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POWERS - EXECUTION BY A RESIDUARY CLAUSE

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POWERS — EXECUTION BY A RESIDUARY CLAUSE — A testator devised all his property in trust; he instructed the trustees to purchase a residence for his wife and gave her the general power to appoint by will, both with respect to this proposed residence and with respect to a sum of money from the testator's estate, the aggregate amount being $20,000. The trustee purchased a 25-foot lot and the wife purchased 8 1/3 feet of an adjoining lot. At the request of the wife, the trustees erected a two family residence, the main part of the building being on the 25-foot lot, but the eaves and one bay window extending over the wife's lot. The evidence in the case indicated that these two parcels were treated as one piece of property. The wife in her will devised "all the rest, residue and remainder of my estate real, personal and mixed, which I now have, may die possessed of, or may be entitled to." *Held*, the power of

appointment was executed by the residuary clause of the donee's will. *Rettig v. Zander*, 364 Ill. 112, 4 N. E. (2d) 30 (1936).

In the absence of a statute, the general residuary clause of a donee's will did not raise a presumption of the exercise of the power of appointment.[1] This rule is explained on the theory that a power is not property; but this assumption is opposed to the realities, for a layman is likely to assume that a power is property and to suppose that the language exercised the power, while if the instrument were drawn by a competent lawyer he would remove all doubt by a categorical reference to the power.[2] In ascertaining whether or not the power has been exercised, the determining element is the intention of the donee.[3] Some courts have taken the position that the intent to exercise the power must clearly appear from the tenor of the entire will.[4] This intent is sufficiently manifested in the will of the donee where there has been (1) a reference to the power; or (2) a reference to the property; (3) where the provision in the will would be ineffective except as an execution of the power.[5] If the court in the principal case had followed this strict view, it might have concluded that the mere fact that the donee possessed a separate property interest of her own coupled with a power of appointment would not constitute an exercise of the power, but could be explained as a disposition of her own property. The principal case, however, has invoked a more liberal view [6] in ascertaining the donee's intention by indicating that there are other situations in which the intent is manifested and that the above categories are only instances of the strong and unequivocal proof required. Under this view the donee's will can be read in the light of the surrounding circumstances at the time of its execution,[7] although the declarations of the testator are inadmissible as their admission would defeat the policy of the wills act.[8] Thus, in the principal case, the evidence of the extent of the estate and circumstances of the donee at the time

[1] Hollister v. Shaw, 46 Conn. 248 (1878); Farnum v. Pennsylvania Co. for Ins. on Lives & Granting Annuities, 87 N. J. Eq. 108, 99 A. 145 (1916); Lister v. Lister, 47 R. I. 366, 133 A. 437 (1926); Bilderback v. Boyce, 14 S. C. 528 (1880); Arnold v. Southern Pine Lumber Co., 58 Tex. Civ. App. 186, 123 S. W. 1162 (1909); Butler v. Prudden, 182 Ga. 189, 185 S. E. 102 (1936); 16 Ann. Cas. 203 (1910).

[2] 1 SIMES, LAW OF FUTURE INTERESTS 481 (1936).

[3] Ann. Cas. 1914D 586 (1915); 16 Ann. Cas. 201 (1910); 64 L. R. A. 849 (1904); 21 R. C. L. 795 (1918); 91 A. L. R. 426 (1933).

[4] 32 A. L. R. 1395 (1924); 91 A. L. R. 433 at 453 (1933).

[5] Blagge v. Miles, Fed. Cas. No. 1479, 1 Story 426 (1841).

[6] Funk v. Eggleston, 92 Ill. 515, 34 Am. Rep. 136 (1879); Moore v. Avery, 146 Ark. 193, 225 S. W. 599 (1920); Hartford-Connecticut Trust Co. v. Thayer, 105 Conn. 57, 134 A. 155 (1926); Wilmington Trust Co. v. Grier, 19 Del. Ch. 34, 161 A. 921 (1932); 64 L. R. A. 849 at 880 (1904).

[7] Rice v. Park, 223 Ala. 317, 135 So. 472 (1931); Hartford-Connecticut Trust Co. v. Thayer, 105 Conn. 57, 134 A. 155 (1926); Funk v. Eggleston, 92 Ill. 515, 34 Am. Rep. 136 (1879); Moore v. Avery, 146 Ark. 193, 225 S. W. 599 (1920); Chase Nat. Bank v. Chicago Title & Trust Co., 155 Misc. 61, 279 N. Y. S. 327 (1935).

[8] Farnum v. Pennsylvania Co. for Ins. on Lives & Granting Annuities, 87 N. J. Eq. 108, 99 A. 145 (1916); White v. Hicks, 33 N. Y. 383 (1865); Harvard Trust Co. v. Frost, 258 Mass. 319, 154 N. E. 863 (1927); 94 A. L. R. 26 at 173 (1935).

of the execution of the will clearly indicated an intent to execute the power and the result appears to effectuate the donee's probable intent. Cases that seem in conflict can be reconciled by a failure to find such special circumstances.[9] In other jurisdictions either by statute [10] or by judicial decision,[11] the general residuary clause per se raises a presumption of the exercise of the power of appointment.

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[9] Emery v. Emery, 325 Ill. 212, 156 N. E. 364 (1927); Harvard College v. Balch, 171 Ill. 275, 49 N. E. 543 (1898); Methodist Episcopal Home v. Tuthill, 113 N. J. Eq. 460, 167 A. 9 (1933).

[10] 1 SIMES, LAW OF FUTURE INTERESTS 483, note 72 (1936), gives a list of states adopting such statutes; 91 A. L. R. 433 at 448 (1933).

[11] Armoy v. Meredith, 7 Allen (89 Mass.) 397 (1863); Bangs v. Smith, 98 Mass. 270 (1867); Cumston v. Bartlett, 149 Mass. 243, 21 N. E. 373 (1889); Hassam v. Hazen, 156 Mass. 93, 30 N. E. 469 (1892); Tudor v. Vail, 195 Mass. 18, 80 N. E. 590 (1907); Howland v. Parker, 200 Mass. 204, 86 N. E. 287, 16 Ann. Cas. 201 (1908); Emery v. Haven, 67 N. H. 503, 35 A. 940 (1893); Johnston v. Knight, 117 N. C. 122, 23 S. E. 92 (1895); Slayton v. Fitch Home Inc., (Mass. 1936) 200 N. E. 357, 104 A. L. R. 669; 49 HARV. L. REV. 1382 (1936); 34 MICH. L. REV. 888 (1936); 24 KY. L. J. 206 (1936).