

Spring 1959

## The Creation of Estates by Implication

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### Recommended Citation

Summerall, Henry Jr. (1959) "The Creation of Estates by Implication," *South Carolina Law Review*. Vol. 11 : Iss. 3 , Article 5.

Available at: <https://scholarcommons.sc.edu/sclr/vol11/iss3/5>

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# THE CREATION OF ESTATES BY IMPLICATION

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Despite the oft-repeated statement that the court cannot make a will for a testator,<sup>1</sup> nevertheless in construing wills and other instruments conveying property a court will sometimes raise estates by implication even though the instrument is silent concerning them. To enable the lawyer to draft instruments free from ambiguities and uncertainties, to advise clients as to their rights under instruments, and to litigate constructional questions, it is important that he know under what circumstances a court will imply estates.

It must be remembered that the rules as to implication of estates

1. *See e. g. Cornelson v. Vance*, 220 S. C. 47, 58, 66 S. E. 2d 421 (1951); *Wolfe v. Wolfe*, 215 S. C. 530, 537, 56 S. E. 2d 343 (1949).

are rules of construction and not rules of law.<sup>2</sup> A court will give effect to the intention of the testator if it is apparent on the face of the will; if his intention is not apparent, the court will apply a rule of construction to ascertain his presumed intention. A rule of construction operates in the law of wills and trusts as a rebuttable presumption operates in the law of evidence.<sup>3</sup>

Since most of the cases on this topic have involved wills, this discussion of necessity does likewise. However, some cases have involved deeds, particularly trust deeds. Although this discussion is based primarily on the South Carolina cases, the general rules as to implication based principally on the English cases will be stated on those points not yet passed on in this state.

### THE GENERAL PRINCIPLES

In the leading South Carolina case on estates by implication, Judge Nott thus stated the general constructional rules in two propositions: "The first is, that in the construction of a will the intention of the testator must always prevail. The second is, that express words are not necessary to create an estate; but that an estate may arise, be enlarged, controlled and even destroyed by implication."<sup>4</sup> Later in the opinion, however, he stated the rules as to implication of estates with more particularity:

. . . although the intention is to govern in the construction of a will, that intention must be apparent either from the words or provisions of the will, and must be consistent with the rules of law. That an estate by implication is never allowed to issue as purchasers. That an estate by implication is never allowed in any case except from necessity, which must be apparent on the face of the will, and for the purpose of carrying into effect the manifest intention of the testator.<sup>5</sup>

Perhaps the best way to approach the problem is to see how these general principles have been applied to particular limitations of property. The fairly numerous South Carolina cases on implication of estates which will be discussed fall into three groups: I. The creation of life estates by implication; II. Implication of cross limitations;

2. Perhaps the best example of the operation of a rule of law in South Carolina is the requirement of words of inheritance in a deed to convey a fee simple estate, for which see Means, *Words of Inheritance in Deeds of Land in South Carolina: A Title Examiner's Guide*, 5 S. C. L. Q. 313 (1953).

3. See *Peoples National Bank v. Harrison*, 198 S. C. 457, 469-470, 18 S. E. 2d 1 (1941).

4. *Carr v. Porter*, 1 McCord Eq. 60, 70 (S. C. 1825).

5. *Id.* at 86.

III. Remainders implied to children, issue, heirs of the body and the like as purchasers. It should be noted that this discussion concerns only these types of limitations and does not concern some other problems of implication, such as whether a gift of a fee in real estate, of an absolute interest in personal property, or of stocks themselves is to be implied from an unrestricted gift of the rents, income, or dividends respectively.

#### I. THE CREATION OF LIFE ESTATES BY IMPLICATION

Perhaps the simplest case involving the problem of estates created by implication is that of a devise "to A at the death of B." By making the gift in that form, has the testator sufficiently manifested his intention to create a life estate in B, or rather, will a rule of construction say that such was presumably his intention? The answer depends on the relationship which A bears to the testator. The old common law authorities said that a life estate would be implied in B only if A were *the heir* of the testator.<sup>6</sup> The reason for this result is that the testator has manifested his intention to exclude A and to postpone his enjoyment of the estate in possession until the death of B. The only way this can be done is to give A a life estate, for otherwise A, as the testator's heir, would be entitled to the rents and profits until B's death, which would be an absurdity or incongruity.<sup>7</sup> But the cases were clear that if the gift were "To A at B's death" and A were not the testator's heir, but was a stranger, then no life estate would be implied in B.<sup>8</sup>

The common law statement of the rule was obviously based on the law of primogeniture, since it refers to "the heir." The reason for the rule was to prevent the manifest absurdity and incongruity which would result if the implication of a life estate were not made. Therefore, anything which would eliminate that absurd result should prevent the implication.<sup>9</sup>

The modern authorities state that no implication of a life estate will be made unless the person or persons given the expressly created but postponed estate are either the sole heir or all of the heirs of the testator; that is, where a gift is to X group of persons at B's death, a life estate will be implied in B only if X group is equal to

6. 2 JARMAN, WILLS \*532 (5th Am. ed. 1880).

7. *Id.* \*\*532-533.

8. *Ibid.* See also Carr v. Porter, 1 McCord Eq. 60, 80 (S. C. 1825); Addison v. Addison, 9 Rich. Eq. 58, 63 (S. C. 1856).

9. Kales, *Implication of Life Estates, Distributive Construction and Disposition of Intermediate Income*, 10 MICH. L. REV. 509, 510 (1912).

the testator's heirs, no more and no less.<sup>10</sup> Thus, if X group consists of some but not all the testator's heirs, no life estate in B will be implied.<sup>11</sup> A like result will be reached if X group contains more than the testator's heirs, that is, all of his heirs plus strangers.<sup>12</sup>

The constructional doctrine of implied life estates has been recognized in South Carolina.<sup>13</sup> In *Nicholson v. Drennan*<sup>14</sup> the testator directed that his real and personal property remain as it was during his widow's lifetime "and after her death. . . [be] equally divided among [his] children that may be alive at the time." The Court held that the testator's widow took a life estate by implication and therefore her grantee was entitled to an injunction against the testator's sole surviving son's disturbing his possession. It might seem that this case is wrong under the modern constructional rule because the group of persons who were to take the ultimate estate was composed of less than all the heirs of the testator since the widow was not included. The decision was based on the rule stated in the old common law authorities written when primogeniture was the law. But the same result has been reached in other cases where a widow and children were involved.<sup>15</sup> And since the rule is but a rule of construction, the case might be justified on the grounds that since the ultimate estate was given to children living at the widow's death, that was a strong enough showing of the testator's intention to create a life estate and a contingent remainder to overcome the presumptive constructional rule that no life estate would be implied.

The presence of a residuary clause in the will may change the result which would otherwise be reached under the constructional rules as to implication of life estates. Thus, if the gift were to the testator's heirs at the death of B and there were a residuary clause in which the heirs were not included, there would be no implied life estate in B, for the heirs are strangers to the residuary clause and therefore

10. 1 RESTATEMENT, PROPERTY § 116 comment a (1936); 96 C. J. S., *Wills* § 891 (1957); 33 AM. JUR., *Life Estates, Remainders, and Reversions* § 17 (1941); 2 PAGE, *WILLS* § 930 (3rd Lifetime ed. 1941).

See the excellent statement of the rules in *Equitable Trust Co. v. Johnson*, 28 Del. Ch. 45, 36 A. 2d 257 (1944).

11. *In re Willatts*, [1905] 1 Ch. Div. 378, s. c. [1905] 2 Ch. Div. 135.

12. The leading case is *Ralph v. Carrick*, 11 Ch. Div. 873 (1879).

13. See *Carr v. Porter*, 1 McCord Eq. 60, 80 (S. C. 1825); *Addison v. Addison*, 9 Rich. Eq. 58, 63 (S. C. 1856); *Logan v. Cassidy*, 71 S. C. 175, 191, 50 S. E. 794 (1905) (circuit court decree).

14. 35 S. C. 333, 14 S. E. 719 (1892).

15. *Eaton v. Broaderick*, 101 Miss. 26, 57 So. 298 (1912). See also *Holbrook v. Bentley*, 32 Conn. 502 (1865) (to grandchildren at widow's death); *Kelly v. Stinson*, 8 Blackf. 387, 390 (Ind. 1847); *Rathbone v. Dyckman*, 3 Paige 9, 27 (N. Y. 1831).

would not take the intermediate rents and profits in any event.<sup>16</sup> One authority goes further and suggests that these rules apply by analogy to takers under residuary clauses so that if the gift were a specific devise to one who was also the residuary devisee to take effect in possession at the death of another, a life estate in the other should be implied, since an absurdity or incongruity would result if the residuary devisee were immediately allowed to take the rents and profits when the will had expressly postponed his taking to the death of the other.<sup>17</sup>

It should be stated here that the rules as to implication of life estates apply equally to devises of real property and to bequests of personal property including leasehold interests.<sup>18</sup>

Another constructional problem in this area involves a limitation of Whiteacre to A for life, and at A's death Whiteacre and Blackacre to B, the testator's sole heir. Should A get an implied life estate in Blackacre in addition to his express life estate in Whiteacre? The suggested answer is no, for the testator has indicated his intention to give A a life estate in Whiteacre only and therefore the words "at A's death" are to be taken in a "distributive sense", that is, they are to be applied only to the property in which A took an express life estate.<sup>19</sup>

#### A. The Distribution of Intermediate Income

Suppose that there is a limitation "to A at the death of B" and the circumstances are such that no life estate will be implied in B. Then what disposition is to be made of the intermediate income, rents and profits from the testator's death until the death of B? The answer depends on the form of the gift and the nature of the subject matter of the gift.<sup>20</sup> 1) If the subject matter of the gift is specific real or personal property, the residuary devisee or legatee is entitled to the intermediate income, rents and profits, or if there is an intestacy,

16. 2 JARMAN, WILLS \*540 (5th Am. ed. 1880), based on a dictum in *Stevens v. Hale*, 2 Dr. & Sm. 22, 28, 62 Eng. Rep. 529, 531 (V. C. 1862). The same was held in *Horton v. Horton*, Cro. Jac. 74, 79 Eng. Rep. 63 (K. B. 1606). See also *Hudleston v. Gouldsbury*, 10 Beav. 547, 50 Eng. Rep. 692 (Rolls Ct. 1847).

17. 2 JARMAN, WILLS \*540-541 (5th Am. ed. 1880), which cites no authority for the statement.

18. *Id.* \*544. See also *Logan v. Cassidy*, 71 S. C. 175, 191, 50 S. E. 794 (1905) (circuit court decree).

19. *Kales, op. cit. supra* note 9, 10 MICH. L. REV. 509, 513 (1912).

See also 2 JARMAN, WILLS \*\*536-540 (5th Am. ed. 1880).

20. The statement of the various rules is taken largely from *Kales, op. cit. supra* note 9, 10 MICH. L. REV. 509, 514-516 (1912). These rules apply where an intermediate estate is undisposed of for any reason.

the heir at law or distributee will be entitled.<sup>21</sup> 2) If it is a residuary bequest of personal property only, the intermediate income must accrue and be added to the principal and thus pass to the ultimate legatee.<sup>22</sup> 3) If it is a residuary devise of real property only, then under the old common law and present English rule there is an intestacy and only the heir at law can take the intermediate rents and profits; the ultimate residuary devisee cannot take; however, this result is doubtful today.<sup>23</sup> 4) If the gift is a mixed residue of both real and personal property, the intermediate income, rents and profits must be accumulated and paid over to the ultimate beneficiary, for by blending them, the testator has indicated his intention that the rule as to a residue only of personal property be applied.<sup>24</sup> However, when the testator specifically enumerates real and personal property in a single clause, but does not include them together in a single blended fund, that is, if there is no true residue even though

21. Two of the leading English cases are *Hopkins v. Hopkins*, Cas. temp. Talbot 44, 25 Eng. Rep. 653 (Chancery 1734) (real estate), and *Haughton v. Harrison*, 2 Atk. 329, 26 Eng. Rep. 600 (Chancery 1742) (personal property). *Accord*, *Thomas v. Benton*, 4 DeS. 17 (S. C. 1807) (personal property); *Drayton v. Rose*, 7 Rich. Eq. 328, 338 (S. C. 1855) (real estate). *See also* *Feemster v. Smith*, Rice Eq. 34, 38 (S. C. 1838).

22. *Green v. Ekins*, 2 Atk. 473, 26 Eng. Rep. 685 (Chancery 1742); *Hodgson v. Bective*, 1 H. & M. 376, 71 Eng. Rep. 164 (V. C. 1863), s. c. 10 H. L. C. 656, 11 Eng. Rep. 1181 (H. L. 1864). *Accord*, *Feemster v. Smith*, Rice Eq. 34, 38 (S. C. 1838).

23. *Hodgson v. Bective*, Note 22 *supra*, is the leading English case. Although *Dougherty v. Dougherty*, 2 Strob. Eq. 63, 68 (S. C. 1848) quotes an English case to that effect, the result reached under the English rule would most probably not be reached in South Carolina today should such a rare situation be presented. According to Professor Kales, three reasons have been given for the rule: 1) if the heir did not take so as to be entitled to the rents and profits, the fee would be in abeyance; 2) the heir cannot be disinherited without express words; 3) prior to the time when after-acquired real estate could be devised, a residuary devise was treated as a specific devise and the rule of no accumulations applicable to specific devises was applied; the English cases say that this established rule was not changed by the statute making after-acquired real estate devisable. None of these reasons should have any weight today. 1) The fee can descend to the heir and thus satisfy any requirement of seisin and the rents and profits nevertheless go to another; the South Carolina court has stated that if necessary, equity will make the heir a constructive trustee of the rents and profits for the one ultimately entitled. *Dougherty v. Dougherty*, 2 Strob. Eq. 63, 66 (S. C. 1848). 2) Aside from the fact that the second reason is illogical in that it assumes the very point at issue, the presumption against disinheritance of the heir is not very strong in this state. *See* *Kales*, *op. cit.* note 66 *infra*, 10 S. C. L. Q. 159, 173-174 (1957). 3) CODE OF LAWS OF SOUTH CAROLINA, 1952 § 19-231 which provides that after-acquired property passes under a will should have the effect of overcoming the third reason given by the English cases. *See* the excellent discussion and criticism of the rule in *Kales*, *op. cit. supra* note 9, 10 MICH. L. REV. 509, 516-518 (1912).

24. *Genery v. Fitzgerald*, Jac. 468, 37 Eng. Rep. 927 (Chancery 1822); *Dougherty v. Dougherty*, 2 Strob. Eq. 63 (S. C. 1848) (probably the leading American case); *Brailsford v. Heyward*, 2 DeS. 18 (S. C. 1800); *Shackleford v. Buchanan*, 1 DeS. 570 (S. C. 1797). *See* *Drayton v. Rose*, 7 Rich. Eq. 328, (S. C. 1855).

the different types of property are listed in a single clause, then only the income of the personal property accumulates and the rents and profits pass to the heir at law.<sup>25</sup>

## II. IMPLICATION OF CROSS LIMITATIONS

A. "To A and B and the heirs of their bodies; but if they both die without heirs of the body, over . . ."

Suppose land is devised by the above limitation and A subsequently dies without heirs of his body. In that case what disposition is to be made of A's moiety? Clearly, the limitation over to the ultimate devisees cannot take effect, for both A and B have not died without heirs of their bodies. The South Carolina lawyer's first reaction would probably be that since the English Statute De Donis Conditionalibus is not in force in this state,<sup>26</sup> a fee simple conditional estate has been created, and there would be a reverter of A's moiety to the testator's heirs at law determined as of the time of A's death. But such is not the law.

Under the classical English authorities, there would be an implied cross remainder in tail to B, for the limitation over was intended to take effect only if *both* A and B died without heirs of the body; hence if only one died without heirs of the body, there would be a partial intestacy, a hole or "chasm", in the limitation if a cross remainder were not implied.<sup>27</sup>

Although in South Carolina use of the words "heirs of the body" in a limitation creates a fee simple conditional estate rather than a fee tail as in England, it seems that the same result would be reached in this state as under the English authorities: there would be an implied cross limitation to B.<sup>28</sup> However, this would be by way of an executory limitation and not by way of a remainder, for a remainder cannot follow an estate in fee simple.<sup>29</sup>

Under the earlier English cases, cross limitations would be implied only between two tenants in common in tail, but later cases hold that they may be implied among three or more.<sup>30</sup> In South

25. In *re Drakeley's Estate*, 19 Beav. 395, 52 Eng. Rep. 403 (Rolls Ct. 1854).

26. See Note, 10 S. C. L. Q. 431, 442 (1958) and the authorities cited in footnote 70 thereof.

27. 3 JARMAN, WILLS \*536 *et seq.* (5th Am. ed. 1881).

28. See *Gordon v. Gordon*, 32 S. C. 563, 580-581, 11 S. E. 334 (1890), where the English rule is recognized but is not applied under the facts.

29. See Note, 5 S. C. L. Q. 69, 70 (1952).

30. 3 JARMAN, WILLS \*\*537-538 (5th Am. ed. 1881). 2 SIMES & SMITH, FUTURE INTERESTS § 843 pp. 337-338 (2nd ed. 1956).



Carolina the number of persons taking the first estate is apparently immaterial in determining whether a cross limitation will be implied.<sup>31</sup>

B. "To A and B for life, and at their deaths to their children, and if they both die without leaving children, over . . ."

If land were devised by the above limitation, what disposition would be made of his interest if A died without leaving children, leaving B surviving him? According to dicta in two South Carolina cases, there would be a cross remainder to B by necessary implication, for nothing was given over until both A and B died without children.<sup>32</sup> It has been said that the same result might be reached even if the word "both" were omitted, since the testator's apparent intention is to give the whole property over as one estate to the ultimate remaindermen.<sup>33</sup>

However, the clear inference to be drawn from a later, more carefully considered case is that the doctrine of implied cross remainders does not apply in this situation, but rather that A's estate is an estate per autre vie, for the life of B.<sup>34</sup>

C. "To A and B as tenants in common in fee simple, and if they die without issue, over . . ."

Suppose that both real and personal property were given by will by the above limitation, or by one construed to the same effect, and that A died without issue. What would be the disposition of A's moiety? Would it pass under A's will or as intestate property of A's, or would it go to B by way of an implied cross limitation? The English cases limit the doctrine of implied cross limitations to cases where the first gift to the tenants in common is for life or in fee tail; they hold that there can be no implication of a cross limitation after an absolute gift of real or personal property, for the testator has entirely divested himself of all interest and therefore there could be no partial intestacy for lack of a limitation over, and hence no necessity exists for implying a cross limitation.<sup>35</sup> This is the universal holding,<sup>36</sup> outside of South Carolina.

31. See *Gordon v. Gordon*, 32 S. C. 563, 580-581, 11 S. E. 334 (1890).

See also *Seabrook v. Mikell*, Cheves Eq. 80, 88 (S. C. 1840).

32. See *Baldrick v. White*, 2 Bailey 442, 445 (S. C. 1831) ("children"); *Seabrook v. Mikell*, Cheves Eq. 80, 87-88 (S. C. 1840) ("issue").

33. See *Baldrick v. White*, 2 Bailey 442, 445 (S. C. 1831).

34. *Richardson v. Manning*, 12 Rich. Eq. 454 (S. C. 1866), discussed at length *infra* pp. 364, 365.

35. 3 JARMIN, WILLS \*556 (5th Am. ed. 1881).

36. See 2 SIMES & SMITH, FUTURE INTERESTS § 843 (2nd ed. 1956) in which it is said at page 336: "A primary requirement for the implication of cross remainders is that the preceding gift to the tenants in common must be for

In this situation South Carolina apparently goes beyond the authorities elsewhere and holds that B takes a cross limitation by implication. This result was reached in an early case involving personal property only.<sup>37</sup> The principal cases on the point arose from an early will which contained a gift in the residuary clause of both real and personal property to the testator's two grandsons, Wilson and Thomas, to be equally divided between them and delivered to them at the age of twenty-one, but provided for a limitation over "should they die, leaving no lawful issue." Wilson died under age without leaving issue. Thomas attained the age of twenty-one, conveyed away a portion of the property, and died leaving children. The will was litigated several times, and although the appellate courts of law and equity split as to whether the issue of Thomas took an estate as purchasers, they unanimously held that Thomas took Wilson's moiety by way of an implied cross limitation.<sup>38</sup> This result was reached despite the fact that the first estates were in fee simple<sup>39</sup> and was based on the following reasoning:

The testator has also said that his whole estate, and not a part, shall go over to the ulterior remaindermen; this is saying in other words that the limitation shall not have effect until a failure of issue of both his grandsons, which necessarily implies that they were to take cross-remainders.<sup>40</sup>

However, it is clear that if the property is divided into shares by the testator, so that each share is given over separately upon the happening of some contingency, there is no necessity for implying cross limitations among the first takers. Thus, where property is given "to A and B for life, remainder to their children, and if they or either of them leave no children, then over. . ." and A dies without leaving children, A's share goes over and there is no implied cross limitation to B.<sup>41</sup> A like result was reached in *Seabrook v. Mikell*<sup>42</sup> where a plantation was given "to A and B for life, then

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life or in tail. It cannot be an absolute gift; for it is universally held that cross limitations will not be implied to divest absolute interests. Their purpose is to fill out a gap caused by an interstitial intestacy; and, if the first gift be not for life or in tail but in fee, then no intestacy would occur and any such implied limitations would merely divest a vested interest. . . ."

37. *Cudworth v. Thompson*, 3 DeS. 256, 4 Am. Dec. 617 (S. C. 1811).

38. *Carr v. Jeannerett*, 2 McCord 66, 71-72 (S. C. 1822) (*per* J. Bay); *Carr v. Green*, 2 McCord 75, 83 (S. C. 1822) (*per* Chancellor Waties); *Carr v. Porter*, 1 McCord Eq. 60, 66, 80 (S. C. 1825) (*per* J. Nott for combined Court of Appeals for both law and equity cases).

39. *See Carr v. Jeannerett*, 2 McCord 66, 69-70 (S. C. 1822).

40. *Carr v. Green*, 2 McCord 75, 83 (S. C. 1822) (*per* Chancellor Waties).

41. *Baldrick v. White*, 2 Bailey 442 (S. C. 1831).

42. *Cheves Eq.* 80 (S. C. 1840).

the share of each to go to his children or grandchildren, but to go over. . . if either died under age or without leaving any children surviving him." (Will as construed). Likewise was there no implication of a cross limitation in *Boykin v. Boykin*<sup>43</sup> where land was given to the testator's three sons in equal shares at his wife's death with a limitation over of each son's share to his issue should *any son* die before time for distribution leaving issue him surviving.

D. "To A and B for life, then the share of each to his children; but if either A or B die under age without issue, then to the survivor of them; and if both die without issue, over . . ."

If property were devised or bequeathed by a limitation in the above form, what disposition would be made of his moiety if A should come of age and then die leaving no issue? In other words, will the fact that there is an express cross limitation to the survivor upon one contingency (*i. e.*, death under age without issue) prevent implication of a cross limitation to the survivor upon another contingency (*i. e.*, death without issue after coming of age)? In South Carolina, as in England,<sup>44</sup> the answer seemingly is no: the Court will imply a cross limitation here to prevent a partial intestacy.<sup>45</sup> It may be that in this situation the Court will prevent a partial intestacy from arising by holding that A's estate has an estate per autre vie rather than by holding that cross remainders arise by implication,<sup>46</sup> but the case is nevertheless authority for the proposition that express cross limitations upon one contingency will not prevent implication of cross limitations on another unanticipated contingency.

E. Implication of cross limitations among stocks of issue of first takers.

Two South Carolina cases carry the doctrine of cross limitations by implication to the extent of implying cross limitations among stocks of issue of the first takers, an extension of the doctrine considerably beyond implying cross limitations between the first takers themselves as in the preceding limitations. Though extreme, such a result has been reached in other cases.<sup>46a</sup>

43. 21 S. C. 513 (1884).

44. 3 JARMAN, WILLS \*\*539-542 (5th Am. ed. 1881).

45. See *Seabrook v. Mikell*, Cheves Eq. 80, 89 (S. C. 1840). This was by way of dictum, for the court construed the express limitation to the survivor if one "die under age [and] without issue" to mean if one "die under age *or* without issue."

46. *Richardson v. Manning*, 12 Rich. Eq. 454 (S. C. 1866), discussed *infra* pp. 364, 365.

46a. See 2 SIMES & SMITH, FUTURE INTERESTS § 844 (2nd ed. 1956), headed

In the very early case of *Sams v. Mathews*<sup>47</sup> the testator had divided his personal property, consisting largely of slaves, into six shares, one for each of his children, and had given one share to his two grandchildren by a deceased child substantially as follows: "to my grandchildren A and B equally divided for life, then the share of each to the issue of his body; for default of such issue of either A or B, his share to the survivor for life, remainder to the issue of the survivor's body; and for default of issue of both A and B, to my right heirs." But as the facts developed, there was a hole in the limitation despite its elaborate and apparently all-inclusive provisions. A died first, leaving a daughter; B later died without issue. The limitation over to the testator's right heirs could not take effect because both A and B had not died without issue. Despite the fact that the will did not provide for the situation where the survivor died without issue, the Court held that A's daughter took the entire estate after B's death by way of an implied cross remainder, thus giving effect to the testator's intention to make an equal division per stirpes among his six children and to keep each share among the lineal descendants of each child until the line became extinct.

In *Buist v. Williams*<sup>48</sup> a somewhat similar situation was presented. For a consideration of love and affection and the release by his three grandchildren of their claims against him concerning some slaves, a settlor deeded land by a trust deed substantially as follows: "in trust for my three grandchildren, A, B and C, for life, then the share of each to his issue living at his death; but should either of them die leaving no issue him surviving, then his share to the survivor or survivors; and if all three die without issue them surviving, over. . . ." Here also the unprovided for, overlooked contingency occurred. A died childless; B died leaving two children. C sued for a construction of the instrument, alleging that she also would die childless and contending that the property would then go as intestate property of the settlor, since upon her (C's) death there would be no survivor of the grandchildren and the limitation over could not take effect because one grandchild had died leaving issue him surviving. The Court rejected C's contention and held that upon C's death, B's issue which survived C would take the entire property, for only the three grandchildren had furnished consideration for the conveyance and hence the benefit was intended solely for them and their issue, not for the testator's heirs.

"Implication of Gifts to Complete the 'General Plan' of the Testator", and the cases there discussed and cited.

47. 1 DeS. 127 (S. C. 1785).

48. 88 S. C. 252, 70 S. E. 817 (1911).

## F. Implication of cross remainders for life:

"To A and B for life, and upon the death of both, over to C."

Suppose that Blackacre is devised by a limitation like the above or by a similar limitation which is construed as manifesting an intention that C not take Blackacre until the survivor of A and B dies. Then if A dies before B, what disposition is to be made of the rents and profits from the death of A until the death of B?

According to Professor Powell,<sup>49</sup> assuming that the limitation is construed to mean that Blackacre is not to go over to C until both A and B are dead, there are four possible solutions to the problem which a court may adopt: 1) There is a partial intestacy as to A's moiety, which passes under the residuary clause of the will or as intestate property. 2) A and B are joint tenants for life with right of survivorship; therefore B takes A's moiety by virtue of the *jus accrescendi*. 3) Each life tenant has a life estate measured by two lives, i. e. until the survivor of A and B dies; therefore, when A dies, his estate has an estate per autre vie which passes as those estates do.<sup>50</sup> 4) A and B are tenants in common of life estates with cross remainders implied between themselves; therefore A's moiety goes to B.

Since the *jus accrescendi* (right of survivorship) has been abolished by statute as an incident of the estate of joint tenancy in South Carolina,<sup>51</sup> we may reject the second alternative above at the outset. And due to the strength of the presumption against intestacy, the Court has rejected the first alternative.<sup>52</sup> Therefore we are left with a choice between the third and fourth alternatives.

The English rule<sup>53</sup> and probably the majority rule in the United States is that cross remainders between the tenants in common for life will be implied<sup>54</sup> and thus B in our hypothetical example would take the entire rents and profits until his death. Dicta in two South Carolina cases indicate such a result. In *Baldrick v. White* the Court said:<sup>55</sup> "If property were given to two for life, and at their deaths to their children, if both should die without leaving children, then

49. 2 POWELL, REAL PROPERTY § 324 (1950).

50. See note 58 *infra*.

51. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 19-55.

52. *Richardson v. Manning*, 12 Rich. Eq. 454, 458-461 (S. C. 1866) (decree of circuit chancellor).

53. 3 JARMAN, WILLS \*554 (5th Am. ed. 1881).

54. 33 AM. JUR., *Life Estates, Remainders, and Reversions* § 83 (1941); 1 RESTATEMENT, PROPERTY § 115 (1936); 5 AM. LAW PROP. § 21.35 (1952); 2 POWELL, REAL PROPERTY § 324, p. 707 (1950); 2 SIMES & SMITH, FUTURE INTERESTS § 843 pp. 333-334 (2nd ed. 1956); 2 PAGE, WILLS §§ 930, 1125 (3rd Lifetime ed., 1954 Cum. Supp.); ANNOT., ANN. CAS. 1916B 713.

55. 2 Bailey 442, 445 (S. C. 1831).

over, here would be cross remainders [between the life tenants] by necessary implication; nothing being given to the remaindermen over, until the death of both without children." This statement was repeated in *Seabrook v. Mikell*.<sup>56</sup>

But, although the point is not entirely free from doubt, the rule in South Carolina is probably otherwise and is that an estate per autre vie results. In *Richardson v. Manning*<sup>57</sup> the residue of the testator's estate, both real and personal, was given to his executors in trust to keep it together "during the joint lives of my two brothers, John P. Richardson and Thomas C. Richardson, and that they divide the net proceeds of said real and personal estate annually between my said two brothers, share and share alike. . . . At the death of my two brothers . . . the whole of the real and personal estate . . . [is to] be divided between my three nephews. . . ." John P. Richardson, one-time governor of South Carolina, died first leaving his brother Thomas surviving him. Thomas filed a bill in equity in his capacity as executor and trustee against the testator's distributees and heirs at law, the executors of his brother John, and against the remaindermen under the will to have it determined who was entitled to the net proceeds of the trust after John's death. The Court construed the trust estate to endure for the lives of both John and Thomas; hence the limitation over could not take effect until the death of the survivor. The Court held that no cross remainders between the life tenants were to be raised by implication, for there was no necessity for it; but rather that the estate of John, the deceased life tenant, had an estate per autre vie which passed to his executors in the absence of a devise of it by him and in the absence of a special occupant.<sup>58</sup>

The reason given by the circuit chancellor for not implying cross

56. Cheves Eq. 80 (S. C. 1840).

57. 12 Rich. Eq. 454 (S. C. 1866). According to SHEPARD'S SOUTH CAROLINA CITATIONS, this case has never been cited.

58. The manner in which an estate per autre vie passes is regulated by statute. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 19-202 provides that an estate for the life of another may be devised. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 19-708, which was the twelfth section of the original Statute of Frauds, provides in substance that if it is not devised, it goes to the special occupant, if any, and is chargeable in his hands as assets by descent; and if there be no special occupant, it passes to the life tenant's executors or administrators and is assets in their hands.

BALLANTINE, LAW DICTIONARY p. 1220 (2nd ed. 1948) thus defines a "special occupant": "Where land has been granted to a man and his heirs for the life of another, and the grantee dies before the cestui que vie, the grantee's heir may enter and occupy the land as one having a special and exclusive right to do so; not by right of inheritance, but by the very terms of the grant. The heir who thus goes into possession is called special occupant. See 2 Bl. Comm. 259."

remainders between the life tenants was that where a testator manifests his intention to give the whole property over at one and the same time as one estate, the court would imply cross remainders to bring the estate together, but here the estate was held together in the trustees until the death of the surviving life tenant and therefore there was no necessity for implying cross remainders.<sup>59</sup> The lower court thus seemed to draw a distinction between legal and equitable life estates and to hold that cross remainders will be implied between the life tenants where their interests are legal, but that where they are equitable, an estate per autre vie results. However, the holding of the Court of Appeals was much broader and indicates that in no event would cross remainders be implied.<sup>60</sup> The Court further indicated that the same rules of descent and conveyance apply to legal estates and to the interests of cestuis que trust.<sup>61</sup> This indicates quite clearly that the same constructional rule should apply to legal and equitable life estates as to whether cross remainders will be implied or an estate per autre vie will result, for the greater includes the lesser. Indeed, there seems to be no logical reason to draw a distinction between legal and equitable life estates in this situation, for in either case the primary inquiry is the same: what is to be the disposition of the intermediate income between the death of the first life tenant and the survivor?

Other jurisdictions have reached the same result as *Richardson v. Manning* in cases involving the intermediate income of trust funds when one of two or more life tenants has died.<sup>62</sup>

#### G. Implication of cross limitations in deeds

The rule has often been stated in the cases that although cross remainders will be raised by implication in a will, they cannot be in a deed.<sup>63</sup> The *Restatement*, however, takes the position that cross

59. *Richardson v. Manning*, 12 Rich. Eq. 454, 463-464 (S. C. 1866).

60. *Id.* at 480-481: "There is nothing in the cases mentioned in the decree, nor in other cases that have been cited here, nor in the learning applicable to joint tenants and tenants in common, nor in the scheme of the will, nor in the motives which have been attributed to the testator, that would warrant a decision, either that the estate of the trustees was determined by the death of one brother, or that cross-remainders between the two brothers were raised by implication, so that the moieties of both are now united for the benefit of the survivor." (emphasis added).

61. *Id.* at 483: "[W]e will consider the case . . . as subject, being a trust, to the same rules of descent and conveyance which would apply to it if it was a legal estate."

62. *ANNOT.*, 140 A. L. R. 841, 854-858 (1942).

63. 26 C. J. S., *Deeds* § 113 p. 930 n. 79 (1956); 18 C. J., § 290 (1919); 33 AM. JUR., *Life Estates, Remainders, and Reversions* § 84 (1941); *ANNOT.*, *ANN. CAS.* 1916B 713, 717.

limitations will be implied in both deeds and wills.<sup>64</sup> It points out that the common law rule not allowing the implication in deeds is based on very weak authority and on faulty reasoning.<sup>65</sup> The principal reason given for the distinction is the presumption against intestacy in the case of a will. However, this presumption is balanced by the contrary presumption that a will is not to disinherit the heir.<sup>66</sup> Moreover, the rule that a deed is to be construed most strongly against the grantor<sup>67</sup> provides sufficient reason for making the implication in deeds. The English equity rule is that the implication will be made in deeds of marriage settlements.<sup>68</sup> Thus, some modern authority favors making the implication in deeds.<sup>69</sup>

While the point seems never to have been raised in South Carolina, it is quite possible that this state would follow the modern liberal rule and make the same implications of cross limitations which would be made in cases of wills in cases of deeds, for one of the most extreme cases on implied cross limitations in this state involved a trust deed.<sup>70</sup> However, since a more liberal rule of construction is applied to trust deeds than to others,<sup>71</sup> it might be that cross limitations will not be implied in deeds other than trust deeds.<sup>72</sup>

### III. REMAINDERS IMPLIED TO CHILDREN, ISSUE, HEIRS OF THE BODY AND THE LIKE AS PURCHASERS

Probably the most difficult constructional problems of all involve the word "issue." And the area of estates by implication is no exception. The fairly numerous South Carolina cases involving the problem of estates by implication to children, issue, heirs of the body and the like may be grouped into three classes of limitations: A. "to X, but if he die without issue, over . . ."; B. "to X for life, but if he die without issue, over . . ."; C. "to X and his issue, but if he

64. 1 RESTATEMENT, PROPERTY § 115 comment a (1936).

65. Monograph, *Implication of Cross Remainders in Deeds*, 1 RESTATEMENT, PROPERTY, Appendix 16 (1936).

66. Recently recognized in this state in *Rikard v. Miller*, 231 S. C. 98, 109, 97 S. E. 2d 257 (1957), discussed in *Karesh, Survey of South Carolina Law: Wills*, 10 S. C. L. Q. 159, 173-174 (1957).

67. See *Coleman v. Gaskins*, 165 S. C. 301, 304, 163 S. E. 790 (1932) and the cases therein cited.

68. *Twisden v. Lock*, Amb. 663, 27 Eng. Rep. 430 (Chancery 1768); *In re Stanley's Settlement*, [1916] 2 Ch. Div. 50.

69. See also 33 AM. JUR., *Life Estates, Remainders, and Reversions* § 84 (1941).

70. *Buist v. Williams*, 88 S. C. 252, 70 S. E. 817 (1911) (cross limitations implied between stocks of issue of first takers).

71. See *First Carolinas Joint Stock Land Bank v. Deschamps*, 171 S. C. 466, 477-480, 172 S. E. 622 (1934) (Rule in *Shelley's Case*). See also Means, *op. cit. supra* note 2, 5 S. C. L. Q. 313, 328-337 (1953) (words of inheritance).

72. See 2 SIMES & SMITH, *FUTURE INTERESTS* § 843 pp. 335-336 (2nd ed. 1956).



die without issue, over. . . ." In considering the South Carolina law on such limitations as these, it should be noted that two separate questions are really involved: 1) Does a remainder arise by implication? 2) Is a fee simple conditional estate created?

A. "To X, but if he die without issue, over . . ."

If land were devised by the above limitation, what disposition should be made if X died *leaving issue*? A plausible argument might be made that the testator's unexpressed intention was that X's issue take the remainder and that the court should imply a remainder to effectuate the testator's intention. A small minority of American cases have so held.<sup>73</sup> However, probably the English rule<sup>74</sup> and certainly by far the American majority rule is that no such remainder is to be implied in this situation for the reason that since the estate in X is a fee simple, to imply a remainder would be in effect to construe the limitation to X as a life estate with alternative contingent remainders.<sup>75</sup> Therefore, some cases in construing such a limitation lay stress on whether the first estate is a fee simple expressly, as "to X and his heirs . . .", or a fee simple only by virtue of statute or construction.<sup>76</sup>

On the first question, the South Carolina law is entirely clear: no remainder arises by implication in this situation. The point was settled by the early and leading case of *Carr v. Porter*.<sup>77</sup> The testator had left the residue of his estate "to be equally divided between my grand sons Willson and Thomas, and delivered to them at the age of twenty-one years; but should they die, leaving no lawful issue," then over. Willson died under age without issue; Thomas attained twenty-one and thereafter died leaving several children. In the extensive litigation in which the will was involved, the Court of Errors (law) held that no remainder would be implied;<sup>78</sup> the Court of Appeals (equity) reached a contrary result, following its own precedent in a prior unreported case involving the same will,<sup>79</sup> and

73. 22 A. L. R. 2d 177, 229 (1952).

74. ANNOT., 22 A. L. R. 2d 177, 234-238 (1952). Ex parte Rogers, 2 Madd. 449, 56 Eng. Rep. 400 (V. C. 1816) is contra, but has been disapproved in later cases.

75. 1 SIMES & SMITH, FUTURE INTERESTS § 532 p. 512 (2nd ed. 1956), 2 *id.* § 842 p. 330. ANNOTS., 22 A. L. R. 2d 177, 209 *et seq.* (1952); 51 L. R. A. (N. S.) 485, 489 (1914).

76. See ANNOTS., 22 A. L. R. 2d 177, 224-226 (1952); 51 L. R. A. (N. S.) 485, 493-496 (1914).

77. 1 McCord Eq. 60 (S. C. 1825).

78. Carr v. Jeannerett, 2 McCord 66 (S. C. 1822, Jan. term).

79. Grant v. Thompson, referred to in 2 McCord 75, 77 (S. C. 1822).

held that Thomas took only a life estate with contingent remainder to his issue by implication.<sup>80</sup> Thereafter, the Court of Appeals was created and vested with appellate jurisdiction in both law and equity cases; it followed the law court precedent in holding that no remainder would be implied to the issue, and laid down the general principle "[t]hat an estate by implication is never allowed to issue as purchasers."<sup>81</sup> However, that general rule was stated more broadly than the facts of the case warranted, for the Court said that an estate could never arise by implication except from necessity,<sup>82</sup> and that here no necessity existed. The principal reasons for the decisions were that since the first estate was in fee simple, it was not open to the Court to construe it to be a mere life estate;<sup>83</sup> and also that if it were construed to be a life estate with contingent remainder to issue of the life tenant, the Rule in Shelley's Case would apply to give the life tenant a fee simple conditional or fee tail,<sup>84</sup> and hence the remaindermen could not take as purchasers in any event.

The result in *Carr v. Porter* had been reached in an earlier case involving personal property,<sup>85</sup> and has been followed in later cases involving personal property<sup>86</sup> and real property.<sup>87</sup> The reasons have been admirably stated by Chancellor Dargan:<sup>88</sup>

In this case the issue of A. do not take as purchasers, because nothing is intended to be granted to them in the words of the direct gift. Their existence or non-existence at the death of A., like any other contingent event, is simply made the condition upon which the remainder to B. depends.

As to the second question, whether a fee simple conditional estate is created in this situation, despite a dictum in *Carr v. Porter* to the contrary,<sup>89</sup> the later cases are quite clear that a fee simple conditional estate does not arise.<sup>90</sup> Rather, a fee defeasible estate is created,

80. *Carr v. Green*, 2 McCord 75 (S. C. 1822, Nov. term).

81. *Carr v. Porter*, 1 McCord Eq. 60, 86 (S. C. 1825).

82. *Id.* at 79.

83. *Id.* at 76-77.

84. *Id.* at 81.

85. *Cudworth v. Thompson*, 3 DeS. 256, 4 Am. Dec. 617 (S. C. 1811).

86. *Manigault v. Holmes*, Bailey Eq. 298 (S. C. 1829); *Hay v. Hay*, 4 Rich. Eq. 378 (S. C. 1852); *O'Dom v. Davis*, 7 Rich. 536 (S. C. 1853). *See* *Waller v. Ward*, 2 Speers 786 (S. C. 1844); *McLure v. Young*, 3 Rich. Eq. 559, 578 (S. C. 1851). *See also* *Folk v. Varn*, 9 Rich. Eq. 303 (S. C. 1857).

87. *Shaw v. Erwin*, 41 S. C. 209, 19 S. E. 499 (1894); *Drummond v. Drummond*, 146 S. C. 194, 143 S. E. 818 (1928).

88. *Hay v. Hay*, 4 Rich. Eq. 378, 382 (S. C. 1852).

89. 1 McCord Eq. 60, 81 (S. C. 1825). *See also* *Cudworth v. Thompson*, 3 DeS. 256, 259, 4 Am. Dec. 617 (S. C. 1811) (personal property).

90. *Bedon v. Bedon*, 2 Bailey 231 (S. C. 1831); *Edwards v. Edwards*, 2 Strob. Eq. 101 (S. C. 1848) (deed).

defeasible upon the first taker's dying without issue.<sup>91</sup> The general principle has often been stated that a fee conditional cannot arise by implication.<sup>92</sup>

B. "To X for life, but if he die without [issue], over . . ."

Suppose land were devised to X for life by the above limitation with a limitation over in the event that he died without children, issue or heirs of his body. Then if X died leaving persons fitting that description, would they take a remainder by necessary implication?

Many courts, probably a majority in the United States, hold that a remainder arises by implication on the ground that this is an obvious case of an incomplete testamentary disposition which the court will complete by supplying a remainder in accordance with the testator's unexpressed though probable intention.<sup>93</sup> The English cases take a hybrid position and hold that no remainder will be implied in this situation ". . . unless additional features of the will render that conclusion necessary."<sup>94</sup>

However, South Carolina clearly and uniformly holds that no remainder will be implied here.<sup>95</sup> In one will which was twice litigated the limitation was "to X for life, and if he die without heirs of the body," then over (as construed). The ingenious argument was advanced that a remainder should be implied in the heirs of A's body which the Rule in Shelley's Case converted into a fee simple conditional in the life tenant. The Court rejected this argu-

91. *Bedon v. Bedon*, 2 Bailey 231 (S. C. 1831).

92. *See, e. g.*, *Adams v. Chaplin*, 1 Hill Eq. 265, 282 (S. C. 1833); *Barber v. Crawford*, 85 S. C. 54, 59, 67 S. E. 7 (1910); *Bomar v. Corn*, 150 S. C. 111, 116, 147 S. E. 659 (1929); *Prudential Ins. Co. v. Monk*, 165 S. C. 111, 114, 162 S. E. 911 (1932).

93. 1 Simes & Smith, *FUTURE INTERESTS* § 532 (2nd ed. 1956); 2 *id.* § 842; 3 *RESTATEMENT, PROPERTY* § 272 (1940); 33 AM. JUR., *Life Estates, Remainders, and Reversions* § 63 (1941); ANNOT., 22 A. L. R. 2d 177, 186-195 (1952).

94. ANNOT., 22 A. L. R. 2d 177, 203-204 (1952).

95. *Lawrence v. Burnett*, 109 S. C. 416, 96 S. E. 144 (1918), s. c. 116 S. C. 347, 108 S. E. 142 (1921) ("die without child"); *Wood v. Wood*, 132 S. C. 120, 128 S. E. 837 (1925) (die without "surviving legitimate children"). *See Manigault v. Holmes*, Bailey Eq. 298 (S. C. 1829) (personal property) (die without issue); *Addison v. Addison*, 9 Rich. Eq. 58, 61 (S. C. 1856) (real and personal property) (construed die without issue) *Shaw v. Erwin*, 41 S. C. 209, 19 S. E. 499 (1894) (die without "child or children"); *Monk v. Geddes*, 159 S. C. 86, 156 S. E. 175 (1930) (die without "heirs" construed die without "heirs of the body" or "children"); *Prudential Ins. Co. v. Monk*, 165 S. C. 111, 162 S. E. 911 (1932) (same will as above). *See also Davis v. Hodge*, 102 S. C. 178, 183, 86 S. E. 478 (1915) ("die without heirs or children of their own body"); *Murchison Nat. Bank v. McInnis*, 153 S. C. 382, 389, 150 S. E. 895 (1929) (dissent) ("die without issue"). *Contra: Harkey v. Neville*, 70 S. C. 125, 135, 49 S. E. 218 (1904) (dictum, criticized in concurring opinion at p. 137).

ment and held that A took only a life estate and that no remainder would be implied in the heirs of his body.<sup>96</sup>

As to whether a fee simple conditional estate is created in X, the matter is somewhat more complicated. In *Carr v. Porter* the Court said by way of a dictum that X would take a fee simple conditional in this situation, by analogy to the English fee tail estate.<sup>97</sup> This result was reached in *Addison v. Addison*.<sup>98</sup> The testator there had died in 1850 leaving real and personal property to his son X for life "[b]ut if my said son . . . should die without leaving any child or children", then over. The will contained no residuary clause. The son X died leaving a child G, so the limitation over could not take effect. The Court refused to raise a remainder by implication in G, the life tenant's son. The situation was thus presented that G could not possibly take unless his father had taken a fee simple conditional estate. The Court, however, relied heavily on the presumption against intestacy and held that the limitation over should be construed as upon an *indefinite failure of issue*, despite the word "child or children" which would normally lead to the definite failure of issue construction; hence the estate in X was enlarged from a life estate into a fee conditional in the land and an absolute estate in the personal property, which passed *per formam doni* to his child in the case of the land and by inheritance as to the personalty.<sup>99</sup>

However, the result reached in *Addison v. Addison* was changed by the Act of 1853<sup>100</sup> which adopted the definite failure of issue construction. That case was in effect overruled by a case subsequent to the Act. In *Harkey v. Neville*<sup>101</sup> land was devised to A for life, then to B for life, and in case of B's death without issue, over. The Court said that the Act of 1853 required the limitation to be read as it had said ". . . to B for life, and in case of her death without issue living at the time of her death," then over; hence the Court held that a fee simple conditional estate was not created in B.

It is open to some doubt as to how far the Act of 1853 has changed

96. *Monk v. Geddes*, 159 S. C. 86, 156 S. E. 175 (1930); *Prudential Insurance Co. v. Monk*, 165 S. C. 111, 162 S. E. 911 (1932).

97. 1 McCord Eq. 60, 75-76 (S. C. 1825), relying on *Knight v. Ellis*, 2 Bro. C. C. 570, 29 Eng. Rep. 312 (Ch. 1789).

98. 9 Rich. Eq. 58 (S. C. 1856).

99. *Id.* at 63 the Court stated the reasons for the result.

100. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 57-3. "Whenever in any deed or other instrument in writing, not testamentary, or in any will of a testator, an estate, either in real or personal property, shall be limited to take effect on the death of any person without heirs of the body, issue or issue of the body, or other equivalent words, such words shall not be construed to mean an indefinite failure of issue, but failure at the time of the death of such person."

101. 70 S. C. 125, 49 S. E. 218 (1904).

the common law preference for the indefinite failure of issue construction. The scholars suggest that the statute merely creates a rebuttable presumption and that the common law indefinite failure of issue construction would apply if the testator used rather explicit language to that effect.<sup>102</sup> No South Carolina cases on this precise point have been found; the Court seems to assume that it is bound by the definite failure of issue construction.

One case may give difficulty in this area. The limitation in *Bonds v. Hutchison*<sup>103</sup> seems indistinguishable from that in *Harkey v. Neville*,<sup>104</sup> which was cited to the Court,<sup>105</sup> but the Court in the former case nevertheless held that a fee simple conditional estate was created, and not a mere life estate. The grounds for such a holding were not made entirely clear, but two alternative grounds have been suggested:<sup>106</sup> 1) The Court applied the indefinite failure of issue construction to enlarge the life estate into a fee conditional; 2) the Court implied a remainder to the bodily heirs of the life tenant and applied the Rule in Shelley's Case to enlarge the life estate into a fee conditional. The first alternative would seem to be precluded by the Act of 1853 and by the case of *Harkey v. Neville*. The second alternative is believed by the leading textwriters<sup>107</sup> and by this writer to be the true grounds for the decision, since the cases which the Court relied on most heavily involved the Rule in Shelley's Case.<sup>108</sup> If this be the ground, the case is opposed to the holding in prior cases to the effect that no remainder will be implied in this situation to make the Rule applicable and thus enlarge the life estate into a fee conditional.<sup>109</sup> Moreover, the opinion does not indicate when the will in question was executed, whether before or after October 1, 1924 at which time the Rule in Shelley's Case was abolished in certain respects and particulars.<sup>110</sup> The case is contrary to the precedents and seems itself extremely weak as a precedent;

102. Warren, *Gifts Over on Death Without Issue*, 39 YALE L. J. 332, 340 (1930), cited and adopted in 1 SIMES & SMITH, FUTURE INTERESTS § 526 p. 497 (2nd ed. 1956).

103. 199 S. C. 197, 18 S. E. 2d 661 (1942).

104. 70 S. C. 125, 49 S. E. 218 (1904).

105. See synopsis of argument for respondents, *Bonds v. Hutchison*, 199 S. C. 197, 198 (1942).

106. See 1 SIMES & SMITH, FUTURE INTERESTS § 532 p. 512-513 fn. 94 (2nd ed. 1956).

107. *Id.* § 531 p. 509 fn. 85.

108. *I. e.*, *Dukes v. Shuler*, 185 S. C. 303, 194 S. E. 817 (1938); *Lucas v. Shumpert*, 192 S. C. 208, 6 S. E. 2d 17 (1939).

109. Cases cited in note 96 *supra*.

110. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 57-2.

it may fall within that class of cases thus characterized by Mr. Justice Cothran:<sup>111</sup>

. . . it was manifestly an instance of those controversies as to the result of which both parties are agreeable, and which they are anxious to have consummated, a class of cases which are extremely dangerous, and of little weight as precedents.

C. "To X and his issue, but if he die without issue, over . . ."

A line of cases beginning with *Henry v. Stewart*<sup>112</sup> which construe limitations of the type above have firmly established an apparent exception to the general rule that remainders are not to be implied to issue as purchasers. Thomas Bell bequeathed slaves "to X [his daughter] and the lawful issue of her body; and if she die without lawful issue of her body surviving her, over." X died leaving three children surviving her and the question arose as to what estate, if any, they took in the slaves. The Court held that X took only a life estate with remainder to her issue surviving her as purchasers.<sup>113</sup>

The Court's reasoning seems to be essentially that since the word "issue" was used in the direct gift, the testator clearly intended some benefit to the issue. If it were real property, a gift to one and his issue would create a fee tail in England [a fee simple conditional in South Carolina] which the issue would inherit *per formam doni* and thus take the benefit. But the same language which would create such an estate in land creates an absolute estate in the first taker in personal property. Hence, the Court would defeat the testator's intention to benefit the issue if it applied the strict constructional rules which govern limitations of real property to those of personal property. So where personal property is involved, it will seize on any language which indicates that "issue" was not used in its broad sense but rather in the restricted sense of "issue living at death." The limitation over will be given that effect, and will restrict the generality of "issue" as used in the primary gift. Thus, the limitation over upon death without issue surviving cuts down the first estate to a life estate, rather than creating an absolute interest, with a remainder to issue living at the life tenant's death.<sup>114</sup>

For the Court to reach this result, it must find that in a gift "to

111. *Thomson v. Ehrlich*, 148 S. C. 330, 348, 146 S. E. 149 (1928), discussing *Barbot v. Thompson*, 94 S. C. 3, 77 S. E. 716 (1913).

112. 2 Hill 328 (S. C. 1834).

113. *Henry v. Stewart*, 2 Hill 328 (S. C. 1834); *Henry v. Archer*, Bailey Eq. 535 (S. C. 1837).

114. See *Henry v. Stewart*, *id.* at 331-332; *Henry v. Archer*, *id.* at 542-543, 562-563.

X and his issue", "issue" means "issue living at his death."<sup>115</sup> It thus depends upon the limitation over being on a definite failure of issue. In some cases following what we may term the Rule of Bell's Will the limitation over has been expressly upon failure of issue living at the first taker's death.<sup>116</sup> In others the Court has had to resort to other language to reach that construction, as in those cases where the limitation over is to a survivor of the first taker upon failure of his issue.<sup>117</sup>

All of the cases applying the Rule of Bell's Will to limitations of personal property have been based on limitations effective before the Act of 1853<sup>118</sup> took effect which abolished the indefinite failure of issue construction. That statute should have the effect of creating a life estate with a remainder any time personal property is limited to one and his issue with a limitation over if he die without issue.<sup>119</sup>

It should be noted that the Rule of Bell's Will has been applied both to deeds of personal property<sup>120</sup> as well as to wills.<sup>121</sup>

However, later cases have placed two restrictions upon the operation of the rule. First, not only must the limitation over be valid under the Rule Against Perpetuities, i. e. be upon a definite failure of issue, but it must also otherwise be an effectual limitation over. Thus in *Hay v. Hay*<sup>122</sup> where personal property was limited "to X and the heirs of her body, and if she die without living issue of her body, then over to the nearest heirs of my body by my mother's lineage," the Court held that although the limitation over was upon a definite failure of issue, it was void for uncertainty since a limitation over to such a group of persons was meaningless and hence X took an absolute estate. Second, the limitation over must be solely upon the contingency of a failure of issue; if it is upon failure of issue coupled with another contingency or with another alternative contingency, the first taker takes an absolute estate. Thus, in *Waller v. Ward*<sup>123</sup> where personal property was bequeathed "to X and his

115. See, e. g., the references to "Bell's will" in *Hay v. Hay*, 3 Rich. Eq. 384, 386 (S. C. 1851), 4 Rich. Eq. 378, 387 (S. C. 1852); *Moore v. Paul*, 7 Rich. Eq. 358, 369 (S. C. 1855).

116. Cases cited in note 113 *supra*; also *McLure v. Young*, 3 Rich. Eq. 559 (S. C. 1851).

117. *Templeton v. Walker*, 3 Rich. Eq. 543 (S. C. 1850); *Nix v. Ray*, 5 Rich. 423 (S. C. 1852); *Mendenhall v. Mower*, 16 S. C. 303 (1881).

118. See note 100 *supra*.

119. See *Mendenhall v. Mower*, 16 S. C. 303, 316 (1881).

120. Cases cited in note 117 *supra*.

121. *Henry v. Stewart*, 2 Hill 328 (S. C. 1834); *Henry v. Archer*, Bailey Eq. 535 (S. C. 1837); *McLure v. Young*, 3 Rich. Eq. 559 (S. C. 1851); *Simons v. Bryce*, 10 S. C. 354 (1878).

122. 4 Rich. Eq. 378 (S. C. 1852).

123. 2 Speers 786 (S. C. 1844).

issue, and if he die under age and without issue surviving him, then over," the Court held that the Rule in Bell's Will applied only if the limitation over and issue were alternatives and that here X took an absolute interest.<sup>124</sup> The case has been followed.<sup>125</sup>

Thus, the Rule of Bell's Will is well established as to the construction of limitations of personal property. And the Court has considered devises of real property as if it were applicable.<sup>126</sup> And a strong dictum in *Mendenhall v. Mower*<sup>127</sup> makes it applicable to both, saying that there is generally no difference in construing limitations of real and personal property<sup>128</sup> and that in this situation it would make no difference.<sup>129</sup> However, in that case although the Court considered it as involving real property all the way through the opinion, at the end it said that it was really personal property as the order of the circuit court settled.<sup>130</sup> All the cases involving limitations of this type of real property have held that a limitation "to X and his issue, but if he die without issue living at his death" creates a fee simple conditional in X, with nothing in his issue as purchasers.<sup>131</sup> Of course, this is based on a finding that the word "issue" was used as a word of limitation.<sup>132</sup> But in a limitation to one and his issue, whether by deed<sup>133</sup> or will<sup>134</sup> "issue" is prima facie used as a word of limitation and not of purchase and a fee conditional results unless other language shows that "issue" was used as a word of purchase.<sup>135</sup> And in a limitation like that under discussion, it is hard to see how "issue" could be used except as a word of limitation.

Thus, it seems clear that the Rule of Bell's Will does not apply to limitations of real property so as to create a remainder in the issue as purchasers. The Court construes the primary gift and the gift over entirely separate and apart from each other,<sup>136</sup> so that

124. *Id.* at 794-795 the Court stated the result would be the same whether the limitation over were on the contingency that X "die under age or without leaving issue" or "die under age and without leaving issue".

125. *O'Dom v. Davis*, 7 Rich. 536 (S. C. 1853).

126. *See DeHay v. Porcher*, 1 Rich. Eq. 266 (S. C. 1845), which, however, did not follow the Rule in Bell's Will.

127. 16 S. C. 303 (1881).

128. *Id.* at 309.

129. *Id.* at 316.

130. *Ibid.*

131. *Hay v. Hay*, 3 Rich. Eq. 384 (S. C. 1851); *Bethea v. Bethea*, 48 S. C. 440, 26 S. E. 716 (1897); *Federal Land Bank of Columbia v. Wells*, 172 S. C. 1, 172 S. E. 707 (1934). *See Selman v. Robertson*, 46 S. C. 262, 267, 24 S. E. 187 (1896); *Mattison v. Mattison*, 65 S. C. 345, 43 S. E. 874 (1903).

132. *See Federal Land Bank of Columbia v. Wells*, 172 S. C. 1, 172 S. E. 707 (1934).

133. *See Means, op. cit. supra* note 2, 5 S. C. L. Q. 313, 350, n. 135.

134. *Id.* n. 134.

135. *Id.* at 351, n. 136.

136. *See Hay v. Hay*, 3 Rich. Eq. 384, 390 (S. C. 1851).



the Act of 1853 restricting the generality of "die without issue" in the limitation over has no effect whatsoever on the construction of the word "issue" in the primary gift.<sup>137</sup>

HENRY SUMMERALL, JR.

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137. *Bethea v. Bethea*, 48 S. C. 440, 443, 26 S. E. 716 (1897).