

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 the interest becomes possessory. It could be, for example, 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 the 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.¹

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

¹ Unless *A* forfeits his estate, see *infra*.

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 § 2F *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*, p. S105, Note 2) 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. S165–166 *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, reversions, 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. The most common situation of merger was probably the one that arose where the holder of a life estate conveyed his or her interest to the holder of the reversion or vice versa. Any intervening contingent remainder was destroyed. I think that we can bypass destructibility by merger here, except as a doctrine that explains why the law developed the way it did. I doubt that any jurisdiction would apply the doctrine 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, perhaps 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 1–5, *supra* p. S202, assume that the Statute De Donis is in effect, and assume that the common-law doctrine of destructibility of contingent remainders has been abolished.

11. [We will not do this problem in class. If you want to do it, you should read the fuller description of estates tail and of the destructibility doctrine in DKM3.] 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.”

12. G grants “to A for life, remainder to B’s children.”

13. G grants “to A for life, remainder to B’s surviving children.”

In grants (12) and (13) 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."

14. [We will not do this problem in class. If you want to do it, you should read the fuller description of the destructibility doctrine in DKM3.] *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

Supreme Court of Oregon.

267 Or. 645, 518 P.2d 656 (1974).

O'CONNELL, C.J. This is a suit in which plaintiff seeks to have a provision in the will of Kate Webb construed. The question presented is whether the remainder devised to plaintiff's husband, Franklin Browning, now deceased, and his brother, Robert Sacrison, the defendant, was vested or contingent at the time of Mrs. Webb's death. The trial court found the remainder to be contingent. Plaintiff appeals.

Kate Webb was the maternal grandmother of Franklin Browning and Robert Sacrison. Her will, executed in 1943 when Franklin was 20 and Robert 13, contained the following provision (paragraph III): [p*412]

"I give and devise to my daughter, Ada W. Sacrison, a life estate for the term of her natural life in and to all real property belonging to me at the time of my death, excepting only the residence property at Pilot Rock described in paragraph II of this will, with remainder over at the death of the said Ada W. Sacrison, share and share alike, to my grandsons, Francis Marion Browning¹ and Robert Stanley Browning,² or, if either of them be dead, then all to the other, subject to a like condition as to the use of the same or any portion of the proceeds thereof for Clyde Browning, as mentioned in paragraph II of this my last Will."³

Kate Webb died in 1954. She was survived by her daughter, Ada, and grandchildren Franklin and Robert. At the time of her death, Mrs. Webb owned 960 acres of farmland in Umatilla County. This is the land devised by paragraph III of the will. Franklin died in 1972 without issue. He did not survive the life tenant Ada, who is still alive.

Plaintiff takes the position that the language in paragraph III of the will, creating an interest in the two grandsons "or, if either of them be dead, then all to the other" refers to the death of the testatrix not the death of their mother Ada, the life tenant. Thus, she argues the estate vested at the

¹ Francis Marion Browning is the same person as Franklin M. Browning.

² Robert Stanley Browning is the same person as Robert Stanley Sacrison.

³ This condition was "that no portion of the property or proceeds thereof shall ever go to or be used for the benefit of their father, Clyde Browning." For further discussion of the effect of this condition see *infra*.

time of Mrs. Webb's death.

Conversely, defendant contends that the grandsons each took a remainder contingent upon surviving the life tenant.

Plaintiff relies upon the constructional preference favoring the early vesting of estates. It cannot be denied that there is considerable case support, including our own cases, for the view that the law favors the early vesting of estates. And it is clear that at an earlier day the rule was widely, if not universally accepted. The policy reason for this preference is that it "quickens commerce in the ownership of property by facilitating alienability to a considerable degree."⁴ But with the passage of time the rule was eroded by exceptions and by a closer analysis of the rationale for the early vesting preference, until today that constructional preference probably no longer represents the prevailing view.⁵ The most severe criticism of the constructional preference for vesting is found in *V American Law of Property*, 21.3 at 130 (Casner ed. 1952), where it is said:

"The preference for vested interests undoubtedly originated in connection with conveyances of interests in land and at a time in feudal England when contingent interests in land had not attained a dignified statu[r]e. Under such conditions, it may be reasonable to attribute to a transferor the intention to give the transferee an estate of recognized quality. Today, however, unfortunate tax consequences may follow a determination that an interest is vested and most transferors who consider all the consequences which attach to a vested interest are inclined to postpone vesting until the time set for enjoyment of the interest in possession. Thus continued [p*413] adherence to this preference in modern times is at least of doubtful validity in many situations."

The foregoing critique has in turn been criticized for being a "harsh, unbalanced assessment of the rule, . . . as unfortunate as the more common tendency to accept the rule uncritically."⁶ Thus a middle position has evolved which urges that "what is needed is a more discriminating evaluation rather than outright rejection of the rule."⁷

We adopt this latter approach. It is true that the reasons which prompted the creation of the rule favoring early vesting no longer obtain. Nevertheless, early vesting still may be desirable for other reasons which have application today.⁸ On the other hand, the factors supporting early vesting must compete against other factors favoring the postponement of vesting. All of the factors "must be given their respective weights in the ultimate determination of the judicially

⁴ *Dean et al. v. First Nat'l Bank et al.*, 217 Or. 340 at 361, 341 P.2d 512 (1959).

⁵ "It is the peculiar genius of the common law that rarely is an outmoded rule suddenly repudiated. Usually, it is gradually eroded by exceptions that ultimately form a new rule; what remains of the old rule becomes the exception. Most of the exceptions to the rule favoring the vesting of estates have not been explicitly recognized as such. Nevertheless, exceptions exist and are becoming more common." Rabin, *The Law Favors the Vesting of Estates. Why?*, 65 COLUM. L. REV. 467, 473 (1965).

⁶ Rabin, *supra* note [5] at 479.

⁷ *Ibid.*

⁸ ". . . Nevertheless the early vesting of interests is still regarded as very desirable from the viewpoint of public interest. Construing an interest as vested may reduce the number of persons having interests in the affected thing and thus makes it easier to secure a conveyance of the ownership of such thing. Also such construction tends to reduce the uncertainties as to the created interest and hence results in a readier market for it. Thus earlier vesting still facilitates alienability to a considerable degree. Furthermore the rule against perpetuities operates more destructively as to interests subject to a condition precedent than as to interests vested subject to complete defeasance." 3 *Restatement, Property*, § 243 at 1217-18 (1940). *Dean et al. v. First Nat'l Bank et al.*, 217 Or. 340, 341 P.2d 512 (1959).

ascertained intent of the conveyor.”⁹

In the present case, competing with the constructional preference for early vesting is the preference for that construction which conforms more closely to the intent commonly prevalent among conveyors similarly situated than does any other possible construction.¹⁰ In modern law it is felt that when a devise is made to a life tenant with a remainder conditioned upon an ambiguous form of survivorship, the intent “commonly prevalent among conveyors similarly situated”¹¹ is deemed to require that the remainderman survive the life tenant rather than the testator.¹² The application of this constructional preference would make Franklin’s interest subject to the condition that he survive his mother Ada, as the trial court held.

The trial court based its decision in part upon a comparison of the language in other parts of the will with the language in paragraph III. For example, paragraph II provided as follows:

“I give and devise to my grandsons, Francis Marion Browning and Robert Stanley Browning, share and share alike, the real property owned by me in the Town of Pilot Rock, in Umatilla County, Oregon, subject to the condition that no portion of said property or the proceeds thereof shall ever go to or be used for the benefit of their father, Clyde Browning, and if either of said grandchildren be not living at the time of my death, then the other shall take all of such property, subject to said condition.”

In this paragraph the testatrix expressly designates that the time for vesting of the Pilot Rock property in the survivor shall be “at the time of my death.” The trial court reasoned that “it must be assumed that when these specific words were not used [in paragraph III] after the estate of Ada Sacrison, but the words, “or, if either of them be dead, then to the other,” the [p*414] testatrix intended that the interest became vested at the time of the death of the life tenant, and not at the date of her death.”

The principle employed by the trial court is well recognized as one of the canons of construction. However, it loses some of its force here because the disposition in paragraph II, being directly to the devisees or the survivor without the intervention of a life estate, would necessarily have to vest, if it were going to vest at all, upon the death of the testatrix and therefore the survivorship provision could not relate to any other person’s death insofar as it affected the vesting of the estate. This factor, standing alone, therefore would not justify the trial court’s decision.

The trial court did, however, point to another factor which we think is more significant in ascertaining the testatrix’s intent. The trial court noted that “all provisions of the will specifically excluded Clyde Browning from sharing in any interest in the estate.” The court then concluded that “[i]f the construction propounded by the plaintiff were to be followed, the grandsons of Kate Webb would have had a vested transferable interest at the death of Kate Webb, and had they died intestate without issue prior to the death of the life tenant, their father, Claude (sic) Browning would have shared in his interest to the estate of Kate Webb as an heir of his child, contrary to the testatrix’ specific wishes.”

To strengthen this conclusion, the trial court could have pointed out that at the time the will was executed in 1943 Robert was only 13, Franklin was 20, and neither of them was married. (Indeed, neither had married by 1954 when the testatrix died.) There was, then, at least in the case of Robert, a rather long period of time during which a beneficiary might die intestate and before

⁹ 3 Restatement, Property, § 243 at 1209 (1940).

¹⁰ 3 Restatement, Property, § 243 at 1208 (1940).

¹¹ *Ibid.*

¹² Cf. 3 Restatement, Property § 264 (1940); Rabin, *supra* note [5] at 473.

marriage and-or the birth of issue could divert the estate from vesting in whole or in part in Clyde Browning. It must be noted, of course, that even if the estate is regarded as vesting only upon the death of Ada, the life tenant, the survivor who outlived Ada might not have married or had issue, in which case Clyde would share in the estate upon his son's death. Moreover, if a grandson did have issue and predeceased the life tenant, treating the vesting event as the death of Ada would result in the disinheritance of the grandson's issue. However, we can only indulge in assumptions as to her possible objectives. We think that the assumption made by the trial court, supported by the preference for the construction which more closely conforms to the intent commonly prevalent among testators similarly situated, is the most reasonable.

The decree of the trial court is affirmed.

Notes and Questions on the Vested/Contingent Distinction Today

1. The principal case is discussed in McGovern, *Facts and Rules in the Construction of Wills*, 26 U.C.L.A. L. REV. 285, 319–20 (1978).

2. With the general abolition of the destructibility of contingent remainders and the growing tendency to treat contingent remainders as freely alienable, two of the most important consequences of the vested-contingent distinction no longer exist in most American jurisdictions. As the principal case illustrates, however, the distinction remains of considerable importance.

In the principal case all the parties were agreed that Franklin's interest was contingent upon his surviving someone. If that someone was his mother, then his death without having fulfilled the condition meant that his interest went to his brother by the express terms of the will. If that someone was his grandmother, the testatrix, then Franklin's interest was vested at the time of his death and [p*415] passed to his heirs. The court does not tell us if Franklin died testate or intestate but the fact that his widow is the plaintiff suggests either that he left all his property to her by will or that he died intestate without any surviving issue. *See* OR. REV. STAT. § 112.035 (1989) (which was in effect both when Kate Webb died and when Franklin died).

Had the court applied the presumption in favor of early vesting in the case, Franklin's widow would have won. She loses not because of the doctrine of destructibility (which is not in effect in Oregon and would not apply anyway because there is no gap in seisin or merger) nor because of the rule about inalienability of contingent interests (which also does not apply in Oregon and would not apply anyway because Franklin did not make an *inter vivos* conveyance), but because Franklin failed to fulfill the condition, which was, the court holds, that he survive his mother.

Should there be a presumption in favor of early vesting when the instrument, as in the principal case, is ambiguous? As the court points out, many have thought so. Even if contingent remainders are alienable, it is difficult to find purchasers for interests subject to contingencies over which the purchaser has no control. In the principal case it would be easier to evaluate a 1/2 interest in the property subject to the mother's life estate than it would be to evaluate a 1/2 interest in the property subject to a life estate and to the possibility that Franklin would predecease his mother. But the latter evaluation is not impossible, and in either case the purchaser is going to have to wait for Franklin's mother to die. In any event, the alienability argument is somewhat remote in this case.

One situation where the alienability argument has some force is in the case of class gifts. Consider a grant "to A for life, remainder to the children of B." (If you wish to give the grant some modern reality, say that A is the testator's spouse and B the testator's child who is independently wealthy.) At common law the class of B's children had to close no later than A's death; otherwise there would be a gap in seisin. If B had no children at A's death, the remainder was destroyed. If B had children but was still alive and capable of having more, the possibility of open was destroyed, and the interest vested in possession in the then-born children (or their heirs,

if they had predeceased A). With the abolition of the destructibility of contingent remainders, neither of these results follows automatically, but if we leave the class open until B's death, we will considerably hinder the alienability of the land. Clearly today the testator can compel this result if he makes that intention clear, but if he does not, the courts have generally adopted the following rule of thumb: If B has children at A's death, those children will take the remainder to the exclusion of any afterborn children. We presume that the testator did not want to have the estate tied up until B's death. If, on the other hand, B has no children at A's death, we will imply a reversion until B has a child. That child's interest, however, will remain subject to open until B's death. The notion seems to be that as long as we are going to have to suspend the practical alienability of the land anyway, we might as well wait until there is no possibility of further members of the class. L. SIMES, *FUTURE INTERESTS* § 102 (2d ed. 1966).

The presumption in favor of early vesting can also help out testators with the Rule Against Perpetuities, *infra*, § 2C4. There are a number of situations in which the application of the presumption can make the difference between a valid and a void interest under the Rule. As we shall see when we come to the [p*416] Rule, however, there was no question of Perpetuities in the principal case. Franklin's interest was good under the Rule whether it was vested or contingent.

On the other hand, the presumption in favor of early vesting tends to have adverse tax consequences, as the A.L.P. excerpt quoted in the principal case suggests. Under the current Federal Estate Tax law, the value of Franklin's remainder interest as of the date of his death would be included in his taxable estate, because it was an asset over which he had the power of disposition. I.R.C. § 2031 (1986). If the remainder is held to be contingent upon his surviving his mother, however, that value is zero. He had nothing of value which he could have disposed of, granted that he died when he did. If the remainder is held to be vested, on the other hand, it has substantial value, even though it is subject to his mother's life estate. Federal Estate Tax, however, only applies to rather large estates. We do not know whether it was relevant in the principal case. For an illustration of the need under the Federal Estate Tax to determine whether a remainder is vested or contingent *see In re Question Submitted by the United States Court of Appeals for the Tenth Circuit*, 191 Colo. 406, 553 P.2d 382 (1976).

Do these considerations help you in evaluating what the court did in the principal case? What more would you want to know before deciding a case like this?

3. In the principal case the testatrix had imposed a condition of survivorship, but it was unclear how the condition was to be applied. Recently, some courts have gone further than the court in the principal case and have implied conditions of survivorship where none are expressed. The paradigmatic situation involves language like this: "to A for life, remainder to A's children, the surviving child of any deceased child of A taking his parent's share." One or more of A's children predecease A but leave no surviving children. Do the children of A have a vested remainder (subject to open and subject, as we will learn in the next subsection, to being divested by predeceasing A and leaving a surviving child)? If they do, then the death of a child of A without leaving surviving children will result in the interest being passed to the heirs or devisees of the child of A, who may not be that child's sibs. This result, with all its possible adverse tax consequences, is the traditional one under the presumption of vesting. Can we say that there is an implied precedent condition that A's children have to survive A before their interest vests? If we can, then only those children of A who survive A or who leave children who survive A will take an interest. This is the result that a number of courts, still decidedly a minority, seem to have come to recently. *See, e.g., Schau v. Cecil*, 257 Iowa 1296, 136 N.W.2d 515 (1965), *noted critically in* 63 IOWA L. REV. 924 (1978); *cf. Hanley v. Craven*, 200 Neb. 81, 263 N.W.2d 79 (1978), *noted in* 58 NEB. L. REV. 551 (1979); *Fletcher v. Hurdle*, 259 Ark. 640, 536 S.W.2d 109 (1976), *noted in* 31 ARK. L. REV. 134 (1977); *but see In re Estate of Blough*, 474 Pa. 177, 378

A.2d 276 (1977); *Elliott v. Griffin*, 218 Va. 250, 237 S.E.2d 396 (1977). At least one jurisdiction has long implied conditions of survivorship in the case of class gifts, but now seems to be moving away from it. *See Note, Has Tennessee Abolished its Ancient Class Gift Doctrine or Only Modified It?*, 7 MEMPHIS ST. U. L. REV. 129 (1976). The Iowa Supreme Court has now limited its decision in *Schau v. Cecil*, *supra*, to instruments drafted before the enactment in 1925 of a statute interpreted as abolishing the common law destructibility rule with respect to contingent remainders. *Davies v. Radford*, 433 N.W.2d 704 (Iowa 1988); *Matter of Estate of Ruhland*, 452 N.W.2d 417 (Iowa 1990). The Iowa cases are discussed in detail in Hines, *Implied Conditions of Personal Survivorship in Iowa Future Interests* [p*417] *Law*, 75 IOWA L. REV. 941 (1990). Why should elimination of the destructibility rule lead to rejection of an implied condition of survivorship? *Compare Harris Trust and Savings Bank v. Beach*, 118 Ill.2d 1, 513 N.E.2d 833, 112 Ill.Dec. 224 (1987) (suggesting that the preference for early vesting was a result of the destructibility rule, and that given abolition of the rule a preference for early vesting may be inappropriate). Do the principles of interpretation suggested by the court in the principal case help in resolving this kind of conflict?

4. The abolition of the destructibility of contingent remainders has meant that the use of merger as estate-planning device (because it allows the life tenant and the reversioner to destroy the contingent remainders and remake the estate plan; *see* p. S213 *supra*) is no longer available. Today estate planners achieve the same purposes by the use of trusts, *infra*, § 2G, and powers of appointment. Thus *D* might leave the property in trust, the income payable to *A* for life with the principal to be divided among *A*'s children at *A*'s death, and give *A* a power to invade the corpus of the trust and/or to designate which of the children was to take the principal and/or to designate someone other than the children to take the principal. The law of powers is complicated, and the interplay of that law with tax considerations is even more complicated. *See generally* L. WAGGONER, R. WELLMAN, G. ALEXANDER & M. FELLOWS, *FAMILY PROPERTY LAW* ch. 14 (1991).

5. In addition to introducing you to the continuing importance of the tax collector to the law of estates and future interests, the principal case is also a good introduction to the problem of construing ambiguous instruments. The topic is a complicated one, and for a full treatment you will have to wait for a wills and trusts course. The jumble of vocabulary lawyers use in describing estates is part of the reason there are inconsistencies in this area of the law. The definition and application of the terms used in the law of estates are not uniform, so the words do not always mean the same thing to different people. Language that is clear and unambiguous to one person is not always clear to another. (Unfortunately, this latter person is often a judge.) Because the decision in a given case will turn on the language used in the documents, and because amateur estate planners have the uncanny ability to compose new and unique variations on the familiar testamentary themes, courts are often forced to make detailed inquiries into the meaning and probable sense of certain phrases or terms. To aid in these inquiries, courts have created, and legislatures have sometimes codified, a rough-and-ready set of rules to aid in the interpretation of wills to carry out the testator's wishes. Some rules are widely accepted; others are less well received. For example, few courts would disagree with the proposition stated by the court that the testator's intent, as determined from the four corners of the instrument, is to govern. That rule, unfortunately, as the principal case illustrates, rarely decides hard questions. Where that intent is difficult or impossible to determine, some courts (the "strict constructionists") refuse to admit evidence extrinsic to the instrument; other courts will admit such evidence. In either event resort is frequently had to various principles of construction. Among a number of such principles the two mentioned in the opinion are the presumption of vesting and the canon of construction that a phrase ambiguous in one context may be clarified by its use in another. Other principles include: wills are to be construed in favor of the decedent's spouse and heirs (*see In re Burk*, 298 N.Y. 450, 84 N.E.2d 631, *reargument denied*, 299 N.Y. 308, 86 N.E.2d 759 (1949), *noted in* 48 Mich.

L. Rev. 383 (1950); *Luscher v. Luscher*, 308 Ky. 677, 215 S.W.2d 581 (1948)); wills are to be construed to defeat intestacy (*Estate of Thompson*, 414 A.2d 881 (Me. 1980); *Estate of Paulsen*, 113 Colo. 373, 158 P.2d 186 (1945)); and that later wills and words in an instrument [p*418] control or supersede earlier statements. To what extent are such rules devices for determining the testator's intent? To what extent are they devices for achieving policy goals independent of or contrary to the testator's intent? *See generally* 5 A.L.P. §§ 21.1–.3; T. ATKINSON, *WILLS* § 146 (2d ed. 1953); 3 T. JARMAN, *Wills* 2068–72 (R. Jennings ed. 1951); Kales, *Considerations Preliminary to the Practice of the Art of Interpreting Writings—More Especially Wills*, 38 YALE L.J. 33 (1928).

6. Throughout this section we will emphasize the problems which have occurred and which do occur with alienating land which is subject to future interests. The principal case is unusual for a modern case in that it involves legal future interests. Today most future interests are equitable; most estate planners would have put Kate Webb's land in trust (*infra*, § 2G) and have given the trustee a power of sale. In 1925, England abolished most legal future interests, although equitable future interests remain possible and quite common. Law of Property Act, 1925, 15 Geo. 5, c. 20, §§ 1–4. What would be the consequences of adopting such a scheme in this country? *See* Bostick, *Loosening the Grip of the Dead Hand: Shall We Abolish Legal Future Interests in Land?*, 32 VAND. L. REV. 1061 (1979); Maudsley, *Escaping the Tyranny of Common Law Estates*, 42 MO. L. REV. 355 (1977).

2. Summary of Future Interests Prior to the Statute of Uses¹

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

¹ Of all the dubious history in this chapter, this section is probably the least historical. There is little evidence that anyone prior to the Statute of Uses thought about conveyances like those described here. What happened was that after the Statute lawyers started to imagine what the situation was prior to the Statute and began to devise ways to recreate this imagined situation.