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FUTURE INTERESTS - POWERS-FRAUD ON A SPECIAL POWER

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FUTURE INTERESTS—POWERS—FRAUD ON A SPECIAL POWER—*H* was co-trustee under a trust agreement executed by his father which provided for payment of a specified monthly sum to *H* for life and after his death to his wife *W*. The trust was to terminate upon the death of the survivor of *H* and *W*, and thereupon the other trustee was to deliver 20% of the corpus to each of three named persons, *A*, *B*, and *C*. The trust instrument further provided that *H* was to have absolute power, with approval of the co-trustee, to prescribe that the distribution of this 60% of the corpus should be made in different proportions than those provided. *W* predeceased *H*. *H* remarried and, desiring to secure a benefit for his second wife from the trust, proposed that each of the three beneficiaries, *A*, *B*, and *C*, agree to pay a sum equal to 7½% of the total trust fund to *R*, the second wife, on receipt of their 20% shares. *A* and *B* agreed to this proposal but *C* refused to assent. *H* thereupon purported to exercise his power and changed the percentages to read, 28% to *A*, 28% to *B*, and 4% to *C*. This change was approved by the co-trustee and shortly thereafter the trust was terminated by the death of *H*. *C* sought a declaratory judgment as to the effect of the attempted exercise of the power. *Held*, the attempted exercise was void as a fraud on the power, since it was made for the purpose of benefiting a non-object. *Horne v. Title Insurance and Trust Co.*, (D.C. Cal. 1948) 79 F. Supp. 91.

It is well settled that even though a donee is given absolute discretion in exercising a special power, his discretion is not in fact complete in the sense that he may appoint for any motive whatever.¹ Regardless of the wording of the instrument bestowing the power, the donee must act for the purposes² and with the

¹ 41 AM. JUR., Powers, § 65 (1942); BISPHAM'S PRINCIPLES OF EQUITY, § 233 (1931); LEAKE, LAW OF PROPERTY IN LAND 312 (1909); *Sikes v. Sikes*, 163 Ga. 510, 136 S.E. 523 (1927); *Chenoweth v. Bullitt*, 224 Ky. 698, 6 S.W. (2d) 1061 (1928).

² LEAKE, LAW OF PROPERTY IN LAND 311 (1909); Eblen, "Fraud on Special Powers of Appointment," 25 KY. L.J. 3 (1936); *Chenault's Guardian v. Metropolitan Life Ins. Co.*, 245 Ky. 482, 53 S.W. (2d) 720 (1932); *DeCharette v. DeCharette*, 264 Ky. 525, 94 S.W. (2d) 1018 (1936); *Sikes v. Sikes*, supra, note 1; *Chenoweth v. Bullitt*, supra, note 1.

state of mind³ intended by the donor. In general terms, the donee must act in good faith.⁴ Thus it has been frequently held that the exercise of a special power for the purpose of indirectly benefiting a non-object, who may be either the donee or a stranger, is void as a fraud on the power.⁵ In the cases laying down this rule, however, the non-object whom the donee was attempting to benefit would not have taken anything had the power not been exercised.⁶ The principal case presents an interesting difference at this point. Prior to the exercise of the power both A and B had agreed to pay to R a sum equal to 7½% of the corpus of the trust upon receipt of their shares. From the facts set forth it appears that the motivation of these promises was a feeling on their part that the trustor would have intended to provide for R had he foreseen the donee's remarriage. Their promises were not conditioned upon an exercise of the power. Thus, R, the non-object, would have benefited even though the power had not been exercised and the fund had gone by default. It does not appear that the appointment was preceded by, or conditioned upon, an agreement to increase the amount to be paid to R.⁷ Hence, it seems that the power was exercised, not for the purpose of benefiting a non-object, but as a reprisal against an object who refused to participate in the donee's scheme to benefit a non-object. Thus, it is believed that from the findings made by the court it was not correct to conclude that the appointment was void because made for the purpose of benefiting a non-object. Furthermore, it is arguable that the appointment made here is not subject to attack on any theory, since there is much authority for the proposition that a motivation of prejudice or anger alone will not invalidate an exercise of a special power.⁸ However, the facts of this case seem to point up a desirable limitation to the application of this doctrine. Where, as here, the motivating anger or ill will arises from prevention of the donee's scheme to circumvent the power, it seems reasonable to conclude that the

³ *BISPHAM'S PRINCIPLES OF EQUITY*, § 235 (1931); Eblen, "Fraud on Special Powers of Appointment," 25 *KY. L.J.* 3 at 19 (1936); 2 *SCOTT ON TRUSTS*, § 187 (1939).

⁴ 41 *AM. JUR.*, Powers, § 65 (1942).

⁵ *Sikes v. Sikes*, supra, note 1; *Chenoweth v. Bullitt*, supra, note 1; *In re Carroll*, 274 *N.Y.* 288, 8 *N.E.* (2d) 864 (1937); *Beatson v. Bowers*, 174 *Ind.* 601, 91 *N.E.* 922 (1913), affirming (App. 1909) 88 *N.E.* 966 (1910); *Shank v. Dewitt*, 44 *Ohio St.* 237, 6 *N.E.* 255 (1886); *Bostick v. Winton*, 1 *Sneed* (33 *Tenn.*) 524 (1853); *Degman v. Degman*, 98 *Ky.* 717, 34 *S.W.* 523 (1896); *Holt v. Hogan*, 58 *N.C.* 82 (1859); *In re Cohen*, 1 *Ch.* 37 (1911). See also *Vatcher v. Paull*, (1915) *A.C.* 372 at 378, where the court observes, "The term fraud in connection with frauds on a power does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term or any conduct which could properly be termed dishonest or immoral. It merely means that the power has been exercised for a purpose . . . or intention, beyond the scope of or not justified by the instrument creating the power."

⁶ See cases cited, supra, note 5. The usual arrangement is for the donee to appoint to an object who agrees to bestow some benefit either upon the donee or a stranger in return for the appointment. The benefit to the non-object is contingent upon the appointment's being made.

⁷ The existence of such an agreement could be inferred from the facts, but the court drew no such inference and looked only to the prior agreement in finding a fraud on the power.

⁸ *LEAKE, LAW OF PROPERTY IN LAND* 312 (1909); 2 *SUGDEN, POWERS* 179 (1856); 1 *SIMES, FUTURE INTERESTS*, § 290 (1936); 12 *CONV. (n.s.)* 106 (1947); *Vane v. Lord Duncannon*, 2 *Sch. and Lef.* 118 (*Irish Chancery* 1804).

appointment served to defeat the obvious intent of the donor and therefore constitutes a fraud on the power. It is believed that the result reached in the principal case is desirable but could better be justified on the general ground that the power was not exercised for the purposes or with the state of mind intended by the donor.⁹

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⁹ See cases cited *supra*, notes 1, 2 and 3. See also Eblen, "Fraud on Special Powers of Appointment," 25 Ky. L.J. 3 at 6 (1936), where the writer in speaking of the purposes intended by the donor says, "He intends that the benefit passing to the appointee by reason of the appointment shall be a benefit resulting from a gift of the property as property. In other words, he does not intend that the gift of the property be used as a means of accomplishing some independent purpose of the donee, even though there be no intention to benefit an outsider."