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POWERS - LIABILITY OF APPOINTED PROPERTY FOR DEBTS OF DONEE - VALIDITY OF ATTEMPTED RESTRICTION OF LIABILITY BY THE DONOR

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POWERS — LIABILITY OF APPOINTED PROPERTY FOR DEBTS OF DONEE — VALIDITY OF ATTEMPTED RESTRICTION OF LIABILITY BY THE DONOR — By the terms of the donor's will a spendthrift trust was set up for her three grandchildren for life, giving them a general testamentary power of appointment over that portion of the corpus from which their share of the income had been derived, "but in no event shall any part of said trust funds be liable for, or be paid or appropriated to or for any debts or liabilities of such grandchildren. . . ." There was a gift over to the issue of the donees in default of appointment. By will one of the donees exercised the power in favor of three named persons who, the court found, were creditors of the donee to the amounts appointed them. Contending that the quoted provision was a limitation on the power, and that it had been exceeded, another donee appealed from the decree of the probate court authorizing the trustees, upon their petition for instructions, to pay over the donee's share to his executors for distribution. *Held,* although the quoted provision is a restriction on the trustees and not a limitation on the power, the intent to extend the spendthrift provision beyond the lives of the beneficiaries (for which period it is valid) cannot be given effect: the restriction is void; and, since the donee's estate is insolvent, the appointments will be set aside, the property to be shared by all the creditors. *State Street Trust Co. v. Kissel,* (Mass. 1939) 19 N. E. (2d) 25.

Absent such a provision as that in the principal case to prevent creditors of the donee from reaching the property, the usual rule is [1] that property subject to

501, 108 P. 1086 (1910) (ordinance imposing discriminatory tax on automatic selling device held invalid); Douglas v. South Georgia Grocery Co., 180 Ga. 519, 179 S. E. 768 (1935) (ordinance imposing a discriminatory license fee on stores using "cash and carry" method held invalid).

[6] 3 MCQUILLIN, MUNICIPAL CORPORATIONS, § 1102 (1928); 37 MICH. L. REV. 498 (1939).

[7] In each case the evidence showed that the profits of the self-service groceries would be insufficient to meet the tax imposed.

[8] Fiscal Court of Owen County v. F. & A. Cox Co., 132 Ky. 738, 117 S. W. 296 (1908); City of Louisville v. Pooley, 136 Ky. 286, 124 S. W. 315 (1910); Ziedman & Pollie v. City of Ashland, 244 Ky. 279, 50 S. W. (2d) 557 (1932).

[1] Townshend v. Windham, 2 Ves. Sen. 1, 28 Eng. Rep. 1 (1750); Johnson v. Cushing, 15 N. H. 298 (1844); Hill v. Treasurer and Receiver General, 229 Mass. 474, 118 N. E. 891 (1918); Crane v. Fidelity Union Trust Co., 99 N. J. Eq. 164, 133 A. 205 (1926); Seward v. Kaufman, 119 N. J. Eq. 44, 180 A. 857 (1935). See 59 A. L. R. 1510 (1929). The case which gave greatest impetus to the doctrine in the

a power of appointment is an "equitable asset" of the donee's estate for the payment of his debts if (1) the power is a general one,[2] (2) is exercised,[3] (3) in favor of a volunteer,[4] and (4) the donee's own property is not sufficient to pay his debts.[5] In spite of strong criticism [6] and in spite of the respectable and apparently growing opposition in the cases,[7] the rule seems justified on the premise that the donee's creditors have a greater equity by virtue of the donee's legal obligation to any property over which the donor has given him absolute control than has anyone else by virtue of any moral obligation, notwithstanding the intentions of either the donor or donee.[8] In the light of this justification, the dictum in the principal case, broadly asserting that the rule should be the same ". . . whether the appointment be made voluntarily as a benefaction or upon a consideration" [9] seems ill considered, particularly if applied to an appointment under an inter vivos power for which money or money's worth had been given, unless

United States was Clapp v. Ingraham, 126 Mass. 200 (1879), which was based partly on a misinterpretation of Thompson v. Towne, 2 Vern. 319, 23 Eng. Rep. 806 (1694) [also reported, Prec. in Chanc. 52, 24 Eng. Rep. 26 (1695)], wherein the donee and donor were the same person. Whether the property involved be realty or personalty makes no difference. Tallmadge v. Sill, 21 Barb. (N. Y.) 34 (1855). In general, see 1 SIMES, FUTURE INTERESTS, § 265 et seq. (1936).

[2] For the power to be a general one, it is but necessary that the donee be able to appoint to himself or his estate, though it may still be limited in some instances. Johnson v. Cushing, 15 N. H. 298 (1844); Edie v. Babington, 3 Irish Chanc. 568 (1854) (appointment to anyone except J. B.); Olney v. Balch, 154 Mass. 318, 28 N. E. 258 (1891); Price v. Cherbonnier, 103 Md. 107, 63 A. 209 (1906) (dictum). On classification of powers for this purpose, see Leser v. Burnet, (C. C. A. 4th, 1931) 46 F. (2d) 756.

[3] Gilman v. Bell, 99 Ill. 144 (1881). A number of statutes, modelled after the New York Statute, 49 N. Y. Cons. Laws (McKinney, 1937), §§ 149-150, 159, enacted to aid the donee's creditors by crystallizing the rule in some form, make no distinction in this regard. See 1 SIMES, FUTURE INTERESTS, § 266 (1936).

[4] Patterson v. Lawrence, 83 Ga. 703, 10 S. E. 355 (1889); Vinton v. Pratt, 228 Mass. 468 at 471, 117 N. E. 919 (1917); and see Harmon v. Weston, 215 Mass. 242, 102 N. E. 470 (1913).

[5] Patterson v. Lawrence, 83 Ga. 703, 10 S. E. 355 (1889); Tuell v. Hurley, 206 Mass. 65, 91 N. E. 1013 (1910).

[6] 77 UNIV. PA. L. REV. 422 (1929); 59 A. L. R. 1510 at 1523 et seq. (1929).

[7] *Illinois* (here there seems to be conflict in the cases): People v. Kaiser, 306 Ill. 313, 137 N. E. 826 (1922) (following the general rule); Boyle v. John M. Smyth Co., 248 Ill. App. 57 (1928) (dictum contra). *Kentucky*: St. Matthew's Bank v. De Charette, 259 Ky. 802, 83 S. W. (2d) 471 (1935). *Maryland*: Prince de Bearn v. Winans, 111 Md. 434, 74 A. 626 (1909) (repudiation of the rule as to testamentary powers). *Pennsylvania*: Dunglison's Estate, 201 Pa. 592, 51 A. 356 (1903); Fidelity-Philadelphia Trust Co. v. McCaughn, (C. C. A. 3d, 1929) 34 F. (2d) 600, cert. den. 280 U. S. 602, 50 S. Ct. 85 (1929) (dictum); but see Lederer v. Pearce, (C. C. A. 3rd, 1920) 266 F. 497. *Rhode Island*: Rhode Island Hospital Trust Co. v. Anthony, 49 R. I. 339, 142 A. 531 (1928).

[8] Johnson v. Cushing, 15 N. H. 298 (1844); Shattuck v. Burrage, 229 Mass. 448, 118 N. E. 889 (1918).

[9] (Mass. 1939) 19 N. E. (2d) 25. Strong language to the same effect was used by Lord Lindley in Beyfus v. Lawley, [1903] A. C. 411.

that appointment, which otherwise would seem to be in the nature of an allowable "preference" [10] be actually fraudulent [11] or be given too close to the donee's insolvency.[12] However, as to an appointment under a testamentary power in performance of a contract to that effect, it has been held [13] that the appointee is necessarily a volunteer since he could not command specific performance or enjoin revocation of a will which did appoint to him. The unique feature of the case, however, is the limitation on the rights of creditors which the donor attempted to impose upon the property subject to the power. No problem exists, of course, as to the spendthrift restriction on the life estate; its validity is unquestioned in most courts, even when the beneficiary is likewise the donee of a power of appointment over the remainder.[14] The court in the principal case treated this restriction on the appointed property as a restriction upon the trustees, and not a limitation upon the power which had been exceeded.[15] However it be regarded, authoritative justification for holding such a provision valid in situations more or less analogous is difficult to find. Certainly the purpose for which the usual spendthrift trust provisions for a beneficiary's lifetime are allowed and upon which rests their justification, viz., that the beneficiary may be protected against his own incompetence and improvidence,[16] does not furnish a rationale to justify this similar restriction upon the exercise of a testamentary power of appointment. Nor can support be found in attempted restrictions upon an interest in the principal of a trust which is given the beneficiary; for, whether the beneficiary has the immediate right to the principal, or it is given him in fee but in trust, or his right to the principal accrues after a designated period, or he has no right to the income at all and a vested remainder in the principal, a majority of courts will allow creditors to reach that interest during the life of the beneficiary.[17] Likewise, when the beneficiary is given an equitable

[10] See Grover v. Wakeham, 11 Wend. (N. Y.) 187 (1833); Sawyer v. Levy, 162 Mass. 190 (1894). Such preferences are still allowed under the Uniform Fraudulent Conveyances Act, §§ 3 and 9, adopted in some sixteen states including Massachusetts. Mass. Gen. Laws (1932), c. 109A.

[11] See Harris v. Carlson, 201 Iowa 169, 205 N. W. 202 (1926).

[12] The court made reference here to the Bankruptcy Act. 30 Stat. L. 54 (1898), 11 U. S. C. (1934), § 21. This is likewise the view of the PROPERTY RESTATEMENT (Tentative Draft No. 7, 1937), § 453.

[13] Vinton v. Pratt, 228 Mass. 468, 117 N. E. 919 (1918) (approved in the principal case). See PROPERTY RESTATEMENT (Tentative Draft No. 7, 1937), § 452. And it should be noted that if the appointment be testamentary, taking effect at the donee's death, at which time he is, ex hypothesi, insolvent, it could scarcely be called an allowable preference.

[14] Huey's Estate, 17 Pa. Dist. 1030 (1908); Lederer v. Pearce, (C. C. A. 3d, 1920) 266 F. 497, affg. Pearce v. Lederer, (D. C. Pa. 1919) 262 F. 993. See generally, GRISWOLD, SPENDTHRIFT TRUSTS (1936).

[15] (Mass. 1939) 19 N. E. (2d) 25 at 28.

[16] Broadway Nat. Bank v. Adams, 133 Mass. 170, 43 Am. Rep. 504 (1882).

[17] Gray v. Obear, 54 Ga. 231 (1875); Taylor v. Harwell, 65 Ala. 1 (1880); Vaughan v. Wise, 152 N. C. 31, 67 S. E. 33 (1910); McCreery v. Johnston, 90 W. Va. 80, 110 S. E. 464 (1922); Perabo v. Gallagher, 241 Mass. 207, 135 N. E. 113 (1922); Flanders v. Parkers, 80 N. H. 566, 120 A. 558 (1923); Spann v. Carson,

fee so limited, and he devises the remainder so that the question arises after his death, only in Pennsylvania does it seem to be certain that the creditors of the beneficiary cannot reach the property.[18] And there would seem to be little doubt that if the donee himself attempted to limit his creditors when he appoints the property, such a restriction would be held invalid since the rule is equitable, operating primarily against the intent of the donee; and such is the tenor of what little authority there is on the question.[19] Authority covering the exact situation presented in the principal case, where the donor attempts the restriction, is scarce; but there is a little indication that in Pennsylvania such a restriction would be given effect.[20] The *Restatement of Property*,[21] however, takes the opposite view as to testamentary powers. It could be argued, of course, that a manifestation by the donor of an intent that the property should not be liable should be given effect on the logical grounds that originally were used to justify restraints on alienation—that "whoever has the right to give has the right to dispose of the same as he pleases"; "cujus est dare ejus est disponere";[22] and that the law allows a donor free rein in other aspects of the creation and limitation of powers. It would seem, however, that at least with the general testamentary power, its exercise is sufficiently analogous to a devise of owned property so that the same rules as to payment of debts should apply; and that the rationale of the equitable doctrine which makes such appointed property "assets" of the donee's estate where there is no expression of a contrary intent by the donor should be strong enough to justify a like rule where the donor indicates an opposite desire, either by restricting the trustees, or by limiting the power. Ability to pay debts should require payment.

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123 S. C. 371, 116 S. E. 427 (1923). But see Haskell v. Haskell, 234 Mass. 442, 125 N. E. 601 (1920); Richardson v. Warfield, 252 Mass. 518, 148 N. E. 141 (1925); 2 SIMES, FUTURE INTERESTS, § 454 (1936), and cases cited; GRISWOLD, SPENDTHRIFT TRUSTS, § 81 et seq. (1936) (where the cases are classified and discussed).

[18] In re Fleming's Estate, 219 Pa. St. 422, 68 A. 960 (1908) (cited and approved in the principal case).

[19] Rogers v. Hinton, 62 N. C. 101 (1867), rehearing 63 N. C. 78 (1868); see Hill v. Treasurer and Receiver General, 229 Mass. 474, 118 N. E. 891 (1918).

[20] Swaby's Appeal, 14 Wkly. Notes Cas. (Pa.) 553 (1884); Fell's Estate, 14 Pa. Dist. 327 (1905). The explanation would seem to be, however, that such a view is but consistent with the minority doctrine, followed in Pennsylvania, that appointed property is not considered "assets" of the donee's estate at all. See note 7, supra.

[21] PROPERTY RESTATEMENT (Tentative Draft No. 7, 1937), § 452, reads as follows: "When the donee of a general power makes an otherwise effective appointment by will to a volunteer or creditor, the property appointed can be subjected to the payment of the claims of creditors of the donee or claims against his estate to whatever extent other available property is insufficient for that purpose." And comment (c) adds: "The rule stated in this Section applies in spite of the manifestation of a contrary intent by the donor or the donee or both. Thus it is immaterial that the donor provides in the instrument creating the power that the property covered thereby shall in no circumstances be appointed to the donee's creditors or subjected to their claims."

[22] Ashurst v. Given, 5 W. & S. (Pa) 323 at 330 (1843); and see Nichols v. Eaton, 91 U. S. 716 at 727 (1875).