TESTAMENTARY POWERS OF SALE FOR DEBTS IN ONTARIO

In 15 *Canadian Bar Review*, 516, the subject of conveyances under the Devolution of Estates Act was discussed and reference was made incidentally to a concurrent power vested in executors to sell lands independently of that statute where the will itself gave executors a power to sell lands, to pay debts or legacies either expressly or as the result of a direction to executors to pay them, from which an implied power to sell lands for those purposes could be inferred. Down to 1926 such a direction often obviated the necessity of complying with the somewhat confusing and limited powers of sale conferred by the Devolution of Estates Act where it was desired to sell lands not so much to pay debts as for the purposes of distribution amongst beneficiaries; *Mercer* v. *Neff*, 29 O.R. 680; *Kennedy* v. *Suydam*, 36 O.L.R. 512 at pp. 520, 521; *Re Reynolds*, 51 O.L.R. 123.

This power in modern cases was dealt with as though it depended upon an Act passed in England in 1859 and adopted in Upper Canada in 1865 as 29 Vict. c. 28, secs. 13, 14, 15 and 16, which eventually found its way into the Trustee Act and there remained down to R.S.O. 1914, c. 121, s. 47. Though in the course of years certain changes and additions appeared, yet in principle and in substance the revision of 1914 embodied the original legislation of 1865. Then in 1926 in preparation for the revision of 1927 there was passed the Trustee Act, 16 Geo. V, c. 40, which became R.S.O. 1927, c. 150, and later R.S.O. 1937, c. 165. Many changes appeared in the Act of 1926 and amongst others section 47 of the 1914 Act was shortened and changed, and what remains of it is now R.S.O. c. 165, s. 43. In particular subsection 3 of section 47 was left out. That subsection enabled executors to sell lands under this implied power even though the lands had not been in terms devised to them, and as that frequently occurs in wills, doubts have arisen whether executors in such cases can now sell the lands under this testamentary power. If these doubts are well founded then the former very convenient method of selling without complying with the Devolution of Estates Act no longer exists and the purpose of this article is to enquire whether it has in fact been done away with.

To begin with we should remember that the English legislation of 1859 and its counterpart enacted here in 1865 were enabling Acts. The judgment of Boyd C. in *Yost* v. *Adams*,

8 O.R. 411, reminds us of this and though in appeal in 13 O.A.R. 129 the judgment proceeded largely upon the statute, yet at p. 134 Hagarty C.J. said: "I must not be understood as questioning or discussing the learned Chancellor's view as to the law being with the respondent without the aid of the statute." The original rule and the effect of legislation are indicated by the following extract from 25 Halsbury, (2nd ed.) p. 521, par. 947 :—

> The intention of the testator that the executor should take a power of sale over his real estate was sufficiently shown by his charging that estate with the payment of his debts. A mere general direction that his debts should be paid effectually charged them upon all his real estate whether the real estate was devised to the executors or not and whether the testator effectually disposed of it or died intestate as to it. But apart from the Law of Property Amendment Act, 1859, the executor in such cases could not before January 1st, 1898, convey the legal estate to the purchaser "unless it was devised to him."

This power of sale is a creature of the courts and not of statute and its antiquity may be gathered from the fact that *Shallcross* v. *Finden* (1798), 3 Ves. 738, cited in *Hawkins* on *Wills*, 2nd ed. pp. 331, 332 as the leading case upon it, is not the earliest decision upon the point. It was this antiquity and the state of the law then in force governing the devolution of lands on the death of an owner which made legislation necessary if the power of sale created by a charge of debts or legacies upon lands was to be effectively exercised.

Lands did not then pass to an executor by virtue of his office. As executor his powers only extended to personal estate. If the will made no disposition of the lands they passed to the heir at law direct; if the will did dispose of lands they passed to the devisee direct and not, as now, to the executor first and thence through him to the devisee. Consequently when the courts found in the will a direction to the executor to pay debts or legacies they might and did construe it as a charge upon the lands and a power given to the executor to sell the lands to realize the charge; but they could not or did not thereby vest in the executor the legal estate which had passed to the heir or devisee so that before a purchaser under the power could be compelled to complete, the heir or devisee had to join in the conveyance; *Goring* v. *Carter* (1845), 1 Coll. 644; see also

Gregory v. *Connolly* (1850), 7 U.C.R. 500, and *Macdougall* v. *Macdougall* (1855), 5 U.C.C.P. 355.

This was only one of the difficulties which confronted conveyancers when seeking to take advantage of this power of sale and it was removed by the enactment of a section which became R.S.O. 1914, c. 121, s. 47 (3). It was this subsection which amongst others was omitted from the revision of 1926, but neither that section nor the effect of its omission can be understood without examining the other provisions of section 47 and the other conveyancing difficulties which they also attempted to remove.

Though section 47 of the 1914 revision differs somewhat from the wording of the 1865 legislation these differences are not important enough to justify our tracing the sections through the intervening statutory revisions.

It may be easier to understand the "remedies" which section 47 seeks to apply if we consider the "mischiefs" which existed before the statute was passed. Though in appropriate cases the courts implied the existence of a charge upon lands and a power of sale where the executor was directed to pay debts and legacies, the executor as such had not at that time any estate in the lands. The following are some of the situations which could and did result from thus limiting the executor's normal functions to personal estate only :—

1. The testator might create an express charge of debts and legacies upon lands and devise the lands to the executor as trustee with power to realize the charge by selling or mortgaging the lands. Here no difficulty occurs if on the death of the testator the executor proves the will, accepts the devise with the burden of the charge, and duly executes the power of sale. The executor is also devisee in trust; the testator's estate is vested in him by the devise and he can convey to a purchaser under the power all the estate originally vested in the testator.

2. But powers vested in one person were looked upon as exerciseable by him alone unless the instrument or some statute passed them on to his successor in office. For that reason what became section 47 (2) permitted various successors in office, or successors in title, to execute powers conferred on their predecessors. Subsequently similar legislation of a more general character was enacted—see R.S.O. 1937, c. 165, secs. 7, 25 and 39—so, in the Trustee Act of 1926 and in the revisions of 1927 and 1937, sec. 47 (2) of 1914 was omitted.

3. The testator might by his will charge his lands with the payment of debts or legacies and in the same will devise his lands so charged to a trustee without making any express provision for raising such debt or legacy by sale or mortgage. When we remember that a mere direction to the executor to pay debts or legacies was in appropriate cases interpreted by the courts as creating such a charge and conferring such a power upon the executor, it is not hard to realize how often this might happen. The testator might and often did appoint the executor his devisee in trust as well; but not having in terms given him express power to sell or mortgage the lands devised to him for debts or legacies, a purchaser under the implied power would at once raise the question whether this devisee in trust had any right to sell for debts or legacies lands which had been devised to him upon other and possibly inconsistent trusts since in the first instance at least creditors or legatees should look to the personal estate for satisfaction of their claims. Furthermore a testator having appointed an executor and directed him to pay his debts and legacies in terms sufficient to charge his lands might devise those lands to some other trustee upon different and perhaps inconsistent trusts. A purchaser then has two problems: (1) Who is to execute this power over the lands? (2) Can the devisee in trust, if he is the donee of the power, convey them to him without committing a breach of the possibly inconsistent trusts upon which he holds them? See *Ball* v. *Harris*, 4 My. & Cr. 264; *Doe d. Jones* v. *Hughes*, 6 Exch. 223. Section 47 (1) solved these problems: (1) by conferring the power upon the devisee in trust. If the executor is also devisee in trust the first of the above problems does not arise; if they are different persons it is the latter who raises the money to satisfy the charge; (2) By providing that the devisee in trust "*notwithstanding any trusts actually declared by the testator*" may raise the money by sale or mortgage to pay such debt or legacy. This protected both the devisee in trust and the purchaser against any claim that by exercising the power to pay debts or legacies in proper cases he was disregarding his duty towards some other *cestui que trust.*

By the revision of 1926, section 47 (1) was greatly abbreviated and is now R.S.O. 1937, c. 165, s. 43 (1), and the important words "notwithstanding any trusts actually declared by the testator" were left out; so that one of the old conveyancing difficulties may be revived if the devisee in trust in exercising

an implied power of sale to pay debts or legacies sells contrary to trusts "actually declared by the testator" in favour of some other *cestui que trust.* It may be that the present section 43 (2) will protect a purchaser from enquiring into any inconsistent trusts though the difficulty will be that the devisee must produce the will in order to prove that he is devisee in trust and on such production any inconsistent trust will usually be staring a purchaser in the face.

Section 43 (2) reads as follows :—

"Purchasers or mortgagees shall not be bound to enquire whether the powers conferred by this section or any of them have been duly and correctly exercised by the person acting in virtue thereof." It is very wide and has been liberally construed for years past, so that perhaps it may yet be successfully invoked in order to remove any difficulty created by the omission of the above quoted words. A recent but different example of its value is seen in *Re McCutcheon* and *Smith,* [1933] O.W.N. 413, 692.

While subsections (1) and (2) of section 47 of the 1914 revision dealt with cases where the will had actually devised the testator's estate in the lands to a devisee in trust, but had not expressly conferred upon him the power to sell for debts or legacies which the will by other provisions had created, subsection (3) was directed to a different situation. The power was found in the will but the lands subject to it were not devised in trust. They had passed either to the heir or to some devisee as beneficiary and not as trustee. The courts had created the power and had conferred it on the executor but could not under conditions then existing give him the estate which the testator had had in the lands.

It is true that in later years courts had said that "when trustees are directed to do anything for the performance of which the legal estate is requisite they are to have the legal estate," (*Davies to Jones and Evans,* 24 Ch.D. 190, p. 194) but purchasers under such a power had not been satisfied and demanded from the executor the concurrence of the holder of the testator's former estate. It was to meet this difficulty that subsection (3) was enacted. Where the testator had devised his lands to a trustee subsection (1) empowered him to exercise the power, but where there was no such devise subsection (3) amplified the power which the executor already possessed by enabling him to convey that which the will had not vested in a devisee in trust and which was not at that time vested in him

by the nature of his office, namely the testator's estate in the lands.

Though this subsection follows and depends for its effect upon the powers conferred on devisees in trust it is really the one which had been most frequently invoked and the one most frequently relied upon in the numerous cases in which executors in recent years had been enabled to sell lands charged with the payment of debts without invoking the Devolution of Estates Act. Its omission, therefore, from the revisions of 1926, 1927 and 1937 has been a serious matter for conveyancers and it remains to consider whether executors can, notwithstanding its absence from the present Act, still exercise this ancient power of sale without resorting to and complying with the terms of the Devolution of Estates Act.

The presence of subsection (3) of section 47 under the general heading "Devises in Trust" involved some confusion of thought not present when the statute was enacted in England in 1859, at which time this subsection appeared as an independent section. The powers conferred by it upon executors were based upon the fact that the testator while creating the charge *had not* devised the lands so charged "in such terms that his whole estate and interest therein became vested in a trustee." In other words, there was a power of sale but no devise in trust, and if this clause should have any separate heading that heading should be "Execution of Powers" and not "Devises in Trust".

This may have influenced the draughtsman of the 1926 Trustee Act when he left out section 47 (3). There was evidently a desire to shorten the statute for it was then reduced from 31 to 26 pages and from 73 to 66 sections. Then also there was in the 1914 as in earlier revisions a group of sections dealing generally with the "Execution of Powers", under that heading. One of these—section 43—provided that "where there is in a will a direction express or implied to sell, dispose of, appoint, mortgage, incumber or lease any land and no person is by the will or otherwise by the testator appointed to execute or carry the same into effect, the executor, if any, named in such will may execute and carry into effect every such direction *in respect of such land and any estate or interest therein* in the same manner and with the same effect as if he had been appointed by the testator for that purpose." This section was reproduced under the same heading in the revisions of 1926, 1927 and 1937 and is now section 40 of R.S.O. 1937, c. 165.

Before 1926 there was no need to resort to this section in order to execute a power, of sale to raise money for debts

or legacies because section 47 (3) of the 1914 Act was expressly directed to this power, and the predecessor of section 40 was only invoked where the power of sale was required for some other purpose, as in *Re Roberts and Brooks*, 10 O.L.R. 395; but as the legislation of 1926 and subsequent revisions did not abolish the ancient power, of sale for payments of debts and legacies, but only left out the subsection which had formerly amplified that power by ensuring that the testator's estate in the lands should pass to the purchaser, there seems to be no reason why section 40 should not now be invoked, provided the executor can not only exercise the power but also convey the testator's estate in the lands. The omission of section 47 (3) was noticed and discussed in *Dumouchelle* v. *Pitre*, [1934] O.W.N. 280, and the existence of the preexisting power referred to in the following passage from the judgment at page 282 :

> Any rights possessed by an executor are not affected by the Devolution of Estates Act (*supra*) and by the Common Law a general direction to pay debts creates a debt charge upon the lands and empowers the executor to raise money by way of mortgage. This is so even if the testator had no debts, or the executor and devisee being the same person the mortgage did not purport to be given by that individual in his representative capacity. *In re Henson, Chester* v. *Henson*, [1908] 2 Ch. 356.

Though thus discussing the powers of an executor to sell, the learned judge preferred to rest his judgment upon another ground, namely, that the executor being also devisee he did not purport to act as executor but that he made the mortgage as devisee alone and solely for the purpose of raising money for his private benefit.

It is submitted, therefore, that the testamentary power vested in the executor has not been abolished and that if statutory assistance is required to give it full effect that assistance can now be found in section 40 of the present Trustee Act. The following considerations are advanced in support of this submission :

1. Section 65 of the Trustee Act provides that "The powers, rights and immunities conferred by this Act are in addition to those conferred by the instrument creating the trust and shall have effect subject to the terms thereof."

This is a testamentary power conferred by an instrument creating it and the mere omission of an enabling section which was intended to give it greater effect would not destroy its original scope. Furthermore, we are entitled to examine the

Trustee Act to find out if there still exists any additional "powers, rights or immunities conferred by this Act."

2. Under section 40, "Where there is in a will, a direction express or implied to sell . . . . any land and no person is by the will appointed" not only "to execute" but *"to carry the same into effect"* the executor "may execute and carry into effect every such direction *in respect of such land and any estate or interest therein."* When it is remembered that under the old law the executor could execute the power but could not carry it into effect because the testator's estate in the lands could not pass to him by virtue of his office, the words underlined appear to supply all that is necessary not merely to execute the power but to pass the testator's estate in the lands to a purchaser.

3. Apart from the wording quoted above there is a general rule that "when trustees are directed to do anything for the performance of which the legal estate is requisite they are to have the legal estate" (*Anthony* v. *Rees*, 2 Cr. & J. 75, at p. 83; *Re Davies to Jones and Evans*, 24 Ch. D. 190, at p. 194; *Re Roberts and Brooks* 10 O.L.R. 395, pp. 396, 397; *Sissons* v. *Chichester*, [1916] 2 Ch. 79, pp. 84 and 85. See also *Re Waugh*, 42 O.L.R. 87, which like *Re Roberts* was a case under what is now section 40 of the 1937 Act).

4. For years past lands like goods now pass first to the executor who administers them both and makes the necessary distribution, so that the executor not only has the power to sell but has in himself the testator's estate in the lands so that the old conveyancing difficulty of the executor executing a power of sale over lands when he had no estate in them no longer exists.

This latter point requires some explanation. In 1896 there was passed in Ontario the Devolution of Estates Act whereby lands as well as goods were vested in the executor. This vesting clause was frequently changed and in 1902 the wording of the English Land Transfer Act (1897) was adopted. This new phraseology, reenacted in 1910 by 10 Edw. VII c. 56, s. 3, 4, 5, passed into R.S.O. 1914, c. 119, under the same section numbers, and in this form it is now to be found in the Devolution of Estates Act, R.S.O. 1937, c. 163, ss. 2, 3, 4. Their effect was to vest in the personal representative as trustee for the persons beneficially entitled all estate, legal or equitable, possessed by the testator subject to the payment of his debts. Thus the executor became a statutory devisee in trust of all the testator's interest in lands and had by statute the testator's estate in the lands which he could convey to a purchaser under the power.

At the beginning of this article there is a quotation from 25 Halsbury (2nd ed.) p. 521, in which the effect of the Land Transfer Act (1897) in England is mentioned as removing the difficulty previously confronting an executor who had the power to sell but no estate in the lands, and it is submitted that the same words have the same effect in Ontario, though the Land Transfer Act does not in all other respects conform to our Devolution of Estates Act.

While the executor thus derives title to the testator's lands from the Devolution of Estates Act, it does not follow that that title is subject to the later provisions of that statute; for though section 12 of that Act provides for the estate in the lands passing from executor to beneficiary after a lapse of time, unless a caution is filed, section 13 states that "Nothing in section 12 shall derogate from any right possessed by an executor or administrator with the will annexed under a will or under the Trustee Act or from any right possessed by a trustee under a will."

So also in section 20, conferring powers of sale upon executors subject to numerous qualifications and restrictions, subsection 7 provides that both it and section 19 "shall not derogate from any right possessed by a personal representative indepently of this Act."

As a result of this review of the subject it is therefore suggested that in appropriate cases the executor still has the same power of sale as he possessed while section 47 (3) of the Trustee Act of 1914 remained in force, and that it may still be executed without complying with the requirements of the Devolution of Estates Act.

The changes in the Trustee Act (1914) raise another question of great importance to a purchaser. Section 43 (2), relieving a purchaser from enquiring into the propriety of a sale by a devisee in trust, does not apply to section 40, nor to any prestatutory power of sale by an executor. Is a purchaser therefore required to make sure that there are debts or legacies outstanding and making a sale necessary? The point arose in *Re McCutcheon and Smith*, [1933] O.W.N. 413, 692, where a court of first instance held that there being no need to sell for payment of debts a purchaser could get a good title. This was reversed, however, by the Court of Appeal, relying upon section 47 (3) and (5); but since section 47 (3) no longer exists, that decision no longer helps a purchaser unless there is both a power and a devise of the lands by will.

Since the English Act of 1859 was originally passed to remove difficulties in the way of making title to lands in order to raise money for debts or legacies, we might expect to find, as is in fact the case, that the protection of purchasers had been dealt with by the court apart from the statute. *In re Barrow-in-Furness Corporation and Rawlinson's Contract,* [1903] 1 Ch. 339 at p. 347, Kekewich J. goes so far as to say that "the purport of the statute is to express in statutory form what judicial opinion had declared the law to be", and in *Yost* v. *Adams,* 8 O.R. 411 at p. 414, Boyd C. quotes from Lord St. Leonard's judgment in *Stroughill* v. *Anstey* (1852), 1 DeG. M. & G. 635, at p. 653. This is a leading case upon the general topic of executors' and trustees' powers to sell lands for debts, and though decided some years before 1859 it has been often referred to since, as in *Banque Provinciale* v. *Capital Trust,* 62 O.L.R. 458 at p. 465.

Though the decision also deals with other matters, its importance for our purposes lies in the statement quoted in *Yost* v. *Adams* and in *Farwell on Powers,* 3rd ed. (1916) pp. 94 and 95, where it is reproduced with the addition of the word (executors) in brackets as follows :—

> When a testator by his will charges his estate with debts and legacies he shows that he means to entrust his trustees (or executors) with the power of receiving the money anticipating that there will be debts and thus providing for the payment of them. It is by implication a declaration by the testator that he intends to entrust the trustees with the receipt and application of the money and not to throw any obligation at all upon the purchaser or mortgagee; that intention does not cease because there are no debts; it remains just as much if there are no debts as if there are debts because the power arises from the circumstance that the debts are provided for, there being in the very creation of the trust a clear indication amounting to a declaration by the testator that he means, and the nature of the trust shows that he means, that the trustees are alone to receive the money and apply it. In that way all the cases are reconcilable and all stand upon one footing, namely, that if a trust be created for the payment of debts and legacies the purchaser or mortgagee shall in no case be bound to see to the application of the money raised.

This quotation from *Stroughill* v. *Anstey* is preceded in *Farwell on Powers,* p. 94, by the following rule : "A purchaser from executors selling under a power of sale created by a charge of debts is not bound and ought not to enquire whether there are debts or not if such sale is made within a reasonable time after testator's death."

The above rule does not quote or rely upon the statute. It is a statement of general law often restated in England as in

Re Tanqueray, 20 Ch. D. 465, pp. 476 and 477, and *Re Henson*, [1908] 2 Ch. 356. As pointed out in *Re Tanqueray*, delay in selling under the power for 20 years might raise a presumption that debts had been paid so as to put a purchaser upon enquiry, and in *Corser* v. *Cartwright*, L.R. 7 H.L. 356, it was stated that if the purchaser knew that there were no debts his title would be defective, but such knowledge must be brought home to a purchaser. The onus is not on him to prove his ignorance.

It is, therefore, submitted that where an executor has a power of sale to pay debts by will without any devise of lands to him by will, and where he executes that power, then notwithstanding the absence of any statutory protection an innocent purchaser can obtain a good title from the executor and pay him the purchase money without satisfying himself that there are debts or that they render a sale necessary.

This review of the subject has assumed throughout the existence in a will of a power to sell lands for debts. It is not pretended that every reference to debts in a will confers such a power. That is a question of intention and various rules of interpretation exist for finding that out.

The sole object of the foregoing article is an attempt to ascertain how far changes in legislation have affected a power much older than the statute.

J. SHIRLEY DENISON.

Toronto.