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FUTURE INTERESTS-POWERS OF APPOINTMENT-FORMALITIES REQUIRED FOR RELEASE

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FUTURE INTERESTS—POWERS OF APPOINTMENT—FORMALITIES REQUIRED FOR RELEASE—Deceased had a general testamentary power of appointment over the corpus of a trust, which provided for a gift over to his heirs in default of appointment. Prior to his death, he executed a written document, under seal and for consideration, whereby he released the power, and further covenanted with the trustee who held the property, and with the individual takers in default, that he would not thereafter attempt to exercise the power. He delivered the document to the trustee, for itself, and as trustee for each individual taker in default. *Held,* the transaction effected a valid release of the power. *District of Columbia v. Lloyd,* (D. C. App. 1947) 160 F. (2d) 581.

Although much has been written about releasability of the various types of powers of appointment,[1] little has been said about the formalities required to

[1] See, for example, SUGDEN, POWERS, 8th ed., 79 (1861); KALES, FUTURE IN-

effect such release. In the absence of statute, it is generally assumed that the donee of a releasable power can effectually relinquish such power by executing an instrument for consideration or under seal, evidencing an intention to release it.[2] Authorities have declared that such instrument may be delivered to any person having an estate of freehold in the land, by way of possession, reversion or remainder,[3] or to a person whose interests would be affected by the exercise of the power.[4] Delivery of the instrument to the trustee who holds the property subject to the power has been held good.[5] It is almost universally held that a releasable power is extinguished by acts of the donee which are inconsistent with a subsequent exercise of the power,[6] such as conveying an absolute fee in the property with covenants of warranty,[7] joining with takers in default of remaindermen in a conveyance of the property,[8] or by executing a deed to the property with a covenant to extinguish and forego the power.[9] The South Carolina court has said that no special form is required; "Any evidence therefore which satisfactorily proves the fact [of release] is sufficient." [10] It should be noted, however, that since 1942, the law regarding the release of powers has undergone drastic changes. As of January 1, 1947, twenty-three states had enacted statutes on the subject,[11] most of which set out procedures for accomplishing the release.

TERESTS, 2d ed., 708 (1920); 1 SIMES, FUTURE INTERESTS 492 (1936); Gray, "Release and Discharge of Powers," 24 HARV. L. REV. 511 (1911); 76 A.L.R. 1430 (1932).

[2] SUGDEN, POWERS, 8th ed., 82 (1861); 3 PROPERTY RESTATEMENT, § 336 (1) (1940); Atkinson v. Dowling, 33 S.C. 414, 12 S.E. 93 (1890); Merrill v. Lynch, 173 Misc. 39, 13 N.Y.S. (2d) 514 (1939); McLaughlin v. Industrial Trust Co., (Del. Ch. 1945) 42 A. (2d) 12.

[3] WILLIAMS, REAL PROPERTY, 24th ed., 474 (1926); Grosvenor v. Bowen, 15 R.I. 549, 10 A. 589 (1887).

[4] 1 SIMES, FUTURE INTERESTS 507 (1936); 3 PROPERTY RESTATEMENT, §336 (1) (1940); Columbia Trust Co. v. Christopher, 133 Ky. 335, 117 S.W. 943 (1909).

[5] Merrill v. Lynch, 173 Misc. 39, 13 N.Y.S. (2d) 514 (1939).

[6] 1 SIMES, FUTURE INTERESTS 507 (1936); SUGDEN, POWERS, 8th ed., 85 (1861); Hume v. Hord, 46 Va. 374 (1849); Thorington v. Thorington, 82 Ala. 489, 1 S. 716 (1886).

[7] Baker v. Wilmert, 288 Ill. 434, 123 N.E. 627 (1919); Mountjoy v. Kasselman, 225 Ky. 55, 7 S.W. (2d) 512 (1928).

[8] Hume v. Hord, 46 Va. 374 (1849); Thorington v. Thorington, 82 Ala. 489, 1 S. 116 (1886).

[9] Isaac v. Hughes, L. R. 9 Eq. 191 (1870); Lyon v. Alexander, 304 Pa. 288, 156 A. 84 (1931).

[10] Atkinson v. Dowling, 33 S. C. 414 at 425, 12 S. E. 93 (1890).

[11] Ala. Laws (1945) c. 67; Cal. Laws (1945) c. 318; Colo. Laws (1945) c. 146; Conn. Laws (1943) c. 422; Fla. Laws (1945) c. 23007; Ga. Laws (1945) Act. 348; Ill. Laws (1943) vol. 1, p. 6; Ind. Laws (1945) c. 258; Iowa Laws (1943) c. 251; Ky. Laws (1944) c. 14; Md. Laws (1943) c. 870; Mass. Laws (1943) c. 152; Mich. Laws (1945) Act 296; Miss. Laws (1946) c. 405; N. J. Laws (1943) c. 57; N. Y. Laws (1943) c. 476; N. C. Laws (1943) c. 665; Ohio Laws (1943) §8509-22—8509-28; Pa. Laws (1943) no. 334, p. 797, amended

All of these statutes specify that the release shall be a written instrument which evidences an intent to release or renounce the power. Although most of the statutes say the release may be either with or without consideration, Connecticut and Massachusetts require it to be either for consideration or under seal, and Colorado, Florida, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, and Rhode Island are silent on the subject. Mississippi, Ohio, and Virginia require the release to be acknowledged in the manner of deeds, and Maryland and Florida require two witnesses. New Jersey and Maryland require that the release be recorded, but most states require recordation only to make the release effective as against a purchaser of the property for value. The Virginia statute, which contains a typical recording provision, permits recording either in the county where the property is located, where the donee resides, where the trustee of the property, if it is held in trust, has his residence or principal office, or where the instrument creating the power is filed or recorded. Indiana, Ohio, and Wisconsin make no provision for delivery, and Florida requires it only if the property is held in trust. Generally, recording the release is a valid substitute for delivery. The Alabama statute, which is typical, provides for delivery to a person specified for that purpose in the instrument creating the power, any trustee of property subject to the power, any person who would be adversely affected by the exercise of the power, or to the proper official for recording. Several of the statutes expressly provide that the specified method of release is not exclusive, and that any other lawful means of extinguishing a power may still be used. The question of what constitutes a valid release of a power of appointment seems never to have been passed upon by the District of Columbia court, but it is quite clear that the release upheld in the principal case would have satisfied any court, so far as the formalities of execution were concerned.[12]

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(1945) no. 431, p. 1337; R. I. Laws (1944) c. 1486; S. D. Laws (1945) c. 344; Va. Laws (1944) c. 63; Wis. Laws (1943), chs. 513, 553. Where further reference is made to state statutes, see those just cited. This flurry of legislative action was prompted by new provisions in the federal estate tax law, (56 Stat. L. 942, c. 619, 403, as amended) which placed a premium on the releasibility of powers.

[12] The court, in ruling upon the formal sufficiency of the release, said, "We deem it enough to refer to 3 PROPERTY RESTATEMENT, 336 (1) . . . ." Principal case at 584. On formal requirements in general, see Nossaman, "Release of Powers of Appointment," 56 HARV. L. REV. 757 (1943).