1892

Powers in Trust with Special Reference to the Law in New York

Clarence G.T. Smith

Follow this and additional works at: http://scholarship.law.cornell.edu/historical_theses

Part of the Law Commons

Recommended Citation

POWERS IN TRUST WITH SPECIAL REFERENCE TO THE LAW IN NEW YORK.

CLARENCE G. T. SMITH,

CORNELL UNIVERSITY, '92.
TABLE OF CONTENTS.

Origin of Powers,----------------------------------------- 1.
Statute of Uses,------------------------------------------- 2.
Statute of Wills,------------------------------------------ 2-3.
Definition and Classification of Powers,---------- 3.
Who may be Donee,---------------------------------------- 4.
Trust Powers Irrevocable,------------------------------- 5.
How Powers may be Created,------------------------------- 5.
By Whom Powers may be Executed,----------------------- 5-6-7-8.
Mode of Execution,---------------------------------------- 9-10.
Powers when Mandatory,------------------------------- 11.
Powers that are Mandatory in Wills,------------------- 11.
Longmore V. Brown,-------------------------------------- 13-14.
Imperative Powers not involving Personal discretion,---- 19-20-21.
Use for Life with Power of Appointment among descendants, 21-22-23.
and Limitation over,Continued,----------------- 21-22-23.
Conclusion,--------------------------------------------- 25.
ORIGIN OF POWERS.

From a careful study and examination of the authorities on Powers, it is evident that they take their origin and authority from the common law; directions operating only on the conscience of the person in whom the legal interest is vested; or declarations or directions deriving their effect from the Statute of Uses.

Before the passage of that important statute, a use was a mere confidence in a friend to whom the estate was conveyed by the owner, without consideration, to dispose of it upon trusts designed at the time, or to be afterwards appointed by the real owner. The feoffee or trustee to all intentions and purposes, was the real owner of the estate at law, and the cestui que use had only a confidence or trust, for which he had no remedy at common law.

Often times the trustee would convert the property, that he was intrusted with, for the benefit of the cestui que use, to himself, thus depriving the cestui que use of his property, and, as he had no remedy at common law, it was that fraud that led to the passage of the important statute in the reign of 27 Hen. VIII c. 10.
STATUTE OF USES.

When any person shall be seized of lands, tenements or other hereditaments to the use or confidence or trust of any other person or body politic, the person or corporation entitled to the use in fee-simple, fee-tail, for life, for years, or otherwise, shall thenceforth stand and be seized or possessed of the lands &c of and in the like estates as they have in the use, trust, or confidence; and the estate of the person so seized to uses shall be deemed to be in him or them that have the use, in such quality, manner, form and condition as they had before in the use.

The statute "executes the use", that is, it conveys the possession to the use, and transfers the use into possession; thereby making the cestui que use complete owner of the lands and tenements, as well at law as in equity.

STATUTE OF WILLS.

There are powers that take their authority from the above statute and the estate so created is an executory devise, deriving its force and effect from the will itself.
The creation of the power rests in the person to whom it is granted, called the trustee of the power, a present indefeasible executory interest in the land. All powers that are contained in a will operate under the above statute, except in case it takes the form of a power to limit a use and there is a special seizin raised by the will to sustain the use thus limited, then and in that case it operates under the Statute of Uses or a contingent or future use. 1 Sugden on Powers 240; Tiedeman on Real Pro. 559.

In this State all powers that take their authority from the Statute of Wills or Uses have been abolished and only certain powers that are enumerated in the statute can now be created.

DEFINITION AND CLASSIFICATION OF POWERS.

8th Ed. N.Y.R.S. page 2445 #74.

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.

#76. Powers are general or special, and beneficial or in trust.
A general power is in trust, when any person or class of persons, other than the grantor of such power, is designed as entitled to the proceeds, or any portion of the proceeds, or other benefits to result from the alienation of the lands, according to the power.

A special power is in trust,

1. When the disposition which it authorizes, is limited to be made to any person or class of persons, other than the grantee of such power.

2. When any person or class of persons, other than the grantee, is designed as entitled to any benefit from the disposition or charge authorized by the power.

Every trust power, unless its execution or 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 in equity for the benefit of the parties interested.

WHO MAY BE DONEES.

A person who can hold and dispose of his own property can be the donee of a power. American Home Missionary Society v. Wadhams 10 Barb. 604.
TRUST POWERS IRREVOCABLE.

All trust powers are irrevocable unless the right is granted or reserved in the instrument creating the power. Selden v. Vermilyea 1 Barb. 62. Lane v. Lane 2 Barb. 58. Bennett v. Rosenthal 11 Daly 96. Marvin et al. v. Smith et al. 46 N.Y. 577.

HOW POWERS MAY BE CREATED.

Powers may be created by a deed or last will and testament. They may be granted by a special instrument. No particular form is required. Any words that clearly express the intention of the donor to create the power, and which define its scope with any reasonable degree of certainty will be sufficient. Fellows v. Heermans 4 Lans. 238. Amoy v. Lord 5 N.Y. 413. Russell v. Russell 36 N.Y. 583. 2 Washburn on Real Pro. 650; 1 Sugden on Powers 118. Bradley v. Wescott 13 Ves. 445. Smith v. Bell 6 Pet. 58. Brant v. Coal Iron Co. 93 U.S. 326.

BY WHOM POWERS MAY BE EXECUTED.

As a general rule only those who are named as donees in the instrument creating the trust or power can execute it. The donee will not be allowed to assign it unless he has authority in the instrument creating the power, nor
can his personal representatives execute it unless they are expressly named. 1 Sugden on Pow. 214. 4 Cruises Dig. 211. Cole v. Wade 16 Ves. 27. Tainter v. Clark 13 Met. 220. Browns Leg. Max. 665.

This is not true of powers in trust, the execution of which does not depend upon a discretion of a particular donee. Where a power is in trust, the court will not allow any accident or neglect on the part of the trustee of the power, not even his death, to defeat the power that is in trust. The court will compel the appointee of the power, which is in trust to execute it, or will appoint another trustee in his place, who will have exactly the same powers. 2 Sugden on Pow. 158. Gibbs v. Marsh 2 Met. 243. Wilson v. Troupe 2 Conn. 236. Seeds v. Wakefield 10 Gray 517.

When a power is limited to more than two as a class, such as son's executors and trustees, all must join in the execution, if living, the power can survive the decease of one or more, but there must be at least two surviving in order to answer the plural description of the donees. 1 Sugden on Pow. 144. Story's Eq. Jur. #1061-2n. Tainter v. Clark 13 Met. 220; Franklin v. Osgood 14 Johns. 553.
A trust proper and a power in trust are very much alike but differing in one respect. In a trust the legal title to the property is always vested in the trustee for the benefit if the cestui que trust, but in a trust power the legal title to the property is vested in a third person, and the trustee has power to distribute the property to or among the beneficiaries. In some cases the trustee is clothed with a complete discretion whether he will dispose of the property to or among the beneficiaries or not, but in their case he has a power simply and not coupled with a trust, and in case the appointee of the power should die without executing his power, a court of equity will not interfere to aid the expected beneficiaries, and the property will revert to the grantor of the power or his heirs. But on the other hand if the power is in trust, the trustee may have some say in regard to how the property shall be distributed among the beneficiaries and the like, but he is not clothed with any discretion as to whether he shall execute it or leave it unexecuted.

It is so much like a trust that he is required to execute it, and an equitable right is in the beneficiaries, a right that is recognized in equity, and to a certain extent,
protected. So if the trustee does not make the appointment a court of equity will in every such case.

A trust power is defined by Mr. Pomeroy # 1002 Vol. 11: "to be an authority given to A to dispose of property of which the legal title is held by B, to or among a special beneficiary or class of beneficiaries, conferred in such terms that a fiduciary or trust obligation rests upon A to make the disposition,"

The trustee of the power may have the right to make an unequal division of the property among the persons that constitute the beneficiaries or even as to a particular individual that he shall select from the beneficiaries to have the whole amount. But on the other hand, the beneficiaries may be so designated that no discretion with respect to them exists. If the trust power is of such a kind that the appointee is clothed with authority to dispose of the property among a class of beneficiaries and also has a discretion, a court of equity has nothing to do whatever with the control of the discretion of the trustee, if he makes a valid appointment.

When the donee-trustee does not make any valid appointment whatever, it is settled law that a court of
equity in executing the power will always distribute the property in equal proportions among the beneficiaries that constitute the particular class. Harding v. Glynd 1 Ark. 469; Cole v. Wade 18 Ves. 42; 3 Sandif's Chan. 555; Brown v. Higgs 3 Ves. 561; Delaney v. McCormick 38 N.Y. 174; Pom. Eq. Jur. Vol. 11 §1002.

MODE OF EXECUTION.

The donee in executing a power should observe strictly conditions and also the restrictions placed upon him by the creator of the power, both as to the manner and also to the time, when it should be executed. The donor can impose any conditions he sees fit, and how unnecessary they may be, a neglect of them would cause the execution to be defective. They should generally be strictly complied with in every case. 1 Sugden on Pow. 211; 2 Ves. 231; Haukins v. Kempt 3 East 410; Wright v. Wakeford 17 Ves. 454; Ives v. Davenport 3 Hill 373; Williams on Real Prop. 295;

Thus when a power to dispose of land is to be by a will, it must be by a will duly executed. The American Home Missionary Society v. Wadham et al. 10 Barb. 597; Coleman v. Beach 97 N.Y. 558; Smith v. Gage 41 Barb. 69.
On the other hand if the disposition is to be by grant it must not be executed by a will. Albany Fire Ins. Co. v. Day 4 N.Y. 11; Coleman v. Beach 97 N.Y. 556; Content v. Hollyvvv. Servors et al. 3 Barb. 129;

If there are no restrictions as to the instrument that is to be used, it may be either a deed or will and all other directions must be observed strictly. Ladd v. Ladd 8 Hun 30; More v. Damond 5 R.I. 130; Allen v. Lawrence 12 Gray 375;

If the power is one of sale, the property can not be sold only by the manner that is prescribed by the creator of the trust, and a power to sell will not generally imply a power to mortgage. 1 Suggin on Pow. 513; 4 Nants Coms. 331; Bolmer v. Walden 3 Hill 361; Leavitt v. Pell 25 N.Y. 474; Ives v. Davenport 3 Hill 373;

Lands embraced in a power to devise, will pass by a will purporting to convey all the real property of the testator, unless the intent is clearly expressed that the will shall not operate as an execution of the power. Bolton v. DeFeyster 25 Barb. 564; White v. Hicks 43 Barb. 91; Hunton et al. v. Bankard 92 N.Y. 295.
POWERS WHEN MANDATORY.

Prof. Hutchins in delivering his course of lectures upon Equity Jurisprudence in speaking of powers laid down this proposition: "That no general rule could be given which would determine when powers are mandatory, as so much depended upon the wording of the instrument and the intent of the party as expressed in the instrument that created the power; but when it was clearly expressed in the paragraph that contained the power or from the whole instrument taken together that it was the intent of the creator of the power that it should be mandatory, a court of equity would so hold."

POWERS THAT ARE MANDATORY IN WILLS.

The most of the litigation that arises is that which is contained in wills, and some of the most important cases that contain mandatory powers will now be taken up and fully discussed.

Brown v. Higgs 8 Ves. 561.

The power in this case was created in terms of mere authority. "I authorize and empower." It was given to John Brown, a nephew of the testator, to pay over the rents and profits of certain real estate, deducting prior
charges, as follows: "To such children of my nephew Samuel Brown, as my said nephew John Brown shall think most deserving and will make the best use of it, or to the children of my nephew William Augustus Brown, if any such there are or shall be." The donee of the power, John Brown died in the lifetime of the testator, and the question was whether by his death the devise had wholly lapsed, or the power was to be considered as a trust, the execution of which had devolved upon the court.

The counsel for the defendant strenuously and very plainly insisted, that the large discretion which was given to the donee, repelled the presumption of a trust in favor of all the children, who were the objects of the power, since it was plainly not the intention of the testator that all should take. The gift, as made by the testator, was not to all, but only to such as the donee might select, and consequently, that no selection having been made, there was no gift at all. To declare a trust in favor of all the children, was not to execute, but to defeat the intention of the testator; nor was it possible for the court to make a selection; the power of doing so being a personal confidence reposed in the donee; a discretion
which it was meant that he, and he alone, should exercise.

The master of the rolls in giving his opinion held, that all the children were to be considered as the objects of the bounty of the testator, and that the power given to the nephew, John Brown, was to be regarded as a power merely of selection. The gift was to all, although the donor of the power, in the exercise of his discretion, might limit it to some. The court could not take upon itself the exercise of a similar discretion, but could carry into effect the intention of the testator by declaring a trust for all who were the objects of his bounty.


In this case the power which was given to executors, was declared in the will itself to be a trust, but the case is still important as showing that when a discretion is given to the devisees of a trust power in the selection of its objects, if the discretion is not exercised, the trust will be enforced in equity for the equal benefit of all to whom any portion of the property might have been given. The trust in this case was that the executors should divide the personal estate of the testator to and among two brothers and a sister or their chil-
dren. As the executors might have given a portion of even the whole to the children, it was held that they were entitled to share equally with their parents, and the master of the rolls decreed a distribution per capita upon this principle. His decision is therefore a pertinent authority to prove that a trust is not converted into a mere power by the non-execution of which it is defeated, by the addition merely of the right of selection.


It was determined by the plain, broad, and practicable maxim which he there laid down, and which has since been a guide to his successors, namely, that a power of disposition limited to a class in all cases implies and creates a trust, where the property which is given is certain, and the objects (that is, the persons,) to whom it is given are also certain; evidently meaning that where this certainty exists the trust arises, whether the words are those of positive direction, or of mere recommendation, or mere authority. And the maxim or rule thus interpreted, we conceive to have been the basis of the decree that a trust existed in favor of those descendants, who, in that case, were the objects of the power.
Lord Thurlow, in affirming the decree of the master of the rolls, which he did without having counsel in its support, expressed himself with his usual brevity and decision, saying, "where the object and the property are both certain, the rule that there is a trust must be adhered to." It is true, that in this case there were strong expressions in the will manifesting the desire of the testator that the power should be executed, and it is certain that in numerous cases such expressions, and in many much weaker, are held to be imperative, that is, to impose a duty of execution; but it is equally certain that it was not upon the force of these expressions that either the master of the rolls or lord chancellor laid the stress of his opinion. On the contrary, Lord Kenyon said it would be lamentable if a distinction were to be raised upon slight words borrowed from the civil laws, such as "Peto, Rogo, &c."; and Lord Thurlow, that the use of such words is only important as "making a designation of the object," the plain influence being, that such words are useless, if the "designation" is otherwise certain. It is, indeed, difficult to understand why the same effect should not be given to words of mere authority or power, as to
words of recommendation, entreaty, or desire. A power, positive in its terms and limited in its execution to a particular class, is not only sufficient, but it seems to be conclusive evidence of the desire of the grantor that it shall be executed. The desire of its execution can be the only motive for its creation, and if the mere wishes of a testator are to be followed as a law, it is surely immaterial whether they are declared in terms, or collected by a necessary implication. The power was a power of distribution merely, without a right of selection. Hence, as all belonging to the designated class were entitled to a share under the execution of the power, it might well be construed as a gift to all, and therefore a trust for all, should the power remain unexecuted.

Burrow v. Philcox 5 Mylne & Craig 72.

In this case a power was given to a tenant for life, its terms were those of mere power, not of direction, recommendation, or request; and although it was limited in its execution to a particular class, the donee had an unlimited right of selection. It was a power to dispose of by will, all the real and personal estate of the testator among his nephews and nieces, or their children, either all
to one of them, or to as many of them as the donee of the power might think proper. The counsel for the defendants relied upon each and all of the distinguishing circumstances that have been spoken of, as proving that the power did not impose a duty of execution, but vested in the donee an absolute discretion, wholly inconsistent with the supposition that the nephews and nieces, and their children, took any interest as cestui que trust; and the lord chancellor overruled all their arguments and objections, by holding that the power was not discretionary, but imperative, and was in effect a gift to all the nephews and nieces, and their children, subject only to the power of selection given to the donee. The case is very fully reported, and the opinion of Lord Conttenham is particularly able and lucid, and leaves no doubt whatever as to the true grounds of his decision. He remarked that much argument had been urged upon the ground, that the donee of the power had no estate in the property under the will, beyond a life estate; but that in his view of the case, this was quite immaterial. It was not, indeed, one of these cases in which expressions are added, as to the disposition of the property, that are held per se to fix a
trust upon the gift, but that it was sufficient, if a declaration was found in the will, of who, in the events that had happened, were to be the cestui que trust, and when that is sufficiently expressed, it is immaterial whether the donee of the power be also a trustee, or whether the trust be vested in others, it is immaterial in whom the fee is vested, at the time the power is to be executed, if the person to whom the property is to be, or may be, given by an execution of the power, are designed with sufficient certainty. There is then a trust in their favor. In reply to the objections arising from the unlimited right of selection, and the absence of recommendatory and precatory words, his lordship observed, that it was shown by the cases to which he had referred (Harding v. Glynn, Brown v. Higgs; and Witts v. Bodington 1 Atk. 469,) that when there is a general intention in favor of a class, and a particular intention in favor of individuals of that class to be selected by the donee of the power, and the particular intention fails, that selection not being made, the court will carry into effect the general intention in favor of the class. In every such case the power is so given as to make it the duty of the donee to execute it,
and the court will not permit the objects of the power to suffer by his negligence in its execution, but fastens a trust upon the property for their benefit. And after a careful analysis of the opinions of the master of the rolls, and of Lord Eldon, in *Brown v. Higgs*, his lordship arrived at the conclusion, that the general intention of the donor of the power to give to a class, is in all cases sufficiently proven when an authority and power are confided for selection and distribution; thus plainly saying, that words of mere authority have the same effect in creating a trust, as a positive direction. The words in their ordinary acceptation may be discretionary, but in a court of equity are mandatory. Connect together the several propositions, in the opinion of Lord Cottenham, and they will be found to correspond exactly with the provisions of the revised statutes, that a power is always a trust, when a disposition is limited to be made to a class and that if, it is accompanied by a right of selection, and remains unexecuted, its execution must be decreed in equity, for the benefit equally of all who are its object.

**IMPERATIVE POWER NOT INVOLVING PERSONAL DISCRETION.**

A testator, by will gave all his personal estate to
his son, J, for life and to him in fee in case of marriage and issue, but if he died without issue, the testator directed his executors who should then be surviving or the last survivor of them, to sell his real estate and distribute the proceeds among the testator's "next of kin, as personal estate, according to the laws of the state of New York for the distribution of intestate personal estate". The executors named were J and two others. J died without issue. Upon action brought by one who was the testator's sole next of kin at the death of J, for a construction of the will and the appointment of a trustee to carry out the unexecuted provisions, all the executors being dead, and in which action the children of certain persons who were next of kin at the time of the testator's death, but died before J, were made defendants, Held, that the authority to sell granted to the executors was a general power in trust under the statutes, (1 R.S. 762, §73-79, 96, 97,) and as it did not involve the exercise by the executors of individual choice and discretion, it did not die with them, but survived and vested in a court of equity having full power to compel the execution of

USE FOR LIFE WITH POWER OF APPOINTMENT AMONG DESCENDANTS, AND LIMITATION OVER, CONTINUED.

By a will made in 1807, the testator devised "the use and improvement" of certain real estate to his grandson, with power to dispose of the same to the children or grandchildren of the devisee, and for want of such children the will directed that the estate should descend to the testator's son and to his heirs. By a subsequent clause, the testator disposed of other real estate as follows: *I give the use of my house No. 205 and No. 207, to my grandson, and then to his children, as the other real estate is given.*

The learned Judge who wrote the opinion after a careful examination of the whole will, said: *To me, it seems very manifest that the testator looked forward to the time of the death of his grandson, for whose benefit, primarily, the property was intended, as the period when the title should finally and absolutely vest. He gave the use of the property to his grandson, and "then to his child or children." He meant that Campbell, his grandson, should have the benefit of it, so long as it should be
useful to him, and then, if he should die leaving descendants, that the property should rest in some or all of these. To this end he gave his grandson full power, by a testamentary disposition, to determine who, among his children, who might be living at the time of his death, should, and who should not, take the property. He was also authorized, in case he should die, leaving children, instead of giving the property to them, to give it to their children. He might discriminate between children and grandchildren, who should be living at the time of making the testamentary disposition, or passing by his children, he might give the property to his grandchildren generally. This I understand to be the import of the testator's language when he says: "I give unto my grandson full power to dispose of the before mentioned real estate by will, to any or either of his children, if he shall leave any, or to his grandchildren." But Campbell was then young and unmarried. He might never marry. He might have no children, or his child might die before the period for them to take the property should arrive. These contingencies were not lost sight of by the testator. He therefore proceeds to declare, that in case his grandson should die, without
leaving children or grandchildren to take the property, it should descend to his son Thomas C. Pearnall, and his heirs. Thus it was provided, that upon the death of Campbell, whatever else might happen, an absolute title to the property, in fee should vest somewhere, and the court held, that the grandson took a life estate, with remainder in fee to his children or grandchildren, and with an executory limitation over to the testator's son in case the grandson should leave no child or grandchildren living at the time of his death, also that the first born child of the grandson took a vested remainder in fee subject to open and let in after-born children, or grandchildren, and subject to be defeated by the execution of the power of appointment among the children (or grandchildren) given by the will to the testator's grandson.

Baker et al. v. Lorillard 4 N.Y. 257.

DOMMICK v. SAYRE 3 SANDFORD'S REP. 503.

Francis Domnick, deceased, by his last will and testament, devised eight lots of ground in the city of New York, to his daughter Margaret, during her life, and added to the devise these words: "With power to give the same by deed or will to any of the male descendants of my family
of the name of Dormick, and their heirs." The daughter, 
Margaret, by her will devised two of the lots to a nephew, 
who, subsequently to the execution of her will, died in her 
lifetime, and as by his death the devise in his favor be- 
came lapsed, the power given to the daughter, as to those 
two lots remains unexecuted, and the question is whether 
the power as created, implied a trust, the execution of 
which has developed upon the court. In other words, was 
the power merely discretionary, or must it be construed as 
 imperative?

If the exercise of the power vested in the mere dis- 
ccretion of the donee, it is a necessary consequence of the 
failure in its execution that an absolute fee is now 
vested in the heirs at law, or in the residuary devisees, 
but if the power as imposing a duty of execution is to be 
regarded as imperative, it has fastened a trust upon the 
lands, which we are bound to declare and enforce.

Held that the power was imperative, and created a 
trust in behalf of the class designated; and the donee of 
the power having failed to execute it effectually, that 
this court as a court of equity, must execute the same in 
their behalf. The extent of the estate or interest of the 
donee.
donee of the power in the lands of which it is the subject, does not affect its construction as a trust. If the power be given to a tenant for life, it is equally imperative, though it enables him to create an estate in fee.

CONCLUSION.

The author in completing his discussion of this article has fully come to the conclusion, from the English and American authorities that he has examined, that a power is always imperative, when its subject, that is, the property given, and its object, that is, the persons to whom it is given, are certain. Such a power is not to be construed as discretionary, because the terms used are simply those of authority, and not terms of discretion, request, or recommendation.

This the author believes to be the law in this state although it has never been passed upon by the court of last resort, and the author has been informed to the contrary by eminent counsel. 

Clarence G. T. Smith.