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EXCLUSIVE AND NONEXCLUSIVE POWERS AND
THE ILLUSORY APPOINTMENT¹

*John E. Howe**

POWERS of appointment may be classified as either general or special. Under this classification a power is said to be a special power when the donee has the right to exercise it only in favor of a limited group of persons of which he himself is not a member.²

In considering special powers it is helpful to subdivide them into two separate groups, one being termed exclusive and the other non-exclusive powers. In a factual situation where the intent of the donor is such that the donee of the power has the right to exclude any of the objects, it is said that the power through which he acts is an exclusive one. Conversely, if it appears that a share should be given to each of the objects, the donee does not have a right of exclusion, and the power is said to be nonexclusive.³

It should at once be apparent that all general powers are exclusive, because the right of the donee to exclude an object in a general power is never questioned, inasmuch as the donee could appoint the property to himself and then give it to any object he so desired. It is also true that in a majority of the cases in which there is a special power the question will not arise, because from the terms of the instrument it is clear that the donor intended the donee to have this right of exclusion. Therefore, any discussion of the subject is at once confined to a small group of cases in which a special power is given to appoint to a limited number, and it is impossible to tell from the instrument which creates the power whether the donor intended all the objects to take a share, or whether he intended only those selected by the donee to receive a portion of the property.

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¹ PROPERTY RESTATEMENT, §§ 360 and 361 (1940); 1 SIMES, FUTURE INTERESTS, § 275 (1936); CHANCE, POWERS, §§ 1044-1203 (1841); FARWELL, POWERS, 3rd ed., 414-428 (1916); SUGDEN, POWERS, 8th. ed., 444-451 (1861).

² 1 SIMES, FUTURE INTERESTS, § 246 (1936). There are many other ways in which powers may be classified. However, the method used will depend on the purpose of the classification. For a general discussion of the various methods consult any of the texts in note 1, *supra*.

³ 1 SIMES, FUTURE INTERESTS, § 275 (1936); FARWELL, POWERS, 3rd ed., 414 (1916); CHANCE, POWERS, § 1044 (1841).

I

DETERMINING THE TYPE OF POWER

In order to avoid any possible doubt as to the type of power that is intended, the creating instrument should state with certainty whether the donee has the right to exclude any object, or whether the donor intends that all objects receive a share. Sugden says that when the donor desires to create an exclusive power the instrument should contain the following language: "To all and every, or such one or more exclusively of the other or others' of the objects, as the donee shall appoint."⁴ In giving the donee a power to appoint property in such a way that all shall receive a share, the following form would be adequate to accomplish the purpose: "To all and every of the objects as the donee shall appoint, but no object shall be excluded by the donee."

However, if the donor desires all to share, it would undoubtedly be better to make a direct gift of a part of the fund to the various objects, giving each one the minimum amount that the donor desires him to have. After these gifts are provided for, the donor can then authorize an exclusive appointment as to the remainder of the fund.⁵

In the absence of express language as to the type of power created by the donor, or where the language is ambiguous, it is said that the intent of the donor will govern.⁶ However, if the true intent were discoverable there could be little litigation as to the type of power created. It is the failure of the donor to express his intent that creates the difficulty, and a statement to the effect that in any case where the wording is ambiguous the intent of the donor will govern is of little practical value in solving the problem.

It cannot be denied that the type of power created is and should be a product of the donor's intent. The real difficulty is in discovering that intent, which in the final analysis rests on what the court itself believes that intent to be. In reaching a conclusion as to the type of power created one is actually dealing with a case of judicial construction.⁷ In fact, the court in construing the language of the donor seems to base its conclusion on the wording which is used in the instrument. Hence, where the type of power intended is not clear, the determination of this question would seem to be governed solely by the language which is utilized by the donor.

⁴ SUGDEN, POWERS, 8th ed., 444 (1861).

⁵ PROPERTY RESTATEMENT, § 360, comment d (1940).

⁶ FARWELL, POWERS, 3rd ed., 414 (1916).

⁷ *Garthwaite v. Robinson*, 2 Sim. 43 at 49, 57 Eng. Rep. 706 (1827); *CHANCE*, POWERS, § 1044 (1841).

The Restatement of the Law of Property provides:⁸ "The donee of a special power may, by an otherwise effective appointment, exclude one or more objects of the power from distribution of the property covered thereby, unless the donor manifests a contrary intent." This section of the *Restatement* would seem to indicate a presumption of exclusiveness. If such is the case it should follow that where there are two phrases of equal weight and one gives a power of selection but the other indicates that all should share, the court as a matter of construction would uphold an appointment to a portion of the objects. However in the only case the writer found in which there was a factual situation similar to this, the court held that the donee did not have the right to exclude any of the objects in exercising the power.⁹

It may be true that one would have to find an absolutely colorless case, with no indication either way, before a definite conclusion could be reached regarding the view advanced by the *Restatement of Property*. It is doubtful whether such a case will ever arise; and from the information at hand one would be inclined to entertain some doubt concerning the presumption that a power is exclusive unless the intent of the donor indicating otherwise is clearly expressed.

Therefore, in order to form a general rule for the construction of powers which are created by ambiguous language, it is necessary that the various forms which have been used be examined, and the decision of the court in the particular case be noted. By the use of this method it will be possible to determine the extent of any uniformity in the decisions at the present time.

In the case of *Hatchett v. Hatchett*,¹⁰ the husband was given the power to dispose of certain property by deed or will "among our children and grandchildren in such proportions as he may choose." The court in construing the power held that all objects were entitled to a share of the property. In another case the donor provided: "the said property to be disposed of by her among my children as she may think best." The donee gave each object a share of the property, but there was fraud in the execution. The court, in its decision, intimated that each object should be given a portion of the property.¹¹ In an English case, which involved similar language, certain property was bequeathed "to . . . Martha Kemp for her life and then to be disposed of amongst

⁸ PROPERTY RESTATEMENT, § 360 (1940).

⁹ *Lippincott v. Ridgway*, 10 N.J. Eq. 164 (1854).

¹⁰ 103 Ala. 556 at 561, 16 So. 550 (1893).

¹¹ *Degman v. Degman*, 98 Ky. 717 at 719, 34 S. W. 523 (1896).

her children as she shall think proper."¹² In passing on the validity of the execution of this power the court held that each of the children of Martha Kemp was entitled to share in the execution of the power.

The above cited cases are similar in that the word "among" is used in each case. It is true that the word is somewhat qualified by the addition of "as she may think best" or "as she shall think proper," but, nevertheless, the court in each case has held the power created thereby to be nonexclusive. This attitude has been confirmed in other cases and appears to be the unanimous view.¹³

There are certain other phrases which influence the court in concluding that the power in question is nonexclusive. In *Clay v. Smallwood*¹⁴ a will provided for certain gifts and then "the other to be distributed to my other children as she may direct." In the distribution some of the children were omitted by the donee and the court held that the exercise was void, inasmuch as each child was entitled to a share of the property. The words used to create the power in the *Clay* case were very similar to those used in one of the early cases involving this phase of powers. In that case one third of the estate was devised to the widow of the testator during her widowhood, but in event of her remarriage the testator provided: "I do will and desire her to give unto my children the remainder of my estate, according as she shall think fit." The court concluded that the power involved therein was a non-exclusive power.¹⁵ The controlling and similar words in the last two cases are "to give to." The fact that a nonexclusive power is created by the use of these words is further substantiated in other cases where the courts reach the conclusion that none of the objects can be excluded, because the word "to" or "unto" has been used in the instrument creating the power.¹⁶ Likewise the courts have held that the words "to

¹² *Kemp v. Kemp*, 5 Ves. Jr. 849 at 849, 31 Eng. Rep. 891 (1795).

¹³ *McCormick v. Security Trust Co.*, 184 Ky. 25, 211 S. W. 196 (1919); *Melvin v. Melvin*, 6 Md. 541 (1854); *Stableton v. Ellison*, 21 Ohio St. 527 (1871); *Neilson's Estate*, 17 W.N.C. (Pa.) 158 (1885); *Russell v. Kennedy*, 66 Pa. 248 (1870); *McKonkey's Appeal*, 13 Pa. 253 (1850); *Cathey v. Cathey*, 9 Humph. (28 Tenn.) 470 (1848); *Knight v. Yarbrough*, 1 Gilmer (21 Va.) 27 (1820); *Hudson v. Hudson's Adm'r*, 6 Munf. (20 Va.) 352 (1819); *Fowler v. Hunter*, 3 Y. & J. 506, 148 Eng. Rep. 1279 (1829); *Garthwaite v. Robinson*, 2 Sim. 43, 57 Eng. Rep. 706 (1827); *Wilson v. Piggott*, 2 Ves. Jr. 351, 30 Eng. Rep. 668 (1794); *Bennett v. Honeywood*, Ambl. 708, 27 Eng. Rep. 459 (1772); *Alexander v. Alexander*, 2 Ves. Sr. 640, 28 Eng. Rep. 408 (1755).

¹⁴ 100 Ky. 212 at 215, 38 S. W. 7 (1896).

¹⁵ *Craker v. Parrott*, 2 Ch. Cas. 228 at 228, 22 Eng. Rep. 921 (1677).

¹⁶ *Parker et al. v. Macbryde et al.*, (C.C.A. 4th, 1942) 132 F. (2d) 932; *In Re Sloan's Estate*, 7 Cal. App. (2d) 319, 46 P. (2d) 1007 (1935); *Barrett's Exr. v. Barrett*, 166 Ky. 411, 179 S. W. 396 (1915); *Den v. Crawford*, 3 Halsted (8 N.J.

and among"¹⁷ and "to divide between"¹⁸ create a nonexclusive power, and the donee in exercising it must give a share of the property to each of the objects.

It now becomes apparent that there are at least four sets of words that immediately tend to indicate a nonexclusive power in the absence of qualifying language. It is true that in the various cases cited there have been derivatives of the primary phrases or words, but somewhere in the language one can find the "magical" words in one form or another. The task of classifying powers would be very simple if all cases could immediately be placed in one of the four mentioned groups. However, there are many cases in which the courts have held the power to be nonexclusive, and nowhere can one find any of these familiar phrases to serve as landmarks.

In *Lippincott v. Ridgway*¹⁹ there were two distinctive phrases, the first being a power to convey a certain fund "unto such of the brothers and sisters," and subsequently an expression "my will being that my said daughter Hannah shall in such case have power to dispose of the same among her brothers and sisters." The first part of the instrument seems to indicate that a power of selection has been given to the donee. However, in deciding the case, the latter section was held to qualify the former language, and the court said the power created thereby was non-exclusive. In an early English case²⁰ certain household goods were given to the wife "upon trust and confidence that she would not dispose thereof but for the benefit of her children." This power does not contain any of the familiar words that would indicate a nonexclusive power, but the court held that none of the children could be excluded in the appointment. A utilization of the words "all and every" is perhaps the strongest indication possible that the donor intended each object to share in the benefit of the appointment. This is substantiated by the fact that there are few cases where the point has arisen, and the

L.) 90 (1825); *Hodges v. Stegall*, 169 Tenn. 202, 83 S. W. (2d) 901 (1935); *Thrasher v. Ballard*, 35 W. Va. 524, 14 S. E. 232 (1891); *Morgan d. Surman v. Surman*, 1 Taunt. 289, 127 Eng. Rep. 844 (1808); *Vanderzee v. Aclom*, 4 Ves. Jr. 771, 31 Eng. Rep. 399 (1797).

¹⁷ *Cameron v. Crowley*, 72 N.J. Eq. 681, 65 A. 875 (1907); *In Re Lawler's Will*, 215 App. Div. 506, 213 N.Y. S. 723 (1926); *Maddison v. Andrew*, 1 Ves. Sr. 57, 27 Eng. Rep. 889 (1747).

¹⁸ *Hawthorn v. Ulrich*, 207 Ill. 430, 69 N. E. 885 (1904); *Faloon v. Flannery*, 74 Minn. 38, 76 N. W. 954 (1898); *Wright v. Wright*, 41 N.J. Eq. 382, 4 A. 855 (1886); *Lloyd v. Fretz*, 235 Pa. 538, 84 A. 450 (1912); *Herrick v. Fowler*, 108 Tenn. 410, 67 S. W. 861 (1902).

¹⁹ 10 N.J. Eq. 164 at 166 (1854).

²⁰ *Gibson v. Kinven*, 1 Vern. 66 at 66, 23 Eng. Rep. 315 (1682).

courts have consistently held in those cases that these words did make the power nonexclusive.²¹

Just as there are certain words which in themselves make the power nonexclusive, so are there words which have been held to make the power exclusive. In this latter class the words "to such of the" or "among such of the" recur more frequently than others. The case of *Ingraham v. Meade*²² involved a power to appoint a certain fund "among such of the children of 'R' and 'M' and in such proportions as 'M' may appoint." This is a typical case in which the donor used the word "such," and the court held that the power created thereby was exclusive. The English interpretation of "such" is about the same as the American. In *Brown v. Higgs*²³ the donee could appoint "to such of the children of my nephew Samuel Brown as my said nephew John Brown shall think most deserving." The donee did not exercise the power, but the court, in giving all of them an equal share, said that John Brown, if he had exercised the power, could have excluded any of them that he wished. The other cases, both English and American, would seem to bear out the fact that when the donee can appoint to "such" he is given the power to exclude.²⁴ It is likewise held that the same result is reached whenever there is a power to appoint "to the class or to any one."²⁵

There is another group of words which seem to have the same effect in determining that the power is exclusive. The donee may be given full power "to devise and bequeath the same, or any part thereof, to . . . my relations."²⁶ In such a case the donee has a power of selection. It would seem that the addition of the words "or any part thereof" is the deciding factor, because in the absence of these words the power would undoubtedly be held to be nonexclusive. This result may not be logical if one interprets the language as giving the donee a discretion as to the amount of property over which he desires to exercise

²¹ *Strutt v. Braithwaite*, 5 De G. & Sm. 369, 64 Eng. Rep. 1157 (1852); *Menzey v. Walker*, Cases, t. Talb. 72, 25 Eng. Rep. 669 (1735).

²² 3 Wall. Jr. (U.S. Cir Ct. Rep.) 32, 13 Fed. Cas. 50 (1855).

²³ 4 Ves. Jr. 708 at 709, 31 Eng. Rep. 366 (1799).

²⁴ *Brown v. Fidelity Union Trust Co.*, 126 N.J. Eq. 406, 9 A. (2d) 311 (1940); *In Re Skidmore*, 148 Misc. 569, 266 N.Y.S. 312 (1933); *Wollen v. Tanner*, 5 Ves. Jr. 218, 31 Eng. Rep. 555 (1800).

²⁵ *Shaver v. Ellis*, 226 Ky. 806, 11 S.W. (2d) 949 (1928); *Cochran v. Elwell*, 46 N.J. Eq. 333, 19 A. 672 (1890); *Cruse v. McKee*, 2 Head. (39 Tenn.) 1 (1858); *Rhett v. Mason*, 18 Gratt (59 Va.) 541 (1868).

²⁶ *Levi v. Fidelity Trust and S. U. Co.*, 121 Ky. 82, 88 S. W. 1083 (1905); *Huling and others v. Fenner*, 9 R.I. 410 at 411 (1870).

the power, but the result may be justified if one regards it as a power to give any desired part (which might be nothing) to each of the objects.

In addition to the cases already cited there are other instances in which the power has been held to be exclusive without the use of one of the familiar terms. A donee was given the power to devise certain property "to my said son or daughter." Here the word "to" would seem to justify a decision that all should share. However, it was found that the right to exclude did exist.²⁷ This is not necessarily inconsistent with the general rule, because the use of the conjunctive "or" changes the meaning of the phrase.

In any case involving a term which is different from the enumerated types it is difficult to determine whether the power is exclusive or nonexclusive. However, approximately eighty-four per cent of the cases examined by the writer contained one of the following or similar expressions: "among," "to," "to and among," "between," "or to any," "to such," or "to any part." While this does not infallibly indicate the type of power it is reasonably accurate in the absence of other language. In the cases which do not fall in one of the groups, it is often possible to find these words in combination with others or in combination with themselves. If such is the case it is possible to determine with reasonable certainty what the court will decide if called upon to determine the exclusiveness of the power.

Therefore, in a case where there is an uncertainty as to the type of power created, the following rule may be said to apply in the absence of other language or circumstances indicating a contrary intent: *Whenever the instrument states that the donee has the power to appoint "to," "among," "to and among," or "between" specified objects, the power created thereby is a nonexclusive power; but when the instrument states that the donee shall appoint "to any," "to such," or "any part," the power created thereby is an exclusive power.*

II

THE LEGAL CONSEQUENCES OF A NONEXCLUSIVE POWER

A. Rule of Law

The legal consequences that arise from the determination that a given power is nonexclusive have been changed by legislation in both

²⁷ In *Re Turle's Estate*, 185 Minn. 490, 241 N. W. 570 (1932).

England and the United States. The material included in this subdivision must therefore be read in connection with the material found in subdivision IV.²⁸

One may say that the determination that a power is nonexclusive is a legal consequence in itself. The author does not adopt this line of reasoning. Whether a power is nonexclusive or not depends on either the actual or "court determined" intent of the donor. But the legal consequences of a nonexclusive power are dependent on the law at a given time in the particular jurisdiction. Thus the fact that nonexclusive powers may be treated in the same manner as exclusive powers does not warrant a discarding of the classification. It is true that there may be a logical reason for holding that one cannot have a nonexclusive power unless certain consequences follow, but the term "nonexclusive power" is not used in this sense in the discussion.

If one determines that the donor created a nonexclusive power it is at once apparent that the donor must have intended each object to share in the appointment. That each object receive a share in the appointment should be one of the most important legal consequences of a nonexclusive power. It would seem to be so clear that there would be little chance of any litigation over the matter, but this has been disproved by the numerous cases which have arisen.

In England the courts determined at an early date that any appointment under a nonexclusive power which exhausted all of the property without giving a share to each object failed entirely.²⁹ The courts reached a similar result where there were several appointments which took effect together, and in a like manner exhausted the fund without giving a share to each of the objects.³⁰ In the case of *Vanderzee v. Aclom*³¹ the donee of the power gave a share to each object, but the court held the power to be improperly executed for other reasons. In his opinion Lord Alvanley said, "It is now perfectly established, that, whenever a power is given to appoint to and among several persons, the power is not well executed, unless some part is allotted to each."³² The

²⁸ The author has adopted the arrangement followed to give a clearer picture of the development of the law. The reader must remember that the statements contained in this section are qualified by the statements in subdivision IV, especially in regard to the English law.

²⁹ *Craker v. Parrott*, 2 Ch. Cas. 228, 22 Eng. Rep. 921 (1677).

³⁰ FARWELL, POWERS, 3rd ed., 417 (1916).

³¹ 4 Ves. Jr. 771, 31 Eng. Rep. 399 (1797).

³² *Id.* at 784.

opinion expressed by Lord Alvanley in that case would seem to be the almost unanimous view taken by the English courts.³³ In fact there seems to be no case in which the rule has ever been questioned, and the writers have never intimated that there might be a different holding.

In the United States the problem has arisen in twenty-one jurisdictions, and with one exception the courts have seemed to follow the English view. In some of the cases the question has arisen in such a manner that it is impossible to say emphatically that the court decides each must share where the power is nonexclusive, but from the language used such an assumption would appear to be logical.

In the case of *Parker v. Macbryde*³⁴ the testator gave certain property to his niece for life and then gave her a nonexclusive power to appoint by will to her brothers and sisters of the whole blood. The niece made an appointment outside the class and the court held that the exercise of the power was void because the appointment should have been confined to the persons designated by the testator. The decision also intimated that each of the class was entitled to receive a share. From the result of this case it would seem to follow that the federal rule is a mere restatement of the view adopted by the English courts.

In Alabama,³⁵ California,³⁶ Florida,³⁷ Georgia,³⁸ Illinois,³⁹ Kentucky,⁴⁰ Maryland,⁴¹ Minnesota,⁴² Missouri,⁴³ New Jersey,⁴⁴ New

³³ *Morgan d. Surman v. Surman*, 1 Taunt. 289, 127 Eng. Rep. 844 (1808); *Vanderzee v. Aclom*, 4 Ves. Jr. 771, 31 Eng. Rep. 399 (1897); *Kemp v. Kemp*, 5 Ves. Jr. 849, 31 Eng. Rep. 891 (1795); *Wilson v. Piggott*, 2 Ves. Jr. 351, 30 Eng. Rep. 668 (1794); *Burleigh v. Pearson*, 1 Ves. Sr. 281, 27 Eng. Rep. 1032 (1749); *Menzey v. Walker*, Cases, t. Talb. 72, 25 Eng. Rep. 669 (1735); *Gibson v. Kinven*, 1 Vern. 66, 23 Eng. Rep. 315 (1682); *Craker v. Parrott*, 2 Ch. Cas. 228, 22 Eng. Rep. 921 (1677).

³⁴ (C.C.A. 4th, 1942) 132 F. (2d) 932.

³⁵ *Hatchett v. Hatchett*, 103 Ala. 556, 16 So. 550 (1893).

³⁶ *In Re Sloan's Estate*, 7 Cal. App. (2d) 319, 46 P. (2d) 1007 (1935).

³⁷ See *Lines v. Darden*, 5 Fla. 51 (1853).

³⁸ *New v. Potts*, 55 Ga. 420 (1875).

³⁹ *Hawthorne v. Ulrich*, 207 Ill. 430, 69 N. E. 885 (1904).

⁴⁰ *McCormick v. Security Trust Co.*, 184 Ky. 25, 211 S. W. 196 (1919); *Barrett's Exr. v. Barrett*, 166 Ky. 411, 179 S. W. 396 (1915); *Clay v. Smallwood*, 100 Ky. 212, 38 S. W. 7 (1896).

⁴¹ *Melvin v. Melvin*, 6 Md. 541 (1854).

⁴² *Faloon v. Flannery*, 74 Minn. 38, 76 N. W. 954 (1898).

⁴³ See *Fries v. Fries*, 306 Mo. 101, 267 S. W. 116 (1924).

⁴⁴ *Cameron v. Crowley*, 72 N.J. Eq. 681, 65 A. 875 (1907); *Wright v. Wright*, 41 N.J. Eq. 382, 4 A. 855 (1886); *Lippincott v. Ridgway*, 10 N.J. Eq. 164 (1854); *Den v. Crawford*, 3 Halsted (8 N.J.L.) 90 (1825).

York,⁴⁵ North Carolina,⁴⁶ Ohio,⁴⁷ Pennsylvania,⁴⁸ Rhode Island,⁴⁹ South Carolina,⁵⁰ Tennessee,⁵¹ Virginia,⁵² and West Virginia,⁵³ cases have arisen which apparently, from the decisions, adopt the English rule as regards the nonexclusive powers.

In a New Hampshire case⁵⁴ the testator bequeathed a fund to others "for the benefit and comfort of my brothers and sister." This is not a situation where a power of appointment has been conferred, but it is analogous to that situation. In distributing the money one of the brothers received nothing, and, in an action concerning the distribution, the argument was presented that there was not such a discretion that this brother could be excluded under the wording of the instrument. The court refused to set aside the distribution and said that the doctrine of nonexclusive appointments should not be extended to such a case. The court did not discuss the legal consequence in a case which involved a pure power of appointment, and no such case has been decided in that jurisdiction. However, it is possible that it would refuse to follow the weight of authority if the question ever arose.

With the exception of the above cited New Hampshire case, no court has ever questioned the fact that all objects must share in the exercise of a nonexclusive power. The Kentucky court has said that it would be better if more powers of appointment were held to be exclusive; but, apart from this, there is little criticism of the present view.⁵⁵ If the courts adopted the Kentucky suggestion it would be a step toward simplifying the problem, because there could be little objection to any action on the part of the donee if he had the right to exclude any of the objects.

⁴⁵ *In Re Lawler's Will*, 215 App. Div. 506, 213 N.Y.S. 723 (1926).

⁴⁶ See *Little v. Bennett*, 58 N.C. 156 (1859).

⁴⁷ *Stableton v. Ellison*, 21 Ohio St. 527 (1871).

⁴⁸ *In Re Sinnott's Estate*, 310 Pa. 463, 165 A. 244 (1933); *Neilson's Estate*, 17 W.N.C. (Pa.) 158 (1885); *McKonkey's Appeal*, 13 Pa. 253 (1850).

⁴⁹ See *Huling and others v. Fenner*, 9 R.I. 410 (1870).

⁵⁰ *Seibels v. Whatley*, 2 Hill Eq. (51 S.C.) 605 (1837).

⁵¹ *Cathey v. Cathey*, 9 Humph. (28 Tenn.) 470 (1848).

⁵² *Hudson v. Hudson's Admr*, 20 Va. 352 (1819); *Carrington's Exrs. v. Belt*, 6 Munf. (20 Va.) 374 (1819).

⁵³ *Thrasher v. Ballard*, 35 W. Va. 524, 14 S. E. 232 (1891).

⁵⁴ *City of Portsmouth v. Shackford*, 46 N.H. 423 (1866).

⁵⁵ *Barrett's Exr. v. Barrett*, 166 Ky. 411, 179 S. W. 396 (1915) (The main argument concerned the illusory appointment doctrine, and the statement was made in support of the Kentucky view).

B. *Theories of the Rule*

There has never been any extended discussion of the reasons behind the rule. In a few of the English cases where the court of equity interfered because of the insubstantiality of the sum, it was mentioned that there was a fraud on the exercise of the power.⁵⁶ One of the English writers also suggests that there is a trust; and, therefore, the court will grant relief so that the trust will be fulfilled.⁵⁷ While there is merit in both of these rationalizations, the former would seem to be the more sound. When the donor creates a nonexclusive power the donee is given certain duties by the terms of the instrument. These duties are well defined; and to allow the donee to do some act other than that prescribed by the donor would be allowing a fraud to be perpetrated on both the donor and the objects of the power. It is also possible to consider it as a breach of a trust, but in the interest of clarity and reasonableness it would seem that the trust theory should not be extended to such a degree as to include the nonexclusive power cases.

C. *Special Problems*

There are many other problems which may arise in the exercise of a nonexclusive power of appointment. In fact it may be said that the number is limited only by the imagination of the writer. In order to understand these problems it is necessary that they be discussed separately, and for the sake of brevity the author will include only the questions that recur most frequently.

1. *The Exclusion of Afterborn Children*

In any power that is exercisable by deed and under which the objects are members of a class that may increase in number, it may be asked whether the donee has the right to exercise the power before the maximum membership of the class has been determined. If he cannot exercise the power until that time, it means that a power can be validly exercised at the moment, but subsequent events may make it void.

In the case of *Dyke v. Sylvester*⁵⁸ a nonexclusive power of appointment was given to X. The donee, X, made an appointment to all

⁵⁶ *Spencer v. Spencer*, 5 Ves. Jr. 362, 31 Eng. Rep. 630 (1800); *Vanderzee v. Adom*, 4 Ves. Jr. 771, 31 Eng. Rep. 399 (1797); *Kemp v. Kemp*, 5 Ves. Jr. 849, 31 Eng. Rep. 891 (1795).

⁵⁷ CHANCE, POWERS, § 1122 (1841).

⁵⁸ 12 Ves. Jr. 126, 33 Eng. Rep. 48 (1806).

but it was suggested that more children might be born and that they would be entitled to a share. For this reason counsel said that the exercise of the power might be void. However, the court upheld X's appointment, stating that the possibility of afterborn children could not affect the validity of the appointments. It was said that this had always been the view of the court, and it would adhere to this rule until corrected by higher authority.

This case would seem to hold that an appointment under a non-exclusive power is valid if a share is given to all objects then *in esse*, even though more objects might later be born. If this is true, one might say that the donee has the right to exclude any object that comes into being after the date at which the power becomes exercisable; he could have exercised the power at that date and thus legally omitted the object, and, therefore, there is no valid reason why he cannot exclude him at a later period, because as a practical matter the same result would be reached.

The right to omit children born after the power becomes exercisable cannot be supported by authority because no case has ever been decided where this particular problem was involved. The *Restatement of the Law of Property* does not even attempt to advance an opinion as to the validity of an appointment where a share is given to all objects then *in esse* if there is a possibility of an increase in the number of objects. The *Restatement* says that there are many factors which may enter into a determination of the question, and for this reason it is impossible to state a general rule.⁵⁹

Chance says that the donee under such a power could make the appointment to all of the objects in being, and also include a statement that afterborn objects are to share.⁶⁰ If the donor of the power wished to be sure that this result would be accomplished, he should have expressly stated that this was his wish.

2. *Exercise In Favor of A Deceased Object*

Closely related to an exercise when there is a possibility of future issue is the exercise in favor of a deceased object. The general rule is that an appointment by will lapses if the appointee dies before the donee.⁶¹ This question usually arises only in a case where the objects

⁵⁹ PROPERTY RESTATEMENT, § 361 (1), comment e (1940).

⁶⁰ CHANCE, POWERS, § 1080 (1841).

⁶¹ I SIMES, FUTURE INTERESTS, §259 (1936); PROPERTY RESTATEMENT, § 349 (1940). As to the effect of the lapse statutes see PROPERTY RESTATEMENT, § 350 (1940).

are actually named. In a case where they are designated as a class they are not actually members of the class unless they survive the execution of the power. The result reached where they are named may seem strange if one adopts the "relation back" doctrine. Under that doctrine the appointee is said to take under the instrument creating the power and not under the instrument that executes the power. This would mean that the appointee's interest came into being when the donor created the power, and, therefore, if he was living at that time he should be allowed to take.

However, there is a method of justifying the result. In the instrument which creates the power one can add the words, "if they are alive when the execution takes place." Thus it can be seen that the donee would have no right to appoint to an object who was deceased at the time the appointment was made. In *Maddison v. Andrew*⁶² the donee in exercising a power gave a share to a deceased daughter. The court held that the exercise was void in so far as it attempted to provide for the deceased object. A similar result would probably be reached even in a case of an appointment made directly to the representative of a deceased object.⁶³

It is possible that in one instance there may be said to be an exception to the general rule. In a case in which the instrument creating the power also vests an interest in the objects, the fact that one of them dies will not prohibit him from sharing in the fund. In a Pennsylvania case⁶⁴ the wife of the testator was given a life estate and then full power to allot and divide the same equally among the four children of the testator. One of the children died before the wife executed the power, and in her division she gave the fund to the three remaining children. An action was brought by the administrator of the deceased child, and the court held he was entitled to a fourth of the property. In reaching that conclusion the court determined that the interest of the object vested at the time the power was created and that the only right the wife had was to divide the property into four equal parts.

This case may be considered as one in which there is no actual power involved. The situation of the donee can be said to be similar to that of a trustee under a "dry trust." On the other hand, one could say that the donee has no discretion as to the size of the shares nor as to the

⁶² 1 Ves. Sr. 57, 27 Eng. Rep. 889 (1747). A similar result was reached in the United States in *Herrick v. Fowler*, 108 Tenn. 410, 67 S. W. 861 (1902).

⁶³ CHANCE, POWERS, § 1090 (1841).

⁶⁴ *Bryce's Estate*, 238 Pa. 519, 86 A. 286 (1913).

objects who receive the shares, but that the donee does have the right to say which share shall be given to a particular object. If one accepts this latter view, it is possible to understand that there may be an exception to the rule that the donee can not appoint to a deceased object.

3. *Validity of Partial Appointments*

If there is a nonexclusive power to appoint by deed, the donee may exercise it by giving a portion of the fund to only one of the objects. While this is in reality an exclusive exercise of the power, it is said to be valid because there is property left which can be used to satisfy the demands of the other objects when the donee desires.⁶⁵ This result may also be reached if the donee is confined to a testamentary execution. If the donee's will does not entirely exhaust the fund, the remainder may go to the objects in default of appointment. This would satisfy the requirement that all objects were to receive a share providing the objects are the ones who will take in default of appointment.

There are many other ways in which exclusive appointments are valid only because subsequent events make them so. It is possible that the exercise will be made in favor of a stranger and some of the objects. In this case the exercise in favor of the stranger is void, but the court may hold that the other part of the appointment is valid. If this is true the share that was improperly given will pass to the other objects, assuming they are the takers in default, and thus satisfy the condition that all are to share in the appointment.

In *Ranking v. Barnes*⁶⁶ the donee of a nonexclusive power gave one third of the fund to one of the objects, but the exercise was void as to one half of that appointment. Later the donee exhausted the fund without giving all of the objects a share. The court said that, since a part of the first appointment was void, this sum would go by default; and, because the objects themselves took in default of appointment, the requirement that all should have a share had been satisfied. Thus the latter appointment was valid, but it would have been void had it not been for the subsequent failure of a portion of the first appointment.

It is also possible that one of the objects who receives a share may die before the exercise takes effect, and thus his share will pass by de-

⁶⁵ *Stableton v. Ellison*, 21 Ohio St. 527 (1871); *Russell v. Kennedy*, 66 Pa. 248 (1870); *Wilson v. Piggott*, 2 Ves. Jr. 351, 30 Eng. Rep. 668 (1794); *Simpson v. Paul*, 2 Eden 34, 28 Eng. Rep. 808 (1761); CHANCE, POWERS, §§ 1077-1088 (1841).

⁶⁶ 33 L.J.Ch. 539, 10 Jur. N.S. 463, 12 W.R. 565 (1864).

fault of appointment. In this way prior appointments will be valid even though they fail to give a share to each of the objects, assuming that the takers in default are the objects of the power.

One question that arises in connection with this problem concerns the division that is to be made of the remainder which is to go by default. As a general rule the courts hold that equality is equity and give the fund in equal proportions to all of the objects. This procedure may be criticized on the theory that some of the objects have received a share through the partial exercise, and they should therefore not be allowed to share equally in the division of the remainder. In support of the view that it is to be divided equally, it can be said that the donee by favoring them evidently meant them to have an advantage, and that it would not be right for the courts to attempt to equalize the share by having them account for the portion they received through the appointment.

The case of *Stableton v. Ellison*⁶⁷ adopts the view that the objects must account for any sum they receive by appointment before they can share in a division of the remainder. In that case the wife made partial appointments of her husband's land and died before it was completely exhausted. The court said that it should have been appointed equally, and that, therefore, in dividing the remainder all objects would be given an equal share taking into account the amount that each object received by appointment.

The object who takes solely in default of appointment can advance three arguments in support of the proposition that objects provided for by appointment should be made to account before sharing in the remainder. The object can claim that the appointment in reality means that the remainder is to go to the objects who have been omitted by the terms of the instrument. To adopt this reasoning means that it is necessary to read the provision into the instrument, and this is far from desirable. The object might also claim that the appointment is really conditioned on the fact that the appointee will claim no part of the fund to go by default. A third possibility is to say that the appointees are estopped to claim any of the remainder in view of the fact that they have already been provided for. Of these three the second would appear to be the most reasonable and by far the better view.

The *Restatement of the Law of Property* says that in many of the instruments creating a power of appointment it is provided that no

⁶⁷ 21 Ohio St. 527 (1871).

object shall take any share in default of appointment unless he shall bring all portions already received into the fund to go by default. This result could also be reached if the same or a similar provision were included in the instrument exercising the power.⁶⁸

4. *Rights of Objects Where There are Various Classes of Property*

In many cases where there is a power of appointment the subject of the power will consist of both realty and personalty. When this occurs it is necessary to determine whether or not the objects are entitled to a share of each class of property or whether they are merely entitled to a share of the property as a whole.

In *Morgan d. Surman v. Surman*⁶⁹ there were both realty and personalty, and the court held that the donee could give the realty to one and the personalty to the other of the objects. In a comment on this case by Sir Edward Sugden, it was stated that the decision in the case would warrant a donee under any circumstances in making an appointment of only one class of property to an object.⁷⁰ The rule stated in the *Morgan* case has received support in this country,⁷¹ but according to Chance the interpretation of the case by Sir Edward Sugden may be too broad.⁷² There is a Virginia case which would seem to support the view adopted by Chance because the court held that each of the objects was entitled to a portion of each class of property.⁷³

The writer does not think that the cases which deal with the point are necessarily in conflict. It would seem that the donor, by the language he uses in creating the power, controls the decision in any particular case. In one case it might be possible to give one object the realty and another the personalty, while in another case it would be impossible to do this because of the language of the instrument creating the power. However, as a general rule it is probably true that, where there are different classes of property, it is sufficient if an object receives a share from one of the classes.

5. *Special Factors Which Might Warrant An Exclusion*

It seems clear that there are many factors which warrant the courts in upholding an appointment that excludes some of the objects. In

⁶⁸ PROPERTY RESTATEMENT, § 361(1), comment g (1940).

⁶⁹ 1 Taunt. 289, 127 Eng. Rep. 844 (1808).

⁷⁰ SUGDEN, POWERS, 8th ed., 942 (1861).

⁷¹ *Biggins v. Lambert*, 213 Ill. 625, 73 N. E. 371 (1904); *Melvin v. Melvin*, 6 Md. 541 (1854).

⁷² CHANCE, POWERS, § 1086 (1841).

⁷³ *Carrington's Exrs. v. Belt*, 6 Munf. (20 Va.) 374 (1819).

many of the cases involving powers of appointments the donee of the power is the wife or husband of the donor. In these cases the power is probably given in order to guarantee to the donee the respect and affection of the objects. In such a case it would seem that the conduct of the objects would govern their right to share in the subject matter of the power. This was the view taken by the courts in the early cases, but it has recently been looked on with disfavor, and at the present time apparently the misconduct of the objects is no justification for excluding them from sharing in the fund.⁷⁴

There is another instance where the object may be lawfully omitted in the exercise of the power. In a case in which the object is provided for by other means, it is possible that the donee may omit him in the appointment.⁷⁵ In *Hatchett v. Hatchett*⁷⁶ the donee, in exercising the power, said that one of the objects had been provided for by him, and therefore he was not allowing him to share in this property (which was property left the donee by his wife). The court approved of this exclusion and said that, for the object to be entitled to a share of this property, it was necessary for him to show that he in fact had not received anything from the source mentioned.

The main question which arises in connection with this problem is whether or not the specific gift, which the object received, will warrant an exclusion from sharing in the property over which there was a power. There are three situations which might arise. The object might receive another gift from the donor of the power, he might receive something from the donee of the power, or he might receive something from a third person. In the latter instance, that of a gift from a third person, it would not be logical to hold that the object could be excluded, since the fund that he received in no way came from the property over which the donee had a power. To permit a gift from an outside source to affect the object's right to take under the power would allow the element of chance to become the governing factor in an exclusion. There is also reason to believe that a gift by the donor does not justify an exclusion. The donor undoubtedly knows of the possibility of sharing under the appointment, and therefore, if a gift is given in addition to this, it would seem that the donor intended the object to have both unless he specifically stated that this was not his intention.

⁷⁴ SUGDEN, POWERS, 8th ed., 941 (1861).

⁷⁵ *Hatchett v. Hatchett*, 103 Ala. 556, 16 So. 550 (1893); *Long v. Long*, 5 Ves. Jr. 445, 31 Eng. Rep. 674 (1800); *Parsons v. Parsons*, 9 Mod. 464, 88 Eng. Rep. 577 (1744).

⁷⁶ 103 Ala. 556, 16 So. 550 (1893).

Thus we are confined to permitting an exclusion only in the case where the gift comes from the donee. Even here there may be a strong argument that the donee should state in the gift that he is giving it in lieu of a share under the exercise of the power. However, if the donee does exclude the object when he exercises the power, it can be inferred from his action that he intended the gift to be a substitute for a share under the power of appointment.

There are very few cases which have presented this problem and the courts have not attempted to rationalize their holdings. However, it has been held that a relationship is necessary between the gift actually received and the subject of the power.⁷⁷ Thus it would seem that the only instance in which another gift would justify an exclusion is when it comes through the donee of the power, and is of sufficient value to warrant an exclusion.

6. *Consequence When Appointment Is Void Or Power Is Unexercised*

In any case in which the donee fails to make an appointment, it would appear that the court could exercise the power only if it is said to be in trust. This is true whether it is exercisable by deed, by will, or by either.⁷⁸ If the court does exercise the power, the subject matter will be given to the objects in equal shares because of the equitable maxim that equality is equity.⁷⁹

If the attempt of the donee to exercise the power is invalid, the court will set aside the execution and distribute the property itself.⁸⁰ As a general rule it will be distributed equally among the objects in the same manner as though there had been no attempt to make an appointment.⁸¹

In *Morris v. Owen*⁸² the testator gave his wife the power to dispose of the property among his (the testator's) children. The donee gave a portion of the property to the testator's child, but also made an appointment to the grandchildren. The court found that the power did not authorize a gift to grandchildren, and therefore found that the exercise

⁷⁷ *Parsons v. Parsons*, 9 Mod. 464, 88 Eng. Rep. 577 (1744).

⁷⁸ 1 SICES, FUTURE INTERESTS, § 274 (1936).

⁷⁹ *McGaughy's Admr. v. Henry*, 15 B. Mon. (Ky.) 383 (1854).

⁸⁰ *Degman v. Degman*, 98 Ky. 717, 34 S. W. 523 (1896); *Lippincott v. Ridgway*, 10 N. J. Eq. 164 (1854); *Cruse v. McKee*, 2 Head. (39 Tenn.) 1, 73 Am. Dec. 186 (1858); *Knight v. Yarbrough*, 1 Gilmer (21 Va.) 27 (1820); *Gibson v. Kinven*, 1 Vern. 66, 23 Eng. Rep. 315 (1682).

⁸¹ *Supra*, note 80.

⁸² 2 Call. (6 Va.) 520 (1801).

was partially void. The court then determined that the portion of the property which had not been validly appointed should go as intestate property of the donor. The reasoning of the court is not clear, but it might be said that the power was not in trust, and therefore the court would not exercise it.

The courts have not distinguished between an invalid exercise by will and an invalid exercise by deed. In each case the court reached the same result, namely, that the exercise is void. If the appointment is void the legal effect is that the donee has not exercised the power. Thus it may be said that the donee should be allowed to make another execution if it is possible. However, no cases, which followed this line of reasoning,⁸³ have been found.

III.

THE ILLUSORY APPOINTMENT DOCTRINE

A. England

It is seldom questioned that an exercise of a nonexclusive power is void in any case where one of the objects does not receive a share of the property. Thus, according to the English common law, an excluded object may obtain relief in a court of law where he is given nothing, but if the donee gives him as much as one cent he cannot complain; the result may prove to be unfair, but at law any sum, no matter how small, is regarded as a substantial sum.⁸⁴

In order to minimize the obvious injustice which resulted from the view taken by the courts of law, an object was given the right in equity to have the appointment set aside if the share he received was not substantial. This equitable relief, which was available to the object, came to be known as the illusory appointment doctrine and developed hand in hand with the legal view providing that some part should be given to each object. In any instance in which the power was exclusive the donee could give, as small a share as he desired, and the object could not come into equity and object because the portion given was not substantial.⁸⁵ There is not the slightest doubt that this is the proper

⁸³ It is difficult to prove that the donee is still capable of exercising in the reported cases. However, no case has been found which intimated that he could attempt to exercise again.

⁸⁴ *Hatchett v. Hatchett*, 103 Ala. 556, 16 So. 550 (1893); CHANCE, POWERS, §§1110, 1117 (1841); SUGDEN, POWERS, 8th ed., 938 (1861).

⁸⁵ *Ingraham v. Meade*, 3 Wall. Jr. (U. S. Cir Ct. Rep.) 32, 13 Fed. Cas. 50 (1855).

result in such a case; in any case in which the donee has the power to omit entirely he should also have the right to give as small a share as he desires.

In England the illusory appointment doctrine was definitely established in the case of *Gibson v. Kimven*.⁸⁶ In that case the wife of the testator was given certain household goods, the testator being sure that "she would not dispose of them except for the benefit of their children." In exercising the power thus created, the wife gave one of the children five shillings. The size of the fund was not disclosed in the opinion of the court, but the exercise of the power was held to be voidable on the ground that the giving of five shillings, when compared with the other amounts, created too great an inequality. It is impossible from the decided cases to place this illusory appointment doctrine on any established basis of legal principle. However, if the fund is large and the object receives only a small portion, the practical result to the object is the same as being totally excluded. It is possible that courts of equity regard the exercise thus, and determine that, as far as this particular object is concerned, there has not been an exercise of the power, and that he is entitled to a substantial share before he need recognize the fact that there has been an exercise.⁸⁷ Regardless of the lack of a definite theory upon which to place the doctrine, the courts of equity in England continued to grant relief where an insubstantial sum was given until the doctrine was abolished by legislative act.⁸⁸

B. *United States*

In the United States there has been no unanimity of judicial opinion concerning the illusory appointment doctrine. The *Restatement of the Law of Property* provides that any exercise of a nonexclusive power is void if a substantial share is not given to each donee.⁸⁹ This statement of the law differs from the English view in one material aspect.

⁸⁶ 1 Vern. 66, 23 Eng. Rep. 315 (1682). This is the first case found which actually involved the doctrine, but it was intimated that the share should be substantial in *Craker v. Parrott*, 2 Ch. Cas. 288, 22 Eng. Rep. 921 (1677).

⁸⁷ *Kemp v. Kemp*, 5 Ves. Jr. 849, 31 Eng. Rep. 891 (1795).

⁸⁸ *Dyke v. Sylvester*, 12 Ves. Jr. 126, 33 Eng. Rep. 48 (1806); *Mocatta v. Lousada*, 12 Ves. Jr. 123, 33 Eng. Rep. 47 (1806); *Bax v. Whitebread*, 10 Ves. Jr. 31, 32 Eng. Rep. 755 (1804); *Spencer v. Spencer*, 5 Ves. Jr. 362, 31 Eng. Rep. 630 (1800); *Vanderzee v. Aclom*, 4 Ves. Jr. 771, 31 Eng. Rep. 399 (1797); *Pocklington v. Bayne*, 1 Bro. C. C. 450, 28 Eng. Rep. 1234 (1785); *Alexander v. Alexander*, 2 Ves. Sr. 640, 28 Eng. Rep. 408 (1755). For a discussion of the legislative changes see *infra*, subdivision IV.

⁸⁹ PROPERTY RESTATEMENT, § 361 (1) (1940).

If it is true that the exercise of the power is void because an illusory sum is given, the courts of law will grant relief to the donee, and there will be no need for equitable relief. However, no decisions have been found which support the view adopted by the *Restatement*. In a recent federal case, the court, in its decision, cited with approval the above section of the *Restatement*.⁹⁰ However, from the facts of the case, it is apparent that some of the objects were omitted in the exercise of the power; thus, the discussion in relation to illusory appointments is dictum, and not authority for the proposition that an exercise is void in any case where each donee does not receive a substantial share.

In many of the states there are decisions which intimate that the old English rule will be followed when the problem arises.⁹¹ In those jurisdictions, it is probable that the object will have to go into equity and have the appointment set aside. In *Hatchett v. Hatchett*⁹² the plaintiff was one of the objects of a power of appointment. The donee of the power omitted the plaintiff because he had been provided for by other means. The court held that the appointment was valid and, if the plaintiff wished to assert that his share was illusory, it was necessary for him to go into equity because all shares are regarded as substantial at law.

There is an opposing line of decisions containing dicta which reject the illusory appointment doctrine.⁹³ It is true that in these cases the portion of the opinion dealing with the illusory appointment is only dictum, but it is safe to predict that a court in these jurisdictions would refuse to give relief if and when the question is presented.

In a Missouri case certain property was given to the wife of the testator and the court held that she took the fee. The plaintiff contended that the instrument created a life estate with a power of appointment, and that the share given to him was illusory. In the decision it was said that even if the contention was correct the plaintiff

⁹⁰ *Parker et al. v. Macbryde et al.*, (C. C. A. 4th, 1942) 132 F. (2d) 932.

⁹¹ *Hatchett v. Hatchett*, 103 Ala. 556, 16 So. 550 (1893); *In Re Sloan's Estate*, 7 Cal. App. (2d) 319, 46 P. (2d) 1007 (1935); *New v. Potts*, 55 Ga. 420 (1875); *McGaughey's Admr. v. Henry*, 15 B. Mon. (Ky.) 383 (1854); *City of Portsmouth v. Shackford*, 46 N.H. 423 (1866); *Den. v. Crawford*, 3 Halsted (8 N.J.L.) 90 (1825); *Herrick v. Fowler*, 108 Tenn. 410, 67 S. W. 861 (1902); *Cruse v. McKee*, 2 Head (39 Tenn.) 1 (1858); *Knight v. Yarbrough*, 1 Gilmer (21 Va.) 27 (1820); *Thrasher v. Ballard*, 36 W. Va. 524, 14 S. E. 232 (1891).

⁹² 103 Ala. 556, 16 So. 550 (1893).

⁹³ *Lines v. Darden*, 5 Fla. 51 (1853); *Fries v. Fries*, 306 Mo. 101, 267 S. W. 116 (1924); *Brown v. Fidelity Union Trust So.*, 126 N.J. Eq. 406, 9 A. (2d) 311 (1940); *Fronty v. Fronty's Exrs.*, 1 Bailey Eq. (S.C. Eq.) 517 (1833).

could not complain "unless this court adopts the doctrine of illusory appointments. That doctrine now has nothing in the way of logic to support it in a case like this, and has never been applied as a rule of decision by any American court save one."⁹⁴

In addition to the dicta already discussed, there are several states which have passed on the doctrine of illusory appointments, and the majority of them reject the English theory. Illinois,⁹⁵ Pennsylvania,⁹⁶ and Tennessee⁹⁷ have refused to set aside an appointment on the ground that the share given to one object was nominal. The only state which reaches a different conclusion is Kentucky.⁹⁸

In the first Pennsylvania case to announce the doctrine of that state the donee was given the power to appoint three hundred and twenty-six acres of land among four of his children. Two of the children received three acres each, and it was claimed that this was an illusory share. The court held the execution to be valid. In the decision it was mentioned that such a distribution was always valid at law, and there was no reason for introducing the equitable rule of illusory appointments, which the English courts had found so difficult to administer.⁹⁹

In *Hodges v. Stegall*¹⁰⁰ the objects claimed that the share given them was too small to be considered a substantial sum. To support their contention the objects claimed that according to previous decisions the state had adopted the illusory appointment doctrine. In the decision the court admitted there was dicta in earlier cases that the doctrine was accepted in that state, but the court was of the opinion this could not be taken as the law of the state. Because of this the appointments were held to be valid.

The early Kentucky cases contained dicta to the effect that the illusory appointment doctrine would be applied in that state. However, it was not until the case of *Barrett's Exr. v. Barrett*¹⁰¹ that it could be said with certainty that Kentucky would set aside an appointment on

⁹⁴ *Fries v. Fries*, 306 Mo. 101 at 109, 267 S. W. 116 (1924).

⁹⁵ *Hawthorne v. Ulrich*, 207 Ill. 430, 69 N. E. 885 (1904).

⁹⁶ In *Re Sinnott's Estate*, 310 Pa. 463, 165 A. 244 (1933); *Lloyd v. Fretz*, 235 Pa. 538, 84 A. 450 (1912); *Graeff v. DeTurk*, 44 Pa. 527 (1863).

⁹⁷ *Hodges v. Stegall*, 169 Tenn. 202, 83 S. W. (2d) 901 (1935).

⁹⁸ *McCormick v. Security Trust Co.*, 184 Ky. 25, 211 S. W. 196 (1919); *Barrett's Exr. v. Barrett*, 166 Ky. 411, 179 S. E. 396 (1915). See *Clay v. Smallwood*, 100 Ky. 212, 38 S. W. 7 (1896); *Degman v. Degman*, 98 Ky. 717, 34 S. W. 523 (1896).

⁹⁹ *Graeff v. DeTurk*, 44 Pa. 527 (1863).

¹⁰⁰ 169 Tenn. 202, 83 S. W. (2d) 901 (1935).

¹⁰¹ 166 Ky. 411, 179 S. W. 396 (1915).

the ground that a nominal sum had been given. In the decision *Hanna, J.*, said: "If an analysis of these cases leaves any doubt, however, that the illusory appointment doctrine is the law of this State, we have no hesitation now in adopting it as a competent rule in the testing of the execution of non-exclusive powers."¹⁰²

C. Factors Which Determine That a Share is Illusory

One of the arguments for refusing to adopt the illusory appointment doctrine is the difficulty in determining when a given share is illusory. The courts have been unable to agree on a dividing line between a substantial share and one that is nominal. It may be that there are many factors which would enter into such a determination, and in order to understand them it is necessary that they be discussed separately.

1. Amount Of the Appointment

In general it can be said that the value of the sum given is not one of the determinative characteristics in deciding the substantiality of the appointment. In *Vanderzee v. Aclom* Lord Alvanley said:¹⁰³ "It is clear, the mere amount of the sum will not determine, whether it is illusory, or not. It must be connected with the power and the extent of it."

In regard to personal property the amount or size of the appointment is of less importance than the same factor in relation to realty. Certain sums are said to be nominal merely because of their value. Some writers believe that one shilling, five shillings, or one guinea could never be a substantial amount.¹⁰⁴ This would be true in most cases, but it is possible that a fund might be so small that an equal share would only amount to five shillings. If this were the situation there could be no doubt that an appointment of that sum would be valid. In deciding the validity of an appointment of personal property the courts have placed little importance on the size of the fund which was allotted, and it is of little aid in determining when a given share is illusory.¹⁰⁵

When the fund over which the donee has the power consists of realty there are two aspects in relation to the size of the appointment.

¹⁰² *Id.* at 417.

¹⁰³ 4 Ves. Jr. 771 at 775, 31 Eng. Rep. 399 (1797).

¹⁰⁴ CHANCE, POWERS, § 1151 (1841).

¹⁰⁵ *Spencer v. Spencer*, 5 Ves. Jr. 362, 31 Eng. Rep. 630 (1800); *Kemp v. Kemp*, 5 Ves. Jr. 849, 31 Eng. Rep. 891 (1795); *Burrell v. Burrell*, Ambl. 660, 27 Eng. Rep. 428 (1768).

The object may be given a life estate, which is in effect an element of size, or there may be a gift of a very small acreage of land. Most powers will not permit the donee to appoint only a life estate to one of the objects.¹⁰⁶ This would seem to depend upon an interpretation of the language of the instrument, and under the usual terms there is little chance to say that the donor intended a life estate to be given.

In *Pocklington v. Bayne*¹⁰⁷ there was an undisclosed acreage of real estate. Two of the objects were given an acre for life and the appointment was held to be illusory. It cannot be determined whether it was the restriction to a life estate or whether it was the fact that only one acre was allotted that invalidated the exercise of the power. It is probable that the decision was based on both factors, for it is unlikely that an increase in the acreage alone would have made the appointment substantial. No definite rule can be laid down in relation to realty, but if one considers size as also including the quantum of the estate it is probable that size alone would have an effect in determining substantiality.

The element of time also enters into the determination of the sum, size, or value of an appointment. This is especially true if the subject of the power consists of stocks or bonds which can fluctuate in value. If the subject matter does consist of bonds, the donee may appoint by will, and at the time the division is made the appointments may be equal. Later events may alter economic conditions to such an extent that the appointments will be grossly unequal when they take effect, and it would be necessary to determine whether to consider the values when the will was drawn or when the object actually received the property. The latter choice is the better, unless it is necessary to find an intent on the part of the donee to give an illusory sum. Even if it is necessary to find this intent it would appear that a failure to change the will would imply an intent to give the object a nominal sum. However, the author does not believe intent to be an important factor in deciding the substantiality of a sum.

2. *The Relationship of the Appointment to the Fund*

The most important single factor in determining whether an appointment is illusory is the relation of the appointment to the fund over which the donee exercises the power. If the courts would realize this fact there would be far less confusion in the cases. In *Barrett's Exr.*

¹⁰⁶ *Stuyvesant v. Neil*, 67 How. Pr. (N.Y.) 16 (1883).

¹⁰⁷ 1 Bro. C. C. 450, 28 Eng. Rep. 1234 (1785).

v. Barrett the idea was stated in the following manner:¹⁰⁸ "True it is that one thousand dollars is a substantial sum of money in itself; but the question here is, as we think, its relation to the whole of the amount to be distributed pursuant to the power."

Many of the English judges, especially Sir William Grant, took an entirely different view of the question. This judge adopted the position that he would only declare a given sum to be illusory when that same sum had been held to be nominal in an earlier decision based on the same facts.¹⁰⁹ Since it is very improbable that two cases will ever arise with exactly the same set of facts, the learned judge must have realized that his statement meant little. The accompanying chart will show all

Case	Equal Share	Share Given	Percent of Pro Rata	Holding
1	£ 788.8	£ 71.4	9.05	Good
2	£ 500.0	£ 33.3	6.66	Good
3	£ 1,800.0	£ 200.0	11.11	Good
4	£ 1,200.0	£ 100.0	8.33	Good
5	£ 250.4	£ 5.0	1.99	Bad
		£ 9.0	3.23	Bad*
		£ 10.0	3.99	Bad*
6	£ 622.9	£ 10.5	1.69	Bad
7	£ 633.0	£ 10.0	1.58	Bad
		£ 50.0	7.90	Good*
8	£ 1,000.0	£ 250.0	25.00	Good
9	\$12,125.00	\$6,000.00	49.48	Good
10	\$37,500.00	\$1,000.00	2.67	Bad
11	\$ 57.21	\$ 24.56	42.89	Good*

* Indicates the conclusion is dictum.

1. *Dyke v. Sylvester*, 12 Ves. Jr. 126 (1806).
2. *Mocatta v. Lousada*, 12 Ves. Jr. 123 (1806).
3. *Butcher v. Butcher*, 9 Ves. Jr. 382 (1804).
4. *Bax v. Whitebread*, 10 Ves. Jr. 31 (1804).
5. *Spencer v. Spencer*, 5 Ves. Jr. 362 (1800).
6. *Vanderzee v. Aclom*, 4 Ves. Jr. 771 (1797).
7. *Kemp v. Kemp*, 5 Ves. Jr. 849 (1795).
8. *Wilson v. Piggott*, 2 Ves. Jr. 351 (1795).
9. *McCormick v. Security Trust Co.*, 184 Ky. 25 (1919).
10. *Barrett's Exr. v. Barrett*, 166 Ky. 411 (1915).
11. *City of Portsmouth v. Shackford*, 46 N.H. 423 (1866).

of the instances in which the courts have passed upon the question whether a given sum is illusory. There are other cases on this point, but they are incapable of tabulation because all of the facts are not

¹⁰⁸ 166 Ky. 411 at 414, 179 S. E. 396 (1915).

¹⁰⁹ "As therefore no case has been found, in which a sum of this amount has been declared illusory, there is no ground, upon which I think myself justified in determining, that this is an invalid appointment." *Butcher v. Butcher*, 9 Ves. Jr. 382 at

included in the report. An examination of the table will give a fairly accurate picture of where the dividing line should be drawn. The fact that there is no overlapping of percentages should prove significant, because it tends to substantiate the fact that there is an actual line dividing substantial sums from mere nominal appointments. The largest appointment which is intimated to be illusory is equal to three and ninety-nine hundredths per cent of an equal share, and the smallest sum which is held to be substantial is equal to six and sixty-six hundredths per cent of an equal share. At what precise point between these two figures the line is to be drawn will remain unknown until future decisions are encountered which present the question. However, with the material now at hand, the courts should have little trouble in determining the substantiality of an appointment that falls either above or below the percentages mentioned.

3. *Relationship of the Objects and the Donor*

In practically all cases the objects of the power are related to the donor in the same manner. They are usually children, grandchildren, brothers and sisters, or members of some other class which have the same degree of relationship. Therefore, a small appointment cannot be justified on the ground that this particular object was not as close to the donor as the other objects. If the objects do have a different degree of relationship, there is a possibility that the court would have to take this into account in passing on the substantiality of the appointment. However, no reported cases have been found in which this factor entered into the consideration of the substantiality of the appointment.

4. *Other Factors*

There are certain other factors which are of minor importance in determining whether a given share is substantial. In subdivision II it was mentioned that while the conduct of the object might warrant an exclusion it was of little importance at the present time. For the same reasons mentioned therein, behaviour may also play a small part in determining substantiality.¹¹⁰

399, 32 Eng. Rep. 650 (1804). See also *Mocatta v. Lousada*, 12 Ves. Jr. 123, 33 Eng. Rep. 47 (1806).

¹¹⁰ *Bristow v. Warde*, 2 Ves. Jr. 336, 30 Eng. Rep. 660 (1794); *Clarke v. Turner*, 2 Freem. 198, 22 Eng. Rep. 1158 (1694).

In *Long v. Long*¹¹¹ the court held that there could be no question of an illusory appointment if the object was provided for by other means. This would undoubtedly be governed by the same qualifications as govern a total exclusion for this reason, because the essential difference between a total exclusion and the giving of an illusory share is really only a matter of degree.

The intent of the donee may affect the decision of the court. In *Kemp v. Kemp*¹¹² the court held an appointment to be void. In the decision it was said that the sum in question (£10) was clearly meant as an illusion and not an execution. However, it has never been suggested that it was necessary to show an intent on the part of the donee to give an illusory sum before the appointment could be set aside. If such a factor is necessary it is evidently implied from other facts in the case.

IV

LEGISLATIVE REFORM

The law relating to nonexclusive appointments has been another attempt to accomplish judicially a just result. In certain powers each object should be given a portion of the property, and the share given ought to be a substantial amount. This was the result which the early English courts hoped to attain, but time has proved that they were unable to attain any degree of success.

Fundamentally the inability of the courts to determine when a sum was nominal underlies the entire failure of the law. The whole scheme of this phase of the law depended upon relief in equity when a sum was illusory, and when the courts were unable to determine this factor there was little to be accomplished in distinguishing between an exclusive and a nonexclusive power. Because of this the courts soon became dissatisfied with the doctrine, and, although following it, the courts admitted they were reluctant to do so. In *Vanderzee v. Aclom*¹¹³ it was said that the share given to the object must be substantial "though from the difficulty, that has followed, one cannot but lament the rule."

Because of the difficulties mentioned an act was passed in 1830 to remedy the situation.¹¹⁴ The preamble of the act stated that certain difficulties and inconveniences had arisen because of the equitable rule

¹¹¹ 5 Ves. Jr. 445, 31 Eng. Rep. 674 (1800).

¹¹² 5 Ves. Jr. 849, 31 Eng. Rep. 891 (1795).

¹¹³ 4 Ves. Jr. 771 at 785, 31 Eng. Rep. 399 (1797).

¹¹⁴ 1 Wm. 4, c. 46 (1830).

that the share given to an object must be substantial. Hence, it was expedient that such appointments should be as valid in equity as at law; it was therefore enacted that from and after that date no appointment should be impeached in equity on the ground that the sum given was nominal.

By this act it was thought that all difficulties had been ironed out of the law and the question finally settled. The result in reality placed the law at the same stage it was when equity first intervened. The reason for the equitable interference had been the unjustness of allowing an object to be cut off with a shilling. After the passage of the act the status of an object receded to the position occupied a hundred years before. The case of *In Re Stone*¹¹⁵ illustrates the judicial interpretation of the act. In that case the donee executed a nonexclusive power of appointment by giving one of the objects a square yard of land. The court agreed that this amount was illusory, but said that the statute provided for the giving of a sum that was nominal, and hence the appointment was valid. This result was as undesirable as the state of the law before the act of 1830, and again the legislature took a hand in the matter.

In 1874 an act was passed which permanently removed any doubt as to the law in relation to nonexclusive appointments. The act recited that many appointments failed because the donee omitted some of the objects, and it was desirable that this situation be changed. Hence, no appointment should be declared invalid on the ground that one or more of the objects were entirely excluded in the exercise thereof.¹¹⁶ By this act the legal consequences of a nonexclusive power were completely abolished, and after the passage of the act there was little practical value to be obtained in distinguishing between the two types of powers. The first act had allowed the donee to cut off an object with a shilling and this act enabled the donee to cut off the shilling also.¹¹⁷ The English law has remained unchanged since the time of the act of 1874. When the English Property Act was enacted in 1925 a provision was adopted which merely restated the law as regards nonexclusive powers as it stood at that time.¹¹⁸

In the United States there have been several states which have enacted statutes changing the law in regard to nonexclusive powers.

¹¹⁵ 3 I.R. Eq. 621 (1869).

¹¹⁶ 37-38 Vict., c. 37, § 1 (1874).

¹¹⁷ FARWELL, POWERS, 3rd ed., 427-428 (1916).

¹¹⁸ English Law of Property Act 1925, § 158 (1), 15 Geo. 5, c. 20.

The first state to attempt to modify the law was New York. Its statute reads as follows:

“Where a disposition under a power is directed to be made to, among, or between, two or more persons, without any specification of the share or sum to be allotted to each, all the persons designated shall be entitled to an equal proportion; but when the terms of the power import that the estate or fund is to be distributed among the persons so designated, in such manner or proportions as the grantee of the power thinks proper, the grantee may allot the whole to any one or more of such persons in exclusion of the others.”¹¹⁹

Similar statutes are in operation in the District of Columbia,¹²⁰ Alabama,¹²¹ Michigan,¹²² Minnesota,¹²³ North Dakota,¹²⁴ Oklahoma,¹²⁵ South Dakota,¹²⁶ and Wisconsin.¹²⁷ However, these statutes substitute the term trustee for donee or grantee of the power. By this change it may be said that the statute would only apply when the power was said to be in trust; but it is more likely that the courts will hold the word trustee synonymous with donee, and, therefore, apply the statute to any and all powers of appointment.

It is difficult to determine the effect of the American statutes. There have been no cases which directly interpret them, and as a result no conclusive statement regarding them can be made. It would seem that where there is no discretion on the part of the donee each object must be given an equal share, but where the donee has a discretion as to the proportions which are to be given, he may exclude any of the objects. As a practical matter it would seem that the donee has a discretion in the majority of the cases. Hence, where the law has been changed by statute the result reached is very similar to that of England.

The author believes that the view originally adopted by the courts of England is by far the most just. The main objection, as was previously pointed out, was a failure to agree on what constituted an illusory

¹¹⁹ N.Y. Stat. (McKinney, 1937) “Real Property,” § 158.

¹²⁰ D.C. Code (1940), § 45-1015.

¹²¹ Ala. Code (1940), § 47-85.

¹²² Mich. Stat. Ann. (1937), §§ 26.116, 26.117.

¹²³ Minn. Stat. (Mason, 1927), §§ 8132, 8133.

¹²⁴ N.D. Comp. Laws (1913), §§ 5437, 5438.

¹²⁵ Okla. Stat. (1941), §§ 60-294, 60-295.

¹²⁶ S.D. Code (1939), §§ 59.0455, 59.0456.

¹²⁷ Wis. Stat. (1941), §§ 232.23, 232.26.

sum. This question should have been determined by a comparison between the sum given and the sum which would represent an equal share. It is true that this would place the law on a mechanical basis and would tend to restrict the freedom of action which was one of the characteristics of the court of equity. However, it is noticeable that in at least one other instance the court resorted to such a device in order to remove the element of uncertainty from its decisions.¹²⁸

At any rate the English statutory change is probably preferable to the American. It may be true that there is no difference between the English statute and the American legislative changes, but the English law seems to be more certain, and it is desirable that the jurisdictions which enact future legislation adopt the English rather than the New York form.

¹²⁸ In allowing an abatement on the purchase price because of a mistake in regard to the quantity of land sold in gross the Kentucky court adopts a mechanical rule, allowing the abatement where the deficiency is in excess of ten per cent of the total amount of land sold. *Cecil v. Knox*, 195 Ky. 214, 242 S.W. 26 (1922); *Landrum v. Wells*, (Ky. 1909) 122 S. E. 213.