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 Uses[1]

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.

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, 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. S265 *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*, p. S169), 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. S169 *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 be 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 similar 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" was still invalid at common law. It was not until the nineteenth century that it became clear in most jurisdictions that

executory interests could be created by bargain and sale without the necessity of stating a feoffment to uses. *See Abbott v. Holway*, *infra*, p. S225.

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" (Example [2], above). 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 termor; *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:

Interest	Alienable?	Devisable?	Descendible?
reversion (always vested)	yes	yes	yes
possibility of reverter	no	perhaps[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 11–14, *supra* p. S213, 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 different results in problem (e) and problem (f), and that is worth talking about.]

15. *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*."

16. *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 (15) and (16) 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.

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[2] *Brown v. Independent Baptist Church of Woburn*, *infra*, p. S262, assumes that it is, and the holding is dependent on that assumption. There is, however, English authority to the contrary.

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

ABBOTT V. HOLWAY

Supreme Judicial Court of Maine.
72 Me. 298 (1881).

This is an action on the case for waste. The writ is dated September 28, 1878.

The plea is the general issue and brief statement denying the plaintiff's title and claim.

At the trial it was admitted that James Abbott was, on the 30th of April, 1872, and long had been, the husband of the plaintiff; that he died May 5, 1875; that the defendant is the administrator of his estate; that he owned, on the 30th of April, 1872, and long had owned, the premises described in the writ, a valuable farm in Pittston, upon which was a large timber and wood lot; that he continued to live on the farm with his wife managing and taking the crops thereof until his death, she now surviving him; that in the winter and spring of 1875, without the consent and against the remonstrance of the plaintiff, he caused to be cut and hauled to market, a quantity of mill logs, cut for that purpose, and not for fencing or repairs.

Since Abbott's death, his administrator has sold the lumber made from the logs and received the money therefor.

The plaintiff put in evidence the deed from James Abbott to her, dated April 30th, 1872, embracing the premises described in the writ and upon which the alleged waste was committed, and proved its execution and delivery on the day of its date, and its record in the Kennebec registry on the same day by plaintiff's procurement. It is made part of the case.

[The deed is reprinted in full *supra*, p. S165.] . . . . [p*424]

[Counsel for the defendant argued, among other things:] The instrument is a mere executory agreement-a promise by Abbott to make a title after he should die. It is an attempt to make an executory devise in a manner not authorized by Law, and against sound principles of public policy. If sustained as a conveyance it would amount in effect to a partial repeal of the statute of wills.

BARROWS, J. The plaintiff's right to maintain this action must depend ultimately upon the construction to be given to the deed or instrument under which she claims title, and upon the force and effect of the terms used therein to define the interest which she acquired by virtue thereof.

Our statutes (R.S., c. 73, § 1,) provide that "a person owning real estate and having a right of entry into it, whether seized of it or not, may convey it, or all his interest in it, by a deed to be acknowledged and recorded as hereinafter provided." Detailed regulations as to the mode of execution and as to the force and effect of conveyances thus made and recorded, follow this general provision in some thirty sections, more or less. Can it be doubted that under such statutes the owner of real estate can convey in the manner prescribed, such part or portion of his estate as he and his grantee may agree, subject only to those restrictions which the law imposes as required by public policy, but relieved from the technical doctrines which arose out of ancient feudal tenures, and all the restrictive effect which they had upon alienations. Why prevent the owner in fee simple from agreeing with his grantee (and setting forth that agreement in his conveyance) as to the time when, and the conditions upon which, the instrument shall be operative to transfer the estate from one to the other?

In substance our law now says to a party having such an interest in real estate as is mentioned in R.S., c. 73, you may convey that interest or any part thereof in the manner herein prescribed with such limitations as you see fit, provided you violate no rule of public policy, and place what you do on record so that all may see how the ownership stands.

In the discussion of the effect of the statute of uses and of our own statutes regulating conveyances of real estate in *Wyman* v. *Brown*, 50 Maine, 139, (a leading case upon the validity of conveyances under which the grantee's right of possession was to accrue not upon delivery of the deed but at some future day), WALTON, J. remarks: "We are also of opinion that effect may be given to such deeds by force of our own statutes, independently of the statute of uses. Our deeds are not framed to convey a use merely, relying upon the statute to annex the legal title to the use. They purport to convey the land itself, and being duly acknowledged and recorded, as our statutes require, operate more like feoffments than like conveyances under the statute of uses." In this connection he quotes Oliver's Conveyancing, touching the operation and properties of our common warranty deed to the effect that in the transfer authorized by the statute in this mode, "the land itself is conveyed as in a feoffment except that livery of seizin is dispensed with upon complying with the requisitions of the statute, acknowledging and recording, substituted instead of it."

And he concludes that deeds executed in accordance with the provisions of our statutes and deriving their validity therefrom may be upheld thereby, as well as under the statute of uses, notwithstanding they purport to convey freeholds to commence at a future day.

In other words the mere technicalities of ancient law are dispensed with upon compliance with statute requirements. The acknowledgement and recording are accepted in place of livery of seizin, and it is competent to fix [p*425] such time in the future as the parties may agree upon as the time when the estate of the grantee shall commence. No more necessity for omitting one estate upon another, or for having an estate (of some sort) pass immediately to the grantee in opposition to the expressed intention of the parties.

The feoffment is to be regarded as taking place, and the livery of seizin as occurring at the time fixed in the instrument, and the acknowledgment and recording are to be considered as giving the necessary publicity which was sought in the ancient ceremony. The questions, did anything pass by the conveyance, if so, what, and when, are to be determined by a fair construction of the language used, without reference to obsolete technicalities. The instrument will be upheld according to its terms, if those terms are definite and intelligible, and not in contravention of the requirements of sound public policy.

The defendant, while he does not controvert the doctrine of *Wyman* v. *Brown*, insists that nothing passed by the deed of James Abbott to his wife, because according to its terms it was left uncertain whether the instrument would ever take effect as a conveyance, that not even a contingent remainder which the plaintiff claims, passed when the deed was made and delivered, that it amounts at most, to a mere executory agreement, and any recognition of its validity is contrary to public policy, because it is an attempt to evade the statutes regulating the making and execution of wills. But the instrument was duly executed by the defendant's testator, a man capable of contracting, and having an absolute power of disposition over his homestead farm, subject only to the rights of his existing creditors. It was duly recorded so that all the world might know what disposition he had made of a certain interest in it, and what was left in himself. If operative at all, it operated differently from a will. A will is ambulatory, revocable. Whatever passed to the wife by this instrument became irrevocably hers.

We fail to perceive that any principle of public policy, or anything in the statute of wills calls upon us to restrict the power of the owner of property unincumbered by debt, to make gifts of the same, and to qualify those gifts as he pleases, so far as the nature and extent of them are concerned. Public policy in this country has been supposed rather to favor the facilitation of transfers of title, and the alienation of estates, and the exercise of the most ample power over property by its owner that is consistent with good faith and fair dealing. The selfish principle may fairly be supposed to be, in all but exceptional cases, strong enough to prevent too lavish a distribution of a man's property by way of gift.

The learned counsel for defendant speaks of this instrument as "an attempt to make an executory devise," "a mode of devising real estate." It is something more and different, and if the doctrine of *Wyman* v. *Brown*, is to be maintained, it gives to the grantee a contingent right in the property which (unlike the interest of a devisee in the lifetime of the testator) cannot be taken from her, and may, upon the performance of the condition make her the owner of the premises in fee simple, according to its terms. It is argued that if the court give effect to this mode of transmitting a title to real estate, it will lead to uncertainty as to the rights of the respective parties, and to litigation between the heirs of the grantor and grantee, that "it would tie up estates, embarrass titles, and impair the simplicity of our modes of conveyance," without producing any compensatory benefit. Why these results should follow (when the validity and effect of such conveyances as once been determined) in any greater measure than they are liable to follow any kind of family settlement is not apparent. What we do is precisely this. We uphold a conveyance in conformity with the agreement of the parties [p*426] therein expressed, that the title of the grantee shall accrue, not upon the delivery of the deed, but upon the happening of a certain event (the proof of which is commonly easy) at a future time specified in the recorded conveyance. Why should harm come of it any more than from a lease made to run from a future day certain?

In substance the grantor says to the grantee, I give you this conveyance made and executed in the manner prescribed by our statute, so that you may have an irrevocable assurance that if you outlive me the property therein described shall be yours in fee simple, from and after my decease, in like manner as if you took the same by livery of seizin on that day, under a feoffment from me, the statute provisions for a recorded deed dispensing with that ceremony. Doubtless this is all contrary to the ancient doctrine, which is thus stated in Greenleaf's Cruise, vol. iv, p. 48: "A feoffment cannot be made to commence *in futuro*, so that if a person makes a feoffment to commence on a future day, and delivers seizin immediately, the livery is void, and nothing more than an estate at will passes to the feoffee." What was the foundation of this doctrine? It is stated *ibidem* thus: "This doctrine is founded on two grounds; first, because the object and design of livery of seizin would fail if it were allowed to pass an estate which was to commence *in futuro*; as it would, in that case, be no evidence of the change of possession; secondly, the freehold would be in abeyance which is never allowed when it can be avoided." But, given the system of recorded conveyances for which our statutes provide, the ceremony of livery of seizin becomes of no importance as an evidence of the change of possession; and we shall find our natural horror of a freehold in abeyance (if it could be demonstrated that such a result would follow from allowing a freehold to take effect *in futuro*) greatly mitigated by the circumstance that here and now it is no longer necessary "that the superior lord should know on whom to call for the military services due for the feud," and so, in any event, the defence of the commonwealth will not be weakened; and by the future circumstance that "every stranger who claims a right to any particular lands, may know against whom he ought to bring his praecipe for the recovery of them," by a simple inspection of the public records, and proof of actual possession.

The doctrine of *Wyman* v. *Brown* is a good illustration both of the maxim, *cessante ratione, cessat etiam lex*, and of the changes wrought in the common law by statutory provisions. . . .

We are at liberty, then, to give to the language used by the grantor in a deed, its obvious meaning without invalidating the deed, to say that it shall operate as the parties intended, and carry an estate to commence *in futuro* if they so agree, without the necessity of resorting to any subterfuges under which the estate thus created to commence *in futuro* may be recognized as existing only by way of remainder or by virtue of some imputed covenant to stand seized.

A single reading of this conveyance of James Abbott to his wife is sufficient to satisfy one that it was no part of the intention or expectation of either, that the wife acquired thereby any interest in the homestead farm during the life of the grantor except as expressly therein declared, to wit, a right to the "use, income and control of said premises during her life," in case the husband

deserted her (which he did not do), and besides this, an irrevocable right to the same in fee simple, in case she survived her husband, her estate to commence at his decease. [p*427]

The language of the deed differs widely from that of any of the conveyances which have been sustained as passing an estate in remainder to the grantee with a life-estate in the grantor reserved. If the object of the draftsman had been to exclude the idea that the conveyance should have any force until the time therein appointed, in other words, to have it take effect as a feoffment made at the time fixed in futuro, to convey, as of that date, an estate in fee simple and to have no other operation, it is difficult to see how he could have made that object plainer in words.

"This deed is not to take effect and operate as a conveyance until my decease, and, in case I shall survive my said wife, this deed is not to be operative as a conveyance . . . if she shall survive me, *then*, and in that event only, this deed shall be operative to convey to my said wife said premises *in fee simple*." Note also the language of the *habendum* and covenants. A conveyance thus framed cannot give the rights of a remainder-man presently to the grantee, nor so operate forthwith, as a conveyance as to convert the holding of the grantor from that time forward into a mere tenancy for life. Such language bears little resemblance to the stipulation in the deed which was under consideration in *Drown* v. *Smith*, 52 Maine, 142, "but the said (grantee) is not to have or take possession till after my decease; and I do reserve full power and control over said farm during my natural life."

It differs quite as much from the provision in the case of *Wyman* v. *Brown*, to the effect that Mrs. Brown was "to have quiet possession, and the entire income of the premises until her decease." *Drown* v. *Smith*, however, is an authority which relieves us on the question whether stipulations which on the face of them are not consistent with terms previously used importing a present conveyance, will avoid the deed. There is an apparent contradiction in saying, I convey this property to you, but this is no conveyance until, &c. nor unless, &c. But the modern cases like *Drown* v. *Smith*, indicate that if the intent, taking the whole together, is clear and intelligible, the court will give effect to it notwithstanding some apparent repugnancy. If a deed can be upheld where, as in *Drown* v. *Smith*, the grantor reserves to himself "full power and control over said farm during my (his) natural life," on the face of it including the power of disposition, we may give its fair and just effect to one framed, as this is, to convey an estate in fee simple to the grantee, *to commence* at the decease of the grantor, provided the grantee outlives him; and the true effect seems to be that of a feoffment under which the execution and record of the deed operate in the same manner as livery of seizin made at the time of the grantor's decease. It gives no right of action for waste committed during the grantor's life. While this grantor lived he could do anything with the homestead farm not inconsistent with the right which he had conveyed to his wife to take it from the time of his decease, if she survived him, as the owner thence forward in fee simple.

If the testimony of Lapham and Palmer represents truly the acts of which the plaintiff complains as waste, her suit, were it otherwise well founded, would fail for want of proof of anything which amounts to waste according to the best considered decisions in this country. See *Brown* v. *Smith*, *ubi supra*, and cases there cited.

Plaintiff nonsuit.

Notes and Questions

1. What is the holding in *Abbott v. Holway*? Recall the concept of waste, *supra*, p. S210. [p*428]

2. Is Justice Barrows' ultimate finding that James Abbott's "deed" was in fact a deed essential to the holding? How would the case have come out if it had been found to be a will? See Note on Wills, *supra*, p. S197.

3. The court mentions three possible constructions that could be placed on the "deed." Under which one, if any, could Clarissa B. collect? Can you think of any other plausible constructions? Review the Note on the Words of Conveyance, *supra*, p. S167.

4. Once the court had decided that instrument was a deed and not a will, there are a number of possible constructions that could be placed on the interest which was given Clarissa B. The court distinguishes this conveyance from one granting a contingent remainder to Clarissa B., reserving a life estate in her husband. (Do you see how?) Yet ample authority exists for the proposition that an otherwise valid deed, stating that it is not to be effective until the death of the grantor, will be upheld, as reserving a life estate in the grantor and conveying a remainder in the grantee. 3 A.L.P. §§ 12.65, 12.95 n. 5. What interest does the court decide that Clarissa B. had? What are the possibilities?

4. The Rule Against Perpetuities

At about the same time as the courts were reviving the doctrine of destructibility of contingent remainders, they also began to announce another doctrine which came to be known as the Rule Against Perpetuities. The first case in which the Rule was announced is generally thought to be the Duke of Norfolk's Case, 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1682).

The reason for the origin of the Rule probably lies in the courts' concern with the free alienability of land. In the case of entailed estates, the entail could be barred; in the case of contingent remainders, the remainder could be destroyed. Executory interests, however, because of their indestructibility could tie up land potentially for generations. It became necessary to devise some limit to the type of interest that could be created, and that limit as expressed in the Rule constitutes what today is probably the most significant restriction on the power of private owners to create whatever future interests they wish.

There have been a number of attempts at stating the rule succinctly. The following is borrowed with some modifications from Professor John Chipman Gray's classic treatise, THE RULE AGAINST PERPETUITIES 191 (4th ed. 1942); "No interest, other than one in the grantor-testator, is good unless it must vest or fail to vest (if it is a remainder), or become possessory or fail to become possessory (if it is an executory interest), if at all, not later than twenty-one years after some life in being at the creation of the interest."

The Rule Against Perpetuities is notorious for its complexity and difficulty. It has been held that it is so difficult that a lawyer is not liable in malpractice for drafting an instrument which violates the Rule. Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961). We will have occasion to treat the Rule in some detail, *infra*, § 3B. What follows are some simple applications of the rule. (Assume all grantees indicated by letters are lives in being.)

(1) "To *A* for life, remainder to the first son of *A* to obtain a college degree." In a jurisdiction which has not abolished the destructibility of contingent remainders, this grant creates no problems. The son of *A* must obtain the college degree before *A*'s death or the remainder fails. In a jurisdiction in which destructibility has been abolished, or if the grant were [p*429] worded ". . . one day after *A*'s death to the first son (etc.)," the contingent interest is void *ab initio*. The reason is that the Rule says that the interest must vest or become possessory within the period of the Rule: *A* might have a son after the grant (who would not be a life in being at the time of the creation of the interest) and that son might obtain a college degree more than twenty-one years after *A*'s death. Therefore, the interest need not necessarily vest or become possessory within the lives in being plus twenty-one years, the period of the Rule.

What happens now? The courts are not completely consistent about what they do once an interest has been declared void under the Rule. Sometimes the matter turns on the perceived intent of the grantor. A good rule of thumb, however, (which applies in any situation in which an interest is declared void, not just under the Rule Against Perpetuities) is this: If the interest