THE LAW OF PROPERTY

SUPPLEMENTAL READINGS

Class 16

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EXAMPLES & EXPLANATIONS

Property

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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.

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.

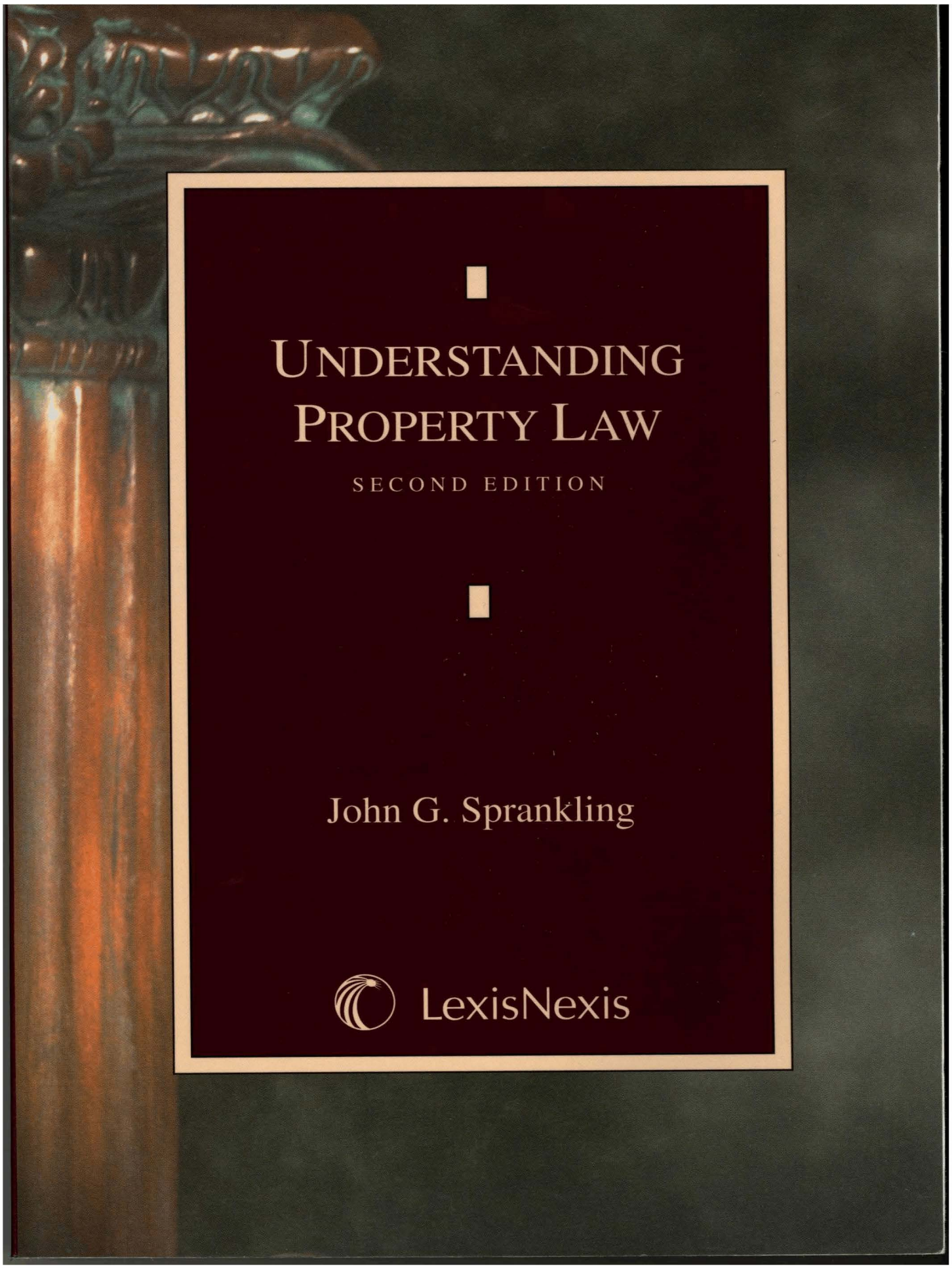
(d) Yes. The document purported to create a life estate in *A* and a remainder in *A*'s heirs. Thus the remainder becomes a vested remainder in *A*. *A* then owns both a life estate and a vested remainder in fee simple absolute. The two interests do not merge to form a fee simple absolute, however. The 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).



UNDERSTANDING PROPERTY LAW

SECOND EDITION

John G. Sprankling

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§ 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.

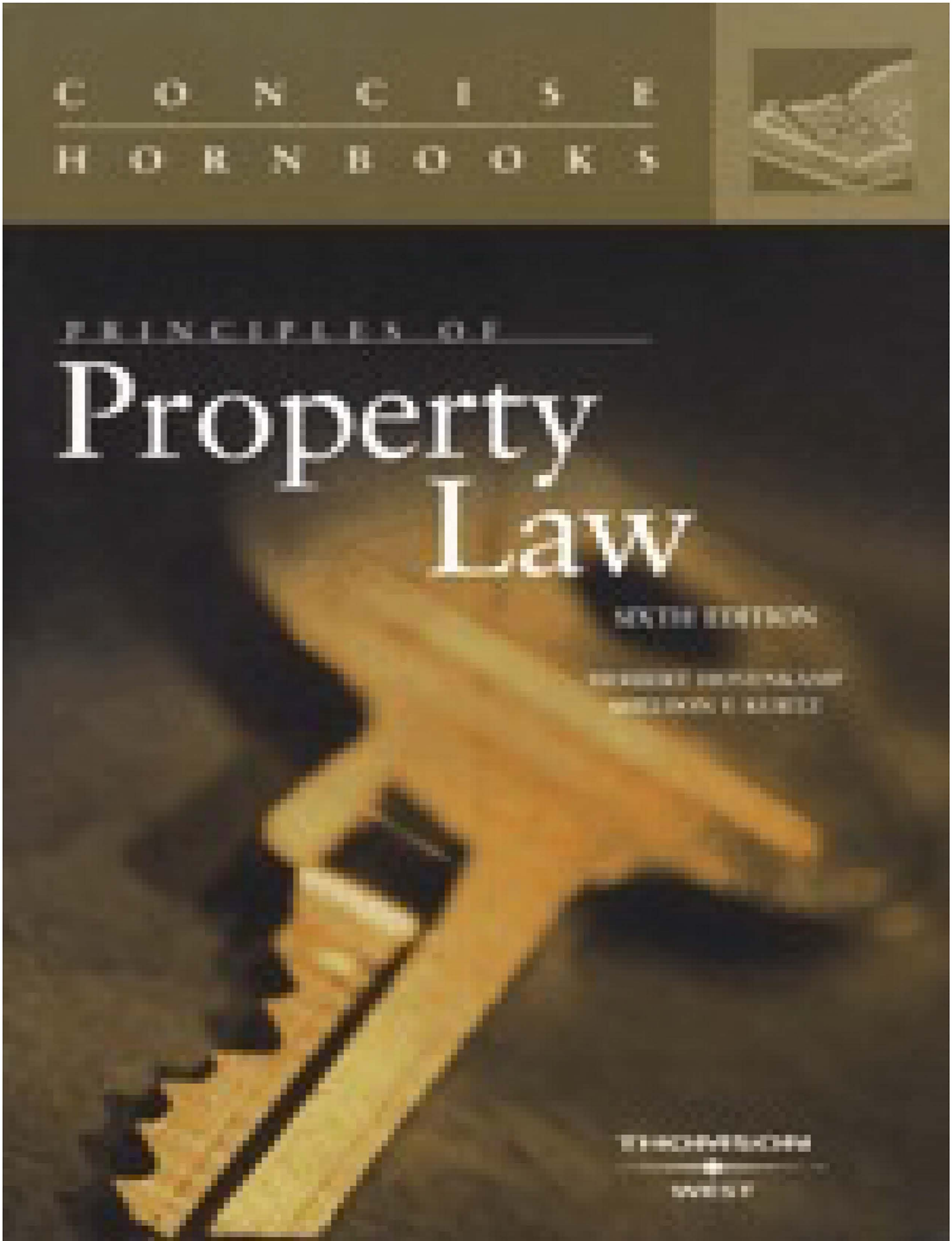
Yet—because courts ultimately held that it did not apply to executory interests—the doctrine could be circumvented through careful drafting. Instead of using a contingent remainder, the drafter could create an executory interest that had a similar impact. Similarly, the doctrine did not extend to equitable 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).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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.