UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 16 | Number 2 Article 1

2-1-1938

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THE DESTRUCTIBILITY OF CONTINGENT REMAINDERS IN NORTH CAROLINA

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North Carolina, perhaps to a greater extent than any other state, has preserved intact in its real property law many of the rules and doctrines of the common law which it inherited from England. Some of these bear upon their faces the unmistakable imprint of the feudal system. The Rule in Shelley's Case—that "Gothic column found among the remains of feudality"—; the estate by the entirety; dower and curtesy; a statute of descents that still talks in terms of "the blood of the first purchaser" and bears a striking similarity to the Canons of Descent as set forth by Blackstone; the non-assignability of contingent rights of re-entry—these, to mention a few, have grown to a ripe and active old age in our law, respectfully unscathed by the legislative hand. Nor has North Carolina enacted any legislation expressly preserving from destructibility contingent remainders. It is our purpose to determine to what extent, if at all, the ancient common law doctrine of destructibility still obtains in this state. Is it still a part of our real property law, or has it fallen upon evil days as a result of judicial decisions which have boldly rejected it, or by virtue of statutes, which, though not directly leveled against it, have had the effect of emasculating it?

For a clearer understanding of the problem perhaps it would be well first to indicate the nature of a remainder and the distinction which our court has drawn between vested and contingent remainders. An estate in remainder is an estate limited to take effect in possession immediately after the expiration of a prior estate created at the same time and by the same instrument.[1] In distinguishing between a vested and a contingent remainder our court relies upon and quotes freely from Fearne on *Contingent Remainders,* as follows: "That wherever the preceding estate is limited, so as to determine on an event which certainly must happen, and the remainder is so limited to a person *in esse* and ascertained, that the preceding estate may, by any means, determine before the expiration of the estate limited in remainder, such remainder is vested. On the contrary, wherever the preceding estate (except in the instances noted . . .) is limited, so as to determine only on an event which is uncertain and may never happen, or wherever the

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[1] Carolina Power Co. v. Haywood, 186 N. C. 313, 317, 119 S. E. 500, 502 (1923).

remainder is limited to a person not *in esse* or not ascertained, or wherever it is limited so as to require the concurrence of some dubious, uncertain event, independent of the determination of the preceding estate and duration of the estate limited in remainder to give it a capacity of taking effect, then the remainder is contingent. . . . It is not the uncertainty of ever taking effect in possession that makes a remainder contingent; for to that, every remainder for life or in tail is and must be liable; as the remainderman may die, or die without issue before the death of the tenant for life. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent."[2] In the celebrated case of *Starnes v. Hill*,[3] the court said: "We return to the rule as laid down by Fearne. This may be illustrated by a limitation to *A* for life, and then to *B* for life. Now here *B* may die before *A*, in which event he would never actually enjoy the possession; but during his life he has a fixed right of future enjoyment, which, upon the determination of *A*'s estate, whether by death or otherwise, entitles him to the immediate possession, irrespective of the concurrence of any collateral contingency, and his remainder is therefore vested. In other words, the term 'vested remainder' imports, *ex vi termini*, 'a present title' in the remainderman. So that, if the limitation in the above illustration had been to *B* and his heirs, the latter would have taken, although *B* had died before *A*. In Gray, Perp. 63, the learned author thus distinguishes a vested from a contingent remainder: 'A remainder is vested in *A* when, throughout its continuance, *A* or *A* and his heirs have the right to the immediate possession whenever and however the preceding estates determine; or, in other words a remainder is vested, if so long as it lasts, the only obstacle to the right of immediate possession by the remainderman is the existence of the preceding estates; or again, a remainder is vested if it is subject to no condition precedent save the determination of the preceding estates.' "[4] Tiffany says that "a contingent remainder is merely the possibility or prospect of an estate, which exists when what would otherwise be a vested remainder is subject to a condition precedent, or is created in favor of an uncertain person or persons."[5] This statement, in effect, epitomizes the view of the North Carolina

[2] *Ibid.*, citing and quoting from 1 FEARNE, CONTINGENT REMAINDERS (1845) 216, 217.

[3] 112 N. C. 1, 9, 16 S. E. 1011, 1013 (1893).

[4] To the same effect, see also Richardson v. Richardson, 152 N. C. 705, 68 S. E. 217 (1910), in which case the court accepts Fearne's classification of contingent remainders. 1 FEARNE, CONTINGENT REMAINDERS (1845) 5.

[5] 1 TIFFANY, REAL PROPERTY (2d ed. 1920) §136.

court as to the general nature of the contingent remainder.[5a] An example of a contingent remainder in favor of an ascertained person, that is, a remainder subject to a condition precedent other than the ascertainment of the remainderman may be found in the case of *Brown v. Guthery*,[6] where the testator devised lands to his wife, Katie, for life, and upon her death to his son, Charles, if he be alive, or to his heirs, if he be dead. The court held that Charles took a contingent remainder, since he took no estate under the will until the happening of the event provided therein for the vesting of such estate, to-wit, his survival of the life tenant. To illustrate the contingency of a remainder created in favor of an uncertain person or persons, we call attention to the case of *Young v. Young*,[7] where lands were conveyed in trust for the use of Jane for life, and at her death for the use of her children then living. The court held the remainder to the children to be contingent since it was impossible to tell who would be entitled to take until the life tenant died.

According to Fearne, it was a rule of the common law that a legal remainder must vest either during the existence of the particular estate, or at the very instant of its determination, otherwise it would never take effect at all. Consequently, a contingent remainder was destroyed by the determination of the preceding estate before the event happened upon which the remainder depended for its vesting.[8] In other words, if *A* conveyed Whiteacre to *B* for life, remainder to *C* and his heirs if *C* married *D*, the remainder would fail unless it vested (that is, unless *C* married *D*) at or before the termination of *B*'s life estate. This doctrine whereby *C*'s contingent remainder might be defeated by its failure to become vested within a serviceable period—the duration of the preceding particular estate—was called the destructibility rule. Without stopping at this point to enumerate the various ways in which at common law contingent remainders could be destroyed, we pass on to a brief consideration of the reasons which gave rise to the rule of destructibility.

Like many other rules of the common law governing land titles, the doctrine of destructibility lies deeply rooted in the feudal concept of seisin. The feudal economy required that at all times there should be some person seized of an estate of freehold in a particular tract of land against whom an action concerning the land could be brought, who

[5a] Mercer v. Downs, 191 N. C. 203, 131 S. E. 575 (1926) quoting from 1 TIFFANY, REAL PROPERTY (2d ed. 1920) §136.

[6] 190 N. C. 822, 130 S. E. 836 (1925).

[7] 97 N. C. 132, 2 S. E. 8 (1887). See also Corl v. Corl, 209 N. C. 7, 182 S. E. 725 (1935) in which the testator devised certain property to *B* for life, and in the event he should marry and have legitimate children, the remainder after his death to go to said legitimate children. The children took a contingent remainder.

[8] 1 FEARNE, CONTINGENT REMAINDERS (1845) 316.

could meet adverse claims thereto, and who could render the feudal services to the lord.[9] The seisin—the possession of a freehold estate—could never be in abeyance, and any act which would have the effect of leaving the freehold without a tenant was void. In addition to the feudal requirement just indicated, another factor played a large part in determining the rule of destructibility. According to the common law, the only way in which an estate of freehold could be created in favor of a grantee was by livery of seisin—the actual delivery of the feudal possession of the land by the grantor or feoffor. This was a present act effective immediately or not at all and led to the rule that "there could be no conveyance of an estate of freehold to commence in the future, that is, subject to a condition precedent, and that any such attempted conveyance was void."[10] The creation of a vested remainder did not violate this rule. For instance, if *A*, owning a fee simple estate in Blackacre, wished to convey to *B* for life, remainder to *C* and his heirs, he delivered the seisin to *B*, the holder of the particular estate, who held it not only for himself during his life estate but also for *C*, the vested remainderman. Whenever and however *B*'s estate terminated, the seisin (the right to immediate possession of the freehold) would shift to *C* who had theretofore been owner of an existent estate in Blackacre, "a fixed right of future enjoyment".[11] *C*'s vested remainder was perfectly good because there had been a present delivery of the seisin, the remainderman had participated therein, and at the termination of the particular estate a freeholder was ready to step in and take possession of the land with no break in the continuity of the seisin.

The contingent remainder, however, being only a possibility or prospect of an estate because subject to a condition precedent or created in favor of an uncertain person or persons,[12] may not perchance become vested during the continuance of the preceding particular estate and may thus run afoul not only of the rule that there can be no break in the continuity of the seisin but also of the rule prohibiting the creation of an estate of freehold to commence in the future. Tiffany points out that, since in their creation contingent remainders did involve a violation of the latter rule, "it was no doubt for this reason that such remainders were for a long time not recognized by the courts."[13] About 1450, however, the courts began to recognize the validity of a contingent remainder if at the time of its creation it was supported by a particular estate of freehold and there was a chance of it becoming

[9] 1 TIFFANY, REAL PROPERTY (2d ed. 1920) §140.
[10] *Ibid.*
[11] See note 3, *supra.*
[12] See note 5, *supra.*
[13] See note 9, *supra.*

vested in interest either during the existence of the particular estate or at the very instant of the termination thereof. In other words if the continuity of the seisin could be preserved, the requirements of the feudal economy were satisfied. Thus, if *A*, owning Blackacre in fee simple, should wish to convey it to *B* for life, remainder to the heirs of *C* (a living person), *A* would deliver the seisin to *B* who held it both for himself and for the contingent remaindermen, the heirs of *C*, if and when they should become entitled upon the death of *C*.[14] This would satisfy the common law conveyancing requirement that there be a presently effective delivery of the seisin. Now if *C* should die during the life of *B*, then *C*'s heirs would become definitely ascertained persons and their remainder therefore vested; upon the death of *B* the seisin, without any gap therein, would pass directly to them. Thus the continuity requirement would be met. On the other hand if *C* should survive *B*, *C*'s heirs would yet be unascertained and, of course, their remainder not vested. The seisin of *B* must pass to someone; it could not be in abeyance. *C*'s heirs, as yet having only a possibility of an estate, were not entitled to it; therefore the seisin would return to *A* the grantor, or his heirs, by virtue of his reversion and the contingent remainder would be destroyed. The subsequent death of *C* would not enable his heirs to take. The seisin could not jump automatically from *A*: that would involve a violation of the rule against livery of seisin, to create a freehold estate, taking effect *in futuro*. Only by a new conveyance from the grantor or his heirs could *C*'s heirs take an estate in Blackacre. On the same basis, if the remainder had been limited to *C* and his heirs provided *C* marry *D* and *C* had not married *D* during *B*'s life or at the instant of its termination, *C*'s contingent remainder would have been irrevocably destroyed. Upon the foregoing feudal concepts of seisin and its transfer depended the common law rule of destructibility of a contingent remainder—that it must vest during the preceding particular estate or *eo instante* it terminated, otherwise it would fail completely.

In the illustrations just given we have indicated how at common law contingent remainders might be destroyed by the *natural* termination of the particular estate before the happening of the contingency upon which the remainder should become vested. It was also possible for the contingent remainder to be defeated by the *premature* destruction of the

[14] If, however, in the illustration given, *A* had limited the estate to *B for 10 years*, remainder to the heirs of *C*, the remainder would have been *void ab initio;* since *B* holding only an estate for years—less than a freehold—could not receive the seisin, and the heirs of *C* with only a possibility of an estate were not yet entitled to it and it could not take effect in them *in futuro* even if *C* died during *B*'s estate for years. Hence the common law rule that a contingent remainder of freehold must always be supported by a particular estate of freehold or be void in its inception.

particular estate by the holder thereof or as a result of legal consequences flowing from the acts of others. The contingent remainder therefore could be destroyed by the natural termination of the particular estate; or prematurely, (1) by tortious alienation, (2) by forfeiture, (3) by surrender, (4) by merger, (5) by disseisin and the change of the right of entry in the disseisee to a right of action in him,[15] and (6) by the life tenant's renunciation of his interest.

By an examination of the North Carolina decisions and statutes we shall now attempt to discover to what extent, if at all, contingent remainders are still destructible[16] in this state on the bases just described.

By Natural Termination of Preceding Freehold

At least two cases have been found in which the North Carolina court held that a remainder which had not become vested at the normal termination of the preceding particular estate was destroyed. Both of them are old cases. In *Chessun v. Smith*,[17] decided in 1816, the testator devised lands "unto [*B*] . . . to him and his heirs of his body, lawfully begotten; and for want of such," to the heirs of *M* (a living person). *B* died without issue in 1777 or 1778; *M* died in 1800 without ever having had any children. Her collateral heirs, claiming title under the clause in the will, above set out, brought ejectment to recover the lands from other claimants not identified in the report of the case. The court held for the defendants, saying in part: "The remainder is not limited to any definite person, but merely to those, who upon the death of [*M*], should be her heirs. It is limited, also, upon an estate tail, a particular freehold estate capable of supporting a contingent remainder. The ulterior termination must therefore be construed a contingent remainder, which could only become vested in the event of [*M*] dying and leaving heirs, during the continuance of the estate tail. This expired in 1777 or 1778 by the death of [*B*] without issue. [*M*] survived him by upwards of twenty years; so that the remainder to her heirs could never vest in them." The problem presented by this particular case could not arise under the present North Carolina law. Since by statute[18] every

[15] CHALLIS, REAL PROPERTY 135; See also Corl v. Corl, 209 N. C. 7, 182 S. E. 725 (1935).

[16] Unquestionably North Carolina absorbed into its jurisprudence, and recognized, the common law doctrine of destructibility. Accord: King v. Rhew, 108 N. C. 696, 13 S. E. 174 (1891); Starnes v. Hill, 112 N. C. 1, 16 S. E. 1011 (1893); Richardson v. Richardson, 152 N. C. 705, 68 S. E. 217 (1910); Carolina Power Co. v. Haywood, 186 N. C. 313, 119 S. E. 500 (1923); and other cases cited and discussed in this article. See also, N. C. CODE ANN. (Michie, 1935) §970, where, in general, the common law is declared to be in force.

[17] 4 N. C. 274.

[18] N. C. CODE ANN. (Michie, 1935) §1734. This statute was passed in 1784 and, in one of its aspects, operated retroactively to 1777 to bar the entails by virtue of a conveyance made since that time by the tenant in tail to a bona fide purchaser for value.

fee tail estate is converted into a fee simple, *B* would now take a fee simple, defeasible upon his dying without issue surviving him, and the heirs of *M* would take an indestructible executory devise.[19]

In *Flora v. Wilson*,[20] decided in 1852, the testator devised certain lands to his wife during her widowhood, and after her marriage or death, to his wife's heirs by consanguinity with the exception of one of her sisters. The testator died in May, and when his will was probated in the same month, his wife dissented therefrom. The following August the widow remarried to one Flora and shortly thereafter a posthumous child of the testator was born to her. Within six months this child, the only offspring of the testator, died and a few months after its death the testator's wife had another child, the issue of her marriage with Flora. This second child brought ejectment to recover the lands from an heir *ex parte paterna* of the testator's posthumous child. *Held,* (1) that the plaintiff could not claim as heir of the deceased child because he was not of the blood of the testator from whom the deceased child had derived the property;[21] (2) that, even if the devise to the wife's heirs was contingent at first, still the plaintiff, claiming as purchaser under the will, could not take as one of the remaindermen because the particular estate of the wife, whether determined by her dissent to the will or by her marriage, did not continue to his birth, and consequently his contingent remainder would have been defeated.

The *Flora* case is notable because, curiously enough, we find in it a double inconsistency on the part of the court in applying the rule of destructibility. Although the first child was not actually born until three months after the destruction of the particular estate, yet since he was *en ventre sa mère* at that time, his apparently contingent remainder was treated as vested and of course not subject to the rule of destructibility. Without the aid of any statute[22] our court followed this important exception to the rule of destructibility as laid down by the House of Lords in the case of *Reeve v. Long*.[23] Professor Simes, speaking of that case (in which a son, posthumously born six months after the death of his father, the life tenant, was allowed to take) says: "The case is obviously illogical if one accepts the doctrine that the seisin must pass to the remainderman without a gap."[24] With regard, however, to the second son of the wife who was not born until after the termination of the particular estate, our court applied inexorably the rule of destructibility.

[19] Accord: Smith v. Brisson, 90 N. C. 284 (1884).
[20] 35 N. C. 344.
[21] See N. C. CODE ANN. (Michie, 1935) §1654, Rule 4.
[22] See N. C. CODE ANN. (Michie, 1935) §1654, Rule 7, which provides for the vesting of an estate by inheritance in an heir born within ten lunar months after the death of its ancestor.
[23] 3 Lev. 408 (1694).
[24] 1 SIMES, FUTURE INTERESTS (1936) §103.

Another interesting case has been found in which the North Carolina court *preserved from destruction* a remainder which it had apparently regarded as contingent. In *Beddard v. Harrington*[25] a testator devised a tract of land to his wife "for and during her natural life or widowhood," then to his granddaughter in fee simple "after the death of my said wife." After the testator's death his widow remarried, and thereupon his granddaughter claimed the right to immediate possession of the land given her by the will. The widow, asserting a right to the land for the rest of her natural life, brought suit against the granddaughter to have the will construed. The court held that the widow, who had remarried, could not maintain an action to recover possession, since she had held only a life estate determinable either upon her death or remarriage. As to the granddaughter the court said, in part: "The devise to the granddaughter, the defendant, 'after the death of my said wife', can not take effect until that event. . . . After the remarriage of the widow, until the devise to the granddaughter is to take effect, *i.e.*, at the death of the widow, the realty would go to the heirs at law of the devisor for such interval and the granddaughter would be entitled in that capacity as sole heir, unless there were others, in which event she would be tenant in common till the death of the widow, when she would become sole owner under the terms of the devise." No authority was cited by the court for this position. While no reference is made to contingent remainders, it is obvious that the court regarded the death of the testator's wife as a condition precedent to the granddaughter's taking any interest under the terms of the will. This construction, in effect, would give the granddaughter a contingent remainder in the same tract of land in which the widow took a life estate determinable upon her death or remarriage. When the preceding estate of freehold was terminated by the widow's remarriage, the remainder had not yet become vested since the contingency upon which it was to vest—the widow's death—had not occurred. Here was a gap in the seisin and the stage was set for the court to apply the rule of destructibility to defeat the contingent remainder of the granddaughter. But, instead, it did a strange thing: it preserved the remainder. Apparently without sensing that the situation called for an application of the rule, the court held that during the interval in which the devise could not take effect the realty should go to the heirs of the testator, with the granddaughter, if she were his sole heir, taking *as an heir* until the death of the widow, when the granddaughter would become sole owner *as purchaser* under the terms of the devise. This means that the court without statutory aid preserved from destruction an apparently obvious contingent remainder

[25] 124 N. C. 51, 32 S. E. 377 (1899).

by allowing it, in a blinking uncomprehending fashion, to take effect as an *executory devise* operating under the law of wills analogously to a springing use under the Statute of Uses. Of course, if the granddaughter's freehold interest were treated as an executory devise, it could take effect in the future regardless of the termination of the preceding limitation to the widow; and, since testamentary dispositions are not subject to the requirement of livery of seisin, the abeyance-of-seisin problem would be solved by regarding the seisin as being in the testator's heirs during the interval while the widow remained alive.[26] Also, executory devises have long since been held indestructible.[27]

It may be conceded that the North Carolina court in the *Beddard* case effectuated the intention of the testator and thus attained a desirable result; but in order to reach that result the court treated a contingent remainder as an executory interest (hence giving it an indestructible quality) and thus ran counter not only to the settled English common law rule on the subject but also to a prior North Carolina decision which had accepted the English doctrine. In the leading English case of *Purefoy v. Rogers*[28] Lord Hale set forth a rule to the effect that, "where a contingency is limited to depend on an estate of freehold which is capable of supporting a remainder, it shall never be construed as an executory devise, but a contingent remainder only, and not otherwise." And in the case of *Watson v. Smith,*[29] decided seven years before the *Beddard* case, we find the North Carolina court stating the same rule in these words: "An executory devise is strictly such a limitation of a future estate or interest in lands as the law admits in the case of a will, though contrary to the rules in limitations in conveyances at common law, but it is never construed to be such if it is possible that it should take effect as a remainder."[30] The effect of this rule was that if by will a contingent remainder supported by a particular estate of freehold were created, then such contingent remainder must take effect according to the rules of the common law governing its vesting and consequently its destructibility, and it could not be salvaged beyond the time set for its vesting by being labeled an executory devise. It will be readily seen that our court ignored this rule in deciding the *Beddard* case when it let the contingent remainder, which had failed to vest *during* the preceding particular estate or by the time it terminated, survive as an executory devise. No mention was made either of the Eng-

[26] See 1 TIFFANY, REAL PROPERTY (2d ed. 1920) §160.
[27] Pells v. Brown, Cro. Jac. 590 (1620).
[28] 2 Wm. Saunders 380, 2 Lev. 39 (1670).
[29] 110 N. C. 6, 14 S. E. 640 (1892).
[30] It should be pointed out, however, that *Watson v. Smith, supra* note 29, dealt not with the question of destructibility, but with the problem of construing a limitation by way of remainder on a contingency with a double aspect.

lish authorities or of the *Watson* case, nor does the court refer to the doctrine of destructibility.

Our court could have easily avoided being placed in the awkward and embarrassing situation just described by construing the words, "after the death of my said wife," as being merely conditional in form and not as adding a condition to the vesting of the remainder. In other words, as suggested by Professor Simes, "the testator probably meant to limit the remainder to take effect either on *A*'s (the wife's) death or upon the sooner determination of *A*'s estate by marriage or otherwise."[31] This being so, the granddaughter's remainder could have been construed as being vested[32] and ready to take effect in possession upon the remarriage of the testator's widow. Such a result would have been in accord not only with the leading English case of *Luxford v. Cheeke*[33] but also with the American authorities[34] which have passed upon a similar problem.

Since the North Carolina court did not explain the result it reached in the *Beddard* case on any technical, legal basis, it must remain a matter of conjecture as to whether it consciously rejected the rule of destructibility or failed to apply it through sheer oversight.

By Premature Destruction of Preceding Freehold

1. By tortious alienation—feoffment, fine, or common recovery.

According to Kent: "Estates for life were, by the common law, liable to forfeiture . . . by alienation in fee. Such an alienation, according to the law of feuds, amounted to a renunciation of the feudal relation, and worked a forfeiture of the vassal's estate to the person entitled to the inheritance in reversion or remainder. Alienation by feoffment, with livery of seisin, or by matter of record, as by fine or recovery, of a greater estate than the tenant for life was entitled to, by devesting the seisin and turning the estate of the rightful owner into a right of entry, operated as a forfeiture of the life estate, unless the person in remainder or reversion was a party to the assurance."[35] This premature destruction of the life estate by the tortious alienation of the holder thereof also had the effect of destroying a contingent remainder limited to take effect

[31] 1 SIMES, FUTURE INTERESTS (1936) §74.

[32] See Gillespie v. Allison, 115 N. C. 542, 20 S. E. 627 (1894) in which the court held that a remainder dependent upon the termination of an estate *durante viduitate* is a vested and not a contingent remainder.

[33] 3 Lev. 125 (1683).

[34] Gibson v. Land, 27 Ala. 117 (1855); De Vitto v. Harvey, 262 Ill. 66, 104 N. E. 168 (1914); Klingman v. Gilbert, 90 Kan. 545, 135 Pac. 682 (1913); Maddox v. Yoe, 121 Md. 288, 88 Atl. 225 (1913); Ferson v. Dodge, 23 Pick. 287 (Mass. 1839).

[35] 4 KENT'S COMM. (12th ed. 1873) **82-83, 84.

immediately after the life estate but which had not become vested at the time of the forfeiture.[36]

It seems clear that in North Carolina today contingent remainders can not be destroyed by the life tenant's tortious alienation—and consequent forfeiture—of his particular estate. Fines and recoveries as modes of conveyance were never used in this state.[37] Feoffments with livery seem to have become obsolete with the passage of a law in 1715[38] which dispensed with livery of seisin and substituted registration of the deed in lieu thereof.[39] Indeed, only one case has been found in which the subject of forfeiture by alienation was discussed and that case did not involve the destruction of a remainder.[40] Apparently all conveyances of land today in North Carolina operate innocently under the Statute of Uses[41] to convey only the grantor's interest and therefore occasion no forfeiture.[42]

2. By forfeiture—(a) for treason or other crime.

There is a possibility that at common law the contingent remainder might be destroyed by the forfeiture of the life estate as a result of the treason or other crime of the tenant thereof. Professor Simes states that "Fearne discusses the possible effect of forfeiture for treason, but gives us nothing conclusive on the point."[43] No such basis for the destruction of contingent remainders could arise in North Carolina because it is expressly provided in the Constitution that, "No conviction of treason or attainder shall work corruption of blood or forfeiture."[44] Another section[45] of the Constitution effectually excludes forfeiture as

[36] By feoffment: Archer's Case, 1 Co. Rep. 66 b (1597); Snelling v. Lamar, 32 S. C. 72, 10 S. E. 825 (1889). By fine: Doe d. Willis v. Martin, 4 Term R. 39 (1790). Accord: Bouknight v. Brown, 16 S. C. 155 (1881). By common recovery: Loddington v. Kime, 1 Salk. 224 (1695); Waddell v. Rattew, 5 Rawle 231 (Pa. 1835).

[37] So stated in the preamble of a statute passed in 1715 and published as Chapter 3 of 1 POTTER'S REVISAL (1821).

[38] 1 POTTER'S REV., c. 6 (1821).

[39] Hogan v. Strayhorn, 65 N. C. 279, 283 (1871). In Savage v. Lee, 90 N. C. 320, 324 (1884) the court declared that "livery of seisin was abolished by our act of 1715."

[40] Doe on d. of Taylor v. Shufford, 11 N. C. 116, 129 (1825).

[41] N. C. CODE ANN. (Michie, 1935) §1740.

[42] In Wilder v. Ireland, 53 N. C. 85, 90 (1860) the court, in an appended note, said that "all the conveyances of land, adopted and used in this State, are based on and take effect by, the operation of that statute" (the Statute of Uses). See also, Hogan v. Strayhorn, 65 N. C. 279, 284 (1871), wherein the court said: "After the act of 1715 . . . deeds of bargain and sale, and of covenants to stand seized, have answered every purpose."

[43] 1 SIMES, FUTURE INTERESTS (1936) §100, citing FEARNE, CONTINGENT REMAINDERS (1845) 282, 283, also, Roe v. Davis, 1 Yeates 332, 342, 343 (Pa. 1794).

[44] N. C. CONST. (1868) art. IV, §5. See also White v. Fort, 10 N. C. 251, 264 (1824), in which it was held that forfeiture for felony, which was the established rule at common law, has had no force in this state since 1778.

[45] N. C. CONST. (1868) art. XI, §1.

a punishment for any crime, since it provides that: "The following punishments only shall be known to the laws of this state, *viz.;* death, imprisonment with or without hard labor, fines, removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under this state."

2. By forfeiture—(b) for waste.

The old English Statutes of Marlbridge[46] and of Gloucester,[47] which respectively, provided that the person guilty of waste should be amerced in damages or should forfeit the place wasted and pay treble damages, have, with some qualifications, been embodied in the law of North Carolina.[48] Our present law provides that "an action [of waste] lies in the Superior Court at the instance of him in whom the right is, against all persons committing the waste, as well tenant for term of life as tenant for term of years and guardians,"[49] and that "the judgment may be for damages, forfeiture of the estate of the party offending, and eviction from the premises."[50] "When judgment is against the defendant, the court may give judgment for treble the amount of the damages assessed by the jury, and also that the plaintiff recover the place wasted, if the damages are not paid on or before a day named in the judgment."[51] What effect should the forfeiture, under these statutes, by the life tenant for waste have upon the rights of the contingent remainderman whose interest has not become vested at the time of the forfeiture? Although no decision bearing directly on the point has been found, at least in two cases it has been intimated by way of dicta that the contingent remainder might be destroyed.[52] Such a result would logically follow if the rationale of the destructibility rule were strictly adhered to in such a situation.[53]

Let us examine the North Carolina statutes relating to forfeiture for waste in order to determine whether, in their practical operation, a situation calling for the application of the rule of destructibility might possibly be presented. The proper approach to the problem would seem to lie in the ascertainment of the person who, under the statute, would

[46] 52 Hen. III, c. 23 (1267). [47] 6 Edw. I, c. 5 (1278).
[48] N. C. CODE ANN. (Michie, 1935) §§888-893.
[49] *Id.* §889. [50] *Id.* §888.
[51] *Id.* §893. Our court has construed this section to mean that the judgment for the place wasted must be conditional, and can take effect only upon the failure of the defendant to pay the actual damages before a day certain. So that it is left in the sound discretion of the judge who tries the action to determine whether he will give single or treble damages, as well as fix a day after which a writ of possession may issue for the place wasted, if the damages allowed shall not have been in the meantime actually paid. Sherrill v. Connor, 107 N. C. 630, 12 S. E. 588 (1890).
[52] Starnes v. Hill, 112 N. C. 1, 9, 16 S. E. 1011 (1893) (reference to waste omitted in S. E. report of case); Richardson v. Richardson, 152 N. C. 705, 709, 68 S. E. 217, 219 (1910).
[53] 1 SIMES, FUTURE INTERESTS (1936) §100.

be entitled to institute the action for waste. The statute is very general on the point: "an action lies in the superior court at the instance of him in whom the right is . . . ."[54] The court, however, in a number of decisions has held that the owner of the first estate of inheritance, either by way of reversion or vested remainder, may maintain an action for waste.[55] It is also well settled that the owner of an executory devise or of a contingent remainder cannot recover damages or ask that a forfeiture be declared for waste already committed, but is entitled to have his interest protected from threatened waste or destruction by injunctive relief.[56] Suppose then, for illustrative purposes, *G* by deed has created an estate in *A* for life, remainder to *B* for life if he pay *X* $100, remainder to *C* and his heirs. Or suppose in the illustration just given no remainder in fee simple had been limited to *C*, thus leaving a reversion in fee in *G*. *A*, the life tenant, commits waste. Would it be possible under the North Carolina law for *C*, the remainderman, or *G*, the reversioner, to sue *A* for waste and obtain a judgment declaring a forfeiture of *A*'s life estate, which judgment would have the effect of destroying *B*'s contingent remainder (assuming *B* had not yet paid *X* $100)? It is our belief that the answer to the question would be in the negative. It is hardly conceivable that our court would permit the plaintiff in such a suit to avail himself of a statutory remedy and obtain such a judgment thereunder as would have the effect of destroying the validly created interest of a person not a party to the suit.[57] In all probability the court in its sound discretion would limit the reversioner or remainderman to a recovery of damages for the waste committed by the life tenant.[58]

To illustrate the point further: suppose *G* should create an estate in *A* for life, remainder to the children of *B* who should survive *A*. Would it be possible for *G* or his heirs, claiming the reversion in fee, pending the vesting of the contingent remainder in *B*'s children, to sue *A* for waste, ask that a forfeiture of *A*'s estate be declared, and obtain a judgment which would have the effect of destroying the contingent re-

[54] N. C. CODE ANN. (Michie, 1935) §889.

[55] Burnett v. Thompson, 51 N. C. 210 (1858); Wall v. Williams, 91 N. C. 477 (1884); Latham v. Lumber Co., 139 N. C. 8, 51 S. E. 780 (1905); *cf.* 1 TIFFANY REAL PROPERTY (2d ed. 1920) §290 (c). But see Dozier v. Gregory, 46 N. C. 100, 106 (1853) to the effect that an action in the nature of waste might be maintained by a vested remainderman holding only an estate for life or for years.

[56] Gordon v. Lowther, 75 N. C. 193 (1876); Latham v. Lumber Co., 139 N. C. 8, 51 S. E. 780 (1905); Richardson v. Richardson, 152 N. C. 705, 68 S. E. 217 (1910).

[57] Whatever the result, it would seem that under the law a contingent remainderman would be a necessary party to the suit. N. C. CODE ANN. (Michie, 1935) §§456, 457. The writer is indebted to Dr. A. C. McIntosh, Professor of Law Emeritus of the University of North Carolina, for helpful suggestions concerning the procedural aspects of the action of Waste.

[58] See note 51, *supra*.

mainder of *B*'s children? Again it would seem that the answer should be, no. In addition to the arguments presented in the preceding paragraph against such a result, attention is directed to other matters which would seem to preclude the reversioner from squeezing out the contingent remaindermen. All the authorities seem to agree that the remedy of forfeiture, in all statutes, is given to the owner of an *indefeasibly vested* reversion or remainder in fee simple *immediately following* an estate for life.[59] The reversion of *G*, in the illustration given, is not indefeasibly vested, but vested subject to defeasance by the vesting of the contingent remainder in fee in *B*'s children. Nor does it immediately follow the estate for life. Hence it follows that *G* (or his heirs) would be precluded from availing himself of the remedy of forfeiture and would have to be content with injunctive relief against the threatened waste.[60] If our conclusions are correct, it would appear by the process of elimination to be procedurally impossible for any person in North Carolina to obtain in an action for waste a judgment of forfeiture which would have the effect of destroying a contingent remainder.

However, the conclusiveness of the foregoing proposition might be open to question by virtue of certain dicta extant in two North Carolina cases.[61] In *Starnes v. Hill H* conveyed land to a trustee for the use of *M* for life, and in the event *R* should outlive *M* then to *R* for life, and at the determination of both life estates, then to the heirs of *R* and their heirs forever.[62] The court held that, since the remainder to *R* was subject to the condition precedent of his outliving *M* and was therefore contingent, the Rule in Shelley's Case did not yet apply to give him a fee simple in remainder so as to permit him to join in a deed with *M* to convey an unfettered fee simple in the land to their grantee. It was pointed out that since the vesting of *R*'s remainder depended upon his outliving *M*, his contingent remainder might be totally defeated by the premature destruction of *M*'s particular estate during her lifetime by surrender or forfeiture; and, said the court, "It may be observed in this connection, that waste is still recognized by the laws of this State as a ground of forfeiture." The case in no particular involved the problem of waste, nor did the court suggest who, under our law, would be the proper party to bring the suit which might ultimately result in the destruction of *R*'s contingent remainder. It is our opinion that the

[59] 3 SIMES, FUTURE INTERESTS (1936) §621. RESTATEMENT, PROPERTY (1936) §199, Comment c: "Thus under all these statutes except those in terms referring to future interests 'for life or for years', the person, if any, entitled to claim a statutory forfeiture is the owner of the next immediate indefeasible estate of inheritance and such person only." North Carolina seems to be in line with these authorities. See note 55, *supra*.

[60] SIMES, FUTURE INTERESTS (1936) §622.

[61] See note 52, *supra*.

[62] 112 N. C. 1, 16 S. E. 1011 (1893).

court inserted the dictum as to waste simply to bolster its position that *R*'s remainder was *contingent* instead of vested.

The other case, *Richardson v. Richardson*,[63] did involve an action for waste. Testator devised land to his wife for life, "and at her death" to his grandson, *J. R.*, during his lifetime, and at *J. R.*'s death to his children if any were living at his death; but if none, then over to *J. R.*'s brothers. *J. R.* brought suit against the first life tenant not only to recover damages for the waste alleged to have been committed by her but also to have her life estate forfeited by reason of such act of waste. The court sustained the judgment of non-suit in favor of the defendant on the ground that since *J. R.*'s remainder was contingent upon his surviving the defendant, the first life tenant, *J. R.*'s only remedy was by way of injunction.[64] However, the court, by way of dictum, pointed out that if the judgment had been for the forfeiture of the widow's life estate, then that particular estate would have been determined before the happening of the event, namely, the *death* of the widow, upon which the remainder was to vest in *J. R.* Said the court: "The widow would have lost her life estate, as the plaintiff would have recovered the place wasted by virtue of the statute, but the interest in and the possession of the land would have vested in him under the judgment of the court declaring a forfeiture of the life estate, and not by virtue of the terms of the will. . . . If the first life estate is determined by forfeiture, surrender or otherwise, and the life tenant survives its determination, the remainder can not take effect, by the express words of the will, until the death of the widow, whereas the imperative rule of law requires that the remainder must vest, that is, the contingency must happen during the continuation of the particular estate or *eo instanti* it determines. The life estate is destroyed by the forfeiture resulting from the waste under the statute, and yet the event upon which the plaintiff is to take his estate in remainder has not happened." Here is a clear statement of the rule of destructibility with an intimation by the court that, under some circumstances, the forfeiture of the life estate on account of waste would destroy a contingent remainder limited thereon. It will be noticed, however, that the court does not permit the contingent remainderman, through his own procedural error, to destroy his own interest; nor does it allow him to accelerate the vesting of his remainder by taking advantage of the statutory remedy of forfeiture for waste. While the court does not suggest who would be the proper party to bring the action, it is a matter of serious doubt whether it would recognize the right of any party to obtain a forfeiture judgment under the statute which would have the effect of squeezing out the contingent remainder-

[63] 152 N. C. 705, 68 S. E. 217 (1910).
[64] See note 56, *supra*.

man. In other words, if the contingent remainderman could not avail himself of the statutory remedy for his benefit, should any one else be permitted to take advantage of it to such remainderman's detriment?

One further word remains to be said in connection with the *Richardson* case. It is believed that the court was in error in holding that the remainder of *J. R.* was contingent. The property was devised to the widow for life, "and at her death" to go to *J. R.* during his lifetime. It is a well settled rule that a limitation will not be construed as creating a contingent remainder if it can possibly be construed as creating a vested one.[65] And where an estate is limited to *A* for life, an "on", "at", "from", "after", or "in the event of" *A*'s death, to *B*, such words are construed to refer to the time when *B* may take possession of his estate and are not regarded as conditions precedent to the vesting of his interest. His remainder is therefore regarded as vested and not contingent.[66] This rule of construction is generally accepted in North Carolina.[67] If the court in the *Richardson* case had followed its own decisions[68] in which it had construed language almost identical with that involved in the Richardson case, it logically would have been forced to hold that the remainder devised to *J. R.* was *vested,* and the problem of destructibility would never have arisen.

No cases have been found in other jurisdictions where contingent remainders were destroyed by the forfeiture of the supporting life estate under the waste statutes.[69] In view of this total absence of precedent and in the face of the procedural difficulties presented by our statute, we believe that the North Carolina court, despite the dicta in the two cases just discussed, would hesitate to be the first to extend the harsh and unjust doctrine of destructibility to a case to which it has never before been applied.[70]

[65] 1 TIFFANY, REAL PROPERTY (2d ed. 1920) §138.

[66] *Ibid.*

[67] In Carolina Power Co. v. Haywood, 186 N. C. 313, 319, 119 S. E. 500, 503 (1923) the court said: "One of the prevailing rules of construction is that adverbs of time, or adverbial clauses designating time, do not create a contingency in a devise, but merely denote the time when the enjoyment of the estate shall commence." The court cited a number of North Carolina cases in support of the statement.

[68] McNeely v. McNeely, 82 N. C. 183 (1880) (Devise to *B* "at the death of his mother": *Held, B* took a vested remainder); Ellwood v. Plummer, 78 N. C. 392 (1878) (Land was devised to *O* in trust for two of *T's* daughters during their natural life, and, after the death of either, in trust for *T's* three grandchildren until the death of the other daughter "at which time" the land was to be divided among the three grandchildren of whom *P* was one: *Held, P* took a vested remainder. Accord: Harris v. Russell, 124 N. C. 547, 32 S. E. 958 (1899); King v. Stokes, 125 N. C. 514, 34 S. E. 641 (1899); and other cases cited in Carolina Power Co. v. Haywood, *supra,* note 67.

[69] 1 SIMES, FUTURE INTERESTS (1936) §100.

[70] *Ibid.*

2. By forfeiture—(c) for failure to pay taxes.

Only three states, North Carolina, Arkansas, and Ohio, have provided by statute[71] for the forfeiture of the life estate by the owner thereof who, by failing to pay taxes assessed thereon, has been remiss in protecting the subsequent interests in the land. Would such forfeiture, resulting in the premature failure of the life estate, have the effect of destroying the interest held by a contingent remainderman in the same land? By strict logic the rule of destructibility should be applied if the remainder had not become vested at the time the life estate fell in. No cases have been found either in North Carolina or in Arkansas and Ohio in which contingent remainders were involved where forfeitures under the statutes took place. At the risk of not letting sleeping dogs lie, let us investigate the possibilities under the North Carolina law. Our statute[72] provides that the life tenant shall forfeit his estate to the remainderman or reversioner when he suffers it to be sold for taxes by reason of his neglect or refusal to pay the taxes, and fails to redeem the property within a year after the sale; and that such remainderman or reversioner may also recover damages from the life tenant for his failure or refusal to pay the taxes. The remainderman or reversioner is also given the right to redeem the land after it is sold. It is obvious that this statute was passed to protect the holder of the future interest, since under our present law the property itself is sold at the tax sale and not simply the interest of the delinquent.[73] In construing this statute our court has held that the payment of the taxes by the reversioner or remainderman is not a condition precedent to the institution of his action against the life tenant for forfeiture;[74] nor does he have to wait until there is a sale for taxes or until the foreclosure of the tax-sale certificate to institute his action for forfeiture, but may intervene before the sale and pay the taxes and sue to recover the amount expended therefor from the life tenant together with any damages accruing by virtue of the life tenant's failure or refusal to pay the taxes.[75] In all the decided cases the parties availing themselves of the statutory remedy of forfeiture were *vested* remaindermen whose estates immediately followed the life estate of the delinquent taxpayer. Suppose, however, the remainder had been contingent, for example: X to A for life, remainder in fee to such children of B as shall survive A. A fails to pay the taxes. What may the remaindermen do? The statute makes no pro-

[71] N. C. CODE ANN. (Michie, 1935) §7982; ARK. DIG. STAT. (Crawford & Moses, 1921) §10054; GEN. OHIO CODE (1930) §5688.

[72] N. C. CODE ANN. (Michie, 1935) §7982.

[73] Smith v. Proctor, 139 N. C. 314, 51 S. E. 889 (1905).

[74] Bryan v. Bryan, 206 N. C. 464, 174 S. E. 269 (1934).

[75] Smith v. Miller, 158 N. C. 98, 73 S. E. 118 (1911); Sibly v. Townsend, 206 N. C. 648, 175 S. E. 107 (1934).

vision for contingent remaindermen, as such, and the many questions pertaining to their remedies are left unanswered. In the case just stated, we do not believe that the living children of *B* could sue for the forfeiture of *A*'s life estate if the result of such an action would be to accelerate the vesting of the remainder.[76] Several possible remedies might be suggested of which the contingent remaindermen might avail themselves: (1) pay the taxes due on the land and sue the life tenant for reimbursement[77]—the docketed judgment therefor constituting a lien on the life tenant's interest; (2) obtain a mandatory injunction compelling the life tenant to pay the taxes.[78] Could *X*, the reversioner in the hypothetical case, bring an action under our statute against the delinquent life tenant for forfeiture of the latter's estate and obtain a judgment therefor which would effectually destroy the contingent remainder of *B*'s children by removing prematurely its freehold support? Since the statute was enacted primarily for the protection of the holders of future interests in the land, we do not believe that our court would sanction the activity of any one of them which would have the backfiring effect of destroying the validly created interest of any other.[79] The same reasoning could be employed if *B* held an intervening contingent remainder for life, and *C*, a vested remainderman in fee, should sue *A* to have his life estate declared forfeit for *A*'s failure to pay taxes. It remains a question of serious doubt whether, in the first place, the statutory remedy of forfeiture would be available to either the reversioner or the remainderman in such instances. We think that our court, in the absence of any guiding precedent, would be loath to invoke the doctrine of destructibility in this, another situation where it has never before been applied.

2. By forfeiture—(d) for contesting a will.

Our discussion thus far has been predicated on the assumption that the doctrine of destructibility has not been, either by statute or by judicial decision, declared officially extinct in North Carolina. The comparatively recent case of *Corl v. Corl*,[80] while it raises grave doubts as to the continued existence of the doctrine in this state, still leaves the

[76] Compare our discussion of the *Richardson* case, *supra* note 64, in the analogous situation where forfeiture for waste was involved.

[77] That such a remedy is available to the contingent remainderman may perhaps be inferred from a statement by the court in Riggsbee v. Brogden, 209 N. C. 510, 513, 184 S. E. 24, 26 (1936) that there is a "duty resting upon the life tenant to keep the property free from tax liens so that it may pass to the remainderman unencumbered by such liens."

[78] See RESTATEMENT, PROPERTY (1936) §189(1)(b).

[79] Compare the situation where, under N. C. CODE ANN. (Michie, 1935) §1744, a life tenant is permitted to bring suit for the sale of land which has become so unproductive the income therefrom will not pay the taxes, and in which suit the interests of contingent remaindermen are adequately protected. *Cf.* Stepp v. Stepp, 200 N. C. 237, 156 S. E. 804 (1930).

[80] 209 N. C. 7, 182 S. E. 725 (1935).

matter somewhat open to question. The case is unusual in that the problem of the destructibility of contingent remainders was raised when the life tenant contested the will creating the various interests and thereby brought about a premature destruction of the supporting freehold estate.

In the *Corl* case the testator devised lands and money to a trustee in trust for his son *B* for life, and in the event he should marry and have legitimate children, remainder after his death to said children; but should he die without leaving legitimate children, then to his nearest blood relatives in fee simple, discharged from any trust. The testator further provided that if any of his children or other beneficiary under the will should contest the will, the person so contesting should forfeit "all beneficial interest in the estate," which should then go to another son *G* in fee simple, discharged from any trust. *B* contested the will, and, upon *G*'s suit to have *B*'s interest forfeited, the trial court rendered judgment that *G* was entitled to the land in fee simple, discharged from any trust or remainders; and that he was the owner of all money and other personalty, freed from any trust. Upon appeal by the defendants, the Supreme Court reversed the decision of the lower court and held that *B*'s life estate only was forfeited to *G* who took the same discharged of any trust, and that the contingent remainders were not destroyed.

An examination of the court's opinion will reveal the fact that it "failed to explain the exact grounds for preserving the remainders" and that, as a consequence, "the future effect of the decision is problematical."[81] The case is of sufficient importance to warrant liberal quotation from the opinion. Said the court: "Does the forfeiture of all of [*B*'s] beneficial interest in his father's estate destroy the contingent interests limited after his life estate? The court below was of opinion that the inquiry should be answered in the affirmative. The law is otherwise. Note, Ann. Cas., 1917 A, 902 et seq.; 23 R. C. L., 560, 561. True, at the early common law it was said that every remainder requires a particular estate to support it, and a contingent remainder must vest during the continuance of the particular estate, or eo instanti that it determines. . . . The determination of the particular estate, therefore, by surrender, merger, tortious alienation, forfeiture, or otherwise, prior to the happening of the contingency upon which the remaindermen could take, would defeat the remainder for want of a particular estate to support it. . . . The rule was of feudal origin, based on the philosophy of feoffment, livery of seizin, etc. . . . But with the invention of intervening estates to trustees to preserve contingent remainders . . . , and later

[81] See an excellent comment on the case in (1936) 4 DUKE B. A. J. 108, 109.

by statute . . . , the law of conveyancing underwent quite a change in England, and much of the prior learning on the subject was confined to simple deeds or became obsolete." The general language just quoted is all that was said by the court on the subject of destructibility of contingent remainders. The court devoted the rest of its opinion to a construction of the testator's intent as to what *B* and *G*, respectively, should receive under the will. Despite the language of the will to the effect that all forfeited interests should go to *G* "in fee simple discharged of any trust," the court said, "The intention of the testator was to take from any beneficiary, who should contest the validity of his will, the interest intended for him or her thereunder, and to give such interest to [*G*], . . . discharged from any trust previously created in the will for the benefit of any who should contest the validity of the will." A careful reading of the opinion will not disclose whether the court intended to abrogate with finality the doctrine of destructibility in its application to all situations, nor will it indicate the exact basis upon which the contingent remainders in the instant case were preserved.

While it is true that the language of the opinion, in its broad implications, might be construed to show an intention on the part of the court to repudiate entirely the rule of destructibility, it is not altogether clear that the court entertained such an intention. Even though it could be said that it repudiated the doctrine as it applied to the facts of the case at hand, the court in no way refers to or expressly overrules the two early North Carolina cases of *Chessun v. Smith*[82] and *Flora v. Wilson*[83] in which the rule was invoked to destroy contingent remainders which had not vested before the *natural termination* of the particular estate. The only two North Carolina cases[84] referred to in the opinion were cited: the one, in support of the court's statement of the common law rule of destructibility; the other, to show the inapplicability of the Rule in Shelley's Case to a situation where the life tenant took an equitable estate and a legal remainder was given to the heirs of her body. Moreover, in answer to the general proposition that the forfeiture of *B*'s life estate destroyed the contingent interests limited thereon, the court stated, "The law is otherwise," but cited in support of its statement two general authorities[85] which merely collect the cases describing the various methods by which contingent remainders were destructible, together with some of the statutory modifications of the rule.

May we suggest, briefly, some of the ways in which the court in the

[82] See note 17, *supra*. [83] See note 20, *supra*.
[84] Carolina Power Co. v. Haywood, 186 N. C. 313, 119 S. E. 500 (1923); Payne v. Sale, 22 N. C. 455 (1839).
[85] Note Ann. Cas., 1917 A 902 *et seq.*; 23 R. C. L. 560-61.

Corl case might have entirely avoided any conflict with the destructibility rule. (1) Since the will set up a trust estate, the court might have construed the remainder to *B*'s children as an *equitable* contingent remainder. As such, it would not be destructible since the legal title and seisin would be in the trustee after, as well as before, the forfeiture of *B*'s life estate and consequently, there would be no "gap" in the seisin.[86] The opinion of the court tends to indicate that it actually, but unconsciously, achieved such a result since it held that the son, *G*, took the estate forfeited by *B* "discharged of any trust previously created for the benefit of any who should contest the validity of the will"—the inference being that the trust was preserved for the benefit of *B*'s children, the contingent remaindermen. (2) We agree with the suggestion offered by the commentator in the *Duke Bar Association Journal* that:[87] "In sympathy with a tendency to regard conditions subsequent on the particular estate as special limitations, the court might have interpreted the limitation over as a special limitation, so that *G* would have had a vested life estate in remainder which would support the contingent remainders."[88] (3) Or, on the basis of common law principles, it might be argued that, since a conveyance by *B* of his life estate would not defeat the contingent remainder,[89] then the court's construction of the limitation in the will, which had the effect of shifting to *G* the same interest *B* could have conveyed to him, should result in the preservation and not the destruction of the remainder. In either case there would still be adequate freehold support for the contingent remainder since *G* would have an estate for the life of *B* immediately preceding the remainder. An argument might reasonably be advanced that the failure of the court to avail itself of any of these possible solutions of the problem was indicative of that tribunal's desire to pronounce officially dead in this jurisdiction the rule of destructibility.[90]

It is a matter of regret that the court did not make itself absolutely clear on the subject, and that it did not take advantage of the opportunity it had to reject boldly an obsolete doctrine, which by virtue of statutes and judicial decisions no longer has any existence in twenty-two jurisdictions and which in five more states has been excluded at least to a substantial degree.[91]

[86] Astley v. Micklethrwait, 15 Ch. D. 59 (1880); Abbiss v. Burney, 17 Ch. D. 21 (1881); 1 SIMES, FUTURE INTERESTS (1936) §105.

[87] See note 81, *supra*.

[88] Citing, 1 SIMES, FUTURE INTERESTS (1936) §166. See also 1 FEARNE, CONTINGENT REMAINDERS (1845) 272.

[89] 1 BL. COMM. (Jones' ed., 1916) 940 n.

[90] See (1936) 4 DUKE B. A. J. 108, 109.

[91] For a collection of the statutes and decisions affecting the destructibility of contingent remainders, see RESTATEMENT, PROPERTY, EXPLANATORY NOTES (Tent. Draft No. 6, 1935) §282, at pp. 193-196. See POWELL, CASES ON FUTURE INTERESTS (2d ed. 1937) 635-637, for a note on *Statutory Enactments Concerning the Ex-*

A dictum in the case of *Lancaster v. Lancaster,*[92] decided a year and a half later than the *Corl* case, casts considerable doubt upon whether or not the court in the *Corl* case intended to eradicate completely the doctrine of destructibility. In the *Lancaster* case, which involved the right of a contingent remainderman to take under a will, there appeared in the opinion the following: "The respondent contends: 'If a contingent remainder becomes impossible of vesting because of the determination of the life estate before the contingency upon which the remainder was limited has happened—i.e., if the contingent remainder had perished it is the same as if it never existed. . . .' *The above principle is ordinarily true,*[93] but not applicable here." The court thus apparently gives some intimation that it still countenances the destructibility rule.

3 and 4. By merger—by surrender or otherwise.

According to Blackstone: "Whenever a greater estate and a less coincide and meet in one and the same person without any intermediate estate, the less is immediately annihilated; or, in the law phrase, it is said to be merged, that is, sunk or drowned in the greater."[94] Since a contingent interest is not deemed to be an estate, the operation of the law of merger would have the effect of destroying contingent remainders.[95] For example: suppose *T* should devise lands to a married woman for life, remainder in fee to her son if one should be born. The reversioner in fee (the heir of *T*) before the birth of a son conveys, by release, his reversion to the married woman. Her life estate would merge with the fee simple released to her and the son's contingent remainder would be destroyed because the life estate supporting it would cease to exist.[96] The same result would follow in the converse case, that is, if the tenant of the particular estate should surrender his estate to the reversioner in fee or to a vested remainderman in fee.[97] Or, suppose *T* should devise land to *A* for life, contingent remainder to *B* and his heirs. *T* dies and *A*, his only heir, inherits the reversion in fee. *A* could subsequently convey his life estate and reversion to *C* and thus destroy by the doctrine of merger *B*'s contingent remainder.[98]

What is the situation in North Carolina with reference to the destruction of contingent remainders by the operation of the merger doctrine? Only two cases have been found which might furnish any clue to the answer.

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tinguishability of Contingent Remainders; and note (1926) 11 CORN. L. Q. 408 for a discussion of the statutes and decisions eliminating or modifying the destructibility of contingent remainders.

[92] 209 N. C. 673, 676, 184 S. E. 527, 529 (1936).

[93] Italics ours.

[94] 2 BL. COMM. 177.

[95] 1 SIMES, FUTURE INTERESTS (1936) §102.

[96] Accord: Purefoy v. Rogers, 2 Wm. Saunders 380 (1670).

[97] 7 HOLDSWORTH, HISTORY OF ENGLISH LAW (1926) 109.

[98] Accord: Blocker v. Blocker, 103 Fla. 285, 137 So. 249 (1931).

In *King v. Rhew*[99] land was conveyed to *R* and his heirs in trust for *C* during her life, and at her death to be equally divided among any children she might leave her surviving, born of her marriage with her present husband. In a suit brought by *C*'s children, after *C*'s death, against the defendant who claimed the land by adverse possession under color of title under the defectively executed deed of *C* and her husband, the court ruled adversely to the plaintiffs on the ground that the statute of limitations having run against the legal title of *R*, the trustee, the interest of the contingent remainderman as well as that of the life tenant was consequently barred. Although not necessary to the decision of the case the court by way of dictum said: "Although the plaintiffs may not have been in existence at the time of the execution of the conveyance, the limitation could have been made by a deed (operating as a common law conveyance) directly to the wife, the inheritance during the contingency being either, as the old writers say, in abeyance or *in nubibus* or, according to Mr. Fearne, remaining in the grantor until the ascertainment of the persons who are entitled to take. Under such a conveyance, however, . . . the contingent limitations over could have been defeated by the destruction of the life estate." From this dictum it could possibly be inferred that a merger, operating either by way of release of the grantor's fee to the life tenant or by virtue of the life tenant's surrender of her interest to the grantor, would have been recognized by the court as a means of effectively destroying the contingent remainder.

The problem was more squarely presented in the case of *Winslow v. Speight*.[100] In that case the testatrix devised certain land to her two sons, *F* and *J*, for their lives, "and, should they or either of them die without issue, then in that case the interests of them both, or the interest of either one, shall revert back to my (testatrix's) nearest or living kin." The eighth item in the will provided: "My will and desire is that all the residue of my estate, if any, taking out the devises and legacies above mentioned, shall be equally divided among my three children." (A third child, also provided for in the will, died before this suit arose and her interests are not involved in the controversy.) The two sons, one of whom was unmarried and had no issue, the other of whom had three children, contracted to convey the land to the plaintiff and tendered him a fee simple deed therefor, but plaintiff refused the deed on the ground that the title was defective, and sued the sons to recover the option money which was to be returned if the title proved to be defective. The sons contended that, since the reversion in fee des-

[99] 108 N. C. 696, 13 S. E. 174 (1891).
[100] 187 N. C. 248, 121 S. E. 529 (1924).

cended to the testatrix's three children pending the happening of the events upon which the estate given over was to take effect, the conveyance to the plaintiff of the life estate and the reversion merged the life estate into the reversion and destroyed the contingent remainder to the testatrix's nearest or living kin. Although the court recognized the existence of the destructibility doctrine, it refused to allow its application in this case where on the same facts under the English common law the merger contended for by the defendants would have had the effect of destroying the contingent remainder. This being so, it might well be argued that the case represents a definite narrowing of the destructibility rule by our court by the elimination of merger as a destructive agent.

The court, in the *Speight* case, in holding that the two sons, the defendants, could not give an indefeasible fee simple title to the land, reached that conclusion upon a construction of the entire will to the effect that whatever interest the sons took in the land, they acquired it under the will and not, in any respect, by descent from their mother. Item eight of the will quoted in the preceding paragraph was the determining factor in such construction. The court reasoned that if, under the item of the will which gave the land to the two sons with limitations over, the married son should predecease his brother and the surviving brother should die without issue, then the latter's interest would go to the testatrix's nearest or living kin who would necessarily be other than the parties purporting to convey to the plaintiff. Obviously, the court was refusing to allow the doctrine of merger to upset what it conceived to be the decedent's testamentary scheme. Had the decision in this case been adverse to the plaintiff, then it would have followed that the defendants, in a subsequent equity suit, would have been entitled to a decree of specific performance of plaintiff's contract to buy the land, albeit the perfection of the vendor's title would have depended upon the destruction by merger of a contingent remainder. Perhaps the North Carolina court, in deciding the instant case, foresaw such a possibility, and thus shared with other authorities the view that since the destruction of contingent remainders "is regarded as an unconscionable transaction, equity will not encourage it."[101]

While perhaps it cannot be dogmatically said that the *Speight* case removes, beyond the possibility of doubt, merger as an agent operating effectively to destroy contingent remainders in North Carolina, yet

[101] 1 SIMES, FUTURE INTERESTS (1936) §107. *Cf.* Redfern v. Middleton's Executors, 1 Rice 459 (S. C. 1839); Bentham v. Smith, 1 Cheves Eq. 33 (S. C. 1840). In these cases the South Carolina court refused to grant specific performance of contracts to convey land where the perfection of the vendors' titles depended upon the destruction of contingent remainders by tortious feoffments.

from the decision one senses a rather definite feeling of hostility on the part of the court toward so ungracious a doctrine.[102]

5. By disseisin of, or adverse possession against, the life tenant.

Suppose land has been conveyed to *A* for life, remainder in fee to *B*'s eldest son who is yet unborn. *X* possesses the land adversely against *A* for the statutory period of limitation so that *A*'s right of action to recover the land is effectively barred, and his original life estate is thereby destroyed. Does this premature excision of *A*'s life estate destroy also the contingent remainder of *B*'s son, which at that time had not yet become vested? No case dealing with the problem has been found in North Carolina, and there is a paucity of decisions thereon in other jurisdictions. However, let us examine, briefly, some of the possibilities.

At common law, according to Fearne:[103] "If *A* be tenant for life with contingent remainder over, and tenant for life be disseised, all the estates are divested; but the right of entry of tenant for life will support the contingent remainders; but in this case, if the contingent remainder does not vest before such a descent be cast as will take away the entry of tenant for life within the statute of H. 8, c. 33, and drive him to his action, then is the contingent remainder gone; because there no longer subsists any right of entry to support it, that right being turned into a right of action." This means that when, by the death of the disseisor, or by any other means, the right of entry under a previous estate is lost, there is no longer a rightful estate capable of supporting a contingent remainder.[104] However, under the modern law of adverse possession the person dispossessed is generally deemed to be the owner of the land until the statute of limitations runs.[105] This is true under the North Carolina statutes.[106] And even though we grant that the original life estate of *A* is destroyed and at an end when the statute has run against him, it has been consistently held that the statute does not run against the holder of any future interest until the normal termination of the life estate, when the future interest becomes possessory.[107] Nor may the owner of the reversion in fee after the contingent remainder make entry, as may be inferred from Fearne's statement quoted above, to squeeze out the contingent remainderman.[108] Pro-

[102] A strong decision against the destructibility of contingent remainders by merger was rendered in McCreary v. Coggeshall, 74 S. C. 42, 53 S. E. 978 (1906), in which case the fact situation was somewhat similar to that of the *Speight* case.

[103] 1 FEARNE, CONTINGENT REMAINDERS (1845) 288.

[104] *Id.* at 286, n. e.

[105] 1 SIMES, FUTURE INTERESTS (1936) §101.

[106] N. C. CODE ANN. (Michie, 1935) §§428, 430, 446.

[107] 1 SIMES, FUTURE INTERESTS (1936) §776; Brown v. Brown, 168 N. C. 4, 84 S. E. 25 (1915).

[108] Kales, *Adverse Possession Against Reversioners and Remaindermen* (1919) 14 ILL. L. REV. 564, 565, 583.

fessor Kales argues, further, that if the disseisor of the life tenant, *A*, were held to acquire a new title for the life of *A*, this freehold should serve adequately to preserve from destruction the contingent remainder.[109] It would seem, therefore, that under the American authorities, including North Carolina, the disseisin of the life tenant resulting *prematurely* in the loss of his interest before his death would not destroy the contingent remainder dependent upon the life estate. *Sed quaere* as to the result, if the remainder has not yet vested when the life tenant dies.

We again call attention to the case of *King v. Rhew*,[110] discussed above in connection with the doctrine of merger, in which the North Carolina court held that the acquisition of title by an adverse possessor against a trustee destroyed not only the interest of the life tenant but also that of the contingent remaindermen. It will be readily seen that this case did not involve the destructibility doctrine as such, but proceeded on the well-recognized theory, as stated by Professor Simes, that: "For purposes of an action to recover the possession of land, the trustee represents the beneficiary, and his failure to sue binds the beneficiary."[111]

6. By life tenant's renunciation of his interest.

Suppose a testator devises land to *A* for life, remainder in fee to the children of the testator who shall survive *A*. *A* renounces and refuses to take his life estate, or *A*, being the testator's widow, dissents from the will and elects to take her dower intead of the testamentary provision made for her. How would the renunciation of the life estate affect the contingent remainder dependent for support upon such freehold? If we arbitrarily say that renunciation, like forfeiture, terminates the already effective life estate before the contingent remainder has vested, then, under the rule of destructibility, the remainder would fail and the reversioner would take the seisin in fee. By a dictum in the early case of *Flora v. Wilson*,[112] previously discussed in this article, the North Carolina court intimated that it might take a position that would lead to such a result. It suggested in that case that if the particular estate given the widow by the will were prematurely determined by her dissent from the will, the contingent remainder dependent upon the life estate would thereby be defeated. Later decisions, however, indicate that the court would now take a different position in the matter. For instance, in *Young v. Harris*[113] a testator devised certain land to trustees for the benefit of the testator's wife during her widowhood, and if she should ever remarry, the trustees were directed to distribute the

[109] *Id.* at 144.
[110] See note 99, *supra*.
[111] 3 SIMES, FUTURE INTERESTS (1936) §786.
[112] See note 20, *supra*.
[113] 176 N. C. 631, 97 S. E. 609 (1918).

property among the testator's next of kin "who would be entitled to the same at law." Shortly after the testator's death his widow dissented from the will and elected to take her dower. The question arose as to whether *J*, who was at that time the testator's next of kin and only heir at law, could by his deed convey an indefeasible fee simple title to the land. The court, without any mention of the doctrine of destructibility, held that the widow's dissent had accelerated *J*'s remainder and had vested in him complete title to the land subject only to the widow's dower. Although the court realized that perhaps *J*'s remainder was a vested one under the rule that the ascertainment of the "next of kin" normally would be referable to the death of the testator, it said: "But conceding this to be otherwise in the present instance, not only is there nothing in the will that forbids the application of the principle of acceleration . . . but it is clear from a perusal of the instrument that . . . the entire purpose in putting this estate in the hands of the trustees was to insure the proper maintenance of the testator's widow while she remained unmarried or until she died without having remarried, and that the distribution among the ultimate takers was only postponed in order the better to effect the primary purpose; and this purpose and the preceding interest conferred on the widow having been entirely removed by her dissent, the ultimate takers come into the immediate enjoyment of their rights to the extent that the same creates no interference with the interests which the law has conferred upon the widow." What would seem to be the effect of this decision? Our court has already definitely held that, by a widow's dissent from her husband's will giving her a life estate, the *vested* remainder in the will was accelerated; and that the will, in so far as provision therein was made for the widow, operated in the same manner as to the time of enjoyment by those entitled after her death, as if she had died prior to her husband.[114] In other words the remainderman, on this construction, takes by executory devise as if there had never been any life estate. The *Young* case, citing a number of vested remainder cases, seems to go further and hold, in effect, that a contingent remainder would be accelerated and would take effect in possession as an executory devise when the widow dissented even though the condition precedent to the remainder's vesting had not actually been fulfilled. Thus, the court, as indicated by the portion of the opinion quoted above, is giving effect to the testator's intent merely to postpone the remainderman's enjoyment of his interest for the benefit of the widow's preceding life estate. By such a construction the court departs from the inflexible rule of destructibility and preserves remainders which otherwise might have

[114] Baptist Female University v. Borden, 132 N. C. 476, 44 S. E. 47, 1007 (1903); Wilson v. Stafford, 60 N. C. 646 (1864).

been destroyed. Should the question be squarely presented the court would not want for authority to support its dictum in the *Young* case that contingent remainders are accelerated and not destroyed by the widow's renunciation of her life estate.[115]

No case has been found in this state where the question of destructibility was raised as a result of an ordinary life tenant's renunciation of his interest before the remainder vested. We suggest that, should such a case arise, the court could easily avoid application of the destructibility rule (certainly in a testamentary situation) by treating the renounced life estate as if it had never been created and then, reasoning from the anology either of the widow's dissent cases or of the lapsed devise cases,[116] give effect to the contingent remainder as an executory devise if and when the condition precedent is fulfilled.

STATUTES

We shall now give brief consideration to some North Carolina statutes with reference to any bearing they might have indirectly on the problem of destructibility. At the beginning of this article we pointed out that this state has not enacted any legislation expressly preserving from destruction contingent remainders.

By our statute of descents[117] any person born within ten lunar months after the death of his ancestor is deemed to be in being for inheritance purposes; hence if a contingent remainderman is begotten but not born when the particular estate terminates, his remainder is regarded as vested and not, therefore, subject to the rule of destructibility. This statute buttresses the same proposition already arrived at by a judicial decision[118] rendered without statutory guidance.

At common law if Blackacre were conveyed to *A* for life, remainder to the heirs of *B,* a living person, and if *B* outlived *A,* the contingent remainder to *B*'s heirs would fail, for the reason that since no one is the heir of a living person, there would be no ascertained person entitled to take the seisin at the termination of the particular estate.[119] The chances for the destruction of a contingent remainder on such a basis have been considerably lessened by virtue of a statute[120] which pro-

[115] Scotten v. Moore, 5 Boyce 545, 93 Atl. 373 (Del. 1914); Fox v. Rumery, 68 Me. 121 (1878), cited in the Young case; Cockey v. Cockey, 141 Md. 373, 118 Atl. 850 (1922); Christian v. Wilson's Ex'rs, 153 Va. 614, 151 S. E. 300 (1930).

[116] See Simmons v. Gooding, 40 N. C. 382, 389 (1848). "It is settled law, that where a particular estate is given by will with a remainder over, whether vested or contingent, the remainder takes effect notwithstanding the particular estate fails by the death of the person for whom it was intended, before the death of the testator."

[117] N. C. CODE ANN. (Michie, 1935) §1654, Rule 7.

[118] Flora v. Wilson, 35 N. C. 344 (1852), discussed in the first part of this article.

[119] 2 BL. COMM. 170.

[120] N. C. CODE ANN. (Michie, 1935) §1739.

vides that: "A limitation by deed, will, or other writing, to the heirs of a living person, shall be construed to be to the children of such person unless a contrary intention appear by the deed or will." If a child is born to *B* any time during *A*'s lifetime, under the statute the remainder immediately becomes vested in that child subject to being opened up to let other children of *B* born during *A*'s lifetime share therein.

At this point incidental mention might be made of two North Carolina statutes, which, although they in no way involve the common law rule of destructibility as discussed in this article, operate so as to affect seriously the rights of a contingent remainderman in a particular tract of land. One of them[121] provides that lands, in which there is a vested interest with a contingent remainder over either to persons not in being or to those who have not yet satisfied the condition precedent to the vesting of their interests, may by proper proceedings in court be sold or mortgaged for reinvestment or improvement purposes. While the contingent remainderman, by virtue of such sale or mortgage, may lose his rights in the particular tract of land involved, the statute impresses upon the fund derived from the sale or mortgage the same contingencies and limitations as were imposed upon the original property.[122] This statute facilitates the alienation of lands in which contingent future interests are held and at the same time affords adequate protection to the owners of such interests.

The other statute[123] permits the grantor or settlor in a voluntary deed or trust to revoke, by proper instrument, any future contingent interest limited therein to persons not *in esse* or to those whose interest cannot be determined until the happening of some future event, provided that such revocation takes place prior to the happening of the contingency which would precipitate the vesting of the future estates.

In 1715 the legislature of North Carolina passed a statute which is still effective law today, and which reads, in part, as follows: "All deeds executed and registered according to law shall be valid, and pass title and estates without livery of seizin, attornment or other ceremony."[124] Although the point has never been raised, we believe that this statute, in view of our court's construction of it, should play an extremely significant part in the determination of the existence of the destructibility doctrine in this state.

In *Savage v. Lee*[125] the question was raised as to whether or not a grantor could, after reserving a life estate for himself, create a valid

[121] *Id.* §1744.
[122] For the operative effect of this statute, see Springs v. Scott, 132 N. C. 548, 44 S. E. 116 (1903).
[123] N. C. CODE ANN. (Michie, 1935) §996.
[124] *Id.* §3308.
[125] 90 N. C. 320 (1884).

freehold estate in another person, such interest not to take effect in possession until the grantor's death. It was contended that the deed was void because it conveyed an estate of freehold to commence *in futuro*. It was held that the deed, operating under the Statute of Uses as a good bargain and sale, was effective to convey a future freehold estate to the grantee. In the opinion appeared the following significant language: "But independently of the statute of uses, we can see no reason why a deed in this state may not have the effect of passing a freehold estate *in futuro*. The reason why it could not be done at common law arose from the necessity of livery of seizin; but livery of seizin was abolished by our act of 1715, which declared that all deeds . . . registered . . . 'shall be valid and pass estates in land, without livery of seizin, attornment or other ceremony whatever.' *Ratione cessante, cessat et lex.* The object of this statute . . . 'is to dispense with the ceremony of livery of seizin, to substitute registration of the deed in lieu thereof, and to allow title to be passed by the deed. . . .' "[125a] It has also been held that all registered deeds of bargain and sale and covenants to stand seized to uses have been put on the same footing with feoffments at common law, with respect to seisin, the declaration of uses thereon, and consideration.[126]

As we have already pointed out, the doctrine of destructibility of contingent remainders had its origin in the two theories: (1) that there could be no gap in the seisin; and (2) that livery of seisin, being a presently operative mode of conveyance, an estate of freehold could not thereby be created to take effect in the future. Since the feudal requirement that someone always be seised of the land to prevent a gap in the seisin never existed in North Carolina; and since livery of seisin, as a mode of conveyance, has been abolished in this state; and since, independently of the Statute of Uses, a registered deed may have the effect of creating a freehold estate *in futuro*, it would seem to follow that all the common law bases upon which the destruction of contingent remainders was predicated have been removed. The reason for the rule having ceased, the rule itself ought to become extinct.

But what if the deed is unregistered? Our court has held that a deed is good and valid as between the parties thereto without registration,[127] and that the title vests, as against the grantor and all others except creditors and purchasers for value, from the delivery of the deed.[128] Here again, we would argue that a contingent remainder, even though created by an unregistered deed, should be held inde-

[125a] *Id.* at 324.
[126] Rowland v. Rowland, 93 N. C. 214 (1885).
[127] Weston v. Roper Lumber Co., 160 N. C. 263, 75 S. E. 800 (1912).
[128] Warren v. Williford, 148 N. C. 474, 62 S. E. 697 (1908).

structible since the title to the land passes by the delivery of the deed and not by the obsolete and outlawed delivery of the seisin.

By way of fortifying our position we call attention to the fact that the Kansas court in *Miller v. Miller*[129] repudiated the destructibility doctrine by a similar construction of the Kansas statute, which was worded in essentially the same language as our statute.

SUMMARY

As a result of our research, we find that although North Carolina has recognized the rule of destructibility it has not squarely applied it except in two early cases; that the court preserved the contingent remainder in one case where the rule, if applied, would have warranted the remainder's destruction; that contingent remainders can no longer be destroyed by the forfeiture of the life tenant's interest by reason of his tortious alienation or commission of crime; that it is doubtful if the life tenant's forfeiture for waste or failure to pay taxes would defeat the contingent remainder; that our court refused to recognize merger as an agent of destruction in a case where, at common law, the merger would have operated to defeat the remainder; that the situation where the life tenant loses his estate by adverse possession has not ever been passed upon; that the court has strongly indicated that it would preserve contingent remainders from destruction where the life tenant has renounced his interest; that in the *Corl* case, decided in 1935, the court in general language repudiated the doctrine of destructibility but left the matter open to question by failing to indicate the exact basis upon which it preserved the contingent remainders; and, finally, that by one statute a contingent remainder to a begotten but unborn child is made indestructible, and that by virtue of another statute abolishing livery of seisin, it could reasonably be argued that the common law rationale upon which the rule of destructibility is predicated no longer exists in this state.

It is a matter of no little wonder that in a state where the destructibility rule has so long obtained so few cases invoking the rule have been found. One can only conjecture that this paucity of decisions is perhaps attributable to: (1) the employment of the conveyancing device of trustees to preserve contingent remainders,[130] or (2) the ignorance of lawyers as to the operation of the rule of destructibility, or (3) the unwillingness of the legal profession to invoke the rule.

[129] 91 Kan. 1, 136 Pac. 953 (1913).

[130] That this device is not unknown in North Carolina, see King v. Rhew, 108 N. C. 696, 13 S. E. 174 (1891); Cameron v. Hicks, 141 N. C. 21, 53 S. E. 728 (1906).

CONCLUSION

We have reviewed the situation with reference to the destructibility of contingent remainders in North Carolina, not for the purpose of breathing the breath of life into a moribund doctrine, but for the purpose of showing such confusion and uncertainty in the law regarding the existence of the doctrine as would call for remedial legislation to settle the matter. The rule of destructibility, as a relic of the Middle Ages based on the feudal concept of seisin and of the transfer thereof, is a useless anachronism in our property law of today and should definitely be excised therefrom. Arbitrarily applied, the rule, in nearly every case, defeats the intention of the grantor or testator. The trend of judicial decisions and legislative enactments indicates a definite animosity to the continued existence of the rule. It was entirely eliminated in England by legislation in 1844, 1845 and 1877.[131] We have already pointed out that in America the rule has been eliminated either wholly or in part by legislation enacted in twenty-seven states.[132] In three jurisdictions the doctrine has been rejected by judicial decision.[133] The Property Restatement, in line with modern trends, announces that "when a remainder is subject to a condition precedent, the termination, before such condition precedent is fulfilled, of all prior interests created simultaneously therewith does not destroy the remainder".[134]

Shall we—to paraphrase the language of a court of common pleas of Pennsylvania—retain in North Carolina this unjust relic of feudalism when it is being abandoned everywhere?[135] We suggest that North Carolina, by statutory enactment, visit a merciful death upon the doctrine of destructibility and forever put an end to its crippled and confused wanderings through our real property law. This statutory euthanasia could very well take the form of an act suggested by Professor Kales, as follows:

> "No remainder or other interest shall be defeated by the determination of the precedent estate or interest prior to the happening of the event or contingency on which the remainder or expectant interest is limited to take effect, and any rule which requires a future interest which by possibility may take effect as a remainder to do so or fail entirely is hereby abolished."[136]

[131] 7 & 8 Vict. c. 76; 8 & 9 Vict. c. 106; 40 & 41 Vict. c. 33.
[132] See note 91, *supra*.
[133] Godfrey v. Rowland, 16 Hawaii 377 (1905); Miller v. Miller, 91 Kan. 1, 136 Pac. 953 (1913) (with the aid of a statute authorizing the creation of estates to commence in the future); Haywood v. Spaulding, 75 N. H. 92, 71 Atl. 219 (1908).
[134] 2 RESTATEMENT, PROPERTY (1936) §240.
[135] See Stewart v. Neely, 139 Pa. 309, 313, 20 Atl. 1002 (1891) (The Atl. report of this case does not contain the language referred to.)
[136] KALES, ESTATES AND FUTURE INTERESTS (2d ed. 1920) §106.