SUPPLEMENTARY MATERIALS ON
PROPERTY

Installment III

Note: These materials are formatted in the way that the book is with the following exceptions: (1) Page numbers are given with an initial “S” for “Supplement.” (2) On the last page of a given set of footnote numbers, the footnotes will be found at the end of the section rather than at the bottom of the page. (3) Cross-references without an “S” are to page numbers in the book, as are the bracketed “star page” references that are included in material drawn from the book.

Fall, 2009

Professor Donahue

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A written release or promise, hereafter made and signed by the person releasing or promising, shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound. [1927]

§ 7. Uniformity of interpretation

This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. [1927]

§ 8. Short title

This act may be cited as the Uniform Written Obligations Act. [1927]

NOTE

In 1951, the Pennsylvania legislature repealed § 1 of the statute insofar as it applies to leases and substituted the following: "Real property, including any personal property therein, may be leased for a term of not more than three years by a landlord or his agent to a tenant or his agent, by oral or written contract or agreement." PA. STAT. ANN. tit. 68, § 250.201.

Section 3. THE COMMON LAW SYSTEM OF ESTATES IN LAND AND FUTURE INTERESTS ["LITE" VERSION]¹

A. INTRODUCTION

[The assignments in DKM, even with the omissions, cover more material than is necessary for this course. Some students get interested in the material, and I certainly don’t want to prevent you from working through the material in DKM. For some time, however, I have thought that a “liter” version would be better for most people, and my first attempt at that follows. For the purpose of what we will be doing in class (in addition to the cuts which are noted on the syllabus and are made silently here), the principal difference will be that in all cases you will be asked to solve the problems only according to the common law as it exists today with an assumed set of statutory or decisional changes that are given at the beginning of each problem set.]

Many students quite justifiably ask why they should go through the dismal process of learning the common-law system of estates and future interests. Some of the rules which are discussed in this section are not in effect in most American jurisdictions today, a fact which leads many students to think that estates and future interests are an exercise in legal history. In fact, much of the purported history in this section is not history at all. It is a construct put together after the fact when the system of estates and future interests was about to be reformed in the nineteenth century. But that construct proved to be powerfully attractive, perhaps because it was systematic. For whatever reason, much of the common law system is still with us today. The part of it which

¹ Because of the introductory nature of this section we have not included anything like a full panoply of citation support. Property casebook buffs will recognize that the basic organizational structure of this section has been borrowed, with the kind permission of the authors, from O. BROWDER, R. CUNNINGHAM & J. JULIN, BASIC PROPERTY LAW (1st ed. 1966). Many students find it helpful to read a fuller but still introductory account of this material, and for this purpose we recommend either C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY (2d ed. 1988) or T. BERGIN & P. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS (2d ed. 1984). For fuller but still basic introduction to the history, see A. SIMPSON, A HISTORY OF THE LAND LAW (2d ed. 1986). The standard treatise on future interests is L. SIMES & A. SMITH, FUTURE INTERESTS (2d ed. 1956).
has been displaced in such a way that one must understand what went before in order to understand what has been changed. (A statute which says “the Rule in Shelley’s Case is hereby abolished” (e.g., FLA. STAT. § 689.17 (1989) doesn’t make much sense unless one knows what that Rule is.)

Behind the logical construct of the nineteenth century, which one must understand in order to understand today’s law, there lies a real history—a curious blend of logic, policy and misunderstanding that typifies so much of legal development. We have tried to write this section in such a way that that real development is not totally lost, for we think that estates and future interests makes a fascinating study in itself. The first-year property course, however, is not a course in legal history, and if you have the opportunity to take a course in legal history later on, you may be surprised at how different the system of estates and future interests really was in the Middle Ages or even the seventeenth century from what we describe here as “the common law.” Our focus is on today, and today we see the common law through nineteenth-century glasses.

This section is designed to introduce the entire “common law” system of estates and future interests as it is viewed today. In most subsections we go beyond the common law system to show how the law has been changed and how it works today. In three areas, however, the changes have been so radical or the subjects are so important that they have separate sections or chapters devoted to them: restraints on alienation and perpetuities (Ch. 4, § 4), marital property and concurrent interests (Ch. 4, § 5) and landlord and tenant (Ch. 6). In these areas all that is given in this section is the common law background. To see the common law system as a whole, you should read the text at the beginning of each subsection and work the initial problems.

[p*385] Estates and future interests are not easy. As is often the case in property law, a principal problem is vocabulary. The following chart is designed to introduce you to the basic vocabulary of estates and future interests. The chart is not complete; we will add to it as the section goes on, but it contains the basic framework for the section, and you should return to it for reference.

<table>
<thead>
<tr>
<th>How long?</th>
<th>How inherited?</th>
<th>Begins when?</th>
<th>Subject to contingencies?</th>
</tr>
</thead>
<tbody>
<tr>
<td>freehold</td>
<td>simple</td>
<td>present</td>
<td>no</td>
</tr>
<tr>
<td>fee</td>
<td>tail</td>
<td>future</td>
<td>absolute (usually applied only to fees)</td>
</tr>
<tr>
<td>life</td>
<td></td>
<td>in the grantor</td>
<td>vested (applies only to future interests and denies conditions precedent other than the expiration of the preceding estate(s))</td>
</tr>
<tr>
<td>non-freehold</td>
<td></td>
<td>reversion</td>
<td>yes</td>
</tr>
<tr>
<td>term of years</td>
<td></td>
<td>possibility of</td>
<td>subject to a condition or special limitation</td>
</tr>
<tr>
<td>periodic (e.g.,</td>
<td></td>
<td>reverter</td>
<td>contingent (applied only to future interests and indicates the presence of condition(s) precedent)</td>
</tr>
<tr>
<td>month to month)</td>
<td></td>
<td>right of entry</td>
<td></td>
</tr>
<tr>
<td>at will</td>
<td></td>
<td>in third party</td>
<td></td>
</tr>
<tr>
<td>at sufferance</td>
<td></td>
<td>remainder</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>executory interest</td>
<td></td>
</tr>
</tbody>
</table>

Notes

1. Freehold interests tend to be called “estates” while non-freehold interests tend to be called “tenancies.” The distinction is not accurate historically, but today we associate non-freehold
interests with the landlord-tenant relationship and thus tend to speak of a periodic tenancy or one for years, at will or sufferance but of a life estate or an estate in fee.

2. Generally the vocabulary given above carries with it at least an indication of the meaning of the terms. We will try to make these terms more precise throughout the rest of this chapter. Two of the terms, however, may be completely mystifying: "fee" and "tail." "Fee" denotes today an estate of potentially infinite duration. When a man dies holding a fee, it passes to his heirs or devisees uninterrupted. "Tail" denotes a type of inheritance restricted to the lineal descendants of the first taker. When a man dies holding a fee tail, it passes to his children (grandchildren, etc.), but cannot pass to his collateral heirs if he dies without issue. See pp. 389–90 infra.

3. By and large the vocabulary in each column is mutually exclusive. To say that A has a life estate in fee would be a contradiction in terms. A complete description of an interest, however, should contain the answers to each of the four questions at the heads of the columns. To say that someone has a fee really doesn't tell you much, unless you know whether his fee interest is a present or future one, freely inheritable (simple) or entailed, absolute or conditioned in some way. On the other hand, it is an awful mouthful to say that someone has a "present estate in fee simple absolute," so we tend to use a shorthand based on how common the interest is (or is thought to be). Thus, when a court says that [p*386] "Jones has a fee," it probably means that Jones has a present estate in fee simple absolute unless it otherwise qualifies what Jones has got.

Certain kinds of grants are so uncommon that we practically never use certain terms to describe them. We tend to think of a life estate as not being inheritable; [Footnote 3] and so the quality of inheritance is almost never given with a life estate. You should, however, make it a habit fully to describe the interests you encounter to make sure that you have exhausted all the possibilities.

4. The non-freehold interests have a number of peculiarities. We have included them above for the sake of completeness, but warn you against using the terminology in the other columns in connection with the non-freehold interests until you have read the material concerning them, infra pp. 433–35.

5. A future interest which begins its life as one held by the grantor or by a third party retains the characterization which it had at the time it was created, even when it passes into other hands. Thus, if G (the grantor) makes a conveyance and retains a reversion in himself, that future interest is still called a reversion, even if G conveys it to A. Similarly, if G grants a remainder to A and subsequently A conveys that future interest back to G, G has a remainder not a reversion. On the other hand, future interests initially created in third parties can change to other types of interests which can be held by third parties. Thus, a contingent remainder can become a vested remainder when the conditions for vesting are fulfilled, and an executory interest can become a remainder. See further infra pp. 407–11, 420–23.

6. On the Vocabulary of Alienation and Succession. Some of the most important features of the common law system of estates and future interests have to do with the alienation of and succession to the various interests which the law recognizes. There are three basic ways in which a property interest may change hands: by conveyance between living persons (inter vivos), by will or testament, and, in the absence of a will, by devolution according to the rules of law.

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2 Originally it meant simply a "fief" and is derived from Latin fœodum from which we get our word "feudal."

3 A life estate for the life of the grantee, of course, is not inheritable, and this is the most common kind of life estate. But a life estate for the life of another (an estate pur autre vie) may, under some circumstances, be devised or descend, as long as the measuring life continues. See 2 R. POWELL, REAL PROPERTY ¶ 203[4] (P. Rohan ed. 1991).
While there are a number of words which describe alienation of land *inter vivos* (see pp. 348–353 *supra*), the word *convey* has become the common generic word to describe the *inter vivos* alienation of interests in land, and the word *grant* is often used to describe the conveyance of any freehold interest. These words are not generally used for personal property. For personal property *gift* and *sale* are the most common words of alienation, although these words may also be applied to land.

Until the nineteenth century in England the succession to realty was under the jurisdiction of the king’s courts while the succession to personalty was largely under the jurisdiction of the church courts. For this reason the vocabulary of succession to realty differs from the vocabulary of succession to personalty. In the absence of a will, real property *descends* to the heirs of the deceased owner, while personal property is *distributed* by his *administrator* to his *distributees*. By will realty is *devised* to the testator’s *devisees* while personal property is *bequeathed* to his *legatees* who receive their legacies normally from the testator’s *executor*. It would be simpler if these words were always used only in *infra p.*387 these senses, but they are not, although you can almost always tell from context whether the word is being used in a technical or a general sense.

In the Middle Ages alienation of land *inter vivos* was not so common as it is today, and the devise of much of English land was prohibited. Land normally descended by primogeniture: the eldest son (or that son’s eldest son if the former predeceased his parent) took all of his deceased parent’s land. In the absence of a son the daughters took equally as coparencers (*infra p.* 439). Alienation of personal property, on the other hand, was quite common; disposition of it by will was possible and encouraged by the Church, and in the absence of will, the spouse and children of the deceased shared in the succession to his personal property by a system not too different from that which we have today (see pp. 508, 542–43 *infra*).

B. THE FREEHOLD ESTATES

1. Present Estates in Fee Simple Absolute

"To A and his heirs."

Reading across the top of the vocabulary chart we come to the present estate in fee simple absolute. This estate is often described as “the largest estate” known to the common law, the “crown jewel” in the system of estates. Such statements must be taken with caution. In the first place, “large” does not refer to physical extent. I may have a present estate in fee simple absolute in a parcel of land no bigger than a postage stamp. Secondly, the “largeness” of the estate should not be taken to refer to absolute rights of ownership. Absolute ownership has never existed at the common law; the fee estate carries less of an absolute connotation than does the civil law concept of *dominium*. The present fee simple absolute is subject to both the eminent domain and the regulatory power of the state. Further, any given parcel of land may be subject to numerous rights in others, easements, liens, etc., which severely hamper the fee owner’s ownership rights.

What we mean when we say that A owns a present estate in fee simple absolute is that he has the right to possession (more accurately, seisin) of a parcel of land and that that right has the longest possible duration known to the common law. It may be inherited by descendants or collaterals; it may be devised (after the Statute of Wills in 1540), and it is freely alienable by the present holder. Only upon the death of the present holder intestate and when no heirs can be found (for the law presumes that all men have heirs, either descendants or collaterals), will the estate escheat (revert back) to the crown or the state whence it came. Thus, the duration of the fee simple estate is potentially infinite.

Two important points follow from the preceding discussion: (1) When we are talking about estates we are talking about the seisin (or, in the case of estates less than freehold, the possession)
of a given tract of land. (2) When we are talking about the quantum of an estate, we are talking about its duration, beginning with the "largest" estate, the present fee simple absolute, which is now possessor and can have a potentially infinite duration. All other estates (except ownership by the crown or the state which is not regarded as an estate) have a lesser quantum than this.

[p*388] The formula of words by which a fee simple absolute is created is "Grantor hereby gives (etc., see pp. 348–53 supra) to A and his heirs." This is the formula to be found in Henry II's grant of Meath, supra p. 354, and is in common use today. At common law, with a few exceptions, a grant simply "to A" without the addition of the phrase "and his heirs" would not create a fee but simply a life estate.¹ Most states today have statutes dispensing with the necessity of the phrase or stating in effect that a grant "to A" will be presumed to be a grant in fee unless an intention to the contrary appears on the face of the document.

Despite the phrase "to A and his heirs," however, the presumptive heirs of A have no interest in the land unless and until A dies intestate and without having alienated the estate. The words "and his heirs" are not words of purchase, i.e., words which indicate that the purchaser (whether or not for consideration) takes an interest, but words of limitation, i.e., they describe the quantum of the estate which A takes. (We find that some students tend to forget this distinction; so perhaps we should point out here that the phrase "and his (their) heirs" always is taken as words of limitation. Thus in the grant "to A for life, remainder to B and his heirs," B has a remainder (not a present estate) in fee simple and his heirs have nothing.)

The reason why the phrase "and his (their) heirs" came to be taken as words of limitation is obscured in history. In the feudal period (11th and 12th centuries) devise of most land was not possible and alienation inter vivos uncommon. In this period we get some indication that the heirs presumptive ("presumptive" because no one has heirs until he is dead) were regarded as having some interest in the fee. They seem to have lost this interest around the beginning of the 13th century. Later on in the century the Statute Quia Emptores, 18 Edw. I, c. 1 (1290), is generally regarded as having reinforced a policy of freer alienability of land. By this statute a landlord could no longer grant out his land and retain the feudal suzerainty in himself (a practice known as subinfeudation). See p. 348 supra. If he granted the land in fee the new owner took over completely for the old and assumed the feudal obligations which the old owner owed to the next higher feudal lord, be that lord the king or some lesser magnate in the feudal hierarchy. At the same time the old owner under the statute no longer had to obtain the permission of his feudal lord before he alienated the land. Thus, the phrase "to A and his heirs" came to describe simply what A got, a freely alienable, descendible, and (after 1540) devisable interest in a piece of land.

Problems

Fully describe the interest of all parties named or described in the following instruments in a common law jurisdiction as of the effective date of the instrument (recall that a devise is not effective until the devisor's death). Assume that the Statute Quia Emptores is in effect, and that there is a statute of wills and a statute stating that all grants are assumed to be in fee simple unless the contrary is expressed:

1. G grants "to A."
2. G grants "to A and his heirs."
3. D devises "to A."
4. D devises "to A for life."

¹ The same rule did not apply to devises.
Would you answer any differently if the jurisdiction in question had not passed the statute stating that all grants are assumed to be in fee simple?

2. The Fee Tail (Introducing the Reversion and the Remainder)

"To A and the heirs of his body."

Like the fee simple, the fee tail is potentially infinite in duration. As in the fee simple, too, the words "heirs of his body" are words of limitation not words of purchase. Unlike the fee simple, however, the fee tail may descend only to the first grantee's direct descendants (children, grandchildren, etc.) and not to collaterals. The fact that the fee tail may not descend to collaterals means that this estate is somewhat less "large" than a full fee simple (hence it was called talliatum or taillé, from the Latin and Norman French, respectively, meaning "cut down"). Let us suppose that G the owner of land in fee simple grants it "to A and the heirs of his body." It should be clear that A has a fee tail, but what happened to the rest of G's fee simple? G had the largest estate known to the law and gave away only part of it. By a curious logic, which might be called the principle of conservation of estates,2 the law asserts that that portion of G's estate which he has not granted to A cannot simply disappear. If G does not expressly grant it out, he will be assumed to have retained it; he has the reversion after A's fee tail. Thus, if at any time the direct descendants of A should die out, the land will revert back to G, or, if he is dead, to his heirs.

G might not, however, want to have the reversion. He might want some other person, B, to have the land if A's line should die out. G may achieve his purpose by giving B the remainder after A's fee tail: "to A and the heirs of his body, remainder to B and his heirs." We will return to remainders and reversions, infra pp. 407–11. Suffice it to say here that the important distinction between the two is that reversions are future interests retained by the grantor, to take effect after the expiration of some prior interest, while remainders are future interests granted to someone other than the grantor, to take effect after the expiration of some prior interest.

In addition to the general fee tail, an estate which could be inherited by any of the heirs of the body of the first taker, the law permitted two further restrictions on the type of inheritance: (1) an estate could be made inheritable by the heirs of the first taker by a particular spouse, the special fee tail, and (2) it could be made inheritable by only the male heirs of the body of the first taker, the fee tail male, or by only the female heirs of the first taker's body, the fee tail female. Beyond this the law did not go; other restrictions on the type of inheritance are generally thought to have been forbidden. See p. 457 infra.

Note on the Fee Tail in America Today

There is nothing deadlier in the common law system of estates than the fee tail (unless it be the unexecuted passive use). By the time the colonies were founded disentailing an estate by a form of conveyance known as a common recovery was easy to do, and the estate was never popular in America anyway. Yet, there's always someone who doesn't get the word, and [p*391] the reactions of American jurisdictions to attempts to create the estate have been most diverse:

(a) In two states, of which South Carolina has by far the most decisions, the Statute De Donis Conditionalibus (which created the fee tail as described above) is said not to be part of the received law and thus a grant "to A and the heirs of his body" creates a fee simple conditional, a fee conditioned on the grantee having heirs of his/her body. 2 R. POWELL, REAL PROPERTY ¶ 195 (P. Rohan ed. 1991).

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2 The principle has also been called "the arithmetic of estates." T. BERGIN & F. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 21-23 (1966).
(b) In four states, Delaware, Maine, Massachusetts, and Rhode Island (only for estates created by deed), the fee tail is recognized, but disentailing is readily achieved by deed, and creditors take preference over issue in satisfying their claims. *Id.* ¶ 196.

(c) Connecticut, Ohio, and Rhode Island (only for devises) have statutes preserving the fee tail for one generation and giving a fee simple to the issue of the first donee in tail. *Id.* ¶ 198[1].

(d) Six states have statutes which convert a purported grant in fee tail to an estate for life in the first taker with a remainder in fee simple in the issue. E.g., ILL. REV. STAT. ch. 30, § 5 (1989); see R. POWELL, *supra*, ¶ 198[2].

(e) Approximately twenty-five states have statutes which convert a purported grant in fee tail to an estate in fee simple in the first donee. E.g., N.Y. EST., POWERS & TRUSTS LAW § 6-1.2 (McKinney 1967); see R. POWELL, *supra*, ¶ 198[3]. In this group probably should also be placed those few states in which the fee tail is prohibited. E.g., TEX. CONST. art. I, § 26; see R. POWELL, *supra*, ¶ 197. About half of these states allow a remainder limited over after the fee tail to take effect as an executory interest if the first donee in tail dies without issue. E.g., MICH. COMP. LAWS ANNOT. § 554.4 (1988); see R. POWELL, *supra*, ¶ 198[3], at 14.33.

**Problems**

[I will not do these problems in class. They are, however, a good exercise, and I will pass out answers to them when I pass out answers to the rest of the problems at the end of the unit. If you do decide to do them, you might want to read the slightly longer description of the fee tail that appears in DKM.]

What would be the effect of each of the above statutory provisions on each of these two devises:

5. *D* devises “to *A* and the heirs of his body”;

6. *D* devises “to *A* and the heirs of his body, remainder to *B*”;

in the following situations:

(a) *A* dies without surviving issue;

(b) *A* dies with surviving issue;

(c) *A* has issue and attempts to convey his estate to *C*;

(d) *A* has no issue and attempts to convey his estate to *C*.

3. **Defeasible Fees**

"To *A* and his heirs, so long as the land is used for school purposes."

"To *A* and his heirs, but if the land is used for other than school purposes, *G* or his heirs shall have the right to enter and declare the estate forfeit."

Like the fee tail these grants clearly do not pass a full fee simple absolute to the grantee. By the principle of conservation of estates something is left, which, absent a specific grant over, is retained by the grantor. In the case of the first form of grant what is left over is called a possibility of reverter; in the case of the second form a right of entry or power of termination. For reasons which we shall examine *infra* pp. 428–30, it is difficult to create interests corresponding to possibilities of reverter or rights [p*392] of entry in third parties. If such interests are permissible, they are called executory interests, and *A*’s interest is called a fee simple subject to an executory limitation.

Examine again the language of the two grants above. The effect of each looks pretty much the same. In both grants it is clear that *G* wants *A* to have the land contingent upon his using it for school purposes. If he does not so use the land, *G* or his heirs are to get it back. There is a
substantial difference between the two grants, however, one which almost all courts recognize, although they frequently get the matter confused in technical vocabulary. Under the first form of grant A's fee estate terminates automatically when the land ceases to be used for school purposes. Under the second form G or his heirs have to do something if the condition is breached. G has a right of entry, but if he does not exercise that right, A's estate continues. Some of the practical consequences of this distinction can be seen in the case following this introduction. Now for the vocabulary: The first form of grant is known as the *fee simple determinable*, also the *base* or *qualified* fee (although the latter term, like *defeasible* fee, is sometimes used to describe both forms), or *fee upon a special limitation*. The second form of grant is known as the *fee simple on a condition subsequent* (to distinguish it from the conditional fee prior to the Statute De Donis where the condition of the birth of an heir was a precedent condition). The term *fee on a conditional limitation* is sometimes applied to either form of grant, perhaps more frequently to the *fee simple determinable*, and it is also applied to the fee subject to an executory limitation. We do not recommend the use of the term, because it is confusing.

The courts frequently say that no form of words is necessary to create either of these interests; the question is one of intent. Because of the confusion between the two types of interests, however, the draftsman is advised to proceed cautiously. Language such as "so long as," "while" or "until" is usually held to create a determinable fee, frequently aided by an additional clause such as: "but if the land is not used for school purposes, it shall revert to G and his heirs." Language such as "but if" or "upon the condition that" usually creates a fee upon a condition subsequent. Here draftsman far less persnickety than Abundance of Caution would advise that the right of entry or power of termination be specifically retained, because many courts will not assume that it is retained without the language. It is important that the conditional language be expressly stated as such, since in its absence the courts will tend to interpret the statements of intended use as being covenants, the breach of which will give rise only to an action for damages (or perhaps specific performance) but will not result in forfeiture of the estate.

The owner of a defeasible fee has a freely alienable, devisable estate, subject always to the limitation or condition. The situation of the holder of the right of entry or possibility of reverter is considerably less favored. At common law his interest was generally not devisable or alienable, although it could, under most circumstances, be inherited by his heirs. (There was, perhaps, more openness to the devisability of the possibility of reverter.) Some American courts still follow this rule, and a few have held that the attempted alienation of a right of entry destroys it. The trend, however, aided by statute, is in favor of free alienability of these interests.

The *fee simple* is not the only estate which can be made defeasible. Defeasible life estates are not uncommon ("to my widow for life so long as she does not remarry"), and at common law the fee tail could be made defeasible. Leaseshold interests can be made defeasible, although there is [p*393] some doubt whether the distinction between an interest on a special limitation and one subject to a condition subsequent applies to leaseshold estates. But see pp. 724–25 *infra*.

**Problem**

Fully describe the interests of all parties named or described in the following instrument. Assume the same statutes as in Problems 1–4, *supra* p. 388.

7. G grants "to A, provided that the estate granted shall cease and determine if liquor is sold, stored or used on the premises." G then devises all his right, title and interest in the land to B and then dies.

**STORKE v. PENN MUTUAL LIFE INSURANCE CO.**

[Read this case and the following Notes and Questions in DKM3, pp. 393–97].
4. The Life Estate

"To A for life."

The life estate is the simplest and perhaps the most common of the freehold estates less than fee simple. By the principle of conservation of estates, there must always be a remainder or reversion following a life estate.

There are two important qualifications on the rights of the life tenant. First, s/he cannot lawfully alienate more than s/he has; therefore, if tenant A in the grant above conveys to B, B will only take an estate for A’s life. B is said to become a tenant pur autre vie, from the Norman French meaning “for another’s life.” An obvious corollary of this is that the life estate for [p*398] the life of the tenant cannot be devised or inherited. The second important limitation on the life tenant’s powers is that s/he, unlike the present holder of a fee however qualified, must preserve the capital value of the land intact for the remainderman or reversioner; more precisely, s/he may not commit waste.

Summary

The following chart summarizes the freehold estates which we have considered so far. Braces ({})) indicate synonymous terms, a question mark (?) preceding the phrase indicates doubt about the propriety of usage or the existence of the estate.

<table>
<thead>
<tr>
<th>Present Interest:</th>
<th>Future Interest:</th>
</tr>
</thead>
<tbody>
<tr>
<td>fee simple absolute</td>
<td>in grantor:</td>
</tr>
<tr>
<td>fee tail</td>
<td>none</td>
</tr>
<tr>
<td>general</td>
<td>reversion</td>
</tr>
<tr>
<td>special</td>
<td>remainder</td>
</tr>
<tr>
<td>female</td>
<td></td>
</tr>
<tr>
<td>{defeasible fee</td>
<td></td>
</tr>
<tr>
<td>?qualified fee</td>
<td></td>
</tr>
<tr>
<td>?fee on a conditional limitation}</td>
<td></td>
</tr>
<tr>
<td>[p*407]</td>
<td>possibility</td>
</tr>
<tr>
<td>(a) fee simple determinable base fee</td>
<td>of reverter</td>
</tr>
<tr>
<td>fee on a special limitation</td>
<td>executor interest⁴</td>
</tr>
<tr>
<td>?qualified fee</td>
<td></td>
</tr>
<tr>
<td>?fee on a conditional limitation}</td>
<td></td>
</tr>
</tbody>
</table>

---

³ The situation with the estate pur autre vie is considerably more complex. See p. 386 n. 3 supra and source cited.

⁴ When the defeasing interest is created in a third party (as opposed to coming into his hands after creation), the interest of the first taker is more properly described as a fee subject to an executory limitation. See p. 392 supra.
(b) fee simple on a condition subsequent

{right of entry

power of termination

contingent right of reentry}

life estate reversion remainder

C. FUTURE INTERESTS

The important characteristic of future interests is that the holder of such an interest is not entitled to the possession of the land, if at all, until some future time. Thus we call future interests by different names from present ones: remainder, reversion, or executory interest. The fact that A has a future interest, however, should not make us lose sight of the fact that we should also describe the quantum of the estate which A will have when and if his interest becomes possessory. He may, for example, have a remainder in fee simple absolute, fee tail, fee simple determinable or for life. If A's remainder is anything other than one in fee simple absolute, there will necessarily be other future interests following after A's future interest. Thus, it is important in describing the state of any title which involves future interests to describe not only when the future interest will (or may) become possessory but also how long that future interest will last when it becomes possessory.

1. Remainders and Reversions

"To A for life, remainder to B and his heirs."

"To A for life, remainder to B [an eighteen-year-old] and his heirs, if B shall have reached the age of 21."

The two grants above differ obviously in their wording. In both grants, it is a necessary condition to B's interest becoming possessory that A's life estate expire. In the first case, however, this necessary condition is also sufficient; in the second case it is not; in that case B must also have reached the age of twenty-one.

The first type of remainder is called a vested remainder. This term does not mean that the remainderman has a present possessory interest; rather, it means that there is no precedent condition to be met for the remainder to become possessory other than the expiration of the preceding estate(s). The fact that a remainder is vested does not mean necessarily that it is likely to become possessory. If G grants "to A for life, remainder to B for life," B has [p^408] a vested remainder, but if B is eighty years old and A twenty, the chances that B will ever enjoy his remainder are slim.

The second type of remainder is a contingent remainder, which means that some precedent condition in addition to the expiration of the prior estates must be fulfilled in order that the remainder may become possessory. In many instances the additional precedent condition will be the identification of the taker. In the grant "to A for life, remainder to the first son of A and his heirs," the remainder is contingent if A has no sons. As soon as he has a son, the remainder becomes a vested remainder; it is said to vest in the son. In other instances a known taker may be required to do something to fulfill the added condition, e.g., "to A for life, remainder to B and his heirs if B survives A." In this situation the remainder will not vest until the expiration of the
preceding life estate because only then will we know whether $B$ will survive $A$. Thus, in this situation the remainder will vest and become possessory at the same time.\footnote{Unless $A$ forfeits his estate, see infra.}

What, however, if the contingency is never fulfilled? What if $B$ in the second grant at the head of this subsection dies before he reaches 21 or if $A$ in the first grant in the preceding paragraph has no sons? By the principle of conservation of estates, there is something left over of the full fee simple absolute, and this something is retained by $G$ as a reversion, unless $G$ has specifically granted it over. Further, this reversion, perhaps because of the law's preference for vested interests, is regarded as vested, subject to being divested by a condition subsequent, the vesting of the contingent remainder. There is also an implied reversion following these same contingent remainders because $A$ may forfeit his life estate before he dies, for example, by committing treason. (In the case of the vested remainder no reversion is necessary since $B$ stands ready to take however $A$'s estate terminates.) In fact, we may state a rule that contingent remainders are always followed by a vested interest, a reversion being implied if no other vested interest is stated.

There follow further examples of contingent remainders. See if you can determine precisely what conditions must be filled and when the interest will vest:

(1) "To $A$ for life, remainder to the heirs of $B$ (a living person) and their heirs." Gifts to the heirs of a living person are always contingent. No living person has heirs, only presumptive heirs.

(2) "To $A$ for life, remainder to $A$'s children and their heirs." This one is a bit tricky. If $A$ has no children, the remainder is clearly contingent. Once he has a child, the remainder becomes vested in that child (and will pass to the child's heirs or devisees if the child predeceases $A$), but it is subject to open, or, as it is sometimes called, subject to partial divestment, that is, if $A$ has more children, they will take a concurrent vested remainder with the first child. See pp. 438–40 infra. Until $A$ dies, his first child's remainder is always subject to open, since the law presumes that $A$, regardless of his age, sex, or physical condition, is always capable of having children.

(3) "To $A$ for life, remainder to his surviving children and their heirs."

(4) "To $A$ for life, remainder to such of $B$'s children who survive $B$ and their heirs."

(5) "To $A$ for life, remainder to the first man to marry $A$'s daughter, $B$."

[p. 409] Now that we have some idea what the distinction between a vested and contingent remainder is, it might be well to ask what possible difference it makes. The answer lies in the fact that sometime in the fourteenth century the common law of estates began to experience hardening of the arteries, a phenomenon that is experienced by many elements of many legal systems, frequently after a period of rapid growth and expansion. Up to this time the law had created devices by which the intent of the grantor could be implemented; it now began to be restrictive-to tell grantors that they could not do things. In the case of contingent remainders, the courts began to express doubt that such interests could be created at all, and this doubt lasted, to some extent, into the sixteenth century.

Why there was this hostility to contingent remainders is a matter of some controversy. The judges may have felt that the existence of outstanding contingent interests interfered with the free alienability of land, or the policy against the transfer of rights to sue (supra pp. 64, 85–86) may have been extended to include contingent interests which were regarded not as interests in land but “mere expectancies.”

For whatever reasons, the following differences arose between vested and contingent remainders: Vested remainders were freely alienable, and if they were remainders in an estate of inheritance, descendible, and, after the Statute of Wills, devisable. This means that if the holder of a vested remainder in fee died before the life tenant, his interest passed to his heirs or devisees. 
(Reversions were also alienable, devisable, and descendible.) Contingent remainders were not alienable. They were, however, devisable and descendible, unless those qualities were precluded by the nature of the remainder. For example, the remainder in the grant “to A for life, remainder to B and his heirs if A shall leave no children him surviving” is devisable by B and inheritable by his heirs, while the remainder in the grant “to A for life, remainder to B and his heirs if B survives A” is not. The inalienability of contingent remainders has been changed by statute or decision in most jurisdictions today, although it survives in a few.

The second important difference between vested and contingent remainders is that the latter were destructible while the former were not. To understand the concept of destructibility we must return to the importance of seisin. See pp. 348–49 supra. In order to ensure that there be no gaps in the seisin of land, the law required that transfers be made by feoffment with livery of seisin. There could be no feoffment in futuro, grants “to A and his heirs, to take effect one week from now.” Seisin could not spring up automatically out of the grantor’s seisin. It had to be delivered presently or not at all. In the case of vested remainders, for reasons that are not completely clear, the law was willing to countenance a limited exception to this rule. In a grant “to A for life, remainder to B and his heirs,” the courts were willing to say that livery of seisin to A sufficed for B as well, that A held the seisin for B during his life estate. The same was also true of vested remainders following a fee tail, reversion, and probably also of possibilities of reverter.

The law drew the line, however, at contingent remainders. Suppose a grant in the form of the one at the head of this subsection, “to A for life, remainder to B if he shall have reached 21.” A dies; B is living but has not reached the age of twenty-one. The land cannot go to B; the grant specifically precludes that. It must, therefore, go to the reversioner, G, or his heirs, or the person to whom the reversion has been granted or devised, in order to avoid a gap in seisin. Suppose, however, that the grant read “to A for life, remainder to B when he reaches the age of twenty-one”? The p*410 reversioner must still take if B has not reached twenty-one. But here the grantor clearly intended that B take when he reaches twenty-one irrespective of his age when A dies. Will his intent be carried out? It will not. Once the seisin has returned to the reversioner, the courts felt that it would take a new livery of seisin to transfer that seisin to B upon his fulfilling the condition. Thus, the rule arose that unless the contingencies upon which a contingent remainder was founded were fulfilled prior to, or, at the very least, at the time of, the expiration of the preceding interest, the contingent remainder was destroyed.

Contingent remainders could also be destroyed by merger. The rules about this were complicated. They are given in DKM3, pp. 410–11. I think that we can bypass them here. I doubt that any jurisdiction would apply them today. The rule about the destructibility of contingent remainders for failure to fulfill the condition before the expiration the supporting estate has also been abolished in most, probably all, jurisdictions. If one makes it clear that one wants the remainder to take effect without regard to whether the condition is fulfilled before or after the expiration of the supporting estate, the courts will imply a reversion in the grantor, which is defeased if the remainderman fulfills the condition. If, however, the drafter is not clear, there is still a decided tendency to insist that the condition be fulfilled before the expiration of the supporting estate. As is true in a number of cases what was at common law a rule of law has become a rule of construction.

Problems

Fully describe the interests of all parties named or described in the following instruments. Assume the same statutes as in Problems 1–4, supra p. 388, assume that the Statute De Donis is in effect, and assume that the doctrine of destructibility of contingent remainders has been abolished.

8. [We will not do this problem in class.] D devises “to A and the heirs male of his body.” A is D’s sole heir. Then A conveys all his right, title, and interest in the land “to B.”
9. G grants “to A for life, remainder to B’s children.”
10. G grants “to A for life, remainder to B’s surviving children.”

In grants (9) and (10) consider the state of the title at the following times:
(a) A and B are both alive, and B is childless.
(b) A and B are both alive, and B’s only child C grants all his right, title and interest to D.
(c) B dies childless during A’s lifetime.
(d) B dies during A’s lifetime, and his only surviving child C grants all his right, title and interest to D.
(e) A dies; B is still alive but has no children.
(f) A dies, survived by B and B’s child C who grants all his right, title and interest to D.

Moral: Watch out for the word “surviving.”

11. [We will not do this problem in class.] D devises “to A for life, remainder to such of A’s children who survive him.” D also devises all the rest and residue of his estate “to A.” In devise (11) consider the state of the title at the following times:
(a) Upon D’s death.
(b) After D’s death and after A has conveyed his interest to B who immediately reconveys it to A.

**BROWNING v. SACRISON**

[Read this case and the following note in DKM3, pp. 411–18]

2. Summary of Future Interests Prior to the Statute of Uses

The same hardening of the arteries which we noted in the common law courts of the fourteenth century with respect to contingent remainders may be seen in the law courts of the same period with regard to future interests generally. Future interests could only be created by way of remainder or reversion, with rights of entry or possibilities of reverter creatable, if at all, only in the grantor. Alienation of contingent interests was strictly limited. More specifically, the following rules restrained a grantor’s flexibility.

(1) Interests could not be made to spring up at some future time with the grantor or his heirs retaining the seisin during the interval. This was seen as creating a possible gap in seisin, although why this is necessarily so is certainly not immediately plain. Perhaps a better explanation is that the abhorrence of gaps in seisin led to an insistence on conveyance by feoffment with livery of seisin and that this insistence prevented, because of the nature of the form of the conveyance, feoffments in futuro.

(2) A possible corollary of the rule against feoffments in futuro was that remainders had to take effect, if at all, upon the expiration naturally or by forfeiture of some supporting estate. Thus, one could not convey “to A for life, remainder one year after his death to B,” even though a gap in seisin could be avoided by having G or his heirs hold the seisin for the intervening year. This rule also may explain why contingent remainders were destroyed if they did not vest, at the latest, at the time of expiration of the supporting estate.

(3) An interest could not be made to rise after a fee already granted; in the words of the writers: “a fee cannot be limited on a fee.” An exception was recognized in the situation where G retained a right of entry or possibility of reverter. This exception causes some doubt as to whether the real reason for the objection was the rule about feoffments in futuro. Later writers were to say that such grants were “repugnant to the fee already granted,” but this explanation does not account for the acceptance of the fee on condition subsequent and (probably) the determinable
fee. Another explanation has been sought in the common law abhorrence of champerty [p*419] and maintenance, but this explanation serves better to explain why such interests might not be assignable, not why they could not be created at all.

(4) Finally, and probably as a corollary to Rule (3), an interest could not be created in third parties to take effect in derogation of a preceding possessory estate for life or vested remainder for life.

These rules may be summarized as follow: no springing interest (interest arising out of the grantor’s seisin) or shifting interest in third parties (interest cutting short a preceding vested or possessory interest prior to its natural expiration) will be recognized in the common law courts. These rules, combined with the destructibility of contingent remainders, [Footnote 3] severely hampered the ability of grantors to transfer land as they wished. Here are some examples of simple grants which were invalid at law in whole or in part prior to the Statute of Uses.

(1) “To A and his heirs upon A’s marrying my daughter.” This is a classic feoffment in futuro, an attempt to create a springing interest, and void for that reason. (2) “To A for life, remainder to B when he reaches twenty-one.” The grant to A is good. The grant to B is good if he reaches twenty-one before A’s death. Otherwise, by Rule (2), supra, and the doctrine of destructibility, G or his heirs take an indefeasible reversion, since B cannot take by way of an interest springing from the reversion.

(3) “To A for life, remainder to B and his heirs, but if B does not marry A’s daughter, remainder to C and his heirs.” A’s life estate is good. So is B’s vested remainder in fee. (Why is this remainder vested? Review your understanding of the vested-contingent distinction.) The shifting interest in C is void as an attempt to limit a fee upon a fee. Whether B has the full fee in remainder at this point or whether his estate is still subject to forfeiture upon his failing to fulfill the condition, i.e., whether the law will imply a right of entry in G and his heirs, was not completely settled. The modern cases on invalid interests tend to favor the former solution. See p. 483 infra.

(4) “To my widow, A, for life, remainder to my grandson, C, and his heirs, but if A remarries, then to my son, B, for life, remainder to C and his heirs.” This one is a bit tricky. A’s life estate and C’s remainder are valid. The condition on A’s life estate is not void because of Rule (3) (it is not a fee limited on a fee) but is void because of Rule (4): it is an interest which will take effect in derogation of a life estate. Now suppose that G, on the advice of counsel, frames his grant in these terms: “to A for life so long as she remains unmarried, remainder to B for life, remainder to C and his heirs.” An argument could be made that B’s interest should be allowed to take effect upon A’s death but not upon her remarriage. The law, however, regarded B’s interest as a vested one and seems to have permitted him to take however his mother’s estate was terminated. (Can you see what the problems would have been with an alternative holding?) On the other hand, this second form of grant does not quite achieve the purposes of the first one. In the second grant B will get a life estate if he survives his mother even if she does not remarry, while he will get his life estate in the first grant only if she remarries.

[p*420] Prior to the Statute of Uses of 1536 (supra pp. 351–52), it may have been possible to create interests like those in (1)–(4) above by means of uses that were enforceable in equity but not in the courts of law. Here is how is might have been done:

(1) “To X, Y, and Z and their heirs to the use of A and his heirs upon A’s marrying my daughter.” There is no problem about a feoffment in futuro since the feoffment of X, Y, and Z is a present one, and they get seisin, which they retain. Because the law assumed that a use was retained where one was not specifically stated (cf. p. 352 supra), G has an equitable resulting use unless and until A marries his daughter. A has an equitable springing use to take effect upon A’s marriage to G’s daughter.
(2) "To X, Y, and Z and their heirs to the use of A for life, remainder to B when he reaches twenty-one." A has an equitable life estate. B has an equitable remainder if he has reached twenty-one upon A's death. If he has not, G and his heirs have an equitable resulting use by way of reversion unless and until B reaches twenty-one. B has a springing use upon his reaching twenty-one.

(3) "To X, Y, and Z to the use of A for life, remainder to B and his heirs, but if B does not marry A's daughter, remainder to C and his heirs." A has an equitable life estate and B an equitable remainder in fee. The remainder, however, is defeasible by C's interest. Since C's interest is a shifting one and not a remainder, let us call it a shifting use.

(4) "To X, Y, and Z to the use of A for life, remainder to C and his heirs, but if A remarries, then to B for life, remainder to C and his heirs." A has an equitable life estate and C an equitable remainder in fee. B has a shifting use for life, to take effect if A remarries.

3. The Statute of Uses, Executory Interests, and the Rule in Purefoy v. Rogers

The importance of the Statute of Uses for the law of future interest cannot be overstated, for by the Statute equitable interests, including the springing, shifting, and resulting uses became fully recognized legal interests. Such interests could also be created by will under the Statute of Wills, although springing or shifting uses created by will tended to be called by another term, executory devises. In modern terminology we tend to give a generic name to springing and shifting uses and executory devises: executory interests.

The operation of the Statute may be seen by re-examining the examples with which we dealt above. (The examples are in a different order to permit a treatment of the post-Statute developments.)

(1) "To X, Y, and Z and their heirs to the use of A and his heirs upon A's marrying my daughter." The use is executed by the Statute. X, Y, and Z take seisin momentarily and automatically pass it back to G. G, however, takes subject to a springing executory interest in A. Both G's interest and A's are legal ones; X, Y, and Z are out of the picture entirely.

What, you might ask, happened to the rule about feoffment in futuro? Perhaps the simplest answer is that the Statute did away with it: "... all and every ... person ... that have or hereafter shall have any ... use, confidence or trust, in fee-simple, fee-tail, for term of life or for years, or otherwise, or any use, confidence or trust, in remainder or reverter, shall [p*421] from henceforth stand and seised ... to all intents, constructions and purposes in the law, of and in such like estates as they had or shall have in use, trust or confidence ...." 27 Hen. 8, c. 10 (1536) (emphasis supplied). From a policy point of view, livery of seisin was no longer needed. It had served its purpose; a new age would recognize interests which violated the strict rules of seisin.

(3) & (4) Similarly, the law now recognized shifting uses. The remainder limited to B in fee (example 3) or for life (example 4) could be made defeasible to be shifted over to C upon the happening of some contingency. As you will recall, we suggested that a slightly different policy was at stake here, the policy against creating rights of action in third parties. That policy too fell before the words of the Statute, but not the corollary rule that contingent rights could not be alienated. Thus, by analogy to contingent remainders, it became the rule that executory interests could not be alienated, although they could be devised or inherited. This rule, like the rule about contingent remainders, has been abrogated today in many jurisdictions.

Note that for any of these interests to be valid, it is necessary that there first be a use raised in X, Y, and Z. A direct grant "to A and his heirs upon A's marrying my daughter" is still invalid at common law. It was not until the nineteenth century that most jurisdictions allowed the creation of executory interests by bargain and sale without the necessity of stating a feoffment to uses. See Abbott v. Holway, infra p. 423.
The courts came to rebel against this new found freedom, motivated perhaps by atavism and perhaps by a feeling that too many outstanding interests would interfere unduly with the free alienability of land. A most significant restriction occurred in grants of the following type: "To $X$, $Y$, and $Z$ and their heirs, to the use of $A$ for life, remainder to $B$ and his heirs when he becomes twenty-one." Before the Statute of Uses, such a grant created an indestructible interest in $B$, to take effect as an equitable remainder if he had reached the age of twenty-one prior to the expiration of $A$’s life estate, to take effect as a use springing from $G$’s implied reversion if he had not. After the statute, the uses were executed, but what kind of interest did $B$ have? There was no problem if he reached twenty-one before the expiration of $A$’s estate; his interest would take effect as a remainder at law. But if he was not twenty-one at that time, would the courts allow him to take by way of executory interest springing from $G$’s implied reversion? After some hesitancy, the courts answered this question in the negative. Any other answer would have meant the end of the destructibility rule, and the courts were not prepared to go so far. In Purefoy v. Rogers, 2 Wms. Saund. 380, 85 Eng. Rep. 1181 (1670), the court stated the rule which was to become of general applicability: Any future interest which can possibly take effect as a remainder will be regarded as a remainder and destructible and not as an indestructible executory interest.

The conveyancers, as one might expect, reacted by creating interests which were indestructible because they could not possibly take effect as remainders. Examine the following examples carefully to ensure that you understand the distinction between remainders and executory interests. (In all cases assume an initial feoffment to uses which is executed):

[p*422] (1) “To $A$ for life, remainder one day after $A$’s death to $B$ and his heirs when $B$ reaches twenty-one.”

(2) “To $A$ for life, remainder to $X$ [the friendly family lawyer] and his heirs, but if $B$ reaches twenty-one, to $B$ and his heirs.” This one is dangerous because it can result in the friendly family lawyer getting the whole shooting match. Suppose, however, that we word it like this: "to $A$ for life, remainder to $X$ and his heirs as trustees to preserve contingent remainders (i.e., to hold the land and reinvest the proceeds), then to $B$ and his heirs if he reaches twenty-one, otherwise to $C$ and his heirs.” What we have here is alternative contingent remainders made indestructible through the device of trustees to preserve contingent remainders. This form of grant was quite common, particularly in the eighteenth century.

(3) “To $A$ for 200 years, if he should live so long, then to $B$ and his heirs if he reaches twenty-one.” $B$’s interest could not take effect as a contingent remainder because at common law a contingent remainder could not be limited after a term of years. ($A$ does not have seisin because he is a tormor; $B$ is allowed to take seisin from $G$ at the time of the grant only if his remainder is vested. The logic of this is more than a bit slippery, but the rule was well established.) Thus, $B$’s interest is an indestructible executory interest.

Today in those jurisdictions where the destructibility of contingent remainders has been abolished, the distinction between remainders and executory interests is not nearly so important as it was at common law. In these jurisdictions contingent remainders are treated for most purposes like executory interests before the Statute of Uses and Purefoy v. Rogers. We think the student should still master the distinction, however, principally because a knowledge of it helps to understand the process by which the law got where it is. Further, (a) it still may be relevant for destructibility purposes in some jurisdictions (although I must confess that I seriously doubt it), (b) the vocabulary is still in general use, and (c), and, perhaps most important, the distinction makes a difference for purposes of the Rule Against Perpetuities, to which we will turn shortly.

Before we do, however, perhaps we should summarize in chart form the common law rules about alienability of future interests:

<table>
<thead>
<tr>
<th>Interest</th>
<th>Alienable?</th>
<th>Devisable?</th>
<th>Descendible?</th>
</tr>
</thead>
<tbody>
<tr>
<td>reversion (always vested)</td>
<td>yes</td>
<td>yes</td>
<td>yes</td>
</tr>
</tbody>
</table>
possibility of reverter no perhaps\textsuperscript{2} yes
right of entry no no yes
vested remainder yes yes yes
contingent remainder no yes yes
executory interest no yes yes

Notes

1. All inalienable interests may be released to the holder of the present possessory estate. There is also some authority that an attempted alienation of an inalienable interest will be enforced between the parties to the transaction by way of estoppel and perhaps will be enforced in equity between the parties, their privies, and maybe those with notice, if the conveyance is for value.

2. There is some authority for the proposition that the attempted alienation of a right of entry destroys it. Otherwise, an attempted alienation of an inalienable interest is simply void, leaving the putative alienor in the same position he was in before.

[p*423] Problems

Fully describe the interests of all parties named or described in the following instruments. Assume the same statutes as in Problems 8–11, supra p. 411, and also assume the existence of a statute allowing the creation of executory interests without the specific declaration of a use. [We will do these problems in class only to understand the basic form of the two grants. The differences in result in the different fact-situations are largely dependent on the common-law rules of destructibility, which we are assuming are no longer in effect. Many courts today, however, would reach a different result in problem (e) and problem (f), and that is worth talking about.]

12. \( G \) grants “to \( A \) for life, remainder to such of \( A \)’s children as reach the age of 21, but if \( A \) has no children who reach the age of 21 then to the heirs of \( B \).”

13. \( G \) grants “to \( A \) for life, remainder to \( A \)’s children, but if none of \( A \)’s children reach the age of 21, then to the heirs of \( B \).”

In grants (12) and (13) consider the state of the title at the following times:

(a) \( A \) and \( B \) are living, and \( A \) has no children. \( G \) then conveys all his right, title and interest to \( A \).

(b) \( A \) and \( B \) are living, and \( A \) has a child \( C \) who is 5. \( G \) then conveys all his right, title and interest to \( A \).

(c) \( A \) and \( B \) are living, and \( A \)’s only child \( C \) dies at the age of ten. Then \( A \) dies.

(d) \( A \) and \( B \) are living, and \( A \) has two children, \( C \) who is 22 and \( D \) who is 18.

(e) \( B \) dies; then \( A \) dies survived by his only child \( C \), a ten-year old.

(f) \( B \) dies; then \( A \) dies survived by two children, \( C \) who is 22 and \( D \) who is 18.

**FURTHER NOTE ON HOLBROOK v. HOLBROOK**

Further to the Notes in DKM3, p. 511: The mysterious statute quoted in the note was derived from two statutes, the first passed in 1854 which read substantially as does the first sentence of the OR. REV. STAT. § 93.180, as quoted in the note. Another statute passed in 1862 read

\[2 \text{ Brown v. Independent Baptist Church of Woburn, infra, p. 499, assumes that it is, and the holding is dependent on that assumption. There is, however, English authority to the contrary.} \]