FUTURE INTERESTS

BERTEL M. SPARKS

AMONG the significant developments within the year has been the judicial acceptance of the wait-and-see doctrine in one jurisdiction, the application of the rule in Shelley's case to personal property in another and the express rejection of the worthier title doctrine in any form in a third. Distribution of a condemnation award when land encumbered with future interests is taken by eminent domain has been dealt with, and a charitable corporation has been permitted a rather wide discretion in altering its operation without forfeiting land held subject to a reverter provision if it ever ceases "to be used for the purposes set forth in the charter" of the charitable corporation. The problems involved in determining the meaning of "heirs" and "next of kin" and ascertaining class membership have been before the courts with their usual level of frequency.

Reversionary Interests.—It seems that private land use restrictions can call for a judicial determination of whether a split-level home is a one or a two-story residence.[1] A deed conveying land located on a hillside and sloping away from the street restricted its use to "one-story residences and garages" and provided that upon breach of this restriction "the title to said premises shall immediately, ipso facto, revert to" the grantors.[2] It was held that a building that was one story in front but two stories in the rear did not constitute a breach of the condition.

A more dramatic case raising the question of what constitutes a breach involved a conveyance to a charitable corporation known as the Georgia Military Academy.[3] The deed contained a provision that "if ever the aforementioned properties herein conveyed cease to be used for the purposes set forth in the charter of the grantee corporation," they were to revert to the heirs of the grantor.[4] The terms of the academy's charter were not fully set out in the opinion, but it was clear that its purpose included the operation of a preparatory school for boys and young men, including military training. The Supreme Court of Georgia held that the academy could (1) abolish military training, (2) admit females and (3) change the name of the institution without forfeiting its title to the property held subject to the above provision.[5]

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1. Guttman v. Howard Homes, Inc., 241 Cal. App. 2d 616, 50 Cal. Rptr. 769 (Dist. Ct. App. 1966).
2. Id. at 617, 50 Cal. Rptr. at 770.
3. Harris v. Georgia Military Academy, 221 Ga. 721, 146 S.E.2d 913 (1966).
4. Ibid.
5. Id. at 724, 146 S.E.2d at 915-16.

A recent decision by the Supreme Court of Tennessee[6] establishes three propositions theretofore uncertain in that state; they are (1) a right of entry is inalienable before breach of the condition subsequent, (2) an attempt to alienate does not destroy the right, and (3) some act of re-entry is necessary to revest title upon breach of condition. The decision against alienability was made in spite of a statutory provision that "[E]very grant or devise or real estate, or any interest therein, shall pass all the estate or interest of the grantor or devisor, . . ."[7] the Tennessee court taking the position that a right of entry is a mere possibility which does not qualify as either an "estate" or "interest."[8]

Rule in Shelley's Case.—The rule in Shelley's case was applied in Illinois where there was a life interest in a spendthrift trust with a remainder to the life tenant's heirs.[9] The equitable quality of the remainder, essential to the application of the rule, was found in the trustee's duty to pay the life tenant's funeral expenses, an act which had to be performed after the life tenant's death, and then pay the corpus over to the heirs. The life tenant's claim to a fee was not barred by his failure to assert it within his lifetime nor by his participation in litigation which impliedly recognized his interest as being only a life estate.

The real surprise came in North Carolina where the rule in Shelley's case was applied to personal property, the court declaring that "the rule in Shelley's case has been consistently applied in North Carolina to the disposition of personal property where the language would require application of the rule in a disposition of real estate."[10] The authorities cited for this statement were all old and consisted largely of cases where the property concerned was slaves. Prior to this decision it had been suggested that the earlier cases applying the rule to personal property probably resulted from the tendency to treat slaves more like realty than like other chattels and that these decisions would probably not be followed at the present time.[11] However, the application of the rule to personal property in the present case is unequivocal.[12]

6. Pickens v. Daugherty, 397 S.W.2d 815 (Tenn. 1966).

7. Tenn. Code Ann. § 64-501 (1955).

8. 397 S.W.2d at 819. For the operation of similar statutes in other states see Simes & Smith, Future Interests § 1862 (2d ed. 1956). As to whether or not a right of entry is an interest in land see 2 Powell, Real Property ¶ 272 (1950); Simes & Smith, supra at § 242.

9. Seymour v. Heubaum, 65 Ill. App. 2d 89, 211 N.E.2d 897 (1965). The case involved the will of a testatrix who died prior to the statutory abolition of the rule in Illinois in 1953. Ill. Ann. Stat. ch. 30, §§ 186-87 (Smith-Hurd Supp. 1966).

10. Riegel v. Lyerly, 265 N.C. 204, 206, 143 S.E.2d 65, 67 (1965).

11. Simes & Smith, Future Interests § 367 (2d ed. 1956).

12. See also Wright v. Vaden, 266 N.C. 299, 146 S.E.2d 31 (1966) (giving express recognition to the application of the Shelley rule to personalty although the facts in the particular case did not call for its operation).

Worthier Title Doctrine.—Probably the year's most significant decision[13] in this area occurred in the District of Columbia where a settlor transferred certain property to a trustee to pay income to the settlor for life with remainder to such persons as the settlor should by will appoint, and in default of appointment, to the settlor's next of kin. No power to alter, amend or revoke was reserved. The settlor later became displeased with the arrangement and brought a proceeding to modify the trust to permit payment to the settlor of a certain amount of principal each year. She proceeded on the theory that the worthier title doctrine precluded the creation of any interest in her next of kin and left a reversion after the life estate in herself. The worthier title doctrine could have been recognized as a rule of construction and the petition nevertheless denied on the theory that the reservation of a testamentary power of appointment showed an intent to create a remainder in the next of kin.[14] But, in refusing to permit a revocation, the federal appeals court did not rely upon this theory. Instead it was declared "that the doctrine of worthier title is no part of the law of trusts in the District of Columbia, either as a rule of law or as a rule of construction."[15]

Legal Relations Among Owners of Successive Interests.—An eminent domain case, worthy of note, involved the taking of a part of a tract held by a life tenant with remainders over. The part taken divided the retained land into two separate tracts and destroyed a private road, a water line, a small pond, fences and a small house. The condemnation award was based in part upon the extent to which the taking had destroyed the use of the land retained. The life tenant was permitted to use part of the award for the reconstruction of the destroyed facilities, and the remaining part was invested, the income payable to the life tenant and the corpus being held for the remaindermen.[16]

In Georgia, the petition of a life tenant for the sale of unproductive property and the investment of the proceeds for the benefit of all concerned was granted,[17] and in Nebraska, a remainderman's suit for partition was denied so long as there was objection from the life tenant.[18]

Construction Problems and Class Gifts.—Although it should be axio-

13. Hatch v. Riggs Nat'l Bank, 361 F.2d 559 (D.C. Cir. 1966). See Comment, 41 N.Y.U.L. Rev. 1228 (1966).

14. In re Burchell's Estate, 299 N.Y. 351, 87 N.E.2d 293 (1949); Richardson v. Richardson, 298 N.Y. 135, 81 N.E.2d 54 (1948); Whittemore v. Equitable Trust Co., 250 N.Y. 298, 165 N.E. 454 (1929).

15. 361 F.2d at 564.

16. Bradley v. Bradley, 185 So. 2d 655 (Miss. 1966).

17. Webb v. Jones, 221 Ga. 754, 146 S.E.2d 910 (1966).

18. Fisher v. Peden, 179 Neb. 150, 137 N.W.2d 349 (1965).

matic that the presence of one condition, whether precedent or subsequent, is not a sufficient reason for implying another, efforts to accomplish that result form a frequent source of litigation. The Kentucky Court of Appeals found it necessary to overrule what appears to be inconsistent authority[19] in order to reach that result.[20] But in New York, the appellate division experienced little difficulty in holding that a remainder that was contingent upon the life tenant's dying without surviving issue was not defeated by the remainderman's failure to survive the life tenant.[21] In like manner a provision that if either of two named remaindermen dies without children prior to the death of the life tenant his share will go to the survivor, gives the longest liver an absolutely vested interest if neither survives the life tenant and neither leaves any children.[22] A California testator provided for a separate trust for each of two life tenants. He then provided for a remainder following the first trust with a divesting condition if the remainderman failed to survive that life tenant. In a separate paragraph of the will, a remainder following the second trust was given to the same remainderman "under the same conditions" as the first remainder. The remainderman survived the first life tenant but predeceased the second. The court adhered to the literal words of the will and permitted the absolute vesting of both remainders.[23] In another decision, one that appears to rest on very questionable reasoning, an Iowa court held that a gift over, if the first taker died without issue, failed when the beneficiary of the gift over failed to survive the first taker.[24]

Even when there is an express condition of survivorship, there is sometimes uncertainty as to what event the remaindermen must survive. A postponed gift to "my living children" was held to mean children living at the date of distribution.[25] But a postponed bequest without any express requirement of survivorship vests in all members of the class who are living at the death of the testator, and a provision for divestment if any die leaving children prior to the date of distribution has no effect upon the interest of any member of the class who dies without children prior to that time.[26] Likewise, a postponed gift to an individual legatee with a provision for a substitutional gift if the legatee fails to survive the testator and dies without issue will not be divested if the legatee survives the testator but

19. Lepps v. Lee, 92 Ky. 16, 13 Ky. L. Rep. 317, 17 S.W. 146 (1891).
20. Saulsberry v. Second Nat'l Bank, 400 S.W.2d 506 (Ky. 1966).
21. In re Ashner's Will, 24 App. Div. 2d 595, 262 N.Y.S.2d 261 (2d Dep't 1965).
22. In re Washburn's Will, 24 App. Div. 2d 83, 264 N.Y.S.2d 33 (3d Dep't 1965).
23. In re Estate of Ash, 50 Cal. Rptr. 549, 413 P.2d 149 (1966).
24. Schau v. Cecil, 136 N.W.2d 515 (Iowa 1965).
25. Miller v. Rogers, 246 S.C. 438, 144 S.E.2d 485 (1965).
26. Manufacturers Nat'l Bank v. McCoy, 212 A.2d 53 (R.I. 1965).

dies without issue prior to the date of distribution.[27] However, a remainder that is unconditional except for a provision for a gift over if the remainderman "should have no direct blood heirs" creates in the remainderman a fee simple subject to an executory interest.[28]

The year under review has encountered the usual amount of difficulty in ascertaining the meaning of "heirs," "next of kin" and words of like import. Such expressions should be avoided in dispositive instruments unless extreme care is exercised in seeing that their meaning is clear. Where there is a remainder to the heirs of a life tenant, the fact that the only issue of the life tenant fails to survive her is not sufficient reason for not ascertaining heirs in the usual statutory manner.[29] But if the remainder is to the heirs of the testator, and the life tenant is one such heir, there is a difference of opinion as to whether heirs means "heirs" or whether it means those who would be heirs if the testator survived the life tenant.[30]

North Carolina adheres to the minority view that "next of kin" means "nearest of kin," *i.e.*, the nearest blood relatives without reference to the Statute of Distributions.[31] A recent case in that state presented an occasion for ascertaining "nearest of kin" as if the testator had survived the life tenant.[32]

Rule Against Perpetuities.—Even without the aid of a statute, the Supreme Court of Mississippi appears to have accepted the wait-and-see doctrine without reservation.[33] A testamentary gift over to private takers upon the contingency of its being declined by two named charities was

27. In re Trust of McDowell, 31 Wis. 2d 519, 143 N.W.2d 505 (1956). It was argued on behalf of the beneficiary of the substitutional gift that he was an implied taker if the primary remainderman died without issue. Arguments in support of implied gifts usually fail, but for an instance where such a gift was upheld, see Bredin v. Wilmington Trust Co., 216 A.2d 685 (Del. Ch. 1965).

28. In re Estate of Carter, 404 S.W.2d 693 (Mo. 1966).

29. First Nat'l Bank v. Watkins, 396 S.W.2d 342 (Tenn. 1965).

30. Clarken v. Brown, 137 N.W.2d 376 (Iowa 1965) (holding that heirs means "heirs"); First Nat'l Bank v. Sullivan, 394 S.W.2d 273 (Mo. 1955) (holding that heirs means those who would be heirs if the testator survived the life tenant).

31. McCain v. Womble, 265 N.C. 640, 144 S.E.2d 857 (1965). See also Simes & Smith, Future Interests § 727 (2d ed. 1956).

32. Central Carolina Bank & Trust Co. v. Bass, 265 N.C. 218, 143 S.E.2d 689 (1965).

33. Phelps v. Shropshire, 254 Miss. 777, 183 So. 2d 158 (1966). For a further analysis of the wait-and-see doctrine see Simes & Smith, Future Interests § 1230 (2d ed. 1956); Bordwell, Perpetuities from the Point of View of the Draughtsman, 11 Rutgers L. Rev. 429 (1956); Dukeminier, Kentucky Perpetuities Law Restated and Reformed, 49 Ky. L.J. 3 (1960); Leach, Perpetuities in Perspective, 65 Harv. L. Rev. 721 (1952); Mechem, Further Thoughts on the Pennsylvania Perpetuities Legislation, 107 U. Pa. L. Rev. 965 (1959); Simes, Is the Rule Against Perpetuities Doomed?, 52 Mich. L. Rev. 179 (1953); Tudor, Absolute Certainty of Vesting Under the Rule Against Perpetuities, 34 B.U.L. Rev. 129 (1954).

upheld when both charities declined less than twenty-one years after the death of the testatrix. The court offered no guidance as to how long it would have waited had the charities delayed their election to decline.[34] The decision produces at least two unfortunate results. First, it creates an additional means for tying up property in a day when the trend appears to be toward a more highly industrialized economy with its accompanying need for greater mobility.[35] Second, it multiplies the occasions where litigation will be necessary to determine ownership. These problems cannot be considered moot or hypothetical. Prior to the election by the charities to decline the gift, there was uncertainty as to whether or not any future interest of any kind had been created. In the meantime, the property was being held by trustees. If the trustees had begun embezzling the funds, would the would-be remaindermen have had any remedy for the protection of their interests? This is only one of numerous unanswered questions inherent in any rule of law requiring that the legality of a transaction be determined by the happening of fortuitous events long after the transaction itself is an accomplished fact.

The separable limitations doctrine was applied in Kansas to uphold a gift over upon the death of two life tenants if both died without issue, although there were invalid alternative gifts over if either of them died leaving issue.[36] In doing so, the court expressly rejected the wait-and-see doctrine and distinguished it from both the separable limitations principle and the so-called "second look" which permits the court to consider the circumstances existing when a power of appointment is exercised even when the period of the rule against perpetuities is being calculated from the time the power was created.[37] Although the separable limitations principle is not new or unique in the law,[38] it cannot be applied where the choice be-

34. A note writer has suggested that, "It might be inferred from the decision . . . that the court will wait until the termination of the period of the Rule Against Perpetuities." Note, 37 Miss. L.J. 487, 490 (1966). But one is left to speculate as to the meaning of that statement. The rule against perpetuities has nothing to do with the duration of interests. It is merely a rule which prevents the creation of certain types of interests and it has no clear meaning aside from its operation in that direction.

35. The possible argument that the wait-and-see doctrine does nothing more than permit property to be tied up during the period for which it could possibly have been tied up anyway is effectively answered in Simes & Smith, Future Interests § 1230 (2d ed. 1956).

36. In re Freeman's Estate, 195 Kan. 190, 404 P.2d 222 (1965).

37. See Breault v. Feigenholtz, 358 F.2d 39 (7th Cir.), affirming 250 F. Supp. 551 (N.D. Ill. 1965), cert. denied, 385 U.S. 824 (1966); In re Bird's Estate, 225 Cal. App. 2d 196, 37 Cal. Rptr. 288 (1964); In re Warren's Estate, 320 Pa. 112, 182 Atl. 396 (1936).

38. Layton v. Black, 34 Del. Ch. 1, 99 A.2d 244 (1953); Proctor v. The Bishop of Bath & Wells, 2 H. Bl. 358, 126 Eng. Rep. 594 (1794). Cf. Hancock v. Watson, 27 App. Cas. 14 (1901) (doctrine not applied because the testator failed to separate the contingencies and the court declined to do it for him).

tween a valid and an invalid alternative depends solely upon the discretion of a trustee.[39]

The problems of administrative contingencies, particularly those having to do with the settlement of estates, continue to create difficulties in a number of states. In upholding a gift made contingent upon the probate of a will, the Delaware Court of Chancery emphasized the criminal penalties for failure to submit a will to probate and the pressures of inheritance and estate taxes to get estates settled as reasons for concluding that it would be unreasonable to assume that probate might be delayed beyond the period of the rule against perpetuities.[40] A similar result was reached in Connecticut as early as 1893,[41] and in recent years, a few other states have moved in that direction, some by legislation[42] and others by judicial decision.[43] One of the states having a statute on the subject is Illinois,[44] but a recent federal case applying the law of that state has expressed the opinion that the same result would have been reached even if there had been no statute.[45] Thus it appears that in one form or another, the trend is toward a rule which would uphold the validity of a limitation that is dependent upon an administrative contingency that is likely to happen within a relatively short time but which might possibly happen at a time beyond the period of the rule against perpetuities. It appears that such a rule is a wise one and should be applied as a rule of construction permitting the implication of a further condition that the specified contingent event happen within the period.

A bequest to "anyone of my relatives upon condition that said relative shall give my name to his or her child" is necessarily too remote if it is not confined to a living relative.[46] But a similar bequest to a charitable

39. Carr v. Jones, 403 S.W.2d 181 (Tex. Civ. App. 1966).

40. Asche v. Asche, 216 A.2d 272 (Del. Ch. 1966). Accord, Emerson v. Campbell, 32 Del. Ch. 178, 84 A.2d 148 (1951) (postponement of vesting until final distribution of an estate not too remote).

41. Belfield v. Booth, 63 Conn. 299, 27 Atl. 585 (1893) (upholding a limitation postponing vesting until fourteen years after settlement of decedent's estate).

42. E.g., Ill. Ann. Stat. ch. 30, § 153a (Smith-Hurd Supp. 1966); N.Y. Pers. Prop. Law § 11-b(4); N.Y. Real Prop. Law § 42-c(4).

43. Elliott v. Travelers Ins. Co., 121 Ind. App. 400, 99 N.E.2d 274 (1951) (gift to life tenant's executor or administrator held valid); Champlin v. Powers, 80 R.I. 30, 90 A.2d 787 (1952) (postponement of vesting until the end of the administration of the estate upheld).

44. Ill. Ann. Stat. ch. 30, § 153a (Smith-Hurd Supp. 1966).

45. Breautl v. Feigenholtz, 250 F. Supp. 551 (N.D. Ill.), aff'd, 358 F. 2d 39 (7th Cir. 1965), cert. denied, 385 U.S. 824 (1966) (also emphasizing that for this purpose admission to probate means an effective or operative testamentary disposition and that if the probate is later set aside the effect is the same as if the instrument had never been admitted).

46. In re Finn's Will, 47 Misc. 2d 538, 262 N.Y.S.2d 972 (Surr. Ct. 1965).

corporation yet to be formed should be upheld on the theory that the formation of the corporation is not a condition precedent to the gift's becoming vested in the general public.[47] And a devise that is otherwise vested in a class within the period of the rule against perpetuities is not made invalid by a provision in the will that the members of the class may divide the property among themselves in any manner they choose.[48] The judicial preference for early vesting[49] sometimes results in the saving of a gift by construing what might appear to be a condition as being a mere charge upon an already vested interest.[50]

A New Jersey court admitted evidence of physical impossibility of issue for the purpose of deciding a trust termination question,[51] and it appears that similar evidence would be admitted in that state in perpetuities cases when it is relevant to the point in dispute.[52] New York continues to be burdened with the necessity of applying its peculiar "two lives" rule against the suspension of the power of alienation when construing instruments that took effect prior to the repeal of that rule.[53]

By its enactment of a statutory provision that for the purpose of applying the rule against perpetuities to interests created by a revocable trust the period of the rule is to be calculated from the time the trust becomes irrevocable,[54] Virginia has adopted what has usually been accomplished without the aid of a statute.[55] The Virginia legislature also exempted certain aspects of the condominium from the operation of the rule,[56] thus providing a possible solution for a problem that is likely to become more

47. In re Harber's Estate, 99 Ariz. 323, 409 P.2d 31 (1965). Further treatment of the same doctrine may be found in Bogert, Trusts and Trustees § 344 (2d ed. 1964); 4 Scott, Trusts § 401.8 (2d ed. 1956).

48. Prior v. Prior, 395 S.W.2d 438 (Mo. 1965).

49. Gray, The Rule Against Perpetuities § 103 (4th ed. 1942); Simes & Smith, Future Interests § 573 (2d ed. 1956).

50. Matthews v. Savage, 195 Kan. 501, 407 P.2d 559 (1965). Cf. Hardgrove v. Hardgrove, 240 Md. 634, 215 A.2d 183 (1965) (construing as a mere charge what might appear to be a twenty-year restraint on alienation).

51. In re Estate of Ransom, 89 N.J. Super. 224, 214 A.2d 521 (App. Div. 1965).

52. See In re Lattouf's Will, 87 N.J. Super. 137, 208 A.2d 411 (App. Div. 1965); 1965 Ann. Survey Am. L. 498.

53. In re Estate of Holmes, 26 App. Div. 2d 151, 271 N.Y.S.2d 760 (4th Dep't 1966) (construing the will of a testator who died in 1953). The "two lives" rule was repealed in 1958 and the new law has been the subject of a number of statutory refinements added since that time. N.Y. Pers. Prop. Law §§ 11-11c; N.Y. Real Prop. Law §§ 42-42c.

54. Va. Code Ann. § 55-13.2 (Supp. 1966).

55. Cook v. Horn, 214 Ga. 289, 104 S.E.2d 461 (1958); Fitzpatrick v. Mercantile-Safe Deposit & Trust Co., 220 Md. 534, 155 A.2d 702 (1959).

56. Va. Code Ann. § 55-79.36 (Supp. 1966).

acute with the increasing popularity of that particular device for owning and developing real estate.[57]

The infectious invalidity problem and the employment of a cy pres principle to remedy certain violations of the rule against perpetuities have been the subjects of recent legislation in Missouri.[58] Professor Willard L. Eckhardt has provided an excellent discussion of the peculiar problems arising out of the effective date of the legislation,[59] and it is hoped that his promised studies in the substantive provisions of the act will not be long delayed.

Significant periodical contributions, not mentioned elsewhere, have dealt with special perpetuities problems relating to charities[60] and to land use controls.[61] There has also appeared a worthwhile analysis of certain problems peculiar to a single jurisdiction[62] and a brief discussion of the "measuring lives" problem with its application to recent legislative modifications of the rule.[63]

Powers of Appointment.—A will purporting to dispose of the testator's entire estate is not within itself sufficient to exercise a general testamentary power in Alabama,[64] but the case reaching that result leaves a number of unanswered questions. Two such powers were involved, one in the life beneficiary and one a reserved power in the settlor of an inter vivos trust. It was clear that neither power was exercised but no reason was given as to why that did not leave the appointive property in the estate of the settlor as an undisposed of asset which would pass to his residuary legatees. The court apparently assuming that the residuary legatees had to take as appointees or not at all, directed a distribution to the settlor's next of kin and held that "next of kin" should be construed to mean those persons who would have been next of kin if the settlor had died immediately after the death of the

57. Moller, The Condominium Confronts the Rule Against Perpetuities, 10 N.Y.L.F. 377 (1964).

58. Mo. Ann. Stat. § 442.555 (Supp. 1966).

59. Eckhardt, Perpetuities Reform by Legislation, 31 Mo. L. Rev. 56 (1966). The uniqueness of the Missouri application of the infectious invalidity doctrine prior to the statutory enactment is considered in Eckhardt, Rule Against Perpetuities in Missouri, 30 Mo. L. Rev. 27 (1965).

60. Lynn, Perpetuities—The Duration of Charitable Trusts and Foundations, 13 U.C.L.A.L. Rev. 1074 (1966); Najarian, Charitable Giving and the Rule Against Perpetuities, 70 Dick. L. Rev. 455 (1966).

61. Boyer & Spiegel, Land Use Control—Pre-emptions, Perpetuities and Similar Restraints, 20 Miami L. Rev. 148 (1965).

62. Comment, The Rule Against Perpetuities in Alabama, 18 Ala. L. Rev. 129 (1965).

63. Lynn, Reforming the Rule Against Perpetuities, 1965 Duke L.J. 720.

64. Mastin v. Merchants Nat'l Bank, 278 Ala. 261, 177 So. 2d 817 (1965).

life tenant. North Carolina has a statute providing that a general testamentary disposition of one's entire estate "shall be construed to include" property over which the testator had a general power of appointment.[65] But it has been held that this statute does not apply to a special power even though the residuary legatee is a proper object of the power.[66] And even though a residuary clause expressly provides for a disposition of all the property owned by the testator-donee "or over which [he has] the power of disposition," there is not necessarily a sufficient blending to make the appointive assets part of the donee's estate for all purposes.[67] Such a provision, however, has been held sufficient in Illinois to subject the appointive property to the payment of debts and costs of administration even though the appointment itself might be defective and have to be set aside.[68]

A power incapable of being presently exercised might be presently released. In a case where there was created a contingent general testamentary power of appointment in the survivor of four children one of whom had subsequently died, the remaining three joined in an agreement which in form appeared to be an ineffective, premature attempt to exercise the power. Since the agreement was for the benefit of the takers in default, it was quite properly upheld as a valid release[69] thereby accomplishing the desired result.

It has become quite common in recent years for the creators of powers to impose special requirements concerning the manner in which the powers may be exercised and much has also been said about the wisdom of and the technique for exercising unknown powers. These topics constitute the subject matter of an excellent study by Professor Edward H. Rabin.[70] Another periodical writer has examined the recent statutory changes in the New York law of powers.[71] And Professor Charles L. B. Lowndes made a rather detailed study of the tax effects of restrictions upon the exercise of appointment and related powers.[72]

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65. N.C. Gen. Stat. § 31-43 (1966).

66. Wachovia Bank & Trust Co. v. Hunt, 267 N.C. 173, 148 S.E.2d 41 (1966). Cf. Fiduciary Trust Co. v. First Nat'l Bank, 344 Mass. 1, 181 N.E.2d 6 (1962).

67. In re Breault's Estate, 29 Ill. 2d 165, 193 N.E.2d 824 (1963).

68. In re Breault's Estate, 63 Ill. App. 2d 246, 211 N.E.2d 424 (1965) (purporting to follow Northern Trust Co. v. Porter, 368 Ill. 256, 13 N.E.2d 487 (1938). Cf. Fiduciary Trust Co. v. Mishou, 321 Mass. 615, 75 N.E.2d 3 (1947); Talbot v. Riggs, 287 Mass. 144, 191 N.E. 360 (1934); Low v. Bankers Trust Co., 270 N.Y. 141, 200 N.E. 674 (1936).

69. Wood v. American Security & Trust Co., 253 F. Supp. 592 (D.D.C. 1966).

70. Rabin, Blind Exercises of Powers of Appointment, 51 Cornell L.Q. 1 (1965).

71. Comment, Powers of Appointment—The New York Revision, 65 Colum. L. Rev. 1289 (1965).

72. Lowndes, Tax Consequences of Limitations Upon the Exercise of Powers, 1966 Duke L.J. 959.

Power To Consume.—Ascertaining the extent of the power continues to be the chief difficulty in this area and it does not appear that any more exact standard than the requirement of good faith has been developed.[73] Even when the power is expressed in extremely broad terms, it is usually held not to include the power to make gifts or otherwise divert the assets to the benefit of third persons.[74] But a life tenant having such a power may validly transfer the property to a third person in consideration of a promise to provide care and maintenance for the life tenant.[75] And a devise or bequest to a wife "for her own use and behoof forever" followed by a gift over of what remains undisposed of at the death of the wife gives the wife a power to make gifts within her lifetime even though the remainder over is good.[76] It appears that the effect is to treat the power as a general power of appointment.[77] A gift of income unrestricted as to time coupled with an unlimited power of disposition without any provision for a gift over is sufficient to create a fee simple absolute.[78] But a beneficial interest in a trust identified as a life estate and followed by an express provision for a gift over was construed to be a life estate in spite of a power in the life tenant to withdraw "such sums from principal as she may . . . request [with] no limitation . . . as to either the amount of or reason for such invasion of principal."[79] The case became the occasion for an excellent review as it has developed in Colorado.[80]

An intriguing problem in construction arose in North Carolina where a life tenant was given a power to consume principal in an amount not to exceed $1,800 per year. There was a remainder over of one-third to the heirs of the life tenant and two-thirds to others. An unanticipated application of the rule in Shelley's case resulted in the life tenant getting one-

73. See generally Norvell, The Power to Consume, 28 Mich. S.B.J. 5 (March 1949).

74. Baldwin v. Hambleton, 196 Kan. 353, 411 P.2d 626 (1966) (holding that a surviving wife clothed with a power to "have, use, mortgage, sell, convey and dispose" was still subject to "a duty to act honorably and in good conscience" and without power to make gifts); In re Estate of Gramm, 420 Pa. 510, 218 A.2d 342 (1966) (power to consume "the entire principal estate if, in her judgment, her needs require" it not sufficient to authorize even an indirect diversion of funds to third persons).

75. Mitchell v. Wilcox, 179 Neb. 553, 139 N.W.2d 293 (1966).

76. Jones v. Merrimack Valley School Dist., 107 N.H. 144, 218 A.2d 55 (1966).

77. Although no tax questions were raised in the case concerned, it would appear that, contra to the usual rule regarding a life estate with power to consume, the gift to the wife would qualify for the marital deduction in the husband's estate and that the part that remained at the death of the wife would be included in her estate and taxed again. Sparks, Application of the Marital Deduction to Joint and Mutual Wills, 37 Miss. L.J. 226 (1966).

78. In re Estate of Ransom, 89 N.J. Super. 224, 214 A.2d 521 (App. Div. 1965).

79. First Nat'l Bank v. People, 405 P.2d 730 (Colo. 1965).

80. Marsh, When Is a Life Estate Not a Life Estate in Colorado?, 43 Denver L.J. 173 (1966).

third in fee simple absolute but her power to consume the remaining principal remained at $1,800 per year.[81] What would have happened if the unanticipated application of the Shelley rule had given her two-thirds or even nine-tenths in fee simple?

81. Riegel v. Lyerly, 265 N.C. 204, 143 S.E.2d 65 (1965).