Contingent Remainders and Executory Interests: A Requiem for the Distinction

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Modern writers still differentiate between "executory interests" and "contingent remainders," using catch phrases to designate the various criteria which determine whether an interest is classified as one or the other, and generally implying that different legal consequences follow accordingly. Professor Dukeminier finds these to be mere verbal distinctions based on feudal concepts which have ceased to be useful; he suggests a reappraisal of the present-day utility in making any distinction whatever and concludes that in view of the uncertainty and confusion caused by the terms, they should be discarded.

J. J. Dukeminier, Jr.*

A FEW years ago James Thurber spun a whimsical yarn about a Duke who "limped because his legs were of different lengths. The right one had outgrown the left because, when he was young, he had spent his mornings place kicking pups and punting kittens. He would say to a suitor, 'What is the difference in the length of my legs?' and if the youth replied, 'Why, one is shorter than the other,' the Duke would run him through with the sword he carried in his swordcane and feed him to the geese. The suitor was supposed to say, 'Why, one is longer than the other.' Many a prince had been run through for naming the wrong difference."†

Many a student in future interests has been run through by his instructor for an error of equal magnitude: calling a contingent remainder an executory interest (or vice versa). We who pretend to some knowledge of future interests are wont to stress the importance of precise labelling, of carefully classifying the interest by the rigid and artificial criteria of the common law. But if the legal consequences which flow from the label "executory interest" are the same as the consequences which flow from "contingent remainder" then

† The substance of this article is a portion of a thesis to be submitted to the Yale Law School in partial fulfillment of the requirements for a graduate degree.

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† Thurber, The 13 Clocks 20 (1950).
the student is likely to believe he is being impaled by a crotchet. Either label should do. And would, were it not for our professional love of being able to speak well the language of the dead.

The question is, is a contingent remainder an interest that differs in important ways from an executory interest? This must be answered “no” before we can dismiss proper labelling as a mere matter of good form. In order to answer it we shall have to look into the criteria for applying the labels and then examine the situations where it has been suggested the label matters. These situations are:

A. Creation
   (1) Application of the Rule in Shelley’s Case
   (2) Application of the Rule Against Perpetuities
   (3) Invalidity of gift over where first taker has power to alienate
B. Termination of Possessory Estate
C. Rights Against Owner of Possessory Estate
   (1) Waste
   (2) Security for personal property
D. Alienation Inter Vivos

There are many, many other problems that may arise concerning contingent future interests, such as: may the holder partition, sue a third party in tort, recover a portion of condemnation proceeds? What rights has he against a possessory owner who fails to pay taxes or interest on the mortgage? In these problems there is no evidence that the two interests might be treated substantially differently.² Hence they are excluded from discussion.

If we conclude that executory interests and contingent remainders are treated alike in the seven situations discussed, the question then arises whether it is wise to preserve the two concepts in seemingly unchanged historic form or whether it would be better to revamp them to account for factors modern cases reveal to be important. If the concepts are too stubborn to change, they may have to be discarded altogether. I shall take up this question at the end of the article.

I. The Labels: How and When Applied

A. Executory Interest

The words “executory interest” stand for a future interest in a transferee that must, in order to become possessory, divest or cut short some other interest (other than a reversion).³ If it is possible for the interest to take effect on the natural termination of the preceding estate, it is not an executory interest. Like all definitions, this one has its difficulties. The first is where there is a certain period of

² See 1 AMERICAN LAW OF PROPERTY § 4.100 (Casner ed. 1952) [hereinafter cited as AM. LAW PROP.]
³ For elaboration see 1 Simes & Smith, THE LAW OF FUTURE INTERESTS §§ 101, 228 (2d ed. 1959) [hereinafter cited as Simes & Smith].
time (a "certain gap") between the termination of the prior estate and the time the future interest becomes possessory; for instance, "to A for life, then one year after his death to B." In this case the executory interest in B will divest what is presently called a reversion and thus would seem not to fit the definition. However, when divesting takes place the reversion will have become a possessory fee. This is not so much an exception to the rule as a clarification.

Another difficulty with the definition is that it requires a label to be first affixed to the preceding estate. If we classify interests in sequence, in all cases the label of the future interest depends to some extent on the label given the prior estate, and in some cases the label of the prior estate absolutely controls the designation of the future interest. Thus where we are unsure what to call the prior estate, we are usually uncertain that we have an executory interest. For example, take a transfer "to A for life, then to B if B shall reach twenty-one, but if B does not reach twenty-one to C." If the gift to B is classified as a contingent remainder the gift to C will also be a contingent remainder, but if the gift to B is dubbed a vested remainder the alternative gift to C must divest it in order to become possessory and must be an executory interest. Another example is a presently effective transfer by O "to A from and after the date of my death." If O is said to retain a life estate then A's interest cannot be an executory interest because it will not cut short O's life estate. On the other hand if O retains the fee, A must have an executory interest since the fee has a theoretically infinite duration and A can take possession only by divesting it. For the definition to work then, we must be certain that a particular label will be affixed to the prior interest, and in many cases such certainty is not to be had.

Furthermore, the word "prior" used in the preceding paragraph must be put in quotation marks. It may refer to the sequence of words in the instrument (see the first example) or to sequence of possession (see the second example). With respect to the sequence of words, courts have been known to reverse the order in classifying. This is regularly done with a gift over in default of appointment. That is to say, a transfer "to A for life, remainder as A shall by will appoint, and in default of appointment to B" is read as "to A for life, remainder to B, but if A appoints the property by will, to his appointees." In still other cases courts reach over and classify the gift over first, or at least take it into account in classifying the prior interest. An illustration of this is the strong tendency to classify the interests in the second example above as a life estate in O, vested remainder in A. 4 Unless the gift over were looked at, O could

4. The cases are collected in Annot., 31 A.L.R.2d 532 (1953).
never be said to have a life estate. This is in violation of the first rule of construction ("start at the beginning") and will get us into a circle if we adhere to our definition of executory interests which requires labelling in sequence. It is easy to see that this definition rests upon some rather shaky assumptions of how courts will construe instruments.

The label "executory interest" may also be applied in two situations to a future interest in a transferee that will not divest a preceding interest. These are exceptions to the foregoing definition. One situation is where there is a fee simple determinable. The interest over should logically be classified as a remainder if the ordinary definition of a remainder⁵ be accepted. And in the usual case it should be a vested remainder. It is ready to take whenever and however the preceding estate ends. Yet it is perfectly clear that under modern orthodoxy it is called an executory interest. We do not know the reason for this anomaly and probably never shall. As Casner and Leach put it, "A could not create a remainder after a fee simple determinable. There could be no remainder after any fee simple. Why not? Well, just because there couldn't be, and stop asking impertinent questions."⁶ The statement that there can be no remainder after a fee simple is logically valid where a fee simple absolute is involved, for such a fee simple by definition is of infinite duration. But it is not a convincing explanation in case of a determinable fee for that estate may end sometime short of infinity.⁷ Remainders could follow the fee tail, the base fee and possibly the fee simple conditional⁸—other historic fee estates that might end this side of infinity.⁹ The logical enigma is further confounded by

⁵. 2 Restatement, Property § 156(1), at 535 (1936), states that except in the case of a determinable fee "a remainder is any future interest limited in favor of a transferee in such manner that it can become a present interest upon the expiration of all prior interests simultaneously created, and cannot divest any interest except an interest left in the transferor.”


⁷. 1 Simes & Smith § 35, at 41 offer the following rationalization: “The totality of legal relations in any given piece of land consisted in one and only one fee-simple estate. . . . As a corollary to this proposition, it was only natural to conclude that there could be no remainder or reversion after a fee simple. If the totality of legal relations had been granted, obviously there was nothing left to give.” The authors' conclusion follows only if they are speaking of a fee simple absolute. Otherwise a determinable fee would be impossible, since the holder of such a fee would have “the totality of legal relations” and the holder of the interest over would have nothing.

⁸. 2 Pollock & Maitland, History of English Law 23–24 (1911); Milsom, Formedon Before De Donis, 72 L.Q. Rev. 391 (1956).

⁹. The dogma inhibiting a remainder after a determinable fee has doubtful roots in history except in dicta. In the Buckhurst Peerage Case, [1876] 2 App. Cas. 1, 23, Lord Chancellor Cairns noted, “There is no instance in the books that we are aware of in which a fee simple, or a fee tail qualified in the way that I have mentioned, as by the addition of the words, 'lords of the manor of Dale,' is followed by a remainder to
the rule that a future interest must be construed as a remainder rather than an executory interest, if possible. Yet in spite of the difficulties in rationalization the result is fortunate. The holder of an executory interest after a determinable fee has practically the same rights as the holder of an executory interest after a fee simple subject to condition subsequent, so it is just as well the labels are the same.

The other situation where the label “executory interest” may be applied to a nondonvvesting interest is where there is a contingent future interest following a term of years. At early common law it was impossible to have a contingent remainder after a term because there was no one to give the seisin to, and transfer of seisin was required for an effective transfer. After the Statute of Uses, the contingent future interest was given effect at law as an executory interest. With the decline in the significance of seisin the interest began to be called a contingent remainder and that is the proper label according to modern writers. This easy shifting of labels by eminent authorities, calling what was formerly an executory interest a contingent remainder, indicates how insubstantial is any difference between the two interests.

B. Contingent Remainder

A “contingent remainder” may be defined as a future interest in a transferee that

1. will never divest any other interest; and
2. either (a) is given to an unborn or unascertained person; or (b) is subject to a condition precedent.

The first requirement distinguishes a contingent remainder from an executory interest. A remainder, unlike a grasping executory interest, never pushes any interest aside. The second requirement separates a contingent remainder from a vested remainder, which is a future interest in an ascertained transferee that is not subject to a condition precedent. This last distinction, “subject to a condition

11. 2 Restatement, Property § 156, comment e at 540 (1936); 1 Simons & Smith § 116; 1 Am. Law Prop. § 4.81.
12. Executory interests may be divided into uses (i.e., executory interests created by deed) and executory devises, and into interests that divest the grantor (springing interests) and interests that divest a transferee (shifting interests). The distinctions are unimportant today and are seldom made.
13. 2 Restatement, Property § 157 (1936); 1 Am. Law Prop. § 4.82.
precedent," is one of the most ambiguous in the entire law of future interests. It is unclear whether the words refer to the language of the dispositive instrument, to the grantor's intention as to who gets what when, or to the conclusion of the court (for unstated reasons) to protect a particular party. For example, when there is a transfer "to A for life, then to B and his heirs if B reaches twenty-one," if you say B's remainder is subject to a condition precedent you may be saying that the language of the instrument requires that B reach twenty-one before he is entitled to possession. Or you may be saying the grantor intended the event to happen, or the court has concluded for unspecified reasons that the event must happen, before B is entitled to possession. Or you may not be referring to a condition precedent to possession at all. You may be thinking about a condition precedent to vesting in interest. That is, not only must the event happen before B is entitled to possession; it must happen before his interest "vests." This type of thinking is commonly encountered under the Rule Against Perpetuities. Obviously it reduces the definition of a contingent remainder to inanity.

The pain of classification is particularly acute where there are alternative gifts. If we add an alternative gift to the preceding example, "but if B does not reach twenty-one to C and his heirs," have we alternative contingent remainders? Or a vested remainder in B with an executory interest in C? This question arose in the old case of Edwards v. Hammond.14 There it was held that B had a vested remainder. Scrutiny of the facts leads to the conclusion that this was eminently reasonable. A died when B was seventeen. B would receive the land for certain if he lived for four more years since his remainder (in copyhold land) was indestructible. Why let C or the reversioner come in for an interim possession of four years instead of letting B improve and enjoy what most probably would be his absolutely in four years? In order to accelerate B's remainder it had to be called vested, since contingent remainders did not accelerate. Later courts and text writers, instead of saying Edwards v. Hammond involved acceleration of a remainder that most likely would become possessory in four years, made a "rule" of the case,15 then spent more than 200 years evading it by drawing slight verbal distinctions that give you the feeling of tossing feathers in the air.16

15. Which is, when a condition is Janus-faced, look at it rear-end-to. 5 Am. Law Prop. § 21.32.
16. The most celebrated distinction was made in Festing v. Allen, 12 Mee. & W. 279, 152 Eng. Rep. 1204 (Ex. 1843). There the gift was "to B for life, then to all children of B when they attain twenty-one, and for want of any such issue to C." The court held the gift to B's children contingent, stating that Edwards v. Hammond would not apply where the condition was essential to the description of the beneficiaries. But if the gift had been "to the children of B when they attain twenty-one" or "if they attain twenty-one," their gift would have been vested. Randall v. Roake, 5 Dow. 202, 3 Eng. Rep.
Edwards v. Hammond is an example of a court peeking through to consequences before classifying. If undesirable consequences will flow from the label “contingent,” the court can call it “vested” and doubtless find some authority for such a classification. Courts have done this so frequently that it is most difficult for the rationalizers in this field to harmonize the decisions on the basis of language used in the instrument, which under orthodox theory is supposed to control classification. In order to appear consistent, courts and writers have emphasized the minutest differences in language, yet each hairsplitting distinction only makes lawyers increasingly uncertain as to the usefulness of the rules of classification, and indeed of the labels themselves. Dallying so nicely with words has made them wanton.

This is not the place to explore all the difficulties involved in predicting how a court will classify a future interest. It suffices to point out that in an extraordinary number of cases it is impossible to tell without going to court. The nub of the matter is that the definitions do not necessarily point in one direction. Look back and you will see they are not stated in terms of fact. They do not say: given these facts, then this label. Instead they are phrased in terms of “divestment” and “condition precedent,” words which do not refer to facts but, ambiguously, to both facts and legal consequences. These words are hypnotic, blinding the mind to their own concealed, tautologous and often question-begging assumptions. One way to avoid these ambiguous definitions is simply to give a list of words that have been held to create certain interests. But this is clearly unsatisfactory. Reading an exhaustive list, taking into account the wording of thousands of wills passed upon every year, would be like swimming through sand. And even with a short list you find that the identical words have been held by different courts, and sometimes by the same court on different days, to create different interests. “It should be obvious,” as Professors McDougal and Haber have observed, “that the terms ‘remainder’ and ‘executory interest’ cannot be given realistic meaning without careful discriminations, not only in the ‘apt’ words of the donor’s language and his reference to time, person and event, but also in the problems before officials, the claims of the contending parties, and relevant community policies.”

1302 (H.L. 1817); Hawkins, Wills 286 (3d ed. 1925). There cannot, surely, be any difference between “children who shall attain twenty-one” and “children if they attain twenty-one.”

17. Those which reached appellate courts occupy an entire volume in Fifth Dec. Dig. (1936–1946). Only four other topics have more pages.

18. McDougal & Haber, op. cit. supra note 10, at 309. The authors conclude that the terms are “but verbal counters which officials use in a great variety of contexts to effect a preferred distribution of values.”
It is true that generally it is not as difficult to distinguish a contingent remainder from an executory interest as it is to distinguish a contingent remainder from a vested remainder. "Divest" has a somewhat more definite meaning than "condition precedent." Nevertheless, the definitions given are very inexact working hypotheses, and as will become clear in the analysis below, courts frequently use a label that is, by these definitions, wrong.

II. Analysis of Problems

A. Creation of Interest

(1) Application of the Rule in Shelley's Case

A simplified statement of the Rule is:

If (1) one instrument
(2) creates a life estate in land in A, and
(3) purports to create a remainder in A's heirs, and
(4) the estates are both legal or both equitable,

the remainder becomes a remainder in fee simple in A.\(^{19}\) The doctrine of merger may then come into play and cause the life estate to merge into the remainder, giving A a fee simple. The rule as traditionally stated applies only to remainders and not to executory interests. If there were a transfer "to A for life, then to B and his heirs, but if B does not survive A to A's heirs," A's heirs would have an executory interest unaffected, at least so long as B is alive, by the Rule in Shelley's Case. If the grantor's intention were precisely the same but expressed differently ("to A for life, then to B and his heirs if B survives A, but if B does not survive A to A's heirs") A's heirs would have a contingent remainder to which the Rule in Shelley's Case would apply. The rule would turn it into a contingent remainder in fee in A. Thus under the Rule in Shelley's Case different legal consequences may flow from the labels "contingent remainder" and "executory interest."

There was apparently a reason in the dark abysm of history for saying the Rule in Shelley's Case would not apply to executory interests, but it is not necessary to go into it. The reasons for requirement of a remainder as well as the original reasons for the rule itself have wholly disappeared. If there is any reason for not applying the rule to executory interests today, it is that any technicality

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19. An elaborate statement of the rule, with all the fanciful distinctions courts have drawn to prevent its operation, may be found in 29 L.R.A. (n.s.) 965 (1911). See also 3 Simes & Smith §§ 1541–72.
ought to be used to cut down on the operation of an undesirable rule.

Case authority for the proposition is slight. No case has been found where the court has refused to apply the rule on the ground that the purported gift to "heirs" was an executory interest. In view of the known tendency of courts to construe the instrument in such a way that the Rule in Shelley's Case is avoided, this may seem rather surprising, but apparently there are so many other open sesames ("not indefinite succession," "no freehold," and such) courts have not needed an executory interest construction to get out of the rule. On the other hand in one case the rule was applied to an executory interest. And in another the court said the gift over was arguably an executory interest, but that it did not matter. However classified, the Rule in Shelley's Case applied. In still other cases involving a life estate and remainder which are both part of an executory limitation, the court has assumed the rule would apply. Finally, there is the problem of its application to a gift to heirs when the life tenant renounces. Is the gift to heirs renounced too, on the theory the life tenant had a fee under the Rule in Shelley's Case? No case has been found, but the Restatement takes the position that the rule would apply to the gift to heirs and it would fail. It is well-established that a gift to heirs is an executory interest when the

20. Hodam v. Jordan, 82 F. Supp. 183 (E.D. Ill. 1949) (dictum); Foxwell v. Van Grutten, 78 L.T.R. (n.s.) 231 (1895) (dictum); Chipp v. Hall, 23 W. Va. 504 (1884) (dictum). But cf. In re White & Hindle's Contract, 7 Ch. D. 201, 203 (1877), where Vice-Chancellor Malins said: "As regards the argument that the rule in Shelley's Case does not apply where the gift to heirs is by way of an executory or conditional limitation, I should be slow to admit such a doctrine if the question came before me . . . ." In In re Norrington, 40 T.L.R. 96 (1923), the question was raised but not decided, the report noting: "The authority for that proposition appeared to be merely a statement in Farnie on Contingent Remainders, 10th edition, at page 276."

21. For examples, in Smith v. Thomas, 317 Ill. 150, 147 N.E. 788 (1925), the court concluded the rule did not apply because an annuity of $2500 for life was not a life estate or a freehold. In Randolph v. Wilkinson, 294 Ill. 508, 128 N.E. 525 (1920), the rule did not apply to a devise to testator's children for their lives, and twenty years after death of last survivor to their children or descendants, because gift over was not to "heirs generally." In Barnard v. Moore, 71 Colo. 401, 207 Pac. 322 (1922) the rule did not apply to devise "to W for life, then to A in fee, but if A die before W, to A's heirs." The court concluded testator used "heirs" as a word of purchase, not of limitation. In all these cases the gift over, an executory interest under orthodox doctrines, is called a remainder by the court, indicating again the equivalence of the labels in the courtroom.

22. Darragh v. Barmore, 242 S.W. 714 (Tex. Comm. of App. 1922), devise "to A in fee, but if A die without heirs of his body to B, and if A die with heirs of his body to said heirs." The court held the gifts over did not cut A's fee down to a life estate; the Rule in Shelley's Case applied to the executory interest in A's heirs, giving A a fee defeasible only if he died without issue.


25. Restatement, Property § 312, comment c, illustration 5, II at 1747 (1938).
life estate is renounced and the issue is destructibility, and if the same classification is followed where the issue is the Rule in Shelley's Case, and the gift fails, then the rule applies to an executory interest. The Restatement assumes the gift to heirs is a remainder, but it requires some vigorous logic-chopping to make that assumption consistent with the established proposition adverted to above.

If holdings are the test of a proposition, then the Rule in Shelley's Case applies to executory interests as well as to remainders by a count of one to nothing. If dicta are relevant, in the states where the rule has not been abolished, there is one dictum that it applies to executory interests. I find none to the contrary. Nevertheless, the point is not worth arguing, for the rule is moribund. In thirty-seven states, the District of Columbia, Hawaii and England, the rule has been done away with by statute or judicial decision. In only six states—Arkansas, Delaware, Indiana, North Carolina, Texas and Washington—is it reasonably certain the rule still lives. Considering (a) the few states still retaining the Rule in Shelley's

26. ALA. CODE tit. 47, § 141 (1940); ARIZ. REV. STAT. § 33-231 (1956); CAL. CIV. CODE ANN. § 779 (West 1954); CONN. GEN. STAT. § 7084 (1949); D.C. CODE § 45-203 (1951); Fla. STAT. § 689.17 (1957); GA. CODE ANN. § 85-504 (1955); IDAHO CODE § 55-206 (1947); ILL. REV. STAT. c. 30, § 186 (1957); IOWA CODE § 557.20 (1958); KAN. GEN. STAT. § 58-502 (1949); KY. REV. STAT. § 381.090 (1958); ME. STAT. ANN. c. 184, § 5 (1955); MICH. COMP. LAWS § 554.28 (1948); MINN. STAT. § 500.14(4) (1957); MISS. CODE ANN. § 835 (1942); MO. ANN. STAT. § 442.400 (1940); MONT. REV. CODE § 67-520 (1947); NEB. REV. STAT. § 76-112 (1950); N.J. STAT. ANN. § 46:8-14 (1940); N.M. STAT. ANN. § 70-1-17 (1953); N.Y. REAL PROP. LAW § 54; N.D. REV. CODE § 47-0420 (1953); OHIO REV. CODE ANN. § 2107.49 (Baldwin 1953); OKLA. STAT. ANN. tit. 60, § 41 (1949); PA. STAT. ANN. tit. 20, §§ 180.10, 220, 301.17 (Purdon 1950); R.I. GEN. LAWS c. 4, § 34-4-2 (1956); S.C. CODE § 57-2 (1952); S.D. CODE § 51.0420 (1939); TENN. CODE ANN. § 64-103 (1955); VA. CODE §§ 55-14 (1950); W. VA. CODE § 3534 (1955); WIS. STAT. ANN. § 230.28 (West 1957); Vt. STAT. ANN. c. 4, §§ 12 (1954); WA. STAT. ANN. § 64.50.25 (1953); WY. REV. CODE § 114.220 (1953). In Oregon, by judicial decision the rule applies to deeds, but in New Hampshire it is an open question. Lytle v. Hulen, 128 Ore. 485, 275 Pac. 45 (1929).

27. Rogers v. Kaylor, 299 S.W.2d 204 (Ark. 1957); Farrell v. Faries, 25 Del. Ch. 404, 22 A.2d 380 (Sup. Ct. 1941); Dowling, "Rationale of the Rule in Shelley's Case in Indiana," 13 IND. L.J. 486 (1938); Wharton v. Barnett, 237 N.C. 483, 75 S.E.2d 301 (1953); Sybert v. Sybert, 152 Tex. 106, 254 S.W.2d 999 (1953); Cross, "The Rule in Shelley's Case in Washington," 15 WASH. L. REV. 99 (1940). As for the other states, "the rule of property which is known as the Rule in Shelley's Case is probably not the law in Colorado," King, Future Interests in Colorado, 21 ROCKY Mt. L. REV. 1, 15 (1948). Dean King's conclusion is supported by Johnson v. Shriver, 121 Colo. 397, 216 P.2d 653 (1950), where there was a remainder to the heirs of the life tenant, and the court, without referring to Shelley's Case, held "no property right of any kind in said land vested in the estate of the' life tenant upon her death. The rule has never been accepted in Louisiana Civil Law. In Wyoming there is only a vague reference in Singleton v. Goron, 60 Wyo. 268, 144 P.2d 138 (1944). The court said "we are not prepared to hold that the case comes within the Rule of Shelley's Case." Id. at 38-37, 144 P.2d at 141. No reference in decision or statute is found in Nevada and Utah.
Case, (b) the probability of its application to executory interests, (c) the infrequency of an executory interest in "heirs," and (d) that most future interests are created in personal property and the rule (supposedly) applies only to land, the problem here is of utterly negligible importance.

(2) Application of the Rule Against Perpetuities

The Rule Against Perpetuities, as formulated by John Chipman Gray, provides that "no interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." To satisfy the rule it is not necessary that an interest vest in possession (become possessory) within the period; it is satisfied if the interest "vests in interest." If both contingent remainders and executory interests can vest in interest there is no difference in the application of the rule to them.

Most treatise writers state that an executory interest cannot vest in interest,29 but this statement is misleading and in two classes of cases unwarranted. What is meant by "vest in interest"? This is one of those elusive, vaporous phrases that the mind finds at first so hard to grasp, and perhaps no one has done better than Professor Leach in defining it. He puts it this way:30

To say that an interest is vested may mean that, although it is still a future interest, it has acquired that metaphysical and artificial status which under the feudal law made it an estate rather than the possibility of becoming an estate—i.e., that it is vested in interest. A remainder is vested in this sense when it is not subject to a condition precedent other than the termination of the particular estate. Executory interests do not have the capacity for vesting in interest as remainders do. Hence remainders which are subject to a condition precedent and all executory interests are contingent in the sense that they are not vested in interest.

Stripped of metaphysics and the now-rejected notion that contingent remainders and executory interests are not estates, it seems all that is meant by a remainder "vested in interest" is that the criteria for applying the label "vested remainder" are satisfied. It is obvious that a contingent remainder can turn into a vested remainder and thereby "vest in interest." So can an executory interest. Take this case: "to A for life, then to B and his heirs, but if B does not survive A, to C and his heirs." Under orthodox classification C has an execu-

29. GRAY § 114; KALES, ESTATES, FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS § 482 (2d ed. 1920); 3 SHAYS & SMITH § 1296; 6 AM. LAW PROP. § 24.20; MORRIS & LEACH, THE RULE AGAINST PERPETUITIES 1 (1930). But see CAREY & SCHUYLER, ILLINOIS LAW OF FUTURE INTERESTS § 474 (1941); 3 WALSH, COMMENTARIES ON THE LAW OF REAL PROPERTY § 211 n.20 (1947), for cogent arguments that executory interests can vest in interest.
30. LEACH, CASES ON FUTURE INTERESTS 255 (2d ed. 1940).
tory interest, but if B dies within the lifetime of A, C’s executory interest will change into a vested remainder. This capacity of an executory interest to change into a vested remainder was recognized by Gray when he said executory interests are “not vested interests until they take effect in possession or are turned into vested remainders.”\(^{31}\) The statement is equally true of contingent remainders. What is meant, then, by the statement that an executory interest cannot vest in interest is hard to fathom. It clearly has as much capacity to turn into a vested remainder as a contingent remainder has.

Both contingent remainders and executory interests can be saved under the Rule Against Perpetuities if it is certain that the labels will change (to vested remainders) or the interests will fail within the period. Mr. Leach, in his article “Perpetuities in a Nutshell,” gives this example of saving a contingent remainder:

T bequeaths a fund in trust to pay the income to A for life, then to pay the income to A’s children for their lives, then to pay the principal to his residuary legatees (B, C, D and E) if they should then be living but, if not, to the heirs of the residuary legatees. The remainder is good. It is not presently vested; but it must become vested within the lives or upon the deaths of the residuary legatees, who are lives in being. If at the death of the children of A, a residuary legatee is living, his share then becomes vested in possession; if he dies before that time his heirs are ascertained at his death and as to them the gift is thenceforth vested in interest.\(^{32}\)

An almost identical fact situation arose in the recent Tennessee case of Sands v. Fly,\(^ {33}\) where an executory interest was saved. There was a devise which may for our purposes be stated as follows: to A for life, then to A’s surviving children for their lives, remainder in fee to B, “provided she should be then living, and if not then” to C in fee. The court classified the remainder to B as a vested remainder and thus the gift to C must be an executory interest. The court held both gifts valid. The executory interest is valid because either one of two events must happen within B’s life: (1) A and A’s children all die, leaving B surviving, in which case C’s interest fails altogether, or (2) B dies before A and A’s children all die, in which case C’s interest turns into a vested remainder.\(^ {34}\) If the second event happens, C’s interest may vest in possession long after the death of all persons in being at T’s death, but his interest is nevertheless valid. Hence, the

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32. Leach, Perpetuities in a Nutshell, 51 Harv. L. Rev. 638, 647 (1938).
34. The interests in B and C could have been construed as alternative contingent remainders, but they both still would be valid. Each one was bound to become a vested remainder, or fail altogether, at or before B’s death. But see Trautman, Wills, Trusts and Estates—1957 Tennessee Survey, 10 Vand. L. Rev. 1238, 1246 (1957), concluding that the gift to B should be void if classified as a contingent remainder and the gift to C should be void if classified either as a contingent remainder or executory interest.
statement that “the Rule Against Perpetuities requires that executory interests become possessory within lives in being and twenty-one years”—a statement that has received wide currency in the cases as dictum—must be qualified by adding, “or turn into a vested remainder.” Precisely the same requirement is made of a contingent remainder.

In two classes of cases the misleading notion that an executory interest cannot vest in interest must be rejected entirely. The first is where there is an executory interest in an ascertained person upon an event certain to happen; for example, “to A in fee twenty-five years from date.” Here an analogy is made to a vested remainder after a term of years. The executory interest is said to be “vested” under the rule and valid. If the transfer were “to A twenty-five years from date if A is living at that time, and if A is not then living, to B,” the same reasoning should validate both gifts. The gift to A is bound to become possessory, if at all, during his lifetime; the gift to B is bound to fail within A’s lifetime or at his death become an indefeasible interest on an event certain to happen. The vesting of an executory interest where it is in an ascertained person on an event certain to happen is supported not only by the commentators, but also by statutory definitions of a vested future estate. For instance, New York Real Property Law Section 40 provides:

A future estate is either vested or contingent. It is vested when there is a person in being, who would have an immediate right to possession of the property, on the determination of all the intermediate or precedent estates. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain.

Similar statutes are found in a number of states, and in other states this definition has been incorporated in judicial decisions. Its effect is to vest certain executory interests which, according to orthodox doctrine, would have been neither vested nor contingent at common law. The most usual case of an executory interest vesting under these statutes is where there is a deed to A to take effect at the grantor’s death. A has a vested executory interest indistinguishable from a vested remainder after a life estate. (Here, however, it is not

35. Leach, supra note 32, at 648.
36. 3 SIMES & SMITH § 1236; 6 AM. LAW PROP. § 24.20; 5 POWELL § 779. Cf. In re Throm’s Estate, 378 Pa. 163, 106 A.2d 815 (1954), where gift “to pay and deliver to issue of my daughter upon attaining the age of thirty” was held to be vested.
necessary to say that A has a presently vested interest under the Rule Against Perpetuities, since in any event it will become possessory at the death of a person in being.

In another, but related, group of cases executory interests have been held to vest in interest. These cases have to do with gifts that are vested in interest with possession postponed. Take a bequest of "$10,000 to A, to be paid at twenty-one." The gift is said to be vested with possession postponed. While few, if any, courts have called the gift an executory interest, essentially that is what it is. The basic difference between present interests and future interests is that the former are entitled to possession whereas the latter are not. If A has no right to possession, his interest is not properly a present interest, but a future interest. His interest cannot be a remainder. It must be an executory interest. If A is age eleven at testator's death, the gift is not distinguishable from a gift of "$10,000 to A ten years after my death," which would create an executory interest in A.

Likewise an executory interest may vest in interest with possession postponed where there is a possessory estate in another. In *Hunt v. Carroll* the testator devised property in trust to pay, upon certain conditions, $250 a month to his daughter, and if at the end of twenty years, the daughter were still living, to pay the corpus to the daughter. If the daughter were to die before twenty years leaving a child or children surviving her, each surviving child was to receive $50 a month until he reached thirty, and at thirty receive his share of the corpus. If an executory interest could not vest until it became possessory, the gift of the corpus to the children would be invalid under the Rule Against Perpetuities. The court held the gift would vest at the daughter's death, with possession postponed, and expressly rejected the proposition that an executory interest cannot vest in interest before it vests in possession. Said the court:

[W]e overrule appellees' proposition: 'Executory interests are not vested until they take effect in possession'; and their proposition: 'The executory devise to the grandchildren, to be good, must vest in possession within twenty-one years after lives in being.' . . . So, an estate, whether a remainder or an executory devise or interest is vested within the Rule when it is vested in interest; it can vest in interest before it vests in possession; the requirements of the Rule in this respect are complied with when a future estate or interest becomes vested in interest, regardless of when it becomes vested in possession.

The result is sound. If the gift had been to daughter for life, and at her death income to be divided among her surviving children, each

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40. 157 S.W.2d at 437.
child to receive his share of the corpus at thirty, the contingent remainders would vest at the daughter’s death, with possession postponed. No reason can be advanced for upholding that gift and striking down the one at issue, even though the labels are different.

In *Rust v. Rust* 41 there was a devise very similar to the one litigated in *Hunt v. Carroll*. In 1942 testator devised his residuary estate in trust for twenty-five years (until 1967) to pay income to his daughter and upon termination of the trust to pay corpus to her; if the daughter died before 1967 leaving surviving issue, to pay income to such issue and upon termination of the trust to pay corpus to such issue “then surviving.” The court held “then surviving” referred to issue surviving the daughter; the executory interest (called a remainder by the court, not that it makes any difference) would vest at the death of the daughter with possession postponed. What we are dealing with here is an alternative gift in case the principal beneficiary dies prior to the termination of the trust or before reaching a certain age, and the alternative gift of corpus is to be paid upon termination of the trust or on reaching a certain age. If living to the termination of the trust or to a certain age is not a condition precedent, then the alternative gift of corpus may vest in interest prior to possession. How it is classified, as contingent remainder or executory interest, is unimportant. 42

Although there is no discernible difference in the application of the Rule Against Perpetuities to these two interests, 43 the effect of invalidity on prior interests might be said to be different. That is, if there is a devise “to A for life, then to A’s children for life, then to the issue of the children per stirpes in fee,” the gift to issue is void and at the death of A and his children the reversion falls in.” On the other hand, if the gift is “to A for life, then to A’s children in fee, but if they die leaving issue surviving, at the death of the last sur-

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43. With one trifling qualification. Where contingent remainders are still destructible, a legal contingent remainder in land can be saved if it is certain to vest or be destroyed within the period. See 3 Simes & Smith § 1231.

44. However, in *Maher v. Maher*, 139 F. Supp. 294 (E.D. Ky. 1956), where a gift to grandchildren was void, the court enlarged the life estate in children to a remainder in fee on grounds of testator’s intent. But see *Taylor v. Dooley*, 297 S.W.2d 903 (Ky. 1956), where the Kentucky Court of Appeals refused to do so on similar facts.
viving child of A to such issue per stirpes,” the gift to issue is void but A’s children have an indefeasibly vested fee. The difference in result, however, comes not because of the label given the gift to issue but because of the label given the prior interest. Under orthodox doctrine the invalid gift is struck out of the instrument just as if it had never been there, and the instrument is then read and given effect.45

(3) Invalidity of gift over where first taker has power to alienate

Out of a dictum of Chancellor Kent grew a rule that an executory interest limited after a fee was void if the owner of the fee had the absolute power to dispose of the property.46 The typical situation in which this rule may be invoked is a devise of property “to my wife absolutely, to do with as seems best for her, but if any of the property remains undisposed of at her death, then to A.” The remnant gift over to A, an executory interest, is void if the rule is applied. The rule can not be applied to a contingent remainder, since the rule presupposes the prior estate is a fee, and a remainder by definition cannot follow a fee.

The rule is entirely illogical as a matter of theory. There is no reason why a valid executory interest cannot be limited subject to being destroyed by the exercise by another of a power of disposition. Chancellor Kent, father of the rule, apparently misconceived the common law notion that an executory interest could not be destroyed by a gap in seisin or a common recovery. He assumed an executory interest was an indestructible interest and, paying no mind to what was meant by “indestructible,” concluded that an executory interest could not exist if it could be destroyed by the fee owner alienating the property. Today the most frequently heard rationalization is that such an executory interest is repugnant to the fee, but what Professor Bordwell with his usual perspicacity said about restraints on alienation is equally applicable here.

The great objection to repugnancy as an explanation, however, is that it explains nothing. It begs the question. By definition it makes alienability a characteristic of the fee simple and then rejects general restraints as inconsistent with the definition.47

Moreover, all executory interests that cut short fees are conceptually repugnant to the fee, which by definition has an infinite duration. Fees subject to be divested by executory interests are like Mahaf-

45. See 8 Am. Law Prop. § 24.47.
fy's famous Irish bulls, "always pregnant." But since 1536 they have been recognized. It is inconceivable that an executory interest contingent upon nonalienation of the fee could be more repugnant than one which divests the entire fee irrespective of alienation. The only other rationale for striking down these interests is that they violate public policy. This too is untenable. If the fee owner can convey an absolute fee, destroying the gift over, the property is at all times marketable. And the suggestion that an executory interest is really a restraint on alienation by will or intestacy and thus obnoxious is simply the repugnancy argument in another guise. What other public policy might be offended is not perceived. On the contrary, striking down executory gifts over is inconsistent with the primary policy of giving effect to the express wishes of the testator.

With the increasing inclination of courts to carry out the testator's intent, it is not surprising that they have developed a number of constructional devices to avoid the rule. The usual gambit is to construe the interest in the first taker as a life estate. An express power to dispose in the first taker is said to be evidence a life estate was intended, since if a fee were intended, the power is superfluous. On the other hand absence of an express power to dispose may indicate no more than a life estate was intended. Heads, plaintiff wins; tails, defendant loses. Other indications of a life estate are: (1) there was a gift over; the gift over was in a codicil or subsequent clause; a gift of "what remains" means a gift of a "remainder" and a remainder must follow a life estate. To strike down the gift over there is also a requirement that the first taker be given the absolute power of disposition, and courts have held, the power is not absolute (1) when it is limited to a specific purpose such as supporting and maintaining the first taker; (2) when it is exercisable only during life; or (3) when, although it is exercisable inter vivos or by will, it does not allow devolution to the first

taker's heirs by intestacy (a question-begging rationalization).\textsuperscript{56} Even though on each of these points there are cases to the contrary,\textsuperscript{57} they indicate that no astute court can really be forced either way by Chancellor Kent's rule.

Construing the interest in the first taker as a life estate with a "power to consume" or a "power to alienate," which to some extent gives effect to testator's intent, raises further problems. Can the life tenant give the property away? Can she will it? Can she live it up at the Plaza?\textsuperscript{58} Or take a holiday in Capri?\textsuperscript{59} Does she have a general power of appointment for federal estate tax purposes so that the property qualifies for the marital deduction or is includible in the life tenant's gross estate?\textsuperscript{60} The cases are abundant, but no definite answer can be given to any of these questions.

What we have here is a bad rule and a profusion of verbal devices to avoid it. Many of them only a casuist could follow. The problem is usually stated as simply one of construction. What did the testator intend the first taker to have? The language of the testator—looked at through these darkling devices—frequently leads only to a bad case of eyestrain. The language can be read either way: fee simple or life estate. Other factors then loom important, factors which most practising lawyers assume to be influential in spite of solemn statements by the courts that testator's language is controlling. If one may venture a guess, these factors include (a) the type of property (family heirloom, consumable chattels, money or residuary personality difficult to trace), (b) the value of the property, (c) the relationship of the first taker to the testator, (d) the need of the first taker, (e) the relationship of the second takers to the testator (children, collateral relatives, charity), (f) the parties to the lawsuit (is it a quarrel between the first taker and second takers, or between the heirs or legatees of the first taker and the


\textsuperscript{57} Annot., 17 A.L.R.2d 7 (1951) contains an exhaustive compilation of cases and attempts to sort them by these transient verbal distinctions.

\textsuperscript{58} The Kentucky court held she could in Combs v. Carey's Trustee, 287 S.W.2d 443 (Ky. 1955).

\textsuperscript{59} This problem was brought home to me in a very pleasant fashion by Mr. Noel Coward's song, In A Bar on the Piccolo Marina, (Columbia Masterworks Record, ML 5063), which was inspired by the "hordes of middle-aged ladies arriving [in Capri] by every boat—obviously all set to have themselves a ball." Doubtless some of them were consuming life tenants.

second takers?), (g) the remedy sought.\textsuperscript{61} There is no absolute proof of course that such factors alone, in combination or in variation have any influence on decisions. Lawyers and judges are accustomed to traditional explanations in terms of the language of the instrument. But language alone will not explain these cases.

Where there is a gift over on failure of the first taker to alienate the property, the classification of the gift over is unimportant. If the first taker gets a fee, under Chancellor Kent's rule the gift over is void. If the first taker does not get a fee or if this rule is not followed the gift over is valid. Thus the only significant label here is that attached to the first taker's interest.

\textbf{B. Termination of Possessory Estate (Herein of destructibility of contingent remainders)}

The medieval mind was obsessed with the idea that there could be no gap in seisin. A remainder had to follow hard on the heels of a possessory estate. If there was a moment of time between the termination of the possessory estate and the time when the remainderman had the right to possession by the terms of the instrument there was a gap in seisin. And it was fatal. The remainder was destroyed. Since a vested remainder by definition was ready to take whenever and however the preceding estate ended, a vested remainder was not subject to destruction. Not so the contingent remainder. If perchance the contingent remainderman was not ready to take when the life estate ended, because he was unborn or unascertained or some prescribed event had not happened, he could never take. This was known as the doctrine of destructibility of contingent remainders.

The destructibility doctrine did not apply to executory interests which were by definition indestructible by a gap in seisin. That is,\textsuperscript{61} A limited but revealing analysis of remnant gifts over was made in a student note at 45 Ky. L.J. 711 (1957). The author concluded:

"Most of the cases involve a determination of the interests of the widow or her devisees or heirs and the remaindermen or heirs of the husband, and there is some evidence that the court is more objective in its construction where the interests of the spouse are directly involved. Where the widow is a party, the existence or extent of her need may be another important factor. If she is impecunious and infirm, her 'appeal' is correspondingly increased, and if she seeks to consume the property, the court's interpretation of the instrument may vary depending on whether her motive is to secure necessary support and maintenance or merely a profitable bargain. . . . Certainly counsel for the appellant understood the possible influence of these extrinsic factors when he carefully pointed out in his brief that if the construction placed upon the will by the lower court prevailed, the appellant would become a public charge. . . . In their original brief, the appellees betrayed a knowledge of the 'unpopularity' of their position when they cautioned the court not to assume that the upkeep of the small cemetery named as remainderman was not of relative importance to testator." Id. at 715, 717-18 & n.25.
to say A has a springing executory interest is to say he has an interest which will follow a certain gap in seisin. If the gap destroyed the interest, it would be impossible to create a springing executory interest. The same is true of a shifting executory interest, which shifts seisin out of a preceding vested estate. By definition, no gap is possible between the preceding estate and the shifting executory interest. Thus if executory interests are recognized they must be indestructible by a gap in seisin.

The destructibility of contingent remainders was the great historic difference between executory interests and contingent remainders. It was the tap root of a poisonous crop of verbalisms, but fortunately it has been extirpated, root and branch, almost everywhere. In England destructibility of contingent remainders by failure to vest upon premature termination of the life estate (by forfeiture, merger, etc.) was abolished in 1845, and destructibility by failure to vest upon natural termination of the life estate was done away with in 1877. In twenty-five states plus the District of Columbia and Hawaii the doctrine of destructibility has been abolished in its entirety by statute or judicial decision. As remainders are unknown in the civil law, the doctrine is not in force in Louisi-

62. For examples see White v. Summers, [1908] 2 Ch. 256.
64. Contingent Remainders Act, 1877, 40 & 41 Vict. c. 33, § 1.

In Maine, Maryland and the District of Columbia, the following statutes appear to abolish destructibility entirely: Me. Rev. Stat. ch. 168, § 11 (1954) ("no expectant estate can be defeated by any act of the owner of the precedent estate or by any destruction of it . . . "); (emphasis added); Md. Code art. 93, § 323 (1951) ("Any contingent remainder . . . shall be capable of taking effect, notwithstanding the determination, by forfeiture, surrender, or merger, or otherwise, of any preceding estate of freehold . . . ") (emphasis added); D.C. Code § 45-814 (1951) ("No expectant estate can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent estate, nor by any destruction of such precedent estate, by disseisin, forfeiture, surrender, merger or otherwise, except when such destruction is expressly provided for . . . "). (Emphasis added.) Professors Powell and Simes cite the Maine and District of Columbia statutes as abolishing destructibility only in the case of premature termination of the life estate, but the italicized language is broad enough to wholly eliminate it. No cases interpreting the statutes have been found.


66. Palmer v. Bender, 49 F.2d 316 (W.D. La. 1931), aff'd, 57 F.2d 32 (5th Cir. 1932), aff'd, 287 U.S. 551 (1933); U.S. v. Nebo Oil Co., 190 F.2d 1008 (5th Cir. 1951).
CONTINGENT REMAINDERS

ana. In four states by statute contingent remainders cannot be destroyed by premature termination of the life estate, and in at least two of them the doctrine has probably been wholly eliminated.67 It also seems reasonably certain the doctrine does not prevail in Connecticut,68 Oklahoma,69 Missouri,70 Tennessee, Arkansas, and New Jersey. As the cases in the last three states have not been analyzed elsewhere, I must undertake the task of setting them out here.

Some writers have stated destructibility to be the law in Ten-

67. Miss. Code Ann. § 839 (1942). As for destructibility by failure to vest at the natural termination of the life estate, there is an obscure dictum in Irvine v. Newlin, 63 Miss. 192 (1885), that the contingent remainder involved "failed for want of persons to take according to its terms." The dictum may have been an erroneous application of lapse doctrines (argued by counsel), it may have been no more than a doubtful reading of the grantor's intent, or it may have meant that the interest had failed to become possessory, so the reversioner was entitled to possession in the meantime. See for a case interpreting similar dictum in Tennessee note 74 infra. It is inconsistent: with an earlier dictum in Jordan v. Roach, 32 Miss. 481, 617 (1859), that the statute providing for estates to commence in futuro destroyed the differences between remainders and executory interests; with Rose v. Rose, 126 Miss. 114, 88 So. 513 (1921), preserving a contingent remainder upon renunciation of the supporting life estate; and with Hays v. Cole, 221 Miss. 459, 73 So. 2d 238 (1954), holding that a contingent remainder could be "divested" only upon failure of the contingency upon which it was limited. It is believed destructibility has been completely abolished in Mississippi, in view of these later cases and of the fact that the Mississippi court uses the terms "contingent remainder" and "executory interest" interchangeably. See Hays v. Cole, supra; Crump v. Phelps, 207 Miss. 682, 43 So. 2d 105 (1949). But see Cross, Real Property-Some Observations, 26 Miss. L.J. 13 (1954).

S. Code § 57–4 (1952). The statute prevents destruction by tortious feoffment, but the South Carolina court also has in effect abolished destruction by merger, and possibly entirely. It has held contingent remainders cannot be destroyed by merger where (a) it was not intended by the life tenant, McCready v. Coggeshall, 74 S.C. 42, 53 S.E. 978 (1906); (b) it would defeat the transferor's intent, Miley v. Deer, 93 S.C. 66, 76 S.E. 27 (1912); and (c) the transferor intended the life tenant to be a trustee for the remaindermen, Folk v. Hughes, 100 S.C. 220, 84 S.E. 713 (1919). It has also held contingent remainders cannot be destroyed by forfeiture of the life estate. Burkhalter v. Breeden, 163 S.C. 64, 160 S.E. 165 (1931). In Spann v. Carson, 123 S.C. 371, 386, 118 S.E. 427, 492 (1922) there is a dictum in the concurring opinion that Code § 57–4 makes it impossible for the life tenant "or anyone else" to destroy contingent remainders. Tex. Civ. Stat. Ann. § 1290 (Vernon 1945). A Note in 2 BAYLOR L. REV. 441 (1950) doubts that destructibility by natural termination exists in Texas. Fritz, Texas Law of Conveyancing, Text. Civ. Stat. Ann. v. 3 § 28 (Vernon Supp. 1957) reaches the same conclusion.

68. See 2 PowEl 314, n.34.


70. See Eckhardt, The Destructibility of Contingent Remainders in Missouri, 6 Mo. L. Rev. 268 (1941); Mo. Ann. Stat. v. 28, § 49, at 48 (Vernon 1953); Bullock v. Peoples Bank, 351 Mo. 557, 173 S.W.2d 753 (1943) (holding contingent remainder not destroyed even though bank purchased both life estate and reversion); Coley v. Lowen, 357 Mo. 762, 211 S.W.2d 18 (1948) (holding contingent remainder not destroyed by a conveyance of life estate and ½ interest in the reversion to X); Bullock v. Porter, 369 Mo. 872, 294 S.W.2d 595 (1955) (dictum that conveyance by life tenant "will have no effect upon the rights or interests of the remainderman").
nnesota, but this conclusion is based on an interpretation of a dictum in *Ryan v. Monaghan* that has been repeatedly rejected by the Tennessee Court. In *Ryan* there was a devise to W for life, then to the heirs of James P. Monaghan, but if James die without issue and unmarried, to X. James was the testator’s heir and held the reversion. On W’s death James claimed possession as reversioner. The court quite properly held James was entitled to possession, since neither contingent remainder was ready to take under the terms of the will. Although the validity of the remainder to James’s heirs was not in issue, the court remarked that the remainder, “not being able to take effect on the termination of the particular or supporting estate, fell to the ground.” This language seems to indicate the remainder was destroyed, but later Tennessee cases make plain it was not. The very next year in fact, Judge Neil, later Chief Justice of Tennessee, in speaking for the Court of Chancery Appeals explained *Ryan v. Monaghan* this way:

The court held that pending the death of James P. Monaghan . . . the title to the fee was vested in the only heir at law of the testator; that is, James P. Monaghan, as such heir. Such title might be subject to one of three events: If he died leaving issue, the product of marriage, his title would determine and pass to such issue; if he died without issue living . . . .

The italicized language indicates the court thought the contingent remainder was not destroyed (by natural termination), but could, phoenix-like, arise and take possession if issue were born and survived their father. Moreover, it was apparently assumed in this latter case that a contingent remainder could not be destroyed by merger either.

Subsequent cases in the Tennessee Supreme Court make it clear that court does not recognize destructibility. In *Buntin v. Plummer*, the devise, put simply, was to Mrs. Craighead for life, contingent remainder to her children. Mrs. Craighead also held the reversion. In 1912, when she had no children, Mrs. Craighead

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72. 99 Tenn. 338, 42 S.W. 144 (1897). One other case, Lumsden v. Payne, 120 Tenn. 407, 114 S.W. 483 (1907), is also usually cited for destructibility. It contains dicta that contingent remainders are destructible, but, as Professor Powell observes, this case is explicable “on the ground that breach of a condition requiring support ended both present and future interests.” Except on this ground, the case is of little authority in light of later holdings and dicta of the Tennessee court.

73. 99 Tenn. at 341, 42 S.W. at 144. The contingent remainder in X was called an executory interest and held valid.

74. Scales v. Curfman, 53 S.W. 755, 761 (Tenn. Ch. 1898), aff’d, 53 S.W. 763 (Tenn. 1899). (Emphasis added.)

75. 164 Tenn. 87, 46 S.W.2d 60 (1932).
purported to convey the fee to X. If remainders were destructible by merger, this would have destroyed the contingent remainder in her children. But, said the court, citing Ryan v. Monaghan, "the life estate of Mrs. Craighead was enlarged into a fee determinable upon her dying leaving children. . . . The grantees in the deed of 1912 would have been divested of their title had Mrs. Craighead been survived by a child, but that contingency never happened." A similar devise was construed in Manhattan Sav. Bank v. Bedford. There was a life estate in Julian, remainder in the surviving heirs of his body. Julian was one of three reversioners. The question was whether by a "partition deed" the other two heirs of the testatrix had conveyed their interest in the reversion to Julian. He argued they had. But he admitted, and the court stated, that this would not destroy the contingent remainder. Since that case Tennessee courts have twice stated that "a freehold estate is no longer necessary to support a remainder." And recently, in Quarles v. Arthur, it was held that a conveyance by the life tenant to the reversioner would not destroy a contingent remainder. In the face of all these cases, I have difficulty in seeing how destructibility can be considered alive in Tennessee.

In Arkansas there are similar cases. Le Sieur v. Spikes, a 1915 case, involved an inter vivos conveyance by O to A for life, remainder to the heirs of her body. Subsequent thereto, and before A had any children, A and O purported to convey the fee to X. If destructibility had been in force the contingent remainder would have been destroyed by merger, but after A's death A's children brought suit in ejectment and recovered the land. The court said the grantor could not thereafter by conveyance defeat the rights of the remaindermen in the lands, and this without regard to whether the fee be considered in abeyance, during the estate of the life tenant, or still held by the original grantor for the purpose only of passing to the remaindermen upon the termination of the life estate.

76. Id. at 91, 46 S.W.2d at 61-62. See also Cochran v. Frierson, 195 Tenn. 174, 258 S.W.2d 748 (1953), where the life estate merged into the reversion, giving the life tenant a defeasible fee which, on her death without issue, became indefeasible and passed under her will.

77. 161 Tenn. 187, 30 S.W.2d 227 (1930).

78. Id. at 196, 30 S.W.2d at 229: "A conveyance of this fee by the other heirs at law to Julian T. Bedford would therefore vest in him the fee, subject to a contingent remainder, in fee, in the heirs of his body living at his death." Accord, Frank v. Frank, 153 Tenn. 215, 280 S.W. 1012 (1926). See also Rodgers v. Unborn Children of Rodgers, 315 S.W.2d 521 (Tenn. 1958), where the court refused to quiet title in fee in a 46 year old childless woman who held all the interests in a tract of land except for a contingent remainder in her unborn children.


80. 33 Tenn. App. 291, 231 S.W.2d 589 (1950).

81. 117 Ark. 956, 175 S.W. 413 (1915).
It appears that destructibility by merger was thereby abolished.

In two recent Arkansas cases contingent remainders were also held indestructible. In Lathrop v. Sandlin\(^{83}\) the grantor conveyed “lot 10” to W for life, then to the grantor’s bodily heirs. The grantor subsequently conveyed the fee to W, but the court held the contingent remainder in bodily heirs could not be destroyed. In Hutchison v. Sheppard\(^{84}\) the life tenant inherited the reversion and subsequently attempted to convey a fee, but again the court held this would not destroy contingent remainders. Within the last ten years there have been five other reported cases in which the life tenant has purported to convey a fee.\(^{85}\) In every case the court held the transferee did not get a fee simple; on the life tenant’s death the contingent remainder would vest. In none of them was it stated who had the reversion, but we may surmise it was the life tenant (at least in some) since the life tenant was in every case the child of the transferor. There appear to be no cases involving destruction by failure to vest at the death of the life tenant, but it is most unlikely that the Arkansas court, having abolished destructibility by merger, would apply the doctrine in case of natural termination.

In New Jersey, Lampros v. Tenore\(^{86}\) indicates destructibility by merger is not recognized. There land was devised to W for life, then to testator’s children, with the issue of any deceased child taking such child’s share. W and the children were apparently reversioners also. After testator’s death, his children conveyed their interest to W, who then purported to convey the fee to X. The court held the contingent remainders in the children’s issue were not thereby destroyed. That the interests in issue are probably more properly executory interests did not bother the court. It seemed to consider the labels interchangeable. In view of the fact that in New Jersey the common law “doctrine of merger is not now operative, either at law or in equity, if thereby the intention of the parties will be frustrated”\(^{87}\) or an innocent third party harmed, it seems pretty

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\(^{82}\) Id. at 371, 175 S.W. at 414. There is language in the case that grantor had a possibility of reverter (instead of a reversion) which was not disposable, but in Davis v. Davis, 219 Ark. 623, 243 S.W.2d 739 (1951), the court set the matter straight by dismissing such language as inadvertent remarks.\(^{83}\)

\(^{83}\) 223 Ark. 774, 268 S.W.2d 606 (1954).\(^{84}\)

\(^{84}\) 225 Ark. 14, 279 S.W.2d 33 (1955).\(^{85}\)

\(^{85}\) Walker v. Blaney, 225 Ark. 918, 286 S.W.2d 479 (1956); Robertson v. Sloan, 222 Ark. 671, 262 S.W.2d 148 (1953); Peebles v. Garland, 221 Ark. 185, 252 S.W.2d 396 (1952); Weatherly v. Purcell, 217 Ark. 908, 234 S.W.2d 32 (1950); Bradley Lumber Co. v. Burbridge, 213 Ark. 165, 210 S.W.2d 284 (1948). See also Bowen v. Frank, 179 Ark. 1004, 18 S.W.2d 1037 (1929).\(^{86}\)

\(^{86}\) 142 N.J. Eq. 293, 60 A.2d 80 (Ch. 1948). Cf. Zane v. Weintz, 65 N.J. Eq. 214, 55 Atl. 641 (Ch. 1903).\(^{87}\)

clear destructibility by merger would not be recognized. If the court does not recognize destructibility by that method there is no reason to believe it would recognize it by another.

In Oregon, North Carolina and Pennsylvania there are some old cases applying destructibility, but its present vitality is very doubtful. Recent cases indicate it is being left to die from atrophy. In Oregon, for instance, it was held in 1915 that a contingent remainder was destroyed by merger. On the facts of the case the result was probably justifiable. The contingent remaindermen were the unborn children of three persons age sixty-six, sixty-eight and seventy-four. The court stressed the remoteness of children being born, and it appears that destructibility was applied here in order to avoid the "fertile octogenarian" presumption and make the title marketable. Then in 1934 the Oregon court held a contingent remainder was not destroyed by merger. There the remainder was to the heirs of the life tenant, and the life tenant had children and grandchildren living. The rationale of the latter case is quite obscure, the court merely saying the destructibility doctrine "can have no application here because there has been no merger of both the inheritance and of the particular estate." On the facts of the case merger would have resulted at common law. The court quoted an early New Hampshire case to the effect that only a feoffment by the life tenant destroyed contingent remainders, implying remainders could not be destroyed by any other method. Since feoffment is obsolete, this would mean contingent remainders are not destructible at all. If this case did not wholly abolish destructibility the least that can be said about it is that merger in Oregon has become a matter of sound judicial discretion, and it will be allowed only when the possibility of the remainder becoming possessor is negligible.

In North Carolina recent cases also indicate abandonment of destructibility. Professor McCall, writing in 1937, concluded at that time that the doctrine had doubtful existence. Two cases since then make it even more doubtful. In Ellis v. Barnes there was an inter vivos conveyance to A for life, then to his surviving issue, but if he die without issue, to the surviving children of the grantor. The grantor also reserved a life estate. Subsequently the grantor and A contracted to convey a fee simple to X, and brought a suit

88. Love v. Lindstedt, 76 Ore. 66, 147 Pac. 935 (1915).
90. This conclusion is supported by a dictum in the later case of Erickson v. Erickson, 167 Ore. 1, 115 P.2d 172 (1941), that a contingent remainder could not be "divested" by any act of the life tenant or any other person.
92. 231 N.C. 543, 57 S.E.2d 772 (1950).
against X for specific performance. The court denied specific performance, holding the plaintiffs could not convey a fee simple because of the contingent remainders intervening between the life estate and the reversion. The narrow holding is that specific performance will not be granted when contingent remainders exist, but from the language in the case ("the plaintiffs cannot give a fee simple title") it is arguable that contingent remainders cannot be destroyed by a voluntary conveyance. In another recent North Carolina case there is a dictum that if the life estate were forfeited for waste the contingent remaindermen would be entitled to possession when and if they survived the life tenant.

The last decision in Pennsylvania on the topic was in 1891, and one may well wonder whether destructibility is still recognized as law by bench and bar there inasmuch as the Pennsylvania Estates Act of 1947, passed after a comprehensive study and making some far reaching reforms, says nothing about destructibility. Moreover, the Pennsylvania court in the last half-century has many times held that equity would step in and prevent merger where it was against the wishes of the parties affected by it, or against the intent of the transferor, or would be inequitable. In one case the life tenant (thinking he was a fee tail tenant) conveyed the land to X for the express purpose of destroying the contingent remainders over. The court did not bother to say who had the reversion, but since the life tenant was the son of the testator, it is possible that he held at least part of it. The court assumed the only question was whether the transferor had a life estate or a fee tail; if a life estate, the contingent remainders were not destroyed. In another part of its opinion, dealing with the acquisition of the leasehold interest by the life tenant, the court discussed merger at length, concluding it was largely a matter of the sound discretion of the court. If merger of a leasehold interest into a life estate is denied on equitable grounds, there is no reason why merger of a life estate into a reversion should not also be denied. In both we have a lesser estate coming into the hands of a holder of a greater estate. It is quite possible that relaxation of the arbitrary rules of merger has saved, and will save, contingent remainders from destruction by merger in Pennsylvania.

In summary, only in Florida is it clear that the destructibility

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94. Stewart v. Neely, 139 Pa. 309, 20 Atl. 1002 (1891). The author of a Note at 27 TEMP. L.Q. 207 (1953) concludes destructibility still exists, citing as authority more recent cases where the remainder failed because the contingency upon which it was limited did not happen. The author misses the vital distinction between failure by terms of the instrument and destruction.
outside Florida, except for a Delaware case where the court conceded destructibility for purpose of argument, there is neither holding nor dictum in recent cases that favors destructibility. There are some old cases recognizing destructibility in North Carolina, Oregon and Pennsylvania, but more recent decisions strongly indicate the older cases may be abandoned ships. In seven states—Vermont in the east, and Colorado, Nevada, New Mexico, Utah, Washington and Wyoming in the west—there is nothing to indicate acceptance or rejection, but it is pertinent to note that the western courts have generally shown less reluctance to slough off old English rules unsuited to modern conditions than have their eastern brethren. It is also pertinent that in at least two of them the courts have held that neither in law or equity will merger take place "when to so hold would work injustice." This principle well may be applied to prevent the destruction of contingent remainders.

Any prediction of what the courts in the eleven states mentioned immediately above (excluding Florida) would do with destructibility is a matter of opinion over which persons can reasonably differ. Nevertheless, there are a number of factors which, in my opinion, point to the conclusion that these courts would reject destructibility or refuse to apply it by using various constructional devices. In recent years there has been a strong trend in the courts to try to carry out the testator's wishes, and not merely to pay that policy lip service. One gets a "feel" from reading fifty years of cases on contingent remainders that destructibility is more pedantic than realistic. In the doubtful states only once in that period was destructibility successfully argued (Oregon, 1915). In a number of cases in states that had given prior recognition to the doctrine it was argued unsuccessfully. The courts have been astute in avoiding the doctrine. Outside the doubtful states, seven state courts (Arkansas, Kansas, Indiana, Missouri, New Hampshire, Oklahoma and Tennessee) have in the last fifty years clearly rejected destructibility, and New Jersey has apparently rejected it. In the same period only two courts (Illinois and Florida) have accepted destructibility, and the Illinois decisions were reversed by legislation in 1921. As Professors Simes and Smith have said:

This decisive trend away from the destructibility rule, evidenced by the legislative and judicial abolition thereof, should be influential in other

98. Security Trust Co. v. Cooling, 28 Del. Ch. 303, 315, 42 A.2d 784, 790 (Ch. 1945). But see Scotten v. Moore, 28 Del. (5 Boyce) 545, 93 Atl. 373 (1914).
jurisdictions where the matter has not yet been settled by either statute or decision. It would seem that those courts would be justified in holding that the destructibility rule no longer exists, just as the Restatement of Property has taken that position. Based purely upon a conception of continuity of seisin which has no practical significance today and has had none for centuries, the rule cannot be justified today.\textsuperscript{100}

Professor Walsh was even more sanguine. He asserted:

No possible doubt should now exist in the United States that this ancient relic of feudal law no longer exists because in all the states statutes have been enacted which provide for simple short form deeds of grant for use in all cases of conveyances of land, including the creation of executory estates as well as remainders after life estates, eliminating every trace of the ancient conveyance by livery of seisin, and therefore preventing any possible putting of seisin in abeyance. Even a little straight thinking and common sense should be sufficient to prevent the continued teaching of this old rule as anything other than curious legal history illustrating the exceedingly fallible qualities of human reason.\textsuperscript{101}

The only basis for supposing the doctrine exists is the notion that all the common law rules still exist unless abrogated by statute or decision. But the chasm that yawns between feudal days and contemporary society cannot be leaped in so facile a fashion. One might as well assume that the rule tracing descent of future interests from the last purchaser (abolished in England in 1897) and the rule requiring a tenurial relation for covenants to run at law (still law in England) are in force in this country. They too were related to seisin. Yet only the most credulous would assume either to exist in this country. There is nothing more inexorable about destructibility than there was about many other now-rejected feudal rules.

Nor can stare decisis be said to require adherence to the old English cases, or, in a few states, to their own nineteenth century cases. The function of stare decisis is to give effect to the expectations of persons, a requirement of any system of order. Where a doctrine defeats the expectations of persons and does not implement an important public policy, understanding of the proper function of stare decisis leads to the conclusion that the doctrine should be abandoned. The destructibility doctrine, operating so capriciously, cannot be said to be a rational implementation of policy after the Rule Against Perpetuities developed; it is unanimously opposed by all the commentators and the Restatement of Property. And it obviously defeats the expectations of the grantor or testator. To accept destructibility because of stare decisis seems precisely the sort of misrule Holmes had in mind when he said, "It is revolting to have no better reason for a rule than that so it was laid down in the time

\begin{footnotes}
\footnote{100. 1 Simes & Smith § 209, at 246. (Footnotes omitted.)}
\footnote{101. 3 Walsh, Commentaries on the Law of Real Property 201 (1947). (Footnotes omitted.)}
\end{footnotes}
of Henry IV.” Destructibility of contingent remainders apparently was recognized in 1388, eleven years before the reign of that unhappy monarch.¹⁰²

Even if it is assumed, however, that destructibility is still a spectre at a few bars, the area in which it can operate is fairly limited. It does not apply to equitable remainders or to remainders in personal property, and today the chief form of wealth is personalty. This partly explains why modern cases on destructibility are so scarce. Destructibility is limited to legal contingent remainders in land, and they can be destroyed only in two ways, (a) by the death of the life tenant before the remainder vests, and (b) by merger of the life estate into the reversion. At early common law the life estate was also terminated in case the life tenant by common law conveyance (feoffment, fine or common recovery) conveyed a larger estate than he had. These conveyances are wholly obsolete and destructibility by tortious conveyance is impossible. A life estate also may be renounced or may lapse because of the prior death of the intended life tenant, but contingent remainders are not destroyed in such event. They are given effect as executory interests on the theory that the life estate never existed.¹⁰³

C. Rights Against Owner of Possessory Estate

(1) Waste

Where the possessory estate is a life estate, all the authorities agree the holder of a contingent remainder or an executory interest is entitled to an injunction restraining the life tenant from committing waste.¹⁰⁴ They likewise agree that damages cannot be recovered unless all the future interests holders join or are represented in the action, or unless the sum due is impounded by the court, the reason being there is no certainty a contingent interest will ever become possessory. Where the possessory estate is a fee, however, a distinction has been drawn by the textwriters. Here Professors Simes and Smith contend, “In order to secure an injunction, the owner of the executory interest should show that the contingency which will make his interest possessory is soon to happen, and that the threatened conduct is unconscionable.”¹⁰⁵ The suggested distinction is not based on the labels, executory interest and contingent remainder, but upon the classification of the possessory estate. If we called a

¹⁰³. 2 Simes & Smith § 795.
¹⁰⁴. 4 Simes & Smith §§ 1663-64; 5 Powell § 644; 1 Am. Law Prop. §§ 4.102, 4.104, and cases cited therein.
¹⁰⁵. 4 Simes & Smith § 1664, at 25-26. Professor Powell substantially agrees. 5 Powell § 646.
future interest after a fee a "remainder" presumably the distinction would still be proffered.

Although the label of the future interest is irrelevant, it must be noted that the distinction has only the slightest support in the cases and is of dubious soundness. Few cases raise the problem of protecting an executory interest against waste by the fee owner. I can find only eight cases in this county and England where injunctive relief was asked for, and seven of them are over fifty years old. Except for two early Georgia cases, upon which doubt has recently been cast, all the cases assume an injunction could be granted upon proper facts. Six cases involve in substance a devise "to A in fee, but if A die without children him surviving, to B in fee." In two the contingency was A dying under twenty-one. Where injunctions were denied, the fee owner, although childless, was assumed still to be capable of procreation (men of ages twenty, forty and sixty and a woman of age forty). Where injunctions were granted — excluding the slave case which in substance involves security for movable property — the fee owner was in one case a woman of age fifty-two in another a man of "advanced age," and in the third a man of twenty. (With respect to the last case, which is out-of-pattern, Lord Campbell suggested in Turner v. Wright that the injunction was issued to protect the minor from improvidence.) In the Illinois and English cases there is language that the threatened waste must be unconscionable. Thus the cases may be read as standing for requirements that the contingency will soon happen and the threatened abuse be unconscionable.

However, this proposition has something of the chameleon about it for these requirements can also be found in cases where the possessory estate is a life estate. For example, in Brown v. Brown.


108. In Farabow v. Green, 108 N.C. 339, 12 S.E. 1003 (1891), there was a life estate in A and B, with remainders in A and B if they married, but if they did not marry to testator's heirs. The court seemed to treat A and B as though they had a defeasible fee, and granted an injunction to the heirs. A and B were old maids over eighty years old.

there was a devise "to A for life, then to A's surviving issue, but if no issue of A survive her, then to B." The contingency upon which B was to have possession was the same as in six of the cases cited above. A was sixty-six years old and had nine children and numerous grandchildren. B was denied an injunction against cutting timber on the specific ground that it was highly improbable A would die without surviving issue. On the other hand, in three North Carolina cases involving devises of life estates, injunctio ns were granted where the life tenants were childless women over fifty-five. In two of them the life estate would be enlarged to a fee if issue survived the life tenant. Clearly probability of possession is an important consideration in any case, but why it should be more important when the possessory estate is a fee is difficult to see. Suppose in Brown v. Brown the children of the life tenant had sued for an injunction. They probably would have been successful because the probabilities of their getting possession were far greater than B's. Why should not the same result follow even though A had a fee, with a shifting executory interest in surviving issue? It could be argued that by giving A a fee the testator intended that A not be liable for waste, but such an argument (an artificial one at best) relates to the intention of the testator, not to probabilities.

The second requirement—that the threatened conduct be unconscionable—has support in the language of two Illinois cases handed down in 1901 and 1907. But it was applied to contingent interests after life estates as well as after fees. In Ohio Oil Co. v. Daughetee, an oil lease was cancelled upon suit by a contingent remainderman, the Illinois court saying, after referring to the two earlier cases: "This case is within the requirements suggested in the cases just mentioned, the contingency being certain to happen and the waste threatened amounting to a wanton and unconscientious abuse of right." And eleven years later in a suit by a contingent remainderman for an accounting, the court reiterated: "We have held in Ohio Oil Co. v. Daughetee . . . that a contingent remainder-man may maintain a bill for the protection of the interest in remainder . . . where the contingency is certain to happen and the acts threatened amount to a wanton and unconscientious abuse of right." This requirement that waste be unconscionable is based upon the English notion of "equitable waste," which was that equity would

111. See note 106 supra. In Jones v. Britton, 132 N.C. 166, 185, 9 S.E. 554, 563 (1889) there is a dictum in the dissenting opinion that equity will restrain a fee owner only for wanton waste. But in a concurring opinion the chief justice suggests that equity will restrain any injurious misconduct. Id. at 205, 9 S.E. at 567.
intervene to protect the remainderman where waste is unconscionable even though the life tenant expressly held “without impeachment for waste.” The rationalization was that the grantor could not have intended that the life tenant could do wanton and unconscionable acts even though he freed him from liability for “legal waste.” In the two Illinois cases last cited, however, the life tenants did not hold “without impeachment for waste,” and yet the court used an “equitable waste” rationalization. It is possible that the Illinois court concluded that all contingent interests, being not estates but mere possibilities, could be protected only against wanton waste.\textsuperscript{114} Or, inasmuch as “equitable waste” is a nebulous term—a doctrine of obscure limitations,\textsuperscript{115} the language of the court could simply be the smile on the Lord Chancellor’s cat. Today equity has expanded its protection to far more situations than were covered by the original concept of “equitable waste.” This wide equitable jurisdiction has made the legal action for waste quite rare. The words “equitable waste,” having been disembodied from the original context, may occasionally appear in the cases, but they no longer mean that a wanton or unconscionable act is the only thing that will move the court. There is nothing in recent cases that suggests the label of the possessory estate is of substantial importance in equity, and the older cases are inconclusive.

The suggested distinction between contingent future interests after fees and after life estates is bottomed on an assumption that the grantor, by giving the first taker a fee, intended that he have more rights than a life tenant. Where the transfer is gratuitous and the grantor himself is the possessory owner, the assumption has been rejected. It matters not whether he retains a life estate\textsuperscript{116} or a fee.\textsuperscript{117} Whether it should have force in other transfers is open to question. Doubtless B would regard the law with a bruised sort of amazement if he lost in case of a transfer “to A in fee, but if A die without issue him surviving, to B,” but were told he would have won had the grant read “to A for life, remainder to A’s surviving issue, but if A die without issue him surviving, to B.”\textsuperscript{118} The grant-

\textsuperscript{114} In Robertson v. Guenther, 241 Ill. 511, 89 N.E. 689 (1909), the parties apparently assumed that to be the law for they all agreed that a contingent remainderman could not get an injunction against opening a gravel pit, but a vested remainderman could.

\textsuperscript{115} Camden Trust Co. v. Handle, 132 N.J. Eq. 97, 105, 26 A.2d 865, 870 (Ct. Err. & App. 1942).


\textsuperscript{117} Damages denied in Abbott v. Holway, 72 Me. 298 (1881).

\textsuperscript{118} Where A is past the age of childbearing, the Mississippi court has said the two devises in the text are equivalent. Crump v. Phelps, 207 Miss. 682, 689–90, 49 So. 2d 105, 107 (1949): “We construe these provisions as vesting in the named devises [A
or's intent as to when and in what event B is to have the property is precisely the same in both cases.

There is little reason to suppose the labels "fee" and "life estate" are reliable oracles of the grantor's intent. It is probable he never thought about waste at all. Moreover, such reasoning implies several doubtful assumptions that are not stated. It implies that all grantors have like intentions, and further that this grantor has unambiguously categorized the first taker's interest. And there is an even more obvious difficulty. It proves that a fee owner is immune from legal waste by assuming the grantor so intended, and it proves the grantor so intended by assuming a fee owner is immune from legal waste. In short, it begs the question.

But the logical flaws are not the principal defects in the argument. More objectionable is that it hands over the problem, bound hand and foot, to the artificial conventions about attributes of "fees" and "life estates." It ignores prominent and enormously important factors that a rational solution requires taking into account. These include (a) the type of resource involved (oil, coal, timber, stocks, etc.); (b) policies respecting conservation and exploitation of resources;\(^1\) (c) the amount of depreciation in the value of the resource which would be caused by the objectionable conduct; (d) the duration of the depreciation (e.g., cutting timber that would regrow in twenty years); (e) the kind of remedy sought;\(^2\) (f) the character of the act complained of; (g) the probable duration of the possessory interest; (h) the probability of the future interest becoming possessory; (i) the time within which the future interest will become possessory; (j) the degree of control which the possessory owner has over the future interest.

The objections to label controlling questions of waste also hold mutatis mutandis against labels controlling the requirement of security from a life tenant (to be next discussed). Such objections are inherent in any attempt to use forms without relating the forms either to important facts or to the purposes of the law.

in our case] a defeasible fee simple title— that is to say, a fee simple title subject to be divested, as to each devisee, upon her or his death without issue . . . . This means appellant [A] is vested with a life estate in the Nitta Yuma plantation, and the appellees are vested, per stirpes, with a fee simple thereto subject to such life estate.”

119. See Olds, Impact of Future Interests on Law of Oil and Gas, Oil and Gas Law and Taxation 163, 165 (Southwestern Legal Foundation Eighth Annual Institute 1957), arguing that exploitation of oil and gas is so important to society that “no owner of an interest in property, however great or small, should be able to veto the development by another and at the same time be in turn subject to a veto by that other. In other words, a stalemate should not be allowed.”

120. Factors (e) through (k) are suggested by 4 Stories & Smith § 1652, at 5. They add that these “are more likely to be controlling in determining the remedies available than mere variations in the types of future interests.” But cf. 4 Stories & Smith, § 1684, at 25–26.
(2) Security for personal property

Where a future interest is created in personal property not in trust, the holder of the future interest often seeks protection against the dissipation of the property by the possessory owner. The remedy sought is usually the execution by the possessory owner of a bond to secure the property to the future interest holder in the event his interest ever becomes possessory. The problem is analogous to protection against waste, except that the problem of requiring security arises even though the injury may not be threatened, but only possible. Where the property involved is a tangible chattel, ordinarily security will not be required unless danger of dissipation is shown. Where the property is money, negotiable securities or the like, the possessory owner can dispose of the property quickly and easily and free of the claim of the future interest holder. Hence many courts require the possessory owner to give security before taking possession of this type of property. No showing of danger is necessary.

Where the possessory interest is ownership analogous to a fee in real property, it has been stated that the type of property is unimportant, that security will be required only if danger of dissipation is shown. This does not involve any difference between contingent remainders and executory interests as such, but between contingent interests after a life estate and executory interests after “absolute ownership subject to defeasance” (an awkward expression, but it will have to do until we begin to talk about fees in personalty). The basis for this distinction is that the transferor intends the possessory owner to have greater control over the property when he gives him absolute ownership subject to defeasance than he does when he gives him a life estate. The same kind of distinction was suggested with respect to relief from waste, but it is even clearer here than it was there that the distinction has no support in the cases and, it is submitted, is not justifiable.

There are very few cases involving security by an owner who would hold absolutely except for an executory interest. In Maryland, Massachusetts, New Jersey, North Carolina and West Virginia there are cases requiring a showing of danger, but as a showing of danger is also required in these states where the first taker is a

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121. 4 SIMES & SMITH § 1717; 1 AM. LAW PROP. § 4.110; KALES, op. cit. supra note 29, § 494, at 569.
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life tenant, the cases do not stand for any distinction between the treatment of the two interests. Indeed, it is quite as (or more) correct to say they stand for the opposite proposition, that a life estate and defeasible ownership must be treated alike. Two of the courts have expressly so held. In Connecticut there is an 1899 case that requires showing of danger in case of a defeasible title, but the Connecticut court has recently stated that was the common law applicable to life estates as well. In Kentucky and New York there are two old cases involving defeasible titles that require a showing of danger, but the rationale of both appears to be that the testator intended the first taker to be put in possession and control without security—a rational also applied to life estates. The important thing to notice is that the cases which require a showing of danger where a defeasible title is involved are, almost without exception, from jurisdictions which require a showing of danger against a life tenant, regardless of the type of property.

The most recent case involving defeasible ownership of personality is In re Merritt’s Estate. There the testator devised a house and furnishings “to A, on condition that she live in the house for five years, with a gift over to B if the condition was not carried out or if A die within five years.” The question was whether a bond should be given by A for furnishings appraised at $2000. The court surveyed the confusion in New York caused by attempts to determine whether the testator intended the life tenant to have only the “use” (security required) or “possession and control” as well (no security required), to have “mere possession” (security) or to have “some rights of ownership” (no security). Then it attempted by analogy to apply to a defeasible title the distinctions developed in the life estate cases. The case it found closest in point was In re Woods, a case involving a bequest of personality “to A for life, upon condition that she make testatrix’s home her residence, and upon A’s death, if A had fulfilled the condition, to A’s estate.” In Woods, A held a defeasible life estate and a contingent remainder.

43 (Ch. 1875) (life estate); Rowe v. White, 16 N.J. Eq. 411 (Ch. 1863) (defeasible title). In New Jersey a statute, N.J. STAT. ANN. § 3A: 25–15 (1953), now requires security of both life tenants and defeasible owners.
123. Horton v. Upham, 72 Conn. 29, 43 Atl. 492 (1899).
126. See, e.g., Crutcher v. Elliston’s Exrs, 299 Ky. 613, 616, 186 S.W.2d 644, 646 (1945).
127. 182 Misc. 1026, 46 N.Y.S.2d 497 (Surr. 1944).
128. The confusion is further examined in a Note, 31 N.Y.U.L. Rev. 592 (1956).
129. 38 Misc. 12, 67 N.Y.S. 1123 (Surr. 1900); aff’d sub nom. In re Hart, 61 App. Div. 597, 70 N.Y.S. 833 (1901), aff’d on opinion below, 168 N.Y. 640, 61 N.E. 1150 (1901).
in Merritt, A held absolute ownership defeasible upon condition subsequent. Unless there are present distinguishing factors other than labels, the cases should be, and were, treated alike. In both the court held A did not have to give bond. The opinion of the court in Merritt strongly indicates the label of the possessory interest was of no substantial importance.

On the basis of these cases one would have to be awfully eager for conviction to be convinced that danger of loss must be shown before security will be required of a defeasible owner of personality, but that it need not be shown if the first taker is a life tenant. In all of them the court was apparently applying the same rule it applied to life estates, and clearly a defeasible owner should not have less rights than a life tenant, other factors being the same. Furthermore there are cases in New York requiring security of a defeasible owner even though danger of loss was not shown. In the Tennessee case two spinster sisters, age fifty-eight and sixty-four, held fees in land defeasible in favor of their respective surviving children. Upon petition of the sisters and others the court decreed a sale of the land and ordered the proceeds distributed to the sisters upon execution of a bond to repay in the event either sister should, through a series of miracles, marry and leave a child who survived her. Obviously there was no danger of depriving the sisters' unborn children of anything since children were physiologically impossible, and yet the court required a bond of the defeasible owners.

The cases do not support turning the requirement of security on the label of the possessory estate, and, it is further submitted, a distinction on the basis of labels is unsound. Take these two cases:

1. "to A for life, remainder to A's estate, but if A die without issue him surviving, to B;"
2. "to A, but if A die without issue him surviving to B."

Is there any reason to require security in case (1) but not in case (2)? In both cases the event on which B takes the property is the same, and, except for B, A is the only other person with an interest in the property. Or compare (8) "to A for life, remainder to A's surviving children, and if no children of A survive him, to B," with (4) "to A, but if A die with children surviving, to

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130. Also the label of the future interest. The court spoke of B as a "contingent remainderman" and of both A and B as "contingent owners."

131. Tyson v. Blake, 22 N.Y. 558 (1860), bequest to A, but if A die without issue to B. The court indifferently called A's interest "a life estate," "more than a life estate," and a bequest of the "entire thing" with a "substituted" gift to B.

132. Frank v. Frank, 153 Tenn. 215, 250 S.W. 1012 (1928). See also Bowen v. Frank, 179 Ark. 1004, 18 S.W.2d 1037 (1929), construing same will.

133. The sisters originally held life estates, but the alternative remaindermen and reversioners conveyed their interest to them giving them defeasible fees under Tennessee law. See cases cited in notes 74–78 supra.
such children, and if A die without children him surviving to B." Is not the grantor's intent precisely the same as to when and on what event possession of the property is to pass to the children of A or to B? Why should security be required in case (3) without a showing of danger and not in case (4)? Lastly (and here is the reductio ad absurdum), suppose a bequest "to A, but when and if B returns from Europe, to B." If labels control, B has less rights than he would have if A had a life estate, remainder in B. And it would make no difference, theoretically, if B were to dock in New York in one day. As stated before in the discussion of waste the difficulty with labels is obvious. They do not distinguish between kinds of events and their probabilities of happening. They lump together interests that are wholly dissimilar in terms of facts. They can be related to the underlying policy of carrying out the testator's intent only on the question begging assumption that testators know the law of future interests.

If we may properly assume that testator intended the future interest holder to take something under specified conditions, the basic question can be simply stated: where property is easily disposable, under what circumstances should security be required? As more and more courts are coming to admit, it is a matter of sound judicial discretion. It depends upon, among other things, (a) the kind of property, (b) the value of the property, (c) the financial solvency of the first taker, (d) the power, if any, of the first taker to consume or to appoint, (e) the propensity of the first taker to squander, (f) the hostility of the first taker to the future interest holder, (g) the residence of the first taker (in or out of state), (h) the probable duration of the possessory interest, (i) the probability of the future interest becoming possessory, (j) the words of the will indicating security be (or not be) given, and, in some states, (k) applicable statutes. Although the trend is toward requiring security without a showing of danger where the property is money, securities or the like, some courts apparently are still reluctant to require it. Whatever differences there may be among the states, however, it seems unlikely that contingent remainders and executory interests will in any way be treated differently when the problem is security for personal property.

134. 4 Simes & Smith, § 1714, at 60, justifies the distinction on the ground that "the remainderman after the life estate usually has a more certain interest and a more substantial interest than the holder of an executory interest." Does the "certainty" and "substance" come from the kind of shifting event or the label? Why throw out the whole barrel because most of the apples are too small?

135. E.g., In the Matter of Chiprout's Estate, 8 Misc. 2d 648, 166 N.Y.S.2d 570 (Surr. 1957); In the Matter of Estate of Miller, 160 Ohio St. 529, 117 N.E.2d 598 (1954); Heintz v. Parsons, 233 Iowa 984, 9 N.W.2d 355 (1943); Quigley v. Quigley, 370 Ill. 151, 18 N.E.2d 186 (1938).
D. Alienation Inter Vivos

Contingent remainders and contingent executory interests are in most states freely transferable inter vivos. In a few states they are alienable only if the contingency relates to the event and not to the person, and in a few other states they are transferable only in equity (on a theory of estoppel or as a contract to convey). Whatever the state law may be as to transfer of contingent interests it applies alike to these two interests. It should be noted, however, that some executory interests are not contingent, but are given to an ascertained person on an event certain to happen. Examples are: “to A after my death,” “to A twenty years from date.” These executory interests are analogous to vested remainders, but the question arises whether they are as freely alienable as vested remainders. In order to simplify discussion of this problem and separate them from contingent executory interests I shall call them “vested” executory interests.

The states where the basic rule respecting contingent remainders and executory interests is still one of inalienability (except in equity) are Arkansas, Colorado, Connecticut, Illinois, Maine, Maryland, Oregon and Tennessee. In six of these states an executory interest is probably assignable where it is contingent only as to event. If this be true, executory interests which are not contingent as to event or person (which I have called “vested” executory interests) could undoubtedly be transferred. And even where interests contingent as to event are not assignable, vested executory interests may be. No case has been found denying the privilege of alienation to the holder of a vested executory interest. In fact, only one case has been found in these states where the assignability of a vested executory interest was involved. In that case there was a conveyance to A for life, and at her death to her children, the conveyance “to take effect immediately after the death of” the grantor. A subsequently conveyed her interest. The assignment was upheld, the court saying A took a “vested” interest which was transferable. The assignment could have been upheld as a release or possibly as a transfer for value in equity, but the court did not bother to use either rationalization.

136. Simes & Smith § 1859; 2 Powell § 283.
Although there are no other cases directly in point, an analogous case is *Gaffney v. Shepard.* There testator devised his property in trust for ten years, and upon expiration of ten years the assets were to be divided among four named income beneficiaries, the children of any deceased beneficiary to take his share. One of the beneficiaries became bankrupt. If his interest in the corpus was assignable it passed to the trustee in bankruptcy. The court, stating that the test of assignability was the "certainty of right of enjoyment," held the interest was assignable. Although the interest was a vested remainder after a term of years, it is believed the court would have come to the same result had the income been accumulated and added to corpus, or had it been an inter vivos trust with income to the settlor for ten years rather than to others. In the latter two cases the bankrupt beneficiary would have had, by strict classification, an executory interest, but the "certainty of the right of enjoyment" is the same in all three cases.

There are a few cases in these states in which there is talk about executory interests being only possibilities and not estates and thus transferable only in equity. These cases involve contingent executory interests, which doubtless the courts had in mind. If the interest is in a certain person on an event certain to happen it is clearly more than a "possibility of an estate." It is as certain to take effect as an indefeasibly vested remainder. Only the most wayward conceptualist would refuse to feign that imaginary quality—"an estate"—if necessary to hold a vested executory interest alienable. On the basis of decided cases, not much can be said, but reason and analogy point to the alienability of such interests.

E. Summary

Executory interests can be divided into two groups: (1) those that are in an ascertained person on an event certain to happen, and (2) those that are given to unascertained persons or on an uncertain event. Executory interests of the first type are rare. Examples are "to A thirty years from date," "to A after my death." The first is analogous to a vested remainder after a term of years, the second to a vested remainder after a life estate. These executory interests are treated like vested remainders under the Rule Against Perpetuities, and, although the cases are scarce, it is believed that they would also be treated as "vested" for other purposes as well. If they do not differ in consequences from vested remainders, they may as well be called vested future interests or vested remainders. And by a number of courts they have been. In this Article they have not been included within the term "executory

139. 108 Conn. 339, 143 Atl. 236 (1928).
interests" except where expressly stated or where the context has indicated otherwise. This exclusion was made to avoid repetition of the clumsy phrase, "contingent executory interests."

Executory interests of the second type are analogous to contingent remainders. It is with these executory interests that we have been primarily concerned. The foregoing analysis indicates there is no difference between them and contingent remainders except where the issue is destructibility and, possibly, where the Rule in Shelley's Case is involved. No court has refused to apply Shelley's Case to an executory interest because it was an executory interest, and for the reasons given above, the distinction between the two interests under the Rule in Shelley's Case is either nonexistent or, if theoretically existent, of no substantial importance. We are left with destructibility as the only distinguishing feature. That relic of feudalism exists in Florida and, viewed in the friendliest fashion, possibly, although certainly not probably, in less than a dozen other states. In three-quarters of the states destructibility has been wholly done away with. Thus, in at least three-quarters of the states, there is no discernible difference between executory interests and contingent remainders. Only in Florida are we sure of any difference between them.

III. Conclusion

Is there any reason for retaining two concepts that produce the same consequences? Of what value are the hours after hours spent teaching students to use labels properly, when they are functional equivalents? It is clear the concepts cannot be revamped in any useful way. The alternatives are keeping the two concepts separate and merging them under one label. It seems to me there are two arguments for the former alternative and two for the latter. I shall deal briefly with each of them.

The arguments for retaining the two concepts are both, in a sense, pedagogical. The first is that students must be taught to distinguish between the two interests because the different labels are currently used by judges and lawyers. The second suggests that while the distinction may be unimportant for contemporary purposes all the history wrapped up in it ("gaps in seisin," "destructibility" and so forth) is of educational value. The first seems fallacious in that it assumes that the labels are meaningfully used today by courts. There is no need to cite again the many cases wherein

140. "If the vesting of the estate is made to depend upon a contingency or if the taker thereof is not with certainty ascertained, the executory devise is contingent and is in the nature of a contingent remainder." Hungerpiller v. Keller, 192 S.C. 329, 335, 6 S.E.2d 741, 743 (1940).

141. A few of the statutes abolishing destructibility and Shelley's Case are recent and are not retroactive, so it is possible these doctrines might apply to an old instrument.
the labels are treated with utmost indifference, where the wrong label is applied or where the labels are used interchangeably.

The second has merit, and I am sure it could be stated with much greater effect by one who believes in it more strongly than I do. The great trouble I have with it is that it proves both too much and too little. All history has many insights to offer, but it cannot all be taught. When the emphasis shifts from the reasons for, and methods of, change and growth to technicalities, the value sharply diminishes. In this field all too often has the mind’s eye skipped over the greatness of the common law as a process constantly adapting forms to changing circumstances and fixed uncritically on the technicalities: on the Rule in Shelley's Case, on destructibility, on contingent interests as “mere possibilities,” on form rather than substance. What is justified as history becomes only training in the worst sort of artificial reasoning.

The first argument for abandoning the distinction is doctrinal simplification. Even John Chipman Gray, ruled though he was by a passion for rigid adherence to theorems, saw the need of paring off useless, artificial distinctions beyond the comprehension of the ordinary lawyer.

A serious objection to the continuance of the old doctrines of real property in the jurisprudence of to-day is that, while the judges are thoroughly familiar with and move at ease among the general doctrines of contract and equity which govern the ordinary transactions of modern life, it is impossible (or if not impossible at least very unlikely) that they should have at their fingers' ends the fundamental distinctions of a highly artificial system, and they are in danger of being unduly governed by ‘the cantilena’ of lawyers' and of losing opportunities for the simplification of the law.

Gray's genius was achieving insight within apparent complexity by discovering a simpler doctrinal order. His energy was fired by an élán to understand multiplicity in terms of a few basic ideas. If he was wrong in thinking that clear and rational doctrines could be built on such words as “vest,” “condition precedent,” “divest,” he was right in thinking that, in order to be useful in advocacy and decisions, words have to have some meaning for the ordinary lawyer and judge.

Society, and by reflection the lawyer's practice, has become far more complex than in Gray's time. Lawyers are even less likely to “have at their fingers' ends the fundamental distinctions” between

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142. For those who do not have a dictionary handy, the word means “melody.” The phrase comes from O'Connell v. The Queen, 11 Cl. & Fin. 155, 8 All E.R. 1061, 1143 (1844).

143. Gray § 782. (Footnote omitted.)

144. Gray himself subsequently had doubts about the word “vest.” See Gray, Appendix M §§ 970–74.
such things as contingent remainders and executory interests. If we are truthful we must admit that not too many students master the distinction and most of those forget about it in their first years of practice. If they think very, very hard they may remember that executory interests are “divesting” or “springing” or “shifting” interests, but that is about as far as their memory and understanding go. More often than not their “knowledge” of executory interests simply clutters up their minds with ambiguous verbalisms and half-understood maxims, such as “there can be no remainder after a fee.” (That particular maxim has led astray a good many lawyers and judges who did not realize all it means is that we call the gift over by another name.)

As a result of this surfeit of vaguely understood words, arguments in future interests cases are often remarkable for their vacuity and for their failure to come to grips with the fundamental problem. Many of the cases cannot be read without writhing. Here, more than in any other field, there is a tendency to collect familiar quotations, glue them together and by sheer humbug make them applicable to the problem. It is hard for the lawyer to know why he has won and even harder for losing counsel to understand why he has lost. Thus the more profane practitioner comes to regard future interests as not a divine madness at all, but, like William James’ algebra, a peculiarly low sort of cunning.

It is a reasonable assumption that two labels stand for two different things; and when they do not, when we have two labels for

145. A leading contender for honors is Sands v. Fly, 292 S.W.2d 706 (Tenn. 1956), 45 Ky. L.J. 704 (1957). Testatrix devised land to her only son Howard for his life, then to his children for their lives, and at the death of the last child of Howard in fee to named nieces and nephews, the issue of any deceased niece or nephew to take his or her share per stirpes, and if any niece or nephew be then dead without issue, his share to the surviving nieces and nephews or their issue. The court held the remainder in fee vested immediately and was entirely valid even though an event to happen later was said to be a “condition precedent” to the remainder’s vesting. Counsel quoted Gray § 108, to the effect that a remainder is contingent where the conditional element is incorporated into the gift to the remaindermen. The court agreed that here “the conditional element was incorporated in the gift to the remaindermen,” but, said the court, “it definitely and conclusively appears that this condition was satisfied at the time of the testatrix’s death, all children of Howard J. Sands being alive at that time.” Having survived living persons is undoubtedly a neat trick, but even more marvelous is having survived the unborn (for the court later conceded that some children of Howard “might be born after the death of the testatrix”). The best argument for invalidity — that the remainder in fee was a gift to a class which would not close until the death of Howard’s children — was not mentioned by the court.

Other features of this bizarre case include an argument by Howard that the remainder in his children for life and the remainder in fee were alternative contingent remainders; a contention by the guardian ad litem of the children that his wards’ remainder was void; and a finding of an alternative remainder after a vested remainder in fee. The court cited numerous cases as authority, not one of which was in point. The case is annotated in 57 A.L.R.2d 188 (1958) by an inapposite note entitled “Character of remainder limited to surviving children of life tenant.”
equivalent future interests, confusion is the natural result. Abandoning the distinction between contingent remainders and executory interests would not be a giant step toward improving this situation, but it would be a much larger step than some might imagine. For understanding the distinction requires at least a speaking acquaintance with "gaps in seisin" and "destructibility"—an acquaintance not likely to be quickly made. If the distinction goes, "gaps in seisin" and "destructibility," which make up a large part of the history of real property law, can go with it.

The second argument for abandonment is that emphasizing labels leads to an unfortunate type of reasoning. It makes form important and substance unimportant. It moves from words to label to result. Numerous examples of this type of reasoning have been exhibited in this Article, and especially in the parts dealing with waste and security. There distinctions were drawn by eminent scholars between executory interests after fees and contingent interests after life estates, between "to A, but if A die without issue to B" and "to A for life, then to A's issue, but if A die without issue to B." B was said to be entitled to less protection in the latter case, irrespective of A's age or the existence of issue or of a host of other important variables. It was shown that in terms of results in the cases the distinctions were illusory. The right inference from this is that the labels had better be dispensed with in analysis of these problems; they are not an adequate substitute for analysis of the many factors that move decisions. The same thing may be said of other problems as well, for there is no proof that labels affect results except in one case (destructibility) in one state (Florida).

It is enchantment with labels that is the hidden cause of most of the law's failures in the field of future interests. So long as we concern ourselves with labels and purely verbal distinctions, we can have no doctrinal structure that is more than a play with words, no doctrines that can justify themselves in terms of policy, no doctrines that can recognize the important factors, that can give predictability. All in all, the way to a useful, critical analysis of future interests seems to lead, not through gaps in seisin, but around them.

146. Any complete analysis of future interests in transferees that may not become possessory would include remainders vested subject to defeasance. Since these interests have the label "vested," and for some purposes (for example under the Rule Against Perpetuities) are treated like indefeasibly vested remainders, to discuss them would require examination of the distinction between "vested" and "contingent" interests. Since that would have been impossible in one article, I have excluded them.