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FUTURE INTERESTS-CREATION OF A POWER BY EXERCISE OF GENERAL TESTAMENTARY POWER HELD VALID

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FUTURE INTERESTS—CREATION OF A POWER BY EXERCISE OF GENERAL TESTAMENTARY POWER HELD VALID—*H* in his will created a trust which provided for a life estate for his wife *W*. The trustee was directed to distribute the corpus of this trust after *W*'s death "to such person or persons as she [*W*] may limit, nominate, and appoint by her last will and testament." At her death, *W*'s will provided that part of the property over which she had a power of appointment was to continue in trust for *S* for life, with the power in *S* to dispose of the corpus absolutely by her last will. *S*, by her will, attempted to appoint the corpus of the trust. *P*, trustee, petitioned for instruction as to the proper distribution of the corpus of the trust. All interested parties under the wills of *W* and *S* were joined as defendants. On appeal from a decree upholding the appointment by *S*'s will, *held*, affirmed. The donee of a general testamentary power of appointment may exercise the power by appointing a partial estate and creating another power of appointment. *Lamkin v. Safe Deposit and Trust Co. of Baltimore*, (Md. 1949) 64 A. (2d) 704.

In spite of recurring statements that a power of appointment cannot be delegated,[1] the weight of authority in this country sustains the result reached in the principal case.[2] There seem to be three valid theories by which such result may be justified. According to one leading author, the creation of the second power is explainable, "not as a delegation of the first power, but as an appointment of the property to shift on an event, namely, the exercise of the second."[3]

[1] Thayer v. Rivers, 179 Mass. 280, 60 N.E. 796 (1901); Hood v. Haden, 82 Va. 588 (1886); 1 SIMES, LAW OF FUTURE INTERESTS, §264 (1936).

[2] Garfield v. State Street Trust Co., 320 Mass. 646, 70 N.E. (2d) 705 (1947); Thayer v. Rivers, 179 Mass. 280, 60 N.E. 796, (1901); Crooke v. County of Kings, 97 N.Y. 421 at 456-8 (1884); Matter of Wildenburg's Estate, 174 Misc. 503, 21 N.Y.S. (2d) 331 (1940); Matter of Hart, 262 App. 190, 28 N.Y.S. (2d) 781 (1941); Central Hanover Bank and Trust Co. v. Brown, 73 N.Y.S. (2d) 282 (1947); Massey v. Guaranty Trust Co., 142 Neb. 237, 5 N.W. (2d) 279 (1942); Mays v. Beech, 114 Tenn. 544, 86 S.W. 713 (1904).

[3] 1 SIMES, LAW OF FUTURE INTERESTS, §264 (1936).

Again some courts allow the creation of a second power because the donee of a general power by deed or by will can transfer an entire fee. This being so, it would seem that the donee ought to be permitted to appoint a lesser estate with a power of appointment in the new donee. The original power is exhausted by the appointment and the power that the appointee receives is a distinct and original power, not a delegation of the old.[4] The final theory is based on the presumed intent of the donor of the power. Thus it is said that if the donor gives the donee a general power of appointment, it is to be inferred that the donor intended that the donee could appoint the property as freely as he could dispose of his own property. Such freedom includes the creation of powers in other persons.[5] There is, however, at least one state, Kentucky, in which the courts have held that the donee of a general testamentary power of appointment cannot create a second power in the appointee.[6] Two main reasons are given for such a decision. First, it is said that if the donee could create a second power, the donee of that power could in turn create a third power and so on indefinitely. This reasoning overlooks the fact that the period of the rule against perpetuities for a general testamentary power is measured from the time of the creation of the original power.[7] If successive powers are created, the rule against perpetuities would eventually be violated and the creation of successive powers would in no event tie up property for longer than the period allowed by law. Second, the donee of a general testamentary power cannot appoint the property to himself.[8] Because of this the Kentucky court apparently felt justified in holding that an attempt to create a second power was a delegation of the original power and a violation of the trust and confidence placed in the donee by the donor. Perhaps the fact that the donee cannot appoint to himself does eliminate the third of the above grounds for holding the creation of the second power a valid exercise of the first but there are at least two other grounds on which the creation of the second power may be sustained. It should also be noted that the Maryland courts, where the principal case was decided, go farther than the Kentucky courts and hold that the donee of a general testamentary power cannot even appoint to his own estate.[9] Yet the Maryland court would not follow the Kentucky decision even though a strong argument was made that, because of the similarity

[4] Mays v. Beech, supra, note 2.

[5] 3 PROPERTY RESTATEMENT, §357, comments (a) and (c) (1940).

[6] DeCharette v. DeCharette, 264 Ky. 525, 94 S.W. (2d) 1018 (1936). The case of Boston Safe Deposit and Trust Co. v. Prindle, 290 Mass. 577, 195 N.E. 793 (1935) is sometimes cited as authority for the position that a donee of a general power cannot create a second power. However the Mass. Supreme Court in Garfield v. State Street Trust Co., supra, note 2, distinguishes the Prindle case and holds that it is not authority for such a position. The cases which hold that a donee of a special power cannot create a second power are not authority for the position of the Kentucky court.

[7] Brown v. Columbia Finance and Trust Co., 123 Ky. 775, 97 S.W. 421 (1906).

[8] DeCharette v. DeCharette, supra, note 6.

[9] Connor v. O'Hara, (Md. 1947) 53 A. (2d) 33. The same rule is applied in Rhode Island. Hooker v. Drayton, 69 R.I. 290, 33 A. (2d) 206 (1943).

between the decisions in the two states, the Maryland courts should follow the Kentucky rule. The decision in the principal case is not grounded on the donee's ability to appoint to himself or his estate but is placed on the ability of the donee to appoint a lesser estate. Such reasoning might well be used in any state which holds that the donee of a general testamentary power cannot appoint to his own estate if the courts of that state decide to follow the weight of authority.

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