

## THE MODERN RULE AGAINST PERPETUITIES AND LEGAL CONTINGENT REMAINDERS IN MISSOURI\*

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For almost a century there has been a controversy between two groups of law writers and judges over the applicability of the modern rule against perpetuities to legal contingent remainders.<sup>1</sup> The participants on both sides of the issue have been prominent in the field of real property. In some jurisdictions the matter has been settled by statutes making contingent remainders indestructible, or by judicial decision. In those where the common law has not been so changed the problem remains unsolved or in a worse condition, that of uncertainty. An examination and discussion 1) of the historical background, 2) of the arguments of the scholars, and 3) of some leading cases is herewith presented for consideration in connection with this narrow and technical part of the law of future interests. There is necessarily brought into the discussion the validity of what has been called the common law rule against remoteness, but what is better known today as the rule in *Whitby v. Mitchell*.<sup>2</sup> In that case the rule was stated by Kay, J., as follows: "You cannot limit an estate to an unborn person for life with remainder to the children of that unborn person, for that such remainder is bad."<sup>3</sup> On one side, it is asserted that this was an established rule of the common law affecting contingent remainders;<sup>3a</sup> on the other hand, it is alleged that no such rule was established as a separate incident to contingent remainders and not only is its use an

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1. From 1843, when W. D. Lewis published, *The Law of Perpetuities*, down to the article by F. E. Farrer, 51 L. Q. Rev. 668 (1935).

2. 42 Ch. D. 494 (1889); 44 Ch. D. 85 (1890).

3. *Ibid.*, l. c. 501.

3a. Frazer, *Rationale of the Rule against Perpetuities* (1922) 6 Minn. L. Rev. 560, 566, and note 26.

error, but its very existence is without sound authority to support it.<sup>3b</sup>

### I. THE HISTORICAL BACKGROUND

A. *An examination of the development of the fee tail and of its characteristics and purposes establishes the necessity for and the creation of a common law remedy by the courts based on destructibility and not on remoteness of vesting which is the basis of the modern rule against perpetuities.*

Pre-Norman common law imposed few restraints, if any, upon the alienation of land.<sup>4</sup> Estates of a restricted inheritance became well established and very prevalent under the feudal system introduced by the Normans. The purpose of these estates was both to restrain alienation and to perpetuate familial holding of land. Opposition to such policies led to the contest between the supporters of restraints on alienation and the advocates of its free and unfettered enjoyment which lasted for centuries. The early transfers of land restricting the inheritance to a particular class of heirs of the transferee, such as to the heirs of his body or the heirs male of his body, if literally interpreted, would restrain alienation and tend to perpetuate the landed interest in his descendants or, by reversion, in the donor and his family. To defeat such an interpretation and its purposes, the courts construed such an interest as a fee conditional, *i. e.*, a fee simple upon a condition precedent that the donee have the type of lineal descendants prescribed in the gift. If the transferee died without having had the issue prescribed, the lands would revert to the transferor. By having the specified issue, the condition precedent was satisfied for three purposes, to wit: to alien, to forfeit, and to charge. After the performance of the condition the grantee could by alienation, not only bar his own issue, but could bar the possibility of reverter in the grantor.<sup>5</sup>

The statute *De Donis Conditionalibus*, sometimes referred to as the statute of Westminster II,<sup>6</sup> was passed in order to prevent alienation of the fee conditional and to ensure the reversion to the over lord on failure of the issue specified. The statute enacted

3b. Gray, *Rule against Perpetuities* (3d ed. 1915) sec. 298 h.

4. Digby, *History of the Law of Real Property* (5th ed. 1897) 28.

5. *Ibid.*, p. 223.

6. 12 Ed. 1, c. 1 (1285); Digby, *History of Law of Real Property* (5th ed. 1897) 226.

in substance that the will of the donor as expressed in the form of the gift should be observed. The land was declared to revert if there never was issue, if such issue failed, or if the heirs of the body of such issue failed. There could be no reversion to the donor so long as there were lineal descendants of the donee, but the donee had no power to alienate the land or bar his issue, and issue meant any descendants. The donee no longer had a conditional fee simple. It was a new estate, a fee tail, *i. e.*, a fee from which the general heirs were entirely cut off. Thus restraints on alienation were restored and familial perpetuities legalized.

Although it has been declared,<sup>7</sup> "that the reluctant spirit of English liberty would not submit to the statute of entails and Westminster Hall siding with liberty, found means to evade it," it was not until *Taltarum's Case*<sup>8</sup> that relief was obtained through a bold extension of the judicial power. It was held in that case that an estate tail might be barred, *i. e.*, the entail cut off, by reason of the intended recompense which a common recovery was supposed to give to those who, by the terms of the gift, were entitled to inherit the land. A common recovery removed all limitations or restraints upon an entailed estate and passed an unqualified fee. By such a conveyance the tenant in tail could bar his own issue and all subsequent remainders. Estates tail and contingent remainders after an estate tail thus became destructible and remained so until modern times.<sup>9</sup>

Efforts to escape the effects of common recoveries brought about provisions in conveyances containing restraints and conditions against taking such action to defeat estates tail, but the courts maintained their stand by holding that any device or condition restricting recoveries was void because it tended to a perpetuity. The origin of the term "perpetuity" is obscure. It was used in *Chudleigh's Case*<sup>10</sup> and while it cannot be assumed

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7. *Duke of Marlborough v. Earl of Godolphin*, 1 Eden 404, 417, 28 Eng. Rep. 741 (Ch. 1759).

8. Y. B. 12 Ed. 4, 19 (1473).

9. In England by statute, 8 & 9 Vict. c. 106, s. 8 (1845), and 40 & 41 Vict. c. 33 (1877). Contingent remainders were made indestructible and placed in the category of executory limitations.

10. 1 Co. Rep. 113b, 76 Eng. Rep. 261 (K. B. 1594). "The term 'perpetuity' summed up in a single word all that the judges had struggled against in their fight for the alienability of land. It gave a name to what had been up to that time an inarticulate principle." Bordwell, *The Iowa Contingent Remainder Act* (continued, 1925) 10 Ia. Law Bull. 275, 280.

that the term was never used on any previous occasion, Mr. Holdsworth, in an article, *An Elizabethan Bill Against Perpetuities*,<sup>11</sup> says that the case directed public attention to the topic. The bill never was enacted into law, but the marginal note shows the attitude of its originator:

"Forasmuch as perpetuities by creating future uses happening long after engender discord and faction in families make children disobedient parents unnatural, upon conceit yt the lands stand secured"

"And this by reason of a construction of the Statute 27 H. 8 being against ye meanings throf whereby greate suites have and doe arise"

"Enactet, yt all limitation of uses for restraining persons yt have estates of inheritance in landes from selling or demising them shalbe void."

The concept that restraints on alienation constitute perpetuities runs through most of the decisions in the cases which involved attempts to get away from the effects of the decision in *Taltarum's Case*.<sup>12</sup> An ultimate remainder to the Crown did not invalidate a common recovery by the present tenant in *Cholmley's Case*.<sup>13</sup> Provisions that if the tenant in tail attempted to bar the entail, his interest should cease as if he were dead were held void.<sup>14</sup> Finally in *Mary Portington's Case*<sup>15</sup> a limitation in the will of a testator was presented which provided that on the performance of any act contrary to that will, the estate of the person so doing would cease *as if he or she were dead without an heir of his or her body*. This, if upheld, might have created a

11. 21 L. Q. Rev. 258 (1919).

12. *Marlborough v. Godolphin*, 1 Eden 404, 409, 28 Eng. Rep. 741 (Ch. 1759); Note S to *Corbet's Case*, 1 Co. Rep. 83b (K. B. 1599), 76 Eng. Rep. 188, reads: "A perpetuity is where, though all who have interest should join in a conveyance, they could not bar or pass the estate."

13. 2 Co. Rep. 50a, 76 Eng. Rep. 533 (K. B. 1597).

14. *Corbet's Case*, 1 Co. Rep. 83b, 76 Eng. Rep. 187 (K. B. 1599); *Mildways' Case*, 6 Co. Rep. 40a, 77 Eng. Rep. 311 (K. B. 1606); *Marlborough v. Godolphin*, 1 Eden 404, 409, 28 Eng. Rep. 741 (K. B. 1759).

15. 10 Co. Rep. 35b, 77 Eng. Rep. 976 (K. B. 1614). The court found the authorities cited in *Scholastica's Case*, 2 Plowd. Comm. 403 (1572) contra to that for which they were cited and overruled that case, saying: "the common recovery leaves a judgment against the tenant in tail and another judgment against the vouchee to have in value; and these resolutions produced the judgment in *Taltrum's Case*, Y. B. 12 Ed. 4 (1473) which was not of any new invention, but proved and approved the resolutions of the sages of the law then perceiving what the contentions and mischiefs had crept into the quiet of the law by these fettered inheritances."

determinable fee tail.<sup>16</sup> The court held the restraint invalid. Speaking of this case, Lord Coke, in the preface to the tenth part of the reports, said:

“Then have I published in Mary Portington’s case, for the general good both of the prince and country, the honorable funeral of fond and new-found perpetuities—a monstrous brood carved out of mere invention, and never known to the ancient sages of the law. I say monstrous, for that the naturalist saith, quod monstra generantur propter corrupti-  
onem alicujus principii; and yet I say honorable, for these vermin have crept into many honorable families. At whose solemn funeral I was present, accompanied the dead to the grave of oblivion, but mourned not, for that the commonwealth rejoiced, that fettered freeholds and inheritances were set at liberty, and many and manifold inconveniences to the head and all the members of the commonwealth thereby avoided.”

Thereafter an unbarrable entail was impossible,<sup>17</sup> because, as a perpetuity it was repugnant to the common law.

Since an infant could not suffer a common recovery or in any other way defeat the entail until he was 21 years of age, it must be clear that one transferring property could not control its disposition for a period longer than 21 years after present lives. Thus a transfer of an estate to A for life would limit that estate and it could be protected by a contingent remainder to trustees for the life of A, but a remainder in tail to A’s eldest or other son, contingent on there being such a taker, could not be limited as a contingent remainder in tail and remain unbarrable after the tenant in tail reached his majority. Thus the hostility to perpetuities shown in the policy of the common law courts developed an *implied limit in fact*, beyond which any attempted restraint on alienation would be void as a perpetuity. Many writers and judges<sup>18</sup> have said that the time limit fixed in the modern rule against perpetuities was not a new rule developed by the courts but was an adaptation of the above time limit placed upon the power to postpone a complete bar of an entailed

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16. Fearn, *Contingent Remainders* (4th Am. ed. from 10th London ed. 1845) 259.

17. The Reports of Sir Edward Coke, Knt., in English (George Wilson, ed. 1777) page vi, part 10. See article, Sweet, *Perpetuities* (1899) 15 *Law Q. Rev.* 258.

18. Hargrave, note 5 to 1 *Co. Lit.* (1st Am. ed. from 19th London ed. 1853) 20a. See note 46, post.

interest at common law. It is believed that the existence of a recognized common law limit to restraints on alienation which long preceded the modern rule against perpetuities is discernible in the period covered above.

It would seem that the source of the rule in *Whitby v. Mitchell* is in this same implication. It need not have found expression as such, to be what Justice Kay called an established rule of the common law. A common law conveyance must have recognized that, if the owner of land could not restrain its alienation, in any disposition he might make of it as an entail, beyond a life and 21 years, he could not do so for a longer period, *i. e.*, for the whole life of an unborn child of an unborn person to whom a life estate had been limited. If asked to incorporate it in a conveyance he would reject it as an attempt to prevent the barring of an entail beyond the recognized limits.<sup>18a</sup> It is believed that to avoid this limitation on the power of disposition, a devise in the form of a series of life estates limited to successive issue of an unborn person was construed in some instances to be an estate tail in the first unborn taker under the *cy pres* doctrine.<sup>19</sup> It is as logical to conclude that, under the generous attitude toward a deviser, his inartistic effort to create an entail by such a disposition would be saved by treating it as a barrable entail, as the conclusion that it was so construed in order to escape the effect of the modern rule against perpetuities. Destructibility was clearly the antidote for restraints on alienation by means of entails, then called perpetuities.

B. *The destructibility of contingent remainders met the same need for protection against perpetuities that had been satisfied by the insistence on the destructibility of estates tail. The remedy at common law was adequate to meet the dangers of*

18a. This was the very situation which arose in *Re Frost*. See statement by Kay, J., 43 Ch. D. 246, 251 (1889).

"The rule was an outgrowth of the English family settlement and of the tradition of the small group of conveyancing specialists which the English family settlement produced." It "is thought to have made such an impression on conveyancers in England that as much as they would have liked to, they were afraid to limit land to successive generations of unborn children." Bordwell, *The Iowa Contingent Remainder Act* (continued, 1925) 10 Ia. Law Bull. 275.

19. W. D. Lewis, *Law of Perpetuities* (1843) 426; Gray, *Rule Against Perpetuities* (3d ed. 1915) 643-670; *Humberston v. Humberston*, 1 P. Wm. 332, 24 Eng. Rep. 412 (Ch. 1716); 2 Vern. 738, 23 Eng. Rep. 1081 (Ch. 1716).

*perpetuities and did not require the application of the rule against remoteness to contingent remainders.*

The definition of a common law remainder in Coke on Littleton, "A remnant of an estate in lands or tenements expectant upon a particular estate created together with the same at one time"<sup>20</sup> is familiar to the profession. A contingent remainder has been defined in the following manner: "A remainder is contingent if, in order for it to become a present estate, the fulfillment of some condition precedent, other than the determination of the preceding estate is necessary."<sup>21</sup> "The history of contingent remainders is obscure"<sup>22</sup> but their validity seems to have been first legally recognized about 1430,<sup>23</sup> which is between two hundred and two hundred and fifty years before the modern rule against perpetuities began to receive definite form.<sup>24</sup> During that period the destructibility of contingent remainders seems to have been adequate protection against perpetuities that might arise therefrom. It is generally conceded that the modern rule against perpetuities owed its existence to the creation of indestructible future interests made possible by judicial interpretation after the Statutes of Uses and of Wills.<sup>25</sup>

20. 1 Coke, *Commentary on Littleton* (1st Am. ed. 1853) 143b; see also Tiedeman, *The American Law of Real Property* (4th ed. 1924) sec. 296.

21. Gray, *Rule Against Perpetuities* (3rd ed. 1915) secs. 9, 101. A. M. Kale differed with Gray on the definition. See *ibid.* note 3, sec. 101. A contingent remainder is not an estate, but a possibility of an estate. *Ibid.*, sec. 113b.

22. Digby, *History of the Law of Real Property* (5th ed. 1897) 265.

23. Williams, *Law of Real Property* (17th ed. 1894) 411, 412; Holdsworth, *History of English Law* (3rd ed. 1925) 135; Y. B. 9 Hen. 6 (1431) Trin. pl. 19.

24. The Duke of Norfolk's Case, 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1682), is usually regarded as the landmark in this regard. Gray, *Rule Against Perpetuities* (3rd ed. 1915) sec. 170.

25. Gray, *Rule Against Perpetuities* (3rd ed. 1915) 136. "Although no question of remoteness was presented in *Pells v. Brown*, it is hard to estimate its influence on the subsequent history of conveyancing. Had it been held that conditional limitations could be destroyed like contingent remainders, the need of a rule against remoteness might never have been felt; even if some such rule had been finally evolved, it would probably have been in other than its present form.

"To the third point, Doderidge held, that this recovery would bar William; for he had but a possibility to have a fee, and quasi a contingent estate, which is destroyed by this recovery before it came in esse: for otherwise it would be a mischievous kind of perpetuity which could not by any means be destroyed. \* \* \* But all the other justices were herein against him, that this recovery shall not bind." *Pells v. Brown*, Cro. Jac. 590, 79 Eng. Rep. 504 (K. B. 1620).

Let us examine the various modes in which contingent remainders could be eliminated, or, as is commonly said, destroyed. They may be divided into two classes.

*a. Destruction of contingent remainders by failure of the contingency to happen on or before the termination of the prior supporting freehold.*

A common law contingent remainder is a successive interest which must comply with the old requirement that there could be no interruption in the seisin and *seisin must be in some one at common law in order to sustain alienation by livery thereof*. A common law contingent remainder must vest on or before the termination of the prior supporting freehold, and if it does not do so, it "falls in," *i. e.*, is entirely destroyed. Then seisin, *with the power of alienation* is in the reversioner. Contingent executory limitations arising after the Statutes of Uses and of Wills presented the same problem until they were held indestructible. The necessity, both before and after the statutes mentioned, for continuity in seisin was a safeguard against the creation of perpetuities by contingent remainders.<sup>26</sup> Continuity of seisin was as vital to alienability of a freehold as it was to the continuity of responsibility for the incidents of feudal tenure.

It would be impossible for any contingent remainder limited after a vested life estate to vest at too remote a time, when the common law rules applicable to contingent remainders required that they vest on or before the death of the life tenant. If a series of contingent remainders to successive issue of an unborn person to whom an estate for life has been limited were indestructible, alienation could be restrained indefinitely since they would not then "fall in" if they failed to vest on or before the end of the supporting vested freehold. Perpetuities would thus be made possible.<sup>26a</sup>

*b. Destruction of contingent remainders by other means or events than the failure of the contingency to happen in due time.*

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26. Frazer, *Rationale of the Rule Against Perpetuities* (1922) 6 Minn. L. Rev. 560, 567. Fearne, *Contingent Remainders* (4th Am. ed. 1845) 497 and 788a.

26a. "Three examples of perpetuity which the judges in Corbet's Case and in Chudleigh's Case seem to have had in mind were the unbarrable entail, the indestructible contingent or executory interest and the perpetual freehold. The perpetual freehold was a limitation of life estates to successive generations of heirs." Bordwell, *Contingent Remainder Act* (1925) 10 Ia. L. Bull. 275, 281.

This is an extension of the preceding common law principle by a validation of the destruction of contingent remainders through acts of the parties or other circumstances which prevented the contingency on which the remainder was limited from happening on or before the termination of the prior supporting estate. There were many of such acts and circumstances, so that a contingent remainderman could hardly be considered to have had an interest fettering and restraining the alienation of property in the common law sense of a perpetuity. If the prior tenant made a feoffment,<sup>27</sup> levied a fine,<sup>28</sup> suffered a common recovery;<sup>29</sup> or if there was a merger of his particular estate and the reversionary interest,<sup>30</sup> or an extinguishment of the particular estate

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27. *Chudleigh Case*, 1 Co. Rep. 113b, 135b, 76 Eng. Rep. 261 (K. B. 1594): "By feoffment of the tenants for life, their estate was determined, and title of entry given for the forfeiture, and then those in the future remainder were not in esse to take it; for this reason, these remainders in future, by this matter ex post facto, were utterly destroyed and made void; and there is no difference when the estate of the tenant for life determines by the death of the tenant for life, and when it determines in right by his forfeiture; for, in both cases, entry is given to him in the next remainder, and then if he cannot take the land when the particular estate determines the remainder is void." Also in *Archer's Case*, 1 Co. Rep. 66b, 76 Eng. Rep. 146 (K. B. 1598), "inasmuch as by the feoffment of Robert, his estate for life was determined by a condition in law annexed to it, and cannot be revived afterwards by any possibility; for this reason the contingent remainder is destroyed." Any person in possession could by livery of seisin effect a tortious feoffment and vest the fee simple in the feoffee. A feoffment was the only form of conveyance which had this effect. See *Coke on Litt.* (1st Am. ed. 1853) 611. If he limited a less estate to the feoffee a tortious reversion vested in himself. Since the statute of 8 & 9 Vict. c. 106 s. 4 (1846) a feoffment can have no tortious operation in England and it only conveys as much as the grantor had to convey.

28. *Digby, History of the Law of Real Property* (5th ed. 1897) 105, 229 n. 2,253.

29. *King v. Melling*, 3 Salk. 297, 91 Eng. Rep. 835 (Q. B. 1695). Where B the life tenant suffered a common recovery it was held a recovery will not bar the right of a mortgagee, unless he is vouched, so likewise of an executory devise; but it will bar a contingent remainder."

30. *Crump ex dem. Woolley v. Norwood*, 7 Taunt. 362, 129 Eng. Rep. 115 (C. P. 1815), it was held that a contingent remainder with double aspect was destroyed by merger of the particular estate which supported it. Where a married woman was tenant for life, remainder to her son, if one should be born. The reversioner in fee, before the birth of a son, conveyed his reversion to the wife and the husband. The court said, the wife's life estate was merged in the fee simple and all contingent remainders were therefore destroyed. *Purefoy v. Rogers*, 2 Wms. Saunders 380, 85 Eng. Rep. 1181 (K. B. 1671). An illustration of a companion idea is to be found in *Thompson v. Leach*, 2 Vent. 198, 86 Eng. Rep. 391 (C. B. 1691), where the tenant of a particular estate surrendered his estate to the reversioner in fee or to a vested remainderman in fee. There the surrender was void because the tenant for life was a lunatic, but the court said that otherwise the contingent remainder would have been destroyed by this surrender. See

by reentry for condition broken,<sup>31</sup> or an alteration in the quantity of the particular estate,<sup>32</sup> or a descent of the reversion upon the particular estate,<sup>33</sup> the contingent remainder "fell in" because of the removal of the supporting freehold.

Destructibility of contingent remainders was, therefore, a sufficient protection against perpetuities, as the latter were understood prior to the Statute of Uses, for two centuries or more before the modern rule against perpetuities took its present form. *The doctrine of remoteness is inseparable from indestructibility* but is not essential where the future interest is not so protected that it cannot be destroyed.<sup>34</sup> Had there been no "recognized rule" of the common law, later expressed in the case of *Whitby v. Mitchell*, making invalid a series of life estates to successive issue of an unborn person to whom a life estate had been limited, perpetuities in that form would have awaited for three centuries a relief under the modern rule, and they would have received the same kind of notoriety that *Chudleigh's Case*<sup>35</sup> produced. That they did not receive such notice supports to some extent an inference that there was such a recognized rule, in the minds of common law lawyers, as Fearne set forth.<sup>36</sup>

*C. The modern rule against perpetuities, sometimes called the rule against remoteness owes its origin and development to the rise of indestructible future interests.*

After the Statutes of Uses and of Wills, efforts of attorneys for landed proprietors to get around the indestructibility of contingent remainders were made by limiting remainders by way of use. The courts, however, for some time held such limitations subject to the same rules as remainders and destructible in the same ways.<sup>37</sup> The principle was laid down that any limitation

Fearne, *Contingent Remainders* (4th Am. ed. from 10th London ed., 1845) c. 5, 515.

31. *Cogan v. Cogan*, Cro. Eliz. 360, 78 Eng. Rep. 608 (K. B. 1892); *Sheffield v. Orrery*, 3 Atk. 282, 26 Eng. Rep. 965 (Ch. 1745).

32. Case CCCLXIV, 4 Leo. 237, 74 Eng. Rep. 843 (K. B. 1591).

33. This is true where the descent is only mediate from the person whose will created the particular estate and the remainder. *Kent v. Harpool*, 1 Vent. 360, 86 Eng. Rep. 197 (K. B. 1678).

34. Gray, *Rule Against Perpetuities* (3rd ed. 1915) sec. 192.

35. Note 11, *supra*.

36. Fearne, *Contingent Remainders* (4th Am. ed. 1845) 502.

37. Gray, *Rule Against Perpetuities* (3rd ed. 1915) sec. 142-146; *Chudleigh's Case*, 1 Co. Rep. 120a, 138a, 76 Eng. Rep. 261 (K. B. 1594), *supra*, note 27.

which could be construed as a remainder should be held to be a remainder and subject to its incidents.<sup>38</sup> Early in the seventeenth century, however, decisions validating executory limitations in terms and freeholds, other than remainders limited by way of use,<sup>39</sup> were handed down.<sup>40</sup> Perpetuities were thus made possible and it became necessary for the courts, in pursuance of the profound public policy against perpetuities, to check and destroy them. Gray has traced the decisions<sup>41</sup> from the *Duke of Norfolk's Case*<sup>42</sup> in 1682 down to *Cadell v. Palmer*<sup>43</sup> in 1833, showing how the rule developed into its present form: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."<sup>44</sup> Throughout his treatment of the *Rule Against Perpetuities*, Gray maintains that during this period there was developed an entirely new rule based on remoteness, *i. e.*, fixing legal limits on the time to which the vesting of any contingent future interest may be postponed.<sup>45</sup>

Another view, advanced by numerous writers and judges, is

38. *Purefoy v. Rogers*, 2 Wm. Saunders 768, 781 (1669); Coke, *Commentary on Littleton* (1st Am. ed. 1853) 217; Fearne, *Contingent Remainders* (4th Am. ed. 1845) 284; 7 Holdsworth, *History of English Law* (1926) 126, 127. Gray, *Rule Against Perpetuities* (3rd ed. 1915) Appendix J.

39. *Adams v. Savage*, 2 Ld. Raymond 854, 92 Eng. Rep. 71 (K. B. 1703); *Goodtitle v. Billington* 2 Doug. 758, 99 Eng. Rep. 481 (K. B. 1781).

40. *Mannings Case*, 8 Co. Rep. 94b, 77 Eng. Rep. 618 (K. B. 1609), and *Lampet's Case* 10 Co. Rep. 46b, 77 Eng. Rep. 994 (K. B. 1612), held that an executory devise of a term was valid and indestructible. *Pells v. Brown Cro. Jac.* 590, 79 Eng. Rep. 504 (K. B. 1620), held that executory interests in a freehold other than contingent uses were indestructible. Gray, *Rule Against Perpetuities* (3rd ed. 1915) sec. 158, discussing *Child v. Baylie, Cro. Jac.* 459, 460, 79 Eng. Rep. 393 (K. B. 1623), says that only one of twelve judges considered remoteness as affecting the validity of a limitation. Davenport said there was no danger of a perpetuity since the contingency ought to happen in the life of the devisee, "but if the contingency—is to commence in futuro after the death of the first devisee, there, because such limitation tends to make a perpetuity, a remainder limited on it is bad." It took some time after the decision in *Pells v. Brown* to develop the limitation on remoteness of vesting.

41. Gray, *Rule Against Perpetuities* (3rd ed. 1915) secs. 159-189.

42. 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1682).

43. 1 Cl. & Fiu. 372, 36 Eng. Rep. 128 (H. L. 1833).

44. Gray, *Rule Against Perpetuities* (3rd ed. 1915) sec. 201. *Cadell v. Palmer*, supra, note 43, settled the maximum period for remoteness of vesting. It was held that the 21 years was a period in gross, irrespective of minority, but that gestation must in fact exist in order to take advantage of the additional months allowed therefor.

45. Gray, *Rule Against Perpetuities* (3rd ed. 1915) sec. 1 and secs. 268-278.

that the modern rule against perpetuities is merely an extension and adaptation of a well established principle to meet new needs unknown to the common law.<sup>46</sup> Thus Justice Farwell in *Re Ashforth* says, "Although, therefore, there was a *general principle* that alienation should not be restricted by the creation of estates beyond a *particular estate for life with a remainder in fee or in tail*, I can find no trace of any statement of the present rule in terms in any of the old books. But the general principle was well established and as the ingenuity of the real property lawyers invented new devices for rendering land inalienable for as long a time as possible, it became necessary to mould the expression of the old law so as to meet new emergencies" and after citing *Cadell v. Palmer*<sup>47</sup> and *Long v. Blackall*<sup>48</sup> to the same effect, he continues, "here, then, is authoritative statement in terms of precision of the rule of law which had existed for centuries, but had not been theretofore defined, and had been applied from time to time, as occasion arose, by judges, who without formulation of the precise limits of the rule, held, as Lord Nottingham said in the *Duke of Norfolk's Case*,<sup>49</sup> 'If it tend to a perpetuity, there

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46. Hargrave says the period of lives in being and 21 years plus gestation period where necessary is, "a limitation not *arbitrarily* prescribed by our courts of justice, but wisely and reasonably adopted in analogy to the case of freeholds of inheritance which cannot be so limited by way of remainder as to postpone a complete bar to an entail, by fine or recovery for a longer space. Notes to Coke on Littleton (1st Am. ed. 1853) 20a, n. 5. 2 Bl. Comm. c. 11, p. 174. Sheppard's, *Touchstone of Common Assurances* (1st Am. ed. 1808) contains the same statement. Digby, *History of the Law of Real Property* (5th ed. 1887) 364 states the following: "It has already been seen that the creation of future estates by ways of remainder is limited by the rule that an estate given to an unborn person for life cannot be followed by any estate given to any child of such unborn person. It followed from this that the great object of settlements of lands, the preserving them in the settlor's family, could be obtained only to the extent of giving an estate tail to an unborn member of the family. But this estate after the introduction of the practice of suffering recoveries was always liable to be turned into a fee simple and alienated, so soon as the tenant in tail came of age. The result was that settlements operating by way of remainder could not absolutely prevent the alienation of lands for a longer period than during a life or lives in being and 21 years after." The same idea is mentioned in *Porter v. Bradley* 3 T. R. 146, 100 Eng. Rep. 502 (1789); *Marlborough v. Godolphin* 1 Eden 404, 28 Eng. Rep. 741 (1759); *Chapman v. Brown* 3 Burr. 1626, 97 Eng. Rep. 1015 (1765); *Long v. Blackall* 7 T. R. 100, 101 Eng. Rep. 875 (1797); *Thellusson v. Woodford* 4 Ves. 227, 11 Ves. 112, 31 Eng. Rep. 117, 32 Eng. Rep. 1030 (1805). See *supra*, note 18.

47. *Supra*, note 43.

48. *Long v. Blackall*, 7 T. R. 100, 101 Eng. Rep. 875 (K. B. 1797).

49. 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1681).

needs be no more said . . .".<sup>50</sup> The following was said in *Porter v. Bradley*:<sup>51</sup>

"This rule was adopted in analogy to legal formal limitations, namely, for a life or lives in being, with a remainder in tail to unborn children who cannot bar it till twenty-one; and the fraction of another year since the Statute of William, if tenant for life should leave his wife enceinte."

From the numerous statements quoted above, it seems established that there was a common acceptance of the analogy theory among writers and lawyers in England.<sup>52</sup> The periods prove to be the same, but the emphasis is on a different phase in the new rule, remoteness of vesting. The rule against perpetuities was still aimed at preventing unreasonable restraints on alienation. "So the rule against perpetuities took *the form* of a rule against remoteness in vesting, but its object was to prevent an unreasonable postponement of the power of alienation by a present tenant entitled to the fee. And where that object is not served the rule should not apply."<sup>53</sup>

## II.

*The conflict of opinions regarding the applicability of the modern rule against perpetuities to legal contingent remainders.*

Lewis and Gray are the outstanding representatives of the school of thought which maintains that the modern rule against perpetuities applies to contingent remainders.<sup>54</sup> Lewis was first to conceive and expound the idea, and states that his theory then seemed "strange and novel to the profession."<sup>55</sup> Gray has done more than anyone else to develop and promulgate it and it is unquestionably the majority view at the present time. He evidently thinks that destructibility was effective as a remedy against perpetuities. He says:

50. In *Re Ashforth*, 1 Ch. 535 (1905).

51. 3 T. R. 146, 100 Eng. Rep. 502 (1789).

52. There was the same general acceptance of the doctrine of *Whitby v. Mitchell*, evidenced as early as Fearne's famous illustration, *Contingent Remainders* (4th Am. ed. 1845) 502.

53. Frazer, *Rationale of the Rule against Perpetuities* (1922) 6 Minn. L. Rev. 560, 570.

54. Lewis, *Law of Perpetuity* (1843); *Supplement to same* (1849); Gray, *The Rule Against Perpetuities* (1st ed. 1886); (2nd ed. 1906); (3rd ed. 1915).

55. Lewis, *Law of Perpetuity* (Supplement, 1849) p. 97.

"That for a long time no question with regard to remoteness arose on remainders is not surprising. Remainder there could be none after an estate in fee simple; a remainder after a fee tail could be barred at will; a contingent remainder after a life estate could practically be barred by a fine, and no contingent remainder was good after an estate for years. The reason why so many cases of remoteness arose concerning executory devises and other conditional limitations is that they were indestructible. The destructibility of legal remainders prevented any question arising concerning their remoteness."<sup>56</sup>

and in another place he adds:

"It is true that the indestructibility of executory devises led to the establishment of the rule against perpetuities, while the case with which contingent remainders might be destroyed prevented or postponed the starting of any question as to their remoteness."<sup>57</sup>

With regard to the tortious destruction of the preceding estate in order to defeat a subsequent contingent remainder, he says:

"The docking of an estate tail is a lawful act, which no condition can restrain, while on the other hand, a tortious conveyance by a tenant for life exposes him to a forfeiture of his estate" and "If a trustee to support contingent remainders joins in a conveyance to destroy them he commits a breach of trust."<sup>58</sup>

That such was the effect of the actions spoken of is true, but it does not alter the fact that the destruction of contingent remainders in those and other ways was recognized as effective by the common law courts in numerous cases.<sup>59</sup> The breach of trust might be a strong deterrent, but even if the trustees would not join in the conveyance, the common law attitude toward perpetuities was a preventative. "If there are trustees to support contingent remainders, the remainder cannot be barred by the tenant for life nor can it be conveyed by the remainder man until he attain the age of twenty-one."<sup>60</sup> Here we have evidence of a recognition of a time limit, the result of hostility toward re-

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56. Gray, *The Rule Against Perpetuities* (3rd ed. 1915) sec. 192.

57. *Ibid.*, sec. 285.

58. *Ibid.*, sec. 285.

59. Fearne, *Contingent Remainders* (4th Am. ed. 1845) Chapter V, pages 316-380.

60. Lord Northington in *Marlborough v. Godolphin*, 1 Eden 404, 418, 419, 28 Eng. Rep. 741 (1759). See *supra*, note 46.

straints on alienation, and of its effectiveness in the minds of the bar as a preventative of perpetuities, just as in the case of unbarrable entails.<sup>61</sup>

Gray dismisses the contention that the destructibility of contingent remainders made unnecessary the application to them of the modern rule against perpetuities thus:

"But it is needless to discuss this theory, the unsoundness of which Mr. Lewis has exposed, for both in England and very generally in America contingent remainders have by statute ceased to be destructible. If they were exempted from the operation of the rule against perpetuities, because they could be destroyed, now that they have become indestructible, they must fall within it."<sup>62</sup>

This view is justified where legislation has changed contingent remainders to indestructible interests and put them in a class with executory devises, and executory limitations by way of use.<sup>63</sup> But where the common law legal contingent remainder is still a valid subsisting interest it must have a freehold to support it, and is subject to the common law rules of destructibility.

Lewis, however, says "The test ordinarily allowed for determining the presence or absence of the danger of perpetuities in respect to future limitations, is not their capacity of being alienated, but of being destroyed."<sup>64</sup> This statement tends to weaken much of his argument that contingent remainders should be subject to the modern rule against perpetuities. Again he says,

"Now, it is apprehended that the contention we have been last considering, was—not that there might be a Perpetuity in the form of a remainder, but—that there was an incidental circumstance which averted from such a remainder the risk of becoming a Perpetuity. It was not said there was any direct independent rule of law which excluded a remainder from the general scope of the Rule against Perpetuities, but that, while *prima facie* within the rule, it was in fact, exempted on the ground of one of its legal incidents which indirectly satisfied the purpose of the rule. That legal incident no longer exists."<sup>65</sup>

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61. See *supra*, note 46.

62. Gray, *Rule Against Perpetuities* (3rd ed. 1915) sec. 286.

63. See *supra*, note 9, for English statutes; Gray, *Rule Against Perpetuities* (3rd ed. 1915) Appendices B and C; Contingent Remainders; Inroads made by legislation and judicial decision in the United States upon the rule of destructibility. 11 Cornell L. Q. 408 (1926).

64. Lewis, *Law of Perpetuity* (Supplement, 1849) n. 19.

65. *Ibid.*, p. 134.

The last sentence alludes to the English legislation of 1844 abolishing the destructibility of contingent remainders by forfeiture, surrender, or merger.<sup>66</sup> Like Gray, Lewis considers the matter settled by the abolition of destructibility by statute. In reply to the question why objections based on remoteness had not arisen earlier, Mr. Gray answers that there was no need for it.<sup>67</sup> He adds: "Even had contingent remainders been more frequent, the ease with which the tenant for life could, by feoffment, fine, or recovery, destroy the particular estate necessary to support a contingent remainder would have prevented their becoming practically inconvenient, however remote."

As to the so-called rule in *Whitby v. Mitchell*, that a contingent remainder for life to an unborn person cannot be followed by a remainder to such person's child, Gray finds no authority to support it as a rule of the common law.<sup>68</sup> He answered Sweet's arguments<sup>68a</sup> in his third edition<sup>69</sup> and in the note thereto regards such a rule as "a *cantilena* of lawyers based on insufficient authority" or "an example of *communis error fecit jus*." Certainly if this is true the common error was regarded as law by a numerous group of otherwise able jurists and writers including Fearne upon whom Lewis relied.<sup>70</sup> Thus Lewis depended upon what is an example of the rule in *Whitby v. Mitchell* used by Fearne long before that case was decided. The statement of Fearne is as follows:<sup>71</sup>

"Here indeed it may not be improper to remark once for all, that any limitation in future, or by way of remainder of lands of inheritance, which in its nature tends to a perpetuity, even although there be a preceding vested estate of freehold, so as to take it out of the description of an executory devise, is by our courts considered as void in its creation; as in the case of a limitation of lands in succession, first to a person in esse, and after his decease to his unborn children, and afterwards to the children of such unborn children, this last remainder is absolutely void and there is no carrying of the estate to them in the extent of the estate

66. 8 and 9 Vict., c. 106, s. 8. See also notes 9 and 63, *supra*.

67. Gray, *Rule Against Perpetuities* (3rd ed. 1915) sec. 134.

68. *Ibid.*, sections 125-133, 298a-298i.

68a. Sweet, *Perpetuities* (1899) 5 Law Q. Rev. 71, and others cited by Gray, note 69.

69. *Ibid.* Appendix K, sec. 931 et seq.

70. Lewis, *Law of Perpetuity* (Supplement 1849) 121.

71. Fearne, *Contingent Remainders* (4th Am. ed. 1845) 502.

limited to their parents, namely, to the unborn children of a person in esse, and estate of inheritance, which is an estate tail."

Kay, J. in the case of *Re Frost* simplified matters by merely quoting the above statement to the first semicolon, and then drawing the conclusion that this authorized the application of the modern rule against perpetuities to legal contingent remainders.<sup>72</sup> Lewis' statement was that, "It ought to almost excite surprise that so emphatic a declaration from the pen of Fearne upon a point which intimately concerns contingent remainders, has not had weight in the present controversy proportioned to the value of his authority."<sup>73</sup> Yet it plainly states that Fearne considered his illustration a typical perpetuity, abhorred by the common law. It was not merely a type of transaction subject to the modern rule against perpetuities.

As showing that contingent remainders did not come under the modern rule against perpetuities, we have the Third Report of the Real Property Commissioners of England, a commission formed in 1843. This body reported unanimously that:

"All future interests, not being remainders, are restrained in their limits by the rules of law relating to perpetuities."<sup>74</sup>

They went on to recommend that the rule regarding the failure of contingent remainders to vest in time should be changed by legislation to the effect that every contingent remainder should take effect if the particular estate determined before the remainder vested "becoming in that event (after they were made indestructible) liable to the rules prescribed for restraining perpetuities." This body consisted of seven notable real property lawyers. Butler in his edition of *Fearne On Contingent Remainders* says: The remoteness of a remainder, however great, was no objection to its own creation."<sup>75</sup> Lord Brougham said in *Cole v. Sewell*,

"I was a good deal surprised to find that there was a question raised about the remoteness of the limitation. . . . It (the suggestion) opened my mind to a new and strange view of the law, applying that to contingent remainders

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72. *Re Frost*, 43 Ch. Div. 246 (1889).

73. *Supra*, note 70.

74. A copy of this report is included in *Lewis, Law of Perpetuity* (1843) Appendix I.

75. *Fearne, Contingent Remainders* (4th Am. ed. 1845) 565.

which I always understood must be, from the very nature of the thing, confined to springing uses and executory devises."<sup>76</sup>

Mr. Joshua Williams says, in substance, that there are two important rules regarding the creation of common law contingent remainders: First, the rule requiring that the seisin shall never be without an owner, and second, the rule that if an estate is given to an unborn person for life, followed by an estate to any child of such person, the latter limitation is void. Williams also states that, "it is in analogy to the restrictions thus imposed on contingent remainders that the time limit in the modern rule against remoteness was adopted."<sup>77</sup> Justice Kay stated in the case of *Whitby v. Mitchell*,<sup>78</sup> "I do not want any authority than that of the late Joshua Williams who was certainly one of the best real property Lawyers that have existed in my life time," and Mr. Williams had upheld the existence of that rule as a common law principle.

The conflict of statements by the various writers and judges is unsatisfactory to Gray who demands authorities in the form of decisions, not dicta. Kay, J. did, only five months later, in *Re Frost*, hold that contingent remainders were subject to the modern rule against perpetuities.<sup>79</sup> Space does not allow of a more complete statement of the conflicting views.<sup>80</sup>

### III.

*In the absence of express decision and of legislation making all future interests of a contingent nature indestructible, the common law incidents of contingent legal remainders have not been abrogated in Missouri and other state jurisdictions.*

Until the real property legislation in England in 1925, it was the general consensus of opinion that there were two rules applicable to legal contingent remainders, the modern rule against

76. 2 H. L. C. 230, 4 Dru. & War. 1 (1843).

77. Williams, *Law of Real Property* (24th ed. 1926), rule 1 at p. 492, rule 2 at p. 496.

78. 42 Ch. D. 494 (1889); 44 Ch. D. 85 (1890).

79. 43 Ch. D. 246 (1889).

80. A detailed review of the conflicting opinions is to be found in Sweet, *Can a Contingent Remainder be Void for Remoteness?* (1905) 49 Sol. J. 414. In *Re Ashforth*, Farwell, J. lines up the authorities on the opposing views and adopts the doctrine that the modern rule against perpetuities (remoteness) applies to legal contingent remainders. 1 Ch. 535 (1905).

remoteness, and the rule in *Whitby v. Mitchell*.<sup>81</sup> Two leading English cases sustain the application of the modern rule, *Re Frost and Re Ashforth*.<sup>82</sup>

In *Re Frost*<sup>82</sup> the testator devised freeholds to trustees upon trust for his daughter for life and after her decease to the use of any husband she might thereafter marry, with remainders over to their children by appointment or otherwise, and an ultimate remainder in default of issue. Kay, J. pointed out that the daughter might have married a person not in existence at the testator's death and goes on to say that therefore the limitations after the death of the daughter and her husband were void for remoteness. He recognized the common law limit upon the power to restrain alienation, saying:

"So that it would not merely be tied up for a life in being and twenty-one years after, but for a life in being with remainder for a life in being, with a contingent gift over."<sup>84</sup>

He admits that the rule in *Whitby v. Mitchell* is still in existence, but simply decides that the new rule is all comprehensive and that remote contingencies which would have been void as common law perpetuities are now void for remoteness if they exceed the time limit of the modern rule. He also relied on the first half of the quotation from Fearne, disregarding the latter part in which Fearne was talking of a common law perpetuity in general and not of the modern rule against remoteness. The decision is simply a disregard of other existing law, and an arbitrary interpretation of the modern rule against remoteness as a rigid general rule. That this is a majority view there can be no doubt.

Is the rigidity of its application justifiable? Gray has maintained the doctrine of remoteness and rigidity of application and has had wide acceptance.<sup>85</sup> Another view seems more reasonable. It is that advanced by Frazer and emphasizes what was certainly the object of the common law courts since very early times, the

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81. 22 Halsbury's, *Laws of England* (1912) 364, 365.

82. The two decisions are severely criticized by F. E. Farrer, 51 *Law Q. Rev.* 668 (1935). He says: "that the contingent remainder failed as a contingent remainder simply for not vesting during or eo instante with the expiration of the only particular estate of freehold existing when the settlement creating the remainder came into force" was sufficient basis for deciding the case, and "any reference to the modern rule of perpetuity was wholly otiose."

83. 43 Ch. D. 246 (1889).

84. *Ibid.*, 259.

insistence on the existence of a tenant who could alien within a time that caused no great social inconvenience. He says:

“So the rule against perpetuities took the form of a rule against remoteness in vesting, but its object was to prevent an unreasonable postponement of the power of alienation by a present tenant entitled to the fee. And where that object is not served, the rule should not apply.”<sup>85</sup>

The application of the rule against remoteness in a case like in *Re Frost* where the children of the testator's daughter must come into existence before her death, no matter what husband she marries, is an example of a return to the mediaeval logic and the syllogism in modern times.

The second case, *Re Ashforth*,<sup>87</sup> is relied upon more strongly than the preceding case as demonstrating the applicability of the rule against remoteness to contingent legal remainders. Farwell, J. said it would be sufficient for him to follow the decision of Kay, J. in *Re Frost*, but that he preferred considering the point himself. The testatrix, M. S. Ashforth, had devised real estate to trustees to pay the rents to her three named children and the survivors of them, and from the decease of the longest liver of such children to pay the rents equally among all such of the children born in her life time and within 21 years. After the death of all said grandchildren except one, the estate went to such survivor in tail with remainder over in fee. Testatrix died in 1864, one of her three children died leaving three children in 1870, who are the applicants of the summons in this case, and the other two children of testatrix died without issue. The question was whether the limitation in tail was too remote.

On behalf of the plaintiffs it was urged that this limitation to the surviving child in tail was a legal contingent remainder supported by a particular estate vested in trustees and their heirs during the lives of the grandchildren. If unaffected by any other restraining rule than that forbidding estates to the children of unborn children who were given prior interests, it was valid since it was supported by a particular estate of freehold on the determination of which it must vest in possession. Justice Far-

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85. Gray, *Rule against Perpetuities* (3rd ed. 1915) sec. 820.

86. Frazer, *Rationale of the Rule against Perpetuities* (1922) 6 Minn. L. Rev. 560, 570.

87. 1 Ch. 535 (1905) 21 T. L. R. 329; 49 Sol. J. 350.

well disagreed with Justice Kay's idea that there was such a common law rule as that enunciated in *Whitby v. Mitchell*, and accepted Gray as an authority who had superseded Joshua Williams. Justice Byrne's statement in *Re Hollis Hospital*,<sup>88</sup> "new statutes and the course of social development gives rise to new aspects and conditions which have to be regarded in applying the old principles" appealed to Farwell, J. He saw an analogy between applying the modern rule to contingent remainders and Byrne, J. applying that rule to remote rights of reentry for condition broken; also to Jessel, M. R. applying it to equitable contingent remainders.

The analogy to Byrne's problem is not good, since there was no new social aspect in connection with contingent remainders, and there could be said to be a social need in the matter of remote rights of reentry for condition broken. With regard to equitable contingent remainders it would seem that Farwell, J. did not see that a decision based on the doctrines of equity stressed by Jessel, M. R. was not analogous to the situation he faced. In the case of *Abbiss v. Burney*<sup>89</sup> there was a devise of a freehold to trustees to pay the rents to A for life, and after his death to convey the estate to such son of B as should first attain 25 years. At testator's death B was living and no son of his had attained the age of 25 years. It was held by Jessel, M. R. that the equitable remainder was void since it was not confined within a period of 21 years after lives in being. It was said, however, that *the result would have been otherwise had the remainder been legal instead of equitable* for in such case it must necessarily have taken effect immediately upon the death of A or not at all. The rule that a contingent remainder must take effect on or before the termination of the preceding estate is not applicable in equity. In equity, if the persons entitled to the remainder cannot be ascertained at that time, the chancellor will subsequently enforce a trust in favor of those persons who afterwards fulfill the description of the donees of the gift. *Clearly this application of equitable doctrine makes an equitable contingent remainder indestructible by a break in the seisin* and justifies an application of the rule against remoteness. Farwell, J. said, "It

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88. 2 Ch. 540, 552 (1889).

89. 17 Ch. Div. 211 (1881).

is plain that the courts have acted on the principle that the rule against perpetuities is to be applied where no other sufficient protection against remoteness is attainable," and concluded there was no such protection offered in *Re Ashforth*. Testatrix died in 1864 and the case was decided in 1905. The legislation of 1845, The Real Property Limitation Act,<sup>90</sup> had abolished tortious operation of feoffments, and further provided that contingent remainders were to be protected against forfeiture, surrender or merger of the particular estate. The protection through destructibility had largely disappeared since the above act was applicable to the estate involved. That feature does not seem to have been raised, or at least discussed. It may well be that when contingent remainders are made indestructible, the modern rule applies.<sup>91</sup>

It would seem that the reasoning in the two leading cases above is not strong support for the applicability of the modern rule against remoteness to legal contingent remainders in Missouri, to say nothing of their being conclusive. Actually they had no effect on the local problem.

Another case requiring attention before examining the Missouri cases, is *Whitby v. Mitchell*,<sup>92</sup> in which was enunciated what has been sometimes called the common law rule against remoteness, as contrasted with the modern rule against perpetuities or remoteness. An agreement provided life estates for the husband and wife, then there was a limitation of a legal life estate to an unborn child of named persons who were the beneficiaries of an antenuptial agreement, followed by a remainder to the children of that unborn child. In the Court of Appeal in 1890 all three Lord Justices, Cotton, Lindley and Lopes gave opinions sustaining Kay, J. who had held that there was a rule forbidding the limitation for the life of an unborn person with a limitation after his death to his unborn children. Further all three agree that it was not the same as, and was not supplanted by, the modern rule against remoteness. The existence of any such rule as that laid down by Kay, J. and sustained by the Court of Appeals is disputed by Gray<sup>93</sup> and Farwell, J. in *Re*

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90. 8 & 9 Vict. c. 106, s. 4 and 8. (1845).

91. Kales, *Future Interests* (1920) sec. 662.

92. 42 Ch. D. 494 (1887); 44 Ch. D. 85 (1890).

93. Gray, *Rule against Perpetuities* (3rd ed. 1915) secs. 133; 191-199; 298a-298i; 931-947, and articles by Sweet and others cited. See note 80.

*Ashforth*. This rule has many supporters among the scholars of England as a part of the common law. It is, unless overruled by legislation or decision, in force as a part of the common law in Missouri.

There can be no doubt that the common law destructibility of legal contingent remainders was in effect in most American jurisdictions until, as in England, legislation, and in rare instances judicial decision, made them indestructible.<sup>94</sup> A number of decisions could be cited.<sup>95</sup> Thus in *Appeal of Mifflin*<sup>96</sup> the court says:

"The estate of M— was destructible by her own act. It was entirely within her power to become the owner of the fee simple of the estates granted. It proves nothing to say she did not exercise her power . . . But in considering the application of the rule against perpetuities, that rule requires that the estates in question should be indestructible, and an estate which can be destroyed by the person who holds it for the time being is not indestructible."

In *Caldwell v. Willis*<sup>97</sup> the Mississippi Supreme Court said that a future limitation is void if it may not vest within the period of the rule, "except when the limitation is by way of contingent remainder, which may be cut off by the alienation of the particular tenant (which liability to be defeated in this way is the reason for the exception)." In a recent article on the destructibility of an estate tail in Missouri,<sup>98</sup> and by that it is supposed the writer meant the statutory replacement of the English fee tail, a life estate in the first taker with a (contingent) remainder to the heirs of the body, and a consequent possibility of reverter to the transferor and his heirs, the following conclusion was reached:

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Bordwell, *Iowa Contingent Remainder Law* (1925) 10 Ia. Law Bull. 282, says, "The rule is the outgrowth of English Family settlement and of the tradition of the small group of conveyancing specialists which the English family settlement produced."

94. See *supra*, note 63.

95. *Bond v. Moore*, 236 Ill. 576, 86 N. E. 386, 19 L. R. A. (N. S.) 540 (1908); *Kales, Future Interests* (1920) secs. 310-314; *Faber v. Police* 10 S. C. 376 (1877).

96. 121 Pa. 205, 224, 15 Atl. 525 (1888).

97. 57 Miss. 555, 573 (1880).

98. Ely, *Can an Estate Tail be Docked During the Life of the First Taker?* (1931) Univ. of Mo. Bull., Law Series 45. Hudson, *Land Tenures and Conveyances in Missouri* (1915) Univ. of Mo. Bull. Law Series 3, p. 17, "There would seem to be nothing to prevent a feoffment from having a tortious operation."

“The interest of contingent remainder men in a Missouri estate tail ought to be held destructible either by a merger of the life estate of the first taker with the reversion or by a tortious feoffment of the life estate. Yet there are no decisions so holding. It would seem that, in the light of the existing decisions, partition of such an estate cannot be had, and that there is some question as to whether or not entailed lands are subject to condemnation, . . . Faced with these economic facts (that commerce demands freely alienable urban lands) it is believed that the court should, in every possible and legitimate manner, favor the destructibility of entailed estates, and that the common law doctrines of merger and tortious feoffment should therefore be applied in the manner indicated . . .”

With no decisions to the contra, it is to be kept in mind that “tortious feoffment” is indicated. A conveyance by the life tenant operating under the Statute of Uses would, of course, pass only his life estate.<sup>99</sup> His possession cannot be adverse to the remainderman, except under the most exceptional circumstance, such as an ouster,<sup>100</sup> and the Statute of Limitations does not run against the remainderman until he has a right to possession.<sup>101</sup> All of the foregoing militate in some measure against the doctrine of destructibility except by merger or a tortious feoffment and on these we have no cases. However the common law doctrine of destructibility applies if the contingency does not happen so that there is no contingent remainderman in existence to take at the termination of the supporting estate. The doctrine of valid executory interests created to arise in the future (without a supporting estate) under Missouri statute does not as yet apply to contingent remainders. An analysis of *Buxton v. Kroeger*<sup>102</sup> shows that the estate to arise ten years after the date when the youngest child reached twenty-one was not a contingent remainder, but a springing contingent interest. Destructibility still exists so as to make unnecessary the application of the

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99. *Foot v. Sanders*, 72 Mo. 616 (1880); In *McConnell v. Deal*, 296 Mo. 275, 246 S. W. 594 (1922), the court would not approve a sale of land for the benefit of the life tenant while subject to a contingent remainder. This has been made possible by statute in certain situations. R. S. Mo. 1929, sec. 1546. In the *McConnell* case Graves, J., wanted a trustee appointed to preserve the contingent remainders in the price of the land.

100. *Salmon v. Davis*, 29 Mo. 176, 181 (1859) cited in *Armor v. Frey*; 253 Mo. 447, 161 S. W. 829 (1913).

101. *Hall v. French*, 165 Mo. 430, 442, 65 S. W. 769 (1901).

102. 219 Mo. 224, 117 S. W. 1147 (1908).

modern rule against remoteness to contingent remainders in Missouri.

Next we consider the existence of the rule in *Whitby v. Mitchell* as an additional reason for not applying the modern rule against perpetuities. The first case in which the invalidity of a contingent remainder for remoteness was in issue in Missouri was *Lockridge v. Mace*.<sup>103</sup> There was a devise to the widow for life, remainder to testator's children, remainder over to his grandchildren and remainder in fee to their children. The court cited 1 Washburn, *On Real Property* (5th ed. 1887) p. 115 and vol. 2 of the same work, p. 760. The first gives two rules, that of *Whitby v. Mitchell*, and the modern rule against remoteness, the second the principle of certainty of vesting rather than the possibility of vesting under the modern rule. The court also cited Gray, sec. 214, and held the remainders to the last class void. (The court then went on to hold the whole disposition invalid because of the tainted portion. Gray has criticized the Missouri court for holding the entire disposition void and points out that the authorities cited do not sustain such a result,<sup>104</sup> but the same result was later reached as to entire invalidity in *Shepperd v. Fisher*.)<sup>105</sup> Hudson says this decision makes it clear that "the rule against remoteness applies as well to contingent remainders as to executory devises."<sup>106</sup> If this decision settles the question of the applicability of the rule against remoteness to contingent remainders, nothing further need be said. The court seems to have approved the statement of Washburn as well as that of Gray. The court recognized the invalidity of an estate over to the unborn child of an unborn child to whom the preceding estate had been given, but applied the rule against perpetuities to it. In *Gates v. Seibert*<sup>107</sup> the disposition was held valid, but the court would apparently have applied the rule against perpetuities (remoteness) if it had not been within the time limit. It said, "But the limitation was such that if he should

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103. 109 Mo. 162, 18 S. W. 1145 (1892).

104. *Ibid.*, p. 22. Gray, *Rule against Perpetuities* (3rd ed. 1915) sec. 249a.

105. *Shepperd v. Fisher*, 206 Mo. 208, 245-247, 103 S. W. 989 (1907).

106. Hudson, *The Rule against Perpetuities* (1914) Univ. of Mo. Bull. Law Series 3, p. 12.

107. *Melvin v. Hoffman*, 157 Mo. 254, 270, 57 S. W. 1067 (1900). "The rule does not apply to a vested remainder nor to a contingent remainder which vests within the time."

have a child the estate in remainder would vest in that child certainly within ten months after the death of the father, even though the mother survived him more than twenty-one years. Therefore we hold that the fifth clause of the will was not repugnant to the rule against perpetuities." The court cited 2 Washburn, *On Real Property* (5th ed. 1887) p. 605, 606, which includes the statement "an executory devise to be valid must" (come within the rule against perpetuities)— "But this does not apply to remainders whether contingent or vested;" Citations were also given from Gray's *Rule against Perpetuities*. In *Bradford v. Blossom*<sup>108</sup> the applicability of the rule against perpetuities to contingent remainders is again implicit in the court's opinion, though not requisite to the decision. It was said, "By this paragraph of the will the trustee is given the power to hold the property during the lives in being, Frank and Carrie, and during the lives not in being—of children which might be born of Carrie after the death of the testatrix, an equitable interest in remainder arising at the natural termination of the first lives." *Abbis v. Burney*<sup>109</sup> was not mentioned. *Shepperd v. Fisher*<sup>110</sup> presented for consideration a life estate to a widow, remainder to her daughter Mary for life, remainder to Mary's bodily heirs, with a devise over if the grandchildren died without issue. Instead of holding that the limitation to Mary's bodily heirs was a remainder in fee subject to a limitation over on failure of issue,<sup>110a</sup> the court construed the limitation to Mary's bodily heirs to be a life estate subject to enlargement into a fee if the heirs had issue. The only analogy to such an estate would be the fee conditional at common law. The court held this enlargement and ensuing fee, as well as the executory devise over on failure of such issue to be within the rule against perpetuities and void. The non-sequitur that the whole disposition was therefore void has been referred to.<sup>111</sup> The case is a tangle of inconsistencies but the rule against remoteness was applied, and was applied to what was actually a contingent (though defeasible) remainder

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108. 190 Mo. 110, 88 S. W. 721 (1905); 207 Mo. 177, 105 S. W. 289 (1907).

109. 17 Ch. D. 211 (1881).

110. 206 Mo. 208, 103 S. W. 989 (1907).

110a. A like situation was properly construed in *Schee v. Boone*, 295 Mo. 212, 243 S. W. 882 (1922).

111. See *supra*, note 105.

in fee. Again citations were given from both Washburn and Gray. It was stated that the purpose of the rule was to prevent perpetuities because they restrained alienation,<sup>112</sup> and *Mifflin's Appeal*<sup>113</sup> was cited from Washburn's text. Gray was cited in support of the idea that "In the states where those statutes exist (against destructibility of remainders) the rule of perpetuities applies with equal reason and force to vested as it does to contingent remainders."<sup>113</sup> Again the court said, that Mary might have children born after the mother's death, and such children might have children who, if they survived would be included as remaindermen. "It is thus seen that under the fifth clause of the will the estate may not vest until the birth of an unborn child of an unborn child."<sup>114</sup> So the rule in *Whitby v. Mitchell* is in the mind of the court and is associated with the contingent remainder, but the modern rule against perpetuities (remoteness) is applied. Nothing can be held determined by this case except that the provisions in the will were void, but there is the suggestion running throughout that the court is still of the opinion that the contingent remainder is subject to the rule against perpetuities (remoteness).

Turning to statutory indestructibility, the case of *Buxton v. Kroeger*<sup>115</sup> is only worth discussing because it might be interpreted as an exception to the statement that no Missouri case has held a contingent remainder indestructible.<sup>116</sup> Though called a contingent remainder in the opinion, the interest involved was a contingent executory limitation. A deed conveyed the title to a trustee for the sole and separate use of the wife during life with certain powers in her, then to the use of the husband if he survived the wife. Thereafter the trustee was to collect the rents for their surviving children until ten years after the youngest came of age, when the trust was to cease and the *title was to pass to and become vested in fee* in said children then living, or the heirs at law of such of the children as had died in the meantime. Regarding the gap of ten years after the death of the prior life tenant, the court said,

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112. *Shepperd v. Fisher*, 206 Mo. 208, 239, 103 S. W. 989 (1907).

113. *Ibid.*, p. 241.

114. *Ibid.*, p. 244.

115. 219 Mo. 224, 117 S. W. 1147 (1908).

116. *Supra*, note 98.

"It is a sufficient answer to the inquiry to say that under the provisions of R. S. Mo. 1899, sec. 4596 (now R. S. Mo. 1929, sec. 3112) it was not necessary that there should be any estate created between the end of the life estate and the vesting of the estate in remainder. It was expressly ruled by this court in *O'Day v. Meadows* (1906) 194 Mo. 588, that an estate may be created by deed to commence in the future without any intervening estate to support the same. But aside from all this in our opinion, under the provisions of this deed the legal title to the real estate embraced in such deed *was vested in the trustee*, and he held the same until the period fixed for the termination of the trust which was 10 years after the youngest child reached its majority. (Italics ours)<sup>116a</sup>.

Two points seem to be wrongly judged here. The statute cited did make it possible to create an interest to arise in the future by deed as well as by will but it did not make that interest a contingent remainder or change the common law characteristics of such a remainder. It made possible a new future interest, really possible under the Statute of Uses, but theretofore not recognized by our court. But in the *O'Day v. Meadows* case, it was held that when such an estate is to arise in the future it must vest in interest in the grantees at the time of execution of the instrument. Here it was vested at once in the trustees, not in the surviving children. Valliant, C. J. dissenting, spoke of the Statute of Uses executing the legal title, but he would not have said this of a contingent remainder. Woodson, J., in a separate dissent thought the rule against perpetuities should be applied because it was possible for the unborn child of an unborn child who was given an interest to succeed to that interest, as a purchaser. The case is not authority for the indestructibility of contingent remainders on the theory that, if not in existence when the supporting estate terminates, they may be considered estates "to arise in the future" like executory devises. The only preservation of contingent remainders by statute in Missouri is the saving in favor of posthumous children.<sup>117</sup> This is the first portion of the statute above quoted. Like *Sheppard v. Fisher*, this case contains a number of confused ideas and is valuable only as a decision on the facts involved.

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116a. 219 Mo. 224, 256, 117 S. W. 1147 (1908).

117. R. S. Mo. 1929, sec. 3112. Sec. 3113, *ibid.*, prevents posthumous children from losing under provisions limiting interests over on failure of issue and the like.

The fundamental distinctions laid down by Fearn<sup>118</sup> seem to have been lost sight of by our court during this period:

“A contingent remainder may be limited in conveyances at common law; it relates only to lands, tenements and hereditaments, real or mixed; it requires a freehold to precede and support it, and must vest at farthest, at the instant the preceding estates determine . . . An executory devise is admitted only in last wills and testaments; it respects personal estates as well as real; it requires no preceding estate to support it; and if there be any preceding estate, it is not necessary that the executory devise should vest when the preceding estate determines.”

The same distinction applies to executory limitations by deed. This distinction was recognized and clearly stated in *Sullivan v. Garesche*<sup>119</sup> which involved the necessity of vesting of a contingent remainder on or before the determination of a particular prior estate, and the lack of that feature in an executory devise. The distinction is also clearly drawn in *Deacon v. St. Louis Union Trust Co.*<sup>120</sup> There is, moreover no statute prohibiting the destruction of contingent interests by merger or tortious feoffment.<sup>121</sup> The statute defining the construction of dying without issue, failure of issue and the like, *i. e.*, making such a provision definite failure of issue has, of course, rendered many possible instances of executory limitations on indefinite failure of issue impossible,<sup>122</sup> but our concern is with contingent remainders.

Whether the rule in *Whitby v. Mitchell*, *i. e.* no remainder is valid which is limited to the unborn child of an unborn person to whom the prior estate was given, is part of the common law of Missouri has been disputed.<sup>123</sup> In *Lockridge v. Mace*<sup>124</sup> it appears in approved quotations from Washburn. In *Shepperd v. Fisher*<sup>125</sup> a passage from Washburn is again cited and it contains the same statement regarding two rules, the one in question, and the modern rule against perpetuities. On page 244 the court said:

118. Fearn, *Contingent Remainders* (4th Am. ed. 1845) 418.

119. 229 Mo. 496, 509, 129 S. W. 949, 49 L. R. A. (N. S.) 605 (1910).

120. 271 Mo. 669, 197 S. W. 261 (1917).

121. See *supra*, note 99.

122. R. S. Mo. 1929, sec. 3109.

123. 2 Powell, *Trusts and Estates* (1933) 243 n.; 2 Simes, *Future Interests* (1936) sec. 487.

124. 109 Mo. 162, 18 S. W. 1145 (1892).

125. 206 Mo. 208, 238, 103 S. W. 989 (1907).

"Such births are not only possible but highly probable, in fact, such a child has been born unto Susan Ellen Shepperd since the death of the testator. It is thus seen that the estate under the fifth clause of the will may not vest until the birth of an unborn child of an unborn child; and that under the sixth paragraph it cannot vest in fee in the child born since the death of the testator unto the said Susan Ellen Shepperd until it also has issue born, which will be beyond the allotted time prescribed by the rule, because such issue would be the unborn issue of the unborn bodily heirs of said Susan Ellen Shepperd."

The court then applies the modern rule against perpetuities. So far both decisions show a recognition of the facts necessary for a simple application of the rule in *Whitby v. Mitchell*, and then apply the modern rule instead. In *Loud v. St. Louis Union Trust Co.*<sup>126</sup> the court quotes from *22 Am. & Eng. Ency. Law* (2d ed.) p. 703 defining a perpetuity as "a future limitation, whether executory or by way of remainder, and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within the period fixed and prescribed by law for the creation of future estates and interests and *which is not destructible by* the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested in the limitation." (Italics ours)

The court then quotes from Gray, whose third edition was then available, the definition now generally accepted.<sup>127</sup> The court on page 177 quotes the language of *Buxton v. Kroeger* with respect to *O'Day v. Meadows*,<sup>128</sup> and its misinterpretation is swallowed whole. Then on page 180 we find: "consequently we would have a case where the unborn child of an unborn child might take under the will in question, an interest in and to the trust estate created thereby. This is so obviously a violation of the rule

126. 298 Mo. 148, 170, 249 S. W. 629 (1923).

127. Gill, *Law of Real Property in Missouri* (1924) sec. 817, states: "Any remainder or estate which can by any possibility take effect later than a life or lives in being plus twenty-one years is void because contra to the rule against perpetuities." It is stated in *Blackhurst v. Johnson*, 72 F. (2d) 664 (1934) thus, "Under Missouri Law no future interest, whether legal or equitable, is good unless it must vest, if at all, not later than 21 years and 10 months after termination of life or lives in being at the time of the creation of the interest."

128. *Supra*, note 116a.

against perpetuities that it is only necessary to copy" (from *Shepperd v. Fisher*). To the suggestion that the possibility of an interest going to an unborn child of an unborn child who had been given an interest was not a serious matter, the court cited the passage from *Shepperd v. Fisher*,<sup>129</sup> and said it was nothing to jest about. From page 180 to 184 the court cites the cases we have discussed above and quotes from some of them. The result is a confusion of confused ideas which can be stated only in the mixture of the two rules: That where there is a limitation of an interest to an unborn person and a remainder to that person's child, the disposition is too remote and falls within the rule against perpetuities. Again the court held the whole disposition void as in *Lockridge v. Mace* and *Shepperd v. Fisher*.<sup>130</sup>

In *Lane v. Garrison*<sup>131</sup> there was a limitation to trustees to pay a portion of the income of a portion of the estate to a grandson for life (leaving out immaterial provisions) and to the grandson's issue when they reached the age of twenty-one, with provisions over on failure of issue. After deciding the case, the court by way of dictum in answer to an attempt to raise the issue of validity under the Rule in *Whitby v. Mitchell*, (after pointing out that this issue raised first on appeal was a departure from the theory of the petition) said:

"But it is urged that the whole provision as to the trust fund in question is void because it violates the rule as to perpetuities, in that an unborn child of an unborn child of said Clark Garrison might take thereunder. . . . But we do not regard this fact as in and of itself violating the rule as to perpetuities if said unborn child must be born or take, if it takes at all, within a life or lives in being and twenty-one years and the period of gestation thereafter."

We must keep in mind that the point was not in issue, and that the limitation was not in the express form of a limitation to the unborn child of an unborn child. It was to the issue of Clark Garrison if he have issue. That, under the statutes of Missouri, must mean issue living at the death of the named taker, so any interest over to his issue must vest at his death or not at all. As a contingent remainder which would vest on his death or not at all, it was destructible and did not fall under either rule

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129. *Supra*, note 125.

130. *Supra*, note 105.

131. 293 Mo. 530, 239 S. W. 813 (1922).

against perpetuities. This case cannot be said to do away with the rule in *Whitby v. Mitchell*, if it were conceded that such a rule exists in Missouri.

It would seem that the Missouri supreme court does not consider the rule in *Whitby v. Mitchell* eliminated, since in 1933 in *Greenleaf v. Greenleaf*<sup>132</sup> the court had occasion to consider the application of the rule and, after a clear exposition of the issue regarding its existence, said: "It is, however, unnecessary for us further to discuss the rule, or whether it has been abrogated by the rule against perpetuities or is in fact but an instance of that rule; to do so would be, so far as this case is concerned, a discussion of a moot question. The rule has no application to the devise in question." Thus we have no decision that the rule in *Whitby v. Mitchell* is not the law in Missouri, but there are at least five cases in which the substance of the rule is stated and the modern rule against remoteness is unnecessarily applied.

The Missouri court took Washburn's 1887 edition and Gray's first edition of 1886 and applied both in the *Lockridge v. Mace* case in 1892. *Whitby v. Mitchell* has been decided in 1887, and *Re Frost* in 1889, but neither was noticed. In *Lockridge v. Mace* the court seems to have taken the first rule of Washburn (the rule in *Whitby v. Mitchell*) and used it as an instance of the rule laid down by Gray. The succeeding cases repeated this construction and in succeeding cases derived their authority from Washburn, Gray, *The American and English Encyclopedia of Law* and prior decisions of their own court, repeating the errors until we have them all gathered in one case, *Loud v. St. Louis Union Trust Co.* in 1923. In the meantime *Re Ashforth* had been decided in 1904 before *Shepperd v. Fisher* (1907), *Buxton v. Kroeger* (1908) and the others commented on herein. In fact but two, the *Lockridge* case and *Gates v. Seibert* preceded the three important English cases and *Whitby v. Mitchell* was not even discussed until 1933 in *Greenleaf v. Greenleaf*. The destructibility of contingent remainders as an antidote for perpetuities seems to have been overlooked altogether. There are no statutes making contingent remainders indestructible. We are uncertain whether the rule of *Whitby v. Mitchell* is law in Missouri or not.

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132. *Greenleaf v. Greenleaf*, 332 Mo. 402, 408, 58 S. W. (2d) 448, 451 (1933).

The distinction between contingent remainders and executory limitations is not clearly drawn.

It seems that we may fairly say that the rule against perpetuities does apply to contingent remainders in Missouri, but that the results have been arrived at without any definite elimination of the destructibility element or of the rule in *Whitby v. Mitchell*. They could exist and in the past have continued side by side. The object of all three was to prevent perpetuities in the form of undue restraints on alienation. That the enforcement of the modern rule according to the letter is not always desirable is seen in the varying attitudes of the judges in facing situations in which they say there arises no undue inconvenience to the public.<sup>133</sup> It might be well to look at the statement of Powell<sup>134</sup> in what may be considered the latest acceptable attitude toward the matter:

“The fact of alienability is unduly suspended when the possibility that the *indestructible and* contingent character of the future interest will continue for more than the permissible period, make it unlikely that the owners of the future and other interests will unite in a conveyance of the complete ownership. While phrased frequently as a rule against remoteness of vesting, *the common law rule against perpetuities is merely an extension of the judicial safeguards of alienability.*” (Italics supplied).

With the foregoing in mind, it is to be hoped that the court will have an opportunity to definitely state whether the modern rule is now our *exclusive* remedy in problems of perpetuities.

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133. Gill, *The Rule Against Perpetuities as it Affects Contingent Future Interests in Missouri* (1936) 21 ST. LOUIS LAW REVIEW 209.

134. 12 *Encyclopedia of the Social Sciences* (1935) 82.