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Power of Appointment--Appointed Property as Assets of the Donee

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making a special session of the legislature altogether unnecessary. Even so under the decision of the Kentucky Court the legislature would have to convene as the governor when he issued the call performed the last act he was authorized to perform.

Suppose the governor decides to issue a call for a special session and accordingly has the proper proclamation drawn up and executes it. Later in the day he learns that he had not been correctly informed as to the true status of the matter for which the proclamation was to issue and therefore decides not to issue the call. However, he leaves the proclamation lying on his desk and his secretary, not being advised, sends the proclamation out. Can the governor revoke the call here? Presumably not under the decision of the Kentucky Court.

The Kentucky Court, although they do not base their decision upon it, present the theory that if the governor was allowed to revoke the call, even though urgent reasons existed for such call, he might be subjected to such pressure by interests that would be affected thereby that he would cancel the call. This argument would be just as effective the other way. That is the governor might be induced by special interests to convene the legislature, and upon sane reflection decide that a special session would be an unnecessary expense. However, this is all beside the point for if the power exists the fact that it might be abused would not deprive the governor of the power.

Of course occasions for the exercise of such power seldom arise, but there are many instances that could occur in which on the basis of reason the governor should have such power, and it seems to me that in many instances such power would be necessary for the governor to effectually carry out the power granted to him. The court in arriving at the proper construction of a section of the constitution must consider the reason for and the purpose of its adoption.[11] There is no way of determining the purpose of the adoption of this provision except through reasoning from the provision itself, but it should be given a practical interpretation,[12] rather than an impracticable one.

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POWER OF APPOINTMENT—APPOINTED PROPERTY AS ASSETS OF THE DONEE

A devised Blackacre to B for life with an express provision giving B a right to dispose of Blackacre by will. In the event B failed to dispose of Blackacre by will A made other provisions for its disposition. B devised Blackacre to C for life with remainder to C's issue. On her death B's creditors seek to subject Blackacre to the satisfaction of their debts. In the case of St. Matthews Bank v. De Charette,[1] the Kentucky Court held that B's creditors had no claim to Blackacre, even though B was given a general power of appointment by will and had exercised that power in favor of volunteers, viz., C and C's issue.

[11] 153 Ky. 604, 156 S. W. 154, 44 L. R. A., N. S. 989.
[12] 234 Ky. 473, 28 S. W. (2d) 745.
[1] 259 Ky. 802, 83 S. W. (2d) 471 (1935).

The rule seems to be well settled that creditors of the donee of a power of appointment by will cannot subject the property which is the subject matter of the power to the payment of their debts, unless, first, the donee's own property is insufficient, second, the power is general, third, the power is exercised, and fourth, the power is exercised in favor of volunteers.[2] When all four of these elements are present the cases are no longer so unanimously in accord. The great majority of the courts favor the donee's creditors,[3] while a few courts have departed from the beaten path and hold that the creditors of the donee of a general power of appointment by will cannot subject the property to the payment of their debts, even though the donee has exercised the power in favor of persons not his creditors.[4] The Kentucky Court in the case noted above being unfettered by precedent, took notice of this conflict of authority, and on principle sided with the minority and against the donee's creditors.

Under a general power of appointment the donee of the power may appoint to whomever he pleases. In fact he may appoint to himself.[5] But as the power of appointment is by will the appointment cannot take effect until death of the donee.

The theory of the majority rule allowing the donee's creditors to reach the subject matter of the power is predicated upon the notion that any person who has such power and control over property that he may appoint to anyone he wishes as owner, even to himself, should be considered the owner at least for some purposes. And any attempt on the donee's part to dispose of the property to others is a fraud on his creditors. It is said that the attempt by the donee to dispose of the property by exercising the power, is exercising complete dominion over it which is not inconsistent with ownership, and that equity will then intervene and frustrate the transaction by seizing the property for the benefit of creditors.[6] The whole theory is based on the idea that a man is under a duty to pay his debts if he can, and if he has the right and power to augment his estate by exercising the power for his own benefit, he should do so.[7] The very minute the donee

[2] Tuell v. Hurley, 206 Mass. 65, 91 N. E. 1013 (1910); Johnson v. Cushing, 15 N. H. 298, 41 Am. Dec. 694 (1844); Gilman v. Bell, 99 Ill. 144 (1891); Bentham v. Smith, 15 S. C. Eq. (Cheves) 33, 34 Am. Dec. 599 (1840); Patterson v. Lawrence, 83 Ga. 703, 10 S. E. 355 (1889).

[3] Clapp v. Ingrahm, 126 Mass. 200 (1879); Forbes v. Snow, 245 Mass. 85, 140 N. E. 418 (1923); Crane v. Fidelity Union Trust Co., 99 N. J. Eq. 164, 133 A. 205 (1926); Freeman v. Butters, 94 Va. 406, 26 S. E. 845 (1879).

[4] Rhode Island Hospital Trust Co. v. Anthony, 49 R. I. 339, 142 A. 531 (1928); Adger v. Kirk, 116 S. C. 298, 108 S. E. 97 (1920); Balls v. Dampson, 69 Md. 390, 16 A. 16 (1888); Cutting v. Cutting, 86 N. Y. 522 (1881); Commonwealth v. Duffield, 12 Pa. 277 (1849) Dictum.

[5] Clapp v. Ingrahm, note 3, *supra.*

[6] Johnson v. Cushing, note 2, *supra.*

[7] Hill v. Treasurer, 229 Mass. 474, 118 N. E. 891 (1918); Shattuck v. Burrage, 229 Mass. 448, 118 N. E. 889 (1918).

attempts to dispose of the property to anyone besides his creditors, equity steps in and declares the transaction to be a fraud on them.[8] But Equity will not force the donee to exercise the power, hence, even under the majority rule the donee may simply default in exercising the power in which case the creditors are helpless. The chief reason given for this requirement is that equity may cure the defective execution of a power but will not supply the failure to exercise it.[9] The courts recognize the fact that it is as great a moral fraud upon his creditors for the donee of the power to fail to exercise it, as it is in the case where he exercises it in favor of volunters,[10] yet in the latter case the subject matter of the power is turned over to creditors, while in the former case the creditors get nothing. It would seem that if the donee is to be treated as owner of the subject matter of the power to such an extent that his creditors can reach it to satisfy their debts when he attempts to turn the property over to his friends, he should likewise be treated as the owner when he defaults in exercising the power

The minority rule, which was followed by the Kentucky Court in the principal case, is based upon the ground that the mere power to dispose of property is not equivalent to its ownership. The property which is the subject of the power is not considered the donee's for the purpose of succession and inheritance taxes;[11] it does not pass to the donee's administrator on his death and it should not be considered the donee's for the purpose of allowing his creditors to reach it. Title to the property is never vested in the donee, but is transferred directly from the donor of the power to the appointees.[12] And finally it is said that the intention of the donor is that the donee be given a right to appoint the property to whomever he pleases, and that this intention of the donor is absolutely disregarded when equity intervenes and declares that the donee must appoint to his creditors, if to anyone.[13]

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[8] Johnson v. Cushing, note 2, *supra;* Gilmere v. Bell, note 2, *supra*
[9] Story—Equity Jurisprudence, 14th Ed., Sec. 241.
[10] Duncanson v. Manson, 3 App. D. C. 260 (1894).
[11] United States v. Fields, 255 U. S. 257, 41 S. Ct. 256, 65 L. Ed. 617 (1921).
[12] McMurty v. State, 111 Conn. 594, 151 A. 252 (1930).
[13] Rhode Island Hospital Trust Co. v. Anthony, note 4, *supra.*