Future Interests in Property in Minnesota

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FUTURE INTERESTS IN PROPERTY IN MINNESOTA

II

A. IN REAL PROPERTY, AT LAW.

The statutes of Minnesota have had little effect on the future possibilities, interests, or estates in real property which are peculiar to the grantor. Possibilities of reverter, rights of re-entry for condition broken, and reversions have generally the characteristics, incidents, and restrictions of the American common law, or, indeed, of the English common law. Future possibilities, interests, and estates to others have, on the other hand, been greatly changed by the statutes. For the common law remainders, future uses and devises the statutes have substituted a "future estate" which is scarcely recognizable as a descendant of common law ancestors. There is still, however, a relationship between the old and the new. The change has not been great enough to dispense with a knowledge of these interests as they were at the common law. A real knowledge of the statutory future estate requires a knowledge of future interests as they have been. The very terms of the statutes can only be understood in the light of the conditions which they were intended to change; and where the statutes are silent the common law continues to speak. The aim of this article is to outline these inter-

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1 This article, while complete in itself, is a continuation of an earlier article in 3 MINNESOTA LAW REVIEW 320.
2 3 MINNESOTA LAW REVIEW 327-341.
3 For the source of the statutory provisions see 3 MINNESOTA LAW REVIEW 320 et seq.
ests as they were at the American common law, that is, under the English common law and the amendatory English statutes, and to show the effect upon them of the Minnesota statutes.

**Future Interests under the English Common Law before 1536.**

**Remainders.**—By the English common law, the only future interest in real property that could be limited to a stranger was a remainder. Not every limitation was a remainder. To be a remainder it must have certain qualities, and unless it had these qualities, it was void. The necessity of these qualities arose from the mode of conveyance and the rules of seisin.

Prior to 1536, the normal mode for limiting legal freehold interests, present or future, was livery of seisin. For A to convey a fee simple estate to B he must take B upon, or near to, the land, and there make a symbolic delivery of the seisin to him. The act was accompanied by a deed of feoffment but the livery was the significant and effective part of the ceremony, without which no title passed.

Seisin was the possession of a freehold interest in land by oneself or his tenant. The rules of feudal tenure required that there be always someone seised of the land to meet adverse claims to it, and to render the services due to the lord of whom the land was held. For these reasons the seisin must never be in abeyance.

The seisin transferred by the livery might be appropriated to a number of successive estates. But the seisin for all must be delivered at one time. Furthermore the nature of the act required that it be delivered presently. A freehold estate could not be created to begin in futuro, as to C, to take possession after the death of A. The livery was made to the first tenant for himself and for those to follow him in the possession, as to B for life, and after his death to C and his heirs. There had consequently to be a present or particular estate created at the same time with the future estate, and this is the first rule governing the creation of remainders.

The livery to B would not support a broken series of estates. It must be possible for each successive estate to become an estate in possession the moment the prior estate ended. If an

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5 Dutcher v. Culver, (1877) 24 Minn. 584, 617.
6 Leake, Property in Land 33; Tiffany. Real Property 278.
7 Co. Lit. 48a; Leake, Property in Land 35; Challis, Real Property 48, 107, 397; Tiffany, Real Property, 848.
8 Challis, Real Property 105.
interval elapsed the seisin transferred by the livery would be in abeyance. The seisin during the interval would be in the grantor and the future limitation would have to take effect out of his seisin and would be open to the objection that, looking from the date of the livery, the estate was to begin in futuro. So on a conveyance to B for life, and one day after his death to C and his heirs, the limitation to C was void. For a future limitation to be a remainder it must be capable of taking effect in possession immediately the prior estates end.

There was no restriction on the number of remainders that could be created out of the fee. There might be any number of life estates, or estates tail, with or without an ultimate remainder in fee. The tenants took in strict succession to each other, and the seisin of all together made up the seisin of the fee transferred by the livery. But a limitation that was to take effect in derogation of a prior estate was not a remainder. The seisin given to one could not be limited to shift to another upon some event. The second limitation was thought repugnant to the first, and partook of the nature of a limitation to begin in futuro. In a conveyance to B for life, or in fee, but unless within a year B pays C £100, to C, the limitation to C was void. The familiar rules that a condition could not be made in favor of a third party, that a fee could not be mounted upon a fee, and that no remainder could be limited after a fee simple, were particular applications of this general rule. A remainder must be limited to take effect upon the termination of the precedent estate, and not in abridgment of it.

That a limitation might be a remainder, then, it had to be limited by the same act of conveyance that created a present estate, to begin immediately on the termination of the prior estate and not in derogation of it. These qualities, arising from the combined operation of the mode of conveyance and the rule of seisin, still characterize remainders under the American common law and distinguish them from the other future interests which became possible after 1536.²

Future Interests introduced by the Statutes of Uses (1536)—Springing and Shifting Uses.—Down to 1536 the system of limitations at law was restricted and simple. There could be no other interests limited to strangers but present estates and remainders.

²Challis. Real Property 81 et seq.; Leake, Property in Land 28, Tiffany, Real Property 274 et seq.
But for a century there had been developing another system of limitations in equity superimposed upon the system at law. This was the system of uses, the prototype of the modern trust. The legal title was in one, known as the feoffee to uses, and the use, the equitable title, was in another, the cestui que use.

There were several reasons for the origin of uses. Statutes of mortmain had restricted the holding of lands by the church. The statutes were evaded by giving the lands to a feoffee to the use of the church. Legal estates were forfeited for treason, but the use was not forfeitable. The legal title was not devisable, but the use was. They could be created without ceremony and there was greater freedom in limiting them than in limiting legal estates.

There were two general methods for raising uses, (1) by transmutation of possession, and (2) without transmutation of possession. (1) A might convey the legal title to B to the use of A himself or to the use of C. The legal title was conveyed by the methods known to the law. The practice of conveying land to the feoffor's own use became so common that it led to the doctrine of resulting uses. Equity came to presume that a conveyance without consideration or without a declaration of the use, was to the use of the feoffor. (2) A simpler method of raising uses to others than the grantor was without transmutation of possession. This method took the two forms of bargain and sale of the use and covenant to stand seised to the use of another. The bargain and sale was, in effect, the promise by one for a valuable consideration to stand seised to the use of another. The promise originally might be oral. The consideration was required to make the promise enforceable in equity against the promisor which was the basis of the use. The covenant to stand seised was likewise a promise of A to stand seised to the use of another, but it had to be made by deed and the consideration was relationship by blood or marriage. 

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10 Feoffments to uses occur much earlier, but the interest of the cestui que use was not protected by the Court of Chancery until this time. Ames, The Origin of Uses and Trusts, 21 Har. Law Rev. 265.
11 Co. Lit. 271b; 1 Sanders, Uses 83 et seq.
12 Leake, Property in Land, 83, 254.
14 Bacon, Uses 13. The practice of stating at least a nominal consideration in deeds is traceable to this requirement.
two forms differed only in these formal requisites. They were identical in their operation. In both A retained the legal title, and C had a promise enforceable in equity.

There was no seisin of the use. The feoffee to uses held the seisin and his seisin satisfied the requirements of the feudal law. The law looked to him and did not recognize the cestui que use. The use was consequently free from the restrictive influences of seisin.

As uses were created without livery and were free from the restrictions of seisin, they could be limited in ways unknown to estates at law. Equity followed the law in determining the descent of the use, and in other respects, but did not follow the law in restricting the limitations that might be created in the use. Uses could be created in the same form as remainders, but they could also be created to begin in futuro without a present estate; with intervals between them; and to take effect in derogation of prior uses. The limitations in the first two cases were called springing uses and in the last case a shifting use, the difference being that the former arose out of the interest of the grantor and the latter cut short the use already limited to the prior cestui que use. So limitations of future interests in the use fell into three classes, remainders, analogous to remainders at law, and springing and shifting uses which had no counterparts at law.

Upon these interests the statute of uses came into operation for various reasons set forth in the preamble, the statute aimed to end the dualism of equitable and legal interests, not by forbidding the creation of uses, but by laying hold of them after they were created and transforming them into legal interests. To this end the statute provides that the person who has an estate in the use, shall have a corresponding seisin or possession; and that the estate of the persons seised to uses shall be in them who have the use "after such quality, manner, form and conditions as they had before, in or to the use."

One result of the statute was to make the hitherto equitable interests of remainders in the use and springing and shifting uses cognizable by the law, and to bring the last two into

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17 Digby, Hist. Real Prop. 327.
18 Leake, Property in Land 87 et seq.
19 27 Hen. VIII c. 10.
20 Sugden's Gilbert, Uses 73 Note; Goodeve, Real Prop. 258.
the legal system of future interests with all the freedom from restraint in their creation that characterized them while they were equitable interests. The statute in no wise changed the manner of their creation. On the contrary it made the methods above outlined for creating uses, available for conveying legal interests, both present and future. Bargain and sale and covenant to stand seised were added to livery of seisin as modes of conveying legal estates. The statute turned the use raised by the promise into a legal estate, or as it was expressed, it "executed" the use.

The manner of operation of the statute was such that some uses were executed at once, some in due course, and others not at all. If the use were a present one, or one in remainder in the strict sense, it was changed at once into a legal estate. Thus, if the use were to B for life, and after to C in fee, B and C had forthwith by force of the statute legal estates in possession and remainder. If the use were to arise in the future, there being no present use created, or a present use were given, to be cut short later by another, the future use was not executed until it could be enjoyed in possession or in remainder and the seisin meanwhile remained in the bargainor, or first cestui que use respectively. Thus if A bargained and sold the use to C in fee to have it after the death of B who took no interest, A remained seised in fee until the death of B and then the statute executed the use in C; or if A gave the use to B in fee, but if B die under 21, to C in fee, the statute executed the use in B at once, and the use to C when the event happened. These continued to be called springing and shifting uses and they were the distinctly new classes of interests which the statute made cognizable by the courts of law.

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21 Leake, Property in Land 82 et seq.
22 Gray, Perpetuities, secs. 56, 57, 114 note, 201.
23 Of the third class of uses which were not executed at all two were of great importance. When the person seised to the use had active duties to perform with respect to the property, as to manage the property and to pay the rents and profits to the cestui que use, since the execution of the use would leave him powerless to perform these duties, and thus defeat the intention of the person creating the use, the use was not executed, but continued cognizable only in a court of equity. Thus originated the doctrine of modern active trusts. Symson v. Turner, (1700) 1 Eq. Cas. ab. 383 note.

And when there was a use upon a use, as a use to B to the use of (or on trust nevertheless for) C, although B had no active duties to perform, the second use was not executed by the statute. Tyrrel's Case, (1557) Dyer 155, Benl. 61, 1 And. 37, A. Bendl. 28; Doe d. Lloyd v. Pasvingham, (1827) 6 B. & C. 305, 9 D. & R. 416, 5 L. J. K. B. O. S. 146.
Future Interests introduced by the Statute of Wills (1540) — Executory Devises.—Under the feudal system, freehold interests in land were not devisable at law. The power to devise legal freehold estates was first given by the statute of wills in 1540. As devises passed the title without livery of seisin, they could be made not only of present estates and remainders, but also to begin in futuro, with intervals between the successive interests devised, and to shift from one to another. These limitations were known as executory devises and corresponded to springing and shifting uses in conveyances inter vivos. They could be created with the same freedom and had the same incidents. The term conditional limitation was a common name for a shifting use and a "shifting" executory devise.24

Thus after 1540 the following future interests could be limited: remainders created by assurances at the common law, by way of use, and by devise; springing and shifting uses by conveyances operating by way of use, and executory devises by devise. By a common law conveyance only remainders could be created, but by a conveyance of bargain and sale or by devise the future limitation might be either a remainder or one of the new executory interests, and, as future interests were generally limited by way of use or by devise, there was difficulty in determining whether the limitation was a remainder or one of the new executory interests. Before considering how they were distinguished, the importance of the distinction should be noted. The importance lies in the different incidents which attended the several interests.

The Different Legal Incidents of the Several Future Interests.—In the early period of the law only vested remainders

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This rule has often been attributed to the narrowness of the courts of law. The true reason was that before the statute the second use was repugnant to the first and void even in equity. And the statute executed no other uses than those which had been good in equity before. See Article by Ames, The Origin of Uses and Trusts, 21 Har. Law Rev. 270. The use to B was executed by the statute but the use to C was void at law. About a century later this use upon a use was taken cognizance of by equity and B was held trustee of the land for C. This is the origin of the modern passive trust, which led Lord Hardwicke to say that the statute of uses "had no other effect than to add at most three words to a conveyance." Hopkins v. Hopkins, (1738) 1 Atk. 581, 591. A bargain and sale of land to B to the use of C created a passive trust, since the statute would execute only the use thereby raised to B.

could be created. Later contingent remainders were allowed. When the remainderman "owns" the estate and merely awaits the termination of the preceding estates to have the right of possession of the land, the remainder is vested. That the remainderman may "own" the estate, he must be in esse and ascertained, and his right to possession must not be subject to any condition precedent other than the ending of the prior estates. Vested remainders had in general like incidents with reversions. The remainderman had most of the rights, privileges and immunities of present tenants except those dependent upon actual seisin.

The contingent remainderman does not "own" an estate. There is but the possibility of an estate to him. If the remainderman is not in esse, or not ascertained, or if his right to possession is dependent upon the fulfillment of some condition precedent other than the ending of the prior estates, the remainder is but a possibility and is contingent.

There was the greatest difference between the incidents of contingent remainders and the other executory interests. The requirement that seisin should not be in abeyance had peculiar effect on contingent remainders. That a contingent remainder might be created, there must also be created by the same conveyance a present estate of freehold to support it. A term for years would not support it because a termor had no seisin. The livery to the present freehold tenant was effective for himself and those in remainder, and his seisin answered the requirements of the rule while his estate lasted, but the rule further required that the contingent remainder vest before, or instantly, the prior estate determined; otherwise the next vested estate in remainder or reversion became the estate in possession and the contingent remainder could never take effect. Thus if A conveyed to B for life, and then to the first of his children to attain 21, in fee, and B died leaving a child not of age that child could never take.

The present estate might, moreover be terminated prematurely in several ways and with like effect upon the contingent remainder. An alienation by the present tenant by livery of seisin, fine or recovery, purporting to convey a greater estate than he

26 2 Prest. Abst. Title 167; Challis, Real Prop. 42, 58.
27 Fearne, Cont. Rems. 207 et seq.
had, operated as a forfeiture of his present estate. So of attainder of treason or felony. The present estate might also be destroyed by merger. If A conveyed to B for life, remainder to B’s first born son for life, remainder to C in fee, and B before a son was born, surrendered his estate to C, or C released his estate to B the two estates merged, and B’s life estate was drowned in the fee. Where contingent remainders were limited in fee, the inheritance, pending the happening of the contingency, was in the grantor, or in the residuary devisee or heirs of the devisor. So if in the example given in the last paragraph B surrendered his estate to A, or if A released the reversion (which he had pending the happening of the contingency) to B, B’s life estate was drowned in the reversion. In these several ways it was in the power of the present tenant to destroy the estate which supported the contingent remainder before it vested, and the remainder could not take effect although the contingency upon which it was to vest happened before B’s death.

After the statutes of uses and wills, all contingent remainders, whether created by a common law conveyance, or by way of use or devise, were liable to be defeated in these ways.

Springing and shifting uses and executory devises, on the other hand, were not dependent upon the seisin of prior estates to support them. They were limited to take effect, not in immediate succession to prior estates limited at the same time, but in defeasance of the estate in the grantor or of another granted estate. Consequently they took effect whenever the time arrived, or the contingency happened upon which they were to vest. And future uses and executory devises were held, in the celebrated case of Pells v. Brown, indestructible by any acts of the tenant of the present estate. To illustrate, on devise to B for life, remainder to the first of his children to attain 21 in fee, the child could not take unless it attained 21 in B’s life time, and B might, in any one of the several ways indicated above, while the child was a minor, destroy the possibility of its taking, even if it attained 21 while he lived; whereas if the devise were to the first born child of B to attain 21, in fee

28 Archer’s Case (1599) 1 Coke 66b; Waddell v. Rattew, (1835) 5 Rawle (Pa.) 231; McElwee v. Wheeler, (1877) 10 S. C. 392.
29 3 MINNESOTA LAW REVIEW 135.
30 (1620) Cro. Jac. 590; Stoller v. Doyle, (1913) 257 Ill. 369, 100 N. E. 959; Gray, Perpetuities, sec. 142.
(there being no preceding life estate) the child could take whenever it attained 21, the fee descending to the devisor's heirs in the meantime, and no act of the heirs could destroy the child's possibility. The intention of the testator is obviously the same in both cases, but in the former it is defeated by the rules of seisin peculiar to remainders.

*How Future Limitations were classified.*—In determining whether a future limitation created by way of use or devise was a remainder or one of the new executory interests, the law was not impartial. The courts of law were accustomed to remainders, and disliked the new interests. The former, if contingent, were destructible, but the latter were indestructible and, therefore, tended towards perpetuities. The courts adopted the rule that any limitation, no matter how created, capable of taking effect as a remainder must be so classified. Only those that could not take effect as remainders were executory uses or devises. A limitation was capable of being classified as a remainder when it had the qualities necessary to a remainder at the English common law. Therefore if it had a freehold estate to support it, was to come into possession in immediate succession to, and not in derogation of, the prior estate, it was a remainder; if it lacked any of these qualities it was not a remainder. It was no longer void but belonged to the new categories provided also that it was created by way of use or devise.\(^3\)

The greatest difficulty lay in distinguishing between contingent remainders and the other contingent executory interests. The courts looked at the limitations as from the time when they were made (the delivery of the deed or the death of the devisor). If the contingent limitation, looked at from that point of time, could by any possibility take effect as a remainder, it was classified as a contingent remainder.\(^2\) For example, if the devise were to B for life, and after to the first of his children to attain 21 in fee, since a child might be born and attain 21 in B's life the limitation was a remainder, destructible, and would fail, at all events, if B died before the child attained 21; whereas if the devise were to the first child of B to attain 21 in fee, it could not, since there is no estate limited to support it, by any possibility take effect as a remainder. It would be classified as an executory devise, would be indestructible, and would vest when-

\(^{31}\) Williams, Real Prop., 21 ed., 356.
\(^{32}\) Gray, Perpetuities, sec. 921.
FUTURE INTERESTS

NON-CONTINGENT

AT COMMON LAW

Created by operation of law

REVERSIONS

Created by act of parties

VESTED REMAINDERS

BY STATUTES OF USES AND WILLS

FREEHOLDS

IN FUTURO

Uses and devises not limited to arise on a condition

VESTED REMAINDERS

By way of use or devise

CONTINGENT REMAINDERS

AT COMMON LAW

BY STATUTES OF USES AND WILLS

CONTINGENT REMAINDERS

By way of use or devise

EXECUTORY LIMITATIONS

Limited to arise on condition

SHIFTING USES AND DEVISES

(Conditional limitations)

SPRINGING USES AND DEVISES

(Freeholds in futuro)

Diagram showing the different classes of future interests that might be limited by the American Common Law. See Fletcher, Contingent and Executory Interests in Land 5.
ever the condition was satisfied. And there would be a like classification, as in the last example, with like results, where the future limitation was not in immediate succession to a prior estate or was to take effect in derogation of it.

Such in general outline was the American common law. Livery of seisin was recognized in many of the early cases as a mode of transferring title. The English statute of uses is generally regarded as a part of the American common law, or is reënacted in substance. The several classes of future interests which had arisen under the English common law and statutes were recognized. The same rules governed the classification of limitations and there was the same preference for remainders. Springing and shifting uses and executory devises were indestructible and took effect according to the intention of the grantor. Contingent remainders were destructible and failed with the supporting estate, the intention of the grantor being defeated by the rules of seisin. Statutes have tempered the effect of this rule in all jurisdictions, but in many states contingent remainders still lack the complete immunity of the future use and devise.

Changes effected by the Minnesota Statutes.—The "future estate" and "remainder."—Estates in expectancy are divided

34a See diagram, page 317.
36 Washburn, Real Prop., 6 ed., sec. 1600.
37 Conveyancing in Minnesota. Livery of seisin is not expressly abolished in Minnesota. A conveyance by livery might be effective between the parties; see Morton v. Leland, (1880) 27 Minn. 35, 6 N. W. 378; Johnson v. Sandhoff, (1883) 30 Minn. 197, 14 N. W. 889; Conlan v. Grace, (1886) 36 Minn. 276, 30 N. W. 880, provided that it complied with the statute of frauds, G. S. 1913, sec. 7002. The statutes prior to the revision of 1895, provided that a conveyance might be made by deed, acknowledged and recorded, "without any other act or ceremony." G. S. 1866 c. 40, sec. 1; G. S. 1878 c. 40, sec. 1; G. S. 1894 sec. 4160. In Smith v. Dennett, (1870) 15 Minn. 81, the court referring to this statute said that the execution, delivery and recording of a deed operate to pass the grantor's seisin without any other act or ceremony; provided that the grantor has seisin and the grantee becomes seized without an actual entry. This provision was repealed by the revision of 1905. R. L. 1905 sec. 5518. The statutes now state the requisites of a deed to entitle it to record G. S. 1913, secs. 6833, 6835, but the nature of the conveyance
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into future estates and reversions. Reversions are defined as they were at common law and continue to be governed by com-

and what would suffice to pass title between the parties are not specified. That deeds generally operate under the statute of uses is, however, im-

pliedly recognized by the statutes which provide that a "deed of quit-

claim and release shall be sufficient to pass all the estate which the gran-
tor could convey by a deed of bargain and sale." G. S. 1913, sec. 6827.

The chapter of the statutes on uses and trusts provides that:

"6701. Uses and trusts except as authorized and modified in this chas-

ter, are abolished; and every estate and interest in lands shall be de-

emed a legal right, cognizable as such in the courts of law, except when otherwise provided by statute."

"6702. Every estate which is now held as a use executed under laws as they formerly existed is confirmed as a legal estate.""6703. Every person who, by virtue of any grant, assignment or devise, is entitled to the actual possession of lands, and the receipt of the rents and profits thereof, in law or equity, shall be deemed to have a legal estate therein of the same quality and duration and subject to the same as his beneficial interests. But this shall not divest the estate of any trustee in any existing trust where the title of such trustee is not merely nominal but is connected with some power of actual disposition or

"6704. Every disposition of lands whether by deed or devise, except where otherwise provided in this chapter, shall be made directly to the person in who the right to the possession and profits are intended to be vested, and not to any other to the use of, or in trust for, such person, and, if made to one or more persons in trust for or to the use of another, no estate or interest, legal or equitable, shall vest in the trustee."" The effect of these provisions is to reenact the most important feature of the English statute of uses and to extend it. All passive uses and trusts, without regard to their number or the manner of their creation are executed and the interest of the beneficiary becomes a legal title. Farmers Nat. Bank v. Moran, (1883) 30 Minn. 165, 14 N. W. 805; Thompson v. Conant, (1893) 52 Minn. 208, 53 N. W. 1145. (Cf. Whiting v. Whiting, (1890) 42 Minn. 548, 44 N. W. 1030). The English statute of uses was doubtless intended to put an end to passive uses and trusts, but they were revived under the form of a use upon a use. See note 23, ante. The Minnesota statute fully accomplishes the reformation which the English Parliament aimed at.

38 The sections of the statutes material to this discussion are:

6658. Estates, as respects the time of their enjoyment, are divided into estates in possession and estates in expectancy. An estate in posses-

sion is where the owner has an immediate right to the possession of the land; an estate in expectancy is where the right to possession is post-

poned to a future period.

6659. Estates in expectancy are divided into, (1) estates commencing at a future day, denominated future estates, and (2) reversions.

6660. A future estate is an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate cre-

ated at the same time.

6661. When a future estate is dependent upon a precedent estate, it may be termed a remainder, and may be created and transferred by that name.

6662. A reversion is the residue of an estate left in the grantor, or his heirs, or in the heirs of a testator, commencing in possession on the deter-

mination of a particular estate granted or devised.

6663. Future estates are either vested or contingent. They are vested when there is a person in being who would have an immediate right to
"Future estate" is defined to exclude reversion, and to include contingent future interests limited to third parties which were not estates, but mere possibilities at common law. The statutory title "future estate" includes all the limitations which at common law were denominated remainders, vested or contingent, springing and shifting uses and executory devises. Every limitation which might have been made under the common law may be created under sections 6660, 6674 and 6677. Irrespective of their nature, the mode of conveyance by which they are created, and of their relation to the estate of the grantor, or to other granted estates, they are classified under the statutory term "future estate."

In Sabledowsky v. Arbuckle,40 A, reserving to himself a life estate, bargained and sold land to his son B. It was urged that a freehold estate to commence in the future cannot be created without a precedent particular estate to support it. The court held that although it would have been void at common law, the statutes recognized and impliedly authorized such a conveyance. The limitation would have been good by the American common law as a springing use.
In *Thomas v. Williams*, a deed of land was made by A to B "to have and to hold to B and his heirs in case he survives A." This was held to be a good conveyance of a "present contingent right in the land in the nature of a contingent fee." This would be good as a contingent springing use by the common law.

In *Whiting v. Whiting*, A devised (in legal effect) to B in fee, "but if he die within ten years it shall go to his issue." The court said:

"At common law a fee could not be limited on a fee. The object of chapter 45 of our statutes was to abolish the technical distinctions between contingent remainders, springing and secondary uses, and executory devises, and to bring all these various executory interests nearer together, and to resolve them into a few plain principles, and to render all expectant estates equally secure from being defeated by the subtle refinements of the common law, contrary to the intention of the grantor or devisor. And . . . we do not see why a remainder may not now be limited after a fee. But whatever may be the rule, as to 'remainders' properly so called, created by a conveyance, even at common law, in a will a fee could be limited on a fee by way of executory devise."

By abolishing expectant estates as they were at common law and substituting the statutory future estate, the statutes neither prevent any limitation possible at the American common law nor allow any limitation that was impossible by some mode.

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41 (1908) 105 Minn. 88, 117 N. W. 155. See also *Vesey v. Dwyer*, (1911) 116 Minn. 245, 133 N. W. 612; *Hagen v. Hagen*, (1917) 136 Minn. 121, 161 N. W. 380.

42 (1890) 42 Minn. 548, 44 N. W. 1030.

43 The court said that apart from the statutes it "would have been void as a feoffment or a bargain and sale." The court added:

"The courts, however, succeeded in inventing a contrivance by which to uphold such conveyances by implying a covenant on the part of the grantor to stand seized of the lands to his own use during his life, and after his decease to the use of the grantee. Of course, they could not be upheld in this state on any such ground, for under our statutes, there are no implied covenants, and such uses are abolished."

But the limitation would have been good as a bargain and sale at common law. The court was probably misled by the error of the Massachusetts cases cited in argument which is examined and explained in *Rogers v. Eagle Fire Co.*, (1832) 9 Wend. (N. Y. 611, and see *Gray, Perpetuities*, secs. 52-57.

As to the second dictum quoted, it is a well recognized doctrine of the common law that if a conveyance cannot take effect in the form intended, it will be moulded over into some other form for which the requisites are present. *Gray Perpetuities*, sec. 65. Is not the statute against implying covenants in deeds, but declaratory of the common law which did not prevent the application of this rule, and are not the Minnesota statutes on uses apt to execute such a use in the covenantee? See sec. 6704 and note 37, ante, and *Thompson v. Conant*, (1893) 52 Minn. 208, 53 N. W. 1145. Cf. *Eysaman v. Eysaman*, (1881) 24 Hun. (N.Y.) 430.

44 Sec. 6692.
or other. But they make all limitations valid without regard to the mode of their creation. And they give to all future limitations the immunity from destruction45 and the capacity of taking effect according to the intention of their creator that characterized certain classes of limitations at common law. It is, consequently, no longer material to which class or denomination, as they were at common law, any particular limitation is to be referred, since all future limitations have the same incidents.46 The statutory future estate includes within itself all the common law classes of limitations and has itself the incidents of those classes brought in by the statutes of uses and wills.47 Thus the common law rules applicable to springing and shifting uses and to executory devises48 are applicable to the statutory future estate, except so far as other rules are provided by the statutes themselves. The statutes eliminated the class of contingent remainders with their peculiar incidents arising from the feudal rules of seisin. But the limitations that had hitherto been classified as such are now classified simply as "future estates."

Some future estates are further denominated "remainders." They are remainders when they are dependent upon precedent estates.49 The term includes limitations denominated remainders at common law, and also limitations which operate to

45 Secs. 6682, 6684.

46 The New York Revisers who prepared the original draft of these statutes said in their appended notes:

"The object of this section [6682] is to extend to every species of future limitation, the rule that is now well established, in relation to an executory devise, namely, that it cannot be barred or prevented from taking effect by any mode whatever. . . The whole doctrine of the law in respect to the means by which contingent remainders may be destroyed, is strictly feudal. . . The protection of the interests of the persons entitled in remainder, will be effectually answered by placing all contingent remainders on the same footing as executory devises, and the end is thus attained in the most simple and direct manner, without the necessity of present expense, or the hazard of future litigation.

"Another most important advantage . . . will result from reducing all expectant estates substantially to the same class. We shall prevent all future litigation on the purely technical question, to which class or denomination any particular limitation is to be referred. It is a well known rule, that no expectant estate, even if created by will, or a conveyance to uses, is to be construed as an executory devise, or secondary use, if it be so limited, as to be capable of taking effect as a remainder and some of the most difficult and obstruse cases to be found in the reports, have turned exclusively on the application of this rule."

47 Fowler, Real Prop. Law 51, 218.

48 See G. S. sec. 6677.

49 G. S. sec 6661.
abridge or determine the precedent estate which were not remainders at common law. The latter are also called conditional limitations,—their common law designation. The statutory remainder thus includes all the estates which take effect in possession subsequently to some other estate, created at the same time, either in immediate succession to it, or in derogation of it. Does it include springing uses and devises that are limited to commence in futuro without the limitation of any present estate? Chancellor Kent was of the opinion that it does. If so it would be synonymous with "future estate." A learned modern writer questions this conclusion and is of the opinion that these are "future estates" but not "remainders." The distinction is perhaps of no importance except to determine what can be passed as a "remainder" under section 6661. The term is used in several other sections of the statutes, but limitations dealt with by these sections are such as would fall under the more restricted definition. The term is, however, unnecessary, and its use in a restricted sense unfortunate, and tends only to renew the confusion which it is the aim of the statutes to remove. The term "future estate" might replace "remainder" throughout the statutes without altering their meaning.

Vested and Contingent Limitations—At Common Law and under the Statutes.—By the common law reversions and remainders are the only vested interests. Future interests are non-contingent and contingent. Interests non-contingent include vested interests and certain executory interests which are neither vested nor contingent. A springing use or an executory devise to an ascertained person to commence on a future event certain to happen, as to C in fee after the death of B is not vested; whereas if the limitation to C were after a life estate to B, it is a remainder and vested. The explanation lies in the fact that reversions and vested remainders are the only true future estates at common law. The reversioner or vested remainderman has a portion

50 G. S. sec 6677.
51 4 Comm. 272.
52 Fowler, Real Prop. Law 222.
53 G. S. secs. 6665, 6668, 6669, 6670, 6671; see also secs. 6672, 6678, 6679, 6684.
54 Gray, Perpetuities, secs. 113-114, 201.
55 Goodeve, Real Prop. 211; Hawkins, Wills 221. The term "vested" is often used in the secondary sense of "transmissible." In that sense many contingent and executory limitations are vested. "As far as I can discover, the only case in which a contingent future interest is not trans-
of the fee of which conveyance has been made. But when the future limitation is of a use or devise, which cannot take effect by way of remainder, the conception is that the whole fee remains in the grantor, or in the devisor's heirs, until the time comes for the future limitation to become an estate in possession or in remainder. The future use or devise, although certain, remains until that time an executory limitation.

The Minnesota Statutes provide that "future estates are either vested or contingent." This provision eliminates the distinction between vested remainders and other executory interests which are certain. It makes all future non-contingent limitations vested, and brings them within the concept of estates which was restricted to reversions and remainders at common law. In respect to vesting all future estates under the statutes are of the nature of remainders at common law.

There are many definitions of vested and contingent remainders. Blackstone defines them thus:

"Vested remainders (or remainders executed whereby a present interest passes to the party, though to be enjoyed in futuro) are where the estate is invariably fixed to remain to a determinate person, after the particular estate is spent. Contingent or executory remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect, either to a dubious or uncertain person, or upon a dubious or uncertain event; so that the particular estate may chance to be determined, and the remainder never take effect."

Gray says that the line between vested and contingent remainders is drawn as follows:

"A remainder is vested in A, when, throughout its continuance, A, or A and his heirs, have the right to the immediate possession, whenever and however, the preceding estates may determine. A remainder is contingent if, in order for it to come into possession the fulfillment of some condition precedent other than the determination of the preceding freehold estates is necessary."

These definitions are sufficient for our present purpose of contrasting the common law with the definition given by the statutes.  

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56 See p. 312 ante.  
57 G. S. sec. 6663.  
58 2 Com. 168, 169.  
59 Perpetuities sec. 101.
The statutes provide that future estates—

"Are vested when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or preceding estate. They are contingent while the person to whom, or the event upon which, they are limited to take effect remains uncertain."

This provision, when first enacted in New York, was said by Chancellor Kent to express accurately and fully, the common law. But the courts have decided that it makes limitations, which were contingent at the common law, vested.

The common law itself favors the vesting of estates and has gone a long way in holding certain limitations vested. A remainder is not prevented from vesting merely because it may terminate before it becomes the present estate. A life estate in remainder may terminate before the preceding estate, yet it may be vested. Again a remainder is none the less vested because it may be terminated, by the operation of a condition subsequent before it becomes the present estate. Thus, if the limitations are to B for life, remainder to C in fee, but if when C dies he leaves no children, then to D in fee, C's remainder is vested, although he may die childless in B's lifetime. And when a condition attached to a remainder is susceptible of being construed as either precedent and so to be satisfied before the remainder becomes the present estate, or subsequent so that it might become operative after the remainder has become the present estate, it will preferably be regarded as subsequent, and the remainder as vested, although the condition may become operative to terminate the remainder and so to prevent it ever becoming the estate in possession.

But suppose the condition is by its terms to be operative only in case it is fulfilled before the remainder becomes the present estate. Of this class of cases Gray says:

"One class of cases, however, presents some difficulty, that, namely, in which the contingency, if it happens at all, must happen at or before the termination of the particular estate, and the coming into possession of the remainder. Suppose, for instance, a gift to A for life, remainder to B and his heirs, but if B dies before the termination of the particular estate, then to C and his heirs. Here, if the condition ever affects B's estate at all, it will prevent it from coming into possession; it will

\[60 \text{G. S. 6663.}
\[61 \text{4 Com. 202.}
\[62 \text{Gray, Perpetuities sec. 102, 103.}
\[63 \text{Perpetuities secs 104-108.}
never divest it after it has once come into possession. Remainders subject to conditions of this sort might have been regarded in three ways.

"(1) If the law looked on vested and contingent interests with an impartial eye, it would seem that such remainders should be held contingent. A condition which may prevent an estate coming into possession, but which can never divest it after it has come into possession, is a condition in its nature precedent rather than subsequent. But the preference of the law for vested interests has prevented this view being adopted.

"(2) Such a condition might be regarded in all cases as a condition subsequent, the circumstance that the contingency must happen, if at all, at or before the end of the particular estate being regarded as immaterial. The effect of this construction would be to make a remainder vested at any time, if there was, at that time, a person ready and entitled to take possession as remainder-man, should the particular estate then determine, although, should the particular estate determine at some other time, such person might not be entitled to the remainder. Upon this theory, if there was a devise to A for life, remainder to his surviving children, the remainder would be at any particular moment vested in the children who would survive A should he at that moment die.

"(3) Neither of these views is that of the common law. Whether a remainder is vested or contingent depends upon the language employed. If the conditional element is incorporated into the description of, or into the gift to the remainder-man, then the remainder is contingent; but if, after words giving a vested interest, a clause is added divesting it, the remainder is vested. Thus on a devise to A for life, remainder to his children, but if any child dies in the lifetime of A his share to go to those who survive, the share of each child is vested, subject to be divested by its death. But on a devise to A for life, remainder to such of his children as survive him, the remainder is contingent."

The statutory definition adopts the second view stated above. In *Moore v. Littel* the conveyance was to B for life, and after his death to his heirs. The remainder was held to be vested under the statute, although the heirs could not be ascertained until the death of B. Woodruff, J., said:

"If there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the precedent estate, then that remainder is vested within the terms of the statute. It is not 'a person who now has a present fixed right of future possession or enjoyment' but a person who would

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64 (1869) 41 N. Y. 66. Other decisions and articles are collected in Gray, Perpetuities sec. 107 notes. Cf. Minnesota Debenture Co. v. Dean, (1902) 85 Minn. 473. 89 N. W. 848; Armstrong v. Armstrong, (1893) 54 Minn. 248, 55 N. W. 971.
have an immediate right if the precedent estate were now to cease. I read this language according to its ordinary and natural signification, and if you can point to a human being and say as to him, 'that man, or that woman, by virtue of the grant of a remainder, would have an immediate right to the possession of certain lands if the precedent estate of another therein should now cease,' then the statute says, he or she has a vested remainder."

The statutory definition of vested remainders is unfortunate. It has caused confusion and uncertainty in the law of New York. The definition of contingent remainders contradicts it. A remainder is said to be contingent while the person to whom it is limited remains uncertain. The two contradictory definitions led Chief Justice Savage to say that some remainders are, by the definitions, both vested and contingent at the same moment.

The vesting of remainders is a matter of law and logic. The various definitions of vested remainders do not define what they are but state when they exist. The legal concept of a vested remainder is "ownership" of an estate which has not yet become a right to possession of the land. The concept requires an "owner," and is not satisfied by saying that a certain person would be "owner" if something happened. It would be almost as good sense to say that an heir apparent has a vested estate in his ancestor's land because he would succeed to it if the ancestor died now. The common law in its partiality for vested remainders has pushed logic to the limit; but the statutory definition sends it beyond. There was sound reason for the common law tendency. Contingent remainders failed unless they were vested when the precedent estates terminated. But the statutes make all remainders independent of the precedent estates. No reason remains for forcing vesting in unusual cases and any leaning away from the common law ought rather to be in the other direction.

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65 See article "The New York Test of Vested Remainders." 9 Columbia Law Review 587, 687, in which the learned writer ingeniously construes the definition to accord with the common law, and with the definition of contingent remainders. If such is the intent of the statute it could be better expressed. See also article "Uncertainties In The Law of Vested Remainders," 10 Bench & Bar (N.S.) 197, 248, 439; 11 ibid., p. 287.


Alienation of Future Interests.—Vested remainders are descendible, devisable, and alienable at the common law. Some contingent interests are descendible at common law, others are not. A contingent interest is descendible when the person to whom it is limited is ascertained and the condition upon which it is limited may be satisfied after his death. When the person to whom it is limited is unascertained, or the condition can only be satisfied by his continued existence the interest is not descendible. Thus upon a limitation to C in fee if B leaves no children, the interest of C is descendible; but upon limitations to B’s children who survive him in fee, or to C in fee if he live to twenty-one, there is no descendible interest in either case until the limitation vests. Contingent future interests which are descendible are also devisable.

At common law contingent future interests were not assignable. Vested remainders and reversions could be conveyed by deed of grant, but contingent interests were mere possibilities which were deemed incapable of alienation by a conveyance at law. They could be released to the tenant in possession. They might, furthermore, be passed by fine by way of estoppel, so as to bind the interest which should afterwards accrue on the fulfillment of the condition. And assignments for a valuable consideration were enforced in equity.

The statutes provide that “expectant estates are descendible, devisable and alienable in the same manner as estates in possession.” Contingent “remainders” are “expectant estates” for

68 By the common law rules of descent both vested and contingent future interests descended to the heirs of the first purchaser of the interest, and not to the heirs the person last entitled. Thus if a contingent future interest were limited to B, and B died leaving C his heir, and C also died before the interest vested in possession, the interest would pass not to the heirs of C but to the heirs of B. The claimant must make himself heir to the first purchaser. Fearne, Cont. Rems. 561b. American statutes of descent have generally changed the common law rule, and descent is traced from the person last entitled. See, Galladay v. Knock, (1908) 235 Ill. 412, 85 N. E. 649, 126 A. S. R. 224; Kales, Cases on Property 86 note. “Three Suggestions concerning Future Interests” by Prof. Ernst Freund, 33 Har. L. Rev. 526. The Minnesota statutes make such interests to descend as do estates in possession. Sec. 6691.

69 Fletcher, Contingent and Executory Interests in Land 177; Roe v. Griffiths, (1766) 2 W. Bl. 606; Goodtitle v. Wood, (1741) 3 Durn. & East 94; Moor v. Hawkins, (1765) 2 Eden 342.

70 Fulwood’s Case, (1591) 4 Co. Rep. 64b; Lampets’ Case, (1612) 10 Co. Rep. 48a; 1 Tiffany, Real Property 306.

71 Williams, Real Property, 21 ed. 367; 1 Tiffany, Real Property 306.


73 Withered v. Withered, (1828) 2 Simmon 183.

74 G. S. 6691.
the purposes of this section. Limitations contingent on some event but certain as to the person may be transferred, subject to the condition.

Limitations to persons not in being are inalienable, and those to persons not ascertained are not absolutely alienable. Even though there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the precedent estate, and so the interest be vested, an alienation by that person will be effective only when, and in so far as, he proves to be the person ultimately entitled. Thus if the limitations are to A for life, remainder to his heirs, the heirs apparent may alien during A's life, but the alienee's interest is dependent upon the alienors proving to be A's heirs at his death. Future estates to persons not in being or not ascertained, are, consequently liable to offend the rule against restraints on alienation, and to be void for that reason, but the discussion of this topic must be left for another time.

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75 Fowler, Real Property Law 372.
76 See, p. 326 ante.