1. Please provide an Analytical Overview of the Topic.

This reading focuses on three very specific, different rules of the common law meant to promote marketability of real property by destroying in specific instances certain types of contingent future interests. Of course, these three rules are 1) the Destructibility of Contingent Remainders Rule, 2) the Rule in Shelley’s Case, and 3) the Doctrine of Worthier Title. (Please note that these rules are specific and limited to the examples provided.) In addition to introducing these three rules, this reading introduces the doctrine of merger. This reading is also a prelude to the most important rule of all that was used to promote marketability of real property, that is the Rule Against Perpetuities (RAP), the subject of the reading for Thursday.

2. Why was there rules further marketability (alienation); what is their rationale?

Wealthy landowners and their lawyers sought to perpetuate their wealth, seeking to pass it on from generation to generation. (This is a noble goal, that is, to provide for one’s future descendants.) One device drafted by the master conveyancer, Sir Orlando Bridgeman, p. 241, fn 10 was the “strict settlement,” described on p. 188, fn 16.

Why should the law care? For various reasons as presented on p. 195, the law had issues with restraints on alienation, namely, restraints make property unmarketable, tend to perpetuate the concentration of wealth by making it impossible for the owner to sell property and consume the proceeds of sale, discourage improvements on land (lenders are less likely to lend and owner less likely to improve), and prevent the owner’s creditors from foreclosing on the property (and therefore not a useful source of securing credit).

Can you see that the recipients of estates so encumbered might be against the restrictions established in the transfer of the estate? It was often they who wished to challenge the restraints (not the judges themselves).

In addition, some of the devices used to restrain alienation also were means of avoiding feudal incidences (taxation), primogeniture (transferring the estate to the elder son, what if as in the Earl of Arundel, p. 241, fn 10, the elder son were insane?), and forfeiture for disobedience to the Crown. So can you see that there were many focuses, political and otherwise, who were constantly working against restraints on alienation, including those designed to benefit from them?

3. Why were vested remainders not a problem to marketability while contingent remainders were?
In a vested remainder, such as “to A for life, then to B and his heirs,” if A and B desired to alienate the estate, they merely need to join together in one deed and transfer fee simple. Compare a contingent remainder conveyance “to A for life, then to A’s heirs.” This is a very different conveyance that the prior one. Can you see it? In this conveyance, A has no heirs until he or she is dead. Therefore, the remainder in A’s heirs is a contingent remainder, for lack of an ascertained person.

The English courts over the years developed rules to rein in the effect that contingent remainders had on the marketability of land in various ways. These rules do not mean that it is illegal to create contingent remainders. It means that to create a contingent remainder might result in the estate planning to be flawed through the application of one of these rules, sending the estate in an unplanned direction.

4. What is the “Destructibility of Contingent Remainders (DCR)”? What result where it applies?

The DCR Rule is “A reminder in land is destroyed (by operation of law) if it does not vest at (become possessory) at or before the termination of the preceding freehold estate.”

It operates as follows: In other words, if there is a contingent remainder and when the prior estates terminates, that contingent remainder is still contingent (the triggering contingency has not occurred, such as (Example 19, p. 242) “to A for life, then to B and his heirs if and when B reaches 21,” and when A dies, B is only 18) then the remainder is wiped out (destroyed) and the right of possession (and title) moves on to the next vested interest (often a reversion to the Grantor). The DCR Rule has a “wait and see” application, meaning that it does not apply at the time of the creation of the grant by rather if and when the prior vested estate lapses (often the death of the prior life estate holder).

The DCR Rule’s original rationale was that seisin must be in someone at all times, and never in abeyance. (Do you see how there is a break in seisin where the Rule applies?) The additional rationale is to enhance alienability of land.

Without the DCR Rule, the estate would either revert to the Grantor unless and until B reached 21, in Example 19, p. 242, see discussion on p. 243.

Please note that the DCR Rule applied to legal contingent remainders, not those created in trust (e.g. equitable contingent remainders). (Can you see why?) Nor did the DCR Rule apply to executory interests, although if the grant was ambiguous as to whether it created a contingent remainder or an executory interest, the court found for a contingent remainder and then applied the DCR Rule. (see p. 242).
5. In addition to application of the DCR Rule, how could one destroy a contingent remainder?

In addition to the DCR Rule, one could destroy a contingent remainder through the actions of the possessory life estate holder who could terminate a life estate before his/her death by forfeiture or merger. So that Grantor to “A for life, then to B and his heirs if B survives A,” A could convey his life estate to the Grantor, and with the life estate merged into the reversion, B’s contingent remainder was destroyed. (This is because the vested two parts of the estate merged into the fee simple. Of course, if the Grantor created the original grant, why would the Grantor want to destroy the contingent remainder? Sometime it was destroyed after the Grantor died, and may have allowed A to get the entire fee simple by inheritance.)

6. What is the doctrine of merger?

The doctrine of merger states that if a life estate and the next vested estate in fee simple come under the ownership of one person, the lesser estate (life estate) is merged into the larger. For example, if the Grantor “to A for life, then to B and his heirs when B reaches 21,” then the Grantor transfers his reversion interest to A, then A would have the entire fee simple and the contingent remainder to B is destroyed. This promotes alienability of land.

One exception, see p. 242, fn 11, when the Grantor grants to “A for life, then to B for life if B reaches 21, then to A and his heirs,” the separate granting of the life estate in A at one time and then the vested fee simple remainder to A when B dies would not automatically be a merger. But could become one if A transferred his vested remainder in the fee simple to a third party, thereby merging with the life estate. This would destroy the contingent remainder in B.

7. What role does the DCR Rule play today?

Today the DCR Rule still exists in a number of states (three-quarter of the states have abolished the DCR Rule either by statute or judicially) and shows up on the Multistate Bar Examination. There are two reasons for the demise of the DCR Rule, the first is that the Rule Against Perpetuities accomplishes the same result and the second is that today most remainders are created in trust.

8. What is the Rule in Shelley’s Case (RSC), when does it apply, and what result does it create?

The RSC states that if one instrument creates a life estate in land in A, and purports to create a remainder in persons described as A’s heirs (or the heirs of his body), and the life estate and remainder are both legal interests or both equitable, then the remainder becomes a remainder in fee simple (or fee tail) in A. Such as
“to A for life, then to A’s heirs.” (Why would a Grantor convey in such a manner? The Grantor is trying to ensure that A cannot alienate the estate and that it must pass after A’s death to A’s heirs. While this is a noble plan to ensure that A’s heirs will get the estate, can you see how it makes the land unmarketable during A’s lifetime?) Please note the RSC does when it applies only translates the remainder “to A’s heirs” into a remainder in fee simple in A; the RSC does not automatically merge the two interests (A’s life estate and A’s remainder interest in fee simple) into one. That is the separate application of the doctrine of merger. See Example 21, page 243. The RSC does not require a “wait and see” approach; it applies upon the creation of the grant. Obviously, if a drafter knows of its existence in a given jurisdiction, she will use a different device or draft in a manner so that the rule does not apply. (Can you imagine such a draft? “To A for life, remainder to X in trust for A’s heirs.” Would this avoid the RSC, why or why not?)

The RSC applies where there is an intervening vested life estate, such as “to A for life, then to B for life, then to A’s heirs.” (But the doctrine of merger would not operate to combine A’s interest into fee simple.)

The RSC is a rule of property law and overrides the intention of the Grantor (therefore is not a rule of construction). The RSC has been abolished in an overwhelming majority of states, with Arkansas being a named exception. Some states that have recently abolished but the abolishment does not apply retroactively. It still shows up on the Multistate Bar Examination.

9. What is the Doctrine of Worthier Title (DWT), when does it apply, and what result does it create?

The DWT provides that where there is an inter vivos conveyance (similar rule also once applied to wills, p. 244, fn 13) of land by a grantor to a person, with a limitation over to the grantor’s own heirs by way of a remainder or executory interest, no future interest in the heirs is created; rather a reversion is retained by the grantor. Thus, in a conveyance of Grantor to “A for life, then to Grantor’s heirs,” the DWT would destroy the contingent remainder in the Grantor’s heirs and would result in a reversion in the Grantor. See Example 22, p. 244. The DWT does not require that we “wait and see” the outcome to apply it; it applies from the time of the creation of the conveyance. Knowing that it applies in a given jurisdiction, a drafter would carefully avoid its use (or be aware of its outcome).

Can you see why the DWT promotes alienability of land, even though the recipients of the Grantor’s estate might be the same in either case? Since the remainder “to the Grantor’s heirs” is a contingent remainder until the Grantor dies, until then the land is not marketable.
The DWT also promotes tax collection as we mention previously, to inherit by
descent of the Grantor was a taxable event (as it is today). To allow the Grantor
to pass on his estate by conveyance would mean that the estate would be depleted
when he died, robbing the government of taxes due on the estate. (Are you aware
that the government taxes one’s estate when they die? This has been termed the
“death tax” by its opponents. It has severe estate planning implications.)

The DWT only applied to land and not to personal property. (But in Doctor v.
Hughes, in New York State, Judge Cardozo applied the DWT as a rule of
construction (interpretation) and hence there it applied to personal property as
well. p. 244. The DWT was abolished in New York by statute.) The DWT still
applies as a rule of construction in many states today. It has been abolished in
California, Illinois, Mass., Minn., N.Y., North Carolina, Texas, and a number of
other states. But again it still shows up on the Multistate Bar Examination.