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POWER OF A LIFE TENANT TO DISPOSE OF A FEE[1]

WALTER L. SUMMERS*

A man whose property is so limited in extent that he cannot feel reasonably sure that the interest therein created by law for the benefit of his widow will be sufficient for her maintenance and support under all circumstances naturally seeks to make proper provision for her by will. Such a testator, if he has children, finds himself between two conflicting desires. He is anxious that his widow have proper support during her lifetime, but at the same time he also desires that his children have the residue of the estate upon her death. He is somewhat reluctant to give the wife a fee and disinherit his children; he fears a life estate with a remainder in fee will not meet all exegencies of the widow's needs, so he attempts to strike between the two by giving the widow a life estate with power to dispose of such of the property as may be necessary for her maintenance, with a gift of the residue to his children. Such a will, if properly drawn, may very well accomplish the intent of the testator without the necessity of litigation to determine its legal effect. Such wills, however, are not always carefully drawn, and the result has been a great mass of litigation in which the decisions of the courts have not been altogether harmonious. An attempt will be made to point out and clarify, from the standpoint of both reason and authority, some of the chief controversies arising out of situations of this sort.

1 The substance of this article was presented in an address to the Gary Bar Association in 1929.

* See biographical note, page 178.

The opportunities for error in testamentary dispositions of this sort are numerous. The nature of the estate of the first taker, the creation and extent of the power, and the validity of the gift by way of remainder, must necessarily depend upon the language of the will. In the construction of wills the courts are guided by the well understood principle that the intention of the testator as gathered from the four corners of the will must control, but this intention, when clearly apparent, cannot be permitted to override settled principles of property law and result in the creation of impossible legal situations.

The first problem concerns itself with the nature of the estate or interest of the first taker. If a testator devises property to his wife and her heirs, or to her generally, with a power to dispose of the fee, and a gift over of what is left to his children, the widow takes a fee. The words creating the power are mere surplusage and the remainder is void, although a testator might be surprised to find that such was his intention. The reason is, that the gift to the widow simplicter, or to the widow and her heirs, creates a fee, and by the creation of the fee in her the testator has thereby created in her powers to dispose of the fee, and any other further expression of intent to that effect is useless. The fee being in existence the remainder must be invalid because of the rule that a remainder cannot be engrafted upon a fee. (It cannot be good as an executory devise because there is no contingency stated upon which the interest of the widow is to be divested.) The above conclusions are in perfect accord with the settled rules of law in all jurisdictions including Indiana. The courts of this state have, in numerous cases, quoted and adopted the well known statement of Chancellor Kent where he says: "A devise of an estate generally, or indefinitely, with a power of disposition over it carries a fee."

If, however, a testator devises land to his wife expressly for life, or by such language that it can be ascertained that a life estate is intended, she takes a life estate only, despite the fact that he adds to the life interest a general power to dispose of a fee in the property by deed or will. A gift over by way of remainder of "what is left", "what remains undisposed of", "or remains unexpended" is valid, subject, however, to be defeated wholly or in part by a proper exercise of the power by the life tenant. This is settled law in England and in a great majority of jurisdictions in this country, including Indiana. A contrary

view is held in Virginia, West Virginia and Tennessee. The rule has, to some extent, been modified by statute in a few states.

In his Commentaries, Chancellor Kent, in speaking of the nature of the legal interest created by gift of a life estate with an added power to dispose of a fee, said: "Where the estate is given for life only, the devisee takes only an estate for life, though a power of disposition, or to appoint the fee by deed or will, be annexed; unless there would be some manifest general intent of the testator, which would be defeated by adhering to this particular intent."

Whenever the question as to the nature of the estate created by such a testamentary disposition has been raised in those jurisdictions following the so-called majority rule the courts have invariably relied upon the rule as stated by Kent. This statement has been quoted and paraphrased in several Indiana cases, although in many of them the court was not put to the necessity of deciding whether a life estate plus a general power to dispose of a fee created a fee simple, for the reason the only question involved was whether the life tenant could convey a fee and she would have this power in either alternative. In a few cases the question has been squarely presented. Thus in *Foudry v. Foudry*,[2] the first taker brought a suit to quiet title claiming a fee. The court in denying the action said: "This instrument by certain and express terms, gave to Martha E. Clark a life estate, with full power of disposition. It is held that in such particular case the devisee for life will not take a fee notwithstanding the gift of a power of disposition."

In *Beatson v. Bowers*,[3] the court said: "Mary Bowers had no interest in fee, but had, by the conveyance to her, a naked power of appointment, and had the appointment been made without pecuniary benefit to herself it would have been valid. The power is not an estate, and does not imply ownership or an estate, nor does it enlarge a life estate into a fee."

In this last mentioned case the Indiana court cited with approval, *Burleigh v. Clough*,[4] wherein the validity of a remainder was attacked upon the ground the life estate and the power to convey the fee merged together to create a fee in the first taker and made the remainder bad as a fee on a fee. The New Hamp-

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[2] 44 Ind. App. 444.

[3] 174 Ind. 601.

[4] 52 N. E. 267.

shire court answered this contention by saying that the power created was not an estate or property and therefore could not merge with the life estate. This statement has likewise been greatly relied upon by other courts as sound support of the general rule.

This hasty survey of the authorities shows that the Indiana court and others following the majority rule base their decisions that a life estate accompanied by a general power of disposition does not enlarge into a fee upon two general reasons. The first is, that the intention of the testator should be controlling. They find the intention of the testator to create only a life estate by the express gift of a life estate, and that proof of such intention is strengthened by the gift by way of remainder to his heirs or children. The second reason is, that granting the intention might be overcome by merger of the power and the life interest, the merger cannot take place because a power being only an authority cannot merge with the life interest, which is an estate or property.

Before offering any criticism of these reasons it is perhaps advisable to turn to the minority view to see upon what theory it is held that a fee is created by a gift of this sort. This view owes its existence to a misunderstanding by the courts of Virginia, West Virginia, and Tennessee of an early decision of the Virginia court in *Burwell v. Anderson.*[5] The court in that case stated that in absence of any inconsistent grant or devise, a gift of a complete power of disposition of property was equal to the direct conveyance of a fee. Later decisions in that jurisdiction, and in the other states mentioned, apparently understood this statement to mean that a gift of a general power of disposition by deed or will, even when accompanied by an express gift of a life estate, would override any expressed intent to give a life estate and, therefore, constitute a fee. Whether the courts in these decisions depend wholly upon the notion that the gift of the power is the controlling intent, or give some weight to the notion that there is a merger of the life estate and the power to produce a fee, is difficult to determine. If they depend upon the former theory they find a different intent and reach a result directly contrary to that laid down by Chancellor Kent, but if they depend upon merger as overriding intent, their holdings are

[5] 3 Leigh 348.

squarely contrary to the reasons advanced against merger in *Burleigh v. Clough.*

Where a deed or will of the type now under discussion, that is, where the estate for life is expressly given with an added power to dispose of the fee by deed or will, and a gift of the residue is made to a third person, usually the donor's children, the intent of the testator or grantor can hardly be misunderstood. Under the holdings of the majority of the courts in England and this country this very evident intent of the grantor or testator is carried out. Perhaps the average practicing lawyer when confronted with the examination of a title to the land involved would be satisfied with the rule and its reasons as stated above. Certainly in the face of the long line of decisions in this state, he would not be justified in encouraging litigation in order to try out some of his own pet theories before the courts. It costs nothing, however, to dig a little deeper into the reasons given by the courts and satisfy one's own curiosity as to their soundness.

The controversy here is one between a rule of intention and a rule of law. If the situation is such that the rule of law applies there is not much controversy about it. The rule of intention involved is that the intention of a testator controls. The rule of law is that property interests presently vested in the same person in respect to the same land or chattels merge into a single interest. Thus where an owner of a reversion in fee buys in an outstanding life estate he takes the fee presently. A might convey Blackacre to B, and C at the same time convey an outstanding easement in the same land to B, with the expressed intention in the deed that there be no merger, yet merger results. It is only natural to expect then, that if one has a present estate for life in a tract of land and also a complete power to dispose of the fee in that land by deed or will, that such person will insist that he has a fee simple, for, on the first impression, he seems to have about all the fee simple owner has. In the application the Rule against Perpetuities to powers, such a person is treated as the owner of the land for the purpose of estimating the period of remoteness.

The majority rule says that intent controls and there is no merger because a power does not merge. The reason given why there is no merger is that it is not a property but an authority. The minority rule, at least indirectly, says there is a merger because the gift of the power is the whole thing and controls and

swallows up the life estate. If there is a merger it will control. It is submitted that the reasons in the majority, as well as the minority decisions, are unsatisfactory. To prove this assertion it is necessary to briefly examine the nature of a life estate, of an estate in fee, and of a general power of appointment.

A life tenant, as here considered, has legal rights, privileges, powers and immunities in respect to a particular tract of land to which relations are correlative the respective duties, no-rights, liabilities and disabilities of all other persons. By the reason of the existence of these legal relations the life tenant may prevent intrusions upon the land by all others, and he may use the land as he pleases, provided he does not commit a nuisance or injure the inheritance through the commission of waste. The foregoing rights and privileges are, of course, limited to the life time of the tenant. By virtue of his legal powers he may destroy all of his legal relations in respect to the land and recreate similar relations in others, and he has immunities against the destruction of his interest by others, subject of course to the power of the state to take the land for public purposes.

The tenant in fee likewise has rights, privileges, powers and immunities in respect to the particular land. His rights like those of the life tenant, are limited for the period of his life. His privileges are no different from those of the life tenant, except that they are not limited by the doctrine of waste. It becomes at once apparent that the most important difference between the legal interest of a life tenant and a tenant in fee lies in the character of their power-immunity relations. The tenant in fee has powers to dispose of the fee by deed, by will, and by descent, while the life tenant only has powers to dispose of such interest as he has. What is it that the tenant in fee has that the life tenant does not have? It is this, powers to create powers in others to transmit by will, by deed or by descent. In other words, the fundamental difference in the nature of an estate for life and an estate in fee is in the fact that the fee simple owner has powers to pass his interest on to his heirs by descent, and when he transfers his estate or interest to others by any proper legal act he transfers to them powers to transmit by descent.

If then there be added to the legal relations of a life tenant general powers to dispose of the fee by deed or will the result is not a fee for the simple reason that such life tenant does not have powers to transmit a fee by descent, the very essence of a

fee. He may create a fee, but he does not have a fee. If he dies his heirs will get nothing.

It is on this reasoning that it is contended that the minority rule is wrong, for granting that a general gift to dispose of the fees by deed or will is the intent of the testator such a gift does not properly describe a fee. It is likewise contended that the courts holding to the majority rule could have disposed of the contention about merger by admitting a merger and showing by this simple process of addition that the result could not be a fee.

The courts sustaining the majority rule have elected, however, to meet the issue about merger by declaring that merger does not take place. The reason given is, that only property interests merge and that a power being merely an authority and not a property interest does not merge. It must be noticed, however, that the very powers involved here are legal relations in rem respecting land and they are an essential ingredient of a fee. It is hard to believe that they are not property relations. The statement that a power is an authority is, of course, merely defining a power in its own terms, and meaningless for the present purpose. The reasoning of the courts here is about as conclusive and convincing as the conclusions of that great investigator who devoted his life to research upon the subject of the "fiery flying serpents in the wilderness", with special attention to their origin and subsequent history. His conclusions, as stated in his own words, were: "They was there all the time, and they stayed where they was."

It is believed that the courts are correct in holding that the life interest and powers do not merge, but that their reasons are by no means convincing.

If A gives a life estate to B with the addition of express powers to dispose of his life interest in the land, the added powers, do not merge for the simple reason that the added words granting the power are meaningless. They pretend to give the life tenant something which he already has and which the grantor did not have at the time. If on the other hand the life tenant is given additional powers to dispose of the fee, legal relations are created which the life tenant did not get by the creation of the life estate and which the devisor had and had powers to create. Now why is it that these powers do not merge with the life estate to create a fee? The answer is simple. It is because a merger of property interest to take place must produce a legal interest in land known to the law. These relations combined do not constitute a life

estate, a base or qualified fee, or a fee simple. The sum is more than a life estate and less than a fee. We call it exactly what it is, a life estate with a general power to dispose of the fee by deed or will. The name is somewhat unhandy but that cannot be helped.

A second important question arising in connection with testamentary dispositions of this sort, and one in respect to which there is considerable confusion and contrariety of view is, What language is necessary to create a power to dispose of a fee? Here the problem is wholly one of gathering the intention of the testator from the language of the will. The difficulty lies in the fact that there are various rules for the determination of intention which sometimes lead to opposite conclusions when applied to a given situation. Of course if the deed or will expressly provides that the life tenant may dispose of the fee there is no question about the intention, but many grantors and testators, or their attorneys, are not so careful as to make this direct statement. A power to dispose of a fee does not, however, need be expressly given, but it may be implied from certain other provisions, from the context as a whole.

If the life interest is expressly given and a power to dispose of the property is added, although it does not expressly state that the fee may be disposed of, and there is a gift over to the testator's children, or his heirs, of "what is left", "what remains unexpended", or words of similar import, it is held in most jurisdictions, including Indiana, that a power to dispose of a fee is intended and therefore created. This conclusion is supported first by the fact that any words creating a power in the life tenant to dispose of his own life estate are meaningless and mere surplusage because he already has such power, and further by the fact that the language creating a remainder in what is left or unexpended clearly indicates that the testator contemplates that the property may be partially or entirely disposed of by the life tenant. The application of these principles may be made clearer by reference to some of the cases.

In *Clark v. Middlesworth*,[6] the will provided: "I hereby will and bequeath and devise all of my property, real and personal, to my wife, Mary A. Clark, during her life, and at her death, should anything remain, the same to be divided among my heirs at law." Here it will be noticed that there are no direct words of

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[6] 82 Ind. 240.

any sort creating a power to dispose of the property in any manner, the court held, however, that the wife took a life estate with power to dispose of the fee, and that a purchaser from her secured a fee simple interest cutting off the remainder to the heirs. "We think", said the court, "it quite clear that the will of A. B. Clark gave to his widow, Mary A. Clark, a life estate in said lot, and that it also gave her by clearest implication, a power to dispose of the same. The words 'at her death, should anything remain,' are senseless and without meaning, unless the testator intended that the tenant for life might, prior to her death, dispose of the property devised to her for her life. The words clearly show that he must have contemplated this at the time, and therefore, have intended it."

In *Silver v. Canary,*[7] where the facts were similar to those in *Clark v. Middlesworth,* the court in holding that the life tenant had a power to dispose of the fee in absence of express words creating such a power, said: "We think this case is governed by *Clark v. Middlesworth,* and upon the authority of that case the widow had the power to convey the fee. It will be observed that the words 'what may not be consumed of real and personal estate at my wife's decease' found in item one of the will, are quite as strong as those used in the case referred to, and in addition to this it must be borne in mind that in all subsequent items of the will the testator is careful to limit the estate devised to property not 'herein otherwise appropriated.' "

The gift of the remainder has been pointed out in a number of Indiana cases of especial importance in determining the nature of the power. Thus in *Wiley v. Gregory,*[8] where a testator gave his wife all of his real and personal property "to be and remain hers during her natural life, to use, enjoy and dispose of as she may desire, and after her death all that remains undisposed of by her, I desire to be equally divided among my children." The court in holding that the widow might dispose of the fee said: "We think, too, that we are warranted in saying that where a testator, in his will creates what purports to be a life estate, and devises a remainder to another, the devise of the remainder is of controlling influence in ascertaining his intention."

Many other interesting cases in Indiana and other jurisdictions might be examined to illustrate the length to which the

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7 109 Ind. 267.

8 135 Ind. 647.

courts go in the examination of the language of a will to find an intention on the part of the testator to create a power to dispose of the fee. *McMillan v. Deering*,[9] is a particularly interesting case.

Where a will does not expressly create a power to dispose of the fee but contains language to the effect that the life tenant may dispose of the property for the maintenance of herself and her children or the education of the latter, it is held in some jurisdictions that she may dispose of the fee of such of the property as is necessary for these purposes. Thus in *Kaufman v. Brekenridge*,[10] where a will gave the widow an estate for life, "to be disposed of and used agreeably to her direction and approval, and in such manner as she may determine most conducive to the welfare and comfortable subsistence of herself and our beloved children," the court held the widow had a power to dispose of the fee to this end.

And in a Kentucky case, *Morse v. Cross*,[11] where the will after a gift of a life estate continued, "to hold, add to, or dispose of at her own discretion, during her life or widowhood, for the purpose of keeping together and raising my children that are yet unmarried," it was held that the life tenant might convey the fee to carry out the object of the will.

The Indiana court has not squarely held that such an expression of intention will imply the creation of a power to convey the fee, although there was an opportunity to do so in *Frazier v. Hassey*.[12] In that case the will gave the widow certain property for life to "dispose of the same as she may think best for the interest and comfort of herself and my children." The court conceded the widow had ample power to dispose of the fee but held that it was not properly exercised. In *John v. Bradbury*,[13] the court suggested that a will by a life tenant of all the property to her relations to the exclusion of her husband's children was not "necessary for her comfort and convenience" within the language of the will creating the power.

Where there are no express words giving a power to dispose of a fee, no special context, no power to dispose of the property for a particular purpose, or no gift over of what remains, from

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[9] 139 Ind. 70.
[10] 117 Ill. 305.
[11] 56 Ky. 735.
[12] 43 Ind. 310.
[13] 97 Ind. 263.

which the power to dispose of the fee may be implied, but the will merely states that the life estate is given "with full power to dispose of as the life tenant pleases," there is considerable diversity of opinion as to the true nature of the power. One view, and perhaps the majority, is that since the life tenant already has power to dispose of the life interest the added words giving a power to dispose of the property are meaningless unless they refer to the disposition of the fee. In the leading opinion expressing a contrary view, Justice Field, in *Brant v. Virginia Coal and Iron Company,*[14] argues that the interest of the heirs of the testator of a remainderman expressly given should not be jeopardized by doubtful expressions, hence words which do not expressly confer a power to dispose of the fee should be held to mean a power to dispose of the life interest.

Field's opinion has been severely criticized, particularly by Professor Rood in an article in 15 Mich. Law Review. If the controversy is limited to the very facts of the Brant case it seems that Field must be about right. Practically all of the cases which Rood cites as being contrary to Field's conclusion are cases wherein there is a gift over of what is left, or remains unexpended, or else there is special context in the will which clearly establishes an intent to give a power to dispose of the fee. In one case, at least the Indiana court apparently adopted the notion of Justice Field, but probably more out of a desire to find some excuse for a particular holding rather than from a firm conviction of the rectitude of the theory.

In this case, *Crew v. Dixon,*[15] the will provided: "I give, bequeath and devise to my said wife all of my other property of every kind, to be held and used by her during her natural life; the house and lot where I now live to be entirely under her control as long as she shall live, together with all the furniture in the same; and the notes that I may have, to be collected by her in her individual name as they may fall due; the principal of such notes to be held or invested by her as she may deem proper, with privilege to use so much thereof as she may deem necessary to carry on her business or to furnish her a comfortable support. But before her death I desire her to provide by will or otherwise for a distribution of whatever may remain in her hands, among her and my children in such manner as she, in her judgment, shall

[14] 93 U. S. 326.
[15] 129 Ind. 85.

deem best and most equitable; such disposition not to take effect until after her death."

This will is very little different from a great many others in Indiana which have been held to create a life interest in the widow with a special power to appoint the members of a class by will, and this case would have been so decided, it is believed, had it not been for certain extrinsic facts. Here the testator had children by a first wife, and the life tenant, his second wife, likewise had children by a previous marriage. The widow elected to take under her husband's will. She died leaving a will by which she gave $25 to each of her husband's children and gave all of the remainder to her own. The court had to find some way to prevent these step-children of the donor from taking all of the property. By a long process of reasoning in which it twisted the words of the will in a painful fashion the court extracted the intent that the life tenant take the personal property for life with an absolute power to dispose of it, but that she had a life estate in the realty, with power to dispose of her life interest only. To soothe its conscience after avenging the act of this unworthy step-mother, the court cited Justice Field's opinion in *Brant v. Virginia Coal and Iron Company.* Apparently in no other case in Indiana has this case been followed, although there is language in *Rusk v. Zuck,*[16] intimating a tendency in that direction.

In *Foudray v. Foudray,*[17] the rule of *Brant v. Virginia Coal and Iron Company* was urged, but the court, not being bothered with a stepmother complex, and having in addition a gift over of what was left or remained to aid it, held that the life tenant took a power to dispose of the fee.

If the power of a life tenant to dispose of a fee is general, that is, if the donee of the power can dispose of the estate by deed or will to any one, then the devises or grantee gets a good fee simple title. But the power may not be exercisable by both deed and will, may be exercisable for a particular purpose only, or it may be a special power to appoint to the members of a class. In all cases, therefore, the instrument should be closely scrutinized by the would be purchaser from the life tenant.

Here again reference to a few Indiana decisions will illustrate the point. In *Dunning v. Vandusen,*[18] where the will gave the

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[16] 147 Ind. 388.

[17] 44 Ind. App. 444.

[18] 47 Ind. 423.

property to the wife for life "with power to dispose of it at her death at her pleasure" the court was of the opinion that the power was exercisable by will only, although the decision did not turn on that point.

In *John v. Bradbury,*[19] the will gave to the wife of the testator all of his property for life to "use, sell and dispose of as she might see fit for her own comfort and convenience", with power, "to sell . . . and convey the same by deed in fee simple if her necessities or comfort require it," with a gift of the residue to the testator's children. The life tenant in this case was a childless second wife. She elected to take under the will and left a will of her own by which she gave the property to her relatives and gave the testator's children nothing. It was held that the power could only be exercised by deed, and then only for the comfort and convenience of the life tenant, hence the relatives of the life tenant took nothing by her will.

In *Beatson v. Bowers,*[20] a deed was made to Mary Bowers, wife of David Bowers, "during her natural life, unless she shall deed the same to one of the heirs of David Bowers, and, if not so deeded, at her death the same to revert to David Bowers, if living, and if not, to his heirs." After the death of David Bowers the life tenant conveyed the land by deed to one of the heirs of David Bowers for a consideration of $1,600. The court held that this deed did not convey a title on the ground that the life tenant had a bare power of appointment to one of a class and since it was exercised for a consideration to the appointor the appointment was invalid.

It was a rule at common law that an instrument is not to be regarded as the execution of a power unless the intent to execute appear either by a reference to the property or the power by the reason of the fact that it would be ineffectual except as an execution of the power. The rule in perhaps a majority of the states in this country, including Indiana, is that the intent to execute the power need not appear in one of the three ways prescribed by the common law, but may be gathered, as in any other case, from the instrument as a whole, taking into consideration all of the circumstances of its execution.

In *Frazier v. Hussey,*[21] the court held that a power to dispose of a fee was not properly exercised by a life tenant by a quit

[19] 97 Ind. 263.

[20] 147 Ind. 601.

[21] 43 Ind. 310.

claim deed. The court reasoned that since the deed purported to convey nothing more than the interest which the life tenant had, and made no reference to the power to convey a fee, it conveyed no more than the life tenant's interest.

In *Dunning v. Vandusen*,[22] the life tenant conveyed by statutory deed. The deed made no allusion to the power or other expression of intent to exercise the power, and the court again held that the deed operated only upon the life interest of the grantor.

In *Clark v. Middlesworth*,[23] the life tenant conveyed the land by warranty deed. In the first opinion the court followed *Dunning v. Vandusen* but on rehearing said: "It may not be improper to say that a subsequent examination of the authorities has convinced us that the deed made to Arthur was a valid execution of the power. It appears that Arthur paid Mrs. Clark, for the lot, the sum of $1,450, its fair cash value. This somewhat distinguishes the case from *Dunning v. Vandusen*."

Perhaps the best considered case in Indiana on this phase of the subject is *South v. South*.[24] There the court, in holding a warranty deed by a life tenant with power to dispose of a fee, to be a valid execution of the power said: "A general warranty deed executed for a consideration equal to the value of the fee and professing to convey the fee is a valid execution of the power. This is plainly so on principle, since to hold otherwise would be to declare that the grantor did not intend to convey the estate the deed engages him to do, and that the grantee meant to receive a less estate than that which the deed purports to convey. It would also involve the absurdity of assuming that the grantor intended to charge himself with a liability upon his covenants of warranty in a case where there rested upon him not the slightest obligation to impose upon himself such responsibility. The authorities, with remarkable unanimity, agree in holding that the question whether the conveyance is in execution of a power or not depends solely upon intent. If from the tenor and effect of the deed or will by which title is conveyed, the intent to execute the power is inferable, there is a valid execution of the power, or if, without referring to the power, the will or deed is not operative as the parties evidently intended it should operate,

[22] 47 Ind. 423.
[23] 82 Ind. 240.
[24] 91 Ind. 221.

then it will be held a valid and effective execution of the power. It is not necessary that the power should be referred to in the deed or will, where the intent is otherwise manifested."

In several later cases the Indiana court has expressed itself to the same effect.

If all persons desiring to create life tendencies with powers in the life tenant to dispose of the fee would first consult careful lawyers who would see to it that the life estate is expressly created, that it is expressly stated that the life tenant may dispose of the fee, and in what manner the power may be exercised, and if all life tenants in attempting to exercise such powers would expressly declare their intention to do so, the litigation on this subject would be greatly reduced, and this very convenient method of providing for one's wife and family would be more freely used. But the majority of laymen and lawyers do not so act and perhaps will not so act in the future, and the coming generation of lawyers will continue to thrive on the mistakes of the past, and provide plenty of "pickings" for those that follow them.