Volume 48 | Number 1 Article 21

12-1-1969

Poverty Law -- Garnishment -- Protection of Debtors' Rights

Clinton Eudy Jr.

public housing tenants does not so much cause white families to take public housing as it puts the tenants in contact with white non-tenants, thereby acting broadly to correct the evils of residential separation of the races. The change in the basis of the court's reasoning between the first opinion in March, 1967, and the issuance of the decree in July, 1969, may indicate a change in constitutional theories upon the part of the court; but it does not leave the final decree without sufficient justification. Thus *Gautreaux* raises for the first time the question of whether racial imbalance in public housing is a denial of equal protection of the laws,[70] which the Constitution would require government to seek to correct.

HUGH J. BEARD, JR.

Poverty Law—Garnishment—Protection of Debtors' Rights

Garnishment[1] is a remedy of ancient origin and doubtless has served the interests of justice. But as wages have become the predominant form of individual income, a once-valuable remedy has changed into an instrument that too often shelters the unjust and defrauds the unfortunate.

In *Sniadach v. Family Finance Corp.*,[2] the United States Supreme Court attempted to eliminate some of the injustices of garnishment. The Family Finance Corporation had initiated a garnishment proceeding against Mrs. Sniadach, and against her employer as garnishee. Defendant was served with summons and complaint the same day that her employer was served with process. In accordance with Wisconsin law, defendant's employer paid her a subsistence allowance of fifty per cent of her accrued wages and retained the other half pending disposition of the case. De-

[70] In Hicks v. Weaver, 302 F. Supp. 619 (E.D. La. 1969), a Federal district court, upon the authority of Gautreaux v. Chicago Housing Authority, stopped housing project construction in Bogalusa, Louisiana, on sites selected with regard to the racial composition of either the surrounding neighborhood or of the projects themselves.

[1] Garnishment is an action that brings the defendant's property into legal custody either to provide security for a claim that may be established in the future or to satisfy a judgment already rendered for the plaintiff. Beggs v. Fite, 130 Tex. 46, 106 S.W.2d 1039 (1937). Attachment is a similar remedy but it reaches property held by the defendant himself, while garnishment is appropriate for reaching property of the defendant held by a third party. 6 AM. JUR. *Attachment and Garnishment* § 3 (1963). A garnishment proceeding cannot stand alone, but is ancillary to the principal action in which the validity of the plaintiff's claim is determined. *See, e.g.*, N.C. GEN. STAT. § 1-440.1 (1953).

[2] 395 U.S. 337 (1969).

fendant then moved in county court that the garnishment proceedings be dismissed for failure to satisfy the due process requirement of the fourteenth amendment, in that notice and hearing were not given prior to the freezing of her wages. The county court and subsequently the Wisconsin Supreme Court[3] declared that the constitutional standard of due process had been met. Speaking through Justice Douglas, a majority of seven of the United States Supreme Court reversed, finding a fatal lack of due process in the Wisconsin garnishment scheme.[4]

The Court emphasized two factors in reaching its decision. The first was the creditor's failure to show that the use of pre-judgment garnishment was required by the existence of an "extraordinary" situation, which the Court defined as one "requiring special protection to a state or creditor interest."[5] Although the opinion does not otherwise describe such a situation, the examples of extraordinary circumstances cited by the Court are cases in which the debtor's actions or status in some manner jeopardized the creditor's access to the debtor's assets[6] or the court's jurisdiction over his person.[7] The fact was emphasized that Mrs. Sniadach was a resident of the state in which the suit was instituted, and that in personam jurisdiction was thus readily obtainable over her.[8] The Court did not say that either the absence of personal jurisdiction or the existence of extraordinary circumstances is a prerequisite for pre-judgment garnishment, although the absence of these factors appears to militate against its use. The case may be a step toward ultimately prohibiting garnishment in any case where "extraordinary" circumstances are absent and where in personam jurisdiction is available.

A second factor cited by the Court is the special nature of wages as an asset. In specifically approving[9] *McKay v. McInnes*,[10] which upheld the prejudgment attachment of real estate and stocks without notice and prior hearing, the Court indicated that it is not garnishment per se that is of-

[3] Family Fin. Corp. v. Sniadach, 37 Wis. 2d 103, 154 N.W.2d 259 (1968).
[4] 395 U.S. at 342.
[5] *Id.* at 339.
[6] Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (seizure of mislabeled tonic before hearing); Fahey v. Mallonee, 332 U.S. 245 (1947) (bank conservator appointed without prior hearing); Coffin Bros. v. Bennett, 277 U.S. 29 (1928) (bank stockholders required, without prior hearing, to contribute to bank's solvency).
[7] Owenby v. Morgan, 256 U.S. 94 (1921) (property of debtor who had fled the jurisdiction attached before hearing).
[8] 395 U.S. at 339.
[9] *Id.* at 340.
[10] 279 U.S. 820, *aff'g mem.* 127 Me. 110, 141 A. 600 (1928).

fensive, but the taking of assets in the form of wages. The opinion seems to suggest that the taking without notice of non-wage assets generates fewer hardships and permits fewer abuses, and will therefore not be affected by the holding in *Sniadach.*

To understand the significance of *Sniadach,* one must appreciate the hardships garnishment visits upon the wage-earner under present law in most jurisdictions. The Court attempted to develop such an appreciation by devoting more than a third of the decision to a discussion of the impact of garnishment on the defendant.[11] The most obvious hardship is that in all but a few states[12] some income will be temporarily withheld from the wage earner. In states such as Missouri[13] and New York,[14] this deprivation may be a fairly minor annoyance since ninety per cent of a worker's wages are exempt from garnishment. However, in states such as Arizona,[15] which exempts only fifty per cent of a wage earner's income, garnishment can precipitate a major financial crisis.

The inadequacy of most exemptions[16] is dramatized by statistics:

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[11] 395 U.S. at 340-42.

[12] The following laws exempt one-hundred per cent of accrued wages from garnishment: ARK. STAT. ANN. § 30-207 (1947); CAL. CIV. PROC. §§ 690.10-.11 (West 1963); MINN. STAT. ANN. § 575.05 (1945); MONT. REV. CODE ANN. § 93-5816 (1947); NEV. REV. STAT. § 21.090(h) (1967); N.C. GEN. STAT. § 1-362 (1953); PA. STAT. tit. 42 § 886 (1966); S.C. CODE ANN. § 10-1731 (1962); S.D. COMP. LAWS § 15-20-12 (1967); TEX. CONST. art. 16, § 28.

[13] MO. ANN. STAT. § 525.030 (1952).

[14] N.Y. CIV. PRAC. § 5205(e)(2) (1963).

[15] ARIZ. REV. STAT. ANN. § 12-1594A (1956).

[16] ALA. CODE tit. 7, § 630 (1958) (seventy-five per cent of wages exempted); ARIZ. REV. STAT. ANN. § 12-1594A (1956) (fifty per cent exempted when needed for support of debtor's family); COLO. REV. STAT. ANN. § 77-2-4 (1963) (seventy per cent exempted for heads of families, and thirty-five per cent for single persons); CONN. GEN. STAT. ANN. § 52-361(b) (1958) (sixty-five dollars per week exempt); DEL. CODE ANN. tit. 10, § 4913 (1953) (sixty per cent of wages exempt in Kent and Sussex County, but ninety per cent except in New Castle County when used for articles found in the home); GA. CODE ANN. § 46-208 (1965) (three dollars per day exempt plus fifty per cent of the excess over three dollars); IDAHO CODE ANN. § 11-205 (1947) (seventy-five per cent exempted if earnings are necessary for use of debtor's family residing in Idaho, but only fifty per cent exemption if debt is incurred for necessaries actually furnished); IOWA CODE ANN. § 627.10 (1950) (thirty-five dollars plus three dollars for each dependent under eighteen); KY. REV. STAT. § 427-010 (1964) (seventy-five per cent exempted except when debt incurred for necessities, in which case exemption is only fifty per cent); ME. REV. STAT. ANN. tit. 14, § 2602(6) (1964) (thirty dollars exempt); MD. ANN. CODE art. 9, §§ 31(a), (b) (1957) (one-hundred dollars exempted except in Cecil, Caroline, Kent, Queen Anne's and Worchester Counties where seventy-five per cent is exempted); MASS. ANN. LAWS ch. 246, § 28 (2 POV. L. REP. ¶ 9906 (June 16, 1969)) (eighty dollars per week); MICH. STAT. ANN. § 27A.7511(2) (1962) (in most cases, sixty per cent exempted for a householder, and forty per cent for a single person); MISS. CODE ANN. § 307(10) (1942) (seventy-five per cent exemption); N.H. REV. STAT. ANN. § 512:211 (1955) (no exemption for wages earned but not

In this country, eighty-five per cent of all personal income is used for current consumption;[17] at lower income levels the percentage is higher.[18] Therefore, in states exempting eighty-five per cent or less,[19] the average individual is forced to reduce his accustomed level of consumption following garnishment; and the impact is proportionally greater on individuals with less income. Moreover, many states' garnishment schemes that feature generous exemptions do not provide in practice the relief that they offer in theory. Many states require of the defendant some affirmative action—most commonly filing an affidavit with the clerk of court—to claim the statutory exemption.[20] Because of ignorance of the exemption, or because of unwillingness to expend the necessary time and

paid before service of process); ch. 92, [1969] N.J. Acts (2 Pov. L. Rep. ¶ 9969 (June 30, 1969)) (forty-eight dollars per week or ten per cent exempted if salary does not exceel 2,500 dollars per year); N.M. Stat. Ann. § 26-2-27 (1953) (eighty per cent of first seventy-five dollars exempt, but one-hundred per cent of wages above seventy-five dollars per month may be garnished); N.D. Cent. Code § 32-09-02 (1960) (thirty-five dollars per week exempt for resident who is not head of family; for head of family fifty dollars plus five dollars for each dependent exempt); Ore. Rev. Stat. § 23.181 (1965) (fifty per cent exempt but in no case less than twenty-five dollars); R.I. Gen. Stat. Ann. § 9-24-4 (1956) (in most cases, a straight fifty-dollar exemption); Tenn. Code Ann. §§ 26-207 to -208 (1968) (fifty per cent for head of family but in no case less than twenty dollars nor more than either of fifty dollars, or seventeen dollars and fifty cents per week plus two dollars and fifty cents per dependent); Utah Code Ann. § 78-23-1(7) (1953) (fifty per cent but only for head of family who needs earnings to support dependents); Vt. Stat. Ann. tit. 12, § 3020(5) (1959) (thirty dollars per week plus fifty per cent of all wages in excess of sixty dollars per week exempted); Va. Code Ann. § 34-29 (1950) (exact exemption computed on maximum-minimum table, but the thirty-five dollars weekly minimum and one-hundred fifty dollars monthly maximum indicate the general inadequacy of the provision); ch. 264, § 28, [1969] Wash. Laws (2 Pov. L. Rep. ¶ 9899 (June 16, 1969)) (seventy-five per cent exempted); ch. 127, [1969] Wis. Laws (2 Pov. L. Rep. ¶ 10,218 (Aug. 8, 1969)) (seventy-five per cent exempted); Wyo. Stat. Ann. § 1-422 (1957) (fifty per cent exempted).

[17] U.S. Bureau of Labor Statistics, Dep't of Labor, Handbook of Labor Statistics 281 (1968).

[18] *Id.*

[19] In addition to the states cited in note 16 *supra*, the following states also exempt eighty-five per cent or less of an employee's wages: Ill. Ann. Stat. ch. 62, § 73 (Smith-Hurd 1964) (forty-five dollars per week or eighty-five per cent of gross wages, whichever is greater, exempted); La. Rev. Stat. Ann. § 13:3881 (1968)) (eighty per cent of wages exempted, but in no case will the exemption be less than one-hundred dollars per month); Ohio Rev. Stat. Ann. §§ 2329.66(F), 2333.21 (Page 1954) (eighty-two and one-half per cent of monthly wages exempt, but only sixty per cent of biweekly wages, and thirty per cent of weekly wages exempt).

[20] *See, e.g.*, Idaho Code Ann. §§ 8-527, 11-203 (1947); Iowa Code Ann. § 627.10 (1962); Kan. Stat. Ann. § 60-2310 (1964); Nev. Rev. Stat. § 21.090(h) (1967).

effort, the exemption is rarely claimed in states where the appropriate portion of the wage-earner's pay is not automatically exempted.[21]

Garnishment may also cost the defendant his job; the firing of workers whose wages are garnished is a widespread, if not universal, practice.[22] Employers are required to answer the garnishment complaint, keep separate accounts for the employee's exempt and non-exempt wages, and in some states even appear in court.[23] The expense involved can be tremendously burdensome.[24] Because prospective employers feel that garnishment of a debtor's wages reflects poorly on his integrity and ability, and because employers seek to avoid future garnishment expense and trouble, they rarely hire individuals whose wages have been garnished in the past.[25] The total economic impact of prejudgment garnishment is described accurately in *Sniadach*: "The result is that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage earning family to the wall."[26]

No one would argue that the law should not provide for the collection of just debts. Viewed in this light, the debtor has brought garnishment-generated hardships on himself. But too often, the defendant is the victim not of reluctance to pay his debts, but of sharp or illegal practices sheltered and encouraged by the garnishment process. Such practices are nurtured by the economic pressure exerted on the garnishment defendant, which makes it impossible for him to await a hearing of his case on the merits, particularly where there are crowded court dockets. Empirical research shows that few suits preceded by an ancillary action in garnishment are ever heard on their merits and that the typical outcome in such cases is a default judgment for the plaintiff.[27] Perhaps the defendants

[21] Brunn, *Wage Garnishment in California: A Study and Recommendations*, 53 CALIF. L. REV. 1214, 1219 (1965).

[22] D. CAPLOVITZ, THE POOR PAY MORE 157 (1967); S. MARGOLIS, THE INNOCENT CONSUMERS VS THE EXPLOITERS 100 (1967); *Wage Garnishment in Washington—An Empirical Study*, 43 WASH. L. REV. 735, 756 (1968); Note, *Wage Garnishment as a Collection Device*, 1967 WIS. L. REV. 759, 761.

[23] *Wage Garnishment in Washington, supra* note 22, at 755.

[24] *Hearings on H.R. 11601 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 90th Cong., 1st Sess., at 197 [hereinafter cited as *Hearings*]. In 1966, Inland Steel spent $500,000 to cover costs of garnishments of its employees' wages. *Id.*

[25] *Wage Garnishment in Washington, supra* note 22, at 790.

[26] 395 U.S. at 341. The language of *Sniadach* emphasizes the effect of garnishment on the family, but it is the individual not supporting a family who receives the smaller benefit from state exemption statutes. *See* notes 16 & 19 *supra*.

[27] A 1967 survey in one Washington jurisdiction showed that of 227 cases involving prejudgment garnishment reported over a six-month period, not one case went to trial. Out of an undisclosed number of similar cases over a period of a

in these studies could not have presented valid defenses, but it is probable in many cases that garnishment prevented their assertion. Many creditors, aware that garnishment can be invoked to prevent a disgruntled debtor from airing his grievances in court, enrich themselves at little risk by engaging in patently fraudulent practices.[28]

Two escape routes exist under current law for a debtor to avoid the rigors of garnishment. First, he can make new arrangements with his creditor for the liquidation of the debt. This option is the one most often chosen by debtors, and desired by creditors. By making such arrangements, the debtor not only waives his best opportunity to assert defenses, but he may also be required by the creditor to defray all costs of asserting the legal process of garnishment, including attorney's fees, filing fees and court costs,[29] and be forced as well to pay all of the creditor's personal expenses in the matter.[30] Alternatively, the debtor may declare bankruptcy. The incidence of personal bankruptcy has been increasing at a phenomenal rate when one considers that the past several years have been periods of economic prosperity.[31] Even bankruptcy may not provide the debtor the relief he seeks; a surprising number of bankrupts reaffirm debts that had been released in bankruptcy.[32]

The methods used by states to comply with the *Sniadach* decision will determine its effectiveness. Clearly, they must set up machinery to provide the garnishment defendant a hearing prior to the time that his wages are suspended. The sort of notice received by the defendant is critical because the right to be heard will not be exercised unless it is known to exist. If the debtor is notified only of the main action on the debt, and if his notice and summons contain no mention of a hearing on the *propriety* of pre-judgment garnishment, he will be forced to rely on the same informal sources that have been unsuccessful in informing him

year, only one went to trial. Patterson, *Wage Garnishment—An Extraordinary Remedy Run Amuck*, foreword to *Wage Garnishment in Washington—An Empirical Study*, 43 WASH. L. REV. 735, 735-36 (1968). For other studies with similar results, see *id.* 764; *Hearings* 435.

[28] *Hearings* 500.

[29] W. MAGNUSON & J. CARPER, THE DARK SIDE OF THE MARKETPLACE 94 (1968); S. MARGOLIS, *supra* note 22, at 102.

[30] W. MAGNUSON & J. CARPER, *supra* note 29, at 94; S. MARGOLIS, *supra* note 22, at 102.

[31] ADMINISTRATIVE OFFICE OF THE U.S. COURTS, TABLES OF BANKRUPTCY STATISTICS 3-5 (1967). The total number of bankruptcies in 1966 was 208,392, an increase of 8.3 per cent from the previous year. Personal bankruptcies accounted for ninety-two per cent of the total. *See also Hearings* 413-50.

[32] Brendes & Schwartz, *Schlockmeister's Jubilee: Bankruptcy for the Poor*, 40 REF. J. 69 (1966).

of the availability of exemptions. The promise of a day in court to the garnishment defendant will be realized only if he is informed both of the availability of a hearing and of the mechanics required to secure it.

Assuming the debtor seeks and secures a hearing prior to garnishment, what matters are in issue? Would the hearing be proper for consideration of the action "on its merits," *i.e.*, could the debtor raise his defenses to the underlying transaction? Or would consideration of only demurrable errors or the garnishment equivalent of probable cause be allowed? There is language in *Sniadach* indicating that the hearing would be on the merits:

> But in the interim the wage earner is deprived of his enjoyment of earned wages without an opportunity to be heard and to tender any defense he may have, whether it be fraud or otherwise.[33]

If states choose to set up hearings on the full merits of the underlying claim, two possible consequences are apparent. First, if the pre-garnishment hearing on the merits were res judicata in the subsequent principle action on the debt, there would be no need for a second trial—a pre-garnishment hearing administered in this fashion would mean the end of pre-judgment garnishment. Legal writers have long argued that such a change would eliminate the worst abuses of the procedure.[34] Second, faced with a reasonable certainty of having to show a meritorious case before being able to invoke the coercive machinery of garnishment, creditors would be discouraged from engaging in fraudulent practices.

The debtor with a valid defense will face a dilemma if the hearing on garnishment is not made binding at the later trial of the underlying claim. If he presents his defenses at the pre-garnishment hearing in order to save his job and his income, he "educates" his opponent and gives him a second chance at a later determinative trial. Few garnishment defendants would want to save money temporarily by defending vigorously and winning at the pre-garnishment hearing, only later to lose to a better-prepared creditor at full trial. However, the debtor's only alternative to defending at a prior hearing is to await trial, which can lead to economic disaster if he has a low income. If the *Sniadach* decision is implemented by a hearing that a non-determinative on the merits, the protection intended by the court will be significantly vitiated.

A third possibility would be to limit the issue at the hearing to the

[33] 395 U.S. at 339.

[34] *Wage Garnishment in California, supra* note 21, at 1248; *Wage Garnishment in Washington, supra* note 22, at 785.

existence of the garnishment equivalent of probable cause: The creditor would be required to show that there is probable cause for the court to believe that the defendant is in default on a legitimate debt. A hearing of this sort would prevent the wage earner's income from being garnished to pay a patently fraudulent debt, but it would not completely do away with pre-judgment garnishment. The defendant could choose to defend with vigor and educate the creditor on his defenses or remain silent and await trial on the merits. Here, of course, the creditor would also be required to disclose some of his case against the defendant.

Finally, the hearing could be one at which only demurrable errors could be raised. Evasion of such a hearing would be simple: the creditor willing to run the risk of being found out later could file a complaint that was false but that appeared regular on its face. This type judicial procedure would afford the debtor little protection.[35]

The Supreme Court in *Sniadach* intended to protect the garnishment defendant; but, administered improperly, the decision could generate abuses by the debtor. *Sniadach* clearly indicates that a hearing must precede garnishment. This requirement gives a defendant with notice of the garnishment an opportunity to go to his employer before the hearing and collect his accrued wages; only subsequent wages would then be left for the creditor. If the employer were required to freeze the defendant's wages at the time he is notified of the action, then the defendant's wages would be in fact garnished prior to hearing, probably in violation of *Sniadach.* A reasonable compromise between the interests of debtor and creditor would be for state law to prohibit the employer, once notified of the garnishment, from paying the defendant his accrued wages. However, the hearing would be required to be held within an appropriately short time—a week or less—after service of process on the employer, with a provision that the defendant's regular pay day not fall in the period between service and hearing. This procedure would not technically satisfy *Sniadach's* prohibition of freezing of wages before a hearing, but, properly applied, it would avoid all the abuses by creditors mentioned by the Court, as well as protect their interests.

Prior to the decision of *Sniadach,* several legislative solutions to the problems of garnishment had been enacted.[36] The most important of these is the Consumer Credit Protection Act (CCPA), which becomes effective

[35] *See, e.g.,* WIS. STAT. ANN. § 263.24 (1957). It is under FED. R. CIV. P. 11 and its state counterparts that the potential for this abuse is most apparent.

[36] 2 POV. L. REP. ¶ 9970 (June 30, 1969) (New York); 2 POV. L. REP. ¶ 9899 June 16, 1969) (Washington).

on July 1, 1970.[37] The Act prohibits the firing of an employee "by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness."[38] This language will benefit few employees because employers rarely discharge for the first garnishment.[39] The Act prohibits firing for "garnishment for any one *indebtedness*," rather than for any one *garnishment*, so that an employee who is garnished several times for a single obligation is protected. The statute's psychological impact may ultimately prove more important than its substantive provisions. Since Congress has indicated that firing for one garnishment is objectionable and is therefore prohibited, the way may be paved for state legislation preventing firing for any number of garnishments. The measure could also have the opposite effect of providing employers who do not discharge for garnishment, or who discharge only for multiple levies, an excuse for firing an employee after the second garnishment of his wages for separate debts. The fact that, subsequent to the passage of the CCPA, two states further restricted the discharging of employees for garnishment[40] indicates that the CCPA will probably have the former effect.

The CCPA also exempts seventy-five per cent of an employee's wages from garnishment.[41] This increases the exemption in only twenty-three states and is inadequate to protect most defendants awaiting trial. The exemption however, is automatic,[42] requiring no affirmative action on the part of the defendant to claim it.

The solutions offered by the Court and by Congress to the problems of garnishment differ greatly in approach and application. The protection afforded the garnishment defendant by the CCPA will be of great assistance, regardless of the validity of the underlying debt, while the hearing guaranteed by the *Sniadach* decision will be of small use to the wage-earner whose income is suspended because of a just debt. The CCPA enables the debtor to await trial by preserving his employment and

[37] 82 Stat. 162 (1968). This measure was enacted in May, 1968, but its effective date was delayed to give the states an opportunity to avoid federal regulation by enacting similar legislation. U.S. Dep't of Labor, Opinion of Wage-Hour Administrator, No. 956 (March 12, 1969), *reported in* 2 Pov. L. Rep. ¶ 9593 (April 7, 1969).

[38] 82 Stat. 163 (1968).

[39] *Wage Garnishment in Washington, supra* note 22, at 757.

[40] 2 Pov. L. Rep. ¶ 9970 (June 30, 1969). New York now flatly prohibits firing for any number of garnishments. 2 Pov. L. Rep. ¶ 9899 (June 16, 1969). Washington permits firing only after garnishments for three or more separate indebtednesses within a year.

[41] 82 Stat. 163 (1968).

[42] *Id.*

most of his income, while *Sniadach* goes directly to the heart of the problem by requiring that a hearing precede garnishment. The degree of protection *Sniadach* will ultimately provide depends upon the administrative techniques the states choose to implement it, while the CCPA's mandate cannot be avoided.

CLINTON EUDY, JR.

Real Property—Direct Restraints on Alienation

Owners who dispose of property frequently attempt to attach restrictions on its further sale or disposition. In *Wachovia Bank & Trust Co. v. John Thomasson Construction Co.*,[1] a case recently before the North Carolina Supreme Court, property had been conveyed in trust for the use of Alexander Children's Home, a non-profit charitable corporation, with the provision that the trustees should have no power to sell or convey it. The court upheld this restriction against sale by saying in part that it would be a strange deviation to permit creation of perpetual charitable trusts while preventing the donor from restraining the sale of the trust corpus. Since direct restraints on alienation are normally void, and this decision reversed the court of appeals and overturned strong dicta which had earlier been generally accepted as indicating such restraints would be void in North Carolina,[2] the decision suggests a review of the case law concerning direct restraints on alienation.[3]

Direct restraints, as discussed in this note, are terms incorporated in the devise or grant that would preclude or limit alienation or set up penalties for attempts to alienate. If the restraint is phrased so that the power to alienate is withheld or limited, as was the case in *Thomasson*, it is termed a disabling restraint. If the restraint calls for forfeiture of the interest to a third party or for reversion back to the grantor when the prohibition is violated, it is, quite naturally, termed a forfeiture restraint.[4] As will be seen, forfeiture restraints are sometimes valid where a similar disabling restraint is void.

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[1] 275 N.C. 399, 168 S.E.2d 358 (1969).

[2] Hass v. Hass, 195 N.C. 734, 741, 143 S.E. 541, 544 (1928).

[3] *See generally* 6 AMERICAN LAW OF PROPERTY pt. 26 (A. J. Casner ed. 1952) [hereinafter cited as A.L.P.]; J. GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY (2d ed. 1895) [hereinafter cited as GRAY]; 6 R. POWELL, THE LAW OF REAL PROPERTY §§ 839-48 (recomp. 1969) [hereinafter cited as POWELL]; IV RESTATEMENT OF PROPERTY §§ 404-38 (1944) [hereinafter cited as RESTATEMENT]; L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS §§ 1111-71 (2d ed. 1956) [hereinafter cited as SIMES & SMITH].

[4] 6 A.L.P. § 26.1.