

POWERS IN TRUST AND THE TERMINATION OF POWERS BY THE DONEE²

LEWIS M. SIMES

II. THE TERMINATION OF POWERS BY THE DONEE

Powers are terminated when the period has expired within which, by the terms of their creation, they are to be exercised.¹ As they are usually personal to the donee, they will generally terminate on his death; though, of course, the donor may stipulate for their termination before that time. A power may also be terminated when it has been exercised, and to the extent that it has been exercised.² But the kind of termination herein considered is a termination caused by the act of the donee independent of the intent of the donor and before the time provided for the expiration of the power. Our question is this: Under what circumstances may the donee of a power extinguish it and thus be precluded from subsequently exercising it? In the discussion of this problem, no attempt will be made to analyse the English decisions as a whole.³ The purpose of this paper is to suggest a rational explanation of the American cases on the subject.

At the outset we must recognize that the problem of the extinguishing of a power is in some respects unique in the law. It bears a resemblance to the disclaimer of a trustee or executor. But it is not disclaimer, for a trustee or executor cannot disclaim as to a part, yet the donee of a power, when he may extinguish it at all, may effectuate a partial extinguishment.⁴ Nor

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¹ See ROOD, WILLS (2d ed. 1926) § 759; FARWELL, POWERS (3d ed. 1916) 39. See also, *Ryan v. Daly*, 134 Atl. 546 (N. J. Eq. 1926).

² A power of sale or a power of appointment would ordinarily terminate when it was exercised. 1 TIFFANY, REAL PROPERTY (2d ed. 1920) § 331. But it is clear that it could be exercised as to different portions of, or interests in, the property at different times. That is, successive acts in exercise of the power are possible. See FARWELL, *op. cit. supra* note 1, at 43; *Jones v. Winwood*, 3 M. & W. 653 (1838). But it has been held that a power to sell and reinvest does not terminate by one sale. *Owsley v. Eads' Trustee*, 22 Ky. L. Rep. 355, 57 S. W. 225 (1900).

Such matters would seem to depend on the intent of the creator of the power.

³ They are discussed in the article by Professor Gray on *Release and Discharge of Powers* (1911) 24 HARV. L. REV. 511.

⁴ See *Hill v. Sangamon Loan & Trust Co.*, 302 Ill. 33, 134 N. E. 112 (1922), where the court held that the power involved was extinguished as to 7/8 of the property subject to it; *Atkinson v. Dowling*, 33 S. C. 414, 12 S. E.

is the extinguishment of a power closely analogous to the conveyance of a trust res by a trustee to a bona fide purchaser. The trustee's act is wrongful and does not relieve him of all duty with respect to his office; but the donee of a power, where he extinguishes, puts an end to all duties arising with respect to the power. There is also some similarity to the situation where an agent terminates the relation existing between himself and his principal. But in that case the net result is materially different. When the extinguishment of a power of appointment occurs, the property is then quite generally out of the control of the donor and not improbably the donor is dead (for many powers are not to be exercised until after the donor's death); so that the purpose of the donor in creating the power is likely to fail irrevocably by reason of the extinguishment. Yet in the case of an agency, the principal expects the authority to operate during his lifetime and under his control; hence, he is more likely to survive any termination of the agency.

An extended discussion of the extinguishment of powers will necessitate some use of the terminology employed by Chief Baron Hale in *Edwards v. Sleator*,⁵ in which were distinguished powers appendant, where the donee has title to or an interest in the property which would be defeated by the exercise of the power; powers in gross, where the donee has an interest in the property, usually a life estate, which is not affected by the exercise of the power; and powers simply collateral, where the donee has no interest in the property. It will be useful also to distinguish between beneficial powers, which may be exercised for the benefit of the donee or of his estate; and special powers, which may be exercised only for the benefit of persons other than the donee.

The usual analysis of the subject of extinguishment of powers is briefly as follows: First, as to powers appendant, a conveyance of the property by the donee operates to estop him from subsequently exercising the power to the prejudice of his alienee. To use the phrase most commonly appearing in the cases, the donee "cannot derogate from his own grant." Second, as to special powers purely collateral and special powers in gross, we may

93 (1890), where the power was held to be extinguished as to one lot of the property subject to it.

⁵ Hardres 410, 415 (1665): "First, powers to raise estates are either simply collateral (as where a party that has such a power has not, nor ever had any estate in the land: as where such power is reserved to a stranger, and there it cannot be destroyed by such stranger, because it is no more than a bare nomination) or not simply collateral: And these latter are of two sorts. First, appendant and annexed to the estate; Secondly, in gross."

express the usual viewpoint by quoting the carefully worded dicta of Sir John Leach in *West v. Berney*,⁶ as follows:

"Upon the authorities and principle my opinion is, that a power simply collateral, that is, a power to a stranger, who has no interest in the land, cannot be extinguished or suspended by any act of his own or others with respect to the land. . . . I think that every power reserved to a grantee for life, though not appendant to his own estate, as a leasing power, but to take effect after the determination of his own estate, and therefore in gross, may be extinguished. In respect of his freehold interest he can act upon the estate, and his dealing with the estate so as to create interests inconsistent with the exercise of his power must extinguish his power. The general principle is, that it is not permitted to a man to defeat his own grant. Such a power in gross in a tenant for life would not be defeated by a conveyance of his life estate, as a power appendant or leasing power would be defeated; because the conveyance of his life estate is not inconsistent with the exercise of his power."

In other words, it is said that the real basis for allowing the extinguishment of a special power in gross is the same as for a power appendant. For under the old law, a life tenant could, by fine, feoffment, or common recovery, tortiously convey in fee simple; and this conveyance, operating as an alienation in fee simple, prevented the donee from exercising the power, under the rule that one cannot derogate from his own grant.

That explanation seems satisfactory enough as far as it goes, but, as its proponents readily perceived, it did not explain all the cases. The English law, before the statutory modifications of 1881, was, as stated by Farwell,⁷ to the effect that "all powers, other than powers collateral and powers coupled with a trust or duty might have been . . . suspended or destroyed, either wholly or in part, by the donees thereof." And as we shall endeavor to show, the present American law is to the same effect. Thus, it is possible to destroy a power in gross, not only by a tortious conveyance in fee, but also by a release. Since a release is an innocent conveyance, passing no larger interest than the releasor has, the argument about derogating from one's grant is inapplicable. Moreover, today as a rule, it is not possible for a man to convey a larger legal title than he has; and furthermore, the doctrine of tortious conveyances never did have any application to personalty or to equitable interests. Hence, under modern conditions, the rule that one cannot derogate from his own grant offers no explanation for the extinguishment of a special power in gross by the donee.

Thus, the dilemma is presented of explaining why, if a special power in gross is releasable, a special power purely collateral

⁶ See 1 Russ. & My. 431, 434, 435 (1819).

⁷ FARWELL, *op. cit. supra* note 1, at 16.

is not releasable also. Or, if a special power purely collateral is not releasable, then why should the courts allow the release of a special power in gross? Professor Gray and Professor Kales, in discussing the subject, took the second horn of the dilemma, and argued that a release of special powers in gross was illogical.⁸ But in view of the recent trend of American decisions, that solution is increasingly difficult to sustain. The following is therefore proposed:

Does not the true line of distinction lie between those powers which are imperative,—that is, powers in trust,—and those powers which are optional? If the donor is under a duty to a group of persons to make an appointment for the benefit of one or more of the group, it seems unjust to allow him to get rid of that duty. It is true, one may sometimes decline to assume a duty when it is offered. But as a rule, though he may release rights and privileges, he cannot rid himself of an active duty. This is illustrated in the ordinary case of a trusteeship. Though one may ordinarily refuse to be a trustee, yet, if one has once assumed the duties, he cannot discharge them by declining to perform them whenever he feels so disposed.

On the other hand, if the donee of a power is not under an active duty to exercise it, either absolutely or conditionally, there seems to be no very good reason why he may not extinguish the power if he wishes. The donor has intended that he exercise the power or not, at his option. And if there is a rule that he may release, it will operate in the interests of freer alienability of property. It is true he may, by releasing, defeat the desires of the donor. But can we say that he owes any duty to the donor as such? While, of course, the whole body of rules of law concerning powers may be said to be designed primarily to enable a donor to carry out certain wishes by means of powers, yet the law does not carry out those wishes by giving the donor any right of action against the donee, whether the power be imperative or not. Hence, if the donee is under no duty to execute the power, it is believed that he should be permitted to extinguish it.

It has been said that the donee of every special power is a fiduciary,⁹ and thus it has been argued that special powers in gross should not be releasable. It may be conceded that, if the donee acts, he is under a duty not to exercise the power indirectly for his own benefit, in other words, not to make an appointment in fraud of the power.¹⁰ But that duty is con-

⁸ Gray, *loc. cit. supra* note 3; KALES, *FUTURE INTERESTS* (2d ed. 1920) § 611.

⁹ *Ibid.*

¹⁰ On appointments in fraud of the power, see in general: SUGDEN, *POWERS* (8th ed. 1861) 606-621; FARWELL, *op. cit. supra* note 1, at 457-495;

cededly of a different character from the duty of the donee of a power in trust. As Sir John Leach observed in *West v. Berncy*,¹¹ with reference to one of the arguments of counsel:

“Mr. Preston urged the relief given against frauds upon the power; as in the case of an appointment by a father substantially to himself. This, however, does not prove the existence of a trust. It proves only that a power given for a particular purpose shall not by circuitry be exercised for a different purpose.”

Whether we say the duty not to appoint in fraud of the power be fiduciary or not,¹² the duty is conditioned on the donee's making an appointment. It seems that a donee may release a special power for his own benefit and this will not be regarded as fraudulent.¹³ Hence the rule which permits the release of some special powers is not necessarily inconsistent with the rule against fraudulent appointments.

Let us now consider to what extent the proposition that all powers are extinguishable except powers in trust is borne out by the cases, with particular reference to American law.

First, can a power in trust be extinguished? Although the

LEAKE, LAW OF PROPERTY (2d ed. 1909) 311-315; 1 TIFFANY, *op. cit. supra* note 2, § 329.

¹¹ *Supra* note 6, at 436.

¹² While the courts sometimes speak of the duty of a donee not to make an appointment in fraud of the power as if it were fiduciary, and it has even been suggested that such a duty was involved by virtue of the existence of a power in trust (See *In re Bradshaw* [1902] 1 Ch. 436, 447), the better view would seem to be that equity is merely intervening in those cases to prevent an execution of the power which is, in substance, in excess of the power conferred. Such appears to have been the view of Lord St. Leonards, of Farwell and of Tiffany, judging by the citations from those authors referred to *supra* note 10. See also the observation of the court in *Vatcher v. Paull* [1915] A. C. 372, 378: “The term fraud in connection with frauds on a power does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term or any conduct which could properly be termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power.”

To the effect that a special power is not necessarily a power in trust are: *In re Somes* [1896] 1 Ch. 250; *Atkinson v. Dowling*, *supra* note 4.

¹³ To that effect are: *In re Radcliffe* [1892] 1 Ch. 227; *In re Somes*, *supra* note 12; *In re Little*, 40 Ch. D. 418 (1889). These cases are decided in part on the English Conveyancing Act of 1881, which made all powers releasable except powers in trust.

In several American cases it appears that, while the point was not under discussion, a release or extinguishment of a special power was permitted where it operated to the benefit of the donee. Cases of that sort are: *Baker v. Wilmert*, 288 Ill. 434, 123 N. E. 627 (1919); *Hill v. Sangamon Loan & Trust Co.*, *supra* note 4. But compare *Thomson's Ex'rs v. Norris*, 20 N. J. Eq. 489 (1869), where the court thought that an agreement to release a special power for the benefit of the donee might be fraudulent.

decisions are not numerous, it seems clear that the donee of an imperative power cannot terminate it by his own act.¹⁴ In *Weller v. Ker*,¹⁵ trustees were directed to hold the testator's estate to the use of his son Robert and the heirs of his body, but the estate was not to be conveyed to the son until he attained the age of twenty-five; and in case the son should marry or otherwise conduct himself so as not to merit the approbation of the trustees, the provision in his favor should only belong to him in life rent, and to his issue or heirs in fee. The son married before attaining the age of twenty-five; and on the occasion of the marriage, a settlement was drawn up which purported to settle the estate on the husband as if he had the fee absolutely. The trustees expressed their approval of the marriage, and seem to have also impliedly approved of the settlement. After the marriage, and before the son reached the age of twenty-five, he conducted himself so as to merit the disapproval of the trustees, and they entered a formal memorandum in their minute book to that effect. The son having thereafter reached the age of twenty-five, this action was brought by the trustees to obtain the direction of the court as to their duties. The court declared that, since the power was coupled with a duty, it could not be released prior to the son's attaining the age of twenty-five. As Lord Chelmsford observed, in his opinion in the case:

"It appears to me that the trustees could not either abandon or fetter the exercise of the power intrusted to them. It was a power coupled with a duty of a most important character."

The case of *In re Somes*¹⁶ also involved an application of trustees for direction of the court as to the distribution of a trust estate. The husband, S. F. Somes, by a marriage settlement, under which he had an equitable life interest and a power to appoint by deed or will to the children or remoter issue of the marriage, appointed the entire estate on trust for the benefit of his daughter and her issue as he might appoint, and in default of appointment, to the daughter. The father, then, by a deed poll, released the trust fund from the latter power. The question was whether this release was valid. The court was of the opinion that it was, by reason of the fact that, though it was a special power to appoint to a class, it was not a power in trust. Mr. Justice Chitty said:

"Two cases . . .¹⁷ were cited and relied on to show that a trust coupled with a duty, or a power in the nature of a trust, cannot be released. But these were both cases of trustees who

¹⁴ See FARWELL, *op. cit. supra* note 1, at 13, 14; ROOD, *op. cit. supra* note 1, § 759c.

¹⁵ L. R. 1 Scotch & D. 11 (1866).

¹⁶ *Supra* note 12.

¹⁷ *Re Eyre*, 49 L. T. 259 (1883); *Saul v. Pattinson*, 34 W'kly Rep. 561 (1886).

had a power coupled with a duty—a fiduciary power in the full sense of the term; and it was held that neither before nor after the Conveyancing Act, 1881, s. 52, were trustees capable of getting rid of or releasing that part of their trust.”

In *Re Dunne's Trusts*,¹⁸ a power which the court regarded as purely collateral was involved. The residue of the testator's estate was left in trust for his children in certain proportions, and it was provided that the share of his son Michael was subject to a power in the testator's wife, at her uncontrolled discretion, by deed or will, to declare that the son should not take more than £1,000. The mother executed an instrument releasing the power; and the question before the court was whether the trustees were bound to turn over to the son more than £1,000. The court held that they were not, and that the power had not been released. While the court urged that this was a power purely collateral, and therefore not releasable, its decision appears to be based primarily on the fact that the power was coupled with a duty,¹⁹ *Weller v. Ker* being quoted with approval.

In the United States, the courts appear not to have considered to any extent the question of the release of powers in trust, though dicta that such powers cannot be extinguished are not uncommon. For example, in *Atkinson v. Dowling*,²⁰ which involved a decision that a special power in gross could be released, the court said, in speaking of the power in question:

“Such a power can, unquestionably, as a general rule, be released or extinguished by the act of the donee. 1 Sugd. Powers, 73. But where such a power is coupled with a trust we suppose it would be otherwise. Thus where an estate for life is given by will to one with power to appoint the remainder, after the termination of his life estate, among the children, and there is no limitation over upon the failure to exercise the power, there a trust will be implied in favor of the children, and the court will make the appointment among the children equally. But where there is a limitation over, upon the failure to exercise the power, no such trust can be implied, for the reason that it would defeat the intention of the testator.”

Second, all beneficial powers may be extinguished. This proposition is generally accepted as law.²¹ It is true, first, because the

¹⁸ L. R. 1 Ir. 516 (1878).

¹⁹ The question may be asked: How could this be a power in trust if the donee had an uncontrolled discretion? It is believed that the answer is that there was a duty on the part of the donee to exercise the power under certain conditions,—namely if the son were undeserving; and that, while this duty was not directly enforceable by a court, it would be indirectly recognized, and would make the relation a power in trust.

²⁰ *Supra* note 4, at 423, 12 S. E. at 95.

²¹ The following American cases sustain the extinguishment of beneficial powers: *McFall v. Kirkpatrick*, 236 Ill. 281, 86 N. E. 139 (1908); *Gros-*

donee does not owe any duty to anyone with respect to the power; it is intended for his benefit, and he is not a fiduciary. Second, it is true because extinguishment would have no more effect than an appointment to the donee himself plus an alienation to the person holding the property in default of appointment. This rule is said to apply to beneficial powers purely collateral, and, without doubt, courts would so hold, though there is little direct authority to that effect.²² A question has sometimes been raised as to whether a beneficial power to appoint by will could be extinguished by deed, since to do so would in a sense defeat the donor's intentions.²³ But the American authorities sustain such an extinguishment.²⁴

In *Thorington v. Thorington*,²⁵ the testator devised land to his wife for life, remainder to her three sons, with power in his wife to dispose of said property by will to the three sons or the survivors as she saw fit. She and the three sons filed a bill in equity for a partition or sale in lieu thereof. A sale was decreed. It was held that this was a power in gross, and that such a power to appoint by will might be released or extinguished.

In *Atkinson v. Dowling*,²⁶ the testator devised one-fourth of his property to his wife for life, with power to appoint by will or other writing upon her death among the children and grandchildren of the testator, and in default of appointment, then the personal estate was to go to all the children, and the realty to the three sons. The wife, desiring to sell a tract of land covered by the power, drew up a writing appointing it to the testator's son Jabez, and this son then joined with her in a conveyance to a

venor v. Bowen, 15 R. I. 549, 10 Atl. 589 (1887); Hume v. Hord, 5 Gratt. 374 (Va. 1849); White v. Roberts, 145 Md. 405, 125 Atl. 733 (1924); Johnson v. Harris, 202 Ky. 193, 259 S. W. 35 (1924); Tillet v. Nixon, 180 N. C. 195, 104 S. E. 352 (1920); Langley v. Conlan, 212 Mass. 135, 98 N. E. 1064 (1912).

²² *Grange v. Tiving*, O. Bridg. 107 (1665), was a case of the execution of a general power purely collateral, but the court discussed at length the question whether such a power could be extinguished, and concluded that such was possible. *Bird v. Christopher*, Sty. 389 (1653), supports the proposition, the full report of the case being as follows: "In this case upon giving of an evidence in a trespass and ejectment, it was said by Roll, Chief Justice, that if I do enfeof I. S. with a proviso contained in the deed, that it shall be lawful for me to revoke this feoffment, and afterwards I levy a fine to I. S. of the same land, this is an extinguishment of the proviso of revocation."

See also SUGDEN, *op. cit. supra* note 10, at 47.

²³ Gray, *op. cit. supra* note 3, at 523-531; KALES, *loc. cit. supra* note 8.

²⁴ White v. Roberts, *supra* note 21; Brown v. Renshaw, 57 Md. 67 (1881); Johnson v. Harris, *supra* note 21; Grosvenor v. Bowen, *supra* note 21. *Contra*: Learned v. Tallmadge, 26 Barb. 443 (N. Y. 1856).

²⁵ 82 Ala. 489, 1 So. 716 (1887).

²⁶ *Supra* note 4.

third party. At her death, the wife appointed to her daughters any property over which she might have a power. It was held that this being a power in gross and not a power in trust, the wife could and did release it as to the lot in question.

In *Columbia Trust Co. v. Christopher*,²⁷ the testator devised one-half the residue of his estate in trust for his mother for life, and then for his wife for life, with power in the wife to appoint the property in her lifetime or at her death to a charitable institution; in default of appointment, to the Y. M. C. A. and the Presbyterian Church. The wife, mother, Y. M. C. A., and Presbyterian Church joined with the trustee in a conveyance of land subject to the power. The case arises on the question of whether or not the grantee in this conveyance can make good title. The court held that his title was good and that the wife's power was extinguished by her conveyance.

In *Baker v. Wilmert*,²⁸ the testator devised land to his daughter for life, remainder to her lineal descendants surviving, and in default of such descendants, remainder to the testator's lineal descendants living at the daughter's death. The testator's heirs were the daughter and three other children. They conveyed to one S, and S conveyed to the daughter. She reconveyed to S, covenanting not to exercise the power. Subsequently the four children became seized as tenants in common and filed their bill for partition. The court decreed a partition and held the power was extinguished. "Powers in gross," said the court, "if not coupled with a trust may be released to any person having an estate of freehold in the land."

This was followed by two more Illinois cases, *Biver v. Martin*,²⁹ and *Hill v. Sangamon Loan & Trust Co.*,³⁰ each involving special powers in gross. Both held, following *Baker v. Wilmert*, that the powers were extinguishable. There is a strong dictum against the release of special powers in gross in *Thomson's Ex'rs v. Norris*,³¹ and the dissenting opinion in *McFall v. Kirkpatrick*³² is against allowing the extinguishment of a general power in gross to appoint by will.

When we come to special powers purely collateral, it must be conceded that the dicta are overwhelmingly against their release. Professor Gray dismissed the whole subject by saying:³³

²⁷ 133 Ky. 335, 117 S. W. 943 (1909).

²⁸ *Supra* note 13.

²⁹ 294 Ill. 488, 128 N. E. 518 (1920).

³⁰ *Supra* note 4.

³¹ *Supra* note 13, at 525. But see the decision in the court below, favoring the release of such a power. 19 N. J. Eq. 307 (1868).

³² *Supra* note 21.

³³ Gray, *op. cit. supra* note 3, at 516.

"Such powers, if special, cannot be released. This has been held *semper, ubique, et ab omnibus*."

But, so far as the writer has been able to find, no case has ever held that a special power purely collateral (not a power in trust) may not be extinguished.³⁴ In support of the statement just quoted, Professor Gray's only citation is Sugden, *Powers* (8th ed. 1861) 49. On that page, Lord St. Leonards makes the statement that the donee of a power simply collateral "cannot by any act whatever suspend or extinguish his power." The only cases he cites in support of the proposition are the following: an anonymous Year Book case in the fifteenth year of Henry VII; ³⁵ *Digges' Case*; ³⁶ *Albany's Case*; ³⁷ *Grange v. Tiving*; ³⁸ *Tippet v. Eyres*; ³⁹ and *Quick v. Ludborrow*.⁴⁰

In the Year Book case referred to (which is perhaps cited for the proposition under consideration more often than any other) a man made a feoffment to trustees to the use of his will, and afterward made his will directing the feoffees to give to his wife a life estate and the remainder to his son and the heirs of his body; but if the son died without heirs of his body, then the feoffees were to alienate the land and distribute the price for the testator's soul. The testator having died, his wife and son also died, the latter leaving no heir. It appeared that the feoffees had enfeoffed others to perform the uses of the testator's will, and the question was whether the second feoffees could make a valid sale. The court thought that the second feoffees could not alienate and that the power still remained with the first feoffees. That conclusion seems unobjectionable, not, however, for the reason that the first feoffees could not extinguish the power, but because the power was limited to the first feoffees and could not be transferred.

There are some observations of the court which pertain more directly to the question of the release of purely collateral powers. Fineux, C. J., said: ⁴¹

"There is a diversity where the power given to the feoffees is annexed to the land and where it is not; for if the will be, that the aforesaid feoffees shall make an estate over to a cer-

³⁴ In *re Dunne's Trusts* might possibly be thought to be such a case, but it is believed to have involved a power in trust, and such was the view of the court. See *supra* note 19.

³⁵ (1500) Y. B. 15 Hen. VII, f. 11b, translated in SUGDEN, *op. cit. supra* note 10, at 893.

³⁶ 1 Co. 173a (1598).

³⁷ 1 Co. 107a (1586).

³⁸ *Supra* note 22.

³⁹ 5 Mod. 457 (1689).

⁴⁰ 3 Bulst. 29 (1581).

⁴¹ See the translation in SUGDEN, *op. cit. supra* note 10, at 894.

tain person for certain years, there, if they make feoffment over to the same use, the first feoffors cannot do that, for that power is a thing annexed to the land, which no one can do but he who has the land. But here the will was that the aforesaid feoffees shall alien the land, etc., and that may well be done after the feoffment made by themselves to the use; and therefore their power is not determined by their feoffment. . . . And if a man has feoffees upon confidence, and makes a will that his executors shall alien his lands, there, if the executors renounce administration of the goods, yet they may alien the land, for the will of land is not a testamentary matter, nor have the executors to interfere in this will, except so far as a special power is given to them."

It will be seen that these remarks of Fineux are not in any way inconsistent with the proposition herein urged,—first, because he is discussing disclaimer of the office and not release of the power; and second, because, as we have seen, the power of an executor to sell is always a power in trust, and thus would not be extinguished in any event. The case contains no generalizations as to the release of powers purely collateral.

Albany's Case involved a general power in gross which the court held could be extinguished. Yet the court observes, citing the Year Book case just referred to, that

"an authority or power which is collateral to the right and title of the land, cannot be given or extinguished by fine or feoffment; neither can he thereby disable himself to make an estate according to his authority and power when it comes *in esse*."

Digges' Case was likewise a case of a general power of revocation in gross. The usual dicta as to powers purely collateral, with the citation of the same Year Book case, appear.

Grange v. Tiving was a case involving the execution of a general power purely collateral by an infant *feme covert*, the court holding the execution good.

Tippet v. Eyres was an action of debt on a bond for the performance of an award of an arbitrator, and the question was whether, when one umpire had been chosen and refused to act, and then a second umpire was chosen and did act, his award was good. The court held it was, and some observations were made about bare powers and authorities which had nothing to do with the case at bar.

Quick v. Ludborrow was an action of covenant which involved a promise to pay money to a stranger to the covenant, and the question was whether the stranger could release. Some observations were made which might be applicable to the release of a purely collateral power, but nothing of the sort was involved in the case.

The only additional cases cited by Mr. Farwell⁴² in connection with the usual statement about the impossibility of extinguishing purely collateral powers are *West v. Berney*,⁴³ which involved a power in gross, and *Willis v. Shorral*,⁴⁴ which involved an attempt by the owner of an estate in the land, who was *not* the donee of the power, to extinguish it by fine.

Mr. Tiffany, in the second edition of his textbook on Real Property,⁴⁵ cites *Digges' Case* and *Grange v. Tiving*, to both of which reference has already been made, and a dictum in *Edwards v. Sleator*⁴⁶ (which was a case involving the power of a life tenant to make a lease for years).

These being substantially the only authorities in support of the proposition, it would seem still to be an undecided question whether a special power purely collateral and not in trust can be extinguished. The strongest argument in favor of the proposition that such a power cannot be terminated by the donee would appear to be found in the large number of unsupported assertions that such is the law.⁴⁷

On the other hand, it should be noted that, as has been seen in Part I of this paper, powers of sale of executors were recognized as powers in trust; and in all probability the power of sale of an executor was one of the earliest types of power purely collateral. Hence it might have been natural to assume that all powers purely collateral are powers in trust.

Furthermore, we find the notion vaguely expressed in some of the earlier cases that the donee of a power purely collateral has nothing he can release for he has no interest in the property. As Dodderidge, J., said in *Quick v. Ludborrow*,⁴⁸ "a release doth not operate, but upon an estate, interest, or right." One may surmise that these early judges were unable to conceive of a power cutting down the sum total of legal relations which make up ownership in fee, and that therefore the donee simply had nothing to give up; or, if the donee had a power in trust, that he had a duty, which, of course, could not be released.⁴⁹

⁴² FARWELL, *op. cit. supra* note 1, at 12.

⁴³ *Supra* note 6.

⁴⁴ 1 Atk. 474 (1738).

⁴⁵ 1 TIFFANY, *op. cit. supra* note 2, at 1103, nn. 47, 48.

⁴⁶ *Supra* note 5.

⁴⁷ See CO. LITT. *237a and *265b, for his statement of the law.

⁴⁸ *Supra* note 39, at 30.

⁴⁹ There is also another explanation which is given in some of the early cases, namely, that the donee of a power purely collateral could not extinguish because, in the case of a power of sale, the vendee is in by the devisor and not the donee. As Mr. Chance pointed out, that is unsound, since many powers are extinguishable where the appointee would derive his title from the donor. 2 CHANCE, POWERS (1841) 580. Nevertheless, in 1 SANDERS, USES AND TRUSTS (5th ed. 1844) 183, the old notion is again

It is quite possible that one reason why no case has arisen on the release of purely collateral special powers not in trust may be because purely collateral powers generally are in trust. But clearly one could conceive of such a power which would not be in trust. Suppose *A* devises to *B* in fee with power to *C* to appoint the property to anyone he may choose except that his choice is to be limited to the blood relations of *A*. Following the decision of *In re Combe*,⁵⁰ we would conclude that this power is not imperative, and, if not imperative, it is not a power in trust. It would seem that there is no good reason of policy for denying the donee of such a power the power to extinguish it.

While the view herein expressed is contrary to the great mass of dicta, some support for it in the textbooks may be found. Mr. Chance, in his work on powers, after pointing out that there are no positive decisions on the point, discusses various cases and continues:⁵¹

"Powers given to executors, and other powers of that description in the nature of trusts, may in general stand on a different footing. The donees of such powers have been resembled to common attorneys under letters of attorney. . . . In such cases the courts may well hold that the donees would be violating their duty in attempting to prevent the execution of their powers. Perhaps it may be doubted whether the doctrine would be carried further; if so, Popham's position in *Digges' Case* may be considered of a questionable nature."

Farther on⁵², he says:

"It may be thought, that the only satisfactory ground on which the doctrine as to the non-extinguishment of certain powers rests, is, that it is or may be the duty of the donee to execute them, and consequently a breach of his duty to extinguish them. . . ."

It would appear also that Mr. Joshua Williams was of the same opinion, for in his well known textbook on Real Property he says:⁵³

"Powers may, generally speaking, be destroyed or extinguished by deed of release made by the donee or owner of the power to any person having an estate of freehold in the land; 'for it would be strange and unreasonable that a thing, which is created by act of the parties, should not by their act, with their mutual consent be dissolved again.' . . . The exceptions to

advanced that a power purely collateral cannot be extinguished because "the person to be benefited under the exercise of the power does not claim the estate from or under the donee, but under the original settlor."

⁵⁰ [1925] Ch. 210.

⁵¹ 2 CHANCE, *op. cit. supra* note 49, at 582.

⁵² *Ibid.* 584.

⁵³ WILLIAMS, REAL PROPERTY (24th ed. 1926) 474.

this rule appear to be all reducible to the simple principle that, if the duty of the donee of the power may require him to exercise it at any future time, then he cannot extinguish it by release."⁵⁴

There is also an observation by way of dictum, in the case of *Jackson v. Davenport*,⁵⁵ which is favorable to the view herein expressed. In that case the Chancellor said:

"It is stated in the books as a general rule that a simply collateral or naked power cannot be barred or extinguished by disseisin, or by fine, feoffment or other conveyance. . . . It is said, for instance, that if a power to sell land be given to executors, and the heir of the testator enters and enfeoffs *B*, who dies seised, yet the executors may sell, and the vendee will be in by the will, which is paramount to the descent, and that a descent which tolls an entry does not toll a power. . . . I presume, that I may venture, upon the strength of the authorities which have been previously mentioned, and upon the reason of the thing, to question the universality of the application of this rule, and to insist that it ought to be confined within reasonable limits."

The limits, however, which the Chancellor then indicated are not particularly pertinent to this discussion.

By what methods may the donee terminate the power? First, he may execute a release to the persons whose interests in the property would be affected by an appointment.⁵⁶ Second, if the power be appendant, a conveyance of the property operates, by way of estoppel, to extinguish the power in so far as its exercise would affect the property conveyed.⁵⁷ This is because the donee will not be permitted to derogate from his own grant. Third, the donee, if he does not have the property which is subject to the power, may acquire it; and thereafter a conveyance by him of the property in question will terminate the power as to the property conveyed, as if the power had been originally appendant.⁵⁸

In a few cases it seems to be the view of the courts that, when the donee of a power in gross acquires the other interests in the property, the power is destroyed by being merged in the

⁵⁴ That these remarks do not refer to the English legislation of 1881 which made special powers, purely collateral, releasable, is seen from the fact that this statement appeared as early as the 4th edition of Mr. Williams' text, which was published in 1871.

⁵⁵ 20 Johns. 537, 552 (N. Y. 1822).

⁵⁶ In *Grosvenor v. Bowen*, *supra* note 21, such a mode of release was held valid.

⁵⁷ This was the mode of extinguishment in *McFall v. Kirkpatrick*, *supra* note 21, and in *Langley v. Conlan*, *supra* note 21.

⁵⁸ Such a method of extinguishment was recognized in *Baker v. Wilmert*, *supra* note 13.

fee.⁵⁹ That certainly, if law, seems inconsistent with the English rule that a power and the fee may exist separately in the same person.⁶⁰ Whether most American courts would recognize the existence of a power separate from the fee in the same person may well be doubted. However, so far as common law systems of power are concerned, it is not necessary to the decision in any of the American cases on extinguishment of powers to hold that they were destroyed by a merger of the power with the fee.⁶¹ Hence, the question may be regarded as still an open one.

In conclusion, be it said that the position herein presented that all powers are terminable by the donee except powers in trust is not a purely technical one. A power may well be a serious clog on the alienability of property. The tendency of land law seems to be in the direction of a greater degree of alienability. That the tendency toward furthering the extinguishment of powers is very real is shown by the fact that in England, where powers are used far more than in America, since 1882, statutory provisions have permitted the release of all powers except powers in trust.⁶²

The view that special powers in gross are not releasable has not been accepted by the American courts. Hence, we would have a most irrational distinction between powers purely collateral and other powers, if we were to follow the usual dictum as to the release of the former. To place the exception to the releasability of powers on the basis of a fiduciary duty in the donee of a power in trust is to put the conclusions of the courts on a rational basis, and at the same time to impose no undue restriction on free alienability. While the proposition contended for,—namely, that all powers are terminable except powers in trust,—cannot be said to be settled law, because of the small number of decided cases, yet it appears to be in accord with the spirit and tendency, as well as the actual *ratio decidendi*, of the American cases.

⁵⁹ That idea is expressed in *Tillet v. Nixon*, *supra* note 21, and *Baker v. Wilmert*, *supra* note 13. In both cases, however, it is possible to explain the extinguishment by an alienation after the power became appendant. *Spencer v. Kimball*, 98 Me. 499, 57 Atl. 793 (1904), contains a dictum that a power of sale would be extinguished by a merger.

In New York, where the common law of powers is not in force, it seems that a power may merge in the fee. *Jennings v. Conboy*, 73 N. Y. 230 (1878).

⁶⁰ *Clere's Case*, 6 Co. 17b (1599); SUGDEN, *op. cit. supra* note 10, at 93 *et. seq.*

⁶¹ See *supra* note 59.

⁶² CONVEYANCING ACT, (1881) 44 & 45 Vict. c. 41, § 52. This provision has been retained in the new LAW OF PROPERTY ACT, (1925) 15 Geo. V, c. 20, § 155; TOPHAM, NEW LAW OF PROPERTY (2d ed. 1925) 208.