Future Interests: Express and Implied

Conditions of Survival

Part I†

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THIS ARTICLE, appearing in two installments, treats what is probably the most litigated question in the law of future interests: whether the interest of a beneficiary whose right of possession is postponed is dependent upon his survival until the date of possession. This is a problem which is frequently mishandled by draftsmen and sometimes by the courts, to which it ultimately comes.

Despite the frequency with which the survivorship question arises, it is still often overlooked until the death of the remainderman in question,

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and this typically occurs after the testator's death when there is no chance to have the will amended. The trustee would be in as good a position—admittedly a poor one—as anyone to guess what the testator would have intended had the question been brought to his attention. However, the necessity of obtaining a binding determination frequently leads to court where the determination is expressed in terms of some generally acknowledged rules of construction, the choice of which often depends upon which result is to be supported. Because the court is forced to make a decision which no one is well equipped to make, because almost inevitably there is something indicating the opposite result in the language of the instrument and the surrounding circumstances, and because there are acknowledged rules of construction pointing the other direction, the unsuccessful litigants will be dissatisfied and unconvinced, often resulting in the cost of an appeal. In states such as California, which have an extra appellate level, further expense and delay may be necessary before the last word can be handed down. This final step can result in significant clarification and improvement in constructional rules,¹ but it does not always do so.²

An article by Professor Ferrier in this *Review* nine years ago³ pointed up some of the local problems in the field. The present article is not confined to California authorities, but seeks to suggest some solutions which would be generally acceptable. However, there are California cases which demonstrate most of the problems, and these will be examined. Particular attention will be given to the impact of two significant recent California Supreme Court cases, *In re Stanford's Estate*,⁴ decided in 1957, and *In re Ferry's Estate*,⁵ now pending. The latter case will be treated in the material covered in the second installment of this article. It is also hoped that, in reviewing questions relating to survivorship, a consideration of principles bearing upon their handling by courts and some comments on drafting will contribute to the solution of these recurring problems.

The scope of this article is limited to the question of whether an instrument requires a beneficiary who is living at the effective date of the deed or will also to be living at some subsequent date. The problem of *lapse*, relating to a beneficiary's death before the testator, is a quite different one and is not here discussed. It might additionally be noted that these problems

¹ See *In re Stanford's Estate*, 49 Cal. 2d 120, 315 P.2d 681 (1957), discussed *infra* at note 40.

² See *In re Easter's Estate*, 24 Cal. 2d 191, 148 P.2d 601 (1944), discussed *infra* at note 75; *In re Blake's Estate*, 157 Cal. 448, 108 Pac. 287 (1910), discussed in the next installment.

³ Ferrier, *Implied Conditions of Survivorship in Gifts of Future Interests in California*, 40 CALIF. L. REV. 49 (1952).

⁴ 49 Cal. 2d 120, 315 P.2d 681 (1957).

⁵ However decided, the question presented (whether an interest dependent upon a condition unrelated to survival is also impliedly subject to a condition of survival) makes the case important. The district court of appeal had held survival was not required. 151 A.C.A. 798, 8 Cal. Rptr. 585 (1960).

are not really concerned with technical vestedness, as the term "vested" is generally used in treatises on the law of property and trusts. Despite the tendency of courts to confuse the issues of vesting and survival requirements, the fact that an interest is technically vested or contingent does not, or at least ought not, to resolve the question of whether a requirement of survivorship is present. Such a requirement may be a condition precedent, making the interest contingent, but it may also be a condition subsequent to an interest which is vested, making the interest defeasible. Furthermore, an interest could be subject to one condition precedent, making it a contingent interest, but not also subject to a condition of survivorship. Courts have not always kept this distinction clear either in the language of their opinions or in actually deciding cases.⁶

I

IMPLIED CONDITION OF SURVIVAL

The uniformly recognized preference for early vesting and indefeasibility⁷ generally leads to the conclusion that survival is not required unless there is something in the instrument which affirmatively indicates a contrary intention.⁸ In the latter event, of course, the preference for vested construction must yield to the higher rule that a will is to be construed in accordance with the intent of the testator.⁹ Thus, the initial question for consideration is what language sufficiently manifests an intention to require survival, thereby overcoming the preference for indefeasibly vested interests. It is evident from the fact that a future interest can be indefeasibly vested that mere postponement of possession does not necessitate that the remainderman be living when the preceding estate terminates in order for his interest to take effect.

A. Simple Future Interests in Named Individuals

1. Remainders with No Express Qualifications

The easiest case in which there is no implied requirement of survival is that traditionally used to illustrate what is meant by an indefeasibly vested

⁶ *In re Coot's Estate*, 253 Mich. 208, 234 N.W. 141 (1931), is a leading example of such confusion which affected the outcome of the case and which required legislative action to correct. MICH. COMP. LAWS § 554.101 (1948) (enacted 1931).

⁷ RESTATEMENT, PROPERTY § 243, comments *i* and *j* (1940); see CAL. PROB. CODE § 28.

⁸ See *In re Stanford's Estate*, 49 Cal. 2d 120, 124-25, 315 P.2d 681, 683-84 (1957). See also *In re Hope's Estate*, 398 Pa. 470, 475, 159 A.2d 197, 200 (1960):

[I]f it is not clear . . . whether the remainder is vested or contingent, then . . . "it is necessary to keep in mind the rule 'that an interest is to be construed contingent only when it is impossible to construe it as vested' . . . ; that the intention to create a contingent interest 'should appear plainly, manifestly and indisputably.'"

⁹ CAL. PROB. CODE § 101.

remainder: *A transfers to B for life, remainder to C*. The terms of the transfer place no qualification on *C*'s estate, except, of course, that his right of possession must await the expiration of *B*'s prior interest. If *C* is living at the effective date of the instrument his interest cannot thereafter be defeated by his death, and the remainder passes via his estate should he die before *B*.¹⁰

It is equally settled that an indefeasibly vested remainder results when several individuals are named as remaindermen following a life estate. For example, *A to B for life, remainder to C and D in equal shares*. In the event of *C*'s death before *B*, *C*'s right to half of the principal on *B*'s death is property which passes in *C*'s estate.¹¹

"Divide-and-Pay-Over Rule."—The results of such cases are not altered by the mere fact that words of futurity are used in creating such remainders.¹² Where the only language of gift is that on the life beneficiary's death the trustee is to divide the corpus and pay it over to the remaindermen, it is arguable that the only language conferring the interests is that requiring an act which cannot occur until a future time and, therefore, that the gift does not occur until then. It could follow that nothing can pass to the named remainderman unless he is then alive to receive it. This is the substance of the so-called "divide-and-pay-over rule," widely criticized and generally discarded in this country.¹³ The lack of any relationship between the choice of such wording and the testator's actual intent on the question of survival is apparent. The rule almost certainly is not a part of the law of California.¹⁴ Even if it were to be recognized by local courts, one of the acknowledged exceptions to the rule should eliminate it as a factor in the cases now under consideration. As conceded in the leading "divide-and-pay-over" case, New York's *Matter of Crane*,¹⁵ if payment is postponed "for the purpose of letting in an intermediate estate, then the interest should be deemed vested" at its creation.

¹⁰ *E.g.*, *Bochte v. Chess*, 124 Cal. App. 2d 321, 268 P.2d 493 (1954).

¹¹ *In re Wallace's Estate*, 11 Cal. 2d 338, 79 P.2d 1094 (1938); *In re Martin's Estate*, 110 So. 2d 421 (Fla. App. 1959).

¹² *In re Ritzman's Estate*, 186 Cal. 567, 569, 199 Pac. 783, 784 (1921) ("upon the death of my wife . . . I give"); *Randall v. Bank of America*, 48 Cal. App. 2d 249, 254, 119 P.2d 754, 757 (1941) ("on his death . . . shall vest in [named remainderman]" held not to require survival despite reservation of power of revocation); *Miller v. Oliver*, 54 Cal. App. 495, 202 Pac. 168 (1921) (to widow for life, remainder to be held by named son and daughter from and after her death).

¹³ See, *e.g.*, *Redman v. Ring*, 94 N.H. 195, 49 A.2d 921 (1946).

¹⁴ See, *e.g.*, *In re Wallace's Estate*, 11 Cal. 2d 338, 79 P.2d 1094 (1938). The closest thing to recognition of the argument that such words are words of futurity and are relevant to the question of vesting is a dictum in *In re Whitney's Estate*, 176 Cal. 12, 21, 167 Pac. 399, 403 (1917), where survival was clearly required by other language.

¹⁵ 164 N.Y. 71, 76, 58 N.E. 47, 49 (1900).

2. Possession of Legatee Postponed until Stated Age

In the class of cases just discussed the result is facilitated by the fact that the remainderman's enjoyment has been quite clearly postponed because of the testator's desire to confer a limited preceding interest upon another. Would it matter if the testator had delayed turning over the property to the legatee for reasons relating to the legatee's own status or character? We are now dealing with gifts such as *A*'s bequest of "\$10,000 to *B* when he reaches the age of 21." It is apparent that delivery to *B*, if he is not yet twenty-one at *A*'s death, is delayed for reasons having to do with *A*'s intentions regarding *B*'s gift, as distinguished from a postponement which is only for the convenience of another, typically the holder of a life interest. The case for the remainder after a life estate has been analyzed as follows by the Illinois supreme court:

[I]f such payment or distribution is not deferred for reasons personal to the legatee, but merely because the testator desired to appropriate the subject-matter of the legacy to the use and benefit of another for and during the life of such other, the vesting of the gift in remainder will not be postponed, but will vest at once, the right of enjoyment only being deferred.¹⁶

This ready explanation is not available when the gift is solely to one individual.

Conceding that postponement for the convenience of another makes a stronger case for immediate indefeasibility, is the absence of such an explanation for postponing possession sufficient to change the answer to the survival question? Placing the blame on the ancient *Clobberie's Case*,¹⁷ the American common law has developed and perpetuated a difficult-to-justify distinction between (a) gifts to *B* "at," "if he reaches," or "when he reaches" a specified age and (b) those which are to *B* "to be paid" or "payable" at a stated age. In the former cases a requirement of survival to that age is commonly inferred,¹⁸ but in the latter cases the language tends to have the opposite effect.¹⁹ It is hard to quarrel with the "if he reaches" rule—in fact this language could well be placed under the heading of an expressed requirement of survival. It is also generally recognized that the inference under the "to be paid" and "payable" language tends to be reinforced and the inference in the other cases tends to be overcome if *B* is entitled to the income in the interim between the effective date of the gift and the age specified. Thus, the gift of interim income tends to negate the

¹⁶ *Knight v. Pottgieser*, 176 Ill. 368, 374, 52 N.E. 934, 935 (1898).

¹⁷ 2 Vent. 342 (1677).

¹⁸ 5 AMERICAN LAW OF PROPERTY § 21.17 (Casner ed. 1952).

¹⁹ *Id.* at § 21.18.

existence of a survival requirement.²⁰ It seems most doubtful, however, that such a provision as to income should impair the effect of the rather clear "if he reaches" language.

If the question of survival had occurred at all to the draftsman in such cases, clear provision would have been made. If such provision is not made, the probably fortuitous choice of particular words is peculiarly unpersuasive as a basis upon which to resolve the question of survival. While the wording of such a gift may reveal much of the drafting habits of his lawyer, it hardly reveals what was in the mind of the testator, unless some modern court is prepared to justify an outmoded inference by openly recognizing what might be called a "freudian slip" rule. The results under the rule in *Clobberie's Case* can hardly be justified in any other way, except in the "if he reaches" situation, which seemingly needs no constructional rule to resolve it. With the exception of this latter situation, a single presumption should be chosen and adhered to in all of these types of cases, preferably one not requiring survival.²¹

The California law is still in some doubt, but it seems hard to believe that a survival requirement will be implied in the cases of type (a), above, merely on account of such "words of futurity." California Probate Code section 28 provides: "Testamentary dispositions, including devises and bequests to a person on attaining majority, are presumed to vest at the testator's death." Only in desperation could a court conclude that the word "vest" is used solely in the technical sense of freedom from a *precedent* condition and that the section merely creates a presumption that any implied condition is to be deemed a condition subsequent. The presumption of early vesting generally encompasses early indefeasibility, and no narrower meaning should result from codification of this principle simply because the section includes the provision as to bequests at majority. The word "vest" is commonly used to connote the characteristic of transmissibility on death and has been so interpreted under this statute.²²

An early California case, by way of a dictum, recognized the classic common-law distinctions discussed above, but the instrument there in question contained an express gift over on the beneficiary's failure to survive.²³

²⁰ *E.g.*, *Bush v. Hamill*, 273 Ill. 132, 112 N.E. 375 (1916); RESTATEMENT, PROPERTY § 258 (1940). In the absence of an express direction to accumulate the income, the legatee would probably be entitled to the interim income anyway under CAL. CIV. CODE § 733 as the person presumptively entitled to the next interest. It is doubtful that a *discretionary* provision as to income in the interim has the same effect. Such a provision existed in *In re Klein's Estate*, 23 Cal. App. 2d 708, 74 P.2d 79 (1937), but was not discussed, since the court found the interest vested without such assistance.

²¹ See discussion *infra* at notes 29-38.

²² *Williams v. Williams*, 73 Cal. 99, 102, 14 Pac. 394, 396 (1887), quoted, in relation to a *survival* question, former Civil Code § 1341 (the predecessor of Probate Code § 28), which provided that an interest is *vested* "unless a contrary intention is clearly manifest."

²³ *In re Rogers' Estate*, 94 Cal. 526, 531, 29 Pac. 962 (1892).

Subsequent cases which have perpetuated this dictum or which are commonly cited as authority for these distinctions are also readily distinguishable.²⁴ On the other hand, there are numerous age-postponement cases refusing to require survival, finding the beneficiary's interest transmissible on his death before the stated age.²⁵ Although no case has been found which is necessarily irreconcilable with the rule that survival tends to be required by the "at" and "when he reaches" forms, several do cast serious doubt upon its existence.²⁶ Furthermore, there is an obvious and generally acknowledged rule that the absence of a provision for a gift over tends to establish the absence of a survival requirement, and this rule has been repeatedly emphasized and given unusual weight in California cases.²⁷ Finally, it now appears from the 1957 opinion of the California Supreme Court in *In re Stanford's Estate* that language of futurity which may reasonably be construed as referring merely to possession does not rebut the presumption of early vesting in interest.²⁸ All in all, an unstrained reading of section 28, the general tenor of California appellate opinions, and the tenuous logic of the frequently criticized rule of *Clobberie's Case*

²⁴ *In re Easter's Estate*, 24 Cal. 2d 191, 148 P.2d 601 (1944) (discussed *infra* at note 75); *In re Van Wyck's Estate*, 185 Cal. 49, 196 Pac. 50 (1921) (express survival requirement); *In re Blake's Estate*, 157 Cal. 448, 108 Pac. 287 (1910) (which will be considered in the next installment); *In re Faris' Estate*, 89 Cal. App. 2d 515, 201 P.2d 63 (1949) (condition expressed); *San Diego Trust & Sav. Bank v. Heustis*, 121 Cal. App. 675, 10 P.2d 158 (1932) (express gift over).

Although the distinction between "at" (etc.) and "to be paid" (etc.) was not mentioned, one case which implied a condition of survival is *In re Hamon's Estate*, 136 Cal. App. 517, 29 P.2d 326 (1934). In fact this case, if the rule of *Clobberie's Case*, in its evolved form did apply, was wrongly decided anyway since (1) the wording was that the property was to be "delivered" at a stated age and (2) there was provision for the beneficiary to receive the interim income. This case is (or more likely was—see note 32 *infra*) "just one of those things" that happen in construction cases.

²⁵ *In re Yates' Estate*, 170 Cal. 254, 149 Pac. 555 (1915) ("to be paid" at 25: indefeasibly vested); *In re Reith's Estate*, 144 Cal. 314, 77 Pac. 942 (1904) ("shall receive" portions at stated ages); *In re Welch's Estate*, 83 Cal. App. 2d 391, 188 P.2d 797 (1948) (an extreme case, probably the result of appealing circumstances; interest held transmissible on death before age 25 despite language "shall have no vested right" therein until age 25; no gift over, so "no vested right" referred only to possession!); *In re Klein's Estate*, 23 Cal. App. 2d 708, 74 P.2d 79 (1937) ("to pay over"); accord, *In re Rider's Estate*, 199 Cal. 724, 251 Pac. 799 (1926); *Keating v. Smith*, 154 Cal. 186, 97 Pac. 300 (1908) ("until . . . and then to go"); *Williams v. Williams*, 73 Cal. 99, 14 Pac. 394 (1887); *In re Riemer's Estate*, 69 Cal. App. 2d 634, 159 P.2d 677 (1945).

²⁶ See especially *In re Budd's Estate*, 166 Cal. 286, 135 Pac. 1131 (1913) (extreme case; "when he shall have attained age of 21" language). See also *Keating v. Smith*, 154 Cal. 186, 97 Pac. 300 (1908); *In re Welch's Estate*, 83 Cal. App. 2d 391, 188 P.2d 797 (1948); *In re Riemer's Estate*, 69 Cal. App. 2d 634, 159 P.2d 677 (1945).

²⁷ See, e.g., *In re Yates' Estate*, 170 Cal. 254, 149 Pac. 555 (1915); *In re Welch's Estate*, 83 Cal. App. 2d 391, 188 P.2d 797 (1948); *In re Riemer's Estate*, 69 Cal. App. 2d 634, 159 P.2d 677 (1945).

²⁸ 49 Cal. 2d 120, 129, 315 P.2d 681, 686 (1957), discussed *infra* at note 40. Accord, *In re Newman's Estate*, 68 Cal. App. 420, 429, 229 Pac. 898, 902 (1924). See also *In re Welch's Estate*, 83 Cal. App. 2d 391, 188 P.2d 797 (1948).

strongly suggest that mere postponement of a sole beneficiary's enjoyment until he reaches a stated age does not give rise to an implied condition of survival to that age.

3. *Principles for the Solution of Cases Involving Named Individuals*

In all cases involving future interests created in named individuals, whether enjoyment is postponed for the convenience of a prior interest or for considerations relating to the beneficiary himself, it would seem sensible for the courts to establish a strong presumption against *implied* conditions of survival. This presumption should be applicable regardless of the choice of words or form of expression. Obviously, if a condition of survival is expressed or clearly contemplated (as in the use of the word "if" in the age-postponement cases), the condition should be given effect. If the language is not so clear as to eliminate any need for resort to rules of construction, then there is no point in converting easy cases into hard ones. There is no reason for allowing the outcome of a case to turn upon the testator's choice of particular words when his uncertain language is no more than evidence of the fact that he failed to consider the question and to form *any* intent on the matter.

All such cases of the types now under consideration should be decided on the basis of a single presumption. That presumption should be a strong one, so as not to offer a temptation to litigate on the basis of the ever-present (but almost always nonpersuasive) "distinctive facts" of each case.²⁹ If it appeared that such litigation really resulted in proving anything about the testator's intent it would be a different matter, but inevitably such cases degenerate into a recitation of rules already too-often expounded; and, commonly, for a given situation there will be a pair of rules pointing to opposite results. When the facts are truly persuasive as to the testator's real intent, or, more realistically, as to the result which is needed to effectuate the testator's purpose, the question will nevertheless be raised and an appropriate result can be reached. Differences of opinion as to what constitutes a "persuasive" set of facts ought not be magnified by weak rules in an area where good reason exists for preferring—and for assuming a testator would have preferred—one result over the other, as seems to be the case here.

²⁹ For example, see the opposite conclusions reached by the majority and minority on the basis of each's over-all evaluation of the circumstances and dispositive scheme in *In re Stanford's Estate*, 49 Cal. 2d 120, 315 P.2d 681 (1957). Although each opinion stressed, in support of its conclusion, the over-all dispositive scheme as related to extrinsic facts, nothing particularly convincing—if anything at all persuasive—is brought out in either opinion. Particular factors of such doubtful utility and opposite impact on different persons are hardly substitutes for adhering to general principles which are supported by what is thought to be the natural intention of testators. The *Stanford* case well illustrates this point.

If a testator (or settlor of a living trust) has selected a particular person to receive some interest in his property and has thought no further than that selection, it seems preferable to allow the rights to vest and to let that beneficiary's own desires take effect where the testator's desires are unknown. Since the beneficiary in question is the only person known to have been intended to receive the property, he could at least be given the benefit of deciding who will take the interest in his place. This is what would have happened had he survived to the date the testator seemingly assumed he would. The beneficiary, having lived for a period after the testator's death, has at least the benefit of constructing his own dispositive scheme with his own death in mind and with the opportunity of considering other changed circumstances. Even if he should die under age, the law's scheme of intestate succession is one calculated to meet the situation of his death. A basic principle of construction ought not be such as to extend the dead hand into a situation not contemplated by the testator and where the testator has not actually sought to do so.

A rule of interpretation relating to matters of survival should not create the very type of problem in future-interest dispositions as that which required curative legislation in immediate gifts. Because of the problems posed by the failure of a legatee to survive until the date of a testator's death, legislatures have inevitably found it necessary to enact anti-lapse statutes to remedy the situation. It hardly seems desirable for courts to create rules of construction which pose similar problems in future-interest arrangements on the supposed basis of an intent which is nearly opposite to that found natural by legislatures in enacting anti-lapse legislation. At least in the lapse situation, if a legatee should die before the testator, the testator, if competent, can make an adjustment by simply changing his will. When a remainderman dies *after* a testator who has not made an explicit provision for this eventuality, no such opportunity is available, at least if the testator has not thought to provide someone with a power of appointment which is worded broadly enough to meet the situation. If his interest were not defeated by his death, the deceased remainderman would have the power to bequeath his interest. This would provide him with some benefits of his interest which could be enjoyed without possession. Thus a court ought not create a future-interest counterpart of the lapse rule unless, at least, local law is equipped to cope with the consequences. Only Tennessee has enacted a statute³⁰ which is calculated to deal with the consequences of the implied survival requirement which exists under the "Tennessee Class Doctrine." This statute provides for the substitution of issue for a deceased class member who dies before the date of possession, until which class members seemingly must survive even under present Tennessee law.³¹

³⁰ TENN. CODE ANN. § 32-305 (1955).

³¹ See *Burdick v. Gilpin*, 325 S.W.2d 547 (Tenn. 1959).

In one early California case³² the court implied, unnecessarily it would appear, a condition of survival but was able to avoid the adverse consequences of such action by also finding an implied gift to the issue of the deceased remainderman under the peculiar form of the disposition and a commonly-recognized rule for implied gifts to issue.³³ However, in the portion of its opinion dealing with the gift by implication to the issue, the court said that "it is to be assumed that the testator would have the same natural solicitude for the issue of the child as for the child herself," and that "in the event of issue their welfare would be a matter of solicitude on the part of their mother [the deceased remainderman]."³⁴ It is not normally in the best interests of this solicitude, on the part of either the testator or the future-interest holder, to impliedly require survival of individual future beneficiaries. The same is true of remaindermen who are designated as a class of a type which would not admit the issue of a deceased member. Furthermore, such solicitude might well extend to the widow of the deceased remainderman, and it is hereby suggested that the law should presume that it does.

Among the well-established canons of construction which bear upon the survival question, in addition to that of early vesting, are: (1) the preference for a complete disposition and against a partial intestacy;³⁵ and (2) the preference for equality among lines of descent (and it may also be noted that pretermitted-heir statutes would not prevent inadvertent disinheritance of a line of issue resulting from failure of a future interest) and among those having like claims upon the testator's bounty.³⁶ Frequently, to imply a survival requirement would be to deny effect to one or both of these preferences, and the presumption on the survival question should not have to be varied with the individual case. These preferences for equality and completeness of disposition are purportedly founded upon what are thought to be the natural desires of a typical testator. This, then, should be the stuff which specific rules of construction are made of. Furthermore, the traditional public interest in marketability of titles, to whatever extent it is a consideration in typical present-day successive interest arrangements, is also advanced by a reluctance to imply a requirement of survivorship. In

³² *In re Blake's Estate*, 157 Cal. 448, 108 Pac. 287 (1910). The survival problem posed will be discussed in the next installment of this article.

³³ On the implied gift to issue, see SIMES, *FUTURE INTERESTS* § 89 (1951). See also Note, 37 CALIF. L. REV. 701 (1949).

³⁴ 157 Cal. at 470, 108 Pac. at 296.

³⁵ RESTATEMENT, PROPERTY § 243, comment *e* (1940); CAL. PROB. CODE § 102; *In re Akeley's Estate*, 35 Cal. 2d 26, 215 P.2d 921 (1950).

³⁶ RESTATEMENT, PROPERTY § 243, comment *f* (1940); *In re Backesto's Estate*, 71 Cal. App. 409, 235 Pac. 670 (1925) (refusing to imply survival requirement so as not to exclude children of deceased nephew who was a remainderman). See also *Seamans v. Phipps*, 171 N.E.2d 846 (Mass. 1961) (pattern of equal treatment of grandchildren opposed any requirement of survival).

serving the interests of marketability by removal of contingencies, violations of the Rule Against Perpetuities will also be avoided on occasion, so that the suggested principles, when carried over into cases not involving named persons, tend also to give effect to the preference for maximum validity.

Some preliminary comment ought to be made about estate-planning considerations, since these considerations may be thought to change the intent of the testator; however, it must also be remembered that we are dealing with the testator who has not directed his attention to the survival question. It cannot be denied that sound estate planning nearly always dictates that transmissible future interests should not be created unnecessarily, thus avoiding wasteful estate and inheritance taxation upon the death of a remainderman whose right of enjoyment has not matured.³⁷ In such planning, the alternative takers will be spelled out and the dangers discussed above will not be present, at least not in the same form; and even the rigidity of alternative plans can be eased by proper use of beneficiary and fiduciary powers. This, however, does not justify a court's action in implying survival requirements in dispositions which are unable to adapt to a failure of beneficiaries. Not only is it easier to write in a condition of survival than to express an intent not to require survival, but the requirement that such a condition be expressed will tend to encourage consideration and expression of an alternative gift. Also, the desirability of requiring survival does not seem to impair the validity of what has been said to be the "intent" suggested by the dispositions under consideration, which are formulated by testators who have not addressed themselves to the survival problem. However, at least one leading treatise has questioned whether tax-motivated planning does not cast doubt upon the continued preference for early vesting.³⁸ Such factors are not likely to have affected either the actual intentions or the basic scheme of the testator who has failed to provide a survival requirement and alternative dispositions.

B. Simple Future Interests in Class Gift Form

While the principles just discussed are generally applicable to class-gift cases, such cases occasionally do pose, and even more often are thought to pose, special problems. Certainly, some considerations, which were said to favor early indefeasibility in the situations discussed above, may lose persuasive force because of the adaptability which may be present under a given class designation. On the other hand, under some class-gift forms other considerations may take on even greater significance.

³⁷ Planning and drafting considerations will be discussed in the next installment of this article.

³⁸ § 5 AMERICAN LAW OF PROPERTY § 21.3a (Casner ed. 1952).

1. Remainder to "Children" with No Express Qualification

Would those cases involving remainders following a life estate be affected, if instead of naming his children individually as remaindermen, the testator had bequeathed property in trust for his wife for life, remainder to his "children" in equal shares? Should the outcome be altered by the fact that the testator chose to make what to him may have been the same disposition in a different form, using a class designation instead of naming the remaindermen? Or would it matter if the testator devised *X* for life, remainder to *X*'s children, so that we are dealing with a class the membership of which could increase after the effective date of the instrument by birth of other children of *X*?

Under the preference for early vesting there ought to be no trouble in giving a negative answer to the above questions. In general it is well established that no condition of survival is to be implied merely from the fact that the remaindermen are described as a class, even one which is subject to the admission of additional members after the effective date of the instrument, and which thereby permits reduction of the shares of existing members.³⁹ So long as the source of the class members is still alive (the source typically being the life tenant, as in the above example involving *X*), the remainders of any children already born are said to be vested "subject to open"—that is, subject to partial divestment to let in afterborn children.

Until recently, this generally accepted rule appears not to have been established in this state. A very close contest on this point arose four years ago in *In re Stanford's Estate*.⁴⁰ There a portion of the testatrix' estate was to be held in trust to pay the income for life to *N*, her niece, and on *N*'s death it was provided that the trust was to terminate and that the corpus "shall belong and be delivered to the child or children" of *N*. The testatrix died in 1905. The only child born to *N* was *C*, who died in 1918 bequeathing all his estate to *X*. In 1924 *N* adopted three persons who, it was held by the court in another portion of the opinion, were entitled to take as "children" of *N*. When *N* died in 1954 *X* claimed, as sole beneficiary of *C*'s will, that portion of the remainder which would have been distributed to *C* if he had survived. *N*'s adopted children claimed all the remainder to the exclusion of *X* on the theory that *C* had failed to survive until the date of distribution and thus that his interest had failed. Stanford University, as residuary beneficiary under the will, claimed the corpus, as property otherwise undisposed of, on the theory that the adoptive children in this situation did not qualify as remaindermen and that *C* was required to survive until termination. The superior court awarded all the property in question

³⁹ *E.g.*, *Privett v. Jones*, 251 N.C. 386, 111 S.E.2d 533 (1959); 5 AMERICAN LAW OF PROPERTY § 25.11 (Casner ed. 1952).

⁴⁰ 49 Cal. 2d 120, 315 P.2d 681 (1957).

to the adopted children. *X* and Stanford University appealed. Ultimately the California Supreme Court held that *C*'s interest was not conditioned upon his survival and that *X*, having received *C*'s remainder interest under his will, was entitled to share the corpus with the adopted children.

The majority opinion, finding the early vesting rule well established in California,⁴¹ concluded that such remainders are free from conditions of survivorship even though in class gift form and even though additional members may be added to the class.⁴² The opinion adds that only rarely does a court reach the opposite result, quoting a leading treatise on future interests.⁴³ Previous cases in this state had created some uncertainty in this area of future interest law, and the court selected the worst offenders and expressly disapproved them as to "the question herein decided."⁴⁴ As a result of the broad language of the opinion, it can be assumed that survivorship conditions will be found by implication only under most persuasive circumstances. This assumption seems permissible despite the court's four to three split.⁴⁵

The dissenting opinion in *Stanford*, which took the position that the children were required to survive until the life tenant's death, requires

⁴¹ *Id.* at 124, 315 P.2d at 683, citing, in addition to treatises and many cases, CAL. PROB. CODE §§ 28, 123.

⁴² *Id.* at 125-26, 315 P.2d at 683-84. *Accord*, *In re Backesto's Estate*, 71 Cal. App. 409, 235 Pac. 670 (1925) (*H* bequeathed to *W* for life, remainder to children of brothers and sisters of *H* and *W*: such children needn't survive *W*); especially note dictum at 417, 235 Pac. at 672. See also quotation set out in note 45 *infra*.

⁴³ 1 SIMES & SMITH, FUTURE INTERESTS § 146 (2d ed. 1956). See also *id.* at § 654.

⁴⁴ 49 Cal.2d 120, 129, 315 P.2d 681, 686. The cases so treated by the court are readily distinguishable from the present problem, but are particularly objectionable in their dicta. These cases have been discussed previously (see *In re Hanon's Estate*, 136 Cal. App. 517, 29 P.2d 326 (1934), *supra* note 24), or will be discussed subsequently in this installment (see *In re Cavarly's Estate*, 119 Cal. 406, 51 Pac. 629 (1897), see text *infra* at note 94), or in the next. See *In re Blake's Estate*, 157 Cal. 448, 108 Pac. 287 (1910), and *In re Clark's Estate*, 64 Cal. App. 2d 636, 149 P.2d 465 (1944) (containing an overly broad and unnecessary dictum as to class gifts at 641-42, 149 P.2d at 468, even though the survival requirement was expressed in the instrument).

⁴⁵ The dissent was written by Justice pro tem Ashburn. Of the present members of the court three (Chief Justice Gibson and Justices Traynor and Schauer) were among the majority, and only one (Justice McComb) joined the dissent. Among the members subsequently added to the court, at least Justice Peters appears to agree with the majority, as revealed by his clear summary of the relation between the class-gift form and implied conditions of survivorship in his earlier opinion (which was quoted by the *Stanford* majority) in *In re Norris' Estate*, 78 Cal. App. 2d 152, 161, 177 P.2d 299, 304 (1947), noted, 36 CALIF. L. REV. 129 (1948) (other aspects of this case, however, are questionable and will be discussed in the next installment):

The law is well settled that vested remainders can be created in a class the membership of which is not complete at the effective date of the grant or devise, so that similar vested interests accrue to those who, by later entry therein, fall within the class. . . . [T]he fact that the interests of existing members of the class may be thus diminished does not convert the interest of such members to contingent remainders.

some attention. This opinion points out a possible course of error in cases of the type before the court and then proceeds to demonstrate its point by acting as exhibit *A*, reproducing the same error which Professor Ferrier found to have been committed in an earlier case, one of those disapproved by the *Stanford* majority.⁴⁶ The dissent states: "Enlargement of the class and shrinking of its membership present two different questions."⁴⁷ Shortly thereafter, however, in support of its position on *shrinkage of the class* by nonsurvival, the dissent quotes a treatise statement on the subject of *enlargement of the class*.⁴⁸ Thus read out of context, the passage suggests a result exactly opposite the true position of the quoted treatise.⁴⁹ Although the predecessor to Probate Code section 123 has been similarly mishandled in at least one California case,⁵⁰ this section supports the majority view in *Stanford* and seems to codify the properly understood common-law result on both class closing and survival. It provides:

A testamentary disposition to a class includes *every person answering the description at the testator's death*; but when the possession is postponed to a future period, it includes *also* all persons coming within the description before the time to which possession is postponed. (Emphasis added.)

The weakness of the dissent's position, at least if it is to be based upon the authorities cited or upon existing rules of construction, is further demonstrated by its misinterpretation of the *Restatement*. After citing and partially quoting section 296(1) of the *Restatement* as to what happens if a class member dies before the time to which he is required to survive, a court footnote reads:

The Restatement amplifies this at page 1610 by this illustration: "1. A has a son B who has children C and D. A, owning Blackacre in fee simple absolute, executes an otherwise effective will devising Blackacre 'to B for life and thereafter to the children of B in fee simple absolute.' C dies. A dies and his will is duly probated. C is excluded from being a distributee of

⁴⁶ See Ferrier, *Implied Conditions of Survivorship in Gifts of Future Interests in California*, 40 CALIF. L. REV. 49, 58 (1952), criticizing *In re Cavarly's Estate*, 119 Cal. 406, 51 Pac. 629 (1897), a criticism noted and cited by the *Stanford* majority. *Cavarly* distorted, by quoting out of context, a passage from an early edition of Gray's treatise on the Rule Against Perpetuities.

⁴⁷ 49 Cal. 2d 120, 152, 315 P.2d 681, 700.

⁴⁸ *Id.* at 153, 315 P.2d at 701, quoting 2 SIMES & SMITH, FUTURE INTERESTS § 640 (2d ed. 1956):

Where a gift to a class is postponed . . . the general rule of construction would permit the class to increase until the end of the life estate, but would exclude all members of the class who were not in being at the termination of the life estate.

This statement in the treatise referred only to the "rule of convenience" which would close the class against after-born (really after-conceived) members so that distribution need not be withheld because of possible later additions in membership.

⁴⁹ See note 43 *supra* and text thereto.

⁵⁰ *In re Cavarly's Estate*, 119 Cal. 406, 51 Pac. 629 (1897), again is the prime example.

Blackacre. B dies. In the absence of an applicable lapse statute (see § 298) D acquires an estate in fee simple absolute in the whole of Blackacre."⁵¹

The reason for the result indicated in the illustration should be wholly apparent. C predeceased A, the testator. This involves a problem of *lapse*—arising from a requirement imposed by law—rather than the constructional question of whether the testator intended that a future interest holder live to the date of possession. The *Restatement* view is actually that a condition of survival beyond the effective date of the instrument is not to be implied from the mere fact that the remainder is to a class.⁵²

It seems quite evident that the result in *Stanford* brings the California position into harmony with that of other states on future interest gifts to children.⁵³

Another Look at the Principles Favoring Indefeasibility.—An implied requirement of survival under a class gift involving the word "children" is subject to most of the same objections earlier discussed in connection with gifts to individuals, and in some cases the objections are more persuasive. The natural preference for a complete disposition is not important, except if the entire class of children should die. If a class member is dropped out as a result of his death, there would be no partial intestacy. His share would be absorbed by an enlargement of the shares of the remaining children, for that is the nature of a class gift. However, the class is still inflexible in that its manner of adapting to a member's death is not to permit his issue to take in his place but to increase the share of the other children. The same objection holds true in other unadaptable classes such as "brothers and sisters," "nieces and nephews" or "grandchildren." In such cases, then, the danger of disinheriting a line of descent, or possibly other equal claimants to the testator's bounty, is not only present but magnified. At least if the remainder to a named child should fail there is a good chance his estate would contain some share of the testator's intestate property or residuary estate, which would include this undisposed of remainder. Under the class-gift form the remainder disposition does not fail but adds to the share which other children take to the exclusion of the deceased child's issue. Again, with but the exception of Tennessee, the anti-lapse policy

⁵¹ 49 Cal. 2d 120, 155, 315 P.2d 681, 702.

⁵² RESTATEMENT, PROPERTY § 296, comment *j* (1940). That the above-quoted illustration relates to death "between the execution of the will and the death of the testator," see *id.* at § 296, comment *d*. Also the illustration is in a comment relating to clause (a) of the section, which clause involves death "before the effective date" of the instrument.

⁵³ Tennessee is the only clear exception to this position. The "Tennessee Class Doctrine," the effect of which has been altered prospectively in cases such as those now being discussed by TENN. CODE ANN. § 32-305 (1955) (enacted in 1927), continues to operate. See *Burdick v. Gilpin*, 325 S.W.2d 547 (Tenn. 1959) (involving survival of "issue" beyond date of named ancestor's death and until distribution).

does not apply, even assuming, as is usually held to be the case, that anti-lapse statutes operate upon class gifts when the class member's death occurs before the testator's.⁵⁴ In addition, when the disposition goes beyond named individuals, it may involve possible unborn persons, and an implied condition of survival could lead to violation of the Rule Against Perpetuities and its statutory counterparts. Thus, the preference for maximum validity becomes a more significant factor in class gift cases. Of course, such matters as the natural concern of the testator and the child for the child's issue are every bit as much present in these cases as in those previously discussed, and it seems probable that the failure to provide for such issue was the result of a failure to think beyond children and to consider the possibility of a child's death.

2. Class Designations Such as "Issue" and "Heirs"

The class designation employed in describing those who are to take trust property at the termination of the trust may be sufficient, in and of itself, to impose upon the claimants, by implication, a requirement of survival to some date later than the testator's death. Designations commonly used, for better or for worse, include "heirs," "next of kin," "heirs of the body," "issue" and "descendants." For all purposes herein it will be assumed that the words in question are words of purchase, not of limitation, and that they are not found to have been misused as synonyms for other terms, such as "children." Also ignored are the great variety of other possible uncertainties in such words—for example, uncertainties as to the shares taken by each class member.

It is not difficult to reach the conclusion that all of these terms require potential takers to survive until the death of the named ancestor, and this is generally recognized.⁵⁵ Such a result can best be justified on the basis that the class is first to be determined at that time rather than that any members are determined previously and then required to survive. Even without aid of *nemo est haeres viventis*, this result is readily apparent in

⁵⁴ On the application of anti-lapse statutes to class gifts, see, e.g., *In re Steidl's Estate*, 89 Cal. App. 2d 488, 201 P.2d 58 (1948); *Drafts v. Drafts*, 114 So. 2d 473 (Fla. 1959) (statute applied to class member who died after execution of will and prior to testator's death, but not to member who died prior to execution).

⁵⁵ See RESTATEMENT, PROPERTY § 249 (1940) for the proposition that "heirs," "next of kin" and "heirs of the body" tend to establish a condition precedent of survival, and *id.* at § 249, comment i, that "issue" and "descendants" connote a survival requirement as a condition subsequent until the ancestor's death, unless distribution is otherwise to be made before that time. As to "issue," see also *Old Colony Trust Co. v. Brown*, 287 Mass. 177, 191 N.E. 358 (1934) (that survival of ancestor is required); *Wright v. City of Tuscaloosa*, 236 Ala. 374, 182 So. 72 (1938) (that such survival requirement is a condition precedent); *Kennard v. Kennard*, 81 N.H. 509, 129 Atl. 725 (1925) (that such a requirement is a condition subsequent); 2 POWELL, REAL PROPERTY ¶ 327 (1952). In most cases, and for the present purposes, it is only necessary to decide whether the condition exists and not whether it is one precedent or subsequent.

California under certain of these class designations. "Heirs" and "next of kin" are governed by a set of statutory definitions,⁵⁶ and "heirs of the body" has been squarely before the California Supreme Court on this point.⁵⁷

As to "issue" and "descendants," the problem is more difficult since these classes technically describe all persons in the descending line regardless of how remote. There is suggestion in at least one California case that it would not be necessary to survive the named ancestor.⁵⁸ In this case the "issue" in question was a sole descendant, and the inclination not to require this child, a daughter, to survive the life tenant, her father, is understandable since she had no issue to take her place and since it would probably have been in accord with what the donor *would have* wanted had he foreseen the precise situation,⁵⁹ even if not in accord with prevailing rules for ascertaining a testator's intentions. The court did require survival, however, because the words "and heirs of the body" were added to the word "issue." However, even under the word "issue" alone it is somewhat doubtful that the suggested result would be reached unless the time otherwise set for distribution had arrived during the named ancestor's life-time. At least where issue are held to take per stirpes it is normally concluded that such issue are not to be determined until the ancestor's death.⁶⁰ Whether issue take per stirpes or per capita in California under a remainder provision which is silent on the point is no longer clear.⁶¹ However, unless its hands are tied, it is almost inconceivable that a modern court would bring about

⁵⁶ See CAL. PROB. CODE § 103 (defining these terms) and § 106 (technical meaning presumed).

⁵⁷ *In re Shoemaker*, 211 Cal. 457, 295 Pac. 830 (1931).

⁵⁸ *Ibid.*

⁵⁹ In effect this would amount to construing "issue" as creating in a child, for example, a vested interest subject to divestment only if he should die survived by issue of his own. *Accord*, 1 SIMES & SMITH, FUTURE INTERESTS § 146 n.82 (2d ed. 1956). *Cf.* *Knight v. Pottgieser*, 176 Ill. 368, 52 N.E. 934 (1898). This seems a more hopeful explanation than to consider the *Shoemaker* case as suggesting a strict per capita rule or a rule in which issue take indefeasible interests at the effective date of the instrument.

⁶⁰ *E.g.*, see *Old Colony Trust Co. v. Brown*, 287 Mass. 177, 191 N.E. 358 (1934); 5 AMERICAN LAW OF PROPERTY § 21.13 (Casner ed. 1952).

⁶¹ When CAL. PROB. CODE § 103 replaced CAL. CIV. CODE § 1334, the legislature did not retain the provision that "issue" in a will was to be construed according to manner of their taking by intestacy. In discussing whether or not adopted persons are "issue," it has been said that "[t]his amendment clearly indicates that the statute of succession was not to control the interpretation of the term 'issue' as used in a will." *In re Pierce's Estate*, 32 Cal. 2d 265, 269-70, 196 P.2d 1, 4 (1948). On the same point (adoptive persons as "issue"), however, it has subsequently been made clear that in the interpretation of wills the public policy as found in the law is to be preferred. *In re Heard's Estate*, 49 Cal. 2d 514, 319 P.2d 637 (1957); *cf. In re Stanford's Estate*, 49 Cal. 2d 120, 315 P.2d 681 (1957), discussed *supra* at note 28 (adopted persons as "children"). Thus, while it would be clear that the intestate pattern does not control as to the intended meaning of "issue," it also appears that a like result would be preferred. See also SIMES, FUTURE INTERESTS § 97 (1951).

the weird results of a strict per capita rule⁶² merely as a punishment to the careless draftsman.

Commonly the ancestor whose heirs or issue are in question will be the life beneficiary. For example, *A* may leave his estate in trust for his daughter *B* for life, remainder "to *B*'s heirs" or "to *B*'s issue." The rules discussed above are applicable, and the case is likely to be an easy one. Certainly *B*'s heirs are to be persons alive at her death, and the same should normally be true of her issue. These cases are readily explainable because a person's heirs are not determined until he dies, and it is logical to presume that one's issue are also to be determined at his death if distribution is contemplated at that time, especially if distribution is to be on a per stirpes basis.

The survivorship problems arising from the use of these terms really become difficult when the heirs or issue in question are not those of a life beneficiary at whose death the trust is to terminate. Common dispositions of this type are: (1) a husband devises to his wife for life, remainder to his (the husband's) issue (or heirs); (2) a devise to the widow for life and then to a child, if then alive, or to the child's issue (or heirs); or (3) a testamentary trust for an unmarried sister for life, remainder to the issue (or heirs) of a brother who is already deceased at the time of the will's execution. Now the natural time for ascertaining heirs or issue, the designated ancestor's death, no longer coincides with the date fixed for distribution. Is survival to be required until possession? Unlike the class designation "children," we are dealing here with broader or at least more adaptable terms. The consequences of dropping out a deceased class member are not so drastic when the deceased member's descendants can step into his place. A greater willingness to require survival in the case of issue than in the case of children, then, is understandable, and an intent to require survival is

⁶² Illustrative of such weird results is *Stickel v. Douglass*, 7 N.J. 274, 81 A.2d 362 (1951), allowing grandchildren of designated ancestor to share even though their parent (a child of such ancestor) was living and also received a share—the same share as taken by each of the grandchildren. See generally Schnebly, *Testamentary Gifts to Issue*, 35 YALE L.J. 571, 591-600 (1925).

The tendency in those states which adopted the per capita rule as to this term has been to abolish the rule by statute or decision. 3 POWELL, REAL PROPERTY ¶ 370 (1952). The general disfavor of this rule is also illustrated by the evolution of the position that the per capita presumption is a weak one made inapplicable by the slightest evidence to the contrary—an unfortunate substitute for correcting an intent-defeating rule and an approach which only fosters wasteful litigation. See, e.g., *In re McKim's Estate*, 21 Misc. 2d 996, 192 N.Y.S.2d 1011 (Surr. Ct. 1959) ("very faint glimpse of a different intention" rule applicable to dispositions made prior to corrective legislation). See also *Plainfield Trust Co. v. Hagedorn*, 28 N.J. 483, 147 A.2d 254 (1958) (dissenting judges found per stirpes result suggested by same facts which majority felt left the per capita rule in effect).

The preferable (and now probably predominant) rule, as well as the trend away from the per capita result, is illustrated by *Clarke v. Clarke*, 222 Md. 153, 159 A.2d 362 (1960) (3-2 decision), 37 N.D.L. REV. 126 (1961).

more likely to exist when the testator has used a term indicating that his thoughts have at least extended beyond the first generation of his descendants.

(a) *Heirs: Date of Distribution Later Than Ancestor's Death.*—Beginning with "heirs" (and "next of kin") it is necessary to distinguish the question of whether, literally, a condition of survival exists from the question of the date as of which a person's heirs are to be determined for purposes of a distribution subsequent to that person's death. Although the latter question is not simply one of survival, it needs to be considered as a variation of a strict survival requirement. If it is concluded that a remainder to the heirs of *A*, who predeceases the life beneficiary, is not to be indefeasibly vested in those heirs until the date of distribution, then the delayed determination of an artificial class of heirs is a more practical and more common solution than to select *A*'s actual heirs at the time of his death and to require the members of that fixed class to survive until a later date. In the delayed determination of heirs, the technical meaning of heirs is disregarded and an artificial class of "heirs" is selected—those who would have been *A*'s heirs if he had died at a later date, presumably that of distribution. In strictly requiring survival, *A*'s actual heirs, who are determined at his death and who are thereby the only possible remaindermen, become a fixed group within which only those still alive at the distribution date will receive a share in the property. To illustrate these and other possible solutions, assume the following facts: *A* devises in trust for *W* for life, corpus, to be distributed "on *W*'s death to my (*A*'s) heirs." *A*'s actual heirs were *W*, his wife, and *B* and *C*, his children. *B* then dies and is survived by a child, *X*, and then *W* dies. Some authority can be found suggesting each of several possible results. (1) If no survival is required *A*'s heirs would be fixed at his death, and at that time *W*, *B* and *C* would all have indefeasibly vested remainders. The wills of *W* and *B* could dispose of their shares.⁶³ (2) If strict survival is found to be required by implication, the fixed and technical class of heirs would again be *W*, *B* and *C*, but since *W* and *B* failed to survive the property all goes to *C*. No other person is then alive who was actually an heir of *A*.⁶⁴ (3) If *A*'s heirs are belatedly determined at distribution (*W*'s death), those who would be his heirs if he then died are *C* and *X*, as the child of a deceased child.⁶⁵ (4) It would also be

⁶³ This is, of course, the usual and technical sense in which the word "heirs" is used. Applying this meaning to such as the above facts is *In re Newman's Estate*, 68 Cal. App. 420, 229 Pac. 898 (1924). See note 56 *supra* for statutory support for such a result.

⁶⁴ See *Continental Ill. Nat'l Bank & Trust Co. v. Eliel*, 17 Ill.2d 332, 161 N.E.2d 107 (1959) (a case which illustrates the strange results of this solution). Cf. *In re Hartson's Estate*, 218 Cal. 536, 24 Pac. 171 (1933) (income to heirs of deceased life beneficiary payable to actual heirs living at distribution dates).

⁶⁵ See *In re Easter's Estate*, 24 Cal. 2d 191, 148 P.2d 601 (1944) (court failing to distinguish this result from result (2), but the judgment is of type (3) in the text).

possible to determine heirs at *A*'s death but simply to exclude *W*, the life tenant, on the basis of what may have been the natural meaning to *A* of his disposition. Then *C* takes one share while *B*'s share, also being indefeasible at *A*'s death, passes by his will.⁶⁶

The well-established basic rule for determination of heirs is that they are to be determined, and that their interests are to vest, at the named ancestor's death,⁶⁷ except if the ancestor died before the testator, in which case they are held to be determined at the testator's death.⁶⁸ The logic of the exception contained in the rule would seem to be that, since the lapse doctrine precludes anyone who is dead at the effective date of a will from taking under it, the testator's natural intent would be to defer the determination of such heirs, leaving the class designation flexible until the testator's death.

In order to depart from the basic rule just described, some affirmative indication of a contrary intent must be found. The question, then, is what circumstances will justify a finding that survival is to be required, either in the strict sense or, more commonly, in the sense of postponing the determination to get an artificial class of heirs. As a general rule the mere fact that distribution is postponed beyond the ancestor's death is not such an indication of intent to defer the ascertainment of heirs.⁶⁹

Probably the only generally recognized basis for holding that heirs are to be selected as if the ancestor had died at the date of distribution of the remainder is when there is a prior interest in the *sole* heir.⁷⁰ The set of facts most aptly illustrating such a case is a bequest in *A*'s will to *B* for life,

⁶⁶ See *Kimberly v. New Haven Bank*, 144 Conn. 107, 127 A.2d 817 (1956). The court in *In re Wilson's Estate*, 184 Cal. 63, 193 Pac. 581 (1920), may have been following this course, although its language is more that of result (3) in the text, the delayed determination of heirs. The exact result is unclear from the opinion.

⁶⁷ E.g., *In re Newman's Estate*, 68 Cal. App. 420, 229 Pac. 898 (1924); *Michigan Trust Co. v. Young*, 347 Mich. 78, 78 N.W.2d 581 (1956).

⁶⁸ E.g., *In re Page's Estate*, 181 Cal. 537, 185 Pac. 383 (1919); *Dunlap v. Lynn*, 166 Neb. 342, 89 N.W.2d 58 (1958). A rare exception on this point is *Continental Ill. Nat'l Bank & Trust Co. v. Eliel*, 17 Ill. 2d 332, 161 N.E.2d 107 (1959), which determined heirs at the death of the ancestor, who had predeceased the testatrix, and then required strict survival not only until testatrix' death, but until distribution.

⁶⁹ E.g., *Katz Inv. Co. v. Lynch*, 242 Iowa 640, 47 N.W.2d 800 (1951) (on death of last survivor of testator's widow and children the trust property was to pass to the heirs of such children; heirs of a deceased child determined at that child's death and such heirs held to have vested remainder prior to termination); *White v. Inman*, 212 Miss. 237, 54 So.2d 375 (1951); 3 HASTINGS L.J. 155 (1952). The cases in note 67 *supra* also directly support this proposition. A seemingly contrary rule has developed in Nebraska. See note 83 *infra*.

⁷⁰ *In re Rutan's Estate*, 119 Cal. App. 2d 592, 260 P.2d 111 (1953); *In re Latimer's Will*, 266 Wis. 158, 63 N.W.2d 65 (1954); RESTATEMENT, PROPERTY § 308, comment *k* (1940). However, the contrary conclusion is not unusual. E.g., *Loring v. Sargent*, 319 Mass. 127, 64 N.E.2d 446 (1946).

remainder to *A*'s heirs, when *A*'s sole heir is *B*.⁷¹ It would be so unnatural to assume *B* was to get a remainder following his own life estate that the technical meaning of heirs is to be disregarded, and the most satisfactory way of meeting the problem—and that which was probably intended—is to defer determination of the heirs.

There is disagreement among American cases as to the result when an exception is sought on the basis that the prior interest is in one or more, but less than all, of the heirs of the named ancestor.⁷² The California position is also unclear. In *In re Newman's Estate*⁷³ a trust was created for the life benefit of the testator's widow and six of his seven collateral heirs; on the death of the survivor of these life beneficiaries, the remainder was to go to the testator's "heirs at law, wherever and whomever they may be." Stating that words of futurity refer to possession rather than vesting if it is possible to so read them,⁷⁴ the district court of appeals held that the word "heirs" was to be applied in its technical sense and that the life beneficiaries held remainder interests of a character which were transmissible on death. Neither a survival requirement nor a postponed determination of heirs was found appropriate under the will.

Much more recently, however, the California Supreme Court had occasion to consider a somewhat comparable situation. In *In re Easter's Estate*⁷⁵ the decree of distribution provided that upon the death of testator's widow, who along with testator's four children was a life beneficiary, "all of the property . . . shall go to and vest in the heirs at law of [the testator] in accordance with the statute of succession of the State of California [in force one month after his death]." After the testator's death but before the death of the widow, a daughter, *D*, died leaving issue; during the same period a son, *S*, died without issue. After the widow's death, the question presented was whether the estates of *S* and the widow were entitled to a share of the remainder. The court held that the remainders did not vest in the testator's heirs at his death and that the estates of *S* and the widow

⁷¹ Cf. *In re Wilson's Estate*, 184 Cal. 63, 193 Pac. 581 (1920), in which added factors made the court's decision easier to explain but were probably unnecessary to the result: e.g., language "among my heirs" said to suggest multiple distributees; life tenant's death without living children was a condition precedent to right of testatrix' heirs. The choice of "among" wording was probably inadvertent, and the other precedent condition should be deemed immaterial, but the sole-heir factor alone adequately justifies the court's decision.

⁷² For example, *contrast* *Richardson v. Poe*, 210 S.W.2d 568 (Tex. Civ. App. 1948) (adhering to rule of ascertaining heirs at ancestor's death), *with* *Boyd v. Fanelli*, 199 Va. 357, 99 S.E.2d 619 (1957) (heirs ascertained at distribution). In this situation "no constructional tendency is sufficiently definite to be capable of statement." *RESTATEMENT, PROPERTY* § 308, comment *k* (1940). However, the result of *Richardson v. Poe*, *supra*, seems to be the more common. See, e.g., *White v. Inman*, 212 Miss. 237, 54 So. 2d 375 (1951).

⁷³ 68 Cal. App. 420, 229 Pac. 898 (1924).

⁷⁴ *Id.* at 429, 229 Pac. at 902.

⁷⁵ 24 Cal. 2d 191, 148 P.2d 601 (1944).

took nothing. However, the court's opinion is confused. The court actually deferred determination of the heirs until termination of the trust, although the opinion reads in terms of implying a condition precedent of survival until distribution. The judgment is not consistent with the latter approach. Since the issue of *D* were allowed to share in the property despite *D*'s failure to survive, which would prevent them from inheriting a share from *D*, and since *D*'s issue were not in fact heirs of the testator, their admission to the class can only be explained on the basis of a delayed determination of the testator's heirs. As issue of a deceased child, of course, they would have been heirs of the testator had he died at the date of distribution. Nevertheless, the technical meaning of heirs and the preference for early vesting were disregarded.

Justice Traynor dissented; Professor Ferrier promptly criticized the case;⁷⁶ and Professor Turrentine has called the dissent "admirable"⁷⁷ and the decision "dubious."⁷⁸ This writer concurs with the majority of the court, but in result only. Since it is recognized that the presumption in favor of technical and usual meanings must yield to an apparent contrary usage by the testator,⁷⁹ this seems an appropriate case for the recognition of a different meaning, one to be established as an openly-stated exception to the usual rule on heirs. Such an exception is already recognized in the *sole-heir* life-tenant situation. The incongruity is substantially the same in the use of "heirs" to describe remaindermen after life interests in some, but less than all, of the heirs.

It is unfortunate that the majority found it necessary to place heavy emphasis upon the wording of the decree of distribution, which stated that the property shall "vest in" the heirs upon *W*'s death, as a basis for finding the remainder not to be vested in interest until that time. The language could as well have been deemed to refer to vesting in possession.⁸⁰ Equally unfortunate is the fact that the recent majority opinion in the *Stanford* case distinguished *Easter* on the basis of the word "vest."⁸¹ The use of the word "vest," even in the decree of distribution (which supersedes the will, as is settled beyond need of citation in this state), hardly seems so revealing. At least the dissent was right in insisting that such language, when met with the preference for early vesting, is not so clear as to preclude resort to the will as an aid in construction.⁸²

However, in supporting its decision the majority can hardly be blamed

⁷⁶ Note, 32 CALIF. L. REV. 320 (1944).

⁷⁷ RESTATEMENT, PROPERTY-CALIFORNIA ANNOTATIONS § 308 (1950).

⁷⁸ *Id.* at § 309.

⁷⁹ See, e.g., codification of this principle in CAL. PROB. CODE § 106.

⁸⁰ See text at note 63 *supra* and after note 48 *supra*.

⁸¹ 49 Cal. 2d 120, 129, 315 P.2d 681, 686 (1957).

⁸² 24 Cal. 2d 191, 196, 148 P.2d 601, 603 (1944).

for utilizing the wording of the decree; it is only unfortunate that its emphasis on the word "vest" waters down the rule which can be derived from the case. If the court had taken the bull by the horns, it would have taken away what this writer considers to be the most persuasive feature of the dissenting position, that of the need for constructional predictability. Even when the life tenant is one of several heirs it seems unnatural that the testator's notion of who is to take the remainder would encompass one at whose death the remainder is to become possessory. This seems clear enough to be recognized as a circumstance requiring a *distinct* exception to the general rule on heirs and to the rule of early vesting. If openly so recognized it would not create (in fact, it would probably help to eliminate) uncertainty of result in subsequent cases. Because of the adaptability of "heirs" as a class designation if ascertainment is deferred, rather than strictly requiring actual heirs to survive, the suggested result would not create the hardship to remoter descendants that would result from requiring children to survive until possession; and, as is seemingly conceded in Professor Ferrier's criticism of the *Easter* case, the result would probably fulfill the testator's intent.⁸³

This latter point seems too important to brush off with the simple concession that this is the only thing that can be said for the *Easter* case. Of course, when made in disregard of constructional rules, *ad hoc* decisions purportedly based on "the intent of the testator" tend to destroy predictability and encourage wasteful litigation. It is even worse in cases where one man's guess as to that intent is as good as another's. But the present situation is one without an already established rule⁸⁴ and one where the intent seems reasonably clear. This writer agrees with Justice Traynor, in his dissent in *Easter*, that rules of construction should be respected because "without them . . . the meaning of a will could not be ascertained until it had been passed upon by a court of last resort."⁸⁵ In fact, because the costly search for intent in other ways is so speculative, these rules should not readily be rebutted once it is determined that the instrument is sufficiently unclear that resort to constructional rules is necessary. On the other hand, where there is no uncertainty in the instrument, such rules are inapplicable and should not be allowed to *create* uncertainty. Thus, for the very reasons set forth in the dissent in *Easter* as to the importance of constructional rules, and because no constructional rule had previously been established as to the facts then in issue, the majority holding seems preferable.

⁸³ Note, 32 CALIF. L. REV. 320, 323 (1944). One legislature has apparently been persuaded that the normal intent in creating future interests in "heirs" is to have a delayed determination of the heirs. See PA. STAT. ANN. tit. 20 §§ 180.14(4), 301.14 (Purdon 1950). Also, the Nebraska courts have frequently recognized that a deferred ascertainment of heirs is the testator's natural intent. See, e.g., *Abbott v. Continental Nat'l Bank*, 169 Neb. 147, 98 N.W.2d 804 (1959).

⁸⁴ See note 72 *supra*, especially *Restatement* position.

⁸⁵ 24 Cal.2d 191, 198, 148 P.2d 601, 604 (1944).

The majority's position seems to conform to the testator's intent, and it is only if constructional rules are in accord with the probable intent of a testator that courts and potential litigants will respect them. A rule of interpretation can serve its purpose only if it is sound as a reflection of probable intent and if it is likely to satisfy a court's sense of justice. A disfavored constructional rule is a rule which courts will try to circumvent as being intent defeating and which litigants will confidently seek to overcome by any discoverable argument for its rebuttal. Some basis for such an argument can nearly always be found, and it is likely to succeed on the basis of what the court will find is a "particular set of facts," in the face of which the rule must yield.⁸⁶ (The Doctrine of Worthier Title is illustrative of such a litigation-breeding rule.) If both the rule and the natural impression of what is intended coincide, then the temptation to litigate and to appeal is reduced.

In the *Easter* case, the facts involved a situation on which no specific rule was established either in California or as a matter of general common law. However, there were other constructional principles competing. The more general preferences for early vesting and the technical meaning favored one side, while the closely analogous sole heir-life tenant rule under the contrary usage exception favored the other. Even where a rule exists on an interpretation question, however, a clear-cut judicial overruling is not necessarily made objectionable on the basis of reliance. No testator or lawyer who had anticipated this question at the drafting stage would have left it unanswered in reliance upon a supposed rule of construction.

Because of the unsatisfactory handling of the problem presented in *Easter*—turning as it did on the narrow facts of the case instead of clear-cut principles—certainty is lacking on this question in California today. A strong judicial solution is essential in matters of interpretive details because it is unlikely that the legislature will become particularly interested in such questions.⁸⁷ (Even as unseemly a growth on modern trust law as Worthier Title went unremoved in this state until two years ago.⁸⁸)

⁸⁶ A "fine" example is *United States v. 654.8 Acres*, 102 F. Supp. 937 (E.D. Tenn. 1952), where the Rule in *Wild's Case*, which the court said was to be disregarded "by a slight indication of variant intent," was found not applicable because the court recognized that it would lead to a harsh result (a premature class closing, which is actually a result inherent in the rule itself) and because of "the requirements of plain justice"; but the court was not able to point out any such "indication of variant intent," which it said would make the rule inapplicable. It just by-passes the point on its way to the result. Thus, disfavored rules are recognized, undermined, and generally disregarded at the stage of actual application—*after* extended litigation to reach a result which would have been easy *without* the rule. (Note, however, that this was probably the best the court could do under the circumstances of the case, since a federal court must "apply" state law as it finds it, rather than "re-make" it.)

⁸⁷ However, see Pennsylvania legislation cited in note 69 *supra*.

⁸⁸ CAL. CIV. CODE § 1073 and CAL. PROB. CODE § 109, discussed in 47 CALIF. L. REV. 740 (1959).

(b) *Issue: Date of Distribution Later Than Ancestor's Death.*—Next let us consider whether survival is required until the date of distribution under the class designation of “issue” or “descendants,” when that distribution date is later than the date of death of the person whose descendants are in question. From this point on let us assume, as is probably the case anyway, that under applicable law issue are not to be determined before the named ancestor's death. If issue need not even survive the *ancestor* in order to take, the present problem of whether a survival requirement exists thereafter when possession is further postponed would seem already to have been resolved in the negative.

Unlike the situation existing where the word “heirs” is used, the technical meaning of the words “issue” and “descendants” does not necessitate the class being selected at the date of the named ancestor's death. That is, in ascertaining takers at a later date *any* descendant selected will literally answer the description of “issue” or “descendant,” even though he may not have been a taker under such terms if applied earlier; but if a person's “heirs” are ascertained as of a later date, those who would not actually have taken intestate property at that person's death do not literally answer the description of heirs of that person. To illustrate, consider the following example: *A* dies in 1955 survived by children *B* and *C*, and by *D* and *E*, who are *B*'s children. *B* dies in 1960. If the event upon which distribution depends occurs in 1961, those who would take as *A*'s issue as of 1961 are *C*, *D* and *E*, and all are actually issue of *A*. In 1961, those who would be *A*'s heirs if the statute of intestacy were applied at distribution are *C*, *D* and *E*, but this artificially selected group includes persons (*D* and *E*) who were not actually heirs of *A*. Heirs are fixed at the ancestor's death, issue are not. The true meaning of “heirs” is violated in the example, but the literal meaning of “issue” is not. Consequently a court may be more willing to imply a condition of survival and to defer determination of the class in cases involving the words “issue” and “descendants” than in those involving “heirs,” since in the former cases it is not necessary to conclude that the testator misunderstood or misused a crucial term in his will.

Unless some other circumstance, such as the fact that the life tenant would also be a remainderman, independently suggests that other than the true meaning was intended, we have seen that a requirement of survival to the date of possession is most unusual in the “heir” cases. Nor was survival required under the designation “children,” a result which is essential to avoid hardship to the family of a child who dies before possession. Should the decision be any different now, in the “issue” cases, when such an implied condition neither requires a violation of word-meanings nor imposes a hardship on the offspring of deceased children? If it is true that survival is to be implied only when an affirmative reason is found for so doing, then logically

the mere absence of *objections* to such an implied condition ought not bring about that result. However, the settlor's choice of the word "issue" may of itself be significant and may pose a different problem than the cases previously considered. If the common understanding accompanying the use of "issue" is that survival to the date of distribution would be required, a rule of construction which coincides with that understanding is essential if it is to be effective.

Strangely enough, there is a paucity of cases actually deciding the question of whether issue or descendants must impliedly survive beyond the named ancestor's death (or, beyond the effective date of the instrument, of course, if that be later) when the date of distribution has not then arrived. If there can be said to be a usual rule as to this question or a commonly recognized inference as to the expectation of one who uses these words, it is that such a condition is impliedly imposed up to the time of distribution.⁸⁹ However, it is not at all unlikely that a particular court will conclude that, as was generally true in the case of heirs, postponement of distribution alone is not to be considered a sufficient basis for implying a condition of survival beyond the ancestor's death and that this rule holds true even where the class is described as "issue" or "descendants."⁹⁰

⁸⁹ For example, in *Altman v. Rider*, 291 S.W.2d 577 (Ky. App. 1956), the "descendants" of a person who predeceased the testator were held not to be determined until the death of the life tenant, at which time distribution was to occur; the portion of the disposition in question was, in substance, to A for life, remainder to the descendants of B. The court avoided becoming "involved in the intricacies of the law of property" by attempting "to project what the testator expected to happen." Another example is *Twaites v. Waller*, 133 Iowa 84, 110 N.W. 279 (1907), requiring issue of one life tenant to survive until the death of the last life tenant, at which time distribution was directed. For other such holdings, see the second group of cases in note 91 *infra*. See also *Curtis v. Citizens Bank & Trust Co.*, 318 S.W.2d 33 (Ky. App. 1958) (where the opinion is so unclear as to conceal the court's reasoning, but the perpetuity violation must have been based on an implied requirement that issue survive until distribution).

"The group designation here employed ['issue of B'] . . . connotes a requirement of survival to the time of distribution even though such time of distribution is later than the death of B. . . . '[D]escendants of B' is similarly construed." RESTATEMENT, PROPERTY § 295, comment g (1940) (in which Illustration 3 is like *Altman v. Rider*, *supra*). See *Commissioner v. Alford*, 282 Mass. 113, 184 N.E. 437 (1933). The same is likely to be true of the words "heirs of the body." See *Pringle v. Houghton*, 249 Iowa 731, 88 N.W.2d 789 (1958) (involving alternative limitation, however).

⁹⁰ See first group of cases cited in note 91 *infra*, in which, despite possible additional arguments for requiring survival, issue were not required to survive to the date of distribution, which was later than the designated ancestor's death.

In *Second Bank-State Street Trust Co. v. Second Bank-State Street Trust Co.*, 335 Mass. 407, 140 N.E.2d 201 (1957), an *irrevocable* inter vivos trust was not to end until 21 years after the death of the last of the settlor's children. The issue of the children were to take the remainder per stirpes upon termination of the trust. The court held that at each child's death his issue were to be determined and were to take a vested interest with no further requirement of survival. However, the court concedes, *id.* at 415, 140 N.E.2d at 208, that general principles of construction require issue to survive and be determined at distribution, but finds this principle outweighed by the preference for an interpretation which would not violate the Rule Against Perpetuities and the preference for a complete disposition. (The court also employed the doctrine of sub-classes.)

Alternative Limitations. What seems to be the most-commonly litigated situation in which a distribution to issue is postponed beyond the ancestor's death is, in substance: to *A* (often testator's widow) for life, and on her death "to such children of *B* (often those of the testator himself) as are then living and to the issue of any deceased children of *B*." If, as suggested in the preceding paragraph, issue are normally to be required to survive to a date of distribution which is later than the ancestor's death, it would seem to follow that such a condition exists in this situation. However, arguments can and have been made for a contrary result. A maxim-prone court may be inclined to adopt the often unfortunate (and here unrealistic) approach that the inclusion of an express requirement of survival as to one class of takers excludes the requirement as to the others. Or it may be argued that the testator demonstrated his ability to express a condition of survival and that the omission of such a condition as to the issue of deceased children indicates that he intended not to impose the same requirement on them. No such nonsense as this would be necessary to make this problem a difficult one, especially where no presumption has been locally established as to the inference normally to be drawn from the use of the word "issue."

This difficulty reflects itself in an about equal division of authority on the question of whether, if a child of *B* predeceases *A* in our hypothetical situation, a particular *descendant* of that child must be alive at *A*'s death in order for his interest to materialize.⁹¹ The holding that the issue of a

⁹¹ Among the cases holding no requirement of survival exists after the ancestor's death are: *Tuffy v. Nichols*, 120 F.2d 906 (2d Cir. 1941); *Rennolds v. Branch*, 182 Va. 678, 29 S.E.2d 847 (1944); cf. *Williams v. Houck*, 143 Conn. 433, 123 A.2d 177 (1956) (result greatly aided if not compelled by language that alternative gift is to child's issue who survived the child). See also *In re Colman's Will*, 253 Wis. 91, 33 N.W.2d 237 (1948) (which, although it has been cited as authority for the proposition here being discussed, ought to be considered no authority on this question, since it involves an alternative limitation to "children" in which arguments against implied conditions are much stronger; see note 99 *infra*).

The *contra* position is represented by: *In re Cavarly's Estate*, 119 Cal. 406, 51 Pac. 629 (1897) (discussed hereafter at note 94); *Brechbeller v. Wilson*, 228 Ill. 502, 81 N.E. 1094 (1907); *In re Doughty's Estate*, 24 Misc. 2d 625, 194 N.Y.S.2d 50 (Surr. Ct. 1959); *In re Sullivan's Trust*, 6 Misc. 2d 994, 157 N.Y.S.2d 30 (Sup. Ct. 1956); *accord*, *Pringle v. Houghton*, 249 Iowa 731, 88 N.W.2d 789 (1958) ("heirs of the body"). Several cases unfortunately have gone far beyond this situation and have required survival under an alternative limitation to "children," finding the express requirements as to one taker impliedly applicable to the alternative takers. *Spence v. Second Nat'l Bank*, 126 Ind. App. 125, 130 N.E.2d 667 (1955); *Jeffords v. Thornal*, 204 S.C. 257, 29 S.E.2d 116 (1944). Distasteful as these cases are, on *this* side of the "issue" question the "children" cases would seem to be very strong authority for the proposition that survival by the alternative takers is impliedly required where the primary takers are expressly required to survive.

The general position of the American Law Institute as to issue would seem to support the view that survival is required of the issue in this situation. See note 89 *supra*, quoting from § 296, comment *g*, of the *Restatement*. This rule is not to be confused with comment *d* of § 254, which deals only with the limited situation in which there is a supplanting limitation in favor

deceased child of *B* would take indefeasible interests at the time of the child's death results in strictly limiting requirements of survival to those upon whom they are clearly imposed⁹²—in this case, the children of *B*. This result also gives effect to the principle of early vesting and offers the virtues of simplicity and consistency in the basic rules of interpretation which generally oppose implied conditions. On the other hand, a result which would require the issue to survive until *A*'s death and to be determined at the date of distribution has a great deal of merit, particularly where it has been decided that issue are generally required to survive until distribution. The testator has in the present situation established a pattern calculated to substitute his remoter issue for any of his *children* who die before distribution. This indicates a preference to limit the benefits to his lineal descendants and not to allow one who dies before the end of the prescribed period to dispose of any part of the property to anyone outside the descending blood line. It would not be a surprising idea for a testator to prefer to leave property to his grandchildren rather than to a son-in-law; in fact that is what the express provisions direct.

Is it not likely that this pattern of retaining this property in the descending line, though imperfectly expressed, is intended to be carried into the next generation? After all, the use of the word "issue" tends strongly to confirm that the testator recognized that descendants beyond grandchildren might take, probably *assuming* the continued substitution of offspring for their deceased parents. Is there any reason for supposing that the testator who would require a child to survive until distribution would not also want to require the same of a grandchild? The language actually used reflects a basic purpose from which one should infer an intent to require survival on the part of the issue. If a child's issue are not to be determined until the child's death anyway, a grandchild who predeceased his parent

of issue (or children) with respect to *some but not all* failures of the ancestor to survive and in which that restricted requirement is a basis of defeasance, rather than a condition precedent, of the ancestor's interest.

⁹² Strict limitation of conditions has been applied in other questions arising under dispositions of a similar type, but where the *children* of *B* are not expressly required to survive *A*. If the disposition had been worded so that on termination the property should go "to *B*'s children and the issue of any deceased children by right of representation," then the condition and gift over may be narrowly construed in that a court might treat the interest of each *child* of *B* as vested subject to divestment *only if he dies survived by issue*, so that a deceased child's estate could take (rather than *B*'s other children) if the child should die *without* issue who could be substituted for him. See, e.g., *Knight v. Pottgieser*, 176 Ill. 368, 52 N.E. 934 (1898); *Boyd v. Bartlett*, 325 Mass. 206, 89 N.E.2d 772 (1950). This in effect treats the quoted language as if it read "to *B*'s children, but if any should die survived by issue, then to such issue." (Such problems as whether gifts over *without* issue imply gifts over *with* issue are discussed in the next installment.) Also compare the restrictive interpretation in *Marvin v. Peirce*, 84 N.H. 455, 152 Atl. 484 (1930), 44 Harv. L. Rev. 1000 (1931); *KALES, FUTURE INTERESTS* § 608 (2d ed. 1920) (accrued shares).

would be excluded; so why ought not the same thing happen to another grandchild whose death happened to occur after that of his parent but still prior to distribution? It appears unlikely that the spouse of one deceased grandchild of the testator was intended to succeed to his interest merely because that grandchild outlived a deceased child of the testator, when such deceased child's own spouse and the spouse of a previously deceased grandchild would be excluded. In fact, in the absence of an implied condition of survival, the anomalous and not unlikely result could be that at a daughter's death a son-in-law of the testator will be precluded from taking any of her share by will or intestacy, the testator's grandchildren in the daughter's line being substituted in her place, but that upon the subsequent death of one of these grandchildren without having married, his interest would be inherited by his surviving parent (the very son-in-law who was earlier excluded), instead of passing to other issue by substitution.⁹³

If the testator's basic scheme is discovered and it does not violate the language used, his failure to spell out his full intent ought not preclude the carrying out of his purpose. The only question would seem to be whether or not such a scheme of requiring survival is sufficiently clear from this wording as to depart from the basic principle of early vesting, each impairment of which will likely weaken the principle and thereby invite litigation and uncertainty, unless based upon a clear-cut exception. Such an exception for the words "issue" and "descendant" does seem appropriate and ought to extend to all cases involving such words, but only as a presumption, of course.

In California, the problem of an alternative gift to the issue of deceased children was litigated in *In re Cavarly's Estate*,⁹⁴ and the court adopted the position that the issue must survive until distribution in order to take. Under the testator's will, the residue of his estate was to be held in trust until the youngest child reached, or if living would have reached, age thirty, and at that time the property was to be distributed "in equal shares among such of my children as may then be living and the issue of any deceased child, such issue to share in the distribution *per stirpes* and not *per capita*." Despite the fact that the question to be resolved was that of the validity of the disposition under the then-existing statutory limitation upon suspension of the absolute power of alienation, the California Supreme Court found that an implied condition of survival until distribution was imposed upon the issue of any deceased child. Even the preference for an interpretation which would result in giving maximum effect to the disposition was

⁹³ And CAL. PROB. CODE § 227 (under which property received by unmarried, under-age child from a deceased parent passes to other children instead of surviving parent) does not apply, since the property came from a grandparent, not from a parent.

⁹⁴ 119 Cal. 406, 51 Pac. 629 (1897).

ignored.⁹⁵ The court reasoned that any interpretation other than that of a condition of survival would allow the widow of a deceased grandchild to take, although not a member of the class intended to be benefited. "Evidently, the testator intended to keep the property in his family, and beyond the power of his descendants to dispose of for the prescribed period."⁹⁶ As a partial basis for its result, however, the court concluded that the implied requirement of survival followed from the fact that it was dealing with a class gift. This conclusion resulted from obvious errors in the court's analysis of authorities—errors much like those earlier pointed out with regard to the dissenting opinion in the *Stanford* case.⁹⁷

The present status of this case is difficult to assess. The *Stanford* case, coming sixty years later, recognized *Cavarly's* misinterpretation of authorities and openly disapproved that case as to "the question herein decided."⁹⁸ The point under consideration in *Stanford*, however, was merely whether the class-gift form in a future-interest disposition imposed a condition of survival. The court decided it did not. Its holding, moreover, involved a class described only as "children." In dealing with the word "children" the problem is materially changed, even in alternative limitations.⁹⁹ Thus, how much *Cavarly* is undermined as to the point it decided is not clear. Even without aid of a false class-gift rule, the presence of a survival require-

⁹⁵ See, e.g., CAL. PROB. CODE § 102. American courts have tended to disregard the theory set forth in GRAY, THE RULE AGAINST PERPETUITIES § 629 (4th ed. 1942), that the Rule Against Perpetuities is to be "remorselessly applied" after construing the instrument "as if the Rule did not exist." See, e.g., Second Bank-State St. Trust Co. v. Second Bank-State St. Trust Co., 335 Mass. 407, 140 N.E.2d 201 (1957), discussed in note 90 *supra*; *In re Session's Estate*, 217 Ore. 340, 341 P.2d 512 (1959); Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 658 (1938).

⁹⁶ 119 Cal. 406, 410, 51 Pac. 629, 630 (1897).

⁹⁷ See notes 46 and 48 *supra* and text at notes 46-52.

⁹⁸ 49 Cal. 2d 120, 129, 315 P.2d 681, 686 (1957).

⁹⁹ Even in the alternative gift form in which *Cavarly* and other cases require *issue* to survive, if the alternative gift had been to *children* instead it would seem essential to find the interests of the children free from any implied survival requirement. Some of the arguments applicable to the "issue" cases are also applicable to "children" cases, but many are not. The crucial difference is that the class is no longer adaptable. Also the testator has not used a term which contemplates a process of substituting remoter descendants for immediate offspring. The testator's scheme of retention of the property in his descending line has been limited to his grandchildren (or to the children of the primary remaindermen). Thus, even in alternative limitations it is the use of the word "issue" which is determinative; if "children" is used instead, an implied condition of survival is not justified. See, e.g., *In re Colman's Will*, 253 Wis. 91, 33 N.W.2d 237 (1948) (where primary group was brothers and sisters and where even though gift in event any should die was to brother's or sister's *surviving children*, the word "surviving" was read to mean surviving their parent rather than surviving until distribution; carried this far, the result seems wrong under the law of most states, and at least that of California, because an *express* condition of survival presumably refers to the date of possession, a matter which will be discussed in the next installment). But, that contrary authority exists as to alternative gifts to children (and to illustrate the price that is paid in such decisions), see *Spence v. Second Nat'l Bank*, 126 Ind. App. 125, 130 N.E.2d 667 (1955).

ment for one remainderman and the fact that the alternative limitation was to an adaptable class encompassing different generations of descendants could be deemed to justify the *Cavaly* result. Such a form and choice of class designation might well be found to manifest an intent contrary to the normal presumption of early indefeasibility.

The recognition of an intent to require *issue* or *descendants* to survive until distribution is opposed neither by hardship to natural objects (as would result from implying a survival requirement under "children") nor by the prospect of violating the class description (as would result from a delayed ascertainment of "heirs"). To so construe these class designations is very likely to be in accord with usual expectations.¹⁰⁰ Unless a court is willing to become involved in the absurdity of the fast-disappearing rule of strict per capita distribution to all descendants, as of *whatever* time that rule may be applied, it is necessary to exclude some members of classes described as "issue" and "descendants." The necessity of excluding some of the persons literally answering the description does not exist in the case of the more limited terms "children," "brothers," "heirs" and the like; however, since some exclusion is virtually essential under terms which potentially encompass all descendants of any degree, it seems appropriate that such terms should be so applied as of the date of distribution, with the prior death of any descendant resulting in his disqualification. Whether this disqualification is to be deemed the result of a condition precedent or subsequent is not important for these purposes—and an optimist might hope that it would rarely be important for any purpose.¹⁰¹

A SUMMARY AT MID-POINT

Thus far a variety of situations have been considered, and an effort has been made to indicate the present state of the law, to suggest workable solutions for particular situations which tend to recur, and to examine the basic considerations and principles which bear upon the solution of these and other implied survival problems. The situations and solutions thus far encountered can be summarized as follows:

(1) In an unqualified remainder to a named individual or to several named individuals there is no *implied* requirement of survival to the date of possession, even where "words of futurity" are used.

(2) When a gift to a named individual is not to be turned over to him until a stated age, rather than after a preceding interest, cases often turn on details of language or disposition of interim income, factors which reveal so little of actual intent that, in any such case, survival ought not to be

¹⁰⁰ See note 89 *supra*.

¹⁰¹ The diminishing importance of distinguishing contingent remainders from those which are vested subject to complete defeasance, especially in California, will be briefly considered in the next installment of this article.

required in the absence of a clearly conditional form of expression, such as "if he reaches age 21."

(3) In unqualified future interests to such a restricted class as "children," there is no implied condition of survival beyond the effective date of the instrument.

(4) Where the class to take a future interest is described as "heirs," or its equivalent, there is generally no implied requirement of survival beyond the *later* of the date of death of the ancestor whose heirs are sought and the effective date of the instrument. However, an exception is normally recognized, and should be, when the preceding interest is in the *sole* heir of the designated person, and it also has been suggested herein that this exception should apply when the preceding interest is in one or more (though less than all) of such heirs, but the cases are not clear on this last point. If an exception is to be made and survival is to be required, then the appropriate method of doing so is by a postponed ascertainment of an artificial class of heirs.

(5) In cases involving distributions to "issue" or "descendants," even distributions later than the death of the designated ancestor, the usually recognized rule is that the takers under such a class designation must survive until, and are to be determined at, the date of distribution. There is, however, a conflict of authority on this point where the limitation to the issue is in the form of an alternative disposition taking effect at a time later than the date of the ancestor's death, although it would seem that this form should make no difference where a survival requirement is considered to be inherent in the class description.

In general it has been suggested throughout that implied-condition-of-survival cases ought not to turn on the "particular facts" of each but should usually be resolved on the basis of sensible rules of construction. Certainly undesirable is the common situation in which there will exist two opposed *general* rules of construction which are equally applicable to the facts before the court, for the effect of such conflicting rules is simply to liberate the court to reach whichever result it thinks best and to destroy predictability. Even worse, however, is the intent-defeating rule which a conscientious judge feels he must circumvent to reach a just result. A variety of considerations enter into the formulation of *particular* rules; and in formulating such rules the principle of early vesting ought not override all other considerations (such as normal expectations when they are evident in certain common forms of expression), although that principle is of great importance in this area of the law as a fundamental cohesive force which fosters predictability and usually leads to desirable results. Justifiable exceptions to the principle of early vesting should be openly recognized as clear-cut rules or else the quest for "just results" on an *ad hoc* basis will

impair the integrity of all such constructional guides. Thus formulated, rules of interpretation should be treated as strongly persuasive in the cases for which they are designed, and they could be applied without apology¹⁰² when language and circumstances fail to reveal clearly the testator's intent.

¹⁰² *Contrast* Corbett v. Skaggs, 111 Kan. 380, 207 Pac. 819 (1922) (reaching a class-gift result rather than one of lapse where, under the latter, intestacy would result from the death of one of several named residuary beneficiaries before the death of the testator because the facts did not fall within the scope of the applicable anti-lapse statute; "The rule [applying lapse in such a case] has been severely criticized even by judges . . . who have felt constrained to follow it"; *id.* at 384, 207 Pac. at 821), *with* the apologetic opinions of other cases on the same point, such as *In re Gray's Estate*, 147 Pa. 67 (1892) (where the court concedes that the "rule [of finding a lapse in such cases] . . . does not commend itself to sound reasoning," *id.* at 74, but applies the rule anyway).