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Estates in North Dakota

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ESTATES IN NORTH DAKOTA

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INTRODUCTION

IS OUR machinery of estates still functional? Should we tear it down and rebuild it or should we continue to operate it in its present form? If the latter, what overhauls and repairs should be made?

The fact that England has already made a major overhaul of its estate law[1] provokes the questions raised above. The English seem to have recognized that basically their old machinery of estates operated on two different "fuels", which did not always mix to obtain the desired smoothness of performance. These "fuels", as they might be described, are the two fundamental policy considerations upon which the law of property is shaped — that of effectuating the transferor's intent and that of obtaining the greatest freedom of alienability, for commercial reasons.[2] Apparently the English have kept the old machinery of estates, but have designed it to operate on a mixture of "fuel" richer with the policy of free alienability.[3]

This paper attempts a partial examination of the law of estates in North Dakota, with an eye to needed repairs and to manifestations that suggest overhaul or rebuilding. It is the writer's intention to confine the subject, in so far as possible, within the basic area of estates and to leave the area of future interests to more expert mechanics.

SOURCE OF THE NORTH DAKOTA CODE

The background of North Dakota legislation dealing with the law of estates should first be noted. The primary source of North Dakota statute law in this area is the Field Civil Code, promulgated for New York in 1865, but never adopted in that state.[4] How-

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1. Law of Property Act of 125, (15 Geo. V., c. 20); Settled Land Act of 1925 (15 Geo. V., c. 18). There are other acts of the same year which round out this revision: The Trustees Act of 1925; The Land Charges Act of 1925; The Administration of Estates Act of 1925; and the Land Registration Act of 1925.

2. Lawson, The Rational Strength of English Law 81 *et seq.* (1951).

3. For comment on the English legislation, see Bordwell, *English Property Reform and its American Aspects*, 37 Yale L. J. 1, 179 (1927); Bordwell, *Property Reform in England*, Iowa L. Rev. 1 (1925); Johnson, *The Reform of Property Law in England*, 25 Col. L. Rev. 609 (1925); Withers, *Property Legislation of 1925—Twenty Years Experience*, 62 L. Q. Rev. 167 (1946).

4. The Civil Code of the State of New York Reported Complete by the Commissioners of the Code (1865).

ever, the territorial legislature of the Territory of Dakota adopted it in the year of its appearance[5] and it has been carried forward, in substantially the same form, into the Codes of North and South Dakota.[6] Four other states have likewise drawn on the Field Civil Code, either directly or from one of the states that had already adopted it — California, Montana, Idaho, and Oklahoma.[7]

In the area of estates, the Field Code appears to be largely grounded on New York legislation of 1828[8] which purported to codify and simplify the common law of estates, enacting some specific reforms which were thought particularly desirable even then. This New York legislation has also been reflected in legislation in at least six other jurisdictions — Indiana, Michigan, Wisconsin, Arizona, Minnesota, and the District of Columbia.[9]

WHAT NORTH DAKOTA HAS

Derived as it is from the 1828 New York legislation, the North Dakota Code has many of the desirable variations from the old common law of property. Thus, the necessity of words of inheritance or succession in a transfer has been eliminated.[10] A transfer is presumed to pass all the transferor's interest unless a different intention is expressed.[11] A transfer by the grantor to himself and another in joint tenancy is made effective.[12] Conveyances by married women[13] and between husband wife are validated.[14] The Rule in Shelley's case has been abrogated.[15] The doctrine of destructibility of contingent remainders has been eliminated.[16] There are a number of other improvements, some of which will be noted hereinafter.

WHAT NORTH DAKOTA SHOULD HAVE

It is the writer's belief that North Dakota should adopt the Uniform Property Act.[17] While some of the reforms embodied in that Act appear to be more or less adequately dealt with by existing

5. Dak. Sess. L. (1865).
6. N.D. Rev. Code (1943), Vol. 1, p. 6 of preface.
7. For an outline of the adoption of this legislation, see I Am. L. Prop. 66 (1952).
8. Report of the Commissioners Appointed to Revise the Statute Law of the State of New York, (1826-28), Part II.
9. See note 7, *supra*.
10. N.D. Rev. Code §§ 47-0915 (transfers, 56-0513 (devises).
11. *Ibid*, § 47-0916 (transfers), § 56-0606 (devises). See also § 47-1013 (Grant presumed to pass fee simple title).
12. *Ibid*, § 47-0203.
13. *Id.* § 14-0705.
14. *Id.* § 14-0706.
15. *Id.* § 47-0420.
16. *Id.* § § 47-0230, 47-0232.
17. 9a Uniform Laws Annotated 251-257.

provisions in the Code,[18] many other mouldy rules of property would be eliminated, and those already dealt with would be handled by more succinct and thorough language.

"The Act is drawn primarily to abolish anachronisms in the law of property, to abolish many out-of-date characteristics which have come down to us from the early feudal law of England and which are out of place in the law of today, and also to correct many characteristics which have crept into the law from improper application of the early law and which can be got rid of today only by statutory enactment. But the Act also contains some changes in the law which in the opinion of experts should be adopted to improve the law's usefulness to society."[19]

The Act was the joint product of the National Conference of Commissioners on Uniform State Laws and the American Law Institute;[20] it has been adopted in Nebraska;[21] and it has been recommended for adoption in other states by a number of wrters.[22]

Some of the problems dealt with in the Act will be specifically referred to hereinafter.

ASSIMILATING INTERESTS IN REAL AND PERSONAL PROPERTY

While "[t]his is in accord with what the courts have been doing by judicial decisions during the last generation,"[23] it is particularly desirable that section 3 of the Uniform Property Act be adopted. It provides that interests which may be created with regard to land may be created also with regard to personal property, when the parties in interest desire to do so.[24]

As it has been pointed out by another writer,[25] however, this provision does not state that the rules applicable to the various interests in real property apply to personal property; nor does it state that the creation of interests in real and personal property is to be

18. See notes 10-16, *supra.*

19. 9a Uniform Laws Annotated 249 (Commissioner's Prefatory Note).

20. *Ibid.*

21. Neb. Rev. Stat. § § 76-101 to 76-123 (1943).

22. O'Connell, *A Property Act for Oregon,* 30 Ore. L. Rev. 1 (1950); English, *The Uniform Property Act in Pennsylvania,* 46 Dick L. Rev. 26, 144, 211 (1942); Myerberg, *Maryland Examines the Proposed Uniform Property Act,* 4 Md. L. Rev. 1 (1939).

23. 9a Uniform Laws Annotated 249 (Commissioner's Prefatory Note). See Simes, *Historical Development of Future Interests in Things Other Than Land,* in 1 Am. L. Prop. 411-15 (1952). In First National Bank & Trust Co. v. Green, 66 N.D. 160, 262 N.W. 596 (1935), it was recognized that a brother and sister could hold a bank deposit as tenants in common or as joint tenants.

24. Uniform Property Act § 3: "Any possessory or future interest, power of appointment or of revocation, which can be created in this State with regard to land, can also be created with regard to anything other than land, including choses in action."

25. O'Connell, *A Property Act for Oregon,* 30 Ore L. Rev. 1, 5 (1950).

governed by the same rules. In short, it does not foreclose consideration of the inherent differences between personal and real property.

At the present time, the Code appears only to provide for estates in real property.[26]

STATUS OF THE FEE TAIL

In North Dakota, the fee tail isn't; it is a fee simple,[27] subject to a contingent limitation upon the death of the first taker, without issue living at the time of his death.[28] The writer has no quarrel with this result, since estates tail do not seem to be much in demand.[29]

THE DETERMINABLE FEE AND THE FEE ON CONDITION SUBSEQUENT

Recognition of the determinable fee and of the fee on condition subsequent (sometimes referred to as a fee simple subject to a power of termination) seems implicit in the statutory definition of a fee simple:

> "Every estate of inheritance is a fee, and every such estate, when not *defeasible* or *conditional,* is a fee simple or an absolute fee."[30] [emphasis supplied]

Another Code section appears to state the common law rules concerning transfer[31] and release[32] of the future estate, right of reentry for condition broken, also known as a power of termination, which correlates to the fee on condition subsequent:

> "Property of any kind may be transferred except:
> (1) A mere possibility not coupled with an interest;
> (2) A mere right of reentry or of possession for breach of a condition subsequent which cannot be transferred to anyone except the owner of the property affected thereby."[33]

While the language of this provision, in terms, does not appear to be applicable to the possibility of reverter, which is the future estate that correlates to the determinable fee, it may have been so applied by the Supreme Court of South Dakota in the only case in

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26. N.D. Rev. Code § 47-0402 (1943): "Estates in real property in respect to the duration of their enjoyment are . . ."
27. *Ibid.* § 47-0405.
28. *Id.* § 47-0406.
29. 1 Restatement, Property c. 5, Introductory Note (1936).
30. N.D. Rev. Code § 47-0404 (1943).
31. 2 Restatement, Property § 160 (1936).
32. *Id.* § 161.
33. N.D. Rev. Code § 47-0902 (1943).

North or South Dakota that has dealt with identically worded provisions.

In that case, *Rowbotham v. Jackson*,[34] Carr, owner of lots 11 and 12, conveyed lot 11 to defendant Jackson. The deed recited certain building "stipulations" and contained the following clause:

> "If these restrictions be in anyway violated, or not fully complied with in the event of any building being placed on said lot, then all right and title shall revert to the grantors without process of law;"

By mesne conveyances, all of which contained a provision that "the grantors also convey . . . certain rights, reserved to said grantor under the building restriction on lot number 11," title to lot 12 was conveyed to plaintiff. Subsequently, the heirs of Carr, after his death quitclaimed their interest in lot 11 to defendant. The quitclaim deeds contained the following clause:

> "And releasing and making null and void the reverting clause in Warranty Deed to John A. Jackson" . . .

Plaintiff sued to enjoin defendant from moving a building on lot 11 which would violate the building restrictions. The trial court granted the injunction. The Supreme Court reversed.

The court held that the clause in the original deed was not a covenant, but rather a "reverter clause" with "reverter language." They went on to say that "[i]t seems to partake of the nature of *a condition subsequent* and not in the nature of a covenant." [emphasis supplied]. After thus holding that plaintiff had no interest in the nature of a covenant running with his land on which to base an injunction, the court went on to hold that this "reverter" interest had not been conveyed to him, relying on the South Dakota section which is identical in language with subsection (2) of §47-0902 quoted supra.

If the court meant to say that a right of re-entry for condition broken, also known as a power of termination, cannot be conveyed, it is undoubtedly in accord with the weight of authority even absent statute.[35] If, however, the court meant to say that possibility of reverter cannot be conveyed, the holding conflicts with the weight of authority, although the matter is not entirely free from doubt.[36] The court did not indicate clearly into which category it meant to

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34. 68 S.D. 566, 5 N.W.2d 36 (1942).

35. See note 31, *supra*. However, in some states a power of termination is made transferable by statute. See 2 Restatement, Property § 160, comment d, (1936), for citation of these statutes.

36. 2 Restatement, Property § 159 (1936); Collette v. Town of Charlotte, 114 Vt. 357, 45 A.2d 203 (1946); 45 Mich. L. Rev. 375 (1947).

classify the "reverter" interest, but stated simply that, "[T]his language, we construe to fall within the above statutory language to 'reentry or of repossession' . . ." It is submitted, however, that the language of the so-called "reverter" clause is more apt to a possibility of reverter, than a right of re-entry for condition broken,[37] and it would therefore appear that the statute was applied to a possibility of reverter.

Moreover, in appraising this decision, it should be pointed out that even if it had been held that the "reverter" interest had been conveyed to plaintiff, it would probably not have entitled him to an injunction because it could hardly be contended that the holder of either a possibility of reverter or a power of termination may enjoin the very act upon which his future estate is conditioned, although the holder of such an interest might sometimes be entitled to enjoin waste under proper circumstances.[38]

THE LIFE ESTATE

The life estate appears to be highly useful in dividing property among the family. Its duration correlates with the needs of those for whom immediate provision is desired to be made by one settling his property among his family. But the flexibility it allows in family planning is offset to a great extent by the complications presented by its relationship to the succeeding interests and by the uncertainty inherent in its duration.

A. Sale

The fact that it is of uncertain duration means that a life estate has relatively no marketability, for any investment in a life estate necessarily involves a gamble on the length of the measuring life. However, the unmarketability of the life estate as an entire interest does not seem to call for repair, if indeed it would be possible, for it may be supposed that the creator rarely contemplates that the life tenant should market it. Too, in an extreme situation, there is the saving equitable doctrine which empowers a court of equity to order a sale of property subject to present and future interests and establish a trust of the proceeds, subject to the same interests, if it is "necessary" to preserve the interests.[39] This doctrine has been

37. Compare 1 Restatement, Property § 44, comment 1 and § 45, comment j, (1936).

38. Restatement, Property § 193 (1936); Pavkovich v. So. Pac. Ry., 150 Cal. 39, 87 Pac. 1097 (1906).

39. The doctrine has the support of the weight of authority. Beliveau v. Beliveau, 217 Minn. 225, 14 N.W.2d 360 (1944); Restatement, Property, c. 11, topic 2 (1936); Schnebly, *Power of Life Tenant or Remainderman to Extinguish Other Interests by Judicial Process,* 42 Harv. L. Rev. 30 (1928); 3 Simes, Future Interests c. 51 (1936).

recognized in North Dakota by *Rasmusson v. Schmalenberger*[40] which sustained such a court order on collateral attack. While the court uses language approving the doctrine, it is not as square a decision as might be desired because the court did not directly pass on the doctrine. Therefore, it is suggested that a statutory provision might well be enacted which leaves no doubt about the matter.[41]

B. Realizing an Income from a Life Estate

No particular problem is raised if the property held for life is a home for the benefit of the life tenant or a beneficial interest in a trust providing a life income. But when it is a legal life estate intended to provide a life income, this uncertainty is frustrating, not only to the creator's intentions but also to public policy, if the property can only be made productive through its commercial use by other than the life tenant. As a practical matter, such property cannot be remuneratively leased to someone capable of making it productive, because of the discouraging fact that a lease by a life tenant terminates with his death.[42] The life tenant cannot let what he does not have.

Thus, for example, if a testator, inadvertently or otherwise, gives his surviving spouse a legal life estate in business property, such as an office building, apartment house, or farm,[43] it is likely that the income on which the spouse is now dependent is not going to fulfill the testator's expectations. Moreover, the full economic utility of the property to society may not be realized.

Of course a method is open to testators by which this could be avoided — a trust of the property with life income to the wife. Thus it might be reasoned that no remedy is called for, since an adequately advised testator will avoid this situation. But there remains the testator who is not adequately advised, or for some other reason desires to use the legal life estate. And the trust device reduces the income by the cost of trust management.

Or the life-tenant could insure the lessee by giving a bond, but this is costly and not altogether satisfactory to lessees.[44]

40. 60 N.D. 527, 235 N.W. 496 (1931).

41. See, for example, Dist. of Col. Code § 45-1104 (1951); Restatement, Property § 124, comment i (1936), for a citation of such statutes. See further in this connection Restatement, Property § 179, Note on Statutory Sale for Reinvestment.

42. Restatement, Property § 124 (1936).

43. Perhaps a legal life estate in farming property is the likeliest solution in North Dakota. It is, of course, recognized that in this situation the problem posed above is minimized by the doctrine of emblements, which will save to the lessee from the life tenant the fruits of his farming effort, even though the life tenant dies before the crop is harvested. Restatement, Property § 121, comment b (1936).

44. Haywood v. Briggs, 227 N.C. 108, 41 S.E.2d 289 (1947).

If, then, we are to retain the legal life estate, why not give it a measure of certainty, thus avoiding the "can't-lease-beyond-his-life" problem and making the life estate more useful — if this can be done without imposing too much on the remainder.

It is believed that the following proposed statute, or something similar, would be a possible solution. While giving the life tenant qualified power to lease beyond his life, and thus the power to guarantee some certainty to the lessee, and to do so without expense, it substantially preserves the remainderman's interest by giving him the rent after the death of the life tenant and restricting the maximum term for which the life tenant can bind the remainderman.

> "Unless otherwise stated in the instrument creating the life-estate, the owner or owners of an estate for life, which is hereafter created, shall have the power to execute a lease for a reasonable term, not exceeding three years, which shall bind and be enforceable against the remainderman or remaindermen, if the person by whose life the estate is measured dies during the term of the lease.
>
> "No such lease, or any renewal thereof, shall be effective if it is executed more than ninety days from the time it is to take effect.
>
> "Such lease shall be ineffective to bind the remainderman or remaindermen if it is made for a nominal rental, which bears no relation to the reasonable rental value.
>
> "From and after the death of the person by whose life the estate is measured, the lessee under a lease made pursuant to this section, and the remainderman or remaindermen shall stand in the relation of lessee and lessor for the remainder of the term.
>
> "Upon the death of the person by whose life the estate is measured, the rent, whether paid in advance or payable at the end of any term, shall be apportioned ratably between the life estate and the remainder.
>
> "If after the death of the person by whose life the estate is measured, rent becomes payable which is apportionable to a period before the death of such person, then it is the duty of the lessee to pay such portion to the holder of the previous life-estate, or to his probate estate.
>
> "The holder of the life estate or his probate estate, shall be liable to the remainderman or remaindermen for rent paid in advance which is in fact apportionable to a period after the death of the person by whose life the estate is measured."

C. Other Leasing Problems

The foregoing proposal shadows another problem. While the Code provides that a lessee is liable for a proportionate part of the

rent where his lease is terminated prior to its term by the death of the life tenant,[45] no provision is found apportioning the rent between the life estate and remainder where the lease continues after the death of the life tenant, as where it is made by the grantor of the life estate, prior to creation of the life estate.[46] It is recommended that a provision be enacted making the rent apportionable in such a case.[47]

D. Protecting the Future Interests

Let us turn now to the second large problem in connection with life estates — relation of the life tenant to the remainderman.

The Code provides:[48]

> If a guardian, tenant for life or years, joint tenant, or tenant in common, of real property, commits waste thereon, any person aggreived by the waste may bring an action against him therefor, and in such action there may be a judgment for treble damages, forfeiture of the estate of the party offending, and eviction from the premises.

This appears to be a carryover from the feudal Statute of Gloucester,[49] enacted in 1278, which provided that a person guilty of waste was liable for treble damages and that he forfeited the place wasted. It has long since been repealed in England.[50] Why do we keep it? Is there any compelling reason why the future interests should gain more than they lost? The draftsmen of the Uniform Property Act apparently thought compensatory damages were sufficient.[51] The writer agrees and advocates repeal of these

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45. N.D. Rev. Code § 47-1621 (1943): "When the leasing of real property is terminated before the time originally agreed upon the lessee must pay the due proportion of the lease for such use as he actually has made of the property unless such use is merely nominal and of no benefit to him."

Id. § 47-1623: "Rent dependent on the life of a person may be recovered after as well as before his death."

At common law, the lessee would not be liable for the rent where his term was cut short prior to the due date of the rent. 1 Am. L. Prop. 135, n. 29 (1952).

46. At common law, rent is non-apportionable. The remainderman was entitled to the whole amount at the subsequent due date, or the life tenant retained the whole amount, if paid in advance, where the life estate terminated between due dates. Restatement, Property § 120, comment c (1936).

47. See Restatement, Property § 120 (Supp. 1948), for a citation of statutes which so provide.

48. N.D. Rev. Code § 32-1722 (1943). It is further provided: "Judgment of forfeiture and eviction only shall be given in favor of the person entitled to the reversion against the tenant in possession when the injury to the estate in reversion shall be adjudged in the action to be equal to the value of the tenant's estate or unexpired term, or have been done in malice." N.D. Rev. Code § 37-1723 (1943).

49. 6 Edw. I, c. 5.

50. Civil Procedure Acts Repeal Act, 42 & 43 Vict., c. 59.

51. 9a Uniform Laws Annotated 613 (1942): "When conduct claimed to constitute waste is made the basis of a claim for damages, the claimant is not entitled to multiple damages or to declare a forfeiture of the place wasted or of the interest of the defendant in the place wasted except in accordance with covenants, agreements, or conditions binding such defendants."

provisions and substitution of section 21 of the Uniform Property Act.[52]

Where a legal life estate is given in personal property, such as stocks and bonds, the problem of preserving the remainderman's interest becomes acute. Of course, if the trust device is used, the trustee is capable of managing the property in the interest of both the life beneficiary and the remainderman. But, where for some reason the legal life estate is used, the facts that the property is transportable, perhaps perishable, and subject to capital losses (securities), makes the law of waste a doubtful safeguard of the remainderman's interest.

While the life tenant can generally be required to give security if it is shown that the property is in danger of loss, through misuse or misappropriation,[53] it is not otherwise clear to what extent a life tenant or his personal representative must account for his transactions concerning the personal property.[54]

No Code provision or case in North Dakota is found relating to the subject. It would seem however that it is a situation to which trust principles should be applied, making the life-tenant trustee or, if he does not desire to assume that responsibility, allowing the courts to appoint a trustee.[55]

It is believed therefore that a statute similar to that enacted in Pennsylvania in 1947 should be adopted:[56]

> "A person having a present interest in personal property, or in the proceeds of the conversion of real estate, which is not in trust, and which is subject to a future interest, shall be deemed to be a trustee of such property . . . with the ordinary powers and duties of a trustee, except that he shall not be required to change the form of the investment to an investment authorized for Pennsylvania fiduciaries, nor shall he be entitled to compensation as a trustee. Such person, unless given a power of consumption or excused from entering security by the terms of the conveyance, shall be required to enter such security for the protection of persons entitled to the future interest as the court in its discretion shall direct. If a person having a present interest shall not enter security as directed, the court shall appoint a trustee who shall enter such security as the court shall direct, and who shall exercise all the ordinary powers and duties of a trustee . . ."

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52. *Ibid.*
53. See Notes, 14 A.L.R. 1066 (1921); 101 A.L.R. 271 (1936); 138 A.L.R. 440 (1942).
54. See Notes, 45 A.L.R. 519 (1926); 137 A.L.R. 1054 (1942).
55. Accord, 1 Am. L. Prop. 170-72 (1952).
56. Purdon's Pa. Stat. Ann., Tit. 20, § 301.03.

E. A Miscellaneous Problem

There is one problem of construction concerning life estates that the writer feels should be anticipated and settled in this state — that of implication of cross remainders in a deed conveying life-estates to two or more persons as tenants in common. While the rule appears settled as to conveyances by will, there is doubt as to its application to conveyances by deed or will,[57] although the Restatement has stated the rule as equally applictable to conveyance by deed or will.[58] Whether the transfer is by will or deed, the intention of the conveyor would seem to be no different. The answer is to adopt §17 of the Uniform Property Act if the act is not adopted in toto.[59]

DOWER, CURTESY, AND THE HOMESTEAD ESTATE

It is twice certain that the common law marital life estates, dower and curtesy, do not exist in North Dakota—two distinct sections say so.[60]

The only statutory substitute therefor is the "homestead estate."[61] While homestead rights of the surviving spouse are recognized in nearly all states,[62] they are particularly important in North Dakota where no other provision is made for the surviving spouse, other than by intestate succession.[63] The entire estate of either spouse may be disposed of by will, subject only to the homestead rights of the survivor.[64]

If the homestead is not set off to the decedent before his death, it can be selected after his death.[65] It is an estate for the life of the

57. 1 Restatement, Property, Appendix, *Monograph on Implication of Cross Remainders in Deeds*, Ap. 16 (1936).

58. Restatement, Property § 115, comment a (1936).

59. 9a Uniform Laws Annotated 255, § 17: "When an otherwise effective conveyance of property is made to two or more persons as tenants in common for life or for a term of years which is terminable at their deaths, with an express remainder whether effective or not, (a) to the survivor of such persons, or (b) upon the death of all the life tenants, to another person or persons, such conveyance unless a different intent is effectively manifested creates cross limitations among the several tenants in common, so that the share of the one first dying passes to his cotenants to be held by them in the same manner as their original shares, and the share of the second and others dying, in succession, are similarly treated until the time when the property is limited to pass as a whole to the remainderman."

60. N.D. Rev. Code §§ 14-0709, 56-0102 (1943). See also Fore v. Fore's Estate, 2 N.D. 266, 50 N.W. 712 (1891).

61. N.D. Rev. Code c. 30-16 and c. 47-18 (1943).

62. 1 Am. L. Prop. 892 *et seq.* (1952).

63. N.D. Rev. Code c. 56-01 (1943). But the surviving spouse is entitled to an immediate $2,500 "exemption" out of the probate estate. N.D. Laws 1953, c. 206. This is true even though she is excluded by the will. Bender v. Bender, 64 N.D. 740, 256 N.W. 222 (1934). And the court has discretion to make additional allowance from time to time for maintenance during probate. N.D. Rev. Code § 30-1610 (1943). See Tyvand v. McDonnell, 37 N.D. 251, 164 N.W. 1 (1917).

64. Fore v. Fore's Estate, 2 N.D. 266, 50 N.W. 712 (1891).

65. N.D. Rev. Code § 30-1603 (1943).

surviving spouse or until he or she remarries; if there is no surviving spouse, or if the surviving spouse dies before all the children reach majority, it goes to the children until the youngest reaches majority.[66]

The extent of the homestead is up to two acres of land if within a town, not exceeding $25,000 in value;[67] or up to 160 acres if not within a town.[68]

In many cases this would hardly be more than a nominal provision for the surviving spouse who is cut off by will — what is a home without an income to maintain it? Indeed it was originally only intended as a protection to the surviving family from creditors.[69]

It is felt that more adequate protection should be accorded the surviving spouse in case she (or he, for that matter) be cut off by will, though revival of technical dower and curtesy hardly seems desirable. Considering the fact of fluctuating economic levels, a provision in terms of so much value, as the homestead is presently framed, would not seem to be desirable. And considering the fact that much of the wealth of today is in personal property (e.g., stocks and securities), provision in terms of land interest, too as the homestead is presently framed, seems outmoded. The possibility of a percentage share of the decedent's estate at his death should be studied, although that too has its drawbacks.[70]

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66. *Id.* § 30-1602.

67. *Id.* § 47-1801 (1) as amended by N. D. Laws 1951, c. 277. This amendment, raising the value from $8,000 to $25,000, may not have been effective to hold off creditors if the value was over $8,000, for it did not change the provision in § 47-1804 which permitted creditors to reach any value over $8,000. However, the oversight was remedied by N.D. Laws 1953, c. 278, which amended § 47-1804 to also read $25,000.

N.D. Rev. Code § 30-1609 (1943), provides: "If the court finds that the homestead selected . . . exceeds in value any limitation fixed by law and that the property cannot be divided with material injury, the order setting it apart must determine the amount of such excess and thereafter the property to the extent of the excess so determine the amount of such after all of the other available property has been exhausted, to the payment of debts in the same manner as other property." Doesn't this imply the "homestead estate" may exceed the value limitation if the creditors don't protest? What if the heirs protest? The widow prevails. Calmer v. Calmer, 15 N.D. 125, 106 N.W. 684 (1906). "If the homestead cannot be divided without material injury, the family home must be preserved intact as against the heirs whose right to inheritance is inferior in degree, and should be postponed to the right of the decedent's family to their home, even though the homestead exceeds . . . (the value limitation). Creditors alone can demand that the homestead in such a case be subjected to their claims to the extent that it exceeds the statutory limit of value."

68. N.D. Rev. Code § 47-1801 (2) (1943).

69. See note 62, *supra.*

70. The problem is how to prevent the old goat from disposing of all his property during his lifetime, leaving nothing for the widow's percentage share to operate upon. The doctrine of "illusory transfers" has been invoked, but it is still a rough problem. In re Halpern's Estate, 303 N.Y. 33, 100 N.E.2d 120 (1951); 50 Mich. L. Rev. 783 (1951).

THE ESTATE FOR YEARS

North Dakota has it, of course.[71] The writer has not attempted to develop any problems in connection therewith, other than those which also concern the life estate.

Concurrent Estates: Status of Tenancy by Entireties

What is the status of the tenancy by the entireties in North Dakota? The pertinent statutory provision defining the possible types of concurrent estates omits mention of estates by entireties.[72] No North Dakota cases are found that have given any consideration to this provision, and, so, none that have considered the specific problem.

One writer has said that the married womens' legislation and the omission of tenancy by the entireties from the statutory list of types of cotenancies "abrogated" the tenancy by the entireties, but simply cites the section with the list.[73] However, it is believed that the legal profession in North Dakota has also generally assumed this conclusion.[74]

The same writer cites *In Re Lower's Estate,*[75] in connection with a similar conclusion for South Dakota, which has the same statutory list of types of contenancies as North Dakota. But this case simply recites the listing provision and speaks of joint tenancies and tenancies in common.[76] It says nothing affirmatively or negatively about tenancy by entireties.

The Civil Code of 1865 provision from which the present North

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71. N.D. Rev. Code § 47-0402 (3) (1943). See N.D. Rev. Code c. 47-16 on the leasing of real property.

72. *Ibid.* § 47-0205. "The ownership of property by several persons is either:
(1) of joint interests;
(2) of partnership interests; or
(3) of interests in common."
N.D. Rev. Code § 47-0206 (1943): "A joint interest is one owned by several persons in equal shares by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants."

73. Phipps, *Tenancy by Entireties,* 25 Temple L. Q. 24 (1951). This conclusion may have some support by reason of the fact that, "In this state there is no common law in any case where the law is declared by the code." N.D. Rev. Code § 1-0106 (1943). Further, "the rule of the common law that statutes in derogation thereof are to be construed strictly has no application to this Code." N.D. Rev. Code § 1-0201 (1943).

74. Surprisingly enough, there is at the present time a reference in the Code to a tenancy by the entireties. N.D. Rev. Code § 31-0203 (1943). However, the reference appears to be entirely inadvertent, with no bearing on the status of that estate in North Dakota, inasmuch as it was included in the Uniform Act on No Sufficient Evidence of Survivorship which was enacted in 1943.

75. 48 S.D. 173, 203 N.W. 312 (1925).

76. "And there is nothing in the transfer of the property, conceding it was a transfer, expressly declaring the same to be a joint tenancy, and in the absence of such an express declaration in the transfer, conceding that she acquired title, it would only be an interest in common with her husband in the certificate, and the right of survivorship could not exist."

Dakota presumption in favor of tenancy in common is drawn, read thus:[77]

> Every interest created in favor of several persons in their own right, *including husband and wife,* is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation, *expressly or by necessary implication,* to be a joint interest, *with a right of survivorship.*" [italics supplied].

Except for the italicized phrases, this provision is the same as the last sentence of N. D. Rev. Code (1943), §47-0208. The italicized parts were omitted from the Revised Codes of the Territory of Dakota, 1877. Is any significance to be attached to dropping the phrase, "including husband and wife"? If so, what significance?

California, with similar provisions, has rejected the tenancy by the entireties.[78] It is to be noted, however, that they did so at a time when the list of concurrent estates included "community interest of husband and wife,"[79] and therefore, at a time when there was no need for an estate by the entireties.

Is it not possible that the estate by the entireties could be recognized as a form of joint tenancy, and thus within the listing?[80] It seems probable, however, that the married womens' property legislation[81] would be viewed as doing away with the unity of husband and wife — [82] the technical theory on which the estate by entireties was rested at common law. Yet, until the Supreme Court of North Dakota has passed on the question, the only assumption that can validly be made is that it is still an open question in this state.

But consider the chief characteristics of the estate by entireties: survivorship, nonseverability, and immunity from creditors. Immunity from creditors of the separate spouses is the one to which most objection has been made.[83] And not without reason, considering the unlimited possibilities of that immunity. But the characteristic which prevents either spouse from voluntarily sever-

77. The Civil Code of the State of New York Reported Complete by the Commissioners of the Code § 179 (1865).

78. Swan v. Walder, 156 Cal. 195, 103 Pac. 931 (1909).

79. Cal. Civil Code § 682 (Deering, 1949).

80. The Michigan Supreme Court has held with a somewhat similar statutory listing of concurrent estates that the estate by the entireties, which was not expressly listed, is included within their statute as a form of the listed joint tenancy. Hoyt v. Winstanley, 221 Mich. 515, 191 N.W. 213 (1922): ". . . an estate by the entirety is a species of joint tenancy and included in that class."

81. N.D. Rev. Code § § 14-0704, 14-0705, 14-0708 (1943).

82. So holding, under similar statutes, Helvie v. Hoover, 11 Okla. 687, 69 Pac. 958 (1902). But note, however, that Oklahoma subsequently reinstated the tenancy by entireties by legislation. Okla. Stat. Ann., Tit. 60, § 74.

83. McDougal and Haber, Property, Wealth, Land 417-19 (1948).

ing the estate, which is not true of a simple joint tenancy, might well serve a useful purpose, in conjunction with the right of survivorship, in a state where a surviving spouse is not accorded dower or curtesy, and is given only a very limited protection, in the form of "homesteads."[84]

Therefore, the writer suggests that the tenancy by entireties be added to the list of enumerated estates,[85] and that the following provision be enacted:[86]

> "A tenancy by the entireties is an interest owned by husband and wife by a title created by a single will or transfer when expressly declared in the will or transfer to be a tenancy by the entireties. Such estate may not be voluntarily severed by either spouse, but the interest of either spouse, is subject to severance pursuant to execution, levy and sale by a judgment creditor."

CONCLUSION

What the writer characterized, at the beginning of this paper, as "our machinery of estates" seems to be functioning pretty well. But a few repairs do seem necessary!

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84. See text to notes 61-70, *supra*.

85. N.D. Rev. Code § 47-0205 (1943). To complete the picture, N.D. Rev. Code § 47-0208 (1943), should also be amended to read thus: "Every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership purposes, or unless declared in its creation to be a joint tenancy *or tenancy by the entireties.*"

86. Compare Okla. Stat. Ann., Tit., 60, § 74.