1. Please provide an Analytical Overview of the Topic.

There are many different, important pieces of information contained in this reading. First, there is the obvious, treatment of executory interests. Second, there is a brief discussion of the law courts versus the Court of Chancery (Equity). Third, there is the introduction to a feoffment to uses. Fourth, there is an introduction to a bargain and sale deed. Fifth, there is the discussion on how the use was successfully used to perfect shifting and springing interests. Sixth, how the use was used in lieu of a will to transfer real property interests inter vivos. Seventh, there is a discussion of the passage of the Statute of Uses (1535, effective 1536) and its impact on uses. Eighth, there is a discussion of modern executory interests. And lastly, there is an introduction and discussion of the trust, an extremely important estate planning device often used today.

2. What is an executory interest?

It is a type of future interest in a third party grantee (transferee) that must, in order to become possessory, either

1) divest or cut short some interest in another grantee (transferee) (a shifting executory interest, possibly shifting from one grantee to another) (such as “Whiteacre to my eldest son A and his heirs, but if A inherits Blackacre (the family manor), then Whiteacre is to go to my second son B and his heirs.” (Notice that this is a future interest in a third party grantee, following a fee simple subject to a condition subsequent. That future interest is called “fee simple subject to an executory limitation. See p. 208, fn 28) or

2) divest the grantor (transferor) in the future (a springing executory interest, possibly springing out of the Grantor’s estate) (such as “to A and her heirs when A marries B”, read this as Grantor to Grantor, but to A and her heirs (if and) when A marries B).

Examples that I like is Grantor to B and his heir, but to A if A comes home from war alive (shifting) and Grantor to Grantor, but to A if A comes home from war alive (springing).

3. What are the difference between the law courts and the court of equity?

The law courts adjudicated title, declaring who had rights in land. While the court of equity did not declare rights, it had the power to punish those who insisted upon enforcing those rights (in an unfair manner), and sometimes to avoid taxation.
4. Prior to 1536, what were the common law rules concerning shifting and springing executory interests?

The common law court created two prohibitory rules: No springing or shifting executory interests. Hence, in Example 9, p. 233, A would take fee simple absolute and B would get nothing, because a grantor could not create a right of entry in a “stranger,” see p. 234, ft 4, and 208, fn 28 (originally, a grantor could not transfer inter vivos or by will his right of entry).

And in Example 10, p. 234, O takes (retains) the fee simple, and A gets nothing, because A did not receive seisin at the time of the grant. (But you could create if there was a freehold estate in a grantee (transferee) to support it, such as “to A for life, then to B and his heirs”.)

5. What is a feoffment to uses, and what role did it play in executory interest?

Grantor enfeoffs Whiteacre “to X and his heirs to hold for the use of A and his heirs, but if A inherits the family manor, then to the use of Grantor’s second son B and his heirs.” Legal title in Whiteacre was held by X, for the benefit (rents, possession) of A and then to provide the benefits to B if A inherited Blackacre.

If X refused to transfer the benefit or use to the B upon the triggering event, then the court of law could do and did nothing. But the court in equity ordered X to act in accordance to the Grantor’s instructions, threatening him with imprisonment if he disobeyed.

6. What is a bargain and sale deed, and what role did it play in executory interests?

If the Grantor did not wish to travel to the land for the livery of seisin, he could go to a solicitor in London and for a value (such as 50 pounds) grant a bargain and sale deed “to A and his heirs.” Legal title would stay in the Grantor for the use (benefit) of A. See p. 235, fn 5, love and affection for relatives was sufficient consideration to raise a use. Hence, if was common for the Grantor to hold legal title, for the use of a family member, such as a daughter.

7. What relationship between shifting and spring uses and the court of equity?

A grantor could create a shifting or springing use that would be enforceable in a court of equity. Such that, in creating a springing use, Grantor “to X and his heirs to the use of Grantor and his heirs, and then to the use of A and her heirs when A marries B.” The court of equity would police X’s exercise of his duty to X (and possibly to A).

8. Prior to the Statute of Wills, how did the use facilitate transfer other than by primogeniture?
Since freehold was freely alienable during one’s lifetime (and thereby could legally cut off one’s apparently heirs), a Grantor could enfeof to “X and his heirs to the use of O during O’s lifetime and then the use to such persons as the Grantor may appoint by will.” By this device, the Grantor could effectively circumvent the doctrine of primogeniture and leave land to a younger son or daughter, as long as the Chancellor (court of equity) enforced X’s duty to the Grantor. The use was also an effective tax avoidance device (avoiding those medieval taxes known as feudal incidents. Feudal incidents were levied when seisin descended to the heir upon death. See p. 235, fn 6, and pp. 178-179. (Similar to our estate tax today.) To avoid the incidents, a Grantor would grant to a large number of jointly owning Xs (when one died, the others would take the legal title, see p. 276) for the Grantor’s use, or for those to who he willed or named.

Perhaps, this would be made clearly if one would imagine that the feoffee to uses was a nontaxable entity, such as the Catholic Church. The Grantor might transfer title to the Church (non taxable) with the understanding that the Church would pass on the benefits to the Grantor or someone the Grantor named.

There was perhaps an additional, spiritual benefit of owning property in this manner. Religious wealthy landowners read the words of Jesus Christ to clearly state that it would be easier to pass a camel through the eye of a needle than for a rich man to get into heaven. With the use, the wealthy could therefore transfer legal title to the Church, while still enjoying the benefits of their riches on earth. Arguably, when they faced Gabriel (the angel guarding Heaven), they could show that they were no longer legally “rich” as they have disavowed their wealth during their lifetime. Clearly, this form over substance argument was a sure road to Hell for many wealthy believers.

9. What is the Statute of Uses (1535, 1536), and what it do to uses?

Henry VIII acted to resurrect feudal revenues that were being avoided through the prevalence of uses. The Statute of Uses, passed in 1535, effective 1536, “executed” uses, that is converted them into a legal interest. Thereby, the holder of the use would be considered seised of the estate (instead of the feoffee to uses). Hence, when the holder of the use died, the feudal incident would be due.

Hence, after 1536, when creating a shifting executory interest use or a springing executory interest use (either by a feoffment to uses, a bargain and sell, or a covenant to stand seised), these interests are no longer enforceable only in a court of equity, but are legal interests in the named party, with all the rights and liabilities thereto. See p. 237, Example 12, the creation of a fee simple in A subject to a shifting executory interest in B in fee simple. And see p. 237, Example 13, the creation of a fee simple in the Grantor subject to a springing executory interest in A in fee simple.
Please note that these are these future interest are still contingent on the occurrence of the triggering event. If the event does not materialize, the future interest will not become possessory. Hence, the legal interest will not be fully realized in the holder of the interest unless and until the triggering event occurs.

10. What is the modern executory interest?

Today, following the Statute of Uses, we have a new estate, a fee simple subject to an executory limitation. Such as Grantor to “A and his heirs, but if A dies without issue surviving him, to B and his heirs.” A has a fee simple subject to an executory limitation (for subject to divestment by B’s executory interest). Or Grantor to Grantor “but to A if A marries B.”

Please note that A has the new estate, one subject to the possibility of being divested by B's interest. B has an executory interest. See p. 208, fn 28. Can you see that an executory interest is also a contingent remainder?

Note: that following a determinable estate, is either a possibility of reverter (in the Granter) or an executory interest (in a third party grantee). And that following a fee subject to a condition subsequent is a right of entry (in the Granter) and with the same language, if the succeeding interest is planned to pass to a third party grantee, then the first granted interest is called an fee simple subject to an executory limitation, followed by an executory interest (in the third party grantee). See pp. 237-8.

11. Why did it matter to classify executory interest different from remainders?

Executory interests were not subject to destructibility by a gap in seisin as were contingent remainders. (More on this next reading.) And executory interests possibly were not caught in the web of Shelley’s Case. (More next reading.)

12. What is a trust and what’s its relationship to the use?

The trust is a very powerful, modern day estate planning tool. First, the common law courts limited the application of the Statute of Uses not to apply where the feoffee to uses (trustee today) was given active duties (such as manage the estate). See p. 239, fn 8. Second, today, in creating a trust, the Grantor (settler) grants fee simple to X (trustee) to manage for the benefit of named beneficiaries (for life), then future interests to other named beneficiaries. See p. 239, Example 18. Third, the trustee has a fiduciary, meaning has stringent legal duties to the trust and its beneficiaries, subject to acceptable management fees. Fourth, trust are powerful tools used to protect against beneficiaries creditors (who in many instances) cannot attach the assets of the trust. Fifth, in many states, a grantor or settler can avoid
their own creditors, under certain circumstances. Sixth, some states allow for a “perpetual” or “dynasty” trust, allowing avoidance of the Rule Against Perpetuities and allowing the grantor to control the disposition of wealth in the future.