Future Interests in Indiana (Part 2)

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As was pointed out in the beginning of this article the question as to the creation of a future interest is closely bound up with rules of interpretation and construction, and presumptions employed by the court in attempting to discover the intention of the testator. Discovering the intention of the testator is the greatest sport known to the law, unless it be the kindred sport of ascertaining the intention of the legislature. Ordinarily, of course, what is done is not to discover the intention of the testator, but it is to find out what the testator would have intended had he known, or had his lawyer known, what he was about. One man's guess on that score is about as nearly correct as another's. It is therefore quite difficult to successfully quarrel with a vast majority of the decisions as to the proper interpretation or construction of a will.  

DEATH DURING THE LIFE OF THE TESTATOR

By far the most valuable rule on the subject is the one which says that a devise over upon the death of the first taker refers to his death during the lifetime of the testator.

The first case in Indiana to apply the rule is *Harris v. Carpenter.* The leading cases are undoubtedly *Fowler v. Duhme,* and *Alfred v. Sylvester.* The rule has been applied correctly in the cases collected in the note.
In each of the cases below the rule should have been applied but was entirely overlooked. 85

The case of Bray v Miles, 86 is a curious example of wasted energy. In that case T gave to W for life, and remainder to D and S, and "in the event of the death of either the share due such to go to the children of such deceased person, if there be children, and if no children then to the survivor." Both D and S survived T. D died during the life of W, having adopted a child prior to the death of T. S claimed the entire remainder on the theory that the adopted child was not a child within the meaning of the will. The court consumes fifty pages in deciding that the adopted child took under the will as a child of D. But quite obviously the death of D referred to a death during the lifetime of T. D therefore having survived T took a fee simple, and the adopted child took as an heir of D, and not as a child under the will.

A few of the cases should be noticed where there is some question as to the correctness of the application of the rule. In Vaubel v Lang, 87 the court refused to apply the rule. In that case T devised to GS and GD, "to have and to hold subject to the following conditions, in case either die leaving no child or children surviving, then that share to go to the other, and if both die without children, then to my heirs." The court says, 88 "Where real estate is devised in terms denoting an intention that the primary devisee shall take a fee on the death of the testator, coupled with a devise over in case of his death without issue, 89


85 Jones v. Miller, 13 Ind. 337 (1859), Smith v. Hunter, 23 Ind. 580 (1864), Huxford v. Milligan, 50 Ind. 542 (1874), Greer v. Wilson, 108 Ind. 322 (1886); Underwood v. Robbins, 117 Ind. 308 (1888), Pate v. French, 122 Ind. 10 (1889); Aspey v. Lewis, 152 Ind. 493 (1896); Bray v. Miles, 28 Ind. App. 482 (1899); Bemninghoff v. Evangelical Assoc., 28 Ind. App. 374 (1901), Bonner v. Bonner, 28 Ind. App. 147 (1901); Colvin v. Springer, 28 Ind. App. 443 (1901), Pulse v. Osborn, 30 Ind. App. 633 (1902), Paul v. Dickenson, 63 Ind. App. 230 (1916).

86 23 Ind. App. 432 (1899)
87 81 Ind. App. 96 (1923).
88 At p. 100, et seq.
courts will hold that the words refer to a death without issue during the lifetime of the testator, unless the contrary appears from the will itself. The testator in the instant case—provided that the primary devisees were ‘to have and to hold the said real estate to the following conditions.’ The fact that they, as devisees, were ‘to have and to hold’ said real estate, subject to certain conditions, a thing they could not do until after the death of the testator, makes it clear that it was not his intention that the occurrence of the event in question should be confined to the time preceding his death. We are fully justified in so holding, without reference to the tendency of courts to seize upon slight circumstances disclosed by wills, in order to avoid the necessity of supplying an omission as to the time of such event, under an arbitrary and artificial rule."

In that case the court clearly holds that slight evidence from the language of the will is sufficient to defeat the rule. In the case of *Alfred v. Sylvester,* the court says, "Words of survivorship are presumed to relate to the death of the testator, rather than that of the first taker, if they are fairly capable of such interpretation." The language of the will there was, ‘to X for life and at her death the land to be sold and proceeds to be divided equally among A, B and C, but if either die before X then over,’ and the court there applied the rule in question, overruling *Corey v. Springer,* where a contrary result was reached on a quite similar will, and also the cases of *Jones v. Miller,* and *Smith v. Hunter,* where the rule should have been applied but was not mentioned.

The *Vaubel v. Lang* case does not discuss the *Alfred v. Sylvester* case, and it is very apparent that there is quite a conflict in the theories back of the two decisions. The first case above mentioned is also in conflict with the case of *Campbell v. Bradford,* where the rule was applied despite the fact that the will provided that the “surviving son shall inherit all my real estate at the death of my wife,” and also the case of *Paul v. Dickinson Trust Company,* where the rule was applied where the limi-
tion was to D for life and at her death to her children should she leave any living, and if not then to her grandchildren. It is submitted that these last two cases are incorrectly decided. If they be correct then it would be impossible to create any life estate in the first taker.

In Duzan v. Chappel, the court said, "It not being manifest that T meant the death of S at any other time we think it must be held to have reference to the death of S during the life of the widow, and that in case he survived her the remainder in fee should absolutely vest in him." And in Curry v. Curry, the court held that the rule in question was one of intention, to be gathered from the entire will, and was to be applied only where it appeared that such was the intention of the testator. Certainly the language of these cases is at variance with Alfred v. Sylvester.

It is to be noted that these two latter cases and the Vaubel v. Lang case are Appellate Court cases, and that only in the Curry case was there a petition for transfer to the Supreme Court which was denied. The theory and result of all of the Supreme Court cases are that the rule is to be applied without inquiring into the actual intention of the testator, apparently upon a more or less conclusive presumption that he meant a death during the lifetime of the testator. An opposite construction would reach the same result in most cases for the usual limitation is "if he die without issue," which would be construed to be an indefinite failure of issue invalid under the rule of Huxford v. Milligan. On the other hand the Appellate Court cases seem to be on the theory that if there is any presumption it is against the application of the rule, except where no other interpretation is admissible.

There apparently is no majority rule on the question, the authorities in other states being about evenly divided, some holding that such language prima facie refers to a death during the life of the testator, and some holding that it may refer to death after as well as before the death of the testator. Most authorities agree however that the question is finally one of intention to be determined from the entire will.

96 41 Ind. App. 651 (1907).
97 58 Ind. App. 567 (1914)
98 50 Ind. 542, supra.
99 Tiff. Real Property, 2nd Ed. Vol. 1, Sec. 166.
VESTED AND CONTINGENT REMAINDERS AND EXECUTORY INTERESTS

Of equal importance with the rule last discussed is the one which says that there is a presumption in favor of the vesting of estates. Thus words of futurity are construed as *prima facie* referring to the enjoyment of the estate, and not to its vesting.\(^{100}\) Even an estate given to S, “provided he attains 21,” is construed as a vested estate subject to a condition subsequent.\(^{101}\) Likewise if the words are “in the event he live to be 21.”\(^{102}\) Likewise if the estate is to several children “until they arrive at 21, and to the survivors at 21.”\(^{103}\)

A direction to sell after a life estate and divide among children or others, gives a vested interest.\(^{104}\) And in general any limitation to take effect at or upon the termination of a prior estate is construed as referring merely to the possession of the estate, and not to its vesting.\(^{105}\)

However, a remainder will be construed as contingent if such is the intention of the testator or grantor.\(^{106}\)

The case of *Davidson v. Koehler,*\(^{107}\) followed in *Davidson v. Bates,*\(^{108}\) holds a remainder vested which is quite clearly contingent.

But if, of course, the estate cannot take effect as a contingent remainder, and is limited to cut down a previous estate, and must

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\(^{100}\) Paul v. Dickinson Trust Company, 63 Ind. App. 230 (1916).

\(^{101}\) Boling v. Miller, 133 Ind. 602 (1892)

\(^{102}\) Chambers v. Chambers, 139 Ind. 111 (1894).

\(^{103}\) Silvers v. Canary, 114 Ind. 129 (1888)


\(^{105}\) Rush v. Rush, 40 Ind. 83 (1872); Bruce v. Bissell, 119 Ind. 525 (1889); Myers v. Carney, 171 Ind. 379 (1908), Timmons v. Timmons, 49 Ind. App. 21 (1911), Harness v. Harness, 50 Ind. App. 364 (1912), Wheatcraft v. Wheatcraft, 55 Ind. App. 283 (1913), Paul v. Dickinson Trust Co., 63 Ind. App. 230 (1916), Hardy v. Smith, 71 Ind. App. 688 (1919); Kemp v. Goodnight, 168 Ind. 174 (1906), Allen v. Mayfield, 21 Ind. 293 (1863); Thebando v. Sebastian, 10 Ind. 465 (1858); Griffin v. Lynch, 16 Ind. 396 (1861), Miller v. Harland, 78 Ind. App. 56 (1921)

\(^{106}\) Clark v. Barton, 51 Ind. 165 (1875), Helm v. Frushe, 59 Ind. 526 (1877), Carver v. McCaslin, 60 Ind. 334 (1878); Cox v. Bird, 65 Ind. 277 (1879), Wood v. Robertson, 113 Ind. 323 (1887), Shannon v. Bonham, 27 Ind. App. 369 (1901), Sexton v. Cronkhite, 74 Ind. App. 245 (1920), Hackelman v. Hackelman, Ind. App., 146 N. E. 590 (1925) (pending on a petition to transfer).
consequently take effect as an executory interest, it will be so construed, and the limitation is given that effect.\textsuperscript{109}

Nowhere in the Indiana cases is there any adequate discussion of the difference between an executory interest and a contingent remainder, although in general there has been a correct recognition of the difference between the two. "A contingent remainder is merely the possibility of an estate," which is limited to take effect as a remainder upon the termination of some previous estate in freehold. Its vesting is either subject to a condition precedent, or subject to the determination as to what person will be the remainderman.\textsuperscript{110} "An executory interest is the possibility or prospect of an estate, which exists by reason of the limitation of a freehold estate subject to a condition precedent, and which cannot be regarded as a contingent remainder."\textsuperscript{111} That is, it is not limited to take effect, if at all, on the termination of a prior estate in freehold, but operates to cut off or divest a prior estate. Executory interests were unrecognized at common law due to the prohibition against the abeyance of the seisin, but became valid under the Statute of Uses and the Statute of Wills.\textsuperscript{112}

Sections 37 and 38, Chap. 23, Vol. 1, Revised Stat. 1852,\textsuperscript{113} are obvious attempts to do away with the law of seisin in Indiana. They provide: "A freehold estate as well as a chattel real, may be created to commence at a future day; and an estate for life may be created in a term of years, with or without the intervention of a precedent estate, and a remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created, expectant on the termination of a term of years. A remainder may be limited on a contingency, which in case it should happen will operate to abridge or determine the precedent estate."

\textsuperscript{107} 76 Ind. 398 (1881).
\textsuperscript{108} 111 Ind. 391 (1887).
\textsuperscript{110} Tiff. Real Prop., 2nd Ed. Vol. 1, Sec. 136.
\textsuperscript{111} Tiff. Real Prop., 2nd Ed., Vol. 1, Sec. 163.
\textsuperscript{112} But see Alsman v. Walters, 184 Ind. 565 (1915) at p. 568: "That a fee may be in abeyance is not without Common Law authority."
\textsuperscript{113} Sections 13413 and 13414, Burns Ann. Ind. Stat. 1926.
It is clear that the word "remainder" in Section 38 is a misnomer, and will have to be construed to mean "executory interest." The word "remainder" is used in the succeeding section of the statute, being the so-called "Statute against Perpetuities." It has been discussed in the first part of this paper. Its use in Section 38 is additional evidence that the words "contingent remainder" in Section 40 (being the so-called Statute against Perpetuities) must be read "executory interest."

The effect of the statute undoubtedly is to allow the creation of remainders, not limited on a prior freehold estate, and of executory interests by deed without the use of a trustee. And there is a dictum to the effect that it permits the creation of a contingent remainder in a deed and after a vested estate for life to the "heirs" of a living person.114 Clearly the statute could have no effect in such a case, because there was no previous estate not of freehold, and such a contingent remainder was good at common law.115

GIFTS TO A CLASS

A deed to B and his children includes only the children living at the time. "A grant of an immediate estate to a person not in existence is void."116 Likewise a deed to D and her "present heirs," gives a vested estate to D and her children as tenants in common.117 And a present gift by will to "the children of C" vests on the death of the testator, and descendants of the deceased children of C do not take.118 And a gift to the "heirs" of a living person will ordinarily be construed to give a vested interest in the children of such person.119

But a gift to a class to be divided equally among those who may be living at the time of distribution, of course, includes after born children.120 And the interest of one who dies before distribution under such a gift is divested.121

If a legacy is payable at a certain date in the future, with a gift over to a class in the event the legatee dies, the class acquires a vested interest, but the legacy is still payable at the

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116 Glass v. Glass, 71 Ind. 392 (1880).
117 Fountain Co. Coal Co. v. Beckleheimer, 102 Ind. 76 (1885).
118 Pugh v. Pugh, 105 Ind. 552 (1885).
120 Goodwin v. Goodwin, 48 Ind. 584 (1874).
121 Miller v. Keegan, 14 Ind. 502 (1860).
original date set. But if the distribution is deferred, and the gift is to a class, the class is determined as of the date of the distribution, and children born after that date do not take.\textsuperscript{123}

If there is gift to a class at the termination of a life estate there is a vested estate created, so that the heirs of a member of the class who dies before the termination of the life estate takes the ancestor's interest.\textsuperscript{124} If there is no member of the class in existence at the death of the testator upon the birth of a child the estate vests, subject to open up to let in all children born before the estate vests in the class in possession.\textsuperscript{125}

But the gift may be contingent, so that no member of the class takes a vested interest, and only those who survive to the time of distribution take.\textsuperscript{126}

In ascertaining whether the class takes \textit{per stirpes} or \textit{per capita} the Indiana courts have laid down the following rules. "They take \textit{per stirpes} unless the language of the will is such as to exclude that intention."\textsuperscript{127} "If the will is ambiguous they take \textit{per stirpes}, as the courts will favor that construction which will follow the Statute of Descents."\textsuperscript{128} But the courts will give effect to a provision for distribution \textit{per capita}, if such an intention is clear.\textsuperscript{129} Generally, however, where the devise is to several persons belonging to different classes, bearing different relationships to the testator, then the presumption is that he intended it to go \textit{per stirpes}, and if they stand in the same relation to the testator, then the presumption is that he intended it to go \textit{per capita}.\textsuperscript{130}

A gift to children "or their descendants," will usually be construed to give an estate to the children \textit{per stirpes}. That is, "or" is construed to mean "and," so that children of any deceased child takes the parent's share, and it is not necessary

\textsuperscript{122} Cann v. Fidler, 62 Ind. 116 (1878)
\textsuperscript{123} Williams v. Harrison, 72 Ind. App. 245 (1919)
\textsuperscript{126} Citizens Loan, etc. Co. v. Herron, 186 Ind. 421 (1917).
\textsuperscript{127} Henry v. Thomas, 118 Ind. 23 (1888)
\textsuperscript{128} Kilgore v. Kilgore, 127 Ind. 276 (1890).
\textsuperscript{129} Rohre v. Burris, 27 Ind. App. 344 (1901)
\textsuperscript{130} Lasure v. Richards, 56 Ind. App. 301 (1913).
that all of the children die so that the grandchildren will take under the will.\textsuperscript{131}

Ordinarily where there is a gift to several with a limitation over to the survivors, the word "survivors" will be construed to mean "others" so that the heirs of one who has previously died take the ancestor's share, although strictly speaking they are not "survivors."\textsuperscript{132} The result, of course, is always an answer to the question as to what was the testator's intention.

There is only one Indiana case on the subject, and there the court without any discussion gave the word "survivor" its strict meaning. There was a devise to A, B and C, and upon the death of any without issue the share to go to the survivors, and on the death of any with issue his share to go to his children. A died without issue, B died leaving a child. C died without issue, and the child of B claimed all. The court held that the child of B did not take C's share, for she was not a "survivor."\textsuperscript{133} There was no discussion of the question of the effect of the phrase "die without issue", and it was assumed that what was meant was a definite failure of issue.

ALTERNATIVE, CROSS AND IMPLIED REMAINDERS
AND EXECUTORY INTERESTS

Contingent remainders, and executory interests may be limited in the alternative, so that one may take effect if the other does not. There is some dissension among the authorities as to whether or not, if the remainders be in fee, either can be considered as vested.\textsuperscript{134} In the only Indiana case where there is any discussion of the subject, there was a devise to W, and after her death to S, if living, and if W survive S, then to W absolutely, and the court there held that W took a life estate, with a contingent remainder to S, with contingent remainder to W.\textsuperscript{135}

Where there is a gift to several, with the ultimate right to possession and title in one, there are created what have been termed "cross-remainders." The interesting question is whether or not cross-remainders will be implied, when the will does not

\begin{itemize}
\item \textsuperscript{131} Stephens \textit{v. Jodon}, 79 Ind. App. 596 (1923), Snyder \textit{v. Greendale Land Co.}, 48 Ind. App. 178 (1911) Sec. 3505, Burns Ann. Ind. Stat. 1926 is a codification of this rule.
\item \textsuperscript{132} Tiff. Real Prop., 2nd Ed., Vol. 1, Sec. 169.
\item \textsuperscript{133} Cooper \textit{v. Hayes}, 96 Ind. 386 (1884).
\item \textsuperscript{134} Tiff. Real Prop., 2nd Ed., Vol. 1, Sec. 142.
\item \textsuperscript{135} Hammond \textit{v. Croxton}, 162 Ind. 353 (1903). See also, Abernathy \textit{v. McCoy} (Ind. App. 1926), 154 N. E. 682.
\end{itemize}
specifically provide for them. In *Bailey v. Sanger*, the Indiana court refused to imply a cross-remainder. They will not be implied in the case of a deed.

But a remainder may be implied to take effect on a contingency not named by the testator, where the entire will justifies it. Thus, where a life estate was given to W for life, and “if she die before the youngest child becomes of age, then and in that case to be divided equally among three sons,” and W survived the time when the youngest child became of age, it was held that nevertheless the three sons took the remainder. But where a will contained a devise to H for life, “and if H survive me, then at his death to D,” and H predeceased W, it was held that the contingency must be strictly construed and that D did not take.

Where there was a limitation to W so long as she remained unmarried, and on her death to D, and W remarried, the court held that “on her death” meant “on the termination of W’s estate,” and that D took immediately. This is what is known as an “acceleration of remainder.” The question most often arises when a widow is given a life estate, and elects to take under the law in fee. Here the law accelerates the remainder as to the balance of the fee, giving to the remaindermen after the life estate an immediate estate in the balance. (To avoid any question on this score a will ought always to provide that a remainder is to vest in possession upon the termination of the preceding estate for any reason.)

An interesting case in this field is that of *Hedges v. Payne*. In that case the testator gave the residue of his estate to a brother and sister, share and share alike, and “if B die before my death, then all to S.” S died before T, and B survived T, and claimed the entire residuary estate. The court there decided that it was bound by the prior decisions of *West v. West*, and *Holbrook v. McCleary*, holding that on the death of one residuary devisee the devise lapses and the lapsed devise vests in the

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136 Tiff. Real Prop., 2nd Ed., Vol. 1, Sec. 143.
137 108 Ind. 264 (1886)
138 *Venus v. Talbert*, 76 Ind. App. 123 (1921)
139 *Jackson v. Hoover*, 26 Ind. 511 (1866)
140 *Gibson v. Seymour*, 102 Ind. 485 (1885) To the same effect is the case of *Beatty v. Irwin*, 35 Ind. App. 238 (1904)
142 Tiff. Real Prop., 2nd Ed., Vol. 1, Sec. 146.
143 35 Ind. App. 394 (1926).
144 89 Ind. 529 (1883).
surviving residuary devisee. That is, the law of lapsed devises reached the same result as an implied condition would have. If there is no residuary clause then the devise lapses, and the estate goes to the heirs.

It is to be noted that the above decisions are seriously limited by Section 3505 Burns' Ann. Ind. Stat. 1926, which provides, "Whenever any estate real or personal, shall be devised to any descendant of the testator, and such devisee shall die during the lifetime of the testator, leaving a descendant who shall survive the testator, such devise shall not lapse, but the property so devised shall vest in the surviving descendant of the devisee as if such devisee had survived the testator and died intestate." "Devise" and "devisee" clearly here mean also "legacy" and "legatee." They would be so construed if used in a will.

IMPOSSIBLE AND ILLEGAL CONDITIONS

An estate limited upon a condition, either precedent or subsequent, which has become impossible of performance, will take effect without compliance with the condition. Thus an estate "to N to pay his expenses at Purdue University, and if he fails to respond to the opportunity, then the estate to revert to the heirs of T," gives N a vested estate, and if he dies before he can fulfill the condition his heirs inherit the estate. The court in the case cited decided it upon the ground that the gift being "for the benefit solely of the donee, he could claim the gift without applying it to the purpose for which it was given." But clearly the better ground for the decision is that suggested above; the condition was a condition subsequent, the performance of which was excused by impossibility.

By the express terms of Section 3502, Burns' Ann. Ind. Stat. 1926, a condition in restraint of marriage annexed to a devise or bequest to a wife is void. Obviously such a condition contained in a deed, and a condition in a will annexed to a bequest or devise to one not the wife would be governed by the common law. Generally, of course, an absolute restraint on marriage,

145 79 Ind. 167 (1881).
146 See also, Garrison v. Day, 36 Ind. App. 543 (1905)
147 Maxwell v. Featherstone, 83 Ind. 339 (1882).
148 Clendenning v. Clymer, 17 Ind. 155 (1861).
149 See Barker v. Petersburg, 41 Ind. App. 447 (1907), Hope v. Jackman, 182 Ind. 536 (1914).
151 Julián v. McAdams, 85 Ind. App. 639 (1927)
whether by condition, or limitation, was void, but a reasonable restraint, for example, until D becomes twenty-one, was valid.\textsuperscript{152} The Indiana courts have recognized as valid a limitation "until remarriage" as distinguished from a condition in restraint of marriage.\textsuperscript{153}

**CONDITIONS SUBSEQUENT**

An estate may be made subject to a condition subsequent, for the breach of which the grantor acquires a right of re-entry, which passes to his heirs.\textsuperscript{154} There must be a demand of performance and a failure then to perform, in order to perfect the right of re-entry,\textsuperscript{155} but a demand for possession is equivalent to an entry on the premises, so that actual re-entry is not necessary.\textsuperscript{156}

A gift on condition that the donee pay money to the donor, or another, ordinarily creates a charge on the land, and not a condition subsequent.\textsuperscript{157} The language of the instrument may be such, however, that the payment of money is construed to be a condition subsequent.\textsuperscript{158}

There is one Indiana case which holds that language restricting the use of property creates a conditional limitation, which can be enforced by re-entry, and that the right of re-entry here passes not to the heirs of the grantor, but to his subsequent grantees.\textsuperscript{159} The latter portion of the decision is clearly erroneous, because the important distinction between a condition, and a limitation, is that in the latter the estate terminates without re-entry. The grantor's estate takes effect in possession upon

\textsuperscript{152} Tiff. Real Prop., 2nd Ed., Vol. 1, Sec. 81.
\textsuperscript{153} Levengood v. Hoople, 124 Ind. 27 (1889), Summit v. Yount, 109 Ind. 506 (1886), Wood v. Beasley, 107 Ind. 37 (1886), Hibbits v. Jacks, 97 Ind. 570 (1884), O'Harrow v. Whitney, 85 Ind. 140 (1882); Harmon v. Brown, 58 Ind. 207 (1877); Thompson v. Patten, 70 Ind. App. 490 (1917); Doe d. Reese v. Campbell, 5 Blackf. 539 (1841), Kelly v. Stinson, 8 Blackf. 387 (1847).
\textsuperscript{154} Cross v. Carson, 8 Blackf. 138 (1846), Hefner v. Yount, 8 Blackf. 455 (1847), Throp v. Johnson, 3 Ind. 343 (1852), Lindsey v. Lindsey, 45 Ind. 553 (1874).
\textsuperscript{155} Schuff v. Ransom, 79 Ind. 458 (1881)
\textsuperscript{156} Cory v. Cory, 86 Ind. 587 (1882)
\textsuperscript{158} Hershman v. Hershman, 63 Ind. 451 (1878); Royal v. The Aultman & Taylor Co., 116 Ind. 424 (1888)
\textsuperscript{159} Full Creek School v. Shuman, 55 Ind. App. 232 (1913).
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the happening of the terms of the limitation. If he has not conveyed the estate it passes to his heirs; if he has conveyed the estate, then the estate, of course, belongs to his grantee.100

Ordinarily, language limiting the use of property is construed to be merely a covenant as to the use, and not a condition subsequent, or a conditional limitation.101 The language of the instrument if it clearly indicates an intention to create a condition subsequent as to the use of the property will be so construed.102 But a substantial compliance with the condition is all that is required,103 and the performance of the condition may be waived.104 Likewise if the grantor prevents the performance of the condition, performance is thereby excused.105

POWERS

The validity of a general power of sale given to an executor was early recognized in Indiana.106 Such a power gave the executor no right to possession, or the rents and profits.107 The question which most frequently arises is as to whether or not a general power or disposition may be given to a life tenant without creating in the supposed life tenant a fee simple. Two early cases held that a gift to W for life, with a general power of disposition, gave W a fee simple, and that a limitation over on her death was void for repugnancy.108 Subsequent cases have had some difficulty in distinguishing these two cases, but the law of Indiana seems fairly well settled by the later decisions, that a general power of disposition attached to a life estate does not create a fee.109 There is one authority to the

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101 Brady v. Gregory, 49 Ind. App. 355 (1912), Newpoint Lodge v. School Town of Newpoint, 138 Ind. 141 (1894); Higbee v. Rodeman, 129 Ind. 244 (1891).
102 The Indianapolis, Penn., etc., Co. v. Hood, 66 Ind. 581 (1879), Hunt v. Beeson, 18 Ind. 380 (1862).
104 Petro v. Cassaday, 13 Ind. 289 (1859).
105 Elkhart Car Works Co. v. Ellis, 113 Ind. 215 (1887).
106 Smith v. Addleman, 5 Blackf. 406 (1840).
107 Thompson v. Schenck, 16 Ind. 194 (1861).
108 Van Gorden v. Smith, 99 Ind. 404 (1884); Mulvane v. Rude, 146 Ind. 476 (1896).
109 Silvers v. Canary, 109 Ind. 267 (1886); Jenkins v. Compton, 123 Ind. 117 (1889); Eubank v. Smiley, 130 Ind. 393 (1891); Wiley v. Gregory, 135 Ind. 647 (1893); Crust v. Schank, 146 Ind. 277 (1896); Rusk v.
effect that a grantor may reserve a life estate and a general power of disposition to himself.\textsuperscript{170}

If, of course, the power was not general, but could be exercised in favor of only a limited group, then the life tenant admittedly got no more than a life estate.\textsuperscript{171}

A power to sell, if exercised in good faith and for a valuable consideration gives to the grantee a good estate.\textsuperscript{172} If the power is given to a stranger to the title, then the right of possession and the rents and profits belong to the heirs,\textsuperscript{173} and if the power is unexercised, of course, the title stays in the heirs.\textsuperscript{174}

Ordinarily the presumption is that the donee of the power does not exercise the power unless express words are used showing an intention to exercise the power.\textsuperscript{175} Two early cases held that a warranty deed did not exercise the power.\textsuperscript{176} The later case of \textit{Clark v. Middlesworth},\textsuperscript{177} holds that a warranty deed did exercise the power, and attempts to distinguish the prior decisions. There is some basis for a distinction; in the first cases the power was "to appoint in fee," and "to sell in fee," while in the last case, there was a general power of disposition. In \textit{South v. South},\textsuperscript{178} where the power was "to sell in fee" (identical with the language in \textit{Axtel v. Chase}), the court followed the \textit{Clark v. Middlesworth} case, and held the power to have been exercised. To a similar effect is the case of \textit{Downie v. Buennagel}.\textsuperscript{179}

In \textit{Crew v. Dixon},\textsuperscript{180} the court says that a power can be exercised without mentioning it, (here it was exercised by will), but the court holds that a power to dispose of "whatever remains in her hands" gives a power of disposition over the personal property and not the real estate.

A power to appoint to one or more of several named persons,
is invalidly exercised if the appointee pays for the exercise of the power in his favor. A power to sell to support the grantor may be exercised after the death of the grantor in order to pay debts incurred for the support of the grantor during his lifetime.

LIFE ESTATE, OR FEE

Generally the courts have laid down the rules that: 1. A gift of the income, or rents and profits from property is a gift of the legal title, and entitles the beneficiary to the possession of the property. 2. A gift of a specific life estate in real property, followed by even a complete power of disposition does not enlarge the original estate. Such a gift of personal property, however, gives the beneficiary the entire estate, although it is, of course, possible to create a life estate in personal property by appropriate words, but even here the testator's intention is finally of controlling influencing, and if from the entire will there is disclosed an intention to give only a life estate in personal property the will is so construed, although the gift appears in the first instance to be absolute. A general gift of real property gives a fee which cannot be cut down. The effect of Section 3502, Burns' Ann. Ind. Stat. 1926, "Every devise in terms denoting the testator's inten-

129 Ind. 85 (1891).
182 McNew v. Vert, 43 Ind. App. 83 (1908)
183 Thompson v. Chenok, 16 Ind. 194 (1861), Stout v. Dunnung, 72 Ind. 343 (1880), Williams v. Owen, 116 Ind. 70 (1888), Hunt v. Williams, 126 Ind. 493 (1890); Skinner v. Spahn, 175 Ind. 672 (1911); Ames v. Cowry (Ind. App. 1927), 158 N. E. 643.


185 Fullewnder v. Watson, 113 Ind. 18 (1887); Stimson v. Rountree, 168 Ind. 169 (1906); Sims v. Ratcliff, 62 Ind. App. 184 (1915).
186 Goudie v. Johnston, 109 Ind. 427 (1886).
188 Snodgrass v. Brandenburg, 164 Ind. 59 (1904); Hume v. McHaffie, 40 Ind. App. 703 (1907); Ewart v. Ewart, 70 Ind. App. 167 (1919); Hancock v. Maynard, 72 Ind. App. 661 (1920), Gremer v. Heins, 75 Ind. App. 482 (1921); Logan v. Sills, 28 Ind. App. 170 (1901).
189 Sec. 2, Chap. 11, 2 R. S. 1852.
tion to devise his entire interest in all his real or personal property shall be construed to pass all of the estate in such property, including estates for the life of another, which he was entitled to devise at his death," seems to be merely that words of inheritance are not necessary to pass an estate of inheritance in a will, if it was the testator's intention to create an estate of inheritance.\(^{190}\)

This statute has been construed in the case of Wolf v. Wolf,\(^{191}\) as having no effect upon the common law rule that after acquired real estate did not pass by a will, where all of the testator's property was not disposed of by the will. It would seem, a fortiori, that it would have no effect as far as the character of the estate was concerned unless the will absolutely disposed of every piece of the testator's property, and in such a case, as far as real estate is concerned, words of inheritance may be necessary to give more than a life estate.\(^{192}\)

**RULE IN SHELLEY'S CASE**

There are repeated expressions in the cases in Indiana that the Rule in Shelley's Case is law in Indiana, but those statements, like almost all other statements, must be taken with some qualifications. To begin with the word "heirs" has been quite freely interpreted to mean "children."\(^{193}\) Although the courts have refused to interpret "children" as meaning "heirs."\(^{194}\)

Usually, of course, a conveyance or devise to A, and remainder to his heirs, or the heirs of his body, has been held to call for the application of the rule.\(^{195}\)


\(^{191}\) 73 Ind. App. 221 (1920).

\(^{192}\) Lambert's Lessee v. Pate, 3 Cranch 97, 2 L. Ed. 377. But see Doe d. Rush v. Kinney, 3 Ind. 50 (1851); Pattison v. Doe, 7 Ind. 282 (1856) ("heirs" not necessary to give a fee by will), and Neilson v. Lagow, 4 Ind. 609 (1853) ("heirs" not necessary to give a fee, by trust deed)

\(^{193}\) Rapp v. Matthaus, 35 Ind. 332 (1871), Owen v. Cooper, 46 Ind. 524 (1874), Ridgeway v. Lamphear, 99 Ind. 251 (1884), Brunsfeld v. Drook, 101 Ind. 101 (1884), Hadlock v. Gray, 104 Ind. 596 (1885), Millett v. Ford, 109 Ind. 159 (1886), Jackson v. Jackson, 127 Ind. 346 (1890); Granger v. Granger, 147 Ind. 95 (1896).

\(^{194}\) Doe d. Patterson v. Jackman, 5 Ind. 283 (1854), Sorden v. Gatewood, 1 Ind. 107 (1848)

\(^{195}\) Tipton v. LaRose, 27 Ind. 484 (1867); Andrews v. Spurlin, 35 Ind. 262 (1871), McCray v. Lipp, 35 Ind. 116 (1871); Lennen v. Craig, 95 Ind. 167 (1883); Hochstedler v. Hochstedler, 108 Ind. 506 (1886); Taney v.
In the two most recent cases decided by the Appellate Court the rule has been laid down with some emphasis that "Every devise coming within the rule in Shelley's case is controlled by it, even though the actual intent of the testator is thereby thwarted." 196 But the Supreme Court has said, "It is settled law that the rule in Shelley's case will not be allowed to defeat the plain intention of the testator." 198

In the earlier cases there certainly seems to be a somewhat more liberal construction in regard to the application of the rule, than now obtains.

FEE TAIL

Section 36, Chap. 23, 1 R. S. 1852, p. 238190 provides "Estates tail are abolished; and an estate which, according to the common law, would be adjudged a fee tail, shall hereafter be adjudged a fee simple; and if no valid remainder shall be limited thereon, shall be a fee simple absolute."

At common law the creation of a fee tail left a reversion in the grantor or testator. This could be sold by the reversioner, or if undisposed of passed to his heirs. By the same instrument in which the fee tail was created remainders could also be created, so that the grantor or testator thereby disposed of his entire estate in the land.200 The statute in question certainly seems to transform a fee tail into a fee simple only where the reversion is undisposed of by the instrument creating the fee tail.

In each of the cases cited in the note the first portion of the statute was given effect, there being no attempt to create a remainder after the fee tail.201

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197 45 Ind. 295 (1873).
198 McMahan v. Newcomer, 82 Ind. 565 (1882). See also Earnhart v. Earnhart, 127 Ind. 397 (1890); Shimer v. Mann, 99 Ind. 190 (1884), although in the last case the rule was applied.
There are five cases in which there was involved a question of the application of the statute or prior statutes as against an attempted remainder after the fee tail. In *Gonzales v. Barton*, the testator gave real estate to W for life, remainder to S for life in fee tail to his lawful issue, remainder in fee to his heirs. The court held that the statute applied so as to give S a fee simple, and there is no discussion as to the effect of the attempted remainder over.

In *Chase v. Salisbury*, T gave to W and D, with full power to sell and convey, and should W and S die without issue the estate to revert to N. The case was decided under Sect. 57, Acts 1843, p. 424, which provided that where a remainder in fee is limited upon an estate which, before the abolition of estates tail, would have been adjudged a fee tail, shall be deemed a contingent remainder, vesting in possession upon the death of the first taker. The court construed the will as giving in the first instance a fee simple, and not a conditional fee or fee tail, so that the statute was held to have no possible application.

In *McIlhinny v. McIlhinny*, A conveyed to D for life, remainder to the issue of her body born alive, and remainder over to J if D die without issue born alive. D in fact has a child born alive and the child and D sue to quiet title against J. The court held that “issue” meant children, overruling the two earlier cases of *King v. Rea* and *Fletcher v. Fletcher* and that therefore D took a life estate, and not a fee tail, and the unborn children took a contingent fee, which vested in the child which was born, so that the contingency upon which J’s estate might possibly vest having become impossible of occurrence J had no further interest in the property. The result would be the same had the court held that the rule in *Shelley’s did apply*, for admitting that D got a fee tail, which was a fee simple under the statute, it was admitted that the contingent remainder was valid under what is now Sec. 13414 Burns Ann. Ind. Stat. 1926, providing that “A remainder may be limited on a contingency, which, in case it should happen, will operate to abridge or determine the precedent estate.” That is, the statute permits the creation by deed of what would be an executory interest under a will or trust, under the name of contingent remainder. But

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202 45 Ind. 295 (1873).
203 73 Ind. 506 (1881).
204 137 Ind. 411 (1898).
205 56 Ind. 1.
206 88 Ind. 418.
here again, clearly, events having made the contingency impossible the so-called contingent remainder was loss. The result is that even if the statute operates to give the first taker a fee simple, still, of course, the fee thus created may be subject to any contingency or limitation, good under the "Statute against Perpetuities." Whether or not what would be a vested remainder can still be created, thus making the estate of the first taker in fact a fee tail is another question.

The case under discussion contains some peculiar language, \(^{207}\) "Such a deed would have conveyed what is known at common law as a conditional estate or fee, called an estate tail liable to be defeated by the failure of the condition, namely, issue of her body born alive, and failure of the contingent remainderman J to be living at the termination of her life estate. In such a case, at common law, the estate would revert, as we have seen, to the donor. But our statute, as we have seen, changes that feature of the estate and makes a fee simple in the first taker, unless there was a valid remainder over limited to the issue of her body or, on failure of such issue, to J. The remainder limited was a valid one, both under the statute, \(^{208}\) and at common law." The court seems to say that after all D did get a fee tail, but it distinctly holds later on in the opinion that the child got a vested remainder in fee on birth, so that the language quoted must be discounted.

In Adams v. Merrill, \(^{208}\) G, by deed, gave to D for life, and at her death "to vest in the children and heirs of the body of D, and if D die without leaving any heirs of her body living at the time of her death, then on her death to X." The court held that "children" meant natural children, so that an adopted son did not take under the deed, and that even if the Rule in Shelley's case applied there was a valid contingent remainder to X. The problem here, and the result, are almost identical with that of McLhinney v. McLhinney, supra. The opinion contains this language: "Our statute contemplates that a valid remainder may be limited after what would be an estate tail at Common Law." \(^{209}\) "The Rule in Shelley's Case has no application." \(^{210}\) "Whether D took an estate tail or a determinable fee, in either case it was limited to the children and heirs of her body

\(^{207}\) At p. 419.
\(^{208}\) 45 Ind. App. 315 (1909).
\(^{209}\) At p. 323.
\(^{210}\) At p. 325.
living at the time of her decease,—and there was a valid con-
tingent remainder to (X)."211

Here again there was what was construed to be a contingent
remainder by deed, operating to cut off a prior estate in fee.

In Lamb v. Medsker,212, H and W, by deed (in 1838), gave
to A and B, and "to the survivor of them, and to the legitimate
heirs of said A, if he should have any, and in case no such lawful
issue, then after the death of both, to the heirs of H, to be con-
sidered part of his estate." The case was decided under the
Act of 1826, p. 50, Sec. 5, which provided that estates tail were
abolished "and any person or persons who may hereafter be
seized of an estate tail, by devise or grant, shall be deemed to be
seized of the same in fee simple absolute." The court holds that
the Rule in Shelley's Case applied and that A and B got a fee
simple under the statute. Nothing whatever is said concern-
ing the limitation to the heirs of H, but the effect of the decision
is that it was invalid, being limited on a fee simple.

Again the cases do not throw much light on the proper con-
struction of the statute. Although the statute purports to abol-
ish estates tail, it also provides that a valid remainder may be
limited on what would have been an estate tail at Common Law.
At common law either a vested or contingent remainder could
be created by deed after an estate tail (without the use of a
trustee). An executory interest could as well be limited on an
estate tail as it could on a fee simple. It was, of course, subject
to the Rule against Perpetuities. Neither a vested or contingent
remainder after an estate tail was effected by the Rule against
Perpetuities. The contingent remainder could be destroyed by
barring the estate tail, and was therefore unobjectionable.

Can one then, in Indiana, still create a fee tail by creating
a vested remainder after the fee tail? There is no suggestion in
the cases as to what the answer will be. It is submitted, how-
ever, that again the word "remainder" must be construed to
mean "executory interest," as in the subsequent sections of the
same statute. It seems rather plain that the legislature intended
to really "abolish estates tail," and that the last clause of the
statute was added for the purpose of saving any question con-
cerning the validity of any executory interest. The last clause,
therefore, does not add anything to the result of the first portion

211 The court also held that the contingent remainder passed to the
heirs of X upon his death, under Sections 900 and 3325, Burns Ann. Ind.
Stat. 1926.

212 35 Ind. App. 662 (1905).
of the statute. The result of the statute is that an estate tail becomes a fee simple under the statute, and that a valid executory interest may be limited upon the first estate the same as it could on any fee simple, and that under Sec. 13414, Burns Ann. Ind. Stat. 1926, a contingent remainder in a deed is given effect as an executory interest.

ESTATES POUR AUTRE VIE

There is but one case in Indiana on this subject.\(^2\) Here A conveyed to trustees for H and W, during the life or period of their natural lives, and after the death of the survivor to the children of H. H died before W, and his children sue to partition the property, subject to the life estate of W. H died testate, but what his will contained did not appear in the record. It was held that H had an estate for the life of W, but that upon his death, not being an estate of inheritance, it did not pass to his heirs, and that therefore the children had no present possessory interest which would entitle them to maintain a suit to partition.\(^3\)

On the record the decision of the court was clearly correct if the Common Law on the subject is still in force in Indiana. Such an estate did not pass to the heirs because it was not an estate of inheritance, and it did not pass to the executors, because it was a freehold estate. Anyone who took possession became the owner as the "general occupant."\(^4\) But it would seem that quite certainly under the Indiana Statute of Descents the life estate being "real estate" passed to the children and widow.\(^5\) Under Sec. 1261, Burns Ann. Ind. Stat. 1926, the children were, therefore, entitled to partition.

\(^1\) Graham v. Sinclair, 83 Ind. App. 58, 147 N. E. 634 (1925). This case is included in this paper because it is interesting and subject to criticism. See also the criticism of Professor H. A. Bigelow, 20 Ill. Law Review 299.

\(^2\) Had the will been in the record the chances are that the estate pour autre vie did pass, under Sec. 3502, Burns Ann. Ind. Stat. 1926, providing that all of the property of the testator passes under a will, denoting that intention, "including estates for the life of another."

\(^3\) Tiff. Real Prop., 2nd Ed., Vol. 1, Sec. 35.

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