The following questions go through the classes that we had on future interests quite systematically. Some of my answers are embedded in the questions in diamond brackets <>. Most of them are numbered like the questions and follow the questions.

Question 1. Should the possibility of reverter and right of entry/power of termination be classified as a future interest? I indicated as much in my notes, but as I've been reviewing, I notice that only the following are classified as future interests: remainder, reversion, executory interest. I know it probably seems like a nit-picky point, but I just want to make sure I'm being scrupulous.

Answer 1. Reversions, possibilities of reverter, and rights of entry are all future interests. They may created only in the grantor/devisor. Remainders and executory interests may only be created in third parties. The technically proper terminology to describe all future interests is 'reversionary interests, remainders and executory interests', but you will find writers using 'reversions' as a shorthand for all reversionary interests.

Question 2. I am hoping you can explain a means of analyzing the following problem:

"David conveys Greenacres to Professor Donahue for life, then to Frank and his heirs, but if Greenacres is not used as a farm, then to John and his heirs."

When we are assigning parties their interests, how do we determine whether or not the "farm usage" requirement applies to Prof. Donahue? That is, if we are trying to determine whether or not Frank has a vested remainder subject to divestment or a vested remainder subject to executory limitation how do we know if the farming requirement is global or if it only takes effect after Frank or Frank's heirs have the farm?

Answer 2. Whether the condition applies to both the life estate and the remainder is anyone's guess. That is to say, I know of no standard interpretive principle that tells you how to resolve this ambiguity. My instinct would be to apply it to both, but that's because I can't see why anyone would want to insist that the remainderman farm without also insisting that the life tenant do so too.

You should be aware, however, that what you have created is almost certainly not enforceable. The executory interest in John and his heirs is void under the Rule Against Perpetuities. That leaves us with a fee simple on a condition subsequent with no right of entry retained. Standard doctrine will not imply rights of entry (contrast possibilities of reverter). Hence, F. has what is, in effect, a vested remainder in fee simple absolute.

Question 3. Checking my answers. It seems like the answers on this page of the website [E&FI Problems] are slightly mismatched with the page numbers in the current edition of the supplement. <You're right. I just updated the page numbers on that chart.> To be sure I'm copying the right answers, explanations, I'm going to list the problems below (with their page # in the version of the supplement we're using) and ask follow-up questions. Problem 8, p. S205. A has a fee simple determinable, G has a possibility of reverter. Why doesn't B get the possibility of reverter? You mention something about the English vs. American rule. For purposes of the exam, should we assume that a possibility of reverter and right of entry/power of termination cannot be devised or alienated? They can be inherited though, yes?

Answer 3. There is a sufficient amount of ambiguity about this that it would be unfair to give an objective question about it. Supp. p. S224 and note 2 deals with the issue. If I had to choose, I would say that possibilities of reverter are probably not devisable in England and probably are in most U.S. jurisdictions.

Question 4. Same question on Problem 9, p. S205. B gets nothing because the right of entry/power of termination cannot be devised. Correct?

Answer 4. Correct, at least until an American court faces the issue and says that all this stuff about inalienability is rubbish. As long as you ask, there is a major exception to inalienability rules generally. The holder of an inalienable future interest may release it to the holder of the present interest.

Question 5. Problem 10, p. S205. For purposes of answering questions in the multiple choice section, should we follow the rule in Storke that if a right of entry/power of termination is not expressly retained in the instrument conveying a fee simple on a condition subsequent, then neither the grantor nor his heirs or devisees have anything? And the grant becomes a fee simple absolute? In other words, how closely should we follow Storke?

Answer 5. That no right of entry will be implied (it has to be expressed) is pretty standard. What is not totally standard is the way in which Storke twisted the language of the grant to make it a fscs. Many courts would probably say that on balance this is probably a fsd.

Question 6. I think I'm also just confused more generally on which rules we should follow regarding the alienability/devisability of a right of entry and possibility of reverter. In your October 7 lecture, you said the trend was toward making all future interests conveyable. Would that include the two interests above? And if so, shouldn't the answers in problems 8 and 9 (at least) have indicated that B had a possibility of reverter / right of entry?

Answer 6. Answered above.

October 14 - Remainders and Reversions [Class Outline 2015]

Question 7. Problem 1a. Can you explain the difference between vesting in interest and vesting in possession? I took notes, but I'm having difficulty understanding exactly what's going on. It seemed like a fairly straightforward problem.

Answer 7. There are no precedent conditions to B's taking, so her interest is vested. It is not, of course, vested in possession, because A is still alive. In fact, it may never vest in possession in B. If she dies before A, the interest passes to her heirs/devisees/alienees, to vest in possession in them when A dies.

Question 8. Problem 1d. The notes I took seem to conflict with something in your typed answers. At common law, if B had not reached the age of 21 by the time A dies, does the remainder revert to G or go to C? My notes said that it would revert to G, but your typed explanation said the remainder would be destroyed and C would "take." My understanding is that at modern law something different would happen: if B had not reached 21 by the time of A's passing, the reversion in G would fall in while we hang out and wait to see if B makes it to 21. It can't go to C right away, because we don't know for certain whether B will not make it to 21. If B does make it to 21 some years after A's death, my understanding is that B gets the remainder (G's reversion would be "defeased" - is that right?). But if B dies at age 20, say, we then know the condition of his receiving the remainder has not been fulfilled, and the interest would then go to C. It's as if G's reversion functions as a "holding ground" for the interest while we wait to see if B's condition is satisfied. Is my understanding of this headed in the right direction? And would you call G's reversion a reversion in fee subject to a condition subsequent?

Answer 8. At common law if B had not reached the age of 21 by the time of A's death, the remainder was destroyed. Whether there would be a reversion or whether the property would go to C is not completely clear, but we don't have to worry about that because we're dealing with modern law, where the automatic destructibility of contingent remainders has been abolished. Under modern law we have an interpretation problem. Did G mean 'if she has reached 21 by the time of A's death' or did G mean 'if she survives to the age of 21 whenever A dies'? Obviously, there is an ambiguity in the language. It could have been made clear. Today either intent will be implemented. If the language is of the first variety, C will take if B is not 21 at A's death. If it is of the second variety, there will be a reversion, but B's and C's interest will be converted into executory interests, B's to take effect if and when she reaches 21, C's if she dies before reaching 21. In the ambiguous case, the modern tendency is to interpret the language as if it said 'if she has reached 21 by the time of A's death' and give the property to C, but other things in the instrument might overcome that rather weak presumption.

Question 9. Is divestment and defeasance the same thing? I know if there's a vested remainder subject to a condition subsequent, we speak of it being "divested" by that condition subsequent. But in the case of a reversion in fee subject to a condition subsequent, we speak of that reversion being "defeased," rather than "divested," no?

Answer 9. The words are largely synonymous, but you're right that we have a tendency to use the former where we have a vested remainder that has not yet become possessory and the latter where we are dealing with an interest that has become possessory.

Question 10. Alternative Contingent Remainders - this is just when you have two contingent remainders back-to-back, correct?

Answer 10. Yes, particularly where they seem to be mutually exclusive: if X to A, if not X to B.

Question 11. Problem 1g. As I reworked this problem before checking the answer, I wrote the following: A has a present possessory life estate; B has a vested remainder in fee simple absolute subject to divestment; C has a contingent remainder in fee simple absolute; and G has nothing (i.e., no reversion). Looking at the answer, I see that what I called "divestment" (and C's contingent remainder) is actually an executory interest. Can you help me understand why my divestment/contingent remainder labels were wrong?

Answer 11. Because any interest that follows a vested interest in fee has to be an executory interest, because it cuts short the interest prior to its natural expiration (which in the case of a fee is never). A remainder must follow the natural expiration of the preceding interest.

On to Executory Interests [Oct. 19 Class Outline 2015]

Question 12. I'm having trouble figuring out when something is an alternative contingent remainder vs. an executory interest.

Answer 12. Definitions: (a) A remainder (be it contingent or not) is a future interest that *may* take effect upon the natural expiration of the preceding freehold estate.

(b) An executory interest is a future interest that *cannot* take effect upon the natural expiration of the preceding freehold estate.

Since the only freehold estate that is at all common today in the US of A and that has a natural expiration is the life estate, look for a life estate and ask yourself the question: could this take effect upon the death of the life tenant?

Example: To A for life, remainder to B if she is 21. Could B take when A dies. Sure, if she's 21. B's interest is a contingent remainder.

Example: To A for life, remainder one day after A's death to B if she is 21. Could B take when A dies? Nope. There's a one day reversion in the Grantor. The Grantor's reversion is a fee and has no natural expiration. Hence, B's interest is an executory interest.

Alternative remainders are a bit more complicated.

Example: To A for life, remainder to B if she is 21, if not to C.

Rule of thumb: If the first remainder is a contingent remainder, the alternative will be one as well.

Example: To A for life, remainder to B, but if B fails to reach the age of 21, remainder to C.

Here the remainder in B is vested subject to being divested by B's dying before she is 21. B's remainder is a remainder in fee. Hence, C's interest must be an executory interest, since it takes effect by cutting short B's fee. Rule of thumb: If the first remainder is vested (or becomes vested), then the alternative interest will be an executory interest.

Question 13. Problem 1a. [Oct. 19 Class Outline 2015] Would we say G's reversion is a reversion in fee subject to a condition subsequent?

Answer 13. We could say that, and it would not be totally inaccurate. It would be more ponderous but more precise to say that G's reversion is a fee subject to an executory interest which will take effect if A has any children alive 5 years after A's death, and which will take effect in those children.

Question 14.Would it be accurate to say that an executory interest exists whenever there is a contingent remainder whose condition has not been fulfilled at the time of the expiration of the preceding freehold estate? I.e., the reversion in the grantor would "fall in" until the condition had been fulfilled, but rather than continuing to refer to a contingent remainder, you would describe it as an executory interest? Is that an appropriate way to think about it? I understand that this would obviously only hold under modern law, since at common law the contingent remainder would be destroyed if the condition had not been met when the prior life estate (suppose) expired.

Answer 14. All of this seems to me to be right. One caveat (related to problem 1d above). There is always the possibility of interpreting an ambiguous condition as one that has to be fulfilled no later than the expiration of the preceding estate.

Question 15. I spent a lot of time trying to understand question 1c but still cannot.

Answer 15. Think about this: Any time that there is a term of years, there are two outstanding interests, the interest of the lessor and that of the lessee. The interest of the lessor (unless otherwise stated) is a fee. The remainder in B is going to cut short that interest. Any interest that cuts short an interest in fee has to be an executory interest. The only thing that's odd about this executory interest is that it does not follow the usual rule about executory interests when it comes to perpetuities, i.e., that they have to become possessory within the perpetuities period. The historical reasons for this exception are complicated and obscure. But there's a quite understandable modern reason: If the rule were otherwise a landlord could not convey his interest at the end of a lease if the lease were any longer than 21 years, and there are a lot of commercial leases that are longer than that.

Question 16. Problem 2a. You mention that there's a reversion in G because of the possibility of forfeiture. I had written that there was a reversion, but my rationale was that, whenever you have a contingent remainder, you must have a reversion (because of the principle of conservation of estates). So is there a reversion because of the possibility of forfeiture or because we have alternative contingent remainders, and therefore there must be a reversion in G. Or both?

Answer 16. You are certainly right in this case that the principle of conservation of estates explains the existence of the reversion. What I was trying to say, and said it badly (I fixed it), is that even in the situation where the contingencies seem to cover all possibilities (for example, if it hadn't said 'heirs of B' but just B) there still would be a reversion because of the possibility of forfeiture. There is always a reversion with alternative contingent remainders. There does not have to be one where there is a vested remainder followed by an executory interest.

Question 17. Also, just as a quick clerical note, in your explanation for 2a [Answers], I think you've inverted B and A. The hypo stem stipulates that A has no children.

Answer 17. You are right. I got it right on the outline and botched it in the 'answers'. It's now fixed.

Question 18. Problem 2(a)(i). In your explanation [Answers] you wrote, "G takes a fee simple absolute." Would it be alright if I just wrote, "G has a reversion."

Answer 18. Yes, to be full it's a reversion in fee simple absolute.>

Question 19. Moving on to the modern law explication, I wrote, "G has a reversion in fee subject to an executory interest/subsequent condition, and B's heirs have an executory interest in fee simple absolute." Or can B's heirs not be said to have an executory interest until their interest becomes vested (i.e., when B dies)?

Answer 19. What you said is fine. I'm reluctant to use the word 'vested' when speaking of executory interests because it means something different when we come to the Rule Against Perpetuities.

Question 20. Problem 2(b)(i). I'm probably going into more depth than is necessary for this, but I really want to make sure I understand this. On the outline [Oct. 15 Class Outline 2015], you quickly make reference to the destructibility of the contingent remainder in one vs. the non-destructibility of the vested remainder in the other, and also point out there's no difference in modern law. I would understand how these notes apply if there had been a stipulation that A died, but absent that, is there a significance to this note? I guess I just didn't see how it applied to the problem stem we had been given.

Answer 20. Under Grant 15 the birth of a child to A leaves us with a contingent remainder because the child still has to reach the age of 21, but in Grant 16 the child has fulfilled all precedent conditions (though is subject to a subsequent one). "There is no difference between the two under modern law" is a bit broad. What I was trying to say is the destructibility feature does not exist under modern law, i.e., a big difference between vested and contingent does not exist in modern law.

Question 21. Secondly, my characterization of each party's interest was a little more extensive. Can you let me know if these are accurate:

* 2(b)(i) Grant 15. A: present possessory life estate; C: contingent remainder in fee simple absolute; G: reversion; heirs of B: contingent remainder in fee simple absolute; C and the heirs of B have alternative contingent remainders

* 2(b)(i) Grant 16: A: present possessory life estate; C: vested remainder in fee simple absolute, <subject to open and> subject to an executory interest in the heirs of B; heirs of B: executory interest

Answer 21. Other than what I added to 2(b)(i) Grant 16, these explanations are totally accurate.

Question 22. Problem 2(b)(ii), Grant 16, Common Law scenario. The explanation says that logic suggests the executory interest of B's heirs would not be destroyed under common law. I don't understand that. What makes it a contingent interest in grant 15 and an executory interest in 16? Is it that in grant 16, it follows a vested remainder?

Answer 22. Yes. And if the vested remainder is not destructible then the logic suggests that the following executory interest won't be either. It's contingent remainders that are destructible at common law not executory interests.

Question 23. Problem 2(b)(iii). I think I had the correct answers here, but my terminology does not exactly match yours. Here is how I characterized the respective interests:

* Grant 15, Common Law. C's contingent remainder is destroyed, and B's heirs take a present estate in fee simple absolute. <Yes>

* Grant 15, Modern Law. G gets a reversion in fee subject to a subsequent condition (i.e., executory interest). C has a springing executory interest. B's heirs have a shifting executory interest. <Yes>

* Grant 16, Common Law. C takes a vested remainder in fee simple absolute subject to an executory interest. The heirs of B have a shifting executory interest in fee simple absolute <Yes>

* Grant 16, Modern Law. Same as common law, supra. <Yes>

Is there anything wrong with the way I've characterized these interests? <No>

Specifically, are there certain contexts in which you use the term executory interest vs. "subject to defeasance?"

Answer 23. Subject to defeasance is ok but less precise. If you describe the executory interest, you've tied it down tighter.

Question 24. Problem 2(b)(v). For grant 16, would we say that both C and D take a fee simple absolute (as in, they share it)?

Answer 24. If you decide to hold the class open (and only if), I would say that C has a fsa subject to an executory interest in D as to one-half of it, if D makes it to 21. This is more usage of language rather than any real difference in result. We rarely say that an interest is subject to open if it has already become possessory, and although C's interest and D's are both fees simple absolute, one is a present possessory interest and the other is a future interest.