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POWERS—EXERCISE OF POWER BY RESIDUARY CLAUSE IN WILL—ADMISSIBILITY OF EVIDENCE TO SHOW DONEE'S INTENT—Testator was the donee of general powers of appointment conferred upon him by his mother's deed and will. By the ninth clause of this will he gave to two named persons "all the rest and residue of my personal property . . . to be divided equitably among the

members of said two families as they may in their uncontrolled discretion decide." *Held*, this did not exercise the powers of appointment. Evidence was admitted to show the testator's knowledge of the nature and scope of his property and of the fact that his estate was being diminished by the expenditure of principal; to show further the varying degrees of intimacy involved in his relation to the principal beneficiaries of the will, on the one hand, and the takers in default of appointment, on the other; to show also that shortly before making his will he took pains through correspondence with the plaintiff to know how much property there was, to verify the existence of the power of appointment; and to show that he had in mind that he possessed such a power when he executed his will. All this evidence was admitted to enable the court to ascertain as nearly as possible with what purpose the words of the will were employed. *Boston Safe Deposit & Trust Co. v. Prindle*, (Mass. 1935) 195 N. E. 793.

That a residuary clause of a will exercises a general power of appointment without express reference has been accepted, by force of statute, in several jurisdictions,[1] and in a few without such a statute.[2] Such a view, however, does not do away with the need for an intent on the part of the donee to exercise the power but rather assumes such an intent unless a contrary intention is shown.[3] In arriving at the intent of the donee, the usual rules of construction are applied [4] and all the circumstances existing at the time the power is exercised (including the extent of his knowledge of them) may be looked into.[5] Declarations of the donee's intent are ordinarily inadmissible,[6] though even these have been ad-

[1] 7 Will. 4 & 1 Vict., c. 26, § 27 (1837); D. C. Code (1929), tit. 29, § 43; Ky. Stat. (Carroll 1930), § 4845; 2 Md. Code (Bagby 1924), art. 93, § 339; Mont. Rev. Code (Choate 1921), § 7029; N. Y. Real Property Law (Consol. Laws 1917), § 176; N. Y. Personal Property Law (Consol. Laws 1917), § 18; N. C. Code (1931) § 4167; 1 N. D. Comp. Laws (1913), § 5698; Pa. Stat. (Purdon 1930), § 2-5; R. I. Gen. Laws (1923), c. 298, § 4299; S. C. Code (1932), § 8928; Utah Rev. Stat. (1933), 101-2-14; Va. Code (1930), § 5241; W. Va. Code (1931), 41-3-6. Applied to realty alone: Idaho Code (1932), § 14-325; 3 Mich. Comp. Laws (1929), § 13047; Minn. Stat. (Mason 1927), § 8158; Okla. Stat. (1931), § 1578; Vt. Pub. Laws (1933), § 2750; Wis. Stat. (1931), § 232.51.

[2] Amory v. Meredith, 7 Allen (89 Mass.) 397 (1863); Emery v. Haven, 67 N. H. 503, 35 A. 940 (1893). Johnston v. Knight, 117 N. C. 122, 23 S. E. 92 (1895).

[3] Ames v. Ames, 244 Mass. 381, 138 N. E. 845 (1923); Hollister v. Hollister, 85 Ore. 316, 166 P. 940 (1917). *Contra*: Wilmington Trust Co. v. Grier, 19 Del. Ch. 34, 161 A. 921 (1932).

[4] Equitable Trust Co. v. Paschall, 13 Del. Ch. 87, 115 A. 356 (1921). See, on deeds, 18 C. J. 252, § 197 ff. (1919), and on wills, 69 C. J. 50, § 1117 ff. (1934). See also, 94 A. L. R. 26 (1935), for an extensive note on the admissibility of parol evidence in construing wills. Moore v. Avery, 146 Ark. 193, 225 S. W. 599 (1920).

[5] Minot v. Paine, 230 Mass. 514, 120 N. E. 167, 1 A. L. R. 365 (1918); Morse v. Stearns, 131 Mass. 389 (1881); Moore v. Avery, 146 Ark. 193, 225 S. W. 599 (1920); Hartford-Connecticut Trust Co. v. Thayer, 105 Conn. 57, 134 A. 155 (1926); Chase Nat. Bank of City of New York v. Chicago Title & Trust Co., 155 Misc. 61, 279 N. Y. S. 327 (1935), noted in 45 YALE L. J. 516 (1936), affd. (App. Div. 1936) 284 N. Y. S. 472.

[6] Saucier v. Saucier, 256 Mass. 107, 152 N. E. 95 (1926); Calder v. Bryant, 282 Mass. 231, 184 N. E. 440 (1933).

mitted when offered, not as direct proof of his intent, but to show facts relevant to his knowledge and state of feelings toward or relation to the claimants.[7] In some jurisdictions [8] the amount and circumstances of the donee's property are admitted to determine the intent, though the English cases seem to deny this.[9] This stand is consistent with the general English view that the contrary intent must be clearly expressed or implied in the will.[10] It is submitted that in the instant case the court remained well within established bounds in admitting the evidence, though Massachusetts is rather liberal in this respect.

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[7] Morse v. Stearns, 131 Mass. 389 (1881).

[8] Funk v. Eggleston, 92 Ill. 515, 34 Am. Rep. 136 (1879); Hutton v. Benkard, 92 N. Y. 295 (1883). Hartford-Connecticut Trust Co. v. Thayer, 105 Conn. 57, 134 A. 155 (1926); Chase Nat. Bank v. Chicago Title & Trust Co., 155 Misc. 61, 279 N. Y. S. 327 (1935), affd. (App. Div. 1936) 284 N. Y. S. 472.

[9] In re Huddleston, [1894] 3 Ch. 595; Andrews v. Emmot, 2 Bro. Ch. 297, 29 Eng. Rep. 162 (1788); Standen v. Standen, 2 Ves. J. 589, 30 Eng. Rep. 791 (1795).

[10] Walker v. Bank, 1 Jur. (N. S.) 606 (1855); Pettinger v. Ambler, L. R. 1 Eq. 510 (1866); Thompson v. Simpson, 50 L. J. (Ch.) 461 (1881).