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## Estates and Trusts - Future Interests - Power of Appointment

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## Recent Decisions

**ESTATES AND TRUSTS—FUTURE INTERESTS—POWER OF APPOINTMENT—**  
The Supreme Court of Pennsylvania has held that a devise giving a life estate and a general testamentary power of appointment is not equivalent to a fee simple when there is included in the devise a gift over in default of appointment.

*Estate of Curtis*, 452 Pa. 527, 307 A.2d 251 (1973).

This case concerned the interpretation of the ninth article of the will of Cyrus H.K. Curtis.<sup>1</sup> That article disposed of all of the testator's real property situated in Montgomery County.<sup>2</sup> The effect of this article was to grant to Mary Louise Curtis Bok,<sup>3</sup> daughter of the testator, a life interest in all of the testator's property plus a general testamentary power of appointment over the same. In default of such appointment, testator's grandchildren and their issue per stirpes were to take the property in fee simple. Mrs. Bok was also granted the power to sell any or all of the testator's realty and substitute the proceeds of the sale for the property sold.<sup>4</sup>

A few years after the testator's death, Mrs. Bok negotiated with the solicitor of the Board of Commissioners of Cheltenham Township for the establishment of a public park in memory of her father, Cyrus Curtis.<sup>5</sup> On March 11, 1937, Mrs. Bok transferred to the township the property now in question by "Deeds of Gift."<sup>6</sup> The park was then

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1. *Estate of Curtis*, 452 Pa. 527, 307 A.2d 251 (1973).

2. Article nine of Cyrus H.K. Curtis' will reads as follows:

Ninth. I give, devise and bequeath to my daughter, Mary Louise Curtis Bok, for her lifetime, my residence know as Lyndon, and all other real estate belonging to me, situate in Montgomery County, Pennsylvania . . . together with all the buildings thereon erected and all the household furniture and effects contained therein . . . .

My said daughter shall have full power by will or other testamentary instrument to dispose of any or all of said property, but failing such disposition, upon her death, I give the same in equal shares to such of my grandchildren as shall be living at the death of my said daughter, and to the issue then living of any deceased grandchildren, such issue to take per stirpes the share which their parent would have been entitled to receive if living.

My said daughter shall have full power to sell any or all of said property, real or personal, and to execute and deliver good and sufficient deeds or other instruments of conveyance or sale, without any obligation upon the part of the purchaser to see to or be responsible for the application of the proceeds. The proceeds of such sale shall stand in place of the property sold and shall be turned over to my daughter, without security.

*Id.* at 529, 307 A.2d at 252.

3. After her husband's death Mrs. Bok remarried, becoming Mary Curtis Bok Zimbalist, but will be continued to be referred to as Mary Bok.

4. *Id.* at 529, 307 A.2d at 252.

5. *Id.* at 530, 307 A.2d at 252.

6. There were eight "Deeds of Gift" transferred to the township. They were alike in

established by the township, on the property, and remained as such to the time of this case.

Prior to her death in 1970, Mrs. Bok released her power of appointment. The takers in default under the testator's will desired that the land which was given to the township by their mother be returned to them as provided by their grandfather's will.<sup>7</sup> The township refused to return the park to the takers in default, and in the action that followed the lower court ruled that the land belonged to the takers in default.<sup>8</sup> The township appealed the decision to the Supreme Court of Pennsylvania which affirmed the decision of the lower court.<sup>9</sup>

The township alleged three theories in support of its position that Mrs. Bok could convey inter vivos fee simple ownership to the township. Each theory was discussed separately by the court.<sup>10</sup>

The township first alleged that the language of the testator's will stating:

. . . to my daughter, Mary Louise Curtis Bok for her lifetime . . .  
but failing to exercise of the power of appointment upon her

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every material aspect except the legal description of the property conveyed. The relevant portions of the "Deeds of Gift" read as follows:

WITNESSETH, That in consideration of the desire of the said party of the first part to establish a free public neighborhood park and arboretum, without essential change in the general landscape character thereof, the said party of the first part has remised, released and quitclaimed, . . . unto the said party of the second part, its successors and assigns, all the right, title and interest of the party of the first part in and to the following described property . . . .

TO HAVE AND TO HOLD the said premises, with all and singular appurtenances, unto the said party of the second part, its successors and assigns, so long as said premises and the whole thereof shall be used and maintained solely as a free public neighborhood park and arboretum, and without essential change in the general landscape character thereof and for no other purpose; PROVIDED that, if at any time the party of the second part, its successors and assigns, shall fail to use and maintain said premises and every part thereof as a free public neighborhood park and arboretum, as aforesaid, without essential change in the general landscape character of said premises, then said premises and every part thereof, together with all and singular the appurtenances, shall revert to said party of the first part . . . .

*Id.* at 530, 307 A.2d at 253.

7. The takers in default alleged that Mrs. Bok was not the owner in fee of the park, but merely held a life estate interest therein, so that at her death they became the owners of the land under the terms of the Cyrus Curtis will. *Id.* at 527, 307 A.2d 253.

8. After the township refused to return the land in question to the grandchildren of the testator, they (the grandchildren) filed a petition in the Orphan's Court Division of Montgomery County, requesting that court to determine ownership of the property in question. The township filed preliminary objections alleging that the lower court lacked jurisdiction over the subject matter. This preliminary objection was overruled by the orphan's court and affirmed an appeal by the Supreme Court of Pennsylvania. *Curtis Estate*, 445 Pa. 603, 284 A.2d 500 (1971).

The Montgomery County court then ruled that the land in question belonged to the grandchildren. *Curtis Estate*, No. 44412 (Pa. O.C. Montg. Co., Jan. 7, 1973).

9. 452 Pa. at 531, 307 A.2d at 253.

10. *Id.* at 531, 307 A.2d at 253.

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death, I give the same in equal shares to such of my grandchildren as shall be living at the death of my said daughter . . . .<sup>11</sup>

gave to Mrs. Bok a fee simple under the Rule in Shelley's Case,<sup>12</sup> thus making the conveyances to the township a fee simple determinable.<sup>13</sup>

The Pennsylvania Supreme Court stated that the crucial element necessary for the invocation of the Rule in Shelley's Case was that the heirs in the remainder must take by inheritance from the person holding the previous freehold estate.<sup>14</sup> The court concluded that the language of the testator's will, granting a gift over to his grandchildren rather than the life tenant's heirs, clearly demonstrated that the gift over was to descend from him and not from the life tenant.<sup>15</sup>

Secondly, the township alleged that Mrs. Bok's actions concerning the property were tantamount to a sale under the power to sell given her by her father's will.<sup>16</sup>

Mrs. Bok was given the power to sell the real estate and deliver to the buyer deeds of purchase but she had to substitute the proceeds of the sale for the land and this, the court held, she did not do.<sup>17</sup>

The court cited *Earle's Estate*<sup>18</sup> as being dispositive of what the testator meant when he used the term "proceeds."<sup>19</sup> In that case the

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11. *Id.*

12. The Rule in Shelley's Case has been applied in Pennsylvania in the following manner:

In determining whether the rule in Shelley's case is applicable, the test is how the donees in remainder are to take. If as purchasers under the donor then the particular estate is limited by the literal words of the deed and the rule in Shelley's case has no application. But if the remainder-men are to take as heirs to the donee of the particular estate, then what has been called the superior intent, as declared in Shelley's case, operates, and the first donee takes a fee, whatever words may be used in describing the estate given to him.

*Shapely v. Diehl* 203 Pa. 566, 567, 53 A. 374 (1902). It should be noted that the Rule in Shelley's Case was abolished prospectively by PA. STAT. ANN. tit. 20, § 229 (1950), but would nevertheless apply to the will of Cyrus Curtis.

13. The township claims possession of a fee simple determinable rather than an absolute fee because of certain restrictions placed on the land by Mrs. Bok in conveyances of the park property.

14. 452 Pa. at 533, 307 A.2d at 254, citing *Stout v. Good*, 245 Pa. 383, 91 A. 613 (1914). In that case the court held:

The Rule in Shelley's case is not a rule of construction, but of law, and is never applied until the meaning of the testator is first ascertained . . . . If the words of the will show that the testator intended the remaindermen to take directly from him, and not by inheritance from the devisee of the life estate, then the rule has no application . . . . On the other hand, if they show a contrary intention, the rule applies.

245 Pa. at 387, 91 A. at 615.

15. 452 Pa. at 533, 307 A.2d at 254.

16. *Id.* at 529, 307 A.2d at 254.

17. *Id.* at 530, 307 A.2d at 255.

18. 331 Pa. 23, 199 A. 173 (1938).

19. *Id.* at 27, 199 A. at 175.

court held that the "proceeds" were the net profits of a sale.<sup>20</sup> The court also noted that the deeds of conveyance were specifically designated "Deeds of Gift" and in a letter written by Mrs. Bok, to the Chairman of the Township's Board of Commissioners, she stated that she proposed to transfer the property in question "as a gift."<sup>21</sup> The court read the deeds and the letter as reinforcing the conclusion that the conveyances in question were "gifts" rather than "sales," as alleged by the township.<sup>22</sup>

Having decided that Mrs. Bok was not given fee simple ownership of the land in question by the invocation of the Rule in Shelley's Case, and that she had not exercised the power of sale granted to her under her father's will, the court turned to the township's contention that Mrs. Bok's life estate coupled with her general testamentary power of appointment vested in her a fee simple, making the transfer to the township a conveyance of a fee simple determinable.<sup>23</sup>

The township cited *Lyon v. Alexander*<sup>24</sup> for support of its position that a life estate coupled with a general testamentary power of appointment is tantamount to a fee simple.<sup>25</sup> The Pennsylvania Supreme Court rejected the township's position, citing *Warren's Estate*<sup>26</sup> in which it was held that a gift over in default of appointment will preclude absolute ownership.<sup>27</sup>

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20. *Id.* at 27, 199 A. at 175. The court held:

The expression "proceeds of such sale" as used by testatrix, can refer only to the net proceeds, namely, the sum which the executors receive after the encumbrances and the costs and expenses of the sale had been deducted from the selling price of the property.

21. 452 Pa. at 534, 307 A.2d at 255.

22. Justice Roberts, joined by Chief Justice Jones, dissented from the majority opinion that the park belonged to the takers by default. He believed that the consideration which had accrued to the estate over the past thirty-six years precluded the appellee-beneficiaries from ascertaining a claim of ownership. *Id.* at 534, 307 A.2d at 254.

23. See note 13 *supra*.

24. 304 Pa. 288, 156 A. 84 (1931). In this case a mother devised a life estate to her daughter (Maude) followed by a fee simple to her oldest son living at her daughter's death. If Maude outlived all of her brothers she was given a general testamentary power of appointment. The mother desired that her property be kept as the family home but did not in any way intend her expression of desire to hamper or encumber or impose any trust whatever upon the absolute fee simple title she gave to her children. Maude and her brothers entered into an agreement and sold the property.

The court, allowing Maude to convey a fee in the property, held:

. . . where the power is a general one under which the donee may appoint to anyone, the testator has completely relinquished all dead hand dominion over the property and has placed it for all practical purposes as completely with the control of the donee of the power as though a fee had been created in him.

*Id.* at 292, 156 A. at 85.

25. 452 Pa. at 532, 307 A.2d at 254, citing 304 Pa. at 292-93, 156 A. at 85.

26. 320 Pa. 112, 182 A. 396 (1936).

27. *Id.* at 120, 182 A. at 399. The court stated:

It is argued that because [the devisee] had a life estate and a general power of appoint-

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The court went on to say that since, in the Curtis will, there was a gift over in default of appointment by the life tenant, whereas, there was no default clause in the *Lyon* case, the rationale of *Warren* would be controlling.<sup>28</sup>

The rationale used by the Court in deciding the third issue raised by the township says, by inference, that if there had not been a default clause in the Curtis will, the *Lyon* rationale and not the *Warren* rationale would have been applicable to the *Curtis* case. The township would then have retained possession of the park because Mrs. Bok would have had, because of her life estate and general testamentary power of appointment, a fee simple in the park property and could have done as she wished with the property during her lifetime.<sup>29</sup>

As will be shown, the case law in Pennsylvania would require that the same decision be reached by the supreme court whether or not there was a default clause in Cyrus Curtis' will. Also, it will be shown that as far as the *Lyon* case states that a life tenant who is also the donee of a general testamentary power of appointment possesses the same estate as a fee simple, it is in error.

The general rule of law in Pennsylvania is that an estate given under a general testamentary power of appointment passes to the appointee from the donor and forms no part of the donee's estate.<sup>30</sup> In *Barton Trust*,<sup>31</sup> the Pennsylvania Supreme Court stated:

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ment, she possessed the equivalent of a fee . . . . It is to be noted that there was a gift over in default of appointment. The alternative gift over precludes an absolute ownership.

*Id.*

28. 452 Pa. at 532, 307 A.2d at 254. It should be noted that although the court's rationale was based on the holding in *Warren*, the court also cited *McCreary Trust*, 354 Pa. 347, 47 A.2d 235 (1946), in its opinion. It is unclear, however, why *McCreary* was cited since the court gave no reason for it. There are two distinct reasons why the court may have cited *McCreary*. First, *McCreary* explains the holding in *Lyon*. *McCreary* states that the holding in *Lyon* applies only to the rights of appointees. The court went on to say that *Lyon* gave to the donee the right to extinguish a power, but the extinguishment was a confirmation and not a destruction of the interests of the remainder-men who would take in default of its exercise.

Second, *McCreary* follows the relation back doctrine in so far as it starts measuring the Rule Against Perpetuities from the execution of the deed rather than the time of the execution of the power.

It seems that the Supreme Court of Pennsylvania would have presented a stronger rationale for its decision of this issue if it would have explained its rejection of the *Lyon* rationale as based on the holding in *McCreary*, rather than distinguishing it from *Warren*.

29. Although three issues were raised and adjudicated by the Supreme Court of Pennsylvania, only the third issue is dealt with in a detailed manner in this note. This approach was taken because the first two issues will have a minor impact on this area of the law in the future, whereas the implication raised by the rationale used by the court in deciding the third issue has the capacity to cause future litigation in the estates area.

30. *In re Huddy's Estate*, 236 Pa. 276, 84 A. 909 (1912).

31. 348 Pa. 279, 35 A.2d 266 (1944).

In executing a power of appointment the donee disposes of the estate as that of the donor, the appointment being referred back to the instrument which created the power as if it had been actually embodied therein . . . .<sup>32</sup>

Also, if a general power of appointment is not exercised by the donee of the power and the donor's will contained a default clause, the appointive property will pass to the takers in default.<sup>33</sup> If, however, there is no default clause in the donor's will and the donee fails to exercise his power of appointment, the appointive property will revert to the donor or those who are entitled to take from him by descent.<sup>34</sup>

This line of case law clearly establishes the fact that in Pennsylvania the relation back doctrine applies to general testamentary powers of appointment. The essence of the relation back doctrine is that the donee's exercise of the power of appointment relates back to the instrument creating the power.<sup>35</sup> Therefore, the person to whom the appointment is made takes his title as though he was included in the testator's will.<sup>36</sup> Thus, where *A* devises property to *B* for life, remainder as *B* shall appoint, *B*'s power is viewed as merely being allowed to fill in a blank in *A*'s will.<sup>37</sup> When *B* exercises the power in favor of *C*, *C* is considered as receiving the property from *A*, not *B*.<sup>38</sup>

The weight of authority states that the period of perpetuities begins to run at the creation of a general testamentary power.<sup>39</sup> This view is based upon the general rule that, as to powers of appointment generally, validity is determined by calculating the period of perpetuities from the creation of the power.<sup>40</sup> The reason for this rule is that the exercise of the power relates back to the instrument creating the power and is considered the act of the donor.<sup>41</sup>

It seems that in applying the doctrine of relation back to general testamentary powers of appointment Pennsylvania is not a maverick

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32. *Id.* at 281-82, 35 A.2d at 268.

33. *McCreary Estate*, 354 Pa. 347, 47 A.2d 235 (1946); PA. STAT. ANN. tit. 20, § 301.3 (1950).

34. *Irish v Irish*, 361 Pa. 410, 65 A.2d 345 (1949).

35. 5 AMERICAN LAW OF PROPERTY § 23.3 (A.J. Casner ed. 1952).

36. *Id.*

37. *Id.*

38. *Id.*

39. A. SIMES & L. SMITH, THE LAW OF FUTURE INTERESTS § 1275 n.89 (2d ed. 1956).

40. J. GRAY, THE RULE AGAINST PERPETUITIES §§ 498, 514 (4th ed. 1942).

41. 5 AMERICAN LAW OF PROPERTY § 23.3 (A.J. Casner ed. 1952).

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jurisdiction, but rather is in accord with the strong majority of jurisdictions.<sup>42</sup>

Since the relation back doctrine applies in Pennsylvania, it is apparent that the donee of a general testamentary power of appointment possesses something less than an absolute fee simple in the appointive property.

Additional support for the position that a life tenant with a general power of appointment does not possess the same estate as a fee simple can be found by examining the rights of a creditor to property over which the debtor life tenant has an appointive power. Creditors have no rights against the appointive property during the debtor's lifetime and can only reach the appointive property after the debtor's death, if he blends his individually owned estate with that of the appointive property.<sup>43</sup>

When a testator makes a devise of his own property, his estate pays the state inheritance taxes on such property.<sup>44</sup> If the donee of a general testamentary power of appointment is the holder in fee of the appointive property, his estate and not that of the original donor should pay the state inheritance taxes on the property passing under the power of appointment at the donee's death. In Pennsylvania, however, the appointive property is taxed in the donor's and not the donee's estate.<sup>45</sup> The donor's estate pays the taxes on the appointive property whether

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42. In *Moore Estate*, 445 Pa. 17, 283 A.2d 50 (1971), the Pennsylvania Supreme Court held that PA. STAT. ANN. tit. 72, § 2301(d) (1964) (which provides that no inheritance tax shall be imposed upon charitable transfers), was applicable to a charitable transfer pursuant to a general testamentary power of appointment which was created before, but exercised after, the effective date of the statute. This failure, on the court's part, to apply the relation back doctrine was seemingly limited to situations involving charitable contributions. To apply relation back in this instance would serve to discourage charitable contributions. The court felt that the legislature did not intend to tax this type of contribution and thereby limit a large reservoir of potential philanthropy. Even this, however, was met with a strong dissent by Justice Eagen in which Justice O'Brien joined. 445 Pa. at 24, 283 A.2d at 54. (This was the second time the supreme court heard the case; the first time the case was before the court, the court found itself equally divided.)

It is therefore evident that the relation back doctrine is still applicable to general testamentary powers of appointment except to the extent that it is limited by *Moore*.

43. Blending occurs when the donee treats the appointive property in the same manner as his individually owned property. See *Commonwealth v. Morris*, 287 Pa. 61, 134 A.2d 429 (1926); *Twitchell's Estate*, 284 Pa. 135, 130 A. 324 (1925); *Forney's Estate*, 280 Pa. 282, 124 A. 424 (1924).

44. PA. STAT. ANN. tit. 72, § 2485-101 (1964).

45. *Id.* § 2485-408 (1964), states:

Property subject to a power of appointment, whether or not such power is exercised, and not withstanding any blending of such property with the property of the donee, shall be taxed only as part of the estate of the donor.

See *Morris' Estate*, 42 Pa. D. & C. 522 (O.C. Mont. Co. 1941).



or not the donee blends the appointive property with that of his own.<sup>46</sup> The legislature of Pennsylvania has, by its enactment of the Wills Act,<sup>47</sup> expressed the view that a donee's appointive property should be treated differently than his individually owned property when the surviving spouse elects to take against the will of the donee of a power of appointment.<sup>48</sup> In Pennsylvania, if a surviving spouse elects to take against her husband's will, she will get her statutory share of her husband's individually owned property,<sup>49</sup> but she is not entitled to any of the property over which he possessed a power of appointment, whether or not he has blended his own property with that of the appointive property.<sup>50</sup>

The donor's intent must also be considered in determining whether or not a life estate coupled with a general testamentary power of appointment should be treated as a fee simple. The Restatement of Property<sup>51</sup> states that the testator's intent would be directly defeated if a donee of a general testamentary power of appointment was allowed to exercise his power of appointment in an inter vivos transaction.<sup>52</sup> There is an appreciable amount of case law supporting the Restatement's view that the donor of the power intended that the donee retain until death the discretion to exercise it.<sup>53</sup>

46. *In re Jaekel Estate*, 424 Pa. 433, 227 A.2d 851 (1967); *In re Powell Estate*, 417 Pa. 164, 207 A.2d 857 (1965); *Fry Estate*, 41 Pa. D. & C.2d 187 (O.C. Phila. Co. 1966); PA. STAT. ANN. tit. 72, § 2485-101 (1964).

47. PA. STAT. ANN. tit. 20, § 180.8 (1950). The 1947 Wills Act has recently been repealed by the Probate, Estates and Fiduciaries Code enacted by Acts 1972, No. 164 effective July 1, 1972. The Wills Act of 1947 was, however, included verbatim by the Probate, Estates, and Fiduciaries Code. The new code was adopted only for organizational purposes.

48. PA. STAT. ANN. tit. 20, § 180.8(c) (1950), provides:

Power of Appointment—The surviving spouse, upon an election to take against the will, shall not be entitled to any share in property passing under a power of appointment given by someone other than the testator and exercised by the will of the testator whether or not such power has been exercised in favor of the surviving spouse and whether or not the appointed and the individual estates have been blended.

49. *Id.*

50. *Id.*; *In re Kates's Estate*, 282 Pa. 417, 128 A. 97 (1925).

51. RESTATEMENT OF PROPERTY § 321 (1940).

52. *Id.*

A power of appointment is a device whereby the donor gives flexibility to his dispositions beyond the time of their original creation by reposing in the donee a discretion to alter the dispositions. A testamentary power has as its essential feature a requirement by the donor that this discretion shall not be irrevocably exercised until the last moment of the donee's life, to the end that flexibility of disposition may be retained until the donee has at hand the amplest data upon which to base a prudent judgment . . . .

53. *Bailey's Estate*, 291 Pa. 421, 140 A. 145 (1927); *Hays's Estate*, 286 Pa. 520, 134 A. 402 (1926) (life estate could not be enlarged into a fee simple when the life tenant also had a general testamentary power of appointment); *Logan v. Glass*, 136 Pa. Super. 221, 7 A.2d 116 (1939) (general testamentary power of appointment can only be exercised at donee's death).

The law of Pennsylvania has clearly demonstrated that allowing a life estate coupled with a general testamentary power of appointment to be treated in the same manner as a fee simple<sup>54</sup> is in opposition to the long supported view that the doctrine of relation back applies to general testamentary powers;<sup>55</sup> the law concerning creditor's rights in appointive property;<sup>56</sup> section 408 of the Inheritance and Estate Tax Act;<sup>57</sup> and section 108.8 of the 1947 Wills Act.<sup>58</sup> The intent of the testator would also be defeated if the estate was enlarged into a fee simple.<sup>59</sup>

It can be said that in Pennsylvania a life tenant who is also the donee of a general testamentary power of appointment does not have fee simple ownership of the property over which he has the appointive power. Therefore, it should make no difference whether or not the donor of the power includes a default clause in his will because the power granted to a donee of a general testamentary power of appointment is unaffected by the admission or exclusion of a default clause.

Although the court decided the *Curtis* case correctly, it incorrectly based its decision on the fact that the testator donor included a default clause in his will. Based on the Pennsylvania law discussed earlier in this note, the courts should have first overruled the *Lyon* case to the extent that it says a life estate coupled with a general testamentary power of appointment is equivalent to a fee simple, and second, decided that since Mrs. Bok possessed a life estate and a general testamentary power of appointment, it was impossible for her, during her lifetime, to convey to the township a fee simple in the property in question.<sup>60</sup>

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54. This was the township's claim based on the *Lyon* case.

55. See notes 35, 39, & 40 *supra*.

56. See discussion at note 43 *supra*.

57. PA. STAT. ANN. tit. 72, § 2485-408 (1964).

58. PA. STAT. ANN. tit. 20, § 180.8 (1950).

59. RESTATEMENT OF PROPERTY § 340 (1940).

60. To hold otherwise would wipe out the distinction between powers of appointment which are presently exercisable and those which are testamentary.