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FRAUD ON SPECIAL POWERS OF APPOINTMENT[1]

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If one makes a will leaving his property to his wife for life and after her death as she shall appoint by her will, to the exclusion of one or any, he has avoided many of the disadvantages of a gift of the property to the wife absolutely, or of a life estate in the wife with a remainder to the children. This special testamentary power[2] of appointment secures a deferred division

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[1] A power of appointment is an authority to make a gift of another's interest in property. The creator of the authority is called the donor and the one to whom the authority is given is the donee. Where the same person is donor and donee, as where an owner of property conveys to trustees in trust for others, reserving a power to alter or revoke, the power is called a power of revocation. It differs from a power of appointment only in that the same person is donor and donee. Bullen v. Wisconsin, 240 U. S. 625, 36 Sup. Ct. 473, 60 L. Ed. 30 (1916); *In re* Goldwitz's Will, 145 Misc. R. 300, 259 N. Y. Supp. 900 (1932). Powers of appointment are to be distinguished from powers of sale, lease, exchange, etc. The authority that is created in this latter type of cases is so limited in scope that they present but few of the problems that arise in connection with powers of appointment. See *Leach, Powers of Sale in Trustees and the Rule Against Perpetuities* (1934), 47 *Harv. L. Rev.* 948.

[2] The two important classifications of powers of appointment are with reference to possible appointees and the method of execution. These two factors are the best (most times the only) indicators of the intention of the donor. Under the first classification are general and special powers; under the second, deed and testamentary powers. If the donee, at the time when the power is first exercisable may appoint to anyone, the power is general. Greenway v. White, 196 Ky. 745, 246 S. W. 147 (1922). For the statutory classification in New York see N. Y. Real Prop. Law (1909) c. 51, Secs. 134, 135. Gray combined the matters of appointees and manner of execution by defining a general power as a power to appoint to anyone, including the donee. *Gray, Release and Discharge of Powers* (1911), 24 *Harv. L. Rev.* 511. Kales agreed. *Kales, Estates Future Interest* (2d ed. 1920) Sec. 609. If at the time when the power is first exercisable the donee may only appoint to the members of a class or group, the power is special. The donee may be a member of that class. Wetmore v. Henry, 259 Ill. 80, 102 N. E. 189 (1913); Taylor v. Allhusen (1905) 1 Ch. 529. If the

of the property among the children according to the unforeseeable circumstances of the later time. This is a distinct advantage where the children are infants. The possible beneficiaries are limited just the same as in the case of the life estate with a remainder. At the same time the share of each is to depend upon the decision of the donee. This fosters the parental control of the surviving spouse. Equally important is the fact that the property is exempt from the debts of the donee.

As against these advantages there is one possible and one partial disadvantage. Since the power is testamentary the donee is prevented from making any appointment which will be effective prior to his death, except as the power may be released.[3] It is possible that there may be a real necessity for a gift to some of the children prior to the death of the donee. Also to a certain extent the success of the device depends upon the trustworthiness of the one who is to act as appointor. He may attempt to appoint to one not an object of the power; he may appoint to an object but for the purpose of benefiting one not a member of the class of objects; he may attempt to attach some collateral condition to an appointment to one of the members; and he may divide the property among the class according to his likes and dislikes and not according to to the needs of each.

It is the purpose of this discussion to make an examination of the extent to which the courts will go in exercising a control over the conduct of the donee in the last three types of appointments mentioned.

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power is exercisable only by will it is a testamentary power. If it may be exercised by deed or by deed or will it is a deed power.

It will be noted that there may be some powers that will not fit the definitions of either general or special powers. The donee may be authorized to appoint to all except one named person. Mines v. Gambrill, 71 Md. 30, 18 S. E. 43 (1889). So far as an appointment to the one named person should be concerned the power would be treated as special. But such a power should be considered as general in determining the liability of the appointed property for the debts of the donee.

A special power may be exclusive or non-exclusive. If the donee may exclude objects of the power, it is exclusive; if not, it is non-exclusive. Whether, under a non-exclusive power, each object of the power must receive a substantial part of the property subject to the power depends upon whether the doctrine of illusory appointments has been accepted in that jurisdiction. Accepted in Barrett v. Barrett, 166 Ky. 411, 179 S. W. 396 (1915). Rejected in Hawthorne v. Ulrich, 207 Ill. 430, 69 N. E. 885 (1904); Bailey's Estate, 276 Pa. 147, 119 Atl. 907 (1923).

[3] This can be avoided by making the power exercisable by deed. In so doing the chance is taken that there may be an early appointment when there is no need for it.

It is essential that the discussion be prefaced with the statement that the courts, in the absence of statute, never order the donee to make an appointment, never appoint for him, and never name one to act as donee should the one named by the donor fail to appoint.[4] The most that they will do is make an examination of an appointment after it has been made for the purpose of determining if it is within the scope of the power. That appointment may be sustained, wholly or in part, or it may be set aside.

In order to make an appointment under the power the one named as donee must act as such, and his action as donee is only valid when he is within the limits of his authority as to the appointees and the method of execution of the power. Therefore, any attempt by the donee to appoint to one to whom an appointment has not been authorized is ineffective.[5] This is called an excessive appointment, and it fails because it is made to a stranger to the power. It is not necessary to look beyond the appointee. If, however, the appointment is to one of the objects of the power on condition that the appointee convey to some outsider, the appointment may or may not be effective. This type of an excessive appointment[6] is called a fraud on the power, and it fails, if at all, because of the purpose of the donee in making it. It is necessary to look beyond the appointee. There is an inquiry into the purpose which prompted the appointment.

The selection of the phrase, fraud on the power, to describe this abuse of authority is unfortunate. Actual fraud is not necessary, and there are many cases in which it will be absent. Honest and reasonable belief as to the exact limts of the authority does not escape the accusation contained in the term. All that is meant is that the donee has attempted to accomplish some purpose not authorized by the power, or as it has been stated:

"The term fraud in connection with fraud on a power does not necessarily denote any conduct on the part of the appointor amount-

[4] "Where a power in trust is created by will, and the testator has omitted to designate by whom the power is to be executed, its execution devolves on the supreme court." N. Y. Real Prop. Law (1909) c. 51, Sec. 161.

[5] *Sugden, Powers* (8th ed. 1861) 498.

[6] See the distinction made between fraudulent and excessive appointments in Note (1929), 42 *Harv. L. Rev.* 419.

ing 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 with an intention, beyond the scope of or not justified by the instrument creating the power."[7]

Where a donor had limited the persons to whom an appointment could be made, it was evident that his intention was that the power should be exercised only for the purpose of benefiting one or some of those persons by the gift of this propetry. This would be true even though the donee should be authorized to appoint to all except one named person, although it would probably be stated in the negative form; there is no intention to benefit the one named person. If the purpose of the donor was to be effective it was necessary that the donee should not be permitted to accomplish some unauthorized purpose of his own. And yet so long as he appointed to one to whom an appointment had been authorized the appointment was valid in law.[8] Relief could only be had in equity, and it was natural that a term should be applied which would state a basis of equitable jurisdiction. The term, fraud on the power, was selected for that reason.

PURPOSES OF THE DONOR IN CREATING A SPECIAL POWER OF APPOINTMENT

An appointment by the donee to objects of the power can only be a fraud on the power when it does not accord with the purposes for which the power was created. To a great extent a study of fraud on special powers is a search for the purposes of the donor, and, in the majority of cases, they must be gathered from the written words used in the instrument creating the power and designating a class of persons as the beneficiaries. Clearly, the donor intends from this that an appointment shall be made to some member or members of the class, and for the purpose of benefiting the appointees. Most of the cases fall within this group. But the donor intends more than that. He intends that the benefit passing to the appointee by reason of the appointment shall be a benefit resulting from the gift of the property as property. In other words, he does not intend

[7] Vatcher v. Paull (1916) A. C. 373, 378.

[8] *Leake, Property in Land* (2d ed. 1909) 311, *Sugden, Powers* (8th ed. 1861) 606.

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.

APPOINTMENT FOR THE PURPOSE OF BENEFITING A STRANGER TO THE POWER

The most obvious cases of fraud on the power are those in which the donee, not an object of the power, appoints to one of the members of the class for the purpose of deriving some personal benefit. The gain to the donee which prompts the appointment may take a multitude of forms. It may be for the purpose of having the appointee reconvey to the donee,[9] pay the debts of the donee,[10] pay the donee a consideration for the appointment,[11] or act as bail for the donee.[12] The consideration need not move from the appointee. A third person may pay the donee a consideration for the appointment[13] or do some act which is desired by the donee in return for the appointment.[14]

Just as free from doubt are those cases in which the intended beneficiary is a third person. The appointment may be made for the purpose of having the appointee convey to an outsider,[15] convey to trustees in trust for cestuis, some of whom are strangers to the power,[16] or release some claim which the appointee may have, the release operating to the advantage of the non-members.[17]

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[9] Sikes v. Sikes, 163 Ga. 510, 136 S. E. 523 (1927).

[10] Chenoweth v. Bullitt, 224 Ky. 698, 6 S. W. (2d) 1061 (1928); Degman v. Degman, 98 Ky. 717, 34 S. W. 523 (1896); *In re* Cohen (1911) 1 Ch. D. 37; Hay v. Watkins, 3 Dru. & War. 339 (Ch. 1843); Jackson v. Jackson, Dru. 91 (Ch. 1843); Palmer v. Wheeler, 2 Ball & B. 18 (Ch. 1811).

[11] Beatson v. Bowers, 174 Ind. 601, 91 N. E. 922 (1910); Shank v. Dewitt, 44 Ohio St. 237 (1886). Payment of money in consideration of the exercise of the power to jointure is permissible. Saunders v. Shafto (1905) Ch. D. 126.

[12] Bostwick v. Winton, 1 Sneed 524 (Tenn. 1853).

[13] *In re* Wright (1920) 1 Ch. 108.

[14] Cochrane v. Cochrane (1922) 2 Ch. 230 (to have decree *nisi* of divorce from donee made absolute); Rowley v. Rowley, Kay 242 (Ch. 1854) (to have charges on the donee's property postponed).

[15] *In re* Carroll's Estate, 275 N. Y. Supp. 911 (Surr. 1934); *In re* Kirwan's Trust, 25 Ch. D. 373 (1883); Lee v. Fernie, 1 Beav. 483 (Rolls Ct. 1839); Daubney v. Cockburn, 1 Mer. 626 (Rolls Ct. 1816).

[16] Pryor v. Pryor, 3 De G. J. & S. 204 (Ch. App. 1864); Birley v. Birley, 25 Beav. 308 (Rolls Ct. 1858).

[17] *In re* Perkins (1893) 1 Ch. 283.

In all these cases the question is whether the appointment to an object of the power was made for the purpose of benefiting a stranger to the power. This necessitates an inquiry into the state of the mind of the donee at the time of the appointment.[18] The most convincing proof of a purpose to benefit an outsider will be found in those cases in which the act which will be beneficial to the outsider is provided for in the appointing instrument.[19] Evidence, however, which tends to show the purpose of the donee, even though not found in the appointing instrument, is necessarily admissable.[20] An agreement between the donee and the appointee to the effect that the appointee will use the property in a way beneficial to a stranger to the power,[21] or an agreement between the donee and a third person to the effect that the donee will appoint to an object of the power[22] are evidence of a fraudulent purpose. The case is strengthened where the agreement has been fully carried out, but it is not necessarily weakened by the fact that it has not been executed according to its exact terms.[23]

While any conveyance of the appointed property to the donee or some third person is some evidence of an intention on the part of the donee to appoint for the purpose of gain to himself or third person, it is not conclusive and may be overcome by evidence tending to show the contrary.[24]

Where an appointment has been made to an object of the power and there is nothing in the appointing instrument, nor any agreement between the donee and the appointee to the effect that the appointee shall use the property in a manner beneficial to a non-member, the appointment may still be a

[18] "In such a case (fraud on the power) what has to be proved is the intention of the appointor at the time when the power was exercised, which frequently necessitates evidence being given as to the state of mind of the appointor at that date." *In re* Wright (1920) 1 Ch. 108, 117.

[19] Chenoweth v. Bullitt, 224 Ky. 698, 6 S. W. (2d) 1061 (1928); *In re* Perkins (1893) 1 Ch. 283.

[20] *In re* Wright (1920) 1 Ch. 108.

[21] Sikes v. Sikes, 163 Ga. 510, 136 S. E. 523 (1927); Pryor v. Pryor, 3 De G. J. & S. 204 (Ch. App. 1864); Lee v. Fernie, 1 Beav. 483 (Rolls Ct. 1839); Daubney v. Cockburn, 1 Mer. 626 (Rolls Ct. 1816).

[22] *In re* Wright (1920) 1 Ch. 108.

[23] *Ibid.*

[24] Ingraham v. Meade, Fed. Cas. No. 7,045 at 55 (C. C. E. D. Pa. 1885); Budington v. Munson, 33 Conn. 491 (1886); McQueen v. Farquhar, 11 Ves. Jun. 467 (Ch. 1885).

fraud on the power.[25] The donee may have intended that the appointee should be told by a third person that the appointee should convey the property to some outsider, and, if so, the appointment must fail the same as though there had been an agreement between the donee and the appointee to that effect.[26] It is the purpose of the donee which renders the appointment a fraud on the power, and not any agreement that may have been made. The agreement is but evidence of the purpose, and where the purpose is shown by other evidence the absence of the agreement is of no consequence.

It is not in every case that donees have been forced to resort to an agreement, condition, or communication by a third person to the appointee in order to render the appointment one for the intended benefit of some outsider. More artful appointors have been quick to take advantage of the physical condition of an object of the power plus the state of the law as to succession of property. If an object of the power is in poor health and the strangers to the power intended to be benefited would succeed to the property on the death of this object, the donee may make an appointment to that member for the purpose of conferring a benefit on those to whom an appointment could not be made directly.[27] Of course he takes the chance that the appointee may not die as soon as he expected, but there may be a greater chance that the fraud will not be discovered since there is little in the way of external evidence.

Whether or not the appointee was in ill health at the time of the appointment would be of consequence in that it might tend to show the purpose of the donee.[28] But actual ill health would not be necessary; the mere belief of the donee that the appointee would soon die, from any cause, would be a sufficient peg on which to hang his intention to benefit a non-member.

[25] "Perhaps the most common instance of this (fraud on the power) is where the exercise is due to some bargain between the appointor and the appointee, whereby the appointor, or some other person not an object of the power, is to derive a benefit. But such a bargain is not essential. It is enough that the appointor's purpose and intention is to secure a benefit for himself, or some other person not an object of the power." Vatcher v. Paull (1915) A. C. 372, 378.

[26] *In re* Marsden's Trust, 4 Drew. 594 (Ch. 1859).

[27] Wellesley v. Mornington, 2 K. & J. 143 (Ch. 1855).

[28] The fact that the appointee is an infant and dies soon after the appointment is not sufficient proof of a fraudulent purpose. Henty v. Wrey, 21 Ch. D. 332 (1882); Beere v. Hoffmister, 23 Beav. 101 (Rolls Ct. 1856).

Since it is the purpose of the donee which is the significant factor in these cases, the actual facts are not so important as the belief of the donee with reference to those facts.

It is safe to state in view of the foregoing that nothing more likely to produce the result desired by the donee than his belief that the object of the power would, in the event of an appointment to him, convey to a third person, would be a sufficient base on which to rest a fraudulent purpose.[29] Such cases would be rare, but they might well arise where the donee's belief should be based on what he assumed to be a moral obligation of the appointee. Indeed, if the belief of the donee as to the health of the object of the power is the significant factor, rather than the actual health, no other conclusion is permissible.

Some doubt might be expressed as to the above case as well as to the case where the donee should take advantage of an agreement between an object of the power and a third person for the conveyance of any appointed property for the purpose of appointing to benefit the third person. It might be urged that the appointment must have been made for the purpose of benefit to the appointee since it must result, either from the satisfaction of a willing conveyance of the property or from the consideration given for the conveyance. This confuses two different matters. The deciding factor is the purpose back of the appointment. Actual benefit to the appointee should, at most, be no more than evidence which might tend to throw some light on the purpose of the donee in making the appointment.

It might well be that the stranger to the power would not receive the intended benefit. The appointee might refuse to convey the property in a case in which the donee had told a third person to so instruct the appointee. That the actual benefit of the appointment shall result to a member or members of the class of objects is but one part of the purpose of the donor to be gathered from the creation of a special power. Another and equally important part of that purpose is that the appointment shall be made with the intention of dividing that property

[29] There is but little more than this in *In re* Marsden's Trust, 4 Drew. 594 (Ch. 1859). But see Pryor v. Pryor, 3 De G. J. & S. 204, 210 (Ch. App. 1864): "The donee of a limited power of appointment may well execute it in favour of an object of the power, though he believes and knows that the appointee will at once dispose of the property in favour of persons who are not objects of the power."

among the class. It is the intention of the donor that the donee disregard the existence of persons other than the objects of the power in making appointments, except as the existence of these persons might be treated as circumstances to be considered in making a division of the property among the class, as, for example, the number of children of each object of the power.

A donee of a testamentary power may covenant with an object of the power that he will exercise the power in favor of that one to the extent of a certain sum of money. On principle it would seem that any appointment pursuant to the covenant would be open to the objection that it might have been prompted by a desire to save the donee's estate from any possible loss for breach of the covenant. Whether or not the covenant would be valid so as to support an action for damages would not necessarily determine whether the donee had appointed in accordance with the covenant for the purpose of relieving his estate of liability. He might think that a breach of the covenant would give rise to an action for damages.

However, if the covenant is valid so as to give rise to an action for the breach thereof, then the donee must have been under a duty to appoint as he had agreed. To hold that a performance of that duty would be a fraud on the power would be placing the donee in the position of almost inability to perform. If he appointed as he agreed the appointment would be set aside as a fraud on the power. About the only possible means by which he could avoid an action for damages would be to let the property pass in default of appointment, and that would not help where he should have covenanted to appoint more than each object would receive in default of an appointment. One is forced to conclude that, if an action for damages may be maintained for breach of the covenant, an appointment pursuant to the covenant cannot be a fraud on the power, even though the donee did so appoint to relieve his estate of liability.

Stuart v. *Lord Castlestuart*[30] was the first case in which this problem was presented. In that case the donee had a power to appoint property by deed or will among his children. He became surety on a debt of one son, and by his will he appointed an amount equal to the debt to that son on condition that the appointee pay the debt. The court dismissed the con-

[30] 8 Ir. Ch. R. 408 (1858).

tention that the donee might have appointed for the purpose of benefiting some one other than the appointee by stating that:

"In the cases which have been cited, some benefit was derived by the donee of the power, so as to constitute fraud. The decision of the Master has carried the principle further than any case that I am aware of, there being no ground whatever for imputing to the testator that he executed the power with any fraudulent or improper motive, or with a view to any benefit to himself."[31]

This language would seem to indicate that the court was under the impression that any intention to benefit those who would succeed to the property of the donee on his death would not be a fraud on the power. Certainly, one cannot escape from the feeling that the very purpose of the appointment of this sum to the appointee was to relieve the estate of the donee of any possible liability.[32] It is no answer to state there was no intention to derive a personal gain.

Yet it is possible that the result of the *Stuart* case is the one that could and should have been reached on another ground. The objects of the power were the children of the donee. For aught that appears they were the only ones who would be benefited by any saving of the estate of the donee. To the extent that they were the only ones who would gain by reason of the removal of any liability of the estate the result may be right. There might not then be any intention to benefit strangers to the power since the objects of the power are the beneficiaries of the estate of the donee as well as the property subject to the power.[33]

In *Coffin* v. *Cooper*[34] the donee had a testamentary power to appoint property among her children. She covenanted with one son and a third person that she would exercise the power in favor of the son to the extent of £1,000. She did so appoint and the court sustained the appointment.

The reason given for the decision was the rule permitting the release of such a power by the donee, plus the decision in

[31] *Id.* at 419.

[32] This is supported by the following extract from the opinion: "The object, however, of the testator in this case, was not to obtain any benefit for himself as the will would not take effect until his death. His object was to prevent the injustice to his other children of having that which was not the testator's own debt paid out of his general property."—*Id.* at 418.

[33] Vatcher v. Paull (1915) A. C. 373.

[34] 2 Drew & Sm. 365 (Ch. 1865).

the case of *Davies* v. *Huguenin*[35] to the effect that a covenant not to exercise a power so as to diminish the amount which an object would receive in default of appointment constituted a release of the power.

The conclusion that a covenant to appoint a certain sum must be treated in the same way as a covenant not to appoint so as to diminish the share which an object would receive in default of appointment appears to be perfectly sound. Yet there is a difference which, so far as the cases are concerned, is substantial. It is the difference between an appointment and a default of appointment.

Under the English law the donee of a testamentary power may exercise the discretion given to him as to the shares of the objects of the power prior to the time when he could make an appointment by releasing the power.[36] But a release means that the power is extinguished and that the property must pass in default of appointment. And though there may be a release as to one object of the power, to hold that a covenant to appoint any amount is a release of the power is to lose sight of the fact that a release should never be permitted to give an object of the power more than he would receive in default of appointment.[37] Therefore, if the donee in the *Coffin* case covenanted to appoint more to the son than he would have received in default of appointment, the covenant should not have been treated as a release of the power. This would leave but two grounds on which to support the result of the case. One is that mentioned in connection with the *Stuart* case and the other is that a breach of the covenant would support an action for damages.

The facts of the case of *Palmer* v. *Locke*[38] are similar to the facts in the *Coffin* case. The donee of a power to appoint property among his children, made a will appointing a certain sum to one son, and he later executed a bond to that son that he would, out of the property over which he had the power of appointment or his property, leave that son the amount which he had already appointed to him in his will. He did appoint this sum to the son. In sustaining the appointment, the court discussed the question of the liability of the estate of the donee

[35] 1 Hem. & M. 730 (Ch. 1863).
[36] *Law of Property Act*, 15 *Geo. V*, c. 20, Sec. 155 (1925).
[37] *In re* Cooke (1922) 1 Ch. 292; *In re* Evered (1910) 2 Ch. 147.
[38] 15 Ch. D. 294 (1880).

for breach of the promise to appoint a certain sum, but refused to decide the case on that ground.[39] Once more it might be possible to sustain the result of the case on the ground that the objects of the power were the only ones who would have gained through any saving of the estate of the donee.

It has been stated that "to hold such appointments bad as a device would be to strain the doctrine as to improper appointments too far."[40] It is possible that that statement may have resulted from the belief that to hold that there could be fraud in these cases would mean that every appointment would have to be set aside. But the mere possibility of fraud does not mean that it is present. It still must be found that the donee did appoint for the purpose of relieving his estate of liability so that strangers to the power might be benefited thereby. This improper purpose will not be present in those cases in which the objects of the power are the only persons who would benefit from any saving of the estate of the donee.

The net result of the English authorities is that an appointment which may have been made for the purpose of benefiting some stranger to the power is not a fraud on the power if that appointment is in accordance with a covenant made with the appointee to so appoint. None of the reasons which are advanced in favor of this result should lead the American courts to hold that there can be no fraud as a matter of law.

It is submitted that a covenant to appoint to an object of the power should not be held to give rise to an action for damages for breach thereof so long as the power is testamentary. The effect would be to permit an appointment by deed, and, where the property subject to the power should be a sum of money, an award of damages would, in effect, be the same as a decree of specific performance. This would mean that the donee could effectively exercise a discretion that should have been retained to the time of his death.

Moreover, the object of the power has no just cause for complaint since he is claiming under the power and against the

[39] For a later decision to the effect that there can be no action for damages for breach of the covenant see *In re* Bradshaw (1902) 1 Ch. 436.

[40] Lord Hatherly, L. C., in Bulteel v. Plummer, L. R. 6 Ch. App. 160, 163 (1870). Referred to with approval by James, Brett, and Cotton, L. JJ., in Palmer v. Locke, 15 Ch. D. 294 (1870) at 299, 301, and 304 respectively.

donee as donee. To him it should be said that the donee covenanted to exercise a discretion once and for all when the donor intended it should remain open to him to the time of his death. The donee and the object of the power should be required to observe this intention of the donor.[41]

This, plus the fact that the American courts have never gone to the extent of the English courts in holding covenants to exercise or not exercise a power to be a release,[42] should lead the former to take the position that an appointment in accordance with a covenant made with the appointee to so appoint may be a fraud on the power. This would still leave open in each case the question as to whether the donee had, in fact, appointed for the purpose of benefiting a stranger to the power.

APPOINTMENTS MADE FOR THE PURPOSE OF CONTROLLING THE FUTURE CONDUCT OF OBJECTS OF THE POWER

Where the appointor is not restricted as to appointees, except as by the method of appointment, the power is general and is said to be for the benefit of the donee.[43] Beginning with a restriction of one person and adding a few at a time,[44] a point is eventually reached where it can be definitely ascertained that the power is for the benefit of those to whom appointments can be made.[45] The line between the two is more or less arbitrary, and more is not now said than that it is reached in those cases in which the power is to appoint among a class such as children, heirs, or next of kin.

When it is stated that a general power is for the benefit of the donee, what is meant is that the power is given to the donee so that he may have such satisfaction as is to be derived from the disposition of the property. The donor intends to

[41] It is on this ground that a deed power is to be distinguished. The donee of a deed power who covenants to exercise that power in favor of an object of the power is exercising a discretion which the donor intended might be finally exercised at any time. He could appoint at the time when the covenant is made.

[42] See *Simes, Powers in Trust and the Termination of Powers by the Donee* (1927) 37 *Yale L. J.* 63, 211; *Gray, Release and Discharge of Powers* (1911) 24 *Harv. L. Rev.* 511.

[43] *Kales, Estates Future Interest* (2d ed. 1920) Sec. 611.

[44] Many interesting problems are suggested by a power to appoint to anyone by the name of Smith.

[45] Special is used here to mean that kind of a power, unless otherwise indicated.

confer on the donee all the attributes of ownership insofar as the conveyance of the property is concerned. Therefore, it is to be concluded from the mere creation of the power that the donor intended the discretion of the donee as to appointees to be as broad as the discretion of an owner. In order to render the discretion of the donee any less than that of an owner there must be something in the instrument creating the power indicating such intention on the part of the donor.

The donee of a special power, one given for the benefit of the objects of the power, starts with a much more limited authority. Without some contrary intention, it is reasonable to conclude that there is, in addition to the intention that appointments shall be made for the purpose of benefiting the objects of the power, an intention that the appointments shall be made for the purpose of benefiting the appointees by a gift of the property as property;[46] that the gift of the property to an object of the power shall not be used for the purpose of controlling the future conduct of the appointee. Without a contrary intention, the donee's authority extends only to a selection of the appointees and the quantum of property that those appointees shall have. If the donor intends that the authority of the donee should be any broader, the burden is on him to use words showing such an intention.

In support of this position is the case of *D'Abbadie* v. *Bizoin*.[47] The donee was given a power to appoint among her children in such shares as she should choose. She directed that part of the property subject to the power be sold and the proceeds be used to purchase other property in France which should belong to one of the objects of the power if he should decide to reside in France. In holding the appointment invalid, it is stated that the purpose of the appointment was to induce the appointee to reside in France and that this is "... an indirect object not warranted by the power."[48] Obviously one cannot, in the face

[46] "A party having a power like this (special power of appointment) must fairly and honestly execute it without having any ulterior object to be accomplished. He cannot carry into execution any indirect object, or acquire any benefit for himself, directly or indirectly. It may be subject to limitations and directions, but it must be a pure, straightforward, honest dedication of the property as property, to the person to whom he affects, or attempts, to give it in character." Lord St. Leonards in Portland v. Topham, 11 H. L. Cas. 32, 55-56 (1864).

[47] 5 Ir. R. Eq. 205 (1871).

[48] *Id.* at 213.

of the condition, contend that the purpose of the donee was to make a gift of the property as such. From the language used in the appointing instrument the donee intended to use the appointment as a means of controlling the future residence of the appointee, a matter clearly not within the scope of the power.

To the contrary is the case of *Hodgson* v. *Halford*.[49] The power given to the donee was similar to the power created in the *D'Abbadie* case. The appointments were on condition that should any of the appointees cease to profess the Jewish religion, or marry anyone not born a Jew, the share of that child was to be forfeited. The appointment was sustained, and in answer to the contention that the appointment was not authorized by the terms of the power, it is stated that:

"In the absence of any authority to the contrary, I think that a power such as this given to a parent to appoint amongst his children ought not to receive a limited or narrow construction, but ought rather to be construed so as to embrace every ordinary provision which a parent might make, and which might be useful or available for the children amongst whom and in whose favor the power is to be exercised."[50]

While there is much truth in the claim that a power to appoint among one's children may be given for the purpose of controlling the conduct of the children up to the time of the appointment through the threat of reducing shares and excluding objects,[51] the statement just quoted from the *Hodgson* case goes far beyond that, and is erroneous in that it permits the donee to control the conduct of the objects of the power beyond the time when an effective appointment could last be made.

Just as clearly as in the *D'Abbadie* case, the purpose of the donee in the *Hodgson* case was to control the conduct of the appointees by means of the appointment beyond the time within which the power must have been exercised, if at all. There is no ground for distinguishing the conditions in the two cases. The fact that one was precedent and the other subsequent is

[49] 11 Ch. D. 959 (1879).

[50] *Id.* at 966.

[51] "The end and purpose of the power is the benefit of the children; and it appears to me to be a principle that the donee in the exercise of the power should have that object alone in view. Of course I do not exclude the consideration that the donor may have also intended to keep the children under the parents' control where a parent is a donee of the power." Kindersley, V. C., in Coffin v. Cooper, 2 Drew. & Sm. 365, 373-374 (Ch. 1865).

immaterial. The two cases are in conflict, and every consideration points to the *D'Abbadie* case as having reached the correct result.

An appointment may be made on condition that the appointee pay a debt which he owes to a third person.[52] Of course there is always the possibility that such an appointment may have been made for the purpose of benefiting the creditor. Aside from that, the condition would render the appointment a fraud on the power in that it shows a purpose on the part of the donee to control the use to be made of the appointed property, a matter also not within the scope of the power.[53] The same would be true of an appointment on condition that the appointee purchase certain property. The fact that the appointee could perform with other money or property does not alter the result. It still remains that the appointor's purpose is not to benefit the appointee by the gift of the property, but by the gift of the property plus the manner in which the property or its equivalent shall be used.

The intention to use an appointment for the purpose of controlling the conduct of the appointee beyond the life of the power could as well be found in the case in which the appointor should make use of an agreement with the appointee rather than a condition in the appointing instrument. In return for the promise of the object of the power to live in a certain place, the appointment might be made for the purpose of securing performance of the promise. An appointment under such conditions should be treated in exactly the same manner as an appointment on condition that the appointee live in a certain place.

It may be thought that an inquiry into the purpose of the donee is unnecessary since the donee is or is not authorized to make conditional appointments; and if he is authorized to make

[52] The appointing instrument in Stuart v. Lord Castlestuart, 8 Ir. Ch. R. 408 (1858), contained such a condition. In Coffin v. Cooper, 2 Drew. & Sm. 365 (Ch. 1865), the appointing instrument directed that the sum appointed should be paid to the creditor of the appointee.

[53] The donee of a special power may appoint the real property which is subject to the power to one object with a charge in favor of other objects. Darling v. Edson, 4 Pa. Super. Ct. 498 (1897). Unless there is something to indicate that the donor intended the specific property to be appointed, the donee of a special power may direct that the property be sold and the proceeds divided among the objects of the power. McNeile's Estate, 217 Pa. 179, 66 Atl. 328 (1907). But in both cases the particular appointments are made for the purpose of distributing the property among the objects of the power.

conditional appointments, it makes no difference whether or not the appointee has any control over the condition—a power to appoint conditionally authorizes the appointments on any conditions that an owner might make in the disposition of his property. If the donee is only authorized to appoint on certain conditions, it necessarily follows that he cannot appoint on any other condition.

As a practical matter it may make little difference whether the appointment is called excessive or fraudulent, and it must be conceded that there is much merit in the contention that the entire problem of conditional appointments could be treated as a matter of excessve appointments. But to the extent that a conditional appointment may show a desire on the part of the donee to accomplish some purpose not authorized by the donor, it may also be treated as a matter of fraud on the power. This latter method of approach is in accord with that pursued in those cases in which the appointment was made on condition that the appointee do some act intended to benefit a stranger to the power.[54]

APPOINTMENTS PROMPTED BY THE LIKES AND DISLIKES OF THE DONEE

It has been stated that, "The mere motive of an appointment apart from the purpose to be effected by it, as the indulgence of feelings of preference or animosity towards the objects, is immaterial to the validity."[55] All that is meant by that is that the donee may prefer one object to another for any reason so long as there is no intention to benefit an outsider or control the conduct of the appointees beyond the life of the power. There is nothing startling in such a proposition. The donor only intended such persons to take and such shares as the donee, in his discretion, should determine. Unless otherwise restricting the donee by the instrument creating the power, the donor must have intended that the appointor be as free in the disposition of this property among this group, so long as his only consideratoin was the division of the property as such among them, as the donor would have been. Doubtless the donor hoped that the donee would appoint only after due con-

[54] Chenoweth v. Bullitt, 224 Ky. 698, 6 S. W. (2d) 1061 (1928); *In re* Perkins (1893) 1 Ch. 283.

[55] *Leake, Property in Land* (2d ed. 1909) 312.

sideration of the needs and merits of each object of the power, but it would be need and merit as determined by the donee. Personal feelings will invariably find their way into such personal determination, and to make that a ground for attacking the appointment is to render it impossible for the donor to obtain the very thing he desired—the discretion of the donee.[56]

It is one thing to make an appointment of all of the property to one or some of the objects of the power because of the conduct of those excluded. So long as the power is exclusive that is a matter within the discretion of the donee. It is an altogether different thing to make an appointment covering all of the property, but which the donee and the appointee secretly agree is to apply to only one half of the property, for the purpose of controlling private affairs of the other objects of the power. This is just as clearly not within the scope of the power. A donee is never permitted to feign an appointment for the purpose of inducing certain action on the part of an object of the power.

In substance this is the principle to be gathered from the case of *Portland* v. *Topham*.[57] In that case there were two objects of the power, and the income from the property was to be paid to them as tenants in common pending an appointment. The donee appointed all the income to one for the purpose of inducing the one excluded to separate from her husband. The appointee was never told that she was entitled to all the income, and she paid over one half to be held at the disposal of the donee. It is a clear case of a pretended appointment to one object of the power for the purpose of controlling the future conduct of other objects.

VALIDITY OF THE APPOINTMENT[58]

Whether an appointment to an object of the power is or is not invalid because of the fact that it has been made for a

[56] "In cases where it is not suggested that the donee of a special power has exercised the power with the intention of benefiting himself or some other person not an object of the power the Court will not as a rule examine into the motive which may have induced the donee to exercise the power in favour of a particular object of the power. The donee is entitled to prefer one object to another from any motive he pleases, and however capriciously he exercises the power the Court will uphold it." *In re* Wright (1920) 1 Ch. 108, 117-118.

[57] 11 H. L. Cas. 32 (1864).

[58] A court will not permit the intended benefit to the stranger to

purpose beyond the scope of the power must depend upon the intention of the donee. If there is nothing in the appointing instrument to indicate that the appointor intended the appointment to the object of the power to be effective, even though the improper purpose desired by the appointment could not be, then the appointment fails.[59] If, however, there is an intention that the appointee shall take the property appointed irrespective of the intended benefit to the stranger to the power, or the attempt to control the future conduct of the appointee, the appointment is valid.

A donee may, in one instrument make two appointments, the second to be effective if the first cannot be. That the first may have been prompted by a desire to accomplish a purpose not warranted by the power is no reason for refusing to give effect to the second if it is within the scope of the authority. Where the donee foresees the possibility and pursues this course the task is a simple one.

In those cases in which there is no expressed intention one way or the other, there is the question as to whether this intention may not be found in the circumstances surrounding the appointment. Thus, in the event of an appointment of $1,000 to an object of the power on condition that he pay $500 to a stranger to the power, it may be felt that there is an intention to benefit the appointee to the extent of $500 since that is the sum which the appointee would have for himself after paying the $500 to the outsider.

Although the appointee would profit if the donee's intention should be carried out, it cannot be said that there is any intention to benefit the appointee aside from the intended benefit to the outsider.[60] It may well have been that the donee appointed the additional $500 to the appointee as an inducement for the performance of the condition.

The problem is of the same nature in those cases in which the appointment is made for the purpose of controlling the fu-

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the power to take effect. Where, however, seasonable objection is not made, the outsider may receive the benefit of the appointment. See Bostick v. Winton, 1 Sneed 524 (Tenn. 1853); Cochrane v. Cochrane (1922) 2 Ch. 230.

[59] Chenoweth v. Bullitt, 224 Ky. 698, 6 S. W. (2d) 1061 (1928); Vatcher v. Paull (1915) A. C. 373.

[60] *In re* Carroll's Estate, 275 N. Y. Supp. 911 (Surr. 1934); Daubney v. Cockburn, 1 Mer. 626 (Rolls Ct. 1816).

ture conduct of the appointee. Is it possible to find a separate intention to benefit the appointee, or is it so tied up with the improper purpose that there can be no separation? Certainly an appointment to a member of the class on condition that he reside in a certain place or profess a certain religion does not contain any facts which might show an intention to benefit the appointee by a gift of the property as such and independent of any intention to control the future conduct of the appointee.[61]

An appointment on condition that the appointee pay a debt he owes or purchase certain property, assuming that it is not made for the purpose of benefiting a stranger to the power, differs from the other situations in that it calls for a single act on the part of the donee and is designed to benefit the appointee through an exchange of the property appointed for the debt that is owed or other property. These facts would seem to indicate an intention on the part of the donee that the appointment should be effective apart from the condition.[62] The appointment partakes much of the nature of benefit to the appointee and little of the nature of control over the conduct of the appointee.

The appointing instrument may contain appointments to several of the objects of the power with a condition annexed to one requiring that appointee to pay a certain sum to a stranger to the power. The Ohio Court,[63] when confronted with this problem, held that all the appointments failed on the ground that those who were given smaller shares might have received more but for the fraud on the power in connection with the one appointment.

That the donee might have appointed more to some of the objects but for his desire to confer a benefit on a stranger to the power is beside the point. It still remains that he did intend the appointees on whom he imposed no conditions to receive the amounts appointed to each, unless there is something to indicate that he intended each appointment to be conditional upon the effectiveness of every other appointment. Where there is no express intention in the appointing instrument there is about as much reason for reaching one conclusion as the other.

Since an appointment is a fraud on the power because it is

[61] D'Abbadie v. Bizoin, 5 Ir. R. Eq. 205 (1871).
[62] Coffin v. Cooper, 2 Drew. & Sm. 365 (Ch. 1865).
[63] Shank v. Dewitt, 44 Ohio St. 237 (1886).

contrary to the purposes for which the donor created the power, it necessarily follows that later appointments to other objects for the purpose of equalizing the shares cannot cure the fraudulent appointment.[64] Equally without effect in determining the validity of the appointment is the fact that the appointee may consent to the act which the donee attempts to impose upon him for the benefit of the outsider.[65]

PURCHASER FROM THE APPOINTEE

The cases state that an appointment made for a purpose foreign to the power is void.[66] The Court of Appeals of Kentucky, after cautioning itself with regard to the use of loose language, concluded that the use of the word void is ". . . an accurate expression designating the result of an attempt to perform an act which the performer has no authority to perform."[67]

Opposed to this is the conclusion of Farwell, L. J., stated in the case of *Cloutte* v. *Storey*[68] as follows:

"The law may be stated thus: An appointment under a common law power, or a power operating under the Statute of Uses by which the legal estate has passed is voidable only, and a purchaser for value with the legal estate and without notice is not affected by the fraudulent execution of the power; but an appointment in fraud of an equitable power, i. e., not operating so as to pass the legal estate or interest is void, and a purchaser for value without notice but without the legal title can only rely on such equitable defenses as are open to purchasers without the legal title who are subsequent in time against prior equitable title."[69]

That the conclusion of Farwell is sound would appear from the following analysis: So long as the appointment is to an

[64] Harrison v. Randall, 9 Hare 397 (Ch. 1852).

[65] Chenoweth v. Bullitt, 224 Ky. 698, 6 S. W. (2d) 1061 (1928).

[66] In none of the cases is the appointment said to be voidable.

[67] Chenoweth v. Bullitt, 224 Ky. 698, 724, 6 S. W. (2d) 1061, 1072 (1928). In that case property was left to *A* and his wife, *B*, during their lives, and the life of the survivor, and then to such of the donor's lineal heirs as *A* should devise by will. *A* devised to one of the donor's lineal heirs on condition that he pay *A's* debts and also pay *B* an annual sum. *B* survived. After *B's* death suit was brought by the heirs of the donor for a sale of the property and division of the proceeds. One defense was the statute of limitations applicable in cases of fraud. The court avoided consideration of this defense by treating the appointment as void, since the statute of limitations would only be applicable if the proceedings were to avoid the appointment. No reason, aside from the fact that the cases say the appointment is void, was given for the holding in this case.

[68] (1911) 1 Ch. 18.

[69] *Id.* at 31.

object of the power and is executed in the manner provided by the donor, the appointing instrument operates to convey the interest in the property which is subject to the power of appointment. Where that interest is the legal estate, no further conveyance is necessary and a purchaser for value and without notice from the appointee would get the legal title, and so take free and clear of the equities of the other objects of the power.[70] Where the interest subject to the power is equitable, an appointment could only pass an equitable interest, which is all that a purchaser could get from his vendor. Having only an equity in that case which would necessarily be subsequent in time to the equities of the other objects of the power, the purchaser would not be protected.[71]

The question then arises as to whether one could ever be a purchaser without notice if the appointing instrument contains the condition, agreement, or other facts which reasonably indicate the purpose of the donee which is foreign to the power. The appointing instrument is a direct link in the chain of title of the purchaser. Purchasers are held to knowledge of the essential contents of instruments in their chain of title, regardless of the fact that the instruments may not be of record.[72] The question, then, must be answered in the negative. So, as a practical matter, the correct result is reached when it is said that fraud on the power renders the appointment void, if the appointing instrument gives reasonable notice of the facts which render the appointment fraudulent.

LATER EXERCISE OF THE POWER

Given a case in which the power is exercisable by deed, the fact that an appointment by deed has been set aside as a fraud on the power does not prevent a later exercise of the power.[73]

[70] The bona fide purchaser from the appointee is protected in England by statute to the extent that the property is equal in value or amount to that to which the appointee was presumptively entitled in default of appointment at the time of the appointment, provided that the appointee was at least twenty-five years of age. *Law of Property Act*, 15 *Geo. V*, c. 20, Sec. 157 (1925).

[71] Cloutte v. Storey (1911) 1 Ch. 181.

[72] *Tiffany, Real Property* (2d ed. 1920) Sec. 572.

[73] After setting aside an appointment in Portland v. Topham, 11 H. L. Cas. 32 (1864), a later appointment was examined in Topham v. Portland, L. R. 5 Ch. App. 40 (1869). In Cochrane v. Cochrane, (1922) 2 Ch. 230, an appointment was set aside as a fraud on the power and it was assumed that the donee might later exercise the

The improper purpose of the donee affects the appointment only and not the power or the position held by the donee.

Even though the donee is still free to exercise the power, a second appointment to the same appointee as the one which has been set aside as a fraud on the power, not under any new arrangement between the donee and the appointee, might still be fraudulent because of the original purpose. The fact that the first appointment to this appointee was fraudulent is relevant evidence in determining the purpose of the donee in the second appointment. The weight to be given to such evidence should depend upon the circumstances, such as a comparison between the amounts appointed in each case and the time that has elapsed between the two appointments.

A second appointment of the same amount to the same appointee was set aside in the case of *Topham* v. *Duke of Portland*.[74] The court stated that ". . . a second appointment by the same donee to the same appointee cannot be sustained otherwise than by clear proof on the part of the appointee that the second appointment is perfectly free from the original taint which attached to the first."[75] This means that the prior fraudulent appointment gives rise to a presumption that the purpose remains in the second appointment. It is doubtful if that should be extended beyond the case in which the second appointment is of the same amount as the first and follows within a reasonably close period of time.

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power. "I note Sir Ernest's offer to ensure the plaintiff (the first appointee) should take a share equal to that of his other children, and I hope that he will take steps to give effect to that offer; but the matter is not one as to which I ought to put him on any terms." *Id.* at 254, 255.

[74] L. R. 5 Ch. App. 40 (1869).

[75] *Id.* at 62.