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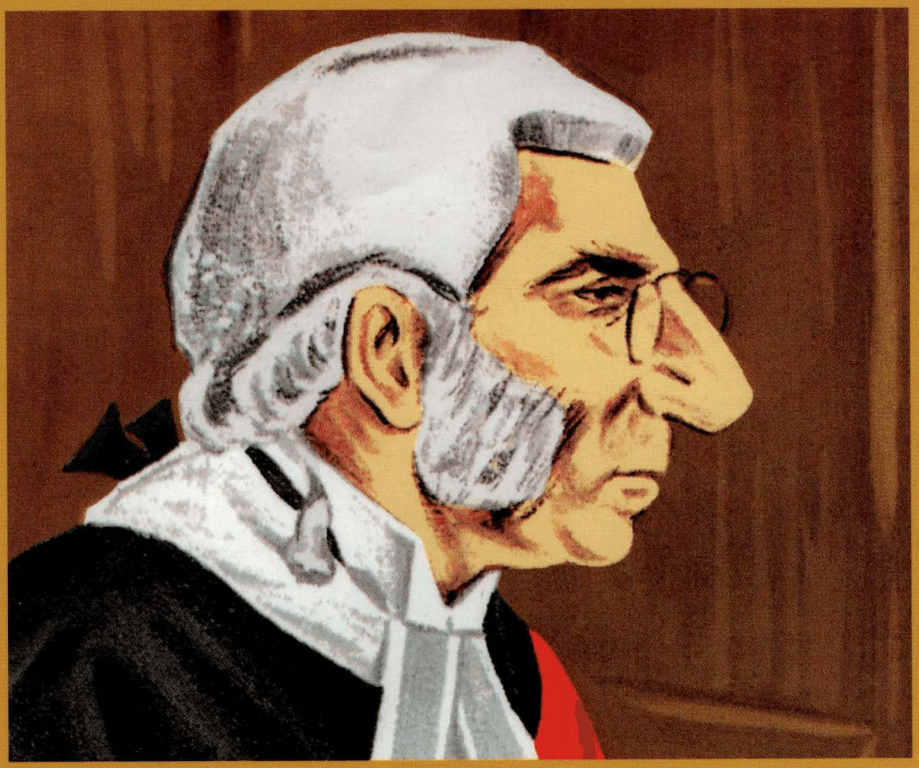

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Calvin Massey

Professor of Law, University of California,

Hastings College of the Law

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CHAPTER 2

FREEHOLD ESTATES

ChapterScope

This chapter examines the freehold estates — the various ways in which people can own land. Here are the most important points in this chapter.

- The various freehold estates are contemporary adaptations of medieval ideas about land ownership. Past notions, even when no longer relevant, persist but ought not do so.
- Estates are rights to present possession of land. An estate in land is a legal construct, something apart from the land itself. Estates are abstract, figments of our legal imagination; land is real and tangible. An estate can, and does, travel from person to person, or change its nature or duration, while the land just sits there, spinning calmly through space.
- The fee simple absolute is the most important estate. The fee simple absolute is what we normally think of when we think of ownership. A fee simple absolute is capable of enduring forever though, obviously, no single owner of it will last so long.
- Other estates endure for a lesser time than forever; they are either capable of expiring sooner or will definitely do so.
- The life estate is a right to possession for the life of some living person, usually (but not always) the owner of the life estate. It is sure to expire because none of us lives forever.
- There are three defeasible fees, estates that will come to an end upon the occurrence of some specified event.
  - A fee simple determinable results when a grantor (owning an estate of longer duration) grants possession only *until* an event occurs, or only for *so long as* something remains true. ("*O* to *A* so long as Britain remains a constitutional monarchy.") When the defeasible condition occurs, the grantor automatically reacquires possession. The grantor's right to possible future possession is called a possibility of reverter.
  - A fee simple subject to condition subsequent results when a grantor (owning an estate of longer duration) grants possession apparently without limitation or condition, but then immediately attaches a condition by which the grantor may retake possession. ("*O* to *A*, but if Britain should cease to be a constitutional monarchy, *O* may retake possession.") The grantor must act to retake possession when the defeasible condition occurs; thus the grantor's retained right to possession sometime in the future is called a ***right of re-entry*** or ***power of termination.***
  - A fee simple subject to an executory limitation results when either of the above defeasible fees is created *but the right to future possession is transferred to a third party.* ("*O* to *A* so long as Britain remains a constitutional monarchy and, if not, to *B.*") The third party's right to future possession is called an ***executory interest.***
- The fee tail is largely extinct; it was designed to endure so long as the first owner has lineal descendants, but whenever the first owner's bloodline should die out the estate should die. The principal modern issue pertinent to fees tail is what happens when somebody attempts to create one.

- Restraints on alienation of freehold estates are much discouraged and often invalidated, because such restraints inhibit freedom and efficient allocation of resources.

I. ORIGINS AND TAXONOMY OF FREEHOLD ESTATES

A. Estates generally: A legitimate possessor of land — ***real property*** — owns an ***estate in land*** rather than the land itself. A ***possessory estate*** is a legal right to occupy the land immediately. By contrast, a ***future interest*** is the right (and sometimes only the possibility) to possess the land at some time in the future. A future interest is a presently existing estate but the estate does not include the right of possession until some future event or events have occurred. Possessory estates are further divided into ***freehold estates*** (essentially various types of what nonlawyers think is ***ownership***) and ***nonfreehold*** or ***leasehold estates*** (possession subordinate to the owner's rights of ownership). At early common law the distinction between freehold and nonfreehold estates was that the freeholder had ***seisin*** and the nonfreeholder had ***possession but not seisin.*** Possessory estates may be of perpetual duration or for some shorter period. The various forms of possessory estates are discussed in this chapter. Our system of estates is derived from the feudal origins of land ownership. While we are long removed from feudal society and, hopefully, your professor is not anxious to test you on your knowledge of feudal law, a brief understanding of the origins will help you make sense of the contemporary concepts.

B. Feudal tenures: When William of Normandy — William the Conqueror — seized the English crown in 1066 he claimed ownership of all the land in England. Then he handed out possession of separate parcels to his henchmen, but with a catch. This possession-with-a-catch was called ***seisin.*** Each possessor was a tenant of the King, and his continued possession (his ***tenure***) depended on his performance of services for the King. The tenant was ***seised of the land,*** which meant he held possession from the King, his lord, and owed ***services to his lord.*** These services could be almost anything from the important (e.g., 50 mounted knights to do combat for the King, 100 bushels of corn each year) to the frivolous (e.g., a sprig of holly at the winter solstice). The first tenant (the one holding directly from the King) was the ***tenant-in-chief.*** The tenant-in-chief could and often did transfer all or a part of his possession rights to some lesser chief, who was known as a ***tenant in demesne*** (pronounced *demean*), and who was obligated to provide services (e.g., 10 knights) to the tenant-in-chief, also known as a ***mesne lord*** (pronounced *mean*), because he was intermediate in the feudal chain of obligation, having a lord above and a tenant below him in the feudal pecking order. This process was called ***subinfeudation*** and it could produce a lengthy chain of possession and obligation. Everyone but the King owed duties to some lord. Everyone in the feudal chain also was owed services by his tenants. Those at the bottom only owed services to their lord. Holders of nonfreehold estates (lessees for a term of years) were not seised and owed no feudal duties to the lord from whom their landlord held. (This was because leaseholders were regarded as a bit low and untrustworthy, not because there was something special about leaseholds). Think of the feudal services as a tax fixed at the time the tenant was ***seised in possession*** and constant thereafter.

1. **Feudal incidents:** As you can imagine, the value of possession rose as population increased but the annual services remained constant. This fact made the imposition of ***feudal incidents*** (essentially death taxes) important, because the lord acquired the tenant's rights (usually possession of the land) — whenever incidents came due. The lord could then either use the

property himself or ***subinfeudate*** — transfer — it anew in exchange for a new package of annual services. The principal incidents were ***escheat, forfeiture,*** and ***wardship and marriage.***

- **Escheat:** If a tenant in possession died without heirs his tenure ended and possession returned to the next lord up the feudal ladder.
- **Forfeiture:** If a tenant in possession committed treason against the King or violated his obligations to the lord from whom he held possession his tenure was forfeited and the next lord up the chain took possession.
- **Wardship and marriage:** If a tenant in possession died leaving an heir who was a minor, the next lord up the chain was entitled to the profits from the land until the heir reached adulthood, and was also entitled to arrange the minor's marriage and receive payment from the family of the minor's prospective spouse for the marriage. (This was before the age of romantic love; marriage was a cold-blooded calculation of financial and social gain.)

2. **Feudal death tax avoidance and statute quia emptores:** To avoid the imposition of incidents, tenants in possession would subinfeudate to their children for nominal services.

   Example: Lord gave possession of Blackacre to Tenant in return for 50 hogs each year. If Tenant dies while his Son is a minor, Lord has possession of Blackacre until Son reaches maturity. But if Tenant had subinfeudated Blackacre to Son for a sprig of mistletoe in midwinter, Lord's incident on Tenant's death would consist of the receipt of a sprig of mistletoe each midwinter.

   Statute Quia Emptores (1290) destroyed this tax avoidance scheme by forbidding any further subinfeudation in fee simple. But the political price for this was recognition of the right of free tenants to transfer, or alienate, their land. A tenant could convey his interest to another in substitution for himself in the feudal chain. This was the beginning of free alienability of land in English law, a critical component of modern property law. Over time, Quia Emptores eliminated most mesne lords, leaving the right of incidents largely held by the King. This fact produced some new tax avoidance devices by lawyers and freeholders of the fifteenth and sixteenth centuries, another statutory response by the King (in 1536), and the development of new estates, all considered when we study future interests in Chapter 3. By then, however, the feudal economy was all but dead and the feudal system of tenure, marked by personal obligations, was essentially replaced by the modern view of ownership — private rights of use, possession, and alienability coupled with mostly financial obligations to the state in the form of taxes.

C. **A taxonomy of freehold estates:** When feudal holdings became alienable by free tenants ("free holders") the modern ***freehold estate*** began to evolve. There are four basic types of freehold estates: the ***fee simple,*** the ***fee tail,*** the ***defeasible fees,*** and the ***life estate.*** Each of these has its variations and all are considered in the rest of this chapter. ***Leaseholds*** — the ***nonfreehold estates*** — are considered in Chapter 5. The principal difference between each freehold estate is the ***duration of the estate.*** Some freehold estates are of finite duration; some may last forever (or at least as long as the legal system that created them). Remember: An estate in land is ***not the same thing as the land itself.*** An estate in land is a legal abstraction — a fictional, imaginary thing that is connected to the land but existing apart from it. An estate in land consists of an important bundle of legal rights and obligations toward others with respect to a particular parcel of Earth. It can move from one person to another, be subdivided in various ways and put back together again, all while the land itself remains unchanged.

II. FEE SIMPLE

A. Introduction: The fee simple is the most common freehold estate. There are two types of fees simple: the ***fee simple absolute*** and the three forms of ***defeasible fees.*** The difference between the two types is that the fee simple absolute can endure forever and the defeasible fees can be terminated upon the happening of some specified future event. The fee simple absolute is considered here. The defeasible fees are discussed in section IV of this chapter.

B. Fee simple absolute: The fee simple absolute is a bit of a misnomer. It is absolute ownership in the sense that its ***duration is perpetual.*** It may last forever (or at least as long as the legal system). It is probably what you thought of as land ownership before you started law school. It is ***not absolute*** in the sense that nobody can restrict the owner's use, possession, or alienability of the estate. The state can and does impose such restrictions for perceived public objectives. The question of when such restrictions amount to a taking of the estate is considered in Chapter 11. People (including professors) often speak of a "fee simple" as a shorthand form of the fee simple absolute. But because there are defeasible forms of fee simple, be precise and speak of a fee simple absolute.

1. Creation of the fee simple absolute.

a. Common law: At common law the fee simple absolute was created by a grant ***"to A and his heirs."*** The words to *A* are ***"words of purchase"*** — words describing the person or persons who are the takers of the fee simple absolute. The words *and his heirs* are ***"words of limitation"*** — words ***limiting the duration of the estate.*** In the early common law, "to A and his heirs" meant that A was granted an estate that was ***capable*** of inheritance and, therefore, of ***potentially infinite duration.*** It did *not* mean that A's heirs (who would not be known because A, being alive, had no heirs) had an interest in the estate.

Example: In Elizabethan England if O grants Blackacre to "A and her heirs" a fee simple absolute in A is created. The heirs apparent of A have no interest. If, instead, O grants Blackacre to "the heirs of A" no fee simple absolute was created in Elizabeth I's era. Because no words of limitation were used in the second grant, the "heirs of A" would acquire a life estate — a freehold estate that ends with the life (or lives) of the heirs of A. Of course, until A dies the "heirs of A" — the takers of the interest created — are unknown. A contingent future interest is created in a set of unknown people — the "heirs of A."

The words of limitation — "and her heirs" — simply meant that because the estate could be inherited the estate could endure forever. The words *to A and his heirs* created a perpetual estate, presently held by A. That is a fee simple absolute. Of course, A will not live forever, but his fee simple absolute can endure forever. During A's life A might convey it to someone else and, if not, after A's death his fee simple absolute will be held by his ***devisees*** under his ***will*** or, in the absence of a will, by his ***heirs.*** Old owners of fees simple absolute wither and die, but their fees simple absolute go on and on. If the grant did not include the words of limitation only a life estate was created, even though the grantor's intentions might be clear.

Example: William Shakespeare, owner of Blackacre-on-Avon in fee simple absolute, conveys Blackacre-on-Avon in 1610 "to A for eternity." A does not have fee simple absolute. A has a life estate. If William Shakespeare wishes to convey his fee simple absolute to A — as his original conveyance plainly suggests — he must convey it "to A and his heirs."

b. Modern view: In every American jurisdiction today it is not necessary to use the magic words of limitation — "and his heirs" — to create fee simple absolute. Either by statutory

change or judicial decision the ***usual rule*** is that a grantor ***conveys his entire estate unless the grant is to the contrary.***

Example: Will Shakespeare, an American contemporary descendant of the bard, owns Blackacre-on-the-Hudson in fee simple absolute. He conveys Blackacre "to A." Fee simple absolute in A is created. Because there is nothing to the contrary in the grant Will is presumed to have conveyed his entire estate in Blackacre — fee simple absolute — to A.

C. Alienability and inheritance of the fee simple absolute: A fee simple absolute is freely alienable, devisable by will, or inheritable in intestacy (the state of dying without a will).

1. **Alienation:** An owner of fee simple absolute can convey the entire fee simple absolute to another person. If O conveys his fee simple absolute to A the fee simple absolute continues without interruption. It just has a new owner. An owner can also split his fee simple absolute into lesser estates, but the sum of the estates will add up to a fee simple absolute.

   Example: Blackacre is owned by O in fee simple absolute. O conveys Blackacre "to A for her life." By this transaction O has split his fee simple absolute into two parts: a ***life estate*** in A and a ***reversion,*** an estate retained by O. The reversion is a ***future interest,*** a presently existing estate that entitles its holder, O, to future possession (when A dies and her life estate expires). The sum of the two parts adds up to fee simple absolute. If O later conveys his reversion to A, the reversion and the life estate will be ***merged*** and their sum is fee simple absolute in A.

2. **Devise:** In England, an estate in land could not be devised (transferred by will) until the Statute of Wills in 1540. Until then, an estate could pass at death only to one's heirs. The difference is that one's heirs are prescribed by law (usually children, then the next closely related persons) and devisees can be anybody the testator specifies in his will. Today, an owner of fee simple absolute can send it under his will to whomever he pleases, or split it up into pieces that when added together equal fee simple absolute.

3. **Inheritance:** Lay persons (and many lawyers) often use the term *inheritance* to describe all testamentary transfers, but the strict meaning of the term is limited to transfers of property owned by a person dying ***without a will.*** This condition, called ***intestacy,*** is dealt with by statutes that specify the ***heirs.*** Strictly speaking, a person dying with a will does ***not have heirs;*** he has ***devisees*** (of his real property) and ***legatees*** (of his personal property). Only a person dying intestate has heirs. At early common law the heirs were the decedent's ***issue,*** and the rule of ***primogeniture*** applied: Estates in land went to the decedent's first born son; daughters inherited only in the absence of sons. The usual statutory scheme today sets aside some portion of the decedent's property for the surviving spouse, and distributes the remainder to the decedent's children. In the absence of a spouse or children, the decedent's parents are heirs. If the decedent leaves no surviving children, spouse, or parents, the heirs are his ***collateral kin*** — brothers, sisters, nieces, nephews, aunts, uncles, and cousins. At some point these people become so remotely related they are not treated as heirs. If an intestate decedent has ***absolutely no heirs*** the decedent's property will ***escheat*** to the state.

III. FEE TAIL

A. Introduction: The fee tail is virtually extinct but its vestigial implications continue to pop up like an unexpected and unwanted guest. Fee tail problems mostly occur, if at all, in connection with the various modern methods of destroying this estate.

B. Origin and operation of the fee tail: Prior to 1285, a conveyance to "A and the heirs of his body" was interpreted by English courts to create a ***fee simple conditional,*** which meant that A, the estate holder, was empowered to convey fee simple absolute if and when he should sire a child. In 1285 Parliament enacted Statute de Donis, which created the ***fee tail,*** the purpose of which was to permit the landed nobility to keep their power over land centralized in their families. Statute de Donis accomplished this by creating an estate, the fee tail, that automatically passed from one generation to the next, expiring only when the lineal bloodline ran out. Upon expiration, the estate reverted to the original grantor and through inheritance or devise (because the grantor would then very likely be an ancient skeleton) to the grantor's presently living remote heirs or devisees. The magic words necessary to create a fee tail were "to A ***and the heirs of his body***" — meaning his lineal descendants.

Example: O conveys Blackacre "to A and the heirs of his body." A has a fee tail in Blackacre. If A conveys Blackacre "to B and his heirs" B does not have a fee simple absolute. Rather, B has possession of Blackacre only until A's death, at which point A1, A's son, gets possession and the fee tail.

Because a fee tail might expire — the lineal bloodline might die out — every fee tail was followed by either a ***reversion*** in the grantor or a ***remainder*** in a third party. These future interests (reversion or remainder) become possessory estates when the lineal bloodline of the fee tail holder runs out.

C. Elimination of the fee tail: In the United States today, the fee tail has been largely abolished by statute. An attempt to create a fee tail will result in one of the following: (1) a fee tail that can be ended by a simple conveyance, (2) a fee simple absolute, (3) a fee simple subject to an executory limitation, (4) a life estate followed by a remainder in the issue of the life tenant, or (5) a fee simple conditional. Each is discussed below.

1. **Fee tail and disentailing conveyance:** Perhaps four states permit creation of the common law fee tail, but all provide that the fee tail is destroyed by a ***disentailing conveyance*** — an ordinary conveyance of fee simple absolute. This is an exception to the usual rule that a grantor cannot convey more than he owns.

   Example: Harold conveys Blackacre to William and the heirs of his body. William has a fee tail. William conveys Blackacre to George and his heirs. George has fee simple absolute. If William wants to keep possession of Blackacre but wishes to own it in fee simple absolute, he must use a ***straw conveyance.*** William would convey Blackacre to his lawyer in fee simple absolute and the lawyer would immediately reconvey it to William, thus giving William both possession of and a fee simple absolute in Blackacre.

2. **Statutory conversion to fee simple absolute:** Many states have, by statute or state constitutional provision, converted the fee tail into a fee simple absolute. Some state statutes declare that an estate that at common law would have been a fee tail is a fee simple. If the creator of the purported fee tail owned fee simple absolute, the grantee would also own fee simple absolute. Other states declare that the fee tail shall not be recognized and that a purported fee tail is a nullity. See, e.g., Texas Const. Art. 1, §26. These states then apply the presumption that a grantor intends to convey the largest estate he owns. Thus, if a grantor owns a fee simple absolute and purports to create a fee tail he conveys fee simple absolute.

   Example: Bill owns Blackacre in fee simple absolute and conveys it to June and the heirs of her body. June has fee simple absolute either because a state statute converts the purported fee

tail to a fee simple absolute or because the purported fee tail is a nullity and the presumption that Bill intended to convey his entire interest will send his fee simple absolute to June.

3. **Statutory conversion to fee simple subject to executory limitation:** Some states provide that an attempt to create a fee tail will create a fee simple in the first taker under the grant, but if the purported fee tail contains a ***remainder*** the purported remainder will be given effect ***if and only if*** the ***first taker dies without surviving issue.*** See, e.g., Cal. Civ. Code §§763-764. This statutory method of eliminating a fee tail creates in the first taker a ***fee simple subject to an executory limitation.*** An executory limitation, or ***executory interest,*** is a future interest in a transferee from the grantor that becomes possessory by either cutting off another transferee's estate or cutting off the grantor's estate at some future time. See Chapter 3.

   Example: Fred, owner of Blackacre in fee simple absolute, conveys Blackacre to "Emma and the heirs of her body, then to Jane and her heirs." At common law Emma would have a fee tail and Jane would have a remainder (which would become possessory when Emma's bloodline expires — indefinite or general failure of issue). But under this statutory scheme Emma receives a fee simple subject to an executory limitation — the executory interest in Jane. If Emma is survived by Caleb, her son, Emma's successors in interest will own Blackacre in fee simple absolute. Jane will get nothing; her executory interest will lapse or expire. If Emma dies without surviving issue — definite failure of issue — Jane's executory interest will become possessory and she will own Blackacre in fee simple absolute. Jane's interest is an executory interest because she is a transferee from Fred and her interest becomes possessory (if at all) by cutting off the fee simple held by Emma. Emma's fee simple doesn't die with her; it either becomes absolute (if she is survived by Caleb) or shifts over to Jane (if Emma dies without surviving issue) and becomes absolute in Jane.

4. **Life estate and remainder in life tenant's issue:** A few states essentially permit a fee tail to persist for one generation, then convert it into a fee simple absolute. They do this by treating the first holder of the purported fee tail as the owner of a life estate, and recognizing a remainder interest in the issue of the life tenant.

   Example: David conveys Blackacre to Alice and the heirs of her body. Alice has a life estate. Her issue owns a remainder in fee simple absolute. But this remainder is contingent upon Alice having issue. If Alice has a child, Mary, upon Alice's death Mary will own Blackacre in fee simple absolute. If Alice dies childless, the contingent remainder in Alice's issue will fail and David's reversion will become possessory. David or his successors will own Blackacre in fee simple absolute. See, e.g, *Morris v. Albright,* 558 S.W.2d 660 (Mo. 1977).

5. **Fee simple conditional created:** Perhaps three states — South Carolina, Iowa, and Tennessee — treat an attempted fee tail as creating a fee simple conditional. These states do not recognize Statute de Donis as part of the common law received from England. The holder of a fee simple conditional has a life estate, but if a child is born to the holder she may convey fee simple absolute.

   Example: Ernie conveys Blackacre to Susanna "and the heirs of her body." Susanna has a fee simple conditional and Ernie retains a reversion. If Susanna never has a child her estate will expire on her death and Ernie's reversion will become possessory, creating a fee simple absolute in Ernie (or his successor to the reversion). But if Susanna gives birth to Bert, Susanna now has the power to convey a fee simple absolute (destroying Ernie's reversion), but she must make the conveyance in order to create the fee simple absolute.

IV. LIFE ESTATES

A. The nature of a life estate: A life estate is, as its name implies, a possessory estate that expires upon the death of a specified person. Usually, the life estate expires upon the death of the life estate holder.

Example: John, owner of Blackacre in fee simple absolute, grants Blackacre "to Bonnie for life." Bonnie has a life estate that expires on her death. John has a reversion, which will become possessory upon Bonnie's death.

A life estate is always followed by some future interest — either a ***reversion*** in the grantor or a ***remainder*** in a third party. A reversion may only be created in a grantor. A remainder may only be created in a transferee.

Example: Liz owns Blackacre in fee simple absolute. She conveys Blackacre "to Guy for life." Liz has retained a reversion. If Liz conveyed Blackacre "to Guy for life, then to John and his heirs," Liz would no longer have any interest in Blackacre. Guy would own a life estate and John would own a remainder.

1. **Life estate *pur autre vie:*** When the duration of a life estate is measured by the life of a person other than the estate holder, it is a ***life estate*** **pur autre vie** — for the life of another.

   Example: Alison, owner of Tribune Lodge in fee simple absolute, conveys it to Gordon for life. If Gordon then conveys his life estate to Eric, Eric will own a life estate ***measured by Gordon's life*** — a life estate **pur autre vie.** Similarly, if Alison had granted Tribune Lodge to Gordon for "the life of Vincent" Gordon would own a life estate *pur autre vie* — lasting as long as Vincent remains alive.

2. **Defeasible life estates:** Life estates may be defeasible, and the same rules apply to defeasible life estates as to defeasible fees. See section V of this chapter.

   Example: Lady Catherine grants Rosings Park "to Rev. Collins for life, so long as he never preaches a sermon." Collins has a determinable life estate and Lady Catherine has both a possibility of reverter (which will become possessory if Collins preaches a sermon) and a reversion (which will become possessory on Collins's death if he refrains from ever preaching a sermon).

   Example: Lady Catherine grants Rosings Park "to Rev. Collins for life, but if he ever preaches a sermon, Lady Catherine retains the right to enter and retake possession." Collins has a life estate subject to condition subsequent and Lady Catherine has both a right of entry and a reversion.

   Example: Mrs. Blackett grants Beckfoot to Nancy for life, but if she ever commits an act of piracy, Beckfoot goes to Peggy. Nancy has a life estate subject to an executory limitation in favor of Peggy.

3. **Life estates in a group or class of people:** A life estate may be created in a group of people. The problem with such class interests is that some of the life tenants will die before others, and there is some uncertainty whether the surviving life tenants take the deceased life tenant's share or whether the remainderman or reversion holder is entitled to possession.

   Example: Suppose Elizabeth Taylor were to convey her royalty interest in the film "National Velvet" to "all of my former husbands for their lives, and then to the ASPCA." Assume there are six former husbands, and Eddie, one of them, dies. Most courts rule that Eddie's life interest is absorbed by the remaining five life tenants, rather than permitting the ASPCA to take Eddie's

interest. The ASPCA's remainder would not become possessory until all of the former husbands are dead. But if the original grant specified the opposite outcome — "to all of my former husbands for their lives, and upon the death of each one, to the ASPCA" — the ASPCA would be entitled to possession of Eddie's share upon Eddie's death.

4. **Ambiguous grants:** A recurring problem is the ambiguous grant. Courts try to follow the ***grantor's intent,*** but that is itself often indeterminate. Other factors are often relied upon to decide whether a life estate or some other interest is created.

★**Example:** Jessie Lide's handwritten will stated: "I wish Evelyn White to have my home to live in and not to be sold." The Tennessee Supreme Court relied on three Tennessee statutes to presume that Jessie meant to give Evelyn fee simple absolute, there being no "clear evidence" to the contrary. One statute stated a common presumption that every grant or devise of real estate shall pass the entire interest of the grantor or testator unless there is clear evidence to the contrary. The second statute stated a presumption that a will conveys the entire interest of the testator in the testator's real property unless there is a contrary intention in the will. The third statute created a presumption against partial intestacy, which is what would happen if Jessie Lide's will was read as creating a life estate in Evelyn White, because Lide did not devise the remainder that would then exist; such remainder would pass to her heirs in intestacy. The court treated the "no sale" restriction as an invalid attempt to restrain alienation of a fee simple absolute rather than clear evidence of a life estate. ***White v. Brown,*** 559 S.W. 2d 938 (Tenn. 1977).

Example: Father devises Hollyhock Farm "to Son, so long as he refrains from imbibing any intoxicating liquors." Courts split on whether this creates a fee simple determinable or a determinable life estate. Most courts hold that a fee simple determinable is created, on the theory that Father intended to pass his entire estate save for the limitation. See, e.g. *Lewis v. Searles,* 452 S.W. 2d 153 (Mo. 1970) (construing a grant "to Hattie so long as she remains single and unmarried" to be fee simple determinable). The theory of a determinable life estate is that, because the condition can only be satisfied or broken during Son's life, Father must have intended to give him only a life estate. The problem with this is that it is equally probable (if not more so) that Father hoped the prospect of a fee simple absolute in Son's heirs, devisees, or assigns would be an incentive to Son to stay sober.

5. **Transferability and valuation:** A life estate is freely alienable during life, but the transferee receives the transferor's life estate. The market value of a life estate is thus a fraction of the value of a fee simple absolute. The fraction is determined by multiplying the life expectancy (in years) of the person whose life measures the duration of the estate by the annual value of possession and discounting the product to reflect the fact that payment must be made now to receive value over time.

Example: If the market value of fee simple absolute in Runymede is $100,000 and the life tenant has a life expectancy of 5 years, the value of the life estate can be computed by determining the annual value of possession (say 5 percent of $100,000, or $5,000) and multiplying that annual value for the remaining expected duration of the life estate ($5,000 × 5 = $25,000). But that product overstates the "present" value of the life estate — its value today — because the receipt of $5,000 every year for the next 5 years is worth less than $25,000 today. If the $25,000 were invested at 6 percent, compounded annually, it would be worth about $32,400 in 5 years. By inverse reckoning, the right to receive $5,000 per year for the next 5 years (the value of the life estate) is about $21,000.

This valuation procedure is also used whenever a life estate and the remainder are sold in a single package — fee simple absolute — and the sale proceeds must be divided between the life tenant and the remainderman.

Example: In the prior Example, if Runymede were sold for $100,000, 21 percent of that sum ($21,000) would go to the life tenant and 89 percent ($89,000) to the remainderman. The percentages would be more or less reversed if the life tenant had a long life expectancy instead of only 5 years.

This is not always as simple as it seems. Sometimes the life tenant (the owner of the life estate) and the remaindermen disagree about life expectancy and the rate of appreciation of the value of the combined fee simple absolute. When this happens it is not easy to reach agreement between life tenant and remaindermen in order to sell a fee simple absolute.

★**Example:** John Weedon devised Oakland Farm to his widow, Anna Plaxico, for life and then to John's grandchildren by a prior marriage. The elderly Anna lived on the farm, which was rising in value because it was in the path of urban development, but earned only about $1,300 annually from farm rents. She wanted to sell the farm and invest the proceeds to increase her income, but the remaindermen were unwilling to do so because they thought that the value of the farm was increasing rapidly and that Anna's life expectancy was shorter than it turned out to be. (She lived for 24 years after the decision in the case.) ***Baker v. Weedon,*** 262 So. 2d. 641 (Miss. 1972). The issue of whether the remaindermen could be forced to join with Anna in selling the farm is discussed in section IV.B.1, below.

B. The modern life estate: The ***equitable*** life estate is a common and important modern estate, but the ***legal*** life estate is uncommon and a bad idea. An equitable life estate is a property interest, owned for life, in the assets of a trust. A legal life estate is an estate for life in the assets themselves.

Example: Arnie devises Deer Park "to my brother Jack, as trustee, to hold for the benefit of my wife, Elka, for life, then to Lucia and Paul, outright and free of trust." Jack, the ***trustee,*** has ***legal title*** to Deer Park in fee simple absolute. Elka, a ***beneficiary,*** has an ***equitable life estate*** and Lucia and Paul, also beneficiaries of the trust, concurrently own a remainder. If Arnie had left Deer Park "to Elka for life, then to Lucia and Paul in fee simple absolute" Elka would have a ***legal life estate*** and Lucia and Paul would own the remainder.

A trustee has fiduciary duties to the equitable owners of the trust but, within the limits of those duties, is free to convey the assets in exchange for other assets in order to benefit the equitable owners.

Example: Refer to the prior Example. If Elka moves from Deer Park to Palm Beach, making Deer Park useless to her, Jack has power to sell Deer Park and add the proceeds of sale to the trust corpus. A purchaser of Deer Park will receive fee simple absolute in Deer Park. By contrast, the owner of a legal life estate can only convey her life estate, which may not be very marketable. A purchaser will likely want fee simple absolute, and that can only be delivered by conveying both the life estate and the remainder (or reversion). If Elka had a legal life estate in Deer Park, she would need the consent of ***every remainderman*** to convey fee simple absolute in Deer Park. Suppose Paul thinks it is a bad idea for his mother, age 80, to move to Palm Beach. His refusal to sell his remainder would effectively frustrate Elka's plan to substitute Palm Beach for Deer Park because nobody would pay very much for Elka's life estate alone, or even for the combination of Elka's life estate and Lucia's remainder.

Much more flexibility is possible with the equitable life estate than the legal life estate.

Example: Arnie could have made Elka both trustee and holder of an equitable life estate. She could then sell Deer Park as trustee (without having to convince her brother-in-law, Jack, to do so) and use the proceeds to purchase Palm Beach.

1. **Judicial responses to inflexibility of the legal life estate:** There are two principal devices courts use (sparingly) to avoid the effects of the legal life estate.

   a. **Construction:** Courts try to implement the grantor's intent, but if a grant is sufficiently ambiguous courts may interpret it to create a more flexible estate, such as fee simple absolute.

   b. **Judicial sale:** Courts sometimes order the sale of the life estate and the remainder and either divide the sale proceeds between the life tenant and the remainderman or order the sale proceeds held in trust with the income payable to the life tenant and the trust corpus preserved for the remainderman. This is rarely done. The life tenant and the remainderman can always agree to sell their interests as a package. If they fail to agree courts are reluctant to impose agreement. Even so, there are two situations where courts might order sale.

      i. **Equitible necessity:** Where it can be proved that ***sale is in the best interests of* all parties** and is the only practical method to effectuate the grantor's intention to provide material comfort for the life tenant and preservation of asset value for the remainderman, a court may invoke its equity powers and order sale of all or part of the property.

      ★**Example:** John Weedon devised Oakland Farm to his wife, Anna, for life, remainder to his grandchildren. Over time, Oakland Farm became valuable for development but produced almost no income to the elderly and impoverished Anna. Anna and the remaindermen could not agree on sale. The Mississippi Supreme Court ruled that sale of *all* of Oakland Farm would not be in the best interest of *all* the parties, but that enough of the property could be sold to provide for Anna's "reasonable needs." But "equity does not warrant . . . sale of all the property since this would unjustly impinge upon the vested rights of the remaindermen" to receive Oakland Farm itself. ***Baker v. Weedon,*** 262 So. 2d 641 (Miss. 1972). Note that this Solomonic judgment required the trial court to engage in the speculative task of determining Anna's "reasonable needs." How much is enough? Everybody has a different answer.

      Courts may also order sale when the remaindermen are incompetent (e.g., minors, insane) but only when sale is in the best interests of the parties.

      ii. **Waste avoidance:** Courts may also order sale when it is necessary to avoid ***waste*** — the deterioration or destruction or the underlying property. Again, the idea is that it is in the iiest interest of all parties to sell the asset before its value is dissipated or destroyed. See, e.g., *Kelly v. Neville,* 136 Miss. 429 (1924).

C. **Waste:** Inherent in a life estate is the idea that the life tenant gets to ***use*** property for life, thus deriving the economic value of possession (e.g., rents, farm income). This use must be consistent with the fact that the property will be handed over to the remainderman on the life tenant's death. ***Waste*** is the term used to describe actions of the life tenant that ***permanently impair*** the property's value or the interest of the future interest holders. Older cases tend to conceptualize waste as derived from the grantor's desire to give the life tenant reasonable use of the land, consistent with its preservation in the same character as when received. Newer cases tend to regard waste as a device to prevent one person from unfairly reaping economic benefits from land possession and

imposing economic losses on another person who shares an interest in the land. Waste may be categorized as follows.

1. **Affirmative waste:** When a life tenant acts affirmatively to damage land permanently the life tenant has voluntarily committed waste. This is sometimes called ***voluntary waste.***

   Example: Erma, life tenant in Woodacre, burns the barn, cuts down all the standing mature timber, and removes a large deposit of gravel from Woodacre. Each of these acts is affirmative waste.

2. **Permissive waste:** When a life tenant fails to act reasonably to protect deterioration of the land, permissive or ***involuntary waste*** has occurred.

   Example: Ivan, life tenant in Homestead, fails to repair a chronic leaking roof and fails to pay the property taxes on Homestead. Each omission is unreasonable and constitutes permissive waste. See, e.g., *Moore v. Phillips,* 6 Kan. App. 2d 94 (1981)(failure to repair); *Hausmann v. Hausmann,* 231 Ill. App. 3d 361 (1992)(failure to pay taxes).

   The question of which omissions are unreasonable is dependent on the particular circumstances. The life tenant must "exercise the ordinary care of a prudent man for the preservation and protection" of the property.

3. **Ameliorative waste:** When the life tenant acts affirmatively to change the principal use of the land, and thereby ***increases the value*** of the land, ***ameliorative waste*** has occurred. Ameliorative waste is actionable, however, only when it is clear that (1) the grantor intended for there to be no change in use, and (2) the property may still reasonably be used in the fashion the grantor intended.

   Example: Adam, owner of Waterside, builds an elaborate complex of tanks, ponds, and buildings comprising a profitable fish farm and hatchery. He devises Waterside "to my son, Abel, for life, then to the University of Eden for use as a fish hatchery and marine biology research facility." Waterside is well-suited to these piscine purposes. Abel replaces the fish farm and hatchery complex with a factory, which doubles the value of Waterside. Abel has committed ameliorative waste. It is actionable by the remainderman, University of Eden, because Adam made it clear that he intended Waterside to be preserved as a fish hatchery and Waterside may still reasonably be used for that purpose.

   If the grantor makes clear that he does not intend for the property to be preserved in its original use, ameliorative waste is not actionable.

   Example: Suppose Adam had devised Waterside "to my son Abel for life, in order to provide Abel with an opportunity to use Waterside to maximize income, and then to my alma mater, University of Eden." Abel's ameliorative waste would not be actionable because it is clear that Abel didn't care about preserving its original character.

   If the grantor intends that the property be preserved in its original character, but it may no longer reasonably be used in that fashion, ameliorative waste is not actionable.

   Example: Otto, founder of a brewery, devises his residence (adjacent to the brewery) to his son, Wilhelm, for life, remainder to his grandchildren. Time passes, and the residence becomes isolated in a sea of industrial facilities. Wilhelm destroys the residence to incorporate the site into the brewery, thereby making the residence site much more valuable. This ameliorative waste is not actionable, because the ***changed conditions*** render continued use as a residence unreasonable. See *Melms v. Pabst Brewing Co.,* 104 Wis. 7 (1899).

V. DEFEASIBLE FEES

A. Introduction: Any estate may be made ***defeasible*** — subject to termination — upon the happening of some future event. This section considers defeasible fees simple, but the principles discussed here may be used in connection with other estates. The distinction between a fee simple *absolute* and a *defeasible* fee simple is that ***no future event can terminate or divest a fee simple* absolute,** while a *defeasible* fee simple is ***subject to termination or divestment upon the occurrence of a future event.*** Of course, the future event may never happen, in which case a defeasible fee endures as long as a fee simple absolute, but all the while the threat of termination hangs, like the sword of Damocles, over the defeasible fee. There are three types of defeasible fees simple: (1) the ***fee simple determinable,*** (2) the ***fee simple subject to condition subsequent,*** and (3) the ***fee simple subject to an executory limitation.*** The fundamental difference between the first two is that the fee simple determinable ***terminates automatically*** upon the occurrence of the future event and the fee simple subject to condition subsequent ***terminates only when proper action is taken to terminate the estate*** following the occurrence of the future event. The fundamental difference between the fee simple subject to an executory limitation and either of the first two types of defeasible fees is that the future interest that cuts short the fee simple subject to an executory limitation is held by a third party (neither the grantor of the interest nor the holder of the fee) while the future interest that cuts short either the fee simple determinable or the fee simple subject to condition subsequent is vested (at least when it is created) in the grantor.

B. Fee simple determinable: A fee simple determinable is created when the grantor intends to grant a fee simple ***only until a specified future event happens*** and uses language in the grant that manifests that intent.

Example: Rick, owner of Blackacre in fee simple absolute, conveys Blackacre to "the Town Library Association for only so long a time as Blackacre is used as a free lending library." Rick has created a fee simple determinable in the Town Library Association. His intent and the words of his grant are clear: Town Library's estate will last only until the moment Blackacre ceases to be used as a free lending library. If the grant had merely said, "to the Town Library Association for the purpose of use as a free lending library" a fee simple determinable *would not* be created. The Town Library Association would have fee simple absolute. Mere expressions of purpose are legally inconsequential surplusage.

Because a fee simple determinable is less than a fee simple absolute, a grantor of a determinable fee (who owned fee simple absolute before the grant) necessarily retained an interest. That retained interest is called a ***possibility of reverter.*** Note: The retained interest is *not* a reversion, and it is *not* a reverter; it is a ***possibility of reverter.***

Example: In the prior Example, Rick would retain a possibility of reverter in Blackacre. Rick did not have to expressly mention its creation because it was created by operation of law — the fact that he conveyed a fee simple determinable, an estate of less duration than his fee absolute, means that he did not convey his entire interest. Once the possessory estate Rick conveyed terminates, the interest Rick retained must become possessory, and that interest will be a fee simple absolute. Put another way, Rick has divided his fee simple absolute into a presently possessory estate (called a fee simple determinable) and a future interest (called a possibility of reverter) and the two pieces added together equal his original fee simple absolute. The arithmetic of estates is simple but inexorable. Of course, in the grant Rick could expressly retain his possibility of reverter, but he does not need to do so in order to create one.

1. **Words evidencing intent to create fee simple determinable:** Some "magic words" still matter when courts decide whether or not a fee simple determinable has been created. Usages like ***so long as, until, during,*** or ***while*** are indicative of a grant for a limited duration, and thus are likely to be construed as creating a fee simple determinable. This conclusion will be bolstered if the grantor also expressly retains a possibility of reverter or uses other words indicating an intention to create an automatic return of possession in fee simple absolute.

   Example: Tom, owner of Blackacre in fee simple absolute, conveys Blackacre "to Swank Yacht Club only for so long as Blackacre is used as the SYC clubhouse and, if not so used, the estate granted hereby shall automatically terminate and all right, title, and interest in Blackacre shall revert to grantor." A grant for a limited duration is clear and the nature of the grant is equally clear even though Tom never described the granted estate as a fee simple determinable or the retained interest as a possibility of reverter. See, e.g., ***Mahrenholz v. County Board of School Trustees,*** 93 Ill. App. 3d 366 (1981).

2. **Transferability:** A fee simple determinable is a freely transferable estate but the nature of the estate stays the same. The transferee takes the estate subject to the limitation that makes it defeasible.

3. **Abolished in some states:** At least two states, California and Kentucky, have abolished the fee simple determinable. An estate that would be a fee simple determinable is, instead, a fee simple subject to condition subsequent.

C. **Fee simple subject to condition subsequent:** A fee simple subject to condition subsequent is created when the words of a grant support the conclusion that the grantor intends to convey a fee simple "absolute," but has attached a string to the grant so that if a specified future event happens (the ***condition subsequent*** to the grant) the grantor may pull the string and get his fee simple absolute back. Conceptually, the grantor has conveyed his fee simple forever, but has added (almost as an afterthought) a condition that will enable him to get it back. By contrast, the theory of the fee simple determinable is that the grantor has conveyed his fee simple only for a limited period. It is somewhat like the difference between a loan of your computer to a friend for a week (analogous to a fee simple determinable) and a gift to your friend of your computer, but if she ever plays computer games on it, you have the right to take it back (analogous to a fee simple subject to condition subsequent).

   Example: Orville, owner of Blackacre in fee simple absolute, conveys Blackacre "to Battered Women's Shelter; provided, however, that if Blackacre should ever be used for any purpose other than sheltering abused women, grantor may enter and retake possession of and title to Blackacre." Orville has indicated an intent to part with his entire estate in Blackacre ("to Battered Women's Shelter"). By itself, that would give BWS fee simple absolute. But Orville added a proviso ("if Blackacre should ever be used . . .") and appended to that proviso a retained power ("grantor may enter and retake possession of and title to Blackacre") that is utterly inconsistent with the preliminary conclusion that Orville conveyed fee simple absolute. Orville has conveyed a fee simple subject to condition subsequent.

   As with the fee simple determinable, because the grantor has parted with less than fee simple absolute the grantor necessarily retains an interest. The interest retained by the grantor when a fee simple subject to condition subsequent is created is called a ***right of entry*** or ***power of termination.*** Unlike the possibility of reverter, which automatically becomes a possessory interest upon occurrence of the future event, a holder of a right of entry (power of termination) must ***actually exercise the power to terminate*** the fee simple subject to condition subsequent in order for that defeasible

fee to come to an end. The holder of a right of entry has the ***option to terminate*** the fee simple subject to condition subsequent.

Example: In the last example, if the Battered Women's Shelter started to use Blackacre as an amusement park instead of a shelter for abused women the condition subsequent would have occurred. But the Shelter's estate in Blackacre would not end ***until and unless*** Orville takes affirmative action to retake possession and thus terminate the Shelter's estate.

1. **Words evidencing intent to create fee simple subject to condition subsequent:** If the words used in the grant indicate an intention to convey the grantor's entire estate coupled with a conditional right to take it back, courts will construe the grant as creating a fee simple subject to condition subsequent. Phrases suggesting this intent include ***provided, however, but if,*** and ***on condition that.*** The key is whether the grant evidences intent to pass title completely, save only for a right to take it back.

2. **Action necessary to assert right of entry:** To exercise a right of entry the holder must take substantial steps to recover possession and title. The right of entry holder need not actually physically enter and retake possession, but must do more than merely proclaim his intention to retake possession. Filing suit to recover possession is surely good enough. A letter demanding possession is debatable; whether it is enough to constitute exercise of the right of entry may depend on other added facts.

   Example: Bruce conveys fee simple in Blackacre to Ian, subject to the condition subsequent that "no hunting shall ever occur on Blackacre." Bruce writes Ian as follows: "I hear you have been shooting deer on Blackacre. If true, this is to let you know I hereby exercise my right of entry." If Bruce does nothing further for 5 years, this is probably not enough to constitute exercise of the right of entry. But if Bruce followed up that letter with an investigation that proved conclusively that Ian had shot 40 deer on Blackacre, turned over these facts to the relevant government authorities, posted signs at the edge of Blackacre stating "No Hunting; signed Bruce, Owner" and retained a lawyer to advise him, his efforts probably amount to exercise of the right of entry.

3. **Transferability:** Like the fee simple determinable, the fee simple subject to condition subsequent is freely transferable during life, inheritable, and may be devised by will. Of course, once the limiting condition has occurred and the right of entry exercised there is no estate left to be transferred.

4. **Preference for fee simple subject to condition subsequent:** It is often difficult to determine which defeasible fee has been created. In ambiguous cases courts prefer to find fee simple subject to condition subsequent. The reason for this preference is that a fee simple determinable produces ***automatic forfeiture*** of title and possession, while the fee simple subject to condition subsequent makes ***forfeiture an option*** of the holder of the right of entry. In general, courts try to avoid forfeiture of title because it is harsh, depriving a fee holder of the considerable reliance interest she has developed by possession of the land.

Example: Simon, owner of fee simple absolute in Blackacre, conveys Blackacre "to Alicia and her heirs so long as Blackacre is left forever wild, but if it is not, then grantor has the right to enter and retake possession and title." This confused grant suggests that the grantor intended to pass title for only a limited time ("so long as") but also indicates reservation of the future interest connected to a condition subsequent ("but if . . . then . . . right to enter and retake possession and

title"). Most courts will resolve this mess in favor of the condition subsequent in order to avoid the harsh consequence of automatic forfeiture of Alicia's estate.

Sometimes courts will rely on extrinsic evidence — evidence wholly apart from the grant itself — to decide which defeasible fee has been created. This usually occurs where the consequences of automatic forfeiture are especially severe.

Example: Larry, who holds fee simple absolute in Blackacre, a large but idle wheat ranch, conveys it "to Lynn so long as within one year from today she places Blackacre into agricultural production and harvests a crop of wheat in an amount of not less than 50 bushels per acre." Lynn invests a very large sum to bring Blackacre back into cultivation (buying machinery, seed, and other tools of the farming trade; hiring people; making contractual commitments) and she is about to harvest her wheat crop 10 months later when a freak hailstorm wipes out the crop. A sympathetic Larry writes Lynn that she has another year to fulfill the terms of the original deed. Larry then dies and his heir, Madeline, sues to eject Lynn, contending that Lynn owned fee simple determinable in Blackacre, that the limitation had occurred and, consequently, title had automatically reverted to Larry and descended to Madeline as Larry's heir. What result?

Although the grant seems clearly to create a fee simple determinable many courts will look to the extrinsic evidence (the freak hailstorm, Larry's extension of time, the substantial expenditures of Lynn) to conclude that Lynn had a fee simple subject to condition subsequent and that Larry, holding a right of entry, could and did waive his right for the extended period. Lynn may well prevail.

D. Some consequences of classification of defeasible fees: Classification of a defeasible estate as a fee simple determinable or as a fee simple subject to condition subsequent can have significant legal consequences. Some of these are introduced here.

1. **Transferability of the interest retained by the grantor:** At early common law, neither a possibility of reverter nor a right of entry could be alienated or devised. They could only be inherited. This was because they were not regarded as estates — a presently existing property right — but something more gossamer — a mere possibility. Today, most states permit a possibility of reverter and a right of entry to be alienated, devised, or inherited. But some states only permit possibilities of reverter to be freely transferable. And other states extinguish possibilities of reverter if the holder attempts to transfer them. See 2A Powell, The Law of Real Property ¶275[2]-275[3] (Rev. ed. 1992).

2. **Accrual of a cause of action for recovery of possession:** Because a possibility of reverter is automatic, once the limitation has occurred the holder of the possibility of reverter has a right to possession. A cause of action accrues at that moment against the person in possession of the property. The possessor, who used to occupy under a fee simple determinable, is now an adverse possessor. If suit is not instituted timely a new title by adverse possession may result.

   Example: Ron holds a possibility of reverter in Blackacre and Caroline holds a fee simple determinable in Blackacre. In 1980 the limitation occurs. Ron does nothing about it until 1991, when he files suit to eject Caroline, who has remained continuously in possession. The state has a 10-year statute of limitations for actions to recover possession of real property. Assuming Caroline can prove the elements of her adverse possession, she now has fee simple absolute in Blackacre, via adverse possession.

   But the cause of action for recovery of possession does not accrue the moment the limitation occurs if the title is fee simple subject to condition subsequent. Because the holder of the right

of entry must take affirmative action to exercise the right of entry, the cause of action accrues when the right of entry is exercised.

Example: Refer to the last example. If Ron held a right of entry and Caroline a fee simple subject to condition subsequent, Ron's cause of action for recovery of possession accrued in 1991, when he first took action to recover Blackacre, thus exercising his right of entry. Ron's suit would be timely and Caroline would likely be ejected.

This stark difference in result has been softened somewhat by various doctrines. Some states apply the equitable doctrine of ***laches*** — undue delay in asserting one's rights — to bar the assertion of stale claims.

Example: Refer to the last example. Even though Ron's cause of action for recovery of possession accrued in 1991 (for purposes of the statute of limitations), a court applying the laches doctrine might well conclude that Ron's delay in exercising his right of entry was undue, producing inequitable consequences to Caroline. The equitable doctrine of laches — not the limitations statute — might bar Ron's recovery of Blackacre.

Some states have statutorily or judicially altered their rules concerning accrual of causes of action to recover possession of real property to remove this anomaly. In such states the cause of action would accrue the moment the limitation occurs, regardless of whether the retained future interest is a possibility of reverter or right of entry.

3. **Effect under the Rule Against Perpetuities:** The Rule Against Perpetuities is a tricky doctrine designed to foster alienability and marketability of property. Under the rule, when uncertainty concerning ownership of a future interest persists too long the future interest will be destroyed. The details are best left for Chapter 3; however, a possibility of reverter and a right of entry are each exempt from the rule. But if the very same interest is created in a third party (not the grantor), and thus called an executory interest, it is subject to the rule and will most likely be invalid. Moreover, the consequences of a destroyed executory interest are quite different, depending on whether the void executory interest was akin to a possibility of reverter or a right of entry. In general, a void executory interest akin to a right of entry will leave the holder of the defeasible fee with fee simple absolute, and a void executory interest akin to a possibility of reverter will leave the holder of the defeasible fee with a fee simple determinable and the original grantor (or his heirs) with a possibility of reverter.

★4. ***Mahrenholz:* an illustration:** Many of the foregoing principles are illustrated by ***Mahrenholz v. County Board of School Trustees,*** 93 Ill. App. 3d 366 (1981). W.E. and Jennie Hutton had conveyed an acre or so of their farm to the school district under an ambiguous grant ("this land to be used for school purpose only; otherwise to revert to Grantors") and the school district built the Hutton School on the land. Later the Huttons conveyed their farm and whatever interest they had in the Hutton School land to the Jacqmains, who then conveyed the same interests to Mahrenholz. Under Illinois law, however, neither a possibility of reverter nor a right of entry may be conveyed during life or pass by will; such interests may only be inherited. Thus, in 1969, when Jennie Hutton, W.E. Hutton's widow, died, her interest in the Hutton School land was inherited by her son Harry Hutton. The school district stopped holding classes in the Hutton School in 1973 but used the building for storage. In 1977 Harry Hutton conveyed to Mahrenholz his interest in the Hutton School land. Mahrenholz then sought to quiet title to the Hutton School land in his name. If the original grant created a fee simple determinable in the school district and a possibility of reverter in the Huttons (which is what the court concluded, based on conflicting Illinois precedent), and if the cessation of classes in the Hutton

School in 1973 terminated the fee simple determinable (an issue the court remanded to the trial court), then Harry owned fee simple absolute in the Hutton School when he conveyed his interest in the Hutton School to Mahrenholz, and Mahrenholz should prevail. This is because a possibility of reverter *automatically becomes possessory* upon breach of the condition. But if the original grant had created a fee simple subject to condition subsequent in the school board and a right of entry in the Huttons, and even if the ending of classes in the Hutton School was a breach of the condition, Harry would only have owned a right of entry in the Hutton School when he conveyed his interest to Mahrenholz (because Harry never took any action to reclaim possession of the Hutton School after breach by the school board) and under Illinois law a right of entry cannot be conveyed, only inherited, so the school board should prevail. ***Mahrenholz*** vividly illustrates the fundamental difference between the fee simple determinable and the fee simple subject to condition subsequent: A fee simple determinable comes to an *automatic* end upon breach of the condition while a fee simple subject to condition subsequent comes to an end *only when the holder of the right of entry asserts his right to recover possession.* Note that the Illinois rule preventing transfer of a possibility of reverter or right of entry by conveyance or will is not commonly followed in America today.

E. Some problems with defeasible fees: Among the issues presented by creation of the defeasible fees and their associated future interests are the following.

1. Invalid restraint on alienation? All defeasible fees restrict the use that may be made of the property. As discussed in section VI, below, restraints on alienation of property are disfavored because they inhibit economic efficiency and productivity; such restraints prevent resources from being reallocated by the market into the hands of a person who values them most highly and who will presumably make productive use of them. When does a use restriction embodied in a defeasible fee become so onerous that it amounts to an invalid restraint on alienation? The general answer is: when the use restriction materially affects marketability adversely.

★**Example:** Toscano gave to the Odd Fellows Lodge a lot adjacent to its existing building. By the deed he restricted its use to the Odd Fellows Lodge only, and stipulated that in the event of a "sale or transfer" of the property or a failure by the Odd Fellows to use the property title would revert to Toscano. In ***Mountain Brow Lodge No. 82, Independent Order of Odd Fellows v. Toscano,*** 257 Cal. App. 2d 22 (1968), a California appellate court voided the no-sale-or-transfer restriction as an invalid restraint on alienation but upheld the use restriction, on the theory that because Toscano meant to convey a determinable fee to the Odd Fellows rather than merely restrict alienability the use restriction was valid. This is mechanical reasoning that fails to get at the real issues. Does the use restriction embodied in a defeasible fee materially inhibit marketability? Would invalidation of such use restrictions, thus converting defeasible fees into fees simple absolute, materially discourage charitable gifts? Do the social and economic benefits of the use restriction embodied in a defeasible fee outweigh the costs imposed by the restriction?

2. Defeasible fee or covenant? A use restriction might be seen as the limitation or condition in a defeasible fee (e.g., "so long as Blackacre is used for residential purposes only") or as a covenant enforceable by a suit seeking either damages for its breach or an injunction preventing violation of the promise. Creation and enforcement of use covenants — generically termed ***servitudes*** — is considered in detail in Chapter 6. Note here that if language is ambiguous a court might interpret a use restriction imposed by a grantor as creating a servitude rather than a defeasible fee. The consequence of the difference is in the remedy for breach of the use restriction. If the restriction is a defeasible fee the remedy is forfeiture — taking title away

from the owner of the defeasible fee and sending it to the owner of the future interest; but if the restriction is a servitude the remedy is either damages or an injunction, not loss of possession and ownership.

Example: Suppose Toscano had conveyed his property "to the Mountain Brow No. 82 Lodge of the Odd Fellows on the stipulation that the property shall always be used for Lodge purposes." This "stipulation" might be read as surplusage, giving the Lodge fee simple absolute, or as covenant — a promise made by Lodge by its acceptance of the deed — which might be enforceable by an injunction or damages, or as creating a defeasible fee. Which interpretation is best depends primarily on which result is most consistent with Toscano's intent and the policies applicable to creation and enforcement of such a use restriction. Don't overlook the varied interpretations that can be given to an ambiguous use restriction.

3. **Valuation of the defeasible fee and the associated future interest:** Placing a separate value on a defeasible fee and its associated future interest is harder than the analogous problem of valuing a life estate separately from its associated remainder. In the case of a life estate the problem is confined by the fact that the estate will expire on someone's death (usually the life tenant) and we can use actuarial techniques to measure that probable life span. The condition that might terminate a defeasible fee is not so limited, and thus the valuation problem becomes vastly more complicated.

   Example: Harry Ink conveyed land to the city of Canton, Ohio so long as it was used for a public park. The State of Ohio took most of the park by eminent domain to construct a highway, and a suit arose between the city of Canton and the Ink family, owners of Harry Ink's possibility of reverter, regarding how the condemnation proceeds should be divided. In *Ink v. City of Canton,* 4 Ohio St. 2d 51 (1965), the Ohio Supreme Court ruled that the Ink family, as owners of the possibility of reverter in the condemned land, should receive that portion of the total proceeds that exceeded the value of the land *as a public park.* There are problems here. (1) How is a park to be valued? There is no exchange value; public parks are not bought and sold as public parks. There is a replacement value, but because land is unique it is difficult to be sure what that value is. (2) Because the city did not voluntarily cease its park use should the value of the possibility of reverter be discounted by the probability that the city would have violated the limitation voluntarily? The Restatement of Property says that unless violation is imminent or probable independent of eminent domain, condemnation proceeds should go entirely to the defeasible fee owner. (3) Because the city's determinable fee was a gift to it, would award of the entire proceeds to the city deter charitable giving and deliver a windfall to the city? The court did not consider whether Harry Ink's original objective — endowing Canton with a public park — might better be served by awarding the entire proceeds to the city, subject to an order to use them to acquire replacement park land and attaching the possibility of reverter to that substituted land. Note that the Restatement view does not apply when the government initiating condemnation is also the owner of the defeasible fee, because to do so would permit the owner of the defeasible fee to create unilaterally a fee simple absolute in itself without compensation. See *City of Palm Springs v. Living Desert Reserve,* 70 Cal. App. 4th 613 (1999).

F. Fee simple subject to executory limitation: A fee simple subject to executory limitation is a fee simple that is ***divested,*** or ***shifted,*** from one transferee to another transferee upon the occurrence of some future event. Both the fee simple determinable and the fee simple subject to condition subsequent involve the creation of a defeasible fee with a future interest retained by the grantor (either a possibility of reverter or right of entry). But the same defeasible fee estates can be created

with the future interests transferred to a third party instead of retained by the grantor. When this happens, a fee simple subject to executory limitation is created. If a grantor uses the words necessary to create a fee simple determinable but, *instead of retaining the possibility of reverter the grantor transfers that interest to a third party,* the interest created in the third party is called an ***executory interest*** and the interest created in the immediate transferee is a ***fee simple subject to executory limitation.*** If a grantor uses the words necessary to create a fee simple subject to condition subsequent but, *instead of retaining the corollary right of entry the grantor transfers that interest to a third party,* the interest created in the third party is called an ***executory interest*** and the interest created in the immediate transferee is a ***fee simple subject to executory limitation.*** Prevailing doctrine says that a fee simple subject to executory limitation is *automatically divested* in favor of the executory interest, no matter whether the divesting condition is phrased in the form of a determinable fee or a fee simple subject to condition subsequent.

Example: Joe, owner of Blackacre in fee simple absolute, conveys Blackacre "to Emily and her heirs for so long as Blackacre is cultivated annually and, if not, to Paula and her heirs." Joe has used words indicating his intent to convey Blackacre for a limited time — "so long as Blackacre is cultivated annually." If the grant had stopped there, Joe would have created a fee simple determinable and retained a possibility of reverter. But the grant sends what would have been Joe's possibility of reverter to Paula. Emily has a fee simple subject to executory limitation and Paula has an executory interest. Similarly, suppose that Phil, who holds fee simple absolute in Whiteacre, conveys it "to Michelle and her heirs; provided that no banana trees shall ever be planted on Whiteacre, and if so, to Bob and his heirs." Without the last clause this would have created fee simple subject to condition subsequent in Michelle and a right of entry retained by Phil, but the added clause turns Michelle's estate into a fee simple subject to executory limitation and creates an executory interest in Bob. In both cases the executory interest automatically becomes possessory if the divesting condition occurs.

Somewhat inexplicably, these differences in the language of the grant have real consequences when the grantor retains the future interest (a possibility of reverter automatically becomes possessory, a right of entry does not), but have no legal consequences when the future interest is created in a third party (all executory interests automatically become possessory upon breach). Perhaps the assumption is that the creator of the interests wants to endow the third party executory interest holder with automatic possession in all circumstances, but what if the creator explicitly says otherwise?

Example: A1 conveys Blackacre to Mary "for residential use only, and if not so used Sigmund shall have the right to retake possession." If A1's intentions are the lodestar of interpretation, shouldn't a court treat Sigmund's executory interest as divesting Mary only when and if Sigmund manifests his intention to do so? The traditional answer is that Sigmund's executory interest automatically becomes possessory. What policy is served by such a rule? Simple administration, perhaps, but surely the policy of honoring a grantor's intentions is poorly served.

VI. RESTRAINTS ON ALIENATION OF FREEHOLD ESTATES

A. **Types of restraints:** Attempts to prevent alienation of a freehold estate are generally void. These restraints are of three types.

1. **Forfeiture:** A forfeiture restraint purports to cause forfeiture of the estate if alienation is attempted, as when Will conveys The Farm "to Margy, but if she should ever attempt to transfer it in any fashion, to the Modern Language Association."

2. **Disabling:** A disabling restraint purports to disable the owner by depriving him of any power to transfer the estate, as when Will conveys The Farm "to Margy, but no further transfer by Margy of any interest in The Farm shall be valid."

3. **Promissory:** A promissory restraint purports to extract a promise from the transferee that she will not alienate the property, as when Will conveys The Farm "to Margy, and Margy promises that she will never transfer any interest in The Farm."

B. Total restraints on a fee interest: No matter what type of restraint is used, a ***total restraint on alienation*** of a fee interest is ***void.*** The reason for this rule is mostly economic efficiency. Restraints on alienation prevent property from moving into the hands of the person who would use it most productively.

C. Partial restraints on a fee interest: Some partial restrictions on alienation of a fee interest are valid, but most are void. The general rule is that a restraint on alienation that is ***for a reasonable purpose*** and ***limited in duration*** is ***valid.***

D. Restraints on life estates: Restraints on alienability of life estates are more readily upheld, but validity depends on the type of restraint and the type of life estate to which it is applied.

1. **Legal life estates:** A life estate is theoretically alienable, but not readily marketable by itself. Thus, the practical effect of a restraint on alienation of a life estate is to prevent gift of the estate or creditor seizure of it. These are considerable impediments to economic efficiency and, in the form of a disabling restraint, operate totally to bar alienability, so courts almost always void disabling restraints on alienation. Forfeiture or promissory restraints pose no less a roadblock to economic efficiency but courts sometimes uphold them on the ground that, unlike the disabling restraint, these restraints can be released.

2. **Equitable life estates:** Disabling restraints on equitable life estates are freely permitted. Such a restraint is called a ***spendthrift trust,*** because it is usually created in a trust designed to provide a spendthrift relative with an income but prevent him from his folly by denying him power to pledge the trust assets as security for a loan or otherwise use it to tempt creditors to extend credit to the spendthrift beneficiary.

   Example: Decedent devises $75,000 in trust and instructs the trustees to pay the income from the fund "to my brother Charles W. Adams during his natural life, . . . free from the interference or control of his creditors, my intention being that the use of said income shall not be anticipated by assignment." This is a valid spendthrift trust. No payments may be made to Charles's creditors to discharge his debts. Of course, once payments are made directly to Charles, creditors may seize the funds disbursed. *Broadway National Bank v. Adams,* 133 Mass. 170 (1882).

   The validity of spendthrift trusts is defended on the ground that the property itself — the trust corpus, legally owned by the trustee — is freely alienable, so the spendthrift trust poses no danger to economic efficiency. Moreover, creditors are not defrauded because they can determine before extending credit whether the borrower's source of wealth is available to repay the debt.

   Objection to spendthrift trusts is mostly moral: "[I]t is not the function of the law to join the futile effort to save the foolish and the vicious from the consequences of their own vice and folly . . . .[S]pendthrift trusts . . . form a privileged class, . . . an aristocracy, though certainly the most contemptible aristocracy with which a country was ever cursed." John Chipman Gray, Restraints on the Alienation of Property 247 (2d ed. 1895).

Exam Tips on FREEHOLD ESTATES

- Freehold estates are elementary building blocks in the property lawyer's conceptual toy chest. These issues are almost always combined with something else, usually future interests, perpetuities, or concurrent ownership, or all three, or any combination.
- The differences between the defeasible estates are mostly a matter of linguistic expression and characterization, but if there is additional evidence that suggests the intention of the grantor to create one or the other type of interest, use that evidence. Grantor's intention should be of paramount concern. Pay attention to the consequences between the two types of defeasible fees.
- Know how these estates are created, and know what to do when you spot a purported fee tail.
- Make sure you understand that the essential difference between these various freehold estates is in their duration. Only the fee simple absolute endures forever. Think of these estates as a series of nesting boxes or eggs — the fee simple absolute is the largest box, encompassing all others. Smaller estates can be carved out of larger estates, and only your imagination (or that of your professor) is the limit.
- Life estates, which are sure to end, pose particular possibilities of conflict between the life tenant and the remainderman. Waste is the doctrine to mediate that conflict. Be alert to issues of waste that can crop up whenever you confront a life estate.

CHAPTER 3

FUTURE INTERESTS

ChapterScope

This chapter examines future interests — the various *presently existing* property interests that consist of a right to *future possession* — and the rules limiting their validity, primarily the rule against perpetuities. Here are the important points in this chapter.

- Future interests are created when an owner of a possessory estate grants a lesser possessory estate to someone, thus necessarily creating a future right to possession when the lesser estate expires.
- Future interests may be created in the grantor, in which case they are either a reversion, a possibility of reverter, or a right of re-entry (also called a power of termination), or in third party transferees, in which case they are called either a remainder or an executory interest.
- Future interests may be vested or contingent. A contingent future interest is a right of possession that depends upon the satisfactory resolution of some uncertainty or uncertainties. A vested future interest is certain to become possessory at some future time. Illogically, some future interests are called vested interests even though there may be an unresolved uncertainty. The principal examples are the possibility of reverter, the right of re-entry, and vested remainders subject to partial or complete divestment.
- Remainders are future interests that become possessory after the natural expiration of the prior possessory estate. Remainders almost always follow a life estate. Remainders are classified as vested or contingent.
  - A contingent remainder is either owned by an unascertainable person ("to the President of the United States in 2016"), or possession is made dependent upon satisfaction of some express condition precedent ("to *A* if *A* shall have become a judge"), or both ("to the President in 2016 if the President is a woman"). The natural expiration of the prior estate is not an express condition precedent.
  - A vested remainder may be *indefeasibly vested,* vested subject to *partial divestment,* or vested subject to *complete divestment.*
    - An indefeasibly vested remainder is certain to become possessory at some point in the future; it may not be destroyed.
    - A vested remainder subject to partial divestment is a remainder held by a known or ascertainable person who has satisfied all conditions precedent to possession, but who is a member of a class of people who own the remainder, not all of whom are known or have yet satisfied the conditions precedent. A grant of a future interest following a life estate "to the children of *A* who reach age 21" creates a vested remainder subject to partial divestment in *A1,* the 22-year-old child of *A.*
    - A vested remainder subject to complete divestment is a remainder held by a known or ascertainable person who has satisfied all conditions precedent to possession, but whose

remainder is subject to being taken away, or divested, if some subsequent event occurs. If *O* conveys Blackacre "to *A* for life, then to *B*, but if *B* should become a lawyer, to *C*," *B* has a vested remainder subject to complete divestment, and *C* has an executory interest.

- Executory interests are future interests created in a transferee that will cut short, or divest, another transferee's possession or vested future interest. All executory interests are contingent.
- The principal modern rule to limit the validity of uncertain future interests is the rule against perpetuities. This rule is designed to destroy future interests that allow uncertainty about ownership to persist too long, because uncertainty of ownership inhibits marketability of property and because there is thought to be a point beyond which the wishes of dead owners of property ought not to govern the present.
- The rule against perpetuities destroys any future interest that cannot be proven will either vest, or fail to vest, no later than 21 years after the end of some relevant life in existence at the moment the future interest becomes effective. It is a rule of law, applies regardless of a grantor's intentions, and considers only possibilities (however outlandish), not probabilities. Unless you can prove that the uncertainty of ownership will be removed, one way or the other, within the rule's period, the future interest is void.
- Modern doctrines reform or temper the rule, but these doctrines are not universally accepted. The principal doctrines are "wait-and-see," by which a court waits to see what actually happens rather than indulging in fanciful possibilities, reform or construction of the instrument creating the future interest to accomplish compliance with the rule, and the Uniform Statutory Rule Against Perpetuities, which waits for 90 years and then reforms future interests still contingent to make them then vest.

I. INTRODUCTION

Future interests are legal interests in property that are ***not possesory*** but which ***are capable of becoming possessory*** at some time in the future. A future interest is a ***presently existing*** property interest but it confers only a ***future right to possession.***

Example: Philip, owner of Drippy Trees in fee simple absolute, conveys Drippy Trees to Ethel for her life, then to Muriel and her heirs. Ethel has a life estate — a presently possessory interest — and Muriel owns a ***remainder*** — a future interest. Muriel's remainder is in existence now but it will not become possessory until the expiration of Ethel's life estate. There are five types of future interests. Three of these — the ***reversion,*** the ***possibility of reverter,*** and the ***right of entry*** (or ***power of termination***) — are the future interests ***retained by the grantor.*** The remaining two — the ***remainder*** and the ***executory interest*** — are future interests ***created in a transferee.*** Remainders are either ***contingent*** or ***vested.*** A contingent interest is subject to one or both of two uncertainties: It is either granted to an ***unknown person*** or there is some ***condition precedent*** to the future right to possession (other than the natural expiration of the preceding possessory estate). Contingent and vested remainders are fully explored in section III.A, below. Executory interests are future interests that ***divest*** (cut off) either (1) *another transferee's possessory or future interest* (a ***shifting executory interest***) or (2) *the grantor's interest at some future time* (a ***springing executory interest***). Executory interests are discussed in section III.B, below.

II. FUTURE INTERESTS RETAINED BY THE GRANTOR

A. Reversion: The reversion is the future interest that is created when the grantor conveys a ***lesser estate*** than that he originally owned. A reversion is freely alienable during life and may be devised or inherited.

Example: Barry, owner of Blackacre in fee simple absolute, conveys Blackacre to Scott for life. Barry has conveyed a life estate, which is less than a fee simple absolute. When Scott dies, the life estate will end and somebody will then be entitled to possession. That "somebody" is the owner of the ***reversion*** which Barry necessarily retained (even without mentioning it in the grant) because he conveyed less than his own estate, fee simple absolute. Barry might still own the reversion when Scott dies, or he might have conveyed it, or it might have passed via Barry's will (if he predeceases Scott), or through intestate succession.

A reversion is created automatically, by operation of law, whenever the grantor conveys less than his entire interest in the property. It need not be expressly retained. A person need not own fee simple absolute to convey a lesser estate and create a reversion. *The conveyance of any estate that is less than the original estate owned by the grantor will create a reversion.*

Example: Barry, owner of Blackacre in fee simple absolute, conveys Blackacre to Scott for life. If Scott leases Blackacre to Elmer for 1 year, Scott retains a reversion in Blackacre which will become possessory upon expiration of the lease (assuming Scott remains alive). If Scott conveys Blackacre to Elmer for Elmer's life, Scott has also retained a reversion. Elmer has a life estate in a life estate *pur autre vie* — measured by Scott's life. If Elmer dies before Scott, his life estate expires and Scott's reversion becomes possessory. If Scott dies before Elmer, Scott's life estate ends and that terminates Elmer's life estate *pur autre vie,* which makes Barry's reversion possessory.

A reversion is ***not necessarily certain*** to become possessory in the future. In the prior example, Scott's reversion would never become possessory if he died before Elmer but would if Elmer died first.

Example: Lewis, owner of Blackacre in fee simple absolute, conveys Blackacre to Mary for life, then to Alice and her heirs if she survives Mary. Lewis has retained a reversion, but it will never become posessory if Alice does, in fact, survive Mary. Alice has a ***contingent remainder:*** A condition precedent to possession is that Alice must survive Mary. If she does, her remainder becomes a possessory estate — fee simple absolute. Lewis's reversion is then destroyed, because Alice at that point would own Lewis's entire original estate in Blackacre. Similarly, if Alice does not survive Mary, her remainder will be destroyed because the contingency never occurred and Lewis's reversion will become possessory.

A reversion is ***not created*** when the grantor conveys to one person part of his estate and simultaneously conveys the rest of his estate to another person.

Example: Jonathan, owner of fee simple absolute in Blackacre, conveys Blackacre to Eleanor for life, then to Roberta and her heirs. Jonathan has ***not*** retained a reversion. Eleanor has a presently possessory life estate (which is, of course, a lesser estate than Jonathan's fee simple absolute) but Roberta has a ***vested remainder in fee simple absolute.*** Roberta is a known person and there is no condition precedent to her taking possession upon the natural expiration of Eleanor's life estate. Roberta's vested remainder is in fee simple absolute because the grant makes clear that it is to "Roberta and her heirs." Jonathan has conveyed his entire interest in Blackacre — part of it in the form of a presently possessory estate and the rest of it in the form of a future interest.

Note that a person has ***not conveyed their entire interest*** when they convey a lesser present possessory estate followed by a ***contingent remainder*** in fee simple absolute.

Example: Suppose Jonathan, in the last example, had conveyed Blackacre to Eleanor for life, then to Roberta and her heirs if she should survive Eleanor. Now Roberta has a ***contingent remainder in fee simple absolute.*** While Roberta is a known person, we do not know whether the express condition precedent to her possession — survival of Eleanor — will or will not occur. Jonathan has retained a reversion.

1. **Reversions are always vested:** Even though not all reversions will certainly become possessory all reversions are ***vested interests.*** Normally, for a future interest to be a vested interest it must be created in a known person and must not be subject to a condition precedent. Reversions are vested because they are created in the person who owned the entire estate at the moment of creation; because the grantor has not parted with all that he owned his retained interest is regarded as vested, even though his future right to possession is uncertain. This is important because, being vested at creation, it is *not subject to destruction by the Rule Against Perpetuities.*

2. **Distinguished from remainder, possibility of reverter, and power of termination:** A remainder looks very much like a reversion but is created in a ***transferee,*** not retained by the grantor. A possibility of reverter is retained by the grantor, but is the future interest created when the grantor conveys a ***determinable*** version of the ***same estate he owns.*** A power of termination (or right of re-entry) is also retained by the grantor, but is the future interest created when the grantor conveys his estate subject to a condition subsequent.

B. Possibility of reverter: A possibility of reverter is created whenever the grantor conveys the same ***quantity*** of estate that he originally had, but conveys it with a ***determinable limitation*** attached and retains the right to future possession if and when the determinable limitation occurs. That future interest in the grantor is a possibility of reverter.

Example: Bill conveys Blackacre to Pete so long as it is used as a warehouse. Pete has fee simple determinable. Bill has retained a possibility of reverter.

Though the possibility of reverter is usually created when the grantor conveys fee simple determinable it can be created by the conveyance of any determinable estate.

Example: Orca, owner of a life estate in Blackacre, conveys Blackacre to Sal so long as Blackacre is devoted to agricultural use. Orca has conveyed her life estate to Sal — an estate of the same quantity she originally had — but with an attached determinable limitation. If during Orca's life Sal uses Blackacre for any purpose other than agricultural, Orca's possibility of reverter will become immediately possessory. If Sal farms Blackacre until Orca's death, Orca's life estate will come to its natural end and the holder of the reversion or remainder (whichever was created simultaneously with Orca's life estate) will be entitled to possession. In that event Orca's possibility of reverter will expire with her life estate.

Another way to remember this is to link together the possibility of reverter and determinable estates. Whenever a determinable estate is created the grantor retains a possibility of reverter, ***unless the grantor simultaneously creates in a third party what would be a possibility of reverter if retained by the grantor.***

Example: April, owner of Fleur-de-Lis in fee simple absolute, conveys Fleur-de-Lis to May so long as Fleur-de-Lis is used solely as a single-family residence and, if not, to June and her heirs.

April has conveyed fee simple determinable to May and has created in June a future interest that would be a possibility of reverter if April had retained it. But because it is created in a transferee — June — it is an ***executory interest.*** Put another way, a possibility of reverter can ***never be created in a grantee.***

1. **Transferability:** Common law did not permit transfer of a possibility of reverter inter vivos or by will, but only by inheritance. Today, most states permit a possibility of reverter to be alienated inter vivos, devised, or inherited.

2. **Termination:** Both the possibility of reverter and the right of entry (see section II.C, below) can endure forever, because (1) the triggering limitation may never occur, and (2) both future interests are vested at creation and so are immune from destruction under the Rule Against Perpetuities. Some jurisdictions have enacted statutes that terminate the possibility of reverter and right of entry after some fixed period, typically 30 years. Other statutes provide for termination after 30 years unless the interest is re-recorded within that period (thus evidencing a fresh desire to maintain the limitation). See, e.g., Cal. Civ. Code §885.010 et seq. This type of statute permits a possibility of reverter to remain in existence in perpetuity, so long as it is re-recorded every 30 years. A third approach is Britain's, which has made these interests subject to destruction under the Rule Against Perpetuities.

3. **Statutory abolition:** In those few states that have abolished determinable estates by statute the possibility of reverter, its corollary future interest, has also been abolished.

C. **Power of termination or right of entry:** A power of termination (or right of entry) is created whenever the grantor retains the power to cut short the conveyed estate before its natural termination.

Example: Hilda conveys Driftwood Farm "to Olga and her heirs, but if Driftwood Farm should cease to be used for pasturing horses, Hilda may terminate the conveyed estate and retake possession." Olga has a fee simple subject to condition subsequent and Hilda has retained a power of termination (right of entry).

Like the possibility of reverter, a power of termination may only be created in the grantor. The analogous interest created in a grantee is an executory interest.

Example: Hilda conveys Driftwood Farm "to Olga and her heirs, but if Driftwood Farm should cease to be used for pasturing horses, to Gertrude and her heirs, who may terminate the conveyed estate and retake possession." Olga has a fee simple subject to an executory limitation, Gertrude has an executory interest, and Hilda has retained nothing.

1. **Transferability:** Like the possibility of reverter, at common law a power of termination (right of entry) was neither alienable inter vivos nor devisable by will. It could only be inherited. Jurisdictions today split over whether to follow the common law rule or to permit free alienability. A very few jurisdictions hold that the mere ***attempt*** to alienate a power of termination destroys it, freeing the possessory estate of the condition subsequent.

2. **Termination:** This issue is discussed in section II.B.2, above.

3. **Effect of abolition of determinable estates:** In those few jurisdictions that have abolished determinable estates (and, thus, the corresponding future interest — a possibility of reverter), what would have been a possibility of reverter is converted by operation of law into a power of termination.

III. FUTURE INTERESTS CREATED IN GRANTEES

A. Remainders:

1. **Definition:** A remainder is a future interest created in a ***grantee*** that ***will become possessory (if it ever becomes possessory)*** upon the ***natural expiration of the preceding possessory estate.*** The parenthetical clause is in the prior sentence because some remainders are ***certain to become possessory*** and others have ***only the possibility of becoming possessory.*** But all remainders ***never divest*** another estate. The ***only*** way a remainder becomes possessory is the natural expiration of the the prior estate.

   Example: Olga conveys Blackacre to Nicholas for life, then to Alexandra and her heirs. Alexandra has a remainder. It is certain to become possessory upon Nicholas's death, which is the ***natural expiration*** of Nicholas's life estate.

   Example: Olga conveys Blackacre to Nicholas for life, then to Alexandra and her heirs if Alexandra survives Nicholas. Alexandra has a remainder. It is not certain of becoming possessory (Alexandra must outlive Nicholas) but it is capable of becoming possessory and the only way it can become possessory is to succeed the natural expiration of Nicholas's life estate.

   Example: Olga conveys Blackacre to Nicholas for life, but if Alexandra should win the Nobel Prize for Literature, to Alexandra and her heirs. Alexandra does ***not*** have a remainder. Her future interest will become possessory, if at all, by ***divesting*** Nicholas of his life estate, or Olga of her fee simple (if Alexandra wins a Nobel Prize after Nicholas's death, because then Olga's reversion would become possessory). Alexandra has an ***executory interest.***

2. **Nature of the estate held in remainder:** The term *remainder* simply identifies the type of ***future interest*** it is. A remainder is a future interest in some estate — fee simple, fee tail, life estate, or a term of years. It can be any estate. Be precise and identify both the future interest and the possessory estate.

   Example: Heinrich conveys Blackacre to Dieter for life, then to Erwin for 5 years, then to Helmut for life, then to Wilhelm and the heirs of his body, then to Olga and her heirs. Erwin has a remainder for a term of years. Helmut has a remainder for life. Wilhelm has a remainder in fee tail (if fee tail is permitted). Olga has a remainder in fee simple absolute.

3. **Classification of remainders:** Remainders are classified as ***vested*** or ***contingent.*** The purpose of distinguishing between the two is to identify those remainders that are of uncertain ownership or ultimate possession. Persistent uncertainties of these sorts make property difficult or impossible to alienate. Common law devised a number of "marketability rules" designed to destroy contingent remainders (and other contingent future interests) if the contingency persists for too long. See section V, below.

   a. **Classification method:** To classify future interests, you must classify each interest created by a grant ***in the order of creation.*** Examine the first interest created. Is it presently possessory or a future interest? If it is a future interest, what kind is it? If it is a remainder, is the interest created in a known person? If so, is ultimate possession subject to any condition precedent? If not, you have a vested remainder. Do this again for each subsequent interest in the grant.

      Example: Roger conveys Holly Farm to Susan for life, then to Dorothea and her heirs if she has published a novel, but if not, to Nancy's then-living children and their heirs. The first

interest created is a presently possessory life estate, held by Susan. The next interest, Dorothea's, is a future interest. It is a future interest because it is not now possessory. It is a remainder because it will become possessory, if at all, upon the natural expiration of Susan's life estate. It is a contingent remainder because, although Dorothea is a known person, there is no certainty that Dorothea will have satisified the condition precedent to possession — publication of a novel. Dorothea has a contingent remainder in fee simple absolute. The last interest, in Nancy's then-living children, is also a remainder because it will become possessory, if at all, upon the natural expiration of Susan's life estate. It is a contingent remainder for two reasons: (1) the class of grantees — Nancy's then-living children — is unknown and cannot possibly be known until Susan's death, and (2) there is a condition precedent to possession — that Nancy's children survive Susan. Nancy's then-living children have a contingent remainder in fee simple absolute. Roger has retained a reversion.

b. Vested remainders: A remainder is vested if it is created in a known person and possession is not subject to any condition subsequent. As a result, a vested remainder ***must necessarily become possessory*** whenever the prior possessory estate expires.

Example: Oscar conveys Arrowsmith to Margot for life, then to Connie and her heirs. Connie's remainder is vested because she is a known person and there is no condition precedent to her possession. Whenever Margot dies, Connie (or her legal successor) is ready to take possession of Arrowsmith.

The natural expiration of the preceding estate is ***not*** a condition precedent.

Example: In the prior example, Connie will not receive possession of Arrowsmith until Margot dies, but Margot's death is not a condition precedent to possession because her death simply marks the natural expiration of her life estate. By contrast, if Oscar had conveyed Arrowsmith "to Margot for life, then to Connie and her heirs if Connie survives Margot," there would be a condition precedent to Connie's possession — surviving Margot. Connie would hold a contingent remainder. These look like the same thing but they are not: In the first example, if Connie dies before Margot, Connie's vested remainder passes to her assignee, devisee, or heir (call him Hector); but in the second example if Connie dies before Margot, Connie's contingent remainder is destroyed and Hector receives nothing. Because Connie's death means that she can never satisfy the condition precedent, her contingent remainder dies with her. It has ***lapsed.*** Vested remainders are not uniform. There are three types of vested remainders: ***indefeasibly vested remainders, vested remainders subject to complete divestment,*** and ***vested remainders subject to open (or partial divestment).***

i. Indefeasibly vested remainders: An indefeasibly vested remainder is ***certain to*** **become *and* remain *possessory.*** Nothing will prevent possession from happening eventually, and once possession occurs, it will last forever.

Example: Dahlia conveys Laurel Hill to Pietro for life, then to Arturo and his heirs. Arturo has an indefeasibly vested remainder in fee simple absolute. Arturo (or his legal successor) is certain to obtain possession following expiration of Pietro's life estate and once he has possession Arturo cannot be divested of his possession (except, of course, by operation of law, as by eminent domain). He has a fee simple absolute.

Despite the "certain to become and remain possessory" rule, an indefeasibly vested remainder is subject to the qualification that any estate can expire naturally, and that expiration might occur while the interest is still in its future interest form. In such cases

the indefeasibly vested remainder is not divested; it has simply expired in accordance with its natural or inherent limits.

Example: Bridget conveys Falcon Perch to Sam for life, then to Miles for life, then to Joel and his heirs. Miles has an indefeasibly vested remainder in a life estate, but if Miles should die before Sam his life estate will terminate naturally, even though he never enjoyed possession. Miles's interest is not divested by Joel, it simply came to its natural end and Joel, owner of an indefeasibly vested remainder in fee simple absolute, will take possession upon Sam's death. An analogy may help. A caterpillar is genetically certain to become a butterfly, but if it dies while still a caterpillar its genetic nature is unaltered; it simply came to an untimely end before it could ever take wing.

ii. **Vested remainders subject to complete divestment:** A vested remainder subject to complete divestment is a remainder created in a known person and not subject to any condition precedent, but which is ***subject to a condition*** **subsequent** that, if it occurs, will ***completely divest*** the remainderman of his interest.

Example: Keith conveys Blackacre to Edgar for life, then to Eve and her heirs, but if Adam should ever return from Vietnam, to Adam and his heirs. Eve has a vested remainder subject to complete divestment. Adam has an executory interest. Eve is a known person and there is no condition ***precedent*** to her possession. If Edgar dies today Eve will be entitled to possession. But both Eve's remainder and her possession, should it occur, may be taken away from her if Adam ever returns from Vietnam. Note that if Edgar dies before Adam returns from Vietnam Eve will possess a fee simple subject to an executory limitation. Adam's executory interest will continue until his death. If Adam never returns from Vietnam his executory interest will lapse at his death. Note that, as drafted, Edgar's life estate is also subject to an executory limitation in favor of Adam. If Keith wishes to convey to Edgar a life estate not subject to executory limitation he must make that intent clear in the grant.

Vested remainders subject to complete divestment are still ***vested*** and they may be transferred inter vivos, devised, or inherited. Note, however, that a vested remainder subject to complete divestment can be created in such a way that it cannot be passed on at death.

Example: Frieda conveys Round Top to Dan for life, then to James and his heirs, but if James does not survive Dan, to Robert and his heirs. James's vested remainder is subject to complete divestment by Robert's executory interest. Because the divesting conditon subsequent is James's failure to survive Dan, James could never pass his remainder at his death. If James dies before Dan his vested remainder is divested in favor of Robert. If Dan dies before James, James acquires possession and the divesting condition subsequent can never occur. In that event, James will pass his fee simple absolute at death, not a remainder.

iii. **Vested remainders subject to open or partial divestment:** A vested remainder subject to open (or partial divestment) is a remainder created in a ***class*** (or group) of grantees, at least one of whom is presently existing and entitled to possession as soon as the preceding estate expires, but which is capable of expansion to include as yet unknown people. It is called "subject to open" because the class is left open for the entry of new members.

Example: Robin devises Orange Hall "to my husband, Harold, for life, then to such of my children who have graduated from law school." Robin has created a remainder in a class — her children who have graduated from law school. If, at the moment of creation, Robin has three children — Tom, Dick, and Harry — but none have graduated from law school the remainder is contingent. At the moment that Tom graduates from law school Tom will acquire a vested remainder, but it is subject to open (or partial divestment) because it is possible that Dick or Harry, or both, will graduate from law school. If Dick does graduate from law school Tom's vested remainder will be partially divested in favor of Dick. Tom and Dick must share possession of Orange Hall. If Harry also graduates from law school, the remainder held by Tom and Dick is further diluted. But then the remainder shared by Tom, Dick, and Harry is indefeasibly vested because Robin is dead and can have no more children, and all of her children have satisfied the condition precedent. The class is closed at that moment. Note that the classification of the future interest created by Robin will change as future events dictate. Future interests are dynamic, not static.

Remember: Vested remainders subject to open are ***vested.*** Even though they are subject to dilution, the interest will survive its holder.

Example: In the prior example, if Tom had graduated from law school, thus acquiring a vested remainder subject to open, and then died from the stress, his vested remainder would pass under his will or by intestate succession.

A vested remainder can be subject to ***both*** **partial** ***and*** **complete** ***divestment.***

Example: Peter devises Blackacre "to William for life, then to Catherine's children and their heirs, but if Ivan returns from Turkey, to Ivan and his heirs." At Peter's death Catherine is living and has two children, Anna and Russell. The class of Catherine's children has a vested remainder subject to partial and complete divestment. Catherine may have another child and, if so, that child would enter the class, partially divesting Anna and Russell. Ivan, holder of an executory interest, may return from Turkey at any time, thus completely divesting Anna, Russell, and any new members of the class of Catherine's children.

iv. **Class gifts:** Whenever a grant creates an interest in a group of people, it is a ***class gift.*** The group can be any ascertainable body of people, but is most often a family group; e.g., "to my children," or "to my surviving nieces and nephews," or "to my grandchildren who have reached age 21." A class is ***open*** if it is possible for new people to enter it, and is closed if new entrants are ***not possible.***

v. **Class-closing rules:** A class closes when either of two events occurs: (1) it is ***no longer physiologically possible to have new entrants,*** or (2) if the ***"rule of convenience"*** applies. The rule of convenience is an interpretive rule, not a rule of law, and states in essence that a class closes if ***any member of the class is entitled to*** **immediate possession** and that result is consistent with the intent of the grantor making the class gift.

Example — Physiologically closed: Arthur devises Hilltop "to Maggie for life, then to my children and their heirs." Arthur is survived by two children, Mordred and Cedric. Arthur has created an indefeasibly vested remainder in the class of his children. It is indefeasibly vested because the class of Arthur's children is physiologically closed — Arthur is dead and can have no more children. Mordred and Cedric compose the entire class; nobody else can enter.

Example — Rule of convenience: George devises Blackacre "to my wife, Liz, for life, then immediately to my grandchildren and their heirs." George is survived by Liz and one child, Betty. Betty has two children, Charles and Diana. Charles and Diana, George's grandchildren, hold a vested remainder subject to open. When Liz dies they will be entitled to immediate possession. The rule of convenience probably applies because the term *immediately* in the grant appears to suggest George's intent that the class of his grandchildren be determined as soon as Liz dies, and under the rule of convenience the class of George's grandchidren closes at that moment. If Betty later gives birth to Anne, this third grandchild of George's is born too late to share in the class gift.

Caveat: Medical technology now permits posthumous conception of children, and courts have yet to resolve definitively whether the possibility of such children causes a class of children to remain open after its ordinary physiological closure. Cf. *Woodward v. Commissioner of Social Security,* 435 Mass. 536 (2002), in which the Massachusetts S.J.C. ruled that twins posthumously conceived and born 2 years after their father's death were his intestate successors if (1) he was genetically related to them and (2) he had affirmatively consented during life to posthumous conception and support of the children. The court noted that the state's interest in orderly administration of estates might permit it to impose a limitations period. See also Cal. Probate Code §6453(b)(3), which provides that paternity may be established by clear and convincing evidence where it was impossible during life for a father to acknowledge paternity.

c. **Contingent remainders:** A contingent remainder is a remainder created in an ***unknown person*** or that has a ***condition precedent*** to ultimate possession.

Example — Unknown persons: Martha conveys Blackacre to Kevin for life, then to Ellen's children. Ellen is 12 years old and has no children. Ellen's nonexistent children have a contingent remainder. Martha has retained a reversion.

Example — Unknown persons: Martha conveys Blackacre to Kevin for life, then to Kevin's heirs. Kevin's heirs are not known until Kevin dies, so the class of Kevin's heirs has a contingent remainder. Recall that the term "heirs" refers to those people who inherit by intestate succession. Again, Martha has retained a reversion.

Example — Condition precedent: Martha conveys Blackacre to Kevin for life, then to Ellen if she graduates from Princeton. Ellen is 12 years old and in the sixth grade. Ellen has a contingent remainder; she must graduate from Princeton in order to be entitled to possession. Martha has retained a reversion.

Contingent remainders have no certainty of becoming possessory, but that is also true of vested remainders subject to complete divestment. Don't make the error of thinking that certainty of ultimate possession is the dividing line between vested and contingent remainders. Note also that a contingent remainder in fee simple will ***always*** leave a reversion in the grantor.

i. **Conditions *precedent:*** A condition precedent must be expressed in the grant. Neither the natural expiration of the prior estate nor precatory language in the grant constitutes a condition precedent.

Example — Condition precedent: Harry conveys Elderfield to Annie for life, then to Eileen if she graduates from Harvard. The condition of graduation from Harvard is expressed in the grant and is a condition precedent to Eileen's possession.

Example — Condition precedent: Jose conveys Soledad to Rose for life, then to William if he survives Rose. The condition of survival is expressed in the grant as a condition precedent to William's possession.

Example — Not a condition precedent: Jose conveys Soledad to Rose for life, then to William. William (or his legal successor) has no right to possession until the natural expiration of Rose's life estate, but that is inherent in the estates conveyed by Jose. William has a vested remainder.

Example — Not a condition precedent: Jose conveys Soledad to Rose for life, and in the event of Rose's death, to William. Though couched as a condition, the language "and in the event of Rose's death" is wholly precatory. It adds nothing; it merely describes the natural expiration of Rose's life estate.

ii. **Recognizing the difference between a condition *precedent* and a condition *subsequent:*** The difference between a vested remainder subject to complete divestment upon the occurrence of some condition subsequent and a contingent remainder subject to a condition precedent can be very subtle. You must pay careful attention to the language of the grant. If the condition is made an integral part of the grant in remainder, it is a contingent remainder. But if the grant uses words to create a vested interest, and then proceeds to add a divesting condition, it is a vested remainder subject to partial or complete divestment.

Example — Vested remainder: Phil conveys Seabreeze to Jane for life, then to Emily, but if Emily ever goes to Canada, to Evan. Emily has a vested remainder subject to complete divestment upon the occurrence of the condition subsequent — Emily going to Canada. Evan has an executory interest. Because Phil has created a vested remainder in fee simple, he has not retained a reversion.

Example — Alternative contingent remainders: Phil conveys Seabreeze to Jane for life, then to Emily if she has never gone to Canada, but if she has ever gone to Canada, to Evan. Now Emily has a contingent remainder because the condition — never going to Canada — is expressed as an integral part of the grant in remainder to her. Evan also has a contingent remainder because the same condition is repeated as an integral part of the grant to Evan. These are ***alternative contingent remainders.*** Because contingent remainders are created, Phil has retained a reversion. Phil's reversion will only become possessory in the unlikely event that Jane's life estate will terminate prior to her death, perhaps by forfeiture for drug dealing or disclaimer of the life estate. Phil's intentions are identical in both examples, but quite different consequences flow from the choice of language.

In cases of hopeless ambiguity the law prefers a vested remainder to a contingent remainder.

iii. **Alienability:** With a few exceptions, common law did not permit alienability of contingent interests, but today nearly every jurisdiction permits alienability of contingent interests. Of course, if the contingency is survival, the interest cannot pass by will or intestate succession, and if the contingency results from the fact that the holder is unknown (perhaps not born) there is no owner to convey it, so as a practical matter it is not alienable.

B. **Executory interests:** Executory interests are future interests in a grantee that divest either (1) another grantee's possessory or future interest (a ***shifting executory interest***) or (2) the grantor's interest at some future time (a ***springing executory interest***).

1. **A note on history:** Executory interests resulted from Henry VIII's desire to eliminate the ***use,*** an early form of the trust, in order to stop death tax avoidance by means of the use. In order to provide the economic benefits of land to another, a feudal grantor might enfeoff (convey possession of a freehold estate) to another person, to hold "for the use and benefit" of a third party. The law courts did not recognize the use, but the equity courts (with power only to act upon a person) would command the feofee to use to administer the land in accordance with the instructions in the use.

Example: John, a sea captain, enfeoffs Blackacre to his brother, Robert, for the use and benefit of John's wife, Elizabeth, and her children. The chancellor in equity would force Robert, on pain of imprisonment, to administer Blackacre for the benefit of Elizabeth and her children. The use provided a number of advantages in Tudor England.

Example: Common law required conveyances of realty to occur by ***livery of seisin,*** a formality in which the seller physically handed the buyer a clod of earth or a twig from the property, while both were on the property. No doubt this was annoying and often inconvenient, so lawyers began to convey property by ***deed,*** in which the buyer would pay valuable consideration for the property. The law courts refused to recognize a deed because there had been no transfer of seisin, but the chancellor in equity would order the seller to hold seisin for the use of the buyer. Equitable title was every bit as good as legal title.

Lawyers and landowners quickly recognized other advantages of flexibility provided by the use. Common law forbade the creation of interests springing out of the grantor at some future time, because the ritual of livery of seisin could not be performed in advance. For equally rigid reasons the common law also forbade creation of interests shifting ownership of freehold estates from one grantee to another. Each of these arrangements could be accomplished through the use.

Example — Springing use: In Tudor England Basil wishes to marry his daughter Sybil to Norbert, which is satisfactory to Norbert so long as Basil supplies Blackacre as her dowry. Norbert is unwilling to wed Sybil, however, unless he can have iron-clad assurance that the dowry will exist and Basil is unwilling to endow Sybil with Blackacre unless he is certain that Norbert will go through with the marriage. (Poor Sybil is not consulted and romantic love forms no part of these arrangements between these deeply skeptical men.) To solve the problem Basil conveys Blackacre "to Orlando for the use of Basil, and upon the marriage of Norbert and my daughter Sybil, for the use of Sybil." This enabled Basil to provide a dowry to Sybil, but only upon her marriage, and simultaneously to satisfy Norbert's family that the dowry would really be there when the marriage vows were pledged.

Example — Shifting use: Basil conveys Oak Park "to Orlando for the use of my son, John, but if my son Roger, who went off with John Cabot, should ever return from the Western Ocean, for the use of Roger." This enabled Basil to provide for the contingency of Roger's return while still providing for his other son.

Perhaps the most exciting advantage of the use to wealthy landowners was that it afforded a method to avoid the feudal incidents, or death taxes. Recall that these death taxes fell due whenever a freeholder died and seisin descended to his heirs. The use enabled seisin to stay frozen in the hands of the trustee (the feoffee to use) forever, thus avoiding death taxes.

Example: Basil conveys Blackacre to Alvin, Bertrand, Charles, and David, jointly, to hold for the use of Basil's first son, then to the first son's first son, then to the first son's first son's first son, then . . . and so forth. Seisin stays in the hands of the four feoffees, so no death taxes ever

become due. If Alvin and Bertrand die, it would be prudent for Charles and David to convey, jointly, to themselves and some younger persons, say Edward and Frank, to keep seisin frozen in the trustees. This process could go on forever, subject to the limits imposed by the Rule against Perpetuities.

a. **The statute of uses:** The corpulent, self-indulgent, and profligate Henry VIII resolved to end this tax avoidance, and did so by forcing the ***Statute of Uses*** (1535, effective 1536) upon an unwilling Parliament. The Statute of Uses simply converted the beneficial interests in uses to legal interests. Because the Statute of Uses "executed" the use, the term *executory interest* eventually was bestowed on those future interests that would have been beneficial interests in a springing use or a shifting use prior to its adoption.

Example: After 1536, Sybil, in the earlier example of a springing use, would have a legal interest in Blackacre — an executory interest before her marriage to Norbert and a fee simple absolute afterward.

Example: After 1536, Roger, in the earlier example of a shifting use, would have a legal interest in Oak Park — an executory interest before his return from the Western Ocean, and a fee simple absolute afterward.

For a time after enactment of the Statute of Uses it was necessary to "raise a use" in order for the Statute to execute it into a legal interest. This is no longer necessary; any deed or will can create an executory interest.

i. **How the trust survived the Statute of Uses:** The Statute of Uses was held by the courts not to apply to so-called active trusts, where the trustee was charged with a duty to manage the property for the beneficiary rather than merely protecting it and conveying it whenever the beneficiary directed. Also, the courts held that a "use-on-a-use" was not affected by the Statute. Thus, after 1536, a conveyance "to *X* for the use of *A* for the use of *B*" resulted in the creation of a legal estate in *A* (because the first use was executed by the Statute of Uses) for the benefit of *B*. Finally, the Statute of Uses did not apply to personal property, so conveyances of money or securities in trust could continue to be created. These exceptions permitted the modern trust to develop. See section IV, below.

2. **Springing executory interests:** A springing executory interest is a future interest created in a grantee that ***divests the grantor*** at some future time after the conveyance. Thus, it "springs" out of the grantor.

Example: Professor Dweeb, a teacher of Property law, conveys Blackacre to the first student in his Property class who becomes a judge. This unknown student has a springing executory interest.

Example: Alice conveys Carter Hall to Ben for life, then to Stephen if he shall give Ben a proper funeral. Stephen has a springing executory interest, not a contingent remainder. It is not possible for Stephen to give Ben a proper funeral (or any funeral, for that matter) until at least some time has elapsed following the expiration of Ben's life estate. During that interval, possession has reverted to Alice (or her legal successor to her reversion). Thus, when Stephen delivers the proper funeral for Ben, possession will spring out of Alice or her legal successor.

3. **Shifting executory interests:** A shifting executory interest is a future interest in a grantee that ***divests another grantee*** upon the occurrence of some condition. By such divestiture, the shifting executory interest ***cuts short*** the preceding estate prior to its natural expiration.

Example: Ron conveys Waterfront to Alex, but if Sarah should ever be released from prison, to Sarah. Sarah has a shifting executory interest that will divest Alex, another grantee, by cutting short his fee simple subject to an executory limitation if and when Sarah is released from prison.

Example: Woody conveys Rose Arbor to Tammy for life, then to Esther, but if Esther does not survive Tammy, then to Arlo. Arlo has a shifting executory interest that will divest Esther, another grantee, of her vested remainder in fee simple subject to an executory limitation if Esther does not survive Tammy.

IV. THE TRUST

A. **Introduction:** Future interests are most commonly employed in trusts, so it is useful to understand the general architecture of the trust and the advantages it affords.

B. **The basics of the trust:** The central feature of the trust is the division of *legal* ownership from *equitable* ownership (or, as it sometimes called, *beneficial* ownership). A person (called the *trustor* or *settlor*) may transfer legal title of his assets to a *trustee,* who becomes the legal owner of the assets, but who is charged with the responsibility to manage those assets (in accord with the terms of the trust and relevant legal standards pertaining to the fiduciary duties of trustees) for the economic benefit of the trust *beneficiaries,* who have *equitable* ownership of the assets.

Example: Evelyn conveys Blackacre, which she owns in fee simple absolute, to Isabel in trust to pay the income for life to Sophie, and then to pay the principal to Sophie's children who survive her. Isabel, the trustee, now owns a legal fee simple absolute in Blackacre. Sophie has an equitable life estate in the trust assets (which consist of Blackacre at the moment) and Sophie's children have an equitable' contingent remainder in the trust assets. Isabel, as trustee, may convey fee simple absolute in Blackacre to Steven in return for $500,000, which sum is now the trust's assets. Sophie and her children continue to have their equitable interests in these assets. Isabel could spend the $500,000 to acquire a portfolio of blue-chip corporate stocks, and so on. None of the transfers alter the nature of the equitable interests held by Sophie and her children; only the composition of the trust assets is altered.

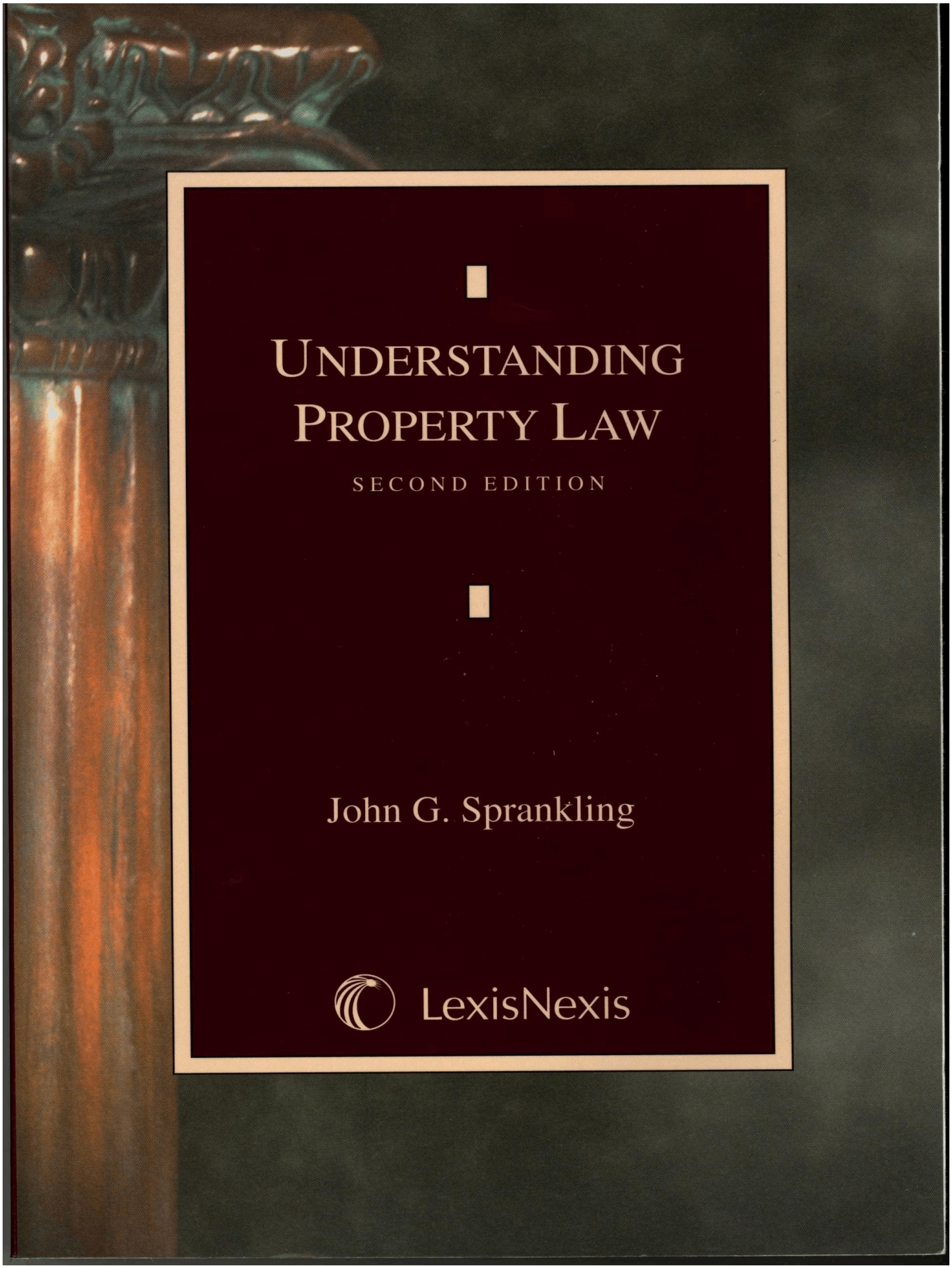
C. **Advantages of the trust:** A trust enables a person to place assets in the hands of a property manager who can respond to changing conditions by selling assets and acquiring new ones, all for the advantage of the people who may be unknown to the settlor (such as grandchildren yet to be born). There is thus combined great flexibility in property management and concentration of assets for the benefit of the identified beneficiaries for some distance into the future, often well past the lifetime of the settlor. Although trusts are used for many purposes other than transmission of wealth through ever-wider family generational lines while keeping the asset management concentrated and flexible, this is surely one of the important uses to which trusts are employed.

Exam Tips on FUTURE INTERESTS

☛ This is fertile examination ground. Pay attention to how much time your professor devotes to this area. If this is taught in detail it will almost surely be an examination subject. Future interests are rarely examined without combining the issues with the Rule Against Perpetuities. The question will require you to classify accurately the various interest created, then determine whether any of them are invalid under the Rule Against Perpetuities (or any of the other marketability doctrines, such as *Shelley's Case,* or Doctrine of Worthier Title, if your professor thinks those are of much significance). You must analyze each future interest created in turn to decide if it is valid or not. Be alert to the consequences of destruction - once a future interest is destroyed that may require you to re-classify the prior interest. Remember to apply the reform doctrines if any of them apply, unless your professor has stipulated that your analysis should focus on the common law Rule Against Perpetuities.

☛ When analyzing perpetuities problems, classify first. After you have identified the uncertainty or uncertainties, ask yourself when they will be resolved. To do this you will need to locate that moment in relation to someone's life, someone who can serve as a validating life because they were alive when the interest became effective. Many uncertainties will be resolved upon the death of someone; if that person is alive when the future interest becomes effective the interest is good. If you cannot prove validity, you must prove invalidity by illustrating some possible way in which the uncertainty will be prolonged beyond the perpetuities period. In concocting such a scenario, be imaginative; usually you will have to invent some person or persons born after the interest became effective (thus not eligible to serve as a validating life), kill off all the people who could serve as validating lives, and then illustrate how the uncertainty will persist during the life of the hypothetical after-born, or at least until some point longer than 21 years after the end of all possible validating lives.

☛ Make sure you understand the classic pitfalls of the common law Rule Against Perpetuities — the unborn widow, the fertile octogenarian — because some version of these traps is likely to occur.



UNDERSTANDING PROPERTY LAW

SECOND EDITION

John G. Sprankling

LexisNexis

Chapter 9

PRESENT ESTATES

SYNOPSIS

§ 9.01 A Byzantine System

American property law has long been dominated by a byzantine system of estates in land. Precise, elaborate, and sometimes arbitrary rules are used to classify estates and future interests into various categories. For decades, the study of property law was almost exclusively devoted toward mastering this system of classification. Yet this complex system is increasingly irrelevant. Virtually all land sales transactions today involve only fee simple absolute, the most basic estate. The other historic estates and future interests discussed in this chapter are rarely if ever created in land. In addition, statutes in many states have greatly simplified the subject.

Modern law recognizes only certain types of estates that are equated with "ownership," traditionally called *freehold estates.*[1] Accordingly, if the language of a deed, trust, or will creates a freehold estate, it will be deemed to be one of the following:

(1) fee simple absolute (often abbreviated as "fee simple") (*see* § 9.05[B]);

(2) fee simple determinable (*see* § 9.06[C][2]);

(3) fee simple subject to a condition subsequent (*see* § 9.06[C][3]);

(4) fee simple subject to an executory limitation (*see* § 9.06[C][4]);

(5) life estate absolute (usually abbreviated as "life estate") (*see* § 9.05[D]);

(6) some form of defeasible life estate (*see* § 9.06[C][5]); or

(7) fee tail (*see* § 9.05[C]).

§ 9.02 Creation of Estates

Estates and their accompanying future interests originate in two main sources: deeds (*see* Chapter 23) and wills (*see* Chapter 28). Certainly, estates and future interests can arise from a trust (*see* Chapter 28), but inevitably either a deed (if an inter vivos trust) or a will (if a testamentary trust) is employed to transfer the property into the trust. Similarly, estates and future interests that already exist may be transferred (but not created) through intestate succession.

Suppose that O holds fee simple absolute—the largest estate recognized by law—in Brownacre; he wants to create a present estate in P for the duration of P's life and a future interest in Q that matures into a present estate when P dies. O could accomplish this goal by executing a deed that

[1] *See* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 Yale L.J. 1 (2000).

immediately conveys Brownacre "to P for life, and then to Q and his heirs." Or O might execute a will that (effective upon O's death) devises Brownacre "to P for life, and then to Q and his heirs."

§ 9.03 Classifying Estates

The central challenge that estates present is classification. English common law developed a number of specific types of estates, together with an intricate system for determining which language in a deed, trust, or will created each type. American law inherited and somewhat modified this system. Thus, our law is preoccupied with rules designed to determine the *precise* name of a particular estate. Which legal pigeonhole does particular language fit into? Once the type of estate is identified, it is usually simple to determine the resulting rights and duties of the affected parties.

Three main variables are used in classifying an estate: (1) is it freehold or nonfreehold?, (2) is it absolute or defeasible?, and (3) is it legal or equitable? Depending on the answer to each of these inquiries, additional variables may become important.

§ 9.04 Estates: Freehold or Nonfreehold?

The law traditionally recognized six basic types of estates: three *freehold* estates (fee simple, fee tail, and life estate) and three[2] *nonfreehold* estates (term of years tenancy, periodic tenancy, and tenancy at will). Modern law generally retains this system, although some of these estates are rare or obsolete. There appears to be a judicial consensus that no new estates may be created; thus, any language creating an estate will be interpreted to mean one of the traditional types. The basic permissible estates are shown on Table 1 below.

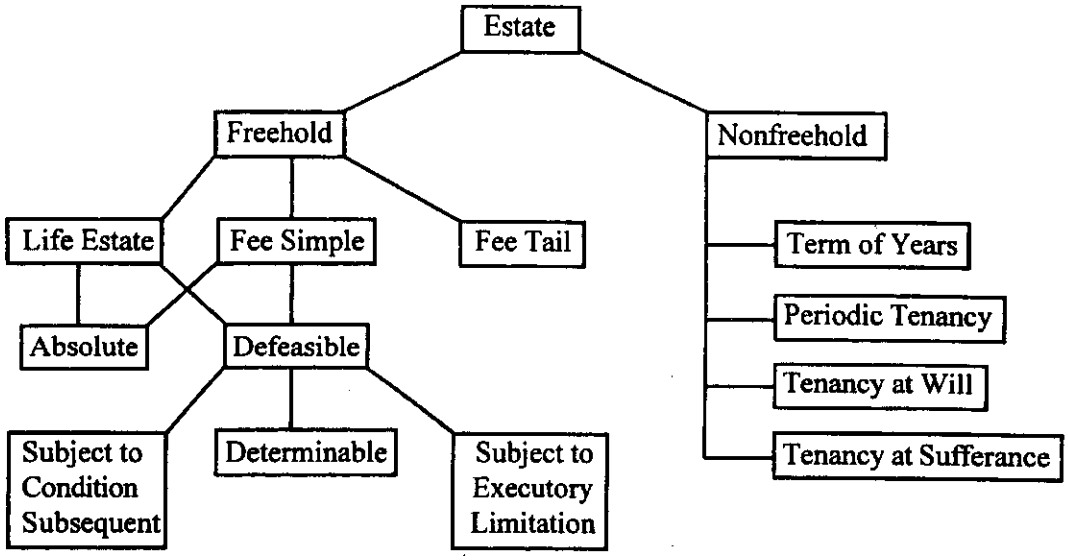
The freehold/nonfreehold distinction was a product of English feudalism. Freehold estates were held by the powerful: the nobles, gentlefolk, and others with a niche on the feudal pyramid. In early England, such estates could be created only through an intricate ceremony (*feoffment with livery of seisin*), which was performed on the land to be transferred. The holder of such an estate was said to have an almost mystical form of possession known as *seisin*. He was benefited by the social, political, and economic facets of the feudal pyramid and obligated to perform feudal duties to a superior. In contrast, nonfreehold estates were held by the powerless—common people who typically farmed the land. A nonfreehold estate could be created informally by agreement; its holder did not have seisin and owed no feudal duties.

Modern law still reflects the freehold/nonfreehold split, even though its feudal rationale ended long ago. Perhaps predictably, the branch of English law governing freehold estates evolved quite differently from that relating

[2] Scholars sometimes identify a fourth type of nonfreehold estate, known as the tenancy at sufferance, which arises when a tenant holds over after his legal right to possession ends (*see* § 15.05[E]).

to nonfreehold estates. Today we view freehold estates as forms of "owning" land, while nonfreehold estates are merely seen as forms of "leasing" land. The balance of this chapter covers freehold estates; nonfreehold estates are discussed in Chapter 15.

TABLE 1: PRESENT ESTATES



§ 9.05 Basic Categories of Freehold Estates

[A] Duration of Estates

The technical distinction between the three basic freehold estates is premised on *duration.* For example, the duration of the fee simple is potentially infinite, while the life estate lasts only for the lifetime of a particular person.

Each type of estate creates different rights and duties in its holder. The fee simple absolute stands alone as the largest "bundle" of permissible property rights, unencumbered by any future interest. By definition, all other freehold estates are accompanied by a future interest in another person, and the rights of the estate owner are accordingly diminished. Thus, if A holds only a life estate in Greenacre, someone else must hold the right to possession of Greenacre after A's death. A's rights over Greenacre are limited by this future interest. For example, A cannot destroy the productive apple orchard on Greenacre because this would permanently interfere with future enjoyment of the property and thus constitute waste (*see* § 9.09).

[B] Fee Simple

[1] Characteristics

Fee simple roughly corresponds to the layperson's understanding of "ownership." The most common type of fee simple—called fee simple absolute—is the largest aggregation of property rights recognized under American law. It is also—by far—the most common estate utilized for ownership of land. Over 99% of all privately-owned land in the United States is held in fee simple absolute.[3] If you "own" a home, farm, or other real property, your estate is almost certainly fee simple absolute.

Technically, fee simple is a freehold estate whose duration is potentially infinite.[4] Thus, if O holds this estate it may endure forever. It does not end if O conveys it to another person; nor does it end if O dies. Rather, it endures over time, being transferred in multiple transactions by wills, deeds, or intestate succession to perhaps an infinite number of new owners.

Despite the conventional definition, the risk that a fee simple absolute might end is more theoretical than real. In theory at least, this estate might be terminated by escheat. Suppose O dies without leaving a will (in other words, "intestate") and leaves no legal heirs who are entitled to his property under the rules governing intestate succession. Under these circumstances, his fee simple absolute is transferred to the state by operation of law, a process called escheat. In a few states, escheat is seen as ending a fee simple absolute and other estates. In most states, however, the escheat process simply transfers a continuing estate to the state as another new owner.

[2] Creation

Under the common law approach, a fee simple estate could be conveyed only if a precise legal formula was used. In large part, this result reflected the law's early preference for the life estate. Unless the correct wording was employed to convey a fee simple or fee tail, the resulting estate would be considered a life estate.[5]

If O held fee simple in Greenacre, he could convey his estate to A by using a formula that included the phrase: "to A and his heirs." The words "to A" are termed *words of purchase*; they identify the person who now owns the estate. The words "and his heirs" are called *words of limitation*. They serve only to signal the type of estate A receives, here fee simple absolute, and do not create any property rights in anyone else. Thus, if A has three children (B, C, and D) at the time of O's conveyance, the children have no interest at all in Greenacre despite use of the phrase "and his heirs." A can convey or devise his rights in Greenacre to anyone and exercise all of his

[3] In practice, "fee simple absolute" is commonly abbreviated as "fee simple."

[4] Restatement of Property § 14 (1936) (defining an "estate in fee simple").

[5] Under the Statute of Wills adopted in 1540, inclusion of specific words of inheritance such as "and his heirs" was not required if the language of the will evidenced the testator's clear intent to devise a fee simple estate.

other rights concerning the property regardless of the wishes of B, C, and D.

In contrast, modern American law assumes that an owner normally intends to convey the entire estate rather than a lesser estate. This produces a constructional preference for the fee simple. Suppose O holds fee simple absolute in Greenacre, and executes a conveyance to A. Unless O uses language that clearly evidences his intent to create a lesser estate, his conveyance will be construed as transferring fee simple absolute to A. For example, if O grants Greenacre "to A" today, A receives fee simple absolute. It is no longer necessary for O to add the traditional verbiage "and his heirs."[6]

This fee simple preference mirrors several concerns. First, in everyday life most grantors both hold fee simple absolute and actually intend to transfer their entire estate. Construing ambiguous language in a deed or will as transferring fee simple absolute implements this intent and respects the autonomy of the grantor. Second, the fee simple preference serves the interrelated goals of marketability and efficiency.

[3] Rights and Duties of Estate Owner

Fee simple absolute provides an owner with the maximum quantum of rights recognized under American law. Suppose H, an unmarried man, owns fee simple absolute in Greenacre, consisting of ten acres of apple orchards. By definition, no one has a future interest in the property, and thus H owes no duties to other interest holders. Nonetheless, like all property rights, H's rights are affected by various utilitarian restrictions imposed to benefit society as a whole. As one court commented, "[a] man's right in his real property of course is not absolute."[7] What are H's basic rights?

First, H is entitled to the use of Greenacre forever. Accordingly, he may harvest the apples or allow them to rot; he may nurture the trees or chop them all down. No private person has the right to challenge this conduct. Of course, H's right is not absolute, for government might regulate the manner in which H uses the land (*see* Chapters 36–40). While H could chop the trees down, he might not be able to burn them down; states often regulate open burning on private land to protect nearby properties against fire danger. Similarly, the smoke produced by H's fire might drift across adjacent land owned by N, a neighboring owner; if this smoke unreasonably interferes with N's use and enjoyment of his property, N could successfully sue H on a private nuisance theory (*see* Chapter 29). But absent such unusual circumstances, H is relatively free to use Greenacre as he wishes simply because he owns all of the private property rights in the metaphorical "bundle of rights" that represents title.

Second, H is entitled to sole possession of Greenacre, which generally allows him to exclude all other persons from the land (*see* Chapter 30).

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[6] *See, e.g.*, Cole v. Steinlauf, 136 A.2d 744 (Conn. 1957). Only South Carolina still clings to the outmoded "and his heirs" formula. McLaurin v. McLaurin, 217 S.E.2d 41 (S.C. 1975).

[7] State v. Shack, 277 A.2d 369, 373 (N.J. 1971).

Suppose T, a hungry stranger, wishes to enter Greenacre to obtain an apple; H may legally prevent T's entry. If T enters without H's consent, T is liable to H in damages for trespass and might also face criminal trespass charges. Yet the right to exclude is not absolute. A wide range of nonpermissive entries is sanctioned by the law (e.g., police officers may enter in pursuit of a fugitive). In the celebrated *State v. Shack*[8] decision, the New Jersey Supreme Court extended this principle by holding that employees of publicly-funded health and legal services organizations could enter a farm to meet with workers living there despite the vehement protests of the employer-owner.

Finally, H may transfer his rights in Greenacre. During his lifetime, H may convey his estate by deed to whoever he wishes; alternatively, H may devise his rights by will to the devisees of his choice. In either case, H can opt to transfer either all or part of his estate. For example, H could grant a life estate to his sister S, retaining a reversion.[9] Even H's right to transfer, however, is somewhat restricted. A variety of doctrines limit the types of future interests that H can create; other rules curtail restraints on alienation and similar conditions that H may impose on his successors.

[C] Fee Tail

[1] Characteristics

The *fee tail*[10] is a largely-obsolete freehold estate whose duration was measured by the lives of the lineal descendants of a designated person.[11] For example, if O granted Greenacre "to A and the heirs of his body," this language created an estate that would endure as long as A's bloodline continued. Assume A had only one child, B, who in turn had only one child, C. Upon A's death, B automatically received the right to possession of Greenacre; upon B's death, the right to possession passed in turn to C. This cycle continued until the family line expired.[12]

Today the fee tail is virtually extinct in the United States. Yet fee tail remains a subject of academic interest, principally because the reasons for

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[8] 277 A.2d 369 (N.J. 1971).

[9] Of course, if H retains rights in Greenacre at his death that are not devised (for example, because he left no will), these rights will pass by intestate succession to his heirs or, if he has no heirs, will escheat to the state (*see* Chapter 28).

[10] Literally, fee tail means a "cut" or "limited" fee simple. "Tail" stems from the Norman French term "talliare," meaning "to cut" or "to limit." The word "curtail" is derived from the same source.

[11] Restatement of Property § 59 (1936) defines fee tail as an estate "in favor of a natural person as to whom the conveyance contains words of inheritance" and "in specific words confines the succession to the issue of the first taker or to a designated class of such issue."

[12] An estate even more esoteric than fee tail is the *fee simple conditional*, which survives only in Iowa and South Carolina. The fee simple conditional is an estate that may only be inherited by the heirs of the first taker. Even where it survives, this estate has been limited by judicial interpretation; once issue are born to the first taker, he may circumvent the restriction simply by conveying fee simple absolute to another.

its rejection help explain the foundational principles of American property law.

[2] Creation

Why create a fee tail? Early English landowners wanted the ability to ensure that their land would be passed on to successive generations of their descendants, and thus remain within the family. In feudal England, ownership of land was central to both social identity and personal wealth. If a landowner could limit the alienability of family lands over the long term, he could safeguard the prestige and honor of his descendants. Suppose L owned fee simple absolute in Redacre. If L were about to die, he could of course convey fee simple absolute to his son M. What if M proved an incompetent manager and was forced to convey Redacre to his creditors? Or, even worse, what if M fell into a drunken stupor and gambled Redacre away? Landowners like L sought a method to prevent incompetent or dissipated descendants from alienating the family lands.

The fee tail was born in 1285 with the enactment of the statute De Donis Conditionalibus.[13] Under this statute, lands could be restricted so that they would pass only to lineal descendants of the first taker. Eventually, specialized forms of fee tail emerged, including fee tail male (limited to male lineal descendants) and fee tail special (limited to lineal descendants from a particular wife). If a landowner like L conveyed fee tail in Redacre to M (e.g., "to M and the heirs of his body"), M could not endanger future generations by transferring fee simple. At most, M could transfer the right to use Redacre during his lifetime; upon M's death, his eldest child would automatically be entitled to possession of the land.

Over the ensuing centuries, English land was increasingly "entailed," that is, held in fee tail. Indeed, the entailed family manor became a stock feature in English novels,[14] until the estate was formally abolished there in 1925. But long before then, fee tail owners were able to circumvent the entail through either of two ingenious and complex procedures, the common recovery (a collusive lawsuit that allowed the successful fee tail holder to convey fee simple)[15] and the fine.

[3] Accompanying Future Interests

Suppose O conveyed Greenacre "to A and the heirs of his body." By definition, two future interests arose: (a) one in the lineal descendants of A for as long as A's bloodline continued; and (b) one in O that would become possessory when A's bloodline ended. A's living lineal descendants (and prospective future descendants) all received a remainder. Thus, for example, if A had one living son, S, when O's conveyance became effective, S received a vested remainder in fee tail. But if A had no living children at

[13] 13 Edw. I, ch. 1 (1285).

[14] *See, e.g.*, Daphne Du Maurier, Rebecca (1938).

[15] *See* Taltarum's Case, Y.B. 12 Edw. 4, fol. 19, pl. 25 (1472).

the time, his unborn, potential descendants would hold a mere contingent remainder in fee tail.

A separate future interest became possessory when the fee tail ended, here when A's bloodline expired. The classification of this interest turned on who acquired it when the fee tail was first created. The future interest was a reversion (*see* § 13.02[A]) if it was created in the transferor. Suppose O conveyed Greenacre "to A and the heirs of his body"; O retained a reversion by operation of law simply because he conveyed less than his entire estate. If O later conveyed his reversion to his daughter D or another successor, it would still be considered a reversion.

On the other hand, if O conveyed the property "to A and the heirs of his body, and then to B and her heirs," O transferred all of his rights. Because ultimate future interest was held by B, who received it in the same conveyance that created the fee tail itself, B's future interest was considered a remainder (*see* § 14.03).

[4] Rights and Duties of Estate Owner

The rights of a fee tail owner were quite restricted when compared to those of the fee simple owner. The holder of fee tail was entitled to the use and enjoyment of the land involved, but not to the extreme of committing waste (*see* § 9.09). For example, if A held fee tail in Greenacre, A could harvest the apples from its orchards or allow them to rot, like a fee simple owner. But—unlike the fee simple owner—A could not chop down the trees because this would unreasonably interfere with the ability of future interest holders to enjoy their rights.

More importantly, the fee tail owner had only a limited right of transfer. Because the owner's possessory right ended at death, it could not be devised or inherited. At most, the owner could convey the right to possess the property during his lifetime. Thus, if A (trying to settle his gambling debts) purported to convey Greenacre to B in fee simple in 1500, B received only what A had—the right to possession of Greenacre until A died. If A died in 1501, B's rights ended and the possessory estate in Greenacre automatically passed to A's eldest son.

[5] The Demise of Fee Tail

The fee tail was largely abolished in the United States over 200 years ago. The principal architect of this reform was Thomas Jefferson, who feared that this estate would undermine democracy. He worried that fee tail would contribute to the development of a hereditary aristocracy (akin to the hated English aristocracy) that could control American political and social life.[16]

[16] Jefferson explained that the bill he proposed to abolish fee tail in Virginia was one of four measures "forming a system by which every fibre would be eradicated of ancient or future aristocracy; and a foundation laid for a government truly republican. The repeal of the laws of entail would prevent the accumulation and perpetuation of wealth in select families, and preserve the soil of the country from being daily more and more absorbed in Mortmain." Thomas Jefferson, *Autobiography, 1743–1790, in* Thomas Jefferson: Writings 44 (Merrill D. Peterson ed., 1984).

Jefferson's utopia was a nation of small landowners. Ownership of land would empower each citizen with the self-sufficiency necessary to make independent political decisions, free from the pressure of a landed employer, creating a society founded on individual merit rather than ancestral status. Jefferson spearheaded a successful effort to convince the Virginia legislature to ban fee tail.

Eventually most other states also abolished fee tail.[17] Jeffersonian concerns played a role in this process,[18] as did the traditional concern for free alienation of land. Fee tail would limit the marketability of land, thus impairing American economic development. Suppose O owned fee tail in land suitable for a shipyard, but lacked the capital required to develop it. As a practical matter, O could not sell the land for shipyard use, because a buyer would receive only O's fee tail, which could end at any time; a prudent investor was unwilling to take this risk. Similarly, O could not finance the development of the shipyard with a loan secured by a mortgage on the land, because the mortgage would end whenever O died. In short, land held in fee tail was destined for economic limbo.

What happens if a modern grantor attempts to create fee tail? In almost every state, this contingency is addressed by statute. The majority of states interprets fee tail language as creating fee simple absolute in the first taker. Thus, if O conveys Greenacre "to S and the heirs of his body," S simply receives fee simple absolute.[19] A few states follow different views. In some, the fee tail is preserved for one generation, and is then converted to fee simple absolute in the issue of the first taker.[20] In other states, fee tail language creates a life estate in the first taker, followed by a vested remainder in fee simple absolute in the first taker's issue.

[D] Life Estate

[1] Characteristics

The *life estate* is a freehold estate whose duration is measured by the lives of one or more specified persons.[21] For example, a grant "to B for B's life" creates a life estate in B for as long as she lives. B, as the holder of the life estate, is called the *life tenant*. Alternatively, the duration of the

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[17] In theory at least, fee tail may still be created in Delaware, Maine, Massachusetts, and Rhode Island. Yet as a practical matter, any fee tail owner in these states can avoid the entail easily. When a fee tail owner executes and delivers a deed that purports to convey fee simple, the grantee receives fee simple. An example is Caccamo v. Banning, 75 A.2d 222 (Del. Super. Ct. 1950), where the fee tail owner conveyed fee simple to a strawman, who reconveyed fee simple to her; the court held that this process eliminated the entail.

[18] *See, e.g.*, Robins Island Preservation Fund, Inc. v. Southold Dev. Corp., 959 F.2d 409 (2d Cir. 1992) (discussing New York's abolition of fee tail in historical context).

[19] What if the conveyance was "to S and the heirs of his body, and then to T"? Statutes in some states provide that such language gives S fee simple subject to an executory limitation and gives T an executory interest in fee simple (which becomes possessory if and when S dies without issue).

[20] *See, e.g.*, Long v. Long, 343 N.E.2d 100 (Ohio 1976).

[21] Restatement of Property § 18 (1936).

life estate may be measured by the life of a person other than the grantee (e.g., "to B for the life of C"); this is called a life estate *pur autre vie*.[22] The life estate is considered the smallest of the three freehold estates.

The life estate is most commonly encountered in the family gift. In the nineteenth and early twentieth centuries, life estates typically involved either the family home or the family farm. For example, suppose W owned a farm in 1920 and wanted both to support her aged sister S and to ultimately give the farm to W's grandchildren. W might devise a life estate in the farm to S, followed by a remainder in W's grandchildren. For a variety of reasons, creation of a legal life estate in land today is unwise and thus rare. The modern life estate is an equitable estate, usually created to facilitate a family gift in trust.

[2] Creation

After the Norman Conquest, the estates initially granted by the king to his supporters were for life terms only. Later, the holder of a fee simple could choose to create a life estate by using appropriate language in a deed or will. Under the formalistic English common law, a fee simple or fee tail could be created only by precise words in inheritance. Thus, any freehold estate created without such words of inheritance was deemed to be a life estate. A grant "to B," for example, created only a life estate in B.

Reversing the common law approach, modern American law presumes that every grant passes *all* of the grantor's estate, unless the grantor's contrary intention is clearly indicated. As a result, ambiguous language in a conveyance by a grantor holding fee simple (e.g., "to B") is judicially interpreted as transferring fee simple absolute.

An example is *White v. Brown*,[23] where the Tennessee Supreme Court construed a holographic will that provided: "I wish Evelyn White to have my home to live in and not to be sold."[24] Concluding that this sentence did not clearly state the intent of the testatrix, the court held that it devised a fee simple estate. Thus, today the holder of a fee simple estate can create a life estate only by using language that clearly reflects this intention (e.g., "to B for life" or "to B for his lifetime").[25]

Although life estates are usually created by an express grant or devise, they can sometimes arise by operation of law. For example, at common law a widow received "dower," a specialized type of life estate in certain lands owned by her deceased husband (*see* § 11.02[D][1]); similarly, in some states an attempt to create a fee tail will be construed as creating a life estate instead.

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[22] "Pur autre vie" is old French for the phrase "for another life."

[23] 559 S.W.2d 938 (Tenn. 1977).

[24] *Id.* at 938 (emphasis in original). *But see* Williams v. Estate of Williams, 865 S.W.2d 3 (Tenn. 1993) (devise "to have and to hold during their lives, and not to be sold during their lifetime" created life estate).

[25] *See, e.g.*, Pigg v. Haley, 294 S.E.2d 851 (Va. 1982). *But see* Nelson v. Parker, 687 N.E.2d 187 (Ind. 1997) (deed to A, providing that it was "subject to" life estate in B, created life estate in B).

[3] Accompanying Future Interests

By definition, whenever a life estate is created a future interest also arises. If O, holding fee simple absolute in Greenacre, conveys "to A for life," he has granted A *less* than the sum of his property rights. O's resulting right to possession of Greenacre upon A's death is termed a *reversion* (*see* § 13.02[A]). But if O creates this future interest in a third person (e.g., "to A for life, and then to B and his heirs"), it is called a *remainder* (*see* § 14.03).

[4] Rights and Duties of Estate Owner

The life tenant is entitled to the use and enjoyment of the land, including any rents and profits it produces. But—like the fee tail owner—the life tenant cannot commit waste (*see* § 9.09). For example, if T has a life estate in the apple orchard known as Greenacre, she is entitled to harvest the apples or not to harvest them, as she chooses; but T cannot chop the trees down, for this would be considered waste.

Similarly, a life tenant has a restricted right of transfer. A life tenant may transfer what he or she has—possession of the land for the duration of the life estate—but nothing more. Thus, while a life tenant in theory might lease, mortgage, or even convey his or her interest, the land is bound by these transfers only for so long as the life estate endures; accordingly, as a practical matter, such transfers are difficult. Moreover, the normal life estate cannot be inherited or devised. In the example above, T's life estate ends when she dies. Suppose, however, that T holds a life estate pur autre vie, measured by the life of U. If T dies before U, T's life estate continues and may be transferred to others upon T's death.

The life tenant's right to sell his or her interest is often illusory because its value is uncertain and speculative. T's life estate in Greenacre, for example, may be virtually worthless (e.g., if T dies tomorrow) or quite valuable (e.g., if T lives for 50 more years). An interesting issue arises when the life tenant wishes to maximize the value of the interest by forcing a sale of the affected land over the objections of the remainderman. *Baker v. Weedon*[26] illustrates the problem. There the 73-year-old plaintiff was a life tenant in a Mississippi farm; the farm produced income of only $1,000 per year, too little for her to live on. But fee simple absolute in the farm was valued at $168,500. If the fee simple could be sold, and her life estate transferred to the sales proceeds, she would earn enough interest to support herself (e.g., over $8,000 per year assuming a 5% return). The remaindermen refused to join voluntarily in selling the fee simple because they expected that future construction of a nearby highway would double the land's value in a few years. Plaintiff sought a judicial decree that would (a) order sale of the fee simple absolute over the remaindermen's objections and (b) recognize her life estate in the proceeds.[27] Prior Mississippi

[26] 262 So. 2d 641 (Miss. 1972).

[27] *See also* United States v. 403.15 Acres of Land, 316 F. Supp. 655 (M.D. Tenn. 1970) (life tenant awarded income for life from entire condemnation award when federal government condemned land for reservoir project; court rejected remainderman's argument that life tenant should only receive the cash value of her life estate based upon actuarial table).

decisions had authorized such judicial sale only where necessary to preserve the estate, that is, if the property involved had deteriorated to the point that its income would not pay for required taxes and maintenance. But the *Baker* court embraced a new rule, holding that such a sale would be proper if "necessary for the best interest of all the parties."[28] The case was remanded to allow plaintiff the opportunity to prove that an immediate sale would serve the best interests of all.

Most states have enacted statutes in recent decades that expand judicial power to order the sale or other transfer of fee simple in this situation. There is quite a bit of state by state variation, but the most common approach echoes the *Baker* standard: sale will be decreed if it is "expedient."[29]

[5] Evaluating the Life Estate

Today the legal life estate in real property has been eclipsed by a more effective tool—the trust (*see* Chapter 28). As *Baker v. Weedon*[30] illustrates, the legal life estate is relatively inflexible. Even if circumstances change dramatically, the future interest holder may have veto power over any alteration in the status quo. However, if an owner creates a life estate in trust (an "equitable life estate"), the trustee holds legal title and can accordingly take appropriate steps to protect all parties against changed circumstances, including selling trust assets. England abolished the legal life estate in land in 1925, and American states may ultimately follow this lead. In short, the legal life estate in land is headed toward extinction.

The life estate is commonly used in connection with personal property assets (e.g., stocks and bonds) held in trust. Thus, if O dies leaving a stock portfolio valued at $5,000,000, his will might create a testamentary trust for the benefit of his remaining family members. His wife W receives an equitable life estate in the stock portfolio, while his children C and D receive equitable vested remainders.[31]

§ 9.06 Freehold Estates: Absolute or Defeasible?

[A] Basic Distinction

Each freehold estate is either *absolute* or *defeasible*. The distinction between the two categories turns on the answer to a simple question: how might the estate end?

Most estates are absolute, meaning that their duration is restricted only by the standard limitation that defines that category of estate. For example,

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[28] Baker v. Weedon, 262 So. 2d 641, 644 (Miss. 1972).

[29] *See, e.g.*, N.Y. Real Prop. L. §§ 1602, 1604.

[30] 262 So. 2d 641 (Miss. 1972).

[31] The legal life estate retains some vitality in the context of personal property. For example, suppose O owns a rocking chair that has been in her family for decades and possesses special sentimental value. In order to control the chair's ultimate fate, she might bequeath a life estate in the chair to one family member, and a remainder to another.

the fee simple is defined as an estate that is potentially infinite, absent escheat. Thus, if O conveys Blueacre "to S and his heirs," S receives the standard type of fee simple, one which is potentially infinite and which will end (if at all) only by escheat; S owns fee simple absolute. Similarly, a life estate is defined as an estate whose duration is measured by the life of a person or persons. So if O conveys Greenacre "to D for life," D owns a life estate absolute. Its length—consistent with the basic definition—is measured by the life of a person.[32]

On the other hand, a defeasible estate is subject to a special provision—included in the language in the deed, trust, or will that creates the estate—that may end the estate prematurely if a particular future event occurs. Suppose O conveys Blueacre "to S and his heirs for so long as S refrains from smoking a cigar." S clearly owns a type of fee simple, yet it is clear that his estate will end if he smokes a cigar, long before any possible escheat. S holds a type of defeasible fee simple called fee simple determinable. Or O might convey Greenacre "to D for life, but if D ever smokes cigars, then to E and her heirs." Here D owns a form of life estate, but one which may end early; this is a fairly rare type of defeasible life estate, called a life estate subject to an executory limitation. Here, the estates of S and D may end prematurely, if either one smokes a cigar. Although the examples above assume a contingent future event (that is, one uncertain to occur), a defeasible estate will also be found where the stated event is virtually certain to occur, e.g., "to X until it next snows in Alaska."

The discussion of defeasible estates below focuses on the defeasible fee simple because—although defeasible estates are becoming an endangered species—the defeasible fee simple remains the most common type.

[B] Why Create Defeasible Estates?

Although widely used in the past, defeasible estates are rarely created today. The defeasible estate was once commonly utilized in conveyances for charitable purposes such as parks,[33] schools,[34] hospitals, orphanages, and the like. It provided leverage to ensure that the donor's intent was followed even after death. Suppose that D, holding fee simple absolute in Greenacre, wished to encourage the creation of a hospital by donating land for the hospital site. She could convey fee simple absolute in Greenacre to a nonprofit hospital corporation. But this might allow the corporation to operate a hospital on the land for a few years, cease operations, and sell the land for another purpose. D could avoid this risk by conveying only a defeasible estate in Greenacre, such as "to Corporation for so long as Greenacre is used as a hospital." Under this granting language, if the hospital use ever ended, the Corporation's estate also ended. Logically, this threatened loss of title would induce a charitable donee to respect the donor's original intent.

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[32] The "life estate absolute" is almost always abbreviated as "life estate."

[33] *See, e.g.*, Ink v. City of Canton, 212 N.E.2d 574 (Ohio 1965).

[34] *See, e.g.*, Mahrenholz v. County Bd. of School Trustees, 417 N.E.2d 138 (Ill. App. Ct. 1981).

Defeasible estates were also sometimes used to secure economic goals or to control the behavior of family members. If F, a farmer, wanted to ensure that his crops could be easily transported to market, he might grant a strip of his land to the railroad "for so long as used as a railroad."[35] Or if G, a strict teetotaler, hoped to persuade her son S never to drink alcohol, she might grant property to S "for so long as S never drinks alcohol."

The use of defeasible estates and related conditions to control the behavior of family members is controversial. Could parent P devise land to daughter D for so long as she remains married to H, follows certain religious practices, or pursues a specified career? Modern cases involving such conditions are scant.[36] The Restatement of Property generally provides that restrictions related to religion, personal habits, education, or occupation are valid;[37] but it limits the enforceability of restrictions concerning marriage, remarriage, divorce, or separation.[38]

[C] Types of Defeasible Estates

[1] Basic Distinctions

The three types of defeasible fee simple estates are:

(1) fee simple determinable;

(2) fee simple subject to a condition subsequent; and

(3) fee simple subject to an executory limitation.

Two basic distinctions are used in categorizing a defeasible fee: (a) who holds the future interest? and (b) is the defeasance language expressed in words of time or words of condition? Where the future interest is retained by the transferor (or his successors), the estate is fee simple determinable if words of time (e.g., "for so long as") are used, and fee simple subject to a condition subsequent if words of condition (e.g., "on condition that") are used. If the future interest is held by a transferee (that is, a person other than the transferor or his successors), the estate is a fee simple subject to an executory limitation where words of condition are used.

[2] Fee Simple Determinable

The *fee simple determinable* automatically expires at the time when a particular event occurs, immediately giving the transferor the legal right to possession.[39]

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[35] *Cf.* Nichols v. Haehn, 187 N.Y.S.2d 773, 775 (App. Div. 1959) (deed provided that land would revert to grantor "in case said Railway shall at any time be abandoned").

[36] *See, e.g., In re* Estate of Romero, 847 P.2d 319 (N.M. Ct. App. 1993) (if decedent intended to separate sons from mother by devise of home to sons for so long as mother did not live with them, then devise would violate public policy).

[37] Restatement (Second) of Property: Donative Transfers §§ 8.1–8.3 (1983).

[38] Restatement (Second) of Property: Donative Transfers §§ 6.1–7.2 (1983). *But see* Lewis v. Searles, 452 S.W.2d 153 (Mo. 1970) (upholding devise of property to niece "for so long as she remains single and unmarried").

[39] *See* Restatement of Property § 44 (1936).

Suppose W owns fee simple absolute in Silveracre and grants "to City for so long as Silveracre is used for a park." This conveyance creates a fee simple determinable estate in City. First, under this language W, the transferor, retained the future interest in Silveracre, called a *possibility of reverter*. Even though W's conveyance to the City does not expressly reserve any interest, her possibility of reverter arises as a matter of law simply because she did not convey her entire estate. Second, the defeasance language is expressed in words of time; the City's estate endures only so long as park use continues. Suppose City operates a park on the land for 10 years, and then builds a sewage treatment plant on the site. Once the park use ends, the City's estate expires according to its terms and the right to possession of Silveracre automatically reverts to W, all without any action on her part. W again holds fee simple absolute in Silveracre.

It is sometimes difficult to distinguish between fee simple determinable and fee simple subject to a condition subsequent. In general, the hallmark of a fee simple determinable is language of time or duration.[40] This estate is created by granting language indicating that a fee simple estate will continue only for the duration of a specified state of affairs such as "so long as" (e.g., "to City for so long as the land is used as a park"), "while" (e.g., "to City while the land is used as a park"), and "during" (e.g., "to City during the time the land is used as a park"). For example, in *Mahrenholz v. County Board of School Trustees*,[41] the grant of land to a school district with the restriction "this land to be used for school purposes only; otherwise to revert to Grantors herein" was held to create fee simple determinable. The appellate court reasoned that the term "only" indicated an intent to "give the land . . . only as long as it was needed and no longer."[42]

Where the granting language is so ambiguous that the above guidelines are unhelpful, most courts will construe the estate as fee simple subject to a condition subsequent in order to avoid forfeiture.[43] While the fee simple determinable causes automatic forfeiture when the stated event occurs, the fee simple subject to a condition subsequent presents only the risk of forfeiture.[44]

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[40] *See, e.g.*, Mayor and City Council of Ocean City v. Taber, 367 A.2d 1233, 1236 (Md. 1977) (grant to federal government that provided "when the United States shall fail to use the said Life Saving Station, the land hereby conveyed for the purpose aforesaid, shall, without any legal proceedings, suit, or otherwise, revert to the said Trustees" held to create fee simple determinable).

[41] 417 N.E.2d 138 (Ill. App. Ct. 1981).

[42] *Id.* at 142.

[43] *See, e.g.*, Oldfield v. Stoeco Homes, Inc., 139 A.2d 291, 294 (N.J. 1958) (deed restriction that provided in part "a failure to comply with the covenants and conditions . . . will automatically cause title to all lands to revert to the City" held to create fee simple subject to condition subsequent).

[44] As the Pennsylvania Supreme Court further explained in Higbee Corp. v. Kennedy, 428 A.2d 592, 596–97 (Pa. 1981), the fee simple determinable "is more cumbersome upon the alienability of land than a fee simple subject to a condition subsequent."

[3] Fee Simple Subject to a Condition Subsequent

The *fee simple subject to a condition subsequent* is—as the name suggests—a fee simple where the granting words are followed by a limiting condition in favor of the transferor. The estate is accompanied by a future interest held by the transferor, most commonly called a *right of entry.*[45] The hallmark of this estate is that it does not automatically expire when the triggering condition occurs. Instead, once the condition occurs, the future interest holder has the power to take affirmative action to end the estate.[46] If the holder fails to exercise this option, the estate continues.

Suppose that W holds fee simple absolute in Silveracre and grants "to City, but if the land is not used as a park, W may re-enter and retake the premises." If City uses Silveracre as a park, but then 10 years later builds a sewage treatment plant there, the City's estate does not automatically end. Instead, W merely has a right to end the City's estate, which W may or may not choose to enforce. Until W acts, the City's estate continues.

While the fee simple determinable is characterized by words of time, the fee simple subject to a condition subsequent is characterized by words of event or condition. This estate is typically created by using phrases such as "on condition that" (e.g., "to City on condition that the land be used as a park"), "but if" (e.g., "to City but if the land is not used as a park, then . . ."), and "provided however" (e.g., "to City, provided however that the land shall be used as a park . . .").

Under the traditional English approach, once the stated condition occurred, the future interest holder could end the estate only by physically re-entering the land with accompanying witnesses. Today physical re-entry is no longer necessary in the United States; indeed, given the growing concern about the risk of violence stemming from self-help, this method should be deemed unacceptable in any event.[47] In some states, the future interest holder can end the estate simply by giving formal notice to the estate owner; other states require the future interest holder to file an ejectment or quiet title action against the estate owner.

[4] Fee Simple Subject to an Executory Limitation

The *fee simple subject to an executory limitation* is a fee simple estate that automatically expires when a stated event occurs (like fee simple determinable), but gives the right to possession to a transferee (unlike fee simple determinable).[48] This estate arose only after the Statute of Uses authorized executory interests in 1536.

Suppose O conveys Silveracre "to City, but if the land is not used as a park, then to Z and his heirs." Here the future interest owned by Z is an

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[45] This future interest is sometimes also called a "power of termination" or "right of reentry."

[46] Forsgren v. Sollie, 659 P.2d 1068 (Utah 1983).

[47] *But see* Forsgren v. Sollie, 659 P.2d 1068 (Utah 1983) (grantor physically re-entered unimproved lot when grantee failed to perform conditions).

[48] Hall v. Hall, 604 S.W.2d 851, 854 (Tenn. 1980).

executory interest, which will automatically divest or "cut short" the City's estate if the park use ceases, without any affirmative act by Z. Because the future interest is held by Z (a transferee from O) rather than by O, the City's estate is a fee simple subject to an executory limitation.

What if O instead conveys Silveracre "to City for so long as the land is used as a park, and then to Z and his heirs"? Some authorities classify O's estate as fee simple determinable, but disagreement remains. Others suggest that this estate is more aptly described as a "fee simple determinable with an executory limitation."[49]

[5] Defeasible Life Estates

Defeasible life estates are permissible but exceedingly rare. For example, if O holds fee simple absolute in Greenacre, she could create any of the following estates: life estate determinable, life estate subject to a condition subsequent, or life estate subject to an executory limitation.

[6] Consequences of the Distinctions

The distinction between fee simple determinable and fee simple subject to a condition subsequent—however precise in theory—is becoming increasingly blurred. Historically, the distinction has produced three different legal impacts: (1) liability for rent; (2) commencement of the statute of limitations period for adverse possession; and (3) applicability of equitable defenses. Yet critics wonder whether grantors actually intend that these differing results follow from minor variations in granting language. Today there is a clear trend toward eliminating the distinction between the two estates, and treating both as fee simple subject to a condition subsequent.[50]

One traditional distinction is liability for rent. Once a fee simple determinable automatically expires, the former estate owner has no legal right to possession and is liable to the new owner for the fair rental value of the land. In contrast, if the land is held in fee simple subject to a condition subsequent, no rent liability attaches until the future interest holder takes affirmative action to end the estate. Suppose O grants a defeasible fee simple in Blueacre, a farm, to D, and the triggering event is D's consumption of alcohol; D first drinks alcohol in 1999, but remains in possession of Blueacre until O brings suit in 2008. If D's estate was fee a simple determinable, it ended in 1999, and D owes O rent for nine years; on the other hand, if D held fee simple subject to a condition subsequent, D owes no rent for his occupancy before O sues in 2008.

Another historic difference is when the statute of limitations for adverse possession commences. All states agree that once a fee simple determinable ends, continued possession by the former estate owner starts the adverse possession period; if D held fee simple determinable in the example above, he started adversely possessing Blueacre in 1999. But there is less logical consistency on the issue when a fee simple subject to a condition subsequent

[49] William B. Stoebuck & Dale A. Whitman, The Law of Property § 2.9 (3d ed. 2000).

[50] *See, e.g.*, Cal. Civ. Code § 885.020 (abolishing fee simple determinable).

is involved. Seemingly, D's estate continues until O brings suit in 2008, so D's possession is not adverse until then; some states follow this view. But others hold—illogically—that the period begins running when the stated event occurs, here in 1999, regardless of whether the future interest holder chooses to terminate the estate.

Finally, equitable defenses such as waiver and estoppel are sometimes utilized to bar a future interest holder from terminating fee simple subject to a condition subsequent.[51] Because fee simple determinable ends automatically, such defenses are usually inapplicable.

[D] Rights and Duties of Estate Owner

The owner of a defeasible estate generally has virtually the same rights and duties as an owner of the parallel absolute estate, except that he or she cannot commit waste.[52] For example, absent a contrary condition in the grant or devise, one holding fee simple determinable is entitled to exclusive use and possession of the affected land, and has the full right to transfer the interest, just as if the holder owned fee simple absolute. Of course, any of these rights may be restricted by special conditions inserted by the transferor (e.g., "for so long as X refrains from picking the apples on the land" or "provided, however, that X allows neighbors to cross the land to reach the lake").

[E] Judicial Hostility Toward Defeasible Estates

American courts have been traditionally and understandably hostile toward defeasible estates.[53] In part, this attitude reflects the law's long-standing concern for the free alienation of land. Property held in a defeasible estate is often difficult to lease, mortgage, sell, or otherwise transfer because of the risk that title may be lost. Another reason for this hostility is judicial abhorrence of forfeiture. The termination of a defeasible fee is often seen as providing a windfall to the future interest holder (perhaps a distant relative of the original transferor), while imposing an inequitable loss on the estate owner.

Various judicial mechanisms are employed to limit the scope of defeasible estates. Most importantly, the granting language must indicate a clear intent to impose a condition on the estate. Words that merely recite the intent or purpose of the grantor do not limit the estate that is granted. For example, in *Wood v. Board of County Commissioners*,[54] a deed that recited

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[51] *See, e.g.*, Storke v. Penn Mutual Ins. Co., 61 N.E.2d 552 (Ill. 1945) (plaintiffs waived right to terminate fee simple subject to condition subsequent because they were aware that stated event—sale of alcohol on property—had occurred but delayed for years in taking action). *But see* Martin v. City of Seattle, 728 P.2d 1091 (Wash. Ct. App. 1986) (plaintiffs who waited 71 years before seeking to terminate fee simple subject to condition subsequent had not waived right).

[52] *See* Restatement of Property §§ 193, 194 (1936).

[53] *See* Gerald Korngold, *For Unifying Servitudes and Defeasible Fees: Property Law's Functional Equivalents*, 66 Tex. L. Rev. 533 (1988).

[54] 759 P.2d 1250 (Wyo. 1988).

that the conveyance was "for the purpose of constructing and maintaining thereon a County Hospital"[55] was held to transfer fee simple absolute; the language did not restrict the fee simple granted, but only stated the grantor's purpose.[56] Similarly, words of covenant or promise (e.g., "and the grantee promises to use the land only for a hospital") merely create a contract obligation in the grantee, not a defeasible estate. In addition, where ambiguous language could be construed as creating either an absolute or a defeasible estate, courts uniformly follow a constructional preference for an absolute estate.[57] Even where a defeasible estate clearly exists, courts tend to construe the conditional language narrowly, in order to avoid forfeiture.[58]

[F] The Lingering Demise of Defeasible Estates

The defeasible estates are slowly following the fee tail into extinction in a lingering death scene reminiscent of a tragic opera. Modern landowners rarely create new defeasible estates, preferring to convey fee simple absolute. In part, this shift reflects our changing culture; as a philosophical matter, landowners are less concerned with restricting the autonomy of future owners than were their nineteenth-century predecessors.

Moreover, as a practical matter, sophisticated landowners are increasingly aware of the constraints that a defeasible estate imposes on land. Land held in a defeasible estate is unlikely to be utilized for its highest and best use; potential buyers, lessees, and lenders, for example, are usually reluctant to invest in land when the owner's title might immediately end.

Finally, even if a new defeasible fee estate is created, statutes in many states indirectly facilitate its conversion to fee simple absolute by restricting the duration and enforceability of the accompanying future interest (*see* § 13.05).

§ 9.07 Freehold Estates: Legal or Equitable?

Each estate and future interest discussed above could also be created in trust (*see* Chapter 28). O, holding fee simple absolute in Greenacre, might convey Greenacre "to T in trust for L for life, and then for R." This grant effectively splits the metaphorical bundle of rights in a different manner. T, the trustee, holds "legal" title to Greenacre, here fee simple absolute. But L and R, the beneficiaries, simultaneously hold "equitable" interests in Greenacre. L owns an equitable life estate and R holds an equitable vested remainder.

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[55] *Id.* at 1251–52.

[56] *See also* Fitzgerald v. Modoc County, 129 P. 794 (Cal. 1913); Roberts v. Rhodes, 643 P.2d 116 (Kan. 1982); Station Ass'n, Inc. v. Dare County, 513 S.E.2d 789 (N.C. 1999).

[57] *See, e.g.*, Humphrey v. C.G. Jung Educ. Center, 714 F.2d 477 (5th Cir. 1983).

[58] *See, e.g.*, Mahrenholz v. County Bd. of School Trustees, 544 N.E.2d 128 (Ill. App. Ct. 1989) (storage of desks and other equipment on land subject to determinable fee held use for "school purpose"); *see also* Red Hill Outing Club v. Hammond, 722 A.2d 501 (N.H. 1998).

§ 9.08 Restrictions on Transfer: Rule Against Restraints on Alienation

[A] The Importance of Free Alienation

One of the foundational precepts of the English property law system was that land should be freely transferable or "alienable." Accordingly, the law was extremely hostile to restraints on alienation—provisions in deeds or wills which purport to prohibit or restrict future transfers. Modern American law reflects similar antagonism.

Why should the legal system protect free alienation? Restraints on alienation are viewed as preventing the maximum utilization of land. Suppose O owns fee simple absolute in Greyacre, a perfect site for a new factory, but cannot transfer any interest because his deed contains an enforceable prohibition against transfer. Under these circumstances, O will probably be unable to secure financing to build and operate the factory because he cannot grant potential lenders a mortgage on Greyacre to secure the loan; O might be unwilling to invest his own money in improving Greyacre simply because he would never be able to recoup it through sale. Similarly, O cannot sell Greyacre to investors who already have sufficient capital for the factory project. If the restraint is valid, Greyacre remains devoted to a low-intensity use (e.g., agriculture) and society loses the benefits that the factory would produce.

Free alienation also serves two lesser policies. It protects the good faith expectations of creditors by allowing them to execute on property in order to satisfy the owner's unpaid debts. Finally, it prevents the undue concentration of wealth that—particularly in the young United States—was seen as a potential threat to democratic values.

[B] Restraints on Fee Simple Estates

American courts uniformly hold that any total or "absolute" restraint on alienation of a fee simple estate (whether absolute or defeasible) is null and void, regardless of the form of the restraint.[59] Suppose O attempts to express a restraint in defeasible fee language, imposing a "forfeiture restraint." If O devises Greenacre "to B, but if B ever attempts to transfer Greenacre, then to C," a court would find the restraint void; thus, B owns fee simple absolute, and C receives no interest. A similar result follows if O imposes a "disabling restraint" by devising Greenacre "to B, however any transfer of Greenacre shall be void"; the restraint is invalid. Similarly, a "promissory restraint"—a promise by the grantee not to transfer the property—is generally held unenforceable.[60]

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[59] *See, e.g.*, Mountain Brow Lodge No. 82, Independent Order of Odd Fellows v. Toscano, 64 Cal. Rptr. 816, 817 (Ct. App. 1967) (deed clause that provided property would revert to grantors "in the event of sale or transfer" held invalid restraint).

[60] An interesting issue arises if a grantor uses defeasible fee language that indirectly restrains alienation. For example, in Mountain Brow Lodge No. 82, Independent Order of Odd Fellows v. Toscano, 64 Cal. Rptr. 816, 817 (Ct. App. 1967), the grantors conveyed a fee simple

Suppose instead that O conveys Greenacre to B on condition that it "is never transferred to anyone other than C, D, or E" or "not transferred to anyone during the next 10 years." Such phrases impose only partial restraints on alienation. The law governing these limited restraints is somewhat unclear. For example, most courts will invalidate restraints that limit the number of transferees or prevent transfer for a specified duration.[61] But the Restatement (Second) of Property advocates a broader view; it suggests that a partial restraint that is reasonable given its purpose, nature, and duration should be upheld.[62]

[C] Restraints on Life Estates

The common law was substantially less concerned with restraints on alienation of the life estate, presumably because its limited duration already impairs marketability. The modern American rule is that forfeiture and promissory restraints on a life estate are valid, but—somewhat illogically—that disabling restraints are void.[63]

§ 9.09 Restriction on Use: Waste

[A] Waste in Context

Waste is the principal common law mechanism for resolving land use disputes where property rights are divided between persons holding present estates and future interests in the same land.[64] In general, absent a superseding agreement, the waste doctrine restrains the present estate owner from acting in a manner that unreasonably injures the affected land and thus reduces the value of the future interest. The law effectively presumes that the original grantor intended the estate holder to pass on possession of the land to the future interest holder in approximately the same condition as it was received.

Suppose L owns a life estate in Redacre, and R owns the ensuing vested remainder. L might prefer to exploit Redacre in a manner that maximizes

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subject to a condition subsequent in a town lot to a fraternal lodge; the deed provided, inter alia, that the land would revert to the grantors "in the event the same fails to be used" by the lodge. When the lodge later sued, claiming a de facto restraint on alienation, the court upheld the restriction based on the historic common law refusal to extend the doctrine to mere use restraints. *But see* Falls City v. Missouri Pac. R.R. Co., 453 F.2d 771 (8th Cir. 1971) (contra).

[61] Similarly, a restraint that purports to preclude transfer based on the race, color, national origin, religion, or other personal characteristic of the transferee would—as a matter of public policy—be invalid. *See, e.g.*, 42 U.S.C. § 3604(a) (residential property); Cal. Civ. Code § 53 (generally).

[62] Restatement (Second) of Property: Donative Transfers §§ 4.1, 4.2 (1983). *See also* RTS Landfill, Inc. v. Appalachian Waste Systems, 598 S.E.2d 798 (Ga. Ct. App. 2004) (preemptive right to purchase personal property was invalid restraint on alienation).

[63] Restatement (Second) of Property: Donative Transfers §§ 4.1–4.3 (1983). *See also* Alsup v. Montoya, 488 S.W.2d 725 (Tenn. 1972).

[64] For an analysis of the development of the law of waste in the United States, see John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. Chi. L. Rev. 519, 533–36 (1996).

his short term profit—for example, by extracting all the oil from Redacre—even if this causes long run damage to R's interest. As Judge Richard Posner observed, a life tenant in this situation has "an incentive to maximize not the value of the property, . . . but only the present value of the earnings stream obtainable during his expected lifetime."[65] Posner posits that various factors may prevent the life tenant and remainderman from negotiating a mutually-acceptable plan for using the land; he envisions waste as the law's solution to this stalemate.

Two principal types of waste are recognized today: affirmative waste and permissive waste. England and the young United States formerly recognized a third category, called ameliorative waste, under which any change in the character of the land was deemed actionable waste.[66] Converting forest into farm land was deemed waste, for example, even if this change increased the market value of the land. Nineteenth-century American courts abandoned this rule as inconsistent with the need for agrarian development of the nation's wilderness land.[67]

[B] Affirmative Waste

Affirmative waste (or *voluntary waste*) occurs when the voluntary acts of the present estate owner significantly reduce the value of the property. For example, if life tenant L wantonly destroys the valuable residence on the land, L will be liable to remainderman R in waste. Conversely, the demolition of obsolete and worthless improvements in order to permit the productive use of the land will not constitute waste, as explained in the classic *Melms v. Pabst Brewing Co.*[68] decision.

Does the life tenant commit waste by exploiting natural resources on the land such as minerals or timber? Most jurisdictions follow the traditional English rule regarding mining activities. If an open mine existed on the land when the present estate owner took possession, its operation may continue until the resource is totally depleted; this result is justified by the presumption that the original grantor intended to permit this ongoing use to continue. On the other hand, the present estate owner may not open a new mine, unless all affected future interest holders agree.[69] Similarly, American courts have relaxed the strict application of waste as applied to timber cutting. If the original owner engaged in commercial tree harvesting, by analogy to the "open mines" rule most courts will allow the life tenant to continue such cutting. Even absent such a history, American courts usually allow the life tenant to cut trees to the extent consistent with good

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[65] Richard A. Posner, Economic Analysis of Law 73 (6th ed. 2003).

[66] *See, e.g.*, Brokaw v. Fairchild, 237 N.Y.S. 6 (Sup. Ct. 1929).

[67] *See, e.g.*, Melms v. Pabst Brewing Co., 79 N.W. 738 (Wis. 1899).

[68] *Id.* (life tenant's acts of demolishing valueless dwelling and grading lot surface down to street level to allow profitable business use of site were not waste).

[69] *Cf.* Nutter v. Stockton, 626 P.2d 861 (Okla. 1981) (where oil and gas lease executed by testator expired during life estate, life tenant could not execute new lease unless remainderman agreed).

husbandry, either to clear land for cultivation or to obtain firewood and building materials.

[C] Permissive Waste

Permissive waste stems from inaction: the failure of the possessor to exercise reasonable care to protect the estate. Most permissive waste cases involve the life tenant who fails to repair a dwelling (e.g., fails to fix a leaky roof), resulting in substantial loss.[70] In addition, permissive waste will be found where the possessor fails to pay property taxes and assessments, mortgage payments, and related expenses necessary to preserve the estate for the future interest holder.[71]

[70] *See, e.g.*, Moore v. Phillips, 627 P.2d 831 (Kan. Ct. App. 1981); *see also* Estate of Jackson, 508 N.W.2d 374 (S.D. 1993).

[71] *See, e.g.*, Hausmann v. Hausmann, 596 N.E.2d 216 (Ill. App. Ct. 1992) (property taxes).

Chapter 12

INTRODUCTION TO FUTURE INTERESTS

SYNOPSIS

§ 12.01 Future Interests in Context

The traditional English law governing future interests was an attempt to reconcile two competing goals: individual autonomy and overall social welfare.[1] Centuries of legal battle between these goals produced an intricate maze of rules that has confused generations of judges, lawyers, and law students. The common law allowed the creation of certain categories of future interests (*see* Chapters 13 and 14), but imposed somewhat different restrictions on each category. Broadly speaking, these restrictions were designed to ensure that land was not burdened with future interests for an unduly long period (*see* Chapter 14).

Accordingly, one crucial task is identifying the category into which a particular future interest falls. For example, is it a springing executory interest, a possibility of reverter, or something else? Complex rules govern the classification or "labeling" of future interests. After classification, the next question is how the restrictions apply to interests within the category. For example, the Rule Against Perpetuities applies to contingent remainders, but not to reversions. Many of these historic restrictions are now obsolete, and are being supplanted or modified by modern legislative reforms.

[1] For more detailed analysis of the law governing future interests, see generally John A. Borron, The Law of Future Interests (3d ed. 2002); *see also* Cornelius J. Moynihan & Sheldon F. Kurtz, Introduction to the Law of Real Property 128-211 (4th ed. 2005).

§ 12.02 What Is a Future Interest?

Broadly speaking, a *future interest* is a right to receive possession of property at a future time. One leading authority defines it more precisely as "an interest in land or other things in which the privilege of possession or of enjoyment is future and not present."[2] In other words, a future interest is a non-possessory interest that will—or may—become a possessory estate in the future. Despite its confusing name, a future interest is a presently-existing property right.

Suppose that O owns fee simple absolute in Greenacre; she wants her daughter D to have possession of Greenacre for D's life, and then wants her granddaughter G to receive fee simple absolute in the property. O can accomplish her goal in either of two ways. O could now convey a life estate in Greenacre to D, wait until D died, and *then* convey fee simple absolute to G. Under this first option, G has no rights in Greenacre at all until and unless O carries out her planned conveyance in the future. O may change her mind or die before this occurs. G has—at best—a hope or expectancy.

Alternatively, O could *now* convey to G a future interest—the right to receive possession of Greenacre after D's death. Under this second option, G now has a legally-enforceable right in Greenacre in the form of a future interest called a remainder. When D dies, G (or if G is then dead, her successors) will be entitled to possession of Greenacre, regardless of whether O dies or changes her mind in the interim. Until D dies, the practical utility of G's remainder is limited. Certainly G can sell or otherwise transfer her interest. Indeed, if Greenacre is a working gold mine and D is on the brink of death, G's remainder is quite valuable. And G may receive other minor benefits; for example, if D commits waste on the property, G can sue to enjoin D's conduct.

§ 12.03 Why Create a Future Interest?

[A] Family Support Motive

Future interests are most commonly encountered in family gifts—testamentary or inter vivos gifts of property to relatives. In effect, they are flexible estate planning tools that allow an owner to control the disposition of property even after death.

Suppose O owns fee simple absolute in Redacre, a farm; O's family consists of daughter D and grandson G. Assume that O's goal is to provide financial support to D and G after his own death. If O simply devises fee simple absolute in Redacre to D, D would be free to transfer her title to anyone before or upon her death. For example, if D gambled Redacre away during her life, she would be unable to devise it to G upon her death. O can avoid this risk by devising a life estate to D and a future interest to G; under this approach, D cannot eliminate or otherwise prejudice G's

[2] 1 John A. Borron, The Law of Future Interests § 1, at 2 (3d ed. 2002); *see also* Restatement of Property § 153 (1936) (defining future interest).

future right to Redacre. In this manner, O can ensure that his family-support goal is met, despite the risks of events that may occur after his death. Of course, a property owner like O might use future interests in a deed or a will to structure a gift in anticipation of many types of other events, such as the marriage, death, or birth of family members.

[B] Charitable or Economic Motives

When future interests are found outside of the family setting, as was quite common in the nineteenth century, they typically serve either a charitable or economic motivation. Suppose that charitable O intends to donate Redacre to a local hospital group, and wants to ensure that it will be forever used as a hospital. To accomplish this goal, O might grant Redacre "only for so long as it is used as a hospital," retaining the future interest called a possibility of reverter. Or perhaps O has an economic goal—to ensure that the railroad runs by his farm, so that the wheat he grows can be easily sent to market. Under these circumstances, O might grant a strip of Redacre to the railroad "only for so long as it is used for railroad purposes." In either event, the grantee is motivated to carry out O's plan in order to avoid loss of title.[3]

§ 12.04 Types of Future Interests

[A] Basic Categories

Five basic types of future interests are recognized:

(1) the *reversion*;

(2) the *possibility of reverter*;

(3) the *right of entry*;

(4) the *remainder*; and

(5) the *executory interest*.

Within each category, there may be further subdivisions; for example, there are four varieties of remainders. Table 2 below summarizes the universe of future interests.

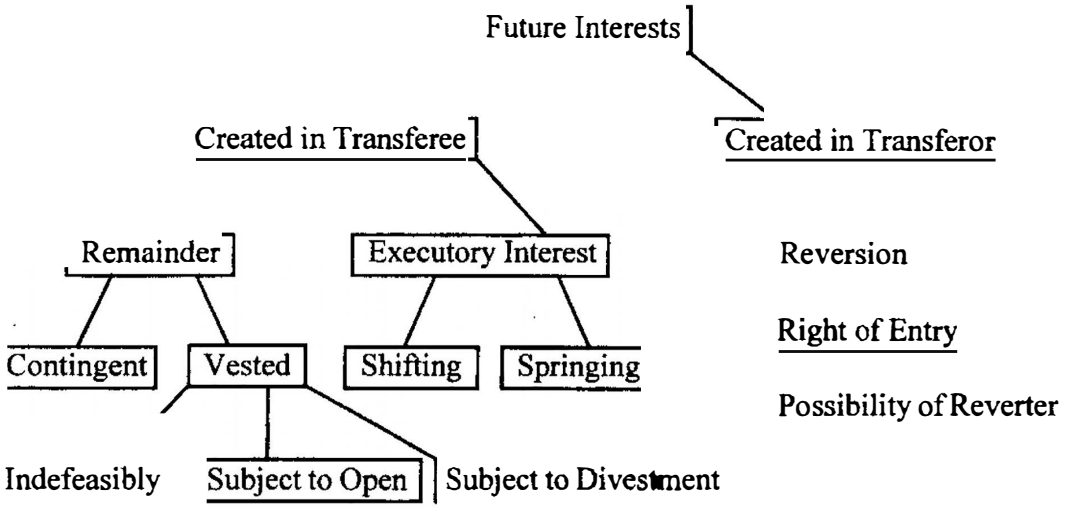
The starting point for classifying a future interest is to determine the identity of the person who holds it: is the holder a transferor or a transferee? Suppose O, holding fee simple absolute in Greenacre, grants a life estate to L (e.g., "to L for life"). O is considered a *transferor* because she transferred an estate smaller than her own, while impliedly retaining a future interest (here, a reversion); once L's life estate ends, O or O's successors will be entitled to possession of Greenacre. The first three future interests

[3] Alternatively, the grantor might have both motivations. *See, e.g.*, Mahrenholz v. County Board of School Trustees, 417 N.E.2d 138 (Ill. App. Ct. 1981) (owner conveyed 1 ½ acre parcel to school board for school use, probably intending both to ensure nearby school for son and to benefit the school district).

above—the reversion, the possibility of reverter, and the right of entry—can be created only in a transferor and are discussed in Chapter 13.

Alternatively, suppose that by a single deed O grants a life estate in Greenacre to L and grants the future interest following the life estate (a type of remainder) to a third person, X; O might use deed language such as "to L for life, then to X." Here, X is considered a *transferee* because he receives his future interest from another person. The final two future interests mentioned above—the remainder and the executory interest—can be created only in a transferee and are discussed in Chapter 14.

TABLE 2: FUTURE INTERESTS



[B] Subcategories of Future Interests

Future interests may be created in a variety of legal settings. For example, although the hypotheticals above concern real property, these future interests can also be created in personal property.[4] Indeed, today future interests are principally created in personal property such as stocks and bonds, not in land.

Similarly, future interests may be either legal or equitable. In the fact pattern above, O created a "legal" remainder in X. However, O could have created a remainder for X in trust (e.g., "to T in trust for the benefit of O for life, and then for the benefit of X") that would be an "equitable" remainder.

Finally, future interests may be either contingent or noncontingent. The legal remainder in X above is noncontingent, simply meaning that it is certain to become possessory upon L's death. However, O could grant a remainder that is contingent on future events, such as X attaining a certain age (e.g., "to L for life, and then to X if X reaches age 21"). This contingent

[4] *See, e.g.*, Gruen v. Gruen, 496 N.E.2d 869 (N.Y. 1986) (remainder created in painting).

remainder may never ripen into a possessory estate (e.g., if X dies at age 20).

[C] A Future Interest in What Possessory Estate?

Each future interest will—or may—become a possessory estate. Thus, in classifying future interests it is conventional to identify both the type of future interest and the possessory estate linked to it. For example, if O grants Greenacre "to L for life, and then to X and his heirs," X's future interest is fully described as an *indefeasibly vested remainder in fee simple absolute*. It is the type of remainder called an *indefeasibly vested remainder*; and when the remainder ripens into a possessory estate, X will have *fee simple absolute*.

§ 12.05 Classifying Future Interests: An Overview

The classification of future interests is governed by elaborate and rather arcane rules, as discussed in Chapters 13 and 14. But classification in a general sense is relatively easy when a deed or will creates a present freehold estate that is followed by only *one* future interest, e.g., "to A for life, then to B and his heirs." In this situation, the identity of the first-created estate will determine the basic category of future interest that follows, as shown in Table 3 below.

TABLE 3: LINKING FREEHOLD ESTATES AND FUTURE INTERESTS

	Future Interest	
Estate	**Created in Transferor**	**Created in Transferee**
Fee simple absolute	N/A	N/A
Fee simple determinable	Possibility of reverter	N/A
Fee simple subject to condition subsequent	Right of entry	N/A
Fee simple subject to executory limitation	N/A	Executory interest
Life estate absolute	Reversion	Remainder
Defeasible life estate	Reversion	Remainder or executory interest
Fee tail	Reversion	Remainder

The usefulness of Table 3 is limited. It may be necessary to determine the subcategory of future interest involved. Even though Table 3 reveals that B's interest is a remainder (because it follows an absolute life estate

and is held by a transferee), we must still assess which remainder subcategory it fits into. In addition, Table 3 provides little assistance when an estate is followed by *multiple* future interests.

§ 12.06 Common Law Approach to Future Interests

[A] Autonomy v. Marketability

Future interests present one of the clearest examples of the historic tension between individual autonomy and overall social welfare. On the one hand, English landowners sought unfettered private property rights that would allow them to transfer property by the use of future interests that would survive the owner's death. On the other hand, mercantile and commercial forces allied with the Crown demanded free marketability of land. They insisted that future interests be limited, so that land could be transferred for maximum societal benefit (*see* § 14.09).

For example, suppose O owns fee simple absolute in Blueacre, a farm located on the Thames River near London. Agriculture is the natural use of Blueacre, and O wants to protect his family against any ill-conceived scheme to change the use. Thus, O devises Blueacre to his daughter D "only for so long as Blueacre is used as a farm, and if Blueacre is not used as farm, then to X and his heirs." One hundred years later, Blueacre and other land fronting on the Thames is extremely valuable for dockyard use. Dockyard use would encourage trade, and thus benefit the English economy; but Blueacre is much less valuable as farm land. If D's successors now try to convert Blueacre into a dockyard, their title will end. Should the law respect O's autonomy as a property owner by enforcing the "farm only" restriction or should it ignore the restriction as inconsistent with the overall social good? To what extent can the dead control the living?

[B] The Common Law Compromise

In a broad sense, the common law governing future interests can be seen as a grudging compromise between these competing factions. Over time, property owners were given increasing latitude to create different types of future interests, including interests held by transferees (entitled to less judicial respect than those held by the original owner) and contingent interests (which might never ripen into possession). This evolution culminated with the Statute of Uses, which first authorized the (seemingly revolutionary) executory interest—a contingent, divesting future interest held by a transferee.

At the same time, the law adopted various devices to limit the impact of these interests on marketability. One device was to limit the transferability of such interests. Future interests that could not be freely transferred were less likely to interfere with the marketability of the underlying estate. Thus, for example, traditionally the possibility of reverter and the right of entry could be transferred only by intestate succession, not by devise or

inter vivos conveyance. Another approach was to impose a time limit on how long a future interest could exist, as exemplified by the doctrine of the destructibility of contingent remainders. Probably the most famous device, however, was an effective ban on the creation of certain types of future interests, as seen in the Rule Against Perpetuities, the Rule in Shelley's Case, and the Doctrine of Worthier Title (*see* § 14.09).

§ 12.07 Modern Future Interest Legislation

Many jurisdictions have modified the common law approach to future interests through legislation. Two themes are evident in this reform effort. First, the complex and confusing categorization system is slowly being simplified, as legal commentators have long urged.[5] For example, some states have merged the executory interest into the remainder, treating both as a "remainder."[6] And the traditional common law restrictions on future interests such as the Rule in Shelley's Case, the Doctrine of Worthier Title, the destructibility of contingent remainders, and even the venerable Rule Against Perpetuities have been either abolished or greatly weakened (*see* §§ 14.09–14.14).

Second, legislation in a number of jurisdictions now effectively limits the duration of future interests, in a modern echo of the Rule Against Perpetuities. Statutes in some states provide that certain future interests simply lapse within a set period (usually 20 to 40 years), unless the holder records a notice of intent to preserve the interest under a "renewal" procedure afforded by the legislation (*see* § 13.05). And, under the "marketable title acts" (*see* § 25.08) in effect in many states, a record owner who has title stretching back for a specified period (usually 40 years) is deemed to have "marketable title," that is, title free of any encumbrances or other defects (including future interests) that are not reflected in documents recorded during the period. In effect, these marketable title acts invalidate most future interests and certain other claims to land title that were recorded before the statutory period began.

§ 12.08 Contemporary Relevance of Future Interests

The importance of future interests has been diminishing for decades. It is now extraordinarily rare to transfer a legal freehold estate in land other than fee simple absolute. Thus, legal future interests in real property are becoming uncommon.[7]

Today future interests are still used as family estate planning tools, but principally for personal property held in trust. Over the last century, stocks, bonds, and other personal property have replaced land as the primary form

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[5] *See, e.g.,* Lawrence W. Waggoner, *Reformulating the Structure of Estates: A Proposal for Legislative Action*, 85 Harv. L. Rev. 729 (1972).

[6] *See, e.g.,* Cal. Civ. Code § 769; N.Y. Est. Powers & Trusts L. § 6-3.2.

[7] *See generally* T.P. Gallanis, *The Future of Future Interests*, 60 Wash. & Lee L. Rev. 513 (2003).

of family wealth. Further, the trust has proven a much more effective estate planning device than the will or deed. Accordingly, equitable future interests are widely utilized.

As future interest usage shifted from real to personal property, the historic common law restrictions on future interests became increasingly anachronistic. Intended in large part to promote the marketability of land, these restraints have little or no application to personal property.

Chapter 13

FUTURE INTERESTS HELD BY THE TRANSFEROR

SYNOPSIS

§ 13.01 Three Future Interests

The common law traditionally classifies future interests according to the identity of the holder. Suppose O, owning fee simple absolute in Blueacre, conveys a life estate to A, retaining a future interest. Because O's future interest arose when O transferred the life estate to A, O is considered a *transferor*. A future interest can be created only through a deed, trust, or will; thus, only a grantor, settlor, or testator can be a transferor.

Three types of future interests may be created in a transferor: the reversion, the possibility of reverter, and the right of entry. These interests share a common theme: if one becomes possessory, the estate will belong to the transferor or his successors. In some contexts, the law accords more protection to future interests held by a transferor than to future interests given to a third party, or *transferee*. For example, the Rule Against Perpetuities does not apply to a transferor's future interests.

Modern law still tends to disfavor the possibility of reverter and the right of entry. Scholars have long argued that the arcane distinction between these two types of future interests should be abolished, and some courts have adopted this view.[1] More fundamentally, many states have severely curtailed the duration and enforceability of these interests through legislation. The law is slowly moving toward the abolition of both interests.[2]

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[1] *See, e.g.*, Verner F. Chaffin, *Reverters, Rights of Entry, and Executory Interests: Semantic Confusion and the Tying Up of Land*, 31 Fordham L. Rev. 303 (1962); Allison Dunham, *Possibility of Reverter and Powers of Termination—Fraternal or Identical Twins*, 20 U. Chi. L. Rev. 215 (1953); T.P. Gallanis, *The Future of Future Interests*, 60 Wash. & Lee L. Rev. 513 (2003).

[2] For a suggestion that defeasible estates be treated as a form of servitude, rather than as a true estate, see Gerald Korngold, *For Unifying Servitudes and Defeasible Fees: Property Law's Functional Equivalents*, 66 Tex. L. Rev. 533 (1988).

§ 13.02 Types of Future Interests

[A] Reversion

When an owner conveys an estate deemed "smaller" than the estate he holds, he retains a future interest called a *reversion*. Assume O owns fee simple absolute in Brownacre and conveys a life estate to A. A's life estate is a "smaller" estate than O's fee simple absolute because a life estate has a shorter duration than a fee simple; accordingly O has failed to convey his entire estate. Even though the language of O's conveyance does not expressly reserve any future interest in O, it arises as a matter of law: O retains a reversion in fee simple absolute. Once A's life estate ends, O automatically receives fee simple absolute, without taking any action. Similarly, when a fee simple absolute owner conveys another estate that is smaller than fee simple (e.g., fee tail, term of years, or periodic tenancy), she retains a reversion. Fee simple determinable and fee simple subject to a condition subsequent are considered estates equal in quantum to fee simple absolute, and thus create different future interests in the transferor as discussed below.

Complexity arises when an owner creates a series of estates and other interests through a single conveyance, but the inquiry remains the same: has the owner conveyed his or her entire estate? Suppose O conveys Brownacre "to A for life, then to B for life, then to C for life, and then to D and his heirs if D passes the bar, and if D never passes the bar, then to E and his heirs if E passes the bar." O retains a reversion in fee simple absolute here because A, B, and C will all die and neither D nor E may ever pass the bar, and thus O has not transferred his entire estate. If D and E do not pass the bar, Brownacre reverts to O (or, if O has died in the interim, to O's successors). It does not matter that O's reversion is contingent on future events; it is still considered a reversion.

The common law traditionally ranked the size or quantum of each estate, in descending order, as follows: fee simple, fee tail, life estate, and leasehold estates. Thus, for example, if L holding a life estate in Greenacre conveys a term of years tenancy to T, L automatically retains a reversion because L transferred less than her whole estate.

[B] Possibility of Reverter

When a transferor creates a fee simple determinable (*see* § 9.06[C][2]), the future interest retained is a *possibility of reverter*. For example, if O conveys Blueacre "to L for so long as the property is used as an orphanage, and then to me," she has expressly reserved a possibility of reverter.[3] Like the reversion, this future interest may also arise by operation of law merely because O has not conveyed away her entire interest; thus, if O conveys Blueacre "to L for so long as the property is used as an orphanage," O

[3] *See, e.g.,* Mahrenholz v. County Board of School Trustees, 417 N.E.2d 138 (Ill. App. Ct. 1981).

similarly retains a possibility of reverter. Under either example, once L stops using the property as an orphanage, his estate *automatically* ends without any action by O, leaving O with fee simple absolute.[4] L's occupancy of Blueacre thereafter will trigger the statutory period for adverse possession.

[C] Right of Entry

When a transferor creates a fee simple subject to a condition subsequent (*see* § 9.06[C][3]), the future interest retained is most commonly termed a *right of entry;* some authorities call this interest a *right of reentry* or *power of termination.* For example, if O conveys Blueacre "to L but if L fails to use the property as an orphanage, then O may re-enter and retake the premises," she has expressly retained a right of entry.

If L now converts Blueacre into a pornographic movie theater, however, O's right of entry is not automatically transformed into fee simple absolute. In this regard, the right of entry is fundamentally different from its close cousins, the remainder and the possibility of reverter. Holding a right of entry here, O must take affirmative action in order to end L's estate, most commonly by either giving L formal notice or bringing a quiet title action against L. Until and unless O acts, L's estate continues. Logically, then, the statute of limitations period for L to adversely possess against O should not commence until O elects to end L's estate, but the case law on point is divided.

§ 13.03 Transfer of Interest

Consistent with the common law insistence on free alienation of property rights, the reversion is freely transferable. If O holds a reversion in Blueacre, he may convey or devise it; if he dies intestate, it will descend to his heirs.

Yet future interests such as the possibility of reverter and right of entry—which may never become possessory—tend to impair the marketability of the affected land. If L's estate endures only so long as the land is used as an orphanage, for example, L may be unable to sell his rights. Moreover, because the Rule Against Perpetuities does not apply to such interests, they may cloud title for a long time. A paradox arises: should future interests that impair marketability of the underlying estate be freely marketable? The early common law answered this question with a clear "no" for the right of entry.[5] It could be transferred only by intestate succession; thus, if O held a right of entry in Blueacre, he could not devise or convey it. The common law tended to impose the same restrictions on the possibility of reverter, although with less force, presumably because this interest seemed more like a reversion.

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[4] Modern courts tend to construe such forfeiture provisions narrowly, to avoid injustice. *See* § 9.06[E].

[5] 1 American Law of Property § 4.68, at 527–29 (A. James Casner ed., 1952).

Today, in most jurisdictions, both the possibility of reverter and the right of entry are freely transferable; they can be conveyed, devised, and inherited.[6] Some jurisdictions still cling to the restrictive common law approach, but allow these interests to be "released," i.e., conveyed inter vivos to the holder of the defeasible estate.[7]

One final aspect of transferability merits mention. The transfer of a reversion, possibility of reverter, or right of entry by the transferor to a third party does not change the name of the affected future interest. Thus, if O first conveys Blueacre "to L for so long as the property is used as an orphanage," and later conveys his possibility of reverter to M, it remains a possibility of reverter even though it is now held by a third person.

§ 13.04 Other Rights of Interest Holder

[A] General Principles

During the period before a reversion, possibility of reverter, or right of entry becomes possessory, the rights of the holder are quite limited. The issue arises most commonly in two contexts: preventing waste and sharing in eminent domain proceeds.

[B] Preventing Waste

Suppose that O conveys Blueacre "to A for life," thereby retaining a reversion in fee simple absolute. If A now commits waste on Blueacre (for example, by starting a gold mining operation), O's rights as a reversion holder are clear; she can secure damages for past waste and enjoin future waste. On the other hand, if O merely holds a possibility of reverter or right of entry, her ability to prevent waste by A is almost nonexistent. Consistent with the common law's disdain for such tenuous and insubstantial interests, a special waste standard was recognized: the holder of such an interest could only enjoin actions that the prudent owner of a fee simple absolute estate would not have performed.[8] Under this standard, O cannot enjoin A's gold mining.

[C] Right to Eminent Domain Proceeds

Eminent domain decisions reflect a similar split. If the state condemns Blueacre in order to build an airport, O's reversion entitles her to a share of the eminent domain award; of course, the value of O's reversion, and thus

[6] *See, e.g.*, City of Carthage v. United Missouri Bank of Kansas City, 873 S.W.2d 610 (Mo. Ct. App. 1994).

[7] *See, e.g.*, Mahrenholz v. County Board of School Trustees, 417 N.E.2d 138 (Ill. App. Ct. 1981).

[8] *See generally* Powell on Real Property § 65.07[5] (Michael Allan Wolf ed., Matthew Bender). The policies underlying this rule have diminished relevance today. Just as the law increasingly acknowledges the rights of such future interest holders to share in condemnation proceeds, modern courts should empower them to prevent waste.

the size of O's share, turns on the probable length of A's life. Conversely, under the traditional and (still majority) view, one holding a possibility of reverter or right of entry receives no share of eminent domain proceeds. Thus, if O conveys Blueacre "to A for so long as the property is used as an orphanage," and the state now condemns the property for an airport, A receives the entire eminent domain award. O's possibility of reverter is seen as too insubstantial and contingent to merit compensation. The Restatement of Property embraces this rule, except in the rare situation where the event that would terminate the defeasible estate will probably occur within a short period of time.[9]

The movement away from this harsh standard is highlighted by *Ink v. City of Canton.*[10] There, the descendants of Harry Ink conveyed property to Canton, Ohio in fee simple determinable for so long as the land was used as a public park. When the state later condemned most of "Ink Park" for a highway, the grantors' heirs argued that they should be compensated for the loss of their possibility of reverter. The Ohio Supreme Court agreed, reasoning that the eminent domain award represented the fair market value of the property for any use, which was presumably greater than the value of land restricted to park use only. Thus, the court held that the heirs were entitled to the difference between these two values.[11]

§ 13.05 Modern Reforms

Modern legislation in California, New York, and other states imposes severe restrictions on the possibility of reverter and the right of entry. This legislative hostility stems from two basic sources. One concern is fundamental fairness. Enforcement of these interests results in the forfeiture of the defeasible estate, often creating an unanticipated windfall for the interest holder. To paraphrase Oliver Wendell Holmes, the holder of the future interest may feel little or no "wrench" if it is restricted or even invalidated. A secondary concern is that such interests restrict the free alienation of the underlying estate.

These reform statutes usually follow the same basic pattern, though differing in details. First, such an interest will lapse within a specified period of time (usually 20 or 30 years) unless its holder files a notice of intent to preserve the interest; because few interest holders comply with this requirement, most interests will simply end. Second, even when the triggering event occurs that will make the interest possessory, it will not be enforced unless the court finds that the restriction on the fee estate substantially benefits the holder. Thus, if O's great-grandson R now holds the possibility of reverter attached to the fee simple determinable granted

[9] Restatement of Property § 53 cmt. b, c (1936). *See also* City of Palm Springs v. Living Desert Reserve, 70 Cal. App. 4th 613 (1999) (where city, holding defeasible estate in desert land, sought to condemn power of termination held by third party, the city's action made a violation of the restriction imminent; third party was accordingly entitled to compensation).

[10] 212 N.E.2d 574 (Ohio 1965).

[11] *See also* Leeco Gas & Oil Co. v. County of Nueces, 736 S.W.2d 629 (Tex. 1987) (following *Ink* approach).

above to L "for so long as the property is used as an orphanage," R's interest will not become possessory unless R can establish that continuation of the orphanage restriction substantially benefits him. In most cases, the holder will be unable to meet this standard. Finally, many states impose relatively short statutes of limitations on actions to enforce the rights of the future interest holder. In Colorado, for example, suit must be brought within one year from the date of the triggering event.[12]

[12] Johnson v. City of Wheat Ridge, 532 P.2d 985 (Colo. Ct. App. 1975).

Chapter 14

FUTURE INTERESTS HELD BY THE TRANSFEREE

SYNOPSIS

§ 14.01 An Intricate Common Law Maze

Suppose O, holding fee simple absolute in Blueacre, transfers a possessory estate to his daughter A and the accompanying future interest to his son B. Under the common law approach to classifying future interests, B is deemed a *transferee*—a third party who receives a future interest from the transferor.

The common law principles governing future interests held by transferees reflect the internal tensions of sixteenth-century English society, as discussed in Chapter 12. Landowners fought for the unfettered right to create future interests in their family members and other transferees, in order

to control future events, perpetuate family wealth, and avoid taxation. Mercantile interests fought to limit such interests—particularly "contingent" interests—in order to encourage the productive use of land and thus maximize societal wealth. The Crown supported efforts to limit these future interests and thereby facilitate taxation. The intricate maze of rules and doctrines that resulted from this struggle may be broadly described as a compromise: future interests in transferees were permitted, but restricted. Contingent future interests were particularly restricted through doctrines such as the Rule Against Perpetuities, the Rule in Shelley's Case, the Doctrine of Worthier Title, and the destructibility of contingent remainders.

Precise classification of future interests was essential to the operation of this system, because different types of interests were restricted in different ways. The Doctrine of Worthier Title, for example, affected remainders but not executory interests. And the Rule Against Perpetuities might invalidate a contingent remainder, a vested remainder subject to open, or an executory interest, but not other interests.

Are these common law rules governing future interests in transferees still relevant today in the United States? The answer is a qualified "yes." Reform efforts in recent decades have somewhat simplified the traditional system, and this is the modern trend.[1] The basic system for classifying future interests remains intact in most states, but the importance of precise classification is diminishing. Why? The law has largely abandoned the archaic restrictions imposed on future interests held by transferees. The Rule Against Perpetuities lingers, although most states have simplified it by statute. Ironically, England—the originator of our intricate common law system—abandoned it in the early twentieth century.

§ 14.02 Classifying Future Interests Held by the Transferee

The traditional common law recognizes only two broad categories of future interests that can be held by a transferee: the *remainder* and the *executory interest*. There are four types of remainders and two types of executory interests. Thus, if a transferee holds a future interest, it must be one of the following six types:

(1) indefeasibly vested remainder;

(2) vested remainder subject to divestment;

(3) vested remainder subject to open;

(4) contingent remainder;

(5) springing executory interest; and

(6) shifting executory interest.

One of the confusing features of this system is that the identity of a transferee's future interest may *change* over time as events unfold. A future interest that is initially a vested remainder subject to open, for example,

[1] *See* T.P. Gallanis, *The Future of Future Interests*, 60 Wash. & Lee L. Rev. 513 (2003).

might become an indefeasibly vested remainder. Or a contingent remainder might be transformed into an executory interest. Other changes are similarly possible. Thus, one must constantly reassess whether a particular future interest still fits within its assigned label.

§ 14.03 Remainders

[A] Remainders in Context

Early English law barred the creation of a future interest in any transferee until a thirteenth-century breakthrough: judicial acceptance of the indefeasibly vested remainder. Suppose O conveyed Blueacre in 1290 "to A for life, then to B and his heirs." B held an indefeasibly vested remainder, that is, a future interest in an ascertainable transferee that was certain to become possessory upon the natural expiration of the prior estate, here A's life estate.

Yet the doctrine of seisin hindered any extension of the remainder beyond this point. The common law required that seisin be vested at all times in an identifiable person. A remainder could not be created in an unascertainable person or group, nor could a remainder be subject to any condition, because this created the risk that when the prior estate ended the future interest holder might be unascertainable; this would cause a gap in seisin. As the feudal system declined, the importance of seisin waned and landowners sought new methods of imposing future restrictions on their lands. The stage was set for the development of new future interests in transferees.

The sixteenth century brought revolutionary change. New types of remainders arose, including remainders held by unascertainable persons and remainders subject to a wide range of conditions. And the Statute of Uses effectively created an entirely different type of future interest: the executory interest. These new future interests injected a large dose of uncertainty into a relatively stable and predictable system.

[B] What Is a Remainder?

[1] Basic Definition

The formal definition of a remainder is simple to recite, but often difficult to apply.[2] A *remainder* is a future interest created in a transferee that is capable of becoming a possessory estate upon the natural termination of a prior estate created by the same instrument.[3] Any future interest in a

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[2] For general discussion of remainders, see Jesse Dukeminier, *Contingent Remainders and Executory Interests: A Requiem for the Distinction*, 43 Minn. L. Rev. 13 (1958); Jesse Dukeminier, *The Uniform Probate Code Upends the Law of Remainders*, 94 Mich. L. Rev. 148 (1995); Edward C. Halbach, Jr., *Creditors' Rights in Future Interests*, 43 Minn. L. Rev. 217 (1958).

[3] *See generally* Restatement of Property § 156(1) (1936) (defining a remainder as "any future interest limited in favor of a transferee in such manner that it can become a present interest upon the expiration of all prior interests simultaneously created, and cannot divest any interest

possessory estate created in a transferee other than a remainder is an *executory interest* (*see* § 14.04).

This pithy definition of a remainder includes three components. First, the future interest must be *created in a transferee*, not retained by the transferor. Accordingly, an instrument that creates a future interest in the transferor (e.g., O's conveyance "to A for life" impliedly creates a future interest in O) does not create a remainder.

Second, both the remainder and a "prior" estate must be created by the *same instrument*, either a deed, trust, or will. Thus, for example, if an instrument merely creates a future interest (e.g., "to A if B ever smokes cigars"), it cannot be a remainder.

Finally, a remainder must be *capable of becoming a possessory estate when the prior estate naturally ends*. A remainder waits patiently for the prior estate to naturally terminate. It cannot "divest" or "cut short" the prior estate. Thus, a remainder can only follow a life estate (by far the most common estate associated with the remainder), a fee tail (where still recognized), or a term of years. Why? A fee simple estate—whether absolute or defeasible—has no natural termination point; it may endure indefinitely. So, for example, if a deed creates a future interest after a defeasible fee simple (e.g., "to A and his heirs, but if A ever smokes, then to B"), it cannot be a remainder. Rather, if A smokes, then B's future interest will "cut short" or "divest" A's estate to become a possessory estate. Thus, B has an executory interest.

There can be no time gap between the end of the prior estate and the point when the remainder becomes possessory. Suppose O conveys Blueacre "to A for life, and 10 minutes after A's death, to B and his heirs." B's interest is not "capable" of becoming a possessory estate at the very instant when A's life estate ends. So what happens? Here O effectively retained a reversion. When A dies, O acquires a fee simple estate, at least for 10 minutes. Because B's interest "cuts short" O's estate, B holds an executory interest.

[2] Application of Definition to Example

Suppose A conveys Blackacre "to B for life, and then to C and his heirs." B obviously receives a life estate under this conveyance. But what is C's interest? A series of logical steps provides the solution.

Because C does not have the right to present possession of Blackacre, he must hold some type of future interest. Further, this future interest was not created in the transferor (A), but rather in a transferee (C). Because C is a transferee, his interest must be either a remainder or an executory interest; these are the only two types of future interests that can be created in a transferee.

except an interest left in the transferor"). *But cf.* Abbott v. Holway, 72 Me. 298 (1881) (refusing to construe a deed to create a remainder in the grantee and a reserved life estate in the grantor where the deed expressly provided that it took effect only upon the grantor's death).

Now the remaining portions of our definition come into play. Is C's interest capable of becoming a possessory estate upon the natural termination of a prior estate created by the same instrument? Yes. B's life estate is a prior estate created by the same deed that created C's interest. The verb "conveys" connotes a transfer by deed, and the quoted language makes it clear that both were created by the same deed. Finally, C's future interest can become a present estate upon the natural termination of B's life estate. When B dies, his life estate ends, and C's future interest will automatically be transformed into a possessory estate: fee simple absolute. Thus, C holds a type of remainder—more precisely, an indefeasibly vested remainder in fee simple absolute.

[C] Types of Remainders

[1] Four Types

The common law distinguished between two basic categories of remainders: the *vested remainder* and the *contingent remainder*. It further divided the universe of vested remainders into three subcategories. Thus, there are only four types of remainders:[4]

(1) indefeasibly vested remainder (often loosely abbreviated as "vested remainder");

(2) vested remainder subject to divestment (sometimes called a "vested remainder subject to complete defeasance");

(3) vested remainder subject to open (sometimes called a "vested remainder subject to partial divestment"); and

(4) contingent remainder.

The traditional rules used to classify remainders depend heavily on the *exact* language of the devise or conveyance involved. For example, the wording differences between a contingent remainder and a vested remainder subject to divestment are often very slight. If O conveys "to S for life, then to T and his heirs if T survives S, and if not then to U and his heirs," T has a contingent remainder. But if O conveys "to S for life, then to T and his heirs, but if T does not survive S, then to U and his heirs," T holds a vested remainder subject to divestment.

[2] Vested Remainders

[a] In General

A vested remainder is a remainder that is (a) created in a living, ascertainable person and (b) not subject to any condition precedent (except

[4] In addition, a vested remainder could be *both* subject to open and subject to divestment. Suppose O conveys "to A for life, and then to the children of B and their heirs, but if any child of B fails to reach age 21, then that child's share shall go to the children of B who reach age 21 and the heirs of those children." At the time, B has one child, five-year-old C. C's vested remainder is subject to open (because later children of B might be born) and also subject to divestment (if C dies before age 21 and B has at least one other child who reaches age 21).

the natural termination of the prior estate).[5] John Chipman Gray's classic definition of the vested remainder expresses the same thought in slightly different language: a remainder is "vested if, at every moment during its continuance, it becomes a present estate, whenever and however the preceding freehold estates" terminate.[6] Any other remainder is, by definition, a contingent remainder.

All other things being equal, the common law favored the vesting of remainders.[7] Thus, courts traditionally construed an ambiguous remainder as vested, not contingent. Modern courts have eroded this rule of construction, but it remains the majority view.[8]

[b] Indefeasibly Vested Remainder

The hallmark of the *indefeasibly vested remainder* is certainty: the identity of the holder is certain and the remainder is certain to become a possessory estate.[9] In other words, an indefeasibly vested remainder is a remainder in a presently identifiable person that is not subject to any condition or limitation.

For example, if A conveys Greenacre "to B for life, then to C and her heirs," C's remainder will someday become fee simple absolute. The holder of the interest is a known person, C. No future event can intervene to stop C's remainder from becoming an estate. B, being mortal, will inevitably die, and her life estate will terminate. C (or whoever then holds C's remainder) will own fee simple absolute in Greenacre. Why? The answer lies in the language of A's conveyance: A did not impose any condition or limitation on C's remainder. C's remainder is ready to become a present estate whenever B's life estate ends.

What if C dies before B? Or what if C never has any "heirs"? Under the language of A's conveyance, neither event has any effect on the remainder. If C dies before B, C's devisees or heirs take the remainder; and if C dies without devisees or heirs the remainder will escheat to the state. Note that A could have imposed a condition on the remainder (e.g., "to B for life, and then to C and her heirs if C is then alive") if she wished to do so.

Suppose A conveys Greenacre "to B for life, then to C for life, and then to D and his heirs." English common law classified C's interest as an indefeasible vested remainder for life. Yet, arguably C's remainder is not certain to become possessory, because C might die before B; this would nullify C's life estate. For this reason, some authorities—notably the

[5] *See generally* Kost v. Foster, 94 N.E.2d 302 (Ill. 1950) (discussing distinction between vested remainder and contingent remainder); *see also* Edward H. Rabin, *The Law Favors the Vesting of Estates. Why?*, 65 Colum. L. Rev. 467 (1965).

[6] John C. Gray, The Rule Against Perpetuities § 9, at 6 (4th ed. 1942).

[7] *In re* Estate of Houston, 201 A.2d 592 (Pa. 1964).

[8] Browning v. Sacrison, 518 P.2d 656 (Or. 1974).

[9] *See* Restatement of Property § 157 cmt. f (1936) (defining the indefeasibly vested remainder).

Restatement of Property[10] —take the position that C merely has a vested remainder for life subject to complete divestment.

[c] Vested Remainder Subject to Divestment

The *vested remainder subject to divestment* is simply a vested remainder that is subject to a condition subsequent. In other words, the identity of the interest holder is certain and the remainder is certain to become a possessory estate, *unless* some specified event occurs. If the specified future event occurs, the remainder is extinguished. Assume A conveys Greenacre "to B for life, then to C and her heirs, but if C ever smokes a cigar during B's lifetime, then to D." C clearly has a type of vested remainder, because C is ascertainable and her interest is not subject to a condition precedent. C's remainder is immediately ready to become possessory whenever B's life estate ends. However, if C ever smokes a cigar during B's life, her remainder will be automatically terminated or *divested*. C holds a vested remainder subject to divestment.

The distinction between a *condition precedent* and a *condition subsequent* is critical in the classification of remainders. This is particularly true in distinguishing between the vested remainder subject to divestment, on the one hand, and the contingent remainder, on the other.

A condition precedent is an event (other than the natural termination of the prior estate) that, according to the creating language, must occur *before* the remainder can become a possessory estate. Suppose O devises Greenacre "to A for life and then, if B reaches age 21, to B and his heirs." The location of this age condition is crucial. Here the condition of B reaching 21 is intertwined with the language that makes the gift, and thus is a condition precedent to the gift. B's remainder here is not vested because it cannot "at every moment" become a present estate when the prior estate (A's life estate) ends. B's remainder is not ready to become a present estate *until* B reaches 21. B has a contingent remainder.

But suppose the devise reads "to A for life, and then to B and his heirs, but if B does not reach age 21, then to C and her heirs." In this second version, O's language first makes a completed gift to B, and then *adds on* a later (or *subsequent*) condition in another clause. This language would create a condition subsequent. Under the common law view, B's remainder is vested because it is fully able "at every moment" to become possessory when A's life estate ends *unless* B has not yet then reached 21. B has a vested remainder subject to divestment.

[d] Vested Remainder Subject to Open (or Subject to Partial Divestment)

The *vested remainder subject to open* is a vested remainder in one or more ascertainable members of a class that may be enlarged by the addition of presently unascertainable persons. The identity of the interest holder is certain and the remainder is certain to become a possessory estate; but the

[10] Restatement of Property § 157 (1936).

size of the holder's *share* in the estate is *uncertain*. If more interest holders are identified, the size of each share will diminish. This interest arises most commonly in gifts to classes described as a particular person's "children," "grandchildren," "great-grandchildren," or "issue."

Suppose A conveys Greenacre "to B for life, then to the children of C and their heirs." If at that time C has only one living child, D, then D has a vested remainder subject to open. D's remainder is vested because D is immediately ascertainable and her interest is not subject to a condition precedent. D's remainder cannot be entirely extinguished because it is not subject to any condition. However, the size of D's interest may shrink if additional "children of C" are born in the future. As long as C is still alive, the class of "children of C" is still "open," meaning that additional members may join the class. If C has additional children, each will receive a vested remainder subject to open. For example, if C has two more children (E and F) before his death, then each child (D, E, and F) will hold a one-third share in fee simple absolute in Greenacre upon B's death.

[3] Contingent Remainders

As its name suggests, the hallmark of the contingent remainder is an element of uncertainty or chance. A remainder is contingent if it is either: (a) subject to a condition precedent (other than the natural termination of the prior estate) or (b) created in an unascertainable person. Either way, it is not ready to become a possessory estate whenever the prior estate terminates. The vested remainder is like an open door, ready to allow its holder access to the present estate in an adjoining room. But the contingent remainder door is closed, unless and until the condition precedent is met or the holder is identified.

A remainder subject to a condition precedent is considered contingent because it is not ready to become a possessory estate *until* the event occurs. For example, suppose O devises Greenacre "to K for life, and then to L and his heirs if L reaches the age of 21." L is ascertainable. But if L is now 10, his remainder is subject to a condition precedent. An event must occur—L must reach age 21—*before* his remainder is eligible to become possessory upon K's death. This specified event may or may not occur; if L dies at age 11, for example, his remainder will automatically end and thus never become possessory. Ten-year-old L now holds a contingent remainder.

Similarly, a remainder created in an unascertainable person is deemed contingent, even if it is certain to become a possessory estate. Assume O devises Greenacre "to K for life, and then to K's heirs." It is impossible to determine who K's heirs are until K dies (*see* Chapter 28). A living person, after all, has no heirs. Because "K's heirs" are now unascertainable, "they" hold a contingent remainder.

[D] Examples of Remainders

The following illustrative conveyances and devises create remainders:

O conveys Greenacre "to A for life, then to B for life, then to C and her heirs." B holds an indefeasibly vested remainder for life, that is, in a life estate. C holds an indefeasibly vested remainder in fee simple absolute. Why? Both interests are remainders because both are capable of becoming possessory on the natural expiration of the prior life estate, without cutting that estate short. Both remainders are indefeasibly vested because (1) the holder of each is known (B and C, respectively) and (2) neither is subject to any condition or limitation.

O devises Greenacre "to A for life, and if B survives A, then to B and his heirs." B holds a contingent remainder in fee simple absolute. B's interest is capable of becoming possessory when A's life estate ends, and hence is a remainder. But B's remainder is subject to a condition precedent; B must first survive A before his remainder is ready to become a possessory estate. Thus, it is a contingent remainder.

O conveys Greenacre "to A for life, then to B and his heirs, but if B does not survive A, then to C and her heirs." B holds a vested remainder subject to divestment in fee simple absolute. B's remainder is vested because B is identifiable and no condition precedent must be met before the remainder takes effect, other than the natural expiration of A's life estate. But if a future event occurs (B dies before A), then B's remainder will be destroyed or divested. C's interest is not a remainder, but rather an executory interest in fee simple absolute.

O devises Greenacre "to A for life, then to the children of B who survive A and their heirs." Assuming A is alive, the class of "the children of B who survive A" have a contingent remainder in fee simple absolute. It is contingent because (a) the holders are presently unascertainable and (b) the interest of each holder is subject to a condition precedent (surviving A).

O conveys Greenacre "to A for life, then to A's children and their heirs." If A has a living child at the time of the conveyance, B, then B holds a vested remainder subject to open in fee simple absolute. The remainder is vested because B is identifiable and there is no condition precedent. However, assuming A is still alive, then additional children of A might be born and expand the class of "A's children," so the remainder is subject to open.

[E] Transformation into Other Future Interests

Events may automatically transform a remainder into another type of remainder or even into an executory interest. The classification of a remainder must be constantly reassessed in the light of developing events.

For example, events might transform a contingent remainder into a vested remainder. Suppose O devises Greenacre "to K for life, and then to L and his heirs if L reaches the age of 21." Assuming that L was 10 years old when the devise became effective, he held a contingent remainder

because his interest was subject to a condition precedent. What happens if K is still alive when L reaches 21? Once this specified condition is fulfilled, the nature of L's remainder changes. No longer subject to the condition, his interest is now an indefeasibly vested remainder.

Similarly, a vested remainder subject to open might become an indefeasibly vested remainder. Assume O devises Greenacre "to K for life, then to L's children and their heirs." When O's will becomes effective, L is alive and has one living child, M. M holds a vested remainder subject to open. But if L now dies without having any additional children, M's interest becomes an indefeasibly vested remainder. Why? Here the "open" class of potential children of L "closes" when L dies;[11] after L is dead, he cannot have additional children. M is the only possible remainderman.

[F] Significance of the Contingent vs. Vested Distinction

The distinction between the contingent remainder and the vested remainder—once critically important—has eroded in recent decades. There is a clear trend toward equating the contingent remainder and the vested remainder subject to divestment, which in turn suggests that the general distinction may similarly evaporate over time.

Traditionally, the contingent remainder received far less legal protection than the vested remainder. For example: (1) the contingent remainder could not be alienated, while the vested remainder was freely alienable; (2) the contingent remainder was "destructible," meaning that it was destroyed if it failed to vest before the termination of the prior estate, while the vested remainder survived; and (3) the contingent remainder might be invalidated by the Rule Against Perpetuities, while most vested remainders were immune from application of the Rule.[12]

Modern law increasingly accords the same protection to both types of remainders. For example: (1) both are freely alienable in most states (*see* § 14.07) and (2) with the demise of the destructibility doctrine, neither is destructible (*see* § 14.14). The main lingering difference in substance between the two is the Rule Against Perpetuities; the Rule still applies to contingent remainders, not vested remainders (*see* §§ 14.10, 14.11). However, because reform legislation has softened the common law version of the Rule in most jurisdictions, this difference is less significant than in the past.

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[11] A class "closes" upon the first of two alternative events: (1) when no new members can be added to the class (e.g., a class defined as the "children of K" closes when K dies); or (2) under the "rule of convenience," when any class member is entitled to receive possession of his share and the prior estate ends.

[12] In addition, the holder of a vested remainder might receive possession sooner, under the principle of acceleration. Assume O devises Greenacre "to A for life, then to B and her heirs, but if B fails to graduate from law school, then to C and his heirs." If A dies while B is still in college, B's vested remainder subject to divestment allows her immediate possession of Greenacre. It "accelerates" into possession. What if O had devised Greenacre "to A for life, then to B and her heirs if B graduates from law school" and A dies while B is still in college? Here B holds a mere contingent remainder. She is not entitled to possession until the condition precedent (graduation from law school) is met.

§ 14.04 Executory Interests

[A] Executory Interests in Context

The lineage of the executory interest can be traced back to the use, a device which arose in thirteenth-century England. In this era, there was only one legal future interest that could be created in a transferee: the remainder. An owner could not create a future interest in a transferee that would cut short a present estate. Suppose O tried to convey Redacre "to B and his heirs, but if B inherits Greenacre, then to C and his heirs." C's interest is not a remainder, because it must divest or cut short B's estate; if C's interest did not exist, B's estate would continue in existence and descend to his heirs. Thus, C's interest was invalid at common law.

In this environment, creative medieval attorneys developed the *use*. Like the modern trust, the use separated the *legal title* to property from the *benefits* of holding title. Suppose now O conveys Redacre "to A and A's heirs, for the use of B and B's heirs, but if B inherits Greenacre, then to the use of C and C's heirs." A holds legal title, while the beneficial interests are split between B and C. Although the law courts would not recognize C's interest, it was enforceable in *equity*. If B inherited Greenacre, the equity courts would require A to honor his obligations to C, even though C's interest divests B's estate.

In practice, the use functioned as an early tax loophole: the beneficiary of the use did not hold legal title and thus was not obligated to provide feudal incidents to the lord. The use was so advantageous that, by the early 1500s, most English land was held in this manner. Confronting a financial crisis, King Henry VIII forced Parliament to enact the Statute of Uses, which took effect in 1536. This statute converted the use into a "legal" future interest—one recognized at common law and thus subject to the jurisdiction of the law courts—which accordingly made its holder liable for providing feudal incidents. The new interest was called an *executory interest*.

[B] What Is an Executory Interest?

An *executory interest* is a future interest created in a transferee that must "cut short" or "divest" another estate or interest in order to become a possessory estate.[13] It is more common to define the executory interest by comparing it to the remainder: an executory interest is any future interest created in a transferee other than a remainder (*see* § 14.03[B]).[14]

An executory interest may divest an estate, almost always a fee simple or a life estate. Assume O conveys Blackacre "to B and his heirs, but if C returns from France, then to C and her heirs." Under what circumstances

[13] *See generally* Restatement of Property § 158 (1936); *see also* John Makdisi, *The Vesting of Executory Interests*, 59 Tul. L. Rev. 366 (1984).

[14] *See, e.g.*, Capitol Fed. Sav. & Loan Ass'n v. Smith, 316 P.2d 252 (Colo. 1957) (invalidating racially-restrictive executory interest held by neighbors).

can C's future interest become a possessory estate? B's defeasible fee simple estate has no natural termination point; it may potentially endure forever. In order to become a possessory estate, C's interest must cut short B's estate.

Due to a historical anomaly, the future interest following a determinable estate is also considered an executory interest. If O conveys Blackacre "to B and his heirs for so long as C remains in France, and then to C and his heirs," C's interest is deemed an executory interest even though it follows what might be described as the natural end of B's fee simple determinable.

Alternatively, an executory interest may divest a vested future interest. Suppose O conveys Blackacre "to A for life, then to B and his heirs, but if C returns from France, then to C and her heirs." B receives a vested remainder subject to divestment in fee simple absolute. In order for C's interest to become a possessory estate, it must divest B's remainder. Thus, C holds an executory interest. As a general rule, if one instrument creates (a) a vested remainder in fee simple in one transferee that is (b) followed by a second future interest in another transferee, the second interest is an executory interest.

[C] Types of Executory Interests

[1] The Basic Distinction

It is both traditional and convenient to distinguish between two categories of executory interests: the *shifting executory interest* and the *springing executory interest*. The difference between the two types hinges on the identity of the person whose estate or interest is divested. However, this distinction has no legal significance.

[2] Shifting Executory Interest

A shifting executory interest is simply one that divests another transferee. Assume O conveys Blackacre "to B and his heirs, but if C returns from France, to C and her heirs." C holds a shifting executory interest because it would cut short the fee simple estate held by B, another transferee.

[3] Springing Executory Interest

A springing executory interest, in contrast, is one that divests the transferor, following a gap in time during which no other transferee has the right to possession. Suppose O conveys Blackacre "to C and her heirs, if C returns from France." In order to become possessory, C's interest must "cut short" the estate held by O, the transferor. C has a springing executory interest.

[D] Examples of Executory Interests

The following illustrative conveyances and devises create executory interests.

O conveys Greenacre "to A and her heirs upon the birth of A's first child." A holds a springing executory interest in fee simple absolute. If a child of A is born, then A's interest will automatically become a possessory estate, which will divest or cut short O's prior estate.

O devises Greenacre "to A and her heirs, but if A becomes an attorney, then to B for life." B holds a shifting executory interest for life, that is, in a life estate. B's interest becomes possessory only if an event occurs (A becomes an attorney) that cuts short A's defeasible fee simple. Note that O retains a reversion following the expiration of B's life estate.

O conveys Greenacre "to A for life, then to B and his heirs, but if C gets married, then to C and her heirs." C holds a shifting executory interest in fee simple. C's interest becomes a possessory estate only if an event occurs (C gets married) that divests or cuts short B's interest.

O devises Greenacre "to A for life, then five years after her death, to B and his heirs." B holds a springing executory interest in fee simple absolute. B's interest is not capable of becoming possessory upon the expiration of A's life estate. The devise creates a gap—a five-year period that must expire before B's interest becomes possessory. During the gap, O holds title and thus in order to take, B must divest O's prior estate.

§ 14.05 Consequences of the Distinction Between Remainders and Executory Interests

At common law, the distinction between remainders and executory interests was quite important. Two examples illustrate the point. Contingent remainders were destroyed if they failed to vest when the prior freehold estate ended (*see* § 14.14), while executory interests remained intact. Similarly, the infamous Rule in Shelley's Case (*see* § 14.13) applied to remainders, but not to executory interests. Thus, the legal rights of an owner varied dramatically depending on how his or her interest was classified.

However, the legal significance of this distinction has melted away over the centuries with the demise of the destructibility of contingent remainders, the Rule in Shelley's Case and related doctrines.[15] In almost all jurisdictions, the contingent remainder holder and the executory interest holder have the same general rights and obligations. As the difference between vested and contingent remainders continues to erode (*see* § 14.03[F]), the distinction between remainders and executory interests will similarly dwindle.

The distinction between remainders and executory interests persists today in part as a customary method for labeling future interests. But there is a trend toward eliminating even this usage. Statutes in California, New York, and certain other states have consolidated both types of interests into a single category, called a remainder.[16]

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[15] *See generally* Jesse Dukeminier, *Contingent Remainders and Executory Interests: A Requiem for the Distinction*, 43 Minn. L. Rev. 13 (1958).

[16] Cal. Civ. Code § 769; N.Y. Est. Powers & Trusts Law § 6-3.2.

§ 14.06 Creation of Interests

Future interests may arise by implication in a transferor, but not in a transferee. Suppose O, owning Blueacre in fee simple absolute, conveys Blueacre "to A for life." Because O has failed to convey her entire interest, she retains a reversion. O's reversion arises by implication, not by language that expressly creates a reversion. It is not necessary for O to convey Blueacre "to A for life, and then to me." On the other hand, if O wishes to create a future interest in a transferee, she must do so by *express* language. e.g., "to A for life, then to B." Remainders and executory interests cannot arise by implication.

The only permissible birthplace for a remainder or executory interest in real property is either a will or a deed. These future interests cannot be created through the process of intestate succession; rather, they arise only from the voluntary decision of an owner. Moreover, this decision must be embodied in a written instrument—either a will or deed—pursuant to the Statute of Wills and Statute of Frauds, respectively. Remainders and executory interests in real property held in trust are governed by the same standards; the testamentary trust arises only through a will, while the Statute of Frauds requires a deed to transfer real property into an inter vivos trust.

The rules governing the creation of remainders and executory interests in personal property are somewhat more flexible. Of course, these interests can be created only through express language, not implication, and may arise in a will or deed. But—because the Statute of Frauds does not apply to personal property—such interests may be created orally (e.g., through an oral declaration of an inter vivos trust in personal property).

§ 14.07 Transfer of Interests

[A] Toward Free Transferability

Remainders and executory interests may be freely transferred by devise, descent, or conveyance in most states. Only one obstacle impairs progress toward a uniform national rule of free transferability: the lingering insistence of some states that contingent remainders and executory interests may not be transferred by an inter vivos conveyance.

[B] Vested Remainders

Under both traditional English common law and modern law, the vested remainder is freely transferable through devise, descent, or inter vivos conveyance. Thus, if O conveys Blueacre "to A for life, then to B and her heirs," B has an unfettered right to transfer her vested remainder, just as if she held fee simple absolute. Suppose, however, O conveys Blueacre "to A for life, then to B for life, then to C and her heirs," and B dies before A. Once B dies, her vested remainder for life is extinguished, although it was fully transferable during her life.

[C] Contingent Remainders and Executory Interests

Contingent remainders and executory interests can—in general—be freely transferred by devise or descent. Assume O conveys Blueacre "to A for life, then to B and his heirs if C returns from Canada." B dies before C returns from Canada. B's contingent remainder will pass either by devise to his devisees or by descent to his heirs. On the other hand, conditions or limitations imposed on the interest by the transferor may preclude transfer. For example, if O conveys Blueacre "to A for life, then to B and his heirs if B survives A," B's contingent remainder is extinguished if B dies before A.

The more difficult problem is whether contingent remainders and executory interests can be transferred while the holder is still alive. The sixteenth-century English courts that first recognized these new interests viewed them as mere possibilities or expectancies, not presently existing legal rights. Moreover, English courts were generally hostile to these interests, in large part due to their potential to impair marketability of land title. Probably for both reasons, the rule developed that contingent remainders and executory interests were inalienable. As a logical corollary of the rule, creditors could not reach such interests to satisfy their claims against the holder. Predictably, over time, a series of exceptions eroded the prohibition on transfer. One holding a contingent remainder in real property could, for example, release it to the person in possession of the land; and the doctrine of estoppel by deed (*see* § 23.09) allowed sophisticated parties to circumvent the rule.

Under modern law, contingent remainders and executory interests are freely transferable in almost all states.[17] Although the law is clearly moving toward a uniform standard of free transferability, scattered traces of the common law ban remain. These remnants are typically encountered in older decisions in a handful of jurisdictions that have not recently considered the issue. For example, case law in some states permits inter vivos transfer of contingent future interests that are conditioned on an *event*, but prohibits the transfer of interests conditioned on the identity of a *person*. A few states still appear to follow the common law rule, as modified by the traditional exceptions.

§ 14.08 Other Rights of Interest Holders

[A] General Principles

The common law traditionally accorded greater protection to the holder of a vested remainder than to the owner of a contingent remainder or executory interest. Modern law still partially reflects this disparity as evidenced in two settings: remedies for waste and shares in eminent domain proceeds.

[17] *See generally* Restatement of Property §§ 162, 163 (1936) (endorsing this approach).

[B] Rights re Waste

Suppose O conveys Blueacre "to A for life, then to B and his heirs," and A subsequently commits waste by starting a gold mining operation on Blueacre. As the holder of an indefeasibly vested remainder, B's rights are adequate to protect his interest; he may recover compensatory damages for past waste and enjoin future waste. The law safeguards B's vested remainder because it is certain to become a possessory estate, and it is accordingly logical to limit A's conduct.[18]

By contrast, little protection against waste is accorded to uncertain future interests, based on the rationale that they are less likely to become possessory estates. Thus, contingent remainders enjoy only minimal protection, while executory interests receive even less. Assume O conveys Blueacre "to A for life, then to B and his heirs if B survives A," and A starts mining gold on the land. English common law developed the rule, still followed today, that the holder of a contingent remainder cannot recover damages for waste committed by a life tenant. Thus, B cannot sue A for damages. Equity mitigated this harsh rule by allowing the contingent remainder holder to enjoin future waste, unless the remainder was highly unlikely to become possessory. Here, B could enjoin future mining by A.

But if B merely holds an executory interest, he has virtually no remedy against waste. Now suppose O conveys Blueacre "to A and her heirs, but if oil is discovered on the land, then to B and his heirs." At common law, the holder of a mere executory interest could not obtain damages for waste. Because modern courts still adhere to this principle, B cannot recover damages if A begins mining gold on the land. Equity did permit the holder of an executory interest to enjoin waste, but only under restrictive conditions: (a) there must be a reasonable possibility that the interest will become possessory, and (b) an injunction will issue only if a prudent owner of a fee simple estate would not have performed the actions at issue. B cannot establish either criterion here and accordingly cannot enjoin A's mining.

[C] Right to Eminent Domain Proceeds

If the state uses its eminent domain power to take land, do future interest holders receive a share of the proceeds? The holder of a vested remainder certainly has this right. At one time, contingent remainders and executory interests were viewed as too insubstantial and tenuous to justify any share in eminent domain proceeds. Although this view may linger in some jurisdictions, most modern courts allow holders of such interests to share in an eminent domain award, unless the interest is highly unlikely to become possessory.

The traditional judicial reluctance here probably stems in part from the practical difficulties of valuing future interests that may never become

[18] *See* Woodrick v. Wood, 1994 Ohio App. LEXIS 2258 (recognizing right of remainder holder to enjoin waste in theory, but finding no waste on facts).

possessory. One solution to this dilemma is simply to transfer the proceeds into a trust, which is administered according to the respective rights the parties originally held in the land. Under this approach, the estate holder receives all income from the trust until and unless the future interest becomes possessory; at this point, the trust ends and the principal is distributed to the future interest holder. The trust could also end if it becomes clear that the future interest can never become possessory, in which event the principal would be paid to the estate holder.

§ 14.09 Four Special Restrictions on Contingent Future Interests Held by Transferees

The evolution of the estates in land system in England culminated in a remarkable burst of sixteenth-century creativity. After steadfastly refusing to permit contingent future interests in transferees, the common law rapidly endorsed both the contingent remainder and the executory interest. Landowners could now create future interests to tie up their lands virtually forever, preserving family wealth from both taxation and the risks of an uncertain future.

Yet these new interests posed very real dangers. Land burdened with "uncertain" future interests was relatively inalienable. It was readily foreseeable that as the use of these contingent interests spread, the supply of freely alienable land would decrease. Consequently, land could not be devoted to its optimum productive uses. A sheep pasture suitable for use as a brickyard, for example, might be burdened by future interests held by unknown (and even unborn) persons; because the estate holder could not transfer fee simple absolute to the potential brickyard entrepreneur, the land would be locked into the less socially-valuable use of grazing.

The resulting inalienability also tended to perpetuate the power and wealth of landowning families; land burdened with these interests was often unsuit-able as security for debt—much like land held in fee tail—and thus was less likely to be lost to creditors than land held in fee simple absolute. If thousands of parcels like the sheep pasture were similarly rendered inalienable, England's expanding mercantile economy would suffer. At the same time, these new contingent interests had the practical effect of evading taxes—in the form of feudal incidents—which increasingly were owed directly to the Crown. Mercantile forces, the Crown, and other segments of English society accordingly sought limitations on these newly-authorized contingent interests.

In response, the common law recognized four doctrines designed to restrict contingent future interests held by transferees:

(1) the Rule Against Perpetuities (*see* § 14.10),

(2) the Doctrine of Worthier Title (*see* § 14.12),

(3) the Rule in Shelley's Case (*see* § 14.13), and

(4) the destructibility of contingent remainders (*see* § 14.14).

The overall result was a delicate compromise between individual property rights and overall social welfare: contingent future interests in transferees

were allowed, but restricted. The new United States inherited this compromise system.

Today this intricate system has largely collapsed. The Doctrine of Worthier Title, the Rule in Shelley's Case, and the destructibility of contingent remainders are virtually obsolete in the United States.[19] Although the Rule Against Perpetuities lingers, modern reforms have diminished its impact.

What accounts for the demise of the common law approach? One major factor is enhanced concern for protecting the private property rights of landowners against legal doctrines that frustrate their intent. Another factor is found in the relative ease by which sophisticated attorneys could circumvent the traditional restrictions through drafting; this converted them from tools that protected the marketability of land into traps for the unwary drafter. A third factor is quite practical: legal future interests in land are rarely created today in transferees, so there is much less need to protect marketability. Modern future interests usually concern personal property. Future interests in land are almost always created in trust; since legal title to the trust property is held by the trustee, marketability is not impaired. Finally, the potential marketability problem is better addressed in most states by statutes that permit the creation of contingent future interests, but eliminate "stale" interests (*see* § 12.07).

§ 14.10 The Rule Against Perpetuities: At Common Law

[A] The Rule in Context

[1] A "Technicality-Ridden Legal Nightmare"?

The common law Rule Against Perpetuities (the "Rule") has perplexed generations of law students,[20] attorneys, and judges.[21] Professor Leach, a leading authority on the Rule, once characterized it as a "technicality-ridden legal nightmare" and a "dangerous instrumentality in the hands of most members of the bar."[22] Indeed, in a controversial opinion, the California Supreme Court suggested that the Rule was so difficult to master that an attorney could not be held liable in malpractice for preparing a document that was invalidated by the Rule.[23] Due in part to these concerns, many states have adopted statutes that simplify the Rule (*see* § 14.11).

[19] Ironically, England abolished all three doctrines long ago by statute (Doctrine of Worthier Title: 1833; Rule in Shelley's Case: 1925; destructibility of contingent remainders: 1877).

[20] Thus, one court characterized the Rule as "every first-year student's worst nightmare." Shaver v. Clanton, 26 Cal. App. 4th 568, 570 (1994).

[21] For scholarly analysis of the Rule, see Jesse Dukeminier, *A Modern Guide to Perpetuities*, 74 Cal. L. Rev. 1867 (1986); W. Barton Leach, *Perpetuities in a Nutshell*, 51 Harv. L. Rev. 638 (1938); W. Barton Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 Harv. L. Rev. 721 (1952).

[22] W. Barton Leach, *Perpetuities Legislation, Massachusetts Style*, 67 Harv. L. Rev. 1349, 1349 (1954).

[23] Lucas v. Hamm, 364 P.2d 685 (Cal. 1961).

[2] Statement of the Rule

The common law version of the Rule is easily stated: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[24] Beneath the placid surface of this sentence, however, lurks confusing complexity. A five-step approach to the Rule (*see* [C], *infra*) helps to grapple with this complexity.

The central core of the Rule is simple to understand: it is a *rule about time*. The Rule essentially imposes a time deadline on how long certain contingent future interests can exist. To comply with the Rule, it must be *logically provable* that within a specified period (equal to the length of one life plus 21 years) a covered interest will *either* "vest" (that is, change from a contingent interest to a vested interest or possessory estate) *or* "forever" fail to vest (that is, never vest after the period ends).[25] Alternatively phrased, if there is any possibility—however remote—that a covered interest might remain contingent after this perpetuities period expires, the interest is void.

The Rule applies to legal or equitable interests created in real property or personal property. Although the discussion below focuses on legal interests in real property—the original concern of the Rule—such interests are becoming increasingly rare. An issue involving the Rule is more likely to arise today in connection with equitable interests in personal property (e.g., an equitable contingent remainder in a trust whose assets consist of stocks and bonds).

In applying the Rule, the only facts considered are those existing when the future interest becomes effective. We do not "wait-and-see" if a particular interest in fact does vest or forever fails to vest during the perpetuities period. Rather, to validate a covered interest it must be logically proven—based *only* on facts existing at the onset—that the interest will comply with the Rule.

An interest that violates the Rule is null and void when created, and thus is judicially stricken from the instrument.[26] Consider three examples. First, suppose O devises Blueacre "to A for life, then to the first child of A to reach age 30 and the heirs of that child." If A is alive and has no living child who is 30 or older when O's devise becomes effective, the interest in "the first child of A to reach age 30" is invalid under the common law Rule at the very minute the devise takes effect. With this interest invalidated, a court will construe the devise as if O had merely devised Blueacre "to A for life"; this leaves O with a reversion. Second, assume O conveys Blueacre "to A and his heirs for so long as used as an orphanage, then to B and his heirs"; the Rule would invalidate B's executory interest and the phrase "then to

[24] John C. Gray, The Rule Against Perpetuities § 201, at 191 (4th ed. 1942).

[25] *See, e.g.*, Warren v. Albrecht, 571 N.E.2d 1179 (Ill. App. Ct. 1991) (devise using formula "to A for life, then to A's children" or if none then to A's two named sisters did not violate the Rule because the interests of the children and sisters would either vest or forever fail at A's death).

[26] *See, e.g.*, City of Klamath Falls v. Bell, 490 P.2d 515 (Or. Ct. App. 1971) (where executory interest was invalidated by Rule, grantor's successors retained possibility of reverter).

B and his heirs" would be stricken. This leaves O with a possibility of reverter. Finally, what if O conveys Blueacre "to A and his heirs, but if not used as an orphanage, then to B and his heirs"? When we strike the language creating the invalid gift to B ("but if not used as an orphanage, then to B and his heirs"), A is left with fee simple absolute.

[3] The Dynamite Analogy

Consider an analogy that helps to explain the nature of the Rule. Suppose S interviews for a job with a mining company. F, the interviewer, explains that the company needs a new "Dynamite Remover." The company uses dynamite to open new mineral deposits in underground mine shafts. When blasting is planned, a dynamite charge is set underground, the mine is evacuated, and the explosives expert pushes a small plunger. Within the next five minutes, the dynamite charge usually explodes. If the charge fails to explode, the Dynamite Remover enters the mine and carries the dynamite back to the surface. Worried about risking his life, S inquires: "Can you prove to me—and I mean PROVE to me—that the dynamite will *either* definitely explode during the five-minute period *or* never explode thereafter"? Or S might ask the same question in a different way: "Is there any possibility that under any conditions, however unlikely, the dynamite *might* explode after the five-minute period ends, while I'm down there in the mine? If there is, I simply won't take the job!"

S's worry is similar to the basic concern of the Rule. Under the Rule, it must be logically proven at the beginning—not later—that a contingent interest (like the dynamite) will *either* definitely vest (explode) during the perpetuities period *or* forever fail to vest during the period (never thereafter explode). Alternatively phrased, the Rule is designed to invalidate certain contingent interests that *might vest* too late (after the perpetuities period ends) just as S fears a dynamite charge that *might explode* too late (after the five-minute period ends).

[B] Rationale for the Rule

The Rule evolved in the seventeenth century as a limitation on gifts to family members of contingent future interests in land, most notably in the 1681 decision in the *Duke of Norfolk's Case*.[27] Its principal goal was to protect the marketability of real property, which in turn: (a) facilitated the productivity of land; and (b) contributed to the utilization of wealth by society in general, thus discouraging the long-term concentration of wealth in particular families.[28]

The Rule was seen as a rough balance between the respective interests of the dead and the living. Contingent future interests could be created in transferees, but only if they were guaranteed not to burden land for too long. The resulting perpetuities period—one life plus 21 years—reflects this

[27] 22 Eng. Rep. 931 (Ch. 1681).

[28] *See, e.g.*, Wildenstein & Co., Inc. v. Wallis, 595 N.E.2d 828 (N.Y. 1992).

compromise. A landowner could provide for family members he knew personally (measured by any one "life") and for those in the next generation (defined as 21 years), but could not tie up land thereafter. As a device to protect marketability of land, however, the Rule suffered from a major loophole. It did not affect contingent future interests retained by the transferor—contingent reversions, possibilities of reverter, and rights of entry—all of which posed the same potential problems as contingent future interests held by transferees. Why not? The principal reason is found in historical chronology. The law governing future interests in transferors matured well before the Rule emerged in the seventeenth century; it was simply too late to subject these interests to the Rule.

The rationale for extending the Rule to encompass interests in personal property is less clear. By encouraging the transferability of money, stocks, bonds, and other forms of personal property, the Rule presumably facilitates commerce and permits the circulation of wealth in society.

[C] Five-Step Application of the Rule

[1] Summary of Approach

A five-step approach is helpful in applying the Rule:

(1) determine if the Rule applies to the future interest at issue;

(2) decide when the perpetuities period begins;

(3) determine what must happen for the interest to vest or forever fail to vest;

(4) identify the persons who can affect vesting; and

(5) test each relevant life to determine if any one validates the interest.

[2] Does the Rule Apply to This Interest?

[a] Contingent Future Interests in Transferees

The Rule applies only to three types of future interests:

(1) contingent remainders,[29]

(2) vested remainders subject to open, and

[29] *See, e.g.,* Connecticut Bank & Trust Co. v. Brody, 392 A.2d 445 (Conn. 1978) (testator bequeathed assets in trust to his children for life, followed by a contingent remainder in his grandchildren for life, followed by a contingent remainder in his great-grandchildren; the class gift to the great-grandchildren was held invalid under the Rule because the interest of a potential after-born great-grandchild might vest too late, while the grandchildren's interest failed under the doctrine of infectious invalidity); North Carolina Nat'l Bank v. Norris, 203 S.E.2d 657 (N.C. Ct. App. 1974) (where testator devised life estate to children, contingent remainder for life to grandchildren, and contingent remainder to great-grandchildren, gift to great-grandchildren was held invalid under the Rule).

(3) "contingent" executory interests.[30]

On the other hand, the Rule does not apply to: (a) present estates, (b) future interests in a transferor (a reversion, possibility of reverter, or right of entry),[31] or (c) future interests in a transferee that are deemed "vested" (e.g., indefeasibly vested remainder) *except for* vested remainders subject to open.

The category of "contingent" executory interests requires explanation. Most executory interests are contingent, meaning that some uncertain event must occur *before* they can become possessory estates. For example, if O conveys Blueacre "to A and her heirs, but if any person ever goes to Jupiter, then to B and her heirs," B's executory interest is contingent; it will "vest," if at all, only when someone travels to Jupiter. However, some executory interests held by ascertained persons are *certain* to become possessory with the passage of time. If O conveys Blueacre "to A and her heirs 10 years from now," A's executory interest is certain to mature into a possessory estate; for purposes of the Rule, it is considered "vested."[32]

When applying the Rule, the whole instrument is not considered as a unit. Rather, each future interest is analyzed separately. For example, if a conveyance creates four future interests subject to the Rule, three might fail, while one might survive.

Consider the following hypothetical, which helps explain the five-step approach to the Rule outlined below. Suppose that on January 1, 2008, O devises Blueacre "to A for life, then to the first child of A to reach age 30 and the heirs of that child." Assume that A is alive on January 1, 2008, but has never had any children. A potential unborn person—"the first child of A to reach age 30"—receives a contingent remainder in fee simple absolute under this language. The remainder is contingent both because the person is unascertainable and a condition precedent must be met. In order for this interest to be valid under the Rule, it must be logically provable—based on facts known on January 1, 2008—that the interest will either definitely vest or forever fail to vest during the perpetuities period. If this cannot be shown, the interest is invalid.

[b] Options to Purchase and Preemptive Rights

The common law Rule also applies to a variety of commercial transactions. These include options to purchase[33] and, in most jurisdictions,

[30] *See, e.g.*, City of Klamath Falls v. Bell, 490 P.2d 515 (Or. Ct. App. 1971) (executory interest following defeasible estate held void under Rule); *see also* Fletcher v. Ferrill, 227 S.W.2d 448 (Ark. 1950).

[31] *See* Brown v. Independent Baptist Church, 91 N.E.2d 922 (Mass. 1950) (where will devised defeasible estate to church and accompanying future interest to other devisees, future interest was invalid under the Rule; thus, estate retained a possibility of reverter—not subject to the Rule—which passed to the same devisees under the residual clause of the will).

[32] *See, e.g., In re* Estate of Anderson, 541 So. 2d 423 (Miss. 1989).

[33] *See, e.g.*, The Symphony Space, Inc. v. Pergola Properties, Inc., 669 N.E.2d 799 (N.Y. 1996) (New York's statutory Rule Against Perpetuities applies to option to purchase); Central Delaware County Auth. v. Greyhound Corp., 588 A.2d 485 (Pa. 1991) (option held void under

preemptive rights or rights of first refusal.[34] The extension of the Rule to encompass such rights has been widely criticized as counterproductive, and there is a clear trend toward exempting commercial transactions. For example, the Uniform Statutory Rule Against Perpetuities (*see* § 14.11[D]) applies only to gifts, not commercial rights.[35]

[3] When Does the Perpetuities Period Begin?

If the Rule applies, we next determine when the "perpetuities period" begins. The duration of the perpetuities period is *one life plus 21 years*. This period begins when the instrument that creates the interest becomes legally effective. Only a person who is living at this time can potentially be used as a "life" in this formula. Thus, we must know when the period begins in order to determine which lives can be used.

Different types of instruments become effective at different times. A will is effective when the testator dies. A deed is effective when it is delivered by the grantor. Because the example above (*see* [2], *supra*) states that O "devises," the instrument involved is a will effective when O dies, on January 1, 2008. Thus, the perpetuities period for our hypothetical begins on that date.

The effective date of a trust is more troublesome. A testamentary trust (that is, one created under a will) takes effect when the settlor (the person creating the trust) dies because it is part of a will. On the other hand, an inter vivos trust (one created during the lifetime of the settlor) is effective for purposes of the Rule only when it becomes irrevocable, that is, *either* (1) when the settlor declares it to be irrevocable or (2) if no such declaration occurs, when the settlor dies.

[4] What Must Happen for the Interest to Vest or Forever Fail to Vest?

[a] Time of Vesting

We next determine what must happen in order for the interest to "vest," that is, to *change* from a contingent interest to a vested interest or estate, or to forever "fail" to vest. In other words, why is the interest contingent? It is crucial to understand that a future interest may become "vested" for purposes of the Rule, even though the holder is *not yet entitled to possession*

Rule); Coulter & Smith, Ltd. v. Russell, 925 P.2d 1258 (Utah Ct. App. 1996) (same); United Virginia Bank/Citizens & Marine v. Union Oil Co. of California, 197 S.E.2d 174 (Va. 1973) (same). *But see* Texaco Ref. & Mktg., Inc. v. Samowitz, 570 A.2d 170 (Conn. 1990) (Rule does not apply to lessee's option to purchase leased premises).

[34] *But see* Cambridge Co. v. East Slope Inv. Corp., 700 P.2d 537 (Colo. 1985) (refusing to invalidate preemptive right under Rule because on facts of case it posed no threat to free alienation of condominium units involved).

[35] The Restatement (Third) of Property: Servitudes takes the position that the Rule does not apply to options and rights of first refusal for the purchase of land, or to other servitudes. Restatement (Third) of Property: Servitudes § 3.3 cmt. a.

of the land. The Rule concerns the *time of vesting*, not necessarily the *time of possession.*

A contingent remainder, by definition, is contingent because either one or more conditions precedent have not been met or because the remainder holder is unascertainable. Once the specified contingency is met, the contingent remainder will "vest," becoming an indefeasibly vested remainder. In our hypothetical (*see* [2], *supra*), the contingent remainder in "the first child of A to reach age 30" is contingent for both reasons. A must have a child who reaches age 30 in order for the interest to vest. Until and unless this event occurs, the remainder will be contingent. On the other hand, if A dies without ever having had children, the interest will forever fail to vest, meaning that there is no possibility it may vest later. By definition, if A never has a child, it is impossible for any child of A to reach age 30.

A contingent executory interest is usually contingent upon the occurrence of a future event. Thus, it is considered contingent until the holder is entitled to possession of the land. Suppose, for example, that O devises Greenacre "to F and her heirs but if F ever cuts down a tree on Greenacre, to G and her heirs." The executory interest in G will vest only if and when G becomes entitled to possession of Greenacre. On the other hand, the interest will forever fail to vest once F dies. After F is dead, there is no possibility that she can cut down a tree!

[b] Special Rule for Class Gifts

Class gifts—that is, gifts to a class or group of persons—are governed by a special rule, dubbed the "all-or-nothing" rule: the interests of *all* class members must comply with the Rule in order for the interest of *any* class member to be valid. For example, if the interests of 99 members of a 100-person class comply with the Rule, but the interest of one member does not, the interests of all 100 members are invalid.

A vested remainder subject to open, again by definition, is "contingent" because all the members of the class cannot yet be identified. Suppose O devises Blueacre "to F for life, then to the children of G and their heirs." The class members described as "the children of G" cannot be ascertained until G dies; at this point, the class is said to "close" and the vested remainder subject to open becomes an indefeasibly vested remainder in G's children, thus "vesting" under the Rule.

The executory interest may also be the subject of a class gift (e.g., O conveys Blueacre "to my grandchildren who both survive my death and pass the bar"). In order for this interest to be valid, it must be proven that within the perpetuities period (a) the class will "close" and (b) the conditions precedent for each class member will either vest or forever fail to vest.

A class closes on the first of two alternative events: (1) when no new members can be added to the class (usually due to the death of an identified ancestor); or (2) under the "rule of convenience," when any class member is entitled to receive possession of his or her share and the prior estate ends.

[5] Who Are the "Relevant Lives"?

Because the length of the perpetuities period is equal to *one life plus 21 years*, it is crucial to identify the persons whose lives can be used in this formula. These persons who can potentially be used as yardsticks to measure the length of the period are called *relevant lives* or *lives in being*.

The relevant lives must be persons who are alive at the time the instrument becomes effective. In addition, a child in gestation at the time is considered a relevant life if later born alive. Almost always, the relevant lives are persons who can affect whatever has to happen for vesting to occur. These may include:

(1) the holder of the interest;

(2) the person creating the interest;

(3) any person who can affect a condition precedent attached to the interest; and

(4) any person who can affect the identity of the holder.

Of course, the transferor cannot frustrate the operation of the Rule by specifying an unduly large number of living persons as relevant lives (e.g., by incorporating all the names in a city telephone book).

Who are the relevant lives in the our hypothetical (*see* [2], *supra)*? O and A are the only parties who are both (a) living on January 1, 2008, (the day the will becomes effective) and (b) arguably relevant to the interest in question. Thus, O and A are the only possible relevant lives here. For example, if A has a child, B, in 2009, B cannot be a relevant life; B was born too late.

[6] Does Any Relevant Life Validate the Interest?

Each relevant life is now tested to see if the interest will *necessarily vest or forever fail to vest* during a period equal to that person's life plus 21 years. In other words, we plug each relevant life into our formula to create a perpetuities period in a process of trial and error. We then attempt to logically prove that the interest will either vest or forever fail to vest during that person's life, at his death, or within 21 years after his death. The goal is to find one relevant life—called the *validating life* or *measuring life*—which will validate the interest. If we test five relevant lives and find that four do not validate, but one does, the interest is valid under the Rule. In applying the Rule, we do not "wait-and-see" if the interest actually vests or forever fails. Rather, we consider only the information available at the time the instrument becomes effective.

The ultimate goal of the Rule is to eliminate interests that *might* first vest too far in the future, thus clouding title to land. Thus, testing a relevant life is governed by a fantasy-like standard, called the "what-might-happen" rule. A party seeking to uphold the interest must meet a difficult standard: she must *prove* as a matter of logic that the interest *will definitely* vest or forever fail to vest during the period, regardless of any possible future events. Conversely, a party may invalidate the interest by meeting a very

easy standard, one based on mere suggestion or imagination. If any future events *might occur, however improbable,* which would prevent the interest from necessarily vesting or forever failing to vest within the period, the life being tested will not validate the interest. *Alternatively phrased, if the creative legal mind can invent any possible scenario under which the interest might first vest after the perpetuities period expires—no matter how unlikely the scenario is—the interest is invalid.*

Consider our example (*see* [2], *supra*) again. On January 1, 2008, O devises Blueacre "to A for life, then to the first child of A to reach age 30 and the heirs of that child." The person most likely to affect vesting is A, because part of the condition precedent is that he have a child. Test A first. Can we prove that during A's life, at his death, or within 21 years thereafter, a child of A will either reach age 30 (resulting in vesting) *or* no child of A will thereafter reach age 30 (making later vesting impossible)? No.

What might happen? Suppose that A's child B is born on January 1, 2009. B cannot serve as a relevant life; he was born too late. One day later, A is killed by a tidal wave (or a falling asteroid, a volcanic eruption, or the like). Suppose then that B reaches age 30 on January 1, 2039. At that point, B's interest "vests." But it vests too late. Here the perpetuities period based on A's life ended on January 2, 2030 (21 years after A died). Thus, it is *possible* that the interest in A's first child to reach age 30 *might* vest too late if A is the relevant life. So A's life cannot validate the interest. For similar reasons, O's life will not validate it. This contingent remainder is invalid under the Rule.

[D] Application of the Rule: Classic Examples

[1] The Fertile Octogenarian

Perhaps the most famous example of the "what-might-happen" principle is the so-called "fertile octogenarian" problem, illustrated in *Jee v. Audley*.[36] There, an eighteenth-century testator bequeathed 1,000 pounds "unto my niece Mary Hall and the issue of her body lawfully begotten, and to be begotten, and in default of such issue I give the said £1,000 to be equally divided between the daughters then living of my kinsman John Jee and his wife Elizabeth Jee." In an era when an English schoolmaster received only about £12 per year, the sum of £1,000 was a virtual fortune. Apparently concerned that Mary Hall might squander the bequest or flee to Paris, the four Jee daughters brought an action to compel Hall to post security to protect their rights. In defense, Hall argued that the daughters' future interest was invalid because it violated the Rule.

The court construed the bequest to create a fee simple estate in Hall (because fee tail could not be created in personal property), but subject to an executory interest in the Jee daughters "then living." The Rule applied because this executory interest was contingent on a future event: the survival of at least one Jee daughter. Because the creating instrument was

[36] 29 Eng. Rep. 1186 (Ch. 1787).

a will, it took effect upon the testator's death, when the following persons were alive: Hall, John and Elizabeth Jee (who were 70 years old), and four Jee daughters. Assume for purposes of illustration that the testator died in 1785.

What must happen in order for the Jee daughters' interest to either vest or forever fail to vest? In order for vesting to occur, (a) Hall's bloodline must expire and (b) *at that time,* there must be at least one living Jee daughter. In order for the interest to forever fail, all Jee daughters must die *before* Hall's bloodline ends. Because the court construed the bequest as a class gift, the interests of all Jee daughters had to be valid under the Rule in order for any interest to be valid.

Hall, the Jee parents, and the Jee daughters might all affect vesting, and are thus all relevant lives. Yet none of them will validate the interest because of the court's assumption that Mrs. Jee, a 70-year-old woman, *might* have another child, a fifth Jee daughter. Under the "what-might-happen" principle, this *might* cause the interest to vest too late. What might happen? Suppose one year after the will takes effect in 1785, Mrs. Jee has a fifth daughter, named A; on the same day, Hall has her first child, a son named B. Neither A nor B can be a relevant life because neither was alive (or in gestation) on the day the will took effect. Next, assume that one day later all the relevant lives (Hall, the Jee parents, and the original four Jee daughters) die due to plague (or an elephant stampede, a massive fire, or the like); A and B survive. In 1820, more than 21 years after the death of all the relevant lives, B dies without having had issue; A is still alive. At this instant, the Hall bloodline expires, and A's executory interest "vests," because A is now entitled to possession of the £1,000. Because the interest in the Jee daughters "then living" might remain contingent after the perpetuities period ends, it is deemed void at the onset.

The court might, of course, have tried to save the bequest to the Jee daughters by interpreting it as a gift to four specific daughters (not a class gift) or by refusing to assume that a 70-year-old woman could bear a child. However, illustrating the common law view that the Rule should be "remorselessly" applied, it refused to do so. Ironically, in light of recent developments in human reproductive technology, the possibility that a 70-year-old woman might give birth seems increasingly likely.[37]

[2] The Unborn Spouse

A second classic perpetuities dilemma involves the unborn spouse, often dubbed the "unborn widow" problem. Suppose T devises Redacre "to A for life, then to A's widow for her life, then to A's issue then living and their heirs." When T's will becomes effective the following are all alive: A, B (A's wife), and C (the son of A and B). Is the interest in "A's issue then living" valid?

The Rule applies here because "A's issue then living" hold a contingent remainder; it is a remainder because it may become possessory as soon as

[37] *See* Sharona Hoffman & Andrew P. Morris, *Birth After Death: Perpetuities and the New Reproductive Technologies*, 38 Ga. L. Rev. 575 (2004).

the life estate in A's widow ends, but it is contingent because "A's issue then living" are currently unascertainable. The perpetuities period begins at T's death. In order for the interest to vest, A and A's widow must both die; at this time, we can ascertain the identities of "A's issue then living." So who are the lives in being who might validate the interest? Only A and C. B cannot be a life in being—and this is the central difficulty in the problem—because it is not certain she will be A's widow. After all, B might die many years later; and A might then marry D, a woman born after T's death who cannot qualify as a life in being.

Can we prove that the interest in "A's issue then living" will either vest or forever fail to vest within the perpetuities period? No. Consider a highly unlikely—but conceivable—series of events. Suppose T dies in 2008. B might die in 2032, and A might then marry D, a 20-year-old woman. C then dies one day after fathering his child, E, and A dies a week later. More than 21 years after the death of the only possible lives in being (A and C), say in 2065, D dies. At that time, the class of "A's issue then living" can be ascertained. If E is still alive, his contingent remainder will "vest." Because the interest in "A's issue then living" *might vest* more than 21 years after the death of A and C, the lives in being, it is void under the common law Rule Against Perpetuities.

[3] The Slothful Executor

The "slothful executor" problem concerns the performance of a future administrative task by an executor, trustee, or other fiduciary.[38] Suppose T devises Redacre "to A for life, then to A's issue who are living upon final distribution of my estate and their heirs."

The Rule applies here because the class members ("A's issue who are living upon final distribution of my estate") cannot be ascertained, and thus their remainder is contingent. The perpetuities period began upon T's death. In order for the contingent remainder to vest, T's estate must be distributed at a time when A has living issue; the interest will forever fail if A has no issue, or no issue who survive that long. Here the only possible relevant lives are T and A.

Logically, it would seem that T or A should validate the interest. It seems obvious that T's estate will be distributed within 21 years after his death. However, under the "what-might-happen" rule, the interest is void. Why? One year after T's death, A might have a child, B; B is not a relevant life because she was born too late. Later, T's executor, E, and A both die. The replacement executor is F, who was born after T died, and is thus not a relevant life. F carelessly delays the handling of T's estate and, as a result, it is not distributed until 22 years after both A and E died. At this point, B's interest vests, too late to comply with the Rule.

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[38] *See, e.g.*, Ryan v. Beshk, 170 N.E. 699 (Ill. 1930) (contingent remainder fails because it contemplates a future trust, and trustees might not be named for more than 21 years after the death of all relevant lives).

[E] Criticism of the Rule

In recent decades, the Rule has been vigorously attacked by its critics and staunchly defended by its supporters. In particular, the late 1970s witnessed a fierce and prolonged struggle among property law professors over the position that the Restatement (Second) of Property should adopt toward the Rule. This struggle culminated with the adoption of a Restatement section that substantially altered the traditional Rule, and effectively launched a national reform movement (*see* § 14.11).

Criticisms of the common law Rule are legion. First and foremost, it disregards the intent of the transferor and thereby frustrates the right to transfer property freely. The policy bases underlying the Rule are increasingly out of step with the enhanced modern concern for respecting owner autonomy.

Second, the Rule is often condemned as serving obsolete policies. The original goal of the Rule—to ensure the marketability of land—requires little protection today. Contingent legal future interests in land are now created only rarely, due to the strong modern preference to transfer fee simple absolute. The feudal fear that these interests would cause widespread inalienability ended long ago. One might argue that society derives benefit from ensuring that money, stocks, bonds, and other forms of personal property are not tied up for long periods by such interests and thus withdrawn from commerce. As a practical matter, however, most contingent future interests in personal property are equitable, not legal; and the trustee has a fiduciary duty to invest the trust assets productively, not to withhold them from the marketplace.

Finally, the Rule is increasingly unimportant because it can be circumvented by drafting. Virtually all interests can be insulated from the Rule through the insertion of a "savings clause."[39] For example, a conveyance of Blueacre "to A for life, then to B and his heirs if anyone goes to Saturn" would be invalid under the Rule. Yet the addition of a few standard phrases will save the gift. The conveyance "to A for life, then to B and his heirs if anyone goes to Saturn, but if no one goes to Saturn within 21 years after the death of B, then the conveyance to B shall be null and void" is valid. Only the client who selects an incompetent attorney, the argument goes, is harmed by the Rule. Viewed in this light, the Rule is merely a trap for the unwary client, not a meaningful principle of law.

§ 14.11 The Rule Against Perpetuities: Modern Reforms

[A] Overview

Most states have modified the common law Rule Against Perpetuities through legislation, a process which began in the 1970s. These reform

[39] *But see* Hagemann v. Nat'l Bank & Trust Co., 237 S.E.2d 388 (Va. 1977) (savings clause ambiguous and thus ineffective).

measures fall into two basic categories: (1) adopting a "wait-and-see" approach in lieu of the "what-might-happen" rule; and (2) permitting reformation to validate the interest where consistent with the transferor's intent. The widely-adopted Uniform Statutory Rule Against Perpetuities incorporates both approaches. A handful of states have enacted only piecemeal changes (e.g., overturning the presumption of fertility), while the common law Rule survives intact in others. Perhaps more importantly, a number of states have enacted legislation permitting the perpetual trust—a development that probably signals the death of the Rule.

[B] Basic "Wait and See" Approach

Some states reacted to the perceived absurdity of the common law "what-might-happen" standard by adopting a simple reform called the "wait-and-see" test, either by statute or judicial decision.[41] Under this approach, the validity of an interest is not determined at the onset. Rather, the parties merely await future events. The interest is valid if it *actually* vests during the common law perpetuities period. It is invalid if it fails to vest during the period.

Consider again O's January 1, 2008, devise of Blueacre "to A for life, and then to the first child of A to reach age 30 and the heirs of that child" (*see* § 14.10[C][2][i]). Under the common law Rule, the contingent remainder in "the first child of A to reach age 30" would be invalid at the onset if A never had any children before the devise became effective. The "wait-and-see" approach, however, might well validate the remainder. For example, suppose A actually has a child, B, on January 1, 2009; A dies on B's 31st birthday, January 1, 2040. Here *in fact* A's life validates the interest. Within the perpetuities period (defined as A's life plus 21 years), B's interest "vested." On B's 30th birthday (while A was still alive), B met the condition precedent of reaching age 30; at that point, B's contingent remainder became an indefeasibly vested remainder and, for purposes of the Rule, then "vested."

The wait-and-see approach has proven extraordinarily controversial ever since its debut in a 1947 Pennsylvania statute.[42] The principal arguments in favor of the approach are that it (a) better implements the transferor's intent and (b) protects the transferor from the malpractice of an incompetent attorney who fails to draft a will or deed in conformity with the Rule. The validity of all contingent interests is measured by the same yardstick—what actually happens to the interest over time—regardless of the skill of the drafting attorney. In response, critics point out that this approach impairs the marketability of land and, more generally, keeps wealth out of

[41] *See, e.g.*, Hansen v. Stroecker, 699 P.2d 871 (Alaska 1985) (adopting wait-and-see approach); *In re* Estate of Anderson, 541 So. 2d 423 (Miss. 1989) (applying wait-and-see approach).

[42] *Compare* W. Barton Leach, *Perpetuities Legislation: Hail, Pennsylvania!*, 108 U. Pa. L. Rev. 1124 (1960) (supporting wait-and-see), *with* Lewis M. Simes, *Is the Rule Against Perpetuities Doomed? The "Wait and See" Doctrine*, 52 Mich. L. Rev. 179 (1953) (criticizing wait-and-see).

the flow of commerce for decades. Under the common law Rule, the validity of any future interest can be determined at the onset. But under the wait-and-see approach, land and other forms of property may be tied up by contingent future interests for 100 years or more while the parties simply "wait." Moreover, it is often practically difficult to identify the relevant lives to be used in the "wait-and-see" formula, absent litigation.

[C] Reformation or Cy Pres

Other states retain the common law Rule, but mitigate its impact by adding a new feature: a reformation or cy pres remedy. If an interest is invalidated by the Rule, a court may rewrite the language of the conveyance or devise to carry out the transferor's intent as closely as possible and thereby validate the interest.[43]

For example, returning to the hypothetical devise of Blueacre "to A for life, then to the first child of A to reach age 30 and the heirs of that child," a court following the cy pres approach would probably be empowered to reduce the age requirement to 21 if this would save the interest. Why? The court would reason that O's dominant intent was to benefit one of A's children who reached maturity, an intent which can be implemented only by reforming the conveyance. O's further intent to define maturity as age 30 is seen as subordinate to his overall goal, absent clear evidence to the contrary. In other words, if O were forced to choose between (a) allowing the interest to fail entirely or (b) reducing the age contingency to 21, the court presumes that O would prefer reformation.

The cy pres remedy has been applied to date in only a handful of decisions and its future impact is accordingly difficult to predict. The crucial question is whether it will effectively swallow the entire Rule. In other words, will courts *routinely* validate interests that would otherwise violate the Rule?

[D] Uniform Statutory Rule Against Perpetuities

The Uniform Statutory Rule Against Perpetuities (USRAP)[44] —in force in many states—combines both reform approaches discussed above.[45] Notably, it applies only to gifts of contingent future interests; all commercial transactions (including options and rights of first refusal) are exempt.[46]

Under the USRAP, a covered interest is valid if *either:* (1) it meets the requirements of the common law Rule; *or* (2) using the wait-and-see

[43] *Cf.* Berry v. Union Nat'l Bank, 262 S.E.2d 766 (W. Va. 1980) (using doctrine of equitable modification to reform testamentary trust and thereby validate interest).

[44] For discussion of the USRAP, see Ira M. Bloom & Jesse Dukeminier, *Perpetuities Reformers Beware: The USRAP Tax Trap*, 25 Real Prop. Prob. & Tr. J. 203 (1990); Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period*, 73 Cornell L. Rev. 157 (1988).

[45] The basic structure of the USRAP was derived from the earlier Restatement (Second) of Property: Donative Transfers (1976), which adopted both the wait-and-see approach and the cy pres remedy.

[46] *See, e.g.*, Shaver v. Clanton, 26 Cal. App. 4th 568 (1994).

approach, it *actually* "vests or terminates within 90 years after its creation." Thus, the USRAP modifies the basic "wait-and-see" approach by using a fixed 90-year perpetuities period, instead of the classic period of one life plus 21 years, thus providing more certainty. The 90-year period was chosen as a rough approximation of the probable length of one life (about 70 years) plus 21 years.

Consider again O's January 1, 2008, devise of Blueacre "to A for life, then to the first child of A to reach age 30 and the heirs of that child." The contingent remainder in "the first child of A to reach age 30" does not comply with the common law Rule, as discussed above. However, the second prong of the USRAP test may save the interest. If A dies childless during the 90-year perpetuities period (from January 1, 2008, until January 1, 2098), the interest will terminate. If a child of A reaches age 30 during this same period, the interest will timely vest.

Alternatively, if a covered interest is invalidated, a court is empowered to reform the creating instrument "in the manner that most closely approximates the transferor's manifested plan of disposition and is within the 90 years" allowed for vesting. Thus, if it becomes clear that the contingent remainder in "the first child of A to reach age 30" might vest too late (e.g., if A dies in 2090, leaving a 20-year-old daughter), the court might well reform the conveyance by reducing the age contingency in order to accommodate O's likely intent.

[E] Future of the Rule Against Perpetuities

The common law Rule Against Perpetuities is fading away. Today, the real question is whether the USRAP or *any* version of the Rule will endure in the long run. For example, if the reformation provisions of the USRAP are routinely used to validate otherwise invalid interests, the demise of the Rule will inevitably follow.

More importantly, many states have recently adopted legislation that permits the perpetual trust, regardless of the Rule.[47] Typically, these statutes permit a trust to endure so long as there is a trustee who holds a power of sale over the trust assets; because any trustee who dies can be replaced by a successor trustee, such a trust might last forever. A prudent settlor has an incentive to create a perpetual trust because this helps to avoid the federal generation-skipping transfer tax. As a result, states recognizing this trust have attracted billions of dollars of trust funds from states that do not, thus creating pressure on all states to abolish the Rule. A number of states that initially adopted the USRAP have either repealed or modified it in order to accommodate such trusts. Many scholars accordingly predict the death of the Rule.[48]

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[47] *See* Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. Rev. 1303 (2003).

[48] *See, e.g.*, Steward E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 Cardozo L. Rev. 2097 (2003).

§ 14.12 The Doctrine of Worthier Title

O conveys Blueacre "to S for life, then to O's heirs." Under the common law Doctrine of Worthier Title, O's attempt to create a remainder in his heirs is invalid. Instead, as a matter of law O retains a reversion that becomes possessory when S's life estate terminates.

The Doctrine of Worthier Title is a medieval relic. The traditional version provided that if (a) an owner devised or conveyed real property to one party and (b) by the same instrument devised or conveyed the following remainder or executory interest to the owner's "heirs," then the owner retained a reversion and the "heirs" received nothing.[49] In effect, an owner could transfer property rights to heirs only through the "worthier" method of descent (that is, intestate succession), not by means of devise or conveyance. The doctrine was a rule of law that bound all parties, regardless of the owner's intent.

The doctrine originated as a tool to prevent landowners from avoiding the feudal incidents and, to a lesser extent, to protect free alienation. The incidents were owed only by tenants who acquired their estates through descent, not by those who took by conveyance or devise. If tenant O could convey or devise the family landholdings to his heirs, the heirs took the property free and clear of the incidents. At least initially, the doctrine was intended to plug this feudal tax loophole. After the demise of feudalism, English courts retained the doctrine because it encouraged the alienability of land. If Blueacre in the example above is burdened with a contingent remainder in the unascertainable heirs of O, it is impossible for O to convey clear title to the land, even after S's death. By eliminating such contingent interests, the doctrine facilitated the sale of fee simple absolute.

Today the doctrine is virtually—but not entirely—obsolete in the United States as a binding rule of law. For decades, there has been general agreement that the doctrine no longer applies to devises. The extent to which the doctrine may still affect conveyances is less clear. Over three-quarters of the states have entirely abolished the doctrine in this context, either by statute or case law. In these jurisdictions, the rule may govern deeds or wills executed before the abolition occurred. Contemporary courts remain strongly focused on honoring the grantor's intent in this and other contexts, despite its impact on alienability. Abolition is the clear modern trend.

Perhaps ironically, the main lingering significance of the doctrine today stems from its revival by Judge Cardozo in 1919 as a rule of construc-tion—an evidentiary presumption utilized to honor grantor intent. Some

[49] *See, e.g.,* Harris Trust & Sav. Bank v. Beach, 513 N.E.2d 833 (Ill. 1987) (refusing to apply doctrine of worthier title on facts of case); Braswell v. Braswell, 81 S.E.2d 560 (Va. 1954) (applying doctrine).

jurisdictions apparently still presume that a grantor who (a) conveys a life estate in real or personal property to one party, and (b) then purports to convey a remainder or executory interest to his own heirs does not actually intend to convey anything to the heirs. In order to defeat this presumption, the heirs must provide evidence of the grantor's actual intention to benefit them. Because reported decisions involving the doctrine are extraordinarily rare, however, it is difficult to assess its vitality.

§ 14.13 The Rule in Shelley's Case

O conveys Blueacre "to S for life, then to the heirs of S." What interests arise? At common law—under the famous Rule in Shelley's Case[52] —such a conveyance effectively created fee simple in S, while the "heirs of S" received nothing. Much like the Doctrine of Worthier Title, the Rule in Shelley's Case transformed a remainder in the transferee's heirs into a remainder held by the transferee.[53]

The rule was simple. If a deed or will (a) created a life estate or fee tail in real property in one person (here S), and (b) also created a remainder in fee simple in that person's heirs (here the "heirs of S"), and (c) the estate and remainder were either both legal or both equitable, then the future interest belonged to that person, not the heirs.[54] S now owns all legal interests in Blueacre. Under the doctrine of merger, S's smaller interest (the life estate) would "merge" into his larger interest (the remainder in fee simple), giving S fee simple absolute. What if O conveys Blueacre "to S for life, then to T for life, then to the heirs of S"? Pursuant to the rule, S holds both a life estate and a remainder in fee simple absolute. No merger occurs in this example, however, because T holds an intervening interest.

The Rule in Shelley's Case was based on the same historic policies that supported the Doctrine of Worthier Title. Initially, the Rule prevented landowners from avoiding the feudal incidents. As the feudal system waned, the Rule was increasingly justified as a tool to help ensure the free alienability of real property, even though it frustrated the owner's intent.[55] Today the Rule is seen as an anachronism. As one judge lamented, "[t]hat rule is a relic, not of the horse and buggy days, but of the preceding stone cart and oxen days."[56]

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[52] Wolfe v. Shelley, 76 Eng. Rep. 206 (1581).

[53] In the era when bar examinations were oral, prospective attorneys were frequently asked, "What is the Rule in Shelley's Case?" As the story goes, one candidate responded, "Sir, the law is no respecter of persons. The rule in Shelley's case is the same as in every other case."

[54] *See, e.g.*, Evans v. Giles, 415 N.E.2d 354 (Ill. 1980) (discussing rule); Seymour v. Heubaum, 211 N.E.2d 897 (Ill. App. Ct. 1965) (applying rule to invalidate remainder); Society Nat'l Bank v. Jacobson, 560 N.E.2d 217 (Ohio 1990) (applying rule to invalidate remainder in personal property under trust agreement that became effective before Ohio abolished rule in 1941); Sybert v. Sybert, 254 S.W.2d 999 (Tex. 1953) (applying rule to invalidate remainder).

[55] *See, e.g.*, Jones v. Stone, 279 S.E.2d 13 (N.C. Ct. App. 1981) (discussing the effect of the rule on alienation).

[56] Sybert v. Sybert, 254 S.W.2d 999, 1001 (Tex. 1953) (Griffin, J., concurring).

The Rule in Shelley's Case has been abolished in all jurisdictions except Arkansas and Delaware. It may be confidently predicted that these holdout states will eventually follow the national trend.[57] Yet in many states the Rule still applies to instruments created before the effective date of abolition.

§ 14.14 The Destructibility of Contingent Remainders

O conveys Blueacre "to S for life, and then to T and his heirs if T reaches age 18." What happens if S dies two years later when T is merely age 17? At common law, T's interest would be extinguished because it failed to vest when S died. Thus, O or O's successors would own Blueacre in fee simple absolute, just as if O had merely conveyed "to S for life."

The common law doctrine of the destructibility of contingent remainders was straightforward.[58] A legal contingent remainder in real property was extinguished or "destroyed" if it failed to vest when the preceding freehold estate ended.[59] Why? In order to ensure the collection of feudal incidents, the rule developed that seisin must always be held by some person; a "gap" in seisin was impermissible. Thus, if the prior freehold estate ended before the remainder was ready to become possessory, the remainder was deemed destroyed and seisin shifted to the next interest. At the same time, the doctrine tended to protect the marketability of land, at least in theory, and this rationale survived after the demise of feudalism.

Yet—because courts ultimately held that it did not apply to executory interests—the doctrine could be circumvented through careful drafting. Instead of using a contingent remainder, the drafter could create an executory interest that had a similar impact. Similarly, the doctrine did not extend to equitable contingent remainders, so drafters could avoid it simply by creating interests in trust. Thus, the doctrine was less successful than anticipated in protecting marketability, leaving a hole which was partially plugged by the Rule Against Perpetuities.

Today, like the dinosaur, the doctrine is extinct in the United States. Almost all states have abolished it, by statute or decisional law. Although legal scholars debate the number of states in which the doctrine might persist (one? two? three?), the debate is largely academic. In recent decades, American courts have simply not applied the doctrine.

[57] *See* John V. Orth, *Requiem for the Rule in Shelley's Case*, 67 N.C. L. Rev. 681 (1989).

[58] *See generally* Jesse Dukeminier, *Contingent Remainders and Executory Interests: A Requiem for the Distinction*, 43 Minn. L. Rev. 13 (1958); Samuel M. Fetters, *Destructibility of Contingent Remainders*, 21 Ark. L. Rev. 145 (1967).

[59] *See, e.g.*, Evans v. Giles, 415 N.E.2d 354 (Ill. 1980) (discussing doctrine); Abo Petroleum Corp. v. Amstutz, 600 P.2d 278 (N.M. 1979) (refusing to follow doctrine); *see generally* Samuel M. Fetters, *Destructibility of Contingent Remainders*, 21 Ark. L. Rev. 145 (1967).

EXAMPLES & EXPLANATIONS

Property

Second Edition

Barlow Burke and Joseph Snoe

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9

Common Law Estates and Present Interests

Real property can be divided up several ways. *O*, owning 100 acres of real property, might transfer 50 acres to *A* and the other 50 acres to *B*. Alternatively, *O* might sell the surface rights to *A* and the mineral rights to *B*. If he wanted, *O* could transfer the management rights to *A* (a trustee of a trust, for example) and the income and profits interest to *B* (a beneficiary of the trust, for example). The next few chapters develop a fourth method of dividing up ownership: over time. *O*, for example, might transfer acreage to *A* for a period of time (say, 10 years) and then give it to *B* for the rest of the time, or might give it to *A* "for life" (this is known as a life estate, meaning it lasts as long as *A* lives, and no longer) and then give it to *B* for the rest of the time, meaning that *B* will wind up, after *A* dies, owning the property in perpetuity. In other words, property can be divided physically, but may also be divided along a timeline.

Studying estates and present and future interests requires more than reading for and attending class. You should work problems outside of class. In addition to the Examples in this book, you can find more practice problems in John Makdisi, *Estates in Land and Future Interests* (3d ed. 1999), and Linda H. Edwards, *Estates in Land and Future Interests: A Step-By-Step Guide* (2002).

Some History

In 1066, the battle of Hastings set English legal history on its present course: a Norman archer shot the Anglo-Saxon king, Harold, in the eye socket, killing him and leading to the conquest of England by William I, the Conqueror. After the battle, William parceled out the countryside to his knights; what he gave them was a use right, or ***tenure*** — the right to hold.

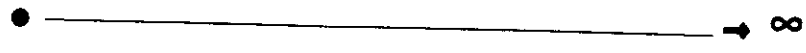
William initially parceled out lands for limited periods of time. The knights, however, quickly became interested in the rights of their families and children to continue to hold the land after their deaths. They were actually interested in two rights: the right to transfer or dispose of their property by will after death (***testamentary power***, or ***devisability***) and the right to dispose of their land during their lifetimes (***a power to alienate***, or ***alienability***). Like William, the knights were also interested in setting up a line of successors who could hold tenure, accounting for spouses, children, and grandchildren: It was and is still possible today to create interests in property that are split along a timeline running successively from the present into the future. Such a split in ownership is one of the features of our common law interests and estates, created first for England's nobility but available to all of us today.

Split ownership — fragmented over time — involves a transferor's or testator's desire to control the ownership of property after the transfer or, in the case of a will, after the testator's death (a ***testator*** is a person dying and leaving a will). Most devices for transfers and wills discussed in this chapter were either formulated for testators interested in such control or by their children, heirs, and transferees resisting that control. The history of common law estates may be seen as a series of intergenerational conflicts, as well as a series of devices designed to achieve that age-old aim of the propertied classes, tax avoidance.

Estates: Some Fundamentals

Common law estates are divided into current ownership rights where the owner has the right to current possession (***present interests***), and current ownership rights where the owner must wait until a future time to take possession of the property (***future interests***). While ownership of property without the right to immediate possession in effect means the future interest owner gets no present enjoyment or economic benefit (other than appreciation in value) from owning the land, the future interest is an ownership interest nonetheless.

Fragmentation of ownership interests over time is the basic concept underlying present and future interests. The human mind, particularly that of judges in early England, wanted to visualize ownership of property for all time. An oft-used diagram shows a dot representing today and a line extending to infinity to identify all estates in property from today to infinity:

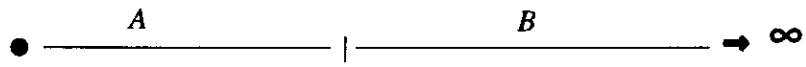


Fee simple absolute interest is complete ownership until the end of time. The fee simple absolute owner can enjoy the property, transfer it away by

sale or gift during his life, or devise it (by will) at his death. If he dies without a will and still owning the property, the property passes to his heirs, usually family members, designated in a statute known as the Intestacy Statute. The above diagram illustrates the fee simple absolute (also called the fee simple or fee).

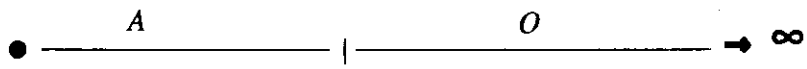
The diagram indicates that beginning at the present, the dot, on the facts known today, all persons who can use or possess the property from now to infinity must get their rights from or through the fee simple absolute owner. Obviously the owner cannot personally use the property until infinity. Human mortality precludes that. The owner, however, controls who gets the property from now until infinity. The owner during his life or at his death will pass the right to control use and possession to others.

A common transfer is from the property owner (*O*) to *A* for life, remainder to *B*. This grant would be diagrammed:



A has a life estate.
B has a (vested) remainder.

If *O* had granted *A* a life estate and not stipulated what happens after *A* dies, the law stipulates the property will revert back to *O* (or *O*'s later designee) at *A*'s death. The timeline would look like this:



A has a life estate.
O has a reversion. Once *A* dies and the property reverts to *O*, *O* again has a fee simple absolute, and once more is free to possess the property or designate who will.

Estates and Interests

The study of estates and interests is one of concepts and vocabulary. Master the vocabulary and relationships early and often.

We'll begin by defining and distinguishing "estates" and "interests." ***Estates*** are present or future possessory interests in property. There are four core estates, categorized based on the potential longevity or duration of the possessory interests.

ESTATE	DURATION
Fee Simple	Forever (Infinity)
Fee Tail (fee simple conditional)	Until original grantee's lineage dies out
Life Estate	For the life of the grantee
Term of Years	Fixed period measured in years, months, or days; or a date certain

The first three estates for historical reasons are known as ***freehold estates.*** The term of years, and its legal cousin, the leasehold, are known as ***nonfreehold estates.*** Historically the owners of freehold estates had more rights and power. The distinction is not so relevant today. Nonfreehold estates are treated like leases. An apartment rental, for example, is a nonfreehold estate.

An ***interest*** is any legal right associated with specific property. All estates are interests in land. Hence, "estates" are a subset of "interests." Interests that are not estates include interests studied later in the course such as easements, restrictive covenants, equitable servitude, liens, and mortgages, all of which give somebody an interest in real property. Also, later chapters explore concurrent interests — when more than one person shares equal possessory rights to specific property.

What to Look for in Studying Freehold Estates

Much of the study of estates is the study of nomenclature, or labels. Master precise labels. There are differences among fee simple absolute, fee simple determinable, fee simple subject to a condition subsequent, and fee simple on executory limitation, for example.

Next, learn the characteristics of each estate. The main characterstic is ***duration.*** A fee simple absolute has a duration of infinity, for example; a life estate lasts only for the life of some person.

Master whether and in what ways the interest holder can transfer the interest. Property is **devisable** if the owner can transfer ownership by a will — a testamentary transfer. Property is **descendible** or **inheritable** if the property can pass by the state's intestacy statute to "heirs" if the owner dies without a will. Property is **alienable, assignable,** or **transferable** if the owner can sell or gift the interest during his lifetime — an inter vivos transfer. Most interests are devisable, inheritable, and alienable (except a person owning a life estate based on her life cannot devise it, nor is it inheritable since the life estate terminates at the person's death). There are quirky exceptions.

Learn how estates end — either naturally or by a condition subsequent. A **condition subsequent** is the occurrence or nonoccurrence of an event that can cut short an estate.

Finally, master the wording used to create each estate. There may be seemingly subtle differences in wording to distinguish different estates. There is a big difference, for example, between a grant to "Jill and her heirs" (fee simple absolute) and one to "Jill and the heirs of her body" (fee tail or fee simple conditional).

(a) Fee Simple Absolute

A ***fee simple absolute*** is an estate with an infinite or perpetual duration. A person owning a fee simple interest (also known as fee simple or fee) theoretically can possess the property forever. There is no inherent end to the ownership. The owner sells or gifts the property or devises it by will. Hence a fee simple absolute is alienable (transferable or assignable), devisable, and descendible (inheritable).

The language to create a fee simple absolute is "***To* A *and his heirs.***" Today the phrase "to *A*" also transfers a fee simple absolute, as do phrases such has "to *A*, his heirs and assigns."

The phrase "to *A* and his heirs" is rife with historical influences. In the eleventh century in England, the king granted a right to the lords and knights to use land during their lives — i.e., life estates. The king needed loyal warriors to defend the country and rewarded these warriors with land. The land reverted to the king at the lords' and knights' deaths. Over time, the lords and knights were allowed to pass property along to male heirs, and by 1290 to devise real property. The right to alienate property was recognized by the Statute *Quia Emptores* in 1290.

Because the life estate was the dominant estate for more than 100 years, courts interpreted transfers "to *A*" as life estates. That is, when in doubt whether the grantor meant to transfer a life estate or a fee simple absolute, English courts 1000 years ago would find a grant to be a life estate. The reverse is true today. A person transferring property today is deemed to transfer his or her entire interest in the property unless the words of grant or other evidence indicate that the grantor intended to transfer a lesser interest. Today a grant from *O* to *A* would transfer a fee simple absolute to *A*.

Currently, the more popular approach to create a fee simple absolute is to use the words "to *A* and his heirs" or "to *A* and her heirs." *A*'s heirs get absolutely nothing from this transfer. Only *A* gets the property. Diagramming the grant:

to *A*	and his heirs
words of purchase	words of limitation

The critical language to determine who owns the estate are the **words of purchase**. Property transferred "to *A*" belongs to *A*. Property transferred "to *A* and his heirs" still belongs solely to *A*. Property "to *A*'s heirs" goes to

A's heirs today (most of the time — more on this later). The remaining language, "and his heirs," are **words of a limitation** or **words of duration**. They tell experienced lawyers the grantor intended the estate to be one greater than a life estate, and that the estate lasts in perpetuity — i.e., that the grantor transferred a fee simple absolute.

(b) Life Estate

The life estate — as the name implies — means the owner owns the property for life. As discussed earlier, in twelfth-century England virtually all estates were life estates. Life estates are alienable inter vivos (transferable during the life tenant's life), but because the estate ends on the death of the life tenant, the life estate is not devisable or descendible (inheritable).

(1) Attributes of Life Estate. One slight quirk: usually the life estate owner is also a person whose death terminates the interest. Thus if *O* transfers Blackacre to *A* for life, *A* owns the property until *A* dies, at which time *O*, or some other person holding the reversion through *O*, owns the property again. In some situations, however, the owner of the life estate and the person whose life determines the duration of the life estate are different people. For example, assume *A*, the owner of a life estate, transfers (assigns) her life estate to *B*. *B* now owns a life estate; *B*'s ownership ends not on *B*'s death, however, but on *A*'s death. *B*'s interest is called a ***life estate pur autre vie*** *A* — that is, a life estate based on the life of another person, *A* in the example.

B's life estate pur autre vie is alienable just as *A*'s life estate was alienable. In addition, since *B* may die before *A*, *B*'s life estate pur autre vie is devisible and descendible. Since *A* cannot transfer more than she owned, *B*'s interest in Blackacre will terminate immediately upon *A*'s death, even if *B* is still alive.

The language to create a life estate is "to *A* for life." Diagrammed:

To *A*	for life
words of purchase	words of limitation

The words "to *A*" are words of purchase or words of grant indicating who gets the property. The words "for life" are words of limitation or words of duration indicating the grantee — in the example, *A* — gets the property for life. As another example, a transfer from *O* "to *A* for the life of *B*" would give *A* a life estate pur autre vie *B*.

(2) Marketability Problems. As a practical matter, life estates are difficult to market. Lenders may be reluctant to take property held as a life estate for security for a loan for fear the life tenant may die before the loan is repaid. Purchasers who wish to improve the property likely will not purchase a life estate and invest

millions of dollars in constructing improvements since they would lose the improvements and land as soon as the life tenant dies. There are other problems with life estates, so much so that England no longer recognizes the *legal* life estate (the *equitable* life estate — one held in trust — is recognized). The legal life estate continues to be recognized in the United States.

(3) Conflicts Between Life Tenet and Remaindermen. Besides the lender and sales problems discussed above, legal life estates create problems between the holder of the legal life estate and the person who owns the property once the life estate ends (the original grantor who has a *reversion*, or a third party who has a *remainder*). Often the current possessor, a life tenant, will want to use the property contrary to what the future interest holder would want. Some rules have evolved to resolve these conflicts.

First, logically enough, the holder of the life estate can exclude others from the property, including any holder of a future interest (reversion and remainder interest). The life estate holder keeps all the income and profits from the use of the land during the life estate. As mentioned earlier, the life estate holder can transfer his life estate to others. Of course, the third party's right to continue using the property ends with the original life tenant's life.

The life tenant has some obligations. The life tenant must keep the premises in ordinary repair, must pay taxes, must pay the interest on any mortgage for all the property, and in some jurisdictions must pay insurance premiums. A life tenant is not entitled to contribution or reimbursement from the future interest holder for these expenses. The repairs required to be made are ordinary repairs only. The life tenant is not obligated to improve the property; to repair extraordinary damages caused by storms, earthquakes, fires, and the like; or to repair damages from ordinary wear and tear. Likewise, a tenant who constructs improvements on the land cannot seek partial payment from future interest holders. We take this up in more detail later in the chapter in the discussion of waste.

As for mortgages and notes, the life tenant is responsible for the interest payments but not for the principal of any loan secured by the property. A life tenant who pays the principal on a mortgage can seek contribution or reimbursement from the future interest holder.

Although some states require the life tenant to insure buildings on the land, most do not. In these states, a life tenant who insures the building anyway cannot seek reimbursement from the future interest holder. Some states hold a life tenant may keep any insurance proceeds received on any claim made against the policy, while other states hold the life tenant and the remaindermen must split any insurance proceeds according to the relative values of each person's interest (which can be calculated using actuarial tables).

The duty of a life tenant to pay taxes includes the obligation to buy the property at a tax sale. Moreover, if the local government makes a special

assessment against the property for permanent improvements, such as streets, sidewalks, sewers, and so on, most states hold the life tenant and the remainderman liable for each person's proportionate share (again based on relative values of each person's interest).

(4) Life Estate or Fee Simple. One big issue in practice is deciding whether a grantor intended to give the grantee a fee simple absolute or a life estate when the drafter did not use "to *A* and his heirs" or "to *A* for life." A court will try to ascertain the grantor's intent or, as is more likely, since most of these occur in nonlawyer drafted wills, ascertain the testator's intent. Often the court resorts to rules of construction. ***Rules of construction*** are not laws, but are accepted suppositions that can be rebutted by evidence. One rule of construction is that the testator intended to give away all her property through her will. An interpretation that disposes of all the testator's property in the will rather than resorting to the state's intestacy statute is favored. A corollary of the first rule is that a partial intestacy is disfavored. Another rule of construction is that a grantor or testator conveys her full interest in the property unless the intent to pass a lesser estate is clearly expressed or necessarily implied by the terms of the deed or will.

(c) Fee Tail and Fee Simple Conditional

Unless you practice in Delaware, Maine, Massachusetts, Rhode Island, or South Carolina, you likely will not see fee tails or fee simple conditionals in your practice. All other states have abolished or never recognized them.

The fee tail and fee simple conditional are related estates — in fact, one replaced the other and both are created by the same language: "***to A and the heirs of his body.***" Initially the grant created a fee simple conditional. The holder of a ***fee simple conditional*** had a fee simple absolute when he first had an heir. At the time, "heir" meant a male son heir, the system of inheritance then in use being ***primogeniture***, or inheritance limited to the eldest male son or heir. Before the birth of the first male son, the holder of the fee simple conditional had a fee simple conditioned on the birth of an heir. If the holder of the estate died without an heir, the property reverted back to the grantor. By the Statute *De Donis Conditionalibus* (1285, five years before passage of the Statute *Quia Emptores*), the fee simple conditional was changed into a fee tail, and thereafter, when *O* conveyed "to *A* and the heirs of his body," a fee tail, inheritable to the last member of the grantee's family line, was established. South Carolina is the only jurisdiction recognizing this estate today.

Desiring to maintain large estates as a unit for generations so as to preserve a family's wealth and social standing, a grantor might have created a fee tail. The ***fee tail*** in effect was a series of life estates. *A* enjoyed a life estate; on *A*'s death the property automatically passed to *A*'s eldest son for his life; on his death the property passed to that son's eldest; and so

on until the family line ended (died "***without issue***" is the popular phrase), at which point the property reverted back to the grantor (or more likely to one of the grantor's heirs). The ending of the grantee's bloodline is called ***failure of issue***.[1]

Fee tails, like life estates, are not devisable or inheritable because the property passes from one generation to the next under the fee tail grant. The fee tail, when used in conjunction with a principle of primogeniture, served to preserve the largest English estates intact rather than to split them up among the children of the nobility. It was also used to return land transferred to a child to the family's estate should the line of that child die out. (You will think the fee tail a less strange device than it sounds when you realize that during the time the estate was first created, mortality rates were such that it took on average a minimum of four children in a family to ensure that land would ever be held by the next generation.)

Only a few states today recognize the fee tail. These are three New England states (Maine, Massachusetts, and Rhode Island) and Delaware. In these four states, the holder of the fee tail can break the entail or ***disentail*** the property simply by conveying his interest in fee simple absolute to a third party, who takes it in fee simple absolute. The third party is often the entailed owner's attorney, who serves as strawman, or someone bound to convey it right back in fee simple absolute. In all other states, the fee tail is abolished by statute. The statutes abolishing it result in one of two configurations of estates: either the first grantee takes a fee simple absolute, or else the first taker has a life estate and the heirs of his body take a fee simple absolute. Only a few states use the second configuration.

Fee tails, even where authorized, are seldom used. More than that, the use of the fee tail was unusual even at common law, because grantors and testators often did not want to take the chance that their children and grandchildren would not produce issue — a "***failure of issue***." Better to have used the conveyance "to *A* and his heirs" or some variation or to split the fee into more acceptable present and future interests.

Waste

(a) Voluntary, Permissive, and Ameliorating Waste

An interesting conflict between the life tenant and the remainderman (the present interest owner and the future interest owner) concerns the use or

1. Rules evolved to address situations where the eldest son had died without issue or was survived only by daughters or by a son who was not the eldest son. Those details are beyond the scope of this book.

nonuse of the property under a label called "waste." Under English common law, a life tenant was obligated to deliver the property in essentially the same condition or use as when the life tenant took possession. ***Waste*** occurs when the possessory life tenant permanently impairs the property's condition or value to the future interest holder's detriment. The future estate holder has standing to enjoin waste.

Waste falls into several categories. ***Affirmative*** or ***voluntary waste*** occurs when the life tenant actively changes the property's use or condition, usually in a way that substantially decreases the property's value. A court will enjoin affirmative waste.

A second category of waste, ***permissive waste***, is akin to nonfeasance — the life tenant fails to prevent some harm to the property. For example, one court found that not making normal repairs to a water pump that resulted in dead lawn, shrubs, and trees was permissive waste. Kimbrough v. Reed, 130 Idaho 512, 943 P.2d 1232 (1997). The life tenant was required to pay damages to the remainderman. The law of permissive waste evolved to become the duties discussed earlier: to make ordinary repairs, to pay interest on debt, to pay taxes and assessments, and in some jurisdictions to pay insurance premiums.

A variation of affirmative or voluntary waste is ***meliorating*** or ***ameliorating waste***. In England, the law of waste was strict: A life tenant could not stop growing crops and begin grazing cattle, for example, even if it made the property more productive or valuable. Even changing crops may have been waste. Courts in the United States have allowed reasonable changes in use and condition. For example, in Melms v. Pabst Brewing Company, 79 N.W. 738 (Wis. 1899), a life tenant owned a stately mansion. Over time breweries and other commercial activities encroached on the mansion to the point at which it was no longer suitable for use as a residence, and not efficiently convertible to commercial purposes. The court held under the circumstances that demolishing the mansion and replacing it with a commercial building would not be waste. In evaluating whether ameliorative waste will be permitted, courts look at the life tenant's expected remaining life, the need for change, and the good faith of the life tenant and future interest holder in proposing or opposing the change.

(b) Open Mines Doctrine

The open mines doctrine sets out rules applicable to natural resources, particularly minerals. Under the **open mines doctrine**, a life tenant may mine and remove minerals (and keep the profits) if the grantor had opened the mines or began the mining and removal before he granted the life estate. The presumption is the grantor intended the life

tenant to continue using the property as the grantor had been using it. That same presumption swayed courts to conclude, unless the future interest holder consented, that the life tenant could not conduct mining operations if no mining took place before the life estate began. While England applied the same rule to timber cutting, American courts in some cases allow timber cutting using the ameliorative waste analysis.

(c) Economic Waste

A variation on waste is economic waste. ***Economic waste*** occurs when the income from property is insufficient to pay the expenses the life tenant has a duty to pay: ordinary maintenance, real estate taxes, interest on mortgages, and in some jurisdictions insurance. Economic waste does not mean the property is not being used for its highest and best use, only that it does not pay for its own upkeep. The life tenant — and in some cases the remainderman — can bring an action to sell the property if economic waste occurs.

Some casebooks include the case of Baker v. Weedon, 262 So. 2d 641 (Miss. 1972), in which Anna Weedon, the life tenant, suffered personal economic distress and wished to sell land (her life estate interest and the remainder interest) and put the money in a trust so she could use the income from the trust to pay for her personal living expenses. The court held that economic waste does not mean the life tenant personally would be better off financially, or that a court can act when a life tenant needs to sell (not just her interest but the remainderman's as well) for economic reasons. Only if the income from the property is insufficient to "pay taxes and maintain the property" could a court order a sale. The property in that case generated just enough money each year to pay the taxes and maintenance. Hence the court found no economic waste.[2]

Defeasible Fee Simple Estates

In addition to the three freehold estates developed to this point — fee simple absolute, life estate, and fee tail (fee simple conditional) — are variations of the three freehold estates, particularly the fee simple absolute, that may be prematurely terminated by a condition subsequent. A ***condition subsequent*** is an event whose occurrence or nonoccurrence will terminate the estate. Once the condition subsequent occurs, the estate holder's interest ends and the property either reverts to the original grantor or passes to a third party.

2. Despite its no-economic-waste holding, the court fashioned a second theory, technically unrelated to waste, that it could order a sale of the property if it was in the "best interest of all parties."

Example: Armas transfers Blackacre "to Britney and her heirs, but if Britney sells alcohol on Blackacre, then to Carrie." Armas has transferred a fee simple to Britney but it is not a fee simple absolute since Britney may lose all her interest in Blackacre if she sells alcohol on Blackacre.

The example illustrates the concept of a defeasible estate. Although defeasible life estates exist, most defeasible estates are defeasible fee simple estates. Three distinct defeasible fees have evolved, each with its own label and characteristics. Britney's estate in the above example is called a fee simple subject to an executory limitation. If the property were to return to Armas, the grantor, Britney's interest would be called a fee simple subject to a condition subsequent. The grant could have been worded slightly differently to create a fee simple determinable.

(a) Fee Simple Determinable

A ***fee simple determinable*** is an estate that would be a fee simple absolute but for a provision in the transfer document that states that the estate shall ***automatically*** end on the happening of an event or nonevent. An example is "to *A* and her heirs so long as the property is used for church purposes," or "to *A* and his heirs unless liquor is sold on the property." Although it is sometimes said that no words of art or magic words are necessary to create such estates, the words typically employed to create a fee simple determinable are "so long as," "during," "while," "unless," and "until."

The significant difference between a fee simple absolute and a fee simple determinable is that while both potentially have an infinite or perpetual duration, the fee simple determinable might terminate automatically if the condition subsequent occurs. Historically a grantor could not provide that the property would pass to a third party if the condition subsequent eventuated and the fee simple determinable ended. The only option was to have the property return to the original grantor (or his heirs if the original grantor was dead). The chance that the property might return to the grantor if the condition subsequent happened is called the ***possibility of reverter***. Memorize the relationship: A fee simple determinable is a present possessory estate followed by a possibility of reverter in the grantor. Sometimes the possibility of reverter is expressed in the deed or will creating the fee simple determinable; if not expressed it will be implied as part of the nature of a fee simple determinable.

Example: Armas deeds Blackacre to Britney "so long as Britney does not sell alcohol on Blackacre." Britney owns a fee simple determinable estate in Blackacre that could last forever. However, if Britney sells alcohol on Blackacre, the property automatically returns to the grantor, Armas.

(b) Fee Simple Subject to a Condition Subsequent

Closely related to the fee simple determinable is the ***fee simple subject to a condition subsequent***. The holder of a fee simple subject to a condition subsequent may hold it forever, but could lose it entirely if the condition subsequent occurs. The difference between a fee simple determinable and a fee simple subject to a condition subsequent is that the fee simple determinable ends automatically upon the happening of the condition subsequent, whereas the grantor of a fee simple subject to a condition subsequent must assert his right of entry (also called "right of re-entry" or his "power of termination"). Until the grantor exercises his power of termination (right of entry), the holder of the fee simple subject to a condition subsequent continues to own the property.

The fee simple subject to a condition subsequent usually can be identified by some of the following language in the granting instrument: "provided that," "but if," "on the condition that," or "provided, however." Compare these phrases with the one used to create a fee simple determinable.[3]

> **Example:** Armas transfers Blackacre "to Britney; provided, however, if Britney sells alcohol on Blackacre, then Armas may re-enter and retake the land." Britney owns a fee simple subject to a condition subsequent in Blackacre. Her interest may last forever. If she sells alcohol on Blackacre, however, Armas can elect to take back the property.

As is the case with the fee simple determinable, the only person who can retake the property on the event of the condition subsequent is the grantor or his heirs. The grantor's right to retake the property is called the ***right of entry***, the ***right of reentry***, or the ***power of termination***.

There are some different legal consequences between a fee simple determinable and a fee simple subject to a condition subsequent. First, since the holder of a right of entry does not automatically gain immediate possession upon a broken condition, the holder may waive any transgression. In that case the owner of the fee simple subject to a condition subsequent continues owning the land. On the other hand, title automatically reverts to the holder of the possibility of reverter on the broken condition, so the owner of the fee simple determinable loses all interest in the property immediately. Once title reverts, it is too late for a waiver. A new deed is required to undo the effect of the broken condition.

Second, unless modified by statute (which many states have done), the running of the statute of limitations for adverse possession starts at different times. The adverse possession statute starts running against the holder of a possibility of reverter on the day the condition subsequent happens. In contrast, since the owner of a fee simple subject to a condition subsequent

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3. The phrases most associated with the creation of a fee simple determinable are "so long as," "during," "while," "unless," or "until." See supra page 116.

continues owning the property even if the designated event occurs, the adverse possession limitations period does not begin to run until the holder of the right of entry exercises that right. A few states by judicial fiat or by statute equate the two estates for adverse possession purposes and begin the running of the statute of limitations as soon as the condition occurs.

Finally, while most states have adopted a uniform rule on the assignability of possibilities of reverter and rights of entry — either both are assignable or neither is — in a few states the possibility of reverter is transferable, while the right of reentry is not.

Commentators have long urged that the two estates be consolidated by statute and that the remaining differences are too small to warrant continuing both. The critics contend that despite the fact that the fee simple determinable has an automatic termination feature and the fee simple subject to a condition subsequent does not, a reentry is never automatic. To them the view that *O* turns up and *A* gives up possession is simply unrealistic. Further, as a matter of policy, any exercise of *O*'s rights ought to be judicially supervised in any event, no matter what words the grantor uses.

Some state legislatures have responded to the problems that possibilities of reverter and rights of reentry create for conveyancing attorneys by enacting statutes that limit their duration to a period of 20 or 30 years. These interests must be asserted within the statutory time period or else be forever barred. A few courts have done the same thing without waiting for their legislatures by limiting the life of a possibility of reverter or right of reentry to a reasonable length of time. See, e.g., Mildram v. Town of Wells, 611 A.2d 84 (Me. 1992) (holding that not asserting a right of reentry for 82 years vested the holder of the present interest with a fee simple absolute). Other courts have found, based on the language used by the drafter, that the future interest was personal to the grantor or transferor and not intended to be alienable, devisable, or descendible for the benefit of his or her heirs.

(c) Distinguishing a Fee Simple Determinable From a Fee Simple Subject to a Condition Subsequent From a Covenant

At times it may be critical to determine whether a given grant is a fee simple determinable or a fee simple subject to a condition subsequent. If properly drafted, the determination is easy. A grant using the words "as long as," "so long as," "during," "while," "unless," or "until" creates a fee simple determinable. A grant using the words "provided that," "provided, however," "but if," or "on condition that" creates a fee simple subject to a condition subsequent. Problems arise when the grant uses words from both categories or the grant is otherwise ambiguous.

A court will try to ascertain the grantor's intent as expressed in the document as a whole. Courts disfavor forfeitures, however. Consequently, when in doubt, as a matter of construction, a court more likely will construe

a grant as a fee simple subject to a condition subsequent rather than as a fee simple determinable because the fee simple subject to a condition subsequent allows the possessor to continue ownership until the holder of the right of reentry (power of termination) acts to retake the property.

In some cases a court may interpret the qualification to the title as not being a divesting condition at all, but instead a covenant. A ***covenant*** is a promise to do or not do some act. A grantor may seek injunctive relief or damages for a breach of a covenant, but the owner of the fee simple will not forfeit ownership. In some cases a court may even interpret limiting language as ***precatory language*** (unenforceable suggestion, expectation, or intention) instead of as a condition or a covenant.

(d) Fee Simple Subject to an Executory Limitation

One shared characteristic of the fee simple determinable and the fee simple subject to a condition subsequent is that only the original grantor or his heirs can hold the future interest (the possibility of reverter or the right of reentry). For more than 200 years in England, a grant could not divest a defeasible fee in favor of a third party. The grantor had to retain the future interest for himself. Finally, by the Statute of Uses enacted in 1536, grantors could pass future interests following a defeasible fee simple to a third party. After more than 200 years of judges and lawyers repeating the mantra "only the grantor can have a future interest following a defeasible fee," the English legal community settled on a new label for the expanded rights.

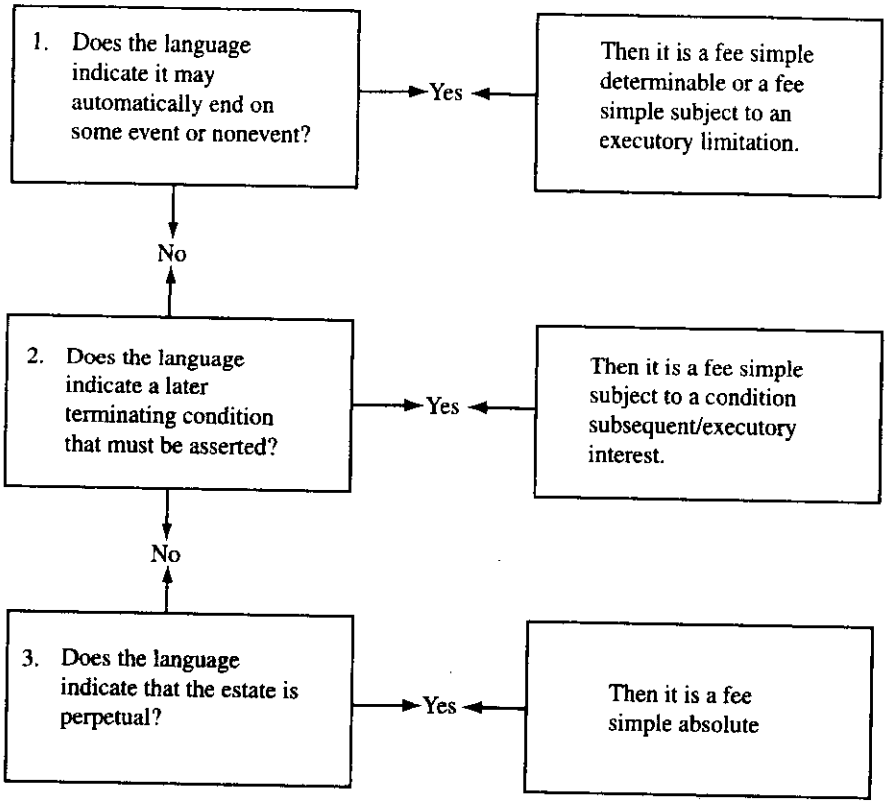
The same granting language that would create either a fee simple determinable or a fee simple subject to a condition subsequent creates a ***fee simple subject to an executory limitation***. (also known as a fee simple on executory limitation). Only one label for the possessory interest was coined, not two. The new label given to the future interest to a third party following a fee simple subject to an executory limitation is the ***executory interest***.

> **Example 1:** Armas transfers Blackacre "to Britney as long as Britney does not sell alcohol on Blackacre." Britney's possessory interest is a fee simple determinable. Armas' future interest is a possibility of reverter.

> **Example 2:** Armas transfers Blackacre "to Britney as long as Britney does not sell alcohol on Blackacre, then to Carl and his heirs." Britney's estate is a fee simple subject to an executory limitation. Carl's future interest is an executory interest (technically a *shifting* executory interest, as will be discussed in the next chapter).

Classifying Estates in Fee Simple – A Flowchart

If an estate is alienable, devisable, and descendible, then ask yourself the following questions, in the order presented in the following flowchart:



EXAMPLES

A Present and a Future Estate

1. (a) *O*, having full ownership, conveys Blackacre "to *A* for ten years." What is *A*'s estate?
   (b) What is *O*'s interest?
   (c) What estate will *A* and *O* have in ten years?

Words of Purchase and Limitation

2. In the following conveyances, does *A* hold an estate in fee simple absolute?
   (a) *O* conveys "to *A*."
   (b) *O* conveys "to *A* and his heirs."
   (c) *O* conveys "to *A* and his heirs, but if *A* dies, to *B* and his heirs."

No Issue

3. *O* conveys "to *A* and his bodily heirs, but if *A* dies without issue, to *B* and his heirs." *A* has a daughter, *C*, who predeceases *A*. This may occur, for example, if a farmer, Orville, dies, leaving his farm to his eldest son, "Arnold, and his bodily heirs, but if Arnold dies without issue, to Bart and his heirs." What estates are created?

An Estate for Joint Lives

4. *O* conveys "to *A* and *B* for the lives of *A* and *B*." When does the estate end?

Insurance Proceeds

5. *O* conveys Blackacre "to Larry for life, remainder to Freda and her heirs." Larry the life tenant insures Blackacre against fire for $100,000. Improvements on Blackacre are worth $75,000. They burn to the ground. Larry claims the proceeds of the policy. Freda appears and claims the bulk of the proceeds. Can she do so successfully?

She Meant Well

6. *O* writes, "I give my house and lot to you for your residence. Don't sell it. Let your sister have the rest of my property." What estate is transferred?

A Slew of Estates

7. What estates are created in the following transfers?
   (a) *O* conveys "to *A* and his heirs so long as the property is used as a residence."
   (b) *O* conveys "to *A* and her heirs, on the express condition that Blackacre be used only for residential purposes, but if it ceases to be used for such purposes, then *O* and her heirs shall have the right to reenter."
   (c) *O* conveys "to *A*, provided that the estate granted shall cease and determine if liquor is sold, used, or stored on the premises."
   (d) *O* conveys "to *A* and his heirs, it being my wish and purpose in making this conveyance that the property be used for residential purposes."
   (e) *O* conveys "to *A* and his heirs, provided further that *O* and *A* agree and promise that the property shall only be used for residential purposes."
   (f) *O* conveys Blackacre "to *A* so long as he wishes to live on the property."
   (g) *O* conveys Blackacre "to *A*, provided that he lives on the property, but if he does not live there, then to *O*."
   (h) *O* conveys "to *A* for life, then if *B* graduates from law school, to *B* and her heirs so long as the land is used for a law office." What interests do the parties have before *B* graduates from law school?
   (i) What interest do the parties have in (h) when *B* graduates from law school?

(j) *O* conveys "to *A* so long as the property is used as a residence solely, provided, however, that if it is not so used, the estate shall cease and revert to *B* and his heirs, who have the right to repossess the property." What estate does *A* have?

Adverse Possession

Review Example 7, "Dispossessing Future Estate Holders," in Chapter 8.

EXPLANATIONS

A Present and a Future Estate

1. (a) *A* has a term of years or a leasehold, and so a nonfreehold estate. It is a present possessory estate.
   (b) Just after the conveyance, *O* has a reversion in fee simple absolute. It is a future interest (currently nonpossessory). See infra Chapter 10.
   (c) After a term of years ends, *A* no longer has any interest in Blackacre. *O* will possess, among estates, the grandest of them all — a freehold held in fee simple absolute, which is what we think of when we say that a person has "ownership" of real property.

Words of Purchase and Limitation

2. (a) Yes. Today *A* holds an estate in fee simple absolute. The words of purchase are "to *A*" and the words of limitations are supplied by the canon of construction that a fee simple absolute is preferred, unless the language of the deed or will indicates the grantor or testator meant to transfer a lesser estate.
   (b) Yes. Although other words might be used, "to *A* and his heirs" are the recommended words to create a fee simple absolute.
   (c) No. *A*'s estate is something less. The words of purchase are the same, but the words of limitation are "and his heirs, but if *A* dies to *B* and his heirs," and indicate that the grantor intends that descendibility and devisability not be part of *A*'s estate; thus no fee simple absolute was intended. *A* holds a life estate. See Mark Reutlinger, *Wills, Trusts, and Estates: Essential Terms and Concepts* 92 (1993).

No Issue

3. "*A* and his bodily heirs" is interpreted to mean the same as "*A* and the heirs of his body." Hence *A* has a fee tail (or fee simple conditional); here it is recognized.

Since *A* has a child, *C*, who predeceased him, it matters how the jurisdiction handles the failure of issue. If the state retains the historically more

popular vehicle, the fee tail, the land would belong to *A* as long as he lived, then to *A*'s eldest child as long as he lived, then to his eldest child as long as he lived, until *A*'s bloodline ended, at which point the land would go to *B* (or his heirs). In the Example, *A*'s line died with him and his daughter, *C*; so on *A*'s death *B* would get a fee simple absolute estate in the farm.

States that have abolished the fee simple conditional and the fee tail have interpreted language that historically created one of the two estates in two different ways. The majority of states treat the "and the heirs of his body" and "and his bodily heirs" language as words of limitation indicating a fee simple absolute — i.e., just like "and his heirs." In those states, *A* received a fee simple absolute, and *B* got nothing.

In other states *A* has a life estate and if he dies with children living at his death (or grandchildren if no surviving child) the child (or grandchild) takes the land in fee simple absolute. If *A* dies without issue, the property passes to *B* in fee simple absolute.

Which interpretation applies makes a big difference in the Example since *A* died without a surviving child (*C* predeceased *A*). In the first instance *A* owns the farm in fee simple absolute and can devise it in his will or it passes to his heirs (siblings, cousins, etc.). In the second instance, *A*'s interest in the farm ends on *A*'s death and *B* owns the farm in fee simple absolute.

An Estate for Joint Lives

4. The estate ends either (1) when the first of *A* and *B* dies, or (2) when the last of the two dies. The intent of the transferor or grantor, *O*, controls the choice. That choice involves either construing the greatest estate granted by the transferor or freeing the title of this life estate at the earliest possible time and vesting the transferor's reversion. Thus, policies of either presuming the words of conveyance against the grantor or freeing up the alienability of the title conflict here. The transferor's intent should control.

If there were added to this conveyance a "remainder to the survivor of them in fee simple absolute," the length of the life estate would be clear. (This remainder would, as we will see, be a contingent remainder, lacking as it does ascertainability of the identity of the survivor until the death of either *A* or *B*.) See 1 *American Law of Property* § 2.15, at 128 (James Casner, ed., 1952).

Insurance Proceeds

5. Some courts hold that a life tenant has no duty to insure the property. If Larry has no duty under a state's law to insure the improvements, then the proceeds should be wholly his, and some courts have so held. There may be insurance law questions as to what Larry can insure, but Freda as the holder of the remainder has no standing to raise those questions. (The moral here is

for the present and future interest holders to get together and purchase insurance, making sure that everyone's interest is adequately covered — or for the person creating the tenancy to impose the duty to insure specially on the tenant.) See 1 *American Law of Property* § 2.23, at 159 (James Casner, ed., 1952).

She Meant Well

6. Several aspects of this language are relevant. The "for your residence" language may indicate a life estate; dead people don't need a house. Similarly, the "don't sell it" language perhaps negates the alienability aspect of a fee simple absolute.

On the other hand, perhaps the drafter intended merely to reenforce and define the purpose of the writing — to provide a residence for the transferee — i.e., precatory language. The restraints on use and alienability on the holder of the estate, may be consistent with either a fee simple absolute or a life estate. If the court finds it to be a fee simple, the court will independently review the "don't sell it" language to decide whether the restraint is an unreasonable restraint on the alienability of land.

On the other hand, perhaps the "rest of my property" language indicates a future interest to follow a life tenancy in the house and lot. If this is a lay drafter, however, one cannot put too much store in such a person's knowledge of future interests. Also relevant to a determination of the issue of how to define the estate are the other provisions of the transfer. Is the sister otherwise well provided for by the "rest of my property" language?

As things stand, the jurisdiction's statutes preferring the larger estate, such as a fee simple, most likely will control.

A Slew of Estates

7. (a) *A* has a present interest in fee simple determinable, followed by *O*'s future interest, a possibility of reverter, held in fee simple absolute. See Thomas Bergin & Paul Haskell, *Preface to Estates in Land* 48 (2d ed. 1984).

(b) *A* has a present interest in fee simple subject to a condition subsequent. *O*'s future interest is a right of reentry or a power of termination. If, after the terminating event is described, the last clause were to read instead "*B* and his heirs shall have the right to reenter," *A* would hold a fee simple subject to an executory limitation, and *B* would hold an executory interest in fee simple absolute.

(c) This is a conveyance with words indicating a fee simple determinable (the "cease and determine" phrase, indicating an automatic shift of the

fee simple back to grantor *O*) and with words indicating a fee simple subject to a condition subsequent (the "provided that" language). In this ambiguous grant, the modern canon of construction, that the grantor is presumed to have conveyed whatever interest and estate he held becomes a preference for finding the larger estate in the grantee; this preference helps construe the conveyance as a present interest in *A*, held in fee simple subject to a condition subsequent, *O*'s retaining a right of reentry at the moment of the conveyance.

(d) *A* has a fee simple absolute. The additional language is precatory language, indicating *O*'s desire, but is neither a condition nor a covenant, and therefore is unenforceable.

(e) *A* has a fee simple absolute. The language neither makes the interest into a fee simple determinable nor subjects it to a condition subsequent. Rather, the promise is a covenant to use the property as a residence; when he does not, the breach of this promise subjects *A* to contract remedies (e.g., damages or an injunction).

The difference between a condition and a covenant is that breach of a condition results in a forfeiture of the property while the owner retains ownership when a covenant is breached, but may be subject to monetary damages or, more likely, an injunction.

(f) This conveyance creates either a determinable life estate or a fee simple determinable in *A*. A court will try to ascertain the grantor's intent based on the surrounding facts and circumstances. Today a court would tend to find that *O* transferred the fee simple determinable, the larger estate, to *A*, the grantee. If the grant is a fee simple determinable, *O* retains a possibility of reverter. If, on the other hand, the grant is a determinable life estate, *O* has a reversion, getting Blackacre back when *A* ceases living on Blackacre and no later than *A*'s death.

If *A*'s interest is a fee simple determinable and *A* continued to live on the property up to his death, *A* has satisfied the condition and, as a result, at the moment of death he holds the property in fee simple absolute. Some good it will do him! This result will, however, benefit his heirs or assigns.

(g) *A* has a fee simple subject to a condition subsequent. It is not subject to an executory limitation. Such a limitation would require that the reentry be made by a third party. The drafting, however, is extremely sloppy: Instead of "then to *O*," better to have said that "*O* has the power to terminate *A*'s interest and the right to reenter the property." This makes plain that the termination is not automatic and that *O* must do something, through either self-help or at law, to reenter. See 1 *American Law of Property* § 4.6, at 417 (James Casner, ed., 1952).

(h) *A* has a life estate, *B* has remainder (a contingent remainder since *B* must satisfy a contingency — graduate from law school — to take after *A* dies). Because it is possible *A* may die before *B* graduates, *O* the grantor retains a reversion. *O* also has a possibility of reverter, but as a matter of tradition, lawyers only mention the first interest *O* holds, the reversion.

(i) *B*'s remainder interest is no longer contingent. It is a vested remainder in fee simple determinable. Contingent and vested remainders are developed more fully in the next chapter. Since *B*'s remainder is vested, *O*'s reversion has ended, but *O*'s future interest, the possibility of reverter, remains. Thus, *B* has a vested remainder in fee simple determinable, and *O* has a possibility of reverter. See 1 *American Law of Property* § 4.12, at 427 (James Casner, ed., 1952).

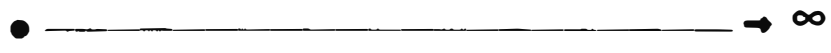
(j) *A* has a fee simple subject to an executory limitation. The language is ambiguous, indicating either a fee or a life estate. The preference for the larger estate permits this language to be construed as a fee simple subject to an executory limitation. *B* has an executory interest (in the next chapter we learn that *B* has a ***shifting*** executory interest).

10

Future Interests

Introduction

The previous chapter introduced estates, present interests, and, to a lesser extent, future interests. An estate delineates the duration of a freehold interest in land. Fee simple absolute, for example, is perpetual ownership or ownership until the end of time. A fee simple absolute can be diagrammed on a timeline as follows:



A life estate can be diagrammed as follows:

where *A* has a life estate. *X* has either a remainder in fee simple absolute or a reversion, depending on who *X* is.

English judges and lawyers a few centuries back wanted to visualize who controlled ownership of land from now until infinity. If a person owned a life estate, the legal mind wanted to know who (or whose heirs or assigns) took possession once the life estate ended. To illustrate, Orville transfers Blackacre to Andrew for life. Andrew has a life estate or, more fully described, Andrew has a present interest in a life estate. Because he transferred less than his full interest in Blackacre and will take back possession of Blackacre once Andrew dies, Orville has a reversion. A reversion is a future interest since the holder does not have a present possessory right to the land. Orville has a present property right, but the possession is deferred until a later time.

Distinguishing Present Interests and Future Interests

A person's interest in property has two analytical components. First, the interest is either a present interest or a future interest. Second, the interest

has an estate component. For shorthand purposes, lawyers normally do not write or speak the present interest or future interest components. Instead, they give labels that denote future interests. The word "remainder" or the phrase "vested remainder," for example, denotes a future estate.

Example: Orville transfers Blackacre to "Andrew for life, then to Becky for life, then to Carrie." Andrew owns a "present interest in life estate." It is a present possessory interest, meaning Andrew can use Blackacre and exclude all others, including Orville, Becky, and Carrie from Blackacre. His estate is the life estate. Instead of identifying both the present interest and the life estate in the label, we shorten the label of Andrew's interest in Blackacre to a "life estate," the present interest component being assumed.

Becky has a "future interest in life estate." Instead of saying that, we say Becky has a "vested remainder in life estate" (more about vested remainders later). The term "vested remainder" indicates a future interest, in fact a particular future interest with its own legal attributes.

Carrie too has a future interest, her interest being a "future interest in fee simple absolute." Instead of saying Carrie has a "future interest in fee simple absolute," we say Carrie owns a "vested remainder in fee simple absolute."

Becky and Carrie currently own property interests in Blackacre, but cannot use the property—they are not entitled to possession until a later date, so they merely have future ***possessory*** interests. Once Andrew dies, Becky's interest becomes a present possessory interest—she will have a "present interest in life estate" or, more simply, a "life estate." Until both Andrew and Becky die, Carrie's interest remains a vested remainder in fee simple absolute. Once Andrew and Becky die, Carrie's possessory interest then becomes a fee simple absolute.

Future Interests Retained by the Grantor or Transferor

The future interest (currently owned interest that becomes possessory at a future date) retained by the transferor (or his heirs or assigns) are the reversion, the possibility of reverter, and the right of reentry (also known as the "right of entry" and the "power of termination").

The three interests were introduced in the previous chapter on estates and present interest. The ***reversion*** is retained by the transferor or grantor when he transfers an interest less than the one he owns to another. It follows a life estate, fee tail, or term of years.

Example: Orville transfers Blackacre to Andrew for life. Andrew has a present possessory interest in life estate in Blackacre. Orville has a reversion. Orville gets possession of Blackacre when Andrew dies.

As discussed in Chapter 9, the ***possibility of reverter*** is a future interest held by a transferor or grantor who transfers a fee simple determinable. The ***right of reentry*** follows the fee simple subject to a condition subsequent.

If the transferor dies or assigns his future interest to a third party, the name of the future interest remains the same. Thus, if *O* transfers a reversion in Blackacre to *A*, *A*'s interest is a reversion.

Future Interests in Third-Party Transferees

Future interests in transferees can be divided into three fundamental types:

1. Vested remainders
2. Contingent remainders
3. Executory interests

There are variations on each.

(a) Remainders

Vested and contingent remainders are interests in third parties that follow interests less than a fee simple, mainly life estates, fee tails, and terms of years. The same future interest retained by the grantor is a reversion. A remainder follows the natural termination of a prior estate; a remainder does not divest or cut short a prior estate. An owner of a remainder takes possession immediately following the natural ending of the prior life estate, term of years, or fee tail with no gap in time between possessions. A life estate to *A*, then to *B* after *A*'s funeral, for example, does not create a remainder in *B* since there is a gap in time between the natural termination of *A*'s life estate and the start of *B*'s right to possess. *B* owns an interest (called an executory interest), but it is not a remainder.

Declaring that a person has a remainder merely says he owns a future interest, an interest that may become possessory sometime in the future. The term "remainder" in and of itself does not say what estate that future interest is: The estate may be a life estate, a fee simple absolute, a term of years, a fee tail, a fee simple subject to condition subsequent, a fee simple determinable, or a fee simple subject to an executory limitation.

Example: Orville transfers Blackacre to Andrew for life, then to Becky. Andrew has a (present possessory) life estate. Becky owns a remainder. She takes possession of Blackacre immediately following the natural termination of Andrew's life estate, which occurs at Andrew's death. What estate — how long will Becky get to possess Blackacre — does Becky get? While the grant was silent on how long Becky will own Blackacre, the rules of construction favoring a fee simple interest over a life estate mean Becky's

estate is a fee simple absolute. Thus, the full label for Becky's interest in Blackacre at the time of the grant is remainder in fee simple absolute. Once Andrew dies, Becky's interest becomes a fee simple absolute, a present possessory interest.

(b) Executory Interests

An ***executory interest*** is a future interest in a third party that divests or cuts short a prior estate. The most common executory interests follow defeasible fees. Although similar to a possibility of reverter and a right of reentry (which are interests in the grantor that follow, respectively, a fee simple determinable and a fee simple subject to a condition subsequent), an executory interest is the name given to the interest following a defeasible fee if the property passes to a *third party* instead of to the grantor. The fee simple that may be divested in favor of the third party is called a ***fee simple subject to an executory limitation.***

The following chart summarizes present estates, words normally used in the creating the estate, and names of the future interests held either by the grantor or by third persons:

Estates in Real Property, with Future Interests

Freehold Estates		Future Interest	
(Typical wording in italics in this column, followed by future interests in the two right-hand columns)		Grantor	3rd Person
Fee Simple			
Absolute	"*to* A" "*to* A *and her heirs*"	None	None
Determinable/Subject to an Executory Limitation	"*to* A *so long as* . . ." "*while* . . ." "*during* . . ." "*unless* . . ." "*until* . . ."	Possibility of Reverter	Executory Interest
Subject to a Condition Subsequent/Executory Limitation	"*to* A *provided that* . . ." "*on condition* . . ." "*but if* . . ."	Right of Recentry	Executory Interest
Fee Tail	"*to* A *and the heirs of his body*"	Reversion	Remainder
Life Estate	"*to* A *for life*"	Reversion	Remainder Executory Interest
	Non-Freehold Estate	Future Interest	
Term of years	"*to* A *for* _____ *years*"	Reversion	Remainder

Future interests are developed more fully below after a digression into the difference between vested remainders and contingent remainders.

Vested and Contingent Remainders

Remainders in land can be vested or contingent. A ***vested remainder*** is one that (a) is owned by an ascertained person or persons and (b) is not subject to a condition precedent. A ***contingent remainder*** is one where either the owner is unascertained or possession of the property is subject to a condition precedent (a contingency).

Because they are already possessory, all present interests, whether a life estate, fee simple absolute, fee simple determinable, fee simple subject to a condition subsequent, or a fee simple subject to an executory limitation, are vested. In addition, all future interests ***in the grantor*** (or his later assigns or heirs) are deemed vested even if the interests become vested only upon the happening of a contingency. Distinguishing between vested and contingent interests, therefore, becomes critical only with regard to remainders and executory interests—i.e., future interests in third parties.

To reviews, a vested remainder is given to an ascertained person and is not subject to a condition precedent. The vested remainder becomes possessory upon the natural termination of the immediately preceding estate. It follows a life estate, fee tail, or term of years. A contingent remainder is a remainder that either is given to an unascertained person or is subject to a condition precedent. Executory interests, because they cut short a prior estate and thus do not follow a natural termination of the prior estate, are contingent interests (but not contingent remainders).

(a) Ascertained Persons

Assuming no condition precedent, a remainder is vested if it is given to an ascertained person and contingent if it is given to an unascertained person. A person is ascertained if he or she can be specifically determined currently. The most certain way to have an ascertained person is to name the person. Thus a remainder to "Paul Property" or to "my son, Paul Property" would be vested (assuming no condition precedent) because Paul Property is an ascertained person. In Property class discussions an ascertained person is designated by a letter. Thus a gift to "*A*" is a gift to an ascertained person.

There is some difficulty, though not much, when a transferee is identified by a label or description. If the description can apply to only one person or individually identifiable persons, the persons are ascertained. If further developments are necessary before a specific individual can be pinpointed, the recipient is an unascertained person. The most common unascertained persons are unborn persons. For example, if Orville dies, his will devising

Blackacre to his daughter, Andrea, for life and then to Andrea's first-born child, but she has no child, the remainder to Andrea's first-born child is to an unascertained person.

Example 1: *O* conveys to *A* for life, then to *B* and his heirs. Both *A* and *B* are ascertained persons.

Example 2: *O* conveys to *A* for life, then to *B*'s children. *B* is childless. The remainder to *B*'s children is to a group of unascertained persons. Therefore, *B*'s children have a contingent remainder.

Example 3: *O* conveys to *A* for life, remainder to *B*'s heirs. *B* is married to *C* and has one son, *D*. Since *B*'s heirs can be definitely identified only when *B* dies but *B* is still alive, the grant to *B*'s heirs is a gift to unascertained persons. Their remainder is a contingent remainder. Once *B* dies, *B*'s heirs can be identified; they are then ascertained persons. Since there is no condition precedent they have a vested remainder in fee simple to take possession on *A*'s death.

Example 4: *O* conveys to his son, *A*, for life, and then to *A*'s children (*O*'s grandchildren). *A* is alive. *A* has three children (*B*, *C*, and *D*). *B*, *C*, and *D* are ascertained persons. The gift to "*A*'s children" is a class gift. When one person in the class is identified, the class is vested. Nonetheless, as will be developed more fully later, for a very important purpose — applying the Rule Against Perpetuities — a gift to a class that is vested but subject to more people being added to the class will be treated as a contingent remainder until the class "closes" (i.e., all persons who might take are ascertained).

Example 5: *O* conveys to *A* for life, then to *A*'s widow. *A* is married to *B*. *A*'s widow is an unascertained person. As facts develop, *B* and *A*'s widow may be different people. *B* may expect to be *A*'s widow, but she may predecease *A*, or she may divorce *A*. *A*'s widow has a contingent remainder. *B* has an expectation only, which is not a recognizable property interest.

(b) No Condition Precedent

A vested remainder has no condition precedent. A remainder with a condition precedent is a contingent remainder.

A ***condition precedent*** is an event (condition) that must occur (or fail to occur, depending on how it is worded) *before* an interest becomes vested (for a remainder) or possessory (for an executory interest). To illustrate, if *O* conveys Blackacre to *A* for life, and then to *B* if *B* becomes a lawyer before *A* dies, the requirement that *B* become a lawyer before *A* dies is the condition precedent. It must occur before *B*'s contingent remainder becomes a vested remainder.

A condition precedent must be contrasted with a condition subsequent that terminates a possessory or vested interest. The fee simple determinable, fee simple subject to a condition subsequent, and fee simple subject to an executory limitation all incorporate a condition subsequent. The holder can be divested if the condition subsequent develops. A condition divesting a fee simple on executory limitation and giving possession to an executory interest is both a condition subsequent and a condition precedent. Since a remainder by definition follows the natural termination of a life estate or term of years, a condition before a remainderman can take can only be a condition precedent.

Example: *O* conveys Blackacre "to *A*, but if *B* becomes a lawyer before *A* dies, to *B*." A has a fee simple subject to an executory limitation. It is a fee simple with a condition subsequent. *B*'s becoming a lawyer before *A* dies also is the condition precedent to make *B*'s executory interest possessory.

Practice Interpreting Grants with Conditions Precedent and Conditions Subsequent

When interpreting grants, read them in the order written, usually interpreting up to a comma or semicolon. The order in which a grant is written can change the type of interest created and whether any remainder created is vested or contingent. Consider the following examples.

Example 1: *O* conveys Blackacre to *A* for life, then, if *B* survives *A*, to *B* and her heirs. *B* has a remainder since it follows the natural termination of *A*'s life estate. For *B* to take possession, however, *B* must outlive *A*. The survivorship requirement is a condition precedent. *B* has a contingent remainder. In the actual conveyance the drafter should provide who takes if the condition precedent is not satisfied. Since no provision was made, *O* (or *O*'s heirs) as the holder of the reversion takes Blackacre on *A*'s death if *A* survives *B*.

Example 2: *O* conveys to *A* for life, and when *A* dies, to *B* and her heirs. *A* has a life estate. *B* has a remainder since it follows the natural termination of *A*'s life estate. *B* in fact has a vested remainder in fee simple absolute. The clause "and when *A* dies" is not a condition precedent. A life estate naturally terminates on the death of the life tenant. The natural termination of a life estate, or the end of a term of years, is not a condition precedent (or a condition subsequent).

Example 3: *O* conveys Blackacre to *A* for life, then to *B* and his heirs, but if *B* does not survive *A*, then to *C* and his heirs. *A* has a life estate. *B*

has a vested remainder since the interest follows the natural termination of the preceding life estate and there is no condition precedent. There is a condition subsequent, however. *B*'s interest, therefore, is a vested remainder, subject to divestment, in fee simple absolute. Compare Example 1 above, where essentially the same grant was labeled a contingent remainder. The difference in the two is the order in which the grant was written. In Example 1 the condition came first and was a condition precedent; here it came after the interest was vested and is a condition subsequent.

C does not have a remainder because a condition must divest or cut short *B*'s vested remainder before *C* can possess Blackacre. *C*, therefore, has an executory interest in Blackacre.

Example 4: *O* conveys Blackacre to *A* for life, remainder to *B*'s children. *B* is alive and has two children, *C* and *D*. *A* has a life estate. *B*'s two children, *C* and *D*, have vested remainders subject to open (more on subject to open later). *B*'s children's interest follows the natural termination of the preceding life estate and there is no condition precedent (*B*'s children do not have to survive *A*). Hence the children's interest is vested. Their interests are subject to partial divestment (subject to open), however, if *B* has another child, who when born would share in the grant.

Example 5: *O* conveys to *A* for life, remainder to *B*'s children who attain age 18. *B* is alive and has one child, *C*, who is ten years old. *B*'s children, including *C* and any later-born children, have a remainder. It is a contingent remainder because to take Blackacre the child or children must reach age 18. Reaching age 18 is the condition precedent. Until *C* or some other child of *B* reaches age 18, the interest remains a contingent remainder in fee simple absolute. Since *O* did not make a provision as to what happens to Blackacre if none of *B*'s children attains age 18, *O* retains a reversion.

Alternative Contingent Remainders

Whenever a grantor fragments ownership rights into present and future interests, parties must be able to identify an owner for all periods of time and all events and contingencies. Of special importance, a grant of a contingent remainder should include a determination of who takes if the condition precedent fails to develop. There are two main options. First, explicitly or by default if the grantor makes no provision, the grantor retains a reversion. Second, the grantor may provide that another person take if the contingency fails, creating an alternative contingent remainder. An alternative contingent remainder results where one of two named persons takes to the exclusion of the other, depending on whether or not a condition precedent occurs.

Example 1: *O* conveys Blackacre to *A* for life, then to *B* if *B* attains the age of 21; but if *B* does not attain age 21, to *O*. *A* has a life estate. *B*, an ascertained person, has a contingent remainder because she must live to age 21. If *B* does not attain age 21, *O* at *A*'s death once more owns the property. *O* therefore has a reversion.

Example 2: *O* conveys Blackacre to *A* for life, then to *B* if *B* attains age 21. *B* is 15. Same result here as in Example 1. *A* has a life estate, *B* has a contingent remainder, *O* has a reversion. *O* has a reversion since he transferred less than his full interest. The grantor retains a reversion when he transfers a life estate followed by a contingent remainder. If *B* turns 21 during *A*'s life, *B*'s contingent remainder becomes a vested remainder and *O*'s reversion disappears. If *A* dies before *B* attains age 21, *O* once more owns Blackacre, subject to a (springing) executory interest in *B* if and when *B* attains age 21 (more on executory interests later in this chapter).[1]

Example 3: *O* conveys Blackacre to *A* and then to *B* if *B* reaches 21, but if *B* does not attain age 21, then to *C*. *A* has a life estate. *B* and *C* have alternative contingent remainders. *O* has a reversion. If *B* attains age 21, *B* gets Blackacre on *A*'s death and *C* gets nothing. Alternatively, if *B* dies before turning 21, *B* loses her interest and *C* gets Blackacre on *A*'s death. If *A* dies before *B* turns 21 but while *B* is still alive, *O* gets back Blackacre until either *B* celebrates her twenty-first birthday, in which case *B* gets Blackacre, or *B* dies before reaching 21, in which case *C* gets Blackacre.[2]

Why We Distinguish Vested and Contingent Remainders

We distinguish vested remainders from contingent remainders for several reasons, many only of historical importance in most jurisdictions. For example, at one time a person could assign and devise vested remainders but not contingent remainders. Today both vested and contingent remainders are assignable and devisable. In addition, persons holding vested remainders had greater rights to prevent waste by the present possessor. Finally, some special rules destroyed contingent remainders or rendered them void. The

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1. In a few jurisdictions, the holder of a contingent remainder must satisfy the contingency before the prior estate ends; otherwise, the contingent remainder is destroyed. This Rule of the Destructibility of Contingent Remainders is developed more fully in Chapter 11. If *B*'s contingent remainder is destroyed, *O* gets Blackacre back as a fee simple absolute.

2. See note 1. If the Rule of the Destructibility of Contingent Remainders applied, and *A* died before *B* reached age 21, both *B*'s and *C*'s alternative contingent remainders would be destroyed.

Rule of Destructibility of Contingent Remainders (mentioned in footnotes 1 and 2), the Rule in Shelley's Case, the Doctrine of Worthier Title, and the Rule Against Perpetuities are the common judicially created rules developed to terminate contingent remainders. These rules, to the extent they remain in force, do not apply to vested remainders. We delve into these rules more in Chapter 11; we dedicate an entire chapter, Chapter 12, to the Rule Against Perpetuities.

Executory Interests

For centuries the only future interests allowed to third parties were remainders. In particular, a grantor could not create a defeasible fee (fee simple determinable or fee simple subject to a condition subsequent) in one party and the equivalent of a possibility of reverter or power of termination (right of entry) in a third party. That's no longer the case. Since the Statute of Uses in 1536, a grantor can create interests other than remainders in third parties. These future interests are called executory interests. Many states by statute have integrated remainders and executory interests under the "remainder" umbrella, but in many states and in your Property class, the executory interest remains a separate property interest.

As a review and transition, remainders must take effect on the natural ending of the prior estate. See supra 129. There can be no gap in seisen (possession) after the prior estate ends and the next vested interest commences. Thus, a conveyance "to *A* for life, then to *B* one year after *A*'s death" cannot be a remainder, and prior to 1536 was void. One type of executory interest recognized today, the springing executory interest, can occur after a gap in time. The ***springing executory interest*** divests or cuts short the grantor's fee simple. Its most common uses are transfers following a gap in time. Thus the conveyance "to *B* one year after *A*'s death" is enforceable as a springing executory interest.

Related to the no-gap-in-time rule was an early rule that a grantor could not convey an interest in property to be effective at some time in the future. For example, Grandpa could not deed Blackacre "to Junior when he graduates from law school." Today the transfer would be good. Junior's interest is not a remainder since it does not follow the natural termination of a prior estate; it is a springing executory interest, springing from the grantor.

A second characteristic of remainders is that the holder of a remainder takes possession only after the natural termination of the prior estate. See supra 129. Remainders follow life estates and terms of years. Any proposed interest in a third party that takes effect only when the preceding interest is

cut short pursuant to a condition subsequent is not a remainder. Prior to the Statute of Uses in 1536, transfers to third parties following a fee simple determinable or fee simple subject to a condition subsequent were void. No "shifting" of the interest to a third party (a stranger to the deed) was allowed. These transfers, resulting in shifting executory interests, have been allowed since 1536. Labels change, however. What is called a fee simple determinable or fee simple subject to a condition subsequent when the grantor retakes the property once the condition subsequent occurs is called a ***fee simple subject to an executory limitation*** when a third party takes the property on the happening of the condition subsequent. The third party's interest following the fee simple subject to an executory limitation is called the ***shifting executory interest.***

No different legal consequences exist between shifting executory interests and springing executory interests. The only difference is that the *springing* executory interest divests the grantor, whereas the *shifting* executory interest divests a transferee (grantee).

Example 1: *O* transfers Blackacre to *A* as long as Blackacre is used for farming, then reverts to *O*. *A* has a fee simple determinable in Blackacre. *O* has a possibility of reverter.

Example 2: *O* transfers Blackacre to *A* as long as Blackacre is used for farming, then to *B* and his heirs. *A* has a fee simple subject to an executory limitation. *B* has a shifting executory interest.

Example 3: *O* transfers Blackacre to *B* to take effect if and when *B* agrees to farm Blackacre. *O* has a fee simple subject to an executory limitation. *B* has a springing executory interest.

Variations on Vested Remainders

Vested remainders are remainders in which the holders are ascertained persons and no condition precedent exists. There are some analytical variations of vested remainders.

(a) Indefeasibly Vested Remainder

The ***indefeasibly vested remainder*** is a remainder with no condition subsequent and is not a class gift subject to open. A gift "to *A* for life, remainder to *B* and her heirs" illustrates the indefeasibly vested remainder. *B* has a vested remainder in fee simple absolute. *B*'s vested remainder is certain to become possessory. Her interest cannot be divested; she need not worry about any class gift complications.

(b) Vested Remainder Subject to Divestment

Because of rules disfavoring contingent remainders, courts favor vesting remainders as soon as possible. Thus a construction may result in a vested remainder being subject to divestment before it becomes a possessory estate. These are labeled ***vested remainders subject to divestment.*** The key to distinguishing a vested remainder subject to divestment from a contingent remainder is whether the determinative condition is a condition precedent (so the remainder is a contingent remainder) or a condition subsequent (so the remainder is a vested remainder subject to divestment). The following examples should clarify the distinction:

Example 1: *O* conveys Blackacre to *A* for life, then to *B* and her heirs. *B* has an indefeasibly vested remainder in fee simple absolute (though lawyers would condense that to "vested remainder in fee simple").

Example 2: *O* conveys Blackacre to *A* for life, then to *B* and her heirs if *B* attains age 21, but if *B* does not attain age 21, to *C* and his heirs. *B* has a contingent remainder in fee simple absolute, the condition precedent being *B*'s attaining age 21. *C* has an alternative contingent remainder. *O* has a reversion.

Example 3: *O* conveys Blackacre to *A* for life, then to *B* and her heirs; but if *B* does not attain age 21, to *C* and his heirs. *B* has a vested remainder subject to divestment in fee simple absolute. *B*'s interest is vested because the divesting condition occurs after the clause granting *B* her interest; it is a condition subsequent. Contrast this with Example 2, where the condition is part of the grant itself, and is a condition precedent.

Because *B*'s interest is a vested remainder that may be divested or cut short, *C*'s interest cannot be a contingent remainder. *C*'s interest ripens into possession only if *B*'s interest is divested. Hence *C* has a shifting executory interest in fee simple absolute.

Example 4: *O* conveys Blackacre to *A* for life, then to *B* and her heirs; but if *B* stops farming Blackacre, to *C* and his heirs. *B* has a vested remainder in fee simple subject to an executory limitation. *B*'s remainder is not subject to a condition precedent and so is not a contingent remainder. Further, *B*'s vested remainder is not subject to divestment before *B* takes possession (i.e., while it is still a vested remainder); therefore, it is incorrect to label it a vested remainder subject to divestment. Her interest is a future interest, a vested remainder; her estate will be a fee simple subject to an executory limitation. Contrast this Example with Example 3 and Example 5. *C* has a shifting executory interest.

Example 5: *O* conveys Blackacre to *A* for life, then to *B* and her heirs, but if *A* ceases to farm Blackacre, to *C* and her heirs. Since *B*'s interest may

be divested before she takes possession (i.e., *B*'s vested remainder may be divested while it is still a vested remainder), *B* has a vested remainder subject to divestment in fee simple absolute. *B*'s interest is vested and not contingent because the grant as written read in the order written up to the comma says "*A* for life, then to *B*," the language creating a vested remainder. Her vested remainder is subject to divestment before she takes possession. Therefore, her interest is a vested remainder subject to divestment in fee simple absolute. *C* owns a shifting executory interest since she can take only if *B*'s interest is divested.

(c) Vested Remainder Subject to Open

A common estate-planning device is for a testator (a decedent with a will) to leave property to a child for life, then to the testator's grandchildren (the life tenant's children), even if none then are born. For example, Owen may devise Blackacre to "my son, Albert, for life, then to Albert's children." The remainder to Albert's children is a ***class gift*** since it is to a group of persons identified by description rather than by names. Albert may or may not have any children. Assuming Albert has two children when Owen died, the two children have vested remainders since their interest follows the natural termination of their father's life estate and there is no condition precedent; but it is not an indefeasibly vested remainder. Albert may have more children who, when born, will share in the grant to "Albert's children." Albert's living children's remainder in Blackacre is vested — they will have a shared right to possession of Blackacre on Albert's death — but that vested remainder is subject to partial divestment in favor of later-born siblings. Hence we label the children's interest a ***vested remainder subject to open***, indicating others can enter the described class; or, synonymously, a ***vested remainder subject to partial divestment,*** indicating the vested members of the class may lose some interest in the property.

(1) Class Closing Physiologically or Naturally

For practical reasons, at some point the class of persons who will share in a class gift must *close* (no more persons can enter the class even if later born). Two rules have evolved. First, a *class closes physiologically* or it closes *naturally* whenever biologically no one else can be born into the class.

Example: *O* dies, devising Blackacre "to my wife, Edna, for life, then to my son Franklin's children." Franklin has one child, Greta. Greta has a vested remainder subject to open. If Franklin has a second child, Harold, Harold shares equally with Greta in the vested remainder subject to open. If Franklin has a third and a fourth child they, too, would share in the vested remainder subject to open. Once Franklin dies, however, or more precisely nine months

after Franklin dies, Franklin can have no more children. The class is complete with however many children are then born. Assuming Franklin dies with two children, Greta and Harold, in the class, the two children will be co-owners of Blackacre, with no chance Franklin will have another child.[3]

(2) Class Closing by Rule of Convenience

A class also may close by the rule of convenience. The ***rule of convenience*** states that a class closes whenever any member of the class can demand possession or distribution. The class does not necessarily close when a person is identified and satisfies any condition precedent, but only when some member of the class can demand possession. A vested member can demand possession usually no sooner than the natural termination of the preceding life estate or term or years, or until the divesting condition occurs in a fee simple subject to an executory limitation. Living persons—including those born within nine months—who are identifiable members of a class when the class closes by convenience, but who have not satisfied any condition precedent, may still share in the property if they later satisfy the condition precedent. In other words, the class closing rules merely circumscribe the persons who might take; it does not limit the number of persons who are in the class to those already vested.

Example 1: *O*'s will devises Blackacre to *W* for life, then to *A*'s children who attain age 21. *A* has two children, *K* (age 8) and *L* (age 5). *K* and *L* have contingent remainders, contingent on attaining age 21. The class of *A*'s children remains open to any after-born children of *A*.

Example 2: When *K* is age 15 and *L* is age 12, *A* has another child, *M*. The three children (*K*, *L* and *M*) have contingent remainders. The class is still open for *A*'s children who may be born later.

Example 3: *K* reaches age 21, and now has a vested remainder subject to open. The class does not close physiologically since *A* is still alive and can breed more children. Likewise, the class is not closed by the rule of convenience since *K*, although vested, cannot demand possession of Blackacre until *W*'s life estate ends.

Example 4: Continuing the facts of Example 3, *A* has a fourth child, *N*. *N* has a contingent remainder and will share ownership of Blackacre as long as *N* attains age 21.

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3. For purpose of class closing—and even more critically for the Rule Against Perpetuities—acceptable procreation techniques are limited to those used two centuries ago. Frozen embryos, cloning, and time travel are not possiblities in class closing and Rule Against Perpetuities applications.

Example 5: *K* dies at age 23. *K* is still vested. The condition precedent is attaining age 21. There is no condition precedent requiring any of *A*'s children to survive the life tenant, *W*. *K*'s devisee or her heir will take *K*'s share of Blackacre on *W*'s death.

Example 6: *W* dies when *L* is 21, *M* is 9, and *N* is 2. *A* is still alive. The class of "*A*'s children" closes pursuant to the rule of convenience since *K* and *L* have satisfied the condition precedent — attaining age 21 — and *K*'s and *L*'s devisees or heirs can demand possession of Blackacre as soon as *W*'s life estate ends, which it did on her death. While the class closes, the class is "*A*'s children," not "*A*'s children who have attained age 21." Thus *M* and *N* are still members of the class and will be vested if and when they attain age 21.

Example 7: Two years after the developments in Example 6, *A* has a fifth child, *X*. *X* is A's child, and just as cute and cuddly as were *K*, *L*, *M*, and *N*; but *X* was born after the class of *A*'s children closed, and will not share in Blackacre. The rule of convenience sometimes works an injustice, but it makes land more alienable and marketable. Without it, *A*'s children could not sell Blackacre until *A* dies since *A* may have another child at any time.

Example 8: *N* dies in car wreck at age 18. *N* will not attain age 21, and thus neither *N*'s devisees nor heirs will own any share of Blackacre. Blackacre will be co-owned in equal shares by *K*'s devisee, *L*, and *M* (age 27 at *N*'s death).

EXAMPLES

Reversion Review

1. Consider which of the following conveyances creates a reversion:
   (a) *O* (the holder of a fee simple absolute) conveys Blackacre to *A* for life.
   (b) *O* conveys Blackacre to *A* for life, but if *B* marries *C*, then to *C* and his heirs "so long as *B* and *C* use the property as a residence."
   (c) *O* conveys Blackacre "to *A* for life" and *A* transfers "to *C* for *C*'s life."

A Has a Life Estate

2. Identify the interests created by the following transfers:
   (a) *O* conveys Blackacre to *A* for life, then to *B* and his heirs.
   (b) *O* conveys Blackacre to *A* for life, then to *B*'s children. *B* is childless at the time of the conveyance.
   (c) *O* conveys Blackacre to *A* for life, "remainder to *B*'s heirs." *B* is alive.

(d) *O* conveys Blackacre to *A* for life, but when *A* dies, to *B* and his heirs.
(e) *O* conveys Blackacre to *A* for life, then, if *B* survives *A*, to *B* and his heirs.
(f) *O* conveys Blackacre to *A* for life, then to *B* if *B* survives *A*, but if *B* does not survive *A*, to *C* and his heirs.
(g) *O* conveys Blackacre to *A* for life, then to *B* for life, then to *C* and his heirs.
(h) *O* conveys Blackacre to *A* for life, then to *B* and his heirs, but if *B* does not survive *A*, then to *C* and his heirs.

B Has a Vested Remainder

3. Identify the interests created by each of the following transfers:
   (a) *O* transfers Whiteacre "to *A* for life, then to *B* for life, then to *C* and her heirs."
   (b) *O* transfers Whiteacre "to *A* for life, then to *B* for life, then if *C* survives *A* and *B*, to *C* and her heirs."
   (c) *O* transfers Whiteacre "to *A* for life, then to *B* for life, then when *A* and *B* die, to *C* and her heirs."

More Future Interests

4. Identify who has what interest in what estate in the following:
   (a) *O* conveys Brownacre "to *A* for life, remainder to *B*'s children." *B* is alive and has two children, *C* and *D*.
   (b) *O* conveys Brownacre "to *A* for life, remainder to *B*'s children who attain age 18." *B* is alive and has one child, who is ten years old.
   (c) *O* conveys Brownacre to *A* for life, remainder to *B*'s heirs. *B* is divorced and has one child, *C* (age 10).
   (d) *O* conveys Brownacre to *A* for life, remainder to *B* if she graduates from law school; if not, to *C*.

Minor Gift

5. (a) *O* conveys Blackacre "to my son *A* for life, then to his children who reach 21." *A* has two children, *B* (age 8) and *C* (age 13). What interests and estates do *B* and *C* have?
   (b) If *C* were to die after reaching 21 while *A* is alive, who owns what then?
   (c) Assuming the facts in (a), *A* dies, leaving *B* (then age 10) and *C* (age 15).What interests and estates are created at *A*'s death?
   (d) What happens six years later, when *B* is 16 and *C* is 21 years old?

A Class Gift

6. Edna owned a 100-acre farm at her death. Her will provided that the farm went to her sister, Faye, for life; at Faye's death, the farm passed to Faye's son, George, for life; it then went to George's children who survive George. George has one child, Trudy.
   (a) What interests do the respective parties have at Edna's death?
   (b) George has a second child, Sam. Does Sam have an interest in the farm?
   (c) Faye dies. A year later George has a third child, Robert. A month after Robert is born, Trudy dies, her only heir being her father, George. Who owns what interests in the farm?
   (d) George dies, survived by Sam and Robert. Who has what interests in the farm?

A Final Go

7. Identify the interests and estates created in the following conveyances:
   (a) *O* conveys Blackacre "to my daughter *A* for life, then to my grandchild *B* and his heirs, but if any issue of my grandchild *B* survive *A*, then to those surviving issue."
   (b) Same facts as in (a). B dies, survived by his wife, *C*, and his child, *D*. *B*'s will devises his interest to his wife, *C*.
   (c) Same facts as in (a) and (b). *A* dies.
   (d) *O* conveys Whiteacre "to *A* for life, remainder to *B* and her heirs, but if *B* marries *C*, then to *C* and his heirs."
   (e) *O* conveys Whiteacre to *A* for life, then to *B* and his heirs, but if *B* sells alcohol on Whiteacre, then to *C* and her heirs.
   (f) *O* conveys "to *A* for 99 years if he lives so long, then to *B* and his heirs."
   (g) *O* conveys "to *A* for life, then one day after *A* is buried, to Bentham and his heirs."
   (h) *O* conveys "to *A* for life, then if *B* survives *A*, to *B* and his heirs, but if *B* does not survive *A*, to *C* and his heirs."

EXPLANATIONS

Reversion Review

1. (a) *O* has a reversion, even though it is not stated in the grant itself. *O* transferred less than his full interest in Blackacre. What *O* retains is a reversion to take possession as soon as *A*'s life estate ends.
   (b) *O* has a reversion until *B* marries *C*. If *A* dies before *B* marries *C*, *O* retakes possession of Blackacre. Once *B* marries *C*, *O*'s reversion

ends. *O* still has an interest, but it is not a reversion. *O*'s interest is a future interest, a possibility of reverter, that follows *C*'s fee simple determinable.

(c) Both *O* and *A* have revisions. *O* has a reversion upon the end of *A*'s life estate. *A* has a reversion upon the end of *C*'s life estate if *A* outlives *C*.

A Has a Life Estate

2. (a) *A* has a life estate. *B* has a vested remainder. There is no implied condition that *B* survive *A*. If *B* dies before *A*, upon *A*'s death *B*'s heirs or devisees take both possession and the remainder.

(b) *A* has a life estate. *B*'s children have a contingent remainder because they are not yet born. They are unascertained persons until born. *O* has a reversion in case *A* has no children. When a child of *B* is born, then that child will be said to have a vested remainder subject to partial divestment or "subject to open" (upon the birth of that child's siblings, when that second child, and each subsequent sibling, will partially divest his or her older siblings, gradually and pro rata reducing their share of the property). This is an example of the law's preference to classify remainders as vested.

(c) *A* has a life estate. *B*'s heirs have a contingent remainder. No one is an heir of a living person — one may only be an heir apparent — a putative heir maybe, a hopeful heir certainly, but not legally an heir until the death of *B*, at which time the remainder becomes vested. If this conveyance were contained in *B*'s will, the remainder would be vested because *B*'s heirs are known at her death. A will, remember, is effective or "speaks" for this purpose at death, no matter how long before the fact it was executed.

(d) *A* has a life estate. *B* has a vested remainder in fee simple absolute. The words "but when *A* dies" do no more than indicate when *A*'s present interest will naturally terminate. The words are not a condition precedent to the remainder.

(e) *A* has a life estate. While *A* is alive, *B*'s estate is a contingent remainder. The condition of survivorship is express and is a condition precedent. Unless clearly expressed as a condition precedent, surviving the life tenant is not a condition to taking a remainder. In this case, however, *O* expressly conditioned the vesting of the remainder on *B*'s surviving the life tenant, *A*. *O* keeps a reversion in case *B* does not survive *A*.

(f) *A* has a life estate. When the words "but if *B* does not survive *A*, to *C* and his heirs" are added to this conveyance shown in (e) above, *B*'s and *C*'s remainders are both contingent; they are called

alternative contingent remainders, meaning that the condition precedent attached to one interest is the opposite of the condition attached to the other. At the time of the termination of the life estate, one of the two conditions will be satisfied and so one of the two remainders will become vested. While the remainders are both contingent, *O* would retain a reversion in fee simple absolute. Alternative contingent remainders were much used in England during the age of Queen Elizabeth I to ensure that when two sons were alive at the conveyance, if the elder son and heir were to die before his parents, the family property would devolve on the younger.

(g) *A* has a life estate. *B* has a vested remainder in life estate. It is vested even though *B* may die before *A*'s life estate ends. The reason *B* might never actually possess Blackacre is that her estate ends on her death, which may occur prematurely; surviving *A* is not a condition precedent to the grant but an end to her estate. *C* has vested remainder in fee simple absolute. *C* takes possession of Blackacre after both *A* and *B* die.

(h) *A* has a life estate. *B* has a vested remainder subject to divestment in fee simple absolute. The survivorship condition is a condition subsequent, not a condition precedent. Since *C* can take only if *B*'s vested remainder is cut short or divested, *C* cannot have a contingent remainder. *C* has a shifting executory interest in fee. If *B* dies before *A*, then *B*'s interest is extinguished and *C* takes.

B Has a Vested Remainder

3. (a) *A* has a life estate; *B* has a vested remainder in life estate (or for life). Remainders designate the interest is a future interest. What estate is held is a different query. Here *B*'s future interest is a life estate or an estate held for life. *C* has a vested remainder as well, his being a vested remainder in fee simple absolute.

(b) *A* has a life estate; *B* has a vested remainder in life estate (or for life). *C*'s remainder is now subject to a condition precedent — *C*'s surviving both *A* and *B*. Thus *C* has a contingent reminder in fee simple absolute. *O* has reversion in case *C* fails to survive *A* and *B*.

(c) *A* has a life estate; *B* has a vested remainder in life estate (or for life). *C* has a vested remainder in fee simple absolute. The clause "then when *A* and *B* die" states the law as to when a remainder takes possession: Life estates end at the death of the life tenant and remainders take immediately thereafter. It is not a condition to *C*'s taking. *C* (or her heirs or devisees) will possess Whiteacre after *A* and *B* die.

More Future Interests

4. (a) *A* has a life estate, a present possessory interest. The two children, *C* and *D*, have a vested remainder subject to open in fee simple absolute (or, alternatively labeled, a vested remainder subject to partial divestment). If *B* has more children, the after-born or adopted children will share in the remainder with *C* and *D*. *B*'s age is irrelevant to this classification.

   (b) *A* has a life estate. *B*'s ten-year-old child has a contingent remainder in fee simple absolute, contingent on attaining age 18. *O* has a reversion in fee simple absolute to take effect on *A*'s death if either *B*'s son dies before he reaches 18 (and *B* has no more children who have attained age 18 by *A*'s death), or *B*'s son is still a minor. Once *B*'s son turns 18 he will have a vested remainder subject to open in fee simple absolute.

   (c) *A* has a life estate. Assuming *B* is alive, *B*'s heirs have a contingent remainder: Only decedents and living persons have heirs, so *B*'s heirs are unascertained. *C* may have an expectation, but no interest yet; *C* may be an heir apparent but is not an heir until *B* dies (and *C* survives *B*). *O* has a reversion in fee simple absolute.

   If, on the other hand, *B* is dead, *B*'s heirs (maybe only *C* on the facts) are ascertained and have a vested remainder in fee simple absolute.

   (d) *A* has a life estate. *B* has a contingent remainder, contingent on *B*'s graduating from law school. *C* also has a contingent remainder, contingent on *B*'s not graduating from law school. *B*'s and *C*'s remainders here are alternative contingent remainders, one taking if there is a graduation, the other if there is none. If both remainders are contingent, the logic of the common law dictates that *O* has a reversion in case the life tenant, *A*, should die before *B* dies or before *B* graduates from law school.

Minor Gift

5. (a) *B* and *C*, then ages 8 and 13, respectively, have a contingent remainder, being subject to a condition precedent (their reaching the age of 21). *O* has a reversion.

   (b) When *C* reaches 21, the remainder vests as to *C*, so *C* has a vested remainder subject to open (subject to partial divestment) upon *B*'s reaching 21. *C*'s heirs or devisees would take his interest in this vested remainder subject to open. *B* is included in the class of *A*'s children but still holds a contingent remainder since *B* at age 16 has not reached 21 yet.

   (c) Assuming the Rule of Destructibility of Contingent Remainders is not the law in this jurisdiction (the Rule of Destructibility of

Contingent Remainders begins the next chapter), *O*'s reversion becomes the present interest at the time of *A*'s death, held in fee simple subject to an executory limitation. *A*'s children, *B* and *C*, hold a springing executory interest. This interest is indestructible and inheritable (and alienable, too).

(d) Six years later, once *C* turns 21, *C*'s springing executory interest divests ●'s reversion. *C* or *C*'s heirs hold in fee simple subject to partial divestment by *B* when *B* reaches 21.

A Class Gift

6. (a) Faye has a life estate. George has a vested remainder in a life estate. Trudy has a contingent remainder, the condition precedent being her surviving her father, George. Edna has a reversion in case George dies with no child surviving him. This question was intentionally written with names instead of letters so you can practice word problems, which you may see on an exam or in actual practice. If it makes you more comfortable, rewrite the grant using letters: E conveys to F for life, then to G for life, then to G's children who survive him.

(b) Yes. Sam is "George's child" so Sam has a contingent remainder, the same as Trudy.

(c) George has a present interest in a life estate, it becoming a present possessory estate when Faye's life estate ended. Sam and Robert still have contingent remainders, contingent on surviving their father. Neither Trudy's heirs nor her devisees have any interest since Trudy did not satisfy the condition precedent of surviving her father. Edna's heirs or devisees (we need more facts to know for sure which) have a reversion in case none of George's children survives him.

(d) Robert and Sam own the farm in fee simple absolute. They will own the farm in equal proportions as tenants in common (tenants in common are covered later).

A Final Go

7. (a) *A* has a present interest, held in a life estate; *B* has a vested remainder subject to divestment in fee simple absolute. *B*'s children who survive *A* have a shifting executory interest. There is no condition precedent to *B*'s remainder so it is a vested remainder, but *B* may be divested of his interest if a child of his survives *A* (whether or not they survive *B*); so *B* has a vested remainder subject to divestment in fee simple absolute. *B*'s issue who survive *A* have a shifting executory interest.

(b) *A* has a life estate. *C* has inherited *B*'s vested remainder subject to divestment in fee simple. *B*'s surviving issue, *D*, has a shifting executory interest in fee simple absolute.

(c) After *A*'s death, *C*'s vested remainder is divested. When *D* survives *A*, *D*'s shifting executory interest shifts the fee simple held by *B*'s heir, *C*, to *D*. So *D* owns Blackacre in fee simple absolute. Modern canons make the words "and his heirs" unnecessary.

(d) *A* has a life estate. *B* has a vested remainder subject to divestment in fee simple absolute. *C* would have a shifting executory interest in fee simple absolute if *C* married *B*.

(e) *A* has a life estate. *B* has a vested remainder in fee simple on executory limitation. It is not a vested remainder subject to divestment since *B* must sell alcohol on Whiteacre to be divested, and this cannot occur until after *B* takes possession. Hence *B*'s interest cannot be divested while it is still a vested remainder. *C* has a shifting executory interest.

(f) *A* owns a determinable term of years. *B* has a shifting executory interest in fee simple absolute. *A*'s interest has a definite maximum term, but can be cut short by his death before the end of the term. It is not a life estate even though in all likelihood *A* will die before the 99 years have passed.

(g) *A* has a life estate. *O* has a reversion. Bentham has a springing executory interest (springing from *O*, not *A*). At common law, Bentham's estate was void because there was a gap in seisin. No one could be buried before his or her death, unless he or she was buried alive — a possibility the law did not admit. Today the gap in seisin, as well as the shift in seisin, is permitted and Bentham's estate is a springing executory interest, held in fee simple absolute.

(h) *A*'s life estate is followed by two alternative contingent remainders in fee simple absolute in *B* and *C*, respectively, and followed further by a reversion in *O*. The condition determining who will take the property is whether *B* survives *A*. If *B* survives *A*, *B* gets a fee simple absolute interest in the property. If *B* does not survive *A*, the property goes to *C* in fee simple absolute.

O has a reversion even though one of the remainders, *B* or *C*, has to take. This is because at common law a life estate terminated by forfeiture before the death of *A* if the life tenant was found to be a traitor or disloyal to the king.

11

Special Rules of Construction

Several rules of law or construction were developed in England. Most states no longer follow the bulk of them, but some do and thus they are included in Property casebooks. This chapter covers this potpourri of theories except for the Rule Against Perpetuities, which merits its own chapter (12).

The Rule of Destructibility of Contingent Remainders

An important rule in early England, the existence of which led to the creation of the executory interest, is the rule of destructibility of contingent remainders. As background, legal conceptualists in eleventh- and twelfth-century England wanted someone to be seized of land at all times. Being seized of land meant taking possession of the land. Judges were troubled when a life tenant died and the named contingent remainder holder had not satisfied the condition precedent. Given the choice between having the property revert back to the grantor until the remainderman satisfied the condition precedent or voiding the contingent remainder, the judges chose to void the contingent remainders that were still contingent when the preceding life estate ended.

The ***rule of destructibility of contingent remainders*** states that a contingent remainder is destroyed if it has not vested at or before the termination of all preceding life estates and terms of years.

Example 1: *O* conveys Blackacre to *A* for life, then to *A*'s children who attain age 21. *A* dies when *A*'s only child, *C*, is age 15. Since *C*'s remainder is not vested (i.e., it is still contingent on *C* turning 21) upon or before the end of *A*'s life estate, according to the rule of destructibility of

contingent remainders, *C*'s contingent remainder is destroyed (void). Blackacre returns to *O* (or *O*'s heirs or devisees).

Example 2: *O* conveys Blackacre to *A* for life, then to *B* for life, then to *A*'s children who attain age 21. *B* dies when *A*'s only child, *C*, is 15. *C*'s contingent remainder is not destroyed since *C*'s remainder does not need to be vested until *A*'s life estate ends.

Example 3: Same facts as in Example 2 except *A* rather than *B* dies when *C* is 15. *C*'s contingent remainder is not destroyed since *B* has possession after *A* dies. Only if both *A*'s and *B*'s life estates end before *C* turns 21 would *C*'s contingent remainder be destroyed.

The rule applies only in narrow circumstances. The rule of destructibility of contingent remainders applies only to contingent remainders in real property, for example. It does not apply to personal property. Thus, the rule does not apply to transfers of artwork, stocks, bonds, furniture, and other personal property.

In addition, the rule of destructibility of contingent remainders does not apply to equitable interests — i.e., interests held in trust. Thus a transfer of real property to a trustee in trust to benefit *A* for life, then to *B* if *B* attains age 21, will continue to be valid even if *A* dies before *B* turns 21.

Third, the rule of destructibility of contingent remainders applies only to contingent remainders. It does not destroy executory interests. In fact, a major impetus for the development of executory interests as legally cognizable ownership vehicles was to circumvent the rule of destructibility of contingent remainders.

The rule of destructibility of contingent remainders can be avoided by structuring the transfer of property as a grant of a term of years rather than as a life estate since a term of years is a nonfreehold estate and not a freehold estate. For example, if *O* transfers Blackacre to "*A* for *A*'s life or five years, whichever is greater, then to *B* if *B* attains age 21" at a time when *B* is 16, B's contingent remainder will not be destroyed since *A* or his heir or devisee will own the land for at least five years, long enough for *B* to turn 21.

Finally, the rule is not a factor in the vast majority of states. Only four states — Indiana, Kansas, New Hampshire, and Oklahoma — retain the rule of destructibility of contingent remainders.

This is not to say that contingent remainders are as sturdy as vested remainders or executory interests. There are other ways contingent remainders can be destroyed or voided. The merger rule, explained next, is one such way.

The Merger Rule

The basic idea of the merger rule is simple. If a person holding a life estate acquires a vested remainder in the same property, instead of saying he owns a life estate and the vested remainder in the same property, we say the two estates "merge" into one larger estate, the fee simple absolute. A technical statement of the ***merger rule*** would read, "If a *vested* life estate and the next succeeding *vested* estate come to be owned by the same person, the two estates are merged into one."

There are significant consequences from the merger rule when a contingent remainder intervenes between the two vested estates, and important exceptions to its operation. First, and the most significant consequence, if a person owning a life estate acquires a vested remainder that follows a contingent remainder held by some other person, the life estate and the vested remainder merge, destroying the contingent remainder. Likewise, if a person holding a vested remainder that immediately follows another person's contingent remainder in the same property acquires the possessory life estate that immediately precedes the contingent remainder, the life estate and vested remainder merge, destroying the contingent remainder. That's a real bummer for the holder of the contingent remainder.

For the two vested interests to merge to destroy an intervening contingent remainder, the two vested estates must be acquired at different times. Two vested interests acquired in the same document do not destroy intervening contingent remainders.

Example 1: *O* conveys Blackacre to *A* for life, then to *B* for life if *B* attains age 21, then to *C*. *B* is age 15. *A* has a possessory (vested) life estate, *B* has a contingent remainder in life estate, and *C* has a vested remainder in fee simple absolute. No merger occurs because *A* and *C* are different people. *B*'s contingent remainder is good.

Example 2: Same facts as in Example 1, except two years later *A* buys *C*'s vested remainder. *A* now owns a (vested) life estate and a vested remainder in the same property, the two vested interests having been acquired at separate times. The two vested interests merge, destroying *B*'s contingent remainder in life estate. *A* suddenly owns Blackacre in fee simple absolute. The same result follows if *C* had acquired *A*'s life estate.

Example 3: *O* conveys Whiteacre to *A* for life, then to *B* for life if she attains age 21 (*B* is 14), then to *C* if *C* attains age 21 (*C* is 5). Three years later *A* acquires *C*'s interest. After the acquisition, *A* has a (vested) life estate and a contingent remainder in fee simple (contingent on C's attaining age

21). *B*'s intervening interest is a contingent remainder in life estate. *A*'s two estates do not merge since *A* has one vested estate and one contingent estate. A person must own two *vested* estates for the two to merge. *B*'s contingent remainder remains valid.

Example 4: *O* conveys Brownacre to *A* for life, then to *B* for life, then to *C* if *C* attains age 21 (*C* is 14). *A* has a (vested) present interest in a life estate, *B* has a vested remainder in life estate, *C* has a contingent remainder in fee simple absolute, and *O* has a reversion (in case *C* does not reach 21). Two years later *B* acquires *A*'s life estate. Since *B* now owns two vested interests, the two interests merge into one possessory life estate for the longer of *A*'s or *B*'s life. The merger does not destroy *C*'s contingent remainder, however, since *C*'s interest follows the two vested estates and is not an intervening estate.

Example 5: *O* conveys Redacre to *A* for life, then to *B* for life, then to *C*. *A* has a (vested) present interest in a life estate, *B* has a vested remainder in a life estate, *C* has a vested remainder in fee simple absolute. Two years later *A* acquires *C*'s vested remainder. *A* has a vested life estate and a vested remainder in fee simple absolute, but the two estates do not merge to destroy *B*'s intervening interest since *B*'s remainder in life estate is vested and not contingent.

Example 6: *O* conveys Greenacre to *A* for life, then to *B* for life if she attains age 21, then to *A*. *A* has a (vested) life estate and a vested remainder in fee simple absolute. In between *A*'s two vested estates is *B*'s contingent remainder in a life estate. *A*'s two vested estates do not merge to destroy *B*'s contingent remainder since the three estates were created in the same document.

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The basic idea of the merger rule is simple. If a person holding a life estate acquires a vested remainder in the same property, instead of saying he owns a life estate and the vested remainder in the same property, we say the two estates "merge" into one larger estate, the fee simple absolute. A technical statement of the ***merger rule*** would read, "If a *vested* life estate and the next succeeding *vested* estate come to be owned by the same person, the two estates are merged into one."

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Example 2: Same facts as in Example 1, except two years later *A* buys *C*'s vested remainder. *A* now owns a (vested) life estate and a vested remainder in the same property, the two vested interests having been acquired at separate times. The two vested interests merge, destroying *B*'s contingent remainder in life estate. *A* suddenly owns Blackacre in fee simple absolute. The same result follows if *C* had acquired *A*'s life estate.

Example 3: *O* conveys Whiteacre to *A* for life, then to *B* for life if she attains age 21 (*B* is 14), then to *C* if *C* attains age 21 (*C* is 5). Three years later *A* acquires *C*'s interest. After the acquisition, *A* has a (vested) life estate and a contingent remainder in fee simple (contingent on C's attaining age

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Example 4: *O* conveys Brownacre to *A* for life, then to *B* for life, then to *C* if *C* attains age 21 (*C* is 14). *A* has a (vested) present interest in a life estate, *B* has a vested remainder in life estate, *C* has a contingent remainder in fee simple absolute, and *O* has a reversion (in case *C* does not reach 21). Two years later *B* acquires *A*'s life estate. Since *B* now owns two vested interests, the two interests merge into one possessory life estate for the longer of *A*'s or *B*'s life. The merger does not destroy *C*'s contingent remainder, however, since *C*'s interest follows the two vested estates and is not an intervening estate.

Example 5: *O* conveys Redacre to *A* for life, then to *B* for life, then to *C*. *A* has a (vested) present interest in a life estate, *B* has a vested remainder in a life estate, *C* has a vested remainder in fee simple absolute. Two years later *A* acquires *C*'s vested remainder. *A* has a vested life estate and a vested remainder in fee simple absolute, but the two estates do not merge to destroy *B*'s intervening interest since *B*'s remainder in life estate is vested and not contingent.

Example 6: *O* conveys Greenacre to *A* for life, then to *B* for life if she attains age 21, then to *A*. *A* has a (vested) life estate and a vested remainder in fee simple absolute. In between *A*'s two vested estates is *B*'s contingent remainder in a life estate. *A*'s two vested estates do not merge to destroy *B*'s contingent remainder since the three estates were created in the same document.

The Rule in Shelley's Case

The ***Rule in Shelley's Case*** is simply stated: When a devise or conveyance transfers a freehold estate to a person and in the same instrument also transfers a remainder to that same person's heirs or the heirs of his body, and both estates are either legal or equitable, both are considered to be held by the first-named freeholder, either for life, in fee simple absolute, or in fee tail. See Shelley's Case, 1 Co. Rep. 93b (1581). This rule is usually broken down into three shorthand requirements: (1) a freehold estate given to a first transferee, (2) a remainder limited to the heirs of the first transferee in the same instrument, and (3) a freehold and a remainder of the same quality—i.e., either being both legal or equitable in nature. Smith v. Wright, 779 S.W.2d 177 (Ark. 1989).

If *O* conveys "to *A* for life, remainder to *A*'s heirs," by operation of law, *A* comes into ownership of both the life estate (under the terms of the conveyance) and the remainder in his heirs. Early cases using the rule interpreted this remainder as meaning ". . . then to *A* and his heirs." Words of purchase (*A*'s heirs) are thus interpreted as words of limitation (". . . and his heirs"), thus construing these words toward the fee simple. Thus, too, by operation of law, the courts changed the contingent remainder into a vested remainder—and the full conveyance into "to *A* for life, remainder to *A* and his heirs."

Pursuant to the Merger Rule, discussed above, *A*'s two estates merged. *A* holds his merged interests in fee simple absolute. The rule is a rule of law, not a canon of construction for ascertaining the intent of the grantor. The grantor's intent makes no difference to the question of whether the rule in Shelley's case applies.

The remainder to *A*'s heirs need not follow the first freehold estate directly; there may be an intervening estate, as when *O* conveys "to *A* for life, remainder to *B* for life, remainder to *A*'s heirs and their heirs." Under the rule, *A* holds both the present interest in the life estate and a future interest, the vested remainder held in fee simple absolute. The same result would occur if a condition precedent were added to the remainder to *A*'s heirs, as where the words "if the land is still used as a farm" were added to the conveyance. That the remainder is not vested makes no difference. The rule applies to both vested and contingent remainders.

In some cases the Rule in Shelley's Case gives *A* two interests in property, but not the complete ownership of the property in fee simple absolute. This is so because the Merger Rule will not operate if there is an intervening estate created by the same document or if the remainder is a contingent remainder. Only when there is no impediment to merger will *A* wind up with a fee simple absolute. In other words, all the Rule in Shelley's Case does is transform a grant to "*A*'s heirs" to a grant "to *A*" if *A* also receives a freehold estate (usually a life estate) in the same document. Once that transformation is done, whether the Merger Rule applies depends on the Merger Rule guidelines.

The Rule in Shelley's Case has been abolished by statute in the vast majority of states. It is still the law in Arkansas, Colorado, Delaware, Indiana, and Washington. However, any statute abolishing the rule is likely to provide simply that "the Rule in Shelley's Case is hereby abolished." Reading such a statute, you are no better off if you do not know what the rule is in the first place; hence its inclusion in the curriculum. Moreover, in some states the rule has been abolished only prospectively, meaning that it still controls conveyances made before the effective date of the abolition statute.

The rule applies to transfers of real property but not personalty, and is useful in understanding the Rule Against Perpetuities (presented in Chapter 12, infra).

Example 1: *O* conveys Blackacre to *A* for life and then to *A*'s heirs. *O* intended for *A* to have a life estate followed by a contingent remainder in fee simple in *A*'s heirs (contingent on *A*'s heirs being identified at *A*'s death). Notwithstanding *O*'s intent, the Rule in Shelley's Case converts the contingent remainder in *A*'s heirs to a vested remainder in *A*. Since *A* owns a life estate and the immediately following vested interest, pursuant to the Merger Rule, *A*'s two interests merge into a fee simple absolute.

Example 2: *O* conveys Whiteacre to *A* for life, then to *B* for life, then to *A*'s heirs. The Rule in Shelley's case converts the contingent remainder in *A*'s heirs to a vested remainder in *A*. Even though *A* owns a (vested) life estate and a vested remainder, the two estates do not merge because there is an intervening vested remainder in life estate in *B*. Merger would not apply even if *B*'s interest were a contingent remainder since the interests were all created in the same document.

Example 3: *O* conveys Greenacre to *A* for life, then to *B*'s heirs. The Rule in Shelley's Case does not apply since *B* received no other interest in the grant. Therefore, *B*'s heirs have a contingent remainder in fee simple absolute, contingent on being identified at *B*'s death.

Example 4: *O* conveys Brownacre to *A* for life, then to *A*'s heirs if the land is used for a farm at *A*'s death, and, if not, to *B* and her heirs. The Rule in Shelley's Case transforms the contingent remainder in *A*'s heirs to a contingent remainder in *A*, contingent on Brownacre being farmed at *A*'s death. No merger results because *A* must own two vested estates for merger, and here he owns one vested estate (the life estate) and one contingent estate (the contingent remainder). Contrast this result with that in Example 1, where the contingent remainder was transformed into a vested remainder. The reason for the different result is that the Rule in Shelley's Case merely converts a grant "to *A*'s heirs" to one "to *A*." Rewritten, the grant in Example 1 is to "*A* for life, remainder to *A*" — the contingency of being an heir disappears automatically. In this Example, on the other hand, if rewritten after application of the Rule in Shelley's Case, the grant is "to *A* for life, then to *A* if the land is used as a farm at *A*'s death" — the contingency remains.

The Doctrine of Worthier Title

(a) Inter Vivos Branch

The Doctrine of Worthier Title — inter vivos branch — is similar to the Rule in Shelley's Case, except it applies to conveyances from the grantor while the

grantor is still alive, it applies to conveyances of personal property as well as to real property, and it is a rule of construction and not a rule of law. The ***Doctrine of Worthier Title*** states that when there is an inter vivos conveyance to a person with a remainder or executory interest to the grantor's own heirs or next of kin, no future interest is created in the grantor's heirs; rather, the grantor retains a reversion. Thus, when *O* conveys "to *A* for life, then to *O*'s heirs," the remainder is void and *O* holds a reversion, which *O* can convey. Once deemed to hold the reversion, *O* can transfer it again and also it can be subjected to levy and sale by *O*'s creditors. This doctrine applies to real, personal, legal, and equitable property.

The Doctrine of Worthier Title started as a rule of law and applied regardless of the grantor's intent. Today it survives as a rule of construction, to which the grantor's intent is relevant. As a rule of construction, a gift over to *O*'s heirs creates a rebuttable presumption that *O* did not in fact intend the gift over to take and intended instead that the grantor retain the reversion. The grantor's heirs have no interest, only the hope or expectation that they will inherit if the grantor does not sell or devise it to others. See, e.g., Doctor v. Hughes, 12 N.E. 221 (N.Y. 1919) (an opinion updating the Doctrine by (1) changing it from a rule of law into one of construction, and (2) rendering it a rebuttable presumption, in a state that later abolished it).

The presumption can be rebutted. The use of a word other than one commonly meaning "heirs" in the limitation is one way to rebut the presumption. *O*'s conveying "to *A* for life, remainder to those persons who would be my heirs at *A*'s death" does the trick, changing the common meaning of the word just enough. So does "to *A* for life, remainder to my heirs, the latter persons to take as purchasers," as does "to my children" or "to my issue."

The doctrine has been abolished in about ten states (including, California, Illinois, and New York) and suffers from a lack of authority for or against it in many states. Even where abolished by statute, the statute's express language may not provide for its retroactive effect (affecting documents drafted before abolishment). When the state statute is silent on the issue of retroactivity, a court may refuse to abolish the doctrine retroactively. In order to avoid running afoul of the Doctrine of Worthier Title, a drafter should specifically name the person to whom the transferor intends property to go.

(b) Testamentary Branch

While the Doctrine of Worthier Title as applied to inter vivos transfers continues as a rule of construction in many states, the doctrine no longer applies to testamentary transfers—i.e., to wills. Thus, a devise from *O* "to *A* for life, then to *O*'s heirs" will be enforced as written.

EXAMPLES

The Rule of Destructibility of Contingent Remainders

1. Unless stated otherwise, assume that the state recognizes the Rule of Destructibility of Contingent Remainders.
   (a) *O* conveys Blackacre to "my son *A* for life, then to his children who reach 21." *A* has two children, *B* (age 8) and *C* (age 13). What interests and estates do *B* and *C* have?
   (b) Same facts as in (a). *A* dies when *B* is 10 and *C* is 15. Who owns what interests in Blackacre?
   (c) Same facts as in (a). *A* dies when *B* is 19 and *C* is 23. Who owns what interests in Blackacre?
   (d) Same facts as in (b), except the state does not recognize the Rule of Destructibility of Contingent Remainders. Who owns what interests in Blackacre?

The Rule in Shelley's Case

2. (a) *O* conveys "to *A* for ten years, then to *A*'s heirs." Does the Rule in Shelley's Case apply?
   (b) *O* conveys "to *A* for life, and then two days after *A*'s death, to *A*'s heirs." Does the Rule in Shelley's Case apply?
   (c) *O* conveys "to *A* for life, and on *A*'s death, to *A*'s children." Does the Rule in Shelley's Case apply?
   (d) *O* conveys "to *A* for life, then to *B* for ten years, then to *A*'s heirs." Does the Rule in Shelley's Case apply?

The Doctrine of Worthier Title

3. (a) *O* conveys Blackacre "to *A* for life, then to *A*'s next of kin." Does the Doctrine of Worthier Title apply?
   (b) *O* conveys "to *A* for life, then to *B* and her heirs," where *B* is an heir of *A*. Does the doctrine apply?
   (c) *O* conveys "to *A* for life, but if *A* does not live on Blackacre, to the heirs of *O*." Does the doctrine apply?

EXPLANATIONS

The Rule of Destructibility of Contingent Remainders

1. (a) *A* has a life estate. *A*'s children, alive and after-born, have a contingent remainder, contingent on their attaining age 21. *O* has a reversion. The Rule of Destructibility is not implicated while *A* is alive.

(b) Pursuant to the Rule of Destructibility of Contingent Remainders, the contingent remainders to *B* and *C* are destroyed. *O* owns Blackacre.

(c) *C* owns Blackacre subject to partial divestment if *B* reaches 21. Once *C* turns 21, *A*'s children's interest becomes a vested remainder subject to open. The Rule of Destructibility of Contingent Remainders does not destroy vested remainders.

(d) Because of the reversion, *O* owns Blackacre. *O*'s possessory interest is a fee simple subject to an executory limitation. *B* and *C* own springing executory interests.

The Rule in Shelley's Case

2. (a) No. *A* does not hold a ***freehold*** estate, as the rule requires. Instead *A* holds a nonfreehold estate, a term of years. This shows you that a slight variance in wording produces a different legal result, so be alert to such variances—for example, *O* transferring "to *A* for 99 years should *A* live so long, remainder to *A*'s heirs" quickly became a way to avoid the Rule in Shelley's Case: This is a term of years, rather than a life estate, followed by a remainder in *A*'s heirs.

(b) No. The heirs' interest here is a springing executory interest, not a remainder. The rule applies to remainders, not to executory interests. *A* has a life estate; *O* has reversion in fee simple subject to an executory limitation, *O*'s reversion to become possessory when *A*'s life estate ends. *A*'s heirs have a springing executory interest. *A*'s heirs' interest is not a remainder since it does not immediately follow the prior life estate; it follows *O*'s fee simple and it must cut short the fee simple to become possessory. Historically, the fact that the Rule in Shelley's case does not destroy executory interests was the impetus for creating executory interests in the first place.

(c) Still no. The remainder in "*A*'s children" is not the same as "*A*'s heirs" even though children constitute a major category of "heirs." The Rule in Shelley's Case applies only to "heirs," not to "children" or "issue" or even to "persons who would be my heirs."

From these three Examples you see how attorneys avoid the impact of the rule. There are other ways to avoid the Rule in Shelley's Case. For example, the use of two instruments—one to the life tenant, another to the heirs of the tenant—will avoid the rule since the Rule in Shelley's Case requires the interest to be created in the same document. Or, either the life tenant's or the heirs' interest can be put in trust, making it an equitable interest, so that the requirement that both interests be either legal or equitable is not satisfied and so (again) the rule does not apply. The Rule in Shelley's Case may be avoided by leaving the remainder to the life

tenant's widow or widower, for example, or to named heirs. This would conform to the typical estate plan of many people and still avoid the rule with a slight change in the wording of the transfer. When the rule is so easily avoided, it becomes a trap for the unwary. For some, this argues also for the Rule's abolition.

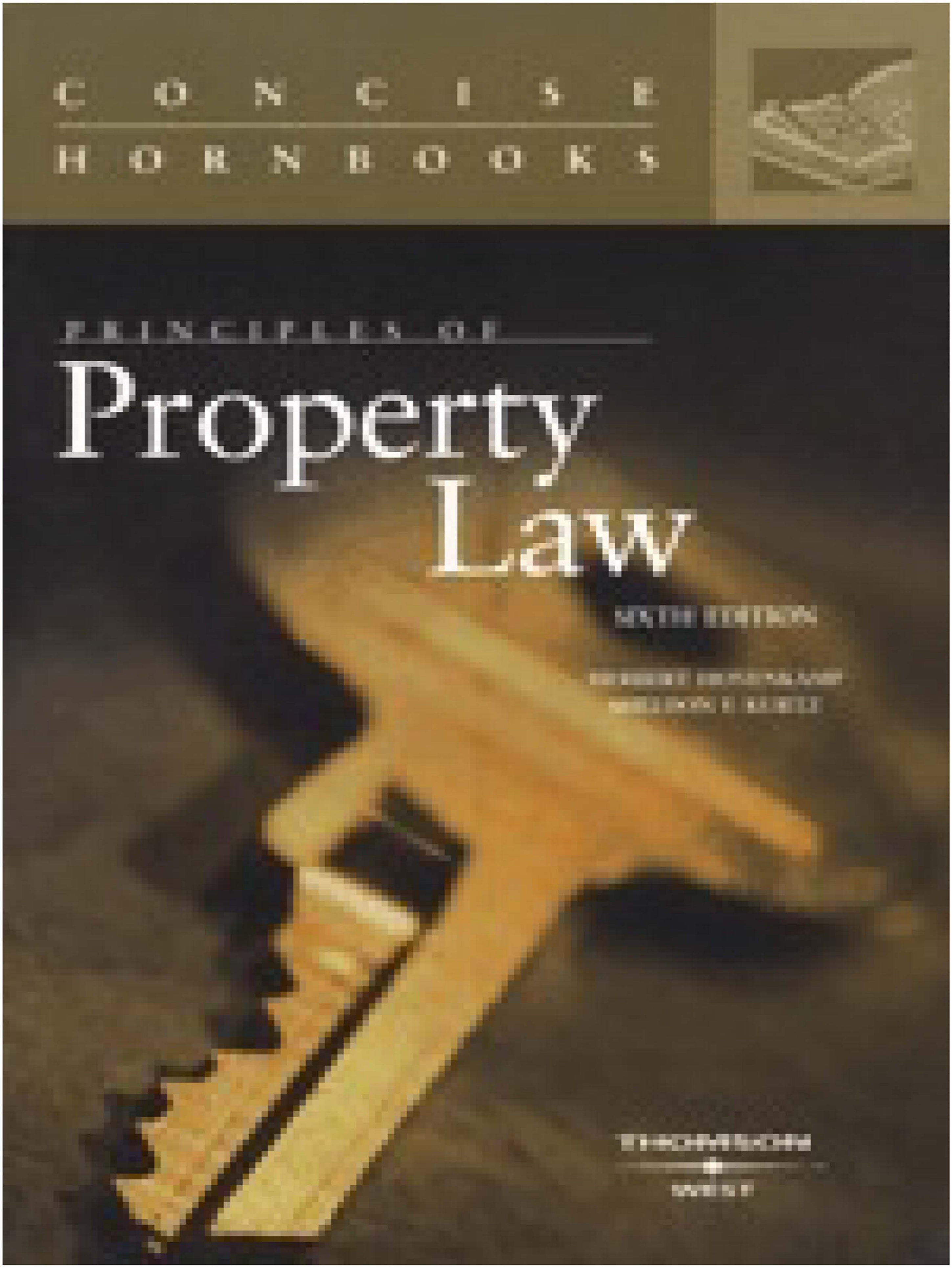
(d) Yes. The document purported to create a life estate in *A* and a remainder in *A*'s heirs. Thus the remainder becomes a vested remainder in *A*. *A* then owns both a life estate and a vested remainder in fee simple absolute. The two interests do not merge to form a fee simple absolute, however. The Merger Rule demands the two vested interests be acquired at different times; merger will be allowed to destroy an intervening interest only when the intervening interest is contingent. Here *A* received both interests in the same document, and *B*'s term of years is vested. So no merger in this case.

The Doctrine of Worthier Title

3. (a) Yes, the words "next of kin" are sufficiently close to "heirs" to render the doctrine applicable since the doctrine today is a canon of construction and not a rule of law.

(b) No, the limitation must use just the term "heirs" or its equivalent.

(c) An executory interest is just as much "a limitation over" as a remainder, so the Doctrine of Worthier Title transforms the executory interests in *O*'s heirs to a right of reentry in *O*. James Casner, an eminent authority on future interests, has disagreed. See James Casner & Barton Leach, *Property* 343 (2d ed. 1969).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PRINCIPLES OF PROPERTY LAW

Sixth Edition

By

Herbert Hovenkamp
Ben V. & Dorothy Willie Professor of Law
University of Iowa

Sheldon F. Kurtz
Percy Bordwell Professor of Law and Professor of Surgery
University of Iowa

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Chapter 6

CONSTRUCTION OF DEEDS AND WILLS CONCERNING PRESENT POSSESSORY FREEHOLD ESTATES

Table of Sections

SUMMARY

§ 6.1 Rules of Construction Generally

1. The purpose of construing a conveyance or will when its terms are ambiguous is to determine the intention of the parties. All rules of construction are subservient to this purpose. In other words, the first rule of construction is to give effect to the parties' intent.

2. In construing an instrument every part of it should, if possible, be given a meaning in considering the meaning of the instrument as a whole. This rule might be characterized as the "four corners doctrine," meaning that everything within the four corners of the instrument should be considered in its construction.

3. If possible, parts of an instrument should be construed as consistent with each other.

4. A deed is always construed most strongly against the grantor who has used the language.

5. If an instrument contains two clauses which are contradictory, the former governs over the latter. This is part of the old

maxim, "the first deed and the last will shall operate." In a deed, this may take the form of the granting clause and the habendum clause being repugnant to the other. In this case, the granting clause governs. This "rule of repugnant clauses" in modern times will normally not be applied in an arbitrary manner, and it frequently will be rejected in favor of the "four corners doctrine."

6. A deed will be construed to grant a fee simple absolute rather than a fee simple determinable or a fee simple on condition subsequent if the language of the whole instrument makes this interpretation reasonably possible.

7. A provision in a deed or will directing that the transferee of property cannot dispose of the property is void as a disabling restraint on alienation.[1]

§ 6.2 Fee Simple[2]

1. Estates in fee simple are:
   a. fee simple absolute
   b. fee simple defeasible
2. Estates in fee simple defeasible include:
   a. fee simple determinable
   b. fee simple subject to condition subsequent
   c. fee simple subject to executory interest including:
      (1) springing executory interest
      (2) shifting executory interest

3. The only way a fee simple estate could be created at common law was by the use of the words of limitation "and his heirs" or "and their heirs." These magic words were indispensable. Under modern statutes these words of limitation are not necessary to create a fee simple estate. It is presumed that the named grantee takes the entire estate the grantor had unless a lesser estate is described in the governing instrument.

4. Under many modern statutes the fee tail estate is deemed a fee simple estate. In jurisdictions where this is the case there is but one inheritable freehold estate, the fee simple.

5. A fee simple determinable comes to an end automatically upon the occurrence of some specified event or act expressed in the words of limitation. A fee simple subject to a condition subsequent requires both a breach of the specified condition and an affirmative act by the grantor or the grantor's heirs to terminate the estate.

1. This rule does not apply to so-called "spendthrift trusts."

2. See Ch. 5.

6. Any disabling restraint on the power to alienate a fee simple estate is void.

§ 6.3 Fee Simple Conditional and Fee Tail

1. The fee simple conditional estate was the forerunner of the fee tail estate and existed prior to the Statute De Donis Conditionalibus which was passed in 1285. This statute destroyed the fee simple conditional estate.

2. The fee simple conditional was an estate that terminated upon the transferee's death if the transferee had no child. Upon termination, the estate reverted to the grantor who retained a possibility of reverter. Upon birth of a child, however, the grantee had the power to convey a fee simple absolute. Absent a conveyance, the property descended under like terms to the grantee's heir of the body, or absent such a surviving heir, the property reverted to the grantor.

3. The Statute De Donis (1285) created the fee tail estate and made it a substitute for the fee simple conditional estate.

4. The typical words which created the fee simple conditional estate before 1285 and the fee tail estate after 1285 were, "to A and the heirs of his body."

5. The fee tail tenant owned an inheritable freehold estate but with limited powers over the estate. The tenant in tail could use it during his lifetime, but he could make no disposition thereof so as to prevent its descending to his bodily heirs, if any, or if no bodily heirs, he could not prevent its reverting to the grantor who retained a reversion. Each succeeding fee tail tenant had the same rights and limitations upon his estate.

6. Because the fee tail estate restricted the free alienability of land, the courts did not favor it. Fictitious legal proceedings were evolved to enlarge the powers of the fee tail tenant. The fine empowered him to cut off the rights of his bodily heirs. The common recovery[3] empowered him to cut off both the rights of his bodily heirs and the reversion of the donor.

7. A fee simple estate is a larger estate than a fee tail estate. Thus, when a fee simple owner conveys a fee tail estate, there is a reversion left in the donor.

8. Almost all states by statutes have abolished the fee tail estate by transforming it into a fee simple or into a life estate in the first taker with a remainder in fee simple to his issue or lineal descendants.

3. See chap. 5, note 17.

§ 6.4 Life Estates

1. Life estates include: (a) life estate for the life of the tenant, (b) life estate for the life of one other than the tenant (pur autre vie), (c) life estate resulting from a fee tail special tenancy after possibility of issue extinct, (d) life estate by dower, (e) life estate by curtesy, and (f) life estate by and during coverture.

2. A life estate is one in which the duration of the estate is measured by the life or lives of one or more human beings and is not otherwise terminable at a fixed or computable period of time.

3. If an estate may last for a lifetime, it is a life estate, even though it may be extinguished before it runs its natural course. However, if a limitation is made expressly subject to the will of the grantee or lessee, there is a conflict, and the interest created is either a life estate determinable or a tenancy at will depending upon the jurisdiction.

4. If a conveyance identifies the grantee but fails to describe effectively the estate which the grantee takes, then the grantee takes a life estate at common law. Today, the grantee is presumed to take whatever estate the grantor had to convey unless a contrary intent appears in the governing instrument.

5. A life tenant, in addition to his estate for life, may be given a power to convey, sell, appoint, or mortgage the fee. Upon the exercise of this power, the rights of the remaindermen or reversioners are affected accordingly.

6. Under the Rule in Shelley's Case, a conveyance of a remainder to the heirs or the heirs of the body of the life tenant, gives the remainder to the life tenant in fee or in fee tail, as the case may be. This Rule, which is a rule of property law at common law and does not give way (as a rule of construction would) to a contrary intent, defeats the intention of the grantor to create a life estate and a remainder in the life tenant's heirs.

7. A life estate may be measured by resort to a reasonable number of lives. Thus, a conveyance "to B for the lives of B, C, D and E" terminates upon the death of the survivor of the four named lives. On the other hand, a life estate to B to last for her life and for the lives of all the persons of a given state would give B a life estate for her life only.

8. Forfeiture restraints on the power to alienate a life estate, usually phrased so as to make the life estate defeasible on an attempted alienation, are valid. The reasons for upholding these restraints are: (1) life estates are not readily alienable in a commercial sense anyway; and (2) the restraint may have been imposed for the benefit of the reversioner or remainderman.

§ 6.5 Concurrent Estates

a. Joint Tenancy

1. Joint tenancy is always created by deed or by will, never by descent.

2. In joint tenancy there must always be two or more grantees or devisees.

3. O "to B and C and their heirs" are typical words for creating a joint tenancy at common law. Today in the absence of a clearly expressed intent to create a joint tenancy with the right of survivorship, this limitation creates a tenancy in common.

4. At common law a joint tenancy was preferred over a tenancy in common. Under modern statutes tenancy in common is preferred over joint tenancy.

5. At common law, every joint tenancy required the four unities of:

a. time—meaning all tenants take their interest in the premises at the same instant of time.

b. title—meaning all tenants take their interest from the same source, the same deed or the same will.

c. interest—meaning every tenant has the same identical interest in the property as every other tenant, such as fee simple, fee tail, life estate, etc.

d. possession—meaning the possession of one joint tenant is the possession of all the joint tenants and the possession of all the joint tenants is the possession of each joint tenant.

6. Every joint tenant owns the undivided whole of the property; co-tenants do not own a fractional interest.

7. The grand incident or characteristic of joint tenancy is that of survivorship. This means that upon the death of one joint tenant, the survivor or survivors own the whole of the property and nothing passes to the heirs of the decedent.

8. Upon the death of a joint tenant the survivors take nothing from the decedent but take the whole from the original conveyance which created the joint tenancy and which whole they have owned all the time.

9. A severance of the joint tenancy can be made by a conveyance, but not by will, because survivorship is prior to and defeats any purported disposition in the will.

10. If all joint tenants except one die without having severed their interests, the survivor owns the whole property.

11. Joint tenancy is destroyed by severance inter vivos, by partition, or by any act destroying any one of the four unities.

12. Except in those jurisdictions where the joint tenancy has been abolished, husband and wife may, by a clearly expressed intention in the conveyance, take and hold as joint tenants.

b. Tenancy by the Entirety

1. A tenancy by the entirety is a form of concurrent ownership based upon the common law concept of unity of husband and wife.

2. Tenancy by the entirety is a species of joint tenancy and as in joint tenancy each spouse owns the whole estate and not a fractional part thereof.

3. Tenancy by the entirety can exist only between husband and wife.

4. The doctrine of survivorship obtains in tenancy by the entirety—the survivor taking all and the heirs nothing.

5. Five unities are essential in tenancy by the entirety: (a) time, (b) title, (c) interest, (d) possession and (e) person. The first four are the same as in joint tenancy. The fifth involves the common law concept of unity of person in husband and wife.

6. Tenancy by the entirety is created only by deed or will, never by descent.

7. In most jurisdictions that recognize the estate by the entirety, neither spouse can dispose of any interest in the estate owned by the entirety; both must join in the conveyance.[4]

8. In most jurisdictions that recognize the estate by the entirety, a creditor of one spouse cannot levy upon the estate owned by the entirety, nor is a judgment against one spouse a lien against the estate held in the entirety.[5]

4. In some states in a tenancy by the entirety, the husband has the sole right to possession during the joint lives, and a fee simple absolute in all of the estate if he survives the wife. The wife, on the other hand, has no present estate but she does have a fee simple absolute in all of the estate if she survives her husband. The husband can convey his interests subject only to the right of the wife to absolute ownership if she survives; but the wife, during their joint lives, cannot convey her possibility of acquiring the estate. See Powell on Real Property ¶ 623. See D'Ercole v. D'Ercole, 407 F.Supp. 1377 (D.Mass.1976) (where an estranged wife brought suit claiming that the common-law concept of tenancy by the entirety deprived her of due process and equal protection in that it gave her husband the right of possession and control during his lifetime of their home, the court held that since tenancy by the entirety is but one option open to married persons seeking to take title to real estate, it is constitutionally permissible).

5. In those states that preserve the estate by the entirety in all its common law flavor, creditors of the husband can attach and sell under execution all of his interest in an estate by the entirety, but

9. Divorce eliminates the unity of person, destroys the tenancy by the entirety and the divorced persons become tenants in common of the property, or in some states, joint tenants.

10. Neither spouse has a right to partition a tenancy by the entirety, and neither has power, without the consent of the other, to destroy it.

c. Tenancy in Common

1. Tenancy in common may be created by deed, by will, or by operation of law.

2. Under modern statutes, tenancy in common is preferred over joint tenancy. Thus, a conveyance to two or more persons presumptively creates a tenancy in common.

3. Only one unity, that of possession, need be present in tenancy in common.

4. Each tenant owns an undivided fractional part of the property, none owns the whole as in joint tenancy.

5. Each tenant can dispose of his undivided fractional part or any portion thereof, either by deed or by will.

6. Upon the death intestate of a tenant in common her interest descends to her heirs. There is no right of survivorship.

7. Tenancy in common may be destroyed by partition or by merger when the entire title vests in one person, either by purchase or otherwise.

8. If one cotenant ousts the other from possession, the ousted tenant has a cause of action against the possessor to regain possession.

9. There is no real fiduciary relationship between cotenants merely because of the cotenancy, but good faith between cotenants prevents one cotenant from buying up an adverse title and asserting it against cotenants if the other cotenants offer to share their part of the expense of gaining the title. The buyer of the adverse title is made to hold in constructive trust for his cotenants.

separate creditors of the wife cannot reach her interest. See Licker v. Gluskin, 265 Mass. 403, 164 N.E. 613 (1929) (where a husband and wife were tenants by the entirety and a creditor of the wife attached her interest in the land and sought to sell it, the court held that under force of statute the attachment and levy were void because the creditor could not do what the wife could not do); West v. First Agricultural Bank, 382 Mass. 534, 419 N.E.2d 262 (1981) (suggesting that historical inequalities in tenancy by the entirety were now unconstitutional), Powell on Real Property ¶ 623.

PROBLEMS, DISCUSSION AND ANALYSIS

§ 6.2 *Fee Simple*[6]

PROBLEM 6.1: O grants Blackacre[7] "to B." In the jurisdiction where the land is located a statute provides in substance that every grant or conveyance of an estate in land made to a person shall be deemed a fee simple unless a lesser estate is described in the instrument. (a) What estate would B take at common law? (b) What estate would B take under the statute?

Applicable Law: Words of limitation, "and his heirs," were indispensable to the creation of a fee simple estate at common law. Under modern statutes and some cases, the use of these words is usually not necessary and a fee simple estate may be created without the presence of these words.

Answer and Analysis

(a) At common law B took a life estate in Blackacre but under the statute B takes a fee simple estate. At common law no conveyance could pass a fee simple from the grantor to the grantee without the use of the magic words of limitation, "and his heirs." Thus, even a conveyance to "B in fee simple absolute" gave B only a life estate.

(b) Under the statute the named grantee takes a fee simple estate in every conveyance (assuming the grantor had a fee simple) unless by express words in the deed it is stated that the grantee takes an estate less than a fee simple. Thus, under the statute B takes a fee simple even though the phrase "and his heirs" was excluded from the terms of the conveyance. Some jurisdictions hold that B takes a fee simple in such case even without the aid of a statute.

The common law rule mandating the use of "and his heirs" was subject to some important exceptions. These were:

If O conveys to B corporation (whether sole, aggregate, or municipal), the corporation takes a fee simple absolute without the use of words of inheritance. Although corporations are legal "persons," they do not have heirs.

If O conveys to "B as trustee," B takes such estate as is necessary to carry out the trust, including a fee simple, even though the phrase "and his heirs" did not appear in the conveyance.

6. At this point those portions of chapter 5 describing the characteristics of the fee simple absolute and the fee simple subject to limitations should be carefully re-read. In each of the following problems, assume that O owns Blackacre in fee simple absolute unless the problem provides otherwise.

7. Unless the problem otherwise provides, O or T, when conveying or devising Blackacre, owns Blackacre in fee simple absolute.

If O conveyed to the heirs of B (a deceased person), that heir took a fee simple even though the phrase "and his heirs" did not appear in the conveyance. This resulted from the fact that at common law B had but one heir where primogeniture applied; thus, the use of the plural heirs was a substitute for "B's heir and his heirs." Similarly, if O conveys to B for life, remainder to the heirs of C while C is still living, C's heirs took as purchasers and as a class of heirs a contingent remainder in fee simple. If C dies before B, they then take a vested remainder in fee simple without words of inheritance being used in the deed.

Suppose O conveyed Blackacre to A and B and their heirs as joint tenants in fee simple. A releases her interest to B. B now is owner in fee simple in severalty without use of the words of inheritance in the deed. The reason is that B, as well as A, had previously owned the fee in the whole. By contrast, suppose O conveyed to A and B and their heirs as tenants in common. In this case each of them owns an undivided one half of Blackacre in fee simple. If A grants "to B" A's interest in Blackacre, B will only take a life estate in A's undivided half at the common law unless words of inheritance are used. This is because A's estate is wholly separate and distinct from B's fee simple, each having a different interest. Lastly suppose T devises Blackacre to B. B takes a fee simple without the use of words of inheritance if this is the testator's intention.[8]

PROBLEM 6.2: O conveys Blackacre "to my son-in-law, B, and his heirs to have and to hold for his lifetime, and at his death to be equally divided among his heirs, they being my grandchildren then living." What estate does B take under this deed?

Applicable Law: If two clauses in a deed are in conflict but the grantor's intention can be found by a reading of the entire instrument, this intention shall govern.

Answer and Analysis

B has a life estate. There is an inconsistency between the granting clause which gives B a fee simple and the habendum clause which limits B's estate to a life estate. If the rule of construction is that if the granting clause is repugnant to or inconsistent with the habendum clause, the former governs, then, of course, B takes a fee simple estate. This rule, however, is resorted to only when the intention of the parties cannot be ascertained from the entire instrument. In this problem O's intent can be gleaned by reading the entire instrument.

8. See Restatement of Property §§ 29–37; Simes, 181–185.

In analyzing the entire instrument little emphasis should be placed on the order in which the words, phrases, or clauses appear. In the first place, the grantee, B, is the grantor's son-in-law. In the second place, the deed provides for another purchaser upon B's death, namely, B's heirs, who are the grantor's grandchildren. A is providing for a remainder among B's children, A's grandchildren. True, there can be no heirs of a living person and it cannot be foretold who B's heirs will be at the time of B's death. Nonetheless, there is reason to believe that O is using "B's heirs" as synonymous with "B's children." If this is the case, then it is clear that B takes a life estate and there is a contingent remainder to B's children living at B's death.

Furthermore, by taking this view, the words "and his heirs" used in the granting clause might well be read as "and his children." This construction would give effect to every part of the deed and reconcile the granting and the habendum clauses. Under this interpretation, B takes a life estate in Blackacre and his children living at his death take a contingent remainder. O, of course, retains a reversion. From a reading of the entire deed this seems to be O's intention.

PROBLEM 6.3: In State X a statute provides that a conveyance which prior to the enactment of the statute would create a fee tail estate should thereafter create a fee simple estate in the grantee. O is domiciled in State X. O conveys Blackacre "to B and the heirs of his body." What estate does B take under the instrument?

Applicable Law: Under many modern statutes a conveyance which would have created a fee tail estate at common law now creates a fee simple estate.

Answer and Analysis

B takes a fee simple absolute. Prior to the statute and at common law the expression "to B and the heirs of his body" created a fee tail estate in B. This estate was limited to lineal heirs. Many states have statutes which provide that an estate which was at common law a fee tail shall be deemed a fee simple. Under this type of statute B would take a fee simple estate. Thus if B owned the property at the time of his death and died intestate, the property would pass to B's lineal descendants, or if none, among his collateral heirs.[9] This estate is also alienable and devisable.[10]

9. Depending upon state law, these heirs might be ancestors of B or collateral relatives of B.

10. See Restatement of Property § 42, Simes, 196–202.

PROBLEM 6.4: O conveys Blackacre to "B and his heirs so long as Blackacre is used for school purposes." What interest does B have in Blackacre?

Applicable Law: A grant to B and his heirs so long as the land is used for school purposes creates in B a fee simple determinable; the grantor retains an estate called a possibility of reverter.

Answer and Analysis

B has a fee simple determinable. B has a fee because words of inheritance, "and his heirs" were used following the grantee's name (words of purchase), which indicate the estate in B may last forever. However, additional words of limitation appear in the deed. These words tie up the use to which B may put the land. Because of these additional words of limitation, there is the possibility that B's estate will not last forever. If B ceases to use Blackacre for school purposes, then B's estate automatically terminates and Blackacre reverts to O because the very words of the conveyance state that B's estate shall last just that long. Thus, there is no forfeiture involved. Rather, B's estate ends naturally.

In this problem, the future interest retained by the grantor is called a possibility of reverter. This estate becomes possessory upon the natural termination of B's estate.

In some cases a limitation may be void as a matter of public policy. For example, suppose O transfers Blackacre to A so long as A remains single. If A marries, does Blackacre revert to O? In resolving this issue, the reasonableness of the restriction may be relevant. Generally, restraints on the marriage of a surviving spouse are upheld, while restraints on the marriage of the grantor's children or others are not.[11] Likewise, any restraint that violates some independent body of law, such as the law of race or gender discrimination, is invalid or unenforceable. For example, a grant "To A so long as the property is occupied exclusively by white persons" is not enforceable in a court.[12]

PROBLEM 6.5: Within X County O owned Blackacre which comprised an area of several blocks of land. The land was unimproved and undeveloped. O offered to convey one block of this land, Whiteacre, in the center of the tract to X County to be used for courthouse purposes. The proper county officers agreed to receive the property on behalf of the county and to locate the courthouse there. O executed a deed granting "to X

11. See, e.g, Lewis v. Searles, 452 S.W.2d 153 (Mo.1970) (upholding limitation regarding marriage as against a niece because court found testator only intended to provide for niece when she would have no other sources of support).

12. See Ch. 12.

County, all of my right, title, claim, interest and estate in and to Whiteacre, but upon this condition that Whiteacre shall be used forever as the site on which the courthouse of X County shall be erected." The courthouse was built on Whiteacre and remained there and was used as such for more than 100 years, when it was abandoned as a courthouse. When the structure ceased to be used for courthouse purposes, H was the sole heir of O then living. H sues X County for possession of Whiteacre contending that the above deed created in X County either a determinable fee simple or a fee simple on condition subsequent. May H succeed?

Applicable Law: This problem distinguishes a fee simple determinable from a fee simple subject to a condition subsequent. The provisions of a deed will be construed to create a fee simple absolute rather than a fee simple determinable or a fee simple subject to a condition subsequent, if this interpretation is reasonable.

Answer and Analysis

No. A determinable fee is a fee which is created by an instrument of conveyance which provides that such estate shall come to an end automatically upon the happening of some described event. A fee simple subject to a condition subsequent is a fee which is created in an instrument of conveyance which provides that, upon the happening of some certain event, the grantor or his successors in interest shall have the power to enter and terminate the estate of the grantee. The principal difference between the two is this: in the determinable fee the estate automatically comes to an end when the stated event happens, whereas in the fee subject to a condition subsequent the termination of the estate is not automatic but must be terminated by an entry or exercise of the reserved power by the grantor or his successor in interest. The former involves no forfeiture, the latter does. Whether a given deed conveys a fee simple absolute or a determinable fee or fee simple on condition subsequent is a matter of construction of the words used in the instrument.

In the construction of limitations the courts favor unconditional estates rather than conditional ones for the reason that estates once vested should not be uprooted after long periods of time unless it was the intention of the grantor expressed in the deed that this should occur. Applying this principle the deed should be construed in favor of the defendant county unless it is fairly clear that the grantor intended either a determinable fee or a fee simple upon condition subsequent. In the deed O grants to X County, a quasi-municipal corporation, "all of his right, title, claim, interest and estate in and to Whiteacre." Words of inheritance are not only not

required but are quite inappropriate where a public corporation is the grantee. Thus, it is clear that O intended to grant a fee simple estate to X County.

The words following, "but upon this condition that Whiteacre shall be used forever as the site" of the courthouse are the only words on which it can be contended there was either a determinable fee or fee simple upon condition subsequent. These words show no intention whatsoever that the fee simple in X County should automatically revert to O or his heirs. While they limit the use to which Whiteacre shall be put, they put no limit on the time during which the estate shall last. The typical words for creating a determinable fee are "so long as," "during," "until," or "while." None of these or similar expression was used but the use was to be "forever." Thus, it seems there is no expression of intention by O in the deed that there should be a determinable fee simple in X County.

Was there a fee simple on condition subsequent? A fee simple on condition subsequent is generally introduced by such phrases as "provided that," "on condition that," "subject to the condition that," or "but if." An express reverter clause giving the grantor the right to re-enter generally is appended. But these reverter clauses are not absolutely necessary. The fee simple subject to a condition subsequent always involves a forfeiture of a vested interest. The law abhors forfeitures and the courts will not construe the words of a deed to create this future estate unless the language is so clear as to admit of no other interpretation. In this case the deed did say, "upon the condition" that the tract be used "forever" as a courthouse site. But there is not one word in the deed expressing what should happen in case the site were not so used. There is no right of entry or power to terminate the estate reserved in O or O's successors in interest. Without any express reservation of this power, the court ought not to imply such, when the result of that implication would cause a forfeiture of an estate which has lasted for more than a century. Thus, there was no fee simple upon condition subsequent created in X County.[13]

There is a further economic argument in this case which should not be overlooked. It may be that O's grant of Whiteacre to X County was not wholly altruistic. If the county courthouse could be located in the middle of land owned by the grantor, such an institution might enhance the value of the lots surrounding the courthouse. Reading the language of the deed as a whole and considering the conditions under which it was executed, it seems

13. In Mahrenholz v. County Board of School Trustees, 93 Ill.App.3d 366, 48 Ill.Dec. 736, 417 N.E.2d 138 (1981) grantor conveyed to a local school board with the land to be used only for school purposes; "otherwise to revert to the" grantor. The court held this language created a fee simple determinable.

quite correct to conclude that X County took a fee simple absolute estate in Whiteacre and that no defeasible fee simple was intended. Thus, H should not succeed in his action.[14]

In many jurisdictions statutes require holders of retained future interests to periodically file a notice or claim to the effect they intend to enforce their rights if the limitation or condition occurs. If State X had a statute of this type and neither H nor H's predecessors timely filed this notice, then even if a fee simple determinable or a fee simple on condition subsequent were created, H would be barred from reclaiming possession of Whiteacre.

PROBLEM 6.6: O conveys Blackacre "to B and his heirs provided that, if intoxicating liquors are ever sold on the premises, then O reserves the right to enter and terminate B's estate." What estate does B take under this deed?

Applicable Law: A grant to B and his heirs provided that if a specified condition occurs or fails to occur the grantor or his heirs have the right to re-enter and terminate the estate creates in B a fee simple subject to a condition subsequent and leaves in the grantor a right of re-entry for condition broken which today is also called a power of termination.

Answer and Analysis

B has a fee simple subject to a condition subsequent. The older cases used the expression "right of re-entry for condition broken" to describe O's right. The more recent cases describe O's right as a "power of termination." B has a fee simple because words of inheritance "and his heirs" are used to describe the quantum of B's estate. B's estate may last forever provided intoxicating liquors are not sold on the premises. It may also last forever although intoxicating liquors are sold on the premises provided O or his successors in interest do not terminate the estate of B by exercising their power of termination.

The usual words for creating a condition subsequent are, "on condition that," "but if," "on the express condition that," "provided that" or similar expression. The usual expressions for reserving the power to terminate are that the grantor may "re-enter and take the property," "enter and terminate the estate," "in such case cause the title to revert back to the grantor," or other words evincing an intention to take back the property. The power to terminate may even be implied from such expressions as "every

14. See Chouteau v. City of St. Louis, 331 Mo. 781, 55 S.W.2d 299 (1932) (where a deed conveyed all interest in realty on condition that it should be used forever as a courthouse site with no express provision for re-entry, the deed conveyed a fee and not an estate on condition subsequent and hence the grantor's heir had no right to the property after its abandonment as a courthouse site); Restatement of Property §§ 44, 45.

thing herein shall be null and void" or "this deed shall be null and void and the title shall revert to the grantor."

In this problem, both the condition subsequent and the power to terminate are provided for expressly in the deed. The phrase "provided that if intoxicating liquors are ever sold on the premises" describes the condition subsequent. The phrase "then I reserve the right to enter and terminate the estate hereby created" describes the power to terminate or right to make reentry for breach of the condition. It is clear then that O intended to create a fee simple in B and that if a certain event or condition happened, namely, the selling of intoxicating liquor on the premises, then O would have the right or power to enter and put an end to that fee simple. B's estate would not end automatically. It would end only if and when the condition happened and thereafter the grantor or his successors in interest performed the requisite affirmative act of reentry for terminating such estate.[15]

PROBLEM 6.7: O conveys Blackacre "to B and his heirs but upon the express condition that B shall not dispose of or alienate Blackacre for a period of five years after B receives the title." Ten days after the deed was delivered to B, B purports to convey Blackacre to C. What estate does C have in Blackacre?

Applicable Law: A restraint which disables a fee simple owner of land from alienating the property is void and the owner may dispose of the property in fee simple.

Answer and Analysis

C owns Blackacre in fee simple absolute. O purported to convey a fee simple absolute to B and also to impose on B a restraint on B's power to alienate or dispose of the fee simple estate. Is this restraint valid? The answer is an unequivocal no.

The power to dispose of the fee simple estate is an integral part of the fee simple estate. This estate cannot exist apart from the power in its owner to dispose of it. This type of restraint or power to alienate is classified as a disabling restraint and is void in all cases except when connected with spendthrift trusts. Where this restraint appears in a deed, the grantee takes the property free of the restraint and with full power to dispose of the property.[16] This is true whether the restraint refers to real or personal property,

15. See Restatement of Property § 45; Simes, 30.

16. Accord, White v. Brown, 559 S.W.2d 938, 941 (Tenn.1977) (where the testatrix stated in her will that she wished a named person to have her home to live in and that it was not to be sold, the testatrix passed a fee simple absolute in the home to such person, and her attempted restraint on alienation was void as contrary to public policy).

whether it refers to legal or equitable interests (spendthrift trusts excepted), and whether the estate involved is a fee simple, fee tail, life estate, or an estate for years. In other words, there is no power on the part of a grantor or testator to convey a fee simple estate to a person *sui juris* and deny that person the power to dispose of the estate for five years, for one year, for one day or one minute. In this case then, O's attempted restraint on B's power to alienate the estate was void and B took the fee simple absolute in Blackacre. B's estate was alienable. B had both the right and power to convey the fee simple estate to anyone. Since B granted B's estate to C, C took from B the estate which B had which was a fee simple absolute.

The disabling restraint illustrated in this problem is a type of direct restraint on alienation. Other types of direct restraints are the promissory and forfeiture restraints. Unlike the disabling restraint which is generally held invalid except in the case of spendthrift trusts, promissory and forfeiture restraints are generally held valid when imposed on interests less than fees simple.

§ 6.3 Fee Simple Conditional and Fee Tail [Omitted]

§ 6.4 Life Estates[17]

PROBLEM 6.12: T's first wife died. Later T remarried W–1. T later dies and bequeaths Blackacre to "my second wife, W–1, so long as she remains a widow, and then to my child C and his heirs." W–1 later dies and bequeaths her entire estate to her brother X and his heirs. X enters Blackacre. C sues X in ejectment. Who wins?

Applicable Law: A grantor can create a determinable life estate as well as a fee simple determinable. Ordinarily distinguishing the two is easy. However, where the limitation is tied to an event that could only occur during the grantee's lifetime, ambiguities can arise whether the grantor intended to create a determinable life estate or a fee simple determinable.

Answer and Analysis

C probably wins. Whether C or X wins depends on whether W–1 had a determinable life estate or a fee simple determinable. It W–1 had a determinable life estate, then C would have a remainder which would become possessory at W–1's death. A determinable life estate is neither devisable nor descendible. If, on the other hand, W–1 had a fee simple determinable, then W's estate would be devisable and descendible and, given that the limitation could not occur after W–1's death, C's shifting executory interest[18] could never become possessory.

17. On life estates, see Ch. 5, Part I.

18. The fact that C would have a shifting executory interest is an excep-

The proper classification of W–1's interest depends on T's intent. A strong argument can be made that T wanted W–1 to have only personal enjoyment of the property during her widowhood and not a devisable or descendible estate. This argument is particularly strong where as here, C is a child of T's first marriage and construing W–1's estate as a fee simple determinable would permit her to devise the property to strangers.[19]

PROBLEM 6.14: H and W were husband and wife who had five minor children. H devised Blackacre "to my wife, W, for the term of her natural life, remainder to our children share and share alike, but if my wife, W, determines it to be for the welfare of the family to sell Blackacre, then she is hereby empowered to sell the land and pass a fee simple title thereto." W decided that it was for the family welfare to sell Blackacre so she conveyed it to "B and his heirs." W died and the five children sue B for possession of Blackacre. Should they succeed in their action?

Applicable Law: A life tenant can be granted a power to convey a fee simple even if by exercise of that power the interest of the remainderman is defeated.

Answer and Analysis

No. Sometimes an estate is given with a power in someone to cut short or destroy it. Sometimes an estate is given with a power to enlarge it. This case involves both types—a life estate in W with a power to dispose of the fee simple and a remainder in fee simple in the children with power in W to destroy it. By W's conveyance to B in fee simple she exercised that power. This act both enlarged her life estate to a fee simple absolute in her grantee and destroyed the vested remainder in her children. But until the exercise of the power by W, she had only a life estate.

PROBLEM 6.15: O conveys Blackacre "to B for the lives of B, C, D and E and the survivor of them." B conveyed to X all of B's right, title and interest in Blackacre. B then died survived by C, D and E. O sues to eject X from Blackacre and argues that B's death terminated X's interest in the premises. May O succeed?

tion to the classification structure. Logically, C should have a vested remainder since, if it were to ever become possessory, it would do so following the natural termination of W's estate upon the happening of a limitation, not a condition. However, because of the early common law rule that a fee simple could not follow on the heels of a fee simple, C's interest was classified as a shifting executory interest and continues to be so classified today.

19. Compare Dickson v. Alexandria Hospital, Inc., 177 F.2d 876 (4th Cir. 1949)(fee simple determinable) with Mouser v. Srygler, 295 Ky. 490, 174 S.W.2d 756 (1943)(determinable life estate).

Applicable Law: O "to B for the lives of B, C, D and E and the survivor of them," is valid to create a life estate in B until the death of the survivor of the four named persons, B, C, D and E. O "to B for the joint lives of B, C, D and E" is valid and lasts as long as all four live and ends upon the death of the first of the four; O "to B for B's life and the lives of all the people who live in State X and the survivor" is a valid life estate for the life of B only, the provision for the other lives and survivor being void for impracticability of determining the death of the survivor.

Answer and Analysis

No. It should be noted that the life tenant's name, B, is listed among the measuring lives so that this is not wholly an estate pur autre vie. B has a valid estate for the lives of B, C, D and E and the survivor of them. This phrase makes the life of the survivor of the four the maximum term of the estate which B had and which B assigned to X. Thus, O has no right to eject X until all of the four are dead. If B is not the survivor of them, B's estate passes to those persons who are the successors of his estate—his heirs if B dies intestate; the beneficiaries of the interest if B dies testate.

Had the conveyance read, "for the joint lives, of B, C, D and E," then the "joint lives" could only last until the first of the four died and when B died, O could have ejected X. But the deed did not so provide.

Had the measuring lives been "for the life of B and the lives of all the persons now living in the State of South Dakota and the survivor of them," the provision for the lives beyond that of tenant, B, would be void for the reason that it would be impracticable if not impossible to determine the time of death of the survivor, and B would take a life estate for his own life only.[20]

PROBLEM 6.16: T devised Blackacre to her daughter, D, for life. T's will directed that upon D's death Blackacre should be distributed to D's two children, X and Y, and their heirs. The will also provided that Blackacre should not be sold until X and Y reached 45 years of age. Is the provision against sale valid?

Applicable Law: (a) Disabling restraints on alienation (spendthrift trusts excepted)[21] generally are void regardless of the estate to which they are attached. (b) Forfeiture and promissory restraints on life estates and lesser interests generally are

20. See Restatement of Property § 107, illustrations 1, 4, 5.

21. A spendthrift trust is a trust which provides, among other things, that the equitable life estate (and remainder) while held by the trustee are not alienable nor reachable to the creditors of the income beneficiary or remainderman.

valid. (c) All unreasonable restraints on the alienation of fee simple estates are invalid. (d) Life estates are subject to termination by special limitations and powers of termination.

Answer and Analysis

In most states the restraint on alienation is invalid. The provision against sale is a restraint on alienation of the disabling type.

A disabling restraint is a direction in the creating instrument that the estate shall not be alienated. If this restraint were valid, it would create a non-transferable estate. If a disabling restraint were valid, the transferee subject to the restraint could not alienate the property and would not lose his interest in the property even though in violation of the restraint he purported to alienate the property.

The general rule, with the exception of a disabling restraint on the beneficial interest under a spendthrift trust, is that all disabling restraints on alienation are void. This rule applies whether the disabling restraint is attached to a fee simple, life estate, or lesser interest. It also applies whether the restraint is total or partial, limited or unlimited as to duration. The rule is based upon a public policy preference to eliminate impediments to the alienability of land. When tied to a life estate or other estate smaller than a fee simple absolute, the practical effect of the restraint is unclear. All future interests act as impediments to the alienability of land. Thus, in this problem, if the restraint were limited to the life of D, an empirical question arises whether the land would be any more alienable without the restraint as it would be with it since D's children have a future interest. If they do not join in a conveyance, no purchaser from D could acquire a fee simple estate.

When applicable, the rule of invalidity invalidates the illegal restraint on alienation and makes the estate freely alienable. Thus, in most jurisdictions D acquires a life estate which D can alienate, and X and Y can alienate their remainder interests during the lifetime of D. They also can alienate the fee simple after the death of D regardless of whether or not they reach the age of 45.

Forfeiture and promissory restraints on fee simple estates generally have been held invalid. Forfeiture and promissory restraints on life estates and lesser interests generally are held valid. A forfeiture restraint exists when the creating instrument provides that on an attempted alienation the estate created or transferred is forfeited or terminated with a further provision for the estate to pass to another.

A promissory restraint is in the form of a covenant (promise) that the grantee will not alienate the estate. Thus, in this problem,

if the will provided that should D transfer or alienate her life estate, then her estate should end and the entire estate vest in X and Y, the provision would be perfectly valid and enforceable.

Forfeiture restraints on life estates may be justified on two grounds: (1) they may be imposed for the benefit of the reversioner or remainderman; and (2) life estates are somewhat inalienable (at least in a commercial sense) anyway because of the uncertainties surrounding the life expectancy of the life tenant. Because the life tenant may die the next day, no one is willing to pay very much for a life estate. Forfeiture restraints on leaseholds are common and are valid. These restraints customarily take the form of affording the landlord the right to re-enter and terminate the estate if the leasehold is transferred without the landlord's consent. The interest of the landlord in protecting rental income and the reversionary estate are sufficient justification for upholding such restraints.

Life estates also are subject to termination by (1) special limitation, such as "to B for life so long as B does not sell liquor on the premises," or "to W for life for so long as W remains a widow (or until she remarries)," and (2) by the exercise of a power of termination, such as, "to B but if he does not keep the fences in repair, then I reserve the right to re-enter and take back the premises."[22]

The modern trend toward condominium and cluster housing has given rise to increased restrictions on the use and transfer of such housing units. The close interrelationships of the community members, whether controlled by a home owners' association, a condominium or a cooperative association, have resulted in the use of restrictions in order to achieve a community of compatible and financially responsible persons. The restrictions frequently involve not only restrictions on use, i.e., single family residence, no children under a certain age, or no pets, but also restrictions on sale or transfer.

A wholly disabling restraint on sale most likely would not be used, and even if it were, it would most likely be held invalid although limited as to duration. However, provisions are common

22. See McCray v. Caves, 211 Ga. 770, 88 S.E.2d 373 (1955) (where a husband's will devised a tract of land to his wife for life and at her death to the heirs of her body but should she cease "to be the wife or widow" of the husband "then in that event she forfeits her right to the life estate" to her children, the estate divested upon her remarriage); Restatement of Property § 18, Note 2.

that grant the condominium association a right of first refusal. In other words, when an owner wishes to sell, the association may either approve the prospective buyer and sale, or instead, may buy the unit on the terms and conditions offered by the prospective buyer. As long as the association does not have an unreasonably long period of time in which to exercise its purchase option, such provisions have been, and should be upheld as long as the particular terms do not violate the rule against perpetuities.[23]

One court expressed the opinion that a right of first refusal was not a restraint on alienation since the seller in effect had two purchasers instead of one.[24] This reasoning is questionable. If a right of first refusal exists, any prospective purchaser that the seller gets must be prepared and willing to wait until the association decides whether or not to exercise the option. If the association is given too long a period of time to decide, many prospective purchasers will refrain from making an offer because they will not want to be bound for a long time without an assurance that they will get the land. Thus, there will definitely be a restraint on alienation. Reasonable controls, however, are common and even desirable.

In view of these recent developments, statements about direct restraints on alienation should be phrased as follows: reasonable restraints on alienation are upheld, but unreasonable restraints on alienation are invalid.[25]

23. Options in gross may be subject to the common law Rule against Perpetuities, but options to renew or purchase attached to leases are not generally subject to the Rule, because they promote rather than hinder alienability. See Ch. 13. See generally, Ch. 8, §§ 8.4; 8.5.

24. Watergate Corp. v. Reagan, 321 So.2d 133 (Fla. 4th D.C.A. 1975) (action for declaratory judgment; an agreement granting a right of first refusal with respect to the sale of certain property did not violate the Rule against Perpetuities and enhanced alienability because the seller had two potential buyers instead of one).

25. See Coquina Club, Inc. v. Mantz, 342 So.2d 112 (Fla. 2d D.C.A.1977), holding that unit owner must tender a qualified purchaser (here, with no children under 12), before association has duty to purchase or provide another purchaser; Hoover & Morris Dev. Co., Inc. v. Mayfield, 233 Ga. 593, 212 S.E.2d 778 (1975), holding that owner did not comply with declaration requirements concerning notice to the association so as to require exercise of the option or consent, but that there was evidence of a waiver; and Ritchey v. Villa Nueva Condominium Ass'n, 81 Cal.App.3d 688, 146 Cal. Rptr. 695 (1978), holding that age restrictions on occupancy and sale were reasonable and valid, and that coupled with a right of first refusal as provided in the documents would impose on the association the duty within fifteen days to either provide a qualified purchaser, purchase itself, or waive the restriction. See Ch. 13.

FREEHOLD ESTATES COMPARED WITH AND DISTINGUISHED FROM NON-FREEHOLD ESTATES

Freehold estates illustrated	Non-freehold estates illustrated
Case 1. Fee simple A *to B and his heirs*—this gives B a fee simple and leaves nothing in A. B's estate is inheritable by his heirs general, either lineal or collateral.	Case 1. Estate for years A *to B for 10 years*—this gives B an estate for years and leaves a reversionary interest in A. If B dies during the 10-year period the balance of the term passes to B's personal representative, i. e. his executor or administrator, for purposes of administration. In many jurisdictions the rules as to the intestate transmission of real and personal property are the same.
Case 2. Fee tail A *to B and the heirs of his body*—at common law this gave B a fee tail and left a reversion in A. B's estate was inheritable only by B's lineal heirs. Today the nature of the estate created by such a conveyance varies from state to state.	Case 2. Estate from year to year A *to B from year to year*—this gives B an estate from year to year and leaves a reversionary interest in A. If B dies during the period of the lease the balance thereof passes to his personal representative.
Case 3. Life estate A *to B for life*—this gives B an estate for B's life and leaves a reversion in A. B's estate is not inheritable.	Case 3. Tenancy at will A *to B as long as A wishes* (or as long as both A and B agree)—this gives B an estate at will and leaves a reversionary interest in A. B's death (or A's death) during the tenancy terminates the tenancy and A has the right to immediate possession. NOTE, HOWEVER, that if the limitation is from *A to B for as long as B wishes*, there is a conflict of authority and B has either a life estate determinable (believed to be the better view) or a tenancy at will depending upon the jurisdiction.

Freehold estates illustrated	Non-freehold estates illustrated
	Case. 4. Tenancy at sufferance A leases to B for 2 years and after the expiration of the 2-year term, B remains in possession without A's permission—B has a tenancy at sufferance which is really no tenancy at all but is called such. A has the right to eject B. B has a mere naked possession without right.
SIMILARITIES	
1. In each case B has possession of the land. 2. In each case B has an estate in the land.	1. In each case B has possession of the land. 2. In cases 1 and 2 above B has an estate in the land but in cases 3 and 4 B does not have an estate but mere possession.
DISSIMILARITIES	
1. The interest of B is *real property.*	1. In cases 1, 2 and 3 B's interest is *personal property*—called a chattel real. In case 4, B has no interest.
2. B's interest is *inheritable*—that is, passes to B's heir or heirs in cases 1 and 2 but this is *not true as to case* 3 for a life estate measured only by the life of the tenant is not inheritable.	2. In cases 1 and 2 and 3 B's interest *is inheritable* but in cases 3 and 4 it is not.
3. B's interest is of *indefinite* or uncertain duration.	3. B's interest in case 1 is of *definite* duration, in cases 2 and 3 of indefinite duration.
4. B is *seised* which means that he is possessed claiming a freehold interest in the land.	4. B is *not seised* but only possessed—seisin exists only as to freehold estates. 5. A tenancy at will is a chattel interest in land, of the lowest nature but it is possession at the mutual wills of the land owner and the tenant, and will support trespass or ejectment; death terminates it.

Freehold estates illustrated	Non-freehold estates illustrated
	6. A tenancy at sufferance is no tenancy at all; it is a mere wrongful, naked possession but neither an estate nor property.

§ 6.5 *Concurrent Estates*

a. Joint Tenancy

PROBLEM 6.17: O conveyed Blackacre "to B, C and D and their heirs as joint tenants with right of survivorship in the survivors, and not as tenants in common." Blackacre is located in State Z. State Z law provides that all concurrent tenancies shall be deemed tenancies in common and not joint tenancies unless it is expressly declared that the grantees or devisees shall take as joint tenants. B died testate devising all of his interest in Blackacre to X and his heirs. X immediately took possession of Blackacre. C and D sue X in ejectment. May they succeed?

Applicable Law: Joint tenancy must under many modern statutes be expressly declared to overcome the preference for tenancy in common. A joint tenant can convey his or her undivided interest by deed. A joint tenant cannot convey his or her interest by will.

Answer and Analysis

Yes. Under modern statutes the survivorship feature of cotenancies is not popular. Many such statutes in express terms prefer tenancy in common over joint tenancy, which is the reverse of the common law. In order to create a joint tenancy under the type of statute given in the problem, there must be a clear expression of intention that the grantor intends the grantees to take as joint tenants. Any doubt is and should be resolved in favor of their taking as tenants in common.[26]

It would seem that O has succeeded in creating a joint tenancy in the grantees. O uses these words, "as joint tenants with right of survivorship and not as tenants in common." Three distinct ideas are expressed: (a) the grantees are called joint tenants; (b) they are to have the right of survivorship; and (c) they are not to be tenants in common. Any one of these expressions by itself may not overcome the preference for tenancy in common. But when all three are

26. In Oregon, common law joint tenancies have been abolished. Ore. Rev. Stat. § 93.180 (1973). However, a right of survivorship can be created in two or more persons without the right to sever that feature. This is accomplished by characterizing language which would have created a joint tenancy as creating a life estates in the grantees, and a contingent remainder in fee in the survivor. See Halleck v. Halleck, 216 Or. 23, 337 P.2d 330 (1959).

put in the conveyance, and it is expressly declared to be joint tenancy as the statute requires, then B, C and D would take as joint tenants. Accordingly, when B died testate or intestate, the survivors, C and D, continue as survivors to hold Blackacre in fee simple in joint tenancy. In order to destroy the joint tenancy by severance the joint tenant must convey his or her interest by deed.[27] A destruction of the joint tenancy occurs even by the conveyance of a lesser interest than the joint tenant has. The joint tenant's interest being in fee simple, a severance occurs by a conveyance of a fee tail, life estate or, according to some cases, by his transfer of a term of years. On the other hand, the will of a joint tenant is wholly ineffective to pass any interest in the jointly owned property; at the instant of death the right of survivorship takes effect and the attempted severance comes too late. Thus, B's devisee, X, takes nothing under the will, has no interest in Blackacre, and can be ejected from the premises by the owners and possessors, C and D.

Suppose during his life, B conveyed all of her interest to Y. That would create a tenancy in common in Y as between Y, and C and D. But the joint tenancy of C and D would not be severed by B's conveyance and upon C's death survived by Y and D, D would own 2/3 and Y 1/3 of Blackacre.

PROBLEM 6.18: T owned a regular section of land, Blackacre, in a given township and effectively devised it to A and B as joint tenants. Later, A executed a deed to X as follows, "I hereby convey all of my right, title and interest in the North East Quarter of Blackacre to X and his heirs." Thereafter, Y, a judgment creditor of A, levied upon and sold to M on execution sale, all of "A's right, title and interest in the South Half of Blackacre." A died intestate leaving W his widow and Z his sole heir at law. Who owns Blackacre?

Applicable Law: A joint tenant owns the whole of the jointly owned property, not a fractional part. The joint tenant can dispose of his or her entire interest and the grantee of that interest takes a fractional part as a tenant in common. A joint tenant may dispose of an interest in a specific part of the jointly owned property. The interest of a joint tenant can be levied upon and sold by his creditors. Upon the death of a joint tenant, the decedent's surviving spouse cannot claim dower and the decedent's heirs have no interest in the property.

27. Riddle v. Harmon, 102 Cal. App.3d 524, 162 Cal.Rptr. 530 (1980) (contrary to the common law, a joint tenant can sever a joint tenancy by conveying to himself as a tenant in common); Swartzbaugh v. Sampson, 11 Cal. App.2d 451, 54 P.2d 73 (1936) (lease by one joint tenant does not sever tenancy). See also, Tenhet v. Boswell, 18 Cal.3d 150, 554 P.2d 330, 133 Cal.Rptr. 10 (1976. As respects mortgages, see Harms v. Sprague, 105 Ill.2d 215, 85 Ill.Dec. 331, 473 N.E.2d 930 (1984); Brant v. Hargrove, 129 Ariz. 475, 632 P.2d 978 (1981); People v. Nogarr, 164 Cal.App.2d 591, 330 P.2d 858 (1958) (all holding that joint tenancy not severed where one joint tenant mortgages his interest where mortgage is not a transfer of title but merely the creation of a lien). In states following the title theory of mortgages, the execution of a mortgage by one joint tenant can sever the joint tenancy.

Answer and Analysis

(1) B and X are tenants in common of the North East Quarter of Blackacre, (2) B and M are tenants in common of the South Half of Blackacre, and (3) B is the owner in severalty of the North West Quarter of Blackacre.

Every joint tenant owns the whole of the jointly owned property and does not own a share or a fractional part thereof. Furthermore, each joint tenant has the right and power to dispose of his or her undivided interest. This means that A and B as a unit owned Blackacre and that A owned Blackacre and B owned Blackacre. It also means that by a conveyance A had the right and power to dispose of an undivided one half interest in Blackacre. If A could dispose of this entire interest in Blackacre, then A could dispose of part of such interest by limiting the conveyance to the North East Quarter of Blackacre. Thus, A's deed to X carved out and vested in X an undivided one half interest in the North East Quarter of Blackacre. But as to that Quarter, X and B are tenants in common because the unities of time and title have been severed by A's deed. X takes title from a different source than did B and X takes title at a different time than did B. Thus, B and X cannot be joint tenants. B and X each own an undivided one half interest as tenants in common in the North East Quarter of Blackacre in fee simple.

Because a joint tenant has the right and power voluntarily to dispose of an interest in the jointly owned property, the joint tenant's creditors have the right and power to take that interest involuntarily. A's judgment creditor, Y, therefore, had the right to levy upon and sell A's interest in the south half of Blackacre. Having done so, when M purchased Blackacre at the execution sale, the unities of time and title were destroyed because M took this interest in Blackacre from a different source and at a different time than did B. The result is that M and B are tenants in common of the south half of Blackacre, each owning an undivided one half interest therein.

The North West Quarter of Blackacre remained unaffected by the conveyances to X and M. A and B remained joint tenants of that quarter until A's death. Survivorship defeats any right which a surviving spouse otherwise might have in the estate of a joint tenant. It also defeats the rights of the heirs of the deceased joint tenant. Therefore, A's widow, W, and his heir, Z, can claim no interest in the North West Quarter of Blackacre. That quarter belongs to B in severalty in fee simple by the doctrine of survivorship.[28]

28. See Klajbor v. Klajbor, 406 Ill. 513, 94 N.E.2d 502 (1950) (joint tenancy may be severed and the estate destroyed by the conveyance of interest of one of the joint tenants and the interest severed is changed into a tenancy at com-

PROBLEM 6.19: T devised Blackacre "to A and B as joint tenants." The property consisted of a 50 foot lot fronting on a very busy street in a city. One half of the 50 foot frontage was covered by a store building. The other half was vacant. The land was worth $16,000. The building was worth $5,000 but needed $1,000 worth of repairs on the roof as an absolute necessity to make it habitable for business purposes. The other half of the lot could be used for store purposes if a building costing $4,000 were built. A asked B to contribute $500 towards repairing the roof of the existing building and $2,000 towards the construction of another store building on the lot for rental purposes. B refused to do anything. A then repaired the roof for $1,000 and built another store building on the lot for $4,000 and, with B's approval, rented both buildings. A then asked B to repay to A one half of the sums A expended in repairs and in building the new store. B refused. A then sued B to partition Blackacre, it being conceded that it was not partitionable in kind but only by making a sale and dividing the proceeds. Under order of the court Blackacre was sold to X for $26,000. The court then ordered the $26,000 divided as follows: $10,500 to B and $15,500 to A. B objects to this division. Was the court correct?

Applicable Law: A joint tenant has no right of contribution against the other joint tenants for repairs or improvements he or she has made, but if a court orders that the property be partitioned, the court in making an equitable division of the proceeds will take into consideration the expenditures made by one tenant for repairs and improvements.

Answer and Analysis

Yes. A partition suit is in equity and an equity court should do equity. At common law A might have had a cause of action to compel B, the other joint tenant, to contribute for the making of repairs which are absolutely necessary, provided he brought the action before the repairs were made. No such action would lie after the repairs were made. Furthermore, one joint tenant has no cause of action against the other joint tenants for contribution for improvements. Under these principles, it is plain that A had no right against B for contribution either for repairs or the improvement.

In a partition suit, however, each joint tenant has the right to have the jointly owned property partitioned. Under the circumstances, by A making and paying for repairs and improvements, A

mon, but severance of joint tenancy must take place before the death of the cotenant and before the other has become owner of the whole by virtue of the right of survivorship).

has enhanced the value of Blackacre by $5,000.[29] By returning to A the $5,000 which A expended in repairing and improving the property, A is made whole and B is not injured. Had there been no repairs or improvements the property would only have been worth $21,000. There is still that sum left after reimbursing A for A's expenditures for repairs and improvements. Thus, it seems the equity court made an equitable partition of the proceeds.[30]

PROBLEM 6.20: H conveys Blackacre to himself and his wife, W, in the following language, "I, H, hereby grant Blackacre to H and W, husband and wife and their heirs forever, in joint tenancy with right of survivorship, and not to them as tenants by the entirety or as tenants in common, it being my intention that all the rights and powers of joint tenants shall accrue to said H and W." H died intestate leaving S as his sole heir at law. In whom is the title to Blackacre?

Applicable Law: A husband and wife can hold real property in joint tenancy. A joint tenancy (or tenancy by the entirety) in most jurisdictions can be created by husband, H, making a grant "to H and W, husband and wife" with clearly expressed intention to that effect.

Answer and Analysis

W owns Blackacre in fee simple absolute. There is no question concerning H's intention. In unmistakable language H expressed an intention that H and W hold Blackacre in joint tenancy. There is no question either (except in those jurisdictions that do not recognize all types of concurrent estates), that a husband and wife may hold real property either as tenants by the entirety, as joint tenants, or as tenants in common, depending on the intention expressed in the conveyance.

The only real question is this: can a grantor grant to himself and another and thereby create a joint tenancy, (or tenancy by the entirety), when such is the grantor's clearly expressed intention? It

29. While an improver cotenant cannot compel other co-tenants to pay for the improvements, the court takes account of the improvement in the partition action. For example, if feasible, the improvement would be included in the portion of the property set aside to the improver. If the property is sold, however, a portion of the proceeds attributable to the improvement would be set off to the improver. See Johnson v. Hendrickson, 71 S.D. 392, 24 N.W.2d 914 (1946).

30. See Calvert v. Aldrich, 99 Mass. 74 (1868) (where two tenants in common owned a machine shop that needed repair after having caught fire and one tenant paid for repairs after the other refused to contribute, the court held that a tenant in common who makes necessary repairs upon common property without the consent of his cotenant cannot maintain an action at law to recover contribution for costs incurred; rather, partition is the usual and natural remedy). See also, Giles v. Sheridan, 179 Neb. 257, 137 N.W.2d 828 (1965)(Co-tenant who pays off mortgage on which co-tenants are equally liable does so for common benefit of the joint tenants and is entitled to contribution).

seems that a proper analysis can bring only an affirmative answer. The cases present at least three distinct views as to the effect of the conveyance.

At common law the husband and wife were one and he was the one. Thus, when the husband granted to himself and wife, he was granting to himself. When one grants to himself, nothing happens. So the conveyance is void. But this concept is an anachronism. Today the wife is a legal person and her personality is no longer merged in that of the husband.

The second view holds that the effect of the conveyance is to create a tenancy in common between the husband and wife, each owning an undivided one half interest in Blackacre. There are two objections to this result. The first is that it does violence to the grantor's clearly expressed intention that H and W shall not take as tenants in common. The second is that it treats H, the grantor, as the same person, as H, the grantee. This view suggests that one part of the conveyance wherein H conveys to H is void and of no effect, and H therefore remains the owner of one half, whereas the other part of the conveyance from H to W affects only an undivided half of Blackacre which H originally owned and therefore W becomes an owner of such other undivided half. Therefore, they are tenants in common.

The third view and the one which is believed to be the correct one is this: Joint means oneness. In joint tenancy when two, three, or a dozen persons are named as grantees, those joint tenants take as a unit, as one juristic person. In this conveyance H is one person and "H and W" constitute in the singular number quite another person. For the purpose of joint tenancy (or tenancy by the entirety) such grantees or devisees take as a unit personage.

Why do all the cases say that when one joint tenant dies, the survivors take nothing from the decedent but take wholly from the original conveyance? Because each owned the whole and they all owned the whole as a unit. When one died the survivors still continued as a unit owning the whole until there was but one survivor. Thus, when H conveyed Blackacre to "H and W" intending them to take as joint tenants, the grantor, H, was one person, and "H and W" was (singular number) another person, and they as a unit took Blackacre as joint tenants. The grantee, "H and W," take title from the same source, at the same time with the same interest and with unity of possession. When H died W held in fee simple by survivorship.

Today, there is much to be said in favor of carrying out the clearly expressed intention of the grantor in the creation of estates,

even though technically all of the so-called four unities may not be present.[31]

PROBLEM 6.21: T devises Blackacre to A, B and C as joint tenants. A then conveys all of his right, title and interest in the premises "to X for the period of his natural life." (a) What is the effect of this conveyance? (b) Who now owns Blackacre?

Applicable Law: A conveyance by a joint tenant constitutes a severance and a destruction of the joint tenancy as to the conveying joint tenant's interest. Thereafter X owns a life estate in one third as tenant in common and A owns the reversion in that same one third; B and C remain fee simple owners in joint tenancy between themselves as to the other two thirds, but as to X they own the two thirds as a tenant in common.

Answers and Analysis

A's conveyance destroys the joint tenancy as to A's interest and X owns a life estate as a tenant in common in an undivided one third interest in Blackacre; A owns the reversionary interest in that same undivided one third interest; B and C own the remaining two thirds interest as joint tenants between themselves but with X as a tenant in common for his life.

Any conveyance by a joint tenant of his entire interest or a freehold interest, or probably of an estate for years, constitutes a complete severance of that joint tenant's interest in the jointly owned property and destroys the joint tenancy as to that interest. Thus, by conveying a life estate to X, A has severed A's entire interest in Blackacre from the joint tenancy. Having carved out of the whole estate an undivided one third portion, and having created in that undivided portion a life estate in X, A has a reversion in such undivided one third in fee simple. A's conveyance destroyed the unities of time, title and interest without which a joint tenancy could not continue.

However, the four unities remain as to the two thirds interest remaining in B and C which was unaffected by A's conveyance to X.[32] As to that undivided two thirds interest B and C remain joint tenants. If one of them should die without having made a conveyance, the survivor of those two would own that undivided two thirds by survivorship. In other words, there are two tenants in common with the one unity of possession: X has an undivided one

31. See also Miller v. Riegler, 243 Ark. 251, 419 S.W.2d 599 (1967) (Intent to create a joint tenancy is sufficient to create a joint tenancy even though four unities test not met).

32. Jackson v. O'Connell, 23 Ill.2d 52, 177 N.E.2d 194 (1961).

third, and B and C as a unit possess the other two thirds. Thus, B and C occupy two roles. Between themselves they are joint tenants of two thirds interest but as to X they, as a single unit, constitute a tenant in common of the two thirds interest.

A, the owner of the reversion in an undivided one third interest, is not called a tenant in common. Rather A owns a future interest in an undivided one third. A is not called a tenant in common because the phrase "concurrent estates," is limited to possessory estates. It involves presently possessory estates owned by two or more persons. Thus, in our case, B, C and X, but not A, have immediate possessory estates in Blackacre and the possession of B or C or X of Blackacre is in law the possession of all three together.

b. Tenancy by the Entirety

PROBLEM 6.22: T devised Blackacre "to H and W, husband and wife, and their heirs forever, jointly." Thereafter H executed to M a mortgage on Blackacre. H then procured a divorce from W and on a later date married W–1. H then died intestate, leaving W–1 his widow, and X as his sole heir. W sues Y and X seeking to quiet in her the title to the whole of Blackacre. May W succeed?

Applicable Law: At common law, there was a presumption that a conveyance to husband and wife jointly creates a tenancy by the entirety. A divorce eliminates the unity of person in tenancy by the entirety, destroys that tenancy and the husband and wife become tenants in common of the property. During the existence of the tenancy by the entirety, in most jurisdictions neither spouse has the right or power to dispose of or encumber the property without the consent of the other.

Answer and Analysis

No. By appropriate language in the conveyance a husband and wife can hold real property as tenants in common, as joint tenants or as tenants by the entirety, where such estate is recognized. But, at common law, there was a presumption that a conveyance to a husband and wife jointly created a tenancy by the entirety. Under this presumption the conveyance in this case would be construed to make H and W tenants by the entirety rather than joint tenants.

Assuming then that H and W are tenants by the entirety, in most jurisdictions recognizing such estates, neither had the right or power to dispose of or encumber such estate without the consent of the other spouse.[33] Therefore, the mortgage which was executed

33. At common law a husband had greater management and administrative authority over tenancy by the entirety property.

alone by H to M was wholly ineffective at that time to create a lien or incumbrance on the land. M's remedy must be limited to his personal action on the debt owed by H to M. Similarly, creditors of one spouse ordinarily cannot reach the tenancy by the entirety property in satisfaction of their claims.[34]

When H procured a divorce from W, the unity of person which is essential to the creation and continued existence of an estate by the entirety was destroyed and with it the tenancy by the entirety was destroyed.[35] H and W, however, continued in some form of concurrent tenancy. Are they joint tenants with right of survivorship or tenants in common? Logically, theirs would be a joint tenancy because of the five unities in tenancy by the entirety, only one, unity of person, was destroyed by the divorce. The other four unities of time, title, interest and possession, remain. But this generally is not the law. H and W after the divorce should be strangers in their property ownership as far as possible. Tenancy in common is more probably in accord with their intent since it is unlikely either would want the survivorship feature preserved. Most cases so hold.[36]

H and W were then each owner of an undivided one half interest in Blackacre when H married W–1. Upon H's death intestate the title to H's undivided one half interest in Blackacre descended to his heir, X, but subject to W–1's right of dower in such half interest, if dower exists. Thus, W and X each own an undivided one half interest in Blackacre as tenant's in common, with X's undivided half interest possibly being subject to the choate right of dower in W–1 widow.

There is also a good possibility that X's undivided one half interest may be encumbered by the mortgage to M as a result of the doctrine of estoppel by deed. Although the mortgage was initially

34. Sawada v. Endo, 57 Hawaii 608, 561 P.2d 1291 (1977); Central National Bank of Cleveland v. Fitzwilliam, 12 Ohio St.3d 51, 465 N.E.2d 408 (1984) (neither spouse can alienate interest in tenancy by the entirety).

35. Porter v. Porter, 472 So.2d 630 (Ala.1985) (divorce decree does not automatically sever a joint tenancy between the former spouses); Mann v. Bradley, 188 Colo. 392, 535 P.2d 213 (1975) (provision in divorce settlement agreement that joint tenancy be sold upon spouse's remarriage or when youngest child attained age 21 constitutes a severance of the joint tenancy). See also, Duncan v. Vassaur, 550 P.2d 929 (Okl. 1976)(husband and wife were joint tenants and wife killed husband; that act severed the joint tenancy causing ½ of the property to pass to husband's estate and ½ to wife.

36. But see, Finn v. Finn, 348 Mass. 443, 204 N.E.2d 293 (1965) (tenants by the entirety who divorce become joint tenants with right of survivorship pursuant to a property settlement agreement incorporated into the divorce decree). A joint tenancy between husband and wife is not affected by divorce absent a specific provision in their property settlement agreement or divorce decree severing the joint tenancy. See generally, Westerlund v. Myrell, 188 Wis. 160, 205 N.W. 817 (1925).

invalid, upon divorce H acquired an undivided one half interest which was freely alienable and mortgageable. Thus, as to this after-acquired severable interest, H can be estopped to deny the effectiveness of M's mortgage in the same way he would be estopped as to previously conveyed or encumbered other after-acquired property. Thus, if estoppel is invoked against H, his second wife, W–1, and his heir, X, take their interests subject to such mortgage.

COMMON LAW CONCURRENT TENANCIES COMPARED*

Kind of tenancy	How created	Typical words in deed or will	Unities present	Interest owned by tenant	Power of disposition	How can disposition be made	Rights on intestacy	How destroyed
Tenancy by the entirety	By act of the parties, deed or will	A "to H & W and their heirs."	Time Title Interest Possession Person	Husband and wife as a unit own the whole, *joint* ownership	Both husband and wife must join in conveyance	By deed only and not by will. Survivorship defeats effect of will.	Survivor continues to own all but in severalty	Divorce terminates the tenancy and makes them tenants in common
Joint tenancy	By act of the parties, deed or will	A to "B & C and their heirs as joint tenants with the right of survivorship and not as tenants in common."	Time Title Interest Possession	All tenants as a unit own the whole, *joint* ownership	All may join and dispose of whole or each tenant can dispose of share he did not own as such	By deed only and not by will. Survivorship defeats effect of will.	If only one survivor he continues to own but in severalty. If more than one survivor they continue to own in joint tenancy.	1-One tenant severs his interest. 2-By partition in kind among tenants. 3-By any act which breaks any unity.
Tenancy in coparcenary	By law of inheritance	A dies intestate leaving J daughters, B, C & D, his only heirs	Title Interest Possession	Each tenant owns an undivided portion which portions are not necessarily equal	Each tenant can dispose of his undivided share or part thereof	By deed or by will	Heir or heirs inherits undivided interest of deceased parcener.	1-By partition 2-By conveyance by one parcener 3-By whole descending or vesting in one parcener
Tenancy in common	By act of the parties, will, or by law	A "to B and C and their heirs share & share alike as tenants."	Possession	Each tenant owns an undivided portion which portions are not necessarily equal	Each tenant can dispose of his undivided share or part thereof	By deed or by will	Heir or heirs inherits undivided interest of deceased co-owner	1-By partition among tenants 2-By uniting all title in one tenant in severalty by purchase or otherwise

(C2454)

Chapter 5

ESTATES AND FUTURE INTERESTS: AN INTRODUCTION

SUMMARY

I. FREEHOLD ESTATES: TYPICAL CASES

Historically estates in land were characterized as either freehold or non-freehold. The characterization of an estate as freehold or non-freehold had little effect on the owner's right to possession. The owner of each type of estate was ordinarily entitled to possession. However, in England the owner of a freehold estate stood on a higher social and political plane. In addition, owners were obliged to provide their overlords with certain "feudal incidences." These included the duty to swear homage and fealty to the overlord and the obligation to contribute money (called "aid") toward the release of the overlord in the event he was captured by an enemy. More importantly, the overlord was the guardian of an heir of a deceased holder of a freehold estate. This entitled the lord to retain the profits from the land during the ward's minority and to control whom the ward would marry. These were known as the incidences of "wardship and marriage." An owner of a freehold estate was said to be "seised" of the land, a concept which meant that the holder was entitled to possession and the obligation to perform the feudal incidences. The obligation to perform feudal incidences never gained a foothold in the United States.

There were eleven types of freehold estates distinguished for the most part on the basis of their probable duration. An estate that could last in perpetuity was called the fee simple absolute. The eleven estates were:

1. Fee simple absolute (sometimes simply referred to as a "fee simple".)
    a. This estate lasts in perpetuity conceptually either in the owner or the owner's successors.
    b. It is alienable, devisable, and descendible. This means the owner can sell, mortgage, or gift the estate during his life, and that upon the owner's death it passes to

his beneficiaries if he or she dies with a will, or to his or her heirs if he or she dies without a will.

c. Historically, but no longer, it was created by use of the phrase "and his heirs" following the designation of the grantee.

2. Fee simple determinable with possibility of reverter (sometimes called a fee simple subject to a special limitation).

a. This estate could last in perpetuity but could end sooner upon the happening of a limitation stated in the terms of the conveyance. Upon the happening of the limitation, the estate would automatically terminate and the property would revert to the grantor who retained the possibility of reverter.

b. Words or phrases typically evidencing the creation of this estate were "so long as," "while," or "during."

3. Fee simple subject to (or on) a condition subsequent.

a. This estate was subject to the happening or non-happening of a condition subsequent and thus terminated by exercise of a power of termination or right of re-entry for condition broken.

b. This estate could last in perpetuity but could end sooner upon the happening of a condition subsequent stated in the terms of the conveyance.

c. Upon the happening of the condition, the estate could only come to an end if the holder of the power of termination or right of entry for condition broken exercised the power or right.

d. Absent such exercise, the holder of the fee simple subject to the condition subsequent continued to possess the estate.

e. Words or phrases typically evidencing the creation of this estate were "on condition that," or "provided that."

4. Fee simple subject to either a shifting or springing executory interest.

a. A fee simple subject to a shifting executory interest is a fee simple that might terminate upon the happening of a condition subsequent. If the condition occurs the fee shifts automatically to someone other than the grantor.

i. Words or phrases typically evidencing the creation of this estate were "on condition that," or "provided that."

ii. If the condition never occurred, then the fee simple estate could last in perpetuity.

a. A fee simple subject to a springing executory interest is a fee simple subject to a future interest that will become possessory after some period of time during which no other transferee is entitled to possession. Typically, the grantor retained the right of possession, expressly or impliedly, during this period so that no other transferee was entitled to possession.

5. Fee tail.

a. This was an estate that automatically descended to the heirs of the estate owner upon his or her death and continued so descending to the lineal descendants until the entire line of lineal descendants became extinct.

b. The person who created the fee tail retained a reversion which could become possessory only at such time, if ever, that the grantee (tenant-in-tail) and his entire line of descendants became extinct.

c. The phrase used to create the fee tail was "and the heirs of his (or her) body." More limited fee tails could also be created.

i. Fee tail male: To A and the male heirs of his body.

ii. Fee tail female: To A and the female heirs of his body.

iii. Fee tail special: To A and the heirs of her body with B.

a. Prior to 1285, words that thereafter created a fee tail created a fee simple conditional. While this estate functioned much like the fee tail, unlike the fee tail the holder, upon birth of issue, was capable of conveying a fee simple absolute to his grantee. This conveyance would extinguish the right of the holder's descendants to inherit the property when the holder died.

6. Life estate for the life of the tenant.

a. As the name implies, this estate lasted only so long as the life tenant was alive. It terminated automatically when he died. At that time, the property either reverted to the grantor or passed to some other person who had either a remainder or an executory interest.

b. A life estate is alienable. Of course, the grantee of the life tenant could take no greater estate than the life tenant had, so effectively the grantee took an estate measured by the grantor-life tenant's life.

7. Life estate for the life of one other than the tenant.

a. This estate lasted for the life of someone other than the current owner of the estate.

b. It was called an estate per autrie vie

8. Life estate created by fee tail after possibility of issue extinct.

a. This was the estate of a tenant-in-tail who could not have issue capable of inheritance by issue of the marriage. It typically followed the creation of the so-called "fee tail special" where the only descendants who could succeed to the property were descendants born to the estate owner with another designated person.

b. For example, if O deeded property to A and the heirs of her body with B, only the descendants of A and B could succeed to the property at A's death. If B died during A's life and before they had any children, A had a life estate in fee tail with possibility of issue extinct.

9. Dower.

a. This was the estate of a surviving widow (not widower).

b. It equaled a life estate in one-third of all lands of which the husband was seized at any time during the marriage.

c. It became a possessory life estate only at the husband's death if the widow survived.

10. Curtesy.

a. This was the estate of the surviving widower.

b. It equaled a life estate in all lands of which the wife was seized of a legal or equitable estate at any time during the marriage.

11. Life estate by and during coverture.

a. This was the estate a married man had in his wife's property beginning as of the date of marriage.

b. With the estate the husband assumed all administrative and management control of the wife's realty.

II. NON-FREEHOLD ESTATES

The holder of a non-freehold estate was entitled to possession but was not obligated to perform the feudal incidences. There were four types of non-freehold estates. They were:

12. Estate (or term) for years.
    a. This estate is common among commercial tenants although it is not unknown among residential tenants.
    b. It is an estate that begins and ends on a fixed date set forth in the lease.
    c. No notice is necessary to terminate this tenancy as the date of termination is known when the lease begins and is fixed in the lease.
13. Periodic tenancy.
    a. This tenancy is common among residential tenants, particularly in low-income housing.
    b. It is an estate that runs from period to period such as year-to-year or month-to-month.
    c. This tenancy is terminable by either landlord or tenant giving the other the required written notice.
    d. Notice to terminate this tenancy is commensurate with the period. Thus to terminate a month-to-month tenancy, one month notice is required. However, a year-to-year tenancy was terminable by the giving of six months notice.
14. Tenancy at will.
    a. This tenancy ends whenever the landlord or tenant decides to terminate the tenancy with no advance notice required.
    b. Because of the potential disruption that could be caused by a no-advance notice termination, this estate is largely disfavored and where the character of an estate is ambiguous, courts are likely to characterize the estate as a periodic tenancy rather than a tenancy at will.
15. Tenancy at or by sufferance.
    a. This is the tenancy that arises if a term of years tenant remains in possession beyond the date fixed in the lease for the term of years to end.
    b. It arises upon the election of the landlord who can treat the tenant who stays beyond the term of the

lease (a so-called "holdover tenant") as either a tenant at sufferance or as a trespasser.

c. At common law, this tenancy was terminable by the giving of six-months notice.

III. CONCURRENT ESTATES: TYPICAL CASES

A concurrent estate exists when two or more persons have a concurrent interest in the property, each of whom is entitled to possession. There are four such estates. They are:

1. Joint tenancy with right of survivorship.

   a. An estate in two or more persons with each entitled to possession of the property.

   b. The co-tenants, at common law, had to have acquired their interest:

      i. At the same time

      ii. Under the same instrument (title)

      iii. Have the same interest (e.g., ½)

      iv. Have equal rights to possession.

   c. The survivor of the co-tenants held the title in fee simple as there were no other claimants to the property. Thus, the interest of the co-tenants who were not the survivor was not devisable or descendible.

   d. The interest of each co-tenant was alienable but an alienation would sever the right of survivorship and convert the tenancy into a tenancy in common.

17. Tenancy by the entirety.

   a. A special form of joint tenancy between spouses to which the unity of marriage was added to the unities of time, title, interest, and possession.

   b. Typically, this estate was not severable unilaterally by either spouse; the interest of a spouse was not reachable by the spouse's creditors.

18. Tenancy in common.

   a. A concurrent estate where the interest of all co-tenants was alienable, devisable, and descendible.

   b. Co-tenants need not have identical interests.

IV. FUTURE INTERESTS:

A future interest is an interest in property with the right or possibility of possession postponed until the future. There are nine types of future interests. They are:

19. Reversion.
    a. A reversion is the future interest retained by a grantor who conveys a life estate, if the life estate is not followed by a vested remainder in a transferee.
    b. Reversions are alienable, devisable, and descendible.
20. Possibility of reverter.
    a. The possibility of reverter is the future interest retained by a grantor who conveys either a fee simple conditional or a fee simple determinable.
    b. Today, in most, but not all states, the possibility of reverter is alienable, devisable, and descendible. If transferred, it continues to be classified as a possibility of reverter in the hands of the transferee.
21. Right of entry for condition broken or "power of termination."
    a. The right of entry for condition broken is the future interest that may be retained by a grantor who conveys a fee simple on condition subsequent.
    b. For the holder of the interest to acquire possession of the property subject to the divesting condition, the holder must exercise the right of entry.
    c. At common law this interest was not alienable. In most states today, it is alienable, devisable, and descendible.
22. Remainder.
    a. A remainder is any "future interest limited in favor of a transferee in such a manner that it can become a present interest upon the expiration of all prior interests simultaneously created, and cannot divest any interest except an interest left in the transferor."[1]
    b. There are four kinds of remainders.
        i. Vested remainder (sometimes called indefeasibly vested remainder).
            (1) A vested remainder is a remainder limited in favor of a born or ascertained person(s) where

1. Restatement of Property § 156(1) (1936).

the person(s) (or their transferees, heirs or devisees) are "certain to acquire a present interest at some time in the future, and [are] also certain to be entitled to retain permanently thereafter the present interest so acquired."[2]

(2) A vested remainder is alienable, devisable, and descendible.

ii. Vested remainder subject to open or partial divestment.

(1) A vested remainder subject to open (also known as the vested remainder subject to partial divestment) is a remainder limited in favor of a class of persons having at least one living member, subject to no unmet conditions precedent.

(a) A class is a group of persons collectively described, (such as children, brothers and sisters, heirs, descendants, nieces and nephews, etc.).

(b) It is subject to open if new persons can join the class.

(c) A class is closed if no additional persons may join the class.

(d) If a class is closed and subject to no unmet conditions, the remainder is an indefeasibly vested remainder in a class of persons.

(e) The interest of a member of such a class is alienable, devisable and descendible.

iii. Vested remainder subject to complete divestment.

(1) A vested remainder subject to complete divestment is a remainder limited in favor of a born or ascertained person or in a class that is vested subject to open, but is subject to the occurrence or nonoccurrence of a *condition subsequent* such that the remainder may not become possessory or, if it becomes possessory, may not remain possessory in infinity.

(2) Generally, a vested remainder subject to complete divestment is alienable and it is devisa-

2. Restatement of Property § 157(a) comment f(1936).

ble and descendible unless the interest is subject to an express or implied condition of survivorship.

iv. Contingent remainder.

(1) A contingent remainder is an interest that may or may not become possessory.

(a) A contingent remainder is a remainder limited in favor of (1) an unborn person, (2) an unascertained person, or (3) a person who is either born or ascertained but whose interest is subject to the occurrence or nonoccurrence of a *condition precedent.*

(b) Generally, contingent remainders are alienable and they are devisable and descendible unless conditioned (expressly or impliedly) upon survivorship

23. Executory interests.

a. An executory interest is an interest limited in favor of a transferee which, in order to become possessory, must divest the vested interest of either another transferee or the transferor.

b. There are two kinds of executory interests.

i. Shifting executory interest.

A shifting executory interest is a future interest created in a transferee that in order to become possessory must, upon the occurrence or nonoccurrence of an event, divest a present interest of another transferee or a vested interest of another transferee.[3] Since the preceding estate must be an estate that is divested, typically such estate must terminate upon the happening of a condition rather than a limitation. The interest that is divested is an interest of a transferee and not an interest that has been retained by the transferor.

c. Generally, shifting and springing executory interests are alienable, devisable and descendible absent express contrary limitations in the governing interest.

ii. Springing Executory Interest

A springing executory interest is a future interest limited in favor of a transferee that in order to

3. Restatement of Property, §§ 25(1), 158 (1936).

become possessory must divest the transferor of a retained interest after some period of time during which there is no transferee entitled to a present interest which, at common law, would be a freehold estate.

PROBLEMS, DISCUSSION AND ANALYSIS

I. FREEHOLD ESTATES:

1. FEE SIMPLE ABSOLUTE

PROBLEM 5.1: O conveys Blackacre "to B and his heirs." (a) What estate does B have? (b) What are the characteristics of B's estate?

Answers and Analysis

(a) B has a fee simple absolute. A fee simple absolute is the largest estate known to the common law; it denotes the maximum of legal ownership, the greatest possible aggregate of rights,[4] privileges,[5] powers[6] and immunities[7] which a person may have in land. It is of potentially infinite duration.

By the year 1250 the phrase "and his heirs" had become the only one by which a fee simple absolute could be conveyed. The words "B and his heirs" meant "B in fee simple absolute" without qualification. Strangely, the words "B in fee simple" used in a deed would give B only a life estate. In order to create a fee simple absolute the words in the deed had to be "B and his heirs."

The words, "and his heirs" used in a deed were words of limitation—that is, they described the quantum or size of the estate transferred to B, the grantee. They gave the heirs of B (who could only be ascertained at B's death) no interest whatsoever in the land. The word "B" in the example is a word of purchase and indicates who the grantee is. Words of limitation indicate what is taken; words of purchase identify the persons who take.[8] Thus, by the use of the words, "B and his heirs," O conveyed a fee simple absolute to B.

4. A right is a legally enforceable claim of one person against another, that the other shall do or not do a given act.

5. A privilege is a legal freedom to do or not to do a given act.

6. A power is an ability on the part of a person to produce a change in a given legal relation by doing or not doing a given act.

7. An immunity is a freedom on the part of one person from having his legal relation altered by a given act or omission to act on the part of another person.

8. Confusingly, if an owner gives property to B and his heirs, the word "B" is still a word of purchase even though B acquired the property by gift rather than by purchase.

In construing a will, as distinguished from a deed, it has long been the rule that the technical phrase, "and his heirs," need not be used to create a fee simple absolute. The intention of the testator determines the interest devised.

Most states have statutes changing the common law rule that required the words "and his heirs" to create a fee simple absolute. The statutes usually provide that the named grantee takes whatever estate in the land the grantor had, unless the grantor indicates an intention to create a lesser or different estate. A few states have reached the same result without the aid of a statute.[9]

(b) The characteristics of the fee simple absolute can best be set forth by answering two simple questions:

(1) *What can B do with a fee simple absolute in Blackacre?* There are five distinct powers which B may exercise over Blackacre. B may (a) use Blackacre, (b) abuse Blackacre, (c) have exclusive possession of Blackacre, (d) take the fruits of Blackacre, and (e) dispose of Blackacre either by deed and (since 1540) by will.

(2) *How long will B's estate in Blackacre last?* The fee simple absolute is the largest estate known to the common law. For all practical purposes it lasts forever in either B's grantees, heirs, or devisees. Thus, if B dies and owns Blackacre at the time of death, Blackacre passes to the devisees under B's will or, if B dies intestate, to B's heirs. If B conveyed Blackacre to another during life, the grantee owns Blackacre in fee simple absolute.

2. FEE SIMPLE DETERMINABLE WITH POSSIBILITY OF REVERTER

PROBLEM 5.2: O conveys Blackacre "to B and his heirs so long as Blackacre is used for school purposes." (a) What estate does B have? (b) What are the characteristics of B's estate?

Answers and Analysis

(a) B has a fee simple determinable, sometimes called a base fee, a qualified fee, or a fee simple subject to a special limitation.

(b) A fee simple determinable is a fee simple that has the potential to last to infinity but is subject to a limitation which could cause the estate to end. If this limitation occurs, then the fee simple estate is automatically extinguished. In this problem, the duration of B's estate is limited by the occurrence of a named event—in this case, B's ceasing to use Blackacre for school purposes. B's estate

9. See Restatement of Property § 39; Powell on Real Property ¶ 180.

terminates automatically by operation of law if that event occurs. If that event fails to occur, B's estate does not end. The predominant characteristic of this determinable estate is that the instant Blackacre is no longer used for school purposes, it reverts to the grantor, O, or if O is dead, Blackacre reverts to O's assignees, devisees, or heirs. This occurs automatically and without any act on the part of O or O's successors in interest.

The rationale for this automatic reverting is contained in the language of the conveyance which says that B's estate lasts only as long as Blackacre is used for school purposes. The language compels the result and carries out the precisely expressed intent of the grantor when the estate was created.

The termination of B's estate upon the happening of a limitation involves no forfeiture, as occurs when an estate terminates upon the happening of a condition. There is no cutting short of B's estate. B's estate was to last only as long as the premises were used for school purposes. When the use ceases, B's estate terminates automatically.

O, the grantor, need not make an entry into the possession of Blackacre if B ceases to use Blackacre for school purposes. Rather, the moment B ceases to use Blackacre for school purposes, O becomes the owner of Blackacre in fee simple absolute and has the right to immediate possession. If B ceases such use, there is nothing left in him because the conveyance, "to B and his heirs so long as it is used for school purposes" specifically limits B's estate to the time during which B uses the estate for school purposes.

At the time of O's conveyance to B, O had a fee simple absolute in Blackacre. This is an estate of infinite duration. Thus, O conveyed to B an estate of lesser duration than O had. Stated differently, O did not convey to B all that O had. The interest that O did not convey (the possibility that Blackacre would revert to O if B ceased to use Blackacre for school purposes) is called a "possibility of reverter." A possibility of reverter, standing alone as it was in O in this case and not attached to a reversionary interest, was inalienable at common law but was descendible to the grantor's heirs. Most states by statute or judicial decision permit the transfer of a possibility of reverter by deed or will.

The words "during," "while," or "until" and the phrase "so long as" are often used to create a fee simple determinable. For example, if O conveys to "B and his heirs *until the property is no longer used for church purposes*" or to "B and his heirs *so long as the property is used for church purposes*," B has a fee simple determinable. The italicized words are words of limitation.

3. FEE SIMPLE SUBJECT TO CONDITION SUBSEQUENT—WHICH MEANS FEE SIMPLE SUBJECT TO BEING TERMINATED BY EXERCISE OF A POWER OF TERMINATION OR RIGHT OF RE-ENTRY FOR CONDITION BROKEN

PROBLEM 5.3: O conveys Blackacre "to B and his heirs, but if intoxicating liquors are sold on the premises then O has the right to re-enter and repossess the land." (a) What estate does B have? (b) What are the characteristics of B's estate?

Answers and Analysis

B has a fee simple subject to a condition subsequent. This estate is of possibly infinite duration because intoxicating liquors may never be sold on Blackacre. However, it can be cut short or terminated by O, the grantor, or those claiming under O, upon the happening of the named event. O has a right of entry for condition broken, or a power of termination. The important characteristic which distinguishes this type of estate from a fee simple determinable is that the estate continues in B, or B's grantee, devisee, or heir, unless and until the power of termination is exercised. In other words, the estate in fee simple subject to a condition subsequent does not end automatically upon the happening of the named event. The basic difference between a fee simple determinable and a fee simple subject to a condition subsequent is that the fee simple determinable automatically expires by force of the limitation when the stated limitation occurs; the fee simple on condition subsequent continues despite the breach of the condition until the estate is divested or cut short by the grantor's exercise of the power to terminate. Upon breach of the condition, B's estate does not end automatically but instead continues until O exercises his power of termination. O has the power to terminate or cut off B's fee by making a re-entry onto the premises if and when the condition is broken. Until O does manifest an election by bringing an action to recover it, the grantee's estate continues. O's re-entry causes a forfeiture of the remaining portion of B's estate; it cuts short and brings to an end an existing vested interest in land.

Although no particular words are essential to create a fee simple on condition subsequent, the use in the conveyance of the traditional words of condition—"upon condition that," "provided that," "but if"—coupled with a provision for re-entry by the transferor on the occurrence of the stated event will normally be construed to manifest an intention to create an estate on condition. According to some older cases, words of condition alone without a re-entry clause are sufficient to create a fee simple on condition

subsequent, but the later trend has been to refuse to construe the conveyance as creating an estate on condition subsequent in the absence of a provision that the transferor has a right to re-enter or words of similar import. If the language of the instrument is ambiguous, the court might construe the conveyance as creating a fee simple determinable coupled with a possibility of reverter. However, the strong reluctance of the courts to enforce or imply a right of forfeiture could result in a court holding that only a covenant or a trust, rather than an estate on condition, was created.

O's right of entry for condition broken, or power of termination, can be exercised by O personally or by O's successor. At common law the right of entry was inalienable and could not be exercised by a third person or intended transferee.[10] Today it is generally alienable, devisable, and descendible.[11]

4. FEE SIMPLE SUBJECT TO EXECUTORY LIMITATION

(a) SUBJECT TO SPRINGING EXECUTORY INTEREST

PROBLEM 5.4: O conveys Blackacre "to B and her heirs, B's interest to begin five years from the date of this deed." (a) What estates do O and B have? (b) What are the characteristics of these estates?

Answers and Analysis

(a) O has a fee simple subject to a springing executory interest in B.

(b) At common law O could not create a freehold estate to begin in futuro because livery of seisin was absolutely essential to a transfer of a freehold estate. If livery of seisin were made to B, then the estate would take effect at once contrary to O's intention that B's possessory interest commence in five years. The conveyance by feoffment had to be effective at once or not at all. Seisin could not remain in the feoffor; it could not be in abeyance. The only way there could be an estate to begin in the future was by way of remainder following on the heels of a life estate. For example, O could enfeoff B for life, remainder to C and her heirs. In this case livery of seisin was made to B who held it for life and at B's death

10. See Restatement of Property § 160.

11. But see Ill. Rev. Stat. ch. 30, ¶ 37b; Mahrenholz v. County Board of School Trustees of Lawrence County, 93 Ill.App.3d 366, 48 Ill.Dec. 736, 417 N.E.2d 138 (1981) (language "this land to be used for school purposes only; otherwise to revert to Grantors" creates alienable possibility of reverter rather than inalienable "power of termination").

through the use of a straw. B, the grantee of a fee simple conditional, would convey a fee simple absolute to C and his heirs. C was often a family retainer or attorney. C, in turn, would reconvey to B and his heirs. Thus, B would acquire the property in fee simple absolute.

In order to prevent this circumvention of the grantor's intention, the statute "De Donis" was passed in 1285. Its purpose was to keep the land in the grantee's family so long as there were descendants of the grantee. The statute provided that B could not convey Blackacre so as to extinguish the right of the heirs of B's body to inherit the land upon B's death. Furthermore, B could not convey the land in a manner that would extinguish the grantor's reversion. Thus, after the enactment of de donis, if B conveyed Blackacre to "C and his heirs" and B died leaving child D surviving him, D rather than C was entitled to the land in fee tail. If B died without heirs of his body, then the grantor rather than C was entitled to the land by way of a reversion. In other words, after the Statute De Donis, B had the power to convey an estate in Blackacre only for the term of B's life. The effect of De Donis was to create a perpetuity in the bodily heirs of B and prevent B and any bodily heir of B from disposing of an estate for longer than his life. This estate was called a fee tail.

The fee tail estate would pass by descent to the heirs of the tenant in tail until the line of heirs became extinct. Upon failure of heirs (an event that might happen decades or even centuries following the death of the original tenant in tail), the property would revert back to the grantor or the grantor's successors. Effectively, B and each succeeding heir acquired a mere life estate in the property.

It was permissible for the grantor of a fee tail to restrict the inheritance to particular lineal descendants by the use of proper words in the limitation. There could be an estate in fee tail male or in fee tail female, and either one of these could be a fee tail general or a fee tail special. A grant to a man and the heirs male of his body created a fee tail male. A grant to a man and the heirs female of his body created a fee tail female. If the grant was to a donee and the heirs of his body by a particular spouse the estate was a fee tail special; if no particular spouse was designated it was a fee tail general. Estates in tail female were, in fact, rarely created but estates in tail male were an integral part of the English family settlement and were very numerous in the eighteenth and nineteenth centuries.

The inalienable feature of the fee tail did not last long. By 1472 the tenant in tail, B, could, by the fictitious lawsuit known as

"common recovery," effectively transfer Blackacre to "C and his heirs" in fee simple absolute, thus extinguishing the interests of both the heirs of B's body and the grantor.[17] Another fictitious action, the "fine," enabled the fee tail tenant to bar or dock the entail of the bodily heirs. Both fines and common recoveries were abolished in England in 1834 by a statute.[18]

In the United States, what B has depends upon the local law of the state. Only four states give B a fee tail estate and in each of them B could convey the land in fee simple by deed. These states are Massachusetts, Rhode Island (as to deeds), Maine and Delaware. In Connecticut, Ohio and Rhode Island (as to wills), B would take an estate tail for life but the first heir of the body to inherit from B would have a fee simple absolute. In Arkansas, Colorado, Florida, Georgia, Illinois, Missouri and Vermont, B would take a life estate with contingent remainder in fee simple to B's heirs of the body or lineal descendants. Because the estate in fee tail[19] is considered inconsistent with the values of a democratic society, it has been prohibited either by statute or constitution in thirty-three states. Where prohibited, B would have a fee simple estate either absolute or with limitations.[20]

6. LIFE ESTATE FOR THE LIFE OF THE TENANT

PROBLEM 5.9: O conveys Blackacre "to B for the term of B's life" or to "B for life." (a) What estate does B have? (b) What are the characteristics of this estate?

17. See Taltarum's Case, Y.B. (Year Book) 12 Edw. IV 19. The common recovery worked like this: A the tenant in tail wants to convey a fee simple absolute to B. B would bring an action in common recovery against A who would allege that he had acquired a fee simple absolute from D and would join D to the suit in order to defend that title. D would falsely swear that he had conveyed a fee simple absolute to A and thus had no defense in B's common recovery action. B would then obtain a judgement that he acquired a fee simple absolute from A and A, his heirs and grantor who had a reversion would get a money judgement against D or a judgement entitling them to other lands owned by D of equal value. This judgement was deemed adequate recompense to B, B's heirs and B's grantor. However, D who was carefully selected by the parties in this collusive lawsuit was judgement proof and the judgement against him worthless. Thus, B would have a fee simple absolute; the others an uncollectible judgement.

18. Fines and Recoveries Act §§ 15, 40.

19. In Iowa and South Carolina, the *Statute de Donis* was not considered to be part of the state's received common law and thus did not form part of the state's jurisprudence. In those states a conveyance to "B and the heirs of B's body" creates a fee simple conditional. In Iowa, the courts have held, however, that upon birth of issue B is capable of alienating a fee simple absolute and devising a fee simple absolute as well. See Prichard v. Department of Revenue, 164 N.W.2d 113 (Iowa 1969).

20. See Restatement of Property, Introductory Note Vol. I, p. 201 et seq.; Powell on Real Property ¶ ¶ 196–198.

Answers and Analysis

(a) B has a life estate for B's life. The phrases "for the term of B's life" or "for life" are words of limitation setting forth the duration of B's estate. These words assure that B's estate ends automatically upon B's death.

(b) B has the right to use Blackacre, to take the fruits therefrom, and to dispose of the life estate to another. This power of disposition includes the right to mortgage, to create liens, easements, leases or other rights in the property. But no interest created by B can extend beyond the period of B's life. B has no right to commit waste or to injure Blackacre. B has the right to the exclusive possession of Blackacre but subject to these qualifications: O, who has the reversion, is privileged to come onto Blackacre to determine if waste has been or is being committed; to collect rent, if any is due; to make repairs essential to protect O's reversionary interest; to remove timber which has been severed and which belongs to O; and to do such acts as may prevent O's reversion from being terminated. In general, the life tenant may use Blackacre in the same way as though the life tenant owned Blackacre in fee simple except that the property must be left reasonably intact for the reversioner. The life tenant must keep the property in repair, except for ordinary wear and tear, and must pay the current taxes and interest on any mortgage on the premises at the beginning of the life estate. The life tenant has the right to the rents and profits from Blackacre. The life tenant's personal representative may harvest any crops which were planted before the life estate terminates and may remove any fixtures which the life tenant has placed on the ground. If the property is damaged by a wrongdoer, the life tenant may recover for the injury to his life interest.[21]

The life estate terminates upon B's death and the right to possession, at that time reverts to O or O's successors. Therefore, B has no interest, except for the limited rights described above, that passes to B's heirs at B's death or is capable of passing by devise under B's will.

7. LIFE ESTATE FOR THE LIFE OF ONE OTHER THAN THE TENANT

PROBLEM 5.10: O conveys Blackacre "to B for the life of C." (a) What estate does B have? (b) What are the characteristics of this estate?

21. See Restatement of Property §§ 117 to 122. See also, Problem 4.2.

Answers and Analysis

(a) B has an estate for C's life. This is called a life estate *pur autre vie*, that is, for the life of another. The words "for the life of C" are words of limitation.

(b) B may either predecease or survive C. In either event, the estate which B has lasts only so long and no longer than the life of C. C's life, not B's life, is the measuring life.

At common law if B died before C, the property was regarded, until C died, as without an owner. Thus, the first person to take possession, called the common occupant, was entitled to the estate. This conclusion resulted from the fact that the estate *pur autre vie* was not an estate of inheritance and could not descend to the heirs of the life tenant, and not being personal property it could not pass to the administrator or personal representative of B's estate. Neither could the reversioner, O, claim the estate because O had granted away his interest during the lifetime of C and C was still alive. The general or common occupant can hold the estate until the death of C, not because this person has any right to hold, but because no one has a right to eject him. Alternatively, if the conveyance were to "B and his heirs for the life of C," then upon the death of B during C's lifetime the heir of B took, not by descent but as "special occupant."

Today, the interest in the property between the death of B and that of C, passes to the successors to B's estate as if it were personal property. Also, since the life estate is alienable, the life tenant can convey the estate, thus giving the life tenant's grantee an estate *pur autre vie*. However, the life tenant cannot (under the common law doctrine of tortious feoffment,[22] unless the life tenant is granted a power in addition to the life estate), convey a greater estate than the life tenant owns.[23]

Suppose B has a life estate and conveys to C. Since B cannot create an estate in C greater than the estate B has, C has an estate for the life of B. If B dies in C's lifetime, C's estate ends and the property reverts to B's grantor. If C dies in B's lifetime, C's estate succeeds to the property until B dies. Alternatively, suppose B, who has a life estate, conveys to C for life. Here, C has an estate that terminates upon the death of C or the death of B, whichever first occurs. If B dies first, C's estate ends and the property reverts to B's grantor. If C dies first, the property reverts to B, who by conveying to C for C's life, retains a reversion for life. Then at B's later death, the property reverts to B's grantor.

22. A conveyance of a greater estate than the grantor had.

23. See Restatement of Property § 151.

8. COMMON LAW LIFE ESTATE BY DOWER

PROBLEM 5.11: O conveys Blackacre in a common law jurisdiction to "H and his heirs." H has a wife, W. H dies. (a) What estate does W have? (b) What are the characteristics of this estate?

Answers and Analysis

(a) At common law upon the death of her husband a widow was entitled to a life estate in one third of all lands of which her husband was seised in fee simple or in fee tail at any time during the marriage. The conveyance gave H a fee simple estate of which H was seised during the marriage. Accordingly, W acquired an estate of dower in Blackacre.

(b) The right of dower at common law is limited to a particular person and to specific estates. First, it is limited to an actual wife and is not available to one who has been divorced from H. Since the husband must have been seised of an estate that was capable of being inherited by issue of the marriage in order for his widow to be entitled to dower, a widow could not, at common law, claim dower in land in which her husband had a life estate, an equitable estate only, a joint tenancy with right of survivorship with another, or in which he had a reversion or remainder expectant upon an estate of freehold. Likewise, since the estate had to be capable of inheritance by issue of the marriage, a wife could not claim dower in lands her husband held in fee tail special with another woman. Of course, dower did not attach to the husband's personal property.

The widow's right to dower cannot be defeated by any conveyance by the husband even to a bona fide purchaser for value, unless the wife joins in the conveyance or releases dower. While the husband is living, the wife's dower is said to be inchoate but becomes choate upon the husband's death if the wife survives. Modern statutes in the United States frequently modify the dower right and change considerably the rights of a married woman in her husband's property. In fact, the trend is to abolish dower, even in name, and to substitute for dower an elective or statutory share in the deceased husband's estate.

Generally, an elective or forced share equals some percentage (e.g., one-third) of the value of all real and personal property owned by the deceased spouse at the time of death. Thus, unlike common law dower, the spouse's share also extends to personal property. On the other hand, in many states the share attaches only to property owned at death. This is unlike the common law where dower attached to real property owned at any time during the marriage.

Under these modern statutes, typically no measure of protection is provided a surviving spouse against lifetime transfers of property that have the effect of reducing the value of decedent's property owned at death. Most states, concerned by the inequities that could result to a surviving spouse by lifetime transfers of property, have by statute or judicial decisions adopted rules which, under certain circumstances, permit the surviving spouse to reach assets transferred away during the marriage in whole or partial satisfaction of a forced share.

9. COMMON LAW LIFE ESTATE BY CURTESY

PROBLEM 5.12: O conveys Blackacre in a common law jurisdiction "to W and her heirs." W has a husband, H, by whom W has a child, X, now living. W dies. (a) What estate does H have? (b) What are the characteristics of this estate?

Answers and Analysis

(a) H has a life estate in all (not in one-third as the wife had with dower) of the wife's lands by curtesy.

(b) While dower existed only for the wife, curtesy was solely for the husband. Four requisites were essential to curtesy in H. (1) H and W must be legally married. (2) W must be actually seised of the land in either fee tail or fee simple. (In this problem W had a fee simple estate). H could not have curtesy in W's reversions or remainders because she was not seised of these. Likewise, H could not have curtesy in lands which W held in trust for others. But H did have right to curtesy in equitable estates in fee held for W. (3) W must have a child by H who is born alive during the marriage and capable of inheriting W's estate. In this problem, X is the child of H and W and capable of inheriting from W. (4) The wife must predecease the husband as W did.

Curtesy was not allowed unless the issue entitled to inherit the land was actually born alive. At common law the husband acquired an estate by the curtesy initiate immediately on the birth of issue. This estate became an estate by the curtesy consummate upon the death of the wife.

The tenancy by the curtesy initiate has been gradually abolished by statute. Today, surviving husbands and wives have the same rights in each other's estate, however these rights might be denominated.

10. LIFE ESTATE BY AND DURING COVERTURE

PROBLEM 5.13: O conveys in a common law jurisdiction "to W and her heirs." W marries H. (a) What estate does H have in W's land? (b) What are the characteristics of this estate?

Answers and Analysis

(a) H has a life estate in W's property during coverture, which at common law means during the joint lives of H and W.

(b) It was said that under the common law the husband and wife were one, and the husband was the one. The wife's personality was merged in that of the husband. She was burdened with the common law disabilities including inability to contract or to use or convey her property. When W, being seised of Blackacre, married H, at that instant she lost and H gained control of Blackacre. He could, during their marriage enjoy the rents and profits of the property and dispose of these for the period of marriage. Furthermore, the property could be levied upon to satisfy his debts. The husband's estate continued until the marriage was dissolved by death or divorce, (an absolute divorce at common law could be obtained only by act of Parliament and so was indeed a rarity), or until issue was born of the marriage at which time his estate was enlarged into a curtesy estate. Thus, during the joint lives of H and W, H had full control of the land of W. This right extended to land in which W had the fee, fee tail, a life estate for W's life or for the life of another. Upon the death of either H or W before the birth of issue, H's control terminated and the land returned either to W or to her estate.

Statutes have now changed the common law respecting dower, curtesy and the husband's control of the wife's property by coverture.

II. NON-FREEHOLD ESTATES

1. ESTATE (OR TERM) FOR YEARS[24]

PROBLEM 5.14: L leases Blackacre to T for the period January 1, 2000 to December 31, 2007, a period of seven years. (a) What estate does T have? (b) What are the characteristics of this estate?

Answers and Analysis

(a) T has an estate or term for years.

(b) Perhaps the most important requisite of an estate for years is that it must have definite beginning and ending dates. T's lease begins on a day certain, January 1, 2000, and ends on a day certain, December 31, 2007. It lasts for a specific period of seven years. An

24. In legal contemplation every estate for years is a smaller estate than a life estate for the reason that a life estate is a freehold in real property, whereas the estate for years (even for 1,000 years) is less than a freehold, a chattel interest. Even though a leasehold is an estate in land and immovable, it is personal property. This is not logical but purely historical.

estate for years exists even though the estate does not happen to correspond with the calendar years or does not cover one year, e.g., a lease from April 23, 2004 to January 4, 2005, is an estate for years (even though its duration is less than one year) because it has a definite beginning date and a definite termination date.

During the period of the lease T has the right to possess Blackacre and to retain all of the rents and profits from Blackacre. T will have to pay rent according to the terms of the lease and must not commit waste on the premises. Upon T's death testate or intestate during the term of the lease, the balance of the term passes to T's personal representative for distribution to those persons entitled to T's estate.[25]

No notice is necessary by either L or T to terminate this tenancy as the notice as to when the lease ends is fixed in the lease.

2. PERIODIC TENANCY

PROBLEM 5.15: L and T enter into a month-to-month lease of an apartment beginning on June 1, 2000. (a) What estate does T have? (b) What are the characteristics of this estate?

Answers and Analysis

T is a periodic tenant for month-to-month. Other periodic tenancies are the tenancy from year-to-year, week to week, or day to day.

The nature of a periodic tenancy is that the period is automatically renewed for a like period unless the tenancy is properly terminated by the giving of a notice of termination.

Requiring a notice of termination benefits both landlord and tenant. It gives the tenant a reasonable time to find new premises; if the tenant serves the notice upon the landlord, it gives the landlord a reasonable opportunity to locate a new tenant and avoid having the premises lie vacant. A notice of termination is not required to terminate a tenancy for years since the lease fixes the date of termination at the time it is executed.

The time in which the notice to terminate must be given is coterminous with the period of the periodic tenancy except that at common law a tenancy for year-to-year was terminated by the giving of only six months notice.[26] The notice must be given on or before the first day of the new term. Thus, in this problem, if L wishes to terminate the month-to-month tenancy as of September

25. The persons entitled to T's estate are T's heirs, if T died intestate, or the devisees of the leasehold as provided in T's will.

26. Some state laws reduce the notice period for a year-to-year tenancy to one month. See, e.g., N.C. Gen. Stat. § 42–14 (1984).

30, a notice must be given on or before September 1. Any notice given after September 1 would be ineffective to terminate the tenancy before September 30. If the notice were given any time between September 2 and September 30, the notice might be sufficient to terminate the tenancy as of October 31.

Death of the periodic tenant does not terminate the tenancy absent a timely filed notice of termination.[27]

PROBLEM 5.16: L leases Blackacre to T for a three year period from March 1, 1998 to March 1, 2000 at a rental of $500 per month payable in advance on or before the 10th day of each month. T holds possession beyond March 1, 2000 and on March 9, 2000 tenders $500 to L which L accepts. (a) What estate does T have? (b) What are the characteristics of such estate?

Answers and Analysis

T now has a periodic tenancy from year-to-year. Upon T holding over beyond the date fixed in the lease for the end of the term and L's acceptance of rent on the same terms as provided in the prior lease, T becomes a tenant from year-to-year.[28]

The essential characteristic of the year-to-year (or month-to-month or week to week) lease is that it is of indefinite duration, while the lease for years is for a definite and fixed term. The leasehold continues indefinitely in the absence of either party's giving the other a timely notice of termination. The terms of the old lease are implied to carry over to the year-to-year lease with the exception of the term itself.

Here, either party can terminate the year-to-year tenancy by giving notice not later than six months preceding the end of the yearly period. The notice must be given on or before September 1st and must state that the lease shall end on the following March 1st. In a month-to-month tenancy a full month notice must be given and in a week to week tenancy a full week's notice must be given. Without giving a notice to terminate, the periodic tenancy continues for another period of a year, month or week.

In the problem, T wrongfully held over beyond the term of the lease. This wrongdoing makes T a tenant at sufferance and gives L an election either to eject T or to accept rent from T and thereby

27. In Kennedy v. Kidd, 557 P.2d 467 (Okl. App.1976), where the tenant died in his apartment while under a month-to-month tenancy, the court held "that like the common law tenancy, the statutory tenancy could not be terminated merely by the death of either the lessor or the lessee; the appropriate notice would still be required."

28. If T's holding over the term is with L's consent or without wrongdoing and without agreement, then T is not a tenant from year-to-year, but a tenant at will, and L can recover only the reasonable value for the time T actually holds over the term.

create a tenancy from year-to-year. If L should give notice of termination of the lease on November 1st of a given year, this notice would be wholly ineffective to terminate the year-to-year tenancy since six months notice is required to terminate a tenancy from year-to-year. The tenancy would continue for another year following March 1st and for the following years indefinitely until either party gives notice on or before September 1st of a given year to terminate the tenancy.

The common law rule permitting a landlord to treat a holdover as a periodic tenant from year-to-year was viewed by the courts and legislatures as harsh. In order to ameliorate the effects of that rule, some states limit the period to month-to-month or construe the facts in such a way as to find that the parties intended some other form of tenancy. For example, where the holding over was not the fault of the tenant and a lease contained a provision providing double rent in the event of any holding over, it was held that the landlord was limited to receiving double rent for the period of the holding over and could not elect to treat the tenant as a periodic tenant for year-to-year.[29]

Year-to-year tenancies may also be created by express agreement or, alternatively, arise through the making of an oral lease which is void under the Statute of Frauds. For example, L orally leases Blackacre to T for five years when the Statute of Frauds provides that any lease for more that a year must be in writing. T takes possession of Blackacre and pays rent to L. Absent a governing statute to the contrary, T has an estate from year-to-year with terms impliedly carried over from the void lease.

3. TENANCY AT WILL

PROBLEM 5.17: L leases Blackacre to T for "as long as L and T wish."[30] (a) What estate does T have? (b) What are the characteristics of this estate?

Answers and Analysis

(a) T has a tenancy or estate at will which can be terminated at the will of either L or T at any time.

29. Commonwealth Bldg. Corp. v. Hirschfield, 307 Ill.App. 533, 30 N.E.2d 790 (1940) (provision stating that if the tenant failed to move at the expiration of the lease he would have to pay double the usual rent for the actual time of his occupancy was reasonable).

30. If the lease were to T for as long as T wishes, many jurisdictions take the position that T has a life estate determinable. See Thompson v. Baxter, 107 Minn. 122, 119 N.W. 797 (1909) (where the lease term was for as long as the tenant or his heirs or assigns wish, the lease was neither a tenancy at will nor a tenancy from month-to-month or year-to-year, but rather a life estate).

(b) The estate at will is always of indeterminate duration because it can be terminated by either the landlord or the tenant. But the relationship of landlord and tenant must be created with the tenant in possession of the land. This estate is not created if L gives T a mere license and it does not arise if T is a trespasser on Blackacre. This estate usually arises when no rent is involved but the fact that rent is to be paid either for a month or a year does not prevent its being a tenancy at will if that is what the parties intend.

Historically, a tenancy at will could be ended by either party without notice.[31] Some states require a "reasonable" notice period or by statute fix the notice to some stated number of days. It is also terminated by the death of either party or by the commission of voluntary waste by the tenant because it terminates the mutual concurrence of the wills of the parties. The estate at will is the lowest form of chattel interest in land and is not assignable.[32]

4. TENANCY AT OR BY SUFFERANCE

PROBLEM 5.18: L leases Blackacre to T for two years, the term ending April 30, 2001. T continues in possession after April 30, 2001 without L's consent. (a) What estate does T have? (b) What are the characteristics of such an estate?

Answer and Analysis

T is a tenant at sufferance but T's interest is not really an estate at all. A tenancy at sufferance arises when any tenant, for years, from year-to-year, month-to-month, or life tenant *pur autre vie* holds possession wrongfully beyond his term. In other words it is a tenant who enters rightfully but continues in possession wrongfully. Thus, the tenant at sufferance differs from a trespasser only in that the tenant's original entry was rightful. There is no relation of landlord and tenant between a tenant at sufferance and the reversioner or remainderman. If the landlord has ejected the tenant from the land, then by relation back to the beginning of the wrongful holding over, the tenant at sufferance is liable as if a trespasser from the date of the expiration of the lease, and judgment may be rendered against the tenant for mesne profits.[33]

As discussed above, at the election of the landlord the tenancy at sufferance may be transformed into a tenancy from year-to-year or month-to-month.

31. A tenancy at will is terminable by either party. If tenant alone has a right to terminate at will, tenant has a determinable life estate. See Garner v. Gerrish, 63 N.Y.2d 575, 483 N.Y.S.2d 973, 473 N.E.2d 223 (1984).

32. See Restatement of Property § 21.

33. These are profits recovered from a wrongdoer while the wrongdoer was in possession of the land.

III. CONCURRENT ESTATES

Concurrent estates are estates owned or possessed by two or more persons at the same time.

1. COMMON LAW JOINT TENANCY[34]

PROBLEM 5.19: O conveys Blackacre "to A, B and C and their heirs forever." (a) What estate does A, B and C have? (b) What are the characteristics of such estate?

Answers and Analysis

(a) The estate that A, B and C have depends upon the jurisdiction and the date of the conveyance. At early common law they would have an estate in joint tenancy with right of survivorship. Of course, the fee simple in A, B and C arises from the use in the conveyance of the words of limitation "and their heirs." The joint tenancy arises from the fact that the common law preferred joint tenancy over tenancy in common. The essence of joint tenancy is that the two or more persons named to take the property take and hold as though they together constituted one person. Each of the joint tenants is a component part of the unity, the fictitious single person. Thus, by calling on one of the joint tenants to do the feudal services, the overlord called on all as a matter of law. This reason has long since disappeared and statutes now provide that in a conveyance or devise to two or more persons, it is presumed that the grantor intended to create a tenancy in common, not a joint tenancy with right of survivorship. Under these statutes, A, B and C take as tenants in common[35] since the right of survivorship or joint tenancy is not specified in the conveyance.

34. A joint tenancy may exist among two or more persons as to any kind of an estate, fee simple, fee tail, life estate, leaseholders and chattel interests.

35. The characteristic of survivorship attendant upon a simple conveyance to two or more persons creating a joint tenancy has led to statutory changes in practically all jurisdictions. The statutes vary considerably—some simply reverse the presumption so as to favor a tenancy in common unless the conveyance or transfer clearly indicates otherwise, and others either abolish joint tenancies, especially in land, or abolish the characteristic of survivorship. Insofar as survivorship is concerned, however, it is generally possible to acquire this right if the transfer or conveyance expressly so provides, but the nature of the estate acquired will depend upon the form of the conveyance. It is possible, for example, to create a co-tenancy for joint lives with a contingent remainder to the survivor, or a cotenancy in fee with an executory interest in the survivor. In these cases the estate does not have the same characteristics as a joint tenancy. Executory interests (and contingent remainders in almost all states) are indestructible, and therefore, the nature of these estates, particularly as to the survivorship right, cannot be changed (as in a joint tenancy) by a severance of one of the four unities by any one of the co-owners. Statutes permitting joint tenancies with the right of survivorship are quite com-

(b) Joint tenants are always purchasers, that is, they always take either by deed or will, never by descent. Thus, if O, the owner of Blackacre, dies intestate leaving S and D as his only heirs, they take as tenants in common. Historically, the four unities test had to be satisfied in order to create a joint tenancy with right of survivorship. These are the unities of: (1) *time*—the tenants take their interests at the same moment, (2) *title*—the tenants acquire their interests from the same source, the same deed or will, (3) *interest*—each must have the same identical interest as every other joint tenant, and (4) *possession*—the possession of each is the possession of all and the possession of all is the possession of each, for, after all, they all constitute a single "person."[36] Joint means oneness and in this problem A, B and C constitute one person and each owns the whole of Blackacre. A owns "all," B owns "all," and C owns "all" of Blackacre. Each does not own one third. Each owns an undivided whole. This is true regardless of the number of joint tenants.

The so-called "grand incident" of joint tenancy is the right of survivorship. This means that if A dies without having conveyed A's interest during A's lifetime, the survivors, B and C, own the whole; if B dies first, then A and C own the whole and if C dies first, then the survivors A and B own the whole. And, if A and B die without having conveyed their interests in Blackacre, C, the survivor, owns all of Blackacre. If C owns Blackacre at C's death, it passes through C's estate to C's heirs or devisees. Technically, the surviving joint tenant owns the whole because the deaths of A and B merely extinguished their interests in Blackacre. C, the survivor, is not inheriting any interest from either A or B.

A joint tenancy is destroyed by any act which destroys one of the four unities. For example, suppose A conveys "to X and his heirs an undivided one-third interest in Blackacre." Here is where logic breaks down. A has both a right and power to dispose of what A did not own. As a joint tenant A owned all of Blackacre jointly with B and C. Yet here A conveys to X a fractional one-third interest. What are the effects of this conveyance? First, B and C as to each other remain joint tenants of a two-thirds interest in Blackacre with the four unities still present as between them. X, on the other hand, cannot be a joint tenant with B and C because X got title from a different deed than did B and C and at a different

mon as to certain types of personal property, such as bank accounts and shares of stock. The law of each jurisdiction must be consulted. See Powell on Real Property ¶ 616.

36. Possession by one co-tenant (joint and tenant in common) is not wrongful as against the other co-tenants who are not in possession so long as the tenant in possession does not exclude the others. If one co-tenant enters into possession of the property, that co-tenant is not liable to pay the other the property's reasonable rental value. Spiller v. Mackereth, 334 So.2d 859 (Ala. 1976). But see McKnight v. Basilides, 19 Wash.2d 391, 143 P.2d 307 (1943)(minority rule to the contrary).

time. Thus, the unities of time and title are both broken. As to X's undivided one-third interest, X is a tenant in common on one hand, with B and C being a tenant in common of the two-thirds interest on the other, although at the same time B and C remain joint tenants between themselves as to their two-thirds interest.[37]

Suppose, A, B, and C agree among themselves to partition Blackacre. A takes the north one-third, B takes the middle one-third, and C takes the south one-third. This partition destroys the unity of possession and each one now owns and possesses a divided part of Blackacre, alone and individually. Each is a tenant in severalty of the portion which each is given in the partition.

Suppose A did not convey any interest in Blackacre to X and A, B, and C did not partition Blackacre. Rather, A dies survived by B and C. In A's will A purports to devise A's one-third of Blackacre "to X and his heirs." X takes nothing for the reason that, upon A's death, the survivorship feature of the joint tenancy becomes effective and B and C as survivors own the whole of Blackacre. In other words, a joint tenant can sever a joint tenancy by conveyance but not by will.

The four unities test made it impossible at the common law for a husband who owned Blackacre in fee simple to convey the property to himself and his wife as joint tenants with right of survivorship. This could not be done because husband and wife would not have acquired their interests at the same time. In order to accomplish this transfer, the husband could convey to a straw person who would then reconvey to the spouses as joint tenants with rights of survivorship. Most states have eliminated the need to use the straw.

If spouses who hold a joint tenancy divorce, their estate typically becomes a tenancy in common.

2. TENANCY BY THE ENTIRETY

PROBLEM 5.20: G conveys Blackacre "to H and W (husband and wife) and their heirs." (a) What estate do H and W have? (b) What are the characteristics of this estate?

Answers and Analysis

(a) H and W have a tenancy by the entirety in those jurisdictions that recognize this estate.

(b) Tenancy by the entirety is a species of joint tenancy. This estate adds a fifth unity to the four unities of the joint tenancy—

37. Because the interest of a joint tenant is alienable, it can be levied upon by the creditors of any joint tenant.

the unity of marriage. This tenancy can exist only between husband and wife, who are considered as one person. In common with the joint tenancy, upon the death of the first tenant by the entirety, the survivor owns the whole of the property. It is created by deed or will and not by descent. Unlike the joint tenancy, however, neither spouse can voluntarily dispose of his or her interest in the property. Rather, H and W must join in any conveyance. Thus, a creditor of either spouse cannot levy on the spouse's interest in the property owned by the entirety unless local law provides to the contrary.[38]

Divorce destroys the unity of person and the tenancy by entirety. The effect of divorce is to make H and W tenants in common if the policy of preferring this tenancy over a joint tenancy is followed in the jurisdiction. In some states, however, the divorced couple hold as joint tenants to preserve the survivorship feature.

The tenancy by the entirety is not recognized in many states because it is viewed as an estate inconsistent with the policies underlying Married Women's Property Acts which were intended to give women management and administrative control over their property.

3. TENANCY IN COMMON

PROBLEM 5.21: G conveys Blackacre to "A, B and C and their heirs each taking a one-third interest therein." (a) What estate do A, B and C have? (b) What are the characteristics of this estate?

Answers and Analysis

(a) A, B and C take Blackacre as tenants in common. While at common law a conveyance to two or more persons presumptively created a joint tenancy, a tenancy in common could be created when this was the clearly expressed intention as appears in this conveyance by the words, "each taking a one-third interest therein." While at common law a joint tenancy was preferred over tenancy in common, the reverse is true under state statutory provisions which generally provide that a conveyance to two or more persons creates a tenancy in common unless it is shown that a joint and not a common tenancy is intended.

(b) Tenancy in common exists when a distinct undivided fractional share is given to each tenant individually. This is true even

38. See Sawada v. Endo, 57 Hawaii 608, 561 P.2d 1291 (1977) (victim cannot set aside conveyance by tenants by entirety for purpose of avoiding paying judgment since tenancy by entirety not reachable for payment of tenant's debts). In *Sawada*, the court also categorized the various state positions on the recognition of tenancies by the entirety, and where they exist the various positions on whether the estate could be subject to the claims of creditors.

when the tenants take similar interests at the same time under a single deed or source of title. Only one unity, that of possession, is required for a tenancy in common. It means that the possession of one tenant is the possession of all. But, unlike the joint tenancy with right of survivorship, the interests of the tenants need not come from the same source, nor at the same time, and their respective interests may be quite different. For example, A, B, and C may be tenants in common when A has only a life estate in one-third with remainder to R, B may have a fee in an undivided one-sixth and C a fee in an undivided half of Blackacre. Further, A may have received the interest by deed and B and C by descent. Tenants in common take equal shares unless the deed or circumstances indicate otherwise. No survivorship exists in a tenancy in common, and each tenant has the right and power to dispose of the tenant's share or any portion thereof by deed or will, and, if the tenant in common dies intestate, the tenant's share descends to the tenant's heirs. The tenancy in common is destroyed either by partition or by purchase when the entire title is owned in severalty by one person.[39]

IV. FUTURE INTERESTS:

1. REVERSION

PROBLEM 5.22: O, who owns Blackacre in fee simple absolute, conveys Blackacre to B for life. (a) What estate does O have? (b) What are the characteristics of this estate?

Answers and Analysis

(a) O has a reversion in Blackacre.

(b) A reversion is the residue left in a grantor who transfers an estate which is smaller than the estate which she had. It arises merely as a matter of simple subtraction. O owned a fee simple absolute but conveyed only a life estate to B. O has an interest left, which is a reversion. The seisin passes to B for B's life. B's life estate terminates automatically at B's death and the seisin reverts to O, the grantor, or if O is dead, through O's estate to O's heirs or devisees.

If prior to B's death O had conveyed the reversion to "X and her heirs," then upon B's death the seisin passes to X in fee simple absolute. A reversion always is retained by the grantor who has transferred less than he has.[40]

39. See In re Horn's Estate, 102 Cal. App.2d 635, 228 P.2d 99 (1951).

40. In some cases, however the reversionary interest is labeled either a possibility of reverter or right of entry for condition broken (power of termination). See ch. 6, § 6.2; ch. 7, §§ 7.3; 7.4.

A reversion is a future interest. Thus, the grantor is not entitled to the present use and enjoyment of the property until B's life estate terminates. A reversion always is a vested interest in the transferor, and the transferor can dispose of it either by deed or will.[41]

2. POSSIBILITY OF REVERTER

PROBLEM 5.23: O, who owns Blackacre in fee simple absolute, conveys Blackacre "to B and his heirs for so long as the property is used for courthouse purposes." (a) What interest does O have? (b) What are the characteristics of this interest?

Answers and Analysis

(a) O has a possibility of reverter.

(b) A possibility of reverter is an interest which is retained by the grantor who conveys a fee simple determinable.[42] B is granted a fee simple determinable. It is true that when a fee simple absolute is granted, there can be nothing left in the grantor. This estate will last forever. How long will B's determinable fee in this case last? The answer is found in the very words of the grant, "for so long as the property is used for courthouse purposes." This estate may last forever but it is also possible that the estate will end should B or B's successors fail to use the premises as a courthouse. If that happens B's estate terminates automatically. The possibility that B's estate may revert to O is what is left in O and it is this interest that is called a possibility of reverter.

At common law O's possibility of reverter, standing alone and not attached to a reversion, was inalienable.[43] On the other hand, it was descendible. Today, most jurisdictions take the view that the possibility of reverter is both alienable, devisable, and descendible.[44] Some jurisdictions, however, limit the transferability of these interests.[45]

41. See 1 Am. L. Prop. § 4.16 at 432 (A.J. Casner, ed. 1952); Rest. § 154.

42. It was also the estate retained by a grantor of a fee simple conditional, the predecessor estate to the fee tail that was abolished with the enactment of De Donis.

43. See 1 Amer. Law Prop. § 4.70 (A.J. Casner ed. 1952).

44. See Restatement of Property § 159a; Collette v. Town of Charlotte, 114 Vt. 357, 45 A.2d 203 (1946) (where a portion of a farm was conveyed to the city provided that the land was used only for school purposes with a possibility of reverter, and later the entire farm was conveyed to a third party, the possibility of a reverter resulting from the creation of a determinable fee is alienable).

45. See Powell on Real Property, ¶ 281. Mahrenholz v. County Board of School Trustees of Lawrence County, 93 Ill.App.3d 366, 48 Ill.Dec. 736, 417 N.E.2d 138 (5th Dist.1981).

3. RIGHT OF RE-ENTRY FOR CONDITION BROKEN OR "POWER OF TERMINATION"

PROBLEM 5.24: O, who owns Blackacre in fee simple absolute, conveys Blackacre to B and his heirs but if at any time the premises are not used for courthouse purposes, then O shall have the right to re-enter and terminate B's estate. (a) What interest does O have? (b) What are the characteristics of this interest?

Answers and Analysis

(a) O has a right of re-entry for condition broken or "power of termination."

(b) A right of re-entry for condition broken is an interest retained by a transferor who has conveyed the property subject to a condition subsequent. In this case, B is granted a fee simple subject to an express condition that B's estate may be terminated upon the happening of two things: (1) the property is no longer used for courthouse purposes; and (2) O, or O's successors, elects to terminate B's estate and does those acts of re-entry as are necessary to accomplish a termination. Either O's re-entering of the land with intent to terminate B's estate or O's bringing an action for this purpose terminates B's estate. Failure to do either for a long period of time after the condition is breached may constitute a waiver of the right or conditions may estop O from asserting the right or exercising the power.

This right of re-entry is descendible and can be exercised by O's heirs, but at common law it was not alienable inter vivos if not attached to a reversion. This followed from the law's abhorrence of forfeitures. The exercise of this right or power was and still is not favored by the courts. Some courts hold an attempt to convey the right extinguishes it. Statutes in some jurisdictions permit the inter vivos transfer of a right of re-entry. When such a right is attached to or incident to a reversionary interest, it is transferable. For example, suppose O conveys Blackacre to "B for life but if B sells liquor on the premises then O or his heirs have the right to re-enter and terminate B's estate." O then conveys her reversion including the right of re-entry to C and his heirs. In this case the right of re-entry would pass to C as an incident to the reversion and C could exercise the power of termination. This would also be true if the transfer was by will.[46]

Notice carefully the distinction between the "right of re-entry for condition broken" or "power of termination" on the one hand,

46. See Restatement of Property §§ 160, 161.

and the "possibility of reverter" on the other. It is a question of intention and construing the words of the grant. Compare "O to B and his heirs so long as no liquor is sold on the premises" and "O to B and his heirs but if liquor is sold on the premises then O shall have the right to re-enter and terminate B's estate." In the former O has a possibility of reverter and in the latter, O has a right to re-enter. In both cases, B has a fee simple that might last forever. But in the former, B's estate will come to an end automatically if liquor is sold on the premises because that is as long as the estate is to last. In the latter, B's estate will not come to an end automatically even though B sells liquor there. There must be an affirmative act on O's part to terminate B's estate. O may or may not act. But if O does act, it will cause a forfeiture of the balance of B's fee. If O does not act, then B's estate continues even though B has breached the condition subsequent.

Where the terms of the conveyance are ambiguous as to whether a fee simple determinable or a fee simple on condition subsequent has been created, there is a judicial preference for finding a fee simple on condition subsequent, particularly if a forfeiture can be avoided because the grantor failed to retain a power of termination.[47]

A distinction should exist between the possibility of reverter and the right of entry for condition broken with respect to when the statute of limitations runs on a cause of action for possession as against an adverse possessor. For example, if O conveys Blackacre to B and his heirs so long as liquor is not served on the premises, B's estate automatically terminates if liquor is sold on the premises and O's possibility of reverter immediately ripens into a fee simple absolute. Accordingly, any continued possession of Blackacre by B is wrongful as against O who has a cause of action for possession as soon as liquor is sold on the premises. If O fails to bring that action within the statutory period, B's possession should ripen into title by adverse possession.[48]

But if O conveys Blackacre to B and his heirs provided that if liquor is sold on the premises O may re-enter, the mere sale of liquor on the premises does not give O a right of possession. Rather, O must first exercise the right of entry. Only if O were to exercise the right and B refused to surrender possession to O, would B's continued possession be wrongful. Thus, until such refusal, O should not have cause of action of possession. Not all

47. See 2 Powell on Real Property ¶ 188.

48. Arguably, since B's entry was rightful rather than wrongful, by analogy to an adverse possession by a co-tenant, actual notice of B's sale of liquor on the premises might be required to start the running of the statute of limitations.

courts agree there should be such a difference even though such difference is conceptually warranted.[49]

Many jurisdictions have enacted statutes requiring the periodic recording by the grantor or the grantor's successor of a notice of intent to enforce either a possibility of reverter or right of entry for condition broken.[50] Typically, these statutes provide that if this notice is not recorded, the estate is terminated after a period of time. Jurisdictions are divided on the constitutionality of these statutes.[51] Other states have statutes that bar enforcement of these interests unless an action is brought within a fixed period following the happening of the limitation or condition.[52]

4. VESTED REMAINDER

PROBLEM 5.25: O, who owns Blackacre in fee simple absolute, conveys Blackacre to "B for life, and then to C and his heirs." (a) What estate does C have? (b) What are the characteristics of such estate?

Answers and Analysis

(a) C has a vested remainder. When it becomes possessory in either C or C's successors, it will be a fee simple absolute.[53]

(b) It should be noticed first that O, who had a fee simple absolute, granted the entire estate in part to B and in part to C. Thus, O retains no interest in Blackacre. B has a life estate. This is a freehold estate and thus B has seisin. B's life estate is the "particular estate of freehold" which supports C's remainder. Every remainder must be preceded by a particular estate of freehold—either a life estate or a fee tail.

At common law, if O granted a fee simple to B, O could not also grant a remainder in fee simple to C because there would have been

49. See 1 Amer. L. Prop. § 4.9 at 424 (A.J. Casner ed. 1952); Bergin & Haskell, Preface to Estates in Land and Future Interests 61–62 (2d ed. 1984).

50. See, e.g., Iowa Code Ann. § 614.24 (1989).

51. Compare Presbytery of Southeast Iowa v. Harris, 226 N.W.2d 232 (Iowa 1975), cert. denied 423 U.S. 830, 96 S.Ct. 50, 46 L.Ed.2d 48 (1975) (where a church acquired title to land and asserted that the defendant's reversionary interest extinguished because of their failure to abide by statutory recording requirements, the court held that a retrospective application of a statute permitting extinguishment of an existing reverter interest in the absence of a recording does not render the statute unconstitutional per se); Board of Education v. Miles, 15 N.Y.2d 364, 259 N.Y.S.2d 129, 207 N.E.2d 181 (1965) (extinguishment of title for failure to re-record is an unconstitutional impairment of vested rights). For further discussion, see Ch. 14.

52. See, e.g., Ill. Rev. Stat. ch. 110, §§ 13–102–3 (1985).

53. Just as restraints on the alienation on a fee simple are invalid, so too are they invalid on remainder interests. Thus, in Hankins v. Mathews, 221 Tenn. 190, 425 S.W.2d 608 (1968) the court held a forfeiture restraint limited to 10 years invalid.

nothing left in O to be granted over. Thus, it is said that a remainder in fee simple could not follow a grant made in fee simple or a fee simple could not follow upon a fee simple. Also, at common law the remainder was the only future estate which could be granted to a person other than the grantor or his heirs. In addition, a remainder could become possessory only when the preceding particular estate of freehold came naturally to its end. This meant that the preceding estate came to an end upon the happening of a limitation.[54] The remainder could not cut short the preceding particular estate. In this problem, C's future interest becomes possessory upon B's death.[55]

Cryptically, today a remainder can be defined as a future interest in a transferee that is capable of becoming possessory immediately upon the termination of a preceding life estate. All remainders must fall into one of four categories. These are: (1) indefeasibly vested remainders, (2) vested remainder subject to open or partial divestment, (3) vested remainder subject to complete divestment, and (4) contingent remainders.

A remainder is indefeasibly vested when it is limited in favor of a born and ascertained person and is not subject to the happening of any conditions. C's remainder is vested because C is in being, and the interest conveyed to C is not subject to the happening of any conditions. In other words, C's future interest will, in all certainty, become possessory immediately upon the termination of B's life estate. Because C has a future right to possession, C's estate is classified as a future estate.

If C dies before B, C's interest will not become possessory in C. Nonetheless, C's interest will in all events become possessory upon B's death. If C survives B, C's interest becomes possessory in C. If C dies before B, C's vested remainder passes through C's estate to C's heirs or devisees. Similarly, C may convey it during C's lifetime.

There could be as many remainders at common law as the grantor saw fit to create subject to the limitation that a fee simple could not follow a fee simple. Thus O, fee simple owner of Blackacre, could convey to "B for life, C for life, D for life, E for life, then to F and his heirs." All except B had vested remainders but if E

54. An exception to the rule applied to the future interest following a fee simple determinable. The future interest following a fee simple determinable was a shifting executory interest. This was consistent with the rule that a fee simple could not follow a fee simple but inconsistent with the rule that remainders followed estates that terminated naturally upon the happening of a limitation.

55. If the case were, "O to B for life but if B marry X, then to C and his heirs," C's estate could not be a remainder and would be void at common law because it would, in case B married X, cut short B's life estate. After the Statute of Uses, C's future interest would be valid as an executory interest.

should predecease B, then E would never enjoy the possession of the property. It is vested, however, if the person or class to take is certain and the estate is definite.

In each of the following illustrations C has a vested remainder:

1. O conveys to "B for life, and then to C for life." C has a vested remainder for life; O has a reversion.

2. O conveys to "B for life, and then to C and the heirs of his body." C has a vested remainder in fee tail at common law and O has a reversion.

3. O conveys to "B for life, and then to C and her heirs." C has a vested remainder in fee simple; O has nothing.

4. O conveys to "B for life, then to X for life if X marries Y, then to C and his heirs." C has a vested remainder in fee simple; X has a contingent remainder for life. It is contingent upon X marrying Y.[56] O has nothing.

5. O conveys to "B and the heirs of his body and then to C and his heirs." Where the fee tail estate is valid, C has a vested remainder in fee simple. It becomes possessory upon the natural end of B's fee tail estate which, if it ends, ends as a result of the happening of a limitation, not a condition. On the other hand if O conveys to B and his heirs so long as liquor is not sold on the premises, then to C and his heirs, C does not have a vested remainder, although conceptually C should. C should have a vested remainder because it follows on the heals of an estate that, if it ends, ends naturally upon the happening of a limitation. But, for historical reasons C's interest is classified as a shifting executory interest. Every system needs an exception, and this is one of them.

A vested remainder in fee simple cannot follow another vested remainder in fee simple or a contingent remainder in fee simple. It can follow a vested remainder for life and a vested or contingent remainder in tail when such estates were recognized.

5. VESTED REMAINDER SUBJECT TO OPEN OR PARTIAL DIVESTMENT

PROBLEM 5.26: O conveys Blackacre to B for life, then to C's children. At the time of conveyance C and one child of C, named D, are living. (a) What does C's children have? (b) What are the characteristics of this estate?

56. A vested remainder in fee could follow on the heels of a contingent remainder for life since the two estates were not of the same quality.

Answers and Analysis

(a) C's children have a vested remainder subject to partial divestment or subject to open.

(b) A vested remainder subject to partial divestment or subject to open is a remainder that is limited in favor of a class of persons. A class is a group of persons collectively described such as children, brothers, sisters, nieces, nephews, grandchildren, etc. In order for a class gift to be vested, there must be at least one living member of the class and there must be no conditions precedent attached to the gift. In this problem, C has one living child, D, and there are no conditions precedent.

The nature of the class gift that is vested subject to open is that until the class gift closes, new members can join the class but no member who joins the class can fall out of the class. If a new member joins the class, the interest of each previous class member is diminished but never eliminated. For example, if C has another child, E, then D's interest is reduced from 100% to 50%. If a third child joins the class, then the 50% interests of D and E are reduced to one third. Once the class closes, the members of the class have a vested remainder and the interest of each member of the class can no longer be diminished.[57]

6. VESTED REMAINDER SUBJECT TO COMPLETE DIVESTMENT

PROBLEM 5.27: O, who owns Blackacre in fee simple absolute, conveys Blackacre to "B for life, then to C and his heirs but, if X marries Y, then to X and his heirs." (a) What does C have? (b) What are the characteristics of this estate?

Answers and Analysis

(a) C has a vested remainder subject to complete divestment.

(b) A vested remainder subject to complete divestment is a remainder that is limited in favor of a born or ascertained person or is limited in favor of a class of persons which class is vested subject to open. However, the remainder is subject to the happening or non-happening of a condition subsequent. Upon the occurrence or non-occurrence of the condition, the remainder may not become possessory, or, if the remainder had already become possessory, the interest might not remain possessory in infinity. In this problem, C's remainder is subject to the condition subsequent of X marrying Y. If this condition fails to occur before B dies, then upon B's death C's vested remainder subject to complete divestment becomes a possessory fee simple estate. If thereafter X marries Y, then C's fee

57. On class closing rules, see Problem 7.09, ch. 7.

simple estate is divested in favor of X whose future interest (a shifting executory interest) becomes a possessory fee simple absolute. If X and Y never marry, X's shifting executory interest ends and C's estate becomes a fee simple absolute. Alternatively, if X marries Y during B's lifetime, C's vested remainder is divested and X's future interest (a shifting executory interest) becomes a vested remainder. Then, upon B's death, X's estate becomes possessory as a fee simple absolute.

7. CONTINGENT REMAINDER

PROBLEM 5.28: O, who owns Blackacre in fee simple absolute, conveys Blackacre to "B for life, then if C survives B, to C and his heirs." (a) What interest does C have? (b) What are the characteristics of this interest?

Answers and Analysis

(a) C has a contingent remainder in fee simple.

(b) A contingent remainder is a remainder: (1) limited in favor of an unborn person, (2) limited in favor of an unascertained person, or (3) limited in favor of a born or ascertained person which is subject to a condition precedent. In this problem, the interest of C is conditioned upon C surviving B. If C survives B, then the condition is satisfied and C's interest vests in possession. If C predeceased B, then C's interest fails and upon B's death, Blackacre reverts to O, the grantor.

Because the contingency was a condition precedent, the older common law considered a contingent remainder only a possibility of acquiring an estate in the land. Thus, it was not alienable or transferable inter vivos. However, today the general rule is that contingent remainders are alienable like other future interests.

At common law contingent remainders were destructible. This meant that if the contingent remainder was subject to a contingency that had not occurred at the time the preceding life estate terminated but might occur thereafter, the remainder was destroyed when the life estate ended and the property reverted to the grantor. The rationale for this rule was that seisin could not be in abeyance. Thus, upon the life tenant's death, seisin had to pass either to the remainderman or to the reversioner. For example, suppose O conveyed Blackacre to B for life, then to C and his heirs if C attains the age of 21 years. B dies survived by C who is age 19. Since the condition precedent did not occur prior to B's death, C's contingent remainder was destroyed and the property reverted to O. While logic might have dictated that even though the property reverted to the grantor the remainderman would take the property

if the condition later occurred, this was not the case. Once the remainder was destroyed, it was destroyed forever.

The Rule of Destructibility was abolished both in England and almost all states. It probably survives in Florida.[58] Where the rule has been abrogated, if the condition occurs after the death of the life tenant, the remainder becomes possessory, thus permitting it to be effective as a springing or shifting use under the Statute of Uses.

As noted, a vested remainder subject to complete divestment is a remainder subject to the occurrence or non-occurrence of a condition subsequent. A contingent remainder, on the other hand, is a remainder subject to a condition precedent. If a transfer creates a future interest in only one transferee or in one class of transferees, then any condition attached to the gift is a condition precedent and the remainder is contingent. Thus, in both a conveyance to "A for life, then to B and his heirs if B attains age 21," and a conveyance to "A for life and if B reaches age 21, then to B and his heirs," B has a contingent remainder.

If a transfer creates a future interest in one transferee or class of transferees and then creates, alternately, another future interest in a different individual or class, the first future interest can be either a vested remainder subject to complete divestment or a contingent remainder, depending upon whether it is subject to a condition precedent or a condition subsequent. Often, and as a matter of document construction, whether a condition is a condition precedent or a condition subsequent depends upon where the condition physically appears in the instrument in relationship to the words of purchase which designate who takes the first future interest. Words of condition that precede the words of purchase are conditions precedent; words of condition that follow the words of purchase are conditions subsequent. For example, if O conveys Blackacre to "A for life, then if B reaches age 21, to B and his heirs, but if B does not reach age 21, then to C and his heirs," B has a contingent remainder because the condition of attaining age 21 precedes the words of purchase "B." If O conveys Blackacre to "A for life and then to B and his heirs, but if B does not reach age 21, then to C and his heirs," B has a vested remainder subject to being divested since the words of condition are subsequent to the words of purchase "B." Since interests are classified in the order in which they are set forth in the governing instrument, if the first future interest is a contingent remainder, then the following future interest is also a contingent remainder. If the first future interest is a

58. Blocker v. Blocker, 103 Fla. 285, 137 So. 249 (1931) (where a life tenant conveyed his life estate to A and the owners of a reversionary interest in the estate conveyed their interest to A for the purpose of merging the two estates into a fee simple estate, the court held that contingent remainders may be defeated by destroying the particular estate upon which they depend).

vested remainder subject to being divested, then the second future interest is an executory interest. As rules of construction, these rules work in most, but not all, cases.

The following conveyances further illustrate contingent remainders:

1. O conveys Blackacre to "A for life, and then to B's heirs." At the time of the conveyance B is living. Since living persons have no heirs, the remainder is limited in favor of unascertained persons and, therefore, is contingent. If B survives A, the remainder is destroyed under the common law. Today, the future interest in B's heirs would become possessory when B died. If B died in A's lifetime, the contingent remainder would become a vested remainder in B's heirs.

2. O conveys Blackacre to "A for life, then to A's children." A is childless. The remainder limited in favor of unborn persons is contingent. It would become a vested remainder subject to open upon the birth of A's first child.

3. O conveys Blackacre to "A for life, then to B and his heirs, if B survives A, but if B does not survive A, then to C and his heirs." Using the rules of construction discussed above, it would initially appear that B has a vested remainder subject to complete divestment because all of the words of condition come after the designation of B as the taker of the first of the two future interests. However, since the survivorship condition is stated twice ("if B survive A" and "but if B does not survive A."), it can be argued that O intended to create a different estate in B than would have been created if O had merely transferred to A for life, then to B and his heirs, but if B predeceased A, then to C and his heirs. This other estate in B would be a contingent remainder.[59]

8. SPRINGING EXECUTORY INTEREST

PROBLEM 5.29: O conveys Blackacre to "B for life and one year after B's death, to C and his heirs." (a) What interest does C have? (b) What are the characteristics of this interest?

59. See Fletcher v. Hurdle, 259 Ark. 640, 536 S.W.2d 109 (1976) (where the testator devised land to his granddaughter for life, then to the heirs of her body, if any, and if not then to the testator's son or his heirs and assigns, the testator created a life estate in the granddaughter, alternative contingent remainders to the heirs of her body and his son, and left in himself a divestible reversion); In re Wehr's Trust, 36 Wis.2d 154, 152 N.W.2d 868 (1967) (where a will created a trust of residue of an estate and which provided that the testator's brothers and sisters were to be life income beneficiaries and upon the death of the last surviving sibling, one-half of the remaining trust estate would pass to the testator's aunt, if living, and if dead then to her surviving descendants, and the aunt predeceased the testator survived by four unmarried daughters without issue, the court held the residuary remainder would pass to the testator's heirs under the state's statutes of descent and distribution).

Answers and Analysis

(a) C has a legal springing interest.

(b) Springing and shifting interests are termed executory interests or executory limitations. They are always created in favor of someone other than the conveyor. They are interests which cannot take effect as remainders, either because they are not supported by a preceding particular estate of freehold (life estate or fee tail) or because they take effect in derogation of an existing estate, that is they divest a vested estate.

More particularly, a springing executory interest is a future interest in a transferee that, in order to become possessory, must divest the transferor of a retained interest (called a reversion) after some period of time during which there is no other transferee entitled to a present interest which, at common law, would have been a freehold.

At common law, executory interests were invalid as legal estates until the Statute of Uses (1536). Conveyances operating under that Statute (bargain and sale deeds, feoffment to uses, and covenants to stand seised) could raise springing and shifting uses which were transformed into corresponding legal estates. Today, as in this problem, it is not necessary to first raise a use in order to create executory interests. In the problem, C's interest would fail as a remainder because a remainder had to become possessory not later than the instant B died at which time the seisin would pass to C. Under the facts there is a gap of one year following B's death before C's interest becomes possessory. During that year O's reversion takes effect in possession.

9. SHIFTING EXECUTORY INTEREST

PROBLEM 5.30: O, owner in fee simple, conveys Blackacre to "B and his heirs but if B marries X, then to C and his heirs." (a) What interest does C have? (b) What are the characteristics of such interest?

Answers and Analysis

(a) C has a shifting executory interest.

(b) A shifting executory interest is a future interest in a transferee that in order to become possessory must, upon the occurrence or non-occurrence of an event, divest a present interest

of another transferee or a vested interest of another transferee.[60] In this case, B has a present interest in fee which is divested upon the happening of a condition—B marrying X. In common with the springing executory interest, C's interest was an invalid common law estate prior to the adoption of the Statute of Uses and then was only validated if properly raised from a use. Today, of course, it is not necessary to first raise a use in order to create executory interests.

60. Two exceptions to this rule are that the future interest following the fee simple determinable and the fee simple conditional (both of which, if they terminate, terminate upon the happening of a limitation and not a condition) is an executory interest and not a remainder. These exceptions grew out of the common law prohibition of a fee on a fee.

Chapter 7

CLASSIFICATION OF FUTURE INTERESTS

Table of Sections

SUMMARY

§ 7.1 Types of Future Interests—Generally

1. There are five classes of future interests:

a. Reversions

b. Possibilities of reverter

c. Powers of termination, also called rights of re-entry for condition broken

The above three future interests are always in favor of the grantor.

d. Remainders

e. Executory interests

Remainders and executory interests are always created in favor of a transferee.

2. Reversions, possibilities of reverter, powers of termination and remainders were recognized by the common law as valid estates. Executory interests were recognized only in the courts of equity prior to the enactment of the Statute of Uses in 1536 as respects deeds and the Statute of Wills in 1540 as respects wills.

3. There are two types of estates, broadly speaking, with respect to rights of possession:

a. possessory estates.[1]

b. future estates. These estates are not possessory in the present. Rather the possession, use or enjoyment of the estates is postponed until a future time. The element of futurity refers not to the ownership or existence of a property interest but to the time when the estate may be possessed.

§ 7.2 Reversions

1. When a person owns an estate in land and conveys to another an estate the duration of which is less than that which the transferor owns, there is an undisposed of residue remaining in the transferor. That residue is called a reversion if the transferred estate is either a life estate, a fee tail, or a non-freehold estate.

2. Because the transferor in the conveyance simply does not deal with that undisposed of part of the estate which remains, a reversion is said to be created by operation of law.

3. Because the transferor has disposed of this entire estate in the land, there is no reversion in O in any of the following examples:

a. O, who owns Blackacre in fee simple absolute,[2] conveys Blackacre to B and his heirs,

b. O, who owns a life estate in Blackacre, conveys to B "my life estate in Blackacre,"

c. O, who owns a 50 year lease in Blackacre, assigns or conveys to B "all of my right, title, and interest in Blackacre."

4. All reversions are vested and are of two classes: (a) those which cannot be divested, and (b) those which are subject to being divested.

5. Examples of reversions which cannot be divested:

O conveys Blackacre:

a. "to B and the heirs of his body." O has a reversion in those jurisdictions which recognize a fee tail.

b. "to B for life." O has a reversion.

c. "to B for 99 (or 10) years." O has a reversion.

O, being a life tenant of Blackacre, conveys

1. See ch. 6.

2. Throughout this chapter, O will be deemed to own property in fee simple absolute unless otherwise stated.

a. "to B for 99 years." Historically an estate for years was always less than a life estate, so O has a reversion.

b. "to B for the life of B." Historically a life estate in another is always a lesser quantum estate than the life estate in the tenant, so O has a reversion.

c. "to B for such portion of my life as B continues to support me." O has a reversion.

6. Examples of reversions which are subject to being completely divested:

O, being fee simple owner of Blackacre, conveys it:

a. "to B for life, and if C pays B $100 before B's death, then to C and his heirs." O has a reversion which is subject to complete divestment if and when C pays B $100.

b. "to B for life, and two years after B's death, to C and his heirs." O has a reversion for two years after B's death. This reversion will then be divested by the executory interest in C.

7. An attempt to create a remainder in a conveyance in favor of the heirs of the grantor is ineffective under the doctrine of worthier title in those jurisdictions where the doctrine has not been abolished, and the grantor retains a reversion.

§ 7.3 Possibilities of Reverter

1. A possibility of reverter is the interest left in a transferor who conveys a fee simple determinable[3] It is a future interest that can become possessory only if the limitation attached to the fee simple determinable occurs.

2. A determinable fee is usually limited or described by the words "so long as," "until," "while" or "during."

3. An example illustrating both a determinable fee and possibility of reverter is this: O, who owns Blackacre in fee simple absolute, conveys Blackacre "to B and his heirs so long as Blackacre is used for court house purposes." B has a determinable fee simple and O has a possibility of reverter.

4. A possibility of reverter always is retained in favor of the transferor or the transferor's successors in interest.

5. Today a possibility of reverter generally is alienable, devisable, and descendible. At common law it was considered inalienable when standing alone.

3. It was also the estate retained by a transferor of a fee simple conditional prior to 1285.

6. A possibility of reverter is not subject to the common law Rule against Perpetuities because it was always viewed as vested from the moment it arose, and the Rule applies only to non-vested interests.

7. A possibility of reverter arises by implication of law from the transferor's failure to convey the interest retained, although the intention to retain this interest actually may be expressed in the governing instrument.

8. A possibility of reverter cannot be a reversion because a reversion cannot remain after the conveyance of a fee simple, even a fee simple determinable.

9. A possibility of reverter may be attached to or be an incident to a reversion. For example, O, who owns Blackacre in fee simple absolute, leases Blackacre to B for 10 years or so long as intoxicating liquors are not sold on the premises. O has a reversion with a possibility of reverter as an incident thereto. If intoxicating liquors are sold on the premises the leasehold automatically terminates and the possession reverts to O even before the end of the 10 year term.

10. The fact that the instrument says the property is to be used for one purpose only does not create a possibility of reverter; neither are express words of reverter essential to create a possibility of reverter.

11. The outstanding characteristic of a possibility of reverter is that the estate granted to the grantee automatically comes to an end and automatically reverts to the grantor upon the happening of the event named in the conveyance.

12. Examples of possibilities of reverter standing alone: O conveys Blackacre:

a. "to B and his heirs while the buildings are kept in good order and repair." O has a possibility of reverter but no reversion.

b. "to X Corporation so long as Blackacre is used for school purposes." O has a possibility of reverter but no reversion.

13. Examples of possibilities of reverter attached to or as an incident to a reversion:

a. O conveys Blackacre "to B for life during the time B personally lives on the premises." O has a reversion with possibility of reverter attached as an incident.

b. O leases Blackacre "to B for 20 years or as long as B continues to support me with food and shelter." O has a reversion with a possibility of reverter as an incident.

c. O, who has a 10 year estate in Blackacre, transfers it to B for 5 years or until intoxicating liquors are sold on the premises. O has a reversion with a possibility of reverter as an incident.

§ 7.4 Rights of Re-entry for Condition Broken, or Powers of Termination

(While these two expressions mean the same thing, the expression "power of termination" will be used here because it is modern, shorter and more accurate. As a general rule today, the owner of this future interest does not have a right to "enter" by self-help, but rather must file an action in court to have his right determined and the interest of the other party terminated.)

1. A power of termination is a future interest retained by the transferor who conveys an estate subject to a condition subsequent.

2. A power of termination always runs in favor of the transferor and his heirs. It never runs in favor of a transferee.

3. A power of termination is a power retained by the transferor to terminate a previously transferred estate if and when the condition subsequent attached to the transferred estate occurs.

4. This power never takes effect automatically even if the condition subsequent has been broken by the transferee.

5. Two things must happen for a power of termination to become effective. First, the transferor must elect to exercise the power and second, the transferor must do some affirmative act to terminate the estate in the transferee.

6. The exercise of a power of termination always causes a forfeiture of the estate of the transferee.

7. Until the exercise of the power by the transferor, the estate of the transferee continues even though the condition subsequent has been broken.

8. A power of termination is created by appropriate language in a deed or a will. Typical words creating the condition subsequent are, "provided that," "but if it should happen that," "but if," "subject to the condition that," or "in the event that."

9. A power of termination may stand alone or may be an incident to a reversion. The following examples illustrate this point.

O conveys Blackacre:

a. "to B and his heirs, but if liquor is sold on the premises O reserves the right to enter and terminate the estate." O has a power of termination which stands alone unconnected with a reversion.

b. "to B for life, provided that if liquor is sold on the premises, then I or my heirs have the right to re-enter." O has a reversion attached to a power of termination.

c. "to B for 10 years, but on the express conditions that if liquor is sold on the premises or B does not pay the rent, O may take back the premises." O has a reversion with a power of termination as an incident, which may be exercised in case of breach of either of two conditions.

10. At common law, a power of termination standing alone, unconnected with a reversion, was not alienable or transferable by deed. This inalienability rule is still in effect in some jurisdictions, but others permit a power of termination to be alienated.

11. A power of termination, standing alone, descends from the ancestor to the heir. In most jurisdictions it also is devisable and can be released to the owner of the transferred estate.

12. A power of termination attached to a reversion is alienable, devisable and descendible as an incident to the reversion.

13. In order to effectuate a power of termination at common law, the transferor had to make an actual entry upon the transferred premises. Today, the transferor makes the power effective by bringing a judicial action.

14. A transferor who fails to exercise a power of termination for an unreasonably long time after breach of the condition may be deemed to have waived the power to terminate. Other acts such as acceptance of rent after breach of condition may also constitute a waiver of the power to terminate.

15. The courts will not construe an instrument to create a power of termination unless the language to create the power is unmistakably clear. The courts are hostile to powers of termination because the effect (forfeiture) is harsh. They prefer to construe such language as creating a covenant, the breach of which gives only an action for damages.[4]

16. Equity often will give relief against forfeiture caused by the exercise of a power of termination in instances of hardship, accident or mistake.

17. A power of termination is not subject to the common law Rule against Perpetuities. It is deemed to be vested from its inception.

§ 7.5 Remainders, Vested and Contingent

1. A remainder is a future interest created in a transferee

4. See Ch. 10.

which is capable[5] of becoming possessory immediately upon the termination of the preceding estate, unless it is a fee simple estate.[6] In the creation of a remainder the following elements must be present:

a. the remainder must be limited in favor of a transferee who is someone other than the transferor;

b. the remainder must be created at the same time and in the same instrument as the prior particular estate which supports it;[7]

c. the remainder must be so limited that it can take effect as a present interest in possession immediately upon the termination of the prior particular estate; and

d. the prior particular estate must be an estate of lesser duration than the interest of the transferor at the time of the conveyance so that there can be an interest to pass in remainder.

2. At common law the particular estate which preceded and supported a remainder had to be a freehold estate, that is, either a fee tail or a life estate, but modern usage permits such prior estate to be either (a) a fee tail, (b) a life estate, or (c) an estate for years.

3. The remainder may be either (a) a fee simple, (b) a fee tail, (c) a life estate, or (d) an estate for years.

4. Remainders are classified as:

5. Some remainders will in all events become possessory; others may become possessory but also may not become possessory depending upon whether certain contingencies occur. This fact helps to explain the difference between vested and contingent remainders.

6. The word "estate" refers to freehold estates. Thus a remainder generally can only follow the termination of a life estate. Where the fee tail is recognized, a remainder can follow the termination of the fee tail.

A remainder might also follow on the heels of a term certain, at least if the future interest were not subject to the happening of conditions. For example, if O conveyed to A for ten years, then to B, B has a vested remainder. At common law this same conveyance might have been called a fee simple in B subject to a 10 year term in A. This classification followed from concerns over the concept of seisin and the fact that at common law a term certain was a non-freehold estate. By contrast, a future interest following a term certain that was subject to contingency would more appropriately have been classified at common law as a springing executory interest. Thus, if O conveyed to A for five years, then to B if B is then living, B's estate would be classified as a springing interest and not a fee simple.

7. Once created, the remainder can usually be transferred to another and will still be classified as a remainder. Likewise, if the transferor retains a reversion at the time of the creation of a life estate and later transfers the retained interest to another, the transferee of the transferor's interest is deemed to have a reversion and not a remainder.

There is some authority for the proposition that the present possessory interest and the remainder may be created in different instruments if they are created as part of the same transaction. See 1 Amer. L. Prop. § 4.29 at 547 (A.J. Casner ed. 1952).

a. vested remainders, and

b. contingent remainders.

Vested remainders include those that are:

(1) indefeasibly vested;

(2) vested subject to partial divestment (defeasance) or subject to open; and

(3) vested subject to total divestment (defeasance).

5. A remainder is always created by deed or by will and the remainderman takes as a purchaser. The remainderman might actually be a donee but is nonetheless technically called a purchaser.

6. Vested remainders have always been alienable, devisable, and descendible. At an earlier date in the common law contingent remainders were considered inalienable. Today, all remainders are considered alienable, and unless terminated by the death of the owner, are devisable and descendible.[8]

7. Every remainder that is alienable is subject to the claims of the creditors of the owner thereof.

8. A remainder cannot take effect in derogation of, that is by cutting short, the prior particular estate; it can take effect only when the prior particular estate comes to an end upon the happening of a limitation. The termination of an estate by the happening of a limitation is often expressed by the notion that the estate ended "naturally." This term distinguishes estates that end "unnaturally" by the happening of a condition.

9. At common law a transferor could create as many remainders as desired, subject, of course, to the limitation that the transferor could not dispose of a greater estate than the transferor had.

10. A vested remainder is a remainder which in all events will become possessory when the preceding estate terminates.

11. A contingent remainder has only a conditional possibility of becoming possessory when the particular estate ends and if the condition fails to occur the remainder interest does not become possessory. A remainder limited in favor of an unborn person is contingent. It is subject to the contingency of birth. A remainder limited in favor of an unascertained person is contingent. It is

8. But see, Fletcher v. Hurdle, 259 Ark. 640, 536 S.W.2d 109 (1976) (remainder contingent on an event other than survivorship implied condition on the remainderman being alive when that event occurs; therefore this remainder is not descendible or devisable). A similar rule was applied in Iowa but has recently been abrogated. See Fletcher v. Hurdle, 259 Ark. 640, 536 S.W.2d 109 (1976). See also, Schau v. Cecil, 257 Iowa 1296, 136 N.W.2d 515 (1965), superceded by Davies v. Radford, 433 N.W.2d 704 (Iowa 1988).

subject to the contingency of the person's being ascertained. A remainder limited in favor of a born or ascertained person that is subject to the happening of a *condition precedent* is also contingent upon the condition first occurring.

12. A remainder limited in favor of a class of which there is at least one living member that is not otherwise subject to any conditions precedent is classified as a vested remainder subject to open. This interest is also called a vested remainder subject to partial defeasance. A class is a group of persons collectively described, such as B's children or A's nephews and nieces.

13. A vested remainder subject to complete divestment (or defeasance) is a remainder limited in favor of a born or ascertained person or in a class that is vested subject to open but is subject to the occurrence or nonoccurrence of a *condition subsequent*. Accordingly, the remainder may not become possessory, or if it does, it may not remain possessory indefinitely.

14. At common law if an instrument could be construed to create either a vested or a contingent remainder, the construction that resulted in the creation of a vested remainder was preferred. This preference was intended to make the property more alienable since the holder of a contingent estate could not alienate the property. There is some doubt whether this preference should continue. A preference for early vesting could result in subjecting property to a death tax it might not otherwise have been subjected to and this is likely inconsistent with a grantor's intent.[9] Furthermore, the preference for early vesting is not as essential to assure the alienability of property given that contingent remainders as well as vested remainders generally are alienable.[10]

15. If an instrument can be so construed as to create either a contingent remainder or an executory interest, the construction that results in the creation of a contingent remainder is preferred.

16. A vested remainder is not subject to the Rule against Perpetuities since it is vested from the moment of its creation. A contingent remainder, however, may be subject to the Rule.

17. If a vested remainder is in fee simple, there is no reversion left in the transferor; there is always a reversion left in the transferor in case of a contingent remainder, as long as the remainder remains contingent.

9. See, e.g., In re Estate of Houston, 414 Pa. 579, 201 A.2d 592 (1964).

10. Under the Uniform Probate Code, a remainder in a trust not expressly conditioned on survivorship is impliedly conditioned on survivorship and if the remainderman dies prior to the date of distribution there is a substituted gift in the remaindermen's issue. The remainder does not pass through the deceased remainderman's estate. See Unif. Prob. Code § 2–707. This section reflects a preference for a contingent rather than a vested construction.

18. At common law, a vested remainderman has a right against the prior estate owner for waste; a contingent remainderman, suing for himself alone, has no such right.

19. A vested remainderman has a right to compel the prior estate owner to pay taxes and interest on encumbrances to the extent of the value of rents and profits; the contingent remainderman has no such right.

20. Examples of vested remainders are:

a. *Vested Remainder:*

(1) O to "B for life, then to C and her heirs." C has an indefeasibly vested remainder.

(2) O to "B and the heirs of his body remainder to C and her heirs." C has an indefeasibly vested remainder.

(3) O conveys Blackacre to B for life, then in sequence to C for life, D for life, E for life, F for life, and finally to G and the heirs of his body. B has a life estate in possession. C has a vested remainder for life. D, E and F all have vested remainders for life and G has a vested remainder in fee tail. O has a reversion. It is immaterial that any one of the vested remainders for life may never be enjoyed because a remainderman dies before the estate becomes possessory. The seisin will pass regularly to those named who are living and then revert to the grantor, O, or if O is dead the reversion will descend through O's estate.

b. *Vested Remainder Subject to Open:*

(1) O to "B for life, then to B's children." At the time of the conveyance B has one child, C. C has a vested remainder subject to open to let in later born children. C's remainder will be partially divested as each additional child who is born to B joins the class. If at the time of the conveyance B had no children, the remainder would be contingent upon birth of a child to B.

c. *Vested Remainder Subject to Complete Divestment:*

(1) O to "B for life, then to C and her heirs but if C predeceases B then to D and his heirs." C has a vested remainder subject to complete divestment.[11]

21. Examples of contingent remainders (subject to condition precedent):

a. O to "B for life, then to C and her heirs if C marries before B's death." C has a remainder contingent upon her marriage before B dies. If C marries in B's lifetime, C's

11. In this case C has a shifting executory interest.

contingent remainder ripens into an indefeasibly vested remainder.

b. O conveys to B for life, then to C's heirs. C is living. C's heirs have a contingent remainder because until C dies his heirs are unascertained.

22. At common law a contingent remainder was destroyed if at the termination of the preceding estate it was still possible for the contingency to occur. If a contingent remainder were destroyed, the property reverted to the transferor. Under this rule, every contingent remainder must vest at or before the termination of the preceding particular estate. For example, suppose O conveys to B for life, remainder to C and her heirs if C marries X. If C does not marry X before B dies, then the seisin reverts to O and C's contingent remainder is destroyed forever at common law. If C marries X but after B dies, that will not revive the irretrievably lost contingent remainder. The destructibility rule is abolished in most but not all states.[12]

§ 7.6 Executory Interests

1. An executory interest is a future interest created in favor of a transferee under the Statute of Uses (1536) or Statute of Wills (1540) in the form of a springing or shifting use which was executed into a legal estate and which could not be construed as a remainder.

2. An executory interest could not exist at common law although it was recognized in equity; at law, it could be created only after and by the authority of the Statute of Uses and Statute of Wills.

3. A shifting executory interest is a future interest created in a transferee that in order to become possessory must, upon the occurrence or non-occurrence of an event, divest a present interest of another transferee or a vested interest of another transferee. Since the preceding estate must be an estate that is divested, the preceding estate must terminate upon the happening of a condition rather than a limitation. An executory interest can take effect at the termination of a fee simple determinable or fee simple conditional where that estate is recognized. This is an exception to the general definition of a shifting executory interest because both of

12. E.g., the rule may still apply in Florida. See Blocker v. Blocker, 103 Fla. 285, 137 So. 249 (1931) (where a life tenant conveyed his life estate to A and the owners of a reversionary interest in the estate conveyed their interest to A for the purpose of merging the two estates into a fee simple estate, the court held that contingent remainders may be defeated by destroying the particular estate upon which they depend).

these estates terminate, if at all, upon the happening of a limitation, not a condition.

4. A springing executory interest is a future interest limited in favor of a transferee that in order to become possessory must divest the transferor of a retained interest after some period of time during which there is no other transferee entitled to a present freehold interest.

5. The following elements are essential to the creation of an executory interest:

a. it is always in favor of a transferee, one other than the transferor;

b. it takes effect either (1) before the natural termination of the preceding estate and, therefore, in derogation of that estate or by divesting it, or (2) after the termination of the preceding estate.

6. An executory interest always divests a preceding vested estate either:

a. of the grantor, in which case it is a springing interest, or

b. of another grantee, in which case it is a shifting interest.

7. By the better view all executory interests are alienable, descendible, and devisable.

8. An executory interest is indestructible. Out of the indestructibility of executory interests has evolved the Rule against Perpetuities.

9. If a limitation could take effect as a contingent remainder, it was construed to be a remainder and it could not take effect as an executory interest even to save the interest from destruction.[13] Of course, where, as in most states today, a contingent remainder is not destructible, the concern over whether a future interest is a contingent remainder or an executory interest usually is academic. However, the classification of a future interest as one or the other may arguably affect the validity of the interest under the Rule against Perpetuities.

10. Executory interests include (a) springing and shifting uses which are created by deed and (b) executory devises which are created by will. Executory devises are interests which are identical

13. This is known as the Rule of Purefoy v. Rogers, 2 Wms. Saunders 380, 85 Eng. Rep. 1181 (K.B. 1670). In other words, if a future interest could be construed to be a remainder, it could not be construed to be an executory interest to save the future interest from the rule of destructibility. The Rule of Purefoy v. Rogers effectively means that estates are classified today in the same manner as they were classified prior to the enactment of the Statute of Uses.

to executory springing and shifting uses except that they are created by will instead of by deed. So all executory interests are either of the springing or shifting type.

11. Equitable future interests of the springing and shifting types were enforceable in equity before the Statute of Uses. Examples:

a. O, who owns Blackacre in fee simple absolute, enfeoffed B and his heirs to the use of C and his heirs three years after this feoffment. B had a legal fee simple absolute subject to C's equitable springing use which equity would enforce three years after the feoffment.

b. O, who owns Blackacre in fee simple absolute, enfeoffed B and his heirs to the use of C for life but if C became bankrupt then to D for life. B had a legal fee simple subject to C's equitable life estate. C's equitable life estate was subject to a shifting use which equity would enforce in D's favor if C became bankrupt, thus cutting off C's equitable life estate. After the Statute of Uses these equitable future interests were converted into legal future interests, examples of which appear below.

12. Examples of legal statutory interests after the Statute of Uses:

a. Illustrating a freehold estate made to commence in futuro and divesting the vested estate of the grantor:

(1) by springing use created by deed of bargain and sale—O, who owns Blackacre in fee simple absolute, conveys "to B and his heirs, this deed to take effect three years after its date." This deed leaves the fee simple in O for three years at which time a use springs up in B and the Statute of Uses executes the use in B into a legal estate in fee simple, thus divesting the fee simple which was in O, the grantor. By this deed O held a fee simple estate subject to a springing executory interest in B. B's interest could not be a remainder because it is not preceded by a particular freehold estate in another grantee.

(2) by executory devise by will—T, who owns Blackacre in fee simple absolute, devises "to B and his heirs three years after my death" (no residuary clause in will). T dies. This will leaves the fee simple in T's heir for three years by intestate succession at which time a use springs up in B. Also, under the Statute of Wills, by analogy to uses under the Statute of Uses, the use is executed into a legal estate in fee simple, thus divesting the fee simple which was in T's heir. The heir held a fee simple estate

subject to an executory devise in B. B's interest could not be a remainder because it is not preceded by a particular freehold estate in another devisee.

b. Illustrating freehold estates made to commence in the future and following gaps in successive estates to grantees, each time divesting the vested estate in the grantor:

By springing uses by deed of bargain and sale—O, who owns Blackacre in fee simple absolute, conveys "to B for life and one year after B's death, to C for life and one year after C's death to D and his heirs." This deed leaves a fee simple in O for one year after B's death and again for one year after C's death. These are reversions. After B dies the estate reverts to O for a year and after C's death the estate reverts again to O for a year. When the year after B's death has ended, a use springs up in C for life and the Statute of Uses executes this use into a legal life estate in C. C's life estate divests O's reversion after the one year period. Then when C dies and another year has ended, a use springs up in D in fee simple and the Statute of Uses executes this use into a legal estate and gives D a fee simple in possession, thus again divesting the grantor of the reversion after one year.

The legal effect of O's deed is a life estate in B, a reversion in fee simple for a year in O subject to an executory interest in C, then a life estate in C, a reversion in fee simple for a year in O subject to an executory interest in D, then a fee simple estate in D. Neither C's interest nor D's interest in its creation could be a remainder because neither was preceded by a particular freehold estate created in the same instrument in favor of another grantee at the natural termination of which either interest could take effect.

c. Illustrating a contingent freehold interest as an executory interest following a term of years:

By a springing use by bargain and sale deed—O, who owns Blackacre in fee simple absolute, conveys "to B for 10 years then to the heirs of C in fee simple," C then being a living person. This deed gives B a legal estate for a term of 10 years followed by an executory interest in C's heirs and a reversion in O. If C dies and her heirs are determined before the end of the 10 years, then at the end of the 10 year term a use is raised in C's heirs and by the Statute of Uses this use is executed into a legal fee simple, which divests the reversion in O. If C dies after the 10 year term the same holds true. If and when C dies, the contin-

gency determining the identity of those to take under the executory interest will have happened. The use is then raised in the heirs in fee simple and the Statute of Uses executes the use into a legal estate in favor of such heirs of C and the reversion in O is thereby divested.

In short, O's deed creates a 10 year term in B, a reversion in O subject to an executory interest in C's heirs in fee simple, which executory interest is indestructible. C's heirs' interest could not be a remainder because it is not preceded by a particular estate of freehold.

d. Illustrating a future freehold interest taking effect by cutting short or divesting the vested estate of another grantee:

By shifting use by bargain and sale deed—O, who owns Blackacre in fee simple absolute, conveys "to B and his heirs but if B dies without leaving children surviving him, then to C and his heirs." This deed leaves nothing in the grantor. It gives the fee simple to B, but subject to an executory interest of the shifting type in C. Upon B's death without children surviving him, the use shifts from B to C, and the Statute of Uses executes the use in fee simple in C into a legal fee simple which cuts off and completely divests B's fee simple estate.

C's interest in this case could not be a remainder because (a) a remainder cannot be created to follow a fee simple estate, and (b) a remainder cannot cut short or take effect in derogation of a preceding vested estate.

§ 7.7 Does Classification Matter

Professor Powell has suggested at least nine situations in which the classification of an interest may be important although some of these are only of historical but of no practical interest today.[14] The principal areas in which the classification of a future interest can make a difference are:

1. *Alienability.* At common law, vested remainders were alienable *inter vivos* while contingent remainders were for the most part inalienable. Most American jurisdictions, however, hold that both vested and contingent remainders are alienable. In jurisdictions where contingent remainders are inalienable, however, creditors of the holder of the contingent interest may not be able to reach that interest in satisfaction of their claims.

14. 4R. Powell, Future Interests 13–14 (1961). See also Dukeminier, Contingent Remainders and Executory Interests: A Requiem for the Distinction, 43 Minn.L.Rev. 13 (1958).

2. *Inheritability.* At common law, both vested and contingent remainders were inheritable unless, in the case of a vested remainder subject to divestment or a contingent remainder, the nature of the contingency was such that the interest terminated at the death of the remaindermen. Thus, if O conveyed Blackacre to A for life and upon A's death to B and his heirs if B survived A, B's remainder interest was not inheritable if B predeceased A since B's death terminated that interest. Most American jurisdictions follow this rule, although at least two jurisdictions[15] hold that a contingent remainder expressly conditioned upon an event other than survivorship is impliedly conditioned on the remainderman being alive when that event occurs. In these jurisdictions, therefore, contingent remainders are not inheritable.

3. *Acceleration.* The possession of a vested remainder accelerates if the preceding life estate prematurely terminates, whereas a contingent remainder will ordinarily not accelerate upon the premature termination of the preceding estate. Thus, if O conveys Blackacre to A for life and upon A's death to B and his heirs, and prior to her death A renounces the life estate, B's vested remainder interest will accelerate and become possessory. On the other hand, if B's interest was expressly conditioned upon B surviving A, B's contingent remainder would not accelerate. However, the rule that contingent remainders do not accelerate is often avoided by first construing an instrument to determine whether any purpose would be served in light of the grantor's intent to deny an acceleration or whether anyone would be harmed by permitting an acceleration. If B's interest does not accelerate who is entitled to the possession of Blackacre until A dies?

4. *Destructibility.* At common law, contingent remainders were destructible.[16] Neither vested remainders nor executory interests were destructible.

5. *Rule Against Perpetuities.* The most important difference lies in the application of the Rule against Perpetuities to the future interest. Indefeasibly vested remainders and vested remainders in an individual or in a class which is closed from the moment of its creation or which are subject to complete divestment are not subject to the Rule. On the other hand, vested remainders subject to open, contingent remainders, and executory interests are subject to the Rule.

15. Arkansas and North Carolina. 16. See § 4.7, infra.

§ 7.8 Survivorship Contingencies

1. Survivorship contingencies can be expressed or implied.

2. An express survivorship contingency is one that appears in the governing instrument. Typically, it is evidenced by such word or phrases as "surviving" or "if [name of taker] survives."

3. An implied condition of survivorship is one that does not appear in the governing instrument but is judicially implied, typically as the result of either a rule of construction or by construing language in the governing instrument to that effect. The Uniform Probate Code may also imply survivorship contingencies at least for trusts.

4. Ordinarily a contingent remainder conditioned on an event, other than survivorship, was not also impliedly conditioned on survivorship.

5. Gifts limited in favor of "children," "grandchildren," "brothers and sisters," and "nieces and nephews" without an express survivorship condition are not impliedly conditioned on survivorship.

6. Gifts limited in favor of "heirs," "descendants," or "issue" are impliedly conditioned on survivorship.

PROBLEMS, DISCUSSION AND ANALYSIS

§ 7.2 Reversions

PROBLEM 7.1: Blackacre is located in a jurisdiction which recognizes the fee tail. O conveys Blackacre to "B and the heirs of his body, remainder to C for life." C dies. Then B dies leaving a son, X. X dies without issue and without having made any conveyance of Blackacre. O still lives. Who has the right to possess Blackacre?

Applicable Law: All reversions are vested and one is vested indefeasibly when it is absolutely certain to revert to the grantor and become an estate in possession upon the natural termination of all prior estates.

Answer and Analysis

The answer is O in jurisdictions recognizing the fee tail. O owned a fee simple estate, the largest estate one can have in land. O conveyed a fee tail estate to B, followed by a remainder to C for the life of C. At common law there could be as many remainders following the prior particular estate as the grantor wished. But, if the prior particular estate, (B's fee tail in the problem) and the remainders were all estates of lesser duration than that which the grantor had, the grantor retained a reversion. Here, B's fee tail was of lesser duration than O's fee simple absolute. Likewise, C's life estate did not absorb the remaining part of O's estate. This left O with a reversion which becomes possessory whenever the granted

estates terminate. Reversions are alienable, devisable and descendible. Thus, if O were to predecease the termination of the estates of B and C, O's reversion would become possessory in O's successors in interest.

C had a vested life estate in remainder but because C died before B and his issue, C never was able to possess or enjoy Blackacre. When B died, not having barred his entail, or O's reversion, either by fine, common recovery or deed, X became possessed of a fee tail estate. When X died without bodily issue and without barring either the entail or reversion, then the possession of Blackacre reverted (turned back) to O.[17]

PROBLEM 7.2: T devised Blackacre to "A for 15 years." There was no residuary clause in the will nor any disposition of Blackacre other than A's 15 year term. T died leaving H as her sole heir. When the 15 years following T's death had expired, A refused to surrender possession of Blackacre to H who then sues A in ejectment. May H succeed in ejecting A?

Applicable Law: A reversion vests in the conveyor, if alive, but if the conveyor is dead, then the reversion vests in her successor in interest who is the heir or devisee as to a reversion in fee simple. A reversion may follow a term of years. Where a testator's will contains no residuary clause, all of the testator's undisposed property passes to the testator's heir by intestacy.

Answer and Analysis

Yes. By T's will A was given a term of years in Blackacre. This is, a non-freehold estate. At an earlier date when a fee simple owner conveyed an estate for years, the grantor was said to have a fee simple subject to a term of years rather than a reversion. Today it is considered that the landowner has a reversion even though the term carved out of the fee simple is a non-freehold interest. When T died and the will became effective, the possessory interest in Blackacre for the 15 year term was vested in A. There was also a reversion left in someone. The reversion could not be in T who is dead and since the reversion was not disposed of by T's will, it passed to T's heirs by intestate succession. H, being the sole heir of T, received the reversion by descent. It was at that time a future interest, owned by H but not to be possessed or enjoyed until the expiration of the 15 year term. Following the end of that term the right to the possession of Blackacre reverted to H. H therefore had the right to eject A.[18]

PROBLEM 7.3: O conveyed Blackacre "to B for life, then to B's surviving children and their heirs." At the time of the

17. See Simes, 17–19; Restatement of Property § 154.

18. See Simes, 17–19; Restatement of Property § 154.

conveyance B was childless. O later deeded "all of my right, title and interest in Blackacre, to X and his heirs forever." What interest, if any, has X in Blackacre?

Applicable Law: A reversion is alienable, devisable, and descendible. Therefore, the reversioner can convey the reversion to another even though it is not a present possessory estate. A reversion that is conveyed to another continues to be classified as a reversion.

Answer and Analysis

X has a reversion in Blackacre. When O executed the first deed O created a presently possessory life estate in B and a contingent remainder in B's children who survive B. That interest is contingent on the happening of two conditions. First, because it is limited in favor of unborn persons, it was conditioned on their being born. Second, it is expressly limited to those children born to B who survive B. The quantum of these two estates—the life estate and contingent remainder—is less than the fee simple absolute O had. Therefore, O failed to convey to B and C all that O had. O retains a reversion. This reversion continues to exist in O, or O's successor in interest, until such time, if ever, that B's life estate terminates and it is determined whether B had surviving children. In other words, so long as there is a condition precedent to the vesting of the fee simple remainder in the children of B, there is a reversion. If no children survive B, then O's reversion ripens into a fee simple absolute upon B's death. If, on the other hand, a child or children of B survive B, then at B's death, the contingent remainder in fee simple ripens into a fee simple absolute in B's children and the reversion terminates. In other words, O's reversion is terminated only if B dies survived by children. Until B dies and it is determined whether B has surviving children, O has a reversion that is alienable, devisable, and descendible.

O's deed to X prior to B's death conveyed the reversion to X. This conveyance did not make X a remainderman. Rather, X became the assignee of the reversion with rights which are substantially the same as though he were a remainderman.[19] A similar result would have followed had O died owning the reversion and devising all of his estate to X. In this case, O would have bequeathed the reversion to X and if B later died without surviving children, X's reversion would have ripened into a fee simple absolute.

19. See Restatement of Property §§ 154, 159; Simes, 70; Powell on Real Property, ¶ 281.

§ 7.3 Possibilities of Reverter

PROBLEM 7.4: O conveys Blackacre "to B and his heirs for school purposes, but when said property shall no longer be used for school purposes, it shall revert to O, her heirs and assigns." O later grants to X and her heirs, "all my right, title and interest in Blackacre." Fifty years later, B ceases to use Blackacre for school purposes. X took possession. B sues X in ejectment. May B succeed?

Applicable Law: At common law a possibility of reverter unconnected with a reversion was not alienable by a deed. Today, according to the better view, a possibility of reverter can be transferred by a deed and the grantee takes the same interest as the grantor had in the property.

At common law a possibility of reverter could always be released to the owner of the determinable fee. In the event of a release, the estate of the holder of the fee simple determinable ripened into a fee simple absolute. Also, a possibility of reverter that was incident to the reversion of which it was a part could be alienated.

Answer and Analysis

No. (1) It was once argued that under the Statute Quia Emptores a possibility of reverter could not exist. Today that question is academic for it is universally held that there can not only be determinable fees but also determinable fees tail (where fees tail are recognized), determinable life estates and determinable estates for years, with consequent possibilities of reverter in each case. Had O conveyed merely "to B and his heirs" it is obvious O would have had nothing left. But when O conveyed to B for school purposes and the deed provided in substance that B's estate should last only so long as it was so used, and then it should "revert to O, her heirs and assigns," there was some interest retained in O. That interest is a possibility of reverter. Although this estate may never become possessory, it is a presently existing interest in real property which is alienable, devisable, and descendible.

(2) At common law a possibility of reverter could be released to the owner of the determinable fee to the effect that the holder of the fee simple determinable would have a fee simple absolute. Thus, if O had released O's possibility of reverter, B would have had a fee simple absolute.

(3) Had O granted "to B for life so long as used for school purposes," so that a reversion as well as a possibility of reverter had remained in O, then under the common law O could alienate the reversion; the possibility of reverter also was transferred as an incident to the reversion.

(4) For reasons that are largely obscure, the common law did not permit a possibility of reverter, unconnected with a reversion, to be alienated. Today they generally are alienable. When O executed the deed to X, O transferred the possibility of reverter to X. When Blackacre ceased to be used for school purposes, the determinable fee simple in B immediately and automatically came to an end, the possibility of reverter immediately and automatically took effect, and the fee simple estate immediately and automatically reverted to X. X is now the owner of Blackacre in fee simple absolute and has a good defense in ejectment against the whole world including B.[20]

PROBLEM 7.5: O conveys Blackacre "to B and his heirs so long as a brickyard is operated on the premises, then to X and his heirs." O died intestate leaving H as his sole heir. When the premises ceased to be used for brickyard operations, X took possession of Blackacre. H sues to eject X from the premises. May H recover?

Applicable Law: A possibility of reverter follows a determinable fee, is descendible, and is not subject to the common law Rule against Perpetuities. An executory interest is subject to the Rule against Perpetuities and if it offends the Rule, is void *ab initio*. A possibility of reverter runs in favor of the conveyor or her heirs if she dies intestate and arises by implication of law without any express words describing it as such.

Answer and Analysis

Yes. O conveyed a fee simple determinable to B. This is evidenced by the words "so long as" a brickyard is operated thereon. This estate might last forever but, on the other hand, it might not. If no interest had been created in X, O would clearly have retained a possibility of reverter and it would have become possessory automatically at the moment the premises were no longer used as a brickyard. However, the plain reading of the deed indicates that O intended to give to X any residual interest in Blackacre should the premises not be used as a brickyard. This interest is a shifting executory interest although classifying it in that manner is clearly an exception to the classification structure. It is a classification exception because if it were to become possessory it would be because of the *natural* termination of B's estate upon the happening of a limitation rather than the divesting of B's estate upon the happening of a condition.

20. See Restatement of Property § 159; Simes, 28–30, 73–75; Collette v. Town of Charlotte, 114 Vt. 357, 45 A.2d 203 (1946), which follows the Restatement.

Although O intended to create a shifting executory interest in X, that interest is void under the common law Rule against Perpetuities. That Rule voids interests that might vest[21] more than twenty-one years after the death of some life or lives in being at the creation of the interest. In this case, since B and X have inheritable interests,[22] B's successors in interest might cease to use Blackacre as a brickyard more than twenty-one years after the deaths of both B and X. If that occurred then, but for the Rule, X's interest would become possessory in X's successors in interest beyond the period allowed by the Rule. Since this event might happen, the Rule voids X's interest from the moment it was created.

The effect of voiding the interest of X is to excise it from the instrument with the effect that no interest is created in any transferee to follow the termination of B's estate. Since no interest is created in another, O retains the possibility of reverter which descended to O's heir, H. When Blackacre was no longer used as a brickyard, H was immediately entitled to possession. Therefore H can sue X to recover possession of the property.[23]

It is important to understand the nature of a possibility of reverter. It is bound up with the nature of a determinable estate. Notice in each of the following examples that each of the determinable estates comes to an end of its own limitation. This means the estate ends by the very words which describe its duration.

In some jurisdictions, statutes have been enacted requiring holders of possibility of reverters (as well as rights of entry for condition broken) to file in the local land records office a notice of intent to enforce the interest should it ever become possessory. If the holder of the interest fails to timely file such notice, the interest is barred and is no longer enforceable.[24]

(a) O conveys Blackacre "to B and his heirs until liquor is sold on the premises." When liquor is sold on the premises B's estate automatically ends because it is described to last just that long. There is no forfeiture. When B's estate ends, O's possibility of reverter becomes an estate in possession.

(b) O, being a life tenant, conveys "to B for my life or until liquor is sold on the premises." When liquor is sold on the premises B's determinable life estate per autre vie comes to an end and O's

21. In the case of a shifting executory interest following a fee simple determinable, the interest vests, for purposes of the Rule, when it becomes possessory.

22. There interests are not extinguished by their deaths.

23. See Restatement of Property § 154.

24. See, e.g, Trustees of Schools of Township No. 1 v. Batdorf, 6 Ill.2d 486, 130 N.E.2d 111 (1955) and Presbytery of Southeast Iowa v. Harris, 226 N.W.2d 232 (Iowa 1975)(holding such statutes constitutional). Contra, Board of Education v. Miles, 15 N.Y.2d 364, 259 N.Y.S.2d 129, 207 N.E.2d 181 (1965)(holding statute invalid).

possibility of reverter becomes an estate in possession because B's determinable life estate reverts to O. There is no forfeiture.

(c) O, being tenant for 10 years, conveys "to B for ten years or so long as liquor is not sold on the premises." If liquor is sold on the premises B's estate automatically terminates and the possibility of reverter left in O automatically takes effect and the 10 year term, or what is left thereof, reverts to O. There is no forfeiture.

Note

The difference in result between the last two problems is significant. In Problem 7.5 the grantor did not attempt to retain a possibility of reverter in himself, but instead attempted to create its equivalent (actually an executory interest) in a third party. Since executory interests are subject to the Rule Against Perpetuities, the particular shifting executory interest was void, and the grantor retained a possibility of reverter. In Problem 7.4 the grantor made no effort to create an executory interest in a transferee but instead retained the possibility of reverter and then in a separate instrument transferred it to a third party. The possibility of reverter is transferable and is not subject to the Rule Against Perpetuities. Therefore, the transferee of the possibility of reverter acquired such interest.

§ 7.4 Rights of Re-entry for Condition Broken or Powers of Termination

PROBLEM 7.6: O conveys Blackacre "to B and her heirs provided that if B does not live on the premises personally, then O has the right to eject her from the property." Two years later and while B still lived on Blackacre, O conveyed all of O's right, title and interest in Blackacre to X and his heirs. O then died testate devising all of O's interest in Blackacre to C. O's sole heir is H. Three years after O died, B leased Blackacre to M for a term of 10 years. M went into immediate possession. H advised M that M was not entitled to live on Blackacre, demanded that M surrender possession to H, and notified B that B's estate had been terminated. M acceded to H's request and H went into possession of Blackacre. C now sues H in ejectment and gives notice to B and M that he has terminated B's estate and consequently, M's interest in Blackacre. May C succeed?

Applicable Law: A power of termination can be created only in the transferor. Under the common law the grantor can devise this interest but cannot alienate it when unconnected with a reversion. It will descend from ancestor to heir.

A power of termination never takes effect automatically upon breach of the condition subsequent by the owner of the

possessory estate. Rather the owner of the power of termination must (a) elect to terminate the estate and (b) do some affirmative act towards its termination. All estates and encumbrances created by the owner of the possessory estate exist subject to the exercise of the power of termination, and if the power is exercised such estates and encumbrances are rendered void.

Answer and Analysis

The answer is yes in jurisdictions following the traditional common law. The language in O's conveyance to B was sufficient to create a fee simple on condition subsequent. Not only did O use words of condition, O also expressly reserved the right to terminate B's estate by ejecting her from the premises. It should also be noted that this power of termination was reserved only for O and not in favor of any third party. It seems clear then that B was granted a fee simple subject to a condition subsequent that if B did not live on the premises O could exercise the power of termination and reclaim the property from B.

Prior to any breach of the condition, O conveyed, or attempted to convey, this power of termination to X. This was a power of termination standing alone. There was no reversion left in O who had conveyed a fee simple estate to B, to which the right of re-entry or power of termination could be attached as an incident. At common law, and also today in some jurisdictions, a power of termination unconnected with a reversion was not alienable because to allow the transfer of what was considered a mere possibility would encourage maintenance and champerty.[25] This reason has ceased to have any practical importance in the law, but persists nonetheless. Curiously enough it has been held in some cases that even though the power of termination is not alienable, nevertheless, an attempt by its owner to transfer it results in its annihilation and that thereafter the owner of the possessory estate owns it without being subject further to the condition subsequent. There seems no proper foundation for the imposition of this penalty and the general rule is that the attempted transfer is void but the power of termination still exists and remains with the transferor.

25. The policy behind the rule of non-assignability was to prevent the stirring up of law suits. Black's Law Dictionary (1979), gives the following definitions:

Champerty. A bargain by a stranger with a party to a suit, by which such third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a part of the proceeds or subject sought to be recovered. Schnabel v. Taft Broadcasting Co., Inc., 525 S.W.2d 819, 823 (Mo.App.1975). Maintenance consists in maintaining, supporting, or promoting the litigation of another.

Another explanation of the non-alienable rule was simply the lack of a remedy for the assignee under medieval law.

Applying this rule to the problem, O's conveyance to X had no effect and O still owned the power of termination. When O died O devised O's interest in Blackacre to C. Generally, it is held that a power of termination is an interest in real property which descends from the ancestor to the heir. In this problem had O died intestate this power of termination would have passed by intestate succession to his heir, H. It is also generally true that an interest which will descend is likewise subject to testamentary disposition and can be devised. This is true for a power of termination. Thus, when O devised his interest in Blackacre to C this power of termination passed to C. H has no interest in Blackacre and therefore had no right to cause the interest of M or B to terminate.

The fact that C owns the power of termination and that the owner of the possessory estate, B, has breached the condition subsequent, however, does not automatically revest the estate in the owner of the power of termination. At common law the owner of the power of termination would have to (a) elect to terminate the estate and (b) make an entry onto the premises. Today the holder of the power has to (a) elect to terminate the estate and (b) do some affirmative act towards its termination. Bringing an action in ejectment or sometimes merely giving notice have constituted such affirmative act. In this case C's bringing ejectment against H and giving notice to B and M should be sufficient affirmative acts to terminate the possessory estate and revest it in C, the owner of the power of termination. C may therefore eject H from Blackacre.

Of course, in jurisdictions where the power of termination is alienable, devisable, and descendible (which today is most jurisdictions), O's conveyance to X would be valid and X, not C, would own the power of termination. In this case, C's action against H, the party in possession, would fail because as between C and H, H has the better title based on his prior possession.[26] On the other hand, if X were to sue H in ejectment, X would prevail.

In some conveyances under which in form the grantee appears to take a fee simple on condition subsequent the grantor fails to expressly retain a power of termination. For example, suppose O transfers property to B and his heirs provided that liquor is not sold on the premises. In this conveyance O has not used the traditional language ("so long as," "while" or "during") used to create a fee simple determinable. Likewise, O has not retained a power of termination. If a court were called upon to determine the interests of O and B in the property, the court could either imply a power of termination in O or conclude that, absent the express retention of such a power, B has a fee simple subject only to

26. Tapscott v. Cobbs, 52 Va. (11 Grat.) 172 (1854).

precatory but not forfeiture language. The preference appears to be for the latter and thus B has a fee simple absolute.

One more point requires consideration. What rights did M acquire under the lease from B? When the owner of an estate subject to a condition subsequent creates estates or encumbrances on the land, all persons who take such estates or encumbrances are bound by the condition. If the power of termination is exercised, the estates and encumbrances are rendered wholly nugatory as to the owner of the power of termination, who now owns the estate as though he had never parted with it *ab initio*. Under this doctrine, when C or X, as the case may be, exercised the power of termination, he not only cut off B's estate but also effectively terminated any interest which M had in the premises.[27]

PROBLEM 7.7: O, being the life tenant of Blackacre, leases it "to B for 10 years upon the express condition that if B sells liquor on the premises or makes an assignment of the lease without O's written consent, then in either event, O, or O's successors in interest, have the right to enter the premises and terminate this lease." The rent was $100 per month, payable in advance. O then assigned all of O's right, title and interest in Blackacre to X. B then began selling liquor on the premises.

On the month following the first sales of liquor on Blackacre, B sent the monthly rent check to X for the sum of $125 instead of $100 and told X the additional $25 was because B was selling liquor on the premises. This procedure continued for a year at which time, without any consent from X, B assigned the lease to M. Thereupon, X promptly entered the premises, evicted M and notified both M and B that the lease had been terminated. B and M join in action against X to regain possession of Blackacre. May they succeed?

Applicable Law: A power of termination connected with a reversion is alienable as an incident to the reversion. When an instrument creates an estate subject to more than one condition subsequent, one may be waived after its breach, without affecting the other. The question of waiver is usually a fact question but if it is so clear that reasonable persons cannot differ, it is a question of law. Re-entry on the premises is an effective exercise of the power of termination.

Answer and Analysis

No. The provisions in O's lease to B are typical of those in many leases. When O provided that the lease was "upon the

27. See Restatement of Property § 154, 155, 159-161, 165 comment a, Illustration 5; Simes, 30-32,73, 76.

express condition" and that the lessor and his successors in interest "have the right to enter the premises and terminate this lease," it seems a condition subsequent was created with a power of termination and not mere covenants that the lessee would not do the things forbidden. A power of termination, therefore, was reserved in favor of O. This power did not stand alone. It was attached to or an incident of the reversion which O reserved because the 10 year lease was a lesser estate than A's life estate.

At early common law a power of termination, even when attached to a reversion, was not alienable. However, by the statute of 32 Henry VIII, c. 34 (1540), which is considered part of the American common law, the power of termination when incident to a reversion was made alienable. Thus, when O assigned to X, both the reversion and power of termination incident thereto, passed to the assignee, X. When B later breached the condition concerning the sale of liquor on the leased premises, X could have terminated the lease. Since X failed to do so, the lease continued. X, however, was not merely passive concerning the continuation of the lease. X accepted additional rent from the lessee who had breached the condition. The acceptance of the additional rent for the breach of the very condition in the lease constituted a waiver of such breach as a matter of law. A waiver is the intentional giving up of a known right. Whether a right has been waived is usually a question of fact, but reasonable persons would not differ on there being a waiver in this case; therefore it is a question of law. X could not exercise the power of termination for the breach of the condition not to sell liquor on the premises.

However, the condition against assignment of the lease is wholly separate and independent from the one concerning liquor and the waiver of the latter did not affect the continued efficacy of the former. When B made an assignment of the lease without the written consent of X, there was a breach of that condition subsequent. This gave X the right to exercise the power of termination. Since X elected to exercise the power, B's leasehold and all rights of the assignee thereunder were effectively terminated. Neither B nor B's assignee, M, has a right against X.

POSSIBILITIES OF REVERTER COMPARED WITH AND DISTINGUISHED FROM POWERS OF TERMINATION

SIMILARITIES

POSSIBILITY OF REVERTER	POWER OF TERMINATION
1. it is a future contingent interest in real property	1. it is a future contingent interest in real property

SIMILARITIES

	POSSIBILITY OF REVERTER	POWER OF TERMINATION
2.	it is always in favor of the transferor only	it is always in favor of the transferor only
3.	it is not an estate in land	it is not an estate in land
4.	it is descendible, will pass from the transferor as ancestor to his heir, and is devisable	it is descendible, will pass from the transferor as ancestor to his heir, and in most states is devisable
5.	it can be released by the transferor to the owner of the determinable estate	it can be released by the transferor to the owner of the determinable estate
6.	when attached to a reversion, it is alienable, descendible and devisable	when attached to a reversion, it is alienable, descendible and devisable
7.	at common law but not today a possibility of reverter, standing alone and unconnected with a reversion, was not alienable	at common law a power of termination, standing alone and unconnected with a reversion, was not alienable (Note—this is true today in some but not all jurisdictions—see under dissimilarities)
8.	it is not subject to the common law Rule against Perpetuities	it is not subject to the common law Rule against Perpetuities
9.	the owner has no right against the owner of the granted estate for waste unless it is reasonably probable that the interest will become possessory and the threatened injury is wanton and unconscionable	the owner has no right against the owner of the granted estate for waste unless it is reasonably probable that the interest will become possessory and the threatened injury is wanton and unconscionable

DISSIMILARITIES

	POSSIBILITY OF REVERTER	POWER OF TERMINATION
1.	It always takes effect automatically upon the happening of the event upon which it is limited **This is its chief characteristic**	It never takes effect automatically upon breach of the condition subsequent upon which it is limited **This is its chief characteristic**
2.	no affirmative act on the part of its owner is necessary to make it effective	to make it effective its owner must (a) elect to exercise the power and (b) must do some affirmative act to terminate the estate

DISSIMILARITIES	
POSSIBILITY OF REVERTER	**POWER OF TERMINATION**
3. it is created by implication of law when a deed or will creates a determinable estate	3. it is created only by clear and express language in a deed or will providing for a condition subsequent to the estate conveyed
4. typical words limiting the determinable estate are "until", "while", "so long as", "during"	4. typical words limiting the condition subsequent are, "but if", "provided that", "upon the express condition that", "but if it should happen that"
5. it is alienable when standing alone unconnected with a reversion	5. it is *not* alienable in many states when standing alone unconnected with a reversion
6. its operation does not cause a forfeiture of any estate	6. its operation causes forfeiture of an estate
7. it cannot be waived after the event	7. it can be waived after breach of the condition

§ 7.5 *Remainders, Vested and Contingent*

PROBLEM 7.8: O conveys Blackacre "to B for life, and upon B's death, to C and her heirs." What interest, if any, do O, B and C have in Blackacre?

Applicable Law: Every remainder (a) must be in favor of a transferee, (b) must be created at the same time and in the same instrument as the prior particular estate of freehold which supports it, (c) must be so limited that it is capable of taking effect as an estate in possession immediately upon the termination of the prior particular estate of freehold, and (d) the prior particular estate of freehold must be a lesser estate than that of the conveyor at the time of the conveyance; thus the prior particular estate must be either a life estate or a fee tail. It cannot be a fee simple.

A remainder is indefeasibly vested when it will become possessory when the preceding particular estate of freehold terminates. It is subject to no condition.

Answer and Analysis

O has no interest in Blackacre; B has a life estate and C has an indefeasibly vested remainder in fee simple, or simply a vested remainder.

(a) Since O, who owned a fee simple estate in Blackacre, conveyed away that fee simple estate by a combination of the life estate in B and the fee simple in remainder in C, there is no reversion in O.

(b) If O's conveyance to B were at common law, it would involve the ceremony of feoffment, whereby O went onto Blackacre and made livery of seisin to B for B's life. O would walk off the premises and leave B in possession, seised of a life estate. If O's conveyance were a bargain and sale deed under the Statute of Uses (1536)[28] and recited a consideration, then mere delivery of the deed to B would vest a life estate in B. The consideration in the deed would raise a use in B and the statute would transfer the legal title. In either event the conveyance would give B a valid legal life estate.

At common law every remainder had to be supported by a preceding particular estate of freehold. This particular estate could be either (1) a life estate or (2) a fee tail estate; but it could not be a fee simple estate because if the prior tenant had a fee simple estate there was nothing left to pass in remainder to the remainderman. Thus, B's life estate is sufficient to support a remainder.

(c) A future interest can qualify as a remainder if it meets the following requirements: (1) it must be in favor of a transferee who is someone other than the conveyor; (2) it must be created at the same time and in the same instrument as the particular estate of freehold which precedes and supports it; (3) it must be so limited (described) that it can take effect as a present interest in possession at (neither before nor after) the natural termination[29] of the particular estate of freehold which precedes and supports it; and (4) the prior particular estate of freehold must be an estate of lesser duration than the interest of the conveyor at the time of the conveyance so that there can be an interest to pass in remainder.

Applying these principles to C's interest clearly results in C's interest being classified as a remainder. (1) C is a transferee; (2) C's interest is created at the same time and in the same instrument as the life estate is created in B; (3) C's interest is so limited or described that it is to take effect at once or immediately upon the termination of B's life estate, that is upon B's death and, therefore, is an interest capable of becoming possessory immediately upon the termination of B's life estate; (4) The prior particular estate of freehold, B's life estate, is a lesser estate than the estate held by the conveyor at the time of the conveyance, O's fee simple. Clearly C's interest possesses all the elements required of a common law remainder. Thus, C has a remainder.

28. The Statute of Uses was enacted in 1535 and became effective in 1536.

29. Estates terminate naturally when they terminate as the result of a limitation, not a condition.

Of what class is C's remainder? It is an indefeasibly vested remainder because it is presently owned by C and is subject to no condition to becoming an estate in possession when B's life estate terminates. The termination of B's life estate is not a condition attached to C's gift. C's remainder is indefeasibly vested because nothing can defeat it.[30] If C survives B, C will take possession of Blackacre. If C conveys the remainder, then C's grantee will take possession at B's death. If C devises the remainder prior to B's death, then C's devisee take possession at B's death. If C dies intestate before B dies, then C's heir will take the possession. Thus, C's interest will in all events become possessory when B's life estate terminates in either C or C's successor in interest.[31]

PROBLEM 7.9: O conveys Blackacre "to B for life, and upon B's death, to the children of B and their heirs." At the time of this conveyance B had no child but two years later B had a child C, and thereafter had in succession children D, E, and F. After C attained adulthood, his creditor, X, levied upon and sold C's interest in Blackacre, to Y. What interest, if any, did Y take by the execution sale?

Applicable Law: A remainder limited in favor of a group of persons collectively described, typically by their relationship to a common ancestor, is subject to partial defeasance if the class is open and the gift is subject to no conditions. If the gift to the class is also subject to conditions, it either can be a contingent remainder or a remainder subject to complete divestment.

A remainder subject to partial defeasance only is called either a vested remainder subject to open or a vested remainder subject to partial divestment. With respect to this type of remainder, as the number of class members increases, the interest of each decreases proportionately and to that extent is defeated. Every remainder is alienable by its owner and is subject to the claims of creditors.

Answer and Analysis

Y took the interest which C had in Blackacre which is a variable in size, but which is at present an undivided one fourth interest in the remainder but which is subject to open if more children are born to B. It is presently at least equal to one fourth because at the time Y asserts an interest, B has four children.[32]

30. While at first blush it might be thought that the phrase "upon B's death" is a condition, in fact that is merely a linguistic restatement of the limitation that causes B's estate to end, namely, B's death. Thus, it is merely a redundancy, not a condition.

31. See Simes 19–25; Restatement of Property § 157.

32. The interest would be at least one fourth even if one of the children born to B had died since the interest of B's children is not subject to conditions

O conveyed a life estate to B followed by a contingent remainder in B's children. B's children have a remainder interest for these reasons: It is an interest that runs in favor of someone other than O. It is created in the same instrument and at the same time as B's life estate. It is to take effect, if at all, when B's life estate naturally ends. Finally, B's life estate is a lesser estate than O's fee simple when he made the conveyance. But there is at the time of the conveyance a condition precedent to the vesting of such remainder because B had no child.[33] Since the remainder to B's children was subject to the contingency of birth, it is a contingent remainder. There was therefore a reversion in O which could become possessory if B died without ever having had children.

When C was born to B, however, the contingent remainder in B's children was transformed (or changed colors). It became a vested remainder in C and any other children that might be born to B. C's birth also resulted in the termination of O's reversion. While C was the only living person entitled to share in this remainder at the time C was born,[34] the remainder interest is subject to open in favor of later born children born to B. C's remainder is also described as one subject to partial defeasance or divestment. When D was born, then C and D were owners of the remainder in fee simple, each owning an undivided one half interest therein. When E was born to B, then the estate opened up still further and C, D and E each owned an undivided one third in the remainder in fee simple. When F was born to B, there was still further division and C, D, E and F each owned an undivided one fourth interest in the remainder in Blackacre. In other words, during B's lifetime there was always the possibility that the interest of B's living children could be diminished or partially divested by the birth of more children.

But for how long was the remainder interest open to admit more members, or, to state it in more technically, when would a class gift close? A class gift is closed when no new members can join the class.

A class gift closes either physiologically when that person who can produce the members of the class dies, or, under the rule of convenience, when any member of the class is entitled to demand possession of his or her share. A person is entitled to make that demand when there is no outstanding possessory estate and with

and, therefore, is devisable and descendible.

33. The language "at the life tenant's death" or "upon the life tenant's death" is not sufficient to create a condition precedent. These phrases refer merely to the time when the future estates become possessory. Accord, Kost v. Foster, 406 Ill. 565, 94 N.E.2d 302 (1950).

34. C's interest was owned in severalty. This means that at the time of C's birth, C was the sole embodiment of the remaindermen, "B's children."

respect to the person who can make the demand there are no outstanding conditions precedent.[35] In this problem, of course, the class closes physiologically and under the rule of convenience at the same time, namely B's death. However, that is not always the case. For example, suppose O conveys Blackacre to B for life, then to C's children. If C dies during B's lifetime, the class closes at C's death physiologically. If C survives B but a child of C also survives B, then presumptively the class closes at B's death under the rule of convenience.

If B dies survived by C but C had not yet had children, the class does not close at B's death.[36] The class would clearly close physiologically no later than C's death and vest in C's then living children, if any. But, suppose that following B's death C has a child. Would the birth of C's child in C's lifetime close the class? According to the Restatement the child's birth would not close the class and the class would remain open until C's death.[37]

The rule of convenience is presumptive, so it gives way to a contrary intent.[38]

Unless the grantor or testator otherwise provides, in most states today these class closing rules apply as well with respect to adopted children. Thus no distinction is drawn between biological and adopted children.[39]

Each remainderman who is entitled to share in a class gift has an interest that is alienable. If the remainder is vested subject to open it is also devisable and descendible. Many remainders limited in favor of a class, however, are subject to a contingency of survivorship, expressly or impliedly. These remainders are not devisable or descendible if the survivorship contingency causes the deceased remainderman's interest to terminate at his or her death. For example, if O conveys Blackacre to B for life, then to C's surviving children, the interest of a child of C who predeceases B fails at his death and, therefore, is not devisable or descendible.[40]

35. See also Restatement (Second) of Property, § 26.2

36. Of course, if the common-law Rule of Destructibility applied, then in this case the remainder would be destroyed at B's death because there was then no remaindermen capable of taking possession of the property.

37. Restatement (Second) Property § 26.2((2).

38. See In re Earle's Estate, 369 Pa. 52, 85 A.2d 90 (1951).

39. cf., Restatement (Second) Property § 25.4.

40. The time when a survivorship contingency may take effect can be ambiguous. Thus, if T devises property to A for life, then to T's surviving children, and T is survived by two children, B and C, their interests are vested if "surviving" means "surviving T" but contingent if "surviving" means "surviving A." See, e.g., Browning v. Sacrison, 267 Or. 645, 518 P.2d 656 (1974) (survivorship contingency related to death of life tenant, not testator, and rejecting argument that the common law preference for the early vesting of estates required a contrary holding).

Interests that are alienable can be reached by creditors of the remainderman. Thus, in this problem C's creditor, X, had the right to levy upon C's remainder interest in Blackacre. Upon the execution sale by X the purchaser, Y, took what the debtor, C, had for the rights of the creditor are derivative. Y bought C's one fourth interest in the vested remainder but this purchased fourth interest in the hands of Y would be subject to open in favor of any child or children thereafter born to B.[41]

REVERSIONS COMPARED WITH AND DISTINGUISHED FROM VESTED REMAINDERS AT COMMON LAW

SIMILARITIES

REVERSION	VESTED REMAINDER
1. is future interest	1. is future interest
2. is preceded by an estate in possession	2. is preceded by an estate in possession
3. is not destructible	3. is not destructible
4. is transferable	4. is transferable
5. is subject to claims of creditors	5. is subject to claims of creditors
6. is vested	6. is vested
7. sometimes subject to defeasance	7. sometimes subject to defeasance
8. is an estate	8. is an estate
9. has right to possess when prior estate ends	9. has right to possess when prior estate ends
10. not subject to Rule against Perpetuities	10. not subject to Rule against Perpetuities
11. has right against prior estate owner for waste	11. has right against prior estate owner for waste
12. may force prior estate owner to pay taxes and interest on encumbrances	12. may force prior estate owner to pay taxes and interest on encumbrances
13. does not take effect in derogation of prior estate	13. does not take effect in derogation of prior estate

DISSIMILARITIES

1. is created by operation of law	1. is created by act of the parties—by deed or will
2. is always in favor of transferor	2. is always in favor of transferee, one other than transferor

41. At common law contingent remainders were not considered alienable but today, with recording statutes under which anyone can look at the records and find out what interest anyone has in land, all remainders are alienable. See Restatement of Property § 157, comment 1, illustration 2, §§ 162, 167; Simes, 19–25.

REVERSION	VESTED REMAINDER
3. there was a tenurial relationship between reversioner and holder of prior estate	3. there was no tenurial relationship between the remainderman and the holder of the prior estate

PROBLEM 7.10: O conveys Blackacre to B for life, then to C and his heirs if C survives B but if C does not survive B, then to D and his heirs. What interests are created in B, C and D?

Applicable Law: Indefeasibly vested remainders are subject to no condition; vested remainders subject to complete divestment are subject to conditions subsequent; contingent remainders are subject to conditions precedent. A vested remainder subject to divestment is one limited in favor of an ascertained person who has the right to immediate possession when the prior estate terminates, or a class of persons of which there is at least one living member even though it may be divested by the happening or non-happening of a condition subsequent. If the language of an instrument can be construed as creating either a vested or a contingent remainder, the preference at common law was for a vested remainder. On the other hand, under the rule of construction mandating that courts give effect to all the words used in a conveyance, additional words in a conveyance may suggest that the grantor intended to create an interest subject to a condition precedent rather than a condition subsequent.

Answer and Analysis

B clearly has a life estate as B's interest is expressly limited to his life. However, there is some dispute regarding the proper classification of the interests of C and D.

A contingent remainder is a remainder that is subject to a condition precedent; a vested remainder subject to divestment is a remainder subject to a condition subsequent. Thus, to distinguish the two remainders, it is imperative to know whether the words of condition are precedent or subsequent. In some dispositions, this will be immediately clear. Thus, if O conveys to B for life, and if C survives B, then to C and his heirs, C's interest in clearly conditioned on surviving B and is a contingent remainder. Likewise if O conveys to B for life and then to C and his heirs if C survives B, C's interest is also classified as a contingent remainder because it is subject to a condition precedent. While the placement of the phrase "if C survives B" differs in the two conveyances, where, as here, there is only one transferee—namely C—of a future interest, words of condition wherever they appear in the instrument are construed as conditions precedent.

Where, as in the problem, there are at least two transferees of a future interest—namely C and D[42]—the placement of the words of condition can effect the classification of the transferees' interests. To begin the analysis, compare these two conveyances:

(a). O conveys Blackacre to B for life, then, if C survives B, to C and his heirs, but if C predeceases B, then to D and his heirs.

(b). O conveys Blackacre to B for life, then to C and his heirs but if C predeceases B, then to D and his heirs.

While both these conveyances express O's intent that at B's death Blackacre should pass to C and only to D if C is dead, under standard rules of construction, the interests of C and D are classified quite differently. Interest are classified in the order in which they are set forth in the governing instrument. Thus, first B's interest is classified, then C's interest is classified, then D's interest is classified. B clearly has a life estate. C's is the next interest to be classified. Whether C has a contingent remainder or a vested remainder subject to being divested depends on whether C's interest is subject to a condition precedent or a condition subsequent. That depends on where the words of condition appear in the instrument. If they appear *before* the designation of C as a purchaser (as in (a)) they are words of condition precedent and C has a condition precedent. If, on the other hand, they appear *after* the designation of C as a purchaser (as in (b)), they are words of condition subsequent. Thus in (a), C has a contingent remainder, in (b), C has a vested remainder subject to being divested. Remember: these are merely rules of construction so courts could find that O had a different intent and classify the interests in a different manner.

Once it is determined what interest C has, it is time to classify D's interest. If C has a contingent remainder, then so does D. It meets the definition of a remainder, and it cannot be an executory interest as it does not defeat the vested interest of another transferee. On the other hand, if C has a vested remainder subject to being divested, D has a shifting executory interest because for D's interest to become possessory it must divest the vested interest of another transferee.[43]

In Problem 7.10 O conveys Blackacre B for life, then to C and his heirs if C survives B but if C does not survive B, then to D and

42. Multiple tranferees could also be classes such as C's children and D's children, or C and D's children.

43. This rule assumes the quantum of the estates of C and D are the same. For example, if O conveys to B for life, then to B's first born child and the heirs of his body, then to D and his heirs, and B is childless, B's first born child has a contingent remainder in tail, and D has a vested remainder in fee. While ordinarily a vested remainder cannot follow a contingent remainder, it can here since the quantum of B's first born child's estate is "in tail" whereas the quantum of D's estate is a "fee simple."

his heirs. Thus all the conditional words ("if C survives B but if C does not survive B") come after the designation of C. Thus, at first blush, it would seem that C has a vested remainderman. But if C's interest were so classified, it would do violence to another rule of construction. This rule is that in construing an instrument courts should give effect to all the words used. If C were to have a vested remainder subject to being divested, then C would have the same estate C would have had if O had conveyed to B for life, then to C and his heirs but if C does not survive B, then to D and his heirs. No effect would be given to the phrase "if C survives B" by that construction. If some effect is to be given that phrase, then the only choice would be to treat the double statement of the condition as evidencing an intent by O to subject C's interest to a condition precedent in which case C and D would have alternative contingent remainders. Of course, a court might also conclude that the phrase "if C survives B" is merely a redundancy and should be ignored leaving C with a vested remainder subject to being divested. If C has a vested remainder, then D would have a shifting executory interest.

The historic preference for a vested rather than a contingent construction may have made sense in the context of legal rather than equitable estate and concerns for assuring the marketability of property. On the other hand, that preference is not so clearly dictated when a future interest is created in a trust and the trustee has the power to alienate the trust property. Furthermore, in our tax-oriented society, the preference for the vested construction may result in the assessment of additional taxes that would be inconsistent with a grantor's intent and could be avoided with the use of a contingent construction.

PROBLEM 7.11: O conveys Blackacre "to B for life, and then to the heirs of C." At the time of the conveyance, C is living. B then died survived by O and C. O then took possession of Blackacre. C later died leaving H as her sole heir. H sues O to eject him from Blackacre. May H succeed?

Applicable Law: At common law if the condition precedent to a contingent remainder did not happen at or before the termination of the prior particular estate, then the contingent remainder could not vest at or before the termination of the particular estate and the contingent remainder was destroyed forever. The condition precedent to a contingent remainder was either the happening of an event or the ascertainment of the remainderman either because he was yet unborn or for some other reason such as the ancestor still being alive. The destructibility of contingent remainders took place in three ways: (1) by its failure to vest at or before the termination of

the preceding particular estate, (2) by merger, or (3) by forfeiture.

The Rule of Destructibility probably is the law in only one state. In the others, by statute or judicial decision, the contingent remainder takes effect when the condition precedent happens, even if it happens after the termination of the preceding particular estate. Prior to the determination of whether the future interest will become possessory, the grantor has a fee simple subject to a springing executory interest.

Answer and Analysis

At common law H would not be entitled to eject O. Today, however, in most jurisdictions, H would prevail.

By the terms of the conveyance O granted B a life estate. C acquired no interest under the conveyance. Rather, C is merely the ancestor through and at whose death the remaindermen would be determined. The heirs of C were given a contingent remainder, the contingency being their ascertainment at the death of C.[44] That was the condition precedent which made the remainder contingent. As long as there is a contingent remainder, there is a reversion in the grantor. What was the effect of B's death? B left no inheritable estate to pass either to his heirs or devisees. But B was seised, and at his death the seisin had to pass to someone. That someone had to be either the grantor, O, or the remaindermen—the heirs of C. But there can be no heir of a living person and C was still alive. Therefore, C's heirs were not yet determined as of B's death and seisin could not go forward to the unascertained and unascertainable remaindermen. Therefore, since seisin could not be in abeyance, the only person to whom it could pass was O. Once that happened, there was no recognized way at common law by which such seisin could be taken from O and given to the heirs of C, once they were determined, except by a new conveyance. Accordingly, the contingent remainder limited in favor of C's heirs was forever destroyed. This is the doctrine known as the destructibility of contingent remainders. It was based on the principle that every remainder must vest at or before the termination of the prior particular estate or it was forever destroyed. In this problem, when B died before C, at that instant the remaindermen being unascertainable, the seisin reverted to O who had the right to immediate and continued possession of Blackacre, and the contingent remainder was completely and forever destroyed.

44. Since living persons have no heirs, C's heirs can only be ascertained at his death.

What would have happened had C predeceased B? This event would have had three distinct legal effects: (1) Upon C's death C's heirs would have been immediately ascertained as H. Thus, the contingency attached to the gift to the heirs of C—being ascertained—would have occurred prior to B's death. This would have transformed the contingent remainder into an indefeasibly vested remainder in H. (2) The instant the remainder became vested in H, the reversion in O would have been extinguished and O would no longer have any interest in Blackacre. (3) Then, upon the death of B, H's vested remainder (the future interest, presently owned but the enjoyment of which is postponed) would have become an estate in possession and presently enjoyed by H. Had that occurred, then H could have ejected O or anyone else from Blackacre.[45]

Generally, the condition precedent which makes a remainder contingent is either, (1) the happening of an event or (2) the ascertainment of the remainderman because he is yet unborn or because some event must happen. An example of (1) follows: O to "B for life, then to C, if C pays O $100." C has a contingent remainder. If C pays O $100 before B dies, then C's contingent remainder becomes a vested remainder. If C does not make that payment before B's death, then C's contingent remainder is destroyed. An example of (2) follows: O "to B for life, then to the children of C, who is childless." C's children have a contingent remainder. If C has a child before B dies, that child has a vested remainder subject to open. If C has no child before B dies, then, at common law the contingent remainder is destroyed.

At common law there were three ways by which a contingent remainder could be destroyed: (1) by the condition precedent failing to happen as here before the life tenant's death, (2) by merger, and (3) by forfeiture.

Merger occurred when the life estate and next vested estate came into the same hands. Merger can occur without destroying contingent remainders. For example, suppose O conveys Blackacre to B for life, then to C and his heirs. Here, C has a vested remainder. Next year C conveys her remainder to B so that B has both the life estate and the next vested estate (i.e, what was once C's but is now B's remainder) They merge to give B a fee simple absolute.

Merger resulting in the destruction of a contingent remainder can be illustrated as follows: Suppose O conveys Blackacre to B for life, then to B's eldest male heir. B has a son born, X. Now, in order there are: (i) a life estate in B, (ii) a contingent remainder in B's male heir (no one can be an heir of B until B's death) and (iii) a reversion in O. Note that the contingent remainder intervenes

45. See Simes 37 et seq.

between the life estate and the reversion. Now, either O grants this reversion to B or B transfers his life estate to O. In either event there is a merger of the life estate in the reversion—the next vested estate—and the intervening contingent remainder is destroyed. Thereafter, upon B's death, B's male heir has no rights. A similar result would follow if O conveyed O's reversion and B conveyed the life estate to the same person. In this case, the life estate and the next vested estate would merge in their transferee and destroy the contingent remainder.[46]

A forfeiture also could result in the destruction of a contingent remainder. For example, suppose in the preceding example that B, the life tenant, makes a tortious feoffment to M and his heirs in fee simple.[47] B dies leaving X his male heir. B's tortious feoffment destroyed the contingent remainder and X has no rights.[48]

The rule of destructibility applies only to legal estates. It did not apply to equitable estates because the trustee was seised of legal title. Therefore, no gap in seisin could occur if no transferee of a future interest was entitled to possession immediately upon the termination of the life estate. Seisin was always in the trustee. Thus contingent remainders in trust are not subject to the Rule of Destructibility.

The Rule of Destructibility appears to be the law only in Florida.[49] Most recently, the Supreme Court of New Mexico held that the rule was not part of New Mexico's common law.[50] In

46. There is an important exception to the rule that merger destroyed a contingent remainder. Under this exception, if a life estate and the *next vested estate* were created simultaneously with a contingent remainder, the life estate and the next vested estate did not merge to destroy the contingent remainder. However, this exception would not continue to apply if the life estate and next vested estate were later conveyed to another. Therefore, as illustrated below, the exception was easy to avoid. For example, if O transferred Blackacre to A for life, then to A's first born daughter and the heirs of her body, and then to A and her heirs, A would have a life estate and a vested remainder in fee. Assuming A had no children, A's first born daughter would have a contingent remainder in tail which would not be destroyed because of the exception to the merger rule. However, if A were to convey A's life estate and vested remainder to B, they would merge in B to destroy the contingent remainder in tail.

47. A tortious feoffment occurred when a life tenant purported to convey a greater estate than he had.

48. See Archer's Case, 1 Co. Rep. 66B (1597).

49. Blocker v. Blocker, 103 Fla. 285, 137 So. 249 (1931) (where a life tenant conveyed his life estate to A and the owners of a reversionary interest in the estate conveyed their interest to A for the purpose of merging the two estates into a fee simple estate, the contingent remainders could be defeated by destroying the particular estate upon which they depend). See also, Popp v. Bond, 158 Fla. 185, 28 So.2d 259 (1946). The doctrine does not apply to interests in personal property. See In re Estate of Rentz, 152 So.2d 480 (Fla. 3d D.C.A. 1963).

50. Abo Petroleum Corporation v. Amstutz, 93 N.M. 332, 600 P.2d 278 (1979) (where husband-wife owners of property conveyed the wife's interest to their daughters with alternative contingent remainders to one of their daugh-

jurisdictions where the rule does not apply, the contingent remainder limited in favor of C's heirs is not destroyed when B dies survived by C. Therefore, once C's heir is ascertained, that heir is entitled to eject O from the premises. During the time O, the grantor, is entitled to possession, O has a fee simple subject to a springing executory interest in C's heirs.[51]

VESTED REMAINDERS COMPARED WITH AND DISTINGUISHED FROM CONTINGENT REMAINDERS AT COMMON LAW

SIMILARITIES

VESTED REMAINDER	CONTINGENT REMAINDER
1. is a future interest	1. is a future interest
2. called a remainder because it *remains* away from the conveyor instead of reverting to him	2. called a remainder because it *remains* away from the conveyor instead of reverting to him
3. must be in favor of a transferee, one other than the conveyor	3. must be in favor of a transferee, one other than the conveyor
4. must be created at same time and in same instrument as the prior particular estate	4. must be created at same time and in same instrument as the prior particular estate
5. must become an estate in possession at the termination of the prior particular estate of freehold	5. must become an estate in possession at the termination of the prior particular estate of freehold
6. must be preceded by particular estate of freehold—a fee tail or a life estate (see 10 below)	6. must be preceded by particular estate of freehold—a fee tail or a life estate (see 10 below)
7. is created either by will or deed, never by descent	7. is created either by will or by deed, never by descent
8. remainderman always takes as a purchaser	8. remainderman always takes as a purchaser
9. there may be as many as the conveyor wishes	9. there may be as many as the conveyor wishes

ter's children, later executed deeds to the daughters purporting to transfer absolute title to the property, and finally attempted to convey fee simple interests in the property to third persons, the conveyance of property in fee to the daughters did not destroy the contingent remainders in the daughter's children. "Because the doctrine of destructibility of contingent remainders is but a relic of the feudal past, which has no justification or support in modern society, we decline to apply it in New Mexico.").

51. See Simes, 41; Restatement of Property § 240.

VESTED REMAINDER	CONTINGENT REMAINDER
10. TODAY—may be preceded by an estate for years	10. TODAY—may be preceded by an estate for years but then it is an executory interest
11. it is descendible and devisable	11. it is descendible and devisable

DISSIMILARITIES

VESTED REMAINDER	CONTINGENT REMAINDER
1. is not destructible	1. is destructible
2. is transferable	2. is not transferable
3. is subject to the claims of creditors	3. is not subject to the claims of creditors
Today contingent remainders are no longer destructible in most states; they are transferable and are subject to the claims of creditors. The above three dissimilarities should *now* be moved up into the similarities column.	
4. is vested	4. is not vested
5. is an estate	5. is not an estate
6. no reversion left in conveyor if remainder in fee	6. reversion is always left in conveyor as long as remainder is contingent
7. has absolute right to possess when prior estate ends	7. has only conditional right to possess when prior estate ends
8. not subject to Rule against Perpetuities	8. is subject to Rule against Perpetuities
9. vested remainderman has right against prior estate owner for waste	9. contingent remainderman has no right against prior estate owner for waste
10. vested remainderman may force prior estate owner to pay taxes and interest on encumbrances	10. contingent remainderman cannot force prior estate owner to pay taxes or interest on encumbrances

§ 7.6 *Executory Interests*

PROBLEM 7.12: O conveys Blackacre "to B and his heirs but if B becomes bankrupt, then to B's children and their heirs." At the time of the conveyance B has one living child. What interest do B's children have?

Applicable Law: If a future interest takes effect, if at all, at the termination of the particular freehold estate that precedes it because of the happening of a limitation, then it is a remainder. However, if a future interest will take effect in derogation of the preceding particular estate of freehold, or

after its termination as a result of the happening or non-happening of a condition, then it is an executory interest with one exception. This exception is the future interest that follows the natural termination of a fee simple determinable. That future interest is called an executory interest even thought it *does not* take in derogation of the preceding estate since the fee simple determinable ends naturally upon the happening of a limitation and not upon the happening of a condition subsequent.

Answer and Analysis

B's children have a shifting executory interest; they do not have a remainder. It cannot be a remainder because a remainder must be so limited that it will take effect in possession at the natural termination of the prior particular freehold estate as the result of the happening of limitation. A future interest cannot be a remainder if it takes effect in derogation of or cuts short such prior particular estate. By the terms of the conveyance if B becomes bankrupt, then B's present possessory fee simple estate is defeated and the future interest in B's children is to become possessory. If that occurred, then the children's future interest would come in derogation of and would cut short B's fee simple. Thus, the future interest to B's children is an executory interest and not a remainder.

There is little difficulty in distinguishing a remainder or executory interest from either a reversion, a possibility of reverter or power of termination, because a remainder or any executory interest is always in favor of a transferee whereas the other three are always in favor of the transferor.

The real difficulty is in distinguishing a remainder from an executory interest. The following may help. A remainder must always be able to take effect, if at all, at the "natural" termination of the particular estate of freehold which precedes it, never by cutting the prior estate short. An executory interest, with one exception given below, always takes effect in derogation of, or by cutting short, the vested estate which precedes it. This occurs when the preceding estate is terminated because a *condition* rather than a *limitation* has occurred.

In one instance, however, an executory interest takes effect at the termination of the preceding estate. Suppose O conveys Blackacre "to B and his heirs so long as the property is used for courthouse purposes, and if it ceases to be so used, then to X and his heirs." X's interest cannot be a remainder because no remainder can follow a fee simple, whether absolute or determinable. It is

an executory interest but it will vest as an estate in possession at the natural termination of the preceding freehold estate in B.[52]

PROBLEM 7.13: O conveys Blackacre "to B for life and one year after B's death, to C and her heirs." B died and O took possession of Blackacre. One year after B's death and while O was in possession, C demanded possession of Blackacre from O. O refused. C sues O in ejectment. (a) May C recover? (b) What type of interest, if any, does C have?

Applicable Law: If a future interest in a transferee is incapable of becoming possessory until some time in the future and in the meantime there is no other transferee entitled to possession it takes effect only as an executory interest. It cannot be a remainder.

Answers and Analysis

C has an executory interest that became possessory one year after B died and is entitled to recover possession of Blackacre from O.

A remainder is a future interest (1) limited in favor of a transferee, (2) created at the same time and in the same instrument as the prior particular estate which supports it and (3) limited (described) in such a way that it can take effect as a present interest immediately upon the termination of the prior particular estate. The prior particular estate must be an estate of lesser duration than the interest of the grantor at the time of the conveyance.

In this problem C is a transferee; C's future interest was created in the same instrument and at the same time as B's life estate which is the prior particular estate which supports it but C's interest is limited in such a way that it is incapable of becoming possessory immediately upon the termination of the prior particular estate. Therefore, C's future interest cannot be a remainder. It is a springing executory interest.

If a future interest can become possessory only after some period of time during which no other transferee is entitled to the possession of a freehold estate, the future interest is a springing executory interest. It could not be a valid remainder at common law because of the rule prohibiting seisin from being in abeyance. When B died the seisin had to go somewhere. It could not go to C for such was not intended until the passing of one year after B's death. So the seisin reverts to the grantor, O. At common law, once the seisin has reverted to O it took another conveyance to divest the grantor. Thus, C's interest fails to qualify as a remainder.

52. See Simes, 25–28.

C's executory interest is not created by way of a use; rather it was created as a legal estate which would have been void. Therefore, prior to the Statute of Uses it was void. However, after the Statute of Uses, two new types of future interests quite unknown to the common law were permitted to be created in favor of transferees. These new future interests took effect in derogation of preceding estates. One of these, the springing interest, cut short the prior estate which was vested in the grantor. The other, the shifting interest, cut short the prior estate which was vested in one other than the grantor. In this problem, when B died there was a reversion to the grantor, O, who is now possessed of a fee simple estate for the period of one year after B's death. When that year has expired a use springs up in C in fee simple which draws the legal title to itself by means of the Statute of Uses. C, now owning the legal title in fee simple, has the right to immediate possession of Blackacre and can eject O whose prior estate has been cut off by C's executory interest which O himself created.[53]

In each of the following cases as well C has a springing executory interest:

(a) O conveys Blackacre to C three years from now.

(b) O conveys Blackacre to B for life, and if C is alive when X is appointed the executor of B's estate, then to C and his heirs.

In each case there is a period of time during which no transferee is entitled to possession. In (a) it is the three years immediately following the conveyance; in (b) it is that period of time following B's death before X is appointed the executor of B's estate. In (b) the condition attached to C's interest is absolutely incapable of occurring during B's life; thus, C's interest is incapable of every becoming possessory at B's death.

PROBLEM 7.14: O conveys Blackacre "to B for a period of 10 years, then to C and his heirs." (a) Is C's interest valid? (b) Would it make any difference if the future interest had been limited in favor of "the heirs of C," a living person?

Applicable Law: At common law every remainder had to be preceded by a particular estate of freehold to prevent abeyance of the seisin. Therefore, a remainder could not be preceded by a non-freehold estate such as a term for years. Future interests following on the heels of a non-freehold estate were classified as springing executory interests. Modern usage permits a *remainder* to follow an estate for years.

53. See Simes, 19–25.

Answers and Analysis

The future interest limited in favor of C was valid at common law but was not actually classified as a future interest. Rather C was said to have a fee simple subject to a term for years in B. Today it is permissible to refer to C's interest as a remainder. If the future interest had been limited in favor of C's heirs, however, it would have been void. A contingent interest was void at common law if it purported to take effect at the termination of a preceding nonfreehold estate; today it could take effect, subject to the Rule against Perpetuities, as a springing executory interest.

The interest limited in favor of C was valid at common law as a result of a technical peculiarity of the common law. At common law every remainder had to be preceded by a particular estate of freehold, either a fee tail or a life estate. Every freehold estate (fee simple, fee tail or life estate) had to be created by livery of seisin. No freehold estate could be made to commence in futuro because there had to be the ceremony of feoffment and that had to take place in the present. However, the creation of a non-contingent future interest was not considered a violation of the rule. For example, suppose X, being fee simple owner, wished to enfeoff Y for life, with remainder to Z and his heirs. X would go onto the land, make livery of seisin to Y with the declaration that seisin was for Y for Y's life and thereafter for Z and his heirs. Both estates were considered as being created at the same time and the feoffor was considered as having put the seisin out of himself for the entire time during which the declared estates would exist. X would then walk off the land leaving Y in possession claiming a life estate therein, he being therefore seised, and holding such seisin for himself and the remaindermen who followed. Indeed, the remainder was the only future estate which was recognized by the common law which was in favor of a transferee, one other than the transferor. But Y's life estate is a freehold estate and a life tenant is seised. When Y dies the seisin will pass immediately to Z in fee simple. There will be no break in the continuity of the seisin, the seisin will not be in abeyance.

In this problem, however, B was to have a nonfreehold estate, an estate for years. A tenant for years, having only a chattel real, could not be seised. The tenant could be possessed only. The grantor could not deliver seisin to a tenant for years to pass naturally to the remainderman at the end of the term for years. O, in other words, could not deliver seisin to B for 10 years which would then pass to C in fee simple. Strictly speaking, then, there could be no remainder following an estate for years, and in the problem C's so-called remainder would be void and there would be a reversion in O.

Nonetheless, even at common law, there was a procedure by which the conveyance by O could be validated and made effective even though C's interest could not be a valid remainder. It was done as follows. O made livery of seisin to B, the tenant for years, but at the same time declared that such livery was made for the benefit of C. Thereupon, the seisin passed immediately through B to C, who then held the fee simple estate in possession but subject to a term of 10 years in B. It should be noted in this procedure that the seisin never lodged in B, nor was it in abeyance for an instant because it passed immediately through B to C, who was intended to be seised.[54]

Today, C's interest is often referred to as a remainder even though it did not technically qualify as such.

If C's interest following the 10 year term was intended to be a contingent remainder, rather than an estate in possession subject to a term of years, not even the procedure described above, could validate the gift. For example, suppose O, being an owner in fee simple, conveys, "to B for 10 years, then to the heirs of C" and C is living. In this case there could be no livery of seisin to B for C's heirs because C's heirs are not, until C's death, ascertainable. Thus the seisin would be in abeyance and the intended contingent interest in C's heirs would be absolutely void at least prior to the enactment of the Statute of Uses.

Under the Statute of Uses (1536), the future interest created in either C or C's heirs could be treated as a valid executory interest following B's 10 year term if created by way of a "use" which was executed in a legal estate by the statute. If that statute operated on the use, then upon the expiration of B's ten year term a fee simple absolute vests in C if the future interest were limited to C. If it were limited to C's heirs and C died before B, a fee simple absolute would vest in C's heirs; if C survived B, then O would be entitled to a fee simple. This interest, however, would continue to be subject to a springing executory interest in C's heirs which would ripen into a fee simple absolute upon C's death, divesting O of O's then present possessory interest.[55]

54. It has been suggested that this technical exception had been created as an early common law form of financing. For example, B might be a money lender willing to loan C the purchase price of Blackacre. However, in lieu of charging C interest, C and B would calculate a fixed term of years to pay rents and profits from the land to B. These rents and profits would be in an amount sufficient to adequately compensate B for making the loan to C as well as a return of the principal.

55. Since future interests are classified today as they were before the Statute of Uses, C's interest in the conveyance to B "for ten years, then to C" would continue to be classified as either a fee simple subject to a term of years or, in more modern terminology, a vested remainder. It is, therefore, not an interest that could violate the Rule against Perpetuities. On the other hand, since the interest of C's heirs could only have been classified as an executory interest, whether before or after the adop-

The preceding answer is intended to explain the historical development and logic in the common law requirements of a remainder in land. Today livery of seisin is obsolete. The reason for requiring continuity of seisin has long since disappeared. The modern view permits remainders not only in land but also in chattels real and in chattels personal. The grantor's estate need not be a freehold and a remainder may follow an estate for years.[56]

FUTURE INTERESTS COMPARED WITH AND DISTINGUISHED FROM EACH OTHER

THE FUTURE INTEREST	HOW CREATED	IN WHOSE FAVOR	VESTED OR CONTINGENT	ALIENABLE INTER VIVOS	DESCENDIBLE AND DEVISABLE	SUBJECT TO DEFEASANCE	DIVESTS PRIOR ESTATE
REVERSION	BY OPERATION OF LAW	ALWAYS IN FAVOR OF GRANTOR	ALWAYS VESTED	ALWAYS ALIENABLE	ALWAYS DESCENDIBLE AND DEVISABLE	SUBJECT TO DEFEASANCE FOLLOWING CONTINGENT REMAINDER AND SO SPRINGING USE	NEVER DIVESTS PRIOR ESTATE
POSSIBILITY OF REVERTER	BY IMPLICATION OF LAW	ALWAYS IN FAVOR OF GRANTOR	ALWAYS CONTINGENT	NOT ALIENABLE AT COMMON LAW WHEN UNCONNECTED WITH A REVERSION. TODAY IT IS ALIENABLE WITH OR WITHOUT A REVERSION	DESCENDIBLE AND DEVISABLE WITH OR WITHOUT A REVERSION	NOT SUBJECT TO DEFEASANCE	NEVER DIVESTS PRIOR ESTATE
POWER OF TERMINATION	BY CLEAR, EXPRESS WORDS IN DEED OR WILL	ALWAYS IN FAVOR OF GRANTOR	ALWAYS CONTINGENT	NOT ALIENABLE AT COMMON LAW WHEN UNCONNECTED WITH REVERSION—LIKEWISE TODAY IN SOME STATES —TODAY IT IS ALIENABLE WHEN CONNECTED WITH REVERSION**	DESCENDIBLE AND DEVISABLE WITH OR WITHOUT A REVERSION	NOT SUBJECT TO DEFEASANCE	ALWAYS DIVESTS PRIOR ESTATE
VESTED REMAINDER	BY WORDS OF DEED OR WILL	ALWAYS IN FAVOR OF GRANTEE	ALWAYS VESTED	ALWAYS ALIENABLE	ALWAYS DESCENDIBLE AND DEVISABLE	MAY BE SUBJECT TO DEFEASANCE PARTIAL OR TOTAL BY SHIFTING USE	NEVER DIVESTS PRIOR ESTATE
CONTINGENT REMAINDER	BY WORDS OF DEED OR WILL	ALWAYS IN FAVOR OF GRANTEE	ALWAYS CONTINGENT	NOT ALIENABLE AT COMMON LAW TODAY IT IS ALIENABLE	DESCENDIBLE AND DEVISABLE	NOT SUBJECT TO DEFEASANCE	NEVER DIVESTS PRIOR ESTATE
EXECUTORY INTEREST	BY WORDS OF DEED OR WILL	ALWAYS IN FAVOR OF GRANTEE	ALWAYS CONTINGENT	TODAY ALIENABLE	DESCENDIBLE AND DEVISABLE	NOT SUBJECT TO DEFEASANCE	ALWAYS DIVESTS PRIOR ESTATE

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* Possibilities of reverter and powers of termination were not subject to the common law rule against perpetuities, however.

** Some states do permit the alienation of powers of termination unconnected with a reversion.

Comments Concerning Chart

(1) Of course no interest is descendible or devisable which is terminated by death, and no interest is alienable except by one identifiable and qualified to convey.

(2) Of all the future interests, only the contingent remainder was destructible at common law; today all future interests, including contingent remainders in most states, are indestructible.

tion of that statute, it can only be classified as such today. This is important because executory interests but not vested remainders are subject to the Rule against Perpetuities.

56. See Simes 19; Restatement of Property § 156, comment e, illustration 9.

Summary of Chart

(a) Reversions and possibilities of reverter are created by law—powers of termination, vested and contingent remainders and executory interests are created by deed or by will (first column).

(b) Reversions, possibilities of reverter and powers of termination are always in favor of the grantor or his successors in interest—remainders and executory interests are always in favor of the grantee (second column).

(c) Reversions and vested remainders are always vested—possibilities of reverter, powers of termination, contingent remainders and executory interests are always contingent (third column). Reversions, vested remainders, possibilities of reverter and powers of termination are not subject to the common law rule against perpetuities. Indestructible contingent remainders and executory interests are subject to the rule.

(d) At common law possibilities of reverter, powers of termination and contingent remainders were not alienable inter vivos—today a power of termination unconnected with a reversion is still not alienable inter vivos in most states—all other future interests, including a power of termination connected with a reversion, are alienable inter vivos (fourth column).

(e) All future interests are descendible and devisable (fifth column).

(f) Only reversions and vested remainders (the vested future interests) are subject to defeasance (sixth column).

(g) Only powers of termination and executory interests divest prior estates (seventh column).

§ 7.8 Survivorship Contingencies

PROBLEM 7.15: O conveys Blackacre to B for life, then to B's children. At the time of the conveyance B has two children, C and D. One year later B had a third child, E. The next year C dies intestate leaving H as C's sole surviving heir. The following year B dies survived by D, E, and H. D and E claim they alone are entitled to Blackacre. Are they correct?

Applicable Law: A class gift limited in favor of a class of persons described as children not otherwise subject to an express condition of survivorship is not impliedly conditioned on survivorship. Thus, B's children have a vested remainder subject to open. While the interest of each living child of B is subject to partial defeasance if B has more children, it is not subject to total defeasance by predeceasing B. In other words, the interest of class member is alienable, devisable, and descendible.

Answer and Analysis

At the time of the conveyance, B had two living children. Each of them and any children of B born before the class gift to B's children closed had a vested remainder subject to open. Class member have an interest that is alienable, devisable, and descendible. Thus, if a child of B dies before B, that deceased child's interest passes under the child's will to the child's designated beneficiary or, if the child dies intestate, to the child's heirs.[57] Here the remainder gift was limited to B's children, a class that is one-generational. Similar classes would include classes limited in favor of grandchildren, nieces and nephew, and brothers and sisters. If a gift is one-generational and the governing instrument does not expressly impose a condition of survivorship, none is implied.[58] If a condition of survivorship were expressed, then the interest of a child of B who died before B would fail, and that child's share would ultimately inure to the children of B who survived B. However, conditions of survivorship, although not expressed in the governing instrument, can be implied.

For example, under the provision of Section 2–707 of the Uniform Probate Code, the interest of B's child who predeceases B is implied conditioned on survivorship, *if the interest were in a trust and not merely a legal remainder*[59] and the governing instrument did not otherwise provide. In that case the deceased child's interest fails. It passes to the B's surviving children unless B's deceased child left descendants who survived B. In that case, B's deceased child's descendants take the share B's deceased child would have taken had the child survived B, as a substitute gift.

If the class gift had been limited to a potentially multi-generational class, such as a gift to issue, descendants, or heirs, a survivorship condition is implied on the theory that members who meet the description of class members at the lower generational levels can only take because those at the higher generational levels have died before the date of distribution.[60] Of course, this presupposes a per stirpes rather than a per capita distribution among class members. More particularly, if a class gift is limited in favor of a one-generational class, then each member of the class is entitled to an equal share (i.e., they take per capita.)[61] On the other hand, if a class gift is limited in favor of a potentially multi-generational class (such as descendants of B), class members may not necessarily

57. See Restatement (Second) Property § 27.3.

58. Id.

59. Unif. Prob. Code § 2–707 does not apply to remainders not created in trust. See Unif. Prob. Code § 2–707(b).

60. Restatement (Second) of Property, § 28.2.

61. See Restatement (Second) of Property, § 28.1.

take equally. According to the Restatement, the following rules apply:

1. Only class members who survive to the date of distribution (here, B's death) share in the gift;

2. Only class members who have no living ancestors who are in the class share in the gift; and

3. The initial division to calculate shares is based on the number of class members, dead or alive, who were in the first generation below the designated person.[62] This latter is called a per stirpes plan of distribution and is explained as follows:

> If a gift is made to the "issue" or "descendants" of a designated person, in the absence of additional language or circumstances that indicate otherwise, the initial division of the subject matter is made into as many shares as there are issue, whether living or not, of the designated person in the first degree of relationship to the designated person. Each issue in the first degree of relationship who survives to the date of distribution takes one share of the subject matter of the gift to the exclusion of any of such first degree issue's descendants. The share of an issue of the first degree who does not survive to the date of distribution is divided into as many shares as there are descendants, whether living or not, of that deceased issue who are in the second degree of relationship to the person whose issue are designated. Such issue in the second degree of relationship that survive to the date of distribution each take one share resulting from such division to the exclusion of their respective descendants. The share of an issue of the second degree who does not survive to the date of distribution is divided into as many shares as there are descendants, whether living or not, in the third degree of relationship to the designated ancestor who are also descendants of the deceased second degree descendant, etc. This is referred to as a per stirpes plan of distribution.[63]

The Uniform Probate Code, on the other hand, would make the initial division at the first generation within the potentially multigenerational class at which there was at least one living member. Thus, if there were no children but only surviving grandchildren who share in a class gift limited in favor of B's descendants, the initial division would be at the grandchildren's level, not the children's level.[64]

62. Restatement (Second) of Property, § 28.2.

63. Id. at Comment b.

64. See Unif. Prob. Code § 2-708. Comments to this section note that it is intended specifically to reject Restatement (Second) of Property, § 28.2.

Chapter 8

SPECIAL RULES GOVERNING FUTURE INTERESTS

Table of Sections

SUMMARY

§ 8.1 Rule in Shelley's Case

1. In its simplest form the Rule in Shelley's Case may be stated as follows: When in the same conveyance: an estate for life is given to a person with remainder to that person's heirs (or heirs of his body), then the person to whom the life estate is conveyed takes the remainder in either fee simple (or fee tail) and the person's heirs take nothing. For example, O conveys Blackacre to "B for life, then to B's heirs." B takes both the life estate and the remainder in fee simple. In this example, because B has both the life estate and next vested estate, they merge to give B a fee simple absolute. Therefore, by operation of two separate rules, (i) the Rule in Shelley's Case and (ii) the Doctrine of Merger, B has the same interest in Blackacre as B would have had if O had given Blackacre to "B and his heirs." Without the doctrine of merger, B would have only a life estate and a vested remainder.

2. A more complete statement of the Rule in Shelley's Case is this: "If a life estate in land is conveyed or devised to person (say A), and by the *same conveyance or devise,* a remainder in the land is limited, *mediately or immediately*[1], to the heirs of A, and the life

1. The remainder is "immediate" if it is the next estate following the life estate; otherwise it is "mediate."

estate and remainder are of the same quality, that is they are both legal or both equitable estates, then the person to whom the life estate is conveyed, has, in addition to his life estate, a remainder in fee simple."

3. The origin of the Rule in Shelley's is lost in antiquity. Most scholars believe it arose in the feudal system as a means of protecting the feudal lord in the benefits of relief[2] and wardship and marriage,[3] which were his when an heir took land by descent but were lost to him if the same person took as a purchaser. To illustrate, suppose O conveyed Blackacre to "B for life, then to B's heirs." If there were no Rule in Shelley's Case, upon B's death the property would pass to B's heir by purchase from O and the feudal incidences would not be due B's lord. On the other hand, if O conveyed to B and his heirs, B would have a fee simple absolute and upon B's death the property would pass to B's heir by descent from B, and B's lord would be entitled to feudal incidences. The Rule in Shelley's Case assured B's lord the same benefits in the first case as in the second by causing B to have a remainder in fee. As a result, upon B's death the land passed to B's heir from B by descent, not from O by purchase.

4. The Rule was abolished in England by statute in 1925. Initially it had almost universal acceptance in the United States but has been abolished by statute in most states. Where the Rule is abolished, the heirs of the life tenant take as remaindermen. Since the life tenant is alive, the remainder is contingent on the heirs being ascertained as a result of the life tenant's death.

5. The Rule is a rule of law and not one of construction. This means if the requisites are present the Rule applies even though the result is wholly contrary to the clearly expressed intention of the grantor. If the Rule were a rule of construction, then it could give way to a contrary intent of the grantor.

6. The Rule applies when both the life estate and the remainder are legal estates or when they are both equitable estates. It does not apply if one estate is legal and the other is equitable.

7. The following examples illustrate the operation of the Rule:

a. O conveys Blackacre "to B for life, then to B's heirs." By this deed O conveys a life estate to B and under the Rule in Shelley's Case a remainder in fee simple to B. The life estate merges into the remainder and B has a fee simple absolute.

b. O conveys Blackacre "to T in an active trust for B for B's life and thereafter T is to hold Blackacre in active trust for

2. The feudal inheritance tax.

3. The ability to control whom the ward married and the right to the profits from the ward's land until the ward reached majority.

B's heirs." By the instrument B is given an equitable life estate, and by the Rule in Shelley's Case the equitable remainder stated to be in favor of B's heirs is given to B. By merger the life interest is merged in the equitable fee and B owns the equitable fee simple, both being of the same quality, that is, equitable estates.

c. O conveys Blackacre "to T in active trust for B for life and upon B's death, title is to vest in the heirs of B in fee simple." The Rule does not apply because B's life estate is equitable and the remainder to B's heirs is legal. The trust is not to continue beyond B's life. Therefore, B takes only a life estate (equitable), and the heirs of B take a legal contingent remainder, the contingency being that they are not determinable until B's death. But they take as purchasers and not by descent as heirs.

d. O conveys Blackacre "to B for life, then to C for life, then to B's heirs." The fact that another life estate intervenes between the ancestor's life estate and the remainder in fee simple does not prevent the operation of the Rule in Shelley's Case. The remainder belongs to B. The intervening life estate does, however, prevent a merger of B's life estate and vested remainder at the time of the conveyance because, at that time, B does not have the next vested estate. C does. However, if C dies before B, a merger occurs at C's death at which time B has the life estate and the next vested estate. Thus, B now has a fee simple absolute. If B predeceases C, then the remainder in B (by virtue of the Rule in Shelley's Case) passes through B's estate to B's heirs if B dies intestate or to B's devisees if B devises the remainder by his will.

e. O conveys Blackacre "to B for life, and if B pays A $100, then to B's heirs." The Rule in Shelley's Case operates to give the remainder to B. However, B's remainder is a contingent remainder because it is subject to a contingency–B paying A $100. A merger cannot take place as long as the contingent remainder remains contingent. If, however, B pays $100 to A, then at that instant the contingent remainder becomes a vested remainder and it merges with B's life estate to give B a fee simple absolute.

f. O conveys Blackacre to "B for life, then one day after B dies, to B's heirs." The Rule in Shelley's Case does not apply because the future interest is a springing executory interest rather than a remainder. Therefore, B has a life estate and B's heirs have a springing executory interest.

9. Historically the Rule applied only to conveyances and devises of real property; it had no application to transfers of personal

property and chattels real. Some jurisdictions, however, applied an analogous rule to personal property as a rule of construction.[4]

§ 8.2 Doctrine of Worthier Title

1. Under the Doctrine of Worthier Title, any limitation in an inter vivos conveyance of real property to the heirs of the grantor is void and the grantor has a reversion. Thus, if O conveys Blackacre to "B for life, then to the heirs of O," B has a life estate and, as a result of the Doctrine of Worthier Title, O has a reversion. O's heirs have nothing. The Doctrine affects only the remainder and has no effect on the life estate.

2. In common with the Rule in Shelley's Case, the Doctrine of Worthier Title arose in the feudal system apparently to preserve the feudal benefits of relief and wardship and marriage to the overlord. These benefits were due to the lord from one who took land by descent but not from one who took by purchase. Thus, in the preceding example, if O's heirs took by purchase from O rather than descent, O's lord would not be entitled to the feudal incidences. The Doctrine of Worthier Title assured this was not the case.

3. The Doctrine requires only that there be (a) a conveyance of real property and (b) a limitation to the grantor's heirs, or its equivalent, e.g., sometimes the word children or issue is used to mean heirs.[5]

4. The Doctrine has no application to a conveyance to a named person even if that person turns out eventually to be the heir of the grantor. Thus, if O conveys to "B for life, remainder to O's son, John," the remainder to John is valid even though upon O's death John is O's heir.

5. The Doctrine does not apply to the situation where the word "heirs" is used to mean "children." For the rule to apply, the word "heirs" must mean heirs in its technical sense, meaning the persons who take by intestate succession at the time of the grantor's death.

6. The estate which precedes the limitation to the grantor's heirs is immaterial. It may be a life estate or an estate for years or a determinable fee. Thus, if O conveys Blackacre to "B and his heirs so long as B keeps the fences in repair, then to O's heirs," the shifting executory interest is in O, not O's heirs. However, since O

4. See Simes, 43–55; Restatement of Property §§ 312, 313.

5. This assumes that a court construes the word "children" to mean heirs because to do so would be consistent with the grantor's intent. Ordinarily, however, the words "heirs" and "children" are not synonymous.

cannot create such an interest in himself, the effect of this conveyance is to give O a possibility of reverter.

7. The type of interest or estate given the grantor's heirs is immaterial. It may be a remainder or an executory interest. Thus, if O conveys Blackacre to "B for life, and one day after B dies to my heirs" the springing executory interest over "to my heirs" is void and O has a reversion.

8. The interest may be either equitable or legal. For example, suppose O conveys Blackacre to "T in fee in active trust for B for life and then in active trust for my heirs." The limitation in favor of O's heirs is void, and O has a reversion. The reversion is equitable. Upon the death of B, O can compel the termination of the trust since O has the entire beneficial interest.

9. For all practical purposes, today the Doctrine applies only to conveyances. But at common law it could apply to devises by will. Under the testamentary branch of the Doctrine, if a testator devised an estate of the same quality and quantity to a person who would have taken that same estate had the testator died intestate, then the devise was void and the person took by descent. For example, if T devised his entire estate to "my heir," the heir took by descent and not devise.

10. At common law the Doctrine was a rule of law and not a rule of construction; in modern law it generally has become a rule of construction under which the intention of the grantor is given effect. Thus, if the grantor intends to create a future interest in the grantor's heirs, that interest is valid. However, the presumption favors the application of the Doctrine and the grantor must use words in the deed to overcome the presumption and show an intent that the heirs take as purchasers.

11. Many states have abolished the Doctrine of Worthier Title; some have merely modified it.

§ 8.3 Powers of Appointment

1. A power of appointment is an authority created by a donor (one having property subject to his disposition as owner or otherwise) and conferred upon a donee enabling the donee either to appoint persons to take the property or to appoint the proportionate shares which designated persons shall take in the property. The person who creates the power is called the "donor" and the person to whom the power is granted is called the "donee."

2. Persons who take by the donee's appointment are called "appointees."

3. Persons who take either because the power of appointment is not exercised at all or is ineffectively exercised are called "takers in default of appointment."

4. Traditionally, powers of appointment are generally classified as:

a. general powers;

b. special powers (nongeneral);

c. powers purely collateral;

d. powers in gross;

e. powers appendant;

f. powers in trust;

g. powers not in trust;

h. exclusive powers; and

i. non-exclusive powers.

5. A general power of appointment enables the donee to appoint to any person, including herself or her estate. More recently, it has been defined as a power "exercisable in favor of any one or more of the following: the donee of the power, the donee's creditors, the donee's estate, or the creditors of the donee's estate."[6]

6. A special power of appointment is one which limits the exercise of the power in favor of a person or persons other than the donee or his estate.[7]

7. A power purely collateral exists when the donee has no interest in the property other than the power itself.[8]

8. A power in gross exists when the donee has an interest in the property in addition to the power, but the exercise of the power does not affect the interest of the donee, as, for example, when the donee has a life estate and a power to appoint the remainder.[9]

9. A power appendant exists when the donee has an interest in the property and the exercise of the power disposes of all or part of such interest. The modern view is that there is no power appendant as the power merges in the property.[10]

6. Restatement (Second) of Property, § 11.4(1). See also, Int. Rev. Code § 2041.

7. The most recent Restatement of Property abandons the phrase "special power" in favor of the phrase "nongeneral power." Restatement (Second) of Property, § 11.4(2).

8. Restatement (Second) of Property, § 11.4 Comment c.

9. Id.

10. See Restatement (Second) of Property, § 12.3(2).

10. A power in trust exists when the donee, under some circumstances and within some period of time, is under a duty to exercise it. A power in trust is also called an imperative or mandatory power. It can exist only when there is a special power whose permissible objects are not too broad or numerous, and there are no takers in default.

11. A power in which the donee is under no duty to exercise it is a power not in trust. A general power can never be a power in trust, nor can a power be a power in trust when there are takers in default.

12. A nonexclusive power is one in which the donee of a special power must appoint something to each of the permissible objects of the power.[11] According to some authorities, if all the permissible objects do not receive a substantial share as a result of an appointment (but receipt of a share as a result of a partial default of appointment is sufficient), the appointment is void as illusory. This doctrine of illusory appointments is difficult in application and is not universally followed.[12]

13. An exclusive power is one in which the donee of a special power may exclude one or more of the permissible objects and appoint all of the property to the others.[13] A donee of a special power of appointment may exclude one or more members of the objects of the power unless the creating instrument evinces an intent that all shall benefit. In other words, the presumption is in favor of an exclusive power.

14. The instrument creating a power of appointment may be either a deed or a will.

15. The creating instrument may require the power of appointment to be exercised only by deed (an "inter vivos" power), or only by will (a "testamentary power"), or by either as the donee shall determine.

16. If the creating instrument requires the power of appointment to be exercised only by deed, it cannot be effectively exercised by will; and if it is required to be exercised by will it cannot be effectively exercised by deed.

17. Creditors of a donee of a special power of appointment cannot subject the property subject to the special power to their claims.[14]

18. Creditors of a donee of a general power of appointment cannot subject the property subject to the general power to their

11. Compare, Restatement (Second) of Property, § 21.2.

12. See Restatement (Second) of Property, § 21.2 (Reporter's Notes 1–3).

13. Restatement (Second) of Property, § 21.1.

14. Restatement (Second) of Property, § 13.1.

claims when the power remains unexercised;[15] but such creditors can, if the power is exercised in favor of a volunteer or a creditor of the donee, subject the property to their claims,[16] because in such case the exercise of such power is considered substantially the equivalent of ownership. To the rule that the affected property of an unexercised general power cannot be reached by creditors of the donee, there are two exceptions:

a. If the donee is also the donor of the power, and the conveyance creating the power is deemed fraudulent, then the donee's creditors can reach the property to the same extent as in the case of other conveyances in fraud of creditors;[17]

b. If the donee who is also the donor creates the power by transferring property in trust and reserves for himself the life income and a general power to appoint the corpus, then, on the donee's death, his creditors can reach the trust property to the extent that their claims cannot be satisfied from the donor's own estate. The creditors can reach the corpus in this case because the donee/donor has retained substantially all the benefits of ownership.

19. When an appointment is made it is usually considered that the title to the property passes to the appointee from the donor of the power and not from the donee.

20. If an attempted exercise of a power is void or ineffective, the property ordinarily passes to the takers in default, or if there are none, it reverts to the donor or her heirs. This rule does not apply, however, if the Doctrine of Capture is employed.

The Doctrine of Capture in essence is an implied alternative appointment to the donee's estate in the case of an ineffective exercise by will of a testamentary general power. The property is "captured" for the donee's estate and taken from the control of the original dispositive provisions of the donor. Application of this Doctrine requires a finding that the donee manifested an intent to "assume control of the appointive property for all purposes and not merely for the limited purpose of giving effect to the expressed appointment."[18]

15. Restatement of Property § 327. See also, Gilman v. Bell, 99 Ill. 144 (1881). The Restatement (Second) of Property, §§ 13.2 and 13.3, adopts this rule but further provides that the property subject to the unexercised general power can be reached by the donee's creditors if the donee was the creator of the power or state statutes otherwise subject those assets to the claims of the donee's creditors.

16. Restatement (Second) of Property, § 13.4.

17. See also Restatement (Second) of Property, §§ 13.2; 13.3.

18. Restatement (Second) of Property, § 23.2.

21. Failure to exercise a power of appointment other than a power in trust results in the property passing to the takers in default, or if there are none, to the donor or her estate.

22. Failure to exercise a power in trust results in the property passing to the objects of the power in equal shares.

23. A contract to exercise a general power presently exercisable is usually valid.[19]

24. A contract to exercise a testamentary power and a contract to exercise a special power in order to benefit a non-object are void.[20]

25. An exercise of a special power of appointment to objects of the power for the purpose of benefitting non-objects is fraudulent and void.

26. All powers other than powers in trust are releasable.

27. Although a contract to exercise a testamentary power is invalid, a contract not to appoint may be valid as a release, and this is true although the release may benefit a non-object of the power.

§ 8.4 Common-Law Rule Against Perpetuities

1. The common-law rule in its simplest form is, "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[21]

2. The stated Rule analyzed:

a. "no interest is good" means that any contingent (non-vested) interest which does not conform to the rule is void *ab initio*. For purposes of the Rule, however, non-vested interests are limited to contingent remainders, executory interests and remainders (vested or contingent) in a class. A vested remainder in an individual, including a vested remainder in an individual that is subject to a condition subsequent is vested for purposes of the Rule.

b. "must vest" means that the contingent interest must become a vested interest (or fail) within the period of the Rule—lives in being plus 21 years. Thus, if O conveys to B for life, then to the heirs of C, and C predeceases B, the contingent remainder becomes a vested remainder. The Rule is satisfied by a vesting in interest even though possession of the interest is postponed until, in this example, B's death. Suppose O transfers Blackacre to "A for life then to A's first born daughter for life, then to that daughter's first born child for life, then to B

19. Restatement (Second) of Property, § 16.1.

20. Id.

21. Gray, Rule Against Perpetuities 191 (4th ed. 1942).

and his heirs." At the time of the conveyance A and B are living but A is childless. B's interest is good under the Rule even though it might become possessory in B's successors more than 21 years after the death of A and B who are lives in being. It is good because, from the moment of its creation, it is a vested remainder.

c. "if at all" means that if the contingent interest is absolutely certain either to "vest" or "fail" entirely within the period of the Rule, it is valid. Of course, the fact that a interest will timely fail and *is therefore good under the Rule* is of no consolation to the holder of the failed interest who takes no interest in the property.

d. "not later than 21 years after some life in being" includes within the period: (1) all relevant lives in being, provided they are not so numerous as to prevent practical determination of the time when the last one dies, plus (2) 21 years, plus (3) such actual periods of gestation as come within the proper purpose of the rule.

e. "at the creation of the interest" means that in the ordinary case the period of the Rule begins when the creating instrument takes effect. In the case of a deed, this is the time of delivery; in the case of a will, this is the date of the testator's death. Special rules apply for purposes of determining when an interest is created as a result of the exercise or failure to exercise a power of appointment.

3. The Rule is directed entirely against remoteness of vesting. The sole test is whether the interest vests (or fails) within the period of the Rule. Under the common law, if at the time an interest is created there is *any* possibility (ignoring probabilities) that it may vest beyond the maximum period permitted by the Rule, it is void even though *in fact* the interest actually vests within the period allowed by the Rule. This is known as the "might-have-been rule."

4. While the Rule is directed toward remoteness of vesting, its ultimate purpose is to prevent the clogging of titles beyond reasonable limits in time by nonvested interests, and to keep land freely alienable in the market places.

5. The following interests are not subject to the common-law Rule:

a. present possessory interests;

b. reversionary interests, including reversions, possibilities of reverter and rights of entry for condition broken;

c. vested remainders in an individual;

d. charitable trusts; and[22]

e. resulting trusts.

6. The following interests are subject to the Rule:

a. contingent remainders in an individual or a class;

b. vested remainders in a class;

c. executory interests;

d. options to purchase land not incident to a lease for years; and

e. powers of appointment.

7. The Rule is applicable to contingent interests whether they are legal or equitable and whether they are in real or personal property.

8. Under the Rule: (a) the lives in being must be human lives, not the lives of any of the lower animals or lives of corporations; (b) the lives in being must precede the 21 years, they cannot follow that period; (c) every human being is conclusively presumed capable of having children during his or her lifetime; (d) the lives in the measuring group or class must not be so numerous or so situated that the survivor cannot be practically determined by the ordinary evidentiary processes.[23]

9. The Rule has been abolished in Idaho, South Dakota, New Jersey, and Rhode Island, abolished as to trusts in Wisconsin, Arizona, Alaska, Delaware, Illinois, Maryland and Florida, and modified to some extent in most of the other states by various statutes including the Uniform Statutory Rule Against Perpetuities.

§ 8.5 Perpetuities Reform

1. While the common-law Rule against Perpetuities continues to apply in many states,[24] in recent years criticism of the Rule has led to various reforms, the most common of which are as follows:

22. A perpetual trust for charity is valid, but this is not necessarily an exception in the strict sense to the common-law Rule against Perpetuities, since the Rule is concerned primarily with remoteness of vesting and not the duration of interests. A clear exception exists, however, in the case of a gift over from one charity to another charity on a condition precedent that may not necessarily occur within the period of lives in being plus twenty one years. Simes, 296.

23. For example, if the lives in being were all the persons now living in the State of Arizona, or in Great Britain, all of those lives could not be used to validate an interest.

24. See, e.g., in Idaho the Rule has been abolished. See Idaho Code § 55–1522; and in Wisconsin, the Rule is inapplicable to trust interests if the trustee has a power of sale. See Wis. Stat.Ann. § 700.16(3). These latter jurisdictions obviously believe that the primary purpose of the rule is to assure alienability of property. However, if the concern underlying the Rule focused on the removal of trust property from the risk capital

a. The Wait-and-See Doctrine.

The essence of this reform is that the validity of the nonvested interest is determined *not* on the basis of facts as they exist when the interest was created but on the basis of facts as they actually occur. Therefore, if a nonvested interest *actually* vests or fails to vest in a timely manner, the interest is good under the Rule. Since this reform applies only to interests that would otherwise violate the common-law Rule, it is still necessary to understand the Rule in order to ascertain whether application of wait-and-see is at all necessary.

b. The Cy Pres Doctrine.

Under this doctrine the limitations which would violate the rule are judicially redrafted or reformed to conform to the intent of the grantor as nearly as possible without violating the Rule. A simple example is the case of an age contingency, as when there is a gift to an unborn person who reaches 25. If by reducing the age contingency to 21 an otherwise invalid gift would be saved, the limitation is reformed accordingly.

c. Statutory enactments modifying the application of the rule to specific typical situations, such as:

(1) reduction of age contingencies of unborn persons to 21 years;

(2) declaring the legal effect of interests limited on certain administrative contingencies such as the probate of an estate.

(3) eliminating the conclusive presumption of fertility for certain persons.

2. The Uniform Commissioners on State Law have promulgated a flat 90–year period in which nonvested interests must vest. Interests that vest within that period are valid under the Rule. By statute, California law provides that any interest that will vest within sixty years from its making is valid. Such absolute time limitations have been the subject of a great deal of controversy. Perhaps their greatest shortcoming is that during the period of time before which validity is determined, final ownership of property is uncertain.

§ 8.6 The Rule in Wild's Case

1. A devise (but not a conveyance) to "B and his children" devises:

markets because of the application of the prudent person investment rule to trusts, then it is questionable whether this liberalization should apply.

a. A life estate to B and a remainder to B's children if, at the time of the devise, B has no living children.

b. A joint tenancy with right of survivorship in B and B's children if, at the time of the devise, B had living children. However, in most states B and B's children would be tenants in common by virtue of the preference for that estate over the joint tenancy. However, there is some authority for the proposition that B has a life estate and B's children a remainder.

2. The Rule in Wild's Case applied only to devises.

§ 8.7 Die (or Death) Without Issue

1. A future interest may be conditioned upon a person's death without issue.

2. Under the English common law, a person died without issue when the person's entire line of lineal descendants became extinct. This event might occur at the named person's death or long after the named person's death when the line of descendants became extinct.

3. Under American law, if a future interest is conditioned upon a named person's death without issue (descendants), whether that condition is deemed to have occurred depends only upon whether the named person had issue who survived him. If issue survived the named person, then the interest conditioned on the death of that person without issue fails; if no issue survived, the interest vests. It is irrelevant to the vesting or failing of the future interest that descendants who survived the named person later die without issue.

PROBLEMS, DISCUSSION AND ANALYSIS

PROBLEM 8.1 O conveys Blackacre to "B for life and thereafter to B's heirs." What estate is granted to B?

Applicable Law: Applying both the Rule in Shelley's Case and the doctrine of merger, a grant to B for life and thereafter to B's heirs creates a fee simple estate in B.

Answer and Analysis

B has a fee simple absolute if the Rule in Shelley's Case is in effect.[25] The Rule in Shelley's Case is a rule of law. Under this rule, if O conveys a life estate to an individual and in the same conveyance that individual's heirs (or heirs of the body) are given the remainder in fee, then the named individual is deemed to have received the remainder in fee. No interest is created in the individual's heirs.

25. Seymour v. Heubaum, 65 Ill. App.2d 89, 211 N.E.2d 897 (1965).

Under the doctrine of merger, if the holder of the life estate also owns the next vested estate, the two estates merge to give the holder a fee.

Applying both rules to this problem, since the remainder is limited in favor of B's heirs, the Rule in Shelley's Case reconstructs the disposition as if it read, "to B for life, then to B." Then, under the doctrine of merger, since B has the life estate and the next vested estate, they merge to give B a fee. In this case, B's fee is a fee simple absolute.

Since the Rule in Shelley's Case is a rule of law, it is irrelevant that O intended to create a contingent remainder in B's heirs. If the Rule were a rule of construction, then O's intent would be relevant to determine what estates were created by this conveyance.

The Rule in Shelley's Case can apply to give a remainder to B without the doctrine of merger further causing B to acquire a fee simple absolute. For example, suppose O conveys Blackacre to B for life, then to C for life, remainder to B's heirs. While the Rule may reconstruct the remainder in fee to run in favor of B, rather than B's heirs, B would not have the next vested estate. Therefore, B's present possessory life estate and vested remainder in fee would not merge.[26]

PROBLEM 8.2: T devises Blackacre "to B for life, then to C for life, and then to the heirs of C." B dies. C dies testate devising all of his interest in Blackacre to M. C's sole heir is X. X's judgment creditor, Y, levies upon Blackacre and threatens to sell it at execution sale. M sues Y to enjoin such sale. May M succeed?

Applicable Law: The Rule in Shelley's Case is not limited in its application to a remainder following a life estate in possession; the life estate also may be one in remainder. If the requirements of the Rule are met, it operates as a rule of law, regardless of the clearly expressed intention of the grantor to the contrary. The requirements are: (1) a conveyance creating

26. There is an important exception to the doctrine of merger. Under this exception, if a life estate and the next vested estate were created simultaneously in the same person with the creation of a contingent remainder in another, the life estate and the vested remainder do not merge to extinguish the contingent remainder. For example, suppose O grants Blackacre to B for life, then to B's eldest son and the heirs of his body, then to B's heirs. B is childless at the time of the conveyance. If the Rule in Shelley's Case applies, B has a life estate and the vested remainder in fee. This remainder is the next vested estate. Nonetheless, they do not merge under this exception to the merger rule. If B was not childless at the time of the conveyance, B would have a vested remainder in fee. It would not merge with B's life estate because it is not the next vested estate. On the contrary, the next vested estate is in B's eldest son in tail. This exception is relevant only when the Rule of Destructibility applied.

a life estate in the ancestor; (2) the same conveyance must create both the life estate and a remainder in favor of the ancestor's heirs; and (3) both estates must be of the same quality, either legal or equitable. Two steps are essential to the ultimate result giving the fee simple (or fee tail) to the ancestor: (a) the Rule must operate giving the remainder to the ancestor; and (b) there must be a merger by which the remainder swallows the life estate.

Answer and Analysis

Yes. It is obvious that T's will creates in B a life estate in possession, a vested remainder in C for life and (but for the Rule in Shelley's Case) a contingent remainder in C's heirs in fee simple. The Rule in Shelley's Case is not limited in its application to a remainder following a life estate in possession. The life estate also may be a remainder as in this problem. Thus, the first requirement of the Rule, that there be a conveyance creating a life estate in the ancestor, is met in T's will.

The second requirement of the Rule is that the same instrument which created the life estate must also create a remainder in the heirs of the ancestor. This requirement is met. T's will creates both the life estate in C and the remainder in C's heirs.[27]

The third requirement is that the life estate and the remainder be of the same quality, either both legal or both equitable interests. In our case C's life estate and the remainder to C's heirs are both legal remainders. Therefore, they are of the same quality and meet the third requirement of the Rule.

Accordingly, the Rule in Shelley's Case applies and the remainder "to the heirs of C" belongs to C by virtue of its application. If T's will is read as it is in legal effect by application of the Rule, it would provide, "to B for life, then to C for life, remainder to C and his heirs," with the words "and his heirs" being words of limitation. By the doctrine of merger C's life estate merges into C's remainder in fee simple. Thus, by reading into T's will the legal effects of both the Rule and merger, it reads simply, "to B for life, remainder to C and his heirs." This result leaves nothing in C's heirs. When C died testate devising Blackacre to M that devise passed C's interest to M. There was no interest at any time in K, the heir of C. Accordingly, K's judgment creditor, Y, took no right by virtue of his levy on Blackacre and had no right to sell the property. Therefore, M's suit for an injunction should succeed.[28]

27. Had T created C's life estate in the will and by a codicil to that will created the remainder in C's heirs, this would have met the requirement of the Rule because a will and a codicil thereto constitute the last will of the testator and are "the same instrument."

28. See generally Simes, 43–55; Restatement of Property §§ 312, 313.

PROBLEM 8.3: T devises Blackacre in fee simple "to my son B for life, then to his heirs who survive him in fee simple, but if none of his children or heirs survive him, then to B's brothers and sisters share and share alike." At T's death B is a widower having two adult children, C and D. Thereafter B marries W and dies testate. B devises all of his interest in Blackacre to W. C and D survive B. C and D take possession of Blackacre and W sues them in ejectment. May she succeed?

Applicable Law: The Rule in Shelley's Case does not apply in a case where the word "heirs" is used to mean "children" or "issue." In the United States the Rule applies when the word heirs is used merely to indicate the first generation of persons to take by intestate succession. Whether the word "heirs" is used in one sense or another is a problem of construction.

Answer and Analysis

No. While the Rule in Shelley's Case is one of law rather than one of construction, its application often involves the interpretation of the provisions of an instrument to see if the requirements of the Rule are satisfied. This particular problem presents one of the most difficult and most litigated questions concerning the application of the Rule.

The difficulty is determining the meaning of the word "heirs" as used in the particular deed or will. For the Rule to apply the word "heirs" must be used in its technical sense and not as a substitute for "children," "lineal descendants," or other group of people. Depending upon the setting in which the word "heirs" is used by the particular grantor or devisor, the word "heirs" has no less than four distinct meanings.

(1) In England the word "heirs" usually refers to the group of persons who are to take land by descent from generation to generation indefinitely. For instance, O to B for life, then to B's heirs, means not only that B's heirs will take from B by descent but that the heirs of those heirs, and heirs of those heirs ad infinitum continue to take without limitation in time. Unless the word "heirs" is used in this broad technical sense in a conveyance in England, the Rule in Shelley's Case was not applied.

(2) Suppose, however, that O conveyed to "B for life, then to B's heirs who take from B by descent at B's death." In this example, the word "heirs" is used to indicate persons who will take by descent but it is used in a much narrower sense. It means merely the first generation of heirs, those who take from B only, not those who will take in indefinite succession. This use of the word falls short of meeting the requirements for applying Shelley's Rule in England. However, under the modern American view, this

narrower use of the word also calls for the application of the Rule, and in this example, the remainder "to B's heirs who will take from B by descent at B's death" would be a remainder to B. Therefore, B's heirs would take nothing.

(3) Sometimes the word "heirs" is used to mean "issue" which is a term broad enough to include lineal descendants of all generations, children, grandchildren, great grandchildren, etc. For example, suppose O conveys to B for life, then to B's heirs or issue. In this case the Rule in Shelley's Case has no application. If B dies leaving two sons, X and Y, and two grandsons, M and N, the children of B's deceased son, Z, then X and Y and M and N by substitution for Z take the property as purchasers from O.[29] The remainder "to B's heirs or issue" is construed as a contingent remainder in B's issue who are determined upon B's death, and not a vested remainder in B under the Rule.

On the other hand, a court might conclude that O used the word "issue" as synonymous with the word "heir" and then apply the Rule in Shelley's Case. For example, in a North Carolina case[30] a grantor effectively conveyed to B for life, then to B's "lawful issue of . . . [B's] body." After concluding that the phrase "lawful issue of . . . body" manifested an intent to convey to B's heirs of the body, the court held that the remainder was limited to B in tail. However, because a North Carolina statute converted an entailed estate into a fee simple, the court held that the *remainder* was limited to B in fee and, then, because of merger, B had a fee simple.

(4) "Heirs" may also be used to mean the first generation of lineal descendants of the life tenant in which case it is synonymous with the usual meaning of the word "children." This is a still narrower meaning than that given to the word "issue." The word "children" is usually a word of purchase, meaning persons to take, and not a word of limitation describing the quantum of the estate taken. When the word "heirs" is used to mean "children," the Rule in Shelley's Case does not apply and the remainder goes to the children and not to the life tenant as ancestor.

This problem raises the question: in what sense did T use the word "heirs" in his will. The suggested answer given above is based on the conclusion that T used the word "heirs" as a synonym of the word "children," and that the Rule in Shelley's Case has no

29. The percentage share of each of them depends upon whether the court construes the instrument to mean that each is entitled to an equal share or M and N are only to take the share Z would have taken had Z survived B.

30. Pugh v. Davenport, 60 N.C.App. 397, 299 S.E.2d 230 (1983) (where land was devised to A for life and upon A's death "to the lawful issue of his body," the lawful issue of the devisor could not claim title to the land as remaindermen, while the plaintiff, who traced her title back to the original will, was entitled to the property).

application. There seems to be three good reasons for this conclusion.

First, in the clause introducing the executory interests in the brothers and sisters, "but if none of his such children or heirs survive him," the word "heirs" is used interchangeably with "children."

Second, in the quoted clause the word "such" modifies the word "children" and must refer back to the word "heirs" in the clause creating the remainder, "then to his heirs who survive him." Thus, T has used synonymously "heirs" and "such children."

Third, the gift over to B's brothers and sisters would seem to be surplusage if T had used "heirs" as "heirs" technically because if B had died without lineal descendants, then his brothers and sisters might well have been his collateral heirs.

This indicates that T must have used the word "heirs" to mean B's children as persons to take. Applying this meaning to the words of T's will, it reads in effect as follows, "to my son B for life, then to his children who survive him in fee simple, but if none of his children survive him, then to B's brothers and sisters share and share alike." Therefore, it appears that B took only a life estate and had not interest in Blackacre which could be devised to W. On the other hand, the contingent remainder in favor of B's surviving children became a vested estate in fee simple in possession in C and D upon B's death. Therefore, W may not eject C and D from Blackacre.

Of course the reverse of what appears in the above case may be true. If the word "issue" or the word "children" is used in a given instrument to mean "heirs" in its technical sense, the Rule in Shelley's Case will apply. The question is one of construction.

PROBLEM 8.4: O, who owns Blackacre in fee simple, conveys it "to B for life, then to the heirs of B." B dies testate devising all of his interest in Blackacre to K and leaving Y as his sole heir. Y takes possession of Blackacre. In the governing jurisdiction a statute abolishes the Rule in Shelley's Case, and provides that in such a case the ancestor or first taker acquires a life estate only and his heirs take the remainder. K sues to eject Y from Blackacre. May K succeed?

Applicable Law: In a jurisdiction where the Rule in Shelley's Case has been abolished, the intent of the grantor and the applicable statute control. Thus, if O conveys Blackacre to B for life, remainder to B's heirs, B takes a life estate and B's heirs, determined at B's death, a contingent remainder under a commonly employed statute. In this case the contingent remainder becomes possessory at B's death.

Answer and Analysis

No. Statutes abolishing the Rule in Shelley's Case exist in most states. These statutes frequently provide that limitations which previously would have operated under the Rule have the effect of giving the ancestor a life estate only with a contingent remainder going to his heirs. The statutes, however, are not uniform, and the exact wording of the applicable statute must be consulted.

When the Rule is abolished, it is necessary first of all to determine if the words of the limitation are such as would have otherwise given rise to the application of the Rule, and also to determine if the limitation is within the terms of the statute. The answer to both questions will usually be the same, that is, both will be either yes or no. It is conceivable that contrary answers might arise in situations where the statute, for example, is less than all inclusive in its operation or as to its specific applications. The usual rule of construction of ascertaining the intent of the grantor or devisor is still of paramount importance in determining the effect of the limitation. This intent must be determined before the statute can be applied.

In this problem, the conveyance expressly provides for a life estate in B with a remainder to B's heirs. All of the requirements for the application of the Rule exist: (1) a life estate in an individual with a remainder to his heirs; (2) both interests are created in the same instrument; and (3) both interests are of the same quality, both legal in this case. Also, there is nothing to show that the word "heirs" is used in other than its technical sense. Thus, the Rule would have applied, and the statute governs. Therefore B acquires a life estate, and B's heirs acquire a contingent remainder. B's heirs are determined at B's death. Under the facts of the case, Y is B's sole heir.

Upon B's death Y became the fee simple owner of Blackacre but Y took the title not from B by descent but as purchaser under O's deed. The word "heirs" is used to mean persons to take by purchase as contingent remaindermen. K, the devisee of B who had only a life estate, took nothing under B's will. Y owns Blackacre and K cannot eject him.

§ 8.2 *The Doctrine of Worthier Title*

PROBLEM 8.5: O conveys Blackacre "to B for life, then to my heirs in fee simple."[31] Thereafter O granted "to C and her heirs all of my right, title and interest in Blackacre." O died leaving

31. At common law the doctrine applied to dispositions of real property. Today, it can apply to dispositions of all property, outright or in trust. For example, if O transferred property to T to hold in trust to pay the income to A for life, then upon A's death to distribute the trust corpus to O's heirs, O's heirs would have nothing and O would have a reversion.

H his sole heir. B then died and H took possession of Blackacre. C sues H in ejectment. May C succeed?[32]

Applicable Law: When a grantor conveys a life estate for life with remainder to the grantor's heirs, under the Doctrine of Worthier Title the remainder is void and the grantor has a reversion.

Answers and Analysis

Yes. O's conveyance created a valid life estate in B. By the very words of that conveyance it is obvious that O intended O's heirs to take a remainder following B's life estate. But under the common-law rule known as the Doctrine of Worthier Title, a remainder limited in favor of the grantor's heirs was void and the grantor had a reversion. This Doctrine was a rule of property and not a rule of construction. Therefore, it did not give way to a contrary intent. It applied without regard to the grantor's intent. Since the grantor, under this Doctrine, had a reversion and reversions are alienable, O effectively granted O's reversion to C who is entitled to the possession of Blackacre at B's death.

Under the Doctrine of Worthier Title, a grantor could not create a remainder in his or her heirs. If the heirs were to take the property, it had to be by claiming through the grantor's reversion. As such, if they took the property upon the life tenant's death, they took by descent from the reversioner rather than as purchasers from the reversioner. The Doctrine is named "worthier title" because it was said to be worthier to claim title by descent than by purchase. In fact, what made descent worthier, from the perspective of the royal treasury, was that title passing by descent but not purchase was subject to the payment of a relief, the feudal inheritance tax.

PROBLEM 8.6: During her life T conveyed Blackacre "to B for life, then to T's heirs." T then executes a will devising all of her interest in Blackacre to X. T later dies leaving H her sole heir. B dies. H takes possession of Blackacre and X sues to eject him. May X succeed?

Applicable Law: The simplest case representing the Doctrine of Worthier Title and its application is, O to B for life, remainder to the heirs of O. B has a life estate, the remainder is void and there is a reversion in O. In effect the conveyance reads merely, O to B for life. The doctrine requires only: (1) a

32. See Robinson v. Blankinship, 116 Tenn. 394, 92 S.W. 854 (1906) (where land was conveyed to the grantee for life, with remainder to the grantor if he should survive the grantee, otherwise to the heirs of the grantor, the heirs had no estate by purchase and the grantor was capable of transferring the estate by a subsequent deed); Simes, 56–57.

conveyance of real property, and (2) a future interest over to the heirs of the grantor. At common law, taking title by descent was considered worthier than taking title by purchase. Therefore, if O creates a future interest in his heirs, O must have intended the heirs to take by the worthier title.

Answer and Analysis

Yes. This case is the simplest illustration in which the Doctrine of Worthier title applies. The Doctrine requires a conveyance of a future interest to the heirs of the grantor. When the doctrine applies, the interest of the heirs is void and the grantor has a reversion.

The legal effect of this conveyance is simply this: T to B for life. Here it should be noted that the grantor in her deed has limited the remainder to the persons who would take by descent, that is, her heirs. Under the Doctrine, the title by descent is considered worthier than the title by purchase, and the heirs take by that title which is worthier. This is the theory of the Doctrine of Worthier Title.

Applying the Doctrine to the facts, H, the heir of T, takes, if at all, by descent as heir of T and not through T's deed as a purchaser. Had T died intestate, H would have taken as T's heir. But in this case T devised his interest to X. Therefore, H takes nothing. T's reversion passes to X by devise.

PROBLEM 8.7: O conveys Blackacre "to B for life, then to O's heirs," it being my intention that those persons who would take Blackacre were I to die intestate, shall take such property through and by virtue of this deed. Thereafter O executed a will devising all of his interest in Blackacre to W. O died without changing this will. H is O's sole heir. W took possession of Blackacre and H sues to eject W therefrom. May he succeed?

Applicable Law: Originally the Doctrine of Worthier Title was a rule of law and not a rule of construction. Therefore it did not give way to a contrary intent. Today, where applicable, it generally has become a rule of construction by which the intention of the grantor controls. But, there is a rebuttable presumption that the grantor's heirs are to take by descent rather than by purchase. For the Doctrine not to apply, the grantor, by express language in the deed, must show that he intends his "heirs" to take as purchasers.

Answer and Analysis

Yes. The Doctrine of Worthier Title was historically a rule of law and not a rule of construction. At that time the remainder in a conveyance being in favor of the grantor's heirs was void and there

was a reversion in the grantor. The grantor's intention was quite immaterial. If the Doctrine were a rule of property, then the devisee, W, would be the owner of Blackacre and H could not eject him.

The modern view is that the Doctrine of Worthier Title is no longer a rule of law but a rule of construction under which the intention of the grantor determines the effect of the limitations in the deed.[33] The Doctrine remains in force in the typical case, O to B for life, then to the heirs of O. But if the grantor evinces an intention that his "heirs" shall take as purchasers under the provisions in the deed, they will.

In this problem, it seems clear that the inference of the Doctrine of Worthier Title, that the grantor does not intend to create an interest in his heirs which he cannot thereafter destroy by his own act, has been overcome by the express limitations in the deed. The deed provides that O's heirs "shall take such property through and by virtue of this deed." This clearly shows that O's "heirs" are to take as "purchasers" and that they are not to take Blackacre by descent at a later time on O's death. These plain words in the deed overcome any presumption to the contrary and make O's heirs contingent remaindermen. At the instant of O's death, his heirs, who turn out to be H, were determined and the contingent remainder was transformed into an estate in possession owned in fee simple by H. Therefore, W, the devisee of O, took no interest in Blackacre by virtue of O's will and H can eject W from the property.[34]

PROBLEM 8.8: O conveys Blackacre "to O for life, then to O's heirs." Two years later O conveys all of her rights in Blackacre to B. Three years later O dies testate leaving all of her property to C. If O had died intestate, H would have been O's sole heir. As among B, C and H, who owns Blackacre?

Applicable Law: Both the Rule in Shelley's Case and Doctrine of Worthier Title could apply to a conveyance.

Answer and Analysis

The answer depends upon whether the Rule in Shelley's Case, the Doctrine of Worthier Title, both or neither apply. B owns Blackacre if the Rule in Shelley's Case applies even if the Doctrine

33. See Doctor v. Hughes, 225 N.Y. 305, 122 N.E. 221 (1919) (where a trust deed provided payment of a yearly sum to the grantor, gave the trustee power to sell or mortgage, and provided that upon death of the grantor the trustee should convey the property to the heirs of the grantor, the heirs did not take by purchase but by descent, and the reservation of a reversion was a rule of construction molded by the court to effect the intent of the grantor). Accord, Braswell v. Braswell, 195 Va. 971, 81 S.E.2d 560 (1954).

34. See Restatement of Property § 314, comment e; Simes, 56–65.

of Worthier Title also applies in the jurisdiction. B wins because under the Rule in Shelley's Case the remainder runs in favor of O and O's heirs have nothing. Then, by virtue of the merger of O's life estate and O's remainder, O has a fee simple absolute. Since the Rule in Shelley's Case is a rule of law and not construction, the fact that O may have intended to create a contingent remainder in O's heirs is irrelevant.

If the Rule in Shelley's Case is inapplicable but the Doctrine of Worthier Title applies, then C, the devisee under O's will owns Blackacre. C owns Blackacre because the purported remainder in O's heirs is void and O has the reversion which is devisable. However, if the jurisdiction applies the Doctrine of Worthier Title as a rule of construction, then H might rebut the presumption that O intended the Doctrine to apply by proving O intended to create a remainder in O's heirs. If H can do this then H would own Blackacre.

In all events H owns Blackacre if neither the Rule in Shelley's Case nor the Doctrine or Worthier Title is law in the jurisdiction. H wins because O created a contingent remainder in O's heirs which became possessory upon O's death.

* * *

THE RULE IN SHELLEY'S CASE COMPARED WITH AND DISTINGUISHED FROM THE DOCTRINE OF WORTHIER TITLE

THE RULE IN SHELLEY'S CASE	THE DOCTRINE OF WORTHIER TITLE
SIMILARITIES	
1. it arose in the feudal system to preserve the feudal benefits of the overlord	1. it arose in the feudal system to preserve the feudal benefits of the overlord
2. in a typical case it affects only the remainder—e.g., A to B for life, remainder to the heirs of *B* (under the rule the remainder is given to the ancestor B)	2. in a typical case it affects only the remainder—e.g., A to B for life, remainder to the heirs of *A* (under the doctrine the remainder is void and there is a reversion in A)
3. in the early common law it was a rule of law and not a rule of construction (it is still a rule of law)	3. in the early common law it was a rule of law and not a rule of construction (it has become a rule of construction)
4. it defeats the expressed intention of the grantor	4. it defeats the expressed intention of the grantor except

THE RULE IN SHELLEY'S CASE	THE DOCTRINE OF WORTHIER TITLE
	in modern times when by construction it is concluded that the grantor intended it to apply
5. it was abolished by statute in England in 1925	5. it was abolished by statute in England in 1833
DISSIMILARITIES	
1. the rule always operates in favor of the *transferee*—e.g., A to B for life remainder to the heirs of *B*—the rule gives the remainder to *B* and his heirs take nothing	1. the rule always operates in favor of the *transferor*—e.g., A to B for life remainder to the heirs of A—the rule makes the remainder void, gives the reversion to A and his heirs take nothing
2. after the rule has operated, then by *merger* B's remainder in fee swallows B's life estate and makes B the fee simple owner	2. after the rule has operated, A owns the reversion subject to B's life estate and there is *no merger*
3. it is still a *rule of law* and not a rule of construction	3. it was a rule of law, but in modern law *has become a rule of construction*
4. it applies *only to freehold interests* in land	4. it applies *to real property and to chattel interests,* personal and real
5. it applies *both to conveyances inter vivos and to devises* by will	5. it applies *only to conveyances* of real property *inter vivos*—it has *no application to devises* by will
6. it has been abolished in most states.	6. it has not been abolished in most states.

* * *

§ 8.3 Powers of Appointment

PROBLEM 8.9: T devises Blackacre "to Trustee in trust for my son, B, for life, remainder as B shall by will appoint among B's children in fee simple, and in default of such appointment such remainder shall be equally divided among B's children living at B's death." At B's death four of his children, M, N, X, and Y, are living. B's will exercises the power of appointment by excluding Y entirely and appointing Blackacre to M, N and X, each to take an undivided one-third interest in fee simple in Blackacre. B dies wholly insolvent. C, a judgment creditor of B,

presents his claim for $500 to B's executor, E, and asks that it be satisfied out of Blackacre. Y seeks a decree of final distribution giving him an undivided one-fourth interest in Blackacre. (a) Should E allow C's claim as against Blackacre? (b) Should the final decree provide for Y as to any interest in Blackacre?

Applicable Law: A special power of appointment is one in which the donee is limited in his appointment to a person or persons other than himself or his estate. A general power of appointment permits the donee to exercise the power in favor of himself or his estate or to any other person or persons. A special power of appointment is exclusive when the donee in its exercise may exclude one or more persons from the group to be benefitted; it is non-exclusive when the donee in the exercise of the power must include all members of the designated class or group, and each must get a substantial benefit under the power, but the donee in the exercise of the power may make the shares of the appointees quite unequal. The creditors of the donee of a special power of appointment cannot subject the property subject to the special power to their claims. The appointees under a special power of appointment take their title from the donor of the power and not from the donee of the power of appointment.

Answers and Analysis

The answer to (a) is no. The answer to (b) is no.

This set of facts represents perhaps a typical case of the creation of a special power. A testator leaves property in trust for his son for life and then empowers the son to determine which of his children, if any, shall be entitled to the property when he dies. Testator further provides that absent a designation of takers by his son, the property should be distributed equally to the son's children.

In this conveyance the son is a donee of a so-called special power of appointment because it cannot be exercised in favor of the donee or in favor of his estate. If the donee could have appointed to either himself or his estate, he would have had a general power.

B's children are called the objects of the power. If B actually appoints to one or more of them, those to whom he appoints are called appointees.

B's power is testamentary since it can be exercised only by will. If B could have exercised the power during his life by deed, it would have been called an "inter vivos" power.

B's power is in gross since B has a life estate in the property and the exercise of the power will not affect his interest.

A special power is either exclusive or non-exclusive. It is exclusive when it permits the donee of the power to exclude one or more of the objects entirely from the benefits to be derived from the exercise of the power. It is non-exclusive when the donee in the exercise of the power must include all the members of the permissible class and none may receive less than a substantial share of the property subject to the power. The exercise of such power, however, may make the shares quite unequal. A special power is construed to be an exclusive power unless the donor of the power has expressed an intention that it shall be non-exclusive.

T also provided what would happen to Blackacre if the donee failed to exercise the power. T designated B's children as takers in that case and, under powers' law, they are called the takers in default of appointment.

Applying these doctrines to the facts, it seems clear that T has included in his will no expression evidencing an intention to make the power given to B a non-exclusive power. Thus, it was within B's power to exclude one or more of B's children from benefits. It was wholly within B's power to exclude the child, Y, from any interest in the remainder in Blackacre. Therefore, the answer to question (b) is that the final decree of distribution in B's estate should make no provision for the excluded child, Y. The probate court would have no power to make such a provision for the reason that no interest in Blackacre is a part of B's estate. B had a life estate in that property and upon his death his interest therein ceased completely.

Blackacre was part of T's estate and by T's will the remainder was given to the children of B living at B's death in default of the exercise of the power. Thus, the children of B had a contingent remainder. This remainder was contingent on both their survivorship of B and B's failure to exercise the power of appointment. By the exercise of the special power of appointment by his will, B has limited the remainder (as restructured by the exercise of the power) to three of his four children, M, N, and X. Y is effectively excluded from any participation in the remainder. Furthermore, under the so-called "relation back" doctrine, by the exercise of this special power the remainder passed to M, N, and X, not from the donee of the power, B, but from the donor of the power, T. In other words, legally the source of the title of M, N and X is T, their grandfather, not B, their father.

The remainder never became any part of B's estate. Therefore, B's creditor, C, has no right against Blackacre and indeed, E, B's executor, has no power to subject any interest in Blackacre to the claim of B's judgment creditor. This follows the general rule that property subject to a special power of appointment cannot be

reached by the creditors of the donee of the power, whether or not such power is exercised.

§ 8.4 *Common-law Rule Against Perpetuities*

PROBLEM 8.10: O conveys Blackacre to "B for life, then to the first child of B who reaches age 25." At the time of the conveyance B is alive and has two children, C, age 2, and D, age 1, respectively. Is the interest of the first child of B who reaches 25 valid under the common-law Rule?

Applicable Law: The destructibility rule, if applicable, saves a contingent remainder in real property[35] from invalidity under the Rule against Perpetuities when the remainder is limited to take effect at the end of one or more life estates of persons in being. This is because of the fact that the remainder will either vest at the termination of the life estates or be forever destroyed at that time, i.e, fail.

If the destructibility rule is inapplicable, then a contingent remainder that might not vest within 21 of the death of the life tenant or another life in being when the remainder was created is void. This life in being could include the holder of the contingent remainder. In considering whether the contingent remainder violates the Rule, all possibilities are considered even though improbable.

Answers and Analysis

Under the conveyance, B takes a life estate. It is a presently vested estate in possession, and therefore cannot violate the Rule against Perpetuities.[36] In all events, O has a reversion. Reversions are not subject to the Rule; they are deemed vested from the moment they are created. The Rule does apply, however, to the contingent interest of the first child of B to reach the age of 25. Since the conveyance is to the first child of B to reach 25 and no child had reached 25 when the conveyance was made, the interest is contingent.[37]

If the destructibility rule is in effect, then the interest of the first child of B who reaches age 25 will either vest no later than, and take effect in possession at, B's death or at such earlier time as B's estate might end. Alternatively, if there is no such child at B's death, the interest fails no later than B's death. Accordingly, as of B's death, it is known with *absolute certainty* whether the contin-

35. Reminder, the Rule of Destructibility did not apply to gifts in trust or to transfers of personal property.

36. The creation of a present possessory estate never violates the rule as it is vested from the moment of creation.

37. If, at the time of the conveyance, B's had a child then living who had reached the age of 25, that child would have an indefeasibly vested remainder which would not violate the Rule.

gent interest vests or fails. Thus, it is valid under the Rule because it will vest, if at all, no later than B's death and B was a life in being at the time the interest was created.

Even if the destructibility rule did not apply, the interest would be good if the phrase "first child of B who reaches age 25" is construed to mean C and only C. This is because the interest will either vest or fail to vest in C's own lifetime and C was also a life in being. For example, if B died survived by C, age 3, it is possible that 23 years would pass before C's interest either vested or failed.[38] Nonetheless, C either attains the age of 25 or fails to attain that age in his own lifetime. Thus, the interest is good under the Rule.

However, if the destructibility rule is not in effect in the jurisdiction and the phrase "first child of B who reaches age 25," is construed to mean the first child of B *whenever born,* then the fact that no child of B has reached 25 at the end of B's life estate does not prevent a child from taking if he reaches 25 after the death of B. In the instant case the fact that B has two children, 2 and 1, does not necessarily mean that one of these two children will actually take. It is possible that both of these children will die before reaching 25, that B will have another child, and that B will die before that child reaches four years of age. If these facts should occur, a subsequently born child will reach 25 more than 21 years after the deaths of B and his presently living children. In other words, the gift to B's first child to reach age 25 would vest more than 21 years after the death of B and any other life in being. Thus, the gift to the first child of B who reaches 25 is void. Because it is void, upon B's death the property reverts to the grantor.

The fact that it is highly probable that one of B's present children, or even an after-born child, will reach 25 within 21 years after the death of B does not validate the gift under the common-law Rule. In other words, the validity of nonvested interests is determined on the basis of what might have been rather than on the basis of facts that actually happen. There must be absolute certainty that the gift will either fail or vest within the period of the Rule. This certainty can be achieved only if there is some life in being alive when the interest is created within 21 years of whose death there is absolute certainty the nonvested interest will vest or fail. For example, had the remainder been limited in favor of B's first child whenever born who reaches the age of 21, the gift would have been good. In this gift B is a life in being when the interest in favor of his first child whenever born who reaches age 21 was created. Furthermore, it can be said that such interest will vest or fail to vest absolutely no later than 21 years after B's death.[39]

38. It would fail if C died before reaching the age of 25.

39. It is possible that B could die survived by a pregnant wife and that

PROBLEM 8.11: T devises Blackacre "to B for life, then to B's children who reach the age of 25." At T's death B and four children of B are living. The oldest child of B is age 19. Is the gift valid under the Rule?

Applicable Law: A gift to a class is void under the common-law Rule if there is any possibility that the gift to *any member of the class* will vest or fail beyond the perpetuity period of lives in being plus twenty-one years.

Answer and Analysis

The gift to B's children who attain the age of 25 is void under the common-law Rule. The gift is void because of the possibility that at B's death B will then have a living child under the age of four and such child cannot attain the age of 25 within 21 years of B's death. Furthermore, under the so-called "all or nothing rule" the gift to all of B's children is void even though some of them may have reached age 25 at B's death. It is irrelevant that at the time of the creation of the contingent remainder in B's children, B had a child then living who was age 19. It is also irrelevant that the only children of B who *actually* take the gift at B's death are the children of B living when T died.

Under the common-law Rule, a gift to a class of persons is not vested if at the time the gift was created the class was open.[40] For a nonvested class gift to vest under the Rule, two things must happen within the perpetuity period. First, the class gift must close. Second, if the class gift is subject to a condition precedent, the condition must occur *for each and every member of the class* within the perpetuity period. If either of these events might occur too remotely, the gift is bad as to *each and every member of the class.*

In this problem, the class gift will necessarily close within the perpetuity period since it will close upon B's death and B was a life in being. However, there is the possibility that one or more children of B (children born after T died who were not lives in being) might not reach age 25 within 21 of the death of B. Because the gift would

any child born after B died could not reach the age of 21 within twenty one years of B's death. However, for purposes of the Rule, a child "en ventre se mere" is treated as being alive. See, Fetters, The Perpetuities Period in Gross and the Child en Ventre se Mere in Relation to the Determination of Common–Law and Wait–and–See Measuring Lives: A Minor Heresy Stated and Defended, 62 Iowa L. Rev. 309 (1976).

40. If the class was closed at the time the gift was created, the effect of the gift is to create individual gifts (vested or contingent) in each then living member of the class. For example, if O transfers property to B for life, then to C's children who reach age 25 and at the time of the transfer C is dead and five children of C are living, the effect of the gift is as if O transferred the property to B for life and contingent remainders only in those five children of C. Therefore, as to each child of C the gift will vest (the child attains age 25, or fail because the child fails to attain age 25 in the child's own lifetime *and the child was a life in being.*

be bad as to such a fictionalized child, it is also bad as to all other members of the class, even those living when T died. Such was the harshness of the common-law Rule.[41]

PROBLEM 8.12: T devises Blackacre "to B for life, then to B's children for their joint lives and then to the survivors of them for the life of the survivor, then to all of T's lineal descendants who survive B." What interests, if any, are valid under the common-law Rule?

Applicable Law: An interest is valid under the common-law Rule if it vests in interest within the period of the Rule. It is not necessary that it vest in possession within the period of the Rule.

Answer and Analysis

All interests are valid. B's life estate is vested in possession at the moment of its creation at T's death. Therefore, the Rule is inapplicable to that interest. If at T's death B has children, then they would have a vested remainder for life subject to open to admit later born children of B. All of B's children, however, will be born within B's lifetime, or the period of gestation thereafter. Thus, the interest of every member of the class of B's children will necessarily vest (if at all) within the period of the Rule, namely within the period of B's life.

If at T's death B has no children, then the remainder would remain contingent until B has a child at which time it would become a vested remainder subject to open. Nonetheless it would vest in interest[42] in such child or children of B no later than B's death when the class closes and would, therefore, comply with the Rule. Therefore, the interest of B's children is valid.

Of course B may have several children after T dies and each of them may live to be 80 years of age. In other words, it is possible that B's children will possess Blackacre far beyond B's life and 21 years. Further, T's lineal descendants cannot possess Blackacre until B's children's estate ends. To put this another way, T's lineal descendants' interest may not become *possessory* within 21 years of the death of B and any other person living at the time of T's death. How does that affect, if at all, the validity of the interest of T's lineal descendants? It affects the possession only and not the

41. A somewhat unique and highly absurd expression of this so-called "all or nothing" rule explains the holding in the famous case of Jee v. Audley, 1 Cox 324, 29 Eng. Rep. 1186 (1787) where a gift to a class was held void. The class was open at the time the gift was created because the named ancestors who were in their seventies were conclusively presumed to be fertile and therefore capable of having more children.

42. Remember, a class gift vests in interest when the class closes and all conditions precedent with respect to each and every member of the class has occurred.

vesting. T's lineal descendants who are entitled to share in this gift are determined at B's death and at that time their interest vests in interest even though their right to possession may be postponed far beyond the period of the Rule against Perpetuities. Since the Rule is concerned with the timeliness of the vesting of an interest, rather than when an interest becomes possessory,[43] the interest of the lineal descendants of T vests if there be such descendants, or fails if none) not later than B's death. Since B was a life in being, the interest of T's descendants is valid under the Rule.

Suppose T's will provided a remainder in T's descendants living at the time the secondary life estates in B's children ended. Would that interest be valid under the Rule? No. In this case, the gift of T's descendants might not vest in interest at B's death. On the contrary, it would not vest until B and all of B's children (one or more of whom might be born after T died) had died. To illustrate, suppose all of B's children living when T died predeceased B. Thereafter, B had another child. B dies and the secondary life estate vests in B's after-born child. Twenty five years later that after-born child of B dies at which time the gift to T's descendants either vests because the class closes or fails to vest because there are not then living descendants of T. This is beyond the permissible period under the Rule.

Suppose, on the other hand, that T bequeathed property to B for life, then to B's children for their lives, then to B's grandchildren for their lives, and then to B's grandchildren's surviving issue. Assuming B survives T, the interests of B and B's children are valid under the Rule as they vest no later than the death of B plus 21 years. However, the interests of B's grandchildren and ultimately the remainder to their issue are void under the Rule as there is the possibility they may vest too remotely.

PROBLEM 8.13: O conveys Blackacre to B for life, then to the first child of C who attains the age of 21 years whether that child attains age 21 before or after the death of B. At the time of the conveyance C is a living single person having no child. Are all the interests valid under the common-law Rule?

Applicable Law: An interest is valid under the common-law Rule against Perpetuities if there is no possibility that it may vest beyond relevant lives in being, plus the period of gestation, plus 21 years. Thus, a limitation to the first child of a living person who attains the age of 21 is valid.

43. In some cases an interest can vest only by becoming possessory. For example, a springing executory interest vests, for purposes of the Rule, when it becomes possessory.

Answer and Analysis

Yes. (1) Because the interest of C's child is contingent there is a reversion in O. Every reversion is vested and the Rule has no application to reversions. (2) B's interest is presently vested in possession and the Rule does not apply to it. (3) The interest of C's first child to attain the age of 21 is a contingent interest. It is contingent both on being born and surviving to the age of 21. Is there any possibility that this interest will vest later than a life in being and 21 years? No.

The measuring life is C's. No child can be born to C later than the period of gestation (the period of gestation is normally 9 months but 10 months is allowed) after C's death. Any such child must attain the age of 21 years, if at all, within 21 years after its birth. Therefore, the longest possible time when such interest must either vest or fail is C's life, plus a period of gestation, plus 21 years. Under the Rule a child in the womb is in being. Therefore, the Rule does not invalidate any interest because the period stated is extended by an actual period of gestation. The interest of C's first child who may attain the age of 21 must either vest or fail within the allowable period with no possibility that it can vest at any later time. Therefore, it is valid.

PROBLEM 8.14: T devises Blackacre "to my grandchildren who attain age 21." T dies survived by three children, X, Y, and Z, but no grandchildren. Is the devise to the grandchildren valid under the common-law Rule?

Applicable Law: Measuring lives may be determined by implication. The measuring lives need not be specifically mentioned in the instrument if they can be determined by implication. Thus, a devise to the testator's grandchildren who reach 21 is valid as the testator's children are the measuring lives. However, a conveyance to the grantor's grandchildren who reach 21 is invalid if no grandchildren are 21 at the time of the conveyance because of the possibility that the grantor may have more children who are not lives in being when the instrument takes effect.

For purposes of the Rule, an interest created by will is deemed created at the testator's death; an interest created by a deed is deemed created at the time the deed is delivered. These are the times relevant to ascertain who are lives in being.

Answer and Analysis

Yes. Without a residuary clause in T's will, Blackacre passes to T's heirs for the period between T's death and when some grandchild attains age 21. The interest in T's grandchildren is a springing executory interest to which the Rule applies.

The devise to T's grandchildren did not take effect until T died. In this case there is no life expressly mentioned who can be the "life in being" or "lives in being," but the mention of grandchildren implies there must be an intervening generation of T's children in order that T may have grandchildren. By implication T's children become the "lives in being" during which, plus 21 years, the devise must vest.[44] Vesting cannot by any possibility take place after the permissible period under the Rule because every grandchild of T, if any, who attains the age of 21 years must do so not later than the death of the survivor of X, Y and Z, and a period of gestation, and 21 years.

For example, assume they die in the following order, X, Y and Z. A child is born to Z posthumously by the name of M. M is the last possible grandchild of T. M arrives at the age of 21. At that instant M's interest in Blackacre vests. How long has it taken after T's death for such interest to vest? The answer is the lifetime of Z, the surviving child of T, plus that part of the period of gestation between Z's death and M's birth, plus 21 years. Therefore, the devise to T's grandchildren who attained the age of 21 years vests within the permissible period under the Rule. Had there been no grandchild of T who attained 21, then the devise would have failed within that period and the reversion would have remained in T's heirs.

Suppose T had conveyed Blackacre rather than devised it to those of her grandchildren who reach 21 (there being no grandchildren at the time of the conveyance who are 21). Then the children of T then living could not be the validating measuring lives because of the possibility that T could have an after-born child, and this after-born child could produce a grandchild who could reach 21 more than 21 years after the deaths of T, her existing children, and grandchildren, if any. Therefore, this conveyance would be void.[45]

On the other hand, if at the time of the conveyance, a grandchild of T was then living *and was 21 years or older,* the gift to the grandchildren would be valid. Since the grandchild 21 years of age or older would at the time of the conveyance be entitled to claim possession of his share, the class closes under the rule of convenience. Only the then living grandchildren of T are in the class. *No later born grandchildren of T* can be included. Therefore the gift vests or fails in each class member during her lifetime.

PROBLEM 8.15: T devises Blackacre "to his son for life, then to his son's widow for her life, then to such of the son's children living at the death of the survivor of the son and his

44. Since this is a springing executory interest, it vests only by becoming possessory.

45. See Simes, 265–266.

widow." At T's death, T's son and the son's wife, Jane, are living. They also have three living children. Is the interest of the son's children valid under the Rule?

Applicable Law: A future interest is void under the Rule if there is any possibility that it could vest or fail to vest too remotely. The common-law Rule's emphasis on possibilities rather than probabilities or actualities may lead to unexpected results and constitute a trap for the unwary. This may be illustrated by the famous case of the "unborn widow."[46]

Answer and Analysis

The gift to the son's children is invalid. There is a possibility that the son's present wife will predecease him and that the son will remarry a person who was born after T died. Under this unlikely scenario, the gift to the son's children might not vest until 21 years after the death of this "unborn widow" which is beyond the permissible period under the Rule. For example, the son's wife, Jane might die, the son might remarry Ada who was born after T died. Ten years later the son and Ada have a child, then the son dies and 25 years later Ada dies, resulting in the vesting[47] of the class gift limited in favor of the son's children living at the death of the survivor of the son and his widow.

Although the gift to the son's children is invalid under the Rule, the gift to his widow for life is valid. It vests or fails to vest no later than the son's death and he was a life in being at T's death.

Could the gift to the son's children be saved from invalidity if the gift to the son's widow was construed to be a gift only to Jane who was the son's wife at the time T died? Yes. If so construed, then the gift to the son's children vests or fails to vest no later than the death of the survivor of the son and Jane both of whom were lives at being at T's death. However, T's will did not specifically limit the gift to Jane; it limited the gift in favor of the son's widow and courts that have considered this issue have not been inclined to construe the will to mean only Jane even though to do so likely comports with T's intent (after all, T knew Jane and did not necessarily contemplate that she would die before the son and he would marry another) and save the gift in favor of the son's children.[48]

46. Leach, Perpetuities in a Nutshell, 51 Harvard L.Rev. 638, 644 (1938). See also Restatement (Second) of Property, § 1.4, comment i.

47. Remember, a class gift vests when the class closes (here, when son dies) and all conditions precedent have occurred (here, the death of the son's widow who might not have been a life in being).

48. See, e.g., Chenoweth v. Bullitt, 224 Ky. 698, 6 S.W.2d 1061 (1928) (where a will gave a life estate to the testator's widow, and after her death to the testator's son and his wife during their lives and on the death of the sur-

A similar result can follow where a gift is limited to vest upon the happening of some administrative contingency.

PROBLEM 8.16: T devises Blackacre to "B and her heirs after the probate of this will." There is no residuary clause in the will and X is T's sole heir. Upon T's death B takes possession of Blackacre and X sues in ejectment. May X recover?

Applicable Law: When, under the Rule Against Perpetuities, no life in being appears as a measuring life, then the contingent interest must vest within the gross period of 21 years from the time of its creation, which, in the case of a will is counted from the time of the death of the testator.[49]

Answer and Analysis

The classic answer is yes. As worded, T purports to create a springing executory interest in B which is contingent upon the probate of T's will. Thus, the question is whether B's interest must vest or fail within the period of the Rule. Viewed from the moment of T's death, and considering all possibilities, the answer is clearly no. It is not absolutely certain that T's will will be probated promptly after T's death. Probabilities, even high probabilities, do not count. Some wills are never probated. Further, B's interest is not contingent on B's being alive when T's will is probated. Therefore, B needn't be living at that time to take. Thus, because the will might not be probated within 21 years of T's death, and because no measuring life is involved, B's interest is void. To illustrate, one year after T dies B might have a child and then die intestate; 25 years later T's will is probated. But for the Rule, Blackacre would then pass to B's heir but that vesting[50] occurs beyond the permissible period. Since this possibility could occur the gift to B is void and Blackacre descends to T's heir X, who may eject B.

In cases of this type, the limitation is sometimes saved by one or another construction techniques. Thus, a devise on probate of an estate may be construed as not contingent at all but simply as a recognition of the fact that no ultimate distribution can be made of the estate until probate. Similarly, a devise to take effect after settlement of the estate may be held valid under the doctrine that the holder of the will is duty bound to deliver the will promptly,

vivor to their children or lineal descendants, the court held that the devise to the son and his wife was void as to limitations following the life estate of the son's wife because under force of statute the absolute power of alienation could not be suspended for a longer period than during the continuance of lives in being at the creation of the estate and 21 years and 10 months thereafter).

49. See Restatement (Second) of Property, § 1.4, comment n.

50. Springing executory interests vest by becoming possessory.

that the executor has a fiduciary duty to settle the estate promptly, and that the testator expected both of these things to be timely done and certainly within 21 years. Of course, if the limitation following the "after probate" contingency is to a named individual for life, the gift is necessarily valid because the devisee herself is a life in being. Thus, a devise "after probate of my estate to B for life," is necessarily valid since B, having only a life estate, will have to take, if at all, within her own lifetime.[51] Similarly, the gift to B in the problem would have been valid in all events if T's will had required B to be living when T's will was probated. It would be valid because the gift to B would vest or fail to vest in B's lifetime and B was a life in being at T's death.

In applying the common-law Rule there is a conclusive presumption of fertility.

PROBLEM 8.17: T devises Blackacre "to the children of B for their lives and the life of the survivor of them, then to B's grandchildren in fee simple." There is a residuary clause in M's favor. At the time T dies, B is a woman of the age of 85 and has three children, X, Y and Z. When the survivor of X, Y and Z dies M takes possession of Blackacre and sues to quiet title. May M succeed?

Applicable Law: For the purpose of the Rule Against Perpetuities every living person is conclusively presumed capable of having children as long as he or she lives. A limitation in the conveying instrument must be construed as of the time when such instrument takes effect which, in the case of a will, is the time of the death of the testator.

Answer and Analysis

Yes. At the outset the following items should be carefully noted. The creating instrument is a will; B, a woman of 85, is not a donee under the will but she does constitute a generation; B's children, X, Y and Z, are given life estates which are to last until the death of the survivor, and such children constitute a second generation; the children of X, Y and Z, are the grandchildren of B and constitute the third generation.

For the purpose of the Rule, every living person is conclusively presumed capable of having children as long as he or she lives.[52] Therefore even though B is age 85, B can have children until her death at least for purposes of the Rule, regardless of the fact that

51. See Restatement of Property § 374; Simes, 286; Leach, Perpetuities In A Nutshell, 51 Harv.L.Rev. 638, 645 (1938); Leach, Perpetuities, The Nutshell Revisited, 78 Harv.L.Rev. 973, 979 (1965).

52. Restatement (Second) of Property, § 1.4, comment h.

biologically B may be quite incapable of reproduction. This is sometimes referred to as the case of the "fertile octogenarian."

Accordingly, in analyzing the validity of the gift under the Rule, B may have another child, H, who will have children who will qualify as B's grandchildren and who were not in being at T's death and may not come into being until more than 21 years after the deaths of B, X, Y and Z. It is possible then that all of B's children and grandchildren except H's children, who were not "lives in being at the creation of the interest," will have died before the interest created by T's devise, vests and that H's children will be the only ones who can take the interest.

In many cases there is often a thin line between what is valid and what is void. For example, in this case, had T's will limited the gift to B's grandchildren who were the children of X, Y and Z, then the devise to them would have been valid because the lives in being as measuring lives would have been X, Y and Z, and their children were bound to take vested interests not later than the death of the survivor of X, Y and Z, and a period of gestation, from "the creation of the interest."

Of course the life estates to the children of B were valid even though they were to open to let in after-born children of B. Because the limitation in T's will to B's grandchildren, is void under the Rule, the will would read in legal effect merely, "to the children of B for their lives and for the life of the survivor of them." The fee simple thereafter passes under the residuary clause to M who now has the right to have the title quieted in him, the life estates in X, Y and Z having been terminated by death.[53]

PROBLEM 8.18: T devises Blackacre "to B for life, then to the brothers and sisters of B who reach the age of 25 years." At T's death, B's parents, H and W, are both living, as are B's three brothers, M, N, and O. While B still lives two other brothers are born, R and S. B dies. X, the heir of T takes possession of Blackacre. M, N, O, R and S join in an action to eject X. May they succeed if contingent remainders are not destructible?

Applicable Law: A gift limited to a class is considered a unit and is not divisible, and if any member of the class cannot qualify to take under the Rule, the entire gift must fail. If, on the other hand, the members of the class are to take not as a class but as individuals, then the gift will not fail and those

53. See Simes, 287. For suggested reforms, see: Restatement, Second, Property, Tentative Draft, §§ 1.1–1.6. For recommended modifications of the common-law rule, with many references, see Maudsley, Perpetuities: Reforming the Common-law Rule—How to Wait and See, 60 Cornell L.Rev. 355 (1975); Comment, Rule Against Perpetuities: The Second Restatement Adopts Wait and See, 19 Santa Clara L.Rev. 1063 (1979).

individuals who can qualify will take according to the limitations in the governing instrument. Likewise, where there are sub-classes, the validity of each sub-class is determined separately.

Answer and Analysis

No. B's life estate is valid. The limitation to B's brothers and sisters is a class gift. This gift is considered a unit and is not divisible into parts. Therefore, unless the interest of all members of the class vests or fails within the perpetuity period, the gift fails in its entirety. In other words, if one member of the class cannot qualify under the Rule, then the entire gift fails even though as to the other members of the class the interest has vested. This is known as the "all or nothing" rule.[54] This principle can be justified upon the theory that the grantor or devisor must have intended all members of the class to take and did not intend that only part of the class, described in the deed or will as a class, should take and some would not take in case some did not qualify under the Rule.

Applying these principles to the problem, if one of B's brothers and sisters cannot qualify to take a vested interest within a life in being and 21 years after A's death, then the entire gift to B's brothers and sisters must fail. Of course this conclusion must be determined by construing T's will at T's death, not by the facts as they actually occurred after T's death. When T's will took effect, B's parents, H and W, were still alive and conclusively presumed capable of having children. If thereafter a child is born to them, being a brother or sister of B, the life tenant, this after-born child would not be "a life in being at the creation of the interest." This child would have to attain the age of 25 years before her interest could vest. That time could be longer than "a life in being plus 21 years" after "the creation of the interest" by T's will. In fact, both R and S are such after-born children. If either or both attain the age of 25 years, it may be at a time more remote from the creation of the interest than is allowable under the Rule. For example, if R and S were under 4 years of age at the death of B, and if H, W, M, N and O had predeceased B, then the interest of R and S would vest (if at all) beyond lives in being and 21 years measured from the effective date of the will. Since all possibilities from the inception of the interest must be considered, such brothers cannot qualify to take the contingent interest in Blackacre as a member of the class, "brothers and sisters of B who reach the age of 25 years." Thus,

54. See, e.g., Connecticut Bank and Trust Co. v. Brody, 174 Conn. 616, 392 A.2d 445 (1978) (refusing to save the class gift from the "all or nothing" rule by adopting a "wait-and-see" reform). See also Restatement (Second) of Property, § 1.4, comment k. See also Jee v. Audley, 1 Cox 324, 29 Eng. Rep. 1186 (1787) (gift to four daughters of living persons void because of possibility that parents could have another child whose interest could vest too remotely).

the entire gift to the class must fail even though some members of the class, M, N and O, did in fact qualify and their interests vested within the perpetuity period. This is an exception to the rule that the Rule against Perpetuities does not apply to vested interests. Stated differently, for purposes of the Rule, vested remainders subject to open are nonvested.

In legal effect T's will would read merely, "to B for life," leaving the reversion to descend by intestate succession to T's heir, X, who now owns and has the right to possess Blackacre as against B's brothers, M, N, O, R and S, who must fail in their ejectment action.

There may be a thin line between the valid and the void. Had T provided in his will for separability of the interest of each brother and sister of B so that the interest of each as an individual (rather than as a member of a class as a unit) would have been tested under the Rule of Perpetuities, then only part but not all of the gift would have failed. For example, suppose T had provided, "then to each brother or sister of B such fractional interest in Blackacre as he or she can qualify to take if and when he arrives at age 25." Under this provision M, N and O, being "lives in being" at T's death would each, upon attaining age 25, have qualified to take Blackacre in fee simple. The interest of each would depend on which, if any, of the three reached age 25. But such might not have been A's intention. The problem is one of construction.

Note

Two important limitations on the unitary class gift rule are in effect. The first is the case of a *per capita* gift to each member of the class, illustrated in the last paragraph of the above discussion, but more commonly illustrated by a gift of a specific sum of money to each member of a class who attains an age in excess of 21. In such instance, the gift is valid as to those members who are in existence when the limitation takes effect, but is invalid as to those who are born afterwards.

The second exception is the sub-class rule. Under this exception, when there is a gift to sub-classes, the gift to a particular sub-class may be valid although the gift to other sub-classes may be too remote. This rule applies when there is a gift to a class, the membership in which is certain to be determined within the period of the Rule as well as a gift to a class whose membership may not be certain to be determined within the period of the Rule.[55]

55. See Leach, Perpetuities in a Nutshell, 51 Harv.L.Rev. 638, 648–651 (1938).

PROBLEM 8.19: T devises Blackacre "to B for life, then to the first child born to B for life, said child to have the general power by deed or will to appoint to whomsoever he will, including himself." At the time of T's death B is a single person having no child. T's will gives the residue of her property to M.

B dies. Surviving him is his first born child, X, who is 25 years of age and competent, and who has not yet exercised the power given him by T's will. Although M disputes the validity of the power given to X in T's will, X executes a deed appointing himself as the owner of the fee simple estate in Blackacre. X then sues M seeking to quiet title in X. May X succeed?

Applicable Law: A general power of appointment presently exercisable is considered the equivalent of ownership of property. Thus, if a donee has a presently exercisable general power, the donee can alienate the property by exercise of the power in the same manner as the owner of property in fee simple absolute can alienate the property.

Answer and Analysis

Yes. (1) There is no question in this case as to the validity of B's life estate or of the life estate of his first born child, X. (2) The dispute between X and M concerns merely the validity of the power of appointment limited to X. While the Rule is directed towards remoteness of vesting, it is intended to prevent the fettering of property over long periods of time. A general power of appointment by deed or will means that the donee of the power can exercise it during her lifetime whenever she so desires. A general power of appointment, therefore, is considered the practical equivalent of the ownership of the property itself. After all, the only thing standing between the donee and a fee simple, is the act of exercise, generally evidenced merely by a signed writing.

The test for the validity of a general power is not when it is exercised in fact but whether it can be exercised within the period of the Rule. In this problem, the general power could be exercised by B's first born child at any time from the date of the child's birth. Indeed, the time when the donee of the power could exercise it from the time of its creation could not be longer than a life in being (B's life) and the period of gestation if his first born child were born posthumously.[56] This is clearly within the Rule. Furthermore, it

56. This is only theoretically true; pragmatically it is not since a one day old baby could hardly in fact exercise a power of appointment. It is possible, theoretically at least, for the donor to provide for the exercise of a power by an infant, but in this case the directions are for the exercise by a deed or will (not by an instrument in the nature of a deed or will). In such a case it is generally held that the donee must have the capacity to execute the particular instrument in

would have been within the period of the Rule had the power been limited to B's first born child who reached age of 21 years.[57] It is true that X could in fact exercise the general power given him at a time more remote from its creation than is permissible under the Rule. But that is irrelevant because the purpose of the Rule is not offended. As long as there is some person who has the power to acquire the absolute property for his own benefit within the period of the Rule, he can do so and alienate the property. Thus the property is freely alienable within the period of the rule. Having exercised the general power in his own favor, X became the fee simple owner of Blackacre and title should be quieted in him as against A's residuary devisee, M.[58]

The power to acquire the absolute interest in the real property must exist within the period allowed by the Rule against Perpetuities, but its exercise may be at a more remote time. Had T's will limited the existence of the general power in B's first born child to the time when such first born child had attained the age of 25 years, that power would have been void, not exercisable by X at any time.

PROBLEM 8.20: O, the owner of Blackacre, agrees for a valuable consideration that B, her heirs or assigns, may have an option to purchase such property for a stated amount of $5,000 at any time, upon 30 days notice, within 22 years from the date of the option agreement. One year later B gives proper notice and tenders the $5,000 to O and demands performance by O, which is refused. May B compel O to perform?

Applicable Law: In some states the Rule against Perpetuities applies to an option agreement to purchase land not connected with or incident to a lease, and if the interest of the optionee may not vest within the period of the Rule, the option is void.

Answer and Analysis

No. The common-law Rule against Perpetuities can apply to option agreements which are not connected with leases or incident thereto.[59] It is obvious that it is possible that no interest will vest in

question, which, in the case of a deed or will, means that the donee must be of sound mind and of the age of majority or otherwise have the disability of infancy removed. Thus, pragmatically, in the instant case, the longest period of time that the power could remain unexercisable would be for B's life, the period of gestation, and 21 years thereafter. This, however, is within the period of the Rule. See Simes 142.

57. This is the practical effect of the limitation as written if the age of majority is 21.

58. See Restatement of Property § 391; Bray v. Bree, 6 Eng.Rep. 1225 (1834).

59. See, United Virginia Bank v. Union Oil Co., 214 Va. 48, 197 S.E.2d 174 (1973) (where an option agreement granted an oil company the right to purchase certain land and the option period was to begin when certain contingencies

B or her successor within a gross period of 21 years from the time the agreement is made. Accordingly, the option is void under the Rule. It is considered that an option agreement fetters the alienability of Blackacre for longer than the allowable period under the Rule and is a deterrent to the owner from selling to any one else during the period provided for in the option.

It should be kept in mind that the validity of the interest is determined at the time of the creation of the interest and not by events thereafter. It is quite immaterial that B attempted to exercise the option within one year after the agreement was made. The option being void under the Rule, B cannot enforce it either by specific performance or by an action for damages. Of course, the Rule does not apply to contracts as such, but is limited to interests in lands and chattels.[60]

An option to renew a lease is valid although it may be exercised beyond the period of the Rule. Similarly, an option in a lease to purchase the reversion is valid although remotely exercisable. A justification for these exceptions is that the option, being an accepted commercial device, may aid rather than hinder alienation.

While options are subject to the Rule, some authority exists that a mere right of first refusal is not. For example, suppose O grants B a first right of refusal to purchase land in the event O should decide to sell that land in the future at a price equal to that offered by a prospective buyer. In this case, it is argued, the "marketability of the property remains unfettered."[61] Unlike the power of an optionee to compel an owner to alienate property, the holder of a mere right of first refusal cannot compel an unwilling property owner to sell.[62]

§ 8.5 Perpetuities Reform: Wait-and-See and Cy Pres

PROBLEM 8.21: T devises property to Trustee to pay the income to "B for life, then to B's children for their lives, then to B's grandchildren in fee." B and two children of B, namely C and D, survive T. B dies survived by C and D. Is the gift to B's grandchildren valid under the common-law Rule? If not, can it

occurred, the court held that since the specified contingencies might not occur until after 21 years passed from the date of the agreement, the option contract was unenforceable because it did not necessarily expire within the period fixed by the Rule against Perpetuities). See also, Pace v. Culpepper, 347 So.2d 1313 (Miss.1977)(option violates Rule against Perpetuities); Central Delaware County Authority v. Greyhound Corp., 527 Pa. 47, 588 A.2d 485 (1991). But see, Unif. Prob. Code § 2-904 (statutory rule against perpetuities inapplicable to nonvested interests arising from a nondonative transfer, such as bargained for options).

60. See Simes, 281.

61. *Robroy Land Company, Inc. v. Prather*, 95 Wash.2d 66, 70, 622 P.2d 367, 369 (1980).

62. But see 40 A.L.R.3d 920 (1971), citing cases to the contrary.

be saved under the "wait-and-see" doctrine or the *cy pres* doctrine?

Applicable Law: Under the common law, or "might have been," rule, if there was any possibility a nonvested interest might vest too remotely, it was void even though as events actually occurred it vested within lives in being plus 21 years. Under the "wait-and-see" rule, a nonvested interest is good if it *actually* vests timely under the Rule. Likewise, *cy pres*, or reformation, may be available to reform the terms of a gift that is otherwise invalid and cannot be saved by the "wait-and-see" rule.

Answer and Analysis

Under the common-law Rule, the gift to B's grandchildren violates the Rule because it was possible as of T's death that this gift might vest too remotely. For example, during B's life, both C and D could die, and B could have another child, E. B could then die survived by E who might not have a child (grandchild of B) and die within 21 years of B's death. This possibility alone, at common law, was sufficient to void the gift to B's grandchildren.

The facts, however, clearly indicate that such an invalidating possibility in fact did not occur. To the contrary, as the facts actually turned out, the gift to B's grandchildren will vest or fail with absolute certainty no later than the death of the survivor of B, C and D, all of whom were lives in being. Under the "wait-and-see" approach, therefore, the gift to the grandchildren is valid because it actually vests or fails within the perpetuity period.

Suppose B had also been survived by an afterborn child, E. Would the gift to the grandchildren be valid? That depends on additional facts. For example, the gift would be valid if E died in the lifetime of either B, C or D because in that case it is again absolutely certain that the gift to the grandchildren will vest or fail no later than the death of the survivor of B, C and D, all of whom were lives in being at T's death. However, the gift to the grandchildren would also be good if E was B's surviving child, if E were to die within 21 years of the death of the survivor of B, C and D. Only if E were B's surviving child and E survived the survivor of B, C and D by more than 21 years, would the gift to the grandchildren violate the Rule using a "wait-and-see" approach.

The *cy pres* doctrine may also be available to validate the gift. For example, if the gift could not be saved using "wait-and-see" because E survived B, C and D by more than 21 years, a court might judicially reform the gift by recasting it in favor of only those grandchildren of B living 21 years after the death of the survivor of B and B's children living at T's death. By this reform, the gift vests

at that time even though it might not become possessory until E died. By vesting the gift at that time, however, later born grandchildren would not be included in the class. The Restatement adopts the "wait-and-see" approach but specifies whose lives can be taken into account in measuring whether an interest timely vests under the Rule.[63]

More typically, the *cy pres* doctrine is used to reform age contingencies that could result in invalidity under the common-law Rule. For example, suppose O conveys Blackacre to "B for life, then to B's children who reach the age of 25." At the time of the conveyance, B has no children. Under the common-law Rule, the gift to the children is void because it might vest or fail more than 21 years after B's death—i.e., B might die with a surviving child under the age of 4. In that case, the gift can be reformed under the *cy pres* doctrine to reduce the age contingency to whatever age results from adding 21 to the age of the B's youngest child living at B's death.[64]

§ 8.7 Die (or Death) Without Issue

PROBLEM 8.22: O conveys Blackacre to B and his heirs but if B should die without issue then to C and his heirs. What estate does B take under the deed?

Applicable Law: The phrase "die without issue" is ambiguous as to when that death must occur in order to determine whether the condition has happened. Two constructions are possible: the definite failure of issue construction and the indefinite failure of issue construction.

Answer and Analysis

Problems of construction frequently arise in a conveyance or devise purporting to divest a present possessory estate upon death without issue. Depending upon additional words in the instrument and surrounding circumstances, several interpretations may be possible. Two interpretations (or constructions) are common—namely, the definite and the indefinite failure of issue construction.

Under the "definite failure of issue" construction,[65] whether B dies without issue is determined at a definite point in time, which is

63. See Restatement (Second) of Property, §§ 1.3; 1.4.

64. Under the Uniform Probate Code a nonvested interest under the common-law Rule is invalid unless the interest must vest or terminate "within 90 years after its creation." Unif. Prob. Code § 2–901.

65. A construction of the instruction to determine O's intent is necessary because O failed to designate the point in time when B must die without issue if C is to take. For example, suppose O conveyed to B and his heirs but if B died without issue surviving him, then to C and his heirs. In this case the italicized portion of the conveyance indicates the

B's death unless the instrument provides otherwise. Under this construction, if B dies leaving any lineal descendants at his death, B leaves issue and the contingency of his dying without issue and divesting his estate does not happen. Thus, his estate ripens into a fee simple absolute which will pass through his estate either to his heirs or to the devisee under his will.[66] On the other hand, if B dies without leaving any issue surviving him, B's estate terminates and shifts to C. Thus, under this definite failure of issue construction, B receives a fee simple subject to a shifting executory interest in C.

"Indefinite failure of issue" means that if B's line of lineal descendants ever becomes extinct, then at that time, if ever, although it may be long after B's actual death, B will die without issue. To illustrate, B might die in 1750 survived by a child, GC, who later dies in 1776 survived by a child, GGC. This great-grandchild of B might die in 1833 survived by a child, GGGC, who might die in 1891 survived by no lineal descendants. Applying the indefinite failure of issue construction, it would be said that B died without issue in 1891, even though B physically died in 1750. How's that for immortality?

The indefinite failure of issue construction also describes the practical effect of the fee tail estate and was highly favored by the English courts during the time when fee tail estates were recognized. Thus, in the above hypothetical, if an indefinite failure of issue construction is employed, B will have a fee tail and C will have a vested remainder in fee simple absolute. In other words, the phrase "die without issue," when subject to the indefinite failure of issue construction, effectively becomes words of limitation rather than condition and, if B's estate terminates because his lineal descendants become extinct, it terminates automatically upon the happening of a limitation and not a condition.[67]

In the United States where the fee tail estate is for the most part unrecognized, courts favor the definite failure of issue construction rather than the indefinite failure of issue construction. If that construction applies, then B has a fee simple subject to a shifting executory interest in C. Of course, no construction is necessary if the governing instrument clearly provides for the time when B's death without issue must occur for C to take. For example, if O had conveyed to B and his heirs but if B dies without issue surviving him, then to C and his heirs, in all events B has a fee simple subject to a shifting executory interest.

latest time B must die without issue for C to take.

66. Thus, the estate may not pass to B's issue who are relevant to whether the divesting condition occurs but are not purchasers under the conveyance. Of course, if B's issue are either his heirs or devisees, they may take the property but as purchasers from B, not O.

67. See Simes 196–203.

Even though the instrument provides upon whose death it is to be determined whether death without issue occurs, there may be other ambiguities in the instrument. For example, suppose T devises Blackacre to B and his heirs but if B dies without issue surviving him, then to C and his heirs. In this devise, it is clear that whether B dies without issue is to be determined at B's death. But, the instrument is ambiguous as to the window period in which B might die without issue. There are at least two possibilities. B might die before T (and therefore the effective date of T's will) without issue or B might survive T and later die without issue surviving him. Some courts hold that C can only take if B dies before T without issue. This is called the substitutional construction and it assures that at T's death either B (or some substitute taker for B)[68] or C will own Blackacre.

It is also possible for a court to conclude that C takes if B dies at any time before or after T without issue. Under this construction, if B dies before T without issue, C takes. If B survives T and later dies without issue who survive him, C takes. Under this so-called successive construction, it is not possible at T's death, if both B and C survive T to determine whether B or C will own Blackacre in fee simple absolute. That determination must await B's death. The successive construction, therefore, has the potential to clutter the title of property whereas the substitutional construction assures that as of T's death someone owns the property in fee simple absolute.

68. If a court concludes that B's estate was not divested because B died with issue, then the court must also determine what is to happen to the property. Since B did not survive T, it cannot go to B. If the devise is saved by the lapse statute, it will go to whomever that statutes substitutes for B as the taker of Blackacre. If that statute does not apply, Blackacre passes as part of the residuary estate under T's will.