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CHAPTER 61

POWERS

3266. Powers abolished, except, etc.—Powers, except as authorized and provided for in this chapter, are abolished; and the creation, construction, and execution of powers shall be governed by the provisions herein contained. (4301)

71-255, 265, 73+967; 78-201, 80+963.

3267. Power defined—A power is an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power might himself lawfully perform. (4302)

52-67, 72, 53+1130.

3268. Who may grant a power—No person is capable, in law, of granting a power who is not at the same time capable of alienating some interest in the land to which the power relates. (4303)

3269. Division of powers—Powers, as authorized in this chapter, are general or special, and beneficial or in trust. (4304)

3270. General power defined—A power is general when it authorizes the alienation in fee, by means of a conveyance, will, or charge, of the lands embraced in the power, to any alienee whatever. (4305)

71-255, 265, 73+967.

3271. Special power defined—A power is special:

1. When the person or class of persons to whom the disposition of the lands under the power is to be made is designated.
2. When the power authorizes the alienation, by means of a conveyance, will, or charge, of a particular estate or interest, less than a fee. (4306)

3272. Power is beneficial, when—A general or special power is beneficial when no person other than the grantee has, by the terms of its creation, any interest in its execution. (4307)

45-424, 48+10; 71-255, 265, 73+967.

3273. Powers to married women—A general and beneficial power may be given to a married woman, to dispose, during the marriage, and without the concurrence of her husband, of land conveyed or devised to her in fee. (4308)

3274. Particular estate with power of disposition—When an absolute power of disposition, not accompanied by any trust, is given to the owner of a particular estate for life or years, such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estate limited thereon, in case the power is not executed, or the lands sold for the satisfaction of debts. (4309)

71-255, 265, 73+967; 78-201, 80+963.

3275. Power of disposition creates fee, when—When a like power of disposition is given to any person to whom no particular estate is limited, such person shall also take a fee, subject to any future estate that may be limited thereon, but absolute in respect to creditors and purchasers. (4310)

71-255, 259, 73+967.

3276. Such power creates absolute fee, when—In all cases where such power of disposition is given, and no remainder is limited on the estate of the grantee of the power, such grantee shall be entitled to an absolute fee. (4311)

71-255, 259, 73+967.

3277. Particular estate with power to devise fee—When a general and beneficial power to devise the inheritance is given to a tenant for life or for years,

such tenant shall be deemed to possess an absolute power of disposition, within the meaning and subject to the provisions of §§ 3274-3276. (4312)

71-255, 259, 73+967; 78-201, 80+963.

3278. What powers of disposition deemed absolute—Every power of disposition shall be deemed absolute, by means of which the grantee is enabled, in his lifetime, to dispose of the entire fee for his own benefit. (4313)

71-255, 259, 73+967; 78-201, 80+963.

3279. Effect of reserving power of revocation—When the grantor in any conveyance reserves to himself, for his own benefit, an absolute power of revocation, such grantor shall still be deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned. (4314)

3280. Special and beneficial powers—Who may take—A special and beneficial power may be granted:

1. To a married woman, to dispose, during the marriage, and without the consent of her husband, of any estate less than a fee belonging to her in the lands to which the power relates.

2. To a tenant for life of the lands embraced in the power, to make leases for not more than twenty-one years, and to commence in possession during his life. (4315)

3281. Power of tenant for life to make leases—The power of a tenant for life to make leases is not assignable as a separate interest, and will pass, unless specially excepted, by any conveyance of such estate; and, if specially excepted in any such conveyance, it is extinguished. (4316)

3282. Release of such power—Such power may be released by the tenant to any person entitled to an expectant estate in the land, and shall thereupon be extinguished. (4317)

3283. Power to lease bound by mortgage—A mortgage executed by a tenant for life having a power to make leases, or by a married woman by virtue of any beneficial power, does not extinguish or suspend the power; but the power is bound by the mortgage, in the same manner as the lands embraced therein. (4318)

3284. Effect of mortgage on power—The effects of such lien by mortgage on the power are:

1. That the mortgagee is entitled, in equity, to an execution of the power, so far as the satisfaction of his debt may require.

2. That any subsequent estate created by the owner, in execution of the power, becomes subject to the mortgage, in the same manner as if in terms embraced therein. (4319)

3285. No beneficial powers valid, except, etc.—No beneficial power, general or special, hereafter created, other than such as are enumerated and defined in §§ 3266-3284, shall be valid. (4320)

3286. Powers liable to claims of creditors—Every special and beneficial power is liable, in equity, to the claims of creditors, in the same manner as other interests that cannot be reached by an execution at law; and the execution of the power may be decreed for the benefit of the creditors entitled. (4321)

3287. General power, when in trust—A general power is in trust when any person or class of persons, other than the grantee of such power, is designated as entitled to the proceeds, or any portion of the proceeds, or other benefits, to arise from the alienation of the lands according to the power. (4322)

45-424, 48+10.

3288. Special power, when in trust—A special power is in trust:

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

2. When any person or class of persons, other than the grantee, is entitled to any benefit from the disposition or charge authorized by the power. (4323)

3289. Trust powers imperative—Every trust power, unless its execution or non-execution is made expressly to depend on the will of the grantee, is imperative, and imposes a duty on the grantee, the performance of which may be compelled in equity, for the benefit of the parties interested. (4324)

3290. Effect of right of selection—A trust power does not cease to be imperative when the grantee has the right to select any, and exclude others, of the persons designated as the objects of the trust. (4325)

49-57, 84, 51+629, 52+26.

3291. Beneficiaries, when to share alike—When a disposition under a power is directed to be made to or among several persons, without any specification of the share or sum to be allotted to each, all the persons designated shall be entitled to an equal proportion. (4326)

3292. When trustee may discriminate between them—But when the terms of the power import that the estate or fund is to be distributed among the persons so designated, in such manner or proportion as the trustee of the power may think proper, the trustee may allot the whole to any one or more of such persons, in exclusion of the others. (4327)

3293. Death of trustee with right of selection—If the trustee of a power, with the right of selection, dies, leaving the power unexecuted, its execution shall be decreed in the district court, for the benefit, equally, of all the persons designated as objects of the trust. (4328)

3294. Power to be executed by district court—When a power in trust is created by will, and the testator has omitted to designate by whom the power is to be executed, its execution shall devolve on the district court. (4329)

3295. Application of law of trusts to powers—The provisions of §§ 3260-3265, in relation to express trusts and trustees, shall apply equally to powers in trust, and the grantees of such powers. (4330)

3296. Execution of power in favor of creditors—The execution, in whole or in part, of any trust power, may be decreed in equity for the benefit of the creditors or assignees of any person entitled, as one of the objects of the trust, to compel its execution, when the interest of the objects of such trust is assignable. (4331)

3297. What power will pass by general assignment—Every beneficial power, and the interest of every person entitled to compel the execution of a trust power, shall pass to the assignees of the estate and effects of the person in whom such power or interest is vested, under any general assignment of the estate and effects of such person, for the benefit of creditors, made pursuant to law. (4332)

3298. Reservation of powers in conveyance—The grantor of any conveyance may reserve to himself any power, beneficial or in trust, which he might lawfully grant to another; and every power so reserved shall be subject to the provisions of this chapter, in the same manner as if granted to another. (4333)

3299. How a power may be granted—A power may be granted:

1. By a suitable clause contained in a conveyance of some estate in the lands to which the power relates.

2. By a devise in a last will and testament. (4334)

65-124, 131, 67+657.

3300. Effect of recording power—Every power shall be a lien or charge upon the lands which it embraces, as against creditors, and purchasers in good faith and without notice, of or from any person having an estate in such lands, only from the time the instrument containing the power is duly recorded; but as against all other persons the power shall be a lien from the time the instrument in which it is contained takes effect. (4335)

3301. When power is irrevocable—Every power, beneficial or in trust, is irrevocable, unless an authority to revoke it is reserved or granted in the instrument creating the power. (4336)

58-187, 59+998.

3302. In whom power may be vested—A power may be vested in any person capable in law of holding lands, but cannot be executed by any person not capable of alienating lands, except in the single case mentioned in § 3303. (4337)

3303. Married woman may execute power, how—A married woman may execute a power during her marriage, by grant or devise, as may be authorized by the power, without the concurrence of her husband, unless by the terms of the power its execution by her during marriage is expressly or impliedly prohibited; but no power vested in a married woman during her infancy can be exercised by her until she attains her full age. (4338)

3304. Survivors may execute power—When a power is vested in several persons, all must unite in its execution; but if, previous to such execution, one or more of such persons shall die, the power may be executed by the survivors. (4339)

3305. Power, how executed—No power can be executed, except by some instrument in writing which would be sufficient in law to pass the estate or interest intended to pass under the power if the person executing the power were the actual owner. (4340)

3306. Instruments in execution of powers—Every instrument, except a will, made in execution of a power, whether it is a power of revocation or otherwise, shall be deemed a conveyance, within the meaning and subject to the provisions of chapter 63. (4341)

3307. Execution of power by will—When a power to dispose of lands is confined to a disposition by devise or will, the instrument of execution must be a will duly executed according to the provisions of law relating to wills of real and personal estate. (4342)

3308. Execution by grant—When a power is confined to a disposition by grant, it cannot be executed by will, although the disposition is not intended to take effect until after the death of the party in whom the power is vested. (4343)

3309. Power not void though directing insufficient conveyance—When the grantor of a power has directed or authorized it to be executed by an instrument not sufficient to pass the estate, such power shall not be void, but its execution shall be governed by the rules prescribed in this chapter. (4344)

3310. Directions of grantor, when immaterial—When the grantor has directed any formalities to be used in the execution of a power, in addition to those which would be sufficient by law to pass the estate, the observance of such additional formalities shall not be necessary to a valid execution of the power. (4345)

3311. Nominal conditions may be disregarded—When the conditions annexed to a power are merely nominal, and evince no intention of actual benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded in the execution of the power. (4346)

3312. When directions of grantor must be observed—Except as hereinbefore provided, the intentions of the grantor of a power, as to the mode, time, and conditions of its execution, shall be observed, subject to the power of the district court to supply a defective execution in the cases hereinafter provided. (4347)

3313. Consent of third person, how expressed—When the consent of a third person to the execution of the power is requisite, such consent shall be expressed in the instrument by which the power is executed, or shall be certified in writing thereon; and, in the first case, the instrument of execution, in the second, the certificate, shall be signed by the party whose consent is required; and, to entitle the instrument to be recorded, it shall be duly acknowledged. (4348)

3314. Execution in excess of power—No disposition by virtue of a power shall be void, in law or equity, on the ground that it is more extensive than

was authorized by the power; but every estate or interest so created, so far as embraced by the terms of the power, shall be good and valid. (4349)

3315. Omission to recite power, effect of—Every instrument executed by the grantee of a power, conveying an estate or creating a charge which such grantee is authorized by the power to convey or create, but which he would have no right to convey or create unless by virtue of his power, shall be deemed a valid execution of the power, although such power is not recited or referred to therein. (4350)

60-73, 81, 61+1020; 78-201, 80+963.

3316. Fraud in execution of power—Instruments in execution of a power are affected by fraud, both in law and equity, in the same manner as conveyances by owners or trustees. (4351)

3317. General devise is execution of power, when—Lands embraced in a power to devise pass by a will purporting to convey all the real property of the testator, unless the intent that the will shall not operate as an execution of the power appears expressly or by necessary implication. (4352)

3318. Gift under power deemed an advancement, when—Every estate or interest given by a parent to a descendant, by virtue of a beneficial power, or of a power in trust with a right of selection, shall be deemed an advancement to such descendant, to the same extent and under the same circumstances that a gift of real or personal estate would be deemed an advancement. (4353)

3319. Suspension of right of alienation—The period during which the absolute right of alienation may be suspended by any instrument in execution of a power shall be computed from the time of the creation of the power, and not from the date of such instrument. (4354)

3320. Who may not take under power—No estate or interest can be given or limited to any person, by an instrument in execution of a power, which such person would not have been capable of taking under the instrument by which the power was granted. (4355)

3321. Married woman may create estate—When a married woman entitled to an estate in fee is authorized by a power to dispose of such estate during her marriage, she may, by virtue of such power, create any estate which she might create if unmarried. (4356)

3322. Defective execution remedied in equity—When the execution of a power in trust is defective, in whole or in part, under the provisions of this chapter, its proper execution may be decreed in equity, in favor of the person designated as the object of the trust. (4357)

60-73, 61+1020.

3323. Purchasers entitled to relief, when—Purchasers for a valuable consideration, claiming under a defective execution of any power, are entitled to the same relief in equity as similar purchasers claiming under a defective conveyance from an actual owner. (4358)

3324. Power of sale in mortgage deemed part of security—When a power to sell lands is given to the grantee in any mortgage or other conveyance intended to secure the payment of money, the power shall be deemed a part of the security, and shall vest in and may be executed by any person who, by assignment or otherwise, shall become entitled to the money so secured to be paid. (4359)

3325. Power of attorney excepted—The provisions of this chapter shall not extend to a simple power of attorney to convey lands in the name and for the benefit of the owner. (4360)

3326. Definition of terms—The term "grantor of power" is used in this chapter as designating the person by whom a power is created, whether by grant or devise; and the term "grantee of a power" is used as designating the person in whom a power is vested, whether by grant, devise, or reservation. (4361)