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INFANTS' EXERCISE OF POWERS OF APPOINTMENT

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The concensus of case authority is that infants may not exercise powers appendant or in gross; some authorities would impose even more stringent restrictions. Professor Stoebuck points out that these restrictions, borrowed from conveyancing law, impinge upon the basic powers-of-appointment concepts. Moreover, the restrictions are not applied consistently with the conveyancing law from which they are taken. The article concludes with a proposal that an infant's exercise of a power be held voidable, but not void, to the extent it would prejudice his owned interest in the property.

MUCH has been said about the literality of the medieval mind and the inflexibility of old common law. The modern student of English legal history cannot but marvel at the strictness of the forms of pleading or the ceremony of livery of seisin. But literalism has another side, about which far too little or nothing has been said, a side that invites change — that, paradoxically, promotes flexibility.

A system that conforms to the very letter of the law, where form surpasses content, bids ingenious men to accomplish by indirection that which by direct action is forbidden. None doubt that the common-law lawyers were ingenious men. Nowhere was their ingenuity applied with more success than to the harsh, feudalistic, increasingly anachronistic land law. Thus, for instance, contingent remainders could be destroyed by common recovery or merger;[1] fee tail could be barred by common recovery.[2] The greatest of all these evasive devices was the use, particularly when combined with its frequent comrade, the power of appointment. Indeed, at an early date there seems to have been no clear distinction between powers, as known today, and uses. The inference is plain that legal suspicion directed toward the use found its way also to powers, because of the connection between the two. A nascent suggestion of this connection can be found running back into the 12th century, nearly to the Conquest. By then the use was being employed to make conveyances that could not be made by livery

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[1] SIMES, FUTURE INTERESTS 50-51 (1951).

[2] *Id.* at 11.

of seisin. For instance, sokemen and villeins, who could not convey in their own names, would circumvent this restriction by surrendering to their lords "to the use of" those persons to whom they wished to pass title.[3] Though the lord as a strawman bears some resemblance to the donee of a power, still he is not, because his function cannot be separated from legal title. The first record of a true power is in the 13th century, around Bracton's time (d. 1268). At that date, until the Statute of Wills[4] in 1540, land could not be devised. But the practice developed of a feoffor's conveying land to a feoffee to the use of such persons as the feoffor should appoint in his will.[5] When the feoffor appointed by will, the land was viewed as passing, not as a devise under the will, but by force of the original conveyance, a concept that will take on ultimate significance later in this article.[6]

Powers of appointment were born as an evasion of the rule against devising land and continued in the capacity of evaders of the land law. Conveyances could be made without livery of seisin by conveying to another "upon such trusts as should afterward be appointed."[7] The Statute of Wills allowed the devise of only a two-thirds interest in lands held in knight service, but by giving himself the power to appoint by will, the owner could in effect, if not in name, devise his whole interest.[8] A married woman, though she lacked capacity to convey land without her husband's concurrence or capacity to make a will, might execute a power of appointment inter vivos or by an instrument effective upon her death.[9] Powers have a well-known utility in avoiding the rights of creditors.[10] Finally, infants having no capacity to make a binding conveyance, might, to the limited extent to be examined in detail later, appoint land. Thus, the subject of this article is in part a study of one evasion of the common law.

We might suppose there would be a counteraction to all this

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[3] PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 577 (5th ed. 1956); 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 228 (1895).

[4] 32 Hen. 8, c. 1.

[5] PLUCKNETT, *op. cit. supra* note 3, at 577; SIMES & SMITH, FUTURE INTERESTS § 872 (2d ed. 1956); 1 SUGDEN, POWERS 1-4 (1856). Good brief discussions are found in Berger, *The General Power of Appointment as an Interest in Property*, 40 NEB. L. REV. 104 (1960), and Bolich, *The Power of Appointment: Tool of Estate Planning and Drafting*, 1964 DUKE L. J. 32.

[6] Sir Edward Clere's Case, 6 Co. Rep. 17b, 77 Eng. Rep. 279 (K.B. 1599); SIMES & SMITH, *op. cit. supra* note 5, § 872.

[7] 1 SUGDEN, POWERS 1-4 (1856); Halbach, *The Use of Powers of Appointment in Estate Planning*, 45 IOWA L. REV. 691 (1960).

[8] Sir Edward Clere's Case, 6 Co. Rep. 17b, 77 Eng. Rep. 279 (K.B. 1599).

[9] *E.g.*, Osgood v. Bliss, 141 Mass. 474, 6 N.E. 527 (1886); Deffenbaugh v. Harris, 6 Atl. 139 (Pa. 1886); Woodson v. Perkins, 5 Grat. (Va.) 345 (1849); Grange v. Tiving, O. Bridgman 107, 124 Eng. Rep. 494 (C.P. 1665). The practice of giving a married woman power to appoint lands came to be a standard feature of marriage settlements.

[10] *E.g.*, Gilman v. Bell, 99 Ill. 144 (1881); SIMES, *op. cit. supra* note 1, at 187-90.

circumvention of the rules, and such has been the case. Two of the theoretical characteristics of powers have been the battleground: first, the concept that a power is akin to an agency and is not an interest in property, and second, the related concept that upon exercise of a power the interest created flows from the donor, not from the donee. By way of example, consider some of the counteractions that have broken in upon these concepts.[11] It has been held, at least as to general powers, that when a power is exercised by will in favor of appointees who predecease the testator-donee, there is a lapse, even though the appointees were alive when the power was created.[12] The insolvent donee's creditors, while they cannot reach the property as long as the power is unexercised, may, in the case of a general power, do so in most jurisdictions if he chooses to exercise it.[13] Also, statutes have made inroads upon the theory of powers; the federal estate tax on powers is one such inroad.[14] A final example of great consequence to our discussion, was the classification of powers as collateral, in gross, and appendant, a development traceable back into the latter half of the 16th century. With this classification came the realization that powers appendant, and to some extent those in gross, "savoured and tasted of the land."[15] The restrictions on infants' exercise of powers are connected with this realization and seem to be a part of it historically.[16]

As we now turn to a detailed examination of infants' exercise of powers, one great refrain underlies all. Powers were first used to evade rules of law, a function which has continued ever since. Attempts to control their use or abuse have led to infringements upon basic concepts of their nature. The history of powers is thus a turbulent one, in large part a struggle between contending forces. This fact is to be continuously borne in mind.

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[11] 3 POWELL, REAL PROPERTY 300-01 (1954), is a handy reference listing several areas in which the concepts of powers have been violated.

[12] Marlborough v. Godolphin, 2 Ves. Sr. 61, 28 Eng. Rep. 41 (Ch. 1750); Oke v. Heath, 1 Ves. Sr. 135, 27 Eng. Rep. 940 (Ch. 1748); SIMES, *op. cit. supra* note 1, at 238. *But see* Daniel v. Brown, 156 Va. 563, 159 S.E. 209 (1931), to the effect that there would be no lapse when the power was special.

[13] *E.g.,* Clapp v. Ingraham, 126 Mass. 200 (1879); Johnson v. Cushing, 15 N.H. 298 (1844); Thompson v. Towne, 2 Vern. 319, 23 Eng. Rep. 806 (Ch. 1694); RESTATEMENT, PROPERTY § 330 (1940). A minority of jurisdictions is *contra.* Johnson v. Shriver, 121 Colo. 397, 216 P.2d 653 (1950) (dictum); and see the logical, telling argument of Gibson, C. J., in Commonwealth v. Duffield, 12 Pa. St. 277 (1849).

[14] INT. REV. CODE OF 1954, § 2041, taxes all general, and some special, powers as though they were ownership interests. Berger, *The General Power of Appointment as an Interest in Property,* 40 NEB. L. REV. 104 (1960), advocates several statutes that would equate a general power with ownership.

[15] Albany's Case, 1 Co. Rep. 110b, 76 Eng. Rep. 250 (K.B. 1586), has been cited as the genesis of these notions. 7 HOLDSWORTH, HISTORY OF ENGLISH LAW 165-70 (1926). However, it contains no clear recognition of them. Such recognition and development can be found in Digge's Case, 1 Co. Rep. 173a, 76 Eng. Rep. 373 (K.B. 1598-1600), and Edwards v. Sleator, Hardres 410, 145 Eng. Rep. 522 (Exch. 1665).

[16] This is brought out in Hearle v. Greenbank, 3 Atk. 695, 26 Eng. Rep. 1200 (Ch. 1749).

I. STATE OF THE AUTHORITIES

A. *English Authorities*

While there is no large body of English cases on the subject of the exercise of powers by infants, the cases are reasonably consistent. The 1665 case of *Grange v. Tiving*[17] held that an infant might exercise a power. The power was collateral, but the case goes on the broader ground that, since infants are to be protected only against harming themselves, an infant should be allowed to exercise a power if its exercise could not prejudice any interest the infant might have in the appointive property. A subsequent case,[18] though sketchily reported, seems to have held that a minor could exercise a power cutting off her own life estate; however, the case was criticized as "an idle case and not law."[19] It obviously has not been followed, for the later case of *Hearle v. Greenbank*[20] held an infant could not exercise an appendant power that would cut off his own life estate.

No direct English authority has been found on infants' exercise of powers in gross. Various secondary sources seem to say or assume they could not do so in England.[21] This might be questioned, in view of the reasoning in *Grange v. Tiving*. Suppose an infant had only a life estate with a power to appoint the remainder. How could exercise of the power prejudice his interest unless possibly, by unlikely coincidence, the remainder would otherwise pass to his heirs?

Comparatively recent English cases have engrafted two liberalizing qualifications onto the above rules. First, it has been held that, as to personal property only, an infant may exercise even appendant powers unless the donor expresses a contrary intent.[22] Second, if the donor of a power over real property manifests an intent he should do so, an infant may exercise an appendant power.[23]

B. *American Authorities*

A handful of American cases have held that infants cannot exercise appendant powers. Of these, *Thompson v. Lyon* [24] is prob-

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[17] O. Bridgman 107, 124 Eng. Rep. 494 (C.P. 1665). The facts are singular. A decedent had conveyed to himself for life, then to the use of his wife and her heirs, reserving to himself and his heirs the power to revoke the uses. His only heir was his infant daughter, who exercised the power of revocation, thus causing the fee to vest in herself.

[18] Hollingshead v. Hollingshead, Gilb. Rep. 167, 25 Eng. Rep. 117 (Ch. 1708).

[19] 16 Viner's Abridgment 486 (1793).

[20] 3 Atk. 695, 26 Eng. Rep. 1200 (Ch. 1749).

[21] SIMES, *op. cit. supra* note 1, at 201; 1 SUGDEN, POWERS 212 (1856); 3 TIFFANY, REAL PROPERTY 35 (1939).

[22] *In re* D'Angibau, 15 Ch. D. 228, 246 (1880).

[23] *In re* Cardross's Settlement, 7 Ch. D. 728 (1878) (manifestation of intent found simply from fact that instrument creating power recited donee's age as 17 years); 6 THOMPSON, REAL PROPERTY 29-30 (1962).

[24] 20 Mo. 155, 61 Am. Dec. 599 (1854).

ably best known, but because of unusual circumstances[25] of the case, *Hill v. Clark*[26] is stronger authority for the proposition. A pair of Kentucky cases, while not excessively clear, appear to hold to the same effect.[27] All the cases cited thus far in this paragraph contain dictum, usually attributed to English authorities, that minors may exercise collateral powers. One 1845 New York case purports to hold alternatively that an infant could exercise a power in gross; that kind of power was involved, but it is doubtful that the facts of the case support such a holding.[28] Two other cases, containing off-hand statements of little significance, have been discovered.[29]

Secondary sources more obfuscate than illume the American law. The Restatement of Property, with which Simes and Powell agree, takes the position that an infant can appoint property only if he can make an indefeasible transfer of similar owned property.[30] On the other hand, Tiffany and Chancellor Kent assert that infants may exercise collateral powers and these only.[31] In this confusing state of the secondary authorities, the reader may wish to review the previous discussion of English and American authority to summarize for himself the common-law rules.

C. *Effect of Statutes*

Some jurisdictions, such as Michigan and Wisconsin, have statutory restrictions upon infants' exercise of powers.[32] The statutes

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[25] The owner conveyed in trust for an infant, directing the trustee to convey to such persons as the infant should appoint. Infant and trustee joined in executing a deed, and the action to cancel the deed was brought by the former after she attained majority. The court held she might elect to cancel the deed (*n.b.* that the court treated it as voidable, not void), but the force of the holding is weakened by the court's statement that, upon remand, the plaintiff might be estopped if the defendant showed he was a bona fide purchaser.

[26] 4 Lea (Tenn.) 405 (1880) (9-year-old girl could not appoint property which she held as life tenant).

[27] Owens v. Owens, 305 Ky. 460, 204 S.W.2d 580 (1947) (infant lacked capacity to change beneficiary of his life insurance policy); Sewell v. Sewell, 92 Ky. 500, 18 S.W. 162 (1892) (infant could not exercise "power to convey;" court confusingly seems to equate appointments with conveyances).

[28] Strong v. Wilkin, 1 Barb. (N.Y. Ch.) 9 (1845). An 18-year-old girl, having a power to appoint the remainder following her life estate, executed it by will and died 15 years later. The court said, in the alternative, that an 18-year-old person could execute a will at the time she made hers and that, in any event, the instrument operated as the exercise of a power. If it was the latter, it seems it would not have been effective until her death, at which time she was 33 years old.

[29] Helvering v. Safe Deposit & Trust Co., 121 F.2d 307 (4th Cir. 1941) (dictum that infant could not exercise testamentary power in North Carolina); Sheldon's Lessee v. Newton, 3 Ohio 494 (1855) (rank dictum that infant could exercise power "as fully and effectually as an adult person").

[30] RESTATEMENT, PROPERTY § 345 (1940); SIMES, *op. cit. supra* note 1, at 201; 3 POWELL, REAL PROPERTY (1954).

[31] 4 KENT, COMMENTARIES ON AMERICAN LAW 325 (12th ed. 1873); 3 TIFFANY, REAL PROPERTY 35 (1939).

[32] MICH. STAT. ANN. § 26.127 (1957); WISC. STAT. ANN. § 232.36 (1957).

referred to allow persons to exercise powers only if they are capable of alienating land and appear to be modeled after an 1829 New York statute which has been repealed.[33] It should be observed that the statutes do not say *indefeasibly* alienating land, for as we shall see, infants may generally make avoidable conveyances. However, the statutes presumably must be read together with other statutes prescribing the minimum ages for doing the acts necessary to alien land.

Similarly, when the donor has required the power to be exercised by "will," it seems a person below the statutory age for making a will cannot exercise the power.[34] Even at common law, where boys could execute wills at age 14 and girls at age 12,[35] there was at least a theoretical age limit on testamentary powers.

D. *Do Appendant Powers Exist in America?*

Upon the basis of a small amount of authority, it appears doubtful that appendant powers are recognized in the United States.[36] The reason for this has been put on two grounds: that the power merges into the fee, and that the power to appoint is a superfluous addition to the power to convey that is an incident of the fee. The latter reasoning is sensible and ought to be followed. When the holder of a life estate has a power presently exercisable, the result should be that he has a power in gross as to the remainder but no power to appoint the life estate. So, if he purports to make an inter vivos appointment of the fee, we could analyze this as being a conveyance of his life estate and an appointment of the remainder.[37] To the extent these principles are or will be followed, our discussion can be centered upon infants' exercise of only powers collateral and in gross. However, perhaps it should be pointed out that the analysis which will be suggested at the conclusion of this article will operate without determining whether powers are collateral, in gross, or appendant.

E. *Married Women's Capacity to Exercise Powers*

At an earlier time, when married women could not devise land or convey it without their husbands' concurrence, it was well settled

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[33] N. Y. REAL PROPERTY LAW § 141, originally enacted in 1829, was repealed in 1964.

[34] *In re* Maxhimer's Est., 139 Ohio St. 444, 40 N.E.2d 941 (1942); RESTATEMENT, PROPERTY § 346(a) and Comment b; *Cf.*, Oke v. Heath, 1 Ves. Sr. 135, 27 Eng. Rep. 940 (Ch. 1748).

[35] Deane v. Littlefield, 18 Mass. (1 Pick.) 239 (1822); Davis v. Baugh, 33 Tenn. (1 Sneed) 477 (1853); Strong v. Wilkin, 1 Barb. (N.Y. Ch.) 9 (1845).

[36] Browning v. Blue Grass Hardware Co., 153 Va. 20, 149 S.E. 497 (1929) (owner of fee cannot have concurrent power to appoint); RESTATEMENT, PROPERTY § 325 (1940); SIMES, *op. cit. supra* note 1, at 274-75; Bolich, *supra* note 5, at 38; Tillett v. Nixon, 180 N.C. 195, 104 S.E. 352 (1920) (seems to say inconsistent for owner of fee to have power to appoint) (*semble*).

[37] RESTATEMENT, PROPERTY § 325 (1940), supports this analysis.

that they could exercise all kinds of powers.[38] As has been noted, powers had great utility as devices for evading the incapacity of married women. With the emancipation of married women, this utility has disappeared.

It might seem that allowing married women freely to exercise powers was inconsistent with any restrictions upon infants' exercise, since both classes of persons were under similar incapacities to convey or devise. However, their respective incapacities arose out of significantly different causes. The feme covert's "disability doth not arise for want of reason" but out of the legal nature of the marriage relationship.[39] Of course the infant's incapacity did arise "for want of reason," and, as will be seen presently, the restrictions on his exercise of powers were designed to protect him from his own foolishness. Thus, the cases on married women's powers are not authority in cases involving infants, nor do the two classes of cases ever seem to have been cited interchangeably.

F. *Theory of Restrictions on Infant's Powers*

We will presently examine in detail two concepts of powers, that they are not an interest in property and that the exercise of a power relates back to the instrument creating it so as to make the property pass by that instrument. In pure theory a minor's exercise of a power would cause title to pass, not by his act, but by the donor's. Theoretically, then, we should not concern ourselves with whether the donee happened to be an infant. Yet, we have seen the courts do so concern themselves. Why?

A partial answer is that the courts have purported to treat the exercise as though it were a conveyance by the infant.[40] Thus, the infant's disability in making conveyances is transferred to his exercise of powers. Obviously, this violates the concepts of no interest and

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[38] *E.g.*, Kennedy v. Ten Broeck, 74 Ky. (11 Bush) 241 (1875) (collateral power); Ford's Ex'r v. Ford, 63 Ky. (2 Duv.) 418 (1866) (testamentary exercise of power in gross); Armstrong v. Kerns, 61 Md. 364 (1884) (power to mortgage); Osgood v. Bliss, 141 Mass. 474, 6 N.E. 527 (1886) (testamentary power); Lippincott v. Wikoff, 54 N.J. Eq. 107, 33 Atl. 305 (1895) (executrix's power of sale); Bunce v. Vander Grift, 8 Paige (N.Y.) 37 (1839) (executrix's power of sale); Taylor v. Eatman, 92 N.C. 601 (1885) (dictum); Deffenbaugh v. Harris, 6 Atl. 139 (Pa. 1886) (power appendant to life estate); Woodson v. Perkins, 5 Gratt. (Va.) 345 (1849) (power in gross); Grange v. Tiving, O. Bridgman 107, 124 Eng. Rep. 494 (C.P. 1665) (collateral power); Hearle v. Greenbank, 3 Atk. 695, 26 Eng. Rep. 1200 (Ch. 1749) (dictum); Oke v. Heath, 1 Ves. Sr. 135, 27 Eng. Rep. 940 (Ch. 1748) (testamentary power).

[39] Hearle v. Greenbank, *supra* note 38.

[40] This factor is emphasized in Thompson v. Lyon, 20 Mo. 155, 160, 61 Am. Dec. 599 (1854), where the rationale is: "A beneficial power, being in the nature of property, which an infant cannot by law alienate, it would be strange that an incapacity which the law imposed should be evaded, by means of a power. . . ." This approach is also emphasized in RESTATEMENT, PROPERTY § 345 (1940), and SIMES, *op. cit. supra* note 1, at 201.

relation back. Still we must ask ourselves why the courts violate these concepts. What overriding policy of the law calls for this?

One reason advanced, seemingly only by American authorities, is that an infant should not, by the guise of an appointment, be allowed to evade the rule disabling him from making conveyances.[41] There are two faults with this reasoning. First, if the purpose is to equate the exercise of powers with conveyances, it would follow that an infant could exercise a power to the same extent he is permitted to convey. As we shall establish, infants' conveyances are merely voidable, not void; yet, to the extent infants' exercises of powers are restricted, they are held void. Second, we should ask, to what purpose do these courts reason that a minor should not evade the restrictions on his making conveyances? What underlying policy requires that the rule on conveyances should override the powers concepts of no interest and relation back? Our investigation will show that the restrictions on conveyances exist to protect the infant himself but not to protect others. With a conveyance the minor is of necessity disposing of his own interest and so always has the potential of harming himself. Not so with the exercise of powers except for appendant ones. And if we follow the Restatement's analysis that appendant powers do not exist,[42] a minor could never appoint an owned interest. In any event, the conveyancing rule ought to intrude upon the powers concepts only so far as its policy reason would take it, *i.e.*, only to the extent to which an infant could appoint away his owned interest.

The early English cases seem more satisfactory in their reasoning. They restrict infants' exercise of powers directly on the policy ground that the courts will protect an infant from unwisely disposing of his own interest.[43] Still, the English authorities are not wholly consistent with this reasoning. For one thing, where infants were restricted, their attempted exercise was held void instead of only voidable. For another, later cases allowed infants to exercise powers affecting their interest in land if the donor indicated they might,[44] and those affecting interests in personalty if the donor failed to indicate they might not.[45] These holdings are inconsistent with the principle of protecting the infant. In fact, the courts in those cases expressed a distaste for restrictions of any kind.

Have we not reached the point where it can be said that the au-

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[41] *Ibid.*

[42] See note 36 *supra.*

[43] Nowhere is this clearer than in the original case, Grange v. Tiving, O. Bridgman 107, 124 Eng. Rep. 494 (C.P. 1665). Hearle v. Greenbank, 3 Atk. 695, 26 Eng. Rep. 1200 (Ch. 1749), is to the same effect, though not as clearly so. 3 TIFFANY, REAL PROPERTY 35 (1939), appears to adopt the English reasoning.

[44] *In re* Cardross's Settlement, 7 Ch. D. 728 (1878).

[45] *In re* D'Angibau, 15 Ch. D. 228 (1880).

thorities are incomplete and at odds? Their reasoning lacks a wholly consistent analysis. This suggests that we should make a thorough investigation of the principles underlying infants' exercise of powers. As was pointed out in the introduction to this article, the problem consists of balancing the concepts of a power's not being an interest in property and of relation back over against the rules for protecting infants by restricting their capacity for making conveyances. These three factors will now be examined, to the end that their limits may be determined and a balance struck between the contending forces.

II. Powers of Appointment Concepts

A. *Is a Power an Interest in Property?*

A most basic concept in the theory of powers of appointment is that a power is not an interest in the appointive property.[46] The exercise of a power is viewed as an event causing the appointed interest to move from the former owner to the new one, much in the fashion of a shifting use limited after a fee upon condition subsequent.[47] This similarity is not surprising, considering the early connection between powers and uses. Further, the donee of the power is spoken of as a "mere instrument or conduit pipe" for passing the interest.[48] Thus, the power of appointment looks much like an agency and the donee, like an agent.

We have already seen that in a number of areas inroads have been made upon these pure concepts.[49] To the extent a minor's exercise of a power is restricted by its being equated with the conveyance of an ownership interest and his conveyancing disability applied, the above concepts are breached.[50]

B. *The Doctrine of Relation Back*

If the donee has no interest in the appointed property, it must follow that upon exercise of the power title passes from some person other than him. That person is the donor of the power.[51] This doctrine must have been established no later than the 13th century, because, before the Statute of Wills, it was a necessary part of the reasoning allowing conveyances to such uses as the grantor should appoint by will.[52] Clear statements of the doctrine are common after *Albany's*

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[46] Simes & Smith, Future Interests § 942 (1956); 3 Tiffany, Real Property 2-4 (1939).

[47] Ray v. Pung, 5 B. & Ald. 561, 106 Eng. Rep. 1296 (K.B. 1822).

[48] Hearle v. Greenbank, 3 Atk. 695, 26 Eng. Rep. 1200 (Ch. 1749); 1 Sugden, Powers 211-12 (1856).

[49] See notes 11-16 *supra* and the textual references thereto.

[50] Nowhere is this more apparent than in Thompson v. Lyon, 20 Mo. 155, 160, 61 Am. Dec. 599 (1854), where a power is said to be "in the nature of property. . . ."

[51] 3 Powell, Real Property 297 (1954); Simes & Smith, *op. cit. supra* note 46 § 912 (1956).

[52] See notes 4-6 *supra* and their textual references.

Case in 1586.[53] *Oke v. Heath* in 1748[54] explained the matter by saying that an appointment relates back to the creation of the power, so that the appointee takes as if his name were inserted in the instrument creating it. This has remained the picturesque expression. It should be observed that relation back does not refer to point of time, so that the appointee takes as of the time of the appointment.[55]

Examples of encroachments upon the doctrine of relation back have been given.[56] We saw that restrictions upon infants' exercise of powers are among these encroachments, since these restrictions treat the exercise as though it were the infant donee's conveyance.

III. CAPACITIES OF INFANTS

A. *Capacity to be Agent*

Powers of appointment are sufficiently analogous to agencies that an infant's capacity to appoint should not exceed his capacity to be an agent. It seems to be a settled rule of the law of agency that an infant may be an agent, his acts binding his principal to the same extent as they would have if done by the principal.[57] Blackstone indicates this was also the rule in England.[58] Moreover, the infant's capacity to convey land as agent or under a power of attorney seems as great as his agency capacity in other connections.[59]

The argument could certainly be made, though little attention has been given it, that infants should be able to exercise powers to the extent they can be agents. Where the exercise would prejudice the infant's interest in the land, the policy of protecting infants might cause the argument to lose force; in other situations it has considerable logical appeal. In any event, insofar as infants are restricted in exercising powers, this seems inconsistent with settled agency law.

B. *Infants as Trustees*

Infants may be trustees and may receive and hold the trust property. However, their discretionary acts in pursuit of their trustees' duties, such as transferring property and making contracts, are

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[53] Albany's Case, 1 Co. Rep. 110b, 76 Eng. Rep. 250 (K.B. 1586); Sir Edward Clere's Case, 6 Co. Rep. 17b, 77 Eng. Rep. 279 (K.B. 1599); Viscount Montague's Case, 6 Co. Rep. 27b, 77 Eng. Rep. 294 (Exch. 1600).

[54] 1 Ves. Sr. 135, 27 Eng. Rep. 940 (Ch. 1748).

[55] Marlborough v. Godolphin, 2 Ves. Sr. 61, 28 Eng. Rep. 41 (Ch. 1750).

[56] See notes 11-16 *supra.*

[57] *E.g.,* Cornelius v. Moore, 211 Ala. 544, 100 So. 895 (1924); Sims v. Gunter, 201 Ala. 286, 78 So. 62 (1918) (dictum); Des Moines Ins. Co. v. McIntire, 99 Iowa 50, 68 N.W. 565 (1896); Talbot v. Bowen, 8 Ky. (1 A. K. Marsh.) 436, 10 Am. Dec. 747 (1819); RESTATEMENT (SECOND), AGENCY § 21 (1958); SEAVEY, AGENCY 27 (1964); 2 WILLISTON, CONTRACTS 13 (3d ed. 1959).

[58] 1 BLACKSTONE, COMMENTARIES *466, n. 27.

[59] *Cornelius, McIntire,* and *Talbot* cases cited note 57 *supra,* all of which so hold. Also, see the secondary authorities cited in that note, none of which make a distinction between agencies to convey and those for other purposes.

effective only to the extent they would be if the minor had been acting as to his own property or affairs.[60] We shall find that, generally speaking, his own conveyances and contracts are voidable but not void. A minority of courts has gone so far as to hold that infants' acts as trustees are binding.[61]

Apparently the reason the agency rule is not applied to trusts is that while a trustee has powers similar to those of an agent, he also has legal title to the trust corpus. Because of this latter fact, a power of appointment is closer in nature to an agency than to a trusteeship, indicating that the agency rule of conveyances should have more application to powers than should the trust rule.

C. *Transfers of Property*

By the decided weight of authority both in the United States and since medieval times in England, minors' conveyances of land are voidable but not void.[62] At their election infants may avoid conveyances before[63] or after[64] reaching majority; in the latter case, some jurisdictions hold the election must be made within a "reasonable" time,[65] and some hold it may be made any time before the running of the statute of limitations on real property actions.[66] As for transfers of personal property, they also are voidable, not void.[67]

As previously discussed, in restricting minors' exercises of powers, courts are engrafting onto the pure theory of powers, concepts of

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[60] Fibikowski v. Fibikowski, 185 Okla. 520, 94 P.2d 921 (1939) (oral trust to hold land for another); Hooton v. Neeld, 12 N.J. 396, 97 A.2d 153 (1953) (minors could hold stocks in trust, but transfer avoidable); RESTATEMENT (SECOND), TRUSTS § 91 (1959); BOGERT, TRUSTS 65 (4th ed. 1963); 1 SCOTT, TRUSTS 701-03 (2d ed. 1956).

[61] *E.g.*, Hughes v. Hughes, 221 S.W. 970 (Tex. Comm. App. 1920). *Cf.*, Clary v. Spain, 119 Va. 58, 89 S.E. 130 (1916) (court of equity may appoint commissioner to issue binding deed when minor trustee has previously conveyed land held in trust).

[62] Shepherd v. Shepherd, 408 Ill. 364, 97 N.E.2d 273 (1951); Klapka v. Shrauger, 135 Neb. 354, 281 N.W. 612 (1938) (argument supporting result but not holding); New v. H. E. Harman Coal Corp., 181 Va. 627, 26 S.E.2d 39 (1943); 1 BLACKSTONE, COMMENTARIES *465-66; COKE, FIRST INSTITUTES *51b (statement attributed to Littleton); 6 THOMPSON, REAL PROPERTY 26-27 (1962 repl. vol.); 5 TIFFANY, REAL PROPERTY 197 (3d ed. 1939); 2 WILLISTON, CONTRACTS 21 (3d ed. 1959). *But see* Weinlein v. Bedford, 138 N.E.2d 173 (Ohio C.P. 1955), which says a minor's deed was a "nullity"; however, the parties had taken the question out of issue by conceding the deed was void.

[63] Smith v. Wade, 169 Neb. 710, 100 N.W.2d 770 (1960).

[64] Coleman v. Coleman, 51 Ohio App. 221, 200 N.E. 197 (1935); COKE, *op. cit. supra* note 62, at *171b; 6 THOMPSON, *op. cit. supra* note 62, at 26-27.

[65] *E.g.*, Shepherd v. Shepherd, 408 Ill. 364, 97 N.E.2d 273 (1951); Sprecher v. Sprecher, 206 Md. 108, 110 A.2d 509 (1955).

[66] *E.g.*, Gibson v. Hall, 260 Ala. 539, 71 So.2d 532 (1954); Elkhorn Coal Corp. v. Tackett, 261 Ky. 795, 88 S.W.2d 943 (1935) (court said time of 10-year statute of limitations was "reasonable" time); Mott v. Iossa, 119 N.J. Eq. 185, 181 Atl. 689 (1935); New v. H. E. Harman Coal Corp., 181 Va. 627, 26 S.E.2d 39 (1943).

[67] Southern Cal. Edison Co. v. Hurley, 202 F.2d 257 (9th Cir. 1953) (stock transfer); Carolina Tel. & Tel. Co. v. Johnson, 168 F.2d 489 (4th Cir. 1948) (stock transfer); COKE, *op. cit. supra* note 62, at *171b; 2 WILLISTON, *op. cit. supra* note 62, at 21

disabilities derived from conveyancing law.[68] One would assume then, that when the exercise is restricted, it will, like a conveyance, be held merely voidable. That it has been held void suggests an illogical internal inconsistency in the restrictions themselves. And, as a matter of policy, it is hard to see why, when an infant's exercise of a power does cut off some interest of his, the exercise should be void, whereas if he chose to cut off the same interest by conveyance, the act would simply be voidable.

D. *Infants' Contractual Acts*

Consistent with his capacity to transfer property, a minor's contractual undertakings are generally valid but voidable at his election.[69] In the case of obligations arising out of his obtaining necessaries, the minor's agreement is binding, though he may avoid paying any sum beyond the reasonable value of necessaries.[70] The exception for necessaries is consistent with the principle underlying infants' disabilities that the infant should be protected by the law. If his contract for necessaries were voidable, tradesmen would hesitate to supply him, and his shield would become a burden to bear.

Some cases have held that a minor's attempt to appoint an agent is void.[71] These, however, appear to represent an older line of authority, and the law now seems to regard the appointment as merely voidable and the agent's acts valid to the extent they would have been if performed by the infant.[72]

To be sure, the rules regarding minors' contractual capacity, like those having to do with trusts, are not as closely related to their exercise of powers as are the capacities for being agents and making conveyances. However, our examination of the principles governing all these areas demonstrates that they follow a consistent, harmonious pattern. Yet, when we come to powers of appointment, we find the courts restricting infants in a manner not within this pattern.

E. *Underlying Policy*

Blackstone captured the law's purpose when he wrote: "Infants have various privileges, and various disabilities; but their very dis-

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[68] See notes 40-43 *supra* and the textual discussion referring to them.

[69] 1 BLACKSTONE, COMMENTARIES *465-66; 1 COKE, FIRST INSTITUTES *171b; 1 CORBIN, CONTRACTS 13-14 (1963); 2 WILLISTON, CONTRACTS 2 (3d ed. 1959).

[70] 1 BLACKSTONE, *op. cit. supra* note 69, at *465-66; 1 COKE, *op. cit. supra* note 69, at *172a; 2 WILLISTON, *op. cit. supra* note 69, at 49-52. Williston says, at 14-17, that the following agreements are, on public policy grounds, also binding: marriage (but not an agreement to marry), enlistment in the armed forces, an agreement to support a bastard child, and the obligation on a bail bond.

[71] Rocks v. Cornell, 21 R.I. 532, 45 Atl. 552 (1900); SEAVEY, AGENCY 27 (1964); 2 WILLISTON, *op. cit. supra* note 69, at 9-12.

[72] Coursolle v. Weyerhauser, 69 Minn. 328, 72 N.W. 697 (1897); SEAVEY, *op. cit. supra* note 71, at 27; 2 WILLISTON, *op. cit. supra* note 71, at 9-12.

abilities are privileges; in order to secure them from hurting themselves by their own improvident acts."[73] This is the principle that explains why an infant may, as agent, bind his adult principal, but at the same time could make only a voidable contract or conveyance for himself. We seek to protect the infant himself, not adults; they can look out for themselves. Perhaps this also explains why his conveyances have come to be voidable instead of void.

The original English cases on infants' powers of appointment went back to this principle. *Grange v. Tiving,* where the infant had a power to revoke another's fee, said the end to be served was "not in respect of the person whose estate is to be revoked, but of the prejudice to the person revoking. . . ."[74] *Hearle v. Greenbank* struck down a power but indicated the power would have stood if the infant's own interest were not prejudiced.[75] It is true that that case and subsequent ones, when they have restricted infants' powers, have held the exercise void. A case can be made that *Hearle* did so without any consideration of the extent of the protective limitations normally placed on infants.[76] Whatever the reason, that case and others like it are subject to the criticism that, while they attempt to serve the policy of protecting the infant from his own folly, they have acted beyond the scope of the policy. The infant is most fully protected when his acts are merely voidable; that way he can enjoy the benefits of any good bargains he makes.

CONCLUSIONS

In pure theory, a power of appointment is no interest in property, and upon exercise, the appointed interest passes from the donor, not the donee. If we followed these concepts faithfully, infants would be untrammeled in exercising any kind of a power. However, the courts have, to the limited extent there is case law on the subject, generally, restricted infants by not allowing them to exercise appendant powers, *i.e.,* powers, the exercise of which would cut off interests they have in the property. Some American authorities would go further and in effect allow infants to exercise no powers by not permitting them to exercise a power unless they could make a binding transfer of the same kind of property.

To the extent they have restricted infants' exercise of powers, the courts have done so by superimposing rules of conveyancing law. These rules in turn spring from a policy of protecting infants from the consequences of their own folly. The conveyancing rule is that

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[73] 1 BLACKSTONE, COMMENTARIES *464.

[74] O. Bridgman 107, 118, 124 Eng. Rep. 494 (C.P. 1665).

[75] 3 Atk. 695, 710, 26 Eng. Rep. 1200, 1207 (Ch. 1749).

[76] *Ibid.*

infants' conveyances are voidable at their election but not void; this protects them to the fullest by allowing them to avoid bad bargains but affirm good ones. However, in holding the exercise of some powers to be utterly void, the courts have gone beyond the conveyancing law, which seems like an illogical and unnecessary position. Further, the American authorities referred to in the last paragraph would not only go beyond the conveyancing rule but would also violate the underlying policy of protecting the infant, by prohibiting his exercising powers even when he had no owned interest at stake in the appointed property.

We need to return to basic principles and start afresh. One way would be simply to reason that a power is like an agency; an infant has full capacity to act as an agent; therefore, he could exercise all powers. But this is unrealistic in certain situations where, by virtue of the peculiar nature of powers, an infant's exercise would appoint away an interest he owned in the property. This is the nub of it: we want to protect him, not because he is exercising a power, but because he is cutting off his interest. So, it seems desirable to infuse some of the protective policy of conveyancing law. In doing so, we should balance three factors: there should be as little disruption as possible of normal powers concepts, we should protect the infant only where he has the capacity to prejudice his own interests, and the protective rule should make his act voidable only.

The following formulation, deceptively simple, is suggested as achieving these ends: an infant may exercise all powers of appointment, but to the extent an exercise prejudices an interest he or his heirs have in the appointed property, such exercise is voidable at his election. Indeed, this seems to have been the meaning of *Grange v. Tiving* 300 years ago.