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Article 15

Powers - Partition Granted Prior to Termination of Executor's Power of Sale

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who sells a used car. Furthermore, the decision does not state whether the dealer can release himself from liability by telling the vendee that the automobile is in defective condition, or that it has not been inspected for defects (although the dissenting opinion feels that the necessary implication is that there is an absolute duty to inspect and correct such defects as might prove dangerous to third parties). Finally, the dissent points out that the decision does not state whether this duty extends to dealers in other second hand merchandise such as farm tractors, road machinery, cook stoves, and the like. Although these questions seem unduly searching in view of the fact that the court ruled specifically upon the duty of used car dealers, and the duty of dealers in other second hand merchandise is not in issue, it is still problematical whether the dealer can release himself from liability by informing the vendee of a defect or by informing him that no inspection had been made.

On the question of vagueness of the majority decision, the dissent rather dramatically stated:

> When a court sets itself up as an instrument of social progress and embarks on a crusade, it should not merely shoot a scatter gun in the general direction of a supposed target. The shots should be zeroed in with some degree of accuracy and innocent bystanders should be given reasonable opportunity to remove themselves from the line of fire.[21]

In view of the fact that the questions posed by the dissent must be answered, it appears that the court, by placing this vague, unqualified duty upon used car dealers, has also broadened the field of litigation between used merchandise dealers and third parties not in privity where the article sold, if defective, becomes a dangerous instrumentality.

POWERS–PARTITION GRANTED PRIOR TO TERMINATION OF EXECUTOR'S POWER OF SALE

Testatrix died in 1938 leaving a one-third interest in the annual gross rents of her farm to her husband as long as he remained unmarried. The remainder was left to her four children equally in fee simple with a power of sale in her executors, which power was to last for five years after the termination of her husband's interest. A devisee of one of the remaindermen sued for partition in 1952, which was only two years after the death of the husband. The defending executors moved to strike, alleging that the plaintiff had no interest to which a suit for partition would attach. They alleged that they as executors became invested with legal title as trustees, and that an equitable conversion occurred leaving the remaindermen as equitable owners of personalty. The Illinois Supreme Court in allowing partition held that in the absence of an imperative

[21] 268 S.W. 2d 627, 631 (Ky., 1954).

direction to sell, no conversion was effected. *Rehbein v. Norene*, 2 Ill. 2d 363, 118 N.E. 2d 287 (1954).

The case involves the personal representative's power of sale created by an expression of intent under a will. This expression may be spelled out,[1] or it may be implied by a construction of the whole will.[2] It may also be implied when it is necessary to carry out the provisions of the will.[3] However, a mere direction to divide an estate consisting in whole or in part of real estate will not of itself give rise to such a power.[4] It must be shown that the power is either necessary or that the testator contemplated a sale. The language in the instant case left no doubt that a power existed. The issue concerned the type of power created, the determination of which was necessary to ascertain whether a bill for partition would lie.[5]

The first type of power is one wherein there is a direct gift of realty to devisees with the executor authorized, but not directed, to sell the property and divide the proceeds. This type is called discretionary because the executor is not duty-bound to exercise his power. Title to the real estate passing under a will containing a discretionary power is in the devisees,[6] and they hold it until the executor deems it advisable to sell the land and distribute the proceeds of the sale.

It is apparent that the intention of the testator can be carried out with no exercise of a discretionary power. In fact, if the power is not exercised within the time limit set when one has been established, or within a reasonable time if a limit has not been established, the power is lost, and the beneficiaries' interest in realty can no longer be divested. In *Vierieg v. Krehmke*[7] where there was no time limit set, it was held that a suit for partition will be available to the devisees where the executor has not exercised his discretionary power within a reasonable time. The suit was said to attach to the interest which the devisees possessed from the moment of the testator's death.

A different picture presents itself when the executor is under a duty to exercise his power. In these instances the testator's intention is not fulfilled until a distribution of the proceeds of a sale has been made.

[1] Young v. Sinsabaugh, 342 Ill. 82, 173 N.E. 784 (1930).

[2] Illinois Christian Missionary Society v. American Christian Missionary Society, 277 Ill. 193, 115 N.E. 118 (1917).

[3] Sartain v. Davis, 323 Ill. 269, 154 N.E. 101 (1926).

[4] McCormick v. McCormick, 292 Ill. 301, 127 N.E. 78 (1920); Grove v. Willard, 280 Ill. 247, 117 N.E. 489 (1917).

[5] Ill. Rev. Stat. (1953) c. 106, § 44.

[6] Young v. Sinsabaugh, 342 Ill. 82, 173 N.E. 784 (1930); Haward v. Peavey, 128 Ill. 430, 21 N.E. 503 (1889).

[7] 293 Ill. 265, 127 N.E. 735 (1920).

Therefore, when the testator dies, an equitable conversion takes place giving the beneficiaries an interest in personalty rather than realty.[8] When this change occurs, there are two possible paths for legal title to take. One possibility is that the executor holds the title,[9] thus giving him more than a naked power; he would also have an estate in the land itself. Rarely will such occur unless there is a direct gift to the executor with directions to distribute the proceeds of a sale. The more common course is that the heirs hold the title.[10] *Knight v. Gregory*[11] points out that when partition is involved, the problem is more academic than real, for in either case title is held in trust for the purpose of carrying out the provisions of the will. Thus it is apparent that due to the conversion, the beneficiaries, although able to compel the executor to exercise his power,[12] cannot succeed in obtaining partition. An exception to this rule is that the beneficiaries may obtain such relief if a reconversion is made. Before that change can occur, however, all the beneficiaries must consent to take the realty in its actual form.[13]

Theoretically, it would seem that partition would not lie after lapse of a mandatory power. The contrary is true however. In *Pope v. Kitchell*[14] the executors did not exercise a mandatory power within a two year limit established by the will. Because of the nonexecution, some named recipients of the proceeds sought partition of the real property. The court granted the bill, citing the *Vierieg* case despite the fact that in that case only a discretionary power existed. Nevertheless, the rule in the *Pope* case has been subsequently followed.[15]

In the instant case, it is clear that the defendants must prove that they, as executors, possessed a mandatory power in order to prevail. They had a power to sell which was set by time limit at five years. Two years after the authority to sell began, this bill was instituted. If the power was mandatory, the bill would automatically fail due to the plaintiff's lack of interest in real property prior to the passage of the time limit. On the other hand, if the power was discretionary, there would be no equitable conversion to defeat his suit. The court found on the question of construction that due to an absence of an imperative direction to sell, and

[8] Goben v. Johnson, 335 Ill. 395, 167 N.E. 94 (1929); Buckner v. Carr, 302 Ill. 378, 134 N.E. 760 (1922); Burbach v. Burbach, 217 Ill. 547, 75 N.E. 519 (1905).

[9] Greenwood v. Greenwood, 178 Ill. 387, 53 N.E. 101 (1899).

[10] Brandt v. Phipps, 398 Ill. 296, 75 N.E. 2d 757 (1947).

[11] 333 Ill. 643, 165 N.E. 208 (1929).

[12] Cannon v. Garrett, 268 Ill. App. 18 (1932).

[13] Bouslough v. Bouslough, 306 Ill. 24, 137 N.E. 517 (1922).

[14] 354 Ill. 248, 188 N.E. 480 (1933).

[15] Lockner v. Van Bebber, 364 Ill. 636, 5 N.E. 2d 460 (1936).

because the fee had been devised in a prior section of the will, the executors possessed a mere naked discretionary power, and as a result, equitable conversion was not involved.

The instant case does not change any law, for the requirement of a duty to effect an equitable conversion is very basic to this concept.[16] In any event, the case is of interest because the power was to last for five years, and this bill was filed during that period. The court used the thought expressed in the *Vierieg* case that filing a bill for partition suspends a discretionary power and granting the bill terminates it, notwithstanding the fact that in the *Vierieg* case it was held that the power lapsed by passage of an unreasonable time.

Apparently there is another facet in the nature of these powers which the court did not deem necessary to discuss. A testator who creates a discretionary power to last a specified period of time might have his intention defeated. This power might be terminated by a devisee obtaining partition before the power lapses. The only limitation on this right is that the suit may not be filed so soon after the opening of the estate that the executor has not had a reasonable time to act.[17] Thus, it appears that the effect of attaching a period of time onto these powers is not to make them indefeasible for that period, but merely to effect an automatic cessation of the right that the executor possessed to execute the power, if that right has not already been terminated before the expiration of the period.

TAXATION–STATE UNABLE TO FORCE NON-RESIDENT SELLER TO COLLECT USE TAX

Maryland enacted a tax on the use, storage, or consumption of tangible personal property purchased within the state. The vendor is given the task of collecting the tax, and for said collection and remittance to the state of Maryland is compensated on the basis of three per cent of the gross tax.[1] Because plaintiff, a Delaware corporation doing business in Delaware, had not collected and remitted the tax, Maryland attached a delivery truck of the plaintiff while the truck was in that state making a routine delivery. In reversing the Maryland Court of Appeals, the United States Supreme Court, in a five to four decision, held that while the tax created a liability on the inhabitants of Maryland, the Delaware corporation could not be made a collector of the tax due to an absence of jurisdiction over the plaintiff. *Miller Bros. v. Maryland*, 347 U.S. 340 (1954).

[16] 4 Pomeroy, Equity Jurisprudence, § 1160 (5th ed., Symons, 1941).

[17] Sartain v. Davis, 323 Ill. 269, 154 N.E. 101 (1926); Fischer v. Butz, 224 Ill. 379, 79 N.E. 659 (1906).

[1] Md. Ann. Code (Flacks, 1951) Art. 81, § 369.