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Powers of Appointment--Residuary Clause

Harry Porter Dies
University of Kentucky

POWERS OF APPOINTMENT—RESIDUARY CLAUSE

In the recent Federal case of *Old Colony Trust Co.* v. *Commissioner of Internal Revenue*,[1] T had a general testamentary power of appointment over two trust funds. At the time he made his will, he had little property of his own. In his will were three clauses of importance. The first one provided: "I give, bequeath, and devise one-half (½) of all my property of whatever kind, and wherever situated, owned by me at the time of my death to my wife", etc. The second provided: "If the total value of all personal property and real estate, of whatever kind, and wherever situated, owned by me at the time of my death, shall equal the monetary value of not less than one hundred thousand dollars ($100,000), I give to my Aunt", etc., certain small specific legacies. The last provided: "I give, bequeath and devise, after all my just debts and expenses of Administration have been paid, all the rest, residue and remainder of my property, of whatever kind and wherever situated, owned by me at the time of my death, and which has not already been given, bequeathed, and devised by and under this will, to K."

The question in the case was whether a residuary bequest in common form in T's will operated as an execution of the powers of appointment which he had over the two trust funds. The court, applying the Massachusetts law, held that the will was an execution of the powers. The court said that for many years it has been the settled law in Massachusetts that a general residuary devise operates as an execution of a power of appointment by will, unless there is something in the will, when read in the light of surrounding circumstances, to show that such was not the intention of the donee of the power.

Here, this presumption of executing the power was not overcome by the fact that certain smaller bequests were made on the condition that the total value of T's property be not less than one hundred thousand dollars.

The Massachusetts rule represents a decided contrast to the common law rule which is still the law in many states today. The common law rule on the execution of a power of appointment under an instrument is: that the intention to execute a power of appointment must always appear in its execution, either by express terms or recitals, or by necessary implications, so that the transaction is not fairly susceptible of any other construction, and if such an intention does not appear the power is deemed to be exercised.[2] Three classes

[1] 73 Fed. (2nd) 970 (1934).

[2] Blagge v. Miles, 3 Fed. Cases No. 1, 479; 1 Story 426 (1841); Harrison v. Lee, 3 Fed. (2d) 796 (1925); Lee v. Simpson, 134 U. S. 572, 33 L. Ed. 1038 (1890); Hollister v. Shaw, 46 Conn. 248 (1878); Union Trust Co. v. Bartlett, 99 Conn. 246, 122 Atl. 105 (1923); Emery v. Emery, 325 Ill. 212, 156 N. E. 364 (1927); Mutual Benevolent Society v. Clendinen, 44 Md. 429, 22 Am. R. 52 (1876); Patterson v. Wilson, 64 Md. 193, 1 Atl. 68 (1885); Andrews v. Brimfield, 32 Miss. 107 (1856); Ackerman v. Ackerman, 81 N. J. Eq. 437, 86 Atl. 542 (1913); Burleigh

of cases have been held to be sufficient demonstrations of an intended execution of the power. (1) Where there has been some reference in the will, or other instrument, to the power,[3] or (2) a reference to the property, which is the subject matter of the power,[4] or (3) where the instrument, executed by the donee of the power, would otherwise be inoperative to its purported extent.[5]

The common law rules of evidence as to the only ways in which an intention on the part of the donee to exercise the power, could be shown, in many cases, actually defeated the intention of the donee instead of aiding it. Courts and writers were outspoken in their criticism of the rule. As a result of such dissatisfaction, Massachusetts[6] as early as 1863 in the case of *Amory* v. *Meredith*,[7] broke away from the common law rule and adopted the rule that the donee in making a will or other instrument is presumed to pass all his property, including that which he owns under a power of appointment, unless a contrary intention clearly appears in the donee not to exercise the power.[8] New Hampshire[9] was the only state to follow the Massachusetts rule by judicial decision.

The action taken by the Massachusetts court was prophetic of

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v. Clough, 52 N. H. 267, 13 Am. R. 23 (1872); Arthur v. Odd Fellows Beneficial Assn., 29 Ohio St. 557 (1876); Hupp v. Union Coal Co., 284 Pa. 529, 131 Atl. 364 (1925); Wetherill v. Wetherill, 18 Pa. 265 (1852); Bilderback v. Boyce, 14 S. C. 528 (1880); Arnold v. Sou. Pine Lumber Co., 58 Tex. Civ. App. 186, 123 S. W. 1162 (1909).

[3] Blake v. Hawkins, 98 U. S. 335, 25 L. Ed. 139 (1878); Lee v. Simpson (*supra*, note 2); Solomon v. Wixon, 27 Conn. 520 (1858) (Power to sell); White v. Holly, 80 Conn. 438, 68 Atl. 997 (1908); Wright v. Syracuse, O. & N. R. R. Co., 92 Hun. 32, 36 N. Y. S. 901 (1895).

[4] Blagge v. Miles, *Supra* note 2. Funk v. Eggleston, 92 Ill. 515, 34 Am. R. 136 (1879); Hoff v. Pensenhafer, 190 Ill. 200, 60 N. E. 110 (1901); Henriott v. Cood, 153 Ky. 418, 155 S. W. 701 (1913); Loring v. Wilson, 174 Mass. 132, 54 N. E. 502 (1899); Munson v. Berdan, 35 N. J. Eq. 376 (1882); Bishop v. Remple, 11 Ohio St. 277 (1860); Drusadow v. Wilde, 63 Pa. St. Rep. 170 (1869).

[5] Lee v. Simpson, *Supra* note 2; Gossen v. Ladd, 77 Ala. 223 (1884); Reed v. Hollister, 44 Cal. App. 533, 186 Pac. 819 (1919); Hartford-Conn. Trust Co. v. Thayer, 105 Conn. 57, 134 Atl. 155 (1926); Henriott v. Cood, *Supra* note 4; Paul v. Paul, 99 N. J. Eq. 498, 133 Atl. 868 (1926); Denson v. Pine State Creamery Co., 191 N. C. 198, 131 S. E. 581 (1926); Bishop v. Remple, *Supra* note 4; Moran v. Cornell, 49 R. I. 308, 142 Atl. 605 (1928).

[6] Ames v. Ames, 238 Mass. 270, 130 N. E. 681 (1921); 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); Russell v. Joys, 227 Mass. 263, 166 N. E. 549 (1917); Sewall v. Wilmer, 132 Mass. 131 (1882); Williad v. Ware, 10 Allen (Mass.) 263 (1865).

[7] 7 Allen (Mass.) 397 (1863).

[8] Andrews v. Brimfield, suggested the rule adopted by Massachusetts as early as 1856. See *Supra* note 2.

[9] Emery v. Haven, 67 N. H. 503, 35 Atl. 940 (1894); Fitts v. Free Baptist Society, 75 N. H. 608, 77 Atl. 484 (1910).

the legislation that was certain to follow. Several states[10] enacted statutes providing for the same rules on intention as the rule established by judicial decision in Massachusetts and New Hampshire.[11]

For the most part these statutes apply only to general powers,[12] and make provisions for a contrary intention.[13] In substance they provide that a general power will be exercised by a general will,[14] and they extend to personal as well as real property.[15] A residuary clause makes a will general.[16]

The passage of such a statute does not leave the problem without its difficulties. It must be remembered that under the latter rule the donee in making a will or other instrument is only presumed to pass all the property he has, including that over which he holds a power of appointment, and this presumption may be rebutted by showing a contrary intention on the part of the donee not to exercise it. However, it is not necessary that the contrary intention provided for by statute should be expressed; in fact, no cases have been found where it was so expressed. This contrary intention may be implied from the surrounding circumstances, and the fact that only a very few cases have been found were such an intention existed seems to support the soundness of the decisions in Massachusetts and New Hampshire and the statutes which have been enacted in the other states.

In an interesting Maryland case the court found a contrary in-

[10] Kentucky, Maryland, Michigan, Minnesota, Montana, North Carolina, North Dakota, New York, Pennsylvania, Rhode Island, Utah, Virginia, West Virginia, and Wisconsin.

[11] Greenway v. White, 196 Ky. 745, 246 S. W. 137 (1922); Speir v. Benvenuti, 197 App. Div. 209, 189 N. Y. S. 885 (1921); Trust Co. v. Livingston, 133 N. Y. 125, 30 N. E. 724 (1892); Hollister v. Hollister, 85 Ore. 316, 166 Pac. 940 (1917); Neill's Estate, 222 Pa. 142, 70 Atl. 942 (1908); In re South's Estate, 248 Pa. 165, 93 Atl. 954 (1915); Thompson v. Wanamaker, 268 Pa. 203, 110 Atl. 770 (1920); Harlow v. Duryea, 42 R. I. 234, 107 Atl. 98 (1919); Machir v. Funk, 90 Va. 284, 18 S. E. 197 (1893).

[12] Lafferty's Estate, 19 Pa. D. P. 504 (1923). The New York statute applies to all powers of appointment. "Real property embraced in a power to devise passes by a will purporting to convey all the real property of the testator, unless the intent that the will is not to operate as an execution of the power, appears, either expressly or by necessary implication." N. Y. Con. Laws (Cahill, 1930), c. 51, s. 176. Similar provisions as to personal property, c. 42, s. 18.

[13] In some statutes there is no express provision for a contrary intention. "Real or personal property embraced in a power to devise passes by a will purporting to devise all the real or personal property of the testator." Montana Rev. Codes (Choate, 1921), s. 7029. Possibly the contrary intention could be made effective under the word "purporting."

[14] The common law rules of intention still apply to execution by deeds. McCormick v. Security Trust Co., 184 Ky. 25, 211 S. W. 196 (1919).

[15] Hutton v. Benkard, 92 N. Y. 295 (1883).

[16] R. I. Hospital Trust Co. v. Dunnell, 34 R. I. 394, 83 Atl. 858 (1912).

tention.[17] In that case T's will contained a residuary clause which gave all his property to his wife. Thereafter, he executed deeds conveying leasehold properties to his wife for life, with specific remainders to his children and a grandchild, subject to a life estate reserved to himself, with full power of disposition. Then by a codicil to his will he made a change in the executorship, but reaffirmed his will in all other respects. The court found a contrary intention from the facts that the deeds came after the will, they cut down the interest given to the wife under the residuary clause, and included persons not provided for in the will. If T had thought that the future effectiveness of the deeds depended upon a change in his will, he would not have resorted to five elaborate deeds, when a change in his will would have produced the same result. He must have intended the deeds to supersede the will.

In view of the fact that the will was executed prior to the creation of the power, the decision seems right although it is possible that T had the provisions of the will in mind when he made the deeds. Certainly the contrary intent is not a necessary implication.

A contrary intention on the part of the donee was found by the court in a late New York case.[18] There T conveyed certain securities by a trust deed to the trustees to pay a part of the income annually to certain named beneficiaries. The last clause of the deed provided that all surplus income over these specific payments above named, should be paid, in quarter-annual installments as long as this trust shall continue, to the said grantor, or in case he dies before the termination of the trust (the trust was to continue until the death of the survivor of the grantor or his wife) to those who may be entitled thereto by virtue of the will of said grantor, or in case he leaves no will, to those who may at the time of his death be his next of kin under the statute of distributions of New York. T thereafter made a will making certain specific devises and legacies and then the will contained a residuary clause which purported to dispose of "all rights, powers, and interest in, over and concerning property of every kind" belonging to T at the time of his death, to trustees for the benefit of four separate beneficiaries. Under the will the executors were given a large discretion as to what property of T's would be used for paying his debts, expenses and legacies. After T's death the trust under the trust deed still continued and a large surplus arose. The trustees having no discretion as to what to do with the surplus, that is to say, they could only do one of two things, turn it over to the executors under the will or to T's heirs at law, brought this action for instructions by the court. The court held that the surplus under the trust deed went to the heirs at law and did not pass under T's will. It said that the dispositions made by T under his will were by their very

[17] Gassinger v. Thillman, 160 Md. 194, 153 Atl. 19 (1931).

[18] Guaranty Trust Co. v. Halsted, 245 N. Y. 447, 157 N. E. 739 (1927).

nature so inconsistent with the subject of the power under the deed, that by necessary implication T could not and did not intend that the will should be an execution of the power.

Considering the fact, as the court did, that the testamentary trustees had a discretion in collecting T's estate for the payment of his debts, legacies, etc., whereas the trustees under the deed could only pay the surplus thereunder to those appointed by T's will or to the heirs, also the fact that T could not have possibly supposed that if the executors had have chosen the surplus under the deed for the sum out of which the creditors were to be paid and that they would have to wait for several years for their money, it seems that the court was right in saying that T had no intention of his will being an execution of the power under the deed and hence the heirs were properly entitled to the surplus.

A very recent Massachusetts case,[19] seems to be the only other case in which a contrary intention has been found. T by his will made several specific bequests. By the residuary clause of the will he gave to certain trustees the rest of the property for, inter alios, thirteen named charities as beneficiaries, subject however, to a life estate from the income to be paid to his wife. It then provided that at her death she was empowered to appoint by her will the whole residuary trust property only on the condition that she deemed the said charities as having become unfit to receive the property. W left a will in which she had made certain specific bequests. By the residuary clause, she gave all the rest of her property in trust to X. She made a special provision in it that under no consideration was her residuary property to fall below the sum of ten thousand dollars and that before it should other legacies should abate to prevent it. She made no mention of the power under her husband's will. The question before the court was whether the residuary clause was an execution of the power in view of the Massachusetts rule. The court said that she had a contrary intention and that the will was not an execution of the power. Two reasons were given which the court says shows a contrary intention. The first one was the fact that the charities named had not in fact become unworthy since her husband's death and that it would be unreasonable to suppose that W considered them all unworthy without mentioning it. The second reason was shown in the fact that W expressly provided that under no condition should her residuary property fall below $10,000 which shows that she had in mind at the time her own property since that under the husband's will at all times amounted to over $100,000.

It seems to the writer that the court correctly found that W did have a contrary intention, but it does not seem that it should have been necessary to inquire into this question. It will be remembered that W only had the power to devise the residuary property under T's will on the happening of the contingency that she deemed the

[19] Worcester Bank & Trust Co. v. Sibley,—Mass.—, 192 N. E. 31 (1934).

charities as having become unworthy of the property. Hence by T's will the beneficiaries got a defeasible title to the property. Now as the only way the contingency can arise is by W expressly saying that she deems the charities unworthy,[20] and as she did not so state in her will that they were, no power arises for her to execute, hence only her own property passes by her will.

It has been held that a contrary intention will not be implied from that fact that the testator may have been in doubt as to the amount of the income, which the property passing under the will, would produce.[21] So in the principal case the fact that T made certain small legacies on the condition of the value of the estate not falling below $100,000 did not show a contrary intention not to exercise the power. The court properly suggested that probably T had in mind at that time the fluctuations of the value of the property and was not referring to his own small estate he had apart from that under the power.

HARRY PORTER DIES.

AGENCY—DISTINCTION BETWEEN "WITHIN THE COURSE OF EMPLOYMENT" AND "WITHIN THE SCOPE OF EMPLOYMENT"

One is faced with a somewhat confusing problem when trying to differentiate, both in point of fact and in point of law, between the terms, "within the course of employment" and "within the scope of employment." Text-writers on agency and the courts in their decisions are pleased to use first one and then the other, until a student or even a practitioner who is confronted with an agency problem, is ultimately baffled as to the exact meaning and application of the two terms as tests of the master's liability for the torts of his agent. In volume two, section 1879 of Mechem's work on Agency, Mr. Mechem selects the phrase "within the course of his employment" and uses it to mean and include, admittedly for the want of a better term, the separate and distinct meanings of the two phrases, "within the course of his employment" and "within the scope of his employment". The meaning of the words in the former phrase is as that of those in the

[20] Garman v. Glass, 197 Pa. 101, 64 Atl. 923 (1900). G devised property to his wife for life, with remainder to others, with provision that, if they should not be obedient to her, he revokes the devise to them and empowers her to devise the property. The court said that there must be an affrmative decision and declaration of their disobedience, to entitle her to exercise the power, and it is not shown by a devise by her of the "residue" of her property; and until determination that the contingency on which the power may be exercised had arisen. This is true notwithstanding a statute embodying the Massachusetts rule. The court said that the statute does not apply.

[21] Art's Student League of N. Y. v. Hinkley, 31 Fed. (2d) 469 (1929).