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SUSPENSION OF THE ABSOLUTE POWER OF ALIENATION AS OCCASIONED BY A POWER OF APPOINTMENT.

The importance of the law concerning the subject of "powers" cannot be over-emphasized. It is not the purpose of this note to give an exhaustive discussion of the law of "powers" but merely to indicate the nature of a "power" and how it may sometimes occasion a suspension of the power of alienation beyond the statutory period.

"Powers of appointment, otherwise simply called 'powers,' originated in connection with the creation of future uses, particularly springing uses." [1] Such a power under the Statute of Uses was an authority enabling a person to dispose of an interest in real property, vested either in himself or another person.[2] The New York statute [3] now 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 or reserving the power, might himself lawfully perform." A power is not an estate or interest in lands; unexercised, it is an incumbrance, and when exercised, the acts performed by virtue of it are considered and construed as done by the donor of the power.[4] Although a power is not an estate or interest in land, it is an authority to create an estate or interest, and such a power may be given to a person who has an estate in the land or to a mere stranger.[5] The creation of a power may be effected either by means of a deed or will.[6] The statute so provides.[7] No formal set of words are necessary to create or reserve a power,[8] and such a power may be vested in any person capable of holding real property but it cannot be exercised unless the donee of the power also has the capacity of transferring real property.[9]

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[1] 1 BURDICK, LAW OF REAL PROPERTY (1914) 722.

[2] 3 BOUVIER (8th ed. 1914) 2646.

[3] N. Y. REAL PROPERTY LAW §131; see Stanley v. Payne, 65 Misc. 77, 119 N. Y. Supp. 570 (1909); *nota bene:* In considering powers the courts must look to the provisions of art. V, N. Y. REAL PROPERTY LAW §§130-182, wherein the subject of powers is now defined.

[4] Eells v. Lynch, 21 N. Y. Super. (8 Bosw.) 465, 482 (1861); Root v. Stuyvesant, 18 Wend. 257, 283 (N. Y. 1837).

[5] Root v. Stuyvesant, supra note 4.

[6] 2 WASHBURN, REAL PROP. (2d ed. 1876) 650; 4 KENT'S COM. (12th ed. 1873) 319.

[7] N. Y. REAL PROPERTY LAW §140.

[8] 4 KENT'S COM., *supra* note 6, 319; Dorland v. Dorland, 2 Barb. 63, 80 (N. Y. 1847); Hubbard v. Gilbert, 25 Hun 596, 599 (N. Y. 1881).

[9] N. Y. REAL PROPERTY LAW §141; Weeks v. Frankel, 197 N. Y. 304, 90 N. E. 969 (1910); Matter of Mayo, 76 Misc. 416, 136 N. Y. Supp. 1066 (1912).

And finally, it is to be noted that powers connected with personal property are now, for all practical purposes, co-extensive with powers in the law of real property of this state, and they are governed by the same rules.[10]

It has often been said that the absolute suspension of the power of alienation can be effected in only two ways, namely, by certain contingencies in future estates, and by certain express trusts.[11] It would appear, however, that there is a third way in which the suspension of the absolute power of alienation can be occasioned, and that is by a power.[12] That a suspension can be so effected "by an instrument in execution of a power," is recognized by the statute[13] which further provides, that the period of such suspension shall be computed "not from the date of such instrument, but from the time of the creation of power." This statement, however, that the power of alienation may be suspended by an instrument in execution of a power, is by no means inconsistent in any manner with the proposition that a suspension can only be occasioned by certain contingencies or trusts. What actually is meant when it is said that a suspension may be caused by a power, is simply this: "that the power of alienation may be suspended, not only by means of a grant or a will of the owner of the title but also by means of an instrument by which the grantee executes the power." And when the cases are examined in order to determine in what way the suspension was caused by the instrument in execution of the power, it will be found that the same manner of disposition which the grantor of the power might have adopted, was the sole cause for the suspension.[14] For according to the statute, "an estate or interest in land cannot be given, or limited to any person, by an instrument in execution of a power, unless it would have been valid, if given or limited at the time of the creation of the power."[15] Hence, the grantee of the power, if he is so au-

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[10] Cutting v. Cutting, 86 N. Y. 522, 547 (1881); Hutton v. Benkard, 92 N. Y. 295 (1883); N. Y. Life Ins. & Trust Co. v. Livingston, 133 N. Y. 125, 30 N. E. 724 (1892); Mills v. Husson *et al.*, 140 N. Y. 99, 35 N. E. 422 (1893); Cochrane v. Schell, 140 N. Y. 516, 35 N. E. 971 (1894); Fargo v. Squiers, 154 N. Y. 250, 48 N. E. 509 (1897); Matter of Moehring, 154 N. Y. 423, 48 N. E. 818 (1897); Lockwoode v. Mildeberg, 159 N. Y. 181, 53 N. E. 803 (1899); Matter of Wilkins, 183 N. Y. 104, 75 N. E. 1105 (1905); Matter of Kellogg, 187 N. Y. 355, 80 N. E. 207 (1907); Matter of Mayo, *supra* note 9 at 419.

[11] CHAPLIN, SUSPENSION OF THE POWER OF ALIENATION (3rd ed. 1928) §316; see Hawley v. James, 16 Wend. 61, 121 (N. Y. 1836); Leonard v. Burr, 18 N. Y. 96, 107 (1858); Everitt v. Everitt, 29 N. Y. 39, 71-72 (1864); Smith v. Edwards, 88 N. Y. 92, 102 (1882); Radley v. Kuhn, 97 N. Y. 26, 34 (1884); Steinway v. Steinway, 163 N. Y. 183, 57 N. E. 312 (1900); Wilber v. Wilber, 165 N. Y. 451, 59 N. E. 264 (1901).

[12] CHAPLIN, *supra* note 11, §§316, 317.

[13] N. Y. REAL PROPERTY LAW §178; see CHAPLIN, *supra* note 11, §316.

[14] CHAPLIN, *supra* note 11, §318.

[15] *Ibid.* §318; N. Y. REAL PROPERTY LAW §179; Everitt v. Everitt, *supra* note 11 at p. 78.

thorized, might effect a suspension by the creation of certain express trusts, or by the limitation of certain contingent future estates, and the validity of the period of suspension would be determined by computing the same from the time of the creation of the power. In such cases, while the suspension may in fact be brought into operation through the power, the manner in which the suspension is effected, is still found to be by an express trust or contingency.[16] But "there are cases where, if a power to alienate is created, to be exercised at the expiration of a period not duly measured by lives in being, and its exercise in the meantime is expressly prohibited, 'the power does suspend the absolute power of alienation until that time and is therefore void.'" [17] In the *Matter of Butterfield* [18] the will of testator provided that no part of his estate shall be sold until all of his children arrive at the age of twenty-one. At his death, five of his eight children were under that age. The will also conferred a trust power of sale on the executrix. "The estate of the devisees was thus subject to the trust power, so that they (the devisees) could not convey a clear title until the five minors had reached twenty-one. * * * The executrix is here absolutely prevented from making a sale for a time limited by the arrival of the five minors at maturity * * * and until that time the conveyance of the devisees would be liable to be defeated by the subsequent execution of the power." Hence, as there were no persons in being by whom an absolute fee in possession could be conveyed, there resulted a suspension in contravention to the prescribed limit.[19] Were it not for the power, no suspension would have resulted as all the devisees, who could in any event take, were in being, could have joined in a conveyance of the entire fee. Thus as the purpose of the instrument was obviously one intended to prevent any conveyance of the property during a term not duly measured, the entire scheme of the will was held to be invalid.[20]

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[16] CHAPLIN, *supra* note 11, §318.

[17] *Ibid.* §316; Matter of Christie, 59 Hun 153, 158, 13 N. Y. Supp. 202, *aff'd* as Matter of Butterfield (Christie), 133 N. Y. 473, 31 N. E. 515 (1892).

[18] *Ibid.*

[19] N. Y. REAL PROPERTY LAW §42: "The absolute power of alienation is suspended, when there are no persons in being by whom an absolute fee in possession can be conveyed. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation, by any limitation or condition whatever for a longer period than during the continuance of not more than two lives in being at the creation of the estate."

[20] See, also, Adams v. Berger, 27 Abb. N. C. 429, 18 N. Y. Supp. 33 (1891); Goldsmith v. Haskell, 181 App. Div. 510, 169 N. Y. Supp. 185 (1st Dept. 1910); Matter of Chittick, 243 N. Y. 304, 153 N. E. 83 (1926). In the last case cited, the court said, at pp. 318, 319: "The difficulty arises over the attempt of the testator to make provision for all the children of his daughter, including those who may be subsequently born, and not in being at the time of his death. If the daughter should die and the granddaughter should die, and then the disposition of the principal should be suspended for twenty-five years during the life of a grandchild born after the death of the testator, here we should have the

Not all powers will cause, or co-operate to cause, a suspension, and there is such a class of powers which does not cause any suspension whatever.[21] It will be found that the powers that will cause a suspension are usually those which involve an absence of persons in being who can grant out an absolute fee in possession, or are such powers, that coupled with other causes, bring about such a result. To illustrate, resort is to be had to the decided cases. In the case of *Garvey* v. *McDevitt*[22] the testator directed his executors, four years after his decease to sell his real estate at public or private sale and pay over the proceeds to the Bishop of Raphoe upon certain trusts. If "the will had directed the proceeds of the sale of this real estate to be paid over absolutely to the Bishop of Raphoe for his own use, there would have been no difficulty with this power to be exercised after the lapse of four years. In that case he being the sole beneficiary of the power in his own right could have released his right to the proceeds to the heirs of the testator and thus perfected in them an absolute title, which could not afterward be defeated by his exercise of the power. But the difficulty here is, the proceeds were not to be paid over to the Bishop in his own right. They were to be paid to him as a trustee. * * * He was to have no personal or private interest in the fund. * * * He could not, therefore, release to the heirs. * * * Notwithstanding anything he may do during the four years, the executors must sell, and pay over the proceeds to him or his successor, as trustee. Therefore, during the four years there are no persons in being who can convey an absolute fee in possession." Here, then, we find a power, that because it cannot be exercised before a certain period ends, co-operates to cause the suspension, for during the period before the power is exercised there are no persons in being who could get together and convey the absolute fee.[23]

Some powers are of such a nature that they cannot be exercised without effecting an illegal suspension and hence all such powers are invalid. In the exercise of every power there must be a substantial compliance not only with the spirit but also with the letter of the power.[24]. But it is always the intention of the grantor of the power as to the manner, time and conditions of its execution that

power of alienation or the suspension of disposition for more than two lives in being—the two lives having gone out, the power of disposition would be suspended until the child or children, born after the testator's death, arrive at twenty-five." The trust was held void because of the undue suspension.

[21] For a detailed discussion of such class of powers and relative cases, see CHAPLIN, *supra* note 11, §§322-332.

[22] 72 N. Y. 556, 561, 563, 564 (1878).

[23] See, also, Allen v. Allen, 149 N. Y. 280, 43 N. E. 626 (1896); Stoiber v. Stoiber, 40 App. Div. 156, 57 N. Y. Supp. 916 (2d Dept. 1899); Hagemeyer v. Saulpaugh, 97 App. Div. 535, 90 N. Y. Supp. 228 (1st Dept. 1904).

[24] Harris v. Strodl, 132 N. Y. 392, 30 N. E. 962 (1892) at p. 397: "The general rule is that to the due execution of a power there must be a substantial compliance with every condition required to precede or accompany its exercise."

must be observed.[25] Thus it has been held that where a power is given under express conditions that it cannot be exercised until a future time, and not until that time, and it cannot be annulled or released, and that because of such conditions the absolute power of alienation is suspended beyond a period measured by two lives in being, the entire power is void.[26] Hence, the time when the power is to be executed may be material to its validity. In *Hawley* v. *James*[27] Judge Bronson said: "The time when the power is to be executed may be material to its validity. There are no means by which the alienation can be suspended beyond the period prescribed in the first article; and we shall find, I think, the same difficulty on that point, when the case is examined under the doctrine of powers that was presented when considering it as an express trust. * * * The power can only be executed at the time and in the manner prescribed by the testator. * * * By the will the final distribution is to be made and the conveyances executed at the expiration of the period herein prescribed for the continuance of the trust. It can only be done when all the minorities shall have ceased and if none can in the meantime convey an absolute fee in the land, then we have already seen that the power of alienation is suspended for a longer period than the statute allows. * * * What kind of a fee can be conveyed so long as a power exists by which it may be thoroughly defeated? It surely is not an absolute fee. The power by which the new estates are to be created cannot be released or in any way destroyed." Later, in *Hone's Executors* v. *Van Schaick*[28] Judge Bronson affirms the above principles. In distinguishing the latter case from *Root* v. *Stuyvesant*[29] he said: "That, however, was a power which the grantees might execute or not at their pleasure. It imposed no duty on the tenants for life; it did not require them to do an illegal act. But this is a special power in trust, and it is imperative. It imposes a duty on the grantees, the performance of which may be compelled in equity for the benefit of the parties interested * * *. The testator has directed such a division and conveyance of his estate at the end of the time as the law has forbidden. Such a power cannot, I think, be upheld for any purpose." Thus it would seem to be fairly clear that where there is a power to appoint and it is imperative and must be executed according to the intentions of the testator, and it further appears that no alienation is possible within the prescribed period, the power is invalid. In *Dana* v. *Murray*[30] there was such a power in trust to sell and an imperative power to pay over the proceeds at a future date to all

[25] N. Y. REAL PROPERTY LAW §172.

[26] Matter of Butterfield, *supra* note 17; Hetzel v. Barber, 69 N. Y. 1, 12 (1887); Beekman v. Bonsoor, 23 N. Y. 298, 317 (1861).

[27] *Supra* note 11 at p. 175.

[28] 20 Wend. 564, 567 (N. Y. 1838).

[29] *Supra* note 4.

[30] 122 N. Y. 604, 26 N. E. 21 (1890).

the then living members of a certain designated class, including such persons as were not in being at the creation of the power. The power could not be executed nor the beneficiaries become known within the period of two lives in being. The court said: "Such proceeds were directed to be divided among all of her children who may then be living, and the issue of any of them who may be dead * * *. It follows that the power in question, under the express provision of the statute is imperative, and its execution will be compelled by the court; and this being the case, it operates to suspend the vesting of the fee, until the power is executed or the estate is terminated. The suspension here is caused by the fact that there are persons not in being at the creation of the power, who may become entitled to take. All the persons then in being could not effct a conveyance of the absolute fee and accordingly the absolute power of alienation is suspended." [31]

Both the courts and the text-writers are unanimous in holding that the period during which the absolute right of alienation may be suspended by an instrument in the exercise of a power of appointment is measured from the time of the creation and not the time of the exercise of the power.[32] This rule which existed at common law [33] is now embodied in the statute.[34] A reason given for this rule which requires computation of the suspension from the time of the creation and not from the exercise of the power, is that "if this were not the case, estates for life with powers of appointment by will might be created, the tenants for life might appoint for life, with powers to the appointees to appoint by will; these appointees might in their turn, appoint in like manner, and so an indefinite series of life estates could be created." [35] This situation could not, of course, exist today for even the statutory definition of a power limits the grantee of the power to do only such acts "which the owner, granting or reserving the power, might himself lawfully perform." [36]

"A typical case for the application of the principle is the following: *A*, by will leaves property to *X*, in trust to pay over the income to *B* for life, and upon *B's* death to transfer the principal to such persons as *B* shall by will appoint. *B's* will executes the

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[31] See Booth v. Baptist Church *et al.*, 126 N. Y. 215, 28 N. E. 238 (1891).

[32] CHAPLIN, *supra* note 11, §§359, 360; GRAY, RULE AGAINST PERPETUITIES (3rd ed. 1915) §§514, 515; Genet v. Hunt, 113 N. Y. 158, 21 N. E. 91 (1889); Dana v. Murray, 122 N. Y. 604, 26 N. E. 21 (1890); Maitland v. Baldwin, 70 Hun 267, 24 N. Y. Supp. 29 (1893); Hillen v. Iselin, 144 N. Y. 365, 39 N. E. 368 (1895); Fargo v. Squiers, *supra* note 10; *Re* of Pilsbury, 50 Misc. 367, 99 N. Y. Supp. 62, *aff'd*, without opinion, in 113 App. Div. 893, 99 N. Y. Supp. 72 (3rd Dept. 1906), and also *aff'd* in 186 N. Y. 545, 79 N. E. 114 (1906); *Re* Banker's Trust Co., 82 Misc. 375, 143 N. Y. Supp. 483 (1913).

[33] GRAY, *supra* note 32, §§514, 515.

[34] N. Y. REAL PROPERTY LAW §178.

[35] GRAY, *supra* note 32, §514.

[36] N. Y. REAL PROPERTY LAW §131.

power of appointment by leaving the property to *Y* in trust to pay the income for life to *C*, who had not been born at the time of *A's* death. The trust for *C* is invalid as an illegal suspension of the power of alienation." [37] Construing the exercise of the power as of the time of the creation, it will be seen that there was a suspension during the life of *B* and then of a person not in being. It could not be ascertained at the death of the testator when such person would be born, if ever, and hence there would be a suspension not duly measured. "Similarly, if the trust created by *B's* will were for the benefit of *M* and *N* for the life of the survivor, then even though *M* and *N* were living at *A's* death, *B's* disposition would be invalid, for the power of alienation would be suspended for three lives." [38] The situation in the "Re of Dodge's Estate" [39] further illustrates the rule. In that case the testator had created a trust for the benefit of his son for life and he also gave his son the power to dispose of the fund by will. The son's will in execution of the power gave the income of the fund to his father for life, with the direction that on the death of his father, the fund was to be divided among three designated brothers share and share alike, the income of a share each to be paid to each of the three brothers for life and upon their death provision was made for the remainders over. The father and one of the brothers died before the son who was the grantee of the power. In considering the question as to whether the exercise of the power had illegally suspended the power of alienation the court said: "It is conceded, of course, that in determining this question the two wills must be read together (*Fargo* v. *Squiers,* 154 N. Y. 250, 48 N. E. 509). The will of (the grantor) the power suspends the power of alienation during the life of said son (grantee of power) and the latter could in his will, therefore, suspend the alienation of the trust fund during one additional life only (*Hillen* v. *Iselin,* 144 N. Y. 365, 39 N. E. 368), whereas in fact he created by his will trusts to run through (1) the life of his father, and (2) the lives of three brothers, respectively. Had his father * * * survived him, this provision in the son's will would violate the statute, for in conjunction with the suspension of aliena-

[37] Marsh, *Perpetuities Arising Through Powers of Appointment in New York* (1925) 25 COL. L. REV. 521; Fargo v. Squiers, *supra* note 10. In that case, at p. 259, the court said: "The validity of the provisions of the will of Georgia Fargo, in so far as she attempted to execute the power of appointment, must, therefore, be tested by reading the provisions of her will into the provisions of the will of William G. Fargo, which created the power. So tested, we find that the Squiers children, not being in existence at the time of the death of William G. Fargo, any attempt to postpone the absolute ownership of property in these children would be a violation of the statute." See, also, Genet v. Hunt, *supra* note 32. *In re* Trowbridges Est., 124 Misc. 317, 208 N. Y. Supp. 662 (1924).

[38] Marsh, *Perpetuities Arising Through Powers of Appointment in New York, supra* note 37 at 522; Farmer's Loan & Trust Co. v. Kip, 192 N. Y. 266, 85 N. E. 59 (1908).

[39] 129 Misc. 390, 220 N. Y. Supp. 247, 249 (1927).

tion of one life (his own) he would have extended the trusts through two additional lives."

The propositions here outlined have been recently applied by the Court of Appeals.[40] The testator, by his will, directed that his residuary estate be divided into three shares upon trusts and limitations as follows: one share to be held in trust for *A*, his wife, during her life, with power to appoint the remainder to her sons, *D* and *C*, and their issue in such proportions as she chose, and then two other trusts for his sons *D* and *C* upon certain limitations, not here material. Then followed a proviso the effect of which was construed as converting any part of the residuary estate which would go to the sons, *D* and *C*, from an apparent absolute fee into a life estate with remainder to the surviving issues of both *D* and *C*. *D* died without issue leaving his entire estate to his mother, *A*. *A* then died leaving a will by which she appointed to her son *C* the share which had been held in trust for her life. The sole issue of *C* is a daughter *X*. Both *C* and *X* are living. In construing the provision of the will which created the trust with power of appointment in *A*, it was held, that as to the real estate in such trust, the gift as to the issue or descendants surviving *D* and *C*, postponed the vesting of the remainders to such issue for more than two lives in being at the death of the testator. By his will the testator suspended the power of alienation during the life of *A*, his wife, and then *A*, by her power of appointment, in conjunction with the effect of the proviso, suspended it for another life by appointing the property to *C*. So far there has been no undue suspension. But to determine the validity of the gift over to the issue or descendants of *D* and *C*, the appointment under the power is to be read into the will of the testator, by which the power was created, and the resulting suspension, if any, is to be computed from the time the power is created and not from the time it is exercised. Hence, the gift over to the issue, upon the death of the testator, should have been so framed that they would vest in interest at the end of two lives. But this was not done, as by the proviso in the will, the testator did not confine the gift over to the issue of the son for whom the trust has been established, but the issue of both sons are to share in the division of the gift. The issue who will share in such gift cannot be ascertained until the death of both sons, *D* and *C*. It is true that *D* had died without issue during the lifetime of both *A* and *C*, with the result that at the death of *C*, who is the holder of the life estate under the power, his issue will be the only persons entitled to share in the remainder. "The validity of the gift must, however, be determined according to the possibilities that are present at the death of the testator." At that time both *D* and *C* were living and it was not known which would die first and whether or not he would leave issue. If both had survived the death of *A*, even though she ap-

[40] Bishop v. Bishop, 257 N. Y. 40, 177 N. E. 302 (1931).

pointed her trust share to *C* alone, the gift over would be divided among a class made up of the issue of both *D* and *C* and not until they were both dead could the members of such class be ascertained. "The result is the postponement of the vesting beyond the statutory period."

The court held the remainder invalid because it did not vest within the statutory period applying the rule of *Matter of Wilcox*.[41] While the case is clearly sustainable on this ground and sets at rest all doubts as to the present strength of the rule against the remoteness of vesting, it is nevertheless well to point out that the same result might have been reached without invoking the *Matter of Wilcox*. For it is clear that at the death of the testator the remainder to the children of both *D* and *C* was limited to unborn persons whose identity might not be determined within two lives. The power of alienation was therefore suspended for longer than the period permitted by the statute. Since the court preferred to decide the case on the authority of *Matter of Wilcox*, it can only be for the purpose of re-affirming the doctrine of that case.

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[41] 194 N. Y. 288, 87 N. E. 497 (1909).