

10-1979

## Loosening the Grip of the Dead Hand: Shall We Abolish Legal Future Interests in Land?

C. Dent Bostick

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Property Law and Real Estate Commons](#)

---

### Recommended Citation

C. Dent Bostick, *Loosening the Grip of the Dead Hand: Shall We Abolish Legal Future Interests in Land?*, 32 *Vanderbilt Law Review* 1061 (1979)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol32/iss5/1>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in *Vanderbilt Law Review* by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

# VANDERBILT LAW REVIEW

VOLUME 32

OCTOBER 1979

NUMBER 5

## Loosening the Grip of the Dead Hand: Shall We Abolish Legal Future Interests in Land?

*C. Dent Bostick\**

### TABLE OF CONTENTS

I.	INTRODUCTION .....	1061
II.	RULES CONCERNING FUTURE INTERESTS .....	1065
	<i>A. Contingent Future Interests</i> .....	1065
	<i>B. The Rule in Shelley's Case</i> .....	1068
	<i>C. The Destructibility of Contingent Remainders</i> <i>Rule</i> .....	1070
	<i>D. The Doctrine of Worthier Title</i> .....	1075
	<i>E. The Rule Against Perpetuities</i> .....	1078
III.	POTENTIAL SOLUTIONS OF THE GREAT FUTURE INTEREST DILEMMA .....	1088
	<i>A. The Specified Intent Solution</i> .....	1088
	<i>B. An Equity Solution</i> .....	1089
	<i>C. The English Solution Background</i> .....	1090
	<i>D. The Unfettered Life Tenant — A Mixed Blessing</i> .....	1096
	<i>E. Constitutional and Other Difficulties</i> .....	1097
IV.	CONCLUSION .....	1100

### I. INTRODUCTION

This Article is concerned with a dilemma in the law of Future Interests. The dilemma stems from the needs and demands of a modern society to convey land cleanly and quickly and from the desire of property owners, especially landowners, to direct from the grave the on-going disposition of their property. This desire of landowners has always played a role in English and American prop-

---

\* Professor of Law & Acting Dean, Vanderbilt University School of Law. B.A. 1952, J.D., 1958, Mercer University. The author wishes to express his thanks to David James Jordan and Charles L. Jarik, former law students at Vanderbilt University, for their research assistance.

erty law. Much of the energy of the early judiciary was devoted to counterbalancing the numerous ingenious arrangements devised by persons to effectuate continual control of their property.

It is the underlying contention of this Article that the free alienability of land within reasonable limitations is to be encouraged in this country, particularly in light of the commercial needs and constantly increasing mobility of our society. With this goal in mind, it is appropriate at this point to consider briefly the virtues promoted by such a policy. The primary advantage of the free alienability of property that courts and commentators have advanced is the increased opportunity for productivity.<sup>1</sup> A grantor's or testator's ability to restrict the transfer of property by creating contingent interests permissible under existing law which can endure and cast sufficient doubt on title to property for 100 years has the potential and actual effect of rendering the property useless or unusable for the property's greatest productive value. Second, and quite distinct from the productivity doctrine, the freedom of the living with interests in property to dispose of their interests favors the free alienability of land. It has long been the policy of the law that it is socially desirable that living persons control the wealth of the world.<sup>2</sup> Professor Simes has characterized the competing interests in this policy consideration as "Dead Hand v. Living Hand."<sup>3</sup> The ability of a testator to create contingent interests is the ability to cast doubt on title until the contingent interests vest, which as previously noted may be as long as 100 years, and to frustrate the efforts of those with vested interests or interests vested subject to partial divestment who may wish to dispose of their interests. Unfortunately, few purchasers are willing to invest in life estates *pur autre vie* or interests subject to partial or total divestment. The impediments presented by such contingencies are enormous to the owners of interests in the property, those interested in purchasing the property, and society as a whole.

It is an interesting and curious phenomenon that at a time society most needs free alienability of property—a time of rapid population shifts and the consequent requirement of property transfers—it is still possible in most American jurisdictions to create by design or by accident future interests that will effectively tie up property for decades. Perhaps there is sufficient societal value for permitting such a result within the framework of a trust arrange-

---

1. See L. SIMES, PUBLIC POLICY AND THE DEAD HAND 33-40 (1955).

2. See *Mabry v. Scott*, 51 Cal. App. 2d 245, 124 P.2d 659, cert. denied, 317 U.S. 670 (1942).

3. L. SIMES, *supra* note 1, at 59-60.

ment. In a trust, flexibility may be assured by wide-ranging powers of the trustee to sell or mortgage the fee simple title to the trust *res*. But the problem with the *legal* future estate is less manageable. It is possible, and simple, to construct a will or deed so as to place the title to realty in doubt for perhaps 100 years or even longer through the creation of various contingent interests. From the earliest times the common law recognized this threat of indefinite property tie-ups as highly undesirable. Through the centuries various counter-measures were mustered to arrest such tendencies. The arsenal came to include the Rule in Shelley's Case,<sup>4</sup> the Destructibility of Contingent Remainders Rule,<sup>5</sup> the Doctrine of Worthier Title,<sup>6</sup> and the Rule Against Perpetuities.<sup>7</sup> These weapons were used by the courts sometimes independently of each other and sometimes in tandem, depending on the time and the circumstances of the will or deed in which the contingent interests were created.

This Article first considers three relics—scant survivors from a medieval past which nevertheless continue to concern and occupy

4. *Wolfe v. Shelley*, 1 Co. Rep. 88b, 76 Eng. Rep. 199 (K.B. 1581). The classic statement of the Rule in Shelley's Case is as follows:

[W]hen a person takes an estate of freehold, legally, or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate.

4 J. KENT, COMMENTARIES ON AMERICAN LAW 216 (14th ed. 1896).

5. The court in *Festing v. Allen* described the effect of the Destructibility Rule as follows: "so that the contingency on which alone the alternative limitations were to take effect had not happened when the particular estate determined, and those alternative limitations, all of which were clearly contingent remainders, were therefore defeated." 12 M. & W. 279, 301-02, 152 Eng. Rep. 1204, 1213 (Ch. 1843).

6. The Doctrine of Worthier Title states that a man cannot either by conveyance of the common law, by limitation of uses, or devise, make his heir a purchaser. See *Cholmondeley v. Maxey*, 12 East. 589, 104 Eng. Rep. 230 (K.B. 1810); *Pibus v. Mitford*, 1 Vent. 372, 86 Eng. Rep. 239 (K.B. 1674); *Bingham's Case*, 2 Co. Rep. 91a, 76 Eng. Rep. 611 (K.B. 1600); *Read v. Erington*, Cro. Eliz., 321, 78 Eng. Rep. 571 (1594). Coke expressed it as follows in the INSTITUTES:

If a man make a gift in taile or a lease for life, the remainder to his own right heires, this remainder is void, and he hath the reversion in him, for the ancestor during his life beareth in his body (in judgment of law) all his heires, and therefore it is truly said that *haeres est pars antecessoris*.

Co. Litt. 22b.

7. John Chipman Gray has set forth the classic statement of the Rule Against Perpetuities as follows: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." J. GRAY, RULE AGAINST PERPETUITIES § 201 (4th ed. 1942). For a good discussion of the operation of the Rule, see Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938) and Leach, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973 (1965). For a good discussion of the Rule and the dilemma in the law of Future Interests discussed herein, see L. SIMES, *supra* note 1.

the student of Future Interests. For two of the relics—the Rule in Shelley's Case and the Destructibility of Contingent Remainders Rule—the end is near. Both have very nearly passed out of American law.<sup>8</sup> The Rule in Shelley's Case was so ridden with technicalities and so often misunderstood by American courts that it fell into almost affectionate disrepute among lawyers. To an extent, the Destructibility Rule came to be superseded by the Rule Against Perpetuities. For the third relic, the Doctrine of Worthier Title, this has been a kinder century. The Doctrine's *inter vivos* branch<sup>9</sup> has enjoyed an infusion of new life from a surprising source.<sup>10</sup> The more recent drift, nevertheless, is against this newly resurrected rule.<sup>11</sup> The "testamentary" branch of the doctrine is already gone.<sup>12</sup>

The three rules came into American law from ancient English practice and custom. In the name of progress, these three older rules have been or are being phased out of American law. Yet unlike England,<sup>13</sup> American jurisdictions have not for the most part provided a suitable compensation for the loss of the unquestionable benefit which each of the three rules carried—a compulsion to free alienability. It is paradoxical that the English, unfettered by jurisdictional considerations and American-style constitutional complications, have abolished all three rules cleanly and with appropriate adjustments to the law of Future Interests to compensate for the inherent values lost by the abolition of the rules,<sup>14</sup> while American

---

8. The Rule in Shelley's Case is viable in no more than 10 jurisdictions today. The Rule survives with reasonable certainty in only five jurisdictions, including Arkansas, Delaware, Indiana, North Carolina, and Washington. See 3 R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 380 (1977); L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* § 1563 (2d ed. 1956 & Supp. 1977). For a good discussion of the problems created by the Rule in one jurisdiction where the Rule survives and legislative attempts at abrogation of the Rule, see Webster, *A Relic North Carolina Can Do Without—The Rule in Shelley's Case*, 45 N.C.L. REV. 3 (1966).

9. At common law the Doctrine possessed *inter vivos* and testamentary branches. The *inter vivos* branch of the Doctrine applies to conveyances by deed and other conveyances involving a living grantor. The testamentary branch was relevant to devises and bequests.

10. See *Doctor v. Hughes*, 225 N.Y. 305, 122 N.E. 221 (1919).

11. See *Hatch v. Riggs Nat'l Bank*, 361 F.2d 559 (D.C. Cir. 1966).

12. 3 RESTATEMENT OF PROPERTY § 314(2), comment j (1940). The testamentary branch of the Doctrine of Worthier Title provided that a devise to a testator's "heirs" was a nullity if the interest limited to the heirs was the same interest the heirs would have taken by descent had there been no devise. *Id.* The reason underlying the testamentary branch of the Doctrine at early common law was the preservation of feudal incidents of relief, wardship, and marriage. After the dissolution of the feudal system and the attendant extinction of the original reason supporting the testamentary branch, the courts chose not to apply that branch of the Doctrine any longer, in an apparent failure to find any other justification for it. *Id.*

13. See Hailsham, *How Britain Lays Down the Law*, SAT. REV. June 11, 1977, at 26. One area in which the British legal system has forged ahead of American jurisprudence is in its relatively sophisticated treatment of this dilemma of the law of Future Interests. See note 143 *infra* and accompanying text.

14. Of course, the major benefit forfeited by the abolition of the Rule in Shelley's Case,

inheritors of these medieval curiosities still struggle with their survival or with problems flowing from inadequately considered abolition.

This is not an Article urging the final excision of the three rules from jurisdictions where they still exist. Nor, certainly, does it attempt to extol the virtues of the rules as such. One would be hard pressed today to find a serious advocate of the reinstatement of the Rule in Shelley's Case or the Destructibility of Contingent Remainders Rule in those many jurisdictions where they have been abolished. Many of the same reasons for abolishing those rules are advanced for abolishing the Doctrine of Worthier Title as well. This Article is, however, an argument for taking another look at these three old rules and at the shortcomings of their successor, the Rule Against Perpetuities, in order to examine what was lost by their abolition and to see what values might be regained without having to reinstate or cope with the medieval encrustations which made their employment so tedious and uncertain. To understand the nature of the loss and the resultant problems, one must return to the origin and development of the rules.

## II. RULES CONCERNING CONTINGENT FUTURE INTERESTS

### A. *Contingent Future Interests*

It is characteristic of the three rules that in each instance they involve a problem of contingent future interests. The remainder is the oldest of the future interests creatable in someone other than a conveyor<sup>15</sup> and an understanding of its nature and function is essential to any question of future interests. The remainder was firmly established in English law by the late fourteenth century, though the courts were still considering at that time some of the novel questions raised by its development.<sup>16</sup> It had been settled by the Statute *Quia Emptores*<sup>17</sup> that a landowner could convey a fee simple

---

the Destructibility Rule, and the Doctrine of Worthier Title was the facilitation of alienability.

15. Other future interests that were creatable in the grantor prior to the emergence of the remainder included the reversion, the possibility of reverter, and the right of re-entry on breach of condition subsequent.

16. One of the novel issues presented for the English courts' consideration was the question of who was to do the feudal services owed to the Lord by the holder of the fee simple title when the remainder in fee simple was contingent. See Y.B. 4 Edw. 2 (Selden Society), ii.4 (1309). The English courts of the fourteenth century also grappled with the question when contingent remainders should be held valid. The courts' early response was to hold contingent remainders that had subsequently vested prior to the litigation challenging such remainders as good, and to hold invalid contingent remainders that had not vested by the time of the litigation. See, e.g., Y.B. Mich. 10 Edw. 3, No. 8 (1336).

17. 18 Edw. 1, cc. 1-3 (1290).

title in realty to another without his overlord's consent. Indeed an owner's heirs, including the presumptive taker at his death under the rules of primogeniture,<sup>18</sup> could not object to the transfer.<sup>19</sup> This result was an immensely significant development in the free alienability of real estates. The common law had already developed the basic notion of "estates" in land, the concept of ownership measured in terms of duration in time. Conveyances were recognized naming a taker for life with the "remainder" limited to another person in existence and specifically named, that is to one whose remainder was "vested" rather than "contingent." From this beginning, the practice developed of conveying as follows: the owner of the land conveyed property to a grantee for the grantee's lifetime and then by the same transaction conveyed the remainder to the grantee's "heirs"<sup>20</sup> or to the "heirs of the grantee's body."<sup>21</sup> Several questions of compelling interest to a feudal society arose at once. One question encountered by the feudal courts was which party had seisin when the fee simple was subject to a contingent remainder—"Who was to do homage?"<sup>22</sup> This question and the ultimate answer developed by the courts gave rise to the Destructibility Rule discussed below. Another and equally urgent question was "Do the 'heirs' in such a limitation take the property as purchasers under the deed, or do they take by descent from the life tenant, their ancestor, if they are to take at all?" The latter question was of considerable financial interest. If the heirs of the grantee could be regarded as "purchasers" under the deed remainder, then the property could pass to them automatically on the life tenant's death without incurring the so-called "relief" obligation to the life tenant's overlord in

---

18. Under the English rules of primogeniture, the oldest male child of the decedent was the heir who took all the decedent's real property to the exclusion of all of the decedent's other children. If the decedent had no sons, then the decedent's daughters collectively became "the heir" to the decedent's real property.

19. The Statute Quia Emptores eliminated the efficacy of the construction some courts had placed on the phrase "to A and his heirs." Those courts had indicated that the fee simple language gave A's heirs an interest in the property that had been conveyed. Quia Emptores guaranteed free alienation of the property to the fee simple title holder, A.

20. The following example illustrates the conveyance: T to A for life, remainder to the heirs of A. A conveyance to A and his heirs signified at common law the conveyance of a fee simple absolute. By operation of the Rule in Shelley's Case and the Doctrine of Merger, the conveyance to A for life, remainder to the heirs of A vested a fee simple absolute title in A.

21. The conveyance might be as follows: T to A for life, remainder to the heirs of A's body. After the Statute De Donis Conditionalibus, 13 Edw. 1, c.1 (1285), a conveyance to A and the heirs of his body constituted a fee tail estate. Therefore, the Rule in Shelley's Case and the Doctrine of Merger operated to give A a fee tail estate in the example above.

22. Y.B. 4 Edw. 2 (Selden Society), ii.4 (1309); see note 16 *supra* and accompanying text.

the feudal structure.<sup>23</sup> If, on the other hand, the "heirs" could not take as purchasers, then they had to take, if at all, through descent from their ancestor, a transaction to which the relief did attach. Recognizing that the relief did not attach to a taking by purchase and yet not wishing to penalize the overlords, the courts by the fourteenth century held that where a grantor conveyed to a person for life, and then limited a remainder to the heirs of that same grantee, the life tenant took both the life tenancy and the remainder.<sup>24</sup> The life tenant's heirs took nothing by virtue of the deed. Often, the Doctrine of Merger operated to give the life tenant a fee simple estate.<sup>25</sup> This basic proposition came to be known as the Rule in Shelley's Case.<sup>26</sup>

Had the continuing reason for the Rule in Shelley's Case been the need to assure levy of the relief, the Rule probably would not have survived the withering of feudal services during the sixteenth and seventeenth centuries.<sup>27</sup> But there developed in the sixteenth century a vastly potent threat to free alienability. This threat came in the form of executory interests, the new legal contingent interests in third parties creatable after the Statute of Uses.<sup>28</sup> The courts could not, by definition, make these interests subject to the Destructibility of Contingent Remainders Rule since that Rule dealt with gaps in seisin, a specifically recognized facet of executory interests.<sup>29</sup> Thus, an unbridled device through which conveyancers could create perpetuities and restrain alienation developed.

---

23. The relief was a sum payable by the decedent's heir to the lord for the privilege of succeeding to the decedent's real estate holding. C. MOYNIHAN, *INTRODUCTION TO THE LAW OF REAL PROPERTY* 18 (1962).

24. See *Provost of Beverley's Case*, Y.B. Hil. 40 Edw. 3, pl. 18 (1366); *Abel's Case*, Y.B. 18 Edw. 2, 577 (1324) (the case is translated in 7 M. & G. 941, note c). Both cases appear to recognize the proposition that came to be known as the Rule in Shelley's Case, but not until Lord Coke's decision in Shelley's Case did the proposition receive definite expression among the reported cases.

25. When one owned two successive vested estates, the common law Doctrine of Merger combined the two estates giving the owners the greater of the two estates at the time of the merger.

26. See note 4 *supra*.

27. The initial policy underlying the judicial development of the Rule in Shelley's Case had been the necessity of determining which party held seisin for the purposes of incidents and relief. See note 23 *supra* and accompanying text. As the concept of seisin lost its importance in the law of real property and the feudal society and its attendant incidents and relief gave way to alternate forms of societal structure, the original policy that had undergirded the Rule was no longer supportive.

28. 27 Hen. 8, c.10 (1536). The Statute of Uses has been called by commentators the most important statute enacted in England to regulate real property transactions. Yet, the true essence of the Statute of Uses went through a metamorphosis as the English courts developed exceptions to circumscribe the strictures of the Statute. These important exceptions constitute the foundation on which modern trust law is founded.

29. A springing executory interest, a legal interest, has by definition a gap in seisin. A



### B. *The Rule in Shelley's Case*

Eventually, the common law courts responded with the development of the Rule Against Perpetuities to contain the threat posed by the strictures on free alienability created by executory interests, but in the interim period old and established rules such as the Rule in Shelley's Case were pressed into service to assist in curtailing the contingent remainder. By frustrating grantor intent and creating in the grantee both life estate and remainder, rather than a life estate only, the courts could guarantee that an estate had been created in which a grantee had an immediately alienable interest rather than one in which the fee could be alienated only after the potentially long wait to ascertain the life tenant's heirs at his death.

In time the Rule in Shelley's Case moved pervasively into American law.<sup>30</sup> The classic fact setting required for triggering the Rule was:

- (a) that by a single will or deed,
- (b) the testator or grantor created a life estate in A, and
- (c) undertook to create a remainder in either A's heirs or the heirs of his body,  
and
- (d) the life estate and remainder were either both legal or both equitable.<sup>31</sup>

The Rule applied only to real property, not personalty,<sup>32</sup> and it was regarded as a rule of law and not a rule of construction.<sup>33</sup> Hence the intent of the testator or of the grantor was immaterial. In its desire to promote the free alienability of land, the Rule always frustrated the transferor's intent which was in every case to give to the first grantee a life estate only, not the life estate plus remainder. The classic statement of the Rule in Shelley's Case applied only to remainders, though apparently there is no American decision refusing to apply the Rule because the limitation over to third parties is in the form of an executory interest rather than a remainder.<sup>34</sup>

The limitation over to "heirs" constituted the gravest problem for American courts in deciding whether or not the Rule applied to a given transfer. The English developers of the Rule had in mind a

---

typical conveyance containing a springing executory interest is:

T to A for life, and twenty years after the death of A, to B in fee simple.

The problem confronting the English feudal courts was to determine who held seisin from the time of A's death until B took in fee simple twenty years later. The courts resolved the question by holding that seisin reverted back to T's heirs until B's executory interest vested.

30. POWELL, *supra* note 8, ¶ 378.

31. See L. SIMES, *HANDBOOK OF THE LAW OF FUTURE INTERESTS* § 23, at 48 (2d ed. 1966).

32. *Id.* § 23, at 48.

33. *Id.* § 24, at 52.

34. See Dukeminier, *Contingent Remainders and Executory Interests: A Requiem for the Distinction*, 43 MINN. L. REV. 13, 21 (1958).

highly technical definition of the term "heirs," and only if the conveyance contemplated this definition did the Rule apply. To the English of the time, "heirs" meant one heir in each generation ascertained by the standards of primogeniture.<sup>35</sup> When an English transferor used the plural "heirs," therefore, he had in mind the heirs of a person from generation to generation *ad infinitum*, not the children or issue of a certain class or individual persons. Either through lack of understanding of this English notion of heirship or through deliberate design to expand the scope of the Rule, many American courts did not restrict the Rule's application to the narrower English view, and indeed, in traditional terms, applied the Rule in entirely inappropriate instances.<sup>36</sup> This circumstance led to dispute and confusion among and within jurisdictions as to the basic features of the Rule and undoubtedly fed the effort to abolish the Rule.<sup>37</sup> It is virtually certain that the Rule is not the law in forty American jurisdictions today.<sup>38</sup> In some of those forty jurisdictions, the rule was never regarded as part of the common law.<sup>39</sup> In others, abolition has taken various forms, sometimes by judicial action<sup>40</sup> and sometimes by statute;<sup>41</sup> in several of the latter, abolition by statute is prospective only and sufficiently recent to require continuing understanding and accounting for the Rule's impact on past transactions.<sup>42</sup>

Unquestionably, the removal of this ancient doctrine from property law has been regarded as desirable reform, though courts and legislatures have been ponderously slow in effecting the Rule's

---

35. See note 18 *supra*.

36. The most common misapplication of the Rule was the common tendency particularly in the midwestern states to apply the Rule to conveyances providing for a remainder in the children or issue of the life tenant, rather than his "heirs" or the "heirs of his body." See, e.g., *McIlhinny v. McIlhinny*, 137 Ind. 411, 37 N.E. 147 (1894). See also Dowling, *Rationale of the Rule in Shelley's Case in Indiana*, 13 IND. L.J. 466, 482 (1938).

37. Lessman, *Statutory Abrogation of the Rule in Shelley's Case*, 38 ILL. L. REV. 183 (1943).

38. See note 8 *supra* (detailing those jurisdictions in which the Rule is still viable).

39. See *Kennedy v. Rutter*, 110 Vt. 332, 6 A.2d 17 (1939). The *Kennedy* court noted that Vermont had never recognized the Rule in *Shelley's Case*. *Id.* at 342, 6 A.2d at 22. See also *Blake v. Stone*, 27 Vt. 475 (1855). The *Blake* case may be characterized more fairly as the first refusal of the Vermont courts to apply the Rule in a case involving a deed, since the Rule was part of the common law adopted by Vermont when it was a colony.

40. See *Thurston v. Allen*, 8 Hawaii 392 (1891). The Hawaiian court held that Hawaii had never adopted the English common law, and therefore the Rule in *Shelley's Case* was never part of Hawaiian law. *Id.* at 397-99.

41. Thirty-seven states and the District of Columbia have abolished the Rule in *Shelley's Case* by statute, although the wording of the different statutes varies considerably. See 3 R. POWELL, *supra* note 8. See also note 8 *supra*.

42. See, e.g., TEX. CONVEYANCES CODE ANN. Tit. 31, § 1291a (Vernon Supp. 1978). The Texas legislature finally abolished the rule with the passage of this act in 1963.

abolition.<sup>43</sup> Whether this inertia has been a function of carefully considered advantages or disadvantages of abolition, or whether it has been due to an understandable reluctance to step into a complex and little understood corner of the law, the reality is that the Rule is gone in most jurisdictions. What was lost and what was gained by the change? The gain is obvious. A trap to the conveyancer whose disposition unintentionally invoked application of the Rule has been removed.<sup>44</sup> This gain is appropriate and valuable. Further, the realty owner who wishes to create a life estate, legal or equitable, in one person, and a contingent remainder in the same property in the heirs of that life tenant, may do so. Thus, the landowner's intent in this respect can no longer be deliberately frustrated. The abolition of the Rule has produced a gain in the predictability and certainty as to the constrictions that courts will put on the use of language that previously evoked the application of the Rule.

The value of this result to society at large, especially in respect to legal estates, is much less obvious. Without the Rule, for example, the transferor may now convey a legal life estate to a one year-old child with a remainder in the heirs of that child. Since the child's heirs cannot be ascertained until the child's death, conceivably many decades later, there is no one in a position to convey the fee simple legal title to the property during the child's lifetime. Given the pace of developments in the twentieth century, this period of ascertainment may be impractically long. So, while the elimination of the Rule in Shelley's Case has furthered the implementation of the transferor's intentions, the Rule's disappearance has concomitantly contributed to the unfortunate restriction of the free alienability of property.

### C. *The Destructibility of Contingent Remainders Rule*

Prior to the enactment by Parliament in 1536 of the Statute of Uses,<sup>45</sup> the courts had developed another method of curtailing the

---

43. Although some commentators have noted that the efforts to purge the American jurisdictions of the Rule in Shelley's Case began as early as 1791, it is generally recognized that New York's abrogation of the Rule in 1830 was the starting point of the ferment in the legislatures and the courts to abolish the Rule. Over the next 100 years, a total of 33 states abolished the Rule, but a number of those 33 jurisdictions did not act until after 1910. 45 HARV. L. REV. 571, 572-73 (1932). The remaining jurisdictions have struggled along, and some still retain the Rule, failing to deal the fatal blow.

44. Frequently, grantors would, and still do, invoke application of the Rule in Shelley's Case by conveying a remainder to the life tenant's "heirs," when in fact the grantor wished, or wishes, to convey an interest to specific children of the life tenant. Rather than specify each child, the grantor merely refers to the true objects of his bounty by the shorter and more convenient designation, "heirs."

45. See note 28 *supra*.

creation of limitless legal contingencies in third party transferees. Since the only legal contingent interest creatable in a transferee prior to the statute was a contingent remainder, this control came to be known as the Doctrine of Destructibility of Contingent Remainders.<sup>46</sup> As noted, the Rule in Shelley's Case dealt only with contingent remainders in the heirs of a life tenant. The Destructibility Doctrine dealt with contingent remainders generally, and came down to this proposition: if a remainder does not vest before or at the termination of the preceding freehold estate, the remainder is destroyed. The Doctrine, based on seisin, concerned only legal interests in land, not equitable interests and not personalty.<sup>47</sup>

The common law was continually concerned with the concept of seisin, the question of the identity of the person to whom the overlord could look for the production of feudal services and incidents from the land in question.<sup>48</sup> There could be no "gap in seisin," that is, no time when the identity of the seized party was in doubt. When, therefore, the concept of the contingent remainder first came to be recognized, there was an immediate recognition that the question of who held the seisin had to be solved.<sup>49</sup> Obviously the contingent remaindermen could not hold it for they were, by definition, unascertained. The only other possibility was that the owner of the freehold estate on which the contingent remainder depended would hold the seisin. Thus, the practiced solution made the owner of the preceding freehold estate, the life tenant or tenant in tail, hold the seisin during his lifetime, a holding which was said to inure to the benefit of the remainderman.<sup>50</sup> This resolution provided a holder of seisin during the life tenant's lifetime. But if for any reason the remainderman could not take at the termination of the life tenancy, then a gap in seisin occurred, the contingent remainders failed, and the next possessory, vested estate, presumably the reversion, acquired the seisin. Typically, the life estate terminated naturally, that is, with the death of the life tenant. It could also terminate at common law by the life tenant's forfeiture through treason<sup>51</sup> (easy to commit in sixteenth-century England) or through a tortious feoff-

---

46. See note 5 *supra*. For a good discussion of the status of the Destructibility Rule in Tennessee, see Jones & Heck, *Destructibility of Contingent Remainders in Tennessee*, 42 TENN. L. REV. 761 (1975).

47. L. SIMES, *supra* note 31, § 17, at 37.

48. The incidents of free tenure included: homage and fealty; relief and primer seisin; wardship and marriage; aids; fines for alienation; and escheat. C. MOYNIHAN, *supra* note 23, at 18-22.

49. See note 22 *supra* and accompanying text.

50. C. MOYNIHAN, *supra* note 23, at 128.

51. See 25 Edw. 3, St. 5, c.2 (1351).

ment<sup>52</sup> which was a purported conveyance of a fee simple title by one who held only a life estate. More likely, after about 1594,<sup>53</sup> the life estate might terminate before the death of the life tenant through application of the Doctrine of Merger. With some exceptions, if at any time the sole life estate and the next successive vested estate, the reversion, came to be owned by the same person, then the life estate was merged into the reversion under the Doctrine of Merger and a fee simple title resulted in the owner.<sup>54</sup> An exception to the Merger Doctrine applied if the title to the life estate and the title to the reversion came simultaneously into the same person. For example, if a testator devised a life estate in certain realty to his child by a will which also created contingent remainders in the property, but which disposed of nothing else, and the testator died intestate as to the reversion of that same property leaving the child as his only heir, the child received the life estate by the will at his father's death and simultaneously received the reversion as the father's sole heir. He thereby owned successive vested estates. Yet the Doctrine of Merger was held not to apply since this result would clearly frustrate the testamentary intent.<sup>55</sup> This result, nevertheless, could be overturned if desired, by the child's conveyance of both the life estate and the reversion to a strawman. When these titles vested in the strawman, the Doctrine of Merger applied, the strawman acquired a fee simple title, and the contingent remainders were destroyed. The strawman could then convey the fee back to the child without the remainders.

The Destructibility Rule functioned, then, as a control on contingent remainders, and so long as the contingent remainder was the only contingent interest creatable in a third party transferee, the doctrine acted effectively as a check on the creation of contingent future interests in third parties. The enactment of the Statute of Uses, however, dramatically altered the effectiveness of the Destructibility Rule. The doctrine still functioned as to contingent remainders,<sup>56</sup> but for the first time, two new devices were available to conveyancers as legal future interests in third parties. These newly developed future interests were the springing executory interest and the shifting executory interest.<sup>57</sup> By definition, neither of

---

52. Archer's Case, 1 Co. Rep. 66b, 76 Eng. Rep. 146 (1598).

53. The court approved destruction of contingent remainders upon the artificial termination of the life estate (for example, by merger) in Chudleigh's Case, 1 Co. Rep. 120a, 76 Eng. Rep. 270 (K.B. 1594).

54. L. SIMES, *supra* note 31, § 16, at 35.

55. C. MOYNIHAN, *supra* note 23, at 132-33.

56. The Statute of Uses, 27 Hen. 8, c.10 (1535), had no effect on contingent remainders.

57. The springing executory interest divests the interest of the grantor of the estate or

these interests could be subject to the Destructibility Rule.<sup>58</sup> The springing executory interest always cut short a reversionary interest. For example: the grantor conveys an estate to grantee, A, twenty-five years from date. A's interest would cut short the grantor's reversion when the title did spring forward from the grantor to his grantee twenty-five years from the date of the deed. The shifting executory interest always cut short the estate of an earlier transferee if in fact the contingency were met and the executory interest became possessory. For example: the grantor conveys a tract of real property to a grantee in fee simple, but if a designated third party ever marries, then to the third party at that time in fee simple. If the third party married, thereby meeting the condition, the shifting executory interest would cut short the estate in the grantee and shift it to the third party in fee simple. In neither kind of interest was seisin a problem, and, therefore, the Destructibility Rule did not apply. Towards the latter part of the seventeenth century, the courts did move to bring somewhat more transactions under the scope of the Rule by holding that if a limitation could be construed either as a contingent remainder or an executory interest, it had to be construed as a contingent remainder.<sup>59</sup> This decision effectively expanded the number of conveyances covered by the Rule. Nevertheless, the limitations of the Destructibility Rule were apparent, and its inability to govern most contingencies of the executory interest variety made essential the development of the broader control known as the Rule Against Perpetuities. Again, as with the Rule in *Shelley's Case*, a situation developed where the reason for the development of the Rule had faded, but new beneficial qualities had

---

his successors in interest, and may be illustrated as follows:

O to A for life, then one year after A's death to B and his heirs.

B's estate is a springing executory interest, which divests O or his successors of their reversion. On the other hand, the shifting executory interest divests the owner of an estate other than the grantor or his successors in interest. A typical illustration of the shifting executory interest is:

O to A for life, but should A remarry, then to B and his heirs.

B's estate is a shifting executory interest cutting short A's life estate.

58. *Pells v. Brown*, 79 Eng. Rep. 504 (K.B. 1620), was the first decision to hold that executory interests were indestructible. The very nature of a springing executory interest requires a gap in seisin before the taker's interest "springs" forward. Absent an allowance for the indestructibility of executory interests where gaps in seisin occur, a grantor could never create an executory interest in a jurisdiction employing the Destructibility Rule. Dukeminier, *supra* note 34, at 32.

59. In *Purefoy v. Rogers*, 2 Wms. Saund. 380, 85 Eng. Rep. 1181 (K.B. 1670), Lord Hale declared: "for where a contingency is limited to depend on an estate of freehold which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only, and not otherwise." *Id.* at 388, 85 Eng. Rep. at 1192.

become apparent and became the sole reason for its continuance.<sup>60</sup> It took the courts over two hundred years to fully develop the Rule Against Perpetuities as a check on alienation restrictions, and during that time the Destructibility Rule, despite its limited application with the gradual disappearance of seisin concerns, and the relative ease with which the Rule could be avoided by draftsmen, continued its function of limiting the ways in which contingent remainders could be used to frustrate free alienability.

The Rule Against Perpetuities has come to be the ultimate brake on the development of contingent interests, including contingent remainders.<sup>61</sup> There are settings, however, where the Destructibility Doctrine may have peculiar advantages over the Rule Against Perpetuities. For example, if a transferor conveyed a legal estate to his one year-old child for life, then to such children of that child who reach age twenty-one, the grantor has created a dual contingency in his grandchildren: first that they come into existence, and second that they reach age twenty-one. These contingencies are not objectionable under the Rule Against Perpetuities because the interests of the grandchildren will vest, if they vest at all, within twenty-one years of the end of the grantor's child's life, a life in being at the creation of the instrument. It is quite possible that if the child happens to be long-lived and has children late in life, over 100 years can pass before the ultimate vesting of the fee can finally be determined. Yet consider the possibilities under the Destructibility Rule. If the grantor's child inherits the reversion of his ancestor, or acquires it otherwise, or if the grantor somehow acquires his child's life estate, a merger occurs in the acquiring party which destroys the contingent remainder in the grandchildren. If it is deemed desirable to get the fee simple title into someone who can presently sell, this result can be deliberately obtained through manipulation of the Destructibility Rule. A sale of the fee cannot possibly be made otherwise without at least going through the expensive and dubious process of appointing guardians for the unborn heirs.<sup>62</sup> Even if they

---

60. As the concept of seisin faded in importance as English real property law developed, the English courts used the Destructibility of Contingent Remainders Rule to eliminate remote contingent interests which would otherwise hinder the free alienability of the property. This judicial use of the Destructibility Rule was particularly significant since the Rule Against Perpetuities had not yet been developed by the courts.

61. See notes 95-99 *infra* and accompanying text.

62. The legislatures of a number of states have provided by statute for the appointment of guardians *ad litem*. See, e.g., CAL. CODE CIV. PROC. § 373.5 (West 1973); ILL. ANN. STAT. ch. 22, § 6 (Smith-Hurd Supp. 1979). Nevertheless, the process of appointing guardians *ad litem* for unborn remaindermen is simply impossible in many American jurisdictions and extremely difficult in most of the other jurisdictions that permit the appointment of a guardian by virtue of enabling statute or judicial decision.

can be appointed, whether such guardians can or properly should agree to a sale of the unborn's interest is always a difficult problem.

The English abolished the Destructibility Rule in two stages during the last century<sup>63</sup> and apparently about two-thirds of the American jurisdictions have done the same.<sup>64</sup> On its face, this abolition seems sensible. Seisin plays no role in modern law and a rule revolving around seisin considerations is clearly an inappropriate antique which complicates the system. Nevertheless, when one considers the free alienability that was lost by the Rule's elimination, the disappearance of the Destructibility Doctrine from American law represents removal of yet another desirable restraint on the tie-up of real property through contingent interests.

#### D. *The Doctrine of Worthier Title*

Of the relics here considered, the Doctrine of Worthier Title can be said to have led a charmed existence. There is no more reason that this Doctrine should have widespread influence than that its close cousin, the Rule in Shelley's Case, should have such sway. Both doctrines originated in the need to ensure the availability of realty to feudal incidents. Both sought to prevent the creation of estates in "heirs" on the theory that if heirs could take as "purchasers" by deed or will, rather than in their capacity as heirs, the process of descent, on which incidents depended, could be circumvented by an appropriate deed or by a will (recognized by local custom prior to the Statute of Wills and by the Statute thereafter).<sup>65</sup> The basic formulation of the rule was that a future interest in real estate devised to or conveyed to the heirs of the transferor was in law a reversion and reverted to the grantor or to the estate of the grantor.<sup>66</sup> The rule applied irrespective of the kind of estate limited to the heirs, whether executory interest or remainder.<sup>67</sup> It also applied irrespective of the character of the preceding estate.<sup>68</sup> There was no requirement that the future interest and the equity preceding it be both equitable or both legal.<sup>69</sup> This rule, therefore, was one with far less stringent technical requirements than the Rule in Shelley's Case and one potentially more widely applicable. The Doctrine's only requirement was that there be a transfer of a future

---

63. 40 & 41 Vict. c.33 (1877); 8 & 9 Vict. c.106 (1845); 7 & 8 Vict. c.76 (1844).

64. L. SIMES & A. SMITH, *supra* note 8, § 207; Dukeminier, *supra* note 34, at 32-41.

65. Statute of Wills, 32 Hen. VIII, c.1 (1540).

66. *See* note 6 *supra*.

67. L. SIMES, *supra* note 31, § 27, at 58-59.

68. *Id.* § 27, at 59.

69. *Id.*



interest to the heirs of the grantor.<sup>70</sup> Originally, the Doctrine applied only to real estate and was a rule of law, as was the Rule in Shelley's Case.<sup>71</sup> Later, when the Doctrine was applied to personalty, a conveyance to "next of kin" or equivalent was required.<sup>72</sup> Most importantly, the Doctrine came to be regarded as a rule of construction, not of law.<sup>73</sup> This meant that the intention of the grantor became of paramount importance. There were two branches to the doctrine: the testamentary branch and the *inter vivos* branch. The testamentary branch is effectively dead in American law today because, for the most part, it does not matter whether the heirs of the grantor take under the terms of a will as remaindermen or whether they take from the estate of the deceased as successors to the reversion.<sup>74</sup> As it is applied in modern law, the doctrine is stated as follows: when a grantor conveys property to his heirs or next of kin, there is a rebuttable presumption that the conveyance was meant by the grantor as the creation of a reversionary interest in his own estate and not as a present creation of a contingent interest in those heirs or next of kin who will take his property at his death. The intention of the grantor is the overriding consideration.<sup>75</sup> For the Doctrine to be applicable, the grantor must intend that the terms "heirs" or "next of kin" be used in their classic sense, that is the grantor must refer to those persons who by statute take his estate at his death, and whose identity is determined at his death and not at some other time.<sup>76</sup> If the presumption prevails, the effect is as if the grantor had used the term "my estate" or equivalent language instead of "my heirs."

Whether the interest created is construed to be a reversion in the grantor or a contingent remainder in those who are his heirs or next of kin at death is fundamentally important in a number of instances where the question of ownership of title is involved. Perhaps the most obvious of these instances is that in which the termination of a trust is sought. Assume a situation in which grantor has conveyed a property in trust for the benefit of his wife for life, remainder to his own heirs or next of kin. Subsequently the couple,

---

70. *Id.* § 27, at 58.

71. *Id.* § 26, at 57.

72. See *Doctor v. Hughes*, 225 N.Y. 305, 311, 122 N.E. 221, 222 (1919).

73. See *Doctor v. Hughes*, 225 N.Y. 305, 122 N.E. 221 (1919); cf. *Cochran v. Frierson*, 195 Tenn. 174, 258 S.W.2d 748 (1953) (regarding the Doctrine of Worthier Title as a rule of policy). See also *National Shawmut Bank v. Joy*, 315 Mass. 457, 53 N.E.2d 113 (1944); *Braswell v. Braswell*, 195 Va. 971, 85 S.E.2d 560 (1954).

74. L. SIMES, *supra* note 31, § 26, at 57 n.5.

75. See *Doctor v. Hughes*, 225 N.Y. 305, 312, 122 N.E. 221, 222 (1919).

76. *Id.*

perhaps childless, conclude that the trust is inappropriate to their needs, and seek termination of the trust. Both the settlor and the life tenant are *sui juris* and willing to terminate. While it would seem that the trust should be terminated, the desired termination depends on the nature of the interest created by the transfer in the "heirs" of the grantor. If this interest is deemed to be a contingent remainder in those persons who are the heirs of the grantor at his death, no present termination is possible because the identity of these heirs cannot be ascertained until the grantor's death. If on the other hand the interest in the "heirs" is regarded as a reversion in the grantor, then between them, the husband and wife together own all the beneficial title and the trust can be terminated.<sup>77</sup> Characterization of the interest as reversion or contingent remainder may also govern the tax liabilities of the grantor's estate,<sup>78</sup> the power of the grantor to dispose of the reversion by subsequent deed or devise,<sup>79</sup> and rights of creditors of the heirs apparent in the property.<sup>80</sup>

The Doctrine of Worthier Title was abolished by statute in England in 1833<sup>81</sup> but lingered on in American jurisdictions, regarded for the most part as a rule of law and as applicable to real estate only. Then in 1919 the New York Court of Appeals decided the case of *Doctor v. Hughes*.<sup>82</sup> In this curious decision the court recognized the ancient rule and its application historically as a rule of "property" or "law" that absolutely prohibited the power of the grantor to create future interests in his own heirs. The court then proceeded to decide that while the Doctrine no longer existed as an absolute curb on grantor intent, it did survive at least as a "rule of construction" in the absence of modifying statute. This proposition opened the whole question of what a grantor intended, and gave new life to the Doctrine. As a result, particularly in New York and in

---

77. See *Hatch v. Riggs Nat'l Bank*, 361 F.2d 559 (D.C. Cir. 1966). For a good discussion of this problem area, see Note, *Trusts: Modification of Irrevocable Trusts Through Appointment of a Guardian for Unborn Heirs—Repudiation of Worthier Title Doctrine*, 66 COLUM. L. REV. 1552 (1966).

78. See *Beach v. Busey*, 156 F.2d 496 (6th Cir. 1946), *cert. denied*, 329 U.S. 802 (1947); I.R.C. § 2037.

79. If the Doctrine of Worthier Title is applied and deemed to create a reversion in the grantor or his estate, then the grantor may dispose of his interest, the reversion, and the ultimate right of possession and title to the property by deed or devise. If the conveyance is deemed to grant a remainder in the grantor's heirs, then the grantor can no longer validly convey any interest in the property.

80. See *Doctor v. Hughes*, 225 N.Y. 305, 122 N.E. 221 (1919). The creditors of the conveyor do have a reachable asset if the interest is deemed to be a reversion vested in the grantor. See *Gould v. Harris*, 132 A. 2 (R.I. 1926); *Sequin State Bank & Trust Co. v. Locke*, 129 Tex. 524, 102 S.W.2d 1050 (1937).

81. 3 & 4 Wm. 4, ch. 106, § 3 (1833).

82. 225 N.Y. 305, 122 N.E. 221 (1919).

those states following *Doctor v. Hughes*, the courts have struggled with the slippery question of what a grantor did in fact intend when he limited a future interest to his heirs.<sup>83</sup> Once relieved of its feudal characteristic of "rule of law" and the seisin aspects of its background, the Doctrine came to be applied to transfers of personalty as well as of land.<sup>84</sup> This new development meant that trusts of personalty now fell within the purview of the Doctrine.

The "new" Doctrine proved to be both pest and friend to the courts following it.<sup>85</sup> On the one hand, it was virtually impossible to ascertain in fact what a grantor had intended by the gift to his heirs. He had used the words to create the gift, and apparently intended them to mean what they said in simple terms. Yet the presumption of the Doctrine was that the transferor meant not to create a contingent gift in his heirs but a reversion in himself. Since for the most part the presumption could not be overcome, the effect was to frustrate the grantor's probable intent. On the other hand, the new formulation was of undoubted value in that it now applied to personalty. It freed the alienability of even more property by vesting title in presently ascertainable persons able to convey that title, rather than tying it down to heirs or next of kin whose identity was in doubt. The new formula gave a broader expanse to the Doctrine's scope by opening the question of intent. At the same time, it rendered less certain what would happen to the property than had been the case under the old "rule of law" concept under which one knew that the grantor's intent could conclusively be found to be a reversion and not a remainder.

For the moment, the Doctrine remains viable in many American jurisdictions,<sup>86</sup> but the insurmountable problem of reconciling a desire to carry out the grantor's intent with the need for predictable results from the use of certain words of limitation has probably put the seal of ultimate doom on it. When this relic is abolished from American law, grantors may freely set up clear and predictable future interests in their own heirs. This result will be a victory for grantor intent, and a defeat for free alienability.

### *E. The Rule Against Perpetuities*

Over a span of about 200 years, the courts developed what is

---

83. See, e.g., *Hatch v. Riggs Nat'l Bank*, 361 F.2d 559 (D.C. Cir. 1966); *Bixby v. California Trust Co.*, 33 Cal. 2d 495, 202 P.2d 1018 (1949); *McKenna v. Seattle-First Nat'l Bank*, 35 Wash. 2d 662, 214 P.2d 664 (1950).

84. See *Hatch v. Riggs Nat'l Bank*, 361 F.2d 559, 562 (D.C. Cir. 1966).

85. See, e.g., *In re Burchell's Estate*, 299 N.Y. 351, 87 N.E.2d 293 (1949).

86. See L. SIMES, *supra* note 31, § 30.

today the work horse of control on remote contingencies—that complex and technical series of propositions known as the Rule Against Perpetuities.<sup>87</sup> Such a rule became inevitable after the Statute of Uses made possible legal executory interests and thereby provided a simple expedient for the circumvention of all the limiting rules governing contingent remainders.

Before examining the Rule and how it operates, perhaps two general observations can be made about it. First, the Rule came to operate in conjunction with some corollary propositions that on the face are ridiculously technical and seemingly inconsistent with modern experience. For example, the “fertile octogenarian principle”<sup>88</sup> seems absurd, even though that particular corollary may in fact well serve the purpose of enhanced alienability. This unsavory reputation makes the Rule appear even more suspect than it ought to be. Second, even taking the Rule in its most attractive guise and applying it to produce the most stringent restraints on remoteness it can provide, the fact is that contingent interests can be created which simply last too long to suit the requirements of a modern society. In the famous *Duke of Norfolk's Case*<sup>89</sup> in which the Rule began its long journey to the final formulation by Gray two centuries later,<sup>90</sup> Lord Nottingham was asked how long he would permit the perpetuity to last. Where would he stop? His answer was that he would not stop “where there is not any Inconvenience.”<sup>91</sup> On reflection, this seems an extraordinarily prudent position. Where inconvenience might appear in the last quarter of the seventeenth century, however, is not likely to be the same place it might appear in the last quarter of the twentieth century. Several profound developments since the seventeenth century have undercut the Rule's effectiveness: First, the Rule is usually geared to the duration of “lives

---

87. See note 7 *supra*.

88. Simply stated, the fertile octogenarian rule presumes that any person is capable of bearing children until the day he or she dies. One of the earliest reported authorities expressing this principle is *Jee v. Audley* in which the court noted:

I am desired to do in this case something which I do not feel myself at liberty to do, namely to suppose it impossible for persons in so advanced an age as John and Elizabeth Jee to have children; but if this can be done in one case it may in another, and it is a very dangerous experiment, and introductive of the greatest inconvenience to give a latitude to such sort of conjecture.

1 Cox Eq. Cases 324, 325-26, 29 Eng. Rep. 1186, 1187 (Ch. 1787). See also 4 RESTATEMENT OF PROPERTY § 377 (1944).

89. 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1682). For a good discussion of the background, effect, and significance of the Duke of Norfolk's Case, see Hadkins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities*, 126 U. PA. L. REV. 19 (1977).

90. See note 7 *supra*.

91. 3 Ch. Cas. at 36, 22 Eng. Rep. at 953.

in being" at the creation of the interest. Average life spans continue to grow, effectively stretching the absolute time available for vesting. Second, the society which the Rule was developed to serve no longer exists. When one considers the pace of change today as compared to the pace of the last century and a half, the antiquity and inappropriateness of a formula fixed two centuries ago becomes apparent. Third, all of the so-called "reforms" of the Rule undertaken recently tend to validate long-lasting contingencies, not to void them. Gray had stipulated that once the Rule was found to apply, it should be applied "remorselessly."<sup>92</sup> This mandate has faded as "wait and see,"<sup>93</sup> "cy pres,"<sup>94</sup> and other reform techniques have been adopted to ameliorate the perceived harshness of the Gray directive. Those "reforms" are the very vehicles through which the Rule's effectiveness has been undercut. Doubtless reforms have been popular because there have been popular targets—formulas expressed in archaic terms reflecting assumptions long discredited. To understand these assumptions and the impact of the reforms, some review of the Rule is required.

The Rule is not, of course, a rule against interests which last too long. In theory a fee simple can last forever. It is, rather, a rule requiring vesting of certain contingent interests, if they are to vest at all, within a stipulated period of time. The most widely accepted statement of the Rule is that of John Chipman Gray: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."<sup>95</sup>

This statement is a workable one but not entirely accurate because the Rule is not always as consistent as the statement suggests. It applies to most contingent interests created in third parties (contingent remainders and executory interests), but it does not apply to rights of re-entry and possibilities of reverter that are made by transferors and are always contingent in theory.<sup>96</sup> The Rule applies to most contingent gifts to charities, but not to all such gifts.<sup>97</sup>

---

92. J. GRAY, *supra* note 7, at § 629.

93. PA. CONS. STAT. ANN., tit. 20, § 6104(b) (Purdon 1975), is representative of those statutes enunciating the "wait and see" doctrine: "Upon the expiration of the period allowed by the common law rule against perpetuities as measured by actual rather than possible events, any interest not then vested and any interest in members of a class the membership of which is then subject to increase shall be void." See note 114 *infra*.

94. VT. STAT. ANN., tit. 27, § 501 (1975), clearly describes in pertinent part the *cy pres* approach that many states have adopted: "Any interest in real or personal property which would violate the rule against perpetuities shall be reformed, within the limits of that rule, to approximate most closely the intention of the creator of the interest."

95. See note 7 *supra*.

96. Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 647-48 (1938).

97. *Id.* at 668-69.

The Rule has no application to most vested interests, though it may invalidate a class gift vested subject to partial divestment.<sup>98</sup> The Rule applies to certain options and not to others.<sup>99</sup> Despite these inconsistencies, it can be said that the Rule is an effective control on those interests it does undertake to control if one accepts the proposition that the time period of "lives in being plus twenty-one years" is not an inconveniently long one.

Criticism of the Rule by its detractors has traditionally taken the form of dissatisfaction with the technicalities of its implementation rather than by a challenge to the time limitations permitted by the Rule when properly applied. These difficulties of implementation are in fact formidable. Identification of the so-called "measuring lives" is often unreasonably difficult.<sup>100</sup> Designation by the draftsman of a large number of lives such as in the "royal lives clauses"<sup>101</sup> can create situations of complex factual determinations by courts. Ascertainment of the time from which interests are to be measured to determine validity involves the understanding and bringing to bear of a mass of highly technical principles, especially when the exercise of a power of appointment is present. That characteristic of the common law Rule that has made it most effective is that it deals in possibilities rather than probabilities. If there is any possibility that the interest in question may not vest within lives in being plus twenty-one years as measured from the time of creation of the interest, the interest is void as of that time.<sup>102</sup> Whether in fact the interest does later vest within the prescribed period is immaterial. This prospective cast of the Rule has enhanced its role as a control on contingent interests, yet, at the same time,

---

98. See 5 R. POWELL, *supra* note 8, ¶ 782[3].

99. Leach, *supra* note 96, at 660-62.

100. In many instances, the measuring lives must be implied from the terms of the gift. See *Harris v. France*, 33 Tenn. App. 333, 355-57, 232 S.W.2d 64, 73-74 (1950); RESTATEMENT OF PROPERTY § 374, comment j, at 2188-90 (1944).

101. See *In re Villar*, [1928] 1 Ch. 471, *aff'd*, [1929] 1 Ch. 243 (C.A. 1928). In this celebrated case, an English court sustained the validity of the testator's dictate that the corpus of a trust fund would not vest in any remainderman until "the period ending at the expiration of 20 years from the day of the death of the last survivor of all the lineal descendants of Her late Majesty Queen Victoria who shall be living at the time of my death [September 6, 1926]." *Id.* The court ascertained that about 120 descendants of the Queen were living on the date of testator's death, and were residing in England, Germany, Russia, Sweden, Denmark, Norway, Spain, Greece, Yugoslavia and Rumania. *Id.* at 473. The court's attempted determination of the measuring lives was complicated by two factors: the possibility of obscure descendants who were not discovered by the investigation of A. T. Butler, Portcullis Pursuivant of Arms, and the uncertainty "whether any of the late Tsaritsa's children were living," *id.*, an obvious reference to the legendary survival of the Grand Duchess Anastasia from the assassination of the Russian Tsar and his family.

102. See *In re Freeman's Estate*, 195 Kan. 190, 404 P.2d 222 (1965); *Jee v. Audley*, 1 Cox Eq. Cases 324, 326, 29 Eng. Rep. 1186, 1187 (Ch. 1787).

it is this facet of the Rule's operation that has triggered most of the recent efforts to reform it. Related to the Rule's prospective application, some four corollary rules have developed. Each of these rules involves either a fiction, a highly artificial or strained construction, or a determined effort to stretch the potential for violation to the outer limit.

The first corollary rule has been called the "fertile octogenarian" rule.<sup>103</sup> This rule applies to any appropriate transfer a conclusive presumption that a female can bear a child at any time in her life and in spite of any physical impediment. As an example, a testator devises property as a class gift to his sister's grandchildren who reach age twenty-one. The family situation at the testator's death is that the sister is eighty-five years old, having had a total hysterectomy some years earlier. She has no living children but has ten living grandchildren, none of whom is twenty-one at testator's death. Applying the common law rule with the fertile octogenarian principle, the gift to the grandchildren is void. The class cannot close at the testator's death under class closing rules because none of the grandchildren is entitled to take at that time, and the rule conclusively presumes that the elderly sister can produce more children who may in turn produce more members of the class. Since these prospective children will be measuring lives for the contingent class, and since they were not lives in being at the critical time, the testator's death, the entire gift to the grandchildren must fail. This result is a boon to free alienation for there is no necessity to wait until the class of grandchildren can be determined. It is, on the other hand, totally destructive of the interests of the grandchildren and for this reason has been often criticized. Because of its presumption in the face of all modern knowledge, this corollary has been especially susceptible to attacks.

The second corollary rule, the "all or nothing" rule, may be illustrated through a similar example. A testator makes a gift to all of his sister's grandchildren who reach age twenty-one, coupled with an express statement that no grandchild of his sister to reach age twenty-one shall be excluded from the class. If at the testator's death there are ten living grandchildren all of whom are twenty-one, the interests of these children are regarded as vested subject to partial divestment to permit the entry of other grandchildren into the class. Yet despite the vested character of the grandchildren's interest, their interests are void under the so-called "all or nothing" rule.<sup>104</sup> This rule requires that the gift be totally vested as to all

---

103. See note 88 *supra*.

104. See *Leake v. Robinson*, 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817); RESTATEMENT OF PROPERTY § 383 (1944).

possible takers or be regarded as contingent as to all possible takers. Since class closing rules of convenience cannot be applied to close the class at testator's death because of the explicit provision to the contrary, the presumption that the grandmother can produce other children who may in turn produce measuring lives not in being at testator's death works to defeat the gift to all the grandchildren under "all or nothing" principles. It should be noted that the result here is quite harsh on the already living grandchildren, but again the rule has performed its function of laying to waste certain contingent interests.

The third corollary rule has been called the "unborn widow" rule.<sup>105</sup> Once more a highly unlikely occurrence in fact is delved up to bolster the relentless attack on contingencies. This corollary can be applied when persons are described in terms of status such as "widow" or "husband" rather than by name. If a contingent gift is made to hinge on a life described in such a way, then the gift may very well fail because it is not certain that such measuring life will be a life in being at the critical moment. The usual illustration is that in which a testator devises to his son for life, then to the son's widow for her life, then to such of the couple's children who survive the widow. There is no problem with either of the life estates because patently they must vest within lives in being of the testator's death. But, there is the possibility, if the son's first wife dies and he remarries, the widow of the son may be a person unborn at the testator's death. Since the membership of the class of contingent takers, her children who survive her, can only be ascertained at her death, her life is the measuring life, and it is not necessarily a life in being at testator's death. The combination is lethal and the gift to the children is void even if in fact at the son's death he is married to the same woman to whom he was married for many years before the testator's death. Again, the rule yields a benefit to alienability but an unattractive result for the contingent remaindermen.

A final associated construction is the so-called "administrative

---

105. An early American court construing a testamentary disposition of a succeeding life estate to the husband or wife of the testatrix's deceased child (having the prior life estate) clearly described the unborn widow rule as follows:

It was possible that a child of Mrs. Blake [the testatrix] might marry a person not in being at the time of her decease; and that such person might be the survivor of the marriage. In that case, a limitation of her estate, not to take effect until after the decease of such unborn person, would be in violation of the rule against perpetuities; because it would not be supported by the definite measure of a life or lives in being and twenty-one years.

Loring v. Blake, 98 Mass. 253, 259 (1867). See also RESTATEMENT OF PROPERTY § 374, comment k, at 2190 (1944).



contingency" rule.<sup>106</sup> Here the contingency is limited on some event that is extremely likely, but not absolutely certain to occur within lives in being and twenty-one years. A contingency to be resolved "on probate of my estate" is such an event. In fact the probate may be virtually certain to occur within the period of the rule and as events transpire may in fact occur within that time. A determined common-law court would nevertheless find the provision violative of the rule and void the contingent interest.

It is fair to say that courts have for the most part sought ways to avoid the Rule's result if that result is seen as an unreasonably harsh one on the contingent takers. Often this could be done by construction giving more conveyances legal effect. If a person is described by status, the court may rule that when the testator used the term "widow," he in fact had in mind the woman to whom his son was then married.<sup>107</sup> If the problem hinges on an apparent class gift the court may find that the transferor had in mind particular persons and not an unascertained "class" of people when he used a term such as "grandchildren."<sup>108</sup> If the distribution is to be made to persons ascertained at probate of the estate, the construction may be that this provision was not meant as a condition but merely inserted as a recognition that no distribution can be made until probate.<sup>109</sup> In short, most courts have sought to validate the conveyance and the presumed intention of the transferor, rather than apply the Rule strictly to invalidate a conveyance and thereby facilitate alienation.

Beyond amelioration of harsh results by construction, there have been substantial modifications of the Rule's application by judicial and statutory reforms. The reforms have taken several forms. Perhaps the most pervasive has been the "wait and see" doctrine<sup>110</sup> adopted by statute in some jurisdictions<sup>111</sup> and by courts

---

106. 5 R. POWELL, *supra* note 8, § 764(5).

107. *See, e.g.*, ILL. ANN. STAT. ch. 30, § 194(c)(1)(C) (Smith-Hurd Supp. 1979).

108. *See Blackstone v. Althouse*, 278 Ill. 481, 116 N.E. 154 (1917). In conveying property to a group of people, the grantor or testator may intend to make a class gift by the conveyance, or he may intend to make a specific gift to specific individuals whom he has designated in class terms for purposes of brevity. The courts decide the issue by determining whether the grantor or testator was "group-minded." Note, *What Constitutes a Gift to a Class*, 49 HARV. L. REV. 903, 930 (1936).

109. *See also* ILL. ANN. STAT. ch. 30, § 194(c)(1)(B) (Smith-Hurd Supp. 1979); N.Y. EST., POWERS & TRUSTS LAW § 9-1.3(d) (McKinney 1967) (modifying the administrative contingency rule by establishing a presumption that the creator of the interest intended the contingency to occur within 21 years of the creation of the interest, so as not to be violative of the Rule Against Perpetuities).

110. *See* note 93 *supra*.

111. The following statutes have established the "wait and see" doctrine in their respective states: KY. REV. STAT. § 381.216 (1972); OHIO REV. CODE ANN. § 2131.08 (Page 1968); PA.

without the aid of a statute in other jurisdictions.<sup>112</sup> This doctrine necessarily assumes that the Rule is too severe in application if it turns out that the contingent interests created by an instrument do in fact vest within lives in being and twenty-one years of the measuring point. Proceeding from this assumption, the doctrine requires that the courts indeed "wait and see" for the entire period allowed by the Rule if the interests vest or do not vest. If as events transpire, they do vest within the period of the Rule, the interests are held valid; if they do not vest, they are held void.<sup>113</sup> The objection to this concept is obvious. It undercuts exactly that which the Rule is established to enforce: free alienability. Since one must wait to see what will transpire, the property in issue is effectively removed from commerce until it can be ascertained which way the contingency will be settled. This wait and see period may be a long time indeed. The whole notion of the Rule as a prospective one dealing with the potential for nonvesting rather than the actuality of vesting has been sacrificed to an exaggerated concern for preserving transferor intent.

More reasonable is the so-called "modified wait and see" reform adopted by several states.<sup>114</sup> This doctrine does not wait the entire period permitted by the Rule, but waits only until the end of any life estates created in lives in being at the effective date of the instrument to decide whether contingencies have vested. Presumably, the property involved would be for the most part out of commerce during the time of the life estates anyway, so there would be no particular disadvantage in delaying during such time to determine the ultimate validity of the contingencies. While somewhat less delay is involved in this concept than in the more expansive "wait and see" doctrine, the delay involved may still be substantial.<sup>115</sup>

Yet another reform effort is that borrowing from the trust doc-

---

CONS. STAT. ANN., tit. 20, § 6104(b) (Purdon 1975); VT. STAT. ANN., tit. 27, § 501 (1975). The Pennsylvania statute is the forerunner and model for the subsequently enacted statutes from the other jurisdictions. For a good discussion of the Pennsylvania statute, see Note, *Separability and the Rule Against Perpetuities*, 77 DICK. L. REV. 277 (1973). The Kentucky, Ohio, and Vermont statutes incorporate the *cy pres* doctrine reform as well as the wait and see doctrine.

112. See *Merchants Nat'l Bank v. Curtis*, 98 N.H. 225, 97 A.2d 207 (1953), noted in 53 COLUM. L. REV. 1158 (1953).

113. See note 111 *supra*.

114. See CONN. GEN. STAT. § 45-95 (West 1960); ME. REV. STAT. tit. 33, § 101 (1978); MD. ESTATES AND TRUSTS CODE ANN. § 11-103 (1974). These statutes received their impetus from model legislation developed by Professors Leach and Casner at Harvard. Bostick, *The Tennessee Rule Against Perpetuities: A Proposal for Statutory Reform*, 27 VAND. L. REV. 1153, 1171 (1974).

115. See Bostick, *supra* note 114, at 1171.

trine of *cy pres*.<sup>116</sup> As applied to perpetuities, the *cy pres* rule would assume that the transferor intended a legal result for his provision and would accordingly move to reshape the disposition as necessary to bring it within permissible boundaries. The most usual employment of *cy pres* is in a situation where the grantor provides for an age contingency which throws an otherwise valid conveyance beyond the Rule's parameters. For example, a devise to those of testator's grandchildren who reach the age of twenty-five is void; but the same devise to those of his grandchildren who reach the age of twenty-one is valid. To save the devise, a court applying *cy pres* principles would cut the age contingency of twenty-five to an age contingency of twenty-one. One objection to this implementation of the *cy pres* doctrine is that a court is permitted to write the will instead of the testator.<sup>117</sup>

The final major reform technique has been to provide in lieu of the complicated "lives in being" formula a simple "in gross" period during which contingencies may vest or not. Typical periods have been sixty to ninety years.<sup>118</sup> While this solution has the undoubted virtue of simplifying the otherwise complex identification of measuring units, it does nothing to reduce extraordinarily long periods of time during which title is uncertain.

The above summary of the current status of the Rule Against Perpetuities mandates the following conclusions. In most jurisdictions, it is certainly the only general control on long term contingencies in property dispositions. It is equally certain that the Rule is little understood and often misapplied by both the draftsman and the courts. All of the major efforts at reform in this country have been directed at saving violating provisions of a disposition at the expense of the policy of the classic Rule rather than restricting even more rigidly the creation of such contingencies.<sup>119</sup> Even assuming

---

116. See note 94 *supra*.

117. *In re Estate of Chun Quan Yee Hop*, 469 P.2d 183, 187-88 (Hawaii 1970) (Kobayashi, J. dissenting); cf. Comment, *Perpetuities Reform Through Judicial Adoption of Complete Cy Pres*, 28 WASH. & LEE L. REV. 184 (1971).

118. See, e.g., CAL. CIV. CODE § 715.6 (West Supp. 1979), which provides: "No interest in real or personal property which must vest, if at all, not later than 60 years after the creation of the interest violates Section 715.2 of this code."

119. For a digest of reform efforts nationally, see Bostick, *supra* note 114, at 1169-73. The merits of reform efforts designed to preserve testator intent has been hotly debated in the secondary literature. One focal point of the controversy has been the "wait-and-see" doctrine, which was strongly advocated by Professor W. Barton Leach and attacked with equal vigor by Professor Lewis Simes. Compare Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721 (1952) with Simes, *Is the Rule Against Perpetuities Doomed? The "Wait and See" Doctrine*, 52 MICH. L. REV. 179 (1953). The debate continues today among Professors Burger, Casner and other members of the American Law

the desirability of reforms yielding such an effect, the Rule continues to be for most a technicality-ridden nightmare which has withstood all effort to reduce it to manageable proportions. Finally, even if the Rule can be reworked successfully so that its application is predictable and simple in each instance, there remains a serious question of whether modern society can afford to sanction the tie-up of real property in excess of 100 years to satisfy transferor intent. If modern society cannot sanction such drastic restraints on free alienation, the reasonable alternatives to the present system must be sought.

If the relic restraints of the past are fading or gone and the Rule Against Perpetuities is inadequate to its task, then it seems appropriate to consider other approaches to the bedrock problem of the freedom of real property disposition versus the modern societal need to keep property reasonably available to commerce. The concept of "estates" in property, one which views ownership in terms of its duration in time, is for the most part a peculiar invention of Anglo-American common law. It is this theory, of course, which makes possible any future interest and gives rise to the problem of control with which this Article has dealt. As has been suggested, the troubles with contingent interests multiplied when Parliament tampered with the original estates concept by in effect expanding the nature of future interests and redefining them beyond control of the old rules.<sup>120</sup> The law responded by infusing new life into the Rule in Shelley's Case, the Doctrine of Worthier Title, the old Destructibility Rule and the Rule Against Perpetuities, all of which have proved lacking. Perhaps the modern solution lies in a further redefinition which will provide the ultimate check to the dilemma by defining out of existence trouble-making legal future interests. The future interest concept is extraordinarily useful despite its penchant for mischief, and any solution based on a wholesale abolition of it seems extreme and counterproductive. Policies encouraging and recognizing the wide ranging freedom of grantor and testator intent are totally consistent with the inescapable interlock between property rights and liberty. Future interests provide valuable flexibility in effectuating this policy. How then can both the value of free alienation and the value of liberally implementing transferor intent be met?

Three suggestions for improvement follow, running from quite

---

Institute. See unpublished memorandum of the 1978 annual meetings of the American Law Institute on Property (copy on file with *Vanderbilt Law Review*).

120. Statute of Uses, 27 Hen. 8, c.10 (1535). See notes 57-59 *supra* and accompanying text.

modest statutory reform to a fundamental reworking of the entire American legal future interest system. Each of the first two suggestions has limited merit. The third may well be the most realistic resolution of the dilemma with which this Article has dealt.

### III. POTENTIAL SOLUTIONS OF THE GREAT FUTURE INTEREST DILEMMA

#### A. *The Specified Intent Solution*

One possibility for reform is a limited one, and one which clearly runs counter to the trend of the law for many decades in its emphasis on transferor intent. The proposal is that a statutory scheme be enacted similar to those enacted in many states to deal with one of the old common-law concepts of concurrent ownership—the joint tenancy with right of survivorship. At common law when a conveyance of land was made to two or more persons to hold concurrently, there was no feature of survivorship.<sup>121</sup> Gradually, due in part to the cumbersome aspects of the “four unities” requirement of joint tenancy, the presumption changed so that in modern law such a conveyance to two or more persons is presumed to create a tenancy in common, unless a contrary intent is expressed.<sup>122</sup> It is this latter treatment of the joint tenancy that presents an analogy for what might be done with the kinds of future interests formerly governed by Shelley’s Case, Worthier Title, and other rules. States taking the middle ground on joint tenancies do not forbid their creation, but they do make it difficult. Typically, one seeking to create a joint tenancy in such a jurisdiction must make the conveyance to the multiple parties and then *expressly provide* that the tenants take as joint tenants with right of survivorship and not as tenants in common.<sup>123</sup>

The proposal for contingent interests would follow a similar theme. One could create a future interest in the “heirs” of a life tenant, or create a future interest in one’s own “heirs” or “next of kin,” but the transferor would have to make an explicit statement to the effect that the intention is to create a present future interest in those persons who will be the named parties’ heirs or next of kin at his death. Absent such a statement, the language of which could best be defined by statute, any attempted legal conveyance or undertaking to create a contingent future interest in the “heirs” or “next of kin” of any person would be void. Hopefully, the effect of such legislation would be to apply cleanly the policy of the ancient

---

121. See 4A R. POWELL, *supra* note 8, ¶ 602.

122. *Id.* ¶¶ 602, 615.

123. See 4A R. POWELL, *supra* note 8, ¶ 616; Annot., 46 A.L.R.2d 523 (1956); Wilson, *Words Necessary for Creation of Joint Tenancy*, 34 NEB. L. REV. 67 (1955).

controls with respect to free alienability without the medieval impediments. It would at the same time give maximum free range to grantor and testamentary intent by permitting the creation of any future interest to those persons, *providing* they make use of the vehicle afforded for the purpose. It comes to this: the transferor could create the future interests that he could always create, but it would be more difficult to create such interests in that he would have to indicate his desires in such a manner as to leave no doubt whatsoever of his intentions. This solution would eliminate the uneasy task of trying to ascertain transferor intent which presently plagues the application of the Doctrine of Worthier Title.<sup>124</sup> Under the proposal, the required statutory language would either be present in the document or it would not. Its presence or absence would conclusively govern the disposition.

A significant shortcoming of this proposal is that it controls only a few of the contingent future interests creatable. The proposal in no way controls gifts to "children," "grandchildren," or examples limited by some contingency which may be long-term in resolution. It does, nonetheless, remove some of the more perplexing ambiguities.

### B. *The Equity Solution*

A second possibility which has been advanced for dealing with the land encumbered by future interests is to employ the inherent power of a court of equity to remove those interests as justice demands.<sup>125</sup> Under certain conditions the equity court would order the unencumbered sale of the fee simple title to the land and establish a trust over the proceeds to be administered in keeping with the terms of the conveyance or will creating the future interests. Considerable judicial development and statutory enactment have emerged over the last century authorizing such transformation from legal or equitable future interests in land to trusts in the personalty coming from their sale.<sup>126</sup> There is promise in this approach. The shortcoming of the equity solution is the hopeless division among jurisdictions on the nature of the showing required to invoke the equity

---

124. See text accompanying note 85 *supra*. The difficulty of ascertaining transferor intent led the District of Columbia to judicially abrogate the Doctrine of Worthier Title in *Hatch v. Riggs Nat'l Bank*, 361 F.2d 559, 564 (D.C. Cir. 1966): "We see no reason to plunge the District of Columbia into the ranks of those jurisdictions bogged in the morass of exploring, under the modern doctrine of worthier title, 'the almost ephemeral qualities which go to prove the necessary intent.'"

125. See Rogers, *Removal of Future Interests Encumbrances—Sale of the Fee Simple Estate*, 17 VAND. L. REV. 1437 (1964).

126. See *id.* for a discussion of both the judicial and statutory developments.

doctrine.<sup>127</sup> Must the need to sell the property be such that the property will be lost to all the owners, present and future, unless a sale is ordered? Or is the showing one of "necessity," or merely one of "convenience" or "in the best interests" of the parties? Some courts have become progressively more lenient in the required showing, especially where the land interests are in trust and the doctrine of settlor intent can be marshalled to justify the sale.<sup>128</sup> Yet the reality of widely varying statutes, as often as not impeding broad judicial development, and fundamental doubts about the propriety of substituting a court's judgment for that of the original conveyor limit equity jurisdiction as a model for ultimate solution.

This proposal has contributed to recognition of the notion that the most desirable resolution is one in which future interests encumbering land are transformed into personalty and wrapped in a trust. Thereby, original conveyor purpose is effected and simultaneously the trustee has a mandatory power of sale. A balance is then struck between the maintenance of productive, available property on the one hand, and grantor-testator intent on the other. While the proposal suggested might be an improvement over the present technique by offering limited relief in narrow cases, it fails to provide for the ultimate need to develop a system that shifts away from the present American law of future interests to a simpler model gauged to contemporary needs. The fundamental purpose of this shift would be to accommodate as nearly as possible a policy retaining the freedom of disposition and flexibility benefits of future interests while at the same time enhancing the free alienability of real estate.

### C. *The English Solution Background*

An ideal future interest system for land should contain as basic:

1. A means by which transferors can utilize the flexibility of the future interest concept.
2. A means by which at all times some identifiable person has the vested legal fee simple title and thus the authority to sell and encumber that title.
3. A means to assure that a purchaser in good faith will receive a good fee simple title unconcerned with any equitable future interest attached to the title in earlier arrangements.

The future estate in land concept deserves retention in the American land system. It is the essential element of family trusts by which property owners for generations have made conditional arrangements reflecting expectations, hopes, and fears for them-

---

127. *Id.* at 1444-48.

128. *See, e.g., American Security & Trust Co. v. Cramer*, 175 F. Supp. 367, 375 (D.D.C. 1959) (finding that the authorization of sale was justified by "the realities of the situation").

selves and their successors. Policies supporting and implementing these arrangements are sound, present no unacceptable social detriments, and ought to be sustained, so long as there are no irreconcilable conflicts between the desires of the property owner and the wishes of society generally. Such conflicts are most likely to develop at the point where arrangements by the property owner make free alienability of a given parcel of realty impossible for unacceptable periods of time. For centuries, the English aristocracy effectively removed the mass of land in England from widespread alienability by an arrangement called the "strict family settlement," a complex web of restrictions legally limited in duration, but in practice effective to approach perpetuity in impact.<sup>129</sup> One of the central elements in the family settlement permitting such a result was the inability of the present occupant, the "life tenant" or his counterpart, to sell, mortgage, or otherwise deal with the land, except as specifically permitted by the terms of the settlement. As new scientific methods of agriculture, the competition of grain imports from the western hemisphere, and the industrial revolution began to change the English economy, the impotence of the occupants of land to deal with it effectively, to sell it, or even to lease it, became increasingly obvious and inconvenient.<sup>130</sup> Thus, Parliament began the long-term response to the problem of land tie-up that was to culminate in the Settled Land Act of 1925.<sup>131</sup> The first tentative legislative steps were not aimed directly at the concept of family settlement, but narrowly to the immediate source of the difficulty—the inability of the life tenant to act.<sup>132</sup> Consequently, while the life tenant did receive in early legislation rights to improve the property<sup>133</sup> and to borrow money for this purpose,<sup>134</sup> the expanded authority was limited by an exaggerated concern for protecting the integrity of the concept of "settlement."<sup>135</sup> There was strict supervision of the tenant's activities,<sup>136</sup> required applications to courts for various purposes,<sup>137</sup> man-

---

129. For a detailed discussion of the intricacies of the strict family settlement, see 7 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 376-80 (1926); R. MEGARRY, *A MANUAL OF THE LAW OF REAL PROPERTY*, 135-37, 188-90 (5th ed. 1975).

130. See R. MEGARRY, *supra* note 129 at 138-39; Spring, *Landowners, Lawyers, and Land Law Reform in Nineteenth-Century England*, 21 AM. J. LEGAL HIST. 40, 44-45, 51 (1977).

131. See R. MEGARRY, *supra* note 129, at 135-73 (extensive treatment of The Settled Land Act of 1925 and the historical antecedents). Early reform efforts are also reviewed in Spring, *supra* note 130, at 46-47.

132. See R. MEGARRY, *supra* note 129, at 137; Spring, *supra* note 130, at 46-47.

133. See R. MEGARRY, *supra* note 129, at 137; Spring, *supra* note 130, at 46-47.

134. Spring, *supra* note 130, at 46.

135. *Id.* at 47.

136. *Id.* at 46-47.

137. *Id.* at 47.



datory consent of parties to the settlement,<sup>138</sup> and other expensive and difficult procedures.<sup>139</sup> By 1882, however, the need for reform had so intensified that the Settled Land Act of 1882 could be passed.<sup>140</sup> The significance of this act in English law is considerable, for it represented a total reversal in the role of the life tenant from one of inability to deal with the land at all, to the power to sell the land for virtually any reason at all. Funds received from a sale remained subject to the settlement, yet the tenant could now, with few exceptions, sell land without intervention or consent of other parties.<sup>141</sup> This legislation, despite retaining those essential ingredients of the strict settlement, primogeniture and fee tail, undermined the foundations of the system which long had hobbled the free transfer of land. The Settled Land Act of 1925, presently the operative law in England, enlarged and built upon the earlier effort making even more extensive the tenant's powers on the theory that he is the individual most interested in the welfare of the land.

The English problem and its solution are relevant to the American situation. Concepts of primogeniture and fee tail that made possible the strict family settlement in England have never been widely available to American lawyers trying to satisfy their clients' desires to tie property to family arrangements.<sup>142</sup> This fortuitous gap in American law made difficult those excesses and dislocations possible in England which doubtless spurred the English to address the problem at an earlier time. Nonetheless, the present American system permits arrangements as unwieldy in today's societal complex as was the strict settlement in the England of a century ago. Fortunately the English effort at reform offers a wealth of experience to American investigators.

The English from earliest times identified the life tenant as the obvious figure on whom authority to act with the land should be bestowed. The first reforms sought to confer authority on the tenant and simultaneously to rigidly circumscribe its exercise through cumbersome safeguards. The limitations imposed proved awkward and expensive, and served to defeat the goal of a simple, effective

---

138. *Id.* The parties whose consent was required were the trustees of the settlement and all persons interested under the settlement.

139. *Id.* The concern with preserving the integrity of the settled estate that hedged early reform legislation was further exemplified by provisions that required amortization of improvement loans and accumulation of a percentage of income from mining leases to compensate for mineral depletion. *Id.*

140. R. MEGARRY, *supra* note 129, at 138-39; Spring, *supra* note 130, at 52-53.

141. R. MEGARRY, *supra* note 129 at 138-39.

142. See generally T. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* 23-36 (2d ed. 1953) (discussing the history of primogeniture in America); 2 R. POWELL, *supra* note 8, ¶¶ 196-98 (discussing the history of the fee tail in America).

method of land alienation. Consequently, the English have retreated from restraints on the life tenant's freedom of action and finally have come to rely on the concept of the life tenant as a trustee, subject in that capacity to all the strict limitations of a fiduciary but largely free of the formal petitions, consents, and other expensive and cumbersome paraphernalia characteristic of the earlier system. Today the life tenant can do virtually anything with the land that a judicious owner of the fee could do except receive the purchase price from the sale.

The trustee concept is embodied in the provisions of the Settled Land Act of 1925. This imaginative legislation was the culmination of three quarters of a century's work, the general purpose of which was to free land from the effects of the strict family settlement, to make it alienable and easily transferable, and to relieve the purchaser of any concern with the various future interests which might attach to it. This purpose was accomplished to a remarkable degree by a drastic, simple, and highly successful action in which Parliament abolished all legal estates creatable in land except:

- A. The fee simple absolute; and
- B. The term of years absolute with the reversion following the term.<sup>143</sup>

Following enactment of the Settled Land Act, all future interests in land previously created by deed or will or thereafter created by either, even if intended as *legal* estates, were *deemed equitable* estates by legislative fiat.<sup>144</sup> Such straightforward reform satisfies the first requirement of an ideal system by providing a means through which transferors can continue to utilize the flexibility of the future interest concept. All future interests formerly creatable are still creatable, but only within the trust framework.

The legislative reform also satisfies the second basic requirement of the ideal system. In this system, an identifiable person has at all times vested title and authority to deal with the estate in land. Of course, one can continue, as previously, to create a trust of future interests and select those whom he wishes to serve as trustees. But if such future interests are created without the express naming of trustees, the life tenant named in the transfer (or the appropriate counterpart to the life tenant, for example, the present holder of a defeasible fee) is deemed to hold the legal fee simple title to the land, not a legal life estate only.<sup>145</sup> The tenant holds the legal fee

---

143. Law of Property Act, 1925, 15 Geo. 5, c.20, § 1. The complete legislative scheme designed to promote alienability of land is contained in two principle statutes, the Law of Property Act, 1925, 15 Geo. 5, c.20, and the Settled Land Act, 1925, 15 Geo. 5, c.18.

144. Law of Property Act, 1925, 15 Geo. 5, c.20, §§ 2, 4.

145. Settled Land Act, 1925, 15 Geo. 5, c.18, 1, 16, 19, 20, 21, 107. The life tenant or

simple estate as a trustee for himself as the beneficial owner of the equitable life estate, and for the future interest conveyees as the beneficial owners of those equitable estates.<sup>146</sup> This simplifies the problem of alienability. The legislation grants the tenant-trustee, virtually without restriction, the right to sell or encumber the fee simple title to the realty. As a practical matter, the powers of the trustee derive from two sources: first, from a statutory power in which a largely unrestricted power of sale, lease, exchange, or mortgage is available to the tenant-trustee,<sup>147</sup> and second, from the deed or will itself, with the instrument providing whatever additional powers the transferor wishes to confer.<sup>148</sup> The transferor is permitted by statute to grant to the tenant powers in addition to those provided by statute, but the transferor can in no way limit or hamper statutory powers in a way not provided in the statute itself.<sup>149</sup> Further, with the exception of a power to revoke a power of appointment, no powers over the property can be given to anyone other than the tenant for life.<sup>150</sup> Any attempt to confer such a power on another person results in that power's being exercisable by the life tenant as a power additional to those conferred by statute.<sup>151</sup> Consequently, the act improves immeasurably the position of the life tenant compared with his common law position. In addition to a power to sell the legal fee simple title, the life tenant enjoys the power to exchange the property, the power to lease it for long periods of time, power to grant options for lease or sale, and the power to mortgage or charge the property for certain stipulated purposes.<sup>152</sup>

Finally, the third requirement of an ideal system is met by the

---

his counterpart holds the legal fee as trustee for himself and all other holders of equitable interests in the land. *Id.*

146. The statute also provides for the designation of "trustees of the settlement." *Id.* § 30. These trustees do not ordinarily hold legal title but instead have certain oversight responsibilities in protecting beneficial interests under the settlement. See R. MEGARRY, *supra* note 129, at 155-57.

147. Settled Land Act, 1925, 15 Geo. 5, c.18, §§ 16, 38-41, 51, 71. The life tenant, of course, has no authority to mortgage the legal fee estate for his own benefit. He may, however, mortgage his own beneficial interest. He may also mortgage the legal fee for the benefit of all equitable interest holders, for example, to pay for permanent improvements. The powers of the life tenant are discussed in detail in R. MEGARRY, *supra* note 129, at 159-67.

148. Settled Land Act, 1925, 15 Geo. 5, c.18, § 109.

149. *Id.* § 108.

150. *Id.*

151. *Id.* Megarry gives the following illustration of the statute's effect:

[I]f land is devised "to X and Y in fee simple with power to sell, on trust for A for life and then for B absolutely" the power of sale purported to be given to X and Y is divested from them and given to A; this is so even though A already has a statutory power of sale.

R. MEGARRY, *supra* note 129, at 167.

152. See note 147 *supra* and accompanying text.

English reform. Purchasers from the holder of the legal fee simple title are relieved of any obligation to investigate the various future interests arrangements within the trust curtain and take free from all rights under the settlement.<sup>153</sup>

Regrettably, the curtain provision has proved ineffective as an absolute protection to purchasers in some situations. On the one hand, the curtain prevents a purchaser from looking at the details of the future interests established by the settlement. He is only entitled to see the "vesting deed" or the "vesting assent."<sup>154</sup> The curtain, however, also may prevent a purchaser from determining whether or not the land is "settled" within the meaning of the act.<sup>155</sup> The status of land as settled or unsettled may determine who has authority to sell<sup>156</sup> and therefore is highly significant to a prospective purchaser. In such cases, the trust curtain must be lifted if purchasers are to be protected.<sup>157</sup>

While there have been numerous recommendations for technical improvements in the English legislation, assessments of its effectiveness over a half century seems generally favorable.<sup>158</sup> Yet any adaptation of the Act's concepts to an American context poses troublesome questions relating in part to the peculiarities of the American constitutional and tax systems and in part to the question of whether American jurisdictions will or should invest the life tenant trustee with the broad powers contemplated by the English system.

---

153. Settled Land Act, 1925, 15 Geo. 5, c.18, § 72. A purchaser will not take free of prior legal mortgages and leases upon the land. *Id.*

154. The Settled Land Act of 1925 requires that all settlements be made by two documents, a vesting instrument and a trust instrument. *Id.* §§ 4,5. Vesting instruments are of two types: the vesting deed, for use in *inter vivos* settlements, and the vesting assent, for use in testamentary settlements. *Id.* §§ 4, 8. The trust instrument sets out the details of the settlement and the vesting instrument contains only the minimal information with which a purchaser would be concerned. *Id.* §§ 4, 5. The trust instrument is said to be "behind the curtain," because a purchaser is not entitled to examine it. The purpose of permitting the parties to the settlement to dispose of the land without disclosing the contents of the trust instrument is to preserve privacy in family financial arrangements. The "curtain" creates the additional advantage of simplifying land transactions since a purchaser need not consult any document other than the vesting instrument to determine the state of the title. See R. MEGARRY, *supra* note 129, at 146-47.

155. Land ceases to be "settled" when all potential interests therein become possessory or are eliminated. Settled Land Act, 1925, 15 Geo. 5, c.18, §§ 2, 3. Whether or not land is subject to a settlement can only be determined by examining the trust instrument.

156. A typical situation in which the status of the land determines who has authority to sell arises when the will of a deceased life tenant directs that unsettled lands be administered by his general executors and that settled lands be administered by settlement trustees. It is impossible, without lifting trust curtains, to determine whether particular lands fall under the authority of the general executors or the settlement trustees.

157. This blemish upon the curtain concept is examined in Withers, *Twenty Years' Experience of the Property Legislation of 1925*, 62 LAW. Q. REV. 167, 168 (1946).

158. See Bordwell, *English Property Reform and Its American Aspects*, 37 YALE L.J. 1 (1927); Withers, *supra* note 157.

D. *The Unfettered Life Tenant—A Mixed Blessing*

With few exceptions the English Act leaves the tenant for life practically unrestricted in his dealings with the property. There is a system of notices and consents built into the act with graduated formality and difficulty in terms of the importance of the action contemplated by the life tenant.<sup>159</sup> Most often these proceedings amount to little more than a formality and the English rely instead not on a check by third parties or courts for trustee performance, but on the fact that the life tenant is a trustee for the future interests owners and as such is a fiduciary subject to all the responsibilities and potential liabilities of that office. There are no bonds, no court intervention save in extraordinary circumstances,<sup>160</sup> nor any other of the traditional modes of assuring fiduciary conduct. The ease with which the life tenant can conduct transactions must be balanced against the virtually unfettered opportunity for misconduct on the part of the life tenant. This deficiency might be controlled by requiring far more for the trustee to act than is required by the English law. The English themselves took this route in the earlier reform efforts and found it counterproductive.<sup>161</sup> The more difficult it is for the life tenant to sell, mortgage, etc., the more cumbersome and unwieldy the system. Perhaps the solution lies in a manipulation of the English provisions governing when and under what circumstances a life tenant must give notice to the trustees of the settlement or when he must receive their consent or the consent of a court for an intended action. For example, the tenant for life may only dispose of the mansion house of an estate, or cut and sell timber under certain circumstances with the consent of the trustees of the settlement or under order of a proper court.<sup>162</sup> He may, on the other hand, do a great many other things with settled property such as make a sale, exchange, lease, or mortgage only upon giving written notice to the trustees of the sale and their solicitor if known.<sup>163</sup> Further, the giving of notice is of little consequence and apparently little protection to anyone since the trustees of the settlement seem to be under no obligation to interfere with an improper transaction, and anyone dealing with the life tenant in good faith is not bound to inquire whether notice has been given. An American version of the prerequisites to an exercise of any of these powers might in-

---

159. The powers of the life tenant are discussed in detail in R. MEGARRY, *supra* note 129, at 159-71.

160. *Id.*

161. See notes 132-39 *supra* and accompanying text.

162. Settled Land Act, 1925, 15 Geo. 5, c.18, §§ 65-66.

163. *Id.* §§ 38-48, 51, 71, 101.

volve a court order authorizing the transaction or at least a stiff obligation on the trustees of the settlement to gauge propriety in the more significant types of dealings such as mortgage and lease arrangements. If eventual experience in this country indicates that the problem of tenant-trustee misconduct is minimal, deregulation of the life tenant's activity in these areas might become desirable. Legislative treatment of the matter of trustee control might be patterned on those sections of the English Act which provide precise regulation for certain actions of especially serious consequence to the property. Such regulation governs the permissible maximum periods for leasing property for specified purposes.<sup>164</sup> The availability of "capital money" or money raised by mortgage to make improvements is governed by the particular kind of improvement contemplated and the certification of the improvements by competent professionals.<sup>165</sup> Little is left to trustee caprice in these transactions which affect the very value of the property interest of the beneficiaries.

#### *E. Constitutional and Other Difficulties*

An attempt to bring new order and control to American future interests by adopting all or parts of the English system immediately encounters difficulties emanating from constitutional differences and from historic variances in the application of the Rule Against Perpetuities to certain future interests. The first problem stems from the fact that some legislative attempts to bar continued life for certain existing future interests have been declared unconstitutional as a violation of the Fourteenth Amendment.<sup>166</sup> While retroactive applications have not fared well, legislation designed to limit or forbid creation of these interests in the future have been generally upheld and well received.<sup>167</sup> The English, of course, did not have this problem because of the sovereignty of Parliament. Yet the spectre of the constitutional problems of retroactivity as a justification for

---

164. *Id.* § 41.

165. *Id.* §§ 71, 73, 84.

166. The legislative reform efforts have been directed at the right of entry and the possibility of reverter. The typical statutory scheme provides that these undesirable interests automatically expire after a stipulated number of years. Some statutes permit the interest to continue in existence if it is periodically recorded with a designated government office. *E.g.*, Ky. Rev. Stat. § § 381.218-223 (1969).

Cases holding the retroactive application of such statutes violative of due process include: *Biltmore Village, Inc. v. Royal*, 71 So. 2d 727 (Fla. 1954); *Board of Educ. v. Miles*, 15 N.Y.2d 364, 207 N.E.2d 181, 258 N.Y.S.2d 129 (1965).

167. Cases that have upheld both the prospective and retroactive application of such statutes include: *Blackert v. Dugash*, 12 Ill. 2d 171, 145 N.E.2d 606 (1957); *Chicago & N.W. Ry. v. City of Osage*, 176 N.W.2d 788 (Iowa 1970); *Atkinson v. Kish*, 420 S.W.2d 104 (Ky. 1967); *Hiddleston v. Nebraska Jewish Educ. Soc'y*, 186 Neb. 786, 186 N.W.2d 904 (1971).

not proceeding with a legislative enactment prospective in nature is unpersuasive. It is true that future interests arrangements entered into prior to the adoption of the legislation could not be forced into the trust vehicle and therefore would continue as legal future interests until the control of the Rule Against Perpetuities worked its way. Prelegislation arrangements could conceivably continue for 100 years, more or less, yet in fact most such future interests would vest and become possessory, or would not, far earlier, as the various structures caved in normally through death of life tenants and the like. The problem of retroactive legislation will not improve with time. Precisely the same concerns about disturbing assumptions governing ancient dispositions lay in the way of reform of the Rule in Shelley's Case, the Destructibility Rule, and the Doctrine of Worthier Title. Now may well be the time to act to control as many new creations as possible, even if the system is imperfect and there remain some future interest relics.

An historical divergence in American and English treatment of the Rule Against Perpetuities accounts for another difficulty in adapting the Settled Land Act of 1925 to American use. Both jurisdictions originally agreed that the Rule governed all contingent future interests save two: the Possibility of Reverter and the Right of Entry for condition broken. These future interests, creatable in the transferor only and usually designed as a leash on the future use of the land, were always contingent in common-law theory. But for somewhat obscure ancient reasons, neither interest was subject to the Rule Against Perpetuities at common law.<sup>168</sup> This is the case in the large majority of American jurisdictions today. The English courts have long since subjected both these interests to the Rule, and thus brought them under control.<sup>169</sup> It is difficult to quarrel with such a result. There simply is no good reason to permit the creation of Possibility of Reverter and Right of Entry interests today. Each interest has always been suspect and often subjected to limitations on alienation.<sup>170</sup> More recently attempts have been made to limit

---

168. See L. SIMES, *supra* note 31, § 132, at 280-81.

169. The Right of Entry was brought within the Rule by the English courts without the aid of a statute. See *In re Hollis, Hosp.*, [1899] 2 Ch. 540; *In re Da Costa* [1912] 1 Ch. 337. Under the Perpetuities and Accumulations Act, 1964, c.55, the Rule applies to the Right of Entry and the Possibility of Reverter.

170. See generally, L. SIMES, *supra* note 31, §§ 34-36. Simes indicates that the precise reasons why courts have restricted the alienability of the Right of Entry and the Possibility of Reverter are not known, but speculated that the nature of their contingency has caused them to be treated like a mere possibility of an interest. *Id.* § 34. The great majority of American jurisdictions now hold that the Possibility of Reverter is alienable *inter vivos*. However, in the absence of statute, most states hold the Right of Entry to be inalienable *inter vivos* unless it is incident to a reversionary interest and both the Right of Entry and the

prospectively the life span of the interest or to make it cumbersome to retain.<sup>171</sup> Courts called on to construe ambiguous formulations have consistently tried to find covenants rather than conditions.<sup>172</sup> A most persuasive reason for forbidding future creations of possibility of reverter and power of termination when they pertain to the use of land as they usually do, is that most American jurisdictions provide a far more reasonable tool for control. This control is the equitable servitude, which can be utilized for either positive or negative goals and which enjoys the further advantage that, as an equitable concept, it is subject to being discarded by equity when its reasonableness and usefulness are at an end.<sup>173</sup>

Even if a case could be made for retaining power of termination and possibility of reverter in transactions involving real estate, there is no logical place for these interests in a new system which permits realty interests to be converted to personalty on the motion of the life tenant. The English Act specifically exempts fee simple estates subject to condition subsequent (and hence the power of termination) from the operation of the Settled Land Act of 1925 by declaring such an estate to be an "absolute" estate. Consequently, the fee on condition may exist as a legal estate and the determinable fee may not.<sup>174</sup> There is no need for such a complication in any American proposal. Such interests should be abolished as prospective creations, and limited wherever possible by requirements for recordation.

---

reversion are transferred together. *Id.* Some jurisdictions also restrict the devisability and descendability of the Possibility of Reverter and the Right of Entry. *Id.* §§ 35-36.

171. See note 166 *supra*.

172. The language of the court in *Templeton v. Strong*, 182 Tenn. 591, 597, 188 S.W.2d 560, 563 (1945), is representative of judicial hostility toward condition upon the fee: "It is a well-settled rule that conditions tending to destroy estates, such as condition subsequent, are not favored in law. They are strictly construed. Accordingly, no provision will be interpreted to create such a condition if the language will bear any other reasonable interpretation . . . ."

For cases construing ambiguous language as creating covenants rather than conditions, see, e.g., *Board of Educ. v. Edgerton*, 244 N.C. 576, 94 S.E.2d 661 (1956); *Post v. Weil*, 115 N.Y. 361, 22 N.E. 145 (1889). The subject is discussed in L. SIMES, *supra* note 31, § 14, at 31-32.

173. For a leading case in which the court refused to specifically enforce restrictive covenants that had become obsolete, see *Blakely v. Gorin*, 365 Mass. 590, 313 N.E.2d 903 (1974). *But see* *Loeb v. Watkins*, 428 Pa. 480, 240 A.2d 513 (1968), in which the court held a restrictive covenant enforceable despite the dissent's strong protest that the covenant had become "absurd, futile, and ineffective." *Id.* at 487, 240 A.2d 517.

174. Law of Property (Amendment) Act, 1926, 16 & 17 Geo. 5, c.11. (amending Law of Property Act, 1925, 15 Geo. 5, c.20, § 7(1)). According to R. Megarry, *supra* note 129, at 71, the purpose of exempting the defeasible fee was to protect a common local practice of selling a defeasible fee for a small cash sum plus a perpetual rent charge. A right of entry is retained in such an arrangement to ensure continued payment of the rent charge.



## IV. CONCLUSION

What is the implication of change to an English-like system for the implementation of grantor intent as expressed in wills and deeds? As a matter of policy, American law has generally favored and even pampered grantor intent to a far greater degree than has English law. The contrast in treatment of spendthrift trusts by the two jurisdictions illustrates the determination of American courts to implement that intent even to the sacrifice of competing interests to an extent the English would never have deemed appropriate.<sup>175</sup> The Rule in Shelley's Case, which always frustrated grantor intent when applied, and the Destructibility of Contingent Remainders Rule, which frequently frustrated that intent when applied, were abolished in part because of a predisposition on the part of American courts and legislatures to give free hand to grantor intent, even to the point of enabling grantors to render real estate inalienable for generations in some cases.<sup>176</sup> Similarly, refusal to apply the Rule Against Perpetuities to grantor-retained future interests such as Possibility of Reverter and Power of Termination reflects an exaggerated concern for implementation of grantor intent. Even modern efforts at perpetuities reform have tried to construe the Rule to implement as nearly as possible every element of grantor intent.<sup>177</sup> The English experience from De Donis Conditionalibus and even earlier has been one of attempted sanctification of grantor intent by one group followed quickly by frustration of that attempt by another societal force.<sup>178</sup>

These national distinctions are understandable as evolving

---

175. See generally E. GRISWOLD, SPENDTHRIFT TRUSTS (2d ed. 1947); 2 A. SCOTT, THE LAW OF TRUSTS §§ 151, 152.1 (3d ed. 1967).

176. The judicial hostility to the common law rules that defeated grantor intent is well represented by the concurring opinion of Justice Griffin in *Sybert v. Sybert*, 152 Tex. 106, 110-11, 254 S.W.2d 999, 1001-02 (1953):

[T]he Rule in Shelley's Case . . . is a relic, not of the horse and buggy days, but of the preceding stone cart and oxen days. . . . [E]very case in which the Rule in Shelley's Case is applied results in setting aside the intention of the person making the instrument. . . . This Rule is only a trap and snare for the unwary, and should be repealed.

The Texas legislature responded to Judge Griffin's plea in *Sybert* by abolishing the Rule in Shelley's Case and the Doctrine of Worthier Title in 1963. See note 42 *supra*.

177. See note 119 *supra* and accompanying text.

178. For instance, the courts frustrated probable grantor intent to perpetuate property in the blood line by construing fee simple conditional transfers (O to A and the heirs of his body) to permit alienation of the fee by A under certain circumstances. This fee simple conditional construction was overturned by enactment of the Statute De Donis Conditionalibus. The Statute, if used, permitted creation of executory interests as legal interests. But the potential danger of these unfettered contingencies was met by development of the Rule Against Perpetuities. See generally L. SIMES, *supra* note 31, § 5.

from a limitless continental frontier with a small population of necessarily independent and self-reliant pioneers in the American case, and from a relatively tiny, limited, and necessarily more controlled environment in the English case. The fact is, however, that the growth of the American civilization and population has brought the country to a position with regard to land use far more analogous to the English situation today than it was a century ago. There is no need to ignore grantor intent in land transactions, but a system which exalts that intent to the serious detriment of competing values such as free alienation is no longer permissible. It has simply become too expensive a luxury to indulge.

Whether the English system can be regarded as superior to the prevailing American system and whether it is indeed a system realistically adaptable to American needs depends largely on one's view of how effective American future interest law is today. If one accepts the notion that there ought to be some effective limitation on the duration of contingent future interests in land, and given the fact that the present work horse of the courts in effecting such a limitation is the Rule Against Perpetuities, then the real concern is whether that Rule is an efficient tool to accomplish the goal of limitation. As suggested above, even if the Rule is properly understood and applied, the time frame for permitted contingency is still far too long under modern conditions.<sup>179</sup> The fashionable proposals for reform advanced over the last three decades increasingly are called into question on the very ground that their implementation will exacerbate even further the problem of exceedingly long-term and rigid future interest arrangements.<sup>180</sup> Yet abandonment of these reform efforts ensures those harsh results that the reforms were designed to avoid.

A move towards a modified future interest system does not, of course, mean that the Rule Against Perpetuities is to be abandoned as a control on contingencies. The English Rule Against Perpetuities, modified from the common-law rule, continues to govern times of required vesting for those future interests within the trust framework just as it did before the reforms of the Settled Land Act. There would be no occasion for the Rule to be invoked for legal future interests since these interests have been defined out of existence.

And so they pass inevitably away: Shelley's Case, Destructibility, Worthier Title—academically fascinating and functionally obsolete. They are of another age and best abandoned. The Perpetui-

---

179. See text accompanying notes 119-20 *supra*.

180. See note 119 *supra* and accompanying text.

ties Rule as now applied must eventually join them. This inevitable passage leaves a vacuum to be filled either by modern stopgaps narrowly constituted to meet immediate deficiencies, or hopefully, by a fully thought-out scheme preserving ancient values for contemporary function.