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TRUSTS—PROCESS BY WHICH CREDITOR MAY REACH CESTUI'S INTEREST IN SPENDTHRIFT TRUST—The former husband of the principal defendant created a trust for her benefit with a clause restraining alienation and barring attachment by creditors. Plaintiff, holding a judgment against the cestui que trust, brought a creditor's bill in equity against the trustee and cestui. *Held*, creditor's bill dismissed, but the exemption of cestui's interest from the claims of creditors was invalid, and plaintiff might recover by amending and bringing an action at law with trustee process. *Brahmey v. Rollins*, (N. H. 1935) 179 A. 186.

Firmly established by *Nichols v. Eaton*,¹ the so-called spendthrift trust has been recognized in this country by an overwhelming majority of states.² The

¹ 91 U. S. 716 (1875).

² For a comprehensive review of the early cases, see GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY, 2d ed., § 175 et seq. (1895). For the positions of the various jurisdictions, see I BOGERT, TRUSTS AND TRUSTEES, § 222, notes 61, 62, 63, and 64 (1935); 3 Ann. Cas. 588 (1906); 65 C. J. 238 (1933); 26 Am. & Eng. Encyc. Law 138 n. 3, 139 n. 4 (1904).

principal case represents a strong reaction against this legal device for defeating the claims of creditors. However desirable the spendthrift trust in a restricted form may be,³ it is opposed to general principles of property law⁴ and, as often results, is capable of great abuse in defrauding creditors.⁵ An adult, sui juris, should not have the enjoyment of property without its responsibilities, one of which is liability to the claims of creditors.⁶ The exemption from attachment allowed the interest of the cestui of a discretionary trust⁷ results from the fact that the cestui has no right against the trustee which he may enforce and which may be attached by his creditors.⁸ On the other hand, the cestui of a spendthrift trust is assured a definite income, uncontrolled by the actions of the trustee, for which he may bring suit against the trustee, and whatever the cestui can demand from his trustee, his creditors should be able to demand from him.⁹ Paradoxically, it has been intimated by the highest authority that the cestui que trust may even have the power of voluntary alienation, while his creditors are nevertheless barred from attaching his interest.¹⁰ Such a result seems highly unjust and contrary to

³ Costigan, "Those Protective Trusts Which Are Miscalled 'Spendthrift Trusts' Reexamined," 22 CAL. L. REV. 471 (1934). Professor Costigan favors a spendthrift trust restricting to a reasonable income all exemptions from claims of creditors. For practical applications of such a doctrine, see New York and California statutes: Cal. Civ. Code (Deering 1931) § 859; N. Y. Real Property Law, § 98 [Consol. Laws (Birdseye 1909), p. 7349]; 33 A. L. R. 565 (1924); and discussion by Griswold, "Reaching the Interest of the Beneficiary of a Spendthrift Trust," 43 HARV. L. REV. 63 at 87 (1929).

⁴ GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY, 2d ed., § 258 (1895). Scott, "Control of Property by the Dead," 65 UNIV. PA. L. REV. 527, 632 at 643 (1917), argues that equity should follow the law because the policy which applies against restraint of voluntary or involuntary alienation of legal interests applies equally to equitable interests.

⁵ An extreme example is *Congress Hotel v. Martin*, 312 Ill. 318, 143 N. E. 838 (1924), where the creditor of the cestui was attempting to collect a \$6,724.16 hotel bill out of \$39,297.41 in accumulated funds, due the cestui, but still in the hands of the trustee. The cestui had a yearly income of \$171,736, including the annuity of \$36,000 under the spendthrift trust. It was held that none of the funds in the hands of the trustee could be reached by the creditor.

⁶ GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY, 2d ed., § 258 (1895); *Gray v. Obear*, 54 Ga. 231 (1875).

⁷ The discretionary trust is more common in England, where the spendthrift trust is not recognized. See I BOGERT, TRUSTS AND TRUSTEES, § 221 (1935).

⁸ But see *Hamilton v. Drogo*, 241 N. Y. 401, 150 N. E. 496 (1926), where it was held that execution could issue under special New York legislation to reach the income of the cestui when and as the trustee of a discretionary trust decided to pay it. Discussed in 26 COL. L. REV. 776 (1926); see also Griswold, "Reaching the Interest of the Beneficiary of a Spendthrift Trust," 43 HARV. L. REV. 63 at 82-83 (1929).

⁹ GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY, 2d ed., § 166 (1895).

¹⁰ *Eaton v. Boston Safe Deposit & Trust Co.*, 240 U. S. 427, 36 S. Ct. 391 (1916). See also, *Blair v. Linn*, 274 Ill. App. 23 (1934). *Contra*, *Croom v. Ocala Plumbing & Electric Co.*, 62 Fla. 460, 57 So. 243 (1911). For a discussion of the general problem, see Griswold, "Reaching the Interest of the Beneficiary of a Spendthrift Trust," 43 HARV. L. REV. 63 at 77 (1929).

good policy.¹¹ If the rule of the principal case be adopted, the particular means by which the creditor may enforce his claims depends largely upon local procedural statutes.¹² Although the decision in the principal case appears highly desirable, it may be suggested that the statute denying creditors the right to proceed by creditor's bill¹³ possibly shows an intent in the legislature to validate spendthrift trusts generally, notwithstanding its failure to make a similar exception to the use of trustee process. The court escapes this conclusion by the novel but persuasive argument that the statute authorizing trustee process was a measure of the creditor's rights against the trust fund, and that no restraint on alienation imposed by the settlor could defeat or impair the statutory remedy. By this reasoning the court is able to subject the cestui's interest to execution in favor of creditors and thus to remove the most objectionable aspect of the spendthrift trust.

E. S. S.

¹¹ *Hartwell v. Mobile Towing & Wrecking Co.*, 212 Ala. 313, 102 So. 450 (1924). Scott, "Control of Property by the Dead," 65 UNIV. PA. L. REV. 527, 632 at 644 (1917), points out: "It may be suggested that to allow a voluntary alienation of an interest in property and at the same time to prevent creditors from reaching that interest is more clearly against public policy than to allow a restraint on all alienation, both voluntary or involuntary."

¹² By equitable attachment, *Smith v. Moore*, 37 Ala. 327 (1861). In New Hampshire, the jurisdiction of the principal case, recovery by creditor's bill in equity is expressly denied, N. H. Pub. Laws (1926), c. 317, § 8, trustee process being the proper remedy, N. H. Pub. Laws (1926), c. 356, § 19. For recovery by garnishment generally, see 59 L. R. A. 385 (1903). A statute allowing creditors to reach surplus income of spendthrift trusts and limiting the amount exempt from their claims is constitutional. *Brearley School v. Ward*, 201 N. Y. 358, 94 N. E. 1001 (1911), discussed in Griswold, "Reaching the Interest of the Beneficiary of a Spendthrift Trust," 43 HARV. L. REV. 63 at 95 (1929). See also, note in 40 L. R. A. (N. S.) 1215 (1912).

¹³ "The provisions of the preceding section [relating to creditor's bills] shall not apply to . . . trust funds, where the trust has been created by . . . some person other than the debtor, and such application may not be made consistently with the trust. . . ." N. H. Pub. Laws (1926), c. 317, § 8.