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REFORMULATING THE STRUCTURE OF ESTATES: A PROPOSAL FOR LEGISLATIVE ACTION

Lawrence W. Waggoner *

Professor Waggoner points out various major inadequacies of the present structure of estates and traces them to the distinctions between conditions and limitations, between conditions precedent and conditions subsequent, and between reversionary and nonreversionary interests. Eschewing such distinctions as artificial, he presents a reformulated structure of possessory and future interests and urges its enactment into law.

I. THE CASE FOR REFORMULATION

THE structure of estates, which was developed over a period of about seven centuries, was and is a great achievement. Although certain parts are adaptable to commercial transfers of property, the peculiar strength of the structure is that it makes available a range of flexibility in the gratuitous transmission of family wealth that is unmatched in non-common law countries. At its heart is the abstract concept that present ownership is capable of being fragmented in terms of time and in terms of beneficial enjoyment. Both types of fragmentation are fundamental to the trust, a central device in modern estate planning.¹

The present structure of estates is shown in the accompanying chart. Magnificent though the structure is, it is unsatisfactory for a number of reasons. The first is its extraordinary complexity, which has proved a barrier to comprehension. Some lawyers and judges who took the course covering future interests in law school do not fully understand the subject matter, and few who did not

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¹ In the latter half of 1970, the aggregate market value of personal trust assets under administration by insured commercial banks was over \$108.5 billion. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, FDIC & OFFICE OF THE COMPTROLLER OF THE CURRENCY, TRUST ASSETS OF INSURED COMMERCIAL BANKS — 1970, at 5 (1971).

THE HIERARCHY OF ESTATES ²

<i>Possessory Interests</i>	<i>Possible Combinations of Future Interests</i>	
	<i>Nonreversionary (in transferees)</i>	<i>Reversionary (in the transferor or his successor)</i>
Fee Simple Absolute	None permissible	None permissible
Defeasible Fee Simple:		
Fee Simple	When none created	Possibility of Reverter
Determinable ³	Executory Interest	If any, Possibility of Reverter
Fee Simple Subject to a Condition Subsequent ⁴	When none created	Right of Entry (Power of Termination)
	Executory Interest	If any, Right of Entry
Fee Tail ⁵	. . . Same as with Life Estate . . .	
Life Estate	When no remainder created	Indefeasibly Vested Reversion
	Contingent Remainder (subject to a condition precedent); Alternative Contingent Remainders	Reversion Vested Subject to Defeasance (may be merely technical)
	Remainder Vested Subject to Defeasance (conditional); Executory Interest	If any, Reversion Vested Subject to Defeasance
	Remainder Vested Subject to Defeasance (limitational); Remainder	If any, Reversion either Vested Subject to Defeasance or Indefeasibly Vested
	Remainder Vested Subject to Open; Executory Interest (in unborn class members)	None permissible
	Indefeasibly Vested Remainder	None permissible
Life Estate Subject to a Special Limitation	Same as with Life Estate	Reversion and Possibility of Reverter ⁶ (otherwise, same as with Life Estate)
Life Estate Subject to a Condition Subsequent	Remainder and Executory Interest (otherwise, same as with Life Estate)	Reversion and Right of Entry (otherwise, same as with Life Estate)
Term of Years	. . . Same as with Life Estate . . .	

take the course have mastered it in practice.⁷ This complexity is unnecessary, for the abstract concept of fragmentation of ownership does not require such elaborateness; the same degree of flexibility in the gratuitous transmission of family wealth as well as in the commercial transfer of property can be sustained under a vastly simplified system.

Another defect of the present structure is that a considerable proportion of the artificiality with which the law of future in-

² Although the chart is believed to be substantially accurate and complete, it does not purport to depict all the combinations of future interests that possibly could follow each possessory interest. A remainder following a life estate might, for example, be in fee simple determinable, in which case the transferor might retain a possibility of reverter in addition to, or instead of, a reversion. Nor does the chart take special note of the fact that the holder of a fee simple absolute can create a springing executory interest in a transferee to take effect in possession at some designated future time. This would render the possessory interest defeasible, but the most commonly used name for this possessory interest — fee simple subject to an executory limitation — does not appear on the chart because it is believed to be adequately covered by the broader term, defeasible fee simple.

³ Fee simple determinable is the most common name employed to describe this interest. Other names are base fee, qualified fee, and fee simple on a special limitation. The *Restatement of Property* utilizes the name fee simple determinable, but along with some other authorities, limits its usage to instances in which the interest is followed by a possibility of reverter. If followed by an executory interest, the *Restatement* calls the possessory interest a "fee simple with an executory limitation creating an interest which takes effect at the expiration of a prior interest." *RESTATEMENT OF PROPERTY* § 47 (1936). The other authorities which adhere to this distinction usually call it simply a fee simple subject to an executory limitation. See, e.g., C. MOYNIHAN, *INTRODUCTION TO THE LAW OF REAL PROPERTY* 37 (1962). The distinction is not followed in the *American Law of Property*. 1 *AMERICAN LAW OF PROPERTY* § 4.55 (A.J. Casner ed. 1952) [hereinafter cited as *AMERICAN LAW OF PROPERTY*]. But see *id.* § 2.10.

⁴ The *Restatement of Property* and some other authorities differentiate between instances in which this interest is followed by a right of entry (power of termination) and those in which it is followed by an executory interest, calling the latter a "fee simple subject to an executory limitation." *RESTATEMENT OF PROPERTY* § 46 (1936); C. MOYNIHAN, *supra* note 3, at 37.

⁵ The fee tail interest, though still permissible in a handful of states, has faded from importance. 2 R. POWELL, *REAL PROPERTY* ¶¶ 196-98 (recomp. ed. P. Rohan 1967) [hereinafter cited as *POWELL*].

⁶ It is disputed whether the possibility of reverter is merged in the reversion. Compare W. SCHWARTZ, *FUTURE INTERESTS AND ESTATE PLANNING* § 2.32 n.1 (1965) [hereinafter cited as *SCHWARTZ*], with T. BERGIN & P. HASKELL, *PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS* 65 (1966) [hereinafter cited as *BERGIN & HASKELL*].

⁷ See A. GULLIVER, *CASES AND MATERIALS ON THE LAW OF FUTURE INTERESTS* 6-7 (1959); T. SHAFFER, *THE PLANNING AND DRAFTING OF WILLS AND TRUSTS* 230 (1972) ("I have never met a practicing lawyer who thought he understood future interests, and the best that the best of law students will say is that he understands it sometimes."). *Sands v. Fly*, 200 Tenn. 414, 292 S.W.2d 706 (1956), is a particularly striking example of the many decisions in which courts have displayed an imperfect understanding of the area.

terests is riddled is directly attributable to the structure of estates itself. The general misunderstanding of the subject matter is due not only to the intricacy of the law, but also to the fact that the law frequently makes very little sense. Decisions often turn on the form in which a disposition is stated rather than on its substance. Different legal consequences flow from verbal differences in referring to the same time, the same person, or the same event.⁸

This artificiality leads to a further flaw in the present structure: easy circumvention.⁹ While some lawyers do not fully comprehend the present system, many do. The knowledgeable can use the artificiality of the system to the advantage of their clients. Whenever legal consequences turn on differences of form, certain results can be achieved by skillful wording of a disposition or by other maneuvers without otherwise affecting the substance of the transaction. Many rules of law in this area, therefore, serve only to trap those unsophisticated in the available ways of manipulation.

Finally, out of the complexity and artificiality of the present structure has arisen a phenomenon that may be called the classificatory mystique — the notion that classifying the interests created in a transfer solves most problems. The volumes are replete with opinions which discuss at length the distinctions between various types of interests. Often these opinions string together definitions which were meaningless to begin with and are, to boot, irrelevant to the case at hand; lost in verbal mazes, they never come to grips with the real issues.¹⁰ This phenomenon goes beyond the familiar cases in which the question is whether a future interest is subject to a condition of survivorship, but the discussion is over whether the interest is vested or contingent.¹¹ *Elmore v. Austin*¹² is illustrative. The testator devised a parcel of land to his daughter, Lucy, providing that her interest should become absolute if she erected a proper dwelling house on the land or if she died leaving issue. He went on to say, however, that if she failed to erect a house or if she died without leaving issue, her interest should terminate on her death. Lucy had built a house but was childless when she brought an action for a declaratory judgment. The question, of course, was one of construction: whether it was sufficient if only one of the conditions was fulfilled.

⁸ McDougal, *Future Interests Restated: Tradition Versus Clarification and Reform*, 55 HARV. L. REV. 1077, 1086 (1942).

⁹ For a general discussion of avoidance, see H. JONES, *THE EFFICACY OF LAW* 26-30 (1969).

¹⁰ See Dukeminier, *Contingent Remainders and Executory Interests: A Requiem for the Distinction*, 43 MINN. L. REV. 13, 54-55 (1958).

¹¹ *E.g.*, *Gordon v. Feldman*, 267 N.E.2d 895 (Mass. 1971).

¹² 232 N.C. 13, 59 S.E.2d 205 (1950).

Nevertheless, a reading of the opinion leaves the distinct impression that the decision depended on whether Lucy received a fee simple determinable or a life estate followed by a contingent remainder. The court chose the former and apparently concluded thereby that the erection of the house rendered her interest absolute.

These deficiencies — unnecessary complexity, artificiality, easy circumvention, and classificatory mystique — surely make the case for a reformulation of the present structure. Indeed, under such circumstances a call for reformulation should not be surprising. In fact, it is not new. The goal of the New York reform legislation of 1830 was reformulation, and in that sense it was a significant step forward, despite the fact that many of the innovations turned out badly because of poor drafting and have since been repealed. Shortly after the first two volumes of the *Restatement of Property* were published in 1936, Professor Simes wrote of a belief that we were “on the eve of a movement looking toward the improvement and simplification of the law of Future Interests by legislation.”¹³ One of the accomplishments of the *Restatement* was, ironically, thought to be “to state what is a recognized principle of law in such clear and distinct form that its bad nature may become apparent.”¹⁴ The development anticipated by Professor Simes was the Uniform Estates Act, which was approved by the National Conference of Commissioners on Uniform State Laws in 1938.¹⁵ Unfortunately, the Uniform Estates Act turned out to be merely a codification of the structure set forth in the *Restatement*, and it has been accorded a certain degree of oblivion. It has yet to be adopted in any state; and although the Commissioners do recommend it for consideration in states having need for legislation in this area,¹⁶ they no longer promote it for uniform enactment.

Indeed, in spite of the glaring deficiencies in the present structure, and perhaps because of the unsatisfactory New York experience, progress toward statutory reformulation has been practically imperceptible. Only three states currently have legislation which can properly be regarded as simplifying and improving the common law structure in any significant sense. Remainders and executory interests are assimilated under the name remainder in

¹³ Simes, *Fifty Years of Future Interests*, 50 HARV. L. REV. 749, 783 (1937).

¹⁴ 11 ALI PROCEEDINGS 146 (1932-1934) (statement of George W. Wickersham, President of the Institute).

¹⁵ 1938 HANDBOOK OF THE NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS 269.

¹⁶ 1970 HANDBOOK OF THE NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS 363.

New York and Wisconsin;¹⁷ and in Kentucky, language which at common law would have created a fee simple determinable and a possibility of reverter is construed as creating a fee simple subject to a right of entry for condition broken and a right of entry.¹⁸ Legislation in a few other states, based on the original New York statute, appears at first glance to effect an assimilation of remainders with executory interests and of possibilities of reverter and rights of entry with reversions; but a closer reading of these statutes reveals that the distinctions are maintained.¹⁹ A number

¹⁷ N.Y. EST., POWERS & TRUSTS LAW §§ 6-3.2, -4.3 (McKinney 1967); WIS. STAT. ANN. § 700.04(2) (Supp. 1970).

¹⁸ KY. REV. STAT. § 381.218 (1962). A subsequent section of the Kentucky statute provides that a right of entry "may be created in a person other than the person creating the interest or his heirs." *Id.* § 381.219. Since this provision does not require that language which would at common law have created an executory interest following a defeasible fee simple be construed as creating a right of entry, its effect does not appear to be to assimilate executory interests and rights of entry. *But see* R. LYNN, *THE MODERN RULE AGAINST PERPETUITIES* 26 (1966).

¹⁹ These statutes provide that, except for reversions, all future interests in land which are dependent on a precedent estate are to be labeled "remainders." But they further provide that "remainders" which divest the precedent estate are called "conditional limitations," which is another name for shifting executory interests. Consequently, they cannot be regarded as eliminating the distinction between remainders and executory interests. ARIZ. REV. STAT. ANN. §§ 33-204, -227 (1956); CAL. CIV. CODE §§ 769, 778 (West 1954); D.C. CODE ENCYCL. ANN. § 45-811 (1968); MICH. COMP. LAWS ANN. §§ 554.11, .27 (1967); MINN. STAT. § 500.11 (1969); MONT. REV. CODES ANN. §§ 67-510, -519 (1962); N.D. CENT. CODE §§ 47-04-10, -04-19 (1960); OKLA. STAT. ANN. tit. 60, §§ 30, 40 (1971); S.D. COMP. LAWS ANN. §§ 43-9-4, -9-10 (1967); *see* IDAHO CODE § 55-205 (1957).

"Reversions" are defined in these statutes as the residue of an estate left in the grantor or his heirs, or in the heirs of a testator, commencing in possession upon the determination of a "particular" estate granted or devised. This definition would seem to be broad enough to assimilate under the name "reversion" the common law possibilities of reverter, rights of entry, and reversions. However, the possessory interest upon which this statutory "reversion" is dependent is called a "particular" estate; and since a "particular" estate is a possessory interest other than a fee simple, this statutory definition is actually in accord with, not broader than, the common law definition of reversions. Many of these statutes also contain a provision to the effect that the only future interests recognized are those defined in the statute. The effect of this provision alone could be thought to be either to abolish possibilities of reverter and rights of entry or to relabel them "remainders," but rights of entry are mentioned in other statutory provisions. CAL. CIV. CODE §§ 703, 768, 790-93 (West 1954); GA. CODE ANN. §§ 85-701, -906 (1970); MINN. STAT. §§ 500.08, .09, .16, .20 (1969); MONT. REV. CODES ANN. §§ 67-329, -509, -525 (1962); OKLA. STAT. ANN. tit. 60, §§ 29, 47, 48 (1971); S.D. COMP. LAWS ANN. §§ 43-8-11, -8-12, -9-3 (1967). Nevertheless, in Oklahoma the statutory definitions of reversions and remainders were relied on in a series of decisions proclaiming that there is no difference in alienability between rights of entry and possibilities of reverter. *Crowl v. Tidnam*, 198 Okla. 650, 653, 181 P.2d 549, 552 (1947); *Fuhr v. Oklahoma City*, 194 Okla. 482, 485, 153 P.2d 115, 118 (1944); *Kassner v. Alexander Drug Co.*, 194 Okla. 36, 39, 147 P.2d 979, 982

of these same states, it should be noted, still have derivatives of the original New York statutory definitions of contingent and vested future interests,²⁰ even though these definitions caused so much confusion in New York that they finally were replaced with ones which accord with the common law.²¹

II. SOURCES OF THE DEFICIENCIES IN THE PRESENT STRUCTURE

Before a specific proposal for the restructuring of estates can be advanced, the sources of the deficiencies in the present structure need to be identified and explored in some detail. An effort has been made, however, to make this discussion as brief as possible by omitting anything more than passing references to historical developments. A page of history may be worth a volume of logic in understanding property law, but not in justifying it. The law in this area, as in any other, must be evaluated for what it is, not on how it came to be that way.

The present deficiencies are all related and are all traceable to three cherished distinctions: the distinctions between conditions and limitations, between conditions precedent and conditions subsequent, and between interests either left or created in the transferor and those created in a transferee. Complicating these three distinctions is the frequent categorization of interests not by analysis of their own nature, but by reference to the classification of the interest that precedes them either in form (the sequence in which the interests are stated) or in substance (the sequence of possession).

A. *The Concept of Defeasance: Condition and Limitation*

1. *Classification of Interests Subject to Defeasance.* — Under the present structure, the only interests which are indefeasible

(1944). These decisions are discussed in Browder, *Defeasible Fee Estates in Oklahoma*, 4 OKLA. L. REV. 141, 157-66 (1951). But a later Oklahoma decision on the issue of the *use* of property referred to the common law distinctions. *Frenslley v. White*, 208 Okla. 209, 254 P.2d 982 (1953), discussed in Browder, *Defeasible Fee Estates in Oklahoma—An Addendum*, 6 OKLA. L. REV. 482 (1953). In the other states, these statutory provisions have not affected the common law distinctions among possibilities of reverter, rights of entry, and reversions. See, e.g., *Alamo School Dist. v. Jones*, 182 Cal. App. 2d 180, 6 Cal. Rptr. 272 (1960).

²⁰ ALA. CODE tit. 47, § 140 (1958); ARIZ. REV. STAT. ANN. § 33-205 (1956); D.C. CODE ENCYCL. ANN. § 45-812 (1968); GA. CODE ANN. § 85-703 (1970); IDAHO CODE §§ 55-105, -106 (1957); MICH. COMP. LAWS ANN. § 554.13 (1967); MONT. REV. CODES ANN. §§ 67-320, -321 (1962); N.D. CENT. CODE § 47-02-15 (1960); S.D. COMP. LAWS ANN. §§ 43-3-10, -3-11 (1967).

²¹ N.Y. EST., POWERS & TRUSTS LAW §§ 6-4.7 to -4.10 (McKinney 1967).

are in fee simple absolute. This category includes future interests as well as possessory interests; future interests are indefeasibly vested only if certain to become possessory and certain to be in fee simple absolute once they become possessory.²² Although this distinction has substance, the present structure does not stop with differentiating interests which are indefeasible from those which are not. The concept of defeasance is divided artificially into two categories: condition and limitation. Both possessory and future interests may be made defeasible on either a condition or a limitation. The classic "to *A* for as long as the premises are used for residential purposes, and upon the cessation of such use, to *B*" illustrates a possessory interest subject to a limitation. Since *A*'s interest is a fee simple, it is classified as a fee simple determinable; if it had been a life estate, it would have been called a life estate on a special limitation (the word "special" differentiates it from the ordinary life estate, which is itself an estate subject to a limitation). "To *A*, but if the premises cease being used for residential purposes, then to *B*," on the other hand, creates a fee simple subject to a condition subsequent; if *A*'s interest had been for life, it would have been called a life estate subject to a condition subsequent.

The familiar justification for this distinction is that the interest subject to a limitation expires "naturally" by its own terms if the event occurs, whereas the interest subject to a condition is "cut short" or "divested" if the event occurs. But surely this difference is simply verbal. In each instance the substance is the same. Both interests are to terminate upon the happening of the same uncertain event: the premises' ceasing to be used for residential purposes. To conclude otherwise is to deny that "to *A*, but if the premises cease being used for residential purposes, then to *B*" is just a shorthand way of saying "to *A*, but if the premises cease being used for residential purposes, *A*'s interest is to terminate and the property is to go to *B*." Yet important legal consequences flow from treating conditions and limitations as different things, instead of as different ways of saying the same thing.²³

²² 2 POWELL §§ 275, 277; RESTATEMENT OF PROPERTY § 157, comments *f*, *p*, illustration 15, at 546-47, 554-56 (1936).

²³ The notion that conditions and limitations carry different meanings goes beyond the concept that a limitational interest expires "naturally" and a conditional one expires by being "cut short." For example, it is widely, though not universally, held that a provision for the termination of an interest on marriage is valid if stated in limitational form, but illegal if in the form of a condition. The explanation is fantastic. A limitation, it is said, imports an intention to provide support until marriage, whereas a condition indicates a restraint on marriage. See 6 AMERICAN LAW OF PROPERTY § 27.14.

2. *Failure of Succeeding Interests.* — The condition-limitation distinction now has importance when the succeeding interest fails and no supplanting interest has been stated by the transferor. A succeeding interest can fail, of course, for any of a variety of reasons. For example, *B*'s interest in the preceding examples violates the Rule Against Perpetuities.²⁴ When an interest subject to a limitation is followed by an interest which fails, it is automatically assumed that the prior interest nevertheless terminates if the event described in the limitation occurs.²⁵ But the opposite conclusion is often mechanically reached when it is an interest subject to a condition that is followed by a failing interest.²⁶ The condition subsequent is not really part of the preceding interest, the rationale goes, but rather is a condition precedent attached to the succeeding interest, and when the succeeding interest fails the condition drops out with it. The woodenness of this approach is obvious.

The *Restatement of Property*, relying principally on a group of English decisions, established a modification of these rules by saying that the prior interest should not become indefeasible automatically. Rather, there should only be a constructional preference for indefeasibility, stronger when the gift over fails because it violates the Rule Against Perpetuities, but rebuttable if the transferor "affirmatively manifests" an intent that the prior interest terminate whether or not the succeeding interest can take effect.²⁷ According to the *Restatement*, a limitation but not a

²⁴ Other possible causes of failure include a legatee's predeceasing the testator, a legatee's surviving the creation of the interest but dying before the occurrence of the uncertain event on which the gift over is expressly conditioned, and so on.

²⁵ *First Universalist Soc'y v. Boland*, 155 Mass. 171, 29 N.E. 524 (1892); *City of Klamath Falls v. Bell*, 490 P.2d 515 (Ore. Ct. App. 1971); 5 AMERICAN LAW OF PROPERTY § 21.47; RESTATEMENT OF PROPERTY § 228, comment *b*, at 937-38 (1936). Agnor, *A Tale of Two Cases*, 17 VAND. L. REV. 1427, 1429 (1964), believes that the *First Universalist* decision was decided on the basis of an incorrect reading of *Proprietors of the Church in Brattle Square v. Grant*, 69 Mass. (3 Gray) 142 (1855). The rule, nevertheless, seems to be well entrenched today. The only exception arises when the succeeding interest is a possibility of reverter which is invalid, for example, because of a statute which limits the validity of possibilities of reverter to a certain number of years. See, e.g., ILL. REV. STAT. ch. 30, § 37e (1969). Since there is no other place for the property to go, the limited estate becomes absolute. RESTATEMENT OF PROPERTY § 228, comment *d*, at 939-40 (1936).

²⁶ See *McGothlin v. McElvain*, 407 Ill. 142, 153, 95 N.E.2d 68, 73 (1950); *Proprietors of the Church in Brattle Square v. Grant*, 69 Mass. (3 Gray) 142, 156-62 (1855); *Edward John Noble Hosp. v. Board of Foreign Missions*, 13 Misc. 2d 918, 176 N.Y.S.2d 157 (Sup. Ct. 1958); *Betts v. Snyder*, 341 Pa. 465, 19 A.2d 82 (1941); *Standard Knitting Mills, Inc. v. Allen*, 221 Tenn. 90, 98-100, 424 S.W.2d 796, 800-01 (1967); 6 AMERICAN LAW OF PROPERTY § 24.47, at 124.

²⁷ RESTATEMENT OF PROPERTY § 229, comments *d*, *e*, at 949-50 (1936); ALI

condition affirmatively manifests by itself such an intent.²⁸ This modification has been attacked on the ground that it introduces uncertainty into the law, whereas the automatic rules were perfectly satisfactory and doctrinally sound.²⁹ What such criticism overlooks is that the chief source of uncertainty is the condition-limitation distinction itself. It is often unclear whether the language of any given disposition is conditional or limitational.³⁰ Thus the *Restatement*, admirable though its purposes may have been in shifting the inquiry to why the succeeding interest failed, perpetuated the source of uncertainty that pervades this area.³¹

3. *Classification of Succeeding Interests.* — Since conditions and limitations are treated as different in substance, it follows, as we have seen, that an interest to which a condition is attached must be classified differently from one to which a limitation is attached. It is thought to follow further that the interests which succeed them must also be classified differently. This distinction, coupled with the distinction between interests left or created in the transferor and those created in a transferee, results in a complex maze. Conditional interests are followed by executory interests, created in a transferee, and rights of entry, created in the transferor. Since conditional interests are said to terminate by being "cut short" or "divested," these two future interests take effect by "cutting short" or "divesting" the preceding interest. Limitational interests, on the other hand, are followed by remainders, created in a transferee, and possibilities of reverter and reversions, left in the transferor — all of which are said to take effect on the "natural" termination of the preceding interest. Reversions follow only life estates or terms of years, whereas possibilities of reverter follow interests in fee simple determinable and life estates or terms of years subject to a special limitation. There are even more complications, for if the interest subject to a limitation is a fee simple determinable and the future interest following it is created in a transferee, the future interest is not a remainder — even though in the artificial world of estates it operates like a remainder — because there is a rule that a remainder cannot follow a fee interest. If not a remainder, what is it? It is an executory interest because it cannot be anything else.

At this point, however, it seems best not to pursue the cate-

Monograph, *Ineffectiveness of an Ultimate Executory Interest*, in 2 RESTATEMENT OF PROPERTY App. 34 (1936). See also 5 AMERICAN LAW OF PROPERTY § 21.48.

²⁸ RESTATEMENT OF PROPERTY § 228, comment *b*, at 937-38 (1936); *id.* § 229, comment *e*, at 949-50.

²⁹ Bordwell, Book Review, 51 HARV. L. REV. 565, 570 (1938).

³⁰ E.g., *In re Pruner's Estate*, 400 Pa. 629, 162 A.2d 626 (1960).

³¹ See Dunham, *Possibility of Reverter and Powers of Termination — Fraternal or Identical Twins?*, 20 U. CHI. L. REV. 215, 223-24 (1953).

gorization attributable to the distinction between future interests created in a transferee and those left or created in the transferor; that will be discussed later. The focus here is on the categorization of future interests caused by the distinction between conditions and limitations: remainders versus executory interests, and possibilities of reverter (and reversions) versus rights of entry.

(a) *Remainders versus Executory Interests.* — When a remainder and an executory interest both in form and substance follow a possessory interest, both interests come into possession upon the happening of the event which terminates the prior possessory interest. The notion that a remainder takes effect on the “natural” termination of a limitational interest and that an executory interest takes effect by “cutting short” a conditional interest involves merely a verbal distinction. Moreover, as indicated, the distinction is not always adhered to. A fee simple determinable is followed by an executory interest, not a remainder.

The distinction between a remainder and an executory interest is equally artificial when they follow a future interest in the sequence in which the interests are stated, for the substance of such situations is that the succeeding interests follow possessory interests as alternatives to the future interest that precedes them in form. Under the present structure, “to *A* for life, then to *B* if he survives *A*, otherwise to *C*,” creates a remainder in *C*. “To *A* for life, then to *B*, but if *B* fails to survive *A*, then to *C*” gives *C* an executory interest. The operation of *C*’s interest in each disposition is the same. If *B* does not survive *A*, *C* takes. The difference depends solely on the arrangement of the words. Since *A*’s interest in each disposition is a life estate (an interest subject to a limitation), *B*’s interest in each case is a remainder. *C*’s interest, however, is different. In the first example it is treated as if it, too, follows *A*’s life estate: *B* does not have a vested interest, and thus *C* can become entitled to possession without first divesting *B*’s interest. In the second example, however, *C*’s interest is not initially treated as if it directly follows *A*’s interest; it is treated as if it follows *B*’s vested interest, which is subject not to a limitation but rather to a condition. If *B* does not survive *A*, *C* takes on the “natural” termination of *A*’s interest, but this occurs only after *C*’s executory interest has been transformed into an indefeasibly vested remainder — that is, after *B*’s interest has been “cut short” by his death during *A*’s lifetime.

Not only is the distinction between remainders and executory interests artificial, it is unnecessary. The only legal consequences which now turn on the distinction are the destructibility rule in the case of contingent remainders and perhaps, when the two interests are created in the heirs of a life tenant, the Rule in

Shelley's Case.³² Both of these rules are of negligible importance, having been abolished in the vast majority of states.³³ Yet the interests continue to have separate identities under the present structure, a situation which contributes substantially to the classificatory mystique.

(b) *Possibilities of Reverter (and Reversions) versus Rights of Entry*. — Possibilities of reverter and reversions follow limitational interests; rights of entry follow conditional interests. Possibilities of reverter are distinguished from reversions on two grounds. First, possibilities of reverter are usually regarded as contingent, while reversions are regarded as vested. Secondly, the limitational interests which reversions follow are life estates and terms of years; the limitational interests which possibilities of reverter follow are fees simple determinable and those life estates and terms of years subject to a special limitation. Because rights of entry are contingent and follow fees simple, life estates, and terms of years subject to a condition subsequent, the possibility of reverter is more comparable to the right of entry than is the reversion, and the succeeding discussion therefore does not directly consider reversions.

The justification usually offered for separating possibilities of reverter from rights of entry goes beyond inquiry into the interests preceding them. By tradition, the breach of the condition preceding a right of entry has a consequence different from a breach of the condition preceding an executory interest. This difference derives from the difference in the language creating the two interests: instead of "to A, but if the premises cease being used for residential purposes, the premises to return to the transferor," the classical right of entry language is "to A, but if the premises cease being used for residential purposes, the transferor is to have the right to reenter and take possession of the premises." The standard appraisal is that the difference between rights of entry and possibilities of reverter is analogous to that between rights of entry and executory interests: the interests operate differently. In one case, the occurrence of the event terminates

³² Dukeminier, *supra* note 10, at 20-23, 31-41.

³³ L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* §§ 207-09, 1563-69 (2d ed. 1956) [hereinafter cited as SIMES & SMITH]. Moreover, because of their feudal origins, the destructibility rule and the Rule in Shelley's Case generally apply only to interests in real property. In North Carolina, however, Shelley's Rule is applicable to personal property. *Riegel v. Lyerly*, 265 N.C. 204, 143 S.E.2d 65 (1965). To avoid risking an action for defamation, Professor Leach refused to comment on the *Riegel* decision. W. LEACH, *PROPERTY LAW INDICTED!* 54 n.60 (1967).

A's interest; in the other, it only gives the transferor the power to terminate A's interest if he so desires.

This standard appraisal must be qualified by two observations. First, the substantive difference between rights of entry and possibilities of reverter sometimes *does* arise artificially from the condition-limitation distinction. When the transferor's interest is not expressly stated, it is held to be a right of entry rather than a possibility of reverter if the possessory interest is clearly one that is subject to a condition subsequent.³⁴ The language of condition is in effect treated as somehow importing merely the power to terminate upon the happening of the specified event,³⁵ rather than the automatic right to possession that clear limitational language standing alone imports.³⁶ Moreover, the notion that clear language of condition subsequent imports merely a right of entry is so strong that it has sometimes been held to apply even when the transferor's interest is expressly described in possibility of reverter terms.³⁷ In situations such as these, therefore, the substantive difference between a possibility of reverter and a right of entry can be dismissed as analogous to other consequences which flow straight from the artificial condition-limitation distinction. In short, the standard appraisal stands up only when the future interests are expressly created in classical terms.

This leads to the second observation. Even when expressly created, the substantive difference is not conceptually required; it is merely customary. There is no reason a possibility of reverter could not be created which would entitle the transferor to possession upon the happening of the specified event *plus* his election to terminate the precedent interest. The language "to A for as long as the premises are used for residential purposes, and upon the cessation of such use for as long thereafter as the transferor refrains from reentering and taking possession; upon the transferor's reentering and taking possession after the premises have

³⁴ *E.g.*, *Hughes v. Cook*, 126 Ind. App. 103, 110, 130 N.E.2d 330, 334 (1955).

³⁵ 1 AMERICAN LAW OF PROPERTY § 2.6, at 96-97. This is often explained differently, on the ground that the law "abhors a forfeiture." When the choice is between a possibility of reverter and a right of entry, the latter is chosen because it is more favorable to the holder of the possessory interest. In a similar vein, language which is not clearly in conditional or limitational form is often interpreted variously as merely precatory or as creating a covenant, a trust, or an equitable charge rather than either a right of entry or a possibility of reverter. *See id.* § 4.7; 2 POWELL ¶ 188; SIMES & SMITH § 248.

³⁶ *Bailey v. Inter-Mountain Tel. Co.*, 202 Tenn. 195, 303 S.W.2d 726 (1957); 1 AMERICAN LAW OF PROPERTY § 4.13. *Contra*, *In re Copps Chapel Methodist Episcopal Church*, 120 Ohio St. 309, 166 N.E. 218 (1929).

³⁷ *Fausett v. Guisewhite*, 16 App. Div. 2d 82, 225 N.Y.S.2d 616 (1962); *Wagner v. Wallowa County*, 76 Ore. 453, 148 P. 1140 (1915); *Watters v. Bredin*, 70 Pa. 235 (1872). *See* note 35 *supra*.

ceased being used for residential purposes, the premises to revert to the transferor" brings the substance of this possibility of reverter into line with a right of entry.

It cannot be denied that, at least in theory, the classical language describing possibilities of reverter and rights of entry does not involve two ways of saying the same thing. It says different things, and the standard appraisal does stand up in these circumstances. Yet, when examined closely, this "substantive" difference turns out to be less meaningful than it appears, for the direction of the law, both legislative and judicial, has been toward the elimination of the differences rather than toward their preservation. Insofar as enforcement — the major point of supposed distinction — is concerned, there is little practical difference between the two future interests. In most states the commencement of an action to regain possession satisfies the requirement of an election to terminate the possessory interest, and the holder of a possibility of reverter usually must institute a similar action in order to enforce his "automatic" interest.³⁸ In addition, after the specified event has occurred, the time allowable under the law of many states for bringing an action to enforce a possibility of reverter is the same as that for making an election under a right of entry.³⁹ The statute of limitations in several states explicitly begins running upon the occurrence of the specified event against both a possibility of reverter and a right of entry;⁴⁰ in other states the statute has been so interpreted;⁴¹ and in still others, the statute is open to such an interpretation.⁴² The two interests are thus brought into line with one another on the question of adverse possession.⁴³ Finally, although the statute of limitations in some states is held not to begin running until an election under a right of entry has been effected, the courts, in an analogy to the equitable doctrine of laches, have required that an election be made within a "reasonable time" after the breach of the condition; and there is authority that the period of the statute of limitations constitutes a "reasonable time."⁴⁴ Other matters of supposed

³⁸ Dunham, *supra* note 31, at 216.

³⁹ *Id.* at 229-30; Comment, *Equivalence of Right of Entry and Right of Reverter*, 18 OHIO ST. L.J. 120, 123-26 (1957).

⁴⁰ See, e.g., ILL. REV. STAT. ch. 83, §§ 1a, 1b (1969); VA. CODE ANN. § 8-5 (1957).

⁴¹ See, e.g., Wolf v. Hallenbeck, 109 Colo. 70, 123 P.2d 412 (1942), *construing* COLO. REV. STAT. ANN. § 118-8-4 (1963).

⁴² Comment, *supra* note 39, at 124 & n.27.

⁴³ Dunham, *supra* note 31, at 229.

⁴⁴ Jeffries v. State *ex rel.* Woodruff County, 216 Ark. 657, 226 S.W.2d 810 (1950); see Note, *Is a Right of Re-Entry Barred by Passage of Time?*, 13 U. PITT. L. REV. 716, 721-22 (1952). Decisions concerning what constitutes a "reasonable time" are collected in SIMES & SMITH § 258, at 314 n.5.

difference between the two interests also turn out to be insubstantial upon close examination.⁴⁵

B. The Concept of Vesting: Condition Precedent and Defeasance (Condition Subsequent or Limitation)

The only defeasible interests that can exist under the present structure are those labeled "vested." Possessory interests are of course always vested; and, as noted, they can be made defeasible in either of two senses: they can be subject to a condition or to a limitation. Future interests, if vested, can also be made defeasible in either of the two senses. An example of a vested future interest defeasible in the limitational sense is a remainder for life. A future interest defeasible in the conditional sense is classified more narrowly as vested subject to divestment. Conditions of divestment, called conditions subsequent, are distinguished under the present structure from conditions precedent; future interests that are subject to conditions precedent are labeled "contingent" rather than defeasible. The difference, therefore, between future interests that are contingent and those that are vested subject to defeasance is that the former are subject to a condition precedent and the latter are subject either to a condition subsequent or to a limitation.

It was not always this clear. The concept of vesting historically was tied to the idea of seisin, and the definition of vested and contingent future interests remained uncertain as late as the earlier part of this century.⁴⁶ One of the few reforms attempted by the *Restatement of Property* was to fix the concept of vesting in terms of the condition precedent-condition subsequent or limitation distinction.⁴⁷ What is wrong with this concept is not that it is ambiguous, but rather that it is patently artificial.

*1. Contingent Remainders and Executory Interests*⁴⁸ *versus*

⁴⁵ Such matters are explored in detail in Dunham, *supra* note 31, at 218-33 (possession, use and enjoyment of the subject matter; power to alienate voluntarily; power to determine devolution at death; termination or loss of right; availability of remedies); Comment, *supra* note 39, at 122-23, 126-27 (dower; creditors' rights).

⁴⁶ Schuyler, *Should the Rule Against Perpetuities Discard Its Vest?*, 56 MICH. L. REV. 887, 888-926 (1958).

⁴⁷ RESTATEMENT OF PROPERTY § 157 (1936).

⁴⁸ The type of executory interest under discussion in this section is the typical executory interest which is contingent because it is subject to a condition precedent. Excluded from the discussion are those atypical executory interests which are not subject to any condition, precedent or subsequent. "To A for life, and one day after A's death, to B," "to B forty years from date," and "to B upon my death" are illustrations of the latter. Executory interests of this type are analogous to indefeasibly vested remainders and should be treated accordingly even under the present structure of estates. Dukeminier, *supra* note 10, at 25-26, 51-52.

Remainders Vested Subject to Defeasance.—The artificiality is most clear when the event upon which the condition depends must precede or coincide with the termination of the prior possessory interest. In the disposition “to *A* for life, then to *B*, but if *B* fails to survive *A*, then to *C*,” *B*’s interest, since subject to a condition subsequent, is a vested remainder subject to divestment. “To *A* for life, then to *B* if he survives *A*; otherwise to *C*,” however, gives *B* a contingent remainder. Yet *B*’s interest in both dispositions is subject to the same condition, the condition that he survive *A*. The only difference is the verbal one between precedent and subsequent form. As to *C*’s interest, in both dispositions it is subject to a condition precedent and therefore contingent; but because of the artificial condition-limitation distinction it is an executory interest in the former disposition and an alternative contingent remainder in the latter.

The distinction between conditions precedent and certain limitations operates in a similar way. *B* has a vested remainder subject to defeasance in the limitational sense in the disposition “to *A* for life, then to *B* for life, then to *C*.” The disposition “to *A* for life, then to *B* if he survives *A*; otherwise to *C*” gives *B* a contingent remainder. Although the substance of *B*’s interest is not identical in each disposition, it is the same in that *B* must survive *A* in order to take possession. Not all limitations work this way, of course; under some the future interest is certain of becoming possessory—for example, “to *A* for life, then to *B* for ten years, then to *C*.” But when the limitation makes the interest uncertain of becoming possessory, it operates identically to a condition precedent, and the different treatment from the standpoint of vesting is artificial.

Nevertheless, several important legal consequences flow from the distinction between interests which are vested subject to defeasance and those which are contingent.⁴⁹ Contingent remainders and executory interests are subject to the Rule Against Perpetuities, whereas vested remainders subject to defeasance are not.⁵⁰ In addition, it has occasionally been held that, when a condition is illegal, the gift becomes absolute if the interest is vested sub-

⁴⁹ Halbach, *Vested and Contingent Remainders: A Premature Requiem for Distinctions Between Conditions Precedent and Subsequent*, in PERSPECTIVES OF LAW: ESSAYS FOR AUSTIN WAKEMAN SCOTT 152 (R. Pound, E. Griswold & A. Sutherland eds. 1964). Consequences sometimes thought to depend on the distinction, but which do not in fact turn on it, are waste, third party liability, and partition. *Id.* 156–57.

⁵⁰ In some states, including California, this is the only situation in which the contingent-vested subject to defeasance distinction has any legal consequence. Dukeminier, *Perpetuities Revision in California: Perpetual Trusts Permitted*, 55 CALIF. L. REV. 678, 679 n.4 (1967).

ject to defeasance, but that both the condition and the gift are defeated if the interest is contingent.⁵¹ Although vested remainders subject to defeasance are unquestionably alienable and subject to the claims of creditors, contingent remainders and executory interests continue to be treated as inalienable in some states;⁵² and in a few others, such interests are inalienable if contingent as to person but alienable if contingent as to event.⁵³ In regard to creditors' rights, it might be expected that creditors can reach interests which are alienable,⁵⁴ and this is the case under the federal Bankruptcy Act.⁵⁵ Yet, in insolvency proceedings in a number of states in which contingent remainders and executory interests are voluntarily alienable, they are nevertheless protected from the reach of creditors. In the handful of states in which such interests are not alienable, they are of course not reachable by creditors either.⁵⁶ In some of the states in which they are alienable, they are nevertheless immune from judgment

⁵¹ *E.g.*, *Winterland v. Winterland*, 389 Ill. 384, 59 N.E.2d 661 (1945). See 6 AMERICAN LAW OF PROPERTY § 27.22. Compare RESTATEMENT (SECOND) OF TRUSTS § 65, comments *e* & *f* (1959), with RESTATEMENT OF PROPERTY § 424, comment *d*, at 2478-79 (1944); *id.* § 425, comment *h*, at 2486; *id.* § 426, comment *e*, at 2491; *id.* § 427, comment *f*, at 2495; *id.* § 428, comment *l*, at 2509-10; *id.* § 429, comment *j*, at 2519; and *id.* § 433, comment *f*, at 2537. See also 6 AMERICAN LAW OF PROPERTY § 27.23, based on Browder, *Illegal Conditions and Limitations: Effect of Illegality*, 47 MICH. L. REV. 759, 762-74 (1949).

⁵² See, *e.g.*, *Roper v. Finney*, 7 Ill. 2d 487, 131 N.E.2d 106 (1956). In keeping with the *Restatement's* position that all future interests except powers of termination should be alienable inter vivos, RESTATEMENT OF PROPERTY §§ 159-63 (1936), contingent remainders and executory interests are freely alienable in the vast majority of states. Inalienability, however, means only that the interest is not gratuitously transferable by quitclaim deed to a stranger to the title, since (1) even inalienable interests can be released, (2) a specifically enforceable contract to convey arises in equity from an attempted transfer for valuable consideration, and (3) the doctrine of estoppel by deed is invoked in law when there is an attempted transfer by warranty deed. Halbach, *Creditors' Rights in Future Interests*, 43 MINN. L. REV. 217, 224-25 (1958).

⁵³ See, *e.g.*, *In re Clayton's Estate*, 195 Md. 622, 74 A.2d 1 (1950); N.J. STAT. ANN. § 46:3-7 (1940).

⁵⁴ RESTATEMENT OF PROPERTY §§ 166-67 (1936).

⁵⁵ The trustee in bankruptcy gains title to all future interests which were transferable by any means by the bankrupt before bankruptcy or, if in real property, which become transferable within six months after bankruptcy. Bankruptcy Act § 70a(7), 11 U.S.C. § 110(a)(7) (1970). The weight of authority appears to be that the phrase "by any means" does not cover contingent interests in states in which such interests continue to be treated as inalienable, even though such interests can in practice be alienated by the devices outlined in note 52 *supra*. SCHWARTZ § 3.12; Halbach, *supra* note 52, at 238-42. But see *In re Landis*, 41 F.2d 700 (7th Cir.), *cert. denied sub nom.* *Farmers Bank v. Bickenbach*, 282 U.S. 872 (1930).

⁵⁶ *E.g.*, *Johnston v. Herrin*, 383 Ill. 598, 50 N.E.2d 720 (1943).

sale when the contingency is remote on the ground that a sacrificial sale should be avoided; but if the same condition is stated in subsequent form, creditors can reach the interest.⁵⁷ The artificial condition precedent-condition subsequent distinction also makes a difference for purposes of the Rule of Destructibility of Contingent Remainders. As its name implies, this rule applies only to contingent remainders, not to vested ones. But the destructibility rule is nearly obsolete, and in any event it applies only to legal remainders in real property.⁵⁸

There are, however, situations where it is justifiable to make certain legal consequences depend on whether a condition is stated in precedent or subsequent form. One such situation is illustrated by the following two dispositions: (1) "to *A* for life, then to *B* if he attains 21; otherwise to *C*," and (2) "to *A* for life, then to *B*, but if he dies without attaining 21, to *C*." In these dispositions the event decisive to the condition may or may not happen prior to the termination of the preceding life estate. If *B* is under the age of 21 when *A* dies, *B*'s interest will not become possessory in the first disposition unless and until he reaches 21,⁵⁹ but in the second it will become possessory immediately upon *A*'s death, subject to being lost if he dies under 21. Another such situation occurs when a prior interest fails for some reason and the question is whether a succeeding future interest should be accelerated. If the future interest is subject to an unfulfilled condition precedent, it is usually said that there can be no acceleration, whereas the contrary rule obtains when the condition is stated in subsequent form.⁶⁰ These results seem justified,⁶¹ but not because the interest is in one case technically vested and in the other contingent. Rather, the choice between precedent and

⁵⁷ *E.g.*, *Adams v. Dugan*, 196 Okla. 156, 163 P.2d 227 (1945); see Halbach, *supra* note 49, at 159-61. In a few states, creditors can attach a contingent interest but cannot force a judgment sale until it vests. *E.g.*, VA. CODE ANN. § 8-534 (1957). In *Meyer v. Reif*, 217 Wis. 11, 258 N.W. 391 (1935), the court held that vested remainders subject to defeasance and contingent remainders should not be treated differently, and that the appropriate relief is a lien on the debtor's interest until the condition either occurs or does not occur.

⁵⁸ See note 33 *supra*.

⁵⁹ This of course assumes that the destructibility rule is either abolished or inapplicable. If the interest were an income interest under a trust, statutes in a few states appear to give *B* the right to intermediate income anyway. *E.g.*, CALIF. CIV. CODE § 733 (West 1954).

⁶⁰ 5 AMERICAN LAW OF PROPERTY § 21.41. When the condition precedent is one of survivorship, however, and the prior interest which fails is a life estate, some courts construe the survivorship requirement as relating to the life estate rather than to the life tenant. *Id.* § 21.42; SIMES & SMITH § 796.

⁶¹ Halbach, *supra* note 49, at 168-70, believes that the distinction operates artificially even here.

subsequent language is helpful, though not decisive, in determining the transferor's intent as to the time of taking. Moreover, for other purposes the condition precedent-condition subsequent distinction is still artificial even as to the above two illustrations. For example, during *A*'s lifetime the verbal difference does not justify the rule in some states that *B*'s interest is inalienable in the first disposition though unquestionably alienable in the second.

2. *Reversionary Interests*. — Reversions may or may not be certain to become possessory; those which are, are classified as indefeasibly vested. A common example of one not certain to become possessory is the disposition "to *A* for life, then to *B* if he survives *A*." The orthodox classification of the transferor's unstated reversion in this example is vested subject to defeasance, the rationale being that *B*'s surviving or not surviving *A* is a condition subsequent, not precedent.⁶² Yet, if the interest had been a remainder, the failure of *B*'s interest to vest would be a condition precedent: "to *A* for life, then to *B* if he survives *A*; otherwise to *C*" gives *C* a contingent remainder. Thus, the difference cannot be the verbal one of stating the condition in either precedent or subsequent form, although this is the explanation usually offered.⁶³ The true reason is probably the one described by Gray:

A remainder is created by the livery of seisin of the particular estate. . . . [A] reversion is independent of the ownership created by the livery . . . and, therefore, any condition affecting it is a condition which, as to it, is subsequent.⁶⁴

In other words, instead of being vested because they are subject to a condition subsequent, reversions which are uncertain of becoming possessory are deemed to be subject to a condition subsequent because they are vested. And they are vested because the concept of vesting as to reversions still has not broken away from livery of seisin.

For the other two types of reversionary interests — possibilities of reverter and rights of entry⁶⁵ — to become possessory,

⁶² There is only a handful of decisions in which a reversion has been characterized as contingent. *Frazer v. Board of Supervisors*, 74 Ill. 282, 290 (1874); *King v. Wurts*, 227 Ky. 705, 709-10, 13 S.W.2d 1043, 1045 (1929) (dictum); *Floyd v. Carow*, 88 N.Y. 560, 569 (1882) (dictum).

⁶³ E.g., RESTATEMENT OF PROPERTY § 154, comment e, at 531 (1936).

⁶⁴ J. GRAY, THE RULE AGAINST PERPETUITIES 105 (4th ed. R. Gray 1942) [hereinafter cited as GRAY].

⁶⁵ Under the *Restatement's* structure, rights of entry (powers of termination) are not technically regarded as "reversionary interests." A reversionary interest is defined as "any future interest left in a transferor or his successor in interest."

there must occur the uncertain event described in the limitation or condition attached to the preceding defeasible interest. Whether it is therefore a condition precedent, making them by definition contingent reversionary interests, is disputed. Some authorities view both interests as contingent;⁶⁶ some view them both as vested;⁶⁷ another thinks possibilities of reverter are vested while rights of entry are not;⁶⁸ others do not care.⁶⁹

Perhaps the last view is the most realistic, for the vesting concept is largely irrelevant as to all reversionary interests. Legal consequences stem from whether an interest is reversionary or from what type of reversionary interest it is, rather than from whether it is vested or contingent. Whether contingent or not, possibilities of reverter and rights of entry are exempt from the Rule Against Perpetuities, probably for mostly historical reasons.⁷⁰ They are inalienable in several states,⁷¹ but not because of any conclusion that they are contingent.⁷² Because of the near una-

RESTATEMENT OF PROPERTY § 154(1) (1936). Rights of entry fall outside this definition because they are treated as future interests newly created in the transferor or his successor in interest. *Id.* § 154, comment a, at 526; *id.* § 155. Nevertheless, for the sake of convenience, rights of entry are treated like reversionary interests in this discussion.

⁶⁶ 1 AMERICAN LAW OF PROPERTY §§ 4.6, 4.12; SIMES & SMITH §§ 281, 1238. The *Restatement* classifies possibilities of reverter as contingent, but does not classify rights of entry in terms of vesting at all. RESTATEMENT OF PROPERTY § 154, comment e, at 531 (1936).

⁶⁷ Leach, *Perpetuities Reform by Legislation: England*, 70 HARV. L. REV. 1411, 1417 (1957). Professor Leach carefully placed the word "vested" in quotation marks, presumably indicating that this is not his view of how they should be treated, but his understanding of how courts treat them. *See also* SCHWARTZ § 6.10.

⁶⁸ GRAY 105-08.

⁶⁹ BERGIN & HASKELL 66.

⁷⁰ Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 740 (1952). Although all the existing American decisions are unanimous in exempting these interests from the Rule, in the vast majority of states there are no decisions at all on the question. Leach, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973, 980 (1965).

⁷¹ Rights of entry are probably inalienable in a few more states than are possibilities of reverter. In addition, some decisions have held that an attempted alienation of a right of entry results in its extinguishment. Agnor, *supra* note 25, at 1432-36; Dunham, *supra* note 31, at 221-22.

⁷² *See, e.g.,* King v. Wurts, 227 Ky. 705, 709-10, 13 S.W.2d 1043, 1045 (1929). The court was uncertain whether the interest was a possibility of reverter, and hence inalienable, or a "contingent" reversion, in which case it would have been alienable because Kentucky is a state which recognizes the alienability of contingent future interests. This question did not have to be decided because even if the interest was a possibility of reverter, it was nevertheless *releasable*; and that is what happened in the case. Possibilities of reverter and rights of entry have subsequently been held to be alienable in Kentucky. Austin v. Calvert, 262 S.W. 2d 825 (Ky. Ct. App. 1953).

nimity that reversions are vested subject to defeasance,⁷³ it is a matter of conjecture whether reversions, if they were to be held to be contingent when uncertain of becoming possessory, would be subject to the Rule Against Perpetuities or be inalienable in those states in which contingent interests are still inalienable.

C. Reversionary and Nonreversionary Interests

Superficially, the differentiation of interests left or created in a transferor from those created in a transferee appears to be a sensible and easy distinction to draw. That it is in fact neither can be quickly demonstrated.

In the case of inter vivos transfers the distinction makes for easy circumvention of such underlying policies as there are. Because possibilities of reverter and rights of entry⁷⁴ are exempt from the Rule Against Perpetuities, a common device for assuring the validity of executory interests which follow fees simple determinable or fees simple subject to a condition subsequent is to convey the fee interest one day and the reversionary interest the next⁷⁵ — or to convey the fee interest by deed and the reversionary interest by will.⁷⁶ That way, the grantee or devisee of the gift over receives a possibility of reverter or right of entry rather than an executory interest. Only the ill-advised would convey “to A for as long as the premises are used for residential purposes, and upon the cessation of such use, to B.” The same two-instrument method can also be utilized to give a transferee a reversion rather than a remainder, thereby avoiding the Rule in Shelley’s Case when the future interest is to be devised to the heirs of the life tenant.

As regards testamentary transfers, the differentiation of reversionary from nonreversionary interests is unsatisfactory for two reasons. One is that it is fuzzy. Possibilities of reverter and reversions need not be explicitly created; it is unclear whether a residuary clause passes a reversionary or a nonreversionary in-

⁷³ See p. 747 & note 62 *supra*. *Frazer v. Board of Supervisors*, 74 Ill. 282 (1874), apparently is the only decision in which a reversion has actually been held to be “contingent.” As a result, the reversion apparently was inalienable, although the court noted that the interest would inure to the grantee of the reversion under the estoppel by deed doctrine if the reversion became vested.

⁷⁴ See note 65 *supra*.

⁷⁵ *E.g.*, SCHWARTZ § 6.31. The feasibility of this method is of course reduced in those states in which these interests are inalienable, though even here the methods cited in note 52 *supra* are still usually available for possibilities of reverter. SCHWARTZ § 3.3.

⁷⁶ Very few states refuse to permit such interests to be passed by will. Illinois, though, does have such a restriction, forcing them to pass by intestacy. ILL. REV. STAT. ch. 30, § 37b (1969).

terest when an incomplete interest is devised in one part of a will. For example, if a testator devises "to *A* for life, then to *B* if he survives *A*," with a residuary clause in favor of *C*, it may be important to determine whether *C* takes a vested reversion subject to defeasance or a contingent remainder. Or, when the devise is "to *A* for as long as the premises are used for residential purposes" with a residuary clause in favor of *B*, if *B* takes an executory interest it violates the Rule Against Perpetuities, but if it is a possibility of reverter *B* takes, it is valid. Although this question has divided the courts,⁷⁷ most scholars have argued strongly that a residuary clause should be deemed to pass a nonreversionary interest on the theory that all parts of a will take effect simultaneously.⁷⁸ As Professor Simes put it, the transferor "did not die twice."⁷⁹

This observation leads to the second and more important reason the distinction is unsatisfactory: it is artificial. Since the testator is dead, it is difficult to apply to his situation the standard definition that reversionary interests are those left in a transferor after he has transferred a lesser interest.⁸⁰ Furthermore, if the transferor has not died twice when the unstated interest passes under a residuary clause, is it reasonable to view him as having died twice when it passes by intestacy? For other purposes,⁸¹ such as the destructibility rule,⁸² it is widely agreed that interests created in a will and interests passing by intestacy take effect

⁷⁷ Some treat it as a reversionary interest. See, e.g., *Gridley v. Gridley*, 399 Ill. 215, 77 N.E.2d 146 (1948) (reversion); *Brown v. Independent Baptist Church*, 325 Mass. 645, 91 N.E.2d 922 (1950) (possibility of reverter). Others, as a non-reversionary interest. See, e.g., *Coquillard v. Coquillard*, 62 Ind. App. 489, 498-99, 113 N.E. 481, 483-84 (1916) (*vested* remainder); *Ringgold v. Carvel*, 196 Md. 262, 272-73, 76 A.2d 327, 332 (1950) (court identified the interest variously as a reversion and as a *vested* remainder). The *Coquillard* and *Ringgold* decisions appear to think that the remainder is "vested," but it seems apparent that, if a remainder, it is "contingent." See RESTATEMENT OF PROPERTY § 278, comment *d*, at 1440-41 (1940).

⁷⁸ 1 AMERICAN LAW OF PROPERTY § 4.29; A. KALES, ESTATES, FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS § 95 (2d ed. 1920); 2 POWELL ¶ 274; RESTATEMENT OF PROPERTY § 278, comment *d*, at 1440-41 (1940); SIMES & SMITH § 1241. Gray's view, however, was that a residuary clause passes a reversionary interest. GRAY 104.

⁷⁹ Simes, *Is the Rule Against Perpetuities Doomed? The "Wait and See" Doctrine*, 52 MICH. L. REV. 179, 179-80 n.4 (1953).

⁸⁰ The *Restatement* dodges this difficulty by defining reversionary interests as those "left in a transferor or his successor in interest." RESTATEMENT OF PROPERTY § 154(1) (1936) (emphasis added). Successor in interest is deemed to mean a testator's heirs or next of kin. *Id.* comment *b*, at 527.

⁸¹ See T. ATKINSON, WILLS 505, 561-64 (2d ed. 1953); UNIFORM PROBATE CODE § 3-101 (1969).

⁸² See SIMES & SMITH § 197, at 225.

simultaneously; and intestate succession is treated as an actual transfer from the decedent to his heirs, not a mere sliding by the heirs into the place of the decedent.⁸³ Yet, under the present structure of estates it is unquestioned that, in the absence of a residuary clause, the interest passing to the heirs is reversionary. Perhaps the bar to concluding that all interests created at death are nonreversionary is the rule, sometimes stated, that remainders must not only be created simultaneously with the particular estate but also in the same instrument.⁸⁴ The reason for this "rule," however, unless it is thought to be another way of saying that a remainder and the particular estate must be created simultaneously, is apparently tied to history, and the "rule" should not be allowed to prevent a realistic appraisal of interests created at

⁸³ E.g., ILL. REV. STAT. ch. 120, §§ 375(1)-(2) (1969). At common law, a legacy under a will can be renounced or disclaimed, the renunciation relating back to the decedent's death and operating as a nonacceptance. A renunciation or disclaimer of an intestate share, however, is said to operate as a transfer from the disclaiming heir to the person who takes the disclaimed portion on the theory that intestate succession cannot be refused because it arises by operation of law. *Hardenbergh v. Commissioner*, 198 F.2d 63 (8th Cir.), cert. denied, 344 U.S. 836 (1952); *Coomes v. Finegan*, 233 Iowa 448, 7 N.W.2d 729 (1943). This distinction perhaps lends support to the idea that an heir merely slides into the place of the decedent. But it is a mindless distinction, rooted in feudalism. See Lauritzen, *Only God Can Make an Heir*, 48 NW. U.L. REV. 568 (1953). One mindless distinction thus supports another. The legislative trend is toward permitting an heir to renounce or disclaim on the same basis as a legatee. COLO. REV. STAT. ANN. § 153-5-43 (1963); HAWAII REV. STAT. §§ 538-1, -3 (1968); ch. 111, § 15-2-801, [1971] Idaho Session Laws 267; ILL. REV. STAT. ch. 3, § 15b (1969); IND. ANN. STAT. § 6-604 (1953); KAN. STAT. ANN. § 59-2291 (Supp. 1969); MD. ANN. CODE art. 93, § 9-101 (Supp. 1971); MICH. COMP. LAWS ANN. § 554.501 (1971); MINN. STAT. ANN. § 525.532 (1969); N.Y. EST., POWERS & TRUSTS LAW § 4-1.3 (McKinney 1967); N.C. GEN. STAT. § 29-10 (1966); OHIO REV. CODE ANN. § 2105.061 (Baldwin 1971); ORE. REV. STAT. § 112.675 (1969); R.I. GEN. LAWS ANN. §§ 34-5-1 to -12 (1969); S.D. COMP. LAWS ANN. § 43-4-29 (Supp. 1971); W. VA. CODE ANN. § 42-4-3 (1966); WIS. STAT. ANN. § 852.13 (Supp. 1970); see FLA. STAT. ANN. § 731.23(8) (Supp. 1971). Some of these statutes are patterned after model disclaimer acts promulgated by the American Bar Association. Special Committee on Disclaimer Legislation of the A.B.A. Section of Real Property, Probate & Trust Law, *Disclaimer of Testamentary and Nontestamentary Dispositions—Suggestions for Model Acts*, 4 REAL PROP., PROB. & TRUST J. 658 (1969). The Idaho statute is § 2-801 of the Uniform Probate Code (UPC). If the UPC gains widespread adoption, the number of states which allow heirs to renounce or disclaim will of course increase significantly. At this writing Idaho is the only state to have enacted the UPC, but its adoption in 12 additional states, 9 of which do not now have such a disclaimer statute, is believed to be probable in the near future. See Committee on Uniform Probate Code of the A.B.A. Section of Real Property, Probate & Trust Law, *Progress on the Uniform Probate Code*, 6 REAL PROP., PROB. & TRUST J. 375, 376 (1971).

⁸⁴ E.g., SCHWARTZ § 2.3; SIMES & SMITH § 103.

death from prevailing. Realistically, it is hard to see how any interest created at death can be viewed as reversionary.

III. THE PROPOSED REFORMULATION

The proposal for the restructuring of estates advanced here has several objectives. It seeks to simplify the present structure as drastically as possible without substantially reducing flexibility for the gratuitous transmission of family wealth or for the commercial transfer of property. At the same time it seeks to improve the quality of the law by removing the artificiality that now pervades the area, by forestalling circumvention, and by eliminating the classificatory mystique. Ambitious as these objectives are, they are achievable under a reformulation of the structure which assures that property interests which in substance operate the same way are grouped in the same categories even though they may be stated differently in form. Toward this end, the proposed reformulated structure would not recognize the sources of the deficiencies in the present structure: the distinctions between conditions and limitations, between conditions precedent and subsequent, and between reversionary and non-reversionary interests. Future interests, moreover, would be categorized solely by their own nature.

Specifically, possessory interests would undergo an important but not dramatic change. Those which will not terminate would continue to be called interests in fee simple absolute. Those which will terminate would also retain their present titles: life estates or terms of years. Those which might terminate would still be called defeasible, but the term defeasible would be restricted to these interests. It would not cover, as it now technically does, interests which are certain to terminate. Furthermore, defeasible interests would not be distinguished on the basis of being either subject to a condition or subject to a limitation. "To *A* for as long as the premises are used for residential purposes, and upon the cessation of such use, to *B*" and "to *A*, but if the premises cease being used for residential purposes, then to *B*" would carry the same classification. Since *A*'s interest in both cases terminates upon the happening of the same uncertain event, in both it would be an interest in fee simple defeasible. Life estates or terms of years, of course, could also be made defeasible under the reformulated structure. Although it will be seen that rights of entry do not retain a separate identity under the reformulated structure, the merger of possessory interests subject to a limitation and those subject to a condition subsequent would not be prevented even if they did, for a defeasible interest followed by a right of entry

would simply be treated as terminating upon the exercise of the right rather than upon the occurrence of the event which makes the right exercisable.

The change in future interests would be more radical. Eliminating the condition-limitation distinction would abolish the difference between remainders and executory interests and remove one of the bases upon which possibilities of reverter are distinguished from rights of entry. Dropping the reversionary-nonreversionary distinction would nullify the difference between reversions and remainders and part of the difference between rights of entry and executory interests. The elimination of the condition precedent-condition subsequent distinction would permit possibilities of reverter and reversions to be merged. Thus, four of the five types of future interests currently recognized as having separate identities would be assimilated under the same title — simply “future interest” for want of a better term — leaving only rights of entry to be accounted for.

Even in the absence of the condition-limitation and reversionary-nonreversionary distinctions, rights of entry are still theoretically different from the other future interests in that they are the only interests which do not automatically entitle the holder to possession when the event upon which they are predicated occurs. Because of the reasons developed previously,⁸⁵ however, it would be futile to insist on prolonging the separate identity of rights of entry. Consequently, they too would be assimilated along with the other future interests under the reformulated structure. Assimilation of this sort, of course, would in effect constitute an abolition of rights of entry, and in this respect the reformulated structure would provide less flexibility than does the present structure. But this reduction in flexibility is not especially significant for two reasons. First, under the present structure the conceptual uniqueness of the right of entry has often been disregarded by the law. The interest has frequently been treated the same as one which takes effect automatically, in spite of any conceptual difference. Secondly, the transferor can still utilize either a power of revocation or a power of appointment to accomplish somewhat the same objective, at least during the lifetime of the holder of the power, or, in the case of commercial transactions such as a lease or mortgage, during the duration of the encumbrance.⁸⁶ Indeed, language which is clearly in right of entry terms could and undoubtedly would be construed, under the reformulated structure, as creating a power of revocation or of appointment whether the defeasible possessory interest is

⁸⁵ See p. 742 *supra*.

⁸⁶ SIMES & SMITH § 243.

described in conditional or limitational language. A power of revocation or of appointment, however, would not be implied merely from language of condition as is a right of entry under the present structure.

Although all future interests would be assimilated under one title, they would be differentiated from one another in terms of vesting. The concept of vesting, however, would be revised to take into account the elimination of the distinction between conditions precedent on the one hand and conditions subsequent and limitations on the other. Accordingly, future interests not certain to become possessory, including those in unborn or unascertained persons as well as those dependent upon the occurrence or non-occurrence of an uncertain event, would be called contingent.⁸⁷ In other words, most interests which are presently labeled vested subject to defeasance would be contingent under the reformulated structure, reversing the maxim that the law favors the vesting of estates.⁸⁸ Thus, *B*'s interest in the following examples would be contingent: "to *A* for life, then to *B*, but if *B* fails to survive *A*, then to *C*"; "to *A* for life, then to *B*, but if he dies without attaining 21, to *C*" (*A* is alive but *B* is not yet 21); and "to *A* for life, then to *B* for life, then to *C*" (*A* and *B* are both alive). Also contingent would be interests subject to a power — a power of appointment, a power to consume, sell, or dispose, or a power to invade corpus.

Conversely, the only future interests which the reformulated structure would call vested would be those certain to become possessory. If the ultimate number of takers is certain and the interest will be in fee simple absolute once it becomes possessory, the interest would retain the present label of indefeasibly vested;⁸⁹ if the number is uncertain, the interest would continue

⁸⁷ A similar proposal was advanced in Browder, *Future Interest Reform*, 35 N.Y.U.L. REV. 1255, 1267-69 (1960).

⁸⁸ This common law rule of construction has several meanings. As subdivided by Professor Rabin, it means that, unless the transferor manifests a contrary intent,

(1) future interests are construed to become indefeasibly vested at the earliest possible time;

(2) conditions are not readily implied, and are construed as narrowly as possible;

(3) future interests are characterized as defeasibly vested rather than contingent.

Rabin, *The Law Favors the Vesting of Estates. Why?*, 65 COLUM. L. REV. 467, 469-70 (1965) (footnotes omitted). Professor Rabin's quarrel is with subrule (2), a rule I believe to be sound. Waggoner, *Future Interests Legislation: Implied Conditions of Survivorship and Substitutionary Gifts Under the New Illinois "Anti-Lapse" Provision*, 1969 U. ILL. L.F. 423. My quarrel in the present article is, of course, only with subrule (3).

⁸⁹ Although most executory interests would be characterized as contingent future interests under the reformulated structure, those which are certain to become

to be called vested subject to open. This leaves unaccounted those future interests in which the number of takers is certain and the ultimate taking is assured, but which will not be in fee simple absolute. An example is *B*'s interest in "to *A* for life, then to *B* for 10 years, then to *C*." Although it might be appropriate to call such future interests vested subject to defeasance, this solution is not proposed here. Rather, such interests would be labeled indefeasibly vested under the reformulated structure. It seems to make more sense to categorize future interests from the standpoint of vesting solely on the basis of the way they operate as *future* interests and to indicate in another way how the interest will operate after possession occurs. Thus, the full classification of *B*'s interest would be an indefeasibly vested future interest in a term of years. In addition, in order to be sure that the condition precedent-condition subsequent or limitation distinction is completely removed from the law, it seems desirable to eliminate entirely the vested subject to defeasance category. It may be noted that *C*'s interest in the above example would also be indefeasibly vested, but would, of course, be in fee simple absolute. Consequently, under the reformulated structure an indefeasibly vested future interest could follow another indefeasibly vested future interest, although they could not both be interests in fee simple absolute.

THE REFORMULATED HIERARCHY

<i>Possessory Interests</i>	<i>Future Interests</i>
Fee Simple Absolute	None permissible
Defeasible Fee Simple	Contingent
Life Estate (may or may not be defeasible)	Contingent (not certain to become possessory); Alternative Contingent Future Interest
	Vested Subject to Open; Contingent (in unborn class members)
	Indefeasibly Vested
Term of Years	Same as with Life Estate

To summarize, the reformulated structure is based on the premise that the only appropriate distinctions are between certainty and uncertainty as to the termination of possessory interests and between certainty and uncertainty as to the ultimate possession of future interests. Possessory interests, by the terms of the particular transfer, either will not terminate (fee simple absolute), will terminate (life estate or term of years), or will

possessory, such as "to *A* forty years from date," would be reclassified as indefeasibly vested.

possibly terminate (defeasible interest). Future interests either will become possessory (indefeasibly vested), will become possessory but with a now uncertain number of takers (vested subject to open), or will possibly become possessory (contingent). The reformulated structure is shown in the accompanying chart, which should be compared with the chart of the present structure of estates given earlier.

IV. THE IMPACT OF THE PROPOSED REFORMULATION ON CERTAIN RULES OF PROPERTY

A. Various Minority Rules

Apart from grouping together interests which in substance operate the same way, what would be the impact of the reformulated structure? First, the scope of several minority rules might be expanded. Since the revised definition of contingent interests is considerably broader than the present definition, the rule of inalienability of contingent future interests would render inalienable many interests now freely transferable. The broadened definition of contingent interests and the assimilation of all future interests under one title might mean that more real property interests would be subject to being eliminated under the destructibility rule. Finally, the assimilation of all future interests might also cause the Rule in Shelley's Case to be held to apply to any future interest in real property in the heirs or the heirs of the body of a life tenant, whereas it now theoretically applies only to remainders.⁹⁰

These undesirable results can be avoided by simply abolishing the rules. The inalienability rule is derived from the now-rejected notion that contingent future interests are not present interests in which possession is postponed and uncertain, but rather interests which arise in the future.⁹¹ Based solidly in the feudal system, the destructibility rule and the Rule in Shelley's Case should never have been adopted in America in the first place.⁹² The ab-

⁹⁰ Dukeminier, *supra* note 10, at 20-23, points out that in actuality there appear to be no decisions refusing to apply the Rule in Shelley's Case on the ground that the interest was an executory interest, and that in one decision, *Darragh v. Barmore*, 242 S.W. 714 (Tex. Comm'n App. 1922), the Rule was applied to an executory interest.

⁹¹ See Halbach, *supra* note 49, at 157. The question of the rights of creditors would be better handled on some basis other than whether the interest is contingent or vested. See pp. 745-46 & note 57 *supra*.

⁹² See W. LEACH, *PROPERTY LAW INDICTED!* 52-58 (1967); Browder, *supra* note 87, at 1259-63; Halbach, *supra* note 49, at 158-59.

Although the reformulated structure would not expand the scope of the doctrine of worthier title, it would be appropriate to abolish this rule at the same time.

olition of these rules in the Uniform Property Act ⁹³ and, in whole or in part, in the statutes of a great majority of states ⁹⁴ demonstrates their utter inappropriateness. Surely the expansion of their scope under the reformulated structure would encourage their abolition in the states in which they are still followed.

B. Failure of Succeeding Interests

The effect of the failure of a succeeding interest when the transferor has not indicated who should take the property in this event would become more automatic with the abolition of the condition-limitation distinction. On the theory that a condition subsequent indicates, just as strongly as does a limitation, that the preceding defeasible interest is to terminate despite the failure of the succeeding interest, ⁹⁵ the preceding defeasible interest, whether subject to a condition or limitation, would terminate and the property would return to the transferor or his successor in interest. The only exception to this, apart from situations in which the transferor expressly manifests a different intention, would be instances in which the interest of the transferor or his successor in interest is invalid because it violates the Rule Against Perpetuities. In these cases, as explained in the next section, the preceding defeasible interest would become absolute.

C. The Common Law Rule Against Perpetuities

This brings us to a consideration of the impact of the reformulated structure on the common law Rule Against Perpetuities. ⁹⁶ Although the paramount objective of the reformulated structure is not to work perpetuity reform, its adoption would extend the scope of the Rule in desirable directions. To put the matter into some perspective at the outset, it might be noted that the impact on the Rule of the reformulated structure would be similar in two respects to that of one form of proposed perpetuity reform — the proposal to change the Rule so that instead of requiring certainty of vesting in interest, if at all, within a life in being plus 21 years, it requires certainty of vesting in possession and enjoyment, if at all, within that period. ⁹⁷ Both this proposal

⁹³ UNIFORM PROPERTY ACT §§ 7, 12, 14, 16 (1938).

⁹⁴ The trend toward the abolition of these rules is reported in SIMES & SMITH §§ 207-09 (destructibility), 1563-71 (Rule in Shelley's Case), 1612 (worthier title), 1858-63 (inalienability).

⁹⁵ See pp. 736-38 *supra*.

⁹⁶ The current status of statutory modifications to the common law Rule can be found in SIMES & SMITH §§ 1411-39.

⁹⁷ This proposal was advanced and fully worked out in Schuyler, *supra* note 46, at 926-52. Gray also felt that the Rule would have been improved by shifting its emphasis to vesting in possession. GRAY 821-22.

and the reformulated structure would extend the application of the Rule to those interests — rights of entry, possibilities of reverter, and defeasibly vested reversions and remainders — which currently enjoy an exempt status even though they are not certain to become possessory; and neither would change the way the Rule now operates on future interests which are vested subject to open.

The similarity stops at this point. The vesting-in-possession proposal in its pure form would extend the Rule to indefeasibly vested reversions and remainders — interests which both presently and under the reformulated structure are exempt because they are certain to become possessory.⁹⁸ And, even as to some presently exempt interests which are not certain to become possessory — defeasibly vested reversions and remainders — the vesting in possession proposal is obviously considerably stricter than the reformulated structure, under which vesting in interest would be sufficient. Finally, requiring vesting in possession would alter the Rule's operation on interests which are not now exempt — contingent remainders and executory interests.

The reformulated structure has none of these latter effects. The Rule would continue to be focused only on certainty of vesting in interest. Yet, if the Rule also continues to operate on contingent future interests as it does now on contingent interests, it will extend to currently exempt interests which are not certain to become possessory because of the revised definition of the concept of vesting and the assimilation of all future interests under one label, especially the equating of reversionary and nonreversionary interests. The reformulated structure thus brings possibilities of reverter and rights of entry, vested reversions subject to defeasance, most vested remainders subject to defeasance, and resulting trusts within the reach of the Rule by recategorizing them as contingent future interests. The succeeding discussion works out the effects of applying to these interests the Rule as

⁹⁸ The proposal to make the Rule applicable to remoteness of possession would thus either invalidate or alter some trust interests in which the payment of principal or portions thereof is directed to be made at designated ages over 21 when such payment is not conditioned on the beneficiaries' surviving to those designated ages. For example, although the interest of the settlor's children in the principal of the following irrevocable inter vivos trust is now valid, under the vest-in-possession proposal it would either be invalid or the age requirement would have to be lowered to 21 (or the proposal would have to entail an alteration of the period of the Rule, for example, to a life in being plus 30 or 40 years): "Income to the settlor for life, and upon the settlor's death to divide the trust into equal shares, one share for each of the settlor's children then living. Each share shall be held as a separate trust to pay the income therefrom to the child until he reaches 30 or until his death, whichever occurs first, the corpus of each trust to be payable to the child at age 30."

it now stands. Fortunately, in the cases where the effect is unsatisfactory, statutory repair is possible without reintroducing the artificial distinctions which the reformulated structure eliminates. With statutory adjustments for certain cases, the reformulated structure puts the Rule on a basis sounder than its present one.

1. *Possibilities of Reverter and Rights of Entry.*—The reformulated structure would eliminate the exemption of possibilities of reverter and rights of entry by classifying such interests as contingent future interests or as powers of revocation or of appointment.⁹⁹ Unless the specified event is tied to a life in being plus 21 years, the contingent interest or the power would be void ab initio, transforming the possessory interest into a fee simple absolute.¹⁰⁰ Eliminated also would be the two-instrument method of avoiding invalidity of an executory interest that might vest too remotely, and the uncertainty as to whether a residuary clause passes a valid possibility of reverter or an invalid executory interest.¹⁰¹

The rendering of *all* remote possibilities of reverter and rights of entry invalid from their inception, however, is undesirable, although it is a better basis to work from than their present status in most states of being exempt from any restriction.¹⁰² The life in being plus 21 year period is relevant to gratuitous, family dispositions, and in these cases it seems reasonable that no exception from the Rule be made.¹⁰³ However, these two types of interests are perhaps more frequently created as a part of a commercial transaction or charitable transfer. Since the period of the Rule bears less or no relationship to these situations, an alternative approach might incorporate the solution which a handful of states have adopted in handling all possibilities of reverter and rights of entry. Instead of legislating them subject to the Rule, these states have provided that such interests cease to be valid a certain number of years (usually from thirty to fifty) after their creation.¹⁰⁴ The effect of such future interests' failing to become possessory

⁹⁹ See pp. 753-54 *supra*.

¹⁰⁰ Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 741 (1952).

¹⁰¹ See pp. 749-50 *supra*.

¹⁰² J. MORRIS & W. LEACH, *THE RULE AGAINST PERPETUITIES* 212-19 (2d ed. 1962) [hereinafter cited as MORRIS & LEACH].

¹⁰³ But cf. L. SIMES & C. TAYLOR, *THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION* 203-04 (1960); Schuyler, *supra* note 46, at 936.

¹⁰⁴ E.g., ILL. REV. STAT. ch. 30, § 37e (1969). The approaches of various states are reviewed in L. SIMES & C. TAYLOR, *supra* note 103, at 205-13, with Model Acts presented at 214-17. There is also a Uniform Act Relating to Reverter of Realty, 1944 HANDBOOK OF THE NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS 209, but it has never been adopted.

within the specified time is, again, that the possessory interest becomes a fee simple absolute.¹⁰⁵ This approach could be accommodated by the reformulated structure with a statutory provision stating that contingent future interests or powers of revocation or of appointment which follow fees simple defeasible and which are incident to bona fide commercial transactions or to charitable transfers are not subject to the Rule, but rather are extinguished after the designated period in gross. Even under this approach the reformulated structure is superior to the present structure because the reformulation provides no basis for a different treatment of what are now executory interests following defeasible fees. Although there is certainly no reason in policy to have a different rule for executory interests,¹⁰⁶ they do not come within the terms of the existing period in gross statutes, and are instead subject to the Rule.

It might be desirable, further, to exempt certain commercial transactions from both the Rule and the period in gross restriction. This might be appropriate, for example, for rights of entry for nonpayment of rent or for default in mortgage covenants.¹⁰⁷ Since under the reformulated structure rights of entry in these types of situations would undoubtedly be replaced by powers of revocation or of appointment, this exemption should refer both to contingent future interests and to powers incident to defeasible fees or defeasible terms of years arising out of the specified types of transactions.

2. *Vested Reversions Subject to Defeasance.* — As contingent future interests, defeasibly vested reversions would be within the scope of the Rule Against Perpetuities. Yet, the possibility of their invalidity causing a preceding life estate to become a fee simple absolute or causing property to escheat to the state is unacceptable. Close analysis, however, reveals that, with one exception which will be discussed later,¹⁰⁸ vested reversions subject to defeasance would not appear to violate the Rule. Since they are originally held by the transferor in the case of inter vivos transfers or by his heirs in the case of testamentary dispositions, there is at the time of transfer no uncertainty as to the identity of the takers of these interests. Nor, being unstated, would they be subject to any express uncertainties. Consequently, the uncertainty over whether they will become possessory arises

¹⁰⁵ See RESTATEMENT OF PROPERTY § 228, comment *d* (1936); Schuyler, *supra* note 46, at 936.

¹⁰⁶ See Schuyler, *supra* note 46, at 936.

¹⁰⁷ See, e.g., ILL. REV. STAT. ch. 30, § 37g (1969). See also authorities cited note 103 *supra*; L. SIMES, PUBLIC POLICY AND THE DEAD HAND 81 (1955).

¹⁰⁸ See pp. 764-65 *infra*.

solely from the fact that an expressly stated contingent future interest or interests have priority and might become possessory instead. If the expressly stated interest or interests are valid, the alternative unstated interest is valid also, since all depend on the outcome of events which must occur or not occur within the period of the Rule. But if the expressly stated interest or interests are invalid because they violate the Rule, they are invalid *ab initio* and the rest of the disposition takes effect as if they were not present.¹⁰⁹ If, then, the validity of alternative future interests is determined not simultaneously but according to the order in which they are stated, with the validity of any unstated interest being determined last, when the expressly stated interest or interests violate the Rule, that removes the only uncertainty attached to the alternative unstated interest. Subject of course to the doctrine of infectious invalidity, the alternative unstated interest is valid because it is indefeasibly vested from its inception.

Although this reasoning is believed to be sound and to be supported by analogous precedent,¹¹⁰ the state of the law on the question is uncertain.¹¹¹ Thus, a statutory provision embodying this reasoning, similar to the one found in the English Perpetuities and Accumulations Act,¹¹² should be included in any legislation adopting the reformulated structure.

The following testamentary disposition illustrates this analysis: "to *A* for life, then to *A*'s children for the life of the survivor of *A*'s children, then to *A*'s grandchildren then living." There is no residuary clause and *A* is the testator's only child and his sole heir. Under both the present and the reformulated structures, *A*'s grandchildren have a contingent interest violating the Rule. Also under both structures, the unstated interest that *A* takes by intestate succession is valid and becomes possessory at the termination of the life estate in *A*'s children. *A*'s unstated interest is valid under the present structure because it is vested subject to defeasance and not subject to the Rule. Under the reformulated structure, too, it is valid because it is not contingent: the invalidity of the grandchildren's interest removes any uncertainty over whether the unstated interest will become possessory. In the terminology of the present structure, the implied condition that *A* as the testator's sole heir is to be divested of his

¹⁰⁹ 6 AMERICAN LAW OF PROPERTY § 24.47; SIMES & SMITH § 1262.

¹¹⁰ See 6 AMERICAN LAW OF PROPERTY § 24.49. The reasoning is also indirectly supported by the broader, generally accepted proposition that when there is more than one way of construing an interest, the construction that makes it valid is the one which should be adopted. See RESTATEMENT OF PROPERTY § 375 (1944); SIMES & SMITH § 1288.

¹¹¹ See MORRIS & LEACH 173-81; *id.* 24-25 (First Supp. 1964).

¹¹² Perpetuities & Accumulations Act 1964, c. 55, § 6.

interest only if one or more of the grandchildren become entitled to possession can never be fulfilled because their interest is invalid *ab initio*. From its inception, therefore, *A*'s interest is indefeasibly vested.

The same analysis would apply to any unstated alternative interest, regardless of whether it would be regarded as a reversion under the present structure. Only when the unstated alternative interest is in the heir or heirs of the transferor, however, as it is in the above example, is the doctrine of infectious invalidity completely inappropriate, since its application would put the title in abeyance. But in other cases the doctrine of infectious invalidity might be more applicable. For example, suppose the same testamentary disposition except that the will contained a residuary clause in favor of *B*, who is unrelated to *A* or his family. Although the invalidity of the grandchildren's interest would mean that *B*'s interest is indefeasibly vested, a court intent on carrying out the testator's wishes *might* apply the doctrine to *B*'s valid interest, since doing so would make it more likely that the property would ultimately pass to *A*'s grandchildren (*B*'s valid interest would become invalid, and the property would pass to *A* by intestacy). The same analysis would be applicable if the original disposition was an inter vivos transfer and the transferor passed his interest to *B* by a later inter vivos instrument, by a specific bequest in his will, or by the will's residuary clause.

3. *Vested Remainders Subject to Defeasance.* — Defeasibly vested remainders may be divided into three categories for the purposes of this discussion: those subject to a limitation, those subject to a condition subsequent other than the nonexercise of a power, and those subject to a power. Limitational ones would be contingent when the nature of the limitation is such that it can prevent the interest from becoming possessory. Nevertheless, this reclassification would rarely result in a violation of the Rule. For example, in the disposition "to *A* for life, then to *B* for life, then to *C* for life, then to *D*," the contingent interests of *B* and *C* would be valid because each person would constitute the measuring life for his own interest.

Remainders vested subject to a condition subsequent other than the nonexercise of a power are typically the first of two expressly stated alternative interests and present a somewhat different problem. The condition of divestment making possession uncertain is the condition precedent attached to the second alternative interest — the executory interest. When this condition can occur too remotely, the second interest is invalid even under the present structure. The reformulated structure, classifying the two as alternative contingent future interests, would also cause

the first one to become invalid, thus closing the loophole which now allows vested remainders subject to defeasance to escape the Rule's scrutiny.

Would the invalidity of the first interest, under the analysis applied to vested reversions subject to defeasance, allow the second interest to be treated as valid? If so, the reformulated structure would accomplish little. Indeed, if this were the effect, the present structure provides a better solution because the transferor probably preferred the takers of the first alternative interest over those of the second. Although this situation could be the result in a given case, it is doubtful that special statutory adjustment is necessary. The second alternative interest would ordinarily not be made valid by the invalidity of the first interest because the uncertainty over the second's becoming possessory is not often limited to the first one's taking effect in possession instead. Frequently the gift over will be in favor of a class which is subject to increase for too long a time. An example would be a variation of the irrevocable inter vivos trust mentioned earlier.¹¹³ The settlor was to receive the income from that trust for life, then the corpus was to be divided into equal shares or trusts, one for each of the settlor's children then living. Each child was to receive the income from his trust until age 30, when the corpus of his trust was to be payable to him. Suppose there were in addition a condition subsequent with a gift over to the effect that if any child should die before attaining the age of 30, the corpus of his trust should be paid to his children. There would then be two contingent future interests, the children's and the grandchildren's. Assuming that infectious invalidity is not applied to the income interest of the settlor's children, the invalidity of the children's interest in the corpus caused by the reformulated structure would not validate the gift over to the grandchildren because their interest would remain open until their parents either reached the age of 30 or died under that age.

Furthermore, unlike defeasibly vested reversions, executory interests are always expressly created. As a matter of construction, a court might conclude that the uncertainty of the second interest's becoming possessory is not removed by the invalidity of the first interest. An example would be: "to *A* for life, then to *A*'s children for the life of the survivor of *A*'s children, then to *B*'s children, but if none is alive at the death of *A*'s last surviving child, then to *C*'s children." Even though the interest held by *C*'s children will not remain open beyond the period of the Rule (unlike the alternative class gift in the example in the preceding paragraph) and the interest held by *B*'s children is invalid, *C*'s

¹¹³ See note 98 *supra*.

children's interest might be considered contingent on there being no child of *B* alive at the death of *A*'s last surviving child.¹¹⁴ Since this uncertainty will not be resolved within the period of the Rule, both of the alternative interests would be invalid.

The same analysis could be applied to the example with the alternative class gift subject to open for too long a period. Suppose the alternative interest in that example, instead of being held by a class that might remain open too long, were in favor either of an individual or of a class whose maximum and minimum membership would be certain to be determined within the period of the Rule. The interest still might be held to be invalid on the construction that it is contingent on the settlor's child's not living to the age of 30 — despite the invalidity of the children's interest in the corpus. The effect in both examples, of course, would be that the third alternative interest, presently called a vested reversion subject to defeasance, would be valid and its holder would become entitled to possession at the expiration of the valid interests.

The final of the three types of remainders vested subject to defeasance, those subject to a power, also would be contingent future interests under the reformulated structure. Here, the analysis developed in regard to vested reversions subject to defeasance would often be applicable. The uncertainty over whether this type of contingent future interest will become possessory derives from the possibility that the power will be exercised. If the power is invalid because it may either be acquired or exercised at too remote a time, the invalidity of the power removes that uncertainty, leaving the interest valid under the Rule.¹¹⁵

A presently exercisable general power, however, may be exercisable beyond the period of the Rule, but still be valid because it will not be acquired too remotely. In this case the future interest subject to the power would be invalid under the reformulated structure. This result is troublesome because the defeasibly vested reversion would, as a contingent future interest, also be invalid. The disposition of the property if the donee failed to make a valid appointment could be resolved by statute in either of two ways. One would make an exception from the Rule for future interests which are contingent solely upon the nonexercise of a valid, presently exercisable general power; the recipients of the express gift in default would then be entitled to possession upon the death of the donee. If, however, there is an additional

¹¹⁴ See 6 AMERICAN LAW OF PROPERTY § 24.49 case 77 & n.1; MORRIS & LEACH 173-75.

¹¹⁵ See MORRIS & LEACH 177-78; *id.* 24 (First Supp. 1964). But see Alexander v. Alexander, 28 Eng. Rep. 408, 409-10 (Ch. 1755), discussed in GRAY 279-80.

uncertainty attached to the express gift in default, such as its being subject to open for too long a time, it would remain invalid and the holder of the interest now called a reversion would be the one entitled to possession. The other and perhaps preferable solution for this situation would be to require the application of the capture doctrine in every case where there is an unexercised presently exercisable general power. What justifies such a rule, at least when the donee's death might not occur within the period of the Rule, is the minimal difference between such a power and outright ownership.

4. *Resulting Trusts*.—Those resulting trusts which arise upon the failure of express family trusts should be analyzed in the same way as defeasibly vested reversions: they simply would not violate the Rule. But how would the failure of charitable trusts operate under the reformulated structure? If *cy pres* cannot be utilized, there are said to be resulting trusts,¹¹⁶ but these interests, now characterized as contingent future interests rather than as vested reversions or possibilities of reverter, would be invalid. Since the reformulated structure continues to afford a basis for differentiating such interests, one solution would be to provide by statute that they are not subject to the Rule. In favor of this solution is that it would be illogical to make such resulting trusts invalid since they are created by operation of law.¹¹⁷ Another solution would be to broaden the *cy pres* power by legislation to the effect that the benefit of such trusts could always be redirected for some other charitable purpose when there is a violation of either the Rule or a period-in-gross statute.¹¹⁸ This solution is appealing because of its similarity to the result under the reformulated structure when a possibility of reverter or right of entry arising out of a nontrust charitable transfer violates the Rule or a period in gross statute. The analogy is stronger when the charitable transfer in trust takes the shape of a defeasible possessory interest, containing words of limitation or condition subsequent. The broadened *cy pres* power would, however, also apply to those transfers which simply contain language restricting the purpose for which the trust property can be used.

¹¹⁶ *E.g.*, *Evans v. Abney*, 396 U.S. 435 (1970); RESTATEMENT (SECOND) OF TRUSTS § 413 (1959).

¹¹⁷ This is one claimed rationale for their present exemption from the Rule. G. BOGERT, TRUSTS AND TRUSTEES § 454, at 519 (2d ed. 1964). The exemption of resulting trusts in real property from the Statute of Frauds is predicated on a similar theory. *Id.* § 452.

¹¹⁸ *Cf.* PA. STAT. ANN. tit. 20, § 301.10 (1950); Schuyler, *supra* note 46, at 942-43; Schuyler, *Future Interests in Illinois: Current Maturities and Some Futures*, 50 NW. U.L. REV. 457, 513-21 (1955).

V. CONCLUSION

A reformulation of the structure of estates of the magnitude proposed here can be accomplished only by legislative action, and an assemblage of provisions that might be used as the nucleus of a statute fulfilling this objective has been inserted in the Appendix. The provisions in the appendix are not intended to comprise a complete piece of legislation and do not treat matters peripheral to the central thrust of the reformulated structure. No specific resolution is offered, for example, as to whether commercial and charitable possibilities of reverter and rights of entry are to be exempt from the Rule Against Perpetuities and subject instead to a period in gross restriction. Nor are specific provisions offered to abolish the inalienability rule, the destructibility rule, the Rule in Shelley's Case, and the worthier title doctrine. Model provisions for these purposes are plentiful.¹¹⁹ If, however, these rules were abolished, as they should be, the sole legal consequence which would flow from an interest's being classified as contingent is that it would be subject to the Rule Against Perpetuities. Finally, no attempt is made here to settle the problem of which provisions should be retrospective.

Reformulating the structure will not eliminate all the complexity in the law of future interests. But the reformulation of the structure outlined here would reduce the complexity in this area of the law and would give to the structure of estates a degree of conceptual integrity now badly lacking.

APPENDIX

Section — . *Classification of Interests in Property as to Time of Enjoyment.* — Legal and equitable interests in real and personal property are classified as to time of enjoyment as:

(A) Possessory interests, which entitle the owner to the present possession or enjoyment of the benefits of the property; or

(B) Future interests, which do not entitle the owner to possession or enjoyment of the benefits of the property until a future time.

Section — . *Classification of Possessory Interests.* — Possessory interests are classified as:

(A) Interests in fee simple absolute;

(B) Defeasible interests, which are interests which terminate upon the happening of an uncertain event, regardless of the language used to describe the uncertain event;

(C) Life interests;

(D) Interests for years, which are interests the duration of which is described in units of a year or multiples or divisions thereof;

¹¹⁹ *E.g.*, UNIFORM PROPERTY ACT §§ 7, 12, 14, 16 (1938).

(E) Periodic interests, which will continue for successive periods of a year, or successive periods of a fraction of a year, unless terminated;

(F) Interests at will, which are terminable at the will of either the transferor or the transferee and have no designated period of duration.

Section — . *Classification of Future Interests.* — All future interests, whether left in or created in the transferor or created in a transferee, including those interests known at common law as “reversions,” “resulting trusts,” “possibilities of reverter,” “rights of entry” (“powers of termination”), “executory interests,” and “remainders,” are assimilated under the title “future interest.”

(A) “Future interests” are classified as:

(1) “Contingent,” if the interest is in favor of one or more unascertained or unborn persons, or is for any reason uncertain to become possessory at some future time; or

(2) “Vested subject to open,” if the interest is in favor of a class of persons, one or more of whom are ascertained and in being, and if the interest is certain to become a possessory interest at some future time, and the share of the ascertained persons is subject to diminution by reason of other persons’ becoming entitled to share as members of the class; or

(3) “Indefeasibly vested,” if the interest is not vested subject to open or contingent.

(B) The classification known at common law as “vested subject to complete defeasance” is abolished. Future interests which would at common law have been so classified are either “indefeasibly vested” or “contingent.”

(C) Language which expressly confers on the transferor the right to reenter and take possession of the premises or words of similar import may be construed as a power of revocation or a power of appointment rather than a future interest.

Section — . *Application of the Rule Against Perpetuities.* — The Rule Against Perpetuities shall apply to all contingent future interests [except as specified in Section —].

Section — . *No Violation of the Rule Against Perpetuities in Certain Cases.* — Subject to the doctrine of infectious invalidity, no future interest shall violate the Rule Against Perpetuities if it is contingent only because another future interest which has priority may take effect in possession instead, or because a power might be exercised creating in the appointee an interest which takes effect in possession instead, and the other future interest or the power violates the Rule Against Perpetuities.