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Wills-Power of Appointment-Exercise of the Power

WILLS—POWER OF APPOINTMENT—EXERCISE OF THE POWER.—Testator died leaving two children to whom he devised his estate in equal shares; he gave his son's share outright, but the share of the daughter he devised in trust for her use during her life, and upon her death, he ordered the trustees to "pay and divide the principal of such share to and among such of her children . . . as she shall by her will appoint." Upon failure effectually to exercise the power, the property was to go over to her children in equal shares. The daughter thereafter died leaving two children and she attempted by will to exercise the power of appointment by creating separate trusts for her children during life with power of appointment in the children. The decree of the lower court holding this a valid exercise of the power was reversed on appeal since the power was held to be limited and special and could be effectively exercised only in the way provided by the testator. *In re Kennedy's Will* (N. Y. 1938), 18 N. E. (2d) 146.

The general rule, with which this note is concerned, goes back to the early seventeenth century and provides that "under a general power to appoint, or a power to appoint limited merely as to the objects, the donee is not restricted to an appointment in fee simple, but may appoint lesser or

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and established a shadow of domicil in three or more states. This result protects those who are the more elaborate rovers. It would seem that the result is unfortunate. Perhaps, therefore, the court will be liberal in finding an injury threatened to the state; thereby circumventing the result of Worchester County Tr. Co. v. Riley (1937), 302 U. S. 392, 82 L. ed. 268, 58 Sup. Ct. 185.

[7] Mr. Justice Frankfurter comments on the extent of the holding in the present case thus: "To find decedent could not on self-serving grounds elect to make his home in Texas 'where he in fact had no residence' and yet to retain the bill and dispose of it on its merits amounts in effect to a declaration of rights on behalf of the estate which could not be adjudicated otherwise than through the screen of a controversy between states."

qualified estates in the subject matter; but if the power expressly or by clear implication requires that an estate in fee, and no other, shall be appointed, a less estate than a fee cannot be given by the donee."[1]

It is clear that an appointment of a lesser estate under a will permitting the donee to appoint a fee or a less estate,[2] or in such parts or shares[3] as he directs, will be held a valid execution of the power unless the will limits the appointment to a class and there is only one of the class remaining.[4]

The difficulty has arisen in those cases in which there is no direct authority given the donee of the power to appoint an estate less than a fee. In this situation however, cases have upheld the appointment of a lesser estate.[5] The theory upon which the courts sustain such appointments is usually said to be that the lesser is included in the greater, and that the appointment of a lesser estate is not an excessive exercise of the power, but a partial execution of it.[6] Courts have permitted this appointment of a lesser estate since the early English case of *Bovey v. Smith*[7] which held, "Where a man has a power of appointing a fee, he may execute it at several times, and appoint an estate for life at one time, and the fee at another time." The rule found expression again in the case of *Slark v. Dakyns*,[8] in which the court said, "An absolute interest might have been conferred, and it was equally competent to a person exercising the power to give something short of an absolute interest."

In those cases which refused the granting of a lesser estate, it seems that the courts have denied the validity of such appointments not because there was no authority to grant a lesser estate, despite language which might lead to such belief, but rather because of one of several other factors. These factors, relating generally to an appointment outside a designated class, may be found in four aspects, (1) an appointment of the lesser estate to members of the class but a remainder in fee to persons not within the class,[9] (2) appointment of a prior interest to persons not within the class,[10] (3) creation of a trust in trustees not within the class,[11] and (4) the creation

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[1] 49 C. J. 1267, § 55.

[2] Hillen v. Iselin (1895), 144 N. Y. 365, 39 N. E. 368.

[3] Appleton's Appeal (1890), 136 Pa. St. 354, 20 A. 521, 11 L. R. A. 85; Beardsley v. Hotchkiss (1884), 96 N. Y. 201; Harker v. Reilly (1871), 4 Del. Ch. 72.

[4] Appeal of Pepper (1888), 120 Pa. 235, 13 A. 929; Wickersham v. Savage (1868), 58 Pa. St. 365.

[5] See Mays v. Beech (1905), 114 Tenn. 544, 86 S. W. 713, 4 Ann. Cas. 1189, which upheld an appointment of a life estate coupled with a power of appointment under wording of the donor's will which granted donee the power to appoint by will, the passing of the property "to be effective to pass the title as absolutely as he (donor) could by will."

See also Butler v. Huestis (1873), 68 Ill. 594, 18 Ann. Rep. 589, in which the court upheld an appointment of a life estate with a remainder in fee where the will stated that the "real estate shall belong, in fee simple absolute, to such person as she shall have appointed by her will."

[6] Mays v. Beech (1905), 114 Tenn. 544, 86 S. W. 713, 4 Ann. Cas. 1139.

[7] (1682), 1 Vern. 84, 23 Eng. Repr. 328.

[8] (1874), L. R. 10 Ch. App. 35.

[9] Wickersham v. Savage (1868), 58 Pa. St. 365.

[10] In re Rafferty's Estate (1924), 281 Pa. 325, 126 A. 796.

[11] Myers v. Safe Deposit & Trust Co. (1891), 73 Md. 413, 21 A. 58.

of a trust to accomplish an object that is not within the terms of the power.[12]

These cases all proceed upon the theory that the power, exercised to give to those outside a class, is not exercised so as to fulfill the intention of the testator. It is true that the court often speaks as if the mere grant of a lesser estate is the voiding act,[13] but there is always present the designated class factor, and it is seriously doubted that the same result would have been reached had there been no limitation to a class.

It has been held that the mere fact that a trust was created would not invalidate the exercise of the power where the donee could appoint the fee in such parts or shares as he should direct.[14] It would seem, on the basis of *Mays v. Beech*,[15] that a valid exercise should be declared even where the trust is created in the absence of words expressly permitting the creation of lesser estates, and this even though the trustees are persons outside a designated class, so long as the trustee has only limited powers of management,[16] for such trustee does not effectively remove control of the property or enjoyment of the property from the selected beneficiary so as to violate the intention of the testator.

In the instant case, the donee attempted to exercise the power of appointment by directing that the property be placed in the hands of trustees who were to pay the income to the appointee during life and thereafter to divide the principal and pay to the appointee's children for certain purposes as the appointee may direct, the remainder to his children in equal shares. This is certainly a limited power of management in the trustee. Thus, insofar as the mere creation of the trust is concerned, it would seem that there was a

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[12] Boyle's Estate (1878), 5 W. N. 363.

[13] See Myers v. Safe Deposit & Trust Co. (1891), 73 Md. 413, 21 A. 58, in which the court says, "He gives the wife the simple power to name who shall take the estate, and she is given no power by implication to create a trust."

See further Wickersham v. Savage (1868), 58 Pa. St. 365, in which the court said, "The authority to appoint . . . would not authorize the appointor to cut down the quantities of estate to the class of designated appointees."

[14] In Appleton's Appeal (1890), 136 Pa. St. 354, 20 A. 521, 11 L. R. A. 85, we find this quotation: "The power is wholly unrestricted: the entire discretion is committed to the donee of the power, to grant the fee in such form and to such persons as she chose. In the exercise of that power she did appoint the fee, and we think she was authorized . . . to declare such uses and trusts for life as would best carry out her wishes with respect to the ultimate disposal of the property."

And in Boyle's Estate (1878), 5 W. N. 363, the court says, "Nor does the mere fact that a trust is created affect the validity of the appointment, where such trust really effectuates the intention of the donor by confining the benefits to the selected objects. Where the appointment is to be exercised in such manner as the donee pleases, the power to create a trust is said to be still clearer."

[15] (1905), 114 Tenn. 544, 86 S. W. 713, 4 Ann. Cas. 1189.

[16] The trustee should have only power to collect rents and profits, pay over to the beneficiary, and transfer title according to direction of the beneficiary. Of course, general powers of management which would permit the trustee to invest and reinvest, and to dispose of the trust property would give the trustee such control that he could, by the exercise of this power, defeat the intent of the testator as to the use and disposal of the property and this should be invalid.

valid exercise of the power. However, the court is entirely correct in its holding since there was not a compliance with the mandate of the testator to "pay and divide the principal . . . among . . . her children" by paying to a trustee for the use and benefit of such children.

In order to protect the intent of the testator, it would seem that yet another factor has had influence upon the courts, namely, the final disposition of the property. In those cases in which the exercise of the power was held invalid, the property was distributed according to the provision of the will of the testator, chiefly to those who would take under the law of descent. This operated, in most cases, to keep the property for the benefit of the family rather than permitting it to go to someone outside the family.[17] It will also be noted that in those cases permitting the creation of an estate less than a fee, the property went into the hands of those or some of those who had been selected by the testator to take the property in default of the exercise of the power.[18]

It is submitted that the proper test of the validity of the creation of a lesser estate under a power to appoint a fee is whether the disposition thus made is consistent with the intention of the testator in conferring the power of appointment. In the language of the cases herein reviewed, there should be only three instances[19] in which the exercise of the power to appoint a fee should be held invalid when a lesser estate is appointed. These instances should be limited to those cases (1) in which a trustee, having general powers of management, might be able, by disposal of the property, to prevent those persons indicated by testator's will from obtaining the property, or (2) in which there has been a designation of a particular class and the appointment either of a present or future estate is to someone outside the class, or (3) in which there is express designation that the donee of the power shall have only the power to grant a fee. H. M. K.

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[17] Appeal of Pepper (1888), 120 Pa. 235, 13 A. 929. To trustees outside a class: Horowitz v. Norris (1865), 49 Pa. St. 213.

See also: Myers v. Safe Deposit & Trust Co. (1891), 73 Md. 413, 21 A. 58; Wickersham v. Savage (1868), 58 Pa. St. 365.

[18] Butler v. Huestis (1873), 68 Ill. 594, 18 Am. Rep. 589; Guild v. Newark (1916), 87 N. J. 38, 99 A. 120; Appleton's Appeal (1890), 136 Pa. St. 354, 20 A. 521, 11 L. R. A. 85; Mays v. Beech (1905), 114 Tenn. 544, 86 S. W. 713, 4 Ann. Cas. 1189; Slark v. Dakyns (1874), L. R. 10 Ch. App. 35.

[19] It may here be noted that the exercise of the power of appointment in such manner so as to violate the rule against perpetuities is a fourth instance but that it is not included in this note. That question is important in the subject of this note, but it is independent in its operation; however, the reader must be ever aware of the existence of this difficult problem and its application to the situation dealt with in the body of the note.