This article is confined to a brief discussion of some of the feudal rules and principles with which the Illinois law of future interests is permeated and to an endeavor to show that some of these rules have no present utility and should be abandoned, and that others should be restated or codified to eliminate a substantial amount of confusion and uncertainty which has necessarily resulted from the attempt by the courts to apply ancient rules to modern problems.

Future interests in land may be defined as those interests in which the right to possession or enjoyment is postponed. Reversions and vested remainders are therefore properly classed as future interests. Other interests such as contingent remainders and executory limitations are future not only because the enjoyment is postponed but also because of the uncertainty as to when, if ever, the right to such interests will vest in ascertained persons.

Whether a future interest is vested with only the enjoyment postponed or whether it is executory in the sense that both enjoyment and ownership are postponed is a construction problem frequently arising in the Illinois cases. The adoption of the common law by Illinois, as it existed in England in 1607 and with it the feudal definitions and characteristics then differentiating vested and executory interests in land, seems to have resulted in considerable confusion and uncertainty of construction in certain types of limitations hereinafter more particularly discussed. The persistence in the Illinois law of the
feudal principles controlling the creation and the common law rules governing the transfer of future interests indicate an unusual lag in this branch of the law at a time when other branches are being codified.

Real property is notoriously a conservative and slowly changing part of the law. However, the rules governing the creation and transfer of possessory interests have been changed to adapt them to modern conditions in Illinois, and in adopting the common law of England as our rule of decision in Illinois, we rejected some of the principles of the feudal law of property as inapplicable to our institutions. For example, alodial ownership of land was substituted for tenure, and no good reason is apparent for discarding tenure and at the same time adopting the feudal rules governing the creation of future estates and interests in land, since the feudal rules had little or no significance apart from the tenurial relation of overlord and tenant.

Not only were the feudal rules controlling the creation of future estates adopted in their entirety but there has been a distinct disinclination to modify them by judicial construction to adapt them to new conditions. Among the rules taken over with the common law was the Rule in Shelly’s Case. It has always been construed in Illinois as an absolute rule of property and given effect regardless of the fact that its operation must defeat the intention of the testator or settlor creating the limitation coming within its provisions. The feudal rule “once a remainder always a remainder” has been invariably followed with the result that remainders are permitted to perish merely because of their form, providing they have not become vested at or before the termination of the preceding particular freehold estate. Although contingent remainders are no longer destructible by a merger of the supporting life estate with the reversion in fee, Illinois does not permit alienation of contingent remainders
by inter vivos transfers. The foregoing and many other of the feudal rules and principles have not been modified by the courts. This may be explained by the fact that the rules are such an integral part of the law of property that the courts consider that it is solely within the province of the legislature to modify or abolish them. There has been very little legislative modification and the failure of the legislature to act is probably due to the lack of any insistent public demand for changes.

Analysis of the Illinois cases indicates that the feudal distinctions between vested and contingent remainders have been almost universally followed as the rule of decision. The application of these distinctions to ordinary problems of construction has not been difficult, but, as will be seen from the following cases, when these distinctions are attempted to be applied to inartificially worded limitations and particularly to those involving contingencies of survivorship, additional definitions and an elaboration of the feudal distinctions has been found to be necessary in many of the decisions.

**Characteristics Differentiating Vested From Contingent Remainders**

The earliest case\(^1\) recognizing the validity of a contingent remainder bears the date of 1453. Vested remainders had previously been recognized as valid, and since remainders were then the only future interests accorded recognition by the law courts, it follows that all of the feudal distinctions between vested and contingent interests must have been evolved subsequent to 1453. Mr. Gray\(^2\) has summarized the feudal distinctions as follows:

Whether a remainder is vested or contingent depends upon the language employed. If the conditional element is incorpo-

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rated into the description of, or into the gift to the remainder-
man, then the remainder is contingent; but if, after words giving
a vested interest, a clause is added divesting it, the remainder is
vested. Thus, on a devise to A for life, remainder to his children,
but if any child die in the lifetime of A, his share to go to those
who survive, the share of each child is vested, subject to be di-
vested by its death. But on a devise to A for life, remainder to
such of his children as survive him, the remainder is contingent.

The feudal distinctions above stated have been fre-
quently quoted with approval and have been in general
adopted as the rule of decision in Illinois but with numer-
ous elaborations and modifications as will be seen in
cases selected more or less at random and hereinafter
analysed. However, a few cases make distinctions in
line with those defined by the New York statute. The
New York statutory distinctions are as follows:

A future estate is either vested or contingent. It is vested,
when there is a person in being, who would have an immediate
right to the possession of the property, on the determination of all
the intermediate or precedent estates. It is contingent while the
person to whom or the event on which it is limited to take effect
remains uncertain.

Notwithstanding the adoption by the Illinois courts of
the feudal distinctions between vested and contingent
remainders, further and more involved definitions and
distinctions appear to have been necessary in many of
the cases in order that limitations, not falling within the
terms of the feudal distinctions, might be given effect in
accordance with the intention of the settlor. A few ex-
amples of amplifications upon or modifications of the
feudal distinctions adopted in particular cases are as
follows:

A remainder is vested when, during the continuance of
the particular estate, there is a person in being and ascer-
tained who answers the description of the remainderman
and who would be entitled to the immediate possession,

3 Boatman v. Boatman, 198 Ill. 414, 65 N. E. 81 (1902); Chapin v. Nott,
203 Ill. 341, 67 N. E. 833 (1903).
4 Cahiil's Consolidated Laws of New York, Ch. 51, § 40 (1930).
FUTURE INTERESTS IN ILLINOIS

if the prior particular estate were to expire in any manner, irrespective of the occurrence of any collateral contingency. A vested remainder is one which throughout its continuance gives to the remainderman or his heirs the right to the immediate possession, whenever and however the preceding estates may determine. A remainder is vested in A, when, throughout its continuance, A, or A and his heirs, have the right to the immediate possession whenever and however the precedent estate may determine. A remainder is contingent in any of the following situations: where the remainder is limited to an unborn or unascertained person; where the remainder is limited on an event that may never happen; where the remainder is limited upon an event that is sure to happen some time, but may not happen until after the expiration of the particular estate. An example of the latter is where a life estate is given to A followed by a remainder in fee to the children of B who survive B. If A and B are both alive when the limitation is created, the remainder is contingent since B may outlive A and it will remain contingent if B does in fact outlive A.

The foregoing definitions would seem to indicate that no uncertainty as to the actual enjoyment, however great, will render a remainder contingent if there is no uncertainty as to the right of enjoyment. The mere fact, then, that the right of enjoyment may be defeated does not render a remainder contingent; a remainder may be vested notwithstanding it is subject to a condition the

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5 Boatman v. Boatman, 198 Ill. 414, 65 N. E. 81 (1902).
7 Scofield v. Olcott, 120 Ill. 362, 11 N. E. 351 (1887); Smith v. West, 103 Ill. 332 (1882); Boatman v. Boatman, 198 Ill. 414, 65 N. E. 81 (1902); Nicol v. Morton, 332 Ill. 533, 164 N. E. 5 (1928).
8 McCampbell v. Mason, 151 Ill. 500, 38 N. E. 672 (1894); Quinlan v. Wickman, 233 Ill. 39, 84 N. E. 38 (1908); Lewin v. Bell, 285 Ill. 227, 120 N. E. 633 (1918).
fulfillment of which will operate to defeat the right of enjoyment by the remainderman.

A multitude of conclusions as to whether remainders are vested or contingent could be gathered by an analysis of all of the Illinois decisions, since they contain a great variety of definitions elaborating upon the stated feudal characteristics differentiating the two types of remainders. The number of such definitions is too large for a classification to be attempted in an article of this scope. The multiplicity of definitions and the variety of more or less similar limitations, construed in some cases as creating vested remainders and in others as creating contingent remainders, has produced confusion and an apparent lack of harmony in the decisions. Uniformity of definition and a greater degree of certainty would seem to require either a complete restatement or a codification of the Illinois law governing vested and contingent remainders.

Considerable of the confusion and uncertainty seems to arise from the feudal rule that "it is the language that controls." The question has frequently been raised as to whether it is the language of the limitation alone or the language of the entire instrument which must be considered in determining the question of vesting. If the context is to control, the construction of the language of the entire instrument must precede the application of the feudal tests to the limitations in question. The cases immediately following seem to indicate that the courts have usually attempted to determine the intention of the testator from the context before applying the tests supplied by the feudal definitions or characteristics.

SELECTED CASES INVOLVING CONTINGENCIES OF SURVIVORSHIP AS AFFECTING THE VESTING OF REMAINDERS

The context of the instrument may justify referring the event of survivorship to the death of the life tenant
rather than to the death of the testator as a literal reading of the limitation might indicate. It was so held in two cases, in each of which the limitations read substantially as follows: "To A for life, remainder to A's children, but if A dies leaving no children surviving, then to B." Without first construing the context, the holding that the remainder to A's children is contingent would appear to be contrary to the accepted feudal definitions or characteristics distinguishing vested and contingent remainders. If the construction of the language of the entire instrument had not preceded the application of the feudal tests, the remainder to A's children would have been controlled by the terms of the feudal rules and would have been construed as vested in the children surviving the testator or born thereafter, but subject to defeasance should they predecease A. The court found from the context that the testator did not intend such a disposition and, in each case, held that by the gift over if A leaves no children surviving, the devise was, by implication, to such children as survive A, and that therefore the interest of each child would be contingent until A's death.

Where remainders are postponed to let in an intervening life estate there is lack of harmony in the decisions as to whether an expressed contingency of survivorship will be referred to the time of the death of the testator or to the death of the life tenant. In some of the cases the context of the will seems to have influenced the court in deciding that survivorship is referrable to the death of the testator and that the remainder vests immediately in the then existing members of the class. In a case involving a limitation of the type "to my widow for her life, remainder to my surviving children," it was held that survivorship referred to the death of the widow and

10 Furnish v. Rogers, 154 Ill. 569, 39 N. E. 989 (1895); Hill v. Hill, 264 Ill. 219, 106 N. E. 262 (1914).

11 Nicoll v. Scott, 99 Ill. 529 (1881); Grimmer v. Friederich, 164 Ill. 245, 45 N. E. 498 (1896); Deadman v. Yantis, 230 Ill. 243, 82 N. E. 592 (1907).
not to the death of the testator and that the remainder was therefore contingent. It may be concluded from that case, *Burlet v. Burlet*,¹² that when there is a gift to survivors as a class, which gift is preceded by a prior interest, survivorship is to be referred to the date of termination of the precedent estate and not to the death of the testator, unless a contrary intention can be clearly gathered from some special context. This case overruled a prior decision¹³ having somewhat similar provisions, and the earlier case was expressly disapproved with a statement that it had not been followed in subsequent decisions. Although *Burlet v. Burlet* dealt with a remainder to the testator’s children, it may be concluded from the language of that decision, when considered with other cases herein discussed, that if a remainder in fee is given to the children of the life tenant with words of survivorship, the event of survivorship is also to be referred to the death of the life tenant.

That the context of the will or deed may influence the court to ignore entirely words of survivorship and hold a remainder to be vested may be gathered from a number of the Illinois decisions.¹⁴ Each of these cases elaborates more or less on the common law distinctions and further appears to justify a generalization to the effect that where, after a life estate given to A, a remainder in fee is given to the children of B, with a gift over “if any child of B dies before the life tenant, leaving a child or children surviving, then to such child or children, they to take the share which their parent would have taken,” the children of B nevertheless have a vested remainder, subject to defeasance only in the event they die before A. The same result seems to follow where the remainder is

¹² 246 Ill. 563, 92 N. E. 965 (1910).
¹³ Hampstead et. al. v. Dickson, 20 Ill. 194 (1858).
¹⁴ Smith v. West, 103 Ill. 332 (1882); Siddons v. Cockrell, 131 Ill. 653, 23 N. E. 586 (1890); Pingrey v. Ruton, 246 Ill. 109, 92 N. E. 592 (1910); Remmers v. Remmers, 280 Ill. 93, 117 N. E. 474 (1917).
to the children of B, with a gift over of their respective shares to their children in the event they predecease B. The rule governing such remainders has been stated as follows: "Where a gift to remainder-men is absolute, neither the fact that their enjoyment is postponed to let in an estate for life, nor that a condition subsequent exists, upon the happening of which their estate will be divested, will operate to make the remainder contingent."\(^{15}\)

The courts favor vesting of remainders as far as rules of construction permit, and although, as has been seen, the Illinois courts have occasionally departed from the feudal distinctions in order that vesting might be upheld in obviously proper cases, our courts have never gone so far in holding a remainder to be vested when it is clearly contingent in terms, as did the New Hampshire court in a well considered case.\(^{16}\) There the limitations were "to A for life, remainder to B if he survive A: if B does not survive A then to C." The court referred to a number of American cases and also to a number of English cases, the latter being grounded on the earlier English case of Edwards v. Hammond,\(^{17}\) and decided that the intention of the testator would be effectuated by construing B's remainder to be vested although contingent in form. The doctrine of Edwards v. Hammond, forming the basis of the New Hampshire decision, was to the effect that the language embodying the expression of the condition as precedent in form may be disregarded in order that the limitation may be brought with the terms of the feudal definition of a vested remainder. The remainder to B was construed as if the words "if he survive A" were not present. Without these words the remainder would be vested, notwithstanding the complete

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\(^{15}\) Ducker v. Burnham, 146 Ill. 9, 34 N. E. 558 (1893); Hinrichsen v. Hinrichsen, 172 Ill. 462, 50 N. E. 135 (1898).

\(^{16}\) Parker v. Ross, 69 N. H. 213, 45 A. 576 (1898).

limitation was contingent in terms, and as a result was accelerated by the renunciation of the will by life tenant A. The doctrine of Edwards v. Hammond was repudiated by the English court in a later case, wherein the limitation took the form of "to A for life, remainder to B and her heirs in case B shall survive and outlive the said A but not otherwise, and in case she die in the lifetime of the said A, then to A and his heirs." It was argued that by the rule of Edwards v. Hammond, the words of survivorship should be ignored and that a vested remainder in B should be implied. However, the court held that the clearly expressed condition precedent of survivorship by B left no room for any implication that her remainder is vested.

Another typical limitation wherein the courts have found a basis for vesting by implication, regardless of the presence of words contingent in form is where there is a gift "to A for life, and if B outlive A, then to B for life." The event of B's outliving A might not occur until after A's estate had ended prematurely by merger or the like, and if the language is taken literally, B's remainder can not be otherwise than contingent. The construction approved in an English case is that the words "if B outlive A" are to be taken as meaning, if B survives the termination of A's life estate whenever and however that may occur. Since by this construction, B's interest is bound to take effect, if at all, whenever and however the estate of A may terminate, it falls within the feudal definition of a vested remainder. Such an interpretation of the limitation in question makes it the equivalent of, and results in its construction in, words which read "to A for life with a remainder to B for life" which an Illinois court has construed as being a vested

remainder falling within the feudal definition.\textsuperscript{20} However, if the limitation is "to A for life and if B outlive A, then to B in fee," B's remainder has been construed as contingent in a number of cases.\textsuperscript{21}

Still another type limitation in which the Illinois cases are not in harmony as to whether a remainder is vested or contingent is that of a gift "to A for life, remainder to his children who are living at his death." The remainder cannot be vested according to the feudal or common law definition requiring that a vested remainder must be capable of taking effect in possession upon the termination of the particular estate in any and every manner. This remainder, however, does measure up to the test that it would, at any particular moment, be vested in the children of A, who would survive him, should he at that moment die. In at least two cases the Illinois court has refused to apply the latter test, because doing so would violate the common law criterion that a vested remainder must be capable of taking effect in possession upon the termination of A's life estate in any manner. In one case, \textit{Furnish v. Rogers,}\textsuperscript{22} the limitations included a devise to the testator's niece, followed by the words, "all of which is to go to her children, should she marry; if she should die childless, then to be divided between her mother and testator's grandnieces and nephews." The limitations were construed as giving the niece only a life estate, and that the remainder to her child, upon its birth, is not vested but contingent. It was considered that the contingency upon which the remainder would vest was not the marriage of the niece and the birth of a child, but that a child should survive the niece. In the other, \textit{Kleinmans v. Kleinmans,}\textsuperscript{23} the remainder was likewise held to be con-

\textsuperscript{20} Madison v. Larmon, 170 Ill. 65, 48 N. E. 556 (1897).
\textsuperscript{21} Belding v. Parsons, 258 Ill. 422, 101 N. E. 570 (1913); Smith v. Chester, 272 Ill. 428, 112 N. E. 325 (1916); Kamerer v. Kamerer, 281 Ill. 587, 117 N. E. 1027 (1917).
\textsuperscript{22} 154 Ill. 569, 39 N. E. 989 (1895).
\textsuperscript{23} 253 Ill. 620, 97 N. E. 1077 (1912).
tingent. An earlier case involving a somewhat similar provision in a deed was *Wallace v. Wallace*,24 where the contingency of survivorship was construed as a condition subsequent. *Wallace v. Wallace* dealt with certain provisions in a marriage settlement. It was held therein that the parties to the settlement intended to provide for the issue of the marriage; that it was their intention that was the paramount consideration and not the mere form of the language, and that the children of the marriage took vested interests at their birth, these interests being subject to divestment only upon the event of their failure to survive their mother. These cases appear to justify the conclusion that limitations of the character named will be construed by the courts as being contingent in accordance with the feudal distinctions and definitions, except in those cases where it is very clear from the context that the intention of the settlor would be defeated unless the interests are construed to be vested.

**Remainders Subject to Powers—Whether Vested or Contingent**

Another group of remainders involving some difficulty in their construction are those subject to a power of appointment or of sale, given either to the life tenant or to some third person. The American authorities with substantial uniformity hold that remainders subject to powers of appointment or of sale may be vested. A remainder subject to a power is not necessarily vested, since, if it is otherwise contingent, it will continue so even though it is subject to a power. There are a number of Illinois cases25 in which the power has been regarded as in the nature of a condition subsequent and operable to divest

24 82 Ill. 530 (1876).

25 Wolfer v. Hemmer, 144 Ill. 554, 33 N. E. 751 (1893); Harvard College v. Balch, 171 Ill. 275, 49 N. E. 543 (1898); Kirkpatrick v. Kirkpatrick, 197 Ill. 144, 64 N. E. 267 (1902); Powers v. Wells, 244 Ill. 558, 91 N. E. 717 (1910); Burke v. Burke, 259 Ill. 262, 102 N. E. 293 (1913).
the remainderman’s title when and to the extent that the power is exercised. *Powers v. Wells*\(^{26}\) was a case involving a devise by the testator to his wife for her life, giving her power of sale or exchange of the land in which she had a life estate and also power to appoint by deed or by will, with a provision that “if any of the land remained undisposed of at the time of her death, such residue and remainder to be equally divided among testator’s children who should be living at that time, the issue of any child who may have [been] then deceased taking the share which such deceased [child] would have taken if living.” There was dictum to the effect that the remainder was vested; no authority or principle was given to support the assumption of vesting. The remainder was clearly contingent under the common-law rule not because of the powers given to the life tenant, but because the identity of the remaindermen would not be ascertained until the death of the life tenant. *Wolfer v. Hemmer*\(^{27}\) was a case requiring a decision as to the nature of an estate where the testator by the first clause of his will devised a certain tract of land to his wife and her heirs. In the second clause he devised the rest of his estate, both personalty and realty, to her for life with power of disposal, directed that if any of his estate remained undisposed of by his wife at her death it should be divided among his children, and declared, “This proviso is to apply to all my estate.” It was contended that the second clause so modified the first that the wife took only an estate for life, with power of disposal in the land devised by the first clause. However, the court followed the great weight of authority in holding that the wife took an estate in fee simple by the first clause and that where a fee simple in land is given, coupled with an absolute power of disposal by deed or by will, a gift over in the same instru-

\(^{26}\) 244 Ill. 588, 91 N. E. 717 (1910).

\(^{27}\) 144 Ill. 554, 33 N. E. 751 (1893).
ment of what remains undischarged is void. Since the widow received a fee by the provisions of the first clause, the void provision could not in any event have created a remainder had it been valid. It was an attempted executory devise and being totally void, there was no question to be disposed of as to how or when it might vest. The provision for the children in the second clause would by the general rule be construed as a vested remainder, since it was not contingent in terms and there were children in being at the death of the testator in whom it immediately vested.

The courts have occasionally construed a remainder accompanied by language in the form of a condition precedent as being a vested remainder subject to a charge. This is frequently done where the condition is the payment of a sum of money as was the case in *Cronin v. Cronin*,\(^2\) and it has been so construed where the condition is the doing of an act which may be performed after the termination of the preceding estate.\(^2\)

**Statutory Remainders—When Vested in Illinois**

The Illinois statute,\(^3\) preventing entailment of property and commonly called the Statute on Entails, in effect provides that where an estate tail would have been created at common law by any limitation—such for example as a gift to A and the heirs of his body, or a gift to A and his issue—the first taker will have only a life estate and the heirs of his body or his issue are given a remainder in fee simple absolute by the operation of the statute. The interest taken by A is usually designated as a statutory life estate and that given to the heirs of his body or to his issue is known as a statutory remainder. Some of the earlier Illinois cases either hold or contain dicta to the effect that the remainder vests in such child

\(^{28}\) 314 Ill. 345, 145 N. E. 619 (1924).
\(^{30}\) Ill. Rev. Stats. 1937, Ch. 30, § 5.
or children of A as is or are in being when the limitations are created. If no child was then in being it was held to vest in any child or children of A who might thereafter be born, but in either case the vested interest of such child or children was subject to be defeated or divested should he or they predecease A, the entire interest going to those who survived A, and if there were no survivors it would revert to the settlor or to his estate in case he were dead.\(^3\) In thus holding that the remainder in A’s child or children was vested subject to being divested, the courts were in fact following the New York statutory definition of a vested remainder, whereunder an interest is vested when there is a person in being who would have an immediate right to the possession of the property on the termination of all of the precedent estates. The later Illinois decisions\(^2\) have construed statutory remainders not only as being vested in the children who were in being at the time of, or born after, the creation of the limitation, but they also hold that no remainderman’s interest is divested by reason of his death while A is still living. This doctrine of indefeasibility of vested statutory remainders can be justified only by construing the Statute on Entails as giving the remainder to the children of A and not to the heirs of his body or to his lineal descendants, and it was so stated in Moore v. Reddell.\(^8\) This conclusion necessarily follows from the latter construction, since at common law the children of a child of A who had predeceased him, but who themselves survived A, would at the death of A be included as his heirs except where prevented by the rule of primogeniture. As statutory remainders are now construed by the Illinois courts, a child of A in being at the time of the creation of

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\(^3\) Butler v. Huestis, 68 Ill. 594 (1873); Lehndorf v. Cope, 122 Ill. 317, 13 N. E. 505 (1887).

\(^2\) Welliver v. Jones, 166 Ill. 80, 46 N. E. 712 (1897); Kyner v. Boll, 182 Ill. 171, 54 N. E. 925 (1899); Moore v. Reddell, 259 Ill. 36, 102 N. E. 257 (1913).

\(^8\) 259 Ill. 36, 102 N. E. 257 (1913).
the limitation or born thereafter, but who predeceases A, dies the owner of a share in the vested remainder unless he has conveyed it during his lifetime. His children do not share therein by the operation of the statute, but it descends to his heirs or goes to his devisees.

It follows that in Illinois statutory remainders are never contingent except in those cases where A has no children or no lineal descendants in being at the time the limitations are created by operation of law. If A has no child born thereafter, the remainder stands contingent until his death when it will terminate as there is then no longer any possibility that a remainderman will come into being. Should A have no lineal descendants at the time his life estate begins but later has a child, the entire remainder interest will vest in that child at birth, subject however to opening up and including any child or children that may thereafter be born to A. Statutory remainders, as now construed by the Illinois courts, are examples of class gifts wherein the membership of the class may never diminish but may increase so long as A is living. It should be observed that the shift by the courts to the view that statutory remainders once vested are never wholly defeasible removes such remainders from the New York statutory definition. It is also apparent that they are not within the feudal definitions of vested remainders as stated by Mr. Gray and therefore require a separate classification.

The Illinois decisions contain numerous distinctions between vested and contingent remainders not herein mentioned. Those discussed have been selected for this purpose more or less at random and are by no means exhaustive. The analysis of these cases is believed to justify the statement that the courts frequently have found the feudal distinctions to be inadequate and have been compelled to adopt additional definitions and distinctions in order that obviously proper transactions may
be sustained as involving vested rather than contingent remainders, notwithstanding the limitations in question are literally within the feudal definition of a contingent remainder. Since contingent remainders are no longer destructible in Illinois, the strain upon the courts to construe remainders as vested in doubtful cases is not so great as formerly. However, the confusion and the uncertainty in the Illinois law as to when remainders are contingent and when vested would seem to justify an attempt to secure a greater degree of uniformity, either by resort to legislative definition or otherwise.

**Springing and Shifting Uses and Executory Devises**

The Statute of Uses\(^{34}\) and the Statute of Wills\(^{35}\) were kept in force in Illinois by the Act of February 4, 1819.\(^{36}\) As is well known, these statutes were utilized to permit the creation of a variety of shifting and springing executory interests in land, not previously recognized by the courts of law as being enforçable or valid interests. These new types of interests differed from contingent remainders in not being dominated by the feudal doctrine that there could be no abeyance of seisin and in not being destructible by any act of the holder of a freehold estate in possession of the same land. The indestructibility of these interests tended to clog the alienability of prior estates, and since inalienability was considered detrimental to the public interest, the courts in furtherance of public policy deemed it advisable to impose some restrictions upon the freedom of creation of shifting and springing executory interests. The restrictions took the form of holding future interests invalid if by any possibility the date of their vesting might be unduly postponed beyond the date of their creation. However, it was not until the early part of the 17th century that the courts

\(^{34}\) Statute of Uses, 27 Hen. VIII, c. 10 (1536).

\(^{35}\) Statute of Wills, 32 Hen. VIII, c. 1 (1540).

\(^{36}\) Ill. Rev. Stat. 1937, Ch. 28, § 1; 3 Ill. 596, Appendix B.
began the evolution of the Rule Against Perpetuities to accomplish this purpose. This evolution was developed by a line of cases\textsuperscript{37} beginning with 1609 and ending in 1833, and the rule as finally evolved has been stated by Mr. Gray as follows: "No interest subject to a condition precedent is good unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest."\textsuperscript{38}

Shortly after the Statute of Uses, deeds of lease and release, bargain and sale, and covenants to stand seised all appear to have been utilized to create springing uses, vesting at some future date or on the happening of some contingency. Such interests were limited as to their validity only by the Rule Against Perpetuities, measured from the time of their creation to the date of their vesting. No immediate or particular precedent estate was necessary to support them as was necessary for contingent remainders. The seisin in the meantime remained in the grantor or his heirs or assigns and upon the arrival of the effective date or upon the happening of the contingency, the statute executed the use and immediately passed the legal title to the releasee, bargainee, or to the covenantee in the case of a covenant to stand seised.\textsuperscript{39}

An attempted conveyance at common law after the Statute of Uses with a declaration of use to the person who was intended to take the legal title by the conveyance, which for any reason was ineffective but which contained all of the elements of a good conveyance under


\textsuperscript{39}Herbert Thorndyke Tiffany, Real Property (Callaghan and Co., 1912), sec. 88.
the Statute of Uses, was given effect, the courts adopting a liberal attitude and recognizing both methods of conveyancing. It seems that this liberal attitude was not in evidence until quite some time after the statute became effective, for in an early case, the court refused to give effect under the Statute of Uses to such an attempted conveyance.

The Statute of Wills, passed in 1540, was construed as permitting devises of the same types of future interests as were valid and enforceable in their inter vivos transactions under the Statute of Uses. The new types of future interests thus valid when created by will were called executory devises to distinguish them from contingent remainders created by devise. For example, if A devised land to X in fee, for the use of C in fee provided he survives B, C’s interest was called an executory devise. However if the devise was to X in fee for the use of B for life, and then for the use of C in fee provided C survives B, the interest of C was known as a contingent remainder, since it answered to the feudal definition of a contingent remainder. It was not called an executory devise notwithstanding it was both executory and created by devise and this distinction seems to be uniformly recognized in the Illinois decisions.

CONTINGENT REMAINDERS CONTINUE DESTRUCTIBLE AFTER THE STATUTE OF USES AND THE STATUTE OF WILLS

Having once adopted a policy of liberal construction permitting the creation of executory interests under the Statutes of Uses and Wills and having held such interests to be indestructible, it was expected that the English courts would abandon or at least relax the application of

the strict feudal rule requiring that a contingent remainder always be preceded by a freehold estate and would thereby avoid the destruction of such remainders should the preceding freehold estate for any reason terminate before the happening of the contingency or event upon which the vesting of the remainder was to occur. The English courts however did not relax the rule but in a number of decisions adhered strictly to the feudal doctrine that contingent remainders, regardless of the manner of their creation, would perish in all events should it happen that the particular freehold estate terminated while the remainder was still contingent. Once a remainder, always a remainder, was the controlling principle, and the remainders continued subject to the feudal rule that abeyance of the seisin could not be permitted, although the importance of seisin had been relegated to the background in the creation of the new types of interests. Once the particular freehold estate supporting a contingent remainder had come to an end, the remainder perished, and the courts would not save it by construing it as an executory interest and thereby remove it from the domination of the feudal doctrine of seisin. The courts proceeded on the theory that the rule of destructibility of contingent remainders had become an absolute rule of property. It was a rule of law established and acted upon and would be permitted to defeat the intention of a settlor even though the remainder was created by way of use or devise and in the same instrument creating indestructible executory interests. The courts failed to be moved by the fact that it was inconsistent to hold executory interests valid and indestructible under the same circumstances as where they held contingent remainders invalid


and destructible. A number of English decisions\(^{46}\) refused to save contingent remainders from destruction when they could have done so by holding them good by way of use or executory devise, even though under the same circumstances executory interests would have been held valid despite their violation of the feudal rule as to abeyance of the seisin. Out of these cases arose the rule that one could not, by events happening after the interests were created, turn a contingent remainder into an executory interest. The contingencies upon which the remainder was limited could not be split by operation of law. It was argued without avail that the happening of the contingency before or at the termination of the preceding estate was one event, and that the same event happening afterward was another, and that the two were split by operation of law. If it had been held that they were split by operation of law and if the event happened before or at the time the preceding estate terminated, the future interest then became a contingent remainder, while if it happened afterwards, it became a shifting executory interest. From one of the cases\(^{47}\) the rule may be drawn as follows:

Where land is devised to A for life, remainder to unborn persons, and A dies before the testator, so that the life estate never arises in A, the gift to the unborn persons is an executory devise, as it would be void by conveyance at common law. But

\(^{46}\) Purefoy v. Rogers, 2 Wms. Saund. 380, 85 Eng. Rep. 1181 (1681): "Where a contingency is limited to depend on an estate of freehold which is capable of supporting a remainder, it shall never be construed as an executory devise, but a contingent remainder only and not otherwise. . . ."

Carwardine v. Carwardine, 1 Eden 27, 28 Eng. Rep. 594 (1757): "... it is a certain principle of law, that, wherever such a construction can be put upon a limitation, as that it may take effect by way of remainder, it shall never take place as a springing use or executory devise."

Doe v. Roach, 5 M. & S. 482, 105 Eng. Rep. 1127 (1816): "... it is a rule of law, that no limitation shall operate by way of executory devise, which, at the time of the testator's death, was capable of operating by way of contingent remainder."

Cole v. Sewell, 4 Drury & War. 1 (Ir., 1843): "Now, if there be one rule of law more sacred than another, it is this, that no limitation shall be construed to be an executory or shifting use, which can by possibility take effect by way of remainder."

if A had survived the testator and died before the remaindermen were born, the gift in remainder would be supported at its creation by A’s life estate, and would, therefore, be a contingent remainder by will. On A’s death these remainders would be defeated because the remaindermen had not been ascertained; and the remainder continued to be contingent when the supporting life estate ended. These remainders must stand or fall as remainders. They will not be converted into executory devises on the death of the life tenant in order to save them.

A change of circumstances after the testator’s death may change an executory devise into a remainder. For example, in the case of a devise to A for life, with remainder in fee to B, and a devise over, in case of B’s death before A, it has been held that, by reason of the death of B after the death of the testator and before the death of A, what had previously been an executory devise to A’s children, by reason of the gift of a fee to B, became upon the destruction of B’s estate by his death, a contingent remainder.\(^{48}\) Also where an executory devise is followed by another executory devise, which is to take effect upon the termination of the previous one, the later devise becomes a remainder when the previous devise takes effect in possession.\(^{49}\) But a change of circumstances after the testator’s death will never enable a limitation which once took effect as a remainder thereafter to take effect as an executory devise since this would violate the feudal rule, “once a remainder always a remainder.”\(^{50}\)


\(^{49}\) Brownsword v. Edwards, 2 Ves. Sen. 243, 28 Eng. Rep. 157 (1750-1). “So, in the case of a devise to A in fee, but if he dies unmarried, then to B for life, and, on B’s death to C in fee, B and C have both executory devises, and, on A’s death unmarried, B’s estate becomes an estate in possession, and C’s estate a vested remainder.” Gray, Rule Against Perpetuities, Sec. 114, n. 2.

\(^{50}\) Doe dem. Mussell v. Morgan, 3 Term. R. 763, 100 Eng. Rep. 846 (1790). The limitations in this case were by way of devise to the testator’s wife for life, with a remainder to his son for a term of years, and, after the death of both the wife and the son, then to the heirs of the body of the son. It was held that the limitation to the heirs of the body was a contingent remainder, which failed by the death of the wife before the son, and it could not be supported as an executory devise.

In the case of a devise preceded only by a term of years and upon the
Numerous Illinois decisions, prior to 1921 held that the contingent remainders under consideration had been destroyed, and dicta in other decisions recognized the common law rule of destructibility. The rule permitting contingent remainders to be destroyed has operated in a variety of situations but has been applied most frequently where there has been a merger of a life estate and a reversion, originally owned by the same or by different persons, by a conveyance of both to a third person. Among the leading cases and one that is perhaps more frequently cited than any other is Bond v. Moore. In this case the testatrix gave a life estate to her son; this was followed by a devise to others in fee in case the son died without children. No other disposition was made of the fee, and the son, being the only heir of the testatrix, inherited the reversion and upon his conveyance of his entire interest in the property, it was held that the life estate merged in the reversion, and the contingent remainder was thereby destroyed. It was also said in that case that a transfer to a third person was necessary to effect a destruction of contingent remainders in cases where the life tenant took a life estate under a will and

termination of which it is to take effect, it seems that the existence of the term of years does not affect the validity of the devise by rendering it a remainder unsupported by an estate of freehold, and it takes effect as an executory devise. See Gore v. Gore, 2 P. Wms. 28, 24 Eng. Rep. 629 (1722), where the testator, seized in fee simple, devised to trustees for five hundred years, and after the determination of that term, to his first and other sons in tail male, with remainder over. The question was raised as to the validity of the limitation to the first son, and it was held to be good notwithstanding it was preceded only by an estate for years and the fact that the first son had no son at the testator's death.

A few cases picked at random are: Bond v. Moore, 236 Ill. 576, 86 N. E. 386 (1908); Barr v. Gardner, 259 Ill. 256, 102 N. E. 287 (1913); Smith v. Chester, 272 Ill. 428, 112 N. E. 325 (1916); Benson v. Tanner, 276 Ill. 594, 115 N. E. 191 (1917); Friedman v. Friedman, 283 Ill. 383, 119 N. E. 321 (1918); Spatz v. Paulus, 285 Ill. 82, 120 N. E. 503 (1918); Lewin v. Bell, 285 Ill. 227, 120 N. E. 633 (1918).

Young v. Harkleroad, 166 Ill. 318, 46 N. E. 1113 (1897); Madison v. Larmon, 170 Ill. 65, 48 N. E. 556 (1897); Spencer v. Spruell, 196 Ill. 119, 63 N. E. 621 (1902).

FUTURE INTERESTS IN ILLINOIS

236 Ill. 576, 86 N. E. 386 (1908).
also upon the death of the testator took the reversion by
descent or by virtue of the residuary clause of the will.\footnote{54}
It was considered that the law kept the interests apart
while in the son as heir and life tenant as otherwise the
law would be giving its aid in the nullification of the
presumed intent of the testator.

If the interests involved were equitable, the rule of
destructibility did not apply to contingent remainders.
This is well illustrated in a case\footnote{55} where the owner of
land by his deed had given a life estate to a woman with
remainder to her children contingent upon their reaching
the age of twenty-one years. The grant left in the
grantor a reversion which descended to his heirs. The
heirs subsequently conveyed to the life tenant and it was
decided that no merger resulted and that the contingent
remainders were not destroyed, since the fee was at all
times subject to a mortgage and the interests involved
were equitable.

It was held in 1921 that a contingent remainder, aris-
ing by operation of the Statute on Entails, was destruct-
ible.\footnote{56} The devise was to the testator’s son and the heirs
of his body. The son, sole heir of the testator, inherited
the reversion. While unmarried he conveyed to a third
person with the expressed intention of effecting a merger
of his life estate with the reversion for the purpose of
destroying any contingent interests in such children or
lineal descendants as he might thereafter have. It was
held that the conveyance destroyed contingent remain-
ders in his unborn children. This is the first and only
Illinois case raising the question whether the common
law rule of destructibility applied to contingent statutory
remainders.

(1857); Bennett v. Morris, 5 Rawie (37 Pa.) 9 (1835); Craig v. Warner,
5 Mackey (16 D. C.) 460, 60 Am. Rep. 381 (1887).}
\footnote{55}{Pinckney v. Weaver, 216 Ill. 185, 74 N. E. 714 (1905).}
\footnote{56}{Edmiston v. Donovan, 300 Ill. 521, 153 N. E. 237 (1921).}
Renunciation by Life Tenant — Inapplicability of the Destructibility Doctrine

It will be remembered that according to the feudal definition a vested remainder is one which is capable of taking effect in possession upon the termination of A’s life estate in any manner, that is, by death of the life tenant or by some premature termination. Equity has sometimes refused to treat a contingent remainder as destroyed by a premature termination of the life estate. For example, in the event that a surviving spouse, taking a life estate under the will of the deceased spouse, should renounce, it has been held that the premature termination of the life estate resulting from such renunciation does not destroy contingent remainders.\(^57\) In this case real estate was devised to the widow for life with a contingent remainder over to the testator’s nieces living at the death of the widow. But the latter elected to take under the statute of descent one-half of the real estate in fee. It was held that the life estate in the other half was relinquished by such election but that the contingent remainder was not thereby destroyed. Pursuant to the prayer of the bill, the lower court appointed a trustee to preserve the property, and the income thereof, during the life of the widow. Upon appeal, the Supreme Court treated the trustee’s interest as analogous to a limitation at common law to trustees to preserve contingent remainders in the event of the premature termination of the particular freehold estate. Mr. Kales,\(^58\) in an analysis of this case, suggests that if the renunciation by the widow meant that she never took a life estate, the situation was the same as if she had died before the testator, in which case the so-called contingent remainder would not be a remainder at all but would take effect

\(^{57}\) Wakefield v. Wakefield, 256 Ill. 296, 100 N. E. 275 (1912).

from the beginning as a springing executory devise and therefore not subject to any rule of destructibility.

**WHEN CONTINGENT REMAINDERS CREATED BY WARRANTY DEED COULD NOT BE DESTROYED**

If the contingent remainders were created by a warranty deed, under which the grantor retained a reversion subject to a life estate and to the contingent remainders, the owner of the reversion, whether he was the original grantor or one to whom the reversion had been transferred, could not, by taking title to the life estate, have a decree by a court of equity that such remainders were destroyed. The court, in a case\textsuperscript{59} decided shortly before the Statute of 1921 became effective, held that the covenants of warranty were binding alike upon the grantor and those who stood in his place as owner and that either the grantor or those holding under him would be estopped, by the covenants of warranty in the grantor’s deed, to assert that the contingent remainders created by the deed were destroyed.

**INDESTRUCTIBILITY OF SPRINGING AND SHIFTING FUTURE INTERESTS**

Springing or shifting future interests, created either by way of use or devise, have never been destructible in Illinois by any act of the first taker operating to defeat the expressed intention of the settlor.\textsuperscript{60} However, there is one situation wherein it appears that the gift over might be defeated by the act of the first taker, as for example an executory limitation created to be effective only upon the first taker’s dying intestate without issue surviving. Should the first taker alienate either by deed or by will, the event (dying intestate as to that property) can never happen upon which the gift over is to take

\textsuperscript{59} Biwer v. Martin, 294 Ill. 488, 128 N. E. 518 (1920).

\textsuperscript{60} Williams v. Elliot, 246 Ill. 548, 92 N. E. 960 (1910); Jacobs v. Ditz, 260 Ill. 98, 102 N. E. 1077 (1913); Blackstone v. Althouse, 278 Ill. 481, 116 N. E. 154 (1917); Morris v. Phillips, 287 Ill. 633, 122 N. E. 831 (1919).
effect. The gift over will fail for this reason and not strictly speaking by reason of any act of the first taker destroying the executory limitation contrary to the expressed intention of the testator. No Illinois case has been found directly involving this point, but the Supreme Court in one decision intimated that the gift over under similar circumstances might be defeated by the act of the first taker in conveying or devising the land in which such taker had a determinable fee.

Effect of Statute to Preserve Contingent Remainders

Legislation to preserve contingent remainders was effected in England as early as 1877. The statute there operates to permit contingent remainders to be effective as springing or shifting executory limitations when necessary to their preservation from destruction. It reads as follows:

Every contingent remainder created by any instrument executed after the passage of this act, or by any will or codicil revived or republished by any will or codicil executed after this date, in tenements or hereditaments of any tenure, which would have been valid as a springing or shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation.

It will be observed that this statute accomplishes something more than the preservation of contingent remainders in the event the prior freehold estates terminate prematurely; it also splits the contingencies in the manner that the courts had held was not to be permitted. It in no way interfered with interests previously created, since it was expressly limited in its operation to limitations in instruments thereafter executed.

61 Friedman v. Steiner, 107 Ill. 125 (1883).
62 Stats. 40 & 41 Vict., c. 33 (1877).
It has been previously stated that Illinois adopted the common law rule permitting the destruction of contingent remainders. The extent to which such remainders were subject to destruction has been shown by the cases hereinbefore discussed. It was not until 1921 that a statute was passed tending to prevent their destruction. The Illinois statute provides:

No future interest shall fail or be defeated by the determination of any precedent estate or interest prior to the happening of the event or contingency on which the future interest is limited to take effect.

The provisions of the Illinois statute serve to preserve contingent remainders only in the event of the premature termination of the precedent estate or interest—not in the event of its natural termination—hence it does not make them good by way of shifting or springing executory interests as does the English statute. It also fails to contain any express provision that it shall apply only to interests created by an instrument executed after its passage. If the statute is retroactive in the sense that it would prevent the destruction of contingent remainders created before the statute took effect, by a conveyance (either before or after the statute) made to merge the supporting life estate in the reversion, it would be clearly violative of Article 14 of the Constitution of the United States forbidding any State to pass a law which will deprive any person of property without due process of law. The statute has been expressly held in a number of cases not to operate retroactively where the conveyance was made to destroy contingent remainders which antedated the statute. There is authority holding that a contingent remainder may not be impaired or destroyed by a statute passed after its creation. On

63 Ill. Rev. Stats. 1937, Ch. 30, sec. 40.
64 Edmiston v. Donovan, 300 Ill. 521, 133 N. E. 237 (1921); Drager v. McIntosh, 316 Ill. 460, 147 N. E. 433 (1925); Danberg v. Langman, 318 Ill. 266, 149 N. E. 245 (1925); Martin v. Karr, 343 Ill. 296, 175 N. E. 376 (1931); Hauser v. Power, 356 Ill. 521, 191 N. E. 64 (1934).
the other hand it has been held elsewhere that the right of the owner of a particular estate, under existing law, to bar contingent remainders is not a vested right and that its subsequent exercise may accordingly be forbidden by statute even as to remainders created prior to its passage. No Illinois cases have been found holding that the statute is retroactive so as to prevent the destruction of contingent remainders created before 1921 by effecting a merger by a conveyance made after the statute took effect. If the statute should be construed as retroactive in the latter sense it seems arguable, in view of *Aetna Life Insurance Company v. Hoppin*, that the statute is unconstitutional, since that case involved property rights in Illinois.

Inasmuch as contingent remainders are inalienable in Illinois, it was undesirable to make them altogether indestructible without some express provision enabling them to be destroyed, since there are occasional situations where the interests of all parties would be favorably affected by their destruction. One writer is authority for the statement that at the time the bill was introduced in the Illinois legislature providing for the abolition of the common law rule of destructibility, a companion bill was also introduced making provision for the destruction of contingent remainders by chancery courts. The impolicy of having such remainders both inalienable and indestructible seems to have prompted the introduction of a bill in the Illinois House of Representatives in 1927 providing for the repeal of the Act of 1921. This bill passed in the House but failed of passage in the Senate, and contingent remainders continue their existence with the combined characteristics of indestructibility and inalienability.

*To Be Continued.*

67 214 F. 928 (C. C. A. 7th, 1914).