

1941

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Recommended Citation

Willard L. Eckhardt, *Destructibility of Contingent Remainders in Missouri, The*, 6 Mo. L. REV. (1941)
Available at: <https://scholarship.law.missouri.edu/mlr/vol6/iss3/2>

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THE DESTRUCTIBILITY OF CONTINGENT REMAINDERS IN MISSOURI

WILLARD L. ECKHARDT*

*"Let the sleeping dog lie."*¹

It has been asserted that the common law doctrine of destructibility exists in Missouri. It is the purpose of this article to show that this rule based on the obsolete doctrine of seisin ought not to exist in Missouri, and that under existing statutes and decisions this rule does not exist in Missouri.

I. THE COMMON LAW DOCTRINE OF DESTRUCTIBILITY OF CONTINGENT REMAINDERS²

So long as the feudal system was a functioning institution in both its political and economic aspects, there was vital significance in the rule that someone always must be seised of the land, in order to provide a responsibility for and a continuity of services. Conveyances were accomplished by a livery of seisin, which had to be a presently effective act. There was no difficulty in the conveyance of a fee simple absolute:

A enfeoffs *B* and his heirs.

The doctrine of seisin had a stagnating effect, however, on the creation of future interests in land in persons other than the grantor. There are at least three possible types of such future interests. (1) The first type is

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1. Accord: CHAUCER, *Troilus and Criseyde* III, 764; ALESSANDRO ALLEGRI, *Rime e Prose*. Compare COUNTRYMAN, *New Commonwealth* (1647) (lion); SHAKESPEARE, *Henry IV*, Part 2, act 1, sc. 2, l. 174 (wolf); NUÑEZ, DE GUZMAN, *Refranes, Salamanca* (cat).

2. This explanation of the common law doctrine of the destructibility of contingent remainders is intended to refresh the memories of lawyers who have forgotten this learning, and to provide a simplified background for lawyers who perchance never have explored our great heritage of English property law.

Citations of authorities have been omitted, and oversimplification in order to achieve sharp delineation results in some inaccuracies. No attempt is made to rise above a purely verbal level. That is matter for another article.

The standard work in the field, indispensable to the lawyer dealing with property, is a three volume treatise, SIMES, *FUTURE INTERESTS* (1936).

a future interest which is limited to come into possession without any support from or connection with a previously limited estate:

A enfeoffs C and his heirs when C attains 21;
A enfeoffs B for life, then to C and his heirs one year after
B's death.

Such a future interest violated the rule that livery of seisin must be a presently effective act, or that there could be no gap in seisin, and the future interest was void.³ (2) Another possible type is a future interest which is limited to take effect by cutting short a previously limited estate:

A enfeoffs B for life, but to C and his heirs when C is admitted
to the bar.

Such a future interest violated the doctrine that no one could take advantage of a condition except the grantor and his heirs. A more practical reason is that B might give up possession only in face of C's superior army. Furthermore, no future interest could be limited after a fee simple estate:

A enfeoffs B and his heirs, but if C marries D, then to C and
his heirs.

The future interest was void because it cut short a previously limited estate and because it was a fee after a fee. (3) The third possible type is a future interest limited to take effect in possession on the determination of a previously limited estate:

A enfeoffs B for life, then to C and his heirs.

The common law permitted only this type of a future interest in persons other than the grantor, and it was called a remainder. In the above example seisin was transferred from A to B at the time of the feoffment, and C took seisin from B. C's remainder is said to be vested,⁴ and it is indestructible. If the limitation is,

A enfeoffs B for life, remainder to C and his heirs if C is
admitted to the bar,

C is said to have a contingent remainder,⁵ that is, it is subject to a condition precedent. B takes seisin, and if C satisfies the condition before the

3. Compare the true-false examination question attributed to Professor Hanna. "A enfeoffs B and his heirs from and after April 1 next. Is the date appropriate?"

4. GRAY, RULE AGAINST PERPETUITIES (3d ed. 1915) 80: "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 freehold estates may determine."

5. *Ibid.*: "A remainder is contingent if, in order for it to come into possession the fulfillment of some condition precedent other than the determination of the preceding freehold estates is necessary."

termination of the life estate, his remainder becomes vested, and on the termination of *B*'s life estate seisin will pass to *C*. *B*'s life estate, a freehold, is called a particular estate and supports the contingent remainder. Because the condition precedent may never be satisfied, every contingent remainder in fee is followed by a reversion in the grantor. This reversion is said to be vested.⁶ If the condition is not satisfied at the determination of *B*'s life estate, *A*'s reversion becomes possessory, and *C*'s contingent remainder is destroyed. The fact that *C* later satisfies the condition is immaterial, and the fact that this result does violence to *A*'s intention is immaterial. If the land had not gone back to *A*, there would have been a gap in seisin between the determination of *B*'s life estate and the date when *C* is entitled to possession. This could not be permitted. If the land goes back to *A*, a subsequent transfer to *C* would be a transfer of seisin taking place in the future, which was not permitted. There could be no objection to the destructibility of contingent remainders so long as the feudal system was the functioning organization of society.

Not every interest of the third type could be created. If the limitation is,

A conveys to *B* for ten years, then to *C* and his heirs if he is admitted to the bar,

the future interest is void. Possession and seisin are distinguished at common law, the owner of an estate less than freehold (term for years) having possession, and the owner of a freehold estate (life estate, fee tail, and fee simple) having seisin. *B* takes possession only under his term for years, and the limitation of the future interest is an attempt to transfer seisin in the future when *C* satisfies the condition precedent.⁷ Hence the rule is that a contingent remainder must be supported by a particular estate of freehold. Only freeholders had the requisite seisin to carry to the remainderman.

The type of destructibility referred to above, where *C* fails to satisfy the condition precedent before *B*'s death, may be called natural destructibility. *B*'s life estate could be determined in other ways than by his

6. *Id.* at 91: "All reversions are vested interests. From their nature they are always ready to take effect in possession whenever and however the preceding estates determine."

7. An apparent exception is the limitation *A* conveys to *B* for ten years, then to *C* and his heirs. This would seem to be an attempt to transfer seisin in the future, but *C*'s interest is held effective with the verbalization that *C* takes a fee simple absolute subject to a term of years. *B* received possession for himself, and seisin for *C*.

death. If *B*, owning a life estate, should enfeoff *X* and his heirs, *X* acquires a tortious fee simple. *B*'s tortious feoffment would forfeit his life estate, leaving no particular estate of freehold to support *C*'s contingent remainder, and *C*'s interest would be destroyed. This might be called artificial destructibility. If *A* should convey his reversion to the life tenant *B*, or if *B* should convey his life estate to the reversioner *A*, the life estate would be determined by merger in the reversion. *C*'s contingent remainder would be destroyed because there would no longer be a particular state of freehold to support it. Merger became the most important method of artificial destruction of contingent remainders.

Several techniques could be used to avoid destructibility. One of the most frequently used devices was that of a trustee to preserve contingent remainders:

A enfeoffs *B* for life, remainder to trustees for the life of *B* to preserve contingent remainders, remainder to *C* and his heirs if *C* is admitted to the bar.

If *B*'s life estate were determined before his death, the vested remainder in the trustees would come into possession to support *C*'s contingent remainder. The above limitation is effective to prevent an artificial destruction of *C*'s contingent remainder. In the same way trustees could be provided to prevent a natural destruction of *C*'s interest.

Seisin was a common law doctrine. Equity never recognized the doctrine, with its stagnating effect on the creation of future interests. Equity permitted the creation of all three types of future interests described above, the springing type, the shifting type, and the successive type.

A bargains and sells to the use of *B* for life, then to the use of *C* and his heirs if *C* is admitted to the bar.

A gap between *B*'s equitable life estate and *C*'s equitable contingent remainder did not destroy the remainder, but equity gave effect to the limitation according to *A*'s intent. The rule is that an equitable contingent remainder is indestructible.

The Statute of Uses⁸ turned equitable estates into legal estates of the same *quantum* where one person was seised to the use of another. The first problem to face the law courts was whether to recognize as valid the new types of legal interests which law had formerly held void. These

8. 27 HEN. VIII, c. 10 (1536).

new interests were the springing executory interest, where there was no particular estate of freehold,

A bargains and sells to *B* and his heirs when *B* is admitted to the bar;

A bargains and sells to *B* for life, and one year after *B*'s death to the use of *C* and his heirs if *C* is admitted to the bar,

and the shifting executory interest where the future interest cut short a previously limited estate,

A bargains and sells to *B* and his heirs, but if *C* is admitted to the bar, to *C* and his heirs.

These new legal interests were held valid, and in the celebrated case of *Pells v. Brown*,⁹ were held indestructible. The next problem was the effect of a limitation of an equitable interest of the type which could have been created at common law without violating the common law restrictions—the contingent remainder. If executory interests are indestructible, if the feudal basis of the destructibility doctrine has been dead for several hundred years, and if the destruction of contingent remainders does violence to the grantor's intention, why should not contingent remainders be held indestructible?¹⁰

The true faith was reaffirmed in *Purefoy v. Rogers*,¹¹ in which it was held that an equitable contingent remainder made legal by the Statute of Uses was destructible. “. . . if there be one rule of law more sacred than another, it is this, that no limitation shall be construed to be an executory or shifting use, which can by possibility take effect by way of remainder . . .”¹² It now appears why one must distinguish so carefully between the contingent interests permitted by the common law, and the contingent interests not recognized by the common law before the Statute of Uses. The former are destructible even if equitable in origin, the latter are indestructible.

The total harm resulting from the doctrine of destructibility of contingent remainders, based on the obsolete doctrine of seisin, was not great in England, where a highly trained conveyancing bar existed. The destruction of a future interest subject to a condition precedent could be

9. Cro. Jac. 590 (K. B. 1620).

10. “It is revolting to have no better reason for a rule of law than that it was laid down in the reign of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since and the rule simply persists from imitation of the past.” Holmes, *The Path of the Law* (1907) 10 HARV. L. REV. 457, 469.

11. 2 Wms. Saund. 380 (K. B. 1670).

12. Lord St. Leonards, in *Cole v. Sewell*, 4 D. & War. 1, 27 (1843).

avoided by any lawyer who knew his precedents. Hard cases usually were the result of the ignorance of the conveyancer. This, of course, did not help the person who lost an estate contrary to the intention of the grantor or testator whose unfortunate choice of a lawyer caused the difficulty.

Thus the law stood in England in the early 1800's, before reform legislation. This is the body of law some persons allege is part of the Missouri common law in 1941.

II. REFORM IN ENGLAND

The nineteenth century was a period of great law reform. In England, reform of the law of property which began in that century culminated in the Law of Property Act, 1925.¹³ In 1845 it was enacted that a contingent remainder should not fail by reason of the determination by forfeiture, surrender, or merger of any preceding estate of freehold.¹⁴ This statute prevented destruction of contingent remainders in case of the premature determination of the supporting estate of freehold, but did not in terms preserve contingent remainders which had not vested at the normal determination of the supporting estate.

*Cunliffe v. Brancker*¹⁵ brought the matter to a head. Edmund Leigh devised Blackacre to trustees for one hundred and twenty years if his niece, Sarah, should so long live, to pay the rents to Sarah, then to her husband John for life, then to the children of John and Sarah who should survive Sarah. John died in 1871, survived by Sarah, who died in 1873. This suit was to determine whether the children surviving Sarah were entitled to the land, or whether the land was intestate property of Edmund Leigh. The court held that the children had contingent remainders, supported by John's life estate, and that the remainders failed not having vested at the termination of the life estate. The term of years in the trustees, not being a freehold, could not support a contingent remainder. The intent to benefit the children was clear, but they lost because of

13. 15 GEO. V, c. 20 (1925).

14. "A contingent remainder, existing at any time after the 31st of December, 1844, shall be, and, if created before the passing of this act, shall be deemed to have been, capable of taking effect, notwithstanding the determination, by forfeiture, surrender, or merger, of any preceding estate of freehold in the same manner, in all respects, as if such determination had not happened." 8 & 9 VICT. c. 106, § 8 (1845).

15. 3 Ch. D. 393 (1876).

the draftsman's omission of a sufficient estate in the trustees to preserve contingent remainders.

The sequel¹⁶ to *Cunliffe v. Brancker* was the enactment of the Contingent Remainders Act, 1877,¹⁷ in the following year. This act preserves contingent remainders which have not vested at the natural determination of the particular estate.

III. REFORM IN ILLINOIS

The history of the destructibility doctrine in Illinois should be of particular interest to Missouri lawyers. In the leading case, *Frazier v. Supervisors of Peoria County*,¹⁸ *A* granted Blackacre to *B* and the heirs of her body. The Illinois fee tail statute¹⁹ gave *B* a life estate, and the heirs of her body a contingent remainder. Before she had any children *B* reconveyed by quitclaim deed to *A*, who had the reversion. *A* conveyed by warranty deed to defendant, who in turn conveyed by warranty deed to plaintiff. The suit was for breach of covenants of title, and rescission. At common law the life estate and reversion would merge to determine the particular estate which supported the contingent remainders, thus destroying the contingent remainders and giving *A* a fee simple absolute. The court held, however, that the remainder was indestructible because it had been created by the fee tail statute.²⁰ This conclusion was not necessarily compelled by the statute, for its provisions were fully carried out when the fee tail was converted into a life estate and contingent remainder.

16. Underhill, in *A CENTURY OF LAW REFORM* (1901) 295.

17. "Every contingent remainder created by any instrument executed after the passing of this act, or by any will or codicil revived or republished by any will or codicil executed after that date, in tenements or hereditaments of any tenure, which would have been valid as a springing or shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation." 40 & 41 VICT. c. 33 (1877).

18. 74 Ill. 282 (1874).

19. The Illinois statute is identical, except for punctuation, with the Missouri statute.

MO. REV. STAT. (1939) § 3498: "In cases where, by the common or statute law of England, any person might become seized in fee tail of any lands, by virtue of any devise, gift, grant or other conveyance, or by any other means whatever, such person, instead of being seized thereof in fee tail, shall be deemed and adjudged to be, and shall become, seized thereof for his natural life only; and the remainder shall pass in fee simple absolute to the person to whom the estate tail would, on the death of the first grantee, devisee or donee in tail, first pass according to the course of the common law, by virtue of such devise, gift, grant or conveyance."

20. This case, based on a statute identical with the Missouri statute, should be very persuasive authority in Missouri that contingent remainders created by the fee tail statute are indestructible.

It looked as though Illinois would reject the doctrine of destructibility of contingent remainders.²¹ *Madison v. Larmon*,²² was a case involving life estates and contingent remainders, but the question of destructibility was not in issue. The trial court in its opinion, however, pointed out how the contingent remainders could have been destroyed, citing Fearne and Gray. The supreme court adopted the trial court's opinion *in toto*, and hence adopted the *dictum*.²³

In 1905 Professor Kales argued that contingent remainders had become indestructible at common law.²⁴ His argument was based on the expansion of *In re Lechmere & Lloyd*²⁵ to its logical conclusion.²⁶ Such a holding was not apt to appear in England because of the Contingent Remainders Acts of 1845 and 1877. "Why, however, should not some of our American jurisdictions hold the children's interest indestructible? In most States there is no statute, no binding decision upon the point, and no practice of conveyancers by which titles depend upon the fact that contingent remainders have been destroyed by forfeiture, surrender or merger. Here then, if anywhere, we may look for the completion, by judicial decision, of that law reform which Jessel inaugurated in *Lechmere v. Lloyd* . . . It is submitted, then, that in any American jurisdiction, even though its land laws may be founded upon those of England, and though there may be no Contingent Remainders Act in force, yet, if neither actual decision nor the practice of conveyancers has settled the law to the contrary, it may fairly be contended that there is practically no such future interest as a contingent remainder, that is, there is no rule of law which says that a springing future interest after a particular estate of freehold which may be turned into a vested remainder, or take effect in possession *eo instanti* upon the termination of the particular estate, must fail entirely unless it does so."²⁷

21. "It is believed, therefore, that the result reached by the Illinois Court upon this occasion exhibits a strong inclination to get rid, by any possible means, of the rule by which contingent future interests of the third class fail unless they take effect by way of succession." Kales, *Contingent Future Interests After a Particular Estate of Freehold* (1905) 21 L. Q. REV. 118, 137.

22. 170 Ill. 65, 48 N. E. 556 (1897).

23. Research has uncovered no such *dictum* in Missouri to encourage a *Bond v. Moore*.

24. Kales, *loc. cit. supra* note 21.

25. 18 Ch. D. 524 (1881).

26. But see Jenks, *Future Interests in Land II* (1905) 21 L. Q. REV. 265, contending that the destructibility of contingent remainders had not been done away with by judicial decision, in answer to Kales' article on page 118 of the same review.

The opposing arguments are summarized in *Destructibility of Contingent Remainders* (1906) 19 HARV. L. REV. 546.

27. Kales, *supra* note 21, at 136-137.

In the next year, 1906, Kales gave a scholarly address entitled "Reforms in the Law of Future Interests Needed in Illinois" at a meeting of the Law Club of Chicago.²⁸ "There are several rules of law—all of feudal origin—which either still expressly obtain in Illinois or at least have not been repudiated. The original feudal reasons for these rules have long since ceased to exist. If, then, they are now obsolete and absurd from the modern point of view, the legislature ought to rid our law of them . . . It must still be quite uncertain whether the ancient Rule making contingent remainders destructible is the law of this state. (See 21 Law Quarterly Review, 118, for an argument that it is not the law here) . . . Apparently, then, the Rule is law here. Thus far, no striking use has been made of it, and no hard cases of its application have appeared in our reports. But we are apt at any time to have presented the case which caused the total abolition of the Rule in England in 1877. In *Cunliffe v. Brancker* the limitations were in substance to A for life and then to such of A's children as survive A and his wife, B. A died first. SIR GEORGE JESSEL held that the gift to the children entirely failed. It would, it is believed, be a most excellent move if the legislature would put an end to the chance of such a result before a similar case actually arises to throw scandal upon the law."²⁹

Kales in 1906 was the scholar. Kales in 1908 was the advocate. *Bond v. Moore*³⁰ on its facts was hardly a case "to throw scandal upon the law." Testatrix in 1883 devised Blackacre to her son B for life, "but should he die without children, then the estate . . . shall go to my nearest relatives, in such proportions as the law in such cases does provide." B was the sole heir, and admittedly had a life estate by the will, and the reversion by descent. Later B married and had two children. In 1908 B conveyed to X, and X reconveyed to B, for the express purpose of destroying by merger the gift to the testatrix' nearest relatives, in order to give B a fee simple. B now seeks to register this title under the Torrens system. The court held the title was entitled to registration. The first problem, with which the dissent deals exclusively, is whether a remainder in favor of B's children should be implied by reason of the words "die without issue." The majority held no such remainder should be implied. The next problem of construction arose because B was the sole heir, hence if

28. Kales, *Reforms in the Law of Future Interests Needed in Illinois* (1906) 1 ILL. L. REV. 311, 374.

29. *Id.* at 374-377.

30. 236 Ill. 576, 86 N. E. 386 (1908).

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the testatrix' "nearest relatives" are determined as of her death, *B* will take the remainder. The court held, however, that the nearest relatives were to be determined as of the life tenant's death, excluding *B* from the class. The destructibility problem is squarely raised. The court sets out the orthodox doctrine and adopts it. *Frazer v. Supervisors of Peoria County*,³¹ was limited to its facts, a contingent remainder created by the fee tail statute. Albert M. Kales was of counsel for the successful plaintiff, and the opinion of the court reflects his masterly brief. One wonders what the decision would have been had Kales prepared the defendant's brief along the lines of his own earlier arguments. As suggested above, the case was an easy one on the facts for the adoption of the destructibility rule. The court could have given *B* a fee simple by a literal reading of the limitation, ascertaining nearest relatives as of the testatrix' death. The court gave *B* a fee simple by applying the destructibility rule. What the court took from *B* with its right hand, it gave back to him with its left hand. Under either construction the land stayed in the direct line of descent.

Bond v. Moore was followed by such wholesale carnage as probably never has been seen in any other jurisdiction.³² Testators' legitimate intentions were reduced to rubble. Succeeding cases were hard cases, hard enough "to throw scandal upon the law." A statute in 1921 settled the problem as to limitations created after that date.³³

In the meantime, the Illinois court in *Biver v. Martin*,³⁴ had adopted a unique theory to limit the doctrine it had embraced with so much fervor in *Bond v. Moore*. The same theory was applied in *Marvin v. Donaldson*,³⁵ where *A* conveyed by warranty deed to *B* for life, remainder to her lineal descendants. By descent and purchase *B* later acquired the reversion. The court held the contingent remainders were not destroyed by merger, because they had been created by a warranty deed. The grantor, who held the reversion, and those claiming under him, were estopped by his

31. 74 Ill. 282 (1874).

32. *Belding v. Parsons*, 258 Ill. 422, 101 N. E. 570 (1913); *Barr v. Gardner*, 259 Ill. 256, 102 N. E. 287 (1913); *Messer v. Baldwin*, 262 Ill. 48, 104 N. E. 195 (1914); *Smith v. Chester*, 272 Ill. 428, 112 N. E. 325 (1916); *Blakeley v. Mansfield*, 274 Ill. 133, 113 N. E. 38 (1916); *Benson v. Tanner*, 276 Ill. 594, 115 N. E. 191 (1917).

33. ILL. REV. STAT. (1937) c. 30, § 40: ". . . no future interest shall fail or be defeated by the determination of any precedent estate or interest prior to the happening of the event or contingency on which the future interest is limited to take effect."

34. 294 Ill. 488, 128 N. E. 518 (1920).

35. 329 Ill. 30, 160 N. E. 179 (1928).

warranty from destroying the contingent remainders. While the reasoning of the case may be questionable,³⁶ its effect in limiting the destructibility doctrine is desirable.

IV. MISSOURI AUTHORITIES

A. *Missouri Text Authorities*

There is very little discussion of the destructibility problem in Missouri by scholars. Silvers' treatise on *Missouri Titles* does not even mention the destructibility rule in its 581 pages.³⁷ This would indicate that Silvers considered the doctrine no longer existed in Missouri, or else that he overlooked the matter entirely. Gill in his treatise on *Tax Titles*³⁸ does not discuss the destructibility rule, but does cite *Fountain v. Starbuck*,³⁹ which contains one of the most powerful statements against destructibility in any jurisdiction.⁴⁰ In his larger treatise on *Missouri Titles*,⁴¹ Gill is evidently of the opinion that contingent remainders are not destructible. He does not discuss the doctrine, although there are several references to it.⁴² Gill lumps all future interests in persons other than the grantor into one amorphous class, remainders, thus recognizing no distinction between contingent remainders and indestructible executory interests.⁴³ He doubts if merger (the most frequent method of destruction) will be permitted contrary to the intent of the grantor.⁴⁴

The two leading text authorities on Missouri property law, Silvers and Gill, on which the bar of the state places great reliance, do not recognize the existence of the destructibility rule. Would it be fair for courts to

36. 1 SIMES, *FUTURE INTERESTS* (1936) § 106: "It appears that there is no historical basis for this doctrine. Just how a warranty of a contingent remainder would effect its destructibility is difficult to see. If one of the incidents of such a remainder is that the holders of the two vested estates between which it is interjected have a power to extinguish it, then it would seem that the grantor warranted it subject to that power."

37. SILVERS, *MISSOURI TITLES* (2d ed. 1923).

38. GILL, *MISSOURI TAX TITLES* (1938).

39. 209 S. W. 900 (Mo. 1919).

40. Gill, *op. cit. supra* note 38, at 73.

41. GILL, *MISSOURI TITLES* (3d ed. 1931).

42. *Id.* at p. 52, and § 813.

43. *Id.* § 768: "The word remainder, as now loosely used, includes all future interests, both valid common law remainders, and also those interests invalid as common law remainders that formerly could only be created as uses (trusts) or executory devises, because of their shifting or springing character."

44. *Id.* § 837: "Query as to whether a conveyance by the life tenant to a remainderman or vice versa, merges the estate, as it is contrary to the intention of the testator or grantor."

apply a doctrine that is not current among members of the profession⁴⁵—that is, fair to the clients whose property is at stake?⁴⁶

The law teachers are a little more cautious. Professor Manley O. Hudson, whose series of articles is the best work which has been done on Missouri property law,⁴⁷ did not discuss at any length the problem of destructibility. He assumed, however, that the rule did exist in the absence of statutory abrogation.⁴⁸ Professor Cullen assumes that contingent remainders are destructible in his article dealing with the rule of *Whitby v. Mitchell*, and the applicability of the rule against perpetuities to contingent remainders.⁴⁹ He cites no Missouri authorities.

In a recent article, Ely discussed the question whether contingent remainders created by the fee tail statute can be destroyed. He concludes that theoretically they are destructible by merger or tortious feoffment, but finds no decision so holding.⁵⁰ He makes a fetish of free alienability of land, and urges that the courts permit the destruction of contingent remainders created by the fee tail statute in order to increase alienability.⁵¹

In summary, Silvers and Gill, the books on titles most frequently used by the profession, ignore the destructibility problem, leading to the inference that no such rule exists. The law teachers, Hudson and Cullen, out of an extreme of caution, and in the absence of authority, assume the rule is still in force because it was a common law rule. A practicing lawyer, Ely, argues that destructibility should be recognized to increase free alienability.

B. Statutes

Contingent remainders created by wills could easily be held indestructible in order to carry out the testator's intention under the general statutory rule of construction:

45. "The artificial and highly technical rules of the ancient common law are not known or understood by the people generally or by the great majority of persons who are called upon to prepare conveyances . . ." *Frazer v. Supervisors of Peoria County*, 74 Ill. 282, 287 (1874).

46. ". . . there is a difference between declaring void what was previously valid and declaring valid what was previously void, and the latter may be done when the former would be improper short of legislative action." Hudson, *Executory Limitations of Property in Missouri* (1916) 11 U. OF MO. BULL. L. SER. 3, 49.

47. These articles appear in the U. OF MO. BULL. L. SER. Some of them are cited in this article.

48. Hudson, *Estates Tail in Missouri* (1913) 1 U. OF MO. BULL. L. SER. 5, 28; Hudson, *Land Tenure and Conveyances in Missouri* (1915) 8 *id.* at 3, 20; Hudson, *Executory Limitations of Property in Missouri* (1916) 11 *id.* at 3, 48.

49. Cullen & Fisher, *The Modern Rule Against Perpetuities and Legal Contingent Remainders in Missouri* (1936) 22 WASH. U. L. Q. 31, 48, 53, 54, 59, 62.

50. Ely, *Can an Estate Tail be Docketed During Life of First Taker?* (1931) 45 U. OF MO. BULL. L. SER. 3, 12-14, 19-21.

51. Compare Steiner, *Estates Tail in Missouri* (1939) 7 K. C. L. REV. 93, which ignores the destructibility problem.

“All courts and others concerned in the execution of last wills shall have due regard to the directions of the will, and the true intent and meaning of the testator, in all matters brought before them.”⁵²

Destruction of contingent remainders is clearly contrary to the testator's intention in most cases. The courts often append a qualification to the intent rule—“unless it contravenes some established rule of law.”⁵³ This exception to the intent rule undoubtedly includes the rule against perpetuities, and perhaps the rule against the creation of a new kind of inheritance.⁵⁴ At least the rule against perpetuities serves desirable social and economic purposes today. The destructibility rule is merely a trap for the unwary, serving no useful function in present-day society. Even if the destructibility rule had ever obtained in Missouri, it is submitted that it is not the kind of “established rule of law” the exception refers to, and that the statute should therefore control. Unfortunately, the statute in terms applies only to wills, and not to deeds, but the statute makes clear that the policy of the state is to carry out the grantor's intent, and the rule could be expanded to cover deeds.

Missouri has been prolific in the production of limitations purporting to create fees tail. The fee tail statute⁵⁵ converts the fee tail into life estate and contingent remainder.⁵⁶ One strong court, in a well reasoned opinion, held that a contingent remainder created by a fee tail statute identical with the Missouri statute was indestructible.⁵⁷ There is no reason why Missouri should not follow this authority.⁵⁸

The celebrated case of *Reeve v. Long*⁵⁹ made an important exception to the destructibility rule. *A* devised to *B* for life, remainder to *B*'s first son. *B* died, leaving his wife great with child. The question was whether this posthumous son could take, the objection being the gap in seisin between the termination of *B*'s life estate and the birth of the remainderman. The courts of Common Pleas and King's Bench unanimously held the remainder was destroyed, but the House of Lords held that the posthumous son

52. 1 MO. REV. STAT. (1939) § 568.

53. *St. Louis Union Trust Co. v. Hill*, 336 Mo. 17, 76 S. W. (2d) 685, 686 (1934), and many others.

54. *Johnson v. Whiton*, 159 Mass. 424, 34 N. E. 542 (1893).

55. MO. REV. STAT. (1939) § 3498. The statute is set out in n. 19, *supra*.

56. *Emerson v. Hughes*, 110 Mo. 627, 19 S. W. 979 (1892).

57. *Frazer v. Supervisors of Peoria County*, 74 Ill. 282 (1874). This case is discussed at p. 274, *supra*.

58. *Contra*: *Ely*, *loc. cit. supra* note 50. The fee tail case is the one where *Ely* would apply the destructibility rule, in order to increase alienability.

59. 3 Lev. 408 (K. B. 1695).

could take.⁶⁰ The professional judges were much dissatisfied, for at that time a decision changing the land law carried the same impact a constitutional law decision does today.⁶¹ "To obviate all doubts respecting the law in this case, the statute of 10 Will. III. c. 16.⁶² was passed, by which it was enacted, that where any estate is, by marriage, or any other settlement, settled in remainder to children, with remainders over, any posthumous child may take in the same manner as if born in the father's lifetime. It is singular that this statute does not expressly mention limitations or devises made by wills. There is a tradition, that, as the case of *Reeve v. Long* arose upon a will, the lords considered the law to be settled by their determination in that case; and were unwilling to make any express mention of limitations or devises made in wills, lest it should appear to call in question the authority or propriety of their determination. Besides, in the above case of *Reeve v. Long*, the words of the act may be construed, without much violence, to comprise settlements of estates made by will, as well as settlements of estates made by deed."⁶³

In the case of a contingent remainder created by deed, Missouri adopted by decision the exception set out in *Reeve v. Long*.⁶⁴ In 1845 Missouri enacted a statute based on the English statute:

"When an estate hath been or shall be, by any conveyance, limited in remainder to the son or daughter, or to the use of the son or daughter of any person to be begotten, such son or daughter born after the decease of his or her father shall take the estate in the same manner as if he or she had been born in the lifetime of the father, although no estate shall have been conveyed to support the contingent remainder after his death . . ."⁶⁵

The language is awkward and punctuation is lacking, but the purpose of the statute is clear in view of its origin.⁶⁶

60. ". . . as late as 1834 the House [of Lords] decided a case without the presence of any professional lawyer . . ." 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW (3d ed. 1922) 376-7.

61. "But all the Judges were much dissatisfied with this judgment of the Lords, nor did they change their opinions thereupon, but very much blamed Baron Turton for permitting it to be found specially where the law was so clear and certain." *Reeve v. Long*, 3 Lev. 408 (K. B. 1695).

62. 10 & 11 Wm. III c. 16 (1699); 4 STAT. (1769) 13-14.

63. 2 CO. LITT. 298a, n. 3.

64. *Aubuchon v. Bender*, 44 Mo. 560 (1869). This case is analyzed and discussed on p. 286, *infra*.

65. MO. REV. STAT. (1939) § 3502. The omitted part reads as follows: "And hereafter an estate of freehold or of inheritance may be made to commence in future by deed, in like manner as by will." This was not in the original English statute, and has no connection with the posthumous child case. This part of the statute is discussed on p. 286.

66. The statute is meant to cover the following case: A grants or devises to B for life, remainder to B's children. The statute saves the contingent remainder for B's posthumous child. Literally the statute might be applied to the following

The end is not yet. In *Miller v. Miller*,⁶⁷ Burch, J.,⁶⁸ completely abolished the destructibility of contingent remainders, in a masterly opinion based on a statute identical with a Missouri statute. In 1904 *A* granted to *B* for life, remainder for life to *B*'s wife *C*, remainder in fee to the surviving issue of *B*. In 1905 *B* repudiated his life estate. In 1906 *C* bought *B*'s life estate at an execution sale for alimony. *A* then brought this action to cancel the conveyance and to quiet title against *B*, *C*, and two children of *B* and *C*. *A* argued that the contingent remainders had been destroyed by a lack of a particular estate to support them. The court held that the contingent remainders were not destroyed. The pertinent part of the opinion is worth quoting.

"The territorial legislature of 1855 passed an act relating to conveyances which dealt with the subject of the creation of future estates as follows:

"When an estate hath been, or shall be, by any conveyance, limited in remainder to the son or daughter, or to the use of the son or daughter of any person to be begotten, such son or daughter, born after the decease of his or her father, shall take the estate, in the same manner as if he or she had been born in the lifetime of the father, although no estate shall have been conveyed to support the contingent remainder after his death. And, hereafter, an estate of freehold, or of inheritance, may be made to commence in future by deed, in like manner as by will." (Statutes of Kansas Territory, 1855, ch. 26, § 9.)⁶⁹

"In 1859 the act of 1855 regulating conveyances was revised, and section 9 was condensed and restated as follows:

"Estates may be created, to commence at a future day." (Kansas Statutes, 1859, ch. 30, § 6.)

case: *A* grants or devises to *B* for life, remainder to the children of *C*. *C* dies, *B* dies, and then a posthumous son is born to *C*. Does the statute apply?

MO. REV. STAT. (1939) § 3503, provides: "A future estate, depending on the contingency of the death of any person without heirs or issue, or children, shall be defeated by the birth of a posthumous child of such person, capable of taking by descent." This Section should not be confused with Section 3502. Section 3503 applies to the following type limitation: *A* grants to *B* and his heirs, but if *B* dies without issue him surviving, then over to *C* and his heirs. A posthumous child is born to *B*. *C* will not take. Whether the posthumous child takes depends on whether *B* still owns the land at his death, as the posthumous child takes by descent if at all and not by purchase. As to the validity in Missouri of a shifting executory interest, see Hudson, *supra* note 46, at 14-29.

67. 91 Kan. 1, 136 Pac. 953 (1913).

68. Rousseau A. Burch is one of the great judges in the United States. His technique in the principal case is as beautiful as anything Cardozo has done. See Burch's opinion in *Foote v. Wilson*, 104 Kan. 191, 178 Pac. 430 (1919).

69. This section is identical with Mo. REV. STAT. (1939) § 3502. The meaning of the second sentence is discussed in Eckhardt, *The Work of the Missouri Supreme Court for the Year 1938 (Property)* (1939) 4 Mo. L. Rev. 419, 419-420.

“This act remained in force until repealed in 1868, when another revision occurred. In this revision section 6 of the act of 1859 was omitted and the subject was covered by a declaration as general as it was possible to make.

“ ‘Conveyances of land, or of any other estate or interest therein, may be made by deed, executed by any person having authority to convey the same, or by his agent or attorney, and may be acknowledged and recorded as herein directed, without any other act or ceremony whatever.’ (Gen. Stat. 1868, ch. 22, § 3.)”⁷⁰

“The words, ‘conveyances of land,’ mean, of course, the land itself in fee simple absolute. The words, ‘any other estate or interest therein,’ include estates of freehold and less than freehold, of inheritance and not of inheritance, absolute and limited, present and future, vested and contingent, and any other kind a grantor may choose to invent, consistent, of course, with public policy.

“The doctrine of the particular estate arose from the necessity under the feudal system of always having a tenant to fulfill feudal duties, defend the estate, and represent it so that other claimants might maintain their rights. The only way to pass a freehold estate was by livery of seisin which operated immediately or not at all, and if the freehold became vacant the lord had an immediate right of entry and all limitations of the tenancy came to an end. The result was that in order to create a freehold estate, the enjoyment of which was to be postponed to a future time, it was necessary to support it by a precedent particular estate taken out of the inheritance, and to make livery of seisin to the particular tenant, which by fiction inured to the remainder man or remainder men. A much more liberal and equitable doctrine applied to the transmission of estates by will.

“ ‘An executory devise of lands is such a disposition of them by will, that thereby no estate vests at the death of the deviser, but only on some future contingency. It differs from a remainder in three very material points; 1. That it needs not any particular estate to support it. 2. That by it a fee-simple, or other less estate, may be limited after a fee-simple. 3. That by this means a remainder may be limited of a chattel interest, after a particular estate for life created in the same.’ (2 Bl. Com., p. *172.)

“The legislature of 1855 placed conveyances by deed on the same footing as wills so far as the creation of future estates was concerned, but following the lead of the legislatures of some of the older states, the Kansas legislature of 1868 undertook not only to permit the granting of

70. This section is identical with Mo. Rev. Stat. (1939) § 3401.

future estates but to abolish other common-law restrictions on alienation not suited to allodial tenures and modern conveyancing, and to make transfers of interests in land as free as possible. The concluding portion of section 3 of the act of 1868, quoted above, expressly abolishes the common-law ceremony of livery of seisin, which stood as an insuperable bar to the creation of freeholds to begin *in futuro* unless supported by a particular estate. The language was adopted from statutes of other states, which usually provided that deeds duly acknowledged and recorded should be valid and pass estates in land 'without livery of seisin, attornment, or other ceremony whatever.'

"It follows that the remainders to [C] and to the [issue] of [B] do not require the support of the life estate to [B] in order to be valid."⁷¹

The Missouri statute is identical with the one relied on in *Miller v. Miller* to completely abolish the destructibility rule. No reason is perceived why Missouri should not adopt Burch's opinion if the case arises.⁷²

C. *Missouri Decisions*

A diligent search has been made for Missouri cases, using the usual media, including the Digest System and *Corpus Juris*. Very few cases were found in this way. Most of the cases were turned up in research on other topics, and in fishing expeditions. It may be that other or better cases exist in Missouri, but if they do they lie buried in an uncharted waste.

1. Cases where remainderman fails to satisfy a condition precedent

A contingent remainderman must satisfy any conditions precedent in order to take. It is sometimes said that the failure of a contingent remainderman to satisfy a condition precedent destroys the remainder. Such a destruction is simply carrying out the intention of the creator of the interest, and as such it is desirable. This kind of destruction is very different from either the natural or artificial destructibility which is

71. The case is approved, and the effect of the statute is ably and exhaustively treated in Foster, *Does the Doctrine of Destructibility of Contingent Remainders Exist in Nebraska?* (1928) 6 NEB. L. BULL. 390.

72. The court in *Miller v. Miller* analyzes the limitation as creating a life estate, a remainder for life, and contingent remainders in fee. This is the correct analysis. An alternative construction is to consider that B's repudiated life estate never existed at all, by a fiction of relation back. Then any future interest which is not accelerated must be an executory interest. Executory interests of course are indestructible. This executory interest construction was used in *Crossan v. Crossan*, 303 Mo. 572, 262 S. W. 701 (1924), to avoid destructibility.

based on obsolete feudal doctrines and which defeat the creator's legitimate intention.

In *Owen v. Eaton*,⁷³ T bequeathed the interest on \$2500 to his widow for life, and the principal at her death "to my son, Lanson Eaton, or his heirs if he should not be alive." Lanson Eaton died before the life tenant. The court held that he had a remainder subject to the express condition precedent of survival, and consequently he took nothing when he failed to survive.⁷⁴ In *Donaldson v. Donaldson*,⁷⁵ A conveyed to B for life, then to his children in fee, "and if he has not children alive then one-third of the real estate is to go to his widow and the rest to return back to his parents." One child of the life tenant conveyed his interest and then predeceased the life tenant. The court held the remainder was contingent on surviving the life tenant, that the condition had not been satisfied, and that, therefore, the transferee of the contingent remainder got nothing. Both of these decisions are sound.

2. *Dicta* recognizing the destructibility rule

No Missouri case has been found which holds that a contingent remainder is destructible by the determination of the particular estate of freehold. Not even a deliberately stated *dictum* in favor of destructibility has been found.

The destructibility rule has been mentioned without disapproval in two Missouri cases by way of *dictum*. In *Payne v. Payne*,⁷⁶ A conveyed to B for life, but no remainder was expressed. In reaching the obvious conclusion that there was no remainder, the court discussed remainders generally, saying in part: "A remainder is supported and preceded by a particular estate, and is created at the same time and by the same instrument."⁷⁷ This was pure *dictum*. In *Norman v. Horton*,⁷⁸ the court again discussed remainders generally, and quoted from Blackstone: "Contingent or executory remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect, either to a

73. 56 Mo. App. 563 (1894).

74. The issue in the case does not appear from the report. The decision is that "the sum of money indicated should be paid to his heirs upon the death of the wife." (p. 569) The court then says (p. 571), "It was no gift to Lanson or his heirs (claiming by descent) unless he was alive at the time fixed for his enjoyment of the gift." It would seem to make no difference from the point of view of the executor whether the heirs took by descent or by purchase.

75. 311 Mo. 208, 178 S. W. 686 (1925).

76. 119 Mo. 174, 24 S. W. 781 (1893).

77. *Id.* at 178.

78. 344 Mo. 290, 126 S. W. (2d) 187 (1939).

dubious or uncertain *person*, or upon a dubious or uncertain *event*; so that the particular estate may chance to be determined, and the remainder never take effect. 2 Bl. Comm. *168, *169.' ”⁷⁹ The statement was *dictum*, for destructibility was not in issue. In both cases the *dicta* were neither pertinent, nor made after deliberation, but were thrown in as makeweight in general discussions taken largely from texts.

The few other cases which recognize the doctrine only to refuse to apply it are mentioned in subsequent sections.

3. Case holding contingent remainder in posthumous child is indestructible

The only case in Missouri which contains a discussion of destructibility and indicates that the court understood the significance of the problem and its historical background is *Aubuchon v. Bender*.⁸⁰ In this case, Missouri by judicial decision⁸¹ applies to deeds the rule of *Reeve v. Long*,⁸² that where land is devised to *B* for life, remainder to his children, a posthumous child may take. This rule, of course, permits a gap in seisin between the life tenant's death and the birth of the remainderman.⁸³

79. *Id.* at 298.

80. 44 Mo. 560 (1869).

81. The conveyance was made in 1844, and therefore was not controlled by the statute adopted in 1845. MO. REV. STAT. (1939) § 3502.

82. *Reeve v. Long* and its ramifications are discussed on p. 280, *supra*. *Reeve v. Long* was concerned with a limitation in a will.

83. The facts of the case were as follows: Adolph Dantin had a wife, Cecile, and five children by her, Adolph, Francois, Cecile, Therese, and Louise. In view of a contemplated divorce which was granted in May, 1844, Adolph, in April, 1844, executed a covenant to stand seised of certain real estate "for his own use during his natural life, and after his death the use, benefit, usufruct and title to the same shall revert to and vest in his said five children above named, and such other children in lawful wedlock by him begotten as shall be living at the time of his death, and their heirs, without the power on the part of said Adolph to sell, alienate, in any wise encumber, or dispose of said lot of ground and appurtenances, for a period longer than his natural life." Four or five years later Adolph married Amanda, by whom he had six children, two of whom predeceased Adolph, and one of whom was posthumous. In 1857 Adolph conveyed part of the premises to Castello, in trust for his wife Amanda for life, remainder to their joint issue. Adolph also made a will in 1853, giving everything to Amanda during widowhood, remainder to her children by him. Adolph died in 1859. The divorced wife, Cecile and her children bring ejectment for the land against Amanda, but Amanda died pending the suit, and the suit was revived against her executor Bender, and her four minor children.

The court construed the limitation in the settlement as creating a life estate in Adolph, vested remainders in his children by Cecile, and remainders contingent on surviving in his children by Amanda. On the basis of this analysis, *Reeve v. Long* was adopted by decision.

Even though I weaken the authority of a case supporting my contention that contingent remainders are indestructible, I must say that the court's analysis of this limitation is open to question. At common law a man could not convey to himself, hence Adolph did not create a life estate in himself. Livery of seisin had to be a present act, and could not take effect in the future; hence the interest in the children could not have been created at common law, but is

The court in all solemnity proclaimed a declaration of independence in property law. "Secondly, it appears that one of the children of Amanda Dantin, was born after the death of her husband, and plaintiffs also claim that he has no interest in the remainder, as he was not living at the time of his father's death. In the days when subtleties of statement were suffered to control rights of property and inheritance, it was held that a posthumous child, not being *in esse*, could not take a contingent remainder, unless an intermediate estate was provided upon which it could rest. *But the practical sense of modern jurisprudence has so sifted that vast pile of wisdom and rubbish, comprising the common law of tenures, that justice and reason are no longer the slaves of technical consistency.* A child unborn will now not only inherit all manner of estates, but take remainders, whether vested or contingent, as though living when the particular estate determined; and it matters not whether, in the technical statement of the case, we say that the estate was suspended until his birth, or that it vested *en ventre sa mere*, or vested in the person next entitled to it, and divested and reinvested at his birth, it is settled by adjudication as well as legislation that the remainder-man shall not be deprived of his estate, although born after the determination of the particular estate. . . . This statute when adopted by us was but an affirmance of what had already become the law."⁸⁴ (Italics mine)

4. Cases calling a contingent remainder an executory interest and holding it indestructible

The conceptual distinction between remainders and executory interests was sharply drawn at common law. *Purefoy v. Rogers*⁸⁵ provided a practical reason for distinguishing the interests, conceptual contingent remainders being destructible, and conceptual executory interests being indestructible.

effective as a springing executory interest after the Statute of Uses. The proper construction, therefore, would seem to be a fee simple defeasible in Adolph, subject to a springing executory interest in the children of both marriages. Such an executory interest everywhere would be indestructible by acts of the parties, and the posthumous child could take without any question of a gap in seisin. The only question as to the posthumous child would be whether he fell under the description "living at the time of [Adolph's] death." This problem could be resolved easily as a matter of intention. Hence the five children of the first marriage, and four of the second marriage are tenants in common, each with one-ninth interest, (ignoring the descent of the share of Francois, who died in 1845). See my discussion of *Goins v. Melton*, 343 Mo. 413, 121 S. W. (2d) 821 (1938), in *The Work of the Missouri Supreme Court for the Year 1938 (Property)* (1939) 4 Mo. L. Rev. 419, 419-21.

84. 44 Mo. 560, 568 (1869).

85. 2 Wms. Saund. 380 (K. B. 1670).

This article is an argument that contingent remainders also are indestructible in Missouri. Other alleged differences will be considered in subsequent articles. If the incidents of contingent remainders and executory interests are the same, there is no longer any reason to perpetuate their conceptual differences.

In Missouri contingent remainders and executory interests were treated as separate concepts by statute as early as 1835.⁸⁶ The first case in Missouri to consider the validity of a springing executory interest by deed was *O'Day v. Meadows*.⁸⁷ In this case is a fair text statement of the learning on executory interests. The best text discussion is by Manley O. Hudson.⁸⁸

Already the Missouri court has gone far to obliterate any distinction between the two concepts. Part of this process was unintentional.⁸⁹ Part was the result of the court's willingness to call a contingent remainder an executory interest if that would prevent a destruction of the interest.

In *Crossan v. Crossan*,⁹⁰ testator devised to his widow for life, "after which to revert to my daughters, Ida . . . and Rebecca . . . provided they shall well and tenderly care for my said wife . . . during her declining years . . ." The widow renounced under the will. This suit was for a construction of the will and partition. The plaintiffs are the heirs of the testator, and the defendants are the daughters Ida and Rebecca. The trial court held that the widow's renunciation did not destroy the daughters' contingent interest, and that the fee was vested in the testator's heirs, subject to his widow's dower, and to divestment if the daughters comply with the condition. The case was affirmed on this point. "It is suggested that the devise to the daughters was a contingent remainder, and that the nullification of the particular estate destroyed the remainder. That is true. It destroyed the remainder, as such. It did not destroy the devise to the daughters, as such. When the renunciation of the will ended the life estate, then the residence property stood as if testator

86. MO. REV. STAT. (1835) § 4; MO. REV. STAT. (1939) § 1715: "In case . . . the ownership of the inheritance shall depend upon an executory devise, or the remainder shall be contingent, so that such parties cannot be named, the same shall be so stated in the petition."

87. 194 Mo. 588, 92 S. W. 637 (1906).

88. Hudson, *loc. cit. supra* note 46.

89. In *Buxton v. Kroeger*, 219 Mo. 224, 117 S. W. 1147 (1909), the court gropes in a miasma of contingent remainders and executory interests for a clue to an analysis of the limitation. The proper interpretation of the limitation may be debatable, but none of the opinions is at all close, the majority opinion being the worst.

90. 303 Mo. 572, 262 S. W. 701 (1924).

had never provided for a life estate for his wife, but had first devised the residence property to his daughters upon the same condition as now appears in the will. . . . The change wrought by the renunciation merely changes the technical name given the devise to the daughters, but does not affect the substance of that devise, or defeat the intent of the testator in imposing upon his daughters the condition named in the will."⁹¹ Destructibility is avoided by construing what was originally a contingent remainder as an executory interest, on the fiction of relation back.

In *Buckner v. Buckner*,⁹² there was a devise in 1876 to testator's widow for life, remainder to the children of testator's son. Eight children were born to the son before the widow's death in 1892, and thereafter three more were born. In a suit for a construction of the will, the trial court excluded the afterborn children. The supreme court reversed the decision of the lower court, saying: "The important question is to determine who were intended by these terms to become the owners of the remainder devised And we hold it was not the intention of the testator to exclude from participancy in the devise of said remainder interest, any of the children of his son born of a lawful marriage, whether before or after the death of the life tenant or their descendants. Unless this intention of the testator is opposed to some principle of public policy or rule of law governing devises of estates, it must be carried out Such limitations over are contingent remainders or executory devises as the case may be. In the case at bar the limitation over became a vested remainder in the lawful children of R. A. Buckner at the death of the life tenant who took the title, subject however, to an executory devise to such other children as should be born to him in lawful wedlock, who when born will *eo instanti* become cotenants with those born before."⁹³ Had the problem of destructibility been mentioned by the court, the holding would be decisive.⁹⁴

The class gift cases present a very difficult problem of analysis. If no children are yet born, then the future interest is a contingent remainder. When the first class member is born, he is said to take a vested remainder which opens up to let in children born later. If the afterborn children

91. *Id.* at 580, 262 S. W. at 703.

92. 255 Mo. 371, 164 S. W. 513 (1914).

93. *Id.* at 375, 377.

94. *Contra*: *Festing v. Allen*, 12 M. & W. 279 (Ex. 1843); *White v. Summers*, [1908] 2 Ch. 256. Compare *In re Lechmere & Lloyd*, 18 Ch. D. 524 (1881).

Missouri accomplished what the English courts were unable to do.

take by way of remainder, their interest is destructible at common law.⁹⁵ If they take by way of executory interest, their interest is indestructible and the testator's intent is carried out.⁹⁶ It is submitted that *Buckner v. Buckner* is sound.⁹⁷

5. Cases holding a contingent remainder is not destructible by merger

Determination of the particular estate by merger in the reversion was the device used most often at common law for the artificial destruction of contingent remainders. Missouri has a number of cases holding on the facts that a contingent remainder is not destroyed by merger. In none of these cases did the court discuss merger, although destructibility was extensively discussed in one of the cases. Nevertheless, a clear holding on the facts is entitled to considerable weight as a precedent. These cases require detailed analysis.

In *Schee v. Boone*,⁹⁸ the Missouri court held on the facts that a contingent remainder was not destroyed by merger. John Mantle died testate in 1906, devising Blackacre to his widow for life, then "to my said daughter Loretta B. Schee and to the heirs of her body at her death." The testator was survived by his widow and two daughters, Loretta and Elizabeth. The widow died. Loretta had two sons, Frank and John. In 1914 John and his wife and the life tenant Loretta quitclaimed to Frank. In 1917 John died, leaving surviving as his sole heir his daughter, Edna, the defendant. At a date not mentioned, Elizabeth, the other daughter of the testator, quitclaimed to Loretta who in 1919 quitclaimed to Frank. Frank now brings suit for construction of the will, and to have his title declared absolute. The defendant is the minor Edna who "is the only person interested in the lands other than the plaintiff, her interest being that of an apparent heir of Loretta B. Schee, as a holder of a contingent interest under the will of the testator."⁹⁹ Judgment for the defendant was affirmed

95. Compare *Aubuchon v. Bender*, 44 Mo. 560 (1869), where later class members are said to take by way of contingent remainder.

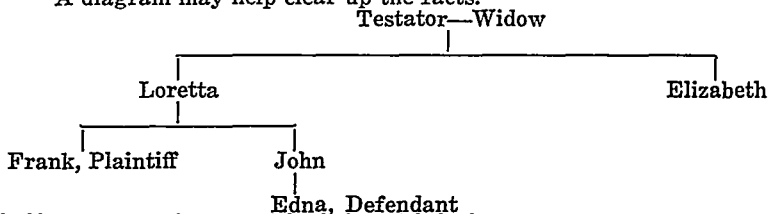
96. See 1 SIMES, *FUTURE INTERESTS* (1936) § 61.

97. Compare *Barkhoefer v. Barkhoefer*, 204 S. W. 906 (Mo. 1918).

98. 295 Mo. 212, 243 S. W 882 (1922).

99. *Id.* at 219.

A diagram may help clear up the facts.



by the supreme court. The judgment was not more particularly set out. In effect it must have been that there was still an outstanding contingent remainder. The court said that the remainder was contingent because the identity of the remaindermen could not be established until the life tenant's death. As heir apparent John had a contingent remainder, but when he predeceased the life tenant his interest dropped out, and his daughter, the defendant, heir of the body of the life tenant, had a contingent remainder.

The facts of *Schee v. Boone* present a typical situation for the application of the doctrine of merger. At the time of the suit Frank had a present life estate, and also the reversion.¹⁰⁰ Merger should result if it is permitted in the jurisdiction. The court held, however, that the contingent remainder was still outstanding, and consequently that it had not been destroyed by merger. Furthermore, the court says in strong language that no conveyance by the life tenant could affect the contingent remainder. "It also appears that the life tenant, Loretta B. Schee, has conveyed her interest in these lands to the plaintiff. It is scarcely necessary to say that the interest thus acquired by the plaintiff can be no greater than that of the grantor, which is the right of use and occupancy during her life. Certainly this conveyance can have no effect upon the rights or interests of the 'heirs of her body at her death.' As to who may come within this category can only be determined upon the demise of Loretta B. Schee. Her apparent heirs, so far as the facts now disclose, are the plaintiff and Edna M. Schee."¹⁰¹

In *Fountain v. Starbuck*,¹⁰² there was a deliberate attempt by one of the parties to destroy a contingent remainder. The court held on the facts that the contingent remainder was not destroyed by merger, and condemned the attempt to destroy contingent remainders with the strongest language

100. A reversion always follows a contingent remainder in fee. Nothing is said in the opinion as to what happened to this reversion, and consequently we must resolve the problem by inference. We are not given the residuary clause nor told if there was one, but the part of the will quoted gave all the personalty to the testator's two daughters, and all of the land to testator's widow for life, then 811 acres of his real estate to Loretta for life, remainder to the heirs of her body, and all the rest of his real estate, 1054 acres, to his daughter Elizabeth, &c. Thus it is a fair assumption that if there was a residuary clause disposing of the reversion it was in favor of one or more of the above members of the testator's family. But since he had disposed of all his property, real and personal, perhaps there was no residuary clause, in which case the reversion would descend to his heirs. Everybody who possibly could have been interested in the reversion quit-claimed to Frank. Therefore Frank must have owned both the life estate and the reversion.

101. 295 Mo. at 225.

102. 209 S. W. 900 (Mo. 1919).

in the books. Archibald Fountain devised Blackacre to his son Joseph and the heirs of his body. This limitation created a life estate and contingent remainder under the fee tail statute. Joseph married in 1895 and had two children in 1897. The life tenant then decided to sell the land to Ira Starbuck; "they agreed upon the price of \$1000, and consulted lawyers as to how the remainder of plaintiffs might be barred." The 1896 taxes had already been paid, but it was agreed the 1897 taxes should remain delinquent, Starbuck to become the purchaser at the tax sale. Starbuck took possession, and the tax proceedings passed to judgment and sale at which Starbuck became the purchaser. "There is no evidence, either direct or circumstantial, that either of [Joseph's] children ever received any benefit from this land or the proceeds of the sale." In 1912 Starbuck died, devising the land to his children, the defendants. In 1914 the children of Joseph (who was still alive) brought a proceeding "to secure an adjudication of their title as remaindermen in the 40 acres of land in question contingent upon their survival of their father." The trial court found for the plaintiffs, and set aside and cancelled the sheriff's deed under the tax sale, subject to the estate of the defendants for the life of Joseph. The supreme court affirmed the decision, so far as the tax deed is avoided where it purports to divest the plaintiff's contingent interests.

"The real and only question for determination is whether the sheriff's deed . . . was fraudulent, and therefore voidable as to these plaintiffs. This presents little difficulty, as there is no dispute as to the facts. The life tenant and father was, as the subsequent facts demonstrate, about to vanish from the place in which he had been born and raised and married and his little children born. The latter are plaintiffs, and were seized of a contingent remainder in the land, which he desired to sell and thereby convert into money. Mr. Starbuck was equally desirous of purchasing it for the enlargement of his extensive farm which adjoined it. *No honest way occurred to them, nor does any such way now occur to us, by which this could be done.* Mr. Fountain was their natural guardian, and as life tenant it was his duty for their benefit to pay taxes as they should become due . . . There was no hardship in this, as the land was productive and Mr. Starbuck was in possession during the pendency of the tax proceeding, paying him \$60 per year rental. He was not in a state of poverty, for the evidence shows that he had horses and cattle, like other prosperous farmers. Under these circumstances it was agreed between him and Starbuck that he would be false to his trust, permit the taxes to

become delinquent, and the land to be sold under the tax judgment to be procured by the state, so that Starbuck might acquire the title for the sum of \$1000 to be paid to him. *Had there been no bond of kinship in the transaction, and the remaindermen been adults, the scheme would have been dishonest. When we consider the relation of parent and child, and the tender age and absolute helplessness of the latter, it is difficult to describe the turpitude which it suggests.* The wrong was entire, but it took them both to perpetrate it, and both were equally guilty. They acted with deliberation, consulting lawyers as they proceeded, but it is gratifying to note that these voluntarily deny their concurrence in the act by which the children were deprived of the careful bounty of their grandfather. They realized fully that they were on dangerous ground, as vividly appears from the testimony of one of the defendants at the trial that they discussed the matter together, and that when the other heirs conveyed to the defendant Clarence they agreed that with respect to this transaction they would 'stand together.' Under these circumstances, it is unnecessary that the adjective 'constructive' should precede the word which expressed the character of the transaction [fraud]. It is a word that, in favor of the injured and against the guilty, avoids all transactions into which it enters, even the judgments of courts and the solemn deeds by which such judgments are finally executed."¹⁰³ (Italics mine)

The court does not discuss merger, but it would seem that the issue

103. *Id.* at 901.

If there is actual fraud here, it would seem not to be by Fountain in his capacity as life tenant, but by Fountain in his capacity as natural guardian of his children. Such a relationship never presented destructibility by merger at common law.

Compare *Warfield v. Bixby*, 51 F. (2d) 210 (C. C. A. 8th, 1931). Testator bequeathed personal property to his widow and son for life, then to the lineal descendants of the son, but if the son should die without lineal descendants, to the heirs of [testator's] brothers. The testator's brothers died, leaving Alice Warfield as an heir. In 1913 the widow and son purchased for \$25,000 an undivided one-half of the contingent interest of Alice Warfield, representing that the entire estate was worth about \$8,000,000. They failed to disclose that there was an additional sum of about \$600,000 still to be accounted for, and also failed to disclose that the son could never become a father. After the death of the son and widow, Alice Warfield, now entitled as remainderman, brings this bill to have her 1913 conveyance set aside, and for an accounting, on the theory that the widow and son breached a fiduciary relationship with her by not making a complete disclosure. The court held that there was no fiduciary relationship between a life tenant and remainderman which would prevent a purchase at arm's length by the life tenant from the remainderman. No problem of destructibility was involved because the contingent remainder was in personal property.

The court said, (p. 214): "The relation of a life tenant to a remainderman or reversioner, is that of a quasi trustee. He is a trustee in the sense only that he must not injure or dispose of the property to the injury of the rights of the remainderman, and can do nothing during the continuance of his trust to impair the corpus of the property." This would seem to indicate that artificial destruction of a contingent remainder by merger would not be permitted.

was present on the facts. The testator's reversion following the contingent remainder probably went to the life tenant.¹⁰⁴ Starbuck acquired both the life estate and the reversion at the tax sale. Since the court holds the contingent remainder still exists, it necessarily holds merger did not occur.

The supreme court, speaking through Dalton, C., delivered one of its best property opinions in recent years in the case of *Lewis v. Lewis*.¹⁰⁵ Hugh Lewis, Sr., died testate in 1896, survived by his widow, Adaline, and by five children, one of whom was Addie Lee. By item four of his will, he devised to his "daughter, Addie Lewis, for the term of her life, and at her death to the heirs of her body, absolutely," the real estate here involved. By item seven he devised the residue of his estate to his widow, Adaline. In 1899 the widow and the other four children quitclaimed to Addie Lee all their interest in the land described in item four. Addie Lee, unmarried, over seventy-five years of age, without issue of body, petitions for a declaratory judgment that she has a fee simple absolute, joining as defendants all living descendants of the testator and his widow.¹⁰⁶ The trial court entered judgment declaring that the plaintiff "did become vested with the fee simple title to the real estate described in the petition subject to be divested upon the plaintiff, Addie Lee Lewis, having heirs of the body." Judgment was affirmed by the supreme court. "We hold that respondent has a life estate in the real estate described and a vested reversionary interest in fee, which reversionary interest in fee is subject only to being divested in the event of respondent's death, leaving surviving her, heirs of her body. The estate which respondent has is, in effect, a fee-simple title which she may transfer by deed or will or which will pass by descent, and which fee-simple title will be defeated only in the event that at her death respondent is survived by heirs of her body."¹⁰⁷

104. The rest of the will is not given in the opinion. If the reversion did not go to the testator's son either by residuary devise, or by descent in whole or in part, this case is not a holding on merger, but it is nevertheless a powerful *dictum* against destructibility.

105. 345 Mo. 816, 136 S. W. (2d) 66 (1940).

106. The principal issue in the case arose under item eight: "If any of my children named in this, my last will and testament, shall die without issue living at the time of his or her death, capable of inheriting, then, and in that case, it is my will, that my dearly beloved wife, if living, and such of my said children as may then be living shall take in equal parts all the property by the terms of this will given and devised to such deceased child . . ." The defendant's claimed an alternative contingent remainder but the court held that none existed, on the theory that "die without issue living at the time of his or her death" refers to the death of Addie Lee before the testator's death, a substitutionary gift. Most of the opinion is concerned with this problem.

107. Compare the language of the trial court, "fee-simple title subject to be divested," with the accurate analysis and terminology of Dalton, C., "life estate, vested but defeasible reversion, contingent remainder." He then properly adds

In the two cases previously discussed, the court did not recognize that a reversion existed after a contingent remainder. In *Lewis v. Lewis*, the court expressly discusses the reversion, and expressly finds that the reversion and the life estate are in one person.¹⁰⁸ Thus there can be no doubt that this is a case for destruction of a contingent remainder by merger if the court will permit it. No holding on the facts that a contingent remainder is indestructible could be more definitive. It is unfortunate that the court did not mention destructibility in express terms, to remove any last iota of doubt.¹⁰⁹

Livery of seisin is obsolete in Missouri, and no example of tortious feoffment appears in the cases. It is almost inconceivable that a Missouri court would hold a contingent remainder destroyed on the ground the particular estate had been determined by a tortious feoffment.¹¹⁰

V. CONCLUSION

It is submitted that contingent remainders are indestructible in Missouri under existing statutes and decisions. No Missouri case has been

that this is "in effect" a defeasible fee simple. The conclusion would seem to be that the result is the same whether one calls the future interest a contingent remainder or a shifting executory interest.

108. 136 S. W. (2d) at 71: "Upon the death of the testator the reversionary interest in fee, in the real estate described, vested in the widow Adaline Lewis, subject to the life estate and the contingent remainder devised under item 4 of the will. . . . The reversionary interest in said real estate, which, by reason of item 7 of the will became vested in the widow Adaline Lewis, was the proper subject of conveyance by deed, and it was conveyed by deed by the said Adaline Lewis in her lifetime to respondent, in whom it is now vested. . . . The [reversion] conveyed to respondent was a vested interest, subject to being divested upon certain conditions, but it has not been divested, and will not be divested, except in the event that respondent is survived by heirs of the body."

109. Any rules which limit the merger of interests in land help to limit the scope of the destructibility doctrine, if such exists.

At common law if A conveys to B for life, then to his children him surviving, and B later acquires one-half of the reversion, there is merger *pro tanto*, and one-half of the contingent remainder is destroyed. To the effect that there is no merger *pro tanto* in Missouri, see *Willis v. Robinson*, 291 Mo. 650, 237 S. W. 1030 (1922). The opinion is of the dream world, without facts and with unstated issues. Space does not permit a complete analysis of the case, but I will say this much: the court overlooked the perfectly obvious reason why there was no merger, *viz.*, a conveyance by the life tenant to his "children" was not a conveyance to his "heirs" except in retrospect.

See also *Evans v. Rankin*, 329 Mo. 411, 44 S. W. (2d) 644 (1931), in which is made the statement, "The absence of any intervening estate is essential to a merger." In its context the meaning of this statement is much more circumscribed than when uprooted and quoted alone.

Morgan v. York, 91 S. W. (2d) 244, 247 (Mo. App. 1936), a case involving a purchase money mortgage, may serve as makeweight. "The doctrine of merger, upon which appellants rely, has been repeatedly declared to be technical and our courts have frequently said that mergers are not favored, either in courts of law or equity. . . ."

110. Consult *Hudson*, *supra* note 48, 8 U. OF MO. BULL. L. SER. at 3.

found which holds a contingent remainder destructible. Many Missouri cases hold contingent remainders indestructible. Statutes limit destructibility, and probably completely abolish the doctrine.

Nevertheless, it is respectfully submitted that legislation should be enacted as an added precaution to avoid any possibility of a *Bond v. Moore* which might discredit the bar, the bench, and the legislature in the eyes of the public. The exact form of such legislation is not here suggested, but a statute for submission to the legislature might well be drawn up with the assistance of the conveyancing bar and the property teachers in Missouri.

In England the doctrine was abolished piecemeal. Their statutory forms are not particularly desirable.¹¹¹ The form suggested by Kales for Illinois lacks the desirable clarity and incisiveness.¹¹² The form finally used in Illinois is much simpler.¹¹³ Many of the states have followed the New York forms.¹¹⁴ The American Law Institute has under consideration a Law of Property Act which includes a section abolishing the destructibility rule.¹¹⁵

Until the legislature acts to abolish the destructibility rule, or until a case appears in which the supreme court repudiates the doctrine in its reasoning as well as in its holding, the careful lawyer must assume that contingent remainders are destructible, and use one or another of the available techniques to avoid the rule.

111. For the text of the English forms, see n. 14, and n. 17, *supra*.

112. Kales, *supra* note 28, at 378: "No future interest whether of real or personal property or created in a conveyance *inter vivos* or by will, taking effect, in the case of a conveyance *inter vivos* upon complete execution and in the case of a will by the death of the testator, on or after the first day of July, 1907, shall be invalid or fail because of the non-happening of any condition precedent to the taking in possession of the future interest either before or at the time of the termination, whenever or in whatever manner that may occur, of the preceding estate expressly limited."

113. For the text of the Illinois form, see n. 19, *supra*.

114. NEW YORK REAL PROPERTY LAW § 57: "An expectant estate cannot be defeated or barred by any transfer or other act of the owner of the intermediate or precedent estate, nor by any destruction of such precedent estate by disseizin, forfeiture, surrender, merger or otherwise; but an expectant estate may be defeated in any manner, or by any act or means which the party creating such estate, in the creation thereof, has provided for or authorized. An expectant estate thus liable to be defeated shall not, on that ground, be adjudged void in its creation."

Id. § 58: "A remainder valid in its creation shall not be defeated by the determination of the precedent estate, before the happening of the contingency on which the remainder was limited to take effect; should such contingency afterwards happen the remainder shall take effect in the same manner and to the same extent as if the precedent estate had continued to the same period."

115. LAW OF PROPERTY ACT (Proposed Final Draft No. 1, 1938) 16: "No future interest, whether legal or equitable, shall be destroyed by the mere termination, in any manner, of any or all preceding interests before the happening of the contingency to which the future interest is subject."