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Property - Powers - State Powers Statutes Protecting Creditors and Requiring Formal Execution

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PROPERTY — POWERS — STATE POWERS STATUTES PROTECTING CREDITORS AND REQUIRING FORMAL EXECUTION—In 1829, the New York Legislature enacted a lengthy statute on powers of appointment, which abolished the common law and undertook a complete realignment of the law of powers.[1] It covered such important subjects as the types of powers, the interest taken by a donee of a power, creditors' rights against appointive property, powers in trust, and requirements for the execution of powers. Since then, seven other jurisdictions, including Michigan, have followed suit, borrowing the New York statute.[2] One, Minnesota, in 1943 repealed its powers statute and reinstated the common law except

1 N.Y. Rev. Stat. (1829) 732, §73 et seq., now 49 N.Y. Consol. Laws. (McKinney, 1945) §§130-183.

2 Ala. Code (1940) tit. 47, §§75-93; D.C. Code (1951) tit. 45, c. 10, §§45-1001 to 45-1019; Mich. Comp. Laws (1948) §§556.1 to 556-106; N.D. Rev. Code (1943) §§59-0501 to 59-0559; Okla. Stat. (1951) tit. 60, §§181-229; S.D. Code (1939) §§59.0401 to 59.0461; Wis. Stat. (1957) §§232.01 to 232.58. Hereafter all statutory citations in the text will be to Mich. Comp. Laws (1948), unless otherwise indicated.

as modified.[3] Two other states have piecemeal legislation on execution requirements,[4] and one other state has legislation on creditors' rights.[5]

In most of these states the powers statutes have received very little interpretation. While decisions in a few of these states are of some assistance, the diversity of interpretations they adopt leaves most questions unanswered. This comment isolates some, but by no means all, of the interpretative problems and tries to supply the necessary answers.

The first part of the comment considers the elevation sections of the statute—sections that change the donee's interest in the appointive or dispositive property to a fee for the benefit of creditors. The second part considers the execution sections of the statute—sections that subject the execution of powers to conveyancing requirements. These sections are of the utmost significance to estate planners.

I. ELEVATION OF THE DONEE'S INTEREST TO A FEE

> "When an absolute power of disposition, not accompanied by any trust, shall be given to the owner of a particular estate, for life or years, such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estates limited thereon, in case the power should not be executed, or the lands should not be sold for the satisfaction of debts."[6]

A. *Statutory History and Purpose: Creditors' Rights at Common Law and the Common Law Rules on Elevation*

The elevation sections are addressed to the resolution of two distinct common-law problems. One had to do with the rights of a donee's creditors to reach property covered by his power of appointment. Before the exercise of the power creditors could not satisfy out of the appointive property debts owed them by the donee. Only after exercise could creditors reach appointive property then in the hands of an appointee. And even this right was surrounded by certain conditions. The appointee had to be a volunteer; a bona fide purchaser was safe from attack. The

3 Minn. Stat. (1957) §§502.62 to 502.78.
4 Ky. Rev. Stat. (1959) §394.070; Va. Code (1950) §64-52.
5 Tenn. Code Ann. (1955) §64-106.
6 Mich. Comp. Laws (1948) §556.9. There are really three elevation sections. See also Mich. Comp. Laws (1948) §§556.10, 556.11.

power had to be a general one; if limited, or special, creditors were unsuccessful. Finally, the donee had to be insolvent.[7] So at common law, creditors had strictly limited rights against appointive property and often had to stand by helpless while their debtor-donee, given a small interest in the appointive property—a life estate, for example—enjoyed it and then passed it on to others who might also be safe from the donee's creditors.[8] Yet the donee's general power of appointment was virtually equivalent to ownership of the appointive property, and it was manifestly unfair to deny creditors free access thereto.[9]

The other common-law problem with which the elevation sections deal was an interpretative one. A donor might give his donee a life estate with an absolute power of disposition over the fee,[10] remainder limited over to another. Courts were faced with a question of construction: did the donor intend the donee to have a fee or only a life estate? The majority rule at common law was that a donee's absolute power of disposition did not convert his life tenancy into a fee. But a minority of courts held that the donee's absolute power of disposition enlarged, or elevated, his life interest to a fee.[11] The effect of the minority rule was to destroy any remainders that were limited after the donee's "tenancy." This rule thus protected the donee's creditors, since they had a fee interest to levy upon, but hurt remaindermen by eliminating their interests.[12]

The statutory revision inaugurated by New York[13] amalgamated these two distinct common law problems and provided a solution to both. Now, according to the elevation sections, the interest of

7 SIMES AND SMITH, FUTURE INTERESTS, 2d ed., §§944-946 (1956); GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES, rev. ed., §158 (1940); comment, 41 MICH. L. REV. 289 at 289 (1942); note, 27 VA. L. REV. 1052 at 1052-1053 (1941).

8 See Matter of Davies, 242 N.Y. 196 at 200-201, 151 N.E. 205 (1926).

9 See Cutting v. Cutting, 86 N.Y. (20 Hun 360) 522 at 537-538 (1881).

10 The courts characterized as a power of "disposition" the following kinds of powers (either singly or in some combination): sell, enjoy, consume, dispose, or use. See the cases cited in the annotations referred to in note 11 infra.

11 36 A.L.R. 1177 (1925), 76 A.L.R. 1153 (1932); note, 30 MICH. L. REV. 796 at 797 (1932); Summers, "Power of a Life Tenant to Dispose of a Fee," 6 IND. L. J. 137 at 138-139 (1930); SIMES AND SMITH, FUTURE INTERESTS, 2d ed., §893 (1956). All authorities agreed that when the donee of a power was given an indefinite or general estate—e.g., "to X, with a power to dispose of the fee"—the donee's estate was enlarged to a fee. Reeves v. Tatum, 233 Ala. 455 at 457, 172 S. 247 (1937); note, 29 MICH. L. REV. 761 at 761 (1931); Summers, supra, at 138-139; FOWLER, REAL PROPERTY LAW OF NEW YORK 353 (1899).

12 See Alford's Admr. v. Alford's Admr., 56 Ala. 350 at 352-353 (1876).

13 For references to New York legislative history, see Whiteside and Edelstein, "Life Estates with Power to Consume: Rights of Creditors, Purchasers and Remaindermen: A Study of New York Real Property Law Sections 149-153," 16 CORN. L.Q. 447 at 453-456 (1931).

a donee of an absolute power of disposition,[14] not accompanied by any trust, when given an estate for life or years, or no particular estate at all, was elevated to a fee, absolute as to creditors and purchasers, but subject to any limitations over if the power went unexercised or the lands were not sold for satisfaction of debts.[15] Protection was thus provided for both creditors and remaindermen.

B. *Impact on Creditors' Rights*

These elevation sections have entirely abolished the common law of creditors' rights in appointive property.[16] Creditors now take their rights exclusively from the statute; if they have none there, they have none at all.[17] Now creation of the power, rather than its exercise, is the source of creditors' rights. If creditors can reach appointive property before exercise of the power, they can reach it after exercise of the power. Conversely, if they cannot reach appointive property before exercise, exercise will not help them, as it did at common law.[18] So long as the donee gets an absolute power of disposition, not accompanied by any trust, the creditors can take that property in satisfaction of the donee's debts, irrespective of the donee's solvency. Nor does the death of the donee affect the right of creditors to reach appointive property in the hands of remaindermen or appointees; creditors may enforce their rights by sale of the property even after the donee's death.[19]

14 It is plain that the statutes are designed to cover both powers of appointment and powers of disposition. The Michigan statutes, for example, provide:

"Powers, except as authorized and provided for in this chapter, are abolished; and from the time this chapter shall be in force, the creation, construction and execution of powers shall be governed by the provisions herein contained."

"A power is an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power, might himself lawfully perform."

Mich. Comp. Laws (1948) §§556.1 to 556.2. The writer has found no cases decided under the statutes which draw any distinction between powers of appointment and powers of disposition.

15 Mich. Comp. Laws (1948) §§556.9 to 556.10. The same elevation took place if there was no limitation after the donee's estate. Id. at §556.11.

16 GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES, rev. ed., §159 (1940); Whiteside and Edelstein, "Life Estates with Power to Consume: Rights of Creditors, Purchasers and Remaindermen: A Study of New York Real Property Law Sections 149-153," 16 CORN. L. Q. 447 at 461 (1931).

17 Comment, 21 ALBANY L. REV. 216 at 216-222 (1957).

18 Cutting v. Cutting, 86 N.Y. (20 Hun 360) 522 at 529, 535-537 (1881); comment, 21 ALBANY L. REV. 216 at 216-222 (1957). See also Whiteside and Edelstein, "Life Estates with Power to Consume: Rights of Creditors, Purchasers and Remaindermen: A Study of New York Real Property Law Sections 149-153," 16 CORN. L. Q. 447 at 464 (1931).

19 Matter of Davies, 242 N.Y. 196 at 201-202, 151 N.E. 205 (1926). See Whiteside and Edelstein, "Life Estates with Power to Consume: Rights of Creditors, Purchasers and

There is thus no requirement that creditors get execution on the property during the donee's life or before execution of the power.

It should be noted that the elevation section is in aid of purchasers as well as creditors. And in New York, incumbrancers are included.[20] Examples of cases in which these people successfully used the statute are set out in the accompanying note.[21]

C. *The Extent of Elevation: Statutory Fee Compared With Common Law Fee*

1. *The Reversion*

It is clear that the statutory fee given the donee by the elevation sections is absolute as to the enumerated classes protected: creditors and purchasers. It is clear also that express remainders limited after the donee's estate are protected if creditors do not attach and the donee does not execute his power. But if (1) there are no creditors' or purchasers' rights involved, (2) the power is not executed, and (3) there is no limitation over, does the donee still get an absolute fee—that is, one which he can devise or one which, if he does not devise, will descend by the laws of intestate succession—or are the elevation sections inapplicable in this case, the donee's interest remaining a life estate, and the fee interest reverting to the estate of the donor? It might be thought that one of the elevation sections [Mich. Comp. Laws (1948) §556.11] provides an obvious answer: "In all cases where such power of disposition is given, and no remainder is limited on the estate of the grantee of the power, such grantee shall be entitled to an absolute fee." There are no Michigan cases interpreting or applying this provision. Hence to determine the effect to be given this provision, recourse must be had to decisions in other states.

(a). *Jurisdictions other than Michigan.* Only two states have dealt with this question, and their answers disagree. In New York, the statutory counterpart to Michigan's section 556.11 is given literal effect. The donee gets a common law fee; his elevated

Remaindermen: A Study of New York Real Property Law Sections 149-153," 16 CORN. L. Q. 447 at 462 (1931).

[20] 49 N.Y. Consol. Laws. (McKinney, 1945) §§149-151.

[21] Wells, Admr. v. American Mortgage Company of Scotland, 109 Ala. 430, 20 S. 136 (1896); Watkins v. French, 149 Okla. 205, 299 P. 900 (1931); Arnold v. McAuliffe, 201 Okla. 639, 209 P. (2d) 866 (1949), cert. den. 338 U.S. 950 (1950); Ruby v. Bishop, (10th Cir. 1953) 207 F. (2d) 84; Ashton v. Great Northern Ry. Co., 78 Minn. 201, 80 N.W. 963 (1899); Larson v. Mardaus, 172 Minn. 48, 215 N.W. 196 (1927).

estate cuts off the reversion.[22] In Alabama, however, although the same result is reached the interpretation of the statute is different. The statutory fee does not carry with it all the ownership of a common-law fee. The statutes are construed to enlarge the donee's interest to a fee *only* in favor of creditors of and purchasers from the donee[23] and protect *only* express remainders when the power goes unexecuted, thus leaving reversions by operation of law untouched.[24] It might be thought from this that in Alabama a donor who gives the donee a life estate and absolute power without limitation over would retain a reversion which, unaffected by the statutes under the Alabama view, would return the property to the donor's estate following the death of the donee-life tenant and absent any creditor attachment. But such is not the case. Alabama is one of the few states following the common-law minority rule that the grant of an absolute power of disposition to the donee of a life estate enlarged the estate to a fee. Since the statute is construed not to cover reversions, the minority common-law rule then operates, raising the tenant's interest to a fee and cutting off the reversion.[25]

22 Ryder v. Lott, 123 App. Div. 685, 108 N.Y.S. 46 (1908), affd. 199 N.Y. 543, 93 N.E. 1131 (1910); Matter of Enright, 109 Misc. 337 at 341, 179 N.Y.S. 757 (1919); Matter of Neuwirth, 170 Misc. 57 at 58, 9 N.Y.S. (2d) 623 (1939); In re Lewis' Will, 107 N.Y.S. (2d) 607 at 609 (1951).

For some purposes a donee in New York may still possess only a life estate. Matter of Sonnenburg, 133 Misc. 42, 231 N.Y.S. 191 (1928), involved a grant by a wife to her husband for life with an absolute power, and at his death, a limitation over of what, if anything, remained to certain legatees. In a tax proceeding an order was entered taxing the husband on the theory that he had a life estate. The husband appealed, arguing that the New York elevation section gave him a fee and that he ought to have been taxed on that basis. (This meant that if and when the remaindermen's estates vested in possession, the remaindermen would not be required to pay a transfer tax, a tax on the transfer of the entire fee having already been paid by the husband.) The court held that while the statute gave the husband a fee in respect to creditors and purchasers, it did not give him a fee for tax purposes.

23 Alford's Admr. v. Alford's Admr., 56 Ala. 350 at 352 (1876).

24 Hood v. Bramlett, 105 Ala. 660 at 663, 17 S. 105 (1895).

25 Hood v. Bramlett, 105 Ala. 660 at 663, 17 S. 105 (1894); Manfredo v. Manfredo, 191 Ala. 322 at 326-327, 68 S. 157 (1915); Jemison v. Brasher, 202 Ala. 578 at 582, 81 S. 80 (1919); Azar v. Azar, 262 Ala. 547 at 550, 80 S. (2d) 277 (1955.) In Hood v. Bramlett, testator willed his property to his wife for life, at her death half of what remained to be willed as she wished, the other half to be sold by his executor, the proceeds to be distributed to certain legatees. The wife made no disposition of the property over which she had a power. In this action, plaintiff, testator's administrator, sued defendant in possession of that half of the property over which the wife had had the power (unexecuted by her). Plaintiff claimed the right to receive rent from the defendant on the theory that the property, not being disposed of by the wife, and not being given in limitation over, had reverted to the testator's estate. The court held for the defendant, finding that there was no reversion. Instead the wife had the fee in the property, not by virtue of the statute, but by virtue of the common law, the statute not being applicable in this situation. The court said, at 663-664, that the protection of the statute was confined to

Both interpretations seem incorrect. The New York view, which, as just stated, gives the statutory language literal application, is certainly a permissible statutory interpretation. This interpretation seems to give the elevation section of the statute too much effect. As indicated in parts A and B of this comment, the elevation sections were enacted in aid of creditors alone. They are *in pari materia,* so the presence of "creditors and purchasers" should be a prerequisite to invocation of any of the sections. In the absence of a creditor's attachment or the donee's exercise of his power, therefore, the donor should get his property back via reversion. The statutory fee should not equal a common law fee.[26]

Alabama, on the other hand, seems to give the statute too little effect. At the very least the lawmakers intended to abolish completely the common law rule on elevation and substitute a statutory grant for creditors' protection instead. If the statute is interpreted not to provide for elevation in the case of reversions, which was the Alabama court's interpretation, then it would seem that there was to be none, the legislative determination being final and precluding resort to the common law.

If the Michigan court elects to follow the Alabama interpretation, the question whether the reversion is cut off will be governed by the Michigan common law rule on elevation. It is necessary, therefore, to inquire what that rule is.

remainders expressly limited after the life estate, citing the Alabama counterpart to Michigan's §556.11 in proof thereof.

> "But the ulterior estates thus protected must rest upon *express* limitations and not upon mere implication. This is demonstrated by [the elevation section] which provides that where *no remainder is limited* on the estate of the donee of the power, he is entitled to an absolute fee, thus confining the protection of future estates . . . to estates in remainder *limited* upon the particular estate, and leaving mere reversions and remainders by implication — the antithesis of express limitation — exposed to the operation of the common law doctrine, which so far from being affected by our statutes is confirmed and re-declared. . . . And this court has removed any doubt which might otherwise have clouded the point by declaring: 'A gift, conveyance or bequest, even when expressed to be for life, if coupled with a general power under which the whole fund may be disposed of, vests an absolute title in the first taker, which an implied remainder or reversion will not cut down to a life estate,' *Adams* v. *Adams,* 85 Ala. 452, 455. As to one-half of the land in question there was no limitation over, but at the most only an implied reversion, and the case is brought directly within the statutory provisions and general principles we have adverted to. . . ."

Thus the Alabama court uses statutory language literally applicable to facilitate an escape to the common law, which is then used to reach the same result which would have followed from a literal application of the statute.

[26] Minnesota, however, in its statutory revision, codified the New York interpretation. See Minn. Stat. (1957) §502.78.

(b). *Michigan Law on Elevation.* The Michigan decisions, dating from 1872, indicate that no ready answer can be given to this inquiry.[27] The Michigan powers statutes were first enacted in 1846, appearing in that year's Revised Statutes. They have been in force continuously ever since but, strangely, although antedating the earliest of the decisions just referred to, were not mentioned by the court until 1944.[28] The court must have become aware of the statutes at some earlier point, however, because it referred to them, in a somewhat different context, in a 1900 case.[29] In the first four cases, from 1872 to 1910, the court came out strongly for the minority rule that an unlimited power of disposition coupled with a life estate raised the estate to a fee. In *Jones v. Jones* and *Dills v. La Tour,* the court, finding the power to be unlimited, enlarged the life estate to a fee. In *Gadd v. Stoner* and *Farlin v. Sanborn,* the court found the powers there given to be limited to exercise only for the donee's comfort and support and held that such limited powers did not enlarge the life estate (in accordance with the usual statement of the common law minority rule).[30] Then in 1910 came *In re Moor's Estate,* which, although not expressly overruling the previous decisions, was squarely contradictory to them, holding that a life estate was not enlarged by an unlimited power and quoting the majority rule as set forth in a Connecticut case. In the next six cases, *Bateman v. Case, White v. Grand Rapids & Indiana Ry. Co., Laberteaux v. Gale, Drier v. Gracey, Woolfit v. Preston,* and *Gibson v. Gibson,* the court returned to the minority rule. In the *White* and *Gibson* cases, the court found the power to be unlimited, and held the estate enlarged to a fee. In the other four cases, the court found the power to be limited and left the estate unenlarged. Then, in 1930, *Quar-*

27 The following list is not exhaustive but contains most of the decisions: Jones v. Jones, 25 Mich. 401 (1872); Jones v. Deming, 91 Mich. 481, 51 N.W. 1119 (1892); Gadd v. Stoner, 113 Mich. 689, 71 N.W. 1111 (1897); Dills v. La Tour, 136 Mich. 243, 98 N.W. 1004 (1904); Farlin v. Sanborn, 161 Mich. 615, 126 N.W. 634 (1910); In re Moor's Estate, 163 Mich. 353, 128 N.W. 198 (1910); Bateman v. Case, 170 Mich. 617, 136 N.W. 590 (1912); White v. Grand Rapids & Indiana Ry. Co., 190 Mich. 1, 155 N.W. 719 (1916); Laberteaux v. Gale, 196 Mich. 150, 162 N.W. 968 (1917); Drier v. Gracey, 203 Mich. 399, 169 N.W. 835 (1918); Woolfit v. Preston, 203 Mich. 502, 169 N.W. 838 (1918); Gibson v. Gibson, 213 Mich. 31, 181 N.W. 41 (1921); Quarton v. Barton, 249 Mich. 474, 229 N.W. 465 (1930); Townsend v. Gordon, 308 Mich. 438, 14 N.W. (2d) 57 (1944); In re Peck Estates, 320 Mich. 692, 32 N.W. (2d) 14 (1948). Some of these cases are touched upon briefly in note, 29 MICH. L. REV. 761 (1931).

28 The case which mentioned the statutes was Townsend v. Gordon, 308 Mich. 438, 14 N.W. (2d) 57 (1944).

29 Hunt v. Hunt, 124 Mich. 502, 83 N.W. 371 (1900).

30 36 A.L.R. 1177 (1925), 76 A.L.R. 1153 (1932); note, 29 MICH. L. REV. 761 at 763 (1931); note, 30 MICH. L. REV. 796 at 797 (1932).

ton v. Barton was decided. There was no question in this case that the power was unlimited; but the court, citing *Ruling Case Law* twice for the majority rule, held that the donee's power did not enlarge his life estate. There was no express reversal of the previous decisions favoring the minority rule. The court stated that the donor's (testator's) intent was paramount and then found that he intended a life estate. Finally, in 1944 the court in *Townsend v. Gordon* at least recognized the existence of the Michigan powers statutes. But the statutes were cited almost as an afterthought, the court placing major reliance on *Farlin v. Sanborn,* which it cited in support of the statement:

> "The general rule is that an indefinite or general power of appointment or disposition . . . carries with it a fee unless testator gave the donee an estate for life only by using certain express words annexing to it the power of disposal."[31]

Construing a will in which testator had given his executor the residue of his estate to dispose of as he should determine, the court held that the executor took the fee. Its reliance on *Farlin v. Sanborn* is rather curious when it is remembered that *Farlin* involved a holding that a tenant's limited power did not enlarge his life estate. The *Townsend* case involved the grant of an indefinite, not a life, estate to the executor, plus an unlimited power. And on these facts it is uniformly held by courts following either the majority or minority rule that the power creates a fee interest in the donee.[32] So, while the result in *Townsend* is consistent with the common law, it is difficult to say what principle the court announced or thought it was following. The most recent pronouncement of the court came in *In re Peck Estates,* decided in 1948. Testatrix had willed property to a trustee to hold in trust and pay the income to her nephew for life, the nephew having a power to appoint the corpus by will, remainders over in case of failure to appoint. It was argued that by virtue of Mich. Comp. Laws (1948) section 556.9 the nephew had held a fee interest which he had tried to convey to his trustee in bankruptcy when he underwent voluntary bankruptcy, such being an execution of the power. The court decided that the nephew had not held a fee interest under the statute because of one of two factors (it is uncertain which the court relied on): either the power was not "absolute" within the meaning of section 556.13, being limited

[31] Townsend v. Gordon, 308 Mich. 438 at 447, 14 N.W. (2d) 57 (1944).
[32] Note 11 supra.

to exercise only by will, or else the donee's estate was accompanied by a disqualifying trust.[33] This decision is thus one based entirely on the Michigan powers statutes and does not bear on the Michigan common law at all. That law is unpredictable.

2. *Tax Effects: Federal Estate Tax*

Property over which a donee has an absolute power of disposition will doubtless be includible in the donee's gross estate for federal estate tax purposes, but not because of the state elevation statutes. These are not necessary to the result. The definition in section 2041 (b) of the Internal Revenue Code of a power which will be included in the gross estate is broader than the definition of "absolute power" in the state statutes. Therefore the federal government will not have to rely on elevation in order to require inclusion.

But a question does arise whether the grant of an absolute power of disposition to a spouse will qualify for the marital deduction under section 2056 (a) of the Internal Revenue Code on the theory that statutory elevation gives the donee-spouse a fee interest in the property.[34] The common law elevation rules have been applied in determining marital deduction qualification.[35] The question is whether the elevation statutes will go as far as the minority common law rule, which raised the donee's estate to a fee for all purposes. The only decision on the point, *Estate of Pipe v. Commissioner*,[36] suggests that in a proper case the court might hold the statute applicable and allow the gift to the donee to qualify for the marital deduction. There a testator had given his wife personalty for life, with a full power of disposition. The testator had directed, however, that his wife was to have no power to dispose of what remained unexpended at her death, this residue going in limitation over.[37] It was argued that that testator's devise to his wife qualified for the marital deduction,

33 In re Peck Estates, 320 Mich. 692 at 700, 32 N.W. (2d) 14 (1948).

34 In certain cases, a grant of a life estate and power of appointment to a spouse will escape the terminable interest disqualification and will be deductible. I.R.C., §§2056 (b) (1) and 2056 (b) (5). The question now raised, however, is not that of squeezing in under §2056 (b) (5) — the escape valve of the terminable interest provision — but rather that of altogether avoiding classification as a terminable interest.

35 Estate of Harrison P. Shedd, 23 T.C. 41 at 44 (1954), affd. (9th Cir. 1956) 237 F. (2d) 345; Estate of Harriet C. Evilsizor, 27 T.C. 710 at 712 (1957); Estate of Wallace C. Howell, 28 T.C. 1193 at 1194-1195 (1957).

36 (2d Cir. 1957) 241 F. (2d) 210, cert. den. 355 U.S. 814 (1957).

37 Id. at 211.

one of the contentions being that under the New York elevation statute the wife took a fee. The court quoted the statute but refused to apply it on the ground that the wife did not have the requisite "absolute power" since she was forbidden to dispose of the property by will.[38] This outcome suggests that if the court had found an absolute power, it would have been willing to apply the statute and allow the deduction.

On the basis of New York law, allowing the gift of an absolute power of disposition to a spouse to qualify for the marital deduction might be the correct decision. New York, it will be remembered, takes a broad view of the fee interest created by its statute. But, to repeat, this does not seem to be the correct view. The elevation statutes are supposed to protect creditors and purchasers, and the taxing sovereign is neither. Nor would it be protected by applying the statute; it would lose money. If the elevation sections cannot be used to qualify the gift to a spouse for the marital deduction, the gift can not be qualified in any other way because it will be a terminable interest, and disqualified under section 2056 (b) (1) of the code. And this seems to be the sounder view of the elevation statutes; they should protect creditors and purchasers but not a testator seeking to reduce taxes through the marital deduction.[39]

D. *Statutory Interpretation: When Will the Statute Apply?*

1. *Absolute Power*

Following the three elevation sections are definitions of "absolute power." The *primary* definition emphasizes that the power must be one exercisable inter vivos: "Every power of disposition shall be deemed absolute, by means of which the grantee is enabled in his lifetime, to dispose of the entire fee for his own benefit."[40] This definition excludes from the category of "absolute" a power exercisable only by will. So, generally, if the power is testamentary only, the elevation section will not apply. But a *secondary* definition of absolute power makes room for the exceptional case. In some cases a power exercisable only by will can be considered absolute within the meaning of the preceding elevation sections:

[38] Id. at 212.

[39] It is recognized, however, that a federal court sitting in New York would, under the Erie Railroad doctrine, be obliged to follow the New York courts' interpretation of the elevation sections.

[40] Mich. Comp. Laws (1948) §556.13.

"When a general and beneficial power to devise the inheritance, shall be given to a tenant for life or for years, such tenant shall be deemed to possess an absolute power of disposition, within the meaning, and subject to the provisions of the three (3) last preceding sections."[41]

(a). *Primary Definition.* (1). *Power to devise as well as convey?* The primary definition commands that an absolute power *must* be one exercisable inter vivos. But what happens if the power is restricted to exercise inter vivos? Can it still be absolute when not exercisable by will as well? A strict reading of the definition suggests an affirmative answer. The donee need only be able to dispose of the entire fee in his lifetime for his own benefit, which he could do even though his power were restricted to exercise inter vivos. And this view has support in some state courts. While they have not explicitly held that a power to devise is unnecessary, they have found an absolute power and applied the elevation statutes, despite the absence of a power to devise.[42] New York, however, appears to be contra, requiring that an absolute power include a power to dispose by will.[43]

(2). *What conditions can an absolute power tolerate?* Often the power given to a donee is one to "sell and dispose" of the property.[44] This can be construed as a power to dispose for a consideration, but not gratuitously. So construed, is the power still absolute? Oklahoma says yes;[45] Wisconsin says no, refusing to apply the elevation statutes in such a case.[46] Oklahoma's position seems to be the sounder. Although a donee cannot give property away, nevertheless, if he can sell it and consume all the proceeds during his lifetime (and there is nothing to prevent him from so doing),[47] he has disposed of the entire fee for his own benefit during his lifetime.

41 Mich. Comp. Laws (1948) §556.12.

42 Reeves v. Tatum, 233 Ala. 455 at 457-458, 172 S. 247 (1937); Gentle v. Frederick, 234 Ala. 184, 174 S. 606 (1937); Will of Zweiful, 194 Wis. 428 at 436-437, 216 N.W. 840 (1927).

43 Rose v. Hatch, 55 Hun (N.Y.) 457, 8 N.Y.S. 720 at 723 (1890); Terry v. Wiggins, 47 N.Y. 512 at 516 (1872). In the former case it was said: ". . . but the power . . . was to be exercised during his life, and therefore the power was not absolute, within the meaning of the law, because such a power includes a power of disposal by will."

44 As just stated, such a power does not include a power to devise; but on what seems the sounder view this omission is harmless. It will not take the power out of the "absolute" category.

45 Ruby v. Bishop, (10th Cir. 1953) 207 F. (2d) 84 at 89-91.

46 Estate of Holmes, 233 Wis. 274 at 279, 289 N.W. 638 (1940).

47 None of the elevation statutes specify that the proceeds resulting from exercise of the power shall be held subject to the limitation over. West Virginia, however, at one time had a statute which so provided. See note, 37 W. VA. L.Q. 422 at 424-425 (1931).

Often the donee receives a power of disposition for his comfort or support. Is this power, so limited and qualified and conditional, still absolute? At common law it was not, and states following the minority common law elevation rule never raised the donee's estate to a fee when his power was limited to exercise for his support.[48] It would seem proper to continue this approach under the elevation statutes, and some states have done so.[49] Nevertheless, there are other states which have found the power to be absolute and applied the elevation statutes without noticing the problem posed by the limitation on the exercise of the power.[50]

(b). *Secondary Definition.* (1). *Ingredients.* Even though a power does not fall within the primary definition of absolute power because restricted to testamentary execution, it can still be an absolute power within the meaning of the elevation sections provided it fulfills the requirements of the secondary definition. It must be a ". . . general and beneficial power to devise the inheritance . . . given to a tenant for life or for years. . . ."[51] The word "inheritance" probably means "the remainder" or "the fee" and thus would not exclude from the definition a power created inter vivos. In *Hume v. Randall,*[52] for example, the secondary definition was used in an inter vivos setting. Grantors had by deed given interests to the grantees and the survivor of them, with a right to convey the fee by will. There was no limitation over. The court said that the secondary definition of absolute power applied.[53]

The meaning of "general" power is fixed by the statute: "A power is general, where it authorizes the alienation in fee . . . to any alienee whatever."[54] When there is no restriction on the power, and the appointees are left to the donee's discretion, the power would seem to be a general one.[55]

48 Note 30 supra.

49 Yockers v. Hackmeyer, 203 Ala. 621 at 622-623, 84 S. 709 (1919); Terry v. Wiggins, 47 N.Y. 512 at 516 (1872); In the Matter of the Estate of Brower, 278 App. Div. 851, 104 N.Y.S. (2d) 658 (1951), affd. 304 N.Y. 661, 107 N.E. (2d) 589 (1952).

50 Larsen and Another v. Johnson, 78 Wis. 300 at 308-309, 47 N.W. 615 (1890); Larson v. Mardaus, 172 Minn. 48, 215 N.W. 196 (1927); Beliveau v. Beliveau, 217 Minn. 235 at 240-241, 14 N.W. (2d) 360 (1944); Rise v. Park, 222 Minn. 444, 24 N.W. (2d) 831 (1946).

51 Mich. Comp. Laws (1948) §556.12.

52 141 N.Y. 499, 36 N.E. 402 (1894).

53 Id. at 504.

54 Mich. Comp. Laws (1948) §556.5.

55 But see Cawker v. Dreutzer, 197 Wis. 98, 221 N.W. 401 (1928). Testator's will set up trusts for his daughters for their lives, giving the daughters each a power to appoint a portion of the principal by will with limitations over, in the absence of appointment, on termination of the trusts. *Held,* at 135, the powers were not absolute within the

The most significant part of the secondary definition of absolute power is the word "beneficial." The meaning of "beneficial" power is likewise fixed by statute: "A . . . power is beneficial when no person other than the grantee has, by the terms of its creation any interest in its execution."[56] It is crucial to know, therefore, when other parties, by virtue of the instrument creating the power, are interested in its execution. Certainly if the power was "in trust" within the meaning of section 556.22 it could not be beneficial, since persons would be designated as entitled to the proceeds resulting from execution of the power and would be interested in its execution. What if the "interest" is expressed less directly—what of remaindermen? Some cases have decided that remaindermen are interested parties. These courts say that when the donor limits remainders after the donee's estate, to take effect in the absence of exercise of the power, there are parties interested in the execution of the power, which therefore cannot be beneficial.[57] Another court has, however, ignored the impact of remainders, never mentioning that they might constitute "interest."[58]

Under the primary definition of absolute power the fact that remainders are limited over does not matter because the definition nowhere requires an absolute power to be a beneficial power. It says simply that a power is absolute if the donee can dispose of the entire fee in his lifetime for his own benefit. It is understandable that some courts, because of this somewhat duplicative terminology ("beneficial" versus "benefit"), can assert that an absolute power (under the primary definition) must be both general and beneficial.[59] But this is clearly incorrect. A donee, in order to have an absolute power under the primary definition, must be able to dispose for his own *benefit.* But this does not mean that his power must be *beneficial.* These are altogether different propositions. So even if the secondary defi-

meaning of the secondary definition. They were not "general," because they embraced interests less than a fee.

56 Mich. Comp. Laws (1948) §556.7.

57 Michigan has so decided in In re Peck Estates, 320 Mich. 692 at 701, 32 N.W. (2d) 14 (1948). Other decisions are Yockers v. Hackmeyer, 203 Ala. 621 at 623, 84 S. 709 (1919); Rose v. Hatch, 55 Hun (N.Y.) 457, 8 N.Y.S. 720 at 722 (1890).

58 Cawker v. Dreutzer, 197 Wis. 98, 221 N.W. 401 (1928).

59 See, e.g., Yockers v. Hackmeyer, 203 Ala. 621 at 623, 84 S. 709 (1919); and Weinstein v. Weber, 58 App. Div. 112 at 116, 68 N.Y.S. 570 (1901), affd. 78 App. Div. 645, 81 N.Y.S. 62 (1903), affd. 178 N.Y. 94 (1904), in which the court admonished that in order for the elevation section to be applicable, it must be found that ". . . the power . . . is both general and beneficial."

nition cannot be used where there are remainders, the primary definition can. Indeed, the elevation sections themselves, which transform an absolute power into ownership, expressly allude to the possibility of remainders being limited over by saying that the donee gets a fee ". . . subject to any future estates limited thereon. . . ."[60] But if the only power given is a power to devise, which will never fit the primary definition, it cannot, in most states, qualify as absolute unless the donor refrains from limiting remainders after the donee's estate.

The conclusion is that if remainders constitute interest, the utility of the secondary definition of absolute power is drastically curtailed. It will be a rare case which can take advantage of the secondary definition;[61] almost always, in a well planned disposition of property, there will be a remainder limited after the donee's estate to take effect if the power goes unexercised. To hold that such remainders constitute "interest" is to vitiate the statutory purpose; creditors would thus in most instances be robbed of the statute's protective elevation. The statute requires interest to be indicated by the terms of the instrument creating the power. From this it seems likely that the legislative intent was that an explicit designation of interest be made before a power became non-beneficial.

(2). *Peculiar decisions in the trust context.* A situation which often provokes a question of the application of the secondary definition is that in which the donor gives property on trust for the donee-beneficiary's life, the donee having a testamentary power to appoint the corpus. As will appear later, this kind of situation is one specifically excluded from the elevation statutes because of the accompanying trust. Several courts, however, have reached the same result, in a more labored and questionable manner, by holding the requirements of the secondary definition of absolute power unfulfilled. The Michigan court, for example, has decided, keeping its concepts of estates and trusts rigidly distinct, that a trust beneficiary with the power to appoint by will was not a "tenant for life or years" as the secondary definition requires him to be. Hence the secondary definition could not be used and the elevation sections could not be applied.[62] The New York decision

60 Mich. Comp. Laws (1948) §556.9.

61 One such rare case was Thompson v. Young, 215 Ala. 603, 112 S. 241 (1927), in which the court applied the secondary definition.

62 Hunt v. Hunt, 124 Mich. 502 at 505-506, 83 N.W. 371 (1900).

of *Cutting v. Cutting*[63] has been interpreted as having reached a similar result; the secondary definition could not be applied because the donee, a trust beneficiary, did not have an estate.[64] With these decisions should be compared *Cawker v. Dreutzer*,[65] which held that a trust beneficiary's power to appoint the corpus could not be considered "general," and hence not within the secondary definition, because the power embraced an interest less than a fee.

2. *Disqualifying Trusts*

If the power given to the donee is accompanied by a disqualifying trust, the elevation statutes will not apply.[66] When is there such a disqualifying trust?

(a). *Express Trusts.* There are two types of cases: those in which the donee of the power is himself a trustee (the donee-trustee case) and those in which the donee is a trust beneficiary (the donee-beneficiary case). In the former case the power may be either one of appointment or of disposition, but it is more likely to be a power of disposition. In the latter case the power will be a power of appointment, for seldom will a power of sale or disposition be given a trust beneficiary. It might be thought that only in the donee-trustee situation is the power accompanied by a trust within the meaning of the statute. There the power does seem to be accompanied by a trust, while in the donee-beneficiary situation it would seem that the trust accompanies not the power but only the property affected by the power.[67]

Nevertheless, the only two jurisdictions in which the question has been raised have held that the donee-beneficiary situation does involve a disqualifying trust. In New York this result is reached in two ways. First, the New York cases reveal that the power of a trust beneficiary to appoint the corpus will not be considered absolute, since there is always some kind of restraint on a trust beneficiary's power of alienation. Only an absolute power elevates, and the slightest restraint on the donee's power of alienation during his lifetime will serve to disqualify a power

63 86 N.Y. (20 Hun 360) 522 (1881).
64 FOWLER, REAL PROPERTY LAW OF NEW YORK 361 (1889).
65 197 Wis. 98 at 135, 221 N.W. 401 (1928).
66 Mich. Comp. Laws (1948) §556.9.
67 This was argued in Whiteside and Edelstein, "Life Estates with Power to Consume: Rights of Creditors, Purchasers and Remaindermen: A Study of New York Real Property Law Sections 149-153," 16 CORN. L.Q. 447 at 466, n. 60 (1931).

from the category of absolute. Therefore, when the appointment can become effective only after termination of the trust at the death of the beneficiary (meaning that the donee cannot appoint his life estate and presently vest possession in his appointee),[68] or when the donee is forbidden to anticipate income from the trust,[69] his power is not absolute and his estate not changed by the statute. Second, the New York courts have decided that in both the donee-trustee[70] and the donee-beneficiary[71] situations, there are accompanying trusts which prevent the elevation section from operating.

In Alabama there are no cases discussing the question whether the power of a donee-beneficiary is absolute. But, as in New York, the power of a donee-beneficiary is held to be one accompanied by a trust, the elevation statute being rendered inapplicable.[72] Nor is there elevation in the donee-trustee situation, although the reason is in some doubt because the only case on the point may be taken more than one way.[73]

68 Farmers' Loan & Trust Co. v. Kip, 192 N.Y. 266 at 277-278, 85 N.E. 59 (1908); Hume v. Randall, 141 N.Y. 499 at 505, 36 N.E. 402 (1894), interpreting Cutting v. Cutting, 86 N.Y. (20 Hun 360) 522 (1881) and Genet v. Hunt, 113 N.Y. 158, 21 N.E. 91 (1889). See also Crooke v. County of Kings, 97 N.Y. 421 at 433-435 (1884).

69 Woodbridge v. Bockes, 59 App. Div. 503 at 514, 69 N.Y.S. 417 (1901), affd. 170 N.Y. 596, 63 N.E. 362 (1902).

70 Haynes v. Sherman, 117 N.Y. 433 at 438, 22 N.E. 938 (1889).

71 Rose v. Hatch, 55 Hun (N.Y.) 457, 8 N.Y.S. 720 at 722-723 (1890); Higgins v. Downs, 101 App. Div. 119 at 123, 91 N.Y.S. 937 (1905); FOWLER, REAL PROPERTY LAW OF NEW YORK 354 (1899), citing Cutting v. Cutting, 86 N.Y. (20 Hun 360) 522 (1881).

72 In Morgan County Nat. Bank of Decatur v. Nelson, 244 Ala. 374, 13 S. (2d) 765 (1943), the court construed a will which in part gave property to one Nelson to be used for the support, maintenance, and benefit of the testator's sister-in-law, any part remaining undisposed of at the time of the beneficiary's death to go to certain remaindermen. The court recognized that the will rather obliquely gave a power of disposition. One question was whether the beneficiary's life estate was elevated by the powers statute to a fee. The court found that the statute did not apply, saying at 380: "If there were no trust created, a power of sale . . . would exist in [the beneficiary]. . . . But in the instant case there is a trust attempted to be set up. The sale is to be for a certain purpose. Those statutes do not apply here." This case is rather unsatisfactory, however, because the will did not quite indicate who was the donee of the power—whether the trustee or the beneficiary—and the court studiously avoided resolving this ambiguity.

73 This was Nabors v. Woolsey, 174 Ala. 289, 56 S. 533 (1911). Testator gave his daughter certain realty for life, authorizing her to sell or dispose for reinvestment, the proceeds to be held and treated the same as was the original property. The daughter was also empowered to dispose of the property by will, but if she did not, it was to descend to her heirs. There were thus two powers here: one exercisable inter vivos and the other exercisable by will. On the question whether the first power was enough to give the daughter a fee, the court, at 292, decided that the daughter ". . . did not get a fee . . . for the reason that she was not given the absolute power of disposition, as the power to sell was accompanied with a trust." This could be a holding that the elevation statute did not apply since the power was accompanied with a disqualifying trust. On the other hand, it could be a holding that the elevation statute did not apply since the power was not absolute, being accompanied with a trust.

In Michigan it is reasonably certain that the elevation statute does not operate in the donee-beneficiary situation—although the precise reason why this is so is in some doubt.[74]

From the foregoing, it is safe to conclude that any time a donor wants to prevent the elevation sections from operating, he need merely give his property in trust, limited to last until an appointment takes effect.[75]

(b). *Implied Trusts: Remainders and the Accompanying Trust.* Remainders are usually limited after the life estate of the donee of the power, and in most cases the donor stipulates that these limitations over are to take effect only if the power goes unexercised. When the power is to appoint, there could never be any question of the power's being accompanied by a trust in favor of the remaindermen. Their interests are in terms made subject to divestment by the donee's execution of his power; they are takers in default. But suppose the donor gives to a life tenant a power, not to appoint, but to sell or consume, with remainder over to somebody else. Since there is no expression that the remainder is limited over in the event that the power goes unexecuted, might it not be that the power is to be exercised for the benefit of the remaindermen? That is to say, is there not a danger that a court would find that the power was affected by an implied trust—a trust of the proceeds of sale or disposal for the benefit of the remaindermen? If a court adopted this attitude,

[74] In re Peck Estates, 320 Mich. 692, 32 N.W. (2d) 14 (1948), testatrix had devised property to a trustee to hold in trust and pay the income to her nephew for life, the nephew having a power to appoint the corpus by will, remainders limited over in case of failure to appoint. It was argued that the elevation section converted the nephew's interest into a fee. The court found the statute inapplicable, holding that the nephew's interest remained a life tenancy. The court's brief statement on the application of the statute came at 700: ". . . the power of disposition was accompanied by a trust in favor of [the nephew], the provisions of which gave him the power to dispose of the corpus of the estate by will. His power was limited to disposing of the corpus by will effective at his death." This may be a holding that the power was not absolute since it was exercisable only by will. [And the secondary definition could not be applied to make the power absolute because of the holding in Hunt v. Hunt, 124 Mich. 502, 83 N.W. 371 1900).] On the other hand, it may be a holding that the elevation section could not be applied since the power was accompanied by a disqualifying trust. The significance of the trust was argued to the court. See the appellate briefs filed in the case in 3777 Supreme Court Records and Briefs, January Term, 1948.

[75] No ready explanation can be offered as to why the authors of this legislation provided so easy a means of avoiding the statute and defeating creditors: at common law the fact that a general power was accompanied by some sort of trust did not preclude creditors from reaching appointive property after the power was exercised. See the discussion in Whiteside and Edelstein, "Life Estates with Power To Consume: Rights of Creditors, Purchasers and Remaindermen: A Study of New York Real Property Law Sections 149-153," 16 CORN. L.Q. 447 at 466-467 (1931).

it would then have to hold that the life tenant's estate was not enlarged by the elevation statute because of the accompanying trust.

Such was the view of the appellate division in New York at one time. In *Weinstein v. Weber*,[76] the court made a finding of trust solely because it thought that the limitations over must mean something—must be protected against destruction by the power. Accordingly, it held that the proceeds resulting from exercise of the power of sale took the place of the appointive property, on a type of trust res analogy.[77]

If the meaning of this decision was that a power would always be accompanied by a trust when a remainder was limited after the donee's life estate, the decision was clearly in error. It ignored the historical context of the elevation statutes—the common-law elevation rules. The rules, it will be remembered, had developed in response to this type of case. The majority view was that the life estate would be controlling, that the absolute power would not enlarge the tenant's interest. The minority view was that the power enlarged the tenant's life estate to a fee. State legislatures, in order to resolve this common-law conflict and to protect creditors, enacted the elevation sections, which provided that the tenant's estate was to be enlarged to a fee in respect of creditors. It is therefore to just such a case as *Weinstein* that the elevation sections were designed to apply.

The apparent error of *Weinstein* was rectified in *Manion v. Peoples Bank of Johnstown*.[78] Testatrix had left property to her son for life ". . . with the absolute power of disposition . . .," remainder over to another son.[79] The trial court found a disqualifying trust, relying on *Weinstein*. It felt that the donee had no right to dispose of the property for his own benefit. Despite the donor's use of the statutory language, the court said there was a complete lack of indication of intent to defeat the remainders; they were to go to the remaindermen undiminished.[80] The trial court's decision was affirmed by the appellate division[81] but

[76] 58 App. Div. 112, 68 N.Y.S. 570 (1901), affd. 78 App. Div. 645, 81 N.Y.S. 62 (1903), affd. 178 N.Y. 94 (1904).

[77] Id. at 116.

[78] 38 N.Y.S. (2d) 484 (1942), affd. 266 App. Div. 1043, 44 N.Y.S. (2d) 593 (1943), revd. 292 N.Y. 317, 55 N.E. (2d) 46 (1944).

[79] 38 N.Y.S. (2d) 484 at 487.

[80] Id. at 488-489.

[81] 266 App. Div. 1043, 44 N.Y.S. (2d) 593 (1943).

reversed by the court of appeals,[82] which decided that the donor, in using the language of the statute, was trying to do exactly what it allowed him to do—to give the donee a fee interest:

> "The life estate left by the testatrix to [the life tenant] was to be held by him—so her will said—with the 'absolute power of disposition.' The quoted phrase presumably was patterned after section 149 of the Real Property Law [New York's elevation statute], so as to bring about the result dictated by that section."[83]

The *Manion* case seems to have laid the *Weinstein* decision, with its notion of implied trust, to rest.

II. EXECUTION OF A POWER OF APPOINTMENT

A. *History, Purpose, and Effect*

The Michigan statutes governing execution of a power are sections 556.40 to 556.47. Attention here will be focused on two of these sections, which are as follows:

> "No power can be executed except by some instrument in writing, which would be sufficient in law to pass the estate or interest intended to pass under the power, if the person executing the power were the actual owner.[84]
>
> "Every instrument, except a will, made in execution of a power . . . shall be deemed a conveyance within the meaning and subject to the provisions of the next succeeding chapter."[85]

The general purpose of these sections is manifestly to set forth exactly the manner in which a power must be executed and the formalities which need, and need not, be observed.

It may be suggested that these provisions, far from subjecting an executing instrument to formal conveyancing requirements, prescribe instead that any such instrument shall be "deemed" to have met these requirements, thus obviating compliance therewith. Statutory history and statutes from other jurisdictions indicate that their purpose is plainly to make compliance with formal conveyancing requirements mandatory to an effective exe-

82 292 N.Y. 317, 55 N.E. (2d) 46 (1944).
83 Id. at 320-321.
84 Mich. Comp. Laws (1948) §556.40.
85 Id., §556.41.

cution of a power. In Alabama, for instance, the relevant section says:

> "No power of disposition of real estate can be executed, except by an instrument in writing, which would be sufficient in law to pass the estate or interest intended to pass under such power, if the person executing the power was the actual owner."[86]

This section is substantially identical to Michigan's section 556.40. Alabama has no provision corresponding to section 556.41, and thus no confusion resulting from the word "deemed." It is then quite obvious that in Alabama formal conveyancing requirements are imposed on executions of a power. In New York this is plainer yet. New York likewise has no provision like Michigan's "deemed" statute and its statute says flatly:

> "A power can be executed only by a written instrument, which would be sufficient to pass the estate, or interest, intended to pass under the power, if the person executing the power were the actual owner."[87]

Where, then, did Michigan get its "deemed" provision? The New York powers statutes as originally enacted in 1829 contained such a provision. Michigan borrowed it in 1846 when it enacted its powers statutes. The New York statutes were amended in 1896 and the "deemed" provision then deleted. Of the original New York provisions, the New York revisers said:

> " 'They rest on the principle, that the alienation of lands by means of a power should be governed by the same rules as their alienation by the legal owner; and where the general solemnities of law are observed, other formalities, though enjoined by the party, may be considered as immaterial, and may be safely disregarded. . . .' "[88]

86 Ala. Code (1940) tit. 47, §82.

87 49 N.Y. Consol. Laws (McKinney, 1945) §165.

88 This comment of the New York revisers was quoted in 27 Wis. Stat. Ann. (1957) 169 by Professor Oliver S. Rundell, Dean and Professor Emeritus of the Wisconsin School of Law, in his introductory comment to the Wisconsin powers statutes, taken from the New York statutes and including a "deemed" statute, §232.39. The source given for the quotation was N.Y. Rev. Stat., 2d ed., Vol. III, p. 52. Professor Rundell first stated that the execution of a power was not a conveyance at common law, but merely a condition of the vesting of an interest created by the donor of the power. Since it was not a conveyance, it did not have to conform to any formal requirements of transfer. But since the effect of execution of a power resembled the effect of a conveyance, the New York revisers saw fit to "deem" the execution a conveyance and apply to it the usual conveyancing requirements.

It therefore appears that a correct reading of section 556.41 is that it decrees that instruments in execution of a power, although heretofore not conveyances, shall be "deemed" conveyances, and since deemed such, consequently subjected to conveyancing requirements as set forth in other Michigan statutes.

It should be carefully noted that these requirements in all probability include recordation, at least when the power relates to realty.[89]

Examples of the strictness with which the courts compel the conveyancing requirements to be observed are *Rutledge v. Crampton*[90] and *In re Hayes' Will*.[91] In *Rutledge,* the holder of a life estate had a power to sell, and it was argued that she had executed the power by joining with another party (who had a half interest in the property) in a petition to the probate court for sale of the land. The Alabama statutes commanded that execution of a power be by instrument sufficient to pass the estate in law and that conveyances of land had to be in writing, subscribed to, and attested by one witness who in turn had to sign. The court held the purported execution defective, referring to a New York case in which it was said that neither the life-tenant's assent to a sale in her answer, nor her approval endorsed on the draft of the decree, could be regarded as a valid execution. The court warned: "We have a statute . . . prescribing how powers must be exercised, and there is no latitude for the courts to uphold any exercise thereof short of a substantial compliance with the statute."[92]

In the *Hayes' Will* case, testator gave a legatee a life estate with power of sale. The executor sold the land. The legatee did not sign the contract of sale nor did she join in the deed. All she did was to sign a receipt given the purchaser by the executor for a payment made as a binder. Signing the binder was not an execution of the power, said the court, remonstrating that ". . . a power of sale can only be exercised by an instrument of equal dignity, namely, a written conveyance in the form prescribed by sections 165 and 242 of the Real Property Law."[93]

89 See Mich. Comp. Laws (1948) §§556.40, 556.41, and 565.1; 49 N.Y. Consol. Laws (McKinney, 1945) §§165, 290, and 291; FOWLER, REAL PROPERTY LAW OF NEW YORK 379 (1899). There does not, it must be confessed, seem to be a need for recording executions of powers.

90 150 Ala. 275, 43 S. 822 (1907).

91 114 N.Y.S. (2d) 87 (1952).

92 150 Ala. 275 at 283-284, 43 S. 822 (1907).

93 114 N.Y.S. (2d) 87 at 90 (1952).

B. *Application to Personalty and Choses in Action*

The important question is whether the court will follow the statutory prescription that an instrument executing a power must conform to conveyancing requirements when the power being executed is over the corpus of a trust consisting of money, stocks, bonds, and other choses in action. The statutes apply, in terms, only to realty.[94] It might be surmised that there is, therefore, no statute law covering powers relating to personalty or choses. But in *Townsend v. Gordon,*[95] the Michigan court decided that the Michigan powers statutes applied to personalty. Other states have reached the same result.[96] It may well be that the same decision will be reached with respect to choses. In *In re Peck Estates,*[97] the Michigan court voiced no objection to applying the powers statutes to a power over a trust corpus.[98] Yet a New York case seems to hold that no formal requirements will be imposed at all for the execution of powers over personalty or choses. In *In re Manville's Will,*[99] testator willed his residuary estate to trustees to hold in trust for certain beneficiaries, one-third thereof ". . . to or for the use of such charitable institutions or purposes as his trustees might select and designate in their absolute and uncontrolled discretion."[100] No payment was made by the trustees; but they did write to plaintiff, a charitable institution, saying that "We shall designate your organization to receive . . . the principal and/or income funds at the earliest moment from the Trust. . . ."[101] Plaintiff petitioned to compel the trustees to make payment, alleging also that it had been advised orally that it was selected and designated as the beneficiary. The trustees argued that there was no valid execution of the power of selection and designation since the New York statute had not been complied with. The court found that there had been no execution of the power because the letter to plaintiff connoted that future action would be taken to select and designate, but disagreed with the

94 E.g., Mich. Comp Laws (1948) §556.2.

95 308 Mich. 438 at 447, 14 N.W. (2d) 57 (1944).

96 *Alabama:* Alford's Admr. v. Alford's Admr., 56 Ala. 350 at 353-355 (1876); *New York:* Cutting v. Cutting, 86 N. Y. (20 Hun 360) 522 at 544-547 (1881); *Wisconsin:* Cawker v. Dreutzer, 197 Wis. 98 at 131-132, 221 N.W. 401 (1928).

97 320 Mich. 692, 32 N.W. (2d) 14 (1948).

98 Neither of these cases, however, concerned the application of the statutory requirements for execution of a power.

99 117 N.Y.S. (2d) 220 (1952).

100 Id. at 225.

101 Id at 224.

trustees' argument that the statute on execution had to be complied with:

> "The Court, however, is not in accord with the view that . . . the power of selection and designation . . . could be exercised only by a duly acknowledged instrument in writing. . . .
>
> "The provisions of section 165 of the Real Property Law do not prescribe the same form of instrument to exercise a power to dispose of personal property as would be required with respect to real property under Sections 242 and 243 of the Real Property Law. Under Section 165 . . . it would therefore appear that the exercise of such power *in so far as related to income* could be accomplished by the delivery of a written instrument signed by the trustees even though it were not acknowledged or recorded pursuant to Section 32 of the Personal Property Law relating to assignments of interests in decedents' estates."[102]

It would seem to follow from this statement that in New York execution of a power over income or personalty will not be saddled with the formal requirements for transfer thereof. The case is not very authoritative, however, being only the opinion of one surrogate.

In the event a court decides that the execution of powers over choses or personalty must conform to the legal requirements for transfer thereof, what impact would such a decision have upon powers in the trust context? It might well be asked how a donee of a power over a trust corpus would ever validly execute his power. The beneficiary does not have legal title; how can he accomplish a legal transfer?

Yet perhaps the execution statutes can, on a reasonable view, be workably applied to the trust situation. Section 556.40 of the Michigan statute states: "No power can be executed except by some instrument in writing, which would be sufficient in law to pass the estate or interest intended to pass under the power, *if* the person executing the power were the actual owner." (Emphasis added.) The stance of this section is hypothetical; it recognizes that the donee usually has no title to the property and commands him to execute the power by a document which, if he owned the property, would transfer it. The facts that the donee does not own the property and cannot commit the acts of transfer are unimportant; indeed, such is usually the case, as the statute recog-

[102] Id. at 228-229. Emphasis added.

nizes. Thus the question becomes what kind of instruments need to be written by the donee to execute the power. If the property involved were land, then the instrument would need to conform to the requirements for transferring land—namely, a duly executed deed of the land or an instrument executed in the same manner as a deed declaring the donee's intention to appoint described land to designated appointees.

An inter vivos transfer of personal property ordinarily does not require a writing if the requirement of delivery is satisfied. Whether a court would permit an appointment of personalty by means of an informal delivery by a donee is a difficult question in view of the statutory purpose to authenticate executions. But, wholly apart from this question, such a method of transfer is obviously fraught with risks that should be avoided; prudence demands some kind of documentation. It has always been recognized that a gift of personalty can be made by deed—an instrument duly authenticated by compliance with whatever requirements a particular jurisdiction may impose. It may safely be assumed that an instrument authenticated in the manner required for conveyances of land would be accepted by the courts as an effective appointment of personalty under the statute.[103] It would also foreclose any possible argument that an instrument valid at the time of appointment would be rendered invalid by a change in the kind of property constituting the corpus of trust occurring after execution of the power and before the termination of the trust. Thus a deed, or something like it, would execute a power over any kind of property once and for all, no subsequent additions or modifications being needed to coincide with and embrace subsequent changes in the appointive property. It would be an instrument of stature and dignity amply sufficient to avouch the authenticity of execution and thus satisfy the statutory purpose.

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103 When, in the case of corporate stock, transfer must be made on the books of a corporation, this formality could be performed upon the motion of a trustee acting pursuant to a formal writing executed by the donee.