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Manley O. Hudson

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EXECUTORY LIMITATIONS OF PROPERTY IN MISSOURI

I INTRODUCTORY

Tho the Supreme Court of Missouri has been called upon to handle a great volume of litigation concerning the construction of deeds and wills during the past few years, many of the problems which continually arise in connection with the creation of future interests in property are still subject to confusion in Missouri law. The court has been very diligent in its efforts to effectuate the intentions of grantors and testators in such litigation, and has frequently gone very far toward effectuating real or supposed intentions not actually expressed.¹ But in an important minority of cases, expressed intentions have been thwarted as a result of the misapplication of some of the old rules of the common law restricting the creation of future interests. There has been too little consideration of the reasons behind these rules, and the court has not shown much disposition to avail itself of the modern development of them outside of court opinions. The result has been the establishment in Missouri law of some highly artificial rules which defeat the very intentions to which the courts have been enjoined to "have due regard."² For example, as the writer has pointed out in an earlier number of the Law Series,³ the rule against perpetuities was so applied in *Lockridge v. Mace*⁴ and *Shepperd v. Fisher*⁵ as to invalidate limitations which have frequently been upheld in other jurisdictions; and it has been sug-

1. See *Bean v. Kemmuir* (1885) 86 Mo. 666; *Cross v. Hoch* (1899) 149 Mo. 325; *State ex rel. Farley v. Welsh* (1913) 175 Mo. App. 303.

2. Since 1815, a statute has directed that all courts "concerned in the execution of any last will or testament, shall have due regard to the true intent and meaning of the testator." 1 Missouri Territorial Laws, p. 411, now Revised Statutes 1909, § 583.

3. 3 Law Series, Missouri Bulletin, p. 23.

4. (1891) 109 Mo. 162.

5. (1907) 206 Mo. 208.

gested in two Missouri decisions⁶ that the artificial rule of *Whitby v. Mitchell*,⁷ to the effect that any limitation to an unborn child following a limitation to its unborn parent is void, is a part of Missouri law.⁸

The greatest uncertainty prevails with reference to limitations which cut short estates previously created and limitations which are intended to have a future operation. The court continues to repeat some of the old feudal maxims of the early common law as if they still had life, and in some cases they have been invoked to defeat expressed intentions, the effectuation of which would violate no principle of public policy. It is common to read in the current reports, for instance, that "a fee cannot be limited on a fee"⁹ and that "a freehold cannot be created *in futuro*."¹⁰ In numerous cases the court has accepted the doctrine that any executory limitation after a fee simple is void if a general power of disposition is conferred on the taker of the fee simple. Yet there has been almost no exposition of the reasons for such a doctrine, and the numerous discussions of it elsewhere have apparently escaped the court's notice.¹¹ Many members of the bar must have shared the delight with which the writer greeted the opinion in *Gibson v. Gibson*¹² a few years ago and the attempt there made to restate the doctrine as applied in Missouri decisions—many must also have shared his disappointment that the actual decision in *Gibson v. Gibson* contributed so little toward resolving the doubts left by the previous cases.

This study will deal with the present position of executory limitations of real and personal property in Missouri law, which

6. *Lockridge v. Mace* (1891) 109 Mo. 162; *Shepperd v. Fisher* (1907) 206 Mo. 208. See also *Buxton v. Kroeger* (1908) 219 Mo. 224.

7. (1890) 44 Ch. Div. 85.

8. See the writer's fulmination against this suggestion in 3 Law Series, Missouri Bulletin, p. 29.

9. *Green v. Sutton* (1872) 50 Mo. 186; *Cornwell v. Orton* (1894) 126 Mo. 335; *Walton v. Drumtra* (1899) 152 Mo. 489.

10. See *O'Day v. Meadows* (1905) 194 Mo. 588, 621.

11. Professor Gray's very thoro analysis has become the classic treatment of this topic. Gray, *Restraints on Alienation* (2d ed.) § 74 *et seq.* But it has not been referred to in the numerous decisions of the Missouri court handed down since it was published.

12. (1911) 239 Mo. 490.

will involve a consideration of their validity at common law and under the English statutes of uses and wills and under the Missouri statutes, and an analysis of the Missouri decisions. The doctrine that any limitation after a fee simple to which is added an absolute power of disposal is void, will be examined particularly, and an effort will be made to point out a way of escape from it. The term executory limitation will be used with reference to the creation of executory interests¹³ in real and personal property by deed or by will; when contained in a will, such limitations will be called executory devises or bequests. The term executory interests in its broad sense should be contrasted with the term vested interests, and as such it includes contingent remainders; but it will be used in this study in the narrower technical sense which excludes all future interests capable of taking effect as remainders.¹⁴ It must be kept in mind that an executory interest may be either certain or contingent, but it can never be vested.¹⁵ It will be profitless to attempt a further definition without a review of the early common law and the effect of the statutes of uses and wills. The history of the subject makes it necessary to treat separately of real property and of personal property.

13. For an exhaustive classification of executory interests, see Smith, *Executory Interests*, § 75. (Smith's work is published as the second volume of *Fearne's treatise on contingent remainders*.)

14. "An executory devise is strictly such a limitation of a future estate or interest in lands or chattels, tho in the case of chattels personal it is more properly an executory bequest, as the law admits in the case of a will, tho contrary to the rules of limitation in conveyances at common law." *Fearne, Contingent Remainders*, p. 386. And Butler adds in a note, "Its being contrary to the rules of limitation in conveyances at common law, gives rise to two rules universally adopted in respect to executory devises; that wherever a future interest is so limited by devise as to fall within the rules laid down for the limitation of contingent remainders, or the estate limited by it is such as can take effect as a contingent remainder, it shall never take effect as an executory devise."

15. The similarity in nature between certain executory interests and vested remainders is frequently neglected. See Smith, *Executory Interests*, § 90. If A devises land to B from and after ten years after his death, B takes a springing executory interest tho the date is certain; the effect is the same as if A had devised to his heir for ten years, remainder to B. In the latter case B would be said to have a vested remainder, or more properly, he should be said to be seised subject to A's term. *Cf. Scott v. Scott* (1759) *Ambli.* 383.

II VALIDITY OF EXECUTORY LIMITATIONS IN GENERAL

A. *Of Real Property*

1. *At Common Law.* While it is a familiar principle that the early common law did not allow a fee to be limited on a fee, the reason for it is frequently misstated. It was not because a feoffor or a grantor had nothing remaining in himself to give away after passing the biggest estate known to the law.¹⁶ The explanation is to be sought in the history of feudal tenure. The early common law was developed in a feudal society based on land tenure and its theories concerning the creation of future interests in land were determined by the exigencies of tenure.¹⁷ In the feudal mind the conception of seisin occupied the important place which in modern times we have given to the conception of title. The feudal lord insisted that at all times some one should be seised of his land, i. e., possessed of it under claim of such an interest as would render him responsible to the lord for the performance of the feudal dues.¹⁸ Such a tenant, i. e., one seised of a freehold, was the only person against whom a writ could be directed in a real action. This importance ascribed to seisin led to the establishment of the principles, first, that the seisin could not be put in abeyance, and second, that no transfer of a present freehold could be effected except by livery of seisin. The prohibition against placing the seisin in abeyance precluded the creation of future limitations unsupported by preceding estates—thus if A desired to convey to B from and after a future date, the conveyance could not be effected by a present livery of seisin for the seisin which would thereby pass to B would be in abeyance until the time for B's enjoyment, and no other method of conveying a freehold was known to the common law. Hence was established the principle that a freehold could not be created to com-

16. Such an explanation is given in *Green v. Sutton* (1872) 50 Mo. 186, where the court said that "when the fee—the whole estate—is disposed of nothing remains." See also *Reinders v. Koppelman* (1878) 68 Mo. 491; 2 Blackstone, Commentaries, 164.

17. The writer has expressed the opinion that tenure still exists in Missouri in 8 Law Series, Missouri Bulletin, p. 4. But it does not follow that the feudal rules must be applied.

18. Challis, Real Property (3d ed.) p. 100.

mence *in futuro*. Furthermore, successive limitations were void if they left the seisin in abeyance—if A enfeoffed B for life and attempted at the same time to convey to C and his heirs one year after B's death, the seisin would be in abeyance during that year and the limitation to C was void.¹⁹ It was for this reason that a remainder was required to fit immediately after the particular estate without any gap between them. But the inhibition against placing the seisin in abeyance did not prevent a shifting of the seisin from one person to another and it is difficult to find any logical explanation of the common law rule that the seisin could not be made to shift. If A enfeoffed B for life with a proviso that if B should go into the army the land should go to C and his heirs, C took nothing—he had no remainder because it was an ineffectual attempt to cut short B's life estate. So if A enfeoffed B and his heirs with a proviso that if B should go into the army the land should go to C and his heirs, C took nothing because the seisin had passed to B from whom it could not be made to shift by A's stipulation at the time of the feoffment. It was a consequence of the early law's aversion to a shifting of the seisin that a remainder could not lap over the particular estate and that a fee could not be limited on a fee. It was essential to a remainder that there should be neither gap nor lap.

But the exigencies of seisin did not forbid a feoffor's creating certain future interests in himself. If A enfeoffed B for life, B took the seisin for but a limited period after which it continued in A who had a *reversion*. If A enfeoffed B and his heirs so long as a certain tree should stand, it could not be said definitely whether A had kept any certain interest, for the tree might stand forever; so A's interest was denominated a *possibility of reverter*.²⁰ Such a possibility could not be created in C nor could it be assigned to C subsequently to its creation in A. It did not in any sense cut short B's estate, for A would not take until after the expiration of B's estate. But A might have provided

19. Cf. Gray, *Perpetuities* (3d ed.) § 918.

20. Possibilities of reverter may have been abolished by the statute of *Quia Emptores*. See Gray, *Perpetuities* (3d ed.) § 31. Their existence in Missouri today depends upon the existence of tenure and the force of *Quia Emptores*. See 8 Law Series, Missouri Bulletin, p. 10.

for B's estate to be cut short by annexing a condition subsequent, for breach of which a right of entry could be reserved to A; but such a right of entry could not be reserved or assigned to a stranger.²¹

At common law, therefore, the only future interests which could be created in another than the feoffor himself were remainders.²² After a time, contingent remainders were recognized;²³ but the common law allowed no other executory limitations.²⁴ A conditional limitation was legally impossible, but the liberal enforcement of trusts by courts of equity without regard to the restrictions prevailing at law paved the way for the introduction of new legal future interests by the statute of uses.

2. *Under the Statute of Uses.* Before the enactment of the statute of uses in 1536,²⁵ it was possible to provide for a shifting of the beneficial enjoyment of land and for the future existence of beneficial interests by means of uses. The person clothed with the legal estate held the seisin and was responsible for feudal dues, and courts of equity proceeded to act upon his conscience without regard to the artificial rules about abeyance of the seisin and conveyance by livery of seisin. The statute of uses gave legal sanction to the uses which equity had previously enforced, with the result of making possible future dispositions of the seisin which had previously been forbidden at law, tho it continued to

21. See *Kennett v. Plummer* (1859) 28 Mo. 142; 5 Law Series, Missouri Bulletin, p. 13.

22. *Cornelius v. Smith* (1874) 55 Mo. 528, 532. "As a matter of history it is a mistake to think that a remainder is so called because it is what remains after a 'particular estate' has been given away." "If after the expiration of one estate the land is not to come back to the donor, but is to stay out for the benefit of another, then it 'remains' to that other." 2 Pollock and Maitland, *History of English Law*, p. 22. Blackstone's oft repeated statement about remainders is not historically accurate and is misleading. 2 Blackstone, *Commentaries*, 164.

23. The recognition of contingent remainders probably dates from the fifteenth century. Williams, *Real Property* (17th Int. ed.) p. 411. See 8 Illinois Law Review 231.

24. It seems unnecessary to include curtesy and dower in this classification, tho strictly they are within it. Professor Gray includes them. Gray, *Perpetuities* (3d ed.) § 5 *et seq.* See also a discussion of future interests at common law in Fearn, *Contingent Remainders*, p. 381, note.

25. 27 Henry VIII, c. 10.

be impossible to put the seisin in abeyance. The use as it had been known in equity was a light and nimble thing and it kept this quality after the statute made it a legal interest. Hence after the statute, in any conveyance to uses effected by any of the common law methods, or in any agreement to stand seised to uses which could be effectuated either as a bargain and sale or as a covenant to stand seised, it was possible to create executory limitations without reference to the common law restrictions. The ordinary feoffment was not changed by the statute, i. e., the common law conveyances remained subject to the rules of the common law so far as the creation of future interests was concerned. But if such a conveyance were made to uses, or if by bargain and sale or covenant to stand seised a use were raised, then the use could be made to spring or shift freely.²⁶

After the statute, if A enfeoffed B and his heirs from and after a future date, B took nothing as before the statute. But if A agreed for a consideration to stand seised to the use of B and his heirs from and after a future date, B took a valid springing use in fee simple, and it was cognizable both at law and in equity. Or to accomplish the same result, A might enfeoff X and his heirs to the use of A and his heirs until the future date and thereafter to the use of B and his heirs. If A agreed to stand seised to his own use for life, and then to the use of B and his heirs, the statute executed the uses so that A thereafter had but a life estate.²⁷ Similarly, it has become possible to create a future estate which would have failed as a remainder at common law. A may agree to stand seised to the use of B for life and one year after B's death to the use of C and his heirs, for upon the termination of B's life estate, the use will result to A in fee and at the end of the year it will *spring* to C. Nor is

26. In *Pollard v. Union National Bank* (1877) 4 Mo. App. 408, 412, the court said that "it is almost a part of the definition of shifting and springing uses that they are contrary to the rules of the common law."

27. While the statute applies in terms only where one stands seised to another's use, in such cases "equity supplies a common law conveyance by holding the covenantor himself to be a trustee and to stand seised to the use." Gilbert, *Uses* (Sugden's ed.) 150-152, note, quoted in 1 Gray, *Cases on Property* (1st ed.) p. 505.

the common law prohibition against shifting any longer important. A may enfeoff X and his heirs to the use of B for life, but if B should go into the army then to the use of C and his heirs, and C will have a valid shifting use; or A may agree to stand seised to the use of B and his heirs but if B should enter the army then to C and his heirs. But as before the statute, if A enfeoffs B and his heirs and provides that on an event the estate shall pass to C and his heirs, C would have nothing.

The statute of uses thus made it possible to create a freehold *in futuro* and to limit a fee on a fee, and to create future interests which were incapable of taking effect as remainders. But the courts continued to approach every future limitation with a desire to effectuate it if possible as at common law before the statute of uses—hence the principle that what can be a remainder must be a remainder.

3. *Under the Statute of Wills.* The common law did not permit a devise of lands, but for some time prior to the statute of uses the devise of uses was permitted as a result of equity's forcing the feoffee to uses to hold to the uses named in the will of a feoffor or *cestui que use*. When the statute converted uses into legal interests, the chancery courts discontinued their enforcement of the devises of uses. But soon afterward, in 1540, the statute of wills authorized the devise of any socage lands "at the free will and pleasure" of the tenants.²⁸ It was for some time doubtful whether this statute permitted the creation of executory interests by devise, but the doubt was dispelled by the decision of the celebrated case of *Hinde v. Lyon*.²⁹ Historically, the sanction of executory devises may have antedated the recognition of executory interests limited in conveyances *inter vivos* under the statute of uses;³⁰ but the same liberality and freedom from common law restrictions were extended to both, and in view of the incompleteness of the statute of wills in this respect, this may have been

28. (1540) 32 Henry VIII, c. 1.

29. (1577) 3 Leonard 64.

30. Challis, *Real Property* (3d ed.) p. 170. Cf. *Cornelius v. Smith* (1874) 55 Mo. 528, in which it was said that "the courts have extended to these [family] settlements the same liberality of construction they have given to executory devises."

the result of an analogy drawn between executory interests created in wills and those made possible by the statute of uses. It would seem that no important distinction should be drawn between executory devises and executory limitations effected by deed and that any future interest which is valid as an executory devise should be valid as a springing or shifting use created by an *inter vivos* conveyance, and conversely.³¹

4. *Under Missouri Statutes.* The common law as it was adopted in Missouri in 1816³² must have been as it was modified by the statutes of uses and wills. Indeed, the English statute of uses itself was included in the body of law adopted by the Missouri statute,³³ for it cannot within the terms of the Missouri statute be said to have been "local to that kingdom"; the reenactment of the statute of uses in 1825³⁴ was therefore unnecessary and effected no important changes. The English statute of wills was not included because of the Missouri statute of wills,³⁵ but the latter must be construed to permit the creation of future interests under the same restrictions which obtained under the English statute of wills.

31. But in *Adams v. Savage* (1703) 2 Salk. 679 (also reported in Ld. Ray 854) and in *Rawley v. Holland* (1712) 22 Vin. Ab. 189, a use limited by deed to a person not *in esse* after an estate for years was held to be void. But these cases have been severely criticised by eminent writers. See an excellent article on "A point in the Law of Executory Limitations" by Challis, 1 Law Quarterly Review 412; Sugden, Powers (8th ed.) p. 35 *et seq.*; Sanders, Uses (Amer. ed.) 112. In 21 Law Quarterly Review 261, Professor Kales attributes the decision in *Adams v. Savage* to the fact that it was decided when it was not yet certain that the common law restrictions did not apply to springing executory interests created by deed.

32. 1 Missouri Territorial Laws, p. 436.

33. *Guest v. Farley* (1853) 19 Mo. 147.

34. Revised Statutes 1825, p. 215. The Missouri Statute copied verbatim the efficacious words of the English statute. In 1835 a condensed statute was enacted without any important change in effect. Revised Statutes 1835, p. 119. In 1845, the original wording was restored, but with the word "found" substituted for "from" in the expression "be found henceforth clearly deemed and adjudged". This is apparently a typographical error, and it was corrected in Laws of 1909, p. 901. The statute is now Revised Statutes 1909, § 2867.

35. A statute of 1807 authorized devises of lands. 1 Missouri Territorial Laws, p. 131, § 18. It was reenacted in 1815. *Ibid.*, p. 405, § 25. This statute follows the English statute of wills almost verbatim, in that it permits any tenant of land to devise "at his or her will or pleasure." No other terms of the statute can refer to the creation of future interests.

There has been very little legislation to affect executory interests since the adoption of the common law. In 1825, the rule in Shelley's case was abolished as to devises,³⁶ and in 1845 it was completely abolished as to both deeds and wills.³⁷ A statute of 1845 provided that "where a remainder . . . shall be limited to take effect on the death of any person without heirs, or heirs of his body or without issue," it should be construed as a definite failure of issue.³⁸ In 1845 the necessity of a contingent remainder's fitting immediately on the particular estate was relaxed as to posthumous children,³⁹ tho the Supreme Court has since held in *Aubuchon v. Bender*⁴⁰ that this statute "was but an affirmance of what had already become the law;"⁴¹ and in the statute to this effect there was appended, apparently as a rider, for it has no relevancy to what preceded,⁴² the provision that, "hereafter, an estate of freehold, or inheritance, may be

36. Revised Statutes 1825, p. 794. See 1 Law Series, Missouri Bulletin, p. 10, note 35.

37. Revised States 1845, c. 32, § 7. See *Tesson v. Newman* (1876) 62 Mo. 198.

38. Revised Statutes 1845, c. 32, § 6; now Revised Statutes 1909, § 2873. Unlike the English statute from which it was copied, 1 Victoria, c. 26, § 29, this Missouri statute makes no exception where a contrary intention is expressed.

39. Revised Statutes 1845, c. 32, § 9; now Revised Statutes 1909, § 2876. The Statute is fashioned on the English statute of 1699, 10 & 11 William III, c. 16.

40. (1869) 44 Mo. 560, 569.

41. The Missouri court relied upon the decision of the House of Lords in *Reeve v. Long* (1694) 3 Levinz 408, reversing the King's Bench decision in 1 Salk. 227. But it should have been noted that the remainder in *Reeve v. Long* was created in a devise. The English statute, tho due to the judges' dissatisfaction with the decision of the House of Lords in *Reeve v. Long*, did not mention remainders created in wills. In a note to Coke, Littleton, 298a, Butler says that "there is a tradition that as the case of *Reeve v. Long* arose upon a will, the Lords considered the law to be settled by their determination in that case; and were unwilling to make any express mention of limitations or devises made in wills, lest it should appear to call in question the authority or propriety of their determination." The Missouri statute mentions only conveyances; it was not enacted at the time of the execution of the deed in *Aubuchon v. Bender*, so that the decision in that case extends *Reeve v. Long* to *inter vivos* conveyances independently of statute.

42. This irrelevancy was pointed out in *O'Day v. Meadows* (1905) 194 Mo. 588, 621.

made to commence in future by deed, in like manner as by will."⁴³ It seems probable that the addition of this clause was due to a failure to appreciate the possibility of creating executory limitations in *inter vivos* conveyances by way of springing and shifting uses. Estates of freehold or inheritance were already susceptible of being created *in futuro* by any deed which operated as a bargain and sale or as a covenant to stand seised or as a common law conveyance to uses,⁴⁴ and in view of the fact that most if not all conveyances then operated either by way of bargain and sale or covenant to stand seised, there would seem to have been no need for this legislation. But as the writer has shown in a previous number of the Law Series,⁴⁵ it was in 1845 and is now possible to have a conveyance operate as a feoffment and the statute under consideration made possible the creation of such freeholds *in futuro* by such a conveyance or by a surrender or exchange without the employment of uses; and taken together with the statute of 1865 authorizing statutory grants,⁴⁶ it authorizes the creation of freeholds *in futuro* by statutory grant.⁴⁷ There can be no doubt about the possibility of creating springing future interests under this statute; but as to shifting interests the case is not so clear. The provision for a freehold to commence *in futuro* may not include shifting interests, i. e., it may have reference only to deeds which create estates which are limited to begin at a future time and not to deeds which create interests limited to cut short other estates created at the same time. But even if such a distinction were made in applying the statute, it would be of small consequence except for the doubt in the decisions as to the possibility of creating shifting interests by a conveyance to uses

43. Revised Statutes 1845, c. 32, § 9, now Revised Statutes 1909, § 2876.

44. *Allen v. DeGroot* (1891) 105 Mo. 442.

45. 8 Law Series, Missouri Bulletin, p. 11.

46. Revised Statutes 1865, c. 109, § 1, now Revised Statutes 1909, § 2787.

47. See 8 Law Series, Missouri Bulletin, p. 21. It may be contended that the statute of 1865 authorizes the transfer but not the creation of future interests by statutory grant. This may be supported by the argument that the statute was not enacted to change the rules of limitation, but merely to afford a new method of conveyance. But *Cf. Abbott v. Holway* (1881) 72 Maine 304, cited in *O'Day v. Meadows* (1905) 194 Mo. 588, 623.

or a conveyance operating under the statute of uses. It can not be contended that the statute operated as a restriction on existing methods of creating future estates.

This statute concerning the creation of freeholds *in futuro* "by deed, in like manner as by will", was considered by the Supreme Court in *O'Day v. Meadows*,⁴⁸ in which the conveyance in question clearly operated as a bargain and sale because of the expressed consideration.⁴⁹ The court purported to hold that the statute applied, but it is clear that the mode of operation of the conveyance was misconceived, and that in view of its operating as a bargain and sale there was no necessity of relying on the statute. The case is therefore of little authority,⁵⁰ the court's statement that it was enacted "to change the common law rules applicable to conveyances," seems to have been made without any understanding of the change actually effected.

5. *Under Missouri Decisions.* The cases have not emphasized the distinction between executory interests created by will and those created by deed. But in view of the foregoing survey the distinction must be borne in mind during a study of the decisions.

The statement that a fee cannot be limited on a fee has frequently been repeated in the opinions, but the decisions have robbed it of its meaning. In *Faust v. Birner*⁵¹ there was a devise

48. (1905) 194 Mo. 588.

49. The conveyance in *O'Day v. Meadows* was expressed to be made in consideration of one dollar, which was sufficient to raise the use. On the requisites of a bargain and sale, see 8 Law Series, Missouri Bulletin, p. 19. *O'Day v. Meadows* was cited in *Buxton v. Kroeger* (1908) 219 Mo. 224, 256, for the proposition that it is not necessary "that there should be any estate created between the end of the life estate and the vesting of the estate in remainder." But it is clear that it stands for no such proposition.

50. In *Aldridge v. Aldridge* (1906) 202 Mo. 565, the court referred to this statute and said that "it is essential to the validity of a deed purporting to convey such an estate that the right to the future estate conveyed vest in the grantee immediately tho possession be deferred." But this must not be taken to mean that the future estate may not be contingent, tho there must be a certain right to the estate on the happening of the contingency. *Christ v. Kuehne* (1902) 172 Mo. 118.

51. (1860) 30 Mo. 414. At the death of the testator his widow was *enclent* of a child which was never born alive. The remainder to that child may be neglected since a stillborn child will be taken never to have lived at all. *Marsellis v. Thalheimer* (1830) 2 Paige 35.

to the testator's widow for life with remainder in fee to her children by any husband whom she might later marry, but a proviso that if the wife died without issue the land should be divided between the testator's brothers. The testator's widow remarried and had three children and her husband was induced to pay a certain sum to the testator's brothers for an interest which they claimed to have under the will and which they purported to convey to him. The wife sued as administratrix of the second husband to recover the sum so paid. The trial court had instructed the jury that "by a plain and settled principle of law the defendants had no interest in the land in question under the will." In reversing and remanding the case, the Supreme Court said that it was a "good executory devise to the brothers."⁵² Tho it may be doubted whether this was an executory devise,⁵³ the decision is a clear recognition of the possibility of future interests created by executory devise.

In *Jecko v. Taussig*,⁵⁴ it was admitted that "a fee simple may be granted in such a way and upon such conditions that it may be defeated by the happening of some future event," and the court seems to have had in mind a conditional limitation after a fee simple. But some doubt was thrown on this by the statement in *Cornelius v. Smith*⁵⁵ that "under the old common law convey-

52. The court held that as an executory devise it was saved from remoteness by the statute making all failures of issue definite. Revised Statutes 1845, c. 32, § 67; now Revised Statutes 1909, § 2873. But this statute in terms applies only where *remainders* are so limited. See 3 Law Series, Missouri Bulletin, p. 10; *Naylor v. Godman* (1891) 109 Mo. 543; *Yocum v. Siler* (1900) 160 Mo. 281.

53. No attention was given by the court in *Faust v. Birner* to the principle that what can be a remainder must be a remainder instead of an executory devise. Smith, *Executory Interests*, p. 71. Applying this principle, it would seem that at the death of the testator his widow had a life estate, with a contingent remainder to her children to be born and an alternate contingent remainder to the testator's brothers. Whether this latter can become a good executory devise is a question of considerable nicety. A similar question arises in applying the Missouri statute concerning estates tail; it has been discussed in an article on "Estates Tail In Missouri" in 1 Law Series, Missouri Bulletin, p. 27.

54. (1869) 45 Mo. 167. It is not clear that a life estate with a power to convey the fee was not created in *Jecko v. Taussig*. *Vide post*, p. 38.

55. (1874) 55 Mo. 528.

ances an estate could not be limited to a stranger to the deed, except by way of remainder, and it may be that a legal title cannot be created in a stranger to a deed under the statute of uses." In the latter case, there was a bargain and sale to A, and her heirs with a proviso that if B should pay certain sums and keep his father during life the land should go to B and his heirs, otherwise it should go to the heirs of B's father.⁵⁶ B failed to perform the conditions and the court treated A as trustee for the heirs of B's father, tho the executory limitation would seem to have been good as a shifting use executed by the statute and the heirs ought to have been held to have had the legal estate.

The validity of an executory devise seems to have been assumed in *Harbison v. Swan*,⁵⁷ but the point was not specially considered. In *Pollard v. Union National Bank*,⁵⁸ the St. Louis Court of Appeals gave very careful consideration to the creation of future interests after the statute of uses. There was a bargain and sale to A and his heirs in trust for B, and if C survived B then to C, otherwise the "property shall remain in [B and her heirs] subject to her absolute control and disposition." No question was raised as to the execution of the use in B and C,⁵⁹ but it was held that the executory limitation to C was good. It was contended that C took nothing because of the attempt to limit a fee upon a fee, but the court answered that such arguments, "so

56. B's father had caused the land to be conveyed by one who held subject to his use (tho it was not manifested in writing). On the right of B to share in the gift in default of his supporting his father, cf. *Holloway v. Holloway* (1800) 5 Ves. 399; *Welch v. Brimmer* (1897) 169 Mass. 204.

57. (1874) 58 Mo. 147. See the comment on *Harbison v. Swan* in 1 Law Series, Missouri Bulletin, p. 30.

58. (1877) 4 Mo. App. 408.

59. It is frequently overlooked that if A bargains and sells to B to the use of C, the statute of uses executes only B's use and not C's. *Guest v. Farley* (1853) 19 Mo. 147; *Roberts v. Moseley* (1873) 51 Mo. 282, 287; 2 Sanders, Uses, p. 52; *Matthews v. Ward* (1839) 10 Gill & J. (Md.) 443. See 8 Law Series, Missouri Bulletin, p. 20. A consideration of this point should not have changed the result in *Pollard v. Union National Bank*. But a use after a use will be executed by the statute; as where A bargains and sells to B for life, remainder to C and his heirs, both B's and C's uses are executed. This difference between a use after a use and a use on a use was overlooked by MARSHALL J., in his dissenting opinion in *Cornwell v. Wulff* (1898) 148 Mo. 542, 583.

far as they tend to show that the limitation is not in accordance with the common law rules relating to contingent remainders, are irrelevant, as it is not contended that the limitation would have been good independently of the doctrine of uses." This decision clearly upholds a shifting executory limitation created by deed.

The Supreme Court conceded in *Wead v. Gray*,⁶⁰ by way of *dictum*, "that by will, there may be a limitation of a future estate or interest in land or personal property which cannot consistently, within the rules of law, take effect as a remainder but may notwithstanding be upheld as an executory devise." Yet two years later, in *Bean v. Kenmuir*,⁶¹ the court seems to have been unanimous in admitting that in a deed of bargain and sale to A and her heirs and assigns with a limitation over to A's husband in the event of A's death, the limitation over would be void if the deed were construed to confer on A a fee simple instead of a life estate; and the decision that A took but a life estate seems to have been the result of this misconception.

The possibility of a limitation after a fee by way of executory devise was clearly admitted in *Chew v. Keller*⁶² tho it was held that no future estate had been created. A clearly valid executory devise limited on an event which did not happen was called a remainder in *Prosser v. Hardesty*,⁶³ and the court seems to have been willing to uphold it as such; the point received but

60. (1883) 78 Mo. 59. Also reported in (1880) 8 Mo. App. 515.

61. (1885) 86 Mo. 666. It is to be noted that the opinion of the court, in which three judges concurred, was written by one of two dissenting judges; but there seems to have been no dissent on the proposition stated in the text, for the dissenting judges concluded that the limitation over was "inoperative and void." No power of disposition was found in the word "assigns"; but *cf. Gannon v. Pauck* (1906) 200 Mo. 75, 88.

62. (1889) 100 Mo. 362. In *Cornwell v. Wulff* (1898) 148 Mo. 542, 549, GANTT, C. J., compared *Chew v. Keller* with *Pells v. Brown* (1620) Cro. Jac. 590. See also *Gaven v. Allen* (1889) 100 Mo. 293, in which the court seems to have recognized the validity of an executory devise which would divest an estate given to the testator's widow on her remarriage; the widow was said to have a "base or qualified fee."

63. (1890) 101 Mo. 593.

scant consideration, however. In *Naylor v. Godman*,⁶⁴ there was a devise to A for life with remainder in fee to his children and a limitation over in the event of his death without issue. A died without issue and it was not shown that he had ever had issue. The court said that the limitation over was good as an executory devise, but it seems quite clear that it took effect as a remainder.⁶⁵

It is difficult to determine from the opinions in the famous *Cornwell* cases⁶⁶ what the attitude of the Supreme Court was at that time on the possibility of executory limitations in a deed. In *Cornwell v. Orton*, GANTT, J., who wrote the court's opinion, seems to have thought that because no remainder can be created after a fee simple, any limitation upon a fee was void. But four years later, when the same learned judge wrote the majority opinion in *Cornwell v. Wulff* he seems to have made a more careful investigation and was ready to recognize the possibility of an executory limitation by way of springing or shifting use or executory devise. In the later opinion he referred to *Pells v. Brown*,⁶⁷ which is the most famous case on executory devises, and said erroneously that *Chew v. Keller* was "just such a case." But the dissenting judges⁶⁸ in *Cornwell v. Wulff* seem to have failed to recognize the possibility of an executory limitation after a fee simple even in the absence of a power of disposal.

In *Walton v. Drumtra*,⁶⁹ the majority of the court held that the deed created a valid equitable remainder after an equitable

64. (1891) 109 Mo. 543. Tho the testator died in Kentucky, it is not shown that he was domiciled there at the time of his death, so that the provision of the will was construed according to Missouri law. The land in question was purchased by the executor under the directions of the will and it passed as tho it had been devised in the will.

65. If children had been born to A, they would have had a vested remainder and the limitation over must, during their lives, have been an executory devise, if it was valid at all. This involves the question discussed *supra*, in note 53.

66. *Cornwell v. Orton* (1894) 126 Mo. 355; *Cornwell v. Wulff* (1898) 148 Mo. 542.

67. (1620) Cro. Jac. 590.

68. MARSHALL, SHERWOOD, and BRACE, JJ. MARSHALL, J., who wrote the opinion, said that "logically one who has given all he has to another has nothing more to give to a third party. This was the reason underlying the old doctrine that a fee cannot be limited on a fee."

69. (1899) 152 Mo. 489.

life estate, but by what was apparently a slip, it was called an executory limitation.⁷⁰ In his concurring opinion, MARSHALL, J., said that all of the judges agreed that "a fee can not be limited upon a fee," which would seem to have amounted to a denial of the possibility of an executory limitation after a fee simple. The possibility of an executory devise after a definite failure of issue was clearly recognized in *Yocum v. Siler*,⁷¹ tho the event upon which it was to take effect had not happened. In *Hoselton v. Hoselton*,⁷² a testator devised lands to his son as long as the son should pay the taxes on them or cause them to be paid, and "in the case of the failure to pay taxes, the land to go to his four children" named. The named children sought to recover the land from their father's second wife who claimed a homestead. The testator's son failing to pay taxes, they were paid by his second wife. The counsel did not contend that the first devisee took but a life estate, but admitted that he took a fee and contended that the limitation was void. The court admitted the validity of the limitation over, calling it a conditional limitation,⁷³ but held that the condition had not happened.

After the decision of the cases referred to, one would have thought it clear that an executory devise is good in Missouri. The

70. It could not have been an executory limitation cutting short the legal estate in the trustee, for the court expressly recognized that the trustee had a duty to convey the legal title to the holder of the future interest—the latter must therefore have had an equitable interest. The trust was active and not executed by the statute of uses.

71. (1900) 160 Mo. 281. See also *Yocum v. Parker* (1904) 134 Fed. 265. MARSHALL, J., dissenting in *Yocum v. Siler*, seems to have thought that no executory devise could be made after a fee simple.

72. (1901) 166 Mo. 182.

73. *Dumey v. Schoeffler* (1857) 24 Mo. 170, also recognizes such a conditional limitation as valid. Cf. *Farrar v. Christy* (1857) 24 Mo. 453. On the distinction between conditions subsequent and conditional limitations see 5 Law Series, Missouri Bulletin, p. 8. The term conditional limitation when used by the Missouri courts has usually meant either a shifting use or a shifting executory devise. A conditional limitation should be sharply distinguished from a special limitation. If A conveys to B and his heirs so long as the University of Missouri is located at Columbia, B holds subject to a special limitation and his interest is properly called a determinable fee. If A conveys to B and his heirs provided that if the University of Missouri is moved from Columbia, then to C and his heirs, B holds subject to a conditional limitation and C takes a shifting use. Strictly speaking, B does not get a determinable fee in the latter case, tho it is often called such.

dicta in *Simmons v. Cabanne*⁷⁴ are therefore nothing short of startling.⁷⁵ After a devise to trustees for his children, a testator had made a limitation over to his brothers in the event of his children's death under twenty-one without issue. The court said that if the will were construed to confer on the testator's children life estates, with fee simple remainders in the grandchildren, "then the attempt to pass the fee to the brothers of the testator upon all his sons' dying without issue within the age of twenty-one years, would be limiting a fee upon a fee, or rather, and worse still, would amount to limiting the entire fee to two different persons or sets of persons at the same time"; and that if the testator's sons had been given an equitable fee simple, "then the attempt to limit the fee to the testator's brothers would be void for repugnancy." These *dicta* are the pronouncements of the court *en banc*, thru the the same judge who had expressed similar misconceptions in *Cornwell v. Wulff* and *Yocum v. Siler*.

The validity of an executory devise was admitted in *Gannon v. Pauk*,⁷⁶ tho the event upon which it was to vest did not happen. So, too, in *Gannon v. Albright*,⁷⁷ where the court was clearly of the opinion that the statute making failures of issue definite⁷⁸ applies as well where executory devises as where remainders are

On the use of these terms by various writers, see Gray, Restraints on Alienation (2d ed.) § 22, note; Smith, Executory Limitations, § 148. Whether there may be an executory limitation after a determinable fee, presents a question of great nicety. Mr. Challis answers it in the affirmative. Challis, Real Property (3d ed.) p. 173. To the same effect is Smith, Executory Interests, § 126, but Smith is careful to speak of it as a springing interest. *Ibid.*, § 165. See the valuable discussion of the topic in Tiffany, Real Property, § 135, note. The will in *Hoselton v. Hoselton* really created on this theory, a determinable fee simple, i. e., a fee subject to a special limitation, and the gift over operated as a springing executory limitation. Some writers, notably Gray, do not recognize the possibility of a determinable fee since the statute of *Quia Emptores* was enacted in 1290. Gray, Perpetuities (3d ed.) § 32. See Kales, Future Interests in Illinois, § 125. To them, therefore, the limitation over in *Hoselton v. Hoselton* would have been a conditional limitation.

74. (1903) 177 Mo. 336, 352.

75. Professor Gray speaks of them as "remarkable" in his classic book. Gray, Perpetuities (3d ed.) § 68a, note.

76. (1904) 183 Mo. 265, 273, (1906) 200 Mo. 75.

77. (1904) 183 Mo. 238.

78. Revised Statutes 1845, c. 32, § 6; now Revised Statutes 1909, § 2873.

limited.⁷⁹ *Kessner v. Phillips*⁸⁰ involved the validity of certain restraints on alienation, and in speaking of spendthrift trusts, the court said that "such limitations or conditions cannot be grafted upon a fee simple, because they are repugnant to the absolute ownership incident to the fee." But the true reason would seem to be founded in the public policy which demands free alienability.

It is submitted that it was largely due to a misconception of executory devises that a monstrous result was reached in *Sheppard v. Fisher*.⁸¹ There was a devise to trustees for the testator's daughter Mary for life and "at her death to her bodily heirs, if the said bodily heirs have issue, forever, but should the said bodily heirs of the said Mary die without issue, then this estate is to revert to this grantee [devisor], his heirs, assigns, or legal representatives." It would seem clear that Mary took a life estate, with a remainder in fee to her bodily heirs subject to an executory devise to the heirs of the testator in the event of Mary's bodily heirs' dying without issue; the executory devise being void for remoteness, it failed altogether and its failure should have left the bodily heirs' remainder in fee undivested.⁸² But the court held that the bodily heirs took but a life estate,⁸³ "liable to be enlarged into a fee by the birth unto them of the 'issue' referred to in the will."⁸⁴ The court neglected the fact that issue born to the

79. See also *Naylor v. Godman* (1891) 109 Mo. 543; and *Yocum v. Siler* (1900) 160 Mo. 281. An executory devise was held valid in *McCune v. Goodwillie* (1907) 204 Mo. 306, and in *O'Day v. O'Day* (1905) 193 Mo. 62.

80. (1905) 189 Mo. 515.

81. (1907) 206 Mo. 208. The writer has pointed out the misapplication of the rule against perpetuities made in *Sheppard v. Fisher*, in 3 Law Series, Missouri Bulletin, p. 14.

82. "If there be no executory devise to take effect on the happening of the condition on which the fee was to determine, or no one to take it, the fee is not cut down but remains, unless there is something else in the will to show that the intention of the testator was that the fee should determine absolutely on the happening of the condition with reference to the devise over." VALLIANT J., in *Sullivan v. Garesche* (1910) 229 Mo. 496. See also *Yocum v. Siler* (1900) 160 Mo. 281, 299.

83. For this the court cited a dissenting opinion in *Yocum v. Siler* (1900) 160 Mo. 281, 313, 314, 315; it is submitted that the majority opinion in *Yocum v. Siler* is authority to the contrary.

84. It is true that the common law recognized the enlargement of estates on condition. Coke, Littleton, 217b; Lord Stafford's Case, 8 Coke Rep. 74; Fearne, Contingent Remainders, p. 279; Smith, Executory Interests, § 137. More recent writers such as Leake, Challis,

bodily heirs might have predeceased them, and it seems to have failed to apply the well established rule favoring vested rather than contingent interests.⁸⁵

Whatever doubt may have existed as to the validity of executory devises after *Simmons v. Cabanne*, ought to have been dispelled by the opinion in *Sullivan v. Garesche*.⁸⁶ There was a devise to the testatrix's daughters, Kate and Julia with a proviso that "in event of the death of both before marriage, said property shall be divided equally among my surviving children." It was held that the claimant was not the heir of a "surviving" child and therefore had no interest in the land as such; further, that he had no reversionary interest as heir of the testatrix since Kate and Julia took a fee simple which could be divested on the event named only in favor of surviving children who had a contingent executory devise. In other words the court held that Kate and Julia took a fee simple subject to a contingent executory devise, the contingency being the double one of their deaths unmarried and of the survival of at least one of the executory devisees, and that their fee simple would not be divested unless both parts of the contingency happened, and on the facts in *Sullivan v. Garesche* this had not occurred. While it would be consistent with the result of this decision to say that the executory devise was void, the opinion unequivocally stamps it as valid and it is so clear that the matter ought at last to be free from doubt. And this seems to have been the opinion of the court itself in *Brown v. Tuschoff*⁸⁷ and in *Buckner v. Buckner*.⁸⁸

Washburn and Gray, seem to have given no attention to the point. The enlargement as described by Coke, seems to have been no more than a merger of a particular estate in a future estate created by release which operated as an executory grant. The merger did not occur until the condition happened. In *Shepperd v. Fisher*, it was unnecessary to resort to such circumvention for the fee simple of the bodily heirs should have been held to be vested subject to being divested, since the law favors vested estates. *Edwards v. Hammond* (1683) 3 Levinz 132.

85. *Chew v. Keller* (1889) 100 Mo. 362.

86. (1910) 229 Mo. 496.

87. (1911) 235 Mo. 449.

88. (1913) 255 Mo. 371.

We may safely say, therefore, that in spite of the *dictum* in *Simmons v. Cabanne*, an executory limitation, either springing or shifting, is now valid in Missouri when created in a will.⁸⁹

It would seem that there should be no doubt as to the possibility of creating a springing executory interest by deed operating as a bargain and sale or as a covenant to stand seised, or, since the statute permitting an estate of freehold to be made to commence *in futuro* by deed as by will, by any conveyance which would have been good at common law apart from uses or which would now be good as a statutory grant. Since the decision of *O'Day v. Meadows*,⁹⁰ the Supreme Court will probably be very liberal in allowing future springing interests.

A conveyance to take effect at the death of the grantor seems to be subject to exceptional scrutiny, however. No one will contend that a deed can be made to accomplish the effect of a will. The chief distinction between a will and a deed is that the former remains ambulatory until the maker's death and may be changed as he pleases. If it is clear that an instrument is not intended to be ambulatory but binding from the time of execution, it is not testamentary and it should be upheld as a deed wherever possible. But in *Murphy v. Gabbert*⁹¹ the test was stated to be whether the instrument "is to take effect *in presenti* or after the death of the maker." This test is misleading in that it may be applied to exclude the creation of a present right to a future interest. If A conveys to B from and after the next presidential election, the conveyance operates presently to give B a present right to a

89. It is to be noted that where there is a devise to a class, the members of which are subject to future determination it will frequently be necessary to support the gift as a shifting executory devise. If for instance, the devise is to A for life, with remainder to B's children to be born before or after A's death, the first child born during A's life will take a vested remainder at the time of its birth, and this vested remainder will open up to let in after-born children, some of whom the incapable of taking by way of remainder may take by executory devise. This was plainly recognized in *Buckner v. Buckner* (1913) 255 Mo. 371. See also *Thomas v. Thomas* (1899) 149 Mo. 426; *Gates v. Seibert* (1900) 157 Mo. 254.

90. (1905) 194 Mo. 588. A valid springing interest seems to have been created in *Allen v. De Groodt* (1891) 105 Mo. 442.

91. (1901) 166 Mo. 596. A will was very clearly intended in *Miller v. Holt* (1878) 68 Mo. 584.

future estate quite as clearly as if A conveyed to C for life and then to B. In the latter case B has a vested remainder, which is a present right to a future estate; whereas in the former case, B has a springing executory interest, which is a present right to a future interest. Both are *to take effect in the future* in the sense that B is not to have the possession until a future time. The instrument in question in *Murphy v. Gabbert* stated that "the intention of this instrument of writing is such that Mrs. Ann Ellison [the maker] relinquishes her entire right at her death, then this deed is to immediately come into effect, but not until then." It was a queer process of reasoning which led the court to hold that "no interest was presently conveyed thereby which interfered with the life estate of the grantor, and if any effect whatever is to be given to the words of reservation they limited the fee to take effect on the death of the grantor and not before, that is, they limited the estate to take effect *in futuro*, which at common law can be done only when an estate is granted." The instrument seems to have been held a will because it was inoperative as a deed. But it is submitted that it was a good bargain and sale of a springing interest and that the decision was due to a neglect of the statute of uses as well as of the statute as to freeholds *in futuro*.⁹²

But in *Christ v. Kuehne*,⁹³ decided one year later, the court seems to have corrected the error, for tho *Murphy v. Gabbert* was not cited and the instrument contained a more equivocal phraseology, it seems impossible to reconcile the decision in *Christ v. Kuehne* with the test applied in *Murphy v. Gabbert*. It is difficult to see just what was the ground upon which the court decided *Christ v. Kuehne*; the maker of the instrument conveyed from and after his death to his wife for her life and after her death to his own heirs at law. It seems clear that the title remained in the grantor subject to a springing executory limitation

92. *Murphy v. Gabbert* was said to have been rightly decided in *O'Day v. Meadows* (1905) 194 Mo. 588, 620. And the decision in *Aldridge v. Aldridge* (1906) 202 Mo. 565, seems to support it.

93. (1902) 172 Mo. 118. *Murphy v. Gabbert* and *Christ v. Kuehne* were decided by different divisions of the Supreme Court, composed of different judges.

to his wife for life and a springing executory limitation⁹⁴ to his heirs after her death,⁹⁵ which latter would become a remainder when the estate vested in the wife. But the court spoke of the interest of the grantor's heirs as a remainder even during the life of the grantor—this cannot be technically exact unless the conveyance be given the effect of creating a life estate in the grantor, followed by a remainder for life in his wife and a remainder in his heirs. This was recognized in *Dozier v. Toalson*⁹⁶ where it seems to have been held that the deed had the effect of creating a life estate in the grantor and a vested remainder in the grantee. The court went upon the ground that a life estate was reserved by the grantor. It recognized the distinction between an exception and a reservation⁹⁷ and said in effect that the life estate was a new right issuing out of the thing granted. It is obvious that if this had been possible at common law the effect of a freehold *in futuro* would have been possible, but in a strict sense no life estate could be reserved at common law because an actual change of possession by means of livery of seisin was required for the creation of any new estate.⁹⁸ Whether the Missouri statute authorizing conveyancing without livery of seisin has changed this rule of the common law would seem to be doubtful. A more proper method of reaching the result of *Dozier v. Toalson* would be this: since the deed operated by way of bargain and sale, the grantor may have agreed to stand seised to his own use for life and then to the use of the grantee in fee; the

94. If A conveys to B and his heirs with a provision that on an event the estate is to shift to C for life and after C's death to D and his heirs both C and D have executory interests and D cannot properly be said to have a remainder until after the happening of the event, at which time his executory interest becomes a remainder.

95. There is no sound objection to the creation of a springing or shifting interest in persons not *in esse*. See Gray, *Perpetuities* (3d ed.) § 61 *et seq.* But the point is by no means clear on the authorities. *Christ v. Kuehne* is authority for allowing a springing executory limitation to persons not *in esse*. Cf. *Thomas v. Wyatt* (1860) 31 Mo. 188.

96. (1904) 180 Mo. 546.

97. As made in *Snoddy v. Bolen* (1894) 122 Mo. 486. In other states it has been said that the grantor may reserve a life estate, but as pointed out in *Tiffany, Real Property*, § 134, this is technically inexact.

98. *Kales, Future Interests*, § 158a. Rents are properly said to be *reserved*.

statute would execute the use, tho this seems illogical⁹⁹ and the result of the application of the statute would be that the grantor would be seised of the life estate with the remainder in fee to the grantee. It would seem, however, that there should be an expressed intention on the part of the grantor to stand seised to his own use for life. If by force of the bargain and sale the legal title were to pass immediately to the grantee, the grantee might hold in trust for the grantor, but in this event there could be no legal life estate in the grantor for the statute, having executed a use in the grantee, would be exhausted. Nor is it possible to support a legal life estate in the grantor on any theory of resulting use, for if the use results it results in fee.

The better explanation would seem to be that by force of the deed of bargain and sale a future springing use is created in the grantee. The grantor remains seised of the fee simple, which upon his death will immediately spring to the grantee. This is not objectionable as a testamentary disposition, for it would take effect at the time of the execution of the deed in the sense that the grantee would become entitled to an executory interest which would operate in the future by a springing of the use. This explanation is the view adopted in *Vinson v. Vinson*¹⁰⁰ where it is expressed with exceeding clearness.

It is important which of these views is adopted in at least one class of cases. If the grantor were to marry after executing the deed, his wife would not be entitled to dower if he was seised of only a life estate; but if the grantor be conceived to be seised of the fee subject to the springing use, then his wife will have dower.¹⁰¹ It would have made no difference in the result of *Dozier v. Toalson*, however, for the grantee's husband was not entitled to curtesy, whether the grantee had a vested

99. *Vide ante*, note 27; Gilbert, *Uses* (Sugden's ed.) 150, 152. But see Gray, *Perpetuities* (3d ed.) § 930, note.

100. (1879) 4 Ill. App. 138. See also *Shackelton v. Sebree* (1877) 86 Ill. 616.

101. *Buckworth v. Thirkell* (1785) 1 Coll. Juris. 322; *Moody v. King* (1825) 2 Bing. 447; Kales, *Future Interests*, § 158b; *Tiffany, Real Property*, § 183; 2 *Jarman, Wills* (6th ed.) p. 1453.

remainder or an executory, springing interest, in view of the fact that the grantor did not die until after the death of the grantee.¹⁰²

102. *Cf. Martin v. Trail* (1897) 142 Mo. 85.

The flood of litigation since *Murphy v. Gabbert* seems to indicate that the bar was taken unawares by that decision. It had been preceded by but one case, *Miller v. Holt* (1878) 68 Mo. 584, in which the instrument purporting to be a will was never actually delivered, and was of course held to be testamentary; but much litigation followed swiftly upon the heels of *Murphy v. Gabbert*. In *Griffin v. McIntosh* (1903) 176 Mo. 392, the instrument, tho called a deed, contained a provision that the grantor should hold it in his possession until his death and the court relied upon the fact that it was so kept and held that there had been no delivery. In *Aldridge v. Aldridge* (1902) 202 Mo. 565, a grantor purported to convey to his wife for life, remainder to his son. The deed contained the condition however, that if the grantor should outlive his wife the land should revert to him in fee and if he should predecease his wife, then she should hold for life, remainder to the son in fee. The court held that it was the intention to make a testamentary disposition and that the instrument had no effect as a deed. In *Givens v. Ott* (1909) 222 Mo. 395, the instrument provided that it should not "take effect until the death of the grantor". The court gave little consideration to the point but held that the deed was invalid as such, but there were many other grounds for the decision. In *Terry v. Glover* (1911) 235 Mo. 544, the court held that there was no delivery of the instrument, and it was entirely *obiter* that it was said to be testamentary in nature because of the clause providing "this deed not to go into effect until after the death of" the grantor. In *Sims v. Brown* (1913) 252 Mo. 58 the instrument was in form a will, and it was contended that it operated as a deed as of the time of its execution, but it is very clear from the form of the instrument and from the power reserved by the person who executed it over parts of his property that it was intended to be testamentary in its nature. In *Priest v. McFarland* (1914) 262 Mo. 229, the words of the instrument do not appear in the report. The court states that it "expressly reserves a life estate in the grantor and conveys at the same time, by words of present import, a vested remainder in the property to the grantees." It recited that the instrument should become absolute and fully convey the title after the death of the grantor. The court held that it operated as a deed at the time of its execution and the decision with reference to the future interest seems to sustain the result of *Dozier v. Toalson*. In *Goodale v. Evans* (1914) 263 Mo. 219, the instrument was in all respects an ordinary deed of bargain and sale, but it contained the provision that the grantee was "to have and to hold the premises for and after the death of" the grantor. It also contained the statement that "it is the intention of the grantor by this deed to convey said property to said [grantee] for life to take effect on the death of the grantor." It is very clear that the grantor intended to be bound by the deed as and from the time of its execution for it was duly acknowledged and recorded. But the court felt "required by the authorities to hold the deed void because it is testamentary in character and not executed according to the statutes of wills." It seems impossible to defend this decision but the reversal and remanding of

In *O'Day v. Meadows*,¹⁰³ the court relied on the statute as to future freeholds in upholding a springing interest created by deed, and it seems that apart from the statute it would have declared it void. *Christ v. Kuehne* was not cited. It has been pointed out in this study that the result of *O'Day v. Meadows* need not be rested on the statute, and if the foregoing analysis of *Christ v. Kuehne* be sound, that case ought to have been controlling authority.

Since the decision in *O'Day v. Meadows* there would seem to be no doubt as to the validity of a springing interest created by deed both under and independently of the statute, and it is to be hoped that the court will not continue to repeat the obsolete maxim that a freehold cannot be limited *in futuro*.¹⁰⁴

But it were still somewhat of a venture to say that shifting interests can be created by deed in Missouri for we may yet be confronted with a decision that a fee limited upon a fee is void, in spite of the statute as to freeholds *in futuro*, tho by a convey-

the case may be put upon the ground of incompetency of one of the witnesses. *Wimpey v. Ledford* (1915) 177 S. W. 302 was decided by the other division of the court five months after the opinion in *Goodale v. Evans* was handed down. The instrument professed to be made with the understanding that the grantor should have the property during his lifetime and that at his death "then the title is to pass" to the grantee. This would seem to be a more emphatic postponement of the time of the instrument's binding the grantor than the words in *Goodale v. Evans*, but the court held it to be a good deed without citing *Goodale v. Evans* and chiefly, it seems, on the authority of *Dozier v. Tolson* and *Christ v. Kuehne*. *Wimpey v. Ledford* offers a ray of hope for the narrowing of *Murphy v. Gabbert* and *Goodale v. Evans*. It is submitted that if possible every instrument ought to be so construed as to be capable of having some effect, *Hunt v. Hunt* (1904) 119 Ky. 39, and that in view of this principle there can be no possible justification of the strict rule of *Goodale v. Evans* and its defeat of clearly expressed intentions.

103. (1905) 194 Mo. 588. In *Anglade v. St. Avit* (1878) 67 Mo. 434, it was said that an ante-nuptial contract operated as a conveyance as of the time of the marriage, but the contract seems to have been made on the same day on which the marriage was celebrated so that the case is no authority for a conveyance *in futuro*.

104. The court in *Aldridge v. Aldridge* (1906) 202 Mo. 565, said of creating a future freehold, "if that be conceded." It is submitted that it ought to have been conceded without argument. See *Sims v. Brown* (1913) 252 Mo. 58.

ance which may operate as a bargain and sale.¹⁰⁵ The history of the subject in other states, notably in Illinois,¹⁰⁶ is not encouraging.

B. *Of Chattels Real and Personal*

6. *Under the Common Law.* It is a more difficult task to trace the origin and history of future interests in personal property. The feudal restrictions resulting from the rules concerning seisin did not apply to chattels, for from a very early time chattels have been owned absolutely and not *held*. Strictly, it is improper to speak of estates in chattels, therefore, and there would seem to be no reason why future interests in chattels should not be freely created and transferred.¹⁰⁷ Certain distinctions have grown up which make necessary the separate treatment of chattels real and chattels personal.

Chattels Real. A lease for ninety-nine years puts into the lessee an estate of less than freehold which is conveniently called a term and classed as a chattel real. A term could be assigned very informally at common law and smaller terms could be created out of it by sub-leases; but no life estate could be carved out of it for the very technical if not absurd reason that in the eyes of the law a life estate is greater than any term.¹⁰⁸ A future term

105. In *Pendleton v. Bell* (1862) 32 Mo. 100, by a marriage settlement, executed before the marriage, land was conveyed to trustees to the use of the husband and his heirs until the marriage and then to the use of the wife for life, etc. No question was raised as to the validity of the shifting interest.

106. The Illinois Supreme Court held a shifting executory interest created by deed void, in *Palmer v. Cook* (1896) 159 Ill. 300; and a similar result was reached as to executory devises in *Ewing v. Barnes* (1895) 156 Ill. 61, and *Silva v. Hopkinson* (1895) 158 Ill. 386. But the latter two cases seem to have been overruled in *Glover v. Condell* (1896) 163 Ill. 566. See the discussion of these cases by Prof. Louis M. Greeley in 14 Harvard Law Review 595, which is answered in Kales, Future Interests in Illinois, § 163 *et seq.* *Palmer v. Cook* seems to have been recently overruled in *Stoller v. Doyle* (1913) 257 Ill. 369, which recognizes the possibility of limiting a fee on a fee by deed. See 8 Illinois Law Review 495.

107. 4 Law Series, Missouri Bulletin, p. 39; Gray, Perpetuities (3d ed.) § 802 *et seq.*

108. Thus any estate for years will merge in a life estate.

could be created¹⁰⁹ and an existing term could be assigned *in futuro*, there being no danger of putting the seisin in abeyance and no necessity of livery of seisin. But the termor could not assign to another from and after the death of the assignor, for this would be in effect carving a life estate out of the term and such an attempted assignment is void.¹¹⁰ A having a term may assign it to C from and after B's death, however, for there is no presumption that B will not die during the term. But if A assigns to B for life and then to C the whole term will pass to B at common law and C will take nothing.

The statute of uses did not change these rules for it applied only when one person is *seised* to another's use. Estates for years could be created under the statute by an agreement by one having a freehold to stand seised to another's use,¹¹¹ but once created, the term could not be transferred by any method of conveyance operating under the statute. In England today, therefore, it is common to create a trust when future interests in terms are settled.¹¹² Nor did the statute of wills have any effect on bequests of chattels real. It was settled in *Manning's Case*¹¹³ that executory bequests of chattels are good, and since that time a bequest of a term to A, for life and then to B will carry the whole term to A, subject to B's executory interest. It has been held, however, that if a chattel real is bequeathed to A for life the executor has a reversionary interest after A's death,¹¹⁴ tho it were difficult to defend this result if B's interest was executory in the other case.

109. Before entry, the lessee would have but an *interesse termini* which is assignable. Whether a term created to begin *in futuro* can be remote and therefore void on account of the rule against perpetuities, see 29 Law Quarterly Review 303, 30 Law Quarterly Review 66.

110. *Welcdon v. Elkington* (1578) Plowden 519, 520; Gray, Perpetuities (3d ed.) § 809 *et seq.*

111. It was for this reason that conveyances by lease and release were invented. To avoid entry and the statute of enrolments, A, desiring to convey to B, leased to B for a year and then released to him. The lease operated by way of bargain and sale, the release operated at common law, really as a grant.

112. Goodeve, Personal Property (5th ed.) p. 7.

113. (1609) 8 Co. 94b. See Gray, Perpetuities (3d ed.) § 813.

114. *Eyres v. Faulkland* (1697) 1 Salk. 231. The executor's interest was called a possibility of reverter. See Gray, Perpetuities (3d ed.) § 820.

Chattels Personal. The common law permitted the transfer of a chattel personal *in futuro*, tho it had to be by deed. Tho a bailment for years was always enforceable, the creation of successive future interests was not allowed. It was said that a "gift or devise of a chattel for an hour is forever."¹¹⁵ But the doctrine of *Manning's Case* was extended to chattels personal and executory interests were allowed to be created by will or by transfer to trustees.¹¹⁶ As early as the seventeenth century it was possible to bequeath chattels personal to A for life and then to B, for B was conceived to have the legal interest and A but the use and occupation.¹¹⁷ Current opinion in England seems to regard all future interests in chattels as susceptible of creation only in equity, or perhaps by executory bequest. It may be doubted whether any future limitation of chattels real or personal can be made in England by a transfer *inter vivos* without resorting to equity.¹¹⁸ Neither the statute of uses nor the statute of wills had any application to chattels personal.¹¹⁹

7. *The Missouri Statutes.* The common law adopted in 1816 would seem to have been as it is now in England. But in the United States generally remainders in chattels personal are well recognized,¹²⁰ and executory interests are created without much distinction between deeds and wills.¹²¹ The Missouri stat-

115. Bro. Ab. Devise, 13. Professor Ames ascribed the doctrine of the text to procedural history. See 3 Harvard Law Review 313. But Professor Gray thought it due to the late invention of the conception of executory interests. See Gray, Perpetuities (3d ed.) § 824.

116. See Fearne, Contingent Remainders, p. 405; Gray, Perpetuities (3d ed.) § 829.

117. *Hide v. Parratt* (1696) 2 Vern. 331. The distinction between the gift of the use of a thing and a gift of the thing itself has now been exploded in England. Williams, Personal Property (16th ed.) p. 359.

118. The English writers still say that there can be no remainder in a chattel real or personal. See Goodeve, Personal Property (5th ed.) p. 8; Williams, Personal Property (16th ed.) p. 45; 2 Jarman, Wills (6th ed.) p. 1453. Consumable goods, *quae ipso usu consumuntur*, are not susceptible of successive limitations and any gift of them must be absolute. *Randall v. Russell* (1817) 3 Mer. 190.

119. "Future interests in personalty owe nothing to statutes; they are what they are by the common law." Gray, Perpetuities (3d ed.) § 845.

120. *State ex rel Farley v. Welsh* (1913) 175 Mo. App. 303. The difference between the English and American law is probably due to Blackstone's influence on the latter. 2 Blackstone, Commentaries, p. 398.

121. See Gray, Perpetuities (3d ed.) § 844.

utes have not converted terms for years into real property, tho the chapter on conveyances¹²² provides that the term "real estate" as used therein "shall be construed as coextensive in meaning with lands, tenements and hereditaments, and as embracing all chattels real."¹²³ The statute authorizing the creation of estates of freehold or inheritance *in futuro* by deed as by will does not apply to personal property, for no estate of freehold or inheritance can be created in personal property.¹²⁴ The common law as to the creation of executory interests in chattels real and personal has not been changed by any Missouri statute.

8. *The Missouri Decisions.* Tho outside of the recent decision in *State ex rel. Farley v. Welsh*¹²⁵ the possibility of a remainder after a life interest in a chattel has received little attention from the Missouri courts, it may be taken to be a settled thing in Missouri law. A gift of a chattel real or personal by deed or will to A for life and then to B, will confer a legal interest in remainder on B unless the goods are such that their use will mean their consumption,¹²⁶ tho in English law B would be said to have but an executory interest. A transfer of a chattel to A absolutely, but on an event to B will raise the question here to be considered.

Chattels real. The writer has found but one Missouri case involving the creation of an executory interest in a chattel real, viz., *Straat v. Uhrig*,¹²⁷ and in later comments on this case the fact that it involved the gift of a chattel real has not been noticed.¹²⁸ By deed, A transferred a term for ten years to B in

122. Revised Statutes 1909, § 2822.

123. *Orchard v. Wright-Dalton-Bell-Anchor Store Co.* (1909) 225 Mo. 414.

124. In *Blair v. Oliphant* (1845) 9 Mo. 239, the court said that "the statute which makes terms for years dowable must be understood as placing them in all respects upon a footing with descendible freeholds." But this was unnecessary to the decision, and it has been disapproved in *Orchard v. Wright-Dalton-Bell-Anchor Store Co.* (1909) 225 Mo. 414.

125. (1913) 175 Mo. App. 303. See also *Riggins v. McClellan* (1859) 28 Mo. 23; *Lewey v. Lewey* (1864) 34 Mo. 367.

126. See *Gregory v. Cowgill* (1854) 19 Mo. 415; *Allen v. Claybrook* (1874) 58 Mo. 124, 131.

127. (1874) 56 Mo. 482.

128. In *Gibson v. Gibson* (1911) 239 Mo. 490, 501; *Cornwell v. Wulff* (1898) 148 Mo. 542, 565, 577.

trust for C, a *feme covert*, for her sole and separate use, and B covenanted and agreed to permit C to convey as directed by C by will or otherwise in writing and in default of any appointment by C to convey after her death to the children of C and D. It was said that this deed created an absolute trust estate in C "with a springing contingent trust in favor of her children," and the court held that after C's death without having made an appointment, B was entitled to receive the rents in trust for the children.¹²⁹ The court said that the deed was "in the ordinary form of a deed of bargain and sale under the statute of uses," but this does not mean that it operated under the statute of uses for there being no seisin in A, the statute did not apply. The deed operated as an assignment to the trustee who took the whole legal estate, and even in England the equitable interest of the children would have been enforced.¹³⁰ The case is therefore no authority for the creation of an executory interest in a term by deed, without the interposition of trustees, and it cannot yet be said whether the Missouri courts will follow the English rule forbidding such interests to be created by deed. The meager authorities in other states do not admit of the hazard of a guess.¹³¹

There should be no doubt as to the validity of an executory bequest of a term for years in Missouri, for there can be no sound reason for a refusal to follow *Manning's Case*.¹³²

129. It was erroneously said in *Gibson v. Gibson* (1911) 239 Mo. 490, 501, that *Straat v. Uhrig* "held the remainder valid." This error had been made in a dissenting opinion by MARSHALL, J., in *Cornwell v. Wulff* (1898) 148 Mo. 543, 577. The criticism of *Straat v. Uhrig* in the majority opinion in the latter case, p. 565, was made without any reference to the fact that it involved a chattel real.

130. The effect of the added power of disposition on the limitation over might have made it bad, however. *Vide post*, p. 40.

131. In Maryland, an executory interest in a term may be created either by deed or will. *Culbreth v. Smith* (1888) 69 Md. 450. See Gray, *Perpetuities* (3d ed.) p. 816.

132. In *Halbert v. Halbert* (1855) 21 Mo. 277, the court referred to a quotation concerning *Manning's Case* with apparent approval of its doctrine. The doctrine of *Manning's Case* was approved in *Waldo v. Cummings* (1867) 45 Ill. 421, 427 and in *Welsh v. Belleville Savings Bank* (1879) 94 Ill. 191, 204. See Kales, *Future Interests in Illinois*, § 186.

Chattels personal. There are several early cases which involved future interests in slaves. In *Wilson v. Cockrell*,¹³³ a gift of certain slaves was made by deed in consideration of love and affection to Juliet, her executors, administrators and assigns, and of certain other slaves to William in like manner, with a proviso that if either Juliet or William should "die without heirs, then the property of the one so dying shall absolutely vest in the other."¹³⁴ After the death of Juliet without issue, William brought replevin for a female slave against a purchaser from Juliet. The gift over to William was held void, apparently on the ground that no executory limitation of a chattel could be made by deed, and the court seems to have thought future interests in chattels created by deed to be subject to the same restrictions as future interests in land created by common law conveyances. The Kentucky court's decision in *Betty v. Moore*¹³⁵ was relied on, but it can be rested on a Kentucky statute. The authority of *Wilson v. Cockrell* is very much weakened by the fact that the gift over was clearly bad for remoteness, tho this fact escaped the court's attention.¹³⁶ In *Vaughn v. Guy*,¹³⁷ the court said that "there can be no doubt of the correctness of the principle asserted in *Wilson v. Cockrell*," and in *Halbert v. Halbert*¹³⁸ the doctrine of *Wilson v. Cockrell* was again asserted tho it was not essential to the disposition made.

133. (1843) 8 Mo. 1. Judge Napton was absent when the case was argued and probably did not participate in the decision, which may therefore represent the opinion of but two judges.

134. The words quoted are from the language of the court, and were probably not the *verbatim* terms of the deed. The words "die without heirs" were probably used for "die without heirs of the body." Even so, the gift over was remote. See 3 Law Series, Missouri Bulletin, p. 7.

135. (1833) 1 Dana 235. See 3 Law Series, Missouri Bulletin, p. 8, note 42.

136. See 3 Law Series, Missouri Bulletin, pp. 8-9, note 48; Gray, *Perpetuities* (3d ed.) § 91, note.

137. (1853) 17 Mo. 429. The court said in *Vaughn v. Guy* that the statute making failures of issue definite, Revised Statutes 1845, c. 32, § 6, had abolished "the distinction between the construction of limitations created by deed, and those whose existence depends on wills and conveyances under the statute of uses." This must refer only to the distinction drawn in *Forth v. Chapman* (1720) 1 P. Wms. 663. See 3 Law Series, Missouri Bulletin, p. 9, note 48.

138. (1855) 21 Mo. 277. See the comment on *Halbert v. Halbert* in 3 Law Series, Missouri Bulletin, p. 9.

The bequest over in *Chism v. Williams*¹³⁹ would apparently have been upheld but for its being on an indefinite failure of issue and therefore remote, and the court refused to consider the previous decisions in which the gift was by deed. The decision in *State ex rel. Haines v. Tolson*¹⁴⁰ is very surprising after *Chism v. Williams*. A testator gave certain real and personal property to A with a limitation over to B in the event of A's death without issue. The action against the administrator *de bonis non cum testamento annexo* concerned the money so given. The gift over was held to be on a definite failure of issue and not remote,¹⁴¹ but as A took the entire property and not a mere life estate the limitation over was held to be "void for repugnancy."¹⁴² But such repugnancy characterizes every shift-

139. (1860) 29 Mo. 288.

140. (1880) 73 Mo. 320.

141. See 3 Law Series, Missouri Bulletin, p. 11.

142. Three cases were cited by the court: *Rubey v. Barnett* (1848) 12 Mo. 6, *Allen v. Claybrook* (1874) 58 Mo. 124, 131, *Amelia Smith's Appeal* (1854) 23 Pa. St. 9. None of these sustains the result reached. In *Rubey v. Barnett*, a life estate was given. In *Allen v. Claybrook*, at p. 131, the reference is to a general gift with a power of disposition; there was no power of disposition in *State ex rel Haines v. Tolson*. The decision in *Amelia Smith's Appeal* was on the ground that words which create an estate tail in land create an absolute interest in chattels, but the words in question created an estate in the land also devised only by implication, and the implication would seem to have been improper. There were similar words in *State ex rel. Haines v. Tolson*. The validity of the gift over of the personalty was not really involved in *Amelia Smith's Appeal*, for the court of probate was declaring only the distribution at the death of the testator. An executory bequest after a bequest to A and the heirs of his body should be held good, unless it is remote. Such a gift of a leasehold was upheld in *Lamb v. Archer* (1673) 1 Salk, 224. See Gray, *Perpetuities* (3d ed.) § 357, note. But if the contrary were conceded, as seems to have been Jarman's opinion, 2 Jarman, *Wills* (6th ed.) p. 1202, yet words which would give a fee tail in realty only by implication ought not to be construed to create an interest in personalty so absolute as to invalidate any executory bequest. Even if *Amelia Smith's Appeal* be sustained on this point, it should be noticed that it depended upon an indefinite failure of issue, for the Pennsylvania statute making failures of issue definite was not enacted until 1897. See Foulke, *Perpetuities In Pennsylvania*, p. 196, note. The gift over was therefore void for remoteness, unless the rule of *Forth v. Chapman* (1720) 1 P. Wms. 663, could save it. Whereas in *State ex rel. Haines v. Tolson* it was distinctly held that the gift over was on a definite failure of issue, if indeed the statute did not impel this result. A gift over of a chattel on a definite failure of issue is good. *Stone v. Maule* (1829) 2 Sim. 490;

ing interest,¹⁴³ and if this were a sufficient reason no executory shifting interest ought to be creatable by deed or will—and there can be no reason why real and personal property should be treated differently in this respect. Yet the court had previously purported to uphold an executory devise of lands in *Faust v. Birner*.¹⁴⁴ As a decision that a shifting executory bequest of a chattel personal is void, *State ex rel. Haines v. Tolson* is opposed to a long and unbroken line of authorities in other jurisdictions.¹⁴⁵ Later comments have failed to point out its peculiarity.¹⁴⁶

There seems to have been no later decision in which an executory interest was created in a chattel, except in cases where the first taker was expressly given a power of disposition and these cases will be considered separately. As the law stands therefore, an executory interest to take effect on the death of the first taker without issue cannot be created in a chattel personal by deed, for *Wilson v. Cockrell* has not been overruled tho it can be distinguished on the ground of the remoteness of the gift; nor by will, if the gift is on the event that the first taker who is given an absolute interest should die without issue living at his death, tho *State ex rel. Haines v. Tolson* may be limited to its very facts when occasion arises. If a picture were given to A and his executors, with a proviso that if a certain painter, X, should come to Columbia to live it should belong to X, the gift ought to be upheld if made in a will in spite of *State ex rel. Haines v. Tolson*, and it is submitted that

Smith, Executory Interest, § 600. This is recognized in *In re Moorhead's Estate* (1897) 180 Pa. 119, by the same court which decided *Amelia Smith's Appeal*.

143. For a discussion of various uses of the term "repugnancy," see Kales, *Future Interests*, §§ 141, 173.

144. (1860) 30 Mo. 414, *Infra*, p. 14. See also *Harbison v. Swan* (1878) 58 Mo. 147.

145. See Gray, *Perpetuities* (3d ed.) § 848, note 5. A statement in Washburn, *Real Property* (6th ed.) § 1781, supports the Missouri court's decision. *Merrill v. Emery* (1830) 10 Pick. 507, is there cited, but that case may be explained on other grounds. See also Theobald, *Wills* (5th ed.) p. 565.

146. *State ex rel. Haines v. Tolson* seems to have been approved in *Munro v. Collins* (1888) 95 Mo. 33. It was justified in *Cornwell v. Orton* (1894) 126 Mo. 355, 369, on the ground that "it was an attempt to limit a remainder on a fee," which of course was a mistake.

this would not involve overruling that case; it should also be upheld if made in a deed, tho the English law seems *contra*, for *Wilson v. Cockrell* is likewise to be limited to its facts. But the careful lawyer will not take the risk, and the gift to X should be accomplished by means of a trust which would make it good beyond question.

There may be some doubt as to the validity of an executory bequest of a chattel real, also, since an executory bequest of a chattel personal may be void.

III EXECUTORY LIMITATIONS FOLLOWING POWERS OF DISPOSAL

Assuming that an executory limitation of realty or personality is good whether it is contained in a deed or a will, a special class of cases must be considered in which the first taker is given a power of absolute disposal and the limitation over is to take effect in the event of his failure to exercise it. In such cases it will make no difference whether the limitation is in a deed or a will. If a demise or a devise is made to A and his heirs, with a proviso that if A goes into the army then the land is to go to B and his heirs, we shall assume that the limitation to B is good; indeed, there would have been no doubt of it except for the Missouri decisions previously reviewed. If the proviso be that if A dies without having gone into the army then the land is to go to B and his heirs, B would have a valid executory interest. Yet in both cases A by doing or refraining from doing some act might defeat the executory limitation to B. If the land were limited to A and his heirs subject to a power given to B to appoint by deed or will to his children and with a proviso that in default of appointment by B the land should go to C and his heirs, there can be no doubt of the validity of the limitation to C. But if the limitation is to A and his heirs¹⁴⁷ with full power to convey or devise the absolute fee simple, and with a proviso that if he does not exercise the power the land

147. The common law requirement of the use of the word "heirs" in creating a fee simple was abrogated in Missouri as to devises in 1825, Revised Statutes 1825, p. 795, § 19; and as to deeds in 1835, Revised Statutes 1835, p. 119, § 2.

shall go to B and his heirs, then the limitation to B is said to be void.¹⁴⁸ If the gift is to A for life with full power to convey or devise the fee and with a proviso that if he does not convey or devise it the land shall go to B and his heirs, then the limitation to B is good.¹⁴⁹ Just why this difference? The cases will be reviewed to determine the reason for such a rule and the effect which it has had on the construction of instruments.

The Missouri cases refer the origin of this rule in Missouri to the harmless statement made *obiter* in *Rubey v. Barnett*¹⁵⁰ that an unlimited gift to one who is given a general power of disposal carries the fee; it is not at all clear that the court had in mind the question of the validity of a limitation over, for it was addressing itself to the question of whether a devisee took for life or in fee and it held that only a life estate had been given.¹⁵¹ In *Gregory v. Cowgill*,¹⁵² it was clearly held that one to whom real and personal property was given for life did not take a greater interest by reason of a gift over of what might remain at his death.¹⁵³ In *Jecko v. Taussig*,¹⁵⁴ a deed conferred on the first taker a power to convey the "fee" and the estate was not expressly limited to a life estate; the only question before the court was as to the power of the first taker to convey an "absolute fee," but it seems to have been of the opin-

148. It should be noted that A may convey the fee subject to the limitation over without any special power being given to him; and if the added power does not give him power to convey the fee free from the gift over, the rule here being considered does not apply.

149. The limits of this study do not admit of a determination of the sufficiency of various expressions for conferring powers of disposal on life tenants. On this subject see a valuable article by Professor Kales in 7 Illinois Law Review 504.

150. (1848) 12 Mo. 3. While the court cited *Jackson v. Robins* (1819) 16 Johns. 587, there was apparently no appreciation of the actual decision in that case.

151. See also *Norcum v. D'Oench* (1852) 17 Mo. 98, where a life tenant had a power which was exercised.

152. (1854) 19 Mo. 415. Some of the personalty was perishable and such that use would consume it. The court seems to have thought that no power of disposition was conferred on the life taker, the expression as to remaining property being construed to carry an absolute interest in the perishable personalty. Cf. *Reinders v. Koppelman* (1878) 68 Mo. 482, 492.

153. Cf. *Footte v. Sanders* (1880) 72 Mo. 616.

154. (1869) 45 Mo. 167.

ion that the gift over on non-exercise of the power was good—it was said to be “contingent on the non-exercise of the power.” It is submitted that this is a distinct recognition of a contingent executory limitation by deed, tho it was *obiter*.¹⁵⁵

In *Green v. Sutton*,¹⁵⁶ there was a bargain and sale to A and his heirs to the use of B and such uses as B might appoint and in the event of B’s dying intestate to the heirs of C. B died intestate before C died. The court seems to have held that B did not take for life only, and that the limitation over was therefore void as a *remainder*. It is difficult to ascertain just the ground of the decision for the court spoke of a “power of absolute disposal, which can only be had by the holder of the fee” and admitted in the next paragraph that a life tenant could be given a power of disposal; it also said that “this was not intended to be a limitation over,” from which we may infer that the court did not intend to hold that an executory limitation was void.¹⁵⁷ As a contingent remainder following a life estate, the future interest failed because of the impossibility of ascertaining the persons to take when the particular estate ended. *Green v. Sutton* is of dubious authority because of the uncertain reasoning of the court.¹⁵⁸

155. The actual decision in *Jecko v. Taussig* would have been the same if the first taker had but a life estate; but in that event the gift over should have been called a vested remainder which could have been divested by an exercise of the power. See also, *Hazel v. Hagan* (1871) 47 Mo. 277. The court seems to have admitted that such a remainder was contingent on the non-exercise of the power, in *Grace v. Perry* (1906) 197 Mo. 550.

156. (1872) 50 Mo. 186.

157. *Jackson v. Robins* (1819) 16 Johns. 288 and *Pulliam v. Byrd* (1847) 2 Strob. Eq. 134, were cited by the court. The gift in the latter case was very clearly for the life of the first taker and there was no gift over in the event of the non-exercise of the power; so that the decision is authority for the proposition only that the life tenant did not take the fee as a consequence of the power of disposal. *Pulliam v. Byrd* is therefore no authority for *Green v. Sutton*. *Jackson v. Robins* will be considered *post* in the connection with the origin of this rule.

158. Judge Bliss wrote the principal opinion, in which Judge Wagner concurred. Judge Adams concurred in result, briefly stating that the limitation over failed because of the non-ascertainment of the persons to take when the first taker died, tho he apparently failed to perceive that this was only necessary if the future estate was a remainder.

*Straat v. Uhrig*¹⁵⁹ is a clear decision upholding the limitation over in spite of the first taker's power of disposal. A leasehold was assigned by deed to a trustee for A, who was given full power to dispose of it, and in the event of no disposal the trustee was to convey to the children of A and B when they reached twenty-one. The court's opinion, concurred in by four very able judges, was that A took an absolute trust estate with a valid shifting (erroneously called springing) limitation to the children. The decision was not achieved blindly, for the counsel had contended for an application of the rule which would have made the limitation over void.¹⁶⁰

The next case¹⁶¹ of a limitation over following a fee with absolute power of disposal was *Tremmel v. Kleibolt*.¹⁶² A conveyed certain lands to B in trust for C, A's wife, and the trustee covenanted to convey as directed by C by deed or will, and in default of C's exercise of the power to convey to C's heirs; the trustee conveyed to C's heir after C's death, and the heir brought ejectment against A, her father, who held possession as tenant by curtesy. In giving judgment for the defendant the court stressed the fact that A had not intended to deprive himself of curtesy, but it seems to have said also that C took the whole estate fol-

159. (1874) 56 Mo. 482.

160. *Rubey v. Barnett* and *Jackson v. Robins* were both cited in the argument. Nor is the decision weakened by the fact that the gift over was to A's children who would have benefitted, even if A had been given the absolute interest; for the issue was between the trustee and A's administrator, and the decision had the same effect as tho the gift over had been to persons unrelated to A. *Straat v. Uhrig* was severely criticized by *Gantt, C. J.*, in *Cornwell v. Wulff* (1898) 148 Mo. 542, 565.

161. In *Carr v. Dings* (1873) 54 Mo. 95, (1874) 58 Mo. 400, the first devisee had but a life estate by force of the fact that the property was "to be used and appropriated in and about her maintenance and support." In *Bryant v. Christian* (1874) 58 Mo. 98, the devise was expressly for life. In *Allen v. Claybrook* (1874) 58 Mo. 124, no power of disposal was given to the first taker. So, too, in *Pollard v. Union National Bank* (1877) 4 Mo. App. 408. In *Reinders v. Koppelman* (1878) 68 Mo. 482, it was held that the life estate was not enlarged into a fee by the addition of a power of disposal. In *Foote v. Sanders* (1880) 72 Mo. 616, both realty and personalty were given to A for life, and "what then remains" was given over; the court held that A took no power of disposal of the realty, since the quoted words could refer to the personalty. In *Boyer v. Allen* (1882) 76 Mo. 498, the power to convey was clearly exercised.

162. (1881) 75 Mo. 255. Also reported in (1879) 6 Mo. App. 549.

lowing *Green v. Sutton*¹⁶³ and that the gift over was void as a remainder. All of this was unnecessary, however, for even if the gift over was good as an executory limitation A would have been entitled to curtesy,¹⁶⁴ and if this were not true the case is weakened by the fact that the heirs of C would have taken anyway by descent from C.

The facts of *Wead v. Gray*¹⁶⁵ are more complicated. A, the maker of several notes, gave deeds of trust to secure them and died leaving a will in which his property was given to C. Notes secured by a second deed of trust were bequeathed by B to C who was given full power of disposal during her lifetime with a gift over to D in the event of her failure to exercise it. C devised her property to D, who sought to have the deed of trust given by A cancelled on the ground that when the notes came into C's hands the deed of trust could no longer be alive because of her holding the equity of redemption. B's administrator resisted the cancellation and was sustained by the St. Louis Court of Appeals which held that the gift over to D was good as an executory devise, that C could not exercise the power by will, and that there was no "merger." The Supreme Court, however, decreed the cancellation and expressed the opinion that the gift over to D was bad as "an abortive effort to give to one the absolute property, and at the same time to engraft a remainder upon it," relying mainly on *State ex rel. Haines v. Tolson*, in which, as has been pointed out, there was no added power of disposal. No reason is assigned for this invalidity except that the gift over was "inconsistent," and yet the court itself admitted the possibility of executory limitations when not preceded by powers of disposal. The Supreme Court also expressed the opinion that C's power of disposal included the power to bequeath the notes. On this theory, the gift over to D was of course defeated by the

163. The court also relied on *Cushing v. Blake* (1879) 30 N. J. Eq. 689, but that case rested on the rule in *Shelley's Case* and was therefore of no authority in Missouri.

164. *Buckworth v. Thirkell* (1785) 1 Coll. Juris. 322. See also *Tiffany, Real Property*, § 183. *Tremmel v. Kleiboldt* was misconceived by MARSHALL, J., in *Cornwell v. Wulff* (1898) 148 Mo. 542, 577.

165. (1880) 8 Mo. App. 515, (1883) 78 Mo. 59.

bequest, and it was unnecessary for the court to express any opinion as to its validity.¹⁶⁶ The decision may be distinguished on this important ground, therefore.

*Harbison v. James*¹⁶⁷ presented a question of conflict of laws which did not receive the attention which it merited and which has been neglected in subsequent comment. A testator domiciled in Kentucky died there leaving property in Kentucky which he devised to his wife with power to sell and re-invest, and "at her death any portion remaining undisposed of" was given to his daughters. The wife invested some of the proceeds in Missouri. Plainly any rights in this Missouri property depended on the effect of the will, which was determined solely by Kentucky law. The Kentucky court had passed on the same will in *Anderson v. Hall*,¹⁶⁸ and the Missouri court referred to the decision with approval but seems to have thought it was applying the Missouri rule in determining that the wife took but a life estate with a valid remainder to the daughters. It is submitted that *Anderson v. Hall* was controlling, and the decision of *Harbison v. James* is, therefore, of little importance in Missouri in spite of the frequency with which it has been cited. The actual decision did not involve the validity of the limitation over.¹⁶⁹

*Gaven v. Allen*¹⁷⁰ presents a peculiar situation. A testator devised land to his wife, with a gift over in the event of her

166. See the comment in *Munro v. Collins* (1888) 95 Mo. 33, 38. It may also be noted that the gift of the notes to C, who held the equity of redemption in the land, may have been held to have cancelled the security for the notes even tho the gift over were good and not defeated.

167. (1866) 90 Mo. 411. In *Russell v. Eubanks* (1884) 84 Mo. 82, the first devisee took for life only. In *Bean v. Kenmuir* (1885) 86 Mo. 666, there was no added power to convey tho the first taker was to hold to herself and "her heirs and assigns" forever. The power given to the first taker in *Hardy v. Clarkson* (1885) 87 Mo. 171, was exercised and what was said about the gift over was therefore *obiter*.

168. (1882) 80 Ky. 91. *Cf. Snively v. Snively* (Ky., 1915) 172 S. W. 911.

169. In *Munro v. Collins* (1888) 95 Mo. 33, the litigation concerned personal property which was bequeathed to the testator's widow "to be held and enjoyed by her as her own" and "after death, such of said property as shall then be in her possession" was given to the testator's daughter. The court held that the wife had only a life interest without a power of disposal, and said that the later quoted words had reference to the consumable personalty. See also *Cook v. Couch* (1889) 100 Mo. 29.

170. (1889) 100 Mo. 293.

re-marriage, and gave her a power of sale; the widow sought specific performance by one who agreed to buy the land and who contended that she could not convey a "perfect title in fee." It was held that the wife had only a "qualified fee," but that she could convey a perfect title in fee. While the result would have been the same if the gift over had been held to be void, the court very clearly thought it was good. It should be noted that the event on which the limitation over was made, was in no way connected with the exercise of the power.

The question of the validity of an executory limitation after a full power of disposal was squarely presented in *Cornwell v. Orton*.¹⁷¹ Land was conveyed by deed to A and his heirs in trust for B, who was to have full power to convey or devise, and in the event of a failure to exercise the power the trustee was to convey to C and his heirs. The court¹⁷² held that B's interest was not limited to a life estate and that the limitation to C was void. No reason was assigned for the latter, except that a remainder cannot be limited after a fee. The limitation over was said to be repugnant, for which the court relied upon *Green v. Sutton* and *Tremmel v. Kleiboldt* and repeated the dictum of *Rubey v. Barnett* that "a power to dispose of a thing as one pleases, must necessarily carry along with it a full property in it." The decision was reviewed by the court *en banc* in *Cornwell v. Wulff*¹⁷³ a few years later, and for the first time the court was forced into an analysis of the principle and its foundation, and while it admitted the possibility of an executory limitation in a deed, it refused to change its ruling that an executory limitation after an absolute power of disposition in the first taker is void. No reasons were given for such a proposition but the

171. (1894) 126 Mo. 355. In *Lewis v. Pitman* (1890) 101 Mo. 281 and in *Redman v. Barger* (1893) 118 Mo. 568, the first taker was held to have a life estate, tho this construction was in both cases influenced by the acceptance of the notion that the gift over would have been void if the first taker had taken a fee. See also *Greffet v. Willman* (1892) 114 Mo. 106; *Schorr v. Carter* (1893) 120 Mo. 409; *Evans v. Folks* (1896) 135 Mo. 397.

172. Division number two, composed of GANTT, BURGESS, and SHERWOOD, JJ.

173. (1898) 148 Mo. 542.

court relied upon *Ide v. Ide*¹⁷⁴ and *Jackson v. Bull*¹⁷⁵ and Chancellor Kent's statement.¹⁷⁶ *Green v. Sutton* was also relied on, and *Straat v. Uhrig* was emphatically disapproved. Curiously enough, the dissenting judges¹⁷⁷ did not deny that the limitation over was void if the first taker took a fee, but they relied on *Lewis v. Pittman*¹⁷⁸ in asserting that the first taker took only a life estate. All of the judges agreed that the limitation after a power of disposal was void, if the first taker got a fee; yet no reasons were given beyond the citations, and *Green v. Sutton* was not clear enough to have produced such unanimity.

In later decisions the issue has usually been whether a life estate or a fee was given to the first taker and it has uniformly been admitted that if a fee has been given the gift over is void. Since the clear statement of this principle in *Cornwell v. Wulff*, the court has shown a disposition to follow *Lewis v. Pittman* and hold that a life estate has been conferred on the first taker even in the absence of express words, in order to avoid the invalidity of the gift over.¹⁷⁹ In *Walton v. Drumtra*,¹⁸⁰ the deed was in all respects like that in *Cornwell v. Wulff* but it was held that the gift over was valid because the first taker took but a life estate, tho the court lapsed into confusion and spoke of the gift over as taking effect as an executory limitation. An attempt was made¹⁸¹ to distinguish *Cornwell v. Wulff* on the ground that the

174. (1809) 5 Mass. 500.

175. (1813) 10 Johns. 19.

176. 4 Kent, Commentaries, 270. In thus referring to the origin of this rule, the court ought to have referred to Professor Gray's classic criticism of the cases cited, which had then been published several years; a reference to it might have changed the decision.

177. SHERWOOD, BRACE and MARSHALL, JJ. Judge SHERWOOD had changed his mind after the decision in *Cornwell v. Orton*.

178. (1890) 101 Mo. 281.

179. See *McMillan v. Farrow* (1897) 141 Mo. 55, in which the gift over was of what remained at the death of the first taker; and *Cross v. Hoch* (1899) 149 Mo. 325.

180. (1899) 152 Mo. 189. The decision follows an earlier construction of the same deed by the federal court in *Yore v. Yore* (1874) 63 Fed. 645; but the federal court apparently did not consider the possibility of the gift over taking effect as an executory limitation.

181. See the opinion of BURGESS, J., on p. 503, and the opinion of GANTT, C. J., on p. 511. The latter judge also attempted to distinguish *Cornwell v. Wulff* as a case of an executed trust, but this seems immaterial unless the active trustee be clothed with discretion to de-

deed in that case contained no gift over, but this was a patent misstatement of the facts. A majority of the court admitted that *Cornwell v. Wulff* had been improperly decided on the ground that the deed ought to have been held to have given the first taker only a life estate, and *Walton v. Drumtra* must be taken to have overruled *Cornwell v. Wulff* for a majority of the court saw no distinction between the two cases.

*Roth v. Rauschenbusch*¹⁸² was decided by two of the judges who had stood up for *Cornwell v. Wulff*. The limitation over had been defeated by a conveyance by the first taker, and the devisees of the gift over sought to avoid the conveyance on the ground that it was the result of undue influence practiced upon the first taker; but the court held that they had no standing in court for the limitation over was void as an executory devise because "such a limitation is inconsistent with the absolute estate and power of disposition *expressly given or necessarily implied* from the will."¹⁸³ The same judges also decided *Jackson v.*

termine the shares of the beneficiaries, and the court did not subscribe to it. ROBINSON, J., who concurred in the majority opinion in *Cornwell v. Wulff*, had changed his mind since the decision of that case and expressed the opinion that it was wrongly decided. This puts *Cornwell v. Wulff* in the position of having been decided by three out of seven judges, and disapproved in *Walton v. Drumtra* by four out of seven.

182. (1903) 173 Mo. 582. The decision was by two judges of division number two; Fox, J., did not sit. The decision represents the opinion of GANTT and BURGESS, JJ. ROY, C., speaking of *Roth v. Rauschenbusch* in *Gibson v. Gibson* (1911) 239 Mo. 490, said that the division which decided it "assumed the responsibility of overruling in effect, the decision of the full court in *Walton v. Drumtra*." But it is submitted that he failed to note that the problem before the court in each case was one of construction, and that the terms of the will in the later case were not exactly the same as those of the deed in the earlier case.

183. In *Gannon v. Albright* (1904) 183 Mo. 238, the event on which the limitation over was made did not occur, tho the court was clearly of opinion that the limitation over was void; and later in *Gannon v. Pauk* (1906) 200 Mo. 75, it was held that the power had been exercised by the first taker. In *Papin v. Peidnoir* (1907) 205 Mo. 521, the first taker was held to have properly exercised the power. See also *Grace v. Perry* (1906) 197 Mo. 550; *Armor v. Frey* (1909) 226 Mo. 646; *Threlkeld v. Threlkeld* (1911) 238 Mo. 459. In *Young v. Robinson* (1906) 122 Mo. App. 187, the Kansas City Court of Appeals purported to hold a gift over void in reliance on *Roth v. Rauschenbusch* and *Gannon v. Albright*, but there was little analysis of the gift and it is not clear that there was an absolute power of disposal.

Littell,¹⁸⁴ in which, tho it was unnecessary to the decision, they said that a limitation over would be void; it is not clear that the court thought there was a limitation over, however.

Such were the precedents when in *Gibson v. Gibson*,¹⁸⁵ Roy, C., sought to clear away the confusion of the decisions and to establish the rule of *Walton v. Drumtra*; but the actual facts did not warrant the attempt, for the first taker was made a trustee for those later entitled and there was no limitation after a fee with added power of disposal. The result of *Gibson v. Gibson* ought not to have been different if the first taker had been held to have had the fee, and in spite of the court's statement that she took but a life estate it would seem that she must have had a fee in order to carry out her duties as trustee. *Gibson v. Gibson*, therefore, settled nothing and the review of the decisions was apparently made without appreciation of the real issue around which the conflict had raged.¹⁸⁶

This completes a review of the cases. It is submitted that only three of the decisions cannot be rested upon some other ground than the impossibility of a valid executory limitation after a fee with added power of disposal—those three are *Green v. Sutton*, *Cornwell v. Wulff*,¹⁸⁷ and *Roth v. Rauschenbusch*. Of these the opinion in *Green v. Sutton* is by no means clear and at least one of judges may have rested the result on the failure of a contingent remainder because the contingency had not happened dur-

184. (1908) 213 Mo. 589. Fox, J., took part and concurred.

185. (1911) 239 Mo. 490. The case was decided by division number two, composed of judges none of whom had participated in the former cases on this topic.

186. In *Burnet v. Burnet* (1912) 244 Mo. 491, the first taker was held to have but a life estate. In *Freeman v. Maxwell* (1914) 262 Mo. 13, the first taker was not given a power of disposal, tho the trustee was authorized to use the legacy for the support of the first taker. The court held that the first taker had only a life interest and WILLIAMS, C., said *obiter*, "Some of the cases cited hold that a remainder over, after what purports to be a devise of the fee, is void. But that is no longer the law of this state, as will appear from a reading of the case of *Gibson v. Gibson*, wherein the Missouri cases on the subject are reviewed and some of the cases cited by appellant are expressly overruled." This statement, it is submitted, is grossly inaccurate.

187. *Cornwell v. Orton* might also be included, but it is part of the same litigation as *Cornwell v. Wulff*.

ing the existence of the particular estate;¹⁸⁸ and *Cornwell v. Wulff* has been expressly overruled upon a ground which would unquestionably have left the limitation over valid. This leaves *Roth v. Rauschenbusch*,¹⁸⁹ which was decided by only two judges and which has since been disapproved on another ground.¹⁹⁰ Opposed to *Green v. Sutton* and *Roth v. Rauschenbusch* are *Straat v. Uhrig*, and the clear *dicta* in *Jecko v. Taussig* and *Gaven v. Allen*.

In view of this situation, is it too late to ask why there should be a rule that an executory limitation following a fee with added power of disposal is void? It is not a rule of construction adopted to effectuate intentions, but a rule of law, the avowed purpose of which is to defeat intentions. We have got rid of the rule in *Shelley's Case*—why has this artificial rule been invented? If testators' and grantors' intentions must be defeated by this rule, there ought to be some good reason for it. Yet no reason has ever been given by the Missouri court beyond the statement that the limitation over would be "inconsistent" or repugnant with an absolute estate given to the first taker. But every shifting executory limitation is likewise inconsistent or repugnant. When pressed for a better reason the court harks back to Chancellor Kent and to *Ide v. Ide*,¹⁹¹ *Jackson v. Bull*¹⁹² and *Jackson v. Robins*.¹⁹³ The American cases have been so thoroly analyzed by Professor Gray¹⁹⁴ that it would be useless to attempt any further exposition of them. Apparently the Missouri court has never seen Professor Gray's analysis, tho it has been cited in numerous modern treatises and decisions.

188. *Vide infra*, note 158.

189. *Young v. Robinson* (1906) 122 Mo. App. 187, might also be enumerated, since it follows *Roth v. Rauschenbusch*.

190. In *Gibson v. Gibson* (1911) 239 Mo. 490.

191. *Ide v. Ide* (1809) 5 Mass. 500 was decided solely on the authority of *Attorney General v. Hall* (1731) Fitz 114, which, as Professor Gray has shown, the court misread. *Attorney General v. Hall* was cited by the Missouri court in *Gibson v. Gibson* (1911) 239 Mo. 490, where the gift over was miscalled a remainder.

192. (1813) 10 Johns. 19.

193. (1819) 16 Johns. 537. Also reported in 15 Johns. 169.

194. Gray, *Restraints on Alienation* (2d ed.) § 67 *et seq.* See also the valuable study by Edward Brooks, Jr., in 32 *American Law Register*, n. s., p. 1035; and another by B. M. Thompson, in 1 *Michigan Law Review* 427, commented on in 16 *Harvard Law Review* 458.

Chancellor Kent¹⁹⁵ gave the reason for this rule to be that "an executory devise cannot be prevented or defeated by any alteration of the estate out of which, or after which it is limited."¹⁹⁶ It will be admitted that since the famous decision of *Pells v. Brown*¹⁹⁷ executory devises are not destructible as are contingent remainders; i. e., they are not in their nature destructible interests, and if the first taker is not specially given a power to destroy the executory limitation he certainly cannot do so. But what is there in reason or in policy to prevent the creator of the estate from conferring on the first taker the power to destroy a subsequent limitation? And if it be conceded that this cannot be done, were it not more logical to say that the power of destruction is bad instead of saying that the gift over is void?

Nor does there seem to be any valid objection to the gift over on the ground that it deprives the first taker's fee of one of its necessary incidents, viz., descent to the heirs in case of intestacy;¹⁹⁸ for this would invalidate an executory limitation over on the death of the first taker without issue where no power of disposal had been conferred, yet in such cases the gift over is unquestionably good.¹⁹⁹ A gift over by way of forfeiture upon alienation in a certain manner may be void on account of the public policy which demands free alienation of property;²⁰⁰ but this ought not to invalidate gifts on a failure to alienate.

A special reason may exist for holding gifts over of personal chattels void, where the first taker has an absolute power of disposal, viz., the uncertainty of the extent of the gift over and the difficulty of determining what is given over.²⁰¹ The American

195. In *Jackson v. Robins* (1819) 16 Johns. 537, 589. See also 4 Kent, Commentaries, p. 270.

196. See a defense of this statement in 2 Reeves, Real Property, § 954, note; and a criticism of it in Tiffany, Real Property, § 140, note.

197. (1620) Cro. Jac. 590.

198. This reason was suggested by FRY, J., in *Shaw v. Ford* (1877) 7 Ch. Div. 669, 673.

199. Gray, Restraints on Alienation (2d ed.) § 63.

200. Gray, Restraints on Alienation (2d ed.) § 55.

201. This reason was adopted in several English cases. See Gray, Restraints on Alienation (2d ed.) § 58. Professor Gray suggests that some reason may be found for the rule inasmuch as it protects the creditors of the first taker. § 74g. The Alabama statute which validates the gift over seems to make an exception in favor of creditors of the first taker. *Cf. Hood v. Bramlett* (1895) 105 Ala. 660.

cases have not gone upon this ground, however, but have treated gifts of personality as governed by the same considerations which apply to realty.²⁰² It is obvious that the reason of uncertainty applies as well where the first taker is limited to a life interest, and is given a power of disposal, yet no one questions the validity of the gift over in this latter case.

In spite of its having no good reason to support it and of its operating to defeat intentions which are now so zealously sought to be effectuated, the rule has a firm hold in England²⁰³ and in many states in this country.²⁰⁴ The authorities are not unanimous,²⁰⁵ however, and many judges have condemned it.²⁰⁶

Is it possible for relief from this artificial rule to be secured without action of the legislature? The stability of titles demands continuity of decision with reference to rules concerning property. However, there is a difference between declaring void what was previously valid and declaring valid what was previously void, and the latter may be done when the former would be improper

202. But cf. *Mills v. Newberry* (1885) 112 Ill. 123 and the comment upon it in Kales, *Future Interests in Illinois*, § 171.

203. *Holmes v. Godson* (1856) 8 De G. M. & G. 152; *Shaw v. Ford* (1877) 7 Ch. Div. 669; *In re Jones* (1893) 1 Ch. 438. More recent cases are collected in 1 Jarman, *Wills* (6th ed.) p. 562. But see *Doe v. Glover* (1845) 1 C. B. 448. The rule does not seem to obtain in the Scotch law. Cf. *Barston v. Black* (1868) Scotch & Divorce App. 392.

204. *Williams v. Elliott* (1910) 246 Ill. 548; *Foster v. Smith* (1892) 156 Mass. 378; *Fisher v. Wister* (1893) 154 Pa. St. 65; *Hoxsey v. Hoxsey* (1883) 37 N. J. Eq. 21; *Law v. Douglass* (1899) 107 Iowa 606; *Howard v. Carusi* (1883) 109 U. S. 725; *Mulvane v. Rude* (1896) 146 Ind. 476; *In re Condon's Estate* (Iowa, 1914) 149 N. W. 264.

205. See *contra* to the rule, *Andrews v. Roye* (1860) 12 Rich. 536; *Hubbard v. Rawson* (1855) 4 Gray 242. The rule is condemned in a recent comment on the Iowa cases in 1 Iowa Law Bulletin 87. See also 16 Harvard Law Review 458. In New York, a statute apparently designed to prevent the destruction of contingent remainders has been seized upon to justify a departure from *Jackson v. Robins*. See *Matter of Cager* (1888) 111 N. Y. 343; *Leggett v. Firth* (1892) 132 N. Y. 7; Gray, *Restraints on Alienation* (2d ed.) § 70. A statute of Alabama expressly validates the limitation over except where it may injure creditors of or purchasers from the first taker. Alabama Code of 1907, § 3424; *Hood v. Bramlett* (1895) 105 Ala. 660, 17 So. 105.

206. PECKHAM, J., in *Greyston v. Clark* (1886) 41 Hun 125, 130, speaks of it as "a wholly artificial rule, founded neither upon any public policy or sound reasoning." Cf., *Easton v. Straw* (1846) 13 N. H. 320. It is clear that Roy, C., in *Gibson v. Gibson* (1911) 239 Mo. 490, disapproved the rule.

short of legislative action. The rule of *Green v. Sutton* and of *Roth v. Rauschenbusch*, because of the confidence with which so many judges have repeated it, has probably been accepted by the bar and frequently acted upon; but reliance upon this rule has usually taken the form either of refraining from making limitations over following absolute powers of disposal, or of clearly limiting the first taker to a life estate. To this extent, an abandonment of the rule by the courts will cause no inconvenience for it will simply change the practice of lawyers as to future instruments. In the unusual case in which such a limitation over has been made in spite of the rule, the heirs of the first taker may have been advised that they could hold in spite of the limitation over; but with the vacillation in the decisions of the Supreme Court for over thirty years²⁰⁷ on the question as to when the first taker has but a life estate with the limitation over good as a remainder, it is improbable that many lawyers have advised clients who would benefit by the limitation over to acquiesce in the holding by the heirs of the first taker; and this conclusion is borne out by the fact that there has been such a mass of litigation on this subject in recent years. It is submitted that little, if any, inconvenience would be caused in such cases by a judicial abandonment of the rule. Nor would inconvenience be caused to purchasers from the first takers, for after they have benefitted by the powers of disposal the limitations over are necessarily defeated.

A big advantage can be achieved by the courts' abandoning this artificial rule. The mass of litigation on the question of when the first taker has but a life estate would be very greatly reduced,²⁰⁸ and the court would have put itself beyond the temptation to find a life estate to have been created where no intention appears to so limit it—the temptation to which it so plainly yielded in *McMillan v. Farrow*, *Walton v. Drumtra*, and *Under-*

207. Since the decision of *Bean v. Kemmuitr* (1885) 86 Mo. 660.

208. See Gray, *Restraints on Alienation* (2d ed.) § 74a. The question would continue to arise with reference to dower and curtesy: if the first taker has but a life estate, his wife has no dower; but if he has a fee, his wife has dower in spite of the limitation over. *Vide infra*, note 101.

wood v. Cave.²⁰⁹ A more positive advantage would be the effectuation of testators' and grantors' intentions whether expressed in the one or the other form, i. e., whether the first taker has a life estate or a fee, and the ridding of our law of a formal and arbitrary rule which serves no good purpose and which, like the rule in *Shelley's Case* and the rule as to indefinite failures of issue, of both of which the legislature has relieved us, only fetters a wholly reasonable and proper disposition of property.

IV SUMMARY

The results of this survey of the present position of executory limitations in Missouri law may be summarized by stating the various types of cases in which the questions have arisen and are likely to arise.

- I. A, having an estate of inheritance in Blackacre, devises it
 1. To B and his heirs with a proviso that if C is admitted to the bar the land shall go to C and his heirs. C has a valid, contingent, shifting, executory devise.
 2. To B and his heirs with a proviso that at the end of twenty years the land shall go to C and his heirs. C has a valid, certain, shifting, executory devise.
 3. To B and his heirs from and after ten years after A's death. B has a valid, certain, springing, executory devise.
 4. To B and his heirs from and after the date of C's admission to the bar. B has a valid, contingent, springing, executory devise.
 5. To B for life (or years) and from and after ten years after B's death to C and his heirs. C has a valid, certain, springing, executory devise.

209. (1903) 176 Mo. 1. Real injury is inflicted by such a misconstruction of gifts in that the spouse of the first taker is deprived of dower or curtesy, and the first taker as a life tenant may be liable for waste.

II. A, having an estate of inheritance in Blackacre, conveys it by bargain and sale, or covenant to stand seised, or a common law method of conveyance to uses,

1. To B and his heirs with a proviso that if C is admitted to the bar the land shall go to C and his heirs. C has a contingent, shifting, executory interest which is *probably* valid in Missouri.

2. To B and his heirs with a proviso that at the end of twenty years the land shall go to C and his heirs. C has a certain, shifting, executory interest, which is *probably* valid in Missouri.

3. To B and his heirs from and after A's death. B has a valid, certain, future interest which will probably be upheld as a remainder, *Dozier v. Toalson*, but which should be treated as a springing, executory interest.

4. To B and his heirs *to take effect* upon A's death. B takes nothing. *Goodale v. Evans*, but *cf.*, *Wimpey v. Ledford*.

5. To B and his heirs from and after C's admission to the bar. B has a valid, contingent, springing, executory interest. *O'Day v. Meadows*.

6. To the heirs of B, a living person. The heirs of B should have a valid, contingent, springing, executory interest; but *quaere*.

7. To B for life (or years) and from and after ten years after B's death to C and his heirs. C has a certain, springing, executory interest which is *probably* valid in Missouri.

III. A, having an estate of inheritance in Blackacre, conveys it by statutory grant or by a method of conveyance good at common law and not operating under the statute of uses. The same results will follow as in II, except for the additional doubt as to the applicability of the statute concerning freeholds *in futuro* to the shifting interests in II, 1 and 2.

IV. A, having a term for years in Blackacre, bequeaths it

1. To B with a proviso that if C is admitted to the bar the term shall go to C and his heirs. C has a valid, contingent, shifting, executory interest. *Manning's Case*.

2. To B with a proviso that at the end of twenty years the term shall go to C and his heirs. C has a valid, certain, shifting, executory interest.

3. To B from and after ten years after A's death. B has a valid, certain, springing, executory interest.

4. To B for life and after his death to C and his heirs. B takes the whole term subject to C's valid, certain, shifting, executory interest.

5. To B for life and from and after ten years after his death to C and his heirs. B takes the whole term which his administrator may hold until ten years after B's death when it will shift to C and his heirs.

V. A, having a term for years in Blackacre, assigns it

1. To B with a proviso that if C is admitted to the bar the term shall belong to C and his heirs. *Quaere*.

2. To X in trust for B with a proviso that if C is admitted to the bar in trust for C. C has a valid, contingent, shifting, equitable interest. *Straat v. Uhrig*.

3. To B from and after the death of A. *Quaere*.

4. To X in trust for B after the death of A. B has a valid, certain, springing, equitable interest.

VI. A, having a picture, bequeaths it

1. To B with a proviso that if B dies without issue surviving him it shall belong to C. C takes nothing. *State ex rel. Haines v. Tolson*.

2. To B with a proviso that if C is admitted to the bar it shall belong to C. *Quaere*.

3. To X in trust for B but if C is admitted to the bar in trust for C. C's contingent, shifting, equitable interest is probably good.

4. To B for life and then to C. C has a valid remainder. *State ex rel. Farley v. Welsh*.

VII. A, having a picture, transfers it by deed

1. To B with a proviso that if B dies without issue surviving him it shall belong to C. C takes nothing. *Wilson v. Cockrell*.

2. Same as VI, 2.

3. Same as VI, 3.

4. To B for life and then to C. C has a valid remainder.

5. To B from and after next Christmas. B has a springing, executory interest which is *probably* good.

VIII. A, having a cask of wine, bequeaths or transfers it to B. Any gift over is void because the use of the wine will necessarily mean its consumption.

IX. A devises or conveys land, or bequeaths or transfers personal chattels

1. To B for life with power to pass an absolute title by deed or will, and in the event of his failure to exercise the power to C and his heirs. C has a valid remainder which is vested subject to being divested by B's exercise of the power. (There is some danger that C's remainder will be held to be contingent.) *Jecko v. Taussig*.

2. To B and his heirs with a proviso that if B does not seek admission to the bar then the property is to go to C and his heirs. The gift over is not bad by reason of B's power to defeat it by seeking admission to the bar.

3. To B and his heirs with power to pass an absolute title by deed or will and if B remarries (or dies without issue) then to C and his heirs. The limitation over is *probably* not void by reason of the power given to B. *Cf., Gaven v. Allen*.

4. To B with power to pass an absolute title by deed or will and in event of his failure to exercise the power then to C and his heirs. B will *probably* be held to have a life estate and C a vested remainder which may be divested by B's exercise of the power. *Walton v. Drumtra*.

5. To B in fee (or if personalty, absolutely) with power to pass an absolute title by deed or will and in the event

of his failure to exercise the power then to C and his heirs. C takes nothing because of the power given to B. *Roth v. Rauschenbusch*. Cf., *Green v. Sutton*.

X. A, having a term for years, assigns it to X in trust for B who is given a general power to dispose of it absolutely, and in the event of B's failure to exercise the power in trust for C. C has a valid, contingent, shifting, equitable interest. *Strat v. Uhrig*.

MANLEY O. HUDSON