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Medieval Law in the Age of Space: Some "Rules of Property" in Arkansas

Robert R. Wright*

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.

*Oliver Wendell Holmes***

One of the projects of the Arkansas Bar Association of the past few years is directed toward promoting the improvement of county courthouses throughout the State. Although some of our courthouses are fairly modern structures, the vast majority are relics of the late 19th century. They stand in Victorian splendor, cold and drafty in the wintertime, hot and sometimes odiferous in the summer, their battlements overlooking the twentieth century world of commerce like Sir Walter Scott catching a glimpse of Cape Kennedy. Their architecture is from a period when local affairs revolved around them and around the county governmental system generally, and their appearance all too often reflects that time and events have eroded the foundation of their importance as centers of local government. Thus are lawyers and judges all too often left to adjudicate the affairs of men in an atmosphere that recalls Prince Albert coats and black bow ties, and sometimes reflects itself more tangibly in falling plaster, rickety furniture, and pink, purple and cream-colored American flags.

Small wonder that in an atmosphere such as this, the law we deal with is often "old law," which is to say that it has its genesis in an age having only a limited relationship at best to transcontinental jet flights, communication satellites, space exploration, or instant communication with all parts of the world. For although our courthouses may in many counties be old and in need of repair, they are centuries more modern than some of the legal doctrines practiced in them.

This is not to say that because some rules are old, they are rendered obsolete by virtue of that fact. Many old rules are

* Professor of Law, University of Arkansas. (Author's Note: This article is adapted from a talk delivered to the Annual Fall Legal Institute at the University of Arkansas in October, 1966. It has been rewritten to some extent, but retains some of the flavor of a talk as opposed to a law review article. I wish to express appreciation to W. Dent Gitchel, one of the Editors of the Law Review, for his assistance with the footnotes.)

** *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

often the best. But to the extent that time has deprived them of their meaning in a modern transactional setting, so that they become an impediment or a snare for the unsuspecting, they should be reconsidered in the light of existing conditions and the utility of our own time and place. Insofar as those "rules of law" are concerned which pertain to commercial and business practices, it would seem not only rational but mandatory, in order that the law function expeditiously and fulfill the expectations of society, that rules change as the practices themselves change. Thus do they become relevant to the times in which we live. Real estate is simply another asset which forms a part of the modern commercial scene, and the sale of land should be viewed with no substantially greater mystique than the sale of other assets. The same principle therefore applies to land as to other objects of value.

Indeed, we should have no less confidence in our ability to create relevant law to serve our needs than did the medieval lawyer who, by virtue of simply being able to read and write, was thereby worthy to be considered an educated man. Certainly we should be in a better position to develop rules of law for the twentieth century than a man who lived five or six centuries earlier and who, in his wildest fantasies, could never have imagined even a fraction of the technological advances and transactional complexities of our life of today.

Yet in the field of real property, many of the "rules" which determine our rights are the same rules which were devised to meet the exigencies of the feudal period and the relationship between the lord of the manor and his freeholders or villeins, and these have no more relevance to real estate transactions today than a covered wagon does to a Boeing 707.

As one Texas supreme court justice stated, these rules are often relics "not of the horse and buggy days, but of the preceding stone cart and oxen days."¹

In this context, brief consideration will be given to some of these immutable "rules of law" which Arkansas lives by in the field of real property, although it should be kept in mind that this article is an overview and is not intended to provide an in depth examination of the subjects touched upon.

1. *Sybert v. Sybert*, 152 Tex. 106, 254 S.W.2d 999, 1001 (1953).

I. THE RULE IN SHELLEY'S CASE

Here is a gem, a real jewel, cut by medieval methods for medieval masters. It had its apparent beginning in the enlightened year of 1324, when a few hundred people congregated together constituted urban living, when superstition was rife, when serfs lived in huts with thatch roofs and mud floors and when the lords and ladies of the castle were not beset with instant television commercials on the glories of underarm deodorant, filter-tip cigarettes, or the problems of washday blues, greasy hair pomade, stubborn bowels or upset stomach. If a dove flew into their kitchen, it was a real one; and these were hardly the swingers of the Pepsi generation.

The Rule in Shelley's Case actually was enunciated centuries earlier in *Abel's Case*,² and it did not receive its modern name until the late 15th century in the case of *Wolfe v. Shelley*.³ Nonetheless, it has endured ever since then, and we have in turn endured it although its sanctity and survival in most jurisdictions has in recent years disappeared. Boiled down, the rule simply provides that if an instrument limits a freehold estate to A with a remainder to A's heirs, then A takes a fee simple absolute. The mechanics of it are that the remainder in the heirs is converted to a remainder in A. Under the principles of merger, A's life estate and his remainder come together to form the fee.⁴ Traditionally, the rule had application whether the grant was to A for life, remainder to his heirs, or to A for life, remainder to A's bodily heirs.⁵ In the latter situation, of course, A took a fee tail. However, as a result of an Arkansas statute,⁶ the Rule in Shelley's Case theoretically no longer applies in the fee tail situation in Arkansas (although it still does in part), and although

2. Y.B. 18 Edw. II 577, 7 M. & G. 941, note c (1324). See 1 AMERICAN LAW OF PROPERTY § 4.40 (Casner ed. 1952). *Abel's Case* is set out in a footnote to *Harrison v. Harrison*, 135 Eng. Rep. 381, 383 (1844), in which the court states that the "rule itself did not originate with that [Shelley's] case; it is as old as the Y.B. 18 E. 2, fo. 577, and depends upon the feudal law, which always preferred to give an estate by descent rather than by purchase." 3 POWELL, REAL PROPERTY § 378, at 284 n.7 (1967), states that the "earliest case arguably concerned with" the rule was Y.B. 2 & 3 Ed. II, 47 (1309), and that *Abel's Case* only "contains language believed to recognize" the rule. The Provost of Beverley's Case, Y.B. 40 Ed. III, 9 (1366) applied the rule and is cited by Lord Coke in support of it. 1 Co. Rep. 104a.

3. 76 Eng. Rep. 206 (K.B. 1581). See BURBY, REAL PROPERTY 280 (1943).

4. See 1 AMERICAN LAW OF PROPERTY § 4.41 (Casner ed. 1952).

5. *Id.*

6. ARK. STAT. ANN. § 50-405 (1947).

it has full application in the fee simple situation. While the majority of American jurisdictions have abolished it altogether,⁷ Arkansas follows it as a rule of law.⁸

It would seem only reasonable to ask why this apparition should be a rule of law when its only utility is as a trap for the unwary. The grantor may very well want his grantee to have only a life estate and the grantee's natural heirs to have the land absolutely when the grantee dies. He may want to preserve the land within the family, at least for a time, without creating the fee tail situation. The grantee's "heirs" may be brothers and sisters of the grantee rather than children. Why should the grantor have to resort to some trust device, elaborate or otherwise, or some similar tool when, absent Shelley, his intent could be accomplished quite easily? It hardly makes a sound argument to say that the Rule makes land more freely alienable. For one thing, it was obviously the intent of the grantor (which should be at least as important as the law's aversion to restraints on alienation) that the land be tied up during the grantee's life in order that he would not be able to prevent his heirs from having it when he died. Since in this day and age the majority of deeds are prepared by lawyers, the grantor's lawyer would surely apprise him of the effect of such a conveyance (sans Shelley), and after such warning if the grantor wished to so encumber his conveyance, he should be permitted to do so. It is his land and within the confines of the public interest, he should be free to act as he chooses in connection with it.

If Arkansas abolished this rule, it would hardly be a pace-maker among Anglo-American jurisdictions. England abolished Shelley's Rule in 1925.⁹ The Rule has been abrogated by statute in the District of Columbia¹⁰ and in thirty-eight states¹¹ and

7. 3 POWELL, *supra* note 2, § 380 (1967).

8. Bishop v. Williams, 221 Ark. 617, 255 S.W.2d 171 (1953), *noted in* 7 ARK. L. REV. 411 (1953); First Nat'l Bank v. Graham, 195 Ark. 586, 113 S.W.2d 497 (1938).

9. Property Act of 1925, 15 Geo. V, c. 20, § 131. *See* 3 POWELL, *supra* note 2, § 378, at 281 (1967).

10. D.C. CODE ANN. § 45-203 (1961).

11. ALA. CODE ANN. tit. 47, § 141 (1940); ALASKA COMP. LAWS ANN. §§ 59-5-2, 59-5-3 (1949); ARIZ. REV. STAT. § 33-231 (1956); CAL. CIV. CODE § 779 (Deering 1949); CONN. GEN. STAT. § 47-4 (1958); FLA. STAT. ANN. § 689.17 (Supp. 1958); GA. CODE ANN. § 85-504 (1955); IDAHO CODE § 55-206 (1947); ILL. REV. STAT. c. 30, §§ 186 (1955); IOWA CODE § 557.20, 557.21 (1946); KAN. GEN. STAT. ANN. §§ 58-502, 58-503 (Sup. 1939); KY. REV. STAT. § 381.090 (1946); ME. REV. STAT. c. 168, § 12 (1954); MD. ANN. CODE art. 93, § 366 (1957); MASS. ANN. LAWS c. 184, § 5 (1939); MICH. STAT. ANN. § 26.28 (1957); MINN. STAT. § 500.14 (Henderson 1949); MISS.

has been found not to be in force by courts in a number of other states.¹² Only four states are left in which the Rule definitely exists,¹³ with Arkansas, of course, being among them. Leading writers in the field of property find little to weep about upon the demise of the Rule. Powell states: "Courts act wisely when they interpret these statutes, in accordance with their obvious policy, as intended to extirpate, root and branch, a too-long-survived anachronism."¹⁴ Simes and Smith, in their landmark work on future interests, declare: "Difficult as it is to define the precise scope of the rule in Shelley's Case, still greater difficulties are likely to be experienced in finding any rational basis for it."¹⁵ And so it goes, until it would simply be gilding the lily to quote from the legion of writers, whether they be law professors, judges or practicing attorneys, who from time to time have vented their passion against this aberration of an earlier era.¹⁶

Before leaving *Shelley*, some mention should be made of its origin, obscure though it may be. Some have suggested that the rule was simply a natural outgrowth of the condition prevailing in the feudal period in which land was normally held for life only, and their heirs obtained their estate through the

CODE ANN. § 835 (1942); MO. ANN. STAT. § 474.470 (1956); MONT. REV. CODE ANN. § 67-520 (Choate - Wertz 1947); NEB. REV. STAT. § 76-112 (1950); N.H. REV. STAT. ANN. § 551.8 (1955); N.J. STAT. ANN. § 46-3-14 (1940); N.M. STAT. ANN. § 70-1-17 (1953); N.Y. REAL PROP. LAW § 54 (C.L.S. 1963); N.D. REV. CODE § 47-0420 (1943); OHIO REV. CODE ANN. § 2107.49 (Baldwin 1958); OKLA. STAT. ANN. tit. 60, § 41 (1949); ORE. REV. STAT. § 114.220 (1957-1958); PA. LAWS, No. 39, § 17, p. 109 (1947); R.I. GEN. LAWS ANN. § 34-4-2 (1956); S.C. CODE § 57-2 (1952); S.D. CODE § 51.0420 (1939); TENN. CODE ANN. § 64-103 (1955); TEX. CIV. STAT. art. 1291(a) (1963); VA. CODE ANN. § 55-14 (1950); W. VA. CODE ANN. § 3534 (1943); WIS. STAT. § 230.28 (1947). See 1 AMERICAN LAW OF PROPERTY § 4.51 (Osner ed. 1952).

12. *Thurston v. Allen*, 8 Hawaii 392 (1891); *Kennedy v. Rutter*, 110 Vt. 332, 6 A.2d 17 (1939).

13. Arkansas, Delaware, Indiana, and North Carolina. See *Shields v. Shields*, 179 Ark. 167, 14 S.W.2d 545 (1929); *Springhitt v. Monaghan*, 50 A.2d 612 (Del. 1946); *DeLawter v. DeLawter*, 90 Ind. App. 571, 169 N.E. 472 (1930); *Rawls v. Roebuck*, 228 N.C. 537, 46 S.E.2d 323 (1948).

14. 3 POWELL, *supra* note 2, § 380, at 305 (1967).

15. 3 SIMES & SMITH, *FUTURE INTERESTS* § 1543, at 427 (2d ed. 1956).

16. See e.g., Mochary, *Reflections of An Arkansas Property Teacher Upon Reading Professor Leach's Property Law Indicted*, 21 ARK. L. REV. 567, 572 (1968); Young, *The Rule in Shelley's Case in Illinois: A New Analysis and Suggestion for Repeal*, 45 ILL. L. REV. 173 (1950); Block, *The Rule in Shelley's Case in North Carolina*, 20 N.C.L. REV. 49 (1941); O'Connell, *The Rule in Shelley's Case in Oregon*, 20 ORE. L. REV. 103 (1941); Comment, *The Rule in Shelley's Case in Washington*, 15 WASH. L. REV. 99 (1940).

overlord rather than by descent.¹⁷ When inheritable estates came into being, the conveyance was to "A and his heirs," with the words, "and his heirs," being necessary as words of limitation to accomplish the objective. So, if Blackacre were conveyed to A for life, with the remainder to A's heirs, it was a simple extension (perhaps viewed as a parallel situation) to say that, again, the words, "remainder to A's heirs" were words of limitation and not of purchase. It is perhaps a more satisfactory explanation to observe that historically the rule prevented the overlord from being deprived of the benefits of feudal tenure. Simes and Smith state:

For example, if A owned land in fee simple and died leaving an heir who took it by descent from him, certain feudal obligations were owed to the overlord by their heir. If, however, the heir took by purchase, these valuable incidents of feudal tenure did not accrue to the lord. Thus, if A, the owner in fee, should desire to deprive his lord of the benefit of various feudal incidents, such as wardships and marriage, on his death, he might convey to X, and then X would convey back to A for life, remainder to A's heirs. Had it not been for the rule in Shelley's Case, A's purpose would have been accomplished. But such a device as A attempted would have so depleted the income of the landed nobility that the courts imposed the rule in Shelley's Case to prevent it.¹⁸

While there are other possibilities, such as the absence of contingent remainders at the time the rule evolved,¹⁹ and the possibility that the situation was affected by the rule of primogeniture whereby a person did not leave "heirs" but only "an heir" at his death,²⁰ the fact remains with regard to this day and age that all of these reasons have long since gone to their graves. The incidents of feudal tenure, such as wardship, marriage and the like, have never had relevance on American soil; we have had inheritable estates and contingent remainders for centuries; and the law of primogeniture is largely (and should be in its entirety) a peculiarity of bygone days. The only rational basis for the rule today would seem to be that it increases the alienability of land. But experts in the field are quick to point out that the "operation of the rule is so arbitrary that even the freer alienability which is gained hardly outweighs its disadvantages."²¹

As the North Carolina court said as far back as 1897, Shel-

17. 3 SIMES & SMITH, *supra* note 15, § 1543, at 427.

18. *Id.* at 428.

19. WILLIAMS, REAL PROPERTY 386, n.e. (23d ed. 1920); 3 SIMES & SMITH, *supra* note 15, § 1543, at 429.

20. 3 SIMES & SMITH, *supra* note 15, § 1543, at 429.

21. *Id.* at 430.

ley's Rule is "the Don Quixote of the law, which, like the last knight errant of chivalry, has long survived every cause that gave it birth, and now wanders aimlessly through the reports, still vigorous but equally useless and dangerous."²²

II. FEE TAIL

It may be argued that Arkansas has abolished both the fee tail and the application of Shelley's Case to fee tail situations.²³ Technically we have, to some extent. We have limited it to the point, by a substitution of estates, that in effect we presently have what might be called a bob-tailed fee tail.²⁴ As a matter of fact, Professor Powell indicates that there is no other quite like it in the English-speaking world.²⁵

It should also be noted in advance of even this limited discussion that a line of fee tail cases in Arkansas may be found to support any one of several inconsistent propositions, and since none of these cases have been reversed, the success or failure of litigation on the subject may depend on which labyrinth the Court wishes to explore to find the desired cubbyhole in which to fit a particular case. The state supreme court's dilemma is that there are a certain number of these Arkansas fee tail cases which are simply irreconcilable, although the court has not recognized that fact *in haec verba*. Professor Samuel Feters has explored the fee tail area in detail in an article

22. *Stamper v. Stamper*, 121 N.C. 251, 28 S.E. 20, 22 (1897).

23. In *Hardage v. Stroope*, 58 Ark. 303, 310, 24 S.W. 490, 492 (1893), the Arkansas court made two erroneous assumptions in one sentence: "The rule [in Shelley's Case] has never been changed in this State, except in one respect—estates tail have been abolished." It added: "To this extent it [*Shelley*] has been repealed." The errors: (1) The statute did not abolish estates tail, but only provided for substituted estates; and (2) as the result of some court decisions, hereinafter discussed, the principle of *Shelley's Case* has been applied in altered form and slightly altered result in a limited number of fee tail situations in Arkansas. It is not applied by name, but in principle. See notes 32, 34, and 35, *infra*. As did *Shelley's Case*, when applied to fee tail conveyances, the result in these cases was to create an early vesting in fee (though in fee simple rather than fee tail).

24. It is "bob-tailed" because we still allow the bodily heirs to take as such—they just take in fee simple, following a life estate, under our substituted estates type of statute. Our statute did *not* abolish fee tail as such; it replaced the fee tail created by the grantor with other estates (life estate followed by a remainder vesting in fee simple in the entailed heirs). The remainder *still passed* as by fee tail to those who would and could take such an estate; it *then* vested in fee simple. See the comments in Feters, *The Entailed Estate: Ferment for Reform in Arkansas*, 19 ARK. L. REV. 275, 281 (1966).

25. 2 POWELL, *supra* note 2, § 198[2], at 84.2 - 84.3.

in the *Arkansas Law Review*,²⁶ which develops this subject extensively and graphically illustrates, in many more facets than those mentioned here, the prevailing contradictions and confusion.

Our fee tail statute provides that in cases where under the common law any person would become seized of a fee tail estate, such person shall instead have a life estate, "and the remainder shall pass in fee simple absolute to the person to whom the estate tail would first pass according to the course of the common law."²⁷ As mentioned earlier, this statute seemingly does away with Shelley's apparition in the fee tail situation.²⁸ Bothered by the statute, the legislature in 1957 provided for dissolution of such an estate by the grantor, the life tenant or tenants and "all of the other persons then living who might be remaindermen"²⁹ executing a conveyance of the fee, which would vest a fee simple estate in the grantee. This more recent statute apparently provided a way to do away with what had been created, but it obviously was a limited form of relief and left the situation essentially as it had been from a practical standpoint.

The obvious conclusion to be drawn from the basic statute is that if A conveys to B for life, remainder to the heirs of B's body, then B has a life estate and his bodily heirs will take in fee simple absolute. That is what it says, and that is what the early Arkansas cases said that it said.³⁰ But what if A goes a step further and conveys to B for life, remainder to C for life, remainder to the heirs of C's body? This was essentially the problem in *Myar v. Snow*,³¹ where the court held that C also had a life estate with a remainder in fee simple in her children.

26. Fetters, *supra* note 24.

27. ARK. STAT. ANN. § 50-405 (1947).

28. Professor Fetters points out that no legislation in Arkansas specifically has abolished *Shelley* in the fee tail situation and observes that the Arkansas court offered no explanation as to why our fee tail statute abolished the rule as applied to estates tail. Fetters, at 281. It would seem that *Hardage v. Stroope*, *supra* note 23, can be justified on this basis: The statute dealt with cases in which a person could be seized in fee tail under the common law. Instead of being seized in fee tail, says the statute, he takes a life estate and the remainder passes to the heirs tail in fee simple. At common law, one way for A to acquire an estate tail was by a conveyance to A, remainder to A's bodily heirs. *Shelley's Case* vested this estate tail in A. Thus, it would seem that the Arkansas court is justified in assuming that the statute intends to eliminate this aspect of the Rule in *Shelley's Case* even though no specific mention is made of it in the statute.

29. Ark. Acts [1957] No. 163, § 1 (p. 491).

30. See *e.g.*, *Horsley v. Hilburn*, 44 Ark. 458 (1884).

31. 49 Ark. 125, 4 S.W. 381 (1886).

But in *Bell v. Gentry*,³² the devise was to *W*, and upon her decease or remarriage, ". . . to my said children and their bodily heirs . . ."³³ The court held that when *W* died, the children took in fee simple. Similarly, in *Pletner v. Southern Lumber Company*,³⁴ *G* devised to *A* during her life, remainder to *M* and her bodily heirs. It was held that *A* had a life estate and that *M* took in fee simple. *Bowlin v. Vinsant*³⁵ is representative of this same construction. *Pletner v. Southern Lumber Company*, *Bowlin v. Vinsant* and that line of cases are contrary to *Myar v. Snow*. They are also contrary to the statute. In *Henderson v. Richardson*,³⁶ the court attempted to distinguish an indistinguishable situation from the *Bell-Pletner* line by stating that you *can* have successive life estates if that intent is clearly manifested by the testator, which apparently leaves the court free to follow either line of cases which strikes its fancy at a given moment. Finally, in *Lewis v. Bowlin*,³⁷ the court had before it a devise to *A* and unto the heirs of his body, which was the traditional statutory situation. This case involved further litigation under the same set of circumstances which had given rise to *Bowlin v. Vinsant* several decades before. Although the court's decision in the second *Bowlin* case was in line with *Horsley v. Hilburn* and the original Arkansas cases constructing the statute, the court took the occasion to note an article in the *Arkansas Law Review*³⁸ on the subject, as well as this statement by Professor Powell in his treatise:

Arkansas, by decision, has injected a peculiar distinction between limitations "to *B* and the heirs of his body" (which are construed to be governed by the statute) and limitations "to *B* for life, remainder to *C* and the heirs of his body." In the latter situation, the statute is not applied, and if *C* is alive at *B*'s death, *C* gets an estate in fee simple absolute, but if *C* is then dead, *C*'s descendants get the estate in fee simple absolute. This strange result seems to be based upon the court's unsound belief that a conveyance to a "remainder" necessarily connotes the conferring of an estate in fee simple on the remainderman.³⁹

The court correctly notes that Powell "criticizes the distinction made by the court" in this connection and observes that "several learned writers have questioned the soundness of the rule

32. 141 Ark. 484, 218 S.W. 194 (1920).

33. 141 Ark. at 486, 218 S.W. at 194.

34. 173 Ark. 27, 292 S.W. 370 (1927).

35. 186 Ark. 740, 55 S.W.2d 927 (1933).

36. 213 Ark. 532, 211 S.W.2d 436 (1948).

37. 237 Ark. 947, 377 S.W.2d 608 (1964).

38. Comment, *The Effect of Stare Decisis Upon Fee Tail in Arkansas*, 10 ARK. L. REV. 181 (1956).

39. 2 POWELL, *supra* note 2, § 198[2], at 84.2 - 84.3.

established in the *Bell, Pletner* and *Bowlin* cases."⁴⁰ The court then defends the error committed in the *Bell-Pletner-Bowlin* line with the same defense earlier enunciated in *Eubanks v. McDonald*: ". . . to repudiate the rule . . . would result in the invalidation of titles that had been acquired in reliance . . ."⁴¹ on it.

If the court did not want to overrule this line of cases outright, but wanted to extricate itself from what it apparently recognized quite wisely to be error, it would be a simple matter for it to issue a *caveat* to the effect that henceforth the rule would be different. At the very least, the rule could by a *caveat* be changed as to estates created after the date of the case.⁴² If it is to be presumed that landowners in Arkansas fully understand the fee tail situation as it presently exists (which would be a remarkable premise in view of the fact that it is barely understood, if at all, by lawyers and law professors), then it may similarly be presumed that they would with reasonable rapidity apprise themselves of the new rule (which would also be a false premise, but at least no worse than the previous one).

It may be just as well, however, that the court stuck to its guns. There are other aspects of the fee tail situation in Arkansas which are in need of correction, and it is almost discriminatory to single out the above milieu as the sole source of confusion. *Bradley Lumber Company v. Burbridge*,⁴³ for example, presents a result which is equally irreconcilable with the statute.

What we have in Arkansas on fee tail is reminiscent of a line from an old Bob Hope-Hedy Lamarr movie, *My Favorite Spy*, in which the villain (observing Hope) comments that a man's subconscious is "a maudlin swamp." Future interests generally, and fee tail in particular, are the Okefenokee of Arkansas land law.

Without considering any further ramifications of the Arkansas fee tail situation, since Professor Fetters explored this juristic entanglement admirably in his earlier article, some brief consideration should be given to the origin of these estates.

The situation which gave rise to estates tail was the essen-

40. *Lewis v. Bowlin*, 237 Ark. 947, 951, 377 S.W.2d 608, 610 (1964).

41. *Id.* at 951, 377 S.W.2d at 610-611.

42. Arkansas has employed the *caveat* device in cases not involving real estate. See *Hare v. General Contract Purchase Corp.*, 220 Ark. 601, 249 S.W.2d 973 (1952), and the follow-up case of *Universal C.I.T. Corp. v. Stanley*, 225 Ark. 96, 279 S.W.2d 556 (1955).

43. 213 Ark. 165, 210 S.W.2d 284 (1948).

tially feudal society and the elaborate tenurial system which prevailed in England in the middle ages. Fee tail conveyances followed on the heels of *D'Arundel's Case*⁴⁴ in 1225. The surrounding principles and aims stemmed from the same tradition and philosophy as primogeniture. We acquired these principles as a result of Arkansas' reception statute⁴⁵ in the same manner that we acquired so many of these medieval principles, despite constitutional protestations to the contrary.⁴⁶ The thinking which produced the fee tail never really had any basis for application in Arkansas, any more than it did in any other American state, and it is historically ludicrous and rationally absurd for any state to continue to adhere to such rules in this day and age. Fee tail should be put to rest once and for all in Arkansas by appropriate statutory wording abolishing such estates.

As for the *Bell v. Gentry* situation, the statute should not only be such that in a case involving a conveyance to *A* for life, remainder to *A*'s bodily heirs, *A* would take a life estate and his bodily heirs would take in fee simple. It should also be true that a conveyance to *A* for life, then to *B* for life, remainder to *B*'s bodily heirs, should lead to successive life estates in *A* and *B*, with the bodily heirs to take in fee simple absolute.

This discussion has not explored the wilds of *Wild's Case*⁴⁷ and its ramifications as does Professor Fetters in his article in the *Arkansas Law Review*.⁴⁸ It is worth suggesting, however, that a possible effective solution to that situation may be found in Section 13 of the Uniform Property Act, which provides that when a conveyance is in favor of a person and his "issue," or other words of similar import designating the person and his descendants, the conveyance creates a life estate in the person and a remainder in fee simple in the descendants, unless an intent to create other interests is clearly manifested.⁴⁹

This discussion and the Fetters article would seem to demonstrate also that *Shelley's Case*, *Wild's Case* and the fee tail statute, as well as other considerations, are interlocking in their ramifications, and changes made in existing law must be comprehensive alterations which take into consideration the entire panorama of future interests so that the end product is a comprehensive, functional system. One who sets out to abolish

44. Bracton, N.B. 1054 (1225).

45. ARK. STAT. ANN. § 1-101 (Repl. 1956).

46. ARK. CONST. art. II, § 28.

47. 6 Co. Rep. 166, 77 Eng. Rep. 277 (K.B. 1599).

48. Fetters, *supra* note 24, at 283-292.

49. UNIFORM PROPERTY ACT § 13.

fee tail must necessarily concern himself with *Wild's Case*, *Shelley's Case*, and related effluvia.

III. THE DOCTRINE OF WORTHIER TITLE

The basis of the Doctrine of Worthier Title is that a title by descent is worthier than a title by grant or devise.⁵⁰ This only makes sense in the context of a feudal society.⁵¹ If the title passed by descent, the lord would be entitled to recover the payment of relief and might be entitled to the incidents of wardship and marriage, but if the title passed by devise, the lord would not receive these feudal incidents. The doctrine actually consists of two rules: (1) If a will gives a freehold estate to an heir of the testator which is of the same quality and quantity that the devisee would have taken by descent if the testator had died intestate, then the estate will pass by descent, rather than by devise; and (2) if the owner grants a life estate to A, remainder to the heirs of the grantor, the remainder is void and the grantor is left with a reversion. The first situation, concerning wills, would seem not to be important because normally the devisee-heir is going to take, one way or the other. As a matter of fact, the Restatement takes the view that this branch of the rule is no longer a part of American law,⁵² even though an occasional decision still deals with it.⁵³ The conclusion that this branch of the rule is dead and departed has been hopefully expressed with regard to Arkansas.⁵⁴

50. For an excellent Arkansas-oriented discussion of this subject, see Comment, *The Doctrine of Worthier Title*, 21 ARK. L. REV. 394 (1967). On the wills branch of the rule, see Morris, *The Wills Branch of the Worthier Title Doctrine*, 54 MICH. L. REV. 451 (1956); and on the inter vivos branch, see Morris, *The Inter Vivos Branch of the Worthier Title Doctrine*, 2 OKLA. L. REV. 133 (1949).

51. See 3 POWELL, *supra* note 2, § 375, at 261 (1966); 3 SIMES & SMITH, *supra* note 15, § 1607 (2d ed. 1956).

52. RESTATEMENT OF PROPERTY § 314, comment J (1940).

53. See Harper & Heckel, *The Doctrine of Worthier Title*, 24 ILL. L. REV. 627, 642 (1930); Morris, *The Wills Branch of the Worthier Title Doctrine*, 54 MICH. L. REV. 451, 486 (1956).

54. Comment, *supra* note 50, at 396-404. The author concludes that *West v. Williams*, 15 Ark. 682 (1855) rejected the doctrine, although its pronouncement was considered sufficiently vague that it put "too much weight on too frail a reed to regard the *West* case as having irrevocably expunged the doctrine from the law of Arkansas." Nonetheless, he regards it as "certain that the case does not accept the wills branch as part of our law." Comment, *supra* note 50, at 403. He then cites two leading texts which use *West v. Williams* as authority for the contention that the court approved the wills branch: PAGE, WILLS § 214 (3d ed. 1941); THOMPSON, WILLS § 74 (2d ed. 1936). His discussion points up

Concentrating on the second part of the doctrine, we can attach some substantial importance to this aspect since if the grantor has a reversion and has not granted away his entire estate, he may thwart his heirs by devising it to someone else or by use of an inter vivos conveyance. The rule may also result in tax consequences.⁵⁵ Moreover, creditors can levy upon the reversionary interest.

In a 1954 Virginia case,⁵⁶ the court stated that this second aspect of worthier title has generally been softened into one of construction, rather than a rule of law which must be applied in all circumstances. As a rule of construction it could be found in one of three forms: (a) as a prima facie preference for a reversion; (b) as a prima facie preference for a remainder; or (c) as presenting an examination into the grantor's intention without any presumption.

The modern trend seems to be in the direction of that taken in the Virginia decision, which was based upon Cardozo's earlier opinion in *Doctor v. Hughes*,⁵⁷ and in fact several states have abolished the rule altogether by statute.⁵⁸ In a 1959 report, the California Law Revision Commission recommended that the doctrine be abolished for the following reasons:

- (a) The doctrine is based upon a false premise, namely, the assumption that a person granting property to his own heirs or next of kin does not really intend to give the property to them or understand that he has done so but rather intends to retain a reversion in the property with full power to dispose of it again in the future.
- (b) The doctrine breeds litigation, since the presumption or

several situations in which (if Arkansas has the wills branch) the doctrine might apply to change the result (had the property instead passed by devise). One of these, quite obviously, is through the ridiculous ancestral estate provisions which still obtain in Arkansas. ARK. STAT. ANN. § 61-110 (Supp. 1967). My own conclusion is that Page and Thompson must be wrong and our student writer must be correct, if only for the reason that I can no more envision our court attempting to breathe life into this old monstrosity than I can accept as fact the result of Dr. Frankenstein's experiments. *But see* *Cupp v. Frazier's Heirs*, 239 Ark. 77, 387 S.W.2d 328 (1965), in which the Arkansas court accepted the "first purchaser" doctrine as a part of our law even though the majority of states have long since rejected the concept.

55. The reversion is a taxable part of the estate under Section 2033 of the Internal Revenue Code of 1954, and if it has a value of more than five per cent of the property transferred, the entire interest will be included in the taxable estate under Section 2037 of the 1954 Code.

56. *Braswell v. Braswell*, 195 Va. 971, 81 S.E.2d 560 (1954).

57. 225 N.Y. 305, 122 N.E. 221 (1919). Cardozo concluded that the rule persists today only as a rule of construction.

58. *See e.g.*, MINN. STAT. ANN. § 500.14(4) (1945); NEB. REV. STAT. §§ 76-114, 115 (1943). *See also* 3 SIMES & SMITH, *supra* note 15, § 1612.

rule of interpretation can be defeated by a showing that the grantor actually meant what he said.

(c) The doctrine can easily operate as an estate and inheritance tax trap by creating a reversionary interest in the estate of a grantor who intended to avoid such taxes by making an inter vivos transfer of the property to his heirs or next of kin.⁵⁹

Arkansas has been regarded as remaining singularly unaffected by the modern tendency and as construing the inter vivos branch of the doctrine of worthier title as a rule of law.⁶⁰ Although the court does not make such a statement, this is the inference drawn from language contained in *Wilson v. Pharris*,⁶¹ a case which seems to incorporate the doctrine into Arkansas law without explicitly purporting to do so. Whether it did or did not is a question which is open to debate. The grant in question provided for a *reversion* to the grantor's heirs upon the death or marriage of the tenant, which necessarily implies the retention of the fee subject to the interest of the tenant, as opposed to the situation involved in the case of a vested remainder. Some of the authority quoted by the court, however, related to remainders, rather than to reversions, which provides the foundation for the classification of the case by the textwriters.⁶²

One recent commentator contends that *Wilson v. Pharris* did not establish the inter vivos branch of the doctrine as a rule of property in Arkansas and, further, that the court was merely construing the intent of the grantor.⁶³ *Fletcher v. Ferrill*⁶⁴ is cited as sustaining the proposition that the rule does not exist in its common-law form in Arkansas.⁶⁵ It is contended that the case "conceded that the heirs of a grantor can take as purchas-

59. Stanton, *Law Revision*, 34 CAL. B.J. 84, 93 (1959). See also CRIBBET, FRITZ, & JOHNSON, *CASES & MATERIALS ON PROPERTY* 158 (2d ed. 1966).

60. See 3 POWELL, *supra* note 2, § 375, at 264; 1 AMERICAN LAW OF PROPERTY § 4.19, at 441 (1952); 3 SIMES & SMITH, *supra* note 15, § 1605; FETTERS, *Destructibility of Contingent Remainders*, 21 ARK. L. REV. 145, 147 (1967).

61. 203 Ark. 614, 158 S.W.2d 274 (1941).

62. The Arkansas court's opinion copied a quotation from WASHBURN, *REAL PROPERTY* 395 (1887), which had been quoted in an Illinois case. The quotation from the treatise stated:

At common law, if a man seized of an estate limited it to one for life, remainder to his own rightful heirs, they would take not as remaindermen, but as reversioners; and it would be, moreover, competent for him, as being himself the reversioner, after making such a limitation, to grant away the reversion.

Quoting this, FETTERS, *supra* note 60, at 147 n.6, observes that Arkansas thereby adopted "the Doctrine of Worthier Title as a rule of law."

63. Comment, *supra* note 50, at 409-410 (1967).

64. 216 Ark. 583, 227 S.W.2d 449 (1950).

65. Comment, *supra* note 50, at 410.

ers.”⁶⁶ The argument is based on this reasoning: The court stated the principal question to be whether the language of the deed created a possibility of reverter or an executory limitation, and that the “inquiry” was as to whether the word “heirs” was one of limitation or purchase; therefore, by implication, the court admitted the absence of the doctrine of worthier title in Arkansas because its very consideration of the question is “inconsistent with a rule of property which refuses to admit the possibility that a grantor’s heirs can take as purchasers.”⁶⁷ It is an ingenuous argument, and the inference is further supported by this statement in the opinion:

*Even if we should sustain the . . . contention that . . . the word “heirs” was used in the deed as a word of purchase, we should still have to decide the case in the appellant’s favor. Under that construction the deed would vest a determinable fee in the Lodge, and upon termination of that estate the title would pass directly to the appellees, not by inheritance from Fletcher but by virtue of the executory limitation in the deed.*⁶⁸

Before the conclusion is reached that Arkansas thereby rejected the doctrine in this case, however, consideration should be given to what the court actually held. It was conceded that a determinable fee was involved. Construing the conveyance, the court concluded: (1) that a possibility of reverter may be devised; (2) that the conveyance created a possibility of reverter as opposed to an executory limitation; (3) that “heirs,” as used in the conveyance was a word of limitation, not of purchase, and thus the title passed first to the estate of the grantor and then to the residuary devisee; and (4) that, therefore the title did not pass by purchase. Consequently, even though the doctrine of worthier title was not employed or even mentioned, the end result in the case was the same as if it had been applied. Moreover, as the author of this comment points out, a genuine rejection of a rule “naturally requires cognizance of the rule rejected.”⁶⁹ The court seemed oblivious to the rule and seemed to be dealing with the situation purely in terms of the construction of the deed. Implicitly, once again, this would seem to suggest that the inter vivos branch of the doctrine does not exist in Arkansas. But how can any reliance be placed upon such an implication when the court neither specifically considered or discussed the doctrine, and in fact reached a conclusion consistent with it? Although it would be hoped when presented

66. *Id.*

67. *Id.*

68. *Fletcher v. Ferrill*, 216 Ark. 583, 586, 227 S.W.2d 449, 450 (1950).

69. Comment, *supra* note 50, at 411.

with the question the court would hold that *Fletcher v. Ferrill* did in fact amount to a repudiation of the doctrine, the issue would seem to remain viable at the present time (and the doctrine perhaps just as viable).

Fletcher v. Ferrill serves to render some doubt as to whether the inter vivos branch of the doctrine is a rule of property in Arkansas. Offsetting it, however, is the unfortunate quotation utilized in *Wilson v. Pharris*. The sum total of the situation is that, as is quite often the case in the law of future interests in Arkansas, the situation on the subject of worthier title is confused. Since there is probably sufficient doubt to provide some leeway to the court should the matter ever be squarely presented, it is not inappropriate to suggest that a major problem generally in Arkansas property law has been the denomination of so many of these hoary apparitions as "rules of property" when in fact many of them are no more than rules of construction (and generally should not even be glorified to that extent). Traditionally, courts feel freer to alter rules of construction, and the Arkansas court of today might feel less constricted if its predecessors had not elevated so many of these ancient constructional preferences into seemingly immutable "rules of property."

The worthier title doctrine (both branches) arose in the late sixteenth century,⁷⁰ a fact which makes it of somewhat more modern vintage than those rules previously discussed. In England, as many have contended is the case in Arkansas, the doctrine operated as a rule of law. The results of its operation were not favored, however, and it was abolished in England by statute in 1833.⁷¹ The inter vivos branch of the rule nonetheless flourished in America even to the point that a few states extended it to dispositions of personalty.⁷² Although as mentioned earlier the rule has been reduced to one of construction in some jurisdictions, one authority points out that this often

70. *Hinde v. Lyon*, 2 Dy. 124a, 73 Eng. Rep. 271 (K.B. 1555) (wills branch); *Fennick & Mitford's Case*, 1 Leon. 182, 74 Eng. Rep. 168 (K.B. 1589) (deeds branch). See 3 POWELL, *supra* note 2, § 381 at 306; Harper & Heckel, *The Doctrine of Worthier Title*, 24 ILL. L. REV. 627 (1930); Morris, *The Inter Vivos Branch of the Worthier Title Doctrine*, 2 OKLA. L. REV. 133 (1949); Comment, *supra* note 50, at 394 (1967).

71. 3 & 4 Wm. IV, Ch. 106, § 3 (1833).

72. See *National Shawmut Bank v. Joy*, 315 Mass. 457, 53 N.E.2d 113 (1944); *Harris v. McLaran*, 30 Miss. 533 (1855); *Scholtz v. Central Hanover Bank & Trust Co.*, 295 N.Y. 488, 68 N.E.2d 503 (1946); *Dunnett v. First Nat'l Bank & Trust Co.*, 184 Okla. 82, 85 P.2d 281 (1938); *Baltimore v. First & Merchant Nat'l Bank*, 170 Va. 221, 196 S.E. 593 (1938). See also RESTATEMENT OF PROPERTY § 314(1) (1940).

leads only to uncertainty in the law and "wasteful expenditures of money by helpless clients."⁷³ The proposed Uniform Property Act abolished the rule and directed that the conveyance operate in favor of the heirs or next of kin by purchase rather than by descent.⁷⁴ Five states have adopted this provision or a similar provision by statute and have thereby abolished the rule.⁷⁵

Although no substantial amount of litigation in Arkansas has resulted from the doctrine, it should be abrogated statutorily, and normal rules of construction should be applied with the heirs taking by purchase in the absence of a manifested intent to the contrary. This doctrine constitutes simply one more of those traps for both the public and for busy lawyers, and both can get along better without it. Probably not a single feudal lord in Arkansas would miss not having a rule which was developed to assure the benefit of the incidents of relief, wardship, marriage and the like.⁷⁶

IV. DOWER AND DESCENT

Without considering these examples *ad infinitum*, some attention might be given to a few more of these rules which we live by in Arkansas. One which affects a greater number of people than any of those previously discussed is dower.⁷⁷ By

73. 3 POWELL, *supra* note 2, § 381 at 316.

74. UNIFORM PROPERTY ACT § 14.

75. NEB. REV. STAT. §§ 76-114, -115 (1943); NEW YORK ESTATE, POWERS & TRUSTS LAW § 6-5.9 (McKinney 1967); MINN. STAT. ANN. § 500.14(4) (1947); WEST'S CAL. CIV. CODE § 1073 (1959); ILL. REV. STAT. ch. 30, § 188, 189 (1967); KAN. GEN. STAT. § 58-506 (1949); TEX. CIV. STAT. art. 1291(a) (1963).

76. Wardship and marriage were abolished in England in the mid-seventeenth century. 12 Car. II, c. 24 (1660).

77. Dower is of ancient vintage as are these other appendages of the past. Blackstone states:

Dower out of the lands seems also to have been unknown in the early part of our Saxon constitution; for in the laws of King Edmond, the wife is directed to be supported wholly out of the personal estate. Afterwards, as may be seen in gavelkind tenure, the widow became entitled to a conditional estate in one half of the lands; with a proviso that she remained chaste and unmarried; as is usual also in copyhold dowers, or free bench. Yet some have ascribed the introduction of dower to the Normans, as a branch of *their* local tenures; though we cannot expect any feudal reason for its invention, since it was not a part of the pure, primitive, simple law of feuds, but was first of all introduced into that system (wherein it was called *triens*, *tertia*, and *dotalitium*) by the emperor Frederick the Second; who was contemporary with our King Henry III. It is possible therefore, that it might be with us the relic of a Danish custom: since, according to the historians of that country, dower was introduced into Denmark by Swein, the father of our Canute the

statute, the widow is entitled to one-third of her husband's real estate for life,⁷⁸ and one-third of his personalty absolutely⁷⁹ if he is survived by children.⁸⁰ Estate tax considerations are important, to be sure, where there is substantial wealth involved. But the vast majority of people in Arkansas do not have any estate tax problems. Their marital deduction is not strained to the breaking point, and the average individual does not even reach the point of making use of it. In the typical situation of a young adult, there are almost invariably minor children involved, and often enough his property is not in a tenancy by the entirety. He may have a bank account and a savings account and own a heavily mortgaged house, or perhaps a vacant lot or some farmland, and probably a car or two—and suddenly he learns that if he dies anytime soon, his minor children are going to own a two-third's share of his property and that before the widow can sell anything, a guardianship will have to be created. Even with older people, there is often the problem of the children inheriting. This is the type of individual who comes in to have the proverbial "simple will" prepared leaving it all to the wife. Whether that is done or his lawyer creates some tenancies by the entirety or some other approach is adopted, the point is that the statutes pertaining to dower and descent in Arkansas today do not correspond to the normal wishes of the vast majority of people, who have some property but not a great deal. When most people die intestate, things are generally *not* like they thought they would be. Contrary to the opinions of some, probate and intestacy laws are not just for estates of a quarter-million dollars and up. Intestacy laws, by and large, should be written for the average man.

One possible solution to this problem is to provide by statute that the widow would inherit the entire estate upon the death of the husband intestate. (This might be said to possess the advantage of conforming the law of descent to what some regard as the usual result in Chancery Court in Arkansas in divorce litigation.) While such a solution might more nearly correspond to the wishes of the average adult male, it has some apparent drawbacks. For example, the result would be the same in a

Great, out of gratitude to the Danish ladies(who sold all their jewels to ransom him when taken prisoner by the Vandals.

2 Blackstone, COMMENTARIES * 129-130.

78. ARK. STAT. ANN. § 61-201 (1947).

79. ARK. STAT. ANN. § 61-202 (1947).

80. See ARK. STAT. ANN. § 61-206 (1947) for dower rights where no children are involved.

situation involving adult children as in that involving minors, and the wishes of the decedent in the case of adult offspring might be that they share in his estate. This is the converse of the problem under the present statute with regard to adult offspring in that at present the prospective decedent must disinherit the children. The fundamental question is what the reasonable expectations of most people would be. A compromise alternative would be to divide the estate between the spouse and the children so that the surviving spouse takes one-half and the children share one-half, but this would create a problem where some of the children were minors and some were adults. Where the children were all adults, such a compromise might be reasonable. This difficulty might be corrected by an equal division between the surviving spouse and the children (with the latter sharing equally in their one-half) and with the spouse serving as trustee of any minor child's share until that child reached maturity. If there were no children, the surviving spouse would take it all.

The third working draft of the Uniform Probate Code,⁸¹ now under discussion by committees of the National Conference of Commissioners on Uniform State Laws but not yet adopted (and therefore subject to change), deals in Article II with the problem of intestate succession. Although it would not be appropriate at this time to reveal the precise wording of these particular provisions of this draft, since they may be reworded or substantially altered, suffice it to say that this Code attempts to solve the problem in keeping with the changing times. For one thing, it eliminates the differentiation between men and women (the old dower-curtsey breakdown of the common law) and simply refers to the share of the surviving spouse. Its provisions apply to the survivor without reference to sex, which in this day and age seems eminently sound. Further, it gives a larger share to the surviving spouse—the entire net intestate estate, if there is no issue (possibly with some limitation attached if the surviving spouse and decedent were married for a short length of time). In the event of surviving issue, the surviving spouse would take an initial lump sum amount plus one-half of the balance, unless the surviving issue are not also issue of the surviving spouse, in which case the living spouse takes one-half. A separate, although similar, provision would be provided for community property states. Other provisions are devoted to the share of heirs other than the surviving spouse. As stated, these

81. Printed in November, 1967.

provisions have not been finally approved by the Commissioners and do not, as of now, reflect the final view. Be that as it may, it would seem that these provisions are pointing in the proper direction. Once the Uniform Probate Code is finally promulgated, Arkansas should give careful attention to it and should consider adoption of it or incorporation of some of its better provisions into our existing Code. While no particular solution is suggested at this time, it is urged that Arkansas' statutory provisions as they presently stand seldom serve either the wishes of the decedent, his best interests or the best interests of his survivors.

There would seem to be an increasing agreement, as indicated from the preliminary work on the Uniform Probate Code, that one-third is too small an amount in an intestate situation for the share of the surviving spouse. It should be no less than one-half, absolutely, under all circumstances, and with regard to both real and personal property. In that connection also, the proposed Uniform Code, as now written, eliminates the distinction for inheritance purposes between real and personal property as being no longer meaningful, and such a conclusion seems well justified. It would further seem that proposed revision in Arkansas should attempt to meet the problem posed by minor children in such a way as to avoid guardianship expenses. The dower-curtesy bifurcation should be abandoned, as in the proposed Uniform Code, and the statute should simply refer to the surviving spouse. There is no justification for treating the husband and wife differently in this regard under the circumstances of modern America, and there will be even less reason for such a differentiation as the years go by.

It is also obvious, as the Commissioners have recognized in going beyond a consideration of dower in the Code, that dower provides only an introduction to the problem and that what is needed is a reconsideration and revision of our entire statutory law of descent. Aside from the obvious necessity of erasing a number of ambiguities and conflicts, there is again the need of meeting the reasonable desires and expectations of the majority of our people, keeping in mind that the law of descent is a statutory testament for all who fail to write their own. What we have at present is probably not too far, in many respects, from the ideal situation.⁸² A decedent who had neither spouse nor children might reasonably and most often prefer that his prop-

82. See ARK. STAT. ANN. § 61-101 (1947).

erty pass first to his parents, then to his brothers and sisters if there were no parents. He would likely choose, in most instances, his brothers and sisters over his grandparents, and almost certainly his grandparents over his aunts and uncles;⁸³ and after that it would not make much if any difference one way or the other.

As for "ancestral" estates,⁸⁴ this perversion is a clear throw-back, at best, to a time when our laws were geared to a plantation society and, at worst, to the feudal period itself. This anomaly should be abandoned.

V. THE DESTRUCTIBILITY OF CONTINGENT REMAINDERS

Most American jurisdictions have done away with the doctrine of the destructibility of contingent remainders by statute,⁸⁵ but Arkansas is not among them. About half of the states are without any statutory provision on the subject,⁸⁶ although some of those have held the rule to be nonexistent there through judicial decision.⁸⁷ The destructibility doctrine apparently exists in Florida,⁸⁸ Oregon⁸⁹ and Pennsylvania⁹⁰ and has been said to exist in Tennessee.⁹¹ There is dictum which indicates its possible existence in South Carolina,⁹² North Carolina⁹³ and Ar-

83. In this respect, the author differs with ARK. STAT. ANN. § 61-101 (1947), which places the grandparents, uncles and aunts on equal footing.

84. See ARK. STAT. ANN. § 61-110 (Supp. 1967). Strangely enough, the General Assembly amended this statute in 1967, and left ancestral estates intact. ARK. STAT. ANN. § 61-111 (1947) is cut from the same cloth as ancestral estates, although the latter are exempted from its provisions. Ancestral estates today simply clutter up and complicate land law in Arkansas without possessing any real, underlying rationale for their existence. They are akin to primogeniture, feudal tenures and a landed aristocracy. They have no place in any modern law of descent.

The only other states in the United States which still recognize ancestral estates are Delaware and Tennessee. See DEL. CODE ANN. tit. 12, § 501 (1953); TENN. CODE ANN. § 31-101 (1955).

85. See, e.g., ALA. CODE tit. 49, 137 (1958); ARIZ. REV. STAT. ANN. §§ 76-116, 117 (1956); NEB. REV. STAT. § 76-116 (1966).

86. 2 POWELL, *supra* note 2, § 314, at 675.

87. Godfrey v. Rowland, 16 Hawaii 377 (1905); Rouse v. Paidrick, 221 Ind. 517, 49 N.E.2d 528 (1943); Williams v. Bricker, 83 Kan. 53, 109 Pac. 998 (1910); Dennett v. Dennett, 40 N.H. 498 (1860).

88. Blocker v. Blocker, 103 Fla. 285, 137 So. 249 (1931).

89. Love v. Lindstedt, 76 Ore. 66, 147 Pac. 935 (1915).

90. Stewart v. Neely, 139 Pa. 309, 20 Atl. 1002 (1891).

91. Manhattan Saving Bank & Trust Co. v. Bedford, 161 Tenn. 187, 30 S.W.2d 227 (1930).

92. Folk v. Hughes, 100 S.C. 220, 84 S.E. 713 (1915).

93. Winslow v. Speight, 187 N.C. 248, 121 S.E. 529 (1924).

kansas.⁹⁴ These conclusions, however, are to a substantial degree a subject of dispute. In a 1958 leading article in the *Minnesota Law Review*, Professor Dukeminier of Kentucky (now of U.C.L.A.) recognized that some old cases in Oregon, North Carolina and Pennsylvania apply the doctrine, but felt that "its present vitality is very doubtful" in those states.⁹⁵ Moreover, he viewed Tennessee and Arkansas as having "clearly rejected destructibility."⁹⁶

The case customarily cited in Arkansas for the proposition that the rule is followed here is *LeSieur v. Spikes*,⁹⁷ a 1915 case which Professor Powell construed in his treatise on real property as demonstrating that the destructibility doctrine may be found in Arkansas.⁹⁸ Professor Dukeminier, however, viewed this case as abolishing destructibility by merger in this state.⁹⁹ In a recent article in the *Arkansas Law Review*, Professor Fetters found the court's analysis in the *LeSieur* case to be confused, pointing out that the court erred in classifying the grantor's interest as a possibility of reverter rather than a reversion, which the court acknowledged as an error in a later case.¹⁰⁰ Contrary to Dukeminier's conclusion that *LeSieur* abolished the doctrine of destructibility by merger, however, Fetters concludes that the

94. *LeSieur v. Spikes*, 117 Ark. 366, 175 S.W. 413 (1915) is the case usually cited for this proposition. A more likely candidate is *Sewell v. Thraillkill*, 209 Ark. 393, 194 S.W.2d 202 (1945), which is considered in Fetters, *supra* note 60, at 155-157.

95. Dukeminier, *Contingent Remainders and Executory Interests: A Requiem for the Distinction*, 43 MINN. L. REV. 13, 37 (1958).

96. *Id.* at 39.

97. *Supra* note 94.

98. See 2 POWELL, *supra* note 2, § 314, at 676. Powell recognizes that the rule was not applied in this case. In addition to Powell, other textwriters stating that the destructibility rule may be in effect in Arkansas, based on dictum, are 1 SIMES & SMITH, *supra* note 15, § 197 and SCHWARTZ, *FUTURE INTERESTS AND ESTATE PLANNING* 32 (1965).

99. Dukeminier, *supra* note 95, at 36.

100. Fetters, *supra* note 60, at 154-155. The later case was *Davis v. Davis*, 219 Ark. 623, 243 S.W. 739 (1951). Prior to the *Davis* case, on rehearing in *Fletcher v. Ferrill*, 216 Ark. 583, 591, 227 S.W.2d 449, 453 (1950), the court had to distinguish the *LeSieur* case on the basis that in *Fletcher* it had held that a possibility of reverter may be devised, whereas in *LeSieur* a will was not involved. Moreover, "the statement was merely dictum" in *LeSieur* because "Dixie LeSieur in fact was survived by heirs of her body and therefore it was unnecessary to decide whether a possibility of reverter can be transferred by deed." This statement partially ignores and partially compounds the error in *LeSieur*. It might be contended that it impliedly supports Dukeminier's thesis that destructibility by merger does not exist in Arkansas; but the problem with that conclusion is that the court gives no indication of recognizing the import of the situation.

erroneous classification of the grantor's interest as a nondisposable possibility of reverter probably led to the result because there could not be a merger if no "disposable interest" remained in the grantor.¹⁰¹ The language of the court supports this thesis: "The entire estate except the possibility of reverter, not a disposable interest, passed . . . by the [original] conveyance . . . and said grantor could not thereafter by conveyance defeat the rights of the remaindermen in the lands, and this without regard to whether the fee be considered in abeyance, during the estate of the life tenant, or still held by the original grantor for the purpose only of passing to the remaindermen upon the termination of the life estate."¹⁰² Clearly, this case cannot be relied upon as having abolished the doctrine of destructibility by merger where the court was operating under the idea (misconception though it was) that no interest remained in the grantor which could be conveyed. Merger cannot merge something with nothing.

As the Fetters article suggests, the court's mention of whether the fee was "in abeyance" or in the grantor for the sole purpose of passing it on to the remaindermen was simply an added indicia of its confusion. Reversions are not held "in abeyance" and the absence of a determinable fee created a decided problem for the court in thinking in terms of a possibility of reverter.¹⁰³ Nonetheless, even in the midst of this emasculation, it seems reasonable to conclude that the court never reached the point of considering the problem of merger because the "entire estate" had "passed" in the original conveyance. If, then, it may be said that Arkansas did not abolish the principle of destructibility of contingent remainders by merger in this case, may it be said (with Powell) that this case illustrates the viability of the doctrine in Arkansas? Such a conclusion could stem from this case only by implication, and although it is arguable that the language of the court, as quoted above, means that if the grantor held a "disposable interest" he could defeat the remaindermen by a conveyance, the case is not sufficiently clear to arrive definitely at such a conclusion. The court confused the law and the facts to the point that the case is of little value as demonstrating very much of anything, and the fact that Powell and Dukeminier arrived at contrary conclusions appropriately

101. Fetters, *supra* note 60, at 154.

102. 117 Ark. at 371, 175 S.W. at 414.

103. Fetters, *supra* note 60, at 155.

demonstrates that little reliance can be placed on *LeSieur v. Spikes*.

The *LeSieur* case involved a conveyance to A and the heirs of her body, with the property to "revert" to the grantor if A should die without any surviving bodily heirs. A and the grantor conveyed to a third party, and later A died leaving two children. Under the Arkansas fee tail provisions, discussed previously, A had a life estate and the surviving children took in fee simple. If the grantor had a reversion in fee simple, and her interest came together with that of the life tenant, A, the result would be a merger of A's life estate which in turn causes the remainder to fail under the destructibility rule. This is why the classification of the grantor's interest was crucial. Other situations in which the destructibility rule has application are, for example, in a conveyance to A for life, remainder to the heirs of B (with A predeceasing B); or in a conveyance to A for life, then if B reaches age twenty-one, to B and his heirs (with A dying prior to the contingency).¹⁰⁴ In the former situation, the heirs of B would run afoul of the rule that no man can be an heir of the living,¹⁰⁵ and in both situations, there is the problem that the supporting freehold estate has been wiped out. The remainder has to vest at or before the termination of the prior estate or it is void under the destructibility rule.¹⁰⁶

The lack of rational applicability of the destructibility doctrine to modern property transactions should be apparent. It is based on the concept from the feudal period that seisin could not be held in abeyance, and thus if the supporting freehold estate failed, the contingent remainder must also fail in order that someone could instantaneously be seized of the land. The reason, as in so many of these old rules, is once again tied to the privileges accorded the feudal lords. Someone had to be immediately available from whom the feudal dues and services could be extracted.¹⁰⁷ Society and to a large extent the state itself were structured upon the feudal system and the services and obligations which stemmed from it. Centuries have passed, however, since the reason departed from the rule. Thus, when the life tenant dies before the con-

104. See 1 AMERICAN LAW OF PROPERTY § 4.60, at 510 (Casner ed. 1952).

105. 2 TIFFANY, REAL PROPERTY § 327, at 46 (1939).

106. 2 BLACKSTONE, COMMENTARIES *171; JACOBSON, ARKANSAS CHANCERY PRACTICE 524 (1940).

107. KALES, FUTURE INTERESTS § 10, at 10 (2d ed. 1920).

tingent interest can vest (as before B reaches twenty-one in the example given above), there is no longer any reason why the title should not be viewed in the same light as an executory interest or simply as resting in the grantor in trust until such time as the remainder can vest.¹⁰⁸ This vitiates the rule of *Purefoy v. Rogers*,¹⁰⁹ and emasculates the historic medieval mish-mash which long before that case had pointed the way toward and necessitated the creation of uses.¹¹⁰ But the primary concern should be the fulfillment of the intent of the grantor to the extent that it can be fulfilled in keeping with the interests of society generally.

Before leaving destructibility, some attention might be given to some more recent Arkansas cases which Professor Dukeminier argues held contingent remainders indestructible.¹¹¹ One was *Lathrop v. Sandlin*,¹¹² in which the conveyance was to A for life, then to the bodily heirs of the grantor. By a subsequent deed, the grantor conveyed the fee simple title to A (his wife). The Arkansas court held that bodily heirs of the grantor had an interest under the earlier deed that was not extinguished by the later deed. On its face, this case would certainly seem to support the Dukeminier evaluation of it. Yet, in the Fetters article, it is pointed out that the case "bears no evidence" that the destructibility by merger doctrine was in issue, and "it would be a thin thesis indeed which would claim that a given result must be predicated upon the repudiation of a rule which is neither raised as a litigation issue nor appreciated and considered by those who have engaged in the decisional process."¹¹³ Similarly, Dukeminier urges *Hutchison v. Sheppard*¹¹⁴ as a case in which "the life tenant inherited the reversion and subsequently attempted to convey a fee, but again the court held this would

108. See 2 POWELL, REAL PROPERTY § 314, at 678 (1967).

109. 2 Wm. Saund. 380, 85 Eng. Rep. 1181 (1670). In this case, it was stated that a contingency "limited to depend on an estate of freehold . . . capable of supporting a remainder . . . shall never be construed to be an executory devise, but a contingent remainder only. . . ." 85 Eng. Rep. at 1192. This was over a century after the Statute of Uses, 27 Hen. VIII, c. 19 (1535), which permitted executory interests to vest *in futuro*, and which type of future interest was upheld as indestructible in *Pells v. Brown*, Cro. Jac. 590, 79 Eng. Rep. 504 (1620).

110. See the interesting discussion in BERGIN & HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 84-115 (1966).

111. Dukeminier, *supra* note 95, at 36.

112. 223 Ark. 774, 268 S.W.2d 606 (1954).

113. Fetters, *supra* note 60, at 158.

114. 225 Ark. 14, 279 S.W.2d 33 (1955).

not destroy contingent remainders."¹¹⁵ Feters, however, points to the court's statement that the reversion was overlooked by the parties and not called to the chancellor's attention; and thus, there was no basis on appeal to invalidate the contingent remainder.¹¹⁶ Other cases cited by Dukeminier to sustain his proposition¹¹⁷ are viewed by Feters as demonstrating not a refusal to apply the destructibility rule but rather a clear indication "that Arkansas attorneys do not . . . recognize that combination of juristic facts which might give rise to its application."¹¹⁸ If this is correct, then the destructibility rule poses a somewhat indistinct, although clearly possible, threat to Arkansas attorneys, since someone is sure to come along eventually who will be able to recognize the problem and raise the issue. When that time comes, *Sewell v. Thrailkill*,¹¹⁹ a 1945 case which is discussed at length by Professor Feters,¹²⁰ offers some hope of success to the party urging destructibility, since in that case the court went to great lengths to determine whether the remainder was vested or contingent when such a determination would only have mattered if Arkansas follows the rule of destructibility of contingent remainders by merger. The court determined that the remainder was vested, but as to the effect of it had it been contingent, "that question is reserved."¹²¹ It is interesting to note that the court erred in the *Sewell* case in declaring the remainder to be vested when it was actually contingent; otherwise, it would have been faced with the question which it reserved.

Another older case which contributes to the argument that Arkansas recognizes destructibility is *Shirey v. Clark*,¹²² in which this statement was made:

It is contended that the conveyance by A. W. Clark to Emily Clark, his wife, created a contingent remainder, which was defeated, and that the estate reverted to the grantor, the precedent estate having been expired by the wife's death before his; and the counsel for the appellant says "that a deed to the heirs of a

115. Dukeminier, *supra* note 95, at 36.

116. Feters, *supra* note 60, at 157.

117. Walker v. Blaney, 225 Ark. 918, 286 S.W.2d 979 (1956); Robertson v. Sloan, 222 Ark. 671, 262 S.W.2d 148 (1953); Peebles v. Garland, 221 Ark. 185, 252 S.W.2d 396 (1952); Weatherly v. Purcell, 217 Ark. 908, 234 S.W.2d 32 (1950); Bradley Lumber Co. v. Burbridge, 213 Ark. 165, 210 S.W.2d 284 (1948).

118. Feters, *supra* note 60, at 157.

119. 209 Ark. 393, 194 S.W.2d 202 (1945).

120. Feters, *supra* note 60, at 155-157.

121. 209 Ark. at 397, 194 S.W.2d at 203.

122. 72 Ark. 539, 81 S.W. 1057 (1904).

living person is always held void unless it is clear from the context that children are meant, which could not be where there is, as here, no context." *We may admit that his statement of the law is correct; and yet his assumption of fact . . . is wrong.*¹²³

In this case the conveyance was from Clark to his wife, Emily, for life, and after her death "then to the heirs of the said A. W. Clark by the said Emily Clark," which was interpreted to mean the children *in esse* of A. W. Clark by Emily. Presumably, except for that interpretation, the destructibility rule would have been applied. Yet the court did not apply it, and we are left only with the implication that it otherwise would have.

It is hardly satisfactory to speculate on the subject. The Arkansas court has shown such a distinct reticence to overturn "rules of property" which might "result in the invalidation of titles that had been acquired in reliance" upon them¹²⁴ that the court might very well discover or rediscover destructibility of contingent remainders as one of these ancient, hallowed common law rules and apply it to eliminate a contingent interest. If it did so, of course, under the supposition that titles had vested in reliance on it, it would be ignoring the fact that few Arkansas lawyers apparently recognize the doctrine even when confronted with it in a lawsuit, as the cases illustrate. Titles could hardly vest in reliance on a doctrine of which not even the great majority of the Bar is seemingly aware. But as long as the possibility remains that the destructibility rule may be in effect in Arkansas, the creation of future interests which could give rise to its application will provide a source of potential litigation.

VI. THE RULE AGAINST PERPETUITIES

Turning very briefly to the rule against perpetuities, we find something which Professor Leach of Harvard has described as a "technicality-ridden legal nightmare" which is a "dangerous instrumentality in the hands of most members of the Bar."¹²⁵ Professors Bergin and Haskell have observed that the rule "had its origin in the musty atmosphere of seventeenth century land law."¹²⁶ The rule, stated rather briefly, provides that an interest must vest if at all not later than "twenty-one years after some life in being at the creation of the interest."¹²⁷ That is

123. 72 Ark. at 542-543, 81 S.W. at 1058.

124. *Lewis v. Bowlin*, 237 Ark. 947, 377 S.W.2d 608 (1964). See also, *Eubanks v. McDonald*, 225 Ark. 470, 283 S.W.2d 166 (1955).

125. Leach, *Perpetuities Legislation, Massachusetts Style*, 67 HARV. L. REV. 1349 (1954).

126. BERGIN & HASKELL, *supra* note 110, at 184.

127. GRAY, *THE RULE AGAINST PERPETUITIES* 191 (4th ed. 1942).

an oversimplification, of course, as far as its ramifications and applications are concerned.¹²⁸ It is supposedly intended to promote the free alienation of land.¹²⁹ What it mostly does is entrap lawyers and laymen. Certainly, the bulk of Arkansas lawyers tend to avoid drafting anything which might even remotely hint at violation of the rule. This rule and the jungle of case interpretations in which it finds solace probably inhibits the creation of future interests more than any other rule extant.

Leach says that the rule simply serves to defeat "reasonable dispositions of reasonable property owners" and should be "substantially changed by statute," and that "lawyers ought to see that this is done."¹³⁰ One possibility for correction of this situation which Leach suggested¹³¹ and which he stated was later suggested also by Professor Simes of Michigan, is the use of the *cy pres* doctrine.¹³² This would change the penalty for violating the rule from the invalidation of the entire interest to permitting the court to reform the gift in such a way that the testator's wishes are carried out to the greatest extent permissible. In effect, something of a court-created trust results. Leach doubted that such a statute could be passed, but said that if Michigan could pass it, "the Sacred Codfish of Massachusetts will make a deep bow in the direction of the Wolverine."¹³³ The Massachusetts statute has a provision which, where there is an age contingency in an instrument which exceeds twenty-one years, simply reduces it by operation of law to twenty-one years.¹³⁴ It also provides that where an interest is dependent on a contingency which may occur beyond the period of perpetuities, the present estate becomes a fee simple absolute if the contingency fails to occur within thirty years.¹³⁵

These possibilities are pointing toward the necessary solution. The rule is too harsh as it stands and serves chiefly to harm the innocent. There is no need to suffer under it when a solution is available to mitigate the ill effects while at the same time not unduly restricting the alienation of land.

128. See 3 SIMES & SMITH, *supra* note 15, at 107.

129. 5 POWELL, REAL PROPERTY § 762, at 552 (1967).

130. Leach, *supra* note 125.

131. Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 746 (1952).

132. See Leach, *supra* note 125, at 1353-1354.

133. *Id.* at 1354.

134. MASS. ANN. LAWS c. 184A, § 2 (1955).

135. MASS. ANN. LAWS c. 184A, § 3 (Supp. 1965).

VII CONCLUSION

This discussion has admittedly rambled from rule to rule and has only hit the high spots of but a few problem areas.¹³⁶ The aim of this abbreviated examination, however, has not been to instruct, but to point up the unreason which marks many of the present rules regulating the transfer of interests in property in Arkansas.¹³⁷ The problem all too often is that courts, lawyers and property professors have honored these ancient strictures too much and too long. An air of mysticism and unquestioning acceptance has grown up about them, so that they have become somewhat like religious relics. The law of real property is in many respects more historical than logical,¹³⁸ but it ought not to be. It should be a useful adjunct to a growing, dynamic economy, an effective tool of landowners and businessmen which may be employed in such a way as to meet their needs and expectations. What is needed in Arkansas is a thorough and complete overhaul of our existing law, preceded by a careful study of the ramifications of proposed changes, keeping in mind that property law is interrelated and has to be considered as a whole.¹³⁹ Such a project might take several years, but the end result would surely prove beneficial.

Our legal tradition has always been a tradition of change as the law has developed to meet new conditions and to solve new problems.¹⁴⁰ We are long overdue, however, in adapting the law

136. How can such a multiplicity of problems be covered even in an "overview" without writing an extended treatise on the subject? With regard to descent alone, Harry Meek observes that our milieu has "obfuscated Arkansas lawyers for more than one hundred years." Meek, *Descent and Distribution*, ARKANSAS DESK MANUAL 17 (1961). Almost ninety years ago, the Arkansas court opined "our confused and incongruous law of descents and distributions." *Oliver v. Vance*, 34 Ark. 564, 567 (1879). In more recent years, the court has referred to "unjust" rules which were "logical only in the days of feudalism," *Jaber v. Miller*, 219 Ark. 59, 65, 235 S.W.2d 760, 763 (1951), but has also declined to repudiate error because such action "would result in the invalidity of titles that had been acquired in reliance" on the rule being considered. *Lewis v. Bowlin*, 237 Ark. 947, 951, 377 S.W.2d 608, 610-611 (1964).

137. For more of the same, see a student note in this same issue on the effect of divorce on tenancies by the entirety.

138. One of Judge E. B. Meriwether's favorite observations during his years as Professor of Law at the University of Arkansas. See Holmes, J., in *Gardiner v. Butler & Co.*, 245 U.S. 603 (1918): [Property law] "is a matter of history that has not forgotten Lord Coke."

139. See Fetters, *supra* note 24, at 275.

140. Roscoe Pound observed that law has for us been in large measure an institution to legitimate the acceptable and reasonable claims and demands placed upon it. POUND, AN INTRODUCTION TO THE PHILOSOPHY

of property to the modern world of commerce by appropriate statutory provisions. To make such changes as these, to build a better structure upon the yet valid and historic rocks which form the foundation of our law of property, is in the highest and best sense an integral part of the common law tradition.¹⁴¹

OF LAW 99 (1922); POUND, *THE TASK OF THE LAW* 88-89 (1944). Professor Willard Hurst has seen in our legal processes an adaptation to the "resistless change of circumstances" in our use of law "to free the Present of the encumbering Past." HURST, *LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY* 235 (1960). Indeed: "Law's conservatism, in the real and best sense of the word, has been manifested in its ability to accomplish the purpose of assimilating change into the broader fabric of our life and institutions without disturbing the basic framework or upsetting the momentum." WRIGHT, *THE LAW OF AIRSPACE* 277 (1968).

141. One great legal scholar, Karl Llewellyn, once penned these verses about the common law:

Come gather and sing to the Common Law
 Whose leaf and seed we are,
 Whether we live by the wagging jaw
 Or counsel, miles from the Bar.
 The wood is good and the sap is strong
 That gave us Coke and Hale,
 Right is a battle to win from Wrong,
 In spite of contempt and jail.
 It calls for brain and it calls for will,
 But an acorn knows its mission:
 Law is the Oak of Liberty still,
 In the Common Law Tradition.

LLEWELLYN, *THE COMMON LAW TRADITION* 399 (1960).