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## FUTURE INTERESTS RESTATED: TRADITION VERSUS CLARIFICATION AND REFORM \*

HERE in this third of five projected volumes of restatement of property "law as it is" — that is, of rules which purportedly predict what an intelligent court will do if properly harangued<sup>1</sup> — the American Law Institute brings to a close its clear expression and authoritative crystallization of our traditional confusion about Future Interests. Having already in Volumes I and II presented its rules about the "creation" and "characteristics" of the complementary freehold estates and about the "types" and "characteristics" of future interests, the Institute now adds, after much

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\* A review of: *RESTATEMENT OF THE LAW OF PROPERTY*. Volume III. St. Paul: American Law Institute Publishers. 1940. Pp. xliii, 1181-2118. \$6.00. The reviewer is indebted for helpful suggestions to his colleagues, Professors Franklin M. Brown and Harold D. Lasswell, and to Miss Shirley Adelson of the New York Bar.

<sup>1</sup> "The Director: Of course, we are stating the law, not as what it ought to be or as it was, but as it is. Now this particular problem I think brings that clearly up. Your judgment should not be wholly swayed by the desirability of the rule proposed. You should ask yourself the question, in view of what has occurred in courts in other instances in trust cases for the last few years, today in the great majority of the cases, if this question was presented and well argued, what in your opinion the decisions would be. We have very often decided against the weight of authority, if you mean by weight of authority the counting of cases. If you mean what we mean by weight of authority, interpreted under all the circumstances of the decisions, what you think today would be the decision of a court if the case was properly presented to it. That is really the issue. It is not an issue of whether we are making law because, of course, we are not in that business." (1937-1938) 15 *PROC. A. L. I.* 243. Such was the statement of Director Lewis in public discussion of certain sections of the volume under review.

further meticulous grinding of its elaborate machinery,<sup>2</sup> a formidable blackletter-comment-illustration distillate of rules about the "creation" of future interests and about "the special topics of Interests of Expectant Distributees and Powers of Appointment."<sup>3</sup> Its purpose is still—this volume refers back to Volume I—to achieve "a correct statement of the general law of the United States" and hence to promote "certainty and clarity" and prevent a supersession of "our common law system" by "rigid legislative codes."

Volumes I and II of the *Restatement of Property* were announced in this Review as "a work of much daring and great ingenuity" in which the restaters had too often "assumed the role of law maker rather than of law stater."<sup>4</sup> The volumes were found to be exuberant with a "new-found Americanism" of creative, revolutionary import and in some of their innovations the restaters had even "gone wild." No such praise or blame is likely to greet the present volume.<sup>5</sup> Its hallmark is not wildness, nor revolution, nor even a disciplined—much less a daring and creative—innovation; but rather a too constant fidelity in both purpose and method to tradition. It still defines and classifies its problems largely in terms not of facts and social objectives but of legal concepts of high-level abstraction. It still offers but little explicit

<sup>2</sup> Professor Richard R. Powell is again Reporter for the whole volume. Professor W. Barton Leach acted as "Special Reporter for the Chapter on Powers of Appointment" and Professor A. James Casner as "Associate Reporter for the Chapters on Limitations to 'Heirs,' 'Heirs of the Body,' 'Next of Kin,' 'Relatives,' and to other groups similarly designated." (Introduction, v.) The reporters were assisted by the usual corps of distinguished advisers and various portions of the volume were considered at three different annual meetings of the Institute.

<sup>3</sup> "Types," "characteristics," and "creation"—the main formal subdivisions of all three volumes—are, it will become obvious from the discussion below, ill-defined and over-lapping categories. Both "types" and "creation" may, in the Institute's usage, refer indiscriminately to the donor's language or to the donor's reference to person, time, and event or to legal consequences; "characteristics" seems, however, to be more consistently confined in its reference to legal consequences (*i.e.*, judicial responses to specific practical problems).

<sup>4</sup> Professor Percy Bordwell in Book Review (1938) 51 HARV. L. REV. 565. It is not to be inferred that Professor Bordwell's review was wholly favorable. His conclusion was: "Legislation is legislation and scholarship is scholarship, but the Institute is not a legislature and its ways are not those of scholarship." *Id.* at 570.

<sup>5</sup> There were those who had strong doubts about even the earlier volumes. See Vance, *The Restatement of the Law of Property* (1937) 86 U. OF PA. L. REV. 173; McDougal, Book Review (1937) 32 ILL. L. REV. 509.

consideration of alternative social objectives and but little justification in terms of policy norms for the objectives which it implicitly prefers. It still seeks to investigate relations of cause and effect — the responses of judges to certain practical problems — by a completely inadequate analysis and observation of environmental and predispositional factors. Confining its attention almost exclusively to the judicial institution, it still hopes to achieve the few social objectives it does announce without invoking the necessary social controls. In sum: as comprehensive and as systematic in its exposition of propositions from appellate opinions as it always is, as critical of inherited dogma as it sometimes seeks to be, and however helpful it may be to harassed draftsmen both because of the excellent free advice it offers and because of its minute itemization of ambiguities in common limitations, the volume still falls far short either of achieving the restaters' avowed goal of determining reliable rules for prediction, or of stating — a goal which the restaters cannot completely renounce — persuasive principles for policy guidance.<sup>6</sup> Formulated in symbols laden with the ambiguities of centuries, its rules are not so much a restatement of the "law as it is" as of the confusion that was, is, and inevitably will be until investigators of future interests problems clarify their purposes, improve their methods of analysis and observation, and widen the range of their efforts to be influential.

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<sup>6</sup> Quite obviously it is impossible for a reviewer, even in an article-length review, to examine every portion of a volume of the scope of the one under review. Consequently I have picked out for comment only those sections of the book which I find most regrettable and which seem to me to illustrate best its general defects in purpose, method of investigation, and form of statement. By such emphasis I do not intend to imply that there is not much in the book which is praiseworthy. [For random sections which could be singled out for commendation see § 242, comment *j*; Introductory Note, p. 1248 (disposal of Swinburne); § 266 and especially comment *b*; §§ 272, 274, 283, 298, and 303. Note the excellent advice to draftsmen on pages 1815 and 1905.] Even the portions of the book I inveigh against exhibit the highest technical skill; no less could be expected in a work sponsored by such eminent reporters. Indeed it would be ungenerous not to state that the volume, taken as a whole, is probably the most critical and most useful study of the problems with which it deals yet published in this country. But it would be an evasion of responsibility not to try to spell out in detail why such praise is damning by its faintness. Public spokesmen of the Institute have, it may be recalled, several times suggested that one of its chief functions is to stir up criticism.

## I

To expedite documentation of so sweeping an indictment, let us look first at the Institute's avowed objective of determining predictive rules and consider some of the methods which would have to be employed for the achievement of such a formidable objective. To state a problem in terms of prediction, if prediction is to be a genuine and not a spurious goal, is to state a scientific problem. For solution of such a problem an investigator must take into account all of the significant and interdependent variables which may affect that variable whose value or magnitude he seeks.<sup>7</sup> The variable whose value the Institute purports to be seeking is judicial response to certain problems in future interests. The task which it sets for itself, therefore, is that of constructing theories and developing techniques of fact-collecting which will enable it to take into account and determine the interrelations of at least the most significant of the many variables in the environments and predispositions of judges that may affect their responses to such problems.

What are some of these variables which, from the perspective of most practicing lawyers and even of most law teachers, are presumptively relevant? Let us undertake—as the Institute did not—to specify a list of classes of variables which an investigator must carefully distinguish, index, and observe if he is justifiably to entertain even faint hope of being able to discover predictive rules. However low our estimate of the possibilities of prediction, such inquiry need not be waste effort: some similar analysis is indispensable even to attainment of clarity of communication about unpredictable alternatives, and hence also to meaningful appraisal of what the Institute has actually done. Here in rough, tentative form is a list which may help to dispel confusion:

*A. The Practical Problem: Competing Claims Presented to the Court.*—In language redolent with legalistic justifications such

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<sup>7</sup> For elaboration of the method of multiple-variable analysis, and some examples of its application to "social science" problems, see BROWN, *PSYCHOLOGY AND THE SOCIAL ORDER* (1936); HENDERSON, *PARETO'S GENERAL SOCIOLOGY* (1935); LASSWELL, *WORLD POLITICS AND PERSONAL INSECURITY* (1935); MAYO, *THE HUMAN PROBLEMS OF AN INDUSTRIAL CIVILIZATION* (1933); ROETHLISBERGER, *MANAGEMENT AND MORALE* (1941); 1 & 2 WHITEHEAD, *THE INDUSTRIAL WORKER* (1938); Keyser, *On the Study of Legal Science* (1929) 38 *YALE L. J.* 413.

problems would be described as problems in "destructibility," "perpetuities," "alienability," "partition," "taxation," "survivorship," "acceleration," "eminent domain," "statute of limitations." In more popular idiom, such problems pose the question of: Who wants what from whom and why? The "who" and the "whom" can include people claiming identification under the donor's language or their creditors, vendees or spouses, people purporting to represent the public interest (*e.g.*, the tax collector), and even people who cannot identify themselves other than as intermeddling strangers; the "what" most often involves a demand for the "property" in whole or in part; and the "why," the justifications for the demand, may include a pronouncement of either legal norms or policy norms or both. At the very inception of our search for predictability we are confronted with the unfortunate fact that appellate opinions and even trial court records are often very meager in the information they yield about all of these quarreling people (their relations, blood and otherwise, to the donor and to each other) and how they identify themselves and what they want.

B. *The Language of the Dispositive Instrument.*—This is sometimes called "the limitation." For clarity of analysis it is indispensable that this variable, emphasized by a major heading here because of its apparent preeminent importance in most future interests problems, be kept quite distinct from the variable following (the donor's reference). As certain shapes on paper, certain manifest syllabic patterns — such as "heirs," "issue," "surviving children," "descendants" — the donor's language may unfortunately point equivocally to various and competing groups of claimants. Different verbal patterns may, conversely, make the same factual reference to person, time, event, and subject matter. Sometimes, furthermore, the language of the donor may be so devoid of factual reference that it gives no direction at all.

C. *The Donor's Reference in the Instrument to Facts of Person, Time, Event, and Subject Matter.*—Here it is important to keep distinct three very different observational standpoints. By the donor's reference is meant his reference as a scientific observer, or a majority of scientific observers, would determine it. Such determination may or may not coincide with the self-serving identifications of the claimants under heading A. And it may or may not coincide with the final determination by the court, which is part of

the response sought. When, as in most problems of "survivorship," the words of the donor are so devoid of reference that they give little or no direction and a court must of necessity create its own reference as part of its response, our chief concern must be to observe whether the court smuggles in such response as a part of the "facts" ("intent of the donor"), and if so, what policy norms it is actually following in its distribution of the property.

D. *Legal Norms.*—These are the conventional justifications of judicial decisions, the answers which judges have become conditioned to give to losing counsel. They are the propositions which appear in most appellate opinions or textbooks discussing the specific practical problem in question and are usually in terms of a peculiar and distinctive vocabulary of lawyers: "vested," "contingent," "possibility of reverter," "class," "condition precedent," "remainder," "executory interest," "title." Often it is difficult to ascribe meaning to such propositions; they point to no identifiable goals and give no directions for action; they are tautological in the sense that they can be given "meaning" only by circular reference to the very behavior which they are supposed to justify and predict. Some contemporaries assume that such propositions have no effect on the decision, but affect only the style of justification; others by obsessive concern with such propositions seem to assume that they are all important. Our problem (that is, the Institute's) is of course to determine, if possible, just what effect they do have. A complete and workable classification of legal norms would also have to include any propositions or standards—appeals to authority, reason, self-evidence, nature, tradition, administrative convenience, and so on—by which judges explain their deference to tautological concepts and any goal-directed words or statements of cause and effect relations which customarily appear in appellate opinions or textbooks. Careful distinctions would have to be taken between the brief synoptic reference to these norms under heading A, the subsequent elaboration of these norms by counsel, and such norms as are a part of the predispositions of any reasonably learned or literate judge. The one point which an investigator should never forget—and which the Institute appears never to have recognized—is that these norms are not themselves the statement of scientific laws but rather a part only of the data from which such laws might be formulated.

E. *Policy Norms.*— These are all of the other significant ideological propositions (social, economic, religious, ethical) of our culture which could conceivably bear on a judge's response to a practical problem in future interests. Such propositions purport to state how values (income, power, deference, safety, knowledge) ought to be distributed among people, and point to goals of varying degrees of abstraction. Some of these may be immediately presented to the court by counsel in argument or may even get mention in appellate opinions (carrying out intent of donor, limiting duration of future interests, promoting free alienability, preventing tax evasion, keeping in blood line); if they get enough mention in such opinions they may eventually qualify for classification as "legal norms." Other such norms are more free-floating in our culture and beat upon the judge from the rostrum, the printed page, and the radio, or are urged by family, friends, and colleagues. It is an axiom of contemporary jurisprudence that such norms are of the greatest significance for the prediction of behavior. Yet our techniques for classifying such norms and for determining which have been brought to a judge's attention over what period of time and by whom are still in the most rudimentary stages.<sup>8</sup>

F. *Other Nonideological Factors: Environmental and Predispositional.*— This class is added for the sake of systematic completeness even though our techniques of observation and analysis have not yet been sufficiently refined to take many such variables into account. Our list here could include, for more or less random examples: personality type, social and class affiliations, group memberships of all kinds, skills of judges, parties, counsel, jurors, and witnesses; trial or hearing conditions, such as duration of proceedings, length of individual sessions, frequency of recesses; bribery and intimidation; shifts in the relative importance of symbols, goods, violence, and institutional practices as methods of social control generally; changes in technology, population, and resource utilization; and so on. Common-sense and unsystematic knowledge of such variables is of course a part of the working equipment of any successful practitioner.

Such in vague outline are some of the initial discriminations

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<sup>8</sup> Dicey's classic *LAW AND PUBLIC OPINION IN ENGLAND* (2d ed. 1914) should be suggestive of what a more systematic analysis might reveal. Cf. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* (1941).

which a scientific observer in serious search of predictability would have to make. As appalling as it may seem to frame categories and subcategories for all of these key variables in terms of such precision that their influence and interrelations can be tested, it is nevertheless a task which cannot be ignored by anyone who pretends to seek scientific laws about judicial behavior. It is, furthermore, not so much the Institute's aspiration as it is its method — a "one factor, one result" analysis in terms of only a part of the relevant data — which is subject to question. Prediction which is useful for policy implementation (for securing, for example, certain desired responses from judges) cannot safely be left to clairvoyance by legal doctrine.

Let us now explicitly consider as a possible legitimate objective of responsible legal scholarship an objective which the Institute disavows, but without which there would be no Institute: the exercise of influence, a conscious effort to affect the distribution of values in our society by the implementation of preferred policy norms. Effective pursuit of this even more formidable objective — since it builds on prediction — must necessarily include at least three steps.<sup>9</sup> The first is a statement of our preferences, of the value distributions that we want, in a consistent system of policy norms which, however abstract they may be at the top of the hierarchy ("good life," "shared power," "shared income," "shared respect," "shared knowledge"), eventually get down to statements so concrete in their reference that they specify observable and measurable effects on people;<sup>10</sup> the second is an attempt to determine, by scientific analysis and observation, the comparative effects of possible alternative decisions (not by judges alone but by all people in influential positions) on the distribution of values which we prefer; and the third is an effort to get command of all of the social controls — doctrines and practices for manipulating old institutions or for creating new institutions — necessary to secure the decisions which promote our preferences.<sup>11</sup>

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<sup>9</sup> For a somewhat similar outline of steps necessary to identify the "public interest" see the volume under review, § 243, comment *h*. The tragedy is that the Institute did not follow up such insight. See note 21 *infra*.

<sup>10</sup> See LASSWELL, *DEMOCRACY THROUGH PUBLIC OPINION* (1941).

<sup>11</sup> Let me be specific here. The one policy norm which dominates the Institute's discussion of "rules of construction" (some 600 pages of the book) is that the "intent" of the donor should be ascertained, if possible, and respected, if ascer-

## II

So much by way of methodological introduction. Our next inquiry must be: just how in the particular volume under review does the Institute violate, as has been alleged, all of these preferred procedures? Because of our present lack of knowledge and techniques, perhaps even an organization of the Institute's resources and scholarship cannot fairly be criticized for ignoring or assigning a zero value to most of the nonideological variables listed above under heading F. Its failures must in justice, and can in fact, be found in its handling of the other five suggested classes of variables and in its abstention from effort to specify and implement policy norms.

Here in brief is my basic criticism: It is not that the Institute has ignored these first five classes of variables — far from it, evidences of their consideration are strewn on almost every page. It is rather that these very different variables are completely confused in a conventional, "legalistic" (see variables D), formal superstructure of concepts and doctrines ("judicially ascertained intent of conveyor," "condition precedent," "condition as a basis of defeasance," "class," "title," "relation back") which make a hopelessly indiscriminating reference to all of the first five classes of variables at once and equally to the variable whose value is sought, namely, specific judicial responses.<sup>12</sup> Practical problems which, from the parties involved, the claims they are making, and a policy perspective are totally different, are hence lumped together in haphazard and anecdotal fashion and disposed of without any sys-

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tainable. Yet cases on construction are cases that come up only because the donor did not make his intent (factual reference to time, person, and event) clear, and it is generally admitted that in most of such cases the donor did not anticipate the very events which give rise to the litigation, else he would have provided for them. Why did not the Institute seize an opportunity for some *preventive* social engineering? If our dominant policy objective really is to carry out the donor's intent in situations of this kind, why should we not make some provision for unequivocal ascertainment of that intent within his lifetime? Might it not be desirable — forgetting the Institute's pathological fear of "rigid legislative codes" — to set up a State Drafting Bureau which could check all wills for common ambiguities and supervise their correction until they provide for all the most likely contingencies? Such supervision might even be made a prerequisite for probate or included in a comprehensive scheme for ante-mortem probate. See Cavers, *Ante Mortem Probate: An Essay in Preventive Law* (1934) 1 U. OF CHI. L. REV. 440.

<sup>12</sup> Cf. Clark, *The Restatement of the Law of Contracts* (1933) 42 YALE L. J. 643.

tematic consideration of relevant policy norms. Differences in legal consequences (specific decisions) are even made to turn on differences in the wording of limitations when the words of the different limitations have the same reference to time, person, and event without any indication, beyond appeal to tradition, of why such differences should be honored. Thus in total result the Institute's much desired predictability is lost in a fog of ambiguity, and policy anachronisms are preserved and enshrined. For specific illustration of all this confusion and its unfortunate results, let us now turn to detailed consideration of some of the rules stated about the construction of limitations and powers of appointment.

First, the rules about the construction of limitations. These are introduced by a special chapter (c. 18) on "general rules of construction" which have a "pervasive and fundamental importance." Stated at a high level of abstraction from, and for, all kinds of differing practical problems, most of these "general rules" have so many doors in and out ("tends to establish," "unless a contrary intent of the conveyer is found") that they often cancel each other out or admit of use on either side of a specific controversy.<sup>13</sup> The word "construction," we are told (§ 241), "denotes the ascertainment, in accordance with judicial standards, of the meaning of the language of a will or deed." Whose meaning? A comment (§ 241, comment *c*) informs us that "the dominant objective of construing a conveyance is to determine the disposition which the conveyer wanted to make." But often "there are difficulties in ascertaining" this "subjective intent": "the behavior of the conveyer" may inadequately evidence an "actually existent" intent; rules of evidence may preclude "resort to some of the behavior of the conveyer as evidence of what has gone on

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<sup>13</sup> Cf. § 243, comment *c*: "Quite as frequently, however, the constructional preferences stated in these three Clauses [(a) to (c)] persuade to inconsistent constructions. No one of them can be stated to be always controlling. In any such case of conflict the relative persuasive force of all relevant factors must be considered and the composite direction of the forces must be worked out, as best it can, in the light of the specific circumstances of the situation in controversy." For an excellent demonstration of how a sophisticated judge can ring the changes on a great variety of these rules of construction and still announce his independence, see the already famous opinion of Surrogate Wingate in *In re Montgomery's Estate*, 166 Misc. 347, 2 N. Y. S.(2d) 406 (1938). Still other views of the same case appear in *Matter of Montgomery*, 258 App. Div. 64, 15 N. Y. S.(2d) 729 (1939), and in *Matter of Montgomery*, 282 N. Y. 713, 26 N. E.(2d) 824 (1940).

in his mind";<sup>14</sup> "very commonly" the conveyer may have failed to envisage some of the possible combinations of future events, in the midst of which his disposition is to take effect, and hence his subjective intent as to such future circumstances has been either nonexistent or very hazy. "Hence the judicial ascertainment of the intent of the conveyer," so the comment concludes, "is a process which combines an orderly, but somewhat restricted, search for his subjective intent with supplementing inferences of an intent which the conveyer probably would have had, if he had addressed his mind to those problems which, in fact, have arisen out of his conveyance."<sup>15</sup> The ambiguity in the Institute's word "meaning" — its double reference to a possible actual "subjective intent" of a conveyer and to an intent manufactured for him by the court — is obvious.

Not only does the Institute fail to make any effort to segregate the types of problem in which "subjective intent" is nonexistent from those in which a search may be less quixotic, but it even seeks to congeal this ambiguity in its word "meaning" into a single concept by proposing in its second blackletter subsection [§ 241(2)] that "the product of this process of construction" be designated "the 'judicially ascertained intent' of the conveyer."<sup>16</sup> For ascertainment of this amorphous compound of factual reference by the donor and of judicial response to this and other factors, we are told (§ 242) to look — "normally"<sup>17</sup> — to "the language em-

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<sup>14</sup> See 2 SCHOULER, WILLS, EXECUTORS, AND ADMINISTRATORS (6th ed. 1923) 975.

<sup>15</sup> There is even less hope for "subjective intent" in Simes, Knouff, and Leonard, *The Meaning of "Heirs" in Wills—A Suggestion in Legal Method* (1933) 31 MICH. L. REV. 356, 357. Cf. Cooley, *What Constitutes a Gift to a Class* (1936) 49 HARV. L. REV. 903, 904, n.3, and the remarks of Professor Powell in (1937-1938) 15 PROC. A. L. I. 215 *et seq.*

<sup>16</sup> Contrast the remarks of Judge Learned Hand: "It is a very satisfactory but very bald way of stating intent and that is that we do not mean by intent, even in these cases, what was actually in the mind of the person who expresses it, who writes the document, but what he would have intended if he had been faced with the circumstances in question. That is what I think we all know is done constantly. Very few courts have had the courage to quite say that. I call that to your attention because it seems to me it is highly desirable to bring it out, but it is quite a revolutionary thing to say." (1937-1938) 15 PROC. A. L. I. 218. The revolutionary character of the admission scarcely removes the confusion of reference in the way it is stated.

<sup>17</sup> "The qualification introduced into the rule stated in this Section by the insertion therein of the word 'normally' is enlarged in proportion as a court is liberal

ployed in his [the conveyor's] conveyance, read as an entirety and in the light of the circumstances of its formulation." And if that fails us, we are to look to that construction "of two or more possible constructions" which "conforms more closely to the intent commonly prevalent among conveyors similarly situated" or "causes results that are more in accord with the public interest" or is "legally more effective" (§ 243). Laudable though this subsection reference to the "public interest" may be, we are not, unfortunately, given any convincing demonstration of why it is in the public interest to bow to the "intent commonly prevalent among conveyors similarly situated," assuming that such intent is identifiable, or to seek "a legally more effective" construction which will, *inter alia*, keep "the destructive force of the rule against perpetuities within reasonable limits."<sup>18</sup>

So much ambiguity in constructional objectives and in the reference of key symbols bears its full fruit of confusion in the very first chapter (c. 19, Requirement of Survival) which takes up specific practical problems. In an Introductory Note we are promised "a concentration of attention upon those aspects of limitations which determine whether or not the taker of the remainder or executory interest is required to survive to a time later than the date at which the deed or will, containing the limitation, speaks." Soon, however, a search for "clarity" not only "as to the person intended to be benefited" but also "as to the exact content of the interest which comprises the benefit intended to be conferred" requires an investigation of "the character" as well as "the existence" of a requirement of survival.<sup>19</sup> "More nebulous and hence more dif-

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in deciding that factors other than those dealt with in the rule stated in this Section are 'relevant.'" § 242, comment *b*.

<sup>18</sup> Though supplementary comments contain much useful discussion of what the Institute means by the various quoted phrases, such comments stop short either of an adequate factual breakdown of type problems or of statement of policy susceptible of testing for their compatibility with major democratic social goals. The discussion is in general too much tempered by complacency. Thus in § 243, comment *h*, after a clear outline of the steps which would be required for identification of "the public interest" there follows: "Practically these steps are commonly simplified by the crystallized conclusions reached as a result of frequent judicial consideration."

<sup>19</sup> Though the Introductory Note limits the scope of the chapter to "problems which arise with respect to limitations purporting to create remainders and executory interests," it adds (p. 1245): "Many of these rules . . . have important col-

difficult to formulate" than rules about its existence, rules about the "character" of the requirement of survival state whether it "is to be construed as a condition precedent of the interest sought to be created or as a basis for the defeasance of such interest." Thus in a topic on "Factors Which Tend to Establish the Requirement of Survival," the blackletter lays it down that "in a limitation purporting to create a remainder or an executory interest, a description of the intended takers" as "heirs," or as "heirs of the body," or as "next of kin," of a person not deceased, or "by some other term similarly connoting a requirement of survival"<sup>20</sup> (§ 249) or "(a) as persons (i) 'who survive' to a future time; or (ii) who are 'living' at the end of a prior interest or other period of time; or (b) by language having the same import as one of the expressions described in Clause (a)" (§ 250) tends to establish as to each such interest sought to be created not only "that a requirement of survival exists" but also "that such survival is a condition precedent of such interest." Similarly (§ 252) when the gift is to "B or his children," or to "B or his issue," or to "B or his descendants," "or by other language of similar import," the same double conclusion follows as to the interest of B. On the other hand, "in a limitation purporting to create a remainder or an executory interest in a person," "the inclusion of a supplanting limitation with respect to all failures of such person to survive to a future time" (§ 253) or equally "the inclusion of a supplanting limitation with respect to some, but not all, failures of [a] person to survive to a future time" (§ 254) tends to establish that the

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lateral implications, since a rule which determines whether the remainder created by a limitation is vested subject to defeasance or is subject to a condition precedent . . . simultaneously determines the nature and extent of the untransferred interest, if any, left in the conveyer. Thus such a rule frequently determines whether the reversionary interest of the conveyer is a reversion [§ 154(2)] or a possibility of reverter [§ 154(3)]." Cf. § 250, comment j. Should Justice Frankfurter's cleansing opinion in *Helvering v. Hallock*, 309 U. S. 106 (1940) get the following it so well deserves on problems other than those of taxation, these "collateral implications" may shortly become as dubious as the main propositions.

<sup>20</sup> Note the question-begging character of this generalization. Comment i informs us, for example, that "'issue' or 'descendants' are not 'other terms similarly connoting a requirement of survival'" within the meaning of this Section. Though "these words do normally connote a requirement of survival," such requirement "is usually construed to be a basis for the defeasance of the interest limited and not to be a condition precedent thereof."

stated requirement of survival "is a basis for the defeasance of such interest rather than a condition precedent thereof."

This same illusory distinction, furthermore, haunts a subsequent topic on "Factors Which Tend to Establish the Absence of a Requirement of Survival or Some Form Thereof." "Negative" rules which state "the absence of a condition precedent of survival" are said to "mean either that the interest is wholly free from any requirement of survival, or, that an existent requirement of survival operates only as a basis for the defeasance of such interest." Thus in sections that follow we get statements that in ambiguous limitations "the present identification of an existing person as the intended taker" (§ 256) or "language of present gift to the intended taker" (§ 257) or "the inclusion of a gift of the income" under certain conditions (§ 258) or even a postponed gift of such income (§ 259) tends to establish the absence of a "condition precedent" of survival. Whether there is a condition as a "basis of defeasance" or no "condition" at all is left to our imagination.

Just what is this all-important distinction between a condition which is "precedent" and one which is a mere "basis for defeasance"? Just what difference does it make to whom and how and why? How does the Institute recognize so easily and so surely that any given limitation "creates" the one or the other? "The statement that a designated occurrence, such as survival, is a 'condition precedent' of an interest means," answers comment *k*, § 249, "that the designated occurrence must happen before the interest vests, that is, before the interest acquires those characteristics connoted by the term 'vested.'" How important this difference in "characteristics" may be is expanded by comment *j*, § 250: different rules are applicable respectively to future interests "subject to a condition precedent" and to future interests "subject to complete defeasance" "in problems of taxation," "in questions involving the destructive operation of the rule against perpetuities," "in determining the possibility of merger between a present interest and a remainder," "in determining whether the interest in question is accelerated upon the failure of a prior interest," "in ascertaining the person entitled to receive otherwise undisposed of income," and "in deciding the type of protection to be accorded to the future interest." Reference back to Volume II, § 157, comment *v*, adds even further differences in rules about

judicially ordered sales, the application of the doctrine of representation, and creditors' claims.

Still, all of these rules about "characteristics" tell us only what a court is supposed to do once it has determined whether an "interest" is subject to a condition precedent or a condition of defeasance; they offer no criteria by which "conditions precedent" and "conditions as a basis of defeasance" can be identified. By what criteria does the Institute operate and by what criteria is it proposing that courts operate? Are the same criteria relevant for each of these many practical problems which from the perspective of policy norms are so totally different? The present volume offers us no explicit help; its blackletter merely pronounces arbitrarily and summarily, as indicated above, that certain "conditions" are either this or that, fish or fowl. Once again we are referred for enlightenment back to Volume II. There (§ 157), remainders are classified as of three degrees of vestedness—"indefeasibly vested," "vested subject to open," and "vested subject to complete defeasance"—and as "subject to a condition precedent." Distinctions between these classes are offered in terms of a wide variety of ill-defined and shifting references to the language of limitations, the factual probabilities of an "interest" coming into possession, and legal consequences.<sup>21</sup> One proposition offered (§ 157, comments *p* and *q*), and perhaps the most relevant, is that "a remainder vested subject to complete defeasance is distinguished from a remainder subject to a condition precedent by the fact that a limitation effective to create this type of remainder presently identifies a person entitled to a present interest on a present ending of all interests which includes [sic] a prior right to enjoyment," though such person "has no certainty of retaining such present interest as he may acquire and commonly has no certainty of ever acquiring any present interest in the affected

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<sup>21</sup> Comment *b* to § 158 of Volume I informs us that "executory interests," which are elsewhere described (§ 158 and cross references) as interests "created" by limitations operating by "divestment," are "not thought of as having degrees of vestedness" and hence that the "classification of remainders" has no "exact application" to such interests. The comment immediately adds, however, that there is "a rough parallel between the classification of remainders" and "differences in executory interests" and notes similar variations in the factual probabilities of an interest becoming or remaining a present interest, suggesting that "these differences do not result in different characteristics with sufficient frequency to justify any formal classification of executory interests on that basis."

thing”;<sup>22</sup> “whereas a limitation effective to create a remainder subject to a condition precedent does not *necessarily* so identify the taker thereof” (italics supplied). Frequently, a follow-up comment (§ 157, comment *t*) adds, “the form of limitation” is “ambiguous as to whether the uncertainty intended to exist as to a future interest was intended to operate as a condition precedent to such future interest or as a defeasibility of an otherwise vested future interest.” “This ambiguity may be resolved by the application of the rules of construction,” we are encouraged, to be “stated in Part III of this Division.”

Back now where we started in Volume III, can we find any distinguishing criteria or policies in “the limitations” here suggested or described? Limitations like “To *A* for life, remainder to his children surviving him”<sup>23</sup> or “To *A* for life, remainder to his

<sup>22</sup> The limitation “to *B* for life, remainder to *C* and his heirs if, but only if, *C* shall attain the age of 21 years” is given, assuming *C* to be 10 years of age, as an example of a remainder “subject to a condition precedent” (Volume II, § 157, illustration 4) and the limitation “to *B* for life, remainder to *C* and his heirs, but if *C* dies before attaining the age of twenty-one years, then over to *D* and his heirs” is given as an example of a “remainder vested subject to complete defeasance” (Volume II, § 157, comment *r*, illustration 20). Note the very slight difference in the factual reference of these two limitations. Can persuasive policy norms be stated for making here all of the many distinctions in legal consequences, about different practical problems, which the Institute spells out of “precedent” and “subject to defeasance”? Should the granting or denial of partition, for example, in a case like *Bush v. Hamil*, 273 Ill. 132, 112 N. E. 375 (1916), be made to depend upon whether or not the factual condition is construed as “precedent” or “subsequent”?

<sup>23</sup> In the first draft of this paper, I used for illustration here the limitation “to *A* for life, remainder to such of his children as survive him”; but on a rereading of the text I discovered that the Institute’s position on this verbal form was that the addition of a supplanting limitation on all nonsurvivals would not work its normal, magical conversion of the condition into a “basis for defeasance.” Deference to an ancient verbalism, sometimes known as the rule in *Festing v. Allen*, 12 M. & W. 279 (1843), which emphasizes the word *such* produces this queer mounting of anomaly on anomaly. § 253, comment *e*.

Perhaps I had best set out the Institute’s own illustrations in § 253, comment *e*. A limitation “to *B* at 21 (or other stated age)” is described as “phraseology typically appropriate to create a condition precedent of survival to the stated age.” But a limitation “to *B* at 21 (or other stated age), but if *B* fails to attain that age, then over to *C*” is “one of the commonest forms of limitation” for application of the rule that a limitation over on all nonsurvivals raises a constructional preference of “defeasance.” If, however, “other phrases of similar import” are used, “in proportion as the used phrase more emphatically connotes contingency, it becomes more unlikely” that this constructional preference “will have effect.” “Thus,” the comment continues, “the force of the rule stated in this Section is somewhat slighter when the limitation is ‘to *B* if [or ‘provided that,’ or ‘in case’] he reaches 21”;

widow" would presumably be said to create a "condition precedent"; but if we merely add to these same limitations "a supplanting limitation with respect to all failures" to survive (§ 253), such as "but if he leave no children who survive him, then over" or "but if he leave no widow, etc.," the requirement of survival undergoes a curious metamorphosis and becomes a condition of "defeasance." Similarly, if a limitation purports to create a remainder or executory interest in "B or his children" it is a "condition precedent" of B's interest that he survive all preceding interests; but if the limitation is to "B and his heirs; but if B does not survive all preceding interests, over to his children," the condition of survival, though exactly the same people are to take upon exactly the same events, again ceases to be "precedent" and becomes a "basis of defeasance."

Conceivably justification could be offered for the Institute's inserting, into its discussion of "requirement of survival," rules about all of these other practical problems concealed in "precedent" and "defeasance" on the ground that the existence of a requirement of survival affects the factual probability of an "interest" coming into possession and that such factual probability or improbability is important in determining policy norms peculiar to each of the many practical problems specified. It should, however, be obvious by now that no such persuasive and consistent theme can be woven through the maze of ambiguous and easily reversible rules which the Institute actually presents.

Let us now return to the specific practical problem, requirement of survival, which gives name to this chapter. Here a court's job is to determine, in the absence of a clear statement of intent by the donor, whether, if a potential taker dies before a stated distribution date, the estate of such potential taker or some other claimant or set of claimants is to get the property. So far no principle of policy has been announced which would preclude a draftsman who thinks of the problem from stating exactly what the donor

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and is normally overcome when the limitation is in such a form as 'to such of my children as may attain the age of 21' or 'to B's children who attain 21.'" One wonders in what dark realm of metaphysics the word "contingency" takes its reference. Contrast the struggle of Reporter Powell with his advisers over his abolition of the dichotomy of "vested" and "contingent." (1939-1940) 17 PROC. A. L. I. 261 *et seq.* The most famous verbalistic distinction of this kind is that of Gray in his PERPETUITIES (3d ed. 1915) § 108.

intends; the cases come up because the draftsman did not anticipate the problem and a court must make a choice which the donor failed to make for himself. It is, in other words, a task of creating a "judicially ascertained intent," of "painfully pricking out" a nonexistent donative intent, or of creating a reference to person and event for the donor's language when objective observers can find no direction in such language. For judicial guidance in the handling of this problem, the Institute, though it boldly stamps out at least one well-known quibble, the so-called "divide-and-pay-over" rule (§ 260), shapes other rules which succumb completely to traditional verbalisms. Such, for example, is the distinction made between the words "or" and "and." Thus, if a remainder or executory interest be limited to "*B* or his children" or "*B* or his issue" or "*B* or his descendants" or by "other language of similar import," the "alternative form" is said to tend to establish a requirement ("condition precedent") that *B* survive "all preceding interests" (§ 252). "The use of the disjunctive 'or,'" so the rationale runs, "tends to establish the intent of the conveyor that a choice be made at some time between '*B*' and the other potential takers and convenience suggests that such choice be postponed for the duration of all prior interests."<sup>24</sup> But even this "strong" constructional preference, since it "depends upon the disjunctive force of the word 'or'" becomes "inapplicable when additional language or circumstances of the limitation causes 'or' to be construed to mean 'and.'" Presumably, then, if a gift be made explicitly "to *W* for life, remainder to *B* and his descendants," the constructional preference is that there is no "condition precedent" that *B* survive *W*; and if *B* predeceases *W*, leaving a widow of his own but no descendants, such widow may, *ceteris paribus*, take.<sup>25</sup> Is it really credible that a competent draftsman who thinks of the problem of survivorship would rely upon such a slight distinction in verbal form, a distinction which has caused so much litigation,<sup>26</sup> to express his intent?

<sup>24</sup> Postponement of choice to this particular date seems to be based in part on "convenience" and in part on inferred "intent." See pp. 1271, 1278.

<sup>25</sup> Cf. *Knight v. Pottgieser*, 176 Ill. 368, 52 N. E. 934 (1898). Suppose the limitation in this case had been worded "or" instead of "and"!

<sup>26</sup> See Note (1940) 128 A. L. R. 306 with its forty-four pages on litigation over the word "or." For some purposes a donor or his draftsman may, of course, intend a different reference to time, person, and event by "*A* or *B*" from what he would

The attaching of different legal consequences to formulae which specify the same factual reference, or factual references of insubstantial difference, is even more obvious in certain further distinctions. Limitations such as "I give to *A*, payable when he becomes 21" or "I give to *A*, to be had by him at 21" are said not to import a condition precedent of survivorship; both "the present identification of an existing person as the intended taker" and "language of present gift" tend to establish the absence of such a condition (§§ 256, 257). But, in contrast, if in a limitation "otherwise like those described" above, the phrasing happens to be "to *B* at 21" or "to *B* when 21" or "to *B* if he attains 21" "under *crystallized* rules of construction, survival to the stated age is a condition precedent of such interests" (§ 257, comment *e*) (*italics supplied*); such limitations are not "couched in 'language of present gift' within the meaning" of the relevant rules. Certain gifts of income may, however, tend to establish that even the interests created by the latter limitations are "free from the condition precedent of survival" (§ 258).

Not only does the Institute bow to all of these traditional, insubstantial distinctions; but, what is even more regrettable, it makes no sustained effort to delineate any consistent policy norms which the courts may, unavowedly, have been following in splitting such barren verbalisms now one way and now another. Even appellate records, meager as they are, might offer "factual data" enough for the formulation of rules of greater predictive value than can be found in these mare's nests of the orthodox vernacular. Simes, in his study of the meaning of the word "heirs," has made a suggestive demonstration of what might be done.<sup>27</sup> Framed for experimental purposes, his norms were, roughly, in terms of "alienability," "keeping the property in the family," "equality of distribution," "natural objects of the testator's bounty," and "probable intent." As difficult as it may be to frame such norms in terms that are meaningful and relevant, and as laborious as may be the task of uncovering the data necessary for confirmation or

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intend by "*A and B*"; the question is, however, whether or not a donor who had any intent about this particular difference would entrust his intent to so frail a carrier.

<sup>27</sup> Simes, Knouff, and Leonard, *The Meaning of "Heirs" in Wills — A Suggestion in Legal Method* (1933) 31 MICH. L. REV. 356.

disconfirmation, anything, however small, which the Institute might have been able to accomplish in such a direction would have been progress.<sup>28</sup> It is possible that decisions about whether or not a requirement of survival "exists" have so little effect on our economy and on the distribution of values generally that it makes no difference how or by what ritual such cases are decided;<sup>29</sup> but the facts which would confirm or disconfirm even this "common-sense" hunch are still out and the Institute has done nothing to bring them in.

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<sup>28</sup> One of my ex-students, Mr. Elmer Batzell, of Washington, D. C., has made a detailed study of 133 relatively recent cases, selected from a somewhat larger sample. Policies which he attempted to test were stated, with considerably more precision than is indicated here, in terms of "immediate rather than deferred taxation," "restriction of the duration of future interests," "opposition to intestacy," "fostering alienability of property," "equality of distribution among beneficiaries," "keeping property in hands of blood relations of donor or named beneficiaries." The results of his study are somewhat inconclusive, largely because of the smallness of the sample. Even so tentative a study does, however, offer a pretty clear indication that if the norms of "equality of distribution" and "blood relationship" were properly refined and tested, rules of greater predictability than the ordinary verbalistic distinctions could be achieved. More promising, of course, than any painful effort to improve predictability would be an active movement for the creation of a "drafting" institution which would keep these problems from coming up. See note 13 *supra*.

<sup>29</sup> Students seldom get excited about whether a widow of some deceased potential taker or a second cousin, once removed, of the donor is to get the property. The fact is that none of the norms occasionally mentioned for controlling distribution in these "requirement of survival" cases is very persuasive. Distribution to "blood relations" makes the questionable assumption that ability and public interest run in the blood of the donor. "Quality of distribution" makes a very inadequate step toward redistribution of wealth or provision for "social security." Promoting "alienability" is based on the assumption, which is false today, that future interests frequently tie up a specific resource. The cases do not frequently come up in a way that courts can "prevent tax avoidance." Both "presumption against intestacy" and "free enterprise" go back for whatever meaning they may have to the mythical intent of the donor. It is, nevertheless, not completely inconceivable that the cumulative effect of hundreds of these decisions may have some effect on the general distribution of values in our society.

One curious justification appears in the introductory chapter of the volume under review. "To whatever extent these modes of resolving an ambiguity frustrate an unexpressed subjective intent of the conveyor," states § 243, comment *b*, "the conveyor is responsible for his own frustration because of his failure to foresee the problems implicit in his disposition and to manifest unequivocally his intent relative thereto." Why does not this "blame" rationale, when no persuasive policy norm can be stated for choice between undesignated claimants, point to escheat? A milder proposal might be to run a lottery between the contestants and give a state a certain percentage.

A similar confusion of different practical problems and a like prescription of identical verbalistic distinctions for the handling of such problems, though neither the factual reference of the donor nor policy norms can be shown to vary with such verbal forms, are found in a subsequent chapter (c. 21) appropriately labelled, "Miscellaneous Problems." Two successive sections (§§ 277, 278) purport to lay down rules for "conveyances" which contain both "a limitation of a life interest" and "two further limitations purporting to create future interests" "of which only one can become a present interest if the life interest ends in accordance with its terms." "With one exception,"<sup>30</sup> the alternative future interests so limited are, it is restated, "both subject to a condition precedent, namely, the course of events which determines which of these future interests will become a present interest." The one exception is "that when the one of these two limitations which is first stated in the conveyance would purport to create a vested remainder, if the second-stated limitation were absent, then the interest limited by the first-stated limitation is a remainder vested subject to complete defeasance by the occurrence of the event stipulated in the second-stated limitation; and this occurrence is a condition precedent of the future interest limited by the second-stated limitation." Elaborate cross-references make it explicit that by "precedent" and "vested subject to defeasance" the Institute is again purporting to dispose of the same wide variety of practical problems as in the similarly cavalier flourishes of the rules on requirement of survival (§ 277, comment *i*; § 278, comment *b*). For justification of such verbal incantation in a vacuum of policy norms, explanatory comment (§ 277, comment *c*) insists that "emphasis" "upon the sequence of [the] words" (that is, the separation of the language of the conveyance "into two parts constituting, respectively, the 'first-stated limitation' and the 'second-stated limitation'") "reflects, as nearly as is possible, the intent sought to be expressed by the conveyor." Once again, we ask, is it credible that a competent draftsman would rely upon such a slight difference in verbal form to express a different intent about all of these problems?

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<sup>30</sup> This and the next introductory phrase are taken from *RESTATEMENT, PROPERTY* (Tent. Draft No. 9, 1938) p. 202 *et seq.* This excellent explanatory comment contains a curiously pathetic sentence: "Such an emphasis upon formalism would create one more trap for the average lawyer and is not desirable." *Id.* at 204.

Still a second rationale is that the exception "deals with the circumstances under which the first-stated limitation has sufficient elements of certainty as to the taker thereunder to permit the interest limited thereby to be construed as defeasibly vested" (§ 278, comment *a*); but under the general rule "the presence of like elements of certainty as to the taker under the second-stated limitation is not, in *contemplation of law*, effective to cause his interest" to be similarly construed (*italics supplied*).<sup>31</sup> Some supporting reasoning is worth quoting in full: "As long as the first-stated limitation creates a fee interest subject to condition precedent the second-stated limitation must be construed to create also an interest subject to a condition precedent. Otherwise, there would be a violation of the rule, recognized since the time of *Loddington v. Kime*, 1 Salk. 223 (1695), that 'no remainder limited after a limitation in fee, can be vested.'" <sup>32</sup> Presumably, then, if gifts be limited "to *A* for life, remainder to *A*'s now living children, but if *A* dies without surviving children, then to *C* and his heirs"; <sup>33</sup> or "to *A* for life, remainder to *B* and his heirs, but if *B* predeceases *A*, then to *C* and his heirs"; <sup>34</sup> or "to *A* for life, remainder to *C* and his heirs, but if children are hereafter born to *A*, remainder to such," the alternative future interests so created will be described, for the invocation of all kinds of legal consequences in a wide variety of practical problems, as "remainders vested subject to defeasance" and as "executory interests." But if, on the other hand, the wording of the various limitations is so changed as to read "remainder to *A*'s now living children *who survive him*, but if there are none such then to *C* and his heirs"; <sup>35</sup> or "remainder to

<sup>31</sup> Further justification in terms of a possible application of the rule against perpetuities to alternative gifts to the donor's grandchildren and to charity achieves the effect of mounting policy absurdity on policy absurdity. Cf. Leach, *The Rule against Perpetuities and Gifts to Classes* (1938) 51 HARV. L. REV. 1329.

<sup>32</sup> Cf. Warren, *The Progress of the Law, 1919-1920: Estates and Future Interests* (1921) 34 HARV. L. REV. 508, 516: "For it is submitted that despite the array of distinguished conveyances to the contrary no valid reason exists for saying that there cannot be a vested remainder after a contingent remainder in fee."

<sup>33</sup> Assume that *A* has children living. Perhaps it should be noted that for limitations of this type the Institute adds to its verbal criteria for identifying "precedent" and "defeasance" certain factual fluctuations in births and deaths. See § 277, illustration 2.

<sup>34</sup> Cf. 1 SIMES, *FUTURE INTERESTS* (1936) § 79.

<sup>35</sup> Cf. § 278, illustration I, and RESTATEMENT, *PROPERTY* (Tent. Draft No. 9, 1938) p. 203.

*B* and his heirs, *if, and only if B* survive *A*, otherwise, to *C* and his heirs"; or "remainder to any child or children who may hereafter be born to *A*, but if none such, then to *C* and his heirs," the alternative interests so created will be described, for invoking different legal consequences on each of these problems, as subject to "condition precedent."

Formalism no less tenuous dominates an accompanying distinction (§ 278, comment *d*) between "reversions" and "remainders." "If *A* transfers Blackacre 'to *B* for life, remainder to the issue of *B* who survive *B*,' his undisposed of reversion is vested," so we are told, "but if he attempts by this same conveyance to transfer the balance of his ownership in Blackacre, the remainder so created is nonvested."<sup>36</sup> Obviously the factual probabilities of the "interest," undisposed of in the limitation "to *B* for life, remainder to the issue of *B* who survive *B*," coming into possession are the same whether such interest is retained in the donor or his heirs or is transferred by the same (or some subsequent) conveyance to a third party.

In this same "miscellaneous" chapter is one other section (§ 276), embodying "a very strong constructional preference," which should remove any lingering doubt about whether or not the restaters are making their momentous distinctions in terms of some undisclosed policy norms that could be related to such factual probabilities of an interest coming into possession. This section provides in vigorous blackletter that: "When a limitation, purporting to create a remainder or an executory interest, also includes a power to consume, to encroach or to appoint, and the donee of the power is a person other than the conveyee of such remainder or executory interest, and the power, if exercised, will lessen the quantum of assets subject to such remainder or executory interest, then, unless a contrary intent of the conveyor is found from additional language or circumstances, such remainder or executory

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<sup>36</sup> This "involves a rejection" of the much discussed case of *Egerton v. Massey*, 3 C. B. N. S. 338 (1857), and to that extent is praiseworthy. For citations, see LEACH, CASES ON FUTURE INTERESTS (2d ed. 1940) 90, and RESTATEMENT, PROPERTY (Tent. Draft No. 9, 1938) p. 204. But why do we get no critical analysis of the policy reasons, if any, for continuing to make distinctions between "reversions" and "remainders" for all these purposes?

One wonders, too, why *Lodding v. Kime* of date 1695 should be more sacrosanct than *Egerton v. Massey* of date 1857.

interest is subject to defeasance to the extent of the exercise of such power, rather than being subject to the condition precedent of its nonexercise." "Logical justification" is the rationale offered for this "long crystallized constructional inference" (§ 276, comment *a*). Though the exercise of such a power may cause "the subject matter" of the remainder or executory interest "to be decreased in quantum, sometimes to the vanishing point," the mere "existence of such an unexercised power neither lessens the clarity of the identification, otherwise made by the limitation, of the taker of the interest subjected thereto, nor diminishes the duration of such interest." *Quod erat demonstrandum.*

For one final example from "rules of construction" of the confusion which can result from the curious practice of phrasing "policy" results in terms of a donor's unstated intent or of system building in terms of concepts of completely ambiguous reference, let us look at the chapter on "Class Gifts" (c. 22). Here, in an otherwise excellent systematic exposition of ambiguities in common limitations and of the norms which courts announce for disposing of property when confronted with these ambiguities, the trouble is caused by a failure to recognize that the concept of "class" itself, though it once did yeoman service in justifying "accrual" in the absence of lapse statutes,<sup>37</sup> has become largely a superfluous and befuddling symbol.<sup>38</sup>

To multiplied problems of survival there is added in most of the types of situation here discussed a problem of possible "increase" in the number of potential takers. So simple a limitation as a gift by will "To *A* for life, remainder to the children of *B*" can raise the more frequently recurring problems: A child of *B*, who was living at the date of the "execution" of the will, may predecease the donor; another child may outlive the donor but predecease *A*;

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<sup>37</sup> See Cooley, "*Lapse Statutes and Their Effect on Gifts to Classes* (1936) 22 VA. L. REV. 373. In § 298 the restatements, courageously disregarding the irrational distinction which has had some judicial favor between lapse statutes which do and do not mention the word "lapse," provide for the application of lapse statutes to testamentary limitations "in favor of a class." Since lapse statutes are almost universal in this country, such a rule will, if it gets judicial following, greatly reduce the number of occasions for the possible invocation of the "class" concept to produce "accrual."

<sup>38</sup> Cf. 2 SIMES, FUTURE INTERESTS (1936) § 364.

*B* may have another child born after the death of the donor before the death of *A*; still other children may be born after the death of *A*. How is a court to put a time reference, omitted by the donor, on the generic symbol "children" and determine just who, or whose estates, are to take? More complicated limitations, including both generic and specific "identifications," and more complicated factual situations, presenting all kinds of competing "equities" and policy norms, can easily be imagined and frequently occur.

For handling these problems, the Institute formulates its rules in terms of a basic distinction between "class" and "individual" gifts. If the gift is to a "class," as opposed to "individuals," "the class" is said to have "two abilities" which—strangely, since both are supposed to be consequences of the same concept—are "wholly independent one of the other," raising "two completely separate and distinct sets of problems" governed by "distinct and separate rules which rest, respectively, upon totally different considerations" (Introductory Note, p. 1450; § 296, comment *j*): "the class" can both "decrease in membership" and "increase in membership." Thus, if "a 'possible taker' under the terms of a limitation in favor of a class" dies "before the effective date of the conveyance containing such limitations," he "is excluded from being a distributee of the subject matter of such class gift"; and if "the subject matter" of such gift is "an aggregate sum," and there is no applicable lapse statute, the exclusion of such a "possible taker" increases the share of each distributee not thus excluded (§ 296 and comment *c*). So also (and lapse statutes are irrelevant here) if a "possible taker" "fails to survive to the time to which he is required to survive by the terms of the limitation" or if he otherwise "has an interest which ends prior to the time when the subject matter of the class gift becomes distributable." For determining how long a "class" can increase the Institute lays down certain detailed rules, impossible to explore here, which are based not so much upon biological possibilities through time as upon certain crystallized conceptions of "convenience"; increase is permitted—it is sufficient for present purposes to note—to varying dates ranging from the death of the donor to later limits fixed both by "convenience" and the lives of named procreators. Emphasis upon the "independence"

of these "abilities" to "decrease" or "increase" — our point of present interest — even achieves the dignity of a blackletter pronouncement that "from the fact that a class can increase in membership until a future date, no inference should be made that only such members of the class as survive to such future date become distributees" [§ 296(2)]. The same limitation, therefore, which produces "accrual," if a "possible taker" dies before the donor, may send the property to the estate of the deceased "possible taker" if he survives the donor but predeceases a life tenant; sometimes, the restaters make it explicit, "a class" may "exist" for "all purposes" and sometimes "only to the extent of preventing lapse, when one of the described group has predeceased the conveyor-testator" (§ 280, comment f).

But, however anomalous or "independent" these "legal consequences" of a "class gift" may be, they do nothing to help judges, the Institute, or anybody else to identify such a gift. The important question is, if all of these differences are to be made, *when* does a "class gift" exist? Though the restaters do not follow, in all literality, the advice of Lindley, M. R., that "you may define a class in a thousand ways,"<sup>39</sup> they do hover uncertainly over a fair range of referents. Whether a conveyance limits property to a "class" or to individuals, so a sweeping Introductory Note informs us, "can be equally well tested by an inquiry described in any one of three ways": "One can ask whether the conveyor was 'group-minded.' One can ask whether there was a possibility of fluctuation in the number of takers under the limitation. One can ask whether the conveyor intended the consequences peculiar to a class gift. All three descriptions are merely different modes of presenting an identical search for the same ultimate fact" (Introductory Note, p. 1448).

What "ultimate fact" is this? Inquiries one and three are stated in terms of the donor's intent; yet the problem before the court exists only because the donor has failed to indicate his intent — because his factual reference is inadequate to identify his beneficiaries. "The doctrine that the testator ever 'intends a class' when he does not say so in so many words," wrote an acute commentator in a relatively recent issue of this Review,<sup>40</sup> "is in any

<sup>39</sup> *In re Moss*, [1899] 2 Ch. 314, 317 (C. A.).

<sup>40</sup> Cooley, *What Constitutes a Gift to a Class* (1936) 49 HARV. L. REV. 903, 912.

case a beneficent fiction. The vast majority of testators in all likelihood have never even heard of a class." Inquiry two is equally fruitless. Surely, if the task of a judge is to determine whether a group of "possible takers" fluctuates, it helps him no whit to tell him that if it is a "class" it fluctuates but that if it is not a "class" it does not fluctuate. Given such a meaning, the word "class" is obviously a tautological label to describe the judge's own behavior. Any group of persons, as Professor Cooley again points out,<sup>41</sup> can, in a factual sense fluctuate; the question for a judge is should a particular group be held to fluctuate for a specified legal purpose and why. In fairness, it must be said that the Institute does try to mark out certain variations in the donor's language and in other facts for guiding decision.<sup>42</sup> But its rules are neither very definite nor very clearly or deeply rooted in policy norms. Completely missing here, as they were in the chapter on "Requirement of Survival," are the factual studies necessary either to pierce this "beneficent fiction" of the donor's intent and discover what consistent policies, if any, the courts have actually been following in sending the property now to one set of donees and now to another or to derive and implement a persuasive and consistent set of norms, stemming from accepted values of our culture, which courts might follow.

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<sup>41</sup> *Id.* at 928. All of Cooley's strictures on Jarman's definition are equally applicable to the Institute's definitions.

<sup>42</sup> Thus, such descriptive or generic terms as "children," "grandchildren," "brothers," "sisters," "nephews," "nieces," "cousins," "issue," "descendants" or "family" stress "the group idea" but limit a "class" gift "only if it is found that the conveyer intended to designate as his conveyees a group capable of future change in number, rather than specific individuals" (§ 279; § 280, comment *a*). The addition to such terms of "the names or other . . . identifications of persons who, at the time of the execution of the conveyance, comply with the descriptive term employed" tends to establish "unless a contrary intent of the conveyer is found from additional language or circumstances" the "intent of the conveyer to make a gift distributively to the individuals so named or identified" (§ 280). Even such definite naming and identification may, however, yield to a "class gift construction" if such construction "more fully accomplishes the manifested intent of the conveyer for an equal or proportional distribution" as between certain beneficiaries or "more fully accomplishes the manifested intent of the conveyer to exclude designated persons from sharing in the subject matter" or if the language of the limitation imposes a joint obligation or includes afterborn persons (§ 281). (Note the shift here in the kind of "intent" relevant to determine "class.") And so on. For some further indication of the difficulty of identifying "class" in the language of a limitation see (1936) 35 *MICH. L. REV.* 178.

At long last we come to the rules about powers of appointment. Here the Institute's policy considerations, if not more persuasive, are at least more apparent. "Primarily the outgrowth of efforts to circumvent the rule, existing prior to 1540, that many of the most important types of interest in land could not be devised," powers of appointment have become, so we are told,<sup>43</sup> "the most efficient device yet contrived" for eliminating *rigidity*, "that primary objection to all future interests"; by enabling life tenants to determine "the disposition of property" at "the moment of distribution" and "in the light of circumstances existing at that time," they banish that "remote control of property by the dead hand" which might otherwise predetermine for decades both the "quantity" of future interests and their takers. Such wonder-working powers are defined as those which a "person [the donor] having property subject to his disposition" creates or reserves to enable "the donee of the power to designate, within such limits as the donor may prescribe, the transferees of the property or the shares in which it shall be received" (§ 318).<sup>44</sup> When the "limits" prescribed include even the donee or his estate, the power is "general"; when the power "can be exercised only in favor of persons, not including the donee, who constitute a group not unreasonably large" and is not intended "primarily for the benefit of the donee" it is "special" (§ 320).

So "distinctly thin in quantity" is "American case authority on powers of appointment," so "plastic" is the "state of the law," it may be possible — thus the Institute and its advisers recognize their opportunity — "for the American law of powers in the course of its growth to adopt the benefits but avoid the anomalies of the English law." "Wherever" in this chapter "a choice has been possible," we are assured, "there has been selected that rule which

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<sup>43</sup> Quotations in this paragraph are taken not only from the Introductory Note (p. 1808) to the Chapter and the Sections indicated but also from Reporter Leach's more colorful remarks before the assembled Institute. See (1937-1938) 15 Proc. A. L. I. 253.

<sup>44</sup> Subsection (2) of this section expressly excludes from the definition "a power of sale, a power of attorney, a power of revocation, a power to cause a gift of income to be augmented out of principal, a power to designate charities, a charitable trust, a discretionary trust," and "an honorary trust." Exclusion of all of these devices which are frequently functional equivalents of the "power" is justified by "the common usage of the profession" (comment *a*).

promises present utility rather than that which merely embalms historical accident" (Introductory Note, p. 1810-11).

The text does make a beginning which, on the surface, appears most auspicious. To prevent the "frustrating by indirection" of "rules of law designed for the protection of creditors and spouses" or "the enlarging by indirection" of "the powers of persons who have been left subject to disabilities by the legislatures," powers "appendant" — that is, powers which operate by "divestment"<sup>45</sup> of the beneficial interests of donees — are said not to "exist in this country" (§ 325 and comments *a* and *b*). "No desirable end is served," so the rationale runs, "by allowing interests owned by the donee to be divested by an appointment"; it is not sound to multiply the devices by which rules of law ["considerations of public policy which the legislature or the courts have made"] are defeated indirectly.<sup>46</sup> Thus, if "*A*, owner of Blackacre in fee simple absolute, by will transfers Blackacre 'to such person or persons as *B* shall appoint and until and in default of appointment to *B* and his heirs,'" "*B* has an estate in fee simple absolute in Blackacre and no power of appointment"; *B* cannot, by purporting to exercise a power, "divest" any interest which his judgment creditors or spouse may acquire. So also if the limitation be "to such person or persons as my wife, *B*, shall appoint and until and in default of appointment to *B* for life, remainder to my children and their heirs," "*B* has an estate for life in Blackacre and a power over the remainder, but no power over the estate for life"; *B* cannot, in result, "divest" her life estate by "appointment" (though she can of course "convey" it) but she can still exercise a "power in gross" over the remainder. Just how effective a reform is this? Is it likely that draftsmen who are seeking to evade creditors, spouses, and the public fisc will be very much chagrined by the

<sup>45</sup> This is the same fuzzy metaphor — "cutting short" (but if, provided that) versus "natural termination" (until, so long as) — which obscures the functional identity of rights of entry and possibilities of reverter and of remainders and executory interests. Contrast, if you can, the factual reference of, and give if you can, a policy reason for a difference in the legal treatment of the following limitations: "to *A* for life, but if he appoints by deed or will, to his appointee" and "to *A* for life, remainder as he shall by deed or will appoint." Remember that a life estate is transferable. For clarification see Note (1937) 50 HARV. L. REV. 1284.

<sup>46</sup> The words in parenthesis are from Professor Leach, (1937-1938) 15 PROC. A. L. I. 262 and the rest of the appositional clause from RESTATEMENT, PROPERTY (Tent. Draft No. 7, 1937) p. 101.

abolition of the "power" in "To *A* and his heirs, remainder as he shall by deed or will appoint" if they can still use the form "to *A* for life, remainder as he shall by deed or will appoint, in default to *X*"? Just how consistent is the Institute in its animus against the multiplication of devices for the indirect thwarting of public policy?

Of the "present utility" of powers other than powers appendant, that is, of powers commonly called "in gross" and "purely collateral," the Institute reveals not the faintest doubt. Indeed, for justification of some of its more important rules about such powers,<sup>47</sup> the Institute even finds it necessary, despite its alleged freedom from restrictive precedent, to resort to the venerable legal norm of "relation back." "Originally conceived to be merely an authority in the donee to do an act for the donor" ("to fill a blank" in his will), a power of appointment when exercised must be held, as this doctrine goes, "to 'relate back' to the time of the creation of the power and to operate as if it had been originally contained in" the donor's will. Like "the owner of property," "the donee of a power of appointment" has "the power to create interests in other persons"; but "it is the underlying dogma of the law of powers of appointment that such interests constitute transfers from the donor of the power, not from the donee." "The current American law of powers is," we are informed, "the outgrowth of a fundamental acceptance of the 'relation back' doctrine, with fairly frequent and important departures in situations where the proprietary aspect of the power is most apparent."<sup>48</sup>

Such an unexpected regression to "historical accident" bears curious and paradoxical consequences. Thus, though "the general power presently exercisable is the practical equivalent of ownership," "the ancient conception" of "mere agency" has "left its mark" on certain rules about the claims of creditors, spouses, and tax collectors. (Rise, vengeful ghosts of the slain powers appendant!) Creditors of a donee cannot, "except as pro-

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<sup>47</sup> Here again, passing over, first, certain oddities such as the backstairs escape from restrictions on "agreements to appoint" which is provided in the rules about "release" (§ 340, comment *d*) and the curious provision for preferences to certain creditors only when the donee fails to carry out an agreement to appoint to them (§ 339, comment *c*) and, secondly, all sections which I deem praiseworthy, I comment only on the rules I find most regrettable.

<sup>48</sup> Quotations in this paragraph are from pages 1811, 1820, and 1812.

vided by statute,"<sup>49</sup> reach "property covered by an unexercised power of appointment, created by some person other than the donee" because of "rigid adherence to the common-law distinction between ownership and a power" (§ 327 and comment *a*). But "when the donee of a general power makes" an "appointment by will to a volunteer or creditor," his creditors can reach the appointed property, "to whatever extent other available property is insufficient," because the donee thus "exercises a dominion over the property covered by the power which is in its practical aspects identical to the dominion exercised by him over owned assets which he devises" (§ 329 and comment *a*). Though creditors of the donee "cannot acquire the power or compel its exercise except as provided by statute," a trustee in bankruptcy will take, under § 70(a) of the Bankruptcy Act, a general power, presently exercisable, because "the donee is substantially in the position of an owner" (§ 331 and comment *a*). When a donee "transfers property in trust for himself for life and reserves a general power to appoint the remainder and creates no other beneficial interests which he cannot destroy by exercising the power," his creditors can, even "though the power is unexercised," subject the property "to whatever extent other available property is insufficient," to payment of their claims because such a donee "has retained all the substantial incidents of ownership and it would be contrary to sound public policy to allow him by this formal change to prevent creditors from reaching the property" (§ 328 and comment *a*). Spouses of donees are not entitled to dower or curtesy or "statutory share" in property covered by a power of appointment (special or general) and "it is immaterial whether the power is exercised and what appointment, if any, the donee makes" (§ 332 and comment *a*). Tax collectors get almost equally summary treatment: under "statutes imposing taxes upon the devolution of property upon death," "unless the legislature manifests a contrary intent," the blackletter rule of construction is that "the transfer" of "property covered by a power of appointment" is "from the donor, not from the donee, to the appointees or takers in default" and "property covered by the power is not part of the 'estate' of the donee or 'property which passes by will'

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<sup>49</sup> This, of course, excludes New York and the several other states which have adopted similar statutes.

of the donee, whether or not the power is general and whether or not the donee exercises it" (§ 333). "As a matter of construction," comment *a* rationalizes, "it is to be inferred that a legislature intends" that "the common-law dogma" apply "unless the contrary is stated or unless the statute declares a legislative policy which would be defeated" by its "application."

In its immunization of property subject to "special" powers of appointment from the claims of creditors, spouses, and, presumably, tax collectors, the Institute is, to continue our documentation of anomalies, even more emphatic. "The special power," whether "presently exercisable" or "testamentary," is said to differ "fundamentally from all general powers"; "it is in no proper sense ownership" (p. 1815). "As a matter of both common-law doctrine and the practicalities of the situation," so runs the verbal proliferation of the rule denying creditors' claims, "the donee of a special power is not the owner of the property subject thereto. He is in a fiduciary position with reference to the power and cannot derive personal benefit from its exercise." Whether he exercises the power or not, "his creditors have no more claim to property covered by a special power than to property which he holds in trust" (p. 1851).

Supplementing the traditional "exercise, nonexercise" dichotomy, which appears not only in the rules announced above for determining the claims of creditors to property subject to a general power but also in tax statutes and in their interpretation, the Institute adds — for our final example — a less traditional corollary rule about "appointments" to "default takers." Such appointments are, sad as it is, appointments in name only. Where the donee "appoints an interest to any person who is a taker in default," the Institute pronounces, after considerable struggle among its advisers,<sup>50</sup> "if the total property passing to such appointee is identical to his interest in default of appointment, the property passes in default of appointment"; "a smaller fractional interest" passes the same way and of "a larger fractional interest" only the "excess" passes by appointment (§ 369). This is because "takers in default of appointment hold interests created by the donor" (remember the "underlying dogma"! ) which "continue" until they "are defeated by an exercise of the power." "Thus to whatever extent a donee purports to appoint to a person

<sup>50</sup> RESTATEMENT, PROPERTY (Proposed Final Draft No. 2, 1938) p. 151.

an interest already held in default of appointment he does not," *mirabile dictu*, "exercise his power to alter the donor's disposition but merely declares his intention not to alter it."

The purely tautological character of all of this reasoning in terms of "relation back," "title," "ownership," "dominion," and so forth, is obvious and has often been deplored.<sup>51</sup> But its vigorous reaffirmation by the Institute, mitigated only by the occasional, brief, and apologetic references to "dogma,"<sup>52</sup> may justify some further indication of its complete lack of persuasiveness. In terms of a Hohfeldian or any other analysis of the aggregate of rights, powers, privileges, and immunities which courts are accustomed to protect under the label of "title" or "ownership," just how does the aggregate which a grantee gets under the limitation "to *A* and his heirs," or "to *A* and his heirs, remainder to such persons as *A* shall by deed or will appoint" (limitations equated by the Institute in its abolition of powers appendant) differ from that which he gets under the approved limitation, "To *A* for life, remainder to such persons as he shall by deed or will appoint"? Only one difference of any significance—other than the consequences for creditors, spouses, and tax collectors outlined above—has been suggested: if under the latter limitation the grantee, *A*, is so foolish as to die without having exercised the "power," the property covered by the power may pass not by his intestacy but by that of

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<sup>51</sup> For sheer eloquence, as well as realistic policy appraisal, the report of the New York Commissioners is still unsurpassed. Report of the Commissioners to Revise the Statute Laws of the State of New York (1828) Part II, c. 1, pp. 55-61. The Commissioners conclude by referring to the regret expressed to an American gentleman by Lord St. Leonards, the great English authority on powers, "that a new state should embarrass itself with our forms of conveyancing, springing out of the doctrine of uses." Cf. LEACH, *CASES ON FUTURE INTERESTS* (2d ed. 1940) 580: "It is the dogma of the common law that the appointee takes from the donor of the power, not from the donee, even though the power is general. Anyone can see that in a good many cases this concept flies in the face of common sense."

<sup>52</sup> Cf. Leach, *The Restatements as They Were in the Beginning, Are Now, and Perhaps Henceforth Shall Be* (1937) 23 A. B. A. J. 517, 520: "But I can tell the Institute [what it could have done]: state the rule as we know it to be; state that it's a bad rule; state that courts which have adopted it have overlooked its inapplicability to American institutions; and point out the grounds upon which a court would be justified in ignoring it. When the essence of the Restatement was dogma, it was plainly a contradiction in terms to declare that our dogma was bad dogma. But with the passing of the dogmatic basis, we can freely admit that law is not perfect just because it is still law." Does an occasional reference to the "illogical" or "unsatisfactory" character of a doctrine sustain the Institute's burden of clarification?

the donor or to any default taker which the donor may have named.<sup>53</sup> But what difference should this possible difference about a highly improbable intestacy make for any other practical problem? What kind of sequitur is there between the proposition that if the donee dies without exercising the power, the property passes by the donor's intestacy and propositions which deny the claims of the donee's creditors, spouses, and tax collectors?

Why is not some sequitur made instead between the latter propositions and propositions about the donee's potential powers of disposal by deed or will? "The power to become owner at will," the Institute asserts in a moment of clarity, "is in essence ownership" (p. 1812). Even casual observation must disclose, to drive our analysis to a somewhat lower level of abstraction, that both the donor and donee, whether the power is "exercised" or not exercised, are equally participants in the factual events which send the property to its ultimate takers. They both *do* something: the donor signs a document which gives the "power" to the donee; and the donee, who up to the moment of his death can send the property wherever he pleases, by speaking sends it to certain appointees or by remaining silent lets it go to certain default takers or by the donor's intestacy. To say that the "title" of the ultimate takers comes from either the donor or the donee, or partly from the one and partly from the other, or that the donee does not affect the "transfer" if he does not "exercise" the power, or that there is no "appointment" although the donee goes through the physical motions, is to talk in terms not of *facts*, but of *legal consequences*; it is, in other words, to give a specious and spurious justification for specific decisions by the use of words which, having themselves no reference to identifiable social goals, must take their meaning either circularly from the very judicial responses which they are supposed to justify and predict, or else from irrelevant high-level generalizations abstracted from other judicial responses to totally different practical problems (*e.g.*, the "intestacy" problem).<sup>54</sup> Do the

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<sup>53</sup> See the volume under review at p. 1837 and Simes, *The Devolution of Title to Appointed Property* (1928) 22 ILL. L. REV. 480, 503. Simes indicates the possibility of a few other relatively trivial and thoroughly praeposterous differences. *Id.* at 488, n.24.

<sup>54</sup> Some mysticism about these "wousin" words still lingers on even with our most eminent scholars. Thus, though Professor Simes writes in 1 SIMES, *FUTURE INTERESTS* (1936) 450 that "title passes by reason of the act of the donee and the donor both" and that whether "the act of the donee" is "to be treated as a con-

creditors, spouses, and tax collectors of the donee lose because "title" comes from the donor or does "title" come from the donor because the creditors, spouses, and tax collectors lose?

Equal circularity dominates the numerous concepts which are auxiliary to the main dogma. What, for some further examples, are the referents of the word "dominion" and the phrase "substantial incidents of ownership" in the Institute's justifications of its rules about creditors' claims? Why does the donee of a general power have "dominion" only if he "exercises" the power? Why does a donee who has such a power and a life estate have "all the substantial incidents of ownership" if he created the interests himself but not if such interests were created by a stranger? Why is the donee of an unexercised general power, presently exercisable, "substantially in the position of an owner" when pursued by a trustee in bankruptcy but not when pursued by judgment creditors? And so on. What, furthermore, are the referents for the words "trust," "personal benefit," "fiduciary position," and "ownership" in the sentences in which the Institute insists that special powers—which may on occasion enable a life tenant to pick and choose among all his "relatives" (§ 320, comment *d*)—differ fundamentally from all "general powers"?

How could the Institute have made its handling of these powers

veyance or devise for any given purpose is purely a question of policy," he prefaces such remarks with the following: "To sum up: It is believed that the proper approach to the question of how title passes on the exercise of a power is as follows: Except in the case of the power appendant . . . the appointee is the successor in title of the donor and not the donee." Likewise, the same author summarizes in *Fifty Years of Future Interests* (1937) 50 HARV. L. REV. 749, 772 as follows: "Looked at broadly, it would seem that the major trend in the law of powers is one toward a recognition of the power as ownership rather than as a mere mandate. By that statement, it must not be inferred that a power *is* ownership; but only that the tendency is to treat the donee as if he were owner in a larger number of situations than fifty years ago." So also Professor Powell in *Powers of Appointment* (1941) 10 BROOKLYN L. REV. 233, 241-42, after summarizing certain results under New York statutes, states: "But it is still untrue to regard even such a donee as the full owner of the property subject to the power. It is only for the benefit of *creditors, purchasers, and incumbancers* that he is treated as owner. With respect to claims of his spouse, to dower, and probably to her present nonbarrable intestate share, he is still the distributor of another's munificence and not the real owner of the property in question." (Italics above are those of the writers.) How do the words "the donee is treated as if he were owner" or "the donee is treated as if he had title" differ in meaning from the words "the donee is owner" or "the donee has title"? To what empirical facts or behavior, other than judicial response, do the words "title" and "owner" refer?

problems more persuasive? Candidly admitting that American case "authorities," none too "thin" in quantity, have much too often reached results highly questionable from any conceivable policy perspective, it could have seriously attempted to make its fine phrase "present utility" meaningful. It might have sought — to make my criticism still more explicit — to distinguish between the "present utility" of powers for achieving that "flexibility" of familial disposition, which it so deservedly extols, and their "present utility" for achieving all of those alleged anti-social consequences for which powers appendant were sent to the grave. Flexibility of disposition the general power of appointment by deed or will does, beyond doubt, give. The fact is, ancient dogma notwithstanding, that under such a power the donor has prescribed no "limits" for the donee's discretion; he has given the donee a "blank check"; not even the "fee" or the "whole property" could give a wider range of choice among possible beneficiaries. Even if the power is "special," even if the donor does limit the donee's beneficence to a group "not unreasonably large," the donee may still have all of the control which most people want and still be able to send the property where most people want to send it; he may be restrained only from giving to charity or out of his blood line.<sup>55</sup> Where, furthermore, the power, general or special, is "testamentary" only — even though the dead hand may with-

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<sup>55</sup> From a study of probate records in New York City, Professor E. C. Lindeman in *WEALTH AND CULTURE* (1936) 50 has drawn "certain tentative conclusions" that "persons who possess large estates do not, at death, redistribute any sizable proportion of their wealth to society. They pass their wealth on," he finds, "so far as is possible, to a small circle of relatives and friends. Only six per cent of the wealthy distribute their estates among agencies and institutions. Moreover, the sum which they thus distribute amounts to only six per cent of the total wealth bequeathed."

In his now famous intramural dispute with Professor Griswold, Professor Leach, the Reporter for the chapter now under review, to sustain his position that the federal estate tax should not be extended to special powers, amplifies the argument that "the donee of a special power is in no sense, legal or practical, the owner of the property." "He has no interest," Professor Leach insists "which he is transferring, legally or practically. To impose a tax where there is a life tenant with a special power is to say that such a person is analogous to an owner rather than to a simple life tenant; and, legally and factually, this is not true." No less emphatic are certain other remarks in this same paragraph: "The donee does not own the property; his creditors cannot reach it; he cannot transfer it to anyone outside the scope of the power; he can derive no personal benefit from the exercise of the power, directly or indirectly. He is very much like a trustee — and, indeed, special powers are frequently referred to as powers in trust." See Leach, *Powers of Ap-*

hold the power of disposal by deed from the living — the donee may still have for all practical purposes such control over claims, goods, and resources that he should, from a policy perspective and for most purposes, be treated as “owners” are treated.<sup>56</sup> Of what benefit is it to creditors, spouses, and the public (here represented by the tax collector) that the dead should limit the discretion of the living in the choice of ultimate beneficiaries or confine the exercise of such discretion to wills rather than deeds? Why should flexibility of familial disposition, desirable end though it may be, be purchased at the expense of all of these people? If such flexibility is a consummation so devoutly to be wished, why should not donors seek, and be made to seek it, as of itself? Is it consistent with the values of a commercial society that we should — shades of J. C. Gray! — continue to tolerate “spendthrift powers” as well as

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*pointment and the Federal Estate Tax — A Dissent* (1939) 52 HARV. L. REV. 961, 965.

Such an argument raises a host of questions. What can “no personal benefit” mean if the donee gets the life enjoyment and has the power to dispose at will among his “small circle of relatives and friends”? Cf. LINDEMAN, *supra*. Does only he get “personal benefit” who can consume principal at will or pick beneficiaries from the whole wide world? Just how is the donee like a “trustee” and just why should this likeness, if any, make any difference for the purposes at hand? True, the donee of a power, whether special or general, may be given the powers of management, and hence be subjected to the duties, which usually distinguish a “trustee” but what difference should “trust” or “no trust” make to creditors, spouses, and tax collectors? In another controversy — about the release of powers — even Professor Leach has insisted that “the classification” of special powers as “powers in trust” is “indefinite,” “illogical,” and difficult to understand. (See RESTATEMENT, PROPERTY (Tent. Draft No. 7, 1937) at p. 164.) Why, furthermore, is a special donee more like “a simple life tenant” than like an “owner”? Does “a simple life tenant” have any powers of disposal? Why does the donee have “no interest which he is transferring” if he does do “an act” which “affects the course of succession”? To what in such a context does the word “interest” refer? Why must tax collectors be disposed of with the same summary treatment that is given to creditors? And how, for that matter, do we know that creditors have been properly treated? Why pick out some few of the total aggregate of interests and burdens summarized under the label “owner” and say that only he who has these few is *the* owner? Cf. Mr. Justice Frankfurter’s opinion in *Whitney v. State Tax Commission of New York*, 309 U. S. 530, 538, 540-41 (1940).

<sup>56</sup> Cf. Leach, *Powers of Appointment and the Federal Estate Tax — A Dissent* (1939) 52 HARV. L. REV. 961, 963: “Thus, if A has a life estate in property and a general testamentary power of appointment, his estate would be computed as including the property subject to the power even though he was the one person in all the world who could never derive a benefit from it, due to the fact that he could not exercise the power until his death.” Why must “benefit” be confined to the power of *inter vivos* consumption or disposal? What policy norm requires such a restricted definition?

"spendthrift trusts"? If there is any policy back of our statutes designed to protect the reasonable anticipations and security of spouses, should property covered by powers be so wholly immune from that policy? For what good reason should contemporary American taxpayers be allowed to skip a generation or two of estate and inheritance taxes by the use of a verbal form invented several centuries ago to enable an English gentleman to make a will of land?<sup>57</sup> Are the alleged anti-social consequences for which powers appendant were abolished the inevitable concomitants of any use of the powers device or are they merely the by-products of that mysterious "fundamental common-law dogma"? Could not the dogma and its nonpreferred consequences be banished but the "device" preserved for the sake of "flexibility" only? Why should courts ever be encouraged to interpret statutes in terms of

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<sup>57</sup> Such "minimization" of taxes is, of course, one of the chief functions of the powers device today. See LEACH, *CASES ON FUTURE INTERESTS* (2d ed. 1940) 574; Angell, *The Impact of the Law of Powers Upon Our Internal Revenue Laws* (1941) 39 MICH. L. REV. 1269; Griswold, *Powers of Appointment and the Federal Estate Tax* (1939) 52 HARV. L. REV. 929; Leach, *Powers of Appointment* (1938) 24 A. B. A. J. 807; Powell, *Powers of Appointment* (1941) 10 BROOKLYN L. REV. 233; Schuyler, *Powers of Appointment and Especially Special Powers: The Estate Taxpayer's Last Stand* (1939) 33 ILL. L. REV. 771; Thompson, *Inheritance Taxation and Powers of Appointment* [1939] WIS. L. REV. 254.

Professor Griswold, of all the writers cited, comes closest to making a persuasive statement of policy norms. He points out, *inter alia*, that "the estate tax" is now "in effect a sort of capital levy, with the periods determined largely by chance" and he suggests that the failure to impose a tax "whenever property passes from a life tenant to a remainderman" is "to allow the tax-free transmission of property from one generation to the next." But, despite such insight, even he does not come out clearly and strongly for a norm of "uniformity" which would require that the tax power operate consistently as between family units on each transfer of economic power from one generation to another. The result is that he makes an unnecessary and disappointing concession to the tax minimizers in agreeing to except from his proposed tax on special powers by far the most numerous class of such powers—namely, powers to appoint among the children of the donor or donee. Why, if he is willing to make such a concession, should he not exclude from the tax all instances where a *general* power is exercised in favor of such children? Surely, whatever the policy justifications for estate and inheritance taxes, it is the *fact* of transmission from generation to generation and not the legal *device* by which such transmission is effected that is important. The answer to Professor Leach's suggestion that a complete abolition of the tax avoidance possibilities of powers of appointment would drive people to framing their dispositions only in terms of rigid remainders is easy. We should indeed, as he justly fears someone may counter, seriously consider a revision of our tax laws with respect to remainders. An adequate exemption could be made for gifts within the same generation to spouses; and then all other transfers by whatever device could be taxed.

“common-law dogma” rather than in terms of “legislative policy,” however obscure the legislature may have been in its statement of policy?<sup>58</sup> By what policy norms, furthermore, should legislators themselves be guided in their handling of all of these problems? How, in a very rough paraphrase of the century-old words of the New York Revisers, can legislators, if judges be too humble, place “the doctrine of powers on rational grounds” and bring them into “harmony with the general system of our laws” and adapt them “to the state of our society” and to the “policy of our institutions”? Such are but a few of the relevant questions which a group of well-subsidized scholars, desirous of exercising a long-term influence, might at the very least have sought to answer for busy legislators, judges, and teachers.

### III

To make a superb inventory of Augean stables is not to cleanse them.<sup>59</sup>

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<sup>58</sup> Cf. Hamilton & Braden, *The Special Competence of the Supreme Court* (1941) 50 YALE L. J. 1319, 1357-67; Jones, *Statutory Doubts and Legislative Intention* (1940) 40 COL. L. REV. 957; Radin, *Statutory Interpretation* (1930) 43 HARV. L. REV. 863.

<sup>59</sup> See methodological introduction, *supra* pp. 1080-84. The opinions, both majority and dissenting, in *Helvering v. Safe Deposit and Trust Company of Baltimore* (1942) only document anew the need of a thorough cleansing. The majority opinion, though it purports to “find it unnecessary to decide between these conflicting contentions on the economic equivalence of the decedent’s rights and complete ownership” and expressly refuses to “reject the principle we have often recognized that the realities of the taxpayer’s economic interest rather than the niceties of the conveyancer’s act should determine the power to tax,” in fact succumbs to the traditional magic of powers of appointment and bases its decision on a mythical congressional intent. The dissenting opinion, though persuasive in its demonstration of the illogicality of the majority opinion, is, in view of previous criticisms of the technicalities of future interests by various of the dissenters, slightly incredible with its talk about “the estate in question” not being “that of the decedent” and “the property” being “a portion of the estates” of the donors and passing under their “deed and wills,” with “nothing” passing, either by “appointment” or “intestacy” or otherwise, when a donee under a general power by will “voluntarily” refrains from exercising, or makes an ineffective attempt to exercise, his power. Nothing—neither economic benefits nor legal “immunity” from other disposition—passes to either default takers or purported “appointees” with whom they have compromised a questioned appointment when the donee of a general power of appointment by will dies without having “effectively” exercised that power!