1897

Powers under the New York Statute

Joseph Alfred Greene
Cornell Law School

POWERS

UNDER THE NEW YORK STATUTE.

#$#$#$#$#$#

THESIS PRESENTED FOR THE DEGREE OF MASTER OF LAWS

BY

JOSEPH ALFRED GREENE LL.B.

#$#$#$#$#$#

CORNELL UNIVERSITY.

COLLEGE OF LAW.

1897.

TABLE OF CONTENTS.

----oo----

POWERS
UNDER THE NEW YORK STATUTE.

----&&----

INTRODUCTION.

It is the purpose of this article to discuss in brief form the present condition of the Law of Powers in the State of New York, from an analysis of the Statute and the cases which interpret it; and to ascertain the more important changes which have been made in the old Common Law relating to this subject. To carry out this latter design, it has been thought necessary and proper to outline in as concise a form as possible the prominent features of the old law, never at any time entering upon a consideration of the intricacies and nice points of distinction in which the subject abounds.

The following works have been freely used in preparing the first chapter: Sugden on Powers, Farwell on Powers, Jickling's Analogy Cruise's Digest of the Law of Real Property, Kent's Commentaries, Kerr on Real Property.

CHAPTER I

POWERS AT COMMON LAW.

Definition. A Power is defined to be "a right reserved by a person to himself or given by him to another, to divest land from those upon whom it is settled by the instrument containing the Power, and to vest it in others" (a)

In the law of England there were two great classes of Powers, namely, Common Law Powers, and Powers derived from the Statute of Uses. The former were mere declarations or directions operating only on the consciences of the persons in whom the legal estate was vested, or to whom the power was granted. These were divided into two sorts: naked powers or bare authorities, and powers coupled with an interest. Examples of this class of powers would be, Powers of Attorney or powers to executors to sell an estate, to execute a deed, to make a contract, or manage any particular business.

It is with the second class we have to deal in this sketch, a knowledge of which is indespensable to an intelligible study of the changes made by the New York Statutes.

These powers are more particularly defined as being "an authority enabling a person through the medium of the Statute, to dispose of an interest in real property vested in himself or another person, and said to be a method of causing a use with its accompanying estate to spring up at the will of a given person" (b)

(a) Butler's n. to Co. Litt. 342, b. (b) Kerr on Real Prop. #1835

Equitable powers existed before the Statute of Uses,worked out through the old use, then a mere confidence in the person to whom an estate was conveyed,to dispose of it as the person by whom it was conveyed should direct. They were introduced in order that appointments and dispositions in the settlement of estates,might be made according to the intention of the parties thereto,thereby avoiding the effect of the strict rules of the Common Law. It was repugnant to a feoffment at Common Law,that a power should be reserved to revoke the estate granted,yet from the nature of a feoffment to uses,being a direction how and to whom the feoffee should convey the estate,there was no such repugnancy. Hence arose Powers,reservations by the feoffor to uses of the right of declaring at a future time,to whose use the land should be held,or to whom the feoffee should convey; this right could be broad enough to defeat the interest of one to whom the present uses were granted and change the use to another. These powers were,then,in substance,limitations of contingent uses,the vesting of which were dependent upon the voluntary acts of a certain person. The Courts of Equity would compel the feoffee to observe the direction of the feoffor and convey to the appointee.

A consideration for the new use was necessary only when the inheritance remained in the grantor of the uses,i.e. on a covenant to stand seized. In all cases where a conveyance operated by transmutation of possession,as a fine,recovery,feoffment,or lease, and uses were declared on such conveyance,Equity did not inquire

into the consideration: the former owner having divested himself of the legal estate,it was not necessary to go into Equity as against him,and the person in whom it was vested being a mere naked trustee, was bound in conscience to follow the directions of the donor.

Upon the Statute of Uses,as interpreted by the Courts,the whole modern law of powers is based. The principle effect of this Statute with reference to powers,was that upon the due execution of a power and the appointment of the new use,the Statute operated to execute the use,and to vest the legal estate in the possession of the appointee,divesting the estate of the first grantee,in whom the statute had previously vested the legal estate. Thus by virtue of the Statute a legal estate could be revoked,and a new legal estate created: as,a feoffment to A to the use of B with the power of revocation and appointment of new uses reserved in the grantor. The Statute executed the first use,and vested a legal title in B. of the same nature and quality as his equitable estate had been,subject to be divested upon the contingency of the execution of the power. On the appointment of new uses,the estate of B ceased and a new use arose in the appointee,in whom the Statute operated to vest the legal title as well. Thus,in brief,the purpose of the reservation of powers was to enable an estate to be shifted from one person to another at the will of the one in whom the power resided,without requiring any other act to be done in the way of transfer,than the appointment by the holder of the power.

Classification of Powers. Powers are given either to one who has an estate,present or future,limited to him in the instrument

creating the power,or who had an estate in the land at the time of the execution of the deed; or to a stranger to whom no estate is given,but the power is to be exercised for his own benefit,or to a mere stranger to whom no estate is given,and the power is for the benefit of others.

The first of these powers,are said to be powers relating to the land,and are divided by Cruise and Jickling into;

(1) Powers appendant,

(2) Powers in gross.

A Power Appendant is where a person has an estate in land with a power of revocation and appointment,the execution of which falls within the compass of and depending strictly upon his estate,attaching upon the interest actually vested in himself. Thus,where an estate for life is limited to A with a power to grant leases in possession; a lease granted under the power may operate wholly out of the life estate,and must have its operation out of his estate during his life, wholly displacing the life estate,though the lease may be for a term lasting beyond his own life: or if a person limits an estate to such uses as he himself shall appoint by his will,and in the meanwhile to the use of himself and his heirs,the settlor has a qualified fee,and a power of appointment appendant to his estate.

A Power in Gross—or as classed by Sugden,Powers Collateral—are powers granted to one who has an interest in the estate either by the instrument creating the power, or already vested in him,the

execution of which falls wholly without the compass of his own estate,i.e. the estate created by the execution of the power is not to take effect until after the determination of his own estate,so not attaching at all to his interest,nor affecting it. As,where a tenant for life is given a power to appoint the fee after his death amongst his children,or to create a term of years to commence from his death.

Both of these are said to be powers coupled with an interest because the grantee of the powers has an interest,not in the execution of the power alone,which may not be for his benefit,but as well in the estate upon which the power depends. A particular power may,through a complication of grants in the original deed,fall within both these classes. In one aspect,it may be appendant,in another,in gross: as,where an estate is settled to A for life remainder to B in tail,remainder to A in fee,and A is given a power to jointure his wife after his death,this power is in gross as to the estate for life,and appendant as to the estate in fee.

A Power Collateral—or Simply Collateral,Sugden—is that which is given to a stranger,who has at the time not any interest in the land,and to whom no estate is given. As,a power to X to revoke a settlement,and appoint new uses to other persons designated in the deed. Before the Statute,the cestui might direct his trustee to convey as a stranger might appoint. On the passage of the Statute, it operated on the direction of the stranger and the appointee was vested with a legal estate..

There was the further distinction between mere powers and powers in the nature of a trust,commonly called Powers in Trust. "Powers are never imperative,they leave the act to be done at the will of the party to whom they are given. Trusts are always imperative and are obligatory upon the conscience of the party intrusted."(a)

It is not necessary in the limits of this discussion to consider further distinctions between the classes,nor to touch upon the rules established by the courts for determining within what class a given power falls; enough to say that where a duty is imposed upon the donee to execute,by the requisition of the deed or will,and an interest is given to him extensive enough to discharge that duty, the grantee becomes a trustee for the execution of the power,and so subject to the jurisdiction and supervision of the Courts of Equity.

Creation of Powers. To the valid creation of powers,it is essential that there should be,first,sufficient words to denote the intention; secondly,an apt instrument,and,thirdly,a proper object. No technical form of words is necessary,any words will be sufficient by which an intention to give or reserve a power is clearly manifested,and the scope of the power is designated within a reasonable degree of certainty. The instrument creating the power may be either a will or a deed,and if a deed,either in the body,or by endorsement before its execution,or by a separate deed of even date. Common Law Powers may be inserted in any kind of deed; but powers operating by the Statute of Uses,can be inserted only in conveyances deriving their effect from the Statute. And in conveyances not

---

(a) Atty Gen. v Lady Downing,Wilmot 23.

operating by transmutation of possession, certain powers of appointment cannot be reserved, unless the appointee be an individual named, and there be a good consideration; the consideration of blood and marriage is good within this limitation.

The object of the power may be of any nature, provided the rules of law or equity are not thereby transgressed. So a power which violates the rule against perpetuities or remoteness of limitation will be held invalid.

Execution. Powers of revocation and appointment may be granted, not only to one who by the Common Law is capable of disposing of an estate actually vested in himself, but also to a married woman, or an infant. A woman could not alien her own estate, except by fine or recovery; but as the agent of another she could convey an estate in same manner as her principal. For this reason it has been determined that a feme covert may execute a power, whether appendant, in gross, or collateral, and her husband's consent is not necessary.

An infant, however, could not execute a power over real estate, other than one simply collateral. Anyone, who may take lands by a Common Law conveyance may be an appointee under a power.

It is the general rule that in the execution of the power by the grantee, every circumstance, required by the instrument creating the power to accompany the execution, must be strictly complied with. The author of the power may surround the execution with as many solemnities, and direct it to be carried out by such instrument, at

such times,and with the consent of such persons as he may please. However arbitrary and unnecessary the conditions may be,and under the strict rule of the Common Law,the effect of the slightest departure will be to render the execution invalid.

The donee has the right in the execution of a power either to appoint absolutely,or reserving to himself a new power of revocation and appointment,though such reservation be not expressly authorized by the instrument creating the power.

Equitable interference. An execution which is invalid at law by reason of the failure to comply with all the requirements,will be aided in Equity in certain cases; the Court interfering to compel the person,entitled in default of execution,to make good the defect. The cases wherein the Court will cure defective executions are those only where there is some natural obligation on the part of the donee to provide for the persons in whose favor the defective execution has been made. These persons are,wife,husband,children, creditors,and purchasers for a valuable consideration. On the other hand,if the donee be under an equal obligation to provide for the person who would take on default of appointment,Equity will not interfere,unless the heirs or persons so taking are otherwise provided for. Equity will also relieve against all manner of accident and fraud,and this even in favor of volunteers.

A non-execution of a power will not be supplied,for it is always left to the free-will and election of the donee either to execute the power or not,and Equity will decline to do for him what he does not see fit to do for himself. And the intervention of

death between the donee's resolving to execute the power,and his execution thereof,is not a ground for the interposition of the Court, although some steps may have been taken toward completing the intention. This rule,it must be remembered,does not apply to the non execution of powers in trust.

Effect of Creation and Execution. The estate,limited by the deed which creates the powers vests in the grantee,subject only to be revoked or defeated by the exercise of the power. When the power granted is void,the estate will take effect in the same manner as though the power had not been inserted in the instrument; so of a power which is given in default of an appointment under a power void in its creation. It is also held that where an estate limited to take effect in default of the exercise of a preceding power of appointment,the estate so limited will vest in interest,and is not merely contingent.

The immediate effect of the proper execution of the power is that the former uses and estates cease,and a new use springs up to the appointee which is derived from the seizin of the trustees of which the Statute transfers the legal estate and the right to possession. Although the estate created by the execution of the power owes its commencement to the deed of appointment,the appointee does not derive his title from the appointor,nor out of the estate whereof the appointor is seized,but acquires it directly from the conveyance by which the power is created. The appointment operates by relation from the time when the original conveyance was executed,just as if the estate created by the appointment,had been

actually limited in that conveyance. The right of dower may, therefore,be cut off by an appointment,but a prior estate created by the person who executes the power will not be defeated.

In the case of a excessive execution,whether by way of limitation or otherwise,if the Court can see the boundaries so as to separate the good from the bad,it will uphold the execution pro tanto,but if the improper excess cannot be distinguished from what would be a proper execution,the whole appointment will fail. As, if a power be granted to make leases for twenty one years,and the donee leases for twenty-five,the execution will be valid as a lease for twenty-one years and the excess only will be void. On the other hand,if the excess be by way of condition,which is inseparable from the execution,the whole execution will be rendered void.

Transfer of Powers. When a power is given which reposes a personal trust and confidence in the donee thereof to exercise his judgment and discretion,he cannot refer the power to the execution of another. The rule goes only so far as to forbid delegation of the confidence and discretion reposed in the donee,so it seems he may execute the instrument of appointment by attorney,unless prohibited by the donor. And where a power is granted to one and his assigns,the power will pass with the interest of the donee to any person who comes to the estate through him;the term "assignee" including heirs and devisees as well as grantees. Where an attempted delegation is made ~~it~~ which is void because unwarranted,the estate limited in default of appointment immediately takes effect. A power might be subject to involuntary transfer by prerogative of

the King,upon attainder of the donee,and the King might execute for his own benefit. Creditors had no rights in the power until execution,but where one had a general power of appointment over an estate and exercised it,the property appointed formed part of his assets,so as to be subject to the demands of his creditors in preference to the claims of his voluntary appointees.

Extinction,Suspension,and Destruction of Powers. The first and most obvious mode by which powers,whether relating to the land or collateral thereto,may be extinguished,is by a complete execution thereof. Powers relating to the land,whether appendant or in gross,may be destroyed by a release to any one having an estate in freehold,in possession,in remainder,or reversion,in the land to which the power relates. Feoffment of his interest by the holder of a power appendant will bar the power,for the feoffment excludes the feoffor from any future rights over the land. So too by any conveyance which derives its effect from the Statute of Uses. The creation of a particular estate out of the interest of the donee of a power appendant merely suspends the execution of the power during the continuance of the estate created. Powers in gross, however,are not barred by a conveyance of the land,unless the whole inheritance is divested,and no seizin is left to feed the uses, whence the power becomes extinct. Powers collateral cannot be released,extinguished or destroyed by a conveyance by the donee,for he has a mere authority and no interest,nor by the act of any other person.

Finally,a power given to a person having a particular estate becomes merged by his acquisition of the fee,and where there is no

object for the execution of the power it of course ceases.

The Early Law in New York. Such was the law of powers as administered in the Mother Country, developed from the doctrine of family settlements. On this had grown an abstruse science, which was monopolized by a select body of conveyancers, who had rendered the subject almost inaccesible to the skill and curiosity of the profession at large. Chancellor Kent declares these settlements to be indispensable in opulent communities, to the convenient distribution of large masses of property and to the discreet discharge of the various duties flowing from the domestic ties; and that the evils are probably exaggerated by the "zeal and philippics of the English political and legal reformers". However this may be, the doctrines were happily almost unknown in practice in this State, being contrary to our theories of land tenure. But although the agency of powers with its intricate machinery was seldom used, yet in every case in which they were met with, the old English Law must of necessity govern.

Of the Revision the learned Chancellor, brought up in all the learning of the Egyptians, and familiar with the profundities and labyrinths of the Common Law, in the interpretation of which he had become so eminent, says "The Revision contains the most extensive innovation which has hitherto been the consequence of any single legislative effort upon the Common Law of the land. . . . The learning concerning real property .... appears to be too abstract and too complicated to admit with entire safety of the compression which has been attempted by a brief, pity, sententious style of composition.

Brevity becomes obscurity and a good deal of circumlocution has heretofore been indulged in all legislative production ... When the Revisers proposed to abolish Powers as they now exist,and substitute another system in their stead,they undoubtedly assumed the task of vast and perilous magnitude".

The work of the Revisers and its effects,we propose to consider in the succeeding chapter.

CHAPTER II

THE NEW YORK STATUTE OF POWERS.

The Revision and its Purposes. The Statute of New York defining and regulating the whole subject of POWERS was submitted to a special session of the legislature on September ninth, eighteen hundred and twenty-eight, by the Statutory Revision Committee — then composed of Messrs Duer, Butler and Spencer. The Statute was passed as submitted, and went into effect January first, eighteen hundred and thirty, as Article three of Chapter one of Part two of the Revised Statutes. By its provisions all existing powers relating to land, other than powers of attorney, were abolished, and specific, detailed regulations prescribed for the creation, construction, and execution of powers in the future.

The reasons given by the Revisers for the sweeping changes made in this branch of the law are stated at large in their report on this Article.(a) -- "The law of powers, as all who have attempted to master it will readily admit is probably the most intricate labyrinth in all our jurisprudence .....We encounter this darkness at the very threshold of our enquiries, as the division or classification of powers seems industriously framed to confound all intelligence of their meaning and utility". This criticism seems merely however rather harsh. They continue --"Nor is it, because it is

---

(a) See Appendix, Vol.3, Ed.II, Rev.Stat.p.588 et seq.

mysterious and complex that a reform in this part of the law is desirable. It is liable to still more serious objections since ..... it affords the ready means of evading the most salutary provisions of our statutes. It avoids all the formalities wisely required in the execution of deeds and wills,frustrates the protection meant to be given to creditors and purchasers,and eludes nearly all the checks by which secrecy and fraud in the alienation of lands are sought to be prevented". Speaking of the old classification they say,"It is a striking error in this classification that it overlooks entirely the nature and objects of the power itself,and regards solely the connection between the party exercising the power and the lands it embraces. Yet it is obvious that the character and consequently the construction and execution of the power may be the same whether it is vested in an owner or a stranger; or is to take effect out of a present or a future estate. . . . It is from this arbitrary classification that rules equally arbitrary have been derived,rules which are first established at Common Law and then by an ordinary process evaded in Chancery,..... We propose therefore,an entirely new division of powers,not merely expressed in terms which at once suggest the reason for their adoption,but because it rests upon substantial and practical distinctions".

Abolition of Existing Powers. The first section of the Article on Powers (a) abolishes powers as they existed on the thirty

---

(a) Now comprising Art.4 of Chap.46 of the General Laws,hereinafter designated as R.P.L.

first day of December eighteen hundred and twenty-nine,and declares that henceforth the only powers permitted to be granted are those enumerated in the Article. It was the intention of the Legislature to make this Article a complete and exhaustive code on the subject; and so thoroughly did the Statute eradicate the old system that it is now held that the only key to the construction of the Statute is to be found within the Article,and the Common Law is no longer applicable even in a judicial construction;though it was once said that the revision substantially followed and adopted the rules of the Common Law,departing therefrom only to remove doubts and secure greater accuracy and precision.

Definitions. The Statute defines a Power as "An authority to do an act in relation to real property or to the creation or revocation of an estate therein or a charge thereon which the owner granting the power might himself lawfully perform.(a)

The Statute is far from defining all the purposes for which a power may be created,nor could it without prescribing all the uses and purposes to which property may lawfully be put. It recognizes the existence of powers of appointment and revocation which were well known to the Common Law. The test of the validity is found in the nature of the act to be done under the power,and this may be any act which,as the Statute says,the creator of the power might himself do. (b)

Section one hundred and twelve of the Real Property Law defines

---

(a) R.P.L.#111 (b) Jennings v Conboy,73 N.Y. 230, Cutting v Cutting,86 N.Y.522. Delaney v McCormack 88 N.Y.174.

the parties to the creation of a power "The word 'grantor' is used in this Article in connection with a power,as designating the person by whom the power is created,whether by grant or devise; and the word 'grantee' is so used as designating ther person in whom the power is vested whether by grant,devise or reservation".

Division of Powers. The Revisers abandoned the old classification and proposed a novel division resting on substantial and practical distinctions looking to the extent of the powers and the objects they are meant to attain; whether the power is to be exercised by the grantee for his own benefit,or for the benefit of others The logical classification was therefore into; General or Special:- and Beneficial or In Trust (a)

The first relates to the extent of the power. -"A power is general where it authorizes the transfer or encumbrance of a fee,by either a conveyance or a will of or a charge on the property embraced in the power to any grantee whatever". (b)

A power is Special where either:

1. The persons or class of persons to whom the disposition of the property under the power is to be made are designated;

2. The power authorizes the transfer,by a conveyance, will or charge,of an estate less than a fee. (c)

The second division has to do with the nature of the power as affecting the parties thereto. A power is Beneficial,whether general or special,when the grantee alone is interested in the according to the terms of the creation.(d)

(a) R.P.L.#113. (b) R.P.L.#114. (c) R.P.L.115. (d) R.P.L.116.

Beneficial Powers have for their object the grantee thereof, and are to be executed solely for his benefit. The words "by its terms" do not mean however, that the grantee must be specifically pointed out and in so many words be given an interest in the power. Although an object is as requisite to the creation of a power under the Statute as at Common Law, there is nothing in the Statute which requires the object to be in terms specified in the instrument creating the power. It is not provided that the instrument shall specify affirmatively what shall be done with the proceeds of the sale or who shall be benefited by the execution. So, where a power is granted and no direction is given to distribute the proceeds among others, the inference is that they shall rest where the sale leaves them; if no one else is declared to be the beneficiary, they remain with the donee. This construction does not deprive the expression "by the terms of its creation" of all meaning; it merely excludes any other way of acquiring an interest in the execution of a power than by virtue of the instrument creating it(a)

A general power to dispose by devise is held to be beneficial, though the grantee himself cannot derive any benefit thereform, where there is none other interested in the execution. (b)

Powers In Trust. "A general power is in trust, where any person or class of persons, other than the grantee of the power is designated as entitled to the proceeds, or other benefits to result from its execution." (c)

(a) Jennings v Conboy, (Supra), Cutting v Cutting (supra)
(b) Hume v Randall, 141 N.Y. 499 (c) R.P.L. #117.

A Special Power is in trust where either:

1. The disposition or charge which it authorizes is limited to be made to a person or class of persons,other than the grantee of the power; or,

2. A person or class of persons,other than the grantee,is designated as entitled to any benefit,from the disposition or charge authorized by the power. (a)

The definition of a power in trust will serve to distinguish that class of powers from those which are beneficial. A power in trust has,however,many of the features of an estate in trust,being often nothing more than an attempted active trust which has failed to come within the Statute of Trusts.

The likeness and difference were well pointed out in the case of Farmers Loan & Trust Company v Carroll (b) -"A power in trust is to be understood in contradistinction to an estate in trust. The former is a mere authority,or right to limit a use, while the latter is an estate or interest in the subject. A trustee is always vested with the legal estate,but this is not necessary with respect to the donee of a power. In the case of a power in trust there is always a person other than the grantee or donee of the power,which person is called the appointee,answering to the cestui que trust in a simple trust. The provisions of the Statute show that in all cases of a power in trust an appointee or beneficiary other than the grantee of the power is contemplated. It is as necessary an ingredient in the power in trust,as a cestui que trust in the case of a conveyance or devise in trust.

(a) R.P.L.#118. (b) 5 Barb.652

A power in trust involves the idea of a trust as much as a trust estate. In both cases a confidence is implied. The difference is in the mode of effectuating the object. In one case it is done through a conveyance or devise of an estate in trust by which the grantee or trustee becomes seized of the legal estate in the land; in the other by the creation or grant of a power by which the donee is invested with an authority in relation to the future use or disposition of the land" So also in analogy to a trust the beneficiaries must be definite,ascertained persons,who can come into Court and say that they are the ones for whose benefit the power has been granted. Therefore,when the selection of the beneficiaries is wholly within the will of the grantee there can be no power in trust (a)

The instrument creating the power need not in so many words declare that it is to be executed for the benefit of A,B,or C; as,if land be granted to X,in trust for A.B.and C. with power to sell,but the grant being silent as to the disposition of the proceeds of such sale,the beneficial interest is conferred by necessary implication on A,B and C (b) A testator gave all the residue of his estate to his children,giving to the executors a power to sell all or any part of the real estate in their discretion,but with no direction as to the disposition of the proceeds. This was held to be a power in trust,and the devisees to whom the land was given were the beneficiaries.(c)

(a) Read v Williams,125 N.Y.560. Tilden v Green 130 N.Y.29
(b) Syracuse Bank v Porter,36 Hun 168 . (c) Kinnear v Rogers 42 N.Y.53.

The grantor himself may be the beneficiary. As a grant of a power to X to sell and convey lands and pay the proceeds to the grantor during his life,and to distribute the residue as the grantor should direct(a). While the grantee cannot be the sole beneficiary in a power in trust,he may be one of several; but if lands be already devised to him in part,the power as to his share becomes merged in the fee (b).

It will be noticed that the language of the Statute in the first sub-division of the section,defining special powers in trust, is practically the same as the first sub-division of the section defining special powers. A special power of the first class,i.e. where the persons to whom the disposition is to be made are designated,is always a power in trust. The only class of special powers which are beneficial are those of the second class,i.e.powers to convey an estate less than a fee.

CREATION OF POWERS

Parties. The Statute declares that no person is capable of granting a power who is not at the same time capable of transferring an interest in the property to which the power relates;(c) -and that a power may be vested in any person capable of holding,but cannot be exercised by a person not capable of transferring real property.(d)

It was provided by the Revised Statutes at the time of their passage,when married women were under disabilities as to the alienation of their real property,that a general and beneficial power may be granted to a married woman to dispose,during her marriage,and

---

(a) Fellows v Hermans,4 Lansing 230. (b) Heitzell v Barber 69 N.Y.1
(c) R.P.L.#119. (d) R.P.L#121

without the concurrence of her husband,of land conveyed to her in fee,—being simply a power to make disposition of her own property in a manner which avoided the restrictions of the Common Law. Later sections granted to married women,as an exception to the rule concerning capacity required for execution,the right to exercise a power during her marriage and without the consent of her husband, unless by the terms of the power the execution was prohibited during marriage,and with the restriction that the power could not be exercised during the minority of such married woman.(a)

These sections were held to be enabling and not restrictive,and by them the disability of coverture was,so far as respects the execution of powers, completely swept away; (b) except that a woman could not by means of a power convey directly to her husband by appointing to his use (c),but might mortgage her lands as security for his debts(d).

Although some of these sections still remain in the present Statute,it would seem that the necessity for all special enabling acts has now passed away.

The only practical restriction now existing on the right to create or execute powers is upon those actually incapable of conveying land,and upon aliens and corporations whose right to hold and dispose of real property is entirely controlled by statutes which relate to those subjects (e)

(a) R.S.# 110,111. (b) Wright v Tallmadge 15 N.Y.307
(c) Dempsey v Tylee,3 Duer 73. (d) Leavitt v Pell 25 N.Y.474.
(e) Ludlow v VanNess 8 Bosw.178

A grantor of real property has the same right to reserve powers to himself,either beneficial or in trust,which he might grant to another.(a)

How Granted. A special power may be granted either:

1.By a suitable clause contained in an instrument sufficient to pass an estate in the real property to which the power relates; or

2. By a devise contained in a will. (b)

No formal set of words is requisite to create or reserve a power. It is sufficient if the intention be clearly declared,or appear by necessary implication. The language is to be construed equitably and liberally in futherance of the grantor's intention.(c) So,where a testator gave his wife "all my real and personal estate, during her life-time",and at her death whatever should remain,to be divided among his heirs,it was held that the testator expressed the clear intention that the widow should have the full enjoyment of the estate during her life,with a view to her support and maintenance,and that this gave her a power of disposition controlled in its exercise by the purposes for which the estate was given to her. (d).

Until the passage of the Real Property Law the language of the first subdivision "by a suitable clause contained in a conveyance of some estate in the land"Etc. This was construed so that it was not necessary that an estate in the land should be granted to the donee. The instrument by which the power was created or reserved

---

(a) R.P.L.#124. (b) R.P.L.#120. (c) Dorland v Dorland 2 Barb.63.
(d) Thomas v Wolford 49 Hun.145. Colt v Heard 10 Hun.189

need not be in and of itself a conveyance of any title,so where the grantor attempted to create a trust,but failing,and the title still remaining in himself,yet if it came within the provisions of the Statute of Trusts (a) the invalid trust would be valid as a power. In which case the grantee held a power merely,without any estate in the land (b). Nor need the grant of the power be contained in the same instrument as the conveyance of the land,but might be created by a separate deed which would be considered as constituting a part of one entire transaction.(c) The Real Property Law obviates all questions on this point,by providing that the instrument creating or reserving the power shall be such an one as would be sufficient to pass an interest in real estate i.e. an instrument of like nature to a conveyance of land.

The creation of powers is also governed by Section 207 of the Real Property Law,which requires a writing for the "creation,granting assigning,Etc. of any trust or power over or concerning real property".

The right to create special and beneficial powers is limited by section 123 of the Real Property Law to the following cases:

1. To a married woman to dispose,during the marriage,of any estate less than a fee belonging to her in the property to which the power relates. —This is a complement to the power to dispose of a fee in lands which he owns,given,in section 112.

2. To a tenant for life,"of the real property embraced

(a) R.P.L.#77 (b) Fellows v Heermans (supra) (c) Hubbard v Gilbert 25 Hun 596. Selden v Vermilyea,2 Sand.S.C. 568.

in the power,to make leases for not more than twenty-one years,and to commence in possession during his life; and such power is valid to authorize a lease for that period,but is void as to the excess."

At Common Law,leases for any term could be authorized by powers and an indefinite power of leasing would permit the granting of leases for any period however long,and which might begin either within the life estate or upon the death of the life tenant who had the power. Under the section as it stood in the Revised Statutes, not then containing the last clause,it was held that a power to lease for a longer term was valid so far only as to permit leases for twenty-one years. The leasing being not imperative,but optional,because beneficial,there was nothing to preclude the execution according to the statutory limit. So a power to lease for any period not exceeding sixty-three years,was held not void in its creation,was because it might be executed in a manner consistent with the Statute. But a power which authorized leases to be made for a longer period than twenty-one years,and not otherwise, would be void, because impossible of execution within the terms of the Statute (a) . The clause in the present section has the effect of making this decision a part of the Statute law.

ABSOLUTE POWER OF ALIENATION.

The Common Law did not treat a general and special power as property,so that if a donee of such a power should die without having executed it,the creditors were without a remedy against the

---

(a) Root v Stuyvesant,18 Wend.257.

land to which the power related; but if he should execute the power in favor of a volunteer and presently die,the appointee was considered in Equity a trustee for the creditors. So by means of a power of revocation one might retain to himself the absolute dominion over his estate,though in form conveying it to another,and place it beyond the reach,both of his own creditors and the creditors of the grantee.

The Revisers rightly considered that the absolute power of disposition over lands,ought in most cases to be treated as the highest form of property,and to carry a fee to the grantee of such plenary beneficial power. They say "that a change in the existing law is here not merely proper,but necessary,will be admitted by all .....In reason and good sense,there is no distinction between the absolute power of disposition and the absolute ownership,and to make such distinction to the injury of creditors may be consistent with technical rules,but is a flagrant breach of the plainest maxims of Equity and Justice. There is a moral obligation on every man to apply his property to the payment of debts;and the law becomes an engine of fraud,when it permits this obligation to be evaded by a verbal distinction. It is an affront to common sense to say that a man has no property in that which he may sell when he chooses,and dispose of the proceeds at his pleasure."

In accordance with these views,it was enacted that when the absolute power of disposition is given to the owner of a particular estate,when not accompanied by any trust,such grantee takes the fee subject, to the future estates limited thereon in default of execution,

but absolute with respect to the right of creditors,purchasers,and incumbrancers. So also where there is no remainder limited on the estate of the grantee (a).

An absolute power of disposition is defined to be where a general and beneficial power to devise is given to a tenant for life or for years,or where the grantee is enabled in his life time to dispose of the entire fee for his own benefit(b). Also where the grantor in a conveyance reserves a power of revocation for his own benefit,he is still deemed the absolute owner so far as the rights of creditors and purchasers are concerned (c).

It will be noticed that the power to dispose during life is turned into a fee whether the grantee has a particular estate in the land or is a stranger; but in case of a power to devise,such power is made a fee only when given to,"a tenant for life or for years", so that when the power to dispose by will is given to one who has no legal interest in the land other than the power,the fee is not considered to be vested in him;as where a beneficiary of a trust estate is given power to appoint to the legal estate by will ,his estate is not,by the grant to him of the power,made subject to the claims of creditors (b).

The Statute,being within itself a complete code of the law of powers,has abrogated the rules of English Courts of Equity in relation thereto,placing the doctrines concerning the rights of creditors on a more rational basis,and in no case not therein provided

---

(a) # 129,130,131,R.P.L. (b) # 132,133,R.P.L. (c) # 125 R.P.L.
(d) Cutting v Cutting,(supra) Genet v Hunt 113 N.Y.158,Crooke v Co.of Kings,97 N.Y.421.

for will the old rules apply,so if there are any powers which the Statute does not render liable to creditors before execution,Equity will not make them so after execution. The provisions as to the absolute power of disposition apply to cases where such power is given by law, As,where a treaty between the United States and Wurtemburg provided that on the death of any person holding real property in one country which would descend to citizens of the other if they were not disqualified by alienage,such subject should be allowed a term of two years within which to sell the property, it was held that they would become absolute owners during the prescribed period and might enjoy the rents and profits. (a)

EXECUTION OF POWERS.

The Statute has provided with great fulness for the execution of powers,changing in many particulars the rules of the Common Law.

We have seen that a valid execution at Common Law required the most strict observance of all the formalities prescribed by the grantor thereof,whether serving any useful purpose as a safeguard to the rights of parties interested,or entirely unnecessary and useless. Moreover,the strictness of the Common Law in requiring the compliance with the most idle and trifling forms and conditions is little less remarkable than the liberality of Equity to dispense with even the most necessary,in the exercise of its jurisdiction in aid of defective execution. The Statute—having always in

(a) Kull v Kull,37 Hun.476.

contemplation the true purpose of powers,namely,the doing of some act in relation to lands,which the owner might do- requires that powers be executed "by a written instrument sufficient to pass the estate or interest intended to pass under the power,if the person executing the power were the true owner",(a) thus placing the grantee in the shoes of the grantor for the purpose of execution. The instrument by which the power may be executed is therefore subject to all the provisions of statutes which relate to the creation or transferring of estates in land whether by deed or by will.

The directions of the grantor,as to the mode of execution must be literally complied with; so if he grants the power to dispose by will,the disposition must be by will,and if by deed,then by deed alone.(b) Where,however, a general power to dispose is given without expressly or impliedly declaring the mode of its execution, it may be executed either by will or deed.(c)

Needless formalities,directed to be observed by the grantor, may be dispensed with,and only those necessary to the proper conveyance of the estate carried out. And conditions merely nominal may be wholly disregarded in the execution.(d)

The grantor may impose conditions upon the performance of which the execution depends. These must be strictly complied with to render the execution valid. The requirement that the grantor or some third person shall give his consent to the execution is such a condition. It is designed to guard against a sale without his personal sanction,and is therefore more than a nominal formality,

---

(a) #145 R.P.L. (b) # 147,148,R.P.L. (c) Matter of Gardiner, 140 N.Y.122, Am.Home Miss.Soc. v Wadham 10 Barb.597 .
(d) # 150,151 R.P.L.

but essential,and such consent must be had to validate the disposition (a). The Statute provides that such consent shall be expressed in the instrument by which the power is executed,or in a written certificate thereon "and to entitle the instrument to be recorded,such signature must be acknowledged or proved and certified in like manner as a deed to be recorded".(b) The signature of certificate is the evidence of the consent,and the consent itself may be given by an acceptance of the land by the third person and a subsequent sale by him; in which case he may be compelled to complete the defective execution by making a certificate of such consent.(c). Where such consent is made a condition precedent and the person whose consent is necessary dies before execution,the power fails and cannot thereafter be exercised; and under the old Revised Statutes,when the joint consent of several was required,the power would be extinguished by the death of one. This was remedied by the Real Property Law which makes the consent of the survivor sufficient unless otherwise prescribed in the grant of the power (d). It is further provided that,"the intention of the grantor of a power,as to the manner,time and condition of its execution,must be observed,subject to the power of the Supreme Court to supply a defective execution as provided in this article".(e) Where the grantor provides that the power shall not be exercised before a certain time,or within certain limits,an execution at any other period than that permitted will be invalid; and in any case

---

(a) Kissam v Dierkes,49 N.Y.602, (b) # 153,R.P.L. (c) Barber v Cary 11 N.Y.397. (d) #154 R.P.L. (e) #152 R.P.L.

where the grantor has imposed valid conditions precedent,the power may not be exercised until the literal happening of the event,and the purchaser or appointee must ascertain at his peril that the conditions have been fulfilled. Where the conditions are subsequent,as a provision for the disposition of the proceeds of a sale,the purchaser is relieved of any obligation to see to their application (a). However,when the performance of a condition precedent has become impossible and the general scheme of the power requires the execution even after the impossibility arises,the condition may be disregarded; as,where a power of sale is given to executors by a testatrix during the life of her husband and with his consent,but the plan of the will required a sale to be made after he had died,the consent was held to be a condition precedent during his life, from which the power was freed after his death.(b) The execution of the power must conform to the conditions of the grant,as to the nature of the estate or interest conveyed to the appointee. So where a power to appoint an estate among children of the grantee was given to a life tenant, it was not well executed by an appointment to the children for life and remainder to their issue.(c)

Judicial Control over Execution. The equitable jurisdiction of the Courts with reference to any interference in the execution of powers is with few exceptions confined to powers in trust.

The Statute declares that;"a trust power,unless its execution or

---

(a) Griswold v Perry,7 Lans.98. (b) Chatfield v Simonson,92 N.Y.199.
(c) Stuyvesant v Neil 67 How.Pr. 16.

non-execution is made expressly to depend on the will of the grantee, is imperative and imposes a duty on the grantee, the performance of which may be compelled for the benefit of the persons interested. A trust power does not cease to be imperative when the grantee has the right to select any and exclude others of the persons designated as the beneficiaries of the trust". (a) In every case where there is a duty on the part of a grantee to perform the trust, the execution may be compelled, the test of the duty being whether the execution is to depend entirely on the volition of the grantee. The only difficulty arises in cases in which it may be uncertain from the language of the deed creating the power, whether the execution is discretionary or not. It is usually considered imperative when the subject and the object are certain, as in cases of trust; as where the authority is clearly given, the beneficiaries are distinctly designated, and there is no express declaration in the deed confiding the execution to the discretion of the grantee. The imperative nature of a trust power is not destroyed because the language is permissive. If the disposing power is given and is not coupled with words which expressly make the grantee the final arbiter of its exercise, then it is imperative. Some positive expression of an intention to make the ultimate conveyance of the property depend upon the volition of the grantee must be found, or there must be annexed to the power some qualification, plainly indicating that the grantor has substituted the judgment of the grantee for his own, for the purpose of determining whether the authorized disposition shall eventually be made. A full and unrestrained

---

(a) #137 R.P.L.

authority to dispose has always been deemed sufficient to impress the power with a trust which imposes a duty on the grateee of executing it. Words of mere authority in a will are,in a Court of Equity,mandatory,as,where a testator gave lands to his son "with the right and privilege of disposing of the same by will or devise to his children" the power was held imperative (a) On the other hand,a simple reservation by a grantor of the power to appoint a life estate to his wife,was held to be purely discretionary (b). Whenever the power is imperative the beneficiary may bring action in the Supreme Court to compel its execution for his benefit. The jurisdiction extends also to adjudging the execution when the trustee has died,or where a power is created by will and no grantee thereof has been named by the testator. (c) Although the Court may compel or supervise the execution,(d) it has no power to divest the grantee of the power and vest it in another on the failure or refusal to execute,nor can it hamper the action of the grantee by the imposition of a bond as security for the proper performance.(e)

When the terms of the power import that the estate,or the fund derived therefrom,is to be distributed among the persons designated in such manner as the grantee thinks proper,he may allot the whole to anyonne or more of such persons,to the exclusion of all the

---

(a) Smith v Floyd,140 N.Y.337, (b) Towler v Towler,142 N.Y.371.
(c) #140,141 R.P.L. (d) Delaney v McCormack 88 N.Y.182
(e) VanBoskerck v Herrick,65 Barb.250.

others.(a) . This clause was proposed by the Revisers to prevent the interference of Equity in correcting illusory appointments,a jurisdiction which they call very questionable in itself, and whose limits are uncertain. It is provided,however,that in case the grantee has no right of selection as to the appointees or the amounts to be given to each,and where no specification as to such amounts is made in the power,or where a grantee with the right of selection dies without having executed it,all the appointees shall be entitled equally.(b)

The Court will interfere to aid the defective execution of a trust power;(c) and where the interest of the beneficiary is assignable,will compel the execution for the benefit of creditors (c).

The only jurisdiction to enforce a beneficial power is that given in section 139,by which a special and beneficial power is made liable to creditors,for whose benefit execution may be decreed. The creditors to be entitled to execution must stand in that relation to the grantee,and not to the grantor.

EXTINGUISHMENT OF POWERS.

The Statute makes not a few changes in the law relating to the extinguishment of powers. The rules of the Common Law were based on the extent of the power and its connection with the land, in absolute disregard of the distinction between beneficial and trust powers. The Statute carefully preserves this distinction, and bases the rule of the survival of trust powers on the doctrine

---

(a) #138 R.P.L. (b) #138,140. R.P.L. (c) #143 R.P.L. (d) #142 R.P.L.

that Equity will not suffer a trust to fail by the death or misconduct of a trustee,applying to powers in trust,so far as analogous, the rules which govern trust estates. The Statute therefore provided that in case the grantee of a power in trust "dies leaving the power unexecuted,the execution must be adjudged for the benefit, equally,of all the persons designated as beneficiaries of the trust".(a) So also the death of one or more of several joint grantees in trust will not extinguish the power but it may be executed by the survivor or survivors.

All powers determine when the purposes thereof have been accomplished.(b) So also where thy have become unattainable,as if the object should cease to exist or the time during which the power was to live had expired,or the purpose of the power is contrary to law or good morals.(c) A power of any class,which can be exercised only with the consent of the grantor or the third person,will cease on the death of that person,unless it is the intention of the grantor that after the death of such person,it may be exercised without such consent.(d) Beneficial powers,simply collateral,remain practically as under the old law,and cannot be extinguished by any act of the grantee (e). As to beneficial powers of the sort, formerly denominated"appendant " or "in gross",important changes have also been made. By the Common Law powers appendant were held to be destroyed by the alienation of the estate by the grantee, and even by the execution of a mortgage. To guard against this latter inconvenience,and to give the mortgagee the benefit of the

---

(a) #140,R.P.L. (b) Hutchings v Baldwin 7 Bos.231. (c) Sharpsteen v Tillou,3 Cow.651,McCarty v Terry,7 Lans.236. (d) Kissam v Dierkes (supra) (e) Learned v Tallmadge 26 Barb.443.

power as further security,the Statute provides that a mortgage of the estate by a tenant for life shall not suspend the power to make leases,"but the power is bound by the mortgage in the same manner as the real property embraced therein,and the effects on the power of such lien by mortgage are:

1. That the mortgagee is entitled to an execution of the power so far as the satisfaction of his debt requires; and

2. That every subsequent estate created by the owner in execution of the power becomes subject to the mortgage,as if in terms embraced therein"(a).

So,too,the grant of his estate by a life tenant will carry with it a power to grant leases,unless it be specifically excepted, and if so excepted it is extinguished; and such power may be extinguished by a release by the life tenant to one entitled to an expectant estate in the property(b). A beneficial power will of course determine upon the death of the grantee leaving it unexecuted and will become merged if the grantee acquires the fee in the land to which the power relates(c). A purchaser under a power buys at his peril. He is bound to enquire whether the power has been extinguished before the attempted execution(d).

MISCELLANEOUS PROVISIONS.

Power as a Lien. Section 127 provides that,"a power is a lien or charge on the real property which it embraces,as against creditors,purchasers,and incumbrancers in good faith and without notice,of or from a person having an estate in the property only

---

(a) #136 R.P.L. (b) #135 R.P.L. (c) Hutchings v Baldwin (supra) Heitzel v Barber 69 N.Y.1 (d) Stafford v Williams 12 Barb.240

from the time the instrument containing the power is duly recorded. As against all other persons,the power is a lien from the time the instrument in which it is contained takes effect."

We have already seen that the instrument containing the power must be in such form as to enable it to be recorded in conformity to the Recording Act,and in part this section declares the effect of the recording. The section was designed to protect those persons who,with respect to the property,stand in an analogous position to that of purchasers and creditors in good faith and without notice,as a creditor who has loaned money or given credit to the debtor upon the representations or reasonable assumption that the property belonged to the heir or devisee. Such persons taking from the heir or devissee before the recording of the power will take the land free from the lien of the power,which cannot thereafter be executed to their damage.(a) Where,however,the devisee assumes to sell to one,who has notice of the existence thereof or is a volunteer,the power is a lien from the time of its creation,and the grantee will not have clear title(b).

Suspension of Power of Alienation. "The period during which the absolute power of alienation may be suspended by an instrument in execution of a power,must be computed,not from the date of such instrument,but from the time of the creation of the power".(c) The instrument in execution of the power is not regarded as an alienation by the grantee,but as an act of the grantor. The deed given

---

(a) Bennet v Rosenthal,11 Daly 91. Jackson v Davenport 20 Johns 537
(b) Heitzell v Barber 6 Hun.534. (c) #158 R.P.L.

by the grantee relates back to the creation of the power,and for the purpose of this section the time of the suspension of alienation begins to run at the creation of the power. So,where a life tenant in the execution of a power to devise in in fee,created a life estate to begin upon his death,with contingent limitations in fee which might not vest in possession during the life estate,the execution was held to be void,because the vesting of the fee might be postponed beyond two lives in being,counting from the creation of the first life estate; and this estate was held to be vested in those to whom it was limited in default of execution (a). It seems,an imperative power of sale will suspend the power of alienation,(b) but a discretionary power will not have this effect (c). Where a power is given by will to appoint an estate,the execution also relates back to the will,as the source of the estate appointed, within the meaning of the Collateral Inheritance Tax Law,which taxes conveyances by will,and upon the appointment,the estate will be appraised and assessed as though given directly and immediately by the will (d).

Further sections place instruments in the execution of powers on the same footing as conveyances and wills so far as the effect of fraud therein is concerned;(e),and on the same footing as actual conveyances by the owner when the rights of a purchaser for value are involved by reason of defective execution (f).

(a) Dana v Murray 122 N.Y.604. (b) Delafield v Shipman 103 N.Y.463 (c) Blanchard v Blanchard,4 Hun 287. (d) Matter of Stewart 131 N.Y. 274. (e) #161 R.P.L. (f) #160 R.P.L.

Finally,to assimilate trust powers more nearly with trust estates for the purpose of their judicial supervision,the Statute provides that certain sections(a) of the Statute of Trusts,which concern the management of the trust estate,and the jurisdiction of the Supreme Court relating to the removal and appointment of trustees and the vesting of the trust in the Court,shall apply equally to trust powers.

A full consideration of the law relating to powers of sale given to executors,together with the doctrines of conversion,election Etc,each opening a broad field of law,have been omitted herefrom,being quite beyond the scope of this sketch.

CONCLUSION.

Such was the work of the Revisers. To the success of their labors time has given its testimony. The law as they framed it has remained almost unaltered to this day;the changes made by the last revision being,in most instances,verbal merely. That the apprehensions of Chancellor Kent and the other Black letter lawyers of the older school have failed to be realized,is proven by the dearth of reports of cases wherein it has been necessary to subject the clear,explicit,and unambiguous language employed by the Revisers to a judicial interpretation. As was said by Chief-Justice Savage in the leading case of Lorillard v Coster (b); in the effort "to extricate this branch of the law from the perplexity and obscurity in which it was before involved,they have certainly succeeded

---

(a) #91,92,93,R.P.L. (b) 14 Wend.265.

to a very great extent if not entirely. . . . . Instead of endeavoring to unravel the mysteries of uses and trusts,or to cast light into the numerous dark and winding passages of the labyrinth of powers,they demolish the whole. The learned antiquarian will pause and wonder over this pile of ruins,venerable,at least,for their antiquity,the erection of which occupied centuries and put in requisition the labors of kings,ecclesiastics and laymen. Upon these runis have been erected new edifices,a new system of uses and trusts apparently plain and intelligible and adapted to the real wants of Society. . . . . Instead of the labyrinth of powers we have a new building of modern architecture through which I hope we may pass with safety,with such clues as the Revisers have furnished."

Joseph Alfred Greene