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LIFE ESTATES WITH POWER TO CONSUME: RIGHTS OF CREDITORS, PURCHASERS AND REMAINDERMEN: A STUDY OF NEW YORK REAL PROPERTY LAW SECTIONS 149-153

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INTRODUCTORY

A life owner of real or personal property has, by virtue of his estate or interest, the right to the income or use and enjoyment of the property during his life. Neither he nor his creditors can ordinarily consume the corpus or sell out the remainderman or reversioner. If, however, the life owner has been given a legal power to consume or dispose of the corpus or principal for his own benefit, both purchasers and remaindermen are interested in the interpretation and scope of the life tenant's power. Likewise, the rights of his creditors, as well as the rights of the creditors of the remainderman, may be affected. It is the object of this paper to point out briefly the rights and powers of the several parties in this situation, with special reference to the New York statutes.¹ It will be necessary first to outline three typical situations in which the problems suggested above may arise.

TYPICAL SITUATIONS

(1) The common law recognized as valid a conveyance or devise of land to *X* and his heirs, for the use of such person or persons as *A* might subsequently appoint; or for the use of *B* and his heirs until *A* should appoint the land to others, and then to the use of *A*'s appointees.² (2) The common law also permitted a conveyance or

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¹For a collection of cases dealing with the rights and duties of the life tenant with a power to anticipate or enjoy the principal, in states which do not have a statutory system of powers, see (1919) 2 A. L. R. 1243; (1923) 27 *ibid.* 1381; (1930) 69 *ibid.* 825.

²Co. Litt. (Butler & Hargreave's 1st Am. ed. 1853) *271b, n. 1, VII. 1; REEVES, REAL PROPERTY, SPECIAL SUBJECTS (1904) § 624. For a general historical treatment of powers, see 7 HOLDSWORTH, HISTORY OF ENGLISH LAW (1926) 149 *et. seq.*

devise to *X* and his heirs, for the use of *A* for life, with a power in *A* to appoint the remainder in fee, followed by a gift over in default of appointment.³

In both these situations, *A*'s creditors could not reach the land over which *A* had the general power of appointment. He could not be compelled to execute his power in their favor.⁴ In equity, however, the rule was laid down that *A* ought to execute his power of disposition in favor of his creditors, if he executed it at all. Consequently, if *A* executed his power, equity treated as done that which *A* ought to have done and secured the property for his creditors, at least as against a volunteer.⁵ The estate of the remainderman in the gift over could not be reached by *A*'s creditors unless *A* executed his power.

These rules were applied to a conveyance or bequest of personal property to *A* for life, with power to consume, or to dispose of the principal or corpus for his own benefit, followed by gift over to *B* of what remained at *A*'s death.⁶ If *A* did not dispose of the property

³I SUGDEN, *POWERS* (3d Am. ed. 1856) *120; see *KALES, ESTATES FUTURE INTERESTS* (2d ed. 1920) § 726 (legal life estate with a power, citing Illinois cases).

⁴*KALES, op. cit. supra* note 3, § 638; 4 *KENT, COMM.* (14th ed. 1896) *339-340; *Brandeis v. Cochrane*, 112 U. S. 344, 5 Sup. Ct. 194 (1884); *United States v. Field*, 255 U. S. 257, 264, 41 Sup. Ct. 256, 258 (1920); *Holmes v. Coghill*, 7 Ves. 498 (1802); *In re Harvey's Estate*, L. R. 13 Ch. Div. 216 (1878).

Cf. *WILLIAMS, REAL PROPERTY* (24th ed. 1926) 456, dealing with the rights of creditors under the common law and as modified by English statutes.

⁵In *FARWELL, POWERS* (1874) it is said at 271, "...both real and personal estate over which a man has a general power of appointment becomes assets for the payment of his debts, if the power has been validly exercised in favor of volunteers... The donee of the power having by his appointment displaced the title of those taking estates subject to the power, and so rendered the property his own absolutely, the court treats it in like manner, follows this out to all its legitimate consequences, and treats his rights acquired under a general power as equivalent to absolute ownership." See 2 *SUGDEN, loc. cit. supra* note 3; (1929) 59 A. L. R. 1510; *Brandeis v. Cochrane, supra* note 4, at 352, 5 Sup. Ct., at 197; *United States v. Field, supra* note 4, at 263, 41 Sup. Ct. at 258.

⁶*SUGDEN, loc. cit. supra* note 3, says that the rule for real and personal property is the same. To the same effect, see *KALES, loc. cit. supra* note 3; *HOLDSWORTH, op. cit. supra* note 2, at 159; *Reith v. Seymour*, 4 Russ. 263 (1828).

It is to be noted, however, that the common law did make certain distinctions with reference to gifts of *personalty*. Thus in 2 *JARMAN, WILLS* (7th Eng. ed. 1930) 1156, it is said that "[t]here are some cases in which a combination of a life interest in *personalty*, with a power of appointment or disposition over the corpus, may in effect be an absolute gift, without any necessity for the donee

in the manner provided, his creditors were without remedy, and *B*'s claim to the undisposed of portion was protected.⁷ No distinction seems to have been made between a life estate to *A* with a power of appointment over the remainder, and a life estate to *A* with power to consume or sell the principal and use the proceeds for his own benefit. In each case, *A*'s creditors could reach the corpus or principal only if *A* exercised his power. If *A* did not exercise his power, the creditors were without remedy.⁸

(3) The common law thought it was wholly illogical to give property to *A* in fee, and at the same time take it away by an executory devise over to *B* if *A* failed to alienate or devise the property. And so, where an *absolute interest* in real or personal property was conveyed or devised to *A*, followed by a gift over to *B*, if *A* failed to alienate or consume the property during his lifetime,⁹ or upon *A*'s death intestate, the common law decisions reached the

of the power either to exercise or release it." This is often a question of the testator's intention as interpreted by the courts. See *ibid.* 1157.

The difference between power and property is explained in *Ex parte Gilchrist*, 17 Q. B. D. 521 (1886). By the English Married Women's Property Act, married women became subject to bankruptcy in respect of their separate property. The question before the court was whether the bankrupt donee of an unexecuted power of appointment had "separate property" within the meaning of the Act. It was held that she did not. See the opinion of Fry, L. J., at 530 *et. seq.* For the distinction between property and a power, see also GOODEVE AND POTTER, MODERN LAW OF REAL PROPERTY (1929) 344. Cf. *Bradly v. Westcott*, 13 Ves. 445 (1807).

See also *KALES, op. cit. supra* note 3, §§486-494, dealing with life interests in specific chattels personal which may be consumed.

⁷ *SUGDEN, op. cit. supra* note 3, at *199, 200; *Keniston v. Mayhew*, 169 Mass. 166, 47 N. E. 612 (1897); *Russell v. Eubanks*, 84 Mo. 82 (1884); *Henninger v. Henninger*, 202 Pa. 207, 209, 51 Atl. 749, 750 (1902); *Pennock v. Pennock*, L. R. 13 Eq. 144 (1871); *In re Thomson's Estate*, L. R. 13 Ch. Div. 144 (1878); and see 2 *SUGDEN, supra* at *124, to the effect that a contract to execute a power in favor of a remainderman (where that is possible) will be enforced in favor of the remainderman.

⁸ *Supra* note 4. See *Cutting v. Cutting*, 86 N. Y. 522, 529 (1881) "...[W]here a person has a general power of appointment by will over property and has exercised the power, the property thus appointed forms a part of his assets, and is subject to the claims of creditors;..." Conversely, if the life tenant did not execute the power, his creditors could not reach the property, *REEVES, op. cit. supra* note 2, § 632.

⁹ *KALES, op. cit. supra* note 3, §719; *GRAY, RESTRAINTS ON ALIENATION OF PROPERTY* (2d ed. 1895) §74c *et. seq.*; *Ide v. Ide*, 5 Mass. 499 (1809); *Shaw v. Ford*, L. R. 7 Ch. Div. 669 (1877). As to personalty see *GRAY, supra* §65 *et. seq.*

result that *A* took the fee absolutely, and *B*'s interest was void.²⁰ The result was the same if the gift over to *B* was of that portion of the property undisposed of at *A*'s death.²¹ Three reasons were given for these results: (a) it was said the gift over was repugnant to the absolute interest previously given to *A*;²² (b) it was said that an executory devise could not be created to take effect upon the exercise of any of the rights incident to the prior estate, and that descent upon intestacy was a necessary incident of *A*'s estate;²³ (c) as to personal property, it was said that the interest of the donee in the gift over was too uncertain, and the difficulty of proving what remained at *A*'s death too great.²⁴ The first reason suggested is based upon a purely metaphysical concept; the second may possess some merit, particularly in respect of real property;²⁵ the third reason has considerable merit, but is applicable only to personal property.²⁶

This doctrine was followed in New York in *Jackson v. Robbins*,²⁷ where Chancellor Kent reasoned that an executory devise, limited

²⁰GRAY, *op. cit. supra* note 9, §§57, 58 *et. seq.*; *Jackson v. Robins*, 16 Johns. 537 (N. Y. 1819); *Ross v. Ross*, 1 Jac. & W. 154 (1819); *Holmes v. Godson*, 8 De G. M. & G. 152 (1856).

²¹*Watkins v. Williams*, 3 Macn. & G. 622 (1851).

²²*Ross v. Ross*, *supra* note 10 (personal property); *Holmes v. Godson*, *supra* note 10 (real property); and see, GRAY, *op. cit. supra* note 9, §74 *et. seq.* Professor Gray also points out, §74f, that no judge has ever given a rational explanation for the rule, and notable judges have spoken of it with thinly veiled contempt.

²³*Shaw v. Ford*, *supra* note 9.

²⁴*Watkins v. Williams*, *supra* note 11, where Lord Chancellor Truro said, at 629: "Now, it is a rule that, where a money fund is given to a person absolutely, a condition can not be annexed to the gift, that so much as he shall not dispose of shall go over to another person. Apart from any supposed incongruity, a notion which savours of metaphysical refinement rather than of anything substantial, one reason which may be assigned in support of the expediency of this rule is, that in many cases it might be very difficult, and even impossible, to ascertain whether any part of the fund remained undisposed of or not; since, if the person to whom the absolute interest is given left any personalty, it might be wholly uncertain whether it were a part of the precise fund which was the subject of the condition or not." Note that as to personalty the New York Court seems to suggest that the remaindermen have the burden of tracing the funds. *Seaward v. Davis*, 198 N. Y. 415, 421-422, 91 N. E. 1107, 1108 (1910).

²⁵GRAY, *op. cit. supra* note 9, §64.

²⁶*Ibid.* §65 *et. seq.*, where the writer points out that the cases do not hold the same way with regard to personalty, not because of the difficulty of tracing personalty, but because the courts simply follow the realty holdings.

²⁷*Supra* note 10, at 583.

upon a contingency within the power of the first taker to defeat, was inconsistent and repugnant. This reasoning was also employed in *Van Horne v. Campbell*,¹⁸ which was decided in 1885 but involved a will that became operative in 1791.

While this rule of the common law was not expressly abrogated by the Revised Statutes,¹⁹ the life has been taken out of it for all

¹⁸100 N. Y. 287, 3 N. E. 316, 771 (1885), reargument denied in 101 N. Y. 608, 3 N. E. 901 (1885).

¹⁹GRAY, *op. cit. supra* note 9, says: "§56 g. [The New York Revised Statutes, Part 2, c. 1, tit. 2, art. 1, §32, p. 725, provides that 'no expectant estate can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent estate, by disseisin, forfeiture, surrender, merger, or otherwise.' The revisers doubtless were thinking of cases on the destruction of contingent remainders, and there is no reason to suppose they had in mind such limitations as are here discussed. But the lower courts of New York have held that, under the Revised Statutes, upon an estate in fee a gift over of what the devisee has not conveyed in his lifetime is good. *Greyston v. Clark*, 41 Hun, 125. *Simpson v. French*, 6 Demarest, 108. *Leggett v. Firth*, 53 Hun, 152. *Baumgras v. Baumgras*, 5 Delehanty, 8. In *Griswold v. Warner*, 51 Hun, 12, however, such a gift was held bad; and no suggestion was made by the court as to any change being wrought by the Revised Statutes. The point does not seem to have been passed upon by the Court of Appeals. Cf. *Leggett v. Firth*, 132 N. Y. 7]"

An analysis of the cases cited by Professor Gray shows: (1) in the *Baumgras* decision the court interpreted the language of the will as being a life estate plus a power to use and consume the principal, and this holding is based on *Leggett v. Firth*, in the Court of Appeals. (2) In the *Greyston* case and the *Simpson* case the lower court did state that the common law rule of repugnancy was abolished by §57 of the N. Y. R. P. L. It is to be noted, however, with respect to the history of these opinions, that (a) the *Greyston* case was cited in *Crozier v. Bray*, 120 N. Y. 366, 24 N. E. 712 (1890), but here again the Court of Appeals interpreted the language of the litigated will as a life estate plus a power to consume. The *Greyston* case was also cited by the Appellate Division in *Hallinan v. Skillen*, 227 App. Div. 125, 128, 237 N. Y. Supp. 141, 144 (1st Dept. 1929). However, this case was reversed by the Court of Appeals in a memorandum decision, 253 N. Y. 550, 171 N. E. 777 (1930), on grounds that are not clear. (b) The *Simpson* case cites *Terry v. Wiggins*, 47 N. Y. 512 (1872), as authority for the proposition that the common law rule of repugnancy was abolished by N. Y. R. P. L. §57, but at most this statement is *obiter* because the court in the *Terry* case interpreted the will as being a life estate plus a power to consume. The Court in the *Simpson* case cites *Wager v. Wager*, 96 N. Y. 164 (1884), as sustaining the general proposition, but in the *Wager* case, at 174, we find this interesting statement: "When provisions are irreconcilably conflicting, one must give way to the other, and that must be adopted which seems to accord most clearly with the testator's primary object in executing the instrument, but when by limiting the character of the first estate; the second may also be preserved, it is clearly the duty of the court to do so unless such a

practical purposes by the mysterious processes of interpretation. The courts have evaded the common law rule of repugnancy by construing an apparently absolute gift to *A* with power to convey and consume, when followed by a gift over to *B* of all that remains at *A*'s death, as only a life interest in *A* coupled with a power to dispose of the remainder, followed by a valid remainder in expectancy to *B*.²⁰ However, in the recent case of *Tillman v. Ogren*,²¹ while the Court

construction is subversive of the general scheme of the will, or forbidden by some inflexible rule of law." (c) As to *Leggett v. Firth*, cited by Gray, the Court of Appeals affirmed the holding of the lower court to the effect that the gift over was not void for repugnancy, but the Court's affirmation seems to be based on interpreting the language of the will as creating a *life estate plus a power to dispose*.

The notes to REV. STAT. § 32 (Part 2. Ch. 1.) which is now § 57 of the R. P.L., make it perfectly clear that the Revisers in proposing this section, had in mind simply the technicalities and difficulties of the common law rule of destructibility, and an intention to abolish it, to reduce expectant estates to the same class, and to make contingent remainders indestructible, in the same manner as executory devises. "The object of this section", as stated by the Revisers, "is to extend to every species of future limitation, the rule that is now well established in relation to an executory devise, namely that it cannot be barred or prevented from taking effect by any mode whatever. If it is consistent with public policy that the owners of lands should be permitted to restrain their alienation, by the creation of future contingent estates, it seems reasonable that they should be protected in the exercise of the power thus given, and that the law should not suffer their intentions to be frustrated by any fraud or device whatever. Where a future limitation is called an executory devise, it receives full protection from the law, yet no reason is perceived why the intentions of the party creating a future estate, ought not to be held equally sacred, whatever may be the technical name of the estate so created."

There is no doubt that the doctrine of repugnancy which is more than a hundred years old is still a live issue in litigation; see, for example, the discussion by Valente J. (in 1929), in *Hallinan v. Skillen*, *supra*.

²⁰*Leggett v. Firth*, 132 N. Y. 7, 29 N. E. 950 (1892). In *Matter of Blauvelt*, 131 N. Y. 249, 30 N. E. 194 (1892), *B*, by will, gave all property to *W* with permission to sell "as to her shall seem just." This was held to be a life estate plus a power to consume. *Accord*: *Seaward v. Davis*, *supra* note 14. See *Trustees of Theological Seminary of Auburn v. Kellogg*, 16 N. Y. 83 (1857) where there was a gift of real and personal property to *Chloe*, heirs and assigns, but if she die without issue to the seminary. Title vested in a guardian who had the power to apply proceeds of the estate for support of *Chloe*. It was held that the legacy to the seminary was not repugnant because the guardian had only a conditional rather than an absolute power to dispose. See also the dissent of Laughlin, J., in *Kelley v. Hogan*, 71 App. Div. 343, 76 N. Y. Supp. 5 (1st Dept. 1902).

²¹227 N. Y. 495, 125 N. E. 821 (1920), reargument denied in 228 N. Y. 559, 127 N. E. 922 (1920).

of Appeals stated that the common law rule had been abolished, they reached the same result as the common law upon the ground that, as a matter of interpretation, the testator did not intend the estate of the first taker to be cut down, and the gift over was therefore in fact repugnant.²² This is indeed a fine distinction.

Thus the common law doctrine of repugnancy has been emasculated and the cases which formerly fell under its condemnation are generally assimilated to type (2) above: that is, a conveyance or devise of real or personal property to *A* for life, with a power in *A* to appoint or dispose of the remainder for his own benefit, followed by a gift over in default of appointment, or a gift over of all that remains undisposed of at *A*'s death.

As we have seen, situations (1) and (2) presented problems in the common law of powers. Situation (3) did not, at common law, present any problem in powers.^{22a} It is to be noted in the latter, however, that when the courts obviated the harshness of the common law rule of repugnancy by construing the absolute estate of the first taker as a life estate plus an added power, they subjected this case to the hazards of the law of powers. This type of gift is a convenient means of providing for the testator's wife or other dependents, for life, with the added flexible feature of enabling them to encroach on the principal or dispose of the remainder, with a gift over of all that remains at their death. But after thus changing the interest of the first taker from an absolute estate to a life estate plus a power, the courts were compelled to look to the law of powers in interpreting the rights of creditors, purchasers and remaindermen. We are now prepared to discuss the effect of the New York Statute upon the rights of the various parties in the three cases outlined.

THE STATUTORY SYSTEM OF POWERS

A statutory system of powers was enacted by the New York legislature in 1828,²³ as part of that chapter of the Revised Statutes which

²²In *Matter of Ithaca Trust Co.*, 220 N. Y. 437, 441, 116 N. E. 102, 103 (1917), the court said, without referring to §57 of the R. P. L., "A remainder can not be limited upon an *absolute* estate in fee. Where a gift is provided by will and such gift is intended to be *absolute*, a gift over is repugnant to such absolute gift and void and the purported gift over must be treated as a mere expression of a wish or desire regarding the distribution of such part of the gift as may remain undisposed of at the death of the donee." This was quoted with approval in *Tillman v. Ogren*, *supra* note 21.

^{22a}*Cf.* PROPERTY RESTATEMENT (Am. L. Inst. 1931) TENTATIVE DRAFT No. 3 § 155, Comment C.

²³The statutory system of powers was contained in Part II, Ch. I, Title II, Art. III, of the Revised Statutes. It is now embodied in N. Y. CONS. LAWS

embodied far-reaching reforms in the law of real property.²⁴ The Revisers, in notes appended to the article on powers, tell us the reasons for the reforms proposed and the objects sought to be accomplished. They say, in part:²⁵

"If the first and second Articles of this Title are adopted, a new regulation of powers in relation to lands, becomes indispensable, since it is from the statute of uses that such powers, as they are

c. 52 (Real Prop. Law) §§130-182 incl. For convenience, all future references in this article will be made to the sections of the Real Property Law without reference to the corresponding sections of the Revised Statutes. Unless otherwise stated, a reference to a statutory section is intended as a reference to the Real Property Law.

The following states have also adopted a statutory system of powers and have made changes as indicated:—

ALA. CODE ANN. (1928) §6928 is substantially like N. Y. R. P. L. §149. (See the Annotation to this section of the Alabama law). §§6929-30 are substantially like N. Y. R. P. L. §§150-151. §6931 combines §§152-153 of the N. Y. R. P. L. into one section defining absolute power of disposition. D. C. CODE (1929) tit. 25, §§395-398 incl.; MICH. COMP. LAWS (1929) §§13003-13007 incl.; MINN. STAT. (Mason, 1927) §§8115-8119 incl.; N. D. COMP. LAWS ANN. (1913) §§5421-5425 incl., are substantially like §§149-153 of the N. Y. R. P. L. OKLA. COMP. STAT. ANN. (1921) §§8522-8525 incl. are substantially like §§149-152, N. Y. R. P. L. §8526 which corresponds to N. Y. R. P. L. §153 says: "Every power of disposition is deemed absolute, by means of which the holder is enabled in his lifetime to dispose of the entire fee, in possession or expectancy, for his own benefit." S. D. COMP. LAWS (1929) §§426-429 incl. are substantially like §§149-152 of the N. Y. R. P. L. §430 which corresponds to §153 of the N. Y. R. P. L. makes the same change that Oklahoma does, *supra*. WIS. STAT. (1927) §§232.08-232.12 are substantially like §§149-153 of N. Y. R. P. L.

²⁴The legislature authorized a general revision of the statutes of New York on Nov. 27, 1824. James Kent, Erastus Root and Benjamin F. Butler were appointed revisers, but Kent declined, and John Duer was appointed to the vacancy by Gov. Yates. In 1825 the two younger revisers, Duer and Butler, asked and received a grant of larger power, and thereafter they had practically a free hand in codifying the laws of the state. Root having retired, Henry Wheaton was substituted, but he resigned in 1827, and John C. Spencer was appointed to fill his place, April 21, 1827. All of Part One of the Revised Statutes and all of Part Two except Chapter I, were adopted by the legislature in a special session, which began Sept. 11, 1827, and continued for fifty-three days. The work was continued in the regular session of 1828 and another special session in the autumn. The entire body of the Revised Statutes was adopted on December 10, 1828, to take effect on January 1, 1830.

²⁵The notes of the revisers will be found in their report to the legislature (1828), and in the second and third editions of the Revised Statutes. An interesting and valuable account of the revisers and their work will be found in BUTLER, THE REVISION AND THE REVISERS (1889). The discussion of Powers may be found in 3 REVISED STATUTES OF NEW YORK (2d ed. 1836) 588-9.

now constituted, derive their efficacy.^[29] We regard it as one of the chief benefits to result from the abolition of uses, that it affords an opportunity of placing the doctrine of powers on rational grounds, by bringing them to the state of our society, and the policy of our institutions.

"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. Few, in the course of their studies, have been called to enter it, who have not found it difficult to grope their way in its numerous and winding passages. In plain language, it abounds pre-eminently in useless distinctions and refinements, difficult to be understood, and difficult to be applied, by which a subject, in its own nature free from embarrassment, is exceedingly perplexed and darkened. . .

"Nor is it merely because it is mysterious and complex, that a reform in this part of the law is desirable. It is liable to still more serious objections, since, as will appear in the course of our remarks, 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.

"The present division of powers, is into powers: 1. Appendant or appurtenant. 2. Collateral or in gross. 3. Simply collateral."

After commenting upon this common law classification, and pointing out how at common law, by means of powers, lands were placed beyond the reach of the creditors of the grantor as well as of the creditors of the grantee, the notes then contain the following paragraph with reference to the protection of creditors:

"That a change of the existing law is here not merely proper, but necessary, will be admitted by all; and it is probably needless to offer any remarks in favor of the regulations that we propose. In reason and good sense, there is no distinction between the absolute power of disposition and the absolute ownership; and to make such a distinction, to the injury of creditors, may be very 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 his 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. We apprehend the legislature will have no difficulty in declaring, that so far as creditors

²⁹REEVES, *loc. cit. supra* note 2.

and purchasers are concerned, the power of disposition shall be deemed equivalent to the actual ownership. It may perhaps be doubted, whether a general power to devise, annexed to a previous estate, should be considered an absolute power of disposition; but there are obvious means, by which, with the aid of this power, the tenant for life or years may acquire, even in his lifetime, the entire domination of the property."

For the accomplishment of these objects, the Revisers proposed, and the legislature adopted, a statutory system of powers, purporting to abolish entirely the common law system. A new classification of powers was adopted, that is, general and special, beneficial and in trust. A general power was defined as one authorizing the transfer or incumbrance of a fee, by either a conveyance, will or a charge, in favor of any grantee whatever.²⁷ A power was called special when the class of persons to whom the disposition could be made was limited, or when the power authorized the transfer or incumbrance of an estate less than a fee.²⁸ A power was defined as beneficial where no person, other than the grantee thereof had any interest in its execution,²⁹ as in trust, where some person or class of persons, other than the grantee thereof, was designated as entitled to the proceeds or benefits.³⁰

We are particularly concerned with the sections in which the Revisers provided for the protection of creditors, purchasers, incumbrancers and remaindermen.³¹ These are now contained in Real

²⁷N. Y. R. P. L. §134.

²⁸N. Y. R. P. L. §135.

²⁹N. Y. R. P. L. §136.

³⁰N. Y. R. P. L. §137.

³¹It is to be noted that these sections (149-153), exclusive of §151, do not operate to give the first devisee on absolute fee, but merely give him an absolute fee in respect to purchasers, creditors, and incumbrancers. Thus *Matter of Sonnenburg*, 133 Misc. 42, 231 N. Y. Supp. 191 (Surr. Ct. 1928) holds that for taxing purposes, a devisee for life with a power to use the income and principal does not have an absolute estate for taxation. It is not within the scope of this article to deal with taxation of such estates. To the same effect with respect to dowers, see *Barri v. Howell*, 85 Misc. 330, 147 N. Y. Supp. 483 (Sup. Ct. 1914).

However, under N. Y. R. P. L. §151, a devisee with a power to use or dispose of the principal, has a fee where no remainder is limited thereon. *Ward v. Stannard*, 82 App. Div. 386, 81 N. Y. Supp. 906 (2d Dept. 1903); *Ryder v. Lott*, 123 App. Div. 685, 108 N. Y. Supp. 46 (2d Dept. 1908), *aff'd*, 199 N. Y. 543, 93 N. E. 1131 (1910); *West v. West*, 215 App. Div. 285, 213 N. Y. Supp. 480 (2d Dept. 1926); *Cf. Rose v. Hatch*, 125 N. Y. 427, 433, 26 N. E. 467, 469 (1891); and see *Phillips v. Wisner*, 75 Misc. 278, 132 N. Y. Supp. 1006 (Sup. Ct. 1912), *aff'd*, 152 App. Div. 911, 137 N. Y. Supp. 1138 (2d Dept. 1912). (memo.).

Property Law, Sections 149-154, and 159. It will be necessary to have before us the language of the sections:

"§149. *When estate for life or years is changed into a fee.* Where an absolute power of disposition, not accompanied by a trust, is given to the owner of a particular estate for life or for years, such estate is changed into a fee absolute in respect to the rights of creditors, purchasers and incumbrancers, but subject to any future estates limited thereon, in case the power of absolute disposition is not executed, and the property is not sold for the satisfaction of debts.

"§150. *Certain powers create a fee.* Where a like power of disposition is given to a person to whom no particular estate is limited, such person also takes a fee, subject to any future estates that may be limited thereon, but absolute in respect to creditors, purchasers and incumbrancers.

"§151. *When grantee of power has absolute fee.* Where such a power of disposition is given, and no remainder is limited on the estate of the grantee of the power, such grantee is entitled to an absolute fee.

"§152. *Effect of power to devise in certain cases.* Where a general and beneficial power to devise the inheritance is given to a tenant for life, or for years, such tenant is deemed to possess an absolute power of disposition within the meaning of and subject to the provisions of the last three sections.

"§153. *When power of disposition absolute.* Every power of disposition by means of which the grantee is enabled, in his lifetime, to dispose of the entire fee for his own benefit, is deemed absolute.

"§154. *Power subject to condition.* A general and beneficial power may be created subject to a condition precedent or subsequent, and until the power becomes absolutely vested it is not subject to any provisions of the last four sections. . .

"§159. *Beneficial power subject to creditors.* A special and beneficial power is liable to the claims of creditors in the same manner as other interests that can not be reached by execution; and the execution of the power may be adjudged for the benefit of the creditors entitled."

Notwithstanding that this statutory system of powers was enacted with reference to real property, the courts of New York have applied it equally to disposition of personal property.²² This result has been

²²Hutton v. Benkard, 92 N. Y. 295 (1883) (rule same for personalty as for real property); Matter of Moehring, 154 N. Y. 423, 48 N. E. 818 (1897) (to the same effect). On the collateral problem of applying the real property law with respect to suspension of alienation to personal property, see White-side, *Suspension of the Power of Alienation in New York*, (1928) 13 CORNELL LAW QUARTERLY, 31 and 75, at 87.

reached ostensibly by an interpretation of the provision in Personal Property Law, Section 11, that "...[i]n other respects limitations of future or contingent interests in personal property, are subject to the rules prescribed in relation to future estates in real property."³³ In fact it has been achieved through the processes of judicial legislation. It may be justified on the grounds of convenience, since it would be most awkward and confusing to administer the statutory system of powers for real property and a distinct common law system for personal property.³⁴

CASES NOT WITHIN THE STATUTE

Before taking up the rights of creditors, purchasers and remaindermen under these sections, it will be necessary to mention briefly

³³Not all the states which adopted a statutory system of powers are in accord with New York in applying those statutes to personal property.

It is not clear that Alabama also applies its system of powers to personalty. See *Braley v. Spragins*, 221 Ala. 150, 128 So. 149 (1930), where in construing a will devising real and personal property, the court made no distinction between the two. The court, however, was concerned only with an action for partition of the real property devised under the will. Cf. *Pitts v. Howard*, 208 Ala. 380, 94 So. 495 (1922), where the court interpreted the language of the litigated will as devising an absolute interest in the personal property and a life estate plus a power as to the real property. ALA. CODE ANN. (1928) §6937 provides: "When a disposition under a power is directed to be made by, between, or among several persons, without specifying the sum or share to be allotted to each...all the persons designated are entitled to an equal proportion; but when the terms of the power import that the estate or *fund* to be distributed..." (Italics are the writers'). This would seem to indicate that the legislature intended to include personal property within the scope of the system of powers.

The following states limit the statute on powers to real property: D. C. CODE (1929) tit. 25, §391; MICH. COMP. LAWS (1929) §12996; MINN. STAT. (Mason, 1927) §8108; N. D. COMP. LAWS ANN. (1913) §5381; OKLA. COMP. STAT. ANN. (1921) §8482; S. D. COMP. LAWS (1929) §388.

Wisconsin follows New York and makes its system of powers applicable to personal property. *Cawker v. Dreutzer*, 197 Wis. 98, 221 N. W. 401 (1928). See *Rundell, Perpetuities in Wisconsin*, (1926) 4 WIS. L. REV. 1. discussing Wisconsin legislative enactments which followed New York.

³⁴Cf. the language of Chief Judge Andrews in *Cochrane v. Schell*, 140 N. Y. 516, 534, 35 N. E. 971, 976 (1894). "There is a manifest propriety in assimilating as far as practicable the rules governing trusts and limitations of real and personal property, and the tendency in this direction has been very marked in the decisions of the courts...It would be unfortunate, we think, if it was necessary to distinguish between trusts of real and personal property for the payment of annuities out of income, holding such trusts valid as to one species of property and void as to the other."

certain cases which, by reason of the interpretation of the conveyance or devise, are taken out of the scope of the statute.

It may sufficiently appear that the testator did not intend the life tenant to have any power to consume or convey. Thus, in *Matter of Felt*,³⁵ the testator, after specific devises and bequests, gave the residue of his real and personal property to his wife "to have and use during her lifetime", and by subsequent clauses of the will he disposed of \$25,000 in bequests "upon the death of my wife", and provided for a gift over the residue upon her death. These dispositions showed that the language first used did not authorize her to consume the principal in her lifetime. So also, in *Mee v. Gordon*,³⁶ an apparently absolute gift to the testatrix' brother was cut down by a modifying clause in which she directed that the share of the brother should be invested for his benefit during life, and for his wife and issue after his death.

On the other hand, the court may be convinced that the estate conveyed is not intended as a life estate, with a power to consume, but as an absolute fee. In *Crain v. Wright*,³⁷ the testator devised fifty acres to his widow "to have and to hold for her support". The will contained a residuary clause in favor of the testator's son. The court interpreted the gift to the wife as a fee absolute,³⁸ not cut down by the general residuary clause in favor of the son. In *Tillman v. Ogren*,³⁹ a gift of a residue to the testatrix' husband, his heirs and assigns, "with the understanding" that at his decease all of the estate remaining undisposed of "he shall give" to A, was interpreted as conveying the estate to the husband absolutely.⁴⁰

Where the grantor creates a trust for his own benefit or for the benefit of another for life, with or without power in the trustee to reconvey, sell or dispose of the property, followed by a direction that

³⁵235 N. Y. 374, 139 N. E. 545 (1923).

³⁶187 N. Y. 400, 80 N. E. 353 (1907).

³⁷114 N. Y. 307, 21 N. E. 401 (1889).

³⁸It is interesting to note that the court might have reached the same result under §149. Here the widow sold the property and the plaintiff-purchaser took title through her. Under §149 the purchaser would have taken a fee simple. The court, however, rests its decision on its interpretation of the will as stated above.

³⁹*Supra* note 21.

⁴⁰*See* *Matter of Enright*, 109 Misc. 337, 179 N. Y. Supp. 757 (Surr. Ct. 1919), where the court in construing a will, interpreted the words limiting the gift over to be merely precatory, and hence the first devisee took an absolute fee. It is interesting to note that the court also relied on R. P. L. §§149-153, insofar as it says that if the words of the gift over are precatory, there is no remainder, and the devisee would take a fee simple absolute by virtue of R. P. L. §151.

upon the death of the life beneficiary the trustee give the property remaining to the grantor's heirs or next of kin, the heirs or next of kin take no estate but only an expectancy.^{40a} All interests not conveyed to the trustee for the life beneficiaries remain in the grantor, and the direction to the trustee to convey to heirs or next of kin is without legal effect. This is, however, a rule of construction, and may be varied by the disclosure of an intention on the grantor's part to vest in his heirs or next of kin an estate or interest.^{40b}

We are not, therefore, concerned with settlements in which by construction the life tenant has no power to dispose of the remainder, nor with those in which by construction the first taker has an absolute and indefeasible interest. Where the interpretation is that the settlor of a trust is the absolute owner of the interests remaining after the termination of the trust, he has the rights of an owner over this remainder or reversion, but not by virtue of the statute on powers. If the settlor is also the *cestui que trust*, and the trustee has the power to reconvey or dispose of the property for the benefit of the *cestui*, this does not present the case of a life tenant with a power over the remainder, since he is the owner of the remainder. If, however, the trust is for the benefit of another, with power in the life beneficiary to encroach upon, or appoint the settlor's reversion, the problems are the same as those discussed below in connection with trusts for life with added powers over the remaindermen.

RIGHTS OF CREDITORS UNDER THE STATUTORY SYSTEM OF POWERS

Prior to the Revised Statutes, as we have seen, a creditor could reach property in which his debtor had a life estate with a general

^{40a}*Doctor v. Hughes*, 225 N. Y. 305, 122 N. E. 221 (1919), where the court held that the ostensible remaindermen had no rights. Cf. *In re Hughes*, 262 Fed. 500 (C. C. A. 2d, 1919), where the bankrupt remainderman failed to schedule his "interest" in the property which was litigated in *Doctor v. Hughes*. The Federal court held that there was no concealment of assets, as the remainderman had no interest in the real property. See also *Livingston v. Ward*, 247 N. Y. 97, 159 N. E. 875 (1929).

^{40b}In *Whittemore v. Equitable Trust Co.*, 250 N. Y. 298, 165 N. E. 454 (1929), the situation was summarized by the court as follows: "...we have a trust created in personal property for the life of the beneficiary. At the death of the life beneficiary, the trustee is directed to do one of three things: pay the principal of the estate to the settlor, if he be alive; or, if he be dead, to pay it as directed in the settlor's last will...; or, if the settlor leave no will, to pay it to the persons who would then take under the Statute of Distributions." It was held that the next of kin of each settlor had a vested remainder, and that the trust could not be revoked, under R. P. L. §23 without the consent of the minor children of the settlor, these children being beneficially interested and unable to consent to revocation because they were minors.

power to appoint the remainder for his own benefit, provided the debtor exercised the power, notwithstanding that he exercised it in favor of someone other than the creditor. Equity said that the debtor must exercise his power in favor of his creditor if he exercised it at all. But if the debtor refused to exercise his power, the creditor was without remedy.⁴¹ These rules were abolished upon the adoption of the statutory system discussed above.⁴²

The Revised Statutes, however, creates new remedies for the creditor. Section 149 of the Real Property Law, quoted above, enables him to reach the property over which his debtor has a power, just as if the debtor had a fee absolute, provided: (a) the power is an absolute power of disposition, not accompanied by a trust; (b) the debtor is the owner of a particular estate for life or for years; and (c) notwithstanding any future estate limited thereon, if the power is not executed. Section 150 gives the creditor the same rights where his debtor has a like power but no particular estate in the land. Under Section 151, the grantee of the powers enumerated in Sections 149 and 150 takes an absolute fee for all purposes if no remainder is limited on his estate. "Absolute power of disposition" is defined in Sections 152 and 153. Under Section 152, a tenant for life or for years who has a general and beneficial power to devise the inheritance, has the absolute power of disposition; under Section 153, every power by means of which the grantee is enabled, in his lifetime, "to dispose of the entire fee for his own benefit", is deemed an absolute power of disposition.⁴³ While these sections do not in terms exclude the possibility that other powers may be absolute powers of disposition, the tendency of the courts, as we shall see, has been to interpret them narrowly and as requiring the creditor to prove that the power in question falls squarely within their provisions.

The chief problem, then, in delimiting the rights of creditors, is to decide whether the grantee of the power has the absolute power of disposition specified in the statute. If he does not have this absolute power of disposition, then the creditor can not invoke the protection of the statute. Moreover, he is without remedy under the previous common law system which was supplanted by the statute.

⁴¹See discussion *supra* note 5. See also, KALES, *op. cit. supra* note 3, §638.

⁴²N. Y. R. P. L. §130; See Cutting v. Cutting, *supra* note 8; Hutton v. Benkard, *supra* note 32.

⁴³aPROPERTY RESTATEMENT, *op. cit. supra* note 22a, §155 deals with life estates and powers and the Reporter recognizes the effect of such statutes as §149 *et. seq.* as to the protection of creditors.

The typical situation in which a creditor of the grantee of the power may treat the interest of the grantee as equivalent to an absolute fee is illustrated in *Matter of Davies*.⁴³ Fannie Davies devised and bequeathed real and personal property to her husband, David L. Davies, "...for use during his natural life, giving him full power to expend the principal, income, interest, rent and profits as he may see fit, upon his death such part of the principal, income, interest, rent and profits as may be unexpended, I direct shall be paid to my son Joseph Jones or his issue." After the death of David, his creditors claimed certain real property so devised, as against the son, David not having conveyed it. It was held, under Sections 149-153, that as to creditors, David had a fee absolute which the creditors could reach after his death. The right of a creditor is even more clear where there is no gift over in default of exercise of the power.⁴⁴

The problem is not, however, always so simple. Sections 149-153 afford no protection to creditors of the grantee of a power unless (a) the power is for the sole benefit of the grantee, (b) it is absolute in the sense that it is not limited by any contingency,⁴⁵ and (c) unless the grantee is enabled in his lifetime to dispose of the entire fee for his own benefit, whether or not he be a tenant for life or years, or is a tenant for life or years with a general and beneficial power to devise the inheritance.

Where the grantee of the power may sell, but must hold the proceeds in whole or in part for others, his power is not beneficial but in trust,⁴⁶ and it is obvious that his creditor should not be allowed

⁴³242 N. Y. 196, 151 N. E. 205 (1926).

⁴⁴*Wendt v. Walsh*, 164 N. Y. 154, 58 N. E. 2 (1900); *Ward v. Stannard*; *West v. West*, both *supra* note 31. And see *Ryder v. Lott*, *supra* note 31. It is not clear, in the latter case, whether the rights of creditors were involved, but the court says that the devisee had an absolute fee.

⁴⁵N. Y. R. P. L. §154; *Taggart v. Murray*, 53 N. Y. 233 (1873) (contingency that life tenant leave no heirs). See *Trustees of Theological Seminary of Auburn v. Kellogg*, *supra* note 20; *Rose v. Hatch*, *supra* note 31; *Higgins v. Downs*, 101 App. Div. 119, 91 N. Y. Supp. 937 (2d Dept. 1905).

⁴⁶N. Y. R. P. L. §137; *Kinnier v. Rogers*, 42 N. Y. 531 (1870) (executor with power to sell realty could convey good title free from the claims of the devisor's creditors); *Dana v. Murray*, 122 N. Y. 604, 26 N. E. 21 (1890) (executor empowered to sell property had to hold proceeds for the cestuis); *Townshend v. Frommer*, 125 N. Y. 446, 26 N. E. 805 (1891).

N. Y. R. P. L. §99 provides that if a trust fails, because directed to an unauthorized purpose, the trustee gets a power. For a discussion of this point, see *Whiteside*, *op. cit. supra* note 32, at 34. *But cf. Murray v. Miller*, 178 N. Y. 316, 70 N. E. 870 (1904) holding that where a trust for an unincorporated charity is invalid, the power in trust is likewise invalid.

to reach the property or the proceeds, at least to the extent that the grantee holds for the benefit of others.⁴⁷ That the creditor can not reach any part of the property is clear, since the grantee's power is not beneficial as is required by both Sections 152 and 153 for an absolute power of disposition; nor may the grantee's creditor proceed under Section 159, where the power is in trust, since that section also applies only where the power is beneficial.

Where the grantee's power is general and beneficial, but subject to a condition, it is not an absolute power of disposition until the condition happens and the power becomes absolutely vested.⁴⁸ Consequently, until the condition happens, creditors are entitled to no protection under Sections 149-153. This limitation is important where a life tenant or other grantee can consume or convey for necessary support and maintenance only.⁴⁹ While the courts are not inclined to substitute

⁴⁷In *Haynes v. Sherman*, 117 N. Y. 433, 22 N. E. 938 (1899), there was a devise to *W* in trust, to hold the estate and use so much of the income and principal as she might deem necessary for the support of herself and the children, with provision to divide the estate among *T*'s legal heirs living when the youngest child reached 21. The court held that the trust for more than two lives was invalid; and that *W* did not have the absolute power to dispose of the estate, since she was clothed with a power for the benefit of the children. There were no creditors' rights involved in the case. See *Matter of Davies*, *supra* note 43, at 200, 151 N. E., at 206, where the court speaking of §149, says: "In order to avail themselves [the creditors] of its provisions they must show first, that the decedent received an absolute power of disposition within the meaning of the statute;..." Cf. *Ackerman v. Gorton*, 67 N. Y. 63 (1876). Here there was a devise of land to *W* for life, remainder to the children equally. *W* was authorized to sell subject to the approval of all the testator's heirs surviving at the time of sale. There was a sale by *W* in accordance with the condition. Although a judgment had been docketed against one of the children prior to the sale, the court held that *W* could convey a good title and suggested that the judgment creditor could proceed against the money realized at the sale. See also, *Dana v. Murray*, *supra* note 46.

See N. Y. R. P. L. §162 which offers a remedy for creditors of a *cestui que trust*.

⁴⁸A conditional power is illustrated by *Ackerman v. Gorton*, *supra* note 47 (life tenant empowered to sell upon receiving the consent of all the heirs); *Beers v. Grant*, 110 App. Div. 152, 97 N. Y. Supp. 117 (1st Dept. 1905) *aff'd*, 185 N. Y. 533, 77 N. E. 1181 (1906) memo. (power to devise principal if the donee died unmarried). The *American Bible Society v. Stark*, 45 How. Pr. 160 (N. Y. Sup. Ct. 1873) is an example of a condition satisfied. *Hume v. Randall*, 141 N. Y. 499, 36 N. E. 402 (1894) illustrates a condition that was discharged.

⁴⁹*Terry v. Wiggins*, *supra* note 19; *Terry v. St. Stephens Church*, 79 App. Div. 527, 81 N. Y. Supp. 119 (4th Dept. 1903) (the life tenant with a power to dispose as she should deem fit could not give the property away to charity).

their discretion for that of the grantee of the power,⁶⁰ and there may be a presumption that his disposition was within the terms of the power,⁶¹ it seems that the grantee must at least consume or convey in good faith, and can not give away the property shortly before his death without receiving any benefit or consideration.⁶²

If the grantee's power is subject to an outstanding estate or charge, it seems that he is not able to dispose of the *entire fee* for his own benefit, and consequently that he does not have an absolute power of disposition.⁶³ Likewise, it has been decided that the power of disposition is not absolute where the life beneficiary of a *trust* of real or personal property has a beneficial power of appointment over the inheritance, by deed or will; *a fortiori*, if the power is to appoint by will only.⁶⁴

In *Cutting v. Cutting*,⁶⁵ real property was devised to trustees for the benefit of *F* for life, and upon his death the trustees were directed to convey the estate as *F* should by will appoint. *F* died, appointing

In *Hasbrouck v. Knoblauch*, 130 App. Div. 378, 114 N. Y. Supp. 949 (1st Dept. 1909), there was a devise to *W* "for her use and behoof during her natural life, she to have absolute control and disposal of all the income to be derived...and so much principal as she may deem necessary." In construing the will the court held that the right to dispose was limited to maintenance and support. To the same effect, see *Matter of Hunt*, 38 Misc. 30, 76 N. Y. Supp. 968 (Surr. Ct. 1902), *aff'd*, 84 App. Div. 159, 82 N. Y. Supp. 539 (3d Dept. 1903), *aff'd*, 179 N. Y. 570, 72 N. E. 1143 (1904) memo.

With the foregoing cases, compare the following, where the courts reached a different result as a matter of interpretation. *Rose v. Hatch*, *supra* note 31; *Swarthout v. Ranier*, 143 N. Y. 499, 38 N. E. 726 (1894). In *Matter of Briggs*, 101 Misc. 191, 167 N. Y. Supp. 632 (Surr. Ct. 1917), in construing a will which devised property to a life tenant with a power to use so much of the principal, within his lifetime, as was in his judgment necessary and proper, the surrogate held that the life tenant had the absolute power of disposition and would not be liable for any property used within the wide limits of his discretion. In 180 App. Div. 752, 168 N. Y. Supp. 597 (3d Dept. 1917), the Appellate Division modified the Surrogate's order, and said that the life tenant could not encroach on the principal while he had property of his own. In 223 N. Y. 677, 119 N. E. 1032 (1918) memo., the Court of Appeals reversed the Appellate Division and restored the judgment of the Surrogate.

⁶⁰*Matter of Fitzpatrick*, 252 N. Y. 121, 124, 169 N. E. 110, 111 (1929).

⁶¹*Swarthout v. Ranier*, *supra* note 49, where the remaindermen and a purchaser from the first taker were involved, but the principle is the same.

⁶²*Vincent v. Rix*, 248 N. Y. 76, 161 N. E. 425 (1928).

⁶³*Jackson v. Edwards*, 22 Wend. 498 (N. Y. 1839).

⁶⁴*Matter of Hayman*, 134 Misc. 803, 237 N. Y. Supp. 215 (Surr. Ct. 1929), *aff'd*, 229 App. Div. 853, 243 N. Y. Supp. 803 (1st Dept. 1930).

⁶⁵*Supra* note 8.

to *W*. The plaintiff, a judgment creditor of *F*, attempted to reach the property, which he might have done prior to the Revised Statutes. The court thought that *F*'s power was general and beneficial, and not a power in trust, but that it was not an absolute power of disposition within the provisions of Sections 152 and 153. The difficulty was that the life beneficiary of the trust could not convey his life interest. He could not therefore convey the *entire fee*, as required by Section 153, though he could dispose of the interest in remainder absolutely.⁶⁶ Apparently also he was, not a tenant for life within the provisions of Section 152, or if so, he was not able to convey the *entire fee*.⁶⁷ The creditor could not, therefore, bring his case within Sections 149-153, and since the legislature had abolished the common law remedies, his action failed.⁶⁸ The result is the same where

⁶⁶It may be questioned whether the Revisers intended that §153 should provide only for the case where the grantee had a beneficial power to convey an *entire* or absolute fee. It may be argued that the power to convey a remainder in fee comes within the spirit of this section. Cf. R. P. L. §§30, 31, 38. Why should the immediate grantee's creditors be protected where he can dispose of an absolute fee, and *not* where he can dispose of a remainder in fee? Cf. *Scheer v. Long Island R. R.*, 127 App. Div. 267, 111 N. Y. Supp. 569 (2d Dept. 1908), *aff'd*, 200 N. Y. 558, 93 N. E. 1131 (1911), where it seems that a *cestui* of a naked or passive trust *can* convey a fee. While no creditors' rights were involved in the *Scheer* case it would seem that if the *cestui* of a naked or passive trust can convey a good title, creditors of the *cestui* can reach the property under R. P. L. §§149-153. In *Long Island R. R. v. Mulry*, 212 N. Y. 108, 105 N. E. 806 (1914), the Court of Appeals intimated that it overruled the *Scheer* case, but on an entirely different point, i. e. prescription. On the collateral point of passive trusts generally, see *Whiteside, op. cit. supra* note 32, at 35.

⁶⁷*Crooke v. County of Kings*, 97 N. Y. 421 (1884); *Farmer's Loan & Trust Co. v. Kip*, 192 N. Y. 266, 85 N. E. 59 (1908), where the court in discussing the absolute power of disposition within the meaning of §153, says that the word "entire" means the right of the donee to give *possession* as well as title; *Dudley v. People's Trust Co.*, 57 Misc. 230, 107 N. Y. Supp. 930 (Sup. Ct. 1907), where the court says that a power of disposition is not absolute while the trust lasts, because of the inability to convey an *entire fee* including the *present estate*; *Matter of Hayman, supra* note 54, to the effect that there is no absolute power of disposition where the *cestui* is not enabled in his own lifetime to dispose of the *entire fee* for his own benefit.

Cf. N. Y. R. P. L. §60 (the *cestui* has no estate or interest in the lands). For a discussion of this, see *Whiteside, op. cit. supra* note 32, at 41.

⁶⁸In *Higgins v. Downs, supra* note 45, there was a devise of property to trustees in trust for the use of *A*, with a power in *A* to appoint by will, but if he die intestate over. On an action by a judgment creditor to reach the fund, the court held that *A* did not have an absolute power because of the trust. The power was further complicated by the fact that the trust was to continue until

the life beneficiary of a *trust* can dispose of the remainder by *deed* or *will*.^{58a}

It follows that in this field the statute denies all remedies to creditors in situations where they had at least a partial remedy in equity before the adoption of the statute. In effect, the *Cutting* case enables the owner of property to give it in trust to *F* for life, conferring upon him an absolute power to dispose of the remainder by will, free from all liability to his creditors. *F*'s will operates as a conduit for passing the property from the original owner to the ultimate grantee.

It may be suggested that no compelling reason of logic or policy, and no precedent, requires the courts to deny to creditors of the grantee of a power the right to satisfy their judgments by a sale of the remainder where the life beneficiary of a trust has a power to appoint the remainder for his own benefit. The result reached by the court in the *Cutting* case is inconsistent with the avowed object of the Revisers.⁵⁹ There is nothing in Sections 149-153 which expressly excludes from their operation the case where a power of disposition, by will or otherwise, is given to the life beneficiary of a trust in the same property.⁶⁰ Furthermore, it may be suggested that the life beneficiary of a trust has no estate or interest in the property within

A reached 50, at which time the trustees, in their discretion, could terminate it. The court, however, suggested that (a) there was a contingent interest in the remaindermen, (b) *A* took a descendible, devisable and alienable estate (R. P. L. §59) to which the lien of the plaintiff's judgment attached, and this interest could be sold upon execution. It is submitted that this is not a very practicable remedy for creditors, since the purchaser would become the owner of a future expectant estate contingent upon events that might never happen.

^{58a}Farmer's Loan & Trust Co. v. Kip, *supra*, note 57.

⁵⁹See discussion of the notes of the Revisers, *supra* page 454.

⁶⁰The phrase "not accompanied by a trust" in §149 limits "power of disposition" and not "estate". In *Stafford v. Washburn*, 145 App. Div. 784, 130 N. Y. Supp. 571 (1st Dept. 1911), Laughlin, J., dissenting, upon whose opinion the Court of Appeals reversed the majority in 208 N. Y. 536, 101 N. E. 1122 (1913) memo., says, at 797, 130 N. Y. Supp., at 580: "The statutory definition of an absolute power of disposition sheds light on what was meant by the words 'not accompanied by a trust'. When the proceeds of the disposition of the property are held in part for the benefit of another or others, then there is a trust within the contemplation of the statute." In that case there was a gift of all the personal estate to *W* to have and to hold to her use forever; all real property to be used and enjoyed for life, after her death one house and lot as *W* should choose to Mary, remainder of property over. Laughlin, J., in his dissent held that if *W* sold, as she did, she had to hold the proceeds for the remaindermen.

the meaning of the Revised Statutes.⁶¹ And, if so, the case does not fall within Sections 149 or 152, since the grantee is not a tenant for life or for years, but "a person to whom no particular estate is limited" within Section 150, and he can dispose of the *entire remainder in fee*, even if he can not dispose of the *entire fee*. Nothing in the statute requires that he be able to convey the entire fee *in possession*.⁶² Finally, even if the life beneficiary of a trust who has a beneficial power of appointment over the remainder, does not have the absolute power of disposition,⁶³ he most certainly has a special and beneficial power within Section 159, and it seems that his creditors should be able to reach his interest in remainder by a creditor's bill under that section.⁶⁴ By this means, the execution of the life beneficiary's special and beneficial power over the remainder may be adjudged for the benefit of his creditors.

To summarize, the cases hold, then, that creditors of the grantee of a power can look to the property subject to the power if the grantee can, in his lifetime, dispose of the entire fee for his own benefit; or if he is a tenant for life or years and has a general and beneficial power to devise the inheritance. In these situations, a creditor can reach the property as the absolute property of the grantee, whether or not he executes the power, and notwithstanding a provision for a gift over of a remainder in default of his execution of the power. To this limited extent the rights of the creditor have been enlarged over those which he had prior to the Revised Statutes. But the power of disposition is not considered absolute, and creditors are not entitled to the protection of the statute, if the interest of the grantee is conditional or subject to any outstanding estate or charge, or if the grantee's life interest is in trust⁶⁵ and his power extends

⁶¹Whiteside, *op. cit. supra* note 32, at 41.

⁶²Farmer's Loan & Trust Co. v. Kip; Dudley v. People's Trust Co., both *supra* note 57.

⁶³"Absolute power of disposition" within the meaning of §153 should not be confused with the *absolute*, as distinguished from *conditional*, power of a *cestui* to encroach upon the principal. Thus in Matter of Briggs, discussed *supra* note 49, the court was concerned with determining whether the *cestui's* right to encroach upon the principal of a trust was conditioned upon his showing the need for comfort and support; and the court, finding that the *cestui* did not have to use his own income before he could encroach upon the corpus, said that his power was absolute.

⁶⁴Apparently the courts have not considered the application of this section. See Cutting v. Cutting, *supra* note 8, at 541, where the court speaks of REV. STAT. §93, now R. P. L. §159.

⁶⁵Query as to the results the court would reach in the following cases: (a) where the settlor is also *cestui que trust*, since in this case his interest can be

only to the remainder. It seems, however, that creditors might in these situations profitably proceed under Section 159.

RIGHTS OF PURCHASERS AND INCUMBRANCERS

The interests of purchasers and incumbrancers under the statutory system have been partly covered in connection with the discussion of the rights of creditors above. The problem presents no difficulty where the grantee of an absolute power of disposition conveys or incumbers the property in accordance therewith.⁶⁵ Even if the grantee's power is special, or in trust or conditional,⁶⁷ purchasers and incumbrancers will be fully protected where the grantee executes the power strictly in accordance with its terms. But a special power, or a power in trust, must ordinarily be executed in accordance with the direction of the grantor.⁶⁸ Whether such a power has been properly executed is often a question of some nicety with which we are not here concerned. Sections 149-153 include only powers that are general and beneficial. But the grantor may specify that a general and beneficial power must be executed only by a conveyance in the lifetime of the grantor, or by will, or in either manner.⁶⁹

alienated; see *Whiteside, op. cit. supra* note 32, at 46; cf. *Doctor v. Hughes, supra* note 40a. (b) Whereby the terms of the trust instrument the *cestui* can terminate the trust. It would seem in both these situations that his interest is absolute and so should be available to creditors.

⁶⁵The remaindermen will take unless the power is properly executed. Thus in *Jackson v. Edwards, supra* note 53, where an attempt was made to execute a general and beneficial power by a decree in partition, instead of by deed or will, it was held that the property would pass to the purchasers subject to the rights of remaindermen.

⁶⁷*Kinnier v. Rogers, supra* note 46 (executors could convey good title under a valid power in trust to convert realty into personalty); *Ackerman v. Gorton, supra* note 47 (donee under a conditional power, requiring the consent of all heirs, can convey good title when the heirs consent); *Swarthout v. Ranier, supra* note 49 (where the power to dispose is conditional on the first taker's "comfort and support", there is a presumption that the power was validly exercised).

⁶⁸N. Y. R. P. L. §172; *Allen v. DeWitt, 3 N. Y. 276, 278 (1880)*; see *Ackerman v. Gorton, supra* note 47.

⁶⁹N. Y. R. P. L. §§167-168; *Terry v. Wiggin, supra* note 19; *Matter of Cager, 111 N. Y. 343, 18 N. E. 866 (1888)*; *Farmer's Loan & Trust Co. v. Mortimer, 219 N. Y. 290, 114 N. E. 389 (1916)*; *Matter of Ithaca Trust Co., supra* note 22. Cf. *Hayes v. Gunning, 51 Misc. 517, 101 N. Y. Supp. 875 (Sup. Ct. 1906)* for a peculiar interpretation of a devise for life, with a power to use and dispose, where the court interpreted this language to include a power to devise.

If a tenant for life or for years is granted the general and beneficial power to consume or convey the inheritance, either in his lifetime or by will, and no future estates are limited thereon, it is clear that his creditors or purchasers and incumbrancers from him are fully protected. Moreover, the grantee of the power is entitled to an absolute fee under Section 151. In *Hume v. Randall*,⁷⁰ *V* conveyed by deed to *X* and *Y* for life, providing that neither should have the right to convey away the property without the written consent of the grantor. The court interpreted this provision as giving *X* and *Y* the absolute power to convey by deed or will after the death of *V*, and held that *X* and *Y* could convey good title after *V*'s death,⁷¹ stating that the case was controlled by Section 152.

Hume v. Randall was followed in *Deegan v. Wade*,⁷² where, however, the facts were somewhat different. Real property was devised to a son for life, with a power to devise but not to convey, and if he die intestate, remainder to his heirs. In an action to construe the will, the court said that the case was controlled by *Hume v. Randall*, that the son took an absolute estate, and that the attempt to restrain a conveyance by deed was inoperative. It seems that in *Deegan v. Wade* the grantee did not take an absolute fee since a future estate was provided for if the power should not be executed.⁷³ Creditors would be protected equally in the two cases, but in *Deegan v. Wade* purchasers and incumbrancers would not be protected unless they claimed through a devise.

Where a general and beneficial power to devise the inheritance is given to a tenant for life or for years, and no remainder is limited over in default of his exercise of the power, it seems that he should be able to convey the entire estate in possession immediately by deed

⁷⁰*Supra* note 48.

⁷¹*Cf.* *Cutting v. Cutting*, *supra* note 8 (life tenant had an equitable interest).

⁷²144 N. Y. 573, 39 N. E. 692 (1895).

⁷³*Livingston v. Murray*, 68 N. Y. 485 (1877) involved the construction of a will whereby the testator devised his residuary estate to children for their separate use during their natural lives, remainder to their lawful issue, subject to the right of each child to dispose one-half of his share by will. It was held that the power to dispose of a moiety by will did not enlarge the life tenant's estate into a fee. And see *Taggart v. Murray*, *supra* note 45, where the testator devised property to *C* for her comfort and support, and at her death to her heirs; but if she were to leave no heirs the property was to be disposed of by *C*'s will. The court held that *C* took a life estate with a power in default of issue, to appoint by will. Consequently a conveyance by *C* and her living children did not convey an absolute title, as it was subject to the contingency that children might be born who would take an interest as purchasers under the will.

or other conveyance or by will.⁷⁴ Where, however, a remainder is limited over, it seems that the interests of the remaindermen can not be cut off except by a devise in strict accordance with the terms of the power.⁷⁵

If the grantor directs that the grantee may consume or dispose of the property for his support or maintenance, but subject to a gift over of all that remains undisposed of at his death, this does not give the grantee a power to devise the property. He can, by the execution of the power in his lifetime, convey to purchasers and incumbrancers, but his devisees and legatees will not prevail over remaindermen. This result has been reached by the Court of Appeals⁷⁶ in a number of cases and, furthermore, it clearly follows from the language of Section 149 that the estate of the grantee with an absolute power of disposition is changed into a fee, "subject to any future estates limited thereon, in case the power of absolute disposition is not executed, and the property is not sold for the satisfaction of debts."

As between creditors of the grantee and purchasers or incumbrancers claiming under him, it seems that the statute gives no preference.⁷⁷ A creditor might, of course, be able to reach the property in the hands of a purchaser or incumbrancer, on the ground that the debtor had conveyed in fraud of creditors, but not by virtue of anything in the statute on powers.

A discussion of the doctrine of relation in the law of powers is not within the scope of this paper,⁷⁸ but it is apparent that if the

⁷⁴N. Y. R. P. L. §151; *Matter of Moehring*, *supra* note 32; *Matter of Lynn*, 34 Misc. 681, 70 N. Y. Supp. 730 (Surr. Ct. 1901).

⁷⁵The rule is the same where there is a trust. *Farmer's Loan & Trust Co. v. Mortimer*, *supra* note 69. In this case the life beneficiary of a trust had a power to devise the inheritance. The court held that he could not be held on a contract to devise when he subsequently executed a will which made a different disposition. *Accord*: *Central Trust Co. v. Dewey*, 179 App. Div. 112, 166 N. Y. Supp. 214 (1st Dept. 1917), *aff'd*, 223 N. Y. 726, 120 N. E. 859 (1918). *But cf.* *Freeborn v. Wagner*, 49 Barb. 43 (N. Y. 1867), *aff'd*, 4 Keyes 27 (N. Y. 1868).

⁷⁶See cases cited *supra* note 57. See also *Vincent v. Rix*, *supra* note 52.

⁷⁷In *Rose v. Hatch*, *supra* note 31, a person claiming land under a judgment sale was subordinated to a subsequent purchaser claiming under execution of the grantee's power, but the power was construed as *not* an absolute power of disposition.

⁷⁸For a discussion of the doctrine of relation back in the law of powers, see Marsh, *Perpetuities Arising Through the Power of Appointment* (1925) 25 COL. L. REV. 521. For a recent case discussing this problem, see *Matter of Hayman*, *supra* note 54.

first power is executed so as to create a second power which is within the condemnation of this doctrine, then no purchaser or creditor claiming under an exercise of the second power can succeed.

RIGHTS OF REMAINDERMEN

In the statement of the rights of the grantee's creditors and purchasers above, the rights of the remainderman have been covered substantially. Obviously, to the extent that the rights of creditors, purchasers and incumbrancers are protected, the future estate limited in default of an exercise of the power is defeated. The rights of remaindermen are protected only in respect of property that has not been taken by creditors or validly conveyed to purchasers. Creditors of the grantee of the power can defeat the remainderman by a sale of the property on execution, if the grantee has an absolute power of disposition. Purchasers from the grantee can defeat the claims of the remainderman only if they take through a proper execution of the power.⁷⁹ Neither the grantee of the power nor the settlor who has reserved a power, has any greater right.^{79a} Thus, a gift by will of real and personal property to the testator's widow for life, "for her sole use and benefit during her lifetime", does not convey a fee, where it is followed by a gift over of all that remains at her death.⁸⁰

Where the grantee has an absolute and unconditional power to consume or convey the principal for his own benefit, the remainderman can reach only that portion which is not consumed or disposed of by the grantee.⁸¹ If, however, the power is conditional, or limited to actual need, or otherwise restricted, the rights of the remainderman are correspondingly increased.⁸² It may be difficult to prove what remains undisposed of at the grantee's death, or to trace the property, particularly if it is personalty, but the burden of proof falls upon the remainderman.⁸³

The principle is not changed where the life beneficiary of a trust is entitled to encroach on the principal for his maintenance and support, and the gift over is only of so much as remains. The trustee can be compelled by the committee of a beneficiary, now incompetent,

⁷⁹Matter of Fitzpatrick, *supra* note 50; see Guaranty Trust Co. v. Halsted, 245 N. Y. 447, 157 N. E. 739 (1927).

^{79a}Whittemore v. Equitable Trust Co., see the discussion *supra* note 40b.

⁸⁰Keefe v. Keefe, 230 App. Div. 654, 246 N. Y. Supp. 389 (3d Dept. 1930).

⁸¹Matter of Fitzpatrick, *supra* note 50; Matter of Marshall v. Marshall, 217 App. Div. 229, 216 N. Y. Supp. 673 (4th Dept. 1926).

⁸²Trustees of Theological Seminary of Auburn v. Kellogg, *supra* note 20.

⁸³Seaward v. Davis, *supra* note 14.

to apply the funds necessary for his support, even to the exclusion of the remaindermen.⁶⁴

Where real or personal property is conveyed or devised to *A* for life, with power in *A* to consume or dispose of it for his support and maintenance, followed by gift over of all that remains undisposed of at his death, *A* cannot defeat the remainderman by a testamentary disposition.⁶⁵ Conversely, it has been held that a power given to a life tenant to dispose of the remainder by will for his own benefit, does not enlarge his estate into a fee as against a remainderman to whom the property was limited in default of an exercise of the power.⁶⁶ Both results seem to be in accord with the statute. Similarly, in *Farmers' Loan and Trust Co. v. Mortimer*,⁶⁷ it was held that a power given to a life beneficiary of a trust, to dispose of the property by his last will, did not protect one to whom he contracted to bequeath it before his death, the grantee of the power having subsequently made a new will.

It appears, then, that creditors of the grantee of the power can defeat a remainderman to whom the property is limited in default of an execution of the power, provided the grantee has the absolute power of disposition defined in Sections 152 and 153. If the power is special and beneficial, it seems that the remainderman can be cut off by a creditor's bill under Section 159. Otherwise the remainderman can be defeated only by a proper execution of the power, as directed by the grantor.

⁶⁴*Rezzemini v. Brooks*, 236 N. Y. 184, 140 N. E. 237 (1923); see also *Doctor v. Hughes*, *supra* note 40a. See *Matter of Fordham*, 235 N. Y. 384, 139 N. E. 548 (1923), illustrating the acceleration of a remainder following a life trust with power to consume the corpus, the life beneficiary having predeceased the testatrix.

⁶⁵See discussion *supra* page 463. The remaindermen can also compel a reconveyance of property where the devisee conveyed to X without consideration and while she was incompetent. *Callahan v. Volke*, 220 App. Div. 379, 222 N. Y. Supp. 48 (3d Dept. 1927).

⁶⁶*Livingston v. Murray*, *supra* note 73, at 491; *Contra: Deegan v. Wade*, *supra* note 72.

⁶⁷*Supra* note 69.