CHAPTER 11

The Requirement of Certainty of Vesting

A. CERTAINTY

To satisfy the Rule Against Perpetuities, a future interest must be so limited that at the commencement of the period of the Rule, it is certain that the interest must vest, if at all, within the period. This does not mean that the interest must be certain to vest; if it did a future interest could not be limited to an unborn person. What it does mean is that there must be certainty that the interest cannot vest at some time beyond the period of the Rule. If Andrew Baker conveys property to John Stiles, who has no children, for life, remainder to the eldest son of John, the contingent remainder may never vest because John may not have a son. But the remainder will either vest or fail at the death of John, so it is valid under the Rule.

The time when the certainty must exist is that of the commencement of the period of the Rule. Events which occur before the commencement of the period are considered in determining the validity of a limitation. If

122 As to which see Chapter 10, § A, supra.
125 Vanderplank v. King, 3 Hare 1 at 17, 67 Eng. Rep. 273 at 279-280 (1843); Gray, Rule Against Perpetuities, 3rd ed., §231 (1915); 2 Simes, Law of Future Interests, §494 (1936); Property Restatement, §370, Comment m., §374, Comment k. (1944). In Mullreid v. Clark, 110 Mich. 229 at 233, 68 N.W. 138 (1896) the Court quoted the cited section of Gray with approval and applied the rule stated to a disposition governed by the statute prohibiting suspension of the absolute power of alienation.
John Stiles devises property to James Thorpe on trust to pay the income to John's children for life, then to their children until the youngest reaches twenty-five, and then to transfer the principal to John's grandchildren living at that time, the disposition of the principal is invalid if John has children living at the time of his death.\textsuperscript{126} If, however, John's children predecease him, that fact is considered in applying the rule and the limitation of the principal is good. Events which occur after the commencement of the period of the Rule are not considered in determining the validity of a limitation.\textsuperscript{127}

In \textit{Michigan Trust Co. v. Baker},\textsuperscript{128} testatrix devised land to her husband until death or remarriage, then to a trustee to sell the land and hold the proceeds in trust to pay half the income to a son, Stuart, for life. The will, as construed by the Court, gave the remainder in half the corpus, after the death of Stuart, to those daughters of Stuart who reached twenty-five and those sons of Stuart who reached thirty, but if none did so to testatrix's son Looe and his children. Testatrix died in 1913,


\textsuperscript{128} 226 Mich. 72, 196 N.W. 976 (1924).
and Stuart died in 1915 without issue. The court held the disposition of the corpus void because, at the time of the testatrix's death, it was possible that Stuart might have children, saying:

"The court must be able to say, to avoid the rule, that to a certainty the estate will vest within 21 years after the death of Stuart and Looe, and this vesting must be found to have been discernible at the date of the death of the testatrix. At that time Stuart and Looe were both living but had no children. Certainty as to time the estate will vest must be apparent unaided by events subsequent to the date the will became operative." 129

The certainty of vesting required by the Rule Against Perpetuities is absolute certainty; a high degree of probability is not enough. If, at the commencement of the period, any combination of future events which would postpone vesting beyond the period is possible, the future interest is void, although the actual occurrence of that combination of events is highly unlikely. 130 If John Stiles devises property "to my brother Henry for life, remainder to my brother Henry's widow for life, remainder to the oldest male descendant of my brother Henry living at the death of his widow" the ultimate remainder is void even though, when John dies, his brother Henry is eighty and has a wife the same age. 131

129 226 Mich. 72 at 77. Cf. Dean v. Mumford, 102 Mich. 510, 61 N.W. 7 (1894), holding that the fact that testator's widow elected to take against the will could not be considered in determining the validity of a disposition under the statute forbidding suspension of the absolute power of alienation.

130 Gray, Rule Against Perpetuities, 3rd ed., §214 (1915); 2 Simes, Law of Future Interests, §496 (1936); Property Restatement, §370, Comment k. (1944).

131 Hodson v. Ball, 14 Sim. 558, 60 Eng. Rep. 474 (1845); Gray, Rule Against Perpetuities, 3rd ed., §214 (1915); 2 Simes, Law of Future Interests, §496 (1936); Property Restatement, §370, Comment k. (1944). In Dean v. Mumford, 102 Mich. 510, 61 N.W. 7 (1894), land was devised upon trust for two sons, their wives and children, for the lives of the sons and their wives, then to the children
Henry's present wife may die and he may marry a woman who was not in being at the death of John. In that event vesting would be postponed until the end of a life not in being at the commencement of the period. It is unlikely that Henry will marry a woman more than eighty years younger than himself, but he may possibly do so.

Provisions in wills postponing distribution until some administrative step, such as probating the will, paying debts, completion of administration, winding up of a business or sale of property, is taken are frequent causes of difficulty. Whenever possible, such provisions are construed to postpone only enjoyment, not vesting. In *Skinner v. Taft*, a direction in a will that the executors transfer property to four named persons and their heirs and assigns, “after the payment of my just debts and funeral expenses” and upon the termination of a trust which was to terminate “five years from the date of the probating of my will in the County of which I may die

and their heirs and assigns. The trust was held invalid for violation of the statute prohibiting suspension of the absolute power of alienation, but the Court thought that the reference to the sons' wives was to wives living at the testator's death. So construed, the trust would not violate the common-law Rule Against Perpetuities. Conover v. Hewitt, 125 Mich. 34, 83 N.W. 1009 (1900), involved a conveyance of land upon trust for William for life, then for his wife and children for her life, remainder to the children. The Court held that, under the language of the deed in question, “children” meant those children living at the death of William so that their interests vested indefeasibly at his death. With this construction, the remainder would not have violated the common-law Rule. Another provision of the instrument limited interests to persons to be determined on the death of William's wife if he had no children. If the word “wife” included anyone whom William might marry after the date of the conveyance, these provisions would have violated the common-law Rule.


a resident," was treated as valid, presumably on the theory that the interests vested at the death of the testator and only enjoyment was postponed. If such a provision does postpone vesting until the taking of some administrative action, such as probating the will, which may not occur within twenty-one years, the interests so postponed are void, even though that action would normally be completed well within the permissible period. Thus in Battelle v. Parks, it was suggested that land could not be devised beneficially to the administrator of the testator's estate, because it is uncertain when an administrator will be appointed. It should be recalled, however, that if vesting is postponed only until the happening of that one of two alternative conditions which

134 2 Simes, Law of Future Interests, §496 (1936); Note, 37 Mich. L. Rev. 814 (1939); Property Restatement, §374, Comment f. (1944). But see: Brandenburgh v. Thorndike, 139 Mass. 102, 28 N.E. 575 (1885); Belfield v. Booth, 63 Conn. 299, 27 Atl. 585 (1893). In re Wood, [1894] 3 Ch. 381 (C.A.), involved a bequest to issue of the testator living when his gravel pits should be exhausted. Although the pits would have been exhausted in four years after the testator's death if worked at the usual rate and they were in fact exhausted in six years, the bequest was held void because the pits might not have been exhausted within twenty-one years. In re Bewick, [1911] 1 Ch. 116, involved a devise to trustees to pay off a £1000 mortgage from income and then to convey to the testator's issue living when the mortgage was paid. Although the normal income was sufficient to pay off the mortgage in five years, the interest of the issue was held void because the income might possibly decrease, thus preventing paying off the mortgage within twenty-one years. The rule that postponement of vesting until probate or administration violates the Rule Against Perpetuities is criticized in Leach and Tudor, "The Common Law Rule Against Perpetuities," 6 American Law of Property, §24.23 (1952).

135 2 Mich. 531 (1853). The case involved the statute prohibiting suspension of the absolute power of alienation, which allowed no period in gross, but the problem can arise under the common-law Rule Against Perpetuities. Cf. Thatcher v. Wardens & Vestrymen of St. Andrew's Church of Ann Arbor, 37 Mich. 264 (1877), where the Court assumed that a direction to pay the expenses of the last illness and funeral of a life cestui could suspend the absolute power of alienation. The facts are not stated in the official report but are set out in Records & Briefs, June Term, 1877, #36.
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first occurs, the fact that one of the conditions might not be performed within the period of the Rule Against Perpetuities, will not invalidate the interest in question. *In re Lamb's Estate* involved a will which left the estate to nine brothers and sisters of the testatrix and provided that if any legatee should die before the estate was ready for distribution his share should pass to his children. The shifting executory interests were properly treated as valid because they would necessarily vest, if at all, on the deaths of the legatees. Similarly, in *Schiffer v. Brenton*, a provision in a will that if any legatee contested it his interest would shift to the other legatees was held valid. A contest by a named legatee would necessarily be commenced during his lifetime.

For the purpose of determining certainty of vesting under the Rule Against Perpetuities, every human being is treated as being capable of having children, regardless of age or physical condition. This is a conclusive presumption of law which cannot be rebutted by evidence that the person is incapable of having children. If

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138 122 Mich. 259, 80 N.W. 1081 (1899), Part Two, note 120 supra.
137 247 Mich. 512, 226 N.W. 253 (1929). Cf. Fitzgerald v. City of Big Rapids, 123 Mich. 281, 82 N.W. 56 (1900), where a gift to named legatees in the event the city refused to accept a bequest for library purposes was treated as valid. This was much more questionable than the provisions in *Schiffer v. Brenton* as the life of the city could not be a measuring life under the Rule. In Moss v. Axford, 246 Mich. 288, 224 N.W. 425 (1929), a bequest of the residue to the executor, "with the instructions to pay the same to the person who has given me the best care in my declining years and who in his opinion is the most worthy of my said property," was held valid. If the discretionary power to select the legatee was confined to the named executor, the legacy would necessarily vest, if at all, during the life of the executor.


139 Although irrebuttable for purposes of determining the validity of future interests under the Rule Against Perpetuities, there is
John Stiles devises property to "my mother for life, remainder to her children for their lives, remainder to her youngest grandchild living at the death of the survivor of her children," the ultimate remainder is void even if John's mother is ninety-eight years old at the time of his death.140 An English court has even suggested that a child is conclusively presumed to be capable of having children before reaching the age of five years.141 Unless the word "children" as used in the limitation includes adopted children,142 the conclusive presumption of law that all persons are capable of having children throughout their lives sometimes requires the treatment as possible that which is factually impossible. For this reason the presumption has been criticized.143 It does have the virtue of increasing the certainty of the law of property

English and some American authority for permitting the presumption of possibility of issue to be rebutted in suits to terminate trusts where the only non-consenting beneficiaries are the unborn children of a person who, because of age, disease, or surgery is in fact incapable of having children. Leng v. Hodges, Jacobs 585, 87 Eng. Rep. 971 (1822); Gray, RULE AGAINST PERPETUITIES, 3rd ed., 191n (1915); Trusts Restatement, §840, Comment e. (1935); Property Restatement, §274 (1940).

140 Ward v. Van der Loeff, [1924] A.C. 653. In this country, if the context permits, the word "children" in such a limitation [i.e., to the children of a person whom the testator knows to be beyond the age of child-bearing] tends to be construed to mean children living at the time of the testator's death. Wright's Estate, 284 Pa. 334, 131 Atl. 188 (1925); Worcester County Trust Co. v. Marble, 316 Mass. 294, 55 N.E. (2d) 446 (1944); Property Restatement, §877, Comment c. (1944). Such a construction would make the limitation valid.

141 Re Gaite's Will Trusts, [1949] 1 All E.R. 459 at 460. The disposition in question was held valid, however, on the ground that, because English law does not permit a child under five to marry, such a child could not have legitimate issue.

142 A limitation to the children of a named person ordinarily does not include adopted children except where an intent to include them is found from additional language or circumstances. Russell v. Musson, 240 Mich. 651, 216 N.W. 428 (1927); Property Restatement, §287 (1940). Some modern adoption statutes may alter this rule. E.g., REV. STAT. MO. (1949) §453.090.

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by making it possible to ascertain the validity of limitations of future interests without awaiting the settlement by litigation of doubtful questions of fact. At any rate, Michigan follows the presumption. In Gettins v. Grand Rapids Trust Co., property was bequeathed to a trustee to pay the income to the testatrix's daughter Belle for life, and then to her children and to transfer a share in the corpus to each child of Belle on reaching twenty-five, with limitations over in the event of any child dying under twenty-five. Although Belle was fifty-two and childless, the provisions as to the limitations over were held void because they might postpone vesting until more than twenty-one years after her death, the Court saying that Belle must be considered as capable of having issue as long as she lived.

B. THE CONCEPT OF VESTING IN ENGLISH LAW

As has been seen, at the time of its reception in this country, English law permitted the creation in persons other than the grantor or testator of three types of future interests in property, remainders, interestsa

144 2 Simes, LAW OF FUTURE INTERESTS, §497 (1936).
145 249 Mich. 238, 288 N.W. 708 (1930). The case involved a devise of land with a mandatory direction to convert to personalty so the common-law Rule applied. Accord under the statute prohibiting suspension of the absolute power of alienation: Rozell v. Rozell, 217 Mich. 324, 186 N.W. 489 (1922) (man aged 44). See: Van Gallow v. Brandt, 168 Mich. 642 at 647, 134 N.W. 1018 (1912) (woman aged 68; suggestion that it would make no difference if she were 100).
146 Professor Simes defines a future interest as "an interest in land or other things in which the privilege of possession or of enjoyment is future and not present." 1 LAW OF FUTURE INTERESTS, §1 (1936). For more extended discussions of the rules of vesting in Anglo-American law see Simes, Id., §§64-158; Fearne, CONTINGENT REMAINDERS, 10th ed. (1844); Gray, RULE AGAINST PERPETUITIES, 3rd ed., §§99-118, 970-974 (1915); PROPERTY RESTATEMENT, §§157, 158 and comments (1936); 2 Powell, LAW OF REAL PROPERTY, §§275-279 (1950); Simes, "Types of Future Interests," 1 AMERICAN LAW OF PROPERTY, §§4.53-4.56, 4.53-4.58 (1952).
147 Part One, notes 351, 352, 358, 359, 363; Part Two, notes 5-21 supra.
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termini, and executory interests. At common law a remainder is a future freehold estate in land so limited as to become possessory immediately upon the termination of a preceding estate for life or in tail created by the same conveyance or will. A remainder is contin-


149 Part One, notes 355, 359, 363; Part Two, notes 23, 25, 26, supra. Part Two, supra, at notes 6-21. Fearne, Contingent Remainders, 10th ed., 3-4 [Butler's Note (c)] (1844); Gray, Rule Against Perpetuities, 3rd ed., §8 (1915); Property Restatement, §156 (1936); Simes, "Types of Future Interests," 1 American Law of Property, §4.25 (1952). A freehold estate limited unconditionally to an ascertained living person, to follow an estate for years, whenever and however the estate for years terminates, although frequently referred to as a remainder, is technically a present estate subject to a term. If Andrew Baker conveys land to James Thorpe for forty years, remainder to John Stiles and his heirs, John takes a present estate in fee simple which is vested and not subject to the Rule Against Perpetuities. Boraston's Case, 3 Co. Rep. 19a, 76 Eng. Rep. 668 (1587); Smith ex dem. Dormer v. Packhurst, 3 Atk. 135, 26 Eng. Rep. 881 (1742); DeGrey v. Richardson, 3 Atk. 469, 26 Eng. Rep. 1069 (1747); Smith, Executory Interests, ed. 1844, §§253, 760; Challis, Law of Real Property, 3rd ed., 80, 99 (1911); Gray, Rule Against Perpetuities, 3rd ed., §§8, 970n (1915); 1 Simes, Law of Future Interests, §62 (1936); Property Restatement, §156, Comment e. (1936). This is true even though the estate for years is subject to a special limitation. If Andrew Baker conveys land to James Thorpe for forty years if the Penobscot Building so long stands, remainder to John Stiles and his
gent (not vested) if it is subject to a condition precedent which may not occur at or before the expiration of the preceding particular estate.\textsuperscript{151} If Andrew Baker conveys land to James Thorpe for life, remainder to John Stiles if John marries Lucy Baker, the remainder is contingent until John marries Lucy. A remainder is vested if it is not subject to any condition precedent except the termination of the preceding estate.\textsuperscript{152} This being so, a re-

heirs, John takes a present estate in fee simple which is, of course, vested. If, however, a freehold estate is limited to cut off or follow a term of years only if an uncertain event occurs, it is an executory interest. If Andrew Baker conveys land to James Thorpe for forty years but, if the Penobscot Building falls at or before the expiration of the term, to John Stiles and his heirs, the interest limited to John is an executory future interest which is void because it may not vest within the period of the Rule Against Perpetuities. Gore v. Gore, 2 P. Wms. 28, 24 Eng. Rep. 629 (1722); Smith, EXECUTORY INTERESTS, ed. 1844, §§121-124; Gray, RULE AGAINST PERPETUITIES, 3rd ed., §§58, 59 (1915); 1 Simes, LAW OF FUTURE INTERESTS, §§62, 155 (1936); Property Restatement, §156, Comment e. (1936); Simes, "Types of Future Interests." 1 AMERICAN LAW OF PROPERTY, §§4.31, 4.55 (1952). See: Green v. Edwards, Cro. Eliz. 216, 150 Eng. Rep. 472 (1591).

\textsuperscript{151} Beverley v. Beverley, 2 Vern. 131, 23 Eng. Rep. 692 (1690); Festing v. Allen, 12 Mees. & W. 279, 152 Eng. Rep. 1204 (1843); Fearne, CONTINGENT REMAINDERS, 10th ed., 5-9 and Butler's Note (g) (1844); Digby, HISTORY OF THE LAW OF REAL PROPERTY, 5th ed., 266 (1897); Challis, LAW OF REAL PROPERTY, 3rd ed., 75, 128 (1911); Gray, RULE AGAINST PERPETUITIES, 3rd ed., §§9, 101 (1915); 1 Simes, LAW OF FUTURE INTERESTS, §§68, 69 (1936); Simes, "Types of Future Interests," 1 AMERICAN LAW OF PROPERTY, §4.36 (1952). See: Smith ex dem. Dormer v. Packhurst, 3 Atk. 135 at 139, 26 Eng. Rep. 881 at 883 (H.L. 1742). So a remainder is contingent even though limited on a condition which must occur, such as the death of a person or the coming of a fixed future date, if the condition is not certain to occur at or before the termination of the preceding estate, whenever and however that termination may occur. If Andrew Baker conveys land to James Thorpe for life, remainder to John Stiles and his heirs if Lucy Baker dies, the remainder is contingent. Lucy must necessarily die, but she may not die at or before the termination of the life estate. Colthirst v. Bejushin, 1 Plow. Comm. 21, 75 Eng. Rep. 33 (1550); Beverley v. Beverley, supra.

\textsuperscript{152} Webb v. Hearing, Cro. Jac. 415, 79 Eng. Rep. 355 (1616); Luxford v. Cheeke, 3 Lev. 125, 83 Eng. Rep. 611 (1683); Digby, HISTORY OF THE LAW OF REAL PROPERTY, 5th ed., 265 (1897); Challis, LAW OF REAL PROPERTY, 3rd ed., 146 (1911); Gray, RULE AGAINST PERPETUITIES, 3rd ed., §970 (1915); 1 Simes, LAW OF FUTURE INTERESTS, §67 (1936). This is so only if the remainder, throughout its continuance, will take
remainder may be vested although it is not presently possessory and may never become so.\footnote{153} If Andrew Baker conveys land to Roger White for life, remainder to Lucy Baker for life, remainder to James Thorpe in tail, remainder to John Stiles in fee simple, all three remainders are vested because none is subject to any condition precedent except the termination of the preceding estate or estates. This is so as to Lucy Baker’s life estate although it will never become possessory unless she survives James Thorpe.\footnote{154} As the Rule Against Perpetuities prohibits only remotesness of vesting, not remotesness of possession, the remainder to John Stiles is valid under the Rule although it will not become possessory until the last lineal descendant of James Thorpe dies, which effect on the termination of the preceding estate, whenever and however such termination occurs. If the remainder is conditional upon the preceding estate terminating in a particular manner, it is contingent. If Andrew Baker conveys land to James Thorpe for life, remainder to John Stiles and his heirs, the remainder is vested. If Andrew Baker conveys land to James Thorpe for life, remainder if, but only if, the life estate terminates by the death of James, to John Stiles and his heirs, the remainder is contingent because the life estate may terminate in some other manner than the death of James, as by forfeiture or surrender. Fearne, Contingent Remainders, 10th ed., 5 and Butler’s Note (d) (1844).


may occur at a time beyond the period of the Rule. Similarly, if Andrew Baker conveys land to Lucy Baker, now unmarried and childless, for life, remainder to the eldest child of Lucy for life, remainder to John Stiles in fee simple, the estate of John Stiles is both vested and valid although it may not become possessory until the end of a life not now in being and follows in time a remainder which is contingent.

At common law a remainder limited to a person not in being or not presently ascertainable is contingent because it is subject to the condition precedent of the remainderman coming into being or becoming ascertainable. If Andrew Baker conveys land to Lucy Baker, now unmarried and childless, for life, remainder to the eldest child of Lucy, the remainder is contingent. So, where the Rule in Shelley’s Case has been abolished, if


Andrew Baker conveys land to Lucy Baker for life, remainder to the heirs of Lucy in fee simple, the remainder is contingent until the death of Lucy because her heirs will not be ascertainable until then.\textsuperscript{158} Similarly, if Andrew Baker conveys land to John Stiles, who now has ten children, for life, remainder to that child of John's who takes the most care of John in his last illness, the remainder is contingent until the death of John because the remainderman cannot be ascertained until then.\textsuperscript{159}

A remainder may be vested although it is subject to being defeated by the exercise of a power of appointment or by the operation of a condition subsequent, a special limitation, or an executory limitation.\textsuperscript{160} If Andrew Baker conveys land to Lucy Baker for life, remainder


as Lucy may by will appoint and, in default of appointment, to John Stiles in fee subject to the condition that John and his heirs care for Lucy's grave forever, the remainder of John Stiles is vested. If Andrew Baker conveys land to Lucy Baker for life, remainder to John Stiles and his heirs so long as they care for Lucy's grave, the remainder is vested. If Andrew Baker conveys land to Lucy Baker for life, remainder to John Stiles and his heirs, but if Lucy's grave is neglected within twenty years after her death, then to James Thorpe and his heirs, the remainder to John Stiles is vested.

Under the common-law system, every future interest limited to someone other than the grantor or testator which is not a remainder or an interesse termini is an executory interest.\(^{161}\) The term includes springing freehold interests in land,\(^{162}\) shifting freehold interests which cut

\(^{161}\) Fearne, Contingent Remainders, 10th ed., 381-386 and Butler's Notes (a) and (b), 401 and Butler's Note (e) (1844); Challis, Law of Real Property, 3rd ed., 76, 168-171 (1911); 1 Simes, Law of Future Interests, §149 (1936); Simes, "Types of Future Interests," 1 American Law of Property, §4.53 (1952). Cf. Property Restatement, §§156, Comment e., 158 (1936). The Restatement classifies interesse termini as executory interests and future interests in chattels real and personal, and following chattels real, which would be remainders if they were freehold estates in land expectant upon freehold estates in land, as remainders. The Restatement classification reflects fairly widespread American usage.

A limitation subsequent to an executory interest is an executory interest, although it is a freehold estate in land so limited as to become possessory upon the termination of a preceding freehold estate. If Andrew Baker conveys land to James Thorpe and his heirs but, if Lucy Baker die in the lifetime of James, to Roger White for life, remainder to John Stiles and his heirs, the interest of John is executory. Fearne, Contingent Remainders, 10th ed., 503 (1844); Challis, Law of Real Property, 3rd ed., 124 (1911). But see Part Two, note 168 infra. A freehold interest which follows an estate for years is either a present estate or an executory interest. Part Two, note 150 supra.

off a prior estate for life\textsuperscript{163} or in tail,\textsuperscript{164} freehold interests which follow or cut off a prior estate in fee simple,\textsuperscript{165} Eng. Rep. 206 (1696). If Andrew Baker conveys or devises land to John Stiles and his heirs “to commence in possession ten years after my death,” the interest of John is a springing executory interest.

\textsuperscript{163} For example, if Andrew Baker conveys land to Lucy Baker for life but, if Lucy remarry, to John Stiles for the life of Lucy, the interest of John is a shifting executory interest. Brent’s Case, 2 Leon. 14, 74 Eng. Rep. 519 (1575); Fearne, Contingent Remainders, 10th ed., 400 (1844). See: Egerton v. Earl Brownlow, 4 H.L.C. 1 at 186, 10 Eng. Rep. 359 at 433 (1853). This must be distinguished from an interest following a life estate on special limitation, which is a remainder, not an executory interest. If Andrew Baker conveys land to Lucy Baker until her death or remarriage and, in the event of such remarriage, to John Stiles for the life of Lucy, John takes a contingent remainder. Brent’s Case, 2 Leon. 14, 74 Eng. Rep. 519 (1575); Fearne, Contingent Remainders, 10th ed., 400 (1844). See: Beverley v. Beverley, 2 Vern. 131, 23 Eng. Rep. 692 (1690); Egerton v. Earl Brownlow, supra.

\textsuperscript{164} For example, if Andrew Baker conveys land to James Thorpe and the heirs of his body, but if the tenant in tail fail to bear the name and arms of Baker, to John Stiles and the heirs of his body. If, however, an estate tail is on special limitation, an estate limited to take effect upon the operation of the special limitation is a remainder, not an executory interest. If Andrew Baker conveys land to James Thorpe and the heirs of his body so long as they bear the name and arms of Baker and, on their ceasing to do so, to John Stiles and the heirs of his body, John takes a contingent remainder. Arton v. Hare, Popham 97, 79 Eng. Rep. 1207 (1594); Fearne, Contingent Remainders, 10th ed., 5, 13 (1844); 1 Simes, Law of Future Interests, §154 (1836).

\textsuperscript{165} Hinde and Lyons Case, 3 Leon. 64, 74 Eng. Rep. 543 (1577); Pells v. Brown, Cro. Jac. 590, 79 Eng. Rep. 504 (1620). As there cannot be a remainder on a fee simple (Part Two, note 7 supra), a future interest limited on a fee simple is always an executory interest whether or not the fee is on special limitation, that is, whether the future interest is limited to follow or to cut off the preceding fee. If Andrew Baker conveys land to James Thorpe and his heirs so long as they shall bear the name and arms of Baker and then to John Stiles and his heirs (special limitation), or to James Thorpe and his heirs, but if they shall cease to bear the name and arms of Baker to John Stiles and his heirs (conditional limitation), the interest of John Stiles is, in either case, an executory interest (which, of course, violates the Rule Against Perpetuities and so is void). Fearne, Contingent Remainders, 10th ed., 12 (1844); Challis, Law of Real Property, 3rd ed., 173 (1911); 1 Simes, Law of Future Interests, §154 (1936); 2 Powell, Law of Real Property, §279 (1950); Simes, “Types of Future Interests,” 1 American Law of Property, §§4.25, 4.27, 4.55 (1952). See: Willson v. Berkley, 1 Plowd. Comm. 223 at 235, 239, 248, 75 Eng. Rep. 339 at 358, 365, 379 (1562); Earl of
all future interests in estates for years except the *intresse termini*\(^{166}\) and all future interests in chattels personal except, possibly, an interest limited to follow a life estate which modern authorities treat as, or analogous to, a remainder.\(^{167}\) In strict common-law theory, an executory interest, unlike a remainder, never vests until it becomes possessory.\(^{168}\) Thus if Andrew Baker conveys to John Stafford v. Buckley, 2 Vcs. Sen. 170, 28 Eng. Rep. 111 (1750). But see Part Two, note 168 *infra*. Compare the different rule as to future interests limited on life estates and fees tail mentioned in the two preceding notes.

\(^{166}\) Manning's Case, 8 Co. Rep. 94b, 77 Eng. Rep. 618 (1609); Lampet's Case, 10 Co. Rep. 46b, 77 Eng. Rep. 994 (1612); Cotton v. Heath, 1 Eq. Cas. Abr. 191, pl. 2, 21 Eng. Rep. 981 (1638); Fearne, *Contingent Remainders*, 10th ed., 4 [Butler's Note (c) 2.] (1844); Smith, *Executor Interests*, ed. 1844, \$756a. Cf. Gray, *Rule Against Perpetuities*, 3rd ed., \$117b, App. F. (1915); *Property Restatement*, \$156, Comment e. (1936); 2 Powell, *Law of Real Property*, \$s273, 279 (1950). The *Restatement* treats some interests in estates for years as remainders. Part Two, note 161 *supra*. Professor Powell follows the terminology of the *Restatement* but recognizes that the rule stated in the text was that of the English law. As to the *intresse termini*, see Part Two, note 148 *supra*. A freehold estate which follows an estate for years is either a present estate or an executory interest. Part Two, note 150 *supra*.

\(^{167}\) Hoare v. Parker, 2 T.R. 876, 100 Eng. Rep. 202 (1788); Re Tritton, 61 L.T.R. 301 (Q.B. 1889); Fearne, *Contingent Remainders*, 10th ed., 4 [Butler's Note (c) 2.] (1844); Part One, notes 409-422 *supra*. Cf. Gray, *Rule Against Perpetuities*, 3rd ed., \$117a, App. F (1915); *Property Restatement*, \$156, Comment e. (1936); Powell, *Law of Real Property*, \$s273, 279. In Evans v. Walker, [1876] 3 Ch. Div. 211, there was a bequest of chattels personal to Maria Evans for life, then to her children for their lives, then to Edwin, Sally, and Eliza Walker. The interest of the Walkers was treated as a vested remainder and held valid. If an executory interest, it would have violated the Rule Against Perpetuities. Most modern American authority follows the view of this case.

Stiles an estate in fee simple in land to commence in possession upon the death of Andrew, the estate does not, in theory, vest until Andrew dies. Similarly, if Andrew Baker conveys to John Stiles an estate in fee simple in land to commence in possession ten years after the date of the deed, the estate does not vest until the expiration of the ten years.\textsuperscript{169} Logical application of this doctrine would mean that if Andrew Baker conveys to John Stiles an estate in fee simple in land to commence in possession twenty-two years after the date of the deed, the conveyance would be void under the Rule Against Perpetuities because the estate cannot vest within the period of the Rule. Such a result would be absurd, because a conveyance by Andrew Baker to James Thorpe for twenty-two years, remainder to John Stiles in fee, is unquestionably valid.\textsuperscript{170} Modern authorities take the

to occur was not contingent. An executory interest of a non-possessory character, such as a beneficial interest under a trust or a profit or easement, would, of course, vest when it becomes presently beneficial. Professor Gray suggested that a future interest in chattels personal, to take effect upon the termination of a prior interest for years, whenever and however the prior interest terminates, and a future interest in chattels personal which would be a vested remainder on a life estate if the property were land, are vested. However that may be, it is settled that a future interest in land which would be a remainder but for the fact that the preceding estate is an executory interest may vest when the preceding interest vests. If Andrew Baker conveys land to James Thorpe and his heirs but, if James die without issue living at the time of his death, to Roger White for life, remainder to John Stiles and his heirs, the interest of John, although originally executory, becomes a vested remainder when James dies without surviving issue. Lewis Bowles's Case, 11 Co. Rep. 79b, 77 Eng. Rep. 1252 (1615); Challis, Law of Real Property, 3rd ed., 124 (1911); Gray, Rule Against Perpetuities, 3rd ed., §114n.4. (1915); 1 Simes, Law of Future Interests, §152 (1936); Property Restatement, §156, Comment c., (1936), §370, Comment o. (1944).

\textsuperscript{169} Clere's Case, 6 Co. Rep. 17b, 77 Eng. Rep. 279 (1599); Davies v. Speed, 2 Salk. 675, 91 Eng. Rep. 574 (1692). Professor Simes thinks that such a conveyance can sometimes be construed to create a life estate followed by a remainder. 1 Law of Future Interests, §150 (1936).

\textsuperscript{170} Part Two, note 150 supra. Professor Simes thinks that such a conveyance can sometimes be construed to create a present estate in fee simple subject to a term. 1 Law of Future Interests, §150 (1936).
view that an executory interest limited to an ascertained living person and certain to become possessory on a fixed future date does not violate the Rule. 171

With this exception, every executory interest which is not certain to become possessory, if at all, within the period of the Rule Against Perpetuities, is void. 172 Thus an executory interest limited to a person who may not be ascertainable within the period of the Rule is invalid. If Andrew Baker bequeaths jewels to John Stiles for life, then to John’s widow for life, then to the eldest son of John living at the death of such widow, the interest of the eldest son is void because he may not be ascertainable until the death of a person not presently in being. 173 Similarly, if Andrew Baker, owning an estate for five hundred years in land, bequeaths it to John Stiles for


172 Part Two, note 134 supra. PROPERTY RESTATEMENT, §370, Comment o., 111. 5 (1944). An executory interest of a non-possessory character, such as a beneficial interest under a trust or a profit or easement, would, of course, vest when it becomes presently beneficial.

173 Hodson v. Ball, 14 Sim. 558, 60 Eng. Rep. 474 (1845); Gray, RULE AGAINST PERPETUITIES, 3rd ed., §214 (1915); 2 Simes, LAW OF FUTURE INTERESTS, §496 (1936); PROPERTY RESTATEMENT, §370, Comment k. (1944); Part Two, note 131 supra. In Re Hill, [1902] 1 Ch. 807 (C.A.), an attempt to create a perpetual succession of life interests in jewels was held invalid. Compare Part Two, note 13 supra. In both the example put in the text and in Re Hill, the interests created would have been contingent remainders if the property involved had been land instead of jewels. Even so, they would have been void because no future interest can vest until the taker is ascertainable. Part Two, note 157 supra.
PERPETUITIES AND OTHER RESTRAINTS

life, then to his eldest son for life, then to the eldest son of such eldest son, the last disposition is void if John has no son when Andrew dies, because the taker may not be ascertainable within lives in being and twenty-one years. Even though the taker of an executory interest is in being and ascertained, it is invalid if so limited as to become possessory upon the happening of an event which may not occur and which may occur at a time beyond the period of the Rule Against Perpetuities. Thus if Andrew Baker conveys land to James Thorpe in fee simple, “but if the descendants of James become extinct, then to John Stiles and his heirs,” the shifting executory interest limited to John is void because it might become possessory at some time beyond the period of the Rule.

Similarly, if Andrew Baker conveys land


175 Davies v. Speed, 2 Salk. 675, 91 Eng. Rep. 574 (1692); Digby, HISTORY OF THE LAW OF REAL PROPERTY, 5th ed., 365-366 (1897); Gray, RULE AGAINST PERPETUITIES, 3rd ed., §177 (1915). See: Badger v. Lloyd, 1 Salk. 232 at 233, 91 Eng. Rep. 206 (1696). That is, an executory interest limited to commence on indefinite failure of issue is void under the Rule although, as has been seen (Part Two, note supra) a remainder on an estate tail, which is really conditional upon indefinite failure of issue, is vested and valid. In England, until the rule was changed by statute [1 Vict., c. 26, §29, (1837)] there was a constructional presumption that, when property was transferred “to James Thorpe and his heirs but, if James die without issue, to John Stiles and his heirs,” the phrase “die without issue” meant indefinite failure of issue, that is “if the descendants of James ever become extinct.” If the property involved was land, such a transfer was construed to create an estate tail in James with a remainder in fee simple in John which was vested and valid. Soulle v. Gerrard, Cro. Eliz. 525, 78 Eng. Rep. 773 (1595); Tuttesham v. Roberts, Cro. Jac. 22, 79 Eng. Rep. 18 (1603); Browne v. Jerves, Cro. Jac. 290, 79 Eng. Rep. 249 (1610); Chadock v. Cowley, Cro. Jac. 695, 79 Eng. Rep. 604 (1624); Doe ex dem. Jones v. Owens, 1 Barn. & Ad. 318, 109 Eng. Rep. 805 (1830). See: Machell v. Weeding, 8 Sim. 4, 59 Eng. Rep. 2 (1836). If the property involved consisted of chattels real or personal, the interest of John was an executory interest which was void under the Rule Against Perpetuities. Green v. Rod, Fitz-G. 68, 94 Eng. Rep. 656 (1732); Beauchler v. Dormer, 2 Atk. 308, 26 Eng. Rep. 588 (1742).
to James Thorpe and his heirs so long as the Penobscot Building stands and then to John Stiles and his heirs, the shifting executory interest of John is invalid because it is not certain that the Penobscot Building will fall within lives in being and twenty-one years.\textsuperscript{176}

\section*{C. VESTING UNDER MICHIGAN LAW}

Chapter 62 of the Michigan Revised Statutes of 1846,\textsuperscript{177} which was adopted, with some modifications, from the New York Revised Statutes of 1829,\textsuperscript{178} made extensive changes in the terminology and some changes in the nature and characteristics of future interests in land. The statutes denominate every interest which is expectant as to possession, created in a person other than

\textsuperscript{176} Part Two, note 49 \textit{supra}. Yet, where estates tail are permitted, a conveyance to James Thorpe and the heirs of his body so long as Westminster Hall stands, remainder to John Stiles and his heirs, would give John a valid vested remainder. Part Two, note 155 \textit{supra}.


\textsuperscript{178} Part Two, Chapter I, Title 2, Art. 1. As to the drafting of the New York Revised Statutes and their partial adoption in Michigan, see Part One, \textit{supra}, at notes 575, 582. The Michigan chapter has two sections which were not in the New York article, §45, which provides that the presumption created by §44, that a conveyance to two or more persons creates a tenancy in common, does not apply to mortgages or conveyances to husband and wife, and §46, relating to nominal conditions, which is quoted in Part One, \textit{supra}, at note 143. Section 24 of the New York article provided: "Subject to the rules established in the preceding sections of this Article, a freehold estate as well as a chattel real, may be created, to commence at a future day; an estate for life may be created, in a term of years, and a remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created expectant upon the determination of a term of years; and a fee may be limited on a fee, upon a contingency, which, if it should occur, must happen within the period prescribed in this Article." Section 24 of the Michigan chapter omitted the italicized portion of the New York section. The significance of this omission has been suggested in Part Two, note 49 \textit{supra}, and will be discussed more fully in Part Three, \textit{infra}. 
the grantor or testator, a future estate\textsuperscript{179} and classify some future estates as remainders but give no special name to those which are not remainders. The Statutes classify as remainders not only those freehold future interests which would have been remainders under English law but also future estates of freehold or for years so limited as to cut off a prior freehold estate, to cut off or follow an estate in fee simple, or to cut off or follow an estate for years.\textsuperscript{180} Thus those interests which

\textsuperscript{179} "Sec. 7. Estates, as respects the time of their enjoyment, are divided into estates in possession, and estates in expectancy.

"Sec. 8. An estate in possession, is where the owner has an immediate right to the possession of the land; an estate in expectancy is where the right to the possession is postponed to a future period.

"Sec. 9. Estates in expectancy are divided into,

"1. Estates commencing at a future day, denominated future estates: and,

"2. Reversions.

"Sec. 10. A future estate, is an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate, created at the same time."

The Revisers' notes make it clear that the object of these provisions was to abolish the technical differences between remainders and executory interests. 3 N.Y. Rev. Stat., 2 ed., 570-571 (1836).

\textsuperscript{180} "Sec. 11. When a future estate is dependent upon a precedent estate, it may be termed a remainder, and may be created and transferred by that name.

"Sec. 16. A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain their full age.

"Sec. 20. A contingent remainder shall not be created on a term for years, unless the nature of the contingency upon which it is limited be such that the remainder must vest in interest, during the continuance of not more than two lives in being at the creation of such remainder, or upon the termination thereof.

"Sec. 21. No estate for life shall be limited as a remainder on a term of years, except to a person in being at the creation of such estate.

"Sec. 23. All the provisions in this chapter contained relative to future estates, shall be construed to apply to limitations of chattels real, as well as of freehold estates, so that the absolute ownership of a term of years, shall not be suspended for a longer period than the absolute power of alienation can be suspended, in respect to a fee.

"Sec. 27. A remainder may be limited on a contingency, which, in case it should happen, will operate to abridge or determine the
in England would have been remainders, shifting executory interests and present freeholds subject to a term are remainders here. One type of estate which would have been a springing executory interest in England, the freehold estate limited to cut off or follow a term of years only if an uncertain event occurs, is also a remainder under the Michigan statutes. Interests which in England would have been *interessia termini* or springing executory interests of other types are simply future estates, without specific name, in Michigan.

The statutes convert all estates tail into estates in fee simple and provide that a remainder in fee limited on an estate tail shall take effect if, but only if, the first tenant in tail dies without issue living at the time of his precedent estate; and every such remainder shall be construed a conditional limitation, and shall have the same effect as such a limitation would have by law.”

§§16, 20 and 23 were repealed by Act 38, P.A. 1949, Mich. Stat. Ann., §26.49 (2), Comp. Laws (1948) §554.52, but the repeal would not seem to alter the meaning of the term “remainder.” For the much narrower meaning of the term “remainder” at common law see Part Two, supra, at notes 6-21, 148, 150.

§§3 and 28 combined is that a conveyance “to John Stiles for life, remainder to the heirs of his body,” creates a life estate in John with contingent remainder in fee simple to the heirs of his body. Thompson v. Thompson, 330 Mich. 1, 46 N.W. (2d) 487 (1951), Part One, note 89 supra. As a remainder to the heirs of a living person is contingent (Part Two, note 158 supra), the abolition of the Rule in Shelley’s Case has the effect of making some dispositions violate the Rule Against Perpetuities which would not have done so at common law.
Whereas in English law the rules as to vesting of remainders and executory interests were different in several respects, our statutes provide a uniform rule as to the vesting of all future estates in land:

"Sec. 13. Future estates are either vested or contingent:

"They are vested when there is a person in being who would have an immediate right to possession of the lands, upon the ceasing of the intermediate or preceding estate:

"They are contingent whilst the person to whom or the event upon which they are limited to take effect remains uncertain."

Because the common-law recognition of remainders was restricted to freehold interests in land, it seemed, at the time when English law was received in this country, that all future interests in chattels real and personal, except *interestia termini*, were executory interests and so could not vest before they became possessory.\(^{183}\) Chap-

\(^{182}\) §4, quoted in the text at Part One, note 84 *supra*. Sec. 22 provides: "When a remainder shall be limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, the word 'heirs' or 'issue', shall be construed to mean heirs or issue living at the death of the person named as ancestor." Compare the different construction of such provisions in the older English decisions. Part Two, note 175 *supra*. By eliminating the "indefinite failure of issue" construction, Section 22 saves many future estates which would otherwise violate the Rule Against Perpetuities. Revisers' Note, 3 N.Y. Rev. Stat., 2d ed., 568 (1836). It was applied in Goodell v. Hibbard, 32 Mich. 47 (1875); Mullreid v. Clark, 110 Mich. 229, 68 N.W. 138, 989 (1896). In St. Amour v. Rivard, 2 Mich. 294 (1852), a will which became effective before the Revised Statutes of 1846 came into force devised life estates to named persons and successive estates for life to their descendants "as long as any posterity will exist, and in case of extinction to the next heirs." The ultimate remainder was held void under the common-law Rule Against Perpetuities.

\(^{183}\) Part One, notes 403-422, Part Two, notes 166, 167, *supra*. However, modern English and American law tends to treat future interests in chattels personal, limited to follow life interests, as remainders, at least for purposes of the Rule Against Perpetuities. Evans v. Walker.
ter 62 of the Michigan Revised Statutes of 1846 makes possible remainders in chattels real and applies the same rules of vesting to future estates in chattels real as to future freehold estates. The chapter did not apply to chattels personal, but the Michigan Supreme Court has shown a tendency to recognize future interests in chattels personal, including remainders, which correspond to those permitted in land. Many of the vesting cases discussed in this section involved future interests in chattels personal and some involved mixed dispositions of land and chattels. In all of them the Court applied the same rules of vesting to future interests in chattels personal as to future interests in land, and in several instances it has expressly stated that the rules of vesting are the same as to both. What the statutes have done for future interests in chattels real, case law has done

[1876] Ch. Div. 211; Gray, Rule Against Perpetuities, 3rd ed., §§841, 851 (1915); Part One, notes 429, 430, supra.

184 Toms v. Williams, 41 Mich. 552 at 556, 2 N.W. 814 (1879); In re Coots' Estate, 253 Mich. 208 at 214, 234 N.W. 141 (1931). Cf. Wessborg v. Merrill, 195 Mich. 556 at 568-569, 162 N.W. 102 (1917). The Rule Against Perpetuities did not apply to dispositions of Michigan land between 1847 and 1949 (Part Two, note 50 supra), but decisions establishing the rules of vesting of interests in land made during this period, although not involving application of the Rule, should be considered authoritative as to the problem of vesting for purposes of the Rule. The Michigan vesting cases are discussed in detail in Brake, "The 'Vested vs. Contingent' Approach to Future Interests: A Critical Analysis of the Michigan Cases," 9 Univ. of Detroit L.J. 61, 121, 179 (1946). The original title of Chapter 62 of the Revised Statutes of 1846 (Part Two, note 177 supra) was, "Of the Nature and Qualities of Estates in Real Property, and the Alienation Thereof." It was the first chapter in Title XIV, which was headed, "Of Real Property, and of the Nature, Qualities and Alienation of Estates Therein." Act 227, P.A. 1949, amended the title of Chapter 62 to read, "Of the nature and qualities of estates in real and personal property, and the alienation thereof." It could be argued that this amendment extended Section 13 and other provisions of the chapter to chattels personal. However, Act 227 did not amend the heading of Title XIV or remove the limiting word "lands" from Sections 1, 8, 13, 36, 44, and 46. The primary purpose of Act 227 was to extend Sections 37, 38, 39 and 40, relating to accumulations, to personal property. Part Two, note 501 infra. It is doubtful that it changed the scope of other sections of Chapter 62.
for chattels personal. We have one system of future interests in all types of property with uniform rules of vesting for all.

Section 13 is a paraphrase of Sir William Blackstone's explanation of the distinction between vested and contingent remainders. Although neither complete nor accurate for that purpose, the section was probably intended to adopt the English rules governing the vesting of remainders and apply them to all future estates. In at least one situation, however, the section, when read with other provisions of Chapter 62, appears to change the rules governing the vesting of remainders. At common law a remainder failed if it was not ready to take effect when the preceding estate terminated. Hence a remainder limited to commence on an event which might not occur at or before the termination of the preceding estate was contingent even though the event was one certain to occur, such as the coming of a fixed date or the death of a living person. If Andrew Baker conveys lands to James Thorpe for life, remainder to John Stiles and his heirs if Lucy Baker dies either before or after James, the remainder is contingent at common law. Lucy will certainly die but not necessarily before James' life estate terminates. Our statutes provide that a remainder does not fail merely because it is not ready

185 "For remainders are either vested or contingent. Vested remainders (or remainders executed, whereby a present interest passes to the party, though to be enjoyed in futuro) are where the estate is invariably fixed, to remain in a determinate person, after the particular estate is spent. . . . Contingent or executory remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect, either to a dubious and uncertain person, or upon a dubious and uncertain event; so that the particular estate may chance to be determined, and the remainder never take effect." 2 Commentaries *168-169 (1765), citing Boraston's Case, 3 Co. Rep. 16a, 20a, 76 Eng. Rep. 664, 670 (1587).

186 Part Two, notes 11, 12, supra.

187 Part Two, note 151 supra.
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...to take effect when the preceding estate terminates,\footnote{188} hence the remainder of John is certain to take effect upon an event certain to occur. If James should die before Lucy, the right to possession for the life of Lucy would revert to Andrew. If the reversionary estate of Andrew is an "intermediate or precedent estate" within the meaning of the second clause of Section 13, John's interest comes within the statutory definition of a vested future estate. If the phrase "intermediate or precedent estate" in the second clause does not include reversionary estates, John's interest does not come within either the second or third clause. The first clause provides that future estates are either vested or contingent. John's interest is not contingent under either the common-law definition of contingency or that provided by the third clause of Section 13 because there is no uncertainty as to the person who takes or the event upon which the interest takes effect, so his interest is probably a vested future estate in Michigan.\footnote{189}
It will be recalled that, under English law, a remainder may be vested although it is not presently possessory, even when it may never become possessory, but an executory interest does not vest until it becomes possessory. It is clear that in Michigan a remainder may vest before it becomes possessory, even when it may never become possessory. Thus if Andrew Baker conveys land to Roger White for life, remainder to John Stiles for life, John's remainder is vested although it will not become possessory if he does not survive Roger. As Section 13 adopts one standard of vesting for all future estates, the standard applicable to remainders in English law, it would seem that a future estate may be vested in Michigan before it becomes possessory even though it would have been an executory interest in England. The language of the second clause of Section 13 makes this clear as to those types of remainders which would have been shifting executory interests under English law. As to those future interests which would have been springing executory interests, a problem like that discussed in the preceding paragraph arises. If the phrase "intermediate or precedent estate"

Under the common-law rules, this section would make every remainder limited on an indefeasible estate for life or years contingent because it would not be ready to take effect whenever and however the preceding estate terminated. It is apparent that the statutes change the common-law rules of vesting in this respect.

190 Part Two, notes 153-155, supra.
191 Part Two, notes 168, 169, supra. But such an interest may not be contingent.
in the second clause includes the retained interest of a grantor who has conveyed a future estate of the springing use type, then such a future estate is within the statutory definition of a vested interest if limited to commence upon an event certain to occur. If the phrase does not include such retained interests, such a future estate does not come within either the second or third clause but, since it is not contingent, must be vested under the language of the first clause. In any event, the Michigan Supreme Court has held that a future estate of the springing executory interest type, limited to commence upon the death of a living person, is vested. Thus in McIntyre v. McIntyre’s Estate,\(^{194}\) involving a conveyance of an estate to commence on the death of the grantors, the Court said,

"Two provisions of the deed were relied on to sustain proponent’s contention that the terms of the deed were not sufficient to create a vested interest in a grantee: (a) ‘It is understood that this deed is made for the purpose of creating a future estate;’ (b) ‘and the full title and enjoyment * * * shall only become operative upon

\(^{194}\) 156 Mich. 240 at 241-242, 120 N.W. 587 (1909). The real problem involved in the case was not vesting but whether the instrument was a will or a present conveyance of a future estate. If, as the Court held, it was a present conveyance of a future estate, that estate would have been a springing executory interest under English law. Part Two, notes 6, 150, 162, 169, supra. In Engel v. Ladewig, 153 Mich. 8, 116 N.W. 550 (1908), a husband and wife joined in a deed conveying land owned by the husband in fee simple to their son in fee simple, subject to certain charges and reserving to the grantors “all right, title and control so long as we or either of us shall live.” The Court treated the interest of the son, which would have been a springing executory interest in England, exactly as if it were a vested remainder. See: Hitchcock v. Simpkins, 99 Mich. 198, 58 N.W. 47 (1894); Taylor v. Richards, 153 Mich. 667, 117 N.W. 208 (1908); Watkins v. Minor, 214 Mich. 308, 183 N.W. 186 (1921); Benton Harbor Federation of Women's Clubs v. Nelson, 301 Mich. 465, 3 N.W. (2d) 844 (1942); Rev. Stat. 1846, c. 62, §24, quoted in Part Two, note 178 supra; Revisers' note, 3 N.Y. Rev. Stat., 2d ed., 570-571 (1886).
the death of the survivor of the grantors hereof, and at
that time, and not before, the said grantee shall enjoy
the full title and control hereof.’ Our statute * * *
defines ‘a future estate’ as ‘an estate limited to commence
in possession at a future day,’ etc., and by [Section 13]
they are said to be either vested or contingent. There
is no contingency mentioned in this deed. The grantee’s
right to possession was inevitable on the happening of
events which were inevitable. He had, therefore, a
vested interest.”

If a future estate of the springing executory interest
type, limited to commence unconditionally on the death
of a living person, is vested, it would seem that such an
estate limited to commence unconditionally on a fixed
future date is likewise vested. In other words, mere post-
ponement of enjoyment to a future time does not make
a future estate contingent and so, under Section 13, does
not keep it from being vested, although it would have
been an executory interest in England. If Andrew Baker
conveys to John Stiles an estate in fee simple in land to
commence in possession twenty-two years after the date
of the deed, John probably takes a vested estate which
does not violate the Rule Against Perpetuities.\(^{195}\)

Under English law, the fact that an interest prior in
time is on special limitation does not make a future
interest contingent, provided it is limited to take effect
whenever and however the prior interest terminates. If
Andrew Baker devises land to Lucy Baker until her
death or remarriage, remainder to John Stiles and his
heirs, John takes a vested remainder at common law.\(^{196}\)

If Andrew Baker conveys land to James Thorpe for

\(^{195}\) In Hibler v. Hibler, 104 Mich. 274, 62 N.W. 361 (1895), there
was a bequest to be paid a year after the death of the testator’s widow.
It was treated as vested. Walsh, Future Estates in New York, §7

\(^{196}\) Part Two, note 154 supra.
forty years if the Penobscot Building so long stands, remainder to John Stiles and his heirs, John takes a present vested estate in fee simple at common law. The Michigan statutes make the interest of John in the second example a future estate instead of a present interest, and Section 13 provides that future estates are contingent “whilst - - - the event upon which they are limited to take effect remains uncertain.” It is arguable that the section makes the interests of John in these examples contingent and, hence, that that in the second example is void because the event may remain uncertain for more than twenty-one years. However, the “event” in each of these examples is not a condition precedent to John’s taking an interest but only one which, if it occurs, will terminate the preceding estate and so make his interest possessory sooner. At any rate, the Michigan Supreme Court has held that a remainder of the type described in the first example is vested, so it would probably hold that one of the type described in the second example is vested and valid.

(1) Contingency as to Person or Event

Under English law a future interest limited to persons not in being or not presently ascertainable or upon a condition precedent not certain to occur is contingent. Hence a remainder limited to the heirs of a living person is contingent because they cannot be ascertained until the death of the ancestor. Dicta in New

197 Part Two, note 150 supra.
199 Part Two, notes 151, 159, 173, 175, 176, supra.
200 Part Two, note 158 supra.
York cases decided in 1835 and 1840 suggested that the second clause of Section 13 may have made a radical change in the rules of vesting by providing that a remainder is vested if there is a person in being who would be entitled to take if the preceding estate terminated now.\(^{201}\) In Moore v. Littel,\(^{202}\) decided in 1869, land had been conveyed to John Jackson "for and during his natural life, and after his death to his heirs and their assigns forever." Although unnecessary to the decision,\(^{203}\) the opinion of Judge Woodruff, in which a majority of the Court of Appeals concurred, stated that the remainder vested presently in the living children of John as his heirs apparent and contained the following dicta:

"If there 'is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the precedent estate, then that remainder is vested' within the terms of the statute. It is not 'a person who now has a present fixed right of future possession or enjoyment', but a person who would have an immediate right if the precedent estate were now to cease. I read this language according to its ordinary and natural signification, and if you can point to a human being and

\(^{201}\) Coster v. Lorillard, 14 Wend. 265 at 301-302 (1835); Moore v. Lyons, 25 Wend. 119 at 144 (1840). In the latter case Chancellor Walworth qualified this startling proposition by a suggestion that it was true only if the preceding estate would be terminated by an event certain to occur. See also Lawrence v. Bayard, 7 Paige 70 at 75 (N.Y. 1838).

\(^{202}\) 41 N.Y. 66 (1869). It is evident from his opinion (pp. 71-75) that Judge Woodruff misunderstood the common-law rules of vesting. He seems to have thought that such a remainder was contingent at common law only because of the doctrine of destructibility of contingent remainders. The context indicates that Judge Woodruff did not consider the remainder indefeasibly vested; it would open to admit after-born children and be defeated, as to any child, if he predeceased his father.

\(^{203}\) The only question involved was whether children of John could alienate their interests before their father's death. Six of the seven judges agreed that the remainder was alienable even if contingent in view of Section 35 (Part One, note 371 supra.)
say as to him, 'that man or that woman, by virtue of a
grant of a remainder, would have an immediate right
to the possession of certain lands if the precedent estate
of another therein should now cease', then the statute
says, he or she has a vested remainder.

"That definition [the third clause] is to be construed
in connection with the other [the second clause]; if there
is no person who would have an immediate right of
possession upon the ceasing of the intermediate or prece-
dent estate, i.e., if no person can be found of whom this
can now be avowed, either because if that precedent
estate should now cease, it would be uncertain who was
entitled, or whether the event upon which it was limited
would happen, then the remainder is contingent."  

If pushed to their logical conclusion these dicta would
seem to mean that if Andrew Baker conveyed land to
James Thorpe and his heirs "until his last descendant
dies” or "until the Penobscot Building falls,” then to
John Stiles and his heirs, the interest of John Stiles
would be vested. The Revisers' Notes make it clear that
this was not intended. Even if confined to the facts of
Moore v. Littel, a remainder to the heirs of a life tenant,
the dicta are unsound. They engraft onto the second
clause of Section 13 the words "if the precedent estate
should now cease." When read in the light of the com-
mon law, that clause means that a remainder is vested
if an ascertained living person would take on the termi-
nation of the preceding estate whenever it terminates.
Moreover, it seems evident that the second clause is
qualified by the third rather than qualifying it. When
the three clauses are read together, the result is a short
statement of the common-law rules of vesting of re-

204 41 N.Y. 66 at 76, 79.
However that may be, the dicta in Moore v. Littel have caused much confusion in New York and other states which have adopted the New York statutes.

In the New York version of Section 13, the clauses are separated by periods. In the Michigan version they are separated by colons. Judge Sanford M. Green, who drafted the Michigan Revised Statutes of 1846, had been a New York lawyer and must have been familiar with the doubt in New York as to the meaning of Section 13. It may be that he introduced this change in punctuation deliberately to make it clear that the second clause was qualified by the third. In any event, the confusion in the New York cases necessitates a careful examination of the Michigan cases which involve the problem in Moore v. Littel.

As to the specific problem involved in Moore v. Littel, the Michigan Supreme Court has shown a disposition to construe the word "heirs" in a conveyance of a remainder to the heirs of a living person as meaning "children" or "issue." If the word is construed to mean...
“children,” the remainder vests in the living children of the named ancestor, subject to open to admit after born children. When, however, the word “heirs” in a conveyance of a remainder to the heirs of a living person is construed in its technical sense, that is, as meaning the persons who would inherit the lands of the ancestor on his death intestate, Michigan rejects the view of Judge Woodruff in *Moore v. Littel* and follows the common-law rule that a remainder to the heirs of a living person is contingent until his death. *In re Churchill’s Estate* involved a devise to a trustee for the life of the testator’s daughter, remainder, if the daughter should die leaving issue, to such issue, and, if she should die without issue, remainder, as to eight-tenths, to named persons. The will provided, “This leaves an undivided two-tenths part of the remainder of my estate, to be disposed of under the laws of the State of Michigan.” The Court held that the two-tenths remained contingent until the death of the daughter without issue and then vested in the heirs of the testator, determined as of the death of the daughter. *Thompson v. Thompson* involved a conveyance to a son, “For and during his natural lifetime and after his decease, to the heirs of his body.” The trial court, evidently following the dicta in *Moore v. Littel*, held that the son took a life estate with

363, 101 N.W. 576 (1904). In all these cases the life tenant, to whose “heirs” the remainder was limited, had living children at the date of the conveyance. Cf. Goodell v. Hibbard, 32 Mich. 47 (1875).


214 330 Mich. 1, 46 N.W. (2d) 437 (1951); Part One, note 89, Part Two, note 181, supra. Cf. Wilson v. Terry, 130 Mich. 73, 89 N.W. 566 (1902). In Menard v. Campbell, 180 Mich. 583, 147 N.W. 556 (1914), land was devised to a son for life, remainder to his heirs. It was held that the son’s widow took a share as a statutory heir.
a vested remainder to the heirs of his body in being at the date of the deed, subject to open to admit after-born heirs. The Supreme Court modified the decree to hold that the son took a life estate with a remainder to the heirs of his body in being at his death. The opinion clearly adopts the technical common-law meaning of "heirs" and appears to accept the common-law view that a remainder limited to the heirs of a living person is contingent.

The dicta in *Moore v. Littel* 215 go far beyond the specific problem involved in that case by stating that a remainder is vested if there is a person in being who would take it if the preceding estate terminated now. In *McInerny v. Haase* 216 the Michigan Supreme Court showed some inclination to adopt this view. In that case, land was devised to the testator's wife for life, "and upon her death I bequeath to my daughter Hannah and finally, upon Hannah's death, to my granddaughter, Mary Jane McInerny, should she survive her mother Hannah. And in case the said Mary Jane dies before her mother, Hannah, then it is my will that the aforesaid property be equally divided among the surviving children of my daughter Hannah." The Court said that the question of whether the will violated the statute prohibiting suspension of the absolute power of alienation,

"depends upon whether the estate in remainder was vested or contingent. Our statute (section 8795, 3 Comp. Laws) defines such estates:

"'Future estates are either vested or contingent: They are vested when there is a person in being who would have an immediate right to the possession of the lands,

215 Part Two, notes 202-204, supra.
CERTAINTY OF VESTING

upon the ceasing of the intermediate or precedent estate. They are contingent whilst the person to whom or the event upon which they are limited to take effect, remains uncertain." \(^{217}\)

"We find in the instant case, under this definition, that at the creation of this estate this granddaughter was such person then in being who would have such immediate right to possession. The conclusion is unavoidable that this was a vested remainder. See opinion, authorities, and notes on the distinction between vested and contingent remainders. Kountz’s Estate, 213 Pa. 390 (62 Atl. 1103, 3 L.R.A. [N.S.] 639, 5 Am. & Eng. Ann. Cas. 427." \(^{218}\)

The report of the cited Pennsylvania case is preceded by a headnote reading:

"A vested remainder is an estate to take effect after another estate, for years, for life, or in tail, which is so limited that if the particular estate were to expire or end in any way at the present time, some certain person would become thereupon entitled to the immediate enjoyment." \(^{219}\)

\(^{217}\) The punctuation does not agree with Comp. Laws (1897) §8795, in which the second clause is followed by a semicolon. Part Two, note 209 supra.

\(^{218}\) 163 Mich. 364 at 368. The question involved was whether these dispositions, plus a provision requiring the then holder of the land to pay $5 to testator’s son if he returned from the Army, suspended the absolute power of alienation for more than two lives. It is difficult to see why the court thought the vested or contingent character of Mary Jane’s remainder was material. It would either vest subject to the $5 charge or fail on the deaths of her grandmother and mother. In Rood v. Hovey, 50 Mich. 395, 15 N.W. 525 (1883) there was a devise to testator’s wife for life or widowhood, remainder "to my children now living, or who may be at the time of her decease or marriage." It was held that the remainder vested indefeasibly in the children living at the testator’s death. This is probably just an illustration of the tendency to construe ambiguous or inconsistent language in favor of early vesting. Cf. Lewis v. Nelson, 4 Mich. 630 (1857), holding that a remainder to the surviving children of the grantors created by a deed executed before the effective date of the Revised Statutes of 1846 conveyed no interest to their living children, present or future.

\(^{219}\) Emphasis supplied.
This headnote appears to express the view of Judge Woodruff in *Moore v. Littel*, but the Pennsylvania opinion quotes from numerous English authorities and clearly asserts the common-law view in the following passage:

"But, in any event, the remainder in the grandchildren could only be deemed vested in case they had the right to immediate possession *whenever and however* the preceding estate determined." ²²⁰

This being so, it would seem that the opinion in *McInerney v. Haase* does not really adopt the theory of the dicta in *Moore v. Littel*. It should probably be classified as an illustration of the judicial tendency to construe as a condition subsequent language which on its face imposes a condition precedent. However that may be, the other Michigan cases involving the question clearly reject the *Moore v. Littel* view and adopt the common-law rules of vesting of remainders. *Fitzhugh v. Townsend* ²²¹ involved a devise to a trustee for the life of testatrix's granddaughter,

"and if, at her decease, she leave lawful issue surviving her, I devise and bequeath the whole of my said residuary estate to such issue.

"In the event of the death of my granddaughter, Elizabeth Fitzhugh Birney, without lawful issue surviving her, - - - I further will and direct that all the rest, residue, and remainder - - - be equally divided among all my brothers and sisters, and the children of such of them as shall be no longer living, - - - ."

Elizabeth died without ever having had issue. A

²²⁰ 213 Pa. 390 at 396, 62 Atl. 1103 (1906). Emphasis supplied. The case held that an interest limited to grandchildren to be ascertained ten years after the testatrix's youngest grandchild came of age was contingent and violated the Rule Against Perpetuities.

²²¹ 59 Mich. 427, 27 N.W. 561 (1886).
brother of the testatrix, Samuel, predeceased the testatrix, survived by a son, William, who survived the testatrix but died in the lifetime of Elizabeth, without issue, devising his estate to Townsend. The interest of William would not be vested under the English concept of vesting because it would be contingent on an event uncertain to occur, the death of Elizabeth without issue. Counsel for Townsend contended that a share vested in William at the death of the testatrix because, if the life interest of Elizabeth had then terminated, William would have taken a share, citing Moore v. Littel and other New York cases following the dicta of Judge Woodruff in support of this contention. The Court affirmed a decree of Circuit Judge Sanford M. Green ruling that Townsend took nothing and held that William's remainder was contingent until the death of Elizabeth. As the same result could have been reached by holding that the interest of William vested at the death of the testatrix, subject to being divested if he predeceased Elizabeth, the Court's care in holding that William's remainder was contingent must be interpreted as a categorical rejection of the dicta in Moore v. Littel and a deliberate adherence to the common-law rules governing the vesting of remainders.

Hadley v. Henderson involved a will which devised the residue to Charles C. Owen and provided, "If in

222 Briefs and Records, January Term, 1886, Defendant Townsend's Brief, pp. 11-15. His counsel was Charles I. Walker, Professor of Law in the University of Michigan. The Briefs and Records contain no opinion by Judge Green and the Bay County Clerk, who searched his records at the author's request, could find none.

case Charles C. Owen dies without issue, it is my will that the above property be disposed of” to three named persons and a society. The Court, relying on Fitzhugh v. Townsend and stressing the third clause of Section 13, held the remainder contingent. In Michigan Trust Co. v. Baker,224 property was bequeathed to testatrix’s husband until death or remarriage, remainder to a trustee for the life of her son Stuart and “If my said son shall have lawful child or children of his body who shall survive him, his share of my estate shall go to such child or children, girls at age of 25 years and boys at 30 years and not before.” The will limited other remainders in the event that Stuart died without issue. Stuart died two years after the testatrix, without ever having had issue. The Court held all the remainders subsequent to the trust contingent and void under the Rule Against Perpetuities. In Lambertson v. Case,225 land was devised to testator’s wife “as long as she lives, and when she gets through with it it shall go to Norma Lambertson if she is living, if not to J. V. Lambertson.” It was held that the remainder of Norma was contingent. In re Coots’ Estate226 involved a devise of land and other property to a trustee for the lives of the testator’s widow and son, then to the son’s children, or their heirs by right of representation, and in case the son should die without leaving issue or lineal heirs, then to six named nephews and nieces. The remainder to the nephews and nieces was held to be contingent. In Floyd v. Smith227 there was a bequest to a trustee for the lives of four named persons,

225 245 Mich. 208, 222 N.W. 182 (1928).
then to the issue of the life beneficiaries living at the death of the survivor. It was held that the remainder vested on the death of the survivor of the life beneficiaries.

This review of the cases would seem to make it abundantly clear that Michigan does not accept the view advanced by Judge Woodruff in *Moore v. Littel* that a remainder is vested if there is a person in being who would take if the preceding estate terminated now. In Michigan a remainder is not vested unless the event upon which it is to become possessory is certain to occur and there are ascertained persons in being who, throughout the continuance of the remainder, will take whenever that event occurs. In the language of Section 13, a future estate is contingent whilst the person to whom or the event upon which it is limited to take effect remains uncertain.

(2) What Language Creates Contingency

As has been seen, a future interest may be vested although possession or enjoyment is postponed until a future time, although it may never become possessory because it may terminate before prior interests, and although it is subject to defeasance by the exercise of a power of appointment or by the operation of a condition subsequent, a special limitation, or an executory limitation. If Andrew Baker devises land to James Thorpe for life, remainder to Lucy Baker for life, but

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228 Part Two, notes 153, 155, 195, supra. Otherwise there could be no such thing as a vested future interest. By definition a future estate is one “where the right to the possession is postponed to a future period.” Part Two, note 179 supra.

229 Part Two, notes 154, 193, supra.

if Lucy remarry, to John Stiles for the life of Lucy, the remainder of Lucy is vested although it will not become possessory in any event until the termination of James's life estate, it will never become possessory if Lucy dies before James and, even after it becomes possessory, it will be defeated if Lucy remarries. On the other hand, if Andrew Baker devises land to James Thorpe for life, remainder, if Lucy is unmarried at the death of James, to Lucy Baker for life, Lucy's remainder is contingent. When a future interest is limited to an ascertained living person it is contingent only if subject to a condition precedent of an uncertain event. In *Michigan State Bank v. Hastings*, land and other property were conveyed to the State, "upon and subject to the express condition that the State of Michigan shall indemnify and save harmless" the grantors against a certain mortgage. In holding that this was a condition subsequent, the Court remarked,

"The right to annex a condition to a conveyance, results from the power of alienation; and this power of alienation is an incident to the right of property. If then, that condition be precedent, and the act upon which the estate depends be not performed, the estate does not vest; but if the condition be subsequent, the estate does vest, and will continue to vest until defeated by a failure on the part of the grantee to perform the condition annexed to the estate; or, in other words, until there is a breach of the condition."  

It should be noted that a future interest may be vested subject to defeasance although the event causing de-

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231 1 Doug. 225 (Mich. 1844). Blanchard v. Detroit, Lansing & Lake Michigan R.R. Co., 31 Mich. 43 (1875), is a similar case. There a conveyance was made "upon the express condition" that the grantee build a depot on the land and stop a train there daily. This was held to be a condition subsequent.  
232 1 Doug. 225 at 252.
feasance may or will occur before the future interest becomes possessory. For example, if Andrew Baker devises land to Lucy Baker for life, remainder as she may by will appoint, and in default of appointment to John Stiles and his heirs, the remainder of John Stiles is vested subject to defeasance.\textsuperscript{233} In \textit{McCarty v. Fish},\textsuperscript{234} property was devised to testatrix's husband for life, with power to use so much of the principal as might be necessary in defraying his necessary expenses, remainder to others. It was held that the remainder vested at the death of the testatrix, subject to being defeated by the exercise of the power.

Whether particular language of a conveyance or will mentioning an uncertain event imposes a condition precedent or merely postpones enjoyment, limits the duration of the interest, or subjects it to defeasance is usually a problem of construction. The Michigan Supreme Court has frequently expressed a strong constructional preference for that construction which will make the future interest vest at the earliest possible time.\textsuperscript{235} An interest which is vested or will certainly vest during the period of the Rule does not, of course, violate the Rule Against Perpetuities.

\textsuperscript{233} Part Two, note 160 \textit{supra}. It is also possible to have a remainder vested subject to a charge. Smith v. Jackman, 115 Mich. 192, 73 N.W. 228 (1897); Engel v. Ladewig, 153 Mich. 8, 116 N.W. 550 (1908).

\textsuperscript{234} 87 Mich. 48, 49 N.W. 513 (1891).

\textsuperscript{235} An interest which is vested or will certainly vest during the period of the Rule does not, of course, violate the Rule Against Perpetuities.
The uncertain events which most commonly cause difficulty are reaching a certain age, and death before another. Other uncertain events occasionally appear in the cases. As has been seen, provisions in wills postponing distribution until some administrative step, such as probating the will, paying debts, completion of administration, winding up of a business, or sale of property, is taken, are construed, whenever possible, to postpone only enjoyment, not vesting.\(^{236}\) In *Skinner v. Taft*,\(^{237}\) a direction in a will that the executors transfer property to four named persons and their heirs and assigns, "after the payment of my just debts and funeral expenses" and upon the termination of a trust which was to terminate "five years from the date of the probating of my will in the County of which I may die a resident," was treated as valid, presumably on the theory that only enjoyment, not vesting, was postponed. In *Ostrander v. Muskegon Finance Co.*,\(^{238}\) the testator devised his estate to his wife, "Provided, she remains my widow." It was held that the widow took a present fee simple, subject to defeasance upon her remarriage.

Where it is clear that no interest was intended to pass unless and until an uncertain event should occur, the interest is contingent. *Conant v. Stone*\(^{239}\) involved a will which provided, "My said son to have the use and income from said estate so long as Lizzie Rice, his present wife, remains as his legal wife, but in case of her death or in case of a legal separation and divorce from my said

\(^{236}\) Part Two, note 132 supra.

\(^{237}\) 140 Mich. 282, 103 N.W. 702 (1905), Part Two, note 133 supra.


\(^{239}\) 176 Mich. 654, 143 N.W. 39 (1913), Part One, note 191 supra.
son, I then give, devise and bequeath to my said son and to his heirs and assigns forever, said above mentioned interest in my estate.” The devise of the fee was held contingent. Similarly, in *Dusbiber v. Melville*, a will provided, “Now, my will is, that in case she shall be compelled to live apart from her said husband, Frederick Melville, and shall have to support herself, that I give, devise and bequeath to her, the said Florence A. Melville, the sum of two thousand dollars, to be paid to her by my executor, out of my estate, as soon as my executor shall be convinced that it is impossible for the said Florence A. Melville to live with her husband . . .” This language was held to impose a condition precedent. In *Markham v. Hufford*, a bequest “to be paid to him at the expiration of two years from the date of my demise: provided that he shall be deemed a reformed man, in the judgment of the executors of this will,” was correctly held to be contingent.

A provision postponing enjoyment until a legatee or devisee reaches a certain age may be construed as a condition precedent which suspends vesting until the legatee reaches that age or the bequest may be found to vest indefeasibly, subject only to postponement of enjoyment, or to vest, subject to defeasance if the legatee dies before reaching the stipulated age. If the legatee is in being and ascertained and entitled to the income until receipt of the principal, the gift is usually found to be

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240 178 Mich. 601, 146 N.W. 208 (1914), Part One, note 191 *supra*. Cf. *Conrad v. Long*, 33 Mich. 78 (1875), where a remainder was devised, “upon this condition: if at any time subsequent she should conclude not to live with her present husband - - - .” This was held to be a condition subsequent.

241 123 Mich. 505, 82 N.W. 222 (1900), Part Two, note 113 *supra*.

vested. In *Hull v. Osborn*, the residue of an estate was devised and bequeathed to two named grandchildren "on the terms and conditions herein contained and payable at the times and in the manner hereinafter set forth." Ten thousand dollars was to be paid to each of the persons "when she shall arrive at" the ages of twenty-one, twenty-five, thirty, thirty-five and forty years "and the remainder of the one-half of the residue hereby devised and bequeathed to the said Blanche Wyckoff Hull shall be paid to her when she shall arrive at the age of forty-five years." After like provision for the other legatee, the will provided that if either legatee should die without living issue before reaching forty-five, the unpaid portion of her share should be paid to the survivor "at the time and in the manner it would have been paid to such deceased grandchild had she lived." If both died under forty-five without living issue, there was a gift over to brothers, sisters, nephews, and nieces then living. It was held that the interest of the two grandchildren in the principal vested at once, subject to postponement of enjoyment and to defeasance upon death.

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244 *Id.*, §§351, 355, 356; *Property Restatement*, §§256-259 (1940). See *Wessborg v. Merrill*, 195 Mich. 556 at 569, 162 N.W. 102 (1917). In *Toms v. Williams*, 41 Mich. 552 at 565, 2 N.W. 814 (1879), Chief Justice Campbell said, "While there has been some variance among the authorities concerning the legal distinctions between vested and contingent estates, they chiefly agree first in favoring the vesting of interests, and second in treating future interests as vested when there is any present interest in the income of the property."

245 151 Mich. 8, 113 N.W. 784 (1908). See: *Le Baron v. Shepherd*, 21 Mich. 268 (1870); *Knorr v. Millard*, 52 Mich. 542, 18 N.W. 349 (1884); *Knorr v. Millard*, 57 Mich. 265, 23 N.W. 807 (1885); In re *Dingler's Estate*, 319 Mich. 189, 29 N.W. (2d) 108 (1947). *Cf.* *Bennett v. Chapin*, 77 Mich. 526, 43 N.W. 893 (1889), Part One, note 611 *supra*, where property was to be transferred to a daughter when she reached thirty-five, but if she died before that to her issue or, if none, to another. The daughter was entitled to part of the income pending the transfer. It was held that her interest was indefeasibly vested. This result is, of course, unsound.
under forty-five. In Gettins v. Grand Rapids Trust Co.,\(^{246}\) there was a bequest to a trustee to pay the income to testatrix’s daughter Belle for life and upon her death to pay portions of the principal to children of Belle who were then twenty-five and the issue of children who pre-deceased Belle,

“And any remaining portions, my trustee shall keep each as a special trust fund, for one each of her children surviving and being less than 25 years of age, and it shall pay to each such child the net income arising from his or her special fund, and upon a child reaching the age of 25 years, it shall pay, deliver and convey to said child his or her special trust fund; and in the event of the death of such child before the same shall reach the age of 25 years, my trustee shall pay, deliver and convey his or her special fund to my said daughter’s children surviving, except this, that if any child has died with issue then surviving, said issue shall take the share the deceased child would receive if living - - -’’

The Court held that the interests of the children of Belle were vested subject to defeasance on death under twenty-five. The provision for defeasance violated the Rule Against Perpetuities, but the interest of the children did not.

In Hunter v. Hunter,\(^{247}\) a will directed the executors to apply the income to the support of the testatrix’s three

\(^{246}\)249 Mich. 258, 228 N.W. 703 (1930); Part Two, notes 103, 145, supra. Gardner v. City National Bank & Trust Co., 267 Mich. 270, 255 N.W. 687 (1934), Part Two, note 88 supra, involved a similar disposition. As the trust included land, it violated the statute prohibiting suspension of the absolute power of alienation. Part One, note 593, Part Two, note 53 supra. The Court did not clearly decide whether the interest of children, who were to receive income until they reached thirty and then the principal, was contingent or vested subject to defeasance but used language suggesting that their interest would violate the Rule Against Perpetuities unless indefeasibly vested. 267 Mich. 270 at 291-292. This is clearly unsound. A future interest vested subject to defeasance does not violate the Rule, although the provision for defeasance may. Cf. Part Two, note 280, infra.

\(^{247}\)160 Mich. 218, 125 N.W. 71 (1910).
children until distribution, to distribute a third of the principal to each child on reaching thirty or, in the discretion of the executors, at any time after reaching twenty-one, and, in case any child die, to distribute its share to its issue or, if none, to the survivor. Two children died without issue before reaching twenty-one; the third died at twenty-seven, leaving issue, before distribution had been made. It was held that the estate of the surviving child took nothing; that his interest was either contingent upon surviving until distribution or vested subject to defeasance on death before reaching thirty.

If a will manifests no intention to give any interest to a legatee unless he reaches a certain age, his interest is, of course, contingent until he reaches that age. In *Michigan Trust Co. v. Baker*,248 there was a bequest to a trustee to pay the income from half to testatrix’s son Stuart for life, then, “If my said son shall have lawful child or children of his body who shall survive him, his share of my estate shall go to such child or children, girls at age of 25 years and boys at 30 years and not before.” It was held that the interests of the children would not vest until they reached the stated ages.

Alleged conditions of survival give rise to three types of problems: (1) whether the future interest in question is subject to such a condition; (2) who must be survived; and (3) whether the condition is precedent or subsequent; that is, whether the interest is contingent or vested subject to defeasance. If the future interest is a life estate following a prior life estate, it will never become possessory unless the remainderman survives the life ten-

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ant. If Andrew Baker devises land to James Thorpe for life, remainder to Lucy Baker for life, Lucy's interest, although vested, will not become possessory unless she survives James. If, however, the future interest is a fee simple or an absolute interest in personalty, the failure of the remainderman to survive the preceding estates does not affect his interest unless it is subject to a condition of survival. If Andrew Baker devises land to Lucy Baker for life, remainder to John Stiles in fee simple, John's remainder is not affected by his death before Lucy. It passes to his heirs, devisees, or assigns as if he owned a present estate in fee simple. 250

When a present interest is devised to the surviving members of a group of persons, "surviving" normally means surviving the testator, because language in a will is ordinarily construed to speak from the death of the testator. 251 Hence if Andrew Baker devises land "to the surviving children of my deceased daughter Lucy," those children of Lucy who are living when Andrew dies will take. When, however, a future interest is devised to the surviving members of a group, the normal meaning would ordinarily seem to be "surviving the preceding estates." Thus if Andrew Baker devises land to Lucy Baker for life, remainder to her surviving children, he probably means those who survive Lucy. Most courts adopt this construction unless the context suggests a different meaning. 252 Michigan, however, appears to fol-


251 Eberts v. Eberts, 42 Mich. 404, 4 N.W. 172 (1880).

252 2 Simes, LAW OF FUTURE INTERESTS, §849 (1936); PROPERTY RESTATEMENT, §251 (1940).
low a minority rule that, even in this situation, "surviving" presumptively means "surviving the testator." In *Toms v. Williams*, land and other property were devised to a trustee to hold for eighteen years and then to transfer them to four named persons "or the survivor of them, and to their heirs and assigns forever, as tenants in common." It was held that the word "survivor" related to surviving the testator so that the interests vested indefeasibly on the death of the testator. *Rood v. Hovey* involved a will by which a testator devised his estate to his wife for life or widowhood, remainder to "my children now living, or who may be at the time of her decease or marriage." Two sons who survived the testator predeceased his widow. It was held that their interests vested indefeasibly on the death of the testator. In *Porter v. Porter*, a testator devised his estate to his wife for life and "on the decease of my wife, I desire my property to be divided equally between my surviving children". One son survived the testator but predeceased his widow. It was held that an interest vested indefeasibly in this son upon his father's death and was not defeated by his failure to survive the life tenant.

The rule that "surviving" means "surviving the testator" being only a rule of construction, it ought to be

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253 41 Mich. 552, 2 N.W. 814 (1879); Part Two, notes 112, 244, *supra*. The four named persons were entitled to part of the income during part of the eighteen years. 254 50 Mich. 395, 15 N.W. 525 (1883), Part Two, notes 198, 218, *supra*. 255 L'Etournau v. Henquenet, 89 Mich. 428, 50 N.W. 1077 (1891) is substantially contra. There land was devised to the widow for life, remainder to three named children with a provision that "whereas one or more of my said children may not survive me or my said wife" in such case the remainder to the survivors. The remainder was held vested subject to defeasance by failure to survive the widow. 255 50 Mich. 456, 15 N.W. 550 (1883). Accord: In re Patterson's Estate, 227 Mich. 486, 198 N.W. 958 (1924).
overcome by a clear expression of contrary intention. In Mullreed v. Clark, where a remainder was devised to the testator's son James "and, if James should die without heirs, then" to testator's daughters, the trial court held that "die without heirs" meant die without heirs before the testator, so that James took an indefeasibly vested estate. The Supreme Court reversed, holding that "die without heirs" referred to the time of James's death. Lambertson v. Case involved a devise of land to testator's wife "as long as she lives, and when she gets through with it it shall go to Norma Lambertson if she is living, if not to J. V. Lambertson." Norma survived the testator but predeceased the life tenant. The court rejected a contention that "if she is living" referred to the time of the testator's death and held that Norma's remainder was contingent upon her surviving the life tenant and never vested. In one case, however, the Michigan Supreme Court has applied the rule as if it were a rule of law, defeating intent, rather than a rule of construction designed to ascertain intent. In Sturgis v. Sturgis, a testator devised land to his son David "for and during his natural life and to descend to his male children, if any shall survive him, if not, then to his female children, and should none of his children survive him" to other grandchildren of the testator. At the death of the testator, David had two sons, Frank and James. Frank predeceased David, leaving issue. It was held that the in-
terest of Frank and James vested indefeasibly at the
death of the testator.

When a condition of survival is found to exist, the
Michigan Supreme Court has shown a strong prefer­
ence for a construction which would make the future
interest affected by it vested subject to defeasance rather
than contingent. 259

When a remainder is vested, it is clear in Michigan as
elsewhere that it is not subject to any condition of sur­
vivorship unless such a condition is imposed expressly or
by implication by the terms of the limitation. 260 As to
contingent remainders, however, Michigan developed a
peculiar doctrine, markedly inconsistent with the usual
constructional preferences for early vesting and early
indefeasibility, that every contingent remainder was sub­
ject to a condition of surviving the life tenant unless a
contrary intention was expressly manifested. In Fitzhugh
v. Townsend, 261 property was devised to a trustee for the
life of a granddaughter, with remainder to the surviv­
ing issue of the granddaughter. In the event of the grand­
daughter's death without surviving issue, the property
was to be divided among testatrix's brothers and sisters,
"and the children of such of them as shall be no longer
living." A brother of the testatrix who had died before

259 L'Etourneau v. Henquenet, 89 Mich. 428, 50 N.W. 1007 (1891),
Part Two, note 254 supra; McInerny v. Haase, 163 Mich. 364, 128
N.W. 215 (1910), Part Two, note 216 supra; Van Gallow v. Brandt,
Mich. 400, 272 N.W. 721 (1937). Accord: PROPERTY RESTATEMENT,
N.W. 75 (1921), Part Two, note 262 infra; Lamberton v. Case, 245
Mich. 208, 222 N.W. 182 (1928), Part Two, notes 225, 257, supra;
In re Coots' Estate, 253 Mich. 208, 234 N.W. 141 (1931), Part Two,
note 263 infra; Stevens v. Wildey, 281 Mich. 377, 275 N.W. 179
(1937), Part Two, note 266 infra; Horton v. Moore, 110 F. (2d) 189
(6th Cir. 1940), Part One, note 372 supra.

260 Part Two, note 250 supra.

261 59 Mich. 427, 27 N.W. 561 (1886), Part Two, note 221 supra.
the will was made left a son, William, who survived the testatrix but predeceased the life beneficiary. It was held that William's interest was contingent both upon the death of the life beneficiary without issue and upon his surviving her, so that his estate took nothing. In *Hadley v. Henderson*,\(^{262}\) there was a bequest to testator's son Charles, but in case Charles should die without issue, $3,000 to a daughter Mary, $2,000 to a sister Susan, $1,000 to a niece Alice, and the residue to a missionary society. Susan predeceased the testator, survived by issue. Mary and Alice survived the testator but predeceased Charles. These three had no issue. It was held that the contingent legacies of Mary and Alice "lapsed" upon their death before Charles. *In re Coots' Estate*\(^{263}\) is the most notorious of this strange line of cases. There, land was devised to a trustee for the life of the survivor of the testator's widow and son, remainder to the son's children and their heirs, but if the son should die without issue, to six named nephews and nieces of the testator. Three of these nephews and nieces survived the testator but predeceased his son, who died without issue. The Court rejected the cogent argument that our statutes make contingent future estates descendent and devisable,\(^{264}\) which they cannot be if all are subject to a condition of survivorship until vesting, and held that the devises to the nephews and nieces were subject to a condition precedent of surviving the widow and son.


\(^{264}\)Part One, note 371 *supra*. 
After this decision the Legislature enacted a statute providing:

“In all cases where the owner of an expectant estate, right or interest in real or personal property, shall die prior to the termination of the precedent or intermediate estate, if the contingency arises by which such owner would have been entitled to an estate in possession if living, his heirs at law if he died intestate, or his devisees or grantees and assigns if he shall have devised or conveyed such right or interest, shall be entitled to the same estate in possession.”

Stevens v. Wildey involved a will which became effective before the statute. By it, land was devised to Richard Odell for life, remainder to his children, but if he died without issue to Isaac Odell. Isaac survived the testator but predeceased Richard, who died without issue. It was held that Isaac’s remainder “lapsed.” The Court said, however, that the rule in the Coots’ case was changed by the statute as to dispositions becoming effective after the statute. It would seem, therefore, that the strange rule in In re Coots’ Estate is no longer the law of Michigan.

Professor Gray and many of the courts which have passed upon the question have taken the position that a limitation should be construed as if the Rule Against


266 281 Mich. 377, 275 N.W. 179 (1937); Part Two, notes 124, 223, supra. See: American Brass Co. v. Hauser, 284 Mich. 194 at 200, 278 N.W. 816, 115 A.L.R. 1464 (1938); Dodge v. Detroit Trust Co., 300 Mich. 575 at 606, 2 N.W. (2d) 509 (1942). In In re East’s Estate, 325 Mich. 352, 38 N.W. (2d) 889 (1949), a remainder was limited by a will admitted to probate in 1905, to Percey C. Hunt in fee, “further, in case he dies without leaving direct heirs then said estate to be divided equally between my brothers and sisters.” It was decided that the condition (dying without direct heirs) had not occurred, but the opinion suggests that the contingent future estate of the brothers and sisters was subject to a condition of surviving Percey.
Perpetuities did not exist, and then the Rule should be applied to it, as so construed "remorselessly." American courts, however, are tending to adopt the view that when the limitation is capable of two possible constructions, one of which would violate the Rule and the other of which would not, the latter should be adopted.\textsuperscript{267} The Michigan Supreme Court has not clearly accepted either view, but it has indicated that it will not distort the language of a limitation in order to achieve a construction which would make it valid.\textsuperscript{268}

\textsuperscript{267}Gray, \textit{Rule Against Perpetuities}, 3rd ed., §629 (1915), but compare §633: "When the expression which a testator uses is really ambiguous, and is fairly capable of two constructions, one of which would produce a legal result, and the other a result that would be bad for remoteness, it is a fair presumption that the testator meant to create a legal rather than an illegal interest." Taking the two sections together, Professor Gray may only have meant that the language should not be distorted in order to achieve a construction which would make the limitation valid. See 2 Simes, \textit{Law of Future Interests}, §550 (1936); \textit{Property Restatement}, §875 (1944); Leach and Tudor, "The Common Law Rule Against Perpetuities," 6 \textit{American Law of Property} §§22.44-22.46 (1952). The Restatement adopts and Leach and Tudor prefer the view that the effect of the Rule should have a bearing on construction. The classic statement of the view that it should not is that of Baron Parke in Viscount Dungannon v. Smith, 12 Cl. & F. 546 at 599, 8 Eng. Rep. 1523 at 1545 (1846). One of the best known statements of the other view is that of Lumpkin, J., in Forman v. Troup, 30 Ga. 496 at 499 (1860).

\textsuperscript{268}Rozell v. Rozell, 217 Mich. 324, 186 N.W. 489 (1922). The limitation was to a son for life, remainder to his children for their lives, remainder to the children's heirs. The question was whether the class "children" closed at the testatrix's death or at her son's death. See Part Two, note 276 \textit{infra}. But in Dean v. Mumford, 102 Mich. 510, 61 N.W. 7 (1894) the court held that a testamentary trust for testator's sons, their wives and children, included only wives whom they had at the testator's death, although one of the sons was then unmarried. The opinion indicates that this construction was adopted because any other would make the limitation invalid.