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VESTED AND CONTINGENT REMAINDERS, A SUGGESTION WITH RESPECT TO LEGAL METHOD

By LAURENCE M. JONES*

For centuries lawyers and judges have been engaged in an attempt to classify remainders as either vested or contingent, but so far the attempt has not been very successful. The difficulties have been well stated by Judge Weaver of Iowa, who combined a keen intellect with a rare sense of humor:

“There is an irrepressible something in the human mind which responds to the challenge of an unsolved problem or intricate puzzle. With young people it may find expression in labored efforts to answer riddles or conundrums or trick questions in mathematics or in heroic efforts to determine ‘How old is Ann?’ In later years, when the young person has, like Paul, ceased to ‘think as a child’ and becomes a lawyer, the same determination to know the unknowable and scale the inaccessible is apt to come to the surface in a life and death struggle with the subject of remainders. Thousands of that learned profession have essayed the task of drawing a clear, definite, and always recognizable distinction between remainders vested and remainders contingent, but unfortunately, instead of producing what the nonprofessional person would naturally expect, a well-beaten path which the wayfaring court, though less than wise, may follow and be safe, a map of the routes so laid out reveals a labyrinth compared with which a plat of the interlacing lines connecting all the stars in the firmament would be a model of simplicity. It may also be admitted that where the courts themselves have sought to blaze their way through a jungle of precedents and mark each turn and twist in the route by guide-posts

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adorned with Latin quotations which everybody feels in duty bound to admire and nobody tries to read, they have, as a rule, found much difficulty in leaving a clear highway which others can follow with any assurance of finding their way home again."¹

The trouble is caused by the fact that the traditional legal technique involves what has been termed a jurisprudence of conceptions,² an idea that all problems involving remainders can be solved by first abstractly classifying the interests as either vested or contingent. The fallacy underlying such an approach is the assumption that it is possible to make a clear and definite classification of remainders which is valid for all purposes and which is useful in all cases; the truth is no such classification can be made.³ As a consequence, the courts which attempt to use such a technique as the first step in the solution of all controversies involving remainders eventually find themselves in trouble. The tests which they state and apply in one case will not work in another; remainders which are called vested for one purpose are held contingent for other purposes; the law becomes confused until neither the lawyers nor the courts themselves can predict with any degree of accuracy what will be the result in the next case. To quote again from Judge Weaver:

"It is to be said, however, that there is little confusion or difference of opinion upon abstract propositions or rules of law defining and governing remainders. The settled definitions may be found in every law dictionary and treatise on the law of real property, and all admit the soundness of the oft-repeated rule that in the construction of wills the intention of the testator is the polestar for judicial guidance, but confusion arises and becomes worse confounded in the apparently hopeless inconsistency of the courts in applying these rules to concrete facts. It is a matter of almost daily occurrence to find that remainders de-

¹ Dowd v. Scally, 174 N. W. 938, 939 (Iowa, 1919).

² See Pound, *Mechanical Jurisprudence* (1908) 8 Col. L. Rev. 605.

³ See 1 SIMES, *FUTURE INTERESTS* (1936) Sec. 40; *RESTATEMENT, PROPERTY* (1936) Sec. 157, Note on Terminology. In the attempt to make such a classification the courts have, at different times, applied various tests in order to determine whether a remainder was vested or contingent. For a statement of the usual tests and a criticism of the results achieved, see 1 SIMES, *supra*, Secs. 68-71.

vised in what seems to be identical form and terms are held by one court to be vested and by another court contingent, and not infrequently the same court is found to be committed to both propositions. Naturally, efforts are often made to avoid the appearance of inconsistency by emphasizing minute differences in cases, but each finespun distinction only aggravates the lack of harmony, and leaves the lawyer or court who is anxious to keep in line with the authorities in ever-increasing doubt—not so much in respect to the fundamental principles of the law of remainders as to their practical application to the case in hand.”⁴

A brief survey of some of the more important problems involving remainders will illustrate the inadequacy of the traditional approach.

DESTRUCTIBILITY.

Historically probably the most important difference between remainders is the fact that some remainders are destructible; this characteristic of certain remainders is a result of the common law doctrines regarding seisin. According to the rules the seisin may not be in abeyance; some person must always be seised of the premises.⁵ In the case of remainders this means that the remainderman must be ready and able to receive the seisin upon the termination of the prior estate in order that there be no gap in the seisin. This requirement causes no difficulty where there is no condition precedent to the remainderman taking the seisin other than the termination of the particular estate; such a remainder is called a vested remainder.⁶ Thus a remainder limited “to B”, following a life

⁴ *Dowd v. Scally*, 174 N. W. 938, 939 (Iowa, 1919).

⁵ The reason for this rule is to be found in the fact that, in feudal times, the only person from whom the lord could demand the performance of the feudal services, or against whom a writ could be brought in a real action, was the tenant of the immediate freehold—that is, the person who was seised of the premises. Therefore, in order to insure that there would always be some person who would be responsible for the performance of the feudal obligations and against whom an action could be brought, the rule was that there could be no gap in the seisin. See *Wyman v. Brown*, 50 Me. 139, 150 (1863); *CHALLIS, REAL PROPERTY* (3d Ed., 1911) 100-101.

⁶ 2 Bl. Comm. *168-169; *GRAY, THE RULE AGAINST PERPETUITIES* (4th Ed., 1942) Sec. 101; *KALES, ESTATES AND FUTURE INTERESTS* (2nd Ed., 1920) Sec. 25; *MILLER, CONSTRUCTION OF WILLS* (1927) Sec. 213; 1 *SIMES, FUTURE INTERESTS* (1936) Secs. 67-68; 2 *TIFFANY, REAL PROPERTY* (3d Ed., 1939) Sec. 319; *WILLIAMS, REAL PROPERTY* (24th Ed., 1926) 412; *RESTATEMENT, PROPERTY* (1936) Sec. 157 (a, b, c).

estate, is indestructible because B is ready and able to take the seisin whenever and however the life estate terminates; that is, there is no condition other than the termination of the life estate which is necessary in order to cause the seisin to pass from the life tenant to B. But where there is some condition other than the termination of the particular estate which has to be fulfilled before the seisin can pass to the remainderman, the result is that if this contingency does not happen before or at the same time the prior estate terminates the remainder fails; such a remainder is termed a contingent remainder.⁷ Therefore, the rule is that a contingent remainder is destroyed in any case in which the named contingency does not happen at or before the time the prior estate terminates, either by the natural course of events, according to the terms of its own limitation, or by any act which prematurely terminates the preceding estate before the contingency happens; in both cases the remainder fails.⁸ For example, suppose, that following a life estate, a remainder is limited "to the children of A", A being a living person. So long as A has no children the remainder is clearly contingent and subject to destruction if the life tenant dies or if he does an act which causes his estate to terminate prematurely prior to his death. This is obviously true in

⁷ 2 Bl. Comm. *168-169; FEARNE, CONTINGENT REMAINDERS (4th Am. Ed., 1845) *3-4; GRAY, *loc. cit. supra*, n. 6; KALES, *op. cit. supra*, n. 6, Sec. 27; MILLER, *op. cit. supra*, n. 6, Sec. 222; 1 SIMES, *loc. cit. supra*, n. 6; 2 TIFFANY, *op. cit. supra*, n. 6, Sec. 320; WILLIAMS, *op. cit. supra*, n. 6, 428.

⁸ By termination in the natural course of events: *Ryan v. Monaghan*, 99 Tenn. 338, 42 S. W. 144 (1897); by premature termination: *Archer's Case*, 1 Co. Rep. 66b (1597); *Blocker v. Blocker*, 103 Fla. 285, 137 So. 249 (1931). At common law a tortious conveyance by the holder of the particular estate resulted in the forfeiture of that interest; such conveyances consisted of fines and recoveries, releases with warranty, and feoffments by which the grantor purported to convey a greater interest than he had. 1 HAYES, CONVEYANCING (5th Ed., 1840) 27-28. But such methods of conveyancing are now obsolete, and the only possibility of a forfeiture which might still be of practical importance is in case the life tenant commits waste; however, there is considerable doubt whether even that method is still available. See 1 SIMES, *op. cit. supra*, n. 6, Sec. 100; Myerberg, *Maryland Examines the Proposed Uniform Property Act* (1939) 4 Md. L. Rev. 1, 47-48. Another method by which the particular estate might terminate prematurely is as a result of the doctrine of merger. 2 Bl. Comm. *177; 1 SIMES, *op. cit. supra*, n. 6, Sec. 102. Renunciation by the life tenant is also a possibility, but in such a case the court may construe what in form is a contingent remainder to be an executory interest and thus avoid the destructibility doctrine. 3 SIMES, *op. cit. supra*, n. 6, Sec. 755.

either case because in both instances there is no person in existence who can take the seisin. However, as soon as a child is born to A we have a person in existence who fits the description of the remainderman and who can take the seisin upon the termination of the life estate; consequently, the remainder is said to vest and is no longer destructible. The fact that such a remainder is not indefeasibly vested but is subject to open up and include children subsequently born to A (that is, it is subject to being partially divested) makes no difference, since as soon as the first child is born there is a person ready and able to receive the seisin when and if the particular estate terminates.⁹ And for similar reasons a remainder which is subject to being completely divested upon the happening of some contingency is, until the contingency happens, treated as vested and is not subject to destruction by the termination of the particular estate.¹⁰ For instance, if a remainder is given "to B", with the further condition that "if B dies before A then to C", there is created in B a vested remainder which is subject to being completely divested. Since the condition attached to the gift to B in no way interferes with the passage of the seisin to B upon the termination of the particular estate, the remainder is considered vested and is indestructible, although it may terminate as a result of the condition attached to B's estate. The distinction between the above case and a remainder limited "to B if he survives A" is a fine one and depends entirely on the form of the limitation. In the latter case the condition of survivorship is a condition precedent to B's taking the seisin, and thus B's interest is described as a contingent remainder and is subject to destruction by any act which causes the particular estate to terminate prior to the life tenant's death.

It thus appears that in so far as the common law rule of destructibility is concerned, the distinction between

⁹ *Deem v. Miller*, 303 Ill. 240, 135 N. E. 396 (1922); GRAY, *op. cit. supra*, n. 6, Sec. 110.1, n. 1; 1 SIMES, *op. cit. supra*, n. 6, Sec. 76.

¹⁰ *Duncomb v. Duncomb*, 3 Lev. 437 (1696); 2 Bl. Comm. *171-172; FEARNE, *op. cit. supra*, n. 7, *215-221; GRAY, *op. cit. supra*, n. 6, Secs. 102, 104, 108; KALES, *op. cit. supra*, n. 6, Sec. 78; 1 SIMES, *op. cit. supra*, n. 6, Sec. 73.

vested and contingent remainders offers a sound test by which remainders which are indestructible may be distinguished from remainders which are destructible. However, the problem of the destructibility of remainders is, in most jurisdictions, now obsolete;¹¹ consequently the distinction between vested and contingent remainders is, for such purpose, of little importance.

MEMBERSHIP IN A CLASS.

Frequently when courts talk about vested and contingent remainders they are really deciding what persons are entitled to take where a gift by way of a remainder has been limited to a class of persons. Assume, for example, the limitation of a remainder "to the children of A", A being a living person. So long as A has no children the remainder, according to the traditional tests, is clearly contingent, which is merely another way of saying that there is no person in being who can qualify as a remainderman.¹² But when a child is born to A a change takes

¹¹ 1 SIMES, *op. cit. supra*, n. 6, Secs. 111-113; RESTATEMENT, PROPERTY (1936) Sec. 240. Md. Code (1939) Art. 93, Sec. 308, purports to abolish the rule of destructibility with respect to all contingent remainders created by instruments executed after July 1, 1929. But because of the wording of the statute, which provides that remainders shall take effect "notwithstanding the determination, by forfeiture, surrender, or merger, or otherwise" of the preceding estate, there is a remote possibility that the rule is not completely abolished. This possibility exists because the only methods of termination expressly mentioned in the statute are methods by which the particular estate might be *prematurely* terminated; therefore, if the *ejusdem generis* rule of construction is applied the words "or otherwise" would be construed to mean only other premature terminations of the prior estate and not terminations resulting from the natural course of events as a result of the wording of the limitation. For example, suppose a remainder is limited "to the children of B", and the life tenant dies before B has any children; what becomes of the remainder? However, in view of the fact that the statute purports to abolish completely the rule of destructibility, and since the rule depends on doctrines, relating to seisin, which are now obsolete, a modern court ought to construe such a statute so as to abolish completely the destructibility rule and thus give effect to the legislative purpose. See *Miller v. Miller*, 91 Kan. 1, 136 P. 953 (1913); *Hayward v. Spaulding*, 75 N. H. 92, 71 A. 219 (1908). For a general discussion of the rule of destructibility, see KALES, *op. cit. supra*, n. 6, Secs. 96-106; 1 SIMES, *op. cit. supra*, n. 6, Secs. 98-113; 2 TIFFANY, *op. cit. supra*, n. 6, Secs. 326-331; Kales, *The Later History of the Rule of Destructibility of Contingent Remainders* (1919) 28 Yale L. Jour. 656.

¹² *Safe Deposit & Trust Co. of Baltimore v. Bouse*, 29 A. (2d) 906 (Md., 1943); 2 Bl. Comm. *168-169; FEARNE, *CONTINGENT REMAINDERS* (4th Am. Ed., 1845) *3-4; MILLER, *CONSTRUCTION OF WILLS* (1927) Sec. 222; 1 SIMES, *FUTURE INTERESTS* (1936) Sec. 67; 2 TIFFANY, *REAL PROPERTY* (3d Ed., 1939) Sec. 321; RESTATEMENT, PROPERTY (1940) Sec. 273.

place and the remainder, which previously was contingent, now becomes vested; what is meant is that now there is a person who fits the description of the remainderman and who is entitled to take an interest under the limitation. Actually his interest is still contingent in a sense as it has not yet been determined just what the amount of his interest will be; consequently, the courts speak of such a remainder as vested subject to open up, or as vested subject to being partially divested.¹³ And although for most purposes it is treated the same as an indefeasibly vested interest, that is not true for all purposes.¹⁴ Thus it appears that there are various types of vested interests which are not always treated alike; once this is admitted the basic assumption upon which the conventional approach to the problems depends fails, and the difficulties of using such a classification become apparent.

Or take another example, which also involves class gifts, of a remainder "to such of A's children as are living at the time of A's death", A being a living person. According to the usual tests such a remainder will remain contingent even after the birth of a child to A, and not until and unless the child survives A will the remainder become vested.¹⁵ Again the use of the terms contingent and vested to describe the interest of the remainderman under such a limitation is nothing more than an attempt on the part of the courts to indicate that until the death of A there can be no person who fulfills the description of

¹³ *Azarch v. Smith*, 222 Ky. 566, 1 S. W. (2d) 968 (1923); *Yeaton v. Roberts*, 28 N. H. 459 (1854); GRAY, *THE RULE AGAINST PERPETUITIES* (4th Ed., 1942) Secs. 110-110.1; MILLER, *op. cit. supra*, n. 12, Secs. 73, 87, 219; 1 SIMES, *op. cit. supra*, n. 12, Secs. 61, 76; 2 TIFFANY, *op. cit. supra*, n. 12, Sec. 325; RESTATEMENT, PROPERTY (1936, 1940) Secs. 157 (b), 295 (a). In the recent case of *Robinson v. Mercantile Trust Co. of Baltimore*, 180 Md. 336, 24 A. (2d) 299 (1942) the Maryland Court of Appeals held a remainder to "all my nephews and nieces" vested at the death of the testatrix in the nephews and nieces then living; as no nephews or nieces were born after the death of the testatrix there was no problem concerning them, but it seems clear that if there had been any such persons they would have been included among the remaindermen.

¹⁴ See text, *infra circa* ns. 31-3, 35-6, 39, 42-3.

¹⁵ *Schapiro v. Howard*, 113 Md. 360, 78 A. 58 (1910); *Ridgely v. Ridgely*, 147 Md. 419, 128 A. 131 (1925); *cf.* *Safe Deposit & Trust Co. of Baltimore v. Bouse*, 29 A. (2d) 906 (Md., 1943). GRAY, *op. cit. supra*, n. 13, Sec. 108; MILLER, *op. cit. supra*, n. 12, Sec. 74; LEAKE, *LAW OF PROPERTY IN LAND* (1874) 324; 1 SIMES, *op. cit. supra*, n. 12, Sec. 93; RESTATEMENT, PROPERTY (1940) Sec. 250.

the remainderman. This does not mean, however, that previous to A's death his child does not have an interest which is recognized by the courts; for some purposes and by some courts the child is treated as having an interest in property as soon as he is born.¹⁶ This again is an illustration of the fact that the distinction between vested and contingent remainders will not solve all the cases. If this were frankly admitted by the courts and the particular legal problem involved in each case considered, it would make for much clearer and simpler terminology; it would then become apparent that the classification of a particular interest as vested, while another is called contingent, does not necessarily mean the courts will treat them differently with reference to a specific problem.

ALIENABILITY.

Often the real problem which a court has before it when it talks about vested and contingent remainders is whether the particular interest is alienable or not, and the result is made to depend on whether the interest is called vested or contingent, for practically all courts are committed to the proposition that vested interests are alienable.¹⁷ Thus all courts would agree that B's interest in the simple case of a remainder "to B" is freely alienable, provided B is a person in being. Not only is such a remainder alienable by B's voluntary act, but it is also subject to the claim of his creditors—involuntary alienation. Such a case is easy; but what about a remainder to a class? Suppose the limitation creates a remainder "to the children of A", A being a living person. As soon as a child is born to A it is certain that the child will take some interest in the land, but the amount of his interest is not finally determined.

¹⁶ See text, *infra circa*. ns. 20, 37-9, 42-3.

¹⁷ 3 SIMES, *FUTURE INTERESTS* (1936) Sec. 708; 2 TIFFANY, *REAL PROPERTY* (3d Ed., 1939) Sec. 340; WILLIAMS, *REAL PROPERTY* (24th Ed., 1926) 422. For general discussions of the problem of alienability of future interests see Reno, *Alienability and Transmissibility of Future Interests in Maryland* (1938) 2 Md. L. Rev. 89; Myerberg, *Maryland Examines the Proposed Uniform Property Act* (1939) 4 Md. L. Rev. 1, 10-22; Bordwell, *Alienability of Non-possessory Interests* (1941) 19 N. Car. L. Rev. 279, (1942) 20 N. Car. L. Rev. 387; Roberts, *Transfer of Future Interests* (1932) 30 Mich. L. Rev. 349.

Should he be allowed to transfer his interest before its amount is determined? That, it is submitted, is a question of policy which cannot be answered by simply calling the interest vested or contingent. The more uncertain the interest the less its value, and the less the social and economic pressure for alienability; consequently, there is not much hardship or inconvenience in holding that the interest of a child of A cannot be transferred during A's lifetime since the demand and the market for it is comparatively limited. And the same can be said, with even greater emphasis, in the case of involuntary alienation; creditors do not lose much if such interests are held to be beyond their reach until they become absolute.¹⁸ Yet most courts allow both voluntary and involuntary alienation of such interests for the reason that they are classified as vested.¹⁹ But when the remainder is given "to such of A's children as are living at the time of A's death", A being a living person, we have an even more uncertain interest for not only is the amount of a particular child's interest undetermined, but it is not certain until A's death that the child will ever be entitled to the use and enjoyment of the property. Therefore, such an interest is usually classified as contingent until A's death and alienability denied; but there is modern authority in favor of both voluntary and involuntary alienability.²⁰ If the approach were to consider the problem in view of the uncertain nature of the interest, and the possible hardship and inconvenience to the individual and society as a whole, a much more sensible solution could be reached. The line

¹⁸ See 3 SIMES, *op. cit. supra*, n. 17, Secs. 707, 736; LEACH, CASES ON FUTURE INTERESTS (2d Ed., 1940) 172-173.

¹⁹ Williams v. Armiger, 129 Md. 222, 98 A. 542 (1916); 3 SIMES, *op. cit. supra*, n. 17, Sec. 711; 2 TIFFANY, *loc. cit. supra*, n. 17.

²⁰ Plumlee v. Bounds, 118 Ark. 274, 176 S. W. 140 (1915); *cf.* Clarke v. Fay, 205 Mass. 228, 91 N. E. 328 (1910). The results are similar where the remainders are limited to heirs or heirs of the body. Dubois v. Judy, 291 Ill. 340, 126 N. E. 104 (1920); Godman v. Simmons, 113 Mo. 122, 20 S. W. 972 (1892); FEARNE, CONTINGENT REMAINDERS (4th Am. Ed., 1845) *365; 3 SIMES, *op. cit. supra*, n. 17, Sec. 341; WILLIAMS, *op. cit. supra*, n. 17, at 437-440. Even in jurisdictions where contingent interests are not generally transferrable they may be transferred by a conveyance which is effective as a release, or which will operate by way of estoppel, or as a contract to convey enforceable in equity. Bailey v. Hoppin, 12 R. I. 560 (1880); 3 SIMES, *op. cit. supra*, n. 17, Sec. 710; 2 TIFFANY, *loc. cit. supra*, n. 20; Reno, *supra*, n. 17, 96-97; Myerberg, *loc. cit. supra*, n. 17.

between alienable and inalienable remainders, if there is to be such a distinction, might well be drawn at some point other than between what are called vested and contingent interests; it might perchance be drawn between voluntary and involuntary alienation.²¹

Practically the same arguments apply when the limitation is in the form of a remainder "to B", but subject to the condition that "if B dies within A's lifetime then to C". In such case we have what is generally classified as a vested remainder although it is subject to being completely divested. Again it is an uncertain interest, and whether it should be held freely alienable or not is really a matter of policy; however, most courts would concede its alienability since it is classed as a vested interest.²² But when we compare such a case with a remainder "to B if he survives A", we see the absurdities of the traditional approach. In the last instance we have what, by the usual tests, is classified as a contingent remainder, and therefore, according to some authorities, inalienable.²³ Other courts allow alienability because the remainder is contingent as to event only, by which they mean that there is a person in being, B, who can qualify as remainderman under the description if he survives A.²⁴ However, in both cases the interests are similar and should be treated alike; in both cases the interests are uncertain; in both cases the uncertainty depends on the same requirement—the necessity that the remainderman survive A; in both cases the hardship and inconvenience to the remainderman and to society will be the same if alienability is denied; yet under the conventional view one remainder is alienable and the other is not. All of which indicates

²¹ Although this has not generally been done, there is some authority for making such a distinction, and it is submitted that it is one thing to allow a man voluntarily to sell his birthright for a mess of pottage but quite a different thing to force him to do so. See 3 SIMES, *op. cit. supra*, n. 17, Sec. 737. The modern trend, however, has quite definitely been toward complete alienability, both voluntary and involuntary, of all interests, vested and contingent. RESTATEMENT, PROPERTY (1936) Secs. 162, 166.

²² 3 SIMES, *op. cit. supra*, n. 17, Sec. 712.

²³ *Ibid.*

²⁴ 3 SIMES, *op. cit. supra*, n. 17, Sec. 714; 2 TIFFANY, *loc. cit. supra*, n. 20; Reno, *supra*, n. 17, 91; Myerberg, *supra*, n. 17; Note (1940) *The Vesting of Remainders and Their Alienability*, 5 Md. L. Rev. 98.

quite clearly that the contingent or vested character of the interest is of little assistance in solving the problem of alienability.

The proper approach would be for the court to consider the nature of the remainder as an uncertain interest and to determine whether, as a matter of policy, it is such an indefinite and uncertain interest that it is not desirable from a social and economic standpoint to allow alienation, taking into consideration the advantages and inconveniences to the remainderman and possible purchasers or creditors. If that were done the real problem would be directly presented to the court, and in making their decision they would be in a better position to weigh the competing factors.

DESCENDIBILITY OR DEVISABILITY.

Perhaps the problem before the court is whether the remainderman has an interest which will survive his death and pass by the rules of descent and distribution to his heirs, or by his will to his devisees.²⁵ Here, too, the approach frequently is to inquire whether the remainder is vested or contingent and to let the answer to that question determine the problem.²⁶ Thus all courts would say that

²⁵ At common law the problem was complicated by the fact that land descended to the heirs of the person last seised or, in the case of future interests, the last purchaser; except in Maryland, this rule has been changed so that now future interests descend the same as present interests. 2 Bl. Comm. *208-209; Co. Litt. *11b; 3 SIMES, FUTURE INTERESTS (1936) Secs. 722-723, 725; WILLIAMS, REAL PROPERTY (24th Ed., 1926) 422; Reno, *Alienability and Transmissibility of Future Interests in Maryland* (1938) 2 Md. L. Rev. 89, 101-107. With respect to the devisability of future interests the problem was, and still is, primarily a question of construing the applicable wills act, for at common law interests in land generally were not alienable by will. FEARNE, CONTINGENT REMAINDERS (4th Am. Ed., 1845) *366-367; 3 SIMES, *supra*, Secs. 730-731; WILLIAMS, *supra*, 422, 438; Reno, *supra*, 107.

²⁶ *Nickerson v. Harding*, 267 Mass. 203, 166 N. E. 703 (1929); 2 TIFFANY, REAL PROPERTY (3d Ed., 1939) Secs. 340-341; Reno, *supra*, n. 25, 110-118. In *Safe Deposit & Trust Co. v. Sanford*, 29 A. (2d) 657 (Md., 1943) certain property was left in trust for M. Jennings Sanford during her life, and after her death for the further period of twenty-one years during which the income was to be paid to the child or children of M. Jennings Sanford, and "from and immediately after the period of twenty-one years from the death of the said M. Jennings Sanford, said trust shall cease and terminate, and said [property] shall then vest in and become the absolute estate of any child or children of the said M. Jennings Sanford". The court held that the interest of one of the children who died during the twenty-one year period was vested and passed to his heir; as they stated it, "The only

a remainder limited absolutely "to B" survives the death of B and passes to his heirs or devisees. Likewise where the remainder is to a class, as "to the children of A", nearly all courts would say that a child of A who dies during the lifetime of A has such an interest as passes to his heirs or devisees. Or where the remainder is limited "to B, but if C marries within A's lifetime then to C", it would be held to pass to the heirs or devisees of B, subject, of course, to the possibility of being divested if the named condition happens.²⁷ But where the remainder is limited "to B, but if he dies within the lifetime of A then to C", B's interest cannot survive if he dies before A. Also where the remainder is "to B if he survives A", it is clear that B has no interest which can survive his death during A's lifetime. Or if the remainder is limited "to such of A's children as are living at the time of A's death", it is quite obvious that a child who dies before A cannot have an interest which will survive his death. And it is not necessary to call the remainders contingent, in these last cases, in order to reach such a result; it is sufficient to point out that the description of the remainderman is such that it requires him to survive to a designated time or else his estate will terminate at his death. Consequently, if he does not survive it is clear that neither his heirs nor his devisees can ever claim any interest after his death irrespective of whether the remainder is said to be vested subject to divestment or contingent prior to that time.²⁸ However, when the contingency is an event other than survivorship, and is not required to be per-

question . . . is whether the . . . interest of David H. Sanford was vested or contingent. If vested, then it would go to his father as his sole heir. . . . If contingent, it would go back to the estate, there to be distributed to the decedent's heirs and next of kin." *Id.* at 659. This result may be sustained in spite of the words of contingency, which seem to postpone the gift of the remainder until the termination of the trust, because the gift of the income to the children during the twenty-one year period overcomes this apparent contingency and indicates that the remaindermen are really the owners of the property even prior to the time for distribution. In re Williams, L. R. [1907] 1 Ch. 180; *Steinway v. Steinway*, 163 N. Y. 183, 57 N. E. 312 (1900); 2 SIMES, *op. cit. supra*, n. 25, Sec. 356; RESTATEMENT, PROPERTY (1940) Sec. 259.

²⁷ 3 SIMES, *op. cit. supra*, n. 25, Sec. 726.

²⁸ 3 SIMES, *op. cit. supra*, n. 25, Sec. 727; 2 TIFFANY, *op. cit. supra*, n. 26, Sec. 341; RESTATEMENT, PROPERTY (1936) Secs. 164, 165.

formed by the designated remainderman, there is no reason why the interest of the remainderman should not survive his death even though the contingency has not yet happened.²⁹ Therefore, a remainder limited "to B if A dies without leaving children living at the time of his death", will pass to B's heirs or devisees even though he dies before A. Thus it appears that the line between remainders which are descendible or devisable and those which are not can no longer be drawn by using the old tests of vested and contingent interests.

THE RULE AGAINST PERPETUITIES.

Another problem which the courts usually decide by first classifying the interests involved as either vested or contingent is the application of the rule against perpetuities, for according to the accepted doctrine vested interests are not subject to the rule.³⁰ Thus remainders limited "to B", or "to B, but if he dies without leaving issue who survive him then to C" can never violate the rule, provided B is a person in being or one who will be determined within the allowed period, although the gift to C, in the latter case, may do so. But again the traditional tests are not entirely accurate, and in at least one instance remainders which are usually classified as vested are held subject to the operation of the rule against perpetuities. This is true in the case of remainders to a class where

²⁹ *Ibid.* In the case of *Gittinger v. Farmers & Mechanics Nat. Bank*, 180 Md. 640, 26 A. (2d) 414 (1942) the testator left the residue of his estate in trust for his wife during her lifetime, and upon her death the trust terminated and, after certain specific gifts, the balance of the property was given to three named persons subject to the condition that "if any of them be dead at the time of the termination of said trust, then to the survivor or survivors of them equally." All three of the named remaindermen died prior to the termination of the trust. The Court of Appeals of Maryland held the remainders were vested subject to being completely divested, but since the divestment was to take place only if some of the remaindermen survived the termination of the trust, the divesting condition did not happen and the remainders passed to the heirs and devisees or legatees of the remaindermen.

³⁰ GRAY, *THE RULE AGAINST PERPETUITIES* (4th Ed., 1942) Secs. 205, 283; MILLER, *CONSTRUCTION OF WILLS* (1927) Sec. 322; 2 SIMES, *FUTURE INTERESTS* (1936) Secs. 498, 504; 2 TIFFANY, *REAL PROPERTY* (3d Ed., 1939) Sec. 401. For a very excellent and interesting discussion of the whole problem of the rule against perpetuities see Leach, *Perpetuities in a Nutshell* (1939) 51 Harv. L. Rev. 638. It has been suggested that the terminology would be more accurate if the name rule against remoteness were adopted rather than rule against perpetuities. GRAY, *supra*, Sec. 2.

the remainder is subject to open up and include after-born members.³¹ Take, for example, a remainder "to the children of A", A being a living person. As previously indicated, such a remainder is usually classified as vested as soon as a child is born to A, for there is then a person who fits the description of the remainderman; but it is not yet certain just what the extent of his interest will be, for the exact amount of each remainderman's interest will not be determined until the class closes. Now for some purposes the fact that such an interest is indefinite in amount does not matter,³² but for the purpose of the rule against perpetuities it is necessary that the extent of an interest be finally determined within the allowed period; that is, in gifts to a class both the minimum and maximum membership must be determined within the period of the rule—in other words the class must both open and close in order not to be subject to the operation of the rule. To justify this result Professor Gray was forced to admit that the conventional statement about vested interests not being subject to the rule against perpetuities must be qualified, though he also argued that remainders which are vested subject to open up are in reality not vested.³³ It is, of course, settled that remainders which are limited in such a way that they may remain contingent for more than the period allowed by the rule against perpetuities are invalid.³⁴ Consequently, remainders limited "to B if he survives A", or "to such of A's children as are living at the time of his death", or "to B if A dies without leaving children living at the time of his death" will violate the rule if it is possible that the named contingency may not happen within the prescribed period—that is, if the uncertainty may extend beyond the time limit. Thus

³¹ *Jee v. Audley*, 1 Cox 324 (1787); *Leake v. Robinson*, 2 Mer. 363 (1817); GRAY, *op. cit. supra*, n. 30, Secs. 205.2, 369-398.2; MILLER, *op. cit. supra*, n. 30, Sec. 328; 2 SIMES, *op. cit. supra*, n. 30, Secs. 499, 527.

³² See text, *supra circa*, ns. 9, 18-19, and *infra circa*, ns. 38-9, 42-3.

³³ He states, "Though the interest is called vested, it is in truth contingent." GRAY, *op. cit. supra*, n. 30, Sec. 205.2. But in a footnote to the above statement he says, "Or at least it is treated as contingent for the purposes of the Rule against Perpetuities." *Id.*, n. 4.

³⁴ GRAY, *op. cit. supra*, n. 30, Secs. 206, 285-286; 2 SIMES, *op. cit. supra*, n. 30, Sec. 505; 2 TIFFANY, *op. cit. supra*, n. 30, Sec. 402.

it again appears that the distinction between vested and contingent interests is not a satisfactory standard to use in deciding all cases.

INJURIES TO THE LAND.

Many times the question which the courts have to decide is whether the remainderman has the type of interest which entitles him to protection against the acts of others which injure, or threaten injury to, the land. In such cases the problem is complicated by the fact that the action may be against either the life tenant (for waste) or a stranger, and the relief sought may be either damages for injuries previously committed or an injunction against threatened injury.

Where the remainder is limited "to B" who is seeking damages against A, the life tenant, for injuries which A has committed, it is clear that B can recover.³⁵ But suppose that the remainder is "to the children of A", and during the lifetime of A, he being the life tenant, one of his children brings an action to recover for waste which A has committed. In this case, although the remainderman's interest is usually called vested, it is uncertain in amount, and, therefore, it is extremely difficult, if not impossible, to award damages to any one child prior to the death of A. For how can the amount of damages be determined before the extent of the remainderman's interest is settled?³⁶ A similar difficulty is present where the remainder is limited "to B, but if he dies within A's lifetime then to C", for it cannot be determined with certainty prior to A's death whether B or C will be the one ultimately entitled to the land and thus the person who has been injured. Likewise where the remainder is limited "to such of A's children as are living at the time of A's death", or "to B if he survives A", it is impossible, prior to A's

³⁵ RESTATEMENT, PROPERTY (1936) Sec. 187. For discussions of the common law rules regarding waste and the development of the modern rules see 2 Bl. Comm. *282-283; Co. Litt. *53a, b, 54a; 3 SIMES, FUTURE INTERESTS (1936) Sec. 616; 2 TIFFANY, REAL PROPERTY (3d Ed., 1939) Secs. 646, 648.

³⁶ See 3 SIMES, *op. cit. supra*, n. 35, Sec. 622; RESTATEMENT, PROPERTY (1936) Sec. 188.

death, to determine what person eventually will be entitled to the land and, therefore, to determine to whom the damages should be paid.³⁷ However, in all the above cases it is clear that the tenant has injured the land and that he ought to be made to pay damages to rectify the wrong he has committed. Consequently, where the suit is brought in a representative capacity, and the damages are paid into court and held until the uncertainty is removed and then paid over to the remainderman when it is finally determined who is entitled to the land, the dilemma is solved and relief can be given.³⁸

On the other hand, if the relief sought is an injunction to prevent further, or threatened, injury to the land, the difficulties suggested above do not arise. Since the life tenant has only a limited interest it is clear that he is not entitled to commit waste, and injunctive relief is proper; therefore, any remainderman who has a reasonable probability of acquiring a present interest in the land should be allowed to protect his interest through the use of injunctive relief, for he will, at the same time, protect the true remainderman and will cause no hardship to the life tenant.³⁹ Thus in all of the preceding illustrations an injunction should be granted, provided the other requirements for such relief are present.

Where the action is brought by a remainderman to recover damages from a stranger who has caused an injury to the premises, we are confronted by a further difficulty in that some courts allow the life tenant to recover for the entire injury to the land and, consequently, refuse to allow any remainderman to recover damages in an action against a stranger.⁴⁰ But in jurisdictions where the life

³⁷ *Latham v. Roanoke Railroad & Lumber Co.*, 139 N. C. 9, 51 S. E. 780 (1905); 3 SIMES, *op. cit. supra*, n. 35, Sec. 625; RESTATEMENT, PROPERTY (1936) Sec. 188.

³⁸ *Watson v. Wolff-Goldman Realty Co.*, 95 Ark. 18, 128 S. W. 581 (1910); 3 SIMES, *op. cit. supra*, n. 35, Sec. 628; RESTATEMENT, PROPERTY (1936) Sec. 189(1)(c).

³⁹ *Ohio Oil Co. v. Daughetee*, 240 Ill. 361, 88 N. E. 818 (1909); *Brown v. Brown*, 89 W. Va. 339, 109 S. E. 815 (1921); 3 SIMES, *op. cit. supra*, n. 35, Secs. 616, 622, 625; 2 TIFFANY, *op. cit. supra*, n. 35, Sec. 647; RESTATEMENT, PROPERTY (1936) Sec. 189(1)(a, b) (2)(b).

⁴⁰ *Rogers v. Atlantic, Gulf & Pacific Co.*, 213 N. Y. 246, 107 N. E. 661 (1915); 3 SIMES, *op. cit. supra*, n. 35, Sec. 619.

tenant is limited in his recovery to the injuries to his own interest, or in cases where he has only recovered for the injury to the life estate, the remainderman may recover for the injuries to his interest;⁴¹ in such instances problems similar to those discussed in connection with the right of a remainderman to recover from the life tenant arise. Thus when the remainder is limited absolutely "to B" there is no difficulty, and B may recover damages for the injury to the land. But where the remainderman's interest is uncertain, either because the amount of his interest is not yet determined or because it is impossible to tell what person will ultimately be entitled to the premises, it is impossible to award damages to any person before the uncertainty is removed. For that reason where the remainder is limited "to the children of A", or "to B, but if he dies before A then to C", or "to B if he survives A", or "to such of A's children as are living at the time of his death", recovery is denied unless the suit is brought in a representative capacity and the money is paid into court and held until the uncertainty is resolved.⁴² However, if the relief sought is an injunction to prevent future injury to the land, there is no difficulty since the defendant is a stranger to the land and not entitled to make any use of it. Therefore, such relief may be given whenever the plaintiff has a reasonable probability of acquiring a present interest.⁴³

Here again we have an illustration of the inadequacy of the distinction between vested and contingent interests as a basis for the solution of all problems involving remainders.⁴⁴

MISCELLANEOUS.

There are other problems involving remainders which the courts often determine by first classifying the interests involved as vested or contingent, and there also are prob-

⁴¹ Zimmerman v. Shreeve, 59 Md. 357 (1882); 3 SIMES, *loc. cit. supra*, n. 40; RESTATEMENT, PROPERTY (1936) Sec. 214(a).

⁴² 3 SIMES, *op. cit. supra*, n. 35, Sec. 628; RESTATEMENT, PROPERTY (1936) Sec. 214(b).

⁴³ 3 SIMES, *op. cit. supra*, n. 35, Secs. 622, 625; RESTATEMENT, PROPERTY (1936) Sec. 212.

⁴⁴ See 3 SIMES, *op. cit. supra*, n. 35, Sec. 614.

lems in which the vested or contingent character of the interest is of no consequence. Thus the right of a remainderman to insist that the life tenant pay current charges, which are liens against the property, such as taxes or interest on mortgages, should not depend on the vested or contingent nature of the remainder.⁴⁵ Likewise the right of a remainderman, who has a future interest in personalty, to insist on the life tenant giving security should be, and is, determined by considerations other than the vested or contingent character of the future interest.⁴⁶ Similarly the right of a holder of a future interest to bring a bill to quiet title ought not to depend on whether the interest is classified as vested or contingent and such seems to be the rule.⁴⁷ But the right of a holder of a future interest to bring a partition proceeding, if such right exists at all, is universally limited to holders of vested interests; not only must the interest be one which is classified as vested but it must be indefeasibly vested.⁴⁸ On the other hand, the power of a court to order a sale of land which is subject to future interests seems to depend, to a great extent, on whether the interests involved are contingent.⁴⁹ While in actions involving title, the question whether the holder of a future interest must be made a party to the proceeding frequently depends upon considerations other than the vested or contingent nature of the interest involved; however, in some cases the character of the interest is important.⁵⁰ And the same is true in cases in which the

⁴⁵ 3 SIMES, FUTURE INTERESTS (1936) Sec. 630; RESTATEMENT, PROPERTY (1936) Secs. 187(a, b), 190.

⁴⁶ *Clarke v. Terry*, 34 Conn. 176 (1867); *Scott v. Scott*, 137 Iowa 239, 114 N. W. 881 (1908); 3 SIMES, *op. cit. supra*, n. 45, Sec. 639; RESTATEMENT, PROPERTY (1936) Secs. 202, 203, 206(a).

⁴⁷ 3 SIMES, *op. cit. supra*, n. 45, Secs. 651-652.

⁴⁸ MILLER, CONSTRUCTION OF WILLS (1927) Sec. 215; 3 SIMES, *op. cit. supra*, n. 45, Secs. 657, 659, 665; RESTATEMENT, PROPERTY (1936) Secs. 170, 171, 174, 175.

⁴⁹ The most important factors seem to be the existence of minors or unborn remaindermen who will be benefited by the sale. Compare *Gavin v. Curtin*, 171 Ill. 640, 49 N. E. 523 (1898), and *Cagle v. Schaefer*, 115 S. C. 35, 104 S. E. 321 (1920), with *Rekovsky v. Glisczinski*, 175 Minn. 531, 221 N. W. 906 (1928); 3 SIMES, *op. cit. supra*, n. 45, Sec. 792; RESTATEMENT, PROPERTY (1936) Sec. 179; *Schnebly, Power of Life Tenant or Remainderman to Extinguish Other Interests by Judicial Process* (1928) 42 Harv. L. Rev. 30.

⁵⁰ The important factors are: the type of proceeding; the vested or contingent nature of the interest; whether or not the person is in being;

problem is whether the failure or renunciation of a preceding interest causes the remainder to accelerate; again the determining factor may be the vested or contingent nature of the interest involved.⁵¹ One other problem must be mentioned—that is, the application of tax statutes in cases involving future interests. In such cases the question may involve the application of income taxes,⁵² gift taxes,⁵³ or transfer and succession taxes.⁵⁴ Here again the tradi-

whether he is a member of a class so numerous that it is impracticable to join all members; whether other persons, who are made parties, are interested in the outcome of the litigation in the same way as the unjoined person; whether there is a trustee or guardian *ad litem* who represents the holder of the future interest. *Weberpals v. Jenny*, 300 Ill. 145, 133 N. E. 62 (1921); 3 *SIMES*, *op. cit. supra*, n. 45, Secs. 673, 687; *RESTATEMENT, PROPERTY* (1936) Secs. 180-186; Roberts, *Virtual Representation in Actions Affecting Future Interests* (1936) 30 Ill. L. Rev. 580. It has been stated that the doctrine of virtual representation never applies to vested interests, or in cases where the remainderman is *in esse*. See *Card v. Finch*, 142 N. C. 140, 149, 54 S. E. 1009, 1012 (1906). An early Maryland case refused to recognize the doctrine. *Downin v. Sprecher*, 35 Md. 474 (1872).

⁵¹ *Scotten v. Moore*, 5 Boyce 545, 93 A. 373 (Del., 1914); *Randall v. Randall*, 85 Md. 430, 37 A. 209 (1897); *Cockey v. Cockey*, 141 Md. 373, 118 A. 850 (1922); *MILLER, op. cit. supra*, n. 48, Sec. 221; 3 *SIMES, op. cit. supra*, n. 45, Secs. 756-759; *RESTATEMENT, PROPERTY* (1936) Secs. 230-233, 236, 237.

⁵² In *Chandler v. Field*, 63 F. (2d) 13 (C. C. A. 1st, 1933); *Huggett v. Burnet*, 64 F. (2d) 705 (Ct. App. D. C., 1933); and *Commissioner v. Alford*, 282 Mass. 113, 184 N. E. 437 (1933), the distinction between interests which were vested, vested subject to being divested, and contingent was held important in determining what income was taxable.

⁵³ In *Robinette v. Helvering*, 63 S. Ct. 540 (U. S., 1943), and *Smith v. Shaughnessy*, 63 S. Ct. 545 (U. S., 1943), it was held that *inter vivos* transfers which created contingent remainders in unascertained persons were completed gifts and subject to taxation, and in determining the amount of the tax the value of the remainders should be included.

⁵⁴ For example, the courts have disagreed as to whether a remainder which is subject to a power of appointment in the life tenant is taxable, under a transfer or succession tax, upon the death of the life tenant, when the power is not exercised or when it is exercised in favor of the remainderman. Compare *Matter of Lansing*, 182 N. Y. 238, 74 N. E. 882 (1905), with *Minot v. Treasurer & Receiver General*, 207 Mass. 588, 93 N. E. 973 (1911); see *RESTATEMENT, PROPERTY* (1940) Sec. 333. This is due, in part at least, to the fact that according to the traditional view a remainder subject to a power is vested. *Matter of Lansing, supra*; 1 *SIMES, op. cit. supra*, n. 45, Sec. 80. Another situation which causes trouble is where a transfer or succession tax is passed after the future interest is created but before it becomes a present possessory interest; in such cases whether or not a tax can be collected upon the death of the life tenant may depend on whether the remainder vests before or after the passage of the statute. In *re Pell's Estate*, 171 N. Y. 48, 63 N. E. 789 (1902). In *Safe Deposit & Trust Co. of Baltimore v. Bouse*, 29 A. (2d) 906 (Md., 1943) a succession tax passed after the future interests were created was applied in the case of contingent remainders, but not to those which were held to have vested prior to the passage of the statute; the court stated: "The vesting in interest constitutes the succession. . . . Accordingly the rate of inheritance tax is to be determined according to the law in effect at the time when remainders vest in interest, when the rights of the parties become fixed and certain, and not when the remainders pass in possession upon the death of the life tenant. . . . Therefore, the question to be decided is whether the

tional concepts do not work well and the trend of the late cases indicates that the vested or contingent character of the interest is of little importance, in most instances, in determining whether the tax applies.⁵⁵

The above review of some of the typical problems involving remainders shows that the traditional legal technique, which assumes that all questions concerning remainders can be answered by first classifying the interests as vested or contingent, is no longer a satisfactory method by which to solve the cases. In most instances this approach serves no useful purpose; it is, in fact, nothing more than a preliminary exercise in mental gymnastics. This is due, in a large measure, to the fact that the distinction between vested and contingent remainders is not clear and definite, as assumed by the courts, and that it is based on principles which, although they had historical importance and justification, are now obsolete and have no particular significance with respect to the problems which the courts now have to decide.⁵⁶ The solution would be for the courts to abandon their basic assumption that

remainders under the testamentary trusts had so vested prior to the taking effect of the Direct Inheritance Tax Act that there was thereafter no occasion in respect to which the tax might constitutionally be imposed." *Id.*, at 908-909.

⁵⁵ Note, for instance, the remarks of Mr. Justice Frankfurter in *Helvering v. Hallock*, 309 U. S. 106, 117-118 (1940) where he says: "The law of contingent and vested remainders is full of casuistries. There are great diversities among the several states as to the conveyancing significance of like grants; sometimes in the same state there are conflicting lines of decision, one series ignoring the other. . . . The importation of these distinctions and controversies from the law of property into the administration of the estate tax precludes a fair and workable tax system. Essentially the same interests, judged from the point of view of wealth, will be taxable or not, depending upon elusive and subtle casuistries which may have their historic justification but possess no relevance for tax purposes. These unwitty diversities of the law of property derive from medieval concepts as to the necessity of a continuous seisin. Distinctions which originated under a feudal economy when land dominated social relations are peculiarly irrelevant in the application of tax measures now so largely directed toward intangible wealth"; and Judge Frank's comments, on the effect of the *Hallock* case, in *Commissioner of Internal Revenue v. Marshall*, 125 F. (2d) 943, 945 (C. C. A. 2d, 1942) in which he refers to the distinction between vested and contingent remainders as "a sort of sacred cow", and concludes that we should be grateful that the distinction "need trouble us no further anywhere in the field of federal taxes." But compare the remarks of the Maryland Court of Appeals quoted *supra*, n. 54.

⁵⁶ According to the orthodox view, the distinction between vested and contingent remainders is based on the concept of seisin. See the discussion of the rule of destructibility, text, *supra circa*, ns. 5-11, particularly n. 5, and the remarks of Mr. Justice Frankfurter quoted *supra*, n. 55.

all cases involving remainders must be solved by first classifying the interests as vested or contingent, and to approach the cases by carefully analyzing them to determine the exact problem involved and then to decide that problem; usually this can be done without determining whether the interest is a vested or contingent remainder.⁵⁷ Such an approach would bring before the court in each case the exact question to be decided and would cause them to consider that question on its merits without regard to some abstract concept; they would then be in a position to weigh all the competing factors and to balance the various interests involved before making their decision. This, it is submitted, would tend to reduce the apparent conflict which one now finds, in many instances, between the language of the cases and the actual decisions.⁵⁸

⁵⁷ See SIMES, *CASES ON FUTURE INTERESTS* (1939), Introductory Note to Part I, p. 10. An interesting admission that this is true is found in the case of *Dowd v. Scally*, 184 N. W. 340 (Iowa, 1921) where the court, after rendering one opinion in which they discussed the distinction between vested and contingent remainders at length (a portion of the opinion is quoted in the text, *supra circa*. ns. 1, 4), on rehearing stated: "On the original submission of the appeal the argument was largely confined to the question whether the remainder . . . was vested or contingent . . . A petition for rehearing was granted, and further arguments have been made by both parties. On reconsideration we are of the opinion that a settlement of the vexed question of the proper distinction between vested and contingent remainders is not necessarily involved in the case, and we refrain from entering again upon that discussion, believing, as we do, that whether as a technical proposition the devise . . . be vested or contingent, the result in this case must be the same." *Id.*, at 341.

⁵⁸ Excellent examples of this conflict may be found in four recent Maryland cases: *Robinson v. Mercantile Trust Co. of Baltimore*, 180 Md. 336, 24 A. (2d) 299 (1942), cited *supra*, n. 13; *Gittinger v. Farmers & Merchants Nat. Bank*, 180 Md. 640, 26 A. (2d) 414 (1942), cited *supra*, n. 29; *Safe Deposit & Trust Co. v. Sanford*, 29 A. (2d) 657 (Md., 1943), cited *supra*, n. 26; *Safe Deposit & Trust Co. of Baltimore v. Bouse*, 29 A. (2d) 906 (Md., 1943), cited *supra*, n. 54. In all of these cases the Court made the vested or contingent character of the remainders the controlling factor in reaching their decisions; in most of them the decisions can be justified, but the language used and the principles stated in the opinions are not always consistent, and, in at least one of the cases, the result reached is difficult to sustain. This is true in the *Bouse* case where the Court held that some of the remainders were contingent, and thus subject to the inheritance tax, while others were vested, and therefore not taxable, although all of the remainders were created by instruments which contained similar or identical language which according to the traditional tests, and the principles stated in the opinion itself, would seem to create contingent remainders. [Ed.—It is planned that the REVIEW will publish, in a following number of this Volume, a casenote on *Safe Deposit and Trust Co. of Baltimore v. Bouse*, *supra*.]