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Future Interests

Maynard Jackson

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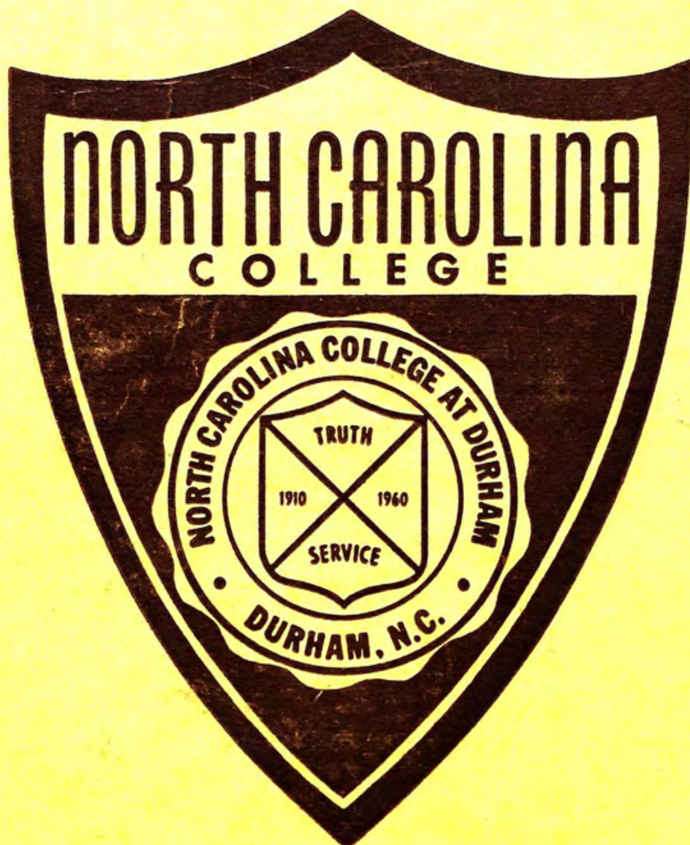
Future
Interests



150 SHEETS
WIDE LINES
THREE DIVIDERS

NAME Maynard H. Jackson, Jr.
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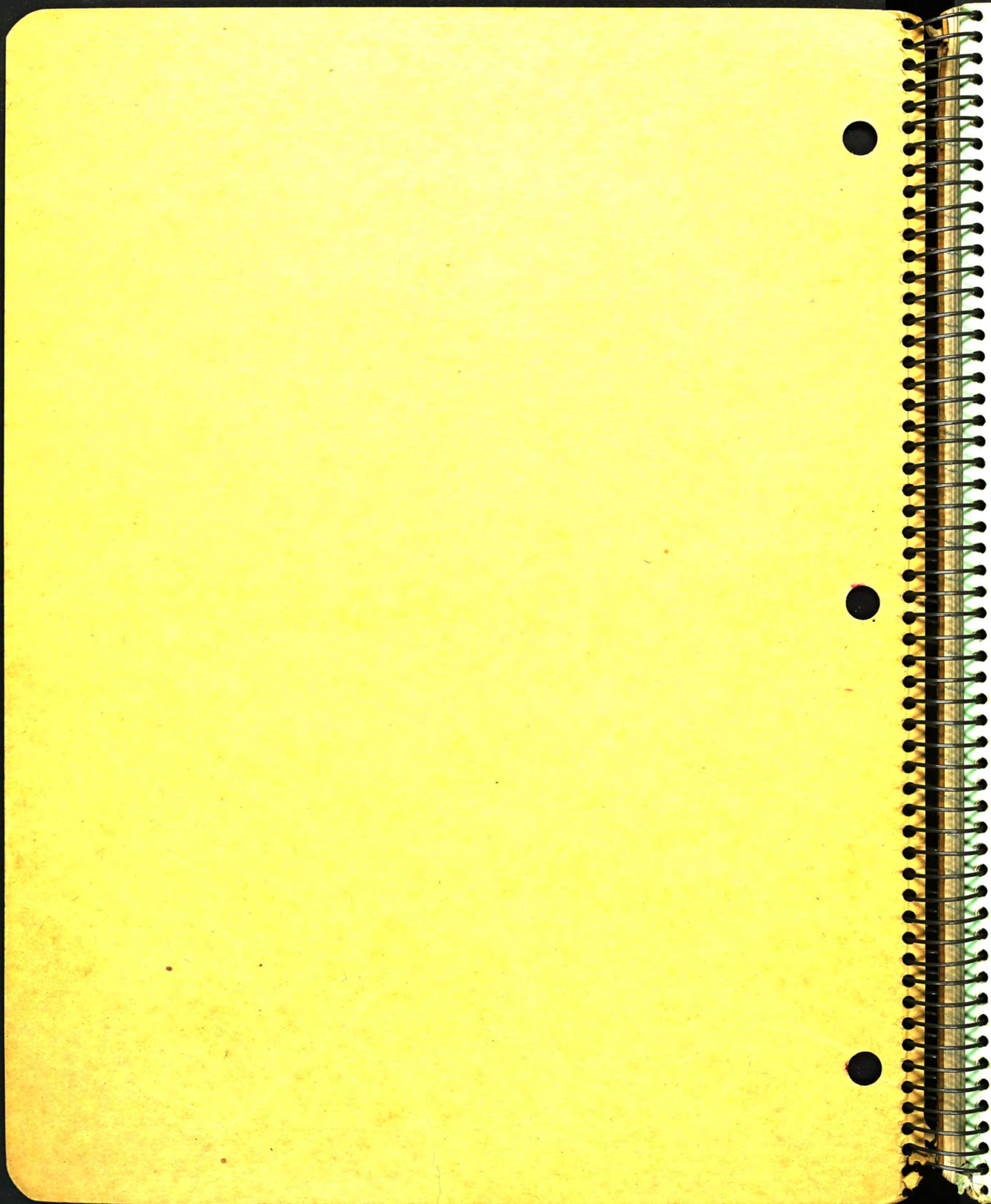
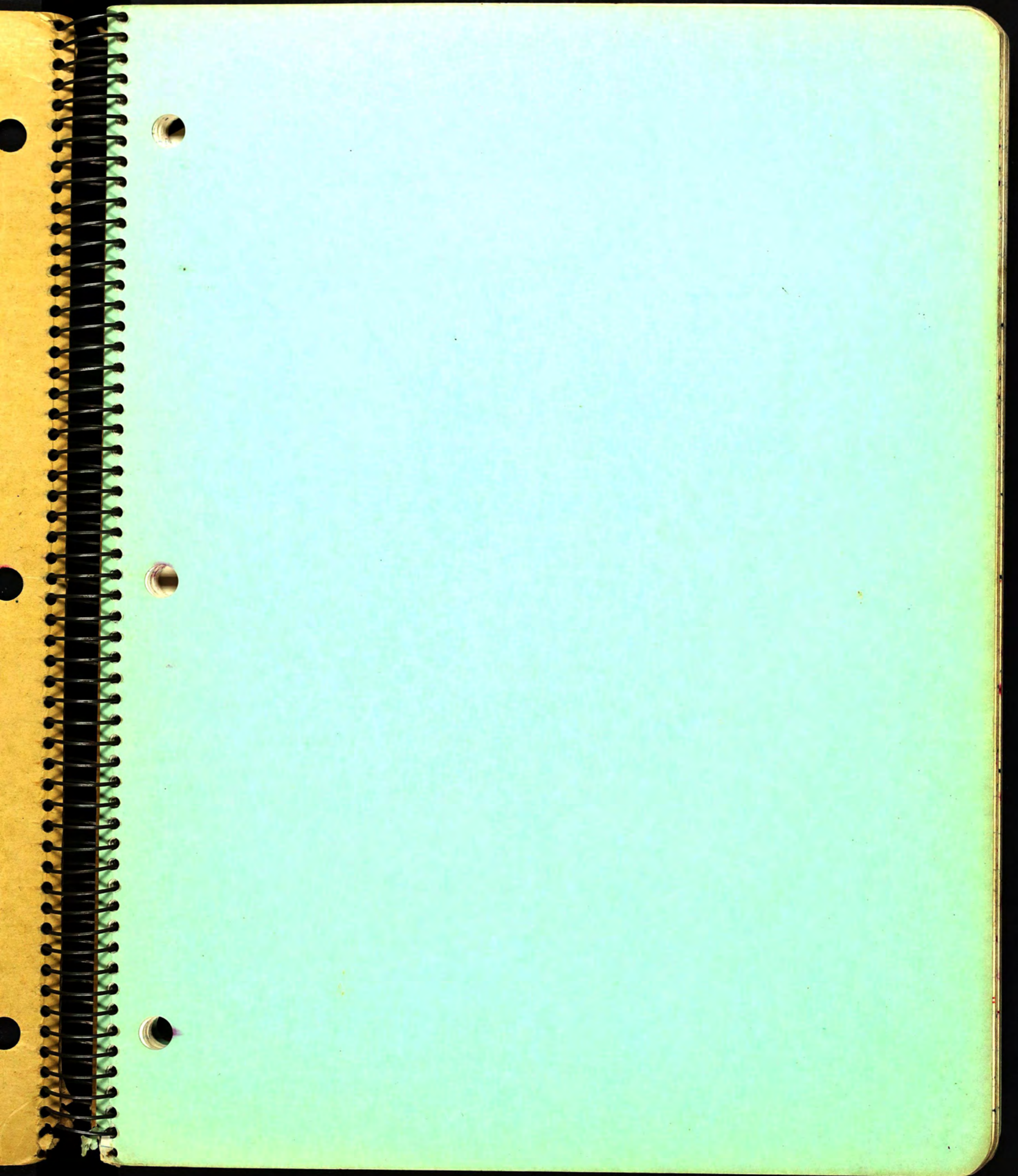
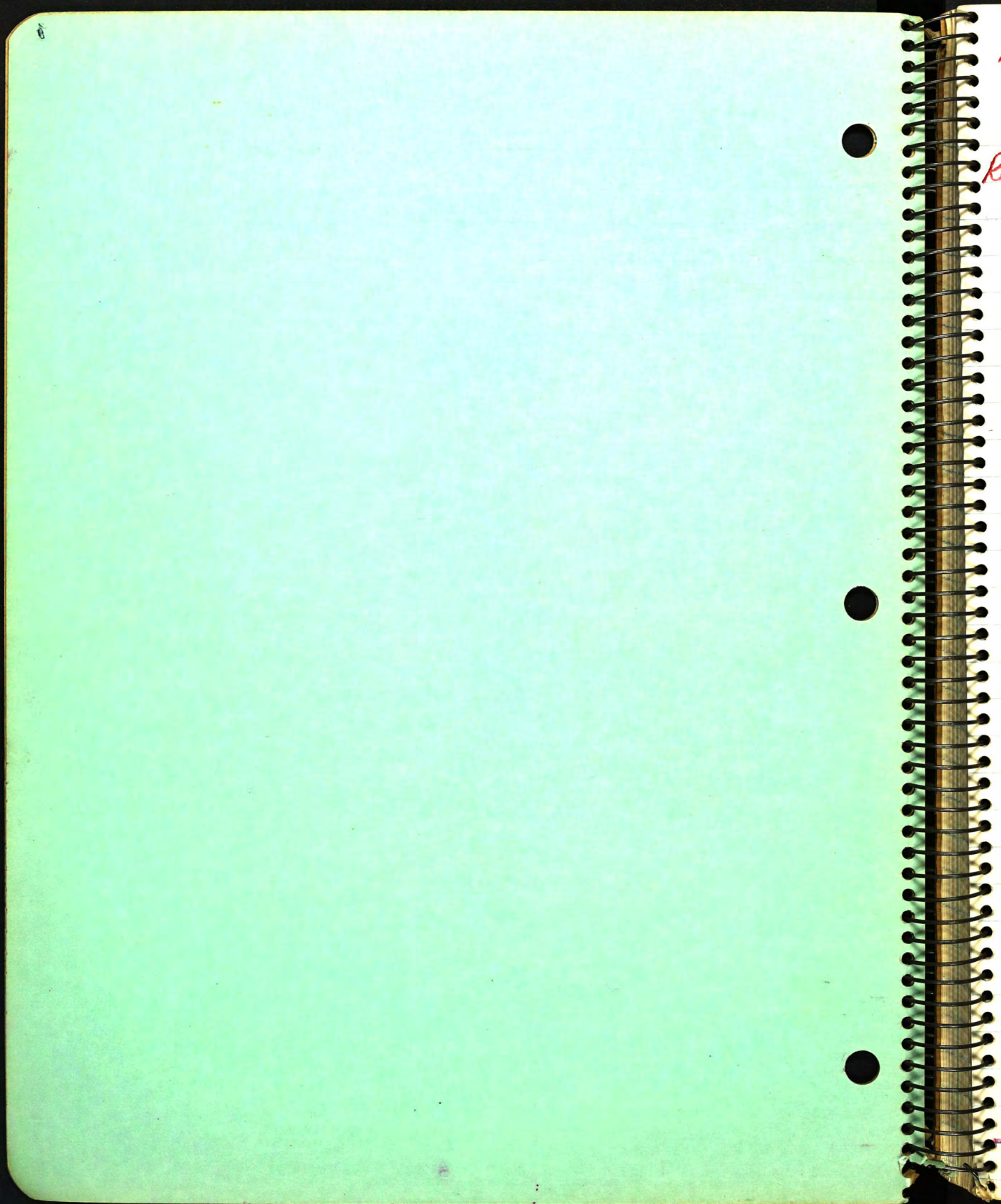
682-8529

No. 33-383







Prof. Dedmond

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Read and review:
1. Real Property
2. Statute of Uses
3. Trusts
4. Life Estates especially.

Future Interests are interests in land defined in terms of duration.

The FSA may be divided in terms of successive takers' interests. May be possessory or it may be postponed.
— "To A and his heirs."

The fee tail may be similarly divided. Also, there can be a remainder after a F/T, e.g., A ⟶ "To B and the heirs of his body, then to C and his heirs."

Status of F/T today: F/T today almost completely abolished by statute. Most statutes simply say that a F/T will be automatically "converted into" (i.e., deemed to be) a FSA.

Quaere: What happens when an interest in land runs out? = Could depend on the orig. grant. The grantor or testator could have provided for someone else to take.

One policy of real property law is to promote the marketability and free alienability of land.

Future interests:
(1.) Reversion
(2.) Remainder
(3.) Possibility of Reverter — an interest that the grantor has after conveying a FS Determinable. A → "To B and his heirs SO LONG AS no liquor is sold on the premises." Upon breach of the condition, the estate AUTOMATICALLY terminates.
(4.) Right of Entry Upon Cond. Broken — A → "To B and his heirs PROVIDED THAT no liquor is sold on the premises." This is the interest retained by the grantor after conveyance of a FSSTCS. Does not automatically terminate. Upon breach of the cond. subsequent, the grantor would have to terminate the FSSTCS

Also called "power of termination"

by exercising his right of Entry.

(5.) Executory interests.

* (Chapter 2) Special Rules About Gifts to Heirs *

* (Section 1.) The Rule in Shelley's Case *

A (deed) → "To B for life, then to the heirs of B."

Dead issue in most States. Very much alive in N.C. and a few others.

Requirements:

(1.) Subject matter must be land.

(2.) The estates involved must be created by one and the same instrument.

(3.) Instrument must give the grantee a freehold estate.

(4.) Estate in the heirs must be a remainder in the technical sense. Rule does not apply if the interest is an executory interest.

(5.) Rule applies when the remainder is limited to the heirs or the heirs of the body of the ancestor (grantee).

(6.) Rule applies even though the freehold in the ancestor - grantee is separated

from the remainder in the heirs of the ancestor-grantee by an intervening estate.

(7.) Rule applies to future interests as well as present possessory estates.

(8.) Rule applies only when the freehold and the remainder are both of the same quality — either both legal or both equitable.

Operative Effect of Rule

⊗ The net Effect of the Rule is to convert the remainder in the heirs into a FSA in the ancestor due to merger. The Rule operates only on the remainder.

Rule in S/C and the Doctrine of Merger do not necessarily operate together, although they may.

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Caveat! — U are probably only about 5 or 6 States (N.C.) in the Rule in S/C applies.

Statement of Rule — Rule in Shelley's Case — When the ancestor takes an estate of freehold (at least a L/E), and in the same gift or conveyance an estate is, by way of remainder, limited either mediately or immediately in fee or F/T, the word "heirs" is a word of limitation of the ancestor's estate; therefore, the ancestor has an estate of inheritance, and the heirs take, if at all, by way of descent.

At C.L., either L/E or F/T in grantee okay. But, in U.S. only L/E applies. Simes, p. 68.

"word of lim." - defines the extent and size of the estate to be taken.

"word of purchase" - defines who takes.

Classic Example — T (or G) —B/A→ "To A for life, remainder to the heirs of A."

No expression of intent, no matter how clear, will defeat the operation of the Rule

in a case to which the Rule applies. The Rule in S/C is a rule of law, not a rule of construction. Perrin v. Blake.

"Heirs" means the indefinite line of succession of persons due to take generation after generation.

"The C.L. doctrine know as the R/S/C is in force in this State." It is a rule of law & is intent-defeating, provided that no other words are superadded which to a certainty show that other persons than the heirs general of the first taker are meant. On the rule applies, the whole estate vests in the first taker. Conveyance to persons named "to have and to hold same to their use during the term of their natural lives and then to their heirs after them," the rule in Shelley's Case applies.

See 117 N.C. 497, Nichols v. Gladden. Name case.

The only possible freeholds in the ancestor are F/T and L/E.

The estates in the ancestor and in the heirs must be of the same quality.

Thus, the conveyance "To A for life, remainder to the heirs of A," will create the following state of title: a L/E in A w/ a vested remainder in F/S

in A. Then, here, the doctrine of Merger would operate to give A a FSA (as if the conveyance read "To A and his heirs.")

The Rule was a crude device to prevent owners from avoiding their feudal obligations and to insure that the feudal Lord will get the valuable feudal incidents on descent.

But, the reasons for the Rule were misunderstood at the outset, and courts misapplied historical theories as bases of the Rule.

Initially, after the Norman Conquest (1066), a gift "To A and his heirs" was interpreted the same as a gift "to A for life, ~~and then~~ remainder to the heirs of A."

The sole modern justification for the rule is to make the land freely alienable one generation earlier.

Hypo: T → "To A for 15 years, rem to the heirs of A." — Rule does not apply because A has no freehold estate granted. An estate for years is not a freehold estate. — Thus, the heirs of A would have an executory interest (very contingent) following an estate for years in A.

Hypo: T → "To A for life, rem. to the heirs of B." Rule not applicable because there would be no remainder ltd. to the heirs of the ancestor - grantee. — Thus, A = L/E; heirs of B = contingent remainder (4

"Nemo est haeres viventis."

can be no heirs of a living person).

Hypo:

T → "To A for life remainder to the heirs of B." A conveys his life estate to B subsequently. — Rule not applicable because the estates were not created in the same instrument. — Will and codicil = same instrument.

Hypo:

T → "To A & the heirs of his body, rem. to the heirs of A." — At C.L., The Rule would apply. Not applicable in N.C.! because statute converts the F/T into (G.S. 41-1) a FSA. (Read G.S. chaps. 39 and 41 generally).

If Stat. De Donis Conditionalibus applies, the F/T could not merge and would have to descend (See Simes, p. 67, footnote 13) lineally.

So here, A = F/T w/ a vested remainder in fee in A. Whether merger will apply depends on the existence or non-existence of De Donis Conditionalibus.

Under De Donis, no merger, because to do so would destroy A's fee tail.

Hypo: T ⟶ "To A for the life ~~of~~ of B, rem. to the heirs of A." — Rule applies, even to life estates pur autra (autre) vie.

Assignment: Does the rule apply to estates in co-tenancy? Does the rule apply only from the time the instrument takes effect, or may it apply subsequent thereto upon the happening of certain conditions?

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C.L. Preference

At C.L., there was a preference for title by descent rather than conveyance inter vivos, because the Lords got certain valuable incidents that way.

hypo: X (fee) ⟶ "To A for life, remainder to the heirs of A." — Classic example. Rule in SC converts the

(because heirs not yet ascertained)
contingent remainder in the heirs into a vested rem. in FSA in A. Then, the Doctrine of Merger would cause the two to fuse into a FSA in A.

If the Rule did not apply, X = reversion, A = L/E, heirs = contingent remainder.

Hypo: X (fee) ⟶ "To A for life, rem. to heirs of the body of A." (a.) With Rule — A = L/E and rem. in F/T. Merger would then give A a F/T estate. (At C.L.)

(b.) With Rule (under modern statutes) — A = L/E and rem. in FSA. Merger would give A a FSA. (N.C.) Equivalent to "To A and his heirs." (See G.S. 41-1.)

Hypo: X (fee) ⟶ "To A for life, rem. to B for life, then to the heirs of A."

Intervening Vested Remainder

A = L/E & vested rem. in FSA.
B = vested rem. for life.
Thus, the Rule would apply

but Merger would not due to B's vested rm. for life. (⊛ Merger will not operate to cut out a vested interest.)

Rule: Merger

If B predeceased A, merger would occur so that A would then get a FSA.

Thus, A would get a vested rm. in fee subject to an outstanding rm. in B for life.

hypo:
Rose v. Rose
219 N.C. 20 (1940)

"merger under a condition"

Has been called merger sub modo (FS subject to L/E in B) because there can be no merger which would squeeze out a vested rm. (in B for life).

Same. Then A ⟶ C a L/E and vested rm. in fee. — C = L/E pur autre vie w/ vested rm. in fee. B would have vested rm. for life. C, therefore, would get a FSA subject to a L/E in B.

If A died before B, C's estate would have to open up and let in B's L/E.

hypo: X (fee) ⟶ "To A for life rm. to B if he marry C, rm. to the heirs of A."

Intervening Contingent Remainder. The only difference between this and the prior hypo is that B's intervening estate is contingent, not vested as before. Thus, the Rule applies + gives A a L/E and vested rm. in fee.

quaere — **Note:** the rm. in fee in A would be contingent if B had a rm. in fee (modern rule: "To B" = FSA); if the estate in B was a vested rm. ~~for~~ life, then A would get a vested rm. in fee.

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* Rule of Construction — whenever possible, courts will find a contingent rm. rather than an executory interest.

Operation of Doctrine of Merger — Merger would cut off the contingent intervening estate. Will not cut off a vested intervening estate.

hypo: X ⟶ "To A for life, and if A survive B, then to the heirs of A."
A = L/E + contingent rm (contingent on A's surviving B). No merger: a contingent rm. cannot merge, and A's estates would therefore remain separate during the joint lives of A & B. If A should survive B, however, the rm. would vest and merge w/ the L/E, giving A a FSA at that time.

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hypo: X (fee) "To A for life, rm. to B for life if he attain age 21, rm to the heirs of A."
A = L/E and X = reversion
B = cont. rm for life
heirs of A = cont rm in fee.
The Rule applies. Thus,
A = L/E and vested rm. in fee
B = cont. rm. for life.
Doctrine of merger would

then operate to squeeze out the CONTINGENT rm in B for life. ⊛ Merger would not operate to squeeze out an intervening VESTED remainder.

There may be conds. precedent to the L/E of the ancestor, or the heirs of the ancestor, or to both; and these conds. may work a change in the operation of the Rule.

hypo: X (fee) "To A for life, and if A survive X, then to the heirs of A."
A = L/E
heirs of A = cont. rm in fee.
X = reversion
Rule applies immediately.
A = L/E + cont. rm in fee
But, no merger until A survive X because of can be no merger of cont. rms.
— The conds. precedent here applied only to the rm. in the heirs of A.

hypo: X ——→ "To A and his heirs, but if A die w/o ~~leaving heirs~~ any issue him surviving, then to B for life, rm to the heirs of B."

A = fee simple subject to an executory limitation. (i.e., F/S defeasible).

B = cont. rm for life

heirs of B = cont. rm in fee.

Rule applies. Thus,

A = same

B = cont. rm for life + cont. rm in fee

The L/E and the rm. are contingent.

Merger would apply to give B a fee simple subject to a condition precedent (an executory interest as to A). But, as to B's heirs, no executory int.

You cannot have a rm. after a fee.

Thus, here, the conds. applied to both the estate of the ancestor (B) and to the estate in the ancestor's heirs.

X would have nothing left because either A or B will take all.

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Executory interests always operate to cut short an already vested estate. A cont. rm. never operates that way. — Two types:

(1.) Executory limitation - if by deed.

(2.) Executory devise - if by will.

hypo: X ⟶ "To A and his heirs, but if A die w/o children him surviving, then to B and his heirs."

This is substantially the same as example (b) on mimeo. sheet (3) in terms of the legal ultimate result. But in this example the Rule in S/C would not apply.

mimeo. hypo (c) (p.3): Must construe this. Did grantor intend the cond. precedent to apply only to the L/E, or to the L/E and the rm. in B's heirs?

(accepted view) Most courts say the L/E only would be subject to a cond. precedent, and, therefore, contingent. Under this interpretation, A = L/E
B = cont. rm. for life.
B's heirs = cont. rm. in fee.
Rule applies. Thus:
A = L/E
B = cont. rm for life + vested rm in fee. BUT, NO MERGER because is can be no merger of cont. interests.

Quaere: When, if at all, will the Rule apply or take effect? Q. At the effecting date of the instrument, or at a later time upon the occurrence of a condition?

View #1. One interpretation says that the Rule applies immediately upon the date of the conveyance, thus giving B a cont. rm. for life + a vested rm. in fee; but merger would only apply when B's L/E vests

(at age 21). The only thing wrong here is that if B die before age 21, he would still have a vested rm. in fee to pass on; and the real question, therefore, was whether B ever had a freehold allowing the Rule to operate!

View #2. Another view is that ~~B~~ the Rule would apply only when B reaches Age 21, thus getting a freehold.

mimeo. hypo (d): Rule would not apply because (ct. taking the latter view above) since B would have to outlive A in order to get a L/E, B never had a freehold and the rule would not apply. If B did not outlive A, B never had ~~an~~ freehold.

If B does not outlive A, ct. said, the heirs would take as purchasers.

Starnes v. Hill — 112 N.C. 1

A limitation to M.J.P. for and during the term of her natural life, and in the event that R.O.P. shall outlive her, then to him for and during the term of his natural life, and after the termination of the said life estates then to the heirs of R.O.P.: HELD, that R.O.P. takes a contingent rm., and that until the happening of the contingency the rule in S/C cannot operate so as to vest in him an indefeasible fee; that should R.O.P. fail to survive M.J.P., his heirs will take as purchasers, no estate having vested in their ancestor, the word "heirs" being DESCRIPTIO PERSONARUM.

→ 112 N.C. 1

This was Starnes v. Hill (nome case) which held that the Rule would be applied only when the conds. of the Rule are met subsequent to the effective date of the instrument. ("Probably the majority rule.")

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mimeo. hypo (e) —

X "to A for life, then to A's heirs if A survives B."

Does rule apply? The contingency applies only to the rm. (Like hypo (a) on this same mimeographed sheet.) — Rule applies right away, but no merger until the contingency is satisfied.

Mimeo. hypo (f) —

X "to A for life, rm to B & his heirs, but if B die w/o issue surviving him, then to the heirs of A."

— Does Rule apply here?

B = vested rm. in fee simple subject to an executory limitation (if by deed).

Heirs of A = executory interest. Could not be a rm. because the preceeding estate is a fee. Thus, no fee upon a fee.

Therefore, Rule does not apply because an executory interest in the heirs is not w/in the Rule. The heirs must have a rm. for the rule to apply.

The executory interest applies only to the heirs of A; in hypo (b), the executory interest applied to the ancestor's L/E and the interest (rm) in the heirs. Thus, in (b), the Rule applied because w/in the executory limitation there is a freehold in the ancestor and a rm in the heirs.

Note, too, that a contingent gift, to the heirs following a term of years would be an executory interest. e.g.,

X → "To A for 99 years as long as he lives, then to A's heirs."

Minnes. hypo (g) —

Rule operates as to rm. in heirs of C. Thus, C = cont. rm for life + vested rm in fee. No merger due to the contingent estates. — Like hypos (c) and (d).

hypo: T — "A for life, rm to the heirs of A."

Lapse

Suppose A predeceases T? This raises a problem of lapse because A predeceased T. Thus, T's heirs could argue that the Rule applied anyway so that upon A's death, his FSA would revert to T and T's heirs would take upon T's death.

LYDICK v. Tate (Ill.) 44 N.E. 2d 583, 145 ALR 1216. (before Ill. abolished the Rule) -

A's heirs could argue that they took by purchase, that the Rule does not apply, and ~~that~~ they would take.

Sec. 312, comment (c), Rest. of Prop. supports the inappli-

cability of the Rule.

hypo: Suppose T → "To A for life, rm. to A's heirs." (1925). Then, in 1927 A renounces his estate.

Renunciation

Q. Does the rule apply? = Rest. of Prop., sec. 312, comment (c), subsec. ____, says YES: (Doctrine of Renunciation: the renunciation relates back to the effective date of the conveyance.) that the Rule applies as soon as the ancestor's (A's) L/E vests, so that when A renounces he will be renouncing a FSA.

® Another argument here would be that the Rule in S/C would not apply because A never had a L/E due to the relation-back of the renunciation.

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hypo: T ⟶ "To A for life, rm to the heirs of A."

It would not be unreas. to say that, where A predeceases T, a whole FSA lapses because if A had lived, A would have had a FSA. Thus, if A predeceases T, we could say ~~that~~ a FSA lapses rather than merely an expectancy.

hypo: X: (fee) ⟶ "To A for life, rm to A's son B and his wife, C and the heirs of their bodies, rm to heirs of A."

Rule would apply, but not merger due to intervening fee tail.

In America, there are no cases on the freehold in the ancestor = F/T. ⊛ Thus, the American Rule requires a LIE in the ancestor.

hypo: X → "To A and the heirs of his body, rm to the heirs of A."

Where De Donis Cond. is in force (all states except Pa. and S.C.), there would be no merger although the Rule in S/C would apply.

hypo: T → "To A for life or until she (A) remarry, rm to the heirs of A."

A = L/E determinable

heirs = cont. rm in fee.

T = ~~possibility of reverter~~ reversion (because of rm. over to the heirs)

T = reversion, not a possibility of reverter, due to rm. over to the heirs.

R/S/C applies, however, to defeat the apparent intent of the grantor because R/S/C = rule of law, not a rule of construction. It is an intention-defeating rule.

NOTE: T could have avoided operation of the Rule by giving A an estate for years determinable.

hypo: X → "To A for life, and if B live to attain age 21, to B for life, rm to heirs of B."

A = L/E
B = cont. rm for life (before B reaches 21) [vested rm. for life (after B reaches 21)]
heirs of B = cont. rm in fee.

Rule applies, but no merger yet.

When B's cont. rm for life vests, merger would then apply.

Was the interest in B an "estate of freehold"? Modern authority says that cont. rms. are estates. Thus, B would have an estate of freehold (a cont. rm. for life). The ~~rule~~ doctrine of merger, however, would not apply until B attain age 21 because, until this cond. occurs, B would have a cont. estate, and merger will not operate on contingent estates. The R/S/C, of course, would apply initially.

Rule of Law

[Remember that the estates of the ancestor and the heirs of the ancestor must be both legal or both equitable. No historical reason for this rule, but that's the law universally.

hypo: X ⟶ "To A for life, rm to T in trust for the heirs of A."
Rule s/c inapplicable.

hypo: X ⟶ "To T in trust for A for life, rm. to the heirs of A in fee."
A = eq. L/E
The heirs may have an eq. cont. rm., or they may have a legal cont. rm. A problem of construction re whether the trust applies also to the rm. in the heirs of A.

Substantial authority supports the finding that the heirs would have a legal rm.

Quaere: Suppose T should convey the legal L/E to A. Would R/S/C apply? = No, because the freehold and the rm. in the heirs would not have been created in the same instrument. (Quaere where the instrument had given T the power to convey, or directed him to convey, to A?)

Assignment - construction of "heirs" in relation to R/S/C.

"IN RE SARAH AND THOMAS"

A FUTURE INTERESTS PROBLEM: TRUSTS

Respectfully submitted by

Maynard H. Jackson, Jr.

PROBLEM: FUTURE INTERESTS

I feel that the advice of counsel is unsound.

The issue here is whether this trust can be reformed or revoked to more closely comport with the intention of the settlor that Thomas have more than a life estate, and that the brothers and sisters, as heirs, have less substantial interests, if any at all.

While the general rule is that in trusts, if a remainder is created, a revocation of the trust requires the consent of all beneficially interested persons, vested and contingent, if in being or ascertained, that rule would not bar revocation by the settlor here. The state of title, at first blush, would seem to be that the trustee has bare legal title, Sarah and Thomas have an equitable life estate by the entireties for their joint lives, the survivor of them has an equitable contingent remainder for life, the children of the marriage have an equitable contingent remainder in fee, the heirs of Sarah have an equitable contingent remainder in fee, and Sarah has the reversion. As will be shown hereinafter, the contingent remainder in the heirs of Sarah is void.

The only party beneficially interested who could have barred revocation (Thomas) has consented thereto. The heirs of Sarah are not, in fact, beneficially interested: the Doctrine of Worthier Title would defeat their remainder and construe a reversion in Sarah. Worthier Title would seem to apply because this was an inter vives transfer of a remainder to the heirs of the transferor by an instrument which created another interest. "Heirs" was used in the general technical sense and not to mean "children", in that "children" was used in the same in-

strument with a meaning different from "heirs".

Although the children of the marriage may be beneficially interested, section 39-6 of the General Statutes of North Carolina makes their consent unnecessary. Under that statute, a voluntary trust may be revoked by the settlor without the consent of beneficially interested parties not in esse, so long as such revocation is with the consent of all other beneficiaries, vested and contingent, in esse.

Therefore, Sarah could revoke the trust. However, I contend that counsel's advice is misconceived because under G.S. 39-6, Sarah need only execute and record a deed of revocation, thereby rendering unnecessary and undesirable the expenditure of time, effort and money incident to an action in equity to reform. Sarah and Thomas apparently intended that Thomas take more and the brothers and sisters of Sarah take less in the event Sarah should predecease Thomas; and, since Sarah would have the fee under this transfer, Thomas would take all as her heir (unless Sarah is survived by her parents or one of them). Further, if Thomas were to predecease Sarah, the heirs of Sarah would take, a result presumptively not inconsistent with the intent of Sarah.

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hypo: X → "To T in trust for A for life, and upon A's death trust to terminate and title to vest in heirs of A."

Rule S/C does not apply.
A = eq. L/E
heirs = legal cont. rem.
The estates not of same quality.

hypo: X → "To T in trust for A for life, and upon A's death T is to convey to A's heirs."

A = eq. L/E
But, is the rem in the heirs legal or equitable? Split of authority (see p. 90 cbk.). Under majority rule, rem is equitable, and R/S/C applies. Sec. 312, comment h, Rest. of Prop. in accord; and see 147 A. 2d 80 (1958, Md.); N.C. in accord (139 N.C. 185). Thus

Rule: [a rm. is eq. where a trustee is directed by the instrument to convey the rem to the heirs.]

*In what sense must the words "heirs" and "heirs of the body" be used?

The rule requires that y must be a lim. of a rm to the "heirs" or "the heirs of the body" in order for the R/S/C to apply.

This point has caused the most litigation in juris. following R/S/C.

The gen. rule is that the grantor must have used "heirs" QUA heirs. That is, "heirs" must have been used in the gen. technical sense indicating those who are to take from generation to generation in a line of indefinite succession (and some authorities add "who take according to the canons of descent").

"heirs"

hypo: (heirs)

X → "To A for life, rm to A's heirs who take according to the canons of descent."

Quaere whether X meant heirs generally or meant only the heirs who would take per canons of descent? The latter would mean a specific group of heirs rather than heirs generally who would take in an indefinite line of succession.

At C.L., "heir" meant the one entitled to take under PRIMOGENITURE (the first son, or all daughters as co-parceners [considered one heir]); and "heirs" meant all generally who would take in an indefinite line of succession from generation to generation. These meanings have come down to the present despite death of

Primogeniture.

Q. Thus, where grantor says "heirs who take according to the canons of descent," what does he mean? = Did he mean only those persons who would take immediately upon the death of the ancestor per canons of descent? =

In most States, the above language is construed as meaning heirs in the ~~the~~ technical sense, and the R/S/C would apply, **all other factors being present.**

Thus, in Archer's Case, p. 211 cbk., the R/S/C did not apply because the rm. was not ltd. to the **heirs generally as a class.**

hypo: X → "To A for life, rm. to those persons who would inherit the land upon the death of X intestate."

Majority rule says

that "heirs" was ~~used~~ intended as in the technical general sense. Rule S/C applies.

Suppo: X → "To A for life, rm to A's heirs and their heirs."

The true test is whether the rm. can be construed to be ltd. to heirs in the general technical sense (i.e., to those who may take from generation to generation in indefinite succession).

See 186 N.C. 221 (1923) — When by be a lim. over to a restricted class of heirs, w/o the use of "heirs" or "heirs of the body" alone, it is indicated (i.e., some proof) that the grantor did not mean "heirs" in the general technical sense: e.g., X → "To A for life, rm. to the heirs of A, but if A never has any heirs, then

to John & Mary." — John and Mary are nephews of A. — This would mean under N.C. law that X did not mean heirs generally, because to single out John & Mary tends to show that X meant a restricted class of heirs, namely, those heirs other than John & Mary.

181 N.C. 158 — If the rm is to "the heirs of A, but if there be no heirs, then to the next of kin of A", the grantor would be deemed not to have meant "heirs" generally in the technical sense.

The peculiar N.C. rule does not comport w/ the majority American rule which would say X meant heirs generally.

181 N.C. 158

QUIZ !! Friday, 2/28/64 on identification of future interests and maybe R/S/C.

89 N.E. 706

Clear Statement (?) ha! : N.C. rule —

North Carolina Rule

a peculiar doctrine. N.C. says where there are superadded words, N.C. follows the English and minority American rule and says that X did not intend "heirs" in the tech. gen. sense. Thus rule would NOT apply.

Exception

Exception: where the "super-added words are "those who would take per the canons of descent", N.C. follows the majority American rule and says that "heirs" was used in the tech. gen. sense, and the Rule/S/C would apply.

N.C. position is a confused one.

QUIZ !! Friday, 2/28/64 on identification of future interests and review

9/2/c

21 Feb. 64

R/S/C will apply inexorably despite intent of the grantor.

England abolished R/S/C in 1935.

Even though R/S/C = rule of law, the ct may have to apply rules of construction to determine whether the conveyance is one which comes w/in R/S/C.

Rule of Construction

⊛ A limitation to heirs, no matter how clearly intended to apply to the first generation of heirs only, will mean "heirs" w/in the general, technical sense, making applicable the R/S/C.

Thus, the American Rule says that the rem. need not necessarily be ltd. to heirs in an indefinite chain of succession, in order for the R/S/C to apply!

Price v. Griffin, 150 N.C. 523 —

"To A for life, and at his death, to his surviving heirs."

Ct held ~~that~~ "surviving" was surplusage and could not affect the legal effect of the use of the technical word "heirs"; that as are no heirs of a living person and "heirs" would necessarily mean the surviving heirs.

163 N.C. 241, Jones Case

"To J & his wife during their natural lives, then to their bodily heirs provided they leave any, and if not to be equally divided among my kin."

Ct held the language "bodily heirs" meant "children" and the rem over to the kids would be contingent upon their

surviving J + his wife.

TRUE TEST (under majority or minority rule)

If "heirs" appears anywhere to be DESCRIPTIO PERSONARUM (descriptive of specific people), the rule would not apply. Thus, here, R/S/C did not apply.

H, v. 6, 184/13 (1922)

Hampton v. Griggs, 184/13 (1922) – discussed another N.C. rule that has had some sporadic vogue: gen. intent v. specific intent. Tried to reconcile w/ Nichols v. Gladden, 117 N.C. ___ .

hypo: X ⟶ "To A and B for life, rm to heirs of A."

Majority Rule: Where One Ancestor = Co-tenant

– The life tenant to whose heirs the rm is ltd takes, under R/S/C, a fee simple in the whole subject to a LE in B (who may be A's wife). – The majority rule. N.C. in accord.

Van Leer 188 N.C. 778

Minority Rule says A would take a F/S in an

undivided half of the property.

Superadded Words: Rule of Construction

If superadded words don't show an intent of the grantor to describe specific persons, they will be disregarded as ~~superadded~~ surplusage.

See Van Leer case, 188 N.C. 778 – heirs and superadded words interpreted to mean children and grandchildren.

hypo: "... rm to heirs share and share alike." – R/S/C does not apply. For R/S/C to apply, the heirs must have been able to take the fee

186 N.C. 510 – express dmt. by grantor that R/S/C shall not apply; has no weight if R/S/C is applicable otherwise.

Co-tenancies

hypo: X → "To A + B for life, rm to the heirs of A and B." — Rule applies and A + B would end up w/ a Joint tenancy in fee.

Our state has a statute wh raises presumption of tenancy in common, then A and B would take fee as Ts in C (N.C.).

hypo: X → "To A and B for their lives, rem to heirs of A." — Rule applies.

View #1 159 N.C. 1 says this would = F/S in A subject to a L/E in B in an undivided ½.

View #2 The Restat. of Prop., sec. 312, R, says A would get F/S in ½ undivided only. — This is said to be "the more logical or better view." Whether this = majority view is uncertain. (Does not matter really since only about 5 states still recognize R/S/c.)

Restat. of Prop., sec. 312, r: R/S/c applies and A = FSA in an undivided one-half of Blackacre. The heirs of A take the rm. in the other undivided ½ as purchasers.

Assign. — Worthier Title.

41 - 2 - TinC

159 N.C. 1 -

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* (Sec. 2) The Worthier Title Doctrine *

Modern Rule: When an inter vivos conveyance of land contains a lim. to the heirs of the conveyor, or an inter vivos conveyance of personalty contains a lim. to the next of kin of the conveyor, such lim. is construed as an expression of intent that the prop. revert to the conveyor. In the absence of an expression of a contrary intent, the conveyor has a reversionary interest and the lim. to the heirs or next of kin is void.

The kind of lim. to heirs or next of kin is immaterial; and the estate wh. precedes is immaterial.

NOTE: Whereas the R/S/C applies to a gift to the heirs of a named ancestor other than the grantor, the D/W/T applies to a gift to the heirs of the grantor!!

At C.L., the language of a lim. of a rem. to the heirs of the transferor, ~~[illegible]~~ was taken as an expression of intent that the transferor retain a reversion.

So, too, this seems to rebut the rule that one cannot convey to himself directly.

Modern Rationale of W/T/D

The current explanation of the existence of the W/T/D is that the doctrine helped to insure the overlord the valuable incidents of descent of land (e.g., primer seisin, wardship, etc.).

The most general utilization of the doctrine today is to enable a settlor to terminate an inter vivos trust which, by its terms, is irrevocable, and such termination suits greatly increased after the stock market crash of 1929.

W/T/D is viable and growing. It applies to real and personal prop. In fact, it probably has most frequent modern application to personalty and trusts.

Effect of W/T/D

Thus, an attempt to create a rm in the transferor's heirs is void. A reversion is deemed left in the transferor.

Two branches of W/T/D: (Inter vivos & testamentary)

(1.) Inter vivos – the attempted gift of a rm. to the grantor's heirs is a nullity, void, totally ineffective. The heirs don't take by virtue of the grant.

(2.) Will – the attempted gift to transferor's heirs is void, BUT here the heirs will probably take. Thus, differing from

Effect of W/T/D here usually is to cut off the heirs altogether.

A gift by will to the heirs of the testator may (residuary estate to ~~B for life~~ ~~then to the testator may~~ testator's heirs) or may not (residuary estate outright to testator's heirs) involve a ~~fut~~ future interest. An INTER VIVOS

transfer to the ~~heirs~~ transferor's heirs must necessarily be in the form of a future interest (A to B for life, then to A's heirs; A to trustee in trust for A for life, then to A's heirs), because of nemo est haeres viventis.

the inter vivos branch, it is not a question of whether the heirs of the transferor will take, but how. Thus, the heirs will more than likely take by intestacy rather than descent.

W/T/D = Rule of Construction

In the majority of juris, cts apply W/T/D as a rule of construction (not intent-defeating if intent to give heirs rem. is clear)

(inter vivos & testamentary)

GEORGIA LAW

Ga. has repudiated expressly and clearly the W/T/D.

Calif., Ill. and maybe Wis. have statutorily abolished the W/T/D.

* Only about 1/2 of Amer. states have the W/T/D.

Restat. of Prop., §314, comment j, says that the wills branch of

54 Mich. L. R. 451 (1956) — W/T/D is dead. But, that stmt. is questionable. See Mich. L. R. cited, titled The Wills Branch of the W/T/D.

hypo: X (fee) "to A for life rm to B and his heirs." B = heir of X. — W/T/D does not apply.

W/T/D does **not** apply if the rm is ltd to heirs not to be ascertained at transferor's death, but at some later time.

The estate limited to the heirs need not be of the same quality as that would be required in R/S/C.

"heirs" — 168 N.C. 530 — Lim to the heirs of transferor means children, W/T/D not applicable. — Gen. rule.

"heirs"

If "heirs" used ~~[illegible]~~ Descriptio personarum, w/T/D not applicable.

Rule #1

If a will devises to one a freehold of the same qual. and quantity as he would have taken by descent if the testator had died intestate, then such an estate passes by descent and not by devise.

Rule #2

If a grantor, who is an owner in FSA, purports to create a L/E (...or an estate for years or defeasible fee) or estate tail w/ a rm to the grantor's heirs, the rm is void, and the grantor has a reversion.

Ellis v. Page, 7 Cush. 161 (Mass. 1851)

If ~~T~~ be a devise to an heir, is he a "devisee" w/in

The meaning of an anti-lapse statute ?=

If the local doctrine of ancestral prop. applies to a devise (1 Blackstone 157, Hearst case; 3 Md. 190) rather than descent, would an heir take by devise ?=

hypo: A → "to B for life, rem to A's heirs." Or,
A → "To T for life for B, rem to T in trust for A's heirs."

Rule #1 deals w/ the manner in wh the heirs take. But, under rule #2, the prop. is taken away from the heir and given to the transferor. Thus, some say this Rule #2 is "the Rule Forbidding Remainders in the Grantor's Heirs" and not really W/T at all.

"Heirs" — In the wills branch, W/T/D applies where "heirs" qua heirs is used or where the rm. is ltd. to a named person who turns out to be the heir at death.

However, Rule #2 applies only where "heirs" is used in the gen. technical sense, i.e., qua heirs.

The rule of construction (W/T/D) is a rebuttable presumption of intent of the grantor to retain a reversion.

It creates a rebuttable presumption that a provision for the heirs of the transferor does not show an intent to give them any interest.

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Under modern law presently, it makes no difference whether one who takes does so by descent or by devise.

NOTE: The w/T/D has little or no applicability today as far as wills are concerned.

N.C. G.S. 41-6 = designed to abrogate destructibility of cont. rms.; to limit Rule v. perpetuities. The statute says that a transfer to the heirs of a living person will be construed as a gift to the children.

This stat. has stirred up much litigation. But, Starnes v. Hill said it does not apply in the case of "A ⟶ To B for life, rm. to the heirs of C." Thus, Rule s/C still lives in N.C.

In N.C. and most states, therefore, the testamentary branch of w/T is a mere ghost.

* Requirements of w/T/D:

(1.) Inter vivos conveyance or transfer.

(2.) Language which in terms limits prop. to "heirs" of transferor, if land, or "next of kin", if personalty, or intestate successors, or equivalent language.

(3.) The instrument must transfer another interest. (i.e., "A → To the heirs of A" has been held in some states to be void for want of a grantee.)

hypo: X → "To A for life rm to B and his heirs." Suppose B = X's heir apparent at effective date of instrument and turns out to be X's heir in fact

upon X's death. — W/T/D not applicable because the limitation must be in terms to "heirs" or its equivalent. Thus, transfer effective.

A = L/E
B = rm. in fee

hypo: Same, but by will. — W/T/D does apply because in the WILLS BRANCH a limitation by will ~~to a~~ named person who turns out to be an heir, is a devise to "heirs." Reason: Heirs under a will are only ascertained at death of testator anyway.

hypo: A (fee) "To B and his heirs, but if B die w/o any children surviving him, then to the heirs of A."

B = F/S S.T.E. Limitation
A's heirs = executory interest.
W/T/D applies + limitation

153 A. 739, 302 Pa. 439 (1931), In re Brolasky's Estate – name case on this hypo.

over is void. However, unlike a rem., the limitation over will be considered in ~~[illegible]~~ construing the estate in B, the prior interest. That would show that A did not intend B to keep the prop. if B did not have any children. Thus, the estate would seem to be a FSD, w/a possibility of reverter in A (premise: W/T applies and y was no interest in A's heirs.)

Thus, after W/T applied:
B = F/S Determinable.
A = possibility of reverter.

28 Feb. 64

Doctor et al. v. Hughes et al. (p. 105)

NAME CASE

Cardozo, J.

This case began the trend toward considering W/T as a rule of construction.

Effect of W/T

W/T operates to create a presumption that the grantor intended a reversion and the supposed limitation over to the grantor's heirs was only designating the way they would take (descent) by law.

Thus, we are concerned w/ determining whether a grantor has clearly manifested intent that the heirs would take a rm, rebutting thereby the above presumption.

This was an action by creditors to satisfy a judgment lien by attaching an alleged

S(fee) → "To T to pay income to S for life, then to pay principal to the heirs of S." S is living and has two daughters.

interest in the prop.

The issue was whether the daughter got any interest in the realty by virtue of the conveyance so that something could be attached by the C^ors.

Held, no. "To transform into a rem what would ordinarily be a reversion, the intention to work the transformation must be clearly expressed. Here is no clear expression of such a purpose." The direction to convey by grantor to trustee was really a stmt. of the rule of law ~~that~~ the heirs would take by descent due to "nemo est haeres" (this conveyance to trustee directed trustee to convey to heirs of grantor upon grantor's death), and that grantor was

presumed to intend a reversion.

W/T = rule of construction. This case establishes that, even though W/T is not mentioned by name.

Cardozo looked at the "four corners" of the instrument to determine the grantor's intent.

Thus, D (daughter of grantor) did not have an estate, but had a mere expectancy.

Quaere: What interests are subject to the claims of creditors?

TESTS: In deter. intent of a grantor to create a rm, the following questions are asked:

(1.) Did transferor mean "heirs" or "next of kin" in the technical sense? = If not, W/T not applicable. If the limitation "to heirs" means that the people to take as heirs are to be

deter. at some time other than at death of the transferor, that is not "heirs" in the technical sense, and W/T not applicable. Wt/authority.

See Gray v. Union Trust Co. 171 Cal. 637, 154 P. 306 (1915) (p. 137 cbk.) – represents wt/author.

If "heirs" is used mistakenly when transferring personalty, or "next of kin" when transferring realty, the ct. will not prevent application of W/T on that ground alone. It will be disregarded as mere loose language.

heirs = realty
next of kin = personalty

(2.) Whether the transferor's language indicative of his intent is suf. to rebut the presumption that he was just intending to describe the descent of the reversionary interest rather than limiting a rm. to the heirs.

You must look at the chain of cases following

Doctor v. Hughes to deter. this question.

(p. 118) Whittemore et al. v. Eq. Trust Co. of N.Y.

Involved a trust for the life of a third party beneficiary, and on that party's death to pay the principal to the settlor, and if settlor is dead to pay per settlor's will; but if settlor left no will, then to pay to those persons who would take per the laws of intestate succession of N.Y. Dealt w/ personalty.

Here, settlor wants to revoke the trust (the most common fact situation today involving w/T). If any person got an interest beneficially in the trust matter, that beneficiary must consent to a revocation of the trust. — Rule

To deter. whether any

beneficial interest was created in one other than the settlor, the w/T/D comes in.

2 March 64

Tenn. says w/T = rule of law, not a rule/constr. But, the majority of states say that w/T = rule of construction.

See Bogert, Trusts, p.624.

Under N.Y. statute, if a Trust is for the settlor for life, and then to those persons who wd take if S died intestate, the S is only one w/ beneficial interest and may revoke the trust w/o any permission from any other persons.

S = settlor

Whittemore: a holding

Thus, if any intestate successors take, they will take by descent from S only.

In N.Y., under R/S/C, the rm. "to the heirs" of the ancestor creates in the heirs

a VESTED (!) rm. subject to divestment, not a cont. rm. as in most places that follow R/s/c. Moore v. Littel (N.Y.)

In Whittemore case, the language on p. 119 (bot., left) causes the trouble. This language must be construed. Somewhat similar is the following:

A → "To B for life, rem to such of B's children ~~persons~~ as B may appoint, and in default of appointment, rm. to C and his heirs."

B = L/E and power of appointment.

B's children = cont. rm. (they are appointees).

C = a rm. vested subject to divestment (Reason: on the "remainderman" is ascertained and living, cts. favor finding a vested rm. due to preference therefor, unless intent otherwise is clearly shown), not a cont. rm.

B = L/E

Whittemore holding

This latter result was the result in the Whittemore case, the finding being that the presumption that S intended to reserve an indefeasible reversion was rebutted by two main indicia of contrary intent:

(1.) Express retention of power of appointment by will only (would have been superfluous and inconsistent if S had reserved reversion); and

(2.) Manifest desire to dispose of ALL of his property.

⊛ Thus, the intestate successors got a vested rem. subject to divestment by the exercise of the power of appointment.

(p. 119) If the language "or, in default of such appmt...." were absent, the S would = reversion.

The intestate successors, therefore, got a "rm in default of appointment.

Assignment: begin working on problem, p.14 of syllabus. Not over two (2) typed pages.

N.C. Law:
REVOCABILITY OF VOLUNTARY TRUSTS

This presupposes that the settlor has not made the trust irrevocable and that all persons in esse, ascertained & beneficially interested have consented

Held (Whittemore case, p. 118), the S cannot revoke because there were some minor beneficiaries (same for unborn beneficiaries) who are incapable of consenting to revocation under N.Y. law, even where the minor beneficiaries are legally represented by guardians, and the like.

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In N.C. (39-6 G.S.) volun. trusts are revocable by settlor unless the trust instrument itself expressly (197/292) provides that the trust is to be irrevocable.

G.S. 39-6 - settlor may revoke a ~~any kind~~ ~~of~~ trust which provides for contingent interests, so long as that is done before vesting. Note: ~~If~~

and provided that the contingent beneficiaries are neither in being nor ascertained.

settlor attempted revocation of a trust wh provides for vested interests, a constitutional question is raised.

In trusts, if a rem is created, a revocation of the trust requires the consent of all beneficially interested persons, vested and contingent (if in being ~~and~~ or ascertained).

General Rule

A trust w/o reservation of power of revocation may not be revoked w/o the consent of all persons sui juris who are beneficially interested.

104 F.2d 144 (9th Cir. 1939)

However, on the power of revocation is reserved the voluntary trust may be revoked w/o consent of beneficiaries.

(272 N.Y.S. 101)

265 N.W. 640 (1936) — Volun. trust may not be set aside or cancelled in Eq., on no right of revocation has been reserved, w/o the consent of the beneficially interested persons, unless, however, the settlor can show fraud, coercion or undue influence.

EXCEPTION

154 P.2d 417 (Cal. Ap. 1945) — on all beneficiaries seek termination of the trust, not allowed on there are some unborn beneficiaries. (Traynor, J., vigorously dissented, saying that representatives of the unborn benes. could speak for them (unborn benes.)).

An owner of prop. has the right to control the disposition of same in future; and any attempt of beneficiaries to do otherwise (e.g., termination) would necessarily be secondary to the wishes of the settlor. Better + majority view.

See 217/171, Wachovia Bank + T. Co. v. Laws — says that ct. of eq. may frustrate wishes of settlor on all benes. consent, or where same would be necessary or expedient. — Min. View.

Epilogue to Doctor v. Hughes

While Doctor v. Hughes held that the intent to give a rem must be CLEARLY MANIFEST, later cases follow a lesser test to justify rebuttal of the presumption-of-reversion. Now, therefore, the intent need not be so clear as Cardozo said in Doctor v. Hughes.

N.Y. cases following Whittemore have distinguished Whittemore as being based on the existence of minor beneficiaries, and, as a result, more trusts are permitted to be terminated. Note: these later cts. seem to ignore "nemo est haeres viventes."

Reversion Presumption—Rebutting factors:

e.g., S → T in trust for S for life (or for A for life), then to pay principal to PERSONS S

(1) Express reser. of power to control or dispose of the prop. (e.g., testamentary power of

would appt. BY WILL, in default to [heirs, next of kin, intestate successors, or persons who wd inherit]." — As intended to retain a reversion, the underlined phrase would be superfluous. Thus, rm. may be argued.

"... in default of appointment"

appointmt.). The reser. of power would be superfluous if settlor has reversion; thus, rm. may be inferred.

(2.) A provision of ultimate disposition of prop. upon happening of other contingencies showing that settlor is willing to part w/ power of disposition.

(3.) Disposition of immediate bene. interests to persons other than the settlor.

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[On S retains immediate beneficial interest, it may be inferred that he gave away the ultimate rights in the res. — This was the factor in the Whittemore case on which the ct. based its finding of a rm.

If factor #1 plus one of the other two co-exist, rm will usually be

found; and, if either #2 or #3 exists, rm will usually be found.

NO CONSENT OF T^EE to REVOCATION REQUIRED

*Universal rule: consent of T^ee to revocation of trust not required because he is not "beneficially interested" in the sense that ~~will~~ such phrase is used. T^ee only stands to gain fees, and that is not a beneficial interest in the trust res.

City Bank Farmers Trust Co. v. Miller (p.129)

Marilyn O'Brien (née Miller) executed will on 4/23/31 wh provided for disposition of the gen. estate and for a testamentary trust.

On 7/26/1935, M.M.O'B. executed inter vivos trust. When she died on 4/7/36, the inter vivos trust still had about $63,000.

M.M.O'B.'s husband, Chester Leo O'Brien, claimed

Held, rm was created (rm. was Hd. to take effect upon default of execution of testamentary a power of apptmt.). But, on appeal, held that a reversion was retained in the settlor, and no rm was created.

against the will, alleging that the residue in the inter vivos trust should pass under the residuary clause to settlor's heirs at law (her husband, her father and mother).

Lower ct held (inter alia):
(1.) Absent fraudulent conveyance to defraud H of his stat. intestate share, W (the settlor, M.M. O'Brien) has the right to dispose of her prop. as she pleases during her lifetime or by will.

(2.) When S (Marilyn) set up trust reserving to herself income for life with the corpus' disposition also provided for, then the entire corpus or trust res had been disposed of, and a rm. may be inferred.
But, J/P rvsd. on appeal! Held, for Ds.

Power of Appointment

* When a power of appt-ment is exer., title passes under the instrument creating the power & not under the instrument exer. it.

Chester L. O'Brien was an intestate successor of M.M.O'B.

The trust deed of 7/26/35 said that any resi-due would go to the person(s) appt'd by S, but that in default of apptmt, the intestate successors would take.

181 So. 410
(Ga.) 185 S.E. 102

* Gen. rule/author says that a residuary clause does not execute powers of apptmt. on no reference thereto is made.

N.Y., Mich., Calif., Pa., N.C. (117/122; but see 152/351; 191/198

* Minority rule says that the residuary clause executes power of apptmt. despite absence of reference etc.

On appeal, held that a reversion was re-tained, and that the fund passed to the executors of Mrs. O'Brien subject to the

right of election of her surviving spouse and the administration of the fund in accordance w/ her will.

Thus, creditors got $3,000 and the remaining amt. was divided by Mr. O'Brien and S's parents.

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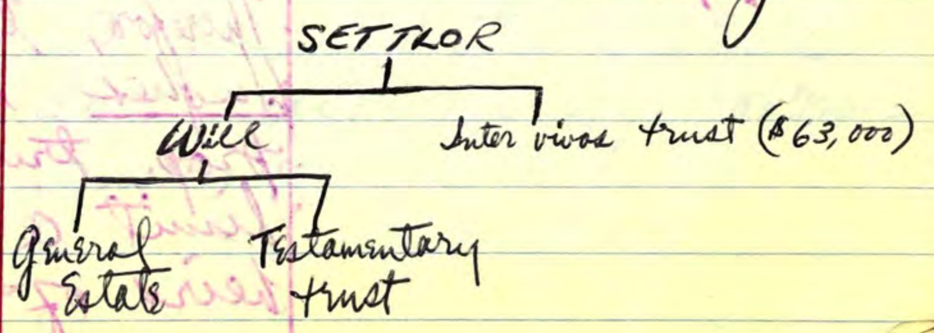
On settlor has a L/E in a trust and testamentary power of disposition by appointment, C^ors may reach the trust under N.Y. law; it's against public policy to set up spendthrift trust out of reach of C^ors:

Claims of C^ors on a decedent's estate are superior to all devisees and legatees.



RESULT IN MILLER CASE

Thus, the inter vivos trust was construed to reserve a reversion rather than create a rm; and, thus, the remaining amt. in the I/V trust passed via the will (residuary clause) to the mother & two sisters and to her widower via his intestate elected share.

Re method of distribution to the heirs under the will after O'Brien got his $30,000 (under N.Y. law, surviving spouse gets 1/2 stat. share on if are no children) see cbk, p.136 (PRO RATA ABATEMENT — probably more equitable of the two methods).

See sec. 314, Comment A, Rest/Prop. — states W/T/D as it was at C.L.

Therefore, the law after Doctor v. Hughes is that, re real prop. trusts, an intention to limit a rm over to the heirs of the grantor must

be made clear in terms.
Later, the N.Y. cts said that an intention to create a rm. may be manifest by an indication thereof. Thus, much less evidence is now required than Cardozo in Doctor v. Hughes stated.

(see p.139) Richardson v. Id: factors that rebut presum:

(1.) Full, formal disposition of the corpus of the estate (i.e., the principal on certain contingencies)
(2) S made no ~~reversion~~ reservation of power to grant or assign during life.
(3) S reserved only a test. power of appt.
(4) S failed to provide for return of principal or any part thereof to S upon any contingency.

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Thus, under N.Y. law today, the net effect of these cases is to make the W/T/D sound like this: that to reserve a reversion, the grantor must spell out the requirements therefor in order to avoid a finding of a rm.

NEW YORK W/T/D TODAY

The question in all these cases is: who owns the future interest? — This question arises on:

(1.) S attempts to later alienate, devise or bequeath the estate.

(2.) On cors of S, or of the presumptive heirs on the other hand, are trying to reach the interest as one of their debtor.

(3.) On federal tax official is trying to reach the interest in the i/v trust

alleging that S retained reversion.

(4.) Or one is seeking ct. decree to terminate a trust.

(5.) "Royal family foul-up." e.g. or S has thought that he provided for all w/ the plain use of plain words, but later finds out that the applicable rules of the Law foul up that desire (w/T/D). Thus, then S wants to change the status.

Study:
1. Mimeo. materials
2. Rts/entry + poss/reverter

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Tax Consequences: Estate Planning

In planning estates, beware the reversionary interest for tax purposes. Reason: at the very least, the settlor may be liable for the value of the reversionary interest; and S may be liable tax-wise for the full trust fund.

Speigel v. Commis'r.
335 U.S. 701

S will be taxable if:

(1.) Beneficiaries are to take only if they survive S.

(2.) S would be liable anyhow for the value of his reversionary interests, whatever they be.

If a limitation over to S's heirs is determined to be a reversion under W/T/D, the entire trust estate is includable in S's gross estate for tax purposes. See Speigel v. Commin'r. 335 U.S. 701. — Taxable (whole trust) to S if:

(1.) S reserves any power of appmt.

(2) If S = life bene. of trust.

Those two are true regardless of existence of rm. or reversion.

If one dies owning any descendable fut. int., the value thereof will be includable in his estate. Thus, in drafting, eliminate the descendable nature of the fut. int. from the decedent's estate. — If taxed here, where does the money come from? (Remember: fut. int. not usually a liquid asset; thus, it's hard to sell.) The I.R.S. allows some relief by allowing postponement of tax, ~~but~~ you must pay 4% interest and post bond.

hypo: [Example of non-descendable revers. int.] X (fee) "To A for life then upon A's ~~estate~~ terminating for whatever reason, ~~death, to revert to X if X~~ rem. to B and his heirs if X be not then living. ~~is still living~~

If X predeceases A, X would not have qualified for the reversionary interest.

Note: the value of the reversion must exceed 5%, in value, the value of the gross estate.

Re reversions for tax purposes, if the limitation over to the benes. will vest only on the benes surviving the grantor or settlor, then regardless of elimination of the descendable quality, S will be taxable for the value of it.

e.g., an insured has "incidents of ownership"

If an insured has a reversion in the proceeds of the ins. policy, whether by operation of law, due to the policy or any other documents, or for any other reason the proceeds of the policy will be includable in insured - decedent's gross estate for tax purposes.

represented before ct.
fully competent
consent

TRUSTS

A trust (irrevocable) can be revoked only by or on all persons bene-

Y is no implied power of revocation. If a trust is revocable by nature, that must be expressed clearly.
— The right to revoke will be implied, even absent expressed power of revocation, on the sole bene. = S.

"CONSENT RULE" — on the consent of all benes. is obtained, any trust may be revoked regardless whether the trust is irrevocable because it does not expressly provide for revocation, or whether expressly irrevocable.

ficially interested are
(1.) represented before the ct,
(2.) fully competent, and
(3.) Consent to the revocation.

Doctrine of Virtual Representation: on contingent remaindermen (whether unborn or whether merely unascertained) are represented by someone who may represent them (usually some member of the class who is born though unascertained). **Usually**, the representative must not have conflicting interests. (However, Calif. goes so far as to say that a prior estate holder may represent! Quaere this on the cont. rm. can cut short the prior estate).

The statute of N.Y. (see Cblc. p. 145) abrogated the Whittemore case so far as trust termination is concerned.

7[6]

Quaere effect of G.S. 41-6 on w/T/D in N.C.?

16 March 64

"Heirs"

In order for w/T/D to apply, the word "heirs" or equivalent language must be used. If "heirs" be construed to mean "children" or otherwise than heirs in the gen. technical sense, w/T/D does not apply.

If transferor says "those who would take under the laws of descent of N.Y.", the majority rule says that = "heirs."

But, if transferor says "(same) as they now exist", the majority rule says w/T/D does not apply. Generally, therefore, if the transferor says that "heirs" is to be determined at any time other than at his death, or

Gen. Majority Rule

under laws not existing at his death, or in a place other than the place of his death, the majority rule says that W/T/D does not apply because "heirs" was not used in the gen. tech. sense.

G.S. 41-6 — (p. 47, supra)

Would 41-6 apply to this conveyance: A (fee) "to B for life, rem. to the heirs of B." ? = No. Starnes v. Hill, 112/1, decided this exact question by saying that if the legislature had intended to abrogate the R/S/C, it would have said so explicitly. Thus, "heirs" would not mean "children" as 41-6 provides un there be a freehold limited to the ancestor of the "heirs." ~~[illegible]~~

However, under 41-6, A (fee) "To B for life, rm to the heirs of C", would be

Scott v. Jackson 257/658 (1962)

construed as meaning "children".
See Scott v. Jackson, 257 N.C. 658 (1962).

For all practical purposes, the testamentary branch of W/T/D in N.C. has been abrogated because we (N.C.) abolished "ancestral property doctrine" wh allowed W/T/D some last few breaths.

And the inter vivos branch of W/T/D has been abrogated due to 41-6 unless a contrary intent has been expressed.

Thompson v. Bass. Read
168/333

Ferrel v. Clanton - Read
271/391 - modified
Thompson v. Bass - Read

18 March 64

(Chap. 3) **Rights of Entry and Possibilities of Reverter**

(R/E and P/R)

e.g. [P/R] A (fee) to B & his heirs so long as no liquor is sold on the premises.

P/R – the interest left in the transferor who creates a FSD (or a FSCond. before the statute De Donis Conditionalibus [only in S.C. and one western state]).

(FSCond. nonexistent in all states except S.C. and one other.)

Hervis v. McSween (S.C.) 106 S.E. 2d 913

Distinguishable contingent fees:

1. F/S on special lim. (FSD)
2. F/S S. + C. S.
3. F/S on cond. lim. ← (Alternative name for #5.)
4. F/S cond.
5. F/S subj. to exec. interest

Not necessary to express, per major. view, the reverter in the grantor because it arises automatically by the grantor's creation of less than he had.

Minority view: must express the reverter. Name case: 166 N.E. 218 (1916, Ill.).

166 N.E. 218

Rule of Construction

The law frowns on defeasible fees. Thus, since absolute interests in prop. are favored, any ambiguity will be construed to find an absolute int., not a contingent interest.

139 A.2d 291 (1958, N.J.)

Thus, for safety's sake, draftsmen should spell out the reverter ("so long as, etc., and no longer" will suffice).

Re language necessary to create defeasible fees, see 139 A.2d 291 (1958, N.J.).

Rule of Construction

FSSTCS favored over a FSD. That is a constructional preference.

Rule of Construction

Gen. rule of construction: an instrument will be construed most strongly against the grantor!

242/311 (1955)
350 U.S. 983 cert. den.

Statement of purpose, w/o

more, does not create a defeasible fee. Precatory language = language merely expressing desire.

R/E: Definition

R/E (or Power of Termination) — that estate ~~left~~ created in the transferor after conveyance of a FSSTCS.

Rule

Clauses of re-entry must be expressed.

Examples:

1. Reverter clause.
2. Null & void clause.
3. Rt of entry or possibility of term. clause.

→ 4.

R/E is a future interest CREATED in the transferor who transfers a FSSTCS. It can never be created in a transferee. Thus, no R/E on F/S subj. to an exec. int. is created.

Rule Against Perpetuities

(p. 153) Proprietors of Church in Brattle Square v. Grant

This created a F/S on cond. lim. (or subject to an exec. lim.). Thus, y was no fut. int. in the transferor. But, the ct. ultimately held that the exec. lim. was void as against the Rule Against Perpetuities, and that, therefore, the proprietors of the Church got a FSA.

("life in being plus 21 years", must vest w/in ...).

20 March 64

Hypo: A (fee) "to Trustees of B church for church purposes; if used for non-church purposes, then to C and his heirs."
— Trustees have F/S subject to an executory interest in C. Thus, A retains nothing.

However, the executory interest in C may or may not vest w/in life in being

Rule Against Perpetuities

plus 21 years; thus, the executory int in C is void as w/in the Rule v. Perpetuities (R/P). The interest or lim. over MUST vest w/in lives (or a life) in being plus 21 years to be valid. (*) If, at the effective date of the instrument, there is a possibility that the lim. over may not vest w/in lives in being + 21 yrs, the lim. over is void.

Brattle Square Holding

Church in Brattle Square v. Grant held that once the lim. over is void as w/in R/P, the fee in the ~~grantee~~ transferee will not be avoided. Since the transferor retained nothing, the transferee will get a FSA.

hypo: A (fee) "to Trustees of B church for church purposes; if

used for non-church purposes," then to revert to A and his heirs." — Trustees = FSSTCS; A = R/E. A's R/E would be unaffected by the R/P.

R/P

*Gen., all fut. interests in a transferor are exempt from the R/P. Only fut. interests in the transferee (cont. rms. + exec. ints.) are subject to the R/P.

R/P

R/P is a rule against remoteness of vesting. Thus, vested remainders are not subject to R/P.

Exec. Interests

Exec. interests can never vest in interest before it vests in poss.

R/E not a presently legally enforceable claim; its a mere power. Upon breach, the holder

of the R/E must bring an action to terminate. The holder of the R/E must elect upon the breach.

As between FSD & FSSTCS, the latter is preferred because the law favors vested interests and the FSD is more easily determined (i.e., ended).

FSSTCS requires:
1. Words of gen. lim. (e.g., "To A & his heirs")
2. Words of condition.
3. Clause providing (in most states) ~~for~~, upon breach, for forfeiture, or that the transferor may enter & terminate, or that the deed will be null & void (NOT IN N.C.), or for reverter to the transferor.

FSSTCS requires two (2) things to happen in order to end it:
1. Breach of Cond.
2. Affirmative action by holder of R/E.

FSD requires only the happening of the breach in order for the FSD to be ended.

What language is necessary to create R/E?

Yes — Gray
8 Pick. 284
No (major.) must have it
Post v. Weil, 22 N.E. 145

To create R/E, must there be language showing the power of term. in the grantor, or will

280 P.2d 514 (1955)

the mere expression of the cond. be suff.? **Majority** says that language showing power of term. must be used. Post v. Weil, 22 N.E. 145.

Minority rule: mere expression of cond. is suffi to raise R/E. Gray case, 8 Pick. 284.

If ambiguous language is used, cts. favor ~~usu~~ finding that such language is precatory and does not create R/E. Contra: 280 P.2d 514 (1955).

In this situation, language held usually to create a ~~contract~~ covenant, and grantor has only an action for damages upon the breach.

Waiver of R/E

K

conduct

214 N.C. 121 (laches)

Waiver of R/E

R/E may be waived by K, or may be waived by conduct. See 214 N.C. 121 (laches barred R/E).

Cts divided on whether mere inaction by holder of R/E = waiver.

Gifts to Charities: Brattle Square Church case involved gift to a charity w/ gift over to an individual. Major. view says that a gift to a charity and then a gift over to a non-charity on a remote contingency is w/in the R/P. — whether the gift is to a charity first ~~this~~ is material only in juris. on the R/P is construed as a "rule suspending the power of alienation" rather than "against remoteness of vesting." In such juris., the gift over to the indiv. would **not** be **void** as ~~against~~ w/in the R/P. — NOTE THIS.

Assignment: read all remaining cases in chapter.

23 MARCH 64

hypo: T (fee) "to the P Society for Society purposes so long as the land is used for Society purposes, then to A, B, C, D and T."

The FSD and the FSSTCS can be distinguished from the F/S on exec. lim. In the latter, you always have a lim. over to a third party after the fee, and nothing would remain in the transferor. But, in the FSD and in the FSSTCS (or, F/S on special lim.), there is no lim. over after the defeasible fee, and the transferor has an interest remaining in him.

Thus, here this is a FS subject to an exec. lim.; and the exec. lim. is void as w/in R/P, even though the transferor was named as one of those to whom the exec. lim. was ltd.

The P Society, therefore,

Effect on Preceding Estate of Void Limitation Over

was left w/ an estate wh must be determined in regard to ~~the~~ T's intent. (*) The gen. rule is that on the lim. over is void, the transferee (P society) would ord. get a F/S/A, because T divested himself of everything. However, on this situation arises, we must look to see whether T INTENDED that P Society's estate be continued after breach of the cond. even though the lim. over is void. Thus, here the T apparently intended, looking at the instrument's language, that P Society should have the land only so long as the land was used for Society purposes; therefore, the P Society would have ~~an estate "in the nature of~~ a FEE SIMPLE DETER., and T would have a

possibility of reverter. See First Universalist Society of North Adams v. Boland, p. 163 cbk. (155 Mass. 171, 29 N.E. 524, 1892).

And see Institution for Savings in Roxbury and its Vicinity v. Roxbury Home for Aged Women, 244 Mass. 583, 139 N.E. 301,

Charities

Perpetual trust for a charity is not subject to R/P. Transfers to charities are strongly favored.

Limitation to one charity w/ a lim. over to another charity upon a remote contingency, is not subj. to R/P. A true exception to R/P. Reason: policy favoring charities.

This is said to be like a perpetual trust for a charity.

On cy is a gift to a non-charity w/ a gift over to a charity on remote contingency, that would be subject to R/P. Same on cy is a gift to a charity w/ a lim. over to a non-charity upon a remote contingency. Same on cy is a gift to a charity upon

a remote contingency w/o a prior gift to anyone.

All of these rules may be changed by statute. See G.S. 36-21 wh ~~makes~~ prevents all gifts to charities from failing due to indefiniteness of beneficiary. But, quare gift to a non-charity w/ lim. over to a charity upon a remote contingency? In Re Brown's Estate, 165 N.W. 929 (1917, Mich.) held ~~that~~ this type of statute did not apply to a gift to a non-charity w/ lim. over to charity. Compare 228 N.C. 458 (dicta).

Law in N.C. not clear ← on this point.

228/458

25 MARCH 64

G.S. 36-21 — re gifts to charities.

Wms. v. Wms. 215 N.C. 739

Gift to charity in N.C. will not fail for indefinite duration, and that's consistent w/ the general rule against perpetuities. R/P is not a rule against indefiniteness of duration, but against remoteness of vesting.

Gen. Rule: charities and the R/P

Therefore, other than a gift to a charity w/ a lim. over to another charity, R/P applies to gifts to a charity. See Williams v. Williams, 215 N.C. 739.

Two views of R/P:

(a.) C.L. view — R/P = rule against remoteness of vesting.

(b.) That R/P = rule against suspension of power

of alienation.

Y is a separate and distinct "rule against restraints on alienation."

Further, y is a rule against indestructible private trusts wh may last longer than lives in being plus 21 years. This rule against excessive duration of trusts is followed in the majority of states and, where applicable, will invalidate the entire trust; it will be void. — This is even though the trust interest is vested. Reason for this rule: to prevent attempts to circumvent ~~attempts~~ the R/P.

Am. Trust Co. v. Williamson
228/458

Inst. for Savings in Roxbury v. Roxbury Home for Aged Women (note, p.166)

HYPO: X (fee) "to A and his heirs so long as the prop. is used for residence; if used for non-residence, then to B B and his heirs." — Gift over to B is void as v. R/P.

HYPO: X (fee) "to A and his heirs, but if used for non-residential purposes then to B and his heirs." — Gift to B void as v. R/P.

But, the effect of the two hypos is different, per Roxbury case. Roxbury case involved a case like hypo #1. This was a gift to a non-charity w/ lim. over to a charity, and R/P applied to render void the lim. over as too remote. — The Home for Aged Women ("B" in ~~the~~ hypo #1 above) tried to argue that the R/P did ~~not~~ apply

because this was a gift to a charity w/a lim. over to another charity. This argument failed: the first gift was to a non-charitable corp.

Thus, the Institution for Savings got a ~~FSD~~, ~~and the grantor~~ F/S subj to exec lim.; since the exec. lim. was void, then the Inst. for Savings may be said to have a FSD with a possibility of reverter in the grantor.

What is the crucial time for determining this? (Follow this up, M.H.T.!!)

[See Burby in this area.]

* Quaere Effect of Failure of Exec. Limitation —

A F/S S.T.E.L. may become a FSA in certain situations upon the failure of the exec. limitation; but ...

(1.) Where the possessory int. is of the kind that ends of its own force (FSD ~~—~~ ~~————~~), the failure of the exec int. has no

R/P = rule of law, not of construction. It is intent-defeating.

effect on the possessory interest. ~~on the poss. int. is of the kind that ends of its own force~~ - This is the **major** view and is the **Roxbury** case. Boland case in accord. Contra: McMann v. Consistory etc., 75 A.2d 122 (Md., 1950)

(2.) Where poss. estate does NOT terminate automatically upon happening of ~~the~~ an event, the effect of the failure of the exec. int. depends upon the intent of the grantor as gathered from the instrument as a whole.

(The overall issue in this immediate area is the effect of a void exec. int. on the prior poss. estate.)

It is usually ~~intended~~ assumed that the grantor intended that the poss. estate should end only if the

interest over is valid. Brattle Square Church case.

3 APRIL 64

[NO CLASS ON 3-27-64 and 4-1-64.]

hypo: A → "To X Church deacons so long as a minister resides on prop., and when he ceases to reside, then to B and his heirs."

X Church deacons = FSST EL.

B = exec. lim. WHICH IS VOID UNDER R/P.

Quaere the effect of the failure of the exec. lim. on the prior poss. estate? Roxbury case in point: X church deacons would have a FSD, not a FSA, because the possessory interest of the deacons was of the kind that ends of its own force irrespective of the interest over in B. — This rule applies on the poss. int. is a "base fee," but

would not apply only
is an estate in the first
taker which is subject to
a cond. subsequent.
In the latter
case, on the exec.
int. over is void,
the answer will de-
pend on the intention of
the grantor as gathered
from the instrument
as a whole. See
Brattle Square Church
case, p. 153.

Brown v. Indep. Baptist Church of Woburn (p. 169)
The exec. devise over to
10 legatees was void
under R/P. Thus, they
did not take the
land that way. But,
upon breach by the
Church, the legatees
took, under the residuary
clause of the will,
as holders of the poss.
of reverter.

[R/E and P/R are
not subject to R/P.
Thus, "you may do in

ASSIGNMENT: ALIENABILITY OF R/E AND P/R.

two ways what you cannot do in one." S.J.D. See McMann v. Consistory etc., 75 A.2d 122 (Md., 1950).

QUESTION (1), (p. 162) —
Cts. do not favor divesting (forfeiture) of estates even in favor of the grantor. Thus, the FSSTCS is favored because that is more likely to become a FSA.
This could have been construed as a FSD w/a P/R in the testatrix. But, she could not devise a FSD and devise the P/R in the same clause.

Q. (2) - **Practically**, the land become more freely alienable and was put back in the free channels of commerce. The Church in Brattle Square could alienate now. Cf. Brown case: the title in Brown case is unmarketable because it is a FSD wh will

last only so long as used for the propagation of the church's purposes.

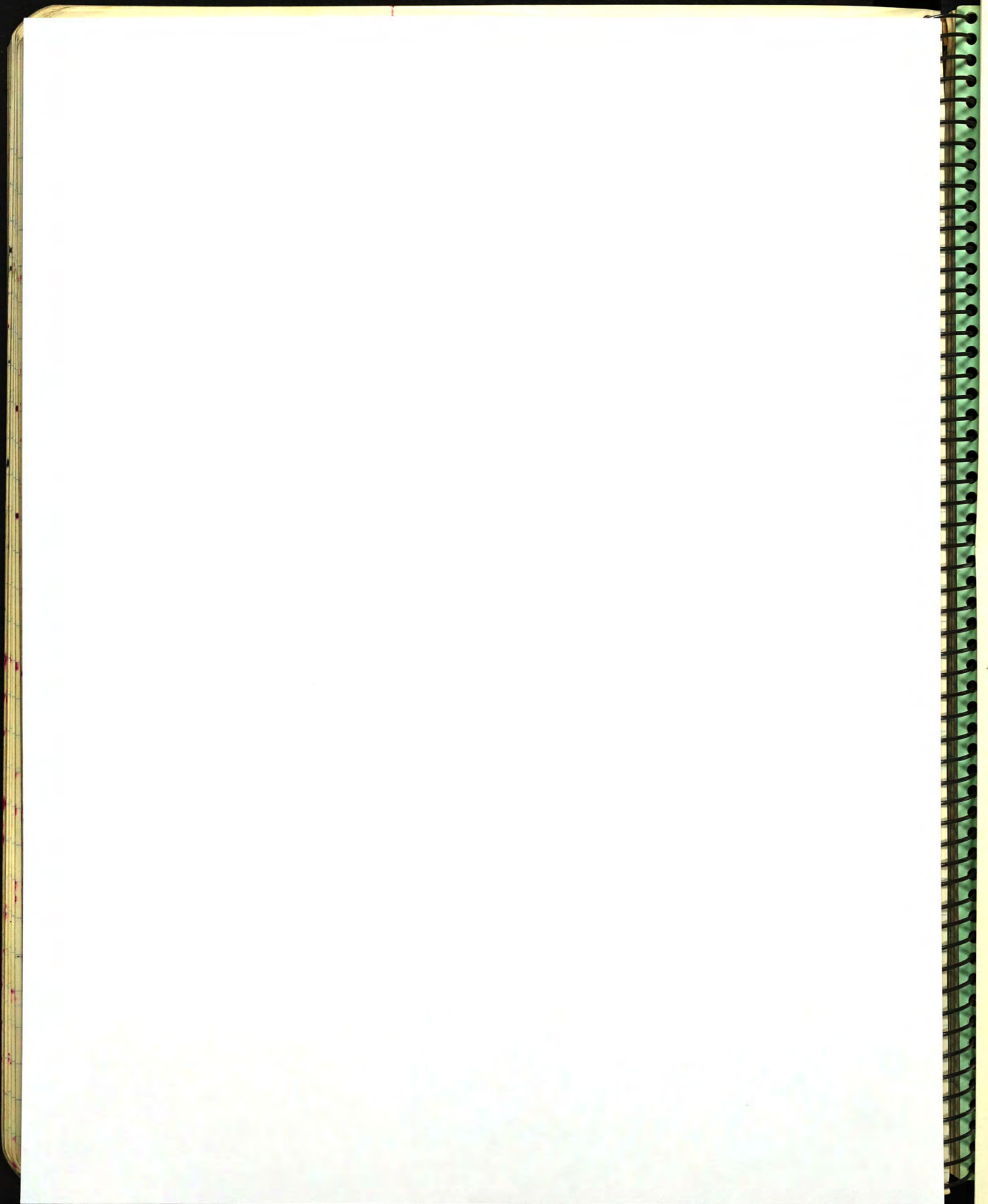
6 APRIL 64

370

Exec. interests cannot vest in interest before they vest in possession. Restat. of Prop., sec. 370.

Drafting carefully can circumvent the R/P. e.g. A shifting gift to a third party transferee can be made valid despite remote contingency by placing the interest in some category that is not objectionable from a doctrinal point of view.

hypo: A(fee) "To X Church so long as used for ~~third~~ church purposes, then to B & his heirs." — B's gift void; but if it were put in another clause of the will, then it ~~would~~ be



FUTURE INTERESTS

Final Examination

Mrs. S. J. Dedmond   May 18, 1964

Part II

1. leave at 9:45

Thomas Reed devised Blackacre "to my son, Sam, for life, then to my daughter, Dora and her heirs if she attain age 21," and Whiteacre "to my wife, Wilma, for life, then to my daughter, Dora and her heirs if she attain age 21." At the time of the testator's death, Sam was dead and Dora was 18 years old. Wilma dissented from the will and elected to take her statutory share of the decedent's estate. Two years after the testator's death, Dora attained age 21.

Will Dora be entitled to the possession of Blackacre? Whiteacre? Give reasons for answer.

2. 10:10

John Gray, owner in fee simple of a tract of land, conveyed it "to the City of New Dover, so long as a golf course is operated on the land, and if the City ceases to operate a golf course, then to Paul White and his heirs." After operating a golf course on the property for 35 years, the City closed the golf course and proceded with plans to erect a fire station. White sued the City to enjoin it from erecting the building and to recover the possession of the land. The sole heir of John Gray, a cousin, Luke Collins, intervened in the action, claiming title in himself.

For whom should the court render judgment? Why?

3. 10:35

H and W, husband and wife, conveyed land by deed to A for life, with the provision that upon the death of A, the land shall go to the living issue of A, in fee simple, share and share alike; but if A shall have no children at the time of his death, then the land shall go to the heirs at law of H and W, in fee simple. There was also added this further provision in the deed: "The intent and meaning of this deed is that A shall have and hold the land herein described during the term of his natural life; at his death the land shall go to his living issue or children, in fee simple, and if at his death he have no living issue or children, then the land shall go to the heirs at law of H and W, his wife, in fee simple, share and share alike."

not heirs

H and W are dead and A is still living. A has acquired, by proper deeds from all of the lineal heirs of H and W and from all of his own (A's) children, whatever interest they had in the property. All spouses joined in the various deeds and no grantor was under any legal disability. A and his wife tendered D a fee simple deed to the land under a contract to convey, and upon D's refusal to accept the deed, sued for specific performance.

(a) Would specific performance be granted in view of the provisions in the deed from H and W? Explain.

(b) Would your answer be different if the "further provision" had not been inserted in the deed?

4. 11:00

Bessie Tyler devised all of her real property "to the children of my only sister, Mary, for their lives and for the life of the survivor of them, and then to Mary's grandchildren and their heirs forever." In a residuary clause of her will, the testatrix devised and bequeathed all the residue of her property to her brother, Walter. At the time of the testatrix's death, Mary was 82 years of age and she had two children, Alma and Bertha. After the deaths of Alma and Bertha, Walter took possession of the real property and brought an action to quiet title in himself. What decree? Why?

5. 11:25

T died in 1950 leaving a will containing the following clause: "I loan to my son, S, my homeplace where I now live containing 91 acres more or less to him his lifetime and then to his widow, W, her lifetime or widowhood then to his nearest heirs." S died intestate in 1955 survived by his widow, W, and two children, A and B. S's widow, W, is incompetent and her guardian has instituted a special proceeding to obtain a court order for the sale of the land, alleging that his ward, W, owns it in fee simple. Is his contention correct? Give reasons for answer.

6. 11:50

State X instituted a condemnation proceeding for the acquisition of a tract of land known as "the Edwards tract." After the acquisition was completed and an award made, a question arose as to whom the proceeds should be paid. The parties agreed that their claims depended upon a construction of a deed executed by J. B. Edwards in 1940, the granting clause of which read as follows:

> "For and in consideration of love and affection and 10.00, the receipt of which is hereby acknowledged, I hereby convey my property known as the "Edwards tract" (described) to my wife, Alice, and her heirs the children of J. B. and Alice Edwards in fee simple."

It was also agreed: that at the time the deed was executed and delivered, J. B. and Alice had two living children, Clarence and Dolly; that three years later, another child, Emma, was born; that in 1945 Clarence died intestate leaving two children, Clarence, Jr. and Frank, surviving him; and that Alice Edwards died intestate in 1951.

Who is entitled to share in the proceeds of the condemnation award? Why?

7. 12:15

T died in 1961 leaving a will containing the following clause:

> "Item 6. The remaining one half of my property, real and personal, I devise and bequeath to my son, S, in trust for the following purposes:
> (a) To hold, manage, exchange, convert, sell, lease, improve, invest, and keep invested in such stock, bonds, and other securities and properties as shall from time to time be deemed by said trustee to be in the best interest of my estate.
> (b) To pay over the net income monthly, or as often as in the judgment of my trustee her needs shall require, to my wife, W, during her lifetime.
> (c) After the death of my wife, to divide and distribute the trust property, discharged of the trust, in such manner as may be agreed upon as follows: one half to himself, S, and one half to my daughter, D.

T's daughter, D, survived T but predeceased W. She left surviving her husband, H, and one child, C. H and C each claim a one fourth interest in the trust property. R, the residuary beneficiary in T's will, claims he is entitled to one half interest. How should the trust property be distributed? Why?

(1) Devise of P/R

Effective as a devise of the possibility of reverter.

Thus, a testator may devise the interest after a deter. fee, provided he does not attempt the devise in the same clause that created the deter. fee. Woburn case.

There are other drafting techniques: e.g., (1) "To X church for 999 years so long as the premises are used for church purposes, then to B and his heirs." — B's interest = vested rm. in fee, and not subject to R/P. Church = estate for years deter.

(2) Vested Rm.

(2) "To X church so long as, etc." (by one deed). By another deed, the transferor assigns his P/R "to B and his heirs."

(3) Assignment of P/R

 "unwisdom"?

Majority rule says that P/R is alienable inter vivos. R/E not alienable. (N.C., as of 2-1-64, says that all future interests are alienable. G.S. 39-6.3. This is indicative of the modern trend in U.S. toward free alienability.)

39-6.3

(3) Transferor can K w/ transferee to tie up the land indefinitely. R/P applies to conveyances, not Ks. The K must be supported by good and suff consid. [E.g., After A → X church, X church Ks w/ A to give interest to B and his heirs.] Consid. ~~of the~~ purchase of the prop. Not suff to supply consid. for the K.

(4) Contract

On land is tied up, it is "inconveniently fettered" in language of Rest/Prop.

If a grantee (A) has an estate (defeasible fee) that may be terminated in favor of a third party (B), that offends the R/P. B's interest would be void if expressed in a will or deed of A or B. (Quaere ?)

(upon a remote contingency) ←

Walker v. Marcellus & Otisco Lake Ry. Co. (p. 174)

(Read carefully!)

Transferor was trying to reserve in herself a vested defeasible fee and transfer to the transferee a future interest upon a remote contingency. This was not allowed.

The fut. int. was more like an exec. int. than a P/R.

The R/P was here applied to an exec. int. of the springing type, and not the usual shifting type. See Simes on this case.

8 April 64

At C.L., no fee after a fee. But, what did that mean? Technically, it meant that once a grantee was given a fee, no following grantee could take a fee. But, this seemed to apply to only shifting interests w/in New York law as far as exec. interests are concerned, and not to springing interests.

C.L. R/P = rule v. remoteness of vesting.

When R/P is interpreted as a rule against the suspension of the power of alienation (as under early N.Y. statutes), then the R/P does not apply to all fut. interests, in that it would apply only to fut. interests on the grantee of the contingent fut. int. is either not in esse or not ascertainable.

Thus, under N.Y. law, the following transfer would not offend the R/P

because A and B could join to transfer in alienating the interest:
X (fee) "To A and his heirs so long as lime kiln is maintained on the premises, then to B and his heirs."
Note, however, that under present N.Y. law, the above transfer would offend the R/P because N.Y. law (R/P) has now been interpreted as being a rule against remoteness of vesting as well as a rule against suspension of the power of alienation. If the R/P were interpreted only as the latter, the above hypo would NOT be w/in R/P.

hypo: X (fee) "to A and his heirs one year from date of this deed."
R/P. This would not offend

N.Y. law follows both C.L. theories re R/P: rule against suspension of power of alienation, and a rule against remoteness of vesting.

Shifting – int. goes from a transferee to another transferee.

Springing – interest springs from the transferor to a transferee other than the first grantee.

No case on point re what the nature of a future int. following a FSD is; but it is generally believed to be an exec. int.

When dealing w/ N.Y. law, you'd have to consider both theories of the R/P, and if a transfer offends either N.Y. theory, it will be void.

The gen. belief in America is that the C.L.

rule was one against remoteness of vesting, a broader theory than the theory of a rule against suspension of the power of alienation. The C.L. theory reaches all contingent fut. interests.

"VESTED" — if the fut. int. though contingent though ltd. to an ascertained person, that person would have a "vested right to a future contingent estate." (See pp. 175, 176.) This is one of four (4) meanings of "vested".

(52/481; 118/422) → One who makes the ~~per~~ happening of the contingency impossible will generally not be allowed to benefit therefrom. Walker case.

Alienation of Defeasible Fees —

FSSTCS is alienable inter vivos, descendable,

and devisable; but any taker from the grantee thereof takes subject to the R/E in the orig. grantor.

A cond. ~~[illegible]~~ which is contrary to public policy is of no force and effect. e.g. Most restrictions based on race.

Courts will not quiet title on the finding of a breach of cond. would be premature and would work a forfeiture, despite the change of circumstances surrounding the property. See Strong v. Shatto.

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186 P. 596 (1919), Los Angeles Invest. Co. v. Gary – restraint on alienation to a non-Caucasian was void; but restraint on occupancy by a non-Caucasian was acceptable.
#1 (cont'd) – cond. against remarriage is valid in gift from one spouse to another; but some authority to the contrary.

Conditions that are void:
1. Conds. placing total restraint on marriage, even on y is a gift over upon breach.
2. Restraints on alienation due to race.
3. Restraints due to religious beliefs are generally VALID; but y is some authority saying these, too, are against public policy as violative of the policy favoring freedom of religion.

Covenants are favored over conds. because the latter often lead to forfeiture, and y is a judicial bias against forfeiture.

Effect of Changed Conds. – The gen. rule: that conds. in the community have changed so that it would be inequitable to enforce

conds. subsequent, is not justification to warrant quieting title against the conds. Strong v. Shatto, 45 Cal. App. 29, 187 P. 159 (1919). Contra: 10 P.2d 496 (1932); 250 P.2d 292, Townsend v. Allen (1952).

Where covenants, rather than conds., are involved (depends on a matter of construction), the cases of Sheilds v. Barrow and Shelley v. Kramer are the law [RESTRICTIVE COVENANTS]. Shelley v. Kramer held that any State ct. injunction or other eq. relief in support of racially restrictive covenants would be State action and denial of equal protection. While Weiss case, 225 S.W. 127 (Mo. 1949) held that action for dams. would lie against one breaching the restrictive covenants, Sheilds v. Barrel(?), 346 U.S. 249, held that no action

(346 U.S. 249
334 U.S. 1
3 ALR2d 441

Weiss, 225 S.W. 127 (Mo. 1949)
28 N.C.L.R. 442

242 N.C. 311 - conds.
cert. den. 350 U.S. 983

would lie for dams, thereby extending the Shelley rule. (Note: under Shelley v. Kramer, the restrictive covenants are valid as between the parties.)

How is R/E exercised?

1. Eq. action to quiet title ~~after~~ already forfeited for breach of cond. subsequent. This way eq. is not declaring a forfeiture, but quieting title already forfeited (162 P. 709), provided that it is clear from the instrument that the parties intended that forfeiture occur upon breach.

2. Ejectment (at law) - some states require that the granter be given notice as a cond. precedent to the right to maintain the action (applies also to eq. action). N.C.

168/271

requires no notice to grantee; just commence action. See 168 N.C. 271.

Upon breach, no automatic revesting in grantor. Must re-enter ~~at~~ or begin action. 168 N.C. 271.

If grantor is in poss upon breach, no action by grantor is required.

Defenses to claim of forfeiture:

1. Changed conds. – usually no defense except on the conds. are construed as restrictive covenants or eq. servitudes. And see 140 N.E.2d 577 (w/ author.); contra author. however.

2. Tax sale has been held. E.g., on grantor brings action against ~~grantee, but y has been~~ a purchaser at a tax sale (56 P.2d 1127), the purchaser ~~of the~~ would

be deemed to have gotten a better paramount title and would defeat R/E. (N.C. unclear.)

(3.) Failure to bring action w/in stat. (66 S.E.2d 495, Va. 1951) of lim. See G.S. 1-41, 1-35, 1-38, & 1-40.

(4.) Laches

(5.) Waiver by owner of R/E (or power of term). See 200 P. 1051, Cal. 1921. e.g. Waiting too long to bring action.

(6.) On breach is unintentional and involves only failure to pay money by grantee.

(7.) Unforeseen events. E.g., on perf. of conds. was impossible. 136 N.E. 772 (36 Harv. L.R. 758). If some interested (118/422) party prevented perf. of conds. by grantee, that = added reason for denying forfeiture. Also, on govt. 26 A. 469 (Conn.) on action renders perf. impossible. 152 F.2d 735 (10th Cir., 1945).

152 F.2d 735

Legis. Devices to limit R/E + P/R:

1. Mass. has model act (p.172 clk.)

There has been limiting legis. because the R/E and P/R are ~~not~~ favored because they tie up property and are not subject to R/P.

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Alienability

There is a difference between legal and marketable title. There may be legal but unmarketable title.

Legislation –

There are various types of statutes wh affect interests that take effect after the enactment of the stat. –

1. ~~those~~ creating a fixed period of time w/in wh the interest (future, contingent) must vest, or in the alter-

native, that type of statute wh applies the R/P. see Mass. statute, p. 172. — The Mass. stat. on p. 173 can be circumvented by limiting the ~~interest~~ cond. or restriction as to time (e.g., "for 1000 years").

The Minn. stat. on p. 186 imposes a mandatory time limit. Thus, thereunder, any ~~interest~~ covenant or condition lasting longer than 30 years will be void thereafter; and y is a S/L on enforcement of R/E of 6 years after breach. This "fixed duration" type of stat. is followed in Ill. w/ 50 year limit.

(2.) Legis. affecting interests limited to take effect before the statute — y are definite constitutional problems here: due process, impairment of K, and state constitutional prohibitions against civil ex post facto laws.

(Federal ex post facto applies only to criminal statutes.)

Best way to avoid these constitutional problems is to include in the statute a declaration of legislative purpose and ends desired to be accomplished.

83 N.W. 2d 800

(3.) Mass. (1956), Minn. (1945) have "marketable title" statutes which require periodic registration of P/R and R/E (also N.Y. - R.P.L. 345 (1958)). See re upholding retroactive application of Minn. statute (above, this para.): 83 N.W. 2d 800 (1958).

R.P.L. 345 (1958)

N.C. has statute only saying that all future interests are freely alienable.

hypo: X (fee) "To A & his heirs, but upon express cond. that the land will be used for ~~(certain purposes)~~ residential & private purposes), and if not

so used X or his heirs may enter and term. the estate." (A gets FSSTCS). Five years later, X conveyed "all right title and interest" to B and his heirs. Later, X died testate and devised "to C & his heirs." Y is X's sole heir. Then, two years after X's death, A leased to D corp. ~~Later, Y~~ for biz purposes. Later, Y enters, evicts D corp. and notifies A that he was terminating A's estate. Then, C comes forward and notifies Y and D that he is terminating Y & D's "interests." Thus, C = Plaintiff. Will C prevail?

The ISSUE is whether R/E is alienable inter vivos, devisable and descendable? Majority Rule says that R/E is inalienable inter vivos and that any attempt to alienate

Alienability Inter Vivos of R/E

inter vivos would extinguish the R/E (see Rice v. Boston & Worcester Railroad Corp., p. 187). Under that rule, therefore, B got nothing, C got nothing, & Y got nothing. Thus, C would lose.

A would, ∴, get FSA & the lease would be valid.

However, Simes says the better rule is that the R/E is not extinguished. Thus, under the better rule, B got nothing, C got the R/E by devise and would win over Y and D corp.

R/E: Descendibility and Devisability

By the majority view, R/E is freely descendible and devisable; and by the better, but "minority" view, R/E is freely alienable inter vivos.

R/E: Alienability inter vivos: Minority Rule ("Better Rule")

However, an R/E is annexed to a reversion, the R/E is freely alienable (along w/ reversion) inter vivos (since 1540).

Inalienability of R/E Inter Vivos: EXCEPTION

Holder of R/E must elect to terminate upon breach and enter (at C.L.). Today, holder of R/E need only start action and notify the Tenant; no entry is required after breach of the cond.

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hypo: A and B (fee) "To C and his heirs so long as used for school; if cease, then prop. to revert to [A + B]." That was 1930. In 1945, A conveys "to D & his heirs" all his right, ~~title~~ & interest in whiteacre and blackacre (both held jointly by A & B). In 1945, A died leaving A, Jr. as his sole heir. In 1950 the cond. is breached by D. Will A, Jr. get anything? Wt. of authority says that P/R is alienable inter vivos.

North v. Graham, 85 N.E. 267 — represents the C.L. view that P/R not alienable, but that any attempt to so alienate it would have no effect on it and would not extinguish it.

At C.L., P/R not descendible either. It was thought that an heir would take by representation, seisin being required.

Today, the modern law says that P/R is freely alienable inter vivos. Therefore, in the hypo, when A → "To D & his heirs", that was valid. Therefore, upon breach, B got ½ by his P/R, and D got ½ by his P/R.

Minority view follows the view that P/R is not alienable, but attempt to alienate it would not destroy it, and the P/R can descend

to the heir (unlike C.L. view of representation).

Right of Entry

EXCEPTION: on R/E is annexed to a reversion (and no merger applies).

Helms v. Helms, 137/206 — see this (N.C.)
– R/E not alienable in the absence of statute. This is the general rule, too, and the wt/author.

P/R is devisable or it is descendible.

P/R + R/E not regarded as estates at C.L. But, the modern trend is to treat them as estates.

§1–57 of G.S. of N.C. (Real Party in Interest Statute) – grantee of realty held by adverse possessor is the real party in interest. (Quaere)

169 N.C. 75 – (dictum) attempt to alienate inter vivos a R/E will extinguish it.

G.S. 39–6.3 (1961) applies only to transfers after date of stat.

271 N.W. 193

31 A.2d 819 (1943)

— Any vested future interest is freely alienable inter vivos, descendible + devisable.

Re cont. rems. and exec. interests, there are three views (see Simes, pp. 102–106). C.L. view was that none of the five fut. interests was alienable inter vivos except the reversion; but there were three exceptions to that rule:

(1) Release (true exception)

(2) Estoppel (217 N.C. 639)

(3) A conveyance was supported by valuable consid., eq. will treat and enforce it as a K to convey.

Assignment: Chap. 4.

Review:

1. Reversion
2. Remainders
3. Exec. Interests
4. Stat. of Uses (see Moynihan).

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Read Moynihan on S/U, pp. 163-215

(CHAPTER 4)

REMAINDERS AND EXECUTORY INTERESTS

Methods of transferring freehold at C.L. —

(1.) Feoffment — not written; when "charter of feoffment" was used, it was only evid. of the transfer and did not operate per se to transfer the land.

(2.) Fine

(3.) Common Recovery

Later, when a remainder came to be recog., it was created by a grant, not livery of seisin.

What future interests could be created at C.L.? = There were four:

(1.) Reversion
(2.) P/R
(3) R/E
(4.) Remainder

The only fut. interests possible to be created in a transferee are:
(1.) Remainder
(2.) Executory Interest

Thus, only the rem. was a fut. int at C.L. that could be created in a transferee.

All reversions are vested, but y are two categories:
(1.) Those vested indefeasibly.
(2.) Those vested subject to defeasance.

REVERSION –

DEF. – The residue of an estate left in a transferor after he has transferred an interest of lesser dignity than that of the transferor. It is created by operation of law, not by act of the parties.

Three requirements:
(1.) Estate in transferor.
(2.) Transfer of a lesser estate.
(3.) Residue & interest left is a reversion.

Rule of Construction: When technical words are used in conveyances, courts tend to give them their tech. meanings.

REMAINDER –

Created by act of the parties. ✱ Any fut. int. created by a transferor in favor

of another if it and all preceeding estates are created by the same instrument, if, upon expiration of the preceeding estate it may become possessory, and if it is not preceeded by a fee simple, is a remainder.

hypo: X(fee) "To A for life, rem. to B in fee, but if B fail to survive A, then to C and his heirs."

A = life estate
B = cont. rm.
C = cont. rm.
X = reversion (subject to defeasance).

There are ALTERNATIVE CONT. REMAINDERS here.

A cond. of ~~survivorship~~ survival will not be implied.

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The possibility of enjoyment plays no role in the classification of fut. interests.

A possessory estate (i.e., "particular estate") always preceeds a fut. interest.

Not even a tortious act wh ends the particular estate will defeat a vested fut. int.

A vested rem. and a reversion are indestructable and freely alienable everywhere. Thus, they may be reached by C^ors, and are subject to voluntary and involuntary transfer. Both, though vested, may be divested. Neither the rever. nor the rem, is subject to R/P. A Life tenant is subject to an action by the remman or reversioner for waste; and some states say the L/T can forfeit for waste. The L/T can be compelled to pay current

operating expenses.
Neither the rever. nor vested rm. will take effect in derogation of the prior estate nor after an interval of time ("gap").

Rever. v. vested rm. —
Rever. is created by oper. of law; rm. created by act of the parties. Rever. always in transferor; rm. always in transferee. ⊗ Rm. can never follow a fee simple estate, not even a cont. rm. A rm. cannot cut short or take effect in derogation of a prior particular estate.

REMAINDERS —
Essential elements:
(1.) Fut. interest & all preceding interests must be created by the same instrument.

2. May become possessory, immediately upon ~~said~~ expiration of preceding estate.

3. May not be preceeded by a fee simple. Thus, the preceeding particular estate may be a 4/E, F/T or, in some states under modern law, a term of years. (At C.L., a cont. rem. following a term of years was absolutely void.)

Two basic ideas inherent in classification of future interests:

1. "GAP" – an interval of time ~~that~~ during which, by the terms of the transfer, no transferee would be entitled to possession.

At C.L., no gap in seisin was permitted, and there could be no estate in futuro.

2. DIVESTMENT – taking

effect in poss. prior to the normal expiration of the particular estate.

Vested rm. will never be preceded by a gap.

Rm. will take effect whenever and however the preceding particular estate terminates.

A vested rm. can be divested.

Three categories of vested rms. –

1. Indefeasibly vested rm.
2. Rm. vested subject to partial divestment ("subject to open"). This means ∃ is a cond. subsequent wh will operate to partially divest the rm.
3. Rm. vested to total divestment – Cond. subsequent wh will operate to ~~#~~ totally divest the rm.

e.g., X(fee) "To A for life, rm to B and his heirs, but if B predeceases A, then to C & his heirs."
A = life estate.
B = rm in fee subject to exec. interest.
C = exec. int.
Thus, B's int. is two things: 1. Rm. vested subject to total divestment (2) Rm ~~in~~ fee subj. to exec. interest.

hypo: X(fee) "to A for life, rm ~~to~~ as A by will appoints, and in default of appointment and until A appoints, ~~to~~ to B & his heirs."
A = L/E & power of appmt.
B = vested rm. subj. to total divestment.
appointee = exec. int.
B's int. could be construed as a cont. rm; but since ~~y~~ is some ~~doubt~~ doubt, the rule of construction that vested interests are preferred will warrant

Power of apptmt. = interest in land; always vested.

the conclusion that B's rm. is vested subj. to total divestment.

CONTINGENT REMAINDERS -

Always subject to a cond. precedent other than the normal expiration of the particular estate.

Not long after the recog. at C.L. of cont. rms. the rule developed that a rm. would fail if it does not vest at or before the termination of the preceeding estate. i.e., DOCTRINE OF DESTRUCTIBILITY OF CONT. RMS.

Cont. rm. may or may not be preceded by a gap, depending on subsequent events.

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Three old rules of C.L. that prevented many future interests:
1. No transfer of an estate to commence in futuro.
2. No gaps in, or lapse of, seisin.
3. No fee upon a fee.

Springing interests not recog. at C.L. because they were CERTAIN to be preceeded by a gap.

Always possible for a cont. rm. to be preceeded by a gap.

hypo: X (fee) to B for life, rm. to the heirs of C". C is a living person. B later dies and X took poss. after B's death. Then, C died, leaving as his sole heir S. Then, S v. A in ejectment. Who prevails? First, the effect of the initial transfer was: B = L/E, heirs of C = cont. rm; X = Reversion. The contingency of the rm. is

that the heirs become ascertained at or before B's death.

Effect of B's death: ended LE, destroyed the cont. rm. and seisin reverted to X. At C.L., once seisin returned to the grantor, there was no way to get it out of him except by transfer.

Therefore, J/X.

Hypo: Same, but C died before B. —

The rm. would have vested, w/ enjoyment being postponed until B dies. Also, the reversion of X would be divested.

When B, the life tenant, dies, the rm. in the heirs of C would become possessory.

Contingencies may be as to:

1. Ascertainment of persons.
2. Event.

When eg is a lim. over after a cont. rm., it will most often be construed to be a rm. wh may vest subj. to divestment, by the lim. over being an exec. int.

If an interest is ltd. to take effect AT the termination of the particular estate, that int. = RM. Thus, an int. following a L/E deter. = rm. e.g., X ⟶ "To A for life or until A remarry, then to the children of A."

If an int. is ltd. in such a way that it was intended to take effect AFTER the term. of the particular estate, it CANNOT be a rm. That would be an exec. int. in the nature of a "springing use" (one which cuts short an estate in the transferor).

If int. ltd. to take effect BEFORE natural term. of prior particular estate, that fut int CANNOT be a remainder. That will be an exec. int in the nature of a "shifting use" (one which ~~casts~~ cuts short an estate in the transferee). This operates in derogation of the the prior particular estate.

Archer's Case

p. 211

The transfer created a L/E in Robert, w/ a cont. rm. in fee tail male in the next heir male of Robert. (See p. 211 for abstract under "NOTE").

When the L/T tortiously enfeoffed Kent, the cont. rm was destroyed.

(NOTE: today, no one can

transfer more than he had. But, at C.L. a L/T could convey a F/S (tortious feoffment).

R/S/C would not apply because there was no rm. to the "heirs" of the freeholder in the general technical sense. This rim. was to the "next heir male" of Robert.

Thus, this was the theory of the tortious alienation of a fee simple by a L/T, and the theory of premature term. of the L/E by forfeiture.

So, in deter. whether a gap can occur, remember that a L/E ~~could~~ can term. premature-ly by forfeiture (not today) and merger.

If the L/E may or can possibly prematurely term, = rm. If such is certain = exec. interest.

24 April 64

What is the effect on a fut. int. upon the failure of a prior int.?

If a cont. rm. was ltd. following a L/E, the L/T could prematurely end the L/E before the cont. rm. vested. On that happens, the cont. rm. is destroyed.

If a fee tail holder suffered a common recovery, he could "bar the entail" (Taltarum's Case); i.e., he could destroy a rm. (even vested) and a reversion.

L/T could be given a power of appointment to appoint the taker of the fee, and if y is a vested rm. following the L/E, that rm. = vested subject to being divested by the exercise of the power of apptmt. This is another way to destroy the

(D/D of C/R)

Three ways to destroy cont rms —
1. By natural term. of prior particular estate.
2. By premature term. of prior particular estate.

future interest.

* Doctrine of Destructability of C/R is now primarily obsolete. But, some states still retain the Doctrine.

Inherent in D/D of C/R are the following concepts:
1. Seisin
2. Transfer of the land by feoffment accompanying the transfer of poss.
3. No estate could be ltd. to commence in futuro.

When cont rms were recog., the "in nubibus" theory arose in an attempt to rationalize seisin. That theory said that seisin passed out of the transferor and hung in the clouds until the

Doctrine of D. of C.R. abolished in Ga. and most states by statute.

244 N.C. 142, (1956) - Doctrine of D. of C.R. not abolished by statute, but the "trend of judicial decisions" favors the conclusion that the doctrine is abolished.

fut. int holder qualified to take.

Cont rm could also be destroyed by forfeiture and by merger:

1. Doctrine of Merger - on one has two successive vested estates, the smaller will be swallowed up by the larger. Since cont rms were not thought to be estates at C.L., they could not merge; and on a cont rm came between two successive vested estates in another, the doctrine of merger would still apply and operate to squeeze out the cont. rm. — A method of premature termination of the particular estate so that a cont.

rm is destroyed.
Intervening vested rm. cannot be squeezed out because there would be no two successive vested estates. If there were an intervening cont. rm. between two vested estates in the same person, there would still be considered to be "successive vested estates" because, at C.L., there was the theory that there was "nothing between the vested estates, thereby making them "successive."

Merger would kill a cont. rm. but would not prevent the initial lim. of a cont. rm. Thus, an EXCEPTION to Doctrine of Merger squeezing out a cont. rm. is on the merger & the cont rm came into

existence simultaneously. One theory says the two vested successive estates merge subject "to open up." Another theory says there will be no merger at all. In any event, the cont. rm. will survive.

preferred view ←

Any merger occurring after the initial creation of the cont. rm will destroy the cont rm (if the contingency had not yet occurred, of course), all other factors being present.

2. Forfeiture – a cont. rm is destroyed by the forfeiture of the L/E. By tortious feoffment, the L/T would lose at once his L/E but would create the fee simple sought to be conveyed (at C.L.).

Assignment – Stat. of Uses

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Archer's Case — the Doctrine of Destructibility of Cont. Rms. would be applicable here but for the applicability of the exception to such rule (creation of merger & cont. rm. simultaneously will not destroy the cont. rm; merger will be deemed to have occurred, but subject to "open up" to let in the rm. when the contingency occurs).

This doctrine of D. of C.R. was not later extended to eq. cont. rms and to personal prop. even though future interests therein were recognized later.

PELLS v. BROWN p. 214

Common recovery could destroy all rms (cont. & ~~~~~~~~ vested) under Taltarum's Case. However, here

this fut int was not destroyed; that this was an executory devise and could not be destroyed by the common recovery.

The classification of the future int here depended on whether the interest in Thomas was a fee tail or a fee simple. If the court interpreted "w/o issue" to mean indefinite failure of issue, Thomas = fee tail, and the fut int = rm. But, court decided on definite failure of issue (the dominant English and American view), thus compelling the view that a fee simple was created in Thomas w/ an exec. devise over in William. The fee simple in Thomas was defeasible. There could be no rm. after a fee, therefore Wm had an exec. devise.

At C.L., a tortious feoffment by a L/T left a right of entry in the holder of the next vested estate.

G.S. 41-4 - definite failure of issue assumed absent contrary intent expressed.

G.S. 41-1 - converts fee tail into fee simple

Thus, an exec. int. is indestructible by the holder of a particular estate.

Rule against Perpets. was not violated because the exec. int. in William must take effect w/in lives in being and 21 years.

See 241/629 (1955)

29 April 64

hypo: X(fee) "to A for life, then to B and his heirs if B survive A."

This is a L/E in A, cont. rm. in B, w/ reversion in X.

However, this could be, and has been, interpreted to be a vested rm in B subject to divestment.

In this hypo, there is no possibility of a gap here (barring possibility of premature term. of the L/E) because B will either survive A or be dead when

A dies.

Rule of Law

* PELLS v. BROWN, (p. 214), held that E/I are indestructible. Name case. This made R/P necessary. Also, this clarified "w/o issue".

"w/o issue"

American constructional preference is for definite failure wh is rebuttable by evidence tending to show that "indefinite failure of issue" was intended. And, generally, "definite failure" in U.S. means that there be no issue surviving — not merely born — at the death.

RULE OF LAW:

Purefoy v. Rogers

After Pells case, the rule evolved, thru Purefoy v. Rogers, that a fut. int. wh could take effect as a cont. rm must take effect as such, if at all. i.e., an interest will not be classified as an exec. int. if it is capable

of taking effect as a rm.

Purefoy v. Rogers (p. 222)

⊛ This case demonstrates the doctrine of the destructibility of a C/R by premature term. of the L/E.

Also, this case estab. the rule that an int. will not be classified as an E/I if it is capable of taking effect as a remainder.

ALTERNATIVE CONTINGENT REMAINDERS

⊛ Remember: ∃ can be alternative cont. rms.

Hypo: X → "To B for life, & on B's death, to B's surviving children & their heirs, then to C and his heirs."

B = L/E

B's surviving children = cont. rm.

C = cont. rm. (alternative)

X = reversion

Thus, we have alternative cont. rms.

Caveat!! ⊛ ∃ can be no vested rm. after a cont. rm (very few exceptions). C's interest

could not be a rm.
vested subject to divest-
ment because that
would require the
interest of the sur-
viving children of B to
operate in defeasance
of C's interest, and

Caveat!! a rem. never works
to, prematurely, defeat another estate.

There can be an
E/I after a cont. rm.;
e.g., X → "to B for life,
+ after B's death to C
if C shall have attain-
ed age 21; then to C
and his heirs, if C
shall not have attain-
ed age 21, when he
attains that age."

RULE OF LAW: Thus, any interest
following a C/R can
only be another C/R
or an E/I.

The alternative C/Rs were
found in Loddington v.
Kime, p. 227.

hypo: X → "to A for life, then to such of B's children as attain age 21." B has four children, 2 over 21, 2 under 21. — Two views on this:

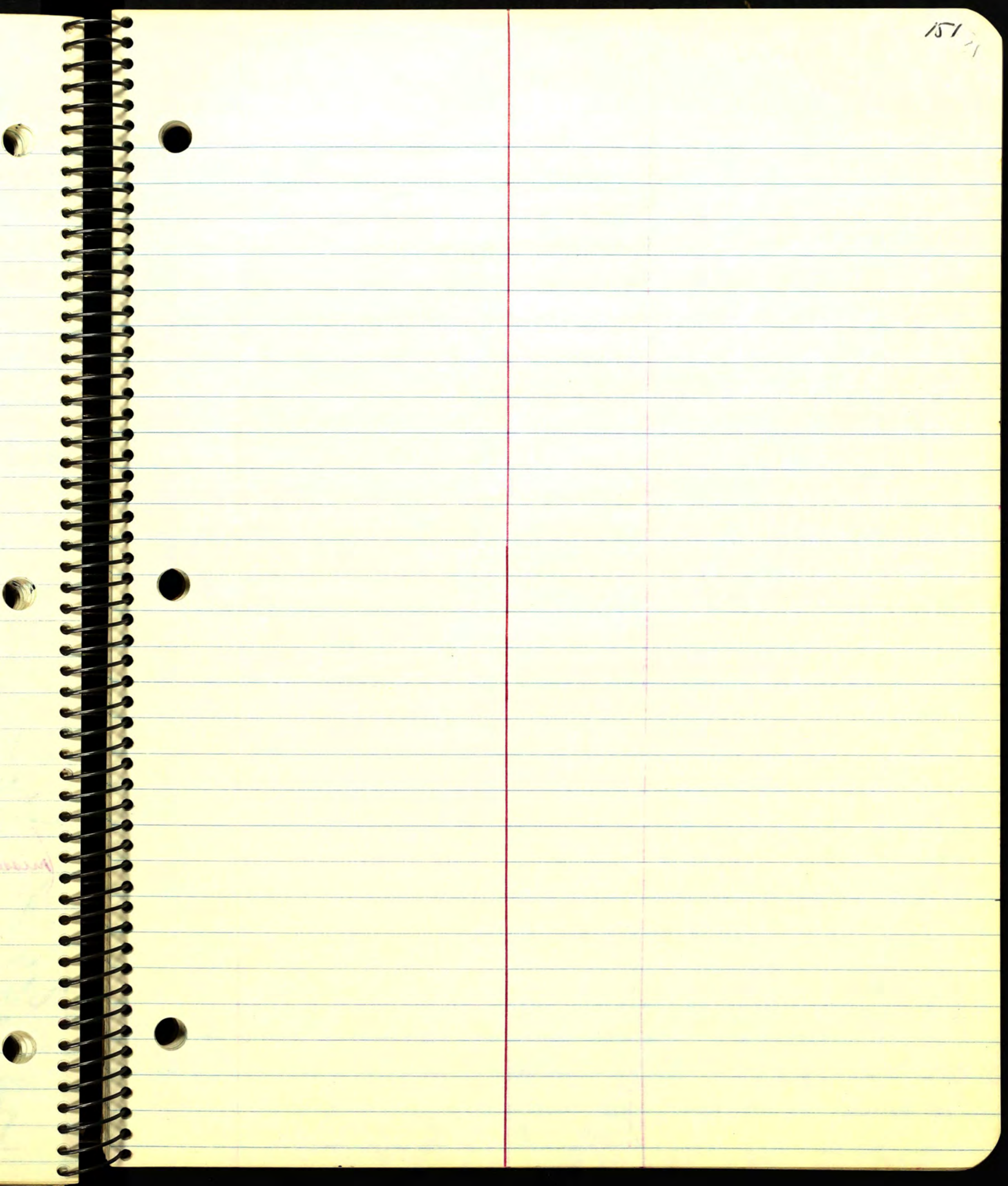
(1.) One view — class gift here, and all interests must be capable of taking effect, at the time of the transfer, as cont. rms. or the whole thing will fail. Reasoning: the gift to the class is capable of taking effect as a rm.; thus, under Purefoy v. Rogers, it must take effect as a rm. Now, given a rm. in a class, ~~the~~ if we were to say that the 2-under-21 kids had a vested rm., then that would be saying that their interests were capable of partially divesting the rm. of

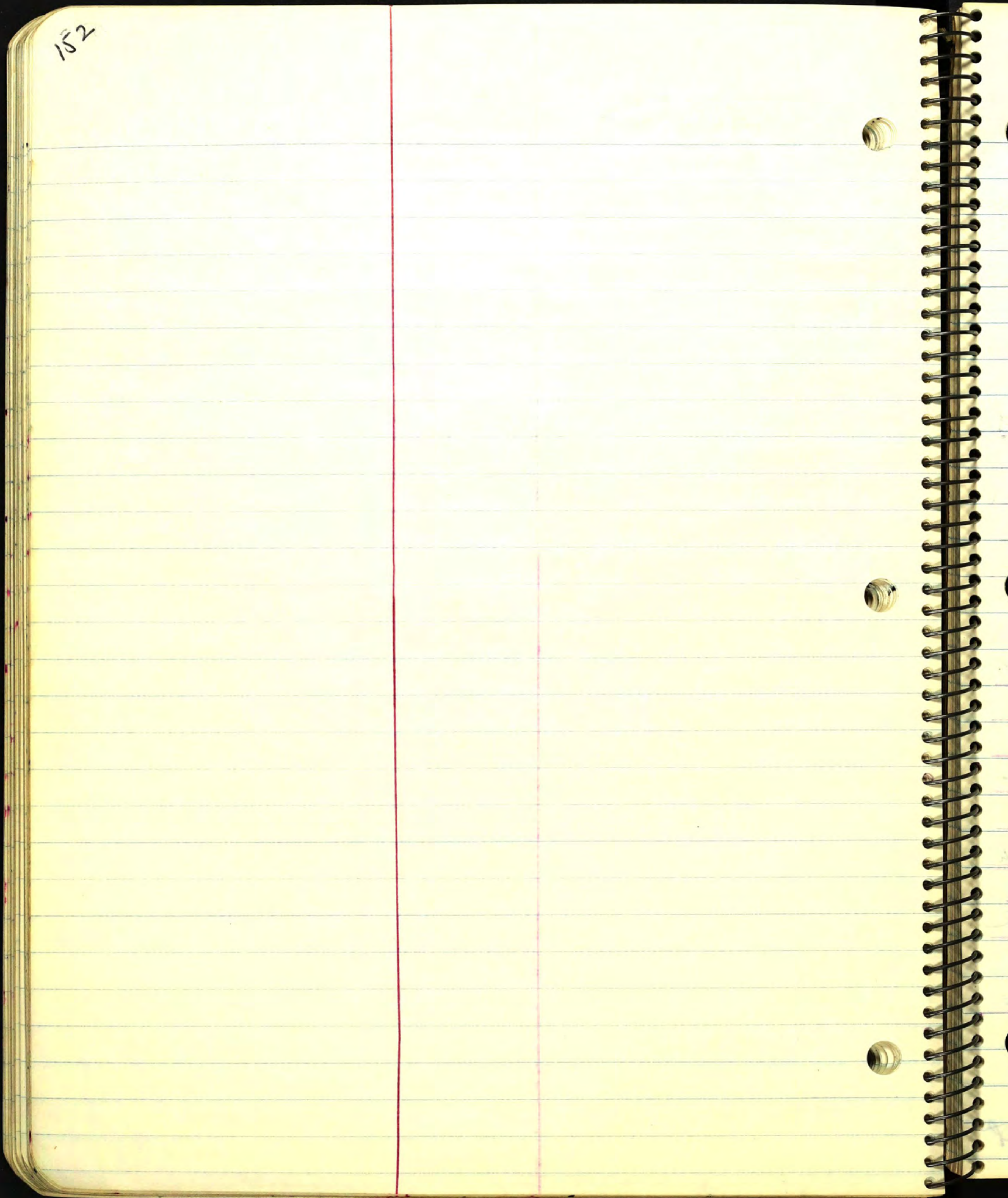
the over-21 kids; and that cannot be, because a rm. cannot operate to defeat another estate. Therefore, under this view, the over-21 kids would have a vested rm., and the interest in those under 21 would fail.

(2.) Second view - the over-21 kids would have a rm in fee, vested subject to partial divestment ("to open"), and those under 21 would have an E/I. Considerable author. on this point.

(missed class on 5/1/64.)

1 MAY 64





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In Festing v. Allen, the rms. to the children were destroyed because the contingencies had not occurred before the L/E terminated.

In re Lechmere & Lloyd (p. 246), said it was possible to avoid the rule of Purefoy v. Rogers. Here, 5 of the 7 children had reached 21 before death of the L/T, and the court looked at this as two separate class gifts: the interest in the 5 kids = cont. rm. (not vested), the gift to the 2 under 21 = executory interest (because it was certain to be preceded by a gap and because ∴ can be no rm. after a vested rm. in fee). — Ct said the harsh rule of Festing v. Allen should not

Here, since the rm. in the children, as a class, could take effect as a rm., it must, if at all. Thus, since they were not 21 by the time the L/T died, the rm. failed.

"... those who reach ← age 21 BEFORE OR AFTER death of L/T"

4/274 (see)

be extended.

The devise in Festing v. Allen was in trust. Thus, g were EQUITABLE c/Rs, and they are supposed to be indestructible. However, this was a dry (inactive) trust, & the s/u executed the trust so that the legal title was passed out of the trustee into the holders of the eq. estates (making them legal estates).

Two exceptions to doctrine of destruc. of C/R:
(1) Eq. cont. rms.
(2) C/Rs in personalty

227/155 (1947) } compare w/ Festing and Lochmere & Lloyd cases
231/543 (1950) }
209/7

209 N.C. 7 (1935) X (fee) "To son A for life" w/ C/R in any legitimate children of son A surviving, but any son of X who contested the will would forfeit ~~their~~ his interest. Son A contested will (after having legitimate children). Thus, Son A's L/E was pre-

See also 124/51.
The N.C. cases "seem to say" that the doctrine of destructibility of c/Rs is dead, but ∃ is confusion on the point.

naturely forfeited. However, ct held that the c/R was not destroyed. — Thus ∃ is confusion in N.C. re whether doctrine of destruct. of c/R is viable.

Egerton v. Massey (p. 252)

Like this: T → to A for life, rm to such of A's children as she shall appoint; in default of apptmt., to surviving children; in default of issue, to B. — Residuary clause gave any residue to A.

1 ⊛ Ord. an int. over in default of apptmt. is a vested rm. Thus, any following int. = executory devise.

∃ were 4 possibilities of classification of interests here, the ct taking the view that the residue in A = reversion, w/ the

other gifts over being cont/rms. Thus, w/ A getting L/E + reversion, merger squeezed out the Jc/Rs.

Note: the residuary gift to A fit the def. of rm. rather than rever

Rule of Law: Rm. following Power of Appointment (see over for exception)

A rm. subject to a power of apptmt = vested rm. See 237 Fed. 507; 49 S.E. 690 (Ga., 1904); 141 N.Y.S. 370 (1913): in accord. This = overwhelming and almost universal wt/author.

(179 S.W. 756)

See Durby, p. 545: re force of contingency wh affects only quantity, but not nature, of a fut. int.

In Doe Dem. Willis v. Martin, (p. 256), this int. over after pwr/apptmt = vested rm. subject to being divested partially by exercise of pwr/apptmt.

It matters not whether the language

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creating the pwr/apptmt. follows or pre-cedes the rm.

NOTE: if the rm. following the pwr/apptmt is ltd. to unborn persons, that rm will necessarily be contingent. Some cts. even say that if the rmman is born, but unascertained, that will still make the rm following the pwr of apptmt contingent.

Doctrine of Destruc. of C/R is in full bloom in Florida.

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hypo:

DESTRUCTION OF ALTERNATIVE CONTINGENT REMAINDERS BY PREMATURE TERMINATION OF THE PARTICULAR ESTATE DUE TO MERGER

T devised land "to A for life, and if she leave any children surviving her, then to such children, but if she leave no children surviving her, to B and her heirs." T's sole heirs were A and a son, S. A and S joined to convey "to X + his heirs." X reconveyed to A. A now brings an action to quiet title in A in FSA, joining as defendants her only child, C, and B. What result?

The state of title is:

A = L/E

any surviving children of A = C/R

B = alternative C/R.

S = reversion

Q. Can A destroy the C/Rs in ~~the~~ any surviving children and in B? = Naturally, this depends on whether the doctrine of destruc. of C/Rs is recog. in the juris. (This is the case of Blocker v. Blocker, p. 284).

Assuming the doctrine

is in force in the juris., when A & S conveyed to X, the L/E & the reversion merged in X, causing thereby a premature term. of the L/E. The C/Rs were destroyed because of merger and because no cont. remainderman was ready to take at the time of such termination.

See Simes chap. 4
2 Rest. Prop., sec. 240.
2 " " , sec. 184

Q. Did ct. have power to decree quieting of title in A and H are unborn remaindermen who were not present during the action so to protect their interests?

Q. Was the court's determination a denial (to the unborn remaindermen) of due process of law? NO! The unborn remaindermen were "virtually represented by H, one of the same class.

Doctrine of Virtual Representation

⊕ A holder of a fut. int. may sometimes be bound by a holding or decree, even tho' he is absent, where one of the same class is joined in the action; and such absent party will be deemed virtually represented. The rationale is that the present-at-court representative will adequately represent the absent class members because such present party has a "similar and "vested" interest in the outcome.

See 198 N.C. 445, Green v. Stadium → Note: if the interests of the present party are, in any way, adverse to any other "class members", the doctrine of virtual rep. will not apply.

CAVEAT!!

G.S. 41-11 (very important) re selling and mtging of future interests.

179 N.C. 14; 173 N.C. 569; 162 N.C. 145 – cases under G.S. 46-6 (partition proceedings) which held that a disinterested party may be apptd. by ct to represent unknown or unborn fut. int. holders.

G.S. 28-87

G.S. 28-87 – re selling prop. to create assets (by admr or executor).

G.S. 105-391(e)

223/502

Re tax action under fictitious name, see 223 N.C. 502.

Gen. Rule: Parties

Any necessary party (any party having an int. in the land) not joined will not be bound.

Test of suff. of notice to meet Due Process requirements:

Whenever unknown persons are named as a class, the description

must be suff precise to enable one of the persons representing the class, when reading the notice, to be put on notice that he is a member of the class in the action. See 221 N.C. 324.

(i.e., when reading the publication notice of action)

Apptmt. of guardian ad litem for unborn persons in:
1. Actions in rem & quasi in rem.
2. All actions or special proceedings ~~concern~~ involving wills, trusts, Ks or other writing
3. All actions or special proceedings involving the ownership or disposition of real or personal prop.

G.S. 1-65.2 (1955) (re unborn persons)
G.S. 1-65.1 (re minors)

Two types of representation:
1. The rep. may be a fiduciary (admr, executor, guardian ad litem).
2. The rep is not a fiduciary, but has an interest

in the prop. wh may be affected in the same way as the person(s) represented.
Possible to have both kinds of rep. e.g. where a minor who has a similar int. must be rep. by a guardian ad litem.

See 225/520; 221/320.

Caveat

The doctrine of virtual Rep. will not be (179/44) applied on there are (144/157) adverse interests as between the purported representative and the absent persons. They are not of the same class.

The statutes re representatives are strictly construed.

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Cont. rms. v. rms. vested subject to divestment — (Gray's Rule)

#6 on sheet (and #2) is a cont. rm. because the cond. preceeds the vesting of the estate.

(The Gray Test) → "Form of the Language Test"

Whether a rm is cont. or vested subj. to div. depends on whether the "form of the language" creating the contingency preceeds or follows the rm.

With the "form of the lang." test as a starting point, add a presumption in favor of a vested construction; and then analyze any limitation.

Rule of Law

A rm. to an unascertained person is ALWAYS CONTINGENT.

One may be unascertained because unborn, or because some other event must take place before a born

person can be ascertained.

Whether a rm. is to an ascertained person on a ~~further~~ cond. precedent, or whether the rm is to an unascertained person, it's a contingent rm. although which one of the above is the case is sometimes difficult to determine.

(Chap. V) Meaning of Unmarketability of Title

"Nemo est haeres viventis" — thus, an "heir" of a living person is always unascertained. e.g., X (f.s.) to A for life, rem. to the heirs of B.

Under ⊗MOORE v. LITTEL, the court based its decision, in part, on the finding that, where is a limitation "to A for life, rm. to the heirs of A," the rm in the

heirs of A is VESTED!
It was held to be vested, when there is a person in being, who would have an immediate right to poss. of the property, on the determination of all the intermediate or precedent estates (in accord: N.Y. Real Prop. Law).

This only applies in N.Y. because:

1. N.Y. does not recog. the Rule in S/C,
2. N.Y. does not recog. the Doctrine of Destructibility of C/Rs,
3. N.Y. statute allows for free alienation of C/Rs, and
4. N.Y. has a statute w/ the above lang. making all rms. that fit the above test VESTED.

* (Chap. 6) Some Problems of Construction *

Generally, the intent of the testator controls; but

sometimes there are rules of construction wh apply to interpret such intent and some that are used despite intention.

These would not be rules of constr., but = rules of law.

Two kinds of rules of construction:

1. broad
2. narrow

Sometimes, broad and narrow rules of constr. are simultaneously applied.

Rules of construction are applicable only where the language is not clear and unequivocal. But, where the intent of the testator is clear, that intent controls, provided, of course, that the whole thing does not fail for incompleteness or vagueness (e.g., "I devise all of my property." — To whom?)

(See sheet dated 8 May 64)

Broad rule of construction:

(1.) Preference for vested interests.

(2.) Preference against partial intestacy (one who writes a will is presumed to dispose of all of his property, not only some of the property under the will).

(3) Preference in favor of maximum validity.

(4.) Preference for producing a result more in accord w/ public policy ~~and public interest~~ (e.g., rule of convenience in deter. the time of closing the gift to a class).

(5.) Preference for keeping prop. among blood relatives. See (105 N.W. 175) 105 So. 106 (1925, Fla.). Often aids finding of vested interest; but sometimes this may operate to make an

interest in a close non-blood heir contingent where this was not intended. (e.g., where the wife is not the nearest blood relative, but where decedent ~~intended~~ wanted his wife to get the property.)

(6.) <u>Preference against disinheriting an heir.</u>

Good drafting is the key to avoiding these problems.

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Bond v. Moore

T → to A for life, rem to A's nearest relatives.

Ct used Preference against disinheriting an heir. Holding here = minority view.

Boyse v. Boyse
159 N.E. 217 at 219

7. Preference for (111 N.E. 914) interpreting technical words in their technical sense.

Naturally, all of these rules are used to deter. the intent of the transferor only where the intent is not clear (i.e., or the language is ambiguous).

Gifts By Implication

SPECIFIC OR NARROW RULES OF CONST.

hypo: T → "To X, trustee, income to W for life, and after her death, principal to D, if she shall be then living, but if D die during W's life w/o lawful issue surv-

D = daughter of W

viving, then to S (son of W) and his heirs." D died while living, leaving 1 child, C, and husband, H. D died testate, leaving all to H.

The claimants would be C, H and S. S would argue that no gift should be implied in favor of C; that if T intended C to take, T would have so provided. But, S's claim is weak.

The heirs of T would also be claimants who would claim alternative cont. rms. in D and S, and that both failed.

C could argue that he had a gift of an alternative cont. rm. by implication; that T intended to make a complete disposition; that y is a presumption against intestacy. — Weak also.

Argument for H: D got a rm vested subj. to divestment, that when she died it vested indefeasibly, and that she could ~~will the~~ devise her prop. to H. H would argue that "if she shall be then living" was mere surplusage, a pseudo contingency, and that the presumption favors vested estates. H would argue further that since D's rm. was vested, all following interests could only be executory interests and would fail upon the vesting of D's rm.

Courts are split on the "gift by implication" but C and H would have arguments of equal weight. In favor of C, the court would consider the following

blood
v. rules
v. disinh. heirs
other refers to C

factors:
1. That C = blood relative.
2. Presump. against intestacy.
3. Presump. v. disinheriting heirs.
4. Other referenses to C in the instrument.

Ways to avoid finding of incompleteness of transfer:
1. Finding reversion.
2. Finding vested rm.
3. Finding a gift by implication.

hypo: X ⟶ To A for life, but if A die w/o issue, then to B + his heirs. — This is incomplete because where would the prop. go if A die w/ issue?

"... w/o children" often used.

There is a rule that a gift of interim income to the same person to whom the corpus

is ltd is not subject to a cond precedent, and will be construed as vested.

In the last hypo, supra, there could be argued that if A died w/o issue, the issue would take a gift by implication. 108 P. 287 (Calif., 1910).

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153 P.2d 553; 225/633 — the law will not favor gifts by implication; but if there is cogent (246/91; 251 N.C. 439) evidence that a gift was implied, ~~that~~ gift will be recognized.

Determination of membership of a class usually determined at the death of the testator (if a will) or the effective date of an inter vivos transfer, where the gift is vested. If the gift is contingent, the class

membership will usually be determined at a later date, and that is usually at the termination of the life estate.

181/406
192 S.E. 273 (S.C.)
137 S.E. 921 (Ga.)

If, when heirs, next of kin, nearest relatives, issue, etc., are determined it is found ~~that the~~ the L/T is one of that class, the L/T will not be excluded, unless y is other evidence that the transferor intended him not to be included. Majority view. Accord: 137 S.E. 921 (Ga.); 181 N.C. 406; 192 S.E. 273 (S.C.).

hypo: T ⟶ To A and his heirs, but if A die w/o issue, to B and his heirs.

A = fee simple defeasible
B = executory interest.

Thus if A die w/ issue, A would have a fee simple absolute wh would pass to his heirs.

Cross Remainders

A form of gift by implication.

hypo: X ⟶ "To A and B for their lives, and upon the death of the survivor, then to C and his heirs."

Interpretation #1: If A dies first, B would take as survivor. But, where statute has abolished incident of survivorship, this interpretation would fail (as in N.C.).

Interpretation #2: If A died first, his interest would go to his estate. When B dies, however, all of the property would pass to C. Ill. and Ky. follow this.

Interpretation #3: If A dies first, C immediately takes A's part. 154 A. 602 (1931, N.J.).

Interpretation #4: If A dies first, B would be a cross remainderman and take A's share

See 223/1 (1943) - Wachovia Bank & Trust Co. v. Miller (excellent case)

To find a joint tenancy the language must be clear.

154 A. 602 (1931)

These are cross-remainders deter.

so long as B lives. Thus, during joint lives of A and B, each is the cross-remainderman as to the other. — Caveat: this is applicable only where the language is ambiguous and no other implication is possible.

Reasons for implying cross-remainders:
1. Prevent temp. intestacy
2. Prevent defeat of testator's intention to have the whole gift go over at ~~once~~ the same time to the ultimate taker.

33 S.E. 876 (1891)

Where cross-rems don't apply:
1. On the transfer is by deed rather than will. 33 S.E. 876 (1891, Ga. – dictum). Majority: contra.
2. Only on the particular

estate is a life estate. X-rms. will not be used to divest a fee.

3. In (209 P.2d 621) the testator gives each life tenant specific shares for life. e.g., "½ to A & ½ to B for life..."

4. In first takers take as joint tenants or (206 N.W. 366) tenants by the entireties.

Rule re Intention to Exclude Heirs

(Assume here that all gifts are vested.)

If a testamentary gift is made to the testator's heirs after death of a named person, the only way to exclude the heirs from immediate enjoyment is to imply a life estate in the named person. Thus, an interim gift (108 N.E. 117 [Ind.]); 281 N.Y.S. 591, aff'd. 289 N.Y.S. 819) by implication will be found.

Implied gift will not

be found if:
1. Y are residuary devisees which can take during the interim until the named person dies.
2. Only some, but not all, of the heirs are postponed in their enjoyment.
3. The postponed gift is to non-heirs, for here the heirs will take by intestacy during this interim. (Here, presump. v. partial intestacy is disregarded.)

This rule is another variation of "gifts by implication."

Gift of Interim Income

Read Burby.

hypo#1 X → To B "at" 21.
or
hypo#2 X → To B when he attains 21.

Now, did X intend that the gift to B would be contingent upon B's attaining 21, or did X merely

intend the poss. or enjoyment to be post-poned until B reached 21?

Hypos #1 and 2 are usually interpreted to mean ~~that~~ B must survive until age 21 before he can take anything. Thus, on B dies before he reaches 21, his estate gets nothing. There is some authority ~~that~~ the words "at" and "when" do not require survival ~~until~~ age 21: minority view.

hypo: (13 S.E. 154(?)) X → To B until C is 21, and when C reaches 21, then to C + his heirs.
— B = L/E deter.
C = fee simple (vested) w/ enjoyment post-poned.

hypo: X → To B "to be paid" (or "payable") at age 21.
— Usually construed to mean ~~that~~ B was intended

to take a vested interest w/ enjoyment being merely postponed. There is no requirement of survivorship here nor generally (whether dealing w/ vested or contingent interests) unless the language clearly indicates that the cond. of survivorship attach.

A gift of interim income w/ corpus to go to that same party "at" (or "when") 21 will usually be construed as vested w/ postponement of enjoyment of the corpus. True even on "at" or "when" is used. Thus, here there is no requirement of survivorship.

241 N.C. 264
233 N.C. 1

"Divide and Pay Over" Rule

Read Burby

Direction of testator to divide and pay-over will not, standing alone, indicate intention (3 Rest Prop., sec. 260) to postpone vesting, but only to postpone enjoyment. No requirement that the one to whom the divided and paid over prop. is to go must survive.

Gift Over on Death of First Taker

Read Burby

If the donee survive the testator, his gift will vest indefeasibly despite the provision that the first taker must die first.

Everywhere, a donee must survive the TESTATOR in order to take a vested (indefeasibly) interest.

Hypo: X → "To A for life, then to B for life if B survive A." — "If B survive A" is

244 N.C. 95
112 N.C. 1 (Stearns v. Hill)

Assignment:
1. Rule on Acceleration
2. Class Gifts, esp. closing of classes.

mere surplusage and will not make the rm. of B cont. B's rm is vested, and survival only goes to the matter of enjoyment.

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52 N.C. 587 – illegitimate children not issue.

Absent statute, adopted children not issue.

If "w/o issue" or "w/ issue" is indicated to mean children, then the gift will be ltd to children. See 97 N.E.2d 341.

"Die w/o issue" may mean w/o ever having had issue. 10 Q.B. 459. On this is the case, once issue is born, the contingency is met, and the issue need not be living at death of the ancestor.

Conclusively presumed that one is capable of procreating as long as one lives. Universal rule. Only some tax cases have encroached on this rule.

Acceleration

On L/E is renounced, is the rem accelerated?

Reasons for failure of L/E:

1. Renunciation
2. Lapse - L/T may predecease testator.
3. On L/E is avoided, under statute, on the L/T was a witness to the will. Cf. G.S. 31-10
4. Disclaimer
5. L/E could be void as against R/P.
6. The event upon wh the prior estate (L/E) was to end may happen before death of testator.

31-10

7. L/E void due to restraints on alienation.

Renunciation —

X → To A for life, rm to B & his heirs.

If rm is vested, it will be accelerated, provided, however, there is no manifested contrary intent that the rm be not accelerated.

If renunciation distorts the testamentary scheme, the L/E may be sequestered to preserve the scheme, acceleration being denied. Sequestration would mean putting the L/E in trust, the income being paid to the residuary legatees and devisees until they have been paid. Then, acceleration may be allowed.

X → To A for life, rm to the children of A then living.

If rm is cont., it will usually NOT be accelerated. However, the

rm may be reconstrued in the light of the renunciation or the testator has indicated that he intended the rm to take effect whenever the preceding estate ended.

132 N.C. 476, University v. Borden — leading case.

If the life estate ends at or before death of the testator, and there is an interest over which would have otherwise been construed as a rm, that "rm" will be construed as an exec int in states or the doctrine of destructibility of c/r is not in force. [It would = exec. int. because y would be no preceding estate to support it.]

Usually, if the life ends as of the death of the testator for any reason other than renunciation, then the usual rules in the case of renunciation will apply.

Exec. Int. following Rm vested subject to being divested: three views:
1. Rm accelerated, but the divesting exec. int. is not.
2. Rm plus exec int would be accelerated. N.C. follows this. Accord: Restat. of Prop. Under this, the rm would become indefeasibly vested after acceleration.
3. Neither accelerates. (Ill.) 141 N.E. 176.

141 NE 176

Class Gifts (C/G)

"children", "issue", "sons"

Definition: [C/G is one to a group or unit rather than any individual.

May be created by deed or will.

Class may be capable of increasing or decreasing, or both; but it need not necessarily be capable of doing both.

Rules of Construction:

(1.) If transferees are designated by a group designation, the constructional preference is for a class. May be rebutted.

Test factors:

(1.) One transferees are named specifically (even if the group also is named), constructional preference

is for a finding of no class, and for indiv. gifts.
— This may be rebutted.
e.g., On there is an aggregate gift to one named indiv. plus a class ① the view of the Restat. of Prop., vol. 3, sec. 284, and Burby, is that there is a gift only to a class, the named indiv. being one of the class. ② Other authorities say this would be a gift to an indiv. and a class. Calif. follows this along w/ American Law of Prop.

3 R.P. 284

two Views

Gift to parent and his children —
Rule in Wild's Case said that this would = FSA in the parent.
The better (and maybe majority) rule is ~~that~~ the parent gets a LE w/ a rm in the children.

"To A and his children"

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Class Closing Rules

Determination of maximum membership may be by increase or decrease of class.

Minimum membership is usually determined at the death of the testator.

The rules of constr. re class gifts are used to deter what the testator would have intended if he had foreseen the difficulties that arose.

Three guides:

1. That testator would have desired to include all members that could be included. e.g., "children" - testator would have wanted all children, whenever born, to be included.

2. Testator would have wanted as early a distribution as possible.

3. Testator would not have wanted any part of his gift to fail for any reason.

Rules of Construction: Class gifts

A. Immediate Gift to Classes

hypo: T devises B/A "to the children of A."

Rule: The class ("children") will include all children born and living at T's death, plus any children en ventre sa mere. The class, before T's death, can increase or decrease. After, and from the time of T's death, the class cannot increase.
— This is the rule absent an anti-lapse statute.

See 41/437

Rule: If no members of a class are ~~m~~ living

at T's death, and y is a gift of a lump sum or a specific piece of prop., the class will remain open and will include all children thereafter born who can be included appropriately in the class. The class gift is treated as postponed until children are born.

Rule: If there is no member living at death of T, and there is a per capita gift to class members (specific amount to each member of the class), the whole gift would fail.
Reason: otherwise, whole estate of T would be held up until the class is fully determined, and that is contra to a policy of the law that a decedent's estate is to be determined as soon as possible.

— This is usually contrary to T's intent, but is followed. Settlement promptly of T's estate is more important.

B. Postponed Gifts

Rule: The class is not closed at T's death, but is allowed to increase until the time for distribution.

hypo: T (Devise) → to A for life, then to the children of A.

The time set for distribution is death of A. Thus, all children alive at death of A and any child en ventre sa mere would be included. Quaere any children who die before T and before A?

If this were "to A for life, then to the children of B," any of B's kids born

after A's death would be excluded, except a child en ventre sa mere.

Where T devises aggregate gift including present and future interests, as to the fut ints (63/268) the rules re postponed gifts would apply.

hypo: T devises $10,000 "to the children of A, each child to receive a share upon reaching age 21." When A dies, A has children, but none has reached 21.

(Immediate gift)

Rule: class closes when first member can call for distribution. All after-born children are excluded. Thus, class is deter., or closed, when the first child reaches 21. The class would include all children then born who later

reach 21; but any child born thereafter will be excluded, even tho' he reach 21 later. However, any child born before any child reaches 21, but after T's death, would be included. — Distribution will be made to each class member as he reaches 21.

hypo: (Postponed gift)

T devises to A for life, then to B's children who shall attain age 21. — Same result except that those born after T's death and before the first child reaches 21.

Quaere gift ltd to a class "when the youngest shall attain age 21." — When all of those living at death of T reach 21, the class closes. If the parents have children after T's death, excluded.

Mimeo problem (1) – 14 May 64

In N.C., "heirs" will be construed as children in a class gift. G.S. 41-6. — G can recover because this is a postponed gift and will include all children born until the time for distribution occurs. But, G could only get 1/4 of B/A.

S/L no bar. G had 3 years after ~~the~~ removal of the disability.

See 229/757, Cole v. Cole (1957)

15 MAY 64

Lapse Statute

hypo: T devises property to A for life, then to the children of B.

If a conceivable member of the class predeceases the ~~testator~~, there are four conceivable takers.

1. Surviving members of class

2. Estate of deceased member.
3. Heirs of testator
4. Residuary beneficiaries under resid. clause of ~~testator~~.

Lapse generally

Lapse has several meanings. It usually means that after the will has been executed, but before the testator dies, the beneficiary ~~class~~ or legatee ~~[illegible]~~ dies.

A lapsed gift is one good at date of will but becomes void before death of testator due to predecease of the ~~[illegible]~~ legatee or devisee.

A lapse statute applies only to lapsed, not void, legacies and devises.

Void gift is where the individual being ~~member~~ dies before the will is executed.

Lapse: class gifts —

If a class member dies before T, the shares

of the remaining members of the class (170/211) will be increased by that amount.

250/311

250 N.C. 311 – residuary ~~class~~ gift to three named ~~indiv~~ sisters who all predeceased T. The ct held the gift to lapse and the residuary clause failed. Thus, the land passed by intestacy to the T's heirs and next of kin.

If a gift is void, lapses, or is revoked, the prop. passes by residuary clause or, if there is none, by intestacy.

Only Ky. has statute (lapse) ~~that~~ specifically applies to class gifts. However, most states say that their lapse statutes apply to class gifts. See 56 ALR 2d 948; 117 A. 489;

201 A.2d 58
117 A 489
56 ALR 2d 948
202 N.C. 92

201 P.2d 58.
N.C. seems not to apply lapse stat. to class ~~sta~~ gifts. See 202/92.
Read 258 N.C. 371 (1963), Poindexter v. Wachovia Bank and Trust Co. — some of the meaning of the ct is unclear, but this is important.

RULE AGAINST PERPETUITIES

An interest MUST vest, if at all (i.e., or fail to vest) w/in ~~21 years~~ lives in being plus 21 years.

Rules:

1. The 21 years may be in gross, or connected w/ minority of a person, and not connected w/ lives in being.

2. Remainders and executory interests are subject to the rule. One apparent exception: an executory (Simes, p. 377)

interest that is certain to occur. e.g., To A 25 years from the date of this instrument.

3. Must be w/in lives in being at time of effectual date of the instrument, plus 21 years.

4. Lives in being may be, and usually are, beneficiaries, but need not be beneficiaries nor even related nor even having a rational connection w/ the conveyance. Where strangers are the measuring lives, they are usually mentioned. If the measuring lives are a class, all possible class members must be in being at the date of a deed or trust instrument. e.g., on X gives to children by deed or trust while he's still alive. X is conclusively

presumed to be able to procreate as long as he is alive. Thus, there could be a taker after lives in being at time of deed or trust + 21 yrs.

"ALL OR NOTHING" RULE –
"Vest" means something more under R/P. All members of class must be able to take w/in lives in being + 21.

hypo: Leak v. Robinson (p. 447 cbk.)

T devises "To Wm for life, + if Wm die w/o issue, to my brothers and sisters who reach the age of 25."
Class doesn't close until T dies, and its possible for class members to be born after death of T, assuming T's parents (both) are still living at T's death. Thus, gift fails altogether. R/P deals w/ possibilities, not probabilities.

Check list of problem areas: notes (refs. to pages)

R/S/C 1. 16 – 24

2. 34, 35

3. p. 38

4. 39

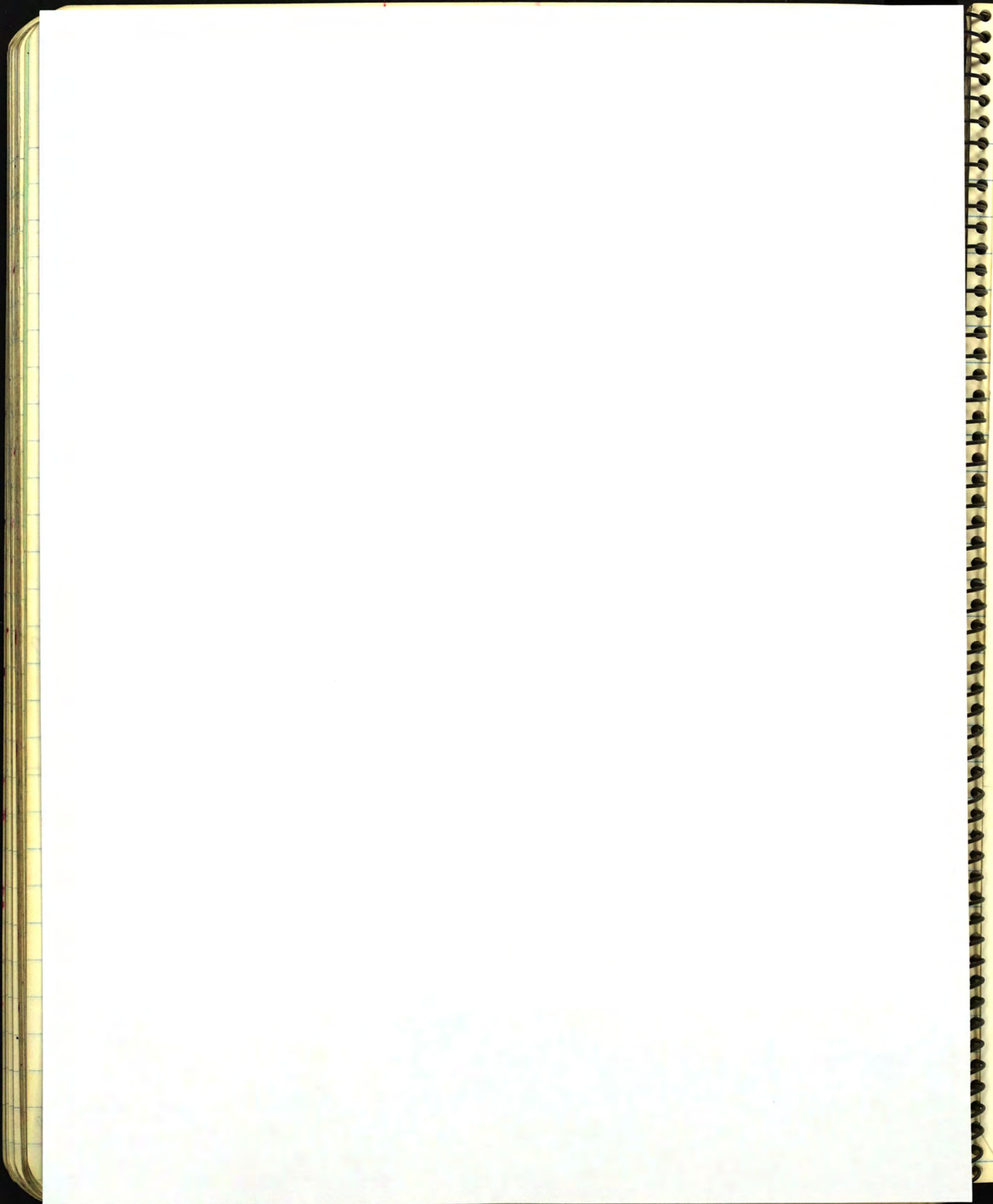
W/T/D 5. hypo, 49 & 50.

6. Rebutting factors: quaere reser. of inter vivos v. testamentary power of appointment?

7. 62, 63, 69

FSD & FSSTCS 8. p. 87.

9. 103



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524-7369

MEMBER COMMITTEES:

APPROPRIATIONS
EDUCATIONAL MATTERS
HEALTH & WELFARE
JUDICIARY

The State Senate

Senate Chamber
Atlanta

Dear Alumni and Friends:

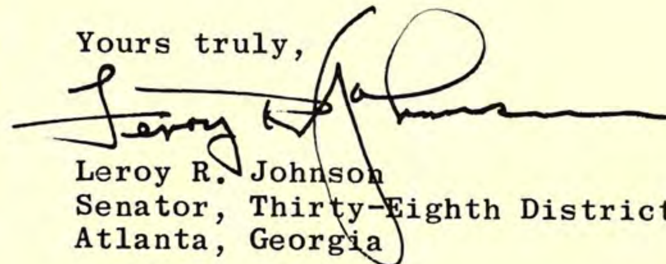
Each year the North Carolina College Alumni Association conducts a Loyalty Fund Drive. The purpose of this drive is to solicit funds from Alumni, Friends and other supporters to help the organization absolve its financial commitments. This year I have volunteered to serve as Chairman of the drive. I hope that you will agree with me in giving whatever financial support you can to make this worthwhile project successful.

You may ask "Why is this Loyalty Fund Drive necessary?" or "Why does the organization need money?" There are many reasons why the organization needs money and the Loyalty Fund Drive is one way of obtaining money. Some of the reasons are as follows. There are certain inherent expenses in operating any organization such as supplies, equipment and materials. There is the Alumni Bulletin which the organization desires to publish four times per year. It is mailed to approximately five thousand Alumni at each publication. The various departments at the college such as the band, choir and athletics come to the Alumni Association for financial aid. Recently, the organization was asked by the track, football and basketball coaches for aid totaling more than a thousand dollars. The organization made a financial commitment to the college at the occasion of the Fiftieth Anniversary Commemoration. It is still outstanding. The organization sponsors receptions for Alumni and Friends at all outstanding affairs, such as Homecoming and Commencement, held at the college. In summary, money is needed to make the organization truly representative of you.

As Chairman of this Drive, I am personally asking that you be as generous as you possibly can in your support. Make your check or money order payable to Loyalty Fund - North Carolina College, Durham, North Carolina.

Best regards.

Yours truly,



Leroy R. Johnson
Senator, Thirty-Eighth District
Atlanta, Georgia

315 Woodbury

(1.) Power of Appmt. w/ Rule
R/P.

(2.) All or nothing Rule
Leake vs Robinson

250
85
335

(3) Gen'l Power / App
Special Power / Appmt.

4. W/T/D

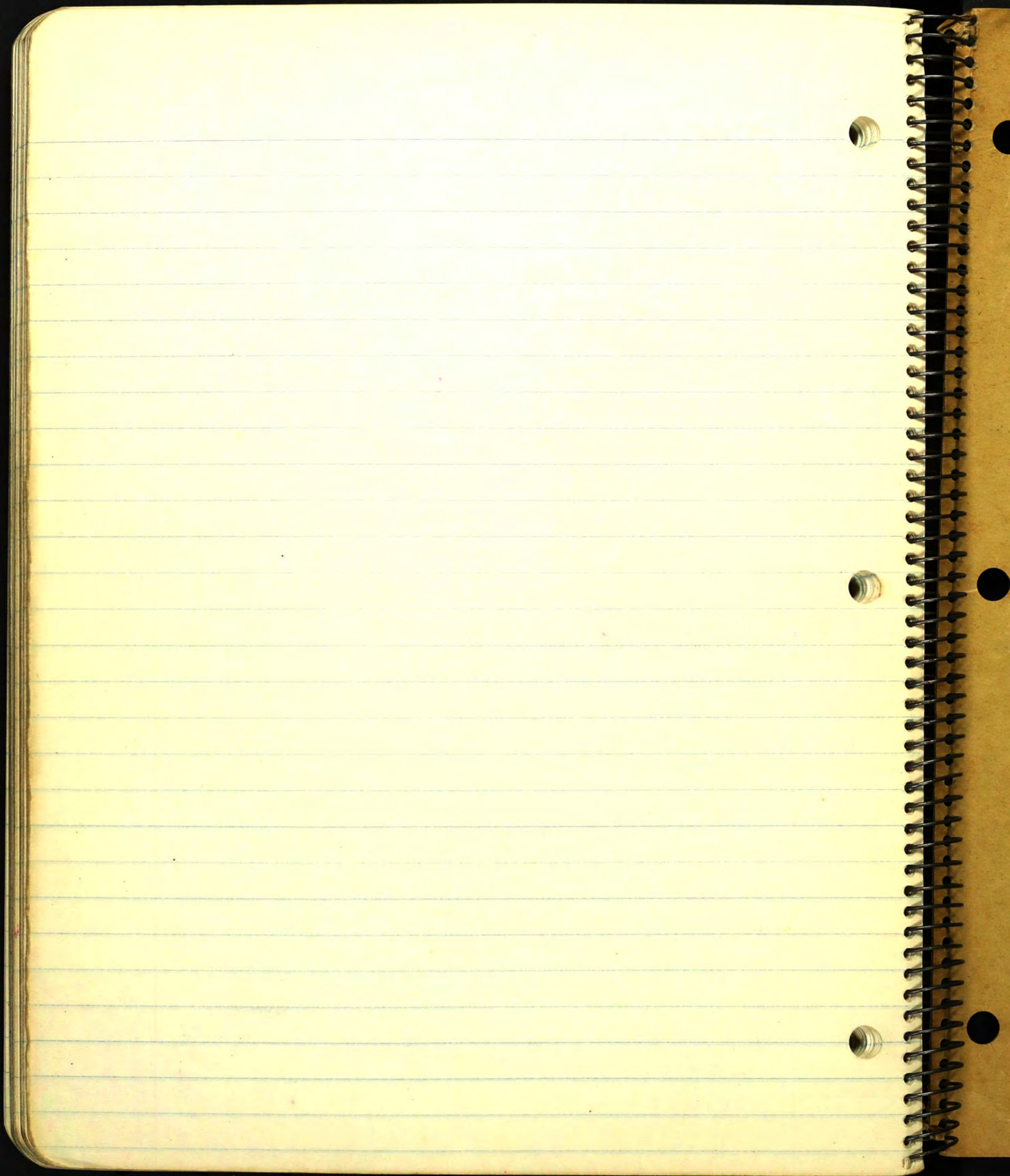
5. Dest. of Contng. Rem.

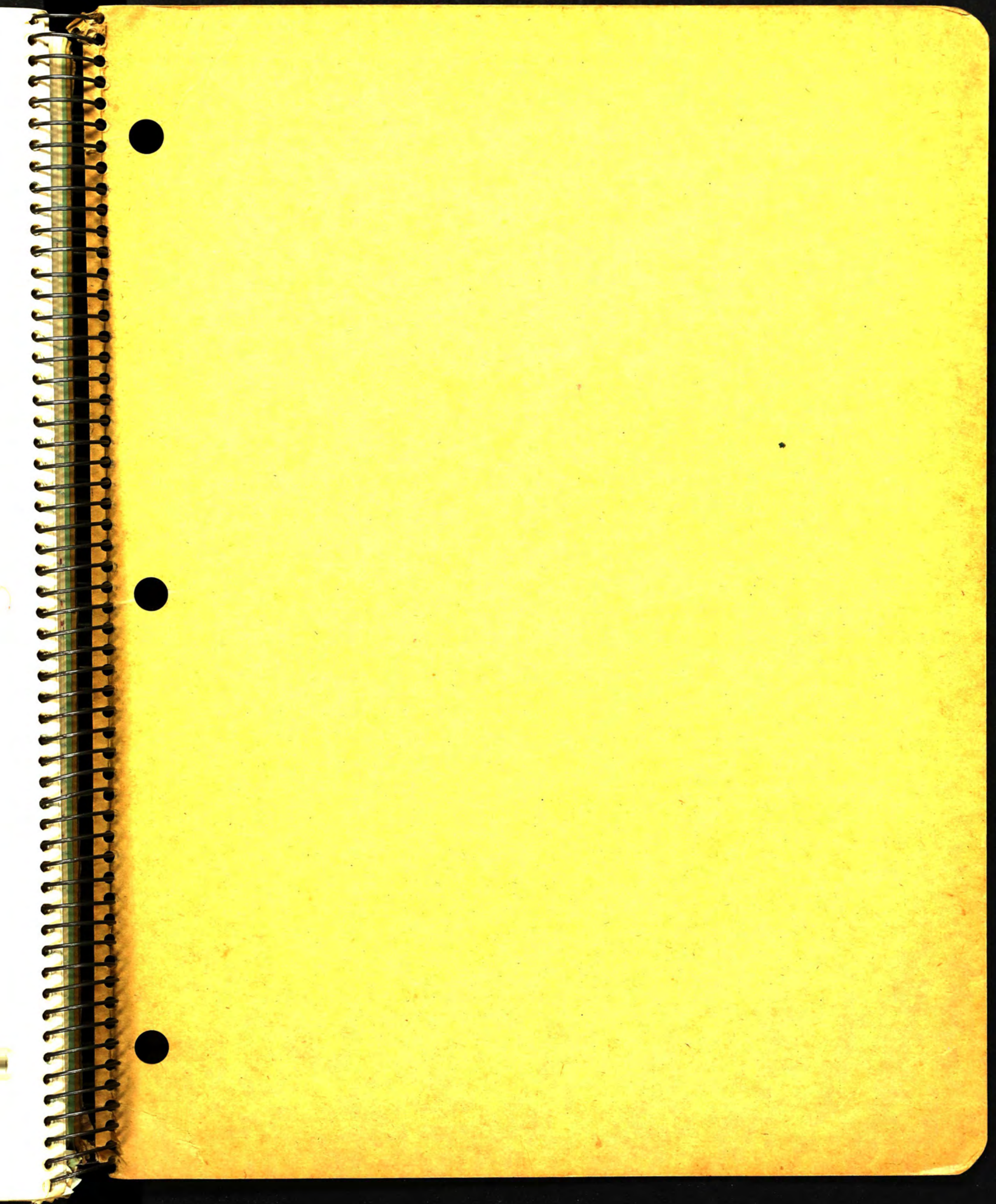
(6) No vested Remainder
after a contingent remainder

(7) No vested Remainder after
a fee / simple

(8) Wild's Case Rule
p. 190

We are thinking of
you. Conveying our
deep sympathy to
you and family.





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