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POWERS - RULE AGAINST PERPETUITIES - DISPOSITION OF PROPERTY WHERE APPOINTMENT IS INVALID - ENFORCEMENT OF CONTRACT TO APPOINT

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POWERS — RULE AGAINST PERPETUITIES — DISPOSITION OF PROPERTY WHERE APPOINTMENT IS INVALID — ENFORCEMENT OF CONTRACT TO APPOINT — The donor of the power bequeathed a fund to trustees to pay the income to the donee for the donee's life, and then to convey to such persons as the donee appointed by will. The donee appointed by will to trustees to pay the income to the donee's daughter for life; and then to convey the remainder to the daughter's surviving children and the surviving lawful descendants of any deceased child of the daughter, upon the death of the last surviving child or twenty-one years after the death of the last surviving child living at the donee's death, whichever event occurred first; and in the event the daughter left no lawful descendants, to convey to the donor's then surviving lawful descendants. *Held*, the appointment to the surviving children of the daughter is bad under the rule against perpetuities, and the whole disposition being inseparable, all parts of it fail. Pursuant to the donee's probable intention, the fund passes to the takers in default named in the donor's will rather than to the next of kin of the donee. *Northern Trust Co. v. Porter*, (Ill. 1938) 13 N. E. (2d) 487.

The rule against perpetuities applies to equitable contingent remainders in personalty.[1] Where such remainders are created by the exercise of a power of appointment, the point of time from which the period of the rule is measured depends upon the kind of power exercised. If the power is a special power, one which the donee cannot exercise by appointment to himself or to his estate, then the period of the rule is uniformly measured from the time the instrument creating the power takes effect.[2] If the donee has a general power to appoint by deed or will, then the period of the rule is measured from the time at which the power is exercised.[3] But where the donee has a general power to appoint

[1] 2 SIMES, FUTURE INTERESTS, § 505 (1936). In general on the application of the rule to powers, see 2 ibid., §§ 534-539, and GRAY, RULE AGAINST PERPETUITIES, 3rd ed., §§ 473-561 (1915).

[2] Wollaston v. King, L. R. 8 Eq. 165 (1868); Whitby v. Von Luedecke, [1906] 1 Ch. 783; Bartlett v. Sears, 81 Conn. 34, 70 A. 33 (1908); Greenough v. Osgood, 235 Mass. 235, 126 N. E. 461 (1920). Many more cases where this rule has been stated or applied are cited in the annotation in 1 A. L. R. 374 (1919). It is suggested in Bartlett v. Sears, supra, that a reason for this rule is that the appointee really takes from the donor, who is regarded as creating the estate. The same argument ought to apply to the case of a general power to appoint by deed or will; but see note 3, infra. The real reason for this rule in respect to special powers is that its application avoids tying up the property for a period longer than that allowed by the rule against perpetuities.

[3] Mifflin's Appeal, 121 Pa. St. 205, 15 A. 525 (1888). Cases are collected in the annotation in 1 A. L. R. 374 at 376 (1919). For all purposes of alienability, the donee

by will only, the period has been measured from both points of time.[4] In the instant case, the court follows the view of the majority of the American courts and measures the period from the time of the creation of the power. This seems to be the sounder position, for it is more in accord with the policy promoting free alienability.[5] Once it is determined that the appointment fails to take effect, the question of the disposition of the fund remains. To whom it passes is said to depend upon the "intent" of the donee.[6] That is, the donee may in effect elect first to make the property his own for all purposes of devolution (as by appointing it to a trustee), and second, by further appointing the property to the particular objects. If the donee chooses to do so, then, upon the failure of the particular objects, his general "intention" may still be carried out, and the fund will then be distributed as property of the donee.[7] More realistic perhaps is the view that the failure of the appointment to take effect is simply a circumstance the donee never contemplated,[8] whereupon the court determines from the dispositive language in the instrument of execution what the donee would

of such a power is in the position of an absolute owner, and commercial dispositions of the property subject to such a power are not hindered.

[4] Measured from the time the power is exercised: Rous v. Jackson, 29 Ch. Div. 521 (1885); In re Flower, 55 L. J. (N. S.) (Ch.) 200 (1885); Stuart v. Babington, 27 L. R. (Ire.) 551 (1891). Measured from the time the instrument creating the power takes effect: Lawrence's Estate, 136 Pa. 354, 20 A. 521 (1890); Gambrill v. Gambrill, 122 Md. 563, 89 A. 1094 (1914); Minot v. Paine, 230 Mass. 514, 120 N. E. 167 (1918); Equitable Trust Co. v. Snader, 17 Del. Ch. 203, 151 A. 712 (1930). Seemingly the only American case which follows the English view is Miller v. Douglass, 192 Wis. 486, 213 N. W. 320 (1927). The earlier English cases measured the period from the time of the creation of the power. Wollaston v. King, L. R. 8 Eq. 165 (1868); In re Powell's Trusts, 39 L. J. (N. S.) (Ch.) 188 (1869). See the annotation in 1 A. L. R. 374 at 376 (1919) where the cases are collected.

This question has been argued in a series of law review articles. Kales, "General Powers and the Rule Against Perpetuities," 26 HARV. L. REV. 64 (1912), made the point that at the time the donee of a general power to appoint by will exercised the power, he had as free a power of alienation as though he had owned a fee throughout his lifetime. Gray, "General Testamentary Powers and the Rule Against Perpetuities," 26 HARV. L. REV. 720 (1913), reiterated the position he had taken in his book, RULE AGAINST PERPETUITIES, 3d ed., §§ 526-526c (1915), that the donee of a general testamentary power ought not be treated in this respect as an owner in fee, for by giving only a testamentary power the donor never intended the donee to have, in substance, a fee. Thorndike, "General Powers and Perpetuities," 27 HARV. L. REV. 705 (1914), sided with Kales.

[5] As pointed out in 2 SIMES, FUTURE INTERESTS, § 538 (1936), the general testamentary power hinders commercial dispositions of property from the time of its creation; for whatever the theoretically absolute power of alienation of the donee may be at the time of its exercise, practically, commercial dispositions of property are not made by will. Therefore, the reason of the rule against perpetuities ought to call for measurement of the period from the time of creation.

[6] 2 JARMAN, WILLS, 7th ed., 792 (1930), citing Chatterton, V-C., in Re de Lusi's Trusts, 3 L. R. (Ire.) 232 at 237 (1879).

[7] Re de Lusi's Trusts, 3 L. R. (Ire.) 232 (1879); Re Boyd, [1897] 2 Ch. 232.

[8] Re Van Hagan, L. R. 16 Ch. Div. 18 at 34 (1880).

have provided had he thought of the possibility that has defeated his actual intention. In other words, the court determines his probable intent, and disposes of the property in accordance with that. The circumstances that are significant in determining this probable intent are varied. If, for instance, the donee in the instrument of execution lumps his own property with that over which he has a power of appointment, and then treats the whole indiscriminately, it is ordinarily held he intends to treat the appointed property as his own for all purposes of devolution.[9] If the donee refers to the property as his own, the same result may follow.[10] Likewise, if the donee directs that the appointed property be charged with the payment of his debts.[11] And if the appointment is made to the donee's executors as such, that is significant in determining his probable intent.[12] Where the donee appoints to trustees, as in the instant case, and the trusts fail to take effect, it is said there is a strong indication of an intent to treat the property as his own.[13] Such a theory makes the presence of an express gift in default immaterial, and it is so held.[14] In the instant case, the power of appointment was exercised in a separate clause in the donee's will and the property appointed did not appear to have been treated as a part of the donee's property. This circumstance was the one relied on by the court in concluding that the donee's probable intent was to allow the property to pass by default of appointment. On the facts of this case, the English courts likely would have empha-

[9] Re Marten, [1902] 1 Ch. 314; Re Vander Byl, [1931] 1 Ch. 216; Hammond v. Hammond, 234 Mass. 554, 125 N. E. 686 (1920).

[10] Re Pinede's Settlement, L. R. 12 Ch. Div. 667 (1879); Coxen v. Rowland, [1894] 1 Ch. 406; Bradford v. Andrew, 308 Ill. 458, 139 N. E. 922 (1923).

[11] Re Ickeringill's Estate, L. R. 17 Ch. Div. 151 (1881).

[12] Bickenden v. Williams, L. R. 7 Eq. 310 (1869).

[13] Re de Lusi's Trusts, 3 L. R. (Ire.) 232 (1879); Talbot v. Riggs, 287 Mass. 144, 191 N. E. 360 (1934), where it was said the appointment to trustees gave them legal title, held in trust for the donee's next of kin on a resulting trust theory. In such cases, however, if the appointment of a bare legal title to the trustee is good, it might logically be argued the resulting trust ought to be in favor of the donor's next of kin, for title is said to pass from the donor to the appointee, not from the donee. In general, on the devolution of title to the property appointed, see 1 SIMES, FUTURE INTERESTS, §§ 253-255 (1936). There is an excellent annotation on the subject of notes 6-13, supra, in 93 A. L. R. 967 (1934), where the cases are collected and discussed. It may be concluded that any general language in a residuary clause sufficient to execute a power of appointment ought to be sufficient to bring about a devolution of the property to the donee's next of kin. The same kind of circumstances are significant in both problems. See 1 SIMES, FUTURE INTERESTS, § 270 (1936).

[14] Re Pinede's Settlement, L. R. 12 Ch. Div. 667 (1879); Re Ickeringill's Estate, L. R. 17 Ch. Div. 151 (1881); Re Vander Byl, [1931] 1 Ch. 216. But see Reed v. McIlvain, 113 Md. 140, 77 A. 329 (1910); Burruss v. Nelson's Exr., 132 Va. 17, 110 S. E. 254 (1922), where the property went to the takers in default without discussion of the question raised in the English cases. This English rule does not seem unjust to the takers in default. They have no special equity, for the donor has allowed the donee to dispose as he wishes, and anything the takers in default get is in the nature of a windfall. The donor is primarily interested in seeing that the property passes as the donee intends, not in benefiting the takers in default.

sized the appointment to trustees, thus arriving at an opposite conclusion. But the result actually reached is just as much an application of the probable intention rule. That rule is more or less artificial, and the outcome of its application is unpredictable. An arbitrary rule favoring one group or the other would avoid this difficulty. There seems to be no special policy favoring either group, however. In the instant case, the donee contracted with her son to exercise the power in his favor, and the son made certain conveyances in consideration thereof. The donee breached the agreement, and the son sought damages from her estate. In denying his claim, the court departed from the English precedent,[15] and followed the more logical and probably sounder position set out in the Restatement.[16] Enforcement of a damage remedy is as much an enforcement of the contract as is specific performance, which is never decreed, for to do so violates the donor's intent.[17]

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[15] In re Parkin, [1892] 3 Ch. 510. The court allowed damages equal to the value of the property appointed and made that property liable for the debt.

[16] The court cited with approval PROPERTY RESTATEMENT, (Tentative Draft No. 7), § 463 (1936).

[17] In an analogous situation, the American courts have likewise refused to follow the English lead. Thus, while specific performance of an option will not be decreed in either country if the rule against perpetuities is violated, the English court allowed damages for the breach of the contract in Worthing Corp. v. Heather, [1906] 2 Ch. 532, 75 L. J. (N. S.) (Ch.) 761, on the theory that the rule against perpetuities had nothing to do with contracts. But in Eastman Marble Co. v. Vermont Marble Co., 236 Mass. 138, 128 N. E. 177 (1920), the court denied damages, feeling that the fear of an action for breach of contract would effectually deter the obligor from alienating and thus take the land out of commerce for a period longer than the rule against perpetuities permits. In general on the application of the rule to option contracts, see 2 SIMES, FUTURE INTERESTS, § 512 (1936).