

2272

POWERS OF ATTORNEY—RECORDING POWERS OF ATTORNEY DEALING WITH PERSONAL PROPERTY—SECTION 8538 G. C. HAS NOT BEEN REPEALED BY IMPLICATION OR MADE INOPERATIVE BY AMENDMENT OF SECTION 2757 G. C.—SUCH POWERS OF ATTORNEY, WHEN FILED WITH COUNTY RECORDER SHOULD BE RECORDED IN SEPARATE RECORD BOOK.

## SYLLABUS:

Section 8538, General Code, relating to the recording of powers of attorney dealing with personal property, has not been repealed by implication or rendered inoperative by the recent amendment of Section 2757, General Code, and such powers of attorney, when filed with the county recorder for recording, should be recorded in the separate record book which Section 8538 requires the recorder to keep for that purpose.

Columbus, Ohio, September 26, 1947

Hon. Brandt S. Hervey, Prosecuting Attorney, Licking County  
Newark, Ohio

Dear Sir:

This will acknowledge receipt of your letter relating to Section 2757, General Code, as recently amended, and Section 8538, General Code, each of which in terms provides that the county recorder shall keep a record of powers of attorney, and requesting my opinion as to where powers of attorney dealing with personal property should be recorded. In other words, your letter raises the question whether or not Section 8538 which relates specifically and exclusively to the recording of powers of attorney dealing with personal property, has been rendered inoperative by the recent amendment of Section 2757.

Section 8538, and also Sections 8539 to 8541, inclusive, which are pertinent to your inquiry, were enacted in 1893 as one Act, designated as H. B. No. 1294, 90 Ohio Laws, page 355, and their present code numbers were assigned in 1910 when the General Code was adopted. These sections read as follows:

Section 8538. "The recorder of each county must keep a

separate record, in which shall be recorded powers of attorney authorizing the transfer of personal property or the transaction of any business relating thereto. Upon presentation of such a power of attorney he must indorse thereon the date of its presentation, and after it is recorded indorse thereon the time when recorded, and the number or letter and page of the book in which it is recorded. He also shall make and keep up an alphabetical index of each power of attorney so recorded."

Section 8539. "Any person or persons interested may have a power of attorney authorizing the transfer of personal property, or the transaction of any business relating thereto admitted to record in the recorder's office of the county in which such property is situated, or in which any of such business is to be transacted."

Section 8540. "Such instrument must be duly signed, witnessed and acknowledged as deeds and mortgages are required by law to be. When so executed, acknowledged and recorded, a copy of the record thereof, duly certified by the county recorder, with his official seal affixed thereto, shall be received in all courts and places within this state as prima facie evidence of the existence of such instrument and as conclusive evidence of the existence of such record."

Section 8541. "The recorder shall charge such fee for the record of such an instrument, the indexing thereof, and for making a certified copy of the record of it, as he is now by law allowed to charge for like services in regard to mortgages and deeds of conveyances; which fees must be accounted for and paid over by him as required by law."

Section 2757, as recently amended, reads as follows:

"The recorder shall keep five sets of records, namely: First, a record of deeds, in which shall be recorded all deeds and other instruments of writing for the absolute and unconditional sale or conveyance of lands, tenements and hereditaments; Second, a record of mortgages, in which shall be recorded all mortgages, or other instruments of writing by which lands, tenements, or hereditaments are or may be mortgaged, or otherwise conditionally sold, conveyed, affected or incumbered in law; Third, a record of powers of attorney; Fourth, a record of plats, in which shall be recorded all plats and maps of town lots, and of the sub-divisions thereof, and of other divisions or surveys of lands, and any center line survey of a highway located within the county, the plat of which shall be furnished by the director of highways or the county engineer; Fifth, a record of leases, in which shall be recorded all leases. All instruments entitled to record shall be recorded in the proper record in the order in which they are presented for record.

The recorder may index, keep and record the unemployment compensation liens, federal tax liens, personal tax liens, mechanics liens, notices of liens and discharges of recognizances and excise and franchise tax liens on corporations in one volume."

It should be noted at the outset that Section 8538 in express terms mandatorily requires that the county recorder shall keep a record in which powers of attorney dealing with personal property are to be recorded. The language used is, that he "must keep a separate record," and, in my opinion, this means that the record therein referred to must be a record separate and apart from all other records. See 57 C. J., p. 130, where the word "separate", when used as an adjective, is defined as follows :

"Ordinarily it means apart from; different; disconnected; distinct; individual; not physically a part of; particular; private. It implies division and distribution. The term has been distinguished from 'general,' 'joint,' and 'separable.'"

It is also defined in Webster's New International Dictionary as follows :

"Unconnected; not united or associated; distinct; \* \* \* divided from another or others; disjointed; disconnected; \* \* \* pertaining to one only; not common or shared; peculiar; \* \* \*"

It will also be noted that Section 8538 et seq. deal with personal property only, that is, to powers of attorney authorizing the transfer of personal property, or the transaction of any business relating thereto, and also that it is expressly provided therein that such instruments must be signed, witnessed and acknowledged in the same manner as deeds and mortgages, and that when so executed a copy of the record, duly certified by the county recorder, with his official seal affixed thereto, shall be received in all courts and places in this state as prima facie evidence of the existence of such instrument, and as conclusive evidence of the existence of such record. But when we come to examine Section 2757, it will be observed that the provision thereof which requires the county recorder to keep a record of powers of attorney, contains no reference to personal property, but is directly associated with another class of property, namely, lands, tenements and hereditaments, and to instruments relating thereto, and to plats, surveys and highways, and also that it contains none of the specific provisions found in the Section 8538 group relating to the formalities of

execution, or to the prima facie and conclusive character of such recorded powers of attorney as evidence.

A comparison of Section 2757 with the section in force prior to its recent amendment will also disclose that, whereas under the former law powers of attorney relating to the conveyance of land were required to be recorded in the deed record, and those relating to mortgages were required to be recorded in the mortgage record, and those relating to leases were required to be recorded in the lease record, these three classes of powers of attorney may now be recorded in one record, instead of in three records as formerly, and in my opinion that is all that the legislature intended to accomplish when it inserted in general terms the provision requiring the recorder to keep a record of powers of attorney.

It will also be noted that the amended section has made provision for the recording of several classes of liens in one book, namely, the unemployment compensation liens, federal tax liens, personal tax liens, mechanics' liens, recognizance liens, and excise and franchise tax liens, and this fact, it seems to me, is evidence that had the legislature intended all classes of powers of attorney, including those dealing with personal property, to be recorded in one book in company with those relating to lands, tenements and hereditaments, it would have so provided, and not left it to the courts, or to executive or administrative officers, to read into the law by construction a provision which it did not see fit itself to incorporate therein.

Attention may also be called at this point to the fact that if it is to be held that the Section 8538 group is repealed by implication, or is rendered inoperative by reason of the recent amendment of Section 2757, there would then be no statute requiring the recording under any circumstances of powers of attorney dealing with personal property, because, under the statutory law of the state, it is only powers of attorney for the conveyance, mortgage or lease of an estate or interest in land that must be recorded in the recorder's office before the attorney in fact or agent named therein may execute the power. See Section 8536.

I have already called attention to the fact that Section 8540 requires that powers of attorney relating to personal property be duly signed, witnessed and acknowledged in the same manner as deeds and mortgages, and if it is to be held that the Section 8538 group is repealed by implication, or

rendered inoperative by Section 2757, the result would be that powers of attorney dealing with personal property could be recorded in the new record without having been witnessed and acknowledged. This result would follow because the only powers of attorney required by law to be witnessed and acknowledged are those for the conveyance, mortgage or lease of real estate. See Section 8512, General Code.

It has been repeatedly held by the Ohio courts that repeals by implication are not favored, that the presumption is always against the intention to repeal where express terms are not used, and that unless the laws involved are so clearly inconsistent and repugnant that they cannot by a fair and reasonable construction be reconciled and effect given to both, a repeal by implication cannot result. And with respect to the effect of a later act relating to the subject matter of an earlier act, the established rule is that if they can stand together, or if both can be enforced concurrently, there is no implication of repeal. Furthermore, it is essential to a repeal by implication that the repugnancy between the two statutes be irreconcilable, or as expressed by the various courts, necessary, clear, obvious, direct, strong and absolute. See 37 O. Jur. "Statutes", Sections 136, 140 and 143. In this connection I quote from 37 O. Jur. "Statutes", Section 149, as follows:

"It is, however, equally true that the policy against implied repeals has peculiar and special force when the conflicting provisions, which are thought to work a repeal, are contained in a special act and a later general act. The special statute, in many cases, remains wholly unaffected by the later general act. Indeed, the presumption is that the special is intended to remain in force as an exception to the general act. In order to work a repeal by implication, the inconsistency between the general and special provisions must be manifest and irreconcilable. Moreover, it has been laid down as an established rule in the construction of statutes that a subsequent statute, treating a subject in general terms, and not expressly contradicting the provisions of the prior act, shall not be considered as intended to affect more particular and positive provisions of the prior act unless it is absolutely necessary to do so in order to give its words any meaning or unless such intention is clearly manifested—that is, unless the repugnancy is so glaring and irreconcilable as to indicate the legislative intention to repeal."

As I have already stated, the provision in Section 2757, as amended, relating to powers of attorney is found in association with the provisions

of the section relating to lands, tenements and hereditaments. In other words, the section deals with a class of property separate and distinct from personal property, and according to another rule of statutory interpretation the provision therein as to powers of attorney should be restricted to the particular subject matter with which it is associated. 37 O. Jur. "Statutes", Section 299. And the absence from the section of the word "all," when referring to powers of attorney, and its presence when referring to deeds, mortgages, leases and plats, is also significant.

After considering the matter from the above viewpoints, I am unable to reach the conclusion that Sections 2757 and 8538, are in irreconcilable conflict, and that effect cannot be given to each. In other words it is my opinion that Section 8538 has not been repealed by implication or rendered inoperative by the recent amendment of Section 2757, and that powers of attorney authorizing the transfer of personal property, or the transaction of business relating to that class of property, when filed with the county recorder for recording, should be recorded in the "separate record" which Section 8538 requires the recorder to keep for that particular purpose.

Respectfully,

HUGH S. JENKINS,  
Attorney General.