1924

Future Property Interests in Kentucky

W. Lewis Roberts
University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Property Law and Real Estate Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol13/iss1/3

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
FUTURE PROPERTY INTERESTS IN KENTUCKY.*

VI Powers.

(a) Definition

A power over land, as defined by Tiffany, is a right or ability in a person to create an estate or interest in the land, or to impose a lien thereon, which, when exercised, takes effect in diminution or to the destruction of the rights of others in the land, or if it takes effect in diminution or to the destruction of an estate belonging to the person exercising the power, does so by reason of the power alone, without reference to his ownership of the estate.1 As he further points out, such a power over land is not an estate in the land. It is a mere ability to dispose of it, and according to views set out in some cases, not even an interest in the land.

This definition, however, includes not only powers of appointment but also the familiar powers of attorney as well. It is with the former that we are chiefly concerned when dealing with future interests. A power of appointment as defined by the English court in Maundrell v. Maundrell2 is a mode which the owner of the estate reserves to himself, or gives to another, through the medium of the statute of uses, of raising and passing an estate. And still later Jessel, M. R., gives us a definition in simpler words in his opinion in the case of Freme v. Clement,3 where he says it is a power of disposition given a person over property not his own by someone who directs the mode in which that power shall be exercised by a particular instrument.

The person who creates the power of appointment is called the donor and the person to whom the power is given, the donee. On the exercise of the power the donee becomes the appointor and the persons in whose behalf it is exercised are appointees.

In England owing to the frequency of family settlements of land, cases bearing upon powers of appointment are very numerous. In this country while such case cases do not come

---

*The first installments of this article are published in the January, March and May issues of the Kentucky Law Journal, Vol. XII.
1 Real Property (2d Ed.) 1041.
3 18 Ch. D. 499, at 504.
before the courts so often, they are far from being exceptional, and not a few cases dealing with powers of appointment are to be found in our own state reports.

(b) Classification

With respect to the scope of the power of appointment, powers are either general or special. The Court of Appeals in Dudley v. Weinhart\(^4\) said: "Now, a general power of appointment is a power given by the maker of a deed or will, called the donor of the power to another person, called the donee of the power, in the name of and by the authority of the donor, to create a new estate in any one out of the estate of the donor without divesting any estate previously granted or devised subject to such power; or by divesting an estate previously granted subject to such power and bestowing on another person. Such power has always been exercised and held valid as being the will of the donor of the power, and not as a revocation or destruction of his will in the sense of the statute supra; for it is perfectly competent for a testator to give another person the power to dispose of his property according to his judgment and discretion." The testator had provided in his will that his wife might change or cancel certain gifts provided she did so by an instrument in her own handwriting, attested by two witnesses and recorded in the county court before the gift or devise took effect, which was not to be until the thirteenth day after the will was probated. The widow exercised the power conferred upon her and it was contended that this was an attempt to give her the power to revoke the will after the death of the testator and not within the provision of the statute providing for the revocation of a will. The validity of such a power of appointment was upheld.

A special or limited power is one which points out the group or class to the members of which an appointment may be made or limits the quantum of the estate to be appointed. Such was the power involved in McCormick v. Security Trust Company of Lexington.\(^5\) The testator bequeathed all his property to his wife during her lifetime with the right to dispose of it by deed

---

\(^{4}\) 93 Ky. 401, 20 S. W. 308.
\(^{5}\) 184 Ky. 25.
or will in such proportions as she might think best among their children.

With respect to the estate of the donee, powers are simply collateral or not simply collateral. As stated in Columbia Trust Co. v. Christopher,6 "powers are either collateral or such as relate to an estate or interest given by the donor to the donee of the power. A collateral power is a bare power given to a mere stranger, who has no interest in the estate or property to which the power relates; e. g., a power of sale given to executors." A power relating to an estate or interest may be either appendant or gross. The court further explains that "a power is appendant when the estate created by the execution of the power overreaches, affects, or destroys the interest of the donee. It is gross when the estate created by the execution of the power is beyond and does not affect the estate or interest of such donee. Thus a power of appointment by will given to a tenant for life is in gross. The execution of such a power does not affect the life estate of the donee of the power. A power of sale given a life tenant is, however, appendant because the execution of such a power overreaches, affects and destroys the interest of the donee."

A further classification of powers is sometimes made with respect to the discretion of the donee as to execution. They are either powers in trust where the terms impose upon the donee an imperative duty to execute the power, enforceable in equity; or mere powers, where it is entirely within the discretion of the donee as to whether he will exercise it or not.

(e) Who May Exercise a Power of Appointment

While it seems self-evident that only those who can dispose of property can create powers of appointment,7 it also seems clear that one not having the necessary qualifications to convey or to dispose of property may, nevertheless, exercise a power of appointment. In the words of the court in Kennedy v. Ten Broeck, "There can be no question that a feme covert can be invested by deed or will emanating from a third party, with a power of appointment in lands; still, as long as she is under the

---

6 133 Ky. 335, 344, 345.
7 Kennedy v. Ten Broeck, 11 Bush (Ky.) 241.
disability of coverture there is no rule of law or equity enabling the wife, by her own deed or in conjunction with her husband, to vest herself with such a power in or over her general estate. A *femur covert* can only dispose of her lands in the manner pointed out by the statute, nor can the consent of the husband by uniting with her in the deed remove the disability or confer upon the wife the power to dispose of her property in any other way.18

The same result was reached in *Ford's Ex'rs v. Ford*9 and in *Hankins v. Columbia Trust Co.*10 The latter decision arose under the present statute affecting married women's property rights. And it is evident that not only married women can exercise a power of appointment but section 4826 of the statutes makes it clear that a minor may also, although he is not allowed to make a valid will for other purposes. Of course the reason why one incapacitated from conveying property himself may exercise a power of appointment is that it is the donor and not the donee who is really passing title to the property under the appointment.

(d) Release and Discharge of Powers

The question of whether powers of appointment may be released by the donee was carefully considered in *Columbia Trust Co. v. Christopher.*11 It is there said that a power simply collateral can not be extinguished or suspended by any act of the donee. To use the words quoted by the court from the opinion of the chancellor who tried the case in the lower court: "Such a power is not in the nature of a right or interest in the donee thereof, and is given, or supposed to have been given, for the benefit of some third person. Thus, if a testator gives to his wife power to dispose by will of any fixed portion of his estate among certain named individuals or institutions, giving her at the same time no interest in the property so to be disposed of, the wife would, in such case, have simply a collateral power. She would have no interest whatever in the property, and could not by any act or agreement extinguish such power in herself.

---

11 Bush 251.
2 Duvall 418.
12 142 Ky. 206, 134 S. W. 498.
13 133 Ky. 335, 345, 350; 117 S. W. 943.
or bind herself not to exercise it. Such power is indestructible in its nature, and of course, every power coupled with a trust or duty is likewise indestructible. The execution of such last mentioned power is imperative on the donee, and it would be a breach of trust for the donee to undertake not to execute the power. All powers, however, other than powers collateral and powers coupled with a trust or duty, may be suspended or destroyed, either wholly or in part, by the donee thereof.\textsuperscript{12}

This rule is undoubtedly true in regard to collateral powers special, but it is suggested by Professor Gray that if the collateral power be general as where the power can be exercised in favor of the donee himself, if exercisable by deed or will, it can be released.\textsuperscript{13} A release by the donee in such a case is, he says, equivalent to an appointment by the donee.

By act of Parliament in England in 1882 it was provided that even collateral powers might be extinguished or suspended by act of the donee. In referring to that statutory change the court in \textit{Columbia Trust Co. v. Christopher} said: "In this State, however, I take it the rule is the same as it was in England prior to January 1, 1882. As heretofore stated, the rule as it then existed permitted the donee of the power, which related to property an interest in which was given to the donee, to extinguish or suspend the power by express agreement or by implication. All powers other than powers collateral and powers coupled with a trust or duty, may be suspended or destroyed, either in whole or in part, by the donee thereof."

The facts of the particular case under consideration by the court were that the donor devised land to trustees to pay the income to his mother for life, and on her death to convey to certain charities. The wife had a power, not testamentary, to appoint to another charity. The court held that the wife could release the power.

In this case the court further states that any dealing with the property inconsistent with the exercise of such power will operate as an implied release or extinguishment of the power. This statement it also based upon English decisions. In \textit{Johnson v. Yates}\textsuperscript{14} the Court of Appeals had itself passed upon the

\textsuperscript{12} Partial revocation, \textit{McCumber v. McCumber}, 198 Ky. 816.

\textsuperscript{13} 24 Harvard L. Rev. 516.

\textsuperscript{14} 9 Dana 491, 496.
same question. A wife, having a life estate in property with a
general power of appointment by will or deed in writing, joined
with her husband and the trustee in a deed disposing of part of
the property absolutely. It was held that the power as far as
it related to the property thus disposed of was extinguished.

Professor Gray, after reviewing the English cases holding
that testamentary powers may be released, referred to the deci-
dion in Columbia Trust Co. v. Christopher and the Rhode Island
case of Grosvenor v. Bowen and summarized his article on Re-
lease and Discharge of Powers by saying: "There are therefore
only two states, Kentucky and Rhode Island, in which the
English precedents have been followed (with perhaps the addi-
tion of Alabama), and it is submitted that the 'broad principles
of equity,' to use the expression of Kindersley, V. C., requires
that the doctrine should not be adopted in other jurisdictions."

(e) Appointments in Fraud of Power

Where a power of appointment is special, it is, as the court
pointed out in Degman v. Degman, a fraud for the donee of
the power to attempt to derive a personal benefit out of the exer-
cise of it for himself. In Degman v. Degman a widow, to whom
a life estate was devised, with power to divide the remainder
among the testator's children as she should think best, under-
took to leave the greater portion to one of the sons on condition
that he should assume the payment of her debts and provide
for her and her second husband during their lives. The court
said: 'It is likewise well settled that the power of appointment
must be exercised for the benefit of the parties entitled thereto,
and not with a view of benefitting the appointor or donee of the
power to appoint, and that an appointment or division made for
the purpose of benefitting the appointor is in law fraudulent
and void.'

When we come to a general testamentary power there are
not the same grounds for objecting to the appointee's binding
himself to exercise the power in a particular way that there are
in the case of special powers. As the power is general the donee

24 Harvard L. R. 533.
26 98 Ky. 717, 34 S. W. 523.
34 98 Ky. 722.
has a right to leave the property to any one he wishes and there can be no violation of a fiduciary obligation if he covenants to appoint to a certain person. The English cases further show that the donee may make himself liable in damages for a breach of such a covenant;¹⁸ and that if he does appoint in accordance with such a covenant, the appointment will not be set aside.¹⁹

(f) *Illusory Appointments*

Closely akin to fraudulent appointments are illusory appointments. One is said to make an illusory appointment where, having a power of appointing among all the members of a class as to all of the children of A, he appoints a nominal share only to one of the class. Under the doctrine of illusory appointment courts have regarded such an exercise of the power as invalid and have required that a substantial share be given to each member of the class. The doctrine applies when the power is nonexclusive, not when it is exclusive.

The question of whether a power is exclusive or nonexclusive was carefully considered in *Barret’s Ex’r v. Barret.*²⁰ In that case the testator devised the bulk of his property to a trustee, directing that it be divided into five equal parts, one part to be held in trust for each of his five children and at the death of each of his sons, his share was to pass as he by will should direct, “to his wife and heirs at law, and in the absence of a will, to his widow, if he leaves one, and to his heirs at law in the same proportion as if he had died owning the same in fee simple, according exactly to the law of descent and distribution as it then be in force in the State of Kentucky.” One son died in 1910 leaving a widow but no children. Prior to his death another brother had died and had left one-half his share to his widow and one-half to the brothers and sister. The son, who died in 1910, by will appointed to his sister and to each of his two surviving brothers $1,000 each. The remaining $147,000 he devised in trust to the use of his wife with power to dispose of it by will. She died in 1913 having by will appointed the estate to her own relatives. An action was brought on the

---

¹ In re Parkin, L. R. (1892), 3 Ch. 510.
³ 166 Ky. 411, 179 S. W. 396.
ground that the appointment of $1,000 each to the sister and brothers, and $147,000 to the widow was not a valid exercise of the power given by the original donor. The court sustained this contention, citing the earlier Kentucky cases on illusory appointments.\textsuperscript{21} After mentioning the fact that in England the doctrine was so much criticised by the leading jurists that it was abrogated by statutes, the court expressed its own approval in the following paragraph:

"It has been said that the doctrine is founded upon no principle, and that it is an arbitrary one, subject to no restraint or limitation. But in this we do not concur, for it is grounded upon the principle that, where a testator and donor of a power of appointment has confided to the donee thereof a nonexclusive power to dispose of the estate to the members of a designated class, the donee must fairly and reasonably execute the power and justify the confidence reposed in him, and that equity will nullify any attempt to betray the trust thus created. Nor is the doctrine an arbitrary one, subject to no restraint or limitation; for, if the appointments made in execution of the power are fairly and reasonably proportioned to the estate so distributed, there is a valid execution of the power, notwithstanding that the members of the designated class are not made equal in the distribution. If such a rule is arbitrary, then most, if not all, of the rules in equity possess the same attribute."

In holding that the doctrine is law in Kentucky the court said: "If an analysis of these cases (McGaughey's Adm'r v. Henry, Degman v. Degman, and Clay v. Smallwood) leaves any doubt, however, that the illusory appointment doctrine is the law of this state, we have no hesitation now in adopting it as a competent rule in the testing of the execution of nonexclusive powers."

In pointing out when a power is exclusive and when not, the court said: "Powers of appointment to a class are 'exclusive' or 'nonexclusive'—'exclusive' when there is granted to the donee of the power the right to exclude entirely any members of the designated class; and 'nonexclusive' when no such right

\textsuperscript{21} McGaughey's Admr. v. Henry, 15 B. Mon. 383; Degman v. Degman, 98 Ky. 717; Clay v. Smallwood, 100 Ky. 212, 38 S. W. 7; Levi v. Fidelity Trust & C. Co., 121 Ky. 82, 88 S. W. 1083
of selection or exclusion is granted. In the case of 'nonexclusive' powers, the exclusion of any member of the designated class in making the appointments will invalidate the attempted exercise of the power."

*Levi v. Fidelity Trust and Safety Vault Co.* is an illustration of an exclusive power. The testator's widow was given the power to "will or distribute to her relations and to my relations any property, real or personal, as she may choose or desire them to have." There was added the statement, "I am satisfied that she will act justly in this matter." This power the court said was a mere naked power, to be exercised at the discretion of the donee.

As pointed out by the court in *Barret's Ex'r v. Barret*, the doctrine has been abolished in England by statutes. In this country some courts have repudiated it without the aid of legislation and Professor Gray in the article already referred to speaks of it in these words: "But the rule as to illusory appointments is unique in the law. Other rules of doubtful character have found defenders or apologists, but no one has had a good word for this. It has been condemned in the most unmeasured terms by judge after judge—by Sir Richard Pepper Arden (afterwards Lord Alvonley, M. R.), in *Spencer v. Spencer*, 5 Ves. 362 (1800), and *Kemp v. Kemp*, Id. 849 (1801); by Sir William Grant, M. R., in *Butcher v. Butcher*, 9 Ves. 382 (1804); and by Lord Eldon, C., in *Box v. Whibread*, 16 Ves. 15 (1809), and *Butcher v. Butcher*, 1 Ves. & B. 79, 94, 96 (1812)."

There can be, however, no doubt as to the fact that the doctrine is law in this jurisdiction. To quote from a recent case, *McCormick v. Security Trust Co. of Lexington*, "The rule is thoroughly established in this state that when a power of appointment is given by will to be exercised as to a class of persons each one of the class is entitled to a substantial portion of the estate, but it is not necessary that each of the class shall receive an equal share.'

---

*21* 121 Ky 82, 88 S. W. 1083.
*24* 184 Ky. 25.
When Powers Survive

Under the old common law rule where a power was given to several persons, it could not be exercised by less than all of them.\(^2\) If one died, the power did not survive. As Professor Kales pointed out, this rule has been curtailed in three ways: “First, by statutes relating to the survival of powers in executors; second, where the power was actually lost equity under certain circumstances made those taking in default of appointment constructive trustees for those interested in the exercise of the power; and third, courts have strained to construe the power as exerciseable by whoever occupied the office of executor or trustee where the power was conferred upon persons discharging such office.\(^2\)

Section 2348 of the Kentucky Statutes provides for partition in the case of joint tenancies and abolishes the right of survivorship in the case of such estates. Section 2349 reads: “The preceding section shall not apply to any estate which joint tenants have as executors or trustees, nor to an estate conveyed or devised to persons in their own right, when it manifestly appears, from the tenor of the instrument, that it was intended that the part of the one dying should belong to the others, neither shall it affect the mode of proceeding on any joint contract or judgment.”

In section 3845 we find the provision that “when the powers of one executor or administrator ceases, the remainder may execute the trust, or, if none, administration de bonis non may be granted, and, if there be a will with it annexed.” And in section 3846, which provides for the removal of a personal representative under certain conditions, in the case of a removal it is further provided that “the other representative shall discharge the trust.”

When we come to the court decisions in regard to survival of powers we find a distinction drawn between a naked power and a power coupled with an interest. To quote from the court in Atzinger v. Berger,\(^2\) “The authorities are agreed that, if,

\(^2\) Estates, Future Interests (2d Ed.), p. 713.
\(^2\) 151 Ky. 802, 152 S. W. 971.
when fairly construed, the language used by the testator may be said to create a naked power, that is, a simple personal confidence reposed in the trustees by the testator, then, in order to pass title, it was necessary for both to qualify and convey; and the failure of one so to do necessarily had the effect of invalidating the conveyance. If, on the other hand, the effect of the language was to create a power, coupled with an interest, then the trustee who did qualify and, in pursuance of the authority granted, made the sale and conveyance, passed a perfect title.”

The court cited with approval the earlier cases to the same effect, Woolridge’s Heirs v. Watkins, 3 Bibb, 349; Coleman v. McKinney, 3 J. J. Marshall, 246; Muldrow’s Heirs v. Fox’s Heirs, 2 Dana, 74; and Clay & Craig v. Hart, 7 Dana, 1.

A recent case to the effect that a naked power must be exercised by all but that a power coupled with an interest may be exercised by the survivor, is Steele v. Cassell.29 There a deed conveyed land to husband, wife and children and gave the husband and wife power to sell the same. It was held that the husband’s death did not defeat the power but that the wife might exercise it in the interest of herself and her children. In Owsley v. Ead’s Trustee30 power to sell real estate and to reinvest the proceeds was conferred by will upon a trustee. It was held that this power was not exhausted by one sale and reinvestment. And in Bakewell v. Ogden31 the executors were empowered by the will to sell the realty within two years. They undertook to exercise the power ten years later. The court in holding they had no right to do so, intimated that they would have no authority to sell the lot at any time after the two years from the testator’s death.

(h) Gifts Implied in Default of Appointment

In the case of a power of appointment among a certain class and the donee of the power dies without having made the appointment, the question arises as to what disposition shall be made of the property where the donor made no provision in case of default of appointment. A devises to B for life with

---

29 173 Ky. 317, 191 S. W. 640.
30 22 Ky. L. R. 355, 57 S. W. 225.
31 2 Bush 265.
power to appoint among the children of C, and B dies without having appointed. Is this power given B to be regarded as one in trust for all the children of C or can it be regarded as an implied gift to them? Both theories have been advanced to sustain the gift where there is no provision made in default of appointment. The former, namely, raising a constructive trust in favor of all the members of the class is equitable; and the latter, the implied gift, is legal and is reached through construction of the language used in the will.

The Court of Appeals in McGaughey’s Adm’r v. Henry adopted the theory of an implied gift. There a testator devised part of his property as follows: “I will now designate the portions or tracts of land allotted and bequeathed to my beloved wife, Julia P.” (describing two tracts), “set apart for the exclusive benefit of my wife, to be disposed of in any way she may think proper, as life interest, and at her death, or before, to give said lands to any one or more of her children, as she may believe them most worthy or needy.” The wife died shortly after the testator without having exercised the power. The court held that her interest was a life estate and that the effect of the language used was to create a gift to the children as a class, subject to the wife’s power of selection and discrimination, and that the power having failed, the gift to the children as a class still remained.

The court in referring to 2 Jarman on Wills, side p. 485, laid down the doctrine, “that where the property is given to one for life, and afterward to such children, relations, etc., as he or she shall appoint, or among them in such proportions as the donee shall appoint, and there is no express gift to these objects in default of appointment, such a gift will be implied: the presumption being that the donor did not intend that the objects of the power should be disappointed by the failure of the donee to exercise it in their favor.”

As pointed out by Professor Kales in his work on Future Interests the doctrine of implication arose at a time when the courts were very favorably disposed toward finding gifts by implication in wills but that in the latter half of the 19th century they ceased to look upon them with favor and that unless the

15 B. Mon. 383 (1854).
2d Ed., section 637.
doctrine under discussion has been firmly settled in a particular case it is in a precarious position today. The English case of In re Week's Settlement bears out his contention. Professor Gray, who strongly supported the doctrine of gift by implication, has said: "The American cases lend no countenance to the novel doctrine of In re Week's Settlement."

In that case land was settled to the use of the wife for life, and on her death, as she should by will appoint, and in default of appointment, to B. Also by another settlement personal property was given in favor of the husband and wife for their lives, and on the death of the survivor, as the survivor should by deed or will appoint, and in default of appointment, to the children of the marriage. The wife by her will gave her interest in the land to her husband and also gave him power to dispose of both the land and personalty by will among their children. The husband died without appointing. The question presented to the court was whether B or the children took the land. It was held that B was entitled to it. Romer, Jr. in giving the opinion, said:

"The authorities do not show, in my opinion, that there is a hard and fast rule that a gift to A for life with a power to A to appoint among a class and nothing more must, if there is no gift over in the will, be held a gift by implication to the class in default of the power being exercised. In my opinion the cases show (though there may be found here and there certain remarks of a few learned judges which, if not interpreted by the facts of the particular case before them, might seem to have a more extended operation) that you must find in the will an indication that the testatrix did intend the class or some of the class to take—intended in fact that the power should be regarded in the nature of a trust—only a power of selection being, or, for example, a gift to A for life with a gift over to such of a class as A shall appoint."

Since the Kentucky Court of Appeals in adopting the doctrine of gift by implication relied upon the English cases, if a case were to come before it today involving the question presented in the case of In re Weekes' Settlement, is it not possible

---

34 L. R. (1897), 1 Ch. 289.
35 25 H. L. R. 18.
36 (1897) L. R. 1, Ch. 292.
that it might following this later English precedent, Professor Gray's objection to the contrary, notwithstanding?

(i) **Appointed Property as Assets**

As a general proposition when a general testamentary power of appointment is exercised by the donee in favor of one who pays no consideration, a "volunteer," the property becomes assets for the payment of the donee's debts and claims of his creditors will take precedence of the claims of the appointees. This doctrine is well stated by Knight Bruce, L. J., in *Fleming v. Buchanan*:

"On whatever grounds it was originally so held, it is and has for a long time been the settled law of the country, that if a man having a power, and a power only, over personal estate to appoint it as he will, exercises the power by a testamentary appointment, the property becomes subject in a certain order and manner to the payment of his debts, whatever may be the intention or absence of intention upon his part. Not only in point of principle and reason, but of precedent and authority, I apprehend that the same rule applies to real estate where it is subject to a general power exercised by will."38

This rule is said to have arisen out of consideration for creditors and is a rule of equity, and Lord Hardwicke said that equity intercepts the fund or stops it in transitu.39

The Court of Appeals in *Boyce v. Waller*40 after stating the rule as laid down in the English decisions, said: "And this judicial doctrine has been virtually recognized by the Legislature of this State, in that provision in the statute against fraudulent devises, which makes every voluntary execution of a general power of appointment by will, fraudulent as to the creditors of the donee of the power, unless they or some of them be the appointees."

(j) **Defective Execution**

In cases where it was provided in the instrument creating the power that the power should be executed in a certain way

---

37 Tiffany Real Property (2d Ed.) 1107.
38 3 D. & G. 976, 980.
40 9 Dana 478, 481.
and the donee attempted to appoint in a different manner than that specified, equity early came to the aid of the appointees who were (1) purchasers for value, (2) creditors, (3) persons for whom the donee was, by relationship, bound to make provision, and (4) charities; and compelled the person or persons entitled in default of execution to make good the defect.

Section 4829 of our statutes bears upon this point and provides: "No appointment made by will in exercise of any power shall be valid unless the same is so executed that it would be valid for the disposition of the property to which the power applies if it belonged to the testator; and every will so executed, except the will of a married woman, shall be a valid execution of a power of appointment by will, notwithstanding the instrument creating the power expressly requires that a will made in execution of such power shall be executed with some additional or other form of execution or solemnity."

The general principle that equity will aid a defective execution of a power when a proper case for such aid arises was approved by the Court of Appeals in Muldrow's Heirs v. Fox's Heirs\(^{41}\) in the following language: "Although a chancellor can not enforce the execution of a mere power, 2 Pr. Wms. 227, nevertheless, there can be no doubt that he may, on the application of a beneficial party, enforce the execution or supply the defective execution, of a power connected with a trust, or which it is the duty of the depository to execute. 4 Kent's Commentaries, 344; 2 Roper on Legacies, 300. Whenever the power fails in consequence of the death or accidental incapacity of its appointed depository, or whenever it is in danger of being frustrated or injuriously exercised the chancellor may interpose, and in a proper case, between the proper parties, his decree will be effected."

(k) What Words Exercise a Power

Closely allied to the subject of defective execution is the question, What words will be taken as an exercise of a power? As stated by Tiffany,\(^{42}\) "it is well settled that the instrument executing the power need not specifically refer to the power,

\(^{41}\) 2 Dana 74, 82.
\(^{42}\) 1 Real Property (2d Ed.), 1081.
provided it shows an intent to execute it. . . . . It has occasionally been said that the intent to execute a power must appear in one of three ways—either (1) by reference to the power; (2) by reference to the property which is the subject of the power; or (3) by reason of the fact that the instrument will be ineffectual unless considered as an execution of the power. It has, on the other hand frequently been considered that the intent need not appear in one of these ways, but that it is to be ascertained, as in any other case, by a construction of the whole instrument, with reference to the circumstances under which it was executed."

This question so far as testamentary powers are concerned is governed by section 4845 of the Kentucky Statutes, which provides that "a devise or bequest shall extend to any real or personal estate over which the testator has a discretionary power of appointment, and to which it would apply if the estate was his own property; and shall operate as an execution of such power, unless a contrary intention shall appear by the will."

This statute is not limited to general powers as is shown by the language of the court in Herbert’s Guardian v. Herbert’s Ex’rs.43 There the court said: "This provision of the statute evidently means that when the power of appointment is given to be exercised by a last will, that a devise of the testator’s whole estate to the person who, in the testator’s discretion, he has a right to designate, the person thus designated will take under the devise, and the same shall be regarded as the execution of the power, although the power given may not be mentioned or referred to."

As pointed out in McCormick v. Security Trust Co. of Lexington44 this statute applies to testamentary appointments only and we are left in the case of appointments by deed to the common law rule for guidance. In that case one E had a special power of appointment over certain land, exercisable by deed or will among her children. She had a life estate in the land, but besides the power, no other interest. She conveyed by deed part of the land to her son T in fee, reserving a life estate to herself but making no reference to the power. By will she devised all her property to her four children, including T, in

---

43 85 Ky. 134, 147.
44 184 Ky. 25, 28.
equal shares, but again she failed to mention the power. The court held that the power was exercised by both instruments.

(1) Execution in Excess of Power

When the donee of a power makes an appointment in excess of the power granted as a general rule courts will allow the part coming within the power granted to take effect and will hold the part in excess of the power void. This principle was recognized and followed in Johnson v. Yates.

(m) Powers in Life Tenant to Dispose of the Fee

One point further remains to be considered in dealing with the subject under consideration, that is to determine whether a power is given to a life tenant to dispose of the fee or not. Where a power of disposing of the land is given a life tenant some courts have regarded this power as allowing the life tenant to dispose of his life estate only, while other courts have taken the position that such a power gives the life tenant the right to dispose of the fee. It is claimed by those that take the first view that the remainderman's estate ought not to be sacrificed unless the language of the testator clearly indicates that the power to convey a fee is granted the life tenant. Courts taking the opposite view saw it would be superfluous to grant to the life tenant power to dispose of his life estate and therefore the testator must intend to give him power to dispose of the fee.

The Kentucky Court of Appeals has taken the latter view. In McCullough's Adm'r v. Anderson the testator devised his estate to his wife in the following words: "To my most precious and well beloved wife I give, during her life, all my estate, real and personal, whether in possession or in action, with full and ample authority to dispose of the whole of it as she pleases. At her death, should she not have previously made a testamentary distribution of all remaining undisposed of by her, I desire that such remainder shall be distributed as herein directed. The court held that this did not create a fee in the wife but a life estate only, with power to dispose of it and what remained at

45 284 Ill. 11.
46 9 Dana 491, 497.
47 90 Ky. 126, 13 S. W. 353.
her death went to the testator's devisees, and not to the heirs of the wife.

In *Coats' Ex'r v. Louisville & Nashville Railroad Company* there was a similar provision in a will. The testator devised all his estate to his wife "to be at her absolute disposal to sell, convey, transfer or expend as she may deem proper during her lifetime without restraint, she to receive all rents, dividends or interest on investments, or to convert the same into money or other investments at her discretion, and after her death the remainder of my estate unexpected by her I devise and bequeath as follows." It was held that one who purchased shares of stock sold by the duly authorized agent of the widow took a good title. The same result was reached in *Lee v. Fidelity Trust & Safety Vault Co.* The court quoted with approval the rule laid down in *McCullough's Adm'r v. Anderson*, namely: "After a careful review of all the authorities to which our attention has been called, the rule sanctioned and followed is this: If the estate is given or devised generally or indefinitely, with a power of disposition, it passes a fee, but when the devisor or grantor owning the fee gives to the first taker an estate for life, with the power to dispose of the fee, no greater estate is vested in the first taker than that carved out of the fee, and vested in him by the devisor or grantor. He is given a life estate in express terms, and the failure to exercise the power gives to the remainderman the fee, because, no disposition having been made of it by the life tenant, he takes under the will or conveyance."

"The rule thus announced is in harmony with the statute long in force in this state (see Ky. St. section 2345)."

Of similar purport are *Pedigo's Ex'x v. Botts*, *Mandel v. Fidelity Trust Co.*, *McCormick v. McCormick*, and *Trustees Presbyterian Church, Somerset v. Mize*.

After a survey of the Kentucky decisions dealing with questions relating to powers, one can not fail to note the fact that the court has relied to a great extent upon the English cases

---

48 22 Ky. L. R. 311, 57 S. W. 239.
49 28 Ky. L. R. 196, 89 S. W. 164.
50 32 Ky. L. R. 1085, 197 S. W. 775
51 121 S. W. 450.
52 181 Ky. 567, 205 S. W. 674.
in settling points as they have come before it for the first time and has generally followed the rules laid down by the English courts.

W. Lewis Roberts,
University of Kentucky, College of Law.
(To be continued)