Construction of Written Instruments (Part 3)

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CONSTRUCTION OF WRITTEN INSTRUMENTS
(Concluded)

BY RICHARD R. POWELL*

FOURTH:

Problems of construction involving future interests in donative conveyances.

My address on this third day of our series will concern itself with the diagnosis and resolution of problems of construction involving future interests in donative conveyances. As statutes were our topic of yesterday, so wills and voluntary declarations of trusts, grouped together under the label of donative conveyances, are to constitute the sub-topic of this afternoon. Insofar as these instruments create trusts they raise abundant problems as to the powers wisely to be conferred upon trustees as to the duty of the trustee to safeguard the trust res, and simultaneously to produce reasonable income for the current beneficiaries of the trust, and as to the allocation of expenses incurred, and of funds received. With none of these problems peculiarly thought of as trust law do I propose to deal. Instead I shall ask your attention

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to certain aspects of these instruments which center about their creation of, or their attempts to create, future interests. Within the field thus delimited I hope to present some ideas which will aid in two particulars.

Before one can resolve a problem he must be aware of the existence of a problem demanding resolution. I have encountered in the State of New York many lawyers who have said to me with a straight face that they never had encountered a problem in future interest during their long careers at the bar. To each such one, if I knew him well enough to be frank, I said, "That is merely because you have not seen the problems when you met them."

The revelations of science are constantly telling us of things which go on about us without our knowledge. There are sounds that are too loud, as well as too low, to register on our ears. There are light rays—infra red and ultra violet—which our eyes are not tuned to see. So also within the field of law there are problems which pass us by as a ship passing in the night without making even a ripple in our consciousness.

When I search the decisions of Indiana and find large areas in the law of future interests, with scant authority, or even without a single decision, I am led to wonder how greatly this is due to the problems not having arisen and how greatly it may be due to the problems having passed unseen when actually presented by the sets of facts which have passed through your law offices.

I know, of course, that future interests typically are not created by the owners of small wealth. One must have $50,000.00, shall we say, or more, before division into present and future interests becomes a likely mode of distribution. But Indiana has had many citizens with wealth far in excess of this minimum, and their dispositions have in fact divided the property into present and future interests. In a state where the bar has proved itself so able to make the most of available legal business, as your change of venue system proves you to be, I am somewhat astonished at the failure
of your bar to see the opportunities for legitimate and profitable business in this field of future interests.

In the older days, and perhaps still today in many law schools, future interests is a subject avoided by law students as something fearsome and terrible to encounter. I am glad to say that in the Law Schools of Columbia and of Harvard Universities this is no longer true. In my own institution the course is voluntarily elected by over ninety-five per cent of the students. In Harvard it has been made a compulsory course. And so it is my desire today to spend these two hours together in opening up before you some of the neglected possibilities offered by this field.

Diagnosis in law is like diagnosis in medicine. Excellence in it presupposes extensive awareness of the possibilities which can be encountered. So I shall spend a part of today's time on a presentation of these possibilities. After the problem has been 'seen, has been classified and isolated, its resolution remains. Here we need to know how far the statutes and decisions of our own State fix for us a path which must be followed. In this State of Indiana your freedom of action is not, in most particulars, greatly hampered by other local statute or an extensive body of precedents. Here then is preeminently a place in which the resolution of problems requires an awareness of the experiences of other States. Here then is a place where the Restatement of the Law of Property can be useful, and where you, as lawyers anxious simultaneously to serve yourselves and your clients, cannot afford to disregard the work which the American Law Institute has done in this field. The realization that many States are in exactly the position in which Indiana now is, was the chief reason for the Institute devoting its resources and efforts to the production of the Volumes II and III of the Restatement of Property.

Volume II appeared two years ago and contains some 529 pages of text. Volume III is to appear this coming year and will contain some 700 pages of text. Into the preparation of those two volumes much has gone. The money expended in work upon them runs above $200,000.00. I have
spent upwards of one-third of my entire time on them for the past ten years. Besides this I have had as a Board of Advisers nine men recognized throughout the country as the leading scholars in this field. They are: Bigelow, who is dean of the University of Chicago Law School; Casner, who was formerly the professor at Illinois and is now teaching property at Harvard University; Fraser, who is the Dean of the University of Minnesota Law School; Leach, who is also a teacher of property law at Harvard; Madden, who was formerly of the Pittsburgh Law School, and has been Chairman of the National Labor Relations Board for the past several years; Rundell, of Wisconsin; Simes of Michigan; and Henry Upson Sims, former President of the American Bar Association, and probably the leading lawyer of Birmingham, Alabama.

Since I can do no better for you in the time at our joint disposal today than to give you a genuine introduction to the helpfulness available to you in this work, I desire to take a few minutes to recount briefly the history of this Institute so that you can all see its product in the light of the circumstances of its formulation.

The Institute has been in existence since early in 1923—a little over fifteen years. During that time, in the preparation of the restatements and in the compilation of its code of criminal procedure, it has expended in a careful manner calculated to get full value for each dollar expended close to $2,000,000.00. It has brought into cooperative effort lawyers, judges and law professors in a fashion never before accomplished or even attempted. It has published some twelve volumes and has some four or five more which can be described as still in gestation. Its published works, down to the 1st of January, 1938, have been cited over three thousand times in the decisions of various courts in these United States. Of these three thousand citations ten only were in opinions of Indiana. Only eleven States had referred to it less often! From this I find some basis for an inference that the extent of knowledge as to the usefulness of the work of the Institute is rather slight among both the lawyers and the judges of this
State. In the firm belief that interest will be generated if knowledge exists, I am anxious to continue to give you some further data as to the background of the Institution and the way in which it has been functioning.

First, then, as to the situation which demanded and which still demands remedy, and to meet which the Institute is designed as a response. That situation can be described succinctly as the growing complexity and uncertainty of the law. The multitude of reported decisions is appalling. For the five years prior to 1914 the Library of Congress made a count of American jurisdictions, showing more than 65,000 decisions, occupying 630 printed volumes. For five years! Each ten years brings twenty-four or more new huge volumes of the American Decennial Digest. "But," you may say, "there are fifty-nine jurisdictions consisting of the forty-eight States, the District of Columbia and the ten Federal Circuits, and I, as a lawyer in but one of these jurisdictions, am concerned with a relatively small number of these."

That restriction of view to the decisions of one's own State and circuit has become an habitual necessity because of the human impossibility of any judge or lawyer keeping abreast of current law elsewhere. Such acquaintance demands an impossible expenditure of time and of labor and of money. But this impossibility of acquaintance with the law of sister States fosters divergencies of rule having no better justification than lack of knowledge as to how the problem has been handled elsewhere. These divergencies become increasingly troublesome as our State lines are more and more overrun by nation-wide business units and common economic problems. Furthermore, even in a single jurisdiction, both briefs and opinions suffer from a lack of an adequate sifting of the prior decisions. The pitfalls of the vast content of precedent remind one of those illimitable regions described by Milton where "chaos umpire sits, and by decision more embroils the fray by which he reigns."

The complexity and uncertainty which result from multitude are aggravated by the prevailing lack of sharp accuracy in the use of words. A judge already weary from his efforts
to supplement counsels’ presentation of prior authorities, and faced only with the decision of the narrow issue in litigation before him, does not deserve heavy censure if his opinion is couched in language adequate to make clear the result in the case before him but apt to mislead when sought to be applied as a precedent removed from its context.

Does this situation, when appreciated, reveal an intrinsic and inevitable weakness of the common-law system, certain to bring about the destruction of that system at a time now rapidly approaching? The Institute is a strong negative answer made to that question by leaders of the Bar.

As the Director of the Institute, William Draper Lewis, said to the Pennsylvania Bar Association in June of 1932, "Not lightly should a people abandon an institution which having its bed roots in their remote past has developed with their development. Our capacity for progress today is tested, as always, not by our eagerness to discard the old in order to adopt the new, but by our willingness to employ the institutions which our experience has taught us how to use, and, so using them, model them to new needs."

The utility of a cooperative enterprise enlisting the judges, practitioners and law teachers in an ascertainment and formulation of existing law was suggested by the late Mr. Justice Cardozo in December, 1921, at an address delivered in the City of Chicago. He likened the resultant process to that which occurs in the consulting room of an appellate court where pet hobbies find derision, personal peculiarities of thought are curbed and the ultimate fusion of views acquires a balance, a moderation and a prestige not otherwise attainable. The outcome of this suggestion was the organization of a committee to explore the possibilities of the idea and to suggest ways and means for its accomplishment.

William Draper Lewis, who was then Dean of the University of Pennsylvania Law School and a distinguished lawyer of Philadelphia, became the indefatigable promoter of the enterprise. By his skillful efforts the late Elihu Root became the guide and constant helper of the new movement. John G. Milburn, George W. Wickersham and other men of
like type spent liberally of their time in these months of travail. By call of this committee the organization meeting of the Institute occurred in Washington, D. C., on February 23, 1923. The personnel of that first meeting is indicative of the character of the enterprise. It included three justices of the United States Supreme Court, members of the Circuit Courts of Appeal in five of the circuits, the chief justice or an associate justice from the highest courts in twenty-seven different States, some two-score of law teachers and upwards of two hundred distinguished practicing lawyers selected from the country as a whole. The charter adopted by this group declared that it purposed "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice and to carry on scholarly and scientific legal work."

A decade and a half is a short time in movements affecting the welfare of a society consisting of 120,000,000 people. But I submit that Mr. Lewis, Mr. Root, Mr. Wickersham and those hundreds of others of the leaders of our profession who have put to work the money of the Carnegie Foundation have not only conceived a worthy ideal but have moved forward substantially toward its attainment along lines now about to become of immediate practical utility alike to the judge, to the office and litigating lawyer, and to the teacher of law. This area of practical utility is certain to become increasingly significant as more of the restatements emerge from their long process of incubation. Clarification, simplification, elimination of unnecessary divergencies and inconsistencies are a service not only to the profession, but to the public, to whom so often we have been but poor guides.

I think you are entitled to have a very brief description of how this restatement group functions. I can describe that best, perhaps, in connection with the property restatement where I have had the task under my direction. It is my task, first, to prepare a collection of the authorities from the country as a whole on the subject which we are about to restate. That memorandum varies in length, as you would suspect, according to the subject. In the course of the ten
years that we have been working I have collected in my office some 12,000 to 14,000 cases in the field of future interests. On the subject of class gifts, which has been the subject matter of our work this past year, we have a collection of some 1500 cases digested, and we discarded some 1500 more which were merely cumulative authority on points which were already adequately covered. On the basis of such a preliminary law memorandum I, as reporter, prepare a first draft of a chapter dealing with a certain unit of the subject matter. The law memorandum and the draft are both mimeographed and are distributed to the group of advisers which I enumerated a few moments ago in your hearing. They then meet with me at some central point. We spend about four days on a draft of fifty pages. That means rather minute consideration, because we normally sit some seven hours a day in those sessions. So we spend together about twenty-eight hours of work chewing to pieces a fifty-page draft. You can guess that there is often not much left after that process has gone on! A stenographic record is kept of their suggestions. I go back home with those suggestions and my mutilated draft, and it is my job to reconstruct a new draft along the line of their suggestions. It comes back to a similar group meeting. That occurs with varying repetitions according to the difficulty that we encounter in the chapter. No single chapter has come through in less than three group meetings of that type. One took eight meetings of that type to get it into shape where we were willing to put it out.

Having thus survived this group the draft then goes to the Council of the Institute, which is a group composed of thirty-three practicing lawyers and judges. The membership in the first group, as you see, is largely a law school crowd. The membership in the Council is entirely judges and practicing lawyers. They consider the draft, and if it looks to them correct, they approve it and pass it on, with such suggestions as seem to them desirable.

It then goes to the Annual Meeting in Washington, which occurs early in May, where some 700 persons congregate from different parts of the country. Only after it has been
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approved by the group, by the Council and by the Annual Meeting, does it come out as a published Restatement.

Now, these two volumes of which I have been speaking contain twenty-one chapters, and I want to run over their general scope with you and then take up for detailed discussion three of the chapters. The twenty chapters divide into four parts. The first part is a single chapter of some sixty to seventy pages dealing with terminology. The effort of that chapter is to define our terms in the field so that there will be no uncertainty as to the content of a given name. That chapter was not written first; it was written after ten others. In other words, we did not write our chapter on terminology until we had gone through ten chapters of substance to find out what terms needed definition and how we could best define them in terms of their use. The chapter on terminology is Chapter 7.

Next comes a series of ten chapters on the characteristics of future interests. Quite obviously, I can't give you in five minutes the substance of those ten chapters, but I do want to indicate their general subject matter.

First, we deal with the subject of transferability, and there are really four chapters which center about that subject: transferability by conveyance inter vivos; transferability by succession on death; transferability that occurs when you subject a future interest to the satisfaction of the claims of creditors; the transfer that is implicit in a partition proceeding or in a judicially ordered sale of the property.

These four are followed by four more chapters which deal with the protection of future interests. First there is the protection that is accorded to future interests by the requirement that the owner of it shall have been made a party to a proceeding that affects the subject matter of the interest. Secondly is the protection that is afforded in the way of actions for damages or in equitable actions for an injunction or in equitable proceedings for the appointment of a receiver. Thirdly is the protection which is accorded against persons other than the owner of the prior possessory interest as for example when some third person proceeds against the
property and injures it. And lastly the limits that are set to these protections by the statutes of limitations. Thus the first eight chapters are divided into two groups of four each.

The last two of the chapters on characteristics deal with ineffectiveness. Such an ineffectiveness may exist as to the ultimate interest. I have a limitation "to B and his heirs, but if B dies without issue at any time, over to C and his heirs." C dies before the testator so that the doctrine of lapse applies. Does the first interest become indefeasible or does the first interest end upon the death of B without issue? So our first problem concerns the ineffectiveness of the ultimate interest and the resultant enlargement, in some instances, of the prior interest.

More difficult than that, much more troublesome, is the ineffectiveness of the prior interest. A limits property to his wife, B, for life, and, after her death, to certain people. In many States the spouse can reject the testamentary provision for her and claim her intestate share. If that is done, the life estate drops out of the picture. What then happens to the balance of the testamentary disposition? Do you accelerate the subsequent interests so that they move up and become presently possessor to the extent that they are not absorbed by the intestate share of the wife? Do you sequester the interest that was attempted to be given to the woman and distribute it for the ironing out of inequalities between the subsequent takers? The doctrine of renunciation and the doctrines of acceleration and sequestration come in to give much trouble, many problems.

Lastly the material dealt with in Chapter 17 deals with the termination of an interest and the effect thereof on succeeding interests. You have all heard of the destructability of contingent remainders, and that is a question which is important in your State because you have no statute on the subject.

Those ten chapters on the characteristics of future interests which I have so briefly described in your presence are designed to show when it makes a difference in the result of a contro-
versy, whether a future interest is of one type or another. Having determined, therefore, the extent to which it is important to differentiate between types of future interests, we now proceed with the balance of the material. In the Third Volume, which is not yet published, we deal with the construction questions—questions which enable the lawyer and judge to determine what types of future interests the particular limitation before him creates and thereby to determine what the consequences of the limitation are under the rules stated in the preceding ten chapters.

In this Third Volume there are to be at least six chapters dealing with the construction of conveyances which purport to create these various types of future interests. The first of those chapters is the one on general rules of construction and covers substantially the same material as I lectured to you upon on my first day here insofar as I was then discussing donative conveyances. In the tentative draft (No. 9), which was published last May, there are three chapters centering about the three most litigated questions of construction. The first of those is the requirement of survival—when is a future interest so limited that the person to take must live until the time of distribution? That is the requirement of survival. The second deals with limitations over on death, or on death without issue. That is the second of the three most litigated questions in this field. The third deals with those limitations which are conditional upon behavior. You give property to a son provided he supports the grantor and the grantor's wife as long as they live, and so on. So those three chapters center about the types of construction problems most frequently litigated.

In the part that has not yet been published even in tentative form we deal with the subject matter of class gifts. That has been the subject matter of our work this past year.

I must move on, because I want to discuss with you today the utility and the applications of the material that you will find in three of those chapters in this State of Indiana. And the three chapters that I have selected for such discussion are Chapter 7, which is in the published Volume II, on
terminology and classification; Chapter 20, which is in tenta-
tive draft, No. 9, that was published last May, on gifts
over on death, and on death without issue, and Chapters 22
to 23—I will consider those as one chapter for our purposes
today—as yet unpublished, on class gifts.

Why do I think it important to discuss with you Chapter 7
on terminology and classification? I suspect every one of
you, no matter how much you may have done or how little
you may have done in this field, has heard of reversions, re-
mainders and executory interests. There are echoes of those
words in all of our minds even though we are very hazy as
to the differences between them. An expert in the field, of
course, talks of many more and of many subdivisions. What
materiality is there in this pigeon-holing of future interests
under specific names? I submit that these names are not
mere survivals of historic accidents—although all do reach
back into history and do gain a part of their content because
they reach into different eras of history having arms of
variant lengths. They are not mere excess baggage usable
by the initiate desiring to give an appearance of importance
in the view of the uninitiated. They serve presently useful
objectives as a shorthand mode of transition from the vary-
ing forms of limitation by which each can be created to the
varying aggregates of consequences which each connotes.
That, to me, is the sole justification for the present retention
of the historically derived names of future interests.

What, then, is the classification that you will find in this
material and how far does it fit into the attitudes of your
courts in this State?

First of all, let us divide future interests into those that
are created in persons other than the conveyor; and then
later we shall consider those which are created or left in the
conveyor.

As to those created in persons other than the conveyor,
there is the sharp line of demarcation between remainders
and executory interests. The remainder developed earlier as
a legal interest. It came in about the fourteenth century.
It was typically the type of future interest left after a life
That is, A, having complete ownership, conveyed property to B for life, and then it shall remain over to C, as the phrase originally was. From that phraseology the term "remainder" came. It meant the type of future interest which is created in a person other than the conveyor, typically after a life estate.

The executory interest, on the other hand, did not come into the law as a legal interest until after the Statute of Uses and Statute of Wills, just before the middle of the sixteenth century. Typically the executory interest was after a fee interest of the conveyor. Thus A, having property, conveys property to B and his heirs, and on certain stated events over to C and his heirs. The executory interest was the type of interest creatable as a result of the Statute of Uses and the Statute of Wills and was limited typically after a prior estate not certain to end.

Those two types of future interests—remainders and executory interests—differ not only in the types of limitations that create them, but they differ also in their characteristics. I can not take time to illustrate that extensively, but this will serve to show what I mean. If you have a remainder after a life estate, you are dealing with a future interest that is certain sometime to become possessory, and consequently that interest is entitled to be protected against wrongful conduct on the part of the person in possession, that is to be protected normally by an action at law for damages. Whereas if it is an executory interest, you are dealing with an interest that is not certain ever to become possessory, and consequently the protections accorded to it by way of law action are nil and in equity are slight.

With respect to remainders we need to make a further subclassification. You are familiar with the traditional division into vested and contingent interests. And here we must stop for a few moments of careful thinking. The terms "vested" and "contingent" have been important in Anglo-American law for upwards of six centuries, but the differences that are connoted by those two words have shifted in content from century to century, and a failure to realize that shift in
content is one reason for real confusion in the writings and decisions of today.

Originally, in the fourteenth and fifteenth centuries, remainders could only be created in favor of presently identifiable persons. The interests of such persons were "vested" and were seldom if ever subject to any possible defeat. When the intended taker was not presently identifiable, a "contingency" existed and that meant no interest was created. Thus, in the first stage, "vested" estates were allowed estates whereas the label "contingent" designated the unsuccessful effort to create an interest. Contingent remainders gained a hesitant recognition between 1450 and 1536 and the distinction between "vested remainders" and "contingent remainders" centered in the fact that the latter type of remainder could eventuate in possession, if, but only if, the condition precedent was fulfilled at or before the expiration of the supporting estate of freehold. Thus in the second stage these terms both designated allowed interests, but interests differentiated chiefly by widely varying degrees of probability of becoming possessory.

The Statute of Uses (1536) and the Statute of Wills (1540) introduced executory interests and powers of appointment, both of which could operate to defeat "vested remainders." So the spread of defeasible vested remainders lessened the clarity of the distinction between vested remainders and contingent remainders based upon the probability of becoming possessory, since that probability could be just as effectively lessened by a provision for the defeat of the interest as by a condition precedent thereto. Nevertheless, the "destructibility" of contingent remainders by the termination of the supporting estate of freehold prior to the fulfillment of the condition precedent kept the distinction one of importance to the legal profession. Judicial efforts to avoid this destructibility caused many border-line limitations to be construed as creating "remainders vested subject to defeasance" rather than a remainder subject to a condition precedent. Thus in the third stage the terms were applied chiefly to differentiate remainders which respectively were
and were not "destructible." The development of the rule against perpetuities beginning in the late seventeenth century gave a new opportunity for the pouring of old wine into new bottles. Thus in the fourth stage the terms "vested" and "contingent" were pressed into service to differentiate interests which, in order to be valid, do and do not need to have something further happen within the permissible period under that rule.

I think that this little historical excursion has made it clear that there are incongruities between those remainders commonly grouped together as vested. Consequently, in the Restatement, you will find a three-fold subdivision of the remainders that are commonly grouped together as vested. The three-fold subdivisions are: (1) indefeasibly vested remainders; (2) remainders that are defeasibly vested; and (3) remainders that are vested subject to open. Let me illustrate these three with situations familiar to you here in Indiana.

The indefeasibly vested remainder is the one most favored in Indiana. It is illustrated best, perhaps, by the illustration: A to B for life and then to C. C's interest is indefeasibly vested. That means there is a person to take presently and unalterably identified and his taking is certain whenever and however the preceding estate ends. Such an interest results in the maximum of protection being accorded to it by the courts. In Indiana the preference for vesting which exists everywhere throughout the country has become almost a phobia against finding anything less than indefeasibly vested interests. I shall have more to say about that just a bit later.

The defeasibly vested remainder is well illustrated in *Heilman v. Heilman*,¹ a case where a man, A, gave his property to "my wife, B, for life, with power to consume, remainder to my children." It is a very common form of limitation. The power to consume given to the life tenant means that there may be nothing left for the children. Under

¹ 129 Ind. 59 (1891).
such a limitation the children have a remainder vested subject to complete defeasance.

*Williams v. Harrison,*² involved another defeasibly vested remainder of a slightly varying type. There the limitation was "to my son B in trust for his children C and D and any other child or children that may hereafter be born to him, to be applied to the support and education of such children or the survivor or survivors of them; the share of each child to be paid to him on coming of age or marriage and to survivors if one dies before such receipt." You see, the interest in the children was vested subject to complete defeasance by failing either to live to maturity or to marry.

*Summers v. Old First National Bank and Trust Company*³ is another case in which the remainder was defeasibly vested. One-fourth of the residue was given in trust for a son, B, until he reformed, and then to him outright. But the will went on: "Should my son die before the conclusion of this trust over to my daughters Mary, Ella and Elizabeth." Mary, Ella and Elizabeth each had a remainder vested subject to complete defeasance, if and when the son, B, reformed.

These three cases illustrate the types of defeasibly vested remainders that you find in the decisions of the fairly recent years in this State.

What do we mean by a remainder vested subject to open? *Conger v. Lowe,*⁴ illustrates that. Testator gave "to my wife Hannah for her life, then to my son Silas during such part of his life as he shall live on this land, then to the children of Silas." When the testator died in 1874 Silas had four children. Each of these four acquired a remainder interest in a quarter subject to become a fifth only on the birth of a fifth child to Silas, and so on as to each other child of Silas. Thus your remainder vested subject to open exists when the group consists of presently ascertainable persons, each certain to take some share, but the size of the share is subject to be

² 72 Ind. App. 245 (1919).
³ 13 N. E. (2d) 320 (Ind. App., 1938).
⁴ 124 Ind. 368 (1890).
diminished by further birth of further persons who fit into the class.

In addition to these three types of remainders that are of varying degrees of vestedness, there is the remainder subject to condition precedent, and despite the best efforts of your courts to find everything that they can vested, there still are some remainders subject to a condition precedent in your cases. Dickey v. Citizens' State Bank of Fairmont is one such case. The testator there had made quite ample other provisions for all of his family, including his son, and then he wanted to make an additional provision for the additional expenditures which would be incurred by this boy if he married, so he made the limitation in controversy, devising land "to my wife, B, for life, and if, at her death my son, C, is at that time married and living with his wife, then to C in fee simple, otherwise the property is to be sold and the proceeds divided among" three named charitable institutions. That interest of C was construed to be subject to three conditions precedent. He must outlive his mother, B. He must marry before his mother died. He must be living with his wife when B dies. The interest was subject to a three-fold condition precedent.

So we find ourselves with five varieties of future interests which can be created in a person other than the conveyor. Each has its own series of possible creating limitations and each has its own peculiar agglomerate of characteristics.

We must pass rather hastily over the interests which are left in the conveyor. They are two main types, with three subdivisions of one of these two.

First of all is the power of termination—the right to enter for condition broken, which is reserved to a conveyor. You have an illustration of that in Cree v. Sherfy. So we have the right to enter for condition broken, which, in the Restatement, we call the power of termination.

Then we have reversionary interests—but reversionary interests can exist in three different forms. The simplest form

5 98 Ind. App. 58 (1932).
6 138 Ind. 354 (1894).
of the reversionary interest is where A, having a fee, conveys to B for life. He still has all the balance of his ownership. He has an interest like an indefeasible remainder. But supposing he does differently than that. Supposing he conveys, as he did in the Dickey case, which I discussed with you a few moments ago, to his wife for life and then to the son C on condition precedent. What has he left then? He still has the entire reversion, but this retained interest is subject to be defeated by the occurrence of the condition precedent of the interest limited in the third person. That reversionary interest is very like the remainder vested subject to complete defeasance.

Can we also find a reversionary interest which is subject to a condition precedent? How about Mendenhall v. First New Church of Indianapolis? Land was conveyed to this church organization for such time as they should use it as a church and Sunday school. That created a defeasible interest in the church. What was left in the conveyor? He had the chance of getting back that property if the defeasible interest created in the church ended.

Isn't the retained interest of the conveyor rather accurately described as a reversionary interest subject to a condition precedent? We more commonly speak of it as a possibility of reverter, but I submit to you that the possibility of reverter is nothing but a rather roundabout mode of describing a reversionary interest subject to a condition precedent.

So we really have left in the conveyor four varieties of future interests—the power of termination, the indefeasibly vested reversion, the defeasibly vested reversion, and the reversion subject to a condition precedent, which you can call, if you prefer, the possibility of reverter.

Thus we have nine categories, nine pigeon-holes, or to change the metaphor, nine bridges, each leading from distinct congeries of creating conveyances to distinct congeries of consequent characteristics. Careful observation of the terminologies thus set forth will increase precision in our

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7 177 Ind. 336 (1912).
thought, will cause us more quickly to apprehend the problems upon which we must work; will contribute clarity to both briefs and opinions, and will make this difficult subject less difficult than it heretofore has been. These terminologies set forth in Chapter 7 of the Restatement of Property are not new either in this or any other State. They merely utilize and put into compact and readily accessible form the best that has been done by the best of our judges and legal thinkers of the past. They are the sharp tools which justifiably increase the confidence of a good technician as he approaches a complex written instrument which requires construction. Chapter 7 in the published Volume II of the Restatement of the Law of Property does not itself settle any of your problems. It does facilitate your approach to problems, it quickens your apprehension of problems, and thus saves time, which is the chief commodity which we, as lawyers, have to sell.

The utility of Chapter 20, dealing with limitations involving a gift over on "death" or on "death without issue" is very different. Here we are concerned with substance, and if I may be permitted to say so, with a substance which Indiana needs.

The State of Indiana is unique in its handling of the problems which this chapter concerns. In order that we may get a proper perspective I want to take a few moments to show you the historical background of limitations of this type. There has been a very long history as to gifts over on death without issue. The importance of the estate tail in English society was great from the fourteenth to the nineteenth centuries. The typical settlement made of property in England employed the estate tail so as to provide that the land should go down the line of the eldest son until it became extinct, and if and when that line became extinct it should then go down the line of the second son, and so on through the family.

Out of that common practice of conveyancing arose the idea which is described as a gift over on indefinite failure of issue. The term "indefinite failure of issue" is a term applied to a gift over that is intended to operate whenever in the future—no matter how far in the future it may be—that the line
becomes extinct. Thus if property was granted by A to B and his heirs, but if B died without issue, over to C and his heirs, that limitation was construed to give to the first taker an estate tail, which meant that it would stay in his line of descent as long as there were descendants, and then, and then only, pass over to C. That construction of limitations as embodying an indefinite failure of issue had its acceptance because of the English social interests in estate tail.

In this country we have never been greatly interested in estates tail. Our whole social set-up has been to such an extent different that that type of land interest has not met our desires or our needs. There has been no such situation in this country as there was in England favorable to the estate tail. Consequently there has been no favor in this country for the indefinite failure of issue construction. This was quite clearly manifested in the enactment of statutes in some of our States providing in effect that when you had one of these limitations, theretofore construed to mean indefinite failure of issue, it should henceforth be presumed to mean definite failure of issue. That meant that the gift over would take effect if, but only if, the first taker was unsurvived by issue at the time of his death. So let's take a limitation and see the difference of result under those two: A to B and his heirs, but if B dies without issue, to C and his heirs. Under the English view B had an estate tail and C had a remainder after an estate tail. C's interest could take effect if, and only if, B's line became ultimately extinct. Whereas under a statute that substituted the preference for definite failure of issue, C could take only if, when B died, B was then unsurvived by issue.

Do you see that preference for the definite failure of issue construction eliminated wholly the estate tail from the picture and moved up the time when you looked at the facts for the ascertainment of whether the gift over could take effect? The change was in the direction of lessening the long tie-ups of land.
Statutes of that sort, establishing a preference for the definite failure of conception began with the Virginia statute of 1819.\(^8\) Right at that same period, within about a decade, similar statutes were passed in Mississippi,\(^9\) in North Carolina\(^10\) and in New York.\(^11\) England made a similar shift in 1838 by the statute of the First Victoria Chapter 26, § 29. Statutes of this sort spread in this country so that long prior to this time they have been enacted in twenty-seven States, in addition to the District of Columbia. But Indiana is not one of the States that has such a statute. The statutory body of law through the country doesn’t help you in this State at all.

Now, what should a state do when it doesn’t have a statute on this subject? The fact that it doesn’t have a statute doesn’t in any way eliminate the distaste for estate tail, nor does it in any way eliminate the distaste for indefinite failure of issue. Some States met the situation by shifting to the definite failure of issue construction by judicial decision.

Perhaps one of the best illustrations that I can bring to you of that is a decision written in Kentucky prior to the time that Kentucky enacted the statute. Kentucky has since enacted one of the statutes adopting the definite failure of issue construction. But before they had such a statute the question was up before their courts, and in Moore v. Moore,\(^12\) the court said this, which I want to read to you: "Issue, in common parlance, and as used generally by the community, signifies immediate descendants—children. And to tell those who have not made the law their study, that the phrase 'if Martha should die without issue,' does not contemplate her death without an immediate descendant of her body, at her death, but a failure of those lineally descended from her, a hundred

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\(^10\) Acts 1827-8, c. 7.
\(^12\) 12 B. Monroe 651 (1851).
or two hundred years subsequently to her death, is to tell
them not only what surprises them, but what they do not
understand, and what they cannot be easily made to appre-
hend. * * * And yet this artificial, ungrammatical and
unnatural interpretation of the phrase, is to be applied to the
construction of their wills, in order to ascertain and give effect
to their meaning! Is it not tantalizing the community to allow
them the privilege of making their wills if the courts in con-
struing and interpreting them, are to wrest the language they
employ from its plain and obvious meaning and import, and
by applying strained, artificial and arbitrary rules of interpre-
tation, make them mean what it is acknowledged they do not
mean? We say what it is acknowledged they do not mean;
for, not only many of the judges of our own country have
substantially made such acknowledgment, but Lord Thurlow
is reported to have said, in the case of Bigge v. Bensley: ‘I
agree with you, that the general sense of dying without issue,
is at the time of the death. That is the grammatical construc-
tion, and is the sense in general of those who use the words.’
* * *

“We are free to confess that the weight of English author-
ity is opposed to the interpretation which we are disposed to
give them. But whatever may have been the causes which
originated and continued the unnatural signification which the
English Judiciary attached to these words; whether owing to
the genius of their government, or to the spirit of their laws
growing out of their entailment, it is certain that their Courts
of Chancery, as if conscious of original and continued error,
seize with avidity any words in a will to tie up the generality
of the expression ‘dying without issue,’ and confine it to
‘dying without issue living at the time of the decease’; at
least, in regard to terms for years, and personal estate; and
we are utterly unable to see any good reason in this country
for a different construction of the same words when applied to
real estate.”

So the Kentucky court made the shift from the indefinite
failure of issue construction to the definite failure of issue
construction, by judicial legislation.
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Connecticut, Florida, Illinois, New Hampshire, Ohio, and Texas made the shift in the same way.

Now, Indiana took an independent route of escape by stressing the substitutional viewpoint. Thus if A executes a will in favor of "B and his heirs, but if B dies without issue over to C and his heirs," the Indiana decisions say that if B outlives the testator he acquires forthwith an indefeasible interest, and it makes no difference whether he thereafter dies with or without issue. C is out. That is called the substitutional construction, because under it, one or the other person takes. There is no situation under which first one takes and then the other takes a future interest after it. There is no successiveness to the interests. One or the other takes. And therefore it is called the substitutional construction. Maryland, New York, Pennsylvania have all flirted with this same idea, but they have gradually pulled themselves wholly free from its entanglements. The State of Washington—with the vigor of a recent convert—alone remains enamoured of this false god. In re Gulstine's Estate adopted the doctrine in 1932 for the first time.

Now, how did Indiana happen to do this?

There are several contributing factors which I want to mention. The Indiana judges were aware of the common law preference for early vesting and for early indefeasibility. Both of those doctrines played a large part at common law. Both of those doctrines still play a large part everywhere in this country. They are correct attitudes, if not overdone.

13 Couch v. Gorham, 1 Conn. 36 (1814); St. John v. Dann, 66 Conn. 40 (1895).
14 Russ v. Russ, 9 Fla. 105 (1860).
15 Ahlfield v. Curtis, 229 Ill. 139 (1907).
16 Kimball v. Penhallow, 60 N. H. 448 (1881); McAllister v. Elliot, 83 N. H. 225 (1928).
17 Parish v. Ferris, 6 Ohio St. 563 (1856).
19 166 Wash. 325 (1932).
Then there were prior correct decisions dealing with gifts over on death alone. These also are a part of the background of this misstep. Let me illustrate what I mean by the case of Heilman v. Heilman.\textsuperscript{20} That case involved this limitation: "to my children, and should any one of them be dead leaving children, then such children shall take the share of their parent." That is a gift over on death simply, "to my children" and should any of them be dead, then their children take. That is obviously an attempt by the testator to provide takers to take the place of a parent who dies before the testator. Very properly the courts in this State and everywhere else apply a substitutional rule to that case. Death being a certain event, as I think we all must concede it to be, the contingency sought to be expressed by the limitation must be as to the time of its occurrence, and hence, in such case, survival past the death of the testator makes the interest indefeasible. The substituted gift is intended to prevent lapse and such survival makes it no longer significant.

These, then, are the two contributing factors, as far as I can find them, which explain Wright v. Charley.\textsuperscript{21} This is the first case that misapplied these prior rules and reached the substitutional construction in this State. So this doctrine of which I am speaking is less than fifty years of age in your State. Wright against Charley was a case of this sort: A will had been executed in 1873. After giving property to five unmarried and named children he provided: "in case of the death of either of my (five unmarried) children and they leave no children, the property bequeathed to them by this will is to be divided between my (other) children." All five survived the testator. One of the five died in 1888 without offspring but with a husband. The controversy was between this son-in-law of the testator and the remaining actual children of the testator. The husband won. The court relied on the two factors above described, namely, the preference for early vesting and the body of authority adopting the sub-

\textsuperscript{20} 129 Ind. 59 (1891).
\textsuperscript{21} 129 Ind. 257 (1891).
stitutional construction in cases of gifts over on death simply. The court cited English and New York cases as well as its own decision made earlier in the same year in Heilman v. Heilman\(^{21}\) as authority for its decision, but all of these cases were on totally unsimilar forms of limitation, because they dealt with gift over on death simply, whereas this was a gift over on death without issue.

I think it is fair to say, if you read that case carefully, that the court did not see that it was dealing with a different kind of case, that it did not know that it was extending by analogy where there was no basis for any analogy to be drawn. The weed thus sown unwittingly has borne some most extraordinary fruit, and I want to bring some of that fruit to your attention.

*Moores v. Hare\(^{22}\)* is the first of these cases. Testator there gave "to my daughter Maria for life as a life estate and not a fee (realty). At the death of her (said Maria) all the said real estate so devised to her for life shall go to her children in fee simple. If any child of hers shall have died, leaving a child or children, then the portion of said real estate that would have gone to the parent shall go to such child or children." At the time of probate Maria was a widow and had four children, one of whom later died intestate and without issue. Maria is still alive. This is an action by her children against their children to quiet title.

Here, the court had three choices: It could say that any children of Maria who outlived the testator acquired thereby an indefeasible interest; or it could say that any child of Maria who outlived Maria, the life tenant, thereby acquired an indefeasible interest; or it could have said, applying the definite failure of issue construction that any child of Maria continued to have a defeasible interest until it was ascertained at the time of the death of such child, whether she was survived by children. The court took the first of those three positions, holding that any child of

\(^{21}\) 129 Ind. 59 (1891).
\(^{22}\) 144 Ind. 573 (1896).
Maria who survived the testator acquired forthwith an indefeasible interest.

*Clark v. Thieme*\(^{23}\) was a case in which there was an express provision in the will making substituted gifts in the event that any taker died before the testator; and then in the next clause they had this gift over on death without issue of a particular taker. Despite the detailed and specific provision to cover death in the lifetime of the testator, they construed the other and distinctive clause as having the same effect. It is a bit difficult to see how that can be regarded as giving effect to the intent expressed by the language of the instrument.

*Aldred v. Sylvester*\(^{24}\) is a third case. Here there was a life estate followed by an express gift to three brothers. This was followed by a further provision that if any one of the three died before the life tenant, survived by issue, it should go to such issue. The court held that any one of these three who survived the testator, acquired an indefeasible interest, and that death of any one of the three prior to the life tenant was of no effect. There was a complete disregard of the express language of the instrument. The court had a guilty conscience as it wrote that opinion, too! All the way through you will find it talking in terms of intent, but peeping through between the lines of the opinion is a feeling of uneasiness that they are protesting a bit too much that they are following the intent of the testator.

*Quilliam v. Union Trust Co.*\(^{25}\) is one of the most outrageous cases I have ever encountered in the decisions of any jurisdiction. It was a suit to quiet title to real estate. Item 6 of this will provided as follows: "Subject to the foregoing provisions and conditions I devise to my daughter Anna all my real and personal estate forever, provided, however, that if my said daughter should die without issue, then . . . the property she may have derived from my estate at the time of her death shall have descended to my nephews and nieces."

\(^{23}\) 181 Ind. 163 (1914).
\(^{24}\) 184 Ind. 542 (1916).
\(^{25}\) 194 Ind. 521 (1924).
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Could you have it more explicit than that that successive interests were intended; that Anna was intended to take; and that the nephews and nieces were intended to take if there was a failure of issue of Anna at the death of Anna? It is almost impossible to frame language that would be more appropriate to express that purpose. Daughter Anna survived the testator and died without issue surviving her, devising in trust to the Union Trust Company. The nephews and nieces naturally came around and said, "Here are we; give us." The Trust Company claimed by the terms of the will that this girl had taken a fee and hence that her will transferred the property to the Trust Company and the nephews and nieces were out of luck. The court held that it is a well established rule in this State that words of survivorship are presumed to relate to death of the testator. "Such rule has been applied in so many cases where the language used was of similar effect to that used in the case at bar that such construction has the force of a rule of property and should not be disturbed." On the death of the testator Anna took a fee simple.

O'Brien v. Clarke\textsuperscript{26} is one of the recent cases in your intermediate Court of Appeal. The testatrix provided in that case, "I give to my daughter Mary for life, thereafter to my daughter Catherine and my sons Joseph and James, but should said Catherine, Joseph or James be childless at the time of his respective death and still be the owner of any personal and real estate hereinbefore provided for him, then I give it over" to certain other people. That didn't do the trick. The estates in remainder vested at testatrix's death, according to the court.

McDowell v. Fletcher\textsuperscript{27} is another case of the same vintage. Testatrix left all her property to her grandchildren "share and share alike among them, but if any one or more of my said grandchildren shall die at any time without issue surviving them the share . . . . of such shall be equally divided

\textsuperscript{26} 102 Ind. App. 421 (1936).
\textsuperscript{27} 103 Ind. App. 165 (1936).
among his or her brothers and sisters and their descendants.” Note the express provision for “death at any time without issue.” It didn’t work. The estate vested indefeasibly as of the death of the testatrix.

The substitutional rule has become so strong by repetition that an Indiana opinion which, in such cases, still talks in terms of effectuating the intent of the conveyor, can hardly mean what it says. Does this rule serve so useful an end that you are entitled thus to defeat the desires of testators? I can see none. It is a rule which grew out of an understandable and wise dissatisfaction with the continued reign of the indefinite failure construction, but it is a rule which took its form because a court nearly fifty years ago made a gross error in reasoning, seeing no difference between two types of limitation as different from each other as night is from day. It is a rule which frustrates legitimate and reasonable desires of testators. It has well-nigh become a fetish. It is a rule which marks Indiana as unique, in a particular where uniqueness has naught to commend it.

In the Uniform Property Act drafted by the cooperative efforts of the Commissioners on Uniform State Laws and the Institute there is a provision which, if enacted in your State, would work a wholesome change that is needed. This section is thus worded: “Whenever property is limited upon the death of any person without ‘heirs’ or ‘heirs of the body’ or ‘issue’ general or special, or ‘descendants’ or ‘offspring’ or ‘children’ or any such relative described by other terms, such limitation, unless a different intent is effectively manifested, is a limitation to take effect only when such person dies not having such relative living at the time of his death or in gestation and born alive thereafter and is not a limitation to take effect upon the indefinite failure of such relatives; nor, unless a different intent is effectively manifested, does it mean that death without such relative, in order to be material, must occur in the lifetime of the creator of the interest.”

That statute, if enacted, would work a very desirable change, in my judgment, in the law of this State.
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I do not know how familiar you are with class gift law and consequently I want to discuss the types of limitation which create class gifts.

A makes a will leaving property “to my children.” That is one of the simplest forms. A makes a will leaving property “to my wife B for life, then to my nephews and nieces.” That is substantially different from the first because of the interposed life estate, and also because there can be more nephews and nieces born, provided the necessary parents are still alive, as is, of course, often the case. There can’t be such additional members born, in the first case, where it is a limitation to the children of the fellow that is now dead, whose will it is; so there is a substantial difference in those two types of limitations.

Third—there are five of these illustrations which I think will put before us most of the possibilities in class gifts—A leaves a will in favor of “my son B for life, then to those of the children of B who attain to the age of twenty-one.” Here, there is this new element that only those will take who survive to the date of distribution, an element not present in either of the other two.

Fourth, A, by will, leaves “to my nephew B and to the children of my brothers C and D.” Here you have a problem of distribution. Here also you have a problem as to whether the named nephew B is a member of the class.

Fifth, “A to B for life and then to the heirs of C” a limitation which uses the words “heirs” or “next of kin” brings into the picture the statute of descent for the definition of the takers and perhaps also for the definition of the size of the shares.

The common limitations in favor of classes are either in favor of “children,” “grandchildren,” “brothers,” “nephews,” “nieces,” “cousins,” “family,” “heirs,” “next of kin,” or “relatives.” Those are the group designations which would include probably all but five per cent of all the class gift cases.
What difference does it make whether the limitation creates a class gift or not? There are three differences chiefly. Let's illustrate them by the use of one assumed limitation: "A to my wife B for life, then to my nephews and nieces." A nephew C dies before the testator. All of those nephews and nieces who fit the description when the will speaks take the entire subject-matter of the disposition, and the failure of one nephew to survive is unimportant; that is, the group is a shifting group, which in this instance can decrease its membership between the time the limitation is written and the time it takes effect.

Let's take a variant on these facts for our second situation. A executes a will in favor of "my wife B for life and then to my nephews and nieces." Some time later he doesn't like Nephew D so much, so he executes a codicil stating: "I exclude my nephew, D, from any share in my estate." Does that cause a failure in part of the prior disposition? Not at all. It merely excludes that chap from the group who take the entire subject-matter of the gift at the time the will speaks. So, in these first two, the importance of finding the class gift is because the results of finding a class gift are peculiar when a person who fits the description either dies before the testator or is excluded from taking by the terms of the codicil executed by the testator.

In the third, the importance of finding a class gift is on the expansibility of the crowd. You have this same limitation, i.e., "to my wife, B, for life, remainder to my nephews and nieces." As long as you have brothers and sisters alive that group—nephews and nieces—can get bigger and bigger, and all of them that are born subsequent to the time when the will is executed up to the time when the testator dies, and in the case of a life estate, such as I have given you here, until the life tenant dies will come into the class. So there is an expansibility in the group taking if you find a class gift.

Now, in these chapters of the Restatement on the law of class gifts we have sought to present an analytical approach separating the rules concerning class gifts into a series of
successive problems, and I want merely to mention those so that you will see where you can find helpfulness in this type of problem.

First of all, to have a class gift you have got to have words of purchase in the limitation. You still have the Shelley's Case as a part of your law. Consequently, if there is a limitation to B for life, remainder to the heirs of B, the rule in Shelley's Case applies and B has a fee simple.

In such a limitation you have in terms a gift to a group, "heirs of B," but the rule in Shelley's Case comes in, defeats intent, and this language, which in form is a class gift, constitutes words of limitation rather than words of purchase. You have a great many decisions applying the rule in Shelley's Case. Most of them are older cases, and this is so, I suspect, because all of you as lawyers have learned how to avoid that rule and consequently the modern cases involving modern conveyances very seldom contain a limitation that comes within it. You also have the doctrine of worthier title in this State. There is the case of *Wheeler v. Loesch*\(^\text{28}\) which applies the doctrine of worthier title to this kind of a case. I own Blackacre in fee simple. I execute a conveyance of Blackacre "to B for life with remainder to the heirs of the conveyor." Now, the doctrine of worthier title says that if a will limits property to the heirs of the conveyor in such a fashion that the same persons will take either by descent or by purchase, they take by descent and the language of the instrument that purports to give them something is a nullity. Here again you have a situation where the instrument contains language that looks like a class gift but which is prevented from being a class gift because of the rule which comes in—i. e. the doctrine of worthier title—to prevent the requisite words of purchase from being present. So the first problem that we deal with in these chapters of the Restatement are the situations in which the language of the instrument lacks the essential words of purchase.

\(^{28}\text{51 Ind. App. 262 (1912).}\)
The second problem is whether the limitation includes the possibility of fluctuation in the takers under it. There is no class gift, unless the language of the limitation is appropriate to describe a group capable of fluctuating in number. That problem comes up for litigation with great frequency in other States. I can't find a case on it in your State. And frankly I don't believe that this is true, because there haven't been limitations that raised the question. To make clear the situation giving rise to the problem, let us suppose that a limitation reads "in favor of B and C, that is, the children of my sister D." Is this a class gift? You have named the people. You have used a descriptive phrase concerning them. Does the naming exclude the fluctuating capacity of the group? In other words, to what extent does the naming of part or all of the persons who fit the descriptive phrase employed exclude the class gift construction?

Then, we consider as our third problem, what is the exclusionary force of the term that is used to describe the class. Here I intend to go into a considerable number of your cases. You have some nice cases on this point. I make a gift to "my children." Does that exclude my illegitimate children, or does it take effect only in favor of those children who were legitimate at birth, or does it include those who were legitimate at birth, plus those who were legitimated subsequent to birth by, perhaps, the inter-marriage of the parents? You have one most interesting case here, Elliott v. Elliott,29 in which the court recognized that the word "children" normally meant only legitimate issue; but under the facts of that case they held that the word "children" designated the illegitimate children to the exclusion of the legitimates. The decision was found on the facts of the case. I haven't time to go into it. You would be interested in reading it. It was a situation in which it was very clear that when this man used the word "children" he was referring to a distinct brood who were in fact his illegitimate offspring. So the question requires answer as to whether the word "children" excludes the illegitimates;

29117 Ind. 380 (1888).
and a further question—does it exclude adopted children? That's another problem that's extremely difficult of resolution. It is not so difficult when it is a gift to the children of the conveyor. But suppose that I make a gift to the children of someone and then he adopts a half dozen children in addition to the three very nice ones that he now has, do all nine share, or do only the three share? You have decisions on that.  

I make a gift to the children of X. He has none when I die, but his wife gives birth to a child a couple of months later. Does that child \textit{en ventre sa mere} at the time of my death come in as a taker under the terms of gift of children? So you see there is a great deal of exclusionary force in the term that is used to describe the group. It excludes sometimes the illegitimates, it excludes sometimes the adopted, it excludes never the children \textit{en ventre sa mere}, it excludes normally descendants more remote than issue of the first generation. So there is a large body of material. We have perhaps some fifty pages in Chapter 22 on it, dealing with the exclusionary force of the term used to describe the group.

The fourth problem centers about the so-called rules of convenience. You have a limitation, A to B for life, remainder to the children of C. How long can children born to C come into this group? Certainly as long as B, the life tenant, is alive. Supposing a child is born after the life tenant dies, can he also claim a share? You have good cases on that body of material.  

Fifth problem: How long can the class continue to decrease in membership? And there you have the problem of the requirement of survival, a problem that brings into this picture of the law of class gifts all the learning and knowledge that you can get on the construction problems of vested interests.

\textsuperscript{30} Bray v. Miles, 23 Ind. App. 432 (1899); Caspar v. Helvie, 83 Ind. App. 166 (1924); Nickerson v. Hoover, 70 Ind. App. 343 (1919).

\textsuperscript{31} King v. Rea, 56 Ind. 1 (1877); Conger v. Lowe, 124 Ind. 368 (1890); Kilgore v. Kilgore, 127 Ind. 276 (1890); Williams v. Harrison, 72 Ind. App. 245 (1920); Goodwin v. Goodwin, 48 Ind. 584 (1874).
The last of the six problems is the problem of distribution. I make a gift to the children of B and the children of C. B has two children and C has ten children. Do they take in twelfths or do the two children of B take a half and the ten children of C take the other half? So you see we have sought by presenting in a series of successive sections these six problems which, when answered, give you the solution of the ultimate taker under the terms of the class gift.

In our consideration today of the diagnosis and resolution of problems of construction which arise in connection with donative conveyances, I have tried to present to you three types of help which you can expect to find in the second and third volumes of the Restatement of the Law of Property. In the first place you find there a sharpness of terminology and a restricted but sufficient fineness of classification to enable you not only to analyze the instrument before you for construction, but also to determine the real relevancy of prior decisions, thought, or argued to be in point. This is the contribution of Chapter 7 in published Volume II. In the second place, you find detailed presentations of the historical and doctrinal background of gifts over on “death” and on “death without issue” giving to you an awareness of the uniqueness of the law of Indiana upon this point, and, I hope, a desire to bring this one body of law into accord with your general policy of will construction which gives large emphasis to the effectuation of the resonable desires of testators. In the third place, I have presented the skeleton treatment of class gifts which will become available to you by March of next year, and which will, I believe, aid the profession greatly in so breaking down the problems raised by class gifts into a series of relatively simple problems that they can be handled separately and successively, so that this field of law will no longer terrify or greatly trouble the practitioner.