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 preceding that held void is less than a fee or is a determinable fee, a reversion or possibility of reverter will be implied; if it is a fee on a condition subsequent, it will be deemed absolute. Thus, most courts in the grant above would, in the absence of an expressed intent to the contrary, give *A* a life estate and imply a reversion in *G* and his heirs. See *infra*, p. S265.

How to avoid the Rule? Sometimes the draftsman cannot avoid the Rule without doing great violence to the grantor's intent. In the case of the grant above, however, two ways out of the Rule which will probably serve in most contingencies are available: (a) "To *A* for life, remainder to the first son of *A* living at the time of this grant to obtain a college degree," or, (b) "To *A* for life, remainder to the first son of *A* to obtain a college degree within *A*'s lifetime or twenty-one years after his death." Abundance of Caution might word it this way: "To *A* for life, remainder to the first son of *A* to obtain a college degree, provided that said first son must either be living at the time of the creation of this interest, or obtain the college degree within twenty-one years after *A*'s death."

(2) "To *A* for life, remainder to his children for life, remainder to his grandchildren living at the death of *A*'s last child." The remainder to the grandchildren is a classic violation of the Rule. You should determine why and draft your way around the problem in the same way that we worked out grant (1), *supra*.

(3) "To *A* and his heirs but if the land is not used for residence purposes then to *B* and his heirs" or ". . . so long as the land is used for residence purposes, then to *B* and his heirs." *B*'s interest is void under the Rule. His interest is not "vested" within the meaning of the Rule, or to avoid the "vesting" language entirely, it may not become possessory within the period of the Rule. Note that if *G* had retained a right of entry or possibility of reverter, that interest, in most jurisdictions, would not be void under the Rule. The reason often stated for this result is that rights of entry and possibilities of reverter are always vested interests. We believe that it is better simply to say that interests retained by the grantor are not covered by the Rule.

(4) "To *A* and his heirs twenty-five years from the date of this grant." Since *A* does not have to live for the twenty-five year period, his life cannot be used to measure the validity of the interest. Since the interest will become possessory more than twenty-one years after its creation, it is void under the Rule. [p*430]

5. The Rule in Shelley's Case and the Doctrine of Worthier Title

"To *A* for life, remainder to the heirs of *A*."

"To *A* for life, remainder to *G*'s heirs."

These two grants look similar, and the curious common law doctrines which grew up around them bear a distinct family resemblance. The first grant illustrates the Rule in Shelley's Case, the second the Doctrine of Worthier Title.

(1) The Rule in Shelley's Case may be stated thus: If a grant or devise creates some freehold estate in an ancestor and if, in the same conveyance, a remainder of the same quality (legal or equitable, as the case may be) is limited to the heirs or heirs of the body of that same ancestor, then that limitation is treated as containing words of limitation not words of purchase, i.e., the ancestor takes both the freehold estate created in him and the remainder. (Because of the words of limitation rationale for the Rule, it does *not* apply in the situation where the remainder is limited to persons who are or become the heirs or heirs of the body of the ancestor, but are not so described in the instrument.) Applying this rule to the sample conveyance above we see that *A* has been granted or devised a legal freehold estate for life. His heirs are granted or devised a legal remainder in fee simple absolute. By the Rule in Shelley's Case the remainder is treated not as an interest in *A*'s unascertained heirs but in *A* himself.

The origins of the Rule seem to lie in the courts' desire to protect the feudal incidents. If *A* has both the life estate and the remainder, his heirs take not by purchase but by descent, and the feudal incidents will attach.

The Rule may have made some sense in the days when conveyance of land was not common. As conveyance of land became more common, however, *A* was clearly getting more than his grantor intended him to have. By the rule of merger, *supra* pp. S213, he could convey a full fee simple in derogation of the interest which the grantor clearly intended for the heirs. Further, the feudal incidents died out, and at this point, one would have thought that the Rule should die out with them.

But the Rule did not die out. It gained new life, perhaps because of the courts' interest in free alienability. Note how the Rule can be used in combination with the doctrines of merger and destructibility to clear an otherwise messy title: "to *A* for life, remainder for life to the first son of *A* to reach twenty-one, remainder to *A*'s heirs." *A* has a son *B* who is not twenty-one. By the Rule in Shelley's Case *A* takes a life estate and a remainder in fee. *B*'s contingent remainder is not destroyed since it is created by the same instrument which gave *A* the life estate and the remainder in fee. But if *A* wishes to cut his son out, he may at any time convey his interest to the friendly family solicitor, who immediately conveys back to *A*. With the conveyance to the solicitor, merger takes place, the contingent remainder is destroyed, and *A* takes back the full fee simple.

The conveyancers, however, soon found a way around the Rule. Suppose the conveyance read "to *A* for 200 years if he should live so long," with remainders over as above. Now *A* does not have a freehold but a term of years and the Rule does not apply. As time went on, the Rule ceased to be a genuine constraint on the power of grantor and simply a trap for unwary conveyancers. The rule has therefore been abolished in most jurisdictions. [p*431]

(2) The Doctrine of Worthier Title may be stated as follows: If a grant or devise creates a remainder in the heirs of the grantor, that remainder is a nullity. The grantor retains a reversion which passes to his heirs (if not otherwise disposed of) by descent rather than by purchase.

The origins of the Doctrine are similar to those of the Rule in Shelley's Case. When the courts said that it was "worthier" to take by descent rather than by purchase, they meant that it was worth more to the feudal lord to have his tenants take by descent.

The Doctrine has taken a curious turn in modern law. One might expect that it would go the way of Shelley's Case and in some jurisdictions it has. A New York decision, however, Doctor v. Hughes, 225 N.Y. 305, 122 N.E. 221 (1919) (per Cardozo, J.), breathed new life into the Doctrine in a slightly different form, and today it exists in some jurisdictions[1] with the following additions and exceptions: The modern Doctrine is said to apply only to *inter vivos* transfers, not to devises. Unlike the Rule in Shelley's Case, however, it applies to both real and personal property. It is not a rule of property, like Shelley's Case, but a rule of construction, i.e., it will not apply in the fact of clearly expressed intention to the contrary.

What difference does it make that the heirs take by descent rather than by purchase? Well, in Doctor v. Hughes, *supra*, it meant that the heirs' creditors could not force the dissolution of a trust and satisfy their claims against the assets.

Problem

Fully describe the interests of all parties named or described in the following instrument. Assume the same statutes as in Problems 12–13, *supra* p. S213:

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[1] Not, however, in New York where it was abolished by statute. N.Y. EST., POWERS, & TRUSTS LAW § 6–5.9 (McKinney 1967).

17. D devises "to *A* for life, remainder to *B* for life, remainder to my [i.e., *D*'s] heirs." *D*'s heirs then convey all their right, title and interest to *A*.

6. The Rule Against Direct Restraints on Alienation (and Other "Illegal Conditions")

"To A *and his heirs, but if the land is alienated Grantor and his heirs shall have the right to enter and declare the estate forfeit."*

We will return to the rule against direct restraints on alienation in Section 3, but some treatment of it here is necessary to complete the picture of common law estates.

We have examined heretofore a number of instances in which we suggested that a common law policy in favor of free alienability dictated or influenced a result that a given type of interest was void or voidable. A direct restraint on alienation of the kind created in the grant above flies squarely in the teeth of such a policy, and it should not surprise you to learn that the courts are hostile to such restraints. There are, however, many situations in which restraints on alienation are considered reasonable, for example, in a short term lease. The cases, therefore, tend to attempt to classify restraints on alienation by their quality (total or partial), duration, the type estate on which they are imposed, and the consequences of violation. At one extreme we might place an attempt to disable forever a grantee [p*432] in fee simple absolute from alienating the land to anyone. At the other extreme we might place a promise by a tenant from month-to-month not to sublet his tenancy to anyone with an income of less than $5000 a year. Restraints falling in the first class are almost always held void; those in the second class almost never, and predictability declines as we move to the middle.

To add to the confusion the courts have sometimes become mesmerized by the form of the restraint rather than its practical consequences (which in most cases are the same). Traditionally, direct restraints are divided into disabling, forfeiture, and promissory: those which purport to deprive the grantee of the power of alienation, those (like the one above) which state that the grantee's estate will forfeit if he does alienate, and those in which the grantee covenants not to alienate. The source of this distinction is sometimes said to lie in the Statute Quia Emptores, which made alienability a necessary characteristic of freehold estates. Be that as it may, the following results can be predicted with a reasonable degree of certainty:

(1) A disabling or forfeiture restraint of a fee will almost always be held invalid. Possible exceptions are forfeiture restraints for very short periods of time or restraints on alienation to very limited classes of persons. A major exception, recognized by many, but not all, jurisdictions is the so-called "spendthrift trust," a trust in which the beneficiaries cannot alienate their benficial interest in the trust. Promissory restraints on fees are sometimes upheld if they are "reasonable," i.e., limited in duration and scope, and created for what seem to the judge to be good reasons.

(2) A disabling restraint on a life estate will almost never be upheld, but forfeiture and promissory restraints frequently are, particularly if they are part of family settlements.

(3) Forfeiture and promissory restraints on leasehold interests are almost always upheld. There is little authority about disabling restraints in the case of leaseholds.

We close our discussion of common law future interests with a miscellany of matters broadly classified as "illegal conditions." Such conditions are void and, generally, if the condition is subsequent, the estate usually is allowed to continue free of condition.

"Illegal conditions" break down into two broad categories: those that are illegal because impossible of fulfillment and those which are illegal on public policy grounds. Impossible conditions are a matter of common sense, although common sense may dictate different results at different times. The classic impossible condition "to *A* if he flies to the moon" might not be held void today. Conditions void on public policy grounds are also generally matters of common sense. The law would obviously look pretty silly if it enforced the condition in the grant "to *A* and his heirs, so long as they maintain a house of prostitution on the premises." Nor should we be surprised to see the courts striking down conditions which are conducive to offenses against traditional sexual morality. Thus, grants "to *A* (a married man) on the condition that he marry *B* (a woman not his current wife)" and "to my illegitimate children hereafter begotten" have been struck down. The most troublesome conditions of this kind have been conditions in restraint of matrimony. General conditions forbidding the grantee to marry (but not those forbidding remarriage) have been held invalid in many cases, but such conditions are rare. Little in the way of legal (as opposed to sociological) sense can be made out of the cases dealing with more particular restraints on marriage: "to *A* so long as she does not marry an actor"; "to *A* [p*433] on the condition that he not marry without his parents' consent." One gets the feeling that the law is most awkward when it intervenes in the most personal of human relationships.

D. NON-FREEHOLD ESTATES

One of the curiosities of the common law is its division of interests in land into freehold and non-freehold. The freeholder has seisin and the protection of the possessory assizes; his interest descends to his heirs as real property. The non-freeholder, on the other hand, is not seised, the protection of his possession must await the development of ejectment,[1] and his interest is personal property (more precisely, a chattel real) which he may bequeath to his legatees by will and which, in the absence of will, will be distributed pursuant to a scheme of intestate succession quite different from the inheritance by primogeniture of the common law. Today the fact that the non-freeholder is not seised has relatively few practical consequences; the fact that his interest is personalty, however, continues to have practical consequences in those jurisdictions which have different schemes of intestate succession or taxation for real and personal property.

The origins of the distinction between freeholds and the non-freeholds is obscured in history. The simplistic view that the denial of seisin to the termor was part of the general scheme of repression of impoverished tenant farmers collapses before the fact that the first termors were not impoverished farmers but wealthy men, frequently landholders themselves, who used the lease as a device to secure the payment of the debts owed by those who were seised in freehold.[2] Further, categorization as chattel real was also applied to many interests, including the feudal incidents of wardship and marriage, which were exclusively in the possession of the wealthy. Some writers have seen the influence of the Roman law in the treatment of terms of years. Be that as it may, the fact is that leaseholds usually involved a much more commercial relationship than the intensely personal feudal relationships involved in freeholds, and this difference may go some of the way to explaining why the law saw a distinction between the two. The development of ejectment (*supra*, p. S70) coincides with the increasing use of leases for agricultural purposes. Because of the procedural advantages of ejectment, leaseholders by this time had no desire to be protected by the seisin-based real actions. Thus, there was no urgent necessity for giving the termor seisin, even though the reason for denying it to him in the first place had ceased.

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[1] Before the development of ejectment (see pp. 55–56 *supra*) the dispossessed leaseholder was confined to an action for damages against an ousting third party, much as if he had suffered the theft or injury of a chattel in his possession. He could, under some circumstances, recover possession if the landlord was the ousting party, but most of the landlord's obligations were enforced by the damage action of covenant.

[2] There is also evidence that leaseholds were used in the early Middle Ages to avoid restrictions on taking interest for loans (usury). *A* would lend money to *B* and take in return a leasehold of *B*'s land, the profits of which would be sufficient to repay the principal and give *A* interest (sometimes at quite high rates) on his loan. Obviously, such leaseholds must be for a fixed period so that the parties know precisely how much is at stake, and it is perhaps for this reason that the leasehold for a fixed term was the first of the types of leaseholds to be developed.

G. TRUSTS

Like concurrent interests, trusts are not a separate kind of estate in land but rather another way in which interests in land (or personal property) may be divided. The basic notion of a trust is that one or more trustees hold the legal title to the trust property, called the trust res, for the benefit of one or more *beneficiaries* or *cestuis que trust*.

Having said this, the best course for the editors might be to suggest that you will learn more about trusts in an advanced course and go on to other topics. But no introduction to the concept and the institution of property would be complete without some discussion of trusts. The concept of the trust is encountered in almost every field of property law; it is one of the great contributions of the common law to the world of legal ideas; it has been of crucial importance historically and is of great practical importance today. One author has estimated that $100 billion of assets are held in American private trusts today. 4 R. POWELL, REAL PROPERTY § 503 (P. Rohan ed. 1991). So we must say something about the trust, even if only of a broad and introductory nature.

We have already encountered the ancestor of the trust, the use, *supra*, pp. S167–170; § 2C2–3. Like the modern trust, the use involved a division between beneficial and legal ownership, the interests of the beneficial owner, the *cestui*, being protected in equity. The Statute of Uses might have put an end to this type of division of ownership, but the courts read the words of the Statute narrowly, so that it came to apply only to passive uses of freeholds. Thus, division between legal and beneficial ownership [p*446] was still possible where the trust res consisted of personal property or a non-freehold interest in land, such as a term of years, or, most importantly for the future of the law, where the use was not passive, i.e., where the legal owner had something to do other than just hold title, for example, manage the assets and pay the income to the beneficiary.

The active use or trust proved to be a convenient device in an extraordinary variety of situations. It was used in the family situation where it served to keep the family wealth intact, allowed professional management of it, and permitted the creators, *settlors*, of trusts to benefit people whom the law did not favor, such as married women. The trust also proved useful in a variety of business and philanthropic contexts. Further, the courts found that the trust could be used as a remedy in certain otherwise messy situations.

Today, the concept of the trust covers a wide variety of legal situations which have little in common other than that the beneficial and legal ownership of the trust res is divided and that a high standard of care and selflessness is required of the legal owner. This standard encompasses the various fiduciary duties. As Judge Cardozo put it:

> A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. . . . Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty of the "disintegrating erosion" of particular exceptions [citation omitted]. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. . . .

Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928).

Broadly categorizing we may say that trusts today are of two types, *express* trusts, those created consciously by a settlor for some purposes, and *remedial* trusts, those created by a court in order to effectuate the intent of an otherwise imperfect transaction or to remedy mistake, fraud, or overreaching. In the first category, the most common form is the *private express trust*, the traditional family settlement. Two of the more common forms of this type of trust are the trust to pay the income to the settlor's wife for her life, dividing the corpus among the settlor's children and the trust to pay the income to the settlor's children for life dividing the corpus among the grandchildren. Other forms of express trust include the *charitable* trust, where the beneficiaries are one or a number of those persons or activities recognized by the law as appropriate objects of charity; *honorary* trusts, where the beneficiaries are not charitable but for some reason cannot act for themselves, as, for example, "to *X* trustees to pay for the care of my dog, Fala, until he dies"; and *business* trusts, a catch-all encompassing a variety of commercial situations in which business operation in trust form has proved convenient. A frequently used modern example of the last-named is the real estate investment trust where the trustees hold legal title to land for the benefit of a number of investors who share in the benefits in proportion to their investment.

Non-express or remedial trusts are usually divided into two groups, *resulting* trusts and *constructive* trusts. We have already seen the origins of the first in our examination of the history of the use, *supra*, p. S169, where, as you will recall, the courts came to regard the passage of consideration *vel non* as the key element in determining whether or not the use (as opposed to legal title) passed. One significant development of this doctrine is the notion that a purchaser under a contract for the sale of land has, at least upon [p*447] timely payment of the purchase price, an equitable interest in the land and may obtain a mandatory injunction compelling the vendor to transfer the legal title to him. *See* DKM3, Ch. 5, § 2. Another consequence of this doctrine is the resulting trust. Suppose that *A*, who is attempting to acquire a number of parcels of land in a given area and does not wish his plan to be known, asks *B* to purchase Blackacre from *O* and gives *B* the money to do it. The price is paid and the deed is made out and delivered to *B*. Most courts in this situation will hold *B* a resulting trustee of the land for the benefit of *A* and will compel *B* to account for his profits from the land and to convey the land to *A*.

In the resulting trust the courts use trust doctrine to achieve the result which both parties to the transaction probably intended but did not achieve. The constructive trust, however, is a device whereby the courts attempt to do equity by means of trust doctrine in situations where at least one of the parties clearly did not intend the result which the court reaches. Suppose that *A* representing himself to be a long-lost relative persuades *B* to transfer Blackacre to him. The transfer is completely valid in form and the legal title is clearly in *A*, but upon proof of the fraud equity will, in many instances, impose a constructive trust on *A* and compel him to account for the profits and to reconvey the land.

H. THE COMMON LAW SYSTEM OF ESTATES AND FUTURE INTERESTS AS APPLIED TO PERSONAL PROPERTY

What we have said so far has focused almost exclusively on land. The common law system of estates and future interests arose in a society in which by far the larger proportion of wealth was held in the form of real property. It is not surprising, therefore, that the focus of the law which developed in the king's courts should be on land, and to a lesser extent, on chattels real, and not on chattels personal. Today, however, more wealth is held in the form of personal property, particularly in choses in action such as stocks, bonds, bank accounts, and insurance policies, so that the types of interests which may be created in personal property are a matter of considerable practical importance.

Unfortunately, it is not at all clear what forms of interest in personalty will be recognized at law, and it is probably because of the unclarity of the law that family settlements of personal property came to be made chiefly by way of trust. This historical reason, coupled with management and tax advantages which can be gained by the use of trusts, may explain the fact that today the trust remains the most common device used to create successive interests in personal property: "To *T* (bank or trust company) to hold as trustees paying the income to my wife for life, then to my children for their lives, the principal to be distributed to my surviving grandchildren upon the death of my last surviving child." The similarity of this grant to the grant of life estate to the wife, remainder for life to the children, remainder to the grandchildren in fee, is apparent, but it is not quite the same thing. A little history may serve to explain why the trust is used.

At the early common law a person could be seised of personal property just as he was of land. As the concept of seisin became separated from the concept of possession, however, the term "seisin" came to be applied only to freehold estates in land. The elaboration of the system of estates had no corresponding medieval development in the case of personal property, probably because most medieval chattels were perishable in nature and also because testamentary dispositions of chattels were controlled by the church [p*448] courts which, in deference to their Roman law heritage, did not recognize the concept of estates, but spoke in terms of *dominium* (ownership), *possessio* (possession), and *usufructus* (right to use or to profits). The law was similarly embryonic on the matter of conveyance of personal property. It was not until the fifteenth century that the common law courts came to recognize that property in chattels could pass other than by delivery, i.e., by deed or contract of sale.

In the sixteenth and seventeenth centuries, the law had to come to terms with the increasing importance of personal property. Unfortunately, the law was by this time committed to the proposition that successive estates could not be created in chattels. A gift of a book to *A* for life, remainder to *B*, gave *A* the whole thing. This may still be the law today in England and some American jurisdictions, so far as *inter vivos* transfers are concerned. So far as testamentary dispositions are concerned, the law courts retreated and gave effect to the testator's intent. Thus, in a legacy of personal property to *A* for life, remainder to *B*, it is clear that *B* will get the property upon *A*'s death, but exactly what kind of interest *A* and *B* have has really not been settled to this day. See 7 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 470–78 (2d ed. 1937).

On the equity side, however, the situation was considerably clearer. A grant or legacy of personal property to *T* for the use of *A* for life, remainder to *B*, gave *A* an equitable use for life and *B* an equitable use to follow. Both interests were enforceable in equity, both were freely alienable by bargain and sale, the "remainder" could be bequeathed, and *B*'s successors would take it in the event of his intestacy. The Statute of Uses did not affect this, since it only applied to property of which *T* was *seised* to the use of another. Thus, the common method of creating future interests in personal property was by way of use (later trust), and so it remains today.

We should note at this point the principal distinctive features of the rules governing interests in personal property:

1. It is frequently said that a future interest cannot be created in a consumable chattel. It would make little sense to allow a remainder following a life estate in a stick of chewing gum. Obviously, most people do not make such conveyances consciously, but general legacies sometimes raise this problem: "all the rest and residue of my personal property [which happens to include a few odd sticks of chewing gum, along with a collection of Rembrandts] I bequeath to my wife for life, remainder to my children."

2. The rules concerning future interests which are based on the concept of seisin do not apply to future interests in personal property. Thus, contingent future interests in personal property are not destructible.

3. The Rule in Shelley's Case does not apply to personal property, but the modern Doctrine of Worthier Title does.

4. Dower and curtesy do not attach to personal property.

5. It is possible to have concurrent ownership of personal property. There is doubt in some jurisdictions, however, whether a tenancy by the entireties can be created in personal property.

The most important restriction which does apply to the creation of future interests in personal property, whether legal or equitable, is the Rule Against Perpetuities. [p*449]

Section 3. ESTATES IN LAND AND THE POLICY AGAINST UNDUE RESTRAINTS ON ALIENATION

A. INTRODUCTION

As our examination of the history of the law of estates and future interests has shown (*supra*, § 2), the law has vacillated over time between effectuating the intent of property owners in disposing of their property and frustrating that intent for various, frequently imperfectly articulated, policy reasons which are deemed to be overriding. As we will see in Chapter 7, the ability of the property owner to dispose of his property by and large as he or she sees fit is an essential element in our market system, and on that system, again by and large, our society relies for the allocation of resources. Certainly, for better or worse, Anglo-American law places a high value on individual volition with regard to the transfer of resources, and it seems unlikely that, short of revolution, this value will soon cease to be a basic one in our law's scheme of values.

In some instances, however, perhaps in an increasing number of instances, this value must give way to what are perceived as higher values. Fair housing legislation, discussed in DKM3, pp. 189–91, for example, illustrates a situation in which an individual's volition with regard to the transfer of land is frustrated because of society's interest in ensuring civil rights for all of its members.

The rules against undue restraints on alienation, with which we treat in this section, represent another significant check on individual volition in the transfer of property. By the term "restraint on alienation" we are referring to more than simply the direct kind of restraint illustrated by the grant "to *A* and his heirs, so long as the land is not sold." (*See* § 2E6.) This type of restraint is included, but the category is broader. Simes and Smith in their massive treatise on future interests include in their chapter on restraints on alienation: direct restraints on alienation, the Rule Against Perpetuities, gifts over on failure to alienate, illegal conditions and limitations, the Rule in Shelley's Case, and the Doctrine of Worthier Title. L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS §§ 1101–1640 (2d ed. 1956). While this grouping does not define "restraints on alienation," it includes all the situations (with the exception of the destructibility of contingent remainders and the rule against new forms of estates) in which the common law may strike down a future interest because it unduly restrains the power of the transferee to alienate. The stated reason for these rules gets us closer to a comprehensive definition of a restraint on alienation: it is any device by which a transferor impedes the power of the transferee to alienate the transferred property.

This definition is broad enough to serve our purposes but it probably is so broad that it needs some illustration to have any meaning. We said above that private volition with respect to the transfer of property is an essential element in the way our society uses the market mechanism to effect an efficient allocation of resources. Suppose, however, that an individual makes a transaction in such a way that it effectively isolates a resource from market forces. That resource could not thereafter be drawn by the market to its highest and best use. Not only would the owner of that resource lose [p*450] out, but society would lose as well, since that resource would not be producing as much for society as it could.

The creation of a contingent remainder at common law illustrates the problem in a relatively pure form. At common law contingent remainders could not be alienated. Thus, if the grantor conveyed to *A* for life, remainder to *B* if he reaches 21, if not to *C*, the only interests which were alienable in that land were *A*'s life estate and the grantor's reversion. Suppose, however, that *A* discovers that the land contains valuable minerals. She cannot exploit those minerals herself both because to do so would be waste and because she simply doesn't know how. Both the grantor and *A* agree that the land should be sold to the *X* corporation, a mining company, but unfortunately they cannot give *X* anything more than a life estate plus a bet that both *B* and *C* will conveniently commit treason.

B and *C* cannot join in the conveyance because their contingent remainders are inalienable. An obvious way around this problem would have been to allow B and C to alienate their remainders, but the law was locked into the inalienability doctrine and chose instead the device of destructibility by merger. The grantor sells his reversion to *A* (for a good price), and *A* gets thereby a fee simple absolute, leaving *B* and *C* out in the cold.

It is easy enough to see that policy problems are posed when no combination of people have the power fully to alienate a given resource. But the law went further than that. Suppose in the example above that *B* and *C*'s interests were indestructible and alienable but that they would not vest in possession, if at all, until several generations hence. The present value of such interests is extremely low (because of the discount factor), but nonetheless a full fee simple cannot be alienated unless *B* and *C* join in the conveyance. It seemed to the courts somehow unfair to allow *B* and *C* with such slight interests to hold up the conveyance, and the Rule Against Perpetuities was designed, at least in part, to prevent this from happening. Whether this makes sense as a matter of policy is something we shall have to explore, but reasoning like this clearly underlies some of the decisions we will see.

One more situation will serve to round out the picture: Suppose that *G* transfers to *A*, *B*, *C*, *D*, *E* and *F* in such a way that all the grantees have an indestructible, alienable, and valuable interest which is either a present one or which will vest in possession within the period of the Rule Against Perpetuities. Is there any restraint on alienation? As a legal matter perhaps not, but as a practical matter the power to alienate the property may be considerably impeded. Previously, it took the decision of only one owner, *G*, to make a transfer. Now it requires that six owners, *A* through *F*, all agree. What *G* has done, in economic terms, is to raise considerably the transaction cost of dealing with this property. Note that the policy considerations at stake in the three hypothetical cases given above are really quite different. In the first case a resource has been removed from market forces entirely; in the second access to the market is possible but is made difficult by the fact that two people who don't have much of a present stake in the property are given the power to block its disposal, leading to a bargaining situation the results of which are indeterminate, and in the third situation access to the market is also possible but costly because so many people have to be consulted. Unfortunately, the cases do not make even this crude a differentiation among the policies at stake but tend, if they speak of policy at all, to speak in conclusory terms about whether an "undue" restraint on alienation has been created. [p*451]

So far we have spoken of the policy against restraints on alienation as if the transferor were still alive. More frequently, however, the interests at stake in such cases were created either by devise or by an *inter vivos* conveyance by a long-dead grantor. Thus, in addition to the resource allocation problem, we have an added policy problem-that of dead hand control. Totally without regard to allocational efficiency, many people find it somehow disturbing that the wills of the dead should control the will of the living (a horrible pun, but it makes the point). Sometimes the objection to dead hand control is based on the fact that the deceased created a restriction which no one living can release—that is, that he isolated a resource from market forces. Sometimes, however, the objection is not on economic but on social grounds—wealth should not be accumulated, or the living should be free to make their own way. Again, the various policies are usually not very carefully analyzed, but tend to be applied with some passing language about "dead hand control."

As you examine the cases and problems in this section you should ask yourself in each case precisely which policy about restraints on alienation is the court enforcing? Is it an economic policy or a social policy? Does it make sense? Does the rule of law which the court announces fit the policy, or are there gaps or overlaps? Before we get to the cases, however, we ask you to examine carefully the following excerpts concerning the policy of the rules against restraints on alienation, so that you can refer back to them as you examine the cases. The first extract is considerably more critical of the current law than the second.

M. MCDOUGAL & D. HABER, PROPERTY, WEALTH, LAND
246–251 (1948).

DEAD HAND VOLITION: TRUSTS, FUTURE INTERESTS, POSSESSORY ESTATES . . .

It has already been observed that our community carries its preference for individual volition, as the prime instrument for allocating resource use, to the extent of honoring within limits the dictates of the dead. The "power of free testamentary disposition" was described by Sir Henry Maine as "the greatest latitude ever given in the history of the world to the volition and caprice of the individual."[1] Our contemporary, and long-standing, practices and doctrines confer, however, even greater latitude. Not only does the community permit donors a relatively untrammeled choice among private beneficiaries and public purposes; it even affords methods, available during life as well as at death, by which donors can project their control or caprice, with respect to the use of specific resources or wealth, into the time after death, for private purposes for about a hundred years (or more for certain purposes and by certain methods) and for public purposes more or less indefinitely. It is a distinguishing fact of our society that not only the living, but even the dead, can use wealth as a base value for influencing the distribution of other values.[2] [p*452]

[Professors McDougal and Haber next outline the process by which wealth passes from generation to generation. They note that the objectives of the donor may include: (1) transferring bounty to dependents or successors with ancillary purposes of evading taxes and creditors or penalizing disfavored dependents; (2) the establishment of business organizations; (3) the achievement of community purposes, such as the relief of poverty or the promotion of education; and (4) the influencing of private behavior, such as getting a dependent to refrain from drinking or having someone look after a tombstone. These objectives are achieved through a variety of legal devices of which the trust and estates and future interests are among the more common.

[The community, on the other hand, has its objectives. These include: (1) keeping resources free from dead hand restraints on productive use of resources; (2) ensuring reasonable economic security for dependents and survivors; (3) preventing the over-concentration of power that follows over-concentration of wealth; (4) maintaining the stability of the social order by seeing to it that the reasonable expectations of beneficiaries are not frustrated; (5) obtaining tax revenues fairly; (6) ensuring that wealth is donated to general community purposes and that such wealth is

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[1] Maine, Village Communities (1889) 42.

[2] In the quaint language of yesteryear Lord Campbell insist[s] in Jeffries v. Alexander, 8 H.L.C. 584, 648 (1860):

> "A man has a natural right to enjoy his property during his life, and to leave it to his children at his death, but the liberty to determine how property shall be enjoyed *in saecula saeculorum* when he who was once the owner of it, is in his grave, and to destine it in perpetuity to any purposes however fantastical, useless, or ludicrous, so that they cannot be said to be directly contrary to religion and morality, is a right and liberty which, I think, cannot be claimed by any natural or Divine law, and which I think, ought by human law to be strictly watched and regulated."

well administered.] . . .

The methods that the community employs to intervene in protecting and policing dead hand control include, apart from such direct controls as taxation or condemnation, all the practices and doctrines commonly described as the law of "trusts" and "future interests and possessory estates." The authoritative doctrines that make up this body of law comprise an elaborate, verbal superstructure, which includes not only the anachronistic distinctions between legal and equitable interests and a complete cross-categorization of "possessory estates" and "future interests" into multiple, illusory categories, but also a variety of policing rules such as the rules against perpetuities and restraints on alienation. It is the function of the policing rules to determine the substantive extent or scope of dead hand control-how far, upon what events, and for what persons or for what purposes, dead hand control can be projected into the future. Within the limits of possible projections, it is the function of the "law" and "equity" dichotomy and of the "estates" and "interests" categorizations to rationalize and justify official responses on the great variety of practical problems (with respect to protection against third parties, transfer, construction, termination, and so on) which arise between disputing claimants and between them and third parties. . . .

The traditional categorization of possessory estates and future interests-that great structure of doctrinal nebulae: reversions, rights of entry, possibilities of reverter, vested remainders, contingent remainders, and executory interests-developed in an England of aristocratic family dynasties and primogeniture, when the maintenance of feudal dues and seisin were still important, when competition between the courts of Chancery and of Common Law was most severe, when modes of conveyancing were still primitive and formal, and before the community had developed generalized notions of freedom of contract and private volition. It needs no emphasis that the conditions, which may have at one time made these distinctions rational efforts to implement community policies, have long since disappeared. [p*453] It will bear emphasis, however, that these distinctions linger on as irrational verbalisms, making shifting and ambiguous reference to the whole range of very different contemporary problems, to different dispositive formulae invoked by donors, to varying factual references (to time, person, and event) of donors' formulae, to different forms of wealth, to official behavior or legal consequences, and to the policies that are invoked to explain or justify official responses.

The principal instrument by which the community seeks to limit the extent to which the dead hand can project its control into the future is, as has been indicated, the Rule against Perpetuities (an ellipsis for several rules or for several different factual references of the same verbal formulae). Stated in its most orthodox, and deceptive, form that no interest is good unless it must vest, if at all not later than twenty-one years after some life in being at the creation of the interest[3] (for "vest," the Restatement substitutes removal of any "unfulfilled condition precedent"),[4] the rule had its origin in the efforts of English courts to preserve land from the fetters of aristocratic family dynasties, under conditions peculiar to two and more centuries ago. Today in the United States it survives as a highest level expression of the community's policy on a great variety of unrelated problems and presents a needless hazard to the preparation of almost any dispositive instrument. The main outlines of the confusion may be indicated in these summary terms: the principal doctrinal statements of the rule are either tautologous or metaphorical, bearing little relation to observable facts and making completely unrealistic assumptions about cause and effect in determining forbidden consequences; these principal doctrinal statements purport to make reference to, and to guide and justify the making of decisions about, the whole range of practical problems inherent in the variegated objectives of donors in the wealth transmitting process; the

[3] Gray, The Rule Against Perpetuities (Roland Gray, 4th ed., 1942) § 201.

[4] 4 Restatement of Property (1944) § 370.

most important syntactical term, the word “vest,” finds its original meaning in a problem, “destructibility,” which no longer exists today and the continued use of the word-confusing its descriptive, predictive, and prescriptive functions-summons up a whole host of dead metaphors and irrelevant analogies, in lieu of a rational consideration of policies; the policies which might be thought to be relevant, in terms of their relation to clarified community objectives, to each of the specific objectives of donors are as a result hopelessly confused and poorly implemented, if at all; initiative in the enforcement of whatever policies are sought, in this process of blind groping for irrelevant reifications, is not put in the hands of community agents but left to the greed of private and disappointed parties.

After perusal of the major outlines of the existing confusion in practice and doctrine about dead hand control, the student may wish to consider how the community might achieve more rational practices and doctrines.

L. SIMES & A. SMITH, FUTURE INTERESTS
§§ 1115, 1117 (2d ed. 1956).

§ 1115. General Theory of the Present Law of Illegal Restraints

In suggesting a general theory to rationalize the numerous rules of law concerned with all kinds of restraints on alienation, direct and indirect, no attempt is made to explain the decisions on historical [p*454] grounds. The historical explanations for rules with reference to direct restraints appear to be decidedly outworn; they explain little today.[1] It is believed, however, that the body of rules on restraints on alienation, diverse though they are, represent the expression of but a single policy of the law; that, though this policy is largely inarticulate, it nevertheless has pervaded the law for centuries and still furnishes the important element of unity in this branch of the law.

In brief, the law is concerned primarily with practical alienability, not with a theoretical power of alienation.[2] All these rules tend primarily to further practical alienability. Whether a given provision will be held valid or not depends on a number of considerations, but, reduced to their lowest terms, these considerations amount to no more than this: One must consider, first, the extent to which the sort of provision in question tends to decrease practical alienability; and, second, the purpose of the restraint in question. On the first proposition, direct restraints may be presumed to restrain more than indirect ones; directions not to alienate would restrain more than conditions forfeiting the estate on alienation; direct restraints of a general character would restrain more than restraints for a short time or only as to particular persons. Moreover, there are certain legal devices which, by reason of their purposes, are permissible in spite of the fact that they restrain alienability. Trusts are among these; likewise fee tail estates and future interests. Now the same restraint when applied to a fee simple absolute would decrease alienability to a much greater degree than if applied to a fee tail or a life estate, for the fee tail or the life estate is already less alienable than the fee simple absolute. By placing property in trust, its alienability is impaired to a considerable extent. Hence a direction that the beneficiary shall not alienate his interest affects the degree of alienability which would otherwise exist much less than the same direction would affect a conveyance in fee simple absolute. Thus, if a given restraint on alienation is coupled with a legal device which itself restrains alienation to some degree, the restraint is, for that reason, more likely to be held valid. When we come to consider the matter of purpose, we note that obviously the direct restraint expresses the bald purpose to restrain alienation; hence it is likely to come under the ban of the law. But a landlord may create a valid condition against

[1] As to early explanations for the rule, see Sheppard, Touchstone, p. 126 (6th Ed. 1785).

[2] [See 2 L. SIMES, LAW OF FUTURE INTERESTS § 437 (1936), for a discussion contrasting legal, absolute inalienability and practical inalienability of encumbered estates from a business standpoint. Ed.]

alienation of the term of years which he has created, for his purpose presumably is to protect his own reversion by determining who shall be his tenant.

An indirect restraint is, as we have defined it, created for some purpose other than the mere restraining of alienability. This purpose being in accordance with legal policy, the law may well be more lenient with the indirect restraint.

Lastly, it should be noted that the two considerations, extent of decrease of alienability and purpose, are not weighed in each individual case. The law is worked out for type situations, and, if a case falls within one of these type situations then the rule is mercilessly applied regardless of other circumstances affecting practical alienability in the particular case. In other words, it is not a matter of practical marketability in a particular case, but in a particular class of cases. [p*455]

[Section 1116 expands on the authors' distinction between direct and indirect restraints. Indirect restraints are subject to the rule against perpetuities and to analogous rules. Here a balance must be struck between eliminating all future interests, all of which in some sense restrain alienation, and the freedom of the donor. This balance has generally been struck by limiting the time within which the future interest must vest. The rules about direct restraints on alienation, on the other hand, apply without regard to whether the interest at stake is present or future, and a direct restraint may be invalid without regard to the length of time which it is to last.]

§ 1117. Reasons for a Policy of Alienability-The Rationale of the Rule against Perpetuities

Traditionally, the policy of the law in favor of alienability has been assumed as axiomatic. If a given legal device tends to restrain alienation, that has been considered reason enough to weigh against its validity. It is desirable, however, to go further and inquire why rules of law are justified solely on the ground that they prevent property from becoming inalienable. . . .

Without doubt the common law rule against perpetuities evolved as a rule concerning interests in specific land. As applied to this subject matter, alienability was believed to be desirable to prevent the land from being taken out of commerce. The gist of the reason, in those rare cases where it was expressed, was that, if land were taken out of commerce, it would tend to be unproductive, and the national wealth would thereby be decreased. It was undesirable for the same reason as that which prohibited a contract in restraint of trade. . . .

Just why does inalienability decrease productivity? When the owner of land in fee simple absolute is unable or unwilling to use it, or to make it productive, he normally sells it to some person who will make it productive. But, if there is a direct restraint, he cannot sell; or if the possessory interest is subject to a contingent future interest, he will be unable to find a buyer. This is not because the possessory interest, or even the future interest, is necessarily inalienable, but because normally only fees simple absolute or terms of years are marketable. And the reason why other interests are unmarketable is that their duration, or continued existence, is uncertain. People do not buy interests in land which may terminate on an uncertain event which is beyond their control.

Suppose agricultural land is conveyed "to A in fee simple, but if all A's children die under the age of thirty years, then to B's issue then living, in fee simple." A's possessory interest would, of course, be legally alienable, even though the executory interest in favor of B's issue were valid. But no one would buy it because of its uncertain duration. In this case, the executory interest in B's issue, if valid, would actually be inalienable, for some or all of B's issue who survive the contingency might as yet be unborn. Thus the rule against perpetuities declares that the executory interest limited to B's issue is void, and A has a fee simple absolute.

Suppose, however, the limitations are "to A in fee simple, but if all A's children die under the age of thirty years, then to B in fee simple." Here, also, the executory interest is void and A has a fee simple absolute. It is true, by the weight of authority, B's executory interest would be legally alienable. Moreover, A and B could join in creating a fee simple absolute which would be readily marketable. But they are not likely to do so. For A [p*456] would insist that the contingency is unlikely to happen, and, therefore, he should receive almost all the price of a fee simple absolute. On the other hand, B would contend that A is very likely to leave no children who attain the age of thirty, and that, therefore, he (B) should receive a very substantial price for his interest. Thus the property would not be marketed.

However, if alienability for the purpose of productivity were the only reason for the rule against perpetuities, then it is doubtful whether such a rule would be justified today. This is true, first, because today most future interests are equitable interests in trusts; thus, the trustee generally has a power to sell an absolute interest, and is under a duty to make the trust estate productive. Second, the subject matter of most future interests is corporate shares or bonds or government bonds. In such situations the actual economic value is in the corporation or the governmental unit, and this is being put to productive use. Third, . . . even though contingent future interests in specific land are created without the use of a trust, there are situations where the court will order a sale of the land in fee simple absolute. If, due to changed circumstances, it is necessary for the preservation of all interests in the land to have it sold, the court can order a sale in fee simple absolute and direct that the proceeds be held in trust, with the beneficial interests in the persons who had legal interests in the land.

It is believed, therefore, that, today, the principal reason for the rule against perpetuities is not to secure alienability for the purpose of productivity. Various other reasons for the rule have been suggested. Thus, it has been suggested that the rule exists to prevent "the power and grandeur of ancient families,"[3] or to prevent "the threat to the public welfare of great family dynasties built either on great landed estates or great capital wealth."[4] It would seem, however, that succession and estate tax laws can more effectively cope with the problem, and, indeed, are now doing so. It has also been suggested that the rule is designed to permit a kind of economic survival of the fittest,[5] that those who are less able to succeed in the economic struggle should not be protected by a tying up of property for their benefit. Yet it would seem that the whole trend of modern society is in the direction of protecting those who are incompetent.

The compelling reasons for the rule against perpetuities are believed to be these. First, it strikes a fair balance between the satisfaction of the wishes of members of the present generation to tie up their property and those of future generations to do the same. The desire of property owners to convey or devise what they have by the use of trusts and future interests is widespread, and the law gives some scope to that almost universal want. But if it were permitted without limit, then members of future generations would receive this property already tied up with future interests and trusts, and could not give effect to their desires for the disposition of the property. Thus, the law strikes a balance between these desires of the present generation and of future generations.

A further reason is that, other things being equal, society is better off, if property is controlled by its living members than if controlled by the dead. [p*457] Thus, one policy back of the rule against perpetuities is to prevent too much dead hand control of property.

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[3] Edgerly v. Barker, 31 A. 900, at page 906, 66 N.H. 434, at page 455, 28 L.R.A. 328 (1891).

[4] "Graduated estate and income taxes have largely eliminated any threat to the public welfare from family dynasties built either on great landed estates or on great capital wealth," Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 Harv. L. Rev. 721 at 727 (1952). "It [the Rule against Perpetuities] should be a check on vain, capricious action by wealthy empire builders." Leach and Tudor in 6 AM. L. OF PROPERTY 43 (1952).

[5] 4 Restatement, Property (1944) [introduction to Part I at 2132].

Much that has just been said with reference to the policy of the rule against perpetuities can be applied to other related rules. Thus rules against direct restraints on alienation do prevent dead hand control, and provide a balance between the satisfaction of the desires of the present generation and of future generations to tie up property. However, direct restraints on *inter vivos* alienation, when applied to interests in specific tangible things, do also tend to take property out of commerce and thus prevent productivity. On the other hand, it would seem that direct restraints on the power to devise have nothing to do with taking property out of commerce, since a devise is not a commercial transaction. Nevertheless, the rules against direct restraints on the power to devise are about the same as those with respect to direct restraints on the power to convey. As was early recognized,[6] a trust for the accumulation of income does not take property out of commerce or render it unproductive. Yet the law restricts it, for much the same reasons as justify the rule against perpetuities.

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[6] Thellusson v. Woodford, 11 Ves. 112, at page 147 (1805). [See p. S256 *infra*. Ed.]

B. THE RULE AGAINST PERPETUITIES

Review the materials on the Rule Against Perpetuities, *supra*, § 2C4. We will make no effort to consider all of the applications of the Rule nor all of its technical complexities. The materials which follow are designed simply as an introduction to the subject. The Rule and its reform have been the subject of considerable controversy in recent years. These reform efforts are discussed in Section 2 of these materials. We begin, however, with the Rule in its classic form, both because some states still adhere to this formulation and because reform of the Rule cannot be intelligently considered without an understanding of what is to be reformed.

There is a vast literature dealing with the Rule. Perhaps the best introduction for the student is two sparkling articles by the late Professor Barton W. Leach: *Perpetuities: in a Nutshell*, 51 HARV. L. REV. 638 (1938); *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973 (1965). A more recent relatively concise exposition of the traditional Rule (as well as of the Rule reformed) is Lynn, *Perpetuities Literacy for the 21st Century*, 50 OHIO ST. L.J. 219 (1989).

1. The Rule in Its Classic Form

"No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." J.GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942). This is the classic statement of the Rule (without the modifications that we suggested *supra*, p. S229).

While Gray's formulation is generally taken as the classic statement of the Rule, it does not actually reflect the holding of The Duke of Norfolk's Case, 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1682), in which the Rule is thought to have been first announced. That case involved future interests in a trust of term of years (a form of conveyance which we doubt you will see in the twentieth century, but the fact is important because it meant that the interests of the beneficiaries of the trust were equitable executory interests and not legal remainders). The beneficiaries of the trust were defined as follows: "to *B* [the settlor's second son] and the heirs male of his body; but if *A* [the settlor's eldest son] should die without issue during *B*'s lifetime [in which event *B* would come into a massive inheritance], then to *C* [the settlor's third son] and the heirs male of his body." Against the opinion of the chief judges of the three common law courts, the Chancellor, Lord Nottingham, sustained the conveyance:

> [T]he law . . . will allow a future Estate arising upon a Contingency only, and that to wear out in a short Time. [p*472]

> But what Time? And where are the Bounds of that Contingency? You may limit, it seems, upon a Contingency to happen in a Life: What if it be limited, if such a one die without Issue within twenty-one Years, or 100 Years, or while Westminster-Hall stands? Where will you stop, if you do not stop here? I will tell you where I will stop: I will stop where-ever visible Inconvenience doth appear . . . .
>
> . . . Shall . . . a Man . . . be disabled to provide for the Contingencies of his own Family that are within his View and Prospect . . . when there is no Tendency to a Perpetuity, no visible Inconvenience?

3 Ch. Cas. at 49, 50, 22 Eng. Rep. at 960, 961.

Lord Nottingham's test of "visible inconvenience" is far vaguer than Gray's classic statement of the Rule. It was not until the nineteenth century that the Rule crystallized in Gray's form. *See generally* Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities*, 126 U. PA. L. REV. 19 (1977). While remoteness of vesting was suggested as a test almost from the beginning of the Rule, an alternative test of the suspension of power of alienation also held some sway. *See* Avern v. Lloyd, L.R. 5 Eq. 383 (1868). Under this rule no interest was void if living persons could together convey a fee without regard to when their interests might vest. This alternative was disapproved in *In re* Hargreaves, 43 Ch. Div. 401 (1890), and since then the common law rule in both England and America has been one of remoteness of vesting. Can you think of a policy argument supporting the rule of *Avern v. Lloyd*? Similarly, it was not until Cadell v. Palmer, 1 Cl. & F. 372, 6 Eng. Rep. 956 (H.L. 1833), that the period of the Rule—the familiar lives in being plus twenty-one years—was settled.

The Rule operates against remoteness of vesting of interests, i.e., against contingent interests where the removal of the contingency could occur beyond the period set forth in the Rule. Such interests are void from the outset. Central to the application of the Rule is its focus on whether it is *possible* the interest could fail to vest within the stated time. The Rule is not stated in terms of either probabilities or actualities. That it is probable, but not certain, the interest will vest in time, is irrelevant. Nor does it matter that at the time an interest is challenged it has in fact vested, if at the time the instrument takes effect it is possible that it could have remained contingent longer than the "twenty-one years after some life in being at the creation of the interest." On occasion, an interest is subject to more than one contingency (e.g., "to *B* if survives me and attains the age of 25"). In such a case, if *any* of these contingencies might not be resolved within the perpetuities period the interest is void. Note further that the Rule does not say that an interest must be certain to vest. It is enough that it will either vest or fail by its own terms within the perpetuities period (or, as Gray's formulation states, an interest must vest, "if at all," within the period). Thus a remainder to John, a living person, "if he attains 21," is valid, not because John will necessarily become 21, but because he will either become 21 or die before he attains 21 during his lifetime. The meaning of these rather abstract propositions should become clearer as you work through the problems which follow.

Analysis under the Rule begins with the question whether there is an "interest" within the meaning of the Rule. If so, what is the period of the Rule? More particularly, who are the relevant "lives in being"? And when does the interest "vest"? These questions are considered in more detail in the text and problems which follow. [p*473]

a. Interests Subject to the Rule

The Rule Against Perpetuities is the most important restriction on the power of a present holder of property to create future interests in that property. The range of the Rule is wide: It applies to both real and personal property, to both legal and equitable interests (and hence it applies to future interests in trust of personal property; see *infra*, p. S264). The interests to which the Rule is most commonly applied are contingent remainders and executory interests.

The Rule also applies to interests which are not normally regarded as "future interests." For example, in most states it applies to options to purchase property when the optionee has no other interest in the land, a fact that a number of recent draftsmen seem to have forgotten. *See*, *e.g.*, Certified Corp. v. GTE Products Corp., 392 Mass. 821, 467 N.E.2d 1336 (1984); Pace v. Culpepper, 347 So. 2d 1313 (Miss. 1977). A number of courts have concluded, however, that the Rule does not apply to so-called preemptive options, which simply grant the holder of the option the first right to purchase if the owner decides to sell. Such rights remain subject to the rule against unreasonable restraints on alienation. *See*, *e.g*., Metropolitan Transportation Authority v. Bruken Realty Corp., 67 N.Y.2d 156, 501 N.Y.S.2d 306, 492 N.E.2d 379 (1986); Cambridge Co. v. East Slope Investment Corp., 700 P.2d 537 (Colo. 1985). Nor is the Rule normally applied to options given to a lessee to purchase the leased land or to options to renew the lease, even if the option to renew is a perpetual one. *See* Texaco Refining & Marketing, Inc. v. Samowitz, 213 Conn. 676, 570 A.2d 170 (1990); St. Regis Paper Co. v. Brown, 247 Ga. 361, 276 S.E.2d 24 (1981), reversing, 155 Ga. App. 679, 272 S.E.2d 544 (1980).

The Rule has not normally been applied to contingencies in easements, *e.*g., the right given an easement holder to expand his use upon the occurrence of certain conditions, but it has recently been argued that it should be. Note, *Customary and Expansible Easements: Applicability of the Rule Against Perpetuities*, 56 OR. L. REV. 518 (1977). The most important interests to which the American common-law Rule does not apply are future interests retained by the grantor or devisor: rights of entry, possibilities of reverter and reversions. These will be considered in a separate subsection, *infra*, § 3B.

b. The Period of the Rule

"*Lives in Being*"

Some initial propositions. The Rule requires proof that an interest must vest within 21 years after some "life in being," i.e., a natural person living when the interest is created. Corporations, for obvious reasons, may not be used. You must then be able to point to a living person about whom you can say that the interest must vest within 21 years of that person's death. This is the so-called "measuring life" (sometimes referred to as the "validating life"). If no such person can be identified, the interest is invalid. In some cases, the measuring life is obvious. Thus if a testator grants a remainder to "my son John if he attains 25," and John is alive at the time of the will, John is himself the relevant measuring life. The interest is valid because he must attain 25 in his own lifetime. But it is not necessary that the measuring lives be specified in the instrument. A devise to "my grandchildren when they become 21" is good, even though the testator's children have [p*474] not yet had children. Do you see why? Why would an identical grant made during the grantor's lifetime not be valid? While the measuring lives need not be specified in the instrument, they must be connected to the vesting of the interest. It may seem highly probable, for example, that if a grantor grants to "those of my grandchildren who attain the age of 25," such grandchildren would necessarily attain 25 (or die) within the lives of some infant in a maternity ward in a large hospital on the date of the grant. But each of those infants could die the following day. Because the time of vesting is not affected by their deaths, they cannot serve as measuring lives which would validate the interest. If the instrument does not specify the measuring lives and none are inferable from it, then the interest must vest, if at all, within twenty-one years from the effective date of the instrument. Finally, the measuring lives must come before the twenty-one year period. A grant "to the last survivor of my descendants born within twenty-one years of the effective date of this instrument" is not valid.

Whose lives and how many? Suppose that the testator words his bequest this way: "I give and bequeath the principal of this trust to such of my lineal descendants who are alive twenty-one years after the death of the last survivor of the next twenty healthy babies born in Chickasha, Oklahoma, just before the effective date of this instrument." Note that in the example just given, the testator has made vesting turn on the lives of the Chickasha babies, deliberately making the last survivor of them the measuring life. Can such extraneous lives be used? How is the court to know whether the condition is met or not? As to the first question, it is settled that the measuring lives need not be those of beneficiaries under the instrument, nor need they have any connection with the instrument other than that they are measuring lives. *See* Fitchie v. Brown, 211 U.S. 321 (1908). As to the second question, it is generally held that the measuring lives must not be "so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain." RESTATEMENT OF PROPERTY § 374 (1944). *See also* RESTATEMENT (SECOND) OF PROPERTY-DONATIVE TRANSFERS § 1.3 comment a (1983) (a gift to my descendants alive at the death of the last survivor of "the individuals alive on the date the period of the rule begins to run who are listed in the New York City telephone directory" is void).

In re Villar, [1929] 1 Ch. 243, marks the limit to which English courts have stretched the "lives in being" requirement. The testator in that case created a trust to terminate and be distributed to those of his issue surviving a period "ending at the expiration of 20 years from the day of the death of the last survivor of all the lineal descendants of Her Late Majesty Queen Victoria who shall be living at the time of my death." The testator died in 1926 at which time there were in esse more than one hundred such persons, many living private lives. In *In re* Leverhulme, [1943] 2 All E.R. 274, 281, 169 L.T.R. 294, 298 (Ch.), however, the court specifically cautioned: "I do not at all encourage anyone to use the [*Villar*] formula in the case of a testator who dies in the year 1943 or at any later date." *See* RESTATEMENT, *supra*, § 374 comment l. Would the objections to such a limitation be cured by using the children of President Bush or the late President Johnson's grandchildren as the measuring lives?

"*Plus Twenty-one Years*"

It is settled that the twenty-one year period is a period in gross and need not be the minority of any actual person, much less of a beneficiary. *See*, *e.g.*, Cadell v. Palmer, 1 Cl. & F. 372, 6 Eng. Rep. 956 (H.L.1833); Kolb v. Landes, 277 Ill. 440, 115 N.E. 539 (1917). Granted this, what is the function of the twenty-one year period? What should be the effect on the twenty-one [p*475] year requirement of statutes changing the age of majority from twenty-one to eighteen? *See* Soled, *Effect of Reduction of the Age of Majority on the Permissible Period of the Rule Against Perpetuities*, 34 MD. L. REV. 245 (1974).

Periods of Gestation

The gestation of an actual child (as opposed to a nine-month term in gross) may extend the period of the Rule at the beginning of "lives in being," at the end of "lives in being" and at the end of the twenty-one year period.[1] Thus under the devise "to my children for life, remainder to be accumulated until my youngest grandchild reaches twenty-one, and then divided among my grandchildren then living, the issue of any deceased grandchildren taking his ancestor's share," it is possible for the period of the Rule to be extended by three periods of gestation if the following events occur: The testator dies leaving a child *en ventre sa mere*. That child has two children *A* and *B* of which *B* is also posthumous. Just before *B*, who necessarily is the youngest grandchild, reaches 21, *A* dies leaving a posthumous child. *See* J. GRAY, THE RULE AGAINST PERPETUITIES § 222 (4th ed. 1942); *see also* Equitable Trust Co. v. McComb, 19 Del. Ch. 387, 168 A. 203 (1933).

At this point you are probably ready for the Communist Rule Against Perpetuities dreamed up

[1] This is the way this portion of the Rule is normally stated, and for that reason we state it this way here. We are persuaded, however, by the argument that the "true Rule" is that there may be a term in gross of 21 years and 4 1/2 months. *See* Fetters, *The Perpetuities Period in Gross and the Child en ventre sa mere in Relation to the Determination of Common-Law and Wait-and-See Measuring Lives: A Minor Heresy Stated and Defended*, 62 IOWA L. REV. 309 (1976).

by two Yale law students: "All interests must vest in the state or there will be no lives in being." A. GULLIVER, CASES AND MATERIALS ON THE LAW OF FUTURE INTERESTS 396 (1959).

c. "Vesting" Under the Rule

An interest is vested under the Rule when any conditions precedent (including ascertaining the taker or takers) are satisfied. Thus a remainder which is vested at the outset always satisfies the Rule (and is therefore often said to be "not subject" to it).

Consider again the limitation in *The Duke of Norfolk's Case*. Would it qualify under the modern rule? If *C*'s interest be regarded as a remainder in fee tail male, is it vested? May it be regarded as such an interest? In our view it makes no difference how *C*'s interest is categorized, because it will become a present possessory interest, or fail, within *B*'s lifetime. You will recall, however, *supra*, § 2C1, that a remainder may become vested even though it has not become a present possessory interest. If a grant is in the form: to *A* for life, remainder to *A*'s children for their lives, remainder to *B* and his heirs, then *B* has a vested remainder even though *A* is alive and has no children. Since *B*'s interest is vested, there is no perpetuities problem, although the interest may not become a present possessory one until long after lives in being plus 21 years. On the other hand, when does an executory interest vest? There was little learning on this topic at the time of the *The Duke of Norfolk's Case* since executory interests were indestructible, and thus the contingent-vested distinction was not made with respect to such interests. It was eventually decided that executory interests would not be considered to have "vested" for the purposes of the Rule until they became present possessory interests. Thus, if the grant above had read: to *A* for life, remainder to *A*'s children for their lives, and one day after the death of the last child of *A*, to *B* and his heirs, then *B*'s interest could not [p*476] vest in possession until one day after the death of *A*'s last surviving child, an event which may take place well beyond the period of the Rule. (*B*, of course, is not a measuring life in either event since the grant does not specify that *B* need himself survive the last of *A*'s children. Nor may *A*'s children be measuring lives since *A* may have a child after the effective date of the grant.)

This is not the only example of an instance in which "vesting" has taken on a peculiar and highly technical meaning for perpetuities purposes. For example, a vested remainder subject to open (a gift to a class at least one member of which is determined) is not "vested" for purposes of the Rule until all possibility of further opening is precluded. This is sometimes called the "all or nothing" rule. Rights of entry and possibilities of reverter are generally regarded as "vested" as of their creation, even though they may not become possessory, if at all, for many generations. This brief introduction may serve to explain why it took Gray over 800 pages to explain his simple statement of the Rule.

Problems

Solving problems under the Rule against Perpetuities is not easy, but there are some techniques which many students (and practitioners) find helpful. The first question to ask is "Is this interest subject to a precedent condition?" If the interest is subject to no condition other than the natural expiration of the preceding estate or if it is subject only to a condition subsequent, then the interest is "vested" for purposes of the Rule. (You will note that these are the same questions we asked when we attempted to determine whether a remainder was vested or contingent *supra*, § 2C1). If the interest is subject to a precedent condition, the next question to ask is, "When will we know for sure whether the condition has been fulfilled or is not going to be fulfilled?" Sometimes the answer to this question will be easy because the instrument will say that the condition must be fulfilled within a certain number of years or within someone's lifetime. For example, suppose that the instrument says: "to my husband John for life, remainder to my son Robert if he obtains a college degree." Robert's interest is subject to a condition precedent: he must obtain a college degree before his interest vests. Robert, however, is not going to obtain a college degree after he is dead. Thus, we will know for sure whether the condition is going to be fulfilled no later than Robert's death. Since Robert is a "life in being" at the effective date of the instrument, his contingent interest is good under the Rule.

Suppose, however, that no time is expressed for fulfilling the condition or that the condition need not be fulfilled by a living person. Does that mean that the interest is bad under the Rule? Not necessarily. It may be possible to find a person or persons living at the effective date of the instrument within 21 years of whose death(s) the condition must be fulfilled or fail. This is where the Rule gets tricky, both because finding the measuring lives involves some reasoning by inference and also because the law's insistence that the interest must vest within the period of the Rule has led to some assumptions about what might happen that are far away from common sense.

Let us begin with some relatively easy cases: Suppose the instrument says: "to my husband John for life, remainder to the first child of John's to obtain a college degree." John may have several children alive at the effective date of the instrument, but none of them may be the first child to obtain the degree. They could all die. John could have another child, who was not a life in being at [p*477] the effective date of the instrument. Then John could die. Twenty-five years later the afterborn child could obtain a college degree. Implausible? Yes. Impossible? Certainly not. The Rule deals in possibilities not probabilities, and because it is possible that someone could fulfill the condition more than 21 years after the death of all lives in being, the interest is void under the Rule.

The technique which we used to determine the invalidity of the interest of John's child can be expanded to any perpetuities problem. Ask yourself the question "If everyone in the world died within nine months after the effective date of the instrument, leaving behind a generation of children conceived after the effective date of the instrument, could any of those children fulfill the precedent condition?" (This, of course, assumes that the new generation could survive without any adults, but it is in such a never-never land that perpetuities analysis operates.) Now apply this test to these problems: "to John for life, remainder to the first child of John's to reach the age of 21." John dies one day after the effective date of the instrument, having on that day conceived a posthumous child who was not a life in being at the effective date of the instrument. Then everyone else in the world dies leaving that child as the sole representative of the human race. When will we know for sure whether the condition will be fulfilled? Within twenty-one years and a period of gestation after John's death. But John was a life in being at the effective date of the instrument. So the interest is good.

"To John for life, remainder to the first child of John's to reach the age of 25." John dies one day after the effective date of the instrument having conceived on that day a posthumous child who was not a life in being at the effective date of the instrument. Then everyone else in the world dies leaving that child as the sole representative of the human race. When will we know for sure whether the condition will be fulfilled? Within 25 years and a period of gestation after John's death. But that is four years too long if we use John's life as a measuring life. Are there any other lives in being at the effective date of the instrument which we can use? No, everyone else in the world (including the child's mother) has died within nine months of the effective date of the instrument, and we still won't know for 24 years and three months whether the child will fulfill the condition. The interest in the child is void under the Rule.

Testator devises "to my children for their lives, remainder to such of my grandchildren as reach the age of 21." (Remember that under the Rule all members of a class must be determined within the Perpetuities period; otherwise the entire class gift is void.) Both the life estate and the remainder are subject to conditions precedent. In the case of the life estate the condition precedent is being a child of the testator. But the testator is not going to conceive children after he is dead, and since the devise is not effective until the testator's death, the interest of the life tenants will vest as of that date. (The situation would be different if the devise were a grant, since the grantor could have children after the effective date of the grant. The interest of these children would, however, be good under the Rule since they would have to be conceived during the grantor's lifetime.) The interest of the grandchildren is subject to two conditions precedent. They must be grandchildren of the testator, and they must reach the age of 21. We will know for sure who all the grandchildren of the testator are going to be no later than the death of the last surviving of the testator's children plus a period of gestation. Thus even if all the testator's children die the day after the effective date of the grant and everyone else who was alive at the effective date of the devise dies in nine months, the total [p*478] membership of the class will be known within lives in being plus a period of gestation plus 21 years.

(1) *G* grants "to my children for their lives, remainder to such of my grandchildren as reach the age of 21."

(2) *D* devises "to my children for their lives, remainder to such of my grandchildren as reach the age of 25."

Both of these instruments contain void remainders. You should go through the same process which we went through above, step-by-step, to determine why the remainders are void.

The following problems are more difficult, because they involve "fantastic possibilities." Nonetheless, if you proceed in the same step-by-step fashion, you should be able to see why each involves an arguably void interest. In all cases, A devises:

(3) "To *B* for life, then to *B*'s children for life, remainder to *B*'s grandchildren." *B* is an eighty-year-old widow at the time of the grant. *See* Jee v. Audley, 1 Cox 324, 29 Eng. Rep. 1186 (Ch. 1787).

(4) "To *B* for life, then to *B*'s widow for life, remainder to such of *B*'s children who survive both *B* and his widow." *B* is also eighty and happily married to a woman of 79. *See* Loring v. Blake, 98 Mass. 253, 259 (1867). For a recent version, see Pound v. Shorter, 259 Ga. 148, 377 S.E.2d 854 (1989).

(5) "To such of my lineal descendants who are alive at the probate of my will." *See* Johnson v. Preston, 226 Ill. 447, 80 N.E. 1001 (1907); *cf. Ryan v. Beshk, infra*.

(6) "To *B* for life, remainder to such of *B*'s grandchildren living at my death or born within five years thereafter as attain 21." *Cf. In re* Gaite's Will Trusts, [1949] 1 All E.R. 459 (Ch.).

(7) "To *B* for life, then to *B*'s children for their lives, remainder to *B*'s grandchildren." *B* is a woman of eighty. The jurisdiction in question has passed a statute that for purposes of the Rule against Perpetuities, women over sixty will be presumed infertile in the absence of competent medical evidence to the contrary.

(8) "To *B* for life, remainder to such of *B*'s children as attain 21."

In the case of devises (3)–(6) there are cases which hold or suggest that there is a violation of the Rule. The eighth case is a joke. *See* Leach, *Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent*, 48 A.B.A. J. 942 (1962). The development, however, of what is sometimes called "high-tech procreation" makes it less of a joke than it was when Leach wrote his article. The seventh case is no joke, but it remains a hypothetical case, since legislation of this sort has received few tests. The nicknames of these cases provide the clue for the reasons for their invalidity or supposed invalidity. They are, in order, the case of (3) the fertile octogenarian, (4) the unborn widow, (5) the administrative contingency, (6) the precocious toddler, (7) the fortuitous adoption, and (8) the fertile decedent.