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# Personal Property - Consumables - Legal Relations of Owners of Present and Future Interests in Personality

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# NOTES

## LEGAL RELATIONS OF OWNERS OF PRESENT AND FUTURE INTERESTS IN PERSONALITY— CONSUMABLES

In the problem of protection of future interests in personalty one question must be whether future interests can exist in personalty. This problem has had a peculiar and long history and its adequate recounting as an historical problem has been done elsewhere and needs no repetition.[1]

Today the chief vestige of the hoary past lies in the rule that there can be no future interests in consumables, an anachronistic survival among personalty doctrines. The rule raises two question: 1) what is a consumable and 2) to what extent can there be no future interest in consumables.

The first question: what is a consumable, is largely a question of fact. Actually it seems that there are two rules here which are often confused. The first rule concerns things which are necessarily consumed in their use and this group consists largely of foodstuffs. The second rule concerns things whose use involves deterioration or diminution and in some cases annihilation and this group covers a wide variety such as household goods, tools and the like. As to the first group: foodstuffs, the rule is that there can be no future interests[2] unless the quantity is so large that no one would reasonably expect actual physical consumption. The other rule concerning things whose use involves deterioration is that the life tenant has free and unlimited use (short of waste) and the remainderman gets whatever, if anything, is left.[3] But a formalistic rule based on the form of the *res* has given way to a freer classification, thus if the *res* is part of a stock in trade or is given

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[1] Gray, *Future Interests in Personal Property*, 14 HARV. L. REV., 52 (1901).

[2] Andrew v. Andrew, 1 Colby Ch. Cas. 686, 63 Eng. Rep. 598 (1845); Bryant v. Easterson, 5 Jur. N.S. 166 (1859); Phillips v. Beal, 32 Beav. 25, 55 Eng. Rep. 10 (1862); Underwood v. Underwood, 162 Ala. 553, 50 So. 305, 136 Am. St. Rep. 61 (1909); Burnett v. Sister, 53 Ill. 325 (1870); Walker v. Pritchard, 121 Ill. 221, 12 N.E. 336 (1887); Buckingham v. Morrison, 136 Ill. 437, 27 N.E. 65 (1891); Gentry v. Jones, 6 J. J. Marsh 148 (Ky., 1831); Christler's Ex. v. Meddis Adm., 6 B. Mon. 35 (Ky. 1845); Davison's Adm. v. Davison's Admx., 149 Ky. 71, 149 S.W. 982 (1912); Healy v. Toppan, 45 N.H. 243, 86 Am. Dec. 157 (1864); Ackerman v. Vreeland, 14 N.J. Eq. 23 (1861); Rapalye v. Rapalye, 27 Barb. 610 (N.Y., 1857); Holman's Appeal, 24 Pa. 174 (1854); Robertson v. Collier, 1 Hill 370 (S.C., 1883); Calhoun v. Furgeson, 3 Rich. 160 (S.C., 1850); Wilson v. Gordon, 81 S.C. 395, 61 S.E. 85, 62 S.E. 593 (1908); Henderson v. Vaulx, 10 Yerg. 30 (Tenn., 1836); Forsey v. Luton, 2 Head 183 (Tenn., 1858); Dunbar's Ex. v. Woodcock's Ex., 10 Leigh 628 (Va., 1840). The cases are gathered in Note, 77 A.L.R. 753 (1932).

[3] Re Hall, 1 Jur. N.S. 974 (1855); Groves v. Wright, 2 Kay & J., 60 Eng. Rep. 815 (1856); Phillips v. Beal., supra, n. 2; Leonard v. Owen, 93 Ga. 678, 20 S.E. 65 (1893); Christler v. Meddis, supra, n. 2; Davison's Adm. v. Davison's Adm., supra, n. 2; Field v. Hitchcock, 17 Pick. 182 (Mass., 1835).

together with another *res* in which future interests can exist, there may be future interests.[4] Occasionally anomalous cases arise. Such was *Sealwik* v. *Grimes* in which the court refused to recognize a future interest in a printing press.[5]

The other and important question is: to what extent is it true that future interests cannot be created in consumables.

The Master of the Rolls, Sir William Grant, has given an historical explanation[6] of the doctrine of consumables which has been frequently quoted: "A gift for life of a chattel is now construed to be a gift of the usufruct only. But, when the use and the property can have no separate existence, it should seem that the old rule must still prevail, and that a limitation over, after a life interest, must be held to be ineffectual."

What rationale can support the rule? It is argued that a gift for life in a consumable imports a power to consume and that such a power is inconsistent with the existence of a future interest. This by analogy to the case of a power of sale coupled to a life estate. But most cases do not hold the latter a gift of the absolute interest.[7]

A strong argument, but one not often cited in the opinions, although perhaps tacitly assumed, is that normally no effort is made to create future interest in consumables and if they were permitted, undesirable results would follow.

There are several limits to the rule that there can be no future interests in consumables. Several cases provide that if the grantor were clear as to his intent, he might vitiate the rule[8] or circumstances just pointed out, namely, gift of stock in trade or of consumables and another *res* clearly not a consumable with the intent that they be a unit may take the case out of the rule.

But the most important exception is the case where there is a gift of a residue or a general bequest. In that case there is said to be a duty on the executor to sell the goods and the future interests attach

[4] Howe v. Howe, (1849) 14 Jur. 359; But cf. Howe v. Dartmouth, infra, n. 9.

[5] 107 Md. 410, 68 Atl. 883, 16 L.R.A. N.S. 483, 126 Am. St. Rep. 400 (1907),

It has been suggested that the run of mine cases involving the holding that a res is consumable do not necessarily involve holding that there can be no future interest but may merely decide that there is a future interest in whatever is left at the cessation of the first interest.

The present case involves holding that there can be no future interest in consumables because here the court was dealing with what was left over after the cessation of the first interest and the quarrel was between the heirs of the first owner and the future owner. The heirs of the first owner prevailed, the court holding there could be no future interest in consumables.

[6] Randall v. Russell, 3 Merivale 190, 36 Eng. Rep. 73 (1817).

[7] Cf. Simes: *Future Interests* (1937) sec. 598.

[8] Greggs v. Dodge, 2 Day 28 (Conn., 1805); Innes v. Polter, 130 Minn. 320, 153 N.W. 604, 3 A.L.R. 896 (1915); Healey v. Toppan, 45 N.H. 243, 86 Am. Dec. 159 (1864): Saunders v. Haughton, 8 Ired. Eq. 217 (N.C., 1832); Patterson v. Devlin, McMul. Eq. 459 (S.C., 1827); Madden v. Madden's Ex., 2 Leigh 337 (Va., 1830).

to the proceeds. This rule was first stated in England in 1802 in *Howe* v. *Dartmouth*.[9] The rule is based on the implied intent of the testator. Since future interests were stated and there may well be no property to enjoy if the life tenant can consume it, the property must be converted into income-yielding property and the income paid to the life tenant. The distinction between a general or residuary gift and a specific devise lies in the fact that in a specific devise the testator has made it clear that he intends the life tenant to enjoy that particular *res*. The rule of *Howe* v. *Dartmouth* is followed generally[10] but not in Maryland[11] on the ground that such an intent as the rule involves is too fictitious.

If a contrary intent is manifest, the rule of *Howe* v. *Dartmouth* will be set aside.[12]

Included in the class of consumables to which the rule of *Howe* v. *Dartmouth* applies are: leaseholds,[13] annuities,[14] and royalties,[15] in addition to the aforementioned foodstuffs and household goods.

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[9] 7 Ves. Jr. 137, 32 Eng. Rep. 56, 25 Eng. R. C. 29 (1802).

[10] Hinves v. Hinves, 3 Hare 609, 67 Eng. Rep. 523 (1844); Re Bates (1907) 1 Ch. 22, 6 B.R.C. 199; Prendergast v. Prendergast, (1850) 3 H. L. Cas. 195, 10 Eng. Rep. 75; Tickner v. Old, (1874) 18 Eq. 422; Harrison v. Foster, 9 Ala. 955 (1846); Burnett v. Lester, 53 Ill. 325 (1870); Welsch v. Belleville Sav. Bank, 94 Ill. 191 (1876); Buckingham v. Morrison, 136 Ill. 437, 27 N.E. 65 (1891); Balch v. Hallet, 10 Gray 402 (1858); Minot v. Thompson, 106 Mass. 583 (1871); Dexter v. Dexter, 274 Mass. 273, 174 N.E. 493 (1931); Healey v. Toppan, 45 N.H. 243, 86 Am. Dec. 159 (1864); Ackerman v. Vreeland, 14 N.J.Eq. 23 (1861); Hull v. Eddy, 14 N.J.L. 169 (1833); Rowe v. White, 16 N.J.Eq. 411, 84 Am. Dec. 169 (1863); Howard v. Howard, 16 N.J.Eq. 486 (1864); Jones v. Stites, 19 N.J.Eq. 324 (1868); Coole v. Monkhouse, 47 N.J.Eq. 73 (1890); Ott v. Tewksbury, 75 N.J.Eq. 4, 71 Atl. 302 (1908); Covenhoven v. Shuler, 2 Paige 122 (N.Y., 1830); Cairns v. Chaubert, 9 Paige 160 (N.Y., 1841); Spear v. Tinkham, 2 Barb. Ch. 211 (N.Y., 1841); Rapalye v. Rapalye, 27 Barb. 610 (N.Y., 1857); Re Housman, 4 Dem. 404 (N.Y., 1886); Re Kendall, 4 Dem. 133 (N.Y., 1885); and many later N.Y. cases; Smith v. Barham, 2 Dev. Eq. 420, 25 Am. Dec. 721 (N.C., 1833); Jones v. Simmons, 7 Ired. Eq. 178 (N.C., 1851); Saunders v. Haughton, 8 Ired. Eq. 217 (N.C., 1852); Ritch v. Morris, 78 N.C. 377 (1878); Simmons v. Fleming, 157 N.C. 389, 72 S.E. 1082 (1911); Henderson v. Vaulx, 10 Yerg. 30 (Tenn., 1836); Golder v. Littlejohn, 30 Wis. 344 (1872).

[11] Evans v. Inglehart, 6 Gill & J. 171 (Md. 1834); Wooten v. Burch, 2 Md. Ch. 190 (1851).

There are dicta in several other jurisdictions against Howe v. Dartmouth.

[12] Alcock v. Sloper, 2 Myl & K. 699, 39 Eng. Rep. 1111 (1833) and a score of succeeding English cases; Gay v. Focke, 291 Fed. 721 (1923); Harrison v. Foster, 9 Ala. 955 (1846); Buckingham v. Foster, 136 Ill. 437, 27 N.E. 65 (1891); Old Colony Trust Co. v. Shaw, 261 Mass. 158, 158 N.E. 530 (1927); Corle v. Monkhouse, 47 N.J.Eq. 73, 20 Atl. 367 (1890); Re Housman, 4 Dem. 404 (N.Y., 1886); Tayloe v. Bond, Busbee Eq. 5 (N.C., 1852); Deighmiller's Estate, I Legal Gaz. 42 (1869); Robertson v. Collier, 1 Hill Eq. 370 (S.C. 1833); Vancil v. Evans, 4 Coldw. 340 (Tenn. 1867); Golder v. Littlejohn, 30 Wis. 344 (1872).

[13] Re Game (1897) 1 Ch. 881; Frankel v. Farmers Loan & Trust Co., 152 App. Div. 58, 136 N.Y. Supp. 703 (1912) affmd. 209 N.Y. 553, 103 N.E. 1124 (1913) and in 168 App. Div. 634, 154 N.Y. Supp. 363 (1915).

[14] Sutherland v. Cooke, 1 Colby Ch. Cas. 498, 63 Eng. Rep. 516 (1844).

[15] Re First Trust & Deposit Co., 210 App. Div. 575, 206 N.Y. Supp. 765 (1924).

A contrary intent (opposing *Howe* v. *Dartmouth*) may be found from an authorization or direction to retain[16] or to sell at a designated time[17] or at discretion[18] or to pay rents.[19]

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EDITOR'S NOTE: This article is the third part of a series relating to Problems in the Legal Relation of Owners of Present and Future Interest in Personality, the first of which will appear in the March issue of the Wisconsin Law Review, and is entitled "The Right of the Owner of a Future Interest in Personality to Security"; the second part will appear in either the February or March issue of the Michigan Law Review, and is entitled "Some Problems in the Apportionment of Increase Between Holders of Present and Future Interests in Personality."†

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[16] Re Bates (1907) Ch. 22, 6 B.R.C. 199.
[17] Daniel v. Warren, 2 Younge & C. Ch. Cas. 290, 63 Eng. Rep. 127 (1843).
[18] Re Pitcairn (1896) 2 Ch. 199; Robertson v. Collier, 1 Hill. 370 (S.C., 1833).
[19] Goodenough v. Tremamondo, 2 Beav. 512, 48 Eng. Rep. 1280 (1840).