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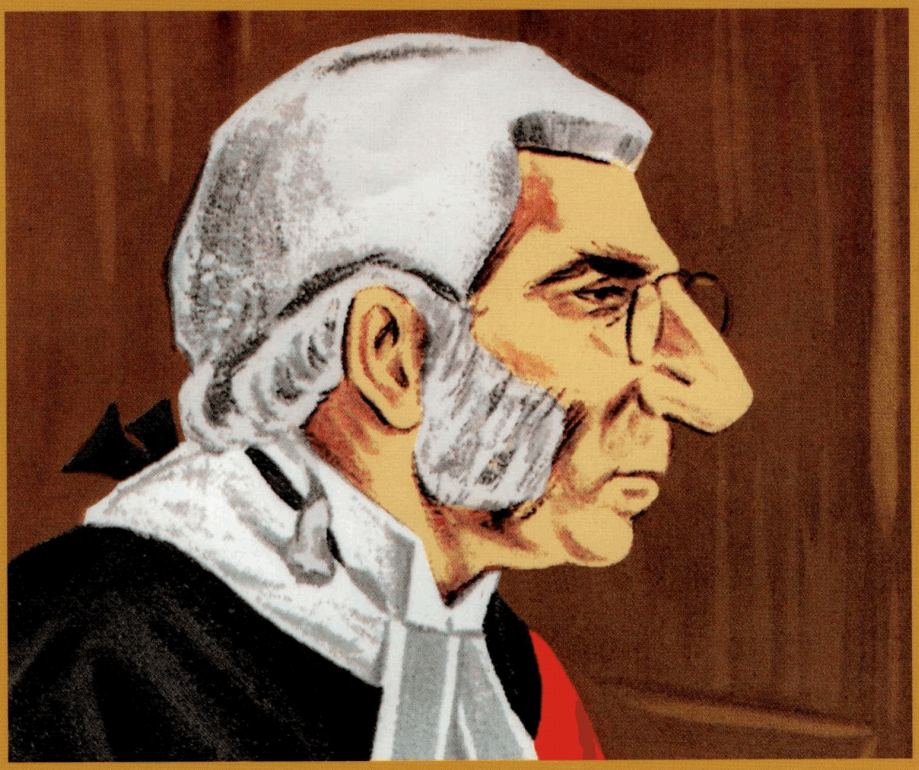

PROPERTY

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CHAPTER 3

FUTURE INTERESTS

ChapterScope

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

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

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

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

I. INTRODUCTION

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

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

II. FUTURE INTERESTS RETAINED BY THE GRANTOR

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. FUTURE INTERESTS CREATED IN GRANTEES

A. Remainders:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. THE TRUST

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

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

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

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

V. THE MARKETABILITY RULES

A. Introduction: Common law judges devised a number of rules to increase the marketability of land by eliminating uncertainties of title that inhibited alienability. These rules are considered here. Three doctrines — ***destructibility of contingent remainders,*** the ***Rule in Shelley's Case,*** and the ***doctrine of worthier title*** — are mostly abandoned today, although enough jurisdictions cling to

them to make it worthwhile to study them briefly. The principal modern marketability rule is the ***Rule Against Perpetuities.***

B. Destructibility of contingent remainders: At common law, a ***contingent remainder in land was destroyed if, at the expiration of the preceding freehold estate, it was still contingent.*** To become possessory, a contingent remainder had to vest at or prior to the termination of the prior freehold estate.

Example: Roger conveys Baskerville Hall to Arthur for life, then to Holmes if he should be knighted. Holmes has a contingent remainder; his possession of Baskerville Hall is subject to the condition precedent that he receive a knighthood. If Holmes is knighted by the King before Arthur dies, his remainder will become vested because the condition precedent will have been satisfied. Upon Arthur's death, Sir Holmes would take Baskerville Hall in fee simple absolute. But if Holmes has not been knighted before Arthur's death, his contingent remainder would be destroyed, leaving Roger's reversion as the possessory interest in Baskerville Hall in fee simple absolute.

The rule was created when seisin was still important. The holder of seisin was responsible for the feudal obligations. Because seisin could not be passed from an expiring freehold estate to a contingent remainderman — a person who could not hold seisin — the contingent remainder must be eliminated, because seisin must go somewhere. There could be no gaps in seisin. Because seisin is irrelevant to the modern world, this rationale is utterly useless today. The amazing thing is that about a quarter of American states have not explicitly abolished this rule. The issue is rarely litigated and when it is courts appear to use good judgment and eliminate the rule as part of the common law. See, e.g., *Johnson v. Amstutz,* 101 N.M. 94 (1984).

1. **Effect of merger:** The rule had a significant impact on contingent remainders following a life estate because it applied at the ***natural termination*** and at the ***artificial termination*** of a life estate. A life estate could terminate early — before the death of the life tenant — by forfeiture or merger. Forfeiture occurred if the life tenant committed treason or tortiously attempted to convey a fee simple. Merger occurred if the same person held the present possessory freehold estate (the life estate) and the ***next vested estate,*** in which event the two titles would be merged together to form one possessory fee simple. Note that if a life estate was followed by a contingent remainder, the next *vested* estate would be a reversion. The merger doctrine enabled conspiracies by the life tenant and the holder of the reversion to destroy the intervening contingent remainder.

   Example: William conveys Bayberry Hall to Alfred for life, then to Hortense if she survives Alfred. Hortense has a contingent remainder. Suppose that William dies before Alfred and his reversion is inherited by his greedy son Cecil. If Cecil can persuade Alfred to convey his life estate to him, Cecil will own both the possessory freehold estate and the ***next vested estate*** (the reversion). The merger doctrine extinguishes the life estate prematurely and, because Hortense has not yet satisfied the contingency of surviving Alfred, her remainder is destroyed. Cecil owns Bayberry Hall in fee simple absolute.

2. **Limited effectiveness of the rule:** The destructibility rule had lots of loopholes so it wasn't very effective. Because vested remainders were exempt, the inclusion of a vested remainder before a contingent remainder would block the merger doctrine. Executory interests are not remainders and so the rule did not apply to them, despite the fact that they are contingent interests. This was logical in the world of seisin, because an executory interest posed no possibility of any gap in seisin. Seisin would either spring from the grantor to the holder of

the executory interest or shift from one seised freeholder to another. Because a leasehold is considered personal property, a leaseholder could not hold seisin. Thus, a contingent interest following a term of years was treated as an executory interest, not a remainder (because it does not follow a freehold estate) and was exempt from the destructibility rule. Finally, contingent equitable remainders were unaffected by the rule, because the trustee held legal title and was thus seised for the duration of the trust. Thus, real property could be placed in trust, held there until the contingency was satisfied, and then distributed.

3. **Modern replacement of the rule:** All the work performed by the destructibility rule can be and is performed by the Rule Against Perpetuities. See section V.E, below.

C. **The Rule in *Shelley's Case:*** This rule, which takes its name from *Wolfe v. Shelley (Shelley's Case),* 1 Co. Rep. 93b, 76 Eng. Rep. 206 (1581), was originally intended to prevent avoidance of the feudal incidents (death taxes). After the abolition of feudal incidents in the mid-seventeenth century the rule survived because it improved marketability of land. That function, however, is fully performed by the Rule Against Perpetuities. While most of the states have eliminated this rule of law, it survives in three or four and applies in other states to grants made prior to elimination of the rule.

1. **The rule:** If (1) ***one instrument*** (2) creates a ***freehold in real property*** and (3) a ***remainder in the freeholder's*** **heirs** ***(or heirs of the freeholder's body),*** and (4) the freehold estate and the remainder are **both *equitable*** **or both *legal,*** then (5) the remainder becomes a remainder in the freeholder.

   Example: Warren conveys Blackacre to Smith for life, then to Smith's heirs. In this ***single instrument*** Warren has created a life estate in Smith and a purported contingent remainder in Smith's heirs. The Rule in Shelley's Case converts the remainder in Smith's heirs into a remainder in Smith. That is all the Rule in Shelley's Case does. The ***merger doctrine*** operates independently but inexorably to give Smith a fee simple absolute in Blackacre, thus making Blackacre easily alienable by Smith rather than only after his death.

   a. **Freehold estate:** Given the virtual extinction of the fee tail, the only freehold estate that can be followed by a remainder is a life estate. As a practical matter, a Rule in Shelley's Case problem will only occur if the freehold estate is a life estate.

   b. **Remainder only:** The Rule in Shelley's Case only applies to remainders, not to executory interests but the rule does apply to the rare case of a life estate and a remainder combined within an executory interest.

      Example: Amy conveys Blackacre to Hazel so long as motor vehicles never enter Blackacre and, if so, to Florette for life, then to Florette's heirs. The shifting executory interest is split into a life estate in Florette and a remainder in Florette's heirs. The Rule in Shelley's Case applies, giving Florette the entire shifting executory interest.

   c. **Heirs:** The common law judges who created the rule had in mind a special meaning of the term *heirs.* They did ***not*** mean the ***specific persons who would inherit,*** for in their time that was usually only one person, the decedent's eldest son. Rather, they meant the term to describe an ***indefinite line of succession*** of heirs: the class of people, ***over time,*** who would be heirs in each successive generation. This means that if the remainder is phrased to describe **only *the specific*** **immediate *heirs of the freeholder,*** the Rule does ***not*** apply.

Example: Eric conveys Blackacre to Rich for life, then to "Rich's heirs, his children." Though the grant reads to "Rich's heirs" it adds language — "his children" — that makes it plain that the term *heirs* does ***not*** refer to an ***indefinite*** line of succession but only to Rich's ***immediate heirs.*** The Rule in Shelley's Case does not apply. Even so, some confused American courts have applied the rule in similar circumstances.

d. Both estates legal, or both equitable: Remember that the rule does ***not*** apply if one of the two estates is equitable and the other is legal.

D. The doctrine of worthier title:

1. Statement of the doctrine: If an inter vivos conveyance creates **any *future interest*** in the **heirs *of the* grantor** the future interest is **void.** Instead, the ***grantor*** retains a ***reversion.***

Example: Lewis conveys Tucker Hall to "my son Scott for life, then to my heirs." Lewis has purportedly created a future interest — a vested remainder — in Lewis's heirs. The doctrine of worthier title voids this interest. Lewis is necessarily left with a reversion, which may be conveyed by him during his life, devised, or inherited by his heirs.

A very few courts have applied this doctrine to testamentary gifts, but mostly it applies to inter vivos conveyances. In its modern form the doctrine is a ***rule of construction*** — it raises a ***rebuttable presumption*** that the grantor did not intend to create a future interest in her heirs. The rationale for this presumption is that a ***living grantor*** is not likely deliberately to create a future interest in his ***heirs,*** but is far more likely to make that decision as part of his will. Worthier title preserves that option ***unless the grantor clearly intended otherwise.*** Note, by contrast, that the Rule in Shelley's Case and the rule of destructibility of contingent remainders are ***rules of law.*** This old common law rule was originally formulated to curb avoidance of feudal death taxes (by causing real property to descend by inheritance rather than pass inter vivos), but persisted because it also improved alienability of land. Worthier title is still observed in some American states.

2. Operation of worthier title: The scope of the worthier title doctrine is very broad. It applies to both ***real and personal property*** and to ***any kind of future interest.*** It applies ***regardless of the nature of the preceding estate*** and ***regardless of intervening future interests*** in people who are not the grantor's heirs.

a. Heirs of the grantor: Worthier title applies to future interests in the "heirs" of the grantor, so long as it appears that the term *heirs* is used to mean ***indefinite succession*** rather than specific people (who are likely to be the prospective immediate heirs of the grantor).

Example: James conveyed 37 acres to Nate for life, and if Nate "should die leaving no lawful heir from his body, then the land . . . shall revert back to James . . . or to his lawful heirs." The Virginia Supreme Court ruled that worthier title applied to create a reversion in James rather than a remainder in his heirs, because this language did not "signify anything other than its normal and technical meaning of indefinite succession as determined at the death of the grantor." But if James had said "the land shall pass to my children," or "to my issue," or even "to my heirs as determined when Nate dies," worthier title would not apply because of these references to ***immediate and specific heirs.*** *Braswell v. Braswell,* 195 Va. 971 (1954).

b. **Trust revocation:** Worthier title can become an issue when a person establishes an irrevocable trust for the benefit of himself and his heirs, but has a change of heart and seeks to revoke it.

Example: Maude conveys property irrevocably to Opus in trust for the benefit of Maude for life, then to Maude's heirs. An irrevocable trust can be terminated only if all the beneficial interest holders consent. Maude owns all those interests (and so can terminate this trust) if worthier title applies, because the remainder in Maude's heirs is void, leaving instead a reversion in Maude. But if Maude left persuasive evidence that she ***intended*** to create a remainder in her heirs, she is out of luck. Remember that the modern version of worthier title is a rebuttable presumption that Maude retained the reversion instead of creating the remainder in her heirs. See, e.g., *Hatch v. Riggs National Bank,* 361 F.2d 559 (D.C. Cir. 1966). This problem is common enough that some states that have abolished worthier title have, by statute, retained the principle that the settlor of a trust may terminate it if she owns all the interests except for a remainder in her heirs. See, e.g., N.Y. Estates, Powers & Trusts Law §6-5.9.

3. **Distinguished from *Shelley's Case*:** The Rule in Shelley's Case involves the grant of a future interest to the heirs of the life *tenant,* while worthier title involves the grant of a future interest to the ***grantor's heirs.*** The Rule in Shelley's Case is completely independent of worthier title. Abolition of the Rule in Shelley's Case has no effect on worthier title.

Example: John Paul conveys Wolfwood to Terry for life, then to Terry's heirs if they are Roman Catholic, otherwise to John Paul's heirs. If both Shelley's Case and worthier title apply the contingent remainder in Terry's heirs is converted by Shelley's Case into a contingent remainder in Terry and the alternative contingent remainder in John Paul's heirs is converted by worthier title into a reversion in John Paul. If Shelley's Case is abolished, but not worthier title, Terry's heirs hold a contingent remainder and John Paul has a reversion. If Shelley's Case applies but not worthier title, Terry holds a contingent remainder and John Paul's heirs have an alternative contingent remainder.

4. **Criticisms of worthier title:** It is charged that the doctrine breeds litigation because the presumption can be overcome by sufficient evidence that the grantor really meant what he apparently said. It is also claimed that worthier title is a death tax trap because the grantor may think he has parted with all interest in property during his life, but in fact has retained a reversion that is part of his taxable estate. Finally, some critics doubt the assumption that a person is unlikely to wish to give his heirs a future interest in his property. The legendary Professor Richard Powell's rejoinder was to note that while stability was more important than either outcome, worthier title's presumptive reversion "would be less likely to run counter to the real desires of settlors and would help to keep trusts readily revocable and property more easily alienable." 3 R.B. Powell, Real Property ¶269 (1952).

E. **The Rule Against Perpetuities:** After the Statute of Uses lawyers began to employ shifting executory interests to tie up ownership of property for very long periods into the future. The marketability rules considered so far mostly applied to remainders and not to executory interests. A rule was needed that would apply to ***all contingent future interests*** to prevent uncertainty about future ownership and possession from continuing so far into the future that land would become inalienable. Beginning with the *Duke of Norfolk's Case,* 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1681), that rule is the Rule Against Perpetuities.

1. **Brief summary of the rule:** The classic statement is that by John Chipman Gray: ***"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."*** J.C. Gray, The Rule Against Perpetuities 191 (4th ed. 1942).

   a. **Vesting:** The Rule is designed to eliminate ***uncertainty about ownership*** that persists too long. If an interest is ***certain to vest*** **or** ***certain*** **not** ***to vest*** within the permitted period it is good. But if there exists **any possibility,** ***no matter how unlikely,*** that vesting could occur after expiration of the permitted period the interest is void. See section V.E.2, below.

   b. **Permitted period of uncertainty:** An interest is good under the Rule if it will ***certainly vest*** **or** ***certainly fail to vest*** within (1) 21 years from its creation, or (2) during the life of some person ***alive at its creation,*** or (3) upon the death of some person ***alive at its creation,*** or (4) within 21 years after the death of some person ***alive at its creation.*** Thus, the Rule requires you to identify some person, ***living on the effective date of the grant,*** whose life can serve as the ***measuring life*** (or ***validating life***) for the interest in question. That person, which may consist of a class or group of persons, is always a person whose life is germane to the grant — a person who can affect vesting of the interest. If an effective measuring (or validating) life cannot be identified the interest is void. See section V.E.3, below.

   c. **Future interests to which the Rule applies:** The Rule applies to all ***contingent*** future interests (***executory interests, contingent remainders,*** and ***vested remainders subject to open***) except for interests ***created in the grantor*** (reversions, possibilities of reverter, and rights of entry). These latter interests are regarded as vested at the moment of creation, because they represent a ***retained portion*** of the grantor's estate. The contingency concerning future possession is thus permitted to persist forever. Note that when these latter interests are created in a grantee (and so are executory interests) they are subject to the Rule. See section V.E.4, below.

   d. **Validity tested at creation:** The validity of future interests under the Rule is tested ***when they are created.*** This means that, in order to prove validity (or invalidity), you must conjure up ***what*** **might** ***happen*** in the future. The Rule boils down to proof. If you can prove that the future interest in question is **certain** ***to vest or fail to vest*** within the permitted period the interest is valid. If you can prove ***any*** **single** ***scenario, no matter how*** **improbable** ***of actual occurrence,*** in which uncertainty of vesting will continue until after expiration of the permitted period, the interest is void.

      Example: On July 15, 1997 Alice dies and devises Blackacre "to Barry's first child to graduate from college." Barry's only child, Ted, is a senior at Columbia. The validity of this springing executory interest is tested at the moment of its creation — July 15, 1997. It is void. It is ***possible*** (though unlikely) that (1) Ted will die tomorrow, before graduating from college, (2) Barry will have another child, Mary, born in 1998, (3) Barry will die immediately after Mary is born, and (4) Mary will graduate from Yale 23 years later. The only conceivable validating lives are Barry and Ted. The hypothetical Mary's hypothetical graduation ***could occur*** more than 21 years after the expiration of all conceivable measuring (or validating) lives.

      For an interest to be valid, it must be proven that the interest will ***necessarily vest or fail to vest*** within the permitted period.

Example: Martha devises Blackacre "to my husband William for life, then to my children for their lives, then to my grandchildren then living." At Martha's death she has two children, Thomas and Louise. The life estate in William is presently possessory. The remainder to Martha's children is vested at its creation (because there is no condition precedent and the class of Martha's children closes at her death around Thomas and Louise) so the Rule does not apply to it. The remainder in Martha's grandchildren who survive both Thomas and Louise is contingent, but that contingency will be eliminated the instant that both Thomas and Louise are dead. At that moment, the remainder will ***certainly vest*** (there will be surviving grandchildren) ***or certainly fail to vest*** (there will be no surviving grandchildren). Because both Thomas and Louise are lives in being at the creation of the interest, this interest will ***certainly vest or fail to vest*** at the expiration of the second of two lives in being. The interest is valid.

2. **Vesting:** With one major exception (see V.E.2.a, below) an interest is vested for perpetuities purposes when it has ***either*** become ***possessory*** (referred to as vesting in possession) or has ***vested in interest*** (the owners are known, existing people and there are no unsatisfied conditions precedent). Some interests (e.g., an executory interest following or divesting a defeasible fee) can only vest in interest at the same time that they vest in possession. But many interests can and do vest in interest well before vesting in possession. An interest that is vested for classification purposes is vested for perpetuities purposes ***except for vested remainders subject to open (or partial divestment).*** The reason is that for purposes of the Rule Against Perpetuities, a gift to a ***class*** of people is **not vested in any member of the class until it is vested in every member of the class.** For this to happen, two things must be true: (1) the ***class must be closed*** and (2) ***any conditions precedent must be satisfied by*** **every member** ***of the closed class.***

   Example: In 1997, Olaf devises Blackacre "to my daughter Karen for life, then to Karen's children for their lives, then to Karen's grandchildren." Olaf is survived by Karen, her two children, Victor and Alexa, and Karen's sole grandchild, Natalie. Karen's life estate is possessory and thus not subject to the Rule. Victor and Alexa have a vested remainder subject to partial divestment, as Karen may have more children. While this remainder is ***vested for classification purposes*** it is **not** ***vested for perpetuities purposes.*** The class of Karen's children will not close until Karen dies, but because Karen is a life in being at Olaf's death (the effective date of the grant) the remainder is certain to vest in every member of the class of Karen's children no later than the end of Karen's life, and so it is valid. Similarly, Natalie's vested remainder subject to open is vested for classification purposes but not for perpetuities purposes. The uncertainty about the identity of Karen's grandchildren will not be removed until the class of Karen's grandchildren is closed, and that will happen only when Karen and all of her children are dead. There is no certainty that the class of Karen's grandchildren will close at Karen's death or within 21 years after her death. (Victor might have a child 22 years after Karen's death.) While the death of Karen's children will close the class of Karen's grandchildren the class of Karen's children is not a life in being because that class is not closed (there could be another child born to Karen after Olaf's death, and unless *every possible member* of a class is alive at the time the interests become effective the class is not a life in being). Thus, none of the lives of Karen, Victor, or Alexa provide sufficient certainty to serve as validating lives, and the remainder in Karen's grandchildren is void in its entirety. The following scenario ***might happen:*** (1) Karen has another child, Tony, in 1999; (2) Karen, Victor, Alexa, and Natalie all die in a plane crash in 2000; (3) Tony has a child, Ava, in 2026. At that point — 2026, or 26 years after the death of all the relevant lives who could have served as measuring (or validating)

lives — Ava would have a vested remainder subject to open (Tony could have more chidren). It is too late. Note that Natalie's remainder interest is destroyed in 1997 simply because of this chain of unlikely possibilities.

3. **Measuring or validating lives:** The concept of the measuring or validating life is crucial to the Rule Against Perpetuities. To validate future interests under the Rule you must prove that the interest is ***certain to vest*** **or** ***fail to vest*** within the lifetime of one or more people alive when the grant becomes effective, or within 21 years after the death of that person or persons. This person serves as the measuring or validating life. This person will be found among the relatively small number of people whose lives are *relevant* to the interest in question — they ***can affect vesting of the interest in question.***

Example: Orville devises Cliff House to Tina for life, then to Tina's children who reach age 21. The contingent remainder in Tina's adult children is valid because (1) the uncertainty as to the identity of "Tina's children" will be resolved at Tina's death, and (2) the uncertainty as to which, if any, of Tina's children will reach age 21 will be resolved no later than 21 years after Tina's death (Tina might die in childbirth). Tina, a life in being when Orville died, is clearly relevant (she can affect the vesting of the remainder) and her life will serve to prove the validity of the remainder.

The measuring or validating life is not always mentioned in the grant.

Example: Erwin, an orphan, devises Holmescroft "to my nieces who reach age 21." Erwin is survived by two sisters and five nieces, who range in age from 3 to 15. The springing executory interest in the nieces is good because the class of Erwin's siblings (not mentioned in Erwin's grant) can serve as validating or measuring lives. Because Erwin's parents are dead the class of Erwin's siblings is closed; all possible members of that class are lives in being. The contingency in the executory interest (the identity of Erwin's nieces and which of them will reach age 21) will be resolved no later than 21 years after the death of both of Erwin's sisters. Different lives may be used to validate different interests.

Example: A1 conveys Blackacre to Bill for life, then to Bill's widow for life, then to Connie if she is then alive and, if not, to Connie's heirs. The contingent remainder in Bill's widow is good because we will know her identity when Bill dies (Bill is the validating life). The contingent remainder in Connie is good because it will vest or fail during (or at the end of) Connie's life. Either Connie will outlive Bill's widow (and her remainder will vest during Connie's life) or Connie will die before Bill's widow dies (and Connie's remainder will fail to vest). Connie is the validating life for her contingent remainder. The alternative contingent remainder in Connie's heirs is good because it will vest or fail no later than upon the death of Connie. If Connie outlives Bill's widow the contingent remainder in Connie's heirs will lapse (and thus fail to vest); if Connie predeceases Bill's widow the contingent remainder in Connie's heirs will be indefeasibly vested because we will know the identity of Connie's heirs and there will be no condition precedent to their taking possession after Bill's widow dies. Connie is the validating life for the contingent remainder in her heirs.

A person is a life in being if *in utero* at the effective date of the grant. Common law considered (and still does) a person born within 9 or 10 months of the effective date of the grant to be a life in being at the effective date.

a. **Class of persons as measuring lives:** It is possible to use a group or class of people as measuring or validating lives, but ***every possible member of the class must be alive at the***

effective date of the grant. In other words, the ***class must be closed at the effective date of the grant*** for a class of persons to be effective as validating lives. See section V.E.2, above.

Example: If Erwin, in the prior example, had been survived by his parents as well as his two sisters and five nieces, the springing executory interest in the nieces would be void. The class of Erwin's siblings is ***not closed*** (Erwin's parents may have another child) and thus may not be used to validate the executory interest in the nieces. Here's what ***might*** happen: (1) Erwin's parents have another child, Zelda; (2) Erwin's parents, both of his older sisters, and all five nieces are killed in an avalanche; (3) Zelda, the sole survivor, has a child, Zoe, who reaches age 21. Only then would Zoe's remainder vest, for that is the moment the condition precedent is satisfied, but that moment is over 21 years since Erwin's death, or that of his parents, the two most relevant lives in being at Erwin's death.

Occasionally, lawyers make a large number of people artificially relevant to the grant for purposes of creating a large class of lives in being. This works only if the class is sufficiently small that it will be practical to know when the perpetuities period has expired.

Example: Rocco conveys Sweetbrier to Maribelle for life, then to Maribelle's children after the last person now alive in the City of Los Angeles has died. The springing executory interest in Maribelle's children is void because it is simply not possible to know when this event will occur.

Example: Viscount Leverhulme devises gobs of property in trust to be distributed to a class of beneficiaries when all descendants of Queen Victoria living at the time of his death have died. An English chancery court upheld this artificial class of lives in being even though there were "at least 134" members of the class and the court admitted that there were "certain difficulties in ascertaining exactly how many of Queen Victoria's descendants were living" on the date of the Viscount's death, to say nothing of the problem of determining when this class would expire. *Cooper v. Leverhulme,* 2 All.E.R. 274 (Ch. 1943).

4. **The curious problem of defeasible fees:** Recall that a defeasible fee is followed by either a possibility of reverter or right of entry (if retained by the grantor) or by an executory interest (if transferred to a grantee). Executory interests are subject to the Rule but neither a possibility of reverter nor a right of entry is subject to the Rule. Thus, the ***identical contingency*** can last forever if preserved by a possibility of reverter or right of entry but may well be destroyed by the Rule if created in a grantee as an executory interest. That is curious enough, but even more curious is the fact that, due to the differing grammatical construction of a fee simple determinable as opposed to a fee simple subject to condition subsequent, the estate left after destruction of the executory interest will differ.

Example — Executory interest following determinable fee: Thomas conveys Thimbleberry to Edward and his heirs so long as Thimbleberry is never fenced, then to Paul and his heirs. The executory interest in Paul is void because you cannot prove that it will necessarily vest or fail to vest within 21 years after any life in being at the time of Thomas's conveyance. The condition of "no fences" may not be broken for generations, if ever. Paul's executory interest is erased. It is as if the grant stopped at "fenced," with the final clause expunged. *The effect of this removal is to leave Edward with a fee simple determinable.* The law then operates to create a possibility of reverter in Thomas. Note that Thomas could avoid this result by first conveying a fee simple determinable to Edward, then conveying separately his possibility of reverter to Paul.

Example: — Executory interest following a fee simple subject to a condition subsequent: Thomas conveys Thimbleberry to Edward and his heirs, but if Thimbleberry is ever fenced, then to Paul and his heirs. As in the prior example, the executory interest in Paul is void because you cannot prove that it will necessarily vest or fail to vest within 21 years after any life in being at the time of Thomas's conveyance. Paul's executory interest is erased, so that the grant stops at "Edward and his heirs," with the final clauses expunged. *The effect of this removal is to leave Edward with a fee simple absolute.* Again, Thomas could avoid this result by first conveying a fee simple subject to condition subsequent to Edward, then conveying separately his right of entry to Paul, assuming that local law permits rights of entry to be conveyed inter vivos. This dramatic difference in result is hard to justify, as is the difference in result between a possibility of reverter or right of entry, on the one hand, and the analogous executory interest on the other. This common law result has been modified in some jurisdictions, but modification schemes differ.

a. **Apply the Rule Against Perpetuities to possibilities of reverter or rights of entry:** By statute, this change has been adopted in the United Kingdom but has not been widely adopted in the United States. This approach eliminates the preferential treatment under the Rule accorded possibilities of reverter and rights of entry but does nothing to alter the different estates that result from destruction of the future interest following a defeasible fee.

b. **Statutory destruction of possibilities of reverter and rights of entry:** A number of American states have enacted statutes that automatically destroy possibilities of reverter and rights of entry a specific number of years after creation, usually 30 years. See, e.g., Mass. Ann. Laws c.184A, §7. Some of these statutes permit a possibility of reverter or right of entry to be preserved for an additional period if notice of that intention is recorded prior to expiration of the initial period. These interests continue to be exempt from the Rule of Perpetuities. The statutory destruction rule performs the work of the Rule and, in practice, can be more harsh than the Rule Against Perpetuities.

c. **Statutory destruction of all future interests following defeasible fees:** Some states have enacted statutes that automatically destroy possibilities of reverter, rights of entry, *and executory interests following a defeasible fee* a specific number of years after creation, usually 30 years. These statutes typically permit a possibility of reverter, right of entry, or analogous executory interest to be preserved for an additional period if notice of that intention is recorded prior to expiration of the initial period. This process of preservation can go on forever, so long as somebody cares enough to record the notice of intent to preserve every 30 years. See, e.g., Cal. Civ. Code §§885.010-.030. In this scheme, all of these interests are exempt from the Rule of Perpetuities but the statutory destruction rule will accomplish that job once the holder of the interest fails to keep it alive. Though conceivable, no jurisdiction exempts possibilities of reverter, rights of entry, and the analogous executory interests from the Rule Against Perpetuities ***without subjecting them to some statutory rule of destruction.***

d. **Charity-to-charity exemption:** By statute, and sometimes by judicial decision, an executory interest following a defeasible fee is exempt from the Rule Against Perpetuities ***if the defeasible fee*** **and** ***the following executory interest are*** **both** ***owned by charities.*** The justification for this rule is to foster and preserve charitable giving.

Example: Ellen conveys Thornhedge to Whitman College so long as it is used for educational purposes, and if not, to the National Trust for Historic Preservation. Whitman College

has a fee simple subject to an executory limitation and the National Trust has an executory interest. This executory interest would normally be destroyed by the Rule Against Perpetuities, but because ***both*** Whitman College and the National Trust are charities, the executory interest in the National Trust is exempt from the Rule.

5. **Classic traps for the unwary:** This section discusses two of the classic traps of the Rule Against Perpetuities. Each results from the Rule's insistence on considering ***future possibilities,*** no matter how outlandish, rather than ***probabilities.***

   a. **The fertile octogenarian:** The Rule presumes that a person of any age, whether male or female, can produce a child. This presumption can lead to some harsh results.

      Example: Edward devises Blackacre to Mary, but if and when Mary ceases to have any lineal descendants, to the children then living of John and Elizabeth. At the time of Edward's death Mary is 65 years old, John and Elizabeth are each 80 years of age, and John and Elizabeth have two children, Amos and Obadiah, each in his fifties. Mary has a fee simple subject to an executory limitation in favor of the open class of John and Elizabeth's children. The executory interest in John and Elizabeth's children is void. Though biologically well-nigh impossible, the common law rule against perpetuities assumes that Mary and Elizabeth are each capable of conception and childbirth. Mary could have a child, Zoë, and then die. John and Elizabeth could have a third child, Isaac, and then each die. Amos and Obadiah could then die. Finally, more than 21 years after all these deaths, Zoë could die with no lineal descendants. At that point, the executory interest in Isaac and the successors in interest to Amos and Obadiah would vest, but it would be too late — more than 21 years after the expiration of any relevant life in being at the time of Edward's death. This conclusion results from imagining the possibility of fertile octogenarians and the like. Of course, people can adopt children at any age. [This example is a variation on the facts of the classic case, *Jee v. Audley*, 1 Cox 324, 29 Eng. Rep. 1186 (Ch. 1787).]

   b. **The unborn widow:** This is another classic. Without more, a bare reference to "*A*'s widow" is construed to refer to the unknown person who answers that description on *A*'s death not necessarily the person who is *A*'s wife when the instrument is drafted. The Rule presumes the possibility that aged men and women might substitute fresh youngsters for the elderly mates — so young that they were not even born at the time of the grant.

      Example: William devises Mosswood to "my son, Charles, for life, then to his widow for life, then to his children then living." At William's death, Charles is 40, married to Diana age 35. Charles has a possessory life estate. The remainder to "his widow" is contingent because we cannot know the identity of this person until Charles's death. This contingent remainder is valid under the Rule Against Perpetuities because the uncertainty concerning her identity will be removed at Charles's death: Charles serves as a validating or measuring life. The contingent remainder in Charles's children is void, however, because the uncertainty as to which, if any, of Charles's children will survive Charles's widow will not be r moved until the death of that person. It may be Diana, a life in being, but ***it is possible that may be someone not alive when William dies.*** Diana may die, or Charles may divorce her and as an 80-year-old man might marry Lolita, age 16, a person born 24 years after William's death. The "class" of "Charles's widow" is open at William's death and, even though it is a class of one, it may be composed of a person not alive when the executory interest is created. So "Charles's widow" is ineffective as a validating life.

6. **Applicability of the Rule Against Perpetuities to commercial transactions:** Although frequently criticized, the Rule applies to commercial option agreements with respect to real property. The optionee has an equitable interest in the property, consisting of a specifically enforce ble right to purchase on the terms of the agreement.

★**Example — *The Symphony Space, Inc. v. Pergola Properties, Inc.*:** In 1978 Broadwest Realty sold a building in Manhattan to Symphony Space for much less than its real value, in return for which Broadwest leased much of the building for a nominal rent and obtained an option to purchase the building, exercisable any time until July 2003. The value of the building increased significantly and Pergola Properties, the assignee of Broadwest's interests in the building, exercised the option in 1987. Symphony Space contended the option violated the Rule and the New York Court of Appeals agreed. Because corporations were involved (and corporations have no natural life span) the period during which the option must either vest or fail was the naked 21-year period. Although the Rule was never designed to curb lengthy uncertainty of ownership produced by commercial options the court concluded that the Rule's policy of fostering alienability in order to enhance productive use of resources was advanced by applying the Rule to commercial options. Because of the option, Symphony Space had no incentive to improve the building. Moreover the option's existence foreclosed sale to someone other than the optionee who might make a better use of the land. The court refused to construe the option to comply with the Rule because it was apparent from the option agreement that the parties intended it to last for longer than 21 years. The court refused to apply the "wait-and-see" doctrine (see the next section) because New York's legislature had not adopted wait-and-see. ***Symphony Space v. Pergola Properties,*** 88 N.Y. 2d 466 (1996), is representative of the common law approach to commercial options.

The Uniform Statutory Rule Against Perpetuities (USRAP), adopted in 25 states, exempts options and other commercial transactions from the Rule, although one USRAP jurisdiction, Indiana, has construed the exemption to mean that options remain subject to the otherwise displaced common law Rule. The Restatement of Property 3d (Servitudes) also exempts options from the Rule but subjects them to generally applicable principles voiding unreasonable restraints on alienation. Some courts avoid applying the Rule to options by implying into the option agreement a proviso that the option must be exercised, if at all, within 21 years of its creation. See, e.g., *Robroy Land Co. v. Prather,* 95 Wash. 2d 66 (1980).

7. **Reform doctrines:** The common law Rule Against Perpetuities has been reformed in over half the American states by adoption of ***wait-and-see*** statutes. Many jurisdictions also attempt to save interests by ***construction of the grant,*** if possible, and some are willing to engage in ***reformation of the grant*** in order to save interests created by it from destruction.

   a. **Wait-and-see:** As the name implies, this statutory reform evaluates the validity of future interests under the Rule Against Perpetuities ***as events unfold,*** not at the time of creation of the interests. The focus under wait-and-see is on ***what actually happens,*** not on ***what might happen.*** The common law Rule has the virtue of supplying a quick answer to the question of validity of future interests, albeit sometimes at the expense of common sense. Wait-and-see avoids that expense, but at the cost of years of uncertainty while we wait to see what actually happens. Wait-and-see comes in two essential forms, with a few permutations on each.

      i. **Wait-and-see for the common law period:** About two-thirds of the non-USRAP wait-and-see states wait for the period permitted by the common law Rule Against

Perpetuities. This means that you must still determine the appropriate measuring or validating life for the interest in question, ***even if it won't work to validate the interest under the common law Rule,*** and then wait for that life (or lives) to expire plus 21 years.

Example: Chuck devises Converse Hall to Taylor for life, then to Taylor's children for their lives, then to Taylor's grandchildren. At Chuck's death, Taylor has two children, Agnes and Ethel, and one grandchild, Sean. Under the common law Rule, the contingent remainder in Taylor's children is good because their identities will be fully known upon Taylor's death (the class will close) and Taylor is a life in being. But the contingent remainder in Taylor's grandchildren is void because their identity will not be known until all of Taylor's children are dead, and the class of Taylor's children, being open at Chuck's death, cannot serve as a validating life because all possible members of the ***class*** are not lives in being. Under wait-and-see for the common law period, we wait for the following lives to end: Taylor, Agnes, Ethel, and, if necessary, Sean. All of these people were lives in being at Chuck's death. If Taylor never has any more children, the remainder in Taylor's grandchildren will be completely vested when both Agnes and Ethel are dead, and will be good. If Taylor has an after-born child, Cedric, the remainder in Taylor's grandchildren will not vest when both Agnes and Ethel are dead, because the class of Taylor's grandchildren is not yet closed. We would continue to wait for Sean's death. If Sean dies before Cedric, we will wait for 21 years more. If Cedric is still alive at that point the class of Taylor's grandchildren is still open and the contingent remainder in the grandchildren is void. If Cedric predeceases Sean or dies within 21 years after Sean's death, the class of Taylor's grandchildren closes and the contingent remainder is vested within the permitted perpetuities period.

ii. **USRAP: Wait-and-see for 90 years:** The Uniform Statutory Rule Against Perpetuities (USRAP) provides for waiting for a maximum of 90 years after the creation of the interest to see if it has vested. This avoids the necessity of locating the lives that measure the common law perpetuities period, but may (in some cases) permit uncertainty to persist for a longer period than under wait-and-see for the common law period. If at the end of the 90-year wait an interest is still not vested or lapsed USRAP commands that the contingent interest be judicially reformed to vest within the 90-year period and conform as closely as possible to the grantor's intent.

Example: In the prior example, we would simply wait for 90 years after Chuck's death to see if all of Taylor's children had died, thus closing the class of Taylor's grandchildren and causing the remainder in Taylor's grandchildren to vest (or fail, in the absence of any grandchildren). If at the end of that 90-year period Taylor's after-born son Cedric were still alive, thus keeping open the class of Taylor's grandchildren, USRAP would require a court to reform Chuck's will so that the interest in Taylor's grandchildren would be vested within the 90-year period. This would probably mean that the class of Taylor's grandchildren would be closed at the 90-year mark, thus excluding from the class any grandchildren of Taylor born after that moment. Under USRAP, an interest is good if it is valid ***either*** under the common law Rule Against Perpetuities ***or*** under the wait-and-see-for-90-years approach.

b. **Construction of the instrument:** Most modern courts will construe an instrument to save future interests from destruction by the Rule, if possible to do so without plainly violating the grantor's intent.

Example: Edward devises Blackacre to Mary, but if and when Mary dies without issue, to the children then living of John and Elizabeth. At the time of Edward's death Mary is 65 years old, John and Elizabeth are each 80 years of age, and John and Elizabeth have two children, Amos and Obadiah, each in his fifties. Mary has a fee simple subject to an executory limitation in favor of the open class of John and Elizabeth's children. A modern court would likely construe the phrase, "dies without issue," to refer to Mary's death without children, rather than the extinction of Mary's imaginary bloodline generations hence. This construction would validate the executory interest in John and Elizabeth's children because Mary would serve as the validating life. A modern court would also be likely to construe the phrase, "children then living of John and Elizabeth," to mean Amos and Obadiah, thus excluding some fanciful child born to the octogenarian couple. This latter construction, by itself and without the former construction, would also save the executory interest because it would close the class of John and Elizabeth's children around their two now living children who must also be living when Mary's bloodline expires, even if that occurs generations later. Amos and Obadiah could serve as the validating lives because the divesting condition (expiration of Mary's bloodline) would necessarily occur or fail to occur within the joint lives of Amos and Obadiah.

c. **Reformation of the instrument:** Some modem courts apply the *Cy pres* doctrine to reform a grant to make it comply with the Rule Against Perpetuities. *Cy pres* is a doctrine of wills and trusts (usually applied with respect to gifts to charities) that permits courts to revise the grantor's instrument to get as close as possible to the grantor's intentions when the grantor's actual intentions are impossible to accomplish. Eight non-USRAP states specify that all or some violations will be reformed. Under USRAP (adopted by 24 states) violations after 90 years of wait-and-see will be reformed.

Example: Harry conveys Woodlot to Angela for life, then to Angela's children who reach age 30. The contingent remainder is void under the common law Rule because Harry and Angela's presently living children might all die, Angela might have another after-born child, and die in childbirth. The after-born child could satisfy the contingency 30 years after the expiration of Angela's life and Angela is the only possible relevant measuring or validating life. Reform by *cy pres* would rewrite Harry's conveyance to read "to Angela's children who reach age 21." Now the remainder is good because even the hypothetical after-born child born at Angela's death would necessarily satisfy (or fail to satisfy) the contingency no later than 21 years after Angela's death. Under USRAP there would be no necessity to reform because the after-born child would necessarily satisfy the age contingency or fail to do so within the 90-year wait-and-see period.

8. **Perpetual trusts: The end of the Rule?** Twenty-three states have either repealed the Rule in its entirety or made it inapplicable to interests in trusts (which is where almost all future interests are created). Washington permits trusts to endure for 150 years, Florida allows 360 years, and Utah and Wyoming permit trusts to last for 1,000 years. This movement has its origins in federal tax law. A rich person, *T*, could create a trust at his death that would pay the income from the trust principal to his child *A* for her life, then to pay the income to *A*'s children for their lives, and then to pay the principal out free of trust to *A*'s grandchildren. With an appropriate saving clause this trust would comply with the Rule. Until 1986, an estate tax would be paid by *T*'s estate on the amount transferred into the trust, but no estate taxes would be paid at the deaths of *A* or *A*'s children because those persons owned

no interest in the trust at their death (they only had a life estate, which expired at their death; in tax parlance they did not own a "transmissible interest"). The next estate tax would be due only upon the deaths of *A*'s grandchildren. Thus, estate taxes could be avoided for two generations with respect to the amounts placed in trust. In 1986, Congress enacted a "generation skipping transfer tax" (GST) that applies in lieu of estate taxes whenever wealth is transferred by means of a life estate that avoids the estate tax by skipping a generation, as would the trust described above. The GST rate is the highest rate under the estate tax. If that is all Congress had done, the GST might have served as a practical brake on the creation of dynastic trusts, making the Rule a bit redundant. But Congress also provided that a person could transfer up to $2 million (in 2006; the amount will increase to $3.5 million in 2009) in a trust that would be exempt from the GST. Only the Rule would limit the duration of such trusts. Because the urge to avoid taxes is basic to human nature states began to compete to attract these "GST exempt" trusts, and the surest way to do so was to eliminate the Rule, thus permitting such trusts to endure forever without the burden of any estate or generation skipping taxes. Of course, Congress could eliminate the GST exemption, or eliminate the estate tax and GST altogether, either of which would remove the incentives for creating perpetual trusts.

Another factor that may hasten the end of the common law Rule is the adoption of USRAP by 25 states as of 2005. USRAP permits contingent interests to endure for 90 years and reforms those that remain contingent at that time. Although USRAP permits the common law period to be used as an alternative to the 90-year period, it is quite possible that, if USRAP becomes universal, after a century of reliance upon the 90-year period the common law Rule will be largely forgotten by lawyers and judges, a relic much like the Rule in Shelley's Case.

The rise of perpetual trusts and the uncertain future of the Rule illustrates the conflict in American law concerning dead-hand control of property. One view is that the property belongs to the decedent and he should be entitled to do with it what he wishes, regardless of the practical or policy consequences; the other view is that property should be controlled by the living. For centuries, the Rule has been the compromise between these principles.

Exam Tips on FUTURE INTERESTS

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

to re-classify the prior interest. Remember to apply the reform doctrines if any of them apply, unless your professor has stipulated that your analysis should focus on the common law Rule Against Perpetuities.

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

EXAMPLES & EXPLANATIONS

Property

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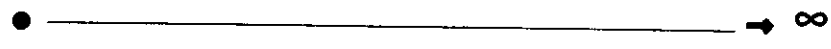
10

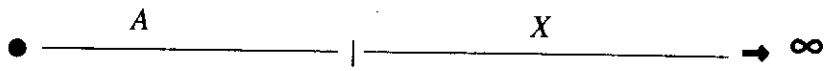
Future Interests

Introduction

The previous chapter introduced estates, present interests, and, to a lesser extent, future interests. An estate delineates the duration of a freehold interest in land. Fee simple absolute, for example, is perpetual ownership or ownership until the end of time. A fee simple absolute can be diagrammed on a timeline as follows:



A life estate can be diagrammed as follows:



where *A* has a life estate. *X* has either a remainder in fee simple absolute or a reversion, depending on who *X* is.

English judges and lawyers a few centuries back wanted to visualize who controlled ownership of land from now until infinity. If a person owned a life estate, the legal mind wanted to know who (or whose heirs or assigns) took possession once the life estate ended. To illustrate, Orville transfers Blackacre to Andrew for life. Andrew has a life estate or, more fully described, Andrew has a present interest in a life estate. Because he transferred less than his full interest in Blackacre and will take back possession of Blackacre once Andrew dies, Orville has a reversion. A reversion is a future interest since the holder does not have a present possessory right to the land. Orville has a present property right, but the possession is deferred until a later time.

Distinguishing Present Interests and Future Interests

A person's interest in property has two analytical components. First, the interest is either a present interest or a future interest. Second, the interest

has an estate component. For shorthand purposes, lawyers normally do not write or speak the present interest or future interest components. Instead, they give labels that denote future interests. The word "remainder" or the phrase "vested remainder," for example, denotes a future estate.

Example: Orville transfers Blackacre to "Andrew for life, then to Becky for life, then to Carrie." Andrew owns a "present interest in life estate." It is a present possessory interest, meaning Andrew can use Blackacre and exclude all others, including Orville, Becky, and Carrie from Blackacre. His estate is the life estate. Instead of identifying both the present interest and the life estate in the label, we shorten the label of Andrew's interest in Blackacre to a "life estate," the present interest component being assumed.

Becky has a "future interest in life estate." Instead of saying that, we say Becky has a "vested remainder in life estate" (more about vested remainders later). The term "vested remainder" indicates a future interest, in fact a particular future interest with its own legal attributes.

Carrie too has a future interest, her interest being a "future interest in fee simple absolute." Instead of saying Carrie has a "future interest in fee simple absolute," we say Carrie owns a "vested remainder in fee simple absolute."

Becky and Carrie currently own property interests in Blackacre, but cannot use the property—they are not entitled to possession until a later date, so they merely have future *possessory* interests. Once Andrew dies, Becky's interest becomes a present possessory interest—she will have a "present interest in life estate" or, more simply, a "life estate." Until both Andrew and Becky die, Carrie's interest remains a vested remainder in fee simple absolute. Once Andrew and Becky die, Carrie's possessory interest then becomes a fee simple absolute.

Future Interests Retained by the Grantor or Transferor

The future interest (currently owned interest that becomes possessory at a future date) retained by the transferor (or his heirs or assigns) are the reversion, the possibility of reverter, and the right of reentry (also known as the "right of entry" and the "power of termination").

The three interests were introduced in the previous chapter on estates and present interest. The ***reversion*** is retained by the transferor or grantor when he transfers an interest less than the one he owns to another. It follows a life estate, fee tail, or term of years.

Example: Orville transfers Blackacre to Andrew for life. Andrew has a present possessory interest in life estate in Blackacre. Orville has a reversion. Orville gets possession of Blackacre when Andrew dies.

As discussed in Chapter 9, the ***possibility of reverter*** is a future interest held by a transferor or grantor who transfers a fee simple determinable. The ***right of reentry*** follows the fee simple subject to a condition subsequent.

If the transferor dies or assigns his future interest to a third party, the name of the future interest remains the same. Thus, if *O* transfers a reversion in Blackacre to *A*, *A*'s interest is a reversion.

Future Interests in Third-Party Transferees

Future interests in transferees can be divided into three fundamental types:

1. Vested remainders
2. Contingent remainders
3. Executory interests

There are variations on each.

(a) Remainders

Vested and contingent remainders are interests in third parties that follow interests less than a fee simple, mainly life estates, fee tails, and terms of years. The same future interest retained by the grantor is a reversion. A remainder follows the natural termination of a prior estate; a remainder does not divest or cut short a prior estate. An owner of a remainder takes possession immediately following the natural ending of the prior life estate, term of years, or fee tail with no gap in time between possessions. A life estate to *A*, then to *B* after *A*'s funeral, for example, does not create a remainder in *B* since there is a gap in time between the natural termination of *A*'s life estate and the start of *B*'s right to possess. *B* owns an interest (called an executory interest), but it is not a remainder.

Declaring that a person has a remainder merely says he owns a future interest, an interest that may become possessory sometime in the future. The term "remainder" in and of itself does not say what estate that future interest is: The estate may be a life estate, a fee simple absolute, a term of years, a fee tail, a fee simple subject to condition subsequent, a fee simple determinable, or a fee simple subject to an executory limitation.

Example: Orville transfers Blackacre to Andrew for life, then to Becky. Andrew has a (present possessory) life estate. Becky owns a remainder. She takes possession of Blackacre immediately following the natural termination of Andrew's life estate, which occurs at Andrew's death. What estate — how long will Becky get to possess Blackacre — does Becky get? While the grant was silent on how long Becky will own Blackacre, the rules of construction favoring a fee simple interest over a life estate mean Becky's

estate is a fee simple absolute. Thus, the full label for Becky's interest in Blackacre at the time of the grant is remainder in fee simple absolute. Once Andrew dies, Becky's interest becomes a fee simple absolute, a present possessory interest.

(b) Executory Interests

An ***executory interest*** is a future interest in a third party that divests or cuts short a prior estate. The most common executory interests follow defeasible fees. Although similar to a possibility of reverter and a right of reentry (which are interests in the grantor that follow, respectively, a fee simple determinable and a fee simple subject to a condition subsequent), an executory interest is the name given to the interest following a defeasible fee if the property passes to a *third party* instead of to the grantor. The fee simple that may be divested in favor of the third party is called a ***fee simple subject to an executory limitation.***

The following chart summarizes present estates, words normally used in the creating the estate, and names of the future interests held either by the grantor or by third persons:

Estates in Real Property, with Future Interests

Freehold Estates (Typical wording in italics in this column, followed by future interests in the two right-hand columns)		Future Interest	
		Grantor	3rd Person
Fee Simple			
Absolute	"*to* A" "*to* A *and her heirs*"	None	None
Determinable/Subject to an Executory Limitation	"*to* A *so long as* . . ." "*while* . . ." "*during* . . ." "*unless* . . ." "*until* . . ."	Possibility of Reverter	Executory Interest
Subject to a Condition Subsequent/Executory Limitation	"*to* A *provided that* . . ." "*on condition* . . ." "*but if* . . ."	Right of Recentry	Executory Interest
Fee Tail	"*to* A *and the heirs of his body*"	Reversion	Remainder
Life Estate	"*to* A *for life*"	Reversion	Remainder Executory Interest

Non-Freehold Estate		Future Interest	
Term of years	"*to* A *for* _____ *years*"	Reversion	Remainder

Future interests are developed more fully below after a digression into the difference between vested remainders and contingent remainders.

Vested and Contingent Remainders

Remainders in land can be vested or contingent. A ***vested remainder*** is one that (a) is owned by an ascertained person or persons and (b) is not subject to a condition precedent. A ***contingent remainder*** is one where either the owner is unascertained or possession of the property is subject to a condition precedent (a contingency).

Because they are already possessory, all present interests, whether a life estate, fee simple absolute, fee simple determinable, fee simple subject to a condition subsequent, or a fee simple subject to an executory limitation, are vested. In addition, all future interests ***in the grantor*** (or his later assigns or heirs) are deemed vested even if the interests become vested only upon the happening of a contingency. Distinguishing between vested and contingent interests, therefore, becomes critical only with regard to remainders and executory interests—i.e., future interests in third parties.

To reviews, a vested remainder is given to an ascertained person and is not subject to a condition precedent. The vested remainder becomes possessory upon the natural termination of the immediately preceding estate. It follows a life estate, fee tail, or term of years. A contingent remainder is a remainder that either is given to an unascertained person or is subject to a condition precedent. Executory interests, because they cut short a prior estate and thus do not follow a natural termination of the prior estate, are contingent interests (but not contingent remainders).

(a) Ascertained Persons

Assuming no condition precedent, a remainder is vested if it is given to an ascertained person and contingent if it is given to an unascertained person. A person is ascertained if he or she can be specifically determined currently. The most certain way to have an ascertained person is to name the person. Thus a remainder to "Paul Property" or to "my son, Paul Property" would be vested (assuming no condition precedent) because Paul Property is an ascertained person. In Property class discussions an ascertained person is designated by a letter. Thus a gift to "*A*" is a gift to an ascertained person.

There is some difficulty, though not much, when a transferee is identified by a label or description. If the description can apply to only one person or individually identifiable persons, the persons are ascertained. If further developments are necessary before a specific individual can be pinpointed, the recipient is an unascertained person. The most common unascertained persons are unborn persons. For example, if Orville dies, his will devising

Blackacre to his daughter, Andrea, for life and then to Andrea's first-born child, but she has no child, the remainder to Andrea's first-born child is to an unascertained person.

Example 1: *O* conveys to *A* for life, then to *B* and his heirs. Both *A* and *B* are ascertained persons.

Example 2: *O* conveys to *A* for life, then to *B*'s children. *B* is childless. The remainder to *B*'s children is to a group of unascertained persons. Therefore, *B*'s children have a contingent remainder.

Example 3: *O* conveys to *A* for life, remainder to *B*'s heirs. *B* is married to *C* and has one son, *D*. Since *B*'s heirs can be definitely identified only when *B* dies but *B* is still alive, the grant to *B*'s heirs is a gift to unascertained persons. Their remainder is a contingent remainder. Once *B* dies, *B*'s heirs can be identified; they are then ascertained persons. Since there is no condition precedent they have a vested remainder in fee simple to take possession on *A*'s death.

Example 4: *O* conveys to his son, *A*, for life, and then to *A*'s children (*O*'s grandchildren). *A* is alive. *A* has three children (*B*, *C*, and *D*). *B*, *C*, and *D* are ascertained persons. The gift to "*A*'s children" is a class gift. When one person in the class is identified, the class is vested. Nonetheless, as will be developed more fully later, for a very important purpose — applying the Rule Against Perpetuities — a gift to a class that is vested but subject to more people being added to the class will be treated as a contingent remainder until the class "closes" (i.e., all persons who might take are ascertained).

Example 5: *O* conveys to *A* for life, then to *A*'s widow. *A* is married to *B*. *A*'s widow is an unascertained person. As facts develop, *B* and *A*'s widow may be different people. *B* may expect to be *A*'s widow, but she may predecease *A*, or she may divorce *A*. *A*'s widow has a contingent remainder. *B* has an expectation only, which is not a recognizable property interest.

(b) No Condition Precedent

A vested remainder has no condition precedent. A remainder with a condition precedent is a contingent remainder.

A ***condition precedent*** is an event (condition) that must occur (or fail to occur, depending on how it is worded) *before* an interest becomes vested (for a remainder) or possessory (for an executory interest). To illustrate, if *O* conveys Blackacre to *A* for life, and then to *B* if *B* becomes a lawyer before *A* dies, the requirement that *B* become a lawyer before *A* dies is the condition precedent. It must occur before *B*'s contingent remainder becomes a vested remainder.

A condition precedent must be contrasted with a condition subsequent that terminates a possessory or vested interest. The fee simple determinable, fee simple subject to a condition subsequent, and fee simple subject to an executory limitation all incorporate a condition subsequent. The holder can be divested if the condition subsequent develops. A condition divesting a fee simple on executory limitation and giving possession to an executory interest is both a condition subsequent and a condition precedent. Since a remainder by definition follows the natural termination of a life estate or term of years, a condition before a remainderman can take can only be a condition precedent.

Example: *O* conveys Blackacre "to *A*, but if *B* becomes a lawyer before *A* dies, to *B*." A has a fee simple subject to an executory limitation. It is a fee simple with a condition subsequent. *B*'s becoming a lawyer before *A* dies also is the condition precedent to make *B*'s executory interest possessory.

Practice Interpreting Grants with Conditions Precedent and Conditions Subsequent

When interpreting grants, read them in the order written, usually interpreting up to a comma or semicolon. The order in which a grant is written can change the type of interest created and whether any remainder created is vested or contingent. Consider the following examples.

Example 1: *O* conveys Blackacre to *A* for life, then, if *B* survives *A*, to *B* and her heirs. *B* has a remainder since it follows the natural termination of *A*'s life estate. For *B* to take possession, however, *B* must outlive *A*. The survivorship requirement is a condition precedent. *B* has a contingent remainder. In the actual conveyance the drafter should provide who takes if the condition precedent is not satisfied. Since no provision was made, *O* (or *O*'s heirs) as the holder of the reversion takes Blackacre on *A*'s death if *A* survives *B*.

Example 2: *O* conveys to *A* for life, and when *A* dies, to *B* and her heirs. *A* has a life estate. *B* has a remainder since it follows the natural termination of *A*'s life estate. *B* in fact has a vested remainder in fee simple absolute. The clause "and when *A* dies" is not a condition precedent. A life estate naturally terminates on the death of the life tenant. The natural termination of a life estate, or the end of a term of years, is not a condition precedent (or a condition subsequent).

Example 3: *O* conveys Blackacre to *A* for life, then to *B* and his heirs, but if *B* does not survive *A*, then to *C* and his heirs. *A* has a life estate. *B*

has a vested remainder since the interest follows the natural termination of the preceding life estate and there is no condition precedent. There is a condition subsequent, however. *B*'s interest, therefore, is a vested remainder, subject to divestment, in fee simple absolute. Compare Example 1 above, where essentially the same grant was labeled a contingent remainder. The difference in the two is the order in which the grant was written. In Example 1 the condition came first and was a condition precedent; here it came after the interest was vested and is a condition subsequent.

C does not have a remainder because a condition must divest or cut short *B*'s vested remainder before *C* can possess Blackacre. *C*, therefore, has an executory interest in Blackacre.

Example 4: *O* conveys Blackacre to *A* for life, remainder to *B*'s children. *B* is alive and has two children, *C* and *D*. *A* has a life estate. *B*'s two children, *C* and *D*, have vested remainders subject to open (more on subject to open later). *B*'s children's interest follows the natural termination of the preceding life estate and there is no condition precedent (*B*'s children do not have to survive *A*). Hence the children's interest is vested. Their interests are subject to partial divestment (subject to open), however, if *B* has another child, who when born would share in the grant.

Example 5: *O* conveys to *A* for life, remainder to *B*'s children who attain age 18. *B* is alive and has one child, *C*, who is ten years old. *B*'s children, including *C* and any later-born children, have a remainder. It is a contingent remainder because to take Blackacre the child or children must reach age 18. Reaching age 18 is the condition precedent. Until *C* or some other child of *B* reaches age 18, the interest remains a contingent remainder in fee simple absolute. Since *O* did not make a provision as to what happens to Blackacre if none of *B*'s children attains age 18, *O* retains a reversion.

Alternative Contingent Remainders

Whenever a grantor fragments ownership rights into present and future interests, parties must be able to identify an owner for all periods of time and all events and contingencies. Of special importance, a grant of a contingent remainder should include a determination of who takes if the condition precedent fails to develop. There are two main options. First, explicitly or by default if the grantor makes no provision, the grantor retains a reversion. Second, the grantor may provide that another person take if the contingency fails, creating an alternative contingent remainder. An alternative contingent remainder results where one of two named persons takes to the exclusion of the other, depending on whether or not a condition precedent occurs.

Example 1: *O* conveys Blackacre to *A* for life, then to *B* if *B* attains the age of 21; but if *B* does not attain age 21, to *O*. *A* has a life estate. *B*, an ascertained person, has a contingent remainder because she must live to age 21. If *B* does not attain age 21, *O* at *A*'s death once more owns the property. *O* therefore has a reversion.

Example 2: *O* conveys Blackacre to *A* for life, then to *B* if *B* attains age 21. *B* is 15. Same result here as in Example 1. *A* has a life estate, *B* has a contingent remainder, *O* has a reversion. *O* has a reversion since he transferred less than his full interest. The grantor retains a reversion when he transfers a life estate followed by a contingent remainder. If *B* turns 21 during *A*'s life, *B*'s contingent remainder becomes a vested remainder and *O*'s reversion disappears. If *A* dies before *B* attains age 21, *O* once more owns Blackacre, subject to a (springing) executory interest in *B* if and when *B* attains age 21 (more on executory interests later in this chapter).[1]

Example 3: *O* conveys Blackacre to *A* and then to *B* if *B* reaches 21, but if *B* does not attain age 21, then to *C*. *A* has a life estate. *B* and *C* have alternative contingent remainders. *O* has a reversion. If *B* attains age 21, *B* gets Blackacre on *A*'s death and *C* gets nothing. Alternatively, if *B* dies before turning 21, *B* loses her interest and *C* gets Blackacre on *A*'s death. If *A* dies before *B* turns 21 but while *B* is still alive, *O* gets back Blackacre until either *B* celebrates her twenty-first birthday, in which case *B* gets Blackacre, or *B* dies before reaching 21, in which case *C* gets Blackacre.[2]

Why We Distinguish Vested and Contingent Remainders

We distinguish vested remainders from contingent remainders for several reasons, many only of historical importance in most jurisdictions. For example, at one time a person could assign and devise vested remainders but not contingent remainders. Today both vested and contingent remainders are assignable and devisable. In addition, persons holding vested remainders had greater rights to prevent waste by the present possessor. Finally, some special rules destroyed contingent remainders or rendered them void. The

1. In a few jurisdictions, the holder of a contingent remainder must satisfy the contingency before the prior estate ends; otherwise, the contingent remainder is destroyed. This Rule of the Destructibility of Contingent Remainders is developed more fully in Chapter 11. If *B*'s contingent remainder is destroyed, *O* gets Blackacre back as a fee simple absolute.

2. See note 1. If the Rule of the Destructibility of Contingent Remainders applied, and *A* died before *B* reached age 21, both *B*'s and *C*'s alternative contingent remainders would be destroyed.

Rule of Destructibility of Contingent Remainders (mentioned in footnotes 1 and 2), the Rule in Shelley's Case, the Doctrine of Worthier Title, and the Rule Against Perpetuities are the common judicially created rules developed to terminate contingent remainders. These rules, to the extent they remain in force, do not apply to vested remainders. We delve into these rules more in Chapter 11; we dedicate an entire chapter, Chapter 12, to the Rule Against Perpetuities.

Executory Interests

For centuries the only future interests allowed to third parties were remainders. In particular, a grantor could not create a defeasible fee (fee simple determinable or fee simple subject to a condition subsequent) in one party and the equivalent of a possibility of reverter or power of termination (right of entry) in a third party. That's no longer the case. Since the Statute of Uses in 1536, a grantor can create interests other than remainders in third parties. These future interests are called executory interests. Many states by statute have integrated remainders and executory interests under the "remainder" umbrella, but in many states and in your Property class, the executory interest remains a separate property interest.

As a review and transition, remainders must take effect on the natural ending of the prior estate. See supra 129. There can be no gap in seisen (possession) after the prior estate ends and the next vested interest commences. Thus, a conveyance "to *A* for life, then to *B* one year after *A*'s death" cannot be a remainder, and prior to 1536 was void. One type of executory interest recognized today, the springing executory interest, can occur after a gap in time. The ***springing executory interest*** divests or cuts short the grantor's fee simple. Its most common uses are transfers following a gap in time. Thus the conveyance "to *B* one year after *A*'s death" is enforceable as a springing executory interest.

Related to the no-gap-in-time rule was an early rule that a grantor could not convey an interest in property to be effective at some time in the future. For example, Grandpa could not deed Blackacre "to Junior when he graduates from law school." Today the transfer would be good. Junior's interest is not a remainder since it does not follow the natural termination of a prior estate; it is a springing executory interest, springing from the grantor.

A second characteristic of remainders is that the holder of a remainder takes possession only after the natural termination of the prior estate. See supra 129. Remainders follow life estates and terms of years. Any proposed interest in a third party that takes effect only when the preceding interest is

cut short pursuant to a condition subsequent is not a remainder. Prior to the Statute of Uses in 1536, transfers to third parties following a fee simple determinable or fee simple subject to a condition subsequent were void. No "shifting" of the interest to a third party (a stranger to the deed) was allowed. These transfers, resulting in shifting executory interests, have been allowed since 1536. Labels change, however. What is called a fee simple determinable or fee simple subject to a condition subsequent when the grantor retakes the property once the condition subsequent occurs is called a ***fee simple subject to an executory limitation*** when a third party takes the property on the happening of the condition subsequent. The third party's interest following the fee simple subject to an executory limitation is called the ***shifting executory interest.***

No different legal consequences exist between shifting executory interests and springing executory interests. The only difference is that the *springing* executory interest divests the grantor, whereas the *shifting* executory interest divests a transferee (grantee).

Example 1: *O* transfers Blackacre to *A* as long as Blackacre is used for farming, then reverts to *O*. *A* has a fee simple determinable in Blackacre. *O* has a possibility of reverter.

Example 2: *O* transfers Blackacre to *A* as long as Blackacre is used for farming, then to *B* and his heirs. *A* has a fee simple subject to an executory limitation. *B* has a shifting executory interest.

Example 3: *O* transfers Blackacre to *B* to take effect if and when *B* agrees to farm Blackacre. *O* has a fee simple subject to an executory limitation. *B* has a springing executory interest.

Variations on Vested Remainders

Vested remainders are remainders in which the holders are ascertained persons and no condition precedent exists. There are some analytical variations of vested remainders.

(a) Indefeasibly Vested Remainder

The ***indefeasibly vested remainder*** is a remainder with no condition subsequent and is not a class gift subject to open. A gift "to *A* for life, remainder to *B* and her heirs" illustrates the indefeasibly vested remainder. *B* has a vested remainder in fee simple absolute. *B*'s vested remainder is certain to become possessory. Her interest cannot be divested; she need not worry about any class gift complications.

(b) Vested Remainder Subject to Divestment

Because of rules disfavoring contingent remainders, courts favor vesting remainders as soon as possible. Thus a construction may result in a vested remainder being subject to divestment before it becomes a possessory estate. These are labeled ***vested remainders subject to divestment.*** The key to distinguishing a vested remainder subject to divestment from a contingent remainder is whether the determinative condition is a condition precedent (so the remainder is a contingent remainder) or a condition subsequent (so the remainder is a vested remainder subject to divestment). The following examples should clarify the distinction:

Example 1: *O* conveys Blackacre to *A* for life, then to *B* and her heirs. *B* has an indefeasibly vested remainder in fee simple absolute (though lawyers would condense that to "vested remainder in fee simple").

Example 2: *O* conveys Blackacre to *A* for life, then to *B* and her heirs if *B* attains age 21, but if *B* does not attain age 21, to *C* and his heirs. *B* has a contingent remainder in fee simple absolute, the condition precedent being *B*'s attaining age 21. *C* has an alternative contingent remainder. *O* has a reversion.

Example 3: *O* conveys Blackacre to *A* for life, then to *B* and her heirs; but if *B* does not attain age 21, to *C* and his heirs. *B* has a vested remainder subject to divestment in fee simple absolute. *B*'s interest is vested because the divesting condition occurs after the clause granting *B* her interest; it is a condition subsequent. Contrast this with Example 2, where the condition is part of the grant itself, and is a condition precedent.

Because *B*'s interest is a vested remainder that may be divested or cut short, *C*'s interest cannot be a contingent remainder. *C*'s interest ripens into possession only if *B*'s interest is divested. Hence *C* has a shifting executory interest in fee simple absolute.

Example 4: *O* conveys Blackacre to *A* for life, then to *B* and her heirs; but if *B* stops farming Blackacre, to *C* and his heirs. *B* has a vested remainder in fee simple subject to an executory limitation. *B*'s remainder is not subject to a condition precedent and so is not a contingent remainder. Further, *B*'s vested remainder is not subject to divestment before *B* takes possession (i.e., while it is still a vested remainder); therefore, it is incorrect to label it a vested remainder subject to divestment. Her interest is a future interest, a vested remainder; her estate will be a fee simple subject to an executory limitation. Contrast this Example with Example 3 and Example 5. *C* has a shifting executory interest.

Example 5: *O* conveys Blackacre to *A* for life, then to *B* and her heirs, but if *A* ceases to farm Blackacre, to *C* and her heirs. Since *B*'s interest may

be divested before she takes possession (i.e., *B*'s vested remainder may be divested while it is still a vested remainder), *B* has a vested remainder subject to divestment in fee simple absolute. *B*'s interest is vested and not contingent because the grant as written read in the order written up to the comma says "*A* for life, then to *B*," the language creating a vested remainder. Her vested remainder is subject to divestment before she takes possession. Therefore, her interest is a vested remainder subject to divestment in fee simple absolute. *C* owns a shifting executory interest since she can take only if *B*'s interest is divested.

(c) Vested Remainder Subject to Open

A common estate-planning device is for a testator (a decedent with a will) to leave property to a child for life, then to the testator's grandchildren (the life tenant's children), even if none then are born. For example, Owen may devise Blackacre to "my son, Albert, for life, then to Albert's children." The remainder to Albert's children is a ***class gift*** since it is to a group of persons identified by description rather than by names. Albert may or may not have any children. Assuming Albert has two children when Owen died, the two children have vested remainders since their interest follows the natural termination of their father's life estate and there is no condition precedent; but it is not an indefeasibly vested remainder. Albert may have more children who, when born, will share in the grant to "Albert's children." Albert's living children's remainder in Blackacre is vested — they will have a shared right to possession of Blackacre on Albert's death — but that vested remainder is subject to partial divestment in favor of later-born siblings. Hence we label the children's interest a ***vested remainder subject to open***, indicating others can enter the described class; or, synonymously, a ***vested remainder subject to partial divestment***, indicating the vested members of the class may lose some interest in the property.

(1) Class Closing Physiologically or Naturally

For practical reasons, at some point the class of persons who will share in a class gift must *close* (no more persons can enter the class even if later born). Two rules have evolved. First, a *class closes physiologically* or it closes *naturally* whenever biologically no one else can be born into the class.

Example: *O* dies, devising Blackacre "to my wife, Edna, for life, then to my son Franklin's children." Franklin has one child, Greta. Greta has a vested remainder subject to open. If Franklin has a second child, Harold, Harold shares equally with Greta in the vested remainder subject to open. If Franklin has a third and a fourth child they, too, would share in the vested remainder subject to open. Once Franklin dies, however, or more precisely nine months

after Franklin dies, Franklin can have no more children. The class is complete with however many children are then born. Assuming Franklin dies with two children, Greta and Harold, in the class, the two children will be co-owners of Blackacre, with no chance Franklin will have another child.[3]

(2) Class Closing by Rule of Convenience

A class also may close by the rule of convenience. The ***rule of convenience*** states that a class closes whenever any member of the class can demand possession or distribution. The class does not necessarily close when a person is identified and satisfies any condition precedent, but only when some member of the class can demand possession. A vested member can demand possession usually no sooner than the natural termination of the preceding life estate or term or years, or until the divesting condition occurs in a fee simple subject to an executory limitation. Living persons — including those born within nine months — who are identifiable members of a class when the class closes by convenience, but who have not satisfied any condition precedent, may still share in the property if they later satisfy the condition precedent. In other words, the class closing rules merely circumscribe the persons who might take; it does not limit the number of persons who are in the class to those already vested.

Example 1: *O*'s will devises Blackacre to *W* for life, then to *A*'s children who attain age 21. *A* has two children, *K* (age 8) and *L* (age 5). *K* and *L* have contingent remainders, contingent on attaining age 21. The class of *A*'s children remains open to any after-born children of *A*.

Example 2: When *K* is age 15 and *L* is age 12, *A* has another child, *M*. The three children (*K*, *L* and *M*) have contingent remainders. The class is still open for *A*'s children who may be born later.

Example 3: *K* reaches age 21, and now has a vested remainder subject to open. The class does not close physiologically since *A* is still alive and can breed more children. Likewise, the class is not closed by the rule of convenience since *K*, although vested, cannot demand possession of Blackacre until *W*'s life estate ends.

Example 4: Continuing the facts of Example 3, *A* has a fourth child, *N*. *N* has a contingent remainder and will share ownership of Blackacre as long as *N* attains age 21.

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3. For purpose of class closing — and even more critically for the Rule Against Perpetuities — acceptable procreation techniques are limited to those used two centuries ago. Frozen embryos, cloning, and time travel are not possiblities in class closing and Rule Against Perpetuities applications.

Example 5: *K* dies at age 23. *K* is still vested. The condition precedent is attaining age 21. There is no condition precedent requiring any of *A*'s children to survive the life tenant, *W*. *K*'s devisee or her heir will take *K*'s share of Blackacre on *W*'s death.

Example 6: *W* dies when *L* is 21, *M* is 9, and *N* is 2. *A* is still alive. The class of "*A*'s children" closes pursuant to the rule of convenience since *K* and *L* have satisfied the condition precedent — attaining age 21 — and *K*'s and *L*'s devisees or heirs can demand possession of Blackacre as soon as *W*'s life estate ends, which it did on her death. While the class closes, the class is "*A*'s children," not "*A*'s children who have attained age 21." Thus *M* and *N* are still members of the class and will be vested if and when they attain age 21.

Example 7: Two years after the developments in Example 6, *A* has a fifth child, *X*. *X* is A's child, and just as cute and cuddly as were *K*, *L*, *M*, and *N*; but *X* was born after the class of *A*'s children closed, and will not share in Blackacre. The rule of convenience sometimes works an injustice, but it makes land more alienable and marketable. Without it, *A*'s children could not sell Blackacre until *A* dies since *A* may have another child at any time.

Example 8: *N* dies in car wreck at age 18. *N* will not attain age 21, and thus neither *N*'s devisees nor heirs will own any share of Blackacre. Blackacre will be co-owned in equal shares by *K*'s devisee, *L*, and *M* (age 27 at *N*'s death).

EXAMPLES

Reversion Review

1. Consider which of the following conveyances creates a reversion:
   (a) *O* (the holder of a fee simple absolute) conveys Blackacre to *A* for life.
   (b) *O* conveys Blackacre to *A* for life, but if *B* marries *C*, then to *C* and his heirs "so long as *B* and *C* use the property as a residence."
   (c) *O* conveys Blackacre "to *A* for life" and *A* transfers "to *C* for *C*'s life."

A Has a Life Estate

2. Identify the interests created by the following transfers:
   (a) *O* conveys Blackacre to *A* for life, then to *B* and his heirs.
   (b) *O* conveys Blackacre to *A* for life, then to *B*'s children. *B* is childless at the time of the conveyance.
   (c) *O* conveys Blackacre to *A* for life, "remainder to *B*'s heirs." *B* is alive.

(d) *O* conveys Blackacre to *A* for life, but when *A* dies, to *B* and his heirs.

(e) *O* conveys Blackacre to *A* for life, then, if *B* survives *A*, to *B* and his heirs.

(f) *O* conveys Blackacre to *A* for life, then to *B* if *B* survives *A*, but if *B* does not survive *A*, to *C* and his heirs.

(g) *O* conveys Blackacre to *A* for life, then to *B* for life, then to *C* and his heirs.

(h) *O* conveys Blackacre to *A* for life, then to *B* and his heirs, but if *B* does not survive *A*, then to *C* and his heirs.

B Has a Vested Remainder

3. Identify the interests created by each of the following transfers:

(a) *O* transfers Whiteacre "to *A* for life, then to *B* for life, then to *C* and her heirs."

(b) *O* transfers Whiteacre "to *A* for life, then to *B* for life, then if *C* survives *A* and *B*, to *C* and her heirs."

(c) *O* transfers Whiteacre "to *A* for life, then to *B* for life, then when *A* and *B* die, to *C* and her heirs."

More Future Interests

4. Identify who has what interest in what estate in the following:

(a) *O* conveys Brownacre "to *A* for life, remainder to *B*'s children." *B* is alive and has two children, *C* and *D*.

(b) *O* conveys Brownacre "to *A* for life, remainder to *B*'s children who attain age 18." *B* is alive and has one child, who is ten years old.

(c) *O* conveys Brownacre to *A* for life, remainder to *B*'s heirs. *B* is divorced and has one child, *C* (age 10).

(d) *O* conveys Brownacre to *A* for life, remainder to *B* if she graduates from law school; if not, to *C*.

Minor Gift

5. (a) *O* conveys Blackacre "to my son *A* for life, then to his children who reach 21." *A* has two children, *B* (age 8) and *C* (age 13). What interests and estates do *B* and *C* have?

(b) If *C* were to die after reaching 21 while *A* is alive, who owns what then?

(c) Assuming the facts in (a), *A* dies, leaving *B* (then age 10) and *C* (age 15). What interests and estates are created at *A*'s death?

(d) What happens six years later, when *B* is 16 and *C* is 21 years old?

A Class Gift

6. Edna owned a 100-acre farm at her death. Her will provided that the farm went to her sister, Faye, for life; at Faye's death, the farm passed to Faye's son, George, for life; it then went to George's children who survive George. George has one child, Trudy.
   (a) What interests do the respective parties have at Edna's death?
   (b) George has a second child, Sam. Does Sam have an interest in the farm?
   (c) Faye dies. A year later George has a third child, Robert. A month after Robert is born, Trudy dies, her only heir being her father, George. Who owns what interests in the farm?
   (d) George dies, survived by Sam and Robert. Who has what interests in the farm?

A Final Go

7. Identify the interests and estates created in the following conveyances:
   (a) *O* conveys Blackacre "to my daughter *A* for life, then to my grandchild *B* and his heirs, but if any issue of my grandchild *B* survive *A*, then to those surviving issue."
   (b) Same facts as in (a). B dies, survived by his wife, *C*, and his child, *D*. *B*'s will devises his interest to his wife, *C*.
   (c) Same facts as in (a) and (b). *A* dies.
   (d) *O* conveys Whiteacre "to *A* for life, remainder to *B* and her heirs, but if *B* marries *C*, then to *C* and his heirs."
   (e) *O* conveys Whiteacre to *A* for life, then to *B* and his heirs, but if *B* sells alcohol on Whiteacre, then to *C* and her heirs.
   (f) *O* conveys "to *A* for 99 years if he lives so long, then to *B* and his heirs."
   (g) *O* conveys "to *A* for life, then one day after *A* is buried, to Bentham and his heirs."
   (h) *O* conveys "to *A* for life, then if *B* survives *A*, to *B* and his heirs, but if *B* does not survive *A*, to *C* and his heirs."

EXPLANATIONS

Reversion Review

1. (a) *O* has a reversion, even though it is not stated in the grant itself. *O* transferred less than his full interest in Blackacre. What *O* retains is a reversion to take possession as soon as *A*'s life estate ends.
   (b) *O* has a reversion until *B* marries *C*. If *A* dies before *B* marries *C*, *O* retakes possession of Blackacre. Once *B* marries *C*, *O*'s reversion

ends. *O* still has an interest, but it is not a reversion. *O*'s interest is a future interest, a possibility of reverter, that follows *C*'s fee simple determinable.

(c) Both *O* and *A* have revisions. *O* has a reversion upon the end of *A*'s life estate. *A* has a reversion upon the end of *C*'s life estate if *A* outlives *C*.

A Has a Life Estate

2. (a) *A* has a life estate. *B* has a vested remainder. There is no implied condition that *B* survive *A*. If *B* dies before *A*, upon *A*'s death *B*'s heirs or devisees take both possession and the remainder.

(b) *A* has a life estate. *B*'s children have a contingent remainder because they are not yet born. They are unascertained persons until born. *O* has a reversion in case *A* has no children. When a child of *B* is born, then that child will be said to have a vested remainder subject to partial divestment or "subject to open" (upon the birth of that child's siblings, when that second child, and each subsequent sibling, will partially divest his or her older siblings, gradually and pro rata reducing their share of the property). This is an example of the law's preference to classify remainders as vested.

(c) *A* has a life estate. *B*'s heirs have a contingent remainder. No one is an heir of a living person — one may only be an heir apparent — a putative heir maybe, a hopeful heir certainly, but not legally an heir until the death of *B*, at which time the remainder becomes vested. If this conveyance were contained in *B*'s will, the remainder would be vested because *B*'s heirs are known at her death. A will, remember, is effective or "speaks" for this purpose at death, no matter how long before the fact it was executed.

(d) *A* has a life estate. *B* has a vested remainder in fee simple absolute. The words "but when *A* dies" do no more than indicate when *A*'s present interest will naturally terminate. The words are not a condition precedent to the remainder.

(e) *A* has a life estate. While *A* is alive, *B*'s estate is a contingent remainder. The condition of survivorship is express and is a condition precedent. Unless clearly expressed as a condition precedent, surviving the life tenant is not a condition to taking a remainder. In this case, however, *O* expressly conditioned the vesting of the remainder on *B*'s surviving the life tenant, *A*. *O* keeps a reversion in case *B* does not survive *A*.

(f) *A* has a life estate. When the words "but if *B* does not survive *A*, to *C* and his heirs" are added to this conveyance shown in (e) above, *B*'s and *C*'s remainders are both contingent; they are called

alternative contingent remainders, meaning that the condition precedent attached to one interest is the opposite of the condition attached to the other. At the time of the termination of the life estate, one of the two conditions will be satisfied and so one of the two remainders will become vested. While the remainders are both contingent, *O* would retain a reversion in fee simple absolute. Alternative contingent remainders were much used in England during the age of Queen Elizabeth I to ensure that when two sons were alive at the conveyance, if the elder son and heir were to die before his parents, the family property would devolve on the younger.

(g) *A* has a life estate. *B* has a vested remainder in life estate. It is vested even though *B* may die before *A*'s life estate ends. The reason *B* might never actually possess Blackacre is that her estate ends on her death, which may occur prematurely; surviving *A* is not a condition precedent to the grant but an end to her estate. *C* has vested remainder in fee simple absolute. *C* takes possession of Blackacre after both *A* and *B* die.

(h) *A* has a life estate. *B* has a vested remainder subject to divestment in fee simple absolute. The survivorship condition is a condition subsequent, not a condition precedent. Since *C* can take only if *B*'s vested remainder is cut short or divested, *C* cannot have a contingent remainder. *C* has a shifting executory interest in fee. If *B* dies before *A*, then *B*'s interest is extinguished and *C* takes.

B Has a Vested Remainder

3. (a) *A* has a life estate; *B* has a vested remainder in life estate (or for life). Remainders designate the interest is a future interest. What estate is held is a different query. Here *B*'s future interest is a life estate or an estate held for life. *C* has a vested remainder as well, his being a vested remainder in fee simple absolute.

(b) *A* has a life estate; *B* has a vested remainder in life estate (or for life). *C*'s remainder is now subject to a condition precedent — *C*'s surviving both *A* and *B*. Thus *C* has a contingent reminder in fee simple absolute. *O* has reversion in case *C* fails to survive *A* and *B*.

(c) *A* has a life estate; *B* has a vested remainder in life estate (or for life). *C* has a vested remainder in fee simple absolute. The clause "then when *A* and *B* die" states the law as to when a remainder takes possession: Life estates end at the death of the life tenant and remainders take immediately thereafter. It is not a condition to *C*'s taking. *C* (or her heirs or devisees) will possess Whiteacre after *A* and *B* die.

More Future Interests

4. (a) *A* has a life estate, a present possessory interest. The two children, *C* and *D*, have a vested remainder subject to open in fee simple absolute (or, alternatively labeled, a vested remainder subject to partial divestment). If *B* has more children, the after-born or adopted children will share in the remainder with *C* and *D*. *B*'s age is irrelevant to this classification.

   (b) *A* has a life estate. *B*'s ten-year-old child has a contingent remainder in fee simple absolute, contingent on attaining age 18. *O* has a reversion in fee simple absolute to take effect on *A*'s death if either *B*'s son dies before he reaches 18 (and *B* has no more children who have attained age 18 by *A*'s death), or *B*'s son is still a minor. Once *B*'s son turns 18 he will have a vested remainder subject to open in fee simple absolute.

   (c) *A* has a life estate. Assuming *B* is alive, *B*'s heirs have a contingent remainder: Only decedents and living persons have heirs, so *B*'s heirs are unascertained. *C* may have an expectation, but no interest yet; *C* may be an heir apparent but is not an heir until *B* dies (and *C* survives *B*). *O* has a reversion in fee simple absolute.

   If, on the other hand, *B* is dead, *B*'s heirs (maybe only *C* on the facts) are ascertained and have a vested remainder in fee simple absolute.

   (d) *A* has a life estate. *B* has a contingent remainder, contingent on *B*'s graduating from law school. *C* also has a contingent remainder, contingent on *B*'s not graduating from law school. *B*'s and *C*'s remainders here are alternative contingent remainders, one taking if there is a graduation, the other if there is none. If both remainders are contingent, the logic of the common law dictates that *O* has a reversion in case the life tenant, *A*, should die before *B* dies or before *B* graduates from law school.

Minor Gift

5. (a) *B* and *C*, then ages 8 and 13, respectively, have a contingent remainder, being subject to a condition precedent (their reaching the age of 21). *O* has a reversion.

   (b) When *C* reaches 21, the remainder vests as to *C*, so *C* has a vested remainder subject to open (subject to partial divestment) upon *B*'s reaching 21. *C*'s heirs or devisees would take his interest in this vested remainder subject to open. *B* is included in the class of *A*'s children but still holds a contingent remainder since *B* at age 16 has not reached 21 yet.

   (c) Assuming the Rule of Destructibility of Contingent Remainders is not the law in this jurisdiction (the Rule of Destructibility of

Contingent Remainders begins the next chapter), *O*'s reversion becomes the present interest at the time of *A*'s death, held in fee simple subject to an executory limitation. *A*'s children, *B* and *C*, hold a springing executory interest. This interest is indestructible and inheritable (and alienable, too).

(d) Six years later, once *C* turns 21, *C*'s springing executory interest divests *O*'s reversion. *C* or *C*'s heirs hold in fee simple subject to partial divestment by *B* when *B* reaches 21.

A Class Gift

6. (a) Faye has a life estate. George has a vested remainder in a life estate. Trudy has a contingent remainder, the condition precedent being her surviving her father, George. Edna has a reversion in case George dies with no child surviving him. This question was intentionally written with names instead of letters so you can practice word problems, which you may see on an exam or in actual practice. If it makes you more comfortable, rewrite the grant using letters: E conveys to F for life, then to G for life, then to G's children who survive him.

(b) Yes. Sam is "George's child" so Sam has a contingent remainder, the same as Trudy.

(c) George has a present interest in a life estate, it becoming a present possessory estate when Faye's life estate ended. Sam and Robert still have contingent remainders, contingent on surviving their father. Neither Trudy's heirs nor her devisees have any interest since Trudy did not satisfy the condition precedent of surviving her father. Edna's heirs or devisees (we need more facts to know for sure which) have a reversion in case none of George's children survives him.

(d) Robert and Sam own the farm in fee simple absolute. They will own the farm in equal proportions as tenants in common (tenants in common are covered later).

A Final Go

7. (a) *A* has a present interest, held in a life estate; *B* has a vested remainder subject to divestment in fee simple absolute. *B*'s children who survive *A* have a shifting executory interest. There is no condition precedent to *B*'s remainder so it is a vested remainder, but *B* may be divested of his interest if a child of his survives *A* (whether or not they survive *B*); so *B* has a vested remainder subject to divestment in fee simple absolute. *B*'s issue who survive *A* have a shifting executory interest.

(b) *A* has a life estate. *C* has inherited *B*'s vested remainder subject to divestment in fee simple. *B*'s surviving issue, *D*, has a shifting executory interest in fee simple absolute.

(c) After *A*'s death, *C*'s vested remainder is divested. When *D* survives *A*, *D*'s shifting executory interest shifts the fee simple held by *B*'s heir, *C*, to *D*. So *D* owns Blackacre in fee simple absolute. Modern canons make the words "and his heirs" unnecessary.

(d) *A* has a life estate. *B* has a vested remainder subject to divestment in fee simple absolute. *C* would have a shifting executory interest in fee simple absolute if *C* married *B*.

(e) *A* has a life estate. *B* has a vested remainder in fee simple on executory limitation. It is not a vested remainder subject to divestment since *B* must sell alcohol on Whiteacre to be divested, and this cannot occur until after *B* takes possession. Hence *B*'s interest cannot be divested while it is still a vested remainder. *C* has a shifting executory interest.

(f) *A* owns a determinable term of years. *B* has a shifting executory interest in fee simple absolute. *A*'s interest has a definite maximum term, but can be cut short by his death before the end of the term. It is not a life estate even though in all likelihood *A* will die before the 99 years have passed.

(g) *A* has a life estate. *O* has a reversion. Bentham has a springing executory interest (springing from *O*, not *A*). At common law, Bentham's estate was void because there was a gap in seisin. No one could be buried before his or her death, unless he or she was buried alive — a possibility the law did not admit. Today the gap in seisin, as well as the shift in seisin, is permitted and Bentham's estate is a springing executory interest, held in fee simple absolute.

(h) *A*'s life estate is followed by two alternative contingent remainders in fee simple absolute in *B* and *C*, respectively, and followed further by a reversion in *O*. The condition determining who will take the property is whether *B* survives *A*. If *B* survives *A*, *B* gets a fee simple absolute interest in the property. If *B* does not survive *A*, the property goes to *C* in fee simple absolute.

O has a reversion even though one of the remainders, *B* or *C*, has to take. This is because at common law a life estate terminated by forfeiture before the death of *A* if the life tenant was found to be a traitor or disloyal to the king.

11

Special Rules of Construction

Several rules of law or construction were developed in England. Most states no longer follow the bulk of them, but some do and thus they are included in Property casebooks. This chapter covers this potpourri of theories except for the Rule Against Perpetuities, which merits its own chapter (12).

The Rule of Destructibility of Contingent Remainders

An important rule in early England, the existence of which led to the creation of the executory interest, is the rule of destructibility of contingent remainders. As background, legal conceptualists in eleventh- and twelfth-century England wanted someone to be seized of land at all times. Being seized of land meant taking possession of the land. Judges were troubled when a life tenant died and the named contingent remainder holder had not satisfied the condition precedent. Given the choice between having the property revert back to the grantor until the remainderman satisfied the condition precedent or voiding the contingent remainder, the judges chose to void the contingent remainders that were still contingent when the preceding life estate ended.

The ***rule of destructibility of contingent remainders*** states that a contingent remainder is destroyed if it has not vested at or before the termination of all preceding life estates and terms of years.

Example 1: *O* conveys Blackacre to *A* for life, then to *A*'s children who attain age 21. *A* dies when *A*'s only child, *C*, is age 15. Since *C*'s remainder is not vested (i.e., it is still contingent on *C* turning 21) upon or before the end of *A*'s life estate, according to the rule of destructibility of

contingent remainders, *C*'s contingent remainder is destroyed (void). Blackacre returns to *O* (or *O*'s heirs or devisees).

Example 2: *O* conveys Blackacre to *A* for life, then to *B* for life, then to *A*'s children who attain age 21. *B* dies when *A*'s only child, *C*, is 15. *C*'s contingent remainder is not destroyed since *C*'s remainder does not need to be vested until *A*'s life estate ends.

Example 3: Same facts as in Example 2 except *A* rather than *B* dies when *C* is 15. *C*'s contingent remainder is not destroyed since *B* has possession after *A* dies. Only if both *A*'s and *B*'s life estates end before *C* turns 21 would *C*'s contingent remainder be destroyed.

The rule applies only in narrow circumstances. The rule of destructibility of contingent remainders applies only to contingent remainders in real property, for example. It does not apply to personal property. Thus, the rule does not apply to transfers of artwork, stocks, bonds, furniture, and other personal property.

In addition, the rule of destructibility of contingent remainders does not apply to equitable interests—i.e., interests held in trust. Thus a transfer of real property to a trustee in trust to benefit *A* for life, then to *B* if *B* attains age 21, will continue to be valid even if *A* dies before *B* turns 21.

Third, the rule of destructibility of contingent remainders applies only to contingent remainders. It does not destroy executory interests. In fact, a major impetus for the development of executory interests as legally cognizable ownership vehicles was to circumvent the rule of destructibility of contingent remainders.

The rule of destructibility of contingent remainders can be avoided by structuring the transfer of property as a grant of a term of years rather than as a life estate since a term of years is a nonfreehold estate and not a freehold estate. For example, if *O* transfers Blackacre to "*A* for *A*'s life or five years, whichever is greater, then to *B* if *B* attains age 21" at a time when *B* is 16, B's contingent remainder will not be destroyed since *A* or his heir or devisee will own the land for at least five years, long enough for *B* to turn 21.

Finally, the rule is not a factor in the vast majority of states. Only four states—Indiana, Kansas, New Hampshire, and Oklahoma—retain the rule of destructibility of contingent remainders.

This is not to say that contingent remainders are as sturdy as vested remainders or executory interests. There are other ways contingent remainders can be destroyed or voided. The merger rule, explained next, is one such way.

The Merger Rule

The basic idea of the merger rule is simple. If a person holding a life estate acquires a vested remainder in the same property, instead of saying he owns a life estate and the vested remainder in the same property, we say the two estates "merge" into one larger estate, the fee simple absolute. A technical statement of the ***merger rule*** would read, "If a *vested* life estate and the next succeeding *vested* estate come to be owned by the same person, the two estates are merged into one."

There are significant consequences from the merger rule when a contingent remainder intervenes between the two vested estates, and important exceptions to its operation. First, and the most significant consequence, if a person owning a life estate acquires a vested remainder that follows a contingent remainder held by some other person, the life estate and the vested remainder merge, destroying the contingent remainder. Likewise, if a person holding a vested remainder that immediately follows another person's contingent remainder in the same property acquires the possessory life estate that immediately precedes the contingent remainder, the life estate and vested remainder merge, destroying the contingent remainder. That's a real bummer for the holder of the contingent remainder.

For the two vested interests to merge to destroy an intervening contingent remainder, the two vested estates must be acquired at different times. Two vested interests acquired in the same document do not destroy intervening contingent remainders.

Example 1: *O* conveys Blackacre to *A* for life, then to *B* for life if *B* attains age 21, then to *C*. *B* is age 15. *A* has a possessory (vested) life estate, *B* has a contingent remainder in life estate, and *C* has a vested remainder in fee simple absolute. No merger occurs because *A* and *C* are different people. *B*'s contingent remainder is good.

Example 2: Same facts as in Example 1, except two years later *A* buys *C*'s vested remainder. *A* now owns a (vested) life estate and a vested remainder in the same property, the two vested interests having been acquired at separate times. The two vested interests merge, destroying *B*'s contingent remainder in life estate. *A* suddenly owns Blackacre in fee simple absolute. The same result follows if *C* had acquired *A*'s life estate.

Example 3: *O* conveys Whiteacre to *A* for life, then to *B* for life if she attains age 21 (*B* is 14), then to *C* if *C* attains age 21 (*C* is 5). Three years later *A* acquires *C*'s interest. After the acquisition, *A* has a (vested) life estate and a contingent remainder in fee simple (contingent on C's attaining age

21). *B*'s intervening interest is a contingent remainder in life estate. *A*'s two estates do not merge since *A* has one vested estate and one contingent estate. A person must own two *vested* estates for the two to merge. *B*'s contingent remainder remains valid.

Example 4: *O* conveys Brownacre to *A* for life, then to *B* for life, then to *C* if *C* attains age 21 (*C* is 14). *A* has a (vested) present interest in a life estate, *B* has a vested remainder in life estate, *C* has a contingent remainder in fee simple absolute, and *O* has a reversion (in case *C* does not reach 21). Two years later *B* acquires *A*'s life estate. Since *B* now owns two vested interests, the two interests merge into one possessory life estate for the longer of *A*'s or *B*'s life. The merger does not destroy *C*'s contingent remainder, however, since *C*'s interest follows the two vested estates and is not an intervening estate.

Example 5: *O* conveys Redacre to *A* for life, then to *B* for life, then to *C*. *A* has a (vested) present interest in a life estate, *B* has a vested remainder in a life estate, *C* has a vested remainder in fee simple absolute. Two years later *A* acquires *C*'s vested remainder. *A* has a vested life estate and a vested remainder in fee simple absolute, but the two estates do not merge to destroy *B*'s intervening interest since *B*'s remainder in life estate is vested and not contingent.

Example 6: *O* conveys Greenacre to *A* for life, then to *B* for life if she attains age 21, then to *A*. *A* has a (vested) life estate and a vested remainder in fee simple absolute. In between *A*'s two vested estates is *B*'s contingent remainder in a life estate. *A*'s two vested estates do not merge to destroy *B*'s contingent remainder since the three estates were created in the same document.

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).

12

The Rule Against Perpetuities

The Rule Against Perpetuities

The Rule Against Perpetuities (RAP) befuddles many law students (and practicing lawyers). Some problems arise because students must master the present and future estate rules discussed in the previous chapters before applying the Rule Against Perpetuities. Applying the Rule itself causes a few problems since a result may turn on an event not immediately apparent.

The Rule Against Perpetuities, as stated by John Chipman Gray, § 201 (4th ed. 1942) in its totality, reads as follows:

> 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.

The Rule Against Perpetuities voids some future interests. The Rule balances the marketability and free alienability of land against the legitimate reasons a grantor may have for controlling who owns property long after the grantor has died. In general, the Rule Against Perpetuities permits a person to control ownership of property for one generation beyond those persons alive and known to the grantor. But the Rule is more technical than that.

In a Rule Against Perpetuities analysis, a judge proceeds in two distinct stages. First, the judge will interpret the deed or will to establish who owns which interests and estates according to the instrument. At this stage the judge attempts to carry out the grantor's intent, resorting to the canons of construction as necessary, and to apply the other rules of law studied in the previous chapters to determine who has vested interests and who has contingent interests. This is the kind and benevolent judicial persona.

A ruthless judicial persona controls the second stage. There the judge tests the conveyance reached in the first stage by the Rule Against Perpetuities. The judge's demeanor shifts from one trying to carry out the

grantor's intent to one seeking any possibility that any part of the grant violates the Rule Against Perpetuities. In this stage, the judge need find only one possible scenario, no matter how remote the possibility, that the intended grant violates the Rule Against Perpetuities to void the attempted interest.

Interests Not Affected

All the Rule Against Perpetuities requires for an interest to be valid is that, under any and all sets of circumstances, the interest either vests or fails to vest within 21 years of a life in being at the creation of the interest. An important corollary is that all interests vested at the creation of the interest (vested remainders subject to open being the exception) satisfy the Rule. Thus the Rule Against Perpetuities will not void any *present possessory interests* in third parties such as a life estate, fee tail, term of years, fee simple absolute, fee simple subject to a condition subsequent, fee simple determinable, or fee simple subject to an executory limitation. It may void those interests if they are the estate in a contingent remainder, however.

The Rule Against Perpetuities also will not void *future interests* held by third persons if the interests are vested immediately upon creation. Hence the Rule will not void vested remainders (except for some vested remainders subject to open).

For purposes of the Rule Against Perpetuities, all future interests in the grantor are vested. Thus the Rule Against Perpetuities will not void reversions, possibilities of reverter, and rights of reentry.

Interests Affected

The Rule Against Perpetuities applies only to contingent interests. Specifically, the Rule might void:

(1) Contingent remainders
(2) Executory interests (both shifting and springing executory interests)
(3) Vested remainders subject to open (class gifts)

In addition, the Rule Against Perpetuities has been used to void options to purchase in commercial transactions.

Contingent remainders and ***executory interests*** are future interests to third parties where a condition precedent must be satisfied or the specific recipient must be ascertained. Unless contingent remainders and executory interests can be proved to either vest or forever fail to vest within 21 years of a life in being, they will be found invalid under the Rule Against Perpetuities.

Remainders and executory interests differ somewhat in what constitutes sufficient vesting. A remainder is vested when all recipients are ascertained

and all contingencies (conditions precedent) have been satisfied. At that point the remainder is said to be ***vested in interest***. The vested remainder remains a future interest and the holder of a vested remainder will not have the right to possess the property until all preceding estates have ended. There is no direct relationship between being vested in interest and having the right of possession, which may occur decades after the remainder is vested in interest. In contrast, a person owning an executory interest will see his interest become vested and possessory at the same moment. An executory interest is said to become ***vested in possession***. In most cases the difference between vested in interest and vested in possession will not affect your analysis. It is very important, however, to remember that a remainder can vest in interest without being currently possessory.

Vested remainders subject to open are grants to more than one person (a class gift), where the recipients are identified by description rather than named, and/or at times must satisfy a condition precedent. As soon as one person in the class is identified and satisfies any condition precedent, that person's interest becomes vested. The interests of the remaining people in the class may still be contingent, however.

All persons receiving a class gift must pass the Rule Against Perpetuities or no member's interest can be good. Unfortunately, instead of holding the class is vested if any one of the class members becomes vested, or holding that the interest of any member in the class whose interest is sure to vest (or sure to fail to vest) within the Perpetuities period is valid even if other members' or prospective members' interests are not, the Rule demands each and every person in the class be certain to vest (or certain to fail to vest) within the perpetuities period. If even one *potential* member of the class can be identified or envisioned who will not vest (or fail to vest) within the required period, the grant to the entire class fails and is void. We discuss class gifts in more detail later.

Example 1: *O* conveys Blackacre "to *A* for life, then to *B*'s children who attain age 35." *B* is alive and has one child, *C*, age 6. Before applying the Rule Against Perpetuities, *A* has a (vested) possessory life estate; *B*'s children (*C* and any child born to *B* in the future) have a contingent remainder, contingent on being identified and on attaining age 35; and *O* has a reversion. *A*'s life estate is valid under the Rule Against Perpetuities since it is a (vested) present possessory interest. *O* has a reversion, a vested interest not subject to the Rule Against Perpetuities.

The contingent remainder to *B*'s children is subject to the Rule Against Perpetuities. Note the contingent remainder to *B*'s children is a class gift. All of *B*'s children (living and potential children) are members of the class; each child to take must reach age 35. *C* is alive and we will know whether *C* reaches age 35 on or before his death; unfortunately, the test is not whether one member will vest or fail to vest within the time period, or whether one

member of the class is a life in being, or whether we can envision one scenario where all members vest or fail to vest in time. The test is can we dream up one scenario, however improbable, in which we will not know within 21 years of all lives in being whether a member of the class will vest or fail to vest.

In this case we can envision a chain of events where we will not know within 21 years of a life in being whether all of *B*'s children either will or will not reach age 35. *B* could have another child, *X*, not a life in being at the creation of the contingent remainder. *O*, *A*, *B*, and *C* (all the relevant lives in being) could die soon after *X* is born. Since *X* is not even one year old when all relevant lives in being die, and so we will not know in 21 years whether *X* reaches age 35, the contingent remainder to *B*'s children who attain age 35 violates the Rule Against Perpetuities and is, therefore, void. *B*'s children's interest is struck from the grant. Now under the original grant, *A* has a life estate, *O* has a reversion.

Example 2: *O* conveys Whiteacre "to *A* for life, then to *B*'s children in fee simple, provided if any of *B*'s children fail to attain 35 that child's interest passes to *B*'s surviving children." *B* is alive and has one child, *C*, age 6. As in Example 1, *A* has a (vested) possessory life estate not subject to the Rule Against Perpetuities. *C* has a vested remainder, subject to open (partial divestment) if *A* has more children, and subject to complete divestment if *C* does not reach age 35. Attaining age 35 is a ***condition subsequent*** potentially divesting a child's interest; it is not a ***condition precedent*** to taking an interest. Since we will know at *B*'s death who *B*'s children are (*B* cannot have a child after his death),[1] *B*'s childrens' interest will vest no later than *B*'s death. At that point, *B*'s children will have a vested remainder subject to an executory limitation. Thus the remainder to *B*'s children is valid under the Rule Against Perpetuities. Note that while the grant in Examples 1 and 2 may be alternative wordings to achieve the grantor's intent, the grant in Example 2 succeeds while the grant in Example 1 fails to accomplish the grantor's goals.

The original grant in Example 2, before applying the Rule Against Perpetuities, divests the vested interest of any child who does not attain age 35. Any divested interest passes to *B*'s surviving children, if any, who therefore have a shifting executory interest in any divested interest. The shifting executory interest is subject to the Rule Against Perpetuities analysis; it fails to satisfy the Rule. The reasoning: After every life in being (*O*, *A*, *B*, and *C*) dies, we still might not know if any of *B*'s children's executory interests will become possessory within 21 years of the last to die. The executory interests

1. A child in gestation is considered born for purposes of the Rule Against Perpetuities.

are void, and must be deleted from the grant. Note that after deleting the offending language, the grant reads, "to *A* for life, then to *B*'s children in fee simple." *A* has a life estate, *B*'s children have a vested remainder in fee simple absolute. The divesting condition disappears!

As with estates and future interests, the Rule Against Perpetuities is best mastered by working practice problems. In addition to the examples in this chapter, you can find more practice problems in Linda H. Edwards, *Estates in Land and Future Interests: A Step-by-Step Guide* (Aspen 2002), and in John Makdisi, *Estates in Land and Future Interests: Problems and Answers* 3d ed. (Aspen 1999).

Interests Dependent on an Event

The Rule Against Perpetuities is likely to invalidate interests in one of three scenarios. The first is when a contingent interest (contingent remainder, executory interest, or vested remainder subject to open) depends on the occurrence or nonoccurrence of an event to vest. Unless the event must be accomplished by a life in being, during a life in being's life, or within a definite period of time less than 21 years, in all likelihood any interest dependent on the occurrence or nonoccurrence of an event will violate the rule, no matter how improbable the chances we will not know one way or the other within the perpetuities period. When a condition is an event or act, look for a life in being — known as the ***validating life*** — who must accomplish the act, or in whose life (or no longer than 21 years after that person's life ends) the event will occur or forever be unable to occur. If there is a validating life, the contingent remainder or executory interest will be good. If there is no validating life, the future interest most likely will be invalid.

Typical conditions and events that run afoul of the Rule Against Perpetuities are "when a decedent's estate is settled," "when all the gravel is taken from the land," "when a bridge [or building or road] is completed," "as long as used for school purposes" (or church purposes, or park purposes, or lodge purposes), and "after the next President is elected."

Example 1: *O* conveys Blackacre "to *A* for life, then to *B* and his heirs if *A* is given a Christian burial." The first step is to determine each person's interest as intended by the grantor. *A* has a (vested) life estate, *O* has a reversion, and *B* has a springing executory interest. (*B* does not have a contingent remainder since it does not follow immediately after *A*'s life estate ends; there is a break between the time *A* dies and the time *A* is buried — or so we hope. Blackacre returns to *O* in that interim period.) Only the springing executory interest is subject to the Rule Against Perpetuities.

The second step is to apply the Rule Against Perpetuities to *B*'s springing executory interest. The odds of *A*'s either receiving or not receiving a Christian burial within 21 years of his death (and *O*'s and *B*'s deaths since they are lives in being also) are infinitesimal. Unfortunately, the Rule Against Perpetuities is a rule of logical proof (not a rule of common sense). A judge can imagine a scenario in which *A* dies and his body is not discovered until 21 years after all lives in being have died, or in which the undertaker failed to act in the requisite time; and *A* is given a Christian burial more than 21 years after all lives in being have died. All it takes is one scenario in which it is uncertain whether the interest vests within the perpetuities period. In this case the contingent interest — *B*'s springing executory interest — violates the Rule and is invalid.

When an interest is invalid under the Rule Against Perpetuities, judges literally draw a line through the invalid part of the conveyance. In Example 1, a line would be drawn through "then to *B* and his heirs if *A* is given a Christian burial." What remains is "to *A* for life," with an unstated reversion in *O*.

Example 2: *O* conveys Whiteacre "to Local School District so long as Whiteacre is used for a school, then to *A* and her heirs." The first step is to determine each party's interest before applying the Rule Against Perpetuities. Local School District has a fee simple subject to an executory limitation. *A* has a shifting executory interest.

The second step is to apply the Rule Against Perpetuities as stringently as possible. Local School District's fee simple subject to an executory limitation is a (vested) possessory interest and is not subject to the Rule Against Perpetuities. *A*'s shifting executory interest is subject to the Rule Against Perpetuities, however. Since Local School District may use Whiteacre for a school for a time lasting at least 21 years after all lives in being have died, the Rule Against Perpetuities voids *A*'s executory interest. There is no validating life. Drawing a line through "then to *A* and her heirs" leaves a grant "to Local School District so long as Whiteacre is used for a school." After applying the Rule Against Perpetuities, Local School District has a fee simple determinable. *O* has a possibility of reverter (which is not subject to the Rule Against Perpetuities).

Example 3: *O* conveys Brownacre "to Local School District; but if Local School District ceases to use Blackacre for a school, to *A* and his heirs." The analysis parallels Example 2 but has a twist ending. Before applying the Rule Against Perpetuities, Local School District has a fee simple subject to an executory limitation. *A* has a shifting executory limitation. Since Local School District may use Brownacre well beyond the perpetuities period, *A*'s executory interest violates the Rule Against Perpetuities and thus is void. Drawing a line through "but if Local School District ceases to

use Brownacre for a school, to *A* and his heirs" leaves a grant "to Local School District." Local School District has a fee simple absolute. Neither *A* nor *O* has any interest in Brownacre. Contrast the consequence in Example 2. .

Not all events can occur past the perpetuities period. If a life in being must be the one to satisfy the condition, the condition or event must happen no later than that person's death.

Example 4: *O* conveys Greenacre "to *A* and his heirs, but if *A* sells alcohol on Greenacre, to *B* and her heirs." The first step is to determine each person's interest as intended by the grantor. *A* has a fee simple subject to an executory limitation, a present possessory interest not subject to the Rule Against Perpetuities. *B* has a shifting executory interest, which is subject to the Rule.

The second step is to apply the Rule Against Perpetuities. *B*'s shifting executory interest is good since either *A* will sell alcohol on Greenacre during his life (in which case *B* gets Greenacre) or *A* will not sell alcohol on Greenacre during his life (in which case *A* can devise Greenacre or his heirs get it, and *B* gets nothing). *A* is the validating life since the condition must occur, if at all, during *A*'s lifetime. If the grant were changed to read "to *A* and his heirs, but if alcohol is ever served on Greenacre, to *B* and her heirs," the Rule Against Perpetuities would void *B*'s interests since alcohol may not be sold on Greenacre until at least 21 years after all lives in being have died.

Example 5: A Property professor funds a trust with $10,000, to be paid to the first person in her current Property class who becomes a U.S. senator. The trustees have legal title and each person in the class has an opportunity to claim the $10,000 by becoming a U.S. senator. Every student in the current class is a validating life. Since we will know at least by the death of the last student in the class whether any one became a U.S. senator, the gift is valid under the Rule Against Perpetuities. The probability that any student in the class will become a U.S. senator is irrelevant; only the certainty that we can tell one way or the other during the lives in being matters.

Example 6: Contrast Example 5 with these facts: A Property professor funds a trust with $10,000 to be paid to the first student to become a U.S. senator who was ever or will ever be enrolled in her Property classes during her teaching career. There is no validating life in this Example. It is possible that a person, *X*, may be born a year after the trust is established, thus not a life in being, and enroll in the professor's Property class 25 years later. Then at least 21 years after the last of the professor and all her Property

students who were lives in being at the creation of the trust died, student *X*, who was not a life in being, may be elected U.S. senator, or may live another 50 years without holding any office. Since we might not know at the end of the perpetuities period whether anyone was vested, the interest is invalid. The Property professor gets her money back.

Grantee Identified by Description Rather Than Named

A second scenario that raises Rule Against Perpetuities concerns occurs when a measuring life or a recipient of a contingent remainder or executory interests is described by a label rather than a name. The rub comes because a person who was not a life in being at the creation of the interest can fit the description. The most troublesome situation arises when some person already seems to fit the description, and likely will be the person to fit the description, but a remote chance exists that some other person ultimately might be the one described. A famous example in this category is the unborn widow (or, as my students call it, the Hugh Hefner or the Anna Nicole Smith rule).

Unborn Widow Example. *O* conveys Blackacre "to *A* for life, then to *A*'s widow, if any, for life, then to *A*'s issue then living." This is an understandable grant, especially if *A* is married at the time of the grant. Unfortunately, *A*'s current spouse may not be *A*'s widow, and the person who will be *A*'s widow may not even be a life in being at the creation of the interest. *A*, for example, may divorce or become widowed himself, and many years later may marry someone who had not been born at the time of the original grant. The first step in the analysis is to determine each person's interest as intended by the grantor. *A* has a (vested) life estate not subject to the Rule Against Perpetuities; *A*'s widow has a contingent remainder in a life estate, contingent on being identified, and we must wait until *A*'s death to identify *A*'s widow, "*A*'s issue then living" is also a contingent remainder, contingent on being alive when *A*'s widow dies.

The second step is to apply the Rule Against Perpetuities. *A*'s widow's contingent remainder is valid under the Rule. *A*'s widow will be identified immediately upon *A*'s death, and once identified her interest is vested. *A* is the validating life for his widow's interest. *A* was a life in being at the creation of the interests so *A*'s widow's interest will be vested well within the perpetuities period. If *A* dies without a widow, that fact is known at *A*'s death also.

The contingent remainder in *A*'s issue then living at *A*'s widow's death, on the other hand, fails to satisfy the Rule Against Perpetuities. *A*'s issue then living must satisfy two contingencies. First, *A*'s children must be identified,

which they will be by *A*'s death (or nine months thereafter), so that causes no Rule Against Perpetuities problem. Second, the children must survive *A*'s widow. *A*'s widow is not a validating life since she might not have been a life in being at the creation of the interest. It is possible that *A* will divorce his current spouse, then 30 years later *A* will marry a woman who was not born when the interest was created. All of *A*'s children by his prior marriage and his first wife may die. *A* and his new spouse may have children, also not lives in being at the creation of the children's contingent remainder. *A* dies, leaving a widow and children, none of whom were lives in being at the creation of the children's contingent remainder. *A*'s widow easily might live another 21-plus years, so it is possible we will not know within the perpetuities period which of *A*'s children survive *A*'s widow. *A*'s children's contingent interest, therefore, is invalid under the Rule Against Perpetuities.

Drawing a line through "then to *A*'s children then living," the remaining grant as rewritten reads, "to *A* for life, then to *A*'s widow, if any, for life." *A* has a life estate, *A*'s widow has a contingent remainder in life estate, and *O* has a reversion (which may be assigned, devised, or inherited) not subject to the Rule Against Perpetuities.

A similar situation may occur where, for example, *O* conveys "to *A* for life, then to *A*'s children for life, then to the principal of City High School." The grant to the City High School principal is invalid. Be on the lookout for labels such as husband, wife, widow, mayor, minister, president, and so on. When testing interests held by a person identified by or following an interest held by a person identified by a descriptive label, separate the possible ultimate recipient from the identifiable person currently wearing the label.

Intergenerational Family Transfers

Intergenerational family transfers invoke Rule Against Perpetuities scrutiny. The compromise that is the Rule Against Perpetuities allows a grantor to control ownership of property "from the grave" for persons he knew plus one generation, while not allowing control beyond that generation. Thus the Rule Against Perpetuities prevents a person from devising property to his children for life, to his grandchildren for life, to his grandchildren's children for life, and so on for centuries.

A key to finding RAP violations is isolating open classes of individuals (classes in which more people can be added, usually by birth). As a guideline, unless the class is subject to a condition precedent other than being born, a class subject to open following a possessory estate will not violate the Rule Against Perpetuities, but any class gift subject to open held by members of a subsequent generation will violate the Rule.

Example 1: *O* devises Blackacre "to his son *A* for life, then to *A*'s children for life, then to *A*'s grandchildren in fee simple." *A* has no children. The first step is to determine what interests the grantor (a testator in this case) intended to convey. *A* owns a present possessory life estate not subject to the Rule Against Perpetuities; *A*'s children have a contingent remainder in life estate, contingent on being born; and *A*'s grandchildren have a contingent remainder in fee simple absolute, contingent on being born.

The second step is to apply the Rule Against Perpetuities to any contingent interests, including any vested remainders subject to open. The contingent remainder to *A*'s children is valid since we will know at *A*'s death whether *A* had any children, and who they are. *A* is the validating life for *A*'s children's interest. The class of *A*'s children closes biologically immediately on *A*'s death.[2]

The grant to *A*'s grandchildren, on the other hand, violates the Rule Against Perpetuities. The members of the class can be increased by *A*'s children having children. *A*'s children (or any of them) cannot be validating lives since an after-born child can become a member of the class. In one scenario, for example, *A* could have a child, *X*, who is not a life in being at the creation of the interest. *A* could die suddenly. *X*'s first child may not be born until 21 years after *A* dies. Since under this scenario we will not know whether the interest to *A*'s grandchildren will vest until after the perpetuities period ends, the entire contingent remainder to *A*'s grandchildren fails. The transfer to *A*'s grandchildren fails because the class of persons who can give birth to new members of the class itself can grow to include persons who were not lives in being at the creation of the interest.

The grant as rewritten after striking out the grandchildren's interest is "to his son *A* for life, then to *A*'s children for life." *A* has a life estate, *A*'s children have a contingent remainder in a life estate, and *O*'s heirs or devisees have a reversion.

Example 2: *O* conveys Whiteacre "to *A* for life, then to *A*'s children for life, then to *B*'s grandchildren." *A* and B are both alive and childless. *O* intended to grant *A* a life estate, *A*'s children a contingent remainder in life estate, contingent on *A*'s having children, and a contingent remainder in fee simple absolute to *B*'s grandchildren, contingent on *B*'s grandchildren being born (no survivorship requirement).

Under the Rule Against Perpetuities, the grants to *A* and to *A*'s children are valid: *A* because he is already vested, and *A*'s children because we

2. For more on class closings biologically and by the rule of convenience, see supra pages 139–141.

will know at *A*'s death whether *A* had any children (and who they are). *B*'s grandchildren's contingent remainder, contingent on *B*'s grandchildren being born, violates the Rule, however. The group that can increase the members of the class of *B*'s grandchildren are *B*'s children. Since *B* is alive she may have one or more children, none of whom would be lives in being at the creation of the interest. Neither *B* nor *B*'s children are validating lives. *B*'s after-born children could live at least 21 years after the last to die of *A*, *B*, and *O*, before procreating any of *B*'s grandchildren. The contingent remainder to *B*'s grandchildren, therefore, is invalid under the Rule Against Perpetuities since it is possible a grandchild may be born after the perpetuities period has run.

Drawing a line through "then to *B*'s grandchildren," the grant is "to *A* for life, then to *A*'s children for life." *A* has life estate, *A*'s children have a vested remainder in life estate, and *O* has a reversion. *B*'s grandchildren have no interest in Whiteacre.

Not all grants to grandchildren are invalid, however. Sometimes a descriptive class can be the validating lives if no after-born person can enter the class. Compare the above example with the following:

Example 3: *O* conveys Greenacre "to *A* for life, then to *A*'s children for life, then to *B*'s grandchildren." *A* is alive; *B* is dead, survived by two children, *C* and *D*. As in Example 2, *A*'s life estate and *A*'s children's contingent remainder are valid under the Rule Against Perpetuities. Before applying the Rule Against Perpetuities, *B*'s grandchildren have a contingent remainder in fee simple absolute, contingent on being born. The class of individuals that can procreate more persons into the class of *B*'s grandchildren are *B*'s children. In contrast to Example 2, when *B* herself could have more children, here *B*, being dead, cannot have any more children. Thus the class of *B*'s children is fixed at two children, *C* and *D*, both of whom are lives in being at the creation of the interest. *C* and *D* are validating lives. Since we will know whether *B* had any grandchildren, and who they are, no later than the death of the last to die of *C* and *D*, *B*'s grandchildren's contingent remainder will vest at that time if *B* has any grandchildren or never vest if *B* has no grandchildren by that time. The contingent remainder in *B*'s grandchildren is valid.

Effect of Class Closing Rules

As explained in Chapter 10, classes can close physiologically (naturally or biologically) or by the Rule of Convenience. A class closes *physiologically* whenever no one else can enter the class; usually this means born into the

class. The preceding three examples illustrate a class closing physiologically. No new child could enter a class when the potential parents and grandparents have died. A class closes pursuant to the ***Rule of Convenience*** when any member of the class can demand possession of the property. See supra Chapter 10 for a fuller explanation.

Closing a class does not end the inquiry. Even though a class closes, either physiologically or by the Rule of Convenience, all persons who comprise the class, in addition to being members of the class must be certain to vest (or fail to vest) within the perpetuities period. If just one member of the class is not certain to satisfy the Rule Against Perpetuities, the grant to everyone in the class fails. That bears reiterating: All it takes is one member or hypothetical member of a class to fail to satisfy the Rule Against Perpetuities for the grant to the class to fail, even to those members already vested. This can happen by the class remaining open past the perpetuities period (see Examples 1 and 2, pages 168-169). In addition, it can happen even if the class is closed, if the members cannot satisfy a condition precedent within the perpetuities period.

Example 1: *O* by will devises Blackacre "to *A* for life, then to *B*'s children who attain age 20." *B* has no children. *O* intended *A* to have a life estate and *B*'s children to have a contingent remainder, contingent on attaining age 20. Applying the Rule Against Perpetuities, *A*'s life estate is valid since it is a present possessory estate.

Likewise, the contingent remainder to *B*'s children who attain age 20 is good. *B* is the validating life. The class of *B*'s children — the class is *B*'s children, not *B*'s children who attain age 20 — closes *physiologically* when *B* dies or, if *B* is still alive at *A*'s death, by the *Rule of Convenience* if at least one of *B*'s children has turned 20 by *A*'s death. Or if *B* never has any children, we will know that by her death. If *B* has children, after the class closes, all persons who form the class must attain age 20 or definitely fail ever to reach age 20 (by dying prematurely, for example) within 21 years of the last to die of *A* or *B*. In this example, since no child can be born to *B* after she dies, all of *B*'s children will be sure to turn 20 or die before age 20 within 21 years of *B*'s death. Hence, *B*'s children's contingent remainder is valid.

Example 2: *O* devises Whiteacre "to *A* for life, then to *B*'s children who attain age 30." *B* has no children. The only difference between this Example and Example 1 is that in this Example *B*'s children must attain age 30. Because of this difference, however, the contingent remainder to *B*'s children fails. *B* is not a validating life. The class may close when *B* dies but the contingency of attaining age 30 presents an insurmountable obstacle. *B* may die the day her youngest child is born, and *A* may also die that day. In 21 years *B*'s youngest child may be 21, but will still be uncertain whether he or

she will attain age 30. The Rule Against Perpetuities does not tolerate uncertainty. *B*'s children's interest fails. Drawing a line through the grant to *B*'s children, *A* has a life estate, and *O*'s heirs or devisees have a vested remainder in fee simple absolute.

Example 3: Same facts as in Example 2, except *B* has two children, *K*, age 33, and *L*, age 28, when the devise is effective. Before applying the Rule Against Perpetuities, *K* has a vested remainder subject to open and *L* has a contingent remainder, contingent on turning 30. Applying the Rule Against Perpetuities, the remainder to *B*'s children is invalid. The reason is the class of *B*'s children does not close until either *A* or *B* dies. Once the class closes, the last person — living or hypothetical — to enter the class must satisfy the condition precedent within the perpetuities period. An invalidating scenario envisions *B* having another child, *X*, and *A*, *B*, *K*, and *L* die soon after *X* is born. In that case we won't know for certain within 21 years whether one-year-old *X* will reach age 30. Hence the gift to the entire class of *B*'s children fails, even though one member already satisfies the condition precedent, and one will or will not do so within a couple of years. Drawing a line through the grant to *B*'s children, *A* has a life estate, and *O*'s heirs or devisees have a vested remainder in fee simple absolute.

Example 4: *O* devises Brownacre to *A* for life, then to *B*'s children who attain age 30. *B* is dead, survived by *K*, age 33, *L*, age 28, and *M*, age 15. The class is closed physiologically since *B*, the parent, is dead. Since we will know within 21 years of lives in being (*K*, *L*, and *M* are all lives in being so we will know during their lives in being) which of *B*'s children attain age 30, the vested remainder subject to open is valid.

Example 5: Same facts as in Example 4, except *M* is age 3. The vested remainder subject to open is still valid. The class is closed physiologically because *B* is dead, and all three children (*K*, *L*, and *M*) were lives in being at the creation of the interest. Hence we will know at or before the last of *B*'s children to die whether they attain age 30. *B*'s children themselves are the validating lives. No more children can enter the class. This Example is a reminder that the perpetuities period is 21 years after all lives in being have died, which includes three-year-old *M*.

Example 6: Same facts as Example 4, except *B* is alive and *A* is dead when *O*'s devise becomes effective.[3] The grant to *B*'s children is valid. Since

3. A person's will creates no interests while that person lives; at most it results in unenforceable expectations. The person can revoke or amend his will until the day he dies. The will takes effect on the testator's death, and the interest in others is created once the testator dies.

K is age 33 and thus meets the condition precedent, *K* has a vested interest. A second consequence of *K*'s being vested is that at the end of *A*'s life estate (which never began here since *A* predeceased *O*), *K* can demand distribution of her share of Brownacre to own in fee simple subject to partial divestment if her siblings attain age 30. Under the Rule of Convenience, since *K* can demand distribution, the class of *B*'s children closes. If *B* has another child, that after-born child cannot share in Brownacre. Once the class closes, the question becomes whether we are certain to know within 21 years of a life in being if all the members of the class will reach age 30. Since all the members in the class of *B*'s children in this example are lives in being — and are validating lives since the class is closed — the answer is a resounding "yes." The grant to *B*'s children is valid.

Commercial Options

Early Rule Against Perpetuities issues centered on intergenerational transfers. Rule Against Perpetuities challenges today are being made more frequently against options and rights of first refusal. A person may sell land, for example, and stipulate that if the purchaser ever finds a buyer for the property, the original seller has the right to repurchase the land for the price offered by the third party. It is possible no buyer will be found until after all lives in being have been dead for at least 21 years. Alternatively, a landowner may enter into a long-term lease, giving the lessee or his heirs or assigns an option to purchase the leased premises. Again the person exercising the option may not be a life in being and all lives in being may have been dead for 21 years before any person exercises the option. Or a person may acquire an option to purchase land without an outside time limit on the right to exercise the option.

Commentators dislike extending the Rule Against Perpetuities to options, favoring instead a more direct inquiry into whether the option is an unreasonable restraint on alienation. Nonetheless, some courts have concluded that an option to purchase is a property interest akin to a springing executory interest; therefore, they invalidate options to purchase that have no expiration date. Most courts relying on the Rule Against Perpetuities will not imply a reasonable time period in the agreement. Other courts have refused to extend RAP to options and rights to repurchase. The best defense to a RAP challenge is for the drafter to establish a time period of less than 21 years in which the holder must exercise the option.

Example: In a state that subjects options to the Rule Against Perpetuities, *O* gives *A* the option to purchase Blackacre for $100,000, the option to be good for six months after the State Highway Department completes the Lane Road Bridge over Green River. Since the state may not

complete the bridge over Green River within 21 years of any lives in being, the option violates the Rule Against Perpetuities.

Statutory Reforms of the Rule

The Rule Against Perpetuities in its pure form remains the law in only a handful of jurisdictions (Alabama, Arkansas, and the District of Columbia). Some states have abolished it (Alaska, Idaho, New Jersey, South Dakota, and Wisconsin). About one-fourth of the states have modified the Rule to exempt ***perpetual trusts*** from the Rule Against Perpetuities if trustees have the power to alienate the trust property. Some states permit trusts to last a long time (360 years in Florida; 150 years in Virginia, Ohio, and a couple of other states). The Rule in these states still applies to legal estates.

(a) Wait-and-See Doctrine

Fewer than half the states have adopted a statutory approach set out in the Uniform Statutory Rule Against Perpetuities (USRAP), promulgated in 1986 by the Commissioners on Uniform State Laws, and made part of the Uniform Probate Code. Under USRAP, a court will wait and see what happens instead of imagining one scenario under which the Rule would be violated. If the interest vests (or it becomes certain the interest will never vest) within the waiting period, the interest is valid; otherwise, it is not.

The USRAP states have taken two approaches in setting the relevant waiting period. Some use the common law perpetuities period based on the specific facts of the individual grant and begin running 21 years after the death of the last relevant life in being. The statutes set out which persons are relevant lives in being. Other states set a definite limitations period — 90 years is common — for a contingent interest to vest (or definitely fail to vest). See Lawrence Waggoner, The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period, 73 Corn. L. Rev. 157 (1988).

(b) Cy Pres Doctrine

In a few states (New York, Texas, and Missouri among them), a court will reform an instrument to validate contingent interests, attempting to carry out the grantor's intent in a way that does not violate the Rule Against Perpetuities.

EXAMPLES

Unless otherwise stated, assume the common law Rule of Perpetuities applies to the following Examples.

Grandpa's Class Gift

1. *O* executed a will in 2000 (signed under statutory formalities) devising Blackacre to *A* for life, then to *A*'s children for their lives, then to *A*'s grandchildren. In 2000, *O*, *A*, and *A*'s two children (*L* and *M*) are alive.

O dies in 2006. *A* died in 2004, survived by *L*, *M*, and *A*'s newborn daughter, *P*, and one grandchild, *R*.

(a) Who are the lives in being at the creation of the interest?

(b) Are the devised interests valid under the Rule Against Perpetuities?

(c) What result if *A* were alive at *O*'s death?

Another Grandpa Story

2. *O* devises and "to *A* for life, then to *A*'s children for their lives, then to *A*'s grandchildren living at the death of *A*'s last surviving child." At *O*'s death, *A* and his two children, *X* and *Y*, are living. Is the Rule Against Perpetuities violated by this devise?

The Big Event

3. (a) *O* conveys Whiteacre "to *A* and his heirs so long as a commercial use is not made of the property, and, if it is used for a commercial purpose, then to *B* and her heirs." How does this grant fare under a Rule Against Perpetuities analysis?

(b) What result if *O*'s grant was "to *A* and his heirs; but if used for commercial purposes, to *B* and her heirs?"

(c) What result if *O*'s grant is to "to *A* and his heirs so long as *A* does not use Whiteacre for commercial purposes, and if *A* uses Whiteacre for a commercial purpose, then to *B* and her heirs?"

RAP Session

4. (a) *O* conveys Blackacre "to *A* for life so long as *A* uses Blackacre as a residence, then to *B* and her heirs, but if liquor is sold there, to *C* and her heirs." Do *B*'s and *C*'s interests violate the Rule Against Perpetuities?

(b) *O* conveys Brownacre "to *A* for life, then 30 years after *A* dies, to *B* and his heirs." *B* dies, leaving *C* as his heir. Does *B*'s interest violate the Rule Against Perpetuities?

(c) *O* conveys Whiteacre "to *A* for life, then to *A*'s children for their lives, then to *B*." Is *B*'s future interest valid under the Rule Against Perpetuities?

(d) *O* in his will devises Redacre "to my grandchildren who attain age 21." *O* is survived by his son, *A*, but no grandchildren. Is the grant to *O*'s grandchildren valid?

(e) *O* while alive conveys Greenacre "to such of my grandchildren who attain 21." *O* has one child, *A*, and one grandchild, *GC*. Is this interest valid under the Rule Against Perpetuities?

Keeping Options Open

5. *O* conveys "to *A* Corporation an option to purchase Blackacre when its appraised value is greater than $1 million an acre." Is the option valid?

Wait and See

6. Assume the following occur in a wait-and-see jurisdiction:
   (a) *O* devises Blackacre to "to *A* for life, remainder to *A*'s child first reaching the age of 25." *A* has no children either at *O*'s death or at *A*'s death. The remainder to *A*'s child would be void under the common law Rule Against Perpetuities. How does it fare in a jurisdiction with a wait-and-see statute?
   (b) What if, in the devise in (a), *A*'s only child is born after the interest is created, and is three years old at *A*'s death? Is the remainder valid in a wait-and-see jurisdiction?
   (c) What if *A* dies survived by his two children, two-year-old *B* and four-year-old *C*? *B* then dies. Is the gift valid in a wait-and-see jurisdiction?
   (d) What if, in (c), it was *C* rather than *B* who died just after *A*'s death?
   (e) On January 1, 2005, *O* conveys Whiteacre "to *A* and his heirs so long as a commercial use is not made of the property, and if it is used for a commercial purpose, then to *B* and her heirs." What result in a wait-and-see jurisdiction?

EXPLANATIONS

Grandpa's Class Gift

1. (a) A will becomes operational upon the testator's death. Until that time the will can be revoked or amended, and the owner can sell, assign, or gift any property mentioned in the will. The interests, therefore, were created in 2006, at *O*'s death, and not in 2000, when *O* executed his will. The lives in being in 2006 were *L*, *M*, *P*, and *R*. *O* and *A* were both dead and thus not lives in being at the creation of the interests.
   (b) The first step is to determine what interests *O* intended his will to create. Since *A* is dead, under the will, *A*'s children, *L*, *M*, and *P*, have vested possessory life estates and *A*'s grandchild, *R*, has vested remainder subject to open in fee simple absolute. The second step

is to apply the Rule Against Perpetuities to the interests. The possessory life estates are vested and thus not subject to the Rule Against Perpetuities. The vested remainder subject to open must be tested by the Rule Against Perpetuities since it is a class gift and every member of the class must satisfy the Rule for the class gift to be good: a class gift passes or fails as a unit.

As tested, the class gift to *A*'s grandchildren is good. The validating lives are *A*'s children since we must know at their deaths who their children are. *A*'s children were lives in being at the creation of the interest (i.e., at *O*'s death) and no more children can be born to *A* and added to the class of *A*'s children. The class of *A*'s grandchildren closes physiologically when the last of *A*'s children dies. Since the class of *A*'s grandchildren closes at the last to die of *A*'s children, the gift to *A*'s grandchildren.

(c) *R*'s vested remainder subject to open and any executory interest in future-born *A*'s grandchildren violate the Rule Against Perpetuities if *A* is alive at *O*'s death. *O* intended a life estate in *A*, a vested remainder subject to open in life estate in *A*'s children, and a vested remainder subject to open in fee simple to *R* and *A*'s other grandchildren when born. The gift to *A* is valid since *A* owns a possessory life estate. The vested remainder subject to open in *A*'s children is valid since the class of *A*'s children closes physiologically and by the Rule of Convenience when *A* dies, and becomes both possessory and vested immediately upon *A*'s death. *A* is the validating life.

The vested remainder subject to open in *R* is invalid, however. An interest is invalid if there is any chance we could not be certain that every possible holder would either be vested or be certain to fail to vest within 21 years of a life in being. In this case, *R*, *L*, *M*, and *P* could all die suddenly. *A* could have another child, *X*. *A* could die shortly after *X* is born, and *X* could live well past 21 years before having any children, or could live a hundred years without having any children. Either way, the class gift to *A*'s children would not be closed until the perpetuities period lapsed.

The interest to *R* (and *A*'s grandchildren) being invalid, the devise is to *A* for life, to *A*'s children for life, then to *O*'s heirs or devisees.

Another Grandpa Story

2. The answer is yes, in part. The remainder to *A* is vested, so the Rule is inapplicable to it. The remainder to *A*'s children is a vested remainder subject to open in life estate. *A* is a ***validating life*** — meaning *A* is alive, no persons who were not lives in being can enter the same class as *A* (or fit his

description), and a class must of logical certainty close at or before *A*'s death or within 21 years of his death — and at his death and no later than his death we will know who his children are. Hence the class of *A*'s children will close and be vested immediately at *A*'s death. *A*'s children's vested remainder subject to open in life estate also is valid under the Rule Against Perpetuities.

However, the remainder to *A*'s grandchildren is invalid. The interest is a contingent remainder. The two conditions precedent are the grandchildren being ascertained (which can be done by being born) and surviving until the death of the survivor of *A*'s children. So the Rule applies. For the contingent remainder to *A*'s grandchildren to be valid, we must know for certain which potential grandchildren of *A* will have died before the last of *A*'s children to die, and which will survive; and we must know these things within 21 years of the lives in being at the creation of the interest. It's possible we will not know them within the perpetuities period.

The hitch is that there is no validating life, no life in being for which we must know one way or the other before he dies (or 21 years after his death) whether the contingency has occurred or will never occur. Normally, *A*'s children would be the validating lives for *A*'s grandchildren. Unfortunately, in our case "*A*'s children" itself is a class subject to open for after-born children of *A*, himself a life in being, and also the possible progenitor of more children.

A could have another child, *Z*, born after *O*'s death; *A*, *X*, and *Y* could then die; 22 years later, *Z* could have a child, *GC* (a grandchild of *A*). *GC* possibly being born 22 years after all lives in being have died already is an event indicating we will not know within 21 years of a life in being which, if any, of *A*'s grandchildren will survive the last to die of *A*'s children. In addition, *Z* is not dead yet, and easily could live another 50 years, making it at least 70 years since the last life in being died before we will know if *GC* survived *Z*. The Rule does not permit 70 years of uncertainty in this situation.

As rewritten after invalidating *A*'s grandchildren's interest, *O*'s devise is to *A* for life, then to *A*'s children for their lives, then to *O*'s heirs or devisees.

The Big Event

3. (a) *O* intended to grant *A* a fee simple subject to an executory limitation and *B* a shifting executory interest. *A*'s fee simple subject to an executory interest is a vested possessory interest and not subject to the Rule Against Perpetuities.

The shifting executory interest in *B* is subject to the Rule Against Perpetuities, and is invalid under the Rule. The condition subsequent to *A*'s interest, and thus the condition precedent to *B*'s executory interest, is an event, use of the property for commercial purposes. Since Whiteacre may be used for noncommercial

purposes for centuries after all relevant lives in being have died, *B*'s shifting executory interest is invalid. Just because the grant mentions two lives in being (*A* and *B*) does not mean the condition must occur during their lives.

Drawing a line through *B*'s shifting executory interest, the grant reads, "To *A* and his heirs so long as a commercial use is not made of the property." As rewritten, *A* has a fee simple determinable. *O* (or his heirs or devisees) has a possibility of reverter.

(b) *O* intended *A*'s interest to be a fee simple subject to an executory limitation and *B* to have a shifting executory interest. *A*'s interest is a present possessory vested interest and thus not subject to the Rule Against Perpetuities. *B*'s shifting executory interest is invalid under the Rule Against Perpetuities since the event, using Whiteacre for commercial purposes, may not occur until *A* and *B*, the relevant lives in being, have been dead for decades.

Drawing a line through *B*'s invalid executory interest, the grant reads, "to *A* and his heirs." *A* owns Whiteacre in fee simple absolute. *O* and *B* have no interest in Whiteacre. Compare the result in (a).

(c) *O* intended *A* to own a fee simple subject to an executory limitation, and *B* to own a shifting executory interest. *A*'s present possessory interest is vested and not subject to the Rule Against Perpetuities. *B*'s shifting executory interest dependent on a condition precedent, *A*'s using the land for commercial purposes, is subject to the Rule. In contrast to *B*'s interest in (a) and (b), this time *B*'s interest is good. *A* is the validating life here. The divesting event by its terms must occur during *A*'s lifetime and *A* was a life in being at the creation of the interest.

Lesson: When drafting transfers dependent on an event to shift an interest, write the condition so that it can occur only during a life in being at the time the interest is effective — i.e., write it as follows: "to *A* and her heirs so long as *A* resides there, then to *B* and her heirs." This ties the interest to *A* and limits its force to the length of *A*'s life. It is impossible then for this executory interest to vest only after the lives in being plus 21 years. Stated another way, unless a divesting event must occur during a life in being, the executory interest following a fee simple subject to an executory limitation violates the Rule Against Perpetuities.

RAP Session

4. (a) *O* intended that *B* receive a vested remainder subject to an executory interest (alternatively, give yourself bonus points if you said *B* received a vested remainder subject to divestment in fee simple

absolute since *B* may lose her interest if *A* sells liquor on Blackacre). As a vested interest, it is not subject to the Rule Against Perpetuities. *B*'s interest is valid.

O meant for *C* to get a shifting executory interest. It is invalid under the Rule Against Perpetuities, however. The divesting event, liquor being sold on Blackacre, may occur during *A*'s life estate determinable (if used as a residence), during *A*'s life, or decades after all lives in being have died. This is another "events" type RAP question. Rewriting the grant after striking out *C*'s executory interest, *A* has a life estate determinable and *B* has a vested remainder in fee simple absolute. *O* and *C* have nothing.

(b) Yes, *B*'s interest violates the Rule Against Perpetuities. The original grant gave *A* a life estate, *O* a reversion in fee simple subject to a springing executory interest, and *B* a springing executory interest. *A*'s life estate and *O*'s reversion are not subject to the Rule Against Perpetuities. There is no survivorship requirement for *B* to take, only the passage of time. An executory interest must ***vest in possession*** (rather than just vest in interest) to be valid, however. Unfortunately, the 30 years that must pass after *A*'s life estate ends before the springing executory interest becomes possessory is way too long. *O* and *B* could die about the same time *A* does. If so, 21 years later still no one would be entitled to possession of the executory interest.

As rewritten after striking *B*'s springing executory interest, *A* has a life estate, and *O* has a reversion.

(c) *O* intended *A* to have a life estate; *A*'s children to have a contingent remainder in life estate, contingent on being ascertained; and *B* to have a vested remainder. *A*'s life estate is not subject to the Rule. *A*'s children's contingent remainder is subject to the Rule. *A* is the validating life for a grant to *A*'s children. We will know at *A*'s death who *A*'s children are. Therefore, the contingent remainder in life estate in *A*'s children is good. *B*'s interest is a vested remainder. Unlike executory interests, vested remainders need only be ***vested in interest*** not vested in possession. *B*'s vested remainder is good.

(d) Yes, *O*'s grandchildren's interest is valid. The Example does not say who owns Redacre until *O*'s grandchildren turn 21, but at any rate *O* intended the grandchildren to have an executory interest. An executory interest must vest in possession within 21 years (or, more precisely, 21 years plus 9 months' gestation period) after all lives in being at the creation of the interest have died. *A* is a validating life since *O*'s grandchildren are the same as *A*'s children, *A* is a life in being, and no other person can enter the class of *O*'s children. Once *A* dies, the class of *O*'s grandchildren closes physiologically. Each

member of the class will have either attained age 21 or died before reaching age 21 in the 21 years after *A* dies. The interest to *O*'s grandchildren, therefore, is good.

Note, however, that if *O*'s grandchildren must attain age 22, the gift would be invalid since *A* might die days after his youngest child is born, and 21 years later we still won't know if that child will reach age 22. The Rule Against Perpetuities would void the interest of that child and every child in the class of *O*'s grandchildren, even those who have already reached age 22.

(e) *O* intended that his grandchildren would receive a springing executory interest. It is not a vested remainder subject to open since the interest does not follow the natural termination of a life estate or estate for years. It cuts short *O*'s fee simple.

What might happen? *A* and *GC* might die soon after the interest is created. *O* might have another child, *B*. *O* then could die, survived by *B*, who was not a life in being. In 21 years we might not know if *B* has any children (if *O* will have any grandchildren, and how many), much less whether all of *O*'s grandchildren will attain age 21. The gift is void. *O* still owns a fee simple absolute. Compare (d).

Keeping Options Open

5. No. Because the possibility exists that the appraised value will not exceed $1 million for more than 21 years, the option is void. The Rule Against Perpetuities considers only human beings as potential lives in being, not corporations. Although *A* Corporation is a legal entity with many useful purposes in our legal system, it is not a "life in being."

Wait and See

6. (a) In a "wait-and-see" jurisdiction, we may not know if the contingent remainder in "*A*'s child first reaching the age of 25" is met within the 21-year perpetuities period until 21 years after *A* dies. No decision can be made either way on *O*'s death. We must wait to see if *A* has any children during his life. If *A* dies childless, as in this Example, no one will satisfy the condition precedent. So at this point, whether *A*'s first child is a valid gift or not becomes an irrelevant issue since no one can take. *O*'s reversion becomes a fee simple absolute at *A*'s death.

If, instead of using the 21-year perpetuities period, the state adopts a 90-year wait-and-see period, as long as *A* has a child survive him, no matter the child's age, we wait to see if that child attains age 25.

(b) In a jurisdiction adopting the common law perpetuities period, the remainder is not valid, because *A*'s life is now the only measuring life. *B* was not a life in being. When it is clear a three-year-old cannot attain age 25 in the 21-year perpetuities period, the interest is invalid.

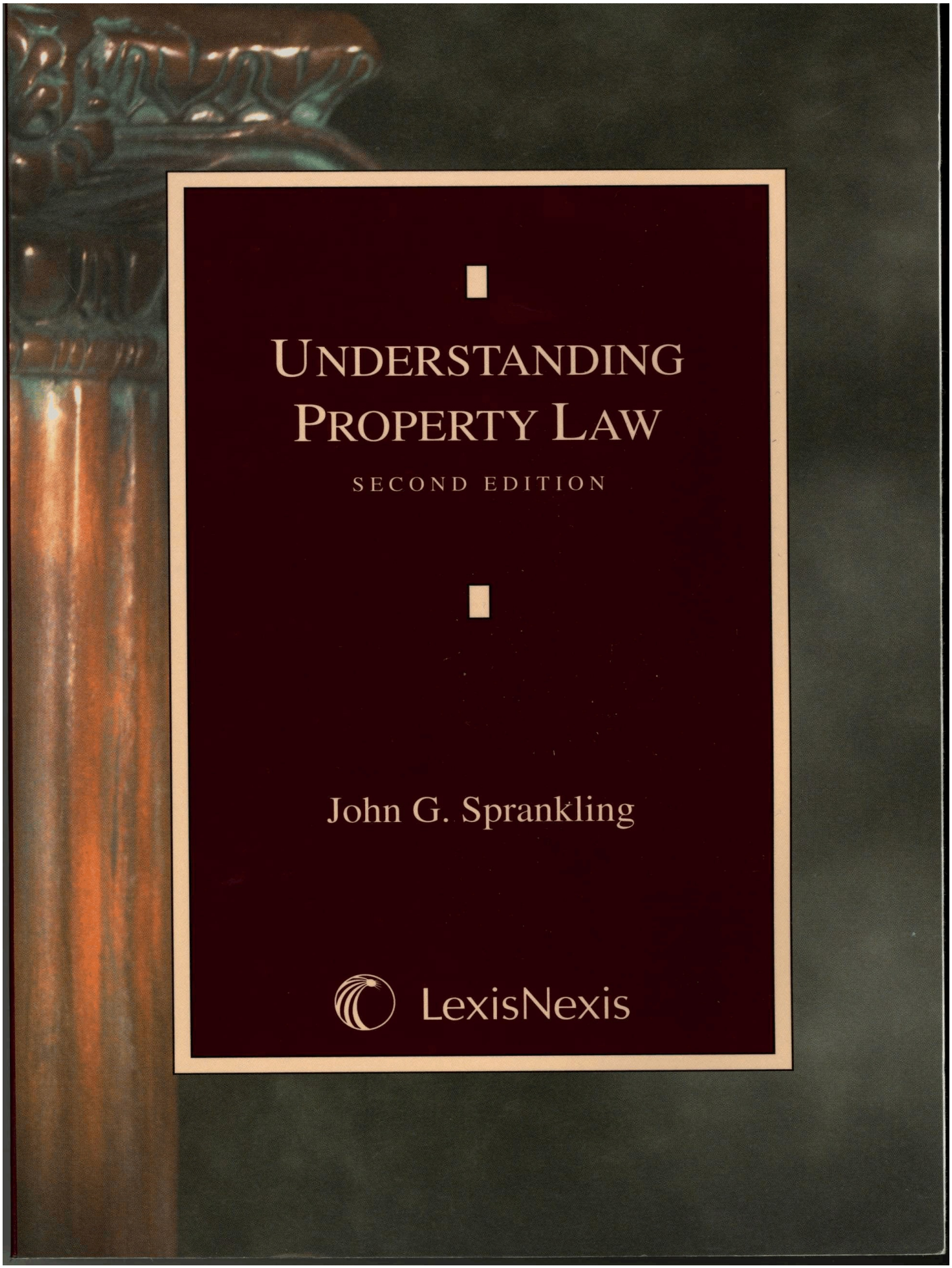
If, on the other hand, the jurisdiction has adopted a fixed 90-year perpetuities period, we must wait and see if *B* turns 25 in the 90 years after the interest is created. Assuming *B* was born within 65 years of *O*'s death, the Rule Against Perpetuities poses no barrier to *B*'s taking. The condition precedent that he must attain age 25 might, but the Rule Against Perpetuities does not.

(c) We must wait and see. The determination of validity cannot be made at *O*'s death or at *A*'s death. The decision is deferred in a "wait-and-see" jurisdiction. *B*'s death is totally irrelevant. *C*, at four, is the eldest child and thus stands to be the first of *A*'s children to attain age 25. The Rule Against Perpetuities is not a barrier to *C*'s taking. If *C* turns 25, he gets the property.

(d) *B* at age two cannot turn 25 in 21 years. In states using the common law perpetuities period, *B*'s interest is invalid. *O* has a reversion. In states using the 90-year perpetuities period, as long as *B* was born within 65 years of *O*'s death, which is almost certain, the Rule Against Perpetuities will not keep *B* from taking.

(e) In a wait-and-see jurisdiction using the common law perpetuities period, the parties must wait until 21 years after the last of the relevant lives in being. Here, *O*, *A*, and *B*'s being mentioned in the grant would serve as measuring lives. If Whiteacre is used for commercial purposes during the perpetuities period, *A* is divested and *B* takes pursuant to the shifting executory interest. If no commercial use is made of the property during that period, *B*'s interest disappears. The condition subsequent to *A*'s interest remains. *A* continues with a fee simple determinable and *O* (or his heirs or devisees) has a possibility of reverter. Compare Example 3(a), above.

In a jurisdiction adopting the 90-year rule, the parties must wait 90 years after the interest was created (i.e., from January 1, 2005, until January 1, 2095) to see if the property is used for commercial purposes. If so, *B* gets Whiteacre. If Whiteacre is used for commercial purposes after 2095, it reverts back to *O* and his heirs.



UNDERSTANDING PROPERTY LAW

SECOND EDITION

John G. Sprankling

LexisNexis

Chapter 12

INTRODUCTION TO FUTURE INTERESTS

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§ 12.01 Future Interests in Context

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

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

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

§ 12.02 What Is a Future Interest?

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

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

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

§ 12.03 Why Create a Future Interest?

[A] Family Support Motive

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

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

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

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

[B] Charitable or Economic Motives

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

§ 12.04 Types of Future Interests

[A] Basic Categories

Five basic types of future interests are recognized:

(1) the *reversion*;

(2) the *possibility of reverter*;

(3) the *right of entry*;

(4) the *remainder*; and

(5) the *executory interest*.

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

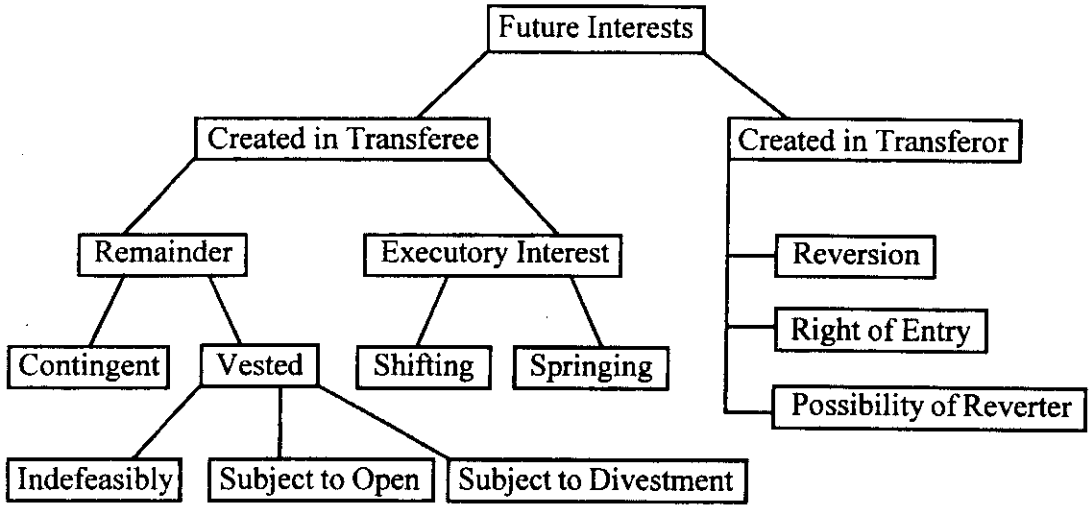
The starting point for classifying a future interest is to determine the identity of the person who holds it: is the holder a transferor or a transferee? Suppose O, holding fee simple absolute in Greenacre, grants a life estate to L (e.g., "to L for life"). O is considered a *transferor* because she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

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

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

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

TABLE 2: FUTURE INTERESTS



[B] Subcategories of Future Interests

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

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

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

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

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

[C] A Future Interest in What Possessory Estate?

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

§ 12.05 Classifying Future Interests: An Overview

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

TABLE 3: LINKING FREEHOLD ESTATES AND FUTURE INTERESTS

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

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

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

§ 12.06 Common Law Approach to Future Interests

[A] Autonomy v. Marketability

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

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

[B] The Common Law Compromise

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

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

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

§ 12.07 Modern Future Interest Legislation

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

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

§ 12.08 Contemporary Relevance of Future Interests

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

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

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

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

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

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

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

Chapter 13

FUTURE INTERESTS HELD BY THE TRANSFEROR

SYNOPSIS

§ 13.01 Three Future Interests
§ 13.02 Types of Future Interests
[A] Reversion
[B] Possibility of Reverter
[C] Right of Entry
§ 13.03 Transfer of Interest
§ 13.04 Other Rights of Interest Holder
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[B] Preventing Waste
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§ 13.01 Three Future Interests

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

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

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

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

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

§ 13.02 Types of Future Interests

[A] Reversion

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

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

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

[B] Possibility of Reverter

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

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

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

[C] Right of Entry

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

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

§ 13.03 Transfer of Interest

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

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

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

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

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

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

§ 13.04 Other Rights of Interest Holder

[A] General Principles

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

[B] Preventing Waste

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

[C] Right to Eminent Domain Proceeds

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

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

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

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

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

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

§ 13.05 Modern Reforms

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

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

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

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

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

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

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

Chapter 14

FUTURE INTERESTS HELD BY THE TRANSFEREE

SYNOPSIS

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§ 14.01 An Intricate Common Law Maze

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

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

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

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

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

§ 14.02 Classifying Future Interests Held by the Transferee

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

(1) indefeasibly vested remainder;

(2) vested remainder subject to divestment;

(3) vested remainder subject to open;

(4) contingent remainder;

(5) springing executory interest; and

(6) shifting executory interest.

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

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

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

§ 14.03 Remainders

[A] Remainders in Context

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

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

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

[B] What Is a Remainder?

[1] Basic Definition

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

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

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

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

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

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

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

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

[2] Application of Definition to Example

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

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

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

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

[C] Types of Remainders

[1] Four Types

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

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

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

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

(4) contingent remainder.

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

[2] Vested Remainders

[a] In General

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

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

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

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

[b] Indefeasibly Vested Remainder

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

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

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

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

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

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

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

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

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

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

[c] Vested Remainder Subject to Divestment

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

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

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

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

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

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

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

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

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

[3] Contingent Remainders

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

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

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

[D] Examples of Remainders

The following illustrative conveyances and devises create remainders:

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

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

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

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

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

[E] Transformation into Other Future Interests

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

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

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

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

[F] Significance of the Contingent vs. Vested Distinction

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

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

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

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

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

§ 14.04 Executory Interests

[A] Executory Interests in Context

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

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

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

[B] What Is an Executory Interest?

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

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

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

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

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

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

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

[C] Types of Executory Interests

[1] The Basic Distinction

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

[2] Shifting Executory Interest

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

[3] Springing Executory Interest

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

[D] Examples of Executory Interests

The following illustrative conveyances and devises create executory interests.

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

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

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

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

§ 14.05 Consequences of the Distinction Between Remainders and Executory Interests

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

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

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

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

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

§ 14.06 Creation of Interests

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

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

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

§ 14.07 Transfer of Interests

[A] Toward Free Transferability

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

[B] Vested Remainders

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

[C] Contingent Remainders and Executory Interests

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

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

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

§ 14.08 Other Rights of Interest Holders

[A] General Principles

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

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

[B] Rights re Waste

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

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

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

[C] Right to Eminent Domain Proceeds

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

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

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

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

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

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

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

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[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

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[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,

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[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.[40] 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).

[40] The impetus for reform may be traced back, at least in part, to 1964, when England adopted legislation that substantially modified its Rule Against Perpetuities

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

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[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.[50] 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 construction—an evidentiary presumption utilized to honor grantor intent.[51] Some

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[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).

[50] *See, e.g.*, Restatement (Second) of Property: Donative Transfers § 30.2(2) (1987).

[51] *See* Doctor v. Hughes, 122 N.E. 221 (N.Y. 1919), where Judge Cardozo resurrected the doctrine, transforming it into a rule of construction and extending it to encompass both real and personal property.

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.

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[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 5

ESTATES AND FUTURE INTERESTS: AN INTRODUCTION

SUMMARY

I. FREEHOLD ESTATES: TYPICAL CASES

Historically estates in land were characterized as either freehold or non-freehold. The characterization of an estate as freehold or non-freehold had little effect on the owner's right to possession. The owner of each type of estate was ordinarily entitled to possession. However, in England the owner of a freehold estate stood on a higher social and political plane. In addition, owners were obliged to provide their overlords with certain "feudal incidences." These included the duty to swear homage and fealty to the overlord and the obligation to contribute money (called "aid") toward the release of the overlord in the event he was captured by an enemy. More importantly, the overlord was the guardian of an heir of a deceased holder of a freehold estate. This entitled the lord to retain the profits from the land during the ward's minority and to control whom the ward would marry. These were known as the incidences of "wardship and marriage." An owner of a freehold estate was said to be "seised" of the land, a concept which meant that the holder was entitled to possession and the obligation to perform the feudal incidences. The obligation to perform feudal incidences never gained a foothold in the United States.

There were eleven types of freehold estates distinguished for the most part on the basis of their probable duration. An estate that could last in perpetuity was called the fee simple absolute. The eleven estates were:

1. Fee simple absolute (sometimes simply referred to as a "fee simple".)
    a. This estate lasts in perpetuity conceptually either in the owner or the owner's successors.
    b. It is alienable, devisable, and descendible. This means the owner can sell, mortgage, or gift the estate during his life, and that upon the owner's death it passes to

his beneficiaries if he or she dies with a will, or to his or her heirs if he or she dies without a will.

c. Historically, but no longer, it was created by use of the phrase "and his heirs" following the designation of the grantee.

2. Fee simple determinable with possibility of reverter (sometimes called a fee simple subject to a special limitation).

a. This estate could last in perpetuity but could end sooner upon the happening of a limitation stated in the terms of the conveyance. Upon the happening of the limitation, the estate would automatically terminate and the property would revert to the grantor who retained the possibility of reverter.

b. Words or phrases typically evidencing the creation of this estate were "so long as," "while," or "during."

3. Fee simple subject to (or on) a condition subsequent.

a. This estate was subject to the happening or non-happening of a condition subsequent and thus terminated by exercise of a power of termination or right of re-entry for condition broken.

b. This estate could last in perpetuity but could end sooner upon the happening of a condition subsequent stated in the terms of the conveyance.

c. Upon the happening of the condition, the estate could only come to an end if the holder of the power of termination or right of entry for condition broken exercised the power or right.

d. Absent such exercise, the holder of the fee simple subject to the condition subsequent continued to possess the estate.

e. Words or phrases typically evidencing the creation of this estate were "on condition that," or "provided that."

4. Fee simple subject to either a shifting or springing executory interest.

a. A fee simple subject to a shifting executory interest is a fee simple that might terminate upon the happening of a condition subsequent. If the condition occurs the fee shifts automatically to someone other than the grantor.

i. Words or phrases typically evidencing the creation of this estate were "on condition that," or "provided that."

ii. If the condition never occurred, then the fee simple estate could last in perpetuity.

a. A fee simple subject to a springing executory interest is a fee simple subject to a future interest that will become possessory after some period of time during which no other transferee is entitled to possession. Typically, the grantor retained the right of possession, expressly or impliedly, during this period so that no other transferee was entitled to possession.

5. Fee tail.

a. This was an estate that automatically descended to the heirs of the estate owner upon his or her death and continued so descending to the lineal descendants until the entire line of lineal descendants became extinct.

b. The person who created the fee tail retained a reversion which could become possessory only at such time, if ever, that the grantee (tenant-in-tail) and his entire line of descendants became extinct.

c. The phrase used to create the fee tail was "and the heirs of his (or her) body." More limited fee tails could also be created.

i. Fee tail male: To A and the male heirs of his body.

ii. Fee tail female: To A and the female heirs of his body.

iii. Fee tail special: To A and the heirs of her body with B.

a. Prior to 1285, words that thereafter created a fee tail created a fee simple conditional. While this estate functioned much like the fee tail, unlike the fee tail the holder, upon birth of issue, was capable of conveying a fee simple absolute to his grantee. This conveyance would extinguish the right of the holder's descendants to inherit the property when the holder died.

6. Life estate for the life of the tenant.

a. As the name implies, this estate lasted only so long as the life tenant was alive. It terminated automatically when he died. At that time, the property either reverted to the grantor or passed to some other person who had either a remainder or an executory interest.

b. A life estate is alienable. Of course, the grantee of the life tenant could take no greater estate than the life tenant had, so effectively the grantee took an estate measured by the grantor-life tenant's life.

7. Life estate for the life of one other than the tenant.

   a. This estate lasted for the life of someone other than the current owner of the estate.

   b. It was called an estate per autrie vie

8. Life estate created by fee tail after possibility of issue extinct.

   a. This was the estate of a tenant-in-tail who could not have issue capable of inheritance by issue of the marriage. It typically followed the creation of the so-called "fee tail special" where the only descendants who could succeed to the property were descendants born to the estate owner with another designated person.

   b. For example, if O deeded property to A and the heirs of her body with B, only the descendants of A and B could succeed to the property at A's death. If B died during A's life and before they had any children, A had a life estate in fee tail with possibility of issue extinct.

9. Dower.

   a. This was the estate of a surviving widow (not widower).

   b. It equaled a life estate in one-third of all lands of which the husband was seized at any time during the marriage.

   c. It became a possessory life estate only at the husband's death if the widow survived.

10. Curtesy.

   a. This was the estate of the surviving widower.

   b. It equaled a life estate in all lands of which the wife was seized of a legal or equitable estate at any time during the marriage.

11. Life estate by and during coverture.

   a. This was the estate a married man had in his wife's property beginning as of the date of marriage.

   b. With the estate the husband assumed all administrative and management control of the wife's realty.

II. NON-FREEHOLD ESTATES

The holder of a non-freehold estate was entitled to possession but was not obligated to perform the feudal incidences. There were four types of non-freehold estates. They were:

12. Estate (or term) for years.
    a. This estate is common among commercial tenants although it is not unknown among residential tenants.
    b. It is an estate that begins and ends on a fixed date set forth in the lease.
    c. No notice is necessary to terminate this tenancy as the date of termination is known when the lease begins and is fixed in the lease.
13. Periodic tenancy.
    a. This tenancy is common among residential tenants, particularly in low-income housing.
    b. It is an estate that runs from period to period such as year-to-year or month-to-month.
    c. This tenancy is terminable by either landlord or tenant giving the other the required written notice.
    d. Notice to terminate this tenancy is commensurate with the period. Thus to terminate a month-to-month tenancy, one month notice is required. However, a year-to-year tenancy was terminable by the giving of six months notice.
14. Tenancy at will.
    a. This tenancy ends whenever the landlord or tenant decides to terminate the tenancy with no advance notice required.
    b. Because of the potential disruption that could be caused by a no-advance notice termination, this estate is largely disfavored and where the character of an estate is ambiguous, courts are likely to characterize the estate as a periodic tenancy rather than a tenancy at will.
15. Tenancy at or by sufferance.
    a. This is the tenancy that arises if a term of years tenant remains in possession beyond the date fixed in the lease for the term of years to end.
    b. It arises upon the election of the landlord who can treat the tenant who stays beyond the term of the

lease (a so-called "holdover tenant") as either a tenant at sufferance or as a trespasser.

c. At common law, this tenancy was terminable by the giving of six-months notice.

III. CONCURRENT ESTATES: TYPICAL CASES

A concurrent estate exists when two or more persons have a concurrent interest in the property, each of whom is entitled to possession. There are four such estates. They are:

1. Joint tenancy with right of survivorship.

   a. An estate in two or more persons with each entitled to possession of the property.

   b. The co-tenants, at common law, had to have acquired their interest:

      i. At the same time

      ii. Under the same instrument (title)

      iii. Have the same interest (e.g., ½)

      iv. Have equal rights to possession.

   c. The survivor of the co-tenants held the title in fee simple as there were no other claimants to the property. Thus, the interest of the co-tenants who were not the survivor was not devisable or descendible.

   d. The interest of each co-tenant was alienable but an alienation would sever the right of survivorship and convert the tenancy into a tenancy in common.

17. Tenancy by the entirety.

   a. A special form of joint tenancy between spouses to which the unity of marriage was added to the unities of time, title, interest, and possession.

   b. Typically, this estate was not severable unilaterally by either spouse; the interest of a spouse was not reachable by the spouse's creditors.

18. Tenancy in common.

   a. A concurrent estate where the interest of all co-tenants was alienable, devisable, and descendible.

   b. Co-tenants need not have identical interests.

IV. FUTURE INTERESTS:

A future interest is an interest in property with the right or possibility of possession postponed until the future. There are nine types of future interests. They are:

19. Reversion.
    a. A reversion is the future interest retained by a grantor who conveys a life estate, if the life estate is not followed by a vested remainder in a transferee.
    b. Reversions are alienable, devisable, and descendible.
20. Possibility of reverter.
    a. The possibility of reverter is the future interest retained by a grantor who conveys either a fee simple conditional or a fee simple determinable.
    b. Today, in most, but not all states, the possibility of reverter is alienable, devisable, and descendible. If transferred, it continues to be classified as a possibility of reverter in the hands of the transferee.
21. Right of entry for condition broken or "power of termination."
    a. The right of entry for condition broken is the future interest that may be retained by a grantor who conveys a fee simple on condition subsequent.
    b. For the holder of the interest to acquire possession of the property subject to the divesting condition, the holder must exercise the right of entry.
    c. At common law this interest was not alienable. In most states today, it is alienable, devisable, and descendible.
22. Remainder.
    a. A remainder is any "future interest limited in favor of a transferee in such a manner that it can become a present interest upon the expiration of all prior interests simultaneously created, and cannot divest any interest except an interest left in the transferor."[1]
    b. There are four kinds of remainders.
        i. Vested remainder (sometimes called indefeasibly vested remainder).
            (1) A vested remainder is a remainder limited in favor of a born or ascertained person(s) where

1. Restatement of Property § 156(1) (1936).

the person(s) (or their transferees, heirs or devisees) are "certain to acquire a present interest at some time in the future, and [are] also certain to be entitled to retain permanently thereafter the present interest so acquired."[2]

(2) A vested remainder is alienable, devisable, and descendible.

ii. Vested remainder subject to open or partial divestment.

(1) A vested remainder subject to open (also known as the vested remainder subject to partial divestment) is a remainder limited in favor of a class of persons having at least one living member, subject to no unmet conditions precedent.

(a) A class is a group of persons collectively described, (such as children, brothers and sisters, heirs, descendants, nieces and nephews, etc.).

(b) It is subject to open if new persons can join the class.

(c) A class is closed if no additional persons may join the class.

(d) If a class is closed and subject to no unmet conditions, the remainder is an indefeasibly vested remainder in a class of persons.

(e) The interest of a member of such a class is alienable, devisable and descendible.

iii. Vested remainder subject to complete divestment.

(1) A vested remainder subject to complete divestment is a remainder limited in favor of a born or ascertained person or in a class that is vested subject to open, but is subject to the occurrence or nonoccurrence of a *condition subsequent* such that the remainder may not become possessory or, if it becomes possessory, may not remain possessory in infinity.

(2) Generally, a vested remainder subject to complete divestment is alienable and it is devisa-

2. Restatement of Property § 157(a) comment f(1936).

ble and descendible unless the interest is subject to an express or implied condition of survivorship.

iv. Contingent remainder.

(1) A contingent remainder is an interest that may or may not become possessory.

(a) A contingent remainder is a remainder limited in favor of (1) an unborn person, (2) an unascertained person, or (3) a person who is either born or ascertained but whose interest is subject to the occurrence or nonoccurrence of a *condition precedent.*

(b) Generally, contingent remainders are alienable and they are devisable and descendible unless conditioned (expressly or impliedly) upon survivorship

23. Executory interests.

a. An executory interest is an interest limited in favor of a transferee which, in order to become possessory, must divest the vested interest of either another transferee or the transferor.

b. There are two kinds of executory interests.

i. Shifting executory interest.

A shifting executory interest is a future interest created in a transferee that in order to become possessory must, upon the occurrence or nonoccurrence of an event, divest a present interest of another transferee or a vested interest of another transferee.[3] Since the preceding estate must be an estate that is divested, typically such estate must terminate upon the happening of a condition rather than a limitation. The interest that is divested is an interest of a transferee and not an interest that has been retained by the transferor.

c. Generally, shifting and springing executory interests are alienable, devisable and descendible absent express contrary limitations in the governing interest.

ii. Springing Executory Interest

A springing executory interest is a future interest limited in favor of a transferee that in order to

3. Restatement of Property, §§ 25(1), 158 (1936).

become possessory must divest the transferor of a retained interest after some period of time during which there is no transferee entitled to a present interest which, at common law, would be a freehold estate.

PROBLEMS, DISCUSSION AND ANALYSIS

I. FREEHOLD ESTATES:

1. FEE SIMPLE ABSOLUTE

PROBLEM 5.1: O conveys Blackacre "to B and his heirs." (a) What estate does B have? (b) What are the characteristics of B's estate?

Answers and Analysis

(a) B has a fee simple absolute. A fee simple absolute is the largest estate known to the common law; it denotes the maximum of legal ownership, the greatest possible aggregate of rights,[4] privileges,[5] powers[6] and immunities[7] which a person may have in land. It is of potentially infinite duration.

By the year 1250 the phrase "and his heirs" had become the only one by which a fee simple absolute could be conveyed. The words "B and his heirs" meant "B in fee simple absolute" without qualification. Strangely, the words "B in fee simple" used in a deed would give B only a life estate. In order to create a fee simple absolute the words in the deed had to be "B and his heirs."

The words, "and his heirs" used in a deed were words of limitation—that is, they described the quantum or size of the estate transferred to B, the grantee. They gave the heirs of B (who could only be ascertained at B's death) no interest whatsoever in the land. The word "B" in the example is a word of purchase and indicates who the grantee is. Words of limitation indicate what is taken; words of purchase identify the persons who take.[8] Thus, by the use of the words, "B and his heirs," O conveyed a fee simple absolute to B.

4. A right is a legally enforceable claim of one person against another, that the other shall do or not do a given act.

5. A privilege is a legal freedom to do or not to do a given act.

6. A power is an ability on the part of a person to produce a change in a given legal relation by doing or not doing a given act.

7. An immunity is a freedom on the part of one person from having his legal relation altered by a given act or omission to act on the part of another person.

8. Confusingly, if an owner gives property to B and his heirs, the word "B" is still a word of purchase even though B acquired the property by gift rather than by purchase.

In construing a will, as distinguished from a deed, it has long been the rule that the technical phrase, "and his heirs," need not be used to create a fee simple absolute. The intention of the testator determines the interest devised.

Most states have statutes changing the common law rule that required the words "and his heirs" to create a fee simple absolute. The statutes usually provide that the named grantee takes whatever estate in the land the grantor had, unless the grantor indicates an intention to create a lesser or different estate. A few states have reached the same result without the aid of a statute.[9]

(b) The characteristics of the fee simple absolute can best be set forth by answering two simple questions:

(1) *What can B do with a fee simple absolute in Blackacre?* There are five distinct powers which B may exercise over Blackacre. B may (a) use Blackacre, (b) abuse Blackacre, (c) have exclusive possession of Blackacre, (d) take the fruits of Blackacre, and (e) dispose of Blackacre either by deed and (since 1540) by will.

(2) *How long will B's estate in Blackacre last?* The fee simple absolute is the largest estate known to the common law. For all practical purposes it lasts forever in either B's grantees, heirs, or devisees. Thus, if B dies and owns Blackacre at the time of death, Blackacre passes to the devisees under B's will or, if B dies intestate, to B's heirs. If B conveyed Blackacre to another during life, the grantee owns Blackacre in fee simple absolute.

2. FEE SIMPLE DETERMINABLE WITH POSSIBILITY OF REVERTER

PROBLEM 5.2: O conveys Blackacre "to B and his heirs so long as Blackacre is used for school purposes." (a) What estate does B have? (b) What are the characteristics of B's estate?

Answers and Analysis

(a) B has a fee simple determinable, sometimes called a base fee, a qualified fee, or a fee simple subject to a special limitation.

(b) A fee simple determinable is a fee simple that has the potential to last to infinity but is subject to a limitation which could cause the estate to end. If this limitation occurs, then the fee simple estate is automatically extinguished. In this problem, the duration of B's estate is limited by the occurrence of a named event—in this case, B's ceasing to use Blackacre for school purposes. B's estate

9. See Restatement of Property § 39: Powell on Real Property ¶ 180.

terminates automatically by operation of law if that event occurs. If that event fails to occur, B's estate does not end. The predominant characteristic of this determinable estate is that the instant Blackacre is no longer used for school purposes, it reverts to the grantor, O, or if O is dead, Blackacre reverts to O's assignees, devisees, or heirs. This occurs automatically and without any act on the part of O or O's successors in interest.

The rationale for this automatic reverting is contained in the language of the conveyance which says that B's estate lasts only as long as Blackacre is used for school purposes. The language compels the result and carries out the precisely expressed intent of the grantor when the estate was created.

The termination of B's estate upon the happening of a limitation involves no forfeiture, as occurs when an estate terminates upon the happening of a condition. There is no cutting short of B's estate. B's estate was to last only as long as the premises were used for school purposes. When the use ceases, B's estate terminates automatically.

O, the grantor, need not make an entry into the possession of Blackacre if B ceases to use Blackacre for school purposes. Rather, the moment B ceases to use Blackacre for school purposes, O becomes the owner of Blackacre in fee simple absolute and has the right to immediate possession. If B ceases such use, there is nothing left in him because the conveyance, "to B and his heirs so long as it is used for school purposes" specifically limits B's estate to the time during which B uses the estate for school purposes.

At the time of O's conveyance to B, O had a fee simple absolute in Blackacre. This is an estate of infinite duration. Thus, O conveyed to B an estate of lesser duration than O had. Stated differently, O did not convey to B all that O had. The interest that O did not convey (the possibility that Blackacre would revert to O if B ceased to use Blackacre for school purposes) is called a "possibility of reverter." A possibility of reverter, standing alone as it was in O in this case and not attached to a reversionary interest, was inalienable at common law but was descendible to the grantor's heirs. Most states by statute or judicial decision permit the transfer of a possibility of reverter by deed or will.

The words "during," "while," or "until" and the phrase "so long as" are often used to create a fee simple determinable. For example, if O conveys to "B and his heirs *until the property is no longer used for church purposes*" or to "B and his heirs *so long as the property is used for church purposes*," B has a fee simple determinable. The italicized words are words of limitation.

3. FEE SIMPLE SUBJECT TO CONDITION SUBSEQUENT—WHICH MEANS FEE SIMPLE SUBJECT TO BEING TERMINATED BY EXERCISE OF A POWER OF TERMINATION OR RIGHT OF RE-ENTRY FOR CONDITION BROKEN

PROBLEM 5.3: O conveys Blackacre "to B and his heirs, but if intoxicating liquors are sold on the premises then O has the right to re-enter and repossess the land." (a) What estate does B have? (b) What are the characteristics of B's estate?

Answers and Analysis

B has a fee simple subject to a condition subsequent. This estate is of possibly infinite duration because intoxicating liquors may never be sold on Blackacre. However, it can be cut short or terminated by O, the grantor, or those claiming under O, upon the happening of the named event. O has a right of entry for condition broken, or a power of termination. The important characteristic which distinguishes this type of estate from a fee simple determinable is that the estate continues in B, or B's grantee, devisee, or heir, unless and until the power of termination is exercised. In other words, the estate in fee simple subject to a condition subsequent does not end automatically upon the happening of the named event. The basic difference between a fee simple determinable and a fee simple subject to a condition subsequent is that the fee simple determinable automatically expires by force of the limitation when the stated limitation occurs; the fee simple on condition subsequent continues despite the breach of the condition until the estate is divested or cut short by the grantor's exercise of the power to terminate. Upon breach of the condition, B's estate does not end automatically but instead continues until O exercises his power of termination. O has the power to terminate or cut off B's fee by making a re-entry onto the premises if and when the condition is broken. Until O does manifest an election by bringing an action to recover it, the grantee's estate continues. O's re-entry causes a forfeiture of the remaining portion of B's estate; it cuts short and brings to an end an existing vested interest in land.

Although no particular words are essential to create a fee simple on condition subsequent, the use in the conveyance of the traditional words of condition—"upon condition that," "provided that," "but if"—coupled with a provision for re-entry by the transferor on the occurrence of the stated event will normally be construed to manifest an intention to create an estate on condition. According to some older cases, words of condition alone without a re-entry clause are sufficient to create a fee simple on condition

subsequent, but the later trend has been to refuse to construe the conveyance as creating an estate on condition subsequent in the absence of a provision that the transferor has a right to re-enter or words of similar import. If the language of the instrument is ambiguous, the court might construe the conveyance as creating a fee simple determinable coupled with a possibility of reverter. However, the strong reluctance of the courts to enforce or imply a right of forfeiture could result in a court holding that only a covenant or a trust, rather than an estate on condition, was created.

O's right of entry for condition broken, or power of termination, can be exercised by O personally or by O's successor. At common law the right of entry was inalienable and could not be exercised by a third person or intended transferee.[10] Today it is generally alienable, devisable, and descendible.[11]

4. FEE SIMPLE SUBJECT TO EXECUTORY LIMITATION

(a) SUBJECT TO SPRINGING EXECUTORY INTEREST

PROBLEM 5.4: O conveys Blackacre "to B and her heirs, B's interest to begin five years from the date of this deed." (a) What estates do O and B have? (b) What are the characteristics of these estates?

Answers and Analysis

(a) O has a fee simple subject to a springing executory interest in B.

(b) At common law O could not create a freehold estate to begin in futuro because livery of seisin was absolutely essential to a transfer of a freehold estate. If livery of seisin were made to B, then the estate would take effect at once contrary to O's intention that B's possessory interest commence in five years. The conveyance by feoffment had to be effective at once or not at all. Seisin could not remain in the feoffor; it could not be in abeyance. The only way there could be an estate to begin in the future was by way of remainder following on the heels of a life estate. For example, O could enfeoff B for life, remainder to C and her heirs. In this case livery of seisin was made to B who held it for life and at B's death

10. See Restatement of Property § 160.

11. But see Ill. Rev. Stat. ch. 30, ¶ 37b; Mahrenholz v. County Board of School Trustees of Lawrence County, 93 Ill.App.3d 366, 48 Ill.Dec. 736, 417 N.E.2d 138 (1981) (language "this land to be used for school purposes only; otherwise to revert to Grantors" creates alienable possibility of reverter rather than inalienable "power of termination").

through the use of a straw. B, the grantee of a fee simple conditional, would convey a fee simple absolute to C and his heirs. C was often a family retainer or attorney. C, in turn, would reconvey to B and his heirs. Thus, B would acquire the property in fee simple absolute.

In order to prevent this circumvention of the grantor's intention, the statute "De Donis" was passed in 1285. Its purpose was to keep the land in the grantee's family so long as there were descendants of the grantee. The statute provided that B could not convey Blackacre so as to extinguish the right of the heirs of B's body to inherit the land upon B's death. Furthermore, B could not convey the land in a manner that would extinguish the grantor's reversion. Thus, after the enactment of de donis, if B conveyed Blackacre to "C and his heirs" and B died leaving child D surviving him, D rather than C was entitled to the land in fee tail. If B died without heirs of his body, then the grantor rather than C was entitled to the land by way of a reversion. In other words, after the Statute De Donis, B had the power to convey an estate in Blackacre only for the term of B's life. The effect of De Donis was to create a perpetuity in the bodily heirs of B and prevent B and any bodily heir of B from disposing of an estate for longer than his life. This estate was called a fee tail.

The fee tail estate would pass by descent to the heirs of the tenant in tail until the line of heirs became extinct. Upon failure of heirs (an event that might happen decades or even centuries following the death of the original tenant in tail), the property would revert back to the grantor or the grantor's successors. Effectively, B and each succeeding heir acquired a mere life estate in the property.

It was permissible for the grantor of a fee tail to restrict the inheritance to particular lineal descendants by the use of proper words in the limitation. There could be an estate in fee tail male or in fee tail female, and either one of these could be a fee tail general or a fee tail special. A grant to a man and the heirs male of his body created a fee tail male. A grant to a man and the heirs female of his body created a fee tail female. If the grant was to a donee and the heirs of his body by a particular spouse the estate was a fee tail special; if no particular spouse was designated it was a fee tail general. Estates in tail female were, in fact, rarely created but estates in tail male were an integral part of the English family settlement and were very numerous in the eighteenth and nineteenth centuries.

The inalienable feature of the fee tail did not last long. By 1472 the tenant in tail, B, could, by the fictitious lawsuit known as

"common recovery," effectively transfer Blackacre to "C and his heirs" in fee simple absolute, thus extinguishing the interests of both the heirs of B's body and the grantor.[17] Another fictitious action, the "fine," enabled the fee tail tenant to bar or dock the entail of the bodily heirs. Both fines and common recoveries were abolished in England in 1834 by a statute.[18]

In the United States, what B has depends upon the local law of the state. Only four states give B a fee tail estate and in each of them B could convey the land in fee simple by deed. These states are Massachusetts, Rhode Island (as to deeds), Maine and Delaware. In Connecticut, Ohio and Rhode Island (as to wills), B would take an estate tail for life but the first heir of the body to inherit from B would have a fee simple absolute. In Arkansas, Colorado, Florida, Georgia, Illinois, Missouri and Vermont, B would take a life estate with contingent remainder in fee simple to B's heirs of the body or lineal descendants. Because the estate in fee tail[19] is considered inconsistent with the values of a democratic society, it has been prohibited either by statute or constitution in thirty-three states. Where prohibited, B would have a fee simple estate either absolute or with limitations.[20]

6. LIFE ESTATE FOR THE LIFE OF THE TENANT

PROBLEM 5.9: O conveys Blackacre "to B for the term of B's life" or to "B for life." (a) What estate does B have? (b) What are the characteristics of this estate?

17. See Taltarum's Case, Y.B. (Year Book) 12 Edw. IV 19. The common recovery worked like this: A the tenant in tail wants to convey a fee simple absolute to B. B would bring an action in common recovery against A who would allege that he had acquired a fee simple absolute from D and would join D to the suit in order to defend that title. D would falsely swear that he had conveyed a fee simple absolute to A and thus had no defense in B's common recovery action. B would then obtain a judgement that he acquired a fee simple absolute from A and A, his heirs and grantor who had a reversion would get a money judgement against D or a judgement entitling them to other lands owned by D of equal value. This judgement was deemed adequate recompense to B, B's heirs and B's grantor. However, D who was carefully selected by the parties in this collusive lawsuit was judgement proof and the judgement against him worthless. Thus, B would have a fee simple absolute; the others an uncollectible judgement.

18. Fines and Recoveries Act §§ 15, 40.

19. In Iowa and South Carolina, the *Statute de Donis* was not considered to be part of the state's received common law and thus did not form part of the state's jurisprudence. In those states a conveyance to "B and the heirs of B's body" creates a fee simple conditional. In Iowa, the courts have held, however, that upon birth of issue B is capable of alienating a fee simple absolute and devising a fee simple absolute as well. See Prichard v. Department of Revenue, 164 N.W.2d 113 (Iowa 1969).

20. See Restatement of Property, Introductory Note Vol. I, p. 201 et seq.; Powell on Real Property ¶ ¶ 196–198.

Answers and Analysis

(a) B has a life estate for B's life. The phrases "for the term of B's life" or "for life" are words of limitation setting forth the duration of B's estate. These words assure that B's estate ends automatically upon B's death.

(b) B has the right to use Blackacre, to take the fruits therefrom, and to dispose of the life estate to another. This power of disposition includes the right to mortgage, to create liens, easements, leases or other rights in the property. But no interest created by B can extend beyond the period of B's life. B has no right to commit waste or to injure Blackacre. B has the right to the exclusive possession of Blackacre but subject to these qualifications: O, who has the reversion, is privileged to come onto Blackacre to determine if waste has been or is being committed; to collect rent, if any is due; to make repairs essential to protect O's reversionary interest; to remove timber which has been severed and which belongs to O; and to do such acts as may prevent O's reversion from being terminated. In general, the life tenant may use Blackacre in the same way as though the life tenant owned Blackacre in fee simple except that the property must be left reasonably intact for the reversioner. The life tenant must keep the property in repair, except for ordinary wear and tear, and must pay the current taxes and interest on any mortgage on the premises at the beginning of the life estate. The life tenant has the right to the rents and profits from Blackacre. The life tenant's personal representative may harvest any crops which were planted before the life estate terminates and may remove any fixtures which the life tenant has placed on the ground. If the property is damaged by a wrongdoer, the life tenant may recover for the injury to his life interest.[21]

The life estate terminates upon B's death and the right to possession, at that time reverts to O or O's successors. Therefore, B has no interest, except for the limited rights described above, that passes to B's heirs at B's death or is capable of passing by devise under B's will.

7. LIFE ESTATE FOR THE LIFE OF ONE OTHER THAN THE TENANT

PROBLEM 5.10: O conveys Blackacre "to B for the life of C." (a) What estate does B have? (b) What are the characteristics of this estate?

21. See Restatement of Property §§ 117 to 122. See also, Problem 4.2.

Answers and Analysis

(a) B has an estate for C's life. This is called a life estate *pur autre vie*, that is, for the life of another. The words "for the life of C" are words of limitation.

(b) B may either predecease or survive C. In either event, the estate which B has lasts only so long and no longer than the life of C. C's life, not B's life, is the measuring life.

At common law if B died before C, the property was regarded, until C died, as without an owner. Thus, the first person to take possession, called the common occupant, was entitled to the estate. This conclusion resulted from the fact that the estate *pur autre vie* was not an estate of inheritance and could not descend to the heirs of the life tenant, and not being personal property it could not pass to the administrator or personal representative of B's estate. Neither could the reversioner, O, claim the estate because O had granted away his interest during the lifetime of C and C was still alive. The general or common occupant can hold the estate until the death of C, not because this person has any right to hold, but because no one has a right to eject him. Alternatively, if the conveyance were to "B and his heirs for the life of C," then upon the death of B during C's lifetime the heir of B took, not by descent but as "special occupant."

Today, the interest in the property between the death of B and that of C, passes to the successors to B's estate as if it were personal property. Also, since the life estate is alienable, the life tenant can convey the estate, thus giving the life tenant's grantee an estate *pur autre vie*. However, the life tenant cannot (under the common law doctrine of tortious feoffment,[22] unless the life tenant is granted a power in addition to the life estate), convey a greater estate than the life tenant owns.[23]

Suppose B has a life estate and conveys to C. Since B cannot create an estate in C greater than the estate B has, C has an estate for the life of B. If B dies in C's lifetime, C's estate ends and the property reverts to B's grantor. If C dies in B's lifetime, C's estate succeeds to the property until B dies. Alternatively, suppose B, who has a life estate, conveys to C for life. Here, C has an estate that terminates upon the death of C or the death of B, whichever first occurs. If B dies first, C's estate ends and the property reverts to B's grantor. If C dies first, the property reverts to B, who by conveying to C for C's life, retains a reversion for life. Then at B's later death, the property reverts to B's grantor.

22. A conveyance of a greater estate than the grantor had.

23. See Restatement of Property § 151.

8. COMMON LAW LIFE ESTATE BY DOWER

PROBLEM 5.11: O conveys Blackacre in a common law jurisdiction to "H and his heirs." H has a wife, W. H dies. (a) What estate does W have? (b) What are the characteristics of this estate?

Answers and Analysis

(a) At common law upon the death of her husband a widow was entitled to a life estate in one third of all lands of which her husband was seised in fee simple or in fee tail at any time during the marriage. The conveyance gave H a fee simple estate of which H was seised during the marriage. Accordingly, W acquired an estate of dower in Blackacre.

(b) The right of dower at common law is limited to a particular person and to specific estates. First, it is limited to an actual wife and is not available to one who has been divorced from H. Since the husband must have been seised of an estate that was capable of being inherited by issue of the marriage in order for his widow to be entitled to dower, a widow could not, at common law, claim dower in land in which her husband had a life estate, an equitable estate only, a joint tenancy with right of survivorship with another, or in which he had a reversion or remainder expectant upon an estate of freehold. Likewise, since the estate had to be capable of inheritance by issue of the marriage, a wife could not claim dower in lands her husband held in fee tail special with another woman. Of course, dower did not attach to the husband's personal property.

The widow's right to dower cannot be defeated by any conveyance by the husband even to a bona fide purchaser for value, unless the wife joins in the conveyance or releases dower. While the husband is living, the wife's dower is said to be inchoate but becomes choate upon the husband's death if the wife survives. Modern statutes in the United States frequently modify the dower right and change considerably the rights of a married woman in her husband's property. In fact, the trend is to abolish dower, even in name, and to substitute for dower an elective or statutory share in the deceased husband's estate.

Generally, an elective or forced share equals some percentage (e.g., one-third) of the value of all real and personal property owned by the deceased spouse at the time of death. Thus, unlike common law dower, the spouse's share also extends to personal property. On the other hand, in many states the share attaches only to property owned at death. This is unlike the common law where dower attached to real property owned at any time during the marriage.

Under these modern statutes, typically no measure of protection is provided a surviving spouse against lifetime transfers of property that have the effect of reducing the value of decedent's property owned at death. Most states, concerned by the inequities that could result to a surviving spouse by lifetime transfers of property, have by statute or judicial decisions adopted rules which, under certain circumstances, permit the surviving spouse to reach assets transferred away during the marriage in whole or partial satisfaction of a forced share.

9. COMMON LAW LIFE ESTATE BY CURTESY

PROBLEM 5.12: O conveys Blackacre in a common law jurisdiction "to W and her heirs." W has a husband, H, by whom W has a child, X, now living. W dies. (a) What estate does H have? (b) What are the characteristics of this estate?

Answers and Analysis

(a) H has a life estate in all (not in one-third as the wife had with dower) of the wife's lands by curtesy.

(b) While dower existed only for the wife, curtesy was solely for the husband. Four requisites were essential to curtesy in H. (1) H and W must be legally married. (2) W must be actually seised of the land in either fee tail or fee simple. (In this problem W had a fee simple estate). H could not have curtesy in W's reversions or remainders because she was not seised of these. Likewise, H could not have curtesy in lands which W held in trust for others. But H did have right to curtesy in equitable estates in fee held for W. (3) W must have a child by H who is born alive during the marriage and capable of inheriting W's estate. In this problem, X is the child of H and W and capable of inheriting from W. (4) The wife must predecease the husband as W did.

Curtesy was not allowed unless the issue entitled to inherit the land was actually born alive. At common law the husband acquired an estate by the curtesy initiate immediately on the birth of issue. This estate became an estate by the curtesy consummate upon the death of the wife.

The tenancy by the curtesy initiate has been gradually abolished by statute. Today, surviving husbands and wives have the same rights in each other's estate, however these rights might be denominated.

10. LIFE ESTATE BY AND DURING COVERTURE

PROBLEM 5.13: O conveys in a common law jurisdiction "to W and her heirs." W marries H. (a) What estate does H have in W's land? (b) What are the characteristics of this estate?

Answers and Analysis

(a) H has a life estate in W's property during coverture, which at common law means during the joint lives of H and W.

(b) It was said that under the common law the husband and wife were one, and the husband was the one. The wife's personality was merged in that of the husband. She was burdened with the common law disabilities including inability to contract or to use or convey her property. When W, being seised of Blackacre, married H, at that instant she lost and H gained control of Blackacre. He could, during their marriage enjoy the rents and profits of the property and dispose of these for the period of marriage. Furthermore, the property could be levied upon to satisfy his debts. The husband's estate continued until the marriage was dissolved by death or divorce, (an absolute divorce at common law could be obtained only by act of Parliament and so was indeed a rarity), or until issue was born of the marriage at which time his estate was enlarged into a curtesy estate. Thus, during the joint lives of H and W, H had full control of the land of W. This right extended to land in which W had the fee, fee tail, a life estate for W's life or for the life of another. Upon the death of either H or W before the birth of issue, H's control terminated and the land returned either to W or to her estate.

Statutes have now changed the common law respecting dower, curtesy and the husband's control of the wife's property by coverture.

II. NON-FREEHOLD ESTATES

1. ESTATE (OR TERM) FOR YEARS[24]

PROBLEM 5.14: L leases Blackacre to T for the period January 1, 2000 to December 31, 2007, a period of seven years. (a) What estate does T have? (b) What are the characteristics of this estate?

Answers and Analysis

(a) T has an estate or term for years.

(b) Perhaps the most important requisite of an estate for years is that it must have definite beginning and ending dates. T's lease begins on a day certain, January 1, 2000, and ends on a day certain, December 31, 2007. It lasts for a specific period of seven years. An

24. In legal contemplation every estate for years is a smaller estate than a life estate for the reason that a life estate is a freehold in real property, whereas the estate for years (even for 1,000 years) is less than a freehold, a chattel interest. Even though a leasehold is an estate in land and immovable, it is personal property. This is not logical but purely historical.

estate for years exists even though the estate does not happen to correspond with the calendar years or does not cover one year, e.g., a lease from April 23, 2004 to January 4, 2005, is an estate for years (even though its duration is less than one year) because it has a definite beginning date and a definite termination date.

During the period of the lease T has the right to possess Blackacre and to retain all of the rents and profits from Blackacre. T will have to pay rent according to the terms of the lease and must not commit waste on the premises. Upon T's death testate or intestate during the term of the lease, the balance of the term passes to T's personal representative for distribution to those persons entitled to T's estate.[25]

No notice is necessary by either L or T to terminate this tenancy as the notice as to when the lease ends is fixed in the lease.

2. PERIODIC TENANCY

PROBLEM 5.15: L and T enter into a month-to-month lease of an apartment beginning on June 1, 2000. (a) What estate does T have? (b) What are the characteristics of this estate?

Answers and Analysis

T is a periodic tenant for month-to-month. Other periodic tenancies are the tenancy from year-to-year, week to week, or day to day.

The nature of a periodic tenancy is that the period is automatically renewed for a like period unless the tenancy is properly terminated by the giving of a notice of termination.

Requiring a notice of termination benefits both landlord and tenant. It gives the tenant a reasonable time to find new premises; if the tenant serves the notice upon the landlord, it gives the landlord a reasonable opportunity to locate a new tenant and avoid having the premises lie vacant. A notice of termination is not required to terminate a tenancy for years since the lease fixes the date of termination at the time it is executed.

The time in which the notice to terminate must be given is coterminous with the period of the periodic tenancy except that at common law a tenancy for year-to-year was terminated by the giving of only six months notice.[26] The notice must be given on or before the first day of the new term. Thus, in this problem, if L wishes to terminate the month-to-month tenancy as of September

25. The persons entitled to T's estate are T's heirs, if T died intestate, or the devisees of the leasehold as provided in T's will.

26. Some state laws reduce the notice period for a year-to-year tenancy to one month. See, e.g., N.C. Gen. Stat. § 42–14 (1984).

30, a notice must be given on or before September 1. Any notice given after September 1 would be ineffective to terminate the tenancy before September 30. If the notice were given any time between September 2 and September 30, the notice might be sufficient to terminate the tenancy as of October 31.

Death of the periodic tenant does not terminate the tenancy absent a timely filed notice of termination.[27]

PROBLEM 5.16: L leases Blackacre to T for a three year period from March 1, 1998 to March 1, 2000 at a rental of $500 per month payable in advance on or before the 10th day of each month. T holds possession beyond March 1, 2000 and on March 9, 2000 tenders $500 to L which L accepts. (a) What estate does T have? (b) What are the characteristics of such estate?

Answers and Analysis

T now has a periodic tenancy from year-to-year. Upon T holding over beyond the date fixed in the lease for the end of the term and L's acceptance of rent on the same terms as provided in the prior lease, T becomes a tenant from year-to-year.[28]

The essential characteristic of the year-to-year (or month-to-month or week to week) lease is that it is of indefinite duration, while the lease for years is for a definite and fixed term. The leasehold continues indefinitely in the absence of either party's giving the other a timely notice of termination. The terms of the old lease are implied to carry over to the year-to-year lease with the exception of the term itself.

Here, either party can terminate the year-to-year tenancy by giving notice not later than six months preceding the end of the yearly period. The notice must be given on or before September 1st and must state that the lease shall end on the following March 1st. In a month-to-month tenancy a full month notice must be given and in a week to week tenancy a full week's notice must be given. Without giving a notice to terminate, the periodic tenancy continues for another period of a year, month or week.

In the problem, T wrongfully held over beyond the term of the lease. This wrongdoing makes T a tenant at sufferance and gives L an election either to eject T or to accept rent from T and thereby

27. In Kennedy v. Kidd, 557 P.2d 467 (Okl. App.1976), where the tenant died in his apartment while under a month-to-month tenancy, the court held "that like the common law tenancy, the statutory tenancy could not be terminated merely by the death of either the lessor or the lessee; the appropriate notice would still be required."

28. If T's holding over the term is with L's consent or without wrongdoing and without agreement, then T is not a tenant from year-to-year, but a tenant at will, and L can recover only the reasonable value for the time T actually holds over the term.

create a tenancy from year-to-year. If L should give notice of termination of the lease on November 1st of a given year, this notice would be wholly ineffective to terminate the year-to-year tenancy since six months notice is required to terminate a tenancy from year-to-year. The tenancy would continue for another year following March 1st and for the following years indefinitely until either party gives notice on or before September 1st of a given year to terminate the tenancy.

The common law rule permitting a landlord to treat a holdover as a periodic tenant from year-to-year was viewed by the courts and legislatures as harsh. In order to ameliorate the effects of that rule, some states limit the period to month-to-month or construe the facts in such a way as to find that the parties intended some other form of tenancy. For example, where the holding over was not the fault of the tenant and a lease contained a provision providing double rent in the event of any holding over, it was held that the landlord was limited to receiving double rent for the period of the holding over and could not elect to treat the tenant as a periodic tenant for year-to-year.[29]

Year-to-year tenancies may also be created by express agreement or, alternatively, arise through the making of an oral lease which is void under the Statute of Frauds. For example, L orally leases Blackacre to T for five years when the Statute of Frauds provides that any lease for more that a year must be in writing. T takes possession of Blackacre and pays rent to L. Absent a governing statute to the contrary, T has an estate from year-to-year with terms impliedly carried over from the void lease.

3. TENANCY AT WILL

PROBLEM 5.17: L leases Blackacre to T for "as long as L and T wish."[30] (a) What estate does T have? (b) What are the characteristics of this estate?

Answers and Analysis

(a) T has a tenancy or estate at will which can be terminated at the will of either L or T at any time.

29. Commonwealth Bldg. Corp. v. Hirschfield, 307 Ill.App. 533, 30 N.E.2d 790 (1940) (provision stating that if the tenant failed to move at the expiration of the lease he would have to pay double the usual rent for the actual time of his occupancy was reasonable).

30. If the lease were to T for as long as T wishes, many jurisdictions take the position that T has a life estate determinable. See Thompson v. Baxter, 107 Minn. 122, 119 N.W. 797 (1909) (where the lease term was for as long as the tenant or his heirs or assigns wish, the lease was neither a tenancy at will nor a tenancy from month-to-month or year-to-year, but rather a life estate).

(b) The estate at will is always of indeterminate duration because it can be terminated by either the landlord or the tenant. But the relationship of landlord and tenant must be created with the tenant in possession of the land. This estate is not created if L gives T a mere license and it does not arise if T is a trespasser on Blackacre. This estate usually arises when no rent is involved but the fact that rent is to be paid either for a month or a year does not prevent its being a tenancy at will if that is what the parties intend.

Historically, a tenancy at will could be ended by either party without notice.[31] Some states require a "reasonable" notice period or by statute fix the notice to some stated number of days. It is also terminated by the death of either party or by the commission of voluntary waste by the tenant because it terminates the mutual concurrence of the wills of the parties. The estate at will is the lowest form of chattel interest in land and is not assignable.[32]

4. TENANCY AT OR BY SUFFERANCE

PROBLEM 5.18: L leases Blackacre to T for two years, the term ending April 30, 2001. T continues in possession after April 30, 2001 without L's consent. (a) What estate does T have? (b) What are the characteristics of such an estate?

Answer and Analysis

T is a tenant at sufferance but T's interest is not really an estate at all. A tenancy at sufferance arises when any tenant, for years, from year-to-year, month-to-month, or life tenant *pur autre vie* holds possession wrongfully beyond his term. In other words it is a tenant who enters rightfully but continues in possession wrongfully. Thus, the tenant at sufferance differs from a trespasser only in that the tenant's original entry was rightful. There is no relation of landlord and tenant between a tenant at sufferance and the reversioner or remainderman. If the landlord has ejected the tenant from the land, then by relation back to the beginning of the wrongful holding over, the tenant at sufferance is liable as if a trespasser from the date of the expiration of the lease, and judgment may be rendered against the tenant for mesne profits.[33]

As discussed above, at the election of the landlord the tenancy at sufferance may be transformed into a tenancy from year-to-year or month-to-month.

31. A tenancy at will is terminable by either party. If tenant alone has a right to terminate at will, tenant has a determinable life estate. See Garner v. Gerrish, 63 N.Y.2d 575, 483 N.Y.S.2d 973, 473 N.E.2d 223 (1984).

32. See Restatement of Property § 21.

33. These are profits recovered from a wrongdoer while the wrongdoer was in possession of the land.

III. CONCURRENT ESTATES

Concurrent estates are estates owned or possessed by two or more persons at the same time.

1. COMMON LAW JOINT TENANCY[34]

PROBLEM 5.19: O conveys Blackacre "to A, B and C and their heirs forever." (a) What estate does A, B and C have? (b) What are the characteristics of such estate?

Answers and Analysis

(a) The estate that A, B and C have depends upon the jurisdiction and the date of the conveyance. At early common law they would have an estate in joint tenancy with right of survivorship. Of course, the fee simple in A, B and C arises from the use in the conveyance of the words of limitation "and their heirs." The joint tenancy arises from the fact that the common law preferred joint tenancy over tenancy in common. The essence of joint tenancy is that the two or more persons named to take the property take and hold as though they together constituted one person. Each of the joint tenants is a component part of the unity, the fictitious single person. Thus, by calling on one of the joint tenants to do the feudal services, the overlord called on all as a matter of law. This reason has long since disappeared and statutes now provide that in a conveyance or devise to two or more persons, it is presumed that the grantor intended to create a tenancy in common, not a joint tenancy with right of survivorship. Under these statutes, A, B and C take as tenants in common[35] since the right of survivorship or joint tenancy is not specified in the conveyance.

34. A joint tenancy may exist among two or more persons as to any kind of an estate, fee simple, fee tail, life estate, leaseholders and chattel interests.

35. The characteristic of survivorship attendant upon a simple conveyance to two or more persons creating a joint tenancy has led to statutory changes in practically all jurisdictions. The statutes vary considerably—some simply reverse the presumption so as to favor a tenancy in common unless the conveyance or transfer clearly indicates otherwise, and others either abolish joint tenancies, especially in land, or abolish the characteristic of survivorship. Insofar as survivorship is concerned, however, it is generally possible to acquire this right if the transfer or conveyance expressly so provides, but the nature of the estate acquired will depend upon the form of the conveyance. It is possible, for example, to create a co-tenancy for joint lives with a contingent remainder to the survivor, or a cotenancy in fee with an executory interest in the survivor. In these cases the estate does not have the same characteristics as a joint tenancy. Executory interests (and contingent remainders in almost all states) are indestructible, and therefore, the nature of these estates, particularly as to the survivorship right, cannot be changed (as in a joint tenancy) by a severance of one of the four unities by any one of the co-owners. Statutes permitting joint tenancies with the right of survivorship are quite com-

(b) Joint tenants are always purchasers, that is, they always take either by deed or will, never by descent. Thus, if O, the owner of Blackacre, dies intestate leaving S and D as his only heirs, they take as tenants in common. Historically, the four unities test had to be satisfied in order to create a joint tenancy with right of survivorship. These are the unities of: (1) *time*—the tenants take their interests at the same moment, (2) *title*—the tenants acquire their interests from the same source, the same deed or will, (3) *interest*—each must have the same identical interest as every other joint tenant, and (4) *possession*—the possession of each is the possession of all and the possession of all is the possession of each, for, after all, they all constitute a single "person."[36] Joint means oneness and in this problem A, B and C constitute one person and each owns the whole of Blackacre. A owns "all," B owns "all," and C owns "all" of Blackacre. Each does not own one third. Each owns an undivided whole. This is true regardless of the number of joint tenants.

The so-called "grand incident" of joint tenancy is the right of survivorship. This means that if A dies without having conveyed A's interest during A's lifetime, the survivors, B and C, own the whole; if B dies first, then A and C own the whole and if C dies first, then the survivors A and B own the whole. And, if A and B die without having conveyed their interests in Blackacre, C, the survivor, owns all of Blackacre. If C owns Blackacre at C's death, it passes through C's estate to C's heirs or devisees. Technically, the surviving joint tenant owns the whole because the deaths of A and B merely extinguished their interests in Blackacre. C, the survivor, is not inheriting any interest from either A or B.

A joint tenancy is destroyed by any act which destroys one of the four unities. For example, suppose A conveys "to X and his heirs an undivided one-third interest in Blackacre." Here is where logic breaks down. A has both a right and power to dispose of what A did not own. As a joint tenant A owned all of Blackacre jointly with B and C. Yet here A conveys to X a fractional one-third interest. What are the effects of this conveyance? First, B and C as to each other remain joint tenants of a two-thirds interest in Blackacre with the four unities still present as between them. X, on the other hand, cannot be a joint tenant with B and C because X got title from a different deed than did B and C and at a different

mon as to certain types of personal property, such as bank accounts and shares of stock. The law of each jurisdiction must be consulted. See Powell on Real Property ¶ 616.

36. Possession by one co-tenant (joint and tenant in common) is not wrongful as against the other co-tenants who are not in possession so long as the tenant in possession does not exclude the others. If one co-tenant enters into possession of the property, that co-tenant is not liable to pay the other the property's reasonable rental value. Spiller v. Mackereth, 334 So.2d 859 (Ala. 1976). But see McKnight v. Basilides, 19 Wash.2d 391, 143 P.2d 307 (1943)(minority rule to the contrary).

time. Thus, the unities of time and title are both broken. As to X's undivided one-third interest, X is a tenant in common on one hand, with B and C being a tenant in common of the two-thirds interest on the other, although at the same time B and C remain joint tenants between themselves as to their two-thirds interest.[37]

Suppose, A, B, and C agree among themselves to partition Blackacre. A takes the north one-third, B takes the middle one-third, and C takes the south one-third. This partition destroys the unity of possession and each one now owns and possesses a divided part of Blackacre, alone and individually. Each is a tenant in severalty of the portion which each is given in the partition.

Suppose A did not convey any interest in Blackacre to X and A, B, and C did not partition Blackacre. Rather, A dies survived by B and C. In A's will A purports to devise A's one-third of Blackacre "to X and his heirs." X takes nothing for the reason that, upon A's death, the survivorship feature of the joint tenancy becomes effective and B and C as survivors own the whole of Blackacre. In other words, a joint tenant can sever a joint tenancy by conveyance but not by will.

The four unities test made it impossible at the common law for a husband who owned Blackacre in fee simple to convey the property to himself and his wife as joint tenants with right of survivorship. This could not be done because husband and wife would not have acquired their interests at the same time. In order to accomplish this transfer, the husband could convey to a straw person who would then reconvey to the spouses as joint tenants with rights of survivorship. Most states have eliminated the need to use the straw.

If spouses who hold a joint tenancy divorce, their estate typically becomes a tenancy in common.

2. TENANCY BY THE ENTIRETY

PROBLEM 5.20: G conveys Blackacre "to H and W (husband and wife) and their heirs." (a) What estate do H and W have? (b) What are the characteristics of this estate?

Answers and Analysis

(a) H and W have a tenancy by the entirety in those jurisdictions that recognize this estate.

(b) Tenancy by the entirety is a species of joint tenancy. This estate adds a fifth unity to the four unities of the joint tenancy—

37. Because the interest of a joint tenant is alienable, it can be levied upon by the creditors of any joint tenant.

the unity of marriage. This tenancy can exist only between husband and wife, who are considered as one person. In common with the joint tenancy, upon the death of the first tenant by the entirety, the survivor owns the whole of the property. It is created by deed or will and not by descent. Unlike the joint tenancy, however, neither spouse can voluntarily dispose of his or her interest in the property. Rather, H and W must join in any conveyance. Thus, a creditor of either spouse cannot levy on the spouse's interest in the property owned by the entirety unless local law provides to the contrary.[38]

Divorce destroys the unity of person and the tenancy by entirety. The effect of divorce is to make H and W tenants in common if the policy of preferring this tenancy over a joint tenancy is followed in the jurisdiction. In some states, however, the divorced couple hold as joint tenants to preserve the survivorship feature.

The tenancy by the entirety is not recognized in many states because it is viewed as an estate inconsistent with the policies underlying Married Women's Property Acts which were intended to give women management and administrative control over their property.

3. TENANCY IN COMMON

PROBLEM 5.21: G conveys Blackacre to "A, B and C and their heirs each taking a one-third interest therein." (a) What estate do A, B and C have? (b) What are the characteristics of this estate?

Answers and Analysis

(a) A, B and C take Blackacre as tenants in common. While at common law a conveyance to two or more persons presumptively created a joint tenancy, a tenancy in common could be created when this was the clearly expressed intention as appears in this conveyance by the words, "each taking a one-third interest therein." While at common law a joint tenancy was preferred over tenancy in common, the reverse is true under state statutory provisions which generally provide that a conveyance to two or more persons creates a tenancy in common unless it is shown that a joint and not a common tenancy is intended.

(b) Tenancy in common exists when a distinct undivided fractional share is given to each tenant individually. This is true even

38. See Sawada v. Endo, 57 Hawaii 608, 561 P.2d 1291 (1977) (victim cannot set aside conveyance by tenants by entirety for purpose of avoiding paying judgment since tenancy by entirety not reachable for payment of tenant's debts). In *Sawada*, the court also categorized the various state positions on the recognition of tenancies by the entirety, and where they exist the various positions on whether the estate could be subject to the claims of creditors.

when the tenants take similar interests at the same time under a single deed or source of title. Only one unity, that of possession, is required for a tenancy in common. It means that the possession of one tenant is the possession of all. But, unlike the joint tenancy with right of survivorship, the interests of the tenants need not come from the same source, nor at the same time, and their respective interests may be quite different. For example, A, B, and C may be tenants in common when A has only a life estate in one-third with remainder to R, B may have a fee in an undivided one-sixth and C a fee in an undivided half of Blackacre. Further, A may have received the interest by deed and B and C by descent. Tenants in common take equal shares unless the deed or circumstances indicate otherwise. No survivorship exists in a tenancy in common, and each tenant has the right and power to dispose of the tenant's share or any portion thereof by deed or will, and, if the tenant in common dies intestate, the tenant's share descends to the tenant's heirs. The tenancy in common is destroyed either by partition or by purchase when the entire title is owned in severalty by one person.[39]

IV. FUTURE INTERESTS:

1. REVERSION

PROBLEM 5.22: O, who owns Blackacre in fee simple absolute, conveys Blackacre to B for life. (a) What estate does O have? (b) What are the characteristics of this estate?

Answers and Analysis

(a) O has a reversion in Blackacre.

(b) A reversion is the residue left in a grantor who transfers an estate which is smaller than the estate which she had. It arises merely as a matter of simple subtraction. O owned a fee simple absolute but conveyed only a life estate to B. O has an interest left, which is a reversion. The seisin passes to B for B's life. B's life estate terminates automatically at B's death and the seisin reverts to O, the grantor, or if O is dead, through O's estate to O's heirs or devisees.

If prior to B's death O had conveyed the reversion to "X and her heirs," then upon B's death the seisin passes to X in fee simple absolute. A reversion always is retained by the grantor who has transferred less than he has.[40]

39. See In re Horn's Estate, 102 Cal. App.2d 635, 228 P.2d 99 (1951).

40. In some cases, however the reversionary interest is labeled either a possibility of reverter or right of entry for condition broken (power of termination). See ch. 6, § 6.2; ch. 7, §§ 7.3; 7.4.

A reversion is a future interest. Thus, the grantor is not entitled to the present use and enjoyment of the property until B's life estate terminates. A reversion always is a vested interest in the transferor, and the transferor can dispose of it either by deed or will.[41]

2. POSSIBILITY OF REVERTER

PROBLEM 5.23: O, who owns Blackacre in fee simple absolute, conveys Blackacre "to B and his heirs for so long as the property is used for courthouse purposes." (a) What interest does O have? (b) What are the characteristics of this interest?

Answers and Analysis

(a) O has a possibility of reverter.

(b) A possibility of reverter is an interest which is retained by the grantor who conveys a fee simple determinable.[42] B is granted a fee simple determinable. It is true that when a fee simple absolute is granted, there can be nothing left in the grantor. This estate will last forever. How long will B's determinable fee in this case last? The answer is found in the very words of the grant, "for so long as the property is used for courthouse purposes." This estate may last forever but it is also possible that the estate will end should B or B's successors fail to use the premises as a courthouse. If that happens B's estate terminates automatically. The possibility that B's estate may revert to O is what is left in O and it is this interest that is called a possibility of reverter.

At common law O's possibility of reverter, standing alone and not attached to a reversion, was inalienable.[43] On the other hand, it was descendible. Today, most jurisdictions take the view that the possibility of reverter is both alienable, devisable, and descendible.[44] Some jurisdictions, however, limit the transferability of these interests.[45]

41. See 1 Am. L. Prop. § 4.16 at 432 (A.J. Casner, ed. 1952); Rest. § 154.

42. It was also the estate retained by a grantor of a fee simple conditional, the predecessor estate to the fee tail that was abolished with the enactment of De Donis.

43. See 1 Amer. Law Prop. § 4.70 (A.J. Casner ed. 1952).

44. See Restatement of Property § 159a; Collette v. Town of Charlotte, 114 Vt. 357, 45 A.2d 203 (1946) (where a portion of a farm was conveyed to the city provided that the land was used only for school purposes with a possibility of reverter, and later the entire farm was conveyed to a third party, the possibility of a reverter resulting from the creation of a determinable fee is alienable).

45. See Powell on Real Property, ¶ 281. Mahrenholz v. County Board of School Trustees of Lawrence County, 93 Ill.App.3d 366, 48 Ill.Dec. 736, 417 N.E.2d 138 (5th Dist.1981).

3. RIGHT OF RE-ENTRY FOR CONDITION BROKEN OR "POWER OF TERMINATION"

PROBLEM 5.24: O, who owns Blackacre in fee simple absolute, conveys Blackacre to B and his heirs but if at any time the premises are not used for courthouse purposes, then O shall have the right to re-enter and terminate B's estate. (a) What interest does O have? (b) What are the characteristics of this interest?

Answers and Analysis

(a) O has a right of re-entry for condition broken or "power of termination."

(b) A right of re-entry for condition broken is an interest retained by a transferor who has conveyed the property subject to a condition subsequent. In this case, B is granted a fee simple subject to an express condition that B's estate may be terminated upon the happening of two things: (1) the property is no longer used for courthouse purposes; and (2) O, or O's successors, elects to terminate B's estate and does those acts of re-entry as are necessary to accomplish a termination. Either O's re-entering of the land with intent to terminate B's estate or O's bringing an action for this purpose terminates B's estate. Failure to do either for a long period of time after the condition is breached may constitute a waiver of the right or conditions may estop O from asserting the right or exercising the power.

This right of re-entry is descendible and can be exercised by O's heirs, but at common law it was not alienable inter vivos if not attached to a reversion. This followed from the law's abhorrence of forfeitures. The exercise of this right or power was and still is not favored by the courts. Some courts hold an attempt to convey the right extinguishes it. Statutes in some jurisdictions permit the inter vivos transfer of a right of re-entry. When such a right is attached to or incident to a reversionary interest, it is transferable. For example, suppose O conveys Blackacre to "B for life but if B sells liquor on the premises then O or his heirs have the right to re-enter and terminate B's estate." O then conveys her reversion including the right of re-entry to C and his heirs. In this case the right of re-entry would pass to C as an incident to the reversion and C could exercise the power of termination. This would also be true if the transfer was by will.[46]

Notice carefully the distinction between the "right of re-entry for condition broken" or "power of termination" on the one hand,

46. See Restatement of Property §§ 160, 161.

and the "possibility of reverter" on the other. It is a question of intention and construing the words of the grant. Compare "O to B and his heirs so long as no liquor is sold on the premises" and "O to B and his heirs but if liquor is sold on the premises then O shall have the right to re-enter and terminate B's estate." In the former O has a possibility of reverter and in the latter, O has a right to re-enter. In both cases, B has a fee simple that might last forever. But in the former, B's estate will come to an end automatically if liquor is sold on the premises because that is as long as the estate is to last. In the latter, B's estate will not come to an end automatically even though B sells liquor there. There must be an affirmative act on O's part to terminate B's estate. O may or may not act. But if O does act, it will cause a forfeiture of the balance of B's fee. If O does not act, then B's estate continues even though B has breached the condition subsequent.

Where the terms of the conveyance are ambiguous as to whether a fee simple determinable or a fee simple on condition subsequent has been created, there is a judicial preference for finding a fee simple on condition subsequent, particularly if a forfeiture can be avoided because the grantor failed to retain a power of termination.[47]

A distinction should exist between the possibility of reverter and the right of entry for condition broken with respect to when the statute of limitations runs on a cause of action for possession as against an adverse possessor. For example, if O conveys Blackacre to B and his heirs so long as liquor is not served on the premises, B's estate automatically terminates if liquor is sold on the premises and O's possibility of reverter immediately ripens into a fee simple absolute. Accordingly, any continued possession of Blackacre by B is wrongful as against O who has a cause of action for possession as soon as liquor is sold on the premises. If O fails to bring that action within the statutory period, B's possession should ripen into title by adverse possession.[48]

But if O conveys Blackacre to B and his heirs provided that if liquor is sold on the premises O may re-enter, the mere sale of liquor on the premises does not give O a right of possession. Rather, O must first exercise the right of entry. Only if O were to exercise the right and B refused to surrender possession to O, would B's continued possession be wrongful. Thus, until such refusal, O should not have cause of action of possession. Not all

47. See 2 Powell on Real Property ¶ 188.

48. Arguably, since B's entry was rightful rather than wrongful, by analogy to an adverse possession by a co-tenant, actual notice of B's sale of liquor on the premises might be required to start the running of the statute of limitations.

courts agree there should be such a difference even though such difference is conceptually warranted.[49]

Many jurisdictions have enacted statutes requiring the periodic recording by the grantor or the grantor's successor of a notice of intent to enforce either a possibility of reverter or right of entry for condition broken.[50] Typically, these statutes provide that if this notice is not recorded, the estate is terminated after a period of time. Jurisdictions are divided on the constitutionality of these statutes.[51] Other states have statutes that bar enforcement of these interests unless an action is brought within a fixed period following the happening of the limitation or condition.[52]

4. VESTED REMAINDER

PROBLEM 5.25: O, who owns Blackacre in fee simple absolute, conveys Blackacre to "B for life, and then to C and his heirs." (a) What estate does C have? (b) What are the characteristics of such estate?

Answers and Analysis

(a) C has a vested remainder. When it becomes possessory in either C or C's successors, it will be a fee simple absolute.[53]

(b) It should be noticed first that O, who had a fee simple absolute, granted the entire estate in part to B and in part to C. Thus, O retains no interest in Blackacre. B has a life estate. This is a freehold estate and thus B has seisin. B's life estate is the "particular estate of freehold" which supports C's remainder. Every remainder must be preceded by a particular estate of freehold—either a life estate or a fee tail.

At common law, if O granted a fee simple to B, O could not also grant a remainder in fee simple to C because there would have been

49. See 1 Amer. L. Prop. § 4.9 at 424 (A.J. Casner ed. 1952); Bergin & Haskell, Preface to Estates in Land and Future Interests 61–62 (2d ed. 1984).

50. See, e.g., Iowa Code Ann. § 614.24 (1989).

51. Compare Presbytery of Southeast Iowa v. Harris, 226 N.W.2d 232 (Iowa 1975), cert. denied 423 U.S. 830, 96 S.Ct. 50, 46 L.Ed.2d 48 (1975) (where a church acquired title to land and asserted that the defendant's reversionary interest extinguished because of their failure to abide by statutory recording requirements, the court held that a retrospective application of a statute permitting extinguishment of an existing reverter interest in the absence of a recording does not render the statute unconstitutional per se); Board of Education v. Miles, 15 N.Y.2d 364, 259 N.Y.S.2d 129, 207 N.E.2d 181 (1965) (extinguishment of title for failure to re-record is an unconstitutional impairment of vested rights). For further discussion, see Ch. 14.

52. See, e.g., Ill. Rev. Stat. ch. 110, §§ 13–102–3 (1985).

53. Just as restraints on the alienation on a fee simple are invalid, so too are they invalid on remainder interests. Thus, in Hankins v. Mathews, 221 Tenn. 190, 425 S.W.2d 608 (1968) the court held a forfeiture restraint limited to 10 years invalid.

nothing left in O to be granted over. Thus, it is said that a remainder in fee simple could not follow a grant made in fee simple or a fee simple could not follow upon a fee simple. Also, at common law the remainder was the only future estate which could be granted to a person other than the grantor or his heirs. In addition, a remainder could become possessory only when the preceding particular estate of freehold came naturally to its end. This meant that the preceding estate came to an end upon the happening of a limitation.[54] The remainder could not cut short the preceding particular estate. In this problem, C's future interest becomes possessory upon B's death.[55]

Cryptically, today a remainder can be defined as a future interest in a transferee that is capable of becoming possessory immediately upon the termination of a preceding life estate. All remainders must fall into one of four categories. These are: (1) indefeasibly vested remainders, (2) vested remainder subject to open or partial divestment, (3) vested remainder subject to complete divestment, and (4) contingent remainders.

A remainder is indefeasibly vested when it is limited in favor of a born and ascertained person and is not subject to the happening of any conditions. C's remainder is vested because C is in being, and the interest conveyed to C is not subject to the happening of any conditions. In other words, C's future interest will, in all certainty, become possessory immediately upon the termination of B's life estate. Because C has a future right to possession, C's estate is classified as a future estate.

If C dies before B, C's interest will not become possessory in C. Nonetheless, C's interest will in all events become possessory upon B's death. If C survives B, C's interest becomes possessory in C. If C dies before B, C's vested remainder passes through C's estate to C's heirs or devisees. Similarly, C may convey it during C's lifetime.

There could be as many remainders at common law as the grantor saw fit to create subject to the limitation that a fee simple could not follow a fee simple. Thus O, fee simple owner of Blackacre, could convey to "B for life, C for life, D for life, E for life, then to F and his heirs." All except B had vested remainders but if E

54. An exception to the rule applied to the future interest following a fee simple determinable. The future interest following a fee simple determinable was a shifting executory interest. This was consistent with the rule that a fee simple could not follow a fee simple but inconsistent with the rule that remainders followed estates that terminated naturally upon the happening of a limitation.

55. If the case were, "O to B for life but if B marry X, then to C and his heirs," C's estate could not be a remainder and would be void at common law because it would, in case B married X, cut short B's life estate. After the Statute of Uses, C's future interest would be valid as an executory interest.

should predecease B, then E would never enjoy the possession of the property. It is vested, however, if the person or class to take is certain and the estate is definite.

In each of the following illustrations C has a vested remainder:

1. O conveys to "B for life, and then to C for life." C has a vested remainder for life; O has a reversion.

2. O conveys to "B for life, and then to C and the heirs of his body." C has a vested remainder in fee tail at common law and O has a reversion.

3. O conveys to "B for life, and then to C and her heirs." C has a vested remainder in fee simple; O has nothing.

4. O conveys to "B for life, then to X for life if X marries Y, then to C and his heirs." C has a vested remainder in fee simple; X has a contingent remainder for life. It is contingent upon X marrying Y.[56] O has nothing.

5. O conveys to "B and the heirs of his body and then to C and his heirs." Where the fee tail estate is valid, C has a vested remainder in fee simple. It becomes possessory upon the natural end of B's fee tail estate which, if it ends, ends as a result of the happening of a limitation, not a condition. On the other hand if O conveys to B and his heirs so long as liquor is not sold on the premises, then to C and his heirs, C does not have a vested remainder, although conceptually C should. C should have a vested remainder because it follows on the heals of an estate that, if it ends, ends naturally upon the happening of a limitation. But, for historical reasons C's interest is classified as a shifting executory interest. Every system needs an exception, and this is one of them.

A vested remainder in fee simple cannot follow another vested remainder in fee simple or a contingent remainder in fee simple. It can follow a vested remainder for life and a vested or contingent remainder in tail when such estates were recognized.

5. VESTED REMAINDER SUBJECT TO OPEN OR PARTIAL DIVESTMENT

PROBLEM 5.26: O conveys Blackacre to B for life, then to C's children. At the time of conveyance C and one child of C, named D, are living. (a) What does C's children have? (b) What are the characteristics of this estate?

56. A vested remainder in fee could follow on the heels of a contingent remainder for life since the two estates were not of the same quality.

Answers and Analysis

(a) C's children have a vested remainder subject to partial divestment or subject to open.

(b) A vested remainder subject to partial divestment or subject to open is a remainder that is limited in favor of a class of persons. A class is a group of persons collectively described such as children, brothers, sisters, nieces, nephews, grandchildren, etc. In order for a class gift to be vested, there must be at least one living member of the class and there must be no conditions precedent attached to the gift. In this problem, C has one living child, D, and there are no conditions precedent.

The nature of the class gift that is vested subject to open is that until the class gift closes, new members can join the class but no member who joins the class can fall out of the class. If a new member joins the class, the interest of each previous class member is diminished but never eliminated. For example, if C has another child, E, then D's interest is reduced from 100% to 50%. If a third child joins the class, then the 50% interests of D and E are reduced to one third. Once the class closes, the members of the class have a vested remainder and the interest of each member of the class can no longer be diminished.[57]

6. VESTED REMAINDER SUBJECT TO COMPLETE DIVESTMENT

PROBLEM 5.27: O, who owns Blackacre in fee simple absolute, conveys Blackacre to "B for life, then to C and his heirs but, if X marries Y, then to X and his heirs." (a) What does C have? (b) What are the characteristics of this estate?

Answers and Analysis

(a) C has a vested remainder subject to complete divestment.

(b) A vested remainder subject to complete divestment is a remainder that is limited in favor of a born or ascertained person or is limited in favor of a class of persons which class is vested subject to open. However, the remainder is subject to the happening or non-happening of a condition subsequent. Upon the occurrence or non-occurrence of the condition, the remainder may not become possessory, or, if the remainder had already become possessory, the interest might not remain possessory in infinity. In this problem, C's remainder is subject to the condition subsequent of X marrying Y. If this condition fails to occur before B dies, then upon B's death C's vested remainder subject to complete divestment becomes a possessory fee simple estate. If thereafter X marries Y, then C's fee

57. On class closing rules, see Problem 7.09, ch. 7.

simple estate is divested in favor of X whose future interest (a shifting executory interest) becomes a possessory fee simple absolute. If X and Y never marry, X's shifting executory interest ends and C's estate becomes a fee simple absolute. Alternatively, if X marries Y during B's lifetime, C's vested remainder is divested and X's future interest (a shifting executory interest) becomes a vested remainder. Then, upon B's death, X's estate becomes possessory as a fee simple absolute.

7. CONTINGENT REMAINDER

PROBLEM 5.28: O, who owns Blackacre in fee simple absolute, conveys Blackacre to "B for life, then if C survives B, to C and his heirs." (a) What interest does C have? (b) What are the characteristics of this interest?

Answers and Analysis

(a) C has a contingent remainder in fee simple.

(b) A contingent remainder is a remainder: (1) limited in favor of an unborn person, (2) limited in favor of an unascertained person, or (3) limited in favor of a born or ascertained person which is subject to a condition precedent. In this problem, the interest of C is conditioned upon C surviving B. If C survives B, then the condition is satisfied and C's interest vests in possession. If C predeceased B, then C's interest fails and upon B's death, Blackacre reverts to O, the grantor.

Because the contingency was a condition precedent, the older common law considered a contingent remainder only a possibility of acquiring an estate in the land. Thus, it was not alienable or transferable inter vivos. However, today the general rule is that contingent remainders are alienable like other future interests.

At common law contingent remainders were destructible. This meant that if the contingent remainder was subject to a contingency that had not occurred at the time the preceding life estate terminated but might occur thereafter, the remainder was destroyed when the life estate ended and the property reverted to the grantor. The rationale for this rule was that seisin could not be in abeyance. Thus, upon the life tenant's death, seisin had to pass either to the remainderman or to the reversioner. For example, suppose O conveyed Blackacre to B for life, then to C and his heirs if C attains the age of 21 years. B dies survived by C who is age 19. Since the condition precedent did not occur prior to B's death, C's contingent remainder was destroyed and the property reverted to O. While logic might have dictated that even though the property reverted to the grantor the remainderman would take the property

if the condition later occurred, this was not the case. Once the remainder was destroyed, it was destroyed forever.

The Rule of Destructibility was abolished both in England and almost all states. It probably survives in Florida.[58] Where the rule has been abrogated, if the condition occurs after the death of the life tenant, the remainder becomes possessory, thus permitting it to be effective as a springing or shifting use under the Statute of Uses.

As noted, a vested remainder subject to complete divestment is a remainder subject to the occurrence or non-occurrence of a condition subsequent. A contingent remainder, on the other hand, is a remainder subject to a condition precedent. If a transfer creates a future interest in only one transferee or in one class of transferees, then any condition attached to the gift is a condition precedent and the remainder is contingent. Thus, in both a conveyance to "A for life, then to B and his heirs if B attains age 21," and a conveyance to "A for life and if B reaches age 21, then to B and his heirs," B has a contingent remainder.

If a transfer creates a future interest in one transferee or class of transferees and then creates, alternately, another future interest in a different individual or class, the first future interest can be either a vested remainder subject to complete divestment or a contingent remainder, depending upon whether it is subject to a condition precedent or a condition subsequent. Often, and as a matter of document construction, whether a condition is a condition precedent or a condition subsequent depends upon where the condition physically appears in the instrument in relationship to the words of purchase which designate who takes the first future interest. Words of condition that precede the words of purchase are conditions precedent; words of condition that follow the words of purchase are conditions subsequent. For example, if O conveys Blackacre to "A for life, then if B reaches age 21, to B and his heirs, but if B does not reach age 21, then to C and his heirs," B has a contingent remainder because the condition of attaining age 21 precedes the words of purchase "B." If O conveys Blackacre to "A for life and then to B and his heirs, but if B does not reach age 21, then to C and his heirs," B has a vested remainder subject to being divested since the words of condition are subsequent to the words of purchase "B." Since interests are classified in the order in which they are set forth in the governing instrument, if the first future interest is a contingent remainder, then the following future interest is also a contingent remainder. If the first future interest is a

58. Blocker v. Blocker, 103 Fla. 285, 137 So. 249 (1931) (where a life tenant conveyed his life estate to A and the owners of a reversionary interest in the estate conveyed their interest to A for the purpose of merging the two estates into a fee simple estate, the court held that contingent remainders may be defeated by destroying the particular estate upon which they depend).

vested remainder subject to being divested, then the second future interest is an executory interest. As rules of construction, these rules work in most, but not all, cases.

The following conveyances further illustrate contingent remainders:

1. O conveys Blackacre to "A for life, and then to B's heirs." At the time of the conveyance B is living. Since living persons have no heirs, the remainder is limited in favor of unascertained persons and, therefore, is contingent. If B survives A, the remainder is destroyed under the common law. Today, the future interest in B's heirs would become possessory when B died. If B died in A's lifetime, the contingent remainder would become a vested remainder in B's heirs.

2. O conveys Blackacre to "A for life, then to A's children." A is childless. The remainder limited in favor of unborn persons is contingent. It would become a vested remainder subject to open upon the birth of A's first child.

3. O conveys Blackacre to "A for life, then to B and his heirs, if B survives A, but if B does not survive A, then to C and his heirs." Using the rules of construction discussed above, it would initially appear that B has a vested remainder subject to complete divestment because all of the words of condition come after the designation of B as the taker of the first of the two future interests. However, since the survivorship condition is stated twice ("if B survive A" and "but if B does not survive A."), it can be argued that O intended to create a different estate in B than would have been created if O had merely transferred to A for life, then to B and his heirs, but if B predeceased A, then to C and his heirs. This other estate in B would be a contingent remainder.[59]

8. SPRINGING EXECUTORY INTEREST

PROBLEM 5.29: O conveys Blackacre to "B for life and one year after B's death, to C and his heirs." (a) What interest does C have? (b) What are the characteristics of this interest?

59. See Fletcher v. Hurdle, 259 Ark. 640, 536 S.W.2d 109 (1976) (where the testator devised land to his granddaughter for life, then to the heirs of her body, if any, and if not then to the testator's son or his heirs and assigns, the testator created a life estate in the granddaughter, alternative contingent remainders to the heirs of her body and his son, and left in himself a divestible reversion); In re Wehr's Trust, 36 Wis.2d 154, 152 N.W.2d 868 (1967) (where a will created a trust of residue of an estate and which provided that the testator's brothers and sisters were to be life income beneficiaries and upon the death of the last surviving sibling, one-half of the remaining trust estate would pass to the testator's aunt, if living, and if dead then to her surviving descendants, and the aunt predeceased the testator survived by four unmarried daughters without issue, the court held the residuary remainder would pass to the testator's heirs under the state's statutes of descent and distribution).

Answers and Analysis

(a) C has a legal springing interest.

(b) Springing and shifting interests are termed executory interests or executory limitations. They are always created in favor of someone other than the conveyor. They are interests which cannot take effect as remainders, either because they are not supported by a preceding particular estate of freehold (life estate or fee tail) or because they take effect in derogation of an existing estate, that is they divest a vested estate.

More particularly, a springing executory interest is a future interest in a transferee that, in order to become possessory, must divest the transferor of a retained interest (called a reversion) after some period of time during which there is no other transferee entitled to a present interest which, at common law, would have been a freehold.

At common law, executory interests were invalid as legal estates until the Statute of Uses (1536). Conveyances operating under that Statute (bargain and sale deeds, feoffment to uses, and covenants to stand seised) could raise springing and shifting uses which were transformed into corresponding legal estates. Today, as in this problem, it is not necessary to first raise a use in order to create executory interests. In the problem, C's interest would fail as a remainder because a remainder had to become possessory not later than the instant B died at which time the seisin would pass to C. Under the facts there is a gap of one year following B's death before C's interest becomes possessory. During that year O's reversion takes effect in possession.

9. SHIFTING EXECUTORY INTEREST

PROBLEM 5.30: O, owner in fee simple, conveys Blackacre to "B and his heirs but if B marries X, then to C and his heirs." (a) What interest does C have? (b) What are the characteristics of such interest?

Answers and Analysis

(a) C has a shifting executory interest.

(b) A shifting executory interest is a future interest in a transferee that in order to become possessory must, upon the occurrence or non-occurrence of an event, divest a present interest

of another transferee or a vested interest of another transferee.[60] In this case, B has a present interest in fee which is divested upon the happening of a condition—B marrying X. In common with the springing executory interest, C's interest was an invalid common law estate prior to the adoption of the Statute of Uses and then was only validated if properly raised from a use. Today, of course, it is not necessary to first raise a use in order to create executory interests.

60. Two exceptions to this rule are that the future interest following the fee simple determinable and the fee simple conditional (both of which, if they terminate, terminate upon the happening of a limitation and not a condition) is an executory interest and not a remainder. These exceptions grew out of the common law prohibition of a fee on a fee.

Chapter 7

CLASSIFICATION OF FUTURE INTERESTS

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SUMMARY

§ 7.1 Types of Future Interests—Generally

1. There are five classes of future interests:

a. Reversions

b. Possibilities of reverter

c. Powers of termination, also called rights of re-entry for condition broken

The above three future interests are always in favor of the grantor.

d. Remainders

e. Executory interests

Remainders and executory interests are always created in favor of a transferee.

2. Reversions, possibilities of reverter, powers of termination and remainders were recognized by the common law as valid estates. Executory interests were recognized only in the courts of equity prior to the enactment of the Statute of Uses in 1536 as respects deeds and the Statute of Wills in 1540 as respects wills.

3. There are two types of estates, broadly speaking, with respect to rights of possession:

a. possessory estates.[1]

b. future estates. These estates are not possessory in the present. Rather the possession, use or enjoyment of the estates is postponed until a future time. The element of futurity refers not to the ownership or existence of a property interest but to the time when the estate may be possessed.

§ 7.2 Reversions

1. When a person owns an estate in land and conveys to another an estate the duration of which is less than that which the transferor owns, there is an undisposed of residue remaining in the transferor. That residue is called a reversion if the transferred estate is either a life estate, a fee tail, or a non-freehold estate.

2. Because the transferor in the conveyance simply does not deal with that undisposed of part of the estate which remains, a reversion is said to be created by operation of law.

3. Because the transferor has disposed of this entire estate in the land, there is no reversion in O in any of the following examples:

a. O, who owns Blackacre in fee simple absolute,[2] conveys Blackacre to B and his heirs,

b. O, who owns a life estate in Blackacre, conveys to B "my life estate in Blackacre,"

c. O, who owns a 50 year lease in Blackacre, assigns or conveys to B "all of my right, title, and interest in Blackacre."

4. All reversions are vested and are of two classes: (a) those which cannot be divested, and (b) those which are subject to being divested.

5. Examples of reversions which cannot be divested:

O conveys Blackacre:

a. "to B and the heirs of his body." O has a reversion in those jurisdictions which recognize a fee tail.

b. "to B for life." O has a reversion.

c. "to B for 99 (or 10) years." O has a reversion.

O, being a life tenant of Blackacre, conveys

1. See ch. 6.

2. Throughout this chapter, O will be deemed to own property in fee simple absolute unless otherwise stated.

a. "to B for 99 years." Historically an estate for years was always less than a life estate, so O has a reversion.

b. "to B for the life of B." Historically a life estate in another is always a lesser quantum estate than the life estate in the tenant, so O has a reversion.

c. "to B for such portion of my life as B continues to support me." O has a reversion.

6. Examples of reversions which are subject to being completely divested:

O, being fee simple owner of Blackacre, conveys it:

a. "to B for life, and if C pays B $100 before B's death, then to C and his heirs." O has a reversion which is subject to complete divestment if and when C pays B $100.

b. "to B for life, and two years after B's death, to C and his heirs." O has a reversion for two years after B's death. This reversion will then be divested by the executory interest in C.

7. An attempt to create a remainder in a conveyance in favor of the heirs of the grantor is ineffective under the doctrine of worthier title in those jurisdictions where the doctrine has not been abolished, and the grantor retains a reversion.

§ 7.3 Possibilities of Reverter

1. A possibility of reverter is the interest left in a transferor who conveys a fee simple determinable[3] It is a future interest that can become possessory only if the limitation attached to the fee simple determinable occurs.

2. A determinable fee is usually limited or described by the words "so long as," "until," "while" or "during."

3. An example illustrating both a determinable fee and possibility of reverter is this: O, who owns Blackacre in fee simple absolute, conveys Blackacre "to B and his heirs so long as Blackacre is used for court house purposes." B has a determinable fee simple and O has a possibility of reverter.

4. A possibility of reverter always is retained in favor of the transferor or the transferor's successors in interest.

5. Today a possibility of reverter generally is alienable, devisable, and descendible. At common law it was considered inalienable when standing alone.

3. It was also the estate retained by a transferor of a fee simple conditional prior to 1285.

6. A possibility of reverter is not subject to the common law Rule against Perpetuities because it was always viewed as vested from the moment it arose, and the Rule applies only to non-vested interests.

7. A possibility of reverter arises by implication of law from the transferor's failure to convey the interest retained, although the intention to retain this interest actually may be expressed in the governing instrument.

8. A possibility of reverter cannot be a reversion because a reversion cannot remain after the conveyance of a fee simple, even a fee simple determinable.

9. A possibility of reverter may be attached to or be an incident to a reversion. For example, O, who owns Blackacre in fee simple absolute, leases Blackacre to B for 10 years or so long as intoxicating liquors are not sold on the premises. O has a reversion with a possibility of reverter as an incident thereto. If intoxicating liquors are sold on the premises the leasehold automatically terminates and the possession reverts to O even before the end of the 10 year term.

10. The fact that the instrument says the property is to be used for one purpose only does not create a possibility of reverter; neither are express words of reverter essential to create a possibility of reverter.

11. The outstanding characteristic of a possibility of reverter is that the estate granted to the grantee automatically comes to an end and automatically reverts to the grantor upon the happening of the event named in the conveyance.

12. Examples of possibilities of reverter standing alone: O conveys Blackacre:

a. "to B and his heirs while the buildings are kept in good order and repair." O has a possibility of reverter but no reversion.

b. "to X Corporation so long as Blackacre is used for school purposes." O has a possibility of reverter but no reversion.

13. Examples of possibilities of reverter attached to or as an incident to a reversion:

a. O conveys Blackacre "to B for life during the time B personally lives on the premises." O has a reversion with possibility of reverter attached as an incident.

b. O leases Blackacre "to B for 20 years or as long as B continues to support me with food and shelter." O has a reversion with a possibility of reverter as an incident.

c. O, who has a 10 year estate in Blackacre, transfers it to B for 5 years or until intoxicating liquors are sold on the premises. O has a reversion with a possibility of reverter as an incident.

§ 7.4 Rights of Re-entry for Condition Broken, or Powers of Termination

(While these two expressions mean the same thing, the expression "power of termination" will be used here because it is modern, shorter and more accurate. As a general rule today, the owner of this future interest does not have a right to "enter" by self-help, but rather must file an action in court to have his right determined and the interest of the other party terminated.)

1. A power of termination is a future interest retained by the transferor who conveys an estate subject to a condition subsequent.

2. A power of termination always runs in favor of the transferor and his heirs. It never runs in favor of a transferee.

3. A power of termination is a power retained by the transferor to terminate a previously transferred estate if and when the condition subsequent attached to the transferred estate occurs.

4. This power never takes effect automatically even if the condition subsequent has been broken by the transferee.

5. Two things must happen for a power of termination to become effective. First, the transferor must elect to exercise the power and second, the transferor must do some affirmative act to terminate the estate in the transferee.

6. The exercise of a power of termination always causes a forfeiture of the estate of the transferee.

7. Until the exercise of the power by the transferor, the estate of the transferee continues even though the condition subsequent has been broken.

8. A power of termination is created by appropriate language in a deed or a will. Typical words creating the condition subsequent are, "provided that," "but if it should happen that," "but if," "subject to the condition that," or "in the event that."

9. A power of termination may stand alone or may be an incident to a reversion. The following examples illustrate this point.

O conveys Blackacre:

a. "to B and his heirs, but if liquor is sold on the premises O reserves the right to enter and terminate the estate." O has a power of termination which stands alone unconnected with a reversion.

b. "to B for life, provided that if liquor is sold on the premises, then I or my heirs have the right to re-enter." O has a reversion attached to a power of termination.

c. "to B for 10 years, but on the express conditions that if liquor is sold on the premises or B does not pay the rent, O may take back the premises." O has a reversion with a power of termination as an incident, which may be exercised in case of breach of either of two conditions.

10. At common law, a power of termination standing alone, unconnected with a reversion, was not alienable or transferable by deed. This inalienability rule is still in effect in some jurisdictions, but others permit a power of termination to be alienated.

11. A power of termination, standing alone, descends from the ancestor to the heir. In most jurisdictions it also is devisable and can be released to the owner of the transferred estate.

12. A power of termination attached to a reversion is alienable, devisable and descendible as an incident to the reversion.

13. In order to effectuate a power of termination at common law, the transferor had to make an actual entry upon the transferred premises. Today, the transferor makes the power effective by bringing a judicial action.

14. A transferor who fails to exercise a power of termination for an unreasonably long time after breach of the condition may be deemed to have waived the power to terminate. Other acts such as acceptance of rent after breach of condition may also constitute a waiver of the power to terminate.

15. The courts will not construe an instrument to create a power of termination unless the language to create the power is unmistakably clear. The courts are hostile to powers of termination because the effect (forfeiture) is harsh. They prefer to construe such language as creating a covenant, the breach of which gives only an action for damages.[4]

16. Equity often will give relief against forfeiture caused by the exercise of a power of termination in instances of hardship, accident or mistake.

17. A power of termination is not subject to the common law Rule against Perpetuities. It is deemed to be vested from its inception.

§ 7.5 Remainders, Vested and Contingent

1. A remainder is a future interest created in a transferee

4. See Ch. 10.

which is capable[5] of becoming possessory immediately upon the termination of the preceding estate, unless it is a fee simple estate.[6] In the creation of a remainder the following elements must be present:

a. the remainder must be limited in favor of a transferee who is someone other than the transferor;

b. the remainder must be created at the same time and in the same instrument as the prior particular estate which supports it;[7]

c. the remainder must be so limited that it can take effect as a present interest in possession immediately upon the termination of the prior particular estate; and

d. the prior particular estate must be an estate of lesser duration than the interest of the transferor at the time of the conveyance so that there can be an interest to pass in remainder.

2. At common law the particular estate which preceded and supported a remainder had to be a freehold estate, that is, either a fee tail or a life estate, but modern usage permits such prior estate to be either (a) a fee tail, (b) a life estate, or (c) an estate for years.

3. The remainder may be either (a) a fee simple, (b) a fee tail, (c) a life estate, or (d) an estate for years.

4. Remainders are classified as:

5. Some remainders will in all events become possessory; others may become possessory but also may not become possessory depending upon whether certain contingencies occur. This fact helps to explain the difference between vested and contingent remainders.

6. The word "estate" refers to freehold estates. Thus a remainder generally can only follow the termination of a life estate. Where the fee tail is recognized, a remainder can follow the termination of the fee tail.

A remainder might also follow on the heels of a term certain, at least if the future interest were not subject to the happening of conditions. For example, if O conveyed to A for ten years, then to B, B has a vested remainder. At common law this same conveyance might have been called a fee simple in B subject to a 10 year term in A. This classification followed from concerns over the concept of seisin and the fact that at common law a term certain was a non-freehold estate. By contrast, a future interest following a term certain that was subject to contingency would more appropriately have been classified at common law as a springing executory interest. Thus, if O conveyed to A for five years, then to B if B is then living, B's estate would be classified as a springing interest and not a fee simple.

7. Once created, the remainder can usually be transferred to another and will still be classified as a remainder. Likewise, if the transferor retains a reversion at the time of the creation of a life estate and later transfers the retained interest to another, the transferee of the transferor's interest is deemed to have a reversion and not a remainder.

There is some authority for the proposition that the present possessory interest and the remainder may be created in different instruments if they are created as part of the same transaction. See 1 Amer. L. Prop. § 4.29 at 547 (A.J. Casner ed. 1952).

a. vested remainders, and

b. contingent remainders.

Vested remainders include those that are:

(1) indefeasibly vested;

(2) vested subject to partial divestment (defeasance) or subject to open; and

(3) vested subject to total divestment (defeasance).

5. A remainder is always created by deed or by will and the remainderman takes as a purchaser. The remainderman might actually be a donee but is nonetheless technically called a purchaser.

6. Vested remainders have always been alienable, devisable, and descendible. At an earlier date in the common law contingent remainders were considered inalienable. Today, all remainders are considered alienable, and unless terminated by the death of the owner, are devisable and descendible.[8]

7. Every remainder that is alienable is subject to the claims of the creditors of the owner thereof.

8. A remainder cannot take effect in derogation of, that is by cutting short, the prior particular estate; it can take effect only when the prior particular estate comes to an end upon the happening of a limitation. The termination of an estate by the happening of a limitation is often expressed by the notion that the estate ended "naturally." This term distinguishes estates that end "unnaturally" by the happening of a condition.

9. At common law a transferor could create as many remainders as desired, subject, of course, to the limitation that the transferor could not dispose of a greater estate than the transferor had.

10. A vested remainder is a remainder which in all events will become possessory when the preceding estate terminates.

11. A contingent remainder has only a conditional possibility of becoming possessory when the particular estate ends and if the condition fails to occur the remainder interest does not become possessory. A remainder limited in favor of an unborn person is contingent. It is subject to the contingency of birth. A remainder limited in favor of an unascertained person is contingent. It is

8. But see, Fletcher v. Hurdle, 259 Ark. 640, 536 S.W.2d 109 (1976) (remainder contingent on an event other than survivorship implied condition on the remainderman being alive when that event occurs; therefore this remainder is not descendible or devisable). A similar rule was applied in Iowa but has recently been abrogated. See Fletcher v. Hurdle, 259 Ark. 640, 536 S.W.2d 109 (1976). See also, Schau v. Cecil, 257 Iowa 1296, 136 N.W.2d 515 (1965), superceded by Davies v. Radford, 433 N.W.2d 704 (Iowa 1988).

subject to the contingency of the person's being ascertained. A remainder limited in favor of a born or ascertained person that is subject to the happening of a *condition precedent* is also contingent upon the condition first occurring.

12. A remainder limited in favor of a class of which there is at least one living member that is not otherwise subject to any conditions precedent is classified as a vested remainder subject to open. This interest is also called a vested remainder subject to partial defeasance. A class is a group of persons collectively described, such as B's children or A's nephews and nieces.

13. A vested remainder subject to complete divestment (or defeasance) is a remainder limited in favor of a born or ascertained person or in a class that is vested subject to open but is subject to the occurrence or nonoccurrence of a *condition subsequent*. Accordingly, the remainder may not become possessory, or if it does, it may not remain possessory indefinitely.

14. At common law if an instrument could be construed to create either a vested or a contingent remainder, the construction that resulted in the creation of a vested remainder was preferred. This preference was intended to make the property more alienable since the holder of a contingent estate could not alienate the property. There is some doubt whether this preference should continue. A preference for early vesting could result in subjecting property to a death tax it might not otherwise have been subjected to and this is likely inconsistent with a grantor's intent.[9] Furthermore, the preference for early vesting is not as essential to assure the alienability of property given that contingent remainders as well as vested remainders generally are alienable.[10]

15. If an instrument can be so construed as to create either a contingent remainder or an executory interest, the construction that results in the creation of a contingent remainder is preferred.

16. A vested remainder is not subject to the Rule against Perpetuities since it is vested from the moment of its creation. A contingent remainder, however, may be subject to the Rule.

17. If a vested remainder is in fee simple, there is no reversion left in the transferor; there is always a reversion left in the transferor in case of a contingent remainder, as long as the remainder remains contingent.

9. See, e.g., In re Estate of Houston, 414 Pa. 579, 201 A.2d 592 (1964).

10. Under the Uniform Probate Code, a remainder in a trust not expressly conditioned on survivorship is impliedly conditioned on survivorship and if the remainderman dies prior to the date of distribution there is a substituted gift in the remaindermen's issue. The remainder does not pass through the deceased remainderman's estate. See Unif. Prob. Code § 2–707. This section reflects a preference for a contingent rather than a vested construction.

18. At common law, a vested remainderman has a right against the prior estate owner for waste; a contingent remainderman, suing for himself alone, has no such right.

19. A vested remainderman has a right to compel the prior estate owner to pay taxes and interest on encumbrances to the extent of the value of rents and profits; the contingent remainderman has no such right.

20. Examples of vested remainders are:

a. *Vested Remainder:*

(1) O to "B for life, then to C and her heirs." C has an indefeasibly vested remainder.

(2) O to "B and the heirs of his body remainder to C and her heirs." C has an indefeasibly vested remainder.

(3) O conveys Blackacre to B for life, then in sequence to C for life, D for life, E for life, F for life, and finally to G and the heirs of his body. B has a life estate in possession. C has a vested remainder for life. D, E and F all have vested remainders for life and G has a vested remainder in fee tail. O has a reversion. It is immaterial that any one of the vested remainders for life may never be enjoyed because a remainderman dies before the estate becomes possessory. The seisin will pass regularly to those named who are living and then revert to the grantor, O, or if O is dead the reversion will descend through O's estate.

b. *Vested Remainder Subject to Open:*

(1) O to "B for life, then to B's children." At the time of the conveyance B has one child, C. C has a vested remainder subject to open to let in later born children. C's remainder will be partially divested as each additional child who is born to B joins the class. If at the time of the conveyance B had no children, the remainder would be contingent upon birth of a child to B.

c. *Vested Remainder Subject to Complete Divestment:*

(1) O to "B for life, then to C and her heirs but if C predeceases B then to D and his heirs." C has a vested remainder subject to complete divestment.[11]

21. Examples of contingent remainders (subject to condition precedent):

a. O to "B for life, then to C and her heirs if C marries before B's death." C has a remainder contingent upon her marriage before B dies. If C marries in B's lifetime, C's

11. In this case C has a shifting executory interest.

contingent remainder ripens into an indefeasibly vested remainder.

b. O conveys to B for life, then to C's heirs. C is living. C's heirs have a contingent remainder because until C dies his heirs are unascertained.

22. At common law a contingent remainder was destroyed if at the termination of the preceding estate it was still possible for the contingency to occur. If a contingent remainder were destroyed, the property reverted to the transferor. Under this rule, every contingent remainder must vest at or before the termination of the preceding particular estate. For example, suppose O conveys to B for life, remainder to C and her heirs if C marries X. If C does not marry X before B dies, then the seisin reverts to O and C's contingent remainder is destroyed forever at common law. If C marries X but after B dies, that will not revive the irretrievably lost contingent remainder. The destructibility rule is abolished in most but not all states.[12]

§ 7.6 Executory Interests

1. An executory interest is a future interest created in favor of a transferee under the Statute of Uses (1536) or Statute of Wills (1540) in the form of a springing or shifting use which was executed into a legal estate and which could not be construed as a remainder.

2. An executory interest could not exist at common law although it was recognized in equity; at law, it could be created only after and by the authority of the Statute of Uses and Statute of Wills.

3. A shifting executory interest is a future interest created in a transferee that in order to become possessory must, upon the occurrence or non-occurrence of an event, divest a present interest of another transferee or a vested interest of another transferee. Since the preceding estate must be an estate that is divested, the preceding estate must terminate upon the happening of a condition rather than a limitation. An executory interest can take effect at the termination of a fee simple determinable or fee simple conditional where that estate is recognized. This is an exception to the general definition of a shifting executory interest because both of

12. E.g., the rule may still apply in Florida. See Blocker v. Blocker, 103 Fla. 285, 137 So. 249 (1931) (where a life tenant conveyed his life estate to A and the owners of a reversionary interest in the estate conveyed their interest to A for the purpose of merging the two estates into a fee simple estate, the court held that contingent remainders may be defeated by destroying the particular estate upon which they depend).

these estates terminate, if at all, upon the happening of a limitation, not a condition.

4. A springing executory interest is a future interest limited in favor of a transferee that in order to become possessory must divest the transferor of a retained interest after some period of time during which there is no other transferee entitled to a present freehold interest.

5. The following elements are essential to the creation of an executory interest:

a. it is always in favor of a transferee, one other than the transferor;

b. it takes effect either (1) before the natural termination of the preceding estate and, therefore, in derogation of that estate or by divesting it, or (2) after the termination of the preceding estate.

6. An executory interest always divests a preceding vested estate either:

a. of the grantor, in which case it is a springing interest, or

b. of another grantee, in which case it is a shifting interest.

7. By the better view all executory interests are alienable, descendible, and devisable.

8. An executory interest is indestructible. Out of the indestructibility of executory interests has evolved the Rule against Perpetuities.

9. If a limitation could take effect as a contingent remainder, it was construed to be a remainder and it could not take effect as an executory interest even to save the interest from destruction.[13] Of course, where, as in most states today, a contingent remainder is not destructible, the concern over whether a future interest is a contingent remainder or an executory interest usually is academic. However, the classification of a future interest as one or the other may arguably affect the validity of the interest under the Rule against Perpetuities.

10. Executory interests include (a) springing and shifting uses which are created by deed and (b) executory devises which are created by will. Executory devises are interests which are identical

13. This is known as the Rule of Purefoy v. Rogers, 2 Wms. Saunders 380, 85 Eng. Rep. 1181 (K.B. 1670). In other words, if a future interest could be construed to be a remainder, it could not be construed to be an executory interest to save the future interest from the rule of destructibility. The Rule of Purefoy v. Rogers effectively means that estates are classified today in the same manner as they were classified prior to the enactment of the Statute of Uses.

to executory springing and shifting uses except that they are created by will instead of by deed. So all executory interests are either of the springing or shifting type.

11. Equitable future interests of the springing and shifting types were enforceable in equity before the Statute of Uses. Examples:

a. O, who owns Blackacre in fee simple absolute, enfeoffed B and his heirs to the use of C and his heirs three years after this feoffment. B had a legal fee simple absolute subject to C's equitable springing use which equity would enforce three years after the feoffment.

b. O, who owns Blackacre in fee simple absolute, enfeoffed B and his heirs to the use of C for life but if C became bankrupt then to D for life. B had a legal fee simple subject to C's equitable life estate. C's equitable life estate was subject to a shifting use which equity would enforce in D's favor if C became bankrupt, thus cutting off C's equitable life estate. After the Statute of Uses these equitable future interests were converted into legal future interests, examples of which appear below.

12. Examples of legal statutory interests after the Statute of Uses:

a. Illustrating a freehold estate made to commence in futuro and divesting the vested estate of the grantor:

(1) by springing use created by deed of bargain and sale—O, who owns Blackacre in fee simple absolute, conveys "to B and his heirs, this deed to take effect three years after its date." This deed leaves the fee simple in O for three years at which time a use springs up in B and the Statute of Uses executes the use in B into a legal estate in fee simple, thus divesting the fee simple which was in O, the grantor. By this deed O held a fee simple estate subject to a springing executory interest in B. B's interest could not be a remainder because it is not preceded by a particular freehold estate in another grantee.

(2) by executory devise by will—T, who owns Blackacre in fee simple absolute, devises "to B and his heirs three years after my death" (no residuary clause in will). T dies. This will leaves the fee simple in T's heir for three years by intestate succession at which time a use springs up in B. Also, under the Statute of Wills, by analogy to uses under the Statute of Uses, the use is executed into a legal estate in fee simple, thus divesting the fee simple which was in T's heir. The heir held a fee simple estate

subject to an executory devise in B. B's interest could not be a remainder because it is not preceded by a particular freehold estate in another devisee.

b. Illustrating freehold estates made to commence in the future and following gaps in successive estates to grantees, each time divesting the vested estate in the grantor:

By springing uses by deed of bargain and sale—O, who owns Blackacre in fee simple absolute, conveys "to B for life and one year after B's death, to C for life and one year after C's death to D and his heirs." This deed leaves a fee simple in O for one year after B's death and again for one year after C's death. These are reversions. After B dies the estate reverts to O for a year and after C's death the estate reverts again to O for a year. When the year after B's death has ended, a use springs up in C for life and the Statute of Uses executes this use into a legal life estate in C. C's life estate divests O's reversion after the one year period. Then when C dies and another year has ended, a use springs up in D in fee simple and the Statute of Uses executes this use into a legal estate and gives D a fee simple in possession, thus again divesting the grantor of the reversion after one year.

The legal effect of O's deed is a life estate in B, a reversion in fee simple for a year in O subject to an executory interest in C, then a life estate in C, a reversion in fee simple for a year in O subject to an executory interest in D, then a fee simple estate in D. Neither C's interest nor D's interest in its creation could be a remainder because neither was preceded by a particular freehold estate created in the same instrument in favor of another grantee at the natural termination of which either interest could take effect.

c. Illustrating a contingent freehold interest as an executory interest following a term of years:

By a springing use by bargain and sale deed—O, who owns Blackacre in fee simple absolute, conveys "to B for 10 years then to the heirs of C in fee simple," C then being a living person. This deed gives B a legal estate for a term of 10 years followed by an executory interest in C's heirs and a reversion in O. If C dies and her heirs are determined before the end of the 10 years, then at the end of the 10 year term a use is raised in C's heirs and by the Statute of Uses this use is executed into a legal fee simple, which divests the reversion in O. If C dies after the 10 year term the same holds true. If and when C dies, the contin-

gency determining the identity of those to take under the executory interest will have happened. The use is then raised in the heirs in fee simple and the Statute of Uses executes the use into a legal estate in favor of such heirs of C and the reversion in O is thereby divested.

In short, O's deed creates a 10 year term in B, a reversion in O subject to an executory interest in C's heirs in fee simple, which executory interest is indestructible. C's heirs' interest could not be a remainder because it is not preceded by a particular estate of freehold.

d. Illustrating a future freehold interest taking effect by cutting short or divesting the vested estate of another grantee:

By shifting use by bargain and sale deed—O, who owns Blackacre in fee simple absolute, conveys "to B and his heirs but if B dies without leaving children surviving him, then to C and his heirs." This deed leaves nothing in the grantor. It gives the fee simple to B, but subject to an executory interest of the shifting type in C. Upon B's death without children surviving him, the use shifts from B to C, and the Statute of Uses executes the use in fee simple in C into a legal fee simple which cuts off and completely divests B's fee simple estate.

C's interest in this case could not be a remainder because (a) a remainder cannot be created to follow a fee simple estate, and (b) a remainder cannot cut short or take effect in derogation of a preceding vested estate.

§ 7.7 Does Classification Matter

Professor Powell has suggested at least nine situations in which the classification of an interest may be important although some of these are only of historical but of no practical interest today.[14] The principal areas in which the classification of a future interest can make a difference are:

1. *Alienability.* At common law, vested remainders were alienable *inter vivos* while contingent remainders were for the most part inalienable. Most American jurisdictions, however, hold that both vested and contingent remainders are alienable. In jurisdictions where contingent remainders are inalienable, however, creditors of the holder of the contingent interest may not be able to reach that interest in satisfaction of their claims.

14. 4R. Powell, Future Interests 13–14 (1961). See also Dukeminier, Contingent Remainders and Executory Interests: A Requiem for the Distinction, 43 Minn.L.Rev. 13 (1958).

2. *Inheritability.* At common law, both vested and contingent remainders were inheritable unless, in the case of a vested remainder subject to divestment or a contingent remainder, the nature of the contingency was such that the interest terminated at the death of the remaindermen. Thus, if O conveyed Blackacre to A for life and upon A's death to B and his heirs if B survived A, B's remainder interest was not inheritable if B predeceased A since B's death terminated that interest. Most American jurisdictions follow this rule, although at least two jurisdictions[15] hold that a contingent remainder expressly conditioned upon an event other than survivorship is impliedly conditioned on the remainderman being alive when that event occurs. In these jurisdictions, therefore, contingent remainders are not inheritable.

3. *Acceleration.* The possession of a vested remainder accelerates if the preceding life estate prematurely terminates, whereas a contingent remainder will ordinarily not accelerate upon the premature termination of the preceding estate. Thus, if O conveys Blackacre to A for life and upon A's death to B and his heirs, and prior to her death A renounces the life estate, B's vested remainder interest will accelerate and become possessory. On the other hand, if B's interest was expressly conditioned upon B surviving A, B's contingent remainder would not accelerate. However, the rule that contingent remainders do not accelerate is often avoided by first construing an instrument to determine whether any purpose would be served in light of the grantor's intent to deny an acceleration or whether anyone would be harmed by permitting an acceleration. If B's interest does not accelerate who is entitled to the possession of Blackacre until A dies?

4. *Destructibility.* At common law, contingent remainders were destructible.[16] Neither vested remainders nor executory interests were destructible.

5. *Rule Against Perpetuities.* The most important difference lies in the application of the Rule against Perpetuities to the future interest. Indefeasibly vested remainders and vested remainders in an individual or in a class which is closed from the moment of its creation or which are subject to complete divestment are not subject to the Rule. On the other hand, vested remainders subject to open, contingent remainders, and executory interests are subject to the Rule.

15. Arkansas and North Carolina.

16. See § 4.7, infra.

§ 7.8 Survivorship Contingencies

1. Survivorship contingencies can be expressed or implied.

2. An express survivorship contingency is one that appears in the governing instrument. Typically, it is evidenced by such word or phrases as "surviving" or "if [name of taker] survives."

3. An implied condition of survivorship is one that does not appear in the governing instrument but is judicially implied, typically as the result of either a rule of construction or by construing language in the governing instrument to that effect. The Uniform Probate Code may also imply survivorship contingencies at least for trusts.

4. Ordinarily a contingent remainder conditioned on an event, other than survivorship, was not also impliedly conditioned on survivorship.

5. Gifts limited in favor of "children," "grandchildren," "brothers and sisters," and "nieces and nephews" without an express survivorship condition are not impliedly conditioned on survivorship.

6. Gifts limited in favor of "heirs," "descendants," or "issue" are impliedly conditioned on survivorship.

PROBLEMS, DISCUSSION AND ANALYSIS

§ 7.2 Reversions

PROBLEM 7.1: Blackacre is located in a jurisdiction which recognizes the fee tail. O conveys Blackacre to "B and the heirs of his body, remainder to C for life." C dies. Then B dies leaving a son, X. X dies without issue and without having made any conveyance of Blackacre. O still lives. Who has the right to possess Blackacre?

Applicable Law: All reversions are vested and one is vested indefeasibly when it is absolutely certain to revert to the grantor and become an estate in possession upon the natural termination of all prior estates.

Answer and Analysis

The answer is O in jurisdictions recognizing the fee tail. O owned a fee simple estate, the largest estate one can have in land. O conveyed a fee tail estate to B, followed by a remainder to C for the life of C. At common law there could be as many remainders following the prior particular estate as the grantor wished. But, if the prior particular estate, (B's fee tail in the problem) and the remainders were all estates of lesser duration than that which the grantor had, the grantor retained a reversion. Here, B's fee tail was of lesser duration than O's fee simple absolute. Likewise, C's life estate did not absorb the remaining part of O's estate. This left O with a reversion which becomes possessory whenever the granted

estates terminate. Reversions are alienable, devisable and descendible. Thus, if O were to predecease the termination of the estates of B and C, O's reversion would become possessory in O's successors in interest.

C had a vested life estate in remainder but because C died before B and his issue, C never was able to possess or enjoy Blackacre. When B died, not having barred his entail, or O's reversion, either by fine, common recovery or deed, X became possessed of a fee tail estate. When X died without bodily issue and without barring either the entail or reversion, then the possession of Blackacre reverted (turned back) to O.[17]

PROBLEM 7.2: T devised Blackacre to "A for 15 years." There was no residuary clause in the will nor any disposition of Blackacre other than A's 15 year term. T died leaving H as her sole heir. When the 15 years following T's death had expired, A refused to surrender possession of Blackacre to H who then sues A in ejectment. May H succeed in ejecting A?

Applicable Law: A reversion vests in the conveyor, if alive, but if the conveyor is dead, then the reversion vests in her successor in interest who is the heir or devisee as to a reversion in fee simple. A reversion may follow a term of years. Where a testator's will contains no residuary clause, all of the testator's undisposed property passes to the testator's heir by intestacy.

Answer and Analysis

Yes. By T's will A was given a term of years in Blackacre. This is, a non-freehold estate. At an earlier date when a fee simple owner conveyed an estate for years, the grantor was said to have a fee simple subject to a term of years rather than a reversion. Today it is considered that the landowner has a reversion even though the term carved out of the fee simple is a non-freehold interest. When T died and the will became effective, the possessory interest in Blackacre for the 15 year term was vested in A. There was also a reversion left in someone. The reversion could not be in T who is dead and since the reversion was not disposed of by T's will, it passed to T's heirs by intestate succession. H, being the sole heir of T, received the reversion by descent. It was at that time a future interest, owned by H but not to be possessed or enjoyed until the expiration of the 15 year term. Following the end of that term the right to the possession of Blackacre reverted to H. H therefore had the right to eject A.[18]

PROBLEM 7.3: O conveyed Blackacre "to B for life, then to B's surviving children and their heirs." At the time of the

17. See Simes, 17–19; Restatement of Property § 154.

18. See Simes, 17–19; Restatement of Property § 154.

conveyance B was childless. O later deeded "all of my right, title and interest in Blackacre, to X and his heirs forever." What interest, if any, has X in Blackacre?

Applicable Law: A reversion is alienable, devisable, and descendible. Therefore, the reversioner can convey the reversion to another even though it is not a present possessory estate. A reversion that is conveyed to another continues to be classified as a reversion.

Answer and Analysis

X has a reversion in Blackacre. When O executed the first deed O created a presently possessory life estate in B and a contingent remainder in B's children who survive B. That interest is contingent on the happening of two conditions. First, because it is limited in favor of unborn persons, it was conditioned on their being born. Second, it is expressly limited to those children born to B who survive B. The quantum of these two estates—the life estate and contingent remainder—is less than the fee simple absolute O had. Therefore, O failed to convey to B and C all that O had. O retains a reversion. This reversion continues to exist in O, or O's successor in interest, until such time, if ever, that B's life estate terminates and it is determined whether B had surviving children. In other words, so long as there is a condition precedent to the vesting of the fee simple remainder in the children of B, there is a reversion. If no children survive B, then O's reversion ripens into a fee simple absolute upon B's death. If, on the other hand, a child or children of B survive B, then at B's death, the contingent remainder in fee simple ripens into a fee simple absolute in B's children and the reversion terminates. In other words, O's reversion is terminated only if B dies survived by children. Until B dies and it is determined whether B has surviving children, O has a reversion that is alienable, devisable, and descendible.

O's deed to X prior to B's death conveyed the reversion to X. This conveyance did not make X a remainderman. Rather, X became the assignee of the reversion with rights which are substantially the same as though he were a remainderman.[19] A similar result would have followed had O died owning the reversion and devising all of his estate to X. In this case, O would have bequeathed the reversion to X and if B later died without surviving children, X's reversion would have ripened into a fee simple absolute.

19. See Restatement of Property §§ 154, 159; Simes, 70; Powell on Real Property, ¶ 281.

§ 7.3 Possibilities of Reverter

PROBLEM 7.4: O conveys Blackacre "to B and his heirs for school purposes, but when said property shall no longer be used for school purposes, it shall revert to O, her heirs and assigns." O later grants to X and her heirs, "all my right, title and interest in Blackacre." Fifty years later, B ceases to use Blackacre for school purposes. X took possession. B sues X in ejectment. May B succeed?

Applicable Law: At common law a possibility of reverter unconnected with a reversion was not alienable by a deed. Today, according to the better view, a possibility of reverter can be transferred by a deed and the grantee takes the same interest as the grantor had in the property.

At common law a possibility of reverter could always be released to the owner of the determinable fee. In the event of a release, the estate of the holder of the fee simple determinable ripened into a fee simple absolute. Also, a possibility of reverter that was incident to the reversion of which it was a part could be alienated.

Answer and Analysis

No. (1) It was once argued that under the Statute Quia Emptores a possibility of reverter could not exist. Today that question is academic for it is universally held that there can not only be determinable fees but also determinable fees tail (where fees tail are recognized), determinable life estates and determinable estates for years, with consequent possibilities of reverter in each case. Had O conveyed merely "to B and his heirs" it is obvious O would have had nothing left. But when O conveyed to B for school purposes and the deed provided in substance that B's estate should last only so long as it was so used, and then it should "revert to O, her heirs and assigns," there was some interest retained in O. That interest is a possibility of reverter. Although this estate may never become possessory, it is a presently existing interest in real property which is alienable, devisable, and descendible.

(2) At common law a possibility of reverter could be released to the owner of the determinable fee to the effect that the holder of the fee simple determinable would have a fee simple absolute. Thus, if O had released O's possibility of reverter, B would have had a fee simple absolute.

(3) Had O granted "to B for life so long as used for school purposes," so that a reversion as well as a possibility of reverter had remained in O, then under the common law O could alienate the reversion; the possibility of reverter also was transferred as an incident to the reversion.

(4) For reasons that are largely obscure, the common law did not permit a possibility of reverter, unconnected with a reversion, to be alienated. Today they generally are alienable. When O executed the deed to X, O transferred the possibility of reverter to X. When Blackacre ceased to be used for school purposes, the determinable fee simple in B immediately and automatically came to an end, the possibility of reverter immediately and automatically took effect, and the fee simple estate immediately and automatically reverted to X. X is now the owner of Blackacre in fee simple absolute and has a good defense in ejectment against the whole world including B.[20]

PROBLEM 7.5: O conveys Blackacre "to B and his heirs so long as a brickyard is operated on the premises, then to X and his heirs." O died intestate leaving H as his sole heir. When the premises ceased to be used for brickyard operations, X took possession of Blackacre. H sues to eject X from the premises. May H recover?

Applicable Law: A possibility of reverter follows a determinable fee, is descendible, and is not subject to the common law Rule against Perpetuities. An executory interest is subject to the Rule against Perpetuities and if it offends the Rule, is void *ab initio*. A possibility of reverter runs in favor of the conveyor or her heirs if she dies intestate and arises by implication of law without any express words describing it as such.

Answer and Analysis

Yes. O conveyed a fee simple determinable to B. This is evidenced by the words "so long as" a brickyard is operated thereon. This estate might last forever but, on the other hand, it might not. If no interest had been created in X, O would clearly have retained a possibility of reverter and it would have become possessory automatically at the moment the premises were no longer used as a brickyard. However, the plain reading of the deed indicates that O intended to give to X any residual interest in Blackacre should the premises not be used as a brickyard. This interest is a shifting executory interest although classifying it in that manner is clearly an exception to the classification structure. It is a classification exception because if it were to become possessory it would be because of the *natural* termination of B's estate upon the happening of a limitation rather than the divesting of B's estate upon the happening of a condition.

20. See Restatement of Property § 159; Simes, 28–30, 73–75; Collette v. Town of Charlotte, 114 Vt. 357, 45 A.2d 203 (1946), which follows the Restatement.

Although O intended to create a shifting executory interest in X, that interest is void under the common law Rule against Perpetuities. That Rule voids interests that might vest[21] more than twenty-one years after the death of some life or lives in being at the creation of the interest. In this case, since B and X have inheritable interests,[22] B's successors in interest might cease to use Blackacre as a brickyard more than twenty-one years after the deaths of both B and X. If that occurred then, but for the Rule, X's interest would become possessory in X's successors in interest beyond the period allowed by the Rule. Since this event might happen, the Rule voids X's interest from the moment it was created.

The effect of voiding the interest of X is to excise it from the instrument with the effect that no interest is created in any transferee to follow the termination of B's estate. Since no interest is created in another, O retains the possibility of reverter which descended to O's heir, H. When Blackacre was no longer used as a brickyard, H was immediately entitled to possession. Therefore H can sue X to recover possession of the property.[23]

It is important to understand the nature of a possibility of reverter. It is bound up with the nature of a determinable estate. Notice in each of the following examples that each of the determinable estates comes to an end of its own limitation. This means the estate ends by the very words which describe its duration.

In some jurisdictions, statutes have been enacted requiring holders of possibility of reverters (as well as rights of entry for condition broken) to file in the local land records office a notice of intent to enforce the interest should it ever become possessory. If the holder of the interest fails to timely file such notice, the interest is barred and is no longer enforceable.[24]

(a) O conveys Blackacre "to B and his heirs until liquor is sold on the premises." When liquor is sold on the premises B's estate automatically ends because it is described to last just that long. There is no forfeiture. When B's estate ends, O's possibility of reverter becomes an estate in possession.

(b) O, being a life tenant, conveys "to B for my life or until liquor is sold on the premises." When liquor is sold on the premises B's determinable life estate per autre vie comes to an end and O's

21. In the case of a shifting executory interest following a fee simple determinable, the interest vests, for purposes of the Rule, when it becomes possessory.

22. There interests are not extinguished by their deaths.

23. See Restatement of Property § 154.

24. See, e.g, Trustees of Schools of Township No. 1 v. Batdorf, 6 Ill.2d 486, 130 N.E.2d 111 (1955) and Presbytery of Southeast Iowa v. Harris, 226 N.W.2d 232 (Iowa 1975)(holding such statutes constitutional). Contra, Board of Education v. Miles, 15 N.Y.2d 364, 259 N.Y.S.2d 129, 207 N.E.2d 181 (1965)(holding statute invalid).

possibility of reverter becomes an estate in possession because B's determinable life estate reverts to O. There is no forfeiture.

(c) O, being tenant for 10 years, conveys "to B for ten years or so long as liquor is not sold on the premises." If liquor is sold on the premises B's estate automatically terminates and the possibility of reverter left in O automatically takes effect and the 10 year term, or what is left thereof, reverts to O. There is no forfeiture.

Note

The difference in result between the last two problems is significant. In Problem 7.5 the grantor did not attempt to retain a possibility of reverter in himself, but instead attempted to create its equivalent (actually an executory interest) in a third party. Since executory interests are subject to the Rule Against Perpetuities, the particular shifting executory interest was void, and the grantor retained a possibility of reverter. In Problem 7.4 the grantor made no effort to create an executory interest in a transferee but instead retained the possibility of reverter and then in a separate instrument transferred it to a third party. The possibility of reverter is transferable and is not subject to the Rule Against Perpetuities. Therefore, the transferee of the possibility of reverter acquired such interest.

§ 7.4 *Rights of Re-entry for Condition Broken or Powers of Termination*

PROBLEM 7.6: O conveys Blackacre "to B and her heirs provided that if B does not live on the premises personally, then O has the right to eject her from the property." Two years later and while B still lived on Blackacre, O conveyed all of O's right, title and interest in Blackacre to X and his heirs. O then died testate devising all of O's interest in Blackacre to C. O's sole heir is H. Three years after O died, B leased Blackacre to M for a term of 10 years. M went into immediate possession. H advised M that M was not entitled to live on Blackacre, demanded that M surrender possession to H, and notified B that B's estate had been terminated. M acceded to H's request and H went into possession of Blackacre. C now sues H in ejectment and gives notice to B and M that he has terminated B's estate and consequently, M's interest in Blackacre. May C succeed?

Applicable Law: A power of termination can be created only in the transferor. Under the common law the grantor can devise this interest but cannot alienate it when unconnected with a reversion. It will descend from ancestor to heir.

A power of termination never takes effect automatically upon breach of the condition subsequent by the owner of the

possessory estate. Rather the owner of the power of termination must (a) elect to terminate the estate and (b) do some affirmative act towards its termination. All estates and encumbrances created by the owner of the possessory estate exist subject to the exercise of the power of termination, and if the power is exercised such estates and encumbrances are rendered void.

Answer and Analysis

The answer is yes in jurisdictions following the traditional common law. The language in O's conveyance to B was sufficient to create a fee simple on condition subsequent. Not only did O use words of condition, O also expressly reserved the right to terminate B's estate by ejecting her from the premises. It should also be noted that this power of termination was reserved only for O and not in favor of any third party. It seems clear then that B was granted a fee simple subject to a condition subsequent that if B did not live on the premises O could exercise the power of termination and reclaim the property from B.

Prior to any breach of the condition, O conveyed, or attempted to convey, this power of termination to X. This was a power of termination standing alone. There was no reversion left in O who had conveyed a fee simple estate to B, to which the right of re-entry or power of termination could be attached as an incident. At common law, and also today in some jurisdictions, a power of termination unconnected with a reversion was not alienable because to allow the transfer of what was considered a mere possibility would encourage maintenance and champerty.[25] This reason has ceased to have any practical importance in the law, but persists nonetheless. Curiously enough it has been held in some cases that even though the power of termination is not alienable, nevertheless, an attempt by its owner to transfer it results in its annihilation and that thereafter the owner of the possessory estate owns it without being subject further to the condition subsequent. There seems no proper foundation for the imposition of this penalty and the general rule is that the attempted transfer is void but the power of termination still exists and remains with the transferor.

25. The policy behind the rule of non-assignability was to prevent the stirring up of law suits. Black's Law Dictionary (1979), gives the following definitions:

> **Champerty.** A bargain by a stranger with a party to a suit, by which such third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a part of the proceeds or subject sought to be recovered. Schnabel v. Taft Broadcasting Co., Inc., 525 S.W.2d 819, 823 (Mo.App.1975). Maintenance consists in maintaining, supporting, or promoting the litigation of another.

Another explanation of the non-alienable rule was simply the lack of a remedy for the assignee under medieval law.

Applying this rule to the problem, O's conveyance to X had no effect and O still owned the power of termination. When O died O devised O's interest in Blackacre to C. Generally, it is held that a power of termination is an interest in real property which descends from the ancestor to the heir. In this problem had O died intestate this power of termination would have passed by intestate succession to his heir, H. It is also generally true that an interest which will descend is likewise subject to testamentary disposition and can be devised. This is true for a power of termination. Thus, when O devised his interest in Blackacre to C this power of termination passed to C. H has no interest in Blackacre and therefore had no right to cause the interest of M or B to terminate.

The fact that C owns the power of termination and that the owner of the possessory estate, B, has breached the condition subsequent, however, does not automatically revest the estate in the owner of the power of termination. At common law the owner of the power of termination would have to (a) elect to terminate the estate and (b) make an entry onto the premises. Today the holder of the power has to (a) elect to terminate the estate and (b) do some affirmative act towards its termination. Bringing an action in ejectment or sometimes merely giving notice have constituted such affirmative act. In this case C's bringing ejectment against H and giving notice to B and M should be sufficient affirmative acts to terminate the possessory estate and revest it in C, the owner of the power of termination. C may therefore eject H from Blackacre.

Of course, in jurisdictions where the power of termination is alienable, devisable, and descendible (which today is most jurisdictions), O's conveyance to X would be valid and X, not C, would own the power of termination. In this case, C's action against H, the party in possession, would fail because as between C and H, H has the better title based on his prior possession.[26] On the other hand, if X were to sue H in ejectment, X would prevail.

In some conveyances under which in form the grantee appears to take a fee simple on condition subsequent the grantor fails to expressly retain a power of termination. For example, suppose O transfers property to B and his heirs provided that liquor is not sold on the premises. In this conveyance O has not used the traditional language ("so long as," "while" or "during") used to create a fee simple determinable. Likewise, O has not retained a power of termination. If a court were called upon to determine the interests of O and B in the property, the court could either imply a power of termination in O or conclude that, absent the express retention of such a power, B has a fee simple subject only to

26. Tapscott v. Cobbs, 52 Va. (11 Grat.) 172 (1854).

precatory but not forfeiture language. The preference appears to be for the latter and thus B has a fee simple absolute.

One more point requires consideration. What rights did M acquire under the lease from B? When the owner of an estate subject to a condition subsequent creates estates or encumbrances on the land, all persons who take such estates or encumbrances are bound by the condition. If the power of termination is exercised, the estates and encumbrances are rendered wholly nugatory as to the owner of the power of termination, who now owns the estate as though he had never parted with it *ab initio*. Under this doctrine, when C or X, as the case may be, exercised the power of termination, he not only cut off B's estate but also effectively terminated any interest which M had in the premises.[27]

PROBLEM 7.7: O, being the life tenant of Blackacre, leases it "to B for 10 years upon the express condition that if B sells liquor on the premises or makes an assignment of the lease without O's written consent, then in either event, O, or O's successors in interest, have the right to enter the premises and terminate this lease." The rent was $100 per month, payable in advance. O then assigned all of O's right, title and interest in Blackacre to X. B then began selling liquor on the premises.

On the month following the first sales of liquor on Blackacre, B sent the monthly rent check to X for the sum of $125 instead of $100 and told X the additional $25 was because B was selling liquor on the premises. This procedure continued for a year at which time, without any consent from X, B assigned the lease to M. Thereupon, X promptly entered the premises, evicted M and notified both M and B that the lease had been terminated. B and M join in action against X to regain possession of Blackacre. May they succeed?

Applicable Law: A power of termination connected with a reversion is alienable as an incident to the reversion. When an instrument creates an estate subject to more than one condition subsequent, one may be waived after its breach, without affecting the other. The question of waiver is usually a fact question but if it is so clear that reasonable persons cannot differ, it is a question of law. Re-entry on the premises is an effective exercise of the power of termination.

Answer and Analysis

No. The provisions in O's lease to B are typical of those in many leases. When O provided that the lease was "upon the

27. See Restatement of Property § 154, 155, 159–161, 165 comment a, Illustration 5; Simes, 30–32,73, 76.

express condition" and that the lessor and his successors in interest "have the right to enter the premises and terminate this lease," it seems a condition subsequent was created with a power of termination and not mere covenants that the lessee would not do the things forbidden. A power of termination, therefore, was reserved in favor of O. This power did not stand alone. It was attached to or an incident of the reversion which O reserved because the 10 year lease was a lesser estate than A's life estate.

At early common law a power of termination, even when attached to a reversion, was not alienable. However, by the statute of 32 Henry VIII, c. 34 (1540), which is considered part of the American common law, the power of termination when incident to a reversion was made alienable. Thus, when O assigned to X, both the reversion and power of termination incident thereto, passed to the assignee, X. When B later breached the condition concerning the sale of liquor on the leased premises, X could have terminated the lease. Since X failed to do so, the lease continued. X, however, was not merely passive concerning the continuation of the lease. X accepted additional rent from the lessee who had breached the condition. The acceptance of the additional rent for the breach of the very condition in the lease constituted a waiver of such breach as a matter of law. A waiver is the intentional giving up of a known right. Whether a right has been waived is usually a question of fact, but reasonable persons would not differ on there being a waiver in this case; therefore it is a question of law. X could not exercise the power of termination for the breach of the condition not to sell liquor on the premises.

However, the condition against assignment of the lease is wholly separate and independent from the one concerning liquor and the waiver of the latter did not affect the continued efficacy of the former. When B made an assignment of the lease without the written consent of X, there was a breach of that condition subsequent. This gave X the right to exercise the power of termination. Since X elected to exercise the power, B's leasehold and all rights of the assignee thereunder were effectively terminated. Neither B nor B's assignee, M, has a right against X.

POSSIBILITIES OF REVERTER COMPARED WITH AND DISTINGUISHED FROM POWERS OF TERMINATION

SIMILARITIES

POSSIBILITY OF REVERTER	POWER OF TERMINATION
1. it is a future contingent interest in real property	1. it is a future contingent interest in real property

SIMILARITIES

POSSIBILITY OF REVERTER	POWER OF TERMINATION
2. it is always in favor of the transferor only	2. it is always in favor of the transferor only
3. it is not an estate in land	3. it is not an estate in land
4. it is descendible, will pass from the transferor as ancestor to his heir, and is devisable	4. it is descendible, will pass from the transferor as ancestor to his heir, and in most states is devisable
5. it can be released by the transferor to the owner of the determinable estate	5. it can be released by the transferor to the owner of the determinable estate
6. when attached to a reversion, it is alienable, descendible and devisable	6. when attached to a reversion, it is alienable, descendible and devisable
7. at common law but not today a possibility of reverter, standing alone and unconnected with a reversion, was not alienable	7. at common law a power of termination, standing alone and unconnected with a reversion, was not alienable (Note—this is true today in some but not all jurisdictions—see under dissimilarities)
8. it is not subject to the common law Rule against Perpetuities	8. it is not subject to the common law Rule against Perpetuities
9. the owner has no right against the owner of the granted estate for waste unless it is reasonably probable that the interest will become possessory and the threatened injury is wanton and unconscionable	9. the owner has no right against the owner of the granted estate for waste unless it is reasonably probable that the interest will become possessory and the threatened injury is wanton and unconscionable

DISSIMILARITIES

POSSIBILITY OF REVERTER	POWER OF TERMINATION
1. It always takes effect automatically upon the happening of the event upon which it is limited **This is its chief characteristic**	1. It never takes effect automatically upon breach of the condition subsequent upon which it is limited **This is its chief characteristic**
2. no affirmative act on the part of its owner is necessary to make it effective	2. to make it effective its owner must (a) elect to exercise the power and (b) must do some affirmative act to terminate the estate

DISSIMILARITIES	
POSSIBILITY OF REVERTER	**POWER OF TERMINATION**
3. it is created by implication of law when a deed or will creates a determinable estate	3. it is created only by clear and express language in a deed or will providing for a condition subsequent to the estate conveyed
4. typical words limiting the determinable estate are "until", "while", "so long as", "during"	4. typical words limiting the condition subsequent are, "but if", "provided that", "upon the express condition that", "but if it should happen that"
5. it is alienable when standing alone unconnected with a reversion	5. it is *not* alienable in many states when standing alone unconnected with a reversion
6. its operation does not cause a forfeiture of any estate	6. its operation causes forfeiture of an estate
7. it cannot be waived after the event	7. it can be waived after breach of the condition

§ 7.5 *Remainders, Vested and Contingent*

PROBLEM 7.8: O conveys Blackacre "to B for life, and upon B's death, to C and her heirs." What interest, if any, do O, B and C have in Blackacre?

Applicable Law: Every remainder (a) must be in favor of a transferee, (b) must be created at the same time and in the same instrument as the prior particular estate of freehold which supports it, (c) must be so limited that it is capable of taking effect as an estate in possession immediately upon the termination of the prior particular estate of freehold, and (d) the prior particular estate of freehold must be a lesser estate than that of the conveyor at the time of the conveyance; thus the prior particular estate must be either a life estate or a fee tail. It cannot be a fee simple.

A remainder is indefeasibly vested when it will become possessory when the preceding particular estate of freehold terminates. It is subject to no condition.

Answer and Analysis

O has no interest in Blackacre; B has a life estate and C has an indefeasibly vested remainder in fee simple, or simply a vested remainder.

(a) Since O, who owned a fee simple estate in Blackacre, conveyed away that fee simple estate by a combination of the life estate in B and the fee simple in remainder in C, there is no reversion in O.

(b) If O's conveyance to B were at common law, it would involve the ceremony of feoffment, whereby O went onto Blackacre and made livery of seisin to B for B's life. O would walk off the premises and leave B in possession, seised of a life estate. If O's conveyance were a bargain and sale deed under the Statute of Uses (1536)[28] and recited a consideration, then mere delivery of the deed to B would vest a life estate in B. The consideration in the deed would raise a use in B and the statute would transfer the legal title. In either event the conveyance would give B a valid legal life estate.

At common law every remainder had to be supported by a preceding particular estate of freehold. This particular estate could be either (1) a life estate or (2) a fee tail estate; but it could not be a fee simple estate because if the prior tenant had a fee simple estate there was nothing left to pass in remainder to the remainderman. Thus, B's life estate is sufficient to support a remainder.

(c) A future interest can qualify as a remainder if it meets the following requirements: (1) it must be in favor of a transferee who is someone other than the conveyor; (2) it must be created at the same time and in the same instrument as the particular estate of freehold which precedes and supports it; (3) it must be so limited (described) that it can take effect as a present interest in possession at (neither before nor after) the natural termination[29] of the particular estate of freehold which precedes and supports it; and (4) the prior particular estate of freehold must be an estate of lesser duration than the interest of the conveyor at the time of the conveyance so that there can be an interest to pass in remainder.

Applying these principles to C's interest clearly results in C's interest being classified as a remainder. (1) C is a transferee; (2) C's interest is created at the same time and in the same instrument as the life estate is created in B; (3) C's interest is so limited or described that it is to take effect at once or immediately upon the termination of B's life estate, that is upon B's death and, therefore, is an interest capable of becoming possessory immediately upon the termination of B's life estate; (4) The prior particular estate of freehold, B's life estate, is a lesser estate than the estate held by the conveyor at the time of the conveyance, O's fee simple. Clearly C's interest possesses all the elements required of a common law remainder. Thus, C has a remainder.

28. The Statute of Uses was enacted in 1535 and became effective in 1536.

29. Estates terminate naturally when they terminate as the result of a limitation, not a condition.

Of what class is C's remainder? It is an indefeasibly vested remainder because it is presently owned by C and is subject to no condition to becoming an estate in possession when B's life estate terminates. The termination of B's life estate is not a condition attached to C's gift. C's remainder is indefeasibly vested because nothing can defeat it.[30] If C survives B, C will take possession of Blackacre. If C conveys the remainder, then C's grantee will take possession at B's death. If C devises the remainder prior to B's death, then C's devisee take possession at B's death. If C dies intestate before B dies, then C's heir will take the possession. Thus, C's interest will in all events become possessory when B's life estate terminates in either C or C's successor in interest.[31]

PROBLEM 7.9: O conveys Blackacre "to B for life, and upon B's death, to the children of B and their heirs." At the time of this conveyance B had no child but two years later B had a child C, and thereafter had in succession children D, E, and F. After C attained adulthood, his creditor, X, levied upon and sold C's interest in Blackacre, to Y. What interest, if any, did Y take by the execution sale?

Applicable Law: A remainder limited in favor of a group of persons collectively described, typically by their relationship to a common ancestor, is subject to partial defeasance if the class is open and the gift is subject to no conditions. If the gift to the class is also subject to conditions, it either can be a contingent remainder or a remainder subject to complete divestment.

A remainder subject to partial defeasance only is called either a vested remainder subject to open or a vested remainder subject to partial divestment. With respect to this type of remainder, as the number of class members increases, the interest of each decreases proportionately and to that extent is defeated. Every remainder is alienable by its owner and is subject to the claims of creditors.

Answer and Analysis

Y took the interest which C had in Blackacre which is a variable in size, but which is at present an undivided one fourth interest in the remainder but which is subject to open if more children are born to B. It is presently at least equal to one fourth because at the time Y asserts an interest, B has four children.[32]

30. While at first blush it might be thought that the phrase "upon B's death" is a condition, in fact that is merely a linguistic restatement of the limitation that causes B's estate to end, namely, B's death. Thus, it is merely a redundancy, not a condition.

31. See Simes 19–25; Restatement of Property § 157.

32. The interest would be at least one fourth even if one of the children born to B had died since the interest of B's children is not subject to conditions

O conveyed a life estate to B followed by a contingent remainder in B's children. B's children have a remainder interest for these reasons: It is an interest that runs in favor of someone other than O. It is created in the same instrument and at the same time as B's life estate. It is to take effect, if at all, when B's life estate naturally ends. Finally, B's life estate is a lesser estate than O's fee simple when he made the conveyance. But there is at the time of the conveyance a condition precedent to the vesting of such remainder because B had no child.[33] Since the remainder to B's children was subject to the contingency of birth, it is a contingent remainder. There was therefore a reversion in O which could become possessory if B died without ever having had children.

When C was born to B, however, the contingent remainder in B's children was transformed (or changed colors). It became a vested remainder in C and any other children that might be born to B. C's birth also resulted in the termination of O's reversion. While C was the only living person entitled to share in this remainder at the time C was born,[34] the remainder interest is subject to open in favor of later born children born to B. C's remainder is also described as one subject to partial defeasance or divestment. When D was born, then C and D were owners of the remainder in fee simple, each owning an undivided one half interest therein. When E was born to B, then the estate opened up still further and C, D and E each owned an undivided one third in the remainder in fee simple. When F was born to B, there was still further division and C, D, E and F each owned an undivided one fourth interest in the remainder in Blackacre. In other words, during B's lifetime there was always the possibility that the interest of B's living children could be diminished or partially divested by the birth of more children.

But for how long was the remainder interest open to admit more members, or, to state it in more technically, when would a class gift close? A class gift is closed when no new members can join the class.

A class gift closes either physiologically when that person who can produce the members of the class dies, or, under the rule of convenience, when any member of the class is entitled to demand possession of his or her share. A person is entitled to make that demand when there is no outstanding possessory estate and with

and, therefore, is devisable and descendible.

33. The language "at the life tenant's death" or "upon the life tenant's death" is not sufficient to create a condition precedent. These phrases refer merely to the time when the future estates become possessory. Accord, Kost v. Foster, 406 Ill. 565, 94 N.E.2d 302 (1950).

34. C's interest was owned in severalty. This means that at the time of C's birth, C was the sole embodiment of the remaindermen, "B's children."

respect to the person who can make the demand there are no outstanding conditions precedent.[35] In this problem, of course, the class closes physiologically and under the rule of convenience at the same time, namely B's death. However, that is not always the case. For example, suppose O conveys Blackacre to B for life, then to C's children. If C dies during B's lifetime, the class closes at C's death physiologically. If C survives B but a child of C also survives B, then presumptively the class closes at B's death under the rule of convenience.

If B dies survived by C but C had not yet had children, the class does not close at B's death.[36] The class would clearly close physiologically no later than C's death and vest in C's then living children, if any. But, suppose that following B's death C has a child. Would the birth of C's child in C's lifetime close the class? According to the Restatement the child's birth would not close the class and the class would remain open until C's death.[37]

The rule of convenience is presumptive, so it gives way to a contrary intent.[38]

Unless the grantor or testator otherwise provides, in most states today these class closing rules apply as well with respect to adopted children. Thus no distinction is drawn between biological and adopted children.[39]

Each remainderman who is entitled to share in a class gift has an interest that is alienable. If the remainder is vested subject to open it is also devisable and descendible. Many remainders limited in favor of a class, however, are subject to a contingency of survivorship, expressly or impliedly. These remainders are not devisable or descendible if the survivorship contingency causes the deceased remainderman's interest to terminate at his or her death. For example, if O conveys Blackacre to B for life, then to C's surviving children, the interest of a child of C who predeceases B fails at his death and, therefore, is not devisable or descendible.[40]

35. See also Restatement (Second) of Property, § 26.2

36. Of course, if the common-law Rule of Destructibility applied, then in this case the remainder would be destroyed at B's death because there was then no remaindermen capable of taking possession of the property.

37. Restatement (Second) Property § 26.2((2).

38. See In re Earle's Estate, 369 Pa. 52, 85 A.2d 90 (1951).

39. cf., Restatement (Second) Property § 25.4.

40. The time when a survivorship contingency may take effect can be ambiguous. Thus, if T devises property to A for life, then to T's surviving children, and T is survived by two children, B and C, their interests are vested if "surviving" means "surviving T" but contingent if "surviving" means "surviving A." See, e.g., Browning v. Sacrison, 267 Or. 645, 518 P.2d 656 (1974) (survivorship contingency related to death of life tenant, not testator, and rejecting argument that the common law preference for the early vesting of estates required a contrary holding).

Interests that are alienable can be reached by creditors of the remainderman. Thus, in this problem C's creditor, X, had the right to levy upon C's remainder interest in Blackacre. Upon the execution sale by X the purchaser, Y, took what the debtor, C, had for the rights of the creditor are derivative. Y bought C's one fourth interest in the vested remainder but this purchased fourth interest in the hands of Y would be subject to open in favor of any child or children thereafter born to B.[41]

REVERSIONS COMPARED WITH AND DISTINGUISHED FROM VESTED REMAINDERS AT COMMON LAW

SIMILARITIES

REVERSION	VESTED REMAINDER
1. is future interest	1. is future interest
2. is preceded by an estate in possession	2. is preceded by an estate in possession
3. is not destructible	3. is not destructible
4. is transferable	4. is transferable
5. is subject to claims of creditors	5. is subject to claims of creditors
6. is vested	6. is vested
7. sometimes subject to defeasance	7. sometimes subject to defeasance
8. is an estate	8. is an estate
9. has right to possess when prior estate ends	9. has right to possess when prior estate ends
10. not subject to Rule against Perpetuities	10. not subject to Rule against Perpetuities
11. has right against prior estate owner for waste	11. has right against prior estate owner for waste
12. may force prior estate owner to pay taxes and interest on encumbrances	12. may force prior estate owner to pay taxes and interest on encumbrances
13. does not take effect in derogation of prior estate	13. does not take effect in derogation of prior estate

DISSIMILARITIES

1. is created by operation of law	1. is created by act of the parties—by deed or will
2. is always in favor of transferor	2. is always in favor of transferee, one other than transferor

41. At common law contingent remainders were not considered alienable but today, with recording statutes under which anyone can look at the records and find out what interest anyone has in land, all remainders are alienable. See Restatement of Property § 157, comment 1, illustration 2, §§ 162, 167; Simes, 19–25.

REVERSION	VESTED REMAINDER
3. there was a tenurial relationship between reversioner and holder of prior estate	3. there was no tenurial relationship between the remainderman and the holder of the prior estate

PROBLEM 7.10: O conveys Blackacre to B for life, then to C and his heirs if C survives B but if C does not survive B, then to D and his heirs. What interests are created in B, C and D?

Applicable Law: Indefeasibly vested remainders are subject to no condition; vested remainders subject to complete divestment are subject to conditions subsequent; contingent remainders are subject to conditions precedent. A vested remainder subject to divestment is one limited in favor of an ascertained person who has the right to immediate possession when the prior estate terminates, or a class of persons of which there is at least one living member even though it may be divested by the happening or non-happening of a condition subsequent. If the language of an instrument can be construed as creating either a vested or a contingent remainder, the preference at common law was for a vested remainder. On the other hand, under the rule of construction mandating that courts give effect to all the words used in a conveyance, additional words in a conveyance may suggest that the grantor intended to create an interest subject to a condition precedent rather than a condition subsequent.

Answer and Analysis

B clearly has a life estate as B's interest is expressly limited to his life. However, there is some dispute regarding the proper classification of the interests of C and D.

A contingent remainder is a remainder that is subject to a condition precedent; a vested remainder subject to divestment is a remainder subject to a condition subsequent. Thus, to distinguish the two remainders, it is imperative to know whether the words of condition are precedent or subsequent. In some dispositions, this will be immediately clear. Thus, if O conveys to B for life, and if C survives B, then to C and his heirs, C's interest in clearly conditioned on surviving B and is a contingent remainder. Likewise if O conveys to B for life and then to C and his heirs if C survives B, C's interest is also classified as a contingent remainder because it is subject to a condition precedent. While the placement of the phrase "if C survives B" differs in the two conveyances, where, as here, there is only one transferee—namely C—of a future interest, words of condition wherever they appear in the instrument are construed as conditions precedent.

Where, as in the problem, there are at least two transferees of a future interest—namely C and D[42]—the placement of the words of condition can effect the classification of the transferees' interests. To begin the analysis, compare these two conveyances:

(a). O conveys Blackacre to B for life, then, if C survives B, to C and his heirs, but if C predeceases B, then to D and his heirs.

(b). O conveys Blackacre to B for life, then to C and his heirs but if C predeceases B, then to D and his heirs.

While both these conveyances express O's intent that at B's death Blackacre should pass to C and only to D if C is dead, under standard rules of construction, the interests of C and D are classified quite differently. Interest are classified in the order in which they are set forth in the governing instrument. Thus, first B's interest is classified, then C's interest is classified, then D's interest is classified. B clearly has a life estate. C's is the next interest to be classified. Whether C has a contingent remainder or a vested remainder subject to being divested depends on whether C's interest is subject to a condition precedent or a condition subsequent. That depends on where the words of condition appear in the instrument. If they appear *before* the designation of C as a purchaser (as in (a)) they are words of condition precedent and C has a condition precedent. If, on the other hand, they appear *after* the designation of C as a purchaser (as in (b)), they are words of condition subsequent. Thus in (a), C has a contingent remainder, in (b), C has a vested remainder subject to being divested. Remember: these are merely rules of construction so courts could find that O had a different intent and classify the interests in a different manner.

Once it is determined what interest C has, it is time to classify D's interest. If C has a contingent remainder, then so does D. It meets the definition of a remainder, and it cannot be an executory interest as it does not defeat the vested interest of another transferee. On the other hand, if C has a vested remainder subject to being divested, D has a shifting executory interest because for D's interest to become possessory it must divest the vested interest of another transferee.[43]

In Problem 7.10 O conveys Blackacre B for life, then to C and his heirs if C survives B but if C does not survive B, then to D and

42. Multiple tranferees could also be classes such as C's children and D's children, or C and D's children.

43. This rule assumes the quantum of the estates of C and D are the same. For example, if O conveys to B for life, then to B's first born child and the heirs of his body, then to D and his heirs, and B is childless, B's first born child has a contingent remainder in tail, and D has a vested remainder in fee. While ordinarily a vested remainder cannot follow a contingent remainder, it can here since the quantum of B's first born child's estate is "in tail" whereas the quantum of D's estate is a "fee simple."

his heirs. Thus all the conditional words ("if C survives B but if C does not survive B") come after the designation of C. Thus, at first blush, it would seem that C has a vested remainderman. But if C's interest were so classified, it would do violence to another rule of construction. This rule is that in construing an instrument courts should give effect to all the words used. If C were to have a vested remainder subject to being divested, then C would have the same estate C would have had if O had conveyed to B for life, then to C and his heirs but if C does not survive B, then to D and his heirs. No effect would be given to the phrase "if C survives B" by that construction. If some effect is to be given that phrase, then the only choice would be to treat the double statement of the condition as evidencing an intent by O to subject C's interest to a condition precedent in which case C and D would have alternative contingent remainders. Of course, a court might also conclude that the phrase "if C survives B" is merely a redundancy and should be ignored leaving C with a vested remainder subject to being divested. If C has a vested remainder, then D would have a shifting executory interest.

The historic preference for a vested rather than a contingent construction may have made sense in the context of legal rather than equitable estate and concerns for assuring the marketability of property. On the other hand, that preference is not so clearly dictated when a future interest is created in a trust and the trustee has the power to alienate the trust property. Furthermore, in our tax-oriented society, the preference for the vested construction may result in the assessment of additional taxes that would be inconsistent with a grantor's intent and could be avoided with the use of a contingent construction.

PROBLEM 7.11: O conveys Blackacre "to B for life, and then to the heirs of C." At the time of the conveyance, C is living. B then died survived by O and C. O then took possession of Blackacre. C later died leaving H as her sole heir. H sues O to eject him from Blackacre. May H succeed?

Applicable Law: At common law if the condition precedent to a contingent remainder did not happen at or before the termination of the prior particular estate, then the contingent remainder could not vest at or before the termination of the particular estate and the contingent remainder was destroyed forever. The condition precedent to a contingent remainder was either the happening of an event or the ascertainment of the remainderman either because he was yet unborn or for some other reason such as the ancestor still being alive. The destructibility of contingent remainders took place in three ways: (1) by its failure to vest at or before the termination of

the preceding particular estate, (2) by merger, or (3) by forfeiture.

The Rule of Destructibility probably is the law in only one state. In the others, by statute or judicial decision, the contingent remainder takes effect when the condition precedent happens, even if it happens after the termination of the preceding particular estate. Prior to the determination of whether the future interest will become possessory, the grantor has a fee simple subject to a springing executory interest.

Answer and Analysis

At common law H would not be entitled to eject O. Today, however, in most jurisdictions, H would prevail.

By the terms of the conveyance O granted B a life estate. C acquired no interest under the conveyance. Rather, C is merely the ancestor through and at whose death the remaindermen would be determined. The heirs of C were given a contingent remainder, the contingency being their ascertainment at the death of C.[44] That was the condition precedent which made the remainder contingent. As long as there is a contingent remainder, there is a reversion in the grantor. What was the effect of B's death? B left no inheritable estate to pass either to his heirs or devisees. But B was seised, and at his death the seisin had to pass to someone. That someone had to be either the grantor, O, or the remaindermen—the heirs of C. But there can be no heir of a living person and C was still alive. Therefore, C's heirs were not yet determined as of B's death and seisin could not go forward to the unascertained and unascertainable remaindermen. Therefore, since seisin could not be in abeyance, the only person to whom it could pass was O. Once that happened, there was no recognized way at common law by which such seisin could be taken from O and given to the heirs of C, once they were determined, except by a new conveyance. Accordingly, the contingent remainder limited in favor of C's heirs was forever destroyed. This is the doctrine known as the destructibility of contingent remainders. It was based on the principle that every remainder must vest at or before the termination of the prior particular estate or it was forever destroyed. In this problem, when B died before C, at that instant the remaindermen being unascertainable, the seisin reverted to O who had the right to immediate and continued possession of Blackacre, and the contingent remainder was completely and forever destroyed.

44. Since living persons have no heirs, C's heirs can only be ascertained at his death.

What would have happened had C predeceased B? This event would have had three distinct legal effects: (1) Upon C's death C's heirs would have been immediately ascertained as H. Thus, the contingency attached to the gift to the heirs of C—being ascertained—would have occurred prior to B's death. This would have transformed the contingent remainder into an indefeasibly vested remainder in H. (2) The instant the remainder became vested in H, the reversion in O would have been extinguished and O would no longer have any interest in Blackacre. (3) Then, upon the death of B, H's vested remainder (the future interest, presently owned but the enjoyment of which is postponed) would have become an estate in possession and presently enjoyed by H. Had that occurred, then H could have ejected O or anyone else from Blackacre.[45]

Generally, the condition precedent which makes a remainder contingent is either, (1) the happening of an event or (2) the ascertainment of the remainderman because he is yet unborn or because some event must happen. An example of (1) follows: O to "B for life, then to C, if C pays O $100." C has a contingent remainder. If C pays O $100 before B dies, then C's contingent remainder becomes a vested remainder. If C does not make that payment before B's death, then C's contingent remainder is destroyed. An example of (2) follows: O "to B for life, then to the children of C, who is childless." C's children have a contingent remainder. If C has a child before B dies, that child has a vested remainder subject to open. If C has no child before B dies, then, at common law the contingent remainder is destroyed.

At common law there were three ways by which a contingent remainder could be destroyed: (1) by the condition precedent failing to happen as here before the life tenant's death, (2) by merger, and (3) by forfeiture.

Merger occurred when the life estate and next vested estate came into the same hands. Merger can occur without destroying contingent remainders. For example, suppose O conveys Blackacre to B for life, then to C and his heirs. Here, C has a vested remainder. Next year C conveys her remainder to B so that B has both the life estate and the next vested estate (i.e, what was once C's but is now B's remainder) They merge to give B a fee simple absolute.

Merger resulting in the destruction of a contingent remainder can be illustrated as follows: Suppose O conveys Blackacre to B for life, then to B's eldest male heir. B has a son born, X. Now, in order there are: (i) a life estate in B, (ii) a contingent remainder in B's male heir (no one can be an heir of B until B's death) and (iii) a reversion in O. Note that the contingent remainder intervenes

45. See Simes 37 et seq.

between the life estate and the reversion. Now, either O grants this reversion to B or B transfers his life estate to O. In either event there is a merger of the life estate in the reversion—the next vested estate—and the intervening contingent remainder is destroyed. Thereafter, upon B's death, B's male heir has no rights. A similar result would follow if O conveyed O's reversion and B conveyed the life estate to the same person. In this case, the life estate and the next vested estate would merge in their transferee and destroy the contingent remainder.[46]

A forfeiture also could result in the destruction of a contingent remainder. For example, suppose in the preceding example that B, the life tenant, makes a tortious feoffment to M and his heirs in fee simple.[47] B dies leaving X his male heir. B's tortious feoffment destroyed the contingent remainder and X has no rights.[48]

The rule of destructibility applies only to legal estates. It did not apply to equitable estates because the trustee was seised of legal title. Therefore, no gap in seisin could occur if no transferee of a future interest was entitled to possession immediately upon the termination of the life estate. Seisin was always in the trustee. Thus contingent remainders in trust are not subject to the Rule of Destructibility.

The Rule of Destructibility appears to be the law only in Florida.[49] Most recently, the Supreme Court of New Mexico held that the rule was not part of New Mexico's common law.[50] In

46. There is an important exception to the rule that merger destroyed a contingent remainder. Under this exception, if a life estate and the *next vested estate* were created simultaneously with a contingent remainder, the life estate and the next vested estate did not merge to destroy the contingent remainder. However, this exception would not continue to apply if the life estate and next vested estate were later conveyed to another. Therefore, as illustrated below, the exception was easy to avoid. For example, if O transferred Blackacre to A for life, then to A's first born daughter and the heirs of her body, and then to A and her heirs, A would have a life estate and a vested remainder in fee. Assuming A had no children, A's first born daughter would have a contingent remainder in tail which would not be destroyed because of the exception to the merger rule. However, if A were to convey A's life estate and vested remainder to B, they would merge in B to destroy the contingent remainder in tail.

47. A tortious feoffment occurred when a life tenant purported to convey a greater estate than he had.

48. See Archer's Case, 1 Co. Rep. 66B (1597).

49. Blocker v. Blocker, 103 Fla. 285, 137 So. 249 (1931) (where a life tenant conveyed his life estate to A and the owners of a reversionary interest in the estate conveyed their interest to A for the purpose of merging the two estates into a fee simple estate, the contingent remainders could be defeated by destroying the particular estate upon which they depend). See also, Popp v. Bond, 158 Fla. 185, 28 So.2d 259 (1946). The doctrine does not apply to interests in personal property. See In re Estate of Rentz, 152 So.2d 480 (Fla. 3d D.C.A. 1963).

50. Abo Petroleum Corporation v. Amstutz, 93 N.M. 332, 600 P.2d 278 (1979) (where husband-wife owners of property conveyed the wife's interest to their daughters with alternative contingent remainders to one of their daugh-

jurisdictions where the rule does not apply, the contingent remainder limited in favor of C's heirs is not destroyed when B dies survived by C. Therefore, once C's heir is ascertained, that heir is entitled to eject O from the premises. During the time O, the grantor, is entitled to possession, O has a fee simple subject to a springing executory interest in C's heirs.[51]

VESTED REMAINDERS COMPARED WITH AND DISTINGUISHED FROM CONTINGENT REMAINDERS AT COMMON LAW

SIMILARITIES

VESTED REMAINDER	CONTINGENT REMAINDER
1. is a future interest	1. is a future interest
2. called a remainder because it *remains* away from the conveyor instead of reverting to him	2. called a remainder because it *remains* away from the conveyor instead of reverting to him
3. must be in favor of a transferee, one other than the conveyor	3. must be in favor of a transferee, one other than the conveyor
4. must be created at same time and in same instrument as the prior particular estate	4. must be created at same time and in same instrument as the prior particular estate
5. must become an estate in possession at the termination of the prior particular estate of freehold	5. must become an estate in possession at the termination of the prior particular estate of freehold
6. must be preceded by particular estate of freehold—a fee tail or a life estate (see 10 below)	6. must be preceded by particular estate of freehold—a fee tail or a life estate (see 10 below)
7. is created either by will or deed, never by descent	7. is created either by will or by deed, never by descent
8. remainderman always takes as a purchaser	8. remainderman always takes as a purchaser
9. there may be as many as the conveyor wishes	9. there may be as many as the conveyor wishes

ter's children, later executed deeds to the daughters purporting to transfer absolute title to the property, and finally attempted to convey fee simple interests in the property to third persons, the conveyance of property in fee to the daughters did not destroy the contingent remainders in the daughter's children. "Because the doctrine of destructibility of contingent remainders is but a relic of the feudal past, which has no justification or support in modern society, we decline to apply it in New Mexico.").

51. See Simes, 41; Restatement of Property § 240.

VESTED REMAINDER	CONTINGENT REMAINDER
10. TODAY—may be preceded by an estate for years	10. TODAY—may be preceded by an estate for years but then it is an executory interest
11. it is descendible and devisable	11. it is descendible and devisable

DISSIMILARITIES

VESTED REMAINDER	CONTINGENT REMAINDER
1. is not destructible	1. is destructible
2. is transferable	2. is not transferable
3. is subject to the claims of creditors	3. is not subject to the claims of creditors
Today contingent remainders are no longer destructible in most states; they are transferable and are subject to the claims of creditors. The above three dissimilarities should *now* be moved up into the similarities column.	
4. is vested	4. is not vested
5. is an estate	5. is not an estate
6. no reversion left in conveyor if remainder in fee	6. reversion is always left in conveyor as long as remainder is contingent
7. has absolute right to possess when prior estate ends	7. has only conditional right to possess when prior estate ends
8. not subject to Rule against Perpetuities	8. is subject to Rule against Perpetuities
9. vested remainderman has right against prior estate owner for waste	9. contingent remainderman has no right against prior estate owner for waste
10. vested remainderman may force prior estate owner to pay taxes and interest on encumbrances	10. contingent remainderman cannot force prior estate owner to pay taxes or interest on encumbrances

§ 7.6 *Executory Interests*

PROBLEM 7.12: O conveys Blackacre "to B and his heirs but if B becomes bankrupt, then to B's children and their heirs." At the time of the conveyance B has one living child. What interest do B's children have?

Applicable Law: If a future interest takes effect, if at all, at the termination of the particular freehold estate that precedes it because of the happening of a limitation, then it is a remainder. However, if a future interest will take effect in derogation of the preceding particular estate of freehold, or

after its termination as a result of the happening or nonhappening of a condition, then it is an executory interest with one exception. This exception is the future interest that follows the natural termination of a fee simple determinable. That future interest is called an executory interest even thought it *does not* take in derogation of the preceding estate since the fee simple determinable ends naturally upon the happening of a limitation and not upon the happening of a condition subsequent.

Answer and Analysis

B's children have a shifting executory interest; they do not have a remainder. It cannot be a remainder because a remainder must be so limited that it will take effect in possession at the natural termination of the prior particular freehold estate as the result of the happening of limitation. A future interest cannot be a remainder if it takes effect in derogation of or cuts short such prior particular estate. By the terms of the conveyance if B becomes bankrupt, then B's present possessory fee simple estate is defeated and the future interest in B's children is to become possessory. If that occurred, then the children's future interest would come in derogation of and would cut short B's fee simple. Thus, the future interest to B's children is an executory interest and not a remainder.

There is little difficulty in distinguishing a remainder or executory interest from either a reversion, a possibility of reverter or power of termination, because a remainder or any executory interest is always in favor of a transferee whereas the other three are always in favor of the transferor.

The real difficulty is in distinguishing a remainder from an executory interest. The following may help. A remainder must always be able to take effect, if at all, at the "natural" termination of the particular estate of freehold which precedes it, never by cutting the prior estate short. An executory interest, with one exception given below, always takes effect in derogation of, or by cutting short, the vested estate which precedes it. This occurs when the preceding estate is terminated because a *condition* rather than a *limitation* has occurred.

In one instance, however, an executory interest takes effect at the termination of the preceding estate. Suppose O conveys Blackacre "to B and his heirs so long as the property is used for courthouse purposes, and if it ceases to be so used, then to X and his heirs." X's interest cannot be a remainder because no remainder can follow a fee simple, whether absolute or determinable. It is

an executory interest but it will vest as an estate in possession at the natural termination of the preceding freehold estate in B.[52]

PROBLEM 7.13: O conveys Blackacre "to B for life and one year after B's death, to C and her heirs." B died and O took possession of Blackacre. One year after B's death and while O was in possession, C demanded possession of Blackacre from O. O refused. C sues O in ejectment. (a) May C recover? (b) What type of interest, if any, does C have?

Applicable Law: If a future interest in a transferee is incapable of becoming possessory until some time in the future and in the meantime there is no other transferee entitled to possession it takes effect only as an executory interest. It cannot be a remainder.

Answers and Analysis

C has an executory interest that became possessory one year after B died and is entitled to recover possession of Blackacre from O.

A remainder is a future interest (1) limited in favor of a transferee, (2) created at the same time and in the same instrument as the prior particular estate which supports it and (3) limited (described) in such a way that it can take effect as a present interest immediately upon the termination of the prior particular estate. The prior particular estate must be an estate of lesser duration than the interest of the grantor at the time of the conveyance.

In this problem C is a transferee; C's future interest was created in the same instrument and at the same time as B's life estate which is the prior particular estate which supports it but C's interest is limited in such a way that it is incapable of becoming possessory immediately upon the termination of the prior particular estate. Therefore, C's future interest cannot be a remainder. It is a springing executory interest.

If a future interest can become possessory only after some period of time during which no other transferee is entitled to the possession of a freehold estate, the future interest is a springing executory interest. It could not be a valid remainder at common law because of the rule prohibiting seisin from being in abeyance. When B died the seisin had to go somewhere. It could not go to C for such was not intended until the passing of one year after B's death. So the seisin reverts to the grantor, O. At common law, once the seisin has reverted to O it took another conveyance to divest the grantor. Thus, C's interest fails to qualify as a remainder.

52. See Simes, 25–28.

C's executory interest is not created by way of a use; rather it was created as a legal estate which would have been void. Therefore, prior to the Statute of Uses it was void. However, after the Statute of Uses, two new types of future interests quite unknown to the common law were permitted to be created in favor of transferees. These new future interests took effect in derogation of preceding estates. One of these, the springing interest, cut short the prior estate which was vested in the grantor. The other, the shifting interest, cut short the prior estate which was vested in one other than the grantor. In this problem, when B died there was a reversion to the grantor, O, who is now possessed of a fee simple estate for the period of one year after B's death. When that year has expired a use springs up in C in fee simple which draws the legal title to itself by means of the Statute of Uses. C, now owning the legal title in fee simple, has the right to immediate possession of Blackacre and can eject O whose prior estate has been cut off by C's executory interest which O himself created.[53]

In each of the following cases as well C has a springing executory interest:

(a) O conveys Blackacre to C three years from now.

(b) O conveys Blackacre to B for life, and if C is alive when X is appointed the executor of B's estate, then to C and his heirs.

In each case there is a period of time during which no transferee is entitled to possession. In (a) it is the three years immediately following the conveyance; in (b) it is that period of time following B's death before X is appointed the executor of B's estate. In (b) the condition attached to C's interest is absolutely incapable of occurring during B's life; thus, C's interest is incapable of every becoming possessory at B's death.

PROBLEM 7.14: O conveys Blackacre "to B for a period of 10 years, then to C and his heirs." (a) Is C's interest valid? (b) Would it make any difference if the future interest had been limited in favor of "the heirs of C," a living person?

Applicable Law: At common law every remainder had to be preceded by a particular estate of freehold to prevent abeyance of the seisin. Therefore, a remainder could not be preceded by a non-freehold estate such as a term for years. Future interests following on the heels of a non-freehold estate were classified as springing executory interests. Modern usage permits a *remainder* to follow an estate for years.

53. See Simes, 19–25.

Answers and Analysis

The future interest limited in favor of C was valid at common law but was not actually classified as a future interest. Rather C was said to have a fee simple subject to a term for years in B. Today it is permissible to refer to C's interest as a remainder. If the future interest had been limited in favor of C's heirs, however, it would have been void. A contingent interest was void at common law if it purported to take effect at the termination of a preceding nonfreehold estate; today it could take effect, subject to the Rule against Perpetuities, as a springing executory interest.

The interest limited in favor of C was valid at common law as a result of a technical peculiarity of the common law. At common law every remainder had to be preceded by a particular estate of freehold, either a fee tail or a life estate. Every freehold estate (fee simple, fee tail or life estate) had to be created by livery of seisin. No freehold estate could be made to commence in futuro because there had to be the ceremony of feoffment and that had to take place in the present. However, the creation of a non-contingent future interest was not considered a violation of the rule. For example, suppose X, being fee simple owner, wished to enfeoff Y for life, with remainder to Z and his heirs. X would go onto the land, make livery of seisin to Y with the declaration that seisin was for Y for Y's life and thereafter for Z and his heirs. Both estates were considered as being created at the same time and the feoffor was considered as having put the seisin out of himself for the entire time during which the declared estates would exist. X would then walk off the land leaving Y in possession claiming a life estate therein, he being therefore seised, and holding such seisin for himself and the remaindermen who followed. Indeed, the remainder was the only future estate which was recognized by the common law which was in favor of a transferee, one other than the transferor. But Y's life estate is a freehold estate and a life tenant is seised. When Y dies the seisin will pass immediately to Z in fee simple. There will be no break in the continuity of the seisin, the seisin will not be in abeyance.

In this problem, however, B was to have a nonfreehold estate, an estate for years. A tenant for years, having only a chattel real, could not be seised. The tenant could be possessed only. The grantor could not deliver seisin to a tenant for years to pass naturally to the remainderman at the end of the term for years. O, in other words, could not deliver seisin to B for 10 years which would then pass to C in fee simple. Strictly speaking, then, there could be no remainder following an estate for years, and in the problem C's so-called remainder would be void and there would be a reversion in O.

Nonetheless, even at common law, there was a procedure by which the conveyance by O could be validated and made effective even though C's interest could not be a valid remainder. It was done as follows. O made livery of seisin to B, the tenant for years, but at the same time declared that such livery was made for the benefit of C. Thereupon, the seisin passed immediately through B to C, who then held the fee simple estate in possession but subject to a term of 10 years in B. It should be noted in this procedure that the seisin never lodged in B, nor was it in abeyance for an instant because it passed immediately through B to C, who was intended to be seised.[54]

Today, C's interest is often referred to as a remainder even though it did not technically qualify as such.

If C's interest following the 10 year term was intended to be a contingent remainder, rather than an estate in possession subject to a term of years, not even the procedure described above, could validate the gift. For example, suppose O, being an owner in fee simple, conveys, "to B for 10 years, then to the heirs of C" and C is living. In this case there could be no livery of seisin to B for C's heirs because C's heirs are not, until C's death, ascertainable. Thus the seisin would be in abeyance and the intended contingent interest in C's heirs would be absolutely void at least prior to the enactment of the Statute of Uses.

Under the Statute of Uses (1536), the future interest created in either C or C's heirs could be treated as a valid executory interest following B's 10 year term if created by way of a "use" which was executed in a legal estate by the statute. If that statute operated on the use, then upon the expiration of B's ten year term a fee simple absolute vests in C if the future interest were limited to C. If it were limited to C's heirs and C died before B, a fee simple absolute would vest in C's heirs; if C survived B, then O would be entitled to a fee simple. This interest, however, would continue to be subject to a springing executory interest in C's heirs which would ripen into a fee simple absolute upon C's death, divesting O of O's then present possessory interest.[55]

54. It has been suggested that this technical exception had been created as an early common law form of financing. For example, B might be a money lender willing to loan C the purchase price of Blackacre. However, in lieu of charging C interest, C and B would calculate a fixed term of years to pay rents and profits from the land to B. These rents and profits would be in an amount sufficient to adequately compensate B for making the loan to C as well as a return of the principal.

55. Since future interests are classified today as they were before the Statute of Uses, C's interest in the conveyance to B "for ten years, then to C" would continue to be classified as either a fee simple subject to a term of years or, in more modern terminology, a vested remainder. It is, therefore, not an interest that could violate the Rule against Perpetuities. On the other hand, since the interest of C's heirs could only have been classified as an executory interest, whether before or after the adop-

The preceding answer is intended to explain the historical development and logic in the common law requirements of a remainder in land. Today livery of seisin is obsolete. The reason for requiring continuity of seisin has long since disappeared. The modern view permits remainders not only in land but also in chattels real and in chattels personal. The grantor's estate need not be a freehold and a remainder may follow an estate for years.[56]

FUTURE INTERESTS COMPARED WITH AND DISTINGUISHED FROM EACH OTHER

THE FUTURE INTEREST	HOW CREATED	IN WHOSE FAVOR	VESTED OR CONTINGENT	ALIENABLE INTER VIVOS	DESCENDIBLE AND DEVISABLE	SUBJECT TO DEFEASANCE	DIVESTS PRIOR ESTATE
REVERSION	BY OPERATION OF LAW	ALWAYS IN FAVOR OF GRANTOR	ALWAYS VESTED	ALWAYS ALIENABLE	ALWAYS DESCENDIBLE AND DEVISABLE	SUBJECT TO DEFEASANCE FOLLOWING CONTINGENT REMAINDER AND BY SPRINGING USE	NEVER DIVESTS PRIOR ESTATE
POSSIBILITY OF REVERTER	BY IMPLICATION OF LAW	ALWAYS IN FAVOR OF GRANTOR	ALWAYS CONTINGENT	NOT ALIENABLE AT COMMON LAW WHEN UNCONNECTED WITH A REVERSION. TODAY IT IS ALIENABLE WITH OR WITHOUT A REVERSION	DESCENDIBLE AND DEVISABLE WITH OR WITHOUT A REVERSION	NOT SUBJECT TO DEFEASANCE	NEVER DIVESTS PRIOR ESTATE
POWER OF TERMINATION	BY CLEAR, EXPRESS WORDS IN DEED OR WILL	ALWAYS IN FAVOR OF GRANTOR	ALWAYS CONTINGENT	NOT ALIENABLE AT COMMON LAW WHEN UNCONNECTED WITH REVERSION—LIKEWISE TODAY IN SOME STATES —TODAY IT IS ALIENABLE WHEN CONNECTED WITH REVERSION**	DESCENDIBLE AND DEVISABLE WITH OR WITHOUT A REVERSION	NOT SUBJECT TO DEFEASANCE	ALWAYS DIVESTS PRIOR ESTATE
VESTED REMAINDER	BY WORDS OF DEED OR WILL	ALWAYS IN FAVOR OF GRANTEE	ALWAYS VESTED	ALWAYS ALIENABLE	ALWAYS DESCENDIBLE AND DEVISABLE	MAY BE SUBJECT TO DEFEASANCE PARTIAL OR TOTAL BY SHIFTING USE	NEVER DIVESTS PRIOR ESTATE
CONTINGENT REMAINDER	BY WORDS OF DEED OR WILL	ALWAYS IN FAVOR OF GRANTEE	ALWAYS CONTINGENT	NOT ALIENABLE AT COMMON LAW TODAY IT IS ALIENABLE	DESCENDIBLE AND DEVISABLE	NOT SUBJECT TO DEFEASANCE	NEVER DIVESTS PRIOR ESTATE
EXECUTORY INTEREST	BY WORDS OF DEED OR WILL	ALWAYS IN FAVOR OF GRANTEE	ALWAYS CONTINGENT	TODAY ALIENABLE	DESCENDIBLE AND DEVISABLE	NOT SUBJECT TO DEFEASANCE	ALWAYS DIVESTS PRIOR ESTATE

(C2453)

* Possibilities of reverter and powers of termination were not subject to the common law rule against perpetuities, however.

** Some states do permit the alienation of powers of termination unconnected with a reversion.

Comments Concerning Chart

(1) Of course no interest is descendible or devisable which is terminated by death, and no interest is alienable except by one identifiable and qualified to convey.

(2) Of all the future interests, only the contingent remainder was destructible at common law; today all future interests, including contingent remainders in most states, are indestructible.

tion of that statute, it can only be classified as such today. This is important because executory interests but not vested remainders are subject to the Rule against Perpetuities.

56. See Simes 19; Restatement of Property § 156, comment e, illustration 9.

Summary of Chart

(a) Reversions and possibilities of reverter are created by law—powers of termination, vested and contingent remainders and executory interests are created by deed or by will (first column).

(b) Reversions, possibilities of reverter and powers of termination are always in favor of the grantor or his successors in interest—remainders and executory interests are always in favor of the grantee (second column).

(c) Reversions and vested remainders are always vested—possibilities of reverter, powers of termination, contingent remainders and executory interests are always contingent (third column). Reversions, vested remainders, possibilities of reverter and powers of termination are not subject to the common law rule against perpetuities. Indestructible contingent remainders and executory interests are subject to the rule.

(d) At common law possibilities of reverter, powers of termination and contingent remainders were not alienable inter vivos—today a power of termination unconnected with a reversion is still not alienable inter vivos in most states—all other future interests, including a power of termination connected with a reversion, are alienable inter vivos (fourth column).

(e) All future interests are descendible and devisable (fifth column).

(f) Only reversions and vested remainders (the vested future interests) are subject to defeasance (sixth column).

(g) Only powers of termination and executory interests divest prior estates (seventh column).

§ 7.8 Survivorship Contingencies

PROBLEM 7.15: O conveys Blackacre to B for life, then to B's children. At the time of the conveyance B has two children, C and D. One year later B had a third child, E. The next year C dies intestate leaving H as C's sole surviving heir. The following year B dies survived by D, E, and H. D and E claim they alone are entitled to Blackacre. Are they correct?

Applicable Law: A class gift limited in favor of a class of persons described as children not otherwise subject to an express condition of survivorship is not impliedly conditioned on survivorship. Thus, B's children have a vested remainder subject to open. While the interest of each living child of B is subject to partial defeasance if B has more children, it is not subject to total defeasance by predeceasing B. In other words, the interest of class member is alienable, devisable, and descendible.

Answer and Analysis

At the time of the conveyance, B had two living children. Each of them and any children of B born before the class gift to B's children closed had a vested remainder subject to open. Class member have an interest that is alienable, devisable, and descendible. Thus, if a child of B dies before B, that deceased child's interest passes under the child's will to the child's designated beneficiary or, if the child dies intestate, to the child's heirs.[57] Here the remainder gift was limited to B's children, a class that is one-generational. Similar classes would include classes limited in favor of grandchildren, nieces and nephew, and brothers and sisters. If a gift is one-generational and the governing instrument does not expressly impose a condition of survivorship, none is implied.[58] If a condition of survivorship were expressed, then the interest of a child of B who died before B would fail, and that child's share would ultimately inure to the children of B who survived B. However, conditions of survivorship, although not expressed in the governing instrument, can be implied.

For example, under the provision of Section 2–707 of the Uniform Probate Code, the interest of B's child who predeceases B is implied conditioned on survivorship, *if the interest were in a trust and not merely a legal remainder*[59] and the governing instrument did not otherwise provide. In that case the deceased child's interest fails. It passes to the B's surviving children unless B's deceased child left descendants who survived B. In that case, B's deceased child's descendants take the share B's deceased child would have taken had the child survived B, as a substitute gift.

If the class gift had been limited to a potentially multi-generational class, such as a gift to issue, descendants, or heirs, a survivorship condition is implied on the theory that members who meet the description of class members at the lower generational levels can only take because those at the higher generational levels have died before the date of distribution.[60] Of course, this presupposes a per stirpes rather than a per capita distribution among class members. More particularly, if a class gift is limited in favor of a one-generational class, then each member of the class is entitled to an equal share (i.e., they take per capita.)[61] On the other hand, if a class gift is limited in favor of a potentially multi-generational class (such as descendants of B), class members may not necessarily

57. See Restatement (Second) Property § 27.3.

58. Id.

59. Unif. Prob. Code § 2–707 does not apply to remainders not created in trust. See Unif. Prob. Code § 2–707(b).

60. Restatement (Second) of Property, § 28.2.

61. See Restatement (Second) of Property, § 28.1.

take equally. According to the Restatement, the following rules apply:

1. Only class members who survive to the date of distribution (here, B's death) share in the gift;

2. Only class members who have no living ancestors who are in the class share in the gift; and

3. The initial division to calculate shares is based on the number of class members, dead or alive, who were in the first generation below the designated person.[62] This latter is called a per stirpes plan of distribution and is explained as follows:

> If a gift is made to the "issue" or "descendants" of a designated person, in the absence of additional language or circumstances that indicate otherwise, the initial division of the subject matter is made into as many shares as there are issue, whether living or not, of the designated person in the first degree of relationship to the designated person. Each issue in the first degree of relationship who survives to the date of distribution takes one share of the subject matter of the gift to the exclusion of any of such first degree issue's descendants. The share of an issue of the first degree who does not survive to the date of distribution is divided into as many shares as there are descendants, whether living or not, of that deceased issue who are in the second degree of relationship to the person whose issue are designated. Such issue in the second degree of relationship that survive to the date of distribution each take one share resulting from such division to the exclusion of their respective descendants. The share of an issue of the second degree who does not survive to the date of distribution is divided into as many shares as there are descendants, whether living or not, in the third degree of relationship to the designated ancestor who are also descendants of the deceased second degree descendant, etc. This is referred to as a per stirpes plan of distribution.[63]

The Uniform Probate Code, on the other hand, would make the initial division at the first generation within the potentially multigenerational class at which there was at least one living member. Thus, if there were no children but only surviving grandchildren who share in a class gift limited in favor of B's descendants, the initial division would be at the grandchildren's level, not the children's level.[64]

62. Restatement (Second) of Property, § 28.2.

63. Id. at Comment b.

64. See Unif. Prob. Code § 2–708. Comments to this section note that it is intended specifically to reject Restatement (Second) of Property, § 28.2.

Chapter 8

SPECIAL RULES GOVERNING FUTURE INTERESTS

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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.