

Michigan Law Review

Volume 56 | Issue 6

1958

Should the Rule Against Perpetuities Discard Its Vest?

Daniel M. Schuyler
Northwestern University

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Estates and Trusts Commons](#), [Legal History Commons](#), and the [Property Law and Real Estate Commons](#)

Recommended Citation

Daniel M. Schuyler, *Should the Rule Against Perpetuities Discard Its Vest?*, 56 MICH. L. REV. 887 (1958).
Available at: <https://repository.law.umich.edu/mlr/vol56/iss6/3>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

SHOULD THE RULE AGAINST PERPETUITIES DISCARD ITS VEST?*

Daniel M. Schuyler†

III. THE RULE AS APPLIED TO REMOTENESS OF VESTING ALONE

FROM what has preceded it is apparent that none of those who would reform the rule against perpetuities, excepting Professor Simes, has suggested that the rule's application to remoteness of vesting alone requires investigation. Yet there is little doubt that this aspect of the rule has caused as much if not more litigation than those which have been so harshly condemned. Proof of this assertion will not be undertaken, for every property lawyer knows how frequently courts are called upon to determine whether for purposes of the rule an interest is "vested" or "contingent." Professor Simes put it well when he said, "I doubt whether any other question in the law of estates has caused so much litigation as the question of the vested or contingent character of the interest. If all the decisions on the matter were laid end to end, I know not how many times around the globe they would extend."¹⁸² One may justifiably doubt the propriety of testing the very validity of future interests in terms of a conceptual distinction the tenuousness of which is attested by the countless decisions involving it. What is more important, if one concludes that the validation of vested interests and the invalidation of contingent interests do not serve the modern objectives of the rule—furtherance of the fluidity of property, freeing property for risk capital purposes and the restriction of dead-hand control of the living—then validity under the rule ought not to depend upon whether an interest is vested or contingent. This portion of this article will constitute an attempt to demonstrate why the rule's concern with the concept of vesting has caused so much litigation and to analyze the concept in terms of its relationship to present-day purposes served by the rule.

*The first instalment of this article was published in the March issue (56 Mich. L. Rev. 683-726).—Ed.

†Member of the Illinois and Wisconsin Bars; Professor of Law, Northwestern University.—Ed.

¹⁸² SIMES, PUBLIC POLICY AND THE DEAD HAND 68 (1955).

A. *The Concept of Vesting in General*

1. “. . . *A Matter of History That Has Not Forgotten Lord Coke.*”¹⁸³ As in the case of the rule against perpetuities itself, the development of the concept of vesting, being a part of the growth of the common law, has not been altogether logical. Although it is obviously not feasible to detail here the history of the concept of vesting, it will be of assistance to consider some of the highlights of that history.

The term “vested” in its historical sense seems to be closely, if not inextricably, interwoven with the concept of seisin.¹⁸⁴ That concept, according to mediaeval doctrine was one of “physical possession pure and simple, which insisted that a physical livery of seisin was necessary for a conveyance, which protected the man seised as against all comers, including the owner. . . .”¹⁸⁵ Had this notion of the meaning of seisin not undergone a substantial metamorphosis, it is highly improbable that the law of future interests, and with it the learning concerning vested and contingent remainders, could have developed as it did. However, as Holdsworth admirably demonstrates, statutes designed to enlarge the rights of persons disseised and the development of legal doctrine and procedural progress¹⁸⁶ caused “seisin” to lose at least in part the connotation of “possession” and to become more closely associated with “ownership” and “title.”¹⁸⁷

Notwithstanding material modifications in the law as to seisin, shades of the history of this complex abstraction¹⁸⁸ may even today affect the decision of concrete cases¹⁸⁹ and it seems clear that the feudal rule that there could be no gap in the

¹⁸³ Holmes, J., in *Gardner v. Butler & Co.*, 245 U.S. 603 at 605 (1918), referring to “the law of leases” in connection with the provability of rent claims in federal bankruptcy proceedings.

¹⁸⁴ GRAY, *THE RULE AGAINST PERPETUITIES*, 4th ed., §971 (1942) (hereinafter cited as GRAY): “The idea of a vested remainder . . . had its origin in the theory of seisin.”

¹⁸⁵ HOLDSWORTH, *HISTORY OF ENGLISH LAW* 29 (1926) (hereinafter cited as HOLDSWORTH).

¹⁸⁶ *Id.* at 31-31.

¹⁸⁷ *Id.* at 31.

¹⁸⁸ *Id.* at 56: “It [the law as to seisin and disseisin] consisted of a set of primitive principles which had grown up round, and had been elaborated by, the working of the real actions; these primitive principles had been reconciled with more modern ideas only by the growth of a number of modifications, statutory and otherwise, which made the law difficult, obscure, and complex. . . .”

¹⁸⁹ For example, even today it is the rule in some jurisdictions that there may be no dower in a remainder because the remainderman is not seised. SIMES AND SMITH, *THE LAW OF FUTURE INTERESTS*, 2d ed., §1887 (1956) (hereinafter cited as SIMES AND SMITH).

seisin¹⁹⁰ had a marked, if not indeed an overbearing effect on the concept of vesting. In support of this view, it may be noted that reversions following freehold estates of lesser quantum than a fee simple and reversions following terms for years were valid common law interests.¹⁹¹ Remainders following life estates and freehold interests (sometimes called remainders¹⁹²) following terms were, when certain to take effect at the ending of the preceding estate, also valid at early common law.¹⁹³ Both interests were and are regarded as "vested,"¹⁹⁴ a term which is said to have originated with the word "*vestire*" which meant to put in possession of land, i.e., to deliver the seisin.¹⁹⁵ Considering all of these factors together, it seems reasonable to conclude that a future interest which was vested in the historical sense was an interest so limited that it assured a continuity in seisin when the interest which preceded it ended. The holder of the interest might be actually seised before his right to possession matured, e.g., if he had a reversion or vested "remainder" following a term;¹⁹⁶ or he might simply be assured of the right to seisin upon the ending of a preceding estate, e.g., if he had a reversion or a vested remainder following a life estate, the seisin being for the time in the freeholder—the tenant for life.¹⁹⁷ But at all events seisin was certain to be continuous.

Viewed from the point of view suggested in the preceding paragraph, the word "vested" probably had nothing to do with the absence of contingency.¹⁹⁸ Indeed, contingent remainders were not recognized by the early land law, and those first sanctioned by the courts were remainders to the heirs of living persons.¹⁹⁹ It could only be after remainders dependent upon contingencies other than that of the death of a living person were recognized,²⁰⁰ with the result that remainders began to be more exten-

¹⁹⁰ 7 HOLDSWORTH, 84-85.

¹⁹¹ SIMES AND SMITH, §82. A reversion in fee following a term is sometimes called a present fee simple subject to a term since the seisin remains in the reversioner. *Id.* at 65.

¹⁹² SIMES AND SMITH, §116; 7 HOLDSWORTH, 85.

¹⁹³ *Ibid.* 2 POLLOCK AND MATTLAND, THE HISTORY OF ENGLISH LAW, 2d ed., 21, 25 (1903).

¹⁹⁴ GRAY, §113 ("All reversions are vested interests"); 7 HOLDSWORTH, 84-85.

¹⁹⁵ GRAY, §100; HAWKINS, WILLS, 3d ed., 263 (1925) (hereinafter cited as HAWKINS).

¹⁹⁶ 7 HOLDSWORTH, 85; SIMES AND SMITH, §§82, 1887.

¹⁹⁷ 2 POLLOCK AND MATTLAND, THE HISTORY OF ENGLISH LAW, 2d ed., 38 (1903).

¹⁹⁸ HAWKINS, 263: "In . . . its original sense, 'vested' has no reference to the absence of conditional-ness or contingency."

¹⁹⁹ GRAY, §134; 7 HOLDSWORTH, 85-89; PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW, 2d ed., 502-504 (1936).

²⁰⁰ Holdsworth's discussion of the early history of contingent remainders (7 HOLDS-

sively employed by conveyancers,²⁰¹ that contradistinction between "vested" and "contingent" remainders became important. And when that occurred it was not in connection with the rule against perpetuities. Rather did the difference become significant at first because of the principle, based on the theory that seisin must be continuous,²⁰² that a contingent remainder must take effect, if at all, *eo instanti* upon the termination of the particular estate of freehold that supports it²⁰³—the first and most important facet of the rule of property which came to be known as the rule of destructibility of contingent remainders.²⁰⁴ The matter is nowhere more clearly put than in the statement of Jessel, M. R., in *Abbiss v. Burney*²⁰⁵ that, "The reason why a contingent remainder under a legal devise failed, if at the death of the previous holder of the estate of freehold there was no person who answered the description of the remainderman next to take, *was the feudal rule that the freehold could never be vacant, for that there must always be a tenant to render the services to the lord, and therefore if the remainder could not take effect immediately on the determination of the prior estate, it never could take effect at all.*"²⁰⁶

WORTH, 85-91) seems to indicate that the validity of remainders "dependent upon contingencies other than that of the death of the living person" (*id.* at 89) was not fully established until the decision in *Colthirst v. Bejushin*, 1 Plowd. 21, 75 Eng. Rep. 33 (1549).

²⁰¹ PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW, 2d ed., 529 (1936): "From the middle of the sixteenth century . . . the tendency was to enlarge the class of contingent remainders which the law would recognise, although still emphasising their destructibility." The invention of the device of appointing trustees to preserve contingent remainders and its sanction by at least the beginning of the eighteenth century [*id.* at 530; *Duncomb v. Duncomb*, 3 Lev. 437, 83 Eng. Rep. 770 (1695)], if not somewhat earlier (7 HOLDSWORTH, 104), attests to an expanding use of contingent remainders from the middle of the sixteenth century on.

²⁰² 7 HOLDSWORTH, 105.

²⁰³ *Ibid.*

²⁰⁴ The other facet of the rule of destructibility is the rule that if a future interest can possibly take effect as a remainder (as distinguished from an indestructible executory interest) it will be regarded as a remainder. *Purefoy v. Rogers*, 2 Wms. Saund. 380, 85 Eng. Rep. 1181 (1670). That the original importance of determining whether or not a contingent remainder existed resulted from the rule of destructibility and was not an outgrowth of the rule against perpetuities is exemplified by *Loddingon v. Kime*, 1 Salk. 224, 91 Eng. Rep. 198 (1695), decided only thirteen years after the Duke of Norfolk's Case, 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1681). Long before, in *Archer's Case*, 1 Co. Rep. 66b, 76 Eng. Rep. 146 (1599), which considerably antedates any concern with perpetuities in the modern sense, one question was whether, for destructibility purposes, a remainder was contingent. However, the applicability or non-applicability of the rule in *Shelley's Case*, and not the vested or contingent character of the remainder, was the real issue for decision.

²⁰⁵ 17 Ch. 211 (1881).

²⁰⁶ *Id.* at 229. Emphasis added. For an interesting summary of competing theories concerning the possibility that in limited instances the freehold could be vacant, see 7

The inflexibility of the rule that the freehold must never be in abeyance obviously heightened the importance of distinguishing between vested and contingent remainders. For if a remainder were vested it would take effect whenever and however the preceding estate ended, whether naturally or prematurely by forfeiture or merger.²⁰⁷ But the law's insistence on continuous seisin did more than that; it resulted in the very definition of at least one type of contingent remainder being phrased in terms of whether or not the remainder was certain to take effect in possession upon the determination of the particular estate. Thus, Fearné classifies as a contingent remainder one, "Where the condition, upon which the remainder is limited, is certain in event, but the determination of the particular estate may happen before it. . . ." ²⁰⁸ So, if property is given to *A* for life, remainder to *B* after the death of *C*, or to *A* for 21 years if he shall so long live, and after his death to *B*, the remainder in each instance is limited to take effect upon an event certain to occur, but it is in each instance treated as contingent.²⁰⁹ Hence it appears that the contingent character of the remainder was not necessarily dependent upon its being created in terms of "contingency" as we would today understand that word, but upon the uncertainty of its becoming possessory when the particular estate ended.

From the foregoing discussion one might conclude that, after it became important to distinguish between vested and contingent remainders, a remainder was vested if it met Gray's specification that throughout its continuance the remainderman and his heirs had the right to immediate possession, whenever and however the preceding estate might determine;²¹⁰ it was contingent not only if limited to take effect upon an uncertain event, but also, even though limited to take effect upon the happening of an event certain to occur, if it was not certain to take effect in possession when the preceding estate of freehold ended. Other-

HOLDSWORTH, 86: "Littleton . . . had admitted that, in the case of the death of a parson [who held land in right of his church], and during the vacancy of a living, even the freehold could be in abeyance."

²⁰⁷ GRAY, §101. Vested remainders following estates tail were an exception and were destructible. *Id.*, §973.

²⁰⁸ 1 FEARNE, CONTINGENT REMAINDERS AND EXECUTORY DEVISES, 3d ed., 4 (1776).

²⁰⁹ *Id.* at 5-6. But if there is a gift to *A* for 80 years if he shall so long live, and after his death to *B*, the remainder is vested because it is assumed that *A* will not overlive the term. *Id.* at 11-12; SIMES AND SMITH, §116 at 105-107, discussing *Napper v. Sanders*, Hut. 118, 123 Eng. Rep. 1142 (1632), and other leading English cases.

²¹⁰ GRAY, §101.

wise put, a remainder was vested if continuity of seisin was assured; it was contingent if it was not certain that seisin would flow without interruption from the holder of an antecedent estate of freehold directly to the remainderman. That seisin could as well flow, without any gap, from the holder of a particular estate to a reversioner and thence to a contingent remainderman (an acceptable concept) seems not to have occurred to the early conveyancers.²¹¹ A complete circuitry of reasoning²¹² is avoided by this refusal to admit that a reversioner may be temporarily seised and thus supply the necessary continuity.

The early distinctions between vested and contingent remainders assuredly involved fictions and abstractions, but these are as important to growth in law as are unproven hypotheses to the expansion of scientific knowledge. In each case, the process of trial and error and ultimate proof of utility impart reality to what in the beginning was essentially in large measure an assumption. However, just as a scientific hypothesis must be discarded when it is disproved or when its utility is spent, so must a legal fiction be rejected when it ceases to serve a rational purpose. The original purpose of distinguishing between vested and contingent remainders, i.e., the assurance of continuous seisin, vanished with the Statute of Uses²¹³ and the abolition of the feudal burdens.²¹⁴ Whether the distinction between vested and contingent interests as developed and refined in connection with its original and other purposes serves a sensible objective in connection with a modern rule against perpetuities remains to be investigated.

2. *Refinements and Transmutations.* All too often it is not recognized that the term "vested" and what is commonly regarded as its antonym, the term "contingent," are used in several senses. As has been seen, a future interest in land was vested in the feudal

²¹¹ This may have been the result of the notion that seisin could not be altered without livery of seisin being made. But it was of course altered without livery when it passed from life tenant to remainderman. This conceptual difficulty was overcome by the theory that seisin was given "to the particular tenant, which seisin was held to enure to the benefit of the remainderman." PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW*, 2d ed., 504 (1936). It would not have been a long step to say that when livery of seisin was made it would inure to the temporary benefit of the reversioner pending a determination of whether or not the contingent remainderman would ever take.

²¹² Cf. 2 POLLOCK AND MAITLAND, *THE HISTORY OF ENGLISH LAW*, 2d ed., 31 (1903): ". . . a man has an action of trespass because he has possession, . . . he has possession because he has an action of trespass. . . . All the while, however, our law of possession and trespass is being more perfectly defined. Its course is not circular but spiral. . . ."

²¹³ 27 Hen. 8, c. 10 (1536).

²¹⁴ 12 Car. 2, c. 24 (1660).

sense when, according to the rules of the common law as they existed prior to the Statute of Uses, seisin in the holder of the future interest was certain instantaneously to follow the ending of an anterior estate in possession. If the future interest did not meet that requirement it was contingent.²¹⁵ In this view, all executory interests are contingent, for they are non-common law interests and, although the Statute of Uses made possible the shifting of seisin without livery of seisin, it could not supply continuity of seisin in the common law sense, even in respect to an executory interest which was absolutely certain at some time to take effect.²¹⁶ Yet, so eminent an authority as Fearne, in dividing "vested estates" into "estates vested in possession" and "estates vested in interest," classifies in the latter category "such Executory Devises . . . as are not . . . made to depend on a period or event that is *uncertain*."²¹⁷ And although Gray took the position that executory devises "are not vested interests until they take effect in possession . . .,"²¹⁸ he admitted that an executory devise which is certain to become vested "cannot be called contingent; but neither is it vested."²¹⁹

Professor Simes says that such an interest is "neither contingent nor vested," but he sees "no good reason why it should be subject to the rule."²²⁰ He recognizes that an executory interest certain to take effect is not vested in the feudal sense,²²¹ but he at least impliedly classifies it as "vested for purposes of the rule" when he says that the rule's requirement of vesting "means that the future interest must be certain to be subject to no condition precedent after the expiration of lives in being and twenty-one years."²²² Fearne's classification of "vested estates" and Professor Simes' approach may be said to illustrate at least one important transmutation of the contrast between vested and contingent interests in terms of the application of the rule against perpetuities. Not only is a feudally vested interest not offensive to the rule, but it seems also that an interest certain to become possessory,

²¹⁵ HAWKINS, 263-264.

²¹⁶ GRAY, §114; MORRIS AND LEACH, *THE RULE AGAINST PERPETUITIES* 1 (1956) (hereinafter cited as MORRIS AND LEACH); SIMES AND SMITH, §1236.

²¹⁷ I FEARNE, *CONTINGENT REMAINDERS AND EXECUTORY DEVISES*, 4th ed., Introduction, 1 (1791).

²¹⁸ GRAY, §114.

²¹⁹ *Ibid.*

²²⁰ SIMES AND SMITH, §1232.

²²¹ *Id.*, §1236.

²²² *Id.*, §1232.

even if not feudally vested, meets the rule's requirement of vesting. The word "contingent" acquires a new meaning too; it still means any non-feudally-vested common law interest and it means in addition an interest the taking effect of which is subject to "any unfulfilled condition precedent."²²³

The words "vested" and "contingent" have still other meanings. Thus, with regard to legacies of personal property, it is stated by Hawkins that, "The rules and expressions relative to vesting . . . have been derived in great measure from the civil law."²²⁴ Legacies "payable at a future time certain to arrive"²²⁵ were transmissible in the sense that the personal representative of the legatee would take the property if the legatee died before the time of payment. Legacies "payable on any event which might never happen"²²⁶ were not transmissible in that sense; they were, in modern terminology, contingent on survivorship. But the authorities, both English and American, recognize that an interest may be contingent and yet "non-contingent on survivorship," as, for example, a gift to *A* if *B* goes to Rome.²²⁷ Such an interest, though "vested" under Anglo-American decisions in the one sense of being "transmissible," would not have been vested (unconditional and transmissible) under the civil law, and it is not vested in the feudal sense nor in the more modern sense of the word of being subject to no condition precedent. And of course a gift which is contingent on survivorship, e.g., to such of *A*'s children as are living at his death, can never be transmissible or vested in any sense until the requirement of survivorship is met.

From the preceding paragraph, it must be apparent that a determination that an interest is transmissible does not necessarily (though it may) mean that it cannot violate the common law rule against perpetuities. But it does not follow that an apparently non-transmissible interest is always contingent within the meaning of the rule, because, as the concept of vesting became more refined, interests which were vested-to-be-divested came to be recognized. So if property is given to *A* for life, remainder to *B* in fee, but if *B* dies before *A*, then to *C* in fee, *B*'s remainder,

²²³ 5 AMERICAN LAW OF PROPERTY §21.5 (1952) (hereinafter cited as AMERICAN LAW OF PROPERTY).

²²⁴ HAWKINS, 264.

²²⁵ *Ibid.*

²²⁶ *Ibid.*

²²⁷ *Id.* at 265.

though in a practical sense as contingent as one given to *B* if he is living at *A*'s death, is vested to be divested according to the view most commonly taken by courts.²²⁸ Here, obviously, no perpetuity question could arise. Suppose, however, a gift to the first-born son of *A* (*A* having no son at the time of the gift) if such son reaches the age of 50, and if he dies under that age then to a charitable corporation. In this case, the gift to the son is apparently contingent not only on his birth, but it is also apparently contingent on his reaching 50, and non-transmissible if he dies before reaching that age. Thus it would seem at first blush to violate the rule against perpetuities. However, many courts would say that the gift over, being a "clause of divestiture," causes the gift to *A*'s first-born son to vest at birth.²²⁹ Since the gift over to charity is clearly too remote, it is void, and the prior gift to *A*'s first-born son would probably become absolute.²³⁰ The vested-to-be-divested concept thus changes an otherwise non-transmissible, contingent and remote interest into an interest which is transmissible, vested and inoffensive to the rule.

In connection with the various meanings of "vested" and "contingent" which are illustrated by the foregoing discussion, Professor Leach aptly observes that "in the intricate and borderline cases . . . [the] significance [of these terms] may be obscure and an unconscious transition may be made from one meaning to another."²³¹ Then, with uncharacteristic despair, he goes on to say, "It is useless now to assert that a terminology more descriptive and less confusing could have been adopted, for the multiple use of these terms is now established practice."²³² With more sanguinity, he concludes, "It remains only to separate and define . . . [the] meanings [of "vested" and "contingent"] in order that analysis may not be confounded by nomenclature."²³³ With the utmost deference, it is submitted that Professor Leach falls short of achieving this worthy objective when, after indicating that the word "vested" may refer to a possessory interest, an

²²⁸ See, for example, *Baley v. Strahan*, 314 Ill. 213, 145 N.E. 359 (1924). And see 5 AMERICAN LAW OF PROPERTY, §21.31 at 177; GRAY, §102; SIMES AND SMITH, §149 at 160.

²²⁹ This is the rule of *Edwards v. Hammond*, 3 Lev. 132, 83 Eng. Rep. 614 (1683), discussed in 2 JARMAN, WILLS, 8th ed., 1364-1373 (1951) (hereinafter cited as JARMAN).

²³⁰ 5 AMERICAN LAW OF PROPERTY, §21.48; CAREY AND SCHUYLER, ILLINOIS LAW OF FUTURE INTERESTS §176 (1941); *id.*, §176 (Supp. 1954) (hereinafter cited as CAREY AND SCHUYLER); SIMES AND SMITH, §§825-828.

²³¹ LEACH, CASES ON FUTURE INTERESTS, 2d ed., 255 (1940).

²³² *Ibid.*

²³³ *Ibid.*

interest vested in the feudal sense and to transmissible interests, he defines an interest as vested for purposes of the rule against perpetuities as one which "has acquired the degree of certainty which under the Rule an interest must acquire within lives in being and twenty-one years or fail."²³⁴ Professor Leach would probably be the first to agree that his definition depends for any real content upon the interpolation into it of the great body of case law dealing with vested and contingent interests. That some substance may be imparted to it by resort to constructional rules developed through litigation there is no doubt, and to the extent that this is so the definition is valid: We have already seen, however, that "vested" and "contingent" had a metaphysical beginning, that they now have several meanings and that even these have their shadings, one of which is often confused with another even by sophisticated students of future interests. It is therefore not surprising that we shall find that, despite supposedly well settled rules of construction relevant to the terms in question, it is no simple matter to avoid being "confounded by nomenclature" in determining whether a future interest has acquired the degree of certainty which the law requires within the time the law allows.

B. *The Concept of Vesting in Particular*

A particularized analysis of the concept of vesting necessarily entails an examination of the rules which have been evolved by courts in their efforts to determine whether a given interest is vested or contingent. An intelligent evaluation of these rules presupposes a recognition of the several meanings, already discussed, implicit in the terms "vested" and "contingent." Thus a rule of construction may in its origin have been helpful to a decision that an interest is vested in the feudal sense and the same rule may have no logical application in a case where the question is whether a future interest is contingent on survivorship. Very few courts, however, have recognized this and most have assumed that constructional rules concerning the terms in question are indiscriminately applicable regardless of the issue to be decided. As a consequence, the same rules have been used whether feudal vesting, transmissibility or a possible violation of the rule against perpetuities was the point in controversy.

Account should also be taken of the fact that the rules distinguishing between the vested or contingent character of a future

²³⁴ *Id.* at 256.

interest are rules of construction and not rules of property. They are thus designed as an aid to ascertaining intention—actual, presumed, inferred or supposed. Since most of these rules tend toward the conclusion that future interests are vested it is arguable that they are bound to further intention in perpetuity cases because they tend to save gifts from destruction. In a sense this may be true, but it is equally true that no rule of construction which lacks a rational relationship to a rule of property ought ever to be determinative of the application or non-application of the rule of property. Accordingly, although rules of construction concerning “vesting” and “contingency” can probably never be eliminated in instances where the transmissibility of a future interest is involved, such rules can be sensibly appraised for purposes of the rule against perpetuities only in terms of present-day justifications for the rule itself. It is from this point of view that the major constructional rules in respect to vested and contingent interests will be approached. Rules concerning land and personalty will not be segregated since the tendency has been to fuse the two to a point where they are virtually indistinguishable.

1. *The Rule That the Law Favors the Early Vesting of Estates.* The rule of early vesting, that “the law favors the early vesting of estates,” is as deeply imbedded in the law of property as any other rule of construction.²³⁵ This rule has been examined in detail by the writer in an earlier article.²³⁶ There is of course no need to retrace here the ground there covered, but a summary of the conclusions reached may be helpful.

The rule of early vesting appears to have arisen as a constructional device to ameliorate the rigors of a rule of property, i.e., the rule of destructibility of contingent remainders.²³⁷ Viewed in this

²³⁵ 5 AMERICAN LAW OF PROPERTY, §21.3; CAREY AND SCHUYLER, §292; 2 JARMAN 1346, 1386; SIMES AND SMITH, §573.

²³⁶ Schuyler, “Drafting, Tax and Other Consequences of the Rule of Early Vesting,” 46 ILL. L. REV. 407 (1951). The soundness of the rule has been doubted by others. 5 AMERICAN LAW OF PROPERTY, §21.3 at 130: “. . . [C]ontinued adherence to this preference [for early vesting] in modern times is at least of doubtful validity in many situations.” LEACH, CASES ON FUTURE INTERESTS, 2d ed., 257, n. 3 (1940): “Is it possible that (apart from perpetuities cases, where a vested construction tends to save the gift) the preference for vested interests . . . has no foundation at all at the present time?”

²³⁷ Schuyler, “Drafting, Tax and Other Consequences of the Rule of Early Vesting,” 46 ILL. L. REV. 407 at 408-412 (1951); KALES, FUTURE INTERESTS, 2d ed., §329 (1920). And see *Doe d. Long v. Prigg*, 8 B. & C. 231 at 236-237, 108 Eng. Rep. 1030 (1828): “The law inclines to such a construction as will tend to vest a remainder . . . because contingent remainders are in the power of the particular tenant, and may be destroyed. . . .”

light, the rule in its origin was no doubt concerned with feudal vesting and not with the other meanings, hereinbefore discussed, which the term vesting has come to comprehend. Thus it may be said that in those jurisdictions where the rule of destructibility has been judicially or legislatively abolished²³⁸ the rule of early vesting no longer performs the function for which it was designed. One could almost stop there had the rule of early vesting remained no more than a rule fashioned to further feudal vesting, for had that been the case the rule would be almost wholly wanting in virility at least in those jurisdictions where contingent remainders are no longer perishable commodities.

Like many other constructional rules, however, the rule that the law favors the early vesting of estates has been allowed to spread into areas with which it was not at first concerned. As "vested" and "contingent" acquired new meanings, a rule in the beginning directed at feudal vesting came to be applied in cases when feudal vesting or the lack of it is not the problem at all. So the law is said to favor the early vesting of estates where the question is whether an interest is transmissible (vested) or subject to the condition precedent of survivorship (contingent).²³⁹ Thus applied, the rule has been rationalized as furthering the fluidity of property²⁴⁰ and as implementing the presumption against intestacy.²⁴¹ But it may be doubted that early vesting, however the term is used, makes property more marketable.²⁴² And even if early vesting sometimes prevents intestacy when "vested" means "non-contingent on survivorship," it is by no means clear that the strong aversion of courts to intestacy always furthers intention.²⁴³ Moreover, it is plain indeed that the rule of early vesting often positively defeats intention by casting property to strangers,²⁴⁴ by making it available to creditors of

²³⁸ Judicial and legislative encroachments on the rule of destructibility are summarized in Schuyler, "Drafting, Tax and Other Consequences of the Rule of Early Vesting," 46 ILL. L. REV. 407 at 412-416 (1951).

²³⁹ SIMES AND SMITH, §573.

²⁴⁰ Peadro v. Peadro, 400 Ill. 482 at 487, 81 N.E. (2d) 192 (1948): "The reason for favoring vested . . . estates . . . is to . . . permit and promote alienation. . . ."

²⁴¹ Peard v. Kekewich, 15 Beav. 166 at 172, 51 Eng. Rep. 500 (1852); Boston Safe Deposit & Trust Co. v. Park, 307 Mass. 255 at 261, 29 N.E. (2d) 977 (1940).

²⁴² Schuyler, "Drafting, Tax and Other Consequences of the Rule of Early Vesting," 46 ILL. L. REV. 407 at 424-427 (1951).

²⁴³ Id. at 421-424.

²⁴⁴ See, for example, DeKorwin v. First Nat. Bank of Chicago, (N.D. Ill. 1949) 84 F. Supp. 918, *revd.* on other grounds (7th Cir. 1949) 179 F. (2d) 347, where, as a result of the application of the rule of early vesting, the second wife of the testator's son-in-law

the objects of a testator's bounty²⁴⁵ and by creating federal estate tax problems where none would exist had a presumption of contingency prevailed.²⁴⁶

It should nevertheless be observed that, whatever criticisms may be offered against the rule of early vesting, the rule does indeed further intention to the extent that may help to remove future interests from the operative sphere of the rule against perpetuities. No one except a whimsical testator would knowingly make a gift which is void. Be it noted, however, that the same may be said of every other rule of construction to be considered here, and that the question here is not whether a rule of construction makes sense because it mollifies the rule against perpetuities. The question is whether it makes sense that the rule should apply to remoteness of vesting alone, and part of the answer to that question depends upon whether, apart from the rule against perpetuities, the rules relating to vesting afford valid guideposts to the ascertainment or reasonable imputation of intention. It would be hard to say that the maxim that the law favors the early vesting of estates sheds any light whatever on intention.

2. *The Rule That Expressions as to Future Vesting Do Not Necessarily Render an Interest Contingent.* It is well settled that a remainder limited to take effect "at," "after," or "upon" the death of a tenant for life is vested notwithstanding the fact that words which could be regarded as words of futurity are annexed to the gift.²⁴⁷ The strong tendency to attach the label "vested" to future interests has led courts to go much further in disregarding words of futurity. So where words apparently importing the necessity of survivorship have been employed, it is frequently held that vesting is not thereby deferred,²⁴⁸ the words of apparent contingency having reference to the time of possession merely, as for instance where property was devised upon trust to apply the rents toward the maintenance of the testator's daughter until she should attain 25 and from and after her

shared in his estate. The case is discussed in Schuyler, "Drafting, Tax and Other Consequences of the Rule of Early Vesting," 46 ILL. L. REV. 407 at 428-430 (1951).

²⁴⁵ Id. at 430-432.

²⁴⁶ Id. at 432-436.

²⁴⁷ SIMES AND SMITH, §§144, 585.

²⁴⁸ 5 AMERICAN LAW OF PROPERTY, §21.9; CAREY AND SCHUYLER, §295; 2 JARMAN, 1360 et seq.

attaining that age upon trust for the daughter.²⁴⁹ And this approach has been carried to the extreme point where, for example, future interests expressly stated to be contingent on survivorship have been held to be vested. Thus, in *Chapman v. Cheney*²⁵⁰ the Illinois Supreme Court held vested and valid for purposes of the rule against perpetuities a gift to the testator's grandchildren which provided that, "No such grandchild shall acquire or be vested with an interest or any estate of inheritance in any part of my said real or personal estate unless such grandchild shall live to reach the age of thirty years."

In cases involving remainder interests expectant upon the determination of a prior life estate it would be difficult from a historical standpoint to conclude that words such as "at," "after," or "upon" the death of the tenant for life, introducing the gift in remainder, should cause the remainder to be contingent. For here the requirements of feudal vesting are met; continuity of seisin is assured unless a premature termination of the life estate is supposed and unless the introductory words are read to mean that the remainderman must literally survive the life tenant. Where, however, the willingness to ignore words which might be regarded as importing contingency is broadened into a positive proclivity to distort the normal meaning of words which are repugnant to a finding of vesting, it is not easy to conclude that intention is given effect—unless of course by intention is meant what a court thinks a testator would have done if he had known the consequences of what he did do. Otherwise stated, the rule that words importing contingency may be ignored, when carried to the point that it sometimes has been, becomes a source of confusion rather than an aid in determining the meaning of an instrument of gift. Support for this position may be found in the fact that the same court which decided *Chapman v. Cheney*²⁵¹ has on other occasions thought that vesting should be deferred because of expressions as to future vesting far less equivocal than those there construed.²⁵²

²⁴⁹ Doe d. Cadogan v. Ewart, 7 Ad. & El. 636, 112 Eng. Rep. 609 (1838).

²⁵⁰ 191 Ill. 574, 61 N.E. 363 (1901). And see Estate of Welch, 83 Cal. App. (2d) 391 at 395, 188 P. (2d) 797 (1948) (gift in trust for grandson who was to "have no vested right in the net income or principal of said trust estate until he shall have attained the age of twenty-five years" held not contingent on survivorship).

²⁵¹ 191 Ill. 574, 61 N.E. 363 (1901).

²⁵² CAREY AND SCHUYLER, §295 at 404; id. (Supp. 1954), §295.

3. *The Rule of Boraston's Case.* In *Boraston's Case*²⁵³ there was a devise of an eight-year term to *T. A.* and his wife and "after the term of the said eight years, the said . . . [land] to remain to my executors, until such time as Hugh Boraston shall accomplish his full age of twenty-one years, and the mean profit to be employed by my executors towards the performance of this my . . . will. . . . And when the said Hugh cometh unto twenty-one years of age, then I will that he shall enjoy the . . . [land] to him and his heirs forever." Hugh died when he was about nine years old and in an action of ejectment against Hugh's heir it was held that the defendant should prevail. Hugh thus took an interest which was vested in the sense of being transmissible or non-contingent on survivorship. Despite the fact that Hugh's interest was created by will and hence probably an executory devise,²⁵⁴ the court's characterization of the interest as a "remainder" seems also to support the view that it was thought to be vested in the feudal sense, as in the case of a freehold subject to a term. Out of *Boraston's Case* is derived the rule that, "where a testator devises lands to trustees until A shall attain the age of twenty-one years [or any given age], and if or when he shall attain that age, then to him in fee, this is construed as conferring on A a vested estate in fee simple . . . though it is quite clear that a devise to A, if or when he shall attain the age of twenty-one years, standing isolated and detached from the context, would confer a contingent interest only."²⁵⁵ The rule, as do most of those under discussion, appears to apply to realty and personalty alike.²⁵⁶

Since the word "if" does not appear in the devise in *Boraston's Case* and since, despite expressions to the contrary,²⁵⁷ "if" seems

²⁵³ 3 Co. Rep. 16a at 17b, 76 Eng. Rep. 664 (1587).

²⁵⁴ GRAY, §138, n. 5. And see CAREY AND SCHUYLER, §296 at 408-409. But see 2 JARMAN, 1362, where it is stated that the executors had, ". . . a prior interest extending over the whole period for which the devise in question . . . [was] postponed." Professor Simes, in correspondence with the writer, comments on Jarman's views as follows: "The only way I could see it could be called a chattel interest would be to rewrite it as a term of years depending upon the number of years Hugh would have to live before attaining the age of 21. For example, if he would have to live 15 years, the term could be 15 years or so long as he does not attain 21, a term of years with a special limitation. I suppose you could also say that the executors are given a life estate with a special limitation, that is, to the executors for the life of Hugh or so long as he does not attain the age of 21. Both of these constructions are decidedly forced. . . ."

²⁵⁵ 2 JARMAN, 1360-1361.

²⁵⁶ Id. at 1388; SIMES AND SMITH, §574.

²⁵⁷ *Hanson v. Graham*, 6 Ves. Jr. 239 at 246, 31 Eng. Rep. 1030 (1801): "Then why

clearly to import contingency to a far greater degree than "when," it is difficult to see how the case can be said to sustain a rule as broad as that stated at the end of the preceding paragraph. Indeed, the actual holding of the case is not easy to justify on any logical ground. It may of course be urged that the direction that Hugh "shall enjoy" the property at 21 was indicative of an intent that possession only should be postponed.²⁵⁸ It has also been suggested that the testator postponed possession "primarily for the purpose of making other dispositions of his property to other persons and not because he did not regard it as an immediate gift,"²⁵⁹ but this reasoning fails to take account of the express direction that the executors were to hold the property until Hugh reached 21 and no longer, regardless of the status of "the performance of . . . [testator's] will." The truth is that the so-called rule in *Boraston's Case* can be supported only in historical perspective and even the decision itself can be rationalized only in terms of a strong antipathy to a suspension of feudal vesting (at a time when the executory devise was not fully developed²⁶⁰) which would have resulted in an intestacy. It may as a result be observed that *Boraston's Case* and the rule which is said to be an outgrowth of it afford an invaluable illustration of the complexities and illogicalities inherent in the concept of vesting.

4. *The Rule That a Gift Distributable in the Future Will Be Considered Vested if Words of Immediate Gift Are Used.* Where there is a gift, usually of personalty, to A, "when" or "as" he shall attain, or "from and after" his attaining, a given age, or upon the happening of some other event, the gift is said to be prima facie contingent.²⁶¹ However, it was decided at a very early date that the postponement of payment alone does not prevent a gift from being vested if the gift is phrased in terms of an immediate gift distinct from the directions as to payment.²⁶² So, in *Globberie's Case*,²⁶³ where there was a bequest to A, at her age of 21 years or day of marriage, *to be paid to her* with interest,

should we refine upon a refinement by . . . holding . . . that the word 'when' standing by itself does not import condition. . . ." Sir William Grant, M. R.

²⁵⁸ CAREY AND SCHUYLER, §296 at 409.

²⁵⁹ SIMES AND SMITH, §586 at 35.

²⁶⁰ GRAY, §138.

²⁶¹ 5 AMERICAN LAW OF PROPERTY, §21.17; HAWKINS, 266.

²⁶² 5 AMERICAN LAW OF PROPERTY, §21.18; HAWKINS, 268.

²⁶³ 2 Vent. 342, 86 Eng. Rep. 476 (1677).

the money was said to pass to *A*'s executor though she died under 21 without having married. The formula is that, "if futurity is annexed to the *substance* of the gift, the vesting is suspended; but if it appears to relate to the time of payment only, the legacy vests *instantanter*."²⁶⁴

It is obvious that, "A bequest to *A* at twenty-one, and a bequest to *A* payable at twenty-one, do not much differ in expression."²⁶⁵ Yet the distinction, such as it is, drawn between the two in *Clobberie's Case* has been fully accepted in England²⁶⁶ and in this country,²⁶⁷ and the notion that vesting will be accelerated by words of immediate gift is said to apply not only to legacies but also to gifts of land.²⁶⁸ The rule has also been invoked in cases involving the transmissibility²⁶⁹ and validity under the rule against perpetuities²⁷⁰ of gifts in trust. It may be observed that there is more sense to this rule than is the case in connection with many of the other rules of construction concerning vesting, since an immediate gift, unequivocally made, can logically be regarded as conferring an immediate interest on the object of the gift.²⁷¹ The difficulty of course arises in determining what words will be deemed to constitute an immediate gift. This should be obvious from the refined distinction which was drawn in *Clobberie's Case* itself.²⁷²

5. *The Rule That Vesting Will Not Be Deferred Where Distribution Is Postponed for the Convenience of the Estate.* Jarman states that, "where the only gift is in the direction to pay or distribute at a future age, the case is not to be ranked with

²⁶⁴ 2 JARMAN, 1388.

²⁶⁵ HAWKINS, 268.

²⁶⁶ 2 JARMAN, 1388-1390.

²⁶⁷ 5 AMERICAN LAW OF PROPERTY, §21.18.

²⁶⁸ 3 PROPERTY RESTATEMENT §257, comment *f* (1940).

²⁶⁹ *Chaffers v. Abell*, 3 Jur. 577 (1839). And see *In re Bartholomew's Trusts*, 1 Mac. & G. 354, 41 Eng. Rep. 1302 (1849).

²⁷⁰ *Howe v. Hodge*, 152 Ill. 252, 38 N.E. 1083 (1894).

²⁷¹ The rule yields of course to a contrary expression of intention. 2 JARMAN, 1390-1391. And it does not apply if payment is deferred until the occurrence of an event which may or may not happen. *Atkins v. Hiccocks*, 1 Atk. 500, 26 Eng. Rep. 316 (1737) (gift payable on marriage). But see *Booth v. Booth*, 4 Ves. Jr. 399, 31 Eng. Rep. 203 (1799) (residuary gift payable on marriage). The English rule that a legacy charged on land will sink if the legatee fails to reach the age at which payment is to be made was subject to numerous exceptions (HAWKINS, 279-282; 2 JARMAN, 1382-1386) and does not appear to have gained much vogue in this country. 5 AMERICAN LAW OF PROPERTY, §21.18 at 154.

²⁷² SIMES AND SMITH, §586 at 32: "It seems absurd to make a distinction between the use of the words 'to be paid' at a given age and merely 'at' a given age. Rather the rule should be to determine from all the language whether it appears to be an immediate gift with possession postponed or a gift on a condition precedent of surviving the named age."

those in which the payment or distribution only is deferred, but is one in which time is of the essence of the gift."²⁷³ This rule of construction has been incorporated into American law under the label of the "divide-and-pay-over" rule.²⁷⁴ It has been criticized on the grounds that the "reasoning in support of the rule has rarely been either explicit or very convincing," and that "courts commonly content themselves with the observation that futurity is annexed to the substance of the gift and not merely to the time of enjoyment, without attempting to demonstrate why it is that from this fact it should be inferred that the transferor intended to make survival to the time of enjoyment in possession a condition precedent."²⁷⁵ The same authorities suggest that the rule is fast disappearing from American law.²⁷⁶ This conclusion may be correct if it means only that the "divide-and-pay-over" rule is, *eo nomine*, no longer of as much significance as has been the case in the past. But if the suggestion is that there is no presumption of contingency in respect of a gift distributable in the future, then it must be viewed with caution. Most of the rules of construction relating to vesting operate to make vested an interest which would otherwise be contingent; and in most cases the interest would otherwise be contingent because property has been directed to be distributed at a future time. This may appear to be contrary to the maxim that the law favors the early vesting of estates, but the fact remains that favoritism for vesting alone is seldom sufficient to overcome the apparently *prima facie* contingent character of a gift distributable in the future.

It may be that a major reason for the doubtful reputation of the divide-and-pay-over rule is the exception to it which is the subject matter of this subdivision. As indicated in the heading, the formula is that even though there is no gift except in a direction to distribute in the future, the gift is nevertheless vested if "payment or distribution appear to be postponed for the convenience of the fund or property. . . ." ²⁷⁷ If, by "convenience of the fund" is meant "to let in a prior estate" (e.g., where following an equitable life estate in *A* there is a direction to the trustees to pay and divide the subject matter of a gift to *B* and *C*), the

²⁷³ 2 JARMAN, 1391.

²⁷⁴ See especially *Matter of Crane*, 164 N.Y. 71 at 76-77, 58 N.E. 47 (1900). The rule is discussed in 5 AMERICAN LAW OF PROPERTY, §21.21; SIMES AND SMITH, §§657 to 658.

²⁷⁵ 5 AMERICAN LAW OF PROPERTY, §21.21 at 159-160.

²⁷⁶ *Id.* at 161-162; SIMES AND SMITH, §657 at 121.

²⁷⁷ 2 JARMAN, 1392.

formula could almost always be invoked to avoid a suspension of vesting because most future dispositions are subject to one or more anterior estates.²⁷⁸ If, on the other hand, "convenience of the fund" is literally read, the formula becomes little more than a recondite device to expedite vesting, for the "exception is so vague as to make its application in the vast majority of cases a matter of judicial discretion."²⁷⁹ Of course, if it appears that distribution is deferred to permit the sale of a particular asset or the orderly liquidation of an estate, one might say that the "convenience of the estate" is involved. Generally speaking, however, the rule under discussion is useless in the decision of a concrete case and it certainly affords no guide whatever to the intention, in regard to vesting, of the maker of a gift.

6. *The Rule That a Gift of the Whole Income From a Gift Which Might Otherwise Be Contingent Will Cause the Gift To Be Vested.* Where a gift distributable in the future might otherwise be contingent on survivorship, it is a well-established rule of construction that a gift of all of the intermediate income to the one or ones ultimately designated to take causes the gift of the principal to vest,²⁸⁰ unless of course the gift is expressly made contingent on survivorship.²⁸¹ So, a gift to *A*, when or if he attains 21, the entire income to be paid to him in the meanwhile, will pass to *A*'s estate if he dies under 21.²⁸² And the same is true where the gift is to a class, as in the case of a gift in trust to pay the income to the children of *A* until the youngest reaches 21 and then to divide the corpus of the trust among said children.²⁸³

In England the rule has been considerably refined. It appears, for example, that, if the rule is to apply there, all of the intermediate income must be given during the whole period antecedent to distribution,²⁸⁴ that a gift of the whole income for purposes of the maintenance of the beneficiary is the equivalent of

²⁷⁸ 5 AMERICAN LAW OF PROPERTY, §21.21 at 160.

²⁷⁹ SIMES AND SMITH, §658 at 127.

²⁸⁰ 5 AMERICAN LAW OF PROPERTY, §21.20; CAREY AND SCHUYLER, §§324-331; HAWKINS, 270-275; 2 JARMAN, 1394-1407; SIMES AND SMITH, §588.

²⁸¹ CAREY AND SCHUYLER, §331; 2 JARMAN, 1405.

²⁸² Lane v. Goudge, 9 Ves. 226, 32 Eng. Rep. 589 (1803).

²⁸³ Re Grove's Trusts, 3 Giff. 575, 66 Eng. Rep. 537 (1862).

²⁸⁴ 2 JARMAN, 1404-1405. But in *Davies v. Fisher*, 5 Beav. 201, 49 Eng. Rep. 554 (1842), where there was a gift in trust for the children of *A* as they severally attained 25, the income to be applied for their maintenance during their minorities, the court held the gift vested, Lord Langdale, M. R., saying that a gift of income after minority was to be implied. And a gift of all of the income subject to a charge apparently satisfies the requirement that all the income be given. HAWKINS, 272.

a direct gift of the income,²⁸⁵ that the rule applies where the gift is to a class as well as where it is to an individual,²⁸⁶ and that a direction to accumulate is not, for purposes of the rule, the equivalent of a gift of income.²⁸⁷ The English cases also establish that where a gift to a class is involved and the income is given for the maintenance of the class as a whole, the income gift will not accelerate vesting. In other words, there must be a direction that an aliquot share of the income shall be devoted to the maintenance of each member of the class.²⁸⁸ Moreover, where an income gift is for maintenance, all of the income must be given for that purpose,²⁸⁹ subject to the exception laid down by Jessel, M. R., in *Fox v. Fox*²⁹⁰ that a direction to apply all of the income from the presumptive share of each member of a class for his or her maintenance, "or so much thereof respectively as the trustees . . . might think proper . . .," is sufficient to prevent a deferment of vesting. But the view of the learned Master of the Rolls that this should be treated "as a gift of the whole income followed by a discretion to apply less than the whole . . ." has been questioned.²⁹¹

Although the effect of a gift of intermediate income upon the vesting of the ultimate gift of principal may not have been refined by American courts to the degree that it has been in England, it is clear that the rule under discussion has been widely accepted in this country.²⁹² The requirement that all of the income be given to or for the maintenance of the ultimate takers has not been rigidly enforced by all American courts,²⁹³ but the Supreme Court of Pennsylvania has held, in a now very

²⁸⁵ *Hoath v. Hoath*, 2 B.C.C. 3, 29 Eng. Rep. 2 (1785); *Hanson v. Graham*, 6 Ves. Jr. 239, 31 Eng. Rep. 1030 (1801).

²⁸⁶ *Re Grove's Trusts*, 3 Giff. 575, 66 Eng. Rep. 537 (1862). See also *Jones v. Mackilwain*, 1 Russ. 220, 38 Eng. Rep. 86 (1825), where, however, the gift was a residuary one.

²⁸⁷ *HAWKINS*, 274-275; 2 *JARMAN*, 1406.

²⁸⁸ *In re Parker*, 16 Ch. Div. 44 (1880); *In re Mervin*, [1891] 3 Ch. 197.

²⁸⁹ *Watson v. Hayes*, 5 My. & Cr. 125 at 133, 41 Eng. Rep. 319 (1839); *HAWKINS*, 272; 2 *JARMAN*, 1397.

²⁹⁰ L. R. 19 Eq. 286 (1875).

²⁹¹ *In re Grimshaw's Trusts*, 11 Ch. Div. 406 at 410 (1879), per Hall, V. C.; *In re Wintle*, [1896] 2 Ch. 711, per North, J.; 2 *JARMAN*, 1401: "It is . . . somewhat difficult to say how far the authority of *Fox v. Fox* extends. It is certain that it has its limitations." But see *In re Turney*, [1899] 2 Ch. 739; *In re Williams*, [1907] 1 Ch. 180; *In re Hume*, [1912] 1 Ch. 693; *In re Woolf*, [1920] 1 Ch. 184; *In re Ussher*, [1922] 2 Ch. 321.

²⁹² 5 *AMERICAN LAW OF PROPERTY*, §21.20; *CAREY AND SCHUYLER*, §§324-331; *SIMES AND SMITH*, §588.

²⁹³ 5 *AMERICAN LAW OF PROPERTY*, §21.20 at 158-159; *SIMES AND SMITH*, §588 at 38-39.

well known case,²⁹⁴ that the vesting of a gift to a class will not be accomplished by a gift of intermediate income distributable in proportions which differ from those in which the capital is to be distributed. There the principal was distributable per capita, the income per stirpes, among the testator's grandchildren.

Jarman has rationalized the effect of an income gift upon vesting with the statement that, "A gift of interest, *eo nomine*, obviously is difficult to be reconciled with the suspension of the vesting, because interest is a premium or compensation for the forbearance of principal, to which it supposes a title. . . ."²⁹⁵ This of course overlooks the fact that the beneficiary of a gift is an object of the testator's bounty and as such is not in a position to be forbearing in his demands for that which is or will be his only through the testator's grace. It also fails to take adequate account of the fact that interest and principal are perfectly capable of separate disposition.²⁹⁶ Further, it will be noted that Jarman's statement refers to a gift of *interest as such*, whereas there is no indication that the rule in question does not apply with equal force where the gift of intermediate income is phrased in terms of a gift of "income" without any reference whatever to "interest." Other reasons advanced in support of the inference of vesting supposed to arise from a gift of intermediate income are phrased in terms of the maker of the gift thinking of income and principal as one²⁹⁷ and that "the testator intended the legatee or devisee to take some benefit from the gift of the principal immediately on the testator's death, and that the postponement of possession was merely for the benefit of the donee."²⁹⁸ These have their appeal, but neither they nor Jarman's nor any other explanation can qualify as a wholly successful attempt to make this rule of construction conform to reason. Of course it by no means follows that the rule should be rejected when the question is whether a future interest is contingent on survivorship. Once again, however, one is justified in wondering whether validity or invalidity under the rule against perpetuities should be made to depend

²⁹⁴ Kountz's Estate (No. 1), 213 Pa. 390, 62 A. 1103 (1906).

²⁹⁵ 2 JARMAN, 1397.

²⁹⁶ See *Batsford v. Kebbelle*, 3 Ves. Jr. 363, 30 Eng. Rep. 1055 (1797), which, though much criticized [e.g., *In re Wrey*, 30 Ch. Div. 507 at 510 (1885), per Kay, J.], has been said to turn "on the marked distinction which was drawn between the dividends and the capital." 2 JARMAN, 1396.

²⁹⁷ 5 AMERICAN LAW OF PROPERTY, §21.20 at 158.

²⁹⁸ SIMES AND SMITH, §588 at 37-38.

upon the application or non-application of a rule of construction which is largely lacking in logical foundation. That is exactly what happens in connection with the rule as to the effect of an intermediate income gift, for it is applied indiscriminately in determining whether future interests are vested in the sense of being non-contingent on survivorship or whether they are vested for purposes of the rule against perpetuities.²⁹⁹

7. *The Rule That a Direction To Sever a Gift From the Bulk of the Estate Causes the Gift To Vest Even Though It Might Otherwise Be Contingent.* The famous English case, *Saunders v. Vautier*,³⁰⁰ dealt with a gift of stock in trust to accumulate all of the income until the beneficiary should attain 25 and then to distribute to him the stock and all accumulated income. The beneficiary, upon reaching 21, was held entitled to have the stock transferred to him on the ground that he had an indefeasibly vested interest therein. The case is said to establish the rule that a legacy is vested where there is a mandate that it be severed from the bulk of the estate. In a later case, *In re Lord Nunburnholme*,³⁰¹ a gift of shares of stock in trust to be delivered to the testator's son when he attained 26 was held to be contingent on survivorship. There the income from the stock up to £3,000 per year was payable to the son and the balance was to be accumulated, but the income was subject to a contingent charge in favor of the testator's daughters. It was said that in order for a severance to be directed within the meaning of the rule under discussion no one except the beneficiary may have any interest at all in the gift.³⁰² In *Festing v. Allen*³⁰³ appears the added qualification that the gift must be one in trust or one with respect to which a segregation is directed; it is not enough that severance results from some extraneous factor, "as in the case of the residue becoming payable before the legacy itself is payable."³⁰⁴

²⁹⁹ For example, the rule against perpetuities and the rule of construction which is the subject matter of discussion were both involved in the following cases: *Davies v. Fisher*, 5 Beav. 201, 49 Eng. Rep. 554 (1842); *Fox v. Fox*, L. R. 19 Eq. 286 (1875); *Armstrong v. Barber*, 239 Ill. 389, 88 N.E. 246 (1909); *Kountz's Estate* (No. 1), 213 Pa. 390, 62 A. 1103 (1906).

³⁰⁰ Cr. & Ph. 240, 41 Eng. Rep. 482 (1841).

³⁰¹ [1912] 1 Ch. 489.

³⁰² See the remarks of Cozens-Hardy, M. R. (id. at 494), Buckley, L. J. (id. at 497) and Fletcher Moulton, L. J. (id. at 495). The doctrine is discussed in CAREY AND SCHUYLER, §332; HAWKINS, 275-276; 2 JARMAN, 1407-1408.

³⁰³ 5 Hare 573, 67 Eng. Rep. 1038 (1844).

³⁰⁴ Id. at 573.

The doctrine of severance has been accepted at least to some extent in the United States,³⁰⁵ even in connection with class gifts,³⁰⁶ although the nature of the formula is such that its application to non-class gifts is more readily discernible. Like the other rules concerning vesting, the reasoning on which this one is founded is to some degree question-begging, since the decision that no one except the beneficiary or beneficiaries of a gift have any interest in the subject matter of the gift amounts in itself to a decision that the gift is vested in the most absolute sense, i.e., in the sense of unqualified ownership. On the other hand, where there is a mandate to set aside specific property and where no interest in the property or the income from it is conferred upon anyone other than the beneficiary, it is not altogether unreasonable to infer an intention to bestow upon the beneficiary an immediate interest in the property. Thus regarded, the doctrine of severance has at least a little more substance than some of the other rules of construction as to vesting.

8. *The Rule of Edwards v. Hammond*—*Effect Upon Vesting of a Gift Over*. In *Edwards v. Hammond*³⁰⁷ A had surrendered lands to his own use for life and thereafter to the use of his eldest son and his heirs if the latter should live to attain the age of 21 years; provided and upon condition that if the eldest son die before 21 the lands should remain to the surrenderer and his heirs. After A's death his eldest son, being 17, was held entitled to succeed in ejectment against A's youngest son who had entered upon the lands. The eldest son's interest was thought to be vested to be divested. The case is now thought to support the rule that a gift to one when or if he reaches a given age followed by a gift over upon his death under that age creates a vested interest in the named taker. The inference of vesting must necessarily be derived from the presence of the gift over because in its absence the first taker's interest would clearly be contingent.³⁰⁸

The English cases have not confined the rule of *Edwards v. Hammond* to gifts in remainder but have applied it as well to an immediate gift to A when he reaches a given age, followed by a gift over if he dies under that age.³⁰⁹ They have applied it also

305 CAREY AND SCHUYLER, §332 at 459-460; SIMES AND SMITH, §658 at 127-128.

306 O'Hare v. Johnston, 273 Ill. 458 at 467, 113 N.E. 127 (1916).

307 3 Lev. 132, 83 Eng. Rep. 614 (1683).

308 2 JARMAN, 1364.

309 Doe d. Hunt v. Moore, 14 East 601, 104 Eng. Rep. 732 (1811).

where the gift is in trust,³¹⁰ and it appears to make no difference whether the gift over is to take effect on the death of the first taker *simpliciter*, as in *Edwards v. Hammond* itself, or whether the word "death" is coupled with a contingency, as where there is a gift over upon the death of the first taker without leaving issue surviving him.³¹¹ And although the rule originally arose in connection with a disposition of realty, it applies in England with equal force to dispositions of personalty.³¹² Moreover, as in the case of some of the other rules as to vesting, the fact that the inquiry in *Edwards v. Hammond* was directed at whether or not the interest there in question was vested in the feudal sense (though the issue was the transmissibility and not the destructibility of the future interest) has been no deterrent to an extension of the rule to cases where the question for determination was one of remoteness of vesting under the rule against perpetuities. So, a gift in trust to the children of a living person upon their attaining an age in excess of 21, followed by a gift over in case no child should attain the age specified, has been held to confer vested and hence valid interests upon the children designated to take, and the gift over has been regarded as a strong, if not conclusive, justification for the results reached.³¹³

The rationalization advanced in favor of the rule of *Edwards v. Hammond* has been that "the subsequent gift over . . . sufficiently shows the meaning . . . to have been that the first devisee should take whatever interest the party claiming under the devise over is not entitled to . . .,"³¹⁴ and that "the devise over is considered as explanatory of the sense in which the testator intended the devisee's interest in the property to depend upon his attaining the specified age, namely, that at that age it should become absolute and indefeasible; the interest in question, therefore, is construed to vest *instanter*."³¹⁵ If these explanations mean, as they seem to, that the gift over is a clause of divestiture and that from this it follows that the prior interest is vested, one must answer that the conclusion that the gift over is a clause of

³¹⁰ *Phipps v. Ackers*, 9 Cl. & Fin. 583, 8 Eng. Rep. 539 (1842).

³¹¹ *Ibid.*

³¹² *In re Heath*, [1936] Ch. 259.

³¹³ See especially *Fox v. Fox*, L. R. 19 Eq. 286 at 291: ". . . [T]he gift over, if not conclusive on the question, certainly aids the construction adopted by me." Per Jessel, M. R. To the same effect, see *Bland v. Williams*, 3 My. & K. 411, 40 Eng. Rep. 156 (1834); *Davies v. Fisher*, 5 Beav. 201, 49 Eng. Rep. 554 (1842); *In re Turney*, [1899] 2 Ch. 739.

³¹⁴ *Phipps v. Ackers*, 9 Cl. & Fin. 583 at 592, 8 Eng. Rep. 539 (1842).

³¹⁵ 2 JARMAN, 1364.

divestiture (unless it is expressly so designated) can be reached only on the supposition that the first taker's interest is vested, for otherwise there would be nothing to divest. Hence, to label the gift over as a clause of divestiture is to decide just what is to be decided—whether or not the first taker's interest is vested—and the circle of absurdity is completed. That this criticism of the rationale of the rule of *Edwards v. Hammond* is in considerable measure justified is attested by the expressions of more than one able English judge doubting the logic of the rule.³¹⁶ Moreover, although the rule has met with the approval of some American courts,³¹⁷ there are others which have taken the position that a gift over, far from giving rise to an inference of vesting, gives rise to an inference of contingency,³¹⁸ and still others which have said that the absence, not the presence, of a gift over is an indication that vesting is not to be protracted.³¹⁹ It seems a fair conclusion that there is nothing more indisputably compelling about the rule of *Edwards v. Hammond* than there is about any of the other rules relating to vesting so far discussed. That this rule may prevent intestacy (as where there is a gift to *A* at 25, and if he dies without issue under that age, then over) is as much or as little a justification for its application in transmissibility cases as is so in connection with all of the other rules tending toward early vesting *in that sense*. It does not follow that the rule of *Edwards v. Hammond* has any relationship to the objectives of the rule against perpetuities.

9. *The Rule That Words of Survivorship Will Ordinarily Refer to the Time When a Gift Becomes Distributable.* One might suppose that the words "survivor" or "surviving" or words of similar import are singularly unambiguous, and in one sense they are. Where, however, a gift of a future interest is made to a group of persons "surviving," or to a class "or the survivors or survivor" of them or to those who are "living," the words of

³¹⁶ *Phipps v. Ackers*, 9 Cl. & Fin. 583 at 595-596, 8 Eng. Rep. 539 (1842), per Lord Brougham; *In re Heath*, [1936] Ch. 259 at 261: "Apart altogether from authority I think that anyone looking at the terms of the gift itself would not hesitate long before they said it was a contingent gift. . . ." Per Farwell, J.

³¹⁷ *Bush v. Hamill*, 273 Ill. 132, 112 N.E. 375 (1916); *Hoblit v. Howser*, 338 Ill. 328, 170 N.E. 257 (1930); *Hughes v. Hughes*, 51 Ky. 115 (1851); *Hersey v. Purington*, 96 Me. 166, 51 A. 865 (1902); *Roome v. Phillips*, 24 N.Y. 463 (1862); *Manice v. Manice*, 43 N.Y. 303 at 380 (1871); *Raney v. Heath*, 2 Pat. & H. (Va.) 206 (1856); *Sellers' Executor v. Reed*, 88 Va. 377, 13 S.E. 754 (1891); 5 AMERICAN LAW OF PROPERTY, §21.32.

³¹⁸ *Estate of Blake*, 157 Cal. 448, 108 P. 287 (1910); 5 AMERICAN LAW OF PROPERTY, §21.32; *SIMES AND SMITH*, §590 at 40, n. 98.

³¹⁹ 5 AMERICAN LAW OF PROPERTY, §21.22; *SIMES AND SMITH*, §590 at 41, n. 1.

survivorship, in order to be given meaning, must be made referable to some point of time. This factor, by imparting to the words an equivocal meaning, creates a problem which can be solved only through the construction process.

Suppose, for example, a gift to *A* for life, remainder to his "living children," or to his "surviving children," or to his "children or the survivors or survivor of them" or to "*A* and *B* or the survivor of them." In the first three instances, the words survivorship may refer to the death of the testator or to the death of the tenant for life; in the fourth, the word "survivor" may in addition refer to such of *A* and *B* as survives the other. Courts have frequently been called upon to resolve the meaning of words of survivorship with varying results, some taking the position that words of survivorship relate to the death of the testator,³²⁰ others that they refer to the time when the future interest becomes possessory.³²¹

Those courts which hold that words of survivorship are to be referred to the testator's death rationalize their decisions on one or more of several grounds. This construction, it is said, (1) tends to minimize the possibility of intestacy, which might result from the death of all the potential takers before the prior estate or estates end; (2) accords with the presumption against disinheritance where the gift of the future interest is to lineals; (3) favors equality of distribution; and (4) comports with the rule of early vesting.³²² All this may be true, but the fact remains that the English courts, repudiating an earlier view to the contrary,³²³ and a majority of American courts³²⁴ have more generally thought that the normal and natural meaning of words of survivorship may better be given effect by treating such words as relating to the period at which the gift is limited to take effect in possession. The result in these jurisdictions of course is that gifts such as those supposed are contingent on survivorship and it seems to make no difference whether the gift is of realty or personalty³²⁵ or whether it is to individuals or to a class.³²⁶

³²⁰ 5 AMERICAN LAW OF PROPERTY, §21.15 at 150-151; SIMES AND SMITH, §577 at 14-15, n. 24.

³²¹ 5 AMERICAN LAW OF PROPERTY, §21.15 at 150; SIMES AND SMITH, §577 at 16-17, n. 25.

³²² 114 A.L.R. 4 at 13-17 (1933).

³²³ HAWKINS, 310-322.

³²⁴ SIMES AND SMITH, §577 at 15-16; CAREY AND SCHUYLER, §§304, 335.

³²⁵ HAWKINS, 312.

³²⁶ SIMES AND SMITH, §577 at 18-19.

The particular phraseology of gifts involving words of survivorship has given rise to numerous refinements³²⁷ which need not detain us here. For present purposes, it is enough to observe that we are confronted with another constructional problem which, if not inherent in the concept of vesting, at least appears to be an inseparable component of the unfortunately characteristic failure of draftsmen to recognize and eliminate uncertainties. It is no doubt true that words of survivorship are apt to occasion more disputes as to transmissibility than perpetuity questions, but such words are indeed capable of creating the latter.³²⁸ Thus, once again, the innate obscurity of the concept of vesting may breed perpetuity litigation.

10. *Rules Favoring Vested-To-Be-Divested Over Contingent Interests.* The early tendency of courts to construe remainders as vested in the feudal sense was extended to a favoritism for interests which are vested to be divested rather than contingent. Thus courts generally, if not universally, hold a gift in default of appointment, if not contingent upon some event other than the exercise of a power, is vested to be divested,³²⁹ as, for instance, if property is given to *A* for life, remainder to such persons as *A* shall by will appoint, remainder in default of appointment to *B* in fee. The same is often true where the life tenant or others may have a power to encroach upon capital.³³⁰ Likewise, where a gift of a future interest is subject to a condition, such as the payment of money or the performance of some act by the beneficiary, the tendency is to construe the condition as subsequent rather than precedent, thus rendering the gift defeasibly vested instead of contingent.³³¹ So, too, where a gift is to a class as in the case of a gift to *A* for life, remainder to his children, *A*'s children will

³²⁷ HAWKINS, 312-322. If the gift is to *A* for life, remainder to *B* and *C*, but if either dies during *A*'s lifetime, then to the survivor, the survivorship has been deemed to be survivorship of the taker who dies first. *Id.* at 313. But if in a similar gift the share of the one dying is to be transferred to the survivor, the survivorship has been referred to the time of distribution. *Id.* at 313-314. Where there is a gift to *A* for life, remainder to his children at 21, followed by words of survivorship, the words may refer to the attainment of 21. *Id.* at 314. Sometimes the words may be so used as to permit the gift to be construed as vested to be divested, as if the gift is to a class or those living at the time of distribution. *Id.* at 316-317. The words have also caused difficulties with respect to the disposition of accruing shares. *Id.* at 319-322.

³²⁸ *Whitby v. Von Luedecke*, [1906] 1 Ch. 783.

³²⁹ *Cunningham v. Moody*, 1 Ves. Sr. 174, 27 Eng. Rep. 965 (1748); *Doe d. Willis v. Martin*, 4 Term. Rep. 39, 100 Eng. Rep. 882 (1790); 5 AMERICAN LAW OF PROPERTY, §21.31a; CAREY AND SCHUYLER, §299; SIMES AND SMITH, §150.

³³⁰ CAREY AND SCHUYLER, §299; SIMES AND SMITH, §150.

³³¹ 5 AMERICAN LAW OF PROPERTY, §21.31d; SIMES AND SMITH, §151.

ordinarily be said to take interests which are irrevocably vested in quality, subject to being partially divested in quantity by the birth of further children.³³²

Gifts such as those to which reference is made in the preceding paragraph have caused no great confusion. But a gift of a future interest to a class of persons may be complicated by alternative limitations, and these have generated, with respect to the vested or contingent character of the first limitation,³³³ a very considerable body of litigation. Illustrative of this sort of disposition would be a gift to *A* for life, remainder to his children or their descendants; or a gift to *A* for life, remainder to his children or the issue of any who die leaving issue; or a gift to *A* for life, remainder to his children and if *A* dies without children then to *B* in fee. In cases of this sort there has frequently arisen a question as to whether the alternative gift in remainder (if it is decided that it is referable to the ending of the antecedent estate and not to the death of the testator) imparts a contingent quality to the primary gift in remainder. In other words, must the remaindermen survive the tenant for life in order to take, or are the interests of the remaindermen vested to be divested only upon the occurrence of the event which permits the alternative limitation actually to take effect? Results reached in such cases will of course vary according to the particular instrument construed, but they also vary in terms of the degree of preference of particular courts for vested interests.³³⁴

Although gifts of the type discussed in this subdivision are more likely to involve legal remainders following legal life estates and hence to involve no perpetuity question, alternative limitations akin to those of which examples are given in the preceding paragraph can, and not uncommonly do, occur in connection with trust gifts.³³⁵ Where these occur, and where the

³³² CAREY AND SCHUYLER, §300; SIMES AND SMITH, §146.

³³³ The alternative limitation, unless the event upon which it is to take effect is construed as one which must occur during the testator's lifetime, is by its nature contingent on the primary taker's predeceasing the ending of the anterior estate. It may or may not be regarded as contingent on survivorship of the antecedent estate. 5 AMERICAN LAW OF PROPERTY, §§21.25, 22.54; CAREY AND SCHUYLER, §§229-233; SIMES AND SMITH, §§583 (at 28), 659. This is normally a "transmissibility" and not a perpetuity question. Part of the problem results from a tendency to confuse the issue of transmissibility with the issue of when the class closes. *Id.*, §§654, 655.

³³⁴ These and other similar limitations are discussed in 5 AMERICAN LAW OF PROPERTY, §§21.31c, 22.54; CAREY AND SCHUYLER, §§302, 305, 307; SIMES AND SMITH, §§148, 149, 581-583, 659.

³³⁵ Examples are cited in SIMES AND SMITH, §§581-583.

primary gift is not certain to become possessory within the period of the rule, then of course the alternative gift is virtually certain to be invalid and the primary gift will also be void unless it is held to be vested. It may be observed that in these cases, whether the rule against perpetuities is involved or not, the primary gift might logically be vested by the rule of construction (in those jurisdictions where it exists) that a gift over creates an inference of vesting in respect of the gift, which it would defeat. As we have seen, however, logic does not always prevail where the vested character of future interests is in issue and the effect and even the existence of the gift over as such is often ignored. This could be the result of the infinite variations and intricacies which may characterize limitations followed by alternative limitations³³⁶ and which may well obfuscate the possibility of invoking a rule of construction the application of which to less entangled dispositions may be more readily perceived. But considering the conclusion reached earlier, that a gift over cannot reasonably be said to give rise to an inference of vesting, one might say that it is of no great importance to speculate as to why the application of this rule of construction is not more often invited by alternative limitations of the type here considered. However, there may be some logic in theorizing as to why this illogical rule of construction should not be applied in connection with such limitations if by doing so one succeeds in offering an additional illustration of why application of the rule against perpetuities to remoteness of vesting compounds the rule's complexities.

11. *Other Rules of Construction Relating to Vesting.* The rules concerning vesting heretofore discussed may be regarded as rules of major importance. There are of course other rules which are perhaps no less significant but which do not require such extended comment. There are in addition constructional problems created by various gifts which do not lend themselves to or have not yet brought about settled rules of construction. No attempt will be made to consider the latter but an effort will be made to summarize the rules not already considered which appear to be of sufficient general import to require comment.

The fact that a gift is residuary is said to tend toward causing it to vest. As stated by Hawkins, ". . . courts especially lean in

³³⁶ See, as illustrating complex alternatives, *Black v. Todd*, 121 S.C. 243, 113 S.E. 793 (1922).

favor of vesting in the bequest of a residue."³³⁷ This rule is obviously a counterpart of the presumption against intestacy, for if a residuary gift is contingent on survivorship and if the taker predeceases the time specified for distribution, intestacy will be the consequence. The rule seems, like many of the rules as to vesting, frequently to be employed conjunctively with others.³³⁸ Although in its origin it is related to the term "vested" in the sense of "transmissible" or "non-contingent on survivorship," courts have not been discriminate in its application and have seen fit to apply it where the question for decision is a perpetuity one.³³⁹

The English cases, especially the earlier ones, favor the view that a legacy charged on land is contingent on survivorship,³⁴⁰ the theory being that the heir is a favorite of the court.³⁴¹ The failure of American courts generally to adopt this position³⁴² seems very possibly attributable to the tendency in this country to fuse the rules of construction applicable to dispositions of realty and personalty.³⁴³

Gifts to unascertained persons, as to the "heirs" or "heirs of the body" of a living person, are of course quite generally held to be contingent.³⁴⁴ In such cases, the question to be dealt with is not whether the future interest is contingent, but whether, upon a proper construction of the instrument of gift, those designated as takers are truly unascertainable until a future time.³⁴⁵ Thus, if in the cases supposed the words "heirs" or "heirs of the body" may properly be interpreted to mean "children," those who will take will upon birth answer the description of takers and their interests will not necessarily remain contingent until the death of their ancestor.³⁴⁶

³³⁷ HAWKINS, 276. See also CAREY AND SCHUYLER, §336; 2 JARMAN, 1409. The leading case, from a historical standpoint, appears to be Booth v. Booth, 4 Ves. Jr. 399, 31 Eng. Rep. 203 (1799).

³³⁸ 2 JARMAN, 1409-1419.

³³⁹ Id. at 1413-1414, 1417-1418.

³⁴⁰ HAWKINS, 279-281; 2 JARMAN, 1382-1386.

³⁴¹ Prowse v. Abingdon, 1 Atk. 482 at 486, 26 Eng. Rep. 306 (1738), per Lord Hardwicke. But the learned chancellor also observed that the true basis for the rule was that, so far as lands were concerned, the common law should control, whereas as to personalty equity would apply civil law rules.

³⁴² 5 AMERICAN LAW OF PROPERTY, §21.18 at 154; SIMES AND SMITH, §584.

³⁴³ CAREY AND SCHUYLER, §337.

³⁴⁴ 5 AMERICAN LAW OF PROPERTY, §21.31e; SIMES AND SMITH, §152.

³⁴⁵ SIMES AND SMITH, §153.

³⁴⁶ Id. at 172.

Spendthrift provisions in a trust, requiring payment of income or principal to the beneficiaries "in person" or "on their personal receipt," have been held to cause a suspension of vesting on the theory that there can be compliance with the mandate of the spendthrift clause only if the beneficiary survives the time of payment.³⁴⁷ It seems doubtful that a spendthrift clause, usually inserted in an instrument as a device to protect the beneficiary during his lifetime, has any bearing upon what the maker of a gift intended or would have intended with respect to the vested or contingent character of any future interests which he creates.³⁴⁸ Again, the question is usually whether a transmissible interest exists. One case, however, places some stress upon the existence of a spendthrift clause in reaching the conclusion that a future interest was contingent and hence offensive to the rule against perpetuities.³⁴⁹

C. Vesting and the Purposes of the Rule

1. *Sense and Nonsense in the Concept of Vesting.* We have seen that the historical relationship between seisin and vesting and the development of contingent remainders made explicable, if not necessary, the early distinction between vested and contingent remainders. In a modern system of law, however, except in those jurisdictions where contingent remainders are still destructible, it is difficult to justify the feudal differentiations between vested and contingent future interests unless in terms of their relationship to the rule against perpetuities. So far as alienability is concerned, it may be observed that contingent remainders have been made alienable in many jurisdictions without harmful results.³⁵⁰ And the practicalities attendant upon the enforcement of the rights of creditors or those of a trustee in bankruptcy ought certainly not to depend upon feudal notions of vesting.³⁵¹ It may be that the holder of a contingent future interest should be protected against his own profligacy or the

³⁴⁷ CAREY AND SCHUYLER, §338; *id.*, Supp. 1954, §338.

³⁴⁸ CAREY AND SCHUYLER, §338 at 471; *id.*, Supp. 1954, §338 at 199; COSTIGAN, *CASES ON TRUSTS* 468 (1925); GRISWOLD, *SPENDTHRIFT TRUSTS*, 2d ed., 89 (1947); 2 SCOTT, *TRUSTS*, 2d ed., §158.1 (1956).

³⁴⁹ *Easton v. Hall*, 323 Ill. 397 at 417-420, 154 N.E. 216 (1926). But see *Saltonstall v. Treasurer & Receiver General*, 256 Mass. 519, 153 N.E. 4 (1926), *affd.* 276 U.S. 260 (1928).

³⁵⁰ SIMES AND SMITH, §1854.

³⁵¹ Schuyler, "Drafting, Tax and Other Consequences of the Rule of Early Vesting," 46 ILL. L. REV. 407 at 430-432 (1951).

depredations of unscrupulous creditors upon a sale of the interest.³⁵² But this has nothing to do with feudal vesting; the same ethical concepts apply as well to defeasibly vested interests.³⁵³

Even in acceleration cases, the contingent or feudally vested nature of future interests should not be significant. For acceleration inevitably results in an attempt to approximate the intention to be imputed to the maker of a gift upon the happening of an unanticipated event; and this cannot be accomplished by reference to an outmoded distinction which never was and probably never could have been understood by the maker of the original gift. When a prior estate is renounced, the destiny of ulterior limitations can be sensibly decided only by resort to the delicate process of forming a judgment as to what the donor would have wanted under the circumstances.³⁵⁴ To the end that litigation may be minimized, rules of construction may be desirable in typical cases, but that does not vindicate the application of outmoded rules.

The fact that reversions are feudally vested interests which are incident to literally thousands of modern commercial transactions might be urged as an objection to the complete abandonment of the feudal concept of vesting. Here again, however, there is little need to operate within the framework of the ancient property law. It makes little difference,³⁵⁵ under the present social order, whether we say that the reversioner is "seised" or that he "owns" an interest in the fee. But for historical reasons, the holder of an interest contingent in the modern sense, i.e., subject to some condition precedent, can equally be regarded as owning some interest in the fee. The important thing is that a reversion is ordinarily subject to no condition precedent and the reversioner's right to possession is subject only to the ending of the term or other estate carved out of the fee. The rights of the reversioner can be preserved even if confounding nomenclature is not. Thus it seems that the terms "vested" and "contingent" in their feudal

³⁵² Cf. *In re Reifsteck*, (E. D. Ill. 1947) 71 F. Supp. 157; *Meyer v. Reif*, 217 Wis. 11, 258 N.W. 391 (1935).

³⁵³ Schuyler, "Drafting, Tax and Other Consequences of the Rule of Early Vesting," 46 ILL. L. REV. 407 at 431 (1951).

³⁵⁴ Schuyler, "Future Interests in Illinois: Current Maturities and Some Futures," 50 N.W. UNIV. L. REV. 457 at 485-486, 489-490 (1955).

³⁵⁵ It may of course still make a difference with respect to dower rights. SIMES AND SMITH, §1887.

sense could be well-nigh forgotten if they cannot be reasonably related to the rule against perpetuities. Can the same be said of their more modern connotations?

Today an interest is vested, whether or not in the feudal sense, if it is subject to no condition precedent; it is contingent if some condition precedent must be fulfilled before it may take effect. But an interest may be contingent, in the sense of being subject to a condition precedent, and still be transmissible. Moreover, even though feudally vested, or vested in the sense of being subject to no condition precedent, an interest may be defeasibly vested because it is subject to a condition subsequent. If so, it may or may not be transmissible depending upon the nature of the condition subsequent. And, as already shown, as though the difficulty of drawing clear distinctions between conditions precedent and subsequent were not enough of a problem, courts constantly use the terms vested and contingent as though they were interchangeably employable to designate each of the several meanings which the words are capable of connoting. Be it noted, however, that even if courts and lawyers could be induced to abandon the words "vested" and "contingent" (or define in each case the sense in which they are being used), it will, as long as future interests are permitted to exist and as long as instruments of gifts are not perfectly framed, be necessary for courts to decide whether defectively created future interests are (1) subject to any condition at all; (2) if so, whether the condition is precedent or subsequent; and (3) if either precedent or subsequent, whether or not the future interest is transmissible (non-contingent on survivorship). And whereas the destructibility of future interests, their alienability, their availability to creditors or to a trustee in bankruptcy and their susceptibility to acceleration in case an anterior estate is renounced do not or should not depend upon feudal vesting, each one of these very practical attributes (or the lack of it) is intimately related to their vested or contingent character in the senses just defined. Hence, in these senses, it cannot be said that the distinctions between vested and contingent interests are important, if at all, only for purposes of the rule against perpetuities. The question is whether these distinctions, admittedly vital for other purposes, should constitute the linchpin of the rule itself. The answer rests primarily on two subsidiary and closely interrelated inquiries: (1) should the entangled concept of vesting determine the validity of future interests? (2) does vesting satisfy the objectives of the rule?

2. *Vesting as Determinative of Validity.* The rule against perpetuities is a rule of property; its application or non-application is theoretically determined without regard for intention. But the latter statement is followed more in the breach than in the observance³⁵⁶ and there is of course one exception to it which is openly recognized. For an interest which is vested is not subject to the rule, and whether an interest is vested or not is said to be a matter of intention. Thus, at least in this respect, validity or invalidity is, in principle, a matter of intention. This obviously does not mean that a testator can create a remote future interest which is clearly contingent and make it valid by saying that he intends the interest to be vested. It does mean, however, that an element of flexibility is injected into an otherwise almost wholly rigid rule of property the devastating consequences of which are well known to all and have already been commented upon. Flexibility in law is certainly desirable, and if the concept of vesting made the rule against perpetuities sensibly pliable a strong argument could be made for retaining it. Flexibility, however, when its limits are undefinable, is apt to lead to a degree of uncertainty approaching chaos, and a truly basic element of a stable social order is violated—the right of men living in such a society intelligently to evaluate the consequences of their acts and the need for the legal profession to be able to predict with considerable accuracy the results of contemplated litigation. If the volume of literature on the subject is any measure, one might conclude that the distinction between “vested” and “contingent” interests is so obscure, tenuous and uncertain that it should be altogether eliminated from the law of perpetuities if not from the law of future interests.³⁵⁷ That the latter (as indicated in the preceding subdivision) cannot be done does not justify the maintenance of the distinction in connection with the rule against perpetuities, if it is indeed true that it tends toward excessive disorder.

³⁵⁶ For discussions of construction and the rule, see 6 AMERICAN LAW OF PROPERTY, §§24.43-24.46; CAREY AND SCHUYLER, §508; GRAY, §§629-670; MORRIS AND LEACH, 236-247; SIMES AND SMITH, §§1288-1292.

³⁵⁷ For example, Professors Simes and Smith devote more pages to vesting [SIMES AND SMITH, §§131-209 (137 pages), §§571-594 (44 pages) and §§652-659 (36 pages), a total of 217 pages] than they do to the rule against perpetuities itself [id., §§1201-1395 (166 pages)]. Professor Carey and the writer devote almost as many pages to vesting [CAREY AND SCHUYLER, §§291-339 (77 pages)] as to the rule [id., §§471-508 (91 pages)]. The same is not true of AMERICAN LAW OF PROPERTY where 162 pages (6 id., §§24.1-24.68) are occupied with a discussion of the rule and only 50 (5 id., §§21.5-21.32, 22.54) deal with problems of vesting.

For the inability to eliminate all legal quandaries is not a reason for nurturing those that can be eradicated.

What Professor Leach has dexterously characterized as the "polysemantic character"³⁵⁸ of the words "vested" and "contingent" has been developed in the preceding pages of this article. Elsewhere, Professor Leach and Dr. Morris make an admirable effort to define vesting for purposes of the rule. They say that an interest is vested within the meaning of the rule when, "(a) the taker is ascertained, and (b) any condition precedent attached to the interest is satisfied, and (c) where the interest is included in a gift to a class, the exact amount or fraction to be taken is determined. . . ."³⁵⁹ This definition is simple enough and it would indeed be helpful if courts would adopt it whenever confronted with a question of vesting under the rule. The difficulty is, as these same authors admit, that, "The distinctions in this field are so delicate, and depend so often upon a minute consideration of the whole language of an instrument. . . ."³⁶⁰ Which is really to say that even if courts did adopt the relatively simple definition of vesting-for-purposes-of-the-rule which these authors suggest, the profession and the judiciary would still be faced with divining intentions that never actually existed as to whether takers are or are not ascertained, whether a condition is or is not attached to a gift and whether a condition is precedent or subsequent. Thus, though the simplification of the definition of vesting would be a step in the right direction, it could not be expected to eliminate the major problem injected by the concept of vesting, i.e., the ascertainment of a usually nonexistent intention.

It is of course frequently necessary for courts in construing wills to impute to testators intentions concerning matters with respect to which no real intention existed. Where, for example, property is given over upon "death" or "death without issue," where there is a gift to a class containing no specification as to the time of closing, where a gift may be divided either per stirpes or per capita—in all these and numerous other situations—more than one result is possible and courts must decide which one to adopt. It is not in itself startling, then, that the concept of vesting forces courts into a quest for motives which never actually subsisted. However, in other instances where this is necessary, rules of

³⁵⁸ LEACH, *CASES ON FUTURE INTERESTS*, 2d ed., 255 (1940).

³⁵⁹ MORRIS AND LEACH, 37.

³⁶⁰ *Id.* at 37-38.

construction which have been developed are frequently (though by no means always) based upon logical inference. That this is not so of the rules as to vesting has been demonstrated by the relatively detailed review of those rules contained in this article. Even this might conceivably be tolerable if these rules were applied with sufficient uniformity to minimize confusion. But that is not in the nature of the concept of vesting as it is being developed, nor is it reasonable to expect courts to be firm and consistent in the application of rules in which they have and can have but little faith.³⁶¹ At the same time, however the term vested may be defined, it must be expected that, in a system of law which consecrates precedent, lawyers and courts will not readily abandon the subtle refinements as to vesting which have been developed in the course of some five centuries of search for one of the most elusive fugitives known to Anglo-American law—intention as to vesting. The conclusion must be that vesting is not an appropriate test of whether a future interest will stand or fall under a rule which may destroy it unless the objections to it are outweighed by the degree to which it serves the objectives of the rule.

3. *Does Vesting Serve the Objectives of the Rule?* Part of the answer to the question which is the heading of this subdivision is to be found in the discussion which has preceded. For it seems clear that one objective of a rule having consequences as severe as those attendant upon a violation of the rule against perpetuities should be to afford a reasonably workable formula for balancing testamentary purposes against the purposes which the rule seeks to accomplish. To the extent that the concept of vesting introduces an extraordinary degree of indefiniteness into the rule it tends to rob the formula of its workability. In this sense the notion of vesting impinges upon what ought to be a legitimate aim of the rule. This is not to suggest that the rule should be made to be rigid and unbending. Indeed, if the flexibility afforded by the non-application of the rule to vested interests is removed, a substitute will have to be found.³⁶²

³⁶¹ See, for example, the remarks of Surrogate Wingate in *In re Montgomery's Estate*, 2 N.Y.S. (2d) 406 at 409-416 (1938), and of Weaver, J., in *Dowd v. Scally*, (Iowa 1919) 174 N.W. 938 at 939-940.

³⁶² Cf. HOLMES, COLLECTED LEGAL PAPERS 181 (1920): "The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man."

In a more particular sense our inquiry should be directed at the relationship of vesting to the present-day purposes of the rule. Does the destruction of remote contingent interests tend to make property more fluid, to free capital from testamentary restrictions and to stay the influence of the dead hand? To this question the answer must be in the affirmative. It is not so easy to answer affirmatively the companion question: does the exemption of vested interests from the rule further these objectives? Or, perhaps more fairly put, are the characteristics of vested interests such that, however remotely they may become possessory, they do not constitute obstacles to achieving what the rule is intended to accomplish?

It has already been seen that Gray himself doubted the propriety of excluding even feudally vested remainders from the sphere of the rule's operation.³⁶³ And although Gray seems to have been unduly concerned with the rule as punitive in nature, it certainly is demonstrable that even feudally vested interests may unduly fetter alienability and extend the reach of the dead hand. Indeed, in this respect many contingent interests are little more troublesome than those which are vested. For example, from these points of view, there is little practical difference between a gift over to *B* in fee, following a gift to *A* for life, remainder to his unborn son for life, and a contingent gift over to *B* following the same life estates. In each instance, absent a power of sale and a rule of destructibility, the title remains as unmarketable and the hand of the deceased maker of the gift is as controlling until *A* has a son who is old enough to join in a conveyance. And when this has occurred, even though *B*'s interest is contingent, both life tenants, the reversioner and *B* can deliver a marketable title and free the property from the testamentary restriction. The problem of apportioning the proceeds is only a little more difficult than it is if *B*'s interest is vested; the only added factor is the interest of the reversioner. The same cannot of course be said where the holder of the future interest is incapable of ascertainment, but that is sometimes true of vested interests, as in the case of a simple gift to *A* for life, remainder to his children.³⁶⁴ And obviously there may be other contingent interests which frustrate the purposes of the rule to a greater degree than feudally vested ones.

³⁶³ GRAY, §§970-974.

³⁶⁴ See, for example, *Deem v. Miller*, 303 Ill. 240, 135 N.E. 396 (1922); *Azarch v. Smith*, 222 Ky. 566, 1 S.W. (2d) 968 (1928).

The point, however, is that the feudally vested character of outstanding future interests is no assurance that the rule's aims will be met.

Certainly, if there are degrees of "vesting," an interest which is feudally vested is vested to the greatest possible extent. Thus, if feudal vesting does not serve the rule's objectives, it would seem to follow, a fortiori, that vesting in any other sense would also fail to do so. In this connection, it should be remembered that an interest which is not feudally vested will nevertheless ordinarily be regarded as vested for purposes of the rule if its taker is ascertained and if it is subject to no condition precedent. Into this category fall a large group of equitable interests the vested or contingent character of which will depend upon the rules as to vesting heretofore discussed, as for example gifts in trust, following equitable life estates, to the child or children of a living person distributable when the beneficiary or beneficiaries attain an age in excess of 21 or upon the happening of some other event which may not occur until after the period of the rule expires. Where gifts of this sort are vested and hence valid, which they are unless the rule applies to the duration of trusts as some have suggested it should,³⁶⁵ they certainly offend the spirit of the rule insofar as it looks with disfavor upon protracted dead hand control. For if the rule is really concerned only with the beginning of interests and not with their duration,³⁶⁶ there would be nothing to prevent a whimsical testator from creating a spendthrift trust for the benefit of his children during their lives and thereafter creating vested equitable future interests in his grandchildren to be paid to them upon attaining an age of 60, 70 or even 80 years of age. Clearly this cannot be done if the rule, or some kindred rule, applies to the duration of trusts. Observe, however, that if a trust cannot last beyond the period of the rule, there should be nothing startling at all, at least with respect to equitable interests, about the suggestion that remoteness of vesting should be forgotten and remoteness of possession substituted in its place. At all events, it is not easy to argue, in connection with the application of the rule to equitable interests of the sort here considered, that the concept of vesting serves the rule's objectives. Indeed, in a case such as that supposed in this paragraph,

³⁶⁵ GRAY, §§119-121.8; KALES, *FUTURE INTERESTS*, 2d ed., §§658-661, 677-681, 732-738 (1920); SIMES AND SMITH, §1393 at 245-246.

³⁶⁶ GRAY, §§232-236.

the non-application of the rule against perpetuities, if there is to be any rule at all, would be a travesty.

D. *Summary*

The concept of vesting, in relation to the rule and elsewhere, has occasioned a vast amount of litigation. This has resulted in part from the original relationship between seisin (with all of its ancient obscurities) and vesting in its feudal sense, and in part from the failure of lawyers and courts to distinguish with any degree of clarity between the several meanings of "vested" and "contingent" which these terms have acquired through a haphazard process of transformation. It is also due in part to the apparently incurable tendency of draftsmen to fail to anticipate and provide unambiguously for the happening of reasonably foreseeable contingencies. For these reasons, the great body of decisions concerning vested and contingent interests have not clarified the law in this area to any marked degree. Instead, there has been developed a large group of rules of construction, designed to assist in determining intention with respect to vesting, most of which bear no logical relationship to their avowed purpose. Moreover, these rules are applied without discrimination where the "vested" or "contingent" character of a future interest is at issue regardless of the meaning in which those terms are used and with no thought of the purpose for which a determination of "vesting" or "contingency" is being made. The result is disorder perilously close to chaos.

While it must be admitted that, as a result of the concept of vesting, the rule against perpetuities is less rigid than it would be if it were unbendingly concerned with remoteness of possession, the confusion described in the preceding paragraph overbalances the flexibility afforded by the application of the rule to remoteness of vesting alone. A redefinition of vesting-for-purposes-of-the-rule is unlikely to resolve this problem, because it is hardly supposable that lawyers and courts will lose their affinity for all of the refined distinctions which have been developed with respect to vesting. It is, moreover, no answer to say that we will always have to concern ourselves with vesting in other senses, as in the sense of transmissibility. That we must worry over whether a future interest is or is not contingent on survivorship does not mean that this and other troublesome aspects of vesting should be retained as an integral part of the rule.

Apart from the foregoing, it is demonstrable that the exemp-

tion of vested interests from the rule against perpetuities not only does not satisfy the objectives of a modern rule of perpetuities but indeed tends strongly to frustrate these purposes. A vested interest may affect marketability and extend the control of the dead hand to just as great a degree as most contingent interests. Thus the conclusion that the concept of vesting should be eliminated from the rule seems justified. Possible effects of such a step and how it could best be taken without converting the rule into a rigid, mathematical rule of thumb will be considered in the last part of this article.

IV. A RULE APPLIED TO REMOTENESS OF POSSESSION

If remoteness of possession were substituted for remoteness of vesting as a test of validity under the rule against perpetuities, Gray's rule would be amended to read, "No interest is good unless it must vest, if at all, in possession and enjoyment, not later than 21 years after some life in being at the creation of the interest." For purposes of this discussion it is assumed that "vested in possession and enjoyment" should mean vested in possession and enjoyment free of any trust.³⁶⁷ The very simplicity of such a modification makes it alluring. But does it create a rule which meets the criticisms which have been directed at the present rule? Can it be said that it creates a rule which meets the tests of simplicity and practicability which ought to be characteristic of any rule having such serious consequences? And finally, does it afford needed flexibility or would it quickly become a straightjacket from whose confines conveyancers would look nostalgically upon the good old days when the test of the validity of an interest was when will it vest?

The first of these three questions must be answered in the negative. For the mere substitution of remoteness of possession for remoteness of vesting as a test of validity leaves the rule open to almost every ground for censure relevant to the existing rule. The period of the rule would be unchanged so that whatever objection there may be to lives in being and 21 years would remain. The requirement of absolute certainty of vesting, together with the acceptance of all of the fantastic hypotheses incident to the present rule, would be unchanged except that absolute cer-

³⁶⁷ Cf. SIMES, PUBLIC POLICY AND THE DEAD HAND 81 (1955), where it is suggested that an equitable life estate might be regarded as vested in possession and enjoyment.

tainty of vesting *in possession and enjoyment* would be demanded. Class gifts would still be completely valid or completely invalid. The rule would still apply, at least to the extent that it is now applicable, to options. It would still wholly invalidate interests which transgressed it. Only its non-application to possibilities of reverter, rights of entry and resulting trusts and, if it applies to them at all, its application to administrative powers (because trusts could not last beyond the specified period), would be eliminated. It is therefore plain that supplanting remoteness of vesting with remoteness of possession as the criterion of validity does not dispense with the need for whatever reforms are indicated by those infirmities in the present rule which are unrelated to vesting.

Whether a rule which required all interests to vest in possession and enjoyment within lives in being and 21 years would be practically workable and adequately flexible cannot be so summarily determined. Assuming that means can be devised to obviate some or all of those failings of the present rule which are mentioned in the preceding paragraph, the effects and feasibility of a rule directed at remoteness of possession can be judged only by testing these in terms of suppositious specific applications of such a rule. Only after this has been done will it be possible to offer explicit suggestions as to what ought to be done with the rule.

A. *Specific Applications*

1. *To Reversions.* A reversion is of course what is left when the owner of an estate parts with less than he has. There may be reversions in estates less than a fee simple, as where a life tenant leases for a term or where the holder of a term subleases for less than the full balance of the term. There may also be reversions, or the equivalent thereof, in personal property. However, since most of the same factors would be relevant in connection with reversions in estates less than a fee and in personalty, it should be sufficient to consider examples of reversions in fee.

It may be stated at the outset that a rule against perpetuities which destroyed all reversions which were not bound to become possessory within the limits of time would be neither feasible nor workable. The effect of such a rule would be to invalidate every reversion following a lease which might last longer than the period of the rule. This would make it impossible for owners of property to enter into long term leases the commercial utility of which no responsible person would be prepared to question. It

is therefore clear that if the rule were to apply to remoteness of possession, reversions incident to commercial leases of realty and personalty would have to be exempted from its operative sphere.

Reversions following life estates and non-commercial terms require a different approach. No problem arises if the reversion follows one life estate or a term which will not extend beyond the period of the rule. The reversion following a gift to *A* for life or a gift to *A* for 21 years will vest in possession or enjoyment within the time allowed by the present rule. Suppose, however, a gift to *A* for life, remainder to his unborn son during his life; or a gift to *A* for 100 years. The reversions incident to these gifts would be wholly invalid if reversions were made void unless they would necessarily vest, if at all, in possession and enjoyment within the period of the present rule. The consequence would seem to be that title would be in limbo or that the property would escheat. In either event the result is not practical, the penalty too harsh.

It might be thought that the wait-and-see doctrine would solve the problem. But the most cursory analysis demonstrates that it will not, because if, after waiting-and-seeing, the reversion did not become vested in possession within the limits of time, the same impractical and drastic result would follow. Another possibility would be a modified wait-and-see approach, that is, to allow the life estates in the case first supposed and the term in the second case supposed to continue for the period of the rule and then to require that the reversions automatically become possessory. This might be feasible in connection with the uncomplicated cases just considered, but problems incident to the wait-and-see doctrine discussed in the earlier pages of this article arise when the dispositions become more entangled. If, for example, a gift is made to *A* for life, remainder to his children during their lives, remainder to the *X* charity if it is in existence when the life estates end, we have valid successive life estates, a contingent remainder in fee and a reversion in fee outstanding. Here, if the remainder is indestructible and if we wait-to-see whether the remainder will become possessory within the period of the rule or not, we are confronted until the period of the rule expires (or at least until we can be sure whether or not the remainder will be valid or void) with the fettering effect of a remainder which may or may not turn out to be good. Even if, assuming the *X* charity to be in existence at the expiration of the period of the rule, we were willing to allow the remainder then

to become possessory, i.e., to accelerate it, we are still faced in the interim with uncertainty as to the state of the title to the property. We are also faced with determining when and how often applications may be made to a court to have the title declared. As to non-trust gifts of realty and even of personalty, an unsalutary situation is created. And since "savings clauses" are uncommonly used in connection with non-trust gifts, it is not an answer to suggest that the same effect would be achieved by the existence of one in the instrument of gift.

A third alternative would be to exempt reversions in fee from the rule which would leave them in exactly the position that they now occupy. Since reversions in fee are not ordinarily a serious impediment to marketability and since they are not normally employed as a device to perpetuate control over property, this should not too seriously impair the effectiveness of the rule. It should be observed, however, that the exemption of reversions from the rule might lead to some inconsistency if feudally vested remainders were made subject to the rule as they probably ought to be. If that were done it would not be possible to make a valid gift in remainder to *B* in fee following an estate to *A* for life, remainder to his unborn son for life. But it might be possible to accomplish the same result by devising property by one clause of a will to *A* for life, remainder to his unborn child for life, and by devising the reversion to *B* in fee by another clause.³⁶⁸ If the possibility of such an obvious circumvention of the rule were regarded as dangerously undesirable, it could be prevented by providing that an instrument of gift giving rise to a reversion is incapable of passing any interest in the reversion. Although such a restriction would be unnecessary if no perpetuity problem were involved, a complicating factor would certainly be introduced by any attempt to make the restraint inapplicable in such cases.

2. *To Vested Remainders.* As the term is used here, "vested remainder" means a legal feudally vested remainder in real estate, or its equivalent in personalty, as for example a remainder to *B* in fee or for life, following a life estate or an estate

³⁶⁸ As in *Egerton v. Massey*, 3 C.B. (n.s.) 338, 140 Eng. Rep. 771 (1857). And cf. *Brown v. Independent Baptist Church of Woburn*, 325 Mass. 645, 91 N.E. (2d) 922 (1950), where a possibility of reverter was allowed to pass, under the residuary clause of testatrix's will, to the same persons who were unable to take under an executory devise which violated the rule against perpetuities.

pur autre vie or a term for years in *A*. Equitable remainders in realty and personalty which, if they were legal interests, would be feudally vested, as for example the interest in *B* where property is given to trustees in trust to pay the income to *A* for life and upon his death to convey the property to *B* in fee or to pay him the income during his life, will be discussed along with other equitable interests in connection with the duration of trusts.

If vesting in possession and enjoyment within the period of the rule were required, all feudally vested remainders expectant upon the ending of a single life estate, an estate *pur autre vie*, a term of 21 years or less, or several life estates successively limited to persons in being when the remainder was created would still be valid. If, however, property was given to *A* for life, or *pur autre vie*, remainder to his unborn son for life, remainder to *B* in fee, the remainder would be void. Likewise, if property were given to *A* for 22 years, remainder to *B* in fee, the remainder would be bad. Yet, in each instance, the property would be no more or less marketable, nor would the dead hand exercise more protracted control, than would be the case if there had been no attempt to create any gift in remainder or whether or not any rule against perpetuities existed at all. For if no provision were made for a remainder, or if the remainder were void, there would be a reversion outstanding which would be as much of a restraint as the feudally vested remainders supposed. This is recognized by Gray in his discussion of the possibility of a rule concerned with remoteness of possession when he says, ". . . [P]erhaps a remainder vesting [in possession] at the remote termination of a preceding estate is no more objectionable than a reversion to the grantor. . . ." ³⁶⁹ Is this a reason for exempting feudally vested remainders from a prohibition against remoteness of possession? It must be admitted that a formally logical analysis could well result in an affirmative answer because there is no substantial difference in modern law between reversions and feudally vested remainders. The difficulty is that once an attempt is made to exempt a remainder from the rule on the ground that it is feudally vested we are immediately confronted with all of the feudal learning, and the refinements upon it, as to what constitutes a vested remainder—

a predicament not likely to result from allowing reversions to remain free of the rigors of the rule.

Reversions and feudally vested remainders would be accorded like treatment if in both cases the antecedent estates were allowed to continue for the period of the rule and the reversion or remainder were then allowed to become possessory. If this were done, a remainder in fee to *B* following a gift to *A* for life, remainder to his unborn son for life, would vest in possession and enjoyment upon the death of *A*'s son (or upon *A*'s death if he had no son) or upon the expiration of 21 years from *A*'s death, whichever event occurred first. A remainder following a term would vest in possession and enjoyment at the end of 21 years. In other words, no estates anterior to the remainder in fee would be permitted to continue longer than the period of the rule. As in the case of reversions, this would afford a workable solution in the simplest cases. Where, however, the remainder was subject to divestment upon the happening of an event which might or might not, on a wait-and-see basis, occur at too remote a time, even a modified wait-and-see doctrine is not satisfactory. For example, a gift to *A* for life, remainder to his children during their lives, remainder to *B* in fee, but if *B* dies without issue then to the *X* charity if it is in existence when the life estates end, does not differ in any substantial particular, so far as the problems that it would create, from the gift, discussed in the preceding subdivision, to *A* for life, remainder to his children during their lives, remainder to the *X* charity if it is in existence when the life estates end. Thus, if wait-and-see is to be rejected so far as reversions are concerned, it ought also to be discarded in relation to vested remainders even if they are to be invalid unless they are certain to become possessory within the limits of time. That they should be distinguished from reversions in the latter respect is, as already observed, indicated by the fact that failure to do so would result in the retention of all of the old distinctions between remainders which are vested, those which are contingent and those which are vested to be divested.

3. *To Legal Contingent Remainders and Executory Interests.* In this subdivision the term "contingent remainder" refers to a legal remainder which is contingent in the feudal sense, that is, any remainder following an estate or estates of freehold less than a fee simple, which is not certain to take effect instantaneously upon the ending of the prior supporting estate or

estates. A gift to *A* for life, remainder to *B* if he is living at *A*'s death or to *B* when he reaches 21 would afford a typical example. "Executory interest" refers to those legal future interests which do not qualify as remainders in a technical sense either because, if contingent, they are not supported by a freehold less than a fee simple, or, if not subject to any condition precedent, they were not recognized before the Statute of Uses because of their springing or shifting nature. Examples would be a gift to *A* for 25 years and if *A* dies without issue to *B* in fee, or a devise to *A* "15 years after my death." Equitable contingent remainders and executory interests will be left for consideration with the duration of trusts.

Contingent remainders which are indestructible, as they are in England and in a majority of American jurisdictions,³⁷⁰ are indistinguishable from a perpetuity standpoint from executory interests which are contingent in the sense of being subject to a condition precedent. An indestructible contingent remainder to such of *A*'s children as reach 40, following a life estate in *A*, does not differ, in terms of marketability of title and dead-hand control, from an executory interest limited over to such of the children of *A* as attain 40, whether before or after *A*'s death.³⁷¹ The same may be said of the comparison between a protected contingent remainder to the heirs of *A*'s unborn son following a gift to *A* for life, and an executory gift over to the heirs of his unborn son one year after *A*'s death. It is obvious that all of these future interests are void under the present rule against perpetuities and that they would be void under a rule which insisted upon certainty of vesting in possession and enjoyment within the prescribed period. Indeed, it is not possible that any contingent remainder or contingent executory interest could be good under such a rule if it offended the present rule. It is equally plain that future interests such as those described in this paragraph should be subject to control from a perpetuity standpoint if there is to be any rule at all. Can this also be said of those executory interests which are certain to take effect?

Although Gray said that an estate given to *A* in fee 50 years after the testator's death would be too remote,³⁷² Professor Simes

³⁷⁰ Simes and Smith, §207.

³⁷¹ Compare *Festing v. Allen*, 12 M. & W. 279, 152 Eng. Rep. 1204 (1843), with *In re Lechemere and Lloyd*, 18 Ch. Div. 524 (1881).

³⁷² Gray, §201, n. 3.

is of a contrary opinion,³⁷³ and it is difficult to see how a rule directed at remoteness of vesting alone could reasonably be regarded as causing a testamentary or inter vivos executory gift to *A* in fee, to take effect in possession upon the happening of an event certain to occur, to be void. Thus, under the present rule a gift to *A* in fee, by conveyance or devise, to take effect 25 or 50 years hence ought to be perfectly valid. Such a gift is only feudally contingent but it is not contingent in any other sense; it is certain to take effect (if valid) and "vested" in every other sense. But, if it were necessary to validity that the gift be certain to take effect in possession and enjoyment within the period of the rule, the gift in question would be bad unless the period of time within which it was to become possessory were 21 years or less. It has already been shown that from a strictly logical standpoint there is no more objection, from the point of view of the purposes of the rule against perpetuities, to a feudally vested remainder to *B* in fee following a term of more than 21 years than there is to a reversion in fee. The same may be said of an irrevocably "vested" executory interest which is to take effect after more than 21 years. But we have seen that the difficulties inherent in determining whether remainders are feudally vested, contingent or vested-to-be-divested, appears to justify different perpetuity treatment for reversions and remainders. This is equally true of reversions and "vested" executory interests. For as soon as the gift of an executory interest is complicated by any alternative limitation, as for instance if the gift is to *A* in fee 50 years hence and in case of his death or death without issue then to *B* in fee, it becomes necessary to decide whether *A*'s interest is "vested" or "vested-to-be-divested" if "vested" executory interests of this sort are to be exempt from the rule. It seems, therefore, that even "vested" executory interests should be subject to a rule concerned with vesting in possession and enjoyment.

There remains to be considered the practicability of the wait-and-see theory as applied to legal contingent remainders and executory interests. It might be expected that if this principle is likely to create trouble in connection with reversions and feudally vested remainders, even more problems would arise where the validity of contingent remainders and executory devises is at issue. This can best be tested in concrete terms and al-

373 SIMES AND SMITH, §1236.

though legal contingent remainders (assumed to be indestructible) are used in the examples given, they could, without significant alteration, as well be executory interests. Suppose a gift to *A* for life, remainder to such of his children as reach the age of 30 years. Here a legal life estate, a legal contingent remainder and a reversion are outstanding. If we say that possession and enjoyment within the period of the rule is required and if we are willing to wait until 21 years after *A*'s death to determine whether all of *A*'s children have then reached 30, the remainder will turn out to be valid if all of the children have in fact reached 30. Meanwhile the state of the title is uncertain and if, at the expiration of the period of the rule, some of the children are not yet 30 the whole gift over fails unless we are willing to split the class and let those who have attained the given age take to the exclusion of the others. Even under the Massachusetts rule the status of the title cannot be determined until *A* dies and although, under the English Law Reform Committee proposal, it would be possible to have an earlier adjudication, no final determination could be made until, upon the basis of existing facts, the remainder was bound to be either good or bad. Moreover, the Law Reform Committee proposal contemplates the possibility of more than one law suit which seems highly undesirable. If we modify these approaches so as to eliminate the possibility of waiting-and-seeing and still finding the remainder invalid, i.e., by accelerating the remainder at the expiration of 21 years from *A*'s death and allowing all of his children then living to take, we may save the remainder from destruction and approximate the intention of the maker of the gift. However, we still have to wait-and-see, we still have to determine when and how often we may litigate the title and in the meanwhile we still have a title in limbo. Are we not better off to be able to determine once and for all, the moment that the gift becomes effective, what parts of it are good and what parts are bad? We may presume *A* incapable of having more children if that accords with the facts, we may construe the gift to comprehend only children of *A* alive when the gift takes effect if that is consistent with the testator's apparent intention, we may allow only children of *A* who are nine or over at his death to take, we may even reduce the age contingency from 30 to 21, but let us litigate this title only once, and then once and for all. And let us not, with all of these techniques available, consign a legal title to realty or personalty even temporarily to outer space.

Proponents of wait-and-see may reply that with the applica-

tion of one or more of the foregoing techniques the supposed gift discussed in the preceding paragraph would be valid from its inception and that it would be unnecessary to wait-and-see. That is indeed true, because if *A* were a woman 70 years old she would be presumed incapable of having any more children and all of her children would have to reach 30 or not within their own lifetimes. And if she were of child-bearing age the gift would be saved either by reducing the age contingency or by splitting the class. In either event, it would not be necessary to wait-and-see. But that may be as much of an argument against as it is for the principle. The example we have been dealing with is a fairly typical case and it is not easy to find typical cases where other more acceptable techniques do not offer most, if not all of the advantages, of wait-and-see. In less usual cases, other suggestions to ameliorate the rigors of the rule may not be effective and the disadvantages of waiting-and-seeing may be more apparent. Thus, suppose a gift to *A* for life, remainder to his unborn children, or their children, during their lives, remainder to the children of *A*'s children who are living at the death of the last to die of *A*'s children. If *A* is a young person and has no children, no wait-and-see proposal will permit of a declaration of title before *A* dies or is presumed, or can be proved, to be incapable of having children. If *A* has one or more children, the status of the title cannot be determined until all of them are dead, become incapable of having children or die within 21 years after *A*'s death, or until the expiration of 21 years after *A*'s death, whichever event happens first. Waiting-and-seeing would cause great inconvenience which would not be substantially alleviated by automatically terminating the life estates 21 years after *A*'s death and accelerating the contingent remainders. Such a statutory savings clause would simply assure unmarketability for the period of the rule or until all of *A*'s children died. A like clause in the instrument of gift would of course do the same thing, but because a good draftsman can produce undesirable results is not a reason why a legislature should make such consequences inevitable.

It seems a fair conclusion that a rule directed against remoteness of possession could work with practicality on legal contingent remainders and executory interests and that "vested" executory interests should be subject to it. Because of problems of title, certainty of vesting in possession and enjoyment, at the date of the creation of such interests, should be required but such a rule should be mollified by techniques (other than the

wait-and-see principle) which are discussed elsewhere in this article.

4. *Possibilities of Reverter, Rights of Entry and Options in Gross.* If the existing rule were changed by substituting "vesting in possession and enjoyment" for "vesting in interest," it would be difficult to hold any possibility of reverter or right of entry valid unless the instrument of gift specified that the property must revert or the right of entry be exercised in due time. Since most possibilities of reverter and rights of entry are not subject to any temporal restriction by the terms of the instrument pursuant to which they arise, the rule would destroy most of these interests if it insisted upon certainty of vesting in possession and enjoyment within the limits of time in the same fashion that the present rule demands certainty of vesting in interest. Although possibilities of reverter and rights of entry should certainly be subject to some time limitations unless they are created as an incident of a commercial transaction, there is no particular reason that most of them should be wholly invalid from their inception. For this reason, and also because lives in being almost never bear any reasonable relationship to determinable fees and fees subject to conditions subsequent, it makes more sense to specify a time limitation during which future interests following such dispositions may endure and to provide that at the end of the time selected the future interests shall cease to exist.

It will be observed that the suggestion last made does not give rise to any problem similar to that which would be created by declaring reversions to be void after the period of the rule expired, i.e., causing titles to be in abeyance. For if property is left to a church so long as it is used for church purposes, or subject to a right of entry if it ceases to be used for such purposes, it can be made plain that the effect of extinguishing the possibility of reverter or right of entry at the end of some period of time is to leave the title of the church absolute. Accordingly, it would be feasible to exempt possibilities of reverter and rights of entry from a rule directed at remoteness of possession and to provide that they shall cease to exist at the expiration of a period of 30 to 50 years after their creation. The same treatment ought to be accorded executory interests following determinable fees and fees subject to conditions subsequent unless incident to a family settlement in which case the rule against perpetuities should apply. Obviously, neither restriction should affect the validity of possibilities of reverter and rights of entry when these devices

are employed in connection with a bona fide commercial transaction such as a lease or mortgage.

Similar reasoning is applicable to options in gross although, as before stated, there are those who think that options in gross should not be restricted in time.³⁷⁴ At all events, the same reasons which militate against a rule which might invalidate possibilities of reverter and rights of entry from their inception, and the same lack of relevance of lives in being, indicate that no rule against perpetuities, as such, should govern the validity of options in gross. If they are to be subject to any time limits they should be void only as to the excess. Options appendant to leases and mortgages, or arising in connection with other commercial transactions, should be exempt not only from the rule against perpetuities but also from any other temporal restriction affecting options in gross.

5. *To Equitable Future Interests and the Duration of Trusts.* If, as suggested at the beginning of this part of this article, "possession and enjoyment" should mean "possession and enjoyment free of any trust," a requirement of certainty of vesting in possession and enjoyment necessitates special treatment of equitable interests. This may be illustrated by a gift to trustees to pay the income to *A* for life, and after his death to his unborn children during their lives, and after they die to convey and distribute the trust property to the *X* charity. The charity has a vested equitable remainder and the rule would invalidate it. So would a similar rule invalidate a vested legal remainder. But what of the equitable life estates of *A*'s children? If their equitable right to income constituted "possession and enjoyment" at *A*'s death,³⁷⁵ the children's equitable life estates would be valid, but if "possession and enjoyment free of any trust" is the requirement, a rule against remoteness of possession would render the status of the children's equitable life interests at least highly equivocal and might well invalidate them on the ground that they would never be "possessed and enjoyed free of any trust." If the corpus were distributable to the children upon their attaining a given age, say 30, the result would be no different for they might not get possession and enjoyment within lives in being and 21 years. Such an outcome would of course be less serious than certain invalidation of the entire trust which would occur even under the present rule if

³⁷⁴ MORRIS AND LEACH, 220.

³⁷⁵ SIMES, PUBLIC POLICY AND THE DEAD HAND 81 (1955).

the rule does in fact destroy trusts which are to last too long.³⁷⁶ This is not, however, a clear consequence of the present rule. Moreover, although life estates, legal or equitable, in unborn persons are certainly less than desirable from a perpetuity standpoint, it is not consistent to sanction legal remainders for the life of unborns if they vest in possession and enjoyment in due time and to condemn all equitable life estates limited to unborns. This may constitute a reason for taking a "second look" at a modified "wait-and-see" doctrine as applied to trusts since some may feel that the intention of the maker of the gift is too harshly frustrated in the examples supposed above if all of the interests following *A*'s equitable life estate are declared bad.

There are three major difficulties in the wait-and-see principle as it has been expounded by others: (1) it creates uncertainties as to titles and fetters marketability; (2) even after waiting-and-seeing it may turn out that future interests created by an instrument of gift are void; (3) it involves serious problems in determining what measuring lives are to be used. A modified wait-and-see doctrine, applicable only to trusts, akin to that explored (and rejected) in connection with legal interests, might eliminate these stumbling blocks at least in part. If no trust could last beyond the period of the rule but if all trusts were assured of validity during that period there could be no uncertainty as to the trustee's title nor as to its marketability unless the trustee were denied a power of sale. This he could and perhaps should be given by statute. If a statutory rule did not invalidate future interests, but could be drafted so that it provided equitably for their acceleration at the ending of the period of the rule as though the trust had come to its natural termination, it would never be necessary to wait-and-see-only-to-find that the purposes of the maker of the trust would be frustrated in spite of waiting. The Pennsylvania statute attempts to achieve this result by giving "void" interests to the income takers. As will be seen, this attempted solution involves complications. Finally, despite the invitation to the making of illusory gifts which might be implied, it is arguable that the problem of determining measuring lives could be solved by confining these to persons who are or might be beneficiaries of the instrument of gift or who are referred to therein, and that illusory gifts could be discouraged

³⁷⁶ Simes and Smith, §§1391-1393. But cf. Morris and Leach, 313-316.

by providing for an alternative period of validity in gross, say 80 years.

The possibilities of achieving the foregoing objectives may be tested against a gift such as that posed at the beginning of this subdivision—a gift in trust for *A* for life, and thereafter for his unborn children during their lives, and thereafter for the *X* charity in fee. The trust would terminate 21 years after *A*'s death or 80 years after the gift became effective, whichever event occurred last. At that time the corpus would be distributed to the *X* charity. But if *A* were only 30 when the gift became effective and thereafter had two children who were very young when he died, the effect would be to reduce their interests in the income to substantially less than the maker of the gift intended them to have. Indeed, in this case the acceleration of the charitable gift would probably not approximate the maker's intent as well as would the Pennsylvania solution of dividing the corpus equally between *A*'s two children. A more equitable solution would be to commute the children's equitable life estates and give the balance of the corpus to the charity. This would be no more difficult than the problems faced in any ordinary acceleration case. But if the trustee had discretion as to the amount of income to be paid to *A*'s children or as to the allocation of income between them, the valuation of their income interests could cause extreme embarrassment, just as it could in applying the Pennsylvania solution of "vesting" void interests "in the person or persons entitled to the income at the expiration of the period" of the rule.

The more usual gift in trust is exemplified by a gift to a trustee to pay the income to the testator's children during their lives and at their deaths to deliver the corpus to the testator's grandchildren upon the attainment of a given age—25, 30 or 40. In cases of this sort, the modified wait-and-see solution is easier because the ultimate takers of corpus are also income takers. Hence there is no problem of sharply reducing their interests by terminating the trust before the testator provided it should end and therefore the reason for evaluating their income interests is absent. At the expiration of 21 years from the death of all of the children and grandchildren who were living at the testator's death, or 80 years after he died, whichever event happened last, the trust would be terminated and the corpus would be distributed among the testator's grandchildren. There could be questions as to the destination of "shares" of deceased grandchildren,

but these would be questions of transmissibility which we have seen can never be altogether avoided. There would be no question of vesting for purposes of determining validity. Thus in the case just discussed, a modified wait-and-see doctrine would be workable. However, in considering the possibility of a general application of such a doctrine in connection with trusts, one must reckon with at least two additional and more difficult types of disposition. First, how would alternative end limitations be treated? And, second, how could end limitations in favor of unascertained persons be accelerated?

As to alternative end limitations, suppose a gift in trust for *A* for life, and then for his children during their lives and then for the *X* charity in fee, followed by a gift over to the *Y* charity if the *X* charity is not then in existence. What happens to the alternative limitation over 21 years after *A* dies? The problem is the same as that which arises when the question is whether any defeasible future interest may be accelerated except that here it is not possible to refuse to accelerate at all without violating a rule against perpetuities concerned with remoteness of possession. Thus, it would be necessary to provide (subject to evaluating outstanding interests in income if that were decided upon) that the trust should terminate at the expiration of the period of the rule and that the corpus should then be distributed to the person or persons who would have been entitled to receive it had the event of termination specified by the instrument of gift in fact occurred. In the case in question the *X* charity would take to the exclusion of the *Y* charity so the alternative gift to the latter would in effect be destroyed by the rule and not by the non-occurrence of the event upon which it was limited to take effect.

Where the end limitations are in favor of unascertained persons an even more vexing dilemma may be posed. Suppose a gift in trust to pay the income to the testator's children during their lives and thereafter to pay the income to his grandchildren during their lives and thereafter to deliver the corpus to the heirs of the grandchildren. Here, if grandchildren were alive when the period of the rule expired, acceleration would be impossible because their heirs could not be known. While a case of this kind may be unusual it is a possibility that cannot be ignored and it may well explain the provision in the Pennsylvania statute directing distribution, at the rule's end, to the persons then entitled to income. At all events, this case makes it clear that it would not be enough to say that when the limits of time had ended

trust property should go to those who would have received it had the trust terminated according to its terms. Such a provision would have to be supplemented by an alternative if those who then would have taken cannot be ascertained. That alternative might have to be the Pennsylvania provision, which, as already observed, is not without significant infirmities.

Enough has been said to demonstrate that it is not easy to devise a wait-and-see doctrine, even as applied to trusts, which overcomes the objection of waiting-to-see-only-to-find that invalid interests are created. The modifications of the wait-and-see proposals of others which have been explored ought to eliminate some of the criticisms which have been directed at the wait-and-see principle. But the crux of the suggestions made here is the idea of avoiding any possibility of invalidity, and that cannot be done except through the acceleration process. Justly applied, acceleration would ordinarily have to be accompanied by the evaluation of income interests which were cut short. This complication would often be accentuated by the existence of discretionary powers over income which, for tax reasons, are becoming increasingly popular. And where possible takers are unascertainable there can be no acceleration. In such instances, and indeed whenever there is acceleration of one of two or more alternative end limitations, a future interest is destroyed despite wait-and-see.

Although it would not be impossible to fashion a reasonably acceptable wait-and-see rule as applied to trusts, complexity is apparently an inherent characteristic of the doctrine if it is to operate equitably. Furthermore, as we have seen, most of the objectives of the principle can be achieved by simpler means. Accordingly, if simplicity is a worthy purpose of perpetuity reform, then, on balance, the game of wait-and-see may be hardly worth the candle. Indeed, very few trusts would be endangered by a rule against perpetuities which demanded certainty of vesting in possession and enjoyment free of any trust if: (a) lives in being and 21 years were changed to lives in being and 30 or 40 years, or alternatively to a 75 or 80 year period in gross; (b) women over 50 or 55, men over a statistically acceptable age, and girls and boys under 13 or 14 were conclusively presumed to be incapable of having or adopting children; (c) medical evidence as to inability to bear or procreate children were admissible; (d) courts were directed, for perpetuity purposes, to consider reasonable probabilities, not remote possibilities, and to presume within reason that the maker of a gift intended it to be valid; and

finally (e) age contingencies in excess of 21 were reduced to 21 wherever by doing so, after taking full account of (b), (c) and (d), an otherwise void gift would be made valid. It is true that even under such a rule equitable life estates in unborn persons would probably be invalid and that this would not conform to the consequence of the same rule that legal life estates in unborn persons would be valid. But this inconsistency seems inevitable unless the concept of vesting is retained or unless the wait-and-see principle, with all its many entanglements, is accepted. It seems obvious that trusts which serve a valid commercial purpose should be subject to no rule at all.

6. *To Resulting Trusts.* A requirement of certainty of vesting in possession and enjoyment within the period of the rule would not cause resulting trust interests incident to non-commercial private trusts (which are of course exempt from the existing rule) to be too remote. A private trust for non-commercial purposes would have to end within the period of the rule; if it did not, any future interests thereafter limited to take effect in possession and enjoyment would be void. Thus most trusts would either have accomplished their purposes within the period of the rule or would have to come to an end at the expiration of the allotted time. So a testamentary trust for the benefit of *A* (being a person capable of having more children) for life, and then for the benefit of his children until they reached 40, and thereafter to be distributed to them, would involve an attempt to create void future interests in *A*'s children unless the class were split so as to comprehend only children of *A* alive when the gift was made or the age contingency were reduced from 40 to 21. If the future interests were void, the property would at *A*'s death be held upon a resulting trust for the benefit of the testator's heirs. The purposes of the testamentary trust would have been accomplished, to the extent that they could be, within the period of the rule and the interests of the testator's heirs would vest in possession and enjoyment free of the trust within that time. The same would be true with respect to any private trust. Therefore, subjecting resulting trust interests incident to private trusts to the rule should create no problem, though perhaps, for purposes of clarity, they should be exempted from the operation of any statutory rule against perpetuities.

It is not so easy to dispose of the resulting trust interests which may arise upon the failure of purpose of a charitable trust created for a particular purpose. Where the charitable purpose is general,

cy pres is available and there can be no resulting trust. But if the gift is in trust for the benefit of the X church and none other and the X church ceases to exist after the period of the rule has expired, what is to become of the subject matter of the gift if the rule is applicable and the resulting trust which would otherwise arise is void? Surely the trustees should not have the unrestricted beneficial ownership of it,³⁷⁷ though perhaps this possibility should cause no more concern than the invalidation of possibilities of reverter after a specified period of time. What becomes of property given to a church so long as it shall be used for church purposes if the church ceases thus to use the property after the possibility of reverter becomes void as it has been suggested here that it should? The answer as to resulting trust interests, and also with respect to possibilities of reverter, must lie in a modified statutory executive *cy pres* power,³⁷⁸ for neither type of interest ought to be free from any temporal restriction whatever.

7. *To Class Gifts.* The effect upon class gifts of a rule directed at remoteness of possession is implicit from the discussions above of the application of such a rule to vested remainders, contingent remainders and executory devises and to equitable interests and the duration of trusts. However, since the application of the present rule to class gifts is of such signal importance and has been the subject matter of so much literature, completeness demands that class gifts be commented upon separately. The basic problem in connection with class gifts under the present rule arises from its insistence that the precise share of each member of the class must be determined within the period of the rule. This would be unaffected by changing the requirement of vesting in interest to one of vesting in possession. All that is right and wrong (except application to remoteness of vesting alone) concerning the application of the present rule to class gifts would remain the same. The several remedies which have been discussed in detail in the earlier pages of this article would involve the same merits and the same difficulties. Hence, if *cy pres* and

³⁷⁷ But see the extraordinary vacillation concerning this point in *American Colonization Society v. Soulsby*, 129 Md. 605, 99 A. 944 (1917); *Soulsby v. American Colonization Society*, 131 Md. 296, 101 A. 780 (1917); *American Colonization Society v. Latrobe*, 132 Md. 524, 104 A. 120 (1918); *Latrobe v. American Colonization Society*, 134 Md. 406, 106 A. 858 (1919).

³⁷⁸ Cf. the provisions of the Illinois statute concerning distribution, upon dissolution, of the assets of a not-for-profit corporation. Ill. Rev. Stat. (1955) c. 32, §§163a43 to 163a45. These provisions are ably construed in *McDonough County Orphanage v. Burnhart*, 5 Ill. (2d) 230, 125 N.E. (2d) 625 (1955).

wait-and-see are to be rejected under the present rule as applied to class gifts, they ought not to be accepted under a rule concerned with remoteness of possession. If presumptions that a valid gift is intended and as to the capacity to bear and procreate children, the reduction of age contingencies and the splitting of classes ought to be rejected under the present rule, these techniques should not be invoked under a rule concerned with remoteness of possession. On the other hand if the reduction of age contingencies, the splitting of classes and presumptions of validity and incapacity to bear or procreate children are worthy of consideration under the present rule, they are equally deserving of reflection in conjunction with a rule related to remoteness of possession. In short, such a rule would be no worse and no better, save for the simplification to be gained by eliminating the concept of vesting, as it pertained to class gifts.

8. *To Powers of Appointment, Powers of Sale and Other Administrative Powers.* Under the existing rule against perpetuities a power of appointment which is not certain to be exercised within the period of the rule is bad unless the power is one pursuant to which the donee, by his action alone and within the limits of time, may make himself the owner of the appointive property.³⁷⁹ But a power which cannot be exercised after the expiration of the period of the rule is not invalid merely because remote appointments may be made under it.³⁸⁰ Hence it cannot be said that the existence of the vice of remoteness in a power is the result of the possibility that an interest may arise from the exercise of the power which is not certain to vest within the perpetuity period. It is the power itself which is void, though of course it will be invalidated, even if exercisable in due time, by the fact that only remote appointments can be made under it. It may therefore be said that a requirement of certainty of possession and enjoyment within the period of the rule would only slightly alter the law as to the validity of powers of appointment, for the time within which a power would have to be exercisable would be the same. The only change which would be wrought would be in cases where nothing but remote appointments could be made under a power. Thus, under the present rule a testamentary power in *A*,

³⁷⁹ 6 AMERICAN LAW OF PROPERTY, §§24.31-24.32; CAREY AND SCHUYLER, §483 at 613; GRAY, §§474.1-485; MORRIS AND LEACH, 131-136; SIMES AND SMITH, §1273.

³⁸⁰ 6 AMERICAN LAW OF PROPERTY, §24.32 at 95; CAREY AND SCHUYLER, §483 at 612-613; GRAY, §510; MORRIS AND LEACH, 136-137; SIMES AND SMITH, §1274 at 210.

a life tenant, to make appointments to his unborn children to become effective in possession 40 years after his death would be good, because although *A* might make remote appointments, he could make appointments which would be certain to vest in interest at his death. But under a rule directed at remoteness of possession the same power would be bad because *A* could not make appointments which would or could become possessory within 21 years after his death. If one is prepared to accept the suggestion that vesting should be rejected as a criterion of validity, this additionally restrictive effect on the creation of powers of appointment does not appear serious.

As to whether powers of appointment are validly exercised or not, a rule concerned with remoteness of possession would operate in a fashion parallel to the present rule. The validity of appointments made under special powers and general testamentary powers would be measured from the effective date of the creating instrument except of course in those jurisdictions where the time of exercise of general testamentary powers is the date when the period of the rule commences to run.³⁸¹ Likewise, the modified wait-and-see principle which has always been applicable in connection with the exercise of powers would remain unchanged. Account would be taken of events which had actually occurred up until the time of exercise of a power just as it is under the existing rule.³⁸² Whether this would be done with respect to gifts in default of appointment would depend upon whether or not the view of the Massachusetts court³⁸³ which followed the recommendations of American Law of Property³⁸⁴ meets with general acceptance. Any further extension of the wait-and-see doctrine in connection with the validity of appointments, as, for instance, waiting-and-seeing after a power was once exercised, would involve the same considerations that have been discussed in conjunction with the doctrine as applied to other future interests. It may be observed that this is not quite true when the validity of the power itself is at issue, for the mere fact that a

³⁸¹ 6 AMERICAN LAW OF PROPERTY, §§24.33-24.34; CAREY AND SCHUYLER, §483 at 614-616; GRAY, §§514-530.4; MORRIS AND LEACH, 137-138; SIMES AND SMITH, §1274 at 210-211, §1275.

³⁸² 6 AMERICAN LAW OF PROPERTY, §24.35; CAREY AND SCHUYLER, §483 at 615; GRAY, §§523.2-523.6; MORRIS AND LEACH, 143-145; SIMES AND SMITH, §1274 at 211-212.

³⁸³ *Sears v. Coolidge*, 329 Mass. 340, 108 N.E. (2d) 563 (1952).

³⁸⁴ 6 AMERICAN LAW OF PROPERTY, §24.36. Cf. *contra*, Simes, "Is the Rule Against Perpetuities Doomed?" 52 MICH. L. REV. 179 at 181-182 (1953).

power is certain to be exercised during the period of the rule does not make it any less of a fetter as long as it is extant nor assure the validity of appointments under it. Thus it could be argued that no serious harm would result from permitting all powers of appointment to last for the period of the rule and providing that at the end of that time they would lapse. Although powers of appointment in one sense have a restrictive effect, they do in another sense serve the purpose of the rule against perpetuities because they loosen the grasp of the dead hand. These latter observations are of course as much applicable to the present rule as they are to a rule directed at remoteness of possession.

Powers to sell, lease and mortgage, as well as other administrative powers, should be distinguished, for perpetuity purposes, from powers of appointment. When such powers are vested in a fiduciary they further the purposes of the rule against perpetuities and they ought never to be invalidated by the rule³⁸⁵—whether it is directed at remoteness of vesting or remoteness of possession. It may be noted that a rule against remoteness of possession would cause all private trusts to end within the time limits that it specified, so that the application or non-application of the rule to powers of the type under discussion should no longer be a source of concern if such a rule should be adopted. Perhaps, however, it should be made clear that such powers should not be invalidated merely because a fiduciary might exercise them, as incident to his duties in terminating a trust, after the period of the rule had expired.

It is not so clear where no trust exists that a power to sell, lease or mortgage necessarily promotes the objectives of the rule against perpetuities. If the exercise of a power of sale may or will alter the destination of the property,³⁸⁶ then of course it is comparable to a power of appointment and factors relevant to the application of the rule to powers of appointment apply. But even if a power to sell constitutes merely a mechanical means of delivering a title, which one would suppose would always enhance marketability, cases may be found where the existence of the power may in a sense restrain alienability.³⁸⁷ Such cases, how-

³⁸⁵ Leach, "Powers of Sale in Trustees and the Rule Against Perpetuities," 47 HARV. L. REV. 948 (1934).

³⁸⁶ See, e.g., *Ware v. Polhill*, 11 Ves. Jr. 257, 32 Eng. Rep. 1087 (1805).

³⁸⁷ See *Fidelity-Philadelphia Trust Co. v. Harloff*, 133 N.J. Eq. 44, 30 A. (2d) 57 (1943); Supplementary Memorandum 133 N.J. Eq. 60, 34 A. (2d) 135 (1943).

ever, are uncommon and it is certainly more usual that a power to sell free of encumbering future interests not only facilitates the disposition and development of property but also lessens the control of the dead hand. The same would generally be true of powers to lease and mortgage, though it is possible to imagine that an ill-conceived long-term lease could hamper the economic growth of a parcel of real estate in the hands of those whose future interests fell in after the lease was made. But this may be equally true with respect to the ultimate successors to property leased by a trustee or even by one holding a fee simple title. On balance, it appears that powers to sell, lease and mortgage, whether incident to a trust or not, should not be invalid merely because they might have been exercised after the period of the rule expired. At that time, however, the power should also expire.

9. *To Administrative Contingencies.* Gifts conditioned upon the probate of a will or upon the happening of some other "administrative contingency" have been held invalid under the present rule on the theory that they might not vest in interest within the limits of time.³⁸⁸ Cases of this kind have produced harsh results because it is clear that the maker of a gift does not contemplate the possibility that the contingency could ever occur after the period of the rule has expired. In some states an attempt has been made to ameliorate this phase of the rule by providing that the vesting of a limitation shall not be regarded as deferred for purposes of the rule against perpetuities merely because it is conditioned upon the probate of a will or because it consists of a gift to an executor or a trustee under a will.³⁸⁹ Such statutes are effective under the present rule in respect of the particular administrative contingencies to which they apply. They do not, however, necessarily save future interests which are conditioned upon the sale of property or upon the happening of some other administrative contingency, such as the exhaustion of the "magic gravel pit."³⁹⁰ What is more important for purposes of the present discussion, they would not protect a future interest from

³⁸⁸ *Johnson v. Preston*, 226 Ill. 447, 80 N.E. 1001 (1907); *Ryan v. Beshk*, 339 Ill. 45, 170 N.E. 699 (1930); *Hodam v. Jordan*, (E.D. Ill. 1949) 82 F. Supp. 183. But see *Belfield v. Booth*, 63 Conn. 299, 27 A. 585 (1893); *Monarski v. Greb*, 407 Ill. 281, 95 N.E. (2d) 433 (1950).

³⁸⁹ Ill. Rev. Stat. (1957) c. 30, §153a; Ky. Rev. Stat. (1956) §381.220. See note, 55 MICH. L. REV. 1040 (1957).

³⁹⁰ *In re Wood*, [1894] 3 Ch. 381.

a rule against perpetuities which demanded certainty of vesting in possession within the prescribed period.

From the foregoing it seems clear that a rule against remoteness of possession ought certainly to take account of the administrative contingency cases and that it would have to do so in a manner different from that provided by statutes such as those discussed in the preceding paragraph. This could be effectively accomplished (as indeed it might under the present rule) through the presumption technique. In so doing, it would be necessary to anticipate as many common administrative contingencies as possible and to provide that where a gift is conditioned upon the happening of a contingency it shall be presumed that the maker of the gift intended that the contingency must occur, if at all, within a reasonable time. Such a time might be specified as 21 years if the present period in gross is retained or, if it is lengthened, then the longer period should of course be used. Probably, in addition to referring to specific contingencies, such as the probate of a will, the sale of assets, the appointment of an executor or trustee, reference should also be made to the happening of "any other administrative contingency."

B. *Concluding Suggestions*

It must be apparent that it is the opinion of the writer that the question which is the title of this article should be answered affirmatively. It is equally plain that a rule against perpetuities which merely substituted "vest in possession free of any trust" for "vest" would be even harsher and even less workable than the present rule. The reasons for this have been detailed in the preceding pages and it will serve no purpose to repeat them. Likewise, it is unnecessary to reiterate what should be done to the rule in addition to discarding its vest, for those reforms which have been suggested by others and which appear practicable have been summarized in the concluding portion of the second part of this article. Here, instead of restating what has preceded by way of conclusion, an attempt will be made, in the form of a specific proposal for legislation, to assemble the good and to reject what appears to be bad.

The following tentative proposal does not embody even a modified wait-and-see proposal. It is, however, recognized that a statute which did so might be particularly attractive to fidu-

ciaries. The difficulties of drafting a workable wait-and-see statute have already been fully considered and if one were to be attempted the most painstaking care would have to be given its construction. Although what follows is offered with a good deal of trepidation, a start must be made somewhere because it is abundantly clear that the rule against perpetuities cannot be remolded by the judicial process to meet its present-day objectives.

An Act Concerning Perpetuities

Section 1. The rule of property known as the rule against perpetuities is abolished.

Section 2. (a) Except as otherwise provided in this Act, no interest in real or personal property is good unless it must vest if at all, in possession and enjoyment, free of any trust, within (i) thirty years after some life in being at the date of the creation of the interest or (ii) eighty years after the date of the creation of the interest, whichever period is longer.

(b) Subsection (a) shall not apply to:

- (i) legal or equitable reversions, but no reversion may be transferred or otherwise disposed of by the instrument as a result of which it arises;
- (ii) possibilities of reverter, rights of entry or resulting trusts incident to any trust or other disposition for charitable, religious or educational purposes or incident to any business transaction;
- (iii) options incident to any business transaction;
- (iv) resulting trusts arising because of the invalidity of any interest attempted to be created pursuant to the terms of any private trust;
- (v) powers of appointment, powers to sell, lease or mortgage property, and powers which contribute to the effective management of trust assets, including without limitation powers to determine what is principal and what is income and powers to name successor trustees; *provided* that (A) no such power shall be exercised after the expiration of the period specified in subsection (a) except incidentally to the termination of a trust, and (B) nothing herein contained shall be deemed to exempt appointments made under a power of appointment from the provisions of subsection (a);
- (vi) trusts or other dispositions for charitable, religious,

educational, or business purposes when the property being the subject matter thereof must vest, if at all, in possession in the trustee or other designated taker within the period specified in subsection (a), and limitations over for charitable, religious or educational purposes following valid trusts or other dispositions for such purposes;

(vii) trusts created for a business purpose as, or in connection with, a plan for the benefit of all or some of the employes of one or more employers, including, but without limitation, death benefit, disability, pension, profit sharing, stock bonus or unemployment benefit plans, for the purpose of distributing for the benefit of the employes, including their beneficiaries, the earnings and the principal, or either, of the funds held in trust;

(viii) trusts or other dispositions for cemetery care when the property being the subject matter thereof must vest, if at all, in possession in the trustee or other designated taker within the period specified in subsection (a) and when the trustee or other designated taker is an association or corporation organized for cemetery purposes under the laws of this state;

(c) The period specified in subsection (a) shall not commence to run while any one living person has the unrestricted power to transfer to himself the entire legal and equitable interest in the property free of any trust.

Section 3. In determining whether an interest is valid or invalid it shall be presumed that the interest was intended to be valid and unlikely contingencies shall be disregarded.

Section 4. Without limiting the generality of Section 3, in determining whether an interest is valid or invalid:

(a) it shall be conclusively presumed that (i) a female over fifty-five years of age is incapable of bearing or adopting a child, (ii) a minor under thirteen years of age is incapable of procreating, bearing or adopting a child and (iii) a male over seventy [?] years of age is incapable of procreating or adopting a child;

(b) except as to persons described in subsection (a), medical evidence as to the capability of any person of procreating or bearing a child shall be admissible;

(c) where the interest is conditioned upon the probate of a will, the appointment of an executor or trustee, the payment of debts, the sale of assets or the happening of any like administrative contingency, it shall be presumed to have been

intended that the contingency must occur, if at all, within thirty years from the date of the creation of the interest;

(d) where the interest, but for this subsection, would be invalid because it is made to depend upon any person attaining or failing to attain an age in excess of twenty-one, the age contingency shall be reduced to twenty-one as to all persons subject to the same age contingency.

Section 5. (a) Except as otherwise provided in subsection (b), no possibility of reverter, right of entry, resulting trust or limitation over which is incident to any trust or other disposition for charitable, religious or educational purposes shall be valid for more than fifty years from the date of its creation.

(b) Subsection (a) shall not apply to:

(i) possibilities of reverter, rights of entry or resulting trusts incident to any lease, mortgage or other business transaction;

(ii) limitations over for charitable, religious or educational purposes following valid trusts or other dispositions for such purposes.

(c) If property is disposed of, whether in trust or otherwise, for a particular charitable, religious or educational purpose, and if, after the expiration of a period of fifty years, the particular charitable purpose ceases to exist or becomes incapable of accomplishment, the holder of the legal title to the property shall apply to a court of competent jurisdiction for directions as to the disposition thereof. The court shall have power to and shall direct that the property and the income therefrom, or either, shall thenceforth be used for a charitable, religious or educational purpose as nearly approximating the original purpose as may be possible under the circumstances. This subsection shall not be construed as restricting, but as enlarging upon, the judicial *cy pres* power.

Section 6. No option in gross shall be valid for more than fifty years from the date of its creation.

Section 7. This Act shall be known as the "Statute on Perpetuities" and shall apply only to instruments which become effective after the effective date of this Act.

The foregoing is put forward with no sense of finality and with the greatest deference to the able scholars whose views it rejects. It is a "first draft," tendered with the hope that it may evoke the comment and criticism not only of those who have specialized in the field of future interests, but also of the many practitioners whose experience has intrigued them with the rule

against perpetuities. Legislation is good only if it advances the moral, cultural, economic and spiritual values cherished by a free society. Good legislation must embody the thought, comment and discussion of many. Good perpetuity legislation is an important and urgent adjunct of the institution of property as it is known to our society and as we may earnestly hope to continue to know it—albeit subject to such modifications as a dynamic social order may require—even as man, now for the first time, reaches physically toward the stars.