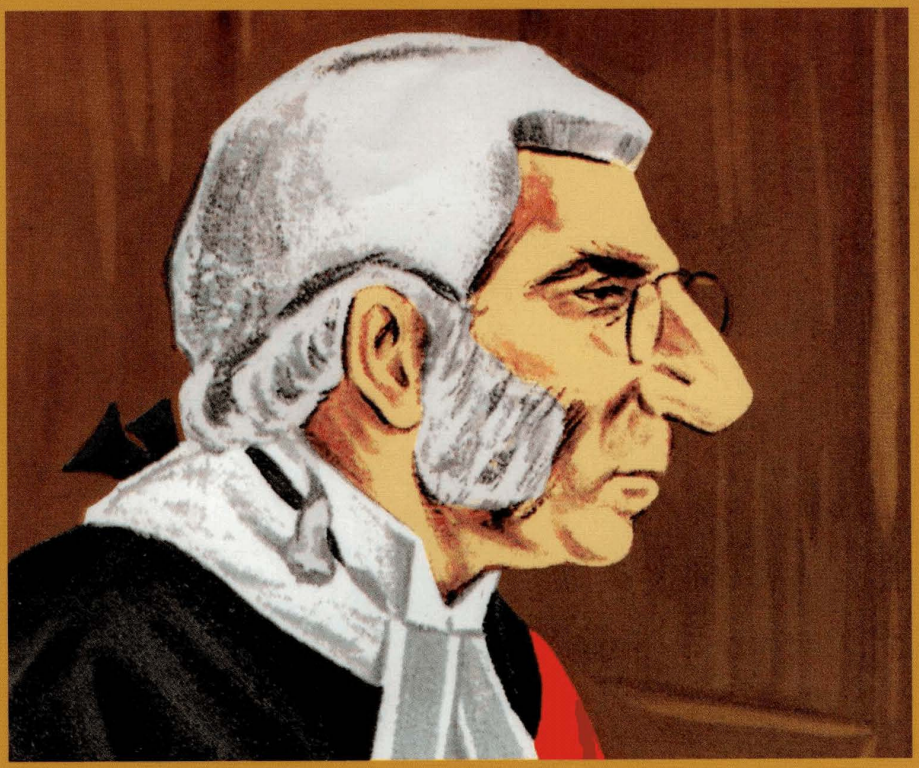
THE LAW OF PROPERTY

SUPPLEMENTAL READINGS

Class 15

Professor Robert T. Farley, JD/LLM

emanuel®
law outlines



PROPERTY

Keyed to Dukeminier/Krier/Alexander/Schill, Sixth Edition

CALVIN MASSEY

ASPEN
PUBLISHERS

CHAPTER 3

FUTURE INTERESTS

ChapterScope

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

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

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

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

I. INTRODUCTION

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

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

II. FUTURE INTERESTS RETAINED BY THE GRANTOR

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. FUTURE INTERESTS CREATED IN GRANTEES

A. Remainders:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. THE TRUST

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

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

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

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

Exam Tips on FUTURE INTERESTS

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

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

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

EXAMPLES & EXPLANATIONS

Property

Second Edition

Barlow Burke and Joseph Snoe

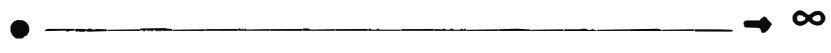
ASPEN
PUBLISHERS

10

Future Interests

Introduction

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



A life estate can be diagrammed as follows:

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

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

Distinguishing Present Interests and Future Interests

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

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

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

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

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

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

Future Interests Retained by the Grantor or Transferor

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

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

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

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

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

Future Interests in Third-Party Transferees

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

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

There are variations on each.

(a) Remainders

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

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

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

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

(b) Executory Interests

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

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

Estates in Real Property, with Future Interests

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

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

Vested and Contingent Remainders

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

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

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

(a) Ascertained Persons

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

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

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

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

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

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

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

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

(b) No Condition Precedent

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

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

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

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

Practice Interpreting Grants with Conditions Precedent and Conditions Subsequent

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

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

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

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

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

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

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

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

Alternative Contingent Remainders

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

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

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

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

Why We Distinguish Vested and Contingent Remainders

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

---

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.

---

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

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

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

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

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

EXAMPLES

Reversion Review

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

A Has a Life Estate

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

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

B Has a Vested Remainder

3. Identify the interests created by each of the following transfers:
   (a) *O* transfers Whiteacre "to *A* for life, then to *B* for life, then to *C* and her heirs."
   (b) *O* transfers Whiteacre "to *A* for life, then to *B* for life, then if *C* survives *A* and *B*, to *C* and her heirs."
   (c) *O* transfers Whiteacre "to *A* for life, then to *B* for life, then when *A* and *B* die, to *C* and her heirs."

More Future Interests

4. Identify who has what interest in what estate in the following:
   (a) *O* conveys Brownacre "to *A* for life, remainder to *B*'s children." *B* is alive and has two children, *C* and *D*.
   (b) *O* conveys Brownacre "to *A* for life, remainder to *B*'s children who attain age 18." *B* is alive and has one child, who is ten years old.
   (c) *O* conveys Brownacre to *A* for life, remainder to *B*'s heirs. *B* is divorced and has one child, *C* (age 10).
   (d) *O* conveys Brownacre to *A* for life, remainder to *B* if she graduates from law school; if not, to *C*.

Minor Gift

5. (a) *O* conveys Blackacre "to my son *A* for life, then to his children who reach 21." *A* has two children, *B* (age 8) and *C* (age 13). What interests and estates do *B* and *C* have?
   (b) If *C* were to die after reaching 21 while *A* is alive, who owns what then?
   (c) Assuming the facts in (a), *A* dies, leaving *B* (then age 10) and *C* (age 15).What interests and estates are created at *A*'s death?
   (d) What happens six years later, when *B* is 16 and *C* is 21 years old?

A Class Gift

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

A Final Go

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

EXPLANATIONS

Reversion Review

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

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

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

A Has a Life Estate

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

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

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

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

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

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

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

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

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

B Has a Vested Remainder

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

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

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

More Future Interests

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

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

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

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

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

Minor Gift

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

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

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

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

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

A Class Gift

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

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

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

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

A Final Go

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

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

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

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

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

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

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

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

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

11

Special Rules of Construction

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

The Rule of Destructibility of Contingent Remainders

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

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

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

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

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

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

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

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

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

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

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

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

The Merger Rule

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

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

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

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

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

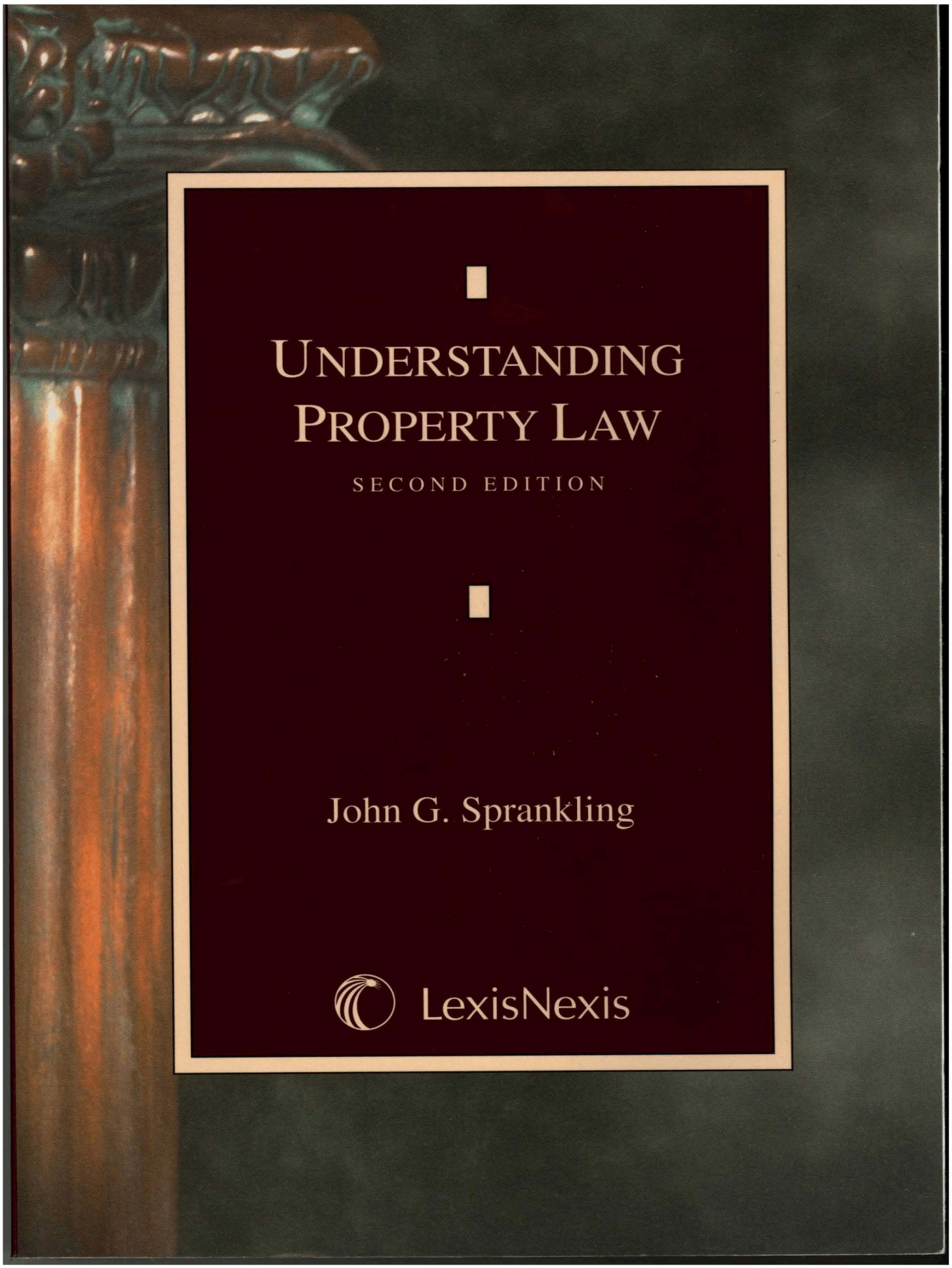
Example 3: *O* conveys Whiteacre to *A* for life, then to *B* for life if she attains age 21 (*B* is 14), then to *C* if *C* attains age 21 (*C* is 5). Three years later *A* acquires *C*'s interest. After the acquisition, *A* has a (vested) life estate and a contingent remainder in fee simple (contingent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

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

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

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

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



UNDERSTANDING PROPERTY LAW

SECOND EDITION

John G. Sprankling

LexisNexis

Chapter 12

INTRODUCTION TO FUTURE INTERESTS

SYNOPSIS

§ 12.01 Future Interests in Context
§ 12.02 What Is a Future Interest?
§ 12.03 Why Create a Future Interest?
[A] Family Support Motive
[B] Charitable or Economic Motives
§ 12.04 Types of Future Interests
[A] Basic Categories
[B] Subcategories of Future Interests
[C] A Future Interest in What Possessory Estate?
§ 12.05 Classifying Future Interests: An Overview
§ 12.06 Common Law Approach to Future Interests
[A] Autonomy v. Marketability
[B] The Common Law Compromise
§ 12.07 Modern Future Interest Legislation
§ 12.08 Contemporary Relevance of Future Interests

§ 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.

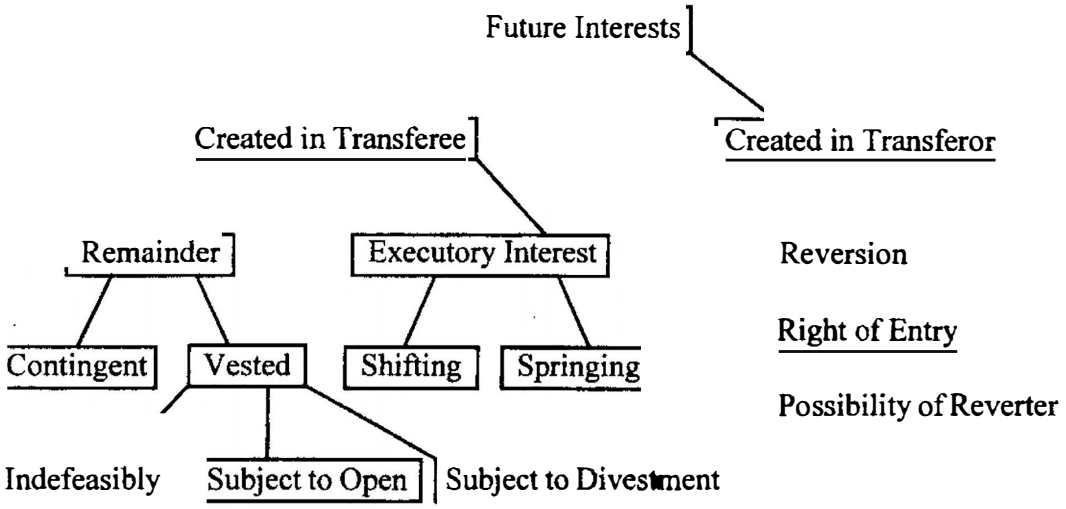
The starting point for classifying a future interest is to determine the identity of the person who holds it: is the holder a transferor or a transferee? Suppose O, holding fee simple absolute in Greenacre, grants a life estate to L (e.g., "to L for life"). O is considered a *transferor* because she 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
[A] General Principles
[B] Preventing Waste
[C] Right to Eminent Domain Proceeds
§ 13.05 Modern Reforms

§ 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]

---

[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.

---

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

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

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

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

§ 13.04 Other Rights of Interest Holder

[A] General Principles

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

[B] Preventing Waste

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

[C] Right to Eminent Domain Proceeds

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

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

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

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

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

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

§ 13.05 Modern Reforms

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

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

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

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

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

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

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

Chapter 14

FUTURE INTERESTS HELD BY THE TRANSFEREE

SYNOPSIS

§ 14.01 An Intricate Common Law Maze

§ 14.02 Classifying Future Interests Held by the Transferee

§ 14.03 Remainders

[A] Remainders in Context

[B] What Is a Remainder?

[1] Basic Definition

[2] Application of Definition to Example

[C] Types of Remainders

[1] Four Types

[2] Vested Remainders

[a] In General

[b] Indefeasibly Vested Remainder

[c] Vested Remainder Subject to Divestment

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

[3] Contingent Remainders

[D] Examples of Remainders

[E] Transformation into Other Future Interests

[F] Significance of the Contingent vs. Vested Distinction

§ 14.04 Executory Interests

[A] Executory Interests in Context

[B] What Is an Executory Interest?

[C] Types of Executory Interests

[1] The Basic Distinction

[2] Shifting Executory Interest

[3] Springing Executory Interest

[D] Examples of Executory Interests

§ 14.05 Consequences of the Distinction Between Remainders and Executory Interests

§ 14.06 Creation of Interests

§ 14.07 Transfer of Interests

[A] Toward Free Transferability

[B] Vested Remainders

[C] Contingent Remainders and Executory Interests

§ 14.08 Other Rights of Interest Holders

[A] General Principles

[B] Rights re Waste

[C] Right to Eminent Domain Proceeds

§ 14.09 Four Special Restrictions on Contingent Future Interests Held by Transferees
§ 14.10 The Rule Against Perpetuities: At Common Law
[A] The Rule in Context
[1] A "Technicality-Ridden Legal Nightmare"?
[2] Statement of the Rule
[3] The Dynamite Analogy
[B] Rationale for the Rule
[C] Five-Step Application of the Rule
[1] Summary of Approach
[2] Does the Rule Apply to This Interest?
[a] Contingent Future Interests in Transferees
[b] Options to Purchase and Preemptive Rights
[3] When Does the Perpetuities Period Begin?
[4] What Must Happen for the Interest to Vest or Forever Fail to Vest?
[a] Time of Vesting
[b] Special Rule for Class Gifts
[5] Who Are the "Relevant Lives"?
[6] Does Any Relevant Life Validate the Interest?
[D] Application of the Rule: Classic Examples
[1] The Fertile Octogenarian
[2] The Unborn Spouse
[3] The Slothful Executor
[E] Criticism of the Rule
§ 14.11 The Rule Against Perpetuities: Modern Reforms
[A] Overview
[B] Basic "Wait and See" Approach
[C] Reformation or Cy Pres
[D] Uniform Statutory Rule Against Perpetuities
[E] Future of the Rule Against Perpetuities
§ 14.12 The Doctrine of Worthier Title
§ 14.13 The Rule in Shelley's Case
§ 14.14 The Destructibility of Contingent Remainders

§ 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.

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.

---

[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]

---

[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.

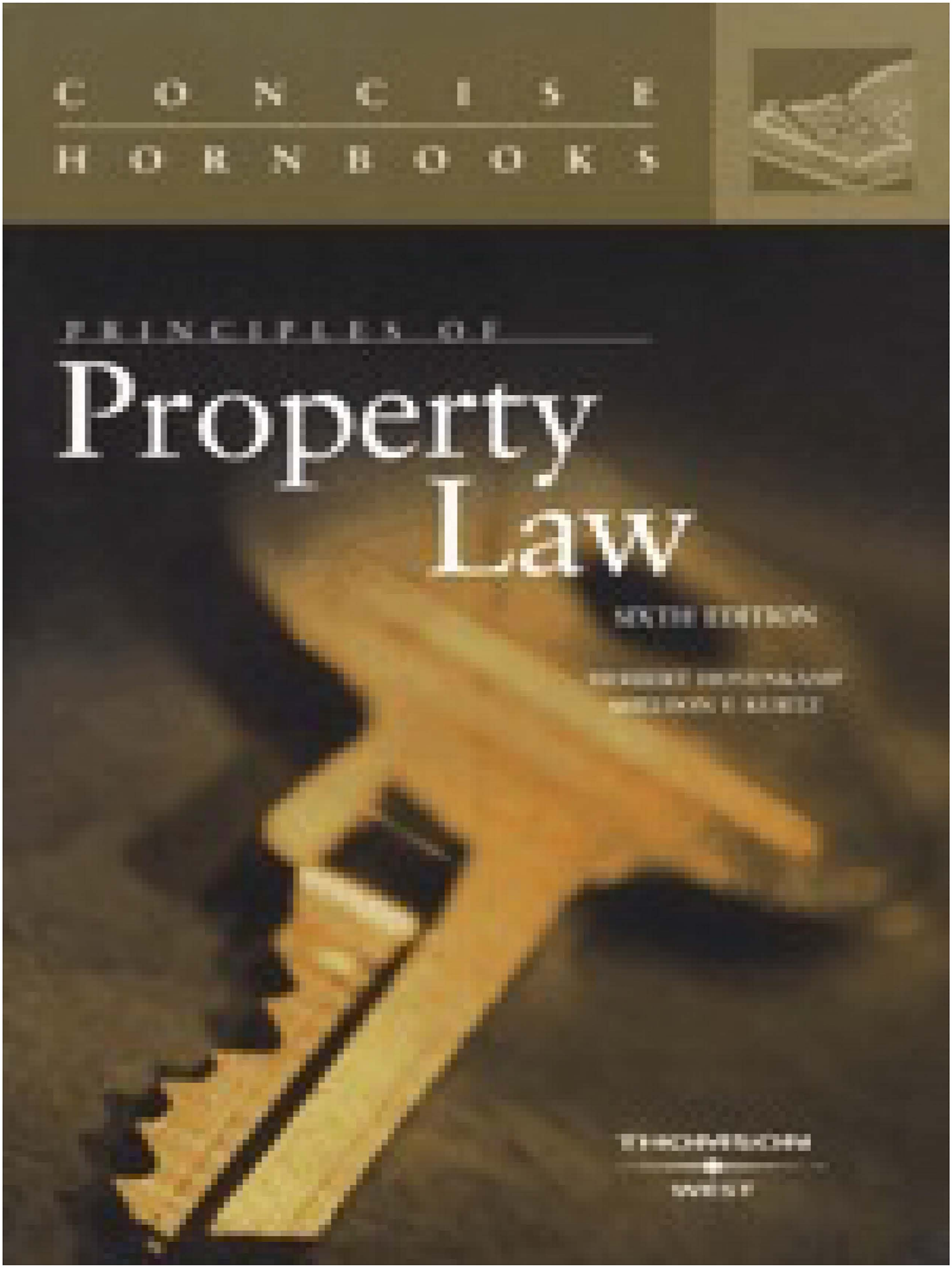
[C] Right to Eminent Domain Proceeds

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.


CONCISE
HORNBOOKS
PRINCIPLES OF
Property
Law
SIXTH EDITION
THOMSON
WEST

PRINCIPLES OF PROPERTY LAW

Sixth Edition

By

Herbert Hovenkamp
Ben V. & Dorothy Willie Professor of Law
University of Iowa

Sheldon F. Kurtz
Percy Bordwell Professor of Law and Professor of Surgery
University of Iowa

CONCISE HORNBOOK SERIES®

THOMSON
WEST

Mat #40188384

Chapter 5

ESTATES AND FUTURE INTERESTS: AN INTRODUCTION

SUMMARY

I. FREEHOLD ESTATES: TYPICAL CASES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. Fee tail.

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

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

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

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

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

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

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

6. Life estate for the life of the tenant.

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

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

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

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

b. It was called an estate per autrie vie

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

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

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

9. Dower.

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

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

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

10. Curtesy.

a. This was the estate of the surviving widower.

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

11. Life estate by and during coverture.

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

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

II. NON-FREEHOLD ESTATES

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

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

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

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

III. CONCURRENT ESTATES: TYPICAL CASES

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

1. Joint tenancy with right of survivorship.

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

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

      i. At the same time

      ii. Under the same instrument (title)

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

      iv. Have equal rights to possession.

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

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

17. Tenancy by the entirety.

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

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

18. Tenancy in common.

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

   b. Co-tenants need not have identical interests.

IV. FUTURE INTERESTS:

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

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

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

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

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

ii. Vested remainder subject to open or partial divestment.

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

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

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

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

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

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

iii. Vested remainder subject to complete divestment.

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

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

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

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

iv. Contingent remainder.

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

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

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

23. Executory interests.

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

b. There are two kinds of executory interests.

i. Shifting executory interest.

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

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

ii. Springing Executory Interest

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

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

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

PROBLEMS, DISCUSSION AND ANALYSIS

I. FREEHOLD ESTATES:

1. FEE SIMPLE ABSOLUTE

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

Answers and Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

2. FEE SIMPLE DETERMINABLE WITH POSSIBILITY OF REVERTER

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

Answers and Analysis

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

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

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

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

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

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

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

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

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

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

PROBLEM 5.3: O conveys Blackacre "to B and his heirs, but if intoxicating liquors are sold on the premises then O has the right to re-enter and repossess the land." (a) What estate does B have? (b) What are the characteristics of B's estate?

Answers and Analysis

B has a fee simple subject to a condition subsequent. This estate is of possibly infinite duration because intoxicating liquors may never be sold on Blackacre. However, it can be cut short or terminated by O, the grantor, or those claiming under O, upon the happening of the named event. O has a right of entry for condition broken, or a power of termination. The important characteristic which distinguishes this type of estate from a fee simple determinable is that the estate continues in B, or B's grantee, devisee, or heir, unless and until the power of termination is exercised. In other words, the estate in fee simple subject to a condition subsequent does not end automatically upon the happening of the named event. The basic difference between a fee simple determinable and a fee simple subject to a condition subsequent is that the fee simple determinable automatically expires by force of the limitation when the stated limitation occurs; the fee simple on condition subsequent continues despite the breach of the condition until the estate is divested or cut short by the grantor's exercise of the power to terminate. Upon breach of the condition, B's estate does not end automatically but instead continues until O exercises his power of termination. O has the power to terminate or cut off B's fee by making a re-entry onto the premises if and when the condition is broken. Until O does manifest an election by bringing an action to recover it, the grantee's estate continues. O's re-entry causes a forfeiture of the remaining portion of B's estate; it cuts short and brings to an end an existing vested interest in land.

Although no particular words are essential to create a fee simple on condition subsequent, the use in the conveyance of the traditional words of condition—"upon condition that," "provided that," "but if"—coupled with a provision for re-entry by the transferor on the occurrence of the stated event will normally be construed to manifest an intention to create an estate on condition. According to some older cases, words of condition alone without a re-entry clause are sufficient to create a fee simple on condition

subsequent, but the later trend has been to refuse to construe the conveyance as creating an estate on condition subsequent in the absence of a provision that the transferor has a right to re-enter or words of similar import. If the language of the instrument is ambiguous, the court might construe the conveyance as creating a fee simple determinable coupled with a possibility of reverter. However, the strong reluctance of the courts to enforce or imply a right of forfeiture could result in a court holding that only a covenant or a trust, rather than an estate on condition, was created.

O's right of entry for condition broken, or power of termination, can be exercised by O personally or by O's successor. At common law the right of entry was inalienable and could not be exercised by a third person or intended transferee.[10] Today it is generally alienable, devisable, and descendible.[11]

4. FEE SIMPLE SUBJECT TO EXECUTORY LIMITATION

(a) SUBJECT TO SPRINGING EXECUTORY INTEREST

PROBLEM 5.4: O conveys Blackacre "to B and her heirs, B's interest to begin five years from the date of this deed." (a) What estates do O and B have? (b) What are the characteristics of these estates?

Answers and Analysis

(a) O has a fee simple subject to a springing executory interest in B.

(b) At common law O could not create a freehold estate to begin in futuro because livery of seisin was absolutely essential to a transfer of a freehold estate. If livery of seisin were made to B, then the estate would take effect at once contrary to O's intention that B's possessory interest commence in five years. The conveyance by feoffment had to be effective at once or not at all. Seisin could not remain in the feoffor; it could not be in abeyance. The only way there could be an estate to begin in the future was by way of remainder following on the heels of a life estate. For example, O could enfeoff B for life, remainder to C and her heirs. In this case livery of seisin was made to B who held it for life and at B's death

10. See Restatement of Property § 160.

11. But see Ill. Rev. Stat. ch. 30, ¶ 37b; Mahrenholz v. County Board of School Trustees of Lawrence County, 93 Ill.App.3d 366, 48 Ill.Dec. 736, 417 N.E.2d 138 (1981) (language "this land to be used for school purposes only; otherwise to revert to Grantors" creates alienable possibility of reverter rather than inalienable "power of termination").

through the use of a straw. B, the grantee of a fee simple conditional, would convey a fee simple absolute to C and his heirs. C was often a family retainer or attorney. C, in turn, would reconvey to B and his heirs. Thus, B would acquire the property in fee simple absolute.

In order to prevent this circumvention of the grantor's intention, the statute "De Donis" was passed in 1285. Its purpose was to keep the land in the grantee's family so long as there were descendants of the grantee. The statute provided that B could not convey Blackacre so as to extinguish the right of the heirs of B's body to inherit the land upon B's death. Furthermore, B could not convey the land in a manner that would extinguish the grantor's reversion. Thus, after the enactment of de donis, if B conveyed Blackacre to "C and his heirs" and B died leaving child D surviving him, D rather than C was entitled to the land in fee tail. If B died without heirs of his body, then the grantor rather than C was entitled to the land by way of a reversion. In other words, after the Statute De Donis, B had the power to convey an estate in Blackacre only for the term of B's life. The effect of De Donis was to create a perpetuity in the bodily heirs of B and prevent B and any bodily heir of B from disposing of an estate for longer than his life. This estate was called a fee tail.

The fee tail estate would pass by descent to the heirs of the tenant in tail until the line of heirs became extinct. Upon failure of heirs (an event that might happen decades or even centuries following the death of the original tenant in tail), the property would revert back to the grantor or the grantor's successors. Effectively, B and each succeeding heir acquired a mere life estate in the property.

It was permissible for the grantor of a fee tail to restrict the inheritance to particular lineal descendants by the use of proper words in the limitation. There could be an estate in fee tail male or in fee tail female, and either one of these could be a fee tail general or a fee tail special. A grant to a man and the heirs male of his body created a fee tail male. A grant to a man and the heirs female of his body created a fee tail female. If the grant was to a donee and the heirs of his body by a particular spouse the estate was a fee tail special; if no particular spouse was designated it was a fee tail general. Estates in tail female were, in fact, rarely created but estates in tail male were an integral part of the English family settlement and were very numerous in the eighteenth and nineteenth centuries.

The inalienable feature of the fee tail did not last long. By 1472 the tenant in tail, B, could, by the fictitious lawsuit known as

"common recovery," effectively transfer Blackacre to "C and his heirs" in fee simple absolute, thus extinguishing the interests of both the heirs of B's body and the grantor.[17] Another fictitious action, the "fine," enabled the fee tail tenant to bar or dock the entail of the bodily heirs. Both fines and common recoveries were abolished in England in 1834 by a statute.[18]

In the United States, what B has depends upon the local law of the state. Only four states give B a fee tail estate and in each of them B could convey the land in fee simple by deed. These states are Massachusetts, Rhode Island (as to deeds), Maine and Delaware. In Connecticut, Ohio and Rhode Island (as to wills), B would take an estate tail for life but the first heir of the body to inherit from B would have a fee simple absolute. In Arkansas, Colorado, Florida, Georgia, Illinois, Missouri and Vermont, B would take a life estate with contingent remainder in fee simple to B's heirs of the body or lineal descendants. Because the estate in fee tail[19] is considered inconsistent with the values of a democratic society, it has been prohibited either by statute or constitution in thirty-three states. Where prohibited, B would have a fee simple estate either absolute or with limitations.[20]

6. LIFE ESTATE FOR THE LIFE OF THE TENANT

PROBLEM 5.9: O conveys Blackacre "to B for the term of B's life" or to "B for life." (a) What estate does B have? (b) What are the characteristics of this estate?

17. See Taltarum's Case, Y.B. (Year Book) 12 Edw. IV 19. The common recovery worked like this: A the tenant in tail wants to convey a fee simple absolute to B. B would bring an action in common recovery against A who would allege that he had acquired a fee simple absolute from D and would join D to the suit in order to defend that title. D would falsely swear that he had conveyed a fee simple absolute to A and thus had no defense in B's common recovery action. B would then obtain a judgement that he acquired a fee simple absolute from A and A, his heirs and grantor who had a reversion would get a money judgement against D or a judgement entitling them to other lands owned by D of equal value. This judgement was deemed adequate recompense to B, B's heirs and B's grantor. However, D who was carefully selected by the parties in this collusive lawsuit was judgement proof and the judgement against him worthless. Thus, B would have a fee simple absolute; the others an uncollectible judgement.

18. Fines and Recoveries Act §§ 15, 40.

19. In Iowa and South Carolina, the *Statute de Donis* was not considered to be part of the state's received common law and thus did not form part of the state's jurisprudence. In those states a conveyance to "B and the heirs of B's body" creates a fee simple conditional. In Iowa, the courts have held, however, that upon birth of issue B is capable of alienating a fee simple absolute and devising a fee simple absolute as well. See Prichard v. Department of Revenue, 164 N.W.2d 113 (Iowa 1969).

20. See Restatement of Property, Introductory Note Vol. I, p. 201 et seq.; Powell on Real Property ¶ ¶ 196–198.

Answers and Analysis

(a) B has a life estate for B's life. The phrases "for the term of B's life" or "for life" are words of limitation setting forth the duration of B's estate. These words assure that B's estate ends automatically upon B's death.

(b) B has the right to use Blackacre, to take the fruits therefrom, and to dispose of the life estate to another. This power of disposition includes the right to mortgage, to create liens, easements, leases or other rights in the property. But no interest created by B can extend beyond the period of B's life. B has no right to commit waste or to injure Blackacre. B has the right to the exclusive possession of Blackacre but subject to these qualifications: O, who has the reversion, is privileged to come onto Blackacre to determine if waste has been or is being committed; to collect rent, if any is due; to make repairs essential to protect O's reversionary interest; to remove timber which has been severed and which belongs to O; and to do such acts as may prevent O's reversion from being terminated. In general, the life tenant may use Blackacre in the same way as though the life tenant owned Blackacre in fee simple except that the property must be left reasonably intact for the reversioner. The life tenant must keep the property in repair, except for ordinary wear and tear, and must pay the current taxes and interest on any mortgage on the premises at the beginning of the life estate. The life tenant has the right to the rents and profits from Blackacre. The life tenant's personal representative may harvest any crops which were planted before the life estate terminates and may remove any fixtures which the life tenant has placed on the ground. If the property is damaged by a wrongdoer, the life tenant may recover for the injury to his life interest.[21]

The life estate terminates upon B's death and the right to possession, at that time reverts to O or O's successors. Therefore, B has no interest, except for the limited rights described above, that passes to B's heirs at B's death or is capable of passing by devise under B's will.

7. LIFE ESTATE FOR THE LIFE OF ONE OTHER THAN THE TENANT

PROBLEM 5.10: O conveys Blackacre "to B for the life of C." (a) What estate does B have? (b) What are the characteristics of this estate?

21. See Restatement of Property §§ 117 to 122. See also, Problem 4.2.

Answers and Analysis

(a) B has an estate for C's life. This is called a life estate *pur autre vie*, that is, for the life of another. The words "for the life of C" are words of limitation.

(b) B may either predecease or survive C. In either event, the estate which B has lasts only so long and no longer than the life of C. C's life, not B's life, is the measuring life.

At common law if B died before C, the property was regarded, until C died, as without an owner. Thus, the first person to take possession, called the common occupant, was entitled to the estate. This conclusion resulted from the fact that the estate *pur autre vie* was not an estate of inheritance and could not descend to the heirs of the life tenant, and not being personal property it could not pass to the administrator or personal representative of B's estate. Neither could the reversioner, O, claim the estate because O had granted away his interest during the lifetime of C and C was still alive. The general or common occupant can hold the estate until the death of C, not because this person has any right to hold, but because no one has a right to eject him. Alternatively, if the conveyance were to "B and his heirs for the life of C," then upon the death of B during C's lifetime the heir of B took, not by descent but as "special occupant."

Today, the interest in the property between the death of B and that of C, passes to the successors to B's estate as if it were personal property. Also, since the life estate is alienable, the life tenant can convey the estate, thus giving the life tenant's grantee an estate *pur autre vie*. However, the life tenant cannot (under the common law doctrine of tortious feoffment,[22] unless the life tenant is granted a power in addition to the life estate), convey a greater estate than the life tenant owns.[23]

Suppose B has a life estate and conveys to C. Since B cannot create an estate in C greater than the estate B has, C has an estate for the life of B. If B dies in C's lifetime, C's estate ends and the property reverts to B's grantor. If C dies in B's lifetime, C's estate succeeds to the property until B dies. Alternatively, suppose B, who has a life estate, conveys to C for life. Here, C has an estate that terminates upon the death of C or the death of B, whichever first occurs. If B dies first, C's estate ends and the property reverts to B's grantor. If C dies first, the property reverts to B, who by conveying to C for C's life, retains a reversion for life. Then at B's later death, the property reverts to B's grantor.

22. A conveyance of a greater estate than the grantor had.

23. See Restatement of Property § 151.

8. COMMON LAW LIFE ESTATE BY DOWER

PROBLEM 5.11: O conveys Blackacre in a common law jurisdiction to "H and his heirs." H has a wife, W. H dies. (a) What estate does W have? (b) What are the characteristics of this estate?

Answers and Analysis

(a) At common law upon the death of her husband a widow was entitled to a life estate in one third of all lands of which her husband was seised in fee simple or in fee tail at any time during the marriage. The conveyance gave H a fee simple estate of which H was seised during the marriage. Accordingly, W acquired an estate of dower in Blackacre.

(b) The right of dower at common law is limited to a particular person and to specific estates. First, it is limited to an actual wife and is not available to one who has been divorced from H. Since the husband must have been seised of an estate that was capable of being inherited by issue of the marriage in order for his widow to be entitled to dower, a widow could not, at common law, claim dower in land in which her husband had a life estate, an equitable estate only, a joint tenancy with right of survivorship with another, or in which he had a reversion or remainder expectant upon an estate of freehold. Likewise, since the estate had to be capable of inheritance by issue of the marriage, a wife could not claim dower in lands her husband held in fee tail special with another woman. Of course, dower did not attach to the husband's personal property.

The widow's right to dower cannot be defeated by any conveyance by the husband even to a bona fide purchaser for value, unless the wife joins in the conveyance or releases dower. While the husband is living, the wife's dower is said to be inchoate but becomes choate upon the husband's death if the wife survives. Modern statutes in the United States frequently modify the dower right and change considerably the rights of a married woman in her husband's property. In fact, the trend is to abolish dower, even in name, and to substitute for dower an elective or statutory share in the deceased husband's estate.

Generally, an elective or forced share equals some percentage (e.g., one-third) of the value of all real and personal property owned by the deceased spouse at the time of death. Thus, unlike common law dower, the spouse's share also extends to personal property. On the other hand, in many states the share attaches only to property owned at death. This is unlike the common law where dower attached to real property owned at any time during the marriage.

Under these modern statutes, typically no measure of protection is provided a surviving spouse against lifetime transfers of property that have the effect of reducing the value of decedent's property owned at death. Most states, concerned by the inequities that could result to a surviving spouse by lifetime transfers of property, have by statute or judicial decisions adopted rules which, under certain circumstances, permit the surviving spouse to reach assets transferred away during the marriage in whole or partial satisfaction of a forced share.

9. COMMON LAW LIFE ESTATE BY CURTESY

PROBLEM 5.12: O conveys Blackacre in a common law jurisdiction "to W and her heirs." W has a husband, H, by whom W has a child, X, now living. W dies. (a) What estate does H have? (b) What are the characteristics of this estate?

Answers and Analysis

(a) H has a life estate in all (not in one-third as the wife had with dower) of the wife's lands by curtesy.

(b) While dower existed only for the wife, curtesy was solely for the husband. Four requisites were essential to curtesy in H. (1) H and W must be legally married. (2) W must be actually seised of the land in either fee tail or fee simple. (In this problem W had a fee simple estate). H could not have curtesy in W's reversions or remainders because she was not seised of these. Likewise, H could not have curtesy in lands which W held in trust for others. But H did have right to curtesy in equitable estates in fee held for W. (3) W must have a child by H who is born alive during the marriage and capable of inheriting W's estate. In this problem, X is the child of H and W and capable of inheriting from W. (4) The wife must predecease the husband as W did.

Curtesy was not allowed unless the issue entitled to inherit the land was actually born alive. At common law the husband acquired an estate by the curtesy initiate immediately on the birth of issue. This estate became an estate by the curtesy consummate upon the death of the wife.

The tenancy by the curtesy initiate has been gradually abolished by statute. Today, surviving husbands and wives have the same rights in each other's estate, however these rights might be denominated.

10. LIFE ESTATE BY AND DURING COVERTURE

PROBLEM 5.13: O conveys in a common law jurisdiction "to W and her heirs." W marries H. (a) What estate does H have in W's land? (b) What are the characteristics of this estate?

Answers and Analysis

(a) H has a life estate in W's property during coverture, which at common law means during the joint lives of H and W.

(b) It was said that under the common law the husband and wife were one, and the husband was the one. The wife's personality was merged in that of the husband. She was burdened with the common law disabilities including inability to contract or to use or convey her property. When W, being seised of Blackacre, married H, at that instant she lost and H gained control of Blackacre. He could, during their marriage enjoy the rents and profits of the property and dispose of these for the period of marriage. Furthermore, the property could be levied upon to satisfy his debts. The husband's estate continued until the marriage was dissolved by death or divorce, (an absolute divorce at common law could be obtained only by act of Parliament and so was indeed a rarity), or until issue was born of the marriage at which time his estate was enlarged into a curtesy estate. Thus, during the joint lives of H and W, H had full control of the land of W. This right extended to land in which W had the fee, fee tail, a life estate for W's life or for the life of another. Upon the death of either H or W before the birth of issue, H's control terminated and the land returned either to W or to her estate.

Statutes have now changed the common law respecting dower, curtesy and the husband's control of the wife's property by coverture.

II. NON-FREEHOLD ESTATES

1. ESTATE (OR TERM) FOR YEARS[24]

PROBLEM 5.14: L leases Blackacre to T for the period January 1, 2000 to December 31, 2007, a period of seven years. (a) What estate does T have? (b) What are the characteristics of this estate?

Answers and Analysis

(a) T has an estate or term for years.

(b) Perhaps the most important requisite of an estate for years is that it must have definite beginning and ending dates. T's lease begins on a day certain, January 1, 2000, and ends on a day certain, December 31, 2007. It lasts for a specific period of seven years. An

24. In legal contemplation every estate for years is a smaller estate than a life estate for the reason that a life estate is a freehold in real property, whereas the estate for years (even for 1,000 years) is less than a freehold, a chattel interest. Even though a leasehold is an estate in land and immovable, it is personal property. This is not logical but purely historical.

estate for years exists even though the estate does not happen to correspond with the calendar years or does not cover one year, e.g., a lease from April 23, 2004 to January 4, 2005, is an estate for years (even though its duration is less than one year) because it has a definite beginning date and a definite termination date.

During the period of the lease T has the right to possess Blackacre and to retain all of the rents and profits from Blackacre. T will have to pay rent according to the terms of the lease and must not commit waste on the premises. Upon T's death testate or intestate during the term of the lease, the balance of the term passes to T's personal representative for distribution to those persons entitled to T's estate.[25]

No notice is necessary by either L or T to terminate this tenancy as the notice as to when the lease ends is fixed in the lease.

2. PERIODIC TENANCY

PROBLEM 5.15: L and T enter into a month-to-month lease of an apartment beginning on June 1, 2000. (a) What estate does T have? (b) What are the characteristics of this estate?

Answers and Analysis

T is a periodic tenant for month-to-month. Other periodic tenancies are the tenancy from year-to-year, week to week, or day to day.

The nature of a periodic tenancy is that the period is automatically renewed for a like period unless the tenancy is properly terminated by the giving of a notice of termination.

Requiring a notice of termination benefits both landlord and tenant. It gives the tenant a reasonable time to find new premises; if the tenant serves the notice upon the landlord, it gives the landlord a reasonable opportunity to locate a new tenant and avoid having the premises lie vacant. A notice of termination is not required to terminate a tenancy for years since the lease fixes the date of termination at the time it is executed.

The time in which the notice to terminate must be given is coterminous with the period of the periodic tenancy except that at common law a tenancy for year-to-year was terminated by the giving of only six months notice.[26] The notice must be given on or before the first day of the new term. Thus, in this problem, if L wishes to terminate the month-to-month tenancy as of September

25. The persons entitled to T's estate are T's heirs, if T died intestate, or the devisees of the leasehold as provided in T's will.

26. Some state laws reduce the notice period for a year-to-year tenancy to one month. See, e.g., N.C. Gen. Stat. § 42–14 (1984).

30, a notice must be given on or before September 1. Any notice given after September 1 would be ineffective to terminate the tenancy before September 30. If the notice were given any time between September 2 and September 30, the notice might be sufficient to terminate the tenancy as of October 31.

Death of the periodic tenant does not terminate the tenancy absent a timely filed notice of termination.[27]

PROBLEM 5.16: L leases Blackacre to T for a three year period from March 1, 1998 to March 1, 2000 at a rental of $500 per month payable in advance on or before the 10th day of each month. T holds possession beyond March 1, 2000 and on March 9, 2000 tenders $500 to L which L accepts. (a) What estate does T have? (b) What are the characteristics of such estate?

Answers and Analysis

T now has a periodic tenancy from year-to-year. Upon T holding over beyond the date fixed in the lease for the end of the term and L's acceptance of rent on the same terms as provided in the prior lease, T becomes a tenant from year-to-year.[28]

The essential characteristic of the year-to-year (or month-to-month or week to week) lease is that it is of indefinite duration, while the lease for years is for a definite and fixed term. The leasehold continues indefinitely in the absence of either party's giving the other a timely notice of termination. The terms of the old lease are implied to carry over to the year-to-year lease with the exception of the term itself.

Here, either party can terminate the year-to-year tenancy by giving notice not later than six months preceding the end of the yearly period. The notice must be given on or before September 1st and must state that the lease shall end on the following March 1st. In a month-to-month tenancy a full month notice must be given and in a week to week tenancy a full week's notice must be given. Without giving a notice to terminate, the periodic tenancy continues for another period of a year, month or week.

In the problem, T wrongfully held over beyond the term of the lease. This wrongdoing makes T a tenant at sufferance and gives L an election either to eject T or to accept rent from T and thereby

27. In Kennedy v. Kidd, 557 P.2d 467 (Okl. App.1976), where the tenant died in his apartment while under a month-to-month tenancy, the court held "that like the common law tenancy, the statutory tenancy could not be terminated merely by the death of either the lessor or the lessee; the appropriate notice would still be required."

28. If T's holding over the term is with L's consent or without wrongdoing and without agreement, then T is not a tenant from year-to-year, but a tenant at will, and L can recover only the reasonable value for the time T actually holds over the term.

create a tenancy from year-to-year. If L should give notice of termination of the lease on November 1st of a given year, this notice would be wholly ineffective to terminate the year-to-year tenancy since six months notice is required to terminate a tenancy from year-to-year. The tenancy would continue for another year following March 1st and for the following years indefinitely until either party gives notice on or before September 1st of a given year to terminate the tenancy.

The common law rule permitting a landlord to treat a holdover as a periodic tenant from year-to-year was viewed by the courts and legislatures as harsh. In order to ameliorate the effects of that rule, some states limit the period to month-to-month or construe the facts in such a way as to find that the parties intended some other form of tenancy. For example, where the holding over was not the fault of the tenant and a lease contained a provision providing double rent in the event of any holding over, it was held that the landlord was limited to receiving double rent for the period of the holding over and could not elect to treat the tenant as a periodic tenant for year-to-year.[29]

Year-to-year tenancies may also be created by express agreement or, alternatively, arise through the making of an oral lease which is void under the Statute of Frauds. For example, L orally leases Blackacre to T for five years when the Statute of Frauds provides that any lease for more that a year must be in writing. T takes possession of Blackacre and pays rent to L. Absent a governing statute to the contrary, T has an estate from year-to-year with terms impliedly carried over from the void lease.

3. TENANCY AT WILL

PROBLEM 5.17: L leases Blackacre to T for "as long as L and T wish."[30] (a) What estate does T have? (b) What are the characteristics of this estate?

Answers and Analysis

(a) T has a tenancy or estate at will which can be terminated at the will of either L or T at any time.

29. Commonwealth Bldg. Corp. v. Hirschfield, 307 Ill.App. 533, 30 N.E.2d 790 (1940) (provision stating that if the tenant failed to move at the expiration of the lease he would have to pay double the usual rent for the actual time of his occupancy was reasonable).

30. If the lease were to T for as long as T wishes, many jurisdictions take the position that T has a life estate determinable. See Thompson v. Baxter, 107 Minn. 122, 119 N.W. 797 (1909) (where the lease term was for as long as the tenant or his heirs or assigns wish, the lease was neither a tenancy at will nor a tenancy from month-to-month or year-to-year, but rather a life estate).

(b) The estate at will is always of indeterminate duration because it can be terminated by either the landlord or the tenant. But the relationship of landlord and tenant must be created with the tenant in possession of the land. This estate is not created if L gives T a mere license and it does not arise if T is a trespasser on Blackacre. This estate usually arises when no rent is involved but the fact that rent is to be paid either for a month or a year does not prevent its being a tenancy at will if that is what the parties intend.

Historically, a tenancy at will could be ended by either party without notice.[31] Some states require a "reasonable" notice period or by statute fix the notice to some stated number of days. It is also terminated by the death of either party or by the commission of voluntary waste by the tenant because it terminates the mutual concurrence of the wills of the parties. The estate at will is the lowest form of chattel interest in land and is not assignable.[32]

4. TENANCY AT OR BY SUFFERANCE

PROBLEM 5.18: L leases Blackacre to T for two years, the term ending April 30, 2001. T continues in possession after April 30, 2001 without L's consent. (a) What estate does T have? (b) What are the characteristics of such an estate?

Answer and Analysis

T is a tenant at sufferance but T's interest is not really an estate at all. A tenancy at sufferance arises when any tenant, for years, from year-to-year, month-to-month, or life tenant *pur autre vie* holds possession wrongfully beyond his term. In other words it is a tenant who enters rightfully but continues in possession wrongfully. Thus, the tenant at sufferance differs from a trespasser only in that the tenant's original entry was rightful. There is no relation of landlord and tenant between a tenant at sufferance and the reversioner or remainderman. If the landlord has ejected the tenant from the land, then by relation back to the beginning of the wrongful holding over, the tenant at sufferance is liable as if a trespasser from the date of the expiration of the lease, and judgment may be rendered against the tenant for mesne profits.[33]

As discussed above, at the election of the landlord the tenancy at sufferance may be transformed into a tenancy from year-to-year or month-to-month.

31. A tenancy at will is terminable by either party. If tenant alone has a right to terminate at will, tenant has a determinable life estate. See Garner v. Gerrish, 63 N.Y.2d 575, 483 N.Y.S.2d 973, 473 N.E.2d 223 (1984).

32. See Restatement of Property § 21.

33. These are profits recovered from a wrongdoer while the wrongdoer was in possession of the land.

III. CONCURRENT ESTATES

Concurrent estates are estates owned or possessed by two or more persons at the same time.

1. COMMON LAW JOINT TENANCY[34]

PROBLEM 5.19: O conveys Blackacre "to A, B and C and their heirs forever." (a) What estate does A, B and C have? (b) What are the characteristics of such estate?

Answers and Analysis

(a) The estate that A, B and C have depends upon the jurisdiction and the date of the conveyance. At early common law they would have an estate in joint tenancy with right of survivorship. Of course, the fee simple in A, B and C arises from the use in the conveyance of the words of limitation "and their heirs." The joint tenancy arises from the fact that the common law preferred joint tenancy over tenancy in common. The essence of joint tenancy is that the two or more persons named to take the property take and hold as though they together constituted one person. Each of the joint tenants is a component part of the unity, the fictitious single person. Thus, by calling on one of the joint tenants to do the feudal services, the overlord called on all as a matter of law. This reason has long since disappeared and statutes now provide that in a conveyance or devise to two or more persons, it is presumed that the grantor intended to create a tenancy in common, not a joint tenancy with right of survivorship. Under these statutes, A, B and C take as tenants in common[35] since the right of survivorship or joint tenancy is not specified in the conveyance.

34. A joint tenancy may exist among two or more persons as to any kind of an estate, fee simple, fee tail, life estate, leaseholders and chattel interests.

35. The characteristic of survivorship attendant upon a simple conveyance to two or more persons creating a joint tenancy has led to statutory changes in practically all jurisdictions. The statutes vary considerably—some simply reverse the presumption so as to favor a tenancy in common unless the conveyance or transfer clearly indicates otherwise, and others either abolish joint tenancies, especially in land, or abolish the characteristic of survivorship. Insofar as survivorship is concerned, however, it is generally possible to acquire this right if the transfer or conveyance expressly so provides, but the nature of the estate acquired will depend upon the form of the conveyance. It is possible, for example, to create a co-tenancy for joint lives with a contingent remainder to the survivor, or a cotenancy in fee with an executory interest in the survivor. In these cases the estate does not have the same characteristics as a joint tenancy. Executory interests (and contingent remainders in almost all states) are indestructible, and therefore, the nature of these estates, particularly as to the survivorship right, cannot be changed (as in a joint tenancy) by a severance of one of the four unities by any one of the co-owners. Statutes permitting joint tenancies with the right of survivorship are quite com-

(b) Joint tenants are always purchasers, that is, they always take either by deed or will, never by descent. Thus, if O, the owner of Blackacre, dies intestate leaving S and D as his only heirs, they take as tenants in common. Historically, the four unities test had to be satisfied in order to create a joint tenancy with right of survivorship. These are the unities of: (1) *time*—the tenants take their interests at the same moment, (2) *title*—the tenants acquire their interests from the same source, the same deed or will, (3) *interest*—each must have the same identical interest as every other joint tenant, and (4) *possession*—the possession of each is the possession of all and the possession of all is the possession of each, for, after all, they all constitute a single "person."[36] Joint means oneness and in this problem A, B and C constitute one person and each owns the whole of Blackacre. A owns "all," B owns "all," and C owns "all" of Blackacre. Each does not own one third. Each owns an undivided whole. This is true regardless of the number of joint tenants.

The so-called "grand incident" of joint tenancy is the right of survivorship. This means that if A dies without having conveyed A's interest during A's lifetime, the survivors, B and C, own the whole; if B dies first, then A and C own the whole and if C dies first, then the survivors A and B own the whole. And, if A and B die without having conveyed their interests in Blackacre, C, the survivor, owns all of Blackacre. If C owns Blackacre at C's death, it passes through C's estate to C's heirs or devisees. Technically, the surviving joint tenant owns the whole because the deaths of A and B merely extinguished their interests in Blackacre. C, the survivor, is not inheriting any interest from either A or B.

A joint tenancy is destroyed by any act which destroys one of the four unities. For example, suppose A conveys "to X and his heirs an undivided one-third interest in Blackacre." Here is where logic breaks down. A has both a right and power to dispose of what A did not own. As a joint tenant A owned all of Blackacre jointly with B and C. Yet here A conveys to X a fractional one-third interest. What are the effects of this conveyance? First, B and C as to each other remain joint tenants of a two-thirds interest in Blackacre with the four unities still present as between them. X, on the other hand, cannot be a joint tenant with B and C because X got title from a different deed than did B and C and at a different

mon as to certain types of personal property, such as bank accounts and shares of stock. The law of each jurisdiction must be consulted. See Powell on Real Property ¶ 616.

36. Possession by one co-tenant (joint and tenant in common) is not wrongful as against the other co-tenants who are not in possession so long as the tenant in possession does not exclude the others. If one co-tenant enters into possession of the property, that co-tenant is not liable to pay the other the property's reasonable rental value. Spiller v. Mackereth, 334 So.2d 859 (Ala. 1976). But see McKnight v. Basilides, 19 Wash.2d 391, 143 P.2d 307 (1943)(minority rule to the contrary).

time. Thus, the unities of time and title are both broken. As to X's undivided one-third interest, X is a tenant in common on one hand, with B and C being a tenant in common of the two-thirds interest on the other, although at the same time B and C remain joint tenants between themselves as to their two-thirds interest.[37]

Suppose, A, B, and C agree among themselves to partition Blackacre. A takes the north one-third, B takes the middle one-third, and C takes the south one-third. This partition destroys the unity of possession and each one now owns and possesses a divided part of Blackacre, alone and individually. Each is a tenant in severalty of the portion which each is given in the partition.

Suppose A did not convey any interest in Blackacre to X and A, B, and C did not partition Blackacre. Rather, A dies survived by B and C. In A's will A purports to devise A's one-third of Blackacre "to X and his heirs." X takes nothing for the reason that, upon A's death, the survivorship feature of the joint tenancy becomes effective and B and C as survivors own the whole of Blackacre. In other words, a joint tenant can sever a joint tenancy by conveyance but not by will.

The four unities test made it impossible at the common law for a husband who owned Blackacre in fee simple to convey the property to himself and his wife as joint tenants with right of survivorship. This could not be done because husband and wife would not have acquired their interests at the same time. In order to accomplish this transfer, the husband could convey to a straw person who would then reconvey to the spouses as joint tenants with rights of survivorship. Most states have eliminated the need to use the straw.

If spouses who hold a joint tenancy divorce, their estate typically becomes a tenancy in common.

2. TENANCY BY THE ENTIRETY

PROBLEM 5.20: G conveys Blackacre "to H and W (husband and wife) and their heirs." (a) What estate do H and W have? (b) What are the characteristics of this estate?

Answers and Analysis

(a) H and W have a tenancy by the entirety in those jurisdictions that recognize this estate.

(b) Tenancy by the entirety is a species of joint tenancy. This estate adds a fifth unity to the four unities of the joint tenancy—

37. Because the interest of a joint tenant is alienable, it can be levied upon by the creditors of any joint tenant.

the unity of marriage. This tenancy can exist only between husband and wife, who are considered as one person. In common with the joint tenancy, upon the death of the first tenant by the entirety, the survivor owns the whole of the property. It is created by deed or will and not by descent. Unlike the joint tenancy, however, neither spouse can voluntarily dispose of his or her interest in the property. Rather, H and W must join in any conveyance. Thus, a creditor of either spouse cannot levy on the spouse's interest in the property owned by the entirety unless local law provides to the contrary.[38]

Divorce destroys the unity of person and the tenancy by entirety. The effect of divorce is to make H and W tenants in common if the policy of preferring this tenancy over a joint tenancy is followed in the jurisdiction. In some states, however, the divorced couple hold as joint tenants to preserve the survivorship feature.

The tenancy by the entirety is not recognized in many states because it is viewed as an estate inconsistent with the policies underlying Married Women's Property Acts which were intended to give women management and administrative control over their property.

3. TENANCY IN COMMON

PROBLEM 5.21: G conveys Blackacre to "A, B and C and their heirs each taking a one-third interest therein." (a) What estate do A, B and C have? (b) What are the characteristics of this estate?

Answers and Analysis

(a) A, B and C take Blackacre as tenants in common. While at common law a conveyance to two or more persons presumptively created a joint tenancy, a tenancy in common could be created when this was the clearly expressed intention as appears in this conveyance by the words, "each taking a one-third interest therein." While at common law a joint tenancy was preferred over tenancy in common, the reverse is true under state statutory provisions which generally provide that a conveyance to two or more persons creates a tenancy in common unless it is shown that a joint and not a common tenancy is intended.

(b) Tenancy in common exists when a distinct undivided fractional share is given to each tenant individually. This is true even

38. See Sawada v. Endo, 57 Hawaii 608, 561 P.2d 1291 (1977) (victim cannot set aside conveyance by tenants by entirety for purpose of avoiding paying judgment since tenancy by entirety not reachable for payment of tenant's debts). In *Sawada*, the court also categorized the various state positions on the recognition of tenancies by the entirety, and where they exist the various positions on whether the estate could be subject to the claims of creditors.

when the tenants take similar interests at the same time under a single deed or source of title. Only one unity, that of possession, is required for a tenancy in common. It means that the possession of one tenant is the possession of all. But, unlike the joint tenancy with right of survivorship, the interests of the tenants need not come from the same source, nor at the same time, and their respective interests may be quite different. For example, A, B, and C may be tenants in common when A has only a life estate in one-third with remainder to R, B may have a fee in an undivided one-sixth and C a fee in an undivided half of Blackacre. Further, A may have received the interest by deed and B and C by descent. Tenants in common take equal shares unless the deed or circumstances indicate otherwise. No survivorship exists in a tenancy in common, and each tenant has the right and power to dispose of the tenant's share or any portion thereof by deed or will, and, if the tenant in common dies intestate, the tenant's share descends to the tenant's heirs. The tenancy in common is destroyed either by partition or by purchase when the entire title is owned in severalty by one person.[39]

IV. FUTURE INTERESTS:

1. REVERSION

PROBLEM 5.22: O, who owns Blackacre in fee simple absolute, conveys Blackacre to B for life. (a) What estate does O have? (b) What are the characteristics of this estate?

Answers and Analysis

(a) O has a reversion in Blackacre.

(b) A reversion is the residue left in a grantor who transfers an estate which is smaller than the estate which she had. It arises merely as a matter of simple subtraction. O owned a fee simple absolute but conveyed only a life estate to B. O has an interest left, which is a reversion. The seisin passes to B for B's life. B's life estate terminates automatically at B's death and the seisin reverts to O, the grantor, or if O is dead, through O's estate to O's heirs or devisees.

If prior to B's death O had conveyed the reversion to "X and her heirs," then upon B's death the seisin passes to X in fee simple absolute. A reversion always is retained by the grantor who has transferred less than he has.[40]

39. See In re Horn's Estate, 102 Cal. App.2d 635, 228 P.2d 99 (1951).

40. In some cases, however the reversionary interest is labeled either a possibility of reverter or right of entry for condition broken (power of termination). See ch. 6, § 6.2; ch. 7, §§ 7.3; 7.4.

A reversion is a future interest. Thus, the grantor is not entitled to the present use and enjoyment of the property until B's life estate terminates. A reversion always is a vested interest in the transferor, and the transferor can dispose of it either by deed or will.[41]

2. POSSIBILITY OF REVERTER

PROBLEM 5.23: O, who owns Blackacre in fee simple absolute, conveys Blackacre "to B and his heirs for so long as the property is used for courthouse purposes." (a) What interest does O have? (b) What are the characteristics of this interest?

Answers and Analysis

(a) O has a possibility of reverter.

(b) A possibility of reverter is an interest which is retained by the grantor who conveys a fee simple determinable.[42] B is granted a fee simple determinable. It is true that when a fee simple absolute is granted, there can be nothing left in the grantor. This estate will last forever. How long will B's determinable fee in this case last? The answer is found in the very words of the grant, "for so long as the property is used for courthouse purposes." This estate may last forever but it is also possible that the estate will end should B or B's successors fail to use the premises as a courthouse. If that happens B's estate terminates automatically. The possibility that B's estate may revert to O is what is left in O and it is this interest that is called a possibility of reverter.

At common law O's possibility of reverter, standing alone and not attached to a reversion, was inalienable.[43] On the other hand, it was descendible. Today, most jurisdictions take the view that the possibility of reverter is both alienable, devisable, and descendible.[44] Some jurisdictions, however, limit the transferability of these interests.[45]

41. See 1 Am. L. Prop. § 4.16 at 432 (A.J. Casner, ed. 1952); Rest. § 154.

42. It was also the estate retained by a grantor of a fee simple conditional, the predecessor estate to the fee tail that was abolished with the enactment of De Donis.

43. See 1 Amer. Law Prop. § 4.70 (A.J. Casner ed. 1952).

44. See Restatement of Property § 159a; Collette v. Town of Charlotte, 114 Vt. 357, 45 A.2d 203 (1946) (where a portion of a farm was conveyed to the city provided that the land was used only for school purposes with a possibility of reverter, and later the entire farm was conveyed to a third party, the possibility of a reverter resulting from the creation of a determinable fee is alienable).

45. See Powell on Real Property, ¶ 281. Mahrenholz v. County Board of School Trustees of Lawrence County, 93 Ill.App.3d 366, 48 Ill.Dec. 736, 417 N.E.2d 138 (5th Dist.1981).

3. RIGHT OF RE-ENTRY FOR CONDITION BROKEN OR "POWER OF TERMINATION"

PROBLEM 5.24: O, who owns Blackacre in fee simple absolute, conveys Blackacre to B and his heirs but if at any time the premises are not used for courthouse purposes, then O shall have the right to re-enter and terminate B's estate. (a) What interest does O have? (b) What are the characteristics of this interest?

Answers and Analysis

(a) O has a right of re-entry for condition broken or "power of termination."

(b) A right of re-entry for condition broken is an interest retained by a transferor who has conveyed the property subject to a condition subsequent. In this case, B is granted a fee simple subject to an express condition that B's estate may be terminated upon the happening of two things: (1) the property is no longer used for courthouse purposes; and (2) O, or O's successors, elects to terminate B's estate and does those acts of re-entry as are necessary to accomplish a termination. Either O's re-entering of the land with intent to terminate B's estate or O's bringing an action for this purpose terminates B's estate. Failure to do either for a long period of time after the condition is breached may constitute a waiver of the right or conditions may estop O from asserting the right or exercising the power.

This right of re-entry is descendible and can be exercised by O's heirs, but at common law it was not alienable inter vivos if not attached to a reversion. This followed from the law's abhorrence of forfeitures. The exercise of this right or power was and still is not favored by the courts. Some courts hold an attempt to convey the right extinguishes it. Statutes in some jurisdictions permit the inter vivos transfer of a right of re-entry. When such a right is attached to or incident to a reversionary interest, it is transferable. For example, suppose O conveys Blackacre to "B for life but if B sells liquor on the premises then O or his heirs have the right to re-enter and terminate B's estate." O then conveys her reversion including the right of re-entry to C and his heirs. In this case the right of re-entry would pass to C as an incident to the reversion and C could exercise the power of termination. This would also be true if the transfer was by will.[46]

Notice carefully the distinction between the "right of re-entry for condition broken" or "power of termination" on the one hand,

46. See Restatement of Property §§ 160, 161.

and the "possibility of reverter" on the other. It is a question of intention and construing the words of the grant. Compare "O to B and his heirs so long as no liquor is sold on the premises" and "O to B and his heirs but if liquor is sold on the premises then O shall have the right to re-enter and terminate B's estate." In the former O has a possibility of reverter and in the latter, O has a right to re-enter. In both cases, B has a fee simple that might last forever. But in the former, B's estate will come to an end automatically if liquor is sold on the premises because that is as long as the estate is to last. In the latter, B's estate will not come to an end automatically even though B sells liquor there. There must be an affirmative act on O's part to terminate B's estate. O may or may not act. But if O does act, it will cause a forfeiture of the balance of B's fee. If O does not act, then B's estate continues even though B has breached the condition subsequent.

Where the terms of the conveyance are ambiguous as to whether a fee simple determinable or a fee simple on condition subsequent has been created, there is a judicial preference for finding a fee simple on condition subsequent, particularly if a forfeiture can be avoided because the grantor failed to retain a power of termination.[47]

A distinction should exist between the possibility of reverter and the right of entry for condition broken with respect to when the statute of limitations runs on a cause of action for possession as against an adverse possessor. For example, if O conveys Blackacre to B and his heirs so long as liquor is not served on the premises, B's estate automatically terminates if liquor is sold on the premises and O's possibility of reverter immediately ripens into a fee simple absolute. Accordingly, any continued possession of Blackacre by B is wrongful as against O who has a cause of action for possession as soon as liquor is sold on the premises. If O fails to bring that action within the statutory period, B's possession should ripen into title by adverse possession.[48]

But if O conveys Blackacre to B and his heirs provided that if liquor is sold on the premises O may re-enter, the mere sale of liquor on the premises does not give O a right of possession. Rather, O must first exercise the right of entry. Only if O were to exercise the right and B refused to surrender possession to O, would B's continued possession be wrongful. Thus, until such refusal, O should not have cause of action of possession. Not all

47. See 2 Powell on Real Property ¶ 188.

48. Arguably, since B's entry was rightful rather than wrongful, by analogy to an adverse possession by a co-tenant, actual notice of B's sale of liquor on the premises might be required to start the running of the statute of limitations.

courts agree there should be such a difference even though such difference is conceptually warranted.[49]

Many jurisdictions have enacted statutes requiring the periodic recording by the grantor or the grantor's successor of a notice of intent to enforce either a possibility of reverter or right of entry for condition broken.[50] Typically, these statutes provide that if this notice is not recorded, the estate is terminated after a period of time. Jurisdictions are divided on the constitutionality of these statutes.[51] Other states have statutes that bar enforcement of these interests unless an action is brought within a fixed period following the happening of the limitation or condition.[52]

4. VESTED REMAINDER

PROBLEM 5.25: O, who owns Blackacre in fee simple absolute, conveys Blackacre to "B for life, and then to C and his heirs." (a) What estate does C have? (b) What are the characteristics of such estate?

Answers and Analysis

(a) C has a vested remainder. When it becomes possessory in either C or C's successors, it will be a fee simple absolute.[53]

(b) It should be noticed first that O, who had a fee simple absolute, granted the entire estate in part to B and in part to C. Thus, O retains no interest in Blackacre. B has a life estate. This is a freehold estate and thus B has seisin. B's life estate is the "particular estate of freehold" which supports C's remainder. Every remainder must be preceded by a particular estate of freehold—either a life estate or a fee tail.

At common law, if O granted a fee simple to B, O could not also grant a remainder in fee simple to C because there would have been

49. See 1 Amer. L. Prop. § 4.9 at 424 (A.J. Casner ed. 1952); Bergin & Haskell, Preface to Estates in Land and Future Interests 61–62 (2d ed. 1984).

50. See, e.g., Iowa Code Ann. § 614.24 (1989).

51. Compare Presbytery of Southeast Iowa v. Harris, 226 N.W.2d 232 (Iowa 1975), cert. denied 423 U.S. 830, 96 S.Ct. 50, 46 L.Ed.2d 48 (1975) (where a church acquired title to land and asserted that the defendant's reversionary interest extinguished because of their failure to abide by statutory recording requirements, the court held that a retrospective application of a statute permitting extinguishment of an existing reverter interest in the absence of a recording does not render the statute unconstitutional per se); Board of Education v. Miles, 15 N.Y.2d 364, 259 N.Y.S.2d 129, 207 N.E.2d 181 (1965) (extinguishment of title for failure to re-record is an unconstitutional impairment of vested rights). For further discussion, see Ch. 14.

52. See, e.g., Ill. Rev. Stat. ch. 110, §§ 13–102–3 (1985).

53. Just as restraints on the alienation on a fee simple are invalid, so too are they invalid on remainder interests. Thus, in Hankins v. Mathews, 221 Tenn. 190, 425 S.W.2d 608 (1968) the court held a forfeiture restraint limited to 10 years invalid.

nothing left in O to be granted over. Thus, it is said that a remainder in fee simple could not follow a grant made in fee simple or a fee simple could not follow upon a fee simple. Also, at common law the remainder was the only future estate which could be granted to a person other than the grantor or his heirs. In addition, a remainder could become possessory only when the preceding particular estate of freehold came naturally to its end. This meant that the preceding estate came to an end upon the happening of a limitation.[54] The remainder could not cut short the preceding particular estate. In this problem, C's future interest becomes possessory upon B's death.[55]

Cryptically, today a remainder can be defined as a future interest in a transferee that is capable of becoming possessory immediately upon the termination of a preceding life estate. All remainders must fall into one of four categories. These are: (1) indefeasibly vested remainders, (2) vested remainder subject to open or partial divestment, (3) vested remainder subject to complete divestment, and (4) contingent remainders.

A remainder is indefeasibly vested when it is limited in favor of a born and ascertained person and is not subject to the happening of any conditions. C's remainder is vested because C is in being, and the interest conveyed to C is not subject to the happening of any conditions. In other words, C's future interest will, in all certainty, become possessory immediately upon the termination of B's life estate. Because C has a future right to possession, C's estate is classified as a future estate.

If C dies before B, C's interest will not become possessory in C. Nonetheless, C's interest will in all events become possessory upon B's death. If C survives B, C's interest becomes possessory in C. If C dies before B, C's vested remainder passes through C's estate to C's heirs or devisees. Similarly, C may convey it during C's lifetime.

There could be as many remainders at common law as the grantor saw fit to create subject to the limitation that a fee simple could not follow a fee simple. Thus O, fee simple owner of Blackacre, could convey to "B for life, C for life, D for life, E for life, then to F and his heirs." All except B had vested remainders but if E

54. An exception to the rule applied to the future interest following a fee simple determinable. The future interest following a fee simple determinable was a shifting executory interest. This was consistent with the rule that a fee simple could not follow a fee simple but inconsistent with the rule that remainders followed estates that terminated naturally upon the happening of a limitation.

55. If the case were, "O to B for life but if B marry X, then to C and his heirs," C's estate could not be a remainder and would be void at common law because it would, in case B married X, cut short B's life estate. After the Statute of Uses, C's future interest would be valid as an executory interest.

should predecease B, then E would never enjoy the possession of the property. It is vested, however, if the person or class to take is certain and the estate is definite.

In each of the following illustrations C has a vested remainder:

1. O conveys to "B for life, and then to C for life." C has a vested remainder for life; O has a reversion.

2. O conveys to "B for life, and then to C and the heirs of his body." C has a vested remainder in fee tail at common law and O has a reversion.

3. O conveys to "B for life, and then to C and her heirs." C has a vested remainder in fee simple; O has nothing.

4. O conveys to "B for life, then to X for life if X marries Y, then to C and his heirs." C has a vested remainder in fee simple; X has a contingent remainder for life. It is contingent upon X marrying Y.[56] O has nothing.

5. O conveys to "B and the heirs of his body and then to C and his heirs." Where the fee tail estate is valid, C has a vested remainder in fee simple. It becomes possessory upon the natural end of B's fee tail estate which, if it ends, ends as a result of the happening of a limitation, not a condition. On the other hand if O conveys to B and his heirs so long as liquor is not sold on the premises, then to C and his heirs, C does not have a vested remainder, although conceptually C should. C should have a vested remainder because it follows on the heals of an estate that, if it ends, ends naturally upon the happening of a limitation. But, for historical reasons C's interest is classified as a shifting executory interest. Every system needs an exception, and this is one of them.

A vested remainder in fee simple cannot follow another vested remainder in fee simple or a contingent remainder in fee simple. It can follow a vested remainder for life and a vested or contingent remainder in tail when such estates were recognized.

5. VESTED REMAINDER SUBJECT TO OPEN OR PARTIAL DIVESTMENT

PROBLEM 5.26: O conveys Blackacre to B for life, then to C's children. At the time of conveyance C and one child of C, named D, are living. (a) What does C's children have? (b) What are the characteristics of this estate?

56. A vested remainder in fee could follow on the heels of a contingent remainder for life since the two estates were not of the same quality.

Answers and Analysis

(a) C's children have a vested remainder subject to partial divestment or subject to open.

(b) A vested remainder subject to partial divestment or subject to open is a remainder that is limited in favor of a class of persons. A class is a group of persons collectively described such as children, brothers, sisters, nieces, nephews, grandchildren, etc. In order for a class gift to be vested, there must be at least one living member of the class and there must be no conditions precedent attached to the gift. In this problem, C has one living child, D, and there are no conditions precedent.

The nature of the class gift that is vested subject to open is that until the class gift closes, new members can join the class but no member who joins the class can fall out of the class. If a new member joins the class, the interest of each previous class member is diminished but never eliminated. For example, if C has another child, E, then D's interest is reduced from 100% to 50%. If a third child joins the class, then the 50% interests of D and E are reduced to one third. Once the class closes, the members of the class have a vested remainder and the interest of each member of the class can no longer be diminished.[57]

6. VESTED REMAINDER SUBJECT TO COMPLETE DIVESTMENT

PROBLEM 5.27: O, who owns Blackacre in fee simple absolute, conveys Blackacre to "B for life, then to C and his heirs but, if X marries Y, then to X and his heirs." (a) What does C have? (b) What are the characteristics of this estate?

Answers and Analysis

(a) C has a vested remainder subject to complete divestment.

(b) A vested remainder subject to complete divestment is a remainder that is limited in favor of a born or ascertained person or is limited in favor of a class of persons which class is vested subject to open. However, the remainder is subject to the happening or non-happening of a condition subsequent. Upon the occurrence or non-occurrence of the condition, the remainder may not become possessory, or, if the remainder had already become possessory, the interest might not remain possessory in infinity. In this problem, C's remainder is subject to the condition subsequent of X marrying Y. If this condition fails to occur before B dies, then upon B's death C's vested remainder subject to complete divestment becomes a possessory fee simple estate. If thereafter X marries Y, then C's fee

57. On class closing rules, see Problem 7.09, ch. 7.

simple estate is divested in favor of X whose future interest (a shifting executory interest) becomes a possessory fee simple absolute. If X and Y never marry, X's shifting executory interest ends and C's estate becomes a fee simple absolute. Alternatively, if X marries Y during B's lifetime, C's vested remainder is divested and X's future interest (a shifting executory interest) becomes a vested remainder. Then, upon B's death, X's estate becomes possessory as a fee simple absolute.

7. CONTINGENT REMAINDER

PROBLEM 5.28: O, who owns Blackacre in fee simple absolute, conveys Blackacre to "B for life, then if C survives B, to C and his heirs." (a) What interest does C have? (b) What are the characteristics of this interest?

Answers and Analysis

(a) C has a contingent remainder in fee simple.

(b) A contingent remainder is a remainder: (1) limited in favor of an unborn person, (2) limited in favor of an unascertained person, or (3) limited in favor of a born or ascertained person which is subject to a condition precedent. In this problem, the interest of C is conditioned upon C surviving B. If C survives B, then the condition is satisfied and C's interest vests in possession. If C predeceased B, then C's interest fails and upon B's death, Blackacre reverts to O, the grantor.

Because the contingency was a condition precedent, the older common law considered a contingent remainder only a possibility of acquiring an estate in the land. Thus, it was not alienable or transferable inter vivos. However, today the general rule is that contingent remainders are alienable like other future interests.

At common law contingent remainders were destructible. This meant that if the contingent remainder was subject to a contingency that had not occurred at the time the preceding life estate terminated but might occur thereafter, the remainder was destroyed when the life estate ended and the property reverted to the grantor. The rationale for this rule was that seisin could not be in abeyance. Thus, upon the life tenant's death, seisin had to pass either to the remainderman or to the reversioner. For example, suppose O conveyed Blackacre to B for life, then to C and his heirs if C attains the age of 21 years. B dies survived by C who is age 19. Since the condition precedent did not occur prior to B's death, C's contingent remainder was destroyed and the property reverted to O. While logic might have dictated that even though the property reverted to the grantor the remainderman would take the property

if the condition later occurred, this was not the case. Once the remainder was destroyed, it was destroyed forever.

The Rule of Destructibility was abolished both in England and almost all states. It probably survives in Florida.[58] Where the rule has been abrogated, if the condition occurs after the death of the life tenant, the remainder becomes possessory, thus permitting it to be effective as a springing or shifting use under the Statute of Uses.

As noted, a vested remainder subject to complete divestment is a remainder subject to the occurrence or non-occurrence of a condition subsequent. A contingent remainder, on the other hand, is a remainder subject to a condition precedent. If a transfer creates a future interest in only one transferee or in one class of transferees, then any condition attached to the gift is a condition precedent and the remainder is contingent. Thus, in both a conveyance to "A for life, then to B and his heirs if B attains age 21," and a conveyance to "A for life and if B reaches age 21, then to B and his heirs," B has a contingent remainder.

If a transfer creates a future interest in one transferee or class of transferees and then creates, alternately, another future interest in a different individual or class, the first future interest can be either a vested remainder subject to complete divestment or a contingent remainder, depending upon whether it is subject to a condition precedent or a condition subsequent. Often, and as a matter of document construction, whether a condition is a condition precedent or a condition subsequent depends upon where the condition physically appears in the instrument in relationship to the words of purchase which designate who takes the first future interest. Words of condition that precede the words of purchase are conditions precedent; words of condition that follow the words of purchase are conditions subsequent. For example, if O conveys Blackacre to "A for life, then if B reaches age 21, to B and his heirs, but if B does not reach age 21, then to C and his heirs," B has a contingent remainder because the condition of attaining age 21 precedes the words of purchase "B." If O conveys Blackacre to "A for life and then to B and his heirs, but if B does not reach age 21, then to C and his heirs," B has a vested remainder subject to being divested since the words of condition are subsequent to the words of purchase "B." Since interests are classified in the order in which they are set forth in the governing instrument, if the first future interest is a contingent remainder, then the following future interest is also a contingent remainder. If the first future interest is a

58. Blocker v. Blocker, 103 Fla. 285, 137 So. 249 (1931) (where a life tenant conveyed his life estate to A and the owners of a reversionary interest in the estate conveyed their interest to A for the purpose of merging the two estates into a fee simple estate, the court held that contingent remainders may be defeated by destroying the particular estate upon which they depend).

vested remainder subject to being divested, then the second future interest is an executory interest. As rules of construction, these rules work in most, but not all, cases.

The following conveyances further illustrate contingent remainders:

1. O conveys Blackacre to "A for life, and then to B's heirs." At the time of the conveyance B is living. Since living persons have no heirs, the remainder is limited in favor of unascertained persons and, therefore, is contingent. If B survives A, the remainder is destroyed under the common law. Today, the future interest in B's heirs would become possessory when B died. If B died in A's lifetime, the contingent remainder would become a vested remainder in B's heirs.

2. O conveys Blackacre to "A for life, then to A's children." A is childless. The remainder limited in favor of unborn persons is contingent. It would become a vested remainder subject to open upon the birth of A's first child.

3. O conveys Blackacre to "A for life, then to B and his heirs, if B survives A, but if B does not survive A, then to C and his heirs." Using the rules of construction discussed above, it would initially appear that B has a vested remainder subject to complete divestment because all of the words of condition come after the designation of B as the taker of the first of the two future interests. However, since the survivorship condition is stated twice ("if B survive A" and "but if B does not survive A."), it can be argued that O intended to create a different estate in B than would have been created if O had merely transferred to A for life, then to B and his heirs, but if B predeceased A, then to C and his heirs. This other estate in B would be a contingent remainder.[59]

8. SPRINGING EXECUTORY INTEREST

PROBLEM 5.29: O conveys Blackacre to "B for life and one year after B's death, to C and his heirs." (a) What interest does C have? (b) What are the characteristics of this interest?

59. See Fletcher v. Hurdle, 259 Ark. 640, 536 S.W.2d 109 (1976) (where the testator devised land to his granddaughter for life, then to the heirs of her body, if any, and if not then to the testator's son or his heirs and assigns, the testator created a life estate in the granddaughter, alternative contingent remainders to the heirs of her body and his son, and left in himself a divestible reversion); In re Wehr's Trust, 36 Wis.2d 154, 152 N.W.2d 868 (1967) (where a will created a trust of residue of an estate and which provided that the testator's brothers and sisters were to be life income beneficiaries and upon the death of the last surviving sibling, one-half of the remaining trust estate would pass to the testator's aunt, if living, and if dead then to her surviving descendants, and the aunt predeceased the testator survived by four unmarried daughters without issue, the court held the residuary remainder would pass to the testator's heirs under the state's statutes of descent and distribution).

Answers and Analysis

(a) C has a legal springing interest.

(b) Springing and shifting interests are termed executory interests or executory limitations. They are always created in favor of someone other than the conveyor. They are interests which cannot take effect as remainders, either because they are not supported by a preceding particular estate of freehold (life estate or fee tail) or because they take effect in derogation of an existing estate, that is they divest a vested estate.

More particularly, a springing executory interest is a future interest in a transferee that, in order to become possessory, must divest the transferor of a retained interest (called a reversion) after some period of time during which there is no other transferee entitled to a present interest which, at common law, would have been a freehold.

At common law, executory interests were invalid as legal estates until the Statute of Uses (1536). Conveyances operating under that Statute (bargain and sale deeds, feoffment to uses, and covenants to stand seised) could raise springing and shifting uses which were transformed into corresponding legal estates. Today, as in this problem, it is not necessary to first raise a use in order to create executory interests. In the problem, C's interest would fail as a remainder because a remainder had to become possessory not later than the instant B died at which time the seisin would pass to C. Under the facts there is a gap of one year following B's death before C's interest becomes possessory. During that year O's reversion takes effect in possession.

9. SHIFTING EXECUTORY INTEREST

PROBLEM 5.30: O, owner in fee simple, conveys Blackacre to "B and his heirs but if B marries X, then to C and his heirs." (a) What interest does C have? (b) What are the characteristics of such interest?

Answers and Analysis

(a) C has a shifting executory interest.

(b) A shifting executory interest is a future interest in a transferee that in order to become possessory must, upon the occurrence or non-occurrence of an event, divest a present interest

of another transferee or a vested interest of another transferee.[60] In this case, B has a present interest in fee which is divested upon the happening of a condition—B marrying X. In common with the springing executory interest, C's interest was an invalid common law estate prior to the adoption of the Statute of Uses and then was only validated if properly raised from a use. Today, of course, it is not necessary to first raise a use in order to create executory interests.

60. Two exceptions to this rule are that the future interest following the fee simple determinable and the fee simple conditional (both of which, if they terminate, terminate upon the happening of a limitation and not a condition) is an executory interest and not a remainder. These exceptions grew out of the common law prohibition of a fee on a fee.

Chapter 7

CLASSIFICATION OF FUTURE INTERESTS

Table of Sections

Sec.
7.1 Types of Future Interests—Generally.
7.2 Reversions.
7.3 Possibilities of Reverter.
7.4 Rights of Re-entry for Condition Broken, or Powers of Termination.
7.5 Remainders, Vested and Contingent.
7.6 Executory Interests.
7.7 Does Classification Matter.
7.8 Survivorship Contingencies.

SUMMARY

§ 7.1 Types of Future Interests—Generally

1. There are five classes of future interests:

a. Reversions

b. Possibilities of reverter

c. Powers of termination, also called rights of re-entry for condition broken

The above three future interests are always in favor of the grantor.

d. Remainders

e. Executory interests

Remainders and executory interests are always created in favor of a transferee.

2. Reversions, possibilities of reverter, powers of termination and remainders were recognized by the common law as valid estates. Executory interests were recognized only in the courts of equity prior to the enactment of the Statute of Uses in 1536 as respects deeds and the Statute of Wills in 1540 as respects wills.

3. There are two types of estates, broadly speaking, with respect to rights of possession:

a. possessory estates.[1]

b. future estates. These estates are not possessory in the present. Rather the possession, use or enjoyment of the estates is postponed until a future time. The element of futurity refers not to the ownership or existence of a property interest but to the time when the estate may be possessed.

§ 7.2 Reversions

1. When a person owns an estate in land and conveys to another an estate the duration of which is less than that which the transferor owns, there is an undisposed of residue remaining in the transferor. That residue is called a reversion if the transferred estate is either a life estate, a fee tail, or a non-freehold estate.

2. Because the transferor in the conveyance simply does not deal with that undisposed of part of the estate which remains, a reversion is said to be created by operation of law.

3. Because the transferor has disposed of this entire estate in the land, there is no reversion in O in any of the following examples:

a. O, who owns Blackacre in fee simple absolute,[2] conveys Blackacre to B and his heirs,

b. O, who owns a life estate in Blackacre, conveys to B "my life estate in Blackacre,"

c. O, who owns a 50 year lease in Blackacre, assigns or conveys to B "all of my right, title, and interest in Blackacre."

4. All reversions are vested and are of two classes: (a) those which cannot be divested, and (b) those which are subject to being divested.

5. Examples of reversions which cannot be divested:

O conveys Blackacre:

a. "to B and the heirs of his body." O has a reversion in those jurisdictions which recognize a fee tail.

b. "to B for life." O has a reversion.

c. "to B for 99 (or 10) years." O has a reversion.

O, being a life tenant of Blackacre, conveys

1. See ch. 6.

2. Throughout this chapter, O will be deemed to own property in fee simple absolute unless otherwise stated.

a. "to B for 99 years." Historically an estate for years was always less than a life estate, so O has a reversion.

b. "to B for the life of B." Historically a life estate in another is always a lesser quantum estate than the life estate in the tenant, so O has a reversion.

c. "to B for such portion of my life as B continues to support me." O has a reversion.

6. Examples of reversions which are subject to being completely divested:

O, being fee simple owner of Blackacre, conveys it:

a. "to B for life, and if C pays B $100 before B's death, then to C and his heirs." O has a reversion which is subject to complete divestment if and when C pays B $100.

b. "to B for life, and two years after B's death, to C and his heirs." O has a reversion for two years after B's death. This reversion will then be divested by the executory interest in C.

7. An attempt to create a remainder in a conveyance in favor of the heirs of the grantor is ineffective under the doctrine of worthier title in those jurisdictions where the doctrine has not been abolished, and the grantor retains a reversion.

§ 7.3 Possibilities of Reverter

1. A possibility of reverter is the interest left in a transferor who conveys a fee simple determinable[3] It is a future interest that can become possessory only if the limitation attached to the fee simple determinable occurs.

2. A determinable fee is usually limited or described by the words "so long as," "until," "while" or "during."

3. An example illustrating both a determinable fee and possibility of reverter is this: O, who owns Blackacre in fee simple absolute, conveys Blackacre "to B and his heirs so long as Blackacre is used for court house purposes." B has a determinable fee simple and O has a possibility of reverter.

4. A possibility of reverter always is retained in favor of the transferor or the transferor's successors in interest.

5. Today a possibility of reverter generally is alienable, devisable, and descendible. At common law it was considered inalienable when standing alone.

3. It was also the estate retained by a transferor of a fee simple conditional prior to 1285.

6. A possibility of reverter is not subject to the common law Rule against Perpetuities because it was always viewed as vested from the moment it arose, and the Rule applies only to non-vested interests.

7. A possibility of reverter arises by implication of law from the transferor's failure to convey the interest retained, although the intention to retain this interest actually may be expressed in the governing instrument.

8. A possibility of reverter cannot be a reversion because a reversion cannot remain after the conveyance of a fee simple, even a fee simple determinable.

9. A possibility of reverter may be attached to or be an incident to a reversion. For example, O, who owns Blackacre in fee simple absolute, leases Blackacre to B for 10 years or so long as intoxicating liquors are not sold on the premises. O has a reversion with a possibility of reverter as an incident thereto. If intoxicating liquors are sold on the premises the leasehold automatically terminates and the possession reverts to O even before the end of the 10 year term.

10. The fact that the instrument says the property is to be used for one purpose only does not create a possibility of reverter; neither are express words of reverter essential to create a possibility of reverter.

11. The outstanding characteristic of a possibility of reverter is that the estate granted to the grantee automatically comes to an end and automatically reverts to the grantor upon the happening of the event named in the conveyance.

12. Examples of possibilities of reverter standing alone: O conveys Blackacre:

a. "to B and his heirs while the buildings are kept in good order and repair." O has a possibility of reverter but no reversion.

b. "to X Corporation so long as Blackacre is used for school purposes." O has a possibility of reverter but no reversion.

13. Examples of possibilities of reverter attached to or as an incident to a reversion:

a. O conveys Blackacre "to B for life during the time B personally lives on the premises." O has a reversion with possibility of reverter attached as an incident.

b. O leases Blackacre "to B for 20 years or as long as B continues to support me with food and shelter." O has a reversion with a possibility of reverter as an incident.

c. O, who has a 10 year estate in Blackacre, transfers it to B for 5 years or until intoxicating liquors are sold on the premises. O has a reversion with a possibility of reverter as an incident.

§ 7.4 Rights of Re-entry for Condition Broken, or Powers of Termination

(While these two expressions mean the same thing, the expression "power of termination" will be used here because it is modern, shorter and more accurate. As a general rule today, the owner of this future interest does not have a right to "enter" by self-help, but rather must file an action in court to have his right determined and the interest of the other party terminated.)

1. A power of termination is a future interest retained by the transferor who conveys an estate subject to a condition subsequent.

2. A power of termination always runs in favor of the transferor and his heirs. It never runs in favor of a transferee.

3. A power of termination is a power retained by the transferor to terminate a previously transferred estate if and when the condition subsequent attached to the transferred estate occurs.

4. This power never takes effect automatically even if the condition subsequent has been broken by the transferee.

5. Two things must happen for a power of termination to become effective. First, the transferor must elect to exercise the power and second, the transferor must do some affirmative act to terminate the estate in the transferee.

6. The exercise of a power of termination always causes a forfeiture of the estate of the transferee.

7. Until the exercise of the power by the transferor, the estate of the transferee continues even though the condition subsequent has been broken.

8. A power of termination is created by appropriate language in a deed or a will. Typical words creating the condition subsequent are, "provided that," "but if it should happen that," "but if," "subject to the condition that," or "in the event that."

9. A power of termination may stand alone or may be an incident to a reversion. The following examples illustrate this point.

O conveys Blackacre:

a. "to B and his heirs, but if liquor is sold on the premises O reserves the right to enter and terminate the estate." O has a power of termination which stands alone unconnected with a reversion.

b. "to B for life, provided that if liquor is sold on the premises, then I or my heirs have the right to re-enter." O has a reversion attached to a power of termination.

c. "to B for 10 years, but on the express conditions that if liquor is sold on the premises or B does not pay the rent, O may take back the premises." O has a reversion with a power of termination as an incident, which may be exercised in case of breach of either of two conditions.

10. At common law, a power of termination standing alone, unconnected with a reversion, was not alienable or transferable by deed. This inalienability rule is still in effect in some jurisdictions, but others permit a power of termination to be alienated.

11. A power of termination, standing alone, descends from the ancestor to the heir. In most jurisdictions it also is devisable and can be released to the owner of the transferred estate.

12. A power of termination attached to a reversion is alienable, devisable and descendible as an incident to the reversion.

13. In order to effectuate a power of termination at common law, the transferor had to make an actual entry upon the transferred premises. Today, the transferor makes the power effective by bringing a judicial action.

14. A transferor who fails to exercise a power of termination for an unreasonably long time after breach of the condition may be deemed to have waived the power to terminate. Other acts such as acceptance of rent after breach of condition may also constitute a waiver of the power to terminate.

15. The courts will not construe an instrument to create a power of termination unless the language to create the power is unmistakably clear. The courts are hostile to powers of termination because the effect (forfeiture) is harsh. They prefer to construe such language as creating a covenant, the breach of which gives only an action for damages.[4]

16. Equity often will give relief against forfeiture caused by the exercise of a power of termination in instances of hardship, accident or mistake.

17. A power of termination is not subject to the common law Rule against Perpetuities. It is deemed to be vested from its inception.

§ 7.5 Remainders, Vested and Contingent

1. A remainder is a future interest created in a transferee

4. See Ch. 10.

which is capable[5] of becoming possessory immediately upon the termination of the preceding estate, unless it is a fee simple estate.[6] In the creation of a remainder the following elements must be present:

a. the remainder must be limited in favor of a transferee who is someone other than the transferor;

b. the remainder must be created at the same time and in the same instrument as the prior particular estate which supports it;[7]

c. the remainder must be so limited that it can take effect as a present interest in possession immediately upon the termination of the prior particular estate; and

d. the prior particular estate must be an estate of lesser duration than the interest of the transferor at the time of the conveyance so that there can be an interest to pass in remainder.

2. At common law the particular estate which preceded and supported a remainder had to be a freehold estate, that is, either a fee tail or a life estate, but modern usage permits such prior estate to be either (a) a fee tail, (b) a life estate, or (c) an estate for years.

3. The remainder may be either (a) a fee simple, (b) a fee tail, (c) a life estate, or (d) an estate for years.

4. Remainders are classified as:

5. Some remainders will in all events become possessory; others may become possessory but also may not become possessory depending upon whether certain contingencies occur. This fact helps to explain the difference between vested and contingent remainders.

6. The word "estate" refers to freehold estates. Thus a remainder generally can only follow the termination of a life estate. Where the fee tail is recognized, a remainder can follow the termination of the fee tail.

A remainder might also follow on the heels of a term certain, at least if the future interest were not subject to the happening of conditions. For example, if O conveyed to A for ten years, then to B, B has a vested remainder. At common law this same conveyance might have been called a fee simple in B subject to a 10 year term in A. This classification followed from concerns over the concept of seisin and the fact that at common law a term certain was a non-freehold estate. By contrast, a future interest following a term certain that was subject to contingency would more appropriately have been classified at common law as a springing executory interest. Thus, if O conveyed to A for five years, then to B if B is then living, B's estate would be classified as a springing interest and not a fee simple.

7. Once created, the remainder can usually be transferred to another and will still be classified as a remainder. Likewise, if the transferor retains a reversion at the time of the creation of a life estate and later transfers the retained interest to another, the transferee of the transferor's interest is deemed to have a reversion and not a remainder.

There is some authority for the proposition that the present possessory interest and the remainder may be created in different instruments if they are created as part of the same transaction. See 1 Amer. L. Prop. § 4.29 at 547 (A.J. Casner ed. 1952).

a. vested remainders, and

b. contingent remainders.

Vested remainders include those that are:

(1) indefeasibly vested;

(2) vested subject to partial divestment (defeasance) or subject to open; and

(3) vested subject to total divestment (defeasance).

5. A remainder is always created by deed or by will and the remainderman takes as a purchaser. The remainderman might actually be a donee but is nonetheless technically called a purchaser.

6. Vested remainders have always been alienable, devisable, and descendible. At an earlier date in the common law contingent remainders were considered inalienable. Today, all remainders are considered alienable, and unless terminated by the death of the owner, are devisable and descendible.[8]

7. Every remainder that is alienable is subject to the claims of the creditors of the owner thereof.

8. A remainder cannot take effect in derogation of, that is by cutting short, the prior particular estate; it can take effect only when the prior particular estate comes to an end upon the happening of a limitation. The termination of an estate by the happening of a limitation is often expressed by the notion that the estate ended "naturally." This term distinguishes estates that end "unnaturally" by the happening of a condition.

9. At common law a transferor could create as many remainders as desired, subject, of course, to the limitation that the transferor could not dispose of a greater estate than the transferor had.

10. A vested remainder is a remainder which in all events will become possessory when the preceding estate terminates.

11. A contingent remainder has only a conditional possibility of becoming possessory when the particular estate ends and if the condition fails to occur the remainder interest does not become possessory. A remainder limited in favor of an unborn person is contingent. It is subject to the contingency of birth. A remainder limited in favor of an unascertained person is contingent. It is

8. But see, Fletcher v. Hurdle, 259 Ark. 640, 536 S.W.2d 109 (1976) (remainder contingent on an event other than survivorship implied condition on the remainderman being alive when that event occurs; therefore this remainder is not descendible or devisable). A similar rule was applied in Iowa but has recently been abrogated. See Fletcher v. Hurdle, 259 Ark. 640, 536 S.W.2d 109 (1976). See also, Schau v. Cecil, 257 Iowa 1296, 136 N.W.2d 515 (1965), superceded by Davies v. Radford, 433 N.W.2d 704 (Iowa 1988).

subject to the contingency of the person's being ascertained. A remainder limited in favor of a born or ascertained person that is subject to the happening of a *condition precedent* is also contingent upon the condition first occurring.

12. A remainder limited in favor of a class of which there is at least one living member that is not otherwise subject to any conditions precedent is classified as a vested remainder subject to open. This interest is also called a vested remainder subject to partial defeasance. A class is a group of persons collectively described, such as B's children or A's nephews and nieces.

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

14. At common law if an instrument could be construed to create either a vested or a contingent remainder, the construction that resulted in the creation of a vested remainder was preferred. This preference was intended to make the property more alienable since the holder of a contingent estate could not alienate the property. There is some doubt whether this preference should continue. A preference for early vesting could result in subjecting property to a death tax it might not otherwise have been subjected to and this is likely inconsistent with a grantor's intent.[9] Furthermore, the preference for early vesting is not as essential to assure the alienability of property given that contingent remainders as well as vested remainders generally are alienable.[10]

15. If an instrument can be so construed as to create either a contingent remainder or an executory interest, the construction that results in the creation of a contingent remainder is preferred.

16. A vested remainder is not subject to the Rule against Perpetuities since it is vested from the moment of its creation. A contingent remainder, however, may be subject to the Rule.

17. If a vested remainder is in fee simple, there is no reversion left in the transferor; there is always a reversion left in the transferor in case of a contingent remainder, as long as the remainder remains contingent.

9. See, e.g., In re Estate of Houston, 414 Pa. 579, 201 A.2d 592 (1964).

10. Under the Uniform Probate Code, a remainder in a trust not expressly conditioned on survivorship is impliedly conditioned on survivorship and if the remainderman dies prior to the date of distribution there is a substituted gift in the remaindermen's issue. The remainder does not pass through the deceased remainderman's estate. See Unif. Prob. Code § 2–707. This section reflects a preference for a contingent rather than a vested construction.

18. At common law, a vested remainderman has a right against the prior estate owner for waste; a contingent remainderman, suing for himself alone, has no such right.

19. A vested remainderman has a right to compel the prior estate owner to pay taxes and interest on encumbrances to the extent of the value of rents and profits; the contingent remainderman has no such right.

20. Examples of vested remainders are:

a. *Vested Remainder:*

(1) O to "B for life, then to C and her heirs." C has an indefeasibly vested remainder.

(2) O to "B and the heirs of his body remainder to C and her heirs." C has an indefeasibly vested remainder.

(3) O conveys Blackacre to B for life, then in sequence to C for life, D for life, E for life, F for life, and finally to G and the heirs of his body. B has a life estate in possession. C has a vested remainder for life. D, E and F all have vested remainders for life and G has a vested remainder in fee tail. O has a reversion. It is immaterial that any one of the vested remainders for life may never be enjoyed because a remainderman dies before the estate becomes possessory. The seisin will pass regularly to those named who are living and then revert to the grantor, O, or if O is dead the reversion will descend through O's estate.

b. *Vested Remainder Subject to Open:*

(1) O to "B for life, then to B's children." At the time of the conveyance B has one child, C. C has a vested remainder subject to open to let in later born children. C's remainder will be partially divested as each additional child who is born to B joins the class. If at the time of the conveyance B had no children, the remainder would be contingent upon birth of a child to B.

c. *Vested Remainder Subject to Complete Divestment:*

(1) O to "B for life, then to C and her heirs but if C predeceases B then to D and his heirs." C has a vested remainder subject to complete divestment.[11]

21. Examples of contingent remainders (subject to condition precedent):

a. O to "B for life, then to C and her heirs if C marries before B's death." C has a remainder contingent upon her marriage before B dies. If C marries in B's lifetime, C's

11. In this case C has a shifting executory interest.

contingent remainder ripens into an indefeasibly vested remainder.

b. O conveys to B for life, then to C's heirs. C is living. C's heirs have a contingent remainder because until C dies his heirs are unascertained.

22. At common law a contingent remainder was destroyed if at the termination of the preceding estate it was still possible for the contingency to occur. If a contingent remainder were destroyed, the property reverted to the transferor. Under this rule, every contingent remainder must vest at or before the termination of the preceding particular estate. For example, suppose O conveys to B for life, remainder to C and her heirs if C marries X. If C does not marry X before B dies, then the seisin reverts to O and C's contingent remainder is destroyed forever at common law. If C marries X but after B dies, that will not revive the irretrievably lost contingent remainder. The destructibility rule is abolished in most but not all states.[12]

§ 7.6 Executory Interests

1. An executory interest is a future interest created in favor of a transferee under the Statute of Uses (1536) or Statute of Wills (1540) in the form of a springing or shifting use which was executed into a legal estate and which could not be construed as a remainder.

2. An executory interest could not exist at common law although it was recognized in equity; at law, it could be created only after and by the authority of the Statute of Uses and Statute of Wills.

3. A shifting executory interest is a future interest created in a transferee that in order to become possessory must, upon the occurrence or non-occurrence of an event, divest a present interest of another transferee or a vested interest of another transferee. Since the preceding estate must be an estate that is divested, the preceding estate must terminate upon the happening of a condition rather than a limitation. An executory interest can take effect at the termination of a fee simple determinable or fee simple conditional where that estate is recognized. This is an exception to the general definition of a shifting executory interest because both of

12. E.g., the rule may still apply in Florida. See Blocker v. Blocker, 103 Fla. 285, 137 So. 249 (1931) (where a life tenant conveyed his life estate to A and the owners of a reversionary interest in the estate conveyed their interest to A for the purpose of merging the two estates into a fee simple estate, the court held that contingent remainders may be defeated by destroying the particular estate upon which they depend).

these estates terminate, if at all, upon the happening of a limitation, not a condition.

4. A springing executory interest is a future interest limited in favor of a transferee that in order to become possessory must divest the transferor of a retained interest after some period of time during which there is no other transferee entitled to a present freehold interest.

5. The following elements are essential to the creation of an executory interest:

a. it is always in favor of a transferee, one other than the transferor;

b. it takes effect either (1) before the natural termination of the preceding estate and, therefore, in derogation of that estate or by divesting it, or (2) after the termination of the preceding estate.

6. An executory interest always divests a preceding vested estate either:

a. of the grantor, in which case it is a springing interest, or

b. of another grantee, in which case it is a shifting interest.

7. By the better view all executory interests are alienable, descendible, and devisable.

8. An executory interest is indestructible. Out of the indestructibility of executory interests has evolved the Rule against Perpetuities.

9. If a limitation could take effect as a contingent remainder, it was construed to be a remainder and it could not take effect as an executory interest even to save the interest from destruction.[13] Of course, where, as in most states today, a contingent remainder is not destructible, the concern over whether a future interest is a contingent remainder or an executory interest usually is academic. However, the classification of a future interest as one or the other may arguably affect the validity of the interest under the Rule against Perpetuities.

10. Executory interests include (a) springing and shifting uses which are created by deed and (b) executory devises which are created by will. Executory devises are interests which are identical

13. This is known as the Rule of Purefoy v. Rogers, 2 Wms. Saunders 380, 85 Eng. Rep. 1181 (K.B. 1670). In other words, if a future interest could be construed to be a remainder, it could not be construed to be an executory interest to save the future interest from the rule of destructibility. The Rule of Purefoy v. Rogers effectively means that estates are classified today in the same manner as they were classified prior to the enactment of the Statute of Uses.

to executory springing and shifting uses except that they are created by will instead of by deed. So all executory interests are either of the springing or shifting type.

11. Equitable future interests of the springing and shifting types were enforceable in equity before the Statute of Uses. Examples:

a. O, who owns Blackacre in fee simple absolute, enfeoffed B and his heirs to the use of C and his heirs three years after this feoffment. B had a legal fee simple absolute subject to C's equitable springing use which equity would enforce three years after the feoffment.

b. O, who owns Blackacre in fee simple absolute, enfeoffed B and his heirs to the use of C for life but if C became bankrupt then to D for life. B had a legal fee simple subject to C's equitable life estate. C's equitable life estate was subject to a shifting use which equity would enforce in D's favor if C became bankrupt, thus cutting off C's equitable life estate. After the Statute of Uses these equitable future interests were converted into legal future interests, examples of which appear below.

12. Examples of legal statutory interests after the Statute of Uses:

a. Illustrating a freehold estate made to commence in futuro and divesting the vested estate of the grantor:

(1) by springing use created by deed of bargain and sale—O, who owns Blackacre in fee simple absolute, conveys "to B and his heirs, this deed to take effect three years after its date." This deed leaves the fee simple in O for three years at which time a use springs up in B and the Statute of Uses executes the use in B into a legal estate in fee simple, thus divesting the fee simple which was in O, the grantor. By this deed O held a fee simple estate subject to a springing executory interest in B. B's interest could not be a remainder because it is not preceded by a particular freehold estate in another grantee.

(2) by executory devise by will—T, who owns Blackacre in fee simple absolute, devises "to B and his heirs three years after my death" (no residuary clause in will). T dies. This will leaves the fee simple in T's heir for three years by intestate succession at which time a use springs up in B. Also, under the Statute of Wills, by analogy to uses under the Statute of Uses, the use is executed into a legal estate in fee simple, thus divesting the fee simple which was in T's heir. The heir held a fee simple estate

subject to an executory devise in B. B's interest could not be a remainder because it is not preceded by a particular freehold estate in another devisee.

b. Illustrating freehold estates made to commence in the future and following gaps in successive estates to grantees, each time divesting the vested estate in the grantor:

By springing uses by deed of bargain and sale—O, who owns Blackacre in fee simple absolute, conveys "to B for life and one year after B's death, to C for life and one year after C's death to D and his heirs." This deed leaves a fee simple in O for one year after B's death and again for one year after C's death. These are reversions. After B dies the estate reverts to O for a year and after C's death the estate reverts again to O for a year. When the year after B's death has ended, a use springs up in C for life and the Statute of Uses executes this use into a legal life estate in C. C's life estate divests O's reversion after the one year period. Then when C dies and another year has ended, a use springs up in D in fee simple and the Statute of Uses executes this use into a legal estate and gives D a fee simple in possession, thus again divesting the grantor of the reversion after one year.

The legal effect of O's deed is a life estate in B, a reversion in fee simple for a year in O subject to an executory interest in C, then a life estate in C, a reversion in fee simple for a year in O subject to an executory interest in D, then a fee simple estate in D. Neither C's interest nor D's interest in its creation could be a remainder because neither was preceded by a particular freehold estate created in the same instrument in favor of another grantee at the natural termination of which either interest could take effect.

c. Illustrating a contingent freehold interest as an executory interest following a term of years:

By a springing use by bargain and sale deed—O, who owns Blackacre in fee simple absolute, conveys "to B for 10 years then to the heirs of C in fee simple," C then being a living person. This deed gives B a legal estate for a term of 10 years followed by an executory interest in C's heirs and a reversion in O. If C dies and her heirs are determined before the end of the 10 years, then at the end of the 10 year term a use is raised in C's heirs and by the Statute of Uses this use is executed into a legal fee simple, which divests the reversion in O. If C dies after the 10 year term the same holds true. If and when C dies, the contin-

gency determining the identity of those to take under the executory interest will have happened. The use is then raised in the heirs in fee simple and the Statute of Uses executes the use into a legal estate in favor of such heirs of C and the reversion in O is thereby divested.

In short, O's deed creates a 10 year term in B, a reversion in O subject to an executory interest in C's heirs in fee simple, which executory interest is indestructible. C's heirs' interest could not be a remainder because it is not preceded by a particular estate of freehold.

d. Illustrating a future freehold interest taking effect by cutting short or divesting the vested estate of another grantee:

By shifting use by bargain and sale deed—O, who owns Blackacre in fee simple absolute, conveys "to B and his heirs but if B dies without leaving children surviving him, then to C and his heirs." This deed leaves nothing in the grantor. It gives the fee simple to B, but subject to an executory interest of the shifting type in C. Upon B's death without children surviving him, the use shifts from B to C, and the Statute of Uses executes the use in fee simple in C into a legal fee simple which cuts off and completely divests B's fee simple estate.

C's interest in this case could not be a remainder because (a) a remainder cannot be created to follow a fee simple estate, and (b) a remainder cannot cut short or take effect in derogation of a preceding vested estate.

§ 7.7 Does Classification Matter

Professor Powell has suggested at least nine situations in which the classification of an interest may be important although some of these are only of historical but of no practical interest today.[14] The principal areas in which the classification of a future interest can make a difference are:

1. *Alienability.* At common law, vested remainders were alienable *inter vivos* while contingent remainders were for the most part inalienable. Most American jurisdictions, however, hold that both vested and contingent remainders are alienable. In jurisdictions where contingent remainders are inalienable, however, creditors of the holder of the contingent interest may not be able to reach that interest in satisfaction of their claims.

14. 4R. Powell, Future Interests 13–14 (1961). See also Dukeminier, Contingent Remainders and Executory Interests: A Requiem for the Distinction, 43 Minn.L.Rev. 13 (1958).

2. *Inheritability.* At common law, both vested and contingent remainders were inheritable unless, in the case of a vested remainder subject to divestment or a contingent remainder, the nature of the contingency was such that the interest terminated at the death of the remaindermen. Thus, if O conveyed Blackacre to A for life and upon A's death to B and his heirs if B survived A, B's remainder interest was not inheritable if B predeceased A since B's death terminated that interest. Most American jurisdictions follow this rule, although at least two jurisdictions[15] hold that a contingent remainder expressly conditioned upon an event other than survivorship is impliedly conditioned on the remainderman being alive when that event occurs. In these jurisdictions, therefore, contingent remainders are not inheritable.

3. *Acceleration.* The possession of a vested remainder accelerates if the preceding life estate prematurely terminates, whereas a contingent remainder will ordinarily not accelerate upon the premature termination of the preceding estate. Thus, if O conveys Blackacre to A for life and upon A's death to B and his heirs, and prior to her death A renounces the life estate, B's vested remainder interest will accelerate and become possessory. On the other hand, if B's interest was expressly conditioned upon B surviving A, B's contingent remainder would not accelerate. However, the rule that contingent remainders do not accelerate is often avoided by first construing an instrument to determine whether any purpose would be served in light of the grantor's intent to deny an acceleration or whether anyone would be harmed by permitting an acceleration. If B's interest does not accelerate who is entitled to the possession of Blackacre until A dies?

4. *Destructibility.* At common law, contingent remainders were destructible.[16] Neither vested remainders nor executory interests were destructible.

5. *Rule Against Perpetuities.* The most important difference lies in the application of the Rule against Perpetuities to the future interest. Indefeasibly vested remainders and vested remainders in an individual or in a class which is closed from the moment of its creation or which are subject to complete divestment are not subject to the Rule. On the other hand, vested remainders subject to open, contingent remainders, and executory interests are subject to the Rule.

15. Arkansas and North Carolina. 16. See § 4.7, infra.

§ 7.8 Survivorship Contingencies

1. Survivorship contingencies can be expressed or implied.

2. An express survivorship contingency is one that appears in the governing instrument. Typically, it is evidenced by such word or phrases as "surviving" or "if [name of taker] survives."

3. An implied condition of survivorship is one that does not appear in the governing instrument but is judicially implied, typically as the result of either a rule of construction or by construing language in the governing instrument to that effect. The Uniform Probate Code may also imply survivorship contingencies at least for trusts.

4. Ordinarily a contingent remainder conditioned on an event, other than survivorship, was not also impliedly conditioned on survivorship.

5. Gifts limited in favor of "children," "grandchildren," "brothers and sisters," and "nieces and nephews" without an express survivorship condition are not impliedly conditioned on survivorship.

6. Gifts limited in favor of "heirs," "descendants," or "issue" are impliedly conditioned on survivorship.

PROBLEMS, DISCUSSION AND ANALYSIS

§ 7.2 Reversions

PROBLEM 7.1: Blackacre is located in a jurisdiction which recognizes the fee tail. O conveys Blackacre to "B and the heirs of his body, remainder to C for life." C dies. Then B dies leaving a son, X. X dies without issue and without having made any conveyance of Blackacre. O still lives. Who has the right to possess Blackacre?

Applicable Law: All reversions are vested and one is vested indefeasibly when it is absolutely certain to revert to the grantor and become an estate in possession upon the natural termination of all prior estates.

Answer and Analysis

The answer is O in jurisdictions recognizing the fee tail. O owned a fee simple estate, the largest estate one can have in land. O conveyed a fee tail estate to B, followed by a remainder to C for the life of C. At common law there could be as many remainders following the prior particular estate as the grantor wished. But, if the prior particular estate, (B's fee tail in the problem) and the remainders were all estates of lesser duration than that which the grantor had, the grantor retained a reversion. Here, B's fee tail was of lesser duration than O's fee simple absolute. Likewise, C's life estate did not absorb the remaining part of O's estate. This left O with a reversion which becomes possessory whenever the granted

estates terminate. Reversions are alienable, devisable and descendible. Thus, if O were to predecease the termination of the estates of B and C, O's reversion would become possessory in O's successors in interest.

C had a vested life estate in remainder but because C died before B and his issue, C never was able to possess or enjoy Blackacre. When B died, not having barred his entail, or O's reversion, either by fine, common recovery or deed, X became possessed of a fee tail estate. When X died without bodily issue and without barring either the entail or reversion, then the possession of Blackacre reverted (turned back) to O.[17]

PROBLEM 7.2: T devised Blackacre to "A for 15 years." There was no residuary clause in the will nor any disposition of Blackacre other than A's 15 year term. T died leaving H as her sole heir. When the 15 years following T's death had expired, A refused to surrender possession of Blackacre to H who then sues A in ejectment. May H succeed in ejecting A?

Applicable Law: A reversion vests in the conveyor, if alive, but if the conveyor is dead, then the reversion vests in her successor in interest who is the heir or devisee as to a reversion in fee simple. A reversion may follow a term of years. Where a testator's will contains no residuary clause, all of the testator's undisposed property passes to the testator's heir by intestacy.

Answer and Analysis

Yes. By T's will A was given a term of years in Blackacre. This is, a non-freehold estate. At an earlier date when a fee simple owner conveyed an estate for years, the grantor was said to have a fee simple subject to a term of years rather than a reversion. Today it is considered that the landowner has a reversion even though the term carved out of the fee simple is a non-freehold interest. When T died and the will became effective, the possessory interest in Blackacre for the 15 year term was vested in A. There was also a reversion left in someone. The reversion could not be in T who is dead and since the reversion was not disposed of by T's will, it passed to T's heirs by intestate succession. H, being the sole heir of T, received the reversion by descent. It was at that time a future interest, owned by H but not to be possessed or enjoyed until the expiration of the 15 year term. Following the end of that term the right to the possession of Blackacre reverted to H. H therefore had the right to eject A.[18]

PROBLEM 7.3: O conveyed Blackacre "to B for life, then to B's surviving children and their heirs." At the time of the

17. See Simes, 17–19; Restatement of Property § 154.

18. See Simes, 17–19; Restatement of Property § 154.

conveyance B was childless. O later deeded "all of my right, title and interest in Blackacre, to X and his heirs forever." What interest, if any, has X in Blackacre?

Applicable Law: A reversion is alienable, devisable, and descendible. Therefore, the reversioner can convey the reversion to another even though it is not a present possessory estate. A reversion that is conveyed to another continues to be classified as a reversion.

Answer and Analysis

X has a reversion in Blackacre. When O executed the first deed O created a presently possessory life estate in B and a contingent remainder in B's children who survive B. That interest is contingent on the happening of two conditions. First, because it is limited in favor of unborn persons, it was conditioned on their being born. Second, it is expressly limited to those children born to B who survive B. The quantum of these two estates—the life estate and contingent remainder—is less than the fee simple absolute O had. Therefore, O failed to convey to B and C all that O had. O retains a reversion. This reversion continues to exist in O, or O's successor in interest, until such time, if ever, that B's life estate terminates and it is determined whether B had surviving children. In other words, so long as there is a condition precedent to the vesting of the fee simple remainder in the children of B, there is a reversion. If no children survive B, then O's reversion ripens into a fee simple absolute upon B's death. If, on the other hand, a child or children of B survive B, then at B's death, the contingent remainder in fee simple ripens into a fee simple absolute in B's children and the reversion terminates. In other words, O's reversion is terminated only if B dies survived by children. Until B dies and it is determined whether B has surviving children, O has a reversion that is alienable, devisable, and descendible.

O's deed to X prior to B's death conveyed the reversion to X. This conveyance did not make X a remainderman. Rather, X became the assignee of the reversion with rights which are substantially the same as though he were a remainderman.[19] A similar result would have followed had O died owning the reversion and devising all of his estate to X. In this case, O would have bequeathed the reversion to X and if B later died without surviving children, X's reversion would have ripened into a fee simple absolute.

19. See Restatement of Property §§ 154, 159; Simes, 70; Powell on Real Property, ¶ 281.

§ 7.3 Possibilities of Reverter

PROBLEM 7.4: O conveys Blackacre "to B and his heirs for school purposes, but when said property shall no longer be used for school purposes, it shall revert to O, her heirs and assigns." O later grants to X and her heirs, "all my right, title and interest in Blackacre." Fifty years later, B ceases to use Blackacre for school purposes. X took possession. B sues X in ejectment. May B succeed?

Applicable Law: At common law a possibility of reverter unconnected with a reversion was not alienable by a deed. Today, according to the better view, a possibility of reverter can be transferred by a deed and the grantee takes the same interest as the grantor had in the property.

At common law a possibility of reverter could always be released to the owner of the determinable fee. In the event of a release, the estate of the holder of the fee simple determinable ripened into a fee simple absolute. Also, a possibility of reverter that was incident to the reversion of which it was a part could be alienated.

Answer and Analysis

No. (1) It was once argued that under the Statute Quia Emptores a possibility of reverter could not exist. Today that question is academic for it is universally held that there can not only be determinable fees but also determinable fees tail (where fees tail are recognized), determinable life estates and determinable estates for years, with consequent possibilities of reverter in each case. Had O conveyed merely "to B and his heirs" it is obvious O would have had nothing left. But when O conveyed to B for school purposes and the deed provided in substance that B's estate should last only so long as it was so used, and then it should "revert to O, her heirs and assigns," there was some interest retained in O. That interest is a possibility of reverter. Although this estate may never become possessory, it is a presently existing interest in real property which is alienable, devisable, and descendible.

(2) At common law a possibility of reverter could be released to the owner of the determinable fee to the effect that the holder of the fee simple determinable would have a fee simple absolute. Thus, if O had released O's possibility of reverter, B would have had a fee simple absolute.

(3) Had O granted "to B for life so long as used for school purposes," so that a reversion as well as a possibility of reverter had remained in O, then under the common law O could alienate the reversion; the possibility of reverter also was transferred as an incident to the reversion.

(4) For reasons that are largely obscure, the common law did not permit a possibility of reverter, unconnected with a reversion, to be alienated. Today they generally are alienable. When O executed the deed to X, O transferred the possibility of reverter to X. When Blackacre ceased to be used for school purposes, the determinable fee simple in B immediately and automatically came to an end, the possibility of reverter immediately and automatically took effect, and the fee simple estate immediately and automatically reverted to X. X is now the owner of Blackacre in fee simple absolute and has a good defense in ejectment against the whole world including B.[20]

PROBLEM 7.5: O conveys Blackacre "to B and his heirs so long as a brickyard is operated on the premises, then to X and his heirs." O died intestate leaving H as his sole heir. When the premises ceased to be used for brickyard operations, X took possession of Blackacre. H sues to eject X from the premises. May H recover?

Applicable Law: A possibility of reverter follows a determinable fee, is descendible, and is not subject to the common law Rule against Perpetuities. An executory interest is subject to the Rule against Perpetuities and if it offends the Rule, is void *ab initio*. A possibility of reverter runs in favor of the conveyor or her heirs if she dies intestate and arises by implication of law without any express words describing it as such.

Answer and Analysis

Yes. O conveyed a fee simple determinable to B. This is evidenced by the words "so long as" a brickyard is operated thereon. This estate might last forever but, on the other hand, it might not. If no interest had been created in X, O would clearly have retained a possibility of reverter and it would have become possessory automatically at the moment the premises were no longer used as a brickyard. However, the plain reading of the deed indicates that O intended to give to X any residual interest in Blackacre should the premises not be used as a brickyard. This interest is a shifting executory interest although classifying it in that manner is clearly an exception to the classification structure. It is a classification exception because if it were to become possessory it would be because of the *natural* termination of B's estate upon the happening of a limitation rather than the divesting of B's estate upon the happening of a condition.

20. See Restatement of Property § 159; Simes, 28–30, 73–75; Collette v. Town of Charlotte, 114 Vt. 357, 45 A.2d 203 (1946), which follows the Restatement.

Although O intended to create a shifting executory interest in X, that interest is void under the common law Rule against Perpetuities. That Rule voids interests that might vest[21] more than twenty-one years after the death of some life or lives in being at the creation of the interest. In this case, since B and X have inheritable interests,[22] B's successors in interest might cease to use Blackacre as a brickyard more than twenty-one years after the deaths of both B and X. If that occurred then, but for the Rule, X's interest would become possessory in X's successors in interest beyond the period allowed by the Rule. Since this event might happen, the Rule voids X's interest from the moment it was created.

The effect of voiding the interest of X is to excise it from the instrument with the effect that no interest is created in any transferee to follow the termination of B's estate. Since no interest is created in another, O retains the possibility of reverter which descended to O's heir, H. When Blackacre was no longer used as a brickyard, H was immediately entitled to possession. Therefore H can sue X to recover possession of the property.[23]

It is important to understand the nature of a possibility of reverter. It is bound up with the nature of a determinable estate. Notice in each of the following examples that each of the determinable estates comes to an end of its own limitation. This means the estate ends by the very words which describe its duration.

In some jurisdictions, statutes have been enacted requiring holders of possibility of reverters (as well as rights of entry for condition broken) to file in the local land records office a notice of intent to enforce the interest should it ever become possessory. If the holder of the interest fails to timely file such notice, the interest is barred and is no longer enforceable.[24]

(a) O conveys Blackacre "to B and his heirs until liquor is sold on the premises." When liquor is sold on the premises B's estate automatically ends because it is described to last just that long. There is no forfeiture. When B's estate ends, O's possibility of reverter becomes an estate in possession.

(b) O, being a life tenant, conveys "to B for my life or until liquor is sold on the premises." When liquor is sold on the premises B's determinable life estate per autre vie comes to an end and O's

21. In the case of a shifting executory interest following a fee simple determinable, the interest vests, for purposes of the Rule, when it becomes possessory.

22. There interests are not extinguished by their deaths.

23. See Restatement of Property § 154.

24. See, e.g, Trustees of Schools of Township No. 1 v. Batdorf, 6 Ill.2d 486, 130 N.E.2d 111 (1955) and Presbytery of Southeast Iowa v. Harris, 226 N.W.2d 232 (Iowa 1975)(holding such statutes constitutional). Contra, Board of Education v. Miles, 15 N.Y.2d 364, 259 N.Y.S.2d 129, 207 N.E.2d 181 (1965)(holding statute invalid).

possibility of reverter becomes an estate in possession because B's determinable life estate reverts to O. There is no forfeiture.

(c) O, being tenant for 10 years, conveys "to B for ten years or so long as liquor is not sold on the premises." If liquor is sold on the premises B's estate automatically terminates and the possibility of reverter left in O automatically takes effect and the 10 year term, or what is left thereof, reverts to O. There is no forfeiture.

Note

The difference in result between the last two problems is significant. In Problem 7.5 the grantor did not attempt to retain a possibility of reverter in himself, but instead attempted to create its equivalent (actually an executory interest) in a third party. Since executory interests are subject to the Rule Against Perpetuities, the particular shifting executory interest was void, and the grantor retained a possibility of reverter. In Problem 7.4 the grantor made no effort to create an executory interest in a transferee but instead retained the possibility of reverter and then in a separate instrument transferred it to a third party. The possibility of reverter is transferable and is not subject to the Rule Against Perpetuities. Therefore, the transferee of the possibility of reverter acquired such interest.

§ 7.4 Rights of Re-entry for Condition Broken or Powers of Termination

PROBLEM 7.6: O conveys Blackacre "to B and her heirs provided that if B does not live on the premises personally, then O has the right to eject her from the property." Two years later and while B still lived on Blackacre, O conveyed all of O's right, title and interest in Blackacre to X and his heirs. O then died testate devising all of O's interest in Blackacre to C. O's sole heir is H. Three years after O died, B leased Blackacre to M for a term of 10 years. M went into immediate possession. H advised M that M was not entitled to live on Blackacre, demanded that M surrender possession to H, and notified B that B's estate had been terminated. M acceded to H's request and H went into possession of Blackacre. C now sues H in ejectment and gives notice to B and M that he has terminated B's estate and consequently, M's interest in Blackacre. May C succeed?

Applicable Law: A power of termination can be created only in the transferor. Under the common law the grantor can devise this interest but cannot alienate it when unconnected with a reversion. It will descend from ancestor to heir.

A power of termination never takes effect automatically upon breach of the condition subsequent by the owner of the

possessory estate. Rather the owner of the power of termination must (a) elect to terminate the estate and (b) do some affirmative act towards its termination. All estates and encumbrances created by the owner of the possessory estate exist subject to the exercise of the power of termination, and if the power is exercised such estates and encumbrances are rendered void.

Answer and Analysis

The answer is yes in jurisdictions following the traditional common law. The language in O's conveyance to B was sufficient to create a fee simple on condition subsequent. Not only did O use words of condition, O also expressly reserved the right to terminate B's estate by ejecting her from the premises. It should also be noted that this power of termination was reserved only for O and not in favor of any third party. It seems clear then that B was granted a fee simple subject to a condition subsequent that if B did not live on the premises O could exercise the power of termination and reclaim the property from B.

Prior to any breach of the condition, O conveyed, or attempted to convey, this power of termination to X. This was a power of termination standing alone. There was no reversion left in O who had conveyed a fee simple estate to B, to which the right of re-entry or power of termination could be attached as an incident. At common law, and also today in some jurisdictions, a power of termination unconnected with a reversion was not alienable because to allow the transfer of what was considered a mere possibility would encourage maintenance and champerty.[25] This reason has ceased to have any practical importance in the law, but persists nonetheless. Curiously enough it has been held in some cases that even though the power of termination is not alienable, nevertheless, an attempt by its owner to transfer it results in its annihilation and that thereafter the owner of the possessory estate owns it without being subject further to the condition subsequent. There seems no proper foundation for the imposition of this penalty and the general rule is that the attempted transfer is void but the power of termination still exists and remains with the transferor.

25. The policy behind the rule of non-assignability was to prevent the stirring up of law suits. Black's Law Dictionary (1979), gives the following definitions:

Champerty. A bargain by a stranger with a party to a suit, by which such third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a part of the proceeds or subject sought to be recovered. Schnabel v. Taft Broadcasting Co., Inc., 525 S.W.2d 819, 823 (Mo.App.1975). Maintenance consists in maintaining, supporting, or promoting the litigation of another.

Another explanation of the non-alienable rule was simply the lack of a remedy for the assignee under medieval law.

Applying this rule to the problem, O's conveyance to X had no effect and O still owned the power of termination. When O died O devised O's interest in Blackacre to C. Generally, it is held that a power of termination is an interest in real property which descends from the ancestor to the heir. In this problem had O died intestate this power of termination would have passed by intestate succession to his heir, H. It is also generally true that an interest which will descend is likewise subject to testamentary disposition and can be devised. This is true for a power of termination. Thus, when O devised his interest in Blackacre to C this power of termination passed to C. H has no interest in Blackacre and therefore had no right to cause the interest of M or B to terminate.

The fact that C owns the power of termination and that the owner of the possessory estate, B, has breached the condition subsequent, however, does not automatically revest the estate in the owner of the power of termination. At common law the owner of the power of termination would have to (a) elect to terminate the estate and (b) make an entry onto the premises. Today the holder of the power has to (a) elect to terminate the estate and (b) do some affirmative act towards its termination. Bringing an action in ejectment or sometimes merely giving notice have constituted such affirmative act. In this case C's bringing ejectment against H and giving notice to B and M should be sufficient affirmative acts to terminate the possessory estate and revest it in C, the owner of the power of termination. C may therefore eject H from Blackacre.

Of course, in jurisdictions where the power of termination is alienable, devisable, and descendible (which today is most jurisdictions), O's conveyance to X would be valid and X, not C, would own the power of termination. In this case, C's action against H, the party in possession, would fail because as between C and H, H has the better title based on his prior possession.[26] On the other hand, if X were to sue H in ejectment, X would prevail.

In some conveyances under which in form the grantee appears to take a fee simple on condition subsequent the grantor fails to expressly retain a power of termination. For example, suppose O transfers property to B and his heirs provided that liquor is not sold on the premises. In this conveyance O has not used the traditional language ("so long as," "while" or "during") used to create a fee simple determinable. Likewise, O has not retained a power of termination. If a court were called upon to determine the interests of O and B in the property, the court could either imply a power of termination in O or conclude that, absent the express retention of such a power, B has a fee simple subject only to

26. Tapscott v. Cobbs, 52 Va. (11 Grat.) 172 (1854).

precatory but not forfeiture language. The preference appears to be for the latter and thus B has a fee simple absolute.

One more point requires consideration. What rights did M acquire under the lease from B? When the owner of an estate subject to a condition subsequent creates estates or encumbrances on the land, all persons who take such estates or encumbrances are bound by the condition. If the power of termination is exercised, the estates and encumbrances are rendered wholly nugatory as to the owner of the power of termination, who now owns the estate as though he had never parted with it *ab initio*. Under this doctrine, when C or X, as the case may be, exercised the power of termination, he not only cut off B's estate but also effectively terminated any interest which M had in the premises.[27]

PROBLEM 7.7: O, being the life tenant of Blackacre, leases it "to B for 10 years upon the express condition that if B sells liquor on the premises or makes an assignment of the lease without O's written consent, then in either event, O, or O's successors in interest, have the right to enter the premises and terminate this lease." The rent was $100 per month, payable in advance. O then assigned all of O's right, title and interest in Blackacre to X. B then began selling liquor on the premises.

On the month following the first sales of liquor on Blackacre, B sent the monthly rent check to X for the sum of $125 instead of $100 and told X the additional $25 was because B was selling liquor on the premises. This procedure continued for a year at which time, without any consent from X, B assigned the lease to M. Thereupon, X promptly entered the premises, evicted M and notified both M and B that the lease had been terminated. B and M join in action against X to regain possession of Blackacre. May they succeed?

Applicable Law: A power of termination connected with a reversion is alienable as an incident to the reversion. When an instrument creates an estate subject to more than one condition subsequent, one may be waived after its breach, without affecting the other. The question of waiver is usually a fact question but if it is so clear that reasonable persons cannot differ, it is a question of law. Re-entry on the premises is an effective exercise of the power of termination.

Answer and Analysis

No. The provisions in O's lease to B are typical of those in many leases. When O provided that the lease was "upon the

27. See Restatement of Property § 154, 155, 159-161, 165 comment a, Illustration 5; Simes, 30-32,73, 76.

express condition" and that the lessor and his successors in interest "have the right to enter the premises and terminate this lease," it seems a condition subsequent was created with a power of termination and not mere covenants that the lessee would not do the things forbidden. A power of termination, therefore, was reserved in favor of O. This power did not stand alone. It was attached to or an incident of the reversion which O reserved because the 10 year lease was a lesser estate than A's life estate.

At early common law a power of termination, even when attached to a reversion, was not alienable. However, by the statute of 32 Henry VIII, c. 34 (1540), which is considered part of the American common law, the power of termination when incident to a reversion was made alienable. Thus, when O assigned to X, both the reversion and power of termination incident thereto, passed to the assignee, X. When B later breached the condition concerning the sale of liquor on the leased premises, X could have terminated the lease. Since X failed to do so, the lease continued. X, however, was not merely passive concerning the continuation of the lease. X accepted additional rent from the lessee who had breached the condition. The acceptance of the additional rent for the breach of the very condition in the lease constituted a waiver of such breach as a matter of law. A waiver is the intentional giving up of a known right. Whether a right has been waived is usually a question of fact, but reasonable persons would not differ on there being a waiver in this case; therefore it is a question of law. X could not exercise the power of termination for the breach of the condition not to sell liquor on the premises.

However, the condition against assignment of the lease is wholly separate and independent from the one concerning liquor and the waiver of the latter did not affect the continued efficacy of the former. When B made an assignment of the lease without the written consent of X, there was a breach of that condition subsequent. This gave X the right to exercise the power of termination. Since X elected to exercise the power, B's leasehold and all rights of the assignee thereunder were effectively terminated. Neither B nor B's assignee, M, has a right against X.

POSSIBILITIES OF REVERTER COMPARED WITH AND DISTINGUISHED FROM POWERS OF TERMINATION

SIMILARITIES

POSSIBILITY OF REVERTER	POWER OF TERMINATION
1. it is a future contingent interest in real property	1. it is a future contingent interest in real property

SIMILARITIES

	POSSIBILITY OF REVERTER	POWER OF TERMINATION
2.	it is always in favor of the transferor only	it is always in favor of the transferor only
3.	it is not an estate in land	it is not an estate in land
4.	it is descendible, will pass from the transferor as ancestor to his heir, and is devisable	it is descendible, will pass from the transferor as ancestor to his heir, and in most states is devisable
5.	it can be released by the transferor to the owner of the determinable estate	it can be released by the transferor to the owner of the determinable estate
6.	when attached to a reversion, it is alienable, descendible and devisable	when attached to a reversion, it is alienable, descendible and devisable
7.	at common law but not today a possibility of reverter, standing alone and unconnected with a reversion, was not alienable	at common law a power of termination, standing alone and unconnected with a reversion, was not alienable (Note—this is true today in some but not all jurisdictions—see under dissimilarities)
8.	it is not subject to the common law Rule against Perpetuities	it is not subject to the common law Rule against Perpetuities
9.	the owner has no right against the owner of the granted estate for waste unless it is reasonably probable that the interest will become possessory and the threatened injury is wanton and unconscionable	the owner has no right against the owner of the granted estate for waste unless it is reasonably probable that the interest will become possessory and the threatened injury is wanton and unconscionable

DISSIMILARITIES

	POSSIBILITY OF REVERTER	POWER OF TERMINATION
1.	It always takes effect automatically upon the happening of the event upon which it is limited **This is its chief characteristic**	It never takes effect automatically upon breach of the condition subsequent upon which it is limited **This is its chief characteristic**
2.	no affirmative act on the part of its owner is necessary to make it effective	to make it effective its owner must (a) elect to exercise the power and (b) must do some affirmative act to terminate the estate

DISSIMILARITIES	
POSSIBILITY OF REVERTER	**POWER OF TERMINATION**
3. it is created by implication of law when a deed or will creates a determinable estate	3. it is created only by clear and express language in a deed or will providing for a condition subsequent to the estate conveyed
4. typical words limiting the determinable estate are "until", "while", "so long as", "during"	4. typical words limiting the condition subsequent are, "but if", "provided that", "upon the express condition that", "but if it should happen that"
5. it is alienable when standing alone unconnected with a reversion	5. it is *not* alienable in many states when standing alone unconnected with a reversion
6. its operation does not cause a forfeiture of any estate	6. its operation causes forfeiture of an estate
7. it cannot be waived after the event	7. it can be waived after breach of the condition

§ 7.5 *Remainders, Vested and Contingent*

PROBLEM 7.8: O conveys Blackacre "to B for life, and upon B's death, to C and her heirs." What interest, if any, do O, B and C have in Blackacre?

Applicable Law: Every remainder (a) must be in favor of a transferee, (b) must be created at the same time and in the same instrument as the prior particular estate of freehold which supports it, (c) must be so limited that it is capable of taking effect as an estate in possession immediately upon the termination of the prior particular estate of freehold, and (d) the prior particular estate of freehold must be a lesser estate than that of the conveyor at the time of the conveyance; thus the prior particular estate must be either a life estate or a fee tail. It cannot be a fee simple.

A remainder is indefeasibly vested when it will become possessory when the preceding particular estate of freehold terminates. It is subject to no condition.

Answer and Analysis

O has no interest in Blackacre; B has a life estate and C has an indefeasibly vested remainder in fee simple, or simply a vested remainder.

(a) Since O, who owned a fee simple estate in Blackacre, conveyed away that fee simple estate by a combination of the life estate in B and the fee simple in remainder in C, there is no reversion in O.

(b) If O's conveyance to B were at common law, it would involve the ceremony of feoffment, whereby O went onto Blackacre and made livery of seisin to B for B's life. O would walk off the premises and leave B in possession, seised of a life estate. If O's conveyance were a bargain and sale deed under the Statute of Uses (1536)[28] and recited a consideration, then mere delivery of the deed to B would vest a life estate in B. The consideration in the deed would raise a use in B and the statute would transfer the legal title. In either event the conveyance would give B a valid legal life estate.

At common law every remainder had to be supported by a preceding particular estate of freehold. This particular estate could be either (1) a life estate or (2) a fee tail estate; but it could not be a fee simple estate because if the prior tenant had a fee simple estate there was nothing left to pass in remainder to the remainderman. Thus, B's life estate is sufficient to support a remainder.

(c) A future interest can qualify as a remainder if it meets the following requirements: (1) it must be in favor of a transferee who is someone other than the conveyor; (2) it must be created at the same time and in the same instrument as the particular estate of freehold which precedes and supports it; (3) it must be so limited (described) that it can take effect as a present interest in possession at (neither before nor after) the natural termination[29] of the particular estate of freehold which precedes and supports it; and (4) the prior particular estate of freehold must be an estate of lesser duration than the interest of the conveyor at the time of the conveyance so that there can be an interest to pass in remainder.

Applying these principles to C's interest clearly results in C's interest being classified as a remainder. (1) C is a transferee; (2) C's interest is created at the same time and in the same instrument as the life estate is created in B; (3) C's interest is so limited or described that it is to take effect at once or immediately upon the termination of B's life estate, that is upon B's death and, therefore, is an interest capable of becoming possessory immediately upon the termination of B's life estate; (4) The prior particular estate of freehold, B's life estate, is a lesser estate than the estate held by the conveyor at the time of the conveyance, O's fee simple. Clearly C's interest possesses all the elements required of a common law remainder. Thus, C has a remainder.

28. The Statute of Uses was enacted in 1535 and became effective in 1536.

29. Estates terminate naturally when they terminate as the result of a limitation, not a condition.

Of what class is C's remainder? It is an indefeasibly vested remainder because it is presently owned by C and is subject to no condition to becoming an estate in possession when B's life estate terminates. The termination of B's life estate is not a condition attached to C's gift. C's remainder is indefeasibly vested because nothing can defeat it.[30] If C survives B, C will take possession of Blackacre. If C conveys the remainder, then C's grantee will take possession at B's death. If C devises the remainder prior to B's death, then C's devisee take possession at B's death. If C dies intestate before B dies, then C's heir will take the possession. Thus, C's interest will in all events become possessory when B's life estate terminates in either C or C's successor in interest.[31]

PROBLEM 7.9: O conveys Blackacre "to B for life, and upon B's death, to the children of B and their heirs." At the time of this conveyance B had no child but two years later B had a child C, and thereafter had in succession children D, E, and F. After C attained adulthood, his creditor, X, levied upon and sold C's interest in Blackacre, to Y. What interest, if any, did Y take by the execution sale?

Applicable Law: A remainder limited in favor of a group of persons collectively described, typically by their relationship to a common ancestor, is subject to partial defeasance if the class is open and the gift is subject to no conditions. If the gift to the class is also subject to conditions, it either can be a contingent remainder or a remainder subject to complete divestment.

A remainder subject to partial defeasance only is called either a vested remainder subject to open or a vested remainder subject to partial divestment. With respect to this type of remainder, as the number of class members increases, the interest of each decreases proportionately and to that extent is defeated. Every remainder is alienable by its owner and is subject to the claims of creditors.

Answer and Analysis

Y took the interest which C had in Blackacre which is a variable in size, but which is at present an undivided one fourth interest in the remainder but which is subject to open if more children are born to B. It is presently at least equal to one fourth because at the time Y asserts an interest, B has four children.[32]

30. While at first blush it might be thought that the phrase "upon B's death" is a condition, in fact that is merely a linguistic restatement of the limitation that causes B's estate to end, namely, B's death. Thus, it is merely a redundancy, not a condition.

31. See Simes 19–25; Restatement of Property § 157.

32. The interest would be at least one fourth even if one of the children born to B had died since the interest of B's children is not subject to conditions

O conveyed a life estate to B followed by a contingent remainder in B's children. B's children have a remainder interest for these reasons: It is an interest that runs in favor of someone other than O. It is created in the same instrument and at the same time as B's life estate. It is to take effect, if at all, when B's life estate naturally ends. Finally, B's life estate is a lesser estate than O's fee simple when he made the conveyance. But there is at the time of the conveyance a condition precedent to the vesting of such remainder because B had no child.[33] Since the remainder to B's children was subject to the contingency of birth, it is a contingent remainder. There was therefore a reversion in O which could become possessory if B died without ever having had children.

When C was born to B, however, the contingent remainder in B's children was transformed (or changed colors). It became a vested remainder in C and any other children that might be born to B. C's birth also resulted in the termination of O's reversion. While C was the only living person entitled to share in this remainder at the time C was born,[34] the remainder interest is subject to open in favor of later born children born to B. C's remainder is also described as one subject to partial defeasance or divestment. When D was born, then C and D were owners of the remainder in fee simple, each owning an undivided one half interest therein. When E was born to B, then the estate opened up still further and C, D and E each owned an undivided one third in the remainder in fee simple. When F was born to B, there was still further division and C, D, E and F each owned an undivided one fourth interest in the remainder in Blackacre. In other words, during B's lifetime there was always the possibility that the interest of B's living children could be diminished or partially divested by the birth of more children.

But for how long was the remainder interest open to admit more members, or, to state it in more technically, when would a class gift close? A class gift is closed when no new members can join the class.

A class gift closes either physiologically when that person who can produce the members of the class dies, or, under the rule of convenience, when any member of the class is entitled to demand possession of his or her share. A person is entitled to make that demand when there is no outstanding possessory estate and with

and, therefore, is devisable and descendible.

33. The language "at the life tenant's death" or "upon the life tenant's death" is not sufficient to create a condition precedent. These phrases refer merely to the time when the future estates become possessory. Accord, Kost v. Foster, 406 Ill. 565, 94 N.E.2d 302 (1950).

34. C's interest was owned in severalty. This means that at the time of C's birth, C was the sole embodiment of the remaindermen, "B's children."

respect to the person who can make the demand there are no outstanding conditions precedent.[35] In this problem, of course, the class closes physiologically and under the rule of convenience at the same time, namely B's death. However, that is not always the case. For example, suppose O conveys Blackacre to B for life, then to C's children. If C dies during B's lifetime, the class closes at C's death physiologically. If C survives B but a child of C also survives B, then presumptively the class closes at B's death under the rule of convenience.

If B dies survived by C but C had not yet had children, the class does not close at B's death.[36] The class would clearly close physiologically no later than C's death and vest in C's then living children, if any. But, suppose that following B's death C has a child. Would the birth of C's child in C's lifetime close the class? According to the Restatement the child's birth would not close the class and the class would remain open until C's death.[37]

The rule of convenience is presumptive, so it gives way to a contrary intent.[38]

Unless the grantor or testator otherwise provides, in most states today these class closing rules apply as well with respect to adopted children. Thus no distinction is drawn between biological and adopted children.[39]

Each remainderman who is entitled to share in a class gift has an interest that is alienable. If the remainder is vested subject to open it is also devisable and descendible. Many remainders limited in favor of a class, however, are subject to a contingency of survivorship, expressly or impliedly. These remainders are not devisable or descendible if the survivorship contingency causes the deceased remainderman's interest to terminate at his or her death. For example, if O conveys Blackacre to B for life, then to C's surviving children, the interest of a child of C who predeceases B fails at his death and, therefore, is not devisable or descendible.[40]

35. See also Restatement (Second) of Property, § 26.2

36. Of course, if the common-law Rule of Destructibility applied, then in this case the remainder would be destroyed at B's death because there was then no remaindermen capable of taking possession of the property.

37. Restatement (Second) Property § 26.2((2).

38. See In re Earle's Estate, 369 Pa. 52, 85 A.2d 90 (1951).

39. cf., Restatement (Second) Property § 25.4.

40. The time when a survivorship contingency may take effect can be ambiguous. Thus, if T devises property to A for life, then to T's surviving children, and T is survived by two children, B and C, their interests are vested if "surviving" means "surviving T" but contingent if "surviving" means "surviving A." See, e.g., Browning v. Sacrison, 267 Or. 645, 518 P.2d 656 (1974) (survivorship contingency related to death of life tenant, not testator, and rejecting argument that the common law preference for the early vesting of estates required a contrary holding).

Interests that are alienable can be reached by creditors of the remainderman. Thus, in this problem C's creditor, X, had the right to levy upon C's remainder interest in Blackacre. Upon the execution sale by X the purchaser, Y, took what the debtor, C, had for the rights of the creditor are derivative. Y bought C's one fourth interest in the vested remainder but this purchased fourth interest in the hands of Y would be subject to open in favor of any child or children thereafter born to B.[41]

REVERSIONS COMPARED WITH AND DISTINGUISHED FROM VESTED REMAINDERS AT COMMON LAW

SIMILARITIES

REVERSION	VESTED REMAINDER
1. is future interest	1. is future interest
2. is preceded by an estate in possession	2. is preceded by an estate in possession
3. is not destructible	3. is not destructible
4. is transferable	4. is transferable
5. is subject to claims of creditors	5. is subject to claims of creditors
6. is vested	6. is vested
7. sometimes subject to defeasance	7. sometimes subject to defeasance
8. is an estate	8. is an estate
9. has right to possess when prior estate ends	9. has right to possess when prior estate ends
10. not subject to Rule against Perpetuities	10. not subject to Rule against Perpetuities
11. has right against prior estate owner for waste	11. has right against prior estate owner for waste
12. may force prior estate owner to pay taxes and interest on encumbrances	12. may force prior estate owner to pay taxes and interest on encumbrances
13. does not take effect in derogation of prior estate	13. does not take effect in derogation of prior estate

DISSIMILARITIES

1. is created by operation of law	1. is created by act of the parties—by deed or will
2. is always in favor of transferor	2. is always in favor of transferee, one other than transferor

41. At common law contingent remainders were not considered alienable but today, with recording statutes under which anyone can look at the records and find out what interest anyone has in land, all remainders are alienable. See Restatement of Property § 157, comment 1, illustration 2, §§ 162, 167; Simes, 19–25.

REVERSION	VESTED REMAINDER
3. there was a tenurial relationship between reversioner and holder of prior estate	3. there was no tenurial relationship between the remainderman and the holder of the prior estate

PROBLEM 7.10: O conveys Blackacre to B for life, then to C and his heirs if C survives B but if C does not survive B, then to D and his heirs. What interests are created in B, C and D?

Applicable Law: Indefeasibly vested remainders are subject to no condition; vested remainders subject to complete divestment are subject to conditions subsequent; contingent remainders are subject to conditions precedent. A vested remainder subject to divestment is one limited in favor of an ascertained person who has the right to immediate possession when the prior estate terminates, or a class of persons of which there is at least one living member even though it may be divested by the happening or non-happening of a condition subsequent. If the language of an instrument can be construed as creating either a vested or a contingent remainder, the preference at common law was for a vested remainder. On the other hand, under the rule of construction mandating that courts give effect to all the words used in a conveyance, additional words in a conveyance may suggest that the grantor intended to create an interest subject to a condition precedent rather than a condition subsequent.

Answer and Analysis

B clearly has a life estate as B's interest is expressly limited to his life. However, there is some dispute regarding the proper classification of the interests of C and D.

A contingent remainder is a remainder that is subject to a condition precedent; a vested remainder subject to divestment is a remainder subject to a condition subsequent. Thus, to distinguish the two remainders, it is imperative to know whether the words of condition are precedent or subsequent. In some dispositions, this will be immediately clear. Thus, if O conveys to B for life, and if C survives B, then to C and his heirs, C's interest in clearly conditioned on surviving B and is a contingent remainder. Likewise if O conveys to B for life and then to C and his heirs if C survives B, C's interest is also classified as a contingent remainder because it is subject to a condition precedent. While the placement of the phrase "if C survives B" differs in the two conveyances, where, as here, there is only one transferee—namely C—of a future interest, words of condition wherever they appear in the instrument are construed as conditions precedent.

Where, as in the problem, there are at least two transferees of a future interest—namely C and D[42]—the placement of the words of condition can effect the classification of the transferees' interests. To begin the analysis, compare these two conveyances:

(a). O conveys Blackacre to B for life, then, if C survives B, to C and his heirs, but if C predeceases B, then to D and his heirs.

(b). O conveys Blackacre to B for life, then to C and his heirs but if C predeceases B, then to D and his heirs.

While both these conveyances express O's intent that at B's death Blackacre should pass to C and only to D if C is dead, under standard rules of construction, the interests of C and D are classified quite differently. Interest are classified in the order in which they are set forth in the governing instrument. Thus, first B's interest is classified, then C's interest is classified, then D's interest is classified. B clearly has a life estate. C's is the next interest to be classified. Whether C has a contingent remainder or a vested remainder subject to being divested depends on whether C's interest is subject to a condition precedent or a condition subsequent. That depends on where the words of condition appear in the instrument. If they appear *before* the designation of C as a purchaser (as in (a)) they are words of condition precedent and C has a condition precedent. If, on the other hand, they appear *after* the designation of C as a purchaser (as in (b)), they are words of condition subsequent. Thus in (a), C has a contingent remainder, in (b), C has a vested remainder subject to being divested. Remember: these are merely rules of construction so courts could find that O had a different intent and classify the interests in a different manner.

Once it is determined what interest C has, it is time to classify D's interest. If C has a contingent remainder, then so does D. It meets the definition of a remainder, and it cannot be an executory interest as it does not defeat the vested interest of another transferee. On the other hand, if C has a vested remainder subject to being divested, D has a shifting executory interest because for D's interest to become possessory it must divest the vested interest of another transferee.[43]

In Problem 7.10 O conveys Blackacre B for life, then to C and his heirs if C survives B but if C does not survive B, then to D and

42. Multiple tranferees could also be classes such as C's children and D's children, or C and D's children.

43. This rule assumes the quantum of the estates of C and D are the same. For example, if O conveys to B for life, then to B's first born child and the heirs of his body, then to D and his heirs, and B is childless, B's first born child has a contingent remainder in tail, and D has a vested remainder in fee. While ordinarily a vested remainder cannot follow a contingent remainder, it can here since the quantum of B's first born child's estate is "in tail" whereas the quantum of D's estate is a "fee simple."

his heirs. Thus all the conditional words ("if C survives B but if C does not survive B") come after the designation of C. Thus, at first blush, it would seem that C has a vested remainderman. But if C's interest were so classified, it would do violence to another rule of construction. This rule is that in construing an instrument courts should give effect to all the words used. If C were to have a vested remainder subject to being divested, then C would have the same estate C would have had if O had conveyed to B for life, then to C and his heirs but if C does not survive B, then to D and his heirs. No effect would be given to the phrase "if C survives B" by that construction. If some effect is to be given that phrase, then the only choice would be to treat the double statement of the condition as evidencing an intent by O to subject C's interest to a condition precedent in which case C and D would have alternative contingent remainders. Of course, a court might also conclude that the phrase "if C survives B" is merely a redundancy and should be ignored leaving C with a vested remainder subject to being divested. If C has a vested remainder, then D would have a shifting executory interest.

The historic preference for a vested rather than a contingent construction may have made sense in the context of legal rather than equitable estate and concerns for assuring the marketability of property. On the other hand, that preference is not so clearly dictated when a future interest is created in a trust and the trustee has the power to alienate the trust property. Furthermore, in our tax-oriented society, the preference for the vested construction may result in the assessment of additional taxes that would be inconsistent with a grantor's intent and could be avoided with the use of a contingent construction.

PROBLEM 7.11: O conveys Blackacre "to B for life, and then to the heirs of C." At the time of the conveyance, C is living. B then died survived by O and C. O then took possession of Blackacre. C later died leaving H as her sole heir. H sues O to eject him from Blackacre. May H succeed?

Applicable Law: At common law if the condition precedent to a contingent remainder did not happen at or before the termination of the prior particular estate, then the contingent remainder could not vest at or before the termination of the particular estate and the contingent remainder was destroyed forever. The condition precedent to a contingent remainder was either the happening of an event or the ascertainment of the remainderman either because he was yet unborn or for some other reason such as the ancestor still being alive. The destructibility of contingent remainders took place in three ways: (1) by its failure to vest at or before the termination of

the preceding particular estate, (2) by merger, or (3) by forfeiture.

The Rule of Destructibility probably is the law in only one state. In the others, by statute or judicial decision, the contingent remainder takes effect when the condition precedent happens, even if it happens after the termination of the preceding particular estate. Prior to the determination of whether the future interest will become possessory, the grantor has a fee simple subject to a springing executory interest.

Answer and Analysis

At common law H would not be entitled to eject O. Today, however, in most jurisdictions, H would prevail.

By the terms of the conveyance O granted B a life estate. C acquired no interest under the conveyance. Rather, C is merely the ancestor through and at whose death the remaindermen would be determined. The heirs of C were given a contingent remainder, the contingency being their ascertainment at the death of C.[44] That was the condition precedent which made the remainder contingent. As long as there is a contingent remainder, there is a reversion in the grantor. What was the effect of B's death? B left no inheritable estate to pass either to his heirs or devisees. But B was seised, and at his death the seisin had to pass to someone. That someone had to be either the grantor, O, or the remaindermen—the heirs of C. But there can be no heir of a living person and C was still alive. Therefore, C's heirs were not yet determined as of B's death and seisin could not go forward to the unascertained and unascertainable remaindermen. Therefore, since seisin could not be in abeyance, the only person to whom it could pass was O. Once that happened, there was no recognized way at common law by which such seisin could be taken from O and given to the heirs of C, once they were determined, except by a new conveyance. Accordingly, the contingent remainder limited in favor of C's heirs was forever destroyed. This is the doctrine known as the destructibility of contingent remainders. It was based on the principle that every remainder must vest at or before the termination of the prior particular estate or it was forever destroyed. In this problem, when B died before C, at that instant the remaindermen being unascertainable, the seisin reverted to O who had the right to immediate and continued possession of Blackacre, and the contingent remainder was completely and forever destroyed.

44. Since living persons have no heirs, C's heirs can only be ascertained at his death.

What would have happened had C predeceased B? This event would have had three distinct legal effects: (1) Upon C's death C's heirs would have been immediately ascertained as H. Thus, the contingency attached to the gift to the heirs of C—being ascertained—would have occurred prior to B's death. This would have transformed the contingent remainder into an indefeasibly vested remainder in H. (2) The instant the remainder became vested in H, the reversion in O would have been extinguished and O would no longer have any interest in Blackacre. (3) Then, upon the death of B, H's vested remainder (the future interest, presently owned but the enjoyment of which is postponed) would have become an estate in possession and presently enjoyed by H. Had that occurred, then H could have ejected O or anyone else from Blackacre.[45]

Generally, the condition precedent which makes a remainder contingent is either, (1) the happening of an event or (2) the ascertainment of the remainderman because he is yet unborn or because some event must happen. An example of (1) follows: O to "B for life, then to C, if C pays O $100." C has a contingent remainder. If C pays O $100 before B dies, then C's contingent remainder becomes a vested remainder. If C does not make that payment before B's death, then C's contingent remainder is destroyed. An example of (2) follows: O "to B for life, then to the children of C, who is childless." C's children have a contingent remainder. If C has a child before B dies, that child has a vested remainder subject to open. If C has no child before B dies, then, at common law the contingent remainder is destroyed.

At common law there were three ways by which a contingent remainder could be destroyed: (1) by the condition precedent failing to happen as here before the life tenant's death, (2) by merger, and (3) by forfeiture.

Merger occurred when the life estate and next vested estate came into the same hands. Merger can occur without destroying contingent remainders. For example, suppose O conveys Blackacre to B for life, then to C and his heirs. Here, C has a vested remainder. Next year C conveys her remainder to B so that B has both the life estate and the next vested estate (i.e, what was once C's but is now B's remainder) They merge to give B a fee simple absolute.

Merger resulting in the destruction of a contingent remainder can be illustrated as follows: Suppose O conveys Blackacre to B for life, then to B's eldest male heir. B has a son born, X. Now, in order there are: (i) a life estate in B, (ii) a contingent remainder in B's male heir (no one can be an heir of B until B's death) and (iii) a reversion in O. Note that the contingent remainder intervenes

45. See Simes 37 et seq.

between the life estate and the reversion. Now, either O grants this reversion to B or B transfers his life estate to O. In either event there is a merger of the life estate in the reversion—the next vested estate—and the intervening contingent remainder is destroyed. Thereafter, upon B's death, B's male heir has no rights. A similar result would follow if O conveyed O's reversion and B conveyed the life estate to the same person. In this case, the life estate and the next vested estate would merge in their transferee and destroy the contingent remainder.[46]

A forfeiture also could result in the destruction of a contingent remainder. For example, suppose in the preceding example that B, the life tenant, makes a tortious feoffment to M and his heirs in fee simple.[47] B dies leaving X his male heir. B's tortious feoffment destroyed the contingent remainder and X has no rights.[48]

The rule of destructibility applies only to legal estates. It did not apply to equitable estates because the trustee was seised of legal title. Therefore, no gap in seisin could occur if no transferee of a future interest was entitled to possession immediately upon the termination of the life estate. Seisin was always in the trustee. Thus contingent remainders in trust are not subject to the Rule of Destructibility.

The Rule of Destructibility appears to be the law only in Florida.[49] Most recently, the Supreme Court of New Mexico held that the rule was not part of New Mexico's common law.[50] In

46. There is an important exception to the rule that merger destroyed a contingent remainder. Under this exception, if a life estate and the *next vested estate* were created simultaneously with a contingent remainder, the life estate and the next vested estate did not merge to destroy the contingent remainder. However, this exception would not continue to apply if the life estate and next vested estate were later conveyed to another. Therefore, as illustrated below, the exception was easy to avoid. For example, if O transferred Blackacre to A for life, then to A's first born daughter and the heirs of her body, and then to A and her heirs, A would have a life estate and a vested remainder in fee. Assuming A had no children, A's first born daughter would have a contingent remainder in tail which would not be destroyed because of the exception to the merger rule. However, if A were to convey A's life estate and vested remainder to B, they would merge in B to destroy the contingent remainder in tail.

47. A tortious feoffment occurred when a life tenant purported to convey a greater estate than he had.

48. See Archer's Case, 1 Co. Rep. 66B (1597).

49. Blocker v. Blocker, 103 Fla. 285, 137 So. 249 (1931) (where a life tenant conveyed his life estate to A and the owners of a reversionary interest in the estate conveyed their interest to A for the purpose of merging the two estates into a fee simple estate, the contingent remainders could be defeated by destroying the particular estate upon which they depend). See also, Popp v. Bond, 158 Fla. 185, 28 So.2d 259 (1946). The doctrine does not apply to interests in personal property. See In re Estate of Rentz, 152 So.2d 480 (Fla. 3d D.C.A. 1963).

50. Abo Petroleum Corporation v. Amstutz, 93 N.M. 332, 600 P.2d 278 (1979) (where husband-wife owners of property conveyed the wife's interest to their daughters with alternative contingent remainders to one of their daugh-

jurisdictions where the rule does not apply, the contingent remainder limited in favor of C's heirs is not destroyed when B dies survived by C. Therefore, once C's heir is ascertained, that heir is entitled to eject O from the premises. During the time O, the grantor, is entitled to possession, O has a fee simple subject to a springing executory interest in C's heirs.[51]

VESTED REMAINDERS COMPARED WITH AND DISTINGUISHED FROM CONTINGENT REMAINDERS AT COMMON LAW

SIMILARITIES

VESTED REMAINDER	CONTINGENT REMAINDER
1. is a future interest	1. is a future interest
2. called a remainder because it *remains* away from the conveyor instead of reverting to him	2. called a remainder because it *remains* away from the conveyor instead of reverting to him
3. must be in favor of a transferee, one other than the conveyor	3. must be in favor of a transferee, one other than the conveyor
4. must be created at same time and in same instrument as the prior particular estate	4. must be created at same time and in same instrument as the prior particular estate
5. must become an estate in possession at the termination of the prior particular estate of freehold	5. must become an estate in possession at the termination of the prior particular estate of freehold
6. must be preceded by particular estate of freehold—a fee tail or a life estate (see 10 below)	6. must be preceded by particular estate of freehold—a fee tail or a life estate (see 10 below)
7. is created either by will or deed, never by descent	7. is created either by will or by deed, never by descent
8. remainderman always takes as a purchaser	8. remainderman always takes as a purchaser
9. there may be as many as the conveyor wishes	9. there may be as many as the conveyor wishes

ter's children, later executed deeds to the daughters purporting to transfer absolute title to the property, and finally attempted to convey fee simple interests in the property to third persons, the conveyance of property in fee to the daughters did not destroy the contingent remainders in the daughter's children. "Because the doctrine of destructibility of contingent remainders is but a relic of the feudal past, which has no justification or support in modern society, we decline to apply it in New Mexico.").

51. See Simes, 41; Restatement of Property § 240.

VESTED REMAINDER	CONTINGENT REMAINDER
10. TODAY—may be preceded by an estate for years	10. TODAY—may be preceded by an estate for years but then it is an executory interest
11. it is descendible and devisable	11. it is descendible and devisable

DISSIMILARITIES

VESTED REMAINDER	CONTINGENT REMAINDER
1. is not destructible	1. is destructible
2. is transferable	2. is not transferable
3. is subject to the claims of creditors	3. is not subject to the claims of creditors
Today contingent remainders are no longer destructible in most states; they are transferable and are subject to the claims of creditors. The above three dissimilarities should *now* be moved up into the similarities column.	
4. is vested	4. is not vested
5. is an estate	5. is not an estate
6. no reversion left in conveyor if remainder in fee	6. reversion is always left in conveyor as long as remainder is contingent
7. has absolute right to possess when prior estate ends	7. has only conditional right to possess when prior estate ends
8. not subject to Rule against Perpetuities	8. is subject to Rule against Perpetuities
9. vested remainderman has right against prior estate owner for waste	9. contingent remainderman has no right against prior estate owner for waste
10. vested remainderman may force prior estate owner to pay taxes and interest on encumbrances	10. contingent remainderman cannot force prior estate owner to pay taxes or interest on encumbrances

§ 7.6 *Executory Interests*

PROBLEM 7.12: O conveys Blackacre "to B and his heirs but if B becomes bankrupt, then to B's children and their heirs." At the time of the conveyance B has one living child. What interest do B's children have?

Applicable Law: If a future interest takes effect, if at all, at the termination of the particular freehold estate that precedes it because of the happening of a limitation, then it is a remainder. However, if a future interest will take effect in derogation of the preceding particular estate of freehold, or

after its termination as a result of the happening or non-happening of a condition, then it is an executory interest with one exception. This exception is the future interest that follows the natural termination of a fee simple determinable. That future interest is called an executory interest even thought it *does not* take in derogation of the preceding estate since the fee simple determinable ends naturally upon the happening of a limitation and not upon the happening of a condition subsequent.

Answer and Analysis

B's children have a shifting executory interest; they do not have a remainder. It cannot be a remainder because a remainder must be so limited that it will take effect in possession at the natural termination of the prior particular freehold estate as the result of the happening of limitation. A future interest cannot be a remainder if it takes effect in derogation of or cuts short such prior particular estate. By the terms of the conveyance if B becomes bankrupt, then B's present possessory fee simple estate is defeated and the future interest in B's children is to become possessory. If that occurred, then the children's future interest would come in derogation of and would cut short B's fee simple. Thus, the future interest to B's children is an executory interest and not a remainder.

There is little difficulty in distinguishing a remainder or executory interest from either a reversion, a possibility of reverter or power of termination, because a remainder or any executory interest is always in favor of a transferee whereas the other three are always in favor of the transferor.

The real difficulty is in distinguishing a remainder from an executory interest. The following may help. A remainder must always be able to take effect, if at all, at the "natural" termination of the particular estate of freehold which precedes it, never by cutting the prior estate short. An executory interest, with one exception given below, always takes effect in derogation of, or by cutting short, the vested estate which precedes it. This occurs when the preceding estate is terminated because a *condition* rather than a *limitation* has occurred.

In one instance, however, an executory interest takes effect at the termination of the preceding estate. Suppose O conveys Blackacre "to B and his heirs so long as the property is used for courthouse purposes, and if it ceases to be so used, then to X and his heirs." X's interest cannot be a remainder because no remainder can follow a fee simple, whether absolute or determinable. It is

an executory interest but it will vest as an estate in possession at the natural termination of the preceding freehold estate in B.[52]

PROBLEM 7.13: O conveys Blackacre "to B for life and one year after B's death, to C and her heirs." B died and O took possession of Blackacre. One year after B's death and while O was in possession, C demanded possession of Blackacre from O. O refused. C sues O in ejectment. (a) May C recover? (b) What type of interest, if any, does C have?

Applicable Law: If a future interest in a transferee is incapable of becoming possessory until some time in the future and in the meantime there is no other transferee entitled to possession it takes effect only as an executory interest. It cannot be a remainder.

Answers and Analysis

C has an executory interest that became possessory one year after B died and is entitled to recover possession of Blackacre from O.

A remainder is a future interest (1) limited in favor of a transferee, (2) created at the same time and in the same instrument as the prior particular estate which supports it and (3) limited (described) in such a way that it can take effect as a present interest immediately upon the termination of the prior particular estate. The prior particular estate must be an estate of lesser duration than the interest of the grantor at the time of the conveyance.

In this problem C is a transferee; C's future interest was created in the same instrument and at the same time as B's life estate which is the prior particular estate which supports it but C's interest is limited in such a way that it is incapable of becoming possessory immediately upon the termination of the prior particular estate. Therefore, C's future interest cannot be a remainder. It is a springing executory interest.

If a future interest can become possessory only after some period of time during which no other transferee is entitled to the possession of a freehold estate, the future interest is a springing executory interest. It could not be a valid remainder at common law because of the rule prohibiting seisin from being in abeyance. When B died the seisin had to go somewhere. It could not go to C for such was not intended until the passing of one year after B's death. So the seisin reverts to the grantor, O. At common law, once the seisin has reverted to O it took another conveyance to divest the grantor. Thus, C's interest fails to qualify as a remainder.

52. See Simes, 25–28.

C's executory interest is not created by way of a use; rather it was created as a legal estate which would have been void. Therefore, prior to the Statute of Uses it was void. However, after the Statute of Uses, two new types of future interests quite unknown to the common law were permitted to be created in favor of transferees. These new future interests took effect in derogation of preceding estates. One of these, the springing interest, cut short the prior estate which was vested in the grantor. The other, the shifting interest, cut short the prior estate which was vested in one other than the grantor. In this problem, when B died there was a reversion to the grantor, O, who is now possessed of a fee simple estate for the period of one year after B's death. When that year has expired a use springs up in C in fee simple which draws the legal title to itself by means of the Statute of Uses. C, now owning the legal title in fee simple, has the right to immediate possession of Blackacre and can eject O whose prior estate has been cut off by C's executory interest which O himself created.[53]

In each of the following cases as well C has a springing executory interest:

(a) O conveys Blackacre to C three years from now.

(b) O conveys Blackacre to B for life, and if C is alive when X is appointed the executor of B's estate, then to C and his heirs.

In each case there is a period of time during which no transferee is entitled to possession. In (a) it is the three years immediately following the conveyance; in (b) it is that period of time following B's death before X is appointed the executor of B's estate. In (b) the condition attached to C's interest is absolutely incapable of occurring during B's life; thus, C's interest is incapable of every becoming possessory at B's death.

PROBLEM 7.14: O conveys Blackacre "to B for a period of 10 years, then to C and his heirs." (a) Is C's interest valid? (b) Would it make any difference if the future interest had been limited in favor of "the heirs of C," a living person?

Applicable Law: At common law every remainder had to be preceded by a particular estate of freehold to prevent abeyance of the seisin. Therefore, a remainder could not be preceded by a non-freehold estate such as a term for years. Future interests following on the heels of a non-freehold estate were classified as springing executory interests. Modern usage permits a *remainder* to follow an estate for years.

53. See Simes, 19–25.

Answers and Analysis

The future interest limited in favor of C was valid at common law but was not actually classified as a future interest. Rather C was said to have a fee simple subject to a term for years in B. Today it is permissible to refer to C's interest as a remainder. If the future interest had been limited in favor of C's heirs, however, it would have been void. A contingent interest was void at common law if it purported to take effect at the termination of a preceding nonfreehold estate; today it could take effect, subject to the Rule against Perpetuities, as a springing executory interest.

The interest limited in favor of C was valid at common law as a result of a technical peculiarity of the common law. At common law every remainder had to be preceded by a particular estate of freehold, either a fee tail or a life estate. Every freehold estate (fee simple, fee tail or life estate) had to be created by livery of seisin. No freehold estate could be made to commence in futuro because there had to be the ceremony of feoffment and that had to take place in the present. However, the creation of a non-contingent future interest was not considered a violation of the rule. For example, suppose X, being fee simple owner, wished to enfeoff Y for life, with remainder to Z and his heirs. X would go onto the land, make livery of seisin to Y with the declaration that seisin was for Y for Y's life and thereafter for Z and his heirs. Both estates were considered as being created at the same time and the feoffor was considered as having put the seisin out of himself for the entire time during which the declared estates would exist. X would then walk off the land leaving Y in possession claiming a life estate therein, he being therefore seised, and holding such seisin for himself and the remaindermen who followed. Indeed, the remainder was the only future estate which was recognized by the common law which was in favor of a transferee, one other than the transferor. But Y's life estate is a freehold estate and a life tenant is seised. When Y dies the seisin will pass immediately to Z in fee simple. There will be no break in the continuity of the seisin, the seisin will not be in abeyance.

In this problem, however, B was to have a nonfreehold estate, an estate for years. A tenant for years, having only a chattel real, could not be seised. The tenant could be possessed only. The grantor could not deliver seisin to a tenant for years to pass naturally to the remainderman at the end of the term for years. O, in other words, could not deliver seisin to B for 10 years which would then pass to C in fee simple. Strictly speaking, then, there could be no remainder following an estate for years, and in the problem C's so-called remainder would be void and there would be a reversion in O.

Nonetheless, even at common law, there was a procedure by which the conveyance by O could be validated and made effective even though C's interest could not be a valid remainder. It was done as follows. O made livery of seisin to B, the tenant for years, but at the same time declared that such livery was made for the benefit of C. Thereupon, the seisin passed immediately through B to C, who then held the fee simple estate in possession but subject to a term of 10 years in B. It should be noted in this procedure that the seisin never lodged in B, nor was it in abeyance for an instant because it passed immediately through B to C, who was intended to be seised.[54]

Today, C's interest is often referred to as a remainder even though it did not technically qualify as such.

If C's interest following the 10 year term was intended to be a contingent remainder, rather than an estate in possession subject to a term of years, not even the procedure described above, could validate the gift. For example, suppose O, being an owner in fee simple, conveys, "to B for 10 years, then to the heirs of C" and C is living. In this case there could be no livery of seisin to B for C's heirs because C's heirs are not, until C's death, ascertainable. Thus the seisin would be in abeyance and the intended contingent interest in C's heirs would be absolutely void at least prior to the enactment of the Statute of Uses.

Under the Statute of Uses (1536), the future interest created in either C or C's heirs could be treated as a valid executory interest following B's 10 year term if created by way of a "use" which was executed in a legal estate by the statute. If that statute operated on the use, then upon the expiration of B's ten year term a fee simple absolute vests in C if the future interest were limited to C. If it were limited to C's heirs and C died before B, a fee simple absolute would vest in C's heirs; if C survived B, then O would be entitled to a fee simple. This interest, however, would continue to be subject to a springing executory interest in C's heirs which would ripen into a fee simple absolute upon C's death, divesting O of O's then present possessory interest.[55]

54. It has been suggested that this technical exception had been created as an early common law form of financing. For example, B might be a money lender willing to loan C the purchase price of Blackacre. However, in lieu of charging C interest, C and B would calculate a fixed term of years to pay rents and profits from the land to B. These rents and profits would be in an amount sufficient to adequately compensate B for making the loan to C as well as a return of the principal.

55. Since future interests are classified today as they were before the Statute of Uses, C's interest in the conveyance to B "for ten years, then to C" would continue to be classified as either a fee simple subject to a term of years or, in more modern terminology, a vested remainder. It is, therefore, not an interest that could violate the Rule against Perpetuities. On the other hand, since the interest of C's heirs could only have been classified as an executory interest, whether before or after the adop-

The preceding answer is intended to explain the historical development and logic in the common law requirements of a remainder in land. Today livery of seisin is obsolete. The reason for requiring continuity of seisin has long since disappeared. The modern view permits remainders not only in land but also in chattels real and in chattels personal. The grantor's estate need not be a freehold and a remainder may follow an estate for years.[56]

FUTURE INTERESTS COMPARED WITH AND DISTINGUISHED FROM EACH OTHER

THE FUTURE INTEREST	HOW CREATED	IN WHOSE FAVOR	VESTED OR CONTINGENT	ALIENABLE INTER VIVOS	DESCENDIBLE AND DEVISABLE	SUBJECT TO DEFEASANCE	DIVESTS PRIOR ESTATE
REVERSION	BY OPERATION OF LAW	ALWAYS IN FAVOR OF GRANTOR	ALWAYS VESTED	ALWAYS ALIENABLE	ALWAYS DESCENDIBLE AND DEVISABLE	SUBJECT TO DEFEASANCE FOLLOWING CONTINGENT REMAINDER AND SO SPRINGING USE	NEVER DIVESTS PRIOR ESTATE
POSSIBILITY OF REVERTER	BY IMPLICATION OF LAW	ALWAYS IN FAVOR OF GRANTOR	ALWAYS CONTINGENT	NOT ALIENABLE AT COMMON LAW WHEN UNCONNECTED WITH A REVERSION. TODAY IT IS ALIENABLE WITH OR WITHOUT A REVERSION	DESCENDIBLE AND DEVISABLE WITH OR WITHOUT A REVERSION	NOT SUBJECT TO DEFEASANCE	NEVER DIVESTS PRIOR ESTATE
POWER OF TERMINATION	BY CLEAR, EXPRESS WORDS IN DEED OR WILL	ALWAYS IN FAVOR OF GRANTOR	ALWAYS CONTINGENT	NOT ALIENABLE AT COMMON LAW WHEN UNCONNECTED WITH REVERSION—LIKEWISE TODAY IN SOME STATES —TODAY IT IS ALIENABLE WHEN CONNECTED WITH REVERSION**	DESCENDIBLE AND DEVISABLE WITH OR WITHOUT A REVERSION	NOT SUBJECT TO DEFEASANCE	ALWAYS DIVESTS PRIOR ESTATE
VESTED REMAINDER	BY WORDS OF DEED OR WILL	ALWAYS IN FAVOR OF GRANTEE	ALWAYS VESTED	ALWAYS ALIENABLE	ALWAYS DESCENDIBLE AND DEVISABLE	MAY BE SUBJECT TO DEFEASANCE PARTIAL OR TOTAL BY SHIFTING USE	NEVER DIVESTS PRIOR ESTATE
CONTINGENT REMAINDER	BY WORDS OF DEED OR WILL	ALWAYS IN FAVOR OF GRANTEE	ALWAYS CONTINGENT	NOT ALIENABLE AT COMMON LAW TODAY IT IS ALIENABLE	DESCENDIBLE AND DEVISABLE	NOT SUBJECT TO DEFEASANCE	NEVER DIVESTS PRIOR ESTATE
EXECUTORY INTEREST	BY WORDS OF DEED OR WILL	ALWAYS IN FAVOR OF GRANTEE	ALWAYS CONTINGENT	TODAY ALIENABLE	DESCENDIBLE AND DEVISABLE	NOT SUBJECT TO DEFEASANCE	ALWAYS DIVESTS PRIOR ESTATE

K-2483

* 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.