



Volume 45 | Issue 1

Article 7

December 1938

Executory Devises and Perpetuities--Brookover v. Grimm

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Recommended Citation

C. C. Williams Jr., *Executory Devises and Perpetuities--Brookover v. Grimm*, 45 W. Va. L. Rev. (1938).

Available at: <https://researchrepository.wvu.edu/wvlr/vol45/iss1/7>

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West Virginia Law Quarterly

and The Bar

Published by the Faculty of the College of Law of West Virginia University, and issued in December, February, April and June of each academic year. Official publication of The West Virginia Bar Association.

Subscription price to individuals, not members of The West Virginia Bar Association, \$2.00 per year. To those who are members of the Association the price is \$1.00 per year and is included in their annual dues. Single copies, 50 cents.

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EXECUTORY DEVICES AND PERPETUITIES —

BROOKOVER v. GRIMM

The days when legal writing could safely be confined to purely hypothetical discussion have long gone by. Lengthy dissertations on such abstruse topics as the nature of possession¹ or the theory of the old real actions² are as obsolete as the escheat of corporation personalty on corporate dissolution.³ Today, periodical literature deals rather with questions of the living law, — even though these do often seem as far-fetched as law school examination questions.⁴

¹ *E. g.*, SAVIGNY, *DAS RECHT DES BESITZES* (7th ed. by Rudorff 1865); HOLMES, *THE COMMON LAW* (1881) Lecture VI.

² 3 BL. COMM. c. X.

³ *Fox v. Horah*, 36 N. C. 358, 36 Am. Dec. 48 (1841).

⁴ Examples are *Palsgraf v. Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99, 59 A. L. R. 1253 (1928), discussed by Green, *The Palsgraf Case* (1930) 30 COL. L. REV. 789; and *Bell v. Wayne United Gas Co.*, 116 W. Va. 280, 181 S. E. 609 (1935), commented upon in (1936) 42 W. VA. L. Q. 168. Just as truth is sometimes stranger than fiction, so these instances raise far more troubling queries than the hypothetical difficulties set forth in law school questions (of the problem type).

Occasionally, modern case-law presents an instance where pure legal theory and historical background combine to present the completed picture of existing law. The solution of the problem then lies in understanding not only the needs of the present, but also the inherited disposition of the courts to deal with the issues in the light of precedents centuries old. *Brookover v. Grimm*,⁵ a recent West Virginia case, illustrates these observations. Its facts involved the transformation of an executory devise into a remainder with the difficulty of postponed vesting in interest thrown in for good measure. Its solution depended on the application of the Rule against Perpetuities to the two possible constructions of these future interests. But with the task of construing more or less evenly balanced, the traditional approach towards executory devises led quickly to the result of their being held invalid. Legal history perhaps unconsciously determined the technique of the court in reaching the decision.

EXECUTORY DEVISES

In any survey of the perplexing subject of executory devises, actually "a page of history is worth a volume of logic."⁶ For four centuries, the common law refused absolutely to permit the limitation of a future estate after conveyance in fee simple. Such "a naughty remainder"⁷ would have been repugnant to the estate originally conveyed: *obviously*, one fee could not be in remainder to another.⁸ Analytically, it would be void, — not as a grant of a remnant within Sir Edward Coke's definition, but as the creation of an estate in derogation of a previous one.

Historically, the attempted creation of this shifting future interest, — to *A* and his heirs, but if a contingency occurred, then over to *B* and his heirs, — was seriously objectionable at one time, socially and economically.⁹ A prior grantee of the fee could hardly be expected to perform the feudal dues incident to his title, when, on happening of the contingency, ownership might be transferred over to the grantee under a subsequent limitation. Discipline inherent in medieval society was shaken, if willingness to perform

⁵ 118 W. Va. 227, 190 S. E. 697 (1937).

⁶ *Per* Holmes, J., in *New York Trust Co. v. Eisner*, 256 U. S. 345, 349, 41 S. Ct. 506, 65 L. Ed. 963 (1921).

⁷ *Per* Lord Nottingham, L. C., in *The Duke of Norfolk's Case*, 3 Ch. Cas. 1, 26 (1682).

⁸ DIGBY, *HISTORY OF THE LAW OF REAL PROPERTY* (5th ed. 1897) 263-264; *CO. LITT.* 143a.

⁹ KALES, *FUTURE INTERESTS IN ILLINOIS* (2d ed. 1920) 26.

onerous obligations and render loyalty to the over-lord were jeopardized. Similarly, when a contingency could shift the fee over to another, it might be expected that the first grantee or his heirs would selfishly be inclined to continue on in possession, defending the seisin. And if the other grantee sought to enforce his right, disorder and strife would be engendered. Even the statute of Richard II, could not suffice in these circumstances.¹⁰ Hence, no shifting executory devise of land devisable by custom was ever held valid before the Statute of Wills.

"Yet the nature of things, and the necessity of commerce between man and man", "found a way to pass by that rule, and that" was "by way of use or by way of devise."¹¹ Common law principles of seisin had never applied to the equitable estates known as uses, in all the many decades of their enforcement by the chancellor.¹² So these shifting equitable estates were commonly met with, and their validity by chancery writ assumed as of course. In 1536, the Statute of Uses¹³ converted into legal estates any shifting uses; and four years later, the Statute of Wills¹⁴ legalized the testamentary practices of the period prior to the earlier enactment. Just as before these statutes, the will had been regarded as a declaration of the use in the land, effective on the testator's death but speaking as from the date of the will, so the new statutory will operated as a conveyance, dealing with the testator's legal interest at the date of the will, but effective from his death only, and subject to revocation theretofore.¹⁵

Possibly to avert further destructive competition from the equity side, common law courts soon fell into line and gave the Statute of Uses and the Statute of Wills wide scope, without restrictive interpretation. Within a few years executory devises were permitted to go unchallenged; in 1567, it is said, their validity at law was expressly decided.¹⁶ One should not infer, however, the new future interests were popular in the courts. On the contrary,

¹⁰ 5 RICH. II, St. I, c. 8 (1382).

¹¹ *Per* Lord Nottingham, *The Duke of Norfolk's Case*, 3 Ch. Cas. 1, 26 (1682).

¹² DIGBY, *HISTORY OF THE LAW OF REAL PROPERTY* 332-333.

¹³ 27 HEN. VIII, c. 10 (1536).

¹⁴ 32 HEN. VIII, c. 1 (1540).

¹⁵ It followed from the original conception of a will, as a mode of raising a use, that it could readily create interests arising at a future time (and divesting previous interests), in a way unknown to the common law. See DIGBY, *HISTORY OF THE LAW OF REAL PROPERTY* 381.

¹⁶ *Oellie's Case* (1567), cited in *Pells v. Brown*, 2 Roll. R. 216, 220 (1620).

—“these executory devises had not been long countenanced, when the judges repented them.”¹⁷ It was held “an inconvenience to devise such a contingent estate.”¹⁸ Still the incontrovertible fact remained: by the aid of shifting uses, the old learning as to the nature of future estates in remainder had been circumvented.¹⁹ Conditional limitations became the accepted term for shifting uses by deed and shifting executory devises:²⁰ with their invention and statutory recognition old common law restraints on the creation of future interests vanished. There survived only a very real prejudice in the courts against this type of estate. Future judges were to formulate the rule against remoteness and their veto on repugnant titles,²¹ in an unyielding effort to curb such use of conditional limitations.

Present-day law assumes without question the executory devise as an increasingly frequent type of future interest. To be sure, opinion may occasionally differ in the attempt to distinguish it precisely from the modern contingent remainder, lately made indestructible by statute.²² With sharply-defined historical background, however, the shifting estate seldom presents now any unusual difficulties in construction of involved wills. Hence, *Brookover v. Grimm*²³ must be deemed a most important decision, both by reason of the exhaustive discussion in the majority and dissenting opinions, and because of the careful analysis of the limitations contained in the will.

A testator devised land to his son-in-law for life,²⁴ remainder to an infant great-grandson in fee. Desiring to keep the property

¹⁷ *Per* Treby, C. J., in *Scattergood v. Edge*, 12 Mod. 278, 287: “And if it were to be done again, it would never prevail.”

¹⁸ *Per* Rolle, C. J., in *Gay v. Gay*, Styles 258, 274 (1651).

¹⁹ KALES, FUTURE INTERESTS IN ILLINOIS 63.

²⁰ GRAY, THE RULE AGAINST PERPETUITIES (3d ed. 1915) 25.

²¹ As to the repugnancy of shifting uses by deed, see *Palmer v. Cook*, 159 Ill. 300, 42 N. E. 796, 50 Am. St. Rep. 165 (1896), as illustrative of the Illinois common law doctrine. *Cf.* *Carlee v. Ellsberry*, 82 Ark. 209, 101 S. W. 407, 12 L. B. A. (N. S.) 956 (1907).

²² The West Virginia provision [W. VA. REV. CODE (1931) c. 36, art. 1, § 15], has of course been in force for decades. Many will agree with Judge Kenna's observation in the present case (118 W. Va. 227, 245), “For most practical purposes, this discrimination at this time and in this state is not important.”

²³ 118 W. Va. 227, 190 S. E. 697 (1937).

²⁴ Item IV of the will reads as follows:

“I give unto Paul Brookover, infant, great-grandson, grand-son of Frances Martin, deceased, wife of Ben Martin, of Minnie, West Virginia, the following real estate: Thirty-three and 1-3 (33 1-3) acres, more or less, on the head waters of Turkey Run, purchased from John Chaplin; Seventy-seven (77)

within the family, — no doubt, — he then provided that if his great-grandson were eventually to die without issue and leave a widow, this widow would take a life estate,²⁵ the property thereafter going over to his (the testator's) two surviving daughters, — or their respective heirs, — and to the heirs of his deceased son. The son-in-law life tenant died in 1925, less than two years after the testator's death. Then, in 1928, the great-grandson beneficiary died, only eighteen years of age, — unmarried and without issue, — leaving his father surviving as sole heir at law.²⁶ Suit was later filed for construction of the will,²⁷ the contest lying between the gift-over men and the great-grandson's heir at law. Of course, when these events took place one after another, the contingency mentioned by the testator, (namely, the great-grandson's death married but without issue), had never really happened; so on these facts, naturally, the infant's fee was never divested.²⁸ Yet, con-

acres, more or less, on the south side of Big Fishing Creek and one hundred and Thirty-four (134) acres, more or less, the last two of said tracts purchased from Adam Kuhn. It is my will that the said Ben Martin shall have a life time interest in the real estate devised to the said Paul Brookover.

“If the said Paul Brookover shall die without issue living and leave a widow, then said widow to have a life time interest in said real estate and at her death, it is my will, after the death of the said Ben Martin, that the real estate so devised to the said Paul Brookover shall descend equally to the said Lottie Grimm or her heirs; Minnie Yoho, or her heirs, and the heirs of Richard T. Morgan, deceased.

“I reserve all my rights to the coal, oil and gas within and under said tracts of land.”

²⁵ Judge Kenna, in his dissent, has urged that the condition be construed to read, — “If Paul should die without issue living or leave a widow,” (118 W. Va. 249-251), citing *Gourdin v. Shrewsbury*, 11 S. C. 1 (1877). This seems a very reasonable construction, particularly in view of the testator's apparent intent that the land remain in his family, and not pass to Paul's heirs generally. On the other hand, the testator has elsewhere in the will, (Items V, VI and VII), more precisely expressed the condition in other language, — the inference here being that he did not desire to split the condition in Item IV. Moreover, the weight of common law authority precludes splitting the contingencies on these facts, *Proctor v. Bishop of Bath and Wells*, 2 H. Bl. 358 (1794).

²⁶ The main issue in *Brookover v. Grimm* is as to the nature of Paul's estate. If the great-grandson took a fee simple absolute, — either because the divesting contingency never happened, or because the executory devises to the gift-over men were barred by the Rule against Perpetuities, — then his father inherited as the sole heir at law. On the other hand, the testator's other descendants were urging, as regards Item IV, both that the condition be split and that the shifting estates vested in timely fashion within the rule.

²⁷ *Brookover v. Grimm*, 114 W. Va. 701, 174 S. E. 567 (1933), held that the lower court should construe these testamentary provisions, under W. VA. REV. CODE (1931) c. 41, art. 3, § 7.

²⁸ *Harrison v. Foreman*, 5 Ves. 207 (1800). Cf. *Jackson v. Noble*, 2 Keen. Ch. 590 (1838).

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struing the will as of the testator's death, the issue before the court was the original nature and validity of these gifts over.²⁹

The rule of medieval law forbade any limitation after conveyance in fee simple. So neither the life estate to an eventual widow of the great-grandson nor the gifts over thereafter may possibly take effect as remainders. A limitation of any sort after the vested fee in the infant beneficiary can only create a shifting interest. Both the widow's share and ultimate gifts must therefore be executory devises,³⁰ and the state of the title becomes:

To the son-in-law for life, the estate in possession; vested remainder to the great-grandson in fee simple; subject to a conditional limitation by way of shifting executory devise in favor of the great-grandson's widow for life, — in the event he die without issue and leave such widow; and subject, further, to a shifting executory devise, on the same contingency, (after the widow's life estate), to the following as tenants in common in fee simple absolute:

1. Daughter *A* or her heirs.
2. Daughter *B* or her heirs.
3. To the heirs of deceased son *C*.

Such, then, was the involved ownership devised by the testator, when the will was offered for probate in 1923.

Assuming, however, the great-grandson were in the future to have died without issue, leaving a widow, it is essential to note that these future interests would have been greatly modified. Upon the contingency happening, the widow might have had her life estate vested in possession or remainder, — depending on whether or not the testator's son-in-law had predeceased the great-grandson. In either event, the executory devise in fee to the tenants in common would have turned into a remainder in fee, after the widow's holding.³¹ It is essential to understand clearly this uncommon transformation of the executory devise into a common law future

²⁹ The case is not altogether academic as to Item IV, for there was a good chance that the court might split the condition and allow the gift-over men to take, if their executory devises were not too remote. In any event, what happened later was immaterial as regards the original validity of the provisions, when the will took effect.

³⁰ That is to say, — in 1923, Paul, the great-grandson, had the vested remainder in fee. The contingent life estate to Paul's widow obviously overlapped, and was thus an executory devise. Similarly, the gifts to *A*, *B* and the heirs of *C* overlapped Paul's fee in 1923, and had to be use estates accordingly. As long as Paul had the fee, there could be no remainders.

³¹ GRAY, THE RULE AGAINST PERPETUITIES 94, n. 4, citing *Craig v. Stacey*, Ir. Term R. 249, and *Storrs v. Burgess*, 29 R. I. 269, 275, 67 Atl. 731 (1907).

estate.³² Normally, when the condition is performed, the shifting use vests in possession instead of continuing on as a future interest and becoming as here, by a sort of metamorphosis, the ordinary sort of remainder. The executory devise as ultimately a remainder is not unusual, but simply rather infrequent.

Thus, when the contingency is fulfilled, the state of the title changes to, —

Life estate in the great-grandson's widow; remainder as respective undivided one-third interests in fee to, —

1. Daughter *A* or her heirs.
2. Daughter *B* or her heirs.
3. To the heirs of deceased son *C*.

There would be left merely the characterization of these interests in remainder as being vested or contingent, — to finish with the job of construing the will.

In West Virginia,³³ the law seems in the main³⁴ to be settled that the disjunctive testamentary word “*or*” indicates contingency in a future interest. It is merely a rule of construction, not a rule of property. If land be given to a life tenant and thereafter in fee to several tenants in common or their heirs, contingent remainders only are created. According to Judge Brannon,³⁵ the reason is that the heirs take as purchasers rather than by descent. In other words, it seems there is a contingent remainder in fee to the named beneficiary, on the condition that he survive the life tenant, with an alternative contingent remainder in his heirs otherwise, —

³² It should be noted that in states where contingent remainders are still destructible, this becomes extremely important. Executory devises may, by the happening of events afterwards, change into contingent remainders: and thereafter be destroyed by the failure of the preceding freehold before the occurrence of the contingency upon which these are to take effect in possession. *Doe d. Harris v. Howell*, 10 B. & C. 191 (1829).

³³ *Schaeffer v. Schaeffer*, 54 W. Va. 681, 46 S. E. 150 (1903); approved in *Dent v. Pickens*, 61 W. Va. 488, 503, 505, 58 S. E. 1029 (1907), and in *Neal v. Hamilton Co.*, 70 W. Va. 250, 260, 73 S. E. 971 (1912).

³⁴ In *Bland v. Davisson*, 77 W. Va. 557, 562, 88 S. E. 1021 (1916), the limitation read, — “To my widow Drusilla for life; and then to my grandson Charles or the children of his body.” *Held*, — the remainder vested at the death of the testator, there being merely a postponement of enjoyment until the widow's death. The court quoted, at p. 561, — “ ‘Courts always favor the vesting of estates, and therefore, in doubtful cases, lean in favor of construing language as creating vested rather than contingent remainders.’ ” As to the *Schaeffer* case, (54 W. Va. 681, 46 S. E. 150 (1903)), — “it was not believed that the cases were similar,” (p. 562).

³⁵ 54 W. Va. 681, 685, 46 S. E. 150 (1903).

analogous to contingent remainders in double aspect.³⁶ Applying the rule to the limitations above, the interests of the daughters would have been contingent on their surviving the great-grandson's widow. As to heirs of the testator's deceased son, the limitation might be either vested or contingent, depending whether these were to be ascertained as of the testator's death or ascertained on the death of the great-grandson's widow, the life tenant. Presumably, if the other two-thirds do not vest until the latter date, the son's heirs must be similarly treated. Granted this approach to the problem, there would be, (as to the respective undivided one-third interests in fee), contingent remainders in *A* and *B*, or their heirs, with a contingent remainder of the same sort in the heirs of *C*.

The trouble with the theory of contingent remainders is that it is simply half the story: it is just one of two equally tenable hypotheses. Even though the West Virginia cases do have a slant in favor of contingent remainders,³⁷ — all things being equal, — the presumption in favor of vesting³⁸ should be given due consideration. There is no good reason of social policy why the remainders to the daughters *A* and *B*, or their heirs, should not vest in interest, on the death of the great-grandson leaving a widow, — or on the deaths of *A* and *B*. Nor, by the same token, is there any compelling argument against holding that the heirs of the deceased son *C* are those alive when the will took effect. As a matter of construction, the technical rule as to ascertaining heirs would favor early vesting.³⁹ If such a method were adopted, these remainders must all vest when the fee in the great-grandson shifted over, or when the daughters died.

To sum up then, there are two equally reasonable constructions as to the fate of the executory devises here:

1. Life estate in the widow; remainders in *A* or her heirs, *B* or her heirs, and the heirs of *C*, these contingent remainders vesting on the death of the widow life tenant.

³⁶ Cf. *Loddington v. Kime*, 1 Salk. 224 (1695), to the effect that no limitation after a contingent remainder in fee absolute can be vested. See *Edmiston v. Donovan*, 300 Ill. 521, 133 N. E. 237 (1921).

³⁷ For an illustration of this see *Davis Trust Co. v. Elkins*, 114 W. Va. 742, 175 S. E. 611 (1934); discussed in *The Davis Will Case* (1935) 41 W. VA. L. Q. 385.

³⁸ *Duffield v. Duffield*, 1 Dow & C. 268 (1827), per Lord Eldon, L. C. See, also, the quotation from *Bland v. Davison*, 77 W. Va. 557, 88 S. E. 1021 (1916).

³⁹ The Massachusetts rule, typical of American common law, is illustrated by *Old Colonial Trust Co. v. Sullivan*, 268 Mass. 318, 167 N. E. 648 (1929).

2. Life estate in the widow; remainders, as before, which must vest in interest not later than the death of the great-grandson, or, — as to the alternative limitations favoring the respective heirs of *A* and *B*, — not later than the deaths of *A* and *B*.

As the legal anatomist dissects all the various limitations of *Brookover v. Grimm*, he must sooner or later choose one of those two constructions, in determining whether the executory devises are perpetuities.

PERPETUITIES

Every executory devise, it has been suggested, "is a perpetuity as far as it goes: that is to say, an estate inalienable, though all mankind join in the conveyance."⁴⁰ Indeed, the link between executory devises and perpetuities seems nearly always to have been before the minds of judges of sixteenth and seventeenth century England. Historically, again, there was much to be said for such an apprehension, even apart from the latent judicial dislike of shifting estates (that has never wholly abated). The term perpetuity had once upon a time been applied to the estate tail conveyed subject to forfeiture if effort were made to dock the entail.⁴¹ *Corbet's Case*⁴² was the answer of the judges to such a scheme: curiously enough, the condition was held invalid as "repugnant". On another occasion, the scheme had been tried of creating perpetuities in the guise of a series of inalienable contingent remainders, manufactured out of the machinery of the Statute of Uses.⁴³ These were all held destructible in *Chudleigh's Case*,⁴⁴ — "commonly called the Case of Perpetuities", — and the danger of any such indestructible remainders thus averted. Finally, in *Child v. Baylie*,⁴⁵ the court had been presented with the "devise" of a long term for years, with a gift over if the first taker died without issue living at his death. This was most improperly considered an entail of a term⁴⁶ and accordingly bad: "and if the law will not suffer such

⁴⁰ *Scatterwood v. Edge*, 1 Salk. 229 (1699).

⁴¹ Bacon, *Essay on the Use of the Law* (1629) 7 BACON'S WORKS (Spedding's ed.) 491.

⁴² 1 Co. 83b (1599).

⁴³ GRAY, *THE RULE AGAINST PERPETUITIES* 123-124.

⁴⁴ 1 Co. 120a (1594).

⁴⁵ Cro. Jac. 459 (1618, 1623).

⁴⁶ On the score of remoteness, the gift was surely good, for it would vest on the death of the first taker, a life in being. As to its being an entail, there was absent any general failure of issue in the shifting estate. The court

perpetuities of inheritances,⁴⁷ then much less will it suffer perpetuities of chattels" real. These judicial speculations had none of the vagueness characteristic of modern legal philosophy, though their style was open to an accusation of harshness. What was forbidden was the inalienable indestructible future interest: with great industry the judiciary ferreted out endeavors to slip these by.⁴⁸

When executory devises had been found indestructible,⁴⁹ limits on them had to be set at once, or the polity of two centuries overthrown. The *Duke of Norfolk's Case*⁵⁰ temporarily confined the frontiers of the executory estates within the concept of "lives in being."

"So is the compass of a life or lives; for let the lives be never so many, there must be a survivor, and so it is but the length of that life; for Twisden used to say, the candles were all lighted at once."⁵¹

"There are bounds set to them, *viz.*, a life or lives in being: and further they shall never go. . . . at law, let Chancery do as they please."⁵²

Gradually, over the period of a century and a half, these boundaries were extended, until the Rule against Perpetuities was cast into its modern form of lives in being and twenty-one years. "Executory devises were in themselves infringements on the rule of the common law, and were allowed only on condition of their not exceeding these established limits."⁵³ To such an extent at least, the prejudices of the older common law had prevailed. The rule became a weapon to be applied remorselessly.⁵⁴

merely looked at the character of the contingency. The judges suspected an entail was possible in some fashion or other, so they held the gift bad, just on general principles.

⁴⁷ While the case of *Child v. Baylie* was pending on appeal, *Pells v. Brown*, Cro. Jac. 590 (1620), sustained the validity of this same limitation as applied to fees simple. Despite that fact, the Exchequer Chamber affirmed, because of "the mischief which otherwise would ensue, if there should be such a perpetuity of a term."

⁴⁸ This was true, in at least a dozen instances, during the period before the *Duke of Norfolk's Case* (1682).

⁴⁹ *Pells v. Brown*, Cro. Jac. 590 (1620).

⁵⁰ 3 Ch. Cas 1 (1682).

⁵¹ *Per Powell, J.*, in *Scatterwood v. Edge*, 1 Salk. 229 (1699).

⁵² *Per Treby, C. J.*, in *Scatterwood v. Edge*, 12 Mod. 287 (1699).

⁵³ Similarly, "it is an established rule that an executory devise is good if it must necessarily happen within" limits: *per Kenyon, C. J.*, in *Long v. Blackall*, 7 T. R. 100, 102 (1797).

⁵⁴ *Prichard v. Prichard*, 91 W. Va. 398 (syl. 2), 113 S. E. 256 (1922).

The Rule against Perpetuities like many another legal precept offers the unpleasant surprise of explaining its purpose by implication and allusion. Perhaps just as the Rule in Shelley's Case, its purpose has varied from age to age.⁵⁵ Anyway, perpetuities were originally indestructible future interests which offended against judicial preference for common law estates of the simpler and more fragile nature. Executory devises, as an evil in and of themselves, prompted courts to invent a method for their liquidation. When the period of historical development had flowered, a newer generation of analytical jurists sought to spell out a more logical basis. Disregarding the former hostility towards executory devises, these nineteenth century scholars established firmly the rule against remoteness, even though troublesome cases occasionally did not quite jibe with their theory.⁵⁶

Now, under present-day influence of realist jurisprudence,⁵⁷ the terminology changes into "a rule against indirect restraints on alienation." "Whatever may be the immediate objective" of the Rule against Perpetuities, so it is said, the "ultimate purpose is to prevent tying up of property."⁵⁸ This assumes inevitably a "policy of the law in favor of the free alienability of most types of interests in land."⁵⁹ The difficulty with the assumption is that courts have seldom followed consistently any such policy, — at least, not very long. Legal historians realize that judges, and not the Statute *de Donis*, created the indestructible fee tail.⁶⁰ The sole and separate estate of the married woman was chancery's eighteenth century discovery.⁶¹ Spendthrift trusts, moreover, and contemporaneous post-

⁵⁵ Originally, the Rule in Shelley's Case was intended to protect feudal lords against serious loss through conveyances in derogation of feudal rights, (PLUCKNETT, CONCISE HISTORY OF THE COMMON LAW (2d ed. 1936) 504-5). Later, its accepted basis became the theory that contingent remainders were invalid in the early common law. In modern times, the *rationale* of the Rule has been free alienability of the land.

⁵⁶ In other words, there are many remote estates which are valid. For example, remote vested remainders, remote rights of reverter, and remote gifts over from one charity to another are all good perpetuities.

⁵⁷ See Pound, *The Call for a Realist Jurisprudence* (1931) 44 HARV. L. REV. 697.

⁵⁸ 2 SIMES, LAW OF FUTURE INTERESTS (1936) 343. Cf. KALES, FUTURE INTERESTS IN ILLINOIS 114: "The Rule against Perpetuities should be carefully distinguished at all times from the rules making void restraints on alienation. There are two different principles of public policy involved and each finds expression in a different rule."

⁵⁹ 2 SIMES, LAW OF FUTURE INTERESTS 269.

⁶⁰ PLUCKNETT, CONCISE HISTORY OF THE COMMON LAW 494-496.

⁶¹ 1 BOGER, TRUSTS AND TRUSTEES (1935) 711; 2 *id.* at 760.

ponement of enjoyment of the vested equitable fee⁶² scarcely typify freedom of alienation. The ready answer is that there is constant and continuous conflict between "control of property by the dead"⁶³ and the assumed policy in favor of free alienation: the result is then make-shift compromise rather than clear legal principle. So without some understanding of the origin and development of the Rule, there is always difficulty in its application.⁶⁴

The limitations in *Brookover v. Grimm* must be approached from this angle, in any effort to ascertain whether they are fairly "within the law". Since the doctrine of "repugnancy" is not often found in recent West Virginia decisions,⁶⁵ the problem is wholly one of perpetuities. Naturally there can be no question about the great-grandson's vested remainder in fee, following the life estate in possession given the son-in-law: it is doubt as to validity of the executory devise that raises the issue. So far as the shifting devise given the great-grandson's possible widow is involved, this must vest (if at all) on his death, — and he is the necessary life in being immediately preceding her estate's taking effect in possession. Her interest is of course valid. Disposition of the fee on the widow's death was what concerned the court.⁶⁶

Superficially, the ultimate gifts over would appear too remote. These were not to vest *in possession* until termination of the widow's prior executory devise; and possibly, — quite possibly (for the great-grandson was then but thirteen), — the widow would have been a life unborn at the testator's death.⁶⁷ As a matter of fact, the majority opinion did hold these too remote.⁶⁸ Still such an issue deserves further study. Common law courts strike down merely the contingent future estates, and not the vested ones. The rule itself recognizes that an executory devise may within limits

⁶² Cf. *Claffin v. Claffin*, 149 Mass. 19, 20 N. E. 454 (1889).

⁶³ Scott, *Control of Property by the Dead* (1917) 65 U. OF PA. L. REV. 527, 632.

⁶⁴ Witness the difficulties courts have encountered in dealing with options to purchase the fee.

⁶⁵ *Bartlett v. Petty*, 93 W. Va. 608, 117 S. E. 551 (1923).

⁶⁶ That is to say, — assuming the contingency were split so that the only issue were the remoteness of the executory devise.

⁶⁷ *Easton v. Hall*, 323 Ill. 397, 154 N. E. 216 (1926).

⁶⁸ The court said, (118 W. Va. 234): "It was altogether possible that he might in manhood marry a woman not in being at the testator's death, and that she would become Paul's widow. In that contingency, the ultimate vesting of the estate would be postponed on account of a life not in being at the testator's death. Clearly, under the authorities stated above, the executory limitation is void."

vest in interest, even if not in possession. No doubt the exception is unsound as a matter of cold metallic reasoning. The vested remainder after a long-term lease may be equally objectionable,⁶⁹ compared with the springing use which is to vest in possession on the same remote future day. Historically, however, the executory limitation (which permanently remained such) was the one the older law disliked and feared. The enquiry here should be to find whether any of the final limitations will necessarily vest in interest within the rule.

It has been indicated above that there are two possible constructions as to the nature of these remainders. On the one hand, the ultimate gifts over may become contingent remainders, vesting finally on the death of the (possibly unborn) widow life tenant. As such, these are bad: later development of the rule swept contingent remainders within its ken.⁷⁰ If that were all, there would be no further chance for these beneficiaries. On the other hand, the alternative construction noted permits the limitations to vest in interest within the rule, either

1. As to the remainders to *A* and *B*, — not later than the death of the great-grandson, a life in being; or

2. As to the alternative gifts to the heirs of *A* and *B*, — not later than the deaths of *A* and *B*, who are lives in being. ("Heirs" ordinarily comprehends those entitled to the beneficiary's property upon his death.)

In short, — assuming the gift to the heirs of *C* has the same construction as the remaining two-thirds, — the executory devises cannot be invalid. They must vest, if at all, within lives in being.

What reasons should determine the choice between these alternative constructions? One might suggest several considerations. In the first place, the West Virginia doctrine as to use of the disjunctive "or" might be applied, if the precedents are to be given any weight. Yet surely the cases are distinguishable: their holding merely favors postponed vesting, without laying down any precise rule as to when vesting will eventually occur. Again, it may be argued that the language "*A or her heirs*" indicates those persons who would have been the daughter's heirs, if ascertained at the death of the unborn widow. Thus "heirs" would have a special meaning, — not the ordinary one, — so that vesting could be held

⁶⁹ GRAY, THE RULE AGAINST PERPETUITIES 662-663.

⁷⁰ *In re Ashworth*, L. R. [1905] 1 Ch. 535.

up till the widow died. There is no indication in the majority opinion that this departure from the ordinary meaning of "heirs" was considered, and no substantial justification for making it.⁷¹ Finally, there is the historical prejudice of the courts against executory devises; and this is perhaps the most important consideration. If these limitations were once so disliked and feared, — if the rule is to be applied remorselessly, — if the doubtful case is to be resolved against the validity of the interest given, — then it is readily evident that the result must follow of striking down these executory devises as perpetuities.

It is equally difficult to conclude that the second construction, (the one favorable to early vesting), is beyond doubt the correct one. True enough, the testamentary language here, — "at her death", — may be disregarded as surplusage: probably its meaning is only, — "subject to the widow's life interest, to A or her heirs."⁷² Still the testator consistently employed language that has a forward look to it: the provisions are all in the future tense.⁷³ Moreover, the presumption in favor of vesting is so frequently disregarded in this day and age that one might consider it as a somewhat weak sort of inference, easily rebutted. Indeed, one could almost suggest that it is merely synonymous with the result reached. If a certain future interest is held vested, then the case will be decided on the basis of the presumption: if on the same limitations the result is a contingent remainder, then the *ratio decidendi* is the condition precedent.⁷⁴ Actually, in these instances, other factors have dictated whichever construction the jurist has reached. It may be urged that the complicated distribution desired by the testator should be given effect, if at all possible, so that the property

⁷¹ The court merely observed, — "It provides that if Paul shall die without living issue and leave a widow, she shall have a life estate, the remainder thereafter to become vested in persons to be determined at the widow's death." The postponement of ascertainment of heirs is justified only in extreme cases, where the testamentary language or other facts clearly require it. See (1934) 40 W. VA. L. Q. 385; Leach, *Perpetuities in a Nutshell* (1938) 51 HARV. L. REV. 638, 647.

⁷² *Maddison v. Chapman*, 4 K & J. 709, 719 (1858); *In re Shuckburgh's Settlement* [1901] 2 Ch. 794.

⁷³ The provision uses "shall" three times. The gift over is "at" the widow's death, and "after" the death of the son-in-law, life tenant in possession.

⁷⁴ Just as a statute may be liberally construed as being "remedial" or the same law narrowly construed as being "in derogation of the common law": the result gives the name to the reason.

remain on in his family.⁷⁵ But even that reasoning proves too much: one must not write a new will, to save these limitations. And, in any event, there is the old common law dislike of remote executory devises.

Nevertheless, the contention in support of the testator's testamentary provision does have some merit. Conceded that the two possible constructions are evenly balanced, it is reasonable to believe the testator meant to create a legal rather than an illegal interest. It is true the Rule against Perpetuities is not a rule of construction, — and that the will must ordinarily be construed as if the problem of perpetuities did not exist. But "when the expression . . . is really ambiguous and fairly capable of two constructions, one of which would produce a legal result and the other a result that would be bad for remoteness", "there is a legitimate use of the Rule."⁷⁶ Such an approach could save the limitations here, even though these be executory use estates and not traditional common law remainders. It must accordingly be regretted that this reasoning was not proposed in the briefs of counsel, so that the court might have had the benefit of argument in construing the testator's intent as to vesting.⁷⁷ One may speculate that perhaps the case would in that event have gone the other way.

Brookover v. Grimm has answered in able fashion many vexing phases of the lore surrounding executory devises. Apart from its central theme of remote executory devises, there is discussion of the doctrine of separable limitations,⁷⁸ — of the question of "fettering

⁷⁵ One must bear in mind that the decision in *Schaeffer v. Schaeffer*, (enunciating the rule of construction for the disjunctive "or"), did not settle whether survivorship in a will related to the death of the testator, or to some other point of time. *Prichard v. Prichard*, 83 W. Va. 652, 655, 98 S. E. 377 (1919). By postponing vesting until the latest possible time, — the death of Paul's widow, — the gifts over become bad. Paul thus takes an absolute fee, which passes to his father, as heir at law. Paul's father not being a descendant of the testator, the property then goes out of the family. The choice here is apparently between the testator's descendants, (expressly named as beneficiaries), and one who is not related by blood.

⁷⁶ GRAY, THE RULE AGAINST PERPETUITIES 499.

⁷⁷ The briefs of counsel are silent in this respect. The case was argued Jan. 26, 1937, and decided Feb. 9, 1937. Plainly, in the preparation of such an elaborate opinion by the court, there would be little opportunity for independent investigation.

⁷⁸ Judge Maxwell cites with approval *Longhead v. Phelps*, 2 W. Bl. 704 (1771), which is a leading authority on separable limitations. Its doctrine is, briefly, that the court will give effect to the good part of a divesting condition, if the testator has divided the contingencies. Unless the testator has *himself* done so, the court will seldom, if ever, do the splitting for him. This rule as to divided contingencies is often overlooked. Cf. *McCreery v. Johnston*, 90 W. Va. 80, 110 S. E. 464 (1922).

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the condition",⁷⁹ — and of the common law principle of repugnancy where the first taker has a power of consumption, with a gift over of the balance left.⁸⁰ Its decision serves to clarify West Virginia law on these points. Gradually local doctrines in the field of future interests are being settled by the court. There is no indication, however, that legal history can ever be excluded from legal theory as to executory devises.

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⁷⁹ The issue is, — does "die without issue" mean "die without issue *in the life-time of the testator?*" Should the condition thus be "fettered"? O'Mahoney v. Burdett, L. R. 7 Eng. & Ir. App. Cas. 388 (1874) holds not. See Warren, *Gifts Over on Death Without Issue* (1930) 39 YALE L. J. 346.

⁸⁰ National Surety Co. v. Jarrett, 95 W. Va. 420, 121 S. E. 291, 36 A. L. R. 1171 (1924). The common law doctrine is modified by W. VA. REV. CODE (1931) c. 36, art. 1, § 16.