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## The Davis Will Case--A Study in Contingent Remainders

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### EDITORIAL NOTE

#### THE DAVIS WILL CASE — A STUDY IN CONTINGENT REMAINDERS

“The notion of a contingent remainder,” according to Chief Justice Wiles, “is a matter of a good deal of nicety”<sup>1</sup> Historically, it would seem that remainders of one sort or another have been sanctioned in the common law ever since the reign of King John,<sup>2</sup> though the more precise distinction between vested

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<sup>1</sup> Parkhurst v. Smith, Wiles 327, 337, 125 Eng. Rep. R. 1197, 1202 (H. L. 1741). The learned judge added, “. . . and if I should trouble you with all that is said in the books concerning contingent remainders and the instances that are put of such contingent remainders I am afraid it would rather tend to puzzle than enlighten the case.”

<sup>2</sup> HUNTER, FINES (1835) vol. 1, 34, citing a fine of 1192, granting to Mary for life; “reversion” after her death to her son Hugh, in special tail; “reversion”, in default of issue, to her son Stephen, in special tail.

and contingent remainders was scarcely recognized by medieval conveyancers.<sup>3</sup> Indeed, in the fourteenth century, a remainder to the heirs of a living person was thought simply to be void,<sup>4</sup> for feudal services could never be owed by an unascertained person.<sup>5</sup> Not until 1453 did common law courts permit such an ordinary type of contingent estate,<sup>6</sup> and the validity of remainders depending on other contingencies awaited the gradual development of judge-made law during the next hundred years.<sup>7</sup> It was left to property lawyers in the Stuart reigns, beginning with Coke<sup>8</sup> and ending perhaps with Sir Orlando Bridgman,<sup>9</sup> to ascertain and phrase the rules which were subsequently to govern this inalienable yet destructible future interest in land, so frequently encountered.<sup>10</sup>

Still the precise frontier between vested and contingent remainders was never measured off clearly in the next decades: there was no bright line of demarcation as to what constituted the latter's scope. A remainder to an unborn or unascertained person, or one subject to a condition precedent, was contingent as a rule of property;<sup>11</sup> and that simple Austinian definition worked well in elementary cases. When courts entered border territory where, for example, the contingency was stated both as a condition precedent and as a condition subsequent,<sup>12</sup> or even where there was a gift over in default of the exercise of a power of appointment,<sup>13</sup> — not to mention the curious contingent remainder with a double

<sup>3</sup> Maitland, *Remainders After Conditional Fees* (1890) 6 L. Q. REV. 22, 23.

<sup>4</sup> *Cf.* Y. B. 18 Edw. II, f. 578 (1325); Y. B. 10 Edw. III, Michs. No. 8 (1336); Y. B. 11 Hen. IV, Trin. No. 14 (1410). LITTLETON, TENURES (1481) § 721, reflected these views.

<sup>5</sup> *Per* Bereford, J., in Y. B. 2, 3 Edw. II (S. S.) 4 (1309).

<sup>6</sup> FITZHERBERT, ABRIDGEMENT, tit. Feoffments, No. 99, citing Hill. 32 Hen. VI (a decision not printed in the Black Letter Year Books).

<sup>7</sup> HOLDSWORTH, HISTORICAL INTRODUCTION TO THE LAND LAW (1927) 68.

<sup>8</sup> Co. Litt. (1628) note to § 721.

<sup>9</sup> Bridgman invented, *inter alia*, the device of the trust to preserve contingent remainders. See BRIDGMAN, CONVEYANCES (1690) 186-187.

<sup>10</sup> These interests became increasingly common with the formulation of the rule that a limitation which can take effect as a contingent remainder must take effect as such, and cannot be construed to be a springing or shifting use, or an executory devise. See *Purefoy v. Rogers*, 2 Wms. Saunders 380, 388, 85 Eng. Rep. R. 1181, 1192 (1670). Presumably, this rule still holds, to-day.

<sup>11</sup> FEARNE, CONTINGENT REMAINDERS (10th ed. 1844) vol. 1, 5-9.

<sup>12</sup> *Edwards v. Hammond*, 3 Lev. 132, 83 Eng. Rep. R. 614 (1683).

<sup>13</sup> *Leonard Lovies's Case*, 10 Co. 78a, 85a, 77 Eng. Rep. R. 1043, 1052 (1613); *Walpole v. Lord Conway*, Barnard. Ch. 153, 27 Eng. Rep. R. 593 (1740). *Contra*, and present-day law, *Cunningham v. Moody*, 1 Ves. Sr. 174, 27 Eng. Rep. R. 965 (1748); *Doe d. Willis v. Martin*, 4 T. R. 39, 100 Eng. Rep. R. 882 (1790).

aspect,<sup>14</sup> — it was in truth a veritable no-man's land. Deprived of the pole-star of any expressed intent on the part of the testator,<sup>15</sup> decisions floundered badly<sup>16</sup> while rules of construction were painfully being formulated, as the precedents slowly accumulated in the seventeenth and eighteenth centuries.<sup>17</sup> The ameliorating presumption in favor of vesting<sup>18</sup> helped materially in this task, but the safest course proved ultimately to be one of negatively defining the issue. A remainder was vested in its owner, so it came to be held, when, throughout its continuance, there existed always the right to the immediate possession, whenever and however the preceding freehold estates might determine: all else was contingent.<sup>19</sup> One found a statutory vagary now and then,<sup>20</sup> Chancellor Kent himself once being misled by such legislative phrasing.<sup>21</sup> Albeit, modern text-writers have empirically assumed, perhaps unwisely, that difficulties of determining whether a remainder be vested or contingent have thus largely been solved.<sup>22</sup>

Presumably, then, there should be no unusual hardship at the present time in applying these settled principles to any ordinary

<sup>14</sup> *Loddington v. Kime*, 1 Salk. 224, 91 Eng. Rep. R. 198 (1695), holding improperly that no limitations after a contingent remainder in fee simple absolute can ever be vested. For a modern decision to this same effect, see *Edmiston v. Donovan*, 300 Ill. 521, 133 N. E. 237 (1921).

<sup>15</sup> See *Garth v. Baldwin*, 2 Ves. Sr. 646, 28 Eng. Rep. R. 412 (1755), *per* Lord Hardwicke, holding that, in a court of equity, construction of limitations in trust must occur according to the ordinary legal rules of construction, unless the intent of the testator appeared by declaration plain. Normally, in these cases there is no such corroborating evidence.

<sup>16</sup> *E. g.*, *Doe d. Roake v. Nowell*, 1 M. & S. 327, 105 Eng. Rep. R. 123 (1813), criticized in *FEARNE, op. cit. supra* n. 11, vol. II, 177-179.

<sup>17</sup> *HOLDSWORTH, HISTORY OF ENGLISH LAW* (1926) vol. VIII, 84-104.

<sup>18</sup> See *Duffield v. Duffield*, 1 Dow. & C. 268, 311, 6 Eng. Rep. R. 525, 542 (1827-1829), as illustrative of the vigorous modern rule, ". . . in construing devises, that all estates are to be holden to be vested, except estates in the devise of which a condition precedent to the vesting is so clearly expressed that the courts cannot treat them as vested without deciding in direct opposition to the terms of the will." *Per* Lord Eldon, "I hope this will be a leading case."

<sup>19</sup> *GRAY, THE RULE AGAINST PERPETUITIES* (3d ed. 1915) § 101.

<sup>20</sup> For example, New York thus defines a remainder as vested, "when there is a person in being who would have an immediate right to the possession of the property, on the determination of all the intermediate or precedent estates." *NEW YORK REAL PROPERTY LAW (MCKINNEY'S CONS. LAWS, Book 49, § 40)*. Thus, in New York, since the abolition of the Rule in *Shelley's Case*, a remainder to heirs, following a life estate to the ancestor, is vested. *Moore v. Littel*, 41 N. Y. 66 (1869), *reversing the reasoning but not the result in s. c.*, 40 Barb. 488 (1863).

<sup>21</sup> Kent said this incorrect New York definition "appears to be accurately and fully expressed." 4 *KENT, COMMENTARIES* (14th ed. 1896) 202.

<sup>22</sup> 1 *TIFFANY, REAL PROPERTY* (2d ed. 1920) §§ 135-139.

problem in future interests.<sup>23</sup> Hence, *Davis Trust Company v. Elkins*<sup>24</sup> must be regarded as the exception to such a bland assumption of ready solution, insofar as it raises varied and vexing issues. In that case, the testator,<sup>25</sup> while arranging a lengthy but careful disposition of his vast estate among his relatives and beneficiaries,<sup>26</sup> set up a trust of personalty<sup>27</sup> for specified issue. In order that his three named children might "have an assured income during their lives," he made them equitable tenants in common for life, subject to a restraint on alienation and without power of anticipation as to the income from the respective shares.<sup>28</sup> Thereafter, with the purpose that "some provisions" might be made "for those dependent upon them at their death," the testator provided that "at the death of any of his said children," each respective share was to pass to the "children" of any such deceased child of the testator.<sup>29</sup> Yet to this gift in favor of his grandchildren, *per stirpes*, he added a postponement of enjoyment, stipulating that the income should be devoted to their welfare until they respectively reached the age of twenty-five,<sup>30</sup> when the corpus of the fund would be turned over. But if any of the testator's children left no children nor child, then and in such event the remainder in the particular share, (after the equitable

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<sup>23</sup> A leading American jurist has remarked that there is seldom a dissenting opinion in a modern decision, on the issue of whether the remainder is vested or contingent.

<sup>24</sup> 175 S. E. 611 (W. Va. 1934).

<sup>25</sup> Henry G. Davis, who died in March 1916.

<sup>26</sup> The will, executed under date of August 24, 1915, contained thirty-one separate provisions as to the distribution of the estate.

<sup>27</sup> Recent case-law, as well as modern statutory provisions, recognizes the existence of remainders in personalty. See *Evans v. Walker*, 3 Ch. D. 211 (1876); W. VA. REV. CODE (1931) c. 36, art. 1, § 9.

<sup>28</sup> While this provision is in the nature of a spendthrift trust, it will be noted there is no specific prohibition against involuntary alienation, *e. g.*, by adverse judgment. Cf. *Bruceton Bank v. Alexander*, 83 W. Va. 573, 98 S. E. 804 (1919). Moreover, no discretion has been confided in the trustee as to payment of income, nor is there any gift over on insolvency, two provisions commonly met with in other jurisdictions. Presumably, however, such a provision would today be execution-proof in West Virginia: see *Hoffman v. Beltzhoover*, 71 W. Va. 72, 76 S. E. 968 (1912), and W. VA. REV. CODE (1931) c. 36, art. 1, § 18.

<sup>29</sup> The language of the will contains a clear gift of the personalty in fee simple, subject to the condition subsequent. Had the trust *res* been realty, present-day legislation would have obviated any necessity of the use of the word "heirs", in order to create the fee in the children: W. VA. REV. CODE (1931) c. 36, art. 1, § 11. Of course, even at common law, this rigid requirement was overlooked where the devise used equivalent language.

<sup>30</sup> For discussion of the problem of remote postponement of enjoyment of a vested estate, see *KALES, FUTURE INTERESTS IN ILLINOIS* (1920) §§ 732-741.

life estate during the tenancy in common), would go to the legal heirs of this child of the testator.<sup>31</sup>

The three named children<sup>32</sup> of the testator survived him and took their respective shares for life. At the testator's death, one daughter<sup>33</sup> then had five living children, all over the age of twenty-five, (which was the postponement limit). The other daughter then had four living children, and the testator's son, two, — all of these grandchildren being less than twenty-five. Subsequently, in the life-time of the elder daughter, (Mrs. Hallie D. Elkins), three of her children died,<sup>34</sup> one of the deceased grandchildren (Blaine Elkins), leaving a son, (Stephen B. Elkins, III.), him surviving. The two remaining grandchildren, (Mrs. Katharine Elkins Hitt and Davis Elkins), as well as the great-grandson, (Stephen B. Elkins, III.), were living at the death of this elder daughter. The present suit was then brought to determine the respective rights of these three parties.<sup>35</sup>

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<sup>31</sup> The upper court (175 S. E. 611, 614) observed that this provision demonstrated the testator's concern over possible grandchildren of the life tenant and his desire to provide for them, "for certainly the grandchildren, if any, would be the sole legal heirs in the event named." With due respect, it is believed that interpretation is unfounded. It is just as probable the testator thought there would be no such grandchildren of the life tenant, if the latter died without leaving children. The remote hypothesis of grandchildren of the life tenant taking by purchase can hardly have entered the testator's mind. Moreover, a gift to the "legal heirs" of the life tenant could never be confined simply to his issue.

<sup>32</sup> Mrs. Hallie D. Elkins, Mrs. Grace D. Lee and John T. Davis.

<sup>33</sup> Mrs. Elkins had five children, — Mrs. Katherine Elkins Hitt; Blaine Elkins, (the father of Stephen B. Elkins, III.); Richard Elkins; Stephen B. Elkins; and Davis Elkins.

<sup>34</sup> Richard and Stephen, of the children, predeceased without issue their life tenant mother; Blaine, also predeceasing, left his son Stephen, III, surviving.

<sup>35</sup> The precise language of the will provision is, as follows:

"XV. In order that my children, Hallie D. Elkins, Grace Davis Lee and John T. Davis, may have an assured income during their lives, and that some provision may be made for those dependent upon them at their death, I give, devise and bequeath to the Davis Trust Company, One Million Five Hundred Thousand Dollars to be held by it in trust for my aforesaid children in equal proportions, that is to say, Five Hundred Thousand Dollars for each, the revenue therefrom to be paid to them semi-annually during their lives; and at the death of any of my said children, I give and bequeath his or her share in equal proportions to his or her children, the income or revenue therefrom to be devoted to their welfare until they respectively reach the age of twenty-five years when they are to receive from my estate their share of the principal of the fund; but if any of my said children leaves no children nor child then his or her share is to go to his or her legal heirs. The intent of the foregoing provision is that a portion of my estate shall be held in trust so that it cannot be spent, sold or given away by my said children, and they, therefore, shall have no power to sell, transfer, or in anyway dispose of their interest in said trust fund, or of the income or proceeds thereof, in advance of receiving the same. The trust fund of One Million Five Hundred Thousand Dollars for

The will must of course be construed as of the time of the testator's death, taking into account the factual situation as it then existed and disregarding all subsequent events.<sup>36</sup> So construed, the state of the title to the trust of personalty became, as indicated above, an equitable life estate in each of the testator's children, by way of tenancy in common, without cross remainders either expressly or by implication.<sup>37</sup> On the death of each child, the respective undivided interest passed, *per stirpes*, to the life tenant's children, (the testator's grandchildren), in the nature of a remainder to a class.<sup>38</sup> Obviously, the class in each instance would close on the death of the life tenant:<sup>39</sup> no testamentary language existed to dispense with the common law presumption that each life tenant would be capable of issue up to the moment of death.<sup>40</sup> Each class of grandchildren might accordingly open up, in order to let in after-born grandchildren, (born between the death of the testator and that of the life-tenant). The postponement of enjoyment until the age of twenty-five, extending thus possibly for more than twenty-one years after lives in being, would be invalid;<sup>41</sup> and each grandchild on reaching maturity could take his fractional interest in the undivided share, after the life estate

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which provision is hereby made may consist of Coal and Coke Railway Company bonds, or other bonds, stocks or other property, at a fair valuation, as my Executors may determine, and is to be managed and its accounts kept under their direction by the Davis Trust Company."

<sup>36</sup> W. VA. REV. CODE (1931) c. 41, art. 3, § 1: "A will shall be construed, with reference to the estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." *Cf.* *Southern v. Wollaston*, 16 Beav. 276, 51 Eng. Rep. B. 785 (1852). The chief difficulty in the present case is the feeling one cannot escape that both trial and appellate courts construed the will in the light of subsequent events.

<sup>37</sup> *Cf.* *Lazier v. Lazier*, 35 W. Va. 567, 14 S. E. 148 (1891).

<sup>38</sup> See the definition of "gift to a class" in *Prichard v. Prichard*, 83 W. Va. 652, 98 S. E. 877 (1919).

<sup>39</sup> *Ayton v. Ayton*, 1 Cox, Ch. Cas. 327, 29 Eng. Rep. B. 1188 (1787); *Middleton v. Messenger*, 5 Ves. 136, 31 Eng. Rep. B. 511 (1799).

<sup>40</sup> The authorities are collected in Note (1934) 40 W. VA. L. Q. 394. The upper court, in this connection, said (175 S. E. 611, 614): "By using the words 'those dependent upon' Hallie D. Elkins, the testator in all likelihood, knowing that his daughter would probably have no more children and that those of her children in life were over 25 years of age and in the nature of things not dependent, contemplated the application of those words to the child of a deceased child of Mrs. Elkins." (Italics supplied.) Not only is the court's statement in opposition to the normal presumption of capacity to bear issue, but it ignores also the fact that all of the children of the other two life tenants were under the age of twenty-five. Surely, "those dependent upon" may possibly have referred to the children of these other two, as well as to any after-born children of Mrs. Elkins.

<sup>41</sup> The so-called "New Rule" against remote postponement of enjoyment of a vested estate in an indestructible trust, (not to be confused with the

had fallen in. The testator's qualification, in the "but if" clause attached as a condition subsequent, was that, in the event a child of his left "no children nor child," — supposing *all* of the existing and possible after-born grandchildren by one of his children predeceased the life tenant parent, — the share went then to the life tenant's heirs otherwise. In other words, the testator desired to protect the children of the life tenant, by giving them a remainder in explicit language, failing which the undivided share was to pass to the stock of the life tenant generally.<sup>42</sup>

The crucial question in the case is the issue as to the nature of the remainders in the undivided shares, given to the respective classes of grandchildren. One alternative possibility is that the members in each class took merely contingent interests,<sup>43</sup> which vested only upon their surviving the life tenant parent, — a view adopted by the Circuit Court<sup>44</sup> and approved, *sub silentio*, by the

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Rule against Perpetuities), strikes down the postponement clause in instances where such postponement may possibly extend beyond lives in being and twenty-one years. *KALES, op. cit. supra* n. 30, § 737. No West Virginia decision exists, but see *Cowherd v. Fleming*, 84 W. Va. 227, 232, 100 S. E. 84, 86 (1919), where the court refused to discuss the point.

<sup>42</sup> *Cf.* the similar contention often raised as to the meaning of the word "heirs", Note (1934) 40 W. VA. L. Q. 385, in instances where an estate is left "to the testator's son A for life; with remainder to A's children in fee; and in default thereof, to the heirs of the testator." Where A is the sole heir at law, it has been plausibly suggested in the decisions that the testator intended (as a sort of partial entail) to protect the life tenant's children by such a specific gift, failing which children he devised to the life tenant's other stock. In short, A's children are to be let in as a new stock, before the testator throws it open to A's stock generally. This is exactly what was done in clause XV of the Davis will. However, the Supreme Court's interpretation makes the clause now become, "A for life; remainder to the heirs of A."

<sup>43</sup> The best argument for so holding is set forth in *GRAY, op. cit. supra* n. 19, §§ 104-105: "Suppose, for instance, a gift to A for life, remainder to B and his heirs, but if B dies before the determination of the particular estate, then to C and his heirs. Here, if the condition ever affects B's estate at all, it will prevent it from coming into possession. . . . If the law looked on vested and contingent interests with an impartial eye, it would seem that such remainders should be held contingent. A condition which may prevent an estate coming into possession, but which can never divest it after it has come into possession, is a condition in its nature precedent rather than subsequent. But the preference of the law for vested interests has prevented this view being adopted." See *Bingham, Common Law Remainders* (1907) 5 *MICH. L. REV.* 497, 507.

<sup>44</sup> *Record*, p. 69: "If the five grandchildren . . . took vested interests as of the date of his death, they would have the right to alien . . . the same . . . during their life-time. Not one ever attempted to dispose of same. The will says that if Mrs. Elkins would die without leaving a child the trust fund would go to her legal heirs. Naturally it could not go to her legal heirs if it had been and could be legally disposed of. If the five Elkins children had no right to alien or dispose of the property they never had any vested interest." The brief of counsel for appellant National Savings and Trust Company (pp. 47-56) adequately deals with the court's reasoning in this regard.



Supreme Court of Appeals.<sup>45</sup> The other alternative theory must be that each grandchild already existing, and each possible after-born grandchild immediately upon birth, took vested interests, subject to be divested by the precise operation<sup>46</sup> of the testator's condition subsequent, namely, that *all* predeceased the life tenant parent, — with a gift over then to the life tenant's other heirs, by way of shifting executory bequest. So phrased, the state of the title in the present litigation is, briefly, in trust for Mrs. Hallie Elkins for life, as tenant in common; vested remainder in fee to her children living at the testator's death, with contingent remainder in fee to any possible after-born child; subject to a shifting executory bequest in fee in favor of her heirs generally, if *all* her children predeceased her. To recapitulate more succinctly, the hypotheses may be stated in this fashion:

1. Mrs. Elkins for life; contingent remainder in fee to such of her children as survive her; if none survive, contingent remainder in fee to her heirs generally; reversion in fee to the testator.

2. Mrs. Elkins for life; vested remainder in fee in her children; subject to a shifting executory bequest in fee to her heirs, if no children survive.

At common law, while there was no great difference in substance in these remainders given, — whichever theory be followed, — very practical differences in result flowed therefrom. If, in the first instance, the life tenant made a tortious feoffment, the contingent remainder to the children was smashed; in the other, the children might come in at once after the tortious livery, having as they did an indestructible vested interest.<sup>47</sup> Similarly, in the former case, the children had no alienable interest, the contrary being true in the latter.<sup>48</sup> To-day, the chief importance might lie in the problem of acceleration of the remainders. If the future interests be contingent, the renouncing of her share by the life tenant would in principle create merely an intestacy as to her life

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<sup>45</sup> 175 S. E. 611, 614: "Only one issue arises upon this appeal: did the lower court err in excluding the infant appellant from the class described as 'children' in paragraph XV . . . ."

<sup>46</sup> Conditions subsequent are strictly construed. *KALES, op. cit. supra* n. 30, § 596.

<sup>47</sup> *FEARNE, op. cit. supra* n. 11, at 288.

<sup>48</sup> Of course, these are freely alienable at present, W. VA. REV. CODE (1931), c. 36, art. 1, § 9.

estate.<sup>49</sup> On the other hand, assuming the remainders vested, had Mrs. Elkins renounced in 1916, her children would at once have taken,<sup>50</sup> subject to being divested in the later event all predeceased her.

These facts bring the present case very close to the shadowy boundary line between vested and contingent remainders. If the testator intended to limit his bounty solely to *such* of the grandchildren as survived Mrs. Elkins, the remainder was clearly contingent. Both the trial and appellate courts would then be correct in holding that the predeceased children took nothing. Assuming the correctness of classifying her grandchild, Stephen B. Elkins, III., (the testator's great-grandson), as a "child" of Mrs. Elkins, the division three-ways among her two *real* children, (Mrs. Hitt and Davis Elkins), and such grandchild, as decreed in the judgment of the Supreme Court of Appeals, would be irrefragable. But, taking the other line of approach, were the limitation given to Mrs. Elkins' children vested, (subject to being divested by a condition subsequent, which in fact never operated), a sharply contrasting consequence must follow. The vested interest of each predeceased child of the life tenant will pass to his respective legatees.<sup>51</sup> Stephen B. Elkins, III., will take as a legatee under the will of his deceased father, Blaine Elkins, and not as a remainderman under that of his great-grandfather, the testator herein. In short, there will be a division five-ways, among all of the children of Mrs. Elkins or their legatees.

It is submitted that the theory of vested interests in remainder is the sounder view in the *Davis Will Case*, both on principle and after examination of the authorities. Starting with the presumption in favor of vesting,<sup>52</sup> there are here words importing the gift of an absolute interest to the children of the life tenant: the inference is one of vested remainder. Next, a proviso is added which may possibly defeat the gift, but the qualification is set forth as a condition subsequent: as such, it must operate to divest

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<sup>49</sup> *Compton v. Rixey's Ex'rs*, 124 Va. 548, 98 S. E. 651, 5 A. L. R. 465 (1919); *contra*, *American National Bank v. Chapin*, 130 Va. 1, 107 S. E. 636, 17 A. L. R. 304 (1921). But see Simes, *The Acceleration of Future Interests* (1932) 41 YALE L. J. 659; *In re Sir Walter Scott* [1911] 2 Ch. D. 374.

<sup>50</sup> KALES, *op. cit. supra* n. 30, § 599. *Eavestaff v. Austin*, 19 Beav. 591, 52 Eng. Rep. E. 480 (1854). Where the limitations read: "A for life, and at A's death, then to B in fee," the italicized phrase means only, "at the termination of A's estate, whenever that happens." All authorities so hold.

<sup>51</sup> RESTATEMENT OF PROPERTY, Tentative Draft No. 4, Part III, Future Interests (Am. L. Inst. 1933) § 206.

<sup>52</sup> 1 TIFFANY, REAL PROPERTY (1920) § 138.

some vested interest already given. Finally, the desires of the testator, "patriarchal in design," would seem to favor a division of his vast estate among all of his grandchildren, particularly those living and known to him before his death, — save in the one remote contingency that all of one branch predeceased the designated life tenant. Viewed from this angle, the present decision would seem untenable.

Granted, however, the remainder to the class of grandchildren was wholly contingent upon surviving the life tenant, it is at least arguable that the great-grandson, (Stephen B. Elkins, III.), should take by purchase under the limitation in question. Surely the testator never anticipated that his great-grandson was to be disinherited, merely through the fortuitous chance of the grandson predeceasing the testator's daughter: it was an unlikely contingency to which in all probability his mind never adverted. His carefully-drafted testament manifested a general plan, incompletely expressed as to this one mishap.<sup>53</sup> While one is treading on dangerous ground in practically rewriting the terms of the gift, so as to take care of the great-grandson, the gap in the will is so small that courts might properly be entrusted with a wise discretion to bridge it over. Nevertheless, it seems almost incredible that a court construing the instrument, immediately after the testator's death in 1916, would have created such an estate in a great-grandchild either by interpretation or by implication, — and this, whether or not the remainder be held to be contingent.

It was suggested, in the briefs of counsel, that if the remainder were contingent, the rule against perpetuities might strike down the gift to the grandchildren. In other words, these remainders would have to "continue contingent not merely up to her death, but up to the age of twenty-five of her youngest child," thereby violating the rule against remoteness of vesting. Any such contention ignored, however, the gift to the children of the income from the life tenant's death until the invalid postponement limit of twenty-five years of age.<sup>54</sup> Clearly, vesting occurred at the death of Mrs. Elkins, and the trial court correctly so ruled.

The *Davis Will Case*, embracing as it did litigation that ranged over almost the entire field of future interests,<sup>55</sup> might

<sup>53</sup> See POWELL, *CASES ON FUTURE INTERESTS* (1928) 214-225.

<sup>54</sup> KALES, *op. cit. supra* n. 30, §§ 510-513. There is a presumption of vesting, arising out of the gift of the income.

<sup>55</sup> It is interesting to note the choice of this field for scholarly research has occasionally been criticized. See Philip Mechem, *Future Interests uber Alles* (1933) 19 IOWA L. REV. 146: "The subject is a difficult and fascinating one;

have furnished opportunity for complete restatement of many of its leading doctrines. The opinions of the courts would thus have settled definitely in this jurisdiction various rules as to which West Virginia decisions are silent. Particularly is this true as to the blurred line between vested and contingent remainders: there is no sharp-focus picture to guide the profession in drafting or examining a complicated instrument creating a series of abstruse limitations. Unquestionably, the increasingly heavy load of cases burdening the Supreme Court of Appeals has precluded the exhaustive discussion of these problems, that was possible a few decades ago. Still one must regret that the present decision serves doubtless to confuse an already uncertain study in contingent remainders.<sup>56</sup>

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the average student, however, neither can nor should be expected to become a master of it . . . . It is a matter of common knowledge that Future Interests is not properly a course but an obsession . . . .” Yet analysis of the choice of electives by students in prominent law schools tends to indicate that the course is consistently taken by the better students.

<sup>56</sup> Counsel for appellant urged on the Supreme Court of Appeals the authority of such leading cases as *Blanchard v. Blanchard*, 1 Allen (Mass.) 223 (1861); *Ducker v. Burnham*, 146 Ill. 9, 34 N. E. 558 (1893); *Calvert v. Calvert*, 297 Ill. 22, 130 N. E. 347 (1921); *Caples v. Ward*, 107 Tex. 341, 179 S. W. 856 (1915); *Lantz v. Massie's Ex'r's*, 99 Va. 709, 40 S. E. 50 (1901); and *Suter v. Suter*, 68 W. Va. 690, 70 S. E. 705 (1911).

These and other decisions cited would tend to indicate that the new West Virginia doctrine is out of line with that generally prevailing in other jurisdictions.