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POWERS-EXECUTION BY A GENERAL RESIDUARY CLAUSE

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POWERS—EXECUTION BY A GENERAL RESIDUARY CLAUSE—Testatrix was given a general testamentary power of appointment over the corpus of a trust by her deceased husband's will. His will further directed that "a general residuary clause in her will shall not be deemed to be an exercise of said power of appointment." Plaintiff was named as a taker in default of appointment. The testatrix died eight years later leaving a will which expressly provided that it was exercising the power of appointment. One paragraph of her will gave several specific bequests from the said trust estate; the paragraph following provided: "All the rest, residue and remainder of the trust property and estate as to which I have the power of appointment under the last Will of my husband, . . . I give, devise and bequeath to such of my nieces, as shall survive me." The next paragraph disposed of the residue of her own estate. Plaintiff petitioned for a

final judicial settlement of the trust estate, claiming the power was not exercised in the manner provided by the donor. *Held*, the power was properly exercised. *In re Kilpatrick's Estate*, (Mich. 1947) 28 N.W. (2d) 286.

The court felt that the probable intent of the donor in prohibiting an appointment by a general residuary clause, was "to provide against a thoughtless or inadequately considered final disposition of . . . property." [1] Thus it concluded that the testatrix had not attempted to exercise the power by "a general residuary clause" within the meaning of that phrase as used by the donor. There seems little doubt but that this decision gave full effect to the donor's intention. The writer has been unable to find any cases based on a similar fact situation. Most of the cases involving the exercise of testamentary powers have arisen where there has been no such restriction by the donor, and the usual question is whether the donee has or has not manifested an intent to exercise the power by his will.[2] In the absence of statute, most states hold that the power of appointment must be referred to either expressly or impliedly in the will, in order to indicate an intent to exercise the power.[3] In applying this rule these courts usually apply the arbitrary test whereby one of the three following elements must be present in the will: (1) reference to the power itself, (2) reference to the subject matter of the power, or (3) the provision must be such that it would otherwise be a nullity unless in exercise of the power.[4] A few cases, however, although purporting to follow the same rule, have found an intent to exercise the power from circumstances and language falling outside the scope of the three above mentioned elements.[5] Since the ultimate question in such cases is the intent of the donee, the reasoning followed in these latter cases seems desirable. Massachusetts, on the other hand, holds that a general or residuary clause presumptively exercises a general power [6] unless a contrary intent is shown on the face of the will.[7] Many states have enacted statutes which have in effect codified the Massachusetts view.[8] While these statutes have some

[1] Principal case at 288.

[2] 1 SIMES, FUTURE INTERESTS, § 270 (1936), and cases cited.

[3] Ibid.

[4] Hollister v. Shaw, 46 Conn. 248 (1878); Equitable Trust Co. v. Paschall, 13 Del. Ch. 87, 115 A. 356 (1921); Butler v. Prudden, 182 Ga. 189, 185 S.E. 102 (1936); Standley v. Allen, 349 Mo. 1115, 163 S.W. (2d) 1012 (1942).

[5] Funk v. Eggleston, 92 Ill. 515 (1879); Rettig v. Zander, 364 Ill. 112, 4 N.E. (2d) 30 (1936); Rice v. Park, 223 Ala. 317, 135 S. 472 (1931); Paul v. Paul, 99 N. J. Eq. 498 (1926).

[6] In Worcester Bank and Trust Co. v. Sibley, 287 Mass. 594, 192 N.E. 31 (1934), the court refused to decide specifically whether this presumption also applied to a special power where the residuary legatees are members of the limited class. See also Stone v. Forbes, 189 Mass. 163, 75 N.E. 141 (1905), for dictum to the effect that the presumption does apply to special powers.

[7] Harvard Trust Co. v. Frost, 258 Mass. 319, 154 N.E. 863 (1927) (extrinsic evidence of a contrary intent held inadmissible); Pitman v. Pitman, 314 Mass. 465, 50 N.E. (2d) 69 (1943). New Hampshire adopted this view in Emery v. Haven, 67 N.H. 503, 35 A. 940 (1894), but apparently rejected it in the recent case of Faulkner v. Faulkner, 93 N.H. 451, 44 A. (2d) 429 (1945).

[8] Cal. Probate Code (Deering, 1941) § 125; D.C. Code (1940) § 19-203; Idaho Code (1932) § 14-325; Md. Code (1939) Art. 93, § 345; Mich. Stat. Ann. (1937) § 26.143; Minn. Stat. (1945) § 502.71; Mont. Rev. Code (1935) § 7029;

variations,[9] the more common type provides that a general devise or bequest of the testator's property exercises any power of appointment which the testator may have, unless a contrary intention shall appear by the will.[10] A few of these statutes say nothing about "a contrary intention";[11] it is believed, however, that the effect of such statutes is merely to provide a rule of construction and that a showing of contrary intention on the part of the donee will override that statutory presumption.[12] Under all these statutes the question is presented: what constitutes " a contrary intention"? While there is no definite standard to serve as a guide, the relatively few cases in which such contrary intention has been found indicate that a fairly clear showing is necessary before a court will say the statutory presumption has been rebutted.[13] In the principal case, the court made no mention of the pertinent statute; [14] however, in view of the specific directions given by the donor regarding the manner of exercising the power,

40 N.Y. Consol. Laws (McKinney, 1938) § 181 and 49 N.Y. Consol. Laws (McKinney, 1938) § 176; N.C. Gen. Stat. (1943) § 31-43; N.D. Rev. Code (1943) § 56-0514; Okla. Stat. (1941) tit. 84 § 164; Pa. Stat. (Purdon, 1939) tit. 20, § 223; R.I. Gen. Laws (1938) c. 566, § 9; S.C. Code (1942) § 8928; S.D. Code (1939) § 56.0314; Utah Code (1943) 101-2-14; Va. Code (1942) § 5241; W. Va. Code (1943) § 4057; Wis. Stat. (1945) § 232.51.

[9] Although most of these statutes expressly refer to both real and personal property, a few specify only real property. Some refer to "powers to devise" while others specify "general powers." The Wisconsin statute, cited in note 9 refers to realty only, yet in Horlick v. Sidley, 241 Wis. 81, 3 N.W. (2d) 710 (1942), the court held that the policy laid down by the statute as to realty applied also to personalty. In Childs v. Gross, 41 Cal. App. (2d) 680, 107 P. (2d) 424 (1940), the use of the word "devise" in the statutory phrase "including property embraced in a power to devise" was held to apply to personalty as well as realty.

In McLean v. McLean, 174 App. Div. 152, 160 N.Y.S. 949 (1916), the court held the statute applied to special powers where the residuary legatees were members of the limited class. Affirmed, 223 N.Y. 695, 119 N.E. 1057 (1918). The same result was reached in Biddle's Estate, 333 Pa. St. 316, 5 A. (2d) 158 (1939).

[10] The Pennsylvania Statute cited in note 9 is typical.

[11] California, Montana, North Dakota, and Utah fall in this category.

[12] 4 PROPERTY RESTATEMENT, § 343, comment d (1940).

[13] Barton Trust, 348 Pa. St. 279, 35 A. (2d) 266 (1944), where testator had two powers of appointment. The residuary clause of his will expressly referred to only one of these powers. Held, the residuary clause executed both powers; Gassinger v. Thillman, 160 Md. 194, 153 A. 19 (1931), where decedent executed his will naming his wife as residuary legatee. A few days later he executed deeds conveying leasehold properties to his wife for life only, reserving full power of disposition in himself. Held, the subsequent deeds show an intention that the residuary clause was not meant to exercise the reserved powers. Cf. Lederer v. Safe Deposit & Trust Co. of Baltimore, 182 Md. 422, 35 A. (2d) 166 (1943). See also Thomson v. Wanamaker's Trustee, 268 Pa. St. 203, 110 A. 770 (1920); Carraway v. Moseley, 152 N.C. 337 (1910); U.S. Trust Co. v. Winchester, 277 Ky. 434, 126 S.W. (2d) 814 (1939); Cal. Trust Co. v. Ott, 59 Cal. App. (2d) 715, 140 P. (2d) 79 (1943); Worcester Bank and Trust Co. v. Sibley, 287 Mass. 594, 192 N.E. 31 (1934) (no statute involved).

[14] Mich. Stat. Ann. (1937) § 26.143. Lands embraced in a power to devise shall pass by a will purporting to convey all the real property of the testator unless the intent that the will shall not operate as an execution of the power shall appear expressly, or by necessary implication.

the court apparently assumed the statute was inapplicable.[15] This assumption certainly seems warranted in view of other Michigan statutes governing the extent to which a donor can effectively impose formalities on the manner of exercising a power. These last mentioned statutes indicate that the donor can impose practically any restriction he wishes with the exceptions noted below.[16] Other states have similar statutes,[17] and the common law is even more liberal in giving effect to the donor's directions.[18] Thus it appears that the presumption created by the statutes relating to the exercise of powers by residuary clause can be evaded by a restriction or direction on the part of the donor, or rebutted by an expression of contrary intent by the donee.

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[15] Apparently the statute would not have applied in any event unless the corpus of the trust embraced some real estate.

[16] Mich. Stat. Ann. (1937) § 26.136. "When the grantor [of a power] shall have directed any formalities to be used in the execution of a power, in addition to those which would be sufficient by law to pass the estate, the observance of such additional formalities shall not be necessary to a valid execution of the power."

Id. § 26.137. "When the conditions annexed to a power are merely nominal, and evince no intention of actual benefit to the party to whom, or in whose favor they are to be performed, they may be wholly disregarded in the execution of the power."

Id. § 26.138. "With the exceptions contained in the preceeding sections, the intentions of the grantor of a power, as to the mode, time and conditions of its execution, shall be observed, subject to the power of a court of chancery to supply a defective execution, in the cases hereinafter provided."

[17] 4 PROPERTY RESTATEMENT, § 345 (1940).

[18] Montgomery v. The Agricultural Bank, 18 Miss. 566 (1848); Breit v. Yeaton, 101 Ill. 242 (1882).