Chapter 4

Future Interests

The validity of legislation abolishing future interests as such has rarely come before the courts, for the legislatures have not undertaken to do away with any of the future interests recognized in modern case law. One great exception is in respect to remainders and reversions limited after fees tail, which, because of the prevalent abolition of that form of land tenure, cannot exist in most jurisdictions. While the legislatures have generally refrained from imposing direct restraints upon the privilege of owners of land to create future interests, they have enacted a rather sizable body of legislation affecting the rights of owners of future interests. Our attention in this chapter will be directed largely to legislation investing private individuals with the power to impair or destroy future interests, for it is around such legislation that most of the constitutional issues revolve.

This chapter has been divided for purposes of convenient discussion into three headings, “Remainders, Reversions, and Executory Interests,” “Powers of Appointment,” and “Powers of Termination and Possibilities of Reverter.” Possibilities of reverter and powers of termination have been treated separately because the constitutional problems which have arisen in respect to these interests are quite unlike those arising in respect to the other future interests. Powers of appointment, while generally present interests, are considered because they are admittedly of importance in any discussion of future interests.
So far as it may be possible or expedient to classify the given interest according to conventional terminology, that will be done.\footnote{The usual classification of future interests, of course, consists of remainders, reversions, executory interests, possibilities of reverter, and powers of termination. This classification does not include all possible types of future interests. There are various kinds of future interests, notably future interests of a statutory nature, which do not strictly fit into any of the conventional molds. See 1 Simes, \textit{Future Interests}, chapter 12 (1936), for a discussion of future interests of statutory origin. Even in respect to the conventional future interests, it appears to be extremely difficult to devise definitions or classifications which do not turn out to be more or less inaccurate, more or less subject to exceptions, and in practice difficult to apply to factual situations. See 1 Simes, \textit{Future Interests}, chapter 5 (1936), wherein he distinguishes vested and contingent remainders; and chapter 6, in which he distinguishes contingent remainders from executory interests. Fortunately, for the purpose of delineating constitutional issues it is not necessary to undertake a consideration of each and every imaginable kind of future interest. The extent to which the conventional or usual future interests are constitutionally protected need only be considered.} However, classifications employed in the law of future interests, important as they are, are not \textit{ipso facto} determinative of constitutional issues. Other factors are very important, such as the purpose to be accomplished by the legislation, the necessity for the enactment, and the economic value of the interests. Statutes are rarely limited in effect to particular types of future interests by name. A given statute may affect different kinds of future interests. Therefore the most objective approach (and the one to be used) is to discuss individually the various types of statutes whose application may impair future interests, rather than to attempt to determine individually what constitutional protection is afforded each type of future interest.

For the most part, it will not be necessary to distinguish equitable from legal future interests. Where it is significant in a given case that the interest is equitable in nature, mention will be made of that fact; otherwise, equitable future interests will be treated as though they were legal future interests.
What is adequate notice and who are necessary parties are problems which are beyond the scope of this discussion. Nevertheless, procedural due process is so intertwined with substantive due process in proceedings affecting future interests that at least a few general statements must be made in regard to parties and notice. To the owner of a future interest it can make little practical difference whether the legislature directly extinguishes his interest by fiat or whether his interest is obliterated in a proceeding in which he is not represented. Questions of necessary parties and adequate notice can arise in almost any kind of proceeding, but inquiries as to who are necessary parties and what is adequate notice especially press for attention when the case is one in which future interests are concerned. Whether there is a future interest at all is frequently a question fraught with much difficulty. So much depends upon the astuteness and diligence of the attorneys for the interested parties. If the possible owners of future interests are not represented in the proceedings, such interests may be eliminated for lack of careful consideration. What is said in the succeeding paragraphs will be applicable to any of the proceedings under the statutes to be discussed subsequently.

In respect to actions or proceedings in which the judgment is *in personam*, it is a fundamental principle of due process that the rights of a person may not be determined unless he is a party.\(^2\) Service of process upon the parties within the jurisdiction of a state is often said to be required by due process of law in order that a judgment *in personam* may be rendered,\(^3\) but due process is probably satisfied by any notice

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which adequately informs the person of what is going on. Persons in being generally are necessary parties whether their interests are vested or contingent. Reversioners and persons having absolutely vested remainders are necessary parties in nearly all situations. If the person is an infant, non compos mentis, or suffering from a legal disability, he ordinarily must be represented by his guardian or by a guardian ad litem appointed especially for the purpose. As to persons unknown or not yet born who may have an interest in the property, certain generalizations may be made. If living persons are joined who are in fact interested in the outcome of the suit in the same way as the unknown or unborn persons, the latter are bound. In case the interests

4 State v. Woodruff, 170 Miss. 744, 150 So. 760 (1933). “... the principal situations where this is not the case being where the person is represented by a trustee and where the person is a member of a very numerous class, so that it is impracticable to join all members.” 3 Simes, Future Interests, sec. 687 (1936). 5 3 Simes, Future Interests, sec. 687 (1936).

6 The failure to appoint a guardian ad litem does not always involve a denial of due process. Where the infant or incompetent has been served with process and he appears and defends or is represented in the proceedings by an attorney, a decree or judgment rendered against him will not be void or subject to collateral attack although subject to reversal on appeal. Levystein Bros. v. O'Bryan, 106 Ala. 352, 17 So. 550 (1895); Linn v. Collins, 77 W. Va. 592, 87 S. E. 934 (1916). It has been suggested that in any event a guardian ad litem is not indispensable in a jurisdictional sense, since the mere filing of a bill against an infant or incompetent is sufficient to make him a ward of the court. McDaniel v. McElvy, 91 Fla. 770, 108 So. 820 (1926). This may be quite true in an in rem proceeding such as a proceeding for the distribution of the estate of a decedent, but in a strictly in personam proceeding, it is extremely doubtful that the solicitation of a court for the interests of the incompetent would be sufficient. The adversary principle in judicial disputes is so deeply embedded in the Anglo-American legal system that any judgment which purports to bind the interests of an incompetent would probably be held void as a deprivation of property without due process unless there were either an opportunity for the incompetent himself to defend those interests, or those interests were represented by a guardian, trustee, executor, or some person before the court.

7 3 Simes, Future Interests, sec. 672 (1936). “... Although this doctrine of virtual representation is a rule of the common law, it is founded on convenience and necessity, since to shackle estates without the power of relief, unless every person having a contingent and possible interest could be brought before the court, as a party complainant
of the living persons who are parties to the proceeding are antagonistic to the interests of unknown and unborn persons, so that the former persons cannot and do not represent the latter, ordinarily a guardian *ad litem* must be appointed by the court to represent the interests of the latter. 8

If the proceeding is one in which the judgment is *in rem*, all persons will be bound whether or not they were joined as parties and whether or not their interests were actually represented, provided that the court has jurisdiction of the *res* and the statutory procedure for giving notice has been followed. 9 Notice by publication is held not to deny due process when the whereabouts of persons to be served cannot be readily ascertained or they are out of the state or when the persons who may have interests are unknown. 10 It is

or defendant, according to the usual forms and ordinary practice of the court, would be to sacrifice the rights and interests of the present generation to those of posterity. All possible parties cannot, as a matter of course, be brought before the court in person, and it would be highly inconvenient and unjust that the rights of all parties in being should be required to await the possible birth of new claimants until the possibility of such birth had become extinct. In accordance with this doctrine of virtual representation, contingent remaindermen and executory devisees not in being may be bound by a judgment when the remaindermen in esse are made parties. The principle upon which this rule rests is that the tenant of the first estate or party in being having a vested interest virtually represents the subsequent estates, because he has a common interest with the other parties in defending. He can be depended on to bring forward the entire merits of the controversy as a protection to his own interest, in like manner as would the remaindermen not in esse if they were present. It should be noted that where the reason of the rule fails the rule itself will not be enforced. Thus, if, under the actual facts of a case, the interests of unborn remaindermen are antagonistic to those of the parties who would represent them, the former will not be concluded by a judgment against the latter. So where persons not yet born are not represented by any party to an action their interests will not be concluded, as for example where their rights are not derived by inheritance from parties to the record, but by purchase from other parties. 15


Notice by publication is insufficient as to known persons of known residence. “Exceptions in the name of necessity do not sweep away the rule that within
quite apparent that persons who have interests may not appear and defend their interests simply because they never saw the notice and did not learn of the proceeding. For this reason there is possibly a limit to the number of classes of judgments in rem which may be authorized by statute or created by judicial action. The courts have recognized the efficacy of such judgments because it is believed to be socially, politically, and economically desirable for a state to have the power to make final determination of property rights which are conceived of as being within her territorial domain.¹¹ That is to say, the rule that no one's interests will be affected by a proceeding unless he is joined or his interests are represented is relaxed because of the paramount need to make a final determination of the status of the title or because of the impossibility of joining all the persons who might possibly have some interest in the property. This rule should not be relaxed to any greater extent than necessity requires. Proceedings which have been held to be in rem are proceedings for the probate of wills and the distribution of the property of a decedent,¹² proceedings to quiet title,¹³ proceedings for the registration of title under the limits of practicability notice must be such as is reasonably calculated to reach interested parties." Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 318 (1950).

It does not appear to have been decided whether it would be a denial of due process if the interests of an ascertainable class of unborn persons (e.g., where there is a contingent remainder to the heirs of a living person) were cut off by a decree or judgment without those interests being represented by a living person under the virtual representation principle nor by a guardian ad litem. A distinction might plausibly be made between unknown claimants, who are bound by the statutory notice even if they were not represented, and unborn claimants in an ascertainable class, who may have to be represented.

¹¹ See Schnebly, Extinguishment of Contingent Future Interests by Decree and Without Compensation, 44 Harv. L. Rev. 378 (1930).

¹² 3 Simes, Future Interests, sec. 677 (1936); Estate of Davis, 151 Cal. 318, 86 Pac. 183 (1907).

Torrens Acts,\textsuperscript{14} proceedings for the sale of land,\textsuperscript{15} proceedings for the partition of land,\textsuperscript{16} and proceedings for the sale, mortgage, or lease of trust res.\textsuperscript{17} This list is not intended to be complete.

\textbf{A WARNING ON THE WORD "VESTED"}

One should be cautioned at the outset against the ambiguous use of the word "vested" which sometimes results in confusion in the cases. In Constitutional Law an interest is said to be "vested" when it has been determined that the particular interest is protected from impairment by a due process clause or some other constitutional provision. The term is also applied in real property law to interests which are ready to vest in possession without the happening of any condition precedent except the determination of the preceding estate. The sense of the term as it is used in these two ways is altogether different. The fact that an interest is vested in the property sense does not necessarily mean that it is immune from legislative impairment (\textit{i.e.}, that it is a "vested interest"). Conversely, it is certainly not correct to say that an interest which is contingent in the property sense is always subject to legislative impairment. Executory interests and contingent remainders are constitutionally protected interests (although not quite in the same degree as are technically vested future interests) which the courts rarely allow to be completely wiped out.

\textbf{I. REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS}

The statutes to be discussed do not fall into any precise groupings. Since each statute presents its own particular

\textsuperscript{14} Tyler v. Judges of the Court of Registration, 175 Mass. 71, 55 N. E. 812 (1900).
\textsuperscript{15} Lee v. Albro, 91 Ore. 211, 178 Pac. 784 (1919).
\textsuperscript{16} Grannis v. Ordean, 234 U. S. 385 (1914).
\textsuperscript{17} Lee v. Albro, 91 Ore. 211, 178 Pac. 784 (1919).
problems which are not germane to any other statute, the order of treatment must necessarily be somewhat arbitrary. The general subject matter of the statutes in the order in which they will be considered is as follows: 1 and 2, compromises; 3, quieting title; 4, 5, and 6, partition, sale, and leasing; 7, allocation of benefits; 8, improvements and repairs; 9, legitimation and adoption; 10, rule against perpetuities; 11, rule in Shelley's Case; 12, Worthier Title Doctrine; 13, destructability rule; 14, fees tail; 15, revocation of grants; 16, marketable titles and limitations of actions.

1. Statutes Which Authorize Compromise of Claims as to Validity or Effect of a Will

In a number of states, statutes are to be found which provide that a court may affirm a compromise in settlement of a controversy as to the validity or effect of a will or of a provision thereof.

The constitutionality of such statutes has been considered in only a few cases. Consequently, the extent to which future interests may be impaired by compromises has not been very well determined. To a large extent our conclusions must rest upon conjecture.

The New York statute 18 confers power upon a court to authorize executors, administrators, and trustees to adjust by compromise any controversy that may arise between persons claiming as devisees or legatees under the will and

18 N. Y. Dec. Est. Law, sec. 19. The statute provides that all persons claiming as devisees or legatees and those claiming the estate to be intestate shall be made parties. It is also provided that where lunatics, infants, or persons not sui juris are necessary parties to a compromise under this section, these shall be represented in the proceedings by a special guardian appointed by the court. And if it appears to the satisfaction of the court that the interests of persons unknown or the future contingent interests of persons not in being are, or might be, affected by the compromise, the court must appoint a guardian ad litem to represent those interests.
persons entitled to or claiming the estate of the deceased under the statutes of descent and distribution. An agreement of compromise in writing pursuant to this statute, if found by the court to be just and reasonable in its effects upon the interests of infants, lunatics, persons of unsound mind, unknown persons, or upon the future contingent interests of persons not in being, is declared to be valid and binding upon such interests as well as upon the interests of adult persons of sound mind.

In Fisher v. Fisher 19 it was held that the statute would authorize a compromise, the effect of which would be to extinguish the possibility of any future contingent interest where, by a fair and reasonable construction of the will, there may be no contingent interest, the whole matter being one of doubt.

That the court has no authority to approve a compromise which results in the elimination of a tangible right unless

19 253 N. Y. 260, 170 N. E. 912 (1930). The testator by his will created trusts for his children, the corpus of which was to be paid over to each child on attaining the age of forty-five. The testator directed the trust to be continued, in the case of the death of any before reaching such age, for any issue of such child until the youngest issue of such child in being at the testator’s death should become thirty years of age, or sooner die, but he failed to make any provision where there was no grandchild in existence at the time of the testator’s death. There were no grandchildren in being at the testator’s death. After the death of the testator, all of his children and his widow entered into a compromise agreement concerning the property left under the will, which in effect wiped out the trust provisions in the will and vested the property absolutely in the beneficiaries named. This compromise was effected under the statute mentioned above.

There was grave doubt whether the testator meant that, in event no grandchildren were living at his death, the child for whom the trust was created should take absolutely and in all events, or whether in case of death of a child under forty-five without leaving issue in being at the testator’s death, there should be an intestacy, in which case the interest would descend to the testator’s heirs, among whom would be the grandchildren. It was determined that the possible interests of the grandchildren born after the testator’s death were so remote, indefinite, and vague as to bring the will within the provisions of the statute, even though the effect of the compromise in the instant case was to wipe out the trust provisions and vest the property absolutely in the beneficiaries.
there is some compensating advantage was expressed in *In re Sidman's Estate*\(^20\) where the following language may be found:

“Where, under a will, a person whether adult, infant, unknown or unborn, receives a tangible right or interest, the absolute elimination of such right or interest without any compensating advantage is not a compromise, it is a complete surrender, a making of a present, and such an act is beyond the deputed power of the court. So long as there is a possibility that any such person may have a right, however remote or contingent, the court possesses no authority to validate an agreement which totally nullifies it, for the reason that no such power has been accorded. Living persons who are *sui juris* may make gifts of their interests if such action suits their humor; others may not, and the court, as the protector of the interests of the latter, may not do it for them.”\(^21\)

The limitations upon the power of the courts, which the *Sidman* and *Fisher* cases attempt to some extent to delineate, do not stem, however, from any constitutional provisions but from the language of the act which requires that the compromise be just and reasonable in its effects upon the interests of infants, lunatics, persons of unsound mind, unknown persons, or upon the future contingent interests of persons not in being. These cases do not determine how far the legislature may go in allowing future interests to be destroyed.

The Massachusetts statute\(^22\) is substantially similar to the New York statute. The Massachusetts Supreme Judicial Court has intimated that an agreement would not be “just and reasonable . . . in its effect upon any future contingent interests that might arise under a will” if it extin-

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\(^{21}\) 278 N. Y. S. 43, 51 (1935).

guished an interest which was more substantial than a "film of mist."

"It is conceivable that future contingent interests may be of such tenuous nature that it would be just and reasonable to remove them even so far as concerns such interests rather than to permit them to remain a cloud upon other rights arising in the estate." 23

However, in the very case in which this language is found, the court below had approved a compromise which extinguished, without compensating factors, some pretty substantial interests. The Supreme Judicial Court seems to have thought that the agreement was "just and reasonable." By the terms of the will offered for probate, a trust was created for the benefit of an unmarried son, aged 52, and a married daughter of the testator. It was provided that upon the death of the son without issue within twenty years after the death of the testator, the share of the son should go to his heirs at law, and, if he were still living twenty years after the testator's death, he should be given his share absolutely. At the time of the testator's death the heir presumptive of the son was his sister and in case of her death his heirs presumptive would be her three minor children. There was considerable doubt about the testator's testamentary capacity. He had been an insane person under conservatorship for many years. The compromise agreement gave the son his share in the trust property outright, thus cutting off all possible benefit which could come to the son's heirs at law under the terms of the will.

In Neafsey v. Chincholo, 24 the Massachusetts Supreme Judicial Court expressed doubt concerning the validity of a "compromise" which looked like an agreement of dissatis-

24 225 Mass. 12, 113 N. E. 651 (1916).
fied devisees, who had simply made over the will to suit themselves. In this case, the testator left a life interest in certain real estate to two of his daughters with remainder to the heirs of the testator at the time of the death of the survivor of the daughters. By the terms of the compromise, the daughters were given fee interests in the real estate in which they were given a life estate by the will, and the remainder to the heirs of the testator was obliterated. The remainder to the heirs of the testator, although contingent because the takers could not be ascertained until the death of the survivor of the daughters, was fairly certain to vest in possession in someone at some time and therefore ought not to have been eliminated except for very good reasons. No such reasons appeared in the case. The decree of the probate court, however, was set aside on the ground that no special guardian had been appointed to represent the future contingent interests as the statute requires.

In *Dodge v. Detroit Trust Co. et al.*

25 the Michigan Supreme Court refused, on the ground that the former proceedings were *res adjudicata*, to set aside a settlement which had been entered into eighteen years previously in anticipation of the Michigan compromise statute. 26 The settlement

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Section 1 (sec. 702.45) provides: "The compromise, settlement or adjustment of any good faith contest of the admission to probate of any instrument propounded as the last will and testament of any decedent, or of any good faith controversy (a) as to the construction, validity or effect of any such provision thereof, whether such controversy shall arise before or after such instrument has been admitted to probate, or (b) as to the rights or interests in the estate of such decedent of any person as beneficiary under such will, or of any child or issue of a deceased child claimed to have been unintentionally omitted from such will, or of the widow claiming to exercise any right of election, or (c) otherwise arising in or growing out of the administration of the estate of any decedent under such will, or of any trust created thereby, including any accounting in such administration, or any distribution under such will or trust, when there is or may be any person interested who is a minor or otherwise without legal capacity to act in person, or whose present existence or whereabouts cannot be ascertained, or where there is any i-
apparently disregarded the interests of unborn persons in a trust set up by the will, but the validity of the compromise as it affected those interests was not discussed by the court.\textsuperscript{27}

alienable estate or future contingent estate or interest which will or may be affected by such compromise, settlement or adjustment, which compromise, settlement or adjustment is made in accordance with the provisions of this act, shall be lawful and valid and binding upon all the parties thereto including such as are represented therein by trustees, guardians or guardians \textit{ad litem} and upon all trusts created by such instrument, and upon all future interests arising thereunder in persons then in being or who may thereafter come into being and shall be recognized and so enforced by all courts and tribunals whatsoever: . . ."  

Section 2 (sec. 702.46) provides that the probate court shall appoint a guardian \textit{ad litem} to represent persons whose whereabouts cannot be ascertained, minors, and incompetents who have no guardian, and unborn persons having future contingent interests or estates. It is also provided that a guardian \textit{ad litem} shall be appointed in case of wills purporting to create trusts where no trustee has qualified or where the trustee doesn’t appear in answer to summons.

Section 3 (702-47) provides that if the probate court finds that the contest was in good faith, and the effects of such agreement upon the estates and interests of the persons and interests represented by any fiduciary or guardian \textit{ad litem} and upon any inalienable estate or interest shall be found to be just and reasonable, an order shall be made approving such agreement.

Section 4 of the original act provided that the act was intended to apply to all cases as well where the decedent had died theretofore as where the decedent shall have died thereafter.

\textsuperscript{27} With the exception of certain specific bequests, the testator devised his entire property, which amounted after payment of debts and taxes to approximately $26,000,000 in trust, the income to be divided five ways, one portion going to the wife of the testator and the other portions to be paid in equal amounts to each of four of the testator’s six children. The share of the income of any deceased child was to go to his issue and upon the death of the last survivor of the children, the trustees were to convey the estate to the heirs of the children. One of the testator’s children was not yet born when the will was executed and therefore not included under the trust. Approximately $2,700,000 was set aside for this child after the testator’s death as its share in the estate. The remaining child, the plaintiff in the Dodge case, was practically disinherited by his father, being given a life income of $150.00 per month. After the will was filed for probate, this son announced his intention of contesting the will. The four children and the disinherited son, John, entered into an agreement, which was immediately binding on the adult signatories, but was conditioned upon obtaining within six months the consent of the minor children, the unborn, and the contingently interested. The compromise statute was pending before the legislature while the negotiations were proceeding and had been enacted when the agreement was reached. The effective date of the statute, however, was approximately two months subsequent to the date of the agreement. Apparently the parties contemplated that the statute was necessary to the fulfillment of the agreement.
The plaintiff's main contention (there were many) was that the trust provisions of the will were null and void *ab initio* because the inclusion of a small amount of real estate caused the whole trust to violate the two-lives rule and that consequently whatever moneys he had received in the attempted settlement were only part of his intestate share of the trust property. The court cast doubt on the correctness of the contention but did not feel compelled to express a definite opinion. Clearly the court thought that the interests purported to be created by the will did have a legal existence at the time of the settlement.

The cases just discussed indicate the temper of the courts but do not aid us very much in setting the constitutional limitations to the legislative power.

We must bear in mind that we are dealing with statutes which authorize compromises. The word "compromise" connotes a giving and taking. A decision of a majority

The guardian *ad litem* to represent future contingent estates was not appointed until after the effective date of the statute and he did not sign until after the decree approving the settlement. The settlement provided for the payment of a lump sum of $1,600,000 plus interest to John and the sum of $1,000,000 to the widow and to each of the four other children mentioned in the will. It was approved by the circuit court and no appeal was taken. At the same time the other four children and the widow entered into a supplemental agreement which re-established out of the remaining property the trust provided for in the will.

28 The two-lives rule was applicable to realty but not to personality. Mich. Comp. Laws 1929, sec. 12934: "Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this chapter; such power of alienation is suspended when there are no persons in being, by whom an absolute fee in possession can be conveyed." And in Mich. Comp. Laws 1929, sec. 12935: "The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of two [2] lives in being at the creation of the estate," etc.

The two-lives statute has been repealed since the Dodge case. Pub. Acts 1949, Act No. 38.

29 The doctrine that the inclusion of a small amount of realty would cause a whole trust to violate the two-lives rule was recognized long before the first litigation in the Dodge case, but was not clearly enunciated until Richards v. Stone, 283 Mich. 485, 278 N. W. 657 (1938).
forced upon a minority is not a compromise; all parties must agree upon the result reached. The statutes presuppose that all parties in being will have voluntarily consented to the agreement. We may assume without argument that a statute allowing the majority of claimants to bind the interests of the dissenting minority of claimants would be held to deprive the latter of their property without due process, except, perhaps, if their interests are extremely unsubstantial and uncertain. It is also obvious that a statute could not make the agreement of the claimants binding upon persons who are not parties to the agreement and are in no way represented in the proceedings.

A statute is needed to make a compromise effective only where there are interests in persons not of age or suffering under a legal disability, or interests in unknown or unborn persons. Heirs and devisees not under any disability can do as they please with their own interests. Compromise statutes will, therefore, normally be unconstitutional only so far as they permit persons in being and *sui juris* to affect the interests of persons *non sui juris* and persons unknown or not in being who cannot take part in the agreement.

The constitutionality of the compromise statutes must first of all be considered in this light: Although a compromise may obliterate some of the interests created by the will, a judicial determination which is even more destructive may be avoided. Were it not for the compromise, a contest of the will might have resulted in a determination that the will is invalid, in which case all of the interests *prima facie* created by the will would have been nullified.30 Or an attack on the

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30 Probate of a will merely declares in a formal way the existence of facts which have previously occurred and furnishes official evidence of those facts. 2 Page, *Wills*, sec. 561 (Lifetime ed.). If, in point of fact, the will is valid, it speaks from the moment of the testator's death, but if it is invalid then the devisee never had any rights. The litigation attending the probate of a contested will is not prosecuted to divest either the heir or devisee of title
validity of a provision might have been successful. Or a construction which would eliminate the existence of the alleged interests might have been adopted by the court. These compromise statutes are founded on the well established maxim of public policy, "interest reipublicae ut finis sit litium." It is better that "paper" interests be impaired than that the property be consumed or diminished by expensive litigation.

The primary consideration in determining the constitutionality of the application of a compromise statute should be whether adequate safeguards are established by the statute to assure that no compromise will be allowed to affect adversely the interests of persons unknown, unborn, or non sui juris, except where there is a bona fide uncertainty as to the validity or construction of the will or of the provision. The technical classification of the extinguished interest should be only a secondary concern. Of course, the substantiality of the interest from the point of view of the likelihood that it will ultimately vest in possession or whether it is vested or contingent in the real property sense must be considered by the court. But the court should consider such to property, but to determine which of them is entitled to the property. Wills v. Lochnane, 72 Ky. (9 Bush) 547 (1873). See Chapter 3, p. 119.

But even though the probate merely establishes the status of the proffered instrument, it might be held to be a taking of property without due process to expose future interests set up by a will to a danger not existing at the testator's death of losing the foundation upon which their existence depends, as by enlarging the grounds for contesting a will, or extending the period in which the will may be contested, or adding to the class of persons who may contest the will. There are apparently no cases involving future interests. However, it has been held, on the ground that a title vested by will is as completely vested as if granted by deed, that to extend the right to contest a will after the estate has thus vested by the death of the testator and permit the property to be taken from the devisees by a contest of the will authorized by a statute passed subsequent to the death of the testator, would be to deprive the devisees of their property without due process. "The right to hold the property under the will free from any liability to contest by any one legally entitled to contest the will at the death of the testator is a vested right, which cannot be taken away by legislative enactment." Havill v. Havill, 332 Ill. 11, 17, 163 N. E. 428, 430 (1928). See Chapter 3, p. 117.
matters only for the purpose of judging the fairness and reasonableness of the compromise. If the interest extinguished could, in fact, have been of no value, or in all probability could never have vested in possession, the court can readily approve a compromise effected in accordance with the statute. On the other hand, if the eliminated interest had a present substantial value or was likely to vest in possession, the court will be reluctant to approve the compromise unless the claims present very difficult and doubtful questions of law and fact. A statute which does not provide for some kind of guarantee that the compromise will be fair in its effect on the interests of persons not in being or not known, or non sui juris, would, in the writer's opinion, be unconstitutional. But one should not generalize that certain classifications of future interest cannot be eliminated by the compromise.

A statute allowing disappointed heirs and devisees to remake any will to suit their desires would be obviously unconstitutional if their agreement could bind the substantial interests of nonassenting parties.

A court which deems the "substantiability" of the extinguished interest to be the primary criterion of the constitutionality of the application of the compromise statute must necessarily put great weight upon whether the effective date of the statute is before or after the death of the testator. Such a court will consider the interests to have "vested" at the death of the testator or certainly when the will has been admitted to probate.31 In Fisher v. Fisher 32 it was stated that the New York statute could not be applied to a will which was effective before its enactment. On the other hand, the will in the Dodge case 33 had been admitted to

31 See note 30 supra.
probate some months before the Michigan statute went into
effect. The result reached in that case is no doubt correct. 
Unfortunately, the court did not really examine the constitu­
tionality of the application of the statute.

Where the statute is enacted before the death of the 
testator, although after the execution of the will, few courts 
are likely to find constitutional objection to allowing the 
statute to apply. The disposition of the property of a 
deceased person is largely a matter of statute. The statute 
which is in effect when the testator dies may be made to 
control rather than the one in effect when the will was 
executed, for a will is deemed to be ambulatory during the 
lifetime of the testator.34 The compromise statute should 
be treated as a provision to the effect that the precise extent 
to which a will creating future interests shall be executed, 
in cases where all other parties in interest in the estate make 
an agreement upon that subject, shall depend upon a judicial 
decree entered upon general principles of justice and reason 
after a full investigation.35 The state indubitably has power 
to regulate prospectively the creation of future interests. It 
is within the power of the state to say that, although future 
interests may be created by will, whenever the recipients 
of such interests are non sui juris, or not known or not in 
being, and there is a grave doubt that the will or the pro­
vision is effective, or it is very uncertain upon proper con­
struction of the terms of the will just what interests were 
created, then such putative future interests may, if certain 
safeguards are followed, be cut off.

34 Estate of Weeks, 154 Kan. 103, 114 P. 2d 857 (1941); Blackbourn 
v. Tucker, 72 Miss. 735, 17 So. 737 (1895); Ostrander v. Preece, 129 Ohio St. 
625, 196 N. E. 670 (1935), appeal dismissed 296 U. S. 543 (1935); In re 
Zeigner's Estate, 146 Wash. 537, 264 Pac. 12 (1928); 1 Page, Wills, sec. 71 
(Lifetime ed.).

2. Statutes Which Authorize the Compromise of Claims Against Trust Estates

A Massachusetts statute enacted in 1861 provided:

"The supreme judicial court may authorize executors, administrators, guardians, and trustees, to adjust by arbitration or compromise any controversy that may arise between different claimants to the estate in their hands, to which such executors, administrators, guardians, or trustees, together with all other parties in being, claiming an interest in such estate, shall be parties. And any award or compromise made in writing in such case, shall, if found by the court just and reasonable in relation to its effects upon any future contingent interests in said estate, be valid and bind such interests as well as the interests of the parties in being: provided, however, that where it shall appear that such future contingent interests may be affected, the court may appoint some suitable person or persons to represent such interests . . . ." 36

In Clarke v. Cordis 37 it was held that merely because the statute operated on contingent interests of persons who were either not in being, or could not, from the uncertain and remote nature of their interests, be made parties to the proceeding, it did not deprive such persons of their right to property in violation of any provision of the Declaration of Rights of the Massachusetts Constitution. 38 In this case

37 4 Allen 466 (Mass. 1862).
38 Article I: "All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness."

Article X: "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. . . . but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. . . . And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."
the testator had devised certain property in trust to his executors with directions to pay over the income to the testator’s four sons during their lives, and upon the death of any son to pay over to his legal heirs the proportion of the income which he would have been entitled to receive. Upon the death of the survivor of the sons, the executors were to convey and assign all of the property to the heirs of the four sons respectively by right of representation. After the probate of the will, one of the sons died. The remaining sons were all alive; some were married and had one or two children. After the deceased son’s death, two minor children appeared and claimed, through their mother, to be his children and lawful heirs. The surviving sons denied that this woman had ever married their brother or that the children were his lawful heirs. In pursuance to the statute quoted above, a compromise agreement was finally entered into between all the parties (the infants were represented by guardians), whereby it was agreed that the two children should presently receive three-eighths of the income to which the deceased was entitled. It was further agreed that they should take the same proportion of the decedent’s share of the principal if they were living at the time of the final distribution of the estate. The children relinquished all claims to any other or greater share. The surviving sons took the remaining five-eighths of the income.

The statute was sustained on the broad ground that it enabled trustees and guardians to enter into expedient and beneficial adjustments or settlements of controversies relating to the property in their hands, just as persons acting in their own right may compose and settle disputes affecting their own estates. If the trustee has the power to compromise, he may be able to avoid litigation which will absorb the value of the estate or destroy all alleged interests. The court believed that the assent of all interested parties might
be presumed to such a statute as this, which (in the opinion of the court) tended to create in everyone concerned a more valuable interest. Contingent interests, it was held, were adequately protected by the provision which requires the court to appoint some suitable person whose duty it shall be to represent them in all proceedings and by the provision that the court shall not allow a proposed compromise unless it is just and reasonable in its effect on all contingent interests.

The result reached in Clarke v. Cordis is easily justified. The outcome of a suit would have been very doubtful. It was clearly to the advantage of everyone to prevent litigation. Moreover, the compromise was probably as advantageous to the interests of the unborn heirs of the surviving sons as could be expected. The sons had a present valuable interest in the same proportions as their presumptive and unborn heirs would some day have in the corpus. They no doubt sought to procure a settlement most advantageous to themselves and their heirs. The only interest of which the heirs of the surviving sons were possibly deprived was the interest in the share of the deceased son. But this they would have taken only if the claimants were not the heirs of the decedent. There was no certainty that the heirs of the surviving sons were actually entitled to any part of the share of the deceased.

The Massachusetts statute has not been given a retroactive effect, but it would seem that the reasons which sustain the prospective operation of the statute would also amply justify its retroactive operation.

39 This was one of the grounds upon which the Massachusetts Supreme Judicial Court sustained the retroactive application of Acts 1785, c. 62, sec. 4, which abolished the common-law presumption that a conveyance to two or more persons (not husband and wife) creates a joint tenancy. The effect of the statute was to turn existing joint tenancies into tenancies in common and to abolish the incident of survivorship. Holbrook v. Finney, 4 Mass. 566 (1808); Miller v. Miller, 16 Mass. 58 (1819). See infra Chapter 7, p. 316.
3. Statutes Which Authorize Proceedings to Determine the Status of Title to Land and Proceedings to Quiet Title: Torrens Acts

Questions do not ordinarily arise as to the general validity of statutes which authorize proceedings to quiet title, or to remove clouds upon title, or to determine adverse claims to land. If the design of such proceedings were to destroy or impair future interests in the same manner that interests are sometimes adversely affected by the compromise proceedings under the statutes just discussed, there would be grave doubts as to whether the legislature had not violated property rights. But the statutes do not vest the plaintiff with a new title; they merely enable him expeditiously to settle what his title is. It appears not to have been seriously urged that statutes like these in any way authorize the impairment of vested rights. Of course, in the application of a statute to specific instances it may well happen that interests are unconstitutionally destroyed by the improper expunction of an instrument from record or it may happen that a valid claim is denied, but the general validity of the statute is not on that account brought into question.

In one aspect these statutes are somewhat likely to occasion the destruction of future interests. Proceedings under the statutes are often declared to be in rem. Since notice by publication is sufficient in proceedings in rem when the

40 The constitutionality of statutes authorizing proceedings for quieting title and registration of title is further discussed in Chapter 3, p. 85 et seq.
42 The constitutionality of the statutes has in the past been challenged often, but very rarely for denial of substantive due process. The common charge has been that the adverse claimants were not adequately advised of the proceedings by the statutory scheme of notice by publication. The statutes have generally been held not to deny procedural due process. Wehrman v. Conklin, 155 U. S. 314 (1894); McDaniel v. McElvy, 91 Fla. 770, 108 So. 820 (1926); Ashton-Jenkins Co. v. Bramel, 56 Utah 587, 192 Pac. 375 (1920).
possible claimants are unknown or nonresident, the owner of a future interest may in fact be uninformed of the proceeding and may not appear with the evidence which would have tipped the scales, so to speak, and have persuaded the court that his claim is valid.

In *McFadin v. Simms*,

43 the failure of persons claiming an indefeasibly vested remainder to appear in response to the statutory notice given them and to offer proof of their title was held to estop them from later making a collateral attack on a judgment which declared the plaintiffs in a statutory proceeding to quiet title to be the owners in fee of the land. The claimants unsuccessfully contended that the statute as applied retroactively (the testator whose will created the remainder died some 37 years before the statute) violated a provision in the state constitution prohibiting retroactive legislation.

44 Now, ordinarily an interest overlooked by the court in a quiet-title proceeding will be less conspicuous than a vested remainder. One would be inclined to answer, if the proposition were put to him abstractly, that such an oversight must be the result of gross mistake or of fraud and collusion, but in any event utterly unjustifiable. However, under the peculiar facts of the case the finding that the plaintiffs in the proceeding were the owners in fee was reasonable. The gaps in the chain of title were thought to be but formal defects, resulting from the loss of a deed or deeds or the failure to record them. The will was not recorded in the county in which the land was located. The plaintiffs' ancestor had lived on the land for more than forty

43 309 Mo. 312, 273 S. W. 1050 (1925).
44 Mo. Const. 1875, Art. 2, sec. 15: "That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be passed by the General Assembly." Now with insignificant modifications, Const. 1945, Art. 1, sec. 13. See Chapter 2, p. 13 supra, for a discussion of the meaning given this provision.
years under a deed purporting to convey a fee-simple estate. The plaintiffs were in complete ignorance of the fact that the grantor to their ancestor was only a life tenant under the will by which the claimants asserted an interest in the land.

The application of the Torrens Acts has given rise to very similar constitutional problems. The purpose of these statutes is not to extinguish interests in land but to do away with the uncertainty in titles inherent in the conventional system of recordation of instruments. By means of a special proceeding in the nature of a proceeding in rem, the owner of land can have the status of the title fixed and have declared the nature of the titles and interests therein and the person or persons in whom such titles and interests are at the time vested. The certificate of title acquired thereby is in theory indisputable evidence of the status of the title. A judicial proceeding to clear titles against all the world would scarcely be possible unless the proceeding got rid of unknown as well as known claims. Personal service upon unknown claimants is, of course, impossible. The statutes provide for notice by publication to all unknown claimants, resident and nonresident, and sometimes provide only for notice by publication to nonresident claimants. Known resident claimants must ordinarily be informed of the proceeding by registered mail or by some other form of individual notice. The Torrens Acts have been often attacked for denying procedural due process, but, with the exception of one or two very early cases, have always been sustained.\(^5\)

\(^{45}\) Eliason v. Wilborn, 335 Ill. 352, 167 N. E. 101, affirmed 281 U. S. 457 (1929); Tyler v. Judges of the Court of Registration, 175 Mass. 71, 55 N. E. 812 (1900); State v. Westfall, 85 Minn. 437, 89 N. W. 175 (1902); Robinson v. Kerrigan, 151 Cal. 40, 90 Pac. 129 (1907): "The state has full control over the subject of the mode of transferring and establishing titles to property within its limits. For these purposes the state has power to provide a special proceeding, in the nature of a proceeding in rem to fix the status of the land and declare the nature of the titles and interests therein and the person or persons in whom such titles and interests are, at the
4. Statutes Which Authorize Compulsory Partition

To what extent owners of future interests are liable to compulsory partition in the absence of a statute has not been very well determined by the cases. It would seem that even in the absence of a statute there should be liability as to all future interests when the partition action is brought by a possessory cotenant who has a fee simple. Suppose, for example, that Blackacre is devised, as to one undivided half, to A and his heirs and as to the other undivided half to B for life, remainder to C and his heirs. A should not have to wait until the death of B before a final partition can be made. Where the possessory interests are life estates, it is less certain that the owners of future interests are liable to compulsory partition by the possessory cotenants. It would seem, however, that if the life estate of the cotenant seeking partition is, or may become, as to any part of its duration, concurrent with the future interest against which partition is sought, then partition should be allowed.

There is very little authority dealing with the constitutionality of statutes under which owners of future interests are subject to liability to compulsory partition by the owners of possessory interests to which the power of partition is incident. But, on principle, the constitutionality of such time, vested. It may do this whenever it may be considered necessary, or likely to promote the general welfare." (151 Cal. 40, 46, 90 Pac. 129, 131.)


Simes, op. cit., sec. 658.

E. g., land is conveyed, as to one undivided half to A for life, remainder to B and his heirs, as to the other undivided half, to C for life, remainder to D and his heirs. If C dies before A, A will hold concurrently with D. Therefore, A should be entitled to partition as against D. Restatement, Property, sec. 177, Illustration 6 (1936). Although in the example, B's remainder can never become concurrent with A's interest, it would be unfair to D not to bind B by the partition.

Outside of California, future interests are not subject to a partition action brought by the sole owner of the entire possessory estate. Powell, Real Property, ¶ 291. The purpose of partition is to sever concurrent interests and not to attempt severance of successive interests.
legislation is clear even where the statute is applied retroactively.\textsuperscript{49} In the first place, there is a public policy which discourages the tying up of property and the prevention of its alienation,\textsuperscript{50} or, as the principle is sometimes put, everyone has the right to enjoy his own in severalty. This particular principle would not in itself authorize an interference with or impairment of constitutionally protected interests, but if the constitutional objections can be further shown to be groundless, public policy would probably weigh heavily in the opinion of the court. A more fundamental reason, and one which does dispel constitutional objections, is to be derived from those cases which hold that liability to partition is one of the inherent characteristics of joint ownership of land.\textsuperscript{51} Where all of the interests are possessory, partition can be compelled by one of the cotenants against the

\textsuperscript{49}Wallace v. Stearns, 96 N. H. 367, 77 A. 2d 109 (1950). At testator's death in 1943 the three devisees respectively became fee owner of an undivided one-half interest, and life tenant and remainderman of the other half. There were no testamentary restrictions on the power to partition. By statute effective June, 1949, the following provision was added to the powers of the Superior Court in partition proceedings: "The holder in possession of a fee simple interest in such real estate may have partition, irrespective of the class or duration of the estate of any petitionee named in the action." N. H. Rev. Laws 1942, c. 410, sec. 1, as amended by Laws 1949, c. 266. It was held that although the statute was retroactive it did not fall within the interdiction of the constitutional provision forbidding retroactive legislation (N. H. Const., Bill of Rights, Art. 23) because it was remedial only and was not injurious, oppressive, or unjust. The court said that the power of partition is remedial in nature and promotes the enjoyment of property and hence should be liberally construed. In an initial proceeding by the same petitioner it was decided that the court was without power to grant partition save in the case of "persons holding with others of the same class." The amending statute first became available late in the pendency of the first petition and was not called to the notice of the court in connection with that petition and was not considered by it in dismissing the petition. The former proceeding was held to be no bar to the present action under the section as amended.

\textsuperscript{50}Mennig v. Howard, 213 Iowa 936, 240 N. W. 473 (1932).

\textsuperscript{51}Richardson v. Monson, 23 Conn. 94 (1854); Metcalf v. Hoopingardner, 45 Iowa 510 (1877); 2 Tiffany, \textit{Real Property}, sec. 474 (3d ed.). However the power is not so absolute that the cotenant cannot preclude himself by agreement with his cotenants from exercising it. Also it seems that if the grantor \textit{expressly} prohibits partition during a period named, involuntary partition is prevented. 2 Tiffany, \textit{op. cit.}
objections and protests of the other cotenants, and this by
to the existing law the same as the interests of poss-
semary cotenants. There is no reason why the owner of a
future interest should be exempted from a liability which is
imposed upon the owners of possessory interests. A third
reason in support of the constitutionality of statutes imposing
liability to partition on owners of future interests is that so
far as the partition is in kind, the owner of the future interest
does not suffer any real loss on account of the partition. The
net effect of the partition can only be to transform his
interest from an interest in an undivided share to an interest
in a determinate portion of the land.

Slightly different constitutional issues might be raised
by statutes which permit the owner of a future interest to
compel a partition. The wording of some of the statutes is
broad enough to permit the owner of any kind of future
interest to compel partition, but probably only the owner of

52 Richardson v. Monson, 23 Conn. 94 (1854); 2 Tiedeman, State and
Federal Control of Persons and Property, p. 667: “The right of compulsory
partition of all joint estates, as an invariable incident of these estates, except in
the case of tenancies in entirety, has come down to us as an inheritance from
the mother country, and all joint estates in the United States have been
created in actual or implied contemplation of the possibility of a compulsory
partition. Consequently, no question can arise as to the constitutionality of
laws providing for compulsory partition.”


54 Unquestionably it may often be undesirable to allow a life tenant to
procure a partition in kind which will be effective beyond his life, especially
where the future interests are held in different proportions than the possessory
estates so that the portion set out for the life tenant will not correspond to
the share to which the owner of the future interest will ultimately be entitled.
It is easy to imagine situations in which the future interests after the life
estates are so uncertain that it would be impossible during the lives of the
tenants to say in what proportions the future owners shall hold the land.
Making a final partition at the instigation of a life tenant will often be out
of the question. And, naturally, if the future interest is in the whole of the
land, it will not at all be affected by a partition in kind of the possessory
interests.
an indefeasibly vested remainder has such power. The reason for the restriction is apparent. It would be impossible to make a permanent or final division where the interest of the person asking partition is contingent or defeasible. One case has been found which sustains the constitutionality of this type of statute (as limited to owners of indefeasibly vested remainders). In Gillespie v. Allison, the real estate was given to a widow “so long as she remained the widow of W. A. Owens,” with remaindermen over. The life tenant and some of the remaindermen sought to compel partition by sale. The defendants, who were also remaindermen, contended that since their rights accrued prior to the enactment, the statute under which the other remaindermen sought partition could not be applied. Before the act, co-owners in remainder or reversion had no power to enforce a compulsory partition of land. It was held that the application of the statute to estates existing prior thereto did not impair vested rights; the statute merely permitted the remaindermen to anticipate the time of partition. This was said to be in furtherance of the public policy which discourages the tying up of property and the prevention of alienation.

55 3 Simes, Future Interests, sec. 665 (1936); 2 Powell, Real Property, ¶ 290.

As of January 1, 1952, statutes of thirteen jurisdictions in general empowered any joint tenant or tenant in common in an unconditional and indefeasible future interest to compel partition of the future interest thus held in co-ownership (Ark., Cal., Del., Ill., Minn., Mo., N. H., N. Y., N. C., Ore., Pa., Tenn., and Wis.); the statutes of five jurisdictions were so worded that probably they had the same effect as the above statutes (Ariz., Md., Neb., N. Mex., and S. C.); and the statutes in five other jurisdictions allowed co-owners of indefeasibly vested remainders to compel partition under restricted sets of circumstances (Ala., Conn., Ind., N. J., and Me.). 2 Powell, Real Property, ¶ 290.

56 115 N. C. 542, 20 S. E. 627 (1894).

57 N. C. Acts 1887, c. 214, sec. 2, now N. C. Gen. Stat. 1950, sec. 46-23: “The existence of a life estate in any land shall not be a bar to a sale for partition of the remainder or reversion thereof, and for the purposes of partition the tenants in common shall be deemed seized and possessed as if no life estate existed. But this shall not interfere with the possession of the life tenant during the existence of his estate.”
In the cases in which remaindermen have been held entitled to bring an action for partition under the statutes, there has been no disturbance of the life estate without the life tenant's consent. In effect, the remaindermen achieve only a partition of title. Permitting persons who do not have an immediate right to possession to compel partition goes beyond the concept of partition as a means of enabling cotenants to enjoy the use of their shares in severalty, but there is no reason why partition should not be used as a means of determining title, and no reason why this determination should await the death of the life tenant.

**Partition by Sale**

The real problems arise when partition in kind is impracticable and a sale is necessary, or where some of the possessory cotenants desire a sale in order to free the title of the encumbrances of future interests. Is a statute constitutional which retroactively creates a liability upon the owner of a future interest to have his interest in the land extinguished?

58 See Drake v. Merkle, 153 Ill. 318, 38 N. E. 654 (1894); Hanson v. Ingwaldson, 77 Minn. 533, 80 N. W. 702 (1899); Hayes v. McReynolds, 144 Mo. 348, 46 S. W. 161 (1898); Blakely v. Calder, 13 How. Prac. 476, aff'd 15 N. Y. 617 (1857); Priddy and Co. v. Sanderford, 221 N. C. 422, 20 S. E. 2d 341 (1942).

59 Nondisturbance of the life estate has not been predicated upon constitutional limitations but upon express or implied limitations in the statutes. The fact that life estates are not disturbed no doubt accounts for the almost complete absence of constitutional cases at this point. Whether it is unconstitutional to confer upon the remaindermen the power to compel a partition which will affect and bind the interests of the life tenant or life tenants is a problem which is somewhat unlikely to come up. Suppose that land is devised to A, B, and C for life, remainders to D and E. D desires partition. If partition by metes and bounds is possible, the court can determine which part D shall have when the life tenants have died and which part will go to E. The life estates are unaffected. Partition statutes do not give the remaindermen any right to possession against the life tenant or tenants which they do not have under the instrument creating their interests. There is ordinarily no occasion to determine the respective shares of the life tenants in a proceeding between the remaindermen and no reason why the remaindermen should want to bind the life tenants.
and transferred to the funds arising from the sale of the land? Perhaps if partition in kind can be made and the purpose of the sale is solely to free the land of future interests, there may be some question as to the constitutionality of applying the statute retroactively. But if partition in kind is impracticable, the way appears to be clear for the application of the statute. The power to compel partition is an inherent feature of joint ownership. Sale is a substitute for the primary right to have the land set off in severalty where partition in kind is not feasible. Since a possessory cotenant (where all the interests are possessory) may be compelled under a retroactive statute to accept a share of the proceeds of sale in lieu of an interest in the land, the owner of a future interest cannot be said to be deprived of property without due process by the commutation of his interest from realty into personalty.

Certainly, where the proceedings are instituted by a possessory cotenant who has a fee-simple interest, there would seem to be no doubt that a sale may properly be ordered notwithstanding the existence of future interests. In Mennig v. Richardson v. Monson, 23 Conn. 94 (1854); Metcalf v. Hoopingardner, 45 Iowa 510 (1877). Supra note 51.

In Richardson v. Monson the statute gave authority to the court to order a sale of the land and to distribute the proceeds among all persons interested in the estate, in proportion to their interests, whenever a sale would, in the opinion of the court, promote the interests of all parties better than a partition in kind, and whenever the property could not be conveniently occupied in common. Conn. Pub. Acts 1853, c. LVII, now embodied in Conn. Gen. Stat. 1949, sec. 8236. The estate of the tenants in common had come into existence prior to the enactment of the statute. Facts were stated in the bill for partition to show that partition in kind was impracticable. The defendants argued that to give the statute a retroactive effect would impair the obligation of a contract and authorize the taking of property from one person and the vesting of it in another, especially in this instance, where only a small minority in interest desired a sale. The court held that the power to compel a partition enters into the very nature of the title of estates held in common and that the only question is how partition can best be made. The legislature had supplied the answer by providing for sale where partition could not be made to the best advantage of the parties. This statute, it was held, introduced no new principle; it only provided for an emergency, when a division could not be well made in any other way.
Howard a testator devised one-half of his realty to his wife, Anna, in fee simple, and to his daughter, Helen, he bequeathed a life estate so long as she and Anna both lived. There was a remainder upon certain conditions in the child or children of Helen who should survive her. At the time of this partition suit, which was brought by Anna, Helen was married but had no children. The plaintiff asked for a sale and alleged grounds to show that partition in kind was impracticable. A statute enacted subsequent to the creation of the interests provided that a partition decree should be binding on the interests of unborn persons. The defendant, Helen, claimed that a sale could not be effective to cut off the interests in her unborn heirs. The court in denying this contention said:

"There was no depriving of any one of his property under the statute in the instant case. The statute merely changed the real estate into a personal estate for the benefit of all parties in interest."

"The primary argument against the instant statute is that it might be said that the unborn children had rights to specific property, and that a sale deprived them of that right and gave them a substitute. As heretofore stated, it is the constitutional provisions against the taking of property without due process which form the foundation of the argument against this class of legislation. The possible injury to owners of the future interest is small in comparison to

61 213 Iowa 936, 240 N. W. 473 (1932).
62 Iowa Acts 1931, c. 231: "When it appears in the petition for partition that a person not in being has an interest, vested or contingent, as a co-tenant of the land sought to be partitioned, the court shall have jurisdiction over the interest of such person not in being and shall appoint a suitable person to act for him in such proceeding. . . . The decree of partition and the division or sale thereunder shall be of the same force and effect as to all such persons, or persons claiming by, through or under them, as though they were in being at the time of entry of the decree, and the property or proceeds of the interest of such person shall be subject to the order of the court until the right thereto becomes fully vested." Now, with immaterial modifications, Iowa Code 1950, c. 651, p. 2140.
the indisputable benefit resulting from the sale, both to the owner of the present estate and also to society at large. The interest of society in the free alienation of land has received recommendation in many ways for centuries past.\textsuperscript{63} Although the court emphasized that the future interests were contingent, it is submitted that the same result would have been reached if the statute had purported to bind the interests of persons in being, whether the interests were contingent or vested. The New York Court of Appeals has allowed an action for partition and sale to be brought by the owner of a fee-simple moiety against the life tenant and persons who, by the law of New York, had vested remainders subject to defeasance.\textsuperscript{64}

One might surmise that if the cotenant who asks partition does not have a fee interest, his power to compel partition by sale is not unlimited. Would a retroactive statute be valid which gives a life tenant the power to affect by a compulsory partition sale the future interests limited after his estate? There are several cases holding that if the statute expressly or by necessary implication permits the life tenant to maintain partition against his fellow cotenants, he has that power as a matter of right, and where the land cannot be divided it may be sold and the proceeds divided.\textsuperscript{65} Judgments for the sale of the land (on suit by a life tenant) have been affirmed against the protests of reversioners having absolutely vested interests in the whole\textsuperscript{66} and against the protests of the owners in fee of the undivided moiety.\textsuperscript{67} In some

\textsuperscript{63} 213 Iowa 936, 942, 240 N. W. 473, 475 (1932).
\textsuperscript{64} Mead v. Mitchell, 17 N. Y. 210 (1858).
\textsuperscript{65} Shaw v. Beers, 84 Ind. 528 (1882); Carneal v. Lynch, 91 Va. 114, 20 S. E. 959 (1895). See also, Sparks v. Clay, 185 Mo. 393, 84 S. W. 40 (1904); Brevoort v. Brevoort, 70 N. Y. 136 (1877) (action by life tenant \textit{per autre vie}); Rutherford v. Rutherford, 116 Tenn. 383, 92 S. W. 1112 (1906) (remainders were contingent here).
\textsuperscript{66} Shaw v. Beers, \textit{supra} note 65.
\textsuperscript{67} Carneal v. Lynch, \textit{supra} note 65.
of the cases the results may be explained by the fact that the interests arose subsequent to the partition statutes. It is very significant, however, that the jurisdiction (Virginia) in which it is held that a life tenant in one moiety of property may compel partition by sale against the fee-simple owners of the other half, is one of the very few jurisdictions where it is held that a statute giving a life tenant power to sell the premises upon a showing of necessity cannot even be applied prospectively if vested remaindermen object to the sale. 68

The courts are much more inclined to sustain a statute which gives a life tenant holding as a tenant in common or joint tenant the power to compel partition by sale against his cotenants, which sale will also be binding on the owners of future interests, than they are to sustain a statute which confers upon a life tenant holding in severalty the power to sell the fee without the consent of the owners of the future interests. A difference in attitude is to be expected. Where a life tenant is authorized to compel partition by sale, the sale is a substitute for the primary objective of the life tenant, which is to have his portion set off in severalty from the portions of the other possessory cotenants. The law recognizes the desirability of enjoyment and use in severalty. But when a statute confers upon a life tenant holding in severalty the power to proceed against the owners of future interests for the sole or primary purpose of compelling a sale of the land free of the future interests, it may seem as though the legislature has unduly empowered one private person to interfere with the property of others.

When sale is ordered in lieu of partition in kind, provision must be made for the transfer of the property rights of the owners of the future interest to the proceeds of the sale. 69

69 Baker v. Baker, 284 Ill. 537, 120 N. E. 525 (1918); Monarque v. Monarque, 80 N. Y. 320 (1880).
The future interests are commuted, not absolutely extinguished. Extinguishment of an interest, of course, is not an impairment of a vested right, if the interest is clearly insubstantial and amounts to no more than a cloud on title, within the technical meaning of that term, or is extremely unlikely to vest in possession. On the other hand, it seems certain that the substantiality of the future interest is no barrier to its being converted to money.

In Gillespie v. Allison, discussed above, the life tenant and some of the remaindermen secured a sale of the land under the provisions of a retroactive statute, notwithstanding the objections of the other remaindermen. There would seem to be no constitutional reason why persons having absolutely vested reversions and remainders, who are entitled to partition under a statute, should not be able to compel a partition sale which will extinguish the possessory interests in the land although the possessory cotenants do not consent. However, an objection to the retroactive application of a statute giving the power to compel a partition sale might be that since owners of future interests cannot have the land in severalty (but in effect achieve only partition of title), disturbance of the possessory interests would be an unwarranted interference with property rights.

5. Statutes Which Authorize the Sale or Mortgage of Land

Even in the absence of statute, courts will direct the sale in fee of land in which there are future interests if the land is in danger of being lost, but there are statutes in many

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70 It will usually be unnecessary to determine whether a given interest is so insubstantial that it can be extinguished, since all interests may be conveniently preserved in commuted form to await the event that will determine which of the interests are valuable.

71 Supra note 56.

72 3 Simes, Future Interests, sec. 789 et seq. (1936); Schnebly, "Power of Life Tenant or Remainderman to Extinguish Other Interests by Judicial Process," 42 Harv. L. Rev. 30, 54 (1928). Such relief will be given also when requested by the owners of the future interests. Beliveau v. Beliveau, 217 Minn. 235, 14 N. W. 2d 360 (1944).
states which provide for, or authorize the sale of land in fee simple, where, except for the statute, such land could not be sold free of interests therein or could not be sold at all.\textsuperscript{73} Statutes authorizing the mortgaging of land so as to bind outstanding future interests are to be found in a number of states.\textsuperscript{74} Quite a few constitutional cases have arisen in respect to statutes authorizing sale but none apparently have arisen out of the application of statutes authorizing the execution of mortgages. The power to mortgage resembles the power to sell; indeed, it is not unusual for both powers to be conferred by one and the same statute.\textsuperscript{75} We may surmise that on the constitutional issue the courts would approach a mortgage case with much the same attitude as a sale case, tending perhaps to allow a mortgage where a sale would not be permitted on the ground that a mortgage is less destructive of the future interests. Discussion will be limited to a consideration of statutes which authorize sale.

\textsuperscript{73} 2 Powell, \textit{Real Property}, ¶ 292, lists the statutes as follows (as of Jan. 1, 1952).

Statutes providing for sale of complete ownership of land in which there are future interests exist in twenty-four jurisdictions: Cal., Conn., D. C., Ill., Ind., Iowa, Ky., Me., Md., Mass., Mich., Mo., N. H., N. J., N. Y., N. C., Ohio, Pa., R. I., Tenn., Va., W. Va., Wis., and Wyo. In Ill., Me., Pa., R. I., and Tenn., the statute can be invoked only if there is present a future interest which is not indefeasibly vested. In D. C., Iowa, Ky., Mass., Mich., Mo., N. H. and N. C., the statute can sometimes apply despite the presence of an indefeasibly vested future interest. In Cal., Conn., Ind., Md., N. J., N. Y., Ohio, Va., W. Va., Wis. and Wyo., the statute becomes available on the presence of any future interest.


\textsuperscript{75} See Massachusetts and New Hampshire statutes quoted infra note 76.
The reader will find in the footnote below, the text of a few representative statutes currently in force.\textsuperscript{76} It will be observed from the quoted statutes that some are broad enough to allow the owners of future interests to compel a sale of the possessory estate. Whether or not the owners of future interests are actually endowed with this power, they very rarely exercise it. The statutes have usually been re­sorted to by the owners of possessory estates.

A statute authorizing sale of land, it is apparent, may be invalid on other grounds than that it is applied retroactively. A statute even when applied prospectively may be unconsti-

\textsuperscript{76} Mass. Gen. Laws 1932, c. 183, sec. 49: "If land is subject to a vested or contingent remainder, executory devise, conditional limitation, reversion or power of appointment, the probate court for the county where such land is situated may, upon the petition of any person having an estate therein, either present or future, vested or contingent, and after notice and other proceedings as hereinafter required, appoint one or more trustees and authorize him or them to sell and convey land or any part thereof in fee simple, if such sale and conveyance appears to the court to be necessary or expedient, or to mortgage the same for such an amount, on such terms and for such purposes as may seem to the court judicious or expedient; and such conveyance or mortgage shall be valid and binding upon all parties."

D. C. Code 1940, sec. 45-1104: "Whenever one or more persons shall be entitled to an estate for life or years, or a base or qualified fee simple, or any other limited or conditional estate in lands, and any other person or persons shall be entitled to a remainder or remainders, vested or contingent, or an interest by way of executory devise in the same lands, on application of any of the parties in interest the court may, if all parties in being are made parties to the proceeding, decree a sale or lease of the property, if it shall appear to be to the interest of all concerned, and shall direct the investment of the proceeds so as to inure in like manner as provided by the original grant to the use of the same parties who would be entitled to the land sold or leased; . . . ."

N. H. Rev. Laws 1942, p. 1085, sec. 28: "When real estate is subject to a contingent or vested remainder, executory devise or power of appointment the superior court for the county in which said real estate is situated may, upon petition of any person who has an estate in possession, remainder or reversion in such real estate, and after notice and other proceedings . . . appoint one or more trustees, and authorize him or them to sell or mortgage and convey such estate, or any part thereof, in fee simple, if such sale, mortgage or conveyance appear to the court to be necessary or expedient; and such conveyance shall be valid and binding upon all parties."

Page's Ohio Code Ann., sec. 11925: "In an action by the tenant in tail or for life, or by the grantee or devisee of a qualified or conditional fee, or
tutional in one or more aspects: there may not be adequate provision for judicial supervision; the possessory owner may be given too unrestricted a power to compel a sale; of any other qualified, conditional, or determinable interest, or by a person claiming under such tenant, grantee, or devisee, or by the trustee or beneficiaries, if the estate is held in trust, courts of common pleas may authorize the sale of any estate, whether it was created by will, deed, or contract, or came by descent, when satisfied that such sale would be for the benefit of the person holding the first and present estate, interest, or use, and do no substantial injury to the heirs in tail, or others in expectancy, succession, reversion, or remainder. This section shall not extend to estates in dower.

The writer did not find any cases holding that judicial supervision was necessary but it would seem a self-evident proposition that, if judicial supervision is not provided for, there cannot be due process. It cannot be denied that in the past many special acts authorizing the sale of land have been sustained where no provision was made for any judicial supervision or any provision for the representation of owners of interests. But it is submitted that the cases which sustain such acts cannot be taken as authorities by modern courts. The courts which sustained such acts often expressed their disapproval of what had been done and refrained from striking down the acts only because at the time so many titles were derived from sales made under special authorization by the legislatures. See Norris v. Clymer, 2 Pa. 277 (1845) where a list of 900 statutes, in principle like the one there in issue, was laid before the court. Since at least 10,000 titles, said the court, depended on legislation of this stamp, “It would be fraught with incalculable mischief to let a doubt rest on the power of the legislature.” It was stated in Clusky v. Burns, 120 Mo. 567, 568, 25 S. W. 585, 586 (1893): “‘It would be entirely safe to say that millions of dollars have been invested upon the strength of these titles; and for the courts of this day to declare the acts, and the titles made in pursuance of them, void, would be a hazardous undertaking, and would unsettle property rights to an alarming extent. We must, therefore, decline to go into the question, or consider it open to discussion.’”

The power of the persons holding the present estate to compel a sale is in no jurisdiction, irrespective of whether the future interests are vested or contingent, as complete as the power of a cotenant to compel partition and sale. Schnebly, “Power of Life Tenant or Remainderman to Extinguish Other Interests by Judicial Process,” 42 Harv. L. Rev. 30, 70 (1928). The statutes generally provide that the petitioner for sale must allege and prove facts which show some necessity for the sale or that the land is not beneficial to him. See the statutes quoted supra note 76. Moreover the court is commonly directed not to decree a sale unless the interests of all persons will be subserved or unless the sale will be for the benefit of the person holding the first and present interest and do no substantial injury to the owners of future interests. See the statutes quoted supra note 76. See Restatement, Property, sec. 179, ¶ 1 (1948 Supp.), for an enumeration of statutes classified according to the requirements of proof as to need for, or expediency of, sale for reinvestment.

What degree of necessity must the possessory tenant prove in order to entitle himself to a sale? That, of course, depends in the first instance upon
or the statute may not provide for the transferring of the interests in the land to the proceeds of the sale. Whether the statute is applied retroactively or prospectively the judgment must substitute the fund for the land or the interests will not be concluded. It is only because the interests are merely the wording of the particular statute. To what extent the owners of future interests are constitutionally entitled to a finding of necessity is more difficult to determine. Some finding is undoubtedly necessary. A sale will always be justified if the land is about to be lost by the life tenant and remaindermen alike because the income is insufficient to preserve the property or to pay taxes and encumbrances. Courts of equity often have granted relief in the absence of statute. Gavin v. Curtin, 171 Ill. 640, 49 N. E. 523 (1898); Graff v. Rankin, 250 F. 150 (7th Cir. 1918). Where there are future interests in unborn persons and all the persons in being consent to the sale, there seems to be no denial of due process in ordering a sale merely upon a showing that a sale will be advantageous to the present tenant and not unduly prejudicial to future interests. Sohier v. Massachusetts General Hospital, 3 Cush. 483 (Mass. 1849); Springs v. Scott, 132 N. C. 548, 44 S. E. 116 (1903); Anderson v. Wilkins, 142 N. C. 154, 55 S. E. 272 (1906); Lee v. Albro, 91 Ore. 211, 178 Pac. 784 (1919); Geary v. Butts, 84 W. Va. 348, 99 S. E. 492 (1919). Where the future interests are vested, perhaps something more needs to be shown than that the sale will be advantageous to the life tenant. The Ohio statute (supra note 76) is one of the most liberal. It permits a life tenant to compel a sale contrary to the wishes of the owner of the indefeasibly vested remainder or reversion upon a showing merely that he is unable to manage the land, that the income is small, and that if it were sold and the proceeds invested, a much larger income could be produced, provided that a sale will do no substantial injury to owners of future interests. It is possible that the authority purported to be conferred by this statute may be held to be in excess of constitutional limitations where the life tenant is merely an investor or creditor, or where the land is very likely to have a much greater value and command a much higher price at the expiration of the life estate. A statute which would clothe a life tenant with the power to compel a sale without respect to the effect on future interests whenever a sale would be desirable from his point of view would probably be declared unreasonable. McConnell v. Bell, 121 Tenn. 198, 114 S. W. 203 (1908).

See Restatement, Property, sec. 179, ¶ m (1948 Supp.) for an enumeration of extent to which statutes providing for partition and judicially ordered sales provide for commuted money payments to holders of successive interest.
commuted by the sale—changed from realty to personalty—that forced sale can at all be justified.

Since all interests must be transferred to the proceeds, the courts have never found it necessary to decide whether there are interests which are so slight that they can be extinguished without recompense. All interests may be conveniently preserved in commuted form to await the happening of the event which will determine which of the interests would have vested in possession, or as the situation then stands, who will get the money.

For convenience, the statutes can best be considered under the following heads: (1) where the owner of the possessory estate seeks to compel a sale of land in which the future interests are contingent; and (2) where the owner of the possessory estate seeks to compel a sale of land in which the future interests are vested.

Contingent future interests, as they appear in the constitutional cases, may be divided into three classes: (1) interests which are contingent because limited to persons not yet in being; (2) interests which are contingent because the identity of the persons who are to take is uncertain, although there are persons in existence to whom one can point as possible takers if the life estate were to end at once (e.g., a remainder to the heirs of a living person where there are heirs apparent or presumptive in existence); and (3) interests which are contingent because the interest of a designated person is conditioned upon some uncertain event such as the death of the life tenant without issue.

I have treated both executory interests and contingent remainders under the heading of contingent future interests. The courts do not seem to have made any distinction between the two kinds of interests in passing upon the constitutionality of the statutes. At least when the statutes operated prospectively, the courts have allowed life tenants to procure forcible
commutation of both common-law contingent remainders and of contingent executory interests. Similarly, owners in fee have been permitted to commute executory interests limited in total or partial defeasance of their estates. Of course, in those jurisdictions in which the common-law rule of destructibility of contingent remainders still obtains, it would be much easier for the courts to permit retroactive destruction of contingent remainders than of executory interests. An indestructible contingent remainder does not differ substantially from an executory interest.

(a) Contingent Future Interests. Insofar as the statutes under discussion empower the owner of a freehold estate to extinguish through judicial sale contingent interests of persons not yet born, they are held constitutional, even as applied to contingent interests created before their passage. The courts are faced with the problem of weighing the possible disadvantage which the unborn persons may suffer against the indisputable disadvantage to society if lands are

80 Remainders to persons unborn or unascertained: McClure v. Crume, 141 Ky. 361, 132 S. W. 433 (1910) (prospective); Sohier v. Mass. Gen. Hospital, 3 Cush. 483 (Mass. 1849) (retroactive); Garrison v. Hecker, 128 Mich. 539, 87 N. W. 642 (1901) (retroactive); In re Field, 131 N. Y. 184, 30 N. E. 48 (1892) (prospective); Geary v. Butts, 84 W. Va. 348, 99 S. E. 492 (1919) (retroactive); In re Rees, 182 Wis. 239, 196 N. W. 239 (1923) (prospective). Remainders to ascertained persons: Linsley v. Hubbard, 44 Conn. 109 (1876) (retroactive); Bamforth v. Bamforth, 123 Mass. 280 (1877) (prospective); Gamble’s Estate, 9 Dist. 691 (Pa. 1900) (prospective). It is difficult in many instances to determine whether cases should be cited in this note or in that succeeding.

81 In re Vail, 99 N. J. Eq. 598, 133 Atl. 866 (1926) (prospective); Clark v. Clark, 110 Ohio St. 644, 144 N. E. 473 (1924) (prospective); Symmes v. Moulton, 120 Mass. 343 (1876) (prospective); Burlingham v. Vandevender, 47 W. Va. 804, 35 S. E. 835 (1900) (prospective).

82 Whitcomb v. Taylor, 122 Mass. 243 (1877) (retroactive); In re Grenawalt’s Appeal, 37 Pa. 95 (1860) (prospective).

83 See 3 Simes, Future Interests, sec. 98 (1936).

made inalienable for indefinite periods of time. In comparison to the benefit resulting from the sale, both to the owner of the present estate and also to society at large, the possible injury to potential interests of persons who may never be born is small. These interests can be adequately protected by being transferred to the fund arising from the sale. The courts do not seem to have any difficulty in making a choice in favor of alienability. In *Geary v. Butts* 85 it was said:

"Without such authority as this act bestows an estate subject to contingent remainders frequently might be tied up indefinitely, and a sale thereof rendered impossible, because no purchaser could be induced to risk a title which would be a source of future litigation, when the interests of remaindermen, living and unborn, clearly might require a sale owing to lack of funds to preserve the corpus of the property at its original value or to develop or improve it sufficiently to yield the income that it should yield. Without such remedy not only is the sale of such property rendered difficult, but its value may be greatly diminished or entirely lost to those interested therein." 86

In some of these cases the sale appears to have been allowed merely for the reason that sale was advantageous to the life tenant (and not too prejudicial to the unborn owners of future interests). 87

So long as no person is born into the class of possible takers there is really no constitutional problem at all in the retroactive application of the statute. The constitutional provisions protect the rights of persons. It is very difficult to see how an unborn person can have any constitutional rights. However, a person may subsequently be born who will claim that his interest in the land was unconstitutionally extin-

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85 84 W. Va. 348, 99 S. E. 492 (1919), *supra* notes 80, 84.
86 84 W. Va. 348, 354, 99 S. E. 492, 494.
FUTURE INTERESTS

guished. A sufficient answer to his claim would seem to be that his alleged interest in the land was extinguished for good reason while it was a mere possibility but that his rights were not destroyed as such, having been transferred to the fund arising from the sale.

When there are in being possible takers, the question becomes more difficult whether the legislature can by retroactive statute empower the owner of the possessory estate to commute the future interests by forced sale. The courts recognize that interests of living persons are more substantial, and are entitled per se to greater constitutional protection than the interests of persons not in esse. However, retroactive statutes which apply to contingent future interests of living persons have been sustained. Generally, in the cases sustaining the retroactive application, there has been proof that the property is unproductive and useless to the life tenant, but usually proof has been lacking that sale is essential to the preservation of the interests of the life tenant and remaindermen. It is not clear whether the courts would approve a retroactive statute which purports to authorize a

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89 Clarke v. Hayes, 9 Gray 426 (Mass. 1857) (remainder to heirs of a living person); Willhite v. Rathburn, 332 Mo. 1208, 61 S. W. 2d 708 (1933) (to A for life, remainder in fee to the heirs of her body); Re Mersereau, 233 N. Y. 540, 135 N. E. 909 (1922) (devise to A for life, remainder to her heirs). But see Rogers v. Smith, 4 Pa. 93 (1846) holding that the legislature could not confer on a life tenant (who had testamentary power of appointment) the power to convey the fee. The remainder was to the heirs of the life tenant who had several minor children living at the time the statute was passed. The reason, however, that the interests of the minor children were held not to be affected by the statute was apparently that they were not represented before the legislature.

In Willhite v. Rathburn supra it was contended that the statute conflicted with the provision in the Missouri Constitution prohibiting retroactive legislation (supra note 44) insofar as it affected an estate created prior to its enactment. It was held that the statute did not fall within the prohibition, which only prevents legislation operating retrospectively to the substantial prejudice of the interested parties, for it contemplated only a beneficial change from a less fruitful to a more fruitful form of property with no injury to the interests of any person.
sale upon a showing merely that a sale will be desirable for the life tenant. The justification which the courts give for allowing a forced sale is that a beneficial change is merely wrought in the form of the property without loss or injury to any interests.

When the takers are ascertained and only the event is uncertain, there appears to be a divergence of opinion as to whether the statute may be given retroactive effect. The Connecticut Supreme Court upheld a special legislative act empowering a life tenant to procure a judicial sale which destroyed alternative contingent remainders to ascertained persons, notwithstanding the objections of the remainder-men. The New York courts have held, on the other hand, that when the owner of the contingent future interest is an ascertained living person (as distinguished from a member of a class of possible takers), the legislature has no power to authorize a sale of lands free of his contingent interest unless he assents to the sale, or unless he is disabled on account of infancy or lunacy from acting in his behalf. Dicta in accord

90 Linsley v. Hubbard, 44 Conn. 109 (1876). The land was devised to M. for life and upon certain contingencies the life estate was to become a fee simple in her and the heirs of her body; otherwise, upon her decease, the remainder was to pass to others, among whom were the plaintiffs. The real estate was completely or nearly completely unproductive. M. had no other means of support except that which she received from relatives. She was thirty-seven years old and unmarried. At her request the legislature passed a resolution authorizing the sale of the land, the proceeds of which were to be invested at interest. The resolution further provided that M. should be maintained with the income from the invested proceeds and that upon her death the principal should be paid over according to the terms of the will. The plaintiffs sought to enjoin the sale of the land on the ground that it amounted to a taking of their property in violation of Article I, sec. 11 of the Connecticut Constitution: “The property of no person, shall be taken for public use without just compensation therefor.” Held: Plaintiffs are not being deprived of their property. It was simply changed from one kind of estate to another. If a sale can be made of real estate held in joint tenancy, although there is a tenant opposed to the sale, then this resolution surely does not deprive plaintiffs of any vested right.

91 Brevoort v. Grace, 53 N. Y. 245 (1873). Testator devised land to his daughter E. for life, the remainder to her issue in fee; in case of her death without issue or children of issue surviving, then to such of the children of
with the New York view may occasionally be found in the cases of other jurisdictions.92

The Connecticut and the New York cases cannot be reconciled. The only answer seems to be that some courts are more inclined than others to protect property interests against what appears to them to be unwarranted encroachments by the legislature, and consequently divergent results must be expected. Even those courts which have allowed the forced commutation of contingent interests of living persons would probably draw a line somewhere and say thus far the legislature can go but no farther. The Connecticut Supreme Court had probably nearly reached that line.

(b) Vested Future Interests. The courts are reluctant to uphold a statute which permits the extinguishment of vested interests without the consent of the owners. The gen-

the testator's brother J. as should be living at the time of the testator's death and to their heirs. The legislature passed a special act (Laws 1872, c. 23) authorizing the Supreme Court to order a sale in fee-simple absolute upon the petition of E. and her issue. The act provided for the investment of the proceeds for the benefit of those entitled under the will. At this time E. had one child, an adult. All the children of J. had died, leaving heirs, a portion of whom were adults. H. joined with his mother in the petition for the sale of land. Their reason for wishing a sale was that the assessments for improvements were in excess of the income. Held: The adult heirs of J. had an estate in expectancy, contingent upon the death of E. without issue surviving, and the statute, so far as it authorized the transfer of such interest without their consent, was unconstitutional. The court inferred, however, that a sale would have been ordered if it had been necessary for the payment of taxes and assessments. Accord, Powers v. Bergen, 6 N. Y. 358 (1852); Gedney v. Marlton Realty Co., 258 N. Y. 355, 179 N. E. 766 (1932). But see Re Mersereau, 233 N. Y. 540, 135 N. E. 909 (1922), where it is held that collateral heirs need not be made parties.

92 Brown v. Brown, 83 W. Va. 415, 422, 98 S. E. 428, 431 (1919). Land was devised to W. for life, with remainder to the heirs of his body, but if W. should die without issue living at the time of his death, then the land should pass to C. and E. for life, with remainder to their issue. E., who was an adult, sui juris, objected to the sale. The court said "But we seriously doubt the constitutional right and power of the Legislature to authorize a court to sell the lands, or any vested interest therein of a person who is sui juris, without his consent, simply for the purpose of reinvesting the funds for his benefit. The jus disponendi is a property right which the policy of the law has always been to allow the owner, when sui juris, to determine for himself."
eral view seems to be that statutes which permit the invol-
untary extinguishment of vested future interests cannot be
applied to interests which were in being prior to the statute. 93

93 Statutes authorizing the sale of lands in which there are future interests
must be distinguished from statutes which authorize the sale of a decedent's
land for various purposes such as payment of debts or facilitation of dis-
tribution of the estate among the heirs or devisees. See Chapter 3, p. 124
supra.

A caveat must also be interposed here in respect to statutes authorizing
the sale of lands belonging to minors, lunatics, and other persons who are
non sui juris. The power of the legislature to authorize the sale of an infant's
land is held to be derived from its functions as parens patriae. As general
guardian of all, it may justly interpose and authorize the property to be sold
for the benefit of such persons. Otherwise many minors and incompetents
might suffer for lack of legal capacity to dispose of property which does
reason often given for the validity of such legislation is that the property of
the infant is not taken from him; it is merely converted from realty into
personalty for his benefit. Dosrey v. Gilbert, 11 Gill and J. 87 (Md. 1839);
Louisville, N. O. & T. Ry. Co. v. Blythe, 69 Miss. 939, 11 So. 111 (1892);
Clarke v. Van Surlay, 15 Wend. 436 (N. Y. 1836).

The interests which are sought to be sold or extinguished under these
statutes are frequently future interests, but the broad ground upon which
statutes relating to the disposition of the land of incompetents are sustained
renders unnecessary a distinction between future interests which are vested
and those which are not. It is clear that any interest which an infant has in
land may be sold, provided only that it is an interest which is alienable under
the laws by one sui juris. Reversion: Davidson v. Koehler, 76 Ind. 398
(1881). Vested remainders: Davis v. Helbig, 27 Md. 452 (1867); Ebling v.
Lee, 10 B. Mon. 495 (Ky. 1850); Rice v. Parkman, 16 Mass. 326 (1820);
Gannett v. Leonard, 47 Mo. 205 (1871); Stewart v. Griffith, 33 Mo. 13
(1862); In re Post, 13 R. I. 495 (1882).

It is firmly established that the legislature may authorize the guardian or
trustee of an infant to sell the realty of the infant if such sale is for the infant's
benefit. The validity of the title under such sale does not depend on the assent
of the infant; he cannot disaffirm the sale on coming of age. Munford v.
Pearce, 70 Ala. 452 (1881); Todd v. Flournoy's Heirs, 56 Ala. 99 (1876);
Brenham v. Davidson, 51 Cal. 352 (1876); Davidson v. Koehler, 76 Ind.
398 (1881); Davis v. State Bank, 7 Ind. 316 (1885); Davis v. Helbig, 27
Md. 452 (1867); Dorsey v. Gilbert, 11 Gill and J. 87 (Md. 1839); Nelson's
Heirs v. Lee, 10 B. Mon. 495 (Ky. 1850); Clusky v. Burns, 120 Mo. 567,
25 S. W. 585 (1893); Gannett v. Leonard, 47 Mo. 205 (1871); Stewart v.
Griffith, 33 Mo. 13 (1862); Louisville, N. O. & T. Ry. Co. v. Blythe, 69
Miss. 939, 11 So. 111 (1892); Rice v. Parkman, 16 Mass. 326 (1820);
Snowhill v. Snowhill, 3 N. J. Eq. 20 (Ch. 1834); Ebling v. Dreyer, 149
N. Y. 460, 44 N. E. 155 (1896); Cochran v. Van Surlay, 20 Wend. 365
(N. Y. 1838); Clarke v. Van Surlay, 15 Wend. 436 (1836); In re Post,
13 R. I. 495 (1882).
Future Interests

It has been so held both in regard to special acts and in regard to general acts.

Since the courts distinguish between vested and contingent future interests in respect to liability to forced sale under a retroactive statute, it is appropriate to ask: "Just what is included under the heading of vested future interests?" The

A statute authorizing the sale of the lands of an infant is not objectionable because it was enacted subsequent to the acquisition of the lands by the infant. Indeed, in nearly all of the cited cases the statutes were retroactive.

In a number of cases involving special statutes (which were necessarily retroactive) it was held that sale might properly be for any purpose whatsoever, provided only that it be one which the infant might have approved had he been sui juris. Cochran v. Van Surlay, 20 Wend. 365 (N. Y. 1838); Davidson v. Kochler, 76 Ind. 398 (1881); In re Post, 13 R. I. 495 (1882). The burden, it has been held, is on the infant, or the person claiming through him, to show that there has been a breach of trust or violation of good faith on the part of the person who applied for the special statute, or that there was no need for a sale and that the infant was not benefited by it. Snowhill v. Snowhill, 3 N. J. Eq. 20 (Ch. 1834).

As to the validity of retroactive legislation authorizing mineral leases which will extend beyond the minority of the infant, see note infra.

Just as the legislature has the power to authorize the sale of an infant's property, so it can authorize the guardian of a person non compos mentis to sell a part of his ward's real estate. Rider v. Regan, 114 Cal. 667, 46 Pac. 820 (1896); Davison v. Johannot, 7 Metc. (48 Mass.) 388 (1884). Statutes authorizing the appointment of a guardian for persons who have been shown to the satisfaction of a court examining into the matter to be incapable of managing their own affairs, whether because of senility, alcoholism, idiocy, or other cause, have been declared not to deprive the incompetent of his property without due process. Shapter v. Pillar, 28 Colo. 209, 63 Pac. 302 (1900); Kutzner v. Myers, 182 Ind. 669, 108 N. E. 115 (1915); Flewwellin v. Jeter, 138 Fla. 540, 189 So. 651 (1939).

94 Ervine's Appeal, 16 Pa. 256 (1851); Hegarty's Appeal, 75 Pa. 503 (1874); Kneass's Appeal, 31 Pa. 87 (1855).

Pa. Const. Art. I, sec. 1 guarantees the privilege to acquire, possess and protect property. Art. 1, sec. 9 provides that an accused cannot be deprived of his life, liberty, or property unless by the law of the land. Sec. 9 has been construed to prevent the unreasonable deprivation of anyone's property by the legislature. Supra Chapter 2, note 17 and infra note 100.

95 Gilpin v. Williams, 25 Ohio 283 (1874); Ream v. Wolls, 61 Ohio St. 131, 55 N. E. 176 (1899); McConnell v. Bell, 121 Tenn. 198, 114 S. W. 203 (1908).

Ohio Const., Art. 2, sec. 28, provides that "the general assembly shall have no power to pass retroactive laws or laws impairing the obligation of contracts." The statute in McConnell v. Bell was held not to afford due process and was held not to come within the meaning of the expression, "the law of the land" (Tenn. Const., Art. 1, sec. 8, supra Chapter 2, note 13).
courts tend to follow real property classifications closely. The following have been held to be "vested" interests in the sense that they could not be involuntarily sold: an indefeasibly vested remainder in fee,\textsuperscript{96} a vested remainder subject to a power of sale,\textsuperscript{97} a reversion in fee,\textsuperscript{98} a reversion subject to a contingent remainder,\textsuperscript{99} and a reversion subject to a testamentary power of appointment.\textsuperscript{100} Technical classifications are useful to the court when it has to make distinctions between vested and contingent future interests in constitutional

\textsuperscript{96} Watkins v. Ford, 123 Va. 268, 96 S. E. 193 (1918) (devise to P. for life, remainder to testator's nephews and nieces); Kneass's Appeal, 31 Pa. 87 (1855) (testator devised land to wife for life and after her death the estate was to be divided equally among the testator's children); Curtis v. Hiden, 117 Va. 289, 84 S. E. 664 (1915).

\textsuperscript{97} Ervine's Appeal, 16 Pa. 256, 257 (1851). The testator directed in his will that his executors should rent his lands, and support his son Daniel out of the proceeds, and "it is further my will and desire that none of my real estate should be sold during the life of my said son Daniel, . . . and it is further my will and desire that after the death of my said son Daniel, that then my real estate shall be sold to the highest bidder, and all my children to receive share and share alike." At Daniel's instigation an act was passed authorizing a sale and the investment of the proceeds, the interest to be paid to Daniel during his life and the principal sum to be subject to the provisions of the will. Held: The legislature could not anticipate the time provided in the will for the exercise of the power and that the legislature did not have the power to direct a sale against the wishes of the other parties in interest (the brothers of Daniel) who were \textit{sui juris}. A sale would have deprived them of the probable increase of the land during Daniel's life and of the privilege of taking it as land at his death.

\textsuperscript{98} Hegarty's Appeal, 75 Pa. 503 (1874). (Devise to Y. and after her death to various charities. Devise to charities held void. Reversionary interest passed by intestacy to testator's brothers and sisters.)

\textsuperscript{99} Gilpin v. Williams, 25 Ohio 283 (1874). (Devise to Mrs. G. for life, and after her death to her children. Mrs. G. was in her late forties and had no children. No disposition was made of the inheritance. Defendants were the heirs of the testator.)

\textsuperscript{100} Shoenberger v. School Directors, 32 Pa. 34 (1858). (Devise to Mrs. S. for life, with power to appoint by will amongst her children or grandchildren, with remainder over, in default of appointment, to the surviving children and issue of deceased children \textit{per stirpes}.)

It was held in the Shoenberger case that the act here was the sort prohibited by the ninth section of the Bill of Rights, which declares that a person accused of crime cannot be deprived of life, liberty, or property, "unless by the judgment of his peers, or the law of the land." See Chapter 2, note 16. The court said that if the property of criminals was protected in this way, surely the property of persons in the position of the heirs must be likewise protected.
cases, but it should be careful not to fall a victim to mere labels. Should, for example, a vested remainder for life, where the remainderman is aged and in poor health and the life tenant young and vigorous, be accorded the same degree of protection as a vested remainder in fee? Should not an executory interest be given the same protection as a vested remainder where the event is certain to occur and the takers are ascertained persons in being? A very commonplace example may be given wherein if property concepts are applied without reservation, an undesirable result might be reached. Suppose A devises Blackacre to B for life, remainder to B's heirs, in a jurisdiction where the rule in Shelley's Case is not applicable. B has a numerous progeny. In technical contemplation the reversion descends to A's heirs, but should it not be held that they cannot prevent a sale of the fee by the life tenant?

Life tenants seeking advantage of the statutes have not usually attempted to show that the property would probably be lost to everyone unless sold—the kind of showing upon which equity will, in the absence of a statute, order a sale notwithstanding the remainderman's insistence upon his alleged rights. Where the situation is such that equity would grant relief, there is no reason why the life tenant should not be permitted to proceed under a statute enacted after the creation of the life estate rather than in equity, if he so prefers. But what the life tenants generally have sought is the sale of the land merely for the purpose of investing the proceeds in other property which would produce a greater income.

The retroactive application of statutes authorizing the involuntary sale in fee of land in which there are vested future interests is probably unwarranted in most instances. No pressing social policy requires that all such interests be liable to sale upon the request of the owner of the freehold. The
operation of the statute can, without very serious consequences, be restricted to interests subsequently coming into being.

In Kentucky and Virginia, upon the ground that one who is *sui juris* cannot be compelled to defer his right of disposition to the judgment of a court, it has been held that even as to subsequently created interests, legislation authorizing sale deprives the nonconsenting owners of vested future interests of property without due process.101 Purely as a policy question, it might be unwise to subject vested future interests to a liability to be liquidated, but it does not seem reasonable to say that such a liability cannot even be imposed prospectively without an unconstitutional taking of private property. When the problem arises hereafter in other jurisdictions, this writer is inclined to think that most courts will not follow Kentucky and Virginia, assuming that the statute in question is adequately drawn, with provision for proper judicial supervision and with some restraint upon the power of the owner of the freehold interest to compel a sale. New Hampshire, Ohio, and Pennsylvania have held contrary to Kentucky and Virginia.102 Of course, the choice will not be easy to make where the life tenant seeking to take advantage of the statute is merely an investor or creditor, or where the land is very likely to have a much greater value and command a much higher price at the expiration of the life estate. Depriving

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101 Gossom v. McFerran, 79 Ky. 236 (1881); Curtis v. Hiden, 117 Va. 289, 84 S. E. 664 (1915); Watkins v. Ford, 123 Va. 268, 96 S. E. 193 (1918). In Curtis v. Hiden and in Gossom v. McFerran, the life tenants had purchased the life estates as investments. When their investment turned out to be unprofitable, they tried to compel a sale. This fact probably had some influence on the decisions.

102 Brierley v. Brierley, 81 N. H. 133, 124 Atl. 311 (1923); Nimmons v. Westfall, 33 Ohio St. 213 (1877); Smith’s Estate, 207 Pa. 604, 57 Atl. 37 (1904). (Held: The property in question became vested under a rule of law promulgated in the statute by which it and property similarly situated might be divested. There is nothing contrary either to natural justice or to constitutional right to allow the act so to operate when the fund is substituted for the estate.)
the remaindermen of the anticipated future enhancement of the value of their interests is harsh. But if the legislature so desires, is there really any constitutional barrier to its investing the owners of all life tenancies thereafter created with the power, upon the conditions and limitations prescribed by the statute, to compel the sale of remainders and reversions? Is it not reasonable to assume that the creator of the estates intended the benefit to accrue primarily to the first donee? When it is made to appear that the estate vested in such donee is not beneficial to him, and can be made so in another form of investment, why not permit the statute to aid the first donee when it can do so without injury to the owner of the future interest (other than that sustained in the commutation of his interest)? It must not be overlooked that the owner of the future interest will always be entitled to an interest in the proceeds and that also the owner of the future interest will often be in a position to buy in the land at the sale or at least to force the bids up.

(c) Land Held in Trust. In some of the cases previously discussed the land was held in trust. The courts, in allowing or refusing to allow the forced commutation of future interests under a statute, have not explicitly distinguished between the situation where the possessory interest is a legal life estate and the situation where the land is held in trust, but it seems that a distinction might possibly be

103 On January 1, 1952, statutes treating the situation where a trust exists and providing for the sale of complete ownership existed in eighteen jurisdictions. 2 Powell, Real Property, ¶ 292. See note 73 supra.

E.g., Ore. Comp. L. Ann. 1940, sec. 9-801, provides: "When any trust in real or personal property, or both, shall have heretofore been created, or shall hereafter be created by will, deed or otherwise, and the trustee or trustees of such trust, or any person interested in said trust or any person interested in the property embraced in said trust upon the termination thereof, whether such latter interest be by way of a vested or contingent remainder, executory devise, conditional limitation, shifting use, or of any other nature, shall deem it for the interest of all persons who are or may become interested in said property that the same or any part thereof should be sold, mortgaged, improved, exchanged or leased; or otherwise dealt with in any manner, such
made. Where there is a legal life estate, a court will not, in the absence of a statute, authorize the sale in fee of the land against the wishes of the owners of future interests unless sale is necessary to prevent the loss of the property. But courts of equity have inherent power to authorize trustees to do what is necessary in order to conserve the trust property and to protect all interests, even though the instrument creating the trust does not give the trustees such power; this is in order to carry out the main purpose of the trust. Courts of equity will direct the sale of the trust lands when lapse of time or changes in the condition of the property have made it prudent and beneficial to alienate the lands. They may even allow a trustee to act contrary to the express stipulations of the settlor and sell, mortgage, or lease (provided the limitations do not create a condition upon the happening of which the estate is to be forfeited) where exigencies have arisen which make departure from the directions of the settlor necessary to the fulfillment of the purpose of the trust.

party or parties may commence a suit for the purpose of obtaining a decree for the sale, mortgaging, leasing, improving, exchanging of, or otherwise dealing with said property, or any portion thereof. Any court of equity in a county in which any of such trust property may be situated shall have jurisdiction to hear the cause of suit and enter the proper decree."

The act further directs that all persons who are living at the time of the commencement of such suit, and who are interested whether as trustees or as beneficiaries in the property under the trust, or who have any vested, contingent, executory, or reversionary interest therein at the termination of the trust, shall be made parties to the suit, as also all persons living at the commencement of suit who have at that time any apparent interest. The act also provides for notice to unknown heirs or unknown persons by publication in the same manner as in suits against nonresident defendants.

Sec. 9-805 provides: "All interested persons who are born subsequent to the commencement of said suit shall be deemed parties to said suit by being represented therein by the defendants served, and shall be bound by any decree or decrees therein as fully as if made parties and duly served with process therein."

105 2 Scott, Trusts, sec. 167; 3 Bogert, Trusts, sec. 742.
106 2 Scott, Trusts, sec. 190.4.
107 2 Scott, op. cit.
The settlor’s specific desires are subordinated to his general intent.

Thus to the extent that future interests, where there is a trust, can be subjected under the present law to the authorized acts of the trustee, there will be relatively less objection to permitting the trustee to sell, exchange, mortgage, lease, or otherwise deal with the corpus as provided in a statute enacted subsequent to the creation of the trust than there will be to allowing a life tenant to sell in fee under a retroactive statute.

(d) The Effect of Restrictions Against Sale. An interesting problem is whether a statute which otherwise can be applied retroactively will override a stipulation in the will or deed that the land is not to be sold. One case intimates strongly that the testator or grantor may condition the estate so that it will terminate if the life tenant procures an order of sale.\textsuperscript{108} There is no good reason why a forfeiture provision should not be given effect, notwithstanding the statute. The public policy to be furthered by the statute is not only the amelioration of the condition of life tenants but also the promotion of alienability by getting rid of future interests. The latter objective may be as much accomplished by forfeiture as by sale in fee.

A restraint on the life tenant’s power of alienation, which is unaccompanied by a forfeiture provision, is generally held to be ineffective.\textsuperscript{109} Yet, even though a stipulation against sale is void, it might persuade the court of the inexpediency of a sale out of deference to the wishes of the grantor or testator. A court once admonished that

“A just government ought as emphatically to protect wills as deeds and contracts. Because, by so doing, not only the rights of the living are secured, but also the rights of the

\textsuperscript{109} I Bogert, Trusts, sec. 220; 2 Simes, Future Interests, sec. 447 (1936).
dead—rights which all civilized nations regard. Those who are now the living will shortly be the dead. And we labor not only for the present, but for the future, and for those who shall be in that future.”

Where, however, courts do not sustain retroactive statutes, it is because the interests of living persons are unduly disturbed, not because the wishes of the dead are flaunted.

On the other hand, restrictions in a trust instrument against sale by the trustee (or mortgaging, leasing, or other acts) will be enforced by the court although unaccompanied by forfeiture provisions. The trustee has no right to alienate or encumber the corpus unless the power is given him under the terms of the trust or conferred by the court. However, restrictions in the trust instrument against sale, mortgaging, or leasing do not prevent the trustee’s taking advantage of a statute authorizing any of those acts, provided that the limitations do not create a condition upon the happening of which the estate is to be forfeited. Indeed, the only reason why the trustee would need to take advantage of the statute would be on account of some supposed defect of power resulting from a limitation expressed or implied in the trust instrument.

6. Statutes Which Authorize a Life Tenant to Execute Leases

At common law, a lease executed by a life tenant automatically expires at his death. A statute may constitution-

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110 Ervine's Appeal, 16 Pa. 256, 265 (1851), supra note 94.
111 2 Scott, Trusts, sec. 186 et seq. Of course, the trustee, as owner of the fee, has the power to alienate and if heconveys to a bona fide purchaser who pays consideration before receiving notice, the corpus will be discharged of the trust. 2 Scott, Trusts, sec. 284.
112 Stanley v. Colt, 72 U. S. (5 Wall.) 119 (1866) (restriction against sale); Russell v. Russell, 109 Conn. 187, 145 Atl. 648 (1929) (language of will indicated that the testator did not intend that any further encumbrances be placed on the property).
ally provide that leases which have already been executed by life tenants of existing estates shall not expire immediately upon the death of the tenant but shall be continued in effect for a limited period after the lessor’s death. For example, it has been held that a statute is constitutional which provides that such leases shall be continued until the end of the lease year current at the time of the life tenant’s death, in lieu of emblements, to the end that the lessee may gather the growing crops.\textsuperscript{115}

If there is a strong showing of necessity, similar to the circumstances under which courts of equity order a sale of the premises, it would seem not unconstitutionally deprivative of the interests of the remaindermen to permit the life tenant to take advantage of a statute enacted after the creation of his estate to execute a lease which will not terminate for a long period after his death. A remainderman can scarcely be heard to complain if the life tenant’s execution of a long-term lease is the only expedient short of sale to prevent everyone’s interests from being lost. The power to make leases for the preservation of property is like the power of sale, and as a matter of fact the power to make leases is sometimes conferred in statutes authorizing sale or mortgage.\textsuperscript{116}

However, where there is no proof of necessity, a statute which would authorize life tenants of existing estates to execute leases which would endure any substantial period of time after the life tenant’s death would be of doubtful constitutionality.

No cases were found which directly passed upon the validity of a statute which purported to give life tenants power to execute long-term leases. However, a similar constitutional issue was considered in a case arising under a statute which authorized trustees, with the approval of a court, to

\textsuperscript{115} King v. Foscue, 91 N. C. 116 (1884).
\textsuperscript{116} E.g., D. C. Code 1940, sec. 45-1104, supra note 76.
lease real property for such periods as might be deemed advantageous to the estate. In *Campbell v. Kawananakoa,* where this statute was sought to be applied to an existing trust (the testator died some thirty years before the enactment), it was held that the trustees could not execute a fifty-year lease which would probably endure beyond the life of the trust, where some of the remaindermen who stood in line to take upon termination of the trust objected to the execution of a long-term lease. The testator had clearly indicated in his will that he intended a distribution of the res at the time designated for the termination of the trust. There was no showing in the *Kawananakoa* case that the execution of the lease was necessary to save the res from destruction or that the income from the trust in its present condition was too small to carry out the plans of the testator. The life beneficiaries would have been clearly benefited by the lease. The remaindermen might or might not have been, depending upon conditions existing when the lease expired, of which the court would make no prognostication. It was held that it would be unjust to the remaindermen (and also unconstitutional) to deny to them the privilege of choosing for them-

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117 34 Hawaii 333 (1937).
118 Hawaii Rev. Laws 1945, sec. 12573.
119 The courts of some jurisdictions will authorize the execution of leases to endure well beyond the life of the trust, even when this appears to be contrary to the intent of the trustor, if it is shown that by the execution of a long term lease the res can be preserved, or that only by this means can the purpose of the trust be carried out, or if some other equally pressing reason is established. *Marsh v. Reed,* 184 Ill. 263, 56 N. E. 306 (1900); *Denegre v. Walker,* 214 Ill. 113, 73 N. E. 409 (1905); *Hubbell v. Hubbell,* 135 Iowa 637, 113 N. W. 512 (1907).

Courts sometimes go to rather extreme lengths to find that the power to execute long term leases is implied in the trust arrangement. In *Upham v. Plankinton,* 152 Wis. 275, 140 N. W. 5 (1913) it was held that the trustees might execute a ninety-nine year lease, if such term were reasonable under all circumstances as the trustor might probably have regarded the matter when he created the trust. The court found that the trustor was a capable businessman who must have appreciated that the property was especially suited for long term business leases.
selves, when the time for the exercise of that privilege arrived, what disposition they wished to make of the corpus.

From the facts as stated in the Kawananakoa case it is impossible to determine whether the remainders were vested or contingent. The court thought it unnecessary to make any distinction. One might surmise, however, that the court believed the legislature could have made the statute applicable to an existing trust at any time before the coming into existence of any of the class who might take. 120

The statutes of some jurisdictions permit life tenants to execute oil and mineral leases. 121 Since it is indubitably within the police power of the state to encourage the development and exploitation of its natural resources, there can be little question of the constitutionality of such statutes if reasonable provision is made for safeguarding future interests from unnecessary diminution in value. In an Arkansas case, Love v. McDonald, 122 it was determined that the statute of that state

120 "Upon the birth of this grandchild [the first born of the class of remaindermen] there came into existence one of a class of beneficiaries clothed with a future interest vested by the terms of the will of the testator in the corpus of the estate. Upon the subsequent birth of other grandchildren the class opened and they also automatically became members of it. To be sure under the terms of the testator's will the right to the enjoyment of the absolute ownership and control of the corpus is postponed until the termination of the trust. The right itself, however, ceased to be nebulous and merely theoretical and became a reality. Whether it is a vested or contingent remainder it is unnecessary to decide." 34 Haw. 333, 343.

121 E.g., W. Va. Code 1949, sec. 3550. This statute permits, under supervision of a court, the sale or lease of timber, oil, gas, coal, or other minerals without the consent of persons in being having vested estates or vested interests in such minerals and resources, where such minerals on account of their volatile or fugitive nature are clearly in danger of being drawn away, or where, in the case of timber and coal, it appears that the coal and timber are being removed from adjoining areas and if this coal or timber is not removed at the same time as that from adjoining lands, it will be difficult and less profitable to mine or produce at any other time and that on account of the circumstances such coal or other mineral will probably deteriorate in value unless it is sold or leased immediately.

122 201 Ark. 882, 148 S. W. 2d 170 (1941).

In Lawrence E. Tierney Coal Co. v. Smith's Guardian, 180 Ky. 815, 203 S. W. 731 (1918), a statute, which provided that the guardian of an infant or incompetent may execute coal, oil, and gas leases for such length of time
was applicable to an estate created by deed many years before the statute was passed. The Arkansas statute provides that one to whom land is devised or granted in fee tail (he has a life estate under the laws of that state) may petition a court for permission to execute an oil and gas lease. It is provided that the court shall award the life tenant, as compensation for the use of the surface of the lands for exploration, an absolute title in a proportion of the minerals, not exceeding a one-sixteenth interest, and also a proportion of the consideration and delay rentals. In the particular case, the heirs apparent of the life tenant, her children, who were as the guardian may approve, without regard to the time at which the disability of such infant or incompetent shall be removed (Ky. Acts 1916, c. 99), was held, where the infants in question had acquired their interests prior to the statute, to deprive them of their inalienable right to acquire, hold, and enjoy property. Under the authority of the act a forty year coal lease with option to renew for like period had been approved by a lower court. A substantial difference was declared to exist between the sale of the lands of an infant or incompetent and what was attempted under this statute. "When the land of an infant is sold for purposes of reinvestment, there is only a change in the character, or perhaps, the location of his estate. The principal fund remains intact to come into his possession when he reaches his majority. . . . When, however, the whole estate is seized during his infancy, and at a time when he is presumed to be incapable of acting for himself, and leased for a term of years that will, under ordinary conditions, extend far beyond the period of his life, the legislature, through the instrumentality of the court, is assuming to exercise a guardianship, for life, over his affairs that is only tolerated in cases of infancy and mental unsoundness." (180 Ky. 815, 828, 203 S. W. 731, 736.) On rehearing, the court stated that its previous decision should be modified so as to exempt oil and gas leases, the same involving substantially different problems, 181 Ky. 764, 205 S. W. 951 (1918). A number of courts have permitted the execution of oil and gas leases for a period of years extending beyond the minority of the infant. Cabin Valley Mining Co. v. Mary Hall, 53 Okla. 760, 155 Pac. 570 (1916); Jones v. Prairie Oil and Gas Co., 273 U. S. 195 (1927). Courts have also approved long term leases of infant's lands on the ground that the interests of the infant would be benefited. Ricardi v. Gaboury, 115 Tenn. 484, 89 S. W. 98 (1905) (ninety-nine years); Beauchamp v. Bertig, 90 Ark. 351, 119 S. W. 75 (1909).


Sec. 4 (b) [53-306b] provides that the court shall appoint some suitable person as trustee for the benefit of the contingent remaindermen and reversioners and requires that such trustees shall execute bond in such sum as the court may deem proper.

all of age, assented to the lease in writing. They also signed a statement that their mother had reached an age where she probably would not have any more children and their interest on that account reduced. In fact, the only person who raised any objection at all was the defendant who was trying to get out of his agreement to accept the oil and gas lease on the alleged ground that since the interests of the remaindermen could not be affected, title was not merchantable. The lease was held to be valid and binding upon the interests of the remaindermen. The decision proceeded partially on the theory that under its police power the state may permit the life tenant to execute leases in order to conserve the contingent estate from the depletion of minerals by production from adjacent territory, but the greater stress was laid upon the very dubious theory that the interests of the remaindermen were not property within the contemplation of the Fourteenth Amendment nor the Constitution of Arkansas. The court quoted with approval a statement from a well known law encyclopedia to the effect:

"The legislature has no power to alter or destroy by statute the nature of vested estates in property. Indeed, authority is not wanting to the effect that a contingent remainder may not be impaired or destroyed by a statute passed after its creation, but the better opinion is that contingent remainders may be impaired or abolished at any time before they become vested. . . ." 125

The court intimated that the result would have been different if the remaindermen had been named.

This case is the only one which the writer has found in which it is declared that contingent remainders are not property within the meaning of the Constitution. The decisions, it is true, permit effects to be wrought on some kinds of contingent remainders which they will not allow in respect to

125 12 C. J. p. 959, § 496.
vested remainders, but they do not hold that contingent remainders as such are not property in a constitutional sense. The remainders in the *McDonald* case were contingent in the respect only that the takers after the death of the life tenant could not at the time of the suit be absolutely ascertained (*nemo est haeres viventis*), but the interests of the children were more than mere expectancies. The only condition to their coming into possession was that they outlive the life tenant. The Arkansas court pretty surely confused vested remainders with vested interests, and contingent remainders with contingencies or expectancies.

What the court said about contingent remainders was dictum. The case did not present a situation in which the proposition that contingent remainders are not property could be tested. All of the persons who in all probability would ever have any interest consented. Even if the remaindermen had objected, the benefit they derived from having the land explored would fairly offset the loss occasioned by payment of royalties to the life tenant. There were excellent reasons for sustaining the statute as applied to an existing life estate. It is well known that oil and gas may be lost by underground drainage. If wells are sunk in the vicinity of the land, the oil and gas under it may shift to the operating wells and be lost to both the life tenant and remaindermen. The latter cannot execute a lease. What could be more reasonable than a statute which allows the life tenant to execute a lease so that wells might be sunk before the oil and gas are depleted?

7. Statutes Which Alter the Rules for Allocation of Benefits Between Life Tenant and Remaindermen

The primary guide for the allocation of benefits between the life tenant or life beneficiary and the remaindermen is, of course, the instrument creating the interests. But often the instrument is an insufficient guide, and for such cases the
courts have devised rules.126 A few legislatures have adopted comprehensive statutes on allocation of benefits.127

A statute embodying a material modification of existing rules, it appears, ordinarily cannot constitutionally be applied to existing estates. An established rule of allocation, the courts hold, is a rule of property. The legislature cannot qualify or extinguish the relative interests of the life tenant or beneficiary and of the remaindermen as ascertained by the rule in existence at the time of the creation of the interests.

In Franklin et al. v. Margay Oil Corp. et al.128 the apportionment statute went into effect fourteen days after the death of the testator whose will created the trust in question. The statute provides as follows for the apportioning of money received as consideration for the permanent severance of natural resources from the land (whether as royalties or otherwise). The percentage allowed for depletion under the federal income tax laws should be treated as principal, and invested or held for the remaindermen, the balance to be treated as income subject to be disbursed to the tenant.129 Two years after the enactment of the statute, the trustees, under authority of the power vested in them, executed certain oil and gas leases. This suit was brought to determine (inter alia) the proper allocation of royalties between life beneficiary and the remaindermen. Under the rule in force at the testator's death, royalties went into the fund to be held for the remaindermen and only the interest on the royalty fund went to the life beneficiary. It was held that a statute

126 See 3 Simes, Future Interests, secs. 688-704 (1936).
129 Okla. Laws 1941, p. 260, sec. 33, 60 Okla. Stat. Ann., sec. 175.33. The statute also provides that if no deduction for depletion is made by the federal laws, then twenty per cent of the net proceeds shall be treated as principal and the remainder as income.
setting up a new rule of apportionment, which has the effect of increasing income and correspondingly reducing the principal or corpus of the estate which may go to the remaindermen at the termination of the trust, if applied to existing trusts, would deprive the remaindermen of property without due process of law.

In *In re West's Estate* the question concerned the constitutionality of certain provisions of the New York Personal Property Law as modified retroactively the rules relating to proceeds of sale in mortgage salvage operations. The court found there would be no taking of property without due process if the statute were applied in case of existing trusts, but the ground of decision was that rules laid down in the cases prior to the statute were tentative only and not intended to be final and that the trustee in his discretion might have paid to the life tenant the amount which the statute directed:

"Before a judicial declaration, thus tentatively stated, becomes a rule of property, it must have become permanently fixed and long continued."

The statute allots to the life tenant out of the net income earned from the operation of real estate in salvage, an annual amount up to three percent of the face value of the mortgage investment, regardless of principal advances for expenses of foreclosures, arrears of taxes, and capital im-

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131 N.Y. Pers. Prop. Law, sec. 17-c, effective April 13, 1940.
132 The cases primarily referred to were Matter of Chapal's Will, 269 N.Y. 464, 199 N.E. 762 (1936) and Matter of Otis' Will, 276 N.Y. 101, 21 N.E. 2d 556 (1937).
133 Salvage income is derived generally from three sources: "(1) rents received by the trustee as mortgagee in possession, (2) rent received by the trustee after foreclosure as owner of the property, (3) interest and amortization payment received by the trustee upon resale, where part of the purchase price consists of a purchase money mortgage," Skilton, "The Rights of Successive Beneficiaries in Unproductive Trust Assets Bearing Interest," 15 Temp. L. Q. 378, 396 (1941).
FUTURE INTERESTS

provements.134 Such payments are to be made from the beginning of the salvage operation and are declared to be final and not subject to recoupment either from the life tenant or from the trustee by way of surcharge.135 Prior to the statute, the trustee could, during the salvage period, at his discretion, make payments to the life tenant from time to time out of the surplus income not necessary for the payment of expenses or for the repayment of advances made out of principal.136 But as a matter of fact, trustees hesitated to exercise their discretion for fear of possible surcharge in the event of an overpayment to the life tenant;137 consequently, the life tenant was often left without income during the salvage period. The legislature came to the aid of life tenants who presumably are the primary objects of the settlor's beneficence and made absolute what formerly was discretionary. It is questionable whether depriving the remaindermen of a right of surcharge against the trustee for overpayment made in conscious good faith is a taking without due process even if the rule of apportionment is held to have been established.

The dissenting opinion in the West case strongly attacked the position of the majority that the rule of apportionment was not settled,138 and vigorously contended that insofar as

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134 Remaindermen are required to advance new principal to pay the expenses of the salvage operations. In re Schnitzler's Estate, 40 N. Y. S. 2d 554 (Surr. Ct. 1943). Pers. Prop. Law, sec. 17-c (b) (c) provide that principal advances shall be repaid out of excess income above three per cent and that unpaid principal advances shall be a primary lien on proceeds of sale.

135 Subsec. (a) provides that payments made are to be credited against life tenant's income in the final computation.


137 Matter of West, 175 Misc. 1044, 26 N. Y. S. 2d 622 (1941).

The statute declares that its purpose is to simplify rules of procedure in mortgage salvage operations and to eliminate complications which often worked disadvantageously to the life tenant who is usually the principal object of the testator's or settlor's bounty. It is stated that only equitable adjustments and balances are intended to be effected by the provisions.

138 He quoted as follows from Matter of Chapal's Will, 269 N. Y. 464, 472, 199 N. E. 762, 764 (1936): "... the proceeds should be used first to pay the expenses of the sale and the foreclosure costs and next to reimburse
the statute retroactively took away the remaindermen's right of recoupment from the life tenant—for payments fixed arbitrarily and without regard to the demands of justice and equity—it was nothing but a mandatory transfer of the remaindermen's property to the life tenant, and a taking of property without due process. On appeal, the Supreme Court of the United States agreed with the majority that the earlier decisions did not amount to a rule of property. The sole question considered by this court was whether the New York Court of Appeals had attempted to avoid the constitutional issue by denying on an unsubstantial ground the existence of rights claimed to be impaired by the statute. The finding by both courts that the remaindermen never possessed such a property right as they claimed was taken from them

the capital account for any advances of capital for carrying charges not theretofore reimbursed out of income from the property. Then the balance is to be apportioned between principal and income in the proportion fixed by the respective amounts thereof represented by the net sale proceeds. In the capital account will be the original mortgage investment. In the income account will be unpaid interest accrued to the date of sale upon the original capital.

He contended in addition that the statute also violates the rule that the legislature may not declare the law in the decision of causes before the courts; the courts are required to ignore the law that pending questions of apportionment are to be decided upon equitable principles and directed instead to decide according to the legislative mandate.

There could be no constitutional objection if the amount of income which was found to be due the life tenant upon the final computation always exceeded the amount of income irrevocably paid over during the salvage operations. In In re Wacht’s Estate, 32 N.Y.S. 2d 871 (Surr. 1942), a number of hypothetical illustrations are given which show how application of the statutory rule may result in the life tenant’s getting a greater share than he would be entitled to under the Otis-Chapal rule.

Since the remainderman is required to advance new capital to pay the cost of salvage operation, if the entire investment is ultimately lost, the irrevocable income payments under 17-c will be, in effect, an expropriation of the remainderman’s contributed capital. This happened in In re Schnitzler’s Estate, 179 Misc. 957, 40 N.Y.S. 2d 554 (1943), affirmed In re Schnitzler’s Will, 290 N.Y. 885, 50 N.E. 2d 293 (1943).

Demorest v. City Bank Farmers Trust Co., 321 U.S. 36 (1944). Douglas and Black concurred. They were of the opinion that the record did not show a substantial federal question. They would simply have dismissed the appeal.
disposed of the federal question. However, Justice Jackson implied that even assuming the contentions of the remaindermen, the state did not lack power to devise new and reasonable directions to the trustees of existing trusts to enable them to meet new conditions such as those the depression produced.

In In re Crawford's Estate it was held that the Uniform Principal and Income Act, if applied retroactively to an existing trust, would deprive the life beneficiary of vested

141 Demorest v. City Bank Farmers Trust Co., 321 U. S. 36, 47 (1944). Jackson, J., remarks that what really seems "to have been taken from the remainderman is his right to question the equity of the rule in his individual circumstances, a right which he had while it was a rule of court." It should be observed that the Chapal-Otis rules were laid several years after the deaths of the decedents in question. Property rights would seem to have been settled at the death of the testators.

142 362 Pa. 458, 67 A. 2d 124 (1949). Accord, In re Pew's Estate, 362 Pa. 468, 67 A. 2d 129 (1949). In the Crawford case, under the will of the testator, who died some ten years before the statute, certain property was placed in trust to pay the income to his daughter for life. After the effective date of the statute, the trustees received stock dividends from corporations whose stock formed part of the trust, and they also sold other corporate stocks and rights to subscribe which resulted in large capital gains. The court below decided that by long established decisions of the Supreme Court of Pennsylvania under the Pennsylvania Rule of Apportionment, the life tenant possessed a vested right to receive as "income" the stock dividends and a share of the capital gains (representing accumulated unpaid earnings) on sales of the stock.

The legislature, in adopting the Uniform Principal and Income Act in substance, substituted the Massachusetts Rule for the Pennsylvania Rule. Under the Massachusetts Rule all cash dividends are payable to the life tenant and all stock dividends to the remaindermen. 3 Simes, Future Interests, sec. 693 (1936). Uniform Principal and Income Act, Pa. Stat. Ann. 3470, sec. 5 (1) provides: "All dividends on shares of a corporation forming a part of the principal, which are payable in the shares of the corporation itself shall be deemed principal. Subject to the provisions of this section all dividends payable otherwise than in the shares of the corporation itself, including ordinary and extraordinary dividends and dividends payable in shares or other securities or obligations of corporations other than the declaring corporation, shall be deemed income."

rights, since he would receive a smaller share under the Act than he would get under the rule in existence when the trust was created. It was argued that the life tenant’s property right was inchoate or a mere expectancy because the quantum of income may vary upon the application of the rule. The court disagreed with this. There was no uncertainty as to the rule of apportionment. Uncertainty as to the quantum of income and the time of receipt, said the court, cannot convert a vested interest into a mere expectancy. 144

In Willhite v. Rathburn et al., 145 a case involving the sale of unproductive land under a statute, it was held that a decree which directed that the present value of the life estate be paid to the life tenant as her absolute property, could not be sustained since the estate had been created prior to the enactment of the statute providing for the computation of the present value of life estates. 146 The statute under which the sale was ordered was sustained although it was retroactive; 147 but insofar as the decree sought to give the life tenant more than the interest on the invested proceeds, above the expenses of administration, the court held that it operated to enhance and enlarge the life estate with consequent depreciation and impairment of the remaindermen’s interest in a manner forbidden by the constitution of the state. 148 The

144 “Appellant asserts that no vested property right exists in a rule of law. This is true, except where such rule of law has established a vested property interest. Where a decision of the Supreme Court of Pennsylvania declares an interest to be vested, no retroactive statutory enactment may modify or extinguish it.” (In re Crawford’s Estate, 362 Pa. 458, 467, 67 A. 2d 124, 129.)

However, if the rule had not been established but was in a process of formulation by the courts at the time the legislature declared its rule, it would seem that the life beneficiary would have no such interest in the imperfected rule as to prevent the application of the statute. This would be the corollary of In re West’s Estate, supra note 130.

145 332 Mo. 1208, 61 S. W. 2d 708 (1933).


147 See supra note 89 and the text to which this note is appended.

court stated that under the law existing at the time the life estate was created, the life tenant was entitled to the emblements, rents, and income accruing during the continuance of the life estate but was in no respect entitled to any part of the corpus, nor was she entitled to enforce a sale in fee of the land and have a portion of the proceeds set apart to her as her absolute property. 149

On the other hand, a statute 150 providing that when money is paid into court on foreclosure proceedings the court shall, upon request of the owner of any life estate, direct the payment to him of such gross sum as shall be deemed a just and reasonable satisfaction for said estate for life, was held in Leach v. Leach et al. 151 not to divest vested rights when applied to existing estates even though the statute did not require the consent of persons interested in remainder, whether vested or contingent. But this situation may be differentiated from that in the Willhite case. Where land is converted into money under a right superior to life tenant and remainderman alike, as in the Leach case, the legislature can determine the period when the money resulting from such sale and the interest therein shall cease to be held as if it were land.

"... the conversion of lands into money under a superior right, to which the tenure of the lands was subject, terminates ipso facto the precise property right in the lands, and the proceeds of sale in strict legal theory are held not as lands, but rather as in lieu of the lands, for the ultimate purpose of compensating the parties interested in the lands." 152

149 The estate involved was created in 1904. Apparently the court did not realize that the law of 1905 was not the first statute relating to the computation of the present value of life estates. The law of 1905 repealed Laws 1903, p. 167. The law of 1903, however, employed the American experience table of mortality, whereas the law of 1905 was based on the Carlisle table.


151 72 N. J. Eq. 571, 66 Atl. 595 (Ch. 1907).

152 72 N. J. Eq. 571, 574, 66 Atl. 595, 596 (Ch. 1907). It was also stated in the opinion that the courts in this jurisdiction had never denied that a court in the absence of any statute might direct payment of sums in gross where the parties were sui juris and could receive it.
The remainders in the *Franklin* case were described by the court as being contingent, but it appears that they were actually vested subject to a power in the trustees to give to the life beneficiary from the principal. The nature of the remainders in the *West* case does not appear from the facts, but they were stated by Justice Jackson to be contingent. The remainders in the *Willhite* case were contingent. The objecting remaindemen in the *Leach* case had a remainder for life.

Before any benefits have actually accrued, the interests of both the life tenant and the remaindemen in any such prospective benefits may seem to be inchoate or mere expectancies. Consequently, it may strike one that there is no basis for holding that a statutory change (otherwise equitable) in the rule of apportionment cannot be applied to benefits accruing after the statute if the interests came into being before the modification. There may, furthermore, be doubt as to the propriety of holding that either the life tenant or remainderman has a vested right in a rule of law. All of these suppositions ignore, however, the basic premise upon which judicial rules of apportionment are predicated: the property (which may be denominated the principal) must, except as

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153 The land was conveyed to “Mattie M. Rathburn and her bodily heirs.” This conveyance would have created an estate tail at common law but which by statute was converted into a life estate in the first taker with a remainder in fee over to those who should prove to be the heirs of her body at her death. Mattie’s children were the ostensible heirs of her body. Mo. Rev. Stat. 1949, sec. 442.470.

154 The lands sold in the foreclosure suit belonged to Mrs. Leach. The marriage took place in 1878, and issue was born, who, at the time of this case, was still alive. In *Leach v. Leach*, 69 N. J. Eq. 620, 61 Atl. 562 (Ch. 1905) it was held that under the decisions declaring the effect of the statutes relating to the real estate of married women, the respective interests of the husband and wife in the lands sold and their proceeds were as follows: The wife had an estate for her life, with remainder to the husband for his life, if he survived the wife, and with remainder over to the issue in fee. Mr. Leach objected to the payment of a lump sum to his wife. He insisted that only the interest on the sum in court should be paid to the wife.
directed otherwise by the instrument creating the interests, be kept intact for distribution to the remainderman at the expiration of the estate; income is to be paid to the life tenant. The principal, according to the prevailing view, consists not merely in the value of the property as of the time the remainders were created but in the property itself.\textsuperscript{155} Enhancement in value accrues, in other words, to the remaindermen. Benefits either may be income in the ordinary sense or may arise as a result of the commutation of the principal. The purpose of a rule of apportionment is to ascertain the portion of the benefits which is principal in commuted form and hence belongs to the remainderman and the portion which is income in the proper sense and therefore is to go to the life tenant. The interests of the remainderman and life tenant, then, do not arise for the first time when the benefit accrues; the accrual simply indicates a change in the form of the interests. From this process of reasoning it follows that a modification of the existing rule, whereby the life tenant or remainderman receives a larger proportion of the benefits, results in a diminution of the relative interest of the other party. Such a shift of relative interests may be deemed a taking of property.

8. Statutes Relating to Improvements and Repairs Made by the Life Tenant or His Grantee

In the absence of statute, the remaindermen or reversioners are under no obligation to place improvements on the premises or to make advances for the upkeep and repair of the same, except that the life tenant may complete improvements begun by the donor of the estate and demand contribution.\textsuperscript{156}

\textsuperscript{155} 3 Simes, \textit{Future Interests}, sec. 689 (1936).

\textsuperscript{156} 1 Tiffany, \textit{Real Property}, sec. 64 (3d ed.).
Nevertheless, permanent improvements annexed to the land become a part of the inheritance and the property of the remaindermen or reversioners.\textsuperscript{157}

A statute giving a remainderman a charge or lien on the property for advances made to the life tenant for necessary repairs, improvements, and support has been declared to deprive the other remaindermen of vested rights where the advances were made prior to the statute.\textsuperscript{158} The remainders were contingent with a double aspect. The court did not explain why the statute could not be applied retroactively but said that it would be a mere waste of words and time to bother stating the reason. Presumably, the reason was that under the existing law the remainderman who made the advances was a volunteer; she could not create an obligation binding the interests of the other remaindermen for expenditures which were not requested by them and which were not necessarily beneficial to them.

It is sometimes held under the occupying claimant statutes that the life tenant who makes improvements in the belief he is owner in fee is entitled to compensation.\textsuperscript{159} Generally, it is held that one in possession of property, believing himself to be owner in fee, under a conveyance from one who had only a life estate, is entitled, as against a remainderman, to an allowance for improvements.\textsuperscript{160} In such jurisdictions, where it is held that the existing betterment statute does not extend

\textsuperscript{157} Darnell v. Williams, 171 Ga. 641, 156 S. E. 584 (1931); Belsfield v. Findlay, 389 Ill. 526, 60 N. E. 2d 403 (1945); Leininger v. Reiche, 317 Ill. 625, 148 N. E. 384 (1925); Day v. Day, 180 Minn. 151, 230 N. W. 634 (1930).


\textsuperscript{159} Bloom v. Strauss, 70 Ark. 483, 69 S. W. 548 (1902); O'Donnell v. Mathews, 221 Mo. App. 657, 284 S. W. 204 (1926); Hall v. Hall, 219 N. C. 805, 15 S. E. 2d 273 (1941).

\textsuperscript{160} Fee v. Cowdry, 45 Ark. 410 (1885); Harper v. Durden, 177 Ga. 216, 170 S. E. 45 (1933); Folsom v. Clark, 72 Me. 44 (1880); Plimpton v. Plimpton, 12 Cush. 458 (Mass. 1853); Harriett v. Harriett, 181 N. C. 75,
to those who are life tenants or the grantees of life tenants, a modification of the statute so as to bring such persons, who built on the *bona fide* belief that they were owners in fee, within its scope would seem to be a just and equitable act of the legislature even when the modification is applicable to existing life tenancies. A number of courts in cases not involving life tenancies have allowed the application of betterment statutes where the possession of the adverse claimant antedated the statute on the ground that a right to betterments already existed in equity and good conscience. 161 If the occupant acted in good faith, it would seem that his equities should not be less merely because he turned out to be a life tenant or tenant *per autre vie* instead of a trespasser.

However, there is an old case holding that a statute which purported to allow the grantees of life tenants to obtain compensation for the increased value of the premises by reason of all proper and judicious improvements which they or the life tenants had placed on the premises, could not be applied where the improvements were made and the death of the life tenant occurred before the statute. 162 This was said to follow from the fact that upon the termination of the life estate an event had occurred by which the improvements became absolutely the property of the remaindemen. While this opinion may be correct as a matter of pure deduction

106 S. E. 221 (1921); Beardsley's Lessee v. Chapman, 1 Ohio St. 118 (1853); Whitney v. Richardson, 31 Vt. 300 (1858).

The measure of damages will be not the cost of the improvements, but only the amount to which the improvements have added to the actual and permanent value of the property. Cagle v. Schaefer, 115 S. C. 35, 104 S. E. 321 (1920).

161 Beard v. Dansty, 48 Ark. 183, 2 S. W. 701 (1886); Fee v. Cowdry, 45 Ark. 410 (1885); Mills v. Geer, 111 Ga. 275, 36 S. E. 673 (1900); Bracket v. Norcross, 1 Greenl. 89 (Me. 1820); Bacon v. Callender, 6 Mass. 303 (1810). Contra, Wilson v. Red Wing School District, 22 Minn. 488 (1876); Billings v. Hall, 7 Cal. 1 (1857); Society, etc. v. Wheeler, 22 Fed. Cas. 756, No. 13,156 (C. C. D. N. H. 1814).

from a rule of law, it is not a point of view which is likely to be acceptable to a modern court where the grantee appears to have acted in good faith.

9. Legitimation and Adoption Statutes

Statutes which confer the rights and privileges of natural and legitimate children upon illegitimates and adopted children, it is said, do not entitle such persons to come in as beneficiaries under a will or deed unless the grantor or testator intended to include such children. The courts will give effect to the intent of the grantor or testator to include or not to include, as that intent may be gathered from the instrument, or, in the case of wills, from surrounding circumstances. But the courts follow a policy of construing both wills and deeds to extend the benefits of the statutes to adopted and legitimated children whenever they can do so without too obviously disregarding the true intent of the maker. Words such as “lawful issue” or “children” which would not be construed in the absence of the statutes to include illegitimate or adopted children, will be construed to include them in accordance with the spirit of the statutes. Words which can be used technically to describe a class (heirs, lawful issue, lawful children, etc.) are sometimes conclusively presumed to have been used in their technical sense; thus all persons who by virtue of the statute are members of that class will be held to take under the instrument, whatever the true intent of the maker. It follows, there-


164 Dunlavy v. Lowrie, 372 Ill. 622, 25 N. E. 2d 67 (1940) (will); Butterfield v. Sawyer, 187 Ill. 598, 58 N. E. 602 (1900) (deed); Sewall v. Roberts, 115 Mass. 262 (1874) (conveyance in trust); Gilliam v. Guaranty Trust Co., 186 N. Y. 127, 78 N. E. 697 (1906); McGillis v. McGillis, 154 N. Y. 532, 49 N. E. 145 (1898) (will); In re Sheffer's Will, 139 Misc. 519, 249 N. Y. S. 102 (1931); Miller's Appeal, 52 Pa. 113 (1866) (will).
fore, that although theoretically the court is carrying out the intent of the grantor or testator, the statute may actually have the effect of altering the will or deed.

The courts, while giving acknowledgment to the idea that it is the intent of the maker which controls, recognize that rights may be conferred independently of the intent of the maker, for they hold that a legitimation or adoption statute may be applied retroactively but only so long as it does not divest vested rights.¹⁶⁵ This means that persons who would have no rights under the instrument as it would have been construed at common law can derive no rights from a statute which is enacted subsequent to the time when the instrument became effective unless the enactment of the statute occurs before the takers are absolutely ascertained. Thus if a devise were made to A for life, remainder to his children, but if he die without issue then to his heirs, an adopted child of A cannot take by virtue of the statute unless it is enacted in A’s lifetime. Who will take must be determined at or before A’s death and not thereafter. The persons who will take in default of children are said to have only an expectancy; their interests are necessarily uncertain and liable at any time before the death of the life tenant to be diminished or defeated by the coming into existence of persons who will take at the life tenant’s death. Consequently, they are not deprived of property without due process if adopted or legitimated children are allowed to take.¹⁶⁶ It probably would also be held that vested remaindermen,

¹⁶⁵ Butterfield v. Sawyer, 187 Ill. 598, 58 N. E. 602 (1900); Sewall v. Roberts, 115 Mass. 262 (1874); McGillis v. McGillis, 154 N. Y. 532, 49 N. E. 145 (1898); In re Sheffer’s Will, 139 Misc. 519, 249 N. Y. S. 102 (1931).

¹⁶⁶ Sewall v. Roberts; Butterfield v. Sawyer supra note 165. Gilliam v. Guaranty Trust Co., 186 N. Y. 127, 78 N. E. 697 (1906). But see Schafer v. Eneu, 54 Pa. 304 (1867) where it is intimated that if the takers in default of children are named persons, the legislature is powerless to enable the adopted child of the life tenant to take.
where the remainder is subject to open up, are not uncon­stitutionally deprived of property if adopted or legitimated children are let in. Conversely, at any time before the takers are definitely determined, the statute conferring rights of in­heritance upon illegitimate or adopted children may be re­pealed so as to prevent such children from taking any in­terest.  

10. Statutes Relating to the Rule Against Perpetuities

A number of states have enacted modifications of or substi­tutes for the common-law rule against perpetuities. A few states have become dissatisfied with the statutory rules and have returned to the common law. It is probable that the courts would not permit a statute adopting the common law or supplanting the common law to have the effect of destroy­ing an existing interest which was good under the previous law. As we have already seen, the extinguishment or im­pairment of an executory interest or contingent remainder is almost never allowed unless the owner is compensated in some manner.

167 Frost's Will, 192 App. Div. 206, 182 N. Y. S. 559 (1920), aff'd In re Kingsbury, 230 N. Y. 580, 130 N. E. 901 (1920). There was a devise in trust to the testator's daughter, B., for life and then to the issue of B., or in default of issue, to her heirs. In 1916 B. adopted an adult child, K. B. died in 1918. Under N. Y. Laws 1915, c. 352, which for the first time in the history of the state permitted adoption of adult children, K. would have taken under the will as an "heir." In 1917, Laws 1915 was amended by providing that "nothing in this article in regard to an adult adopted pursuant hereto inheriting from the foster parent applies to any will, devise or trust, made or created before April twenty-second, nineteen hundred and fifteen, or alters, changes or interferes with such will, devise or trust, and as to any such will, devise, or trust, an adult so adopted is not an heir so as to alter estates or trusts or devises in wills so made or created." N. Y. Laws 1917, c. 149. Held: K. was not an heir. No vested right in the trust fund could arise until the death of B., for a living person can have no heirs.


The validity of a future interest under the common-law rule against perpetuities or under a statutory rule must ordinarily be determined as of the time when the instrument purporting to create the interest becomes effective. There is usually no period of abeyance, therefore, between the time the instrument takes effect and the time for vesting of the interest, within which the legislature can act to save the interest. It has been held that a statute which purports to validate a devise void under the rule against perpetuities at the time of the testator's death, cannot take from the heirs the reversionary interest which passed to them as intestate property as a consequence of the invalidity of the devise.

In any case where the validity of a future interest under the rule against perpetuities or under a statutory rule is to be determined at a time subsequent to the creation of the interest, it would seem that in the interim until such time arrives the interest could probably be validated by retroactive legislation. The objections of the person who stood to gain by the

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170 2 Simes, Future Interests, secs. 494, 496 (1936), as to common-law rule against perpetuities and c. 32 generally as to the statutory schemes.

171 It should not be overlooked in this regard that where the common-law or statutory rule is applied to present interests whose potential duration is too long (as distinguished from the situation discussed in the text where the rule is applied to prevent the creation of remotely vesting future interests) the interest may be held to be voidable rather than void. Suppose for example that an indestructible trust is limited to endure beyond lives in being and twenty-one years. Assuming that the rule against perpetuities is applicable at all, such a trust should not be held void ab initio, but rather the provisions for indestructibility should be held subject to attack by the beneficiary. 2 Simes, Future Interests, sec. 557. While depriving a beneficiary of his power to terminate the trust and to compel a conveyance of the res to him might well be held to be a taking of property without due process, there would at least not be the apparent taking away of the title from persons in whom it had vested as the consequence of the invalidity of a devise or bequest under the previous law.

172 Hartson v. Elden, 50 N. J. Eq. 522, 26 Atl. 561 (Ch. 1893).

173 Where there is in some individual an unqualified power to destroy the future interest, the time at which the validity of the interest is determined is not the moment of the creation of the interest but the time at which the power to destroy ceases; for until the power to destroy is ended, there has been no inconvenient fettering of property. Gray, Rule Against Perpetuities, sec. 524.1 (4th ed. Roland Gray 1932). Situations of this type might exist where
invalidity of the interest would no doubt be met with the proposition that under the previous law he had only a chance to acquire property and that such chance is not a constitutionally protected interest. The maxim would seem to be applicable that no one can have a constitutional right that the law shall not be changed.

II. Statutes Which Abolish the Rule in Shelley’s Case

The classic statement of the rule in *Shelley’s Case* is that of Lord Coke:

“It is a rule in law, when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail; that always in such cases, ‘the heirs’ are words of limitation of the estate, and not words of purchase.” 174

The rule has been abolished in most states by statute,175 and where this is the case the grantee or devisee ordinarily takes a life estate with a contingent remainder to his heirs.176 The statutes have either contained an express provision that they are to have only prospective operation or the courts have declared that they are not intended (save in certain special instances) to apply to instruments executed prior to the date of enactment. In the nature of things, the statutes which abolish the rule cannot be retroactively applied to perfected conveyances and devises. If any legislature or court should attempt to do so, titles would be drastically unsettled.

The future interest is subject to complete destruction by the exercise of a general power of appointment or an unrestricted power of revocation, or where a future interest after a fee tail is subject to be destroyed by the tenant in tail.


175 For a list of the states in which the rule has been abolished see 3 Powell, *Real Property*, ¶ 380.

176 2 Tiffany, *Real Property*, sec. 355 (3d ed.).
The problem of the retroactive operation of the statute can, however, arise in the case of wills which were executed prior to the statute when the rule obtained but the testator died after the effective date of the statute. An executed will, unlike an executed deed, is ambulatory and is subject to revocation at the instance of the testator at any time during his life. The will does not vest any rights until the death of the testator. 177 There would appear, therefore, to be no constitutional objection to the application of the statute abolishing the rule to a will executed prior to the effective date but where the testator dies after it. The only questions would be whether the statute was designed to have this limited retroactive effect and whether the testator intended his will to be given effect according to the law when he executed it or according to the law at the date when the will became effective. In *Reynolds v. Love* 178 the court held that a statute enacted in 1852 179 abolishing the rule ought to be applied to a will executed in 1849 when the rule was in force. The testatrix died in 1861. She left real estate in trust for the benefit of a granddaughter for life, then in trust forever for the granddaughter's issue. The question was whether the granddaughter took an absolute estate or only a life estate with remainder over. The court said that this was a statute which was leveled against an abuse, or remedial in its nature, and therefore ought to be applied to every case which its words could properly include; the abolition of the rule enlarged the power of the owner to entail his property, and being beneficial in its nature, would be given a retroactive effect. It might also be added that by not applying the rule in *Shelley's Case* the court probably gave to the instrument the effect the testatrix intended.

177 Page, *Wills*, secs. 31, 71 (Lifetime ed.), supra note 34.
178 191 Ala. 218, 68 So. 27 (1915).
179 Ala. Code 1852, sec. 1304.
12. Statutes Which Abolish the Worthier Title Doctrine

The Worthier Title Doctrine, or rather its inter vivos branch, is very well described in a recent law review article: "If a person makes an inter vivos conveyance with an ultimate end limitation to his own heirs or next of kin, the end limitation is void in the sense that it designates purchasers, and the grantor retains a reversionary interest." Unlike the rule in Shelley's Case, which is now in force in only a handful of states, the Worthier Title Doctrine has been recognized in one form or another or at least has a potential existence, in most jurisdictions. A few states have statutes abolishing the Doctrine. The statutes of several other states may have the effect of making the Doctrine wholly or partially inapplicable. A statute abolishing the

180 The rule as to wills is that if a testator devises to an heir the precise interest in land which the latter would have inherited in the absence of the provision in the will, the heir is regarded as acquiring the land by descent and not by purchase. Simes, Future Interests, sec. 144 (1936). The rule as to wills is not within the scope of this chapter, since it does not necessarily involve the creation of future interests.

181 Morris, "The Inter Vivos Branch of the Worthier Title Doctrine," 2 Okla. L. Rev. 133, 134 (1949). At the time this article was written over twenty-four jurisdictions had recognized the Doctrine in one form or another.

182 Morris, op. cit. at 134.

183 E.g., Neb. Rev. Stat. 1943, sec. 76-115: "When any property is limited, in an otherwise effective conveyance inter vivos, in form or in effect, to the heirs or next of kin of the conveyor, which conveyance creates one or more interests in favor of a person or persons in existence, such conveyance operates in favor of such heirs or next of kin by purchase and not by descent." Nebraska has adopted the Uniform Property Act and this statute is part of the Act. The wording of the Minnesota statute abrogating the rule in Shelley's Case may be broad enough to encompass also the Worthier Title Doctrine. Minn. Stat. 1949, sec. 500.14 (4). The first part of the statute abolishes the Rule in Shelley's Case. The latter part which is thought to abolish the Worthier Title Doctrine reads: "No conveyance, transfer, devise, or bequest of an interest, legal or equitable, in real or personal property, shall fail to take effect by purchase because limited to a person or persons howsoever described, who would take the same interest by descent or distribution."

184 E.g., N. C. Gen. Stat. 1950, sec. 41-6: "A limitation by deed, will, or other writing, to the heirs of a living person, shall be construed to be the children of such person, unless a contrary intention appear by the deed or will."

Purdon's Pa. Stat. Ann., Tit. 20, sec. 301.14 (1): "A conveyance of real or personal property, whether directly or in trust, to the conveyor's or another designated person's 'heir', or 'next of kin', or 'relatives' or 'family' or to 'the
rule in *Shelley's Case* does not, it is generally held, have the effect of abolishing the Worthier Title Doctrine, as the two rules are distinct.\(^{185}\)

The courts have not yet had much occasion to consider the constitutionality of statutes abolishing the Doctrine. Since the effect of the application of the Doctrine is that the grantor retains a reversion or possibility of reverter, the constitutionality of a statute abolishing the Doctrine, if applied retroactively, would no doubt be vigorously challenged. The decision could conceivably go either way. It might on one hand be reasoned that since the Doctrine is a rule of construction merely,\(^{186}\) no one can have a vested interest in it. Or it might be decided that, although it is a rule of construction, yet where its application is appropriate, property rights are retained which cannot be taken away by legislative declaration. The latter view was that of the Minnesota Supreme Court in *Shaw v. Arnett*;\(^ {187}\) however, as this court declined

persons thereunto entitled under the intestate laws', or to persons described by words of similar import, shall mean those persons, including the spouse, who would take under the intestate laws if such conveyor or other designated person were to die intestate at the time when such class is to be ascertained, a resident of the Commonwealth, and owning the property so conveyed: etc.’

\(^{185}\) Doctor v. Hughes, 225 N. Y. 305, 122 N. E. 221 (1919); Fidelity and Columbia Trust Co. v. Williams, 268 Ky. 671, 105 S. W. 2d 814 (1937); Wilcoxen v. Owen, 237 Ala. 169, 185 So. 897 (1938); Robinson v. Blankinship, 116 Tenn. 394, 92 S. W. 854 (1906); Morris, “The Inter Vivos Branch of the Worthier Title Doctrine,” 2 Okla. L. Rev. 133, 172 (1949).

\(^{186}\) By far the greatest number of American cases have applied the rule as one of construction. This is especially true of the more recent cases. Morris, “The Inter Vivos Branch of the Worthier Title Doctrine,” 2 Okla. L. Rev. 133, 144 (1949). The leading case is Doctor v. Hughes, 225 N. Y. 305, 122 N. E. 221 (1919). It was there held that to transform into a remainder what would ordinarily be a reversion, the intention to work the transformation must be clearly expressed. The New York Court of Appeals, however, has since stated that the presumption which exists from the use of the common-law doctrine has lost much of its force since Doctor v. Hughes; evidence of intent need not be very great in order to allow the remainder to stand. Matter of Burchell, 299 N. Y. 351, 87 N. E. 2d 293 (1949).

\(^{187}\) 226 Minn. 425, 33 N. W. 2d 609 (1948). In 1907, one Arnett conveyed the property to his son for life, remainder to the son's children, but if the son should die leaving no children or descendants of children, “then the said lands to revert to the heirs of the grantor.” Arnett died in 1912. His
to determine whether the statute in question \(^{188}\) really did abolish the Doctrine, the case is weak as an authority.

13. Statutes Which Abolish the Destructibility Rule

The few cases passing on the constitutionality of statutes that abrogate the power of the life tenant to destroy contingent remainders \(^{189}\) unanimously hold that the life tenant’s power to destroy contingent remainders is not a vested right. \(^{190}\) In *Jennings v. Capen* \(^{191}\) the court was compelled to distinguish between divestible rights and nondivestible or vested rights because it failed to realize that what the life tenant had was a “power” to destroy contingent remainders and not a “right” in the strict sense. The conclusion reached,

son died in 1946 without children or descendants of children and leaving his wife as heir at law. The wife claimed a share in the estate as heir of her husband, who, she contended, was the owner of an undivided share in the reversion which descended from his father. The statute, see *supra* note \(^{183}\), was enacted in 1939. Held: The Worthier Title Doctrine applied and the grantor consequently retained a reversion.

\(^{188}\) See note \(^{183}\) *supra*.

\(^{189}\) E.g., Ill. Rev. Stat. 1951, c. 30, sec. 40: “That no future interest shall fail or be defeated by the determination of any precedent estate or interest prior to the happening of the event or contingency on which the future interest is limited to take effect.”

S. C. Code 1942, sec. 8872: “No estate in remainder, whether vested or contingent, shall be defeated by any deed of feoffment, with livery of seizin.” This act only prevents the destruction of contingent remainders by the life tenant’s executing a deed of feoffment with livery of seizin and does not prevent destruction of contingent remainders by merger. *McCreary v. Coggeshall*, 74 S. C. 42, 53 S. E. 978 (1906).


\(^{191}\) *Supra* note \(^{190}\).
however, was that the life tenant had only an "inchoate right" which could be taken from him at any time before he had exercised it. It was said in another case:

"... [T]he rule of law authorizing the destruction of contingent remainders is not regarded as having its foundation on principles of natural justice. We think that the rule is generally regarded as one that does a greater wrong to the contingent remaindermen and to the testator whose will is thus defeated than the denial of it would do to the parties who might desire to defeat such rights, and that there is no reasonable ground for holding that the legislature has denied any natural or vested right to anyone by abolishing the rule in all cases in which such remainders were not destroyed until after the law became effective." ¹⁹²

The Supreme Court of South Carolina, in holding that a life tenant did not have a vested right to bar contingent remainders,¹⁹³ relied upon two grounds: first, this privilege had become part of the law of the state by virtue of an early statute and, being thus derived only from the statute law of the state, might be withdrawn whenever the law-making-power saw fit to do so; second, the doctrine that a life tenant may bar contingent remainders, which had its origin under the feudal system, seems, very generally, to be regarded as a means of doing a wrong to the contingent remainderman, always defeats the intention of the testator, and cannot therefore expect favor of any kind beyond mere support.

It seems that if the life tenant has already exercised his power to destroy the contingent remainders before the statute goes into effect, the statute cannot be given the effect of reviving the remainders.¹⁹⁴

¹⁹² Wood v. Chase, 327 Ill. 91, 100, 158 N. E. 470, 473 (1927), supra note 190.
14. Statutes Abolishing the Fee Tail Estate

The policy of free alienation of property is opposed to entailments. Public policy has always been felt in America to be strongly against this form of land tenure, which was designed to enable landed families to retain their holdings within the family. The Bill of Rights of the Constitution of North Carolina, stating that “Perpetuities and monopolies are contrary to the genius of a free state, and ought not to be allowed,” was pronounced by one court to impose a direct and mandatory obligation on the legislature to rid the people of fees tail without delay.

“We are to recollect that, for many centuries in England the establishment of perpetuities in landed estates has been deemed a great grievance. An estate tail, in particular, created by the statute de donis (which is undoubtedly a perpetuity, because by possibility it may last forever), has been considered a dangerous support of a high aristocratic interest attended with numerous evils both public and private, so much so that though the statute has never been directly repealed, yet successful evasions of it have been practiced, and some of them with the direct sanction of the legislature itself. If this act, therefore, has been in such discredit even in England, where there exists a government consisting of kings, lords, and commons, of course a great aristocratical interest, notwithstanding which it has been deemed too aristocratical even for them, well might it excite the jealousy and precaution of the representatives of the people of this state, assembled to establish a republican form of government, founded on the basis of political equality among all the citizens, and to which any aristocratical devices must be particularly detrimental.”

There are (or seem to be) cogent reasons that the legislatures should be permitted to abolish existing fee tail estates. A serious inconvenience could arise if the statute had to be

limited to affect only estates arising after its enactment. An entailment can conceivably last until the extinguishment of the line of issue to whom the estate is limited. Many generations may pass before the entailment is ended.

The fee tail can no longer be created in most states. Generally, this has been the result of express legislation. Not all courts have waited for the legislature to act; some have declined to recognize the statute *de donis* as operating within their jurisdictions. It has even been held by some courts that the statutes on descents put an end to fees tail.

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196 Fees tail exist in Delaware, Maine, Massachusetts, and Rhode Island (as to wills only), but the estate is obsolescent and infrequently encountered. Powell, *Real Property*, 2, p. 196.

*Restatement, Property*, c. 5, Introductory Note (3) p. 209 (1936), says that in six states (by Jan. 1, 1936), neither statute nor decisive decision has been found dealing with fees tail. "This group includes Alaska, Idaho, Louisiana, Nevada, Utah and Washington. In these states it is possible that estates tail would be recognized, if the question were presented for decision. This possibility seems negligible as to Louisiana because of the civil law rules applicable therein." (Copyright 1936. Printed with permission of the American Law Institute.)

197 Kepler v. Larson, 131 Iowa 438, 108 N. W. 1033 (1906); Yates v. Yates, 104 Neb. 678, 178 N. W. 262 (1920); Rowland v. Warren, 10 Ore. 129 (1881); Blume v. Pearcy, 204 S. C. 409, 29 S. E. 2d 673 (1944). In these jurisdictions a grant to A. and the heirs of his body vests A. with a conditional fee which becomes an absolute fee upon the birth of heirs capable of inheriting. The estate conferred upon A. by the grant has the essential characteristics of a common-law fee-simple conditional. See extensive note on fee-simple conditional, 11 A. L. R. 602 to 627. See also *Restatement, Property*, c. 5, Introductory Note, Special Note 1 (1936) and Introductory Note, Special Note 1 (1948 Supp.).

Fees conditional have now been abolished by statute in Nebraska. Neb. Rev. Stat. 1943, sec. 76-110 provides: "The creation of fees simple conditional as they existed under the law of England prior to the 'statute de donis' is not permitted. The creation of fees tail is not permitted. The use in an otherwise effective conveyance of property, of language appropriate to create such a fee simple conditional or fee tail, creates a fee simple in the person who would have taken a fee simple conditional or fee tail. Any future interest limited upon such an interest is a limitation upon the fee simple and its validity is determined accordingly." This is part of the Uniform Property Act which Nebraska adopted in 1941. Laws 1941, c. 153.

In Connecticut neither the conditional fee nor the statute *de donis* was ever recognized by the courts. It has been held in this jurisdiction from the earliest times that words appropriate to the creation of an estate tail vest a fee simple in the issue of the first donee in tail; such issue taking no interest in the land
The statutes differ in the effect which they have upon a limitation which formerly would have operated to create an estate tail. In some jurisdictions a limitation formerly sufficient to create an estate tail is declared to create a fee simple absolute. In some states such a limitation is declared to create an absolute fee, but with the additional provision that when the language of the instrument would have created a remainder in fee after a fee tail according to the previous law, this remainder is to be valid as a contingent limitation on a fee and shall take effect in possession if the first taker dies unsurvived by descendants. In other states a life estate during the life of the donee and the donee having no alienable interest beyond a life interest. Rudkin v. Rand, 88 Conn. 292, 91 Atl. 198 (1914). Conn. Gen. Stat. 1949, sec. 7083, provides that each estate given in fee tail shall be an absolute estate in fee simple to the issue of the first donee in tail.


E.g., N. J. Rev. Stat., 1937, 46:3-15: "Whenever any conveyance, will or instrument in writing shall hereafter be made, whereby any grantee, devisee or other person shall become seized in law or in equity of such estate in any real estate . . . [as would have been held a fee tail under de donis] such conveyance, will or instrument shall vest an estate in fee simple in such grantee, devisee or other person."

E.g., N. Y. Real Property Law, sec. 32: "Estates tail have been abolished; and every estate which would be adjudged a fee tail, according to the law of this state, as it existed before the twelfth day of July, seventeen hundred and eighty-two, shall be deemed a fee simple; and if no valid remainder be limited thereon, a fee simple absolute. Where a remainder in fee shall be limited on any estate which would be a fee tail, according to the laws of this state, as it existed previous to such date, such remainder shall be valid, as a contingent limitation on a fee, and shall vest in possession on the death of the first taker, without issue living at the time of such death."


In some jurisdictions the creation of estates in fee tail is prohibited, but there is no statutory declaration as to what shall be the consequence of a limitation which would have created a fee tail at common law. Included in this group are Hawaii and Texas. The *Restatement* states that under such a statute the first taker gets a fee simple except when the manifested purposes of the conveyor are to be more nearly attained by creating an estate for life in favor of the first taker with a remainder in fee simple in favor of the issue of the first taker. *Restatement, Property, Introductory Note, Special Note* 3 (1948 Supp.).
only is conferred upon the first taker, with remainder in fee to the person or persons to whom the estate tail would pass according to the course of the common law.\textsuperscript{201} In still others, the first taker receives a fee tail, but when the estate reaches the issue of the first donee, the statute enlarges it into an absolute estate in fee simple.\textsuperscript{202} In some of the states where the fee tail is still recognized, the tenant is given by statute the power to convey a fee simple.\textsuperscript{203} 

Contrary to their usual tendency to be conservative in matters of retroactive legislation, the courts have often been rather hasty in permitting the statutes to operate on existing fees tail. The courts have been so eager to promote reform that they have frequently dealt quite summarily with interests other than those of the tenant in tail.\textsuperscript{204} 

\textsuperscript{201} E.g., Ark. Stat. Ann. 1947, sec. 50-405: “In cases when by common law any person may hereafter become seized in fee tail of any lands or tenements, by virtue of any devise, gift, grant or other conveyance, such person, instead of being or becoming seized thereof in fee tail, shall be adjudged to be and become seized thereof for his natural life only, and the remainder shall pass in fee simple absolute to the person to whom the estate tail would first pass according to the course of the common law by virtue of such devise, gift, grant or conveyance.”

As of Jan. 1, 1952, states having this type of statute included Ark., Colo., Fla., Ill., Kan., Mo., and N. Mex. \textsuperscript{2} Powell, Real Property, ¶ 199. As to conveyances made prior to 1934, New Jersey also belongs in this group; and Vermont as to conveyances prior to 1941. See note 199 \textit{supra} for current New Jersey statute.

\textsuperscript{202} E.g., Page’s Ohio Gen. Code 19512-8: “All estates given in tail, by deed or will, in lands or tenements lying within this state, shall be and remain an absolute estate in fee simple to the issue of the first donee in tail . . .”

Under such statute, children of the donee have, during the life of the donee, a mere possibility which they cannot convey. Dungan v. Kline, 81 Ohio St. 371, 90 N. E. 938 (1910).

As of Jan. 1, 1952, states in which estates in fee tail were preserved as such for a single lifetime only included Connecticut, Ohio and Rhode Island (wills only). \textsuperscript{2} Powell, Real Property, ¶ 198.

\textsuperscript{203} E.g., Me. Rev. Stat. 1944, p. 2066, sec. 10: “A person seized of land as tenant in tail may convey it in fee simple. . . . When land is owned by 1 person for life with a vested remainder in tail in another, they may by a joint deed convey the same in fee simple. Such conveyances bar the estate tail and all remainders and reversions expectant thereon.”

\textsuperscript{204} No case was found in which a tenant in tail resisted the effect of a statute. We can be reasonably sure, however, that he would not be permitted
(a) The Heirs of the Body of the Tenant in Tail. The heirs, who would have taken in the line of descent from the tenant had it not been for the statutory alteration of the law, have been unsuccessful in attacking the statutes on constitutional grounds regardless of the form of the statute. Not a single case is to be found in which the interests of the heirs of the body are held to be protected from the operation of statutes upon estates created before their enactment. Now, it is granted that public policy may sufficiently justify this result. An early Federal Court in answer to the contention of an heir that the statute deprived him of constitutional and natural rights replied:

"The persons to be affected by this act who resided in the state, and were citizens of it, might derive more benefit from their share of the public property occasioned by the remedy against so great an evil, than loss by being deprived of a particular estate derived from so obnoxious a source."

"In a state of society properly regulated it must frequently happen that private and public interests in some degree interfere with each other. . . . Yet, clear as this principle is, and necessary as in many cases it is that it should be enforced, many, from injudicious notions of liberty, speak of the rights of each individual as if he subsisted in a state of nature unconnected with any other mortal in the universe, and deriving no benefits from a well-constituted society, which to question, even if he were inclined to, the validity of a statute which elevates his estate to a fee simple or which enables him to convey a fee. See Pollock v. Speidel, 27 Ohio St. 86 (1875); Gilpin v. Williams, 25 Ohio St. 283 (1874). No one is likely to complain if his estate were to be made more valuable.

It is equally apparent that those statutes which reduce the estate of the first taker to a life estate or to a nonbarrable fee tail during his lifetime cannot be applied to existing estates against the wishes of the tenant. One of the characteristics of the fee tail estate is the power of the tenant to convert his estate into a fee simple. To take this power from the tenant and leave him with a life estate, or what amounts to little more than a life estate, would surely be to deprive him of property without due process.

As to the mode in which the tenant can exercise his power to convert his interest into a fee simple, see infra note 213.
are more than an ample compensation for any accidental sacrifice which the public interest may occasionally require of a subordinate private advantage to a superior public good."  

However, the courts have not generally based their conclusion upon public policy but upon the ground that during the lifetime of the tenant, his issue, who will be the heirs of his body if they survive him, have no interest in the premises except the mere possibility of acquiring property by descent, as heirs of the body, for the maxim is "nemo est haeres viventis."  It is said that before descent casts, the legislature has the power, at all times, to change the course of the inheritance, and deprive the issue of the capability of inheriting.  

206 Pollock v. Speidel, 27 Ohio St. 86 (1875). In 1807 the lands in question were conveyed to John Pollock, Jr., and the heirs of his body. On Dec. 17, 1811, an act (Laws 1811, c. iv) was passed which provided that "All estates given in tail shall be and remain an absolute estate in fee simple to the issue of the first donee in tail." (Now, Page's Ohio Gen. Code 10512-8.) In 1836, James, a son of John, conveyed the premises by warranty deed to H. from whom defendant claimed. Plaintiffs were the issue and heirs of James. It was contended that the act of 1811 did not apply to this estate tail, and that consequently James could not by his conveyance deprive plaintiffs of their interest in the land. Held for defendant.
207 De Mill v. Lockwood, 7 Fed. Cas. 453, No. 3,782 (C. C. S. D. N. Y. 1853). The legislation here was in the form of a special resolution of a legislature which authorized the sale of entailed lands. The resolution declared the estate to be a fee simple.

Jensen v. Jensen, 54 Wyo. 224, 89 P. 2d 1085 (1939). This was a suit under a declaratory judgment act for construction of a deed. In 1892 the grantors executed the deed to Mrs. Murray and the heirs of her body. The plaintiffs were the heirs of Mrs. Murray and the present tenants in tail. The defendant was the son of one of the plaintiffs. The trial court held that the effect of the deed was to create in the grantees a fee tail; that defendant would be entitled to the use of the land during his lifetime; that the plaintiffs could not bar the entail except by compliance with Wyo. Rev. Stat. 1931, secs. 89-3922 to 89-3930, which authorized tenants in tail to maintain an action to secure the sale of an estate in fee-simple absolute, provided that the court should be satisfied that the sale would cause "no substantial injury to the heirs in tail." This statute directed that the proceeds of such sale be substituted for the land sold and be subject to the same conditions originally made relative to the land so sold. After the case had been
“Naked possibilities or mere expectancies of this character are not property in the ordinary sense. They cannot be disposed of by will or deed and are not subject to attachment. They are therefore not property, and are not regarded as vested rights beyond legislative control.” 208

It is apparent that these courts regarded the entailment only as a restriction of the inheritance to lineal heirs, that is, that the persons who take as heirs of the body at the death of the tenant take only in the manner of heirs and not in any way as purchasers under the original grant or devise. This would seem not to accord with the historical concept of the nature of the fee tail estate. According to the English authorities the heir of the tenant takes not by descent but as

appealed, the legislature passed a statute, Session Laws, 1939, c. 92, sec. 1, which provided that all estates given in tail shall be and remain absolute estates in fee simple to the issue of the first donee in tail. Held: Plaintiffs were now the owners of a fee simple. The defendant had no vested rights in the land. Laws 1939, c. 92, sec. 1, has since been repealed. The present statute provides that language formerly appropriate to create a fee tail shall create a fee simple. Wyo. Laws 1949, c. 93; Wyo. Comp. Stat. 1945, sec. 66-137 (1951 Supp.)

In Minge v. Gilmour, 1 Hay 279 (N. C. 1796), the statute (Acts 1784, c. 22, sec. 5) declared that all conveyances in fee simple made in good faith by any tenant in tail, in actual possession, shall be effective to bar the entailment. The particular tenant in tail had sold the land in 1779 with warranty to Gilmour. Minge claimed as heir of the tenant in tail. It was held that the plaintiff was bound by the Act of 1784, and also by the warranty of his ancestor, inasmuch as assets of greater value than the land conveyed to Gilmour were devised by the tenant to the plaintiff.

208 Comstock v. Gay, 51 Conn. 45, 62 (1883). The tenant in tail, believing he had a fee simple, sold the land with covenants of seizin and warranty. In Comstock v. Comstock, 23 Conn. 349 (1854) it was held he was a tenant in tail and could convey only a life estate. Thereafter the legislature passed a special act validating and confirming the deeds and making good the title in the grantees in fee simple, upon the condition that the tenant hold the proceeds in trust for those who might take under the will creating the tenancy. After the tenant died his heir sought to recover the land from the grantees of his father. Held: He could not recover.

The provision for holding the funds, which assured the heir of receiving his estate in commuted form, was not a controlling factor; in fact it was not even considered by the court. General statutes do not usually require the tenant to hold the funds for the heirs. See the Maine statute supra note 203. An exception was the prior Wyoming statute, Wyo. Rev. Stat. 1931, secs. 89-3922 to 89-3930, supra note 207.
a substituted purchaser from the original donor, *per formam doni*, although, of course, he takes because he is heir of the body.\(^{209}\) It was the consequence of this principle that in England, the heir was held not to be bound by contracts in regard to the property made by a previous tenant,\(^{210}\) whereas the heir would be bound if he took by descent. The principle also had the consequence in England that the tenant was incapable of alienating any greater indefeasible interest in the land than an estate *per autre vie* unless he had first destroyed the entailment by fine or common recovery.\(^{211}\) Furthermore, statutory changes of the common-law rules of descent have been held by a number of American courts not to apply to the fee tail estate on the ground that this estate does not pass by descent.\(^{212}\)

However, the decisions to the effect that the heirs of the tenant in tail have no interest in the land prior to the death of the tenant except a possibility of inheriting, may be rationalized upon the ground that the tenant always has the power to defeat the entailment or to bar the heirs.\(^{213}\)

\(^{209}\) Cruise, *Digest*, Tit. 2, c. 2, sec. 19 (3d Am. ed. 1827).
\(^{210}\) Cruise, *op. cit.*
\(^{211}\) Cruise, *op. cit.*, Tit. 2, c. 2, sec. 1.
\(^{212}\) Davis v. Hayden, 9 Mass. 514 (1813); Corbin v. Healy, 20 Pick. 514 (Mass. 1838); Sauder's Lessee v. Morningstar, 1 Yeates 313 (Pa. 1793); Guthrie's Appeal, 37 Pa. 9 (1860).
\(^{213}\) A fee tail which could never be barred would doubtless be void as a perpetuity. The whole history of the fee tail estate is to the effect that there can be no such thing as an unbarrable fee tail. 2 Simes, *Future Interests*, sec. 480 (1936); Orndoff v. Turman, 2 Leigh. 200 (Va. 1830). There has been, however, a diversity of opinion in this country as to the mode in which the tenant can exercise his power. In at least one state it has been held that an inherent characteristic of the fee tail is the power of the tenant to convert his estate into a fee simple by conveyance. Ewing v. Nesbitt, 88 Kan. 708, 129 Pac. 1131 (1913). In other states the courts have stated that in the absence of statute a conveyance by a tenant in tail is ineffective to bar the issue or bar the remainder expectant on the estate in tail and that his deed confers only a life estate *per autre vie* or a voidable base fee on the grantee. Comstock v. Comstock, 23 Conn. 349 (1854); Soule v. Soule, 5 Mass. 61 (1809); Giddings v. Smith, 15 Vt. 344 (1843); Gleeson's Heirs v. Scott, 3 Hen. & M. 278 (Va. 1809). However, at an early date statutes
Consequently, the issue can expect to take only if the tenant has not disposed of the fee in his lifetime. The statutes, then, merely have the effect (1) of relieving the tenant (whether the first donee or the issue of the first donee) of having to take any steps on his own behalf to convert the fee tail into a fee simple, and (2) of removing the restrictions on the line of descent so that collateral heirs can take. Looked at from this point of view, the statutes do not add to the uncertainty of the interests of the heirs, and, in the case of the statutes which cut down the estate of the first taker to a life estate and give the fee to the next taker, the heirs of the body of the first tenant will be more certain to take than they would have been at common law.

Of course, if the tenant had no power to defeat the interests of his heirs, their coming into possession of the land would be dependent solely on their outliving the tenant. Their right to succession would be as vested as the interest of the heirs of a life tenant who have a remainder after the life estate; and as we have seen it is generally agreed that were passed in several states authorizing tenants in tail to bar the entail by conveyance. 1 Tiffany, Real Property, sec. 46 (3d ed.). E.g., Me. Stats. 1821, c. 36, sec. 4; Mass. Stats. 1791, c. 60; N. C. Acts 1784, c. 22, sec. 5. Where there was no general statute, the legislatures appear to have enacted special acts as a matter of course to enable tenants in tail to alienate in fee simple. See Comstock v. Gay, 51 Conn. 45 (1833); Pollock v. Speidel, 27 Ohio St. 86 (1875); Carroll v. Olmsted's Lessee, 16 Ohio 251 (1847); De Mill v. Lockwood, 7 Fed. Cas. 453, No. 3,782 (C. C. S. D. N. Y. 1853); Orndoff v. Turman, 2 Leigh. 200 (Va. 1830). At one time fines and common recoveries were recognized as a mode of barring entails in several of the colonies and states. 1 Tiffany, op. cit., sec. 46. In Riggs v. Sally, 15 Me. 408 (1839) it was stated that the common recovery had been recognized in that jurisdiction and on this ground it was held that a statute which permitted the same result to be accomplished by a conveyance as by suffering a common recovery could be applied to existing estates.

Restatement, Property, sec. 79 (1936): "A person who has an estate in fee tail has both the privilege and the power to create any interest in the land so held which could be created by a person having an estate in fee simple absolute therein, provided he makes an otherwise effective conveyance inter vivos which conforms to the special formalities prescribed for a dis-entailing conveyance, by the law of the state wherein such land is located." (Copyright 1936. Printed with permission of the American Law Institute.)
the legislature cannot divest the interests of such remaindermen, except in certain situations where the remaindermen are compensated for the loss of the interests in the land. In those jurisdictions in which the statute preserves the fee tail for the life of the first taker only, with the fee going to his issue, the tenant may lack the power to bar the entailment. 214 Where this is true, if a change were to be made to the type of statute under which a limitation formerly sufficient to create an estate tail creates a fee simple, the new statute probably could not be given retroactive effect so as to wipe out the interests of the issue. Also, in jurisdictions where under the present statute the donee takes a life estate only, with a remainder in his issue, the tenant of an existing estate probably could not be invested with the fee simple. Nor, probably, could he be given the power to convey the fee except under those conditions and circumstances where a statute authorizing the sale in fee of land in which there are future interests could be applied retroactively. 215

(b) The Reversioners and Remaindermen. The remaining question is whether reversioners and remaindermen expectant

214 Restatement, Property, sec. 89 (1936): “A person who has an estate in fee tail preserved as such for a single lifetime only, has both the privilege and the power to create any interest in the land so held which could be created by a person having an estate in fee simple absolute therein, except that the interest so created may be defeated, upon the death of the conveyor, by the persons entitled after such conveyor, under the form of the limitation which created the estate in fee tail.” A special note immediately following the quoted section states: “This Section states the law applied in both Connecticut and Ohio, but the exception is contra to the rule existing in Rhode Island as to estates in fee tail created by wills. In Rhode Island the first donee in tail has the full power to make a disentailing conveyance (see sec. 79). Only when a disentailing conveyance is not made, does the estate become an estate in fee simple absolute in the issue of the first donee in tail. The rule stated in this Section is preferable because, if the entailment can last not more than a single lifetime, there is no sufficient reason for permitting a disentailing conveyance, during that single lifetime. So to permit it frustrates the desires of the creator of the interest.” (Copyright 1936. Reprinted with permission of the American Law Institute.)

215 Willhite v. Rathburn, 332 Mo. 1208, 61 S. W. 2d 708 (1933), supra note 89.
on fees tail can be cut off by retroactive legislation. A
remainder after a fee tail is vested if the remainderman is
an ascertained person who is ready to come into possession
whenever and however the particular estate terminates. The
uncertainty, and even the improbability, that the remainder-
man will in fact ever enjoy the estate in possession does not
make his interest contingent in the real property sense. However, reversion and remainders after fees tail are not
necessarily vested interests in the constitutional sense. Their
vulnerability to defeasance would appear to be the deciding
factor. The writer does not mean that the legislature can
abolish an interest simply because it is subject to defeasance
at the hands of the parties. But if the interest is subject to
defeasance, and in addition there is a strong policy against
the particular form of land tenure, the power of the legisla-
ture to abolish the interest will almost certainly be vindicated
by the courts.

Cases in point are infrequent. However, in a few decisions
there is dictum, or statements without authority cited or
reasons given, that reversion and remainders after fees tail
can be destroyed by the legislature. In *Gilpin v. Williams
et al.* the interest of the donor was described as a mere
possibility of reverter, which the court intimated could be
cut off. However, no express ruling in this respect was made
because none was required by the facts of the case. In *Moore

216 "What is a vested remainder?" is a matter of definition, in the making
of which economic realities do not necessarily play a role.

Gray's classic definition of a vested remainder is that it is "a future estate
which takes effect as a present estate immediately upon the expiration of the
preceding estate or estates as originally limited, and is ready at every moment
during its continuance to come into possession whenever and however the
preceding estates determine. That is to say, a vested remainder is a future
estate that is subject to no condition precedent except the termination of the
Roland Gray, 1942).

217 Carter v. Tyler and Others, 1 Call. 165 (Va. 1797); Orndoff v. Turman,
2 Leigh. 200 (Va. 1830).

218 25 Ohio St. 283 (1874).
v. Bradley the tenant in tail had conveyed in fee simple and had died without issue before the effective date of a statute which provided that a conveyance by a tenant in tail will be effective to bar the entailment. The remainderman made an entry before the passage of the act but at the time of the enactment the grantee was in actual possession. It was held without discussion that the case came within the words and spirit of the act and so judgment was given against the remainderman in his action in ejectment.

On the other hand, where the tenant has no power to bar the entailment (as may be the case in jurisdictions having a statutory type of fee tail which is to exist for a single lifetime only, or as most probably would be the case in jurisdictions where under the statute the first taker gets only a life estate), it is probable that the legislature could not raise the tenant’s estate to a fee simple nor authorize him to convey a fee except on the conditions and under the limitations applicable to the sales of land in which there are remainder interests. In Green v. Edwards the court had before it a testamentary trust, under the terms of which the beneficiaries took equitable fees tail. One of the beneficiaries

219 3 N. C. 142 (1801).
220 N. C. Acts 1784, c. 22, sec. 5: “All Sales and Conveyances made bona fide, and for valuable Consideration since the first Day of January, in the Year of our Lord one thousand seven hundred and seventy-seven, by any Tenant in Tail in actual Possession of any real Estate where such Estate hath been conveyed in Fee-Simple, shall be good and effectual in Law to bar any Tenant or Tenants in Tail, and Tenants in Remainder of and from all Claim and Claims, Action and Actions, and Right of Entry whatsoever, of, in and to such entailed Estate, against any Purchaser, his Heirs or Assigns, now in actual Possession of such Estate, in the same Manner as if such Tenant in Tail had possessed the same in Fee-Simple.”

The Act was held in Den ex dem. Lane v. Davis, 2 N. C. 277 (1796) to be applicable to tenancies in tail in existence. This case is also without opinion.
221 31 R. I. 1, 77 Atl. 188 (1910).
222 The trustees were to pay the income for life to the three children of the testator and upon the death of any child to convey such portion to his or her lineal descendants in fee simple. If there were no lineal descendants, then the trustees were to convey equally to the survivors of the children of
executed a deed which purported to convey in fee simple all of her interest in the trust property to the complainant. The deed stated the grantor's intention to bar the entail, as provided by a statute, which permitted the barring of equitable estates tail and the remainders and reversions expectant thereon. The complainant sought to compel the trustees to convey to him the legal title of his share of the trust estate acquired under the conveyance. The court ruled that inasmuch as the doctrine of barring an equitable estate tail had never been followed in that state, the reversions or remainders expectant upon the estate in question were vested in the constitutional sense and that legislation which attempted to cut them off was an unconstitutional exercise of the legislative power in violation of the state constitution and of the Fourteenth Amendment.

It is to be observed that statutes which convert existing fees tail into fee-simple estates may indirectly destroy remainders limited after the fees tail. A remainder after a fee tail is not at common law within the rule against perpetuities, however remote it may be. However, after the statute has raised the fee tail to a fee simple, a remainder after the fee tail can then be given effect only as an executory

the testator or their lineal descendants, and in case of the decease of all of the children of the testator without issue, to his heirs at law. It was held in Paine v. Sackett, 27 R. I. 305, 61 Atl. 753 (1905) that the rule in Shelley's Case operated to give the beneficiaries equitable fees tail.

223 R. I. Laws 1906, c. 1346, sec. 16: "Equitable estates-tail in possession or remainder, and all remainders and reversions expectant thereon, may be barred in the same manner as legal estates-tail and the remainders and reversions expectant thereon; and all conveyances of equitable estates-tail made since January 31st, 1896, by deed in common form in which the intention is expressed of barring the entail and reference is made to the specific land by metes and bounds or by other definite description, shall bar the estate-tail and all remainders and reversions expectant thereon."

224 Gray, Rule Against Perpetuities, sec. 443 (4th ed., Roland Gray, 1942). See Kirk v. Furgerson, 6 Cold. 479 (Tenn. 1869). The reason is because the future interest is barrable.
interest, which will be invalid if by any possibility it may not vest in possession within the period of the rule.\(^{225}\)

(c) Effect of Repeal of Statutes. A few words should be added in regard to the effect that repeal of the statute which modified or abolished fees tail would have upon estates tail in existence before the statute. This problem was before the court in *James v. Dubois*.\(^{226}\) In 1768 Robert James conveyed the premises in question to his son, Robert II, and the heirs male of his body. In 1784 the legislature passed an act which provided that no entailment shall last longer than the life of the first donee.\(^{227}\) Robert II died in 1800 and Robert III entered into possession. In 1820 the legislature repealed the Act of 1784. Thereafter, in 1833, Robert III conveyed the premises to one James Cook for valuable consideration. Robert III died in 1834. Robert IV, claiming the premises as tenant in tail under the deed of his great-grandfather, brought an action in ejectment against the defendant who claimed under a conveyance from James Cook. The court held that the effect of the Act of 1784 was to end the entailment immediately on the death of Robert II, but that the statute did not confer any estate on Robert III; he took whatever interest he had under the conditions of the deed of his grandfather. The court then reasoned that, since the Act of 1784 operated only provisionally to raise the interest of Robert III to a fee, when the statute was

\(^{225}\) Hertz v. Abrahams, 110 Ga. 707, 36 S. E. 409 (1900).

At common law a gift over on failure of issue was formerly construed to create a fee tail in favor of the first donee. It has been considered that by reason of a statute changing an estate in fee tail into an estate in fee simple, the common law construction is inadmissible, since it would make the gift over invalid as too remote. Also, the fact that an estate tail cannot by reason of the statute be created, has been viewed as a reason for regarding the failure of issue intended as definite and not indefinite. 1 Tiffany, *Real Property*, sec. 44 (3d ed.).

\(^{226}\) 16 N. J. L. 285 (Sup. Ct. 1837).

\(^{227}\) N. J. Acts 1784, Paton's Rev. 53.
repealed he had to look to the deed to ascertain the nature and quantity of his estate, and by the terms of that deed he was a tenant in tail.

The defendant, who claimed under the conveyance from Cook, should have had, according to this line of reasoning, no valid claim to the property as against the plaintiff. However, the court quite unexpectedly concluded that estates tail were so odious that it was best to consider them as having been done away with once and for all by the Act of 1784. Therefore judgment was entered for the defendant. Most courts as a matter of policy would arrive at the same conclusion.

15. Statutes Which Authorize the Revocation of Grants of Future Interests

North Carolina enacted in 1893 a statute which provided:

"That the grantor in any voluntary conveyance in which some future interest in real estate is conveyed or limited to a person not in esse, may at any time before they come into being revoke by deed such interest so conveyed or limited." 228

It was held in two cases that the Act of 1893 could have no application to deeds made prior to enactment as the rights conferred under the deeds were fixed when the deeds were registered. 229 The Supreme Court of North Carolina subsequently withdrew from its earlier position that the future interests of unborn persons are vested rights. In Stanback v.


A grantor cannot generally derogate from his own inter vivos grant. Lillard v. Lillard, 63 Ohio App. 403, 26 N. E. 2d 933 (1939); Reed v. Barkley, 123 Misc. 635, 205 N. Y. S. 803 (1924).
Citizens National Bank the maker of a trust sought to revoke the trust under the authority of an amendment of 1929, which extended the provisions of the Act of 1893 to trusts in real or personal property. The trust had been created voluntarily without value in 1927. By the terms of the trust, it was to terminate when the cestui que trust reached the age of fifty or at his death if he did not reach that age. When the trust came to an end the whole interest therein was to vest in the cestui if living, but if he died under the age of fifty years the trust property should go to his issue, if any, per stirpes, and if there were no issue then to his next of kin. The maker and the cestui both were agreed upon the revocation, but the trustee doubted that the contingent interests could be extinguished. It was held that all the future contingent interests in the issue and next of kin of the cestui were wiped out.

“The term ‘vested rights’ relates to property rights, and ‘a mere expectancy of future benefit, or a contingent interest in property founded on anticipated continuance of existing laws does not constitute a vested right. Contingent rights arising prior to the enactment of a statute, and inchoate rights which have not been acted on are subject to legislative control.’”

In a subsequent case the court remarked:

“Mere expectancies of future contingent interests provided for persons not in esse do not constitute vested rights such as would deprive the Legislature of the power to enact the statute authorizing revocation of a voluntary grant.”


231 N. C. Sess. Laws 1929, c. 305.

If the settlor has not reserved a power of revocation, he cannot revoke the trust unless the power of revocation was omitted by mistake, except with the consent of the beneficiaries. 3 Scott, Trusts, sec. 330. The same principles are applicable to the modification of a trust. Scott, op. cit., sec. 331.


The legislature of North Carolina subsequently added some significant provisions to the statute as amended in 1929. With the appearance of federal estate and gift taxes, the statute proved to be more detrimental than beneficial. There was a great deal of uncertainty in regard to the incidence of taxes on trusts in which some future interest was limited to a person not in esse and even considerable doubt whether the settlor could by any act make a trust irrevocable within the contemplation of the federal statutes. To remedy this situation the legislature in 1943 added several provisions, the purport of which is that the future interest cannot be revoked when the instrument creating the interest expressly states that the grantor or trustor cannot revoke such interest. In the case of instruments already executed, the grantor or trustor was given six months after the effective date of the amendment to revoke such future interests, or to file with the trustee an instrument stating or declaring that it is his intention to retain the power to revoke. To have made this amendment prospective only, would, in a large measure, have defeated its purpose. The amendment was designed primarily to remove the uncertainty attending existing trusts. In *Pinkham v. Unborn Children* it was argued that the legislature could not take away a grantor’s “right” to revoke the grant of interests to unborn persons. The court was unable to formulate a definition of “vested rights.” The conclusion was that the grantor had merely a personal power

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234 N. C. Sess. Laws 1943, c. 437: “Provided, further, that this section shall not apply to any instrument hereafter executed creating such a future contingent interest when said instrument shall expressly state in effect that the grantor, maker, or trustor may not revoke such interest: Provided, further, that this section shall not apply to any instrument heretofore executed whether or not such instrument contains express provision that it is irrevocable unless the grantor, maker, or trustor shall within six months after the effective date of this proviso either revoke such future interest, or file with the trustee an instrument stating or declaring that it is his intention to retain the power to revoke under this section: . . .”

235 227 N. C. 72, 40 S. E. 2d 690 (1946).
or privilege, solely created by statute and reflecting the existing public policy, and that this privilege was subject to change or withdrawal at the pleasure of the legislature at any time before its exercise and before the happening of the contingency.

16. Statutes of Limitations and Marketable Title Statutes

Ordinarily, until a future interest has become possessory the period of adverse possession does not begin to run against it. This is because generally the owner of a future interest has no right of action against which the statute of limitations can operate. But some statutes of limitations purport, at the expiration of the specified period, to confer title upon the adverse claimant. If this form of language is given literal effect, serious constitutional questions may be raised when the statute is applied retroactively. Admittedly, the immunity of future interests from the operation of the usual statute of limitations is an impediment to the marketability of land. Sometimes a very long period must pass before the adverse possessor finally gets title. But it is improbable that enhancement of marketability would be accepted by the courts as a sufficient reason for obliterating a future interest, unless it were an interest very unlikely to vest in possession. An indefeasibly vested remainder or reversion could surely not be wiped out. There would even be question whether

237 Supra Chapter 3, note 54; 2 *Restatement, Property*, sec. 220, Comment c, and Special Note (1948).

An Illinois statute provides, for example: “Every person in the actual possession of lands or tenements, under claim and color of title, made in good faith, and who shall for seven successive years, continue in such possession, and shall also, during said time, pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title.” Ill. Rev. Stat. 1951, c. 83, sec. 6.

238 For the most part such statutes are construed sooner or later not to bar future interests. See Dunlavy v. Lowrie, 372 Ill. 622, 25 N. E. 2d 67 (1939); McDowell v. Beckham, 72 Wash. 244, 130 Pac. 350 (1913).
239 In Webster v. Cooper, 14 How. 488 (U. S. 1852), a remainderman brought action to recover possession as soon as his interest became possessory.
contingent future interests in unborn or unascertained persons could be summarily destroyed. As we have seen, the courts are generally reluctant to permit the extinguishment of any future interest where the owner does not receive compensation or a substitute for the interest which he loses.

In order for a statute of limitations which bars future interests to be capable of retroactive application without serious doubt of constitutionality, some provision must be made for allowing the owners of existing interests to preserve their interests, and a reasonable period of time must be allotted for this purpose. Recordation as a method of preservation would be easy and inexpensive and in keeping with the policy of the recording statutes. In the case of future interests in unascertained or unborn persons, some difficulty might yet be experienced because such persons (when born or ascertained) would not have had a real opportunity to protect their interests. Perhaps these instances could be passed off as an occasional sacrifice that must be made for social progress. The statute would be on safer ground if provision were made for recordation on behalf of persons who cannot record for themselves.

Another method of preserving existing interests would be by bringing action. The obvious objection to this method is

While his action was pending the following statute was passed. "No real or mixed action for the recovery of any lands . . . shall be commenced or maintained against any person in possession of such lands, where such person or those under whom he claims, have been in actual possession for more than forty years, and claiming to hold the same in his or their own right, and which possession shall have been adverse, open, peaceable, notorious, and exclusive." Me. P. L. 1848, c. 87. If the statute had been given retroactive effect, plaintiff's cause of action would have been extinguished.

240 See supra Chapter 3, p. 73 et seq.

241 The Michigan Marketable Title Statute, for example, provides that "Such notice may be filed for record by the claimant or by any other person acting on behalf of any claimant who is: (a) Under a disability, (b) Unable to assert a claim on his own behalf, (c) One of a class whose identity cannot be established or is uncertain at the time of filing such notice of claim for record." Mich. Comp. Laws 1948, sec. 565.103.
that the owner of a future interest may have no right of action against the possessor. If there is no available action, the owner of the future interest would be given only an illusory remedy. He would have reason to complain of deprivation of property without due process. Of course, a cause of action could be created for the purpose. The owner of the future interest, for example, might be permitted to maintain a suit to quiet title. As a mode of preserving a future interest this would be considerably more expensive than recordation and might be objectionable on that account. Decisions in Kansas and Pennsylvania indicate that in some jurisdictions it may be held unconstitutional for the legislature to create a new cause of action and force the owner of an interest to pursue this cause of action if he does not wish to lose his interest.

The same constitutional problems which arise from the retroactive application of statutes of limitations to existing future interests also arise when the marketable title statutes, 

242 An Iowa statute authorizes the owner of a future interest to bring an action to quiet title. Iowa Code 1950, sec. 649.1. It has been held under this statute that the period of adverse possession runs against future interests, since the statute affords owners of future interests a present remedy to contest the right of the adverse possessor. Ward v. Meredith, 186 Iowa 1108, 173 N. W. 246 (1919).


244 Girard Trust Co. v. Pa. R. Co., 71 Pa. D. & C. 553 (C. P. 5 Phila.), aff'd 364 Pa. 576, 73 A. 2d 371 (1950). The statute provided inter alia that in case of money paid or to be charged against land under any ground rent where a period of fifty years has elapsed and no proceeding or action has been instituted within this period for payment or collection of such ground rent, then there shall be a conclusive presumption of payment, release, or satisfaction thereof, and that no such ground rent shall be enforceable unless within one year after effective date of this act a proceeding to enforce payment, or to preserve, revive, or continue such charge shall be instituted. Act of May 23, 1949, P. L. 1692, Purdon's Pa. Stat. Ann., Tit. 68, sec. 451 (Supp. 1949). It was held that the act could not apply to an existing ground rent because this would allow the legislature to so affect the remedy as "substantially to impair and lessen the value of the contract." The Pennsylvania Supreme Court declared the statute to be so conflicting and irreconcilable in its various provisions and so unsusceptible of rational interpretation as a whole as to be incapable of judicial enforcement.
discussed in Chapter 3, are applied to existing future interests. But as pointed out, the present marketable title statutes are drafted so that the instances will be infrequent where valid interests are subject to extinction. Quite generally speaking, the present statutes operate in favor of persons in possession who can show a chain of title back a rather large number of years. Where a person has both possession and a record title for the specified period, the probabilities are remote that there are any outstanding ancient future interests which are still valid. As a means of preserving such valid ancient future interests as there may be, most of the existing marketable title statutes have provided for recordation within a specified time although one statute does provide for the bringing of an action. In Lane v. Travelers Insurance Co., the Iowa Supreme Court apparently

245 Supra Chapter 3, p. 80 et seq.
247 230 Iowa 973, 299 N. W. 553 (1941). The statute provided: "No action based upon any claim arising or existing prior to January 1, 1920, shall be maintained . . . in any court to recover any real estate . . . or to recover or establish any interest therein or claim thereto . . . against the holder of the record title . . . in possession, when such holder of the record title and his grantors . . . are shown by the record to have held chain of title . . . since January 1, 1920, unless such claimant, by himself, or by his attorney or agent, or if he be a minor or under legal disability, by his guardian, trustee, or either parent shall within one year from and after July 4, 1931, file in the office of the recorder of deeds . . . a statement in writing . . . definitely describing the real estate involved, the nature and extent of the right or interest claimed, and stating the facts upon which the same is based . . ." Iowa Code 1935, sec. 11024; now with different dates, Iowa Code 1950, sec. 614.17, amended Acts 1951, c. 209, sec. 3. The testator, who died in 1895, devised his farm to his son Patrick Lane for life with remainder to the heirs of the son. Patrick mortgaged the land in 1906. In 1910 the mortgage was foreclosed and the land was sold to one Kinney, who in 1913 conveyed to Patrick's wife in fee simple. Thus Mrs. Lane held record title as of 1913. In 1923 she instituted an action to quiet title and a decree was entered in her favor. In 1926 Mr. and Mrs. Lane mortgaged the land to the defendant insurance company, which later foreclosed and claimed full title. After July 4, 1932 (the final date for recording under the above statute), the remaindermen brought an action to establish their interests in the land. Two of the remaindermen were minors, born before 1920. The interests of the adult remaindermen were held to be barred by the running of the statute of limitations on the right to
assumed the constitutionality of the recordation requirement. Contingent remainders were held to have been barred "by the plain provisions" of the statute because no preserving statement had ever been recorded. Unfortunately, the constitutional question was not raised or argued.

II. POWERS OF APPOINTMENT

A discussion of future interests would not be complete without mention of powers of appointment, even though most powers are strictly present interests. By their exercise, future interests may be created. The instrument which creates the power of appointment may also create future interests which will be affected by the exercise of the power.

In some jurisdictions the law of powers of appointment has been materially modified by statute. Conclusions as to what would be the result if a statute were to be applied in case of existing powers of appointment can be only a matter of conjecture in view of the paucity of authority.

For constitutional purposes, the courts would undoubtedly treat a general power of appointment as virtually tantamount to ownership of the property which is subject to the power, since the donee can appoint in favor of himself, or, if the power is limited to an appointment by will, he can appoint in favor of his estate or his creditors. Beyond this, I do

set aside the decree of 1923 quieting title in Mrs. Lane. The interests of the minor remaindermen were held to be extinguished under the statute quoted above, for whether the rights of these remaindermen were deemed to have arisen at the time of their grandfather's death or at the time of their births, the interests had certainly arisen prior to Jan. 1, 1920. The defendant, in the opinion of the court, had filled all the requirements of the statute.

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not believe any general statement can be made concerning the extent to which the power of the donee would be considered a constitutionally protected interest. Possibly not even a special power would be considered to be a mere privilege which the legislature can take away, especially if the power is created by contract.\(^{250}\) Quite certainly, the legislature would not be permitted to take away the power if it is of demonstrable value to the donee or if it is connected with some other interest the donee has in the subject matter of the power.

With some degree of assurance, it may be stated that until an appointment is made, the prospective appointees would be deemed by most courts to have only a mere possibility of acquiring property in case the donee chooses to exercise his power and elects to appoint in their favor. It was held in *Thomson's Ex'rs v. Norris*,\(^{251}\) where the donee was given the power to appoint among the testator's sisters and their children, that the legislature could probably validate a compromise whereby the donee, in consideration of a share in the estate outright, agreed with the adult prospective appointees not to exercise the power. At any rate, in this case the compromise agreement so confirmed was held to be effective to cut off all interests of the minor prospective

cised for his own benefit, but not those which he might have exercised solely for some other person; ...” 11 U. S. C. A. sec. 110a.

A Michigan statute provides: “When an absolute power of disposition, not accompanied by any trust, shall be given to the owner of a particular estate, for life or years, such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estates limited thereon, in case the power should not be executed, or the lands should not be sold for the satisfaction of debts.” Mich. Comp. Laws 1948, sec. 556.9. See 3 Powell, *Real Property*, \(\S\) 390 for a discussion and enumeration of statutes.

For computation of federal estate taxes, the appointive assets in case of powers created subsequent to October 21, 1942, are to be included in the gross estate of the decedent whether the power is exercised or not. Int. Rev. Code, sec. 811 (f).


\(^{251}\) 20 N. J. Eq. 489 (Err. and App. 1869).
appointees who did not consent to or participate in the compromise.

The interest of the prospective appointees, especially where the power is general, has been compared to the expectancy of an heir. However, where the power is in favor of a limited class of persons, and a duty is imposed upon the donee to exercise it, the prospective appointees do have an interest which may be more substantial than a mere expectancy. In default of appointment, courts of equity will give the property to the members of the class in equal shares. Whether the prospective appointees would here be held to have a constitutionally protected interest, would be much influenced by the theory which the court adopted to explain the result reached by the equity courts. It is Professor Simes' theory (the constructive trust theory) that equity simply imposes a remedy in view of the impossibility of the beneficiaries taking in the precise manner intended, to prevent the unjust enrichment of the donor's heirs or of other persons into whose hands the property may have come. Professor Gray, on the other hand, believed that the courts are merely enforcing an implied gift in default of appointment. The theory indicated by the Restatement of Trusts is that the donee is a trustee of the power and the power is


However, where the power is special, courts of equity will set aside fraudulent appointments at the instance of a prospective appointee, thus recognizing that the prospective appointee may have something more than a mere expectancy. Simes, *op. cit.*, sec. 290.

If the exercise of the power were treated as a mere event named in the original limitation, the interest of a prospective appointee would be very much like an executory interest or a contingent remainder. But the act of the donee is not treated by the cases like other events. It involves too much uncertainty. The courts avoid, as a rule, calling the expectancy of an appointee either a contingent remainder or an executory interest. Simes, *op. cit.*, sec. 286.


the subject matter of the trust. If Professor Simes' view is adopted, then it is somewhat difficult to see how the members of the class can have much more than an expectancy before the appointment is made or the constructive trust enforced. Gray's view might suggest that the members of the class have some kind of present interest from the time the power is created, analogous, perhaps, to a contingent remainder or executory interest. The Restatement theory would also seem to presuppose a present interest in the members of the class as beneficiaries of the trust.

As a consequence of the federal estate tax legislation of 1942, making property over which a decedent has at the time of his death a power of appointment includable in his gross estate, statutes have recently been enacted in many states permitting the release of powers of appointment. In order for such statutes to be fully effective for avoiding taxes, it is necessary that they be retroactive and most of them are. They are probably constitutional, except perhaps insofar as they are applicable to powers in trust, but their constitutionality has not yet been passed on. It appears that as a matter of common law all powers are releasable except powers in trust.

255 Restatement, Trusts, secs. 27, 414 (1936). This is also the view of Professors Bogert and Scott. 1 Bogert, Trusts, sec. 116; 1 Scott, Trusts, sec. 27.

256 Int. Rev. Code, sec. 811 (f) (Sec. 403a, Rev. Act of 1942). The law was changed again in 1951, 65 Stat. 91. As to powers created on or before Oct. 21, 1942, the 1951 amendment restores in general the law as it existed prior to 1942. The impact of the law is now limited to general powers.

257 3 Powell, Real Property, ¶ 394.

258 1 Simes, Future Interests, sec. 280 (1936); 3 Powell, Real Property, ¶ 393. Restatement, Property, sec. 334 (1936) states: "All general powers [whether presently exercisable or exercisable only by will] can be released by the donee." Restatement, Property, sec. 335 (1948 Supp.) states "All special powers can be released by the donee unless the donor in creating the power manifests an intent that it shall be non-releasable." (Copyright 1948. Printed with permission of the American Law Institute.)
FUTURE INTERESTS

There is no authority at all as to how far the interests of the takers in default before the exercise of the power are constitutionally protected. Categorical statements are hazardous because the substantiality of the interests of the takers in default must depend upon the wording of the instrument, upon whether the power is general or special, and upon other factors. However, in view of the fact that the gift in default is in the nature of a remainder and the takers in default purchasers under the donor's will or deed, it is safe to say the courts are not likely to permit the legislative extinction of the interests of the takers in default unless the statute merely accomplishes what the donee could and would have done had there been no statute.

Where property has been devised to one for life and after his death to such person as he shall appoint by will and no provision is made in the donor's will for takers in default of appointment, the reversion (a technically vested interest) descends to the heirs of the testator subject to complete divestment by the exercise of the power. The heirs, however, have no such certain interest in the property as to prevent the application of a statute enacted after the testator's death but before that of the life tenant, under which the will of the life tenant is effective to exercise the power, although the will would not have been effective to do so at the time of the execution.

A remainder in default of appointment is vested in the absence of language which would make it contingent; that is, the fact that a remainder is subject to a power does not prevent its being vested. Simes, Future Interests, sec. 80 (1936).

Aubert's Appeal, 109 Pa. 447, 1 Atl. 336 (1885).

But it was held in an older Pennsylvania case that a life tenant donee of a special testamentary power could not be allowed to convey the fee inter vivos under the purported authority of a retroactive statute, where the reversioners were opposed. Shoenberger v. School Directors, 32 Pa. 34 (1858) supra note 100.
Several articles in recent years have pointed out the grave danger to security of titles arising from grantors' conveying the fee to land subject to conditions or limitations so that upon breach of the condition or happening of the event, the title either reverts automatically to the grantor, or the grantor has the power by taking the proper steps to cause a forfeiture of title. The *in terrorem* aspect of powers of termination and of possibilities of reverter has, perhaps, been exaggerated. It is unlikely that present day courts will enforce forfeiture or termination if enforcement will cause a loss to the grantee out of all proportion to any loss the grantor may suffer from breach of condition or the happening of the event, or if changing conditions have rendered enforcement inequitable, although few courts, it appears, have expressly applied equitable notions to the enforcement of possibilities of reverter and powers of termination.

But possibilities of reverter and powers of termination do add undesirably to confusion of titles. Since these interests are generally held to be descendible and devisable and in many jurisdictions alienable *inter vivos*, and since neither

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262 Goldstein, op. cit. supra note 261.

263 Generally possibilities of reverter and powers of termination pass on intestacy of the owner exactly on the same basis as his present interests. These interests are also generally held to be devisable. 2 Powell, *Real Property*, 7284. Powers of termination are not generally alienable *inter vivos* except by release or conveyance with a reversion or between the heirs of the grantor. 3 Simes, *Future Interests*, sec. 716 (1936). The authorities are about equally divided on the question of whether a possibility of reverter is alienable *inter vivos*. 3 Simes, op. cit. sec. 715. Many states have enacted statutes permitting alienation of any estate or interest in property [e.g., Ala. Code Ann. 1940, Tit. 47, sec. 13] and at least nine states specifically authorize alienation of the power of termination [e.g., Cal., Conn., Idaho, Md., Mich., Mont., N. J., N. M., R. I.]. See Note, 45 Mich. L. Rev. 375 (1946).
interest is subject to the rule against perpetuities, over long periods of time the ownership of a power of termination or possibility of reverter may come to be shared by a large number of persons who have no real hope ever to compel forfeiture, but some of whom may nevertheless attempt litigation or may try to capitalize on the nuisance value of their claims. Such threats hinder the use and development of the land. Alienation is indirectly restrained.

There would appear to be need for remedial legislation. Yet despite the repeated warning of the writers, statutes have been enacted in only a few states. The legislation in existence takes four general patterns: (1) statutory time limit imposed in the absence of a differing time stipulation by the parties, (2) prohibition against trivial conditions annexed to a conveyance, (3) a combination of time limit and prohibition against trivial conditions, (4) a statutory time limit

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265 Mass. Gen. Laws 1932, c. 184, sec. 23: "Conditions or restrictions, unlimited as to time, by which the title or use of real property is affected, shall be limited to the term of thirty years after the date of the deed or other instrument or the date of the probate of the will creating them, except in cases of gifts or devises for public, charitable or religious purposes." [Act declared not applicable to conditions existing at the date of enactment.]

266 Mich. Comp. Stat. 1948, sec. 554.46: "When any conditions annexed to a grant or conveyance of lands are merely nominal, and evince no intention of actual and substantial benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded, and a failure to perform the same shall in no case operate as a forfeiture of the lands conveyed subject thereto." Same: Wis. Stat. 1951, sec. 230.46; Ariz. Code Ann. 1945, sec. 71.123.

267 Minn. Stat. 1949, sec. 500.20 (1): "When any conditions annexed to a grant, devise or conveyance of land are, or shall become, merely nominal, and of no actual and substantial benefit to the party or parties to whom or in whose favor they are to be performed, they may be wholly disregarded; and a failure to perform the same shall in no case operate as a basis of forfeiture of the lands subject thereto." (2) "All covenants, conditions, or restrictions hereafter created by any other means, by which the title or use of real property is affected, shall cease to be valid and operative 30 years after the date of the deed, or other instrument, or the date of the probate of the will, creating them; and after such period of time they may be wholly disregarded." (3) [Limits the period in which to assert right of re-entry to six years after happening of breach.]
imposed regardless of any stipulations of time by the parties.\textsuperscript{268}

Out of fear that these statutes cannot be given a retroactive effect without unconstitutionally taking the property of the owners of existing possibilities of reverter and powers of termination, the statutes, with the exception of that of Illinois, have been made prospective in operation. The retroactive features of the Illinois statute, have not caused litigation as yet, but it is probable that they will do so.\textsuperscript{269} It

\textsuperscript{268} Ill. Rev. Stat. 1951, c. 30, sec. 37e: “Neither possibilities of reverter nor rights of entry or re-entry for breach of condition subsequent, whether heretofore or hereafter created, where the condition has not been broken, shall be valid for a longer period than fifty years from the date of the creation of the condition or possibility of reverter. If such a possibility of reverter or right of entry or re-entry is created to endure for a longer period than fifty years, it shall be valid for fifty years.” Sec. 37f: “If by reason of a possibility of reverter created more than fifty years prior to the effective date of this Act, a reverter has come into existence prior to the time of the effective date of this Act, no person shall commence an action for the recovery of the land or any part thereof based upon such possibility of reverter, after one year from the effective date of this Act.

“If by reason of a breach of condition subsequent created more than fifty years prior to the effective date of this Act, a right of re-entry has come into existence prior to the time of the effective date of this Act, no person shall commence an action for the recovery of the land or any part thereof based upon such right of entry or re-entry after one year from the effective date of this Act, unless entry or re-entry has been actually made to enforce said right before the expiration of such year.”

\textsuperscript{269} See Ill. Rev. Stat., c. 30, sec. 37f quoted \textit{supra} note 268. The restrictions imposed by sec. 37f in respect to the time in which actions must be brought raise serious questions concerning equal protection of the laws. The following comments appeared in 43 Ill. L. Rev. 90, 102, 103 (1948): “A more serious objection may be raised by the provision affecting remedies where such interests were more than fifty years old at the effective date of the act, since Sec. 37f restricts the time for bringing an action in that situation to one year from the date the act goes into effect. Where such an interest is a possibility of reverter, and the limiting contingency has in fact occurred, the grantor has an estate in fee upon which an action to recover would not previously have been barred by the Statute of Limitations for twenty years. Is there any policy reason sufficiently compelling to justify limiting the right to recover in that eventuality to a one year period where another whose interest was only forty-nine years old or less when the act became law would still have the full twenty-year period in which to seek his remedy if the reverter fell in? If not, the classification is clearly arbitrary.”

“The subsection further provides that where a right of entry has existed more than fifty years at the passage of the act, not only must the breach have
FUTURE INTERESTS

is often assumed that possibilities of reverter and powers of termination are property interests of which the owners cannot be deprived by legislative act.\textsuperscript{270} One of the points of argument of early advocates of legislative control was that the legislature ought to restrict the creation of these interests while they are still comparatively rare, because the evils once existing might be difficult to remedy by subsequent legislation without violating the Constitution.\textsuperscript{271}

There is actually almost no case authority of any kind to support the view that these interests cannot be extinguished. Certain Illinois cases dealing with statutes relating to vacation of streets have been nearly the only cases where a court has been called upon to decide the constitutionality of statutes which allegedly impair or extinguish possibilities of reverter or powers of termination. The point has several times been raised in that jurisdiction in regard to vacation of streets because the Supreme Court appears formerly to have taken the view that the dedication of a street or alleyway creates in the city a determinable fee, which will last until the city abandons the use, and leaves an interest in the grantor very similar to a possibility of reverter.\textsuperscript{272} Since it

occurred before that time to enable the holder to bring an action, the time for which is also limited to one year from the effective date of the act, but also there is a further stipulation that no such action may be maintained 'unless entry or re-entry has been actually made to enforce such right before the expiration of such year.' As a practical matter this presents certain difficulties, since there is no agreement as to what actually constitutes 'entry' today."


\textsuperscript{271} Frazer, "Future Interests in Property in Minnesota," 3 Minn. L. Rev. 320, 339 (1918-19).

\textsuperscript{272} St. John v. Quitzow, 72 Ill. 334 (1874); Gebhardt v. Reeves, 75 Ill. 301 (1874).
would be undesirable that the title to the strips of land should revert upon vacation to persons who had ceased to own the adjoining lots, as early as 1851, a statute was passed which provided that upon vacation of a street the city authorities shall convey any interest the city has in the street to the owners of lots next adjoining. Succeeding statutes have contained similar provisions. The Illinois Supreme Court has had some difficulty in making up its mind what effect these statutes have upon the interest retained by the dedicator. In an early case, the court averred:

“The fee plaintiff had in the street and alley could not be divested and transferred to the adjacent lot owners by direct legislative action; nor could authority be given to any agency to do it for private purposes. An intention to take the property of one man and transfer it to another, without compensation, ought not to be attributed to the legislature, where a different motive may be assigned for its action. A law that would have that effect, or that would authorize it to be done, would be palpably in violation of the constitution, as well as unjust.”

Yet in a comparatively recent case, Prall v. Burckhartt, the court concluded that title must upon vacation go to adjoining property owners. In People ex rel. Franchere v. City of Chicago, decided a few years after the Prall case, this statement appears:

273 Ill. Laws 1851, p. 112.

Sec. 69–12 provides that upon abandonment of the street, highway, or alleyway, title shall vest in the owners of the adjoining lands, except in cases where the instrument dedicating the street, highway, or alleyway shall expressly provide for a specific devolution of title upon abandonment.

275 Gebhardt v. Reeves, 75 Ill. 301, 308 (1874).
277 People ex rel. Fabriel Franchere, Jr. v. City of Chicago, 321 Ill. 466, 152 N. E. 141 (1926).
“Prior to the act in question, after the executing and recording of a statutory plat and its acceptance by the municipality, nothing remained in the dedicator but a mere possibility of reverter. This possibility of reverter was not an estate but only the possibility of having an estate at a future time. (Hart v. Lake, 273 Ill. 60.) This possibility, not being an estate, was not protected by any constitutional limitation, and it was competent for the legislature to abolish this possibility of reverter or to change the devolution of the title upon the happening of the future contingency in any way it saw fit, . . . any legislative enactment to that end is not unconstitutional.” 278

Neither the Prall case nor the Franchere case afford substantial evidence that the Illinois Supreme Court would tolerate legislative abolition of all possibilities of reverter and powers of termination. The court did not overrule the earlier vacation cases. In these earlier cases 279 the dedication seems in each instance to have been made prior to the particular statute under which the street was vacated, but the facts are not altogether clear. Moreover, in one case, Helm v. Webster, 280 the deed to the city contained an express provision that if the street should at any time be abandoned, the title to the land should revert to the grantor, his heirs and assigns as though the deed had never been made. The platting in Prall v. Burckhardt was made after the vacation act was in effect and the plattor did not expressly retain any interest. 281 The court in Prall v. Burckhardt sought to reconcile the result which it reached with the prior holdings and strongly intimated that an express reservation made prior

278 321 Ill. 466, 476, 152 N. E. 141, 144 (1926).
279 Helm v. Webster, 85 Ill. 116 (1877); St. John v. Quitzow, 72 Ill. 334 (1874); Gebhardt v. Reeves, 75 Ill. 301 (1874).
280 85 Ill. 116 (1877), supra note 279.
281 In Franchere v. City of Chicago, the alleyway was dedicated about 62 years before the enactment of the particular statute (Ill. Laws 1923, p. 629), under which the alley was vacated. However, the act of 1865 containing similar provisions, was in force in 1871.
to the enactment of a vacation statute cannot be defeated or impaired by subsequent legislation.

The prospective operation of the statute in the later cases, as opposed to the retroactive operation in the earlier, would be a completely satisfactory basis for a distinction between the holdings, except that the court did not clearly recognize this basis, or at least it did not use terminology which adequately expressed the *ratio decidendi*. If the court in the *Prall* and *Franchere* cases had not spoken of the grantor’s “possibility of reverter,” which term has the technical denotation of a certain kind of interest in land, in describing the interest which a grantor retains when the grant is made after the statute, the court could have reached the desired result with a great deal less ambiguity. What the grantor in these cases retained was a possibility—a possibility that he might re-acquire title upon abandonment of the street, provided that he was still owner of the adjoining lot when that event occurred.

The claim of a grantor at common law, who has conveyed land to a corporation, to a reversion in case of the dissolution of the corporation, is, like the interest of a dedicator in Illinois, somewhat akin to a possibility of reverter. It has been held that any expectancy the grantor may have can be defeated by subsequent legislation.282 This result is not, however, inconsistent with the view that, in general, possibilities of reverter are nondivestible property interests. The possibility that the corporation will be dissolved is generally remote. The grantor will normally not be injured in any way if the land is put to other uses. If he has been paid the value of the fee, he will suffer no loss if the title never reverts. Indeed, in most jurisdictions the notion has been

abandoned that the grantor retains by implication of law an interest in the land in case of dissolution. 283

In *Kelso v. Steiger* 284 land had been conveyed in trust for certain specified purposes. Subsequently the trustees procured a special act which authorized them to sell a portion of the land no longer used for the specified purposes. It was held that when the land ceased to be used for the purposes contemplated by the original grantor, a right of entry accrued to his heirs which could not be divested by the act.

There is dictum in a Kentucky case, *Evans v. Cropp*, 285 that a deed reserving a possibility of reverter is a contract which the legislature is incompetent to impair by a subsequently enacted statute. The land in question was conveyed for school purposes upon condition that title would revert if the land were abandoned by the school authorities. A subsequently enacted statute required school authorities to perfect the title to all lands dedicated for school purposes. Thereafter the school building on the lot was sold and the premises abandoned by the school trustees. The claim of the grantor's successor to the land was not seriously questioned. He brought an action for damages for the removal of the building. Recovery was denied because it was found that the school board did not abandon the lot until after the building was removed.

Language might be taken from certain cases to support the contention that possibilities of reverter and powers of termination are not property interests which are constitutionally protected. It is said frequently, for example, that neither interest is an estate in land but only the possibility of acquiring one. 286 This is merely a question of definition.

283 Fletcher, *Cyclopedia Corporations*, sec. 8134 (Perm. ed.).
284 75 Md. 376, 24 Atl. 18 (1892). A similar result was reached on similar facts in *Second Universalist Society v. Dugan*, 65 Md. 460, 5 Atl. 415 (1886).
285 141 Ky. 514, 133 S. W. 221 (1911).
286 2 Tiffany, *Real Property*, sec. 314 (3d ed.).
A contingent remainder has also been said not to be an estate but the possibility of acquiring one; however, as we have seen, a contingent remainder is an interest which is constitutionally protected.

Sometimes in eminent domain cases it is said that possibilities of reverter and powers of termination are mere expectancies which the courts cannot protect. The general rule is that when determinable fees or fees subject to a condition subsequent are taken under eminent domain proceedings, the owners of the possibilities of reverter and powers of termination are not entitled to any portion of the award. This rule appears to be based, however, not upon the idea that these interests are not constitutionally protected (whatever may be occasionally remarked in the cases), but upon the matter of valuation. The value of the possibility of reverter or power of termination depends upon how you construe the condition or limitation. Most courts assume that the limitation or condition does not include the taking by eminent domain. Consequently, unless the fee is likely to terminate or be terminated for some other reason, the possibility of reverter or power of termination is practically valueless.

287 Tiffany, *Real Property*, sec. 320 (3d ed.).
291 Restatement, *Property*, sec. 53 (1936), sets forth rules, or perhaps more accurately stated, suggestions for the distribution of the award between the owners of the fee and the owners of the reversionary interest. The Restatement's rules (paraphrased) are: Where the event upon which the possessory estate is to end (not taking into account the effect of the condemnation) is an event, the occurrence of which, within a reasonably short period of time, is not probable, the future interest has no ascertainable value. But if the event upon which the possessory estate is to end (not taking into account any changes resulting from the condemnation) is likely to occur within a reasonably short period of time, then the award is to be divided.
The improbability that the possibility of reverter or power of termination will ever vest in possession is also the basis for the courts' refusal to enjoin the owner of the fee from committing waste.

"A court of chancery will interfere to enjoin equitable waste by the owner of a base or determinable fee only when the contingency which is to determine the estate is reasonably certain to happen and the waste is of a character to charge the owner with a wanton and unconscientious abuse of his rights." 292

This is purely a problem of weighing interests and again does not indicate a belief that in general owners of possibilities of reverter and powers of termination can expect no protection from the Constitution. In keeping with the spirit of American institutions which favors the vesting of estates, opposes entailments and endeavors to secure to the citizen the greatest immediate enjoyment of property consistent with the law, the owner of the fee must be accorded the privilege of using the land pretty much as he pleases.293

The authorities are, as we see, inconclusive. Leaving the cases and attacking the problem on reason, what argument can be proposed against the constitutionality of a statute which retroactively destroys possibilities of reverter and powers of termination? One argument might be that destruction of the grantor's interest enhances the interests of the grantee. This windfall to the grantee, it may be claimed, constitutes a taking of private property for strictly private purposes. Yet, it is submitted, if public property does require

between the owner of the possessory estate and the owner of the future interest in such shares as fairly represent the proportionate value of the present defeasible possessory estate and the future interest. If the condition has been broken prior to the commencement of the eminent domain proceedings, then the owner of the power of termination has the option to claim and to receive the entire award.

292 Fifer v. Allen, 228 Ill. 507, 521, 81 N. E. 1105, 1109 (1907).
an abolition of existing possibilities of reverter and powers of termination, then the abolition may be accomplished, benefit or not to the grantee. Someone will always be benefited by any changes in the law.

“A principle of broad public policy has intervened to the extent that modern progress is deemed to necessitate a sacrifice of many former claimed individual rights. The only obstacle met has been the rule of property or as termed the disinclination to disturb vested property rights. To some extent this, too, has yielded in the sense that many rights formerly labeled as property rights by a process of academic relation are now considered merely personal and have been subjected to the common good.”

There is some basis for distinguishing between the susceptibility of possibilities of reverter and powers of termination to legislative destruction in the greater transferability of possibilities of reverter and in the greater liability of powers of termination to destruction by acts of the grantor. But in the practical application of the statutes no distinction can be made. Either both interests must be subject to legislative control or neither. From the point of view of the owners of the interests they are equally valuable. From the point of view of the owner of the fee, it can make little practical difference whether he has a determinable fee or a fee upon a condition subsequent. The same evils are produced by possibilities of reverter as by powers of termination. To distinguish between the interests in the application of the statutes would be an open invitation to litigation.

It is really quite improbable that any legislature would prohibit absolutely the creation of possibilities of reverter or powers of termination or abolish entirely existing interests. The retention of such interests affords a useful control device for legitimate purposes. If the statutes which have

295 See Brake, “Fees Simple Defeasible,” 28 Ky. L. J. 424 (1940) for an appraisal of the utility of fees simple defeasible. The author of this article
been enacted to date are any indication of what the legislatures of the remaining states are likely to do, the legislation of the future will be aimed at controlling the abuses growing out of the courts' failure to apply the rule against perpetuities and certain equitable doctrines to such interests. Setting a time limit for the duration of the interests is perhaps the easiest way of dealing with them. A period, say of thirty years, would be long enough to accomplish most objectives.\(^{296}\) If this period is not long enough to achieve the grantor's objectives, he can employ other conveyancing devices more susceptible to control. A statute imposing a thirty year limit probably would not be unreasonable if made applicable to existing interests, provided the full period is allowed after the passage of the statute. The troublesome problem of existing interests might be met by providing that such interests shall lose their capacity to cause a forfeiture after a specified number of years from their creation (say the period of the rule against perpetuities), but if circumstances still warrant they shall assume the character of covenants enforceable in equity.\(^{297}\)

enumerates, *inter alia*, the following uses: securing payment of annuities and of legacies, compelling grantee to support the grantor, restraining marriage, influencing moral conduct, prohibiting will contests.

\(^{296}\) Thirty years is the period provided in the Uniform Act promulgated by the Commissioners on Uniform State Laws called an "Act Relating to Reverter of Realty." This act, which has not yet been adopted in any jurisdiction, excludes any retroactive effect.


Like possibilities of reverter and powers of termination, restrictive covenants tend to cloud titles and restrain alienability. But unlike the case of possibilities of reverter and powers of termination, which in theory (at least) subsist even after conditions have so changed as to make forfeiture inequitable and after it can no longer be of any real concern of the grantor to what use the premises are put, many courts of equity have refused to enforce restrictive agreements where there has been such a change in the character of the neighborhood as to defeat the purposes of the restriction and to render the enforcement of the same unreasonable. 3 Tiffany, *Real Property*, sec. 875 (3d ed.). Since relief at law is usually either so inadequate as to make a suit useless or else is not available at all, the refusal of a court of equity to enforce a restrictive covenant has substantially the effect of extinguishing it. Restrictive
Terms for years and estates for life may also be created subject to limitations and to conditions subsequent. There would be little justification for legislation which retroactively extinguishes such limitations and conditions, because the creation of qualified estates for life or for years does not involve or lead to the same undesirable consequences as the practice of conveying fees upon limitations and upon conditions subsequent. The happening of the event or the breach of the condition must occur within a determinate period of time. Social policy does not require that life estates and estates for years shall be freely alienable. Indeed, to the contrary, it may be good policy to allow the lessor, grantor, or testator to restrict the alienability of such estates. To destroy the conditions and limitations (thereby conferring an unqualified estate upon the lessee or life tenant) would work undue hardship upon the lessor or grantor in depriving him of the most effective means of obliging the lessee or life tenant to comply with agreements and restrictions.

covenants may also be abandoned and waived by the parties concerned. 3 Tiffany, Real Property, sec. 874 (3d ed.). None of these modes of extinguishing restrictive covenants has the degree of certainty desirable in commercial transactions. Legislative attempts to fix more certain modes of extinguishing existing restrictive agreements have not fared very well with the courts. A Georgia statute, Laws 1935, p. 112 [Ga. Code Ann. 1936, sec. 29-301] providing that “covenants restricting lands to certain uses shall not run for more than twenty years in municipalities which have adopted zoning laws” (p. 113) was held not to have the effect of terminating a covenant that was already in existence as a valid and binding contract between the parties. Dooley v. Savannah Bank & Trust Co., 199 Ga. 353, 34 S. E. 2d 522 (1945). Twenty years ought to be long enough to accomplish most purposes. The courts plainly do not like substitution of arbitrary standards for the flexible standards of the common law. See also Riverbank Improvement Co. v. Chadwick, 228 Mass. 242, 117 N. E. 244 (1917), supra Ch. 3, note 165. For a discussion of legislative proposals limiting the duration of restrictive covenants see Clark, “Limiting Land Restrictions,” 27 A. B. A. J. 737 (1941).

298 Conger v. Lowe, 124 Ind. 368, 24 N. E. 889 (1890); Southeastern Land Co. v. Clem, 239 Ky. 417, 39 S. W. 2d 674 (1931); Gunsenhiser v. Binder, 206 Mass. 434, 92 N. E. 705 (1910).