

1942

## POWERS - RIGHTS OF DONEES' CREDITORS AGAINST PROPERTY SUBJECT THERETO WHEN THE POWER IS GENERAL AND IS EXERCISED BY WILL

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### Recommended Citation

Charles Wright, III, *POWERS - RIGHTS OF DONEES' CREDITORS AGAINST PROPERTY SUBJECT THERETO WHEN THE POWER IS GENERAL AND IS EXERCISED BY WILL*, 41 MICH. L. REV. 289 (1942).

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POWERS — RIGHTS OF DONEES' CREDITORS AGAINST PROPERTY SUBJECT THERETO WHEN THE POWER IS GENERAL AND IS EXERCISED BY WILL — In general it is said that the majority of jurisdictions in the United States allow creditors of the donee of a general power of appointment, exercisable by deed or will, or by will only, to reach the appointive property when the power is exercised by will, if the donee's personal estate is insolvent and if the appointment is to a volunteer.<sup>1</sup> It would appear from a survey of the authorities dealing with the question that only twenty states have spoken on the subject at all.<sup>2</sup> Of

<sup>1</sup> 49 C. J. 1276 (1930); 21 R. C. L. 785 (1918); 59 A. L. R. 1513 (1929); L. R. A. 1918D 346; 3 PROPERTY RESTATEMENT, § 329 (1940) (see also 330, as to where power exercised inter vivos); SIMES, FUTURE INTERESTS, § 265 (1936); 77 UNIV. PA. L. REV. 422 (1929).

<sup>2</sup> These jurisdictions are: Connecticut, Delaware, District of Columbia, Georgia, Illinois, Iowa, Kentucky, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont and Virginia.

that number only sixteen have decisions which can, by any stretch of the imagination, be considered in point.<sup>3</sup> Ten states of the sixteen have allowed creditors to satisfy their claims from such property without adding any further requirements.<sup>4</sup> Two more have conceded that an appointment might affirmatively be made for creditors.<sup>5</sup> And one of these has held it is enough, even, if the donee sufficiently treats the appointive property as his own.<sup>6</sup> But then, once the fundamental concept of a general power is adopted, there is certainly no logical reason why appointments in fact for creditors or subject to the donee's debts should not be allowed, nor why an appointment to his own estate should not be inferred from his sufficiently treating the property as a part thereof. Only six states may conceivably be considered to have held that insolvency plus a testamentary appointment to volunteers are not enough.<sup>7</sup>

The purpose of this paper is to analyze authorities representative of extreme points of view. The discussion does not undertake to include within its scope the particular problems raised by the exercise of a power *inter vivos*, nor by the exercise or nonexercise of a reserved power, nor does it deal with the question of what will in fact constitute an exercise of a power, except as the answer to such question is directly determinative of the rights of creditors, and, lastly, it is not concerned with the particular effect upon creditors' rights of express legislation, either state or federal. Decisions from those states which are most liberal in allowing creditors' claims are considered first. Then are considered those whose only indications of attitude are in dicta. And finally are taken up decisions from those jurisdictions which have been most strict in their recognition of creditors' claims.

## I.

In 1879 Massachusetts first stated the rule that creditors of the donee of a general testamentary power can reach the appointive property when the power is exercised and the donee's estate is insolvent.<sup>8</sup> The appointment, however, was to the donee's executor, with directions

<sup>3</sup> The four of the twenty (see note 2, *supra*) which do not have anything in point are: Connecticut, Illinois, Texas and Vermont.

<sup>4</sup> These ten are: Delaware, District of Columbia, Georgia, Iowa, New Hampshire, Massachusetts, New Jersey, New York, North Carolina and Virginia.

<sup>5</sup> These are: Pennsylvania and Kentucky.

<sup>6</sup> See section on Pennsylvania, with reference to "blending."

<sup>7</sup> These six are: Kentucky, Maryland, Ohio, Pennsylvania, Rhode Island and South Carolina.

<sup>8</sup> *Clapp v. Ingraham*, 126 Mass. 200 (1879). The appointment was to the takers in default. The question of presuming renoucement by them was not considered.

to keep \$400 for himself and to distribute the rest to the donee's children. This might have been held an appointment to the donee's estate, which might, logically at least, have been found an express appointment subject to the claims of donee's creditors. In the following year, however, an appointment to a trustee for the benefit of one creditor was held to subject the appointed property to the claims of all of the donee's creditors.<sup>9</sup> On the theory that the mere appointment was consideration for his debt, the case appears to hold that the appointee is a mere volunteer and can take only what remains after the general creditors' claims are satisfied. Any doubt on this point was subsequently removed by a later case holding that an insolvent donee's testamentary appointment to one creditor subjects the appointed property to the claims of all creditors.<sup>10</sup> The appointee, as such, is a volunteer. He can, however, also claim as a creditor, and is thus no worse (and possibly better) off than if he had never been made an appointee.<sup>11</sup> A surety, even, cannot reach, by subrogation, the appointed property ahead of creditors, and he is still liable to the assured for the amount of his claim by which the estate is insolvent.<sup>12</sup> Where the donee induced a loan by a representation of having exercised by will a general testamentary power in favor of the lender, and then died intestate, his heirs, taking from the donor's estate by default provision, were not estopped as against the claims of the donee's creditors (including the lender so induced).<sup>13</sup> Failure to exercise the power is fatal to the claims of creditors against the appointive property, even though the donee's estate be insolvent. A general direction to pay debts is not sufficient manifestation of intent to appoint subject to the claims of creditors even in a case where the power is exercised further on in the testamentary instrument.<sup>14</sup> The creditors still take *against* the will, and only to the extent the appointed property is not used to pay debts is it subject to an inheritance tax. It appears, however, from dicta in *Vinton v. Pratt*<sup>15</sup> that when an inter vivos contract is made to exercise a testamentary power by will in favor of the promisee, damages for breach in nonperformance may be claimed against the donee's estate, although specific performance will be denied and although if the appointment had been so made it would have

<sup>9</sup> O'Donnell v. Barbey, 129 Mass. 453 (1880).

<sup>10</sup> Harmon v. Weston, 215 Mass. 242, 102 N. E. 470 (1913).

<sup>11</sup> Vinton v. Pratt, 228 Mass. 468, 117 N. E. 919 (1917). The appointment appears here to be expressly subject to creditors' claims.

<sup>12</sup> Harmon v. Weston, 215 Mass. 242, 102 N. E. 470 (1913).

<sup>13</sup> Montague v. Silsbee, 218 Mass. 107, 105 N. E. 611 (1914). It was argued that one heir even joined the donee in this representation, and yet the court said this would not estop him from proving its subsequent revocation.

<sup>14</sup> Hill v. Treasurer and Receiver General, 229 Mass. 474, 118 N. E. 891 (1918).

<sup>15</sup> 228 Mass. 468, 117 N. E. 919 (1917).

been subject to the claims of all creditors. The soundness of such a proposition is obviously questionable.<sup>16</sup>

That property appointed by will is not thereby made assets in the estate of the donee for all purposes becomes quite clear in view of holdings that appointed property cannot be used to make up deficiencies in the donee's legacies when the estate is insufficient, after the payment of debts, to carry out his provisions therefor.<sup>17</sup> Nor will the appointed property bear any of the administrative expenses except those arising from the administration of that property. The personal estate of the donee, including the realty therein, must first be sold before the appointed property can be reached.<sup>18</sup> It is said that the case might be different if the appointment were to the donee's executor, which, if such were found to make the property expressly assets of the estate, would clearly be a logical result.<sup>19</sup> But in view of *Clapp v. Ingraham*<sup>20</sup> and *Vinton v. Pratt*<sup>21</sup> exactly what would constitute such an appointment is uncertain. Further still, the recovery by the administrator de bonis non of property appointed to a volunteer but misappropriated by the executor is not "new assets" in the donee's estate such as is sufficient to raise the bar of the statute of limitations and allow subjection to claims of creditors.<sup>22</sup> Although the donee's estate was not shown insolvent in the case in which this was determined, it is submitted that solvency could have little bearing in deciding this point. Income from appointive property which is not consumed by the donee is not property in the donee's estate, but is appointed property when the power is exercised, and is treated as such, even though it is in the hands of executors as trustees.<sup>23</sup>

<sup>16</sup> See: 3 PROPERTY RESTATEMENT, § 340, also § 329, Comment (c) (1940). Directly contra in *Northern Trust Co. v. Porter*, 368 Ill. 256, 13 N. E. (2d) 487 (1938).

<sup>17</sup> *White v. Massachusetts Institute of Technology*, 171 Mass. 84, 50 N. E. 512 (1878); *Slayton v. Fitch Home*, 293 Mass. 574, 200 N. E. 357 (1936). See also *Loring v. Wilson*, 174 Mass. 132, 54 N. E. 502 (1899), where it was held that a residuary clause, exercising the power for the benefit of A, which provided that the appointed property was to be used first to make up any deficiency there might be in a preceding specific bequest to B, was, because of the estate's insolvency, to be executed first to meet any claims of creditors unsatisfied after the exhausting of the donee's personal estate, then to fulfill the legacy to B, and lastly, if anything should be left, to give that remainder to A.

<sup>18</sup> *Tuell v. Hurley*, 206 Mass. 65, 91 N. E. 1013 (1910); also cases in note 10, supra.

<sup>19</sup> *Tuell v. Hurley*, 206 Mass. 65, 91 N. E. 1013 (1910).

<sup>20</sup> 126 Mass. 200 (1879).

<sup>21</sup> 228 Mass. 468, 117 N. E. 919 (1917).

<sup>22</sup> *Shattuck v. Burrage*, 229 Mass. 448, 118 N. E. 889 (1918).

<sup>23</sup> *Slayton v. Fitch Home*, 293 Mass. 574, 200 N. E. 357 (1936).

In *O'Donnell v. Barby*<sup>24</sup> it was held that the trustee under the donor's will and not the donee's executor was to administer the appointed property for the donee's creditors, but *Olney v. Balch*<sup>25</sup> pointed out that there the executor not only had refused so to administer the property, but was in addition himself the appointee. For these reasons it distinguished the *O'Donnell* case from the usual situation and held that as a matter of administrative convenience the donee's executor should take the property, when the claims of his creditors are to be allowed to reach it, even in preference to the donee's trustees who were the appointees. The theory is that the "creditors, if there are any, will present their claims to the executors." *Harmon v. Weston*<sup>26</sup> affirms this proposition, as does *Hill v. Treasurer and Receiver General*.<sup>27</sup>

The theory on which Massachusetts approaches these problems becomes obvious from the above analysis of its courts' rulings. It is not surprising to find little attention paid to whether the power is purely testamentary, or is one exercisable by deed or will, so long as it is in fact exercised by will.<sup>28</sup> Also consistent with these results is the bald statement that equity will complete a defective appointment to a purchaser for value, providing no others with superior equities have intervened.<sup>29</sup> Equity, as a matter of policy, simply subjects the appointed property to the claims of creditors rather than allow volunteers to take in derogation of those claims. The rule is too equitable to be overcome by technical legal arguments based on strict property laws, or by consideration alone for the intent of the donor when he created the power for the donee.<sup>30</sup> A donor's provision that a general testamentary power is not to be exercised for creditors is ineffective, and its being exercised for one or more creditors subjects the property to the claims of all creditors where the donee's estate is insolvent. Such a limitation on a general testamentary power is void, being inconsistent with such power. But a spendthrift provision to operate for the life of the donee may be given full effect.<sup>31</sup> On the theory by which a tax statute, providing that property subject to a general power, even though not exercised, should be taxable in the estate of the donee, was held constitutional,<sup>32</sup> it would seem quite possible that the Massachusetts state legislature might constitutionally provide for subjecting appointive property to the claims

<sup>24</sup> 129 Mass. 453 (1880).

<sup>25</sup> 154 Mass. 318, 28 N.E. 258 (1891).

<sup>26</sup> 215 Mass. 242, 102 N. E. 470 (1913).

<sup>27</sup> 229 Mass. 474, 118 N. E. 891 (1918).

<sup>28</sup> *Tuell v. Hurley*, 206 Mass. 65, 91 N. E. 1013 (1910).

<sup>29</sup> *Coates v. Lunt*, 210 Mass. 314, 96 N. E. 685 (1911).

<sup>30</sup> *Clapp v. Ingraham*, 126 Mass. 200 (1879).

<sup>31</sup> *State Street Trust Co. v. Kissel*, 302 Mass. 328, 19 N. E. (2d) 25 (1939).

<sup>32</sup> *Minot v. Treasurer & Receiver General*, 207 Mass. 588, 93 N. E. 973 (1911).

of insolvent donees' creditors, even if the power were not exercised.<sup>33</sup>

More or less in line with the liberal view toward the rights of creditors which is represented by Massachusetts case law are the only cases on record in nine other states. The theories vary greatly, and recent decisions are usually difficult to find. North Carolina, for example, has only four cases in point, the most recent of which is 1868.<sup>34</sup> These old decisions take a very technical approach to the problem and yet reach a very liberal result. They concede that the property appointed passes directly from the donor to the appointee, without in any way touching, or passing from, or passing through the donee. Then, having placed the property in the hands of those whose interests with respect to the property are most adverse to the interests of the donee's creditors, the old North Carolina courts proceeded to impose upon the property a trust, and constituted the appointees trustees for the benefit of the donee's creditors. It was thus recognized that the donee's intent had nothing whatsoever to do with the result. On the other hand, what authority there is in Iowa<sup>35</sup> and the District of Columbia,<sup>36</sup> seems to imply that the courts of these two jurisdictions will look to see whether the donee has a sufficient number of the attributes of ownership to warrant treating the property as the donee's own. New York also, in its prestatutory days, indicated an inclination toward this approach.<sup>37</sup> But this theory does not take into account a distinction generally made between allowing creditors relief when the power is exercised, and denying such relief when it is not exercised. The New Hampshire refinement at least justifies this distinction, by saying in effect that the donor of a general power in effect offers all the attributes of ownership, which offer the donee accepts only by exercising the power given.<sup>38</sup> Georgia,<sup>39</sup> Delaware,<sup>40</sup> New Jersey,<sup>41</sup> and Virginia<sup>42</sup> all, like

<sup>33</sup> But see *Forbes v. Snow*, 245 Mass. 85, 140 N. E. 418 (1923), where it was held that a trustee in bankruptcy could not exercise a power.

<sup>34</sup> *Smith v. Garey*, 22 N. C. 42 (1838); *Leigh v. Smith*, 38 N. C. 442 (1844); *Rogers v. Hinton*, 62 N. C. 101 (1867), petition for rehearing dismissed 63 N. C. 80 (1868).

<sup>35</sup> *Hoskin v. West*, 226 Iowa 612, 284 N. W. 809 (1939).

<sup>36</sup> *Knowles v. Dodge*, 1 Mackey (12 D. C.) 66 (1881); *Duncanson v. Manson*, 3 App. D. C. 260 (1894).

<sup>37</sup> *Tallmadge v. Sill*, 21 Barb. (N. Y. S. Ct.) 34 (1885). See *Cutting v. Cutting*, 86 N. Y. 522 (1881), for New York views after its statute.

<sup>38</sup> *Johnson v. Cushing*, 15 N. H. 298 (1844).

<sup>39</sup> *Patterson v. Lawrence*, 83 Ga. 703 (1889); *Jackson v. Franklin*, 179 Ga. 840, 177 S. E. 731 (1934).

<sup>40</sup> *Security Trust & Safe Deposit Co. v. Ward*, 10 Del. Ch. 408, 93 A. 385 (1915).

<sup>41</sup> *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).

<sup>42</sup> *Freeman's Admr. v. Butters*, 94 Va. 406, 26 S. E. 845 (1897).

Massachusetts, see the problem as essentially an equitable problem,—one which is simply to be determined on principles of fairness to all concerned. The fundamental proposition here seems to be that if the donee could have appointed to himself, he will not be allowed, in derogation of his creditors' claims, to appoint elsewhere. In general, nevertheless, the results obtained by the application of these widely varying theories are not remarkably inconsistent, in any respect, with the well-developed line of Massachusetts authority.

## 2.

Only one case has been decided in Vermont which considers very seriously the problem under discussion.<sup>43</sup> For the reason that it denied relief to creditors,—without stating that it recognized the “general rule” permitting creditors of an insolvent donee to reach property testamentarily appointed by the exercise of a general power,—this case is classified separately from those in the preceding section. The basis for the distinction made by the court here was that the creditors of the donee had not become such after the power had been created in the donee. They had thus not acted in reliance on the donee's ability to appoint to them. The justification for reading into the rule this estoppel element is uncertain, to say the least. There was certainly no precedent for so doing in the existing cases,<sup>44</sup> and there is really no such logical explanation, either, as could exist consistently with the proposition that creditors' claims would ever be recognized.<sup>45</sup> Despite the criticism, however, it must be admitted that this decision raises an interesting possibility, and also brings into sharp relief the fact that the basis for the Massachusetts rule<sup>46</sup> does not involve any particular consideration of the reasonableness of creditors' actions.

<sup>43</sup> *Wales' Admr. v. Bowdish's Exr.*, 61 Vt. 23, 17 A. 1000 (1888).

<sup>44</sup> The early cases never considered the point, and they did not, in fact, even trouble to point out, ordinarily, when or how the claimants acquired their status as creditors.

<sup>45</sup> If it is argued that the creditors rely on the mere naked power being in the donee, it can be answered that, as a practical matter, they would not be likely even to know of the power's existence at the time of extending credit to him (and this would also be requiring an extra element of knowledge), and if they did know, they could not rely on the donee's refraining from exercising it *inter vivos* to a bona fide purchaser. On the other hand, if the rationale proffered to support this holding is that the power (secret or not), in addition to a present possessory interest (which would be notice to all), is the real basis for the estoppel approach, then it should be pointed out that a donee would be permitted to exercise a naked general power at any time, in derogation of creditors, and if such were true, it might well be said that the protection to creditors, for which the courts were originally striving would itself be destroyed, and the *inter vivos* purchase problem is also left unsolved by this approach.

<sup>46</sup> For convenience, the proposition that creditors of an insolvent donee may reach property appointed by will, in the exercise of a general power to appoint by deed or will, or by will only, is referred to throughout the rest of this discussion as the Massachusetts rule.



The one Texas case having any bearing on the right of donees' creditors contains only dicta in favor of the Massachusetts rule plus an additional statement raising another unanswered problem.<sup>47</sup> It is suggested that equity will come to the aid of a defective appointment, and perfect it in order to favor the donee's creditors. There are some dicta from other jurisdictions in support of this proposition,<sup>48</sup> and there are at least two cases in which defective appointments have not been aided.<sup>49</sup> Whatever effect may be given such a principle will depend upon the balance reached by the court between the rights of unsatisfied creditors on the one hand, and consideration owing to the donor's intent in relation to the expectations of default takers on the other. If it be granted that a general power is capable of limitation as to exercise, it is submitted that a court should aid appointments which are defective only in technicalities.<sup>50</sup>

The few cases to be found in Illinois<sup>51</sup> and Connecticut<sup>52</sup> which discuss the donees' creditors problem at all contain only general dicta which show a tendency to favor the Massachusetts rule. They add nothing to the discussion.

## 3.

Illustrative of many of those jurisdictions which are least disposed to recognize the claims of donees' creditors against appointed property are the Pennsylvania cases on the subject. The first of these is *Morris v. Phaler*,<sup>53</sup> decided in 1833. In view of subsequent decisions contrary to its apparent holding, this case is probably of little value as an authority, though it seems never to have been overruled. The court appears in this instance to hold that where the donee of a life estate in realty is given a power to dispose to her heirs and assigns one-half of the proceeds of the sale of such realty after the termination of the life estate,

<sup>47</sup> *Arnold v. Southern Pine Lumber Co.*, 58 Tex. Civ. App. 186, 123 S. W. 1162 (1909). The holding was that the power was not exercised at all and that the property, therefore, went directly to the default takers.

<sup>48</sup> See *Duncanson v. Manson*, 3 App. D. C. 260 at 273 (1894); *Johnson v. Cushing*, 15 N.H. 298 at 308 (1844); *Northern Trust Co. v. Porter*, 368 Ill. 250, 13 N.E. (2d) 487 (1938); *Gilman v. Bell*, 99 Ill. 144 at 149 (1881).

<sup>49</sup> *Boyce v. Waller*, 39 Ky. 478 (1840); *Benthan v. Smith*, Cheves Eq. (S. C.) 33 (1840).

<sup>50</sup> Thus an attempt to exercise a power in an entirely different manner or at an entirely different time should probably be considered a mere nullity.

<sup>51</sup> *Gilman v. Bell*, 99 Ill. 144 (1881); *Boyle v. John M. Smyth Co.*, 248 Ill. App. 57 (1928); *Northern Trust Co. v. Porter*, 368 Ill. 256, 13 N. E. (2d) 487 (1938); *People v. Kaiser*, 306 Ill. 313, 137 N. E. 826 (1923).

<sup>52</sup> *McMurtry v. State*, 111 Conn. 594, 151 A. 252 (1930).

<sup>53</sup> 1 Watt (Pa.) 389 (1833). The theory of this decision might well be, on the other hand, that where the default taker is either the donee or her heirs, or the heirs of the donor and she is that heir, then if she has a legal life estate, the estates will merge and she will have a fee. See *Langley v. Conlan*, 212 Mass. 135, 98 N. E. 1064 (1912), which apparently proposes this approach.

the donee has the absolute power of disposal, and since the donee must have intended to exercise the power by her testamentary provision giving one-fourth of the proceeds of such sale to a creditor, the appointee takes subject to the claims of all the donee's creditors, her personal estate being insolvent.

In 1849 Chief Justice Gibson's oft-quoted dictum<sup>54</sup> appeared, sharply criticizing the proposition that a donee's creditors may reach appointed property, on the ground that it disregards the donor's intent in the disposition of his property, that it is contrary to the property-law concept of the nature of a donee's interest in appointive or appointed property, and that it is merely a device to foster credit. The vehemence of this statement apparently overshadowed the holding of *Morris v. Phaler*,<sup>55</sup> and grew to be the backbone of the Pennsylvania rule as to the rights of donees' creditors,—with the result that in 1941 the Pennsylvania court upheld the exercise of a general testamentary power in derogation of creditors' claims.<sup>56</sup>

There is a certain amount of confusion, however, in the application of this rule. A statute, providing that under certain circumstances a general devise or bequest may be construed as an exercise of a general power, appeared in 1879.<sup>57</sup> Its real effect is, to say the least, uncertain, but it might well have had an indirect influence upon the development of the *doctrine of blending*. At any rate a survey of the state's authorities shows a constant attention to the problem of whether or not the donee has (1) manifested an intent to exercise his power in favor of creditors or subject to their claims, or (2) so treated the appointive property that it has become blended with his own estate.<sup>58</sup> If either of

<sup>54</sup> *Commonwealth v. Duffield*, 12 Pa. St. 277 at 279-281 (1849). The case itself involves the application of a Pennsylvania collateral inheritance tax provision and a jurisdictional matter.

<sup>55</sup> 1 Watts (Pa.) 389 (1933).

<sup>56</sup> In re Stannert's Estate, 339 Pa. 439, 15 A. (2d) 360 (1941).

<sup>57</sup> Act of June 4, 1879, Pa. Pub. Laws (1879), p. 88, § 3, repealed and re-enacted June 7, 1917, Pa. Pub. Laws (1917), p. 407, § 11.

<sup>58</sup> Cases where decisions as to creditors turned chiefly on the answer to one or both of these questions: *Stokes' Estate*, 20 W. N. C. (Pa.) 48 (1887); *Horner's Estate*, 4 Pa. C. C. 189 (1887) (uncertain); *Fell's Estate*, 14 Pa. Dist. 327 (1905); *Fleming's Estate*, 219 Pa. 422, 68 A. 960 (1908); *Huey's Estate*, 17 Pa. Dist. 1030 (1908); *Terppe's Estate*, 224 Pa. 482, 73 A. 922 (1909); *Huddy's Estate*, 236 Pa. 276, 84 A. 909 (1912); In re Pennsylvania Co. for Insurances on Lives & Granting Annuities Account, 264 Pa. 433, 107 A. 840 (1919); *Forney's Estate*, 280 Pa. 282, 124 A. 424 (1924); *Kates' Estate*, 282 Pa. 417, 128 A. 97 (1925); *Hagen's Estate*, 85 Pa. Super. 123 (1925), affirmed 285 Pa. 326, 132 A. 175 (1926); *Stannert's Estate*, 339 Pa. 439, 15 A. (2d) 360 (1941).

• Cases where the problem is chiefly in regard to taxation: *King's Estate*, 14 W. N. C. (Pa.) 77 (1883); *Swaby's Appeal*, 14 W. N. C. (Pa.) 553 (1884); *Twitchell's Estate*, 284 Pa. 135, 130 A. 324 (1925); *Valentine's Estate*, 297 Pa. 99, 146 A. 453 (1929).

these is found in the affirmative, the creditors are allowed to reach the property appointed. But the standards by which such questions are answered, being essentially matters of construction, are not easy to ascertain with exactness, nor can it often be definitely determined whether the decision rests on the answer to the first or second. That the statute just referred to is considered in this connection is clear.<sup>59</sup> That it does not act of itself to blend the appointive property with the donee's estate by affecting the exercise of a power through a general testamentary provision disposing of the donee's own estate has been expressly held.<sup>60</sup>

From an analysis of the various cases the only conclusions the writer has been able to form as to what the court will look to when the question of creditors' rights are raised are (1) that a general provision for the payment of debts followed by a general devolution of all the testator's estate, such as will be construed to exercise any general power of appointment he may have, will not be conclusive,<sup>61</sup> or may, as in *Fell's Estate*,<sup>62</sup> be held to show an intention not to subject the appointive estate to the claims of creditors; (2) that where the provision for the payment of debts follows the general clause which operates to exercise the power, there is likely to be found a clear manifestation by the donee of an intent to subject such property to his debts;<sup>63</sup> (3) that an appointment which expressly announces an intention to blend in so many words and in addition to subject the property to debts will be given effect and the estate will be held to go to the donee's executors both to pay his debts and for tax purposes;<sup>64</sup> and (4) that more than anything else it is the donee's intent, from all the circumstances, which will influence the court.<sup>65</sup>

Once the question whether or not creditors can establish their claims against appointed property is decided, the Pennsylvania law becomes more or less precise. When the appointment is to a taker in default, and it is decided that it is exercised subject to creditors, there appears to be no more consideration here of a renunciation by the ap-

<sup>59</sup> For examples see: *Horner's Estate*, 4 Pa. C. C. 189 (1887); *Huddy's Estate*, 236 Pa. 276, 84 A. 909 (1912); *In re Pennsylvania Co. for Insurances on Lives and Granting Annuities Account*, 264 Pa. 433, 107 A. 840 (1919).

<sup>60</sup> *Huddy's Estate*, 236 Pa. 276, 84 A. 809 (1912).

<sup>61</sup> *Hagen's Estate*, 85 Pa. Super. 123 (1925) affirmed 285 Pa. 326, 132 A. 175 (1926).

<sup>62</sup> 14 Pa. Dist. 327 (1905).

<sup>63</sup> *Horner's Estate*, 4 Pa. C. C. 189 (1887); and strong dicta in the general discussion of the subject in *Hagen's Estate*, 285 Pa. 326 at 331, 132 A. 175 (1926).

<sup>64</sup> *Forney's Estate*, 280 Pa. 282, 124 A. 424 (1924).

<sup>65</sup> *Stannert's Estate*, 339 Pa. 439, 15 A. (2d) 360 (1941), and note that in *Fleming's Estate*, 219 Pa. 422, 68 A. 960 (1908), despite the donor's stringent spendthrift provision, the court decided the case on the donee's intent.

pointee than there was in Massachusetts.<sup>66</sup> At least no case appears yet to have either had the point seriously argued, or to have followed the lead of the federal tax cases and raised a presumption of renunciation.<sup>67</sup>

In the ordinary case where the property is appointed by will, and it is found there is no blending, it will pass directly to the appointee, so that where a husband elected to take against his wife's will, he was able to take the benefit of the appointment as well as his full share of her personal estate by intestacy.<sup>68</sup> But where a husband did not appoint to his widow, though he did exercise his power, the widow electing to take against the will was held unable to take any more than she would have got had her husband died intestate.<sup>69</sup> She apparently argued that if he had blended with his personal estate the appointive estate, it would be blended for all purposes and she would thus be able to take her statutory share from the appointed property as well. The court held that the estates were blended, but that only the donee's creditors could reach the property because it was appointed for their benefit. In the first case, however, the donee's estate did not appear insolvent, but logically in Pennsylvania this should have made no difference whatsoever to the decision, once it was found that the estates were not blended.

Where a blending is found, the property will ordinarily be put in the hands of the donee's executors for convenience in administration.<sup>70</sup> In such a case it might well be used to make up deficiencies in legacies resulting from the payment of debts, since if it becomes part of the donee's estate, it might be held to be such for all purposes *consistent with the will* so blending it.<sup>71</sup>

That Pennsylvania has particularly relaxed the strict application of property-law concepts in favor of the rights of creditors does not very clearly appear in a general survey of its authorities. In fact there are occasionally very hard cases, such as *Dunghlison's Estate*,<sup>72</sup> where the donee, acting also as trustee of the donor, created liabilities through his malfeasance in office which his testamentary exercise of the power to

<sup>66</sup> Clapp v. Ingraham, 126 Mass. 200 (1879); Terppe's Estate, 224 Pa. 482, 73 A. 922 (1909); In re Pennsylvania Co. for Insurances on Lives and Granting Annuities Account, 264 Pa. 433, 107 A. 840 (1919).

<sup>67</sup> See Helvering v. Grinnell, 294 U. S. 153, 55 S. Ct. 354 (1935).

<sup>68</sup> Huddy's Estate, 236 Pa. 276, 84 A. 909 (1912).

<sup>69</sup> Kates' Estate, 282 Pa. 417, 128 A. 97 (1925).

<sup>70</sup> Horner's Estate, 4 Pa. C. C. 189 (1887); Pennsylvania Co. for Insurances on Lives & Granting Annuities Account, 264 Pa. 433, 107 A. 840 (1919).

<sup>71</sup> See dicta in Hagen's Estate, 285 Pa. 326 at 331, 132 A. 175 (1926), to the effect that "the real test [for blending] is whether the testator has treated the two estates as one *for all purposes* and manifested an intent to commingle them generally." (Italics added.) This was cited with approval in regard to another tax matter. See also Valentine's Estate, 297 Pa. 99, 146 A. 453 (1929), where again no blending was found.

<sup>72</sup> 201 Pa. 592, 51 A. 356 (1902).

appoint was allowed to defeat, despite the facts that he had thereby made his estate insolvent and that he appointed to volunteers. But on the other hand the courts are not necessarily prevented from doing whatever equity they see fit to recognize. If nothing else appears clearly, the proposition that Pennsylvania authorities can be literally construed in favor of creditors, where a testamentary exercise of a power is found, deserves consideration. The fact that they most often are not is a matter for its judges to take up with their collective conscience.

Three Ohio cases,<sup>73</sup> spanning nearly one hundred years, indicate quite strongly that Ohio courts take very much the same view of the rights of donees' creditors as is taken by the Pennsylvania courts. The blending doctrine in its present form seems not to have been considered, however, and an appointment expressly subject to debts is apparently a condition to the recognition of creditors' claims.<sup>74</sup>

Kentucky authorities<sup>75</sup> present quite clearly its stand on these matters. The donee's intent will govern, as in Pennsylvania. The principle is even carried to the point of allowing preferential appointments to certain designated creditors, to the exclusion of the claims of undesignated creditors.<sup>76</sup> Such a result is certainly consistent with the donee's intent approach, but it can scarcely be reconciled with present-day principles of insolvency law and the modern concept of a fraudulent conveyance. Another interesting theoretical consistency appears in a case refusing to allow creditors to reach appointive realty when a general power to appoint both personalty and realty was exercised only with respect to the personalty. Courts agreeing with the Pennsylvania approach to these problems would logically have to reach this result, but courts concurring with the Massachusetts theory of creditors' rights might well find that a power is indivisible, and if exercised at all must be considered exercised in full. This holding in turn could result in the first inroad on the rather mechanical distinction between the results possible when the general power is exercised and when it is not exercised.

<sup>73</sup> *Donley's Adms. v. Shields*, 14 Ohio 359 (1846); *Meehan v. Burr, Trustee*, 58 Ohio St. 689, 51 N. E. 1099 (1898); *Matter of Trust of Howald*, 65 Ohio App. 191, 29 N. E. (2d) 575 (1940).

<sup>74</sup> *Matter of Trust of Howald*, 65 Ohio App. 191, 29 N. E. (2d) 575 (1940), where the court allowed creditors' claims in such a case, but did not discuss the principle of blending.

<sup>75</sup> *Boyce v. Waller*, 39 Ky. 478 (1840); *Payne v. Johnson's Exrs.*, 95 Ky. 175 (1893); *Slayden v. Hardin*, 257 Ky. 685, 79 S. W. (2d) 11 (1935); *St. Matthews Bank v. De Charette*, 259 Ky. 802, 83 S. W. (2d) 471 (1935); *Godfroy v. De Charette*, 260 Ky. 147, 84 S. W. (2d) 66 (1935).

<sup>76</sup> *Godfroy v. De Charette*, 260 Ky. 147, 84 S. W. (2d) 66 (1935).

*Rhode Island Hospital Trust Co. v. Anthony*<sup>77</sup> appears to be the only Rhode Island case on the subject. Since the donee's estate did not there appear to have been insolvent, and since it was the donee's executor, and not his creditors, who was making the claim for the appointed property, that part of the opinion discussing the rights of donees' creditors in general was perhaps dictum, but nevertheless it is so strong and so well considered that it may still be a basis for saying that, at least in the absence of a contrary expression of intent by either the donor or the donee, appointive property is immune in Rhode Island from the claims of donees' creditors.

The implication of the only two South Carolina cases conceivably in point is that it is the donor's intent which must govern in deciding whether creditors' claims can be recognized.<sup>78</sup> If this were so, South Carolina would stand alone on the proposition. But in neither of these cases is there any indication that the donees' estates were insolvent. It is submitted that they cannot be taken too seriously, and that, at its strictest, South Carolina would adopt the Pennsylvania view if the problem arose.

In Maryland the predominant dicta are in favor of the Pennsylvania view,<sup>79</sup> but there is one conspicuous exception. A power authorizing a donee to appoint generally by will appears in this state not to be considered a general power.<sup>80</sup> The case proposing this interpretation held, however, that there was involved no attempt to appoint to creditors. Thus, by this reading, all that was decided was that the donee's intent is to some extent determinative. Subsequent Maryland cases are not even this much in point,<sup>81</sup> but the denial that a testamentary power can be a general power within the meaning of a donees'-creditors rule is repeated in dicta.<sup>82</sup>

The above analysis of cases which in fact decide anything relevant to the rights of donees' creditors against property appointed by will discloses that, generally speaking, there are, under a given set of circum-

<sup>77</sup> 49 R. I. 339, 142 A. 531 (1928).

<sup>78</sup> *Humphrey v. Campbell*, 59 S. C. 39, 37 S. E. 26 (1900); *Adger v. Kirk*, 116 S. C. 298, 108 S. E. 97 (1920).

<sup>79</sup> *Balls v. Dampman*, 69 Md. 390, 16 A. 16 (1888); *Price v. Cherbonnier*, 103 Md. 107, 63 A. 209 (1906).

<sup>80</sup> *Balls v. Dampman*, 60 Md. 390, 16 A. 16 (1888).

<sup>81</sup> *Price v. Cherbonnier*, 103 Md. 107, 63 A. 209 (1906), where the donee of a testamentary power to appoint to children or descendants attempted to appoint to the children of a third person; *Prince de Bearn v. Winans*, 111 Md. 434, 74 A. 626 (1909), where the real question involved was a problem in conflict of laws; *Mercantile Trust Co. v. Bergdorf & Goodman Co.*, 167 Md. 158, 173 A. 31 (1934), where the donor and donee were the same person, and where the power was not exercised.

<sup>82</sup> *Price v. Cherbonnier*, 103 Md. 107, 63 A. 209 (1906).

stances, two partially conflicting approaches to the problem. In practice the chief distinction is that where on the one hand a court will look solely to the solvency of a donee's estate before recognizing creditors' claims, on the other it will look also to a donee's intent as expressed in the instrument exercising the power. Whether, on principle, the intent of a donee should be the determinative factor in deciding whether or not certain property should be used to satisfy his creditors generally, in preference to protecting appointees who may or may not have legal claims against his estate, is a question which probably should be answered with an eye to the present broad theories of bankruptcy law. Technical property concepts of the operation and effect of the exercise of a power of appointment must be weighed against the proposition that a man will be made to use property for the payment of his just debts before he can use it for any other selfish or philanthropic purpose. It is submitted that those jurisdictions which are aligned with Pennsylvania and consider principally the donee's intent have either failed to see this as the ultimate problem or, having seen it, have inconsistently conceded the greater weight to property-law technicalities. What will be accomplished by juridical decision in the future is quite uncertain, particularly in view of the fact that recent cases seem rather to revitalize old ones than to show a distinguishable trend in any particular direction. It would appear that in those jurisdictions where the courts are already committed to one of the two approaches, any sharp change which may seem desirable will have to be accomplished chiefly through legislative action.

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