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POWERS -TESTAMENTARY POWER - ENFORCEABILITY OF CONTRACT TO EXERCISE

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POWERS — TESTAMENTARY POWER — ENFORCEABILITY OF CONTRACT TO EXERCISE — Charles Wetmore and Morgan Kent, beneficiaries of a trust under the will of their mother which was probated in 1913, entered into an agreement whereby Kent agreed, inter alia, to devise one ninth of the corpus of the estate to Kent's children living at the time of his death in consideration of a promise by Wetmore to exercise a testamentary power of appointment given by the will of the testatrix over one sixth of the corpus in favor of Kent, or if he be deceased at the time Wetmore's will became effective, in favor of such persons as Kent should by will direct. The parties to the agreement also exchanged bonds for the performance of the contract. Kent died in 1939 leaving a will which complied with the agreement made by him and Wetmore. Wetmore died in 1941 exercising the power in favor of his son in violation of the terms of the agreement. Plaintiff, executor of Kent's will, brings this action against the executors of Wetmore's will, demanding that Wetmore's estate be impressed with a trust to the value of the property passing under the power or in the alternative for judgment upon a bond for \$100,000 given to secure performance of the contract. *Held*, the contract was invalid as undertaking to bind Wetmore in advance of his death to the exercise of a testamentary power in a certain manner. Nor can the bond be made the basis of a recovery of damages, since it was made pursuant to an unenforceable contract. *Kent v. Thornton*, 179 Misc. 593, 39 N.Y.S. (2d) 435 (1942).

It is generally stated as a rule of law that the donee of a testamentary power

of appointment can exercise it in no way other than by will.¹ The reason generally given for this rule is that the donor of the power expected the donee to retain his discretion and judgment to the end of his life and to exercise the same in the light of whatever changes of circumstances might occur.² This intent may be defeated if the donee is permitted to appoint in his lifetime. For the same reasons, the courts have frowned on contracts by donees of a testamentary power of appointment to appoint to a particular person or in a certain way, and have unanimously refused specific performance of their provisions.³ On the question of damages for breach of the contract to appoint, there has been division of opinion between the English and American courts, the only other American case on this precise point also refusing an action for breach of contract.⁴ These courts have felt that knowledge of the fact that his estate would be liable for damages would make the donee reluctant to breach the contract to appoint and thus indirectly the free exercise of judgment intended by the testator would be prevented. Yet both the English and American courts have not hesitated to disregard the testator's intent in permitting the release of general testamentary powers of appointment.⁵ And property passing under a general testamentary power is liable for the debts of the donee once an appointment has been made.⁶

¹ *Wilks v. Burns*, 60 Md. 64 (1882); *Farmers' Loan & Trust Co. v. Mortimer*, 219 N.Y. 290, 114 N.E. 389 (1916); *Hood v. Haden*, 82 Va. 588 (1886).

² *Farmers' Loan & Trust Co. v. Mortimer*, 219 N.Y. 290, 114 N.E. 389 (1916); *Northern Trust Co. v. Porter*, 368 Ill. 256, 13 N.E. (2d) 487 (1938).

³ *Wilks v. Burns*, 60 Md. 64 (1882); *Farmers' Loan & Trust Co. v. Mortimer*, 219 N.Y. 290, 114 N.E. 389 (1916).

⁴ *Northern Trust Co. v. Porter*, 368 Ill. 256, 13 N.E. (2d) 487 (1938), noted 51 HARV. L. REV. 1451 (1938), 16 CHI-KENT L. REV. 298 (1938), 13 NOTRE DAME LAWY, 308 (1938); 3 PROPERTY RESTATEMENT, § 340 (1940). The only English cases permit damages for breach of contract. In *re Parkin*, [1892] 3 Ch. 510; *Coffin v. Cooper*, 2 Drew & Sm. 365 at 376, 62 Eng. Rep. 660 (1865); *Re Collard and Duckworth*, 16 Ont. 735 (1889).

⁵ Gray, "Release and Discharge of Powers," 24 HARV. L. REV. 511 (1911). It is generally said that all powers except special powers collateral are releasable. It has been suggested, however, that releasability really depends on whether the special power is or is not in trust, not on whether it is appendant, in gross, or purely collateral. 1 SIMES, FUTURE INTERESTS, §§ 280, 281 (1935).

⁶ *Clapp v. Ingraham*, 126 Mass. 200 (1879); *Stratton v. United States*, (C.C.A. 1st, 1931) 50 F. (2d) 48, cert. denied 284 U.S. 651, 52 S. Ct. 31 (1931); *Johnson v. Cushing*, 15 N.H. 298 (1844); cases collected in 59 A.L.R. 1510 (1929), 97 A.L.R. 1071 (1935). To the effect that this doctrine is inapplicable to a general power of appointment by will only, see *Leser v. Burnet*, (C.C.A. 4th, 1931) 46 F. (2d) 756; *Wales' Administrator v. Bowdish's Executor*, 61 Vt. 23, 17 A. 1000 (1888). A vocal minority is represented in *Rhode Island Hospital Trust Co. v. Anthony*, 49 R.I. 339, 142 A. 531 (1928); *St. Matthews Bank v. De Charette*, 259 Ky. 802, 83 S.W. (2d) 471 (1935); *Prince de Bearn v. Winans*, 111 Md. 434, 74 A. 626 (1909); *Commonwealth v. Duffield*, 12 Pa. St. 277 (1849). The decisions of the majority may be justified in part by the fact that the nonexercise of a power is in reality a kind of exercise after all, and hence the doctrine of *Clapp v. Ingraham* does not coerce the donee in every respect and still leaves him free to "appoint" to the taker in default free from the donee's personal obligations. On the other hand, if damages were given to the promisee of a contract to appoint, a pressure would be exercised both on the exercise and the nonexercise of the power.

Yet the existence of these anomalies in the law of powers should not detract from the soundness of the decision in the principal case, which is clearly in furtherance of the testator's intent. In addition, the harsh effect of such holdings on the promisee is lessened by the fact that restitution is available to him as a remedy and he may be reimbursed to the extent of the value he has given, even out of the property passing under the power if the personal assets of the donee are insufficient to satisfy his claim.⁷

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⁷ *Vinton v. Pratt*, 228 Mass. 468, 117 N.E. 919 (1917); 3 PROPERTY RESTATEMENT, § 329 (1940).