and”, or the disjunctive particle “or”. For example there may be a devise “to A, but if he die without issue and before attaining the age of twenty-one, then to B”; or a devise or bequest substituting the word “or” for the word “and” in the above example. When the word “and” is used, the natural effect is to confine the contingency of death without issue to the period preceding the happening of the event with which it is coupled, namely, attaining the age of twenty-one, and if the devisee or legatee lives to be twenty-one, his title becomes indefeasible, even though he may subsequently die without issue. In other words, the courts will not substitute the word “or” for the word “and” unless the general scheme of the will necessi-

\(^9\) O'Mahoney v. Burdett, supra, n. 11.

\(^50\) In Re Farmer's Loan & T. Co., 189 N. Y. 202, 82 N. E. 181 (1907); Shearer v. Miller, 185 Pa. 149, 39 A. 846 (1898); Van Houten v. Pennington, 8 N. J. Eq. 745 (1852); Price v. Johnson, 90 N. C. 592.
tates the substitution, and thus the cases hold that the limitation over cannot take effect unless both of the contingencies occur, i.e. that the devisee dies without issue and before reaching twenty-one.\textsuperscript{51} However, where the contingency of death without issue was coupled with a dying unmarried, as in a gift "to A, but if he should die unmarried and without issue, then to B", the early English cases held that the word "and" should be read as "or", it being presumed that since the two were used together the testator did not intend that the limitation over might be defeated by the marriage of the donee without any resulting children,\textsuperscript{52} which would be the result if the word "and" were given its natural effect. The American cases seem to be in conflict on whether to convert "and" to "or" when used to couple the contingency of death without issue to the contingency of marriage, an early Maryland case having followed the early English decisions.\textsuperscript{53}

The most frequent problem arising seems to be where the word "or" is used to couple death without issue with the contingency of death before a stated age, as where there is a gift "to A, but if he die without issue or before attaining the age of twenty-one, then to B". If the word "or" were given its natural effect, the limitation over would operate either upon death before twenty-one with or without issue, or upon death without issue before or after reaching twenty-one. Thus if the legatee or devisee had issue before reaching twenty-one, but also died before that age, the limitation over would take effect and his issue would be disinherited. It is chiefly for this reason that the courts have said that the word "or" must be read as "and", reaching the result that if the first taker either attains the age of twenty-one or has issue before that time, the gift in him becomes indefeasible.\textsuperscript{54}

As to the result when the word "or" is used to couple death without issue with the event of marriage, the American cases are again in conflict, some courts saying that the limitation over will not take effect unless both of the contingencies happen, thus converting the word "or" to read


\textsuperscript{52} Bell v. Phyn, 7 Ves. Jr. 453.

\textsuperscript{53} Janney v. Spriggs, 7 Gill 197, 48 Am. Dec. 557 (1848).

\textsuperscript{54} Morris v. Morris, 17 Beav. 198; and uniformly recognized as a settled rule in this country in Kindig v. Deardorff, 39 Ill. 300 (1866); Shreve v. MacCrellish, 60 N. J. Eq. 198, 46 A. 581 (1900); Doebler's Appeal, 64 Pa. 9 (1869); Neal v. Cosden, 34 Md. 421 (1871).
as "and", and others retaining the disjunctive particle "or", thus causing the limitation over to operate upon the happening of either of the contingencies.

It should be pointed out that the discussion of this aspect of the construction of the phrase is intended merely to create an awareness of the problems rather than to state or explain any rules of law to be obtained from the decisions.

Summary and Conclusions

By way of summary it may be said that where there is an absolute gift to one legatee or devisee, with a limitation over to another in the event that the first taker dies without issue, then, unless the context of the will manifests a contrary intent, the majority of cases and the weight of authority support the rule of construction which gives the words "death without issue", or words of similar import, their natural unrestricted meaning, and hold that the limitation over will become operative should the first taker die without surviving issue, whenever that event occurs. On the other hand, a substantial minority of cases follow that rule of construction which restricts the happening of the contingency to the lifetime of the testator, and hold that if the first taker survives the testator, the estate in him becomes indefeasible, even though he may subsequently die without issue. The Restatement of Property throws its weight in favor of the former rule, pointing out in Comment (i) of Section 266 that the wisest policy is to avoid the necessity of applying any rule of construction by putting the gift in proper form to show the exact intent of the testator. The proper forms are suggested by the drafters in that comment. It is believed by this writer that the question remains open in Maryland, even though the results reached in the later cases are the same as the minority rule, due to the fact that those results seem to be based clearly on the special context of the will.

Where the gift to the first taker is preceded by a life estate, or where the period of distribution and possession of the first taker is postponed, essentially all the American cases adopt the rule referring the contingency of "death without issue" to the termination of the life tenancy or the period before distribution, respectively, with only sev-

55 Denn v. Woodward, 1 Yeates 316; Morse v. Church, 15 R. I. 336, 5 A. 501 (1886).
56 Harwell v. Benson, 8 Lea. 344; and by inference from Janey v. Spriggs, supra, n. 53.
eral cases in this country following the rule now established in England which, in the case of a preceding life estate, gives the words their unrestricted meaning and applies the contingency to death without issue whenever it occurs.

A QUERY ABOUT PLAINTIFF'S RIGHT TO A DIRECTED VERDICT AS TO DEFENDANT'S NEGLIGENCE

Vogelsang v. Sehlhorst

Plaintiffs, the driver of an automobile and his passenger, sued defendants, the owner and the driver of a taxicab, for personal injuries sustained in a collision due to the alleged negligence of the taxicab driver. The jury returned a verdict for the plaintiffs and the defendants appealed from judgments entered thereon. Both vehicles at the time of the collision had been travelling west on that part of Edmondson Avenue in Baltimore City which is classified as a dual lane highway. The portion of the highway used by westbound traffic is designated as a one-way street (with signs so indicating) and is separated from the portion for eastbound traffic by a parkway and streetcar tracks. The automobile was proceeding next to the parkway at a moderate speed, when the taxi driver sounded his horn to signal his intention to pass. The automobile driver held to the left and the cab driver then attempted to pass on the right. The collision occurred when the taxi driver had to swerve to his left to avoid hitting a parked car. As he did so, the left rear fender of the cab came in contact with the right front fender of the automobile causing it to jump the curb of the parkway and strike a pole.

The driver of the automobile testified that the accident was due to the fact that the cab driver cut to his left before he had completely passed his automobile. He also testified that if he had pulled over to the right when the taxi driver sounded his horn, he might have hit a parked car. Both plaintiffs asserted that the automobile did not alter its course nor increase its speed prior to the collision. The taxi driver admitted that he had swerved to his left to avoid a parked car, but claimed that he had fully passed the plaintiff's car before doing so, as he had seen the plaintiff's lights in his rearview mirror. He did not testify that he signaled before cutting to the left. He testified that

171 A. 2d 295 (Md. 1950).