

1926

Springing Uses in Illinois

Harry A. Bigelow

Follow this and additional works at: http://chicagounbound.uchicago.edu/journal_articles

 Part of the [Law Commons](#)

Recommended Citation

Harry A. Bigelow, "Springing Uses in Illinois," 20 Illinois Law Review 662 (1926).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

SPRINGING USES IN ILLINOIS

BY HARRY A. BIGELOW*

Among the old common law rules relating to the creation of future interests in land, there are two doctrines that go back to the feudal origins of our land law and that still survive just sufficiently to cause trouble and occasionally, by application or misapplication, to prevent the carrying out of the plain intent of the grantor.

The first of these hoary but still surviving principles, is that, by common law, after the owner of land has made a conveyance thereof in fee, he has no further conveyable interest in the land. Hence, if a common law conveyance of land is made by *X*, the owner in fee, to *A* and his heirs with a further limitation that if *A* dies without male issue him surviving, the estate shall go to *B* in fee, the conveyance is operative to vest a fee in *A*, but gives *B* no interest whatsoever.¹

The other rule is that a conveyance of the seisin or freehold possession of the land can not be made to begin in futuro; thus *X*, the owner of land can not convey to *B* a life estate or a fee to begin after the death of *X*. If he puts the seisin out of himself by a present act, as by a conveyance to *A* for his life or in tail, he may provide that on the expiration of the life estate or tail estate the seisin, i. e., the freehold interest in the land, shall pass by way of remainder to *B*; but if there is any gap between the estate of *A* and *B* so that the seisin has become revested in *X*, or if there is no particular present freehold estate in *A*, the attempt to create the interest in *B* fails.²

These doctrines were in full force, and so far as they went, were the only ones recognized or acted upon by the English common law courts of the early sixteenth century in deciding what future interests in land could be legally created. If a conveyance violated either of these principles it was to that extent ineffective.

It was in this state of the English law that the Statute of Uses was enacted. This provided in substance that whenever one person should stand or be seized of land to the use of another that other

*[Professor of Law at the University of Chicago.]

1. *Telburg v. Barbut* 1 Ves. Sr. 89 *Fearne*, "Conting. Rems." 372, 373.
2. *Fearne*, "Conting. Rems." 307.

should have a legal estate of the same size and quality that he had before the statute as a merely equitable or use estate.³

The consequence of this legislation was to open the door to a freedom and flexibility in the creation of future interests in land that were impossible under the common law theory. At the same time, however, the possibility of creating common law limitations within the restrictions already referred to, still formed an integral part of the law relating to future interests. The position was gradually taken by the English courts that if a future limitation could be regarded as a remainder it would be so regarded.⁴ If, however, the limitation could not by any possibility take effect as a remainder, vested or contingent, then it could be regarded as an executory interest arising under the Statute of Uses.⁵ This meant that any future interest limited to take effect immediately upon the expiration of a life estate or an estate in fee tail, was a remainder vested or contingent as the case might be, and subject to the common law rules with regard to such estates. If it was limited to take effect otherwise than on the termination of these estates, or if it was a limitation after a fee, or if it was a limitation to take effect in futuro out of the estate of the grantor it was an executory interest.⁶

This fusion of the common law conception of future estates and the conceptions that trace their origin to the Statute of Uses has produced in this state, as in others, decisions, or at least dicta on the part of the court that are not always easy to reconcile. Two typical cases, the first, of a shifting use, and the second, of a springing use, may be thus stated:

X, owning in fee, conveys by a deed of bargain and sale to A in fee but if A dies leaving no issue him surviving, to B in fee.

A, owning in fee, similarly conveys to B in fee from and after A's death.

In both cases the question is as to the validity of the limitation to B. This limitation may be either contingent or non-contingent: B may be a definite individual who will take on the happening of the event specified; on the other hand, the final limitation may be to an individual at present unidentified, as "the heirs of X," a living

3. Gray "Cases on Property," (2nd ed.) I 468. This statute has in substance been re-enacted in sec. 3 of the Illinois Conveyance Act.

4. *Purefoy v. Rogers* 2 William's Saunders, 380, 388; *Carwardine v. Carwardine* 1 Eden, 27, 34; *Doe d. Herbert v. Selby* 2 B. & C. 926, 930; *Festing v. Allen* 12 M. & W. 279 *Leake* "Digest," (2nd ed.) 255 et seq.

5. In re *Lechmere & Lloyd* 18 Ch. Div. 524; *Hayes* "Conv." (5th ed.) II 464, 465.

6. *Hayes* id. I 119, et seq. *Leake* "Dig." (2nd ed.) 256.

person, or "the then oldest living son of X," or it may be contingent upon the doing of some act by B, as the payment of money.

With regard to the first case the language of the Supreme Court of this state has varied greatly from time to time. It has frequently seemed to deny the possibility of such a limitation and it so definitely held in one case.⁷

The latest case involving the validity of a shifting use is *Harder v. Matthews*.⁸ In that case, X, in consideration of \$100 paid by A, conveyed land by an ordinary indenture deed to A in fee, provided that if A should die without leaving children, the land should go to and the title vest in, the living grandchildren of X, X reserving the use, occupation, rents and profits during his life. The Supreme Court in a lengthy and learned opinion by Mr. Justice Dunn held that such a limitation to the grandchildren was valid. He reviewed and distinguished the earlier cases, definitely overruling *Palmer v. Cook*.⁹ He pointed out that such a deed operates, not as a common law conveyance, directly upon the seisin, but upon the use, under the Statute of Uses, by way of bargain and sale or covenant to stand seised.¹⁰ He stated the operation of the statute in the following terms:

"The operation of the conveyance by bargain and sale was in this manner: The bargain for the sale of the land by the owner for a valuable consideration had no effect upon the legal title but the payment of the consideration raised a use in favor of the purchaser, and the bargainer thereby standing seized to the use of the purchaser, the statute executed the use, so that the purchaser became seized of the legal estate in the same manner as he had been seized of the use and as completely as if he had been invested with it by livery of seisin. The same result followed from the covenant to stand seised where the owner of land, in consideration of relationship by blood or marriage, covenanted to stand seised of the land to the use of the person so related, either immediately or in futuro. A use was raised by the covenant which the statute executed *at the time stated* out of the covenantor's seisin, so that the cestui que use became seized of the legal estate."¹¹

7. *Palmer v. Cook* 159 Ill. 300.

8. 309 Ill. 548.

9. See note 7, *supra*.

10. Compare ILL. LAW REV. 18: 485.

11. 309 Ill. 559. (My italics.) The decision in *Harder v. Matthews* presents another interesting question which cannot be gone into here, viz., how far its implications are consistent with the decision in *Miller v. McAllister* 197 Ill. 72. In that case land was conveyed to A "and her children, born and to be born." A had two children alive at the time of the conveyance. Others were born later. Held only those alive at the date of the conveyance took an interest. If by a shifting use a fee simple interest may pass from

This decision places the law with regard to future estates created under the Statute of Uses by way of a shifting use on a clear and understandable basis, and may fairly be regarded as having definitely freed the law in this state upon this subject from the obscurities which have hitherto surrounded it.

Just recently the Supreme Court has had to deal with a case that involves the second type of future interest mentioned above, viz., the springing use. This is the case of *Legout v. Price*.¹² The relevant facts in the case are these:

A had a son *B*. He executed an indenture, the important parts of which are as follows:

"This indenture made . . . between [*A*] of the first part and the heirs of [*B*] of the second part; witnesseth

"That the said party of the first part, in consideration of \$1000 . . . paid by the party of the second part . . . do grant, bargain and sell unto the said party of the second part, his heirs and assigns" the land in question.

"Provided that the said [*B*] may retain the possession and have the use of the lands above conveyed during his life."

Habendum "unto the said party of the second part, his heirs and assigns forever."

At the date of the conveyance *B* had one child; three more were born later. One of these latter children, after reaching majority, executed to *X* a conveyance of an undivided one-fourth interest in the land in question. Subsequently *B* claimed to own the land in fee simple by operation of the rule in *Shelley's* case and brought an action against *X* to have the deed to *X* cancelled as a cloud on *B's* title. The lower court decided in *B's* favor and *X* appealed. The Supreme Court held that neither *B*, nor *X* claiming under the grant from *B's* son had any interest in the land for the reason that the original conveyance from *A* was wholly inoperative.

The reasoning of the court is as follows:¹³

"The instrument is void for want of a grantee, and is inoperative to affect the title in any way. It purports to convey a present estate, but the grantee named is the party of the second part, 'the heirs of Adolphus Legout,' who is still living, and a conveyance of a present estate to the heirs of a living person is void for uncertainty. *Aetna Life Ins. Co. v. Hoppin* 249 Ill. 406, 94 N. E. 669; *Duffield v. Duffield* 268 Ill. 29, 108 N. E. 673, Ann. Cas. 1916D, 859. Future estates may,

A to *B* on a contingency as was held in the *Harder* case, why by a similar operation of the Statute of Uses may not a proportionate part of the fee simple estate pass from the older to the subsequently born children?

12. 318 Ill. 425, 149 N. E. 427.

13. 318 Ill. 428, 149 N. E. 429.

however, be limited to persons who are not ascertained or even not in existence, provided there is a present particular estate to sustain the remainder, and the grantee shall be in existence when the time arrives for the enjoyment of the estate: *Du Bois v. Judy* 291 Ill. 340, 126 N. E. 104; *Aetna Life Insurance Co. v. Hoppin* supra. If the instrument may be construed as conveying a life estate to Adolphus, the grant to his heirs, who will be ascertained immediately on his death, may be sustained as the grant of a future estate supported by the particular estate for the life of Adolphus. The deed contains no words purporting to convey an estate to Adolphus. It purports, first, to grant the land to the heirs of Adolphus in fee simple, and this grant is followed by the proviso 'that Adolphus Legout may retain the possession of and have the use of the lands above conveyed during his lifetime.' These words do not convey an estate or purport to do so."

The remainder of the opinion is devoted to a consideration of the proposition that *B* did not take a life interest under the deed, for the reason that no reservation can be made to a third person and there was no other language sufficient to vest an interest in him. So far as this part of the case is concerned, it will be assumed for the purposes of this discussion, that *B* took no interest under the deed.

This leaves for consideration the vital part of the case, viz., the estate that was attempted to be vested in the heirs of *B* upon his death.

It should be noticed that so far as the phraseology of the deed is concerned, the language used is adequate for the purpose. If the deed had successfully created a life estate in *B* the limitations to *B*'s heirs would have been good. The reason that is given for its failing in the actual case is because the gift to *B* failed and the estate to the unascertained persons not being sustained by a particular estate therefore also failed. In support of this proposition the court cites two cases, *Aetna Life Insurance Company v. Hoppin*,^{13a} and *Du Bois v. Judy*.^{13b} In the *Hoppin* case the conveyance was to *A* for life and on his death to the heirs of the body of *A*, their heirs and assigns. The court held that the rule in *Shelley's* case did not apply, and that the limitations were a life estate in *A* and a contingent remainder in fee to the heirs of his body. It pointed out that though the remainder to the heirs was to persons at present unidentifiable and so was contingent, it would become vested at the exact moment of the termination of the life estate. Several authorities were cited for the well established proposition that a contingent remainder preceded by a life estate is good if it vests at or before the termination

13a. 249 Ill. 406.

13b. 291 Ill. 340.

of the life estate. The *Judy* case involved in part the same question and the *Hoppin* case was cited with approval.

These cases are of course in accordance with the entire body of law on the point, both English and American.¹⁴ But it should be noticed what they are, viz., life estates followed by an estate intended to fit on immediately at the termination of the life estate. They are common law remainders, a form of future interest much older than the Statute of Uses. As has already been pointed out,¹⁵ if a limitation of a future estate is of a kind that can possibly operate as a remainder it will do so. Hence, where the limitations are of a validly created life estate with an immediately following interest that by its terms may become vested coincidentally with the termination of the vested life estate, that interest will be treated as a remainder. This result ought to follow whether the deed is regarded as operating as a bargain and sale under the Statute of Uses or as a statutory equivalent of a common law conveyance.

At this point, it is desirable to examine another line of cases, viz., those where the future interest in *B* is not supported by a previous expressly created life estate. Such a limitation could not have been created at common law as it would have involved an attempt to pass the seisin out of the present holder thereof by an act operating in futuro; a legal impossibility under the feudal doctrines of seisin. Such an estate can be created only as a springing use by a conveyance operating under the Statute of Uses or by a conveyance that derives its power from a statute like section 1 of the Conveyance Act.

The earliest case in which the question of a springing use was considered by the court to any extent was *Shakleton v. Sobree*.¹⁶ That was a conveyance of land from *A* to *B* in fee by deed, the form of which is not given, which contained this clause: "This deed not to take effect until after my decease . . . not to be recorded until after my decease." After *A*'s death the deed was duly recorded. In a contest between the heirs of *A* and *B* the court held that *B* took a good title. They said in part:¹⁷

"Was this deed void, or did it operate to convey the fee at the death of the grantor? Had he conveyed a life estate to another, or had he conveyed to another to hold in trust for him during his life,

14. *Archer's Case* 1 Co. 66b; *Festing v. Allen* 12 M. & W. 279; *Sharman v. Jackson* 30 Ga. 224; *Abbott v. Jenkins* 10 S. & R. (Pa.) 296; *Ryan v. Monaghan* 99 Tenn. 338; *Fearne* "Conting. Rems." I 307 et seq.

15. Ante p. 663.

16. 86 Ill. 616.

17. 86 Ill. 619, 620, 621.

then it would have been free from all doubt. Or had he in the same instrument reserved a life estate to himself, we apprehend that it will be conceded that the title would have passed to the grantee. Then, in substance, and, if not, in form, in what does this differ from the last two supposed cases? Had the life estate been conveyed to another for the use of the grantor, without creating an active trust, the life estate would, under the statute of uses, have vested in the grantor precisely as it did under this deed: *Whitman v. Broomer* 63 Ill. 344. And had he expressly reserved in this deed a life estate, he would have held in the same manner. If, then, in either of these cases, the grantor could thus hold the title necessary to support a remainder, why not when, by operation of law and construction of the deed, he holds a life estate in legal effect the same? We are unable to perceive any reason in law or in fact. . . .

"Our state has abolished livery of seizin, and deeds of feoffment have gone out of use, and lands are conveyed by deed of bargain and sale, and, under the statute of uses, the use is executed and the title passes to the grantee on the delivery of the deed. . . .

"If the remainder was contingent, and it was uncertain who would take at the death of the grantor, then it may be that there might exist a distinction; but be that as it may, here the remainderman was in being, named as grantee, and no reason is seen, since livery of seizin has been abolished, why the fee in remainder did not vest on the delivery of the deed, which has been adopted as a substitute for livery. . . .

"By giving effect to such conveyances we only estop the grantor by his covenants, and hold that he stands seized to the use of the grantee, as in other deeds of bargain and sale. We give effect to the statute of uses."

In these extracts several points are worth noting.

1. The court definitely decided that this estate beginning in futuro was good and that the deed operated under the Statute of Uses to create in the grantee a use executed into a legal estate by operation of the Statute of Uses.

2. They call this interest of *B* a remainder and refer to the interest of *A* as a life estate.

3. They leave open the question whether the result would have been otherwise had this future interest been contingent.

The first of these three propositions, which was the actual decision in the *Shakleton* case, has been several times followed and the language of the decision quoted with approval, where the facts of the cases were the same as in the *Shakleton* case.¹⁸ In several of the opinions reference is also made to section 1 of the Conveyance Act

18. *Vinson v. Vinson* 4 Ill. App. 138; *Harshbarger v. Carroll* 163 Ill. 636; *Latimer v. Latimer* 174 Ill. 418; *White v. Willard* 232 Ill. 464; *Hathaway v. Cook* 258 Ill. 92; *Nowakowski v. Sobeziak* 270 Ill. 622; *Hudson v. Hudson* 287 Ill. 286.

and to some degree the court seems at times to have relied also on that to sustain the result reached.

With an uninterrupted line of decisions running back over a period of almost fifty years, there can be no doubt that a non-contingent future interest can be created out of the estate of the grantor to take effect at his death.

In all these cases *B* has been an identified person and his interest depended on no contingency except the death of *A*.

Suppose, now, that *A*, owning land in fee, executes an indenture with *B* by which for a valuable consideration he grants, bargains and sells the land in fee to those of *B*'s children who shall be alive at *B*'s death. Is there any rule of law that prevents this contingent estate in *B*'s children from becoming vested at *B*'s death? It may aid in the solution of this question to settle first the nature of the interest vested in *A*. As already stated, in *Shakleton v. Sobree* and the other cases that have followed it, where *B*'s estate was non-contingent the Supreme Court has commonly referred to the interest of *A* as being a life estate, although in none of these cases has anything turned on the nature of *A*'s estate. If *A*'s interest is a life estate then there would seem no reason for questioning the validity of the contingent interest to *B*'s children. It is the ordinary case of a contingent remainder supported by a vested freehold estate and *Aetna Insurance Company v. Hoppin*¹⁹ and the cases cited therein would all support the validity of the contingent limitation.

Whether or not *A*'s interest is a life estate may well depend on the language of the conveyance. In any case, it cannot be a common law conveyance because at common law a man cannot convey to himself.²⁰ Hence it must operate either under the Statute of Uses or by virtue of the Conveyance Act.

In *White v. Willard*²¹ the language of the conveyance was as follows:

"But the grantors herein hereby expressly reserve the use and absolute control of said premises for and during the period of their natural lives."²²

In such a case it would seem clear that *A* had a life estate and that the future interest in *B* would be good as a remainder, vested or contingent, as the case might be.

19. Ante p. 666.

20. *Hayes* "Conveyancing" (5th ed.) I 111.

21. 232 Ill. 464.

22. 232 Ill. 471. Language similar to this was used in the deeds in *Fowler v. Black* 136 Ill. 363; *Palmer v. Cook* 159 Ill. 300; *Valter v. Blavka* 195 Ill. 610.

When, however, the language of the deed in *White v. Willard* is compared with the language in *Shakleton v. Sobree*²³ there is seen to be a distinct difference between them. By the language of the deed in the latter case the grantee is given a fee simple to commence in the future; no other uses are declared; they still are in the grantor. The rule appears to be definitely established in England that, providing that the grantor had a fee simple, a resulting or undisposed of use is always in fee.²⁴ Upon the general principles of Uses this result would seem clearly correct. The grantor originally had the entire use, he has executed a document which will take it out of him in fee at his death; until then he has it as completely as ever. The proposition that the estate in *A*, until the limitation over becomes operative, is a fee simple, would seem even plainer in the case where the interest given to *B* is a contingent one. Suppose the conveyance to *B* in fee had read that it was not to take effect until the death or marriage of *A*'s daughter, would it be held that the undisposed of interest remaining in *A* was an estate d'autre vie or, on the other hand, that once owning the fee, *A* would continue to own it until the event happened on which it was to go over to *B*? A further difficulty with holding *A*'s estate in such a case to be only a life estate would be that it leaves the fee simple in the air. The fee cannot be in *B* because the contingency has not happened.²⁵ It would

23. Ante p. 667.

24. *Clerc's Case* 6 Coke 17b; *Davies v. Speed* 2 Salk 675.

"Where a future use is limited as a springing use without any preceding limitation of the use, whether in a conveyance operating with or without transmutation of possession, then until the springing use takes effect, the use results to or remains in the grantor for an estate commensurate with his original estate, and not for a particular estate only. The springing use thus operates upon the resulting use in the same manner as a shifting use does upon the preceding limitation, and does not operate by way of remainder": *Leake* "Digest of Law of Property" (2d ed.) 254. To the same effect are *Sander's* "Uses" I 146; *Hayes'* "Conveyancing" (5th ed.) I 464-465.

25. *Kales* "Future Interests" (2nd ed.) 538, mentions with citations of authorities, three situations where a different result will follow according as *A*'s estate is regarded as a fee with a springing use to *B* or a life estate with a remainder to *B*:

1. If *A* marries after the execution of the conveyance, his widow may have dower on the first assumption. She clearly will not on the second assumption.

2. If *A* has a fee, *B* has no action for waste; he may have, if *A* has only a life estate.

3. If the limitation over is to "the heirs of *A*" and *A* has a life estate, he will get a fee under the rule in *Shelley's* case and the heirs get nothing. If *A* has a fee, the executory limitation to the heirs is still good.

To these may be added a fourth: If the limitation to *B* is contingent, and *A* has a life estate, *B*'s interest prior to the Act of July 2, 1921, Rev. Stat. 1925 Ch. 30 sec. 40, may be destroyed by a conveyance by *A* to *X* of his life estate and his reversion back of *B*'s contingent interest: *Egerton v. Massey* 3 C. B. N. S. 338; *Bond v. Moore* 236 Ill. 576; *Drager v. McIntosh*

seem that the statement of the Supreme Court, repeated in various cases²⁶ where their attention had not been particularly directed to the question, that the interests under deeds giving an interest to *B* to begin in futuro, were a life estate in the grantor with a remainder in fee in the grantee, should not be regarded as final on the point. This conclusion is strengthened by the fact that in *Hudson v. Hudson*,²⁷ where the language of the deed²⁸ was substantially the same as in the *Shakleton* case, the court in speaking of the interests created thereby, said:

"A grantor may convey the fee in his land beginning at a future time, and the time of the commencement of the estate may be fixed by his death or may be at any arbitrary date before or after his death, or may be fixed by reference to such circumstances as the grantor may choose. Subject to the fee thus granted the grantor will retain for himself and his heirs and grantees the ownership of the land and the right to possess and use it. . . ."²⁹

If, then, it be assumed that *A*'s interest is a fee, clearly the limitation to *B*'s children at his death cannot be a remainder since there can be no remainder after a fee simple.³⁰ In fact, we now have a case that in all vital details is on all fours with *Harder v. Matthews*. In both we have a fee in the first taker followed by a fee to persons at present unidentifiable. The considered holding of the court in the *Harder* case that this interest was not a remainder but an executory interest coming into being as a shifting use by the operation of the Statute of Uses and free from the common law requirements relating to remainders would seem exactly applicable to the case of the springing use and would reach the same result in both classes of cases.³¹

316 Ill. 460. If *A*'s estate is a fee, and *B*'s consequently an executory interest, it is indestructible: *Pells v. Brown* Cro. Jac. 590; *Stoller v. Doyle* 257 Ill. 369.

26. Ante note 18.

27. 287 Ill. 286.

28. "This deed, with six others of the same date, made by the grantors herein, all to their children, is made as anticipating a partition of their estate among their children as they wish it to be done and will only take effect after their decease": 287 Ill. 290.

29. 287 Ill. 301, 302 (*My italics*). See also *Abbott v. Holway* 72 Me. 298.

30. *Harder v. Matthews* 309 Ill. 548, 557.

31. A covenant to stand seised to the use of subsequently born issue of the covenantor has been held good in England: *Mildmay's Case* 1 Coke 175a, 176b, 177a; *Bolls v. Winton* Noy 122. There is some authority for the proposition that there cannot be a bargain and sale to a person not in esse, but there seems to be no valid distinction between the covenant to stand seised and the bargain and sale. The authorities are collected and discussed in *Gray "Rule Against Perpetuities"* (3rd ed.) 55 et seq.

It remains only to consider the acts and decision of *Legout v. Price*³² in the light of the preceding discussion.

In that case there is an attempt to create a life estate in *B*, followed by an estate in fee to those who at his death would be his heirs. If that conveyance had been properly worded for that purpose it would have created a life estate in *B* and a contingent remainder in his heirs. This the court definitely says in the opinion.

If the grant had been to *B* in fee followed by an estate to his heirs if he died, say, leaving no male issue surviving, the second limitation would have been good on the authority of the *Harder* case. In the actual conveyance the limitation to *B* is intrinsically bad for lack of proper terms of conveyance; the limitation to the heirs of *B* is open to no such objection. Now, it would seem inevitable that the consequence of the failure of the attempted grant to *B* was either to produce no effect at all upon the estate of the grantor so that he still had a fee or else it was to cause to result to him an estate for the life of *B*. If the latter is the case, then the situation would seem to be an estate in the grantor for the life of *B*, followed at *B*'s death by an estate to *B*'s heirs in fee. If this is the correct analysis, the contingent remainder to *B*'s heirs is supported by a vested freehold estate, viz., that in *A* for the life of *B*; and being so supported and vesting at the exact moment of the termination of the life estate, viz., *B*'s death, there seems to be no reason why it should be said to be bad.

In fact, however, it is believed that the foregoing hypothesis is not correct, and it seems artificial to designate *A*'s interest as an estate for the life of *B*. The conjecture may be hazarded that the court itself did not consider that the result of the failure of the limitation to *B* was to give *A* an estate for the life of *B*. The natural and, it is submitted, the correct way legally of regarding the situation is to say that since the limitation to *B* failed, *A* was still in of his fee. If that is true, what objection is there to executing the estate to the heirs of *B*? That it is contingent makes no difference. As soon as it is admitted that *A* has a fee, the second limitation cannot be regarded as a remainder and becomes necessarily an executory interest. If in the *Harder* case an executory interest in fee can be validly made to divest, on a contingency, a preceding fee vested in *X*, why, in this case, can it not be made to divest a resulting fee in the grantor?

32. Ante p. 665.

It may be said that the estate to *B*'s heirs was intended to operate by following after a life estate in *B*, not by cutting off a fee in *A*. This is true, but it seems irrelevant. It was intended to come in at a certain time, viz., at the death of *B*, and how it came in, whether as a remainder or as an executory interest, and whose estate preceded it, that of *A* or of *B*, would seem beside the point. For the last 350 years judges have construed conveyances with the idea of making them operate in whatever way they could legally do so, irrespective of what theory of estates or of method of operation may have been conjecturally in the minds of the parties.³³

There is nothing in the opinion of the court to indicate that its attention had been called to the close parallel in fundamentals between the *Harder* case and the present one. Had this been done, it seems hard to believe that the court would not have followed the logical implications from the earlier decision. As it is, the court is apparently in the position of saying that because if the life estate had been good, the estate to the heirs would have been a remainder and good as such, therefore where the attempt to create the life estate is intrinsically bad, resulting in leaving the grantor's estate unaffected thereby, the limitation to the heirs must still be treated as a remainder and must consequently be held bad. This result seems both unfortunate and unnecessary. It calls to mind the language used by Gray in discussing two English cases³⁴ involving a somewhat similar situation.

"It is well settled that if a future limitation can be construed as a remainder it must be so construed, and not as a springing use, but it is a very different thing to say that a good springing use must be construed into a bad remainder, because it is preceded by an estate which is insufficient to support a remainder. To construe a limitation as a remainder, if it can be a remainder, is one thing; but to insist upon construing it as a remainder, when it cannot be a remainder, seems the very wantonness of destruction."³⁵

33. *Grey v. Edwards* 4 Leon. 110; *Roe d. Wilkinson v. Tranner* 2 Wils. 75; *Perry v. Price* 1 Mo. 553; *Field v. Columbet* 4 Sawy. 523.

34. *Adams v. Savage* 2 Ld. Ray. 854; *Rawley v. Holland* 22 Vin. Abridg. 189; See Gray "Rule Against Perpetuities" (3rd ed.) p. 54 note 6 for collection of adverse criticisms on these cases.

35. Gray *id.* Compare with *Legout v. Price, Miller v. Miller* 91 Kan. 1.