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GRANTS TO USES TO DEFEAT DOWER.

One of the unexpected results of the passing of the Statute of Uses, 27 Hen. VIII, Cap. 10 (now R. S. O. 1897, Cap. 331; See R. S. O. appendix A.) was that conveyancers devised a method of defeating the right to dower which was not theretofore available. A vendor of land would enfeoff a third person to such uses as the purchaser should appoint, and in default of and until appointment, to the use of the purchaser and his heirs and assigns. In such a case, the possession or seisin of the legal estate vested in the third person, and the use in the purchaser. The Statute of Uses then executed the use in the purchaser, and the legal estate and beneficial interest were vested in one person. The purchaser being now seised of the land, dower immediately attached and if the purchaser died without having appointed, his widow was entitled to dower. If however the purchaser exercised the power of appointment his estate was destroyed, the title of the appointee became paramount to that of the wife, and her claim for dower was defeated. The learning with respect to uses has become so involved in subtilties, and the effect of certain forms of conveyances has become so uncertain, that it may not be out of place to recall the definition of a use, and to explain the operation of a conveyance in the form already referred to. Mr. Sanders in the fourth edition of his book on Uses and Trusts at p. 2, defines a use as a trust or confidence in the feoffee, "that *cestui que use* shall take the profits, and that the terretenant shall make estates according to his directions"; and again, at p. 3, *ibid.*, "a feoffment was made in fee, by which the possession, or seisin" (i.e., the legal estate), "was transferred to the feoffee; and a confidence, or trust, was placed in him to permit the feoffor, or any other person and his heirs, to receive the rents and profits; and also make such legal estates as he or they should direct." The effect of the Statute of Uses was to prevent the

legal estate being in one person, and the use in another, and to unite them both in the person of the actual purchaser. In more modern language, a use is the right to the beneficial interest in the land, and the expression, "a limitation of a use," means simply a declaration as to who shall be entitled to the beneficial interest in land. Since the Statute of Uses, when the legal estate was conveyed to one, with a use or confidence annexed in favour of another, the grantee was a mere conduit pipe for the legal estate, which by force of the Statute, vested at once in the person who had been declared to be entitled to the beneficial or equitable interest, and the two estates became united in one person. When a power is reserved or granted to any person to declare or limit a use, or to appoint under the power, it should be remembered that the exercise of the power has in itself no conveyancing operation. The passing of the legal estate is effected by the instrument reserving or creating the power. This has been expressed in various cases collected in Comyn's Digest, Vol. VIII, at p. 844, as follows: "An act done under power in a deed is as if incorporated in the deed when executed. The execution of a power of appointment operates by way of limitation of a use under and by the effect of the instrument reserving the power: the fee vesting in the meantime. Execution of a power is a limitation of a use, which must arise, if at all, at the time of execution, and is as if expressed in the original settlement." So that when an owner of land covenants to stand seised to such uses as the grantee of a power shall appoint, and the grantee of the power makes an appointment, the result is as if the owner of the land had by his original deed in which the covenant is contained, conveyed to the appointee; the use is declared by the grantee of the power and is supported or led by the seisin of the covenantor, and the Statute of Uses unites the seisin and use in the appointee. Similarly when A. conveys to B. and his heirs to such uses as C. shall appoint, and C. appoints to D., it is as if A. by his original conveyance had conveyed to B. to the use of D. The Statute then vests the legal estate in D. It will be seen therefore that it is not the appointment which conveys the land; the grantee of the power by declaring a use is enabled as it were to insert the name of the appointee in the original deed creating the power. In other words, the grantee of such a power takes no estate, but is enabled to divert the stream of ownership by declaring a use, which the Statute executes in the appointee. It will now be seen how the right of a dowress was defeated by such a conveyance to uses, and the exercise of the power reserved therein. Upon the grantee of the power, i.e., the actual purchaser, exercising his power of appointment in favour of some other person in fee, he

revokes the use in favour of himself and declares the use in favour of that other. There being now no use in the purchaser on which the Statute can operate it operates in favour of the person in whom the new use has been declared; that is the seisin of the third person to whom the original conveyance was made supports or leads the use in favour of the new appointee and the Statute unites the seisin of the original grantee with the use declared in favour of the new appointee. In other words, it is as if the grantee of the power had erased the name of the original purchaser from the original conveyance, and inserted therein the name of the new appointee, so that the conveyance operates as if it had originally been to the third party, his heirs and assigns, to the use of the new appointee, his heirs and assigns. It is as if the estate of the original purchaser had never existed, and the estate of the new appointee being derived from and by virtue of the original conveyance, is necessarily paramount to the claim of the dowress.

This doctrine was not immediately accepted by either conveyancers or the Courts; some being of the opinion that once an estate in fee simple had vested in the purchaser, he could not destroy it, at any rate, to the extent of depriving his widow of dower. In 1821 the point came up squarely for decision in *Ray* v. *Pung*,[1] an action for specific performance before the Vice-Chancellor. The facts involved were that lands were conveyed to Golding Ray, his heirs and assigns, to the use of such person and persons, etc., as James Ray should appoint, and in so far as any appointment should not extend, and in default of, and until appointment to the use of James Ray, his heirs and assigns. James Ray appointed in favour of Golding Ray (the plaintiff, and a different person from the original grantee to uses) his heirs and assigns, the wife of James Ray being alive but not joining in the conveyance. The plaintiff then agreed to sell to the defendant Thomas Pung, who paid part of the purchase money, and then refused to complete, unless the wife of James Ray joined with him in a fine to defeat her claim for dower. The Vice-Chancellor decided that the conflicting authorities created too much doubt in the question to make it fit for that Court to bind a purchaser without the further opinion of a Court of law. He accordingly stated a case for the opinion of the Court of King's Bench, before whom the stated case was argued in the same year. After taking time to consider the Court decided that the wife of James Ray would not be entitled to dower in the lands in question, should she survive her husband. Other authorities in support of this doctrine will be found in note (j) on p. 114 of Armour on Real Property, 2nd Edition, and the result is

[1] 5 Madd. 310.

admitted by conveyancers at the present time. A variation in the form of conveyance intended to defeat dower gave rise to further complications. A case of *Moreton* v. *Lees,* decided in 1819, is referred to in *Ray* v. *Pung,*[2] which is not in the regular reports, but is referred to in Sugden on Powers.[3] In that case a widow brought a Writ of Dower, and the defendants pleaded that the husband was only seised by virtue of a feoffment whereby the estate was granted to the husband, and his heirs and assigns, to such uses as he should appoint by deed or will, and for want, or in default of and in the meantime and until, appointment, to the use of the husband, his heirs and assigns for ever; and they also pleaded an appointment in fee by him. The case was decided against the widow's right. It will be seen at once that the facts of this case differ materially from those involved in *Ray* v. *Pung.* In that case the conveyance was to a stranger to such uses as the husband should appoint, but in *Moreton* v. *Lees,* the conveyance was made to the husband in fee to such uses as he should appoint. In spite of the decision in *Moreton* v. *Lees* the question arose whether a power to appoint could be granted to and exist in a tenant in fee simple. It was contended by some conveyancers that upon a feoffment in fee, a power could not be granted at the same time to the feoffee, for either it would merge in the fee, or it was superfluous and nugatory. The case usually cited in opposition to this view is *Maundrell* v. *Maundrell,*[4] where Lord Eldon, L.C., decided that a power of appointment could subsist with the fee. But in that case lands were conveyed by the settlor to trustees their heirs and assigns, to such uses as the settlor might appoint, and in default of appointment, to the use of the settlor for life, and after his death to his right heirs. It will be noticed that in this case the seisin was originally in the trustees. Upon the settlor revoking the use in his own favour and declaring a new use, the seisin of the trustees under the settlement would be sufficient to support and lead the new use, and no question of merger could arise. The case is not therefore an authority for the proposition that land may be conveyed to a purchaser and a power of appointment may be limited to him at the same time. *Sir Edward Clere's case,*[5] which was said by Mr. Sugden to have been decided by all the judges in England, was the authority on which *Maundrell* v. *Maundrell* was decided. But it did not deal with the case of the grantee to uses and the grantee of the power being the same person. Sir Edward Clere made a feoffment to the use of such person and persons, and of such estate and estates as he (himself)

[2] 5 Madd. 310, at p. 318.
[3] Sugden on Powers, 2nd ed. at p. 339.
[4] 7 Ves. jun. 566, 10 Ves. jun. 246.
[5] 6 Co. 18*a*.

should limit and appoint by his last will in writing, and afterwards appointed by his will. It was held that the use vested in the feoffor until appointment and then took effect by force of the feoffment. The feoffment could not have been made by Sir Edward Clere to himself; so the grantee to uses was some person other than the feoffor to whom the power of appointment had been reserved; and on appointment being made, the seisin of that other was sufficient to lead the new use declared.

There are two other points that require consideration where the grantee to uses and the grantee of the power are the same person, neither of which were dealt with in *Ray* v. *Pung*, and which it is submitted are still awaiting satisfactory judicial settlement. They are (a) If the grantee is tenant in fee simple by the common law does the declaration of a further use have any effect? and (b) If the grantee is in by the common law and an express use has been declared, can he declare any further use ? It is considered by some conveyancers that the grantee being seised in fee simple by the common law, any limitation of a further use, or attempt to engraft a power upon what was already a complete ownership, was superfluous and nugatory, if not absolutely void. That was the opinion of Mr. Sanders,[6] who after citing *Ray* v. *Pung*, points out the difference arising in the case of the grantee in fee, the grantee to uses and the grantee of the power being the same person. His opinion was adopted in Halsbury's Laws of England.[7] This view received the sanction of the Courts in *Goodill* v. *Brigham*.[8] That case was disapproved of in *Maundrell* v. *Maundrell* (*supra*), as an authority for the proposition that the fee could not rest in a grantee of a power of appointment until the power was exercised, the grantee to uses being a different person from the grantee of the power. But that was not the point at issue in *Goodill* v. *Brigham*. In that case, the settlor, without the intervention of trustees, attempted to settle lands upon a *feme covert* in fee simple and to annex to her estate a power to dispose of it free from the control of her husband, and the Court held that the power was invalid. At the date of the decision a married woman could not acquire land and dispose of it free from the control of her husband without the intervention of trustees. What the settlor was endeavouring to do was to annex a power to the estate of the grantee which would destroy one of the legal incidents of that estate and enable the grantee to do something contrary to the law of the land. Mr. Preston in his book on Conveyancing, vol. 3, pp. 271, 272, expresses the same opinion. It

[6] Sanders, Uses and Trusts, 4th Ed. pp. 91, 156.
[7] Halsbury's Laws of England, Vol. XXIV, 275.
[8] 5 B. & P. 192.

seems probable that the Courts would under similar circumstances arrive at the same result at the present day, and the writer knows of no reported case which shakes the authority of *Goodill* v. *Brigham* for the point it actually decided. The disapproval of the case expressed in *Re Hazell,*[9] must be confined in its effect to the point raised in *Maundrell* v. *Maundrell,* which has no application to the case of the grantee to uses and the grantee of the power being the same person. Although the grantee is tenant in fee simple by the common law, and the declaration of a further use is powerless to add anything to his estate, the declaration is not entirely without effect. It is pointed out in Halsbury's Laws of England[10] that the express declaration of a use having been made in favour of the grantee that prevented the raising of any further use, either by declaration, resulting use, or by way of shifting use. *Tipping* v. *Cosins.*[11] In *Doe. d. Lloyd* v. *Passingham,*[12] where an estate was limited to A. to the use of A. in trust for B., it was held that A. took the legal estate, and that although he took it by the common law, and not by force of the Statute of Uses, yet he was in also by the use declared, and his estate being clothed with the use the second use could not be executed by the Statute. In *Cooper* v. *Kynock*[13] land was conveyed to a trustee, his heirs and assigns, to certain uses, and after the determination of those uses, to the use of the trustee, his heirs and assigns, upon trust to pay the rents and profits to A., for life, and after the determination of that estate to stand seised to such uses as A. should by his will appoint, and in default of appointment to the use of the heirs and assigns of A. It was held that the trustee had the legal estate in fee simple, and that A. took only equitable estates. Sir W. M. James, L.J., said at p. 403, "To say that anything but equitable estates are given in this deed after the limitation to 'the use of B. Smith (the trustee), his heirs and assigns,' would be in effect to over-rule all the decisions on the Statute of Uses, that where you have a limitation to a trustee, his heirs and assigns, to the use of the trustee, his heirs and assigns, the first use is executed, and the subsequent limitations only operate to give equitable estates. Here the limitations over are limitations of trusts after a use executed by the Statute, and the true construction of this deed appears to me to be conclusively settled by the authorities." Sir G. Mellish, L.J., at p. 405 says, "It is impossible to hold that B. Smith has not the legal estate without holding that there may be a use upon a use." In Farwell on Powers,[14] it is

[9] 57 O.L.R. 166 at p. 169.
[10] Halsbury's Laws of England, Vol. XXIV at p. 275.
[11] (1695) Comb. 312.
[12] (1827) 6 B. & C. 305.
[13] (1872) 7 Ch. App. 398.
[14] 3rd Ed. p. 5.

pointed out that where a use is limited to a feoffee, such use is not executed by the Statute, and the following opinion from Sanders on Uses, 5th ed., p. 89, is cited with approval: "Notwithstanding the grantee is in by the common law, yet after the declaration of the use to him, he has not only a seisin, but an use, although not the use which the Statute requires, and therefore, that seisin which, before the limitation of the use to himself, was open to serve uses declared to a third person, is by the limitation filled up, and will not admit of any other use being limited upon an use."

If this view is correct then a declaration of a further use by the grantee to uses and the grantee of the power, being one person, would be a use upon a use. That being so, the seisin and the first use executed by the Statute would remain in the appointor; the use declared by him would not be executed by the Statute, and though certain contractual or equitable rights might arise between the appointor and appointee, they would arise by reason of the appointment, and not by virtue of the original conveyance to uses. Unless a power were reserved to the grantee of the power by the conveyance to uses to revoke the use declared and declare new ones, it is difficult to see how the grantee could declare a use which would not be a use upon a use. In the absence of such a reservation, the fact that a use has already been limited, and any further declaration of uses cannot be executed by the Statute, seems an insuperable obstacle to the grantee being able to defeat dower by any such means, whatever may be the correct view as to a power to appoint and a fee simple residing in the same person. As late as 1902 it was held that a grant to A. "to hold unto and to the use of A. in fee simple," operated at common law and not under the Statute of Uses. *Savill Brothers* v. *Bethell*.[15] It could not be said, therefore, that up to the time when the inchoate right to dower was abolished in England, there was any settled law enabling dower to be defeated by a grant to a husband to such uses as he should appoint, and in default of appointment to the use of the husband in fee. Since that date, 1st January, 1834, authorities on the point must be sought for in our own Courts.

Before considering the cases before the Ontario Courts it is necessary to refer to one more result of the execution of a power of appointment. If the grantee of the power may appoint in fee simple, and appoints for a less estate than a fee simple, he may make another or other appointment or appointments until the different uses declared are commensurate with the fee simple in the legal estate. If, however, he appoints to the full extent of his power, he exhausts the

[15] (1902) 2 Ch. 523.

power unless he reserves a power of revocation by the instrument executing the power; and this is so, even though the instrument creating the power expressly authorizes a revocation of the appointment.[16]

In an early Ontario case the dictum that a power to appoint may co-exist with the fee in the same person is referred to with approval—*Lyster* v. *Kirkpatrick*.[17] That case, however, did not deal with a power of appointment, and is not helpful on the point now under consideration. The question came squarely up for decision, however, in *In re Osborne and Campbell*,[18] the conveyance in question being to one M. "in fee simple," "to have and to hold unto the said M. his heirs and assigns forever, to such uses as he shall by deed or deeds in writing or by his last will and testament appoint and in default of appointment to the use of him and his heirs absolutely." M. died and devised all his property to his executors in trust to sell; and the question was whether the widow of the testator was entitled to dower. According to the report of the case Middleton, J., refused to construe the deed in the absence of the wife, but declared, without giving reasons, that the wife was not entitled to dower. *In re Cooper and Knowler*,[19] a similar deed came before the Court and Orde, J., held that the question was too doubtful for final decision in the absence of the wife and refused to force the title on the purchaser, though *Re Osborne and Campbell* was called to his attention. In an article on these two cases,[20] the late Mr. Armour, K.C., expressed the opinion that the conveyance operated to vest in the grantee an estate in fee simple by common law, and that the declaration to uses did not add anything to his estate. *In re Strauss and Fierstein*,[21] a similar deed was considered by Rose, J., who refused to force the title on an unwilling purchaser, when the wife of the vendor was not a party to the application. And *In re Morris and Cherttkoff*,[22] Orde, J., adhered to his former opinion. The result of the Ontario authorities now was that in *Re Osborne and Campbell* the objection was held to be not well taken by the purchaser and the title was forced on the purchaser; in the two subsequent cases the matter was considered too doubtful for consideration by a single Judge, and in *Re Strauss and Fierstein*, the vendor was ordered to pay costs. The matter was now in worse shape than ever, when *Re Hazell* was taken before the Appellate Division. The report of the case before the Judge of first instance will

[16] Sugden on Powers, 6th Ed. 470; Farwell on Powers, 3rd Ed. 306; *Worrell* v. *Jacob*, 3 Mer. 256; *Hele* v. *Bond* (Sug. Pow. 903, Ch. Pre. 474).
[17] (1866) 26 U.C. 217 at p. 218.
[18] 55 D.L.R. 258.
[19] (1920) 19 O.W.N. 27.
[20] 55 D.L.R. at p. 259.
[21] 26 O.W.N. 304.
[22] 56 O.L.R. 665.

be found in 57 O. L. R. at p. 166, and in appeal in 28 O. W. N. 308. The judgment of the Appellate Division is not fully reported in the Ontario Weekly Notes, but is reported in full in (1925) 3 D. L. R. p. 661. Before dealing with the decision it is convenient to set out the case rather fully. The chain of title involved was as follows:—

1. C. conveyed to Marshall "unto the said grantee to and for the uses hereinafter declared . . . . to have and to hold unto the grantee to and for such uses as he shall, by deed, mortgage, will or other instrument in writing, appoint, and, in default of and until such appointment or in so far as such appointment shall not extend, unto the use of the grantee, his heirs and assigns forever;" the grantee being then and now a married man, and the land free from encumbrances.

2. Marshall subsequently mortgaged the land to V., the deed containing a recital that "Whereas the mortgagor, being seised of an estate in fee simple in possession of the lands mentioned, has applied to the mortgagee for a loan," etc., and containing the operative words, "grant, mortgage, limit, and appoint unto the mortgagee, her heirs, executors, administrators and assigns, forever." Marshall's wife did not join in the mortgage.

3. Marshall executed a conveyance of the same land to Brown, a married man, purporting to "grant, limit, and appoint unto the said grantee unto such uses as he, the said grantee, may, by deed, will, mortgage, or other instrument in writing, appoint, and, until and in default of appointment and in so far as such appointment may not extend, unto the use of the said grantee, his heirs and assigns, to and for his and their sole and only use forever." Marshall's wife did not join in this deed.

4. A statutory discharge of mortgage was registered, reciting that Marshall had satisfied all moneys due under the mortgage.

5. Brown conveyed to Hazell by a deed "in the ordinary form pursuant to the Short Forms Act, but purporting (without so stating) to be in exercise of his power of appointment contained in the deed from Marshall to Brown, the grant being 'unto the grantee in fee simple.'" Brown's wife did not join in the deed.

The questions submitted to the Court were (1) Has Marshall's wife any inchoate right to dower? (2) Has Brown's wife? (3) Did Marshall by his mortgage to V. exhaust his right to appoint his equity of redemption? (N.B.—The mortgage not being in arrears Marshall had no equity of redemption, which is a right arising only after the estate in the land has become absolute in the mortgagee by reason of the default of the mortgagor. Apparently what was meant,

was: Did Marshall by his mortgage to V. exhaust his right to appoint the land subject to the mortgage ?) (4) What is the nature of the estate which Brown acquired from Marshall ? (5) What is the effect of the registration of the V. discharge (a) on the estate which Brown had, (b) as to the attachment of any inchoate right of dower in his wife?

The judgment in appeal decided in answer to question 3 that Marshall did not exhaust the power of appointment by appointing to V. by way of mortgage, the reason given being that Marshall had the right and power to mortgage and that he intended to appoint by way of mortgage and not in fee simple. It is respectfully submitted that this was not the effect of the appointment by way of mortgage. Supposing for the moment that the mortgage to V. was a valid exercise of the power, and was intended as such, it is important to bear in mind the distinction between the conveyancing operation of a mortgage and the relationship which arises in equity between the mortgagor and mortgagee. The mortgage is a conveyance of the lands comprised in it to the mortgagee in fee simple. Upon the mortgage debt being paid, the land must be re-conveyed to the mortgagor in order to revest the title in him. The equitable relation which arises is that the mortgagor cannot clog his equity of redemption, *i.e.*, although his contract is that upon his default the title to the land shall become absolute in the mortgagee, equity will still enable him to redeem the mortgage after default. This equitable rule, however, does not alter the fact that in order to revest the title in the mortgagor a reconveyance, either by virtue of the Registry Act, or at common law, is necessary. The mortgage in this case then, if it is regarded as an exercise of the power of appointment reserved to the mortgagor, is an appointment in fee exhausting the whole power. That is borne out by the reasons given for the Court's answer to question 5. It was held that after the appointment by way of mortgage the registration of a statutory discharge of mortgage re-conveyed the fee to the mortgagor. The reason given was a suggested analogy to the operation of a statutory discharge when a mortgage is made by a tenant in tail. In such a case the discharge revests the land in the mortgagor in fee simple, and this is one of the recognized methods of barring an entail. But the discharge has this operation because by reason of the provisions of The Estates Tail Act, R. S. O., cap. 113, sec. 8, a mortgage by a tenant in tail vests the fee in the mortgagee, and the effect of the reconveyance, whether by discharge or conveyance, is to revest in the mortgagor what vested in the mortgagee, namely the fee. If a discharge of a mortgage made by the exercise of a power of appointment is to vest the fee in the mortgagor, it must

be because the whole of the fee has previously vested in the mortgagee, that is, that the grantee of the power has exhausted his power of appointment. But it is not at all clear that the mortgage was an exercise of the power of appointment. It has been held that when a deed does not recite that it is made in exercise of a power, but can have no validity or effect, except as an exercise of that power, it shall be deemed to be such an exercise.

But when the owner of a power may convey by the exercise of that power or as absolute owner of an estate, he must recite or refer to the power in his deed; otherwise he will be deemed to convey as absolute owner, and not as executing the power.[26]

In this case Marshall took, under the authority of *Savill* v. *Bethell* (*supra*), an estate in fee simple at common law. He was in also as of the use, and under the authority of *Tipping* v. *Cosins, Doe d. Lloyd* v. *Passingham, Cooper* v. *Kynock* (*supra*), no further use could be declared upon the use. But admitting that the power to appoint reserved to him was a valid power, did he exercise it? Apparently not, for the mortgage recites, "Whereas the mortgagor, *being seised of an estate in fee simple,* has applied to the mortgagee for a loan." It is true that he then uses words of conveyance apt for the exercise of the power—"Grant, mortgage, limit and appoint"—but if he was conveying as owner of the fee simple, the last three words would be rejected as surplusage. The recital is not consistent with the intention to exercise the power; for in order to exercise it the mortgagor must put an end to his own defeasible fee. Either view, viz., that the mortgage is a complete exercise of the power, or that it was not an exercise of the power, is not inconsistent with the assertion in Halsbury, vol. 23, p. 25, para. 54, referred to in the judgment that a power may be exercised by way of mortgage.

Applying the opinions of Sanders and Preston, and the reasoning in *Goodill* v. *Brigham,* which has only been doubted as an authority for a general principle it did not decide, Marshall had no valid power of appointment, and his mortgage to V. and his conveyance to Brown must be considered as ordinary conveyances in which his wife must have joined to defeat her claim for dower. It is submitted that in failing to distinguish between the conveyancing effect of the mortgage and the equitable relation between the parties, the judgment does not satisfactorily dispose of the argument that such a mortgage is a complete exercise of the power. If this view is correct, and the power was a valid one, and was exercised, at the time of the conveyance to Brown, Marshall had only an equitable interest in the land

[26] Sanders on Uses, 4th ed. Vol. 2, p. 72; Sugden on Powers, 8th ed., p. 343; Farwell on Powers, 2nd ed. p. 266; 3rd ed. p. 300.

which he could convey in his life-time free from dower. (Dower Act, R. S. O., cap. 70, sec. 4). If the mortgage was not an exercise of the power, and the power was a valid one, Brown's title was paramount to the claim of Marshall's wife to dower.

As to question 1, and the effect of the appointment in favour of Brown, the Court dealt with the question as if it depended solely upon whether a right to appoint could reside in the owner in fee. The reasons for judgment were in part as follows:—"The second question raised is, whether Marshall, by the execution of the conveyance to Brown in exercise of the power, defeated any right to dower that might exist in Marshall's wife. This question is based upon the difficulty that was at one time supposed to exist by reason of the grantee to uses holding in fee until he exercised the power of appointment, it being suggested that the estate and the power could not co-exist in the same individual. At one time this question was greatly debated and an extraordinary diversity of opinion existed. But all doubt was put at rest by the decision of the Judges in the case of *Ray* v. *Pung* (*supra*). . . . . From that time on, no doubt was expressed as to the law until a note appeared in Armour on Real Property, p. 114, in which reference is made to the great authorities acquainted with the mediæval learning necessary to appreciate fully the difficulties surrounding the whole situation whose opinions were in conflict, and the opinion expressed by the Justices of the King's Bench is disposed of by the brief words: 'See also *Ray* v. *Pung*.'"

"It was suggested upon the argument that the case of *Ray* v. *Pung* did not really determine the question, because in that case the property was conveyed to an intermediary and not to the husband. I am quite unable to see that this really makes any difference. Counsel arguing that case evidently did not regard the point as of importance."

It is quite true that in *Ray* v. *Pung* it was decided that an estate and a power could exist in the same person; but the general proposition that a power and an estate may exist in the same person must be confined to the circumstances before the Court enunciating the proposition, viz., the grantee to uses and the grantee of the power being different persons. It seems clear also that the question is not based wholly upon the existence of the power and an estate in the same person. The authors of Halsbury, Sanders on Uses, Farwell on Powers,[27] and the English Courts, found a difficulty in a power being reserved to declare a use on a use. Sanders and Preston found a difficulty in annexing to a fee simple anything inconsistent with or additional to a fee simple, and the Courts agreed with

[27] Vol. XXIV, p. 275; Sanders on Uses, 4th ed. p. 89; Farwell on Powers, 3rd ed. p. 5.

them in *Goodhill* v. *Brigham*. These two points are not dealt with in the decision under consideration. As to the suggestion that from the time of the decision in *Ray* v. *Pung* no doubt was expressed until the publication of the late Mr. Armour's book on Real Property, it is noticeable that *Ray* v. *Pung* was decided in 1821. In 1824 Mr. Sanders published the 4th edition of his book on Uses, and at p. 155 of Vol. 1, after setting out the facts of *Ray* v. *Pung* and the decision thereon, propounds a different case, that of the grantee to uses and the grantee of the power being the same person, and expressed the opinion that the power is void. In 1829, Mr. Preston published the 3rd edition of his book on Conveyancing and at pp. 265 and 271 expressed a similar opinion. The author speaks as if the decision of the King's Bench had not been given, but he seems to distinguish between the facts in *Ray* v. *Pung* and those now under consideration. The writer knows of no reported case in England following *Ray* v. *Pung* decided on the facts in question in *Re Hazell*, and knows of no case exactly in point but the unreported case referred to in *Ray* v. *Pung*.

It is submitted that even if a doubt had never existed as to the result of a conveyance such as that in question in the present case, the absence of a reported case on the point is hardly a firm foundation on which to base a conclusion that no doubt on the point exists. Clearly in the minds of Sanders, Preston and Farwell no doubt existed; for the reasons given they considered that even if the power to appoint was reserved to the same person as grantee to uses and owner of the fee it was not only inoperative, but void. If however their opinions are considered to be at variance with the decision in *Ray* v. *Pung*, it must be admitted that some doubt has existed since that case was decided. No decisions can be looked for in the English Reports since 1834, and all the cases in Ontario until the present one have expressed a grave doubt. In view of the diverse opinions expressed, and the absence of reported decisions on the point, the late Mr. Armour expressed no opinion, but set out the authorities for the two schools of thought, and shewed how a conveyance could be drawn, the effect of which would be beyond peradventure. With his habitual accuracy, he quoted *Ray* v. *Pung* in support only of the principle decided by it; not a bad way, it is believed, of dismissing a case. It remains to deal with questions 2, 4 and 5. As to questions 2 and 5 and applying the above reasoning an attempt to reserve a still further right to appoint to uses to Brown in appointing to his use, would be a flagrant example of a use on a use. It seems necessary to regard the conveyance to Brown as a grant of the land subject to the mortgage in fee to V., and that upon a discharge being registered the land

vested in Brown in fee. It could not affect the estate of Marshall because the reconveyance operated to re-convey not to him but to Brown. The fee being vested in Brown, dower must necessarily attach. As to question 4, if the conveyance to Brown fails as an exercise of a power of appointment and the reservation in it of the right to declare other uses is void, the conveyance contains words apt to grant an estate in fee simple.

While *Re Hazell* may be a binding authority as to facts which may be brought within the decision, it is submitted that it yet remains to be decided that a use can be limited upon a use; and that a power which is repugnant to or inconsistent with an estate in fee simple can be annexed to it. Both those matters seem to form a necessary part of any consideration of the effect of a conveyance to a husband directly with the intention that dower shall not attach.

A. D. ARMOUR.

Toronto.