

THE ACCELERATION OF FUTURE INTERESTS

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THE reshaping of major premises to meet new situations is one of the ever recurring phenomena of the judicial process. The rules of property, fully guarded though they are by the protecting aegis of *stare decisis*, can claim no immunity. However fixed and unalterable we may suppose them to be, the hand of the judicial potter still warms them into plasticity and molds them on the wheel of an insistent human want. A striking example of this phenomenon of adaptation is found in the methods evolved by the courts of dealing with certain problems of the acceleration of future interests in the light of accepted postulates of the law of property.

To the layman, the term acceleration denotes a speeding up process, an increase in velocity: the director of the orchestra moves his baton more rapidly; the taxi driver "steps on the gas." To the student of property law, it refers to a hastening of the owner of the future interest toward a status of present possession or enjoyment by reason of the failure of the preceding estate. The preceding interest, frequently a life estate, has not terminated, as might normally be expected, by the death of the life tenant or the happening of the event on which it was expressly limited. Something else has occurred which the law says ends the present estate; but the testator or grantor did not expressly provide for this situation.

The question then arises: shall the future interests at once become present interests? In other words, shall they be accelerated? The term acceleration has been applied to a situation where a preceding interest in a will failed because the devisee or legatee predeceased the testator; where the legatee or devisee of the preceding interest was a witness to the will under a statute which made void testamentary provisions in favor of

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the witness; where the preceding interest was void as a restraint on the absolute power of alienation; where the grantee or devisee of the preceding interest was without capacity to take; where the grantee or devisee of the preceding interest disclaimed; or where the preceding interest, a life estate in land, terminated prematurely by merger or by tortious feoffment.

In the American cases, however, the question commonly arises on a widow's renunciation. A testator devises to his wife a life interest in property in which, by the same instrument, he gives future interests to other persons. The widow renounces and elects to take the portion of her husband's estate provided for her by law in such a case.¹ What effect does her renunciation have upon succeeding future interests? The discussion which follows will be devoted primarily to a consideration of this question. This approach is adopted, not only because most American cases on acceleration involve this problem, but also because it is believed that the solution of acceleration problems arising from the failure of the preceding interest in other ways should be worked out along the same lines as those arising from the widow's renunciation. The termination of the preceding interest by merger or forfeiture, while sometimes referred to as raising a question of acceleration, is excluded from this discussion except by way of comparison.²

To appreciate the difficulties with which courts have been confronted in attempting to work out problems involved in a widow's renunciation, let us recall three propositions, arising from pre-

¹ At common law a testamentary gift to a wife, so worded as to be inconsistent with a claim of dower, might force the donee to an election. If the widow elected to take dower equity would not permit her to retain her gift under the will. I POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) §§ 492-502. Modern statutes frequently provide that a wife must renounce the gift in her husband's will if she elects to take dower or a distributive share. The following extract from the ILLINOIS REV. STAT. (Smith-Hurd 1929) c. 41, § 10, is illustrative: "Any devise of land, or estate therein, or any other provision made by the will of a deceased husband or wife for a surviving husband or wife, shall, unless otherwise expressed in the will, bar the dower and other rights of such survivor given by Section 1 hereof, unless such survivor shall elect to and does renounce the benefit of such devise or other provision, in which case he or she shall be entitled to such dower and other rights as hereinbefore defined. . . ."

² The word acceleration will be treated herein as referring only to cases where the preceding estate terminates other than by merger or forfeiture. Of course, it cannot be denied that when a life estate in land is terminated by merger the next vested remainder may in a sense be said to be accelerated since it then becomes a present interest. But that problem is usually regarded as distinct from the so-called problems of acceleration, partly because the courts have dealt with it in a different way, and partly perhaps because in such a case the preceding interest may not terminate until a very long time after it has become possessory. See, for example, KALES, ESTATES AND FUTURE INTERESTS (2d ed. 1920) § 599.

vailing conceptions of vested and contingent future interests,³ which may be termed major postulates of this branch of the law. First, a future interest is vested if "at every moment during its continuance, it becomes a present estate, whenever and however the preceding freehold estates determine,"⁴ or, to state the same thing in another way, it is "an estate which is deprived of the right of immediate possession by the existence of another estate created by the same instrument;"⁵ otherwise the interest is contingent or executory. Second, according to accepted rules of construction, a limitation "to A for life, and on his death to B and his heirs" is regarded as giving B a vested remainder in fee, since the words "on his death" are regularly construed to mean "on his death or other determination of the life estate."⁶ The same construction of these words is applicable where the limitation to B is followed by a divesting condition. Third, where conditions precedent occur in limitations of property, it is generally assumed that the precise event stipulated must happen; rarely is it excused.⁷ That is, if the precise contingency on which an executory interest or a contingent remainder is to vest does not occur, the interest must fail.

The application of these three propositions to the case where a preceding life estate in land is terminated by merger or forfeiture (a situation which we exclude from our discussion except by way of comparison) is so well known as to be one of the commonplaces of property law. By a process of logical deduction, we conclude that, if the remainder is vested, it be-

³ While we may regard the classification of property interests as vested and contingent as unsatisfactory, it is deeply interwoven in the fabric of the law. Not only is it relied upon to determine questions of the destructibility of contingent remainders in land, but it has also sometimes been employed to solve problems of the alienability of future interests, the right to recover damages for waste and the application of the rule against perpetuities. Originating in certain feudal situations of land tenure, it has been applied to equitable as well as legal interests, and to land as well as to chattels.

⁴ GRAY, RULE AGAINST PERPETUITIES (3d ed. 1914) § 9.

⁵ 1 TIFFANY, REAL PROPERTY (2d ed. 1920) § 135. See also the statement in 2 JARMAN, WILLS (7th ed. 1930) 701: "The doctrine evidently proceeds upon the supposition that, though the ulterior devise is in terms not to take effect in possession until the decease of the prior devisee, if tenant for life, or his decease without issue, if tenant in tail, yet that, in point of fact, it is to be read as a limitation of a remainder, to take effect in every event which removes the prior estate out of the way."

⁶ Baley v. Strahan, 314 Ill. 213, 145 N. E. 359 (1924). And see Dowd v. Scally, 174 N. W. 938, 940 (Iowa 1919). Decisions to this effect are very numerous. See KALES, ESTATES AND FUTURE INTERESTS, § 330.

⁷ In re Turton [1926] Ch. 96; Co. LIT. 206a. It is doubtless not always true that the precise condition precedent stipulated must occur. See Boggess v. Crail, 224 Ky. 97, 5 S. W. (2d) 906 (1928); 2 JARMAN, WILLS, 1455, 1456. But it would seem that the performance of such conditions cannot be excused in any such fashion as conditions precedent in contracts.

comes a present interest immediately on the termination of the life estate by merger or forfeiture. This follows because, being vested, it is ready to take effect in possession however and whenever the preceding estate terminates. On the other hand, if the remainder be contingent, it can never take effect in possession until the precise contingency has happened, and since this contingency has not happened when the life estate terminates, the remainder not only does not become a present estate, but, according to the destructibility doctrine, is gone forever.

The same logical process might have been pursued with regard to a widow's renunciation. Suppose a testator has devised Blackacre to his wife for life, and on her death to *C* and his heirs; and Whiteacre to his wife for life, and on her death to the heirs of *C*, a living person. The wife renounces the life estates. Reasoning from our three major premises concerning vested and contingent interests, we would conclude that, since the first remainder is limited to take effect in possession "on the wife's death," as a matter of construction it is a vested remainder, and is therefore ready to take effect in possession however and whenever the preceding estate terminates. Hence, the remainder should become a present estate. With reference to the devise of Whiteacre, we would also conclude that, since at the time the will took effect the gift to the heirs of *C* was so limited as to be capable of taking effect as a remainder, it was necessarily a contingent remainder; that, since it did not vest before the wife renounced, it was then destroyed. As we shall see from the cases hereafter discussed, however, the courts have not reached that result in the case of the gift of Whiteacre to the heirs of *C*, and some of the courts would not always reach that result in the case of the gift to *C* of a remainder in Blackacre.

What is the explanation for this apparent inconsistency? Is it that we have generalized too broadly in working out the concepts of vested and contingent future interests, and that, after all, vested remainders are not always accelerated when the preceding estate is removed, nor are contingent remainders necessarily destroyed on that event? Or have the courts simply overlooked elementary doctrines of the common law in that particular? Writers are not lacking who have suggested an affirmative to the latter query.⁸ On the whole the courts have approached these problems in an entirely practical manner without much regard for common law conceptions of vested and contingent future interests. But the old doctrines, in form at least, are left standing. The rationalizations employed to explain these results are in brief as follows:⁹ The renunciation, disclaimer,

⁸ 1 TIFFANY, REAL PROPERTY, § 146; 9 IOWA LAW BUL. 313 (1924).

⁹ This explanation of the acceleration cases has been well expressed in the case of *Crossan v. Crossan*, 303 Mo. 572, 580, 262 S. W. 701, 703 (1924)

lapse, or other event which removes the present interest is regarded as if it were operative at the time of the testator's death. The problem is then worked out as a matter of construction. In the case of the widow's renunciation, that event, for purposes of construction, is regarded as relating back to the death of the testator, and the instrument is re-constructed in the light of that fact. In this process of re-construction the court does not regard itself as bound by the usual rules with respect to the construction of particular phrases.

The mere suggestion of this theory may well evoke criticism on the ground that a fiction of relation back is inherently undesirable. It may be conceded that, other things being equal, legal fictions are generally to be avoided. Nor does a doctrine of relation back give rise to any favorable presumptions. It is believed, however, that as the courts have worked out this theory, it is an extremely useful one; that in spite of *a priori* arguments which may be urged against it, it has the enormous advantage of avoiding the confusing distinctions between vested and contingent future interests without running squarely counter to them. That the widow's renunciation would not be related back to the time of the testator's death for all purposes goes without saying.¹⁰ But if examples of relation back in analogous situations are demanded, one may cite the time-honored doctrine of *Reeve v. Long*,¹¹ to say nothing of the case of a posthumous heir.

In considering the various aspects of acceleration, no attempt will be made to review at length the early English authorities, so frequently discussed in this connection, although it is believed that they are not inconsistent with the conclusions herein sug-

That case involved the construction of a will in which testator gave his home and household goods to his wife for life, after which the property was to go to two named daughters provided they cared for the wife during her declining years. The widow renounced. Holding that the remainder to the daughters was not destroyed, the court said: "It is suggested that the devise to the daughters was a contingent remainder, and that the nullification of the particular estate destroyed the remainder. That is true. It destroyed the remainder, as such. It did not destroy the devise to the daughters, as such. When the renunciation of the will ended the life estate, then the residence property stood as if testator had never provided for a life estate for his wife but had first devised the residence property to his daughters upon the same condition as now appears in the will."

¹⁰ See *Dean v. Mumford*, 102 Mich. 510, 61 N. W. 7 (1894), where for purpose of the validity of limitations under a statute prohibiting the suspension of the absolute power of alienation for more than two lives, it was held that the widow's renunciation would not relate back.

¹¹ 3 Lev. 408 (1695). The case held that a contingent remainder to an unborn child would not fail if the child were born within the period of gestation after the termination of the precedent vested estate. Apparently the vesting would be treated as relating back to the time of termination

gested.¹² In the discussion which follows, the effect of the widow's renunciation will be considered: first, with reference to language which would ordinarily create a contingent remainder; second, with reference to language which would ordinarily create an absolutely vested remainder; third, with reference to language which would ordinarily create a remainder vested subject to be wholly divested; fourth, with reference to language which would ordinarily create a remainder vested subject to be partly divested; fifth, with reference to language which would ordinarily create an executory devise. These five types of future

of the precedent estate. The doctrine of *Reeve v. Long* is generally recognized in the United States.

¹² For discussions of the English authorities see Farrer, *Acceleration of Remainders* (1916) 32 L. Q. REV. 392; Sweet, *Acceleration of Future Interests* (1917) 61 SOL. J. 573, 588; Note (1921) 30 YALE L. J. 849; 1 TIFFANY, REAL PROPERTY § 146. These discussions usually begin with certain situations suggested in PERKINS' PROFITABLE BOOK (15th ed. 1827) §§ 566-568, which have been also mentioned elsewhere: 18 VINER'S ABRIDGEMENT (2d ed. 1793) Title, Remainder, p. 381; 2 SHEPPARD'S TOUCHSTONE, (8th ed. 1826) 435. Perkins' first case is that of a devise for life, followed by a remainder for life to a monk (a person incapacitated from taking land), remainder to a stranger in fee. As he indicates, the remainder to the monk being void, the ultimate remainder in fee takes effect on the termination of the first life estate. The next case put by Perkins is that of a devise to a monk for life, remainder to a stranger in fee. His conclusion is that, since the monk is incapacitated from taking, "the remainder is good, for that the will of the devisor shall be observed." His third case is somewhat perplexing. "But if a lease of land be made unto a monk for life, the remainder unto a stranger in fee, this remainder is void." It may be asked, why should not the remainder be valid here as in the case of the devise? Either of two explanations is possible. The conveyance was no doubt by feoffment. If that be so, it would seem that the incapacity of the monk would invalidate, not merely the estate to him, but the entire feoffment itself. It would be as if, today, A were to prepare a conveyance giving land to B for life, remainder to C in fee, and A should fail to make adequate delivery of the deed or to execute it as required by the statute. Or the conclusion of Perkins may be based upon the fact that deeds were not construed as liberally as wills in order to effectuate general intent. It has been asserted that acceleration is permissible only under the learning of uses and devises. 1 PRESTON, ESTATES (1820) 119; 2 SHEPPARD'S TOUCHSTONE, 435. It is difficult to see why that should be so. Of course, a limitation could not be construed as a legal executory interest in land before the Statute of Uses, simply because such an interest could not be created at all at that time.

It must be conceded that the statement of Lord Coke in *Co. Litt.* 298a, with reference to an infant's renunciation, can hardly be reconciled with any prevalent theory; but no cases have been found supporting it.

In *Fuller v. Fuller*, Cro. Eliz. 422 (1595), the court approved of accelerating an absolutely vested remainder in tail on the failure by lapse of the preceding estate tail.

Carrick v. Errington, 2 P. Wms. 361 (1726), has been much discussed, but would seem to be explainable on quite obvious grounds. See *In re Willis* [1917] 1 Ch. 365, 374; *In re Conyngham* [1921] 1 Ch. 491, 501. But compare the remarks in (1917) 61 SOL. J. 588, 589.

interests¹³ will first be discussed on the assumption that no question is raised as to postponing acceleration in order to compensate other devisees or legatees who have been disappointed by reason of the widow's election to take under the statute. We shall then consider whether acceleration of the future interest is ever prevented in order to reimburse other beneficiaries of the will who have suffered by the widow's renunciation. Cases involving future interests both legal and equitable, in both realty and personalty, will be discussed.

Since acceleration has been classified as a matter of construction, it may be well to digress briefly in order to explain what is meant by that term. The word construction is used in a broad sense. While hundreds of cases profess to make the intent of the testator the "pole star" of construction, and disclaim any other guide, yet it is believed that, after all the evidence is before the court, no real problem of construction arises unless it is impossible to get at the specific intent of the testator with respect to the situation which has arisen. What the court is trying to do is to ascertain what the testator probably would have done had he thought of an event which has transpired, but which he did not in fact anticipate. The court is effectuating testamentary intent only if by intent we mean a very general expression of purpose. If we were strictly logical we would usually say such wills are void for indefiniteness, since no one can really tell which one of two or more possible concrete solutions of the ambiguity would have been intended by the testator had he thought of the events which have transpired. But courts rarely declare a will void for indefiniteness. Instead they purport to find a fictitious intent under the guise of construing the instrument. A few judges and writers, it is true, are fully aware of this process.¹⁴ But more, doubtless, either are unconscious of it or conceal it. Construction in its broader aspects is really the

¹³ The writer is indebted to Professor Richard R. Powell for this useful classification of remainders:

"a. Remainders absolutely vested: *A* to *B* for life remainder to *C* in fee.

"b. Remainders vested subject to being divested in part only: *A* to *B* for life, remainder to the children of *B* (*B* being alive and having one or more children at the time of this conveyance).

"c. Remainders vested subject to being divested completely: *A* to *B* for life, remainder as *B* shall appoint, but in default of and until appointment to *C* in fee.

"d. Remainders absolutely contingent: *A* to *B* for life, remainder to the first son of *B* (*B* being still an infant and unmarried), or *A* to *B* for life, remainder to *C* in fee, if *C* shall marry *D* in the lifetime of *B*." POWELL, CASES ON FUTURE INTERESTS (1928) 35.

¹⁴ "I have to do with a situation quite outside of anything which the testator had in contemplation, and it is therefore obvious that any solution is bound to be verbal and indeed formal. Yet while it is idle to speculate upon what he personally would have done had he been able to look ahead,

process of resolving an ambiguity; and usually this ambiguity arises by reason of the happening of an event which the testator did not anticipate. Sometimes the process involves an actual appeal to what testators generally have in mind when they use such language. Thus the presumption that the testator intended to favor the natural objects of his bounty is probably a rule expressing what people generally do intend. But often the ambiguity is resolved by applying a rule of policy such as the presumption in favor of construing an interest as vested. This presumption is not employed because people more often intend to create vested than contingent interests, but because a reduction in the number of contingent interests in existence is believed to further alienability. Finally, however, we reach a point where the expressed intent is so general that the courts refuse to press the fiction of construction further, and announce that they cannot make a will for the testator. Then, if it is a proper case, the doctrine of *cy pres* may be employed. But it must be remembered that in most questions of construction, even where the courts are willing to resolve the ambiguity, they are in fact to a limited extent applying a kind of surreptitious *cy pres* doctrine.¹⁵

We are now ready to consider cases involving language which, but for the widow's renunciation, would have been construed as creating a contingent remainder. Suppose Blackacre is devised to *A* for life, remainder to the first son of *B*. *A* renounces before *B* has ever had a son. As we have seen, if we apply ordinary rules of construction to this instrument and treat the renunciation like any other event which terminates the life estate after it takes effect, we are forced to the conclusion that the limitation to *B*'s son was a contingent remainder which had failed. According to feudal notions the seisin would have gone to the reversioner when the life tenant renounced, and the con-

courts have always permitted themselves, within limits, to impute to testators an intent which they could not foresee. While I think the cases conclusive, I shall claim the same right so far as they are not authoritative." Judge Learned Hand in *Boal v. Metropolitan Museum*, 292 Fed. 303, 304 (S. D. N. Y. 1923).

"What the judges have to do is, in truth, to say what shall be done where the testator has had no real intention; the practice of modern judges to which I have alluded is to guess from the language used in the particular will what the testator would have meant had he had any meaning, which he had not; the older practice was to look for an established rule of construction." GRAY, *NATURE AND SOURCES OF LAW* (2d ed. 1921) 175.

¹⁵ Nothing illustrates this more clearly than the doctrine of the well known case of *Jones v. Westcomb*, 1 Eq. Cas. Abr. 245 (1711). In that case testator bequeathed leasehold property to his wife for life, and on her death "to the child which she was then enseint with; and if such child died before it came to twenty-one, then he devised one-third part of the same term to his wife, her executors and administrators." The wife was

tingent remainder not having vested when the preceding estate terminated, it could never take effect, since such was the nature of a remainder. On the other hand, if we regard the renunciation as relating back to the testator's death, we can say that there never was any life estate, that therefore this is an executory devise in the first son of *B*, and that until such son is born there is an intestacy after which the limitation will take effect in possession. According to this view, the harshness of the destructibility doctrine would be avoided. In *Hopkins v. Hopkins*,¹⁶ a case where the preceding estate failed by lapse, these two views were definitely presented to the court, and the second was chosen; but since the limitations were equitable, the future interest would not have been destructible, even if it were a contingent remainder. But in other cases where the destructibility doctrine could have been applied, courts have held such a future interest to be an executory devise.¹⁷ The writer has found but one decision which holds to the contrary.¹⁸ Of course, if the

not enceinte. It was held that she took one-third of the leasehold property absolutely. Clearly testator did not anticipate that she was not enceinte. But his general purpose was to benefit her if a child did not reach majority. Yet the specific event which was to precede the wife taking never happened. The court very properly worked out a solution "as nearly as possible;" but evidently regarded it as construction.

It may be said that if the problem considered in this paper is one of construction, then it is not a matter of acceleration, at all. Strictly speaking that may be true. But the use of the word "acceleration" is so common that that terminology is believed to be justified.

¹⁶ Cas. Temp. Talb. 44 (1734). In giving his opinion, Lord Talbot, after observing that the future interest was to be construed as an executory interest and not a remainder, said: "So we see, that in these cases the method of the courts is not to set aside the intent because it cannot take effect so fully as the testator desired; but to let it work as far as it can." For a later hearing, see 1 Atk. 581 (1738).

¹⁷ *Wakefield v. Wakefield*, 256 Ill. 296, 100 N. E. 275 (1912); *Miller v. Miller*, 91 Kan. 1, 136 Pac. 953 (1913) (the court, however, repudiates the whole destructibility doctrine); *Rose v. Rose*, 126 Miss. 114, 88 So. 513 (1921); *Crossan v. Crossan*, 303 Mo. 572, 262 S. W. 701 (1924).

Fearne, in his treatise on CONTINGENT REMAINDERS (1831) 524, makes the following statement: "I have before shewn that whenever a contingent limitation is preceded by a freehold capable of supporting it, it is construed a contingent remainder, and not an executory devise; but it is possible that the freehold so limited, may, by a subsequent accident, become incapable of ever taking effect at all, (as by the death of the first devisee in the testator's life-time;) in which case the subsequent limitation, if the contingency has not then happened, will be in the same condition at the testator's death (that is, at the time when the will is to take effect) as if it had been limited without any preceding freehold: now, in this case, it has been held, that where such subsequent limitations could not vest at the testator's death, it should enure as an executory devise rather than fail for want of that preceding freehold which had never taken effect."

¹⁸ *Bouknight v. Brown*, 16 S. C. 155 (1881); cf. *In re Scott* [1911]

interest be in personalty or equitable, or if the destructibility doctrine be not in force in the jurisdiction, it makes little difference whether we call it a contingent remainder or an executory devise. But in the situation next to be considered, personalty and equitable interests would seem to be equally involved.

The second deviation from accepted norms of property law is found in the cases which assert, not that the contingent remainder is preserved from destruction, but that it is accelerated on the widow's renunciation.¹⁹ As we have seen, if an interest is limited to take effect in possession or enjoyment on a condition precedent, ordinarily that precise condition must happen before it can take effect. Yet where the renunciation is unanticipated this rule may work out unjustly. Suppose, for example, property is devised to the widow for life, and on her death to the children of the testator then surviving. Even though we concede that the gift to the children can be regarded as an executory interest, the accepted doctrine of property law would lead us to say that the children cannot take until the widow actually dies and they are left surviving. Yet the context of the will may indicate that the testator postponed the gift to the children solely to make adequate provision for his widow; and that, the moment she is otherwise provided for, it would be reasonable to assume that the testator wished his children to take. It is true he used the word "surviving," but that may be because he did not wish heirs or issue to take, although he had no intention of requiring his children actually to survive his wife if they could take before that time without injury to her. Hence in this situation many courts have said, and some have held, that the children who survive the widow's renunciation take a present interest on that event.²⁰ What they really are doing is construing the will in the light of the widow's renunciation so that the limitation in remainder reads: to my children living at the termination of the life estate.²¹

2 Ch. 374, where it was assumed that, in the absence of statute, a disclaimer would destroy contingent remainders.

¹⁹ Dean v. Hart, 62 Ala. 308 (1878); *Scotten v. Moore*, 5 Boyce (Del.) 545, 93 Atl. 373 (1914); *O'Rear v. Bogie*, 157 Ky. 666, 163 S. W. 1107 (1914); *Fox v. Rumery*, 68 Me. 121 (1878); *Cockey v. Cockey*, 141 Md. 373, 118 Atl. 850 (1922); *American National Bank v. Chapin*, 130 Va. 1, 107 S. E. 636 (1921); *Christian v. Wilson's Ex'rs*, 153 Va. 614, 151 S. E. 300 (1930). See cases collected in Notes (1920) 5 A. L. R. 473-476; (1922) 17 A. L. R. 314-317; (1929) 62 A. L. R. 206-207.

²⁰ See cases cited in note 19, *supra*.

²¹ It may be argued that in this class of cases, the condition precedent is merely satisfied by somewhat less than the precise occurrence of the event. That is, however, inconsistent with the old doctrine that conditions precedent in property must, as a rule, be performed. See note 7, *supra*. Moreover, according to that theory, if the contingency were one of survivorship of the life estate, a person surviving the testator, but not the widow's act of

In *Dean v. Hart*²² testator devised real and personal property to his wife and daughter jointly for life, the survivor to take the whole, and on the death of both, to the heirs of the daughter. The widow renounced. It was held that the daughter took a life estate at once. The court said: "The effect of her [the wife's] dissent is simply to annul the provisions of the will in her favor, to blot them out, and leave them as if from death or any other cause she had become incapable of taking."

In *Scotten v. Moore*²³ testator, seized of lands, gave his entire estate to his wife for life and after her death to "my then living children (or in case of their death to their legal representatives), share and share alike." Testator left seven children at his death who were his heirs at law. The widow elected to take dower. The children brought an action of ejectment against the widow. A judgment for the plaintiffs was affirmed. The court conceded that the decision might be justified either on the ground that the remainder was really vested or that the limitation to the children was a contingent remainder which failed by the disappearance of the preceding estate allowing the heirs to take, or that the limitation was to be construed as an executory devise and there was an intestacy until the death of the widow. But all these theories were definitely rejected, and the court held that the contingent remainder was accelerated and vested in the children of the testator living at his death, because this was in accordance with testamentary intent. Of course, what really happened was that the remainder became a present interest by reason of the widow's election because the language was construed to read thus: to my children living at the death of my wife or sooner determination of her estate by renunciation.²⁴

It is interesting to note that, in a number of cases in this group, the courts definitely refused to consider distinctions between vested and contingent future interests. The whole notion seems to be that they are construing the words in the light of the renunciation, and that fact renders inapplicable ordinary rules of construction. The question which the courts profess

renunciation, would not take. It may well be doubted whether courts would so hold.

²² *Supra* note 19.

²³ *Supra* note 19.

²⁴ A difficulty arising from this rather free construction is that it may be impossible to tell when the interest will be held to be vested and when it will be regarded as an executory interest, on the widow's renunciation. Two recent Virginia cases illustrate this. In *Compton v. Rixey's Ex'rs*, 124 Va. 548, 98 S. E. 651 (1919), testator, after giving his wife one third of the net annual income from his entire estate, further provided that "upon the death of my wife or her marriage, my youngest child living being of age, I direct my entire estate to go to and be divided equally between my children then living and the descendants per stirpes of such as may be then dead with issue surviving." After accepting the benefits of the will

to consider is not: is this technically a vested or a contingent remainder; but, to whom would the testator have given his property in the absence of any life estate in the widow? Thus in *Scotten v. Moore* the court, after observing that acceleration was based on presumed intention, said: "If the principle is based on the presumed intention of the testator, there need be no distinction made between vested and contingent remainders in its application."²⁵ Other cases have expressed the same idea in still more elaborate terms.²⁶

When we come to consider limitations which ordinarily create absolutely vested remainders, we find that, by the weight of authority, in that case the future interest is accelerated on the

for seven years, the widow executed a paper reciting that she renounced all property interests under the will. It was then too late for her to elect to take under the law. The court held that the children took contingent interests which would not be accelerated. Perhaps it was felt that seven years was too long a period over which to stretch the fiction of relation back. But in *American National Bank v. Chapin*, *supra* note 19, decided two years later, testator gave his estate on trust to be sold and invested and five years after his death to be divided into two parts; one part he gave to his wife for her life, and then to such of testator's children as may be living at her death, and to the issue of any such child who may have died leaving issue, such issue to take the share their parent would have taken if alive. The widow elected to take under the law. More than five years after testator's death, and after all his children had become of age, the widow and children executed a deed to a piece of land of the estate in which the widow had been assigned dower. It was held that the remainder had vested in the children and that a good title passed. The court sought to distinguish the preceding case in these words: "The true doctrine is that there can be no acceleration of a contingent estate from any cause or occasion not expressly or impliedly contemplated or intended by the person creating the estate. In the *Compton* Case, the provisions of the will indicated that the testator intended the whole of the estate to be kept together until his widow died or remarried; and, moreover, the widow did not renounce the will in the manner provided by law. . . ." The court further observed that "As the facts are, her life estate never came into existence." 130 Va. at 10, 107 S. E. at 638.

²⁵ *Supra* note 19 at 549, 93 Atl. at 375.

²⁶ In *Nelson v. Meade*, 129 Me. 61, 149 Atl. 626, 628 (1930), the court said: "There is an apparent conflict of authority as to whether or not contingent remainders may be accelerated. But the conflict is more apparent than real. A study of the cases discloses a clearly defined and logical line of demarcation between those in which the court has refused to accelerate contingent remainders and those in which acceleration has been permitted.

"The application of the doctrine is not dependent upon the circumstance that the remainder is or is not vested. *American National Bank v. C. C. Chapin, Trustee*, 130 Va. 1, 107 S. E. 636. The fact that a remainder is contingent is not conclusive of the right of acceleration, and the rule will not be applied where it will defeat the testator's intention. *Keeton v. Tipton*, 184 Ky. 704, 212 S. W. 909. The principle of acceleration in the vesting of a remainder by the premature termination of the preceding life estate being based on the presumed intention of the testator, there need be no distinction made between vested and contingent remainders in its applica-

widow's renunciation, whether the limitations be legal or equitable, and whether the subject matter be realty or personalty.²⁷ Here, more than anywhere else, we find the courts suggesting the traditional argument to the effect that the language indicates a vested remainder, and that a vested remainder is always accelerated when the preceding estate is removed. Thus, in a number of cases it is said that the renunciation of the widow is equivalent to her death, though obviously it is not the equivalent for all legal purposes.²⁸ It is clear also that language appropriate to create absolutely vested remainders in tail or for life²⁹ would be treated in the same way as that which would create remainders in fee simple. After all, these results seem reasonable. For, even though the widow's renunciation was unanticipated, the testator would in most cases have wished to accelerate the remainder on that event, if the only language of condition in the gift was the statement that the remainderman would take "on the death" of the widow.

In a few cases, as might be expected, courts have, in effect,

tion. *Scotten v. Doe ex dem. Moore*, 5 Boyce (Del.) 545, 93 Atl. 373. It is immaterial whether the remainder is vested or contingent if the time for distribution has in fact arrived, as in such case the contingency is determined and the donees ascertained. *Blatchford v. Newberry*, 99 Ill. 11."

And see *Rench v. Rench*, 184 Iowa 1372, 169 N. W. 667 (1918); *Wyllner's Estate*, 65 Pa. Super. 396 (1917).

²⁷ *Merchants' Nat. Bank of Mobile v. Hubbard*, 222 Ala. 518, 133 So. 723 (1931); *Union Trust Co. v. Rossi*, 180 Ark. 552, 22 S. W. (2d) 370 (1929); *Ladd v. Ladd*, 2 Cranch C. C. 505, Fed. Cas. No. 7972 (C. C. D. C. 1824); *Bank of Statesboro v. Futch*, 164 Ga. 181, 138 S. E. 60 (1927); *Capron v. Capron*, 6 Mackey, 340 (D. C. 1888); *Slocum v. Hagaman*, 176 Ill. 533, 52 N. E. 332 (1898); *Northern Trust Co. v. Wheaton*, 249 Ill. 606, 94 N. E. 980 (1911); *Kern v. Kern*, 293 Ill. 238, 127 N. E. 396 (1920); *In re Rawlings' Estate*, 81 Iowa 701, 47 N. W. 992 (1891); *Allen v. Hannum*, 15 Kan. 625 (1875); *Adams v. Legroo*, 111 Me. 302, 89 Atl. 63 (1913); *Safe Deposit & Trust Co. v. Gunther*, 142 Md. 644, 121 Atl. 479 (1923); *Hesseltine v. Partridge*, 236 Mass. 77, 127 N. E. 429 (1920); *Beideman v. Sparks*, 61 N. J. Eq. 226, 47 Atl. 811 (1901); *Baptist Female University v. Borden*, 132 N. C. 476, 44 S. E. 47 (1903); *Wilson v. Stafford*, 60 N. C. 646 (1864); *In re Vance's Estate*, 141 Pa. 201, 21 Atl. 643 (1891); *Brown and Sterrett's Appeal*, 27 Pa. 62 (1856); *Sherman v. Baker*, 20 R. I. 446, 40 Atl. 11 (1898); *In re McIlhattan's Will*, 194 Wis. 113, 216 N. W. 130 (1927); *Toronto General Trusts Co. v. Irwin*, 27 Ontario 491 (1896).

²⁸ To the effect that it is equivalent to the widow's death, see *Cockey v. Cockey*, *supra* note 19, at 379, 118 Atl. at 852 (1922); *Ferguson's Estate*, 138 Pa. St. 208, 219, 20 Atl. 945, 946 (1890). But in the case of *In re Loneragan's Estate*, 154 Atl. 387, 389 (Pa. 1931), the court said: "Courts of equity are not bound by such phrases as that, the election of the widow is equivalent to her death. . . ."

²⁹ *Wood's Adm. v. Wood's Devises*, 1 Met. 512 (Ky. 1859); *Craig v. Craig*, 140 Md. 322, 117 Atl. 756 (1922); *Dickson's Estate*, 9 Pa. Dist. R. 441 (1900); *Munger v. Munger*, 298 S. W. 470 (Tex. Civ. App. 1927). See also *Fuller v. Fuller*, *supra* note 12; *Lainson v. Lainson*, 5 De G. M. & G. 754 (1854).

re-construed the instrument, making the future interest an executory limitation to vest on the widow's death.³⁰ This may be done when peculiar circumstances indicate that such a construction best accords with the testator's intent. For example, in *Lovell v. Charlestown* testator devised the residue of his estate, real and personal, to a trustee for his wife for life, and at her death, certain specific bequests were to be paid to named persons, and the residue was to go to the town of Charlestown. The court held that, though the widow renounced, the legacies were not payable until her death. The court said: "The bequests are not those of ordinary remainders after a life tenancy, where by a renunciation by the life tenant the estate in remainder is brought forward and attaches at once to prevent a lapse, there being nothing in the language of the will to show a different intention. In this case the estate in remainder, after the renunciation of the life estate by the widow, is upheld by a trustee as an executory bequest, and the intention of the testator that these legacies should not be paid until the death of the life tenant is too plain to be mistaken."³¹ The fact that the legacies were not limited as ordinary vested remainders must have helped to enable the court to reach this result. Yet in the absence of a renunciation the language would hardly have been construed to create contingent legacies.

In Indiana the courts hold that, even in the absence of special circumstances, a remainder which is absolutely vested is not accelerated on the wife's renunciation of the life estate.³² It is sometimes said that the life estate being repudiated passes as intestate property.³³ It is difficult to see how, if the life interest does not pass under the will, it can be a life estate at all. A more rational explanation of the result reached by the Indiana courts is that the remainder is construed as an executory interest when the widow renounces. This is perhaps all the courts intend to say, since the cases do not in fact decide whether the heirs get a life estate or a fee simple for the life of the

³⁰ *Blatchford v. Newberry*, 99 Ill. 11 (1880); see also *Browning v. Hall*, 156 S. E. 190 (Ga. 1930). And compare the cases cited in a subsequent paragraph, to the effect that the present interest is "sequestered" to compensate disappointed beneficiaries under the will, such as *Holdren v. Holdren*, 78 Ohio St. 276, 85 N. E. 537 (1908), and *Jones, Admr. v. Knappen*, 63 Vt. 391, 22 Atl. 630 (1891).

³¹ 66 N. H. 584, 587, 32 Atl. 160, 161 (1891).

³² *Rusing v. Rusing*, 25 Ind. 63 (1865); *Dale v. Bartley*, 58 Ind. 101 (1877); *Cool v. Cool*, 54 Ind. 225 (1876); *Wilson v. Moore*, 86 Ind. 244 (1882); *Hauk v. McComas*, 98 Ind. 460 (1884); *Rocker v. Metzger*, 171 Ind. 364, 86 N. E. 403 (1908).

³³ In *Cool v. Cool*, *supra* note 32, at 230, the court, referring to an earlier decision on the point, said that on the widow's election, "it left the life-estate in two-thirds of the real estate practically undisposed of by the

widow. Even that result is, of course, at variance with other jurisdictions.³⁴

Before leaving the matter of the acceleration of absolutely vested remainders, a word should be said about the English case of *In re Scott*.³⁵ While it is not a case of a widow's renunciation and election, but of an out and out disclaimer by a devisee, the problem is much the same. The aspect of the case which distinguishes it from decisions already considered is that the contingent remainder immediately following the life estate which prematurely terminated was itself followed by an absolutely vested remainder for life. The question was what disposition should be made of this last remainder. The facts were as follows: Freehold lands were devised to *J.S.* for life, with remainder to his first and other sons in tail male, with remainder to *W.S.* for life, with remainders over. *J.S.*, having no sons, disclaimed. The court held that the remainder to *W.S.* was not accelerated. The English statutes making contingent remainders indestructible were then in force. The court seemed to think that, if the life estate in *W.S.* were ever allowed to take effect, then the contingent remainders could never take effect, since they were essentially remainders and as such had to take effect at the termination of the preceding estate. Thus pending the vesting or failure of the contingent remainders possession went to the residuary devisee. While the case elicited considerable discussion and criticism³⁶ the doctrine has never been overruled; but the English courts have definitely restricted it to legal limitations, holding that a similar equitable remainder

will, and that it would go to the widow, there being no child or father or mother."

³⁴ However, in the case of *In re Arms' Estate*, 199 Pac. 1053 (Cal. 1921), the California court reached the conclusion that, by reason of a local statute, an absolutely vested remainder would not be accelerated on the widow's renunciation. The statute is as follows: "When a remainder on an estate for life or for years is not limited on a contingency defeating or avoiding such precedent estate, it is to be deemed intended to take effect only on the death of the first taker, or the expiration by lapse of time, of such term of years." CAL. CIV. CODE (Ragland, 1927) § 780. It may be doubted whether the California statute was designed to have any such consequences as the court attributed to it. NEW YORK REAL PROPERTY LAW (1909) § 55, is substantially the same, yet no such construction has been put on the statute in that state, the doctrine of acceleration being recognized in New York.

³⁵ *Supra* note 18.

³⁶ Farrer, *Operation of a Residuary Devise on a Disclaimed Specific Devise* (1916) 32 L. Q. REV. 83; Farrer, *Acceleration of Remainders* (1916) 32 L. Q. REV. 392; Sweet, *Acceleration of Future Interests* (1917) 61 SOL. J. 573, 588; Sweet, *Effect of a Disclaimer* (1917) 33 L. Q. REV. 132; Farrer, *The Effect of a Disclaimer: A Reply* (1917) 33 L. Q. REV. 254.

would be accelerated.³⁷ If we approach this case as a question of construction in the light of the disclaimer, we clearly would conclude that the contingent remainders to the sons of *J.S.* are to be treated as executory devises, since we are proceeding as if there had been no preceding life estate. Then the question is, will we construe the life estate to *W.S.* as an executory devise also? If we treat it as most courts do other absolutely vested remainders, we will accelerate it. And, since we have called the limitations to sons of *J.S.* an executory devise, there should be no difficulty about allowing those limitations to take effect after the life estate to *W.S.* had vested in possession. On the other hand, it could conceivably be argued that the testator never anticipated that the life estate could take effect in possession until the estates tail to the sons of *J.S.* failed or terminated, and that, therefore, as a matter of construction in the light of the disclaimer we can best give effect to the testator's intention by treating the life estate to *W.S.* as an executory devise to take effect only on the termination of the fee tail estates. This is substantially what the court did, but it obviously does not express the theory of the decision. However, there is no reason why we should draw a distinction, as the English courts have done, between legal and equitable interests. It is believed that American courts would not follow *In re Scott*, but would accelerate the life estate, treating the contingent interests as executory devises.

The case of the remainder vested subject to be wholly divested has given rise to a variety of judicial conclusions. A typical case would involve limitations as follows: to testator's wife for life, and on her death to *A* in fee, but if, at the wife's death, *A* is not living, then to *B* in fee. According to recognized doctrines as to the nature of vested remainders, *A*'s remainder would become a present estate, however the wife's life estate is terminated; and regardless of the sort of vested remainder we are considering. But this line of reasoning has often been ignored in the acceleration cases. It is true, some courts have held that the remainder is accelerated.³⁸ Thus in *Randall v. Randall*, a decision of this sort, the court said that "the rule followed by both the English and American courts is, that a widow's renunciation and election to take as against the will is equivalent to her death, unless it contravenes some manifest intention of the testa-

³⁷ *In re Willis*, *In re Conyngham*, both *supra* note 12; *Re Brook* (1923) 2 Ch. 265. See *Acceleration of Future Interests* (1923) 156 LAW TIMES 2.

³⁸ *Union Trust Co. v. Rossi*, *supra* note 27; *Everett v. Croskrey*, 92 Iowa 333, 60 N. W. 732 (1894); *Randall v. Randall*, 85 Md. 430, 37 Atl. 209 (1897); *In re Schulz's Estate*, 113 Mich. 592, 71 N. W. 1079 (1897); *Parker v. Ross*, 69 N. H. 213, 45 Atl. 576 (1897); *Holderby v. Walker*, 56 N. C. 46 (1856); *In re Disston's Estate*, 257 Pa. 537, 101 Atl. 804 (1917); *Knepley's Appeal*, 17 Pa. St. 19 (1851).

tor as expressed by the will."³⁹ But in other cases, such an interest was treated as an executory interest to take effect on the actual death of the life tenant because that seemed best to effectuate testamentary intent.⁴⁰ The old doctrine that a remainder to take effect in possession "on the death" of the life tenant is vested, was avoided by construing the will in the light of the widow's renunciation. After all, a remainder vested subject to be wholly divested differs little in substance from a contingent remainder in the alternative; and certainly in the latter case courts would not feel bound to accelerate.

Often the court is troubled by the fact that it must construe, not one, but two limitations, and a certain degree of consistency is regarded as essential. To return to the illustration already given, where the gift over after the life estate is "to *A* in fee on the death of the wife, but if at the wife's death *A* is not living, then to *B* in fee," the dilemma is this. If the orthodox view of vested remainders is taken, "on the wife's death" means however and whenever the life estate terminates, and therefore the remainder to *A* is vested and should be accelerated. But likewise on the orthodox view, the condition precedent in the case of the executory interest to *B* must actually happen, and therefore *B* cannot take unless the wife is actually dead. Thus in one phrase we are saying "on the wife's death" means however and whenever the life estate terminates, and in the next, that it means the wife's actual death and not any other termination of her estate. Some of the courts seem to have felt that the phrase should be construed in the same way in both cases—that is that both the gift to *A* and *B* should be accelerated or else that neither should be accelerated. Yet, in the light of an unforeseen event, namely the widow's renunciation, why should we not construe the two phrases differently, if that seems best to effectuate the probable intent of the testator?

This problem arose in the case of *Hasemeier v. Welke*.⁴¹ Testator devised his estate, real and personal, to his wife for life "and at her death to be equally divided among my children, or in case of their death, then to the heirs of their body." The widow renounced. The question came up on a matter of a partition of the real estate and a construction of the will. After concluding that "in case of their death" did not mean death in the life-

³⁹ *Supra* note 38, at 439, 37 Atl. at 210.

⁴⁰ *Swann v. Austell*, 253 Fed. 807 (N. D. Ga. 1918) (for subsequent reports of same case see 257 Fed. 870; 261 Fed. 465, *cert. den.*, 252 U. S. 579); *In re Rogers' Trust Estate*, 97 Md. 674, 55 Atl. 679 (1903). In *Sawyer v. Freeman*, 161 Mass. 543, 37 N. E. 942 (1894), the court appears to lay down the rule that remainders vested subject to be divested will not be accelerated.

⁴¹ 309 Ill. 460, 141 N. E. 176 (1923).

time of the testator, the court then proceeded to consider the question of acceleration. The difficulty seemed to be this. If the court were to construe the words "at her death to be equally divided among my children" to mean "at her death or other termination of her life estate, to be equally divided among my children," then must not the court apply the same construction to the executory devise so that it would read "or in case of their death before the termination of the widow's life estate, then to the heirs of their body"? The court felt that, on the whole, the testator's purpose would best be effectuated by construing the executory devise to take effect only on the actual death of the widow. But the remainder was apparently regarded as accelerated.⁴²

It is believed that in this class of cases, courts would be more likely to reach a just result if they always realize that they are dealing with a problem of construction, and that because the remainder is accelerated, it does not necessarily follow that the executory devise will be accelerated. As will be brought out more fully in a subsequent paragraph, however, it is conceivable that the executory devise may, in a certain sense, be accelerated. A case where that was done is *Rench v. Rench*, the language of which so well expresses a doctrine of liberal construction that it is worth quoting. In that case the election of the widow to take under the law, gave her one third of the estate. The remaining two thirds, the court said, "must be disposed of in accordance with the provisions of the will, and *such provisions must be construed in the light of the widow's rejection thereof* [italics are ours]. . . . Under the evidence, we have no need to determine whether the daughter of the testator took a contingent remainder or a vested one. For the same reason, we need not determine the nature of the interest, if any, taken by the appellant as a devisee. The decisive question presented is: What was the effect upon the primary remainderman of the rejection by the widow of the life estate provided for under the will?"⁴³

A remainder to a class of persons, one or more of whom is ascertained, is regarded as vested, if it is subject to no condition precedent other than the determination of the membership of the class. It may, however, be referred to as vested subject to be partly divested, since the share of each ascertained member is subject to be diminished by the addition of other members to the class. Thus property may be given to testator's wife for life, remainder to the children of X. Two questions suggest themselves: first, does the remainder become a present interest when

⁴² Cf. *Foreman Bank v. Seelenfreund*, 329 Ill. 546, 161 N. E. 88 (1928), where the same court refused to accelerate equitable remainders which were vested subject to be wholly divested.

⁴³ *Supra* note 26, at 1376, 169 N. W. at 668.

the widow renounces; and, second, if the remainder is accelerated, does the class close at once, or only on the death of the widow. As might be expected, here, as in the case of the remainder vested subject to be wholly divested, courts may be inclined to make the erroneous assumption that, if the remainder is held to be accelerated, it must be held to be absolutely vested so that no more members of the class can be admitted. There are one or two English cases, involving the analogous problem of a present interest void because the beneficiary of the will was an attesting witness, or of present interests removed by a subsequent codicil, where the future interest in the class has been accelerated and the class seems to have been closed at that time.⁴⁴ On the other hand, in *Askey v. Askey*⁴⁵ the Nebraska court refused to accelerate a future interest in a class, some of whom were in existence when the widow renounced, partly on the ground that to do so would be to give the property to a different class than that intended by the testator. It is submitted that, if such a construction would best carry out the testator's general intent, the court could accelerate the remainder and still leave the class open until the widow's death. There are a few American cases where that has been done even in the case of a life estate terminated by merger.⁴⁶ And, while it may be inconsistent with feudal notions, it would appear to effectuate probable intent more nearly than to close the class at once. Clearly, if the class will not be closed when the life estate is terminated by merger, which is never regarded as relating back to the creation of the interests, it should not be closed where the life estate is terminated by renunciation, which may relate back for

⁴⁴ *Re Johnson*, 68 L. T. (N. S.) 20 (1893); *Jull v. Jacobs*, L. R. 3 Ch. Div. 703 (1876); and see *Eavestaff v. Austin*, 19 Beavan 591 (1854). In *Jull v. Jacobs*, at 712, Malins, V. C., said that "the remainder is accelerated, and the children take just as if the mother had died immediately after the testator."

⁴⁵ 111 Neb. 406, 196 N. W. 891 (1923). The language of the will in this case is peculiar. Testator provided that his wife should occupy the residence while she remained his widow "but if she again marry after my death then this amount shall stop . . . and at the death of my wife I want the property sold and divided among my grandchildren share and share alike." It is conceivable, as argued in the opinion, that distribution was to take place only in the event of the widow's death, and not on her remarriage. If so, the future interest would have been a contingent remainder but for the renunciation, and in the light of that fact, should have been construed as an executory limitation. But see the discussion of the case in 9 IOWA L. BULL. 313 (1924).

⁴⁶ *Azarch v. Smith*, 222 Ky. 566, 1 S. W. (2d) 968 (1928); *Deem v. Miller*, 303 Ill. 240, 135 N. E. 396 (1922); *Hovey v. Nellis*, 98 Mich. 374 (1894); *Abernathy v. McCoy*, 154 N. E. 682 (Ind. App. 1926); *Smith v. Neill*, 104 N. J. Eq. 339, 145 Atl. 537 (1929). *Contra*: *Archer v. Jacobs*, 125 Iowa 467 (1904); see Note (1923) 25 A. L. R. 770-773.

some purposes. The American authorities are too few to reach a very definite conclusion about the state of the law in the case of future interests to classes.⁴⁷ It would seem, however, that if the language is such as to indicate what would ordinarily be called a vested remainder, the interest should be accelerated, but that, whether the class should then close would depend upon what construction would most nearly carry out the testator's probable wishes.

When we come to consider executory limitations, the short conclusion we should arrive at, according to the recognized postulates of property law already referred to, is that executory interests are not accelerated.⁴⁸ But since the widow's renunciation is an event which is ordinarily unexpected by the testator, the words may call for a different construction in the light of that event. And just as the renunciation may be read into language which would ordinarily create a contingent remainder, making it vest at once, so language which would create an executory limitation may be construed as referable to a contingency which takes place at the widow's renunciation rather than at the widow's death. Thus in *Fisch v. Fisch*⁴⁹ testator devised the residue of his estate in trust for his wife for life, and then to be divided into two equal parts; one part to be given to *L* forever, and one part to *S* forever, *S* and *L* being children of testator. The will also contained this clause: "The issue of any deceased child taking the share of such child *per stirpes*." On renunciation by the widow, it was held that the remainders were to be accelerated, and that the children living at the death of the testator were to take absolute interests. That is to say the court construed the words, "the issue of any deceased child to take the parent's share," to mean any child deceased *at the time the widow's life estate terminated*, not at the time the widow died. The court said: "The fact that testator, after providing for a remainder to his children upon the death of the life tenant, stated that the issue of a remainderman should take the share of the remainderman, does not mean that he intended a gift over to issue contingent upon the death of the parent before the natural death of the life tenant. Postponement of enjoyment of the remainder is only for the purpose of letting in the particular

⁴⁷ That such remainders are accelerated is recognized in *Allen v. Hannum*, *supra* note 27, *Davis v. Hilliard*, 129 Md. 348, 99 Atl. 420 (1916), and *Yeaton v. Roberts*, 28 N. H. 459 (1854). In the latter case the court indicated that after born remaindermen would be let in.

⁴⁸ See *Street v. Cave Hill Investment Co.*, 191 Ky. 422, 230 S. W. 536 (1921); *Kearney v. Kearney* [1911] 1 Ir. Ch. 137; *M'Carthy v. M'Carthy*, L. R. 1 Ir. 189 (1878).

⁴⁹ 155 Atl. 146, 147 (N. J. Eq. 1929).

estate." Other cases can be found where the same construction has been employed.⁵⁰

So far we have only considered the effect of the widow's renunciation. But, when she renounces, she usually also elects to take a portion of her husband's estate, dower, a distributive share, her portion as her husband's heir, or whatever the rule of law in the particular jurisdiction provides. We have yet to consider what is the effect on future interests of the widow's election to take a portion of her husband's estate which the will did not give her. If we accelerate the future interest the effect will sometimes be to give the holder of that interest more than he otherwise would have had, while other beneficiaries under the will are compelled to take less. It is entirely possible that the widow's renunciation will so upset the general scheme of the will that any attempt to give effect to the rest of it would entirely defeat the testator's intent. In such a case, all the limitations are void.⁵¹ But such cases are exceptional, and courts generally give some effect to the instrument if it can be done on any possible theory.

What the courts often do is to give the disappointed legatees or devisees the benefit of the interest which the widow has renounced. To use a phrase frequently recurring in the decisions, her devise or bequest will be "sequestered to compensate those beneficiaries under the will whose shares are cut down by her election." A few illustrations will indicate how courts have applied this doctrine. In *Holdren v. Holdren*⁵² testator left a widow, five children, and six grandchildren, the issue of a deceased child. One child was the issue of the surviving wife; the others were children of a former wife. He gave his wife a life estate in one sixth of his real estate, and provided that on her death it should go to his son by her. To his other four children he gave each a sixth of his real estate, and to his grandchildren the other sixth. The widow renounced and elected to take dower, which would be a life estate in one third of the real estate. The question was: should the remainder to the child of the surviving wife be accelerated? If this were done, the testator's probable purpose of making the share of the widow's son bear the burden of her life estate would be defeated, and five sixths of this burden would be shifted to other issue of the testator. The court indicated that the rejected life interest would be sequestered for disappointed devisees. But as the land had to be sold for the payment of debts, the proceeds of the sale were

⁵⁰ Spangler's Estate, 23 Pa. Dist. Ct. 332 (1914); Coover's Appeal, 74 Pa. 143 (1873); See also *Rench v. Rench*, *supra* note 26.

⁵¹ *Fennell v. Fennell*, 80 Kan. 730, 106 Pac. 1038 (1909), same case, 81 Kan. 642 (1910).

⁵² 78 *Supra* note 30.

merely distributed in such a way that the life interest repudiated was first taken to satisfy the dower claim, before resorting to the other five shares. In *McReynolds v. Counts*⁵³ testator devised real estate to his wife for life and after her death to his son Isaac in fee simple. The personal estate was to be divided into eight equal shares, one of which was given to each of his seven children, and the other to the children of a deceased child. The widow renounced and elected to take dower in the land and her distributive share in the personalty. The result, of course, would be that, if the remainder were accelerated, the remainderman would get a present interest in a part of the land although the will gave him only a remainder, while the other children would get less than the will gave them since the distributive share would be taken from their legacies. The court decreed that the rents and profits during the widow's lifetime of two thirds of the land should be applied as far as necessary to indemnify the disappointed legatees, and that after full indemnification of the legatees or the widow's death, whichever should first occur, the land should be delivered to Isaac. Many other cases recognize this doctrine of compensation.⁵⁴

⁵³ 9 Grattan 242 (Va. 1852).

⁵⁴ *Dean v. Hart*, *supra* note 19; *Bank v. Futch*, *supra* note 27; *Schaffnacker v. Beil*, 320 Ill. 31, 150 N. E. 333 (1926); *Foreman Trust & Savings Bank v. Seelenfreund*, *supra* note 42; *Timberlake v. Parish's Ex'r.*, 5 Dana (35 Ky.) 345 (1837); *Adams v. Legroo*, *supra* note 27; *Hinkloy v. The House of Refuge*, 40 Md. 461 (1874); *Shreve v. Shreve*, 176 Mass. 456 (1900); *Sellick v. Sellick*, 207 Mich. 194, 173 N. W. 609 (1919); *Cotton v. Fletcher*, 77 N. H. 216, 90 Atl. 510 (1914); *Sarles v. Sarles*, 19 Abbott's New Cases 322 (N. Y. 1887); *Sandoe's Appeal*, 65 Pa. St. 314 (1870); *Batione's Estate*, 136 Pa. 307 (1890); *Collins' Estate*, 10 Pa. Dist. Ct. 249 (1901); *Young's Appeal*, 108 Pa. 17 (1884); *McIntosh's Estate*, 158 Pa. 528 (1893); *Meek v. Trotter*, 133 Tenn. 145, 180 S. W. 176 (1915); *Latta v. Brown*, 96 Tenn. 343 (1896); *Alexander v. McAdams*, 40 S. W. (2d) 407 (Tenn. 1931); *Jones v. Knappen*, *supra* note 30; *Mitchells v. Johnsons*, 6 Leigh 461 (Va. 1835).

In Illinois a statute is cited as the basis of the doctrine. ILLINOIS REVISED STATUTES (Callaghan, 1924) c. 3, § 80. The statute refers only to personalty, yet it has been applied also to realty.

MASSACHUSETTS GENERAL LAWS (1921) c. 191, §§ 15 and 16, makes special provision to the effect that, in certain cases, the widow's portion is to be taken from the testamentary gift which she has renounced.

For cases where the court refused to give relief to a legatee or devisee, who was somewhat prejudiced by the election, see *Safe Deposit & Trust Co. v. Gunther*, *Hesseltine v. Partridge*, both *supra* note 27.

It is not always easy to say when other beneficiaries are so disappointed as to give rise to the doctrine. In *Jones v. Knappen*, *supra*, at 397, the court said: "The controlling, and, we think, the more reasonable principle, announced in most of these cases, is the one expressed by *Woorner*, *supra*, viz., to use the renounced devises and legacies given by the will to the widow, to compensate, as far as may be, the devises and legacies diminished by such renunciation. When the remaindermen are effected *pro rata* by such

One may well ask, what is this strange principle by which the courts seek to compensate disappointed beneficiaries? If, as we have suggested, acceleration is a matter of construction, and the renunciation relates back to the death of the testator, then how can there be any life estate to sequester? Is any life estate really sequestered, or are the courts merely construing the future interest as an executory limitation to vest only on the widow's death? Is this an equitable doctrine of adjustment, where the results desired cannot be reached by any fiction of construction? And can the whole thing be explained as a rule for the marshalling of assets of the estate?

renunciation, acceleration of the enjoyment of their devises or legacies, diminished proportionably, will equitably compensate them, so far as possible for such diminution."

The problem raised in *Holdren v. Holdren*, *supra* note 30, that of a gift of equal shares of testator's estate to a group of persons, the widow's life estate to be taken out of one of the shares, has been variously dealt with by the courts.

In *Cavanaugh v. Madden*, 175 Ark. 236, 299 S. W. 1 (1927), income of property was devised to testator's wife for life and at her death the property was to be divided into two equal parts, the wife to have the absolute power to dispose of one part by will, and in default of appointment that part was to go to *E*. The other part was given to testator's nieces. By electing to take under the statute testator's widow acquired one half of his estate. It was held that the gift in default of appointment failed absolutely, since it was assumed that the testator intended *E* to take only if the wife did not renounce the life estate. Probably what appealed to the court was the fact that, though the wife died without making an appointment, she did devise the half which she took under the law to *E*, who was a relative of hers.

In *Hoskins v. Hoskins*, 43 Iowa 452 (1876), testator devised one half of his estate to one of his daughters and the other half to his wife during widowhood with remainder to testator's other daughter. The widow's election gave her one third of the property in fee. The court took this third out of the half which was given to the widow for life in the will, saying, at 454: "The intention of the testator seems to have been to give one half of his real estate to his daughter, Lydia Ann, and to divide the other half between his daughter Ellen and her mother, a life estate, or an estate during widowhood to the mother, with remainder in fee to the daughter." The idea of "sequestering" the life estate does not seem to have occurred to the court. This case was overruled by *Dillavou v. Dillavou*, 104 N. W. 432 (Iowa 1905), where the court, on almost identical facts, held that the loss should be distributed equally among the various shareholders and the remainders accelerated. The court purported to base its conclusion in part on an Iowa statute. It also observed, at 433, that "there is no ground whatever for saying that the testator, without adverting to the matter at all, even inferentially, intended the dower interest to be taken from the shares of some devisees rather than from those of others." But see *Dillavou v. Dillavou*, 130 Iowa 405, 106 N. W. 949 (1906), where the former opinion was withdrawn on jurisdictional grounds.

See also *Macknet's Ex'rs v. Macknet*, 24 N. J. Eq. 277 (1873). *Latta v. Brown*, *supra*, another case of the same type as *Holdren v. Holdren*, proceeds on the "sequestration" theory.

The most common explanation is that this is but a special instance of the equitable doctrine of election.⁵⁵ It is well settled that if a testator devises a piece of property of his own to *A* and another piece of property which belongs to *A* he devises to *B*, *A* cannot take under the will and at the same time retain the property which the testator devised to *B*. Equity will compel him to elect whether he will take his own property or take under the will. And if he elects to take his own property, then the property devised to him will be taken in so far as is necessary to compensate *B* for being deprived of the property devised to him.⁵⁶ In like manner it has been said that the widow's dower or distributive share is her own property which the testator has devised to someone else. And if the widow elects to take it, it is said that equity will take the interest which the testator devised to her, in order to compensate those who are disappointed by her election.

This may work well enough when the widow is given an absolute interest in property by the will, and no future interests are involved. For if a devisee disclaims a fee simple in land or an absolute interest in personalty, the fee or the absolute interest still exists and may be made available for disappointed beneficiaries; but if a life estate is disclaimed, it would seem that it is extinguished. However, under the equitable doctrine of election, there is no renunciation or disclaimer whatever, if compensation is to be made. The beneficiary has already acquired both interests; but equity merely says that the rents and profits of the life estate are to be paid over to disappointed legatees or devisees. Thus, even though the remainder is vested, there is no question of acceleration because the life estate is still in existence.⁵⁷ In any jurisdiction where the widow gets title both to her dower or distributive share and to the devise, and where election is purely a matter of equity, this theory will hold. Under the Arkansas statute, for example, the widow who renounces is

⁵⁵ This theory is definitely presented in the following cases: *Jennings v. Jennings*, 21 Ohio St. 56 (1871); *Holdren v. Holdren*, *supra* note 30; *Cauffman v. Cauffman*, 17 Serg. & R. 16 (Pa. 1827); *Collins' Estate*, *supra* note 54; *McReynolds v. Counts*, *supra* note 53; *Mitchells v. Johnsons*, *supra* note 54.

⁵⁶ On the doctrine of election, see *Rogers v. Jones*, L. R. 3 Ch. D. 688 (1876); *Dillon v. Parker*, 1 Swans. 359 (1818); *Gretton v. Haward*, 1 Swans. 409 (1819).

For further discussion of the doctrine, as applied to a widow's election not to take under her husband's will, see 1 JARMAN, WILLS, c. XVI; 1 POMEROY, EQUITY JURISPRUDENCE, §§ 516-519; 1 WOERNER, AMERICAN LAW OF ADMINISTRATION (3d ed. 1923) 406, 407.

⁵⁷ In *Jennings v. Jennings*, *supra* note 55, at 80, in discussing this theory, the court quoted with approval ADAMS' EQUITY as follows: "The effect of election is not to divest the property out of the donee, but to bind him to deal with it as the court shall direct."

directed to convey the devised lands to the heirs.⁵⁸ But in many jurisdictions the statutes evidently contemplate that the widow's renunciation shall operate as a complete disclaimer of all property given to her under the will.⁵⁹ If the statute says that the widow must relinquish the benefits under the will as if they had never come to her, then how can equity take them from her?

Moreover, according to the doctrine of election, when compensation has fully been made, the property devised should go back to the widow, since the basis of the doctrine is everywhere recognized to be compensation and not forfeiture.⁶⁰ But the writer has found no case involving a widow's renunciation where this has been done. Indeed, under many American statutes, it would hardly be possible.⁶¹ In several cases, courts have indicated that, where the disappointed beneficiaries have been compensated and the widow is still alive, the property would then be given to the vested remaindermen.⁶² While such a solution seems fair, it is utterly inconsistent with the "election in equity" theory.

A second theory is conceivable and seems to be suggested in the case of *Holdren v. Holdren*, already referred to.⁶³ Although the future interest appears to be a vested remainder, the circumstance that such a construction will disappoint beneficiaries under the will might lead us to construe it as an executory devise to take effect in possession only on the widow's death. That

⁵⁸ ARK. DIG. STAT. (Crawford & Moses 1921) § 3510.

⁵⁹ See ILLINOIS REVISED STATUTES (Smith-Hurd, 1929) c. 41, § 13, which provides that the surviving spouse's renunciation "shall operate as a complete bar to any claim which such survivor may afterwards set up to any jointure, devise, testamentary provision or dower thus renounced."

⁶⁰ To the effect that, according to the doctrine of election, the one electing to take against a will loses only to the extent that it is necessary for compensation of the disappointed person, see 1 JARMAN, WILLS, 514, 515, and cases therein cited; BISPHAM, PRINCIPLES OF EQUITY (10th ed. 1922) § 305, and cases therein cited.

⁶¹ See note 59, *supra*. Other statutes which imply or expressly state that a widow's election to take under the law prevents her from taking anything under the will, unless it so provides are: IND. ANN. STAT. (Burns, 1914) §§ 3043-3046; KAN. REV. STAT. ANN. (1923) c. 22, § 117; MD. ANN. CODE (Bagby, 1924) art. 93, §§ 310-333; MASS. GEN. LAWS (1921) c. 191, § 17; N. Y. REAL PROP. LAW (1909) § 200; N. C. CONSOL. STAT. (1919) §§ 4096, 4097; W. VA. CODE (Barnes, 1923) c. 78, § 11.

⁶² *McReynolds v. Counts*, *supra* note 53; *Adams v. Legroo*, *supra* note 27; *Meek v. Trotter*, 133 Tenn. 145, 180 S. W. 176 (1915); *Morriss v. Garland's Adm'r*, 78 Va. 215 (1883). A similar result is reached in *Heraty's Estate*, 22 Pa. Dist. Ct. 847 (1913), where the court ordered a "sequestration" of a part of the life interest and an acceleration of a part.

But in *Wilson v. Hall*, 6 Ohio C. C. 570 (1892), it was held that the life estate passed as intestate property after the disappointed legatees were compensated.

⁶³ *Supra* note 52.

would leave the property undisposed of by the will prior to the widow's death, and this undisposed of interest could be used to reimburse disappointed beneficiaries. But this again does not account for the holdings to the effect that the remainder is accelerated as soon as the persons disappointed by the election are satisfied. Either the future interest is a vested remainder or it is an executory devise. If it is the former, it may be accelerated in the widow's renunciation; if it is the latter it cannot become a present interest until the widow dies.

It is believed that the attempt to fit the cases into the equitable doctrine of election is forced and unsatisfactory; nor can all the cases be explained purely on the basis of construction. Yet the results which the courts reach are generally fair and likely would have met with the testator's approval if he could have foreseen what did transpire. A more satisfactory explanation is this: the vested remainder is accelerated and becomes a present interest, but equity seizes it in the hands of the remainderman, and imposes a trust for the benefit of disappointed beneficiaries. Such a procedure is merely a matter of marshalling the assets in the course of the administration of the testator's property; and is analogous to rules for the abatement of legacies. This would explain the decisions giving the remainderman the property when the disappointed beneficiaries are satisfied. And it is consistent with the fact that in many jurisdictions the widow's election appears to operate at law as well as in equity, and is practically equivalent to a disclaimer. That this theory may have been recognized by the Tennessee court in a vague way, is indicated by the following quotation from the opinion in *McCl v. Trotter*: "We therefore are of opinion that the realty turned back on renunciation by the widow should have been sequestered by the court below so that the net proceeds therefrom during the life of the widow should be first applied to such indemnity of the minor legatees; and that thereafter the beneficial enjoyment be with the devisees whose estates were accelerated by the dis-
sent, they to be equalized *inter sese* as above indicated."⁶⁴

It should be noted that, while this doctrine may be described in a loose way as a kind of marshalling rule, it does not parallel the rules for the abatement of legacies. For, although there has been some difference of opinion about the matter, the weight

⁶⁴ *Supra* note 62, at 158, 180 S. W. at 179. Elsewhere, however, [133 Tenn. at 156, 180 S. W. at 178] the court says: "The renounced benefit may be conceived of as intercepted in devolution and sequestered as the property of the widow for such indemnity." It has been said that the doctrine is not for the purpose of securing a readjustment because of a disappointment of expectation, but to effectuate an indicated testamentary desire. See *Hesseltine v. Partridge*, *supra* note 27, at 80; *Crocker v. Crocker*, 238 Mass. 478 (1918).

of authority is that residuary legatees are compensated just as other legatees and devisees.⁶⁵

But whatever we say about the matter of compensating disappointed beneficiaries, and wherever we classify these rules in the card index of legal categories, certain it is that the courts have not followed traditional postulates concerning the characteristics of vested and contingent future interests, nor have they overruled them. A practical working device has been found to take care of a concrete need; the court is enabled to solve the problem without straining the facts of each case through a feudal sieve.

In conclusion, it is believed that much of the confusion with reference to the so-called acceleration of future interests arises because the courts have wavered between two approaches; on the one hand they have treated it as a problem of re-construction; on the other, they have regarded the instrument as already construed when the widow renounced, and have applied time-honored doctrines concerning the nature of vested and contingent future interests without much regard for the merits of the particular case. But, on the whole, the cases show a pronounced trend in favor of the proposition that, in contemplation of law, future interests following a renounced life estate are re-construed in the light of the renunciation, and that this so-called acceleration is really re-construction. As to particular types of future interests, whether in realty or personalty, legal or equitable,⁶⁶ limitations phrased as contingent remainders will not be held to fail; they will be re-construed either as executory devises or as present interests. Limitations phrased as absolutely vested remainders will generally be re-construed as present interests, though in rare instances they might be re-

⁶⁵ Hinkley v. The House of Refuge, *supra* note 54; Firth v. Denny, 84 Mass. 468 (1861); Sellick v. Sellick, *supra* note 54; In re Lonergan's Estate, *supra* note 28 (overruling a contrary holding in Ferguson's Estate, *supra* note 28, and Vance's Estate, *supra* note 27); Jones v. Knappen, *supra* note 30; Meek v. Trotter, *supra* note 62; Morris v. Garland's Adm'r, *supra* note 62. Compensation for residuary legatees or devisees was refused in the following cases: Trustees of Church Home for Females v. Morris, 99 Ky. 317, 36 S. W. 2 (1896); Adams v. Legroo, *supra* note 27; Hesseltine v. Partridge, *supra* note 27. See also Crocker v. Crocker, *supra* note 64.

⁶⁶ It is true, when the interest is equitable, the legal title being in a trustee, the problem might be worked out as one of resulting trusts; but generally the existence of a trustee does not alter the court's approach. For example: remainders after life estates in trust, were accelerated in Christian v. Wilson's Ex'rs, *supra* note 19, Bank v. Futch, *supra* note 27, Safe Deposit & Trust Co. v. Gunther, *supra* note 27, Young v. Harris, 176 N. C. 631, 97 S. E. 609 (1918); and the sequestration doctrine was recognized in the following cases involving trust estates: Hinkley v. House of Refuge, and Cotton v. Fletcher, both *supra* note 54. But *cf.* Brandenburg v. Thorndike, 139 Mass. 102 (1885).

garded as executory devises. Limitations phrased as remainders vested subject to be wholly divested may be re-construed as present interests (or, as is commonly said, accelerated), but this does not necessarily mean that the divesting condition need be re-construed so as to take effect prior to the widow's death; in some cases such remainders are construed as executory devises. Limitations phrased as remainders vested subject to be partly divested might be re-construed as present interests (that is accelerated) just as readily as remainders vested to be wholly divested. The class, however, should not ordinarily close until the widow's death. Executory devises would not ordinarily be modified by the widow's renunciation; but sometimes they may be re-construed in the light of that fact so as to become present interests. Furthermore, it is believed that the doctrine of compensating disappointed legatees and devisees is not necessarily inconsistent with these conclusions; that it does not prevent a vested remainder from being re-construed as a present interest on the widow's renunciation; but that the present interest may be held in trust to compensate disappointed beneficiaries.